

HB

301



HOUSE JUDICIARY COMMITTEE

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MEMORANDUM

Date: January 21, 2008

To: Representative John Coghill, Chairman
House Rules Committee

From: Representative Jay Ramras, Chairman
House Judiciary Committee

Re: Referral File HB301 - PARTIAL-BIRTH ABORTION

Attached please find the following documents regarding the referral file for HB301:

- Sponsor Statement
- HB301 - 25-LS1139\C
- HSS Fiscal Note - 0
- AS 18.16.050
- HJUD Committee Report
- Back-up

ALASKA STATE LEGISLATURE

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REPRESENTATIVE WES KELLER DISTRICT 14 Sponsor Statement HB 301

Since the Supreme Court of the United States determined that states, not the federal government should control certain medical procedures within their state boundaries, abortions have been legal in Alaska. Despite strong controversies on the abortion issue there is one practice that many people agree needs to stop. Partial-Birth or late term abortion is a process that few people support.

House Bill 301 will end this practice in Alaska. The procedure is well described by its name with the child being partially born and then terminated. Alaska is one of only 14 states that have not restricted this practice, and Congress passed legislation with broad Bi-partisan support to ban it nationwide.

HB 301 sends a message that Alaska will not tolerate this inhumane treatment, and that other better decisions must be made. Your support of HB 301 goes beyond Pro-Life or Pro-Choice.

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FISCAL NOTE

STATE OF ALASKA
2008 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB 301
 () Publish Date: _____
 Dept. Affected: Health & Social Services
 RDU: Public Health
 Component: Public Health Admin Svcs

ID(File name) HB301-DHSS-PHAS-1-18-08
 Title: PARTIAL BIRTH ABORTION
 Sponsor: KELLER, COGHILL
 Requester: HOUSE JUDICIARY COMMITTEE

Component No. 292

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	Appropriation		Information					
	Required		FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014
OPERATING EXPENDITURES								
Personal Services								
Travel								
Contractual								
Supplies								
Equipment								
Land & Structures								
Grants & Claims								
Miscellaneous								
TOTAL OPERATING			0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES								
CHANGE IN REVENUES (0)								

FUND SOURCE (Thousands of Dollars)

	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1037 GF/Mental Health						
Other(Specify Type-do not abbreviate)						
Other(Specify Type-do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2008) cost: _____

POSITIONS

	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014
Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This bill has no programmatic impact on the Division of Public Health or the Department of Health and Social Services.

AS 18.16.010(2) states that the Department's role in regulating abortions is limited to the licensing of facilities where abortions are performed. This bill does not involve facility licensing.

AS 08.64.105 - regulation of abortion procedures - states that the State Medical Board "shall adopt regulations necessary to carry into effect the provisions of AS 18.16.10 and shall define ethical, unprofessional, or dishonorable conduct as related to abortions, set standards of professional competency in the performance of abortions, and establish procedures and set standards for facilities, equipment, and care of patients in the performance of an abortion."

Prepared by: Beverly K. Wooley, Director
 Division: Division of Public Health
 Approved by: Karleen Jackson, Commissioner
 Agency: Department of Health and Social Services

Phone: 269-8045
 Date/Time: 01/18/2008
 Date: 01/19/2008

Sec. 18.16.050. Partial-birth abortions.

(a) Notwithstanding compliance with AS 18.16.010, a person may not knowingly perform a partial-birth abortion unless a partial-birth abortion is necessary to save the life of a mother whose life is endangered by a physical disorder, illness, or injury and no other medical procedure would suffice for that purpose. Violation of this subsection is a class C felony.

(b) A woman upon whom a partial-birth abortion is performed may not be prosecuted under this section or under any other law if the prosecution is based on this section.

(c) In this section, "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.

((i ch 15 SLA 1997))

Editor's notes. A Superior Court for the Third Judicial District held that AS 18.16.050 is unconstitutional and enjoined its enforcement. *Planned Parenthood v. State*, 3-AN-97-6019 (Super. Ct., Third Jud. Dist. at Anchorage, Alaska; March 13, 1998), appeal withdrawn, No. S-08610 (June 29, 2000). The State appealed the Superior Court's decision, but withdrew the appeal following the U.S. Supreme Court's decision in *Stenberg v. Carhart*, 530 U.S. 914, 120 S. Ct. 2597, 147 L.Ed.2d 743 (2000).

Jurors find Scott Peterson guilty of first-degree murder



Scott Peterson now faces the death penalty or a life sentence.

By Harriet Ryan
Court TV

REDWOOD CITY, Calif. — After seven days of tumultuous deliberations that saw the removal of two jurors and a mutiny against the foreman, a jury convicted Scott Peterson Friday of first-degree murder in the slaying of his pregnant wife.

The jurors also found the Modesto fertilizer salesman guilty of second-degree murder in the death of the son his wife, Laci, was carrying when he killed her in December 2002.

Scott Peterson Guilty of First-Degree Murder

From Charles Montaldo,

Verdict Comes in 7th Day of Deliberations

Scott Peterson has been found guilty of first-degree murder in the death of his pregnant wife, Laci Peterson, and second-degree murder in the death of his unborn son Conner. The jury reached a verdict in the case in its seventh day of deliberations, after three jurors were replaced during the trial, including the first foreman.

