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Memorandum

To: Right to Life of Michigan
From: James Bopp, Jr. & Corrine L. Youngs
Date: May 10, 2019
Re: Pro-life Strategy Issues for Right to Life of Michigan

This memorandum describes how best to advance the pro-life cause at present with Justice Kavanaugh confirmed to the Supreme Court. This memo specifically addresses legislative goals of the pro-life movement, problematic legislation, including the heartbeat ban, and possible legislation, specifically dismemberment, to consider.

The Big Picture

Roe v. Wade declared that the substantive due process right to privacy encompassed abortion. 410 U.S. 113 (1973). Since that decision, pro-life groups have strived toward overturning that precedent. With the arrival of Justice Kennedy on the Court in 1988, it finally seemed as though the Court had the conservative majority necessary to end more than a decade of federally-mandated abortion on demand throughout the country. But Kennedy dashed those hopes by switching sides and joining a majority that reaffirmed the abortion right in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

With Justice Kavanaugh's recent confirmation, pro-life groups gain a renewed confidence that *Roe* could be overturned, but this is not guaranteed. Although confirming Kavanaugh is a step toward overturning *Roe*, it is still unsettled whether this will be sufficient. Overturning precedent is a process and rarely occurs immediately following confirmation of a new justice. And often the willingness of the Court to do so can require more than five votes. The important question is whether a majority of the Court is *willing* to do so.

As the Court currently stands, Justice Thomas is the only Justice who has said, in a judicial opinion, that *Roe v. Wade* should be overturned. There is speculation that four other Justices might ultimately be willing to do this based on their general judicial philosophy, but this is currently only speculation until they speak to this in a judicial opinion. A major obstacle that

stands in the way, even for a Justice who believes that *Roe v. Wade* was wrongly decided, is the Doctrine of Stare Decisis. Stare Decisis, Latin for "to stand by things decided," is a judicial doctrine under which the Court follows prior decisions when deciding a case on similar facts. Of course, *Roe v. Wade* is a Supreme Court precedent that will be accorded stare decisis respect, but, as Justice Kavanaugh explained during his confirmation hearings, the 1992 Supreme Court decision in *Casey*, which reaffirmed *Roe's* abortion right, is itself subject to stare decisis respect. So in order to overturn a precedent, one must look to how the Court has done this in the past and discover the tried and true process.

To understand how and when the Court overturns precedent, one must study where it has been done successfully. Because of the Court's strict adherence to stare decisis, the Supreme Court rarely overturns precedent, but has done so in about 250 cases in its history. The Court does recognize a justification in overruling precedent to rectify egregiously wrong decisions. This is exemplified in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), where the Supreme Court declared that racial segregation of public schools is unconstitutional, overturning *Plessy v.Ferguson*, 163 U.S. 537 (1896). But even overturning this previously acclaimed "separate, but equal" doctrine required all nine Justices of the Court.

Second, overturning precedent is an incremental process. The Court is loathe to switch sides just because a new justice joins the Court. Thus, overturning precedent almost always is a process through a series of cases over time where the prior decision is undermined, questioned, distinguished and stripped of any content or meaning and only then does the Court decides to overturn it. The key element is a willing Court—meaning a Court willing to entertain your proposal to overturn precedent. The Court cannot be forced to do anything because it is in complete control of its docket and decisions.

Legislative Goals

Given the current climate, realistic goals need to be set for the pro-life movement. These goals should include **1)** building popular support, **2)** saving lives in the meantime, and **3)** passing legislation that gives the Court the best opportunity to undermine and eventually reconsider *Roe*.

First, we must build popular support for the pro-life position. This will influence the Court. And in a democracy, popular support is needed to keep the issue on the public agenda. For example, alcohol prohibition was so popular in the 1920s that Congress passed a constitutional amendment prohibiting it. But it became so unpopular that it is not on the public agenda. Popular support for an issue is essential for success in a democracy.

Second, we must save lives in the meantime. For this proposition, consider this moral

dilemma: if a boat was sinking and only half of the inhabitants could be saved by transferring those passengers to a smaller boat, do you save the half you can or let all the passengers drown, since you cannot save everyone? Morally, you save as many as can with what you have—a smaller boat. Under the circumstances, you have done all that you can to save the most lives and you have a moral imperative to do this. Regarding the abortion issue, legislation can and has been passed that has been effective in saving lives. But to be effective in saving lives, the legislation must go into effect. And we have seen, a reduction of almost 46% of abortions in Michigan, in part, because of the legislation passed by the Michigan Legislature.

But you cannot save lives if the legislation never goes into effect. Thus, there needs to be a plausible justification why a new law is constitutional under current law. Consequently, you cannot be the most pro-life state in the nation because of heartbeat, 15-week ban, or personhood legislation. There is no plausible justification why these proposals are constitutional under current law, and thus, such legislative initiatives are doomed to be enjoined and will never take lawful effect—never saving a single life. So by passing this legislation—you've really accomplished nothing.

