

Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. note	re: Partial Birth meeting (2 pages)	03/07	P5
002a. letter	Lisa LeRoy to Ann Lewis re: address and phone number (partial) (1 page)	05/16/2000	P6/b(6)
002b. fax	Lisa LeRoy to Heather Howard re: phone number (partial) (1 page)	06/01/2000	P6/b(6)
002c. letter	Lisa LeRoy to Heather Howard re: address, phone number, SSN, and DOB (partial) (1 page)	06/01/2000	P6/b(6)
002d. letter	Lisa LeRoy to Heather Howard re: address and phone number (partial) (1 page)	01/18/2000	P6/b(6)
002e. envelope	re: address (partial) (1 page)	06/10/2000	P6/b(6)

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Heather Howard (Subject Files)
OA/Box Number: 21196

FOLDER TITLE:

Partial Birth [1]

2012-0254-S

rc668

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

Freedom of Information Act - [5 U.S.C. 552(b)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
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b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

July 17, 2000

MEMORANDUM FOR MELANNE VERVEER

FROM: HEATHER HOWARD

**CC: SHIRLEY SAGAWA
LISSA MUSCATINE
ANN O'LEARY**

SUBJECT: CONSTITUTIONALITY OF PARTIAL BIRTH LEGISLATION

I. QUESTION PRESENTED

Per your request, I have analyzed whether the partial birth abortion bills passed by the Congress would be constitutional under the standards set forth by the Supreme Court in its recent decision Carhart v. Stenberg.

II. BACKGROUND

In 1996 and again in 1997, Congress approved legislation purporting to ban so-called partial birth abortions. Both times, President Clinton vetoed the legislation, pointing to the lack of a health exception. In this session, Congress is again considering partial birth abortion legislation; the Senate passed such legislation in 1999, and the House in 2000. A conference committee has not yet met to work out the differences.

Recently, in Carhart v. Stenberg, the Supreme Court invalidated a Nebraska partial birth statute. The Court struck down the statute because it 1) lacked an exception to protect women's health, and 2) imposed an undue burden on a woman's right to choose, because it banned not only the D&X procedure, but also the D&E procedure, the most common form of second trimester abortion.

III. ANALYSIS

1996 and 1997 legislation

The 1996 and 1997 versions, which were both vetoed by the President, had identical definitions¹ which closely track the definition at issue in Carhart². The Supreme Court found that the

¹ The federal legislation bans abortions "in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery."

Nebraska definition was so vague that it could be interpreted to cover the D&E procedure as well as the D&X procedure. Because the federal legislation vetoed in 1996 and 1997 contain a similar construct, under Carhart they would be unconstitutional as an undue burden on a woman's right to choose.

Recent legislation

The bills that passed the House and Senate in this session contain new definitional language, which proponents claim remedies the legal infirmities of prior legislation (this is the new Santorum language). Both Sen. Santorum and Rep. Canady claim the new definition of the banned procedure is more narrow: it bans the vaginal delivery of "some portion of an intact living fetus until the fetus is partially outside the body of the mother." Despite their claims, the language raises several constitutional questions under Carhart. First, the banned procedure is still vaguely-defined, without reference to medical terminology; thus, the ban may be construed to apply to more commonly used second trimester abortion procedures. Indeed, the American College of Obstetricians and Gynecologists (ACOG) has written that "it fails to use recognized medical terminology and fails to define explicitly the prohibited medical techniques it criminalizes." Second, the legislation still lacks a reference to gestational age, and thus there is no guarantee that it would not apply to pre-viability abortions. Finally, the legislation currently pending lacks any health exception whatsoever, which alone renders the legislation unconstitutional under Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) and Carhart.

IV. CONCLUSION

Legislation vetoed by President Clinton in 1996 and 1997 is similar to the Nebraska statute struck by the Supreme Court in Carhart and would also be unconstitutional. Although the bills passed by Congress this year purport to contain a more narrow definition of the banned procedure, they arguably are still vague and may ban procedures performed during the second trimester, thus imposing an undue burden on a woman's right to choose. In addition, both the House and Senate versions of the pending legislation lack a health exception.

Conferees have not yet met to resolve differences in the House and Senate versions. Even though they will argue that their new definition is constitutional, they still must add a health exception to comport with Carhart. Even a narrowly-drawn health exception is anathema to the anti-choice groups, so it is unclear what they will do.

² The Nebraska statute forbids "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."

<u>THIS SEARCH</u>	<u>THIS DOCUMENT</u>	<u>GO TO</u>
Next Hit	Forward	New Bills Search
Prev Hit	Back	HomePage
Hit List	Best Sections	Help
	Doc Contents	

Bill 38 of 50

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Partial-Birth Abortion Ban Act of 2000 (Introduced in the House)

HR 3660 IH

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. ROEMER, 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.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Partial-Birth Abortion Ban Act of 2000'.

SEC. 2. PROHIBITION ON PARTIAL-BIRTH ABORTIONS.

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

'CHAPTER 74--PARTIAL-BIRTH ABORTIONS

'Sec.

'1531. Partial-birth abortions prohibited.

'Sec. 1531. Partial-birth abortions prohibited

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

'(b)(1) As used in this section, the term 'partial-birth abortion' means an abortion in which the person performing the abortion deliberately and intentionally--

'(A) vaginally delivers ⁽¹⁾some ⁽²⁾portion of an ⁽³⁾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

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

'(2) As used in this section, the term 'physician' means a doctor of medicine or osteopathy legally authorized to practice medicine and surgery by the State in which the doctor performs such activity, or any other individual legally authorized by the State to perform abortions: *Provided, however,* That any individual who is not a physician or not otherwise legally authorized by the State to perform abortions, but who nevertheless directly performs a partial-birth abortion, shall be subject to the provisions of this section.

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

*Does that
mean
6 m. Gest?*

'(2) Such relief shall include--

'(A) money damages for all injuries, psychological and physical, occasioned by the violation of this section; and

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

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

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

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

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

1531'.

<i>THIS SEARCH</i>	<i>THIS DOCUMENT</i>	<i>GO TO</i>
<u>Next Hit</u>	<u>Forward</u>	<u>New Bills Search</u>
<u>Prev Hit</u>	<u>Back</u>	<u>HomePage</u>
<u>Hit List</u>	<u>Best Sections</u>	<u>Help</u>
	<u>Doc Contents</u>	

THIS SEARCH	THIS DOCUMENT	GO TO
Next Hit	Forward	New Bills Search
Prev Hit	Back	HomePage
Hit List	Best Sections	Help
	Doc Contents	

Bill 6 of 7

Final version (Enrolled Bill) as passed by both Houses. There are 6 other versions of this bill.

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Partial-Birth Abortion Ban Act of 1995 (Enrolled Bill (Sent to President))

--H.R.1833--

H.R.1833

One Hundred Fourth Congress

1996

of the

United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Wednesday,

the third day of January, one thousand nine hundred and ninety-six

An Act

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

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Partial-Birth Abortion Ban Act of 1995'.

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‘Sec. 1531. Partial-birth abortions prohibited

‘(a) Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than two years, or both. This paragraph shall not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, illness, or injury: *Provided*, That no other medical procedure would suffice for that purpose. This paragraph shall become effective one day after enactment.

‘(b)(1) As used in this section, the term ‘partial-birth abortion’ means an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery.

‘(2) As used in this section, the term ‘physician’ means a doctor of medicine or osteopathy legally authorized to practice medicine and surgery by the State in which the doctor performs such activity, or any other individual legally authorized by the State to perform abortions: *Provided, however*, That any individual who is not a physician or not otherwise legally authorized by the State to perform abortions, but who nevertheless directly performs a partial-birth abortion, shall be subject to the provisions of this section.

‘(c)(1) The father, if married to the mother at the time she receives a partial-birth abortion procedure, and if the mother has not attained the age of 18 years at the time of the abortion, the maternal grandparents of the fetus, may in a civil action obtain appropriate relief, unless the pregnancy resulted from the plaintiff’s criminal conduct or the plaintiff consented to the abortion.

‘(2) Such relief shall include--

‘(A) money damages for all injuries, psychological and physical, occasioned by the violation of this section; and

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

‘(d) A woman upon whom a partial-birth abortion is performed may not be prosecuted under this section, for a conspiracy to violate this section, or for an offense under section 2, 3, or 4 of this title based on a violation of this section.’.

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

1531’.

Speaker of the House of Representatives.

