September 17, 1996

Ms. Jen Klein
Office of the First Lady
White House
1600 Pennsylvania Ave NW
Washington DC 20500

Dear Ms. Klein,

Knowing of your interest in the "partial birth" abortion issue, I thought that you would be interested in a copy of the amicus brief ACOG filed in the case involving the Ohio law. I have also enclosed a copy of the Ohio statute in case you do not already have one.

Sincerely,

Kathy Bryant, JD
Associate Director
Government Relations

KB:dc

Enclosures

THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS • WOMEN'S HEALTH CARE PHYSICIANS
409 12TH STREET SW WASHINGTON DC 20024-2188
MAILING ADDRESS: PO BOX 96920 WASHINGTON DC 20090-6920
202/638-5577

Nos. 96-3157, 96-3159

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WOMEN'S MEDICAL PROFESSIONAL CORP., et al.,

Plaintiffs-Appellees,

vs.

GEORGE VOINOVICH, GOVERNOR, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION
(District Court Case No. 95-414)

BRIEF OF AMICI CURIAE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, NATIONAL ABORTION FEDERATION, AMERICAN CIVIL LIBERTIES UNION, AND AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION, INC., IN SUPPORT OF PLAINTIFFS-APPELLEES

NANCY NORTHUP
LOUISE MELLING
Reproductive Freedom Project
ACLU Foundation
132 W. 43rd Street, 7th Floor
New York, New York 10036
(212) 944-9800 ext. 618

JOAN M. ENGLUND (0040814)
Counsel of Record
Legal Director
ACLU of Ohio Foundation, Inc.
1266 West Sixth Street
Cleveland, Ohio 44113-1353
(216) 781-8639

ISAAC SCHULZ (0021009)
Cooperating Counsel for the
ACLU of Ohio Foundation, Inc.
Ulmer and Berne
1300 East 9th Street, Suite 900
Cleveland, Ohio 44114-1583
(216) 621-8400

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Legislative Authority

Medical and Other Authority

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

(This statement should be placed immediately preceding the statement of issues contained in the brief of the party. See copy of 6th Cir. R. 25 on reverse side of this form.)

Women's Medical Professional Corp., et al., Plaintiffs-Appellees, v. George Voinovich, Governor, State of Ohio, et al., Defendants-Appellants.	Case Nos. 96-3157, 96-3159 Appeal from the United States District Court for the Southern District of Ohio. (Dist. Ct. Case No. 95-414)

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 25, The American College of Obstetricians and Gynecologists
(name of party)
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? NO

   If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? NO

   If the answer is YES, list the identity of such corporation and the nature of the financial interest:

Ann E. Allen
(Signature of Counsel)

8/7/96
(Date)

6CA-1
7/86

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

(This statement should be placed immediately preceding the statement of issues contained in the brief of the party. See copy of 6th Cir. R. 25 on reverse side of this form.)

Women's Medical Professional Corp., et al., Plaintiffs-Appellees, v. George Voinovich, Governor, State of Ohio, et al., Defendants-Appellants.	)	Case Nos. 96-3157, 96-3159 Appeal from the United States District Court for the Southern District of Ohio. (Dist. Ct. Case No. 95-414)

DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 25, NATIONAL ABORTION FEDERATION (name of party)

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? NO

If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? NOT TO OUR KNOWLEDGE.

If the answer is YES, list the identity of such corporation and the nature of the financial interest:

Elizabeth Wydra (Signature of Counsel) 8/7/96 (Date)

6CA-1
7/86

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

(This statement should be placed immediately preceding the statement of issues contained in the brief of the party. See copy of 6th Cir. R. 25 on reverse side of this form.)

Women's Medical Professional Corp., et al.,	Case Nos. 96-3157, 3159
Plaintiffs-Appellees,	Appeal from the United States District Court for the Southern District of Ohio. (Dist. Ct. Case No. 95-414)
v.	
George Voinovich, Governor, State of Ohio, et al.,	
Defendants-Appellants.	

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 25, American Civil Liberties Union Foundation
(name of party)

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? no

If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? no

If the answer is YES, list the identity of such corporation and the nature of the financial interest:

Laura Mellby
(Signature of Counsel)

8/9/96
(Date)

6CA-1
7/86

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

(This statement should be placed immediately preceding the statement of issues contained in the brief of the party. See copy of 6th Cir. R. 25 on reverse side of this form.)

Women's Medical Professional Corporation, et. al., Plaintiffs-Appellees, v. George Voinovich, et al., Defendants-Appellants.	Case Nos. 96-3157 & 96-3159 On Appeal from the United States District Court for the Southern District of Ohio, Western Division, Case No. 95-414

DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 25, American Civil Liberties Union of Ohio Foundation, Inc.
(name of party)

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? No.

If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? No.

If the answer is YES, list the identity of such corporation and the nature of the financial interest:

(Signature of Counsel)

August 8, 96
(Date)

6CA-1
7/86

STATEMENTS OF SUBJECT MATTER, JURISDICTION, AND ISSUES PRESENTED

Amici adopt the statement of Plaintiffs-Appellees with respect to the statements of subject matter, jurisdiction, and issues presented.

INTRODUCTION

In 1995, the Ohio legislature enacted a new law for the purpose of "prohibiting . . . a dilatation and extraction procedure" and creating "the offenses of terminating or attempting to terminate a human pregnancy after viability." See generally Ohio Rev. Code §§ 2305.11, 2307.51-.52, 2919.15-.18 (1996) (the "Act"). Even if crafted to achieve only what it purports to do, the Act would impermissibly hinder the right of women to choose to terminate their pregnancies. The Act, however, lacks precision, extending broadly and without clear boundaries. As a result, physicians will be deterred from performing most second-trimester abortions, or any abortions subsequent to twenty-two weeks of pregnancy, despite the necessity of such procedures to save a woman's life, or to avert substantial and irreversible impairment of a major bodily function, or to terminate a pregnancy when the fetus is nonviable. This vagueness alone renders the Act unconscionable and unconstitutional.[1]

STATEMENT OF INTEREST OF AMICI CURIAE

The American College of Obstetricians and Gynecologists (ACOG), the National Abortion Federation (NAF), the American Civil Liberties Union (ACLU), and the ACLU of Ohio Foundation, Inc. submit this brief amici curiae in support of Plaintiffs-Appellees. Amici submit this brief with the consent of the parties, letters from which are attached hereto as an Addendum.

ACOG, a nonprofit educational and professional organization founded in 1951, is the leading professional association of physicians who specialize in the health care of women. Its more than 37,000 members, approximately 1340 of whom practice in Ohio, represent

---

[1] In this brief, amici curiae address only the unconstitutional vagueness of the Act, and leave to Plaintiffs-Appellees discussion of the other infirmities of this law.

approximately ninety percent of all obstetricians and gynecologists practicing in the United States. ACOG is dedicated both to the continuing professional development of physicians and to the maintenance of high quality health care services to women. ACOG produces many types of medical education materials, including written guidelines for the practice of obstetrics and gynecology, and undertakes a wide range of other activities relevant to its professional members and their patients.

NAF, a nonprofit professional association, was founded in 1977 and is composed primarily of clinics and physicians' offices providing reproductive health services, including abortions. Currently, NAF members include more than 300 abortion providers operating in forty-two states, the District of Columbia, Puerto Rico, and Canada. NAF provides professional standards, guidelines, training, and education to its members and serves as a clearinghouse for information and advice to abortion service professionals and the general public.

The ACLU is a nonprofit, nonpartisan, 300,000-member public interest organization devoted to protecting the basic civil liberties of all Americans and extending these rights to groups that have been traditionally denied them. Throughout its seventy-five year history, the ACLU has been widely recognized as the country's foremost advocate of individual rights, including reproductive freedom. The ACLU of Ohio is a statewide affiliate of the ACLU.

STATEMENT OF THE CASE

A. Why Women Need Abortions Subsequent to the First Trimester

The overwhelming majority of abortions performed in Ohio, as in the other 49 states, are performed in the first trimester. Nationally, more than ninety-five percent of abortions occur at or before fifteen weeks gestation. The Alan Guttmacher Institute, Abortion Factbook

181 (Stanley K. Henshaw & Jennifer Van Vort 1992). Compelling considerations of health and necessity, however, may require a later-term abortion.

Pregnancy entails substantial potential health risks to any woman. The risk of death from complications due to childbirth is approximately nine times that of death due to abortion, with recent studies indicating even higher rates of maternal mortality associated with pregnancy and childbirth for a pregnant teenager. Hani K. Atrash et al., Legal Abortion Mortality in the United States: 1972 to 1982, 156 Am. J. Obstetrics & Gynecology 605 (1987); F. Gary Cunningham et al., Williams Obstetrics 3 (19th ed. 1993); Cynthia Berg et al., Pregnancy-Related Mortality in the United States, 1987-1990, 88 Obstetrics & Gynecology 161 (1996).

The majority of women experience some obstetrical or medical complications during pregnancy. However, certain medical and surgical illnesses and conditions, some caused by pregnancy and some caused by preexisting conditions that complicate pregnancy, pose particular risks during pregnancy:

> • anemia and other diseases of the blood, including sickle-cell disease which is an enhanced burden to pregnant women with pain attacks becoming more frequent and infections and pulmonary disfunction more common; Williams Obstetrics 1179-80; American College of Obstetricians & Gynecologists, Technical Bulletin 220, Hemoglobinopathies in Pregnancy (1996); see also Haskell, 11/8 TR at 105;[2]
>
> • urinary tract infections and renal disease, including acute pyelonephritis, which is one of the most frequent medical complications of pregnancy and which on occasion can lead to bacterial shock, producing serious health consequences and in some cases death, Williams Obstetrics 1127-41;

[2] Throughout this brief, evidence from the hearing below is cited by the last name of the witness, the date of the hearing, and the page of the transcript.

• cardiovascular disease, producing significant risks of morbidity or mortality for both the pregnant woman and the fetus, Williams Obstetrics 1083-85; American College of Obstetricians & Gynecologists, Technical Bulletin 168, Cardiac Disease in Pregnancy (1992);

• endocrine disorders, such as diabetes, which can either preexist pregnancy or be caused by pregnancy, and which often produce serious adverse effects on the woman, including a four-fold increase in pre-eclampsia and eclampsia (which is characterized by convulsions and comas), more frequent and more serious infection, a substantially larger and compromised fetus, hydramnios (excessive amount of amniotic fluid), which may cause cardiorespiratory symptoms in the woman, Williams Obstetrics 1202-04; see also John Doe 1, 12/5 TR at 29;

• neurological disorders, including epilepsy, which may be exacerbated by pregnancy and which may increase the frequency of seizures, Williams Obstetrics, 967, 1243-44;

• liver disease, some of which are induced by pregnancy, such as acute fatty liver of pregnancy and which may prove fatal to the woman and fetus, Williams Obstetrics 1016, 1152, 1154-56;

• connective tissue disorders, such as rheumatoid arthritis, which may be exacerbated by pregnancy, Williams Obstetrics 1229-42; and

• chronic hypertension which increases the risk of pre-eclampsia and eclampsia and of maternal and fetal mortality and morbidity, Williams Obstetrics 766, 803-07; American College of Obstetricians & Gynecologists, Technical Bulletin 219, Hypertension in Pregnancy (1996);

• pulmonary disorders, including asthma and pneumonia, Williams Obstetrics 1105-25; American College of Obstetricians & Gynecologists, Technical Bulletin 224, Pulmonary Disease in Pregnancy (1996).

These serious health risks, many of which become critical after the first trimester, cause some women in consultation with their physicians to seek an abortion.

