CITIZENS FOR COMMUNITY VALUES

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TO: Ohio House Criminal Justice Committee
Chairman Nathan Manning

RE: Support of Senate Bill 145

Dear Chairman Manning and Committee Members,

My name is Josh Brown and I am Legal Counsel and Director of Policy for Citizens for Community Values, a non-partisan, non-profit organization. As part of our mission, we seek to educate members of the Ohio General Assembly about the dignity of human life from conception to natural death. Today, we write to ask your **support** for Senate Bill (SB) 145, which was introduced by Senator Matt Huffman (R-Lima).

WHAT IS SB 145?

Senate Bill 145 would prohibit a person from knowingly performing or attempting to perform a "standard dismemberment abortion" (also known as D&E abortion). SB 145 would define a "dismemberment abortion" as one "dismembering a living unborn child and extracting the child one piece at a time from the uterus through use of clamps, grasping forceps, tongs, scissors, or similar instruments that, through the convergence of two rigid levers, slice, crush, or grasp a portion of the child's body to cut or rip it off, with the purpose of causing the child's death." It specifies that a dismemberment abortion includes a dismemberment abortion where suction is used after the death of the unborn child to extract any remaining parts of the unborn child, but that the bill does not prohibit the suction curettage or suction aspiration procedures of abortion.

The bill provides an exception to the crime for when it is necessary, in reasonable medical judgment, to preserve the life or physical health of the mother as a result of the mother's life or physical health being endangered by a serious risk of the substantial and irreversible physical impairment of a major bodily function. It also specifies that there is no liability under the law for the pregnant woman who had an abortion done, any employees of the abortionist, and pharmacists.

WHY THIS COMMITTEE SHOULD SUPPORT SB 145

There are several reasons why this Committee should pass this bill. First of all, it is the right thing to do on principle alone. Tearing and ripping a baby to death is wrong. As this testimony will show, the standard D&E abortion has been described, even by those who think it should be legal, as "brutal," "gruesome," "tearing a fetus apart," and "ripping off its limbs."

Second, this abortion procedure, is an invasive operation that does not cure or treat any disease or injury. It is not done to benefit anybody's health (SB 145 makes an exception when a mother's health is at risk). It is said by some that this procedure is healthier than giving birth. However, this procedure does not make a mother any healthier and it certainly does not protect the health of the baby / fetus. The Courts have acknowledged consistently that the State does have an interest in protecting both the unborn child and the ethics and integrity of the medical profession (in terms of their duty to care for the unborn child). The U.S. Supreme Court has said that medical ethics and integrity is an acceptable justification for banning another gruesome procedure very similar to the one SB 145 bans (discussed in more detail below).

Third, there are many Ohio laws that mitigate in favor of treating an unborn baby humanely. Each of these provisions show a rationale for banning standard D&E abortions:

- Ohio law already requires that the fetal (baby) remains from this procedure be disposed of "humanely." It would not make sense to say you can cause "fetal demise" inhumanely, but you cannot dispose of the body inhumanely.
- Ohio law also allows a death certificate to be issued for any child that dies after 20 weeks gestation. This recognizes the humanity of the child.
- Ohio law allows people to be prosecuted for killing an unborn baby against the mother's will. This recognizes the humanity of the child.
- Ohio law requires the death penalty to be administered "quickly and painlessly" evidencing our commitment to not causing unnecessary pain. Several witnesses before this Committee and medical science shows us that babies undergoing the standard D&E procedure can feel pain.

Lastly, this Committee should not let setbacks in the litigation process prevent them from passing this bill. The Ohio Senate was confident in the State's legal authority and you should be as well, for the reasons that follow.

WHY THIS BILL WILL WITHSTAND LITIGATION UNDER THE *GONZALES* PRECEDENT

In summary, the reason this Committee should be confident in the legality of passing SB 145 is because: 1) it bans the standard D&E procedure, which is nearly identical to the intact D&E abortion procedure (i.e., D&X) that has already been banned nationally, and that the U.S. Supreme Court has already upheld in *Gonzales v. Carhart*; 2) in upholding a ban on D&X in *Gonzales,* the U.S. Supreme Court upheld a ban that is similar to the one in SB 145, in terms of its relation to "viability" analysis from the *Casey v. Planned Parenthood Case*—therefore, SB 145's relation to viability should not be problem; 3) the courts are unlikely to unanimously find a "undue burden" to pre-viability abortions in SB 145 under the *Gonzales* analysis— injunctions in other states are likely to be overruled because they failed to take *Gonzales* and abortion alternatives into adequate consideration, and other districts (including Ohio) are unlikely to follow them; and 4) the State has an interest in protecting unborn children and the integrity and ethics of the medical profession.

