**LEGISLATURE OF THE STATE OF IDAHO**

**SENATE COMMITTEE ON STATE AFFAIRS**

**March 16, 2011**

**Senator Curt McKenzie, Presiding**

**Prepared Testimony of**
**Professor Teresa Stanton Collett***

Good morning Mr. Chairman, Members of the Committee, and other distinguished guests. My name is Teresa Stanton Collett and I am a professor of law at the University of St. Thomas School of Law in Minneapolis, Minnesota. I am honored to have been invited to testify on the constitutionality of the Pain-Capable Unborn Child Protection Act, Senate Bill 1165. As an academic lawyer, I teach and write in the areas of constitutional law and bioethics, and specifically on the topic of abortion. I am the author of one of the first law review articles dedicated to the topic of fetal pain and the regulation of abortion.[1] As a practicing lawyer, I have had the privilege of assisting several state attorneys general in their defense of their states' abortion laws. I currently am defending Oklahoma's mandatory ultrasound requirement as special assistant attorney general for that state. My testimony today is not intended to represent the views of my employer, the University of St. Thomas, or any other organization or person.

There has been extensive debate about whether the unborn experience pain during abortion within medical, legal, and political circles for over three decades in this country. In 1980 President Reagan brought this issue squarely into public view with his statement,

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[1] Teresa Stanton Collett, *Fetal Pain Legislation: Is It Viable?*, 30 PEPP. L. REV. 161 (2003).

"when the lives of the unborn are snuffed out [by abortion], they often feel pain, pain that is long and agonizing."[2] The debate intensified when the world caught a glimpse of life within the womb through the picture of Samuel Armas' tiny hand apparently grasping the finger of his perinatal surgeon who was repairing Samuel's spine when he was only twenty-one weeks in gestation.[3]

The existence of fetal pain has also been the subject of judicial review, particularly in cases involving the constitutionality the federal partial-birth abortion bans. Judge Richard C. Casey, a federal district court judge sitting in the Southern District of New York, called the D & X procedure "gruesome, brutal, barbaric, and uncivilized,"[4] and found that abortion procedures "subject fetuses to severe pain."[5] Judge Phyllis J. Hamilton, a federal district court judge sitting in the Northern District of California, arrived at a different conclusion. She wrote that "much of the debate on this issue is based on speculation and inference"[6] and that "the issue of whether fetuses feel pain is unsettled in the scientific community."[7] While these opinions arrive at divergent conclusions regarding the existence and extent of fetal pain during abortion, both opinions recognize that the existence of fetal main may be of legal relevance of the regulation of abortion.

Idaho Senate Bill 1165, the Pain-Capable Unborn Child Protection Act, is a reasonable legislative response to the debate regarding existence and relevance of fetal

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[2] President Ronald Reagan, Address to the National Religious Broadcasters' Convention (Jan. 30, 1980) available at http://www.americanrhetoric.com/speeches/ronaldreagannrbroadcasters.htm.
[3] Samuel Armas photo (2002), available at http://en.wikipedia.org/wiki/Samuel_Armas. In utero fetal surgery made the news with reports of successful heart surgery on a 23-week-old fetus. Denise Grady, *Operation on Fetus's Heart Valve Called a "Science Fiction" Success*, N.Y. Times, Feb. 25, 2002, at A1, available at http:// www.nytimes.com/2002/02/25/health/25FETA.html.
[4] *Nat'l Abortion Federation v. Ashcroft*, 330 F.Supp. 2d 436, 479 (S.D.N.Y. 2004).
[5] *Id*.
[6] *Planned Parenthood Federation v. Ashcroft*, 320 F.Supp.2d 957, 997 (N.D.Cal. 2004)
[7] *Id*. at 1001.

pain.[8] I understand that this committee will receive testimony from several medical experts regarding the medical and scientific evidence of fetal pain, so I will focus my testimony on the constitutionality of the proposed act.

## I. CONSTITUTIONAL ANALYSIS OF ABORTION REGULATION

In *Roe v. Wade* the United States Supreme Court declared that the Constitution contained an implicit right to obtain an abortion.[9] The Court characterized the right as the logical extension of another implied right -- the right to use contraception -- which was grounded in the implied right to privacy[10] In so holding, however, the Court recognized that the abortion decision was unique.

> The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. See Dorland's Illustrated Medical Dictionary 478-479, 547 (24th ed. 1965). The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt* and *Griswold*, *Stanley*, *Loving*, *Skinner* and *Pierce* and *Meyer* were respectively concerned. As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.[11]

*Roe* established what was to become for a period of time a "rigid trimester analysis,"[12] permitting virtually no regulation of abortion during the first trimester, with regulations directed only at preserving maternal health permitted in the second trimester. Only in the

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[8] S 1186 is similar to Nebraska's Pain-Capable Unborn Child Act, Neb. Code Ann. § 28-3,103 to 3,111**.** *See also* Unborn Child Pain Awareness and Prevention Act of 2005, codified at Ark Code Ann §§20-16-1101 to 1111; and Woman's Right to Know Act, codified at Ga. Code Ann §31-9A-4.

