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October 10, 2007

To: Members of the South Dakota
Pro-Life Leadership Coalition, and
Others to Whom it May Concern

From: Samuel B. Casey, Senior Counsel
Law of Life Project
Christian Legal Society

Harold J. Cassidy
Harold J. Cassidy & Associates
Litigation Counsel on Law of Life Initiative

Re: Overview of the Proposed South Dakota Abortion Bill; Some
Relevant Considerations for the Proposed 2008 Abortion Bill,
Including a Response to August 7 Pro-Life Strategies by Bopp,
Coleson & Bostrom

To All Concerned:

As confirmed by the most recent 2007 polling data, a strong majority of the people of South Dakota support a law that would prohibit abortions in South Dakota as a method of birth control, as long as it would remain legal to have an abortion in cases of rape and incest or when there is a risk to the life or of serious injury to the health of the mother.¹ Acknowledging that the constitutionality and practical enforceability of such legislation is a preeminent concern, the Attorney General of South Dakota instituted a working group of South Dakota citizens and legal counsel to review the legislative history of abortion regulation in South Dakota, including the REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION, as submitted to the Governor and Legislature of South Dakota (December 2005)(the "TASK FORCE REPORT")² and consult with him as to how to best draft

1 The Polling Company™, Inc., SURVEY OF 502 REGISTERED VOTERS IN SOUTH DAKOTA Field Dates: June 30-July 2, 2007 (Margin of Error: ±4.37%)

2 Copies of the TASK FORCE REPORT are available from the State of South Dakota or can be obtained in pdf format at <http://www.dakotavoices.com/Docs/South%20Dakota%20Abortion%20Task%20Force%20Report.pdf>

constitutional legislation protecting an unborn child's intrinsic right to life and the mother's natural intrinsic right to a relationship with her child, with a priority concern for the protection of the mother's health in light of the multitude of harms posed by abortion. After two months of work and extensive telephonic and face-to-face collegial deliberations, the Attorney General's 13-member working group on October 5, 2007 formally concurred in the proposed legislation (hereafter the "Abortion Bill") that is found in Appendix A to this memorandum

This memorandum sets forth why the people of South Dakota are correct to enact such a law at this time. This memorandum also explains why such legislation is constitutional and designed to advance women's health and the right to life without running afoul of any of the legitimate concerns set forth in the Bopp, Coleson & Bostrom PRO-LIFE STRATEGY ISSUES MEMORANDUM, dated August 7, 2007 (the "Bopp Memo") that was directed against the proposed Georgia Human Life Constitutional Amendment, not the quite dissimilar South Dakota Abortion Bill.

A. THE PROPOSED ABORTION BILL

Any inquiry must begin with the proposed legislation. There has been, in South Dakota, four years of legislative hearings, the creation, in 2005, of the Abortion Task Force, the Task Force hearings and the publication of its report, numerous public opinion polls, the passage of an Abortion Bill with no exceptions in 2006, followed by the 2006 referendum and that lengthy process has been reviewed and modified by a thirteen member working group (the "Panel"), including the Attorney General and three of his Deputy Attorneys. That panel has now completed the attached Abortion Bill. While the Abortion Bill does not yet have a popular name (*see* Section 21 of the Abortion Bill), it is otherwise ready for full public debate both in South Dakota and nationally.

The Abortion Bill bans some but not all abortions in South Dakota. In finalizing the draft of the Abortion Bill, the Panel had to balance numerous considerations, including the scope of the abortion prohibition, satisfying the voting public's expressed desire to continue to permit certain abortions, the need to win a constitutional challenge in court respecting the women's health and liberty interests, and to prohibit as many abortions as possible given these competing demands.

Because of the history of the 2006 election, it is assumed that the new Abortion Bill will be referred to the people for a vote in the election on November 4, 2008. Thus, the Abortion Bill had to be drafted with the public debate and election in mind, as well as the need to ultimately succeed in court. Drafted with the need to meet the rigors of both contests, the Abortion Bill is likely to win public support and the public debate. In that sense, the Abortion Bill has great strength.

The Abortion Bill has exceptions for the life of the mother, the health of the mother, rape and incest. All of these exceptions are well defined, and the Abortion Bill removes the most emotional objections to a traditional Abortion Ban Bill. It removes the emotional issue of rape and makes it clear that the pregnant mother cannot be subjected to criminal liability. The Bill isolates the *Roe v. Wade* issues from the *Doe v. Bolton* issues, and becomes an effective vehicle to challenge *Roe* in the only way it can be challenged at this time.

Let there be no mistake. The Abortion Bill is an incremental approach to a ban on abortion. It does not represent the total ban sought by many for the sake of the unborn child, but it creates a prohibition of those abortions we can achieve at this time while laying the foundation for the long

term goal of an abortion-free America.

The attached Abortion Bill is only a necessary first step in achieving the long term goal of providing affirmative protection of the lives of all human beings. We can only start to work on that long term goal, whether ultimately achieved by a constitutional amendment or by other means, after we overturn *Roe*, and then start to reverse *Roe's* harm, initially by more and more and better and better abortion regulations and prohibitions as each state legislature deems fit to protect the women and children of their state.

As noted, the Abortion Bill will appear on the ballot in South Dakota in 2008. Because of its incremental nature, it is reasonable to expect it to win on the ballot. The court challenges by Planned Parenthood will likely begin sometime that November and would reach the United States Supreme Court sometime in 2011 or 2012.

B. WHY PASSAGE OF THE ABORTION BILL IS PRUDENT AND NECESSARY

Whether it is prudent to attempt to pass the Abortion Bill in 2008 involves a number of considerations. Here are some of the most important ones.

1. The Legal Considerations

Whether South Dakota can successfully defend the proposed Abortion Bill against a constitutional attack in the federal courts requires an analysis and answer to three questions: 1) Is the legal reasoning of the Supreme Court's 1973 *Roe v. Wade* opinion viewed within the legal community and among the members of the US Supreme Court as unsound constitutional analysis? 2) Is there a legal and factual analysis of sufficient strength to satisfy a reasonable application of the principles of the *stare decisis* which the Supreme Court held were not satisfied in the Court's 1992 decision in *Planned Parenthood v. Casey*? 3) Is the make-up of the current Court of sufficient quality, pre-deposition and judicial philosophy to make it likely, or at least reasonably plausible, that a well constructed and factually sound argument can result in the Supreme Court upholding the statute?

There is an affirmative answer to each of these three questions. In fact, when the issues raised by the current litigation involving the South Dakota's newly enacted Abortion Informed Consent Bill, and South Dakota's recent TASK FORCE REPORT are fully understood, it is reasonable to conclude that no state will ever be better prepared, better positioned, and better suited to defend the Abortion Bill than South Dakota will be in late 2008 and beyond. The timing of the litigation challenging the Abortion Bill when it reaches the District Court and its timing in reaching the U.S. Supreme Court (probably 2011 and 2012) is the best we may have to overturn *Roe* for the next ten to fifteen years. Here's why.