The jury will now hear evidence in the sentencing phase of the trial beginning Nov. 22 before deciding whether Peterson will be sentenced to death or life without parole for his first-degree conviction for killing Laci.

Scott Peterson convicted of murder

First-degree verdict could bring death penalty

AP Associated Press

updated 6:10 p.m. HT, Sat., Nov. 13, 2004

REDWOOD CITY, Calif. - Scott Peterson's lawyers failed to persuade the jury that someone else killed his pregnant wife. Now, they'll try to persuade the same 12 people to spare him from the death penalty.

But Peterson himself is unlikely to take the stand and beg for mercy — doing that would require him to admit to the murders, and throw away any chance of overturning the convictions on appeal.

Six men and six women convicted Peterson Friday of the first-degree murder of his wife, Laci, and the second-degree murder of the fetus she was carrying. The couple had planned to name their son Conner. The jury also agreed on a "special circumstance" that calls for capital punishment — namely that he killed another person — the fetus — while committing a felony — the intentional and premeditated killing of his wife.

Legal restrictions on later abortion

As of 1998, among the 152 most populous countries, 54 either banned abortion entirely or permitted it only to save the life of the pregnant woman.^[15] In contrast, another 44 of the 152 most populous countries generally banned late-term abortions after a particular gestational age: 12 weeks (Albania, Armenia, Azerbaijan, Belarus, Bosnia-Herzegovina, Bulgaria, Croatia, Cuba, Czech Rep., Denmark, Estonia, France, Georgia, Greece, Kazakhstan, Kyrgyz Rep., Latvia, Lithuania, Macedonia, Moldova, Mongolia, Norway, Russian Fed., Slovak Rep., Slovenia, South Africa, Ukraine, Tajikistan, Tunisia, Turkey, Turkmenistan, Uzbekistan, and Yugoslavia), 13 weeks (Italy), 14 weeks (Austria, Belgium, Cambodia, Germany, Hungary, and Romania), 18 weeks (Sweden), viability (Netherlands and to some extent the United States), and 24 weeks (Singapore).^[15]

United States

The United States Supreme Court decisions on abortion, including *Roe v. Wade*, allow states to impose more restrictions on post-viability abortions than during the earlier stages of pregnancy.

As of April 2007, 36 states had bans on late-term abortions that were not facially unconstitutional (i.e. banning *all* abortions) or enjoined by court order.^[16] In addition, the Supreme Court in the case of *Gonzales v. Carhart* ruled that Congress may ban certain late-term abortion techniques, "both previability and postviability".

Some of the 36 state bans are believed by pro-choice organizations to be unconstitutional.^{[17] [18]} The Supreme Court has held that bans must include exceptions for threats to the woman's life, physical health, and mental health, but four states allow late-term abortions only when the woman's life is at risk; four allow them when the woman's life or physical health is at risk, but use a definition of health that pro-choice organizations believe is impermissibly narrow.^[18] Assuming that one of these state bans is constitutionally flawed, then that does not necessarily mean that the entire ban would be struck down: "invalidating the statute entirely is not always necessary or justified, for lower courts may be able to render narrower declaratory and injunctive relief."^[19]

Also, 13 states prohibit abortion after a certain number of weeks' gestation (usually 24 weeks).^[16] The U.S. Supreme Court held in *Webster v. Reproductive Health Services* that a statute may create "a presumption of viability" after a certain number of weeks, in which case the physician must be given an opportunity to rebut the presumption by performing tests.^[20] Therefore, those 13 states must provide that opportunity. Because this provision is not explicitly written into these 13 laws, as it was in the Missouri law examined in *Webster*, pro-choice organizations believe that

such a state law is unconstitutional, but only "to the extent that it prohibits pre-viability abortions".^[17]

Ten states require a second physician to approve.^[16] The U.S. Supreme Court struck down a requirement of "confirmation by two other physicians" (rather than one other physician) because "acquiescence by co-practitioners has no rational connection with a patient's needs and unduly infringes on the physician's right to practice".^[21] Pro-choice organizations such as the Guttmacher Institute therefore interpret some of these state laws to be unconstitutional, based on these and other Supreme Court rulings, at least to the extent that these state laws require approval of a second or third physician.^[16]

Nine states have laws that require a second physician to be present during late-term abortion procedures in order to treat a fetus if born alive.^[16] The Court has held that a doctor's right to practice is not infringed by requiring a second physician to be present at abortions performed after viability in order to assist in saving the life of the fetus.^[22]

