Prepared Testimony of
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Before the Michigan House of Representatives
Committee on the Judiciary
March 1, 2023

Distinguished Chair and Distinguished Members of the Committee: Thank you for providing me the opportunity to provide testimony on House Bills 4006, 4031, and 4032.

INTRODUCTION

My name is William Wagner and I hold the academic rank of Distinguished Professor Emeritus (Law). I served on the faculty at the University of Florida and Western Michigan University Cooley Law School, where I taught Constitutional Law and Ethics. I currently hold the Faith and Freedom Center Distinguished Chair at Spring Arbor University. Before joining academia, I served as a federal judge in the United States Courts, as Senior Assistant United States Attorney in the Department of Justice, and as a Legal Counsel in the United States Senate. I am also the Founder and President Emeritus of the Great Lakes Justice Center. I represented thousands of Ob-Gyn physicians and other health care professionals as amicus counsel in the U.S. Supreme Court *Dobbs* case.

I am here to testify in my personal capacity before you today and share some thoughts and concerns about House Bills No. 4006, 4031, 4032 opposing passage.

GOOD GOVERNANCE AND THE CONSTITUTIONAL SEPARATION OF POWERS

Article IV, Section 1 of the Michigan Constitution provides "[t]he legislative power of the State of Michigan is vested in a senate and a house of representatives." Nonetheless, the U.S. Supreme Court handed down a decree in *Roe* judicially legislating abortion law into existence for the State of Michigan. Recently, in the *Dobbs* decision, the Court correctly held that lawmaking in this area under our Constitution rests with the people and their politically accountable state legislatures (and not with an unelected Supreme Court). The judicial edict in *Roe* wrongly usurped the constitutional lawmaking authority held by this institution, the Michigan Legislature. As did the Michigan judiciary when a lower court recently did much the same thing.

When the federal or state judiciary usurps the role of the Legislature it undermines government of the people, because it denies participation by the people. Such usurpation destabilizes constitutional good governance and the rule of law, ultimately destroying the institutional legitimacy of our judicial institutions. At least those on the losing side of a legislative battle accept the loss because the process allowed them to fully participate.

Whether or not to protect human life in the womb, or kill it exercising personal autonomy, evokes passionate viewpoints and debate. Public policy decisions of this importance ought to allow for input from all Michigan citizens, not just a few lawyers wearing robes using the ink in their pens to promulgate their personal political policy preferences. Those on the losing side of judicial activism see the judicial policymaking as illegitimate and an abuse of power, diminishing trust in judiciary. And so, I commend this body for returning the debate to the people's branch of the Michigan government. If you care about the Michigan legislature as an institution, if you care about good governance, it would be helpful to acknowledge that truth, as the next time the court does your work for you, you may disagree with the policy they decree.

SERIOUS POLICY CONCERNS

That all being said, the proposed repeal is bad public policy. It does not replace Michigan's law with *Roe.* Instead HB 4006 completely repeals Michigan's protections for human life in the womb. By default, this action legalizes unrestricted late-term abortion, partial-birth abortion, and infanticide.

I. MICHIGAN'S ABORTION REGULATIONS PROMOTE ITS LEGITIMATE INTERESTS IN PRESERVING AND PROMOTING FETAL LIFE.

States hold a "legitimate and substantial interest in preserving and promoting fetal life" and women's health. *See, e.g., Gonzales v. Carhart* (*Carhart II*), 550 U.S. 124, 145 (2007); *Planned Parenthood v. Casey*, 505 U.S. 833, 871 (1992) (recognizing that a state's interests in protecting "the potentiality" of human life and the health of pregnant women were both important and legitimate). The U.S. Supreme Court in *Roe* observed that these legitimate interests "were separate and distinct" and grew "in substantiality as the woman approaches term." 410 U.S. at 162-63. The *Roe* Court determined that "[i]n the second semester, the state interest in maternal health was found to be sufficiently substantial to justify regulation reasonably related to that concern. And at viability, usually in the third trimester, the state interest in protecting the potential life of the fetus was found to justify a criminal prohibition against abortion." *Harris v. McRae*, 448 U.S. 297, 313 (1980) (citing *Roe*, 410 U.S. at 162-63).

The Supreme Court later departed from the trimester framework of *Roe*. *Webster v. Reproductive Health Servs.,* 492 U.S. 490 (1989); *Hodgson v. Minnesota,* 497 U.S. 417 (1990). And the constitutional standard under which abortion regulation was scrutinized has transmogrified over time. *Compare Roe*, 410 U.S. 113 to *Casey*, 505 U.S. 833 and *Hellerstedt*, 136 S. Ct. 2292. Yet, the principle set forth in *Roe*, that a state's legitimate interests should weigh more heavily in the Court's analysis as the child develops and as the pregnant mother faces increased health risks from late-term abortion, remains. *Roe*, 410 U.S. at 145 ("The factor of gestational age is of overriding importance.").