(a) The Legal Soundness of *Roe*

There is no doubt that a clear majority of the current Court (and the broader legal community) recognizes that the 1973 decision in *Roe v. Wade* was incorrectly decided as a matter of

application of constitutional law. That fact, standing alone, is not, as the Court’s 1992 decision in *Planned Parenthood v. Casey* demonstrates, sufficient to have *Roe v. Wade* overturned. As Chief Justice Roberts testified at his confirmation hearings, the fact a decision was incorrectly decided “only raises the question” of whether that decision should be overturned. That realization only prompts the inquiry. The further inquiry is whether the principles of *stare decisis* can be met. In that regard, as Chief Justice Roberts correctly observed, the *Planned Parenthood v. Casey* decision which applied *stare decisis* principles to the *Roe v. Wade* decision is entitled to respect as separate precedent. Consequently, any statute that bans abortion must be supported by facts and legal analysis that are substantially new and fresh to the Court and, at a minimum, sufficient to satisfy at least one – preferably more – of the four prongs of the *stare decisis* analysis set forth in *Casey*, to be discussed more fully below.

However, the starting point in our analysis is whether we are satisfied that the majority of the current Court has at least signaled that they believe that *Roe v. Wade* was incorrectly decided. The evidence is clear that at least five of the current members of the Court – and perhaps six – recognize that *Roe* was incorrectly decided.

Justices Scalia³ and Thomas have repeatedly voted to overturn *Roe* and there is no reason to believe that, given the right opportunity, they would not do so again. They clearly know *Roe* was wrongly decided and have said so in forceful language in published opinions. Based upon their prior legal and judicial careers, it is also safe to conclude that Chief Justice Roberts and Justice Alito know, on an intellectual level, that *Roe v. Wade* was incorrectly decided. In their own ways, both have indicated that understanding in the past. Justices Scalia and Thomas have indicated, in more ways than one, that *Roe* was wrongly decided and for them that fact was sufficient to overturn *Roe*. As for Chief Justice Roberts and Justice Alito, they have signaled that they know *Roe* was incorrectly decided and their particular judicial philosophy is consistent with that of Judges who would not have voted in favor of *Roe* if they had been on the Court at the time the case was first considered. The question for them, however, is different than it is for Justices Scalia and Thomas. For Roberts and Alito a new case must satisfy *Casey’s stare decisis* analysis.

This brings us to Justice Kennedy. On this threshold question of whether he knows *Roe* was wrongly decided it is necessary to recall a bit of history. In 1989 in the *Webster* case, five Justices voted in conference to overturn *Roe v. Wade* because it was incorrectly decided. Those five Judges were Chief Justice Rehnquist, and Justices Scalia, White, O’Connor and Kennedy. Prior to an opinion being completed and published, Justice O’Connor took her vote back under great pressure, most notably from Justice Blackmun. For that reason, *Roe* was not overturned but the Court upheld the Missouri Statute under scrutiny in that case. We first learned that these five Judges voted to overturn *Roe* from anecdotal stories. It became widely known that it was O’Connor who changed her vote. Kennedy stayed fast.

This version of events in the *Webster* case was conclusively confirmed by Justice Marshal

³ Although vote counters always rely upon Justice Scalia as a vote to overturn *Roe*, it is easy to lose site of the fact that he will not be on the Court forever and it may be unlikely he will still be on the Court for more than the next eight to ten years.

when he recounted the events in his papers, made public following his death in the 1990's. This is the first of two occasions on which it has been confirmed that Justice Kennedy voted to overturn *Roe* because *Roe* was incorrectly decided.

The second time was in 1992 in *Planned Parenthood v. Casey*. For the second time in three years, five Judges voted to overturn *Roe v. Wade* in conference because *Roe* was incorrectly decided. This time the five were Chief Justice Rehnquist, and Justices White, Scalia, Kennedy and the newest member of the Court, Justice Thomas. This time it was Justice Kennedy who changed his vote under great pressure. Originally we knew of these events from anecdotal tales coming from inside the Court. In 2003 Justice Blackmun's papers were made public and his account related how Justice Kennedy told him that Justice Kennedy was changing his vote.

Thus, in 1992 when the *Casey* decision reaffirmed *Roe v. Wade*, it was reaffirmed by a Court which had two thirds of its member having voted, in one case or another, to overturn *Roe* because *Roe* was incorrectly decided. *Roe* did not survive because the Court thought it was a correctly decided case. It survived despite the fact the clear majority of the Court knew it was wrongly decided. In *Casey*, the final vote was 5-4. However, only two Justices (Blackmun, who wrote the *Roe* decision, and Stevens) were willing to state in *Casey* that *Roe* was correctly decided.

Justices O'Connor, Kennedy and Souter wrote a joint opinion in which they said they did not have to decide the issues of *Roe* as if they were before the Court for the first time. They said they had to affirm the case even if *Roe* committed error because of the principles of *stare decisis* that says prior cases, such as *Roe*, must be given the respect of precedent and cannot be overruled just because it was wrong, unless there are additional circumstances that meet one of the *stare decisis* criteria.

Thus, the issue wasn't whether *Roe* was wrongly decided – which only, as Chief Justice Roberts points out, raises the question of whether *Roe* should be overruled – the question is whether there are facts or new legal theories not previously considered by the Supreme Court, or one of the other *stare decisis* criteria.

It is clear that Justice Kennedy knows that *Roe v. Wade* was wrongly decided. He has previously acknowledged that fact.

Therefore, it is a reasonable, if not certain, conclusion that at least five Justices currently on the Court know that *Roe v. Wade* was incorrectly decided.

(b) Is There a New Factual and Legal Analysis of Sufficient Strength to Satisfy a Reasonable Application of the Principles of *Stare Decisis*?

Although this memo treats the second question (Is there a new factual and legal analysis that satisfies *stare decisis*?) and the third question (Is the current make-up of the Supreme Court good enough?) as two separate questions, these two questions are inextricably connected, and the third

question cannot be answered without establishing the soundness of the answer to the second. In one sense, the short answer to the third question is that the current make-up of the Court is adequate to overturn *Roe*, if the legal and factual analysis is powerful enough to satisfy a reasonable application of the principles of *stare decisis*. This statement requires a bit of explanation, and a discussion of the answers to both questions 2 and 3.

There are those who claim the main factor – and perhaps the sole factor – in overturning *Roe* is the make-up of the Court. This theory or strategy (if it can be called a “strategy”), is that we only need to pack the Court with “willing” judges, and those judges will just overturn *Roe*. This has been proven to be false on two separate occasions, in 1989 in the *Webster* case, and in 1992 in the *Casey* case. On both occasions a majority of the Court knew that *Roe* had been incorrectly decided, and a majority in both cases voted to overturn *Roe* in conference. In both instances, the make-up of the Court was good enough to overturn *Roe*, but the legal and factual analysis presented to those courts (and the cases that presented the context for that analysis) by the attorneys and the states was not adequate to hold the coalition on the Court together and stand up under the pressure of the appearance that a vote against *Roe* was a vote against women.

Any argument about how to best overturn *Roe* that focuses exclusively upon a strategy to merely “pack the Court” is dangerous and will fail. This has been proven to be the case in the past. It is now more than twenty years since that approach was adopted in the early and mid-eighties, resulting in failure in 1989 and then 1992, effectively shutting down access to the Court on the question of *Roe* for the following decade and a half.

