IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

AMY BRYANT, M.D., M.S.C.R.; BEVERLY GRAY, M.D., ELIZABETH DEANS, M.D., on behalf of themselves and their patients seeking abortions; and PLANNED PARENTHOOD SOUTH ATLANTIC, on behalf of itself, its staff and its patients seeking abortions, Plaintiffs, vs. JIM WOODALL, in his official capacity as District Attorney ("DA") for Prosecutorial District ("PD") 15B; Roger Echols, in his official capacity as DA for PD 14; Eleanor E. Greene, M.D., M.P.H., in her official capacity as Secretary of the North Carolina Medical Board; Rick Brajer, in his official capacity as Secretary of the North Carolina Department of Health and Human Services; and their employees, agents, and successors, Defendants.	Case No.: 1:16-cv-01368-UA-LPA

BRIEF *AMICUS CURIAE* OF THE HON. PHIL BERGER, PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE, AND TIM MOORE, SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Other Authorities:

The President Pro Tempore of the North Carolina Senate, the Hon. Phil Berger, and the Speaker of the North Carolina House of Representatives, Tim Moore, hereby appear by leave of Court as *amici curiae* in support of Defendants and respectfully oppose Plaintiffs' Motion for Summary Judgment, filed herein on December 14, 2016 (Docket No. 13).[1]

INTRODUCTION

The President Pro Tempore of the Senate and the Speaker of the House are constitutional officers, pursuant to Art. II, §§ 14 and 15 of the Constitution of the State of North Carolina. In June 2015, both houses of the General Assembly voted by large margins - the House by 71-43 and the Senate by 31-15 - to amend N.C. GEN. STAT. § 14-45.1, which governs permitted abortions within the State. That section had permitted abortion within the State up to 20 weeks of pregnancy if done by a licensed physician in a hospital or clinic certified by the Department of Health and Human Services as a suitable facility. N.C. GEN. STAT. § 14–45.1(a). Abortion after 20 weeks was governed by Sec. 14-45.1(b), which permitted abortions after that gestation "if there is substantial risk that continuance of the pregnancy would threaten the life or gravely impair the health of the woman." The

[1] The Court's *Amici* state that no party's counsel authored the brief in whole or in part; no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person – other than the *amicus curiae*, its members, or its counsel - contributed money that was intended to fund preparing or submitting the brief.

2015 amendment incorporated the definition of "medical emergency" found in N.C. GEN. STAT. § 90-21.81(5):

> Medical emergency.--A condition which, in reasonable medical judgment, so complicates the medical condition of the pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible physical impairment of a major bodily function, not including any psychological or emotional conditions. For purposes of this definition, no condition shall be deemed a medical emergency if based on a claim or diagnosis that the woman will engage in conduct which would result in her death or in substantial and irreversible physical impairment of a major bodily function.

This definition is substantially identical to the definition for medical emergency exceptions approved as constitutional by the Supreme Court in *Planned Parenthood of SE Pa. v. Casey*, 505 U.S. 833, 879-80 (1992) (quoting and upholding 18 PA.C.S.A. § 3202 (1990)).

The 2015 amendments also added confidential informational and reporting requirements for abortions after the sixteenth week of gestation (N.C. S.L. 2015-62 amending N.C. GEN. STAT. § 14-45.1(b1) and (c)), and increased the period for considering the informed consent information required by the State from twenty-four hours to seventy-two hours. N.C. S.L. 2015-62, Sec. 7.(b), amending N.C. GEN. STAT. § 90-21.82. Plaintiffs do not challenge these amendments. The informational provisions addressed a growing concern of the General Assembly that data regarding abortions, and particularly late-term abortions, was not available or was underreported by practitioners. The revision to the "medical emergency" definition took effect on October 1, 2015, while the informational

requirements and consent period amendments took effect on January 1, 2016. N.C. S.L. 2015-62, § 7.(d).

