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Justitia in veritate praevalebit
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April 26, 2010

The Honorable Attorney General Wayne Stenehjem
North Dakota State Capital
600 E. Boulevard Ave., Dept. 125
Bismarck, ND 58505

Regarding: Proscribing skull crushing and decapitation of unborn children

Dear Honorable Mr. Stenehjem:

I understand that legislation is being promoted in North Dakota to prohibit abortion doctors from decapitating or crushing the skulls of unborn children. I believe this to be a valid exercise of the state of North Dakota's interest in prenatal life under its municipal law. By which, North Dakota would be exercising its police powers to protect the right of personal security of unborn children.

AN OVERVIEW:

Stepping back and getting some perspective on this situation, it is a sad commentary on the status of our national jurisprudence that we should even be engaged in this conversation over the merits of banning decapitation of a living human being. What is more, the alleged right of liberty to engage in such deplorable conduct is said to originate in the Fourteenth Amendment, an amendment that has its roots in our nation's struggle against slavery. This amendment's very "purpose was to protect weak and helpless human beings." *Connecticut General Life Ins. Co. v. Johnson*, 303 U.S. 77, 87 (1938) (Black, J., dissenting). As John Muggeridge keenly observed, "In our choice-drunk universe, a constitutional amendment originally designed to protect the rights of one minority has ended by being invoked to justify the indiscriminate culling of another." Muggeridge, "A Bright Light in Academe," 31 *The Human Life Review* 45, 48 (No. 3, Summer 2005).

Regarding our nation's struggle against slavery, President Abraham Lincoln's efforts epitomize that cause. Lincoln found solidarity with the slaves through their humanity. Accordingly, Lincoln argued that the *Declaration of Independence* included the slaves, regardless of whether or not they were recognized in law as persons in the whole sense. It all boiled down to this: "[F]or although volume upon volume is written to prove slavery a very good thing, we never hear of a man who wishes to take the good of it, *by being a slave himself*." P. Angle and E. Miers, *The Living Lincoln* 156 (Barnes & Noble 1992 edition) (emphasis in the original). The same can be said of abortion: For although volume upon volume is written to prove abortion a very good thing, we never hear of a person who wishes to take the good of it, *by being an abortion himself*.

Lincoln believed the *Declaration* “contemplated the progressive improvement in the condition of all men everywhere.” *Id.* at 205. Yet he believed America was failing to live up to this ideal as slavery was taking the country down the slippery slope (as abortion is now):

Our progress in degeneracy appears to me to be pretty rapid. As a nation, we began by declaring that “*all men are created equal.*” We now practically read it, “all men are created equal, *except Negroes.*” When the Know-Nothings get control, it will read “all men are created equal, *except Negroes, and foreigners, and Catholics.*” When it comes to this I should prefer emigrating to some country where they make no pretence of loving liberty—to Russia, for instance, where despotism can be taken pure, and without the base alloy of hypocrisy. *Id.* at 192 (emphasis in the original).

THE STATES RETAINED EXCLUSIVE JURISDICTION OVER MUNICIPAL LAW:

History seems to be repeating itself. How did this happen? It should be remembered that the states retained their exclusive jurisdiction over municipal law even after the enactment of the Fourteenth Amendment. *Terrace v. Thompson*, 263 U.S. 197, 216-17 (1923). As the Court stated in the *Civil Rights Cases* (1883):

[The Fourteenth Amendment] does not authorize congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment. *Civil Rights Cases*, 109 U.S. 3, 11 (1883).

The federal constitution was derived from the sovereign states, who in turn received their power of government from the people. *Federalist*, No. 32; *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1885). Our federal government is one of limited, enumerated powers—powers granted to it from these states. *United States v. Morrison*, 529 U. S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995); *Gregory v. Ashcroft*, 501U.S. 452, 457-458 (1991); *Cooley v. Board of Wardens of Port of Philadelphia*, 53 U.S. 299, 320 (1851), *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (Marshall, C.J.) (“The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written.”). The Court affirmed such basic notions of federalism *Printz v. United States* and observed:

It is incontestable that the Constitution established a system of “dual sovereignty.” Although the States surrendered many of their powers to the new Federal Government, they retained “a residuary and inviolable sovereignty,” *The Federalist* No. 39, at 245 (J. Madison). This is reflected throughout the Constitution’s text.... Residual state sovereignty was also implicit, of course, in the Constitution’s conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, [Sec.]8, which implication was rendered express by the Tenth Amendment’s assertion that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” *Printz v. United States*, 521 U.S. 898, 918-919 (1997).