Vice President of the United States and

<u>THIS SEARCH</u>	<u>THIS DOCUMENT</u>	<u>GO TO</u>
Next Hit	Forward	New Bills Search
Prev Hit	Back	HomePage
Hit List	Best Sections	Help
	Doc Contents	

Bill 1 of 7

There are 6 other versions of this bill.

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Partial-Birth Abortion Ban Act of 1995 (Passed by the House)

104th CONGRESS

1st Session

H. R. 1833**AN ACT**

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

HR 1833 EH

104th CONGRESS

1st Session

H. R. 1833**AN ACT**

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

*Be it enacted by the Senate and House of Representatives of the United States of America in
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'(a) Whoever, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than two years, or both.

'(b) As used in this section, the term 'partial-birth abortion' means an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery.

'(c)(1) The father, and if the mother has not attained the age of 18 years at the time of the abortion, the maternal grandparents of the fetus, may in a civil action obtain appropriate relief, unless the pregnancy resulted from the plaintiff's criminal conduct or the plaintiff consented to the abortion.

'(2) Such relief shall include--

'(A) money damages for all injuries, psychological and physical, occasioned by the violation of this section; and

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

'(d) A woman upon whom a partial-birth abortion is performed may not be prosecuted under this section, for a conspiracy to violate this section, or for an offense under section 2, 3, or 4 of this title based on a violation of this section.

'(e) It is an affirmative defense to a prosecution or a civil action under this section, which must be proved by a preponderance of the evidence, that the partial-birth abortion was performed by a physician who reasonably believed--

'(1) the partial-birth abortion was necessary to save the life of the mother; and

'(2) no other procedure would suffice for that purpose.'

(b) CLERICAL AMENDMENT- The table of chapters for part I of title 18, United States Code, is amended by

inserting after the item relating to chapter 73 the following new item:

1531'.

Passed the House of Representatives November 1, 1995.

Attest:

hearing - July 20 - House
Judiciary
"Born alive" - HR 4292
redefine person in all Federal
laws to include "infants" - born
alive at any stage of development."

- mandate confirmation of fetal demise before delivery

they will talk about post a borderline viability
fetuses that live for 1-2 hours

uj - Same arguments - undermine Roe - 2nd trimester
lack of health

pro viability

July 10, 2000

MEMORANDUM FOR MELANNE VERVEER

FROM: HEATHER HOWARD

**CC: SHIRLEY SAGAWA
LISSA MUSCATINE
ANN O'LEARY**

SUBJECT: CONSTITUTIONALITY OF PARTIAL BIRTH LEGISLATION

QUESTION PRESENTED

Per your request, I have analyzed whether the partial birth abortion bills passed by the Congress and twice vetoed by President Clinton would be constitutional under the standards set forth by the Supreme Court in its recent decision Carhart v. Stenberg.

BACKGROUND

In 1996 and again in 1997, Congress approved legislation purporting to ban so-called partial birth abortions. Both times, President Clinton vetoed the legislation, pointing to the lack of a health exception. In this session, Congress is again considering partial birth abortion legislation. The Senate passed such legislation in 1999, and the House in 2000; a conference committee has not yet met to work out the differences.

Recently, in Carhart v. Stenberg, the Supreme Court invalidated a Nebraska partial birth statute. The Court struck down the statute because it 1) lacked an exception to protect women's health, and 2) imposed an undue burden on a woman's right to choose, because it banned not only the D&X procedure, but also the D&E procedure, the most common form of second trimester abortion.

ANALYSIS

1996 and 1997 legislation

The 1996 and 1997 versions, which were both vetoed by the President, had identical definitions¹ which closely track the definition (at issue) in Carhart². The Supreme Court found that the

¹ "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

Nebraska definition, by defining partial birth as the delivery of an “unborn child” or “*a substantial portion thereof*”, could be read to cover the D&E procedure as well as the D&X procedure. The federal legislation contains a nearly identical construct, and thus under Carhart would be unconstitutional as an undue burden on a woman’s right to choose.

Recent legislation

The legislation that recently passed the House contains new definitional language, which proponents claim remedies the legal infirmities of prior legislation. Rep. Canady, the author, claims the definition of the banned procedure is more narrow: it bans the vaginal delivery of “some portion of an intact living fetus until the fetus is partially outside the body of the mother.” Despite his claims, the language raises constitutional questions under Carhart. First, the banned procedure is still defined vaguely and without reference to medical terminology; thus, the ban may be construed to apply to more commonly used second trimester abortion procedures. Indeed, the American College of Obstetricians and Gynecologists (ACOG) has written that “it fails to use recognized medical terminology and fails to define explicitly the prohibited medical techniques it criminalizes.” Second, the legislation still lacks a reference to gestational age, and thus contains no guarantee that it is intended to apply only to late-term abortions. Finally, the legislation currently pending lacks any health exception whatsoever, which alone renders the legislation unconstitutional under Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) and Carhart.

Conclusion

Legislation vetoed by President Clinton in 1996 and 1997 closely tracks the Nebraska statute and would be unconstitutional under Carhart. Although the House version, passed this year, purports to contain a more narrow definition of the banned procedure, it arguably is still vague and may ban procedures performed during the second trimester, thus imposing an undue burden on a woman’s right to choose. In addition, both the House and Senate versions of the pending legislation lack a health exception.

Conferees have not yet met to resolve differences in the House and Senate versions. Even if they decide to go with the House definition and argue that it is sufficiently narrow, they still must add a health exception to comport with Carhart. Even a narrowly-drawn health exception is anathema to the National Right to Life Committee, however, so it is unclear what the anti-choice groups will do.

You should know that anti-choice groups may turn their attention to newly-introduced legislation called the Born-Alive Infants Protection Act. The legislation would redefine “person” in federal law to include “every infant member of the species *homo sapiens* who is born alive at any stage

thereof, for the purpose of performing a procedure the physician knows will kill the fetus, and kills the fetus.”

² The Nebraska statute forbids “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.”

of development.” Such legislation lacks a health exception and, because it is defined broadly, might ban not only so-called partial birth abortions, but also procedures performed pre-viability, and thus would undermine Roe v. Wade. The House Judiciary Committee is scheduled to hold hearings on this legislation on July 20th.

Partial Birth

Caitant v. Stenberg (8th Cir.)

- undue burden
- did not reach Vagueness issue

Bill purports to ban D+X procedure but also bans D+E
Thus, prohibits the most common procedure for
2nd trimester abortions + thus imposes undue burden
on a woman's right to choose an abortion

Withdrawal/Redaction Marker

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Domestic Policy Council
Heather Howard (Subject Files)
OA/Box Number: 21196

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P. 13/33
FAX NO. 202 293 4349
JUN-14-2000 WED 01:12 PM Planned Parenthood

Supreme Court Message Box for *Stenberg v. Carhart* - Worst Case Scenario Message Box

It's the beginning of the end for Roe v. Wade and a woman's guarantee of a safe and legal abortion.

- Today the Supreme Court pushed Roe v. Wade was pushed off of the tallest building.
- This decision opens the floodgates for new and final attacks on a woman's right to choose in all 50 states.

Next stop - elections 2000!

- The next President may be able to appoint as many as three of the nine Supreme Court Justices setting the direction for years to come.

This is the Worst Outcome Imaginable.

Today a public relations strategy, not a legal strategy prevailed.

- This decision makes it easy for hardliners to make abortion illegal for any reason, by any method, at any point.

Look at the record. Look at what they've done. Look at your rights in shambles.

- The Court did not affirm that abortion should remain safe and legal.
- The petitioners in this case (the state) said: "If medical opinion is divided, defer to the judgment of the state legislative body." The Supreme Court endorsed that chilling approach to health care with their decision.

This is the beginning, not the end. With this decision, the Supreme Court has signaled, "If at first you don't succeed try, try again."

- This decision invites new battlegrounds in all 50 states. We know anti-choice hardliners will again try to pass legislation to eliminate the right to abortion.

- Hardliners won't stop until abortion is outlawed for everyone, everywhere, for any reason, by any method, at any point.

Witness the power of a few. The Supreme Court – nine justices – who are appointed by the President of the United States – make decisions that can impact 240 million people.

- The next President may be able to appoint several Supreme Court justices, setting the direction of the Court for years to come.

We must work to ensure that only Justices who support Roe v. Wade are confirmed by the Senate.

- The question is: which nine next time?

Little Cause for Celebration

Ultimately, we are all responsible for our rights.

- The Supreme Court says the state can limit abortions, not that it must. Therefore, citizen activism is more important than ever.

Look at the record.

- It's not so much what they said as what they didn't say. The court did not affirm that abortion remains safe.
- The petitioners in this case (the state) said: "If medical opinion is divided, defer to the judgment of the state legislative body." To suggest that medicine be turned over to legislative bodies is indeed chilling.

