Prepared Testimony
of
Distinguished Professor Emeritus William Wagner

Before the

Michigan House
Committee on Judiciary

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Mister Chairman and Distinguished Members of the Committee: Thank you for the opportunity to provide testimony on the constitutionality of House Bill 4320, the "Partial-Birth Abortion and Dismemberment Abortion Ban Act."

INTRODUCTION

My name is William Wagner and I hold the academic rank of Distinguished Professor Emeritus (Law). I served on the faculty at the University of Florida and Western Michigan University Cooley Law School, where I taught Constitutional Law and Ethics. Before joining academia, I served as a federal judge in the United States Courts, a Senior Assistant United States Attorney in the Department of Justice, and as a Legal Counsel in the United States Senate. I currently serve as President of the Great Lakes Justice Center.

I am here to testify today and provide my opinion as to whether the "Partial-Birth Abortion and Dismemberment Abortion Ban Act" (HB 4320) is constitutional. For the following reasons, it is my opinion that it is.

THE "PARTIAL-BIRTH ABORTION AND DISMEMBERMENT ABORTION BAN ACT" (HB 4320) IS CONSTITUTIONAL UNDER CURRENT U.S. SUPREME COURT PRECEDENT

In *Gonzales v Carhart*, 127 S.Ct. 1610 (2007), the United States Supreme Court upheld, as constitutional, a federal statute banning partial-birth abortion. The Act in *Carhart* was, in all relevant ways, akin to the conduct proscribed in HB 4320.

Carhart held that the government has a legitimate interest "in protecting the health of the woman and the life of the fetus that may become a child." *Carhart*, 127 S.Ct. 1610, 1626 (2007). The interest of the State of Michigan in banning partial birth and dismemberment abortions is to protect the health of the mother and the unborn child. The State of Michigan, therefore, has a legitimate interest in enacting the law.

In *Carhart,* the Court summarized the current state of its constitutional jurisprudence on abortion and the protection of unborn life. In this regard, the Court noted:

> Before viability, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy. It also may not impose upon this right an undue burden, which exists if a 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. *On the other hand, regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted*, if they are not a substantial obstacle to the woman's exercise of the right to choose.
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> *Carhart*, 127 S.Ct. at 1626-27 (emphasis added)(internal citations and quotation marks omitted).

The Court in *Carhart* applied the above standard to the Act at issue. This point is significant since the Act at issue in *Carhart* banned, in all relevant ways, similar conduct proscribed in HB 4320 and the law it amends. After applying the constitutional standard

to the Act, the Court concluded the Act was constitutional and that it did not impose an undue burden from any overbreadth. *Carhart*, 127 S.Ct. at 1627. Thus, in my view, the similar provisions of HB 4320 and the law it amends, will also withstand constitutional scrutiny if challenged in the courts.

The Court also concluded that the Act was not void for vagueness. *Id.* In *Carhart* the Court noted that the Act at issue provided "doctors of ordinary intelligence a reasonable opportunity to know what is prohibited." *Carhart*, 127 S.Ct. at 1628 (internal citations omitted). Like the provisions in HB 4320, the Act in *Carhart* provided "relatively clear guidelines as to prohibited conduct" and provided "objective criteria to evaluate whether a doctor has performed a prohibited procedure." *Id.* Here, as in *Carhart*, HB 4320 defines the line establishing criminal conduct, so that doctors conducting a partial-birth or dismemberment abortion will know what conduct constitutes criminal liability. *Id.* Moreover, HB 4320, like the law upheld in *Carhart,* contains a scienter requirement. The Supreme Court has made clear that such a scienter requirement "alleviate[s] vagueness concerns, *Id.* In my view, therefore, HB 4320 is constitutional and will also survive any vagueness challenge in the courts.