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Statement by Carol Tobias
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for press conference hosted by Senator Lindsey Graham (R-SC)
upon his introduction in the U.S. Senate of the
Pain-Capable Unborn Child Protection Act

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I am Carol Tobias, president of the National Right to Life Committee (NRLC), which is the national federation of state right-to-life organizations. I am proud to stand here today with Senator Graham and with leaders of other organizations to offer our strong support for the legislation that Senator Graham is introducing today, the *Pain-Capable Unborn Child Protection Act*.

This legislation would generally protect unborn children from abortion beginning at 20 weeks after fertilization, which is 22 “weeks of pregnancy,” or about the beginning of the sixth month, a point by which – if not earlier – there is substantial medical evidence that the unborn child can feel pain. The bill contains certain exceptions, but also new provisions to protect babies who are born alive during abortions that may be performed under the exception clauses. The bill already passed the House of Representatives, on May 13, by a vote of 242-184.

Public opinion polls show that by lopsided margins, Americans support prohibiting abortion at least by this stage in development, with most polls showing women even more supportive than men. Yet those of us seeking to advance this legislation face some formidable obstacles. I am going to briefly and frankly discuss with you one such obstacle. In the decades since the U.S. Supreme Court handed down its *Roe v. Wade* decision in 1973, successive generations of mainstream journalists have all too often adopted a mind set that one of my colleagues refers to as “willing gullibility” regarding dubious claims provided to them by pro-abortion advocates.

There are many exhibits in the museum of media-propagated myths about abortion. For example, the original *Roe v. Wade* decision in 1973 clearly dictated that states allow abortion for any reason up to the point of “viability,” and the *Roe* Court indicated that abortion must be allowed even in the final three months of pregnancy based on emotional health justifications – yet, for decades, major organs of the media recited endlessly the formula that *Roe* had legalized abortion “in the first three months of pregnancy.” It was demonstrably a myth from day one, and yet it was a myth useful to defenders of abortion, and the mainstream media clung to it tenaciously for decades.

Fortunately, the Supreme Court's doctrine on abortion has shifted somewhat since 1973, which is one reason that makes possible a bill such as that being introduced today by Senator Graham. But unfortunately, some other things have changed very little. All too often, we still see certain reflexive tendencies on the part of many in the mainstream news media. We see undiminished a willingness on the part of many journalists to repeat unskeptically, and often to adopt as simple fact, pronouncements from special-interests such as the Planned Parenthood Federation of America (PPFA), the nation's major abortion provider, and the American Congress of Obstetricians and Gynecologists (ACOG), on any point that might be cast as a "medical" or "science" question. This is a persistent pattern, even though these same organizations have in the past often propagated misinformation on abortion-related matters that came back to bite more than a few journalists.

(It should be noted that nearly every abortion-related question can be framed exclusively as a "medical" or "science" matter, once one has made the pre-determination to approach abortion solely as a "medical procedure." The premise that abortion is a matter of "reproductive rights" is assumed by many journalists, and the perspective of those who recognize pre-natal human rights is marginalized, if it is presented at all.)

The forgetfulness of journalists

This is a subject on which we have a vast amount of experience, and at best I can only brush up against it lightly at an event such as this. But go back and read or view news media accounts from the early days of debate over the Partial-Birth Abortion Ban Act, in 1995 and 1996 especially. This was a bill, which National Right to Life helped pro-life members of Congress to craft, that prohibited an abortion method usually used during the fifth and sixth months, sometimes later. The method involved mostly delivering a living baby before killing that baby.

During that period, 1995 to 1996 especially, it was the norm for mainstream news outlets to state as fact – not as a disputed claim, but as fact – that the method was employed rarely (the figure of 650 a year was sometimes thrown out), and only or virtually only in acute medical circumstances. This was a *fact*, you see, because it was *said* over and over again by the "experts," particularly those associated with PPFA and its allies. From the outset there was compelling evidence available that the method was actually used thousands of times annually, and in the vast majority of cases for purely elective abortions, but many journalists ignored this evidence and batted it aside even when it was thrust at them.