We cannot be naive. The make-up of the Court is very important and justifies all political efforts to elect Presidents and Senators who will nominate and confirm qualified judges to the Supreme Court who will adjudicate the meaning of the Constitution but not legislate unwritten and unenumerated federal rights not intended by the American people. However, the quality and newness of the legal arguments and its factual underpinnings are of equal importance. To pretend that the quality of the argument does not influence the Justices is naive and contradicts the evidence to the contrary. It was precisely because there was no new arguments or new facts presented to the Court in *Webster* (1989) and *Casey* (1992) that a Court with a majority of Justices with a predisposition to overturn *Roe* failed to do so.

Just as the Justices’ philosophy makes them more or less receptive to a particular result, good legal arguments, and proof of new and important facts can and will persuade judges whose philosophical approach requires such persuasion. Indeed, it is important to remember that *Roe* and *Doe* were decided without a single evidentiary hearing on the basis of written declarations that have since been disavowed and there has never been a trial or evidentiary hearing on the any of the core factual presuppositions upon which the core holding of *Roe* rests. Litigation of the constitutionality of the Abortion Bill would require such a hearing and create such an evidentiary record that has never before been considered by the federal courts. There are at least three Justices on the current Court who know *Roe* was wrongly decided but need sound argument and facts presented to them in order to satisfy the requirements of *Casey*. Justices Thomas and Scalia need no further persuasion about *Roe*. Chief Justice Roberts and Justice Alito do. It is naive to think that presenting to them the same tired “states’ interest in fetal life” analysis and argument that failed in *Roe* (1973), *Webster*

(1989), and *Casey* (1992) is adequate to overturn *Roe*. That argument failed in each of those three important cases. But it is not just naive, but dangerously wrong. Returning to the Court with that argument will fail and destroy the historical opportunity to win in the courts.

It is with these facts and considerations in mind that South Dakota's unique initiative must be examined on three separate basis: (1) is it a sound argument and approach; (2) does it satisfy *Casey's stare decisis* analysis; and ultimately (3) does it possess enough force to gain the votes of Justices Roberts, Alito, and even Justice Kennedy?

(i) The Unique Power of South Dakota's Approach

In order to understand the power of the legal argument which supports the South Dakota Abortion Bill, it is helpful to understand the interplay between that Bill and two Statutes passed in 2005, one of which is in current litigation, and the other which resulted in the TASK FORCE REPORT in December, 2005

In 2005 South Dakota passed two bills which are of significance to the Abortion Bill. The first was House Bill 1166, the Informed Consent Law (2005) (the "Informed Consent Law") which was an amendment to the common law and statutory disclosure requirements which a physician must make to a woman contemplating submitting to an abortion. The central purpose and focus of the Informed Consent Law was the protection of the rights, interests and health of pregnant mothers.

The Informed Consent Law requires the written disclosure that an abortion procedure will terminate the life of a whole, unique, living human being. The definition section of the Bill defines "human being" as a "member of the species *Homo sapiens*," which makes it clear that the term is used in the biological sense.

The Informed Consent Law also requires disclosure of the fact that the pregnant mother has an existing relationship with her child which is protected by the U.S. Constitution. It further requires written disclosure of the fact that an abortion will place the women at risk for depression and increased risk for suicide ideation and suicide.

The Informed Consent Law makes it clear that in passing the legislation the State attempts to protect three different constitutional rights of the pregnant mother: her constitutionally protected interest in her relationship with her child; her constitutional interest in making decisions about matters pertaining to the welfare and health of her child; and her interest in her own health.

Thus, this legislation focuses upon the protections of the constitutional rights of the pregnant mother, all of which are in direct conflict with the interests and philosophy of Planned Parenthood as an abortion advocate and provider.

As expected, Planned Parenthood challenged the Informed Consent Law in Federal Court. Consequently, there is a new dynamic introduced by that Informed Consent Law not seen before in the courts. The State is litigating on the side of the constitutional rights of the pregnant mothers, and Planned Parenthood does not really enjoy third party standing to litigate the women's rights. Thus,

the Informed Consent Law and the litigation it spawned is a vehicle to demonstrate to the courts exactly how the women's liberty interests are terminated and adversely affected by legalized abortion. The current suit involving the Informed Consent Law requires the courts to resolve a number of important legal and factual issues which form the necessary basis for the successful defense of the proposed Abortion Bill. On January 9, 2007, the State won a significant victory by having the opinion of the U.S. Court of Appeals that affirmed entry of a preliminary injunction, vacated. The entire U.S. Court of Appeals for the Eighth Circuit – all eleven justices – is rehearing the case and oral argument was heard before the *en banc* panel on April 11. The Eighth Circuit opinion will be received shortly, and a trial on the humanity of the child will likely take place in 2008. Thus, this Informed Consent Law litigation has been successful to this point in percolating important factual and legal arguments, and has been an instrument to expose the abuses of the abortion providers in South Dakota.

The 2005 HB 1233 Task Force Bill has resulted in powerful and factually accurate findings concerning how abortion has harmed the rights, interests and health of women. It is a second tool, and taken together, the Informed Consent Law, the litigation and its defense, and the TASK FORCE REPORT form a solid foundation for the proposed Abortion Bill.

The legal theories and factual analysis supporting the proposed Abortion Bill is based upon the legitimate exercise of the State's power to prohibit abortion in order to protect, not just the life of the unborn child, but the interests, rights and health of their pregnant mothers. THE TASK FORCE REPORT sets out the factual basis for meeting some of the *stare decisis* analysis of *Planned Parenthood v. Casey*.

The Task Force analysis demonstrates that the rights, interests and health of women are terminated and adversely affected, and cannot be adequately protected as long as abortion is legal. Arguments relevant to the injustice to the child are far more likely to be favorably received by the Court when the interests of the mother is better seen as compatible with those of her child.

The State is currently successfully defending the Informed Consent Law at this time, and the State has obtained critical and substantial admissions from Planned Parenthood in the Informed Consent Law litigation that will help to successfully defend the proposed Abortion Bill if it is passed into law. There are reasons to be confident that South Dakota will win the Informed Consent Law litigation in the upper courts and the substantial factual admissions of Planned Parenthood in that case and the favorable rulings likely to be obtained are important to the defense of the proposed Abortion Bill. The Informed Consent Law litigation and the TASK FORCE REPORT positions South Dakota in a unique and advantageous position that no other state currently enjoys.

It is important to observe that the legal analysis which supports the proposed Abortion Bill is not in lieu of the older "state's interest in fetal life" analysis which is sufficient to obtain the votes of Justices Scalia and Thomas. It is in addition to it, and is necessary to win the votes of Chief Justice Roberts, Justice Alito, and clearly needed to win the vote of Justice Kennedy, which is discussed more fully below.

The legal analysis which justifies the proposed Abortion Bill is centered on the State's

protection of the constitutional rights of the pregnant mother, and builds upon the women's interests supporting the Informed Consent Law and the facts and policies set out in the TASK FORCE REPORT.

It is important to understand that the exception for the health of the mother makes it more likely that the proposed Abortion Bill will win in court compared to a bill that had no such exception. Even if *Roe v. Wade* is overturned – which clearly can and should happen – that only “knocks out” the so-called right to an abortion (or right to “terminate” the pregnancy). Getting rid of *Roe v. Wade* does not eliminate the mother's separate “right” to protect her own health. We need to get rid of *Roe* before we can get the courts to think more clearly on other issues. In the long run, the proposed Abortion Bill will result in showing why a health exception is not needed. Thus, the proposed Abortion Bill will knock out *Roe*, and establish the factual and legal predicates to later establish that no the health exception is needed to protect women and children. The presence of the rape and incest exceptions will make it possible to ban abortion on demand, leaving an analysis for the need for such exception to a time after *Roe* is overturned.