[9] 410 U.S. 113 (1973).

[10] *Roe v. Wade*, 410 U.S. 113, 152 (1973). *See* Christopher L. Eisgruber, *The Fourteenth Amendment's Constitution*, 69 S.CAL. L. REV. 47, 96-96 (1995) (describing the "cavalier treatment of the constitutional text" as one of the weaknesses in the opinion).

[11] *Roe*, 410 U.S. at 159.

[12] *Webster v. Reproductive Health Services*, 492 U.S. 490, 517 (1989) (plurality opinion).

third trimester or post-viability could the state protect fetal life by prohibiting abortions that were not necessary to preserve the life or the health of the mother.[13]

This trimester approach to abortion legislation was criticized by four members of the Court in *Webster v. Reproductive Health Services*.

> We think that the doubt cast upon the Missouri statute by these cases is not so much a flaw in the statute as it is a reflection of the fact that the rigid trimester analysis of the course of a pregnancy enunciated in *Roe* has resulted in subsequent cases like *Colautti* and *Akron* making constitutional law in this area a virtual Procrustean bed.[14]

The plurality opinion recognized that the state's interest in protecting fetal life existed throughout the pregnancy. "[W]e do not see why the State's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability."

Ultimately the trimester approach was rejected by a majority of the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[15]

> A logical reading of the central holding in *Roe* itself, and a necessary reconciliation of the liberty of the woman and the interest of the State in promoting prenatal life, require, in our view, that we abandon the trimester framework as a rigid prohibition on all previability regulation aimed at the protection of fetal life. The trimester framework suffers from these basic flaws: in its formulation it misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life, as recognized in *Roe*.[16]

The justices did, however, retain fetal viability as a measure of constitutional significance.[17] Since the Court constitutionalized the abortion question, the Court has

[13] *Roe*, 410 U.S. at 162-165.
[14] *Webster*, 492 U.S.at 517.
[15] 505 U.S. 833 (1992).
[16] *Casey*, 505 U.S. at 873.
[17] 505 U.S. 833 (1992).

recognized the state's compelling interesting protecting unborn children after 23-24 weeks of gestation.

> This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.[18]

That rule remains intact.[19] To date, most cases regarding the viability have focused on the method of determining viability.[20] The Pain-Capable Unborn Child Protection Act does not seek to challenge this holding in any way.

## II. FETAL PAIN AS AN INDEPENDENT COMPELLING STATE INTEREST

The Court has never been asked whether the state's interest in protecting unborn children who have the capacity to feel pain is sufficiently compelling to support a limited prohibition on abortion. If challenged Senate Bill 1165 will present a question of first impression – whether the capacity to feel pain, independent of fetal viability, is sufficient to establish the humanity of the child and to sustain a limited prohibition on abortion.

In *Gonzales v. Carhart*, the Court upheld the federal Partial Birth Abortion Ban Act which made no distinction based on viability.[21] "The Act does apply both previability and postviability because, by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the

[18] *Roe*, 410 U.S. at 164.
[19] *Casey*, 505 U.S. at 879.
[20] *See e.g. Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976) (upholding a Missouri law permitting a case-by-case determination of viability); and *Colautti v. Franklin*, 439 U.S. 379 (1979) (viability is reached when, in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support).
[21] 550 U.S. 124, 147(2007).

womb."[22] Justice Kennedy, author of the majority opinion, emphasized the state's interest in the fetus. "*Casey* struck a balance that was central to its holding, and the Court applies *Casey's* standard here. A central premise of *Casey's* joint opinion…[is] that the government has a legitimate, substantial interest in preserving and promoting fetal life…"[23]

In light of recent abortion cases, it appears that Justice Kennedy's views may determine whether the Court is prepared to accept fetal pain as an independent developmental marker of the humanity of the child.[24] Justice Kennedy's dissent in *Stenberg v. Carhart*[25] and majority opinion in *Gonzales v. Carhart*[26] provides valuable insight into his possible ruling of such a question.

In *Stenberg*, Justice Kennedy emphasized that *Casey* held it was "inappropriate for the Judicial Branch to provide an exhaustive list of state interests implicated by abortion" and that "*Casey* is premised on the States having an important constitutional role in defining their interests in the abortion debate."[27] Justice Kennedy described the state's interest protection of fetal life as substantial at all points. "*Casey* struck a balance that was central to its holding, and the Court applies *Casey's* standard here. A central premise of *Casey's* joint opinion…[is] that the government has a legitimate, substantial interest in preserving and promoting fetal life…"[28]

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[22] *Id.*
[23] 550 U.S. at 126.
[24] Justice Kennedy was initially prepared to provide the fifth vote to overrule Roe and return the issue of abortion to the people and their elected representatives, but Justice Kennedy was eventually persuaded to retain a judicial construction of the Constitution protecting the right of a woman to choose abortion…" Teresa S. Collett, *Judicial Modesty and Abortion,* 59 *S.C. L. Rev.* 701, 714 (2008).
[25] 350 U.S. 914 (2000).
[26] 550 U.S. 124 (2007).
[27] 505 U.S. at 877.
[28] 550 U.S. at 126.