Other women seek abortions after the first trimester upon learning of severe or fatal fetal anomalies. Jane Doe, who was treated by one of the plaintiffs in this case, sought an

abortion after her fetus was diagnosed as having prune belly syndrome, a condition that posed an eighty percent chance the fetus would be dead at birth. Even if it were to survive, the baby would have needed an immediate kidney transplant and would in all likelihood have died before his second birthday. Jane Doe 1, 12/5 TR at 19-20.[3] Jane Doe's experience is not unique. Physicians in Ohio have seen women seeking abortions because their fetuses have been diagnosed as having anencephaly, meaning they have no cerebral hemispheres or cranial vault and thus no chance of survival, or congenital dwarfism, some forms of which are fatal shortly after birth due to the failure of the lungs to develop and function normally. See generally John Doe 1, 12/5 TR at 31-32, 51-54; see also Williams Obstetrics 928-29; Roberto Romero et al., Prenatal Diagnosis of Congenital Anomalies 347-48 (1988). Generally, these and most other anomalies go undetected until the second trimester. See, e.g., Jane Doe 1, 12/5 TR at 11, 16; John Doe 1, 12/5 TR at 32.

Still other reasons prompt women, subsequent to their first trimester, to terminate their pregnancies. Teens pregnant as a result of rape or incest often deny their pregnancies for weeks as a way to avoid confronting the crime they have suffered. See John Doe 1, 12/5 TR at 30; Haskell, 11/8 TR at 107. For example, one eleven-year-old seen in Ohio in 1995, pregnant by her father, sought medical care only when diagnosed as more than twenty weeks pregnant. Hillard, 11/8 TR at 52. Other women, too poor to afford an abortion, struggle for weeks to secure the money they need, with the result that their care is delayed. The Alan Guttmacher Institute, The Need, Availability, and Financing of Reproductive Health Services 99-100 (1989). Women unable to obtain care resort to desperate measures, including self-

[3] The diagnosis of prune belly syndrome and the termination of the pregnancy followed fetal surgery, which attempted to remedy an earlier diagnosed bladder obstruction that threatened the fetal kidneys. Id. at 16-20.

abortion, at the expense of their health and even lives. See Haskell, 11/8 TR at 108-09. In two recorded cases, women shot themselves in the abdomen, believing that they would be unable to obtain an abortion. John Doe 1, 12/5 TR at 53-54.

B. Abortion Procedures Subsequent to the First Trimester

For women seeking an abortion in the first trimester or early second trimester of pregnancy, the procedure is typically a suction curettage or aspiration. See, e.g., Steven G. Gabbe, Obstetrics. Normal & Problem Pregnancies 1380 (2d ed. 1991); Williams Obstetrics 680; Hillard, 11/8 TR at 39. In this procedure, the cervix is dilated and the products of conception removed with a vacuum aspirator that is inserted into the uterus. Hillard, 11/8 TR at 39. In the second trimester, particularly after fifteen weeks gestational age, when the fetus is often too large to remove by means of suction curettage, a procedure known as dilatation and evacuation ("D&E") commonly is used. Williams Obstetrics 680-82; American College of Obstetricians & Gynecologists, Technical Bulletin 109, Methods of Midtrimester Abortion (1987). After the cervix is dilated, some tissue is removed with a suction curette. Hillard, 11/8 TR at 47. The fetal body, which at later stages of pregnancy cannot be removed simply with suction, must be crushed or disjoined. Warren M. Hern, Abortion Practice 123 (1984); see also John Doe 2, 12/7 TR at 48. The head, because of its size, often must be compressed. Abortion Practice 142, 194-95. Sometimes, suction is used before compression to remove the contents. Haskell, 11/8 TR at 144; John Doe 1, 12/5 TR at 36; Giles, 11/13 TR at 270; Goler, 12/6 TR at 113-14.

A few providers have developed and use a variation of the D&E procedure for later abortions. Physicians have referred to this variously as modified D&E, intact D&E, or dilatation and extraction ("D&X"). See, e.g., John Doe 1, 12/5 TR at 44; Haskell, 11/8 TR at

147; Hillard, 11/8 TR at 50. In this procedure, the cervix is dilated and the fetus is removed from the uterus intact. John Doe 1, 12/5 TR at 46. Using forceps, the physician performs a breech delivery of the fetus, with the exception of the head, which is too large to deliver. Hillard, 11/8 TR at 78; John Doe 1, 12/7 TR at 48; Trial Ex. A at 30. Then, using a sharp instrument, the physician creates a small opening at the base of the fetal skull and evacuates the contents, allowing the head to pass through the cervical opening. John Doe 1, 12/5 TR at 43; Trial Ex. A at 31. Those who use this procedure believe it is much less risky for the woman who is undergoing a later abortion, because there is less maternal blood loss, less risk of uterine perforation, less operating time (consequently reducing anesthesia needs) and less trauma than with the standard D&E procedure.[4] John Doe 1, 12/5 TR at 118; Hillard, 11/8 TR at 50; Campbell, 12/6 TR at 41; John Doe 2, 12/7 TR at 172, 229. Additionally, intact fetal removal permits fetal autopsy and facilitates testing for genetic anomalies. See John Doe 1, 12/5 TR at 44, 73-74; Hillard, 11/8 TR at 43, 78.

Subsequent to the first trimester, the only other available methods to terminate the pregnancy -- short of a preterm cesarean section (known as a hysterotomy) -- are the induction or instillation methods. Williams Obstetrics 684-85; ACOG, Methods of Midtrimester Abortions; see also Campbell, 12/6 TR at 23. With these methods, the physician either injects saline or a prostaglandin or urea combination into the woman's amniotic cavity, or places prostaglandin suppositories into the vagina. Campbell, 12/6 TR at 23. The

[4] Reduction of trauma to the cervix has implications for a woman's future ability to have children, as greater trauma has been implicated as a cause of incompetent cervix which results in repeated pregnancy loss. 141 Cong. Rec. S17891 (daily ed. Dec. 4, 1995) (letter of Dr. Laurence I. Burd, Associate Professor of Obstetrics & Gynecology, Michael Reese Hosp. & Med. Ctr.).

substances trigger labor, which results in the birth of a stillborn, often after more than twelve hours of labor. John Doe 2, 12/7 TR at 40; John Doe 1, 12/5 TR at 13.

The various induction methods have the medical risks and complications of labor, as well as specific contraindications resulting from each woman's medical diagnosis. For example, hypertension, sickle cell anemia, heart disease, kidney disease and blood coagulapathy are all contraindications for saline abortion. Campbell, 12/6 TR at 26; see also Abortion Practice 124-25. Similarly, prostaglandin abortions are contraindicated for women with asthma, epilepsy, glaucoma, and pulmonary hypertension or systemic hypertension. ACOG, Methods of Midtrimester Abortions; Abortion Practice 125. Instillation abortions may be contraindicated for women who have had previous cesarean sections or active pelvic infections, or for women with a fetal death in utero. ACOG, Methods of Midtrimester Abortions; see also Campbell, 12/6 TR at 26-28, 118; Goler, 12/6 TR at 118; see also Abortion Practice 146. Complications associated with instillation abortions range from hemorrhage and infection to severe respiratory and cardiac complications. See Kerenyi, Intra-amniotic Techniques in Abortion and Sterilization 368 (Jane Hodgson ed. 1981). Further, after a prostaglandin instillation is completed, a dilatation and curettage may be required because the uterus is frequently not completely empty. K.R. Niswander, Manual of Obstetrics 22 (1980).

C. The Act

In 1995, the Ohio Legislature enacted Substitute House Bill 135 (the "Act"), which radically restricts women's access to the abortions they need. The Act, first of all, creates an outright ban on the procedure it denominates as "D&X." Ohio Rev. Code § 2919.15 (1996). It prohibits any person from "knowingly perform[ing] or attempt[ing] to perform a dilatation

and extraction procedure," which the Act defines as "the termination of a human pregnancy by purposely inserting a suction device into the skull of a fetus to remove the brain." § 2919.15(B), (A). Only when criminally prosecuted or civilly sued can the physician invoke an affirmative defense that, in a particular situation, all other procedures "pose[d] a greater risk to the health of the pregnant woman." §§ 2919.15(C), 2307.51.[5] The physician will be convicted if the prosecutor establishes beyond a reasonable doubt that at least one other "available" procedure was equally safe or safer. § 2919.15(C). A knowing violation of the D&X ban is a felony of the fourth degree. § 2919.15(D).

Second, the Act prohibits all abortions after the beginning of the "twenty-second week of pregnancy" unless the physician first tests for viability.[6] § 2919.18(A)(1). The physician must make the viability determination "in good faith and the exercise of reasonable medical judgment." Id. The Act relieves the physician of the obligation to perform viability tests only "if a medical emergency exists." § 2919.18(A)(3). A medical emergency exists only when a condition

> so complicates the woman's pregnancy as to necessitate the immediate performance . . . of an abortion in order to prevent the death of the pregnant woman or to avoid a serious risk of the substantial and irreversible impairment of a major bodily function . . . that delay in the performance of the abortion would create.

---

[5] Pursuant to the Act, women who have had a D&X procedure with informed consent also may subsequently sue their doctors for compensatory damages, punitive damages, and attorneys fees. § 2307.51.

[6] The Act defines "[p]regnant" as "commencing with fertilization," § 2919.16(H), and "gestational age" as measured from the first day of the last menstrual period (LMP) of the woman, § 2919.16(B), which is presumed to be two weeks before fertilization. See generally Haskell, 11/8 TR at 164-65.

§ 2919.16(F). Absent a medical emergency, failure to perform viability testing is a misdemeanor of the fourth degree. § 2919.18(B).

The Act also prohibits the performance of post-viability abortions. For purpose of this section, viability is rebuttably presumed at twenty-four weeks of "gestational age," by the Act's measure, § 2919.17(C), or twenty-two weeks gestation age, as defined by physicians. § 2919.16(B), see Williams Obstetrics 252, 883. The Act provides an exception only where the physician determines, "in good faith and in the exercise of reasonable medical judgment, that the abortion is necessary to prevent the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman." § 2919.17(A)(1); see also § 2919.17(B)(1) (the "life or major bodily function exception").

Even when the woman risks death or substantial and irreversible impairment of a major bodily function, the Act requires the physician to delay the abortion until she complies with five additional strictures: (1) the physician must certify in writing that the abortion is necessary to save the woman's life or prevent irreversible harm (the "certification requirement"); (2) a second physician must concur in writing with such certification (the "concurrence requirement"); (3) neonatal services must be available where the abortion is performed (the "location requirement"); (4) the physician must use an abortion procedure that "provides the best opportunity" for the fetus to survive, unless and only if that procedure poses a "significantly greater risk" of death to the woman or a serious risk of substantial and irreversible impairment to a major bodily function (the "method requirement"); and (5) the physician must arrange for another physician to be in the same room "who is to take control

of, provide immediate medical care for, and take all reasonable steps necessary to preserve the life and health of the unborn human" (the "attendance requirement"). § 2919.17(B)(1)(a)-(e).

No matter how burdensome, these five steps may be avoided only if the physician identifies a medical emergency even more imminent than the threat to the woman's life or major bodily function that already necessitates the post-viability abortion. § 2919.17(B)(2). The physician must make this determination not only "in good faith," but also "in the exercise of reasonable medical judgment." Id. Terminating or attempting to terminate the pregnancy after twenty-two weeks of pregnancy without satisfying the conditions of the Act is a felony of the fourth degree. § 2919.17(D). Pursuant to the Act, physicians are also subject to suit for compensatory damages, punitive damages, and attorney's fees for performing or attempting to perform an abortion in violation of the post-viability ban, even when performed at the woman's behest and with her consent. § 2307.52(B)(2).

On December 13, 1995, following a full evidentiary hearing, the Honorable Walter Herbert Rice, United States District Judge for the Southern District of Ohio, issued a 100-page opinion holding the Act unconstitutional on its face.[7] Women's Medical Professional Corp. v. Voinovich, 911 F. Supp. 1051 (S.D. Ohio 1995). The Court held that the D&X ban and the "post-viability" ban are impermissibly vague and constitute an undue burden on a woman's right to abortion under the standard set forth in Planned Parenthood v. Casey, 505 U.S. 833 (1992).

