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Carhart v. Stenberg, 192 F.3d 1142

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Citation: 1999 U.S. App. LEXIS 23162

*192 F.3d 1142, *; 1999 U.S. App. LEXIS 23162, ***

No. 98-3245NE, Leroy H. Carhart, on behalf of himself and his patients obtaining abortions, Appellee, v. Donald Stenberg, in his official capacity as Attorney General for the State of Nebraska, Appellants, Mike Munch, in his official capacity as County Attorney for Sarpy County, and as a representative of all County Attorneys in Nebraska, Defendant, Gina Dunning, in her official capacity as Director of Regulation and Licensure of the Nebraska Department of Health and Human Services, and Charles Andrews, M.D., in his official capacity as Chief Medical Officer of Nebraska, Appellants, State of South Carolina; State of Idaho; State of Louisiana; State of Ohio; State of Pennsylvania; State of Rhode Island; State of South Dakota; and State of Utah, Amici Curiae, Family Research Council, Amicus Curiae. No. 98-3300NE, Leroy H. Carhart, on behalf of himself and his patients obtaining abortions, Appellee, v. Donald Stenberg, in his official capacity as Attorney General for the State of Nebraska, Appellee, Mike Munch, in his official capacity as County Attorney for Sarpy County, and as a representative of all County Attorneys in Nebraska, Appellant, Gina Dunning, in her official capacity as Director of Regulation and Licensure of the Nebraska Department of Health and Human Services; and Charles Andrews, M.D., in his official capacity Appellees, as Chief Medical Officer of Nebraska, Appellees, State of South Carolina; State of Idaho; State of Louisiana; State of Ohio; State of Pennsylvania; State of Rhode Island; State of South Dakota; and State of Utah, Amici Curiae, Family Research Council, Amicus Curiae.

Nos. 98-3245NE, 98-3300NE

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

192 F.3d 1142; 1999 U.S. App. LEXIS 23162

April 19, 1999, Submitted
 September 24, 1999, Filed

SUBSEQUENT HISTORY: Certiorari Denied January 14, 2000, Reported at: **2000 U.S. LEXIS 510.**

PRIOR HISTORY: [**1] On Appeal from the United States District Court for the District of Nebraska. 4:97CV3205. Honorable Richard G. Kopf.

DISPOSITION: Affirmed judgment of the District Court.

CASE SUMMARY

PROCEDURAL POSTURE: Defendants appealed United States District Court for District of Nebraska decision holding unconstitutional the Nebraska statute banning "partial-birth abortion" and awarding plaintiff his fees and costs. The county attorney appealed the award of attorney's fees against him.

OVERVIEW: Nebraska's governor signed into law Legislative Bill 23 (LB 23), prohibiting and criminalizing "partial-birth abortion." Partial-birth abortion was defined by the statute as including delivering "a substantial portion" of a fetus. "Substantial portion" was not defined. A Nebraska doctor filed suit against state officials, challenging the statute's constitutionality for placing an undue burden on doctors and patients and being too vague. The district court held LB 23 unconstitutional, enjoined its enforcement, and awarded attorney's fees against defendants. The state appealed the decision. The county attorney appealed the attorney's fees award. The appellate court affirmed, because LB 23 imposed an undue burden on a woman's right to choose to have an abortion by prohibiting the most common procedure for second-trimester abortions, dilation and evacuation. It also held it was not abuse of discretion to hold the county attorney liable jointly and severally for the attorney's fee award to plaintiff as prevailing party.

OUTCOME: Judgment affirmed, as statute banning "partial-birth abortion" placed undue burden on patients by banning the dilation and evacuation procedure, the most common second-trimester procedure. Plaintiff, as prevailing party, was properly awarded attorney's fees, and it was not abuse of discretion to hold county attorney liable, jointly and severally, with other defendants.

CORE TERMS: abortion, fetus, partial-birth, undue burden, uterus, fetal, ban, unborn child, substantial portion, dilation, cervix, vagina, woman, second-trimester, intact, extraction, kill, dismemberment, intentionally, evacuation, performing, partially, demise, vaginally, delivery, tissue, regulation, obstacle, arm, leg

CORE CONCEPTS - ♦ [Hide Concepts](#)

Constitutional Law : Substantive Due Process : Privacy

⚡ A woman has a constitutional right to choose whether to terminate a pregnancy.

Constitutional Law : Substantive Due Process : Privacy

⚡ Although a state cannot prohibit a woman from choosing to have an abortion, the state can promote the interest in potential human life and, after fetal viability, regulate and even proscribe abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

Constitutional Law : Substantive Due Process : Privacy

⚡ A state can enact abortion regulations at the pre-viability stage, so long as there is no undue burden placed on the woman seeking to have an abortion.

Constitutional Law : Substantive Due Process : Privacy

⚡ A regulation which has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus creates an undue burden and is invalid.

Civil Procedure : Appeals : Standards of Review : De Novo Review

⚡ The appellate court reviews the district court's conclusions of law de novo.

Governments & Legislation : Legislation : Construction & Interpretation

⚡ In interpreting a statute, it is the court's duty to give it a construction, if reasonably possible, that would avoid constitutional doubts. The court cannot, however, twist the words of the law and give them a meaning they cannot reasonably bear.

Constitutional Law : Substantive Due Process : Privacy

⚡ An abortion regulation that inhibits the vast majority of second trimester abortions would clearly have the effect of placing a substantial obstacle in the path of a woman seeking a pre-viability abortion.

Civil Procedure : Costs & Attorney Fees : Attorney Fees

✚ 42 U.S.C.S. § 1988 allows a plaintiff who has brought a successful suit under 42 U.S.C.S. § 1983 to recover, at the court's discretion, reasonable attorney's fees from the defendant. The statute provides that the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. 42 U.S.C.S. § 1988(b) (1994).

Civil Procedure : Costs & Attorney Fees : Attorney FeesCivil Procedure : Appeals : Standards of Review : Abuse of Discretion

✚ The appellate court reviews an award of attorney's fees for an abuse of discretion.

Civil Procedure : Costs & Attorney Fees : Attorney Fees

✚ A prevailing party in a 42 U.S.C.S. § 1983 suit should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.

COUNSEL: Counsel who presented argument on behalf of the appellant Sternberg in Case No. 98-3245 was L. Steven Grasz of Lincoln, Nebraska.

Counsel who presented argument on behalf of the appellant Munch in Case No. 98-3300 was Tamra Lynn Walz of Papillion, Nebraska.

Counsel who presented argument on behalf of the appellee was Simon Heller of New York, New York. In addition the names of Jennifer Lemberg of New York, New York, and Jerry M. Hug and Alan G. Stoler of Omaha, Nebraska, appear on the brief of the appellee.

JUDGES: Before RICHARD S. ARNOLD and WOLLMAN, n1 Circuit Judges, and MAGNUSON, n2 District Judge.

n1 The Hon. Roger L. Wollman became Chief Judge of this Court on April 24, 1999.

n2 The Hon. Paul A. Magnuson, Chief Judge, United States District Court for the District of Minnesota, sitting by designation.

OPINIONBY: RICHARD S. ARNOLD

OPINION: [*1144] RICHARD S. ARNOLD, Circuit Judge.

The State of Nebraska appeals a District Court n3 decision holding a Nebraska [*1145] statute banning "partial-birth abortion" unconstitutional. The District Court permanently enjoined enforcement of the statute and awarded attorney's fees and costs to the plaintiff. The County Attorney, named in the lawsuit in his official capacity and as a representative of all county attorneys, appeals the portion of the judgment awarding attorney's fees against him. For the following reasons, we affirm the judgment of the District Court.

-----Footnotes-----

n3 The Hon. Richard G. Kopf, United States District Judge for the District of Nebraska.

-----End Footnotes----- [**2]

It is important to have in mind that we deal here with a particular legal question: the validity, under the Constitution of the United States, of a certain Nebraska law. The law refers to "partial-birth abortion," but this term, though widely used by lawmakers and in the popular press, has no fixed medical or legal content. The closest thing we have to a medical definition comes from the American College of Obstetricians and Gynecologists (ACOG). The ACOG definition describes a method of abortion (commonly called dilation and extraction, or D&X) involving extraction, from the uterus and into the vagina, of all of the body of a fetus except the head, following which the fetus is killed by extracting the contents of the skull. Thereafter, the dead but otherwise intact

fetus is taken from the mother's body. Certainly this medical description is within the definition of "partial-birth abortion" contained in the Nebraska statute before us. The difficulty is that the statute covers a great deal more. It would also prohibit, in many circumstances, the most common method of second-trimester abortion, called a dilation and evacuation (D& E). Under the controlling precedents laid down by the [**3] Supreme Court, such a prohibition places an undue burden on the right of women to choose whether to have an abortion. It is therefore our duty to declare the statute invalid.

I.

On June 9, 1997, Nebraska's Governor signed into law Legislative Bill 23, a bill enacted by the Nebraska Legislature prohibiting "partial-birth abortion." The statute provides:

No partial-birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.

Neb. Rev. Stat. § 28-328(1) (1998). "Partial-birth abortion" is defined in the statute as:

an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery. For purposes of this subdivision, the term partially delivers vaginally a living unborn child before killing the unborn child means deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, [**4] for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child.

Id. § 28-326(9). The intentional and knowing performance of an unlawful "partial-birth abortion" is a Class III felony. See id. § 28-328(2). A physician who intentionally and knowingly performs an unlawful "partial-birth abortion" will automatically have his license to practice medicine in Nebraska suspended and revoked. See id. § 28-328(4).

Shortly after the passage of LB 23, Dr. LeRoy Carhart filed a complaint challenging the constitutionality of the statute. In response to the complaint, the District Court granted a temporary restraining order, followed by a preliminary injunction, suspending enforcement of the statute. After a trial on the merits, the District Court issued its final judgment, holding [*1146] LB 23 unconstitutional, and permanently enjoining enforcement of LB 23 against Dr. Carhart, his patients, and other similarly situated individuals.

Dr. Carhart challenged the constitutionality of LB 23 on two separate grounds. He argued that LB 23 imposed an undue burden on himself and his patients in two ways. [**5] First, because the D& X procedure is the safest procedure for some women in certain circumstances, banning that procedure places an undue burden on women seeking an abortion. Second, because LB 23 prohibits vaginally delivering a "substantial portion" of a fetus as part of an abortion procedure, the law bans the dilation and evacuation (D& E) procedure as well. Because the D& E procedure is the most widely used second-trimester abortion procedure, this ban also places an undue burden on women seeking to have an abortion. Dr. Carhart also challenged the law as being vague, arguing that it was unclear what "substantial portion" meant. The District Court agreed, holding both that the law created an undue burden for Dr. Carhart and his patients, and that the law was void for vagueness. Carhart v. Stenberg, 11 F. Supp. 2d 1099 (D. Neb. 1998). n4

- - - - -Footnotes- - - - -

n4 Because we are holding the law unconstitutional on undue-burden grounds, it is not necessary for us to discuss the vagueness issue. Nor is it necessary for us to discuss whether the law creates an undue burden by prohibiting the D& X procedure. The basis for our holding is the undue burden created by the ban of the D& E procedure.

-----End Footnotes----- [**6]

II.

We state the facts as found by the District Court. (The Court's findings are not clearly erroneous, and we therefore must accept them.) Dr. Carhart operates a family medical practice with a specialized abortion facility in Bellevue, Nebraska. He is licensed to practice medicine in Nebraska, as well as in seven other states. Dr. Carhart performs abortions in a clinic setting from a gestational age of three weeks n5 until fetal viability. The abortion procedures Dr. Carhart performs vary depending on the gestational age of the fetus as well as on various other medical factors. As we shall explain, two of the procedures Dr. Carhart performs are directly affected by LB 23's ban: dilation and evacuation (D& E) and intact dilation and evacuation or dilation and extraction (D& X). n6 Both are procedures for second-trimester abortions. LB 23 affects not only Dr. Carhart, but any doctor in Nebraska who performs the D& E or the D& X procedure, as well as that doctor's patients.

-----Footnotes-----

n5 Gestational age is measured from the first day of the woman's last menstrual period.

n6 The District Court's very thorough opinion details other abortion procedures as well. We see no need to repeat these descriptions and will therefore focus only on the procedures affected by LB 23.

-----End Footnotes----- [**7]

The most common method of abortion during the second trimester is the D& E procedure. A physician performing a D& E procedure gradually dilates the cervix and then removes the fetus and other products of conception. A report by the American Medical Association n7 describes the D& E procedure used from thirteen to fifteen weeks' gestation as follows:

Osmotic dilators are usually used. Intravenous fluids and an analgesic or sedative may be administered. A local anesthetic such as a paracervical block may be administered, dilating agents, if used, are removed, and instruments are inserted through the cervix into the uterus to remove fetal and placental tissue. Because fetal tissue is friable and easily broken, the fetus may not be removed intact. The walls of the uterus are scraped with a curette to ensure that no tissue remains. In pregnancies beyond 14 weeks, oxytocin is given intravenously [*1147] to stimulate the uterus to contract and shrink.

Ex. 7, at 8 (footnotes omitted). The AMA report also includes a description of a D& E procedure used from sixteen to twenty-four weeks' gestation. It includes some variations from the procedure used from thirteen to fifteen weeks. [**8] After the cervix has been dilated:

Fetal tissue is extracted through the use of surgical instruments, followed by extraction of placental tissue and subsequent curettage. Because the fetus is larger at this stage of gestation (particularly the head), and because bones are more rigid, dismemberment or other destructive procedures are more likely to be required than at

earlier gestational ages to remove fetal and placental tissue. Some physicians use intrafetal potassium chloride or digoxin to induce fetal demise prior to a late D& E (after 20 weeks), to facilitate evacuation.

Id.

-----Footnotes-----

n7 The parties stipulated to the admission of the American Medical Association's "Report of the Board of Trustees on Late-Term Abortion" at the preliminary injunction hearing. The report, which studied late-term abortion techniques, was admitted as Exhibit 7.

-----End Footnotes-----

When dismemberment occurs during a D& E procedure, it does not occur in utero. Prelim. Inj. Tr. 116; Trial Tr. 30-31. Dr. Carhart explained that during the [**9] D& E procedure, the dismemberment occurs after a part of the fetus has been pulled through the cervix, into the vagina:

Dr. Carhart: The dismemberment occurs between the traction of . . . my instrument and the counter-traction of the internal os of the cervix. . . .

Counsel: So the dismemberment occurs after you pulled a part of the fetus through the cervix, is that correct?

A: Exactly. Because you're using - The cervix has two strictures or two rings, the internal os and the external os, and you have - that's what's actually doing the dismembering. . . .

Q: When we talked before or talked before about a D& E, that is not - where there is not intention to do it intact, do you, in that situation, dismember the fetus in utero first, then remove portions?

A: I don't think so . . . I don't know of any way that one could go in and intentionally dismember the fetus in the uterus. If you grab an extremity and twist it, you can watch the whole fetus just twist. It takes something that restricts the motion of the fetus against what you're doing before you're going to get dismemberment.

Prelim. Inj. Tr. 116-17. Dr. Phillip Stubblefield, a witness for the [**10] plaintiff, testified that to dismember the fetus in utero a physician:

would have to introduce into the uterus something that would cut up the fetus, or else put in two forceps and try to dismember the fetus inside the uterus, which would increase considerably your chance that you're going to tear the uterus, perforate the uterus, seriously injure the woman. That is not done.

Trial Tr. 31.

In some circumstances, a physician performing a D& E procedure may attempt to remove the fetus intact. This procedure, known as an intact dilation and evacuation (intact D& E) or a dilation and extraction (D& X) can be used in abortions performed from sixteen to twenty-four weeks'

gestation. The AMA report describes the D& X procedure as:

deliberate dilatation of the cervix, usually over a sequence of days; instrumental conversion of the fetus to a footling breech; breech extraction of the body excepting the head; and partial evacuation of the intracranial contents of a living fetus to effect vaginal delivery of a dead but otherwise intact fetus.

Ex. 7, at 8 (footnotes omitted). The physician generally brings all of the fetus, except for the head, out of the [**11] uterus into the vagina. Trial Tr. 35-36; J.A. 1150. Because the cervix is not dilated enough to allow the head to pass through, the physician inserts an instrument into the fetal skull and evacuates the contents, collapsing the skull and allowing removal of an [**1148] intact fetus. Trial Tr. 35-36, 716; J.A. 1150.

Fetal death n8 does not always occur at the same stage of each D& E or D& X procedure. Prelim. Inj. Tr. 217-18. In both procedures, the physician brings a part of a living fetus out of the uterus into the vagina. n9 In a D& E procedure, fetal demise will occur after dismemberment. The time it takes for fetal demise to occur can, however, vary. Id. at 118-19. During a D& X procedure, fetal demise will occur some time after the physician has evacuated the cranial contents. In either procedure, fetal demise will generally occur within a matter of minutes, and after part of the fetus has been brought out of the uterus into the vagina. Id. at 112-13, 118-19.

-----Footnotes-----

n8 With the use of ultrasound, a physician can detect a fetal heartbeat to determine that a fetus is living. Trial Tr. 22-23. No agreed upon definition exists, however, as to what constitutes fetal demise. Id. Physicians determine the death of adults and children by measuring brain function. Id. In either a D& E or D& X procedure, any heartbeat or brain function will cease as the procedure progresses. Prelim. Inj. Tr. 113-14, 118-19. The parties to this case seem to agree that a living fetus is one whose heart is beating. [**12]

n9 In some cases the fetus is not alive at this stage. In those cases LB 23 would not apply because the abortion procedure would not involve the delivery of a "living" fetus as required by the statute.

-----End Footnotes-----

III.

The Supreme Court has held that a ♀woman has a constitutional right to choose whether to terminate a pregnancy. Roe v. Wade, 410 U.S. 113, 153, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973). ♀Although a state cannot prohibit a woman from choosing to have an abortion, the state can promote the interest in potential human life and, after fetal viability, n10 "regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." Roe, 410 U.S. at 164-65. ♀A state can also enact abortion regulations at the pre-viability stage, so long as there is no "undue burden" placed on the woman seeking to have an abortion. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 876, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992). ♀A regulation which "has the purpose [**13] or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" creates an undue burden and is invalid. Id. at 877.

-----Footnotes-----

n10 As we understand the record and the legal arguments in this case, no question is raised with respect to procedures performed on viable fetuses. The applicable legal standard is therefore the undue-burden rule of Casey.

----- -End Footnotes- -----

Several states have enacted statutes seeking to ban "partial-birth abortion." The precise wording of the statutes, and how far the statutes go in their attempts to regulate pre-viability abortions, differ from state to state. The results from constitutional challenges to the statutes, however, have been almost unvarying. In most of the cases that reached the federal courts, the courts have held the statutes unconstitutional.

The Sixth Circuit, the first United States Court of Appeals to consider the issue, n11 struck down an Ohio statute which [*1149] attempted to ban the D& X procedure. Women's Medical Professional Corporation v. Voinovich, 130 F.3d 187, 190 (6th Cir. 1997). [**14]

----- -Footnotes- -----

n11 The Fourth and Seventh Circuits have also heard appeals on this issue. In the Fourth Circuit, Judge Luttig, sitting as a single judge, granted the State of Virginia's stay application after a District Court granted a preliminary injunction enjoining enforcement of the state's partial-birth abortion ban. Richmond Medical Center for Women v. Gilmore, 144 F.3d 326, 327 (4th Cir. 1998) (Luttig, J., in chambers). On July 16, 1999, however, after trial on the merits, the District Court struck down the Virginia statute. Richmond Medical Center for Women v. Gilmore, No. 3: 98CV309 (E. D. Va. Jul. 16, 1999). The Seventh Circuit reversed a lower court's decision denying Planned Parenthood of Wisconsin's motion for a preliminary injunction against enforcement of a Wisconsin statute banning partial-birth abortion. Planned Parenthood of Wisconsin v. Doyle, 162 F.3d 463, 471 (7th Cir. 1998). After a trial on the merits, the District Court upheld the constitutionality of the statute. Planned Parenthood of Wisconsin v. Doyle, 44 F. Supp. 2d 975 (W. D. Wis. 1999).

----- -End Footnotes- ----- [**15]

The statute specifically banned only the D& X procedure: "No person shall knowingly perform or attempt to perform a dilation and extraction procedure upon a pregnant woman." Ohio Rev. Code Ann. § 2919.15(B) (1996). The statute defined dilation and extraction as "the termination of a human pregnancy by purposely inserting a suction device into the skull of a fetus to remove the brain." Id. § 2919.15(A). The Court held, however, that the statutory definition of the prohibited abortion method included both the D& E and D& X procedures. The D& E procedure sometimes requires a physician to "compress the head by using suction to remove the intracranial contents." Voinovich, 130 F.3d at 198. The Court held that because the D& E procedure is the most common method of second-trimester abortions, the statute created an undue burden on women seeking second-trimester abortions. Id. at 201. The legislature was aiming at the D& X procedure, but the language of the statute included a definition which encompassed the D& E procedure as well.

A number of district courts have also addressed the constitutionality of state statutes banning "partial-birth abortion." [**16] " Only one has upheld such a statute. See Planned Parenthood of Wisconsin v. Doyle, 44 F. Supp. 2d 975 (W. D. Wis. 1999). The other district courts faced with the issue have all held the statutes unconstitutional. See Causeway Medical Suite v. Foster, 43 F. Supp. 2d 604 (E. D. La. 1999) (partial-birth abortion act created substantial obstacle in path of women seeking safe abortion and broad language creating confusion and ambiguity rendered Act unconstitutionally vague); Planned Parenthood of Central New Jersey v. Verniero, 41 F. Supp. 2d 478 (D. N.J. 1998) (partial-birth abortion act void for vagueness because persons of ordinary intelligence must guess at meaning of phrases such as "partially vaginally delivers" and "substantial portion"); Eubanks v. Stengel, 28 F. Supp. 2d 1024 (W. D. Ky. 1998) (partial-birth abortion act created undue burden because overbroad language banned procedures necessary to guarantee right to choose to have abortion); Hope Clinic v. Ryan, 995 F. Supp. 847 (N. D. Ill. 1998) (partial-birth abortion act void for vagueness because it failed to define conduct proscribed and created [**17] undue burden because it had potential effect of banning most common and safest abortion procedures); Evans v. Kelley, 977 F. Supp. 1283 (E. D. Mich. 1997) (partial-birth abortion statute vague because ambiguous and susceptible to various interpretations and overbroad because it would operate as substantial obstacle to woman's right to choose to have

abortion).

IV.

The District Court in Nebraska joined the majority of the courts that have considered the issue, holding that the statute enacted by the Nebraska Legislature attempting to ban "partial-birth abortion" could not withstand constitutional scrutiny. ¶ We review the District Court's conclusions of law de novo. See Planned Parenthood of Greater Iowa v. Atchison, 126 F.3d 1042, 1048 (8th Cir. 1997).

In considering a challenge to the facial validity of an abortion regulation, we follow the standard set out in Casey. See Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452, 1458 (8th Cir. 1995). If the regulation operates "as a substantial obstacle to a woman's choice to undergo an abortion 'in a large fraction of the cases in which [it] is relevant, . . . [i] [*18] t is an undue burden, and therefore invalid. ' " Id. (quoting Casey, 505 U.S. at 895).

The District Court determined that LB 23 created an undue burden because in many instances it would ban the most common procedure for second-trimester abortions, [*1150] the D& E. The State argues that LB 23's ban on partial-birth abortion prohibits only the D& X procedure, and not the D& E. Under the statute, a person is prohibited from "deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child." Neb. Rev. Stat. § 28-326(9) (1998). The State argues that the Nebraska Legislature's intent was to ban only the D& X procedure. The language of the statute, however, describes a procedure which encompasses more than just D& X.

¶ In interpreting the statute, it is our duty to give it a construction, if reasonably possible, that would avoid constitutional doubts. We cannot, however, twist the words of the law and give them a meaning they cannot reasonably bear. The crucial problem is the term [*19] "substantial portion," which is nowhere defined in the statute. What the term means for the purposes of LB 23 has been debated at length, both in the record before us and on the floor of the Nebraska Legislature. But if "substantial portion" means an arm or a leg - and surely it must - then the ban created by LB 23 encompasses both the D& E and the D& X procedures. We agree with the District Court's assessment that "in any sensible and ordinary reading of the word, a leg or arm is 'substantial. ' " Carhart v. Stenberg, 11 F. Supp. 2d 1099, 1129 (D. Neb. 1998). In the D& E procedure, the physician often inserts forceps into the uterus, grasps a part of the living fetus, and pulls that part of the fetus through the cervix. That part of the fetus is commonly an arm or a leg. Prelim. Inj. Tr. 117-18; Trial Tr. 31. LB 23 bars intentionally bringing a substantial portion of a living fetus into the vagina for purposes of performing a procedure that will kill the fetus. A physician who brings an arm or a leg into the vagina as part of the D& E procedure therefore violates the statute.