LATER-TERM ABORTION POLICIES

STATE	THRESHOLD FOR LATER-TERM ABORTIONS	LATER-TERM ABORTION PERMITTED WHEN THREAT TO WOMAN'S:			WHEN A LATER-TERM ABORTION IS PERFORMED A SECOND PHYSICIANS MUST:	
		Life and Health	Life and Physical Health	Life	Attend	Approve
Alabama	Viability		X			X
Arizona	Viability	X			X	
Arkansas	Viability	X			X	
California	Viability	X				
Connecticut	Viability	X				
Delaware	▼			▼		
Florida	24 weeks	X				X
Georgia	3rd trimester	X				X
Idaho	Viability			X		X
Illinois	Viability	X			X	
Indiana	Viability		X		X	
Iowa	3rd trimester	X				
Kansas	Viability	X				X
Kentucky	Viability	X				
Louisiana	Viability	X			X	
Maine	Viability	X				
Maryland	Viability	X**				
Massachusetts	24 weeks	X				
Michigan	Viability			X		
Minnesota	▼	▼			▼	
Missouri	Viability	X			X	
Montana	Viability		X			X
Nebraska	Viability	X				
Nevada	24 weeks	X				
New York	24 weeks			X	X	
North Carolina	20 weeks	X				
North Dakota	Viability	X				X
Ohio	▼		▼		▼	▼
Oklahoma	Viability	X			X	
Pennsylvania	24 weeks		X		X	X
Rhode Island	24 weeks			X		
South Carolina	3rd trimester	X†				X
South Dakota	24 weeks	X				
Tennessee	Viability	X				
Texas	3rd trimester	X				
Utah	▼		▼			
Virginia	3rd trimester	X				X
Washington	Viability	X				
Wisconsin	Viability	X				
Wyoming	Viability	X				
TOTAL	36	28	4	4	9	10

▼ Enforcement permanently enjoined by a court order; policy not in effect

* Also permitted in case of rape or incest.

** Also permitted in case of fetal abnormality

† If done for mental health reasons, must have the certification of an independent psychiatrist.

FOR MORE INFORMATION:

For information on state legislative and policy activity click on Guttmacher's [Monthly State Update](#) and for state level information and data on reproductive health issues, click on [Guttmacher's State Center](#).

Cohen SA and Saul R, [The campaign against 'partial-birth' abortion: status and fallout](#), *The Guttmacher Report on Public Policy*, 1998, 1(6):6-10.

Dailard C, [Abortion restrictions and the drive for mental health parity: a conflict in values?](#) *The Guttmacher Report on Public Policy*, 1999, 2(3):4-5 & 14.

The Alan Guttmacher Institute (AGI), [Late-term abortions: legal considerations](#), Issues in Brief, New York: AGI, 1997.

The State Policy in Brief series is made possible in part by support from The John Merck Fund.

U.S. House Gives Final Approval to Partial-Birth Abortion Ban, But Some Democratic Senators Delay Final Senate Vote

WASHINGTON (Oct. 4, 2003) -- Only a single legislative step -- a final vote in the U.S. Senate remains before Congress sends the Partial-Birth Abortion Ban Act (S. 3) to President Bush for his signature.

The bill represents the first direct national restriction on any method of abortion since the Supreme Court legalized abortion on demand in 1973.

The House of Representatives gave final approval to the bill on October 2 by an overwhelming vote of 281-142.

It has been almost a decade since the gruesome practice of partial-birth abortion escaped the shadowy corners of abortion clinics and was disclosed to the public, said Congressman Steve Chabot (R-Oh.), the prime sponsor of the bill in the House. With the House's final approval, we move one step closer to finally banning this horrific procedure, he noted.

House Majority Leader Tom DeLay (R-Tx.) proclaimed the vote a victory for humanity and a pivotal point in the long battle to protect the unborn. Rep. James Oberstar (D-Mn.) said House passage was a landmark day for those who, for more than 30 years, have worked to reduce the number of abortions performed in America.

Approval by the Senate is also assured. Based on past Senate roll calls on the measure and its antecedents, 64 or 65 of the 100 U.S. senators are likely to vote to send the bill to President Bush.

Nevertheless, some Democratic senators who oppose the bill, including Sen. Barbara Boxer (D-Ca.) and Sen. Tom Harkin (D-Iowa), prevented the vote from occurring before the Senate began a 10-day recess on October 3. This means that the necessary Senate vote cannot occur earlier than mid-October.

President Clinton and a minority of senators, mostly Democrats, have blocked enactment of the partial-birth abortion ban for eight years, and now a group made up entirely of Democratic senators is obstructing the bill for additional weeks, commented NRLC Legislative Director Douglas Johnson, who worked with federal lawmakers to originate the legislation in 1995.

The Partial-Birth Abortion Ban Act was originally introduced in 1995 by Congressman Charles Canady (R-Fl.), who retired from Congress in 2000.

Senator Rick Santorum (R-Pa.) is the lead sponsor of the legislation in the Senate.

Senate Majority Leader Bill Frist (R-Tn.), a strong supporter of the ban, expressed regret that Democratic senators did not allow the Senate to give final approval to the bill on October 2, immediately after the House acted.

As soon as we get back, we will be scheduling it for consideration, Frist said on October 3, as the Senate began its recess. It is imperative that the Senate consider this measure in short order so the President can sign this legislation into law.

President Bush urged Congress to pass the ban in his January 28 State of the Union speech. On June 4, he said, I urge Congress to quickly resolve any differences and send me the final bill as soon as possible so that I can sign it into law.

On October 2, as the House completed action on the bill, White House Press Secretary Scott McClellan told reporters, The House right now is voting on the conference committee report on the legislation that would ban the brutal practice of partial-birth abortion. This will be an important step toward building a culture of life in America. And we look forward to the House passage and urge the Senate to move quickly on this important piece of legislation as well.

