Testimony of B. Jessie Hill
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to the Senate Judiciary Committee
Opposing Senate Bill 145
Tuesday, June 27, 2017

I am writing to oppose SB 145. I am the Associate Dean for Academic Affairs and Judge Ben C. Green Professor of Law at Case Western Reserve University School of Law. I have been teaching, publishing scholarship, and litigating in the field of constitutional law, with a particular focus on reproductive rights, for fifteen years. I write now to share with the Committee my legal understanding of what the U.S. Supreme Court has and has not said about Dilation and Evacuation (D&E) bans, such as the one currently under consideration. I am submitting this testimony on my own behalf and not on behalf of Case Western Reserve University.

The proposed abortion ban, which would criminalize the most common method of abortion after approximately thirteen weeks of pregnancy—well before the point of viability—is clearly unconstitutional. It is for this reason that no such ban has ever been upheld by any court where it was challenged.[1] However, it seems that some advocates of this bill believe that the US Supreme Court's 2007 decision in *Gonzales v. Carhart* supports their view. I would therefore like to take this opportunity to explain in detail what *Gonzales* said, and what it did not say:

1. ***Gonzales v. Carhart* did not uphold a ban on D&E.** *Gonzales v. Carhart* upheld a federal ban dealing with a different abortion procedure. That procedure, which is (somewhat confusingly) known as "intact D&E," is used later in pregnancy and involves

[1] *W. Alabama Women's Ctr. v. Miller*, 217 F. Supp. 3d 1313, 1337 (M.D. Ala. 2016), *appeal docketed*, No. 2016-17296 (Nov. 29, 2016); *Hodes & Nauser, MDs, P.A. v. Schmidt*, 52 Kan. App. 2d 274, 275, 368 P.3d 667, 668 (2016), *review granted*, No. 114,153 (Apr. 11, 2016); *Nova Health Sys. v. Pruitt*, No. CV-2015-1838, at 8 (Oct. 28, 2015) (granting temporary injunction). In Louisiana, the state agreed not to enforce the law until its constitutionality was determined. Complaint, *June Medical Services v. Gee*, No. 16-CV-444 (July 1, 2016). Mississippi and West Virginia currently have D&E bans in effect, but to my knowledge, they have not been challenged in court.

the intact or mostly intact removal of a fetus. The Supreme Court said that *intact D&E* "undermines the public perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world."[2] In fact, the Court distinguished intact D&E on this basis—noting that intact D&E, unlike standard D&E, raised "additional ethical and moral concerns that justify a special prohibition."[3]

2. **Gonzales v. Carhart did not imply that a ban on D&E would be constitutional.** In fact, the Government conceded in *Gonzales v. Carhart* that a law banning D&E would be unconstitutional. The Supreme Court stated, "In this litigation the Attorney General does not dispute that the Act would impose an undue burden if it covered standard D & E."[4] The reason the Government took this position is that it has been a settled holding of the Supreme Court for decades that it is unconstitutional to ban or unduly burden access to the safest and most common method of second-trimester abortion.[5] Indeed, in *Gonzales*, the Court explicitly recognized the availability of standard D&E as one reason why the ban on intact D&E could remain in place.[6]

3. ***Gonzales v. Carhart* did not even say that a ban on *intact* D&E would be constitutional in all circumstances.** In fact, the Supreme Court in *Gonzales* did not overturn *Stenberg v. Carhart*, the 2000 case striking down Nebraska's ban on intact D&E. The Supreme Court in *Gonzales* only turned away the plaintiffs' "facial" challenge to the law—that is, the plaintiffs' argument that the lack of a health exception rendered the law unenforceable in all circumstances. *Gonzales* did *not* say that the reasons underlying the federal ban on intact D&E in *Carhart* would trump the woman's

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[2] *Gonzales v. Carhart*, 550 U.S. 124, 160 (2007) (quoting Congressional findings).
[3] *Id.* at 158
[4] *Id.* at 147.
[5] *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 437, 103 S. Ct. 2481, 2496, 76 L. Ed. 2d 687 (1983) (striking down requirement that all D&E procedures be performed in a hospital, because it would unconstitutionally inhibit abortion after 12 weeks); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976) (striking down a ban on most common second-trimester abortion procedure at the time).
[6] *Gonzales*, 550 U.S. at 164-65.

constitutional right when the procedure is significantly safer than other alternatives; rather, the Court said just the opposite. Because there was a dispute of medical fact as to whether *intact* D&E was ever safer than the alternatives, the Court simply held that the issue of undue burden should be raised in a case where the facts were presented more concretely, and it agreed with the plaintiffs that a restriction would be unconstitutional if it banned a safe abortion procedure and forced women to undergo a significantly riskier procedure.[7]

There is no dispute of medical fact here that standard D&E (as opposed to intact D&E) is significantly safer than the alternatives. Thus, under *Gonzales*, the D&E ban is unconstitutional.

For all of these reasons, I believe that SB 145 is unconstitutional, and I oppose this legislation.

Respectfully submitted,

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[7] *Gonzales*, 550 U.S. at 161, 166-168.