- Planned Parenthood's Responsible Choices Action Network unites pro-choice activists and gives them an easy way to voice their opinions with elected officials.

- The Court didn't look at critical questions. They punted this back to the states. (ADD DAY OF WITH DETAILS).



AHERWITT@naral.org

04/05/2000 05:07:37 PM

Record Type: Record

To: Heather H. Howard/OPD/EOP, Lauren M. Supina/WHO/EOP

cc:

Subject: PBA

The vote on final passage was 141-287. In 1997, the last time the House voted to pass the bill, our vote was 132-296. The only pro-choice freshman we lost was Joe Baca (D-CA), and Harold Ford (D-TN) switched his vote from opposing to supporting. We picked up Republican freshman Steve Kuykendall (R-CA), and pro-choice Republican Tom Campbell (R-CA) was absent.

Additionally, the Republicans decided against naming the conferees this afternoon (they might have gotten wind about our efforts to try and force a vote on the Harkin/Boxer language), so we never got the opportunity to do a motion to instruct conferees. But, we are still holding out hope that we will be able to seize the moment when they do appoint conferees. In the next few days we will be planning our strategy, we will keep you guys in the loop.

allison



AHERWITT@naral.org

04/04/2000 10:06:36 PM

Record Type: Record

To: Lauren M. Supina/WHO/EOP, Heather H. Howard/OPD/EOP

cc:

Subject: Resolution Supporting Roe v. Wade -- There may be a way to get this vote!

The following alert only went to 16 offices, we are trying to keep the possibility of a motion to instruct conferees under wraps, so as not to alert anti-choice lawmakers and ruin our chance for a vote on Roe.

~~CONFIDENTIAL~~ ALERT TO PRO-CHOICE OFFICES!

Wednesday morning the House will vote on H.R.3660, the so-called "Partial-Birth" Abortion Ban Act. The rule for this vote prohibits any substitutes or amendments, and allows only one motion to recommit ? the bare minimum required by House rules. However, after the vote on H.R.3660's final passage, members may have an opportunity to vote to uphold the principles of the landmark Supreme Court Roe v. Wade decision.

Under the rule's construction, a motion may be offered to instruct conferees to support language authored by Senators Harkin and Boxer, and adopted 51-47, during last year's debate on the companion measure to H.R.3660. The Harkin-Boxer language states, "It is the sense of the Congress that Roe v. Wade was an appropriate decision and secures an important constitutional right; and such decision should not be overturned." If a motion to instruct conferees in support of this resolution is raised, NARAL strongly urges members to vote "yes." NARAL will score this vote in its 2000 Congressional Record on Choice. Furthermore, in order to be successful in this vote, it is imperative that members speak on the House floor in support of the Senate Roe v. Wade language.

Following are several points outlining the profound impact Roe v. Wade has had on women's health and lives:

üThe Harkin-Boxer resolution reaffirms the principles espoused by the U.S. Supreme Court in the 1973 Roe v. Wade decision. In Roe, the Court decriminalized abortion, recognizing that the constitutional right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."

üEven as recently as 1992, Supreme Court justices have spoken eloquently about the importance of a constitutionally protected right to privacy, which keeps fundamentally important and deeply personal decisions concerning "bodily integrity, identity and destiny" largely beyond the

DETERMINED TO BE AN
ADMINISTRATIVE MARKING
INITIALS: RUR DATE: 02/27/12
2012-0254-5

reach of government interference. "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." (Planned Parenthood of Southeastern Pennsylvania v. Casey, 1992)

üAmericans know and support the Roe decision. Very recent public opinion polls show that 62 percent of voters favor the Roe decision. (Lake Snell Perry for Planned Parenthood, January 2000.) In a 1998 New York Times poll, 60 percent of respondents agreed with the Roe ruling. The same percentage also said the "government should stay out of decisions on whether abortion should be legal," and more than 75 percent opposed a constitutional amendment banning abortion.

üRoe struck a careful balance between the right of women to choose abortion in the early stages of pregnancy and the state's interest in protecting potential life after viability. Prior to fetal viability, the abortion decision resides with the woman, to be made in consultation with her doctor and within the context of her own religious beliefs. After fetal viability, Roe allows states to ban abortion as long as the woman's life and health are protected.

üIn the years before Roe, an estimated 1.2 million women resorted to illegal abortions annually, despite the known hazards "of frightening trips to dangerous locations in strange parts of town; of whiskey as an anesthetic; of 'doctors' who were often marginal or unlicensed practitioners, sometimes alcoholic, sometimes sexually abusive; unsanitary conditions; incompetent treatment; infection; hemorrhage; disfiguration; and death." It is estimated that as many as 5,000 women died yearly from illegal abortion before Roe.

"Someone gave me the phone number of a person who did abortions and I made the arrangements. I borrowed about \$300 from my roommate and went alone to a dirty, rundown bungalow in a dangerous neighborhood in east Los Angeles. A greasy looking man came to the door and asked for the money as soon as I walked in. He told me to take off all my clothes except my blouse; there was a towel to wrap around myself. I got up on a cold metal kitchen table. He performed a procedure, using something sharp. He didn't give me anything for the pain ? he just did it. He said that he had packed me with some gauze, that I should expect some cramping, and that I would be fine. I left." ? Polly Bergen, discussing the illegal abortion in the 1940s that rendered her infertile and nearly proved fatal.

üThe legalization of abortion in 1973 has had a profoundly positive effect on women's health. By invalidating laws that forced women to resort to back-alley abortions, Roe was directly responsible for saving women's lives. Between 1973 and 1992, the number of deaths per 100,000 legal abortions declined from 4.1 to 0.7. The American Medical Association's Council on Scientific Affairs credits the shift from illegal to legal abortions as an important factor in this decline.

üRoe not only established women's reproductive freedom, but also was

central to women's continued progress toward full and equal participation in American life. In the 27 years since Roe, the variety and level of women's achievements have reached unprecedented levels. As the Supreme Court observed in 1992, "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."

We hope this information is helpful. If you have further questions about the motion to support Roe, please contact Allison Herwitt at 973-3003 or Donna Crane at 973-3047.



AHERWITT@naral.org

04/05/2000 06:45:01 PM

Record Type: Record

To: Heather H. Howard/OPD/EOP

cc:

Subject: Re: PBA

motion to recommit was on the Frank physical health language and the vote was 140-289.

Heather_H.

_Howard@opd.eop.gov To: AHERWITT@naral.org

cc: Lauren_M._Supina@who.eop.gov

04/05/00 05:31 PM Subject: Re: PBA

thanks! did Frank do the motion to recommit? what was the vote on that?

(Embedded

image moved AHERWITT@naral.org

to file: 04/05/2000 05:07:37 PM

PIC15497.PCX)

Record Type: Record

To: Heather H. Howard/OPD/EOP, Lauren M. Supina/WHO/EOP

cc:

Subject: PBA

Bill Marshall

filing tomorrow →
working on Q+A of Justice

Research

- ① off-patent drugs - ~~market~~ market incentives don't work
(like Ritalin) - how can we do?
- ② ^{butcher study is good - but:} request studies of Clonidine + ~~other~~ Prozac
- ③ more \$ - more!

← Broderick -

letter to Steny Hoyer -
pull up old letter -

people on Hill need to know more about the brief -
or to give talking points to Broderick

Hoyer / ^{from wood} motion to recommit - bans all post-viability except
serious adverse health

or one Harkin - make new vote on Pros -
may not be genuine - but it's a Senate
version, so they have an argument

groups want Harkin - want Sen a record as against Roe

See mailing

high
onboard
adequate needs

100%

abortion

not precise
specific

The Bill has
[limited
life exception]
adequate
protection

partial birth could come up in conf on Wed.
vote week of April 2nd →

Congress Daily:

civil penalties / settlements?
Rico

conf - health

doctors - best med. indy.
to protect p's health & fertility

viability

need for ^{an} instant decision

~~3/27~~
allison

partial birth --

conf considered - Thursday

Army / FAC - April 13 vote

promise before April recess - This is probably filler

Rules Conf - has never allowed substitute amendment

Boxer
Feinstein

← Hoyer - been word out here - don't know if he'll offer it
Re resolution - Can they draft it for it to be serious - conf staff
don't have the leeway they had in Senate trying