On the 281-142 October 2 House roll call, the ban was supported by 218 Republicans and 63 Democrats. It was opposed by four Republicans, 137 Democrats, and one independent.

A January Gallup poll found that 70 percent of the public favors the ban.

(The Oct. 2 House roll call will be published in the November issue of *NRL News*. The roll calls by which the Senate and House gave preliminary approval to the bill were published in *NRL News* earlier this year. All of these roll calls, including the Oct. 2 House vote, are posted in the congressional scorecards found at the *Legislative Action Center* on the NRLC website at www.nrlc.org.)

Legal Challenge Expected

The bill legally defines a partial-birth abortion as any abortion in which the baby is delivered either Apast the navel . . . outside the body of the mother,@ or Ain the case of head-first presentation, the entire fetal head is outside the body of the mother,@ before being killed.

The method is usually used in the fifth and sixth months of pregnancy, and usually on healthy mothers of healthy unborn babies. It is sometimes used somewhat earlier, but never during the first three months. It is also sometimes used in the seventh month and later.

The bill would allow the method only if it was ever necessary to save a mother= s life.

Pro-abortion groups have vowed to challenge the ban in federal courts as soon as it is signed into law. Re;portedly these will include challenges by the American Civil Liberties Union on behalf of the National Abortion Federation, and by the Center for Reproductive Rights on behalf of Nebraska abortionist LeRoy Carhart.

In the case of *Stenberg v. Carhart* in 2000, by a 5 to 4 vote, the Supreme Court struck down a Nebraska law banning partial-birth abortions, holding that under *Roe v. Wade* an abortionist must be permitted to use the method when he sees fit.

Johnson noted that NRLC has never predicted whether or not the Supreme Court will uphold the federal ban.

AIn *Stenberg v. Carhart* in 2000, five Supreme Court justices struck down Nebraska= s ban on partial-birth abortion, holding that *Roe v. Wade* guarantees an abortionist's right to perform a partial-birth abortion whenever he chooses,@ Johnson noted. ABut that was a 5-to-4 decision, and we hope that by the time this federal ban reaches the Supreme Court, there will be at least a one vote shift away from the extreme position taken by the five justices in 2000 B either by a justice seeing this bill in a different light, or by a change in personnel.@ In the meantime, AThis bill puts a spotlight on the brutal violence that premature infants suffer every day because of *Roe v. Wade*, as interpreted by five justices on the U.S. Supreme Court,@ Johnson said.

Congressional opponents of the bill said that it failed to show proper deference to past rulings of the Supreme Court.

The bill is Anothing but a veiled attempt to undermine the Supreme Court= s landmark ruling,@ complained House Democratic Whip Steny Hoyer (D-Md.).

Another leading congressional opponent of the ban, Rep. Jerrold Nadler (D-NY), said, AThis bill reads as if the authors carefully studied the Supreme Court decisions, then went out of their way to thumb their noses at 30 years of constitutional law.@

Kate Michelman, president of NARAL, said, "This overly broad bill will strike at the very heart of *Roe*, and creates a legal pathway to the overturn of *Roe* ultimately, so we have to challenge it."

Conference Committee

Both houses approved the legislation earlier this year by about two-to-one margins. The only substantive difference between the House and Senate versions was the Harkin Amendment, an amendment expressing support for *Roe v. Wade* that was narrowly adopted in the Senate.

In order to get rid of the Harkin Amendment, sponsors of the bill decided to send it to a House-Senate conference committee. Opponents were able to delay that step for some weeks, but on September 17 the Senate voted to go to conference. The conference met on September 30.

Because Republicans hold majority control of both the House and Senate, Republican supporters of the bill outnumbered Democratic opponents 3-to-2 among the conferees from both the House and the Senate, and the conference was chaired by the chairmen of the Judiciary committees, Senator Orrin Hatch (R-Utah) and Rep. F. James Sensenbrenner (R-Wi.), both strong supporters of the bill.

On party-line votes, the committee deleted the Harkin Amendment, and also rejected a series of other gutting amendments offered by Sen. Boxer, Sen. Dianne Feinstein (D-Ca.), Rep. Zoe Lofgren (D-Ca.), and Rep. Nadler.

AHealth@ Claims Debated

During the October 2 House debate, opponents insisted that the partial-birth abortion method is sometimes necessary to protect women's health.

In reply, House Judiciary Committee Chairman Sensenbrenner said that the bill includes extensive congressional findings, based upon medical evidence received in a series of legislative hearings, that . . . partial-birth abortion is never medically necessary to preserve a woman's health, poses serious risks to women's health, and in fact is below the requisite standard of medical care.

Some opponents of the ban also resurrected long-discredited claims that the method is used mostly or only in cases of babies who cannot survive after birth because of profound disorders.

These are not children who are going to be born and run around the room, said Rep. Louise Slaughter (D-NY).

In response, Rep. Chris Smith (R-NJ), the co-chairman of the House Pro-Life Caucus, noted that even the head of the National Coalition of Abortion Providers had admitted that such claims were untrue. Most of those who are killed with partial-birth abortion methods are perfectly healthy, perfectly normal -- and those kids, like their disabled brothers and sisters, should not be executed in this terrible way or in any other way, Smith said.

