1999 SENATE JUDICIARY

SB 2254

1999 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB2254

Senate Judiciary Committee

❑ Conference Committee

Hearing Date February 2, 1999

Tape Number		Side A	Side B	Meter #
	1		x	2823 - end
	2	x		0 - end
2-9-99	2	x		1500 - end
2-9-99	2		x	0 - 600
2-15-99	2	x		290 - 870
Committee Clerk Signature		Jackie Follman		

Minutes:

SB2254 relates to the performance of partial-birth abortions; and to provide a penalty.

SENATOR STENEHJEM opened the hearing on SB2254 at 10:30 a.m.

All were present.

SENATOR WANZEK, District 29, testified in support of SB2254. Life is about choices. We need to be accountable for our choices. This bill will establish civil and criminal remedies against anyone who knowingly performs or attempts to perform a partial-birth abortion. This bill will take into exception if a life is in danger.

SENATOR NELSON asked if this practice has been done in a hospital or a clinic in North Dakota.

SENATOR WANZEK stated that he did not believe so.

SENATOR STENEHJEM asked where the wording for the bill came from.

SENATOR WANZEK stated that it mostly came from federal statute.

SENATOR CHRISTMANN, District 33, testified in support of SB2254. I have an adopted sister. I don't know the details of the biological mother, but I am grateful she did not have an abortion.

SENATOR MATHERN, District 45, testified in support of SB2254. I heard a comment where someone said you don't mandate other medical procedures, and therefore we should leave this one alone. This is not just a medical procedure, this is a living person. We need to provide other options to our people in this state.

REPRESENTATIVE GORDER, District 16, testified in support of SB2254.

STACEY PFLIGER, Executive Director of the North Dakota Right to Life Association, testified in support of SB2254. Testimony attached.

DR. ROBERT BURY testified in support of SB2254. Testimony attached.

CHRIS DODSON, NDCC, testified in support of SB2254. Testimony attached.

SENATOR NELSON questioned the definition section of the bill.

CHRIS DODSON stated that this issue could be addressed in an amendment.

SENATOR TRAYNOR asked that 25 states have passed similar legislation.

CHRIS DODSON stated that this is correct.

TYLER ARMSTRONG testified in support of SB2254. Tyler is 11 years old.

JASON LAWRENCE testified in support of SB2254. Jason is 10 years old.

EVIE LAWRENCE testified in support of SB2254. As a teacher, I am concerned with the children of this state. I believe in freedom and rights, but I don't believe in this right.

MRS. GARY ZENTZ testified in support of SB2254. Placing a baby up for adoption, I believe this is the greatest gift of love.

SUSIE KLUNDT, New Life Crisis Center, testified in support of SB2254. Testimony attached.

DOUG BAHR, Attorney General's Office, testified with concerns of SB2254. Testimony attached. The Attorney General's Office will be available for amendments.

SENATOR STENEHJEM asked how this bill relates to the bill that Congress passed and the President vetoed.

DOUG BAHR stated that the Court's have determined this to be too vague.

CAROL GASS, Women's Red River Clinic, testified in opposition to SB2254. Testimony attached.

JANE SUMMERS testified in opposition of SB2254.

SENATOR STENEHJEM CLOSED the hearing on SB2254.

February 9, 1999 Tape 2, Side A

CHRIS DODSON brought some amendments to the Committee.

SENATOR NELSON brought some amendments from the Legislative Council.

Discussion.

Tape 2, Side B

SENATOR NELSON made a motion on Amendments, SENATOR BERCIER seconded.

Motion carried. 4 - 2 - 0

Discussion.

SENATOR NELSON stated that the terms are more precise language for the Century Code.

SENATOR WATNE made a motion for DO PASS AS AMENDED, SENATOR LYSON seconded. Motion carried. 5 - 1 - 0

SENATOR TRAYNOR will carry the bill.

SENATOR WATNE made a Motion to Reconsider, SENATOR LYSON seconded. Motion carried.