Series advise health - they think it will cover 9 or serious
fetal abnormalities

3/31

Partial Birth Strategy

Sharon -

go to Rules -

are amendment - Hoyer / Greenwood
Rules will deny

Floor - ask for vote against Rule

reason: no cmt debate, amendment not allowed

so vote a Hoyer / Greenwood ~~amendment~~ is Rule vote

Hoyer / Greenwood is not guarantee a motion to recommit

So - Franks amendment is motion to re

Pro - motion to instruct conferees after it passes
would be guarantee b/c it's a Senate version
(although perhaps motion to instruct doesn't have to be guarantee)

4/3 - partial - mtg w/ NMC + ^{Indianay} cmt staff

4 p.m. - 121 Cannon

Tanesha (66620)

Wanda Kautzges

Catch No shuttle - West Basement -

~~3:45~~ 3:45 from East Side

3:30 from West
garage - 7467

Wed -
late afternoon

Tuesday - 11 am - H201 members only

4/3

Partial Births - mtg in Hill

121
Cannon

Wm staff
(class
room)
etc

Hoyer-Greenwood substitute

going to Rules asking only for this (amendment)

only RB amendments are given

offer only 1 amendment - put them under pressure to accept

think they're going to accept the amendment

motion to recommend - same substance Q's

- maybe Barney Frank

Hoyer - Hoyer's same as Daschle + Durebin
- "already law in 40 states"

Class - Hoyer puts constitutional framework back in
serious

incl. fetal anomaly, future fertility

- if don't get Hoyer-Greenwood under the Rule,
Rule debate becomes proxy on Hoyer-Greenwood - ^{vote on} previous Q
took No a Rule

message - support for Roe v. Wade

88% support health exception

(2)

motion to recommit - of Rank - Amendment to PBA

adding physical health exception

last time - 20 pro-choice members voted as of anti's

Physical
Health

- leaves out mental illness + fetal anomaly

Compare under emotional health exceptions

not asking for vote on Rank -

→ groups don't score it

groups score passage

never had a clean Hays-Greenwood vote -

try to do it on the floor now

make the debate about their efforts to undermine Roe
(missing Viability line + health exceptions
the cornerstones of Roe.)

Lowey will oppose physical health exception.

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
002a. letter	Lisa LeRoy to Ann Lewis re: address and phone number (partial) (1 page)	05/16/2000	P6/b(6)

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Heather Howard (Subject Files)
OA/Box Number: 21196

FOLDER TITLE:

Partial Birth [1]

2012-0254-S
rc668

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Do you want to
accept or forward
to Heather Howard?

Lisa LeRoy

P6/(b)(6)

[002a]

May 16, 2000

Ann Lewis
Communications Director
White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

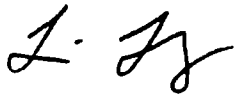
Dear Ms. Lewis:

I am writing to request an opportunity to interview you for my research on the "partial-birth abortion" ban legislation. I am doing my doctoral dissertation in Health Policy at the Heller Graduate School, Brandeis University in Waltham, Massachusetts.

My study will examine the genesis and subsequent course of the legislation as a case study in public policy making. I am looking at how the issue was framed by policy makers, providers, and interest groups, and comparing the competing political strategies employed by pro-life and pro-choice interest groups in their efforts to help pass or defeat the legislation.

I can conduct the interview by telephone or in-person when I travel to Washington on June 12-14. I will call you to follow-up. I can be reached at P6/(b)(6) or via e-mail at l.leroy@erols.com if you would like further information. Thank you.

Sincerely,



Lisa LeRoy

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
002b. fax	Lisa LeRoy to Heather Howard re: phone number (partial) (1 page)	06/01/2000	P6/b(6)

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Heather Howard (Subject Files)
OA/Box Number: 21196

FOLDER TITLE:

Partial Birth [1]

2012-0254-S
rc668

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
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P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

F A X

To: Heather Howard
Company:
Fax number: +1 (202) 456-2878
Business phone:

From: Lisa LeRoy

Fax number:

P6/(b)(6)

[0026]

Business phone:

Home phone:

Date & Time: 6/1/00 12:39:21 PM
Pages: 2
Re: appointment for interview

Withdrawal/Redaction Marker

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
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002c. letter	Lisa LeRoy to Heather Howard re: address, phone number, SSN, and DOB (partial) (1 page)	06/01/2000	P6/b(6)
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COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Heather Howard (Subject Files)
OA/Box Number: 21196

FOLDER TITLE:

Partial Birth [1]

2012-0254-S

rc668

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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and his advisors, or between such advisors [(a)(5) of the PRA]
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personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed
of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C.
2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

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personal privacy [(b)(6) of the FOIA]
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purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of
financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information
concerning wells [(b)(9) of the FOIA]

Lisa LeRoy

P6/(b)(6)

[0020]

June 1, 2000

Heather Howard
Director, Domestic Policy
White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear Ms. Howard:

Thank you for returning my call yesterday and I look forward to meeting with you on Tuesday, June 13 at 3:00 PM. I will plan to arrive at the North West Gate at 2:50. I am working on my doctoral dissertation in Health Policy at the Heller Graduate School, Brandeis University in Waltham, Massachusetts and would like to interview you for my research on the "partial-birth abortion" ban legislation.

My study will examine the genesis and subsequent course of the legislation as a case study in public policy making. I am looking at how the issue was framed by policy makers, providers, and interest groups, and comparing the competing political strategies employed by pro-life and pro-choice interest groups in their efforts to help pass or defeat the legislation.

The information you requested for security clearance is as follows:

Full name: Lisa Joan LeRoy

DOB:

P6/(b)(6)

SS:

I can be reached at P6/(b)(6) or via e-mail at l.leroy@erols.com if you would like further information. Thank you.

Sincerely,

Lisa LeRoy

Lisa LeRoy

Withdrawal/Redaction Marker

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
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002d. letter	Lisa LeRoy to Heather Howard re: address and phone number (partial) (1 page)	01/18/2000	P6/b(6)
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COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Heather Howard (Subject Files)
OA/Box Number: 21196

FOLDER TITLE:

Partial Birth [1]

2012-0254-S
rc668

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

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Lisa LeRoy

P6/(b)(6)

[00201]

June 18, 2000

Heather Howard
Associate Director
Domestic Policy Council
White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear Heather,

Thank you for meeting with me last week to talk about the "partial-birth abortion" ban legislation, and for being so generous with your time. It was helpful to hear about the Administration's position on the legislation and I did follow-up with NAF on the veto ceremony and how that came about. As always, there was an interesting story about the process.

As we discussed, my goal in interviewing individuals with a variety of perspectives is to obtain a balanced view of how and why this issue has attained priority on the national agenda. I plan to continue interviewing individuals from both the pro-choice and pro-life perspectives over the next few months and I hope that I may call you in the future for advice and feedback as I progress with my field work.

It was a pleasure to meet you and it was a treat to go to the White House for business. Thank you, again.

Sincerely,



Lisa LeRoy

P6/(b)(6)

email: l.leroy@erols.com

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
002e. envelope	re: address (partial) (1 page)	06/10/2000	P6/b(6)

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Heather Howard (Subject Files)
OA/Box Number: 21196

FOLDER TITLE:

Partial Birth [1]

2012-0254-S
rc668

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
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- P3 Release would violate a Federal statute [(a)(3) of the PRA]
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C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

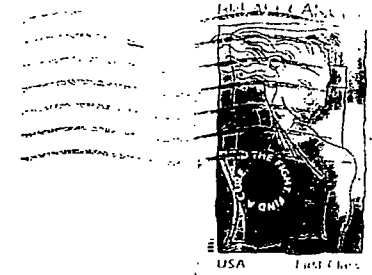
Freedom of Information Act - [5 U.S.C. 552(b)]

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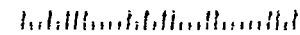
Lisa LeRoy

Pe(b)(6)

[0012]



Heather Howard
Associate Director
Domestic Policy Council
White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500



Stenberg v. Carhart (Partial-Birth Abortion Case)

Background: A Nebraska law enacted in 1997 prohibits any “partial-birth abortion” except when “necessary to save the life of the mother.” Violation of the law by a physician is punishable as a felony. The U.S. Court of Appeals for the Eighth Circuit held that because the law, as drafted, prohibits the most common procedure for second-trimester abortions, it imposes an “undue burden” on a woman’s right to choose to have an abortion in violation of the Constitution. The State of Nebraska petitioned for Supreme Court review of the decision, and the Supreme Court will hear argument on April 25.

Q: Is the federal government filing an amicus brief in the partial-birth abortion case?