Resources on Partial-Birth Abortion

The NRLC website contains the most extensive archive of documentation on partial-birth abortion available anywhere on the internet, including documentation on all disputed issues surrounding partial-birth abortion, White House statements on the issue, groundbreaking reports by investigative journalists for major newspapers and periodicals, and expert-certified color illustrations of the method.

The color illustrations of the partial-birth abortion method that were displayed on the Senate and House floors during the debates this year, along with documentation of their accuracy by eminent medical authorities, are here.

Medical drawings of a "dilation and evacuation" (D&E) abortion, a different method not covered by the bill, appear [here](#).

A basic resource, "Key Facts on Partial-Birth Abortion," is posted [here](#).

The NRLC archive also contains NRLC's in-depth testimony presented to Congress, with citations to primary sources, [here](#).

U.S. House Members Speak Out For Ban on Partial-Birth Abortion

Congresswoman Sue Myrick (R-NC): Al must say, as a mother and a grandmother, it is astonishing to me that this horrible practice is even remotely legal in America today. . . . Partial-birth abortion is the procedure where a pregnant woman= s cervix is forcibly dilated over a 3-day period. On the third day, her child is pulled, feet first, through the birth canal until his or her entire body, except for the head, is outside the womb. The head is held inside the womb by the woman= s cervix, and while the fetus is stuck in this position, dangling partly out of the woman's body and just a few inches from a completed birth, the abortionist inserts scissors into the base of the baby's skull, and the scissors are opened, creating a hole in the baby's head. The skull is either then crushed with instruments or a suction catheter is inserted into the hole and the baby's brain is suctioned out. Since the head is now small enough to slip through the mother's cervix, the now lifeless body is pulled the rest of the way out of its mother and the baby's corpse is discarded, usually as medical waste.@

Rep. Mark Kennedy (R-Mn.), who organized a special series of speeches on the House floor the night before the House took up the bill: Al had a young nephew who was born at less than two pounds. Sadly, 3,000 to 5,000 young children a year -- many of them bigger than my nephew when he was born -- die through partial-birth abortion, and it is time that we end this. It is deplorable that a country like ours which was founded on the respect for life has continued to allow this terrible practice.@

Rep. Mike Pence (R-In.): Al am mindful of that Bible verse that whatsoever you do for the least of these, you do for me, the Lord tells us. And I submit what we will do in this Congress tomorrow, banning this barbaric procedure known as partial-birth abortion, is the least we can do for the least of these.@

Congresswoman Ileana Ros-Lehtinen (R-Fl.): ASome of my colleagues who support partial-birth abortion are the first ones to rightly advocate the prohibition of cruelty against others or even against helpless animals. But how can some cringe in horror when an animal is tortured, yet they do not think twice about the unspeakable suffering of an innocent baby being killed through this so-called medical procedure?

Congressman F. James Sensenbrenner (R-Wi.), chairman of the House Judiciary Committee: Almplicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns but all vulnerable and innocent human life.@

Congressman Joe Pitts (R-Pa.), chairman of the House Values Action Team: AThis type of abortion, partial-birth abortion, is more like a legal technicality. The baby must be delivered

feet-first so that the doctor actually forces the head to stay in the birth canal. Otherwise, he would be born and actually breathe. Most people would call this murder. But right now, it is just a technicality. There is no excuse for this procedure in a civilized nation.@

Partial-Birth Abortion Ban Act of 2003 (Enrolled as Agreed to or Passed by Both House and Senate)

--S.3--

One Hundred Eighth Congress

of the

United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Tuesday,

the seventh day of January, two thousand and three

An Act

To prohibit the procedure commonly known as partial-birth abortion.

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 2003'.

SEC. 2. FINDINGS.

The Congress finds and declares the following:

(1) A moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion--an abortion in which a physician deliberately and intentionally vaginally delivers a living, unborn child's body until either the entire baby's head is outside the body of the mother, or any part of the baby's trunk past the navel is outside the body of the mother and only the head remains inside the womb, for the purpose of performing an overt act (usually the puncturing of the back of the child's skull and removing the baby's brains) that the person knows will kill the partially delivered infant, performs this act, and then completes delivery of the dead infant--is a gruesome and inhumane procedure that is never medically necessary and should be prohibited.

(2) Rather than being an abortion procedure that is embraced by the medical community, particularly among physicians who routinely perform other abortion procedures, partial-birth abortion remains a disfavored procedure that is not only unnecessary to preserve the health of the mother, but in fact poses serious risks to the long-term health of women and in some circumstances, their lives. As a result, at least 27 States banned the procedure as did the United

States Congress which voted to ban the procedure during the 104th, 105th, and 106th Congresses.

(3) In *Stenberg v. Carhart*, 530 U.S. 914, 932 (2000), the United States Supreme Court opined 'that significant medical authority supports the proposition that in some circumstances, [partial birth abortion] would be the safest procedure' for pregnant women who wish to undergo an abortion. Thus, the Court struck down the State of Nebraska's ban on partial-birth abortion procedures, concluding that it placed an 'undue burden' on women seeking abortions because it failed to include an exception for partial-birth abortions deemed necessary to preserve the 'health' of the mother.

(4) In reaching this conclusion, the Court deferred to the Federal district court's factual findings that the partial-birth abortion procedure was statistically and medically as safe as, and in many circumstances safer than, alternative abortion procedures.

