ALLIANCE DEFENDING
FREEDOM
FOR FAITH. FOR JUSTICE

TESTIMONY OF MICHAEL J. NORTON, SENIOR COUNSEL, ALLIANCE DEFENDING FREEDOM

Regarding Senate Bill 15-268 Concerning
Offenses Against An Unborn Child

May 3, 2015

I am Michael J. Norton, an attorney with Alliance Defending Freedom. I have had the privilege of serving as the United States Attorney for the State of Colorado. I therefore have substantial criminal justice experience that is relevant to consideration of Senate Bill 268.

Alliance Defending Freedom is an alliance-building, non-profit legal organization that promotes religious liberty, sanctity of life, and marriage and the family.[1] Today, I also represent Colorado Family Action which encourages the enactment of Colorado laws which will ensure a safe, prosperous and wholesome climate for Colorado families.

We believe that Senate Bill 268 is in the best interests of the people of Colorado. Colorado Family Action supports passage of Senate Bill 268.

Senate Bill 268 was introduced by President Cadman and other members of the General Assembly in response to the horrific case in Longmont in which a 7 month pregnant woman, Michelle Wilkins, was attacked and left

[1] Alliance Defending Freedom does not engage in lobbying; but we are able to explain the legal impact of a legislative proposal

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for dead and her baby ripped from her stomach by the assailant and drowned.

By those acts, Ms. Wilkins was wrongfully deprived of her right to choose for her unborn child to be born. As there was apparently no evidence that the baby had survived even for a moment, the Boulder District Attorney explained in his own words that "without proof of a live birth" and under current Colorado law, he could not file homicide charges against the assailant.

Denver Post writer Vincent Carroll recently said about this result that "there is something obviously very wrong with that outcome. It was a homicide and everyone knows it."[2]

From this incident, all Colorado learned that our law does not permit criminal charges to be filed against a defendant who, during the commission of a serious crime against a pregnant woman, also causes injury to or the death of the pregnant woman's unborn child. Unless the unborn child is born alive and survives even for a few moments, injury to or the death of that child does not support separate criminal charges.

The Michelle Wilkins tragedy is not the only time that we have seen such an "obviously wrong" result where, against the pregnant mother's choice, her unborn child has been wrongfully taken from her.

One of the injured victims who survived the July 20, 2012 Aurora Theater shooting was Ashley Moser who was seriously injured from the shooting. Ms. Moser's 6-year old daughter Veronica was the youngest killed in the theatre that day. But there was a 13th victim from the Moser family whose life was taken during this horrible massacre. Ms. Moser was pregnant at the time of the shooting. A few days after the shooting, as Ms. Moser lay critically injured in a hospital, her unborn baby died as a result of her wounds.

Just as in the Michelle Wilkins case, because the law of the State of Colorado does not follow either federal law or the law of most of our sister

[2] Vincent Carroll, "Death of Michelle Wilkins' Baby Was Murder in All But the Law." Denver Post, April 4, 2015.

States, law enforcement authorities could not charge the assailant with this additional tragic death.

Senate Bill 268 Will Right An Obvious Wrong

Senate Bill 268 would right these obvious wrongs in our State. It would create a new, separate offense for injury to or the death of an unborn child when a defendant is convicted of one of nine – and only nine – egregious crimes perpetrated against the mother of the unborn child. Those nine crimes are murder in the first degree, murder in the second degree, manslaughter, criminally negligent homicide, vehicular homicide, assault in the first degree, assault in the second degree, assault in the third degree, and vehicular assault.

This would mean that an assailant who murders a pregnant woman and her unborn child would, if convicted, be guilty of two murders, not one. Likewise, if an assailant assaults a pregnant woman and she survives, but her unborn child does not, the assailant would be guilty of assault for injury to or the death of the unborn child.

Senate Bill 268 Is Consistent With Federal Law

Passed in April 2004, the federal Unborn Victims of Violence Act, more commonly known as "Laci and Conner's Law,"[3] has enabled federal prosecutors to charge an assailant with the injury to or death of an unborn child when the crime occurs on federal property, such as a military installation, or when the injury stems from the commission of another federal crime.

In fact, as opposed to Senate Bill 268 which creates a crime for injury to or death of an unborn child in the case of only nine egregious criminal offenses, there are 68 enumerated federal laws that cover the mother and under which criminals could be prosecuted under the Unborn Victims of Violence Act.