~~February~~ 15, 1999 Tape 2, Side A

SENATOR WATNE made a Motion to Reconsider Amendments, SENATOR LYSON seconded. Motion carried. 5 - 1 - 0

SENATOR TRAYNOR made a motion for DO PASS, SENATOR WATNE seconded. Motion carried. 5 - 1 - 0

SENATOR WATNE will carry the bill.

FISCAL NOTE

(Return original and 14 copies)

[redacted]/Resolution No.: _____ Amendment to: SB 2254

Requested by Legislative Council Date of Request: 3-24-99

1. Please estimate the fiscal impact (in dollar amounts) of the above measure for state general or special funds, counties, cities, and school districts. Please provide breakdowns, if appropriate, showing salaries and wages, operating expenses, equipment, or other details to assist in the budget process. In a word processing format, add lines or space as needed or attach a supplemental sheet to adequately address the fiscal impact of the measure.

Narrative: If Senate Bill 2254 becomes law as amended, there is a possibility the bill's constitutionality will be challenged in a lawsuit. The amendment reduces the likelihood of a challenge because the amendment would not apply to common abortion procedures. However, the amendment will create novel and controversial law and, thus, be at a greater risk of a challenge than most laws.

It is impossible to determine the exact cost of a lawsuit defending SB 2254 as amended. Costs would partly depend on the approach taken by the party bringing the lawsuit and how it is best determined to defend the bill. A lawsuit challenging SB 2254 as amended is more likely to raise legal, not factual, issues. Thus, it is unlikely there would be substantial factual discovery or the need of many experts. This greatly reduces the cost of defending the lawsuit. If SB 2254 is found unconstitutional, it is likely that the state will be required to pay the plaintiff's attorney's fees and costs. Although the amendments reduce the likelihood of a challenger prevailing in a lawsuit, it does not remove it. However, as previously stated, the costs and fees to bring the lawsuit would likely be reduced by the amendments. This Office estimates the costs of the lawsuit would be in the range of $50,000 to $300,000.

2. **State** fiscal effect in dollar amounts:

	1997-99 Biennium		1999-2001 Biennium		2001-03 Biennium	
	General Fund	**Other Funds**	**General Fund**	**Other Funds**	**General Fund**	**Other Funds**
[redacted]enues						
Expenditures			Unknown	Unknown	Unknown	Unknown

3. What, if any, is the effect of this measure on the budget for your agency or department:

a. For rest of 1997-99 biennium:
(Indicate the portion of this amount included in the 1999-2001 executive budget:)

b. For the 1999-2001 biennium: Unknown
(Indicate the portion of this amount included in the 1999-2001 executive budget:)

c. For the 2001-03 biennium: Unknown

4. **County, city, and school district** fiscal effect in dollar amounts:

1997-99 Biennium			1999-2001 Biennium			2001-03 Biennium		
Counties	**Cities**	**School Districts**	**Counties**	**Cities**	**School Districts**	**Counties**	**Cities**	**School Districts**

Signed: Rosey Sand
Typed Name: Rosey Sand
Department: Office of Attorney General
Phone Number: 328-2210
Date Prepared: 3-25-99

FISCAL NOTE

(Return original and 14 copies)

Resolution No.: SB 2254 Amendment to:

Requested by Legislative Council Date of Request: 3-24-99

1. Please estimate the fiscal impact (in dollar amounts) of the above measure for state general or special funds, counties, cities, and school districts. Please provide breakdowns, if appropriate, showing salaries and wages, operating expenses, equipment, or other details to assist in the budget process. In a word processing format, add lines or space as needed or attach a supplemental sheet to adequately address the fiscal impact of the measure.