A. Michigan Holds a Profound Governmental Interest in the Inherent Value of Life.

There is no state interest greater than the protection of human life. And there is no life more in need of state protection than those most vulnerable, such as a pre-born child. The state's interest is compelling and this state ought to use its power to protect it rather than diminish it.

The Right to Life, and the State's Interest in Protecting Life, Arises at Conception.

Roe recognized that the state has an interest in protecting "potential human life." Although this precept begs for clarification, the kernel of truth in the holding is that human life has inherent value and merits protection under the Fourteenth Amendment. A life meets this criterion when it is human, and every human life begins at conception.[1] As Professor Francis Beckwith cogently explains:

> Only artifacts, such as clocks and spaceships, come into existence part by part. Living beings come into existence all at once and then gradually unfold to themselves and to the world what they already *are*, but only incipiently are. Because one can only develop certain functions by nature (i.e., a result of basic, intrinsic capacities) a human being at every stage of development is *never* a potential person, she is *always* a person with potential even if that potential is never actualized due to premature death or the result of the absence or deformity of a physical state necessary to actualize that potential.[2]

What this means as practical matter is that all human life has dignity and is worthy of protection. Even the *Roe* Court recognized that if a pre-born child is acknowledged as a "person" under the Fourteenth Amendment, the putative right to abortion that *Roe* fabricated fails. 410 U.S. at 157. The *Roe* Court did not make any distinction between a human being and a person, and none should be made. Indeed, the Framers of the Fourteenth Amendment made no such distinction.[3] Any putative difference in this context is merely an ideological political contrivance. It is the life and liberty of all human persons that the Fourteenth Amendment protects, not just those with certain qualities.

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[1] *See, e.g.,* Scott Klusendorf, *The Case for Life* (2009) at 36, 44 (citing numerous embryological experts and texts and noting that even rabid abortion advocates such as Peter Singer admit an embryo is a human being at conception); Dianne N. Irving, *When do human beings begin? Scientific myths and scientific facts*, International Journal of Sociology and Social Policy, Vol. 19 No. 3/4 (1999) at 22-46, *available at* https://doi.org/10.1108/01443339910788730 (last visited 7/24/21); Charles I. Lugosi, *Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence*, 4 GEOJLPP 361, 362, n.2 (2006) (citing a variety of authoritative sources).

[2] Francis J. Beckwith, Defending Life: A Moral and Legal Case Against Abortion Choice (2007) at 34 (emphasis in original; internal citation omitted).

[3] Lugosi, *supra*, 4 GEOJLPP at 395-96.

Assuming there are relatively equivalent arguments on both sides of the issue of life beginning at conception, the only moral course is to err on the side of protecting human life, not on the side of destroying it.[4]

Roe's rule that a mother can have her non-viable child killed other than in self-defense was a ruling that the child is not a human being, not a person. The law doesn't permit the wanton killing of human beings. When *Roe* allowed the killing of non-viable fetuses, it tacitly stated that the fetus is not a human being. So, when the *Roe* Court said that it was not making that decision because scientists and philosophers disagreed on the issue, it was unquestionably wrong. The decision was inescapable. And it is just as inescapable now.

Significantly, scientists no longer disagree on when human life begins. The consensus among scientists is that it begins at conception.[5] Philosophers may still disagree, but that will never change. Disagreeing is pretty much all philosophers do. But this legislature *will* adopt a philosophical stance no matter what decision it makes. Any decision about a right to abortion presupposes a decision about when one becomes a person, because a person cannot be killed lawfully—whether by gunshot or exercise of an alleged right to abortion—except in cases of self-defense or a state-administered sentence after a fair trial and exhaustion of all appeals. If the Court decides a fetus at a certain stage of development can, in ordinary circumstances, be killed, it has decided that that fetus is not a person. If it decides that fetus cannot be killed, it has decided that that fetus is a person. What this legislature purports to be doing when it makes those decisions is immaterial; it is unquestionably defining our humanity. The only question is how it will do so. Are we to be reduced to mere mechanistic constructions that gain value as qualities are added over time and then lose value upon those qualities diminishing, or are we to be recognized as human beings, whole and equal by nature?

Our humanity is a constant. It does not vary over time under different circumstances. It is our nature, not a feature of our environment or our accomplishment. It does not vacillate based on the state of our technology, including the technology that lets a fetus live outside the mother's womb. Just a few centuries ago, a child typically couldn't live outside the womb before it reached near full gestation, which is thirty-seven to forty weeks.

> You and your baby at 37 weeks pregnant, *available at* https://www.nhs.uk/pregnancy/week-by-week/28-to-40-plus/37-weeks/ (last visited February 14, 2021).

