RESPONSE OF CAROL TOBIAS,
PRESIDENT, NATIONAL RIGHT TO LIFE COMMITTEE

August 4, 2014

QUESTION FROM SENATOR GRAHAM: *Regarding the impact of S. 1696 on the ability of states to limit late abortions: In her testimony, Nancy Northup, president and CEO of the Center for Reproductive Rights, suggested that S. 1696 simply reiterates the current "constitutional standard," which, she suggested in her written testimony, draws a sharp demarcation at "viability." Do you agree with Ms. Northup's reading on what the current "constitutional standards" are, regarding limits on late abortions, and do you agree with those who suggest that S. 1696 does nothing more than codify the current "constitutional standard" with respect to regulation of abortion?*

It is striking that in purporting to explain to the Committee the "constitutional standard" regarding regulation of abortion, particularly late abortion, Nancy Northup made no reference in either her written or verbal testimony to the most recent U.S. Supreme Court decision concerning abortion – *Gonzales v. Carhart*, the 2007 ruling in which the Supreme Court upheld the federal Partial-Birth Abortion Ban Act [550 U.S. 124 (2007)].

When Congress was still considering enactment of that statute, Northup's organization – among others – told Congress that it was unconstitutional, because it placed an "undue burden" on abortion before "viability," and because it contained no open-ended "health" exception. In short, they said pretty much the same things they are now saying about the Pain-Capable Unborn Child Protection Act, S. 1670/H.R. 1797, and about the Pain-Capable Unborn Child Protection bills that have been considered in various state legislatures and enacted in ten states, beginning with Nebraska in 2010.

Does Northup neglect to mention *Gonzales* because she considers the Supreme Court's holdings in *Gonzales* to be insignificant, or irrelevant to determining the current "constitutional standard"? This seems unlikely. In her dissent to *Gonzales,* Justice Ruth Bader Ginsburg (the Supreme Court justice who most vigorously articulates the doctrines also embraced by the Center for Reproductive Rights) vehemently denounced Justice Kennedy's majority opinion, which she clearly viewed as a highly significant shift in the Court's doctrine on regulation of

abortion. Justice Ginsburg wrote:

> The Court's hostility to the right *Roe* and *Casey* secured is not concealed. . . . 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."

Law Professor Khiara M. Bridges of Boston University, who was previously an academic fellow with the Center for Reproductive Rights, elaborated on the perceived shift in Supreme Court doctrine in her article "Capturing the Judiciary: *Carhart* and the Undue Burden Standard" (*Washington & Lee Law Review*, 67 Wash & Lee L. Rev. 915, Summer 2010). (Prof. Bridges specifically thanked the Center for Reproductive Rights "for providing financial support during the writing of this article.") Referring to the ruling as *Carhart,* Bridges wrote:

> Note that when Blackmun [in *Roe v. Wade*] announces one of the fundamental holdings of the decision, he refers to previable fetuses as in possession of "potential life" and postviable fetuses as in possession of a, without qualifications, "life." Viability, then, is the point at which the *potential life* of the fetus emerges as a *life,* thereby affording the fetus a whole or quasi-whole membership within the human community – and thereby making it a legitimate target for regulations designed to protect it. If we accept the above reasoning as justification for assigning constitutional significance to viability, then one understands as highly significant Justice Kennedy's casual assertion in [*Gonzales v.*] *Carhart* that the "fetus is a living organism while within the womb, whether or not it is viable outside the womb," as well as his relatively cavalier description of the pre- and post-viability abortion procedures at issue as concerning "a particular manner of ending fetal *life*." **With these simple pronouncements, the majority asserts the *insignificance* of viability as a site distinguishing potential life from unqualified life.** With this pronouncement, *Carhart*

> makes the "bright line" of viability no more than an arbitrary moment, a moment among moments, within the continuous, always already "life" of the fetus. **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.** What follows from the evanescence of the distinction between pre- and post-viable stages of pregnancy and the differing levels of gravity that have been attributed to them is that the justification for curbing the ability of the state to proscribe abortions outright during pre-viability is also eliminated. [boldface added for emphasis]

Consider also the analysis of Randy Beck, associate professor of law at the University of Georgia Law School, a former clerk to Justice Anthony Kennedy, in his essay "*Gonzales,* Casey, and the Viability Rule" (*Northwestern University Law Review*, Vol. 103, No. 1, 2009). Beck notes that Justice Kennedy, in his dissent in *Stenberg* in 2000, 530 U.S. 914, 962, wrote that "[a] State may take measures to ensure the medical profession and its members are viewed as healers, sustained by a compassionate and rigorous ethic and cognizant of the dignity and value of human life, even life which cannot survive without the assistance of others."