In spite of the fact that the statute was amended in June 2015 and the challenged portion became effective in January 2016, Plaintiffs waited to file the Complaint in this case until nearly a year later, on November 30, 2016. (Docket No. 1) Now, through this Motion filed December 14, 2016 (Docket No. 13) before Defendants even had a chance to file their Answer (Docket No. 20, filed January 13, 2017), Plaintiffs urge that no factual record is required in this case, and that they are entitled to judgment as a matter of law. The Court's *Amici* respectfully disagree. The Supreme Court has not treated viability as a black-and-white line of demarcation which prohibits regulation of abortion before that point, and the State in fact has a compelling and constitutionally valid interest in protecting women and their unborn children through all nine months of pregnancy. *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 458, 461 (1983) (O'Connor, J., dissenting); *see also Casey*, 505 U.S. at 846 ("the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child"); *Gonzales v. Carhart*, 550 U.S. 124, 145 (2007) ("the government has a legitimate and substantial interest in preserving and promoting fetal life").

Plaintiffs erroneously claim that the State's limitation on abortion after twenty weeks gestation at a time when abortion is *more dangerous* to the mother than childbirth and unborn infants feel horrific pain on being torn apart in abortion violates the Fourteenth

Amendment right of their patients to access the procedure without being "unduly burdened." Plaintiffs forget, however, that it would be "inappropriate for the Judicial Branch to provide an exhaustive list of state interests implicated by abortion." *Stenberg v. Carhart*, 530 U.S. 914, 961 (2000) (Kennedy, J., dissenting) (citing *Casey*, 505 U.S. at 877). And they misconstrue existing Supreme Court law, which allows the States to reasonably license and regulate the practice of medicine, while permitting abortion under necessary and appropriate circumstances. Plaintiffs carry a "heavy burden" to prove their facial challenge to the 20-week statute. *Gonzales*, 550 U.S. at 167. The proper means to consider the sufficiency of exceptions to abortion statutes is by as applied challenges. *Id*. "This is the proper manner to protect the health of the woman if it can be shown that in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used. In an as-applied challenge the nature of the medical risk can be better quantified and balanced than in a facial attack." *Id*. Their Motion should be denied and the case be permitted to proceed to discovery.

ARGUMENT

I. PLAINTIFFS ERR IN URGING THEY ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW ON THE SOLE BASIS OF THE VIABILITY STANDARD.

In *Gonzales v. Carhart*, the Supreme Court upheld a complete federal prohibition on partial-birth abortion except where "necessary to save the life of the mother" that operated throughout pregnancy, pre- as well as post-viability. 550 U.S. at 141-42. The Court deferred to Congress's legislative findings that the prohibition protected against fetal

pain and upheld the integrity of the medical profession by drawing a bright line between abortion and infanticide. 550 U.S. at 141-42, 158; *id*. at 156 (posing the central question as "whether the Act . . . imposes a substantial obstacle to late-term, but previability, abortions," and concluding that it does not). *Gonzales* demonstrates that factors other than viability may control the constitutionality of a State abortion statute.[2] As with the congressional statute upheld in *Gonzales*, North Carolina has not banned all previability abortions. It continues to allow them prior to twenty weeks of pregnancy when the overwhelmingly large majority of second trimester abortions are performed. *See, e.g.*, Guttmacher Institute, "Facts on Induced Abortion in the United States" (July 2013), available at http://www.guttmacher.org/ pubs/fb_induced_abortion.html (noting that 88% of abortions are performed in the first twelve weeks and 98.5% are performed by the twentieth week). The State also continues to allow abortions even after twenty weeks when

[2] Legal scholars have agreed with the assessment that viability is no longer the sole determining factor for constitutionality after *Gonzales*. *See, e.g*., Khiara M. Bridges, *Capturing the Judiciary: Carhart and the Undue Burden Standar*d, 67 WASH. & LEE L. REV. 915, 941 (2010) ("the majority [in *Gonzales*] asserts the insignificance of viability. . . . As such, *Carhart* can be read to eliminate the significance of viability as a marker, and therefore eliminate the significance of the distinction between the pre-viable and post-viable stages of pregnancy"); Randy Beck, *Gonzales, Casey, and the Viability Rule*, 103 NW. U. L. REV. 249, 253, 276 n.152 (2009) (noting that *Gonzales*, which merely "assumed" the continued application of the viability rule, "undermines *Casey*'s attempted defense of the viability rule"); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 924 (1973) (describing *Roe*'s defense of the viability line as "simply not adequate;" "mistak[ing] a definition for a syllogism"); Mark Tushnet, *Two Notes on the Jurisprudence of Privacy*, 8 CONST. COMMENT. 75, 83 (1991) (describing *Roe*'s viability line as "entirely perverse").

terminating the pregnancy is necessary to avert death or serious health risk to the mother. The Supreme Court has recognized that at least one of the State interests upholding the challenged provision - fetal pain - may be a legitimate basis for a pre-viability, late-term regulation of abortion. Medical science demonstrates that another - the risk to patients of aborting at later term over delivering the pregnancy - is a ground for *Roe*'s conclusion that States could regulate abortion to protect patient safety. Therefore, this case should proceed to discovery to permit the State to prove its interests.