Yet that disinformation campaign collapsed, in late 1996 and early 1997, under the weight of congressional investigations, our educational efforts, and the number of people who knew it was a lie. Some journalists belatedly started looking behind the claim and they found ample evidence that it was a fabrication. For example, the September 17, 1996 edition of the *Washington Post* contained the lengthy results of an investigation conducted by reporters Barbara Vobejda and David M. Brown, M.D., who interviewed a number of late abortion providers, and concluded: "Furthermore, in most cases where the procedure is used, the physical health of the woman whose pregnancy is being terminated is not in jeopardy.... Instead, the 'typical' patients tend to be young, low-income women, often poorly educated or naive, whose reasons for waiting so long to end their pregnancies are rarely medical."

In a later documentary on PBS examining how the media could have gotten the story so wrong, the *Post's* David Brown said: "Cases in which the mother's life were at risk were extremely rare. . . . Most people who got this procedure were really not very different from most people who got abortions."

Another reporter checked in with a single local abortion clinic in New Jersey and learned that it performed about 1500 partial-birth abortions annually, nearly three times the previously claimed national total. One of the abortionists explained, "We have an occasional amnio abnormality, but it's a minuscule amount Most are Medicaid patients, black and white, and most are for elective, not medical, reasons: people who didn't realize, or didn't care, how far along they were. Most are teenagers."

Finally, in early 1997, Ron Fitzsimmons, the executive director of a trade association of abortion providers, the National Coalition of Abortion Providers, confessed that the claim that partial-birth abortions were rare and done mostly in medically acute circumstances had been a coordinated "party line," which he had gone along with but knew to be false. "[I] lied through my teeth," he told *The New York Times* (<http://www.nytimes.com/1997/02/26/us/an-abortion-rights-advocate-says-he-lied-about-procedure.html>). The truth, he said, was that "in the vast majority of cases, the procedure is performed on a healthy mother with a healthy fetus that is 20 weeks or more along." In one interview, he estimated the number of partial-birth abortions performed annually at upwards of 5,000.

There is no evidence to suggest, with rare exceptions, that those women who received second-trimester abortions by the *partial-birth* method, before it was banned, were generally in any different circumstances than those whose abortions, then or now, are performed by the *in-utero dismemberment method* or by other methods, at the same stages of pregnancy.

Yet on January 14, 2015, Dr. Hal Lawrence, the chief executive officer of ACOG, held a conference call to "educate" journalists. *Politico* reported: "Lawrence said that less than 1 percent of all abortions occur after 20 weeks, *but those that do are mostly situations where the life of the mother is at risk or there are severe medical complications.*" [italics added for emphasis]

Quite clearly, Lawrence's statement and others like it seek to revive the misinformation that imploded in 1997. There is more evidence than ever to show that such assertions lack factual foundation, yet they are often adopted as authoritative in the news media and parroted by some lawmakers.

Abortions past 20 weeks fetal age are not "rare." We've estimated that at least 275 facilities in the U.S. offer them. While statistically reporting on late abortions is notoriously spotty, by very conservative estimates there are at least 11,000-13,000 abortions performed annually after this point, probably many more. If an epidemic swept neonatal intensive care units and killed 11,000 very premature infants, it would not be dismissed as a "rare" event – it would be headline news on every channel, a first-order public health crisis.

While I cannot further explore the subject in this venue, the best available evidence suggests that the great majority of abortions performed in the late second trimester are not performed because either mother or baby faces an acute medical crisis (although the bill does contain a life-of-mother exception, regarding which Dr. Lawrence apparently also misled reporters in his January briefing, saying, “I don’t think we want to take that therapeutic option away from physicians trying to save the life of the [woman],” according to “The Gupta Guide” in *MedPage Today*, Jan. 14, 2015).

