

Prepared Testimony of
Professor William Wagner
Before the
Michigan House Families, Children & Seniors Committee
June 16, 2011

Mr. Chairman and Distinguished Members of the Committee: Thank you for the opportunity to provide testimony on the constitutionality of House Bill 4109, the “Partial-Birth Abortion Ban Act.”

INTRODUCTION

My name is William Wagner and I am a Tenured Professor of Law. I currently serve on the teaching faculty at the Cooley Law School where I teach Constitutional Law and Ethics. Before joining academia, I served as a federal judge in the United States Courts, a Senior Assistant United States Attorney in the Department of Justice, and as a Legal Counsel in the United States Senate.

I was asked to testify today and provide my opinion as to whether the “Partial-Birth Abortion Ban Act” (HB 4109) is constitutional. For the following reasons, it is my opinion that it is.

THE “PARTIAL-BIRTH ABORTION BAN ACT” (HB 4109) IS CONSTITUTIONAL
UNDER CURRENT U.S. SUPREME COURT PRECEDENT

In *Gonzales v Carhart*, 127 S.Ct. 1610 (2007), the United States Supreme Court upheld, as constitutional, a federal statute banning partial-birth abortion. The Act in *Carhart* was, in all relevant ways, similar to the partial-birth abortion ban in HB 4109.

Carhart reaffirmed that government has legitimate and substantial interests in preserving and promoting life of the unborn. 127 S.Ct. 1610, 1626 (2007) (discussing the premise of the holding in *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992)). *Carhart* expressly held that government has a legitimate interest “in protecting the health of the woman and the life of the fetus that may become a child.” *Carhart*, 127 S.Ct. 1610, 1626 (2007). The expressed interest of the State of Michigan in banning partial birth abortion here is to protect the health of the mother and the unborn. The State of Michigan, therefore, has a constitutionally proper governmental interest in enacting the law.

In *Carhart*, the Court summarized the current state of its constitutional jurisprudence on abortion and the protection of unborn life. In this regard, the Court noted:

Before viability, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy. It also may not impose upon this right an undue burden, which exists if a regulation's purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability. *On the other hand, regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted*, if they are not a substantial obstacle to the woman's exercise of the right to choose.

Carhart, 127 S.Ct. at 1626-27 (emphasis added)(internal citations and quotation marks omitted).

The Court in *Carhart* applied the above standard to the Act at issue. This point is significant since the Act at issue in *Carhart* banned the same partial birth abortion procedure in the same way as proposed in HB 4109. After applying the constitutional standard to the Act, the Court concluded the Act was constitutional and that it did not impose an undue burden from any overbreadth. *Carhart*, 127 S.Ct. at 1627. Thus, in my view, the similar provisions of HB 4109 will also withstand constitutional scrutiny if challenged in the courts.

The Court also concluded that the Act was not void for vagueness. *Id.* In *Carhart* the Court noted that the Act at issue provided “doctors of ordinary intelligence a reasonable opportunity to know what is prohibited.” *Carhart*, 127 S.Ct. at 1628 (internal citations omitted). Like the provisions in HB 4109, the Act in *Carhart* provided “relatively clear guidelines as to prohibited conduct” and provided “objective criteria to evaluate whether a doctor has performed a prohibited procedure.” *Id.* Here, as in *Carhart*, HB 4109 defines the line establishing potentially criminal conduct so that doctors conducting an abortion will know that “if they do not deliver the living fetus to an anatomical landmark they will not face criminal liability.” *Id.* Moreover, HB 4109, like the law upheld in *Carhart*, contains a scienter requirement. The Supreme Court has made clear that such a scienter requirement “alleviate[s] vagueness concerns, *Id.* In my view, therefore, HB 4109 is constitutional and will also survive any vagueness challenge in the courts.

One final point. My previous federal experience confirms for me the limited capacity of federal authorities to handle cases like those anticipated in the proposed law here. Whether through prioritization of limited federal resources, or political choices of those holding power, state citizens could easily find federal enforcement here wanting. Fortunately, under the U.S. and Michigan Constitutions, the citizens of Michigan need not rely solely on federal enforcement.

Michigan providing protection at the state-level is certainly not redundant. More importantly, it is within its constitutional prerogative to do so. By doing so, Michigan empowers state and local authorities to do a job that federal law enforcement is either under-resourced to do, or could someday, for political reasons, refuse to do.