A: Yes. The decision in this case could affect the ability of Medicaid and Medicare beneficiaries whose pregnancies result from rape or incest to obtain abortions, including when an abortion is necessary to avoid serious health consequences to the woman. The President has vetoed similar bills passed by the 104th and 105th Congresses, in part because of constitutional concerns about how far the prohibitions went.

Q: Does the brief reflect a change in the President’s position on this issue? Doesn’t the brief indicate that the President approved *all* partial-birth abortions?

A: No, the President’s position has not changed. He continues to oppose any legislation that does not protect a woman’s health.


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 Carhart v. Stenberg, 192 F.3d 1142

Service: LEXSEE®

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 Fees
Ⓜ Civil 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.

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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

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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.

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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.

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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.

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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.

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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]

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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).

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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

6th Cir. -
undue burden
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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 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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Carhart v. Stenberg, 192 F.3d 1142

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Office of the Deputy Assistant Attorney General

Washington, D.C. 20530

FAX COVER SHEETDate: 3/16/00

To:

Sarah Wilson

Phone No.:

Fax No.:

4511-1647

From:

Dawn Burton

Phone No.:

202/305-0091

Fax No.:

202/514-9149

No. of Pages:

32

(Excluding Cover)

Comments:

Barry asked me to send these materials. The
1st item is a NAZAL 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
amended

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 15} 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)".~~

Recessitate 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 ⁴11 on page ⁴3.

Page ⁴3, line ⁵12, strike "(e)" and insert "(d)".

MAR-06-2000 09:32

#6

AMENDMENT TO H.R. 929

OFFERED BY

Conyers Miller

Page ¹⁷2, line ¹⁷24, 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".

MAR-06-2000 09:33

78 Scott 003

Amendment to H.R. 929

Offered By Mr. Scott of Virginia

failed
voice-vote

- 1 Page 2, line ¹³ 5, strike "human" and insert "post-viability".
- 2 Page ³ 2, line ¹² 19, strike "infant" and insert "post-viability
- 3 fetus".
- 4 Page ³ 2, line ¹¹ 18, strike "living" and insert "post-
- 5 viability".

AMENDMENT TO H.R. 929

OFFERED BY Jackson Lee

Page 2, line ¹³ 3, strike "or infant".

Page 2, line ¹³ 15, ⁸ strike "section" and all that follows through "the" on line ⁹ 16 and insert "section, the".

Page 2, line ¹³ 19, ¹² strike "infant" and insert "fetus".

Page 2, line ¹³ 19, ¹² strike "; and" and insert a period.

Page 2, ¹³ strike lines ¹³ 20 and ¹⁴ 21.

Page 3, line ¹⁹ 2, 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.

MAR-06-2000 09:33

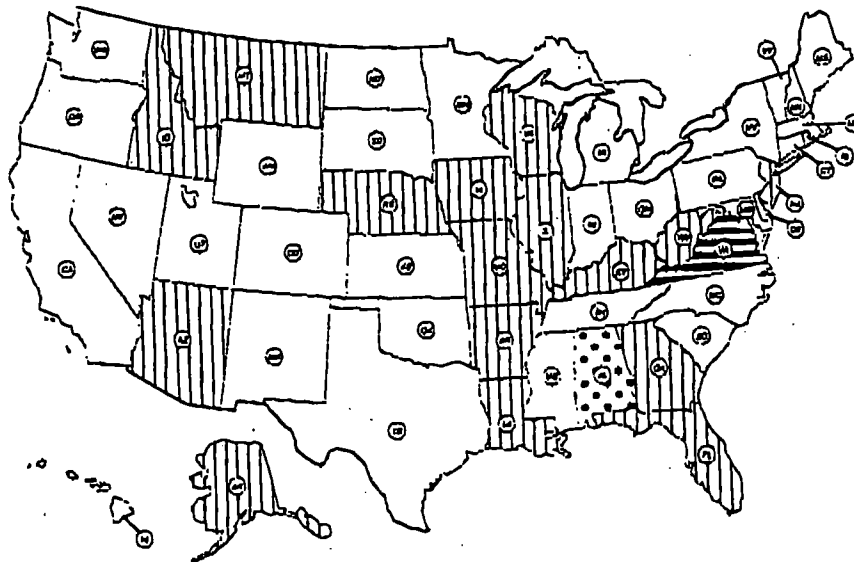
REPRODUCTIVE FREEDOM project

LIBERTIES UNION

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
Arizona
Arkansas
Florida

Georgia
Idaho
Illinois
Iowa

Kentucky
Louisiana
Michigan
Missouri

Montana
Nebraska
New Jersey
Rhode Island

West Virginia
Wisconsin

 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.

ACLU Reproductive Freedom Project

Blocked by the Courts

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,

ACLU Reproductive Freedom Project

Blocked by the Courts

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. SHERRWOOD, 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. HILLARY, Mr. RAHALL, Mr. SOUDER, Mr. WELDON of Florida, Mr. GREEN of Wisconsin, Mr. ARMEY, Mr. GRAHAM, Mr. STUMP, Mr. MCCREY, 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. ROEMER, 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 1591”.

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
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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

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 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 dark ink, 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.

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.

Today: Partly sunny.
High 40, Low 25.
Tuesday: Partly sunny. High
33, Low 25.

Details, Page B8

The Washington Post

MONDAY, JANUARY 24, 2000

Inside: Washington Business
Today's Contracts on Page A2

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Abortion and the Court—Again

THE SUPREME COURT has agreed to review a Nebraska law banning what abortion foes call "partial-birth abortion." The court had little choice in the matter, because the federal courts of appeals cannot seem to agree on whether such laws are constitutional. The U.S. Court of Appeals for the 8th Circuit struck down partial-birth bans in Nebraska, Arkansas and Iowa, while a sharply divided 7th Circuit upheld similar laws in Wisconsin and Illinois.

If the court puts aside the politics of abortion, the partial-birth laws present a pretty easy case; they cannot be reconciled with the Supreme Court's prior abortion holdings. Those earlier decisions grant women the right to abortion unless a pregnancy is so advanced that the fetus would be viable outside the mother. Prior Supreme Court cases thus permit states to ban late-term abortions, but even then such laws must contain exceptions allowing abortions if necessary to safeguard the life and health of the mother. So the partial-birth laws the court has now agreed to review fall short in two respects: They contain no exceptions for the

health of the mother, and they don't restrict themselves to late-term abortions, either. This latter point is a source of confusion, because the laws do ban one particular procedure for carrying out late-term abortions, but they define the procedure in so broad a manner that many abortions performed earlier in pregnancy would be outlawed too.

The partial-birth controversy is frustrating because it has so little relevance to what should be the real objective of legislation in this area: the development of balanced and reasonable abortion policies within the framework of the court's prior holdings. As Chief Judge Richard Posner of the 7th Circuit observed last year in an angry dissent, the partial-birth statutes are not concerned with any real policy objective but with "making a statement in an ongoing war for public opinion, though an incidental effect may be to discourage some late-term abortions. The statement is that fetal life is more valuable than women's health." It is an unfortunate statement, and one squarely at odds with what the Supreme Court itself consistently has said.

Omaha World-Herald

Decide . . . Against Vagueness

Nebraska Attorney General Don Stenberg is right. The U.S. Supreme Court ought to review an appeals panel's ruling on the state's 1997 law that attempts to ban a type of controversial abortion. In one form or another, 30 states as well as Congress have attempted to write such legislation, and the question is too important to remain in legal limbo.

Beyond that, however, the editors of this page part company with Stenberg. He believes the law should be upheld. We believe that it is just what the original trial court said: unconstitutionally vague.

The problem is that in passing the law, the Legislature not only used the popular term "partial-birth abortion," which is not medically recognized; it also used descriptive terminology that could just as easily have applied to one of the most commonly used types of abortion. That kind, no matter what one may think of it, is plainly protected under the Supreme Court's landmark 1973 *Roe vs. Wade* decision.

We believe that most Americans at some level are uncomfortable with abortions. There are too many options available before such a choice to make it easy or casual, ever. But at the bottom line, within the constraints of *Roe*, it still ought to remain a decision between a woman and her doctor, ideally in consensus with the father. Nebraska's 1997 effort is at odds with that right.

Critics of the Nebraska law have said the vagueness was intentional - an end-run attempt to ban much more than just the troubling "partial-birth," or dilation and extraction, abortions. Maybe. Maybe not. We have no crystal ball that allows us to probe into legislators' thought processes. But for the purposes of this discussion, it doesn't matter. What matters is that the law is flawed.