UNBORN CHILDREN POSSESS THE RIGHT OF PERSONAL SECURITY:

The states have historically exercised their police powers to protect the right of personal security of unborn children. The late Chief Justice William H. Rehnquist wrote in *Washington v.*

Glucksberg, “The right to life and to personal security is not only sacred in the estimation of the common law, but it is inalienable” *Washington v. Glucksberg*, 521 U.S. 702, 714 (1997) (Rehnquist, C.J). Touching upon the concept of personal security, Justice Harry Blackmun noted in *O’Bannon v. Town Court Nursing Center*, “Blackstone, whose vision of liberty unquestionably informed the Framers of the Bill of Rights, . . . wrote that “[t]he right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation” *O’Bannon v. Town Court Nursing Center*, 447 U.S. 773, 803 n.11 (1980) (Blackmun, J., concurring opinion) (*quoting* 1 W. Blackstone, *Commentaries* *129).

Justice Blackmun was in turn quoting William Blackstone’s *Commentaries on the Law of England*, written a few decades before the enactment of our Constitution. Examining the *Commentaries* in the cited passage, it will be found that Blackstone gave this explanation of the right of personal security:

The right of personal security consists in a person’s legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.

Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in the contemplation of law as soon as an infant is able to stir in the mother’s womb.... An infant *en ventre sa mere*, or in the mother’s womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born. And in this point the civil law agrees with ours.

A man’s limbs, (by which for the present we only understand those members which may be useful to him in fight, and the loss of which only amounts to mayhem by the common law) are also the gift of the wise creator; to enable man to protect himself from external injuries in a state of nature. To these therefore he has a natural inherent right; and they cannot be wantonly destroyed or disabled without a manifest breach of civil liberty. 1 W. Blackstone, *Commentaries on the Laws of England* 125-26 (1st ed. The University of Chicago Press facsimile 1979).

The right of personal security includes more than just the right to life. It includes the uninterrupted enjoyment limbs, body, health, and his reputation as well. As the Court wrote in *Ingraham v. Wright*, 430 U.S. 651, 672-75 (1977):

The Due Process Clause of the Fifth Amendment, later incorporated into the Fourteenth, was intended to give Americans at least the protection against governmental power that they had enjoyed as Englishmen against the power of the Crown. The liberty preserved from deprivation without due process included the right “generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.” *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); see *Dent v. West Virginia*, 129 U.S. 114, 123-124 (1889). Among the historic liberties so protected was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security (See 1 W. Blackstone, *Commentaries* *134. Under the 39th Article of the Magna Carta, an individual could not be deprived of this right of personal security “except by the legal judgment of his peers or by the law of the land.”).

There are numerous other references by the Supreme Court to the right of personal security, but it is well settled that the states have sole jurisdiction to promulgate laws protecting the life and limb of its residents. The rights of life, liberty and property are natural rights which

pre-existed our state and federal governments, as affirmed in the Declaration of Independence. It is the states, not the federal government, which have the primary duty to protect those unalienable rights. As the Court stated in *U.S. v. Cruikshank*:

The rights of life and personal liberty are natural rights of man. "To secure these rights," says the Declaration of Independence, "governments are instituted among men, deriving their just powers from the consent of the governed." The very highest duty of the States, when they entered into the Union under the Constitution, was to protect *all persons within their boundaries* in the enjoyment of these "unalienable rights with which they were endowed by their Creator." Sovereignty, for this purpose, *rests alone with the States*. *U.S. v. Cruikshank*, 92 U.S. 542, 553 (1875) (emphasis added).

THE PERSONAL SECURITY OF UNBORN PERSONS WAS AND IS PROTECTED:

With regard to the personal security of unborn persons, it is significant that Justice Horace Gray wrote in *Union Pacific R. Co. v. Botsford*, "The writ *de ventre inspiciendo*, to ascertain whether a woman convicted of a capital crime was quick with child, was allowed by the common law, in order to guard against the taking of the life of an unborn child for the crime of the mother." *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 253 (1891) (Gray, J.). See 4 W. Blackstone, *Commentaries* 387-88 (1st ed.). Given that the states have historically exercised their police powers to protect the right of personal security of unborn children, there is unanimity of opinion that the several states adopted this common law rule by decision or statute. In 1914, *Bouvier's Law Dictionary* attested to the writ *de ventre inspiciendo*, also known as pleading pregnancy, being "recognized in America" under an entry for "jury of women" *Bouvier's* also wrote:

"While the cases are very rare, there is no evidence (or authority, it might be added) that a jury of women is not a part of the machinery of the law in those states in which the common law prevails." 12 A. & E. Encyc. Of L. 331....