1) D&E and D&X are Nearly Identical

The D&E abortion, discussed above, is virtually the same as an "intact dismemberment abortion" (also known as D&X or partial birth abortion). The only difference is that "fetal demise" (what courts call "the lethal act") occurs inside the uterus (a mother's womb) during a standard D&E and it occurs outside the uterus for a D&X abortion.

The D&X (outside the uterus) procedure is banned by federal law under the Federal Partial Birth Abortion Ban Act of 2003, which was upheld by the U.S. Supreme Court.[1] Ohio outlawed the "partial birth abortion" procedure, i.e., the D&X or intact D&E procedure, in May of 2000, through the passage of House Bill 351. That bill amended Ohio Revised Code sections 2901.01 and 2903.09, and enacted sections 2305.114, 2307.53, and 2919.151. The Ohio Act was upheld as constitutional by the courts as well.[2]

The case, referred to above, that held the federal D&X ban to be constitutional was *Gonzales v. Carhart.* In that case, in dissent, Justice Ginsburg pointed out that the D&E abortion is not substantially different than the D&X procedure, saying, "D&E could equally be characterized as 'brutal,' [as the D&X procedure] involving as it does 'tear[ing] [a fetus] apart' and 'ripp[ing] off' its limbs . . . The notion that either of these two equally gruesome

[1] See: 18 U.S.C. § 1531 (creating the federal partial birth abortion ban); *Gonzales v. Carhart,* 550 U.S. 124 (2007) (upholding federal partial birth abortion ban).

[2] *Women's Medical Professional Corp. v. Taft*, 162 F. Supp. 2d 929 (S.D. Ohio 2001).

procedures . . . is more akin to infanticide than the other, or that the State furthers any legitimate interest by banning one but not the other, is simply irrational."[3]

2) Viability Analysis

The first thing the courts will look at is the relation of SB 145 to viability under *Planned Parenthood v. Casey*.[4] The U.S. Supreme Court's analysis of laws that may interfere with its abortion jurisprudence is as follows. First, the state may not prohibit or place an "undue burden" on a woman from aborting her baby before "viability." Note that both the standard D&E and the intact D&E (D&X) may take place both pre and post-viability. The Court's opinion in *Casey* also reiterated that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[5]

It is unlikely SB 145 will be struck down by the courts because of *Casey's* viability analysis. We know that the abortion procedure at issue in *Gonzales*—the D&X abortion—was a constitutional banning of an abortion procedure that can occur pre or post-viability. The standard D&E is very similar and can occur pre or post viability as well.

3) SB 145 Does Not Create a "Substantial Obstacle" or "Undue Burden"

Next under *Casey* analysis, the legislature cannot pass an abortion restriction with the intent to place a substantial obstacle or undue burden in the path of a woman seeking a pre-viability abortion. There is an "undue burden" when the regulation's "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[6]

Some may argue that, despite the *Gonzales* opinion, dicta[7] in *Stenberg v. Carhart,* might weigh against SB 145 on the "substantial obstacle" factor. However, that is not necessarily true. In that case, the Court addressed a Nebraska statute that was not clear as to whether it applied to standard D&E abortions. The Court did say in dicta that outlawing the

[3] *Gonzales,* Ginsberg dissent.
[4] *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 878 (1992).
[5] *Casey,* at 879.
[6] *Id.*
[7] "Dicta" is "A statement of opinion or belief considered authoritative because of the dignity of the person making it. The term is generally used to describe a court's discussion of points or questions not raised by the record or its suggestion of rules not applicable in the case at bar. Judicial dictum is an opinion by a court on a question that is not essential to its decision even though it may be directly involved." *Legal Information Institute, Cornell Law School,* 2017. See: https://www.law.cornell.edu/wex/dicta.

standard D&E abortion procedure would be an "undue burden." However, the Court also said that this issue was not relevant to its holding (the case's holding was about whether exceptions for the health of the mother are mandatory in these types of statutes—a feature that SB 145 includes).[8]

Further, the dicta in question is unlikely to be upheld, in light of the *Gonzales* decision and the current makeup of the Court, which favors extension of the *Gonzales* analysis. Also, this 1999 case did not take into consideration that advances in medical capability and technology may offer acceptable alternatives to ripping a baby's body apart to effect fetal demise. So there may be acceptable alternatives in future cases.