(5) However, substantial evidence presented at the Stenberg trial and overwhelming evidence presented and compiled at extensive congressional hearings, much of which was compiled after the district court hearing in Stenberg, and thus not included in the Stenberg trial record, demonstrates that a partial-birth abortion is never necessary to preserve the health of a woman, poses significant health risks to a woman upon whom the procedure is performed and is outside the standard of medical care.

(6) Despite the dearth of evidence in the Stenberg trial court record supporting the district court's findings, the United States Court of Appeals for the Eighth Circuit and the Supreme Court refused to set aside the district court's factual findings because, under the applicable standard of appellate review, they were not 'clearly erroneous'. A finding of fact is clearly erroneous 'when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed'. *Anderson v. City of Bessemer City*, North Carolina, 470 U.S. 564, 573 (1985). Under this standard, 'if the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently'. *Id.* at 574.

(7) Thus, in Stenberg, the United States Supreme Court was required to accept the very questionable findings issued by the district court judge--the effect of which was to render null and void the reasoned factual findings and policy determinations of the United States Congress and at least 27 State legislatures.

(8) However, under well-settled Supreme Court jurisprudence, the United States Congress is not bound to accept the same factual findings that the Supreme Court was bound to accept in Stenberg under the 'clearly erroneous' standard. Rather, the United States Congress is entitled to reach its own factual findings--findings that the Supreme Court accords great deference--and to enact legislation based upon these findings so long as it seeks to pursue a legitimate interest that is within the scope of the Constitution, and draws reasonable inferences based upon substantial evidence.

(9) In *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Supreme Court articulated its highly deferential review of congressional factual findings when it addressed the constitutionality of section 4(e) of the Voting Rights Act of 1965. Regarding Congress' factual determination that section 4(e) would assist the Puerto Rican community in 'gaining nondiscriminatory treatment in public services,' the Court stated that '[i]t was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations * * *. It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did. There plainly was such a basis to support section 4(e) in the application in question in this case.' *Id.* at 653.

(10) *Katzenbach's* highly deferential review of Congress' factual conclusions was relied upon by the United States District Court for the District of Columbia when it upheld the 'bail-out' provisions of the Voting Rights Act of 1965 (42 U.S.C. 1973c), stating that 'congressional fact finding, to which we are inclined to pay great deference, strengthens the inference that, in those jurisdictions covered by the Act, state actions discriminatory in effect are discriminatory in purpose'. *City of Rome, Georgia v. U.S.*, 472 F. Supp. 221 (D.D.C. 1979) *aff'd* *City of Rome, Georgia v. U.S.*, 446 U.S. 156 (1980).

(11) The Court continued its practice of deferring to congressional factual findings in reviewing the constitutionality of the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992. See *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622 (1994) (*Turner I*) and *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 520 U.S. 180 (1997) (*Turner II*). At issue in the *Turner* cases was Congress' legislative finding that, absent mandatory carriage rules, the continued viability of local broadcast television would be 'seriously jeopardized'. The *Turner I* Court recognized that as an institution, 'Congress is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon an issue as complex and dynamic as that presented here', 512 U.S. at 665-66. Although the Court recognized that 'the deference afforded to legislative findings does 'not foreclose our independent judgment of the facts bearing on an issue of constitutional law,' its 'obligation to exercise independent judgment when First Amendment rights are implicated is not a license to reweigh the evidence *de novo*, or to replace Congress' factual predictions with our own. Rather, it is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.' *Id.* at 666.

(12) Three years later in *Turner II*, the Court upheld the 'must-carry' provisions based upon Congress' findings, stating the Court's 'sole obligation is 'to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.' 520 U.S. at 195. Citing its ruling in *Turner I*, the Court reiterated that '[w]e owe Congress' findings deference in part because the institution 'is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon' legislative questions,' *id.* at 195, and added that it 'owe[d] Congress' findings an additional measure of deference out of respect for its authority to exercise the legislative power.' *Id.* at 196.

(13) There exists substantial record evidence upon which Congress has reached its conclusion that a ban on partial-birth abortion is not required to contain a 'health' exception, because the facts indicate that a partial-birth abortion is never necessary to preserve the health of a woman,

poses serious risks to a woman's health, and lies outside the standard of medical care. Congress was informed by extensive hearings held during the 104th, 105th, 107th, and 108th Congresses and passed a ban on partial-birth abortion in the 104th, 105th, and 106th Congresses. These findings reflect the very informed judgment of the Congress that a partial-birth abortion is never necessary to preserve the health of a woman, poses serious risks to a woman's health, and lies outside the standard of medical care, and should, therefore, be banned.

(14) Pursuant to the testimony received during extensive legislative hearings during the 104th, 105th, 107th, and 108th Congresses, Congress finds and declares that:

(A) Partial-birth abortion poses serious risks to the health of a woman undergoing the procedure. Those risks include, among other things: An increase in a woman's risk of suffering from cervical incompetence, a result of cervical dilation making it difficult or impossible for a woman to successfully carry a subsequent pregnancy to term; an increased risk of uterine rupture, abortion, amniotic fluid embolus, and trauma to the uterus as a result of converting the child to a footling breech position, a procedure which, according to a leading obstetrics textbook, 'there are very few, if any, indications for * * * other than for delivery of a second twin'; and a risk of lacerations and secondary hemorrhaging due to the doctor blindly forcing a sharp instrument into the base of the unborn child's skull while he or she is lodged in the birth canal, an act which could result in severe bleeding, brings with it the threat of shock, and could ultimately result in maternal death.

