CHARLOTTE LOZIER INSTITUTE

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Committee on the Judiciary, U.S. Senate
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To the Distinguished Chair and Honored Members of the Committee.

Thank you for the opportunity to testify IN SUPPORT of the Pain-Capable Unborn Child Protection Act.

I am an attorney and legal researcher, currently working for the Charlotte Lozier Institute in Washington, D.C. as an Associate Scholar. I have published extensive research on comparative international law and U.S. public policy. Previously I served as a Fellow for another policy think tank in Phoenix, Arizona, where I compiled and analyzed statutory and case law from all 50 states. I also teach undergraduate philosophy, where a major component of the class is to analyze political society and the rule of law. I am testifying in my capacity as an attorney and legal researcher on behalf of the Charlotte Lozier Institute.

International Norms and Abortion Law

The United States is one of only seven countries in the world that permit elective abortion past 20 weeks.[1] Upholding laws restricting abortion on demand after 20 weeks would situate the United States closer to the international mainstream, instead of leaving it as an outlying country with ultra-permissive abortion policies.

In comparing international law, the sample group consisted of 198 countries, independent states, and semi-autonomous regions with populations exceeding 1 million. Of these 198 countries, independent states, and regions worldwide, 59 allow abortion without restriction as to reason, otherwise known as elective abortion or abortion on demand. The remaining 139 countries require some reason to obtain an abortion ranging from most restrictive (to save the life of the mother or completely prohibited) to least restrictive (socio-economic grounds) with various reasons in between (e.g., physical health, mental health).

[1] Angelina Baglini Nguyen, *Gestational Limits on Abortion in the United States Compared to International Norms*, Charlotte Lozier Institute, Feb. 24, 2014, http://www.lozierinstitute.org/internationalabortionnorms/.

Currently, the United States permits abortion on demand through viability, which is usually marked around 24 weeks.

Of the 59 countries permitting elective abortion:[2]

- 9 countries limit elective abortion before the 12th week of gestation,
- 36 countries limit elective abortion at 12 weeks gestation,
- 6 countries limit elective abortion between 12 and 20 weeks gestation,
- 7 countries permit elective abortion past 20 weeks or have no gestational limit.
- 1 country maintains a federal system where abortion policy is determined at the state/territory level, and at least two of those states permit elective abortion past 20 weeks.

More than 75% of the countries permitting abortion without restriction as to reason do not permit elective abortions past 12 weeks gestation. Only 12% (7 out of 59) of the countries permitting abortion without restriction as to reason permit elective abortion past 20 weeks gestation.

The U.S. is among these 7 countries that permit elective abortion past 20 weeks.
This is true whether 20 weeks is measured from the last menstrual period (gestational age), conception, or implantation. No matter how duration of pregnancy is measured, whether by gestational age or conception or fertilization, or implantation, all countries in this category pass the 20-week threshold. These countries/territories are:

- Canada (no restriction in law)[3]
- China (no restriction in law)[4]
- Netherlands (24 weeks)
- North Korea (no restriction in law)
- Singapore (24 weeks)
- United States (viability)
- Vietnam (no restriction in law)[5]

[2] Harvard School of Public Health, "Abortion Laws of the World" Database, http://www.hsph.harvard.edu/population/abortion/abortionlaws.htm.
[3] "Abortions by Gestational Age," Abortion in Canada, http://abortionincanada.ca/stats/abortions-bygestational-age/
[4] Elina Hemminki, Zhuochun Wu, Guiyung Cao, and Kirsi Viisainen, "Illegal births and legal abortions - the case of China," Reproductive Health, 2005; 2:5.
[5] Nguyen Thanh Binh, "Abortion in Present Day Vietnam," International Journal of Academic Research in Business and Social Sciences, January 2012, Vol. 2, No. 1.

The United States is within the top 4% of most permissive abortion policies in the world (7 out of 198) when analyzing restrictions on elective abortion based on duration of pregnancy.