(ii) South Dakota's Approach Satisfies Casey's Stare Decisis Analysis

When Justices O'Connor and Kennedy – both of whom had previously voted to overturn *Roe v. Wade* – wrote their joint opinion in *Casey* reaffirming *Roe*, they did so based on their conclusion that the principles of *stare decisis* had not been met. Meeting the requirements of *stare decisis* is necessary for the Court to make an exception to the general rule that the Court must follow prior precedent (like *Roe v. Wade*).

Justices O'Connor, Kennedy and Souter wrote that they did not *have* to decide the issue of whether the constitution protects an “interest” in abortion as if the question was before them for the first time. There must be a recognized basis that allows the Court to depart from the requirement of following prior precedent. Chief Justice Roberts has agreed with this proposition, so it is clear that a pro-life argument must satisfy *Casey's stare decisis* analysis.

The joint opinion in *Casey* expressly states that if *Roe* was in error – and clearly Kennedy had thought that it was – that error only went to the “weight to be given to the state's interest in fetal life.” *Casey*, 505 U.S. at 855. But, the Justices writing the joint opinion held that if that is the only error or consequence of the error, it was insufficient to justify overturning *Roe* because that error did not affect the “women's liberty.” *Id.* Kennedy and O'Connor were bothered by the perception that protecting the unborn child by banning abortion was at the expense of the liberty interests of the women; and the perception that to do so was anti-women.

The joint opinion listed four tests of the *stare decisis* principle. Meeting any one of the tests would justify overturning *Roe*. There had to be a showing of one of the following: (a) that there are now new facts or a new appreciation of old facts which show that the *Roe* holding was based upon one or more false assumptions of fact; (b) that the *Roe* decision has not proven to be unworkable; (c) that the *Roe* decision has not had an adverse impact on the women's liberty interests; and (d) the people of the nation have come to rely upon the legal availability of abortion. *Casey*, 505 U.S. at 855-56; 858; 860.

The legal approach that supports South Dakota’s proposed Abortion Bill, as it builds upon the Informed Consent Law litigation and the factual findings and policy analysis of the TASK FORCE REPORT, satisfies not only one prong of this test, which justifies overturning *Roe*; it satisfies all four prongs.

As the State’s arguments in support of Informed Consent Law and the TASK FORCE REPORT sets forth, every factual assumption upon which the *Roe* decision was based has been totally or largely disproved. As the Task Force report concludes, and the discovery in the Informed Consent Law litigation establishes, abortion is a completely unworkable way for a woman to give up or waive her fundamental constitutional right to her relationship with her child (and her right to make decisions about the welfare of her child). The discovery in the Informed Consent Litigation proves that there is no traditional physician-patient relationship, that abortion subjects women to serious medical risks, and abortion is not safer than childbirth. Further, it can be established that it is more the male partner, the abortion providers, the parents of the young pregnant mother, or the society at large, who rely upon the legal availability of abortion as a method to dispose of the mother’s child, in order to avoid helping the mother in her time of need. In the process, the woman is exploited and harmed while her rights of constitutional dimension are terminated.

Finally, it is now clear and provable that abortion destroys the most important liberty interests women have in life.

The entire approach that South Dakota has adopted and advances will satisfy the *Casey stare decisis* analysis. This legal and factual analysis has, especially with the witness of the women who have had abortions, and the professionals and pregnancy help centers that care for them, the power to persuade members of the Court that the *Casey stare decisis* analysis has been satisfied.

There will be those who will argue that we can’t win Justice Kennedy back to where he was between 1989 and 1992; that his vote in *Gonzales v. Carhart* was simply his asserting the compromise he thought he struck with Justices O’Connor and Souter in the *Casey* case.

However, we know that he knows *Roe* was wrongly decided. He wrote with passion in *Gonzales* about the harm abortion causes women. He demonstrated a predisposition and receptiveness to proof about such harm. More importantly, perhaps, he wrote with passion about the beauty of the bond between mother and child:

“Respect for human life finds an ultimate expression in the bond of love the mother has for her child.” *Gonzales*, 127 S.Ct. 1610, 1634 (2007).

Justice Kennedy retained his powerful pro-motherhood language despite a bitter attack by Justice Ginsberg.

It was not a coincidence that Justice Kennedy cited to the “friend of the court” brief of Sandra Cano (the “Doe” in *Doe v. Bolton*) which related the experiences of post abortive women. Of all the Justices on the Court, perhaps Justices Kennedy and Roberts would be most receptive to South Dakota’s women’s interest analysis.

(iii) The Current Timing of an Abortion Bill in South Dakota Makes South Dakota Better Prepared and Positioned to Defend an Abortion Bill Than Any State Could Ever Be

The issues currently being litigated in defense of the 2005 Informed Consent Statute are important building blocks which form the foundation for the Abortion Bill. That litigation is the precursor to the litigation over the ban. There are three or four critical issues presented in that case which are also critical to the success of the ban litigation.

In all likelihood, the State will win the Informed Consent Law litigation, but it is currently unknown whether it will be fully resolved in the Federal District Court and the Eighth Circuit before the commencement, in late November, 2008, of a suit challenging the proposed Abortion Bill.

However, all of the discovery in the informed consent litigation was completed by April 20, 2006, and all of the depositions, expert testimony, document discovery and analysis of the legal and factual issues will be entirely completed. Since the Informed Consent Law litigation involves some of the most critical issues necessary to the successful defense of the Abortion Bill, the favorable record being established in the informed consent litigation will inure to the benefit of the State in the Abortion Bill litigation.

Thus, leading up to November 2008, the State of South Dakota will have already put together a world-class team of ten experts, and will have refined all of the analysis necessary to succeed in the defending the Abortion Bill. The depositions of the Planned Parenthood doctors and personnel have produced critical admissions that can be used in the Abortion Bill litigation. The Attorney General's office has already put together a legal team, which has been acquiring an expertise on the critical facts and issues in a way no other Attorney General's office could possibly do. The TASK FORCE REPORT sets out the factual and policy basis to meet the *Casey stare decisis* analysis, which explains what inspired the legislature to take action. The unique legal issues that support that analysis are supported by both the Informed Consent Law legal argument and the TASK FORCE REPORT.

It is not likely that any state will be better prepared, better positioned, better trained, or ready to defend an Abortion Bill on better grounds than South Dakota in November, 2008. Because, as is discussed below, the U.S. Supreme Court will most likely have the best make-up (for an Abortion Bill) when the case reaches the Supreme Court in 2011 or 2012, than any Court is likely to have in the next ten to fifteen years, there simply are no grounds or valid reasons to delay a ban or wait for some other state to take up the challenge. The State will be able to make a forceful and detailed argument based upon the facts, Planned Parenthood's admissions, and the legal analysis being developed now, why the Abortion Bill is a constitutional exercise of the State's power, better than any state could ever do at any particular time.

(c) The Make-Up of the U.S. Supreme Court When the South Dakota Ban Reaches that Court, Will Most Likely be the Best Court to Submit a Ban Case At Any Time in the Next Decade

If successful, the Abortion Bill will be effective in late November, 2008. Planned Parenthood would likely be in court on an initial application for an injunction in November, 2008. In all likelihood, a petition for *certiorari*, if one were to be filed, would reach the U.S. Supreme Court in late 2011 or 2012.