Narrative: This fiscal note is being provided without consideration of the amendments passed by the House Human Services Committee. In its current state, if Senate Bill 2254 becomes law, there is a good possibility there will be a lawsuit challenging the constitutionality of the bill. It is impossible to determine the exact cost of a lawsuit defending SB 2254. Costs would partly depend on the approach taken by the party bringing the lawsuit, how it is best determined to defend SB 2254, and the development of case law in other jurisdictions (i.e. whether the complaint raises factual or legal issues, amount and type of discovery required, whether experts are required, parties' willingness to stipulate, level to which the case is appealed, etc.). Furthermore, if the statute is found unconstitutional, it is likely that the state will be required to pay the plaintiff's attorney's fees and costs. Again, the amount of plaintiff's attorney's fees and costs will depend in part on how the suit is tried. This Office estimates the costs of the lawsuit would be in the range of $200,000 to $700,000.

2. **State** fiscal effect in dollar amounts:

	1997-99 Biennium		1999-2001 Biennium		2001-03 Biennium	
	General Fund	**Other Funds**	**General Fund**	**Other Funds**	**General Fund**	**Other Funds**
enues						
enditures			Unknown	Unknown	Unknown	Unknown

3. What, if any, is the effect of this measure on the budget for your agency or department:

a. For rest of 1997-99 biennium:
(Indicate the portion of this amount included in the 1999-2001 executive budget:)

b. For the 1999-2001 biennium: Unknown
(Indicate the portion of this amount included in the 1999-2001 executive budget:)

c. For the 2001-03 biennium: Unknown

4. **County, city, and school district** fiscal effect in dollar amounts:

1997-99 Biennium			1999-2001 Biennium			2001-03 Biennium		
Counties	**Cities**	**School Districts**	**Counties**	**Cities**	**School Districts**	**Counties**	**Cities**	**School Districts**

Signed:
Typed Name: Rosey Sand
Department: Office of Attorney General
Phone Number: 328-2210
Date Prepared: 3-24-99

90337.0101
Title. 0200

Prepared by the Legislative Council staff for
Senator C. Nelson
February 9, 1999

PROPOSED AMENDMENTS TO SENATE BILL NO. 2254

Page 1, line 1, replace "partial-birth abortions" with "an intact dilatation and extraction"

Page 1, line 6, replace "Partial-birth abortion" with "Intact dilatation and extraction"

Page 1, line 12, replace "**Partial-birth abortions**" with "**Intact dilatation and extraction**"

Page 1, line 13, replace "a partial-birth abortion" with "an intact dilatation and extraction"

Page 1, line 14, replace "a partial-birth abortion" with "an intact dilatation and extraction"

Page 1, line 19, replace "a partial-birth abortion" with "an intact dilatation and extraction"

Page 1, line 21, replace "partial-birth abortion" with "intact dilatation and extraction"

Page 1, line 24, replace "partial-birth abortion" with "intact dilatation and extraction"

Page 2, line 5, replace "partial-birth abortion" with "intact dilatation and extraction"

Page 2, line 11, replace "a" with "an intact dilatation and extraction"

Page 2, line 12, remove "partial-birth abortion"

Page 2, line 13, replace "a partial-birth abortion" with "an intact dilatation and extraction"

Renumber accordingly

Date: 2-9-99
Roll Call Vote #: 1

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2254

Senate Judiciary Committee

☐ Subcommittee on

or

☐ Conference Committee

Legislative Council Amendment Number

Action Taken Amendments

Motion Made By Nelson Seconded By Bercier

Senators	Yes	No	Senators	Yes	No
Senator Wayne Stenehjem	X				
Senator Darlene Watne	X				
Senator Stanley Lyson		X			
Senator John Traynor		X			
Senator Dennis Bercier	X				
Senator Caroloyn Nelson	X				

Total (Yes) 4 No 2

Absent 0

Floor Assignment

Date: 2-9-99
Roll Call Vote #: 2

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2254

Senate Judiciary Committee

☐ Subcommittee on

or

☐ Conference Committee

Legislative Council Amendment Number

Action Taken Do Pass As Amended

Motion Made By Watne Seconded By Lyson

Senators	Yes	No	Senators	Yes	No
Senator Wayne Stenehjem	X				
Senator Darlene Watne	X				
Senator Stanley Lyson	X				
Senator John Traynor	X				
Senator Dennis Bercier	X				
Senator Caroloyn Nelson		X			