The State argues that the statute's scienter requirement limits the statute's scope. The [*20] partial vaginal delivery of a substantial portion of the living fetus must be done "deliberately and intentionally." The statute applies, according to the State, only to the deliberate and intentional performance of a "partial-birth abortion." The State defines the proscribed procedure as involving the intentional "1) partial delivery of a living fetus vaginally, 2) killing the fetus and 3) completing the delivery." Appellant's Br. 66-67. But the D& E procedure involves all three of those steps. The physician intentionally brings a substantial part of the fetus into the vagina, dismembers the fetus, leading to fetal demise, and completes the delivery. A physician need not set out with the intent to perform a D& X procedure in order to violate the statute. It is enough that the physician have the intent to deliver vaginally a substantial portion of a living fetus, and that occurs in the D& E procedure.

Additionally, the person performing the procedure must do so with the purpose of performing a procedure that the person knows "will kill the unborn child and does kill the unborn child." Neb. Rev. Stat. § 28-326(9) (1998). In any abortion procedure the physician performing the procedure

[**21] does so knowing, and with the purpose, that the procedure will kill the fetus. The language of LB 23 describes a method of abortion that includes the D& E procedure, and the intent requirement of the statute does not work to protect physicians who perform the D& E procedure from violating the statute. LB 23 not only prohibits the D& X procedure, but the D& E procedure as well.

V.

Having determined that LB 23 bans the D& E procedure, we turn now to the question of whether such a ban imposes an [*1151] undue burden on women seeking second-trimester abortions.

In Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 79, 49 L. Ed. 2d 788, 96 S. Ct. 2831 (1976), the Supreme Court held unconstitutional a statute proscribing the use of saline amniocentesis as a method of abortion. Saline amniocentesis was then the most commonly used procedure for abortions performed after the first trimester. Id. at 78. By prohibiting the use of the procedure, the statute would effectively inhibit the vast majority of abortions performed after the first trimester. Id. at 79. Danforth was decided under the trimester framework of Roe. Although [**22] Casey changed that framework, the ban in Danforth meets the undue-burden standard of Casey. See Voinovich, 130 F.3d at 201: ¶ "An abortion regulation that inhibits the vast majority of second trimester abortions would clearly have the effect of placing a substantial obstacle in the path of a woman seeking a pre-viability abortion." LB 23 does not limit all second-trimester abortions. It does, however, prohibit the most common procedure for second-trimester abortions and, in doing so, imposes an undue burden on a woman's right to choose to have an abortion.

VI.

In its final argument, the State suggests that Roe and Casey do not apply to LB 23 because Roe and Casey apply only to the "unborn" and do not prohibit states from protecting partially born human beings. The State argues that "the Supreme Court has left protection in place for the partially born." Appellant's Br. 71. The State also suggests that because the partial-birth abortion procedure involves a fetus which is more outside of the uterus than inside, the fetus is not unborn, sufficiently distinguishing this case from Roe and Casey. The phrase "partially born" is new to [**23] us. Apparently the State uses it to describe a process in which the fetus is killed when it is more outside the womb than inside. If we assume that there is such a legal category, and that, as the State argues, the rule of Roe v. Wade does not apply to it, the argument is still unavailing on the record before us in this case. As we have explained, the Nebraska statute is violated when an arm or a leg of a fetus that is still alive is pulled out of the womb as part of the D& E abortion procedure. In such a situation, although a substantial part of the fetus, as defined by the Nebraska law, has been extracted from the uterus, it cannot be said that the fetus as a whole is more outside the uterus than inside. In addition, we think that the word "born" refers most naturally to a viable fetus, one that is capable of surviving outside the mother. The Nebraska statute is not limited to viable fetuses. Indeed, as we have observed, both the proof and the legal arguments in this case seem to be exclusively about nonviable fetuses. So if there is a separate legal category for the "partially born," and we express no view on that question, we do not see how it could be relevant to the present [**24] case.

VII.

Mike Munch, in his official capacity as County Attorney for Sarpy County, appeals the District Court's award of attorney's fees against him. After the District Court held LB 23 unconstitutional, Dr. Carhart sought, and was awarded, attorney's fees, pursuant to ¶ 42 U.S.C. § 1988. Section 1988 allows a plaintiff who has brought a successful suit under 42 U.S.C. § 1983 to recover, at the court's discretion, reasonable attorney's fees from the defendant. The statute provides that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b) (1994). Because Dr. Carhart was a prevailing party, the District Court appropriately granted his request for attorney's fees.

[*1152] Mr. Munch is the County Attorney in Sarpy County, the county in which Dr. Carhart practices medicine. Dr. Carhart named Mr. Munch in the lawsuit in his official capacity as Sarpy County Attorney and as a representative of all county attorneys in Nebraska. Mr. Munch agrees that Dr. Carhart was a prevailing party. He argues, however, that the award [*25] of attorney's fees should not apply against him. ¶ We review the award of attorney's fees for an abuse of discretion. See Hatfield v. Hayes, 877 F.2d 717, 719 (8th Cir. 1989).

¶ A prevailing party in a § 1983 suit "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." Id. According to Mr. Munch, the special circumstances in this case are that as a government official he is bound to follow state law and enforce LB 23, and that he did not actively participate in the lawsuit. The short answer is that governmental officials are not bound to follow state law when that law is itself unconstitutional. Quite the contrary: in such a case, they are bound not to follow state law. It is true that a prosecuting attorney may not know for certain whether a state law is valid or not, and that he may feel obliged to enforce the law until a determination as to its validity has been made. This, however, is not a special circumstance justifying the denial of the customary award of fees. Presumably it will always be true that state officials enforcing a law or otherwise defending state action will believe, or at least hope, that [*26] the law or action in question will be upheld against a federal constitutional attack. The point of § 1988 is that such officials proceed at their peril. If in fact they are wrong, and the law they are enforcing turns out to be invalid, § 1988 puts the financial burden on the state officials. The judgment of Congress is that the burden rests more properly on them than on the party who has been wronged by the application of an invalid law.

In addition, although Mr. Munch has not had the opportunity to enforce LB 23, he has made it clear that he would prosecute under the statute. J.A. 646-47. Awarding fees against officials bound to enforce the law is a "run-of-the-mill occurrence[]." Supreme Court of Virginia v. Consumers Union of the United States, 446 U.S. 719, 739, 64 L. Ed. 2d 641, 100 S. Ct. 1967 (1980). Additionally, Mr. Munch has the discretion to choose when to prosecute. We find no merit in this argument.

Mr. Munch's argument that he did not actively participate in the lawsuit and that he should not, therefore, be responsible for the attorney's fees, is equally without merit. His role in the proceedings may have been minor, but this does not excuse him [*27] from having to share in the actual costs. He relied on his co-defendants to present their defense of the constitutionality of LB 23, a statute he has indicated he would enforce, and he cannot now avoid helping to pay the prevailing party's attorney's fees.

The District Court did not abuse its discretion in holding Mr. Munch liable, jointly and severally with the other defendants, for the attorney's fee award. How the defendants choose to allocate the fees among themselves is entirely up to them.

VIII.

For the foregoing reasons, we affirm the judgment of the District Court.

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Public Papers of the Presidents

February 10, 1996

CITE: 32 Weekly Comp. Pres. Doc. 260**LENGTH:** 1334 words**HEADLINE:** Statement on Signing the National Defense Authorization Act for Fiscal Year 1996**BODY:**

Today I have signed into law S. 1124, the "National Defense Authorization Act for Fiscal Year 1996." This Act authorizes appropriations for Department of Defense military activities, including military construction, and defense activities of the Department of Energy. It also provides, extends, or amends various authorities relating to national defense programs and activities.

I vetoed the original version of this legislation, H.R. 1530, on December 28, 1995. Since that time, the Congress has addressed my three central national security concerns about the earlier bill. First, the Congress deleted the provisions requiring deployment by 2003 of a costly missile defense system designed to defend against a long-range missile threat, which our intelligence community does not foresee in the next decade. Such a course of action would have prevented us from deploying the best possible technology if a real threat were to emerge at a later time. Moreover, implementation of the system called for in H.R. 1530 would probably have been inconsistent with the Anti-Ballistic Missile Treaty.

Second, the Congress deleted the requirement that the President submit a supplemental appropriations request within a defined time period after commencement of certain contingency and other operations, such as the ongoing military operations in Bosnia. The Act does, however, continue to contain unwarranted restrictions on the manner in which such operations may be funded.

Third, the Congress deleted the restriction on the President's authority to make and implement decisions relating to the operational or tactical control of elements of the U.S. armed forces, a restriction which clearly infringed on the President's constitutional authority as Commander in Chief.

The Act also includes a number of provisions of great importance to our national defense and to the men and women in our armed forces, authorizing critical defense programs to be continued and new ones to be initiated. The Act authorizes the full 2.4% increase in pay and allowances for our military personnel. It authorizes the Military Housing Privatization Initiative, which provides new authority to acquire and improve military housing and supporting facilities through the use of private expertise and capital. It authorizes necessary military construction and NATO infrastructure programs. It continues the Department of Energy's science-based Stockpile Stewardship program. It provides for the sale of the Elk Hills Naval Petroleum Reserve.

The Act also contains the Administration's proposal to allow the United States to extradite indicted

war criminals and provide evidence directly to the International War Crimes Tribunals for the Former Yugoslavia and Rwanda -- a provision that should encourage others to cooperate fully with the War Crimes Tribunal.

And, this legislation makes important strides in the area of procurement reform, which will help produce a better-equipped military for less money. The legislation gives agencies enhanced authority and flexibility in their use of computers and telecommunications, while insisting on accountability. Consistent with the Administration's efforts under the National Performance Review to create a government that works better and costs less, the Act encourages agencies to adopt the best practices of successful companies in the private sector. And the Act includes measures to facilitate the purchase of commercially-available goods and services, to streamline and clarify procurement integrity laws, and to substantially improve the process for resolving bid protests for information technology.

All of these measures are important to the effective and efficient operation of our armed forces. I regret, however, that this legislation continues to contain a number of provisions, identified in my earlier veto message, that will adversely affect the Defense Department's ability to carry out its national defense mission.

First, I am strongly opposed, as is the Department of Defense, to the provision requiring the discharge of military personnel living with the Human Immunodeficiency Virus (HIV), where such discharge is not required by any medical, public health, or military purpose. This provision is blatantly discriminatory and highly punitive to service members and their families. People living with HIV can and do lead full and productive lives, provide for their families, and contribute to the well-being of our Nation. The men and women affected by this provision are ready, willing and able to serve their country with honor and should be allowed to continue to do so.

Therefore, I strongly support the current efforts in the Congress to repeal this provision before a single service member is discharged from the armed forces.

Moreover, the Secretary of Defense and the Chairman of the joint Chiefs of Staff have advised me that the arbitrary discharge of these men and women would be both unwarranted and unwise; that such discharge is unnecessary, as a matter of sound military policy; and that discharging service members deemed fit for duty would waste the Government's investment in the training of these people and would be disruptive to the military programs in which they play an integral role.

I agree.

Consequently, I have concluded that this discriminatory provision is unconstitutional. Specifically, it violates equal protection by requiring the discharge of qualified service members living with HIV who are medically able to serve, without furthering any legitimate governmental purpose. As President Franklin D. Roosevelt said in 1943, explaining his decision to sign an important appropriations bill notwithstanding the fact that it contained a provision that infringed upon individual rights, "I cannot . . . yield without placing on record my view that this provision is not only unwise and discriminatory, but unconstitutional."

In accordance with my constitutional determination, the Attorney General will decline to defend this provision. Instead, the Attorney General will inform the House and Senate of this determination so that they may, if they wish, present to the courts their argument that the provision should be sustained.

Further, to mitigate any unfair burden that this legislation could place on these service members and their families pending any repeal or judicial invalidation, I have directed the Secretaries of Defense, Veterans Affairs, and Transportation, in carrying out the provisions of this Act, to take all steps necessary to ensure that these service members receive the full benefits to which they are entitled -- including, among other things, disability retirement pay, health care coverage for their families and transition benefits such as vocational education.

I am troubled by another provision in this Act, which restricts the ability of service women and military dependents to obtain privately-funded **abortions** in military facilities overseas. I remain firmly opposed to this provision. In many countries, these U.S. facilities provide the only accessible safe source for these medical services. I will support congressional efforts to repeal this and a similar provision that became law in the "Department of Defense Appropriations Act, 1996."

Finally, I note that section 1404 of the Act expresses the sense of the Congress that the Secretary of Defense should not take any steps toward dismantling or retiring specific strategic nuclear delivery systems until the START II Treaty enters into force, and it prohibits obligating or expending funds in fiscal year 1996 for such steps. Reading the provisions of section 1404 together, I interpret the section to prohibit obligations or expenditures only before the START II Treaty enters into force. The explanation of Section 1404 in the conference report supports this interpretation.

William J. Clinton

The White House,

February 10, 1996.

NOTE: S. 1124, approved February 10, was assigned Public Law No. 104-106.

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Public Papers of the Presidents

April 26, 1996

CITE: 32 Weekly Comp. Pres. Doc. 726**LENGTH:** 2005 words**HEADLINE:** Statement on **Signing** the Omnibus Consolidated Rescissions and Appropriations Act of 1996**BODY:***April 26, 1996*

Today I have signed into law H.R. 3019, the "Omnibus Consolidated Rescissions and Appropriations Act of 1996."

This bill helps us move toward a balanced budget in a way that honors our Nation's values by protecting our commitments to education and training, the environment, law enforcement, science and technology, and national service. It restores \$ 5.1 billion of the \$ 8.1 billion I had sought for these priorities over levels in the appropriations bills that I had rejected. In addition, H.R. 3019 provides emergency disaster funding as well as funding for our troops in Bosnia and for the furtherance of the Middle East peace process.

We should have reached this conclusion 7 months ago, at the beginning of the fiscal year instead of more than halfway through it. Unfortunately, the Congress passed versions of the appropriations bills that were far outside of the mainstream, leaving me no choice but to veto them.

Rather than move quickly to reach a compromise such as the one achieved with this legislation, the Congress shut the Government down twice and then I had to sign a record 13 continuing resolutions funding the Government.

The extent of conflict and delay was unprecedented. It should never happen again.

Nonetheless, 7 months later, we have a bill we can all be proud of, one that achieves savings, protects investments, and avoids outcomes that could have been disastrous for our environment and our people.

For example, the bill eliminates, or permits me to suspend, the most egregious legislative riders that the Congress had sought to attach to the appropriations bills, including those that would have blocked enforcement of some of the Nation's key environmental laws. These riders reflected a philosophy of disregard for our environment that the American people and bipartisan majorities in previous Congresses and Administrations had long ago rejected.

At my insistence the Congress dropped the rider that would have prevented the Environmental

Protection Agency (EPA) from using its authority to protect our Nation's wetlands.

Likewise, this bill provides me the authority to suspend three other riders -- authority that I invoked immediately after signing this legislation. If I had not suspended these riders, they would have:

- * overridden existing environmental laws and led to unsustainable levels of timber cutting in Alaska's Tongass National Forest;
- * drastically undermined the level of protection provided to the Mojave National Preserve by the 1994 California Desert Protection Act; and
- * prohibited proposed or final listing actions by the Departments of the Interior and Commerce under the Endangered Species Act, which could have resulted in a greater risk of extinction of some of the over 400 species that are currently either proposed for listing or for which proposed listings are awaiting evaluation.

At my request, the bill also deletes the measure contained in the Senate- and House-passed Interior appropriations bills that would have extended the repeal of environmental laws and allowed the clear-cutting of old growth trees for 3 years or more. That authority is currently set to expire on September 30 of this year, just 5 months away. I am disappointed, however, that the Congress was unwilling to support an immediate repeal of these provisions, despite the fact that, by imperiling salmon and other species, these provisions threaten the environment and economy of the region.

The bill also funds important programs that the House or the Senate -- or both -- had sought to eliminate.

The Congress, in a bill I vetoed, sought to kill AmeriCorps, the National Service program. This bill retains it, as I had insisted, funding the Corporation for National and Community Service at \$ 402 million. Through National Service, we will continue to allow young Americans to help address vital needs in their communities, such as health care, crime prevention, and education, while earning a monetary award to help them pursue additional education or training.

The House sought to terminate Goals 2000, which is providing schools throughout the country with the resources to improve teacher training and raise academic standards to prepare our children for the 21st Century. This bill restores funding for Goals 2000.

In another bill I vetoed, the Congress sought to end the Community Oriented Policing Services (COPS) program, the commitment I made with the previous Congress to put 100,000 additional police officers on the streets of our cities and towns by the year 2000. At my insistence, that program is continued. As a result, we remain on track for fulfilling our commitment, with 45,000 police officers funded by the end of this fiscal year, including 19,000 provided by this legislation. These police are working hand-in-hand with their communities to fight crime. Crime is down in many communities across the Nation, and we can make further progress through the COPS program and similar efforts.

In the same bill that I vetoed, the Congress proposed to end the Department of Commerce's Advanced Technology Program (ATP), an integral part of my civilian technology strategy to promote economic growth. Adequate funding is provided for that program, while proposed language that would have prohibited new grants was deleted. ATP provides an effective mechanism for augmenting U.S. economic growth through highly-leveraged, industry-led research and development. It is a rigorously competitive, cost-shared program that fosters technology development, promotes industrial alliances, and creates jobs. The continuation of a strong ATP is a fitting tribute to the late Secretary Ron Brown, who deserves so much credit for making ATP what it is today.

Other programs or agencies that one or both houses sought to end, but which this bill restores, include the Community Development Financial Institutions program, the Summer Youth jobs program, and the Council on Environmental Quality.

Very importantly, the bill provides \$ 22.8 billion for the Education Department. I am pleased that the Congress restored critical education programs -- among my highest priorities to levels near or above the fiscal 1995 levels. The restorations include important funding for Title I -- Education for the Disadvantaged (which the House had sought to cut by \$ 1.2 billion), Goals 2000, Safe and Drug-Free Schools, School-to-Work, and Education Technology.

This bill also ensures that colleges, universities, and vocational schools can continue to choose the Federal student loan program -- either the new Federal Direct Student Loan Program or the bank-based guaranteed student loan program -- that best serves the needs of their students and ensures that students have access to the most flexible student loan repayment provisions, including income-contingent repayment. Institutions of higher education that now participate in the program or have planned to participate in July 1996 will be able to do so; other schools that wish to participate can enroll without facing limits on the program. Students with guaranteed student loans who want access to income-contingent repayment will be able to switch into the Direct Loan program. The House had sought to place a severe cap on the Direct Loan program, a step that would have had the effect of killing in its infancy an effort that has benefited students, colleges and universities, and taxpayers alike.

The bill also restores other programs to close to, or above, last year's levels that at least one house of Congress had sought to cut deeply. These include Head Start, Department of Labor worker protection programs, and payments to international organizations for peacekeeping and other programs. To help finance these priorities, the bill provides new debt collection authorities, calls for selling the United States Enrichment Corporation, and cuts Government overhead.

The Congress, also at my insistence, dropped from the bill the most seriously objectionable language provisions affecting the Education Department. The Congress also eliminated controversial language affecting Goals 2000, paving the way for renewed bipartisan support for this program.

The bill provides \$ 6.5 billion for the EPA. The cuts originally proposed by the House for the EPA would have crippled its ability to protect the health of families throughout the Nation. I am pleased that the Congress deleted or modified other objectionable legislative riders, including restrictions on the size of the diplomatic presence in Vietnam, the District of Columbia school voucher provision, and a measure that could have resulted in bans on the use of Medicaid funds for **abortions** for victims of rape or incest.

I am also pleased that the Congress dropped political advocacy disclosure provisions. These provisions could have interfered with the First Amendment rights of such nonprofit organizations as the Girl Scouts, the National Conference of Catholic Bishops, and the American Red Cross.

I commend the Congress for repealing the language in the 1996 Defense Authorization Act that unfairly required the discharge of military personnel with HIV.

I am disappointed that the Congress chose to modify the conditions under which prison grant monies are distributed to the States. The Congress carefully crafted a distribution mechanism just 2 years ago to ensure that States implementing "truth in sentencing" would be rewarded for doing so. That mechanism is in place and has no need for change. These program changes will significantly delay getting these resources to the places they are needed most.

I note with regret the other objectionable legislative riders that remain in the bill.

They include a provision intended to allow the construction of a third telescope on Mt. Graham, Arizona, affecting the Mt. Graham red squirrel, Native American cultural lands, and the **abortion** accreditation provision.

While I am disappointed that the Congress chose to reduce funding for the Legal Services

Corporation, I am pleased that the bill assures continued funding of legal services programs for all eligible populations, including migrants.

I am also disappointed that the Congress did not approve my request to increase funding by \$ 250 million for our anti-drug initiative. But I am pleased that the conferees stated their intent to provide additional funds for these important programs in FY 1997, ensuring that we can continue our anti-drug effort at full strength.

Unfortunately, the Congress did not include legislation I had sought to stabilize the Savings Association Insurance Fund. It is important for the Congress to take action on this issue quickly so that we can put the thrift crisis behind us without imposing any further costs on the taxpayers.

In addition, I note that section 119(a) of the Department of the Interior and Related Agencies Appropriations Act, 1996, contains a legislative veto, which would be unconstitutional under *INS v. Chadha* (462 U.S. 919) (1983). However, because I am suspending section 119(a) pursuant to section 119(b), the constitutional problem will be avoided.

With regard to defense, this bill also permits the Federal Government to undertake a multi-year procurement of the C-17 aircraft, the critical next-generation military transport. The C-17 will greatly enhance our ability to respond to crises around the world; buying it this way will save hundreds of millions of dollars for the taxpayers.

This bill represents true compromise and bipartisan cooperation. Clearly, when we work together we can enact good legislation for the American people.

With this in mind, we should build on our efforts here and move on to the larger challenge of balancing the budget over the next 7 years. The American people deserve a balanced budget, and we should give it to them.

William J. Clinton

The White House,
April 26, 1996.

NOTE: H.R. 3019, approved April 26, was assigned Public Law No. 104-134.

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February 10, 1996

CITE: 32 Weekly Comp. Pres. Doc. 260**LENGTH:** 1334 words**HEADLINE:** Statement on Signing the National Defense Authorization Act for Fiscal Year 1996**BODY:**

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I vetoed the original version of this legislation, H.R. 1530, on December 28, 1995. Since that time, the Congress has addressed my three central national security concerns about the earlier bill. First, the Congress deleted the provisions requiring deployment by 2003 of a costly missile defense system designed to defend against a long-range missile threat, which our intelligence community does not foresee in the next decade. Such a course of action would have prevented us from deploying the best possible technology if a real threat were to emerge at a later time. Moreover, implementation of the system called for in H.R. 1530 would probably have been inconsistent with the Anti-Ballistic Missile Treaty.

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Third, the Congress deleted the restriction on the President's authority to make and implement decisions relating to the operational or tactical control of elements of the U.S. armed forces, a restriction which clearly infringed on the President's constitutional authority as Commander in Chief.

The Act also includes a number of provisions of great importance to our national defense and to the men and women in our armed forces, authorizing critical defense programs to be continued and new ones to be initiated. The Act authorizes the full 2.4% increase in pay and allowances for our military personnel. It authorizes the Military Housing Privatization Initiative, which provides new authority to acquire and improve military housing and supporting facilities through the use of private expertise and capital. It authorizes necessary military construction and NATO infrastructure programs. It continues the Department of Energy's science-based Stockpile Stewardship program. It provides for the sale of the Elk Hills Naval Petroleum Reserve.

The Act also contains the Administration's proposal to allow the United States to extradite indicted

war criminals and provide evidence directly to the International War Crimes Tribunals for the Former Yugoslavia and Rwanda -- a provision that should encourage others to cooperate fully with the War Crimes Tribunal.