One of two possible Supreme Courts will be in place at that time. Either it will be the current Court, which would include Chief Justice Roberts, and Justices Scalia, Thomas, Alito and Kennedy, or it will be a Court with one more or perhaps – though unlikely – two new appointments. It is possible that Justice Stephens could be retired and replaced. Replacing Stephens would be greatly welcomed, but we cannot and do not rely upon his being replaced. Whatever future appointments made by President Bush (although unlikely) will have been made by the President by October, 2008.

If the Democrats win back the White House in 2008 – which is probably the more likely occurrence from an historical perspective – a pro-life Republican President may not have an opportunity to appoint a new Supreme Court Justice for ten to twelve years after the expiration of President Bush's second term. There is no guarantee that the next Republican President will be pro-life. Further, even if there were a pro-life Republican President, it may be unlikely that there would be a majority of the Senate that will be Republican. Thus, whatever the make-up of the Supreme Court in 2011, it may well be the best Court we will have for the next ten to fifteen years, and even beyond (Scalia will have retired by then). One must keep this fact in mind when weighing the prudence of passing up the well positioned, well reasoned, historical opportunity given to South Dakota at this time.

If South Dakota is best positioned to litigate an Abortion Bill starting in late 2008, there is nothing stopping South Dakota to pass the ban and litigate the case in court. It has a better chance in succeeding to overturn *Roe* than any other state at any time in the next decade. At the current time we should assume that the deciding fifth vote is that of Justice Kennedy.

So, one of the important questions boils down to whether the historical moment of a well positioned, well prepared state with the right legal approach, is capable of persuading Justice Kennedy to vote one more time to overturn *Roe* the way he did in 1989 and again in conference in 1992. Justice Kennedy knows *Roe* was wrongly decided. But he simply needs to be shown that the *Casey* decision's *stare decisis* analysis can be met by South Dakota.

However, that showing is necessary to win the votes of Chief Justice Roberts and Justice Alito anyway. If a state – and the pro-life forces – don't think they can satisfy the *Casey stare decisis* analysis to satisfy Justice Kennedy, then they probably won't be able to satisfy Chief Justice Roberts and Justice Alito either. In other words, the states and pro-life forces must develop a factual and legal argument necessary to satisfy the *Casey stare decisis* analysis or *Roe* will never be overturned at anytime regardless of future appointments.

In fact, Justice Kennedy may prove to be easier to satisfy than either Roberts or Alito. He has already felt betrayed by the application of *Casey* in upholding the partial birth procedure (see Kennedy's dissent in the *Stenberg* case). The 1166 informed consent litigation has been litigated with an eye towards Justice Kennedy in particular. There has been developments in that case which

may well antagonize him further against the pro-abortion position, and conclusively show how unworkable the *Casey* reaffirmation of *Roe* really is.

2. THE NON-LEGAL CONSIDERATIONS – ENGAGING THE NEW DEBATE

The debate over partial birth abortion for the past fourteen years has been helpful to the pro-life cause. It was a debate that helped exposed abortion for what it is, and it helped shift public sentiment to a degree. Its value was not in directly saving lives by banning that procedure, because even as Justice Ginsberg readily points out, it does not prohibit the killing of the child. Its value was in discussing the humanity of the child, and graphically discussing how abortion doctors kill that child. In the end – although we don't think it could have been confidently predicted – even the final opinion out of the Court in *Gonzales* changed the rules of engagement in abortion litigation for the better.

Although there were, and still are, detractors of the partial birth abortion strategy, as Mr. Bopp and Mr. Coleson point out, we are not counted among them. The strategy was a success.

However, we should point out that there were numerous losses in the courts all along the way. How many were there? Ten? Twelve? All along the way, the states paid millions of dollars in attorney fees to Planned Parenthood's lawyers. Yet, National Right to Life and others persisted despite paying those fees and despite the mounting losses reported in the courts.

Even a brutal loss in the U.S. Supreme Court in 2000 in *Carhart* didn't stop the effort. That case, by any account, made "bad law" and made *Roe v. Wade* and *Casey* "worse."

But proponents of the PBA forged ahead even though it cost tens of millions of dollars and countless defeats. In 2004, ten years after the PBA effort began, the Federal PBA Ban was passed, with detailed findings of fact and revised strategy forged from the lessons of defeat. When the Bill was passed we "didn't have the votes" on the Court. The Bill passed and was defeated in three Federal District Courts and three U.S. Courts of Appeal before being upheld in April, 2007, in the U.S. Supreme Court.

Why was it a good strategy to forge ahead in the PBA when there were constant defeats for twelve years, constant expense on our side, and constant payment of attorney fees for the bad guys, without any guarantee of success in the end? Even if the Bill was upheld in the end, it saved no children, and it could have been a very narrow ruling with no long term legal benefits derived directly from the Court's opinion.

The answer is complex, yet simple. We needed a debate that had the capacity of changing hearts and minds. At the same time it exposed some of the ugliest aspects of our adversaries' philosophies. There were some political advantages and other points that were helpful.

But it took fourteen years. Eighteen million children died due to abortion during that time. Yet it was a good effort.

It taught the public and it taught the courts, including Justice Kennedy. One lesson we presented for Justice Kennedy is that a compromise on the abortion issue is impossible and the consequence of his compromise was ugly, even disgusting.

But that effort only went to “the state’s interest in fetal life.” It dealt with the humanity of the late term fetus.

We must now debate the other half of the issue: the destruction of the rights, interests and health of the children’s mothers. If we do not effectively debate how abortion exploits women and destroys their interests, we will never sufficiently win the public hearts and will never end legal abortion.

The South Dakota strategy, including Informed Consent Law, is to publicly debate the interests of the women. In her dissent in *Gonzales*, Justice Ginsberg cites to a law review article written by her friend, Riva Siegel, a law professor from Yale. When Siegel read the SOUTH DAKOTA TASK FORCE REPORT, Siegel was quoted as saying that it is the greatest threat to *Roe v. Wade* she ever saw. She immediately launched a campaign against it, and she was instrumental in having a law review article published to challenge the policy behind the Informed Consent Law.

What is needed now is a new debate to show how abortion harms the rights, interests and health of women. We must articulate all of the reasons why abortion must be made illegal and all of the arguments that support the overturning of *Roe*. That argument includes a discussion of the facts that support the *stare decisis* argument.

That debate must take place now. If we don’t explain ourselves, our position will never be adopted.

The South Dakota Abortion Bill is a great vehicle for that debate. The election is a great opportunity to debate the issues, not only in South Dakota, but nationally. We must embrace that debate, and perfect our skills in messaging why we are right.

The admissions made by Planned Parenthood in the Informed Consent Law litigation places that debate in the best context for us. The evidence that will be educed in court will damage the pro-abortion position. The State has one year to prepare the defense of the Bill, and has the ammunition it needs from the Informed Consent Law litigation to defend the Bill against a wounded Plaintiff.

The upside, if *Roe* is overturned, is too great to ignore. The value of the public debate is too great to squander. Banning abortion is the morally correct thing to do. The incremental ban approach is strategically calculated to win the debates among the public and in the courts.