It may be safely affirmed that no woman who pleads pregnancy in delay of execution will in any common-law jurisdiction be sentenced to death without examination into the truth of the fact pleaded, and in absence of other statutory provision, it is difficult to see how she could be deprived of this common-law right. J. Bouvier, *Bouvier's Law Dictionary and Concise Encyclopedia* 1786 (Rawle's Rev. 1914).

Bouvier's also cites two cases involving capital offenses wherein the writ was issued, the Massachusetts case of *Commonwealth v. Bathsheba Spooner*, 2 Am.Crim.Trials 175 (1778) and a South Carolina case, *State v. Arden*, 1 Bay 487 (1795). In the 1778 Massachusetts case of *Commonwealth v. Bathsheba Spooner*, decided three years before the Articles of Confederation were enacted and nine years before the Constitution was written, the common-law quickening standard was used by the jury of matrons. As reported in *American State Trials*, "The effect of this plea is that a jury of women called a Jury of Matrons, is summoned, and if they find it to be true, the execution must be put off until the woman's confinement." 2 Am.Crim.Trials 175, 196 n.9 (1778). The jury of twelve matrons, assisted by two male midwives, initially returned a verdict that Mrs. Spooner was "not quick with child." *Id.* at 196, 198. Mrs. Spooner maintained that she was pregnant and after another examination sixteen days later resulted in a split opinion, four midwives were of the opinion that Mrs. Spooner was "now quick with child," and two matrons maintained "that she is not even now quick with child." With the split opinion from the second examination, the Governor's Council "refused all further delay" and the sentences were carried out. *Id.* at 199-201. Unfortunately, the matrons in both examinations were very much

mistaken, “But a post-mortem examination proved that her assertion had been true.” Note, 3 *Harv. L. Rev.* 45 (1889). See also D. Navas, *Murdered by His Wife* (1999).

Bathsheba Spooner’s case resulted in criticism directed towards the jury of matrons. With the advances in medical science and practice, the jury of matrons gave way to examinations by physicians. Professor James Oldham’s book *Trial by Jury* devotes a chapter to the study of jury of matrons, and he concludes: “By the late nineteenth century, the obstetrician-gynecologist had come into existence as the recognized expert on the subject of pregnancy. With these developments, the jury of matrons became superfluous.” Oldham, *Trail by Jury* 113-114 (NY Univ. Press 2006). Noting that the Spooner case was the last one in which a jury of matrons was impaneled, the *Harvard Law Review* had this to say in 1889:

It was hardly likely that the jury of matrons would be summoned again so long as Mrs. Spooner’s case was fresh in mind. Moreover, the progress of the science of medicine has been so great during the past century that every year has seen it less expedient to resort to such clumsy means, when doctors can be had. It is not strange that the “Albany Law Journal” jeers at the Pennsylvania papers for suggesting that a jury be summoned; “it is antiquated,” is the taunt. It is possible, even, by an examination of the later cases, to discover a tendency to put questions of alleged pregnancy to doctors for decision. The writ in Mrs. Spooner’s case, for example, added two “men midwives” to the twelve matrons—a departure from common-law practice not entirely happy, however, if we judge by the result. The jury of women in Anne Wycherley’s case asked for and got the assistance of a surgeon.... In view of all these facts, it seems quite likely that a question of pregnancy arising to-day would be referred for decision directly to doctors. Note, 3 *Harv. L. Rev.* 45 (1889).

Coinciding with the abandonment of the jury of matrons for examinations by physicians, there was a significant change in the evidentiary requirement—note the above quote from the *Harvard Law Review* uses the term “pregnancy” instead of “quick with child,” as did the *State v. Arden* case cited by *Bouvier’s Law Dictionary*. The 1795 *Arden* case, decided a mere eight years after the Constitution was written, is significant in that the criteria of “quick with child” is replaced with simple “pregnancy”: “The prisoner was then asked if she had any thing to offer why sentence of death should not be pronounced against her? Upon which she pleaded *pregnancy*.” *State v. Arden*, 1 Bay 487, 489 (1795). An explanatory note in the margin states, “Pregnancy may be pleaded by a woman, after conviction, before sentence of death is passed upon her; which shall be tried by a jury of matrons.” *Id.* The jury of matrons “examined the prisoner, and found that she was not pregnant.” *Id.* at 489-490.