(B) There is no credible medical evidence that partial-birth abortions are safe or are safer than other abortion procedures. No controlled studies of partial-birth abortions have been conducted nor have any comparative studies been conducted to demonstrate its safety and efficacy compared to other abortion methods. Furthermore, there have been no articles published in peer-reviewed journals that establish that partial-birth abortions are superior in any way to established abortion procedures. Indeed, unlike other more commonly used abortion procedures, there are currently no medical schools that provide instruction on abortions that include the instruction in partial-birth abortions in their curriculum.

(C) A prominent medical association has concluded that partial-birth abortion is 'not an accepted medical practice', that it has 'never been subject to even a minimal amount of the normal medical practice development,' that 'the relative advantages and disadvantages of the procedure in specific circumstances remain unknown,' and that 'there is no consensus among obstetricians about its use'. The association has further noted that partial-birth abortion is broadly disfavored by both medical experts and the public, is 'ethically wrong,' and 'is never the only appropriate procedure'.

(D) Neither the plaintiff in *Stenberg v. Carhart*, nor the experts who testified on his behalf, have identified a single circumstance during which a partial-birth abortion was necessary to preserve the health of a woman.

(E) The physician credited with developing the partial-birth abortion procedure has testified that he has never encountered a situation where a partial-birth abortion was medically necessary to achieve the desired outcome and, thus, is never medically necessary to preserve the health of a

woman.

(F) A ban on the partial-birth abortion procedure will therefore advance the health interests of pregnant women seeking to terminate a pregnancy.

(G) In light of this overwhelming evidence, Congress and the States have a compelling interest in prohibiting partial-birth abortions. In addition to promoting maternal health, such a prohibition will draw a bright line that clearly distinguishes abortion and infanticide, that preserves the integrity of the medical profession, and promotes respect for human life.

(H) Based upon *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), a governmental interest in protecting the life of a child during the delivery process arises by virtue of the fact that during a partial-birth abortion, labor is induced and the birth process has begun. This distinction was recognized in *Roe* when the Court noted, without comment, that the Texas parturition statute, which prohibited one from killing a child 'in a state of being born and before actual birth,' was not under attack. This interest becomes compelling as the child emerges from the maternal body. A child that is completely born is a full, legal person entitled to constitutional protections afforded a 'person' under the United States Constitution. Partial-birth abortions involve the killing of a child that is in the process, in fact mere inches away from, becoming a 'person'. Thus, the government has a heightened interest in protecting the life of the partially-born child.

(I) This, too, has not gone unnoticed in the medical community, where a prominent medical association has recognized that partial-birth abortions are 'ethically different from other destructive abortion techniques because the fetus, normally twenty weeks or longer in gestation, is killed outside of the womb'. According to this medical association, the 'partial birth' gives the fetus an autonomy which separates it from the right of the woman to choose treatments for her own body'.

(J) Partial-birth abortion also confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child, whom he or she had just delivered, all but the head, out of the womb, in order to end that life. Partial-birth abortion thus appropriates the terminology and techniques used by obstetricians in the delivery of living children--obstetricians who preserve and protect the life of the mother and the child--and instead uses those techniques to end the life of the partially-born child.

(K) Thus, by aborting a child in the manner that purposefully seeks to kill the child after he or she has begun the process of birth, partial-birth abortion undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world, in order to destroy a partially-born child.

(L) The gruesome and inhumane nature of the partial-birth abortion procedure and its disturbing similarity to the killing of a newborn infant promotes a complete disregard for infant human life that can only be countered by a prohibition of the procedure.

(M) The vast majority of babies killed during partial-birth abortions are alive until the end of the

procedure. It is a medical fact, however, that unborn infants at this stage can feel pain when subjected to painful stimuli and that their perception of this pain is even more intense than that of newborn infants and older children when subjected to the same stimuli. Thus, during a partial-birth abortion procedure, the child will fully experience the pain associated with piercing his or her skull and sucking out his or her brain.

(N) Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life. Thus, Congress has a compelling interest in acting--indeed it must act--to prohibit this inhumane procedure.

(O) For these reasons, Congress finds that partial-birth abortion is never medically indicated to preserve the health of the mother; is in fact unrecognized as a valid abortion procedure by the mainstream medical community; poses additional health risks to the mother; blurs the line between abortion and infanticide in the killing of a partially-born child just inches from birth; and confuses the role of the physician in childbirth and should, therefore, be banned.

SEC. 3. 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 2 years, or both. This subsection does 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, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself. This subsection takes effect 1 day after the enactment.

(b) As used in this section--

(1) the term 'partial-birth abortion' means an abortion in which the person performing the abortion--

(A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living

fetus; and

'(B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus; and

'(2) 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)(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, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.

'(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'.

Speaker of the House of Representatives.

Vice President of the United States and

President of the Senate.