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[3] Scott Peterson was charged and convicted of murdering his wife, Laci, and their unborn son Conner in Modesto, CA in 2002.

Consistent with the Federal Unborn Victims of Violence Act, Senate Bill 268 would not permit the prosecution of:

- An act committed by the mother of her unborn child.
- Any person for conduct relating to a medical procedure performed by a physician or other licensed medical professional at the request of a mother of her unborn child or the mother's legal guardian (*i.e.,* a surgical abortion).
- Any person providing the lawful dispensation or administration of lawfully prescribed medication (*i.e.,* a chemical abortion).

Since the enactment of the federal Unborn Victims of Violence Act, only two cases involving criminal charges under the Unborn Victims of Violence Act have been reported.

In the first case, in 2009, an Air Force serviceman, Scott D. Boie, was convicted of multiple charges, including one charge based on the Unborn Victims of Violence Act, by an Air Force military court sitting in Alaska. It was alleged that Boie had placed misoprostol, a drug which produces abortions in early pregnancy, in his pregnant wife's food without her knowledge. Boie was convicted of "attempted killing of an unborn child" and other charges and sentenced to nine and one-half years incarceration.

Boie appealed the Unborn Victims of Violence Act-based charge on, among other grounds, that the Unborn Victims of Violence Act incorporated a theory of when life begins in violation of the U.S. Supreme Court's *Roe v. Wade* and related rulings. A three-judge panel of the Air Force Court of Criminal Appeals rejected Boie's constitutional arguments and upheld the Unborn Victims of Violence Act-based conviction.[4]

In the second case, in May 2013, federal prosecutors used the Unborn Victims of Violence Act to indict a man who allegedly killed his own unborn child. When Renee Lee, who was six weeks pregnant, refused to have an abortion as John Andrew Welden had demanded, Welden tricked Lee into taking misoprostol causing the death of the unborn child. Welden was charged with first-degree murder which, under the Unborn Victims of

[4] *United States v. Boie,* 70 M.J. 585 (June 29, 2011).

Violence Act, was punishable by life in prison. In January 2014, Welden pleaded guilty to lesser charges and was sentenced to nearly 14 years in federal prison.

It is evident that the Federal Unborn Victims of Violence Act has not produced, in the more than ten years this law has been on the books, a flood of new crimes.

At Least 29 States Have Similar Laws

Because states have primary jurisdiction for the prosecution of most crimes that occur within the state, the Federal Unborn Victims of Violence Act does not reach many crimes of violence committed against pregnant women and their unborn children.

As a result and over time, state after state has enacted laws to recognize that criminal attacks against a pregnant woman which injure or kill her and injure or kill her unborn child result in two separate victims. Today, thirty-eight states provide varying degrees of protection and justice for pregnant women and their unborn children who are victims of violence. Importantly, twenty-nine (29) states provide protection for unborn children at any stage of gestation just as would Senate Bill 268. Yet, as in the case of the Federal Unborn Victims of Violence Act, there have not been very many prosecutions to date.

Making Senate Bill 268 the law in the State of Colorado will mirror what Congress did with the passage in 2004 of the Federal Unborn Victims of Violence Act and what at least 29 of our sister states have done to provide protection and justice for pregnant women who are victims of violence and whose unborn children are injured or killed in the process of the crime against the mother.

Senate Bill 268 Would Have No Impact on Abortion Rights

Only the most extreme supporters of abortion support abortion on demand at any stage of the life of the unborn child. But that is just what is behind the arguments of opponents of Senate Bill 268. Fortunately, the people of Colorado and America do not agree with this view.

CBS News found in its March 21-24, 2015 poll[5] that fifty-nine percent of Americans want abortions prohibited or more abortion limits. Exactly one-fourth (25%) said abortion should not be permitted at all. Nearly half of the Democrats polled said abortion should either be available but under stricter limits (28%) or not permitted at all (18%).

A January 2014 Marist Poll[6] found that eighty-four percent of Americans believe abortion should be restricted (within the first three months of pregnancy, in cases of rape, incest, or to save the life of the mother) or never allowed at all. This same poll found that nearly two-thirds of Americans who believe in abortion restrictions want to see the U.S. Supreme Court hand down a ruling to support those limits. That, of course, is what the pro-abortion community fears the most and it is why it keeps churning out biased studies and research projects.