And, this legislation makes important strides in the area of procurement reform, which will help produce a better-equipped military for less money. The legislation gives agencies enhanced authority and flexibility in their use of computers and telecommunications, while insisting on accountability. Consistent with the Administration's efforts under the National Performance Review to create a government that works better and costs less, the Act encourages agencies to adopt the best practices of successful companies in the private sector. And the Act includes measures to facilitate the purchase of commercially-available goods and services, to streamline and clarify procurement integrity laws, and to substantially improve the process for resolving bid protests for information technology.

All of these measures are important to the effective and efficient operation of our armed forces. I regret, however, that this legislation continues to contain a number of provisions, identified in my earlier veto message, that will adversely affect the Defense Department's ability to carry out its national defense mission.

First, I am strongly opposed, as is the Department of Defense, to the provision requiring the discharge of military personnel living with the Human Immunodeficiency Virus (HIV), where such discharge is not required by any medical, public health, or military purpose. This provision is blatantly discriminatory and highly punitive to service members and their families. People living with HIV can and do lead full and productive lives, provide for their families, and contribute to the well-being of our Nation. The men and women affected by this provision are ready, willing and able to serve their country with honor and should be allowed to continue to do so.

Therefore, I strongly support the current efforts in the Congress to repeal this provision before a single service member is discharged from the armed forces.

Moreover, the Secretary of Defense and the Chairman of the joint Chiefs of Staff have advised me that the arbitrary discharge of these men and women would be both unwarranted and unwise; that such discharge is unnecessary, as a matter of sound military policy; and that discharging service members deemed fit for duty would waste the Government's investment in the training of these people and would be disruptive to the military programs in which they play an integral role.

I agree.

Consequently, I have concluded that this discriminatory provision is unconstitutional. Specifically, it violates equal protection by requiring the discharge of qualified service members living with HIV who are medically able to serve, without furthering any legitimate governmental purpose. As President Franklin D. Roosevelt said in 1943, explaining his decision to sign an important appropriations bill notwithstanding the fact that it contained a provision that infringed upon individual rights, "I cannot . . . yield without placing on record my view that this provision is not only unwise and discriminatory, but unconstitutional."

In accordance with my constitutional determination, the Attorney General will decline to defend this provision. Instead, the Attorney General will inform the House and Senate of this determination so that they may, if they wish, present to the courts their argument that the provision should be sustained.

Further, to mitigate any unfair burden that this legislation could place on these service members and their families pending any repeal or judicial invalidation, I have directed the Secretaries of Defense, Veterans Affairs, and Transportation, in carrying out the provisions of this Act, to take all steps necessary to ensure that these service members receive the full benefits to which they are entitled -- including, among other things, disability retirement pay, health care coverage for their families and transition benefits such as vocational education.

I am troubled by another provision in this Act, which restricts the ability of service women and military dependents to obtain privately-funded **abortions** in military facilities overseas. I remain firmly opposed to this provision. In many countries, these U.S. facilities provide the only accessible safe source for these medical services. I will support congressional efforts to repeal this and a similar provision that became law in the "Department of Defense Appropriations Act, 1996."

Finally, I note that section 1404 of the Act expresses the sense of the Congress that the Secretary of Defense should not take any steps toward dismantling or retiring specific strategic nuclear delivery systems until the START II Treaty enters into force, and it prohibits obligating or expending funds in fiscal year 1996 for such steps. Reading the provisions of section 1404 together, I interpret the section to prohibit obligations or expenditures only before the START II Treaty enters into force. The explanation of Section 1404 in the conference report supports this interpretation.

William J. Clinton

The White House,

February 10, 1996.

NOTE: S. 1124, approved February 10, was assigned Public Law No. 104-106.

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May 2, 1996

CITE: 32 Weekly Comp. Pres. Doc. 785**LENGTH:** 223 words**HEADLINE:** Statement on **Signing** Technical Corrections to the Omnibus Consolidated Rescissions and Appropriations Act of 1996**BODY:**

Today I have signed into law Senate Joint Resolution 53 ("Resolution"). This Resolution makes technical corrections to Public Law 104-134, the "Omnibus Consolidated Rescissions and Appropriations Act of 1996" ("Act"), which I signed into law on April 26, 1996.

Two of the corrections merit comment.

The Resolution repeals two paragraphs relating to the Tongass National Forest, which were mistakenly not deleted when the operative language was moved to another section.

The Resolution also includes the repeal of section 21104 of the Act, which relates to international population assistance programs and which was inadvertently included in the Act. Nevertheless, I believe that the level of funding that the Congress has provided for FY 1996 for these programs remains inadequate, given the critical importance of these services to protecting the health of women, strengthening families, and preventing unwanted pregnancies and **abortions**. I regret that the House and Senate were unable to come to an agreement to lift the severe limitations placed on U.S. programs by the FY 1996 Foreign Operations appropriations act. It is my hope that the Congress will remove these limitations and provide full funding for these programs in the FY 1997 appropriation process.

William J. Clinton

The White House,

May 2, 1996.

LANGUAGE: ENGLISH**LOAD-DATE:** May 31, 1996View: [Cite](#) | [KWIC](#) | [Full](#) [Previous](#) 5 of 13 [Next](#) [Text Only](#) | [Download](#) | [Fax](#) | [Email](#)
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Public Papers of the Presidents

Public Papers of the Presidents

November 19, 1997

CITE: 33 Weekly Comp. Pres. Doc. 1865

LENGTH: 494 words

HEADLINE: Statement on Signing District of Columbia Appropriations Legislation

BODY:

Today I am pleased to have signed into law H.R. 2607, the "District of Columbia Appropriations Act, 1998."

I am particularly pleased that the Act provides sufficient funding to implement the National Capital Revitalization and Self-Government Improvement Act of 1997 (Revitalization Act), which includes the main elements of the plan for the District of Columbia that I proposed in my 1998 budget in February. That plan, which was the most comprehensive plan that any Administration had ever proposed for the District, was designed to achieve two goals: to revitalize Washington, D.C., as the Nation's capital and to improve prospects for "home rule" to succeed. The Congress adopted the Revitalization Act as part of the historic balanced budget agreement that I signed into law last summer. Now, with this 1998 appropriations bill, the Congress has provided the funds to implement it.

The Act also drops several of the objectionable micro-management and other provisions in the original House-passed version of the bill such as Federal funding for private school vouchers, the requirement to reopen Pennsylvania Avenue, the limitation on public assistance payments, the prohibition on Treasury borrowing authority for the District, and restrictions on the District's authority to make improvements in its financial management system.

The Act continues to contain **abortion** language that would prohibit the use of Federal and District funds to pay for **abortions** except in cases in which the life of the mother is endangered or in situations involving rape or incest. The continued prohibition on the use of local funds is an unwarranted intrusion into the affairs of the District.

In addition, the Act makes important changes to last year's immigration bill by offering more generous treatment to Central Americans than was available under that bill. These changes make good on the pledge I made during my trip to Central America last spring. Nevertheless, I have several concerns. First, I am troubled by the differences in relief offered to similarly situated persons. I believe, however, that these differences can be minimized in the implementation process. I therefore am asking the Attorney General to consider the ameliorative purposes of this legislation and the unique history and circumstances of the people covered by it in giving effect to its provisions. Second, I believe that similar relief should be made available to Haitians and will seek a legislative solution for this group. Finally, I ask the Congress to revisit its decision to continue to apply some of the harsher rules under last year's immigration bill to other persons with pending immigration cases who are not covered by H.R. 2607. I commend to the public my

statement of November 14 for a further discussion of these issues.

William J. Clinton

The White House,
November 19, 1997.

NOTE: H.R. 2607, approved November 19, was assigned Public Law No. 105-100.

LANGUAGE: ENGLISH

LOAD-DATE: December 22, 1997

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Public Papers of the Presidents

February 28, 1997

CITE: 33 Weekly Comp. Pres. Doc. 267**LENGTH:** 359 words**HEADLINE:** **Statement on Signing** International Population Assistance Program Legislation**BODY:**

Today I am pleased to sign into law H.J. Res. 36, which approves a Presidential finding related to international population programs. Approval of this joint resolution permits the release on March 1 of funds previously appropriated for international population assistance programs administered by the U.S. Agency for International Development (USAID). In making these funds available without further delay we are assuring that these programs will continue to serve the many millions of women and men whose health and well-being -- and ability to plan their own futures -- depend on family planning services supported by USAID. Moreover, we are underscoring the indisputable fact that family planning reduces **abortion** -- as best evidenced by significant declines in **abortion** rates as family planning services are becoming available in Russia and Central and Eastern Europe.

The passage of this joint resolution at the opening of the 105th Congress is particularly gratifying as it signifies what we can accomplish by working together -- Democrats and Republicans. By agreeing to secure the timely release of these funds, we are assuring that the United States will continue to lead the world in providing voluntary family planning assistance. More importantly, we are helping the women of the world to prevent millions of unintended pregnancies, permit the healthy spacing of births, prevent the spread of sexually transmitted diseases, including HIV/AIDS, reduce recourse to **abortion**, and avert deaths from childbirth that often leave infants and their siblings motherless.

It is clear to me -- and I am delighted that a strong bipartisan group of legislators in the House and Senate has joined in affirming the view -- that family planning is a key element of our comprehensive strategy to improve women's health and station in life, and to increase child survival rates. By their votes, Members of Congress have shown their concern for the well-being of the poorest families around the globe.

William J. Clinton

The White House, February 28, 1997.

NOTE: H.J. Res. 36, approved February 28, was assigned Public Law No. 105-3.

LANGUAGE: ENGLISH**LOAD-DATE:** March 26, 1997

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Public Papers of the Presidents

September 10, 1996

CITE: 32 Weekly Comp. Pres. Doc. 1710**LENGTH:** 296 words**HEADLINE:** Statement on **Signing** the District of Columbia Appropriations Act, 1997**BODY:**

I have signed into law, H.R. 3845, the "District of Columbia Appropriations Act, 1997." This Act provides \$ 719 million in Federal appropriations for the District of Columbia.

The total amount of Federal funds appropriated to the District for FY 1997 includes \$ 660 million for the Federal payment to the District of Columbia, \$ 52 million for the Federal contribution to retirement funds, \$ 5.7 million for Presidential Inaugural expenses, and \$ 1 million to help address the District's drinking water problem.

I am disappointed that the Congress has excluded the \$ 52 million increase in the Federal contribution to the pension payment proposed in my FY 1997 Budget. The \$ 52 million requested increase was intended to begin to address the District's \$ 5 billion unfunded pension liability. I am committed to working with the Congress to develop a solution to address the District's single largest financial obligation.

The Act sets the total operating expense spending level for the District of Columbia at the requested level of \$ 5.1 billion, \$ 119 million above FY 1996.

The **abortion** language in the Act is the same as current law, which prohibits the use of both Federal and District funds to pay for **abortions** except in those cases where the life of the mother is in danger or in cases of rape or incest. I continue to view this prohibition as an unwarranted intrusion into the affairs of the District.

The Act includes a provision that applies civil rights standards provided for in Executive Order 11246 to Federal construction contracts funded under the District of Columbia School Reform Act of 1995.

William J. Clinton

The White House,
September 10, 1996.

NOTE: H.R. 3845, approved September 9, was assigned Public Law No. 104-194.

LANGUAGE: ENGLISH

LOAD-DATE: November 28, 1996

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February 28, 1997

CITE: 33 Weekly Comp. Pres. Doc. 267**LENGTH:** 359 words**HEADLINE:** Statement on Signing International Population Assistance Program Legislation**BODY:**

Today I am pleased to sign into law H.J. Res. 36, which approves a Presidential finding related to international population programs. Approval of this joint resolution permits the release on March 1 of funds previously appropriated for international population assistance programs administered by the U.S. Agency for International Development (USAID). In making these funds available without further delay we are assuring that these programs will continue to serve the many millions of women and men whose health and well-being -- and ability to plan their own futures -- depend on family planning services supported by USAID. Moreover, we are underscoring the indisputable fact that family planning reduces **abortion** -- as best evidenced by significant declines in **abortion** rates as family planning services are becoming available in Russia and Central and Eastern Europe.

The passage of this joint resolution at the opening of the 105th Congress is particularly gratifying as it signifies what we can accomplish by working together -- Democrats and Republicans. By agreeing to secure the timely release of these funds, we are assuring that the United States will continue to lead the world in providing voluntary family planning assistance. More importantly, we are helping the women of the world to prevent millions of unintended pregnancies, permit the healthy spacing of births, prevent the spread of sexually transmitted diseases, including HIV/AIDS, reduce recourse to **abortion**, and avert deaths from childbirth that often leave infants and their siblings motherless.

It is clear to me -- and I am delighted that a strong bipartisan group of legislators in the House and Senate has joined in affirming the view -- that family planning is a key element of our comprehensive strategy to improve women's health and station in life, and to increase child survival rates. By their votes, Members of Congress have shown their concern for the well-being of the poorest families around the globe.

William J. Clinton

The White House, February 28, 1997.

NOTE: H.J. Res. 36, approved February 28, was assigned Public Law No. 105-3.

LANGUAGE: ENGLISH**LOAD-DATE:** March 26, 1997

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Public Papers of the Presidents

January 6, 1996

CITE: 32 Weekly Comp. Pres. Doc. 22**LENGTH:** 761 words**HEADLINE:** Statement on **Signing** the Sixth Continuing Resolution**BODY:**

Last night, I signed into law H.R. 1643, the Sixth Continuing Resolution for fiscal 1996, which puts all Federal workers back on the job with pay from December 16 until January 26 and also funds a limited number of Federal activities until September 30, 1996.

This bill is a step in the right direction -- but only a step. It does not end the partial shutdown of the Federal Government that continues to seriously impair the activities of the Departments of Commerce, Education, Health and Human Services, Housing and Urban Development, Interior, Justice, Labor, State, and Veterans Affairs; the Environmental Protection Agency; the National Aeronautics and Space Administration; the Small Business Administration; and many smaller agencies.

Most importantly, H.R. 1643 enables Federal workers to return to the job and to be paid -- both the 480,000 who have been working without pay and the 280,000 furloughed workers.

The bill also funds a limited number of Federal functions for the rest of fiscal 1996. They include nutrition services for the elderly; grants to States for child welfare services; Federal Parent Locator Service activities; State unemployment insurance administration activities; general welfare assistance payments and foster care payments to Indians; the Federal subsidy to the rail industry pension and certain other expenses of the Railroad Retirement Board; visitor services of the National Park System, National Wildlife Refuges, National Forests, Smithsonian Institution, National Gallery of Art, John F. Kennedy Center for the Performing Arts, and United States Holocaust Memorial; and State Department visa, passport, and U.S. citizen services. In addition, family support payments to States and payments to States for foster care and adoption assistance are provided through March 15, 1996.

The bill ensures, through September 30, 1996, benefit payments to about 3.3 million veterans and their survivors. It also provides for payments to contractors of the Veterans Health Administration for services related to the health and safety of patients in Veterans Affairs medical facilities.

The measure provides authority for the District of Columbia to continue full operations, using District funds, through September 30, thereby extending the authority provided by the Fifth Continuing Resolution for fiscal 1996, which expires January 25. Regrettably, the measure contains an objectionable provision that would single out poor women by prohibiting the use of District funds for providing **abortion** services. I oppose including this provision in the regular fiscal 1996 District of Columbia appropriations bill, and I urge the Congress to send that bill to me -- in a form

I can sign -- as soon as possible.

The measure also provides for reimbursement to States for State funds used to implement Federal programs and to pay furloughed State employees whose compensation is advanced or reimbursed, in whole or in part, by the Federal Government during any 1996 lapse in appropriations and it makes interest payable on the State funds that were used.

The problem with this bill is in what it does *not* do. It does not end the inconvenience, if not suffering, that millions of Americans continue to experience because of the partial government shutdown. It does not provide funds to help put 100,000 more police officers on the streets of U.S. cities; funds for Head Start; funds for the States for social services and job training; funds to help U.S. businesses with export financing; and funds to continue the Space Station program and other key initiatives at the National Aeronautics and Space Administration. Nor does the bill provide needed funds for contracts vital to protecting the environment.

Along with denying services, the shutdown is threatening the vitality of thousands of businesses, many of them with contracts with the Federal Government. Also at risk are the jobs of thousands of workers in those businesses. The longer the shutdown continues, the more its effects will be felt.

Clearly, this bill is only a partial solution to the partial shutdown. The real solution, and the one that the Congress should pursue without delay, is to send me acceptable 1996 appropriations bills for the agencies in question or, at a minimum an acceptable continuing resolution that will permit the Government to perform the full range of services that citizens expect.

William J. Clinton

The White House,
January 6, 1996.

NOTE: H.R. 1643, approved January 6, was assigned Public Law No. 104-92.

LANGUAGE: ENGLISH

LOAD-DATE: August 09, 1996

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January 4, 1996

CITE: 32 Weekly Comp. Pres. Doc. 13

LENGTH: 448 words

HEADLINE: Statement on Signing District of Columbia Appropriations Legislation

BODY:

Today I have signed into law House Joint Resolution 153, which provides authority for the District of Columbia to continue full operations.

This measure continues the authority provided by the Fourth Continuing Resolution for FY 1996, which I signed December 22, and will enable the District to continue to operate, using District funds, through January 25.

Because H.J. Res. 153 allows the District government to continue to operate without disruption, it is a step in the right direction. Nevertheless, it is only a step. It does not end the partial shutdown of the Federal Government that continues to affect the Departments of Commerce, Education, Health and Human Services, Housing and Urban Development, Interior, Justice, Labor, State, and Veterans Affairs; the Environmental Protection Agency; the National Aeronautics and Space Administration; the Small Business Administration; and nearly three dozen smaller agencies.

This shutdown is hurting millions of innocent Americans -- such as the 600,000 senior citizens who may not get services under the "Meals on Wheels" program, or the 2,500 moderate- and low-income working families per day who cannot get their Federal Housing Administration (FHA) mortgage loans processed. The longer the shutdown continues, the more Americans across the country will feel its impact.

The shutdown has forced the Administration to furlough 280,000 workers in these departments and agencies. And while the Administration has kept 480,000 others on the job because they perform emergency services, we cannot pay them until the shutdown ends. Thus, by not ending the shutdown, the Congress is disrupting the lives of three-quarters of a million Federal workers, most of whom live paycheck to paycheck and are having severe problems paying their mortgages or rent, buying food, and protecting their families.

I am concerned that this bill contains an objectionable provision that would single out poor women by prohibiting the use of District funds for providing **abortion** services. I oppose including this provision in the regular fiscal year 1996 District of Columbia Appropriations Bill, and I urge the Congress to send that bill to me -- in a form I can sign -- as expeditiously as possible.

Once again, I urge the Congress to end this shutdown immediately by sending me an acceptable continuing resolution to fund these departments and agencies, or acceptable fiscal 1996 appropriations bills for them.

William J. Clinton

The White House, January 4, 1996.

NOTE: H.J. Res. 153, approved January 4, was assigned Public Law No. 104-90. This statement was released by the Office of the Press Secretary on January 5.

LANGUAGE: ENGLISH

LOAD-DATE: August 15, 1996

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December 22, 1995

CITE: 31 Weekly Comp. Pres. Doc. 2227**LENGTH:** 589 words**HEADLINE:** Statement on **Signing** Limited Continuing Appropriations Legislation**BODY:**

Today I have signed into law House joint Resolution 136, which ensures that the Government makes veterans' benefit payments to 3.3 million veterans and their survivors without further delay.

The resolution also provides funding for several vitally important programs for children and families. It continues funding for Aid to Families with Dependent Children (AFDC), ensuring that nearly 9 million children receive benefits vital to their well-being. It funds child care for about 600,000 children whose parents are trying to work their way off welfare. And it continues funding for State child support enforcement agencies to ensure that "deadbeat dads" do not get a reprieve from supporting their children.

In addition, H.J. Res. 136 provides authority for the District of Columbia to continue full operations. The resolution contains an objectionable provision that would single out poor women by prohibiting the use of District funds for providing **abortion** services. I have opposed including this provision in the regular fiscal year 1996 District of Columbia appropriations bill. Nevertheless, H.J. Res. 136 allows the District government to continue to operate without disruption

Although I welcome H.J. Res. 136, it is a poor substitute for what the Congress should do immediately -- that is, send me an acceptable continuing resolution to reopen the departments and agencies that are at least partially shut down because they lack fiscal year 1996 appropriations. Along with the Departments of Veterans Affairs and Health and Human Services, they include the Departments of Education, Labor, Housing and Urban Development, Commerce, justice, State, and the Interior; the Environmental Protection Agency; the National Aeronautics and Space Administration, and the Small Business Administration.

To be sure, H.J. Res. 136 prevents the serious impact that the partial shutdown could have had on 3.3 million veterans and their survivors as well as nearly 9 million low-income children. But the shutdown continues to hurt millions of innocent Americans -- from the 20,000 parents and students each day who cannot apply for student aid, to the 2,500 moderate- and low-income working families each day who cannot get their Federal Housing Administration (FHA) mortgage loans processed.

The shutdown also has forced the affected departments and agencies to furlough a total of about 280,000 Federal employees, throwing their lives into disruption and raising their fears just as the holidays approach. Federal workers, who are already being asked to do their jobs more efficiently

as we downsize the Government, deserve better.

The congressional majority apparently wants to use a partial Government shutdown to force me into accepting their extreme budget plan. It did not work last month, when the majority prompted an earlier shutdown by not sending me an acceptable continuing resolution. And it will not work now.

The Congress should send me an acceptable continuing resolution to reopen the Government, return to work the 280,000 Federal employees who were furloughed through no fault of their own, provide back pay for these workers, and give the American people the services they expect from their Government.

William J. Clinton

The White House,

December 22, 1995.

NOTE: H.J. Res. 136, approved December 22, was assigned Public Law No. 104-69. An original was not available for verification of the content of this statement. This item was not received in time for publication in the appropriate issue.

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Office of the Deputy Assistant Attorney General

Washington, D.C. 20530

FAX COVER SHEET

Date: 3/16/00

To: Sarah Wilson

Phone No.: _____

Fax No.: 404-1447

From: Dawn Burton

Phone No.: 202/305-0091

Fax No.: 202/514-9149

No. of Pages: 32 (Excluding Cover)

Comments: Patricia asked me to send these materials. The
1st item is a NABAL proposed Amendment. Then a
packet of Amendments offered the last time Judiciary
committee considered this bill. And then some info
docs. Call if you have any questions.

Dawn

Last - the bill to be
considered.

Lee
Materials

Compensation for health injuries resulting from this Act:

If any woman suffers a health problem of any kind recognized in *Doe v. Bolton*, 410 U.S. 179, 192 (1973) as a result of:

- (a) her inability to obtain an abortion proscribed by this Act, or
- (b) her doctor electing to use a different procedure so as not to fall afoul of this Act,

she is entitled to recover all her actual damages, including pain and suffering, from the United States, notwithstanding any requirements or limitations set forth in the Federal Tort Claims Act or any other law or provision granting the United States immunity from suit or limiting the United States' liability.

Damages shall be paid from the judgment fund established by 28 U.S.C. § 2414; 31 U.S.C. § 1304.

