Robert D. Novak

Clinton's Abortion Whopper

During last Friday's masterful press conference, President Clinton worked himself into a fever over women deprived forever of bearing children if denied "partial-birth" abortion. The problem: There are no such women.

The president's passion was such that his words landed on front pages everywhere: "Hillary and I, we only had one child. And I just cannot look at a woman who's in a situation where the baby she is bearing, against all her wishes and prayers, is going to die anyway, and tell her that I am signing a law which will prevent her from ever having another child."

In fact, there is no medical evidence of any woman's fertility being damaged by failure to abort a fetus. Nor is this Clinton's only misrepresentation. Partial-birth abortions are frequent, not rare as he says. Most do not occur in the final trimester, as he implies.

Why would the president commit an abortion whopper? "Because he believes it to be true," said one longtime aide, who thereby implied it was not true. He has built a dream world to justify an unpopular position. Bill Clinton has no more elections to win, but he still plays the game.

Pro-life forces this year launched a campaign to prohibit what they called partial-birth abortions, in which the doctor removes the fetus, feet first and usually still alive, and then sucks the brain from its head. The public was appalled, and Congress passed a prohibition. The president vetoed it.

Justifying the veto because of reproductive rights was not good enough for a president seeking reelection. On May 23, he raised the fertility issue, mimicking presidential opponent Bob Dole: "It's okay with me—whatever—if they ripped your body to shreds and you could never have another baby, even though the baby you were carrying couldn't live."

Actually, the opposite is true. On Sept. 18, four eminent obstetricians opposed to partial-birth abortion told Congress the procedure "can itself pose serious risks to the health and future fertility of women," adding that destruction of a fetus never is needed to "preserve the life, health or future fertility of the mother." In the New York Times on Sept. 26, former surgeon general C. Everett Koop wrote that "the procedure's impact on a woman's cervix can put future pregnancies at risk."

Consider the case of Claudia Ades, one of the five women who underwent partial-birth abortion and were brought to the White House for the April 10 veto ceremony. She said that after the operation she "unfortunately lost five more [by miscarriages], but we are very blessed that in July we're going to adopt a baby."

In last week's press conference, the president repeated his frequent claim that "there are just a few hundred" partial-birth abortions. That is contradicted by investigative reporting in the Bergen (N.J.) Record, which found that the procedure is performed at least 1,500 times annually in New Jersey alone—three times the supposed national figure. Most, a doctor there said, "are for elective, not medical reasons; people who didn't realize or didn't care how far along they were. Most are teenagers." Ades said her abortion and those of the other women at the veto ceremony were "elective."

All such partial-birth procedures, where the life of the woman is not at risk, would be banned by the vetoed bill—regardless of the age of the fetus. Clinton last week claimed he would "happily" sign a bill banning third-trimester abortions unless the woman had "a very serious health problem."

Two days later White House Chief of Staff Leon Panetta was asked on NBC's "Meet the Press" whether the president would extend the ban into the second trimester. No, said Panetta, "he would not go beyond that. He would want a woman to have the right to choose."

The dirty little secret is that 90 percent of the many thousands of partial-birth abortions occur in the fifth or sixth month—the second trimester. This is not about late-term abortions intended to save a woman's fertility but involves a particularly abhorrent procedure that could force Americans to consider abortion anew.

©1996, Creators Syndicate Inc.

The Washington Post
THURSDAY, DECEMBER 19, 1996

Paul E. Mirengoff

Preference to the Poor

Why class-based affirmative action is a bad idea.

The Washington Post
THURSDAY, DECEMBER 19, 1996

Supporters of affirmative action are scrambling to counteract the decision by the voters of California to dismantle publicly sponsored race and gender preferences in that state. Predictably, the first reaction has been to file a lawsuit. As Richard Kahlenberg recognizes in his op-ed piece ["A Sensible Approach to Affirmative Action," Dec. 2], this strategy is likely to be "ineffective" and "self-defeating." In the end, we will not be treated to the spectacle of the United States judiciary declaring unconstitutional a law that prohibits preferring people because of their race or gender.

Kahlenberg therefore proposes replacing race- and gender-based preferences with a system of preferences based on economic class. Low socioeconomic status would replace race as the favored status. Unlike President Clinton, Kahlenberg seeks not so much to "mend" affirmative action as to bend it into a tool to remedy what he perceives as class-based injustices.

Kahlenberg must be arguing for one of two things: (1) a system under which colleges and employers could select the most qualified applicants but would be required, when assessing qualifications, to take into account the socioeconomic barriers applicants have overcome or (2) a system under which colleges and employers would be forced to prefer applicants from disadvantaged backgrounds even if they were found, all things considered, to be less qualified than their rivals.

Either approach is seriously misguided. To be sure, a poor student from the inner city may be more likely to succeed at college than a wealthy applicant with a private tutor who scores slightly higher on the SAT. But no affirmative action program is needed to ensure that employers and colleges consider relevant socioeconomic facts in making their selection decisions. Employers and colleges consider them all the time.

In the case of colleges, for example, the same institutions that for two decades have used their admissions process for social purposes through race-based affirmative action plans will not, in the absence of such plans, suddenly become slaves to SAT scores and grades. If anything, the danger is that they will use socioeconomic considerations as a pretext to mask continued racial preferences.

Beyond any desire to perpetuate racial preferences, employers and colleges have an obvious incentive to give appropriate weight to facts about an applicant's background that show a potential to succeed not fully reflected in test scores and grades. Moreover, they know more than the government does about how much these facts actually "weigh." And they are more likely than the government, though far from certain, to weigh these facts objectively, rather than doctoring the analysis to achieve social, political or racial ends.

Taking Exception

The second form of class-based affirmative action would require colleges and employers to "correct" for a young person's class position. Under this approach, low-income applicants would be selected not just when they are the most qualified, taking into account hidden potential, but also when it is believed that they would have been most qualified had class-based obstacles not held them back. Kahlenberg has suggested elsewhere that such preferences are a matter of moral desert because teenagers are not responsible for their class positions or the disadvantages that flow from them.

But the last thing we should want our government to do is to force employers and colleges to lower the quality of their employees and students in the name of achieving some social scientist's conception of what a classless society would look like. It is fanciful to suppose that we can unscramble the egg and determine what an applicant's qualifications would have looked like if he or she had lived a different life. And even if this were possible, our institutions should not base real-life selection decisions on hypothetical facts.

Teenagers often are not responsible for the attributes that make them comparatively unattractive to colleges and employers: lack of native intelligence or native ability to perform certain kinds of work. Yet we do not expect colleges and employers to compensate for these disadvantages. Neither should we ask, much less require, them to compensate when the lack of comparative qualifications may be related to socioeconomic factors.

Kahlenberg is also mistaken in supposing that class-based preferences represent a viable compromise on affirmative action. Kahlenberg's "liberals" will accept the compromise only if it continues to produce racial diversity at close to current levels. In a college setting, this means replacing middle-class minority students with lower-class minority students. But, since the test scores of minority students (like those of whites) rise as a function of family income, the upshot will be a decrease in the average test scores of minorities admitted under affirmative action.

The distressingly large gap between mean test scores of minorities and whites at the better universities is already a source of strife and resentment. Any program that widens that gap stands little chance of becoming the grand compromise that saves affirmative action.

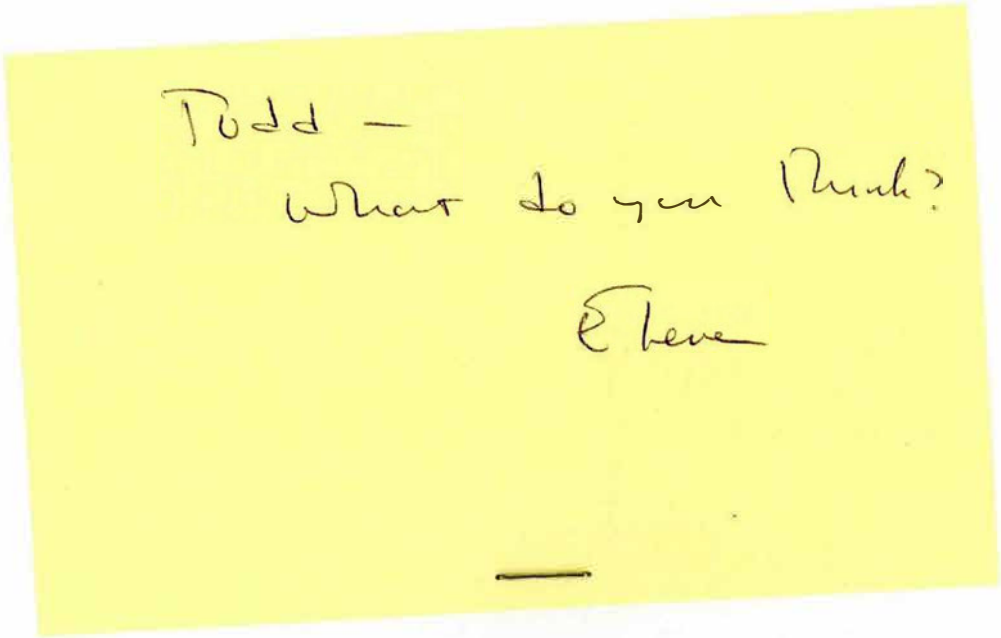
Reformers will always find a use for something as enticing as the manipulation of employment and college decisions for social ends. This helps explain why affirmative action, which began as a short-term remedy for rooting out existing discrimination practiced by specific employers, quickly became a medium-term remedy for the alleged effects of past discrimination, and then evolved into an entitlement system intended permanently to ensure racial diversity. The case for a further mutation, this time into a remedy for class injustice, is entirely unpersuasive.

The writer is a Washington lawyer.

To the Editor:

In response to Richard Cohen's recent column, I wish to make clear that the President would prohibit partial-birth abortions except in those rare cases where the procedure is necessary to protect a woman's life or prevent serious adverse consequences to her health. He also long has opposed late-term abortions of any kind unless the woman's life or health is in danger. The President, then, wholly agrees with Mr. Cohen's view that such abortions be "severely restricted" -- but also that these restrictions be lifted when a woman's life or serious health interests hang in the balance. In short, the President's views on partial-birth and late-term abortions comport exactly with the sensible and balanced position that Mr. Cohen recommends. It is Congress that has doomed this position to failure by refusing to exempt those women who desparately need such an abortion from the legislation's general ban.

Sincerely,
Donna Shalala



104TH CONGRESS
2D SESSION

H. R. 4284

IN THE HOUSE OF REPRESENTATIVES

Mr. HOYER introduced the following bill; which was referred to the Committee on _____

A BILL

To prohibit certain abortions.

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

SECTION 1. SHORT TITLE.

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

SEC. 2. PROHIBITION ON CERTAIN ABORTIONS.

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

(b) EXCEPTION.—This section does not prohibit any abortion performed if, in the medical judgment of the attending physician, the abortion is necessary to preserve the life of the woman or to avert serious adverse health consequences to the woman.

Melanne Verveer

Todd - needs bill.

Bo ~~20~~ SEP 30 A10:33

Jen's desires.

O:\BAI\BAI96.681 S.L.C.

104TH CONGRESS
2D SESSION

S. _____

IN THE SENATE OF THE UNITED STATES

introduced the following bill; which was read twice and referred to the Committee on _____

A BILL

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

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

SECTION 1. SHORT TITLE.

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

SEC. 2. PROHIBITION ON PARTIAL-BIRTH ABORTIONS.

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

"CHAPTER 74—PARTIAL-BIRTH ABORTIONS

"Sec.
"1531. Partial-birth abortions prohibited.

"§ 1531. Partial-birth abortions prohibited

"(a) Whoever, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than two years, or both. The preceding sentence shall not apply to any abortion performed prior to the viability of the fetus, or after viability where, in the medical judgment of the attending physician, the abortion is necessary to preserve the life of the woman or avert serious adverse health consequences to the woman.

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

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

"(2) Such relief shall include—

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

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

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

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

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

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

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

"74. Partial-birth abortions ..... 1531".

O:\BAI\BAI96.C06 S.L.C.

AMENDMENT NO. ____ Calendar No. ____

Purpose: To clarify the application of certain provisions with respect to abortions where necessary to preserve the life or health of the woman.

IN THE SENATE OF THE UNITED STATES—104th Cong., 1st Sess.

H.R. 1833

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

Referred to the Committee on _____
and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by Mrs. BOXER

Viz:

On page 2, line 9, add after the period the following new sentence: "The preceding sentence shall not apply to any abortion performed prior to the viability of the fetus, or after viability where, in the medical judgment of the attending physician, the abortion is necessary to preserve the life of the woman or avert serious adverse health consequences to the woman.".

THE WHITE HOUSE
OFFICE FOR WOMEN'S INITIATIVES AND OUTREACH

96 SEP 25 P1:21

TO: Todd Stern

FAX: 6-2215

DATE: 9/25

NUMBER OF PAGES (including cover sheet): 12

FROM:

√ **BETSY MYERS**, Director

____ **LISA OSBORNE ROSS**, Deputy Director

____ **MARY DIXON**, Agency Rep., Interagency Committee

____ **LEANNE POWELL**, Agency Rep., Interagency Committee

____ **SONDRA SEBA**, Agency Rep., Interagency Committee

____ **Other**

NOTES:

FYI - late term abortions

Betsy

THE WHITE HOUSE
OFFICE FOR WOMEN'S INITIATIVES AND OUTREACH
708 JACKSON PLACE, NW
WASHINGTON, DC 20503
PHONE: (202) 456-7300 FAX: (202) 456-7311

The information contained in this facsimile message is CONFIDENTIAL and intended for the recipient ONLY. PLease call if there are any problems with this transmission.

SEP-24 96 12:32 FROM:WOMENS OFFICE 202-456-7311 TO:2024562215 PAGE:02
09.25.96 11:36 AM P02

The perils of Congress imposing its medical ideas

By David J. Garrow

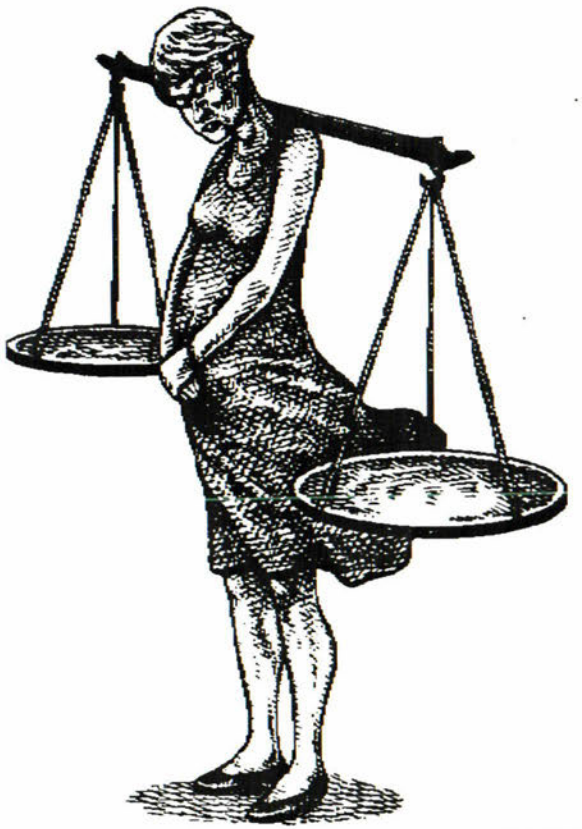
Tomorrow's Senate vote on whether to override President Clinton's veto of the Partial-Birth Abortion Ban Act offers senators a decisive opportunity to affirm the President's judgment and reject a dangerously radical effort to impose Congress' medical ideas in place of the best professional conclusions of accredited physicians.

The proposed statute would impose stiff criminal penalties — two years in prison and up to $250,000 in fines — on any doctor who "partially vaginally delivers a living fetus" during the course of a second- or third-trimester abortion.

Both medical and constitutional experts warn about the imprecision of that crucial phrase, and both attorneys and physicians also challenge the wording of the sole exception, which eschews punishment if an abortion is "necessary to save the life of a mother whose life is endangered by a physical disorder, illness or injury."

Critics wonder whether a pregnancy that itself endangered a woman's life might in some courtroom not qualify as a "disorder, illness or injury."

In vetoing the bill last April, President Clinton highlighted how Congress' failure to adopt a second exception, allowing such procedures in cases where a late-term pregnancy posed a serious threat to a woman's health, was a further conclusive defect. Alternative surgery, the President noted, carries a significant risk of impairing a woman's subsequent ability to have children.



PAUL KOLSTO

Larger issues than abortion are at stake in the debate over terminating late-term pregnancies.

Supporters of the measure contend that most cases of the targeted procedure are discretionary, or "elective," rather than medically necessary. The two sides cite differing statistics and use disparate terms (medical professionals generally call the procedure "intact dilation and evacuation," or "D & E"), but abortion opponents, including Republican presidential nominee and former Senate Majority Leader Bob Dole, torpedoed efforts to add a health exception on the grounds that such an amendment would "gut" the statute.

Backers of the bill refuse to acknowledge their apparently contradictory choices: How could adding a "serious health risks" exception "gut" a measure intended to curtail supposedly "elective" abortions? Such a move would only broaden the definition of "health," and they appear worried that careful review of cases where "D & E" is employed might demonstrate that most, if not all, do indeed involved serious maternal risk.

One critic of the bill, Georgetown University law professor Louis Michael Seidman, apprised the Senate Judiciary Committee last fall that the proposed law "does nothing to discourage abortion per se. It does nothing to protect the rights of fetuses, nothing to protect potential life, and nothing to protect actual life." "So long as other abortion techniques remain legal," the bill's only effect is to force women "to choose a more risky abortion procedure over a less risky one."

While constitutional scholars like Seidman assuredly predict that the federal courts would invalidate the ban, the message it sends to America's doctors, Dr. J. Courtland Robinson of the Johns Hopkins University School of Medicine told the Senate committee that perhaps that act's "vagueness is intentional. ... Because the law itself is so vague ... it would leave doctors wondering if they were open to prosecution or not, each time they perform a later abortion. That means that by banning this technique you would, in practice, ban most later abortions altogether by making them virtually unavailable."

Even cowardly only a relatively few courageous physicians are willing to stand up to the terror tactics employed by some gun- and bomb-wielding abortion opponents; the threat of federal prosecution and stiff criminal penalties would further reduce their number.

But Dr. Robinson also sought to impress another point upon the Senate: "Telling a physician that it is illegal for him or her to adapt his or her surgical method for the safety of the patient is, in effect, legislating malpractice, and it flies in the face of standards of quality medical care." Congress "is not qualified to stand over my shoulder in the operating room and tell me how to treat my patients."

Many other voices from within the medical profession echo Dr. Robinson's warning. The 37,000 member American College of Obstetricians and Gynecologists, noting how the bill would codify "terminology that is not even recognized in the medical community," protests that the measure is a "very disturbing" demonstration of why "congressional opinion should never be substituted for professional medical judgment."

Outlawing a professionally approved medical procedure represents a dangerous legislative precedent. Abortion opponents may be deluging Congress with postcards; abortion rights defenders may be showcasing emotionally powerful stories of women with medically tragic pregnancies whose future childbearing hopes have been preserved by "D & E's."

Senators, however, should realize that their vote to sustain or override the President's veto involves more than just another abortion battle. It also concerns the larger issue of to what extent should legislators regulate the clinical practice of medicine.

David J. Garrow is the author of *Liberty and Sexuality: The Right to Privacy and the Making of*

Debating the 'partial-birth' ban

The mystery to me is how anybody can be partially born. It raises the same dilemma as saying someone was partially exterminated, partially dead or partially raped. It seems to me these physical states are binary, like on or off. So I investigated the partial-birth procedure that President Clinton wants to preserve.

The abortion specialist pulls the baby out of the birth canal feet first until all but the skull is exposed. Scissors are used to puncture the skull. Why the procedure? It turns out that the U.S. Supreme Court ruled that 14th Amendment protections apply only to persons, not the unborn. However, a living, just-delivered baby, no matter how premature, feeble and tenuous, is constitutionally a person. Legally, a baby is not born, and hence not a person, until the head passes through the birth canal. Therefore, when an abortionist leaves the head in the birth canal, he is free to kill the baby and escape murder charges. It's a matter of three or four inches that makes the legal difference between murder and abortion.

Most Americans (72 percent) see the partial-birth ban as a reasonable measure. But many abortion activists see the ban as that important camel's nose into the abortion tent and believe they must fight the nose, lest the entire beast enter.

Walter E. Williams
Syndicated columnist

I walked out of Mass in my parish church some weeks ago after my pastor stood on the altar and urged us — in the name of the sanctity of human life — to sign and mail postcards calling Congress to override President Clinton's veto of a bill criminalizing one type of abortion.

Even before the veto, the National Conference of Catholic Bishops took out a full-page ad in the Washington Post ridiculing the President's insistence on a health exception in the bill, claiming that a woman would then have such abortions because she "hates being fat" or "can't afford a baby and a new car." The bishops distributed 17 million sets of postcards to parishes around the country. Each held three cards, one for U.S. senators and one for the local congressional representative, urging them to override the President's veto of the ban on what they labeled "partial birth" abortion — a term previously unknown to the medical establishment.

The pamphlets in the back of my church were titled "one-fifth abortion, four-fifths infanticide." They featured a line drawing of a large, well-formed infant being pulled from an opening as a huge hand stabbed it with a suction catheter. The baby was center stage. Other than her disembodied pelvis, the woman was invisible.

But I had seen the faces and heard the voices of these women. A year ago, when the bill first hit the headlines, I'd met with women who, faced with catastrophic endings to their pregnancies, had chosen to undergo this procedure. The women had learned through sonograms that these pregnancies were doomed weeks or even months before their due date.

Because the dilation and extraction procedure was available to them, these women's pregnancies could be ended without invasive surgery or the danger of damage to the cervix or uterus that might make later pregnancies risky or impossible. Although in some cases a spinal needle has to be used to decrease the size of the head enough to bring it safely through the birth canal, the fetus is delivered intact.

This makes genetic testing possible that enables doctors to advise the parents about future risks. And it means that the women, with their families, can see and hold and mourn the lost child. They can begin the process of healing.

Janet Gallagher
Director of the Reproductive Freedom Project and the

The Alan Guttmacher Institute
New York and Washington

A Not-for-Profit Corporation for Reproductive Health Research, Policy Analysis and Public Education

1120 Connecticut Avenue
Suite 460
Washington, DC 20036
Telephone: 202 296-4012
Fax: 202 223-5756
e-mail: policyinfo@agi-usa.org

The data remain the same; only the confusion is new. Of the 1.5 million abortions performed annually:

- Half of all abortions take place during the first eight weeks of pregnancy.
- Ninety percent of all abortions occur by the end of the first twelve weeks.
- Ninety-nine percent of all abortions are performed before 21 weeks.
- At 21 weeks or more, the time period during which the dilation and extraction procedure is used, less than one percent of all abortions are performed.
- After 26 weeks (the third trimester), 4/100ths of one percent of all abortions occur.

9/24/96

Boulder Abortion Clinic P.C.

1130 Alpine Avenue
Boulder, Colorado 80304
(303) 447-1361

September 24, 1996

Dear Member of Congress:

I am distressed by recent articles in the *Washington Post*, and statements by Members of Congress, that have left the absolutely false impression that thousands of abortions are performed in the seventh, eighth and ninth months of pregnancy for reasons that do not involve a woman's life or health, or in cases of severe fetal anomaly. Nothing could be further from the truth, and it is important that you -- and the public -- understand the facts, as the Senate prepares to vote on a bill that seeks to criminalize some later abortions. As one of the very few practitioners who provide third trimester abortions, I can assure you that I know of no physician who will provide an abortion in the seventh, eighth or ninth month of pregnancy, by *any* method, for any reason except when there is a risk to the woman's life or health, or a severe fetal anomaly.

I was one of the physicians quoted in the *Post* article, "Late-Term Abortions," on September 17, 1996. I was quoted accurately, and I assume other physicians were as well. However, the piece is edited in such a confusing manner that one is never sure what type of abortion method and what gestation of pregnancy is being discussed. For example, one of my colleagues is paraphrased as stating that 55% of abortions performed after 20 weeks are done for non-medical reasons. The article fails to note that this physician is referring to his own limited practice, which does not include third-trimester abortions. He is not referring to third-trimester abortions -- but the article implies that he is. The article also equates abortions at 13 weeks with abortions at 22 weeks, when they are quite different both in terms of patient profile and clinical requirements. With such misleading editing, readers, including the *Post's* own Richard Cohen (who wrote about the issue on September 24), can certainly be forgiven for being confused by the article.

