Written Testimony of Walter M. Weber,[1] Senior Counsel,
American Center for Law & Justice,
re: HB 547, the Pain Capable bill
March 10, 2017

The Pain Capable Bill is constitutional under the U.S. Constitution.

1. The Pain Capable Bill is a Post-Viability Bill

It is undisputed that the abortion precedents of the U.S. Supreme Court allow states to prohibit abortion after viability, subject to an exception for serious threats to the mother's life and health. *Roe v. Wade* (1973); *Planned Parenthood v. Casey* (1992). Viability means ability to survive outside the womb. Just recently, a study in the New England Journal of Medicine, "Between-Hospital Variation in Treatment and Outcomes in Extremely Preterm Infants" (May 7, 2015), www.nejm.org/doi/full/10.1056/NEJMoa1410689, found that actively treated newborns as early as 22 weeks gestational age were surviving. "Gestational age" is measured from a woman's last menstrual period and is often referred to by the acronym LMP. Because the fertilization/conception of the new child typically takes place about two weeks after LMP, an unborn child's "post-fertilization age" will correspond to an LMP that is two weeks greater. With regard to the proposed Pain Capable Bill, then, a post-fertilization age of 20 weeks means a gestational/LMP age of 22 weeks. That, in turn, means that the prohibition on aborting babies after 20 weeks post-fertilization means a prohibition on aborting babies after 22 weeks LMP – precisely the age at which the NEJM study found babies surviving outside the womb.

In other words, the Pain Capable Bill is a post-viability abortion ban – exactly what the Supreme Court has repeatedly said is permissible.

2. The Pain Capable Bill Is an Anti-Torture Bill

Even if this were not so, there would be solid grounds to uphold the constitutionality of the bill. In *Gonzales v. Carhart* (2007), the Supreme Court ruled that its past precedent "confirms the State's interest in promoting respect for human life at all stages of the pregnancy". As Justice Kennedy wrote in dissent in *Stenberg v. Carhart* (2000), a dissent subsequently vindicated in *Gonzales*, "States also have an interest in forbidding medical procedures which, in the State's

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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 procedure that essentially tortures and kills a live human being, a child who is sufficiently developed to feel pain, is plainly a procedure that fosters insensitivity to, and disdain for, the life in the womb. If torturing animals is inhumane, so much more so is torturing unborn human children.

Attached is a copy of testimony from Prof. Teresa Stanton Collett of the University of St. Thomas School of Law. This memo explains why a pain capable bill should pass constitutional review under the federal Constitution even if it applies before viability. While this memo dates from February 2010, it remains current. There has been only one Supreme Court abortion case since then, namely, last year's *Whole Woman's Health v. Hellertedt* (2016) (*WWH*). That decision does not affect the analysis in Prof. Collett's testimony, as *WWH* did not address bans on late-term abortions, but rather addressed laws and regulations aimed primarily at furthering the health of women seeking abortions, regardless of how early or late in pregnancy the abortion took place.

Importantly, nowhere did the *WWH* decision claim that states are forbidden from regulating abortion as a special case. As the Supreme Court has previously and repeatedly recognized, "Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." *Harris v. McRae* (1980). Nor did the *WWH* opinion impugn the state's motives in passing pro-life laws. While the Court concluded that the challenged regulations were ultimately unjustified, the Court did not accuse the state of having some sinister purpose. Nor did the opinion reflect any hostility to pro-life efforts to stem the abortion tide.

Ultimately, the *WWH* Court faulted Texas, not for regulating abortion, but for adding extra layers of regulation that did not seem, to the Court, actually to enhance women's health. Here, of course, the state has no preexisting ban on aborting unborn humans who are capable of feeling the pain of abortion. The proponents of this bill are therefore seeking to outlaw a horrific and inhuman practice.

3. The Pain Capable Bill Contains Valuable Testing and Reporting Requirements

The Pain Capable Bill also included important additional requirements, namely, that the abortionist should first determine the gestational age of the child and should report basic statistical data about the abortion. Measuring the length of the pregnancy and size/age of the child before undertaking an abortion would seem to be essential to avoiding malpractice, and thus is protective of maternal health. Collecting demographic data about abortions is just common sense when dealing with such a widespread procedure of uncertain health consequences. Indeed, the Supreme Court has repeatedly endorsed the constitutionality of recordkeeping and reporting requirements for abortion.

In short, for the reasons stated above and in Prof. Collett's testimony, the proposed bill should be upheld as valid under the U.S. Constitution.