**House Judiciary Committee Markup
H.R. 929 "The Partial-Birth Abortion Ban"
March 12, 1997**

<i>Majority</i>	1	2	3	4	5	6	7	8	9
Henry Hyde, IL	-	-	-	-	-	-	-	-	-
Jim Sensenbrenner, WI	-		-	-	-	-	-	-	-
Bill McCollum, FL	-	-	-	-	-	-	-	-	-
George Gekas, PA	-	-	-	-	-	-	-	-	-
Howard Coble, NC							-	-	-
Lamar Smith, TX	-	-					-	-	-
Steven Schiff, NM	-	-				-	-	-	-
Elton Gallegly, CA	-		-	-	-		-	-	-
Charles Canady, FL	-	-	-	-	-	-	-	-	-
Bob Inglis, SC	-	-	-	-	-	-		-	-
Robert Goodlatte, VA		-	-	-	-	-		-	-
Steve Buyer, IN	-	-				-	-	-	-
Sonny Bono, CA	-	-	-	-	-	-	-	-	-
Ed Bryant, TN	-	-	-	-	-	-		-	-
Steve Chabot, OH	-	-	-	-	-	-	-	-	-
Bob Barr, GA	-	-	-	-	-	-		-	-
Bill Jenkins, TN	-	-	-	-	-	-	-	-	-
Asa Hutchinson, AR	-		-	-	-	-		-	-
Edward Pease, IN	-	-	-	-	-	-		-	-
Christopher Cannon, UT	-	-	-	-	-	-	-	-	-

<i>Minority</i>									
John Conyers, MI	+	+	+	+	+	+		+	+
Barney Frank, MA	+	+	+	+	+	+	+	+	+
Charles Schumer, NY	+		+	+	+	+		+	+

Howard Berman, CA									
Rick Boucher, VA	+						+	+	+
Jerrold Nadler, NY	+	+	+	+	+	+	+	+	+
Robert Scott, VA	+	+	+	+	+	+	+	+	+
Melvin Watt, NC	+	+	+	+	+	+	+	+	+
Zoe Lofgren, CA	+	+	+	+	+	+			
Sheila Jackson Lee, TX	+	+	+	+			+	+	+
Maxine Waters, CA			+	+	+	+			
Martin Meehan, MA	+	+	+						
William Delahunt, MA	+	+	+	+	+	+		+	+
Robert Wexler, FL	+	+	+	+	+	+		+	+
Steve Rothman, NJ	+	+	+	+	+	+		+	+

NARAL
3/13/97

House Judiciary Committee Markup H.R. 929 "The Partial-Birth Abortion Ban" March 12, 1997

1. Amendment offered by Representative Bobby Scott (D-VA)
Hoyer-Greenwood Bill offered as a complete substitute to H.R. 929. Substitute bans "an abortion after the fetus has become viable," unless it "is necessary to preserve the life of the woman or to avert serious adverse health consequences to the woman." The substitute includes "a civil penalty not to exceed \$10,000."
The amendment failed 13-18.
2. Amendment offered by Representative Barney Frank (D-MA)
Amendment to strike from the bill "in or affecting interstate or foreign commerce," and insert "on a woman who travels across state lines or national borders; or who travels across state lines or national borders to perform such an abortion."
The amendment failed 11-16.
3. Amendment offered by Representative Sheila Jackson Lee (D-TX)
Amendment to insert exception that would allow "any abortion performed prior to the viability of the fetus, or after viability where, in the medical judgement of the attending physician, the abortion is necessary to preserve the health of the mother."
The amendment failed 13-16.
4. Amendment offered by Representative Barney Frank (D-MA)
Amendment to insert exception that would allow the procedure "to avert serious adverse physical health consequences to the mother."
The amendment failed 12-16.
5. Amendment offered by Representative Jerrold Nadler (D-NY)
Amendment to strike from the bill civil suit for money damages.
The amendment failed 11-16.
- * Enbloc Amendments offered by Representative Jerrold Nadler (D-NY)
Amendment to strike from the bill "physical" (page 3, line 23) from civil damages.
Amendment to not allow civil damages to father who abandoned the mother.
The amendments passed by a voice vote.
- * Amendment offered by Representative Jerrold Nadler (D-NY)
Amendment to not allow civil damages to father who abused the mother.
The amendment passed by a voice vote.
6. Amendment offered by Representative Barney Frank (D-MA)
Amendment to remove the two year prison sentence for doctors by striking from the bill "imprisoned not more than two years, or both."
The amendment failed 11-17.
- * Amendment offered by Representative Bobby Scott (D-VA)
Amendment to strike from the bill "human" (page 2, line 13) "infant" (page 3, line 12) and "living" (page 3, line 11) and insert "post-viability" in each case.
The amendment failed by a voice vote.
- * Amendment offered by Representative Sheila Jackson-Lee (D-TX)

Amendment to strike "Infant" and insert "fetus" throughout the bill.
The amendment failed by a voice vote.

7. Amendment offered by Representative Sheila Jackson-Lee (D-TX)

Amendment to not allow "a civil action against a woman who has undergone a procedure described in this Act."
The amendment failed 6-14.

8. Amendment offered by Representative Bobby Scott (D-VA)

Amendment to strike "Physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, if no other medical procedure would suffice for that purpose."
The amendment failed 11-20.

9. Motion to pass H.R. 929 out of Committee

The motion passed 20-11.

*Voice votes not included in vote chart.

NARAL- 3/13/97

#1

AMENDMENT IN THE NATURE OF A SUBSTITUTE
TO H.R. 929
OFFERED BY MR. SCOTT

Strike all after the enacting clause and insert the following:

1 SECTION 1. SHORT TITLE.

2 This Act may be cited as the "Late Term Abortion
3 Restriction Act".

4 SEC. 2. PROHIBITION ON CERTAIN ABORTIONS.

5 (a) IN GENERAL.—It shall be unlawful, in or affect-
6 ing interstate or foreign commerce, knowingly to perform
7 an abortion after the fetus has become viable.

8 (b) EXCEPTION.—This section does not prohibit any
9 abortion if, in the medical judgment of the attending phy-
10 sician, the abortion is necessary to preserve the life of the
11 woman or to avert serious adverse health consequences to
12 the woman.

13 (c) CIVIL PENALTY.—A physician who violates this
14 section shall be subject to a civil penalty not to exceed
15 \$10,000. The civil penalty provided by this subsection is
16 the exclusive remedy for a violation of this section.

Amend the title to read "A bill to prohibit certain abortions."

AMENDMENT TO H.R. 929 OFFERED BY**MR. FRANK OF MASSACHUSETTS**

Page 2, lines 11-12, strike "in or affecting interstate or foreign commerce" and insert on line 12, after the word "abortion", the following:

"on a woman who travels across state lines or national borders; or who travels across state lines or national borders to perform such an abortion,"

AMENDMENT TO H.R. 929
OFFERED BY MS. JACKSON LEE OF TEXAS

Page 2, ^{after 615} line 8, insert the following: "(b) The prohibition of this section does not apply to any abortion performed prior to the viability of the fetus, or after viability where, in the medical judgment of the attending physician, the abortion is necessary to preserve the health of the mother."

~~Page 2, line 8, strike "(b)" and insert "(c)".~~

~~Page 2, line 15, strike "(e)" and insert "(d)".~~

~~Page 2, line 22, strike "(d)" and insert "(e)".~~

~~Page 3, line 12, strike "(e)" and insert "(f)".~~

Revising the succeeding subsections accordingly.

**AMENDMENT TO H.R. 929 OFFERED BY
MR. FRANK OF MASSACHUSETTS**

Page 3, after line 4, insert after the word 'injury' the following:

' , including a life endangering physical condition caused by or arising from the pregnancy itself, or to avert serious adverse longterm physical health consequences to the mother'

AMENDMENT TO H.R. 929

OFFERED BY

Mr. Nadler

Page ¹³2, strike line ¹⁵22 and all that follows through
line ⁴14 on page ⁴3.

Page ⁴8, line ⁵12, strike "(e)" and insert "(d)".

AMENDMENT TO H.R. 929

OFFERED BY

Conyers Miller

Page ⁽⁷⁾ 2, line ¹⁷ 24, after "father" insert "(unless the father has abused the mother)".

Amendment to H.R. 929
Offered by Mr. Nadler of New York

Page 3, line 15, strike "Unless" and all that follows through "the " in line 17 and insert "Except as provided in paragraph (3), the".

Page 4, after line 4, insert the following:

"(3) A civil action may not be commenced under this section if --

"(A) the pregnancy resulted from the plaintiff's criminal conduct;

"(B) the plaintiff consented to the abortion; or

"(C) the plaintiff is a father who abandoned the mother.

AMENDMENT TO H.R. 929

OFFERED BY Mr. Frank

14

Page 2, beginning in line 6, strike "or imprisoned
not more than two years, or both".

78 Scott 003

failed
voice-vote

Amendment to H.R. 929

Offered By Mr. Scott of Virginia

- 1 Page 2, line ¹³5, strike "human" and insert "post-viability".
- 2 Page ³2, line ¹²19, strike "infant" and insert "post-viability
- 3 fetus".
- 4 Page ³2, line ¹¹18, strike "living" and insert "post-
- 5 viability".

AMENDMENT TO H.R. 929

OFFERED BY Jackson Lee

10
 (3)
 Page 2, line ¹³3, strike "or infant".

(3)
 Page 2, line ⁸15, strike "section" and all that follows
 through "the" on line ⁹16 and insert "section, the".

(3)
 Page 2, line ¹²19, strike "infant" and insert "fetus".

(3)
 Page 2, line ¹²19, strike "; and" and insert a period.

(3)
 Page 2, strike lines ¹³20 and ¹⁴21.

(3)
 Page 3, line ¹⁹2, strike "or infant".

AMENDMENT TO H.R. 929

OFFERED BY JACKSON-LEE

Page ⁴ ~~3~~, line ⁹ ~~16~~, after "section." insert the following: "(f) Nothing in this section shall be interpreted to allow a civil action against a woman who has undergone a procedure described in this Act."

Scott 004

Amendment to H.R. 929

Offered By Mr. Scott of Virginia

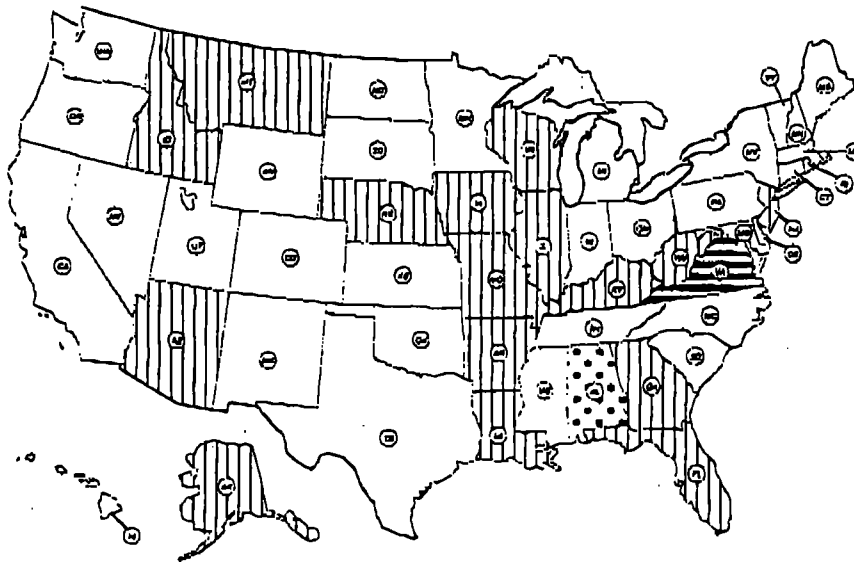
- 1 Page ³2, line ²4, strike "because" and all that follows,
2 through and including line ~~14~~₇.

REPRODUCTIVE FREEDOM project

STATE "PARTIAL-BIRTH ABORTION" BANS: BLOCKED BY THE COURTS

To date, 29 states have enacted so-called "partial-birth abortion" bans. Medical providers have challenged the bans in 20 of these states. The overwhelming majority of courts to have ruled in these cases have declared the bans unconstitutional and blocked their enforcement.

This spring, the United States Supreme Court will review a decision by a federal appellate court striking down Nebraska's ban as unconstitutional. The state of Iowa has asked the Supreme Court to review a ruling by the same federal appellate court invalidating its ban. And Justice John Paul Stevens has blocked enforcement of the Illinois and Wisconsin bans until the Supreme Court decides whether to review a contrary ruling by a different federal appellate court upholding those bans.



 In 18 of 20 states where "partial-birth abortion" bans have been challenged, courts have completely or partially blocked their enforcement.

Alaska	Georgia	Kentucky	Montana	West Virginia
Arizona	Idaho	Louisiana	Nebraska	Wisconsin
Arkansas	Illinois	Michigan	New Jersey	
Florida	Iowa	Missouri	Rhode Island	

 In Alabama, the state attorney general has limited enforcement of the ban to post-viability procedures.

 In Virginia, a federal trial court held the ban unconstitutional and permanently enjoined it, but a federal appellate court has permitted the statute to be enforced while the appeal proceeds.

In 9 states – Indiana, Kansas, Mississippi, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, and Utah – bans have been enacted but not challenged. Ohio passed a law in 1995 that would have banned "dilation and extraction." A federal district court permanently enjoined the ban, after concluding that it was impermissibly vague and posed an undue burden, and a federal appellate court affirmed this ruling. *Women's Medical Professional Corp. v. Voivovich*, 911 F. Supp. 1051 (S.D. Ohio 1995), *affirmed*, 130 F.3d 187 (6th Cir. 1997). The United States Supreme Court declined to review the case, 523 U.S. 1036 (1998).

In enjoining enforcement of the bans, the courts have identified four primary constitutional flaws: (1) the bans impose an undue burden on the right to reproductive choice by prohibiting safe and common abortion procedures performed well before fetal viability, in the second, and even the first, trimester of pregnancy; (2) the bans fail to include adequate exceptions for abortions necessary to preserve a woman's life or health; (3) the bans are unconstitutionally vague in that they fail to describe with adequate precision what abortion procedures are forbidden; and (4) in some cases, the bans would impermissibly require the consent of an abortion patient's parents or sexual partner.

The rulings issued to date are summarized below.

States Where So-Called "Partial-Birth Abortion" Bans Are Enjoined:

Alaska: *Planned Parenthood v. State*, No. 3AN-97-6019 (Super. Ct. Alaska Mar. 13, 1998), appeal docketed, No. S-08610 (Alaska Apr. 13, 1998).

Holding that Alaska's "partial-birth abortion" ban violated the state constitution, a state trial court *permanently enjoined* the ban. The Alaska court declared the law void for vagueness, finding the term "partial-birth abortion" so "susceptible to different interpretations" that it could "apply not only to second-trimester abortions but to some first-trimester abortions as well." Because the law could thus function as a ban on "abortion in general," the court concluded that it infringed the state constitutional right of privacy as well. The state has appealed the decision to the Supreme Court of Alaska.

Arizona: *Planned Parenthood v. Woods*, 982 F. Supp. 1369 (D. Ariz. 1997).

After a trial, a federal district court *permanently enjoined* enforcement of Arizona's "partial-birth abortion" law. The court held the law unconstitutionally vague because it was "susceptible to different interpretations" and therefore failed to give physicians fair warning of what conduct it proscribed. The court also held that the ban constituted an "undue burden" on the right to have an abortion because, in prohibiting the safest, most common methods of abortion after the first trimester, the ban would force women from safer to riskier procedures. Finally, the court struck the law as imposing unconstitutional third-party consent requirements on a woman's decision to terminate a pregnancy. The law allowed the husbands of married women and the parents of minor women to sue the physician unless they had consented to the "partial-birth abortion." The court held that this provision had the effect of requiring those family members' consent to the woman's abortion, in violation of the Constitution.

Arkansas: *Little Rock Family Planning Services v. Jegley*, 192 F.3d 794 (8th Cir. 1999), affirming No. LR-C-97-581 (E.D. Ark. Nov. 13, 1998).

Affirming a federal trial court's *permanent injunction* against enforcement of Arkansas's ban, the United States Court of Appeals for the Eighth Circuit held that the ban was "overbroad and places an undue burden on the right of a woman to decide whether to have an abortion." The court based that holding on its finding that "both the D&E [dilation and evacuation] procedure and the suction-curettage procedure," the two most common abortion methods, "often include what the Act prohibits." Having held that the Act would impermissibly ban these methods, the appellate court did not address the other grounds on which the trial court had struck the ban: that it was unconstitutionally vague and that its lack of a health exception and its inadequate life exception endangered women. The state did not appeal the Eighth Circuit's ruling.

Florida: *A Choice for Women v. Butterworth*, 54 F. Supp. 2d 1148 (S.D. Fla. 1998).

Permanently enjoining Florida's so-called "partial-birth abortion" ban, a federal district court rejected the argument that the law targeted a single, discrete procedure. Rather, the court held, the law's definition contained "broad and amorphous language" that could cover virtually all abortions performed in the second trimester of pregnancy. Thus, the court ruled that the ban violated "a woman's right to choose to have an abortion prior to the viability of the fetus." The court also held the ban unconstitutional on the ground that it "contains no health exception and only a qualified life exception."

Georgia: *Midtown Hospital v. Miller*, No. 1:97-CV-1786-JOF, 1998 U.S. Dist. LEXIS 20827 (N.D. Ga. Sept. 3, 1998).

After the federal district court issued a preliminary injunction restricting enforcement of Georgia's statute to post-viability abortions, the parties settled the case by agreeing that the law would apply only to a narrowly defined procedure when used after fetal viability. The court issued an order – called a consent decree – that made the agreement binding.

Idaho: *Weyhrich v. Lance*, No. CV98-0117-S-BLW (D. Idaho Oct. 13, 1999).

A federal trial court issued a *permanent injunction* against enforcement of Idaho's "partial-birth abortion" ban. The court held the law unconstitutional because it imposed an undue burden on the right to reproductive choice; it was vague; it lacked an exception to protect women's health and an adequate exception to protect their lives; and it impermissibly in effect required the consent of a married woman's husband and a minor woman's parents before any "partial-birth abortion."

Illinois: *The Hope Clinic v. Ryan*, 995 F. Supp. 847 (N.D. Ill. 1998), reversed, 195 F.2d 857 (7th Cir. 1999), stay granted, No. 99A427 (Nov. 30, 1999) (Stevens, J.), petition for certiorari filed, No. 99-1152 (Jan. 10, 2000).

Ruling on the paper record, a federal district court issued a *permanent injunction* preventing enforcement of Illinois's "partial-birth abortion" ban. Finding that the law potentially banned the most common and safest abortion procedures used throughout pregnancy, the trial court held the law unconstitutional for vagueness; for violating the right to reproductive choice; and for effectively imposing a constitutionally deficient parental consent requirement. The state appealed the decision to the United States Court of Appeals for the Seventh Circuit, which heard the case *en banc* (i.e., before every active judge on the court). The Seventh Circuit issued a 5-4 decision, over a vigorous dissent written by the chief judge, upholding the Illinois ban. (In the same decision, the court also upheld Wisconsin's similar ban). The narrow majority reasoned that the vague and broad statutes could somehow be narrowed and rendered constitutional through state-court interpretation. Effectively conceding the bans' potential harm to women and their physicians, however, the majority directed the lower courts to issue "precautionary injunctions" to protect the performance of what the majority called "normal" abortion procedures. After the Seventh Circuit denied plaintiffs' request for a stay, plaintiffs obtained a stay from Justice Stevens until the United States Supreme Court decides whether to review the case. The ban thus remains enjoined.

Iowa: *Planned Parenthood v. Miller*, 30 F. Supp. 2d 1157 (S.D. Iowa 1998), affirmed, 195 F.3d 386 (8th Cir. 1999), petition for certiorari filed, No. 99-1112 (Jan. 3, 2000).

Affirming a federal district court's ruling that *permanently enjoined* Iowa's "partial-birth abortion" ban, the United States Court of Appeals for the Eighth Circuit held that the ban prohibits "the D&E procedure, and, in some circumstances, the suction-curettage procedure as well." Finding that these "are two of the most commonly used abortion procedures," the court held that the ban "places an undue burden on women seeking abortions." The appellate court did not reach the other bases on which the district court had ruled: that the ban was vague and failed to provide an adequate exception for the health and life of the woman. The state has asked the United States Supreme Court to review the Eighth Circuit's decision, but the Supreme Court has yet to decide if it will hear the appeal.

Kentucky: *Eubanks v. Stengel*, 28 F. Supp. 2d 1024 (W.D. Ky. 1998), appeal argued, No. 99-6671 (6th Cir. Dec. 15, 1999).

After a trial on the merits, a federal district court in Kentucky issued a *permanent injunction* against enforcement of that state's "partial-birth abortion" ban. Emphasizing that the legislature appeared to have engaged in "purposeful ambiguity" and, indeed, to have "focused directly on protected activity in a manner which everyone knew might be unconstitutional," the court concluded that the law "create[s] an undue burden upon the women who seek only to exercise their rights." The state has appealed the decision to the United States Court of Appeals for the Sixth Circuit.

Louisiana: *Causeway Medical Suite v. Foster*, 43 F. Supp. 2d 604 (E.D. La. 1999), appeal docketed, No. 99-30324 (5th Cir. Apr. 5, 1999).

Based on the plaintiffs' written testimony, a federal district court in Louisiana issued a *permanent injunction* against enforcement of that state's "partial-birth abortion" ban. The court held that the Act's definition of "partial-birth abortion" was "particularly ambiguous and subject to various interpretations." The court thus held that the ban had "both the purpose and effect of imposing an undue burden on the woman's right to choose abortion." Finally, the court held, "The Act contains no health exception whatsoever, and is constitutionally infirm on this basis alone." The state has appealed the decision to the United States Court of Appeals for the Fifth Circuit.

Michigan: *Evans v. Kelley*, 977 F. Supp. 1283 (E.D. Mich. 1997); *Evans v. Granholm*, No. 00-70586 (E.D. Mich. filed Feb. 2, 2000); *Womancare of Southfield v. Granholm*, No. 70585 (E.D. Mich. filed Feb. 2, 2000).

In the first ruling on a "partial-birth abortion" ban in the nation, a federal district court in Detroit declared Michigan's ban unconstitutional and *permanently enjoined* its enforcement after a trial. The court held the law unconstitutionally vague because - with its ambiguous and non-medical terminology - physicians "simply cannot know with any degree of confidence" what procedures it bans. The court also struck the law as an "undue burden" on the right of a woman to choose to terminate her pregnancy. "[B]ecause of the sweeping breadth of the statute," the court held, "it would operate to eliminate one of the safest post-first-trimester abortion procedures [D&E], a procedure which currently is used in more than 85% of the post-first-trimester abortions performed in Michigan." The law, the court found, would therefore impermissibly force women to undergo riskier procedures.

Notwithstanding this decision, Michigan recently passed a related law that is scheduled to take effect March 10, 2000. Abortion providers have challenged the new ban in federal court.

Missouri: *Reproductive Health Services of Planned Parenthood v. Nixon*, No. 99-04231-CV-C-SOW-ECF (W.D. Mo. Sept. 22, 1999).

A federal trial court issued a *temporary restraining order* against enforcement of Missouri's ban, which remains enjoined pending further order of the court.

Montana: *Intermountain Planned Parenthood v. State*, No. BDV 97-477 (Dist. Ct. Mont. June 29, 1998); *Intermountain Planned Parenthood v. State*, No. ADV 9900561 (Dist. Ct. Mont. Sept. 10, 1999).

On the basis of written testimony, a Montana state district court *permanently enjoined* that state's "partial-birth abortion" ban. The court found that the statute "has the effect of banning D&E abortion procedures," which are used in 88% of second-trimester abortions in the state. The ban would thus "reduce a woman's access to abortion services, and increase the amount of risk and pain to the woman." Although addressing the constitutionality of the ban under the privacy clause of the state constitution, the court also noted that the law was unconstitutionally vague under the federal standard.

Following this ruling, the state passed an amended version of the ban. In a second lawsuit, the state district court issued a *temporary restraining order* against enforcement of the amended law.

Nebraska: *Carhart v. Stenberg*, 11 F. Supp. 2d 1099 (D. Neb. 1998), affirmed, 192 F.3d 1142 (8th Cir. 1999), petition for certiorari granted in part, 120 S. Ct. 865 (2000).

On the state's appeal from a federal district court ruling that permanently enjoined Nebraska's "partial-birth abortion" ban, the United States Court of Appeals for the Eighth Circuit affirmed. The Eighth Circuit held the law unconstitutional for banning the D&E procedure, the most common second-trimester abortion method. The appellate court did not consider the other bases of the district court's ruling, which included that the ban was vague and would harm women's health. The Supreme Court has decided to review the Eighth Circuit's decision and will hear argument on April 25, 2000.

New Jersey: *Planned Parenthood v. Verniero*, 41 F. Supp. 2d 478 (D.N.J. 1998), appeal argued, No. 99-5042 (3d Cir. Nov. 19, 1999).

After a trial on the merits, a federal district court issued a permanent injunction against enforcement of New Jersey's "partial-birth abortion" ban. The court held the law void for vagueness because "persons of ordinary intelligence must guess at the meaning" of the definitional language. The court also concluded that the Act, in part because of its imprecision, effectively and impermissibly "bans suction curettage, D&E and induction abortions... the three most commonly used abortion procedures" in the first and second trimesters of pregnancy. In addition, the court held that the law was "unconstitutional because it does not include a health exception" and contained only an inadequate life exception. The state has appealed the decision to the United States Court of Appeals for the Third Circuit.

Rhode Island: *Rhode Island Medical Society v. Whitehouse*, No. 97-416L, 1999 U.S. Dist. LEXIS 13546 (D.R.I. Aug. 30, 1999), appeal stayed, No. 99-2095 (1st Cir. Nov. 22, 1999).