[7] The district court issued a preliminary injunction, which, on January 12, 1996, was converted into a permanent injunction, incorporating by reference the findings and reasoning of the December 13, 1995, opinion.

SUMMARY OF ARGUMENT

Substitute House Bill 135 is unconstitutionally vague. The Act imposes severe criminal penalties for its violation, yet contains ambiguous language to define which abortion procedures are proscribed and which are permitted, even with regard to life-threatening situations. The law's vague definitions, vague standards of conduct, lack of scienter, ambiguities and inconsistencies render it a trap for the unwary and for those who act in good faith. For others, its vagaries are also a red light that the safest course is to steer clear of providing abortion services beyond the early stage of the second trimester, even when a woman's life or health may be in great danger. The law will without question chill physicians from providing abortions and, consequently, abrogate the constitutional right of women, affirmed in Roe v. Wade, 410 U.S. 113 (1973), and reaffirmed in Planned Parenthood v. Casey, 505 U.S. 833 (1992), to choose to have abortions before viability without undue interference from the State, and to have post-viability abortions when their lives and health are at risk.

The Act is unconstitutionally vague in several respects. First, the Act purports to ban what it denotes the D&X method of abortion but defines the procedure in such a way that it encompasses and cannot reasonably be distinguished from a D&E abortion, the most commonly used and frequently only available procedure for abortion in the second trimester. Thus, without stretching the law's language or the imagination, under the Act, physicians performing most second-trimester abortions are vulnerable to prosecution as felons. Ohio physicians will therefore be chilled from providing any second-trimester abortion employing the D&E method.

The Act's virtual ban on post-viability abortions is similarly loaded with danger for physicians and thus for the lives and health of women. In determining viability, assessing the risk to the woman's life or major bodily functions or gauging the presence of an even more dire medical emergency, the Act requires that the physician make the determination "in good faith and the exercise of reasonable medical judgment." In each instance, the Act conflates the subjective standard of "good faith" conduct with the seemingly objective criterion of "reasonable medical judgment." These disparate descriptions of the state of mind required of the physician make it anybody's guess as to when and under what circumstances the State may prosecute and how a judge might instruct a jury on the issue of culpability. Worse still, with the "reasonable medical judgment" standard, a physician could become a felon simply by virtue of being second-guessed by another physician. This prospect of prosecution will freeze -- not just chill -- the willingness of physicians to perform abortions after twenty-two weeks, even when necessary to preserve the life of the woman or when the fetus is not viable. As a result, women will be denied medical care they desperately need and to which they are constitutionally entitled.

For these reasons and those addressed by Plaintiffs, the Act is facially unconstitutional and the district court's order enjoining enforcement of the statute should be affirmed.

ARGUMENT

Due process prohibits laws so vague that persons "of common intelligence must necessarily guess at their meaning and differ as to [their] application." Smith v. Goguen, 415 U.S. 566, 572 n.8 (1974) (citations omitted). Vague laws offend due process in two ways. First, they fail to provide the persons regulated with a reasonable opportunity to know what is prohibited so that they may act accordingly. Grayned v. City of Rockford, 408 U.S. 104,

108-09 (1972). Second, they invite arbitrary and discriminatory enforcement by failing to "provide explicit standards for those who apply them." Id.

In United States v. Salisbury, 983 F.2d 1369 (6th Cir. 1993), this Court explained the void-for-vagueness doctrine as follows:

> The "void for vagueness" doctrine requires that a statutory prohibition be sufficiently defined so that ordinary people, exercising ordinary common sense, can understand it and avoid conduct which is prohibited, without encouragement of arbitrary and discriminatory enforcement. The law must be specific enough to give reasonable and fair notice in order to warn people to avoid conduct with criminal consequences. In addition to notice, a statute must also establish minimal guidelines to govern enforcement. Due process is violated where a statute provides no definite standard of conduct, thereby giving law enforcement officers, courts and jurors unfettered freedom to act on nothing but their own preferences and beliefs.

Id. at 1370 (citations omitted); accord, e.g., Bzdzuich v. United States Drug Enforcement Admin., 76 F.3d 738, 743 (6th Cir. 1996).

A vague law is especially problematic if it has the potential to cause citizens to "steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." Grayned, 408 U.S. at 108-09 (citations and internal quotations omitted). This chilling effect is dangerous "where the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights." Colautti v. Franklin, 439 U.S. 379, 391 (1979) (citations omitted). For that reason, the standard for definiteness is more stringently measured where "criminal penalties or potential interference with constitutionally protected rights" are at issue. Fleming v. United States Dep't of Agric., 713 F.2d 179, 184 (6th Cir. 1983); see also Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99 (1982); Colautti, 439 U.S. at 391.

Under the principles set out above, the Act is unconstitutionally vague, both in its ban of the D&X procedure and its proscriptions on post-viability abortions. The decision of the district court should therefore be affirmed.

I.

THE DISTRICT COURT CORRECTLY HELD THAT THE ACT'S DEFINITION OF D&X IS UNCONSTITUTIONALLY VAGUE, AS IT DOES NOT GIVE PHYSICIANS FAIR NOTICE OF THE MEDICAL PROCEDURES THE STATE CONSIDERS CRIMINAL.

Pursuant to the Act, physicians who "knowingly perform or attempt to perform a dilation and extraction procedure" at any time during pregnancy are subject to prosecution. Ohio Rev. Code § 2919.15(B), (D) (1996). Performing a D&X procedure constitutes a felony, punishable by imprisonment. See § 2929.11 (setting forth penalties for felony offenses).

The Act's very definition of D&X is impermissibly vague. The Act defines the D&X procedure in a way that does not distinguish it from the most commonly used second-trimester abortion procedure; it then compounds the confusion by criminalizing "attempts" to perform the ill-defined procedure. As the district court correctly held, the Act impermissibly leaves physicians to guess what the State has outlawed and whether the medical care they give their patients will subject them to criminal liability. Women's Medical Professional Corp. v. Voinovich, 911 F. Supp. 1051, 1067 (S.D. Ohio 1995) (the "definition [of D&X] is unconstitutionally vague").

A. The District Court Correctly Found That the Act Defines a D&X Procedure in a Manner that Does Not Distinguish It from the Most Commonly Used Second-Trimester Abortion Procedure.

The Act purports to prohibit only one method of abortion -- "a dilation and extraction procedure." Ohio Rev. Code § 2919.15(B) (1996); see also Ohio H.B. 135, 121 Gen.

Assembly, 1995 Ohio Laws § 3 (the legislature's intent is to prevent "the unnecessary use of a specific procedure") (emphasis added). Despite this disclaimer, the Act broadly defines the banned procedure as "the termination of a human pregnancy by purposely inserting a suction device into the skull of a fetus to remove the brain." The definition further provides that the "'[d]ilation and extraction procedure' does not include either the suction curettage procedure of abortion or the suction aspiration procedure of abortion." § 2919.15(A). As the district court found, "the statutory definition of the prohibited 'Dilation and Extraction Procedure' . . . appears to encompass the purportedly allowable D&E procedure as well." Women's Medical Professional Corp., 911 F. Supp. at 1067.

As the evidence below established, the use of a suction device to remove the intracranial contents, and thus compress the skull so it can pass safely through the partially dilated cervix, does not adequately define or distinguish the D&X procedure from other methods of abortion. Physicians who have testified about the D&X procedure distinguish it from other second-trimester abortion procedures principally in that the fetal body is extracted from the uterus basically intact. Suction is not a distinguishing feature and is used not only in the D&X procedure, but also in a D&E procedure. With any D&E procedure, removal of the cranium is one of the physician's primary concerns, Abortion Practice 194-95, because it is often too large to pass through the cervical opening and yet must be removed because fetal neurological tissue left in utero too long may decrease the woman's ability to clot, leading to greater bleeding and its attendant health risks. Hillard, 11/8 TR at 82-83; John Doe 1, 12/5 TR at 36; Campbell, 12/6 TR at 32.[8]

[8] In arguing that suction curettage "should be read to encompass the D&E procedure," the State simply cites its own evidence at the hearing, ignoring the contrary evidence given by the Plaintiffs' witnesses, and failing to explain why the district court erred in crediting Plaintiffs'

When performing a D&E, physicians use different methods for compressing the fetal skull. Depending on the woman's medical presentation, the physician may employ forceps, scissors or a clamp. Haskell, 11/8 TR at 144; Campbell, 12/6 TR at 19; White, 12/7 TR at 190, 192. In other cases, the physician uses the same method that is used in a "D&X" procedure, inserting a suction device into the cranium and removing its contents. Hillard, 11/8 TR at 77, 100; John Doe 1, 12/5 TR at 43, 72; Campbell, 12/6 TR at 32-33, 65. In still other instances, the doctor uses some combination of the two methods depending on the medical situation presented. John Doe, 12/7 TR at 65, 76-77, 81.[9] Thus, as the district court correctly found, "in both the D&E and the D&X procedures, a suction device may be

---

evidence. See St. Br. at 31, n.13. Moreover, even the very witnesses the State cites at times testified that suction curettage abortions are distinct from D&E abortions. See, e.g., Levitano, 12/7 TR at 235 (witness would understand a statute that banned suction curettage to ban "first semester[sic] suction curettage abortions"); Giles, 11/13 TR at 265 (agreeing that there is a difference between the terms D&E and suction curettage); id. at 265-67 (suction curettage is a first trimester procedure and D&E is a second trimester procedure).

[9] The State concedes that D&E abortions also apply a suction device to the cranium. St. Br. at 32. It claims, however, that D&E procedures are nonetheless outside the reach of the Act because the suction device is inserted in the fetal skull after the fetus has been substantially disjoined, and the Act only prohibits the procedure from being applied during the "termination" of the pregnancy. St. Br. at 32. The State assumes, without foundation, that "termination" refers to the point at which the fetus' life ends rather than to the abortion procedure itself. This tortured construction further confuses, rather than clarifies, the Act's reach. Under the State's theory, a physician may lawfully extract the fetal body intact and insert a suction device into the fetal skull to remove its contents so long as the fetus is not alive at the time of the insertion. Because the parties stipulated that at the beginning of the D&X procedure some fetuses are dead, see 911 F. Supp. at 1074 n.29, under the State's interpretation not even all D&X procedures are banned by the Act. See also 141 Cong. Rec. S17891 (daily ed. Dec. 4, 1995) (letter of Dr. Laurence I. Burd, Associate Professor of Obstetrics & Gynecology, Michael Reese Hosp. & Med. Ctr.) (explaining that, because of compression of the umbilical cord, fetus is "unlikely" to be alive when the head is compressed). And since, as demonstrated by the record, the fetus will not necessarily be dead at the time the skull suctioning is performed in a D&E, even the State's own interpretation does not eliminate the vagueness problem with respect to whether some D&E procedures are banned by the Act.

purposely inserted into the skull in order to remove the skull contents." Women's Medical Professional Corp., 911 F. Supp. at 1067.[10]

The Act purports to ban only D&X procedures, a prohibition that is itself unconstitutional. See generally Br. of Plaintiffs-Appellees. However, by defining the prohibited conduct so vaguely as to reach some D&E procedures as well, the Act not only contradicts its purported purpose of prohibiting but one abortion method -- alone a ground for declaring the section vague -- but also leaves physicians in doubt as to which conduct is prohibited and which is allowed.

The Act's exclusion of "the suction curettage procedure of abortion [and] the suction aspiration procedure of abortion" from the definition of D&X does not save the statute from unconstitutional vagueness. § 2919.15(A). The State argues on appeal, as it did below, that the exclusion of suction curettage[11] "should be read to encompass the D&E procedure."