Beck goes on to argue that in the 2007 *Gonzales* ruling, Kennedy and the other four justices in the majority merely "assumed" the continued application of the viability doctrine but did not actually reaffirm it. (Even in the 1992 *Casey* ruling, which reaffirmed the "core holdings" of *Roe v. Wade*, "the plurality's retention of the viability rule can be viewed as dicta," Beck asserts -- meaning language that was not essential to the issues in the case and that therefore has no precedential force.) More importantly, Beck argues that the overall logic of the *Gonzales* ruling will make it difficult for the Court to articulate a convincing constitutional principle as to why future laws protecting unborn children *prior to viability* are constitutionally invalid.

> The Court's conclusion [in *Gonzales v. Carhart*] that Congress can legitimately protect the previable fetus from a brutal death through the intact D&E [partial-birth abortion] procedure raises the question why a legislature may not protect the same fetus from other brutal abortion techniques. The possible distinction the majority perceived between intact D&E and standard D&E abortions offers little assistance in justifying the viability

> rule. To say that a legislature *may* distinguish between the two procedures for *legislative* purposes does not show why it *must* distinguish between them on *constitutional* grounds. If a legislature may view the previable fetus as a being that warrants protection against the intact D&E procedure, it should be able to protect the same fetus against the standard D&E. The dignity of the not-quite-viable fetus does not change depending on the method by which it will be aborted.
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> Prior to *Gonzales*, if the Court sought to justify the viability rule, it would have needed to present a principled constitutional theory interrelating state power and fetal entitlement such that the state interest in protecting fetal life (a) exists at the outset of pregnancy, (b) grows in strength as the pregnancy progresses, but © does not become strong enough to warrant a prohibition of abortion until the precise moment that the fetus can survive outside the womb. In the post-*Gonzales* world, the task of establishing the legitimacy of the viability rule has become significantly more demanding. Now if the Court wishes to justify the viability rule in a manner consistent with its precedents, it will need an even more subtle and discriminating constitutional analysis, capable of explaining why the state may ascribe sufficient value to a previable fetus to protect it against death by one means, but may not value it sufficiently to protect it against death by other means. It must offer a principled constitutional theory interrelating state power and fetal entitlement, such that the state interest in protecting fetal life (a) exists at the outset of pregnancy, (b) grows in strength as the pregnancy progresses, (c) warrants protecting a previable fetus against an intact D&E abortion due to the similarity of that fetus to a newborn infant, but nevertheless (d) does not warrant protecting the fetus from other abortion methods until it can survive outside the womb.

Going all the way back to *Roe v. Wade*, the U.S. Supreme Court has recognized a compelling state interest in protecting the life of the unborn child after "viability." But the current Supreme Court recognizes that there are other compelling state interests pertaining to unborn children, and recognizes that they begin prior to "viability." Justice Anthony Kennedy – widely understood to be the decisive fifth vote in abortion cases – has written:

> [In *Casey v. Planned Parenthood,* 1992] We held it was inappropriate for

> the Judicial Branch to provide an exhaustive list of state interests implicated by abortion. 505 U.S. at 877. *Casey* is premised on the States having an important constitutional role in defining their interests in the abortion debate. It is only with this principle in mind that Nebraska's interests can be given proper weight. . . .
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> States also have an interest in forbidding medical procedures which, in the State's reasonable determination, might cause the medical profession or society as a whole to become insensitive, even disdainful, to life, including life in the human fetus. . . . A State may take measures to ensure the medical profession and its members are viewed as healers, sustained by a compassionate and rigorous ethic and cognizant of the dignity and value of human life, even life which cannot survive without the assistance of others. *Stenberg v. Carhart*, 350 U.S. 914, 961-62 (2000)(Kennedy, J., dissenting)

While those statements were made while Justice Kennedy was in the minority in *Stenberg*, which struck down Nebraska's Partial-Birth Abortion Ban Act in 2000, in 2007, with a differently composed Court, he wrote for the majority in *Gonzales v. Carhart*.

It should be noted that the federal Partial-Birth Abortion Ban Act was upheld although it made no distinction based on viability:

> "The [Partial-Birth Abortion Ban] 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." *Gonzales*, 550 U.S. at 147.

Indeed, in her dissent, Justice Ginsburg complained that the Court's ruling "blurs the line, firmly drawn in *Casey*, between previability and postviability abortions."

Thus, while Nancy Northup in her testimony attempted to maintain the pretense that the Supreme Court continues to adhere to a rigid demarcation at "viability," both the majority ruling and the dissent in *Gonzales* provide clear evidence that this is not the case. As a result, we believe that the Supreme Court would uphold, for example, the Pain-Capable Unborn Child Protection Act (S. 1670), which would generally protect unborn children of 20 weeks fetal age and greater, based on

findings that by this stage of development (if not sooner) they are capable of experiencing pain while being aborted.