The facts are these:

Third-trimester abortions are extremely uncommon; fewer than 600 are performed per year. This is an irrefutable fact documented by the Alan Guttmacher Institute (AGI), the institution acknowledged by the Centers for Disease Control as having the most complete information on abortion practice. When Richard Cohen wrote in his June 1995 column that "just four one-hundredths of one percent of abortions are performed after 24 weeks," and that "most, if not all, are performed because the fetus

Warren M. Hern, M.D., M.P.H., Ph.D.

Diplomate, American Board of Preventive Medicine
Fellow, American College of Preventive Medicine

is found to be severely damaged or because the life of the mother is clearly in danger," he was absolutely correct. Having published extensive research on the subject, and being well acquainted with my few colleagues who also treat these cases, I know that the AGI statistics Cohen quoted are accurate. Women like Vikki Stella, whose own health was at risk from her complicated pregnancy with a fetus that could not survive, are typical of third-trimester abortion patients.

Abortions in the late second trimester -- 20 weeks to 24 weeks -- are also extremely limited. AGI's research documents that only approximately one percent of all abortions are performed at this stage of pregnancy.

Abortion providers and pro-choice groups have not claimed that second-trimester abortions are only performed in cases of risk to the woman's life or health, or fetal abnormalities. Based on my own practice and the experiences of my colleagues, a significant percentage of second-trimester abortions at and after 16 weeks are, indeed, in wanted pregnancies that have been diagnosed with a serious, untreatable medical condition afflicting either the mother, the fetus or both. Those second-trimester, pre-viability abortions -- by whatever method performed -- that are not done for medical indications have been repeatedly found to be constitutionally protected by the Supreme Court of the United States.

The confusion on the issue of numbers is *not* due to misrepresentation of the facts by the pro-choice movement. Rather, it is due to the clever manipulation of some facts by anti-choice groups, who with an extremely well-financed campaign have sought to confuse the public about the true effects of this legislation on medical practice.

The overall effect of the *Post* article is, sadly, to direct attention toward the "numbers game" and away from the real women who would suffer serious harm should this bill become law. These women demonstrate precisely why this bill is such a tragic injustice. The fact is that women like Coreen Costello, a Republican opposed to abortion who desperately wanted her daughter, Katherine Grace, to be able to live, are exactly the women who would be affected should this bill become law -- and be devastatingly hurt by it. They would have a safe medical option taken away from them at their time of greatest need. The "numbers game" should not be allowed to confuse the issue and put these women at risk. I have dedicated much of my professional life to the health of these women -- they are the patients to whom we physicians must commit our greatest skill and compassion. We cannot do that if we risk jail for exercising our best medical judgment.

Sincerely,

Warren Hern, MD, MPH, PhD

NARAL ***Promoting Reproductive Choices***

To: Interested Parties

From: Jo Blum - Vice President for Government Relations
Allison Herwitt - Legislative Representative

Subject: Information about Abortion Statistics

Date: 24 September 1996

The Alan Guttmacher Institute (AGI) has been collecting and analyzing abortion statistics since Roe v. Wade. Below is the latest data that AGI has collected. Contrary to recent news stories and columns, there is no new data. This is the data that has been used since the debate on HR 1833 began over a year ago.

- It is estimated that there are approximately 1.5 million abortions every year.

  - 89% of all abortions are performed during the first 12 weeks of pregnancy.
  - 18% take place at 11-15 weeks or less from the time of the woman's last menstrual period (LMP).
  - 1% take place at 16-20 weeks LMP.
  - 1% take place at 21 weeks LMP or more.
  - 0.04% take place after 26 weeks LMP.

- Only about 600 abortions are performed each year in the third trimester.

- Abortion data is not collected by the method of the procedure used to terminate the pregnancy.

- The "intact D& E" procedure which has been termed "partial birth abortion" by abortion opponents is used after 20 weeks.

- Roe v. Wade allows states to ban abortions after viability (which usually occurs after 26 weeks) except in cases of life and health. 41 states have passed restrictions. Consistent with Roe v. Wade, prior to viability, the government does not require the reporting of the reasons an abortion is performed.

- Of the approximately 600 abortions performed after viability, only a small percent use the "intact D & E" method.

If you have any questions or need additional information, please call Jo Blum at 973-3003 or Allison Herwitt at 973-3047.

National Abortion and Reproductive Rights Action League

1156 15th Street, NW
Suite 700
Washington, DC 20005

Phone (202) 973-3000
Fax (202) 973-3096
E-Mail: narall@prorgi.org

SEP-24 96 12:34 FROM:WOMENS OFFICE 202-456-7311 TO:2024562215 PAGE:07
09. 25. 96 11:36 AM P03

Abortion debate leaves Dems with dilemma

By Jamie Stiehm

Facing a politically charged vote Thursday on whether to sustain or override a presidential veto on a late-term abortion procedure, Senate Democrats are worried that the issue could come back to haunt them.

Acknowledging the discomfort level in the Democratic caucus, Senate Minority Leader Tom Daschle (D-S.D.) indicated Tuesday that the issue would be revisited in the next Congress.

"I'm going to make a real effort to try to find a way in which to find a suitable compromise on this issue, once the veto is sustained," Daschle declared, referring to the abortion method known as intact dilation and extraction. "It would have to be a health emergency situation involving the health and life of the mother." Daschle also mentioned concerns among colleagues that it not be an elective procedure in the third term.

Sen. Daniel Moynihan (D-N.Y.) denounced the procedure "as close to infanticide as anything I have seen in our judiciary."

Late term abortion has become a focal point for the Catholic Church, with all eight U.S. cardinals protesting President Clinton's veto of a ban on the procedure at a meeting at the Capitol this month. The National Right to Life Committee and Traditional Values Coalition are also spearheading a campaign to persuade Congress to criminalize the procedure.

Following a House vote last week to override the veto, Senate Democrats are expected to muster more than the necessary 34 votes to sustain the veto as long as they have a handful of pro-choice Republicans. But they are far from happy about going on the record on such an unpopular issue this close to an election. As Sen. Byron Dorgan (D-N.D.) put it, "People are going to grit their teeth and vote."

> ***'As close to infanticide as anything I've ever seen.' — Sen. Moynihan***

At least two Democrats who voted against the ban, Sens. Sam Nunn (D-Ga.) and Patrick Leahy (D-Vt.), appear to be having second thoughts. Both said they were not ready to say how they intend to vote. Nunn said, "I haven't studied the issue yet."

Dorgan and Kent Conrad (D-N.D.) both support legal abortion, but plan to vote for an override. "I was just home this weekend," said Conrad, "and that's the issue that people talked about the most." He added that his office has received between 5,000 and 6,000 letters protesting the procedure.

In addition, one pro-choice Republican senator, Arlen Specter (R-Pa.), told The Hill that he may change his mind. "I'm still listening to constituents," said Specter, who voted last December to keep the late-term procedure legal.

Another pro-choice Republican, Sen. Sheila Frahm (R-Kan.) said she will vote to override because she "dislikes the procedure." Kansas' senior senator, Nancy Kassebaum (R-Kan.), said she will vote to sustain the veto. At least three other pro-choice Republicans, James Jeffords (R-Vt.), John Chafee (R-R.I.) and Olympia Snowe (R-Maine) plan to stick with their previous positions and vote to uphold the veto, thereby keeping the procedure legal, according to aides.

Nine Senate Democrats put themselves on record against the procedure last year, including Harry Reid (D-Nev.), Joseph Biden (D-Del.) and John Breaux (D-La.). Some predicted there would be more this time around: "It will be closer this time," said one member.

However, the chief Senate whip on the veto, Barbara Boxer (D-Calif.) said she does not foresee serious public "erosion" within the caucus, despite private misgivings.

"It will be similar to the House," Boxer said, meaning that she doesn't foresee significant switches on the issue. She added, "We could outlaw this procedure if they would allow us an amendment for an exemption for the life and health of the mother....Those on the other side would rather have a political hot potato issue."

Pennsylvania's Rick Santorum (R) is the leading proponent of overriding the veto.

With polls showing weak public support for this procedure, the pro-choice community is worried that their opposition has found an effective tactic for dividing them. Asked if this is likely to splinter the pro-choice community, Susan Cohen of the Alan Guttmacher Institute replied, "That's indisputable. It's certainly peeling off pro-choice politicians and some pro-choice voters. Whether it's factual or emotional is the question."

Rep. Earl Pomeroy (D-N.D.), who voted to override the veto, expressed an opinion that he said reflects the mainstream in his state: "I would consider myself pro-choice, but this is a reprehensible procedure. It's not a tough vote or a close call."

The Hill 9/25/96

METROPOLITAN MEDICAL ASSOCIATES
40 Engle Street
Englewood, New Jersey 07631
(201) 567-0522

Sept. 23, 1996

Mr. Glenn Ritt
Editor, The Record
150 River Road
Hackensack, NJ 07601

Dear Mr. Ritt,

We, the physicians and administration of Metropolitan Medical Associates, are deeply concerned about the many inaccuracies in the article printed on September 15, 1996 titled "The Facts on Partial-Birth Abortions".

The article incorrectly asserts that MMA "performs 3,000 abortions a year on fetuses between 20 and 24 weeks, of which at least half are by intact dilation and evacuation." This claim is false as is shown in raports to the New Jersey Department of Health and documents submitted semiannually to the New Jersey State Board of Medical Examiners. These statistics show that the total annual number of abortions for the peried between 12 and 23.3 weeks is about 4,000, with the majority of these procedures being between 12 and 16 weeks. The intact D&E procedure (erroneously labeled by abortion opponents as "partial birth abortion") is used only in a small percentage of cases between 20 and 23.3 weeks, when a physician determines that it is the safest method available for the woman involved. Certainly, the number of intact D&E procedures performed is nowhere near the 1,500 estimated in your article. MMA perform no third trimester abortions, where the state is permitted to ban abortions except in cases of life and health endangerment.

Second, the article erroneously states that most women undergoing intact D&E procedures have no medical reason for termination. The article then misquotes a physician from our clinic stating that "most are Medicaid patients...and most are for elective, not medical, reasons...Most are teenagers." This is a misrepresentation of the information provided to the reporter. Consistent with Roe v. Wade and New Jersey State law, we do not record a woman's specific reason for having an abortion. However, all procedures for our Medicaid patients are certified as medically necessary as required by the New Jersey Department of Human Services.

Because of the sensitive and controversial nature of the abortion issue, we feel that it is critically important to set the record straight.

The Management of Metropolitan Medical Associates

cc: Mr. Len Fishman, Commissioner
NJ Department of Health
Mr. Kevin Earle, Executive Director
Medical Board of Examiners
The Honorable William Bradley
United States Senator
The Honorable Frank Lautenberg
United States Senator
The Honorable Robert Torricelli
United States Congressman

WA Post 9-24-96

Richard Cohen

A New Look at Late-Term Abortion

A rigid refusal even to consider society's interest in the matter endangers abortion rights.

Back in June, I interviewed a woman—a rabbi, as it happens—who had one of those late-term abortions that Congress would have outlawed last spring had not President Clinton vetoed the bill. My reason for interviewing the rabbi was patently obvious: Here was a mature, ethical and religious woman who, because her fetus was deformed, concluded in her 17th week that she had no choice other than to terminate her pregnancy. Who was the government to second-guess her?

Now, though, I must second-guess my own column—although not the rabbi and not her husband (also a rabbi). Her abortion back in 1984 seemed justifiable to me last June, and it does to me now. But back then I also was led to believe that these late-term abortions were extremely rare and performed only when the life of the mother was in danger or the fetus irreparably deformed. I was wrong.

I didn't know it at the time, of course, and maybe the people who supplied my data—the usual pro-choice groups—were giving me what they thought was precise information. And precise I was. I wrote that "just four one-hundredths of one percent of abortions are performed after 24 weeks" and that "most, if not all, are performed because the fetus is found to be severely damaged or because the life of the mother is clearly in danger."

It turns out, though, that no one really knows what percentage of abortions are late-term. No one keeps figures. But my Washington Post colleague David Brown looked behind the purported figures and the purported rationale for these abortions and found something other than medical crises of one sort or another. After interviewing doctors who performed late-term abortions and surveying the literature, Brown—a physician himself—wrote: "These doctors say that while a significant number of their patients have late abortions for medical reasons, many others—perhaps the majority—do not."

Brown's findings brought me up short. If, in fact, most women seeking late-term abortions have just come to grips a bit late with their pregnancy, then the word "choice" has been stretched past a reasonable point. I realize that many of these women are dazed teenagers or rape victims and that their anguish is real and their decision probably not capricious. But I know, too, that the fetus being destroyed fits my personal definition of life. A 3-inch embryo (under 12 weeks) is one thing; but a nearly fully formed infant is something else.

It's true, of course, that many opponents of what are often called "partial-birth abortions" are opposed to any abortions whatever. And it also is true that many of them hope to use popular repugnance over late-term abortions as a foot in the door. First these, then others and then still others. This is the argument made by pro-choice groups: Give the antiabortion forces this one inch, and they'll take the next mile.

It is instructive to look at two other issues: gun control and welfare. The gun lobby also thinks that if it gives in just a little, its enemies will have it by the throat. That explains such public relations disasters as the fight to retain assault rifles. It also explains why the National Rifle Association has such an image problem. Sometimes it seems just plain nuts.

Welfare is another area where the indefensible was defended for so long that popular support for the program evaporated. In the 1960s, '70s and even later, it was almost impossible to get welfare advocates to concede that cheating was a problem and that welfare just might be financing generation after generation of households where no one works. This year, the program on the federal level was trashed. It had few defenders.

This must not happen with abortion. A woman really ought to have the right to choose. But society has certain rights, too, and one of them is to insist that late-term abortions—what seems pretty close to infanticide—are severely restricted, limited to women whose health is on the line or who are carrying severely deformed fetuses. In the latter stages of pregnancy, the word abortion does not quite suffice: we are talking about the killing of the fetus—and, too often, not for any urgent medical reason.

President Clinton, apparently as misinformed as I was about late-term abortions, now ought to look at the new data. So should the Senate, which has been expected to sustain the president's veto. Late-term abortions once seemed to be the choice of women who, really, had no other choice. The facts now are different. If that's the case, then so should be the law.

WASHINGTON FEMINIST FAXNET
A Project of
The Center for Advancement of Public Policy
Fax (202) 265-6245 Voice (202) 797-0606

September 19, 1994

HOTFLASH -- URGENT ACTION REQUIRED!

"[the House vote to override President Clinton's veto on so-called 'partial birth' abortions] is a huge victory. It's the first time since Roe v. Wade that Congress is poised to outlaw an abortion procedure . . . If Clinton is re-elected, you have to come up with similar bills that outlaw other procedures . . . and it's almost like the welfare bill, a win-win, because if he signs it, he demoralizes his side, and if he doesn't, you energize our side." Ralph Reed, of the Christian Coalition after the House vote 9/20/96.

IF THESE WORDS ARE CHILLING TO YOU, MAKE YOUR CALL NOW!

Thanks to everyone who responded to our HOTFLASH last week to try and stop a House override of President Clinton's veto of the so-called "partial-birth" abortion ban. Because of calls from WFF activists and others, the vote was held to a bare majority. This means the momentum is slowed, and the Senate does not have a mandate to override, but only if pro-choice forces stay mobilized.

BUT, Capitol Hill is being inundated with faxes and telegrams from anti-choice forces, led by Catholic Bishops. The vote in the Senate could be as early as Thursday, September 26. Calls are needed early and often to the Senate (202-224-3121) to URGE SENATORS TO UPHOLD THE PRESIDENT'S VETO.

Senators should be reminded that this abortion procedure is used only in the most tragic circumstances, and that while they, as powerful, privileged members of society could no doubt get around the ban if it was important to a member of their family, most women in need of this procedure would be forced to risk their lives or health if the ban takes affect.

DON'T DELAY - SOMEONE YOU LOVE MAY NEED A CHOICE.

Wash Times 9-20-96

To: Prochoice friends

From: Pat Reuss

ABORTION

From page A1

"This is an attempt to undo choice, this extreme Congress we have," said outgoing Rep. Patricia Schroeder, the Colorado Democrat who headed up the opposition. "I find this a very sad vote to end my career on."

But several of her fellow Democrats joined Republicans on the House floor, bagging members to outlaw such second- and third-trimester abortions.

"I do agree with the Roe vs. Wade decision," said Rep. James P. Moran, Virginia Democrat. "What we are talking about now is the delivery of a fetus clearly with the shape and functions of a human being."

Rep. Ralph M. Hall, Texas Democrat, read to the House quotes from former Surgeon General C. Everett Koop, who claims Mr. Clinton was "misled" by his advisers into believing partial-birth abortions are necessary.

Reps. Tony P. Hall, Ohio Democrat, and James A. Barcia, Michigan Democrat, also argued for an override.

"Those pro-life Democrats really showed their stuff," said Mr. Smith, the New Jersey Republican. "They didn't walk."

Their pro-choice opponents claimed the override vote was a crassly political move timed to embarrass Mr. Clinton and influence the November elections.

"This debate has nothing to do with murdering babies; it has everything to do with murdering truth," said Lloyd Doggett, Texas Democrat. "I would say to all anti-choice Republican militants: The blood is on your hands."

He added, "This same crowd that talks about scissors murders — which aren't occurring today — [next] will be telling American people what kind of birth control they can use."

Photo by Barbara Davidson The Washington Times

Rep. Charles T. Canady discusses the House's vote to override a veto on a ban of partial-birth abortions as Rep. Chris Smith looks on.

Others, such as Rep. Xavier Becerra, California Democrat, asked why Republicans had delayed scheduling the override vote for five months after Mr. Clinton's April 10 veto.

"[Because] Americans can't believe this procedure exists," responded Rep. Henry J. Hyde, Illinois Republican. "It has taken months to educate them."

GOP presidential candidate Bob Dole, who has campaigned against the procedure, repeated that view: "As more and more Americans have learned of this procedure, the president has been left almost alone, defending the indefensible."

"I challenge the president to explain to the American people why he persists in his false assertions despite the strong opposition of Dr. Koop and an array of other medical authorities," he said.

There was no formal comment from Mr. Clinton, but White House Press Secretary Michael McCurry said, "We're confident we can sustain the veto in the Senate."

Yesterday's vote came at an important juncture in abortion politics, arriving on the heels of Wednesday's announcement by the Food and Drug Administration that it has conditionally approved RU-486, the controversial "abortion pill." It is expected to be available by mid-1997.

The Senate and the House also remain deadlocked in committee over a proposal to allow more funds for overseas abortions.

Although the Senate has not yet announced when it will vote to override Mr. Clinton's veto, a group called the Child Protection Fund has announced a massive TV campaign to influence public sentiment against the practice.

The group's chairman is Mary Ellen Bork, wife of former judge Robert H. Bork. Organizers of the campaign say the majority of Americans are still unaware of the procedure's gruesome nature.

The ban, if overridden, would allow doctors to perform the procedure only if they can show it is essential to save the mother's life.

In case you didn't see this

MEMORANDUM OF CALL

Previous editions usable

TO: Todd

☑ YOU WERE CALLED BY– ☐ YOU WERE VISITED BY–

Vicki Radd

OF (Organization)

☐ PLEASE PHONE ▶ ☐ FTS ☐ AUTOVON

☐ WILL CALL AGAIN ☐ IS WAITING TO SEE YOU

☒ RETURNED YOUR CALL ☐ WISHES AN APPOINTMENT

MESSAGE

RECEIVED BY	DATE	TIME
[signature]	9/1	11:40

50363-111 NSN 7540-00-634-4018 OPTIONAL FORM 363 (Rev. 1-94)
*U.S. G.P.O.:1994-300-891/00003 Prescribed by GSA

CLINTON GORE 96

96 SEP 16 AM 11:52

FACSIMILE COVER SHEET

TO: Todd Stern

FROM: VICTORIA RADD

FAX TO: _____

DATE: _____

PAGES: ____ (INCLUDING COVER)

COMMENTS: Call me at your convenience –

Vicki

This message is intended only for the use of the individual or entity to which it is addressed. This message may contain information that is privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone (202-331-1996) and return the original message to us at the address below. Thank you.

P.O. Box 19100 • Washington, D.C. 20036-9100 • voice: 202 · 331 · 1996 • tty: 202 · 530 · 2170 • fax: 202 · 496 · 4849

Paid for by the Clinton/Gore '96 General Committee, Inc.

Stephanie Foster: → 496-5087.

Talking Points

What is the President's position on late term abortion -- that is, abortion in the third trimester of pregnancy?

President Clinton has long opposed late term abortions except "where necessary to protect the life or health of the mother." As Governor of Arkansas, he signed a bill into law that barred third trimester abortions, with an exception for the life or health of the mother. President Clinton would sign such a bill on the national level if it was sent to him by Congress.

The bill sent to the president by Congress bans late term abortions, ~~only~~ allowing the procedure to be used only to save a woman's life. The bill does not allow a doctor to use this procedure when, in the doctor's medical judgment, the procedure is necessary to avert serious health risks to the mother.

The President believes that a woman's doctor should have the ability to determine -- in the best exercise of medical judgment -- that this procedure is necessary to ~~save the life or health of the mother~~.

Why did the President veto the late term abortion bill?

President Clinton vetoed the bill for one reason: ~~the bill says that this procedure can be used only when a doctor believes that a woman faces death by carrying her pregnancy to term.~~

~~The bill fails to allow late term abortions~~ in those extremely rare cases **where a physician says that its use is necessary to protect a women from serious injury to her health.**

What is a "partial birth abortion"?

There is no procedure called a "partial birth" abortion. This bill refers to procedures used in the third trimester to terminate a pregnancy that threatens a woman's life or health.

How many families does this affect?

Late term abortions are very rare. In this country, only four one hundredths of one percent (.04%) of abortions are performed after 26 weeks of pregnancy (the third trimester). Only 600 women annually undergo the procedure outlawed by the late term abortion bill.

Do we know who some of these families are?

Before deciding to veto the late term abortion bill, President Clinton heard from women and families about their personal experiences.

He also met with five women -- all of whom desperately wanted to have babies and were

These women were advised by their doctors that this procedure was the best hope of preventing death or grave harm, including the loss of the ability to bear children in the future.

devastated to learn that their babies had fatal conditions ~~and~~ were certain to perish before, during or shortly after birth.

For these women -- this was not about ~~choosing to have an abortion -- it was about choosing to have a child. Each had been advised by their doctors that this procedure was their best chance to avert the risk of their own death or of grave harm to them which would have included their inability to bear children in the future~~. The only question was how much grave damage ~~they were going to suffer~~ was going to be done to the women.

These women come from varied walks of life, backgrounds and political parties and views on abortion. For example:

-- Colleen Costello is a stay-at-home mother ~~of two~~ who lives in Agoura, California. She is a fundamentalist Christian, a Republican and she opposes most legal abortions, having participated in "Walks for Life." When seven months pregnant, ultrasound revealed that her fetus had a severe and fatal neurological disorder. The head was swollen with fluid and the body was stiff. There was excess amniotic fluid collecting in her uterus that could have caused a rupture, ~~and if the fetus died in utero, dangerous toxins could have been emitted~~. She and her husband ~~have just~~ recently had a new baby and have two other children.

-- Mary-Dorothy Line is a ~~financial~~ consultant on Los Angeles. She is a Republican, a practicing Roman Catholic and a supporter of abortion rights. When she was nineteen weeks pregnant, she found out that her child had too much brain fluid and that the brain could not develop. Line underwent a late term abortion. She and her husband are expecting **[in September].**

-- Claudia Crown Ades lives in Sherman Oaks, California and works in the entertainment industry. She is Jewish, a Democrat and supports abortion rights. When she was six months pregnant, she found out that her first child was diagnosed with fatal chromosomal disorder, which caused brain damage and serious heart complications. After suffering several miscarriages, Ades and her husband are adopting a child.

What procedures are used for a late term abortion?

The most common procedure used is called an "intact D&E." This procedure poses the least risk to the mother and is the most likely procedure to protect the woman's ability to have children in the future.

This procedure is considered "elective" even when necessary to save the women's life. It is elective only because it is scheduled when an appropriate doctor is available and the patient is stable. Organ transplants and coronary bypasses can be classified as elective.

A cesarean delivery is generally not an alternative because it involves twice as much blood loss and carries with it all of the dangers of major surgery.

Delete

Kemp falls for bait; Farrakhan a false idol

The Farrakhan trap.

That's what I call the political bog Jack Kemp stumbled into last week when he spoke admiringly of the Nation of Islam leader's philosophy of self-help and personal responsibility.

It was a guarded embrace of the controversial black Muslim's version of the family values theme — a pat on the back that Kemp sought to qualify by making it clear he didn't agree with all of Farrakhan's teachings.