---

[10] The district court's finding is amply supported by the record. At the hearing, John Doe Number One testified that he preferred to use suction to extract the intracranial contents during a D&E to reduce trauma to the woman. John Doe 1, 12/5 TR at 36. Dr. Mary Campbell testified that in doing a D&E the physician's goal is to insert a suction device into the cranium, although it is not always easy to tell whether this is accomplished, even under sonographic guidance. Campbell, 12/6 TR at 32-33. She further testified that the Act's definition does not adequately distinguish between a D&E and a D&X because in both procedures, the physician needs to remove some of the intracranial contents before removing the cranium. Campbell, 12/6 TR at 42. John Doe Number Two testified that in every D&E he does, he suctions the intracranial contents either purposefully or accidentally. John Doe 2, 12/7 TR at 48. Dr. Paula Hillard testified that in a D&E the cranial cavity is purposely opened and suctioned out whenever it can be, Hillard, 11/8 TR at 76, and that in D&E procedures, she has purposely inserted a catheter to remove tissue when the fetal head was too big and needed to be compressed, id. at 98. She further testified that she doesn't understand what procedures are prohibited by the Act. Id. at 53.

[11] Because physicians use the terms "suction curettage" and "suction aspiration" interchangeably, John Doe 1, 12/5 TR at 46, amici will simply use the term "suction curettage" to refer to what has been excluded by the Act.

St. Br. 31 at n.13.[12] The district court properly rejected that argument, finding, based on the evidence presented at the hearing, that "the D&E method is not included in any definition of suction curettage." Women's Medical Professional Corp., 911 F. Supp at 1064 (emphasis in original). The State does not explain how that factual finding is clearly erroneous. Nor could it. The finding is amply supported by the medical testimony at the hearing.

The Act defines neither suction curettage nor suction aspiration. "In the absence of . . . a definition, this court must construe a statutory term in accordance with its ordinary or natural meaning." FDIC v. Meyer, 510 U.S. 471, 114 S. Ct. 996, 1001 (1994). The evidence in this case established that physicians -- the persons for whom the term suction curettage has common meaning -- understand a suction curettage and a D&E to be two different abortion procedures. E.g., Hillard, 11/8 TR at 47; cf. Fleming v. United States Dep't of Agric., 713 F.2d 179, 184 (6th Cir. 1983). A suction curettage is almost exclusively a first-trimester abortion procedure, John Doe 1, 12/5 TR at 33, whereas a D&E is performed later, primarily in the mid- to late stages of the second trimester. At this stage, the use of suction alone is insufficient to remove the fetus, and the physician must use forceps to assist in removal of the fetus. Id. at 33-35. Because doctors understand a D&E to be a different procedure from suction curettage, and because the statute provides no definition for suction curettage, the district court correctly concluded that the Act's limited exception for suction curettage procedures does not protect D&E procedures from the broad ban of purported D&X abortions.

Indeed, the Act's specific exclusion of suction curettage from the definition of D&X, coupled with the Act's failure specifically to exclude D&E from the definition of D&X, only

[12] "St. Br." refers to the brief filed by the Defendants-Appellants Attorney General of Ohio and Governor of Ohio.

casts further doubt on the scope of criminal conduct under the Act. Under Ohio law, the legislature is presumed to have intended to exclude from the reach of a statute only those cases explicitly enumerated, and courts are powerless to enlarge or modify those exceptions. DuBois v. Coen, 125 N.E. 121, 123 (Ohio 1919); Madjorous v. State, 149 N.E. 393, 395 (Ohio 1925). Moreover, "as a general rule of statutory construction, the specific mention of one thing implies the exclusion of another [expressio unius est exclusio alterius]. This principle is especially pertinent where . . . the statute involved is a definitional provision." Montgomery Cty. Bd. of Comm'rs v. Public Util. Comm'n, 503 N.E.2d 167, 170 (Ohio 1986) (citations omitted).

If physicians were not already confused, the Act injects further uncertainty into what it deems criminal by prohibiting an "attempt" to perform a D&X procedure. § 2919.15(B). The Act gives no further definition of what it means by an "attempt" to perform a D&X procedure. Ohio law defines an attempt as "purposely or knowingly . . . engag[ing] in conduct that, if successful, would constitute or result in the offense." § 2923.02(A). Grafting "attempt" onto the already ambiguous scope of the Act's D&X definition only renders the criminal statute even more hopelessly unclear. What is an attempt to perform a D&X? Is it purposely removing the entire fetal body from the uterus, whether or not the cranium is ultimately suctioned? Women's Medical Professional Corp., 911 F. Supp. at 1066 n.18. Is it purposely removing part of the fetal body from the uterus, regardless of whether suction is ultimately employed? Is it purposely suctioning the contents of the fetal skull from the uterus, although the skull is initially crushed rather than suctioned or partially crushed and partially suctioned?

Given the language of the Act, physicians may well conclude that placing a cannula or other suction device anywhere near the fetal skull or removing intact any part of the fetal body exposes them to criminal liability. Uncertain what conduct is prohibited, physicians will steer clear of the constitutionally protected zone of providing second-trimester procedures. Courts look with particular disfavor upon vague laws that restrict the exercise of constitutional freedoms. Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972); Colautti v. Franklin, 439 U.S. 379, 391 (1979).

Lacking clear standards to curtail their interpretation of the Act, police and prosecutors will not be restrained from harassing physicians whose provision of medical care to their patients is at odds with the "personal predilections" of the law enforcement officials. This broad discretion also poses due process problems. In Papachristou v. City of Jacksonville, the Supreme Court invalidated the city's vagrancy statute as unconstitutionally vague, in part because of the "unfettered discretion" the ordinance placed in the hands of the police. The Court condemned the ordinance because it contained no standards governing its enforcement, thereby permitting arbitrary and discriminatory application of its provisions.
405 U.S. 156, 170 (1972).

Likewise here, no statutory boundaries frame the limits for prosecuting a D&X abortion using suction, as opposed to a D&E abortion using suction. Thus, the "inherently standardless" nature of the Act, like the ordinance struck down in Papachristou, "furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials against particular groups deemed to merit their displeasure.'" Id. (quoting Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940)); see also Kolender v. Lawson, 461 U.S. 352, 357-60 (1983); Smith v. Goguen, 415 U.S. 566, 575 (1974) (a statute that fails to provide minimal

guidelines for law enforcement officials may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections").

The risk of discriminatory enforcement is particularly troublesome in the controversial area of reproductive and abortion rights that the Act purports to regulate. See generally Planned Parenthood v. Casey, 505 U.S. 833, 866, 869 (1992) (noting the "intensely divisive controversy" over abortion); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 419 (1983) (recognizing controversy surrounding the abortion issue and the legislative responses thereto); see also Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 771 (1986) ("controversy over the meaning of our Nation's most majestic guarantees frequently has been turbulent"). The Constitution can tolerate neither the ambiguity of the Act nor the consequences of its vagueness.

B. The Vagaries of the D&X Ban Render It Unconstitutional on its Face.

Although the Act leaves physicians unable to determine whether they may lawfully perform a D&E that applies a suction device to the fetal skull, the State claims that Plaintiffs nevertheless cannot succeed in challenging the Act on it face. St. Br. at 30-31, 33. The State argues that, "[w]ith the exception of First Amendment cases, a facial challenge for vagueness can be sustained only if the law is impermissibly vague in all of its applications." St. Br. at 30 (citing Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494-95 & n.7 (1982)). According to the State, the Act is not vague with respect to its application to the procedure Dr. Haskell described, and therefore it cannot be unconstitutionally vague on its face.[13]

---

[13] Relying on Coates v. Cincinnati, 402 U.S. 611, 614 (1971), the State also argues that "[a] statute is not facially void for vagueness unless it is so vague as to have no 'core' or prohibited conduct." St. Br. at 30. The State's reliance on Coates, and other cases involving facial vagueness

The State is wrong. In the pre-enforcement context, neither this Court nor the Supreme Court has interpreted precedent to so restrict vagueness challenges, particularly with respect to laws circumscribing fundamental rights.[14] In Springfield Armory, Inc. v. City of Columbus, 29 F.3d 250 (6th Cir. 1994), this Court invalidated a statute on its face even though some of its applications were not in doubt. At issue was a city ordinance banning "assault weapons." Id. at 251. The ordinance specifically banned "forty-six individual models of rifles, shotguns and pistols, listed by model name and manufacturer," and in addition

---

claims by criminal defendants charged with violating the challenged statute, is misplaced. In the context of prosecution, it is well-settled that a defendant whose conduct was clearly prohibited by the statute must establish that the statute would be vague in all its applications. Parker v. Levy, 417 U.S. 733 (1974) (habeas corpus action following criminal conviction); Goguen, 415 U.S. 566 (1974) (same); Grayned v. City of Rockford, 408 U.S. 104 (1972) (direct appeal from criminal conviction); Coates, 402 U.S. 611 (1971) (same); cf. Kolender, 461 U.S. 352 (1983) (civil rights action by criminal defendant after 15 arrests and 2 prosecutions under the challenged statute). Otherwise, the void-for-vagueness doctrine would allow a defendant whose conduct was clearly illegal to capitalize on the legislature's unartful drafting with regard to conduct in which the defendant did not engage. No such rationale applies in the case at hand.

In any event, the State's claim that "D&X procedures" are the "core" conduct prohibited by the Act begs the question. See St. Br. at 33. The "core" of the banned procedure as defined -- the insertion of a suction device into the fetal skull to remove the contents -- is used in both D&X and D&E procedures. It is the vagueness of the very "core" that is at issue.

[14] The argument that Plaintiffs cannot succeed in a facial vagueness challenge is simply a specific example of the State's more general claim that, outside the context of First Amendment challenges, facial challenges can survive only if "'the challenger [can] establish that no set of circumstances exists under which the Act would be valid.'" St. Br. at 18 (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)). This argument has been resoundingly rejected when advanced in the context of facial challenges to statutes that restrict abortion, with the courts recognizing that the standard as set forth by the Supreme Court is whether "'in a large fraction of the cases in which [the law] is relevant, it is an undue burden.'" Planned Parenthood v. Miller, 63 F.3d 1452, 1456-58 (8th Cir. 1995) (quoting Casey, 505 U.S. at 895), cert. denied, 116 S. Ct. 1582 (1996) (Stevens, J., respecting cert. denial) ("Salerno's rigid and unwise dictum has been properly ignored in subsequent cases even outside the abortion context."); Casey v. Planned Parenthood, 14 F.3d 848, 863 n.21 (3d Cir. 1994) (on remand); see also Fargo Women's Health Org. v. Schafer, 507 U.S. 1013 (1993) (denying stay) (O'Connor, J. & Souter, J., concurring) (characterizing district court's application of Salerno as inconsistent with Casey). But see Barnes v. Moore, 970 F.2d 12, 14 & n.2 (5th Cir.), cert. denied, 506 U.S. 102 (1992).

banned "other models by the same manufacturer with the same action design that have slight modifications or enhancements of the firearms listed . . . provided the caliber exceeds .22 rimfire." Id. at 252 (internal quotation omitted). In addressing the vagueness of the statute, this Court rejected the very argument Defendants now advance. Specifically, this Court found that Hoffman Estates, 455 U.S. 489 (1982), the Supreme Court's leading case on pre-enforcement facial vagueness challenges, did not require that the challenged law be vague in all applications. This Court explained:

> At times the Court has suggested that a statute that does not run the risk of chilling constitutional freedoms is void on its face only if it is impermissible vague in all its applications, but at other times it has suggested that a criminal statute may be facially invalid even if it has some conceivable application. "The degree of vagueness that the Constitution tolerates -- as well as the relative importance of fair notice and fair enforcement -- depends in part on the nature of the enactment." When criminal penalties are at stake . . a relatively strict test is warranted.

Springfield Armory, 29 F.3d at 251-52 (emphasis added) (citations omitted). This Court then went on to invalidate the entire assault weapon ordinance as unconstitutionally vague on its face, because one section of the statute (the "other models" provision) was vague, and even though the law was not vague as to the forty-six weapons specifically identified in the ordinance by manufacturer and model. Id. at 254.

