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MEMORANDUM

TO: To Whom It May Concern
FROM: Mary Spaulding Balch, JD, Director, State Legislation Department
DATE: January 2015
RE: Constitutionality of the Unborn Child Protection from Dismemberment Abortion Act

The purpose of this memorandum is to explain why the Unborn Child Protection from Dismemberment Abortion Act is highly likely to be upheld as constitutional by the current U.S. Supreme Court in light of its decision upholding the Partial-Birth Abortion Ban Act of 2003, *Gonzales v. Carhart*.¹

Gonzales justified the federal law protecting unborn children from partial-birth abortions based on the government's "interest in protecting the integrity and ethics of the medical profession,"² and on the "premise . . . 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."³

The *Gonzales* Court quoted a Congressional Finding from the Partial Birth Abortion Ban Act:

Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life.

The same principle applies to dismemberment abortions, in which a sharp instrument is used to slice up a living unborn child.

Gonzales itself described the gruesome nature of dismemberment abortions: "[F]riction

¹ 550 U.S. 124 (2007).

² *Id.* at 157, quoting *Washington v. Glucksberg*, 521 U. S. 702, 731(1997).

³ *Gonzales*, 550 U.S. at 158.

causes the fetus to tear apart. For example, a leg might be ripped off the fetus”⁴ Contrasting the partial birth or “intact D&E” abortion, the Court said, “In an intact D&E procedure the doctor extracts the fetus in a way conducive to pulling out its entire body, instead of ripping it apart.”⁵ “No one would dispute,” it wrote, “that, for many, D & E is a procedure itself laden with the power to devalue human life.”⁶ The author of the *Gonzales* opinion, Justice Anthony Kennedy, used an even more graphic description in his dissent in *Stenberg v. Carhart*,⁷ stating, “The fetus, in many cases, dies just as a human adult or child would: It bleeds to death as it is torn limb from limb.”

Indeed, the *dissent* in *Gonzales* stated :⁸

Nonintact D&E could equally be characterized as "brutal," . . . , involving as it does "tear[ing] [a fetus] apart" and "ripp[ing] off" its limbs,⁹ "[T]he notion that either of these two equally gruesome 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."¹⁰

Even some abortion practitioners describing the method acknowledge that “The procedure . . . may be more difficult . . . emotionally for some clinicians.”¹¹

The Court held that protecting unborn children from the brutal inhumanity of partial birth abortion did not impose an unconstitutional “undue burden” on abortion because other methods could be used. In particular, it noted that “the Act's prohibition only applies to the delivery of ‘a living fetus.’ . . . If the intact D&E procedure is truly necessary in some circumstances, it appears likely an injection that kills the fetus is an alternative under the Act that allows the doctor to perform the procedure.”¹²

⁴ *Id.* at 135.

⁵ *Id.* at 137; see also *id.* at 152.

⁶ *Id.* at 158.

⁷ 350 U.S. 914, 958-59 (Kennedy, J., dissenting)

⁸ *Gonzales*, 550 U.S. at 182 (Ginsburg, J., dissenting).

⁹ Internal citations to majority opinion omitted.

¹⁰ *Quoting Stenberg v. Carhart*, 530 U.S. 914, 946-947 (2000)(Stevens, J., concurring).

¹¹ Nathalie Kapp & Helena von Hertzen, “Medical Methods to Induce Abortion in the Second Trimester” in Maureen Paul et al., *Management of Unintended and Abnormal Pregnancy* 179 (1st ed. 2009).

¹² *Gonzales*, 550 U.S. at 164, *quoting* 18 U.S.C. § 1531(b)(1)(A) (2000 ed., Supp. IV).

Similarly, the Unborn Child Protection from Dismemberment Abortion Act provides protection only when dismemberment is applied to “a living unborn child.”

One study has found no difference in complications between those women injected with a feticidal agent prior to a dilatation and evacuation abortion and those injected with a placebo.¹³ Other studies found either no or low side effects as a result of using a feticidal agent prior to abortion.¹⁴ Although the *Gonzales* dissent argued there is medical opinion to the contrary,¹⁵ the Court held, “The question becomes whether the Act can stand when . . . medical uncertainty persists. . . . The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty. . . . Physicians are not entitled to ignore regulations that direct them to use reasonable alternative procedures. The law need not give abortion doctors unfettered choice in the course of their medical practice. . . . Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts.”¹⁶

Because of the close resemblance of the constitutional issues settled in the Partial Birth Abortion Ban Act case to those applying to the Unborn Child Protection from Dismemberment Abortion Act, it is highly likely that the Supreme Court would uphold it against constitutional attack.

¹³ Patricia A. Lohr, “Surgical Abortion in the Second Trimester,” 16 *Reproductive Health Matters* 151, 152 (2006). The article noted that “women in this study did . . . report a strong preference for fetal death prior to the abortion (92% in both groups). *Id.* at 156.

¹⁴ Kapp & Herten, *supra* n. 11, at 185.

¹⁵ *Gonzales*, 550 U.S. at 180n.6 (Ginsberg, J., dissenting).

¹⁶ *Gonzales*, 550 U.S. at 163-64.