II. THE STATE HAS LEGITIMATE AND COMPELLING INTERESTS IN RESTRICTING ABORTION AFTER TWENTY WEEKS THAT MANDATE A FACTUAL RECORD.

North Carolina has a legitimate interest in regulating post-twenty-week abortions because substantial, well-documented evidence exists that an unborn child has the capacity to feel pain during an abortion by at least twenty weeks gestational age, and because the instance of complications to the health of the pregnant woman is highest after twenty weeks of gestation. For these reasons, legislatures of at least nineteen States,[3] as well as one house

[3] Rewire News, "20-Week Bans," available at https://rewire.news/legislative-tracker/law-topic/20-week-bans/. *See, e.g.*, NEB. REV. STAT. §§ 28-3,102 to 28-3,111 (2011); CODE OF ALA. §§ 26-23B-1 to 26-23B-9 (2013); IDAHO CODE ANN. §§18-501 to 18-510 (2011); KAN. STAT. ANN. §§ 65-6722 to 65-6725 (2012); OKLA. STAT. TIT. 63 § 1-745.1 to 1-745.11 (2013); AZ. REV. STAT. § 36–2159; GA. CODE ANN. §§ 16-12-140 to 16-12-141(2013) and GA. CODE ANN. TIT. 31 Ch. 9B; 31-9B-1 to 31-9B-3 (2012); LA. REV. STAT. ANN. 40:1299.30.1 (2013); ARK. CODE ANN. §§ 20-16-1301 to 20-16-1310 (2013); IND. CODE § 16-34-2-1 (2013); N.C. GEN. STAT. § 14-45.1 (2013); N.D. CENT. CODE, § 14-02.1-11 (2013); TEX. HEALTH & SAFETY CODE §§ 171.041 to 171.048 (2013).

of the U.S. Congress,[4] have now adopted legislation limiting access to abortion beyond twenty weeks except when necessary to avert death or serious health risks to the mother.

A. The Significant Increase in Health and Safety Risks to the Mother Presented by Abortion After Twenty Weeks Significantly Undercuts the Rationale of *Roe* and *Casey*.

Post-twenty week abortion results in a significant and even exponential increase of risk to maternal health. *Roe* rested in part on the medical assumption that abortion is safer than childbirth. 410 U.S. at 149, 165. The Court in *Roe* specifically deferred to "present medical knowledge" in holding that the State's interest in protecting maternal health becomes "compelling" "at approximately the end of the first trimester" (*i.e.*, 13 weeks), "because of the now-established medical fact … that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth." 410 U.S. at 162-63. This "compelling" State interest in maternal health past the first trimester allowed the *Roe* Court to acknowledge that the State could regulate abortion after that point "to the extent that the regulation reasonably relates to the preservation and protection of maternal health." 410 U.S. at 163; *see also id*., at 149-50 ("[t]he State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient"); *see also Akron*, 462 U.S., at 460 (O'Connor, J., dissenting) (noting that States have a compelling interest to "ensur[e] maternal safety," "once an abortion may be more dangerous in childbirth").

---

[4] PAIN-CAPABLE UNBORN CHILD PROTECTION ACT, H.R. 1797, 113TH CONG. (2013).