Here too, even assuming arguendo that some prohibited conduct might be discerned from the Act's text, the Plaintiffs properly prevailed in their facial challenge to the Act. In fact, the Plaintiffs' case is stronger than that in Springfield Armory. Most significantly, in the case at hand, the vagueness of the Act imperils "constitutionally protected activity."[15] In

---

[15] Like Springfield Armory, Hoffman Estates concerned a statute that "simply regulate[d] business behavior." 455 U.S. at 499. Accordingly, unlike this case, it too did not implicate constitutionally protected activity, and therefore its standard for allowing facial challenges does not apply. See generally Sweet Home Chapter of Communities for a Great Oregon v. Babbitt,

sum, under the clear authority of Springfield Armory, the district court's invalidation of the D&X ban in its entirety must be affirmed.

II.

THE TRIAL COURT CORRECTLY FOUND THAT THE ACT'S STANDARDS FOR DETERMINING WHETHER A FETUS IS VIABLE, A MEDICAL EMERGENCY EXISTS, OR A WOMAN'S LIFE OR A MAJOR BODILY FUNCTION IS AT RISK ARE IMPERMISSIBLY VAGUE.

The Act requires that the physician's determination of viability, of the existence of a threat to women's life or a major bodily function, and of a medical emergency be made "in good faith and in the exercise of reasonable medical judgment." As the district court correctly concluded, this formulation is unconstitutionally vague. Women's Medical Professional Corp. v. Voinovich, 911 F. Supp. 1051, 1087 (S.D. Ohio 1995). First, the Act creates ambiguity as to whether an objective or subjective standard will determine criminal liability. Second, the very inclusion of a "reasonable medical judgment" standard as a basis for criminal liability impermissibly chills physicians from performing "post-viability" abortions even when, in the physician's judgment, the abortion is necessary to preserve the woman's life or a major bodily function, or the fetus ultimately is not viable. Third, there is no scienter requirement to save the Act from a finding of unconstitutionality.

A. The Act Contains Conflicting Standards for Physicians' Determinations Whether A Fetus is Viable, A Medical Emergency Exists, or a Woman's Life or a Major Bodily Function is at Risk.

Throughout the post-viability ban, the Act contains multiple and conflicting standards by which a prosecutor and jury shall evaluate the physician's judgment. The Act conditions

---

1 F.3d 1, 4 (D.C. Cir. 1993) (describing Hoffman Estates standard as applying to "economic activity" not to "constitutionally protected conduct").

the physician's liability for determining fetal viability, for assessing whether a medical emergency exists, and for deciding whether a woman's life or a major bodily function is at risk on ambiguous, if not conflicting, standards: "good faith" and "reasonable medical judgment." Ohio Rev. Code §§ 2919.18(A)(1), 2919.16(F), 2919.17(A)(1), (A)(2), (B)(1), (B)(2) (1996). Although the "good faith" standard entrusts a physician to use her best medical judgment, the "reasonable medical judgment" standard, in contrast, appears to be an objective one, which turns on the judgment of other physicians. Compare Fargo Women's Health Org. v. Schafer, 18 F.3d 526, 534 (8th Cir. 1994) ("best clinical judgment standard is a good faith standard") with Williams v. Ohio Dep't of Rehabilitation & Correction, 583 N.E.2d 1129, 1131 (Ohio Ct. Cl. 1991) ("Reasonable care is that which would be utilized by an ordinarily prudent person under similar circumstances.").

The presence of two conflicting standards leaves physicians with no guidance as to what standard they must follow to avoid criminal liability.[16] In Colautti v. Franklin, 439 U.S. 379 (1979), the United States Supreme Court found that a similar ambiguity rendered vague a statute criminalizing abortion. At issue in that case was a requirement that every

---

[16] The Act's standard for assessing viability is even more contradictory, and thus confusing. The Act not only conditions the determination of viability on "good faith and . . . the exercise of reasonable medical judgment," Ohio Rev. Code § 2919.18(A)(1), but it also defines viability to mean:

> the stage of development of a human fetus at which in the determination of a physician, based upon the particular facts of a woman's pregnancy that are known to the physician and in light of medical technology and information reasonably available to the physician, there is a realistic possibility of the maintaining and nourishing of life outside of the womb with or without temporary artificial life-sustaining support.

§ 2919.16(L). There is thus a question not only as to the meaning of § 2919.18(A)(1), but as to its meaning in relationship to § 2919.16(L).

person who performed or induced an abortion determine, "based on his experience, judgment or professional competence," whether the fetus was not viable. Id. at 379 n.1. If that person determined that the fetus was viable, or if "there [was] sufficient reason to believe that the fetus [might have been] viable," then the person had to adhere to a prescribed standard of care for the fetus. Id. at 379 n.1, 391. The Court held that the quoted standards were unconstitutionally vague, because they were conjoined with each other.

> Apparently, the determination of whether the fetus "is viable" is to be based on the attending physician's "experience, judgment or professional competence," a subjective point of reference. But it is unclear whether the same phrase applies to the second triggering condition, that is, to "sufficient reason to believe that the fetus may be viable." In other words, it is ambiguous whether there must be "sufficient reason" from the perspective of the judgment, skill and training of the attending physician, or "sufficient reason" from the perspective of a cross section of the medical community or a panel of experts.

Id. at 391-92 (emphasis added).

Here, too, the standard is ambiguous. Physicians confronted with a complication threatening the woman's life or making other determinations demanded by the Act will be without guidance as to whether the judgment is one to be made based on their judgment or one to be made based on "the perspective of a cross section of the medical community." Id. The ambiguity cannot be resolved by construing "reasonable medical judgment" as including, or subsuming, the physician's good faith judgment. Any such construction would render superfluous the very language requiring that the physician act in good faith. See In re Columbus Skyline Sec., Inc., 660 N.E.2d 427, 429 (1996) ("when construing a statute 'it is the duty of this court to give effect to the words used, not to delete words used or to insert words not used'") (citation omitted); see also United Food & Commercial Workers Union Local 751 v. Brown Group, Inc., 116 S. Ct. 1529, 1533 (1996) ("[T]he more natural reading

of the statute's text, which would give effect to all of its provisions, always prevails over a mere suggestion to disregard or ignore duly enacted law as legislative oversight.").

In addressing the statutory provisions governing fetal viability, the district court held that "the statute set[s] forth different standards for judging the legality of the physician's determination, and thus, that Plaintiff has demonstrated a substantial likelihood of success of showing that the determination is unconstitutionally vague." Women's Medical Professional Corp., 911 F. Supp. at 1077. The Court's reasoning is correct, and wholly applicable to the Act's standards for assessing the presence of a medical emergency or risk to the woman's life or major bodily function.

B. The Act's Objective Standard Will Chill Physicians from Providing Necessary and Constitutionally Protected Care.

No reading of the Act would lead anyone to believe that the physician's best clinical judgment alone would suffice to avoid criminal liability. The Act requires not only the physician's "good faith," but "good faith" plus something else. That something else is "reasonable medical judgment," which in practical terms, for the physician, renders the "good faith" requirement superfluous and inconsequential. As the district court concluded, with the inclusion of a reasonable medical judgment standard, each of these provisions has the problem of making the physician criminally and civilly liable "even if he or she acted in good faith, as long as the physician was later determined, in the eyes of others, using 20/20 hindsight, to have acted unreasonably." Women's Medical Professional Corp., 911 F. Supp. at 1083 (emphasis in the original).

Fearful that the difference of opinion with a colleague will trigger a criminal prosecution, physicians will be reluctant to act. As one physician testified when asked about the medical emergency exception, "it would have a potentially chilling effect with my concern

being that no matter what my good faith judgment might be, that I would, might potentially be challenged in that judgment." Hillard, 11/8 TR at 61; see also Goler, 12/6 TR at 111-13. Because the judgments of whether a fetus is viable, a woman's life or major bodily function is endangered or a medical emergency is present often must be made quickly, the absence of clear standards to guide physicians is especially likely to chill them from acting.

Because this chill will limit women's constitutionally protected right to abortion, the Act is unconstitutional. In Colautti, the Supreme Court considered the constitutionality of a statute that required physicians to employ the methods of abortion which "would provide the best opportunity for the fetus to be aborted alive," whenever the physician determined that the fetus was viable or, alternatively, when "there [was] sufficient reason to believe that the fetus may be viable." 439 U.S. at 389. In striking the statute as unconstitutionally vague, the Court stressed that:

> As the record in this case indicates, a physician determines whether or not a fetus is viable after considering a number of variables . . . . Because of the number and the imprecision of these variables, the probability of any particular fetus' obtaining meaningful life outside the womb can be determined only with difficulty. . . . In the face of these uncertainties, it is not unlikely that experts will disagree over whether a particular fetus . . . has advanced to the stage of viability. The prospect of such disagreement, in conjunction with a statute imposing strict civil and criminal liability for an erroneous determination of viability, could have a profound chilling effect on the willingness of physicians to perform abortions near the point of viability in the manner indicated by their best medical judgment.

Id. at 395-96.

Here, as in Colautti, an objective standard is especially dangerous, as physicians who the State will call to offer their hindsight are unlikely to agree with the initial assessment. Determining whether an abortion is necessary to save a woman's life or to prevent substantial

and irreversible impairment of a major bodily function, or whether a medical emergency exists, involve calculations as complex as viability assessments and about which physicians are equally likely to disagree. See Doe v. Bolton, 410 U.S. 179, 192 (1973) (regulations restricting abortions to those necessary to preserve a pregnant woman's health should leave the attending physician "the room he needs to make his best medical judgment"); cf. Campbell, 12/6 TR at 43 ("[D]ifferent physicians have different opinions as to what is safest . . . ."). Physicians will therefore steer clear of providing this essential medical care.

Contrary to the State's argument, the Court has not "routinely" upheld abortion statutes imposing criminal liability based on an objective standard. St. Br. at 38. In fact, the cases evidence the contrary. In Webster v. Reproductive Health Services, for example, the challenge to the viability standard was not premised on vagueness, and, moreover, the Court found the provision to "require[] that a physician apply his reasonable professional skill and judgment." 492 U.S. 490, 515 (1989) (emphasis added). The Court in Planned Parenthood v. Casey, in the very discussion the State cites, emphasizes that the statute did "not prevent the physician from exercising his or her medical judgment." 505 U.S. 833, 884 (1992) (emphasis added).[17]

Casey affords the Defendants no relief from the holding that the Act is unconstitutionally vague. Defendants contend that, by replacing the strict scrutiny analysis controlling at the time of Colautti with the undue burden analysis, the Supreme Court in

---

[17] Even the cases upon which the State relies where the crime truly involved an objective standard cast no doubt on the propriety of the district court's holding in this case, as the conduct involved in those cases was not constitutionally protected. See State v. Shane, 590 N.E.2d 272 (Ohio 1992) (manslaughter); State v. Williford, 551 N.E.2d 1279 (Ohio 1990) (self-defense); State v. Koss, 551 N.E.2d 970 (Ohio 1990) (same); State v. Champion, 142 N.E. 141 (Ohio 1924) (same).

Casey eliminated the principle that a statute that chills the practice of abortions is impermissibly vague. St. Br. at 40. This is simply untrue. Colautti and the cases that follow -- including Hoffman Estates, upon which the State otherwise relies -- stand for the proposition that a statute is unconstitutionally vague where its uncertainty "threatens to inhibit the exercise of constitutionally protected rights." Colautti, 439 U.S. at 391; see also Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982); Grayned v. City of Rockford, 408 U.S. 104, 109 (1972). In Casey, the Supreme Court reaffirmed a woman's constitutional right to obtain a post-viability abortion, "where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." Casey, 505 U.S. at 879. Therefore, a vague statute that chills physicians from performing such abortions is unconstitutional. See Planned Parenthood v. Miller, 63 F.3d 1452, 1465 (8th Cir. 1995) (holding post-Casey that a statute imposing strict criminal liability on the performance of abortions impermissibly chilled physicians from performing abortions), cert. denied, 116 S. Ct. 1582 (1996).