In the nineteenth century the “quickening” distinction was being modified by judicial decision and abandoned by statutory law to fit the burgeoning scientific evidence that the fetus was alive from the moment of conception. Dellapenna, *Dispelling the Myths of Abortion History* 282 (Carolina Academic Press 2006). Some states adopted their criminal common law to fit the scientific evidence of the time; the Supreme Court of Pennsylvania declared in 1850, “The moment the womb is instinct with embryo life, and gestation has begun, the crime may be perpetrated.” *Mills v. Commonwealth*, 13 Pa. 631, 633 (1850). See *State v. Reed*, 45 Ark. 333, 334-36 (1885); *Lamb v. State*, 10 A. 208, 208 (Md. 1887); *Commonwealth v. Taylor*, 132 Mass. 261 262 (1882); *State v. Slagle*, 83 N.C. 630, 632 (1880); *Gray v. State*, 77 Tex. Cr. R. 221, 224 (1915).

Eventually, evidence of mere pregnancy was sufficient for a prosecution under most state criminal statutes. Clark and Marshall, *A Treatise on the Law of Crimes* 394-396 (J. Kearney 5th ed. 1952). See E. Quay, "Justifiable Abortion—Medical and Legal Foundations," 49 *GEO L.J.* 395, 447-520 (1961). See also Blackmun's discussion of the American Medical Association's "role in the enactment of stringent criminal abortion legislation" during the late 19th century, *Roe*, 410 U.S. at 141-142. In 1957, *Wharton's Criminal Law and Procedure* affirmed:

It has generally been held that under statutes defining the crime of abortion as the procuring of the miscarriage of "any woman," the vitality of the fetus at the time of the operation is immaterial. Statutes using the term "pregnant woman" have been interpreted as meaning pregnancy during any stage, regardless of the vitality of the fetus. *Wharton's Criminal Law and Procedure*, Vol. II, Sec. 742, p. 561 (R. Anderson 12th ed. 1957) (footnotes omitted).

Hence, one would not expect a modern use of the plea of pregnancy to maintain the quickening criteria. Indeed, present statutes regarding the plea of pregnancy are just that, pleas of pregnancy. The state of New York's present statute declares, "A sentence of death may not be carried out upon a woman while she is pregnant." N.Y. Correct. sec. 657(1). The statute required that the superintendent of a correctional facility when informed that a condemned woman might be pregnant "shall appoint a qualified physician to examine the convicted person and determine if she is pregnant." N.Y. Correct. sec. 657(2). The state of Georgia's statute also only specifies pregnancy as determined by "one or more physicians." Ga. sec. 17-10-39. A number of other states having similar statutes. See e.g. Ala. Code sec. 15-18-86; Ariz. Rev. Stat. 13-4025; Cal. Penal Code sec. 3705, sec. 3706; Ind. Code 35-38-6-10; Mass. Gen. L. ch. 279, sec. 62; Nev. Rev. Stat. (NRS) 176.465, NRS 176.475; Ohio Rev. Code 2949.31; S.D. Codified Laws 23A-27A-27, S.D. Codified Laws 23A-27A-28; Utah Code 77-19-8 (2)(b)(i). There is also a federal statute enacted in 1994, Title 18 U.S.C.A. Section 3596, which reads, "A sentence of death shall not be carried out upon a woman while she is pregnant." Additionally, Section 3596 provides that the sentence is to be implemented "in the manner prescribed by the law of the State in which the sentence is imposed." If that state law does not provide for the death penalty, another state is to be designated and its laws followed. Therefore, there is no reason to doubt the *Harvard Law Review's* summation, "In view of all these facts, it seems quite likely that a question of pregnancy arising to-day would be referred for decision directly to doctors." Note, 3 *Harv. L. Rev.* 45 (1889). Although the jury of matrons and their evidentiary standard of quickening were both replaced since the eighteenth century with scientific method and standards, the due process protections afforded unborn children of condemned mothers remains "in order to guard against the taking of the life of an unborn child for the crime of the mother." *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 253 (1891).