That noble and strategic effort should not be derailed, unless there is a clear, unequivocal and overriding articulated reason not to proceed. The burden of showing that the effort is wrong or harmful clearly rests with those who would promote stopping South Dakota’s efforts.

3. A RESPONSE TO ARGUMENTS ON WHY

THE ABORTION BILL SHOULD NOT GO FORWARD

In the Bopp Memo now being circulated in South Dakota and other pro-life circles, Messrs. Bopp and Coleson advance reasons why they think the proposed Georgia Human Life Amendment should not be brought. First, the Georgia Human Life Amendment is quite different from the proposed South Dakota Abortion Bill. Unlike the Georgia Human Life Amendment the proposed South Dakota Abortion Bill contains exceptions for rape, incest and health of the mother. Second, the incremental approach represented by the South Dakota Bill satisfies some of the applicable concerns set for the Bopp Memo. Finally, there are better reasons to enact the Abortion Bill than to do nothing at this time as the Bopp Memo may suggest.

(a) “Choosing Proper Terrain”

(i)

The argument is made that we must fight our fights on our terrain and avoid the extreme positions that do not enjoy public support. Bopp Memo, pp.5-6. We should not, it is said, make arguments for “personhood” and must avoid arguing that abortion can’t be available in the cases of rape.

Actually, the strength of the proposed South Dakota Abortion Bill is that the fight is actually on our terrain. In 2006, 44% of the voting public voted to ban abortions without exceptions for rape, incest or health of the mother. Numerous polls show that a majority of the people in South Dakota would have voted for a ban if it had the rape and incest exceptions. A poll this year showed 62% of the public would vote for an abortion prohibition if there were exceptions for rape, incest and health (as well as life) of the mother. We have every reason to believe that the Bill will be popular with the electorate.

The Bill adopts an incremental approach. It fights only on the ground on which we can win.

A further strength is that the good, pro-life people of South Dakota, in following their conscience, passed an Abortion Bill that was more morally just without those exceptions. The people rejected it, and thus the pro-life community can now in good conscience support the proposed Abortion Bill. South Dakota’s unique history, thus, allows the pro-life community to fight on favorable terrain popular with the public, while acting in good conscience.

(ii)

We must move on from partial birth abortion. We must now go to the next step – the threshold abortion prohibition bill. Overturning *Roe* is only a starting point, not an end point. If we have made the gains, it is time to use those gains and learn to advance our reasons why the Ban is just for women and children.

(b) “Current Make-up of the Court” Guarantees Defeat

It is suggested that defeat in the United States Supreme Court is guaranteed because of the make-up of the Court. Although such absolutist statements are suspect by their nature, there are a number of good reasons to reject this one.

(i)

Section B1 of this memorandum addressed the history of Justice Kennedy's votes on *Roe* and the interrelationship between presenting the right facts and arguments and the outcome of a case. It also touches on why the current Court is good enough in the right case. We add some further observations here.

Twenty years ago it was argued that we just present a case and argue the state's interest in fetal life and we win because the Republican president "packed the Court." Over the space of four years, we saw two Republican appointees vote to overturn *Roe*, than change their vote because the arguments were not good enough. Those who argue for the Court packing now supported presenting a ban argument to the Court eighteen years ago. The make-up of the Court is critical; but the "willingness" of the Court depends as much upon the facts and law of the case as it does the Judges. There are simply some Judges who would never support our position no matter what facts and law are presented (e.g. Stevens, Ginsberg), and there may be some Judges who will always be with us (e.g. Thomas and Scalia). But not every Judge falls into one or the other of those rigid camps.

To say the facts and law never matter, is not only too cynical and insulting to the Judges, it simply isn't true. Justice Kennedy has changed his position over time on a number of issues when the facts warranted it.

Justice Kennedy can be won back. He knows *Roe* was wrongfully decided and has been willing to say so in the past. That is the single most important requirement. The burden is on us to show him the facts and how harmful abortion is to women. He stood up to Ginsberg in *Gonzales*, and if he believed the *Casey stare decisis* analysis can be met, it is not unreasonable to think he could come back to his 1991 position. He is clearly disillusioned with the compromise he was talked into in *Casey*. We must show him why that compromise is unworkable.

(ii)

Opposition to the proposed Abortion Bill assumes there will be a better Court sometime in the future. On what basis can it be said there will be a better Court? The South Dakota Abortion Bill will not reach the U.S. Supreme Court for another four to five years. If a pro-life Republican is elected president in 2008, the Court, if it will be better, will be so by 2011. It is far more likely that a pro-abortion president will be elected, and the current Court will be the best Court we have for the next ten to fifteen years, and maybe beyond.

We can count on Justice Scalia now and maybe for the next five to eight years. But can it be guaranteed that he will be on the Court ten years from now at the age of 82?

We suggest that it is wrong to assume the Court will be better at any time in the next ten to

twelve years. It is wrong to tell the people of South Dakota not to act for fifteen years when the Court will probably be good enough for the right argument when the 2008 Abortion Bill reaches the Court.

(c) “Planned Parenthood May Win Attorney Fees”

Opponents argue that if South Dakota loses in Court, Planned Parenthood will be reimbursed its attorney fees. Bopp Memo at p.3. That is true in every case that was ever fought over abortion. Many cases were lost over small issues – the “incremental” issues. That was the cost of fighting the fight. Planned Parenthood doesn’t pocket the money. It goes to their attorneys.

When National Right to Life thought fighting the partial birth abortion cases was a good public debate, it was willing to lose many cases, and did so. Millions were paid in attorney fees over ten years in many cases. Yet, even though the PBA ban did not save a single life, the cost was justified because the cases advanced the debate. Yet there was no guarantee that any case would be won in the Supreme Court. Yet we agree that the PBA strategy was worth the cost.

In South Dakota, the gain is enormous and the chance of victory is good enough to justify the risk of paying attorney fees in one case. Overturning *Roe* will result in the cheapest way to save the lives of the children, when the number of lives saved is calculated.

(d) “You Risk Losing Another Decision”

The opponents said the guaranteed loss will make it so that there is another Court decision striking down a state statute. Bopp Memo at p.3. As a general proposition, if there is just another case it is meaningless because it really adds nothing to the debate if *Roe* was followed.

The risk of loss is an inherent risk of any litigation. But, without the litigation and taking any risks it poses, there can’t be a victory. We agree that a case that has little to gain and is poorly planned should not be brought. However, the South Dakota Abortion Bill is extremely well thought out, is a limited abortion prohibition that has the best chance in Court, and comes out of a state with the best history and best strategy for success.

If it turns out that when South Dakota reaches the U.S. Supreme Court there is no chance of obtaining five votes on the Court to overturn *Roe*, the pro-life wing of the Court will not vote to take it. The four pro-abortion members of the Court will not vote to take the case out of fear *Roe* could be overturned.

If the case is taken, it is far more likely that it would be taken to uphold the Abortion Bill, not the other way around. Which brings us to the last point raised by Messrs. Bopp and Coleson.