Distortions regarding the stage of development

On May 13, 2015, the U.S. House of Representatives took up the Pain-Capable Unborn Child Protection Act. In the lead up to that floor debate, some supporters of the bill tied the bill to a study that had been published in the *New England Journal of Medicine* on May 7 regarding survival rates for premature infants. The study was widely reported in the mainstream media, both television and print. Among other findings, the study reported that of babies born at 22 weeks of pregnancy – which is 20 weeks after fertilization – 23.1 percent survived long-term, when provided with active assistance. Please remember that figure –23 percent – because it is important to what follows.

On the day of the House debate, May 13, ACOG CEO Hal Lawrence held another conference call to educate journalists. His utterances were quoted in some subsequent media accounts on the House’s approval of the bill, and certainly influenced the “facts” presented by other media organs in their own voice. The *Washington Post Fact Checker* column has since published partial transcript [May 26]. Among other points, Lawrence was particularly keen on attacking lawmakers who had claimed that at the point that the bill would limit abortions, many babies born prematurely survive long term. Lawrence said these lawmakers were fostering “another myth” on the public, and that the claim was “quite simply, wrong.” There was “no evidence anywhere of a 20-week fetus surviving,” Lawrence proclaimed.

The *Washington Post Fact Checker* concluded that Lawrence “is incorrect when using the definition in the Pain-Capable Unborn Child Protection Act.”

Hold it right there – so, in a conference called for the specific purpose of attacking this specific bill, and smearing the bill’s proponents as purveyors of mythology, *it was actually the head of ACOG who was dispensing the misinformation.* Unfortunately, he was disseminating that misinformation to a credulous group of listeners, based on what evidence is available based on what later appeared in the press.

There are two medical systems for dating pregnancy. Each has a long pedigree. One system dates from the first day of a woman’s last menstrual period (LMP), often referred to as “weeks of pregnancy,” “weeks gestation,” or “post-menstrual age.” The other system dates from the point of fertilization (often called “post-fertilization age” or “fetal age”), which is two weeks later. Each method is currently employed in different medical fields. Ob-gyns and abortion providers, among others, always use the weeks-of-pregnancy system, while the embryologists and fetologists, among others, tend to favor the post-fertilization system. Scientific papers may

employ one or the other system depending on the specialty of the authors. The specialists mildly argue the advantages of one or the other method, but what is pertinent here is that laws can and do readily incorporate either, as long as the legislation contains a clear definition of which system is employed.

The Pain-Capable Unborn Child Protection Act originated as model state legislation prepared by National Right to Life in 2010. **It has always explicitly incorporated the post-fertilization system.** Thus, it is legislation to generally prohibit abortion at 20 weeks after fertilization, which is the same as 22 weeks of pregnancy (22 weeks LMP). This legislation has now been enacted in 11 states. There are differences among the laws on some points, and differences on some points between the original model bill and the bill being introduced in the Senate today, **but they all incorporate that same definition and therefore all would apply at the same point – 20 weeks post-fertilization, 22 weeks of pregnancy.**

Which brings us back to ACOG. ACOG has been making authoritative pronouncements against the Pain-Capable Unborn Child Protection legislation since it was first introduced at the state level in 2010, and its utterances regarding the various findings and operative provisions in the bill are often presented as authoritative by mainstream news media, or even simply adopted as fact in the voices of those news media. Yet Dr. Lawrence's May 13 statement, read in context, can only be interpreted two ways. Either his organization has been presuming to instruct lawmakers and journalists for years on what the bill says and does, but *they haven't read the basic definitions in the bill* – which might be called “advocacy malpractice” – or, the ACOG boss understood very well what the bill says, but he figured that he could get away with distorting it, because no journalist would check up on the details.