Kemp isn't the first politician to stumble into this abyss.

Jesse Jackson backed into it in 1984 when he accepted Farrakhan's support of his presidential campaign. Kweisi Mfume ended up there in 1993 after proclaiming the existence of "a sacred covenant" between the Congressional Black Caucus and the Nation of Islam. Ben Chavis plunged into it the next year when he invited Farrakhan to the NAACP's black leadership summit. And last year Ed Rendell, Philadelphia's Jewish mayor, landed there after praising the worthy goals of Farrakhan's Million Man March.

By DeWayne Wickham

Each took a calculated risk — they tried to accept some of Farrakhan's message without being stigmatized by the rest — and got burned. But that lesson was lost on Kemp. Why? Because the GOP vice presidential nominee is in a desperate search for black votes.

For years Kemp, who came to value integration as a quarterback on the playing fields of the National Football League, urged GOP leaders to shed the party's race-baiting Southern strategy and expand its base by aggressively courting black voters. Now that he's the second banana on this year's Republican presidential ticket, Kemp is trying to practice what he preached. He got off to a good enough start, trolling inner-city neighborhoods for black converts to the kinder, gentler GOP he envisions. But then Kemp got caught in the Farrakhan trap.

The Farrakhan trap is baited with the belief that the Nation of Islam leader is a dominant force in black America. He's not. Louis Farrakhan is a bit player in the lives of most black folks. He is neither a mayor nor congressman. He doesn't sit on a city council or in a state legislature. His organization is not an economic force within the black community. And many bishops of the AME church have more congregants under their charge than the Nation of Islam is thought to have members.

Farrakhan is a preacher with a gift for gab. He is at times spellbinding, but seldom convincing in all that he says. His message is a mix of good and evil; love and hate. He is as often right in his criticism of this nation's treatment of African-Americans as he is wrong about his prescriptions for turning things around.

Black folks love to listen to Farrakhan — especially when he's beating up on those whites who torment us — but few are willing to follow his teachings. Since it officially entered the political arena in 1984, the Nation of Islam hasn't had a significant impact on a single election. Some of its members have run for public office, but to my knowledge not one of them has won an election of any consequence.

While Kemp touts Farrakhan's self-help message, the Nation of Islam's record is almost as bad as the GOP's treatment this century of African-Americans. According to a 1985 *Chicago Tribune* report that relied heavily on public records, the organization's business holdings are "riddled with debt."

Kemp's quest for black votes — and his embrace of Farrakhan's social conservative values — blinded him to this reality. With the Dole-Kemp team far behind in the polls and given little chance of winning in November, Kemp was desperately trying to mine votes on the tundra of the American electorate when he offered up his faint words of praise for the Black Muslim leader.

Words that landed him in the Farrakhan trap.

Issues the candidates should be talking about

Our crumbling infrastructure and our cuts in basic research aren't sexy topics, but only government can do something about them.

By Vernon Grosse
Counterpoints

WASHINGTON — If you listen to the presidential candidates, you will not think much of the charge that the campaign is all image and no issues.

Bill Clinton has been blanketing the country with issue proposals, from tuition tax credits to capital gains breaks for homeowners and extended family and medical leave. When he isn't offering new ideas, he is talking about the implications of just-passed proposals like welfare reform.

Bob Dole, for his part, is actively discussing his proposal for school vouchers and his sweeping tax cut and budget plan, and criticizing Clinton's policies towards Bosnia, Iraq and drug use and abuse.

Whatever issues candidates think will resonate with voters, they bring up readily in their speeches.

We are awash in discussion of issues — but not necessarily the right ones. There is another, less noted problem with our campaigns. Call it like the Sherlock Holmes adage about the dog that didn't bark. There are important issues none of the candidates talk about because they see little if any political benefit in doing so. The news media follow suit, ignoring any area the candidates avoid.

But there are issues of enormous consequence for America's future that shouldn't be ignored. If the candidates won't bark about them, I will. Here are two:

1. Infrastructure. Bill Clinton has made as his re-election theme building a bridge to the 21st century. He means a rhetorical bridge — he ought to refer to the physical ones. In both the Clinton and Dole convention speeches, there was much made of education, welfare, crime, drugs, families, the environment, the global economy and trade, amidst a host of concerns about the future. There was scarcely a mention of the physical infrastructure in the country — the bridges, dams, locks, roads, railroads and information cables, along with the airports, schools and other public buildings, that underpin our transportation, communications and education systems and are a key to our economy.

For years, we have known that our infrastructure was deteriorating. Three-fourths of the nearly 600,000 bridges in America were built before 1938, and many of them are badly in need of repair. Many of our subway systems go back 80 or 70 years or more, were built to last 50 years, and are showing the wear and tear. Railbeds, runways, waterways — all need lots of work.

Of course, we spend a lot of money building and repairing infrastructure much of it through the Federal Highway Trust Fund that is funded by federal gasoline taxes. But that money goes to highway building and repair, and instead of moving to add to its flexibility to use for other related transportation needs, Congress has tried to seal it off even further from budget flexibility. And other infrastructure spending needs are being pushed to the side by the relentless pressures on the discretionary spending side of the budget.

By Rob Dykstra/USA TODAY

The smooth, efficient and predictable movement of persons, goods and ideas across the country is one of the biggest assets we have to excel in the global economy. We are pursuing a classic, penny-wise/pound-foolish policy in this area.

2. Research. There are a few things libertarians and conservatives should agree on about what government ought to do — things in our collective interest that the private sector can't or won't take over.

One is basic research. Business can be counted on to do applied research — research aimed at a direct commercial payoff. But with few exceptions, basic research, which may or may not have a short-term economic return, and where a payoff may be snatched away by a competitor after you've done the heavy lifting, has never been and never will be a priority of the private sector in a market economy. However, our huge edge over the rest of the world in economic competition has come in significant part from our edge in science and research — an edge that gives us the lion's share of Nobel Prize winners year after year. That is true for research in physics and other natural sciences, in economics and social sciences, and in medical research as well. And the long term benefit for the country, in growth and quality of life, is indisputable.

In the face of this, Congress has been busily cutting away at the Agency for Health Care Policy and Research, space and science research at NASA, the National Science Foundation, energy supply and fossil fuel research, and other key areas. The White House has been intent on cutting back defense-based research, including in areas such as missile defense. The National Institutes of Health budget has gone up, but not enough to cover inflation. A bill to expand the capability to do research into such deadly diseases as Alzheimer's and Parkinson's is floundering.

In many cases, the cuts in basic research are not real cuts but reductions in the rate of growth. But we can and should do better. Here is an area where the investment is small and the potential return to the whole society large. The dollar amounts in the context of a more than $1.5 trillion budget are tiny.

Infrastructure and basic research aren't big deals in politics, and they have no campaign sex appeal. But they are big issues for our future as a country in the 21st century.

COUNTERPOINTS: four columnists provide views from diverse perspectives on today's issues. Tuesday: Michael Gartner rotates Clinton and Dole don't disagree. Wednesday: Linda Chavez. Thursday: Susan Estrich. Monday: Norman Ornstein.

SEP-22 94 08:35 FROM: TO:2024561414 PAGE:04

Kemp falls for bait; Farrakhan a false idol

The Farrakhan trap.

That's what I call the political bog Jack Kemp stumbled into last week when he spoke admiringly of the Nation of Islam leader's philosophy of self-help and personal responsibility.

It was a guarded embrace of the controversial black Muslim's version of the family values theme — a pat on the back that Kemp sought to qualify by making it clear he didn't agree with all of Farrakhan's teachings.

Kemp isn't the first politician to stumble into this abyss.

Jesse Jackson backed into it in 1984 when he accepted Farrakhan's support of his presidential campaign. Kweisi Mfume ended up there in 1993 after proclaiming the existence of "a sacred covenant" between the Congressional Black Caucus and the Nation of Islam. Ben Chavis plunged into it the next year when he invited Farrakhan to the NAACP's black leadership summit. And last year Ed Rendell, Philadelphia's Jewish mayor, landed there after praising the worthy goals of Farrakhan's Million Man March.

By Barbara Haber

Each took a calculated risk — they tried to accept some of Farrakhan's message without being stigmatized by the rest — and got burned. But that lesson was lost on Kemp. Why? Because the GOP vice presidential nominee is in a desperate search for black votes.

For years Kemp, who came to value integration as a quarterback on the playing fields of the National Football League, urged GOP leaders to shed the party's race-baiting Southern strategy and expand its base by aggressively courting black voters. Now that he's the second banana on this year's Republican presidential ticket, Kemp is trying to practice what he preached. He got off to a good enough start, trolling inner-city neighborhoods for black converts to the kinder, gentler GOP he envisions. But then Kemp got caught in the Farrakhan trap.

The Farrakhan trap is baited with the belief that the Nation of Islam leader is a dominant force in black America. He's not. Louis Farrakhan is a bit player in the lives of *most* black folks. He is neither a mayor nor congressman. He doesn't sit on a city council or in a state legislature. His organization is not an economic force within the black community. And many bishops of the AME church have more congregants under their charge than the Nation of Islam is thought to have members.

Farrakhan is a preacher with a gift for gab. He is at times spellbinding, but seldom convincing in all that he says. His message is a mix of good and evil; love and hate. He is as often right in his criticism of this nation's treatment of African-Americans as he is wrong about his prescriptions for turning things around.

Black folks love to listen to Farrakhan — especially when he's beating up on those whites who torment us — but few are willing to follow his teachings. Since it officially entered the political arena in 1984, the Nation of Islam hasn't had a significant impact on a single election. Some of its members have run for public office, but to my knowledge not one of them has won an election of any consequence.

While Kemp touts Farrakhan's self-help message, the Nation of Islam's record is mixed as had as the GOP's treatment this century of African-Americans. According to a 1995 Chicago *Tribune* report that relied heavily on public records, the organization's business holdings are "riddled with debt."

Kemp's quest for black votes — and his embrace of Farrakhan's social conservative values — blinded him to this reality. With the Dole-Kemp team far behind in the polls and given little chance of winning in November, Kemp was desperately trying to mine votes on the tundra of the American electorate which he offered up his faint words of praise for the Black Muslim leader.

Words that landed him in the Farrakhan trap.

Issues the candidates should be talking about

Our crumbling infrastructure and our cuts in basic research aren't sexy topics, but only government can do something about them.

Counterpoints
By Norman Ornstein

WASHINGTON — If you listen to the presidential candidates, you will not think much of the charge that the campaign is all image and no issues.

Bill Clinton has been blanketing the country with issue proposals, from tuition tax credits to capital gains breaks for homeowners and extended family and medical leave. When he isn't offering new ideas, he is talking about the implications of just-passed proposals like welfare reform.

Bob Dole, for his part, is actively discussing his proposal for school vouchers and his sweeping tax cut and budget plan, and critiquing Clinton's policies towards Bosnia, Iraq and drug use and abuse.

Whatever issues candidates think will resonate with voters, they bring up readily in their speeches.

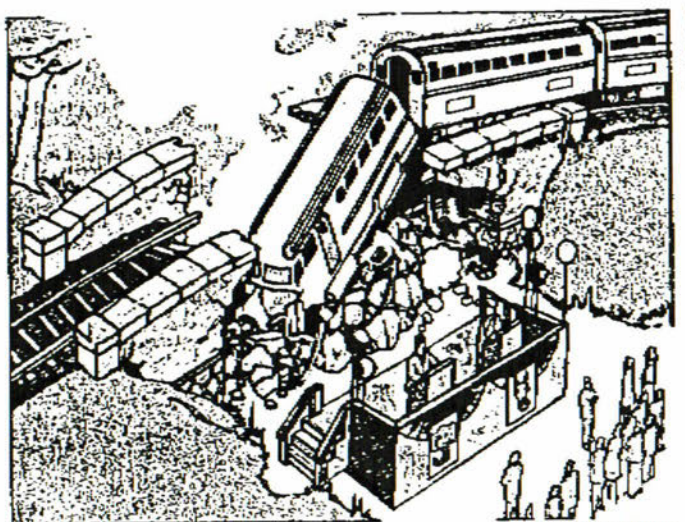
We are awash in discussion of issues — but not necessarily the right ones. There is another, less noted problem with our campaigns, kind of like the Sherlock Holmes adage about the dog that didn't bark. There are important issues none of the candidates talk about because they see little if any political benefit in doing so. The news media follow suit, ignoring any area the candidates avoid.

But there are issues of enormous consequence for America's future that shouldn't be ignored. If the candidates won't bark about them, I will. Here are two:

1. **Infrastructure.** Bill Clinton has made as his re-election theme building a bridge to the 21st century. He means a rhetorical bridge — he ought to refer to the physical ones. In both the Clinton and Dole convention speeches, there was much made of education, welfare, crime, drugs, families, the environment, the global economy and trade, amidst a host of other items on the laundry list of concerns about the future. There was scarcely a mention of the physical infrastructure in the country — the bridges, dams, locks, roads, railbeds and information cables, along with the airports, schools and other public buildings, that undergird our transportation, communications and education systems and are a key to our economy.

For years, we have known that our infrastructure was deteriorating. Three-fourths of the nearly 600,000 bridges in America were built before 1938, and many of them are badly in need of repair. Many of our subway systems go back 60 or 70 years or more, were built to last 50 years, and are showing the wear and tear. Railbeds, runways, waterways — all need lots of work.

Of course, we spend a lot of money building and repairing infrastructure much of it through the Federal Highway Trust Fund that is funded by federal gasoline taxes. But that money goes to highway building and repair, and instead of moving to add to its flexibility to use for other related transportation needs, Congress has tried to seal it off even further from budget flexibility. And other infrastructure spending needs are being pushed to the side by the relentless pressures on the discretionary spending side of the budget.



By Web Bryant, USA TODAY

The smooth, efficient and predictable movement of persons, goods and ideas across the country is one of the biggest assets we have to excel in the global economy. We are pursuing a classic, penny-wise/pound-foolish policy in this area.

2. **Research.** There are a few things liberals and conservatives should agree on about what government ought to do — things in our collective interest that the private sector can't or won't take over.

One is basic research. Business can be counted on to do *applied* research — research aimed at a direct commercial payoff. But with few exceptions, basic research, which may or may not have a short-term economic return, and where a payoff may be snatched away by a competitor after you've done the heavy lifting, has never been and never will be a priority of the private sector in a market economy. However, our huge edge over the rest of the world in economic competition has come in significant part from our edge in science and research — an edge that gives us the lion's share of Nobel Prize winners year after year. That is true for research in physics and other natural sciences, in economics and social sciences, and in medical research as well. And the long term benefit for the country, in growth and quality of life, is indisputable.

In the face of this, Congress has been busily cutting away at the Agency for Health Care Policy and Research, space and science research at NASA, the National Science Foundation, energy supply and fossil fuel research, and other key areas. The White House has been intent on cutting back defense-based research, including in areas such as missile defense. The National Institutes of Health budget has gone up, but not enough to cover inflation. A bill to expand the capability to do research into such deadly diseases as Alzheimers and Parkinson's is floundering.

In many cases, the cuts in basic research are not real cuts but reductions in the rate of growth. But we can and should do better. Here is an area where the investment is small and the potential return to the whole society large. The dollar amounts, in the context of a more than $1.5 trillion budget, are tiny.

Infrastructure and basic research aren't big deals in politics, and they have no campaign sex appeal. But they are big issues for our future as a country in the 21st century.

COUNTERPOINTS' four columnists provide views from diverse perspectives on today's issues. Tuesdays: Michael Gartner refocus Clinton and Dole don't disagree. Wednesdays: Linda Chavez. Thursdays: Susan Estrich. Mondays: Norman Ornstein.

DATE: 9/16/96

TO: Stephanie Foster

FAX NO: 496-2776 PHONE NO: 496-5087

FROM: Todd Stern
(202) 456-2702

SUBJECT/COMMENTS:

Number of pages, including cover sheet: 4

CLINTON GORE 96

96 SEP 16 AM :52

Stephanie Foster 496 2776

FACSIMILE COVER SHEET

TO: Todd Stern

FROM: VICTORIA RADD

FAX TO:

DATE:

PAGES: ____ (INCLUDING COVER)

COMMENTS: Call me at your convenience –

Vicki

This message is intended only for the use of the individual or entity to which it is addressed. This message may contain information that is privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone (202-331-1996) and return the original message to us at the address below. Thank you.

P.O. Box 19100 • Washington, D.C. 20036-9100 • voice: 202 · 331 · 1996 • tty: 202 · 530 · 2170 • fax: 202 · 496 · 4849

Paid for by the Clinton/Gore '96 General Committee, Inc.

Stephanie Foster: → 496-5087.

Talking Points

What is the President's position on late term abortion -- that is, abortion in the third trimester of pregnancy?

President Clinton has long opposed late term abortions except "where necessary to protect the life or health of the mother." As Governor of Arkansas, he signed a bill into law that barred third trimester abortions, with an exception for the life or health of the mother. President Clinton would sign such a bill on the national level if it was sent to him by Congress.

The bill sent to the president by Congress bans late term abortions, ~~only~~ allowing the procedure to be used only to save a woman's life. The bill does not allow a doctor to use this procedure when, in the doctor's medical judgment, the procedure is necessary to avert serious health risks to the mother.

VICKI - this is a crucial mistake + must be changed.

The President believes that a woman's doctor should have the ability to determine -- in the best exercise of medical judgment -- that this procedure is necessary to ~~save the life or health of the mother~~ avert a serious ~~adverse consequence~~ threat to a woman's health.

Why did the President veto the late term abortion bill?

President Clinton vetoed the bill for one reason: ~~the bill says that this procedure can be used only when a doctor believes that a woman faces death by carrying her pregnancy to term.~~

because it failed to include an exception permitting use of this procedure

~~The bill fails to allow late term abortions~~ in those extremely rare cases **where a physician says that its use is necessary to protect a women from serious injury to her health.** The President could not sign a bill that would have abandoned women facing such serious health risks.

What is a "partial birth abortion"?

There are several procedures used to perform late term abortions, including the one the bill is intended to ban.

There is no procedure called a "partial birth" abortion. ~~This bill refers to procedures used in the third trimester to terminate a pregnancy that threatens a woman's life or health.~~

How many families does this affect?

Late term abortions are very rare. In this country, only four one hundredths of one percent (.04%) of abortions are performed after 26 weeks of pregnancy (the third trimester). Only 600 women annually undergo the procedure outlawed by the late term abortion bill.

Do we know who some of these families are?

According to whom? If so delete the line

Before deciding to veto the late term abortion bill, President Clinton heard from women and families about their personal experiences.

He also met with five women -- all of whom desperately wanted to have babies and were

These women were advised by their doctors that this procedure was the best hope of preventing death or grave harm, including the loss of the ability to bear children in the future.

devastated to learn that their babies had fatal conditions and were certain to perish before, during or shortly after birth.

For these women -- this was not about choosing to have an abortion -- it was about choosing to have a child. Each had been advised by their doctors that this procedure was their best chance to avert the risk of their own death or of grave harm to them which would have included their inability to bear children in the future. The only question was how much grave damage they were going to suffer. was going to be done to the women. These babies

These women come from varied walks of life, backgrounds and political parties and views on abortion. For example:

-- Colleen Costello is a stay-at-home mother of two who lives in Agoura, California. She is a fundamentalist Christian, a Republican and she opposes most legal abortions, having participated in "Walks for Life." When seven months pregnant, ultrasound revealed that her fetus had a severe and fatal neurological disorder. The head was swollen with fluid and the body was stiff. There was excess amniotic fluid collecting in her uterus that could have caused a rupture, and if the fetus died in utero, dangerous toxins could have been emitted. She and her husband have just had a new baby.

-- Mary-Dorothy Line is a financial consultant on Los Angeles. She is a Republican, a practicing Roman Catholic and a supporter of abortion rights. When she was nineteen weeks pregnant, she found out that her child had too much brain fluid and that the brain could not develop. Line underwent a late term abortion. She and her husband are expecting **[in September]**.

-- Claudia Crown Ades lives in Sherman Oaks, California and works in the entertainment industry. She is Jewish, a Democrat and supports abortion rights. When she was six months pregnant, she found out that her first child was diagnosed with fatal chromosomal disorder, which caused brain damage and serious heart complications. After suffering several miscarriages, Ades and her husband are adopting a child.

What procedures are used for a late term abortion?

The most common procedure used is called an "intact D&E." This procedure poses the least risk to the mother and is the most likely procedure to protect the woman's ability to have children in the future.

This procedure is considered "elective" even when necessary to save the women's life. It is elective only because it is scheduled when an appropriate doctor is available and the patient is stable. Organ transplants and coronary bypasses can be classified as elective.

A cesarean delivery is generally not an alternative because it involves twice as much blood loss and carries with it all of the dangers of major surgery.

Delete

THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS
1951
WOMEN'S HEALTH CARE PHYSICIANS

96 SEP 20 A8:54

September 17, 1996

Mr. Todd Stearns
White House
1600 Pennsylvania Ave NW
Washington DC 20500

Dear Mr. Stearns,

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

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 ii

STATEMENTS OF SUBJECT MATTER, JURISDICTION, AND ISSUES PRESENTED xii

INTRODUCTION 1

STATEMENT OF INTEREST OF AMICI CURIAE 1

STATEMENT OF THE CASE 2

A. Why Women Need Abortions Subsequent to the First Trimester 2

B. Abortion Procedures Subsequent to the First Trimester 6

C. The Act 8

SUMMARY OF ARGUMENT 12

ARGUMENT 13

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. 15

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. 15

B. The Vagaries of the D&X Ban Render It Unconstitutional on its Face. 22

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. 25

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 25

B. The Act's Objective Standard Will Chill Physicians from Providing Necessary and Constitutionally Protected Care. 28

CONCLUSION 35

TABLE OF AUTHORITIES

Cases	Page(s)
Barnes v. Moore, 970 F.2d 12 (5th Cir.), cert. denied, 506 U.S. 102 (1992)	23
Bzdzuich v. United States Drug Enforcement Admin., 76 F.3d 738 (6th Cir. 1996)	14
City of Akron v. Akron Ctr for Reprod. Health, 462 U.S. 416 (1983)	22
Coates v. Cincinnati, 402 U.S. 611 (1971)	22, 23
Colautti v. Franklin, 439 U.S. 379 (1979)	passim
Doe v. Bolton, 410 U.S. 179 (1973)	30
DuBois v. Coen, 125 N.E. 121 (Ohio 1919)	20
Fargo Women's Health Org. v. Schafer, 113 S. Ct. 1668 (1993)	23, 26
FDIC v. Meyer, 114 S. Ct. 996 (1994)	19
Fleming v. United States Dep't of Agric., 713 F.2d 179 (6th Cir. 1983)	14, 19
Gertz v. Welch, 418 U.S. 323 (1974)	32
Grayned v. City of Rockford, 408 U.S. 104 (1972)	13, 14, 21, 23, 31
In re Columbus Skyline Sec., Inc., 660 N.E.2d 427 (1996)	27
Kolender v. Lawson, 461 U.S. 352 (1983)	21, 23
Madjorous v. State, 149 N.E. 393 (Ohio 1925)	20
Montgomery Cty. Bd. of Comm'rs v. Public Util. Comm'n, 503 N.E.2d 167 (Ohio 1986)	20
Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972)	21
Parker v. Levy, 417 U.S. 733 (1974)	23
Planned Parenthood v. Casey, 505 U.S. 833 (1992), on remand, 13 F.3d 848 (3d Cir. 1994)	passim

Planned Parenthood v. Miller, 63 F.3d 1452 (8th Cir. 1995),
cert. denied, 116 S. Ct. 1582 (1996) 23, 31, 32

Roe v. Wade, 410 U.S. 113 (1973) 12

Smith v. Goguen, 415 U.S. 566 (1974) 13, 21, 23

Springfield Armory, Inc. v. City of Columbus,
29 F.3d 250 (6th Cir. 1994) 23-25

Staples v. United States, 511 U.S. 600, 114 S. Ct. 1793 (1994) 32, 33

State v. Champion, 142 N.E. 141 (Ohio 1924) 30

State v. Koss, 551 N.E.2d 970 (Ohio 1990) 30

State v. Shane, 590 N.E.2d 272 (Ohio 1992) 30

State v. Williford, 551 N.E.2d 1279 (Ohio 1990) 30

Sweet Home Chapter of Communities for a Great Oregon v. Babbitt,
1 F.3d 1 (D.C. Cir. 1993) 25

Thornburgh v. American College of Obstetricians & Gynecologists,
476 U.S. 747 (1986) 22

Thornhill v. Alabama, 310 U.S. 88 (1940) 21

United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.,
116 S. Ct. 1529 (1996) 28