Similar to the prohibition contained in Senate Bill 1165, federal Partial Birth Abortion Ban Act upheld in *Gonzales* made no distinction based on viability. "The Act does apply both previability and postviability because, by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb."[29] This led Justice Ginsburg to vigorously criticize the Court's ruling because it blurred the line "firmly drawn in *Casey,* between previability and postviability abortions."[30]

The dissenting justices in *Gonzales v. Carhart* were convinced that the majority opened the door to recognition of new regulations of abortion.

> The Court's hostility to the right *Roe* and *Casey* secured is not concealed. Throughout, the opinion refers to obstetrician-gynecologists and surgeons who perform abortions not by the titles of their medical specialties, but by the pejorative label "abortion doctor." A fetus is described as an "unborn child," and as a "baby,"; second-trimester, previability abortions are referred to as "late-term,"; and the reasoned medical judgments of highly trained doctors are dismissed as "preferences" motivated by "mere convenience," Instead of the heightened scrutiny we have previously applied, the Court determines that a "rational" ground is enough to uphold the Act. And, most troubling, Casey's principles, confirming the continuing vitality of "the essential holding of Roe," are merely "assume[d]" for the moment, rather than "retained" or "reaffirmed."[31]

If the dissenting justices are correct, Senate Bill 1165 is likely to be upheld. Recognition of a compelling state interest in the protection of pain-capable unborn children doe**s not** require the Court to reject a woman's liberty interest in obtaining an abortion or the balancing framework of *Casey* —it only asks the Court to recognize the legislature's ability to weigh and rely upon new scientific evidence supporting a strong state interest in

[29] 550 U.S. at 147.
[30] *Id*. at 170 (Ginsburg, J., dissenting).
[31] *Id*. at 186-187

regulating abortions 20 weeks post fertilization.[32] Even former U.S. Supreme Court Justice Stevens, who during his tenure on the Court repeatedly voted to strike down abortion regulations, listed the "organism's capacity to feel pain" as a ground on the basis of which "the State's interest in the protection of an embryo increases progressively and dramatically…."[33] He noted that "[t]he development of a fetus -and pregnancy itself- are not static conditions, and the assertion that the government's interest is static simply ignores this reality."[34]

Senate Bill 1165 is innovative only in so far as it relies upon scientific evidence that the 20-week-old fetus can feel pain and concludes that the acquisition of this capacity makes the unborn child sufficiently like the rest of us that it marks a 'tipping point' at which it is reasonable for Idaho to assert a compelling interest in protection of that unborn child's life. This evidence is incorporated into findings that support the legislative distinction between abortions when the fetus can feel pain and when he or she does not.[35] This distinction modestly expands upon the state interests in protection of fetal life and affirmation of the value of that life recognized in *Gonzales v. Carhart*.[36]

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[32] The CDC reports that in 2007, the latest data available, 1.3% of abortions were obtained at 21 weeks or later. Centers for Disease Control, Abortion Surveillance – United States 2007 (2007) (available at http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6001a1.htm?s_cid=ss6001a1_w). In Idaho the number of abortions obtained at 21 weeks or later has ranged from a low of 3 to a high of 7 in the fifteen years between 1994 and 2009. See chart attached as Appendix A.

[33] *Thornburgh v. Amer. Coll. of Obst. & Gyn.*, 476 U.S. 747, at 778 (1986) (Stevens, J. concurring).

[34] *Id*. at 778-79 (1986).

[35] *See Stenberg .v Carhart*, 530 U.S 914 (2000) (Kennedy, J. dissenting)

> The issue is not whether members of the judiciary can see a difference between the two procedures. It is whether Nebraska can. The Court's refusal to recognize Nebraska's right to declare a moral difference between the procedures is a dispiriting disclosure of the illogic and illegitimacy of the Court's approach to the entire case.

*Id*. at 962.

[36] 550 U.S. 124 (2007).

## III. CONCLUSION

Certainly, the issue of at what point the unborn experience pain is an important one that should inform best medical practice. It is of concern to the women who obtain abortions, the providers who serve them, and the public who demand that we not be indifferent to those capable of suffering. If there is a single issue in the abortion debate where common ground could be found, one would hope it might be on the issue protecting the unborn from the pain of abortion by limiting abortions at twenty weeks or later to cases in which the mother's life or physical health is at stake.

Thank you, Mister Chairman, for allowing me the time to appear before the committee and to extend my remarks in the form of this written testimony.