TEXAS
Alliance for Life
Changing Hearts, Saving Lives Since 1988

March 31, 2017

Dear Representative:

We cannot recommend that you support HB 844/SB 415, authored by Representative Stephanie Klick and Senator Charles Perry, which seeks to ban the most common method of second trimester abortions.

If HB 844/SB 415 were passed by the Legislature, it would not survive a federal court challenge. HB 844/SB 415 would save no lives; nor would it prevent the pain endured by unborn children during abortion. Instead, it would fund the abortion industry.

HB 844/SB 415 Will Not Survive a Federal Court Challenge

Our Special Counsel Paul Linton, a respected national authority on abortion law, wrote two legal memoranda on HB 844/SB 415 concluding that unquestionably the Supreme Court would strike down HB 844/SB 415 on the authority of its decisions in *Danford*, *Casey*, *Stenberg*, and *Gonzales*. Those memos are attached. Among the conclusions:

- **The Court would conclude that HB 844/SB 415 had the effect of placing a "substantial obstacle" in the way of a pregnant woman seeking a pre-viability abortion, thereby violating the "undue burden" standard of *Casey*.** Nothing in Justice Kennedy's dissenting opinion in *Stenberg v. Carhart* (2000), or his majority opinion in *Gonzales v. Carhart* (2007), even remotely suggests that he would vote to sustain the constitutionality of a ban on the most commonly used second-trimester abortion procedure.[1] Indeed, Kennedy's opinions indicate precisely the opposite.

- **The fact that HB 844/SB 415 would not apply when the unborn child is killed *before* the procedure begins would not affect the Court's decision.** No court will uphold a ban on the performance of dismemberment abortions on live, unborn children in the absence of compelling evidence that causing the death of the child before beginning the procedure can be done with equal safety for the woman throughout the second trimester of pregnancy by any physician who performs D&E abortions. No such evidence was presented to the Committee, nor does such evidence exist in the literature. Accordingly, a court would find HB 844/SB 415 to be unconstitutional.

The following chart shows that there are few, if any, abortion doctors who regularly kill an unborn child before performing second trimester dismemberment abortion before 17 weeks.

[1] "Table 36 – Induced Terminations of Pregnancy by Procedure and Post-Fertilization Age – Texas, 2014." Department of State Health Services. http://www.dshs.texas.gov/chs/vstat/vs14/t36.aspx (accessed 3/15/17.)

8000 Centre Park Dr. Ste. 380 • Austin, Texas 78754
512.477.1244 • fax: 512.472.6246 • TexasAllianceforLife.org

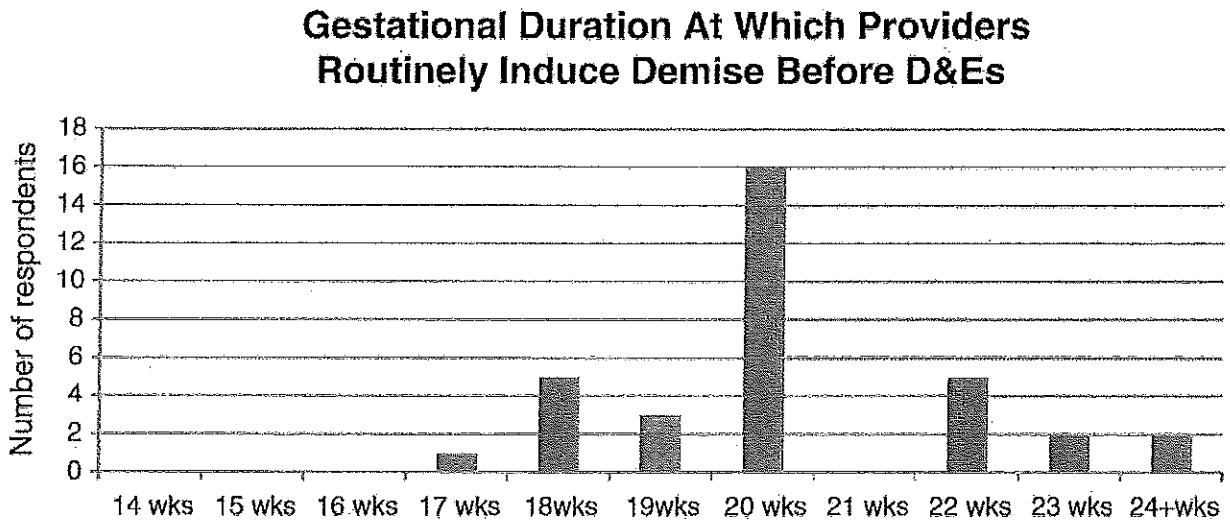

Fig. 1. Gestational duration at which providers routinely induce fetal before D&Es.