Nevertheless, despite the cries of those in the abortion industry who, more often than not, are more concerned about protecting their bottom line profits from abortion rather than the health, safety, and welfare of pregnant women and their unborn children, Senate Bill 268 would have no impact on abortion rights which, under current constitutional doctrine, are protected. It is irresponsible and actually deceitful to suggest otherwise.

State fetal homicide laws now in effect have had no effect on the practice of constitutionally protected abortion rights. Criminal defendants have brought many legal challenges to state unborn victims laws, based on *Roe v. Wade* and other constitutional arguments, but all such challenges have been rejected by state and federal courts. For example, the Minnesota Supreme Court ruled: "*Roe v. Wade* . . . does not protect, much less confer on an assailant, a third-party unilateral right to destroy the fetus." *State v. Merrill,* 450 N.W.2d 318 (Minn. 1990).

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[5] PollingReport.com, Abortion and Birth Control (2015) at http://www.pollingreport.com/abortion.htm.

[6] Marist Poll, Abortion in America (January 2014) at http://www.kofc.org/un/en/resources/communications/marist-poll-abortion-restrictions2014.pdf.

In the 1989 case of *Webster v. Reproductive Health Services,* the U.S. Supreme Court refused to invalidate a Missouri statute that declared that "the life of each human being begins at conception," that "unborn children have protectable interests in life, health, and well-being," and that all state laws (including criminal laws) "shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state," to the extent permitted by the Constitution and U.S. Supreme Court rulings. Anything Colorado might enact that conflicts with these Supreme Court rulings would be unenforceable.

The U. S. Supreme Court has affirmed that states have an "important and legitimate interest" in protecting fetal life at all stages, even if that interest only becomes "compelling" after viability. *Roe v. Wade,* 410 U.S. 113, 163 (1973); *Planned Parenthood v. Casey,* 505 U.S. 833, 856 (1992) (reaffirming that one of *Roe's* essential holdings was that "the State has legitimate interests from the outset of the pregnancy in protecting . . . the life of the fetus . . .").

Since the 2004 enactment of the federal Unborn Victims of Violence Act and similar acts in at least 29 States, *Roe v. Wade* is still the law of the land.

Abortion extremists have nothing to fear from enactment of Senate Bill 268.

Senate Bill 268 Does Not Establish "Personhood"

Likewise the claims of opponents of Senate Bill 268 that it would somehow enact "personhood" into Colorado law are simply false. Senate Bill 268 is not a "personhood" bill. It is an extremely narrow *statute,* tailored to address horrific instances when unborn children are killed by the violent and criminal actions of others (outside of the context of abortion).

The Pennsylvania *Bullock* case dealt with this very issue. The Pennsylvania Supreme Court held that "the statutory language does not purport to define the concept of personhood or establish when life as a human being begins and ends; rather it imposes criminal liability for the

destruction of a human embryo or fetus that is biologically alive." *Bullock,* 913 A.2d at 212-13.

Similarly, the Minnesota Supreme Court, in upholding a similar Minnesota statute, said: "People are free to differ or abstain on the profound philosophical and moral questions of whether an embryo is a human being, or on whether or at what stage the embryo or fetus is ensouled or acquires 'personhood.' These questions are entirely irrelevant to criminal liability under the statute." *State v. Merrill,* 450 N.W.2d 318, 324 (Minn. 1990).

Senate Bill 268 Does Not Criminalize the Conduct of the Pregnant Mother

It is nonsensical to suggest that Senate Bill 268 could somehow "open the door" to prosecution of women, or "criminalize" women and doctors. The bill explicitly excludes mothers, doctors, and lawful medications. The vast majority of states already have this type of law.

Senate Bill 268 simply recognizes that, when a criminal commits one of nine specified crimes against a pregnant woman and her baby is injured or dies in the process, the Colorado criminal code will recognize two separate victims in those limited circumstances. It really gives the pregnant mother the same right to seek the protection of her unborn child as current constitutional law gives to the pregnant mother who wants to abort her unborn child.

Senate Bill 268 Is Not Vague and Ambiguous

Senate Bill 268 is not a "vague and ambiguous" criminal statute as some of its opponents claim. The near identical laws in twenty-nine other states belie that claim.