After a trial on the merits, the federal district court invalidated Rhode Island's ban. The court held that the Act "is vague and does not provide doctors with sufficient guidance to know what the Legislature has made illegal." The court concluded, however, that the Act's terms described, and impermissibly banned, the most commonly used second-trimester abortion method, D&E. The court also struck down the ban because it lacks a health exception and an adequate life exception. Finally, the court invalidated

the law because it would have effectively required the physician to obtain the consent of the pregnant woman's parents (regardless of her age) and the consent of her sexual partner (regardless of his relationship, if any, to the woman) before performing any abortion that could fall under the Act's prohibition. The state has appealed to the United States Court of Appeals for the First Circuit, which has stayed proceedings pending the Supreme Court's decision in the Nebraska case.

West Virginia: *Brancazio v. Underwood*, No. 2:98-0495, 1998 U.S. Dist. LEXIS 22420 (D. W. Va. June 11, 1998).

A federal trial court issued a *temporary restraining order* against enforcement of West Virginia's ban, which remains enjoined pending further order of the court. The parties have agreed to a stay of proceedings pending the Supreme Court's decision in the Nebraska case.

Wisconsin: *Planned Parenthood v. Doyle*, 44 F. Supp. 2d 975 (W.D. Wis. 1999), affirmed, 195 F.3d 857 (7th Cir. 1999), stay granted, No. 99A428 (Nov. 30, 1999) (Stevens, J.), petition for certiorari filed, No. 99-1156 (Jan. 10, 2000).

After a federal district court refused to issue emergency relief enjoining Wisconsin's "partial-birth abortion" ban, a panel of the United States Court of Appeals for the Seventh Circuit reversed and ordered the ban *preliminarily enjoined*. On remand and following a trial, the district court again declined to issue an injunction, but stayed its ruling pending plaintiffs' appeal to the Seventh Circuit. The Seventh Circuit heard the case *en banc* (along with the appeal of the decision enjoining Illinois's ban). Rejecting the reasoning of the earlier Seventh Circuit panel, a narrow majority of the court upheld both the Illinois and Wisconsin laws. The 5-4 decision was issued over a vigorous dissent written by the chief judge. As in the Illinois case, the Wisconsin plaintiffs obtained a stay from Justice Stevens, ensuring that the law cannot be enforced until the Supreme Court decides whether to review the case.

State Where So-Called "Partial-Birth Abortion" Ban Is Severely Limited:

Alabama: *Summit Medical Associates v. James*, 984 F. Supp. 1404 (M.D. Ala. 1998), affirmed, *Summit Medical Associates v. Pryor*, 180 F.3d 1326 (11th Cir. 1999), petition for certiorari filed, No. 99-1041 (Dec. 20, 1999).

Although courts have so far declined – on procedural grounds – to enjoin Alabama's "partial-birth abortion" ban, abortion providers in the state are not without protection while the case progresses: The state attorney general has issued a letter limiting enforcement of the ban to post-viability procedures. While the state has petitioned the Supreme Court for review on a procedural issue, the case has returned to the federal district court for final consideration on the merits.

State Where Court Has Permitted So-Called "Partial-Birth Abortion" Ban To Remain in Effect Pending Further Proceedings:

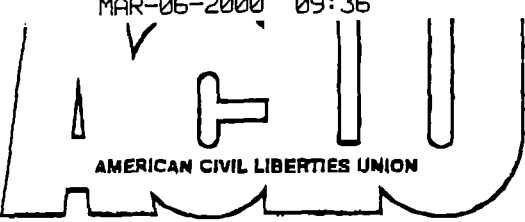
Virginia: *Richmond Medical Center for Women v. Gilmore*, 11 F. Supp. 2d 795 (E.D. Va. 1998) (preliminary injunction), 144 F.3d 326 (4th Cir. 1998) (decision of single judge granting state's motion to stay preliminary injunction pending appeal), 183 F.3d 303 (4th Cir. 1998) (decision of panel declining to lift stay,

over dissent), 55 F. Supp. 2d 441 (E.D. Va. 1999) (permanent injunction), appeal filed, No. 98-1930 (4th Cir. July 23, 1999), No. 98-1930 (4th Cir. Sept. 14, 1999) (decision of panel granting state's motion to stay permanent injunction pending appeal, over dissent).

After a federal district judge issued a preliminary Injunction against Virginia's "partial-birth abortion" ban, a single judge of the United States Court of Appeals for the Fourth Circuit granted the state's motion to stay the injunction. In issuing the stay, the appellate judge concluded that the ban prohibited only one discrete procedure. Because the plaintiffs did not intentionally perform that procedure, the judge held that they lacked standing to challenge the ban. Over a strong dissent, a panel of the Fourth Circuit, which included the single judge, declined to vacate the stay. The ban therefore went into effect while the district court conducted the trial on the merits. After the trial, and for all the reasons that have swayed courts addressing nearly every other "partial-birth abortion" ban, the district court issued a permanent injunction, which stopped enforcement of the ban. Once again, however, the same appellate panel, over a dissent, stayed the injunction pending appeal. Therefore, the ban is back in effect while the state appeals the district court's ruling to the Fourth Circuit.

February 28, 2000

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H.R. 3660, THE SO-CALLED "PARTIAL-BIRTH ABORTION ACT OF 2000," IS UNCONSTITUTIONAL

The ACLU opposes H.R. 3660, the so-called "Partial-Birth Abortion Act of 2000," because it bans safe and common abortion procedures and thus threatens women's health and reproductive rights. Proponents of H.R. 3660, claim that it will prohibit only a single, "late-term" abortion procedure. In effect, however, H.R. 3660 is nothing but a ban on abortion. As medical experts have testified and courts across the country have found, bans worded similarly to H.R. 3660 could reach the safest and most common abortion procedures used *throughout pregnancy*. Such a ban puts women's health and lives at risk and violates the constitutional right to reproductive choice.

Congress has twice put politics before women's health in enacting "partial-birth abortion" bans. Only President Clinton's vetoes in 1996 and 1997 prevented these bills from becoming law. Each time, Congress tried to override the President's veto but fell a few votes short in the Senate. Last fall, the Senate once again passed a so-called partial-birth abortion ban. The House is expected to vote on an identical ban sometime this spring.

Courts Have Overwhelmingly Struck Down Similar Bans in the States

Echoing events at the national level, anti-choice state legislators have also enacted bans on abortion procedures. Like the federal bill, most of the state measures are so vague and so broad that they cover a wide range of abortion methods.

The overwhelming majority of courts to have ruled on challenges to state so-called "partial-birth abortion" bans have declared the bans unconstitutional and enjoined their enforcement. In the last three years, medical providers have challenged state statutes that ban "partial-birth abortion" in twenty states. In eighteen of these states -- Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Illinois, Iowa, Kentucky, Louisiana, Michigan, Missouri, Montana, Nebraska, New Jersey, Rhode Island, West Virginia, and Wisconsin -- the bans are currently enjoined, in whole or in part.¹ In a nineteenth, Alabama, the state attorney general has limited the ban's enforcement to post-viability abortions. In only one state, Virginia, has a court considered the constitutional challenges but nevertheless permitted enforcement of the statute pending further proceedings.² This spring, the

¹ The ACLU has litigated the cases in the following states: Alaska, Idaho, Illinois, Kentucky, Michigan, Montana, New Jersey, and Rhode Island.

² In nine additional states -- Indiana, Kansas, Mississippi, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, and Utah -- bans have been enacted but not challenged. And a thirtieth state, Ohio, passed a law in 1995 that would have banned "dilation and extraction." That law was struck down in federal court.

United States Supreme Court will review a decision by the Eighth Circuit Court of Appeals striking down Nebraska's ban as unconstitutional.

Bans on Safe Abortion Procedures Harm Women's Health

H.R. 3660 threatens women's health. Here are some of the reasons why:

- **H.R. 3660 Reaches an Array of Safe and Common Abortion Methods.**

Although its sponsors characterize it as aimed at a single, "late," "gruesome" procedure, H.R. 3660 is not in fact limited to any stage of pregnancy, and it defines the conduct to be banned so broadly as to reach an array of safe and common methods of abortion. Doctors have testified repeatedly and courts across the country have found that similarly worded bans can apply to virtually all procedures used in the second trimester of pregnancy and even to some first-trimester abortions. In enjoining Iowa's ban, a federal court stated that the law could "encompass within its scope of prohibited conduct all of the abortion procedures" commonly used throughout pregnancy.

- **Women Must Be Able to Rely on Their Doctor's Discretion to Use the Method Safest for Them.**

Even if it were true, as the ban's proponents claim, that H.R. 3660 covers only a single abortion procedure, it would still endanger women's health. A threat to women's health always results when a safe medical procedure is removed from the physician's array of options, as there will always be some woman for whom the banned procedure would be the safest. Physicians must retain the discretion to decide what is best for their patients, and women must be able to count on their doctor's ability to use the abortion method most likely to protect their health. The government simply should not be in the business of banning any medical procedure that doctors consider safe and medically appropriate in certain circumstances.

- **Government Intrusion in the Operating Room Jeopardizes Safe Medical Care.**

Politicians should not regulate medicine in a way that undermines the safety of patients. Legislators are not trained to make medical decisions. They should leave decisions about the best surgical techniques for abortion in the hands of doctors, patients, and their families. H.R. 3660's uncertain scope and use of non-medical terminology simply highlights that politicians should not try to micro-manage the practice of medicine.

Bans on Safe Abortion Procedures Are Unconstitutional

H.R. 3660 bans safe abortion procedures and thus infringes constitutional protections for reproductive freedom. As federal and state courts around the country have recognized, similarly worded bans are unconstitutional for their wide-reaching prohibition on the safest, most common methods of abortion; for their failure to include adequate exceptions to protect a woman's life or health; and for their vagueness.

- **An Unconstitutional "Undue Burden" on Abortion Rights**

H.R. 3660 threatens the core right to choose abortion. The Supreme Court has held that the government may not prohibit a woman from making the ultimate decision, in accordance with her own conscience and moral imperatives, to have an abortion. Abortion restrictions are unconstitutional if they place an "undue burden" on a woman's right to choose abortion, that is, if they would place a substantial obstacle in the path of women seeking abortions.

H.R. 3660 poses not only a substantial obstacle, but an absolute barrier to many abortions that are now safe and legal. Physicians appearing in courts all over the country have testified that they read the language of similarly worded bans to reach most methods of abortion used throughout pregnancy. After reviewing such evidence, a court in Iowa held that the ban in that state was "unconstitutional as a matter of law."

- **An Impermissible Endangerment of Women's Health and Safety**

By prohibiting safe and common abortion methods, H.R. 3660 compromises women's health and drastically limits physicians' discretion to choose the most medically appropriate abortion method for their patients. A federal appellate court enjoined Wisconsin's ban, after concluding that it "tak[es] chances of unknown magnitude with the health of pregnant women."

Moreover, H.R. 3660 unconstitutionally fails to provide adequate life and health exceptions. The government may never, even in the latest stages of pregnancy, prohibit abortions that are necessary to preserve women's lives or health. H.R. 3660 applies throughout pregnancy and yet contains no health exception whatsoever and a dangerously inadequate life exception. As a federal district court in Illinois held after reviewing the exceptions in a similar ban, the law would impermissibly require women "to remain pregnant even in the face of serious health concerns."

- **An Unconstitutionally Vague Definition**

The Due Process Clause prohibits laws so vague that persons of ordinary intelligence must guess at their meaning. H.R. 3660 fails to provide physicians adequate notice as to which abortion methods it prohibits. It would also subject physicians to arbitrary enforcement under unclear standards. In enjoining Rhode Island's ban a federal court concluded that the law fails to "provide doctors with sufficient guidance to know what the Legislature made illegal."

- **No Legitimate State Interest**

The framework set forth in *Planned Parenthood v. Casey* (1992) for evaluating abortion laws under the federal Constitution requires that the government act to further legitimate ends. Yet H.R. 3660 serves neither of the governmental interests that *Casey* identified -- an interest in maternal health or in the potential life of the fetus. By outlawing abortion methods that may be the safest for many women, the bill in fact undermines women's health. Moreover, even if the ban targeted a single procedure, as its proponents claim, it would not further a state interest in potential life. Rather, it would channel women who had already made a decision to end their pregnancies away from one method -- and perhaps, for them, the safest method -- of doing so.

* * *

Congress should learn what judges -- Republican and Democratic appointees alike -- already know: that H.R. 3660 is a dangerous threat to women's health and an unconstitutional attack on reproductive freedom.

For more information, contact: Kathryn Engustian, Legislative Counsel, 202-675-2317

March 3, 2000

I

106TH CONGRESS
2D SESSION

H. R. 3660

To amend title 18, United States Code, to ban partial-birth abortions.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 15, 2000

Mr. CANADY of Florida (for himself, Mr. SHERWOOD, Mr. SMITH of New Jersey, Mr. TAYLOR of North Carolina, Mr. SPENCE, Mr. HYDE, Mr. TIAHRT, Mr. JOHN, Mr. COBURN, Mr. ISTOOK, Mr. BEREUTER, Mr. PITTS, Mr. BARCIA, Mr. GOSS, Mr. NEY, Mr. BLILEY, Mr. SHOWS, Mr. WICKER, Mr. HOEKSTRA, Mr. CHABOT, Mr. BACHUS, Mr. BURTON of Indiana, Mr. DELAY, Mr. PACKARD, Mr. EVERETT, Mr. PICKERING, Mr. TANNER, Mr. HILLEARY, Mr. RAHALL, Mr. SOUDER, Mr. WELDON of Florida, Mr. GREEN of Wisconsin, Mr. ARMEY, Mr. GRAHAM, Mr. STUMP, Mr. MCCRERY, Mr. FLETCHER, Mr. DEMINT, Mr. SHADEGG, Mr. TALENT, Mr. JENKINS, Mr. HOSTETTLER, Mr. HILL of Montana, Mr. KING, Mr. FRANKS of New Jersey, Mr. MCINTOSH, Mr. POMBO, Mr. HUNTER, Mr. ENGLISH, Mr. WELLER, Mr. BUYER, Mr. MASCARA, Mr. BARTON of Texas, Mr. RORMER, Mr. BALLENGER, Mrs. EMERSON, Mr. BRADY of Texas, Mr. LUCAS of Oklahoma, Mr. HANSEN, Mr. GOODE, Mr. MANZULLO, Mr. LEWIS of Kentucky, Mr. BARRETT of Nebraska, Mr. BOEHNER, Mr. CAMP, Mr. SKELTON, Mr. HASTINGS of Washington, Mr. STUPAK, Mr. PHELPS, Mr. EHLERS, Mr. PORTMAN, Mr. TANCREDO, Mrs. MYRICK, Mr. DOOLITTLE, Mr. LARGENT, Mr. DOYLE, Mr. VITTER, Mrs. FOWLER, Mr. COLLINS, Mr. CRANE, Mrs. NORTHUP, Mr. BLUNT, and Mr. ADERHOLT) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 18, United States Code, to ban partial-birth abortions.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Partial-Birth Abortion
5 Ban Act of 2000".

6 **SEC. 2. PROHIBITION ON PARTIAL-BIRTH ABORTIONS.**

7 (a) IN GENERAL.—Title 18, United States Code, is
8 amended by inserting after chapter 73 the following:

9 **"CHAPTER 74—PARTIAL-BIRTH ABORTIONS**

"Sec.

"1531. Partial-birth abortions prohibited.

10 **"§ 1531. Partial-birth abortions prohibited**

11 "(a) Any physician who, in or affecting interstate or
12 foreign commerce, knowingly performs a partial-birth
13 abortion and thereby kills a human fetus shall be fined
14 under this title or imprisoned not more than two years,
15 or both. This paragraph shall not apply to a partial-birth
16 abortion that is necessary to save the life of a mother
17 whose life is endangered by a physical disorder, illness,
18 or injury. This paragraph shall become effective one day
19 after enactment.

20 "(b)(1) As used in this section, the term 'partial-birth
21 abortion' means an abortion in which the person per-
22 forming the abortion deliberately and intentionally—

23 "(A) vaginally delivers some portion of an in-
24 tact living fetus until the fetus is partially outside

1 the body of the mother, for the purpose of per-
2 forming an overt act that the person knows will kill
3 the fetus while the fetus is partially outside the body
4 of the mother; and

5 "(B) performs the overt act that kills the fetus
6 while the intact living fetus is partially outside the
7 body of the mother.

8 "(2) As used in this section, the term 'physician'
9 means a doctor of medicine or osteopathy legally author-
10 ized to practice medicine and surgery by the State in
11 which the doctor performs such activity, or any other indi-
12 vidual legally authorized by the State to perform abor-
13 tions: *Provided, however,* That any individual who is not
14 a physician or not otherwise legally authorized by the
15 State to perform abortions, but who nevertheless directly
16 performs a partial-birth abortion, shall be subject to the
17 provisions of this section.

18 "(c)(1) The father, if married to the mother at the
19 time she receives a partial-birth abortion procedure, and
20 if the mother has not attained the age of 18 years at the
21 time of the abortion, the maternal grandparents of the
22 fetus, may in a civil action obtain appropriate relief, unless
23 the pregnancy resulted from the plaintiff's criminal con-
24 duct or the plaintiff consented to the abortion.

25 "(2) Such relief shall include

1 “(A) money damages for all injuries, psycho-
2 logical and physical, occasioned by the violation of
3 this section; and

4 “(B) statutory damages equal to three times
5 the cost of the partial-birth abortion.

6 “(d)(1) A defendant accused of an offense under this
7 section may seek a hearing before the State Medical Board
8 on whether the physician's conduct was necessary to save
9 the life of the mother whose life was endangered by a
10 physical disorder, illness or injury.

11 “(2) The findings on that issue are admissible on that
12 issue at the trial of the defendant. Upon a motion of the
13 defendant, the court shall delay the beginning of the trial
14 for not more than 30 days to permit such a hearing to
15 take place.

16 “(e) A woman upon whom a partial-birth abortion is
17 performed may not be prosecuted under this section, for
18 a conspiracy to violate this section, or for an offense under
19 section 2, 3, or 4 of this title based on a violation of this
20 section.”.

21 (b) CLERICAL AMENDMENT. The table of chapters
22 for part I of title 18, United States Code, is amended by
23 inserting after the item relating to chapter 73 the fol-
24 lowing new item:

“74. Partial-birth abortions 1531”.

Abortion Bans — Deceptive, Extreme, Unconstitutional

A Ruse to Overturn *Roe v. Wade*

February, 2000

Status of Challenges to Abortion Bans

On January 14, 2000, the U.S. Supreme Court announced it would consider the constitutionality of Nebraska's so-called "partial-birth abortion" ban on April 25. In September, 1999, the U.S. Court of Appeals for the Eighth Circuit found, in a unanimous decision the Arkansas, Iowa, and Nebraska laws to be unconstitutional. However, a sharp split in the circuits occurred in October, 1999, when the Seventh Circuit upheld similar laws in Illinois and Wisconsin. U.S. Supreme Court Justice John Paul Stevens issued a stay blocking the Seventh Circuit's decision on November 30, 1999, pending review by the full Supreme Court.

Legal challenges have been mounted in 21 of the 30 states that have passed such abortion bans. In 20 states the laws have been blocked or severely limited.

Status of Abortion Bans on Appeal:

U.S. Supreme Court: On January 14, 2000, the U.S. Supreme Court accepted Nebraska's case. Arguments will be heard on April 25, 2000, with a decision expected by July.

Illinois –	ACLU filed a petition for Supreme Court review on January 10, 2000
Iowa –	State filed petition for Supreme Court review on December 23, 1999
Nebraska –	State filed petition for Supreme Court review on November 12, 1999
Wisconsin –	CRLP filed petition for Supreme Court review on January 14, 2000
	PPFA filed a petition for Supreme Court review on January 10, 2000

U.S. Courts of Appeal

1 st Circuit –	Both parties agreed to stay the Rhode Island case on November 22, 1999
3 rd Circuit –	Heard argument in New Jersey case on November 19, 1999
	State of New Jersey appealed the permanent injunction decision
4 th Circuit –	Commonwealth of Virginia has appealed the permanent injunction decision
	September 14, 1999 – Fourth Circuit granted state's motion for stay pending appeal.
5 th Circuit –	State of Louisiana appealed the permanent injunction decision – Argument scheduled for March 2, 2000
6 th Circuit –	Argument heard in Kentucky case on December 15, 1999
	State of Kentucky appealed the permanent injunction decision
	Permanently enjoined Ohio's law, which was a narrower ban on a certain method of abortion called D&X. The U.S. Supreme Court declined to hear the case in 1997.

7th Circuit –

See Supreme Court above

November 30, 1999 – U.S. Supreme Court Justice John Paul Stevens issued a stay of the Seventh Circuit decision pending review by the full Court.

October 26, 1999 - upheld constitutionality of Illinois and Wisconsin statutes by a vote of 5-4,

En banc hearing in Illinois and Wisconsin cases heard on September 22, 1999

June 16, 1999 -Wisconsin abortion providers appeal May 28, 1999, decision upholding the abortion ban

Heard appeal of Illinois decision on February 10, 1999

November 3, 1998 issued a decision temporarily enjoining Wisconsin's ban and sent case back to district court for further evidentiary hearings

8th Circuit –

See Supreme Court above.

December 23, 1999 – Iowa petitions Supreme Court to review its case

November 12, 1999 – Nebraska petitions Supreme Court to review its case

September 24, 1999 – affirmed lower court decisions striking down the bans in Arkansas, Iowa, and Nebraska

Heard appeal of Arkansas and Nebraska decisions on April 19, 1999

Appeals from Florida and Arizona have been dismissed upon the request of each state.

Laws Blocked by a Federal or State Court (18) (* indicates cases litigated by CRLP)

Alaska* –

permanent injunction

Arizona –

permanent injunction

Arkansas* –

permanent injunction affirmed on appeal

Florida* –

permanent injunction

Idaho –

permanent injunction

Illinois –

permanent injunction reversed when U.S. Court of Appeals for the Seventh Circuit found ban constitutional - decision blocked by U.S. Supreme Court Justice Stevens

Iowa* –

permanent injunction affirmed on appeal – State has petitioned for Supreme Court review

Kentucky –

permanent injunction

Louisiana* –

permanent injunction

Michigan* –

permanent injunction

Missouri –

preliminary injunction

Montana* –

permanent injunction

Nebraska* –

permanent injunction affirmed on appeal: U.S. Supreme Court will review

New Jersey –

permanent injunction

Ohio* –	permanent injunction (banned D&X method of abortion)
Rhode Island –	permanent injunction
West Virginia* –	<i>temporary</i> restraining order
Wisconsin* –	law upheld by U.S. Court of Appeals for the Seventh Circuit but decision blocked by U.S. Supreme Court Justice Stevens

Injunction Overturned (1)

Virginia* – **permanent** injunction stayed pending appeal

Laws with Limited Enforcement (2)

Alabama* –	Attorney General has limited enforcement to post-viability abortions
Georgia* –	Federal court order limits enforcement to post-viability abortions

Laws Modeled after Federal Legislation

Five of the nine states that passed “partial-birth abortion” laws using the definition from the 1997 federal bill have had their laws enjoined: Idaho, Iowa, Kentucky, Nebraska, New Jersey, and West Virginia (The Oklahoma and Tennessee statutes were not challenged)

The definition is “the term ‘vaginally delivers a living fetus before killing the fetus’ means deliberately and intentionally delivers into the vagina a living fetus, or a substantial portion thereof, for the purpose of performing a procedure the physician knows will kill the fetus, and kills the fetus.”

The Nebraska statute, which is now before the U.S. Supreme Court, uses the term “living unborn child,” which is defined from the point of conception, rather than “fetus.”

State Laws that Have Not Been Challenged (9)

Indiana	Oklahoma	Tennessee
Kansas (post-viability bans)	South Carolina	Utah (post-viability bans)
Mississippi	South Dakota	
North Dakota		

(Note: Michigan and Montana enacted similar abortion bans that have not yet taken effect)



NARAL

Reproductive Freedom & Choice

To: Judiciary and Reproductive Health Staff
From: Allison Herwitt, Director of Government Relations
Donna Crane, Legislative Representative
Date: March 6, 2000
Subject: ***Upcoming Committee Mark-up of H.R.3660,
the "Partial-Birth" Abortion Ban***

On Wednesday, March 8, the House Judiciary Committee will be marking up H.R.3660, the so-called "Partial-Birth" Abortion Ban. **NARAL strongly opposes this legislation and urges members to vote against its passage in committee.**

This marks the third Congress in which this legislation has been considered. Each of the two previous times, the president's veto has been sustained in the Senate but overridden in the House.