United States v. Salerno, 481 U.S. 739 (1987) 23

United States v. Salisbury, 983 F.2d 1369 (6th Cir. 1993) 14

Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.,
455 U.S. 489 (1982) 14, 22, 24, 25, 31

Webster v. Reproductive Health Services, 492 U.S. 490 (1989) 30

Williams v. Ohio Dep't of Rehabilitation & Correction,
583 N.E.2d 1129 (Ohio Ct. Cl. 1991) 26

Women's Medical Professional Corp. v. Voinovich, 911 F. Supp. 1051
(S.D. Ohio 1995) . . . . . passim

Statutes and Legislative Authority

141 Cong. Rec. S17891 (daily ed. Dec. 4, 1995) 7, 17

Ohio H.B. 135, 121 Gen. Assembly, 1995 Ohio Laws § 3 15

Ohio Rev. Code § 2305.11 (1996) 1

Ohio Rev. Code § 2307.51 (1996) 1, 9

Ohio Rev. Code § 2307.52 (1996) 1, 11

Ohio Rev. Code § 2901.21 (1996) 32

Ohio Rev. Code § 2901.22(D) (1996) 33

Ohio Rev. Code § 2919.15 (1996) 1, 8

Ohio Rev. Code § 2919.15(A) (1996) 9, 16, 18

Ohio Rev. Code § 2919.16 (1996) 1

Ohio Rev. Code § 2919.16(H) (1996) 9

Ohio Rev. Code § 2919.16(L) (1996) 26

Ohio Rev. Code § 2919.17 (1996) 1

Ohio Rev. Code § 2919.17(A) (1996) 33

Ohio Rev. Code § 2919.17(B) (1996) 33

Ohio Rev. Code § 2919.17(D) (1996) 11

Ohio Rev. Code § 2919.18 (1996) 1

Ohio Rev. Code § 2919.18(A)(1) (1996) 9, 26, 33

Ohio Rev. Code § 2919.18(A)(2) (1996) 33

Ohio Rev. Code § 2919.15(B) (1996) 9, 15, 20

Ohio Rev. Code § 2919.15(C) (1996) 9

Ohio Rev. Code § 2919.15(D) (1996) 9, 15

Ohio Rev. Code § 2919.16(B) (1996) 9, 10

Ohio Rev. Code § 2919.16(F) (1996) 10, 26, 33

Ohio Rev. Code § 2919.17(A)(1) (1996) 10, 26, 33

Ohio Rev. Code § 2919.17(A)(2) (1996) 26, 33

Ohio Rev. Code § 2919.17(B)(1) (1996) 10, 26, 33

Ohio Rev. Code § 2919.17(B)(2) (1996) 11, 26, 33

Ohio Rev. Code § 2919.17(C) (1996) 10

Ohio Rev. Code § 2919.18(A)(3) (1996) 9

Ohio Rev. Code § 2919.18(B) (1996) 10

Ohio Rev. Code § 2923.02(A) (1996) 20

Ohio Rev. Code § 2929.11 (1996) 15

Medical and Other Authority

American College of Obstetricians & Gynecologists,
Technical Bulletin 168, Cardiac Disease in Pregnancy (1992) 4

American College of Obstetricians & Gynecologists,
Technical Bulletin 220, Hemoglobinopathies in Pregnancy (1996) 3

American College of Obstetricians & Gynecologists,
Technical Bulletin 219, Hypertension in Pregnancy (1996) 4

American College of Obstetricians & Gynecologists,
Technical Bulletin 109, Methods of Midtrimester Abortion (1987) 6-8

American College of Obstetricians & Gynecologists,
Technical Bulletin 224, Pulmonary Disease in Pregnancy (1996) 4

Hani K. Atrash et al., Legal Abortion Mortality in the
United States: 1972 to 1982, Am. J. Obstetrics & Gynecology (1987). 3

Black's Law Dictionary (6th ed. 1990) 32

Cynthia Berg et al., Pregnancy-Related Mortality in the United States, 1987-1990, 88 Obstetrics & Gynecology (1996) 3

F. Gary Cunningham et al., Williams Obstetrics (19th ed. 1993). 3-6, 10

Steven G. Gabbe, Obstetrics, Normal and Problem Pregnancies (2d ed. 1991) 6

Kerenyi, Intra-amniotic Techniques in Abortion and Sterilization (Jane Hodgson ed. 1981) 8

K.R. Niswander, Manual of Obstetrics (1980) 8

Roberto Romero et al., Prenatal Diagnosis of Congenital Anomalies (1988) 5

The Alan Guttmacher Institute, Abortion Factbook (Stanley K. Henshaw & Jennifer Van Vort 1992). 2

The Alan Guttmacher Institute, The Need, Availability, and Financing of Reproductive Health Services (1989) 5

Warren M. Hern, Abortion Practice (1984) 6, 8, 16

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:

Lynn 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 Mellor
(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, 1996
(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 6th, 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\lora\letters.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) 695-3215
FAX (513) 225-3470
Writer's Direct Dial Number (513) 225-4979

APPELLATE DIVISION
Carley J. Ingram, Chief
225-4081

SUPPORT ENFORCEMENT/ PATERNITY DIVISION
Grant L. Wadsworth, Chief
Kevin L. Brooks, Assistant Chief
225-4892
TDD (513) 225-4466
FAX (513) 496-7202

DIVERSION DIVISION
Guy E. Jones, Director
225-4484

VICTIM/WITNESS DIVISION
Rhonda S. Barnes, Director
225-5823

WELFARE THEFT DIVISION
Gary L. Ware, Director
225-4738
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
Assistant Prosecuting Attorney

EDC:mcf

August 23, 1996

96 AUG 23 P3:53

MEMORANDUM FOR ALEXIS HERMAN
DOUG SOSNICK
TODD STERN
MELANNE VERVEER
PETER JACOBY
DEB FINE
JOHN HART

CC: LEE SATTERFIELD

FROM: BETSY MYERS

RE: PRESS CONFERENCE BY CATHOLICS FOR A FREE CHOICE

FYI -

On Sunday, August 25, Frances Kissling, President of Catholics for a Free Choice will hold a press conference to launch a **new ad campaign by Catholics angry at the Bishops** for their partisan work against the President for his veto of HR 1833.

Also attached please find their newest publications on the Catholic vote, as well as some new, favorable polling numbers by the Pew Foundation on Catholic attitudes towards abortion. The new numbers are highlighted.

CFFC
CATHOLICS FOR A FREE CHOICE

N E W S R E L E A S E

FOR IMMEDIATE RELEASE
August 22, 1996

Contact: Jon O'Brien
at this number until Friday 8/23: 202/986-6093
in Chicago via mobile phone: 202/531-9121

Media Advisory

Catholic Groups Call on U.S. Bishops to Halt Partisan Campaign

(Washington, D.C.) Catholics for a Free Choice will launch a campaign to challenge the single-issue nature of the bishop's involvement in electoral politics during this critical year To the exclusion of other issues, the bishops have undertaken a vigorous campaign to override the president's veto of a bill that would ban one form of late-term abortion. The polls consistently show, however, that the bishops' zero-tolerance stance on abortion is at odds with the views of the majority of American Catholics. The CFFC campaign includes advertising, grassroots organizing, and special publications and reports. At the press conference, CFFC will publish an open letter to the U.S. bishops about their partisan campaign.

In this election year, there has been much speculation about the Catholic vote. The political pundits have identified this vote as essential for victory at the presidential level. Ralph Reed described the importance of the Catholic vote in athletic terms, calling it "the jump ball in American politics," saying that "whoever comes down with that ball usually wins in November." At the press conference, CFFC will preview a new publication about the Catholic vote in American politics.

WHO: *Frances Kissling*, president of Catholics for a Free Choice
will be joined by:
Rosemary Radford Ruether, the Georgia Harkness Professor of Applied Theology at Garrett Evangelical Seminary in Evanston, Illinois
Donna Quinn, executive director of the Chicago Catholic Women.

WHAT: a press conference to launch the CFFC campaign including:
- the publication of an open letter from Catholics to the U.S. bishops
- the launch of Everything You Always Wanted to Know About the Catholic Vote, an analysis and discussion of the importance of the Catholic vote and abortion in 1996

WHERE: Embassy Suites Hotel
600 North State Street (between Ohio and Ontario Street), Chicago
two blocks west of the Marriott Hotel

WHEN: Sunday August 25, 1996 12 noon

IMPORTANT NOTICE

Frances Kissling and Jon O'Brien can be reached for comment while in Chicago at:

The Drake Hotel
140 East Walton Place
ph.(312) 787-2200

—or—

via cellular phone: (202) 255-3184
(202) 531-9121
beeper: 1-800-759-8888,PIN # 1587975

• CFFC will arrive in Chicago on Saturday morning, 8/24

1436 U Street, NW • Suite 301 • Washington, DC 20009-3997 • Tel 202-986-6093 • Fax 202-332-7995 • email cffc@igc.apc.org

An Open Letter to the Bishops of the United States

Dear brothers,

In your 1995 statement on political responsibility, you note that "public life should be a place of civil debate," and you lament that "sound bites and symbols, war rooms and attack ads are replacing civil debate and the search for the common good." Your statement lists a wide range of issues which you believe are important in 1996, including abortion, arms control, immigration, and welfare reform. We commend your statement and support your right to express your views on public policy.

We agree with you that all of these are important issues. As Catholics, our views on each of them, shaped by our experience and our application of general moral principles to specific public policies, will reflect our differences as well as our commonalities.

As we observe your actions, however, we see a profoundly disproportionate effort on the issue of abortion. So frequent, so vehement, and so condemning of individual political figures are your statements and actions on abortion as compared to other issues, that it is hard to avoid the conclusion that the United States Catholic Conference and individual diocesan leaders are conducting a partisan campaign.

Nowhere is this more evident than in the debate about legislation that would ban dilation and extraction as a method of abortion in late pregnancy. The massive effort to overturn President Clinton's veto and your relentless criticism of him and him alone are disturbing.

We note that the only advertising you did during the Republican National Convention was an ad criticizing the President's veto. And it is on this same topic—and only this topic—that you have placed ads over the last several months in the *New York Times* and the *Washington Post*.

We note that the only issue on which you are mobilizing Catholics at the parish level is abortion—with your campaign to distribute 27 million postcards urging Congress to override the veto. Where, we ask, is the postcard campaign on immigration, or on protecting poor children from the cruelty of so-called welfare reform?

We note that it is on only one subject—abortion—that all the cardinals have jointly written to the President. The letters came on two occasions: the D&E ban veto and the 1994 International Conference on Population and Development in Cairo.

We note the prominence of abortion in your statement on political responsibility. Not only is abortion the first issue listed (is it truly only a coincidence of alphabetization?), but references to abortion are found throughout. For example, in the section on violence, your first concern is the "violence of abortion." Much later you express a concern about violence against women, and later still, global disarmament.

Surely, the church's vast resources should be used to educate Catholics and others about all of our values and concerns, not just abortion.

We call on the USCC and each bishop to refrain from the single-issue partisan campaign against abortion that has characterized your activity in this election season, and to begin a genuine education campaign on the full range of critical issues, especially immigration policy in the context of our commitment to welcoming the stranger, and welfare reform in the context of the preferential option for the poor.

Moreover, we are concerned that some religiously based activists, most notably those on the religious right, have approached election campaigns and the legislative process with the view that on all issues, there is only one God given, morally correct position—the one they hold. This belief has led at times to disrespect for the diversity of views held by people of faith.

We believe that principles of democracy, pluralism, tolerance, and respect for civil discourse are being severely tested in this campaign season, and we are saddened that some religious institutions are often responsible for this.

In light of these circumstances, **we ask that your every action and statement reflect tolerance, charity, and respect for differences**; we ask that in each action and statement you stress that which is best in candidates and elected leaders, in order to unite the nation, not further polarize us.

Signers

Catholics for a Free Choice, Frances Kissling
Catholics For The Spirit of Vatican II, Thomas J. Egerton
Catholics Speak Out, Maureen Fiedler, S.L.
Chicago Catholic Women, Donna Quinn
National Coalition of American Nuns, Sister Margaret Traxler
Women's Alliance for Theology, Ethics and Ritual, Mary E. Hunt, Diann L. Neu
Women-Church Convergence, Janet Kalven, Mary E. Buckley, Elizabeth McGee

William R. Leahy, *Unitarian Universalist Ministries**
Lena Wolterink, *Fellowship of Saints in Unitarian Unity**
Ruth Fitzpatrick, *Loretto Women's Network**
Andrea Johnson, *Women's Ordination Conference**
John Giles Milhaven, *Professor, Religious Studies, Brown University**

** These organizations listed for identification purposes only*

This ad is sponsored by Catholics for a Free Choice, 1436 U St. NW, Suite 301, Washington DC 20009
phone: 202-986-6093 fax: 202-332-7995 e-mail: cfc@igc.apc.org
World Wide Web page: http://www.catholicchoice.org/catholicvote

current 8/22/96 4:30 pm

DEMOCRATIC NATIONAL CONVENTION - CFFC MASTER ITINERARY

(Events in italics indicate optional/social.)

Contact Information:
Cellular Phone #1 - 202-253-3184
Cellular Phone #2 - 202-531-9121
Beeper # - 1-800-759-8888, PIN #1387975

Important Contacts:
Sive Group -
Donna Quinn -
Rosemary Ruether -
Faithful Witness for Choice Hotline - 312 509-6374
People for the American Way office -

Saturday, August 24

6:25 am	Brenda departs Dulles, United Flt 363
6:50 am	Jon, Suzie and Mimi depart National, American Flt 485
7:41 am	Jon, Suzie and Mimi arrive at O'Hare
7:10 am	Brenda arrives at O'Hare
?? pm	Jon and Mimi make press calls from Rebecca Sive's office Location.
?? pm	Frances departs National, Flt #
?? pm	Frances arrives at O'Hare

Accommodations:

Jon and Frances
Drake Hotel
140 East Walton Place
Chicago, IL 60611
ph: 312-787-2200
fax. 312-951-5803
Frances Conf# 45712
Jon Conf# 45714

Brenda, Mimi and Suzie
Doubletree Hotel
198 East Delaware Place
Chicago, IL 60611
ph: 312-664-1100
fax: 312-664-9881
Brenda Conf#130424
Suzie and Mimi Conf# 129952

Sunday, August 25

10:30 am	Set up room for press conference Location: Embassy Suites Hotel, 600 North State Strect (between Ohio and Ontario Street) ph: 312 565-8000 Who:
12:00 pm	Press Conference Who: Frances, Jon, Mimi,
12:30 pm	Press conference ends
?? pm	Follow up press calls Location: Who:
2:00 pm - 5:00 pm	"From Suffragists to Senators: Women Celebrating the Power of the Vote" - CFFC information table Location: Ramada Congress Hotel, 520 S. Michigan Avenue ph: 312 744-4113 Who:
7:00 pm - 9:00 pm	"A Salute to National Leadership" - Reception sponsored by the DNC, featuring Chris Dodd, Don Fowler, Peter Knight, Alexis Herman, Minyon Moore and Alan Wheat Location: The University Club, 76 West Monroe Street (at Michigan Avenue) Who:

Monday, August 26

8:00 am	Faithful Witness for Choice Event Speakers Meeting pre-event Location: First Congregational Baptist Church 1613 West Washington Boulevard (Washington & Ashland Blvd) Who: Frances,
9:00 am	Credential pick up Location: Who:
9:00 am	Press Conference for Faithful Witness for Choice Event Location: First Congregational Baptist Church Who. Frances, Jon, Mimi, Brenda
9:30 - 12:00 pm	Gender Influences and Washington Coverage Association of Women Journalists Location: Who:
10:00 am	Convocation for Faithful Witness for Choice Event Location: First Congregational Baptist Church Who: Frances (to speak), Jon, Mimi, Brenda
10:00 am - 12:00 pm	DNC Women's Caucus Briefing - CFFC information table Location: Hyatt Regency Hotel Grand Ballroom, 151 East Wacker

	Drive ph: 312-565-1234 Who: Suzie?
11:15 am	Procession for Faithful Witness for Choice Event Location: From Church to United Center and back to Union Park Who: Frances, Jon, Mimi, Brenda
12:15 pm	Rally Location: Union Park (across the street from the church) Who: Frances (to speak), Jon, Mimi, Brenda
2:00 pm - 4:00 pm	EMILY's List Event Location: Sheraton Chicago Towers Who:
3:00 pm - 4:00 pm	Discussion Group - People for the American Way
5:00 pm - 7:00 pm	*Americans for Democratic Action Reception* *Location: Hyatt Regency Chicago, Comiskey Room/West Tower Concourse, 151 East Wacker Drive*
8:00 pm	*Music, Comedy & Politics: Voices for Choice* *Location: Park West*
After Concert	*VIP Reception* *Who: Frances*

Tuesday, August 27

7:00 am	"Cultural Revolution American Style" - Briefing sponsored by People for the American Way Location: The Palmer House Hotel, 17 E. Monroe Who: Frances (to speak)
10:00 am - 12:00 pm	DNC Women's Caucus Briefing - CFFC information table Location: Hyatt Regency Hotel Grand Ballroom, 151 East Wacker Drive ph: 312-565-1234 Who:
2:00 pm - 4:00 pm	Center for National Policy Squaretable Discussion The Congressional Elections Location: The Palmer House Hotel Adams Room (6th Floor), 17 E. Monroe Who:
3:00 pm - 5.00 pm	Reception Honoring the Democratic Women Members of the U.S. House of Representatives, sponsored by American Home Products and Wyeth Ayerst Location: The Chicago Cultural Center, GAR Rotunda & Memorial Hall, 78 East Washington Street Who: Frances

Wednesday, August 28

08-23-96 81:60

8:00 am - 10.00 am	Women's Campaign Fund Breakfast Location: Ritz Carlton Who:
10:00 am - 12:00 pm	DNC Women's Caucus Briefing - CFFC information table Location: Hyatt Regency Hotel Grand Ballroom, 151 East Wacker Drive ph: 312-565-1234 Who:
12:00 pm - 2:00 pm	"What is the Responsibility of the Entertainment Industry To Not Offend Its Audience?" -Panel sponsored by the Creative Coalition - Speakers Steven Bochco, Chuck D, Michael Fuchs, Rep. Edward Markey, Michael Medved Location: The Goodman Theatre, 200 S. Columbus Drive Who:
3:00 pm - 4:00 pm	Discussion Group - People for the American Way Location - The Palmer House Hotel, 17 Monroe Who:
8:15 pm	Jon, Mimi and Suzie depart O'Hare, United Flt 628
8:55 pm	Brenda departs O'Hare, United Flt 114
10:54 pm	Jon, Mimi and Suzie arrive at National
11:36 pm	Brenda arrives at Dulles

The Catholic Vote and Abortion

Poll after poll shows that most Catholics are prochoice. And as voters, they do not follow the bishops—Catholics make up their own minds.

Catholics say abortion should be legal

- A full 82% of US Catholics say abortion should be legal either under certain circumstances or without restrictions.
- This is close to the figure for all Americans: 87%.
- Among Catholics, 39% say a woman should be able to get an abortion if she decides she wants one, no matter what the reason.
- Another 43% say abortion should be legal under certain circumstances, such as when a woman's health is endangered or when a pregnancy results from rape.
- Only 15% of Catholics agree with the bishops' position that abortion should be illegal in all circumstances.

Time/CNN nationwide poll of 1,000 adults, conducted by Yankelovich Partners, Sept. 27-28, 1995, MOE *±3%; subsample of 500 Catholics,* MOE *±4.5%.*

This finding holds true across polls and over time

- 73% of self-described "progressive" Catholics say abortion should be generally available or available with restrictions.
- 43% of self-described "traditional" Catholics say abortion should be generally available or available with restrictions.
- Only 10% of Catholics (and 10% of all Americans) agree with the bishops' position that abortion should be illegal in all cases.

Pew Research Center for People and the Press, June 1996 Religion Survey, May 31-June 9, 1996, and telephone surveys, July 1994-Oct. 1995, of 4,247 adults, MOE *±3%; subsample of 973 Catholics,* MOE *±4%; subsamples of 212 progressive and 237traditional Catholics, approx.* MOE *±10%*

Number of Catholics in the United States: 60 million

Catholics as a portion of total US population: 22%

Catholics as a portion of voters in US House races on Election Day, 1994: 29%

US Catholics who say abortion should be legal in some or all circumstances: 82%

US Catholics who say abortion never can be a morally acceptable choice: 13%

US Catholics saying that a Catholic can vote in good conscience for candidates who support legal abortion: 70%

Importance of abortion in Catholics' voting decisions in the 1994 House races: 9th out of 11 priorities

Findings hold true over time (continued)

- In 1992, 84% of Catholics (and 84% of all Americans) said abortion should be legal in some or all circumstances.
- Only 13% of Catholics agreed with the bishops that abortion should be illegal in all circumstances.

Gallup Survey, for Catholics Speak Out, of 802 Catholics, May 5-7, 1992, MOE ±4%; and Gallup poll of 1,001 adults nationally, Jan. 16-19, 1992, MOE ±3% (data provided by the Roper Center, University of Connecticut).

- In 1990, 85% of Catholics (and 90% of all Americans) said abortion should be legal in at least some circumstances.
- 51% of Catholics, like 57% of all Americans, said choices on abortion should be left up to the woman and her doctor.
- Only 12% of Catholics took the bishops' position that abortion should always be illegal.

Wall Street Journal/NBC News poll of 1,555 registered voters nationwide, conducted by Peter Hart and Robert Teeter, July 6-10, 1990, MOE ±2.6%; subsample of 427 Catholics, MOE ±5%.

- In 1989, 83% of Catholics (and 83% of all adults) said abortion should be legal, at least in cases of rape/incest or to save the woman's life.
- Among Catholics, only 13% said abortion should always be illegal.

CBS News/New York Times poll of 1,347 adults, Sept. 17-20, 1989, MOE ±3%; subsample of 341 Catholics, MOE ±5%.

Catholics believe abortion can be moral

- 64% of Catholics, like 68% of all adults, disapprove or strongly disapprove of the statement that abortion is morally wrong in every case.

US News & World Report survey of 1,000 American adults, conducted by Market Facts' Telenation, designed by Lake Research and Tarrance Group, Sept. 23-24, 1995, MOE ±3.5%; subsample of 493 Catholics, MOE 4.5%.

- Only 13% of Catholics say abortion never can be a morally acceptable choice.

Gallup Survey, for Catholics Speak Out, of 802 Catholics, May 5-7, 1992, MOE ±4%.

- 69% of Catholics believe a woman who has an abortion for reasons other than to save her life can still be a good Catholic.

ABC/Washington Post poll of 1,530 adults, conducted by Chilton Research Services, Sept. 28-Oct. 1, 1995, MOE ±3%.

Catholic women have abortions

- Catholic women are as likely as women in the general population to have an abortion.
- Even after standardizing for age and excluding nonwhites and Hispanics (who have higher abortion rates), Catholics are 29 percent more likely than Protestants to have abortions.

Stanley K. Henshaw & Kathryn Kost (Alan Guttmacher Institute), Family Planning Perspectives, vol. 28, no. 4 (July/Aug. 1996), based on an AGI survey of 9,985 women obtaining abortions in 1994-95.

Catholic women have abortions (continued)

- The same pattern prevailed in 1987-1988.
- When asked why they were having abortions, Catholics were 8% more likely than those of different religious beliefs to say they did not want others to find out about their sexual activity or pregnancy.

Stanley K. Henshaw & Jane Silverman (Alan Guttmacher Institute), Family Planning Perspectives, vol. 20, no. 4 (July/Aug. 1988), based on an AGI survey of 9,480 women obtaining abortions in 1987 and an AGI survey of 1,900 women obtaining abortions in 1987-88.

On abortion as on birth control: Catholics follow their own consciences

- Only 15% of Catholics say a Catholic should always obey official church teachings on such moral issues as birth control and abortion.
- 79% say it is possible for Catholics to make up their own minds on these issues.
- 80% believe it is possible to disagree with the pope on official positions on morality and still be a good Catholic.

Time/CNN nationwide poll of 1,000 adults, conducted by Yankelovich Partners, Sept. 27-28, 1995, MOE ±3%; subsample of 500 Catholics, MOE ±4.5%.

- In one recent poll, 82% of Catholics disapproved or strongly disapproved of the statement that using artificial birth control, such as condoms or birth control pills, is morally wrong.
- In another poll, 76% of Catholics disagreed with the statement that using artificial means of birth control is wrong.