THE UNBORN CHILD'S RIGHT TO LIFE IS A DUE PROCESS RIGHT:

As with any due process question, the Court looks to our nation's legal history, as stated in *Washington v. Glucksberg*, "We begin, as we do in all due process cases, by examining our Nation's history, legal traditions, and practices." *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997). The Court in *Roe* failed to even consider this critical aspect of the legal protections afforded unborn children. What is more, the plea of pregnancy directly opposes Blackmun's claim that "In areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth....

In short, the unborn have never been recognized in the law as persons in the whole sense.” *Roe* 410 U.S. at 161-162 (footnotes omitted).

The plea of pregnancy also directly refutes Blackmun’s obfuscation in *Roe*, that the question of when life begins could not be answered:

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer. *Roe*, 410 U.S. at 159.

Instead, Blackmun denoted unborn persons as only having “potential life,” (*Roe* 410 U.S. at 150, 154, 156, 163.) and the Court had stuck to that mystification, and similar derivations, ever since: e.g. “potential human life,” “potentiality of human life,” “potential life of the fetus,” “fetus’ potential human life,” (see Roden “Unborn Children as Constitutional Persons,” 25 *Issues in Law and Medicine*, no. 3, 185, 270-273 (2010) for a collection of these phrases). Until, at least, *Gonzales v. Carhart*. Significantly, the Court in *Gonzales* dropped the use of the “potential life” euphemisms at the same time it asserted a more substantial state interest in prenatal life. Indeed, the Court went far beyond this and resolved “the difficult question of when life begins.” In doing so, the Court in *Gonzales* affirmed the notion, inherent in the plea of pregnancy, that the determination of when life begins is a factual inquiry capable of being answered.

Whereas, Justice Blackmun declared in *Roe*, “In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake.” *Roe*, 410 U.S. at 162. Thereafter, the states were prohibited from regulating abortion in a manner “inconsistent with the Court's holding in *Roe v. Wade* that a State may not adopt one theory of when life begins to justify its regulation of abortions,” as the Court delimited in *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 444 (1983). Indeed, the states were prohibited from adopting any theory at all other than the unborn child only possessed “potential life.” That has changed as a result of *Gonzales v. Carhart*, 550 U.S. 124 (2007).

GONZALES V. CARHART DECIDES “LIFE” IS AN EVIDENTIARY ISSUE:

In *Gonzales v. Carhart*, the Supreme Court upheld the federal Partial-Birth Abortion Ban Act of 2003 (the “Act”). The Act provides that any physician who “knowingly performs a partial-birth abortion and thereby kills a *human* fetus shall be fined under this title or imprisoned not more than 2 years, or both.” *Gonzales*, 550 U.S. at 141 (emphasis added). In the Court’s discussion of the scienter requirements in *Gonzales* there is plain language affirming the life inherent in the unborn child:

[T]he person performing the abortion must “vaginally delive[r] a *living* fetus.” The Act does not restrict an abortion procedure involving the delivery of an expired fetus.... 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. See, e.g., *Planned Parenthood*, 320 F. Supp. 2d, at 971-972. We do not understand this point to be contested by the parties. *Gonzales*, 550 U.S. at 147 (emphasis added).

Given the Court’s previous strict adherence to the term “potential life” and synonymous expressions, the plain language in *Gonzales* affirming the actual life of the unborn child is

startling. So too is the declaration that this is no longer a contested issue. Said agreement was reached in a lower court decision leading up to *Gonzales, Planned Parenthood Federation v. Ashcroft*, 320 F.Supp.2d 957 (N.D. Cal. 2004). There, the United States District Court for the Northern District of California, in its findings of fact, made this definitive statement, “The fetus may still have a detectable heartbeat or pulsating umbilical cord when the uterine evacuation begins in any D & E or induction, and may be considered a ‘living fetus.’” *Id.* at 971. The Supreme Court accepted these findings noting that the parties in *Planned Parenthood Federation* agreed with that conclusion. Consequently, states may now adopt the theory that life begins with a “detectable heartbeat or pulsating umbilical cord” and would not be in conflict with *Roe* or *Akron*. Rather, the states would be following the theory of when life begins from *Gonzales v. Carhart*. The question of when life begins is no longer a question of law for “the judiciary... to speculate as to the answer.” *Roe*, 410 U.S. at 159. It is now a *factual* inquiry for a jury to decide. Consequently, states once again have sole jurisdiction over the municipal law as it pertains to unborn children from the moment when there is evidence that life has begun.