Gonzales v. Carhart, 550 U.S. ____ (2007),

Decision

Justice Anthony Kennedy wrote for the Court that the respondents had failed to show that Congress lacked power to ban this abortion procedure. Chief Justice John Roberts along with Justices Samuel Alito, Clarence Thomas, and Antonin Scalia agreed with the Court's judgment, and they also joined Kennedy's opinion.

The Court left the door open for as-applied challenges, citing its recent precedent in *Ayotte v. Planned Parenthood of New England*. According to *Washington Post* reporter Benjamin Wittes, "The Court majority, following the path it sketched out last year in the New Hampshire case, decided to let the law stand as a facial matter and let the parties fight later about what, if any, applications need to be blocked."^[15]

The Court decided to "assume ... for the purposes of this opinion" the principles of *Roe v. Wade* and *Planned Parenthood v. Casey*. The Court then proceeded to apply those "principles accepted as controlling here."

The Court said that the lower courts had repudiated a central premise of *Casey* — that the state has an interest in preserving fetal life — and the Court held that the ban was narrowly tailored to address this interest. Relying deferentially on Congress's findings that this intact dilation and extraction procedure is never needed to protect the health of a pregnant woman, Kennedy wrote that a health exception was therefore unnecessary. And, where medical testimony disputed Congress's findings, Congress is still entitled to regulate in an area where the medical community has not reached a "consensus."^[21]

The majority opinion held that "ethical and moral" considerations, including an interest in fetal life, represented "substantial" state interests which (assuming they do not impose an "undue" burden) could be a basis for legislation at all times during pregnancy, not just after viability. Thus, the Court believed that the pre-viability/post-viability distinction was not implicated in *Carhart*.^[21]

In addition, the Court distinguished the *Stenberg* case, which previously struck down Nebraska's partial-birth abortion law. The Court held that the state statute at issue in *Stenberg* was more ambiguous than the later federal statute at issue in *Carhart*.^[21]

The majority opinion in *Gonzales v. Carhart* did not discuss the constitutional rationale of the Court's prior abortion cases (i.e. "due process"). However, the majority opinion disagreed with the Eighth Circuit that the federal statute conflicted with "the Due Process Clause of the Fifth Amendment [which] is textually identical to the Due Process Clause of the Fourteenth Amendment."^[6]

[edit] Concurrence

Justice Thomas filed a concurring opinion, joined by Justice Scalia, saving for another day the issue of whether Congress had sufficient power under the Commerce Clause to enact this ban.^[2] The Commerce Clause was also mentioned in the opinion of the Court, and was the only clause of the Constitution mentioned explicitly by the opinions in this case.

The concurrence also stated that Justices Thomas and Scalia joined the Court's opinion "because it accurately applies current jurisprudence." And, the concurrence reiterated their view that that current abortion jurisprudence "has no basis in the Constitution." Nadine Strossen, President of the ACLU, pointed out that "no less an anti-abortion proponent than Justice Scalia joined by Justice Thomas, in his separate opinion, chided the majority for not coming out and explicitly saying that they had overturned not *Roe vs. Wade*, but the prior partial-birth abortion ban case."^[16]

[edit] Dissent

Justice Ruth Bader Ginsburg dissented, joined by justices David Souter, John Paul Stevens, and Stephen Breyer, contending that the ruling was an "alarming" one that ignored Supreme Court abortion precedent. Justice Ginsburg's dissent was the only opinion in this case that mentioned the word "privacy". Justice Ginsburg, referring in particular to *Planned Parenthood v. Casey*, sought to ground the Court's abortion jurisprudence based on concepts of personal autonomy and equal citizenship rather than the Court's previous privacy approach: "Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."^[2]

Justice Kennedy's opinion in *Carhart* did not touch upon the question of whether the Court's prior decisions in *Roe v. Wade* and *Planned Parenthood v. Casey* were valid. Dissenting Justice Ginsburg characterized this aspect of the Court's opinion as follows: "Casey's principles, confirming the continuing vitality of 'the essential holding of *Roe*,' are merely 'assume[d]' for the moment ... rather than 'retained' or 'reaffirmed.'"

FAILED

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25-LS1139\C.1

Kurtz

1/21/08

AMENDMENT # |

OFFERED IN THE HOUSE

BY REPRESENTATIVE HOLMES

TO: HB 301

1 Page 1, following line 2:

2 Insert a new bill section to read:

3 **** Section 1. AS 18.16.050(a) is amended to read:**

4 (a) Notwithstanding compliance with AS 18.16.010, a person may not
5 knowingly perform a partial-birth abortion unless continuation of the pregnancy is
6 likely to result in the pregnant woman's death or poses a substantial risk of
7 permanent injury to the pregnant woman's physical or mental health [A
8 PARTIAL-BIRTH ABORTION IS NECESSARY TO SAVE THE LIFE OF A
9 MOTHER WHOSE LIFE IS ENDANGERED BY A PHYSICAL DISORDER,
10 ILLNESS, OR INJURY AND NO OTHER MEDICAL PROCEDURE WOULD
11 SUFFICE FOR THAT PURPOSE]. Violation of this subsection is a class C felony."
12

13 Page 1, line 3:

14 Delete "Section 1"

15 Insert "Sec. 2"