Total (Yes) 5 No 1

Absent 0

Floor Assignment Senator Traynor

Date: 2-15-99
Roll Call Vote #: 1

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB2254

Senate Judiciary Committee

☐ Subcommittee on

or

☐ Conference Committee

Legislative Council Amendment Number

Action Taken Motion to Reconsider Amendments

Motion Made By Watne Seconded By Lyson

Senators	Yes	No	Senators	Yes	No
Senator Wayne Stenehjem	X				
Senator Darlene Watne	X				
Senator Stanley Lyson	X				
Senator John Traynor	X				
Senator Dennis Bercier	X				
Senator Caroloyn Nelson		X			

Total (Yes) 5 No 1

Absent 0

Floor Assignment

Date: 2-15-99
Roll Call Vote #: 2

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB2254

Senate Judiciary Committee

☐ Subcommittee on

or

☐ Conference Committee

Legislative Council Amendment Number

Action Taken Do Pass

Motion Made By Traynor Seconded By Watne

Senators	Yes	No	Senators	Yes	No
Senator Wayne Stenehjem	X				
Senator Darlene Watne	X				
Senator Stanley Lyson	X				
Senator John Traynor	X				
Senator Dennis Bercier	X				
Senator Caroloyn Nelson		X			

Total (Yes) 5 No 1

Absent 0

Floor Assignment Senator Watne

REPORT OF STANDING COMMITTEE

SB 2254: Judiciary Committee (Sen. W. Stenehjem, Chairman) recommends **DO PASS** (5 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). SB 2254 was placed on the Eleventh order on the calendar.

1999 HOUSE HUMAN SERVICES

SB 2254

1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2254

House Human Services Committee

❑ Conference Committee

Hearing Date March 16, 1999

Tape Number	Side A	Side B	Meter #
2	x		12.0-end
2		x	0.0-18.9
Committee Clerk Signature			

Minutes:

Senator TERRY WANZEK, District 29 testified in support of Senate Bill 2254. He said he felt obligated to take a stand on this bill. There is no greater gift in life than life itself. We should do everything in our authority to preserve and protect the sanctity of life. It is unbecoming of a civilized society to tolerate such a gruesome procedure. Life is about choices. We need to be accountable for our choices and accept responsibility for our actions. We should not punish an unborn child for irresponsible choices that we make. Senator WANZEK told about enjoying the joys of his nieces and nephews at Christmas. The distinguishing features of the children is determined at conception, not birth. He recounted the story of his niece, Miranda, who was born premature at 24 weeks of pregnancy. She has since grown to a healthy fourteen year old girl. He believes this bill is sincere effort to prohibit a specific procedure. The intent of the bill is not an attempt to do away with abortion but to protect the life of a child near birth. Expects the bill will

be constitutionally challenges. There will be amendments offered to more specifically define the procedure to make it more constitutionally compatible.

Senator DEB MATHERN, District 45 testified in support of the bill. She does not believe the bill is a politically issue. She was appalled when the procedure was first described to her. She sat at the bedside of a dear friend recently and the friend's only regret was that she had killed her unborn child. She urged the committee to support Senate Bill 2254.

CHRISTOPHER DOBSON, Executive Director, North Dakota Catholic Conference, testified. (Testimony attached.)

STACEY PFLIIGER, Executive Director of the North Dakota Right To Life Association testified. (Testimony attached.)

DOUGLAS BAHR, Acting Solicitor General, North Dakota Attorney General's Office, appeared before the committee to provide legal information concerning the bill. (Testimony attached.)

Rep. CLARA SUE PRICE asked to address section three. Mr. BAHR responded that his interpretation was that if the mother consented, she would be prohibited from suing. Texas and Louisiana statutes makes it a felony for the killing of a child during the birth process.

OPPOSITION to Senate Bill 2254.

CAROL GASS, representing the Red river Women's Clinic of Fargo, North