Additionally, over the past five years, 30 states have enacted similar legislation; of the 21 states in which court challenges were initiated, 19 courts have partially or fully enjoined so-called "partial-birth" bans for the very reasons we oppose the federal bill. Even though the Supreme Court is set to hear arguments on Nebraska's so-called "partial-birth" ban April 25, the anti-choice House leadership is bringing up this bill yet again to force pro-choice and mixed-choice members to vote in an election year on an issue that has been demagogued in graphic and sensational rhetoric.

American voters have also concluded the bans are deceptive and extreme; ballot initiatives to outlaw so-called "partial-birth" abortions recently have been defeated in Colorado, Washington, and Maine.

H.R.3660, though modified very slightly from earlier versions of this legislation, remains unconstitutional and deceptive:

- "Partial-birth" is a political term, not a medical term. The definition of what methods of abortion would be banned is vague and overbroad.
- Courts have found it would ban a variety of safe abortion procedures used throughout pregnancy, not just one technique.
- By banning a variety of safe abortion procedures, the legislation would significantly narrow the options available to women seeking abortion, forcing doctors to use procedures that may be less appropriate and safe for the woman's particular circumstances. This imposes an unconstitutional undue burden on women's freedom to choose.
- The bill endangers women's health by failing to include a constitutionally mandated exception to protect the health of the woman.

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- The bill attempts to micro-manage surgical procedures, which undermines the health of women and intrudes on the doctor-patient relationship.

In addition to its inherent legislative flaws, this new bill is being introduced just as the Supreme Court is poised to decide whether Nebraska's so-called "partial-birth" ban is an unconstitutional violation of the right to choose. The Congress should not legislate on this matter; rather, members should let the Supreme Court rule.

Please join the reproductive health community and respected health organizations such as the American College of Obstetricians and Gynecologists (ACOG), the American Medical Women's Association (AMWA), the American Nurses Association and the American Public Health Association in opposition to this legislation. Additional information H.R.3660 is enclosed for your information. If you have any questions, please contact Allison Herwitt at 973-3003 or Donna Crane at 973-3047.



NARAL

Reproductive Freedom & Choice

PROTECT WOMEN: OPPOSE BANS ON SO-CALLED "PARTIAL-BIRTH" ABORTION

Opponents of choice have been using inflammatory rhetoric about "infanticide" and "partial-birth" abortion in a nationwide strategy to further their goal of eroding women's reproductive options. These legislators say they are trying to ban only one abortion procedure, but the vague and broadly worded legislation indicates another motive: they want a political tool to use against women and politicians to undermine support for reproductive choice.

- **Private medical decisions should be made by women and their families, not politicians.** Medical decisions are often difficult and complex and depend on a variety of individual factors. Politicians are not trained to make medical decisions and should not regulate medicine in a way that undermines the safety of patients. Bans on so-called "partial-birth" abortion would take medical decisions out of the hands of women and their families and give it to politicians.
- The American College of Obstetricians and Gynecologists (ACOG), an organization dedicated to women's health, opposes this criminal ban because "[t]he intervention of legislative bodies into medical decision making is inappropriate, ill advised and dangerous."
- **Women's health would be endangered by bans on abortion procedures.** Despite repeated attempts, anti-choice lawmakers have refused to allow an exception to protect women's health. The Supreme Court has concluded in several cases that a woman's health must remain the physician's primary concern and that a physician must be given the discretion to determine the best course of treatment to protect women's lives and health.
- **The ban violates the core principles of *Roe v. Wade*.** Bans on abortion procedures are unconstitutional in at least three ways:
 - The definition of what methods of abortion would be banned is vague and overbroad. "Partial-birth" abortion is a political term, not a medical term. It could ban safe and common abortion procedures pre-viability.
 - By banning a variety of safe abortion procedures, the bans impose an undue burden on women seeking access to abortions by forcing them to rely upon less safe medical options.
 - The bans are unconstitutional because they do not allow women to obtain a banned procedure when it would preserve her health.
- **Instead of making abortion more difficult and dangerous for women, lawmakers should promote policies that reduce the need for abortion.** Almost 50 percent of all pregnancies in this country are unintended, including over 30 percent within marriage. And over half of all unintended pregnancies end in abortion. Improved access to contraception -- including increases in Title X funding, insurance coverage of contraception and improved contraceptive research -- would address the root causes of unintended pregnancy and would reduce the need for abortion.

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Feb. 2000

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NARAL

Reproductive Freedom & Choice

CONSTITUTIONAL ANALYSIS OF LEGISLATION BANNING ABORTION PROCEDURES

Opponents of choice have been using inflammatory rhetoric about "infanticide" and "partial-birth" abortion in a nationwide strategy to further their goal of eroding women's reproductive options. However, bans on abortion procedures are unconstitutional in at least three ways. First, the definition of what methods of abortion would be banned is vague and overbroad -- it would ban a variety of safe and common abortion procedures, not just one procedure. Second, by banning a variety of safe abortion procedures, the bans impose an undue burden on women seeking access to abortions by forcing them to rely upon less safe medical options. Finally, these bans are unconstitutional because they do not allow a woman to obtain a banned procedure when it would preserve her health.

Instead of making abortion more difficult and dangerous for women, lawmakers should promote policies that reduce the need for abortion. Almost 50 percent of all pregnancies in this country are unintended, including over 30 percent within marriage.

And over half of all unintended pregnancies end in abortion. Improved access to contraception -- including increases in Title X funding, insurance coverage of contraception and improved contraceptive research -- would address the root causes of unintended pregnancy and would reduce the need for abortion.

Bans on Abortion Procedures, Such As So-Called "Partial-Birth" Abortion, Violate *Roe v. Wade*.

- ▶ The U.S. Supreme Court recognized a woman's constitutional right to choose whether or not to have an abortion in *Roe v. Wade*.¹ *Roe* also established that this right is limited after fetal viability, at which point the state may ban abortion as long as exceptions are provided for cases in which the woman's life or health are at risk. By violating these holdings, explicitly reaffirmed by the Court in the 1992 *Planned Parenthood v. Casey* decision,² so-called "partial-birth" abortion bans present a direct constitutional challenge to *Roe*.
- ▶ The legislation, as typically introduced, applies throughout pregnancy in disregard of the crucial constitutional distinction between pre- and post-viability abortion. In addition, the bills' failure to provide an exception for cases in which the banned procedure is necessary to

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preserve a woman's health is a grave constitutional flaw.

- ▶ Nearly 90 percent of all abortions occur in the first trimester of pregnancy.³ Only approximately one percent of abortions take place at 21 weeks or later.⁴ Although states may ban virtually all abortion after viability — a point that varies with each pregnancy but is generally considered to be at 23-24 weeks⁵ — the state may not ban second-trimester abortion. As recently as 1992, the U.S. Supreme Court held that “[r]egardless of whether exceptions are made for particular circumstances, [the government] may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.”⁶ By prohibiting the use of certain procedures, both before and after viability, the ban violates the constitutionally protected status of second-trimester abortion and curtails a physician's ability to use the abortion method most appropriate in light of each woman's individual circumstances.

Bans On Abortion Procedures Unconstitutionally Jeopardize Women's Health.

- ▶ As stated above, the Supreme Court held in *Roe*, and reaffirmed in *Casey*, that after viability, a state may not ban an abortion necessary to preserve a woman's life or health. In *Casey*, the Court also held that, prior to viability, restrictions on abortion must not constitute an undue burden on a woman's right to choose. An undue burden is one that has "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."⁷ As numerous courts have found, blocking a woman's access to the abortion procedure that may be safest for her unduly burdens her right to choose.⁸
- ▶ For example, in *Carhart v. Stenberg*,⁹ the U.S. Court of Appeals for the Eighth Circuit concluded that Nebraska's ban on so-called "partial-birth" abortion was problematic because it "prohibit[s] the most common procedure for second-trimester abortions and, in doing so, imposes an undue burden on a woman's right to choose to have an abortion."
- ▶ Similarly, in *Planned Parenthood of Central New Jersey v. Verniero*,¹⁰ the U.S. district court said: "First, the Act's language is so vague that its effect is to ban most conventional abortion procedures without regard to the viability of the fetus. Second, the Act proscribes 'partial-birth abortions' without providing a health or adequate life exception. For these reasons, the Act imposes an undue burden and is unconstitutional."
- ▶ In *Thornburgh v. American College of Obstetricians and Gynecologists*¹¹ and *Colautti v. Franklin*,¹² the Supreme Court established that it is unconstitutional to force a physician to make a "trade-off" between the woman's health and the state's interest in fetal life. The woman's health must remain the physician's primary concern, and the physician must be given the discretion he or she needs to choose the most appropriate abortion method.

- ▶ A statutory ban on so-called “partial-birth” abortion violates the basic tenets set forth in *Casey* and *Thornburgh* by substituting the woman's judgment as informed fully and accurately by her physician with that of a state legislature, thereby unduly burdening her right to choose.

Bans on Abortion Procedures Create an Unconstitutional Chilling Effect.

- ▶ A bedrock principle of constitutional law prohibits the government from punishing individuals for violating a statute when the statute does not give “fair warning as to what conduct is prohibited.”¹³ Many state legislative bans utilize the term “partial-birth” abortion, but this term does not have a medically recognized meaning. The definition of “partial-birth” abortion in most bills fails to identify clearly which procedures are prohibited by the ban. Although proponents of the bans claim that they are targeting a specific abortion method, courts across the country have found that the legislation could prohibit many methods of abortion.¹⁴
- ▶ Generally, under another important constitutional law principle, an individual may be punished as a criminal only for actions undertaken with at least some degree of criminal intent. Under some versions of this legislation, however, physicians could be criminally liable if — in the exercise of their best medical judgment — they determined that a woman's circumstances were so dire that she was covered by the life endangerment exception but this determination was later considered by a court, a jury or state medical review board to have been mistaken.
- ▶ A provision in a bill permitting a physician to seek a hearing before the state medical board regarding whether a banned procedure was necessary to save a woman's life endangered by certain physical threats does not mitigate the threat of criminal prosecution. The government can proceed with its prosecution of the physician regardless of the outcome of the state medical board hearing. Moreover, the medical board cannot decide in favor of a physician exercising his or her considered medical discretion to protect the patient's health unless it concludes that the procedure falls within the narrow life exception.
- ▶ Most bans would subject physicians to broad civil as well as criminal liability. Under many bills, a physician who performs a banned procedure may be sued for monetary damages by his or her patient, and in some cases, the woman's parents or the “father” of the fetus. The threat of unwarranted lawsuits is significant; abortion providers have already been targeted widely for civil litigation.¹⁵
- ▶ Under vague legislation in which the banned procedures are not sufficiently well-defined, physicians are forced to guess whether employing the method they believe to be in the best medical interest of the patient would violate the law. They face criminal liability without criminal intent and significant civil litigation. Such legal peril further chills physicians' willingness to provide necessary abortion services and unconstitutionally

jeopardizes women's lives and health.

10/27/99

Notes

1. *Roe v. Wade*, 410 U.S. 113 (1973).
2. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).
3. The Alan Guttmacher Institute (AGI), "The Limitations of U.S. Statistics on Abortion," Jan. 1997 (Issues in Brief); AGI, "When Do Abortions Take Place?," September 25, 1996 (factsheet).
4. AGI, "The Limitations of U.S. Statistics on Abortion," 2.
5. AGI, "The Limitations of U.S. Statistics on Abortion," 1.
6. *Casey*, 505 U.S. at 879.
7. *Casey*, 505 U.S. at 877.
8. See *Carhart v. Stenberg*, 1999 WL 753919 at *7 (8th Cir. Sept. 24, 1999); *Little Rock Family Planning Services v. Jegley*, 1999 WL 753928 at *4 (8th Cir. Sept. 24, 1999); *Planned Parenthood of Greater Iowa, Inc. v. Miller*, 1999 WL 753770 at *2 (8th Cir. Sept. 24, 1999); *Causeway Medical Suite v. Foster*, 43 F. Supp. 2d 604, 613 (E.D. La. 1999); *Planned Parenthood of Central New Jersey v. Verniero*, 41 F. Supp. 2d 478, 499-500 (D.N.J. 1998); *A Choice For Women v. Butterworth*, 54 F. Supp. 2d 1148, 1156 (S.D. Fla. 1998); *Eubanks v. Stengel*, 28 F. Supp. 2d 1024, 1037 (W.D. Ky. 1998); *Evans v. Kelley*, 977 F. Supp. 1283, 1318 (E.D. Mich. 1997). See also *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 75-79 (1976). But see *Hope Clinic v. Ryan*, No. 98-1726 (7th Cir. Oct. 26, 1999); *Christensen v. Doyle*, Nos. 99-2528 & 99-2533 (7th Cir. Oct. 26, 1999) (upholding so-called "partial-birth" abortion bans in Wisconsin and Illinois while directing the lower courts to issue "precautionary injunctions" prohibiting the enforcement of these bans as applied to all but a single type of procedure, despite the fact that neither statute contained such limiting language).
9. *Carhart v. Stenberg*, 1999 WL 753919 at *7 (8th Cir. Sept. 24, 1999).
10. *Planned Parenthood of Central New Jersey v. Verniero*, 41 F. Supp. 2d 478 (D. N.J. 1998), appeal docketed, No. 99-5042 (3d Cir. Jan. 28, 1999).
11. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 769 (1986).
12. *Colautti v. Franklin*, 439 U.S. 379, 400 (1979).
13. *Women's Medical Professional Corp. v. Voinovich*, 911 F. Supp. 1051, 1063 (S.D. Ohio 1995)(citing *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)), affirmed, 130 F.3d 187 (6th Cir. 1997), cert. denied, 118 S.Ct. 1347 (1998).
14. Several courts have ruled that bans on so-called "partial-birth" abortion and other abortion procedures encompass more than one method of abortion. See, e.g., *Carhart v. Stenberg*, 1999 WL 753919 at *7 (8th Cir. Sept. 24, 1999); *Little Rock Family Planning Services v. Jegley*, 1999 WL 753928 at *4 (8th Cir. Sept. 24, 1999); *Planned Parenthood of Greater Iowa, Inc. v. Miller*, 1999 WL 753770 at *2 (8th Cir. Sept. 24, 1999); *Voinovich*, 130 F.3d at 198-200; *Verniero*, 41 F. Supp. 2d at 494; *Butterworth*, 54 F. Supp. 2d at 1155; *Eubanks*, 28 F. Supp. 2d at 1036; *Planned Parenthood of Southern Arizona, Inc. v. Woods*, 982 F. Supp. 1369, 1378-79 (D. Ariz. 1997); *Evans*, 977 F. Supp. at 1306-12. But see *Hope Clinic v. Ryan*, No. 98-1726 (7th Cir. Oct. 26, 1999); *Christensen v. Doyle*, Nos. 99-2528 & 99-2533 (7th Cir. Oct. 26, 1999)

(upholding so-called "partial-birth" abortion bans in Wisconsin and Illinois only after directing the lower courts to issue "precautionary injunctions" prohibiting the enforcement of these bans as applied to all but a single type of procedure, despite the fact that neither statute contained such limiting language).

15. Julie Cohen, "Protecting Women or Harassing Doctors?" *Legal Times*, Feb. 14, 1994, 1; see David C. Reardon, *Abortion Malpractice* (Lewisville, Texas: Life Dynamics Inc. 1993).



NARAL

Reproductive Freedom & Choice

**NUMEROUS FEDERAL COURTS SPEAK:
BANS ON ABORTION PROCEDURES ARE UNCONSTITUTIONAL**

Recently, the U.S. Supreme Court agreed to review a case regarding the constitutionality of Nebraska's law banning so-called "partial-birth" abortion.¹ Arguments in this case will be heard in April, with a decision expected in the summer of 2000. The highly anticipated decision will determine the constitutionality of such laws, resolving the split that developed among the U.S. Circuit Courts of Appeal in 1999. Despite this split, it is important to note that courts have ruled repeatedly that bans on so-called "partial-birth" abortion are unconstitutional. In fact, a majority of courts considering challenges to such bans has enjoined the laws. Thus, we trust that the U.S. Supreme Court will rule in accordance with courts across the country that have found that these laws are overly broad, deceptive, and threaten women's health and lives. In the interim (while we await U.S. Supreme Court action on this issue), it is inappropriate for Congress to act. To do so exposes Congressional hostility to the judicial rulings in this area and the true political motives behind this legislation.

Bans on so-called "partial-birth" abortion are unconstitutional for three main reasons: they constitute an "undue burden" on a woman's right to choose in violation of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); they are vague and overbroad because it is unclear to what procedures they apply, and thus they chill medical practice; and, the laws lack an exception to protect women's health.

**HERE IS WHAT THE NATION'S FEDERAL JUDGES HAVE TO SAY
ABOUT SO-CALLED "PARTIAL-BIRTH" ABORTION BANS:**

- The Hon. John G. Heyburn, II, U.S. District Court for the Western District of Kentucky:

"By adopting a considerably less precise definition of a partial birth abortion, the legislature not only defined the terms of its prohibition, but also said a lot about its own collective intent. Though the Act calls itself a partial birth abortion ban, it is not. The title is misleading, both

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medically and historically. . . . A few [legislators] seem to disregard the constitutional arguments and push for language which they believed would make abortions more controllable.” *Eubanks v. Stengel*, 28 F. Supp. 2d 1024, 1036 (W.D. Ky. 1998).

BANS ON ABORTION PROCEDURES ARE VAGUE AND OVERBROAD, UNDULY BURDENING THE RIGHT TO CHOOSE

Most courts have held that so-called “partial-birth” abortion bans are unconstitutional because they are so ill-defined that they effectively eliminate some of the safest and most common forms of abortion.

- The Hon. Richard S. Arnold, former Chief Judge, U.S. Court of Appeals for the Eighth Circuit, writing for the unanimous Eighth Circuit panel:

“In interpreting the statute, it is our duty to give it a construction, if reasonably possible, that would avoid constitutional doubts. We cannot, however, twist the words of the law and give them a meaning they cannot reasonably bear. . . . [The Act] prohibit[s] the most common procedure for second-trimester abortions and, in doing so, imposes an undue burden on a woman’s right to choose to have an abortion.” *Carhart v. Stenberg*, 192 F.3d 1142, 1150-51 (8th Cir. 1999), *cert. granted*, 120 S. Ct. 865 (2000).

- The Hon. Donald L. Graham, U.S. District Court for the Southern District of Florida:

“The broad language contained in the Act serves only to heighten the confusion. The legislature’s choice of broad terminology fails to give physicians adequate notice of which medical procedures are prohibited. Moreover, the Act must meet a higher standard of certainty because it directly [affects] a woman’s constitutional right to an abortion and imposes criminal penalties. The Act fails to meet this higher standard.” *A Choice for Women v. Butterworth*, 54 F. Supp. 2d 1148, 1158 (S.D. Fla. 1998).

- The Hon. Ronald R. Lagueux, Chief Judge, U.S. District Court for the District of Rhode Island:

“[T]his Court finds that ‘substantial portion’ is vague and does not provide doctors with sufficient guidance to know what the Legislature has made illegal. [Thus, the law] places an undue burden on a woman’s ability to receive an abortion.” *Rhode Island Medical Society v. Whitehouse*, 66 F. Supp. 2d 288, 309-10 (D.R.I. 1999).

- The Hon. G. Thomas Porteous, Jr., U.S. District Court for the Eastern District of Louisiana:

"[T]he Act now in question advances neither maternal health or potential life and clearly would create undue burdens on a woman's right to choose abortion. At most, the Act may force women seeking abortions to accept riskier or costlier abortion procedures which nevertheless result in fetal death." *Causeway Medical Suite v. Foster*, 43 F. Supp. 2d 604, 612 (E.D. La. 1999).

- The Hon. Gerald E. Rosen, U.S. District Court for the Eastern District of Michigan:

"[T]he language of the definition of 'partial birth abortion' in the Michigan statute is hopelessly ambiguous and not susceptible to a reasonable understanding of its meaning. Physicians looking to its language for direction as to what procedures are proscribed by the law simply cannot know with any degree of confidence what conduct may give rise to criminal prosecution and license revocation." *Evans v. Kelley*, 977 F. Supp. 1283, 1311 (E.D. Mich. 1997).

- Proponents of these bans argue that the Seventh Circuit Court of Appeals decision upholding the bans in Illinois and Wisconsin indicates that the laws are not unconstitutionally vague. In actuality, the closely divided Seventh Circuit opinion (5-4) upheld so-called "partial-birth" abortion bans in Illinois and Wisconsin only after it directed the lower courts to issue "precautionary injunctions" prohibiting enforcement of these bans as applied to all but a single type of procedure. *Hope Clinic v. Ryan* and *Christensen v. Doyle*, 195 F.3d 857 (7th Cir. 1999). Thus, the Seventh Circuit tacitly acknowledged that, on their face, without a limiting instruction, the Wisconsin and Illinois bans needed to be clarified and narrowed.²
- The Hon. Richard A. Posner, writing on behalf of four dissenters who would have struck down the Illinois and Wisconsin laws as unconstitutionally vague, stated that "it is extremely difficult, indeed probably impossible, to distinguish a 'partial-birth' abortion from the methods of abortion that are conceded to be privileged. . . . [T]here is no meaningful difference between the forbidden and the privileged practice. No reason of policy or morality that would allow the one would forbid the other." *Hope Clinic v. Ryan* and *Christensen v. Doyle*, 195 F.3d 857, 879 (7th Cir. 1999) (Posner, C.J., dissenting).

ABORTION BANS ARE UNCONSTITUTIONAL WITHOUT AN EXCEPTION PROTECTING WOMEN'S HEALTH

Numerous courts have ruled that, in the absence of an exception to protect the

woman's health, so-called "partial-birth" abortion bans are unconstitutional.

- On October 26, 1999, a five-judge majority of the U.S. Court of Appeals for the Seventh Circuit sitting *en banc* became the only federal court ruling on the merits of a so-called "partial-birth" abortion ban to disagree that the Constitution requires an exception to protect the woman's health. *Hope Clinic v. Ryan and Christensen v. Doyle*, 195 F.3d 857 (7th Cir. 1999).³ The Hon. Richard A. Posner, writing for the four dissenters, and echoing the view of the other courts around the country that have addressed this issue, explained that "[t]he right of abortion is unduly burdened by any law that endangers the woman's health." *Hope Clinic v. Ryan and Christensen v. Doyle*, 195 F.3d 857, 880 (7th Cir. 1999) (Posner, C.J., dissenting). In an earlier opinion regarding Wisconsin's ban, Chief Judge Posner stated, "Wisconsin is taking chances of unknown magnitude with the health of pregnant women. This the Supreme Court's decisions do not permit. Those decisions require that maternal health be the physician's paramount concern." *Planned Parenthood of Wisconsin v. Doyle*, 162 F.3d 463, 468 (7th Cir. 1998). As demonstrated below, Chief Judge Posner's position is consistent with the majority of courts that have ruled on this issue.

- The Hon. John G. Heyburn, II, U.S. District Court for the Western District of Kentucky:

"The absence of the health exception would seem to raise fundamental concerns under binding Supreme Court precedents. In *Casey*, the Supreme Court explained that even after viability, when a state's interest in protecting potential life is greatest, a state could not proscribe abortion without providing an exception for an appropriate medical judgment that an abortion is necessary 'for the preservation of the life or health of the mother.'" *Eubanks v. Stengel*, 28 F. Supp. 2d 1024, 1041 (W.D. Ky. 1998) (citing *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 879 (1992), quoting *Roe v. Wade*, 410 U.S. 113, 164-65 (1973)).

- The Hon. Ronald R. Lagueux, Chief Judge, U.S. District Court for the District of Rhode Island:

"The Supreme Court requires an exception to any abortion ban that would allow a woman to undergo an abortion if her pregnancy would constitute a threat to her health. . . . This exception must apply even after viability." *Rhode Island Medical Society v. Whitehouse*, 66 F. Supp. 2d 288, 314 (D.R.I. 1999).