82%: US News & World Report survey of 1,000 American adults, conducted by Market Facts' Telenation, designed by Lake Research and Tarrance Group, Sept. 23-24, 1995, MOE ±3.5%; subsample of 493 Catholics, MOE ±4.5%. 76%: Time/CNN nationwide poll of 1,000 adults, conducted by Yankelovich Partners, Sept. 27-28, 1995, MOE ±3%; subsample of 500 Catholics, MOE ±4.5%.

Catholics go to the polls

- Number of Catholics in the United States: 60 million
- Catholics as a portion of the total US population: 22%

PJ Kenedy & Sons, Official Catholic Directory 1996 (New Providence, NJ: R.R. Bowker, 1996).

- Catholics as a portion of voters who turned out in 1992 on Election Day: 27%
- Catholics, among all voters turning out to vote for US House candidates on Election Day in 1994: 29%

Voter News Service (formerly Voter Research & Surveys) exit polls, 1992 & 1994.

- 77% of US Catholics are registered to vote—just under the 79% registered in the general population.
- 50% of Catholics are among the voters judged "most likely" to vote in the November 1996 elections (on the basis of answers to several questions about voting habits and plans).
- Those "most likely" to vote include 52% of self-described "traditional" Catholics and 47% of self-described "progressive" Catholics.

Catholics go to the polls (continued)

- This compares to 49% of the general population, 54% of white evangelical Protestants, and 56% of white mainline Protestants.

  Pew Research Center for People and the Press, June 1996 Religion Survey, May 31-June 9, 1996, and telephone surveys, July 1994-Oct. 1995, of 4,247 adults, MOE ±3%; subsample of 973 Catholics, MOE ±4%; subsamples of 212 progressive and 237 traditional Catholics, approx. MOE ±10%; voter categories were "most likely," "somewhat likely," or "not likely" to vote.

- Every winning presidential candidate since 1976 has carried a majority or plurality of Catholic voters: 54% for Carter in 1976; a 50% plurality for Reagan in 1980; 54% for Reagan in 1984; 52% for Bush in 1988; and a 44% plurality for Clinton in 1992.

  Exit Polls: 1976, CBS; 1980-1988, CBS/New York Times; 1992, Voter News Service.

- In the 1994 House and Senate races, 52% of Catholic voters favored Republicans. In House races alone, 51% voted for Democrats.
- In all House and Senate races, 60% of Protestant voters and 60% of self-identified "religious right" voters favored Republicans.
- Wealthier Catholics were likelier than other Catholics to vote for Republican House and Senate candidates.
- Most Catholics with postgraduate education, or less than a college degree, did not vote Republican. Most of those with a college degree, and no more, did vote Republican.

  Roper Center for Public Opinion Research, America at the Polls: 1994.

Abortion is not a litmus test—but Catholics vote prochoice

- Only 9% of US Catholics feel so strongly about abortion that they would not vote for a political candidate who disagreed with their opinion, regardless of the candidate's stand on other issues.
- This compares to 12% of all Americans.

  CBS News/New York Times poll of 1,200 adults, May 31-June 3, 1996, MOE ±3%; subsample of 294 Catholics, MOE ±6%.

- Rank of abortion among 11 priorities Catholics considered in deciding how to vote in the 1994 US House races: 9.
- Rank of abortion for all voters: tied for 8-9
- 39% of Catholics said crime was among their top two priorities, while only 13% cited abortion among the top two.
- Catholics ranked the 11 issues in this order: crime, the economy/jobs, health care, taxes, national issues tied with education, family values/morality, local issues, abortion, campaign finance reform, foreign trade/ NAFTA.

  Mitofsky International, Nov. 8, 1994, total sample 5,260, including more than 1,000 Catholics.

- The pattern was similar in the 1992 presidential race, with 46% of Catholics saying the economy was among the two most important issues, and only 9% naming abortion.

  Voter News Service (then Voter Research & Surveys), exit polls, 1992.

Catholics vote prochoice (continued)

- 66% of Catholics say President Clinton's April 1996 veto of the bill to ban a late-term abortion method will make no difference in their choice between Clinton and Bob Dole in the presidential election—or will make them more likely to vote for Clinton.
- Just after Clinton vetoed the late-term abortion bill, Catholics preferred Clinton over Dole by 58% to 33%.

Los Angeles Times poll of 1,374 adults (1,149 registered voters), Apr. 13-16, 1996, MOE ±3%; Catholic subsample 418, MOE ±5%.

- Just after the late-term abortion bill veto, Catholic women, who make up 26% of the female electorate, favored Clinton over Dole by a 61% to 35% margin.

Greenberg/Lake survey of 1089 registered voters, for Emily's List, Apr. 12, 1996.

- 70% of Catholics agree or strongly agree with the statement that Catholics can, in good conscience, vote for political candidates who support legal abortion.

Gallup Survey, for Catholics Speak Out, of 802 Catholics, May 5-7, 1992, MOE ±4%.

Catholics say religion should not dictate politics

- 77% of Catholics, like 72% of all Americans, say it is not appropriate for religious leaders to urge people to vote for a candidate because of his or her stand on abortion.
- 63% of all Republicans and 73% of all Democrats say it is not appropriate.

CBS News/New York Times poll of 1,200 adults, May 31-June 3, 1996, MOE ±3%.

- 56% of Catholics (and 55% of non-Catholics) say it is appropriate for religious leaders to take a public position on abortion.
- But 68% of Catholics say it is not appropriate for religious leaders to urge people to vote for or against a candidate because of his or her stand on abortion.
- 65% of non-Catholics say it is not appropriate.

New York Times/CBS News poll of 1,536 adults nationwide, Sept. 18-22, 1995, MOE ±3%; subsample of 423 Catholics, MOE ±5%.

- Just before the 1995 papal visit, 73% of US Catholics said that knowing the pope's position on a social or political issue would not influence their position on the issue.
- Only 16% said they would be more likely to support the pope's position.

New York Times/CBS News poll of 1,536 adults nationwide, Sept. 18-22, 1995, MOE ±3%; subsample of 423 Catholics, MOE ±5%.

- 79% of Catholics say they are not members or followers of conservative Christian political groups.

Peter D. Hart Research Associates, national survey, for People For the American Way, of 1,252 registered voters, July 19-22, 1995; subsample of 279 Catholics, MOE ±6.3%.

Catholics for a Free Choice

A SOCIAL JUSTICE ORGANIZATION

- stands for the rights of women in both church and society, in the United States and internationally

- shapes and advances sexual and reproductive ethics that are based on justice, a commitment to women's well-being, and respect for the moral capacity of women and men to make sound decisions about their lives

- works through discourse, education, and advocacy to infuse these values into public policy, community life, and Catholic social thinking and teaching

The Catholic Vote and Abortion is a companion to *Everything You Always Wanted to Know about the Catholic Vote*, a CFFC publication that is available both as a booklet and on CFFC's site on the World Wide Web: http://www.igc.org/catholicvote

Catholics for a Free Choice
1436 U Street NW, Suite 301
Washington, DC 20009-3997
phone: 202-986-6093 fax: 202-332-7995 e-mail: cffc@igc.apc.org

Frances Kissling, President

The Catholic Vote and Abortion
© August 1996 by Catholics for a Free Choice
Printed on Recycled Paper

Clinton Presidential Records
Digital Records Marker

This is not a presidential record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

This marker identifies the place of a publication.

Publications have not been scanned in their entirety for the purpose of digitization. To see the full publication please search online or visit the Clinton Presidential Library's Research Room.

Let Families Decide

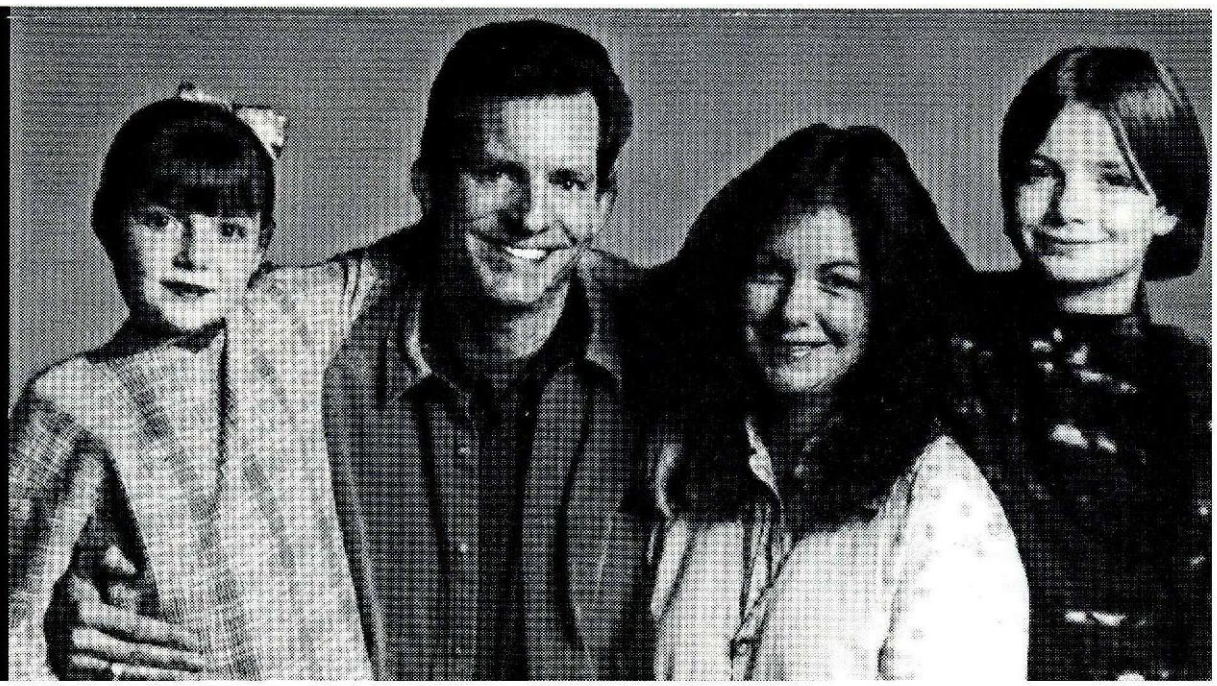
It's a heartwrenching decision no family should have to make. But until now, it has been families and their doctors who decide what to do when faced with a medical emergency during pregnancy.

But Congress is poised to take that intensely personal decision away from some families and put it in the hands of government. This bill would criminalize certain abortion procedures, jail the doctors who perform them and endanger the women and families who need them.

The House and Senate passed H.R. 1833. The President, demonstrating compassion and caring for families facing medical tragedies, vetoed H.R. 1833.

Congress is expected to attempt to override the veto this summer.

Let Families Decide



Oppose H.R. 1833

By sensationalizing this rare and necessary medical procedure, anti-choice forces are cloaking their true goal — to ban all abortions. The bill marks the first time the House has voted to criminalize an abortion procedure since *Roe v. Wade*.

For the sake of families like the Costellos, Wilsons, Stellas, Foxes, Ades, and Watts', protect the right to choose. ●

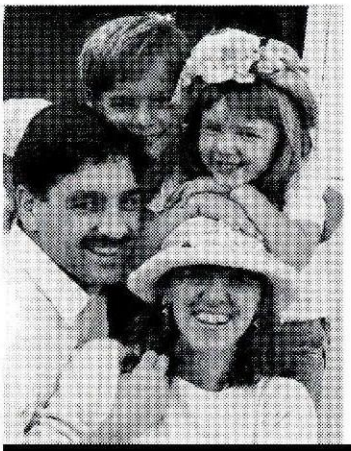
National Abortion Federation

Planned Parenthood Federation of America, Inc.

NARAL Pro-Choice America
National Abortion and Reproductive Rights Action League

5/96

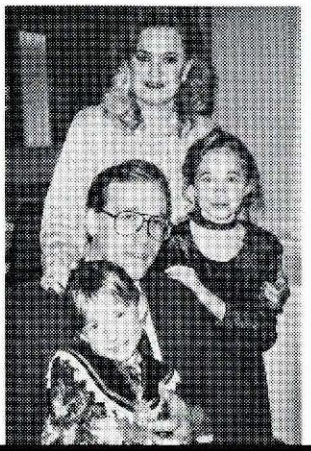
n March 24, 1995, Coreen Costello was seven months into her third pregnancy when ultrasound vealed her fetus had a severe and fatal neurological disorder. The fetus had been unable to move r two months. The head was swollen with fluid and the body was stiff. A conservative Republican, Coreen participated in "Walks for Life" and never thought she'd be faced with such a decision. The Costellos decided, with their doctor, that an abortion was the safest option for Coreen's health and future fertility. The procedure Coreen needed would be banned by this bill.



"We are the families who love and want our babies. We are the families who will forever have a hole in our hearts...It deeply saddens me that you [Senators] are making a decision having never walked in our shoes."

—Coreen Costello

At 32 weeks into her much-wanted pregnancy, Vikki Stella learned that her fetus had nine severe abnormalities — including a fluid-filled cranium with no brain tissue at all. Vikki, a mother of two, and her husband consulted a series of specialists, who offered no hope. For Vikki, a diabetic, the safest procedure to protect her health and preserve her fertility was an abortion. Today, Vikki is again pregnant. She was outraged when the doctor who saved her "life, health and sanity," the doctor whose picture she still keeps on her refrigerator, called and told her the procedure that saved her life was in danger of being banned.



"[I]'ve been told mothers like me all want perfect babies... [My son] wasn't imperfect—he was incompatible with life. The only thing keeping him alive was my body. He could never have survived outside my womb."

—Vikki Stella

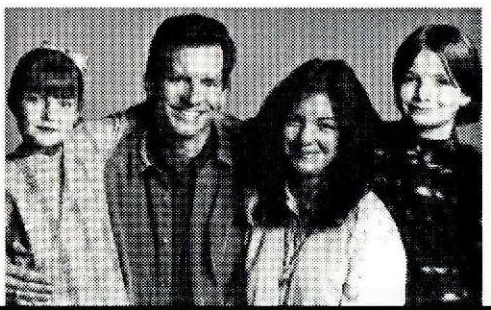
chard and Claudia Ades were devastated. Their first child, due in three months, was diagnosed with a tal chromosomal disorder, which, among other problems, caused extensive brain damage and serious art complications. The fetus was also severely deformed and given no chance of living. The Ades cided for the sake of their family and future children to end the pregnancy. The procedure Claudia eeded would be banned by this bill.

Although I never imagined I'd have to make a decision like this, I can honestly tell you that for any reasons we feel very blessed. First, we were able to find out when we did. Second, that we had access to the finest medical care in the world. Third, we live in a place where our right to make that choice has not been compromised...yet."

—Claudia Ades

Eighteen months ago, Viki Wilson, a nurse, and her physician–husband Bill were expecting their third child. Early tests showed the pregnancy to be normal. But, in the eighth month, ultrasound showed the fetus had a fatal condition — two-thirds of the brain had formed outside the skull. Carrying the pregnancy to term would imperil Viki's life and health. In consultation with their doctor, Viki and Bill made the heartbreaking decision to have an abortion. The procedure Viki needed would be banned by this bill.

"I strongly believe that this decision should be left within the intimacy of the family unit. We are the ones who have to live with our decision."



—Viki Wilson, R.N.

ist fall, Tammy Watts and her husband were elated by the news of her pregnancy. But after routine ultrasound in the seventh month, the Watts learned their fetus was suffering from a evastating chromosomal disorder and would not live. Knowing the fetus was going to die, the 'atts made the most difficult decision of their lives and had an abortion. The procedure Tammy eeded would be banned by this bill.

Until you've walked a mile in my shoes don't pretend to know what this is like for me. Everybody has got a reason for what they have to do. Nobody should be forced into having to make the wrong decision. That's what would happen if this legislation is passed."

—Tammy Watts

Erica Fox was 22 weeks pregnant on October, 19, 1995, when doctors discovered her fetus had stopped growing, had suffered severe heart damage and was going to die in terrible pain. Erica and her husband took their doctor's advice and decided an abortion would be the option that would best protect Erica's ability to have children in the future.

"Did I just decide in my fifth month that I was tired of being pregnant? No! No! No! ... [This was] the most traumatic incident of my life...So, imagine my horror, when during my recuperation, I turn on C-SPAN and see the House of Representatives vote to make this very same procedure illegal."

—Erica Fox

June 24, 1996

96 JUN 24 P1:34

MEMORANDUM FOR DISTRIBUTION

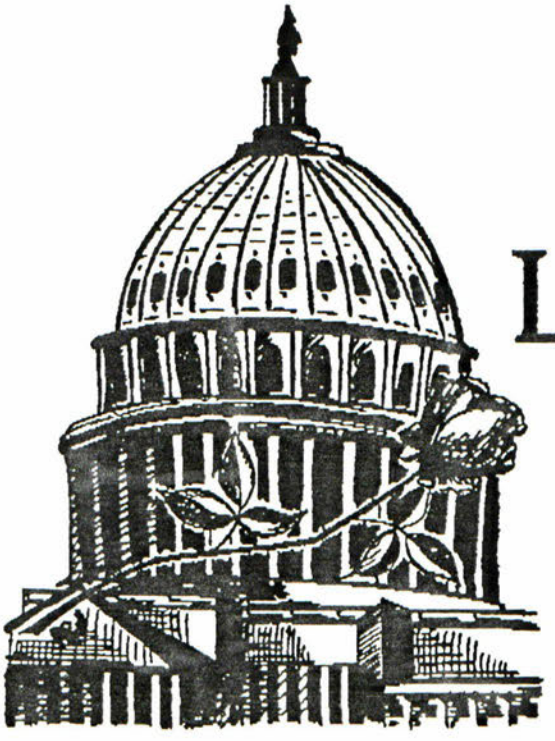
FROM: Debbie Fine

SUBJECT: National Right to Life Committee

FYI: Attached are materials distributed by the National Right to Life Committee in Virginia this past weekend. On Friday their leadership was quoted as being more concerned with inclusion of a tolerance clause on choice in the Democratic platform than in the Republican platform, stating they will not "vigorously fight" such a statement in the GOP plank.

DISTRIBUTION:
Jeremy Ben-Ami
Lyn Hogan
Nancy Ann Min
Todd Stern
Jen Klein
Melanne Verveer
John Hart
George Stephanopoulos
Betsy Myers
Barbara Woolley
Marilyn Yager
Elena Kagan
Bruce Reed

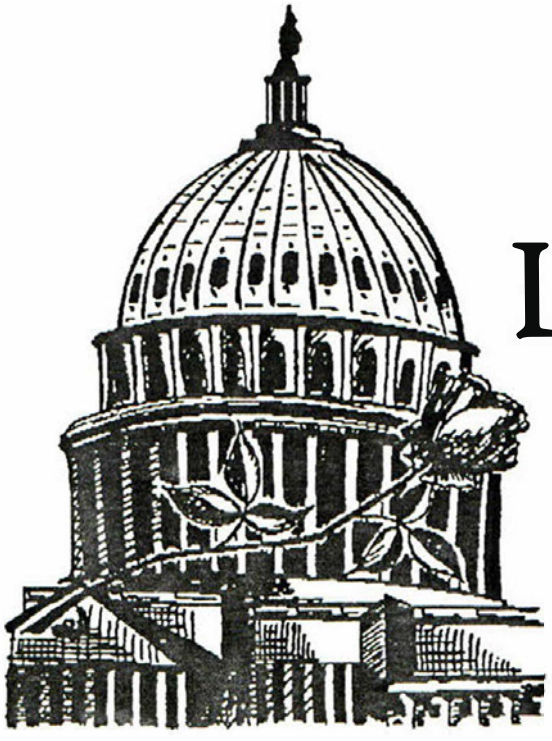
cc: Doug Sosnik
Karen Hancox



Life, Liberty and Justice for All

National Right to Life Committee

1996 Yearbook



Life, Liberty and Justice for All

National Right to Life Convention '96

June 20, 21, & 22, 1996

Alexandria, Virginia

Jacki Ragan
NRLC Convention Director

Corrie Strand
Assistant

Lisa Andrusko
Yearbook Editor

Typesetting:
Apple Ridge Typesetting
Linden, Virginia

Cover Graphic:
Teresa Molitor

Graphic Art:
Debbie Eichler

SOME KEY ABORTION POLICY ISSUES

May 29, 1996

Some of President Clinton's defenders prefer to summarize his abortion policy as, "The President favors keeping the law as it is." However, when the press adopts that formulation, it does so at the expense of accuracy, since President Clinton has initiated or endorsed numerous proposals that would make sweeping ***changes*** in the current landscape of abortion law-- nullifying existing federal *and state* limitations on abortion, and/or vastly expanding access to abortion on demand. For example:

- President Clinton endorsed the so-called "Freedom of Choice Act" (103rd Congress HR 25), the purpose and effect of which was to nullify virtually all state and federal limits on abortion, including several broad classes of state regulations always permitted under *Roe v. Wade* (1973) (doctor-only laws, exclusion of abortion from public hospitals, etc.), and other limitations now permitted under *Casey v. Planned Parenthood* (1992) (waiting periods, informed consent, etc.).

- President Clinton submitted to Congress a health care proposal that would have made abortion, without limitation, a "guaranteed benefit" that all working Americans would have been forced to pay for through government-mandated "premiums" and regular taxes. The bill also required physical access to such guaranteed benefits in every region of every state-- in effect, a mandate for many hundreds of new abortion facilities.

- President Clinton formally urged Congress to entirely repeal the Hyde Amendment, which prohibits federal Medicaid funding of most abortions, and to repeal similar laws that prevent funding of elective abortions in other federal programs. In 1993, the Congressional Budget Office estimated that repeal of these limitations "the federal government would probably fund between 325,000 to 675,000 abortions each year."

- President Clinton's appointees declared abortion to be "part of the overall approach to population control" (Dee Dee Myers, press briefing, April 1, 1993). Secretary of State Christopher sent a cable to all U.S. embassies abroad, urging them "to approach host governments" to lobby for the Administration's abortion doctrine: "The United States believes that access to safe, legal and voluntary abortion is a fundamental right of all women..." (March 16, 1994 State Department cable) The Administration is providing massive funding to groups that seek to legalize abortion in Africa, Latin America, etc.

- On April 10, 1996, President Clinton vetoed a bill to ban partial-birth abortions, except to save the life of the mother. The partial-birth abortion procedure-- used beginning at 4½ months, and often to six months and later-- involves pulling a living baby feet-first out of the womb, except for the head, puncturing the skull, and suctioning out the brains. The great majority of partial-birth abortions are purely elective. President Clinton opposes the bill because "it does not specifically reference, consistent with *Roe v. Wade*, the type of protection that has protected the privacy right of a woman to make her own choice... the President shares the view of many that it would represent an erosion of a woman's right to choose." (Press secretary Mike McCurry, Dec. 8, 1995)

ROBERT DOLE
DEFENDER OF LIFE

Pro-life Congressman Henry Hyde called Senator Bob Dole "a consistent opponent of abortion" and said that "Bob Dole has been in the trenches for many years casting a pro-life vote."

Kate Michelman, President of the National Abortion and Reproductive Rights Action League (NARAL), stated that Bob Dole "constitutes one of the major threats to reproductive choice that this nation has ever seen."

Since the 1973 *Roe v. Wade* decision, Senator Robert Dole has been steadfast in his defense of the unborn child. In over 25 years of voting, Senator Dole has compiled an amazing 94% pro-life voting record.

BOB DOLE'S RECORD

* Has cast 107 pro-life votes in the United States Senate.
* Supports reversal of *Roe v. Wade*.
* Supports a constitutional amendment to prohibit abortion except in cases of life of the mother, rape, and incest.
* Has pledged to reverse Bill Clinton's pro-abortion executive orders.
* Opposes tax funding of abortion.
* Supports a ban on partial-birth abortions.

BOB DOLE'S WORDS

"For more than 20 years I've opposed *Roe v. Wade*, and I support a constitutional amendment to overturn *Roe v. Wade*."

"All our talk about a less violent, more caring society will come to nothing unless we protect the sanctity of human life."

VOTE FOR LIFE

VOTE BOB DOLE FOR PRESIDENT

Paid for by National Right to Life PAC. Not authorized by any candidate.

Join The National Campaign to End Partial-Birth Abortions

We won't let this issue die with President Clinton's veto!

★ Join National Right to Life in our efforts to end partial-birth abortions in America. We will continue the battle to end this grisly procedure throughout the summer months. And it will require the tireless efforts of all of us working together. ★

The Successes of the Pro-Life Movement: *We Can Do It!*

•**FOCA** -- Only three years ago, many "experts" announced the so-called Freedom of Choice Act (FOCA) was as good as passed. A majority in both houses of Congress and the President supported FOCA, and it took a major effort on the part of the grassroots pro-life movement to see that it failed. But we made that effort and FOCA was defeated.