When asked to defend his statement by the *Washington Post Fact Checker*, Lawrence lamely responded that the definition in the bill is “based on a non-medical calculation of pregnancy [which] is evidence of what happens when lawmakers try to legislate women's health.” Aside from being a rather pathetic attempt to deflect attention away from his misrepresentations, his new charge was also purely polemical and false. While I will not belabor the matter here, anyone can refer to embryology texts such as *The Developing Human: Clinically Oriented Embryology: Fourth Edition*, which asserts, “The day fertilization occurs is the most accurate reference point for estimating age,” while the LMP system introduces “possible sources of error.” The House Judiciary Committee stated in its 2012 report on the predecessor legislation, “All three professors of medicine who testified at the May 17, 2012, hearing before the Subcommittee on the Constitution testified that both systems [of dating pregnancy] are equally valid and are regularly employed in different fields of medicine. They also testified that any medical professional could read [the bill] and clearly understand the point at which the limitations contained in the bill would apply.”

The *Washington Post Fact Checker*, although it found Lawrence was wrong about the bill, handled him very gently, and we continue to see stories that ignore or misrepresent key facts, relying on ACOG or similar sources. For example, a long piece posted on the CNN website on June 8, titled “The women on the front lines of the latest abortion battle,” quoted Lawrence as saying that only 5% of babies born at 22 weeks survive – yet the widely reported *NEJM* study found that 23% survive if given active assistance. Rather than point out the disconnect between

Lawrence's claim and the *NEJM* study, the reporter agreed that the survivors represented "a small percentage." Twenty-three percent, "a small percentage"?

The centerpiece of the CNN piece was the story of a woman, Christy Zink, who obtained an abortion after learning that her unborn son had a malformation of the brain; the entire thrust was that the bill would have prevented her abortion. It appears that the reporter had failed to note that Zink had made it clear in her past public statements that her abortion occurred before 22 weeks of pregnancy. Therefore Zink's case would have been unaffected by the Pain-Capable Unborn Child Protection Act.

The Supreme Court's doctrine

It is also striking how many journalists accept, without question, the proposition of abortion advocates that the U.S. Supreme Court will not accept any protections for unborn children before the point of provable "viability." Again, please go back and read the stories that appeared during the congressional debates on the Partial-Birth Abortion Ban Act, 1995 through 2003. Opponents of the bill, inside Congress and elsewhere, proclaimed endlessly that it clearly violated *Roe v. Wade* because the ban applied before "viability," and because it contained no open-ended "health" exception (although it did contain a life-of-mother exception). Yet in its 2007 ruling in *Gonzales v. Carhart*, the U.S. Supreme Court *upheld* the ban, applying both before and after viability, and it is the law today.

I have read or viewed hundreds of news stories about the Pain-Capable Unborn Child Protection Act over the past six months, and at most a handful, or less, have made any mention of the *Gonzales* ruling – even though it is the most recent U.S. Supreme Court decision on abortion, and it dealt with a law aimed at a class of mostly late-second-trimester abortions. Yet many of the stories repeat, not only as advocates' claims but as simple fact, that the Supreme Court will not permit limits on abortion before "viability," which some go on to define as occurring weeks later than the current medical data indicates.

We believe that the approach that the Supreme Court adopted in the *Gonzales* ruling opens the doors for legislative bodies to extend broader protections to unborn children both before and after viability, based on valid governmental interests that legislative bodies may recognize. (Some prominent pro-abortion legal scholars also read the *Gonzales* ruling in this way.) In the Pain-Capable Unborn Child Protection Act, Congress declares a government interest in protecting the right to life of an unborn child who has reached the point at which he or she can experience pain during the process of being aborted, and asserts that unborn children, at least by 20 weeks after fertilization, have that capacity.

Distortions regarding capacity to experience pain

It is common to read in stories about this legislation, and similar bills at the state level, that "medical experts" say that unborn children do not have the capacity to experience pain at 20 weeks fetal age. Which "experts" are those? Well, guess what? – the voice of authority most often quoted is ACOG. Here's what ACOG CEO Hal Lawrence said in the January 14

conference call for journalists: “There is no evidence that there’s any fetal pain until you get [past] the 23 or 24 week gestation.” (Beitman, *Politico Pro*, Jan. 14, 2015)

“*No evidence.*” That’s a pretty categorical statement, isn’t it? And kind of an odd but convenient coincidence, that the purported no-evidence-of-pain period corresponds so neatly with ACOG assertions regarding “viability” occurring at 23-24 weeks.