- The Hon. Anne E. Thompson, Chief Judge, U.S. District Court for the District of New Jersey:

"Reviewing the Act in light of *Roe* and *Casey*, the Court finds . . . that it imposes an undue burden on a woman's constitutional right to terminate her pregnancy. . . . [T]he Act proscribes 'partial-birth abortions' without providing a health or adequate life exception." "[S]tates may not proscribe an abortion procedure,

before or after viability, without providing an exception for when such procedure is necessary, in a physician's medical judgment, to preserve the physical or mental health of the woman." *Planned Parenthood of Central New Jersey v. Verniero*, 41 F. Supp. 2d 478, 499, 502 (D.N.J. 1998).

- The Hon. Donald L. Graham, U.S. District Court for the Southern District of Florida:

"Even subsequent to viability, a State may not interfere with a [woman's] choice to decide which procedure is most appropriate to save her life or health." *A Choice for Women v. Butterworth*, 54 F. Supp. 2d 1148, 1156 (S.D. Fla. 1998).

- The Hon. Richard M. Bilby, Senior District Judge, U.S. District Court for the District of Arizona:

"[T]he fact that the Act does not provide an exception where the proscribed conduct is in the best interest of the health of a woman is an additional reason to find that the Act is unconstitutional." *Planned Parenthood of Southern Arizona, Inc. v. Woods*, 982 F. Supp. 1369, 1378 (D. Ariz. 1997).

- The Hon. G. Thomas Porteous, Jr., U.S. District Court for the Eastern District of Louisiana:

"The Act contains no health exception whatsoever . . . and is constitutionally infirm on this basis alone." *Causeway Medical Suite v. Foster*, 43 F. Supp. 2d 604, 613 (E.D. La. 1999).

March 2, 2000

Notes:

1. *Carhart v. Stenberg*, 192 F.3d 1142 (8th Cir. 1999), *cert. granted*, 120 S. Ct. 865 (2000).
2. Even with these clarifying "precautionary injunctions," the Wisconsin and Illinois bans still interfere with medical practice, removing an option that may, in any particular case, be the recommended course medically.
3. While not a ruling on the merits, the U.S. Court of Appeals for the Fourth Circuit stayed the lower court's permanent injunction of Virginia's ban on so-called "partial-birth" abortion pending appeal—thereby allowing the law to remain in effect without a health exception. *Richmond Medical Center for Women v. Gilmore*, 55 F. Supp. 2d 441 (E.D. Va. 1999) (permanent injunction), *appeal filed*, 99-2000 (4th Cir. July 28, 1999), Nos. 98-1930 and 99-2000 (4th Cir. Sept. 14, 1999) (stay issued), *motion for rehearing* (4th Cir. filed Sept. 24, 1999).



NARAL

Reproductive Freedom & Choice

FEDERAL COURTS HAVE RULED REPEATEDLY ON THE MERITS THAT A BAN ON ABORTION PROCEDURES IS UNCONSTITUTIONAL

In April 2000, the U.S. Supreme Court will hear arguments in a case regarding the constitutionality of Nebraska's law banning so-called "partial-birth" abortion. While we await this U.S. Supreme Court decision, it is inappropriate for Congress to act. This case will determine the constitutionality of such laws and will resolve the split that developed among the U.S. Circuit Courts of Appeal in 1999. We trust that the U.S. Supreme Court will rule in accordance with the majority of federal courts across the nation that have addressed the constitutionality of bans on abortion procedures. As the rulings below demonstrate, ***most federal courts ruling on the merits have held that a ban on abortion procedures is unconstitutional.***

U.S. CIRCUIT COURTS OF APPEAL, RULINGS ON THE MERITS

Eighth Circuit:

Arkansas, Iowa, and Nebraska:

Little Rock Family Planning Services v. Jegley, 192 F.3d 794 (8th Cir. 1999); *Planned Parenthood of Greater Iowa, Inc. v. Miller*, 195 F.3d 386 (8th Cir. 1999), petition for cert. filed, No. 99-1112 (U.S. Dec. 23, 1999); and *Carhart v. Stenberg*, 192 F.3d 1142 (8th Cir. 1999), cert. granted, 120 S. Ct. 865 (2000): the Eighth Circuit affirmed permanent injunctions against enforcement of bans on so-called "partial-birth" abortion in Arkansas, Iowa, and Nebraska on the grounds that they each unduly burden a woman's right to choose. The U.S. Supreme Court granted *certiorari* in the Nebraska case, thereby agreeing to consider the constitutionality of Nebraska's ban. Additionally, a petition seeking Supreme Court review has been filed in the Iowa case.

Seventh Circuit:

Illinois and Wisconsin:

Hope Clinic v. Ryan and Christensen v. Doyle, 195 F.3d 857 (7th Cir. 1999), petitions for cert. filed, Nos. 99-1152 and 99-1177 (U.S. Jan. 10 and 14, 2000): the Seventh Circuit upheld "partial-birth" abortion bans in Illinois and Wisconsin, but directed the lower courts to issue "precautionary injunctions" prohibiting enforcement of these bans as applied to all but a single type of procedure. Subsequently, U.S. Supreme Court Justice Stevens stayed the Seventh Circuit's decision pending the timely filing and disposition of a petition for a writ of *certiorari*, *Hope Clinic v. Ryan*, No. 99A427 (U.S. Nov. 30, 1999) and *Planned Parenthood of Wisconsin v. Doyle*, No. 99A428 (U.S. Nov. 30, 1999), and in

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January 2000, petitions for a writ of *certiorari* were filed in both cases.

Sixth Circuit:

Ohio:

Women's Medical Professional Corp. v. Voinovich, 130 F.3d 187 (6th Cir. 1997), cert. denied, 523 U.S. 1036 (1998): the Sixth Circuit affirmed a permanent injunction against enforcement of Ohio's ban on "dilation and extraction" abortion on the grounds that it unduly burdens a woman's right to choose. The U.S. Supreme Court refused to review the decision.

U.S. DISTRICT COURTS, RULINGS ON THE MERITS

Arizona:

Planned Parenthood of Southern Arizona, Inc. v. Woods, 982 F. Supp. 1369 (D. Ariz. 1997), appeal filed, No. 97-17377 (9th Cir. Nov. 26, 1997), appeal dismissed (9th Cir. Feb. 26, 1999): permanently enjoined Arizona's ban on so-called "partial-birth" abortion on the grounds that it imposes an undue burden on a woman's right to terminate a pregnancy, is unconstitutionally vague, unconstitutionally fails to provide a health exception, and creates impermissible spousal and parental consent mandates. An appeal was filed and then withdrawn by the state attorney general.

Florida:

A Choice for Women v. Butterworth, 54 F. Supp. 2d 1148 (S.D. Fla. 1998), appeal dismissed, No. 99-4002 (11th Cir. Mar. 2, 1999): permanently enjoined Florida's ban on "partial-birth" abortion on the grounds that it places an undue burden on a woman's right to obtain an abortion, unconstitutionally fails to provide a health exception and an adequate life exception, and it is unconstitutionally vague.

Idaho:

Weyhrich v. Lance, No. CV98-0117-S-BLW (D. Idaho Oct. 12, 1999): permanently enjoined Idaho's "partial-birth" abortion ban on the grounds that it constitutes an undue burden on a woman's right to terminate her pregnancy, is unconstitutionally vague, unconstitutionally lacks a health exception and an adequate life exception, and creates impermissible spousal and parental consent requirements.

Kentucky:

Eubanks v. Stengel, 28 F. Supp. 2d 1024 (W.D. Ky. 1998), appeal filed, No. 98-6671 (6th Cir. Dec. 4, 1998): permanently enjoined Kentucky's "partial-birth" abortion ban on the grounds that it is unconstitutionally overbroad, constitutes an undue burden, and unconstitutionally lacks a health exception.

Louisiana:

Causeway Medical Suite v. Foster, 43 F. Supp. 2d 604 (E.D. La. 1999), appeal filed, No. 99-30324 (5th Cir. Apr. 5, 1999): permanently enjoined Louisiana's so-called "partial-birth" abortion ban on the grounds that it constitutes an undue burden on a woman's right to choose, impermissibly lacks a health exception and an adequate life exception, impermissibly imposes third-party consent requirements, and is unconstitutionally vague.

Michigan:

Evans v. Kelley, 977 F. Supp. 1283 (E.D. Mich. 1997): permanently enjoined Michigan's "partial-birth" abortion ban on the grounds that it is unconstitutionally vague and overbroad and unduly burdens the right to choose. (In 1999, Michigan enacted a new ban on so-called "partial-birth" abortion, and two lawsuits have been filed challenging the constitutionality of this new law. Evans v. Granholm, C.A. No. 00-70586 (E.D. Mich. filed Feb. 1, 2000) and Womancare of Southfield v. Granholm, C.A. No. 00-70585 (E.D. Mich. filed Feb. 1, 2000).)

New Jersey:

Planned Parenthood of Central New Jersey v. Verniero, 41 F. Supp. 2d 478 (D.N.J. 1998), appeal filed, No. 99-5042 (3d Cir. Jan. 6, 1999): permanently enjoined New Jersey's so-called "partial-birth" abortion ban on the grounds that it is unconstitutionally vague, unconstitutionally fails to provide a health or an adequate life exception, and imposes an undue burden on a woman's right to terminate a pregnancy.

Rhode Island:

Rhode Island Medical Society v. Whitehouse, 66 F. Supp. 2d 288 (D.R.I. 1999), appeal filed, Nos. 99-2095 and 99-2141 (1st Cir. Sept. 20 and Oct. 5, 1999): permanently enjoined Rhode Island's "partial-birth" abortion ban on the grounds that it is unconstitutionally vague, constitutes an undue burden on a woman's right to terminate a pregnancy, impermissibly lacks a health exception and an adequate life exception, and includes an unconstitutional private right of action.

Virginia:

Richmond Medical Center for Women v. Gilmore, 55 F. Supp. 2d 441 (E.D. Va. 1999), appeal filed, 99-2000 (4th Cir. July 23, 1999), Nos. 98-1930 and 99-2000 (4th Cir. Sept. 14, 1999) (stay issued), motion for rehearing (4th Cir. filed Sept. 24, 1999): although the district court permanently enjoined Virginia's ban on so-called "partial-birth" abortion on the grounds that it is unconstitutionally vague, constitutes an undue burden, and unconstitutionally fails to provide a health or an adequate life exception, the U.S. Court of Appeals for the Fourth Circuit stayed the permanent injunction pending an appeal – thereby allowing the law to remain in effect.



Of Interest: In Georgia, a court has approved a consent order (agreed to by the parties, including the state attorney general) that limits enforcement of Georgia's ban on so-called "partial-birth" abortion to "intact dilation and extraction" procedures performed to abort a viable fetus except when necessary to preserve the woman's life or health. Midtown Hospital v. Miller, No. 1:97-CV-1786-JOF (N.D. Ga. Sept. 3, 1998).

Limitations of this memorandum: This memo contains information regarding federal courts that have issued final rulings on the merits. It therefore does not include information about cases awaiting final decisions regarding the constitutionality of the laws, including those in which state bans have been temporarily enjoined or limited by the state attorney general.

March 3, 2000

FOUR REASONS WHY THE FEDERAL ABORTION BAN IS BAD PUBLIC POLICY

(S. 1692/HR 3660 — The "Partial-Birth" Abortion Ban Act of 1999)

- **The bill does not contain an exception to protect women's health.** Currently, the bill includes only a narrow exception to protect the life of the woman, jeopardizing those women who may need an abortion to protect their health. Proponents of the bill have blocked several attempts to include a health exception even though the President has asked Congress to send him a bill that includes one.
- **Medical decisions should be made by patients in consultation with their doctors, not by the government.** The decision about abortion is a private, medical decision. This bill would prevent doctors and their patients from choosing what might well be the best and most appropriate medical treatment. The ban represents an unprecedented intrusion into the personal lives of Americans— from the halls of Congress right into the examination room.
- **The legislation is unconstitutional.** Most courts that have reviewed legislation banning so-called "partial-birth" abortion have found these bans unconstitutional for several reasons: First, the legislation is unconstitutionally vague because it does not rely on any medical definition of what is prohibited; second, it does not provide an exception to protect women's health; and third, it violates *Roe v. Wade* by banning procedures regardless of the gestational stage of the pregnancy. On September 24, 1999, the 8th Circuit Court of Appeals upheld the rulings of lower courts in Arkansas, Iowa, and Nebraska rejecting bans similar to the federal ban. Although the 7th Circuit, in a 5 to 4 decision issued on October 26, 1999, upheld the Illinois and Wisconsin bans, it did so only after ordering the lower courts to issue "precautionary injunctions" limiting enforcement of the bans to a single type of procedure, despite the absence of limiting language in the statutes. The U.S. Supreme Court has agreed to rule on the constitutional issues this summer, and Congress should await the Court's ruling before taking further action.
- **The bill is deceptive and represents a first step toward the banning of all abortion, at any stage of pregnancy.** Anti-choice groups have unabashedly proclaimed their intent to use the so-called "partial-birth" abortion issue as a strategy to ultimately ban all abortions:

"[Gary Bauer] likes the approach of seeking a ban on all abortions in the ninth month of pregnancy, then the eight, and so on. 'You'd probably get down to the fourth month before you had a close vote ...', [said Bauer]. In the end though, Bauer favors a campaign to ban second and third-trimester abortions."
— from "Beyond Partial-Birth," by Fred Barnes, *The Weekly Standard*, July 6-13, 1998

"By going after partial-birth abortions, we're trying to show the extreme, radical view of the pro-abortion lobby. But no, that procedure isn't what we care most about. Our goal is to stop the killing of unborn children at any stage of development."
— John Jakubczyk, General Counsel, Arizona Right To Life, as quoted in *The Arizona Republic*, "Effort to Ban 'Partial-Birth' Wins By Losing," by Steve Wilson, 9/27/96

The Supreme Court decision in the case of *Roe v. Wade* struck a careful balance between the right of women to choose abortion in the early stages of pregnancy and the states' interest in protecting potential life after viability. *Roe* stated that prior to fetal viability, the abortion decision must reside with the woman, to be made in consultation with her doctor and within the context of her own religious and moral beliefs. After fetal viability, *Roe* allows states to ban abortion as long as the woman's life and health are protected. NARAL supports this careful balance and rejects attempts to restrict abortion in any manner that undermines the basic tenets of *Roe*.

COMPARISON OF PROPOSED HOUSE ABORTION BANS

	<u>Old Canady Language</u>	<u>HR 3660 - New Canady Bill</u>	<u>HR 2149 - Hoyer-Greenwood Bill</u>
<u>Nature of ban</u>	Prohibits so-called "partial-birth" abortion ("PBA") throughout pregnancy, without regard to fetal viability.	Prohibits so-called "partial-birth" abortion ("PBA") throughout pregnancy, without regard to fetal viability.	Post-viability abortion ban.
<u>Definitions</u>	PBA defined as abortion in which physician "partially vaginally delivers a living fetus before killing the fetus and completing delivery," which is defined as, "deliberately and intentionally delivers into the vagina a living fetus, or a substantial portion thereof, for the purpose of performing a procedure the physician knows will kill the fetus, and kills the fetus."	PBA defined as abortion in which physician "deliberately and intentionally vaginally delivers some portion of an intact living fetus until the fetus is partially outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the fetus while the fetus is partially outside the body of the mother; and performs the overt act that kills the fetus while the intact living fetus is partially outside the body of the mother."	Not applicable.
<u>Scienter</u>	Requires knowledge and intent.	Requires knowledge and intent.	Requires knowledge.
<u>Penalty</u>	Civil and criminal penalties. Provides a private cause of action for the fetus' "father," and/or "maternal grandparents."	Civil and criminal penalties. Provides a private cause of action for the fetus' "father," and/or "maternal grandparents."	Civil penalties.
<u>Exceptions</u>	No health exception. Exception for an abortion "necessary to save the life of a mother whose life is endangered by a physical disorder, illness, or injury."	No health exception. Exception for an abortion "necessary to save the life of a mother whose life is endangered by a physical disorder, illness, or injury."	Exceptions for life of and "serious adverse health consequence to" the woman.
<u>Medical Board involvement</u>	Can seek state Medical Board hearing to determine if necessary to save woman's life.	Can seek state Medical Board hearing to determine if necessary to save a woman's life.	Not applicable.
<u>Immunity</u>	Cannot prosecute woman.	Cannot prosecute woman.	Cannot prosecute woman.

The New Canady Language Banning So-Called “Partial-Birth” Abortion Does Not Cure the Constitutional Defects of Prior Versions

- Proponents of the bill claim that the revised language remedies the legal infirmities. Don’t be fooled — HR 3660 continues to endanger women’s health and to deprive them of their constitutional rights by banning safe, previability abortions.
- HR 3660 continues to impose an unconstitutional undue burden on women’s right to choose by reaching safe and common abortion procedures performed before fetal viability. The bill still lacks a reference to gestational age.
- HR 3660 further endangers women’s health by failing to include a constitutionally mandated exception to protect the health of the pregnant woman, and by including only a constitutionally inadequate life exception. The bill impermissibly attempts to micro-manage surgical procedures, thereby undermining the health of women, intruding into the doctor-patient relationship, and interfering with pregnant women’s right to medical self-determination.

S. 1692 (before 10/21/99) (old PBA)	H.R. 3660 (new PBA)	H.R. 2149 (Hoyer – Greenwood)
No health exception	No health exception	Exception for serious adverse health consequences
No medical terminology – thus unconstitutionally vague: <i>“Partially vaginally delivers a living fetus before killing the fetus and completing delivery,” which is defined as, “deliberately and intentionally delivers into the vagina a living fetus, or a substantial portion thereof, for the purpose of performing a procedure the physician knows will kill the fetus, and kills the fetus.”</i>	No medical terminology – thus unconstitutionally vague: <i>“Deliberately and intentionally vaginally delivers some portion of an intact living fetus until the fetus is partially outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the fetus while the fetus is partially outside the body of the mother; and performs the overt act that kills the fetus while the intact living fetus is partially outside the body of the mother.”</i>	Not vague
Ban is not limited by gestational age	Ban is not limited by gestational age	Ban applies only after fetus is viable



October 7, 1999

The Honorable Thomas Daschle, Minority Leader
United States Senate
Washington, DC 20515

Dear Senator Daschle:

The American College of Obstetricians and Gynecologists (ACOG), an organization representing 40,000 physicians dedicated to improving women's health, continues to oppose S. 928, the "Partial Birth Abortion Ban Act of 1999." ACOG urges the Senate to reject this legislation.

ACOG believes that S. 928, as amended, continues to represent an inappropriate, ill advised and dangerous intervention into medical decision-making. The amended bill still fails to include an exception for the protection for the health of the woman.

Further, the bill violates a fundamental principle at the very heart of the doctor-patient relationship: that the doctor, in consultation with the patient, based on that patient's individual circumstances, must choose the most appropriate method of care for the patient. This bill removes decision-making about medical appropriateness from the physician and the patient.

S. 928 is vague and broad, with the potential to restrict other techniques in obstetrics and gynecology. It fails to use recognized medical terminology and fails to define explicitly the prohibited medical techniques it criminalizes. In the most recent court action, the Eighth US Circuit Court of Appeals ruled that the "partial birth" abortion laws in three states were unconstitutionally vague.

Moreover, the ban applies to all stages of pregnancy. It would have a chilling effect on medical behavior and decision-making, with the potential to outlaw techniques that are critical to the lives and health of American women. Chief Judge Richard Arnold wrote in the Eighth Circuit decision that, "Such a prohibition places an undue burden on the right of women to choose whether to have an abortion."

Sincerely,

Ralph W. Hale, MD
Executive Vice President



October 21, 1999

The Honorable Barbara Boxer
112 Senate Hart Office Building
Washington, DC 20510

Dear Senator Boxer:

Upon review of the attached language, an amendment to S 1692, the "Partial-Birth Abortion Ban Act of 1999," by Senator Rick Santorum, in my opinion the language does not correct the constitutional defects of S 1692. In particular, this language does not correct the issues addressed by many states and federal courts, including the U.S. Court of Appeals for the Eighth Circuit, which have held similar legislation to be unconstitutional.

Sincerely,

Ann E. Allen

Ann Allen, JD
General Counsel



October 21, 1999

The Honorable Barbara Boxer
112 Senate Hart Office Building
Washington, DC 20510

Dear Senator Boxer:

In response to the current Senate floor debate on the so-called "partial birth abortion" ban, I would like to clarify that there are rare occasions when Intact D & X is the most appropriate procedure. In these instances, it is medically necessary.

Sincerely,

Stanley Zinberg, MD
Vice President
Clinical Practice Activities



American Medical Women's Association

March 3, 2000

Dear Judiciary Committee Member:

Regarding: Oppose H.R. 3660

As President of the American Medical Women's Association (AMWA), I am writing to urge you to oppose H.R. 3660, the "Partial-Birth Abortion Ban Act of 2000." AMWA is an organization of 10,000 women physicians and medical students dedicated to promoting women's health and increasing the influence of women in all aspects of the medical profession.

AMWA has long been an advocate for women's health care services, including abortion. We feel that abortion is a private decision between a patient and her physician. Abortion is a legal, constitutionally protected procedure, and any regulation of abortion practices should be left to the states' medical licensing boards, as with any other medical procedure. We are concerned with the language in this bill which defines what methods of abortion would be banned, as it is both vague and overly broad, affecting safe and common abortion procedures and placing an undue burden on a woman's right to choose.

Please let me know if AMWA can answer any of your questions. You can reach the Governmental Affairs staff at our National Office at 703-838-0500.

Sincerely,

Catherine A. Henry, MD, FACP
President

American Medical Women's Association



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MARY E. FOLEY, MS, RN
PRESIDENT

DAVID W. HENNAGE, PHD, MBA
EXECUTIVE DIRECTOR

March 3, 2000

The Honorable John Conyers, Jr.
U. S. House of Representatives
Washington, DC 20515

Dear Representative Conyers:

I am writing to express the opposition of the American Nurses Association to H.R. 3660, the "Partial-Birth Abortion Ban Act of 2000," which may be considered by the Committee on the Judiciary in the near future. This legislation would impose Federal criminal penalties and provide for civil actions against health care providers who perform certain abortion procedures.

It is the view of the American Nurses Association that this proposal would involve an inappropriate intrusion of the federal government into a therapeutic decision that should be left in the hands of a pregnant woman and her health care provider. ANA has long supported freedom of choice and equitable access of all women to basic health services, including services related to reproductive health. This legislation would impose a significant barrier to those principles. It is inappropriate for Congress to mandate a course of action for a woman who is already faced with an intensely personal and difficult decision.

The American Nurses Association is the only full-service professional organization representing the nation's registered nurses through its 53 constituent associations. ANA appreciates your consideration of our views on this issue and respectfully urges members of the Committee to oppose H.R. 3660.

Sincerely,

A handwritten signature in cursive script, appearing to read "Chris deVries".

Chris deVries
Deputy Executive Director, Programs

Nos. 98-3245NE, 98-3300NE

Gina Dunning, in her official capacity as Director of Regulation and Licensure of the Nebraska Department of Health and Human Services, and Charles Andrews, M.D., in his official capacity

On Appeal from the United
States District Court
for the District of
Nebraska.

as Chief Medical Officer of Nebraska, *

*

Appellants, *

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----- *

*

State of South Carolina; State of Idaho; *

*

State of Louisiana; State of Ohio; State *

*

of Pennsylvania; State of Rhode Island; *

*

State of South Dakota; and *

*

State of Utah, *

*

Amici Curiae, *

*

Family Research Council, *

*

Amicus Curiae. *

*

On Appeal from the United

*

States District Court

*

for the District of

*

Nebraska.

*

No. 98-3300NE

*

Leroy H. Carhart, on behalf of himself *

*

and his patients obtaining abortions, *

*

Appellee, *

*

v. *

*

Donald Stenberg, in his official *

*

capacity as Attorney General for *

*

the State of Nebraska, *

*

Appellee, *

*

Mike Munch, in his official capacity *
as County Attorney for Sarpy County, *
and as a representative of all County *
Attorneys in Nebraska, *

Appellant, *

Gina Dunning, in her official capacity *
as Director of Regulation and Licensure *
of the Nebraska Department of Health *
and Human Services; and Charles *
Andrews, M.D., in his official capacity *
as Chief Medical Officer of Nebraska, *

Appellees, *

----- *

State of South Carolina; State of Idaho; *
State of Louisiana; State of Ohio; State *
of Pennsylvania; State of Rhode Island; *
State of South Dakota; and *
State of Utah, *

Amici Curiae, *

Family Research Council, *

Amicus Curiae. *

Submitted: April 19, 1999

Filed: September 24, 1999

Before RICHARD S. ARNOLD and WOLLMAN,¹ Circuit Judges, and
MAGNUSON,² District Judge.