Under U.S. law, abortion on demand is permitted without restriction through viability. Viability can vary, and is decreasing in terms of weeks of gestation as perinatal medicine advances, but normally occurs no earlier than 24 weeks.

Permitting abortion on demand past 20 weeks places the United States among the top 4% of most-permissive countries in the world based on duration of pregnancy restrictions on abortion. If the United States adopts a federal policy restricting elective abortion past 20 weeks, or if more states adopt such policies, the U.S. will more closely align itself with the international norm that limits elective abortion past 12 weeks. Policies imposing gestational limits on elective abortion have been overwhelmingly adopted by countries permitting abortion on demand, indicating policies that encourage women's safety in limiting abortion to early pregnancy and policies that protect unborn children from pain and prolonged exposure to the risk of abortion.

In terms of gestational limits, the United States ranks among 7 countries with the most permissive abortion policies. The clear norm among countries that permit elective abortion is to limit abortion to before 20 weeks gestation, and elective abortion is more commonly limited to 12 weeks (the first trimester).

Twenty-week abortion laws in the United States are neither extreme nor unreasonable. Rather, they move the United States closer to international norms of legislating what is safe and healthy for the mother and what grants unborn children more protection in the womb.

Constitutionality of Twenty-Week Laws

In a recent publication, Thomas Messner states, "Opponents of five-month laws argue they violate the 'viability rule' created by the U.S. Supreme Court… However, the viability rule is unworkable, arbitrary, unjust, poorly reasoned, inadequate, and extreme."[6]
It has already been shown how U.S. abortion law is extreme in light of similarly situated international abortion policy. It is also unworkable in light of advancements in prenatal science and technology that continue to push back the threshold of viability, which was once as late as 28 weeks when the *Roe* decision came down in 1973.

Professor Randy Beck of the University of Georgia states, "Due to advances in neonatal care, the state may be able to protect a fetus from abortion today when, just a few years before, it would have been constitutionally disabled from protecting an identical fetus."[7] A publication in The New England Journal of Medicine states that hospital practices influence the survival rate and health outcome of infants born as young as 22 weeks gestation.[8]

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[6] Thomas M. Messner, "The Constitutional Viability of Five-Month Abortion Laws," Charlotte Lozier Institute, January 2015, https://www.lozierinsitute.org/the-constitutional-viability-of-five-month-abortion-laws.
[7] Randy Beck, *Gonzales, Casey, and the Viability Rule*, 103 Nw.U.L.REV. 249 (2009) at 38-39.
[8] Matthew A. Rysavy, et. al. *Between-Hospital Variation in Treatment and Outcomes in Extremely Preterm Infants,* May 7, 2015, http://www.nejm.org/doi/full/10.1056/NEJMoa1410689.

The Pain-Capable Unborn Child Protection Act creates a bright-line rule that is equally applicable to all persons, regardless of situations and services that may change the determination of viability. Messner quotes Beck when he argues that "a child's viability can vary based on factors including race, gender, whether the mother smokes, the altitude of where the baby and mother live and access to treatment facilities."[9] This law would protect all pain-capable unborn children, who have the capacity to feel pain by at least 20 weeks and likely sooner.

Viability is a nebulous rule, and as Messner emphasizes, was never properly briefed or argued in either the *Roe* or the *Casey* decision.[10] Even if the viability rule remains intact, Beck makes the argument that the "Court could appropriately confine the viability rule to the state interest the Court designed the rule to cover, a purely moral assessment of the value of unborn human life, *and recognize different durational limits for the new state interests now permitted under Gonzales*."[11]

An unborn child's ability to feel pain at twenty weeks is a compelling state interest that the Court can accommodate with or without the viability rule. International law compels us to come closer to the norm of removing elective abortion from the territory of late pregnancy. This piece of legislation is neither extreme nor unreasonable, but is a well-reasoned, well-supported, and well-liked limitation on the boundaries of elective abortion in America.

[9] Beck, *supra*, at 39-40.
[10] Messner, 12.
[11] Randy Beck, *The Essential Holding of Casey*: *Rethinking Viability*, 75 UMKC L. REV. 713 (2007).