(e) “The Court May Adopt Justice Ginsberg’s Equal Protection Analysis”

The opponents state that they fear that if *Roe* is upheld as a result of South Dakota’s challenge, the Court: (1) may adopt Justice Ginsberg’s Equal Protection argument; and (2) if they

adopt that argument, it is worse for our position because it is harder to overturn the Ginsberg analysis than it is the *Roe-Blackmun* analysis. Bopp Memo, pp.3-4

It is difficult to take these asserted risks seriously. First, the opponents assert that the four Judges who dissented in *Gonzales v. Carhardt* already adopted Justice Ginsberg's Equal Protection argument. First, if that were actually true, there is nothing to really fear because a plurality – as the opponents view it – already adopted the feared Ginsberg analysis.

However, the dissenters cannot be said to have adopted that analysis. The Ginsberg dissent did not do an Equal Protection analysis and did not say that banning abortion violated the equal protection rights of the women. What she said was far more modest: “Thus, legal challenges to undo restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.” (Citing, Riva Siegel who fears the SOUTH DAKOTA TASK FORCE REPORT). That is not an equal protection analysis, and it is not a statement that a Ban Bill violates the Equal Protection Rights of the women.

We do understand that Justice Ginsberg does agree with Riva Siegel that the *Roe v. Wade* analysis should be discarded and replaced with her equal protection violation analysis. But there is no credible evidence that others would fully adopt that analysis. To do so would require, for instance, overruling about eight decisions in which Justice Stevens joined which held that states can clearly account for the differences in gender without running afoul of the Equal Protection Clause.

More importantly, the Equal Protection analysis would not be worse for us because it is a ridiculous argument. If Mr. Bopp's willing Court that he sees coming in the future would swat away the *Roe* analysis on any reasoning, they surely would swat away Ginsberg's silly equal protection argument.

Actually, Ginsberg pressing that equal protection argument might be good for our objectives. Justice Kennedy surely did not join her dissent in *Gonzales*, and clearly thinks it is ridiculous. If he thought it could be the law of the land, it is one more reason, along with all of the good facts and law South Dakota gives him, to go back to his old position of striking down *Roe*.

CONCLUSION

The people of the state of South Dakota are best positioned to advance the national dialogue for the sake of the lives of our children and the health of our mothers by enacting the proposed Abortion Bill that has been well-crafted and concurred in as to its form and enforceability by the South Dakota's well-respected Attorney General. There is no reason that people of the state of South Dakota should not now be invited to express the will of the people in this vital matter of life and death, sickness and health.

/s/ Samuel B. Casey

Samuel B. Casey

/s/ Harold J. Cassidy

Harold J. Cassidy

APPENDIX A

PROPOSED SOUTH DAKOTA ABORTION BILL
(FOR PUBLIC CIRCULATION & COMMENT ONLY)

**AN ACT TO PROTECT THE LIVES OF
UNBORN HUMAN BEINGS
AND THE INTERESTS OF PREGNANT
WOMEN,
BY PROHIBITING THE PERFORMANCE OF
ABORTION EXCEPT IN
CERTAIN CIRCUMSTANCES.**

FOR AN ACT ENTITLED. An Act to refer to a vote of the people a bill to regulate the performance of certain abortions, to reinstate the prohibition against certain acts causing the termination of the life of an unborn human being and to prescribe a penalty therefore.

**AN ACT TO PROTECT THE LIVES OF UNBORN HUMAN BEINGS
AND THE INTERESTS OF PREGNANT WOMEN,
BY PROHIBITING THE PERFORMANCE OF ABORTION EXCEPT IN
CERTAIN CIRCUMSTANCES.**

FOR AN ACT ENTITLED. An Act to refer to a vote of the people a bill to regulate the performance of certain abortions, to reinstate the prohibition against certain acts causing the termination of the life of an unborn human being and to prescribe a penalty therefore.

BE IT ENACTED BY THE PEOPLE OF SOUTH DAKOTA:

Section 1. The people of the State of South Dakota adopt the provisions of this Act, because of the following findings and conclusions:

- (1) That all induced abortions, whether surgically or chemically induced, terminate the life of an entire, unique, living human being, a human being separate from his or her mother, as a matter of scientific and biological fact;
- (2) That the State of South Dakota possesses a duty to protect the life of all human beings within the State, and it is a legitimate exercise of the State's power to protect the life of all human beings within the State including those human beings living *in utero*;
- (3) That submitting to an abortion subjects the pregnant woman to significant psychological and physical health risks, and that in the majority of cases there is neither the typical physician-patient relationship nor sufficient counseling between a pregnant woman contemplating submitting to an abortion and the physician who performs the abortion
- (4) That a pregnant woman possess certain intrinsic rights which enjoy affirmative protection under the Constitution of the United States, and under the Constitution and laws of the State of South Dakota, and that among these rights are the fundamental right of the pregnant woman to her relationship with her child, and her fundamental right to make decisions that advance the well-being and welfare of her child;
- (5) The State has a right and duty to protect the life of the unborn child, and to protect the life, health, and well-being of any pregnant woman within its jurisdiction, and it is therefore necessary to reasonably balance these interests to allow abortions only in certain circumstances which are set forth within this Act.
- (6) That the State has an established history of working to protect the life of the unborn child, and the life, health, and well-being of pregnant women within its jurisdiction.

Section 2. That chapter 22-17 be amended by adding thereto a NEW SECTION to read as follows:

Except as permitted by Section 3, 4, 5 or 6 of this Act, any person who knowingly performs any procedure upon a pregnant woman, or uses any instrument upon a pregnant woman, or administers any medicine or drug or substance or device to a pregnant woman, or prescribes or procures or sells any medicine or drug or substance or device for use by a pregnant woman, or employs any other means, with the intent of causing the termination of the life of an unborn human being, is guilty of performing an illegal abortion, which is a Class 4 felony.

Section 3. Life of the Pregnant Woman Exception. That chapter 22-17 be amended by adding thereto a NEW SECTION to read as follows

No person may be prosecuted under Section 2 of this Act if a licensed physician has made a judgment that an abortion is necessary to avert the death of the pregnant woman, unless in reaching that judgment the physician knowingly disregards accepted standards of medical practice. The basis of that judgment shall be specifically identified and documented in the woman's medical records.

Section 4. Health of the Pregnant Woman Exception. That chapter 22-17 be amended by adding thereto a NEW SECTION to read as follows

No person may be prosecuted under Section 2 of this Act if a licensed physician has made a judgment that an abortion is necessary because there is a serious risk of a substantial and irreversible impairment of the functioning of a major bodily organ or system of the pregnant woman should the pregnancy be continued and which risk could be prevented through an abortion, unless in reaching that judgment the physician knowingly disregards accepted standards of medical practice. The basis of that judgment shall be specifically identified and documented in the woman's medical records.

Section 5. Rape of the Pregnant Woman Exception. That chapter 22-17 be amended by adding thereto a NEW SECTION to read as follows

No person may be prosecuted under Section 2 of this Act if the woman has reported to the licensed physician that her pregnancy is the result of a rape as defined in § 22-22-1, in which she was the victim, and the physician has complied with Sections 7 and 8 of this Act.

Section 6. The Incest Exception. That chapter 22-17 be amended by adding thereto a NEW SECTION to read as follows

No person may be prosecuted under Section 2 of this Act if the woman has reported to the licensed physician that her pregnancy is the result of incest as defined in Section 14(3) this Act,; and the physician has complied with Sections 7 and 8 of this Act.