Without providers, second trimester abortion will be drastically less available, which the Court would rule to be an undue burden for a woman to obtain an abortion.

It is not surprising, therefore, that in each State where a dismemberment ban has been challenged to date (Alabama, Kansas, Louisiana, and Oklahoma), the ban has not been allowed to go into effect.

HB 844/SB 415 Will Not Prevent Pain Experienced by the Child During Abortion

One witness at the Senate Committee hearing on SB 415 cited 14 articles from the medical literature that supposedly show that killing the unborn baby by lethal injection before dismemberment begins will prevent pain. A review of those article shows exactly the opposite. Killing the child by lethal injection will likely inflict lengthy, terrible pain on the unborn child.

For example, one of the cited studies explains, "Injection of KCl [potassium chloride] is likely to be painful."[2] The study's authors recommended that "fetal analgesia should precede KCl injection as a critical procedure" which "allows the fetus to die without pain when late [termination of pregnancy] is indicated." To avoid "fetal pain and fetal awareness," another study recommended more generally that "fetal analgesia should optimally precede fetocide."[3] HB 844/SB 415, however, does not require fetal analgesia. Second, the techniques used to cause fetal demise do not always cause immediate death. One study cited noted that fetal demise took between one and three hours following an intra-fetal injection of digoxin, and a minimum of four hours with an intra-amniotic injection.[4]Yet another

[2] "Funipuncture for fetocide in late termination of pregnancy," M.V. Senateet *al., Prenat Diagn* 2002;**22**: 354-356.
[3]"The Use of lidocaine for fetocide in late termination of pregnancy," M.V. Senat, BJOG: March 2003, Vol. 110, pp. 296-300.
[4] "A randomized pilot study of the effectiveness and side-effect profiles of two doses of digoxin as fetocide when administered intraamniotically or intrafetally prior to second -trimester surgical abortion," D. Nucatola *et al., Contraception* 81 (2101) 67-74.

study cited reported that "Most patients continue to have fetal cardiac activity at 4 h [hours] post-injection" of digoxin.[5]

HB 844/SB 415 Will Fund the Abortion Industry

The cost to the State to unsuccessfully defend the law may run into hundreds of thousands if not millions of dollars. Handing these funds over to pro-abortion organizations seems entirely unjustifiable given the certainty they will use the funds to attack other pro-life laws in Texas and other states.

We point out that, in the *Whole Woman's Health v. Hellerstedt* case regarding HB 2 (in which the State lost the challenge to the two challenged provisions of HB 2), the State will be required to pay as much as $4.5 million to the plaintiffs for their attorneys' fees. See their motion for reimbursement, which is attached.

In a recent press conference at the State Capitol, Amy Hagstrom Miller, CEO of Whole Women's Health, announced that they have already struck down laws in eight different states using precedent from *Hellerstedt*. Stephanie Toti, former Senior Counsel at the Center for Reproductive Rights went on to say that they can use *Hellerstedt* "as a shield and sword — defend against attacks, but go after bad laws already on the books too and get rid of them."

Strategic, Not Reckless

The problem is not that HB 844/SB 415 will be challenged in federal court. Many of Texas' successful pro-life laws have been challenged, but those laws have survived the challenges. The problem with HB 844/SB 415 is that it predictably will not survive a challenge in federal court.

While we look forward to the day when states can ban abortion in the second trimester (and throughout pregnancy), that day has not yet come. The State of Texas and other states are severely restricted by the United States Supreme Court. Given the current makeup of the Supreme Court, this type of law would not survive a federal challenge, and would therefore save no lives.

We are asking lawmakers to be strategic, not reckless: We favor waiting for the right moment before launching an attack of this kind on *Roe v. Wade*. That moment will not come until there are two or three more justices on the Supreme Court who realize there is no right to abortion in the Constitution. Hence, we cannot recommend this bill at this time because there are simply not enough votes on the Court to overturn *Roe* in total or in part.

Most sincerely,

Joe Pojman, Ph.D.
Executive Director

---

[5] "Umbilical cord transection to induce fetal demise prior to second-trimester D&E abortion," K. Tocce *et al.*, *Contraception* 88 (2013) 712-716.