The Supreme Court has not yet adjudicated any of these dozens of attempts to prohibit partial-birth abortions. That makes Nebraska's case important and possibly history-making. That is not especially a point of pride; nonetheless, a ruling next year would be timely and appropriate. When the justices are through, Nebraska legislators should be left with no doubt: They must attempt a narrower version or give it up. What they tried doesn't work.

This editorial appeared in the *Omaha World Herald* on November 18, 1999.

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MONDAY, JANUARY 17, 2000

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High Court to Review Cases on Abortion, Whether Scouts Can Bar Homosexuals

By ROBERT S. GREENBERGER

Staff Reporter of THE WALL STREET JOURNAL

WASHINGTON — The Supreme Court is venturing into two of the nation's most contentious social issues: abortion and gay rights.

The court agreed to review whether states may ban the medical procedure known as partial-birth abortion, and whether the Boy Scouts of America may exclude homosexuals.

In what is likely to be its most important abortion ruling in several years, the high court will review a Nebraska law that bans the procedure, which involves partially extracting a fetus, legs first, through the birth canal, cutting and then draining the skull. Some 30 states have outlawed the procedure.

Offering a glimpse of the raw emotional content of the issue, Attorney General Don Stenberg of Nebraska said in his petition to the high court: "It shocks the conscience that in the United States of America a human child can be literally pulled from the womb and then cruelly killed by having his or her skull punctured and brains suctioned out."

On the other side, the Center for Reproductive Law and Policy, an abortion-rights group, said in a statement that the "vague wording" of the Nebraska statute under re-

view "actually outlaws the safest and most common procedures used to perform abortions in this country." It added that, "this case will be our road map for women's reproductive choice in the 21st century."

The Nebraska ban was enacted by the state legislature on June 9, 1997. Three days later, LeRoy Carhart filed a complaint challenging the law's constitutionality. On July 2, 1998, a U.S. District Court in Nebraska enjoined enforcement of the law. The Eighth U.S. Circuit Court of Appeals, in St. Louis, agreed with the district court.

But shortly after the Nebraska courts invalidated the law, similar abortion laws were upheld by a U.S. Appeals Court in Chicago. Thus, the high court's decision to review the issue to resolve the conflict was expected. (*Stenberg vs. Leroy Carhart*).

In the case involving exclusion of homosexuals, the high court agreed to review a New Jersey Supreme Court decision that found that the Boy Scouts violated antidiscrimination law when it expelled James Dale, a gay assistant scoutmaster.

In urging the high court to take the case, the Boy Scouts said that, "known or avowed homosexuals are ineligible to serve because of Boy Scouts of America's beliefs regarding sexual morality, reflected in part in the 'morally straight' and 'clean' requirements of the [organization's] oath and law."

Mr. Dale's opposing brief said that by age 20, when he was forced out of the Boy Scouts, he had "spent more than half of his life as a member of the Boy Scouts and had won virtually every award available to a scout." In 1990, while a student at Rutgers University in New Jersey, Mr. Dale first publicly acknowledged in a newspaper article that he was gay. Days later, he was notified by the organization that he was being expelled. (*Boy Scouts of America vs. Dale*).

Court Takes Cases On Abortion, Gays

'Partial Birth' Procedure, Boy Scouts at Issue

By JOAN BISKUPIC
Washington Post Staff Writer

Plunging into two of the most divisive issues in America today, the Supreme Court agreed yesterday to decide whether states can ban a type of late-term abortion and whether the Boy Scouts can exclude gays.

Yesterday's order, made public with a simple sheet of paper listing the case names, immediately transforms this court term into the most momentous in years and, as the presidential campaign heats up, moves two emotionally charged subjects to the political forefront.

In agreeing to review the constitutionality of bans on what opponents call "partial birth" abortion, the justices will for the first time since 1992 address a woman's right to end a pregnancy, a matter that has split the court and the country for three decades.

The case involves Nebraska's appeal of a lower court decision striking down its ban on "partial birth" abortion. "Dilation and extraction," as the procedure is known medically, involves dilating a pregnant woman's cervix to allow the fetus to partially emerge, after which the fetus is killed by inserting a suction tube into its skull and removing the contents.

While the high court is unlikely to use the Nebraska case to reopen the threshold question of whether a woman has a right to terminate a pregnancy, its ruling could determine how far states can go in overseeing various procedures and in dictating rules for women's access to abortions.

By a single vote eight years ago, the high court reaffirmed a constitutional right to abortion but gave states more leeway to impose regulations on the procedure. Since then, the subject has continued to confound the states (30 of which have passed laws banning "partial birth" abortion), Congress and the American people.

Yet if anything rivals abortion in the passion it stirs, it is the issue of gay rights. The justices said they would hear an appeal by the Boy Scouts of America of a New Jersey Supreme Court decision that the group cannot exclude a gay troop leader.

The state court ruled that the policy against gays violates state anti-discrimination law and said that because the Boy Scouts is traditionally such an open and large group, the organization cannot claim a constitutional freedom of association to keep gay people from being Scouts or leaders. In its appeal, the Scouts said the case goes to the core of an organization's freedom "to create and interpret its own moral codes"—in this case, an organization that has been part of American culture for nearly a century and has served 90 million boys. Nationally, most Boy Scout troops are sponsored by churches or synagogues, and an array of religious groups has joined in on both sides of the dispute.

The cases will be heard in April, and the rulings are expected by the end of June, when the justices recess for the summer. Both are likely to be closely decided, settled perhaps by a single vote. And as such, both will point up, just as the presidential race is in its final months, the importance of appointments to the bench and where the candidates stand on the issues.

Whoever wins the White House may get to name two or three new justices, including a new chief justice. William H. Rehnquist is 75 and has been on the bench for 28 years, 14 of them in the center chair. The only member who remains from the 1973 court, when the justices first held in *Roe v. Wade* that the Constitution protects a woman's right to abortion, Rehnquist has consistently voted against abortion.

Among the leading presidential candidates, George W. Bush and John McCain both favor banning "partial birth" abortion; Bill Bradley and Al Gore do not.

Initially, the drama will be at the

high court, as the parties in these cases and their advocates weigh in. Eight years ago, when the justices took up abortion, they heard from scores of women's groups, physicians and health care workers, religious organizations and other outside groups with a stake in this enduring social dilemma.

"Whatever decision the court eventually makes, this case will be our road map for women's reproductive choice in the 21st century," said Janet Benshoof, president of the Center for Reproductive Law and Policy, which challenged the Nebraska law.

Nebraska officials see the case as equally important for the power of states and their role in protecting the unborn. "If a state cannot ban the partial-birth abortion/D&X procedure, there is effectively no limit on abortion at all," Nebraska Attorney General Don Stenberg told the justices.

But opponents of "partial birth" laws contend that they are so broadly worded they would prevent other types of abortion as well.

The 8th Circuit said that the way the Nebraska "partial birth" abortion ban was written, it would prohibit some of the most commonly used abortion procedures and, as a result, unconstitutionally restrict abortion methods protected by prior Supreme Court rulings. Using the language of the high court's 1992 decision, the 8th Circuit said the law puts an "undue burden" on women seeking to end their pregnancies.

In its decision last September, the 8th Circuit also struck down similar statutes in Arkansas and Iowa. A month later, the 7th Circuit upheld similar laws in Wisconsin and Illinois, which may have served as an incentive for the justices to take up the issue and resolve the conflicting rulings.

Ten states, including Virginia,

asked the high court to take up Nebraska's appeal in *Stenberg v. Carhart*. Last fall, the Senate voted 63 to 34 for a national ban on such abortions, and the House is expected to take up the issue this year.

When the New Jersey Supreme Court ruled last August in the case of openly gay Scoutmaster James Dale, it became the first state high court to forbid the Scouts to discriminate based on sexual orientation and immediately galvanized both sides of the cultural debate.

The question before the justices is whether the requirement that a Boy Scout troop not exclude an openly gay assistant Scoutmaster violates the Scouts' First Amendment rights of free association and free speech.

The group, which serves close to 5 million boys aged 11 to 17, says there is no greater "intrusion" on a private organization that forcing it to accept people it doesn't want. The New Jersey court said such "free association" arguments do not apply because of the Scouts' tradition of "nonselectivity." It said that because the group is essentially a "public accommodation," it must abide by state laws that prohibit discrimination.

The Lambda Legal Defense and Education Fund, which represents Dale, had urged the justices not to take the Scouts' appeal in *Boy Scouts of America v. Dale*. After yesterday's announcement, staff attorney Evan Wolfson said, "The court now has a chance to hear that Scouting is about honesty, community service, self-reliance, and respect for others—not discrimination."

Staff researcher Madonna Lebling contributed to this report.