Finally, every law that is passed and then challenged as violating *Roe v. Wade* would provide an opportunity to overturn *Roe*. It is not necessary to pass a prohibition to "challenge" the Court to overturn *Roe*. In *Planned Parenthood v. Casey*, Planned Parenthood challenged a statute that required parental and spouse notification, a waiting period, and informed consent, and the Supreme Court chose to reconsider *Roe.* Any statute that regulates abortions is a legitimate vehicle for the Court to overturn *Roe*, if the Court is willing.

So it does not need to be a heartbeat bill, a personhood bill, or a 15-week ban for the Court to overturn *Roe*. But these bills have two significant down sides. First, they will not reduce abortions in the meantime since they will never go into effect. Second, they are very unlikely to be even taken up by the Court. When considering a case, the Supreme Court is loathe to take a case that leaves them with a stark choice—when the only way to uphold the law is to reverse *Roe*. The Court is much more willing to take a case that arguably can be upheld under current law, and it can reconsider *Roe* if it chooses to.

Problematic Legislation, Including Heartbeat Bans

All potential legislation that prohibits pre-viable abortions should be avoided—this includes the heartbeat bill, personhood recognition, and the 15-week ban. These violate the "viability standard" under *Roe*, which only allows prohibitions after viability. This is so well established that no judge in the country will find this legislation constitutional, because a judge must follow precedent. The Supreme Court is very unlikely to grant review because it presents too stark a

choice for the Court. An argument that all the states within the 6th Circuit need to pass heartbeat bans because this will generate interest within the Supreme Court is completely false. The Supreme Court will unlikely consider it again because the legislation presents only a binary choice. In all likelihood, the Supreme Court has denied certiorari on multiple lawsuits involving the heartbeat legislation for this reason. Again, the Court is likely to grant certiorari on a "non-prohibitory law that is challenged as conflicting with *Roe* as the vehicle to reexamine *Roe*. The Court did this in Webster in 1989 and Case in 1992: Neither case involved an abortion prohibition, yet the Court reexamined Roe in both cases." Clark D, Forsythe, *'Heartbeat Bills' Might Be the Abortion Laws Least Likely to Attract Supreme Court Review*, National Review, (May 9, 2019, 10:47 AM),
https://www.nationalreview.com/bench-memos/heartbeat-bills-might-be-the-abortion-laws-least-likely-to-attract-supreme-court-review/.

Because these bills involve a pre-viable prohibition on abortion, they have the least chance to be considered by the Supreme Court compared to other proposals, which are supported by plausible arguments that they are constitutional under current law. Thus, this legislation will not be effective in accomplishing pro-life goals because (1) such bills will be quickly struck down by a federal district court before they go into effect, (2) that decision will be affirmed by an appellate court, (3) the Supreme Court will not grant review, and (4) the pro-abortion attorneys, who brought the legal challenge, will collect statutory attorneys fees from the state that enacted the provision. This effort will have enriched the pro-abortion forces with no gain for the pro-life movement. In fact, there will be a loss because there will be yet another federal-court decision declaring that state law on abortion is superseded by the federal constitution. These pieces of legislation will not save any lives because they will be enjoined before going into effect and will not be considered by the Supreme Court.

Future Legislation to Consider, Including Dismemberment Abortion Bans

Both passion for the pro-life cause and prudence about the means to achieve it must be maintained if the pro-life movement is to ultimately succeed. To change the hearts and minds of the public on abortion, it is necessary for pro-lifers to frame the debate to their advantage. The debate over partial-birth abortion (PBA) has furthered this strategy because it has forced the pro-abortion camp to publicly defend a particularly gruesome abortion practice. Dismemberment ban will force pro-abortion groups to defend their position in the same way.

Dismemberment is a brutal type of abortion where a live unborn child is purposefully dismembered piece by piece resulting in the death of the child in particularly painful way. This type of legislation will serve two purposes. Primarily, it will expose the vile and gruesome aspects of abortion practice. Also, it will serve to emphasize the dignity of the unborn child. The public

debate should be framed so that our opponents have to defend their "hardest" cases, exposing them as unreasonable and outrageous, and revealing the true nature of the Court's right to abortion.

Dismemberment is similar to the partial birth abortion method and equally barbaric. In *Gonzalez v. Carhart*, the Court assessed the validity of the federal Partial-Birth Abortion Act of 2003. 550 U.S. 124 (2007). In *Gonzales*, the partial-birth abortion ban was upheld by the Court based on the government's "interest in protecting the integrity and ethics of the medical profession," and on the "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 . . . ." *Id*. at 157.