Section 7. Condition for Rape and Incest Exceptions. That chapter 22-17 be amended by adding thereto a NEW SECTION to read as follows

Any abortion performed pursuant to Sections 5 or 6 of this Act must be performed before the completion of the twentieth week following the date of the pregnant woman's last menstrual period, as determined in the physician, according to accepted standards of medical practice, and as confirmed by ultrasound. Any physician who knowingly disregards accepted standards of medical practice in making this determination is subject to the penalty in Section 2 of this Act.

Section 8. Reporting and Counseling Requirements. That chapter 22-17 be amended by adding thereto a NEW SECTION to read as follows

To assist victims of rape and incest and assist law enforcement in the investigation of rape and incest:

- (a) Before performing an abortion pursuant to Sections 5 or 6 of this Act, the physician or the physician's agent shall advise the woman that a report of the rape or incest must be made, and prior to performing the abortion shall report the rape or incest immediately by telephone or otherwise to the state's attorney or law enforcement of the county in which the rape or incest occurred, or, if the location is unknown, to the state's attorney or law enforcement of the county in which the report is made to the physician;
- (b) The report required by this section shall include the name, address, and date of birth of the woman, and, to the best of the woman's ability, the date or dates of the reported rape or incest, the location where it occurred, and either the name and address of the perpetrator, if known, or, if not known, a description of the perpetrator and, in the case of incest, a description of the relationship between the pregnant woman and the perpetrator.
- (c) Prior to the abortion, the physician or the physician's agent shall obtain the woman's consent to collect a buccal or other biological sample from the woman, and a tissue sample from the remains of the embryo or fetus, each sufficient to perform forensic DNA analysis. The physician shall collect, secure, clearly label and refrigerate these samples, and within 24 hours arrange with law enforcement to transfer custody of these samples;
- (d) The physician or the physician's agent shall provide the woman with the phone numbers and addresses of counseling services qualified in counseling victims of rape and incest in the area of her residence and also in the area in which the procedure is performed;
- (e) The physician shall document all the actions taken pursuant to this section and shall maintain copies of all the documents and consents as part of the woman's permanent medical records;
- (f) Nothing in this section limits a physician's duty to report any information required by any other provision of South Dakota law.

Section 9. That chapter 22-17 be amended by adding thereto a NEW SECTION to read as follows;

Each facility which performs abortions shall have a written policy on reporting rape and incest.

Section 10. That chapter 22-17 be amended by adding thereto a NEW SECTION to read as follows:

The Department of Health shall publish, within one hundred eighty days after the date this Act becomes law, forms to aid physicians in the accurate collection and reporting of information pursuant to this Act. Such forms will include the texts of § 22-22-1 and of the definition of incest in subpart 3 of section 14 of this Act and of § 25-1-6, and such other information as the department shall conclude is necessary or helpful and appropriate to aid physicians. The Department shall also provide, upon request, materials necessary to collect and preserve the biological samples required by this Act.

Section 11. That chapter 22-17 be amended by adding thereto a NEW SECTION to read as follows:

Nothing in section 2 of this Act prohibits the prescription, sale, use or administration of a contraceptive medicine, drug, substance or device, if prescribed, sold, used or administered prior to the time when it could be determined that the woman is pregnant through conventional medical testing, and if the contraceptive measure is prescribed or sold in accordance with manufacturer instructions.

Nothing in section 2 of this Act prohibits any person from assisting a pregnant woman in obtaining an abortion in any other state where such procedure is legal.

Section 12. That chapter 22-17 be amended by adding thereto a NEW SECTION to read as follows:

Whenever a physician is performing an abortion permitted by sections 3 or 4 of this Act, the physician shall make reasonable medical efforts under the circumstances to preserve both the life of the pregnant woman and the life of her unborn child in a manner consistent with accepted standards of medical practice. Any physician who knowingly disregards accepted standards of medical practice in failing to make such efforts, is subject to the penalty in Section 2 of this Act.

Section 13. That chapter 22-17 be amended by adding thereto a NEW SECTION to read as follows:

Medical treatment provided to the pregnant woman by a licensed physician which results in the accidental or unintentional injury or death of the unborn child is not a violation of this Act.

Nothing in this Act subjects the pregnant woman upon whom any abortion is performed or attempted to any criminal conviction and penalty for an unlawful abortion.

No good faith report of rape or incest made under this Act may provide the basis for any criminal prosecution against the woman making such a report.

Any woman making a report of incest who is eligible to obtain a legal abortion under Section 6 of this Act shall not be subject to prosecution for the sexual conduct resulting in the pregnancy.

Section 14. That chapter 22-17 be amended by adding thereto a NEW SECTION to read as follows:

Terms used in this Act mean:

- (1) "Pregnant", the human female reproductive condition of having a living unborn child within the pregnant woman's body, throughout the entire embryonic and fetal ages of the unborn child from fertilization to full gestation and child birth;
- (2) "Unborn human being" and "unborn child",[≡] an individual living member of the species *homo sapiens* throughout the entire embryonic and fetal ages from fertilization to full gestation and childbirth;
- (3) "Incest", an act of sexual penetration, as defined in § 22-22-2, in which the woman was less than 18 years of age at the time of sexual penetration and in which:
 - (a) the male performing the sexual penetration was related to the woman within the degrees of consanguinity within which marriages are, by the laws of this state, declared void pursuant to § 25-1-6, or
 - (b) the woman was the child of the spouse or former spouse of the male performing the sexual penetration.

Section 15. That chapter 22-17 be amended by adding thereto a NEW SECTION to read as follows:

Chapters 187 and 188 of the 2005 Session Laws shall take effect pursuant to section 7 of chapter 187, as amended by section 1 of chapter 188, only in the event that the provisions of section 2 of this Act are declared unconstitutional or its enforcement is temporarily or permanently restrained or enjoined by judicial order,

Section 16. That chapter 22-17 be amended by adding thereto a NEW SECTION to read as follows:

Nothing in the provisions of chapters 22-17 and 34-23A permit any action that is prohibited by this Act. To the extent that any provision of chapters 22-17 and 34-23A might be so construed, the provisions of this Act take precedence.

Section 17. That chapter 22-17 be amended by adding thereto a NEW SECTION to read as follows:

Nothing in this Act authorizes a physician to perform an abortion unless the physician

complies with all other applicable provisions of law, including the applicable provisions of chapter 34-23A.

Section 18. That chapter 34-23A be amended by adding thereto a NEW SECTION to read as follows:

Any physician who performs an abortion pursuant to section 3, 4, 5 or 6 of this Act shall submit a written statement to the Department of Health setting forth the following information as it relates to each abortion performed by the physician:

- (1) The section of this Act pursuant to which the abortion was performed;
- (2) All of the facts and circumstances upon which the physician relied in complying with all of the requirements and conditions of that section.

The written statement shall be submitted to the Department of Health at the end of each quarter of the year in which any abortion was performed by the physician. No statement made pursuant to this section may include the name of any pregnant woman having an abortion, but the physician must provide a copy of the patient's records with the patient's names redacted, if requested by the Department of Health in writing.

Section 19. Nothing in this Act repeals, by implication or otherwise, any provision not explicitly repealed.

Section 20. If any provision of this Act is found to be unconstitutional or its enforcement temporarily or permanently restrained or enjoined by judicial order, the provision is severable; and the other provisions of this Act remain effective, except as provided in other sections of this Act.

Section 21. This Act shall be known, and may be cited, as the _____ Act.