The New York Times

JANUARY 15, 2000

By LINDA GREENHOUSE

WASHINGTON, Jan. 14 — Adding an abortion case to its docket for the first time in eight years, the Supreme Court agreed today to decide whether a Nebraska law banning a procedure that the state calls partial birth abortion is constitutional.

The justices plan to hear the case in April and decide it by early summer. The election-year ruling could have a substantial impact on the fractious politics of abortion, although it may not resolve questions about all the similar, but differently worded, prohibitions that 30 states have adopted in recent years.

The Nebraska law, which is broadly written and lacks an exception to protect the health of pregnant women, was declared unconstitutional last September by a federal appeals court, which also struck down similar laws in Iowa and Arkansas. Nearly simultaneously, a different appeals court upheld laws in Wisconsin and Illinois, creating the judicial conflict that the Supreme Court is acting quickly to resolve.

In their order late today granting Nebraska's appeal, the justices indicated that they were not interested in revisiting the basic question of the constitutional status of abortion. Nebraska had asked the court to reconsider its decisions establishing a right to abortion, but the justices granted review only on specific questions of whether the Nebraska law is consistent with those precedents.

Like the laws in other states, the Nebraska law applies to procedures used to terminate pregnancies of fetuses that cannot yet live outside the womb, up to about the 24th week of pregnancy. The procedures in question are used to terminate second-trimester pregnancies. At this stage of pregnancy, the Supreme Court ruled eight years ago in *Planned Parenthood v. Casey*, states may not place an "undue burden" on a woman's access to abortion.

In striking down the Nebraska law, the United States Court of Appeals for the Eighth Circuit, in St. Louis, said that because the Nebraska law would have the effect of prohibiting "the most common method of second-trimester abortion," it constituted an "undue burden" and meant that the court had a "duty to declare the statute invalid."

In his opinion for the appeals court, Judge Richard S. Arnold said that the term partial birth abortion, "though widely used by lawmakers and in the popular press, has no fixed medical or legal content."

JUSTICES TO RULE ON LAW THAT BANS ABORTION METHOD

POLITICAL IMPACT LIKELY

Late-Term Procedure at Issue in Supreme Court Effort to Resolve a Judicial Split

The Nebraska law, which was passed in 1997 but has been blocked ever since from taking effect, contains this description of the abortion technique that it prohibits: "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."

The term "partially delivers" is in turn defined as "deliberately and intentionally delivering into the vagina a living unborn child or a substantial portion thereof."

The appeals court said the phrase "substantial portion" was the law's "crucial problem" because it meant that the prohibition applied to a range of procedures used quite early in pregnancy, in which a doctor pulls fetal parts from the uterus through the birth canal. Although Nebraska argued that its Legislature had not intended to ban this common procedure, known as dilation and evacuation, the appeals court said that "we cannot, however, twist the words of the law and give them a meaning they cannot reasonably bear."

In its Supreme Court appeal, *Stenberg v. Carhart*, No. 99-830, Nebraska argues that the appeals court should have adopted a narrower reading of the law to prohibit only a variant of a procedure known as intact dilation and extraction. In this procedure, which is used infrequently but has become widely known through its graphic depiction in Congressional debates on the issue, a more fully developed fetus is brought feet first through the birth canal, leaving the largest part, the head, inside the uterus. The skull is then collapsed and its contents suctioned to enable it to pass through the cervix.

While this procedure is often referred to as a late-term abortion, it takes place before fetal viability, up to about 24 weeks of pregnancy. Even under *Roe v. Wade*, the court has permitted states to ban abortion after viability, with exceptions for the pregnant woman's life and health. Moreover, most states have long had such prohibitions, which are not at stake in this case.

Dr. Leroy Carhart, the Bellevue, Neb., physician who challenged the state law, performs about 20 intact abortions a year, as well as many other abortions at earlier stages of pregnancy that the appeals court found would also be covered by the law. Doctors performing abortion generally seek to keep the fetus intact as possible to avoid injury to the wall of the uterus.

Dr. Carhart's lawyer, Simon Heller of the Center for Reproductive Law and Policy in New York, said today that although he would have preferred that the Supreme Court let the lower court's decision stand, he thought that of all the cases on the way to the court, Nebraska's was the best for the court to have accepted because of a strong record compiled at trial on the safety and health reasons for the procedure.

"The campaign against partial birth abortion has simply been a campaign of deception orchestrated to demonize abortion in the eyes of the public," Mr. Heller said.

James Bopp Jr., general counsel of the National Right to Life Committee, said that even under *Roe v. Wade*, bans on the procedure could and should be upheld because the court's precedents on the right to abortion did not apply to "the killing of living infants who are only inches away from being fully born alive."

President Clinton has twice vetoed proposed federal laws banning the procedure. Last October, a law passed by the Senate for the third time was two votes short of the number needed to override the president's veto. The House of Representatives will take up the bill this year.

American Medical Association

Physicians dedicated to the health of America



Statement

For Response Only**October 21, 1999**

"U.S. Senator Rick Santorum (R-PA) has reintroduced a bill that would ban intact dilatation and extraction. The American Medical Association (AMA) has previously stated our opposition to this procedure. We have not changed our position regarding the use of this procedure.

"The AMA has asked Sen. Santorum to remove the criminal sanctions from his bill, but such a change has not been made. For this reason we do not support the bill."

New York Times - December 7, 1998

The A.M.A.'s Partial Birth Fiasco

The American Medical Association blundered badly when it endorsed a Republican bill last year banning so-called partial birth abortion. That blunt conclusion, reached long ago by many doctors, has now been echoed by consultants the A.M.A. hired to investigate the debacle. Confronted with this finding, the organization has but one honorable path. It ought to use the gathering of its house of delegates this week in Honolulu to rescind its support for an abortion measure that intrudes on decisions best made by women and their doctors.

The report by the consulting firm of Booz Allen & Hamilton paints a devastating picture of a politically naïve organization so consumed by the desire to cut a deal and to protect the financial interests of doctors on Medicare issues that it "lost sight of its responsibility for making decisions which, first and foremost, benefit the patient and protect the physician-patient relationship." Trustees of the organization, rookies in the high-pressure game of Congressional negotiations, ended up supporting the legisla-

tion, the report notes, even after failing to win concessions to address valid concerns about placing doctors in legal jeopardy by criminalizing a medical procedure the legislation defines only vaguely.

Although the partial birth bill was vetoed by President Clinton, Congress, buttressed by the A.M.A. position, came within three votes of overriding the veto. The bill's sponsors plan to introduce it again next spring. Moreover, the A.M.A.'s endorsement has helped encourage many state legislatures to impose partial birth bans of their own. In 18 states where such bans have been enacted, courts have blocked or severely limited their implementation, finding that the legislative definitions could cover the most commonly used abortion procedures, in violation of *Roe v. Wade*. Inevitably, the issue will reach the Supreme Court, where the position taken by the A.M.A. is bound to be influential. The group should correct its mistake on partial birth abortion before it causes more confusion and damage.

Inquiry Criticizes A.M.A. Backing of Abortion Procedure Ban

By ROBERT PEAR

WASHINGTON, Dec. 3—Investigators hired by the American Medical Association say that the organization ignored its own decision-making procedures, got swept up in politics and failed to protect the welfare of patients when it endorsed a Republican bill banning a specific abortion procedure last year.

In a scathing report, the investigators said that AMA trustees had abandoned the group's longstanding positions on abortion and rushed to embrace the bill even though it did not meet the criteria previously set by the association for such an endorsement.

The report, part of a larger investigation of the board of trustees, concludes that "the AMA blundered" in its handling of the bill to outlaw the procedure that opponents call "partial birth abortion." The trustees had been seeking concessions from Congress to make the bill more acceptable to doctors.

But the report said the association "set itself up for accusations of playing politics" because it announced its support for the abortion bill on the same day it asked Congress to shield doctors from deep cuts in Medicare spending.

"Rather than focusing on its role as steward for the profession and the public health," the report said, "the board got enmeshed in operational issues of lobbying and lost sight of its responsibility for making decisions which, first and foremost, benefit the patient and protect the physician-patient relationship."

The report, a "management audit" by Booz Allen & Hamilton, the consulting company, is based on scores of confidential documents and interviews with people at all levels of the association. The report will be discussed next week in Honolulu at a meeting of the AMA House of delegates, the 486-member policy-making body for the association. At that time, some doctors will press the association to rescind its endorsement of the abortion bill, which passed Congress but was vetoed by President Clinton.