C. The Absence of Any Scienter Requirement Magnifies the Act's Vagueness Problems.

The Supreme Court "has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea." Colautti, 439 U.S. at 395 (citations omitted); accord, e.g., Hoffman Estates, 455 U.S. at 499 ("[T]he Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice . . . that [the] conduct is proscribed."). Mens rea or scienter refers to the requirement that an individual act with "guilty knowledge" of the facts which make his conduct illegal. Black's Law Dictionary 985, 1345 (6th ed. 1990). In the realm of constitutionally protected rights, the lack of scienter raises constitutional

problems in not only criminal, but also civil statutes. See Miller, 63 F.3d at 1467 (holding that civil damages could not be imposed for good faith violation of abortion statute); see also Gertz v. Welch, 418 U.S. 323 (1974) (holding that libel defendants may not be held civilly liable without fault, because of consequent chill on first amendment rights). Determining the requisite mental state required for each element of an offense "is a question of statutory construction." Staples v. United States, 511 U.S. 600, 114 S. Ct. 1793, 1796 (1994). Here, the district court correctly held that there was no scienter to save the confusing provisions from unconstitutional vagueness.[18]

The State's attempt to cast the "reasonable medical judgment standard" as something other than strict liability must fail. See St. Br. at 39. Under Ohio law, a criminal statute must either specify the requisite mens rea or "plainly indicate[] a purpose to impose strict criminal liability." Ohio Rev. Code § 2901.21 (B)(1996).[19] The subsections of the Act requiring a physician to determine viability, a risk to a woman's life or major bodily function, or a medical emergency do not state that the determinations must be done purposefully, intentionally or knowingly. The only decisional standard that resembles scienter is the "good faith" requirement. See id. §§ 2919.18(A)(1); 2919.16(F); 2919.17(A)(1), (A)(2), (B)(1), (B)(2). But that criterion may be abrogated by the additional requirement that the physician

---

[18] Although the district court addressed the lack-of-scienter issue only with respect to the medical emergency provisions, the same analysis applies and should be extended to the determination of viability and assessment of risk to a woman's life or major bodily function.

[19] When the section neither specifies culpability nor plainly indicates a standard of strict liability, recklessness is imposed as the culpability standard. § 2901.21. As the district court correctly noted, imputing recklessness as the mental state for viability, life and medical emergency determinations would conflict with the "reasonable medical judgment" standard in the Act. Women's Medical Professional Corp., 911 F. Supp. at 1086-87. In any event, the State does not contend that recklessness should be imputed as the culpability standard.

exercise "reasonable medical judgment" (and in the case of viability determination the requirement that the physician perform such examinations and tests that a "reasonable physician" would perform). "Reasonable medical judgment" requires even less culpability than criminal negligence, which is the lowest culpability standard under Ohio law and which requires that "because of a substantial lapse from due care, [the defendant] fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature." § 2901.22(D) (emphasis added). In the Act, the legislature did not impose liability for a substantial lapse of medical judgment, but for any lapse, plainly indicating a purpose to impose strict liability.

Equally unpersuasive is the State's argument that a scienter requirement can be found in the language stating: "'no person shall purposely perform . . . an abortion.'" St. Br. at 38 (quoting Ohio Rev. Code § 2919.17(A), (B)) (emphasis added in brief); see also Ohio Rev. Code § 2919.18(A)(1), (A)(2) ("no physician shall perform . . . an abortion"). The claim ignores the syntax of the provisions, the principle that "different elements of the same offense can require different mental states," Staples, 1793 S. Ct. at 1799, and the State's very position on appeal that "reasonable medical judgment" is objective. Read in context, the word "purposely" plainly refers to the actus reus, that is the performance of the abortion itself, and does not refer to the facts that make the abortion illegal under the Act: the after-the-fact determination that the physician's decisions about viability, the risk to a woman's life or major bodily function, or the presence of a medical emergency were unreasonable.

The absence of scienter with respect to those medical determinations exacerbate the vagueness of the Act's "post-viability" abortion crimes. Because physicians cannot proceed based on their best clinical judgment without exposing themselves to criminal and civil

liability, doctors will have no choice but to deny their patients care, even when the care is necessary to terminate a pregnancy that presents a risk of permanent and substantial harm to a woman's health or when her fetus ultimately is nonviable. The district court correctly concluded that the constitution cannot abide this chill.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the brief for the Plaintiffs-Appellees, the District Court's order enjoining the enforcement of the Act should be affirmed.

Dated: August 6, 1996

Respectfully submitted,

Joan M. Englund (0040814)
Legal Director
ACLU of Ohio Foundation, Inc.
1266 West Sixth Street, Suite 200
Cleveland, Ohio 44113-1353
(216) 781-8639

Isaac Schulz (0021009)
Cooperating Counsel for the ACLU of Ohio Foundation, Inc.
Bond Court Building
1300 East 9th Street, Suite 900
Cleveland, Ohio 44114-1583
(216) 621-8400

Nancy Northup
Louise Melling
Reproductive Freedom Project
American Civil Liberties Union Foundation, Inc.
132 West 43rd Street, 7th Floor
New York, New York 10036
(212) 944-9800

Counsel for Amici Curiae
American College of Obstetricians and Gynecologists
National Abortion Federation
American Civil Liberties Union
American Civil Liberties Union of Ohio Foundation, Inc.

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing Brief of Amici Curiae American College of Obstetricians and Gynecologists, National Abortion Federation, American Civil Liberties Union, and American Civil Liberties Union of Ohio Foundation, Inc., were served by Federal Express, this 9th day of August, 1996, upon the following counsel of record:

Alphonse A. Gerhardstein
Sarah Poston
1409 Enquirer Building
617 Vine Street
Cincinnati, Ohio 45202

David Greer
6 North Main Street
Dayton, Ohio 45402

Kathryn Kolbert
Janet Crepps
The Center for Reproductive
Law and Policy
120 Wall Street
New York, New York 10005

Elissa D. Cohen
Montgomery County Prosecutor's Office
301 West 3rd Street
5th Floor
Dayton, Ohio 45402

Diane R. Richards
Assistant Attorney General
30 East Broad Street, 17th Fl.
Columbus, Ohio 43215-3428

David J. Young
Squires, Sanders & Dempsey
31 South High Street
Suite 1300
Columbus, Ohio 43215

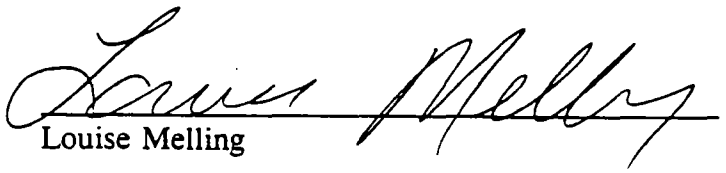
Robert R. Melnick
Rutherford Institute
18 N. Phelps Street, Suite 300
Youngstown, Ohio 44503

James Bopp, Jr.
Richard E. Coleson
Bopp, Coleson & Bostram
2 Faulker Square
401 Ohio Street
P.O. Box 8100
Terre Haute, Indiana 47808-8100

Paul Benjamin Linton
Americans United for Life
343 S. Dearborn St.
Suite 1804
Chicago, Illinois 60604

George N. Prince
7040 North Mercer Way
Mercer Island, Washington 98040

Marcy Wilder
National Abortion Rights Action League
1156 15th Street, N.W.
Suite 700
Washington, D.C. 20005



Louise Melling

ADDENDUM

LAUFMAN, RAUH & GERHARDSTEIN
ATTORNEYS AT LAW
1409 ENQUIRER BUILDING
617 VINE STREET
CINCINNATI, OHIO 45202
(513) 621-9100
FAX (513) 345-5543

ROBERT F. LAUFMAN
TRUDY D. RAUH
ALPHONSE A. GERHARDSTEIN
SARAH W. POSTON

August 8, 1996

By Fax: (216)781-6438

Joan Englund
ACLU of Ohio
1266 W. 6th Street, suite 200
Cleveland, OH 44113

Re: Women's Professional Medical Corp. v. Voinovich, Case No. 96-3157/3159

Dear Joan:

This is to inform you that on behalf of Plaintiffs-Appellants in the above case, I am consenting to the filing of an amicus brief by the American Civil Liberties Union, the American Civil Liberties Union of Ohio Foundation, Inc., the American College of Obstetricians and Gynecologists and the National Abortion Federation.

Please call or write if you have any questions.

Sincerely,

Sarah Poston

Sarah Poston

Attorney General
Betty D. Montgomery

August 9, 1996

Joan Englund
American Civil Liberties Union of Ohio
1266 West Sixth Street
Cleveland, Ohio 44113

Re: ***Women's Medical Professional Corporation, et al., v. Voinovich, et al.***
(United States Court of Appeals for the Sixth Circuit)

Dear Ms. Englund:

This letter is submitted in response to your request for an amended consent letter to the filing of an amicus brief for additional entities not included in your original request. As I indicated when we spoke this morning, the State Appellants would appreciate as a courtesy your faxing a copy of the brief to us when it is filed. We look forward to receiving by fax today the amicus brief to be filed by your organization, and the American Civil Liberties Union Foundation, American College of Obstetricians and Gynecologists and the National Abortion Federation in the above-referenced matter. The State Appellants consent to the filing of such an amicus brief.

Very truly yours,

Diane Richards

DIANE R. RICHARDS
Assistant Attorney General
Section Chief
Chief Counsel's Staff
(614) 466-2872
facsimile (614) 728-7592

DRR/srf
f:\counsel\foroVetters.drr

MATHIAS H. HECK, JR.
Prosecuting Attorney

DEBRA B. ARMANINI
First Assistant

CRIMINAL DIVISION
James R. Lawson Chief
225-5757
Grand Jury
225-4781

CIVIL DIVISION
Chris R. Van Schaik Chief
225-5757

FRAUD AND ECONOMIC CRIMES DIVISION
Robert A. Skinner Chief
225-4767

JUVENILE DIVISION
James D. Cole Chief
225-4253
FAX (513) 496-3350

Mathias H. Heck, Jr.
Montgomery County Prosecuting Attorney

5th Floor
Dayton-Montgomery County Courts Building
Post Office Box 972
301 West Third Street
Dayton, Ohio 45422
(513) 225-5757
TDD (513) 495-3215
FAX (513) 225-3470
Writer's Direct Dial Number (513) 225-4979

APPELLATE DIVISION
Carey J. Ingram, Chief
225-4051

SUPPORT ENFORCEMENT/ PATERNITY DIVISION
Grant L. Wadsworth, Chief
Kelvin L. Brodie Assistant Chief
225-4892
TDD (513) 225-4466
FAX (513) 496-7302

DIVERSION DIVISION
Guy E. Jones Director
225-4664

VICTIM/WITNESS DIVISION
Rhonda S. Barner Director
225-5623

WELFARE THEFT DIVISION
Gary L. Ware, Director
225-4238
FAX (513) 225-4295

August 9, 1996

VIA FAX - (216) 781-6438
Ms. Joan M. Englund
Legal Director
American Civil Liberties Union of Ohio Foundation
1266 West Sixth Street
Cleveland, Ohio 44113

RE: Women's Medical Professional Corp. v. George Voinovich, et al.
U.S. Court of Appeals Case No. 96-1093

Dear Ms. Englund:

Please be advised that Appellant Montgomery County Prosecutor consents to the filing of an amicus brief by the ACLU Foundation, the ACLU of Ohio Foundation, Inc., the American College of Obstetricians and Gynecologists and the National Abortion Federation in the above-captioned matter.

If you have any questions regarding this matter, please do not hesitate to contact me at your earliest convenience.

Very truly yours,

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

By: Elissa D. Cohen
ELISSA D. COHEN
Assistant Prosecuting Attorney

EDC:mcf

MEMORANDUM OF LAW

H.R. 1833/S 939: THE "PARTIAL-BIRTH ABORTION BAN ACT" OF 1995

HR 1833/S 939 would ban the use of a particular abortion method, described in the bill as a partial-birth procedure. The bill defines "partial-birth abortion" to mean "an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery." A person, other than the pregnant woman, "in or affecting interstate or foreign commerce" who knowingly violates the ban is subject to fines and up to two years imprisonment. In addition, the bill creates a civil cause of action for monetary and statutory damages against those who violate the ban that can be maintained by the father, or the parents of a minor woman, even if the woman consents to the abortion.

HR 1833/S 939 represents an unprecedented expansion of Congressional regulation of health care. Never before has Congress intruded directly into the practice of medicine by outlawing a safe medical procedure that is necessary to protect the lives and health of pregnant women.

Although the ban is unclear as to which specific medical procedures it outlaws, it applies to both pre- and post-viability abortions. Specifically, it appears that the sponsors intend to affect only the small number of women who seek abortions from their late second trimester onwards, approximately after twenty weeks LMP.[1] The women who seek these late abortions do so because of dire circumstances such as severe fetal anomalies, fetal death,

---

[1]95% of abortions are performed during the first 15 weeks of pregnancy. Women's Medical Professional Corp. et al. v. Voinovich et al., No. C-3-95-414 slip op. at 22 (S.D. Oh. Dec. 13, 1995).

illness exacerbated by pregnancy, or pregnancies that are the result of rape or incest;[2] indeed, many are terminating wanted pregnancies. This bill only compounds the physical and emotional trauma these women have already experienced because it limits the discretion of their physician to provide the best possible medical care and it limits access to essential services.

Targeting these vulnerable women by sacrificing their health to the political agenda of those who would ban abortion altogether is an ill-conceived idea. Most importantly, this Bill patently unconstitutional both because is contains impermissibly vague language and it imposes an "undue burden" on the reproductive rights of women. Indeed, in an thorough discussion of the law and facts the United States District Court of the Southern District of Ohio preliminary enjoined a similar an Ohio law. Women's Medical Professional Corp. et al. v. Voinovich et al., No. C-3-95-414 (S.D. Oh. Dec. 13, 1995).

I. HR 1833/S 939 IS UNCONSTITUTIONALLY VAGUE

> When determining whether a statute or regulation is sufficiently vague so as to violate due process, there are several relevant considerations. A statute or regulations may be vague if it fails to give fair warning as to what conduct is prohibited. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) ("we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly"), cited in Fleming v. United States Dept. of Agriculture,

---

[2]Warren M. Hern, MD, *Late Abortion for Fetal Anomaly*, 81 Obstetrics & Gynecology 301, 304 (Feb. 1993); see also Voinovich et al., No. C-3-95-414 slip op. at n.15 ("The testimony indicates that some women who seek abortions in their second trimester are victims of rape or incest, and may have been psychologically unable to face their pregnancies at an earlier time. [citations omitted]. Other women who seek abortions in the second trimester do so because it is only then that they discover that their fetus has developed severe anomalies, i.e., physical defects that call into question the ability of the fetus, once carried to term, to survive.").

713 F.2d 179, 184 (6th Cir. 1983). A statute or regulation may also be vague if it is subject to arbitrary and discriminatory enforcement, due to failure to provide explicit standards for those who apply the law. Id.

A vague law is especially problematic in two situations. First, its potential to cause citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked," id. (quoting Baggett v. Bullitt, 377 U.S. 360, 372 (1964)), is of particular concern where the exercise of constitutionally protected rights may be inhibited or "chilled." Calautti v. Franklin, 439 U.S. 379, 391 (1979) (applying to the right to an abortion); Baggett, 377 U.S. at 372 (applying First Amendment Rights). Second, a vague law which provides for criminal penalties is troubling because of the severe consequence which may result from violating the law. Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99 (1982).

Voinovich., No. C-3-95-414 slip op. at 19-20.

In Voinovich, a challenge to a ban on the use of the Dilation and Extraction (D&X) procedure for abortion, the Court held that the definition of Dilation and Extraction[3] was impermissibly vague. Specifically the Court found that "[w]hen the procedures are described in detail, it becomes apparent that the statutory definition of the Dilation and Extraction procedure could be construed to include the more widespread Dilation and Evacuation ("D&E") procedure." Id. at 21. Thus, "it does not provide physicians with fair warning as to what conduct is permitted, and as to what conduct will expose them to criminal and civil liability." Id. at 30.

The definition of "partial-birth" abortion referred to in the congressional Bill suffers from the same defect. Although the legislative history indicates that the sponsors of the Bill intended to ban the D&X method, the Bill may outlaw both the D&E abortion method, which

[3] The statute at issue defined the D&X procedure as: "the termination of a human pregnancy by purposely inserting a suction device into the skull of a fetus to remove the brain. Id. at 4.

is widely used for procedures done throughout the second trimester, and D&X (a variation of D&E also known as intact D&E).[4] This vagueness is illustrated both by the medical testimony at the Senate Hearings which indicated that medical professionals have widely varying opinions as to what the Bill covers,[5] and by the debate on the Senate floor.

In fact, in a colloquy between Senator Brown and Senator Smith, Senator Brown requested that Senator Smith, the sponsor of the Bill, clarify whether the Bill applied to D&E. While Senator Smith stated that the Bill did not intend to prohibit D&E, a colloquy on the floor cannot cure the vagueness inherent in the language of the Bill, which imposes criminal penalties. On the contrary, the very fact neither physicians nor United States Senators, such as Senator Brown, are certain of the Bill's reach, is evidence of its vagueness. The term "living fetus" as used in the Bill is also impermissibly vague. The Bill makes no attempt to define a "living fetus." Thus, physicians have no guidance regarding how to determine whether a fetus is "living," i.e. whether the criteria is a heartbeat, brainwaves, or other factors. The term, without further detail, is inherently vague. Indeed, even after six days of hearings, which included testimony from numerous experts, the Court in Voinovich found that "an exact definition of the term 'alive' was neither stipulated, nor clarified by the evidence." Id. at n.29.

Thus, HR 1833/S 939 fails to give physicians adequate notice of what is prohibited,

---

[4]The definition in the Bill may also criminalize induction methods of abortion or an induced delivery gone awry, where the physician should have known that his or her actions or failure to act would cause the death of the fetus.

[5]H.R. 1833: Hearing Before The Senate Committee On the Judiciary, 104th Cong.,1st Sess. 75-158 (1995)

and is therefore susceptible to arbitrary application. Additionally, it would cause physicians to "steer far wide of the forbidden zone" and avoid both D&X and D&E procedures, which would chill women's constitutional reproductive rights to a severe degree. These defects are compounded by the Bill's criminal penalties which would impose severe consequences on physicians who run afoul of the Bill's vague language.

II. HR 1833/S 939 IMPOSES AN UNDUE BURDEN ON WOMEN SEEKING PREVIABILITY ABORTIONS AND POST-VIABILITY ABORTIONS NECESSARY TO PROTECT THEIR LIVES OR HEALTH.

In 1992, the United States Supreme Court in Planned Parenthood v. Casey reaffirmed what it characterized as the "central holding" of Roe v. Wade:

> Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.[6]

Thus, the Court found that before viability,[7] the government may not enact regulations which have "the purpose or effect of placing a substantial obstacle in the path of woman seeking an abortion. . . ." 112 S.Ct. at 2820. Such regulations constitute an "undue burden" on a woman's right to have an abortion, and violate her right to liberty as guaranteed by the Fourteenth Amendment to the United States Constitution. Id. at 2819. The Court explained:

> A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this

---

[6]112 S. Ct. 2791, 2821 (1992)(citations omitted).

[7]Viability varies with the individual pregnancy, but normally occurs sometime between 25 1/2 weeks and 30 weeks LMP. Where the fetus is suffering from severe anomalies, however, viability may occur much later or not at all.

> purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.[8]

In determining whether an undue burden exists, the focus is on the burden the restriction places on those women affected, even if that group is only a fraction of the women seeking abortions.[9] The fact that only a small number of women would be affected by the federal ban does not, therefore, preclude a claim that it constitutes an undue burden.

The Bill would impose an undue burden on women seeking pre-viability abortions in two ways. First, it would channel women from a safer method of abortion to one that is less safe. Second, it would limit the physician's discretion to choose the most appropriate method of abortion based on the medical needs of his or her patient, thereby risking the woman's health.

In addressing whether the ban on D&X in Ohio constituted an undue burden, the district court noted that:

> only one case has considered the propriety of a ban on a specific abortion procedure. In Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976), the Supreme Court struck down a ban on the second-trimester abortion method of saline amniocentesis. The Court reasoned that, because the method was commonly used and was safer than other available methods, it failed to serve the stated purpose of protecting maternal health. The Court concluded that, given that there were no safe, available alternatives to the banned method, the ban was "an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority" of second trimester abortions. Accordingly the ban was held to be unconstitutional.

---

[8] Id. at 2820.

[9] Id. at 2830.

> The reasoning in Danforth suggests that [the government] may act to prohibit a method of abortion, if there are safe and available alternatives. This reading comports with Casey which dictates that if a ban on a specific method were to place a substantial obstacle in the path of a woman seeking a pre-viability abortion -- for example, if there were no safe and available alternative method of abortion -- the ban would be an undue burden and therefore unconstitutional. The issue before this Court, therefore, is whether, . . . there are safe and available alternatives to the D&X procedure, which is typically performed during the twentieth to twenty-fourth weeks of pregnancy, such that there would be no undue burden if the procedure were banned.

Voinovich., No. C-3-95-414 slip op. at 30-31.

The Court then proceeded to make extensive findings regarding the relative safety of procedures available for late term abortions. The Court found that: 1) D&E is not the procedure of choice for late term abortion because it poses more health risks than a D&X,[10] id. at 31;[11] 2) [t]he main alternative to the D&X procedure, in the late second trimester, is the use of an induction method of abortion, which results in labor lasting 12 to 36 hours (as opposed to 10 to 20 minutes needed for a D&X), id. at 32; 3) induction poses greater risks to maternal health than the D&X procedure, and is not an appropriate method for every woman

---

[10]Specifically, the Court found that:

> use of the D&X procedure in the late second trimester appears to pose less of a risk to maternal health than does the D&E procedure, because it is less invasive -- that is, it does not require sharp instruments to be inserted into the uterus with the same frequency or extent --- and does not pose the same degree of risk of uterine and cervical lacerations . . . .

Id. at 39.

[11] The Court also noted that, as is possible with a D&X, "it is sometimes desirable to obtain an intact fetus in order to confirm the presence of fetal anomalies, and to predict their likely recurrence in future pregnancies." Id. at 36.

needing an abortion,[12] id.at 39; and 4) "that the D&X procedure appears to pose less of a risk to maternal health than either a hysterotomy or a hysterectomy, both of which are major, traumatic surgeries,"[13] id at 39.

Additionally, the Court noted that induction procedures, unlike D&X, "must be performed in a hospital environment, and so cannot be done on an outpatient basis." Id. at 33. The Court found that:

---

[12]Specifically, the Court found that the potential complications of induction include:

> fear, lack of control, mild to severe abdominal pain, nausea, and diarrhea, and extreme discomfort, over a lengthy period of time. The substances used, especially saline, may result in mild side effects -- vomiting, diarrhea, and high fever -- or in severe maternal complications. The fluids which are introduced may be forced into the maternal circulation, leading either to amniotic fluid embolus, which is generally fatal, or to disseminated intravascular coagulation (DIC), in which the clotting factors in the blood are used up, and bleeding cannot be stopped. Induction methods can also thin out the lower uterus to the point that the fetus comes through the uterine wall instead of through the vagina. [citations omitted]. In addition, induction methods cannot be performed on women who have an active pelvic infection, or who are carrying dead fetuses [citation omitted], and probably should not be performed on women who had previously had Cesarean sections, given the possibility of rupturing the uterine scar [citation omitted]. Finally, induction methods may be ineffective in cases where the fetus is lying with its head on one side and its feet on the other, because there is no pressure against the cervix [citation omitted], and the fetus will not be expelled from the uterus.

Id. at 33-34.

[13] Specifically, the Court found that

> "[a]nother alternative to the D&X is a hysterotomy, which is essentially a Cesarian section performed before term, although it is potentially more dangerous because the uterus is thicker than it is at the end of term, and the incision causes more bleeding and may make future pregnancies more difficult. A more extreme alternative is a hysterectomy, which removes the uterus completely. Both of these methods entail risks associated with major surgical procedures, and are rarely used today.

Id. at 34.

> the requirement that a pregnant woman be hospitalized in order to undergo an induction procedure may also have a negative impact on the practical availability of abortions for women seeking pre-viability abortions. First, hospitals may refuse to allow induction procedures on an elective basis, including those situations in which a woman wishes to abort a fetus with severe anomalies. Second, it may be psychologically daunting to undergo the induction procedure in a hospital environment. These practical problems may discourage women in their second trimester from exercising their right of seeking elective, pre-viability abortions, or make it practically impossible to do so, thereby amounting to an undue burden on the right to seek pre-viability abortion. In contrast, the D&X procedure can be performed on an outpatient basis within a much shorter period of time, and is not limited by either of these practical problems.

Id. at 40-41.

The Court then concluded that "[f]or both of these reasons -- because the D&X procedure appears to be the safest method of terminating a pregnancy in the late second trimester, and because the D&X procedure is more available than induction methods, which require the woman to be hospitalized -- Plaintiff has demonstrated a substantial likelihood of success of showing that the ban on the D&X procedure is unconstitutional under Danforth and Casey." Id. at 41.

For the same reasons the United States Supreme Court articulated in Danforth, i.e. that the restriction "forces a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed,"[14] and for the reasons relied upon by the District Court in Ohio -- i.e. that the state's D&X ban was unconstitutional because it prohibited women from obtaining the safest available health care and decreased the availability of services, HR 1833/S 939 is dangerous to women's health and unconstitutional.

[14]428 U.S. 52, 78-79 (1976).

HR 1833/S 939 is also unconstitutional because it eliminates a physician's necessary discretion in providing medical care.

In cases where women are seeking late term abortions, only the physician will be able to determine the most appropriate and safest procedure, based on the totality of the woman's circumstances, the available facilities, and his or her own skills. In fact, the Court in Voinovich found that "doctors who use [both the D&X and D&E] procedure may not know which procedure they will perform until they encounter particular surgical variables and circumstances after they begin and procedure to terminate the pregnancy." Id at 29-30. As a result of these medical realities, the Supreme Court has consistently held that physicians must retain broad discretion to determine the course of treatment for women seeking abortions.

> Roe stressed repeatedly the central role of the physician, both in consulting with the woman about whether or not to have an abortion, and in determining how any abortion was to be carried out. We indicated that up to the points where important state interests provide compelling justifications for intervention, "the abortion decision in all its aspects is inherently, and primarily, a medical decision."[15]

HR 1833/S 939 also violates the constitutional rights of women seeking post-viability abortions, because it provides no exception in cases where a woman needs the procedure to safeguard her health. Since Roe v. Wade the Supreme Court has consistently found that women have a constitutional right to obtain a post-viability abortion in cases where a woman's life or health is endangered. In Casey the Supreme Court stated that:

> We also reaffirm Roe's holding that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgement, for the preservation of the life or health of the

[15]Colautti v. Franklin, 439 U.S. 379, 387 (1979)(citations omitted)(emphasis added).

mother."[16]

The Supreme Court's holding in Casey is consistent with the earlier judgment in Thornburgh v. Amer. Coll. of Obst. & Gyn.,[17] that even for post-viability abortions, the state may not make its interest in the fetus paramount to women's health or require a "'trade-off' between a woman's health and fetal survival." There the Court invalidated a choice of method law requiring a physician performing a post-viability abortion to employ the abortion technique "which would provide the best opportunity for the unborn child to be aborted alive unless . . . that technique would present a significantly greater medical risk to the life or health of the pregnant women." [18] Banning specific abortion procedures would require this same "trade-off" of women's health condemned by the Court in Thornburgh[19] and Casey.

As the Court in Voinovich found, "any regulation which impinges upon or narrows th[e necessary health exception to any restriction], must be declared to be unconstitutional." Voinovich., No. C-3-95-414 slip op. at at 12. "Neither the legislature, nor the courts, has either the legal or the moral authority to balance the interests and lives involved, and to make

---

[16]112 S. Ct. 2791, 2821 (1992)(citations omitted).

[17]476 U. S. 747, 769-70 (1986) overruled in part, Planned Parenthood v. Casey, 112 S. Ct. at 2823, citing Colautti v. Franklin, 439 U.S. at 400.

[18]Thornburgh, 476 U.S. at 768-70.

[19]Although in Casey the Court overruled those parts of Thornburgh which directly conflicted with its ruling on the mandatory delay and biased counseling requirements, the Court let stand the remaining provisions of the ruling and in fact relied on Thornburgh when defining the boundaries of permissible state laws on abortions. See Casey 112 S.Ct. at 2817 (reaffirming the "central premise" of Thornburgh that prior to viability a woman "has a right to choose to terminate her pregnancy"). See also Jane Liberty v. Bangerter, 61 F.3d 1493, 1502-1504 (10th Cir. 1995) (reaffirming Thornburgh's validity regarding choice of method provisions for post-viability abortions.).

this decision." Id.

III. NO LEGITIMATE STATE INTEREST SUPPORTS THE FEDERAL BAN ON ABORTIONS.

Prior to viability, the Supreme Court has recognized only two state interests that can justify restrictions on abortion:

> To promote the State's profound interest in potential life, . . . the State may take measures to ensure that the woman's choice is informed, . . . as long as their purpose is to persuade the woman to choose childbirth over abortion. . . .
>
> As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on that right.[20]

The prohibition on specific abortion procedures serves neither of the interests identified by the Supreme Court as legitimate grounds for restricting abortion. As a pre-viability restriction, it cannot be characterized as furthering the State's interest in potential life because it does nothing to inform a woman's choice in an attempt to persuade her to choose childbirth, rather it simply steers women towards more dangerous procedures. Nor does the bill purport to promote maternal health or safety. In fact, by inhibiting the physician's and women's determination of which abortion method is in her best interest, the proposal overtly undermines maternal health.

Various justifications were presented to the Committee in support of the proposal, including preventing unnecessary cruelty to the fetus, and "moral outrage at partial birth

---

[20]Casey, 112 S. Ct. at 2821.

abortions." These interests are substantially the same as the interest asserted by the State of Ohio in the Voinovich case. The Court first noted that "[n]either of the[] interests [identified in Casey], justify regulations which impose an undue burden on the right to seek a pre-viability abortion." Voinovich No. C-3-95-414 slip op. at 42. Thus, the Court's inquiry need not have gone any further than its conclusion that the ban imposed just such a burden. However, the Court found that it was in the public interest to discuss the issue of cruelty, id. at 43, although it was not legally determinative.

The Court then noted that one of the two State witnesses who testified about the issue of fetal pain, a professor of clinical neurology at Case Western University "specifically refused to testify that a fetus can feel pain."[21] Id. at 45. The State's witness also testified that a D&E would involve no less discomfort than the D&X method. Id. The second witness for the State testified that there was pain but not "a conscious awareness of pain." Id.

The Court then found that given the absence of reliable evidence of either fetal pain or "that the D&X procedure is more cruel than other methods of abortion, this Court is unable to conclude that the ban on the use of D&X procedure serves the stated interest of preventing unnecessary cruelty to the fetus." Id. at 49-50.

Similarly, HR 1833/S 939 serves no legitimate state interests. Rather, it jeopardizes the public health and limits access to necessary medical care.

---

[21] The witness did testify that "although the fetus does 'exhibit a class of responses that are characteristic of reflex responses to obnoxious stimulation . . . feeling is very much beyond that because it involves perception, designation, locality, and things that are far too speculative for me to assure that a fetus feels." Id. at 45.

CONCLUSION

After a six day hearing, the only intensive factual investigation on this issue,[22] five central facts emerged for the Voinovich Court: 1) the language of the Bill is confusing and vague; 2) D&X is the safest available procedure in many cases, and the additional risks and burdens of alternative procedures are substantial; 3) prohibiting the D&X procedure would significantly affect access to late term abortion; 4) physicians need to have full discretion to provide appropriate care, as sometimes it is not clear even at the onset of the procedure what the medical needs of the patient will be; and 5) no significant government interests is served by a D&X ban. Based on these findings, the Court concluded that "[a]s in Danforth, the ban on the D&X procedure therefore 'comes into focus, instead, as an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting,' second-trimester abortions prior to viability." Voinovich No. C-3-95-414 slip op. at 50 (citing Danforth, 428 U.S. at 79.). Because HR 1833/S 939 is equally unreasonable, arbitrary, and has the effect of inhibiting access to necessary medical care, we urge the President to veto the measure.

---

[22] By contrast, the Senate hearing lasted less than one day. It is worth noting that one of the most significant witnesses at that hearing was Nurse Brenda Schaffer. Yet, the State of Ohio, while listing her as a witness up until the day of the trial, never put her on the stand. Moreover, the Court had previously rejected her affidavit as "crying out for cross-examination."

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

WOMEN'S MEDICAL PROFESSIONAL CORP.,	:	
MARTIN HASKELL, M.D.,	:	
Plaintiffs,	:	Case No. C-3-95-414
vs.	:	JUDGE WALTER HERBERT RICE
GEORGE VOINOVICH, Governor, State of Ohio,	:	
BETTY MONTGOMERY, Attorney General, State of Ohio,	:	
MATHIAS H. HECK, JR., Montgomery County Prosecuting Attorney,	:	
Defendants.	:	

ENTRY CONSOLIDATING HEARING ON PRELIMINARY INJUNCTION WITH TRIAL UPON THE MERITS, PURSUANT TO FED. R. CIV. P. 65(a)(2); PURSUANT TO REASONING, CITATIONS OF AUTHORITY, FINDINGS OF FACT AND CONCLUSIONS OF LAW SET FORTH BY THIS COURT IN ITS ORDER OF DECEMBER 13, 1995, GRANTING THE PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION (DOC. #31), JUDGMENT IS TO BE ENTERED IN FAVOR OF THE PLAINTIFFS AND AGAINST DEFENDANTS; PERMANENT INJUNCTION GRANTED; LEAVE OF COURT GRANTED DEFENDANTS, NUNC PRO TUNC, TO FILE ANSWER; TERMINATION ENTRY

Pursuant to the agreement of counsel, and pursuant to the authority granted by Fed. R. Civ. P. 65(a)(2), the hearing on the Plaintiffs' Motion for Preliminary Injunction (Doc. #2), is ordered consolidated with trial upon the merits of the captioned cause.

HD

Based upon the reasoning, citations of authority, Findings of Fact and Conclusions of Law set forth by this Court in its Order of December 13, 1995, granting the Plaintiffs' Motion for Preliminary Injunction (Doc. #31), final judgment is to be entered in favor of the Plaintiffs and against the Defendants herein. Defendants, their employees, agents and servants are permanently enjoined from enforcing any provision of House Bill 135.

Defendants are given leave of Court, nunc pro tunc, January 2, 1996, to file an Answer to the Plaintiffs' Complaint, provided said Answer is filed not later than the close of business on Friday, January 26, 1996.

The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

January 12, 1996

WALTER HERBERT RICE
UNITED STATES DISTRICT JUDGE

Copies to:

David C. Greer, Esq.
Alphonse A. Gerhardstein, Esq.
Sarah Poston, Esq.
Kathryn Kolbert, Esq.
Diane Richards, Esq.
Marilena Walters, Esq.
Chris VanSchaik, Esq./Elissa Cohen, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

WOMEN'S MEDICAL PROFESSIONAL CORP.,

JUDGMENT IN A CIVIL CASE

v.

GEORGE VOINOVICH, et al.,

Case Number: C-3-95-414

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment be entered in favor of the plaintiffs and against the defendants;

that the permanent injunction is granted;

that the above captioned cause is hereby terminated.

1/12/96
Date

Kenneth J. Murphy
Clerk

Claire Adams
(By) Deputy Clerk