We also know that the Supreme Court specifically said the law in question in *Gonzales* "does not prohibit the standard D&E procedure in which the fetus is removed in parts."[9] The distinction was made explicit later in the opinion where the Court addresses whether the alleged intent of Congress was a factor that weighed against the law:

> It is objected that the standard D&E is in some respects as brutal, if not more, than the intact D&E [i.e., D&X], so that the legislation accomplishes little . . . Partial-birth abortion, as defined by the Act, differs from a standard D&E because the former occurs when the fetus is partially outside the mother . . . It was reasonable for Congress to think that partial-birth abortion, more than standard D&E, undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world.[10] There would be a flaw in this Court's logic, and an irony in its jurisprudence, were we first to conclude a ban on both D&E and intact D&E was overbroad and then to say it is irrational to ban only intact D&E because that does not proscribe both procedures.[11]

The Court did not address whether a standard D&E ban would be unconstitutional in *Gonzales*. In the quote above, the Court is saying that Congressional intent did not weigh against the law in *Gonzales*, because the awful nature of the intact D&E abortion (i.e., D&X abortion) is problematic (as described in detail in the opinion). Therefore Congress was reasonable in outlawing it. What you should take note of here is that the Court is saying that intact D&E abortions (i.e., D&X abortions) are *more* problematic than standard D&E—

[8] *Stenberg,* at 939-940.
[9] *Gonzales,* at 20.
[10] Citing: Congressional Findings (14)(K), in notes following 18 U. S. C. §1531 (2000 ed., Supp. IV), p. 769.
[11] *Gonzales,* at 20.

implying that standard D&E abortions are also problematic—only possibly to a lesser extent. When this law goes to the Supreme Court, they are likely to be reminded that they made this implication in *Gonzales*. This is largely why we expect subsequent opinions to follow *Gonzales* more closely than *Stenberg*—the direction is in favor of upholding a standard D&E ban.

The injunctions that were issued in other state were largely based on the "undue burden" factor, so this testimony will discuss these injunctions here. This Committee should pass this bill despite these injunctions for the following reasons.

First, there are two states in which no action has been taken to stop enforcement of standard D&E bans. Hopefully, Ohio will be next. There is one state in which a challenge is currently pending. There are six states in which injunctions have been issued.

In each of the cases where an injunction was issued on the enforcement of a standard D&E ban, the courts relied heavily, if not entirely, on the notion that there were not viable alternatives for various reasons. We also know, from the *Gonzales* case, that the courts will look at what alternatives are available when deciding the constitutionality of this ban.

There are at least three alternatives to the standard D&E abortion: 1) use of a hypodermic needle to inject the drug digoxin transabdominally or vaginally, 2) an injection of potassium chloride directly into the fetal heart; and (3) umbilical-cord transection. The courts that issued injunctions essentially said this was not good enough.

However, in none of these cases were there legislative findings or full reviews on this subject. The Judges had to determine this without a full public hearing process. This Committee will hold open hearings and hear extensive testimony from qualified expert witnesses on this subject. Conversely, there were legislative findings in the legislation reviewed in the *Gonzales* case. The Court relied heavily on them in its opinion in that case.

Further, some of these injunction opinions failed to take into consideration advances in medical technology since the 1999 *Stenberg* case. If their logic is consistent, all the proponents of SB 145 need to do is show that there is a viable alternative to the standard D&E abortion procedure. Surely, we can find an alternative to ripping babies' bodies apart.

Also, if you read the opinions in these injunctions, it is clear that the Judges in those cases preferred the outcome in the 1999 *Stenberg* case, over the outcome of the 2007 *Gonzales* case. The Supreme Court's membership today is more like that of the *Gonzales* court than the *Stenberg* court. A review of the case opinion will reveal that the judges who issued injunctions ignored the precedent and patterns laid out in *Gonzales*. It is unlikely that Ohio state courts, all

other federal district courts, appellate courts, and the U.S. Supreme Court will ultimately do the same. In the long term, differences of opinion are expected to emerge, which will likely lead this issue to the U.S. Supreme Court. I anticipate most Ohio courts, including our federal district and circuit courts will follow *Gonzales* more closely.

Also, this Committee should consider that *Gonzales* itself was a case in which an injunction was issued by a lower court. Just because a lower court has issued an injunction in another jurisdiction, or even if there is a risk that our own jurisdiction will issue an injunction, that does not mean proponents of this bill will not prevail in the end.

4) The State's Interest in Protecting Unborn Children and Medical Profession

The Court also applied two other lines of reasoning in *Gonzales* that are applicable to the standard D&E abortion. First, that the "State, from the inception of the pregnancy, maintains its own regulatory interest in protecting the life of the fetus that may become a child . . . . Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn."[12]

Second, the Court said that the State has an interest in "protecting the integrity and ethics of the medical profession."[13] The Court noted that Congressional findings found that, "Partial-birth abortion . . . confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child."[14]

At the end of the day, regardless of what the courts do, we should hold our heads high and outlaw the process where a baby "bleeds to death as it is torn limb from limb . . . and can survive for a time while its limbs are being torn off."[15]

Respectfully submitted,

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[12] *Gonzales,* at 158.
[13] Citing; *Washington v. Glucksberg,* 521 U.S. 702, 731 (1997); *Barsky v. Board of Regents of Univ. of N.Y.,* 347 U.S. 442, 451 (1954).
[14] Citing: Congressional Findings (14)(N), in notes following 18 U. S. C. §1531 (2000 ed., Supp. IV), p. 769.
[15] *Stenberg,* supra, Kennedy dissent.