The investigators expressed no views for or against abortion. But they cited the association's handling of the abortion bill as an example of serious flaws in its decision-making process. The report suggests that leaders of the association were manipulated by Republican members of Congress, and that the trustees were inexperienced and unable to deal with the intense political pressures surrounding their negotiations with Congress over the abortion bill in the spring of 1997.

"As the AMA became determined to cut a deal with the Congressmen," the report said, "the decision-making process began to reel out of the control of the AMA and into the control of the Congressmen on the other side of the negotiating table."

While the trustees negotiated directly with congressional sponsors of the legislation, they failed to consult adequately with the American College of Obstetricians and Gynecologists and other groups of medical

specialists, the report said.

Some members of the association said they agreed with the auditors' findings. In the culture of the AMA, "political considerations often take precedence over the profession's needs," said a panel of doctors who studied the structure and governance of the organization, at the behest of the House of Delegates. The investigators from Booz Allen & Hamilton worked under the direct supervision of the doctors' panel.

The extraordinary self-examination was prompted by a fiasco in which the AMA last year agreed to endorse health care products of the Sunbeam Corp. in return for millions of dollars in royalty payments. Stung by charges of commercialism and conflict of interest, the doctors' group canceled the deal, and its chief executive resigned.

Supporters of the abortion bill repeatedly cite the AMA's endorsement as a reason for Congress and state legislatures to impose such restrictions, and many states have done so. The federal version was twice vetoed by President Clinton, in April 1996 and October 1997, but it is sure to come up again next year in Congress.

The bill would make it a crime for a doctor to perform a partial birth abortion, defined as a procedure in which a doctor "partially vaginally delivers a living fetus before killing the fetus and completing the delivery."

Supporters of the legislation say it is aimed at a specific late-term abortion procedure. But

judges have struck down similar language in state laws, saying it is so broad that it has the effect of banning abortion techniques widely used in earlier stages of pregnancy.

In July, for example, Judge Richard Kopf of the Federal District Court for Nebraska ruled that the state's ban on partial birth abortion was unconstitutionally vague because it did not give "fair warning" to doctors and patients about what conduct was prohibited.

"One simply cannot ascertain from the legislative history precisely what the Legislature wanted to ban," Kopf said. "We know the legislators wanted to ban 'partial birth' abortions, but that term is unknown in medical circles."

Janet Benshoof, president of the Center for Reproductive Law and Policy, an abortion rights group, said courts had blocked or limited partial birth abortion laws in 18 states. At least six of the laws were modeled on the federal bill endorsed by the American Medical Association.

The audit report also makes these points:

¶Through the timing of its action on the abortion bill, "the AMA painted a picture of itself as primarily concerned about protecting the financial interests of physicians."

¶The trustees had "a general sense, based on national polls, that the American public was opposed to the partial birth abortion procedure," but the AMA did not survey its members to ascertain what would be in the best interest of patients and doctors.

¶The decision to support a ban on partial birth abortion "contradicted longstanding AMA policy" and deviated from positions reaffirmed by the

house of delegates just five months earlier, in December 1996.

¶The association "appeared to get swept up by the high-profile nature of the issue" last year.

¶The AMA had well-established procedures to set policy in a "thoughtful, deliberative and democratic way," but disregarded them. Instead, it used a "crisis mode of policy-setting."

The trustees decided that they had to take a position on the abortion bill in May 1997, rather than wait for the house of delegates to consider the issue at its regularly scheduled meeting one month later.

As a result, the report says, "many doctors were outraged."

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

October 10, 1997

TO THE HOUSE OF REPRESENTATIVES:

I am returning herewith without my approval H.R. 1122, which would prohibit doctors from performing a certain kind of abortion. I am returning H.R. 1122 for exactly the same reasons I returned an earlier substantially identical version of this bill, H.R. 1833, last year. My veto message of April 10, 1996, fully explains my reasons for returning that bill and applies to H.R. 1122 as well. H.R. 1122 is a bill that is consistent neither with the Constitution nor sound public policy.

As I have stated on many occasions, I support the decision in Roe v. Wade protecting a woman's right to choose. Consistent with that decision, I have long opposed late-term abortions, and I continue to do so except in those instances necessary to save the life of a woman or prevent serious harm to her health. Unfortunately, H.R. 1122 does not contain an exception to the measure's ban that will adequately protect the lives and health of the small group of women in tragic circumstances who need an abortion performed at a late stage of pregnancy to avert death or serious injury.

I have asked the Congress repeatedly, for almost 2 years, to send me legislation that includes a limited exception for the small number of compelling cases where use of this procedure is necessary to avoid serious health consequences. When Governor of Arkansas, I signed a bill into law that barred third-trimester abortions, with an appropriate exception for life or health. I would do so again, but only if the bill contains an exception for the rare cases where a woman faces death or serious injury. I believe the Congress should work in a bipartisan manner to fashion such legislation.

WILLIAM J. CLINTON

THE WHITE HOUSE,
October 10, 1997.

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

October 20, 1999
(Senate)

STATEMENT OF ADMINISTRATION POLICY

(THIS STATEMENT HAS BEEN COORDINATED BY OMB WITH THE CONCERNED AGENCIES.)

S. 1692 - Partial-Birth Abortion Ban Act of 1999 (Sen. Santorum (R) PA and 43 cosponsors)

S. 1692 contains the same serious flaws as H.R. 1833 and H.R. 1122, virtually identical bills that were passed during the 104th and 105th Congresses and vetoed by the President on April 10, 1996, and October 10, 1997, respectively.

The President will veto S. 1692 for the reasons he expressed in his veto message of April 10, 1996, which is attached.

'Partial Birth' Deceptions

Once again a woman's right to choose abortion is under direct attack in Congress. The Senate is poised to vote today on the latest Congressional attempt to impose a national ban on so-called partial birth abortions. Billed by its proponents as a narrow targeting of a single late-term procedure, the measure is actually a backdoor attempt to severely constrict abortion rights throughout all stages of pregnancy.

This reality has not been lost on the courts. Since the Senate's last partial birth vote, there have been 11 court decisions on the legal merits of partial birth bans passed by different states. In all but one instance, the ban was blocked because of constitutional problems.

Just last month the United States Court of Appeals for the Eighth Circuit struck down partial birth statutes in Nebraska, Arkansas and Iowa. Two

of the statutes included language nearly identical to the language of the Senate bill. Finding that the term "partial birth abortion" has no fixed medical or legal meaning, the court said that the vague laws placed an undue burden on abortion rights by outlawing even the safest and most common procedures used before fetal viability.

Of course, Republican leaders are well aware of what the courts have been saying. But that has not prevented them from forging ahead without holding a single hearing on the serious constitutional issues. The real goal here is to gain an edge in next year's election by forcing President Clinton to lift his veto pen for the third time. The nation's lawmakers should have more respect for the Constitution, women's rights and their own institution than to go along with such a dangerous and deceptive game.

Sustain the 'Partial Birth' Veto

A woman's right to abortion faces a critical test today in the Senate. The House has already voted to override President Clinton's principled veto last year of the latest Congressional attempt to ban so-called partial birth abortions. A Senate vote scheduled for this morning will determine whether this professedly narrow but actually far-reaching assault on abortion rights becomes the law of the land.

The latest head counts suggest that Mr. Clinton's veto will stand. But for Americans concerned about government intrusion into women's private medical decisions, this is a moment for nervousness. Two years ago, an effort to rally the required two-thirds of the chamber to override Mr. Clinton's veto of a similar bill fell short by just three votes — and that was before Mr. Clinton's Monica Lewinsky troubles and the Christian right's expensive lobbying campaign aimed at senators deemed susceptible to pre-election pressure. The Republican leadership, content to let the Christian Coalition's political strategy drive the Senate's schedule, has timed today's vote to coincide with the group's "Road to Victory" conference in Washington D.C.

Though promoted by its supporters as an attempt to outlaw a single controversial third-trimester procedure, known as intact dilation and extraction, the bill's reach actually is far broader. Its vague terms could be interpreted to prohibit the safest and most common abortion procedures used throughout a pregnancy, not just in the final three months, thus interfering with a woman's right to a first- or second-trimester abortion.

Indeed, six of seven court rulings on state measures that were modeled on the Congressional version have found significant constitutional defects, citing the Supreme Court's decision in *Roe v. Wade*. "The law is unconstitutionally vague and unduly burdensome on a woman's constitutional right to an abortion," explained Federal District Judge Robert Pratt when he enjoined an identically worded Iowa statute from going into effect two months ago.

Mr. Clinton was right to veto this crude attempt to narrow every woman's access to safe and legal abortions. Senators who care about preserving that access will vote to sustain the veto.