ANTI-DECAPITATION LEGISLATION IS NOT VAGUE:

As for the vagueness argument, Congress used very specific in the language of the Partial-Birth Abortion Ban Act because the Court, in *Stenberg v. Carhart*, struck down Nebraska’s similar ban of partial-birth abortions for lack of “sufficient definiteness” in defining the abortion procedures being proscribed. *Stenberg v. Carhart*, 530 U.S. 914 (2000). As with the Partial-Birth Abortion Ban Act, the proposed legislation in North Dakota provides specific anatomical feature so as not to be vague as it involves the existence of a skull. *Gonzales*, 550 U.S. at 150 (“Just as the Act’s anatomical landmarks provide doctors with objective standards, they also ‘establish minimal guidelines to govern law enforcement.’”) The point in fetal development at which the skull exists is well established in medical literature; for example, performing a search of “fetus skull development” in the U.S. National Library of Medicine’s PubMed.gov website will retrieve some 489 records. See <http://www.ncbi.nlm.nih.gov/pubmed> (last visited April 20, 2010). As a further example, some firms even offer reproductions of fetal skulls starting at 13 weeks of fetal development. See <http://www.boneclones.com/human-fetal-skulls-skeletons.htm> (last visited April 20, 2010).

ANTI-DECAPITATION LEGISLATION DOES NOT VIOLATE THE HEALTH EXCEPTION:

Regarding the health exception, the holding in *Gonzales* has significantly strengthened the state’s ability to regulate abortion:

The third 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, cannot be set at naught by interpreting *Casey*’s requirement of a health exception so it becomes tantamount to allowing a doctor to choose the abortion method he or she might prefer. 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. *Gonzales*, 550 U.S. at 158.

As in *Gonzales*, the legislature could make the determination that a health exception is not needed. This would be in agreement with the majority of opinion in the medical community, as the *National Right to Life News* reported:

Physicians who specialize in high-risk pregnancies, as well as the medical textbooks that discuss these risks, are in agreement. In virtually all instances where a pregnant woman comes in with a medical emergency, the recommended course of action is to stabilize her condition. Aborting the child does not help the mother. In fact the trauma of an abortion greatly **increases** the chance that the mother will die! “Nebraska Introduces Abortion Pain Prevention Act,” *National Right to Life News* 26 (February/March 2010) (emphasis in the original).

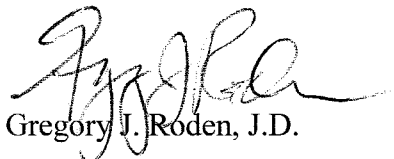
Lastly, as fetal skulls do not develop until the 13th week of pregnancy, the health exception may not be applicable. As the Court stated in *Casey*, “In some broad sense, it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child.” *Planned Parenthood v. Casey*, 505 U.S. 833, 871 (1992). Although the Court in *Casey* used the viability standard, that standard is no longer workable in light of the Court's holding that the question of when life begins is now a factual inquiry, and that the legislative may use anatomical features in regulating abortions. This was recognized by Justice Ginsburg in her *Gonzales* dissent:

In cases on a “woman's liberty to determine whether to [continue] her pregnancy,” this Court has identified viability as a critical consideration. See *Casey*, 505 U.S., at 869-870 (plurality opinion). “[T]here is no line [more workable] than viability,” the Court explained in *Casey*, for viability is “the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman. ... In some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child.” *Id.*, at 870.

Today, the Court blurs that line, maintaining that “[t]he Act [legitimately] appl[ies] both previability and postviability because ... a fetus is a living organism while within the womb, whether or not it is viable outside the womb.” *Ante*, at 17. Instead of drawing the line at viability, the Court refers to Congress' purpose to differentiate “abortion and infanticide” based not on whether a fetus can survive outside the womb, but on where a fetus is anatomically located when a particular medical procedure is performed. See *ante*, at 28 (quoting Congressional Findings (14)(G), in notes following 18 U. S. C. §1531 (2000 ed., Supp. IV), p. 769). *Gonzales*, 550 U.S. at 186 (Ginsburg, J., dissenting).

As states may now adopt evidentiary theories of when life begins in following the theory of when life begins in *Gonzales v. Carhart*, theories that are not in conflict with *Roe* and *Akron*, abortion jurisprudence as it now stands is self refuting. Perhaps that is why the Court in *Gonzales* was careful to note that prior principles and precedents were only “assume[d]” for the purposes of the decision. *Gonzales*, 550 U.S. at 146, 161; *Id.* at 187 (Ginsburg, J., dissenting).

Yours truly,



Gregory J. Roden, J.D.