•**The Clinton Health Care Rationing Plan** – Two years ago, conventional wisdom said that Clinton's health plan was also a "done deal." It came complete with paying for abortion on demand with your health insurance premiums, and rationing your health care if some bureaucrat decided your "quality of life" was not worth the cost of treating you. It took a major effort on the part of the pro-life movement to see that it failed. Again, we made the effort and Clinton's health care rationing plan failed as well.

•**We can do it again for the Partial-Birth Abortion Bill!**

A Grassroots Campaign: What You Can Do

★ **Brochures**: Distribute "National Campaign to End Partial-Birth Abortion" brochures at church, door to door, at your county fair, community events, *anywhere*!

★ **Ads**: Run the "What the Nurse Saw" ad in your local newspaper, Diocesan newspapers, local Christian newspapers, *anywhere*!

★ **Public Service Announcements**: Run PSAs on your local radio stations.

★ **Church Bulletin Inserts**: Encourage local pro-life churches to put a partial-birth abortion insert from National Right to Life in their bulletin.

★ **Petition**: Circulate the National Petition to End Partial-Birth Abortions.

★ **Bumper Stickers**: Distribute "Stop Partial-Birth Abortion Now" bumper stickers.

"The only thing necessary for the triumph of evil is for good men to do nothing."

–Edmund Burke

Do what you can!
Order materials today.

Order materials from:

National Right to Life
National Campaign to End Partial-Birth Abortions
419 7th St., N.W., Suite 500
Washington, D.C. 20004
(202) 626-8800, ext. 256

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

06-Jun-1996 04:29pm

TO: Todd Stern

FROM: Lisa Ross
Office of Public Liaison

CC: Betsy Myers

SUBJECT: Late Term Abortion Veto

Todd:

Vicki Sapporta of NAF has requested a signed copy of the President's veto. Ms. Sapporta would like to frame the document along with the pen the President used to sign the veto.

Christina Soddard from our office has been talking with Tim Saunders and Tim suggesting that we contact you. Please call me with with any questions (67300) or if you forsee any problems with meeting her request. Thanks alot.

Lisa

500 word version of op-ed

The ongoing debate over H.R. 1833, legislation to ban a certain abortion procedure commonly referred to as partial birth abortion, involves an issue as difficult -- indeed, painful -- as any confronting our citizens and public officials. If the goal of those engaged in the debate is to solve a truly human problem rather than create a political issue, all participants in the discussion need to listen to and understand what the others are saying. Unfortunately, President Clinton's clear, principled position on this legislation has been seriously misrepresented and misunderstood.

President Clinton long has opposed late-term abortions, except where necessary to protect the life or health of the mother. As Governor of Arkansas, he signed into law a bill that barred third trimester abortions, with an appropriate exception for life or health. He would sign a bill to do the same thing at the federal level if it were presented to him.

The particular procedure at issue in H.R. 1833 posed a most difficult and disturbing issue for the President, which he studied and prayed about for many months. The President ultimately came to believe that this rarely used procedure is justifiable as a last resort when doctors judge it necessary to save a woman's life or avert serious consequences to her health.

Last month, the President was joined at the White House by five women who desperately wanted to have their babies and were devastated to learn that their babies had fatal conditions and would not live. These women wanted anything other than an abortion, but were advised by their doctors that this procedure was their best chance to avert the risk of death or grave harm which, in some cases, would have included an inability to bear children. For them, this was not about choice -- not about choosing against having a child. Their babies were certain to perish before, during, or shortly after birth. The only question was how much grave damage they were going to suffer.

The President vetoed HR 1833 because it did not provide an exception for the small number of compelling cases where the procedure is necessary to preserve life or protect against serious harm to health. The President has said repeatedly that he would sign legislation banning this procedure if Congress would add a limited exemption covering such cases.

The President does not contend that the procedure is always used in circumstances that meet his standard -- namely, that the procedure must be necessary to prevent death or serious adverse health consequences. The procedure sometimes may be used in other situations. But the President does not support such uses, does not defend them, and would sign appropriate legislation banning them.

Many who support this bill believe that any health exception is untenable because it could be stretched to cover everything. The President does not share this view. It is not impossible - it is not beyond the ingenuity of Congress working with this administration - to draft a bill making absolutely clear that the procedure may be used only where a woman risks death or serious damage to her health, and in no other cases.

President Clinton has implored Congress for months to send him a bill that contains such a carefully limited exception for serious harm to health. In the interests of all who face this tragic situation, the President's offer to Congress remains on the table: Work with him to produce a bill that provides this limited exception, and he will sign it the moment it reaches his desk.

Thank you for your letter regarding H.R. 1833, the so-called "partial birth abortion ban." As you know, I have vetoed this bill, but I appreciate your sincerity and candor on this difficult issue. Because my position on this bill has been widely misunderstood, I'd like to explain it as clearly as I can.

I am against late-term abortions and have long opposed them, except, as the Supreme Court requires, where necessary to protect the life or health of the mother. As Governor of Arkansas, I signed into law a bill that barred third trimester abortions, with an appropriate exception for life or health, and I would sign a bill to do the same thing at the federal level if it were presented to me.

The particular procedure described in H.R. 1833 poses a difficult and disturbing issue, one which I studied and prayed about for many months. When I first heard a description of this procedure, I anticipated that I would support the bill. But after I studied the matter and learned more about it, I came to believe that this rarely used procedure is justifiable as a last resort when doctors judge it necessary to save a woman's life or to avert serious consequences to her health.

In April, I met several women who desperately wanted to have their babies and were devastated to learn that their babies had fatal conditions and would not live. These women wanted anything other than an abortion, but were advised by their doctors that this procedure was their best chance to avert the risk of death or grave harm which, in some cases, would have included an inability to bear children. For these women, this was not about choosing against having a child. Their babies were certain to perish before, during, or shortly after birth. The only question was how much grave damage the mother was going to suffer.

Some have raised the question whether this procedure is ever most appropriate as a matter of medical practice. The best answer to this question comes from the medical community, which broadly supports the continued availability of this procedure in cases where a woman's serious health interests are at stake. In those rare cases, I believe the woman's doctors should have the ability to determine, in the best exercise of their medical judgment, that the procedure is indeed necessary.

The problem with H.R. 1833 is that it provides an exception to the ban on this procedure only when a doctor believes that a woman's life is at risk, but not when the doctor believes that she faces real, grave risks to her health. I support an exception that takes effect only where a woman faces real, serious adverse health consequences. Some have cited cases where fraudulent health reasons are relied upon as an excuse -- excuses I could never condone. But people of good faith must recognize that there are also cases where the health risks facing a woman are deadly serious and real. It is in those cases that I believe an exception to the general ban on the procedure must be allowed.

That is why I implored Congress to add a limited exception for the small number of compelling cases where use of the procedure is necessary to avert serious adverse health consequences. Congress ignored my proposal, but I have continued to make it clear that if Congress will work with me to produce a bill that meets my concerns, I will sign it.

In short, I do not support the use of this procedure on demand or on the strength of mild health complaints. But I do believe that we cannot abandon women, like the women I spoke with, whose doctors advise them that they need the procedure to avoid serious injury. I continue to hope that a solution can be reached on this painful issue.

Once again, I appreciate hearing your views and I am grateful that you took the time to write.

June 18, 1996

96 JUN 19 AM : 37

MEMORANDUM FOR DISTRIBUTION

FROM: Debbie Fine

SUBJECT: State Initiatives on D&X/or "Partial Birth Abortions"

Attached is an update on state legislation, ballot initiatives or referendums on D&X or "partial birth abortions" provided by the Center for Reproductive Law and Policy.

As you can see, most of the initiatives already proposed are dead for this year. States where there is a possibility of action are: California (in the form of an amendment on other legislation), Idaho, New York, Oregon, Virginia and North Carolina. (Note: North Carolina is not included on the attached list, but there is now a state Senate bill pending.)

States that have passed related legislation already are: Iowa, Michigan, Utah and Ohio (Ohio bill is not listed here; it passed, but was then found unconstitutional.)

Updated talking points clarifying the President's position on H.R. 1833 will be available soon for key supporters in states where action remains a possibility. (Note: These will be used to ensure that when necessary, the President's message is accurately described.)

DISTRIBUTION:

Jeremy Ben-Ami	Betsy Myers	Eric Eve
Lyn Hogan	Pat Lewis	Amanda Crumley
Jen Klein	John Hart	Linda Moore
Todd Stern	Melanne Verveer	Joe Trahern
Elena Kagan	David Wofford	Ray Martinez
George Stephanopoulos	Donald Dunn	Cookab Hashemi

cc: Doug Sosnik
Karen Hancox

C · R · L · P

THE CENTER FOR REPRODUCTIVE LAW AND POLICY

120 WALL STREET
NEW YORK
NEW YORK 10005 USA
212/514-5534
212/514-5538 fax

1995-1996 STATE LEGISLATION AND BALLOT INITIATIVES BANNING "D&X"/PARTIAL BIRTH AND LATE ABORTIONS (JUNE 6, 1996)

CALIFORNIA

AB 2984 (ban on D&X abortions) (prohibits "partial birth" abortions; affirmative defense for abortions necessary to save the woman's life, if no other procedure would suffice) 5/31 failed in full Assembly by 35-36; *died according to the rules of the legislature.* could apply as an amendment to other bills.

SB 1999 (ban on D&X abortions) (prohibits "partial birth" abortions; affirmative defense for abortions necessary to save the woman's life, if no other procedure would suffice) Senate Health and Human Services. pending

COLORADO

HB 1298 (ban on late abortions) (requires certification that post-viability abortions are necessary to preserve a woman's life or to prevent irreversible impairment of a major bodily function; establishes conditions for performing post-viability abortions) House Health, Environment, Welfare and Institutions; 2/20 postponed indefinitely, which *killed the bill for this session.*

GEORGIA

HB 1573 (ban on D&X abortions) (bans "partial birth" abortions except in cases of life-endangerment when no other procedure will suffice) House Judiciary; *died when the legislature adjourned*

IDAHO

A measure proposed for the November 1996 ballot would prohibit abortions after viability except to prevent death or "serious physical injury" to the pregnant woman; the bill also prohibits the use of all abortion methods except induction or hysterotomy for post-viability procedures.

7/5 - will know whether moving ahead as an initiative, may not be on ballot.

ILLINOIS

SB 1492 (ban on D&X abortions) (prohibits "partial birth" abortions unless necessary to preserve a woman's life or prevent serious and permanent impairment of a major bodily function) Senate Rules; *died according to the rules of the legislature.* Dead

IOWA

HF 2109 (ban on late abortions) (prohibits the intentional termination of a pregnancy after the end of the second trimester if done with the knowledge and voluntary consent of the pregnant woman, unless performed to preserve the life or health of the woman) 4/10 Governor signed the bill, which is scheduled to take effect on 7/1/96.

KENTUCKY

SB 253 (ban on D&X abortions) (prohibits "partial birth" abortions; affirmative defense if procedure was necessary to save the woman's life and no other procedure would suffice) Senate Judiciary; 3/12 petition for hearing defeated by 15-22; *died when the legislature adjourned.*

LOUISIANA

HCR 25 (ban on D&X abortions) (resolution urging the President not to veto HR 1833) 4/2 enrolled and signed by Speakers of House and Senate; 5/20 chaptered by Secretary of State.

MARYLAND

HB 1213 (ban on D&X abortions) (prohibits "partial birth" abortions unless necessary to save a woman's life or prevent a substantial risk of severe permanent disability when no other procedure is available) House Environment; 3/21 received an unfavorable committee report; 3/22 a motion to overturn the report failed on the House floor by a vote of 39-89, which *killed the bill for this session.*

Dead

SB 695 (ban on D&X abortions) (bans "partial birth" abortions unless the woman's life is endangered and no other medical procedure is available to save her life; permits civil actions by putative married fathers and parents of a minor) Senate Judicial Proceedings; *died when the legislature adjourned.*

MICHIGAN — signed by Gov., in effect 4/1/97 6/14

HB 5889 (ban on D&X abortions) (prohibits "partial birth" abortions unless the physician believes that the procedure is necessary to save the woman's life and no other procedure will suffice) House Human Services; 5/29 passed full House by 63-36; 6/4 rules were waived, bill was placed directly on the Senate calendar for final vote.

HR 324 (ban on D&X abortions) (resolution condemning presidential veto of H.R. 1833 and urging Congress to override the veto) House Human Services; 5/16 reported from committee; 5/29 amended and passed in full House by voice vote, then filed.

SB 1029 (ban on D&X abortions) (prohibits "partial birth" abortions; affirmative defense provided if the physician believed that a medical emergency existed and that no other procedure would resolve the medical emergency) Senate Families, Mental Health and Human Services; 5/29 reported from committee and placed on the Senate calendar.

MINNESOTA

HF 2001 (ban on D&X abortions) (prohibits "partial birth" abortions; affirmative defense if procedure necessary to save a woman's life) House Health and Human Services; *died when the legislature adjourned.*

MISSISSIPPI

SB 2741 (ban on D&X abortions) (prohibits D&X after viability except for life-endangerment and substantial and irreversible impairment of a major bodily function) Senate Public Health and Welfare; *died when the legislature adjourned.*

SB 2742 (ban on D&X abortions) (prohibits the use of D&X after viability except for life-endangerment and substantial and irreversible impairment of a major bodily function) Senate Public Health and Welfare; *died when the legislature adjourned.*

MISSOURI

HB 800 (ban on "partial birth" abortions) (amendment to a juvenile justice bill, HB 800, banning "partial birth" abortions unless necessary to save a women's life) 5/17 "partial birth" amendment approved in full Senate by 16-13; 5/17 bill passed full Senate by 31-0; 5/17 full House refused to concur with the Senate amendments by voice vote, a conference committee was formed; 5/17 conference substitute was reached; 5/17 full House did not approve of conference substitute; *died when the legislature adjourned.*

NEW YORK

AB 9717-B (ban on D&X abortions) (bans "partial birth" abortions; affirmative defense for life-saving procedures) Assembly Health.

SB 6901-B (ban on D&X abortions) (bans "partial birth" abortions; affirmative defense for life-saving procedures) Senate Codes; Senate Rules; 4/30 passed full Senate by 39-21; Assembly Health.

OREGON

A measure proposed for the November 1996 ballot would prohibit abortions after the first trimester, except when necessary to save a woman's life

SOUTH CAROLINA

Dead

HB 4380 (ban on D&X abortions) (prohibits "partial birth" abortions) House Judiciary. Adjourned

UTAH

Passed

HB 206 (ban on methods of abortion) (bans saline amnioinfusion and "partial birth" abortions after viability unless necessary to preserve a woman's life or health) 3/18 Governor signed the bill, which went into effect on 4/29/96.

VIRGINIA

HB 1185 (ban on D&X abortions) (prohibits D&X procedures after the second trimester) House Courts of Justice; 2/11 committee voted 21-1 to carry the bill over to later this year -- the legislature must vote on this measure by 12/20/96.

WASHINGTON

Dead

HB 2524 (ban on D&X abortions) (prohibits abortions in the third trimester and after viability unless necessary to prevent death; prohibits "partial birth" abortions with an affirmative defense that the procedure was necessary to save the woman's life and no other procedure would suffice) House Law & Justice; *died when the legislature adjourned.*

North Carolina

SB 1482 — pending

Partial Birth mtg. on Hill 7-12

Andrea Camp Wendy Vanderman Joseph Blum

Dan — Abom — NARAL NAF

AC:

need doctors health of mother

What can go wrong

maternal health morbidity a real issue

not invented

muddy - of what count

Family Physicians / College of Physicians

NARAL fact sheet

McDermott or Nancy Johnson

Those who need strong up

V13 Clinton (Ind)

Ford (Tenn)

Richardson (NM)

~~V13~~ McCarthy (NY)

Conyers (Pa)

Dem NOs

Dingell

Lantos

Towns

Hefner

Van Hollen

Frost

Barrett

Need 8 to walk or 4 to switch

Cath. Clergy activity Key

July 23rd event —

UH actions in states of using State UJ medical groups

JPs for members

Lost medical & religious for pass

Brian Spell

American Medical Association
Physicians dedicated to the health of America

James S. Todd, MD
Executive Vice President

515 North State Street
Chicago, Illinois 60610

312 464-5000
312 464-4184 Fax

October 23, 1995

The Honorable Charles T. Canady, Chairman
Subcommittee on the Constitution
Committee on the Judiciary
U.S. House of Representatives
1222 Longworth House Office Building
Washington, D.C. 20515

Re: H.R. 1833, the "Partial-Birth Abortion Ban Act"

Dear Chairman Canady,

The American Medical Association (AMA) appreciates the opportunity to review H.R. 1833, the "Partial-Birth Abortion Ban Act of 1995."

The AMA Board of Trustees has determined that it will not take a position on H.R. 1833 at this time. To clear up any confusion which the AMA's legislative review process may have caused, a recommendation from the Association's Council of Legislation, while important in our review process, is not the policy of the AMA. The Council serves in an advisory capacity to our Board and no policy position is taken on the Council's recommendations without the approval of the Board of Trustees.

As the legislation moves forward, if you believe we could lend expertise on any of the medical and ethical issues raised by the legislation, please do not hesitate to contact us.

With warmest regards,

James S. Todd, MD

James S. Todd, MD

The American College of Obstetricians and Gynecologists

April 9, 1996

William Jefferson Clinton
The President of the United States of America
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20100

Dear Mr. President:

The American College of Obstetricians and Gynecologists (ACOG), an organization representing more than 37,000 physicians dedicated to improving women's health care, does not support HR 1833, the Partial-Birth Abortion Ban Act of 1995. The College finds very disturbing that Congress would take any action that would supersede the medical judgment of trained physicians and criminalize medical procedures that may be necessary to save the life of a woman. Moreover, in defining what medical procedures doctors may or may not perform, HR 1833 employs terminology that is not even recognized in the medical community -- demonstrating why Congressional opinion should never be substituted for professional medical judgment. Accordingly, ACOG supports your decision to veto this legislation.

Thank you for considering our views on this important matter.

Sincerely,

Ralph W. Hale MD

Ralph W. Hale, MD
Executive Director

[illegible] Street SW Washington, DC 20024-2188 (202)638-5577

RICHARD 'DOC' HASTINGS
4TH DISTRICT, WASHINGTON
COMMITTEE ON NATIONAL SECURITY
SUBCOMMITTEES:
VICE-CHAIRMAN,
RESEARCH AND DEVELOPMENT
MILITARY PERSONNEL

COMMITTEE ON NATURAL RESOURCES
SUBCOMMITTEES:
WATER AND POWER RESOURCES
NATIVE AMERICANS AND INSULAR AFFAIRS

1229 LONGWORTH BUILDING
WASHINGTON, DC 20515
(202) 225-5816

320 N. JOHNSON, SUITE 500
KENNEWICK, WA 99336
(509) 783-0310

302 E. CHESTNUT
YAKIMA, WA 98901
(509) 452-3243

25 NORTH WENATCHEE AVENUE
SUITE 202
WENATCHEE, WA 98801
(509) 662-4294

Congress of the United States
House of Representatives

July 10, 1996

PARTIAL-BIRTH ABORTION IS WRONG.
SIGN THE HASTINGS LETTER TO SUPPORT A VETO OVERRIDE VOTE.

JUL 10 1996

Dear Colleague:

When President Clinton vetoed H.R. 1833 he allowed the unfortunate procedure known as partial-birth abortion to continue. However, no veto can alter the fact that over 70% of the American people oppose this procedure and want it stopped. The tragic reality of partial-birth abortion demands that we do everything possible to override the President's veto. I am therefore preparing the attached letter urging the House leadership to schedule a veto override vote on H.R. 1833 following the August district work period.

If you have any questions regarding the letter, or would like to sign on, please contact Jon on my staff at 5-5816.

Sincerely,

Doc Hastings
Member of Congress

Congress of the United States
House of Representatives
Washington, DC 20515

July 25, 1996

The Honorable Dick Armey
Majority Leader
H-329, The Capitol
Washington, D.C. 20515

Dear Majority Leader Armey:

Like you, we were pleased that both the House and Senate passed legislation earlier this year which would ban all partial birth abortions, except when the mother's life is at stake. It appeared that the tragedy of partial-birth abortion might finally come to an end. However, we were surprised and disappointed that President Clinton chose to veto this important legislation on April 11, 1996.

Religious leaders such as Pope John Paul II and the Rev. Billy Graham have condemned this veto. Even President Clinton's own Ambassador to the Vatican--Ray Flynn--recently agreed that the President's veto was not justified. Like the majority of Americans who oppose it, we are troubled that the "partial birth" abortion procedure is still used in any civilized society.

We strongly support efforts to override the President's misguided veto of H.R. 1833, and we are confident that such a move would be successful in the House. We feel that we have an obligation to do all we can to end the practice of partial-birth abortion <u>now</u>. Therefore, we urge you to schedule a vote to override the President's veto of H.R. 1833 following the August district work period.

Sincerely,

_____ _____

_____ _____

Final Passage of HR1833- March 27, 1996

72 Democrats voted in support of the bill

27 of those 72 Democrats who voted in support have at least a 60% NARAL Rating

Baesler
Barrett (WI)*
Condit
Cramer
Dingell
Flake
Foglietta
Frost *
Gephardt
Gordon
Hefner
Jacobs **
Jefferson *
Johnson (SD)***
Kennedy (RI)
Lincoln **
Martinez
McHale
Minge
Moran
Obey
Payne (VA)**
Pomeroy
Sisisky
Spratt
Tanner
Traficant
Thornton

45 of the 72 Democrats who voted in support have under a 60% NARAL Rating

Barcia- 3%
Bevill- 3%**
Bonior- 47%
Borski- 17%
Brewster- 16%**
Browder- 26%***
Clement- 55%
Costello- 3%
Danner- 43%
de la Garza- 15%**
Doyle- 16%
Geren- 34%**
Hall (OH)- 4%
Hall (TX)- 1%
Hamilton- 24%
Holden- 3%
Kanjorski- 16%
Kaptur- 57%
Kildee- 3%
Kleczka- 37%
Klink- 16%
LaFalce- 3%
Lipinski- 3%
Manton- 2%
Moakley- 20%
Neal- 55%
Orton- 3%
Mollohan- 3%
Montgomery- 1%
Oberstar-6%
Ortiz- 3%
Murtha- 3%
Mascara- 9%
McNulty- 26%
Peterson (MN)- 2%
Poshard- 2%
Rahall- 3%
Roemer- 16%
Skelton- 3%
Stenholm- 3%
Stupak- 3%
Taylor (MS)- 3%
Tejeda- 3%
Thornton- 47%**
Volkmer- 3%

9 Democrats did not vote, and all have at least 85% NARAL rating

Bryant (TX)***
Collins (IL)**
Filner
Ford**
Gibbons**
Harman
Stokes
Torricelli***
Ward

Richardson-100%-Voted Present on March 27, 1996, voted against the bill on November 1, 1995.

2 New Democratic Members

Blumenauer
Millender-McDonald

(Representative Emerson who voted for the bill, died.)

*Voted against HR1833 on November 1, 1995.
**Member retiring.
***Member running for another office.

NARAL Ratings are from the 1995 Voting Record.

NARAL 7/10/96

CATHOLICS FOR A FREE CHOICE

A SOCIAL JUSTICE ORGANIZATION

- stands for the rights of women in both church and society, in the United States and internationally

- shapes and advances sexual and reproductive ethics that are based on justice, a commitment to women's well-being, and respect for the moral capacity of women and men to make sound decisions about their lives

- works through discourse, education, and advocacy to infuse these values into public policy, community life, and Catholic social thinking and teaching

CATHOLICS FOR A FREE CHOICE
1436 U Street NW, Suite 301
Washington, DC 20009-3997
phone: 202-986-6093 fax: 202-332-7995 e-mail: cffc@igc.apc.org

Frances Kissling, President

● May 1996 by Catholics for a Free Choice

The Catholic Vote and Abortion

Poll after poll shows that most Catholics are prochoice.
And as voters, they do not follow the bishops --
Catholics make up their own minds.

Number of Catholics in the United States: 60 million
Catholics as a percentage of total US population: 22
Catholics as a percentage of voters in US House races on Election Day, 1994: 29
Percentage of Catholics who say that abortion should be legal in some or all circumstances: 82
Percentage who say abortion never can be a morally acceptable choice: 13
Percentage saying Catholics can vote in good conscience for candidates who support legal abortion: 70

Catholics say abortion should be legal

● A full 82% of US Catholics say abortion should be legal either under certain circumstances or without restrictions. ● This is close to the figure for all Americans: 87%. ● Among Catholics, 39% say a woman should be able to get an abortion if she decides she wants one, no matter what the reason. ● Another 43% say abortion should be legal under certain circumstances, such as when a woman's health is endangered or when a pregnancy results from rape. ● Only 15% of Catholics agree with the bishops' position that abortion should be illegal in all circumstances.