The more recent advances in medical knowledge undercut this prior assumption and substantiate the State's position here. It is well established that the risk to maternal health increases significantly, even exponentially, with each passing week of pregnancy. *See* L. Bartlett, et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103:4 OBS. & GYN. 729-737 (2004); Priscilla K. Coleman, et al., *Late-Term Elective Abortion and Susceptibility to Posttraumatic Stress Symptoms*, 2010 J. OF PREGNANCY 1, 7 (citing S. V. Gaufberg, ABORTION COMPLICATIONS (2008). The incidence of major complications from an abortion is highest after twenty weeks. J. Pregler & A. DeCherney, WOMEN'S HEALTH: PRINCIPLES AND CLINICAL PRACTICE 232 (2002). The risk of death from an abortion is about *thirty-five times greater* at sixteen to twenty weeks than it is before eight weeks gestation, and nearly *one hundred times greater* after twenty weeks. Bartlett, *Risk Factors*, *supra*. Risks to the woman's mental health also increase significantly with later term abortions. P. K. Coleman, *Abortion and Mental Health: Quantitative Syntheses and Analysis of Research Published 1995-2009*, 199 BRIT. J. OF PSYCHIATRY 180-86 (2011)); Coleman, *Late-Term Elective Abortion*, at 7 (finding that women who underwent later abortions (thirteen weeks and beyond) reported "more disturbing dreams, more frequent reliving of the abortion, and more trouble falling asleep"); *see also* Brian D. Wassom, Comment, *The Exception that Swallowed the Rule? Women's Professional Corp. v. Voinovich and the Mental Health Exception to Post-Viability Abortion Bans*, 49 CASE W. REV. L. REV. 799, 853 (1999) ("[T]he one fact that

seems nearly axiomatic in psychological literature on abortion is that the later in pregnancy one aborts, the greater the woman's risk for negative emotional sequelae"). The now-established medical fact that abortion is more dangerous to the patient at the age restriction enacted by the State is enough to allow Defendants to proceed to discovery to establish that interest.

B. Recently Developed Scientific Information that Infants in the Womb Feel Pain Beginning at Sixteen to Eighteen Weeks Constitutes New Evidence that the *Roe* Court Could Not Have Considered, But Did In *Gonzales v. Carhart* in Approving a National Ban on a Second-to-Third Trimester Procedure.

The Supreme Court in *Gonzales* credited facts found by Congress that establish that infants feel intense pain upon being subjected to late-term abortion:

> The vast majority of babies killed during partial-birth abortions are alive until the end of the procedure. It is a medical fact, however, that unborn infants at this stage can feel pain when subjected to painful stimuli and that their perception of this pain is even more intense than that of newborn infants and older children when subjected to the same stimuli. Thus, during a partial-birth abortion procedure, the child will fully experience the pain associated with piercing his or her skull and sucking out his or her brain.

H.R. CONF. REP. 108-288, p. 6, para. 14(M), 2003 U.S.C.C.A.N. 1273. State regulation of abortion after twenty weeks likewise recognizes that there is substantial medical evidence that the unborn child feels pain by that point. K. J. Anand & P. R. Hickey, *Pain and Its Effects in the Human Neonate and Fetus*, 317 NEW ENG. J. MED. 1321 (1987); Antony Kolenc, *Easing Abortion's Pain: Can Fetal Pain Legislation Survive the New Judicial*

Scrutiny of Legislative Fact-Finding?, 10 TEX. REV. OF LAW & POLITICS 171 (2005); Teresa Collett, *Fetal Pain Legislation: Is it Viable?*, 30 PEPPERDINE L. REV. 161 (2003). Based upon this now well-established evidence, the State has a compelling interest in preventing abject cruelty to unborn infants in late-term abortion. The Motion should be denied and the Defendants permitted to demonstrate this interest to the Court.

CONCLUSION

For the reasons set forth herein, *Amici* respectfully submit that the Plaintiffs' Motion should be denied and the case be permitted to proceed to discovery.

Date: March 2, 2017

Respectfully submitted,

/s/ Robert D. Potter, Jr.
Robert D. Potter, Jr. NC Bar No. 17553
Attorney at Law
2820 Selwyn Ave., #840
Charlotte, NC 28209
(704) 552-7742
rdpotter@rdpotterlaw.com

Kevin Theriot* AZ Bar No. 030446
Lead Counsel
Steven H. Aden* DC Bar No. 46777
Kenneth Connelly* AZ Bar No. 025420
ALLIANCE DEFENDING FREEDOM
15100 North 90th Street
Scottsdale, AZ 85260
(480) 444-0020
(480) 444-0028 Fax
ktheriot@ADFlegal.org
saden@ADFlegal.org
kconnelly@ADFlegal.org

*Appearing pursuant to Local Rule 83.1(d); appearances to be filed

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2017, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

/s/ Robert D. Potter, Jr.
Robert D. Potter, Jr.

Attorney for *Amicus Curiae*