“*No evidence.*” But consider the 10-page report submitted to a federal court and accepted as expert testimony (<http://www.nrlc.org/uploads/fetalpain/AnandPainReport.pdf>), written by Prof. Kanwaljeet S. Anand, whose research on the pain capacity of premature infants transformed the pain-control practices in our nation’s neonatal intensive-care units over the past two decades. Dr. Anand’s pioneering work in this area has been highlighted in a long profile in *The New York Times* (<http://www.nytimes.com/2008/02/10/magazine/10Fetal-t.html>) and elsewhere. Dr. Anand wrote, “It is my opinion that the human fetus possesses the ability to experience pain from 20 weeks of gestation, if not earlier, and the pain perceived by a fetus is possibly more intense than that perceived by term newborns or older children.”

That does not mean that Dr. Anand supports the 20-week ban – in fact, he has been quoted to the effect that he didn’t want to be in the middle of the abortion debate. Yet we’ve seen nowhere that Dr. Anand has ever withdrawn anything he said in the affidavit, or elsewhere, affirming the capacity of unborn children to experience pain even somewhat earlier than 22 weeks of pregnancy. Moreover, we can provide many pages full of citations from peer-reviewed studies, and extensive testimony presented by professors of medical sciences before the House Judiciary Subcommittee on the Constitution, in support of the various specific findings in the Pain-Capable Unborn Child Protection Act.

In the light of this body of documentation, the repeated statements by ACOG that there is “no evidence” reflects willful ignorance at best, duplicity and advocacy malpractice at worst. Given ACOG’s track record, it is long past time that the news media stop treating ACOG as the Voice of Authority on such matters.

Perhaps the second-most-cited authority is a so-called literature review that appeared in 2005 in the *Journal of the American Medical Association* (JAMA). Almost invariably, journalists who cite it fail to note (as *JAMA* also failed to disclose) that the lead author was a medical student previously employed as an attorney at NARAL, and a co-author was a self-proclaimed activist, the director of the largest abortion clinic in San Francisco and a leading practitioner of late dismemberment abortions. Predictably, the review was relentlessly tendentious, arguing for the truly remarkable position that there is no good evidence for fetal pain capacity before 29 weeks LMP, which is about *seven weeks* later than one-fourth of premies survive with active assistance. (A detailed critique of the *JAMA* “review” is posted on the NRLC website: <http://www.nrlc.org/uploads/fetalpain/NRLCReponsetoJAMAPain.pdf>.)

Sometimes it might help to step back and see if a claim seems plausible on its face. Consider that it is now commonplace to see features on TV or read stories about how unborn children, by 20 weeks fetal age, respond to many forms of stimuli, including music, and the mother’s voice. (Stories of this type generally refer to the “unborn child,” a usage apparently not permitted in

stories that concern abortion, even when the stories are about the same human entities, at the same stage of development.) We read stories of surgeries performed on unborn babies in the womb during the second trimester – who are first, of course, thoroughly anesthetized. Yet, ACOG and PPFA ask you to take their word that these babies, and even babies many weeks older, remain blissfully insensible as powerful grasping tools are introduced into the uterus, and their little arms and legs are twisted off by brute force. (See: <http://www.nrlc.org/abortion/pba/deabortiongraphic>)

ACOG tells you not only that this is so, but that there is “no evidence” to the contrary. It’s time that serious journalists stopped serving as amplifiers for such misinformation.

Extensive evidence that unborn children have the capacity to experience pain, at least by 20 weeks fetal age, is available on the NRLC website at: <http://www.nrlc.org/abortion/fetalspain/> and also here: <http://www.doctorsonfetalspain.com>

Founded in 1968, National Right to Life, the federation of 50 state right-to-life affiliates and more than 3,000 local chapters, is the nation's oldest and largest grassroots pro-life organization. Recognized as the flagship of the pro-life movement, NRLC works through legislation and education to protect innocent human life from abortion, infanticide, assisted suicide and euthanasia.