As Justice Kennedy explained in *Gonzalez*, "where [the state] has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to impose regulations in furtherance of its legitimate interest." *Id*. at 158. The Court added that when medical certainty exists, specifically on which abortion procedure is safer or poses less risk to the mother, the state interests prevail. *Id.* at 163. Here, Michigan has an interest in regulating this method of abortion in 1) supporting pregnant women's psychological health, 2) preserving the dignity of the unborn fetus, and 3) protecting integrity and ethics of the medical community.

So here, there is no undue burden because 1) there is no substantial obstacle preventing a woman from choosing an abortion in her second trimester because there are alternative procedures, i.e. fetal demise; and 2) the state has a legitimate interest to impose regulatory powers. The live dismemberment abortion ban is directly analogous to the ban on partial-birth abortions in *Gonzales* because it's limited in nature to not encompass all D&E abortions and contains a life of the mother exception. For these reasons, the Court would uphold this legislation as constitutional.

Future Effects of Michigan's Abortion Statute, MCL §750.14

Michigan is unique among the pro-life states because of their pro-life statute solidly in place since the 19th Century. Michigan Code provides

> administering drugs, etc., with intent to procure miscarriage—Any person who shall wilfully administer to any pregnant woman any medicine, drug, substance or thing whatever, or shall employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, shall be guilty of a felony, and in case the death of such pregnant woman be thereby produced, the offense shall be deemed manslaughter.

MCL §750.14. Courts have interpreted this statute to include abortion. *See People v. Bricker*, 208

N.W.2d 172, 174 (Mich. 1973); *People v. Higuera*, 625 N.W.2d 444, 447 (Mich. Ct. App. 2001) ("The central purpose of this legislation is clear enough—to prohibit all abortions except those required to preserve the health of the mother.").

After the ruling in *Roe v. Wade*, the Michigan Supreme Court considered the constitutionality of this abortion regulation statute as applied to a non-physician performing an abortion. *Bricker*, 208 N.W.2d 172. The Court reasoned that the statute remains constitutional insofar as it can operate without infringing the cases defined and exempted under *Roe v. Wade* and *Doe v. Bolton*. *Id*. at 175-176. As in *Bricker*, the Michigan Statute prohibited a lay person from performing an abortion. *Id.*

In *People v. Higuera*, the Michigan Court of Appeals re-examined Michigan's Abortion Statute when a physician induced an abortion of a fetus at 28-weeks gestation. 625 N.W.2d at 444. The court in *Higuera* referred to the *Bricker* decision finding that the Michigan Statute is enforceable, but is constrained by precedent from the United States Supreme Court. 625 N.W.2d at 447-48 (Because of the "changed circumstances resulting from the Federal constitutional doctrine elucidated in *Roe* and *Doe*, we construe § 14 of the penal code to mean that the prohibition of this section shall not apply to 'miscarriages' authorized by a pregnant woman's attending physician in the exercise of his medical judgment . . . however, a physician may not cause a miscarriage after viability except where necessary, in his medical judgment, to preserve the life or health of the mother."). The *Bricker* Court considered the Michigan Abortion Statute in relationship to the new Supreme Court precedent of *Roe* and *Doe,* and read into the Michigan Abortion Statute limitations so the Statute could remain constitutionally valid. Thus, as the Supreme Court's standard for abortion shifts, so does the enforceability of Michigan's Abortion Statute. Likewise, Michigan has an interest in preserving this statute for the potential future when a successful case is brought against *Roe v. Wade*. The more the abortion right is dismantled, the more applicable Michigan's Statute becomes.

At the same time, there is a danger that if the Supreme Court were to a accept a case challenging directly the right to abortion, such as a heartbeat ban, that Court might make the abortion right stronger. The majority might abandon its current "substantive due process" analysis (i.e., reading "fundamental" rights into the "liberty" guaranteed by the Fourteenth Amendment against infringement without due process) in favor of what Justice Ginsberg has long advocated—an "equal protection" analysis under the Fourteenth Amendment. In *Gonzales v. Carhart*, 550 U.S. 124 (2007), the dissent, written by Justice Ginsberg, in fact did so. *See id.* at 172 (Ginsberg, J., joined by Stevens, Souter & Breyer, JJ.) ("[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.") This is highly unlikely in a case that decides the constitutionality of such things as

partial-birth-abortion bans, parental-involvement laws, women's-right-to-know laws, waiting periods, and other legislative acts that do not prohibit abortion in any way.

The application of the Michigan Statute is at the mercy of United States Supreme Court precedent. The more power provided to the states to legislate abortion regulations, the more enforceable the Michigan Statute becomes.

So at this time for Michigan, the dismemberment ban is a good choice as it would further pro-life goals—gain popular support, save lives, and withstand legal scrutiny under current law—while also providing the Court with a vehicle to overturn *Roe*—if they are willing. However, a heartbeat ban would be futile and potentially counterproductive and, thus, should not be pursued.