For example, in the late 1990s, Pennsylvania's General Assembly enacted the Crimes Against the Unborn Child Act which created several new offenses designed to protect unborn children from unlawful injury or death. Like Senate Bill 268, the Pennsylvania statute refers to the fetus at any stage of gestation. Also like Senate Bill 268, the Pennsylvania statute's criminal

provisions do not apply to consensual abortion or pregnant women in regard to crimes against their own unborn children.

In *Commonwealth of Pennsylvania v. Bullock*,[7] Bullock, while high on alcohol and cocaine strangled his pregnant girlfriend Lisa Hargrave so that she was almost unconscious. Later, fearing Hargrave would call the police, he strangled her to death. Of course, the unborn child did not survive as well. The coroner concluded that the fetus's death was caused by "asphyxia due to the death of the mother by homicide."

As do the opponents of Senate Bill 268, Bullock contended that the Pennsylvania act was void because it was vague. He argued that, until a fetus was viable (in the sense that the unborn child could likely survive outside the womb), the unborn child cannot actually be alive and, hence, cannot suffer death.

The Pennsylvania Supreme Court held that the definition of an unborn child which included all states of gestation from fertilization to live birth was straightforward and neither obscure nor difficult to grasp. The court added that "[t]oday it is understood that a mother and her unborn child are separate and distinct entities, and that medicine is generally able to prove the *corpus delicti* of the homicide of an unborn child."

It is important to note that, in enacting a statute, it is presumed the legislation is intended to comply with the state and federal constitutions, the entire statute is intended to be effective, a just and reasonable result is intended and public interest is favored over private interest.

Words in a statute are given their plain, ordinary, and commonly understood meaning unless defined by statute or unless a contrary intention plainly appears.

Statutes are construed as a whole and are harmonized to give meaning to related provisions. If the language is clear and unambiguous, the letter of the statute must not be disregarded under the pretext of pursuing its spirit. If the language of statute is ambiguous, however, a court may resort to extrinsic

[7] 590 Pa. 480, 913 A.2d 207 (2006).

aids to determine e the intention of the legislation, including the object sought to be attained, the circumstances under which the legislation was enacted, and the legislative history.

Senate Bill 268 is clear and unambiguous. But even it if is not, the legislative history makes the language clear and unambiguous.

Criminal Prosecutions Require Proof Beyond a Reasonable Doubt

Moreover, all criminal prosecutions require proof of each and every element of a charged criminal offense beyond a reasonable doubt. That means, were Senate Bill 268 enacted, a charged defendant could not be convicted of either the offense against the pregnant woman or injury to or the death of the unborn child unless the prosecution proved, beyond a reasonable doubt, (1) that the mother was pregnant with an unborn child at the time of the crime; and (2) that a defendant had committed one of the nine crimes enumerated in Senate Bill 268; (3) that the defendant was found guilty of committing one of those nine crimes; and (4) that the defendant's criminal conduct caused injury to or the death of the woman's unborn child.

A mere possibility or even the strong likelihood that a defendant's criminal conduct caused injury to or the death of an unborn child would not suffice, because the law requires proof beyond a reasonable doubt. It is also well to note that the American jury system is the fairest criminal justice system in the world.

Senate Bill 268 Rights a Clear Wrong

When Vincent Carroll said there was something "obviously very wrong" with the inability, based on Colorado law, to charge Ms. Wilkins' assailant with the death of her unborn child, he spoke for most Coloradans. "It was," he said, "a homicide and everyone knows it."

Because criminal laws exist to punish and to deter and because some attackers fear punishment, at least some may refrain from committing acts that might injure a pregnant woman and result in injury to or the death of her unborn child. Thus, the provisions of Senate Bill 268 would come into play only when unlawful force is being applied or threatened to a pregnant

woman. Senate Bill 268 can, if enacted, would be enormously helpful in combating violence against women and their unborn children.

Senate Bill 268 is vitally needed to right that wrong. Colorado needs to recognize, as does thirty-eight other states, that when a criminal attacks a woman, injuring or killing her and injuring or killing her unborn child, he has claimed two victims.

Senate Bill 268 will further Colorado's public policy of protecting innocent life. There is no legal impediment to the passage of Senate Bill 268.

On behalf of Colorado Family Action, we respectfully ask you to vote for Senate Bill 268.