[4] *See, e.g.,* Beckwith, *supra*, at 30-31.
[5] *See* fn. 2, *supra*.

When *Roe* was decided, just fifty years ago, viability—and hence personhood in the *Roe* Court's eyes—was gained at about twenty-eight weeks.[6] Now it is about twenty-three weeks.[7] Did human nature really change to that extent in such a short period of time? It did if you adhere to the viability standard. Indeed, one can imagine a time when our technology advances to the point that an embryo at conception could be placed into a technological or bionic "mother" of some sort and be viable. The conception of our humanity as a technologically determined variable of "viability" is utterly dehumanizing.

Advances in science now reveal the remarkable development of a pre-born child from the moment of fertilization and even more evident between the gestational ages of fifteen to twenty weeks. Gone are the days when society can question whether such a pre-born child is merely a "clump of cells."[8] Actual video of children in the womb reveals the completeness of development of a fetus, especially in the period from sixteen to twenty weeks. *See* https://www.ehd.org/your-life-before-birth-video/ (last visited July 15, 2020) (displaying pieces of actual video footage of a child's development in utero).

 [9]

At twenty-two days, the child's heart begins to beat. https://www.ehd.org/your-life-before-birth-video/ (last visited July 15, 2020).

At six weeks, the child begins moving. *Id*. At seven weeks, scientists can detect a child's brainwaves, and the child can move his or her own head and hands. *Id*. The child also displays leg movements and the startle response by that time. *Id*.

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[6] Hollowell, *supra*, 14 Regent UL Rev. at 83; *see also* Bonnie Rochman, *A 21-Week-Old Baby Survives and Doctors Ask, How Young is Too Young to Save?*, Time Magazine (May 27, 2011), available at https://healthland.time.com/2011/05/27/baby-born-at-21-weeks-survives-how-young-is-too-young-to-save/ (last visited July 27, 2021).

[7] *Id*. at 84.

[8] *See* Klusendorf, *supra*, at 38-39 (dispelling "clump of cells" argument).

[9] Actual photograph of a human fetus at eighteen weeks of gestational development. Lennart Nilsson, Foetus 18 weeks, http://100photos.time.com/photos/lennart-nilsson-fetus (last visited July 14, 2020).

At eight weeks, the child's brain exhibits complex development. *Id*. The child also then begins breathing movements and shows preference for either his or her left or right hand. *Id*. At nine weeks, the child sucks his or her thumb, swallows, and responds to light touch. *Id*.

At ten weeks, the child's unique fingerprints are formed on his or her fingers. *Id*. At twelve weeks, the child opens and closes his or her mouth and moves his or her tongue. *Id*. The child's fingers and hands are also fully formed by twelve weeks' gestation. *Id*.; *see also* https://www.ehd.org/movies/231/Responds-to-Touch (last visited July 15, 2020) (displaying video of fetus at fifteen weeks responding to touch). By sixteen weeks, the child's gender is easily detectable, and the child looks undeniably human:

https://www.ehd.org/gallery/436/Hiding-the-Face#content (last visited July 15, 2020) (showing photographic still of sixteen-week ultrasound video of a male fetus hiding his head away from the touch of the ultrasound transducer).

By nineteen weeks, the child hears and responds to noises, even making different facial expressions when listening to music. *See, e.g.*, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4616906/ (last visited July 15, 2020) (finding that neural pathways participating in the auditory–motor system may be developed as early as the gestational age of sixteen weeks).

The humanity of the pre-born child in the second trimester is even more apparent today than when *Roe* was decided.[10]

[10] Moreover, although Justice Blackmun opined that nineteenth century abortion laws were primarily designed to protect the mother (*Roe*, 410 U.S. at 149), that theory has been thoroughly debunked; they were primarily protecting the life of the child. Beckwith, *supra*, at 23 (citing James S. Witherspoon, *Reexamining Roe: Nineteenth Century Abortion Statutes and the Fourteenth Amendment*, St. Mary's LJ 17 (1985)).

B. Michigan's Laws Rightly Protect Women from the Adverse Effects of Late-Term Abortion.

In addition to killing healthy developed children, extending elective and unnecessary abortion late into the second trimester actually increases negative health consequences for women. Unlike abortions performed in the first trimester, where the fetal bones are soft enough to collapse into a large bore suction catheter, unborn children at the gestational ages of fifteen to twenty weeks cannot fit into a catheter because they are too large and "their bones have calcified, making them too firm to remove [from the womb] by suction alone." https://aaplog.org/wp-content/uploads/2019/08/CO-3-Post-Viability-Abortion-Bans.pdf (last visited July 16, 2020). Therefore, dilation and evacuation (D & E) procedures are required. *Id*. In *Gonzales*, this Court detailed how abortion in the second trimester is performed:

> Although individual techniques for performing D & E differ, the general steps are the same. A doctor must first dilate the cervix at least to the extent needed to insert surgical instruments into the uterus and to maneuver them to evacuate the fetus. The steps taken to cause dilation differ by physician and gestational age of the fetus. A doctor often begins the dilation process by inserting osmotic dilators, such as laminaria (sticks of seaweed), into the cervix. The dilators can be used in combination with drugs, such as misoprostol, that increase dilation. The resulting amount of dilation is not uniform, and a doctor does not know in advance how an individual patient will respond. In general, the longer dilators remain in the cervix, the more it will dilate. Yet the length of time doctors employ osmotic dilators varies. Some may keep dilators in the cervix for two days, while others use dilators for a day or less. After sufficient dilation the surgical operation can commence. The woman is placed under general anesthesia or conscious sedation. The doctor, often guided by ultrasound, inserts grasping forceps through the woman's cervix and into the uterus to grab the fetus. The doctor grips a fetal part with the forceps and pulls it back through the cervix and vagina, continuing to pull even after meeting resistance from the cervix. The friction causes the fetus to tear apart. For example, a leg might be ripped off the fetus as it is pulled through the cervix and out of the woman. The process of evacuating the fetus piece by piece continues until it has been completely removed. A doctor may make 10 to 15 passes with the forceps to evacuate the fetus in its entirety, though sometimes removal is completed with fewer passes. Once the fetus has been evacuated, the placenta and any remaining fetal material are suctioned or scraped out of the uterus. . . . Some doctors, especially later in the second trimester, may kill the fetus a day or two before performing the surgical evacuation. They inject digoxin or potassium chloride into the fetus, the umbilical cord, or the amniotic fluid. . . . Other doctors refrain from injecting chemical agents, believing it adds risk with little or no medical benefit.

Gonzales, 550 U.S. at 135–36 (internal citations omitted).

The procedures required in a second trimester abortion are even more gruesome than those in the first trimester. https://aaplog.org/wp-content/uploads/2019/08/CO-3-Post-Viability-

Abortion-Bans.pdf (last visited July 16, 2020). Unsurprisingly, abortions obtained in the second trimester carry substantially greater health risks. *Id*.; *see also* https://pubmed.ncbi.nlm.nih.gov/15051566/ (last visited July 16, 2020).

Later term abortions also cause an increased risk of preterm birth in subsequent pregnancies as well as an increased risk of serious psychological damage, such as depression, substance abuse**,** and suicide. https://aaplog.org/wp-content/uploads/2019/08/CO-3-Post-Viability-Abortion-Bans.pdf (last visited July 16, 2020). Empirical data show that abortions performed in the second trimester pose serious health risks to women that can be about ten times greater than abortions performed only a few weeks earlier. *See*, *e.g.*, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3066627/ (last visited July 16, 2020) (*"*The abortion complication rate is 3%–6% at 12-13 weeks gestation and increases to 50% or higher as abortions are performed in the 2nd trimester."); https://pubmed.ncbi.nlm.nih.gov/15051566/ (last visited July 16, 2020) ("Compared with women whose abortions were performed at or before 8 weeks of gestation, women whose abortions were performed in the second trimester were significantly more likely to die of abortion-related causes.").

Roe significantly underestimated these risks. New data suggests this is a far greater concern than *Roe* and even later decisions recognized.[11] Later-term abortions pose a significant health risk to women, and Michigan has legitimate reasons for limiting them.

C. Michigan's Regulation Preserves the Integrity of the Medical Profession.

The Hippocratic Oath written during the fifth to fourth centuries B.C. declares, "… I will not give to a woman an abortive remedy. In purity and holiness I will guard my life and my art." Hippocratic Oath, *available at* https://biotech.law.lsu.edu/cases/research/hippocratic-oath.htm (last visited July 27, 2021). This standard should be a cornerstone of medical ethics.

Abortion of preborn children is, and always has been, fundamentally incompatible with the physician's role as healer. Cf. Brief of the American Medical Assn., American Nurses Assn., American Psychiatric Assn., et al., as Amicus Curiae in Support of Petitioners at 5, *Glucksberg* (No. 96-110), available in 1996 WL 656263.

CONCLUSION

For these reasons, I recommend you table this bill until it can be rewritten in a way that does not, by default, allow late term abortions, partial-birth abortions, and infanticide. Like those who voted for the fugitive slave act and those who voted against the civil rights act of 1964, this vote is one of those historic votes that defines a legislator and legislature's identity. Vote wisely as history will forever hold you accountable.

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[11] *See, e.g.*, Clark Forsythe, *The Medical Assumption at the Foundation of Roe v. Wade & Its Implications for Women's Health*, 29 Issues in Law and Medicine 183 (2014).