Time/CNN nationwide poll of 1,000 adults, conducted by Yankelovich Partners, Sept. 27-28, 1995, MOE ±3%; subsample of 500 Catholics, MOE ±4.5%.

This finding holds true across polls and over time

● In 1992, 84% of Catholics -- and 84% of all Americans -- said abortion should be legal in some or all circumstances. ● Only 13% of Catholics agreed with the bishops that abortion should be illegal in all circumstances.

Gallup Survey, for Catholics Speak Out, of 802 Catholics, May 5-7, 1992, MOE ±4%; and Gallup poll of 1,001 adults nationally, Jan. 16-19, 1992, MOE ±3% (data provided by the Roper Center, University of Connecticut).

● In 1990, 85% of Catholics and 90% of all Americans said abortion should be legal in at least some circumstances. ● 51% of Catholics and 57% of all Americans said choices on abortion should be left up to the woman and her doctor. ● Only 12% of Catholics took the bishops' position that abortion should always be illegal.

Wall Street Journal/NBC News poll of 1,555 registered voters nationwide, conducted by Peter Hart and Robert Teeter, July 6-10, 1990, MOE ±2.6%; subsample of 427 Catholics, MOE±5%.

Findings hold true over time (continued)

• In 1989, 83% of Catholics -- and 83% of all adults -- said abortion should be legal, at least in cases of rape/incest or to save the woman's life. • Among Catholics, only 13% said abortion should always be illegal.

CBS News/*New York Times* poll of 1,347 adults, Sept. 17-20, 1989, MOE ±3%; subsample of 341 Catholics, MOE ±5%.

Catholics believe abortion can be moral

• 64% of Catholics, and 68% of all adults, disapprove or strongly disapprove of the statement that abortion is morally wrong in every case.

US News & World Report survey of 1,000 American adults, conducted by Market Facts' Telenation, designed by Lake Research and Tarrance Group, Sept. 23-24, 1995, MOE ±3.5%; subsample of 493 Catholics, MOE 4.5%.

• Only 13% of Catholics say abortion never can be a morally acceptable choice.

Gallup Survey, for Catholics Speak Out, of 802 Catholics, May 5-7, 1992, MOE ±4%.

• 69% of Catholics believe a woman who has an abortion for reasons other than to save her life can still be a good Catholic.

ABC/*Washington Post* poll of 1,530 adults, conducted by Chilton Research Services, Sept. 28-Oct. 1, 1995, MOE ±3%.

Catholic women have abortions

• Catholic women are as likely as all other US women to have abortions, and 36% more likely than Protestant women. • When asked about their reasons for having abortions, Catholics are 8% more likely than those of different religious beliefs to say they do not want others to find out about their sexual activity or pregnancy.

Stanley K. Henshaw & Jane Silverman (Alan Guttmacher Institute), *Family Planning Perspectives*, vol. 20, no. 4 (July/Aug. 1988).
36% figure comes from AGI survey of 9,480 women obtaining abortions in 1987.
8% figure comes from AGI survey of 1,900 women obtaining abortions in 1987-88.

On abortion as on birth control: Catholics follow their own consciences

• Only 15% of Catholics say that a Catholic should always obey official church teachings on such moral issues as birth control and abortion. • 79% say it is possible for Catholics to make up their own minds on these issues. • 80% believe it is possible to disagree with the pope on official positions on morality and still be a good Catholic.

Time/CNN nationwide poll of 1,000 adults, conducted by Yankelovich Partners, Sept. 27-28, 1995, MOE ±3%; subsample of 500 Catholics, MOE ±4.5%.

• In one recent poll, 82% of Catholics disapproved or strongly disapproved of the statement that using artificial birth control, such as condoms or birth control pills, is morally wrong. • In another poll, 76% of Catholics disagreed with the statement that using artificial means of birth control is wrong.

82%: *US News & World Report* survey of 1,000 American adults, conducted by Market Facts' Telenation, designed by Lake Research and Tarrance Group, Sept. 23-24, 1995, MOE ±3.5%; subsample of 493 Catholics, MOE 4.5%.
76%: *Time*/CNN nationwide poll of 1,000 adults, conducted by Yankelovich Partners, Sept. 27-28, 1995, MOE ±3%; subsample of 500 Catholics, MOE ±4.5%.

Catholics go the polls

• Number of Catholics in the United States: 60 million • Catholics as a portion of the total US population: 22%

PJ Kenedy & Sons, *Official Catholic Directory 1996* (New Providence, NJ: R.R. Bowker, 1996).

• Catholics as a portion of voters who turned out in 1992 on Election Day: 27% • Catholics, among all voters turning out to vote for US House candidates on Election Day in 1994: 29%

Voter News Service (formerly Voter Research & Surveys) exit polls, 1992 & 1994.

• In the 1994 House and Senate races, 52% of Catholic voters favored Republicans. In House races alone, 51% voted for Democrats. • In all House and Senate races, 60% of Protestant voters and 60% of those identifying themselves with the Religious Right favored Republicans. • Wealthier Catholics were more likely than other Catholics to vote for Republican House and Senate candidates. • Most Catholics with postgraduate education, or less than a college degree, did *not* vote Republican in those races. Most of those with a college degree, and no more, did vote Republican.

Roper Center for Public Opinion Research, *America at the Polls: 1994*.

• Every winning presidential candidate since 1976 has carried a majority or plurality of Catholic voters: 54% for Carter in 1976; a 50% plurality for Reagan in 1980; 54% for Reagan in 1984; 52% for Bush in 1988; and a 44% plurality for Clinton in 1992.

Exit Polls: 1976, CBS; 1980-1988, CBS/*New York Times*; 1992, Voter News Service.

Abortion is not a litmus test -- but Catholics vote prochoice

• 66% of Catholics say President Clinton's veto of the late-term abortion bill in April 1996 will make no difference in their choice between Clinton and Bob Dole in the presidential election -- or will make them more likely to vote for Clinton. • Just after Clinton vetoed the late-term abortion bill, Catholics preferred Clinton over Dole by 58% to 33%.

Los Angeles Times poll of 1,374 adults/ 1,149 registered voters, April 13-16, 1996, MOE ±3%; Catholic subsample 418, MOE ±5%.

• Just after the late-term abortion bill veto, Catholic women, who make up 26% of the female electorate, favored Clinton over Dole by a 61% to 35% margin.

Greenberg/Lake survey of 1089 registered voters, for Emily's List, April 12, 1996.

• 70% of Catholics agree or strongly agree with the statement that Catholics can, in good conscience, vote for political candidates who support legal abortion.

Gallup Survey, for Catholics Speak Out, of 802 Catholics, May 5-7, 1992, MOE ±4%.

Catholics say religion should not dictate politics

• 56% of Catholics and 55% of non-Catholics say it is appropriate for religious leaders to take a public position on abortion. • But 68% of Catholics say it is *not* appropriate for religious leaders to urge people to vote for or against a candidate because of his stand on abortion. • 65% of non-Catholics say it is not appropriate.

New York Times/CBS News poll of 1,536 adults nationwide, Sept. 18-22, 1995, MOE ±3%; subsample of 423 Catholics, MOE ±5%.

• Just before the 1995 papal visit, 73% of US Catholics said that knowing the pope's position on a social or political issue would not influence their position on the issue. • Only 16% said they would be more likely to support the pope's position.

New York Times/CBS News poll of 1,536 adults nationwide, Sept. 18-22, 1995, MOE ±3%; subsample of 423 Catholics, MOE ±5%.

• 79% of Catholics say they are not members or followers of conservative Christian political groups.

Peter D. Hart Research Associates, national survey, for People For the American Way, of 1,252 registered voters, July 19-22, 1995; subsample of 279 Catholics, MOE ±6.3%.

2 letters
should go up
small + Hickey.

DD
Small
+ Little
+ Hickey letter

The Feminist Majority

January 9, 1996

The Honorable William J. Clinton
1600 Pennsylvania Avenue, NW
The White House
Washington, D.C. 20050

Dear President Clinton,

I am writing to urge you to veto the D&X abortion legislation which, if it becomes law, would outlaw a procedure necessary-- albeit rarely-- to save a woman's life, health, or future fertility, or to prevent severe fetal abnormalities. The criminalization of a medical procedure necessary to save a woman's life or fertility represents the first step in dismantling *Roe v Wade* and a woman's fundamental right to decide.

Since you have taken office you have advanced a woman's right to choose. Your Executive Orders to reinforce the gag rule, to facilitate the licensing of RU486, to repeal the Mexico City Policy, to restore abortion services in the military and to end the ban on fetal tissue research have helped and will help countless millions of women. Although vetoing the D&X procedure will help but a few hundred American women and their families yearly, it is still exceedingly important. We must stop extremists from foisting their radical agenda on women and must preserve the fundamental rights of a woman to choose a safe medical procedure without unprecedented government interference.

Thank you for your consideration and your support of women's rights.

Sincerely,

Ellie Smeal

Eleanor Smeal
President

1600 Wilson Boulevard • Suite 801 • Arlington, VA 22209 • (703) 522-2214 • Facsimile (703) 522-2219

THE WHITE HOUSE

WASHINGTON

January 26, 1996

Ms. Eleanor Smeal
The Feminist Majority Foundation
Suite 801
1600 Wilson Boulevard
Arlington, Virginia 22209

Dear Ellie:

Thank you for your recent letter.

As you know, I have always maintained that the decision to have an abortion should be between a woman, her conscience, her doctor, and her faith. I also believe that abortions should be safe, legal, and rare. I have consistently opposed late-term abortions except to protect the life or health of the woman. Since H.R. 1833 -- contrary to Roe v. Wade -- fails to provide for consideration of the woman's health or, in the case of the House bill, even her life, I cannot support it.

I appreciate your counsel on this difficult issue as well as your continuing commitment to help ensure the health and safety of women across the country.

Sincerely,

Bill Clinton

PHOTOCOPY
WJC HANDWRITING

House Vote on Final Passage of HR1833
March 27, 1996
Passed 286-129
Voting Yes were 214 Republicans and 72 Democrats
Voting No were 15 Republicans, 113 Democrats and 1 Independent

Republicans voting against HR1833 (15)

Boehlert (NY)
Campbell (CA)
Franks (CT)
Frelinghuysen (NJ)
Gilman (NY)
Greenwood (PA)
Horn (CA)
Johnson (CT)
Kelly (NY)
Kolbe (AZ)
Meyers (KS)
Morella (MD)
Shays (CT)
Torkildsen (MA)
Zimmer (NJ)

Democrats voting against HR1833 (113)

Abercrombie (HI)
Ackerman (NY)
Andrews (NJ)
Baldacci (ME)
Becerra (CA)
Beilenson (CA)
Bentsen (TX)
Berman (CA)
Bishop (GA)
Boucher (VA)
Brown (CA)
Brown (FL)
Brown (OH)
Cardin (MD)
Chapman (TX)
Clay (MO)
Clayton (NC)
Clyburn (SC)
Coleman (TX)
Collins (MI)
Conyers (MI)
Coyne (PA)
DeFazio (OR)
DeLauro (CT)
Dellums (CA)
Deutsch (FL)
Dicks (WA)
Dixon (CA)
Doggett (TX)
Dooley (CA)
Durbin (IL)
Edwards (TX)
Engel (NY)
Eshoo (CA)
Evans (IL)
Farr (CA)
Fattah (PA)
Fazio (CA)
Fields (LA)
Frank (MA)
Furse (OR)
Gejdenson (CT)
Gonzalez (TX)
Green (TX)
Gutierrez (IL)
Hastings (FL)
Hilliard (AL)
Hinchey (NY)
Hoyer (MD)
Jackson (IL)
Jackson-Lee (TX)
Johnson, E.B. (TX)
Johnston (FL)
Kennedy (MA)
Kenelly (CT)
Lantos (CA)
Levin (MI)
Lewis (GA)
Lofgren (CA)
Lowey (NY)
Luther (MN)
Maloney (NY)
Markey (MA)
Matsui (CA)
McCarthy (MO)
McDermott (WA)
McKinney (GA)
Meehan (MA)
Meek (FL)
Menendez (NJ)
Miller (CA)
Mink (HI)
Nadler (NY)
Olver (MA)
Owens (NY)

Pallone (NJ)
Pastor (AZ)
Payne (NJ)
Pelosi (CA)
Peterson (FL)
Pickett (VA)
Rangel (NY)
Reed (RI)
Rivers (MI)
Rose (NC)
Roybal-Allard (CA)
Rush (IL)
Sabo (MN)
Sawyer (OH)
Schroeder (CO)
Schumer (NY)
Scott (VA)
Serrano (NY)
Skaggs (CO)
Slaughter (NY)
Stark (CA)
Studds (MA)
Thompson (MS)
Thurman (FL)
Torres (CA)
Towns (NY)
Velaquez (NY)
Vento (MN)
Visclosky (IN)
Waters (CA)
Watt (NC)
Waxman (CA)
Williams (MT)
Wilson (TX)
Wise (WV)
Woolsey (CA)
Wynn (MD)
Yates (IL)

Independent voting against HR1833 (1)

Sanders (VT)

6-19

Partial Birth mtg w/ ACOG - Kathy Bayer + Dr. ____

Why this proc. rather than another

How answer infanticide
What serious health risks

Carrying the malformed baby is an option
But is it true woman risks serious risk if carries to term? Impaired coagulation if fetus dies likely in a matter of weeks

Let's say hydrocephalic fetus incompatible w/ life
early 3rd trimester - option is carry to term & monitor coagulate factors & then remove fetus when it has died

small # women for carry to term a fetus incompatible w/ life

- inducing labor

- teaching agent focus d/t term & evaluat-

- partial birth d & extract-

- hysterotomy {C-sec'n}

D & E & D & X advantage of single immediate

procedure requires skill

~~Ex: no set protocol~~

In 3rd trim. want to D & E =

too big, too dangerous

dangers of

~~perfo~~ - lacerate uterus OR cervix hemorrhage, consequences

risk of I surg remove uterus, loss of fertility

eg 2nd WKS

could induce labor or "C-section" -

may not want surgery w/ RISKS of that & maybe compromising women's ability bearing future babies of, increase in uterus that's necy (or future births have to be by c-section)

the risks of

transverse incision allows
vaginal birth in subsequent
pregnancy - but not
possible earlier in preg.
when vertical incision only

why not induce labor or carry to term —

carry to term is best option
as long as fetus alive
(i.e. no complications)
Woman can do that
not a physical health RISK

more frequent option —

What if eg diabetes heart prob.
make judgment based on monitoring
Woman — this is no worse
risk of mother or baby)

most freq. option is induced labor

if heart disease + malformed baby so better to do D + X than inducing labor
so in such case D + X could be latest

Also if pre-viability but early third trimester + serious risk to mother's health/life to induce labor
in g/

But narrow window in which too late to do D + E but still too early for viability
because it risky to do C-sec'n to safe baby

KB says has only found 3 ob-gyns who've done this estimates 20 or so ob-gyns who do partial birth abortions

---

The partial birth abortions done on women at UW was by family DR., not ob-gyn

---

BK: heart problems could make induced labor a bad option - anything else?

2d

In 2d trimester is D&E or D&X ever safest physically?

Ending 2d injection into amniotic not work

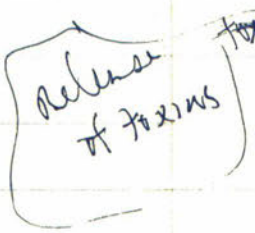
D&E or X maybe

later choice is induce or a D/E ~~D/E~~ D/X

1st- sweep curettage

but as get bigger can't do that

no more 14-24 D/E D/X or induction



Coagulin problem can lead to ~~disse~~ small clots throughout system & leave pt. w/o ability to clot blood, or hemorrhaging

---

Vickie Stella ... could have had induction health risk increased by abort- hist. of diabetes. But still could have had induction

Coreen Costello

Risk to health of C-section was ordinary risk of major surgery

baby transverse so couldn't deliver

~~This~~ ~~Box~~ Suffer

at this time & for long term health

Mary Dorothy-Line hydrocephaly

Richard Addis — baby couldn't live. What risk of carrying — ~~if fetus dead~~

Charmaine

could've had induction vs carry to term

not likelier in this case ~~that would~~ baby will die in utero

Tammy Watts Charmaine trisomy-13

other options

There are rare cases in which this would be the proc. w/ the least risk
but that not mean serious adverse health consequ. if you don't use the procedure

---

Are there cases where it's ok for a woman to have a c-section could be if a woman had a heart condition —
i.e. that is an added factor making c-sec'n still most undesirable

ER: Likelihood of harm might be slightly lower in certain cases by doing partial breath vs other procedures

hysterectomy

"C-sect" risk

in vertical

could rupture preg.
adhesions could ~~from~~.
~~Room~~ cause infertility

THE PRESIDENT HAS SEEN
2.13.96

THE WHITE HOUSE
WASHINGTON

February 5, 1996

MR. PRESIDENT:

Attached is a memo from Leon, Jack, George and Nancy-Ann Min on the partial birth abortion bill, setting forth four policy options and attaching a proposed letter to Senator Hatch. DOJ believes that only Option 4 is constitutional, while our Counsel's office believes any of Options 2-4 are constitutionally sound. In essence these are the options:

1. No use of this procedure in pre- or post-viability stage unless the abortion is being performed because the pregnancy itself threatens life or serious adverse health consequences.

2. Same as Option 1 post-viability, but broader use pre-viability -- namely, if woman chooses an elective (non-health) abortion, she could choose to use this procedure as long as the procedure (as opposed to other procedures) were necessary to avert risk to life or serious adverse health consequences.

3. (Boxer) Same as Option 1 post-viability, but still broader use pre-viability -- namely, procedure could be used in any pre-viability abortion, irrespective of a health rationale.

4. Same as Option 3 pre-viability; differs from Options 1-3 post-viability by requiring only "adverse" rather than "serious adverse" health consequences.

The attached draft letter embodies Option 1 without the bracketed language; Option 2 with such language.

Todd Stern

7:25 pm

THE WHITE HOUSE

WASHINGTON
February 2, 1996

Wramsoff

MEMORANDUM FOR THE PRESIDENT

FROM: LEON PANETTA, JACK QUINN
GEORGE STEPHANOPOULOS, NANCY-ANN MIN

SUBJECT: PARTIAL BIRTH ABORTION ACT

Detailed below are four ways of amending the Partial Birth Abortion Act. They differ with respect to (1) the meaning and appropriate scope of a life and health exception and (2) the permissibility of imposing any restrictions on use of the procedure in the pre-viability setting. Of course, we need not propose any statutory language. But these formulations will help to bring into sharper focus the question of when the regulation of partial birth abortions is impermissible.

The Office of Legal Counsel of the Justice Department believes that only one of the following proposals meets constitutional standards -- namely, Option 4 (the option, of the ones presented here, allowing greatest use of the partial birth procedure). The White House Counsel's Office disagrees, believing that Options 2, 3, and 4 are all at least arguably constitutional. On the other hand, the White House Counsel's Office agrees with OLC that Option 1 is unconstitutional because it prevents a doctor from using the partial birth procedure in any previability case in which the woman desires the abortion for non-health related reasons, even if the partial birth procedure (as compared to other procedures) is necessary to protect her from serious adverse health consequences.

Attached to this memo is a draft of a letter, which sets out your basic position on the Partial Birth Abortion Act. The penultimate paragraph of the letter, in which you say what kind of bill you could sign, is most consistent with Option 1 in the absence of the bracketed words and is most consistent with Option 2 when those words are included.

* * * * *

1. The prohibition of the Act shall not apply to any abortion performed where, in the medical judgment of the attending physician, the abortion is necessary to preserve the life of the woman or avert a serious adverse health consequence to the woman.

This option allows use of the partial birth procedure, whether in the pre-viability or post-viability stage, in only one circumstance: where the abortion is performed because the pregnancy poses a threat to the life or the serious health interests of the woman.

2. The prohibition of the Act shall not apply to any abortion if, in the medical judgment of the attending physician, the abortion (or, in the case of pre-viability abortions, the abortion or election of particular method of abortion) is necessary to preserve the life of the woman or avert a serious adverse health consequence to the woman.

This option allows use of the partial birth procedure in the post-viability stage in the same circumstance described in Option 1: where the abortion is performed because the pregnancy poses a threat to the life or the serious health interests of the woman. It allows use of the of the partial birth procedure in the pre-viability stage in that circumstance and another: where the abortion is performed for non-health related ("elective") reasons, but the use of the partial birth procedure (as opposed to other abortion procedures) is necessary to avert a threat to the life or the serious health interests of the woman.

3. The prohibition of the Act shall not apply to any abortion performed prior to the viability of the fetus, or after viability where, in the medical judgment of the attending physician, the abortion is necessary to preserve the life of the woman or avert a serious adverse health consequence to the woman.

This is the Boxer Amendment. It allows use of the partial birth procedure in the post-viability stage in the same circumstance described in Option 1: where the abortion is performed because the pregnancy poses a threat to the life or the serious health interests of the woman. It allows use of the partial birth procedure in the pre-viability stage in any case at all, regardless whether the abortion is performed for health-related reasons and also regardless whether in "elective" cases, the use of the partial birth procedure (as opposed to other procedures) is medically necessary.

4. The prohibition of the Act shall not apply to any abortion performed prior to the viability of the fetus, or after viability where, in the medical judgment of the attending physician, the abortion is necessary to preserve the life of the woman or avert an adverse health consequence to the woman.

This option allows use of the partial birth procedure in the post-viability stage where the abortion is performed because the pregnancy poses a threat to the life or the health interests of the woman. Note that in this formulation, the adverse health consequences to the woman do not have to be "serious." The option allows use of the partial birth procedure in the pre-viability stage in any case at all, as does Option 3. This is the option preferred by the Justice Department's OLC.

DRAFT

Dear Senator Hatch:

I understand that the House is preparing to consider H.R. 1833, as amended by the Senate, which would prohibit doctors from performing a certain type of abortion. I want to make the Congress aware of my position on this extremely complex issue.

I have always believed that the decision to have an abortion should be between a woman, her conscience, her doctor, and her God. I strongly believe that legal abortions--those abortions that the Supreme Court ruled in Roe v. Wade must be protected--should be safe and rare. I have long opposed late-term abortions except, as the law requires, where they are necessary to protect the life of the mother or where there is a threat to her health. In fact, as Governor of Arkansas, I signed into law a bill that barred third trimester abortions except where they were necessary to protect the life or health of the woman, consistent with the Supreme Court's rulings.

The procedure described in H.R. 1833 is very disturbing, and I cannot support its use on an elective basis, where the abortion is being performed for non-health related reasons and there are equally safe medical procedures available. As I understand it, however, there are rare and tragic situations that can occur in a

DRAFT

woman's pregnancy in which, in a doctor's medical judgment, this procedure may be necessary to save a woman's life or to preserve her health. In those situations, the Constitution requires that a woman's ability to choose this procedure be protected.

I have studied and prayed about this issue, and about the families who must face this awful choice, for many months. I believe that we have a duty to try to find common ground: a resolution to this issue that respects the views of those--including myself--who object to this particular procedure, but also upholds the Supreme Court's requirement that laws regulating abortion protect both the life and the health of American women.

I have concluded that H.R. 1833 as drafted does not meet the constitutional requirements that the Supreme Court has imposed upon us, in Roe and the decisions that have followed it, to provide protections for both the life and the health of the mother in any laws regulating abortions.

I am prepared to support H.R. 1833, however, if it is amended to make clear that the prohibition of this procedure does not apply to situations in which the [~~election of the~~] procedure, in the medical judgment of the attending physician, is necessary to preserve the life of the woman or avert serious adverse health consequences to the woman.

DRAFT

I urge the Congress to amend H.R. 1833 to ensure that it protects the life and the health of the woman, as the law we have been elected to uphold requires.

Sincerely,

THE WHITE HOUSE

WASHINGTON

96 FEB 16 P6:15

MEMORANDUM FOR LEON PANETTA
CHIEF OF STAFF

FROM: KATHLEEN WALLMAN

SUBJECT: PARTIAL BIRTH ABORTION ACT

DATE: FEBRUARY 16, 1996

Pursuant to our meeting this morning, here are some talking points concerning the constitutional infirmity of Option 1 and why Option 2 is the best way to reconcile the desire for limits on the availability of the partial birth abortion procedure with *Roe v. Wade*.