RICHARD S. ARNOLD, Circuit Judge.

The State of Nebraska appeals a District Court³ decision holding a Nebraska statute banning "partial-birth abortion" unconstitutional. The District Court permanently enjoined enforcement of the statute and awarded attorney's fees and costs to the plaintiff. The County Attorney, named in the lawsuit in his official capacity and as a representative of all county attorneys, appeals the portion of the judgment awarding attorney's fees against him. For the following reasons, we affirm the judgment of the District Court.

It is important to have in mind that we deal here with a particular legal question: the validity, under the Constitution of the United States, of a certain Nebraska law. The law refers to "partial-birth abortion," but this term, though widely used by lawmakers and in the popular press, has no fixed medical or legal content. The closest thing we have to a medical definition comes from the American College of Obstetricians and Gynecologists (ACOG). The ACOG definition describes a method of abortion (commonly called dilation and extraction, or D&X) involving extraction, from the uterus and into the vagina, of all of the body of a fetus except the head, following which the fetus is killed by extracting the contents of the skull. Thereafter,

¹The Hon. Roger L. Wollman became Chief Judge of this Court on April 24, 1999.

²The Hon. Paul A. Magnuson, Chief Judge, United States District Court for the District of Minnesota, sitting by designation.

³The Hon. Richard G. Kopf, United States District Judge for the District of Nebraska.

the dead but otherwise intact fetus is taken from the mother's body. Certainly this medical description is within the definition of "partial-birth abortion" contained in the Nebraska statute before us. The difficulty is that the statute covers a great deal more. It would also prohibit, in many circumstances, the most common method of second-trimester abortion, called a dilation and evacuation (D&E). Under the controlling precedents laid down by the Supreme Court, such a prohibition places an undue burden on the right of women to choose whether to have an abortion. It is therefore our duty to declare the statute invalid.

I.

On June 9, 1997, Nebraska's Governor signed into law Legislative Bill 23, a bill enacted by the Nebraska Legislature prohibiting "partial-birth abortion." The statute provides:

No partial-birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.

Neb. Rev. Stat. § 28-328(1)(1998). "Partial-birth abortion" is defined in the statute as:

an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery. For purposes of this subdivision, the term partially delivers vaginally a living unborn child before killing the unborn child means deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child.

Id. § 28-326(9). The intentional and knowing performance of an unlawful "partial-birth abortion" is a Class III felony. See id. § 28-328(2). A physician who intentionally and knowingly performs an unlawful "partial-birth abortion" will automatically have his license to practice medicine in Nebraska suspended and revoked. See id. § 28-328(4).

Shortly after the passage of LB 23, Dr. LeRoy Carhart filed a complaint challenging the constitutionality of the statute. In response to the complaint, the District Court granted a temporary restraining order, followed by a preliminary injunction, suspending enforcement of the statute. After a trial on the merits, the District Court issued its final judgment, holding LB 23 unconstitutional, and permanently enjoining enforcement of LB 23 against Dr. Carhart, his patients, and other similarly situated individuals.

Dr. Carhart challenged the constitutionality of LB 23 on two separate grounds. He argued that LB 23 imposed an undue burden on himself and his patients in two ways. First, because the D&X procedure is the safest procedure for some women in certain circumstances, banning that procedure places an undue burden on women seeking an abortion. Second, because LB 23 prohibits vaginally delivering a "substantial portion" of a fetus as part of an abortion procedure, the law bans the dilation and evacuation (D&E) procedure as well. Because the D&E procedure is the most widely used second-trimester abortion procedure, this ban also places an undue burden on women seeking to have an abortion. Dr. Carhart also challenged the law as being vague, arguing that it was unclear what "substantial portion" meant. The District Court agreed, holding both that the law created an undue burden for Dr. Carhart and his patients, and that the law was void for vagueness. Carhart v. Stenberg, 11 F. Supp. 2d 1099 (D. Neb. 1998).⁴

⁴Because we are holding the law unconstitutional on undue-burden grounds, it is not necessary for us to discuss the vagueness issue. Nor is it necessary for us to

II.

We state the facts as found by the District Court. (The Court's findings are not clearly erroneous, and we therefore must accept them.) Dr. Carhart operates a family medical practice with a specialized abortion facility in Bellevue, Nebraska. He is licensed to practice medicine in Nebraska, as well as in seven other states. Dr. Carhart performs abortions in a clinic setting from a gestational age of three weeks⁵ until fetal viability. The abortion procedures Dr. Carhart performs vary depending on the gestational age of the fetus as well as on various other medical factors. As we shall explain, two of the procedures Dr. Carhart performs are directly affected by LB 23's ban: dilation and evacuation (D&E) and intact dilation and evacuation or dilation and extraction (D&X).⁶ Both are procedures for second-trimester abortions. LB 23 affects not only Dr. Carhart, but any doctor in Nebraska who performs the D&E or the D&X procedure, as well as that doctor's patients.

The most common method of abortion during the second trimester is the D&E procedure. A physician performing a D&E procedure gradually dilates the cervix and then removes the fetus and other products of conception. A report by the American

discuss whether the law creates an undue burden by prohibiting the D&X procedure. The basis for our holding is the undue burden created by the ban of the D&E procedure.

⁵Gestational age is measured from the first day of the woman's last menstrual period.

⁶The District Court's very thorough opinion details other abortion procedures as well. We see no need to repeat these descriptions and will therefore focus only on the procedures affected by LB 23.

Medical Association⁷ describes the D&E procedure used from thirteen to fifteen weeks' gestation as follows:

Osmotic dilators are usually used. Intravenous fluids and an analgesic or sedative may be administered. A local anesthetic such as a paracervical block may be administered, dilating agents, if used, are removed, and instruments are inserted through the cervix into the uterus to remove fetal and placental tissue. Because fetal tissue is friable and easily broken, the fetus may not be removed intact. The walls of the uterus are scraped with a curette to ensure that no tissue remains. In pregnancies beyond 14 weeks, oxytocin is given intravenously to stimulate the uterus to contract and shrink.

Ex. 7, at 8 (footnotes omitted). The AMA report also includes a description of a D&E procedure used from sixteen to twenty-four weeks' gestation. It includes some variations from the procedure used from thirteen to fifteen weeks. After the cervix has been dilated:

Fetal tissue is extracted through the use of surgical instruments, followed by extraction of placental tissue and subsequent curettage. Because the fetus is larger at this stage of gestation (particularly the head), and because bones are more rigid, dismemberment or other destructive procedures are more likely to be required than at earlier gestational ages to remove fetal and placental tissue. Some physicians use intrafetal potassium chloride or digoxin to induce fetal demise prior to a late D&E (after 20 weeks), to facilitate evacuation.

⁷The parties stipulated to the admission of the American Medical Association's "Report of the Board of Trustees on Late-Term Abortion" at the preliminary injunction hearing. The report, which studied late-term abortion techniques, was admitted as Exhibit 7.

Id.

When dismemberment occurs during a D&E procedure, it does not occur in utero. Prelim. Inj. Tr. 116; Trial Tr. 30-31. Dr. Carhart explained that during the D&E procedure, the dismemberment occurs after a part of the fetus has been pulled through the cervix, into the vagina:

Dr. Carhart: The dismemberment occurs between the traction of . . . my instrument and the counter-traction of the internal os of the cervix. . . .

Counsel: So the dismemberment occurs after you pulled a part of the fetus through the cervix, is that correct?

A: Exactly. Because you're using – The cervix has two strictures or two rings, the internal os and the external os, and you have – that's what's actually doing the dismembering. . . .

Q: When we talked before or talked before about a D&E, that is not – where there is not intention to do it intact, do you, in that situation, dismember the fetus in utero first, then remove portions?

A: I don't think so . . . I don't know of any way that one could go in and intentionally dismember the fetus in the uterus. If you grab an extremity and twist it, you can watch the whole fetus just twist. It takes something that restricts the motion of the fetus against what you're doing before you're going to get dismemberment.

Prelim. Inj. Tr. 116-17. Dr. Phillip Stubblefield, a witness for the plaintiff, testified that to dismember the fetus in utero a physician:

would have to introduce into the uterus something that would cut up the fetus, or else put in two forceps and try to dismember the fetus inside the uterus,

which would increase considerably your chance that you're going to tear the uterus, perforate the uterus, seriously injure the woman. That is not done.

Trial Tr. 31.

In some circumstances, a physician performing a D&E procedure may attempt to remove the fetus intact. This procedure, known as an intact dilation and evacuation (intact D&E) or a dilation and extraction (D&X) can be used in abortions performed from sixteen to twenty-four weeks' gestation. The AMA report describes the D&X procedure as:

deliberate dilatation of the cervix, usually over a sequence of days; instrumental conversion of the fetus to a footling breech; breech extraction of the body excepting the head; and partial evacuation of the intracranial contents of a living fetus to effect vaginal delivery of a dead but otherwise intact fetus.

Ex. 7, at 8 (footnotes omitted). The physician generally brings all of the fetus, except for the head, out of the uterus into the vagina. Trial Tr. 35-36; J.A. 1150. Because the cervix is not dilated enough to allow the head to pass through, the physician inserts an instrument into the fetal skull and evacuates the contents, collapsing the skull and allowing removal of an intact fetus. Trial Tr. 35-36, 716; J.A. 1150.

Fetal death⁸ does not always occur at the same stage of each D&E or D&X procedure. Prelim. Inj. Tr. 217-18. In both procedures, the physician brings a part of a living fetus out of the uterus into the vagina.⁹ In a D&E procedure, fetal demise will occur after dismemberment. The time it takes for fetal demise to occur can, however, vary. *Id.* at 118-19. During a D&X procedure, fetal demise will occur some time after the physician has evacuated the cranial contents. In either procedure, fetal demise will generally occur within a matter of minutes, and after part of the fetus has been brought out of the uterus into the vagina. *Id.* at 112-13, 118-19.

III.

The Supreme Court has held that a woman has a constitutional right to choose whether to terminate a pregnancy. *Roe v. Wade*, 410 U.S. 113, 153 (1973). Although a state cannot prohibit a woman from choosing to have an abortion, the state can promote the interest in potential human life and, after fetal viability,¹⁰ "regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Roe*, 410 U.S. at 164-65. A

⁸With the use of ultrasound, a physician can detect a fetal heartbeat to determine that a fetus is living. Trial Tr. 22-23. No agreed upon definition exists, however, as to what constitutes fetal demise. *Id.* Physicians determine the death of adults and children by measuring brain function. *Id.* In either a D&E or D&X procedure, any heartbeat or brain function will cease as the procedure progresses. Prelim. Inj. Tr. 113-14, 118-19. The parties to this case seem to agree that a living fetus is one whose heart is beating.

⁹In some cases the fetus is not alive at this stage. In those cases LB 23 would not apply because the abortion procedure would not involve the delivery of a "living" fetus as required by the statute.

¹⁰As we understand the record and the legal arguments in this case, no question is raised with respect to procedures performed on viable fetuses. The applicable legal standard is therefore the undue-burden rule of *Casey*.

state can also enact abortion regulations at the pre-viability stage, so long as there is no "undue burden" placed on the woman seeking to have an abortion. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 876 (1992). A regulation which "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" creates an undue burden and is invalid. Id. at 877.

Several states have enacted statutes seeking to ban "partial-birth abortion." The precise wording of the statutes, and how far the statutes go in their attempts to regulate pre-viability abortions, differ from state to state. The results from constitutional challenges to the statutes, however, have been almost unvarying. In most of the cases that reached the federal courts, the courts have held the statutes unconstitutional.

The Sixth Circuit, the first United States Court of Appeals to consider the issue,¹¹ struck down an Ohio statute which attempted to ban the D&X procedure. Women's Medical Professional Corporation v. Voinovich, 130 F.3d 187, 190 (6th Cir. 1997).

¹¹The Fourth and Seventh Circuits have also heard appeals on this issue. In the Fourth Circuit, Judge Luttig, sitting as a single judge, granted the State of Virginia's stay application after a District Court granted a preliminary injunction enjoining enforcement of the state's partial-birth abortion ban. Richmond Medical Center for Women v. Gilmore, 144 F.3d 326, 327 (4th Cir. 1998) (Luttig, J., in chambers). On July 16, 1999, however, after trial on the merits, the District Court struck down the Virginia statute. Richmond Medical Center for Women v. Gilmore, No. 3:98CV309 (E.D. Va. Jul. 16, 1999).

The Seventh Circuit reversed a lower court's decision denying Planned Parenthood of Wisconsin's motion for a preliminary injunction against enforcement of a Wisconsin statute banning partial-birth abortion. Planned Parenthood of Wisconsin v. Doyle, 162 F.3d 463, 471 (7th Cir. 1998). After a trial on the merits, the District Court upheld the constitutionality of the statute. Planned Parenthood of Wisconsin v. Doyle, 44 F. Supp. 2d 975 (W.D. Wis. 1999).

The statute specifically banned only the D&X procedure: "No person shall knowingly perform or attempt to perform a dilation and extraction procedure upon a pregnant woman." Ohio Rev. Code Ann. § 2919.15(B)(1996). The statute defined dilation and extraction as "the termination of a human pregnancy by purposely inserting a suction device into the skull of a fetus to remove the brain." *Id.* § 2919.15(A). The Court held, however, that the statutory definition of the prohibited abortion method included both the D&E and D&X procedures. The D&E procedure sometimes requires a physician to "compress the head by using suction to remove the intracranial contents." Voinovich, 130 F.3d at 198. The Court held that because the D&E procedure is the most common method of second-trimester abortions, the statute created an undue burden on women seeking second-trimester abortions. *Id.* at 201. The legislature was aiming at the D&X procedure, but the language of the statute included a definition which encompassed the D&E procedure as well.

A number of district courts have also addressed the constitutionality of state statutes banning "partial-birth abortion." Only one has upheld such a statute. See Planned Parenthood of Wisconsin v. Doyle, 44 F. Supp. 2d 975 (W.D. Wis. 1999). The other district courts faced with the issue have all held the statutes unconstitutional. See Causeway Medical Suite v. Foster, 43 F. Supp. 2d 604 (E.D. La. 1999) (partial-birth abortion act created substantial obstacle in path of women seeking safe abortion and broad language creating confusion and ambiguity rendered Act unconstitutionally vague); Planned Parenthood of Central New Jersey v. Verniero, 41 F. Supp. 2d 478 (D. N.J. 1998) (partial-birth abortion act void for vagueness because persons of ordinary intelligence must guess at meaning of phrases such as "partially vaginally delivers" and "substantial portion"); Eubanks v. Stengel, 28 F. Supp. 2d 1024 (W.D. Ky. 1998) (partial-birth abortion act created undue burden because overbroad language banned procedures necessary to guarantee right to choose to have abortion); Hope Clinic v. Ryan, 995 F. Supp. 847 (N.D. Ill. 1998) (partial-birth abortion act void for vagueness because it failed to define conduct proscribed and created undue burden because it had potential effect of banning most common and safest abortion

procedures); Evans v. Kelley, 977 F. Supp. 1283 (E.D. Mich. 1997) (partial-birth abortion statute vague because ambiguous and susceptible to various interpretations and overbroad because it would operate as substantial obstacle to woman's right to choose to have abortion).

IV.

The District Court in Nebraska joined the majority of the courts that have considered the issue, holding that the statute enacted by the Nebraska Legislature attempting to ban "partial-birth abortion" could not withstand constitutional scrutiny. We review the District Court's conclusions of law de novo. See Planned Parenthood of Greater Iowa v. Atchison, 126 F.3d 1042, 1048 (8th Cir. 1997).

In considering a challenge to the facial validity of an abortion regulation, we follow the standard set out in Casey. See Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452, 1458 (8th Cir. 1995). If the regulation operates "as a substantial obstacle to a woman's choice to undergo an abortion 'in a large fraction of the cases in which [it] is relevant, . . . [i]t is an undue burden, and therefore invalid.'" Id. (quoting Casey, 505 U.S. at 895).

The District Court determined that LB 23 created an undue burden because in many instances it would ban the most common procedure for second-trimester abortions, the D&E. The State argues that LB 23's ban on partial-birth abortion prohibits only the D&X procedure, and not the D&E. Under the statute, a person is prohibited from "deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child." Neb. Rev. Stat. § 28-326(9) (1998). The State argues that the Nebraska Legislature's intent was to ban only the D&X procedure. The language of the statute, however, describes a procedure which encompasses more than just D&X.

In interpreting the statute, it is our duty to give it a construction, if reasonably possible, that would avoid constitutional doubts. We cannot, however, twist the words of the law and give them a meaning they cannot reasonably bear. The crucial problem is the term "substantial portion," which is nowhere defined in the statute. What the term means for the purposes of LB 23 has been debated at length, both in the record before us and on the floor of the Nebraska Legislature. But if "substantial portion" means an arm or a leg – and surely it must – then the ban created by LB 23 encompasses both the D&E and the D&X procedures. We agree with the District Court's assessment that "[i]n any sensible and ordinary reading of the word, a leg or arm is 'substantial.'" Carhart v. Stenberg, 11 F. Supp. 2d 1099, 1129 (D. Neb. 1998). In the D&E procedure, the physician often inserts forceps into the uterus, grasps a part of the living fetus, and pulls that part of the fetus through the cervix. That part of the fetus is commonly an arm or a leg. Prelim. Inj. Tr. 117-18; Trial Tr. 31. LB 23 bars intentionally bringing a substantial portion of a living fetus into the vagina for purposes of performing a procedure that will kill the fetus. A physician who brings an arm or a leg into the vagina as part of the D&E procedure therefore violates the statute.

The State argues that the statute's scienter requirement limits the statute's scope. The partial vaginal delivery of a substantial portion of the living fetus must be done "deliberately and intentionally." The statute applies, according to the State, only to the deliberate and intentional performance of a "partial-birth abortion." The State defines the proscribed procedure as involving the intentional "1) partial delivery of a living fetus vaginally, 2) killing the fetus and 3) completing the delivery." Appellant's Br. 66-67. But the D&E procedure involves all three of those steps. The physician intentionally brings a substantial part of the fetus into the vagina, dismembers the fetus, leading to fetal demise, and completes the delivery. A physician need not set out with the intent to perform a D&X procedure in order to violate the statute. It is enough that the physician have the intent to deliver vaginally a substantial portion of a living fetus, and that occurs in the D&E procedure.

Additionally, the person performing the procedure must do so with the purpose of performing a procedure that the person knows "will kill the unborn child and does kill the unborn child." Neb. Rev. Stat. § 28-326(9) (1998). In any abortion procedure the physician performing the procedure does so knowing, and with the purpose, that the procedure will kill the fetus. The language of LB 23 describes a method of abortion that includes the D&E procedure, and the intent requirement of the statute does not work to protect physicians who perform the D&E procedure from violating the statute. LB 23 not only prohibits the D&X procedure, but the D&E procedure as well.

V.

Having determined that LB 23 bans the D&E procedure, we turn now to the question of whether such a ban imposes an undue burden on women seeking second-trimester abortions.

In Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 79 (1976), the Supreme Court held unconstitutional a statute proscribing the use of saline amniocentesis as a method of abortion. Saline amniocentesis was then the most commonly used procedure for abortions performed after the first trimester. Id. at 78. By prohibiting the use of the procedure, the statute would effectively inhibit the vast majority of abortions performed after the first trimester. Id. at 79. Danforth was decided under the trimester framework of Roe. Although Casey changed that framework, the ban in Danforth meets the undue-burden standard of Casey. See Voinovich, 130 F.3d at 201: "An abortion regulation that inhibits the vast majority of second trimester abortions would clearly have the effect of placing a substantial obstacle in the path of a woman seeking a pre-viability abortion." LB 23 does not limit all second-trimester abortions. It does, however, prohibit the most common procedure for second-trimester abortions and, in doing so, imposes an undue burden on a woman's right to choose to have an abortion.

VI.

In its final argument, the State suggests that Roe and Casey do not apply to LB 23 because Roe and Casey apply only to the "unborn" and do not prohibit states from protecting partially born human beings. The State argues that "the Supreme Court has left protection in place for the partially born." Appellant's Br. 71. The State also suggests that because the partial-birth abortion procedure involves a fetus which is more outside of the uterus than inside, the fetus is not unborn, sufficiently distinguishing this case from Roe and Casey. The phrase "partially born" is new to us. Apparently the State uses it to describe a process in which the fetus is killed when it is more outside the womb than inside. If we assume that there is such a legal category, and that, as the State argues, the rule of Roe v. Wade does not apply to it, the argument is still unavailing on the record before us in this case. As we have explained, the Nebraska statute is violated when an arm or a leg of a fetus that is still alive is pulled out of the womb as part of the D&E abortion procedure. In such a situation, although a substantial part of the fetus, as defined by the Nebraska law, has been extracted from the uterus, it cannot be said that the fetus as a whole is more outside the uterus than inside. In addition, we think that the word "born" refers most naturally to a viable fetus, one that is capable of surviving outside the mother. The Nebraska statute is not limited to viable fetuses. Indeed, as we have observed, both the proof and the legal arguments in this case seem to be exclusively about nonviable fetuses. So if there is a separate legal category for the "partially born," and we express no view on that question, we do not see how it could be relevant to the present case.

VII.

Mike Munch, in his official capacity as County Attorney for Sarpy County, appeals the District Court's award of attorney's fees against him. After the District Court held LB 23 unconstitutional, Dr. Carhart sought, and was awarded, attorney's fees, pursuant to 42 U.S.C. § 1988. Section 1988 allows a plaintiff who has brought

a successful suit under 42 U.S.C. § 1983 to recover, at the court's discretion, reasonable attorney's fees from the defendant. The statute provides that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b) (1994). Because Dr. Carhart was a prevailing party, the District Court appropriately granted his request for attorney's fees.

Mr. Munch is the County Attorney in Sarpy County, the county in which Dr. Carhart practices medicine. Dr. Carhart named Mr. Munch in the lawsuit in his official capacity as Sarpy County Attorney and as a representative of all county attorneys in Nebraska. Mr. Munch agrees that Dr. Carhart was a prevailing party. He argues, however, that the award of attorney's fees should not apply against him. We review the award of attorney's fees for an abuse of discretion. See Hatfield v. Hayes, 877 F.2d 717, 719 (8th Cir. 1989).

A prevailing party in a § 1983 suit "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." Id. According to Mr. Munch, the special circumstances in this case are that as a government official he is bound to follow state law and enforce LB 23, and that he did not actively participate in the lawsuit. The short answer is that governmental officials are not bound to follow state law when that law is itself unconstitutional. Quite the contrary: in such a case, they are bound not to follow state law. It is true that a prosecuting attorney may not know for certain whether a state law is valid or not, and that he may feel obliged to enforce the law until a determination as to its validity has been made. This, however, is not a special circumstance justifying the denial of the customary award of fees. Presumably it will always be true that state officials enforcing a law or otherwise defending state action will believe, or at least hope, that the law or action in question will be upheld against a federal constitutional attack. The point of § 1988 is that such officials proceed at their peril. If in fact they are wrong, and the law they are enforcing turns out to be invalid, § 1988 puts the financial burden on the state officials. The

judgment of Congress is that the burden rests more properly on them than on the party who has been wronged by the application of an invalid law.

In addition, although Mr. Munch has not had the opportunity to enforce LB 23, he has made it clear that he would prosecute under the statute. J.A. 646-47. Awarding fees against officials bound to enforce the law is a "run-of-the-mill occurrence[]." Supreme Court of Virginia v. Consumers Union of the United States, 446 U.S. 719, 739 (1980). Additionally, Mr. Munch has the discretion to choose when to prosecute. We find no merit in this argument.

Mr. Munch's argument that he did not actively participate in the lawsuit and that he should not, therefore, be responsible for the attorney's fees, is equally without merit. His role in the proceedings may have been minor, but this does not excuse him from having to share in the actual costs. He relied on his co-defendants to present their defense of the constitutionality of LB 23, a statute he has indicated he would enforce, and he cannot now avoid helping to pay the prevailing party's attorney's fees.

The District Court did not abuse its discretion in holding Mr. Munch liable, jointly and severally with the other defendants, for the attorney's fee award. How the defendants choose to allocate the fees among themselves is entirely up to them.

VIII.

For the foregoing reasons, we affirm the judgment of the District Court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.