With respect to the letter, I believe that the bracketed language should be restored because it makes the letter more consistent with Option 2. More important than changing the letter, however, is guidance from the President that he agrees that Option 1 should not be embraced because of its constitutional infirmity, and that Option 2 suffices to effect his will on this difficult issue. This guidance is important because, whatever the final wording of the letter, we will need to be prepared to explain to the pro-choice groups, who will call promply upon release of this letter, what it means in terms of *Roe v. Wade*.

I also wanted to remind you that, as stated in the February 2nd memorandum, the Office of Legal Counsel at Justice agrees with the White House Counsel's Office that Option 1 is unconstitutional. OLC also thinks that Option 2 is unconstitutional, but White House Counsel's Office disagrees. We believe that Option 2 is one of three options that have been presented to the President that are at least arguably constitutional.

Please let me know if you need anything further.

cc: Martha Foley
Harold Ickes
Elena Kagan
Evelyn Lieberman
Nancy-Ann Min
Jack Quinn
Carol Rasco
Todd Stern
Melanne Verveer
Marilyn Yager

1. Why Option 1 is unconstitutional.

Option 1 allows a doctor to use the partial birth abortion procedure in an abortion, whether pre- or post-viability, **only** when the abortion is necessary to preserve the life of the mother or prevent serious adverse health consequences to her -- that is, where the **pregnancy itself** poses a threat to the life or serious health interests of the mother and must be terminated to end that threat.

This means that a doctor could not elect to use the partial birth abortion procedure in the following circumstances:

> A woman in her tenth week of pregnancy decides to have an abortion. It is an elective abortion; the **pregnancy** presents no risk to her life or health However, the doctor determines that the use of the partial birth abortion procedure, rather than some other procedure, is necessary to avoid serious adverse consequences to the woman's health. Under Option 1, the doctor **may not** use the procedure. And the woman could not have a safe abortion, because the only method that the doctor judges to be safe is not permitted.

Roe v. Wade broadly protects a woman's right to choose during these early, pre-viability weeks of pregnancy. To embrace an option that would prevent a woman, as in the above example, from having a safe elective abortion altogether during the pre-viability period will be viewed by pro-choice groups as an extremely significant undercutting of the President's previously and often stated commitment to *Roe v. Wade*. This will cause tumult in that community and in the President's relations with them.

2. Option 2 is the best way to reconcile the desire for limits on the use of the procedure with *Roe v. Wade*.

Option 2 allows a doctor to use the partial birth abortion procedure --

> *post-viability*: only when the abortion is necessary to end a pregnancy that poses a threat to the life of the woman or presents serious adverse consequences to her health (identical to Option 1); and
>
> *pre-viability*: both (i) when the abortion is necessary to end a pregnancy that poses a threat to the life or serious health interests of the mother; AND (ii) when the abortion is performed for "elective" reasons, but the doctor determines that he must use the partial birth abortion procedure to avoid a threat to the life or serious health interests of the mother.

Option 2 solves the difficulty presented in the pre-viability scenario described above, because the doctor would be permitted to use the partial birth abortion procedure, based on his determination that it is the only method that will avoid a serious injury to the woman's health.

Option 2 thus allows the President to endorse a position that says that this procedure may never be used unless necessary to avoid risk to life or serious health consequences, without raising the major constitutional problems raised by Option 1, or raising questions about the consistency of his commitment to upholding *Roe v. Wade*.

Partial Birth -- How the Options Work

Post-viability

- Option 1 and 2 are identical -- this procedure can be used only if an abortion is required because the pregnancy itself would risk life or serious adverse health consequences.

Pre-viability

- **Option 1** -- procedure can be used *only* if an abortion is required because the pregnancy itself would risk life or serious adverse health consequences -- i.e., it can never be used in an elective abortion.

- **Option 2** -- procedure can be used in an elective abortion, but only if the procedure, as distinguished from other procedures, is necessary to avoid risk to life or serious adverse health consequences.

- **Illustration** -- Suppose a woman in her first or second month of pregnancy chooses to have an abortion in circumstances where the pregnancy itself does not threaten her life or health. Now suppose further that her doctor tells her that the use of *this procedure* (rather than some other procedure) *is* necessary to avoid risking life or serious adverse health consequences.

  Under Option 1, the procedure *still cannot be used*. Under Option 2 the procedure *can be used*.

Conclusion

- Option 1 is not defensible for us because both White House Counsel and DOJ believe it is unconstitutional under Roe v. Wade, and because women's groups will see this as a major undercutting of Roe. (In addition, it is not tenable for us to veto a bill because the prohibition on the partial birth procedure fails to meet requirements of Roe and then turn around in same veto message and say that we would endorse restrictions that violate Roe.)

- Option 2 allows us to take position that this procedure can never be used unless it is necessary to avoid risk to life or serious adverse health consequences; without running into the major constitutional and political problems raised by Option 1.

DRAFT

MEMORANDUM FOR LEON PANETTA

FROM: KATHLEEN WALLMAN

SUBJECT: PARTIAL BIRTH ABORTION ACT

DATE: FEBRUARY 16, 1996

Pursuant to our meeting this morning, here are some talking points concerning the constitutional infirmity of Option 1 and why Option 2 is a better way to reconcile the desire for limits on the availability of the partial birth abortion procedure with Roe v. Wade.

With respect to the letter, I believe that the bracketed language should be restored because it makes the letter more consistent with Option 2. More important that changing the letter, however, is guidance from the President that he agrees that Option 1 cannot be embraced because of its constitutional infirmity, and that Option 2 is consonant with his thinking on this difficult issue.

1. Why Option 1 is unconstitutional.

Option 1 allows a doctor to use the partial birth abortion procedure in any abortion, whether pre- or post-viability **only** when the abortion is necessary to preserve the life of the mother or prevent serious adverse health consequences -- that is, where the pregnancy itself poses a threat to the life or serious health interests of the mother and must be terminated to end that threat. The procedure could never be used

This means that a doctor could not elect to use the partial birth abortion procedure in the following circumstances:

However,

A woman in her tenth week of pregnancy decides to have an abortion. It is an elective abortion; the pregnancy presents no risk to her life or health. The doctor determines that ~~if he performs the requested abortion by any other method besides partial birth abortion, she will experience~~ serious adverse consequences to ~~her~~ health. Under Option 1, the woman could not have a safe abortion, because the only method that the doctor judges to be safe is not permitted.

Roe v. Wade broadly protects a woman's right to choose during these early, pre-viability weeks of pregnancy. To embrace an option that ~~subtracts from the physician's range of options as to the safest method to employ~~ during the pre-viability period will be viewed by pro-choice groups as an extremely significant undercutting of the President's previously and often stated commitment to Roe v. Wade and will create tumult in that community and the President's relations with them.

2. Option 2 is a better way to reconcile the desire for limits on the use of the procedure with Roe v. Wade.

Option 2 allows a doctor to use the partial birth abortion procedure --

post-viability: only when the abortion is necessary to end a pregnancy that poses a threat to the life of the mother or presents serious adverse consequences to her health; and

pre-viability: when the abortion is necessary to end a pregnancy that poses a threat to the life or health of the mother; AND where the abortion is performed for "elective" reasons, ~~and~~ but the doctor determines that he must use the partial birth abortion procedure to avoid a threat to the life or serious health interests of the mother.

Option 2 solves the difficulty presented in the pre-viability scenario described above, because the doctor would be permitted to use the partial birth abortion procedure, based on his determination that it is the only method that will avoid a serious injury to the woman's health.

Option # 2 thus allows President to ~~say that~~ endorse a position that says this procedure may never be used unless its use is necessary to avoid ~~serious RT~~ threat RISK to life or serious adverse health consequences; ~~but~~ without ~~or~~ raising the major ~~constitutional~~ problems raised by Option 1.

Notes on Partial Birth Memo
(2/14/96)

- Option 1 says that you can only use this procedure in a previability situation if it's a health-related abortion (i.e., serious adverse consequences unless an abortion is done), not an elective abortion. So if it's an elective abortion -- **but you need to use this particular procedure and if you don't you risk causing serious adverse health consequences to the woman -- you *still* can't use the procedure. This is not a defensible position vis-a-vis women, and both White House Counsel and DOJ believe it is unconstitutional under Roe v. Wade.**

- Option 2 says you can't use this procedure in a pre-viability situation unless you have to in order to avoid serious adverse health consequences. Meaning that you can use it in either an elective or a health-related abortion, so long as use of this particular procedure, rather than some other procedure, is necessary to avoid a risk to life or health.

- Option 1 -- which is conceded to be unconstitutional -- should never have gone to President. Option 2 gives him all the protection he needs -- i.e. a woman can never use the procedure unless it's medically necessary -- without being unconstitutional and untenable vis-a-vis women.

Why letter now? No help vis-a-vis women.
Really only on Catholics?

- Ginsburg HIV comments

THE PRESIDENT HAS SEEN
2/1/96

THE WHITE HOUSE

WASHINGTON

January 29, 1996

MEMORANDUM FOR THE PRESIDENT

FROM: JACK QUINN

SUBJECT: PARTIAL BIRTH ABORTION ACT

You have asked for a response to a memo from Lee Strobel urging you to sign the partial birth abortion act. The memo you received argues: (1) that many partial birth abortions are performed in "routine" cases, where there is no life or safety issue; (2) that even in non-routine cases, there are always equally sound medical alternatives to the partial birth procedure; and (3) that some of the non-routine cases highlighted by pro-choice groups (notably, the Coreen Costello and Viki Wilson cases) would not be affected by the legislation. Each of these arguments is not quite accurate, for the reasons described below. At bottom, even acknowledging that medical opinion on this procedure is divided, the best available information, viewed in light of Supreme Court law, suggests that a veto of the bill is appropriate on grounds that it does not sufficiently protect the health of the woman.

1. With regard to the claim that many partial birth abortions are performed in routine cases, you have objected -- and should continue to object -- to the use of this procedure in any "routine" case, not involving a woman's life or safety. If the bill were amended as you have insisted it be, such that you could sign it, then the procedure would be banned in routine cases -- i.e., where the life or health of the mother is not at risk.

2. Doctors have offered a range of different views as to whether and when use of the partial birth procedure is medically necessary or appropriate. Some doctors, as the memo to you indicates, believe that alternative medical procedures are always as safe or safer than the partial birth procedure. Other doctors claim that the partial birth procedure is often the safest surgical alternative for women late in pregnancy. These other doctors, among other things, say that the procedure poses the least risk to a woman's future reproductive capacity.

A federal district court in Ohio recently addressed this matter in ruling on the constitutionality of a state statute banning partial birth procedures. After six days of hearings, during which several medical experts testified on each side of the issue, the district court concluded that the partial birth procedure "appears to pose less of a risk to maternal health" than do other procedures available late in pregnancy.

Given the state of medical evidence on this subject, it

seems appropriate to leave to doctors themselves the decision whether the procedure is medically necessary. The question the Act presents is whether to prevent such doctors from acting on a judgment that the procedure is the safest available in a particular circumstance. In this regard, the Supreme Court has recognized that abortion regulations must "allow the attending physician the room he needs to make his best medical judgment." Such an approach, which allows the medical community to make clearly medical decisions, seems the surest way to protect the health of women.

3. The facts relating to the Costello and Wilson cases are somewhat uncertain, but this uncertainty tends to reinforce, rather than undermine, the Administration's current position on the Partial Birth Act. The Strobel memo claims that Coreen Costello did not have a partial birth procedure as defined by the Act. Some doctors would support this claim; others would dispute it. There is enormous uncertainty within the medical community as to exactly which procedures this Act covers. The Act does not use any medically recognized terms, and although the definition in the Act of "partial birth abortion" may seem clear to a layman, many doctors say that they do not know how it would apply to particular medical procedures. The dispute over whether Costello's procedure was covered by the Act thus points to a real problem with the legislation: its vagueness and lack of clarity as applied to the real world of medicine.

Similarly, it is not clear whether the Costello and Wilson procedures would fall within the bill's current "life of the mother" exemption. Even if Costello and Wilson were in life-threatening (as opposed to health-threatening) pregnancies, which is itself unclear, a partial birth abortion may not have been "necessary" to save their lives, as the current exemption requires. Under this exemption, it is apparently not enough that a woman is in a life-threatening pregnancy and that her doctor has determined that the partial birth procedure is the most medically appropriate; a partial birth procedure falls within the exemption only if that procedure, and no other, is capable of saving the woman's life. No one knows -- indeed, given the state of medical evidence on these matters, it seems impossible to know -- whether Costello or Wilson (or any other woman in their situation) would get any relief from this very limited exemption.

In any event, it seems indisputable that this bill, if it passes, will operate in certain cases to prevent women from receiving the medical procedures that their doctors believe to be the safest for them. As you know, this result is forbidden by current constitutional law, which insists that at every stage of a pregnancy, the state's interest in regulating abortion yield to preservation of a woman's health. It is this infirmity alone that impels me to advise you that the proposed Act does not pass constitutional muster.

Jack

THE WHITE HOUSE

WASHINGTON

February 16, 1996

MEMORANDUM FOR THE PRESIDENT

FROM: JACK QUINN

SUBJECT: PARTIAL BIRTH ABORTION ACT

I gather from your recent note that you do not want to distinguish between the pre-viability and post-viability stages of pregnancy in regulating partial birth abortions. In making that decision, it is important that you not implement it through a position that is both legally and politically vulnerable -- namely, one that prohibits the procedure in pre-viability situations where the doctor believes the particular procedure (as distinct from the abortion itself) is necessary to avoid adverse health consequences for the woman.

We presented this constitutionally infirm position to you in our earlier memo because some felt that its superficial resemblance to the Boxer Amendment was appealing. However, as the memo noted, both we and OLC believe it to be unconstitutional. If your decision is that there should be no distinction between post- and pre-viability abortions, then we need to accomplish this in a different way. Let me explain the two possible positions, only one of which is constitutionally sound (and, I think, politically wise).

1. The first position (the unconstitutional one adverted to above) is set forth as Option 1 in our February 2 memo. This approach would allow use of the partial birth procedure, whether in the pre-viability or post-viability stage, in only one circumstance: where the abortion is performed because the pregnancy itself poses a threat to the life or the serious health interests of the woman.

The problem with this approach is twofold. First, it is unconstitutional, because it prohibits use of the partial birth procedure in any pre-viability case in which the woman desires the abortion for non-health related reasons, even if the partial birth procedure (as compared to other procedures) is necessary to protect her from serious adverse health consequences. Second, the pro-choice groups will be quite hostile, exactly because the approach effects this broadscale pre-viability prohibition.

2. The second possible position -- which we've not considered before -- would allow use of the partial birth abortion procedure, whether in the pre-viability or post-viability stage, in two circumstances: (a) as above, where the abortion is

performed because the pregnancy poses a threat to the life or the serious health interests of the woman; or (b) where the abortion is performed for non-health related reasons, but the use of the partial birth procedure (as opposed to other abortion procedures) is necessary to avert a threat to the life or the serious health interests of the woman.

Stated in statutory language (as in our other memo), this option goes as follows:

> The prohibition of the Act shall not apply to any abortion if, in the medical judgment of the attending physician, the abortion or election of a particular method of abortion is necessary to preserve the life of the woman or avert a serious adverse health consequence to the woman.

In the vast majority of states, this approach effectively would distinguish between the pre- and post-viability stages because the theoretical availability of partial birth abortion under circumstance (b) above would have no actual consequence after viability. This is because most states prevent a woman from getting any post-viability abortion (partial birth or any other) for non-health related reasons. Whatever the scope of the federal law on partial birth abortions, such broadscale state restrictions of post-viability abortions would continue. After viability, such abortions would be available exactly where they are today: where the pregnancy endangers the woman's life or health.

In these states, before viability, such abortions would be available only where there is some health link; today, they are available in any case at all, regardless whether either the abortion itself or the election of the particular procedure is medically necessary.

In the small minority of states that do allow post-viability abortions for non-health related reasons, the approach outlined here would operate identically on pre- and post-viability partial birth abortions. That is, the approach would allow partial birth abortions both before and after viability in circumstances (a) or (b).

In these states, the federal law would cut into the incidence of both pre-viability and post-viability partial birth abortions. Whereas today a woman always can get such an abortion (whether pre- or post-viability), the federal law will limit the availability of such abortions (again, either pre- or post-viability) to cases in which either the abortion itself or the election of the particular procedure is medically necessary.

This approach is far preferable to the first position set out above. First, it does not suffer from the constitutional defect associated with the first position because it allows partial birth abortions where use of that particular procedure

(even if not the abortion itself) is medically necessary. Second, it will not make the pro-choice groups as hostile, again because it fully protects the right of the woman to any medically necessary procedures.

In sum, if your decision is to treat pre- and post-viability abortions alike, then, this is how we should do it: by allowing use of the partial birth abortion procedure whenever abortion or the election of the particular procedure is medically necessary.

THE WHITE HOUSE
WASHINGTON

February 27, 1996

Leon --

Here are two notes from the President on partial birth -- one asking for examples of what we mean by "serious adverse health consequences" (I have asked Elena Kagan, who works with Jack on this issue, to work on this); the other questioning whether we should send the old partial birth letters prepared last month to Eleanor Smeal and Cardinal Hickey (we shouldn't -- they should probably get copies of what we're sending to the Hill).

Re roll out of partial birth letters: my understanding is that Alexis is going to brief groups on this today and that Legislative is going to brief selective Members, but neither Alexis nor Legislative will share the actual letter; that we will leak the letter to the press this evening; and that the letters will actually be sent to the Hill tomorrow morning.

This is George's desired game plan and he is closing the loop on it with Alexis. **So unless I hear differently, I am holding the signed letters until tomorrow morning.** (I have given unsigned copies to Alexis and Legislative to assist them in their briefings.)

Todd

THE WHITE HOUSE

WASHINGTON

January 26, 1996

His Eminence James Cardinal Hickey
Archbishop of Washington
Post Office Box 29260
Washington, D.C. 20017

Dear Cardinal Hickey:

Thank you very much for your thoughtful letter. I understand how you feel about the difficult issue of the so-called "partial birth abortion."

As you know, I have long believed the decision to have an abortion should be between a woman, her conscience, her doctor, and her faith. Abortions should be safe, legal, and rare -- and I'm working hard toward those goals. I have opposed late-term abortions, except where they are necessary to protect the life or health of the woman. Since currently proposed legislation fails to provide for consideration of the woman's health or, in the case of the House bill, even her life, I cannot support it.

This issue demands careful reflection and prayer, and I am fortunate to have your insights.

Sincerely,

Cleared by Ben-Ami

JNO
Wider letter

ARCHDIOCESE OF WASHINGTON

5001 EASTERN AVENUE
POST OFFICE BOX 29260
WASHINGTON, D.C. 20017

OFFICE OF THE ARCHBISHOP

December 14, 1995

Dear Mr. President,

I find myself writing to you once again about a matter of some urgency concerning abortion. In the spirit of our past conversations, I appreciate your willingness to seriously consider my correspondence.

It is my understanding that you will soon be asked to sign the Partial-Birth Abortion Ban Act, which has been passed in both the House and the Senate (with a few minor differences between the bills which will likely be settled in favor of the Senate version). As both of us are aware at this point, the partial-birth procedure is a particularly awful form of abortion. A live child in the very process of being delivered with her body mostly outside of the mother, is brutally stabbed, and her head crushed before being completely delivered.

Supporters of abortion have attempted to deflect attention away from the partial-birth abortion itself. They have repeatedly made false claims about the nature of the procedure, the reasons doctors perform them, the actual cause of death of the child, and many other matters. Their claims are just as frequently contradicted by the very doctors who perform these and other late term abortions, and by other medical experts.

It is not possible in the case of this abortion, however, to avoid the thing in itself. Anyone reading about or seeing pictures of this procedure is confronted with the terrible reality of what is happening. The partial-birth abortion is one-fifth abortion and four-fifths infanticide. There is not moral justification for continuing to allow partly-born children to be killed in this brutal manner.

I urge you, Mr. President, to sign this bill into law. If there is anything further I can do to assist you in your consideration of this matter, please do not hesitate to call upon me.

Sincerely in Christ,

+James Card. Hickey

Archbishop of Washington

The President of the United States
The White House
Washington, DC

FROM
THE WHITE HOUSE
WASHINGTON, D.C.

The Honorable Orrin G. Hatch
United States Senate
Washington, D.C. 20510

The Honorable Orrin G. Hatch
United States Senate
Washington, D.C. 20510

Dear Senator Hatch:

I understand that the House is preparing to consider H.R. 1833, as amended by the Senate, which would prohibit doctors from performing a certain type of abortion. I want to make the Congress aware of my position on this extremely complex issue.

I have always believed that the decision to have an abortion should be between a woman, her conscience, her doctor, and her God. I strongly believe that legal abortions -- those abortions that the Supreme Court ruled in Roe v. Wade must be protected -- should be safe and rare. I have long opposed late-term abortions except, as the law requires, where they are necessary to protect the life of the mother or where there is a threat to her health. In fact, as Governor of Arkansas, I signed into law a bill that barred third trimester abortions except where they were necessary to protect the life or health of the woman, consistent with the Supreme Court's rulings.

The procedure described in H.R. 1833 is very disturbing, and I cannot support its use on an elective basis, where the abortion is being performed for non-health related reasons and there are equally safe medical procedures available. As I understand it, however, there are rare and tragic situations that can occur in a woman's pregnancy in which, in a doctor's medical judgment, this procedure may be necessary to save a woman's life or to preserve her health. In those situations, the Constitution requires that a woman's ability to choose this procedure be protected.

I have studied and prayed about this issue, and about the families who must face this awful choice, for many months. I believe that we have a duty to try to find common ground: a resolution to this issue that respects the views of those -- including myself -- who object to this particular procedure, but also upholds the Supreme Court's requirement that laws regulating abortion protect both the life and the health of American women.

I have concluded that H.R. 1833 as drafted does not meet the constitutional requirements that the Supreme Court has imposed upon us, in Roe and the decisions that have followed it, to provide protections for both the life and the health of the mother in any laws regulating abortions.

I am prepared to support H.R. 1833, however, if it is amended to make clear that the prohibition of this procedure does not apply to situations in which the election of the procedure, in the medical judgment of the attending physician, is necessary to preserve the life of the woman or avert serious adverse health consequences to the woman.

I urge the Congress to amend H.R. 1833 to ensure that it protects the life and the health of the woman, as the law we have been elected to uphold requires.

Sincerely,

BC/TS/ckb (2PRES)
(hatch.ltr)

Xeroxed copy of signed original to NH thru Todd Stern

CLEAR THRU TODD STERN

PRESIDENT TO SIGN

DRAFT

Dear Senator Hatch:

I understand that the House is preparing to consider H.R. 1833, as amended by the Senate, which would prohibit doctors from performing a certain type of abortion. I want to make the Congress aware of my position on this extremely complex issue.

I have always believed that the decision to have an abortion should be between a woman, her conscience, her doctor, and her God. I strongly believe that legal abortions--those abortions that the Supreme Court ruled in Roe v. Wade must be protected--should be safe and rare. I have long opposed late-term abortions except, as the law requires, where they are necessary to protect the life of the mother or where there is a threat to her health. In fact, as Governor of Arkansas, I signed into law a bill that barred third trimester abortions except where they were necessary to protect the life or health of the woman, consistent with the Supreme Court's rulings.

The procedure described in H.R. 1833 is very disturbing, and I cannot support its use on an elective basis, where the abortion is being performed for non-health related reasons and there are equally safe medical procedures available. As I understand it, however, there are rare and tragic situations that can occur in a

DRAFT

woman's pregnancy in which, in a doctor's medical judgment, this

procedure may be necessary to save a woman's life or to preserve her health. In those situations, the Constitution requires that a woman's ability to choose this procedure be protected.

I have studied and prayed about this issue, and about the families who must face this awful choice, for many months. I believe that we have a duty to try to find common ground: a resolution to this issue that respects the views of those--including myself--who object to this particular procedure, but also upholds the Supreme Court's requirement that laws regulating abortion protect both the life and the health of American women.

I have concluded that H.R. 1833 as drafted does not meet the constitutional requirements that the Supreme Court has imposed upon us, in Roe and the decisions that have followed it, to provide protections for both the life and the health of the mother in any laws regulating abortions.

I am prepared to support H.R. 1833, however, if it is amended to make clear that the prohibition of this procedure does not apply to situations in which the ~~[selection of the]~~ procedure, in the medical judgment of the attending physician, is necessary to preserve the life of the woman or avert serious adverse health consequences to the woman.

STET

DRAFT

I urge the Congress to amend H.R. 1833 to ensure that it protects the life and the health of the woman, as the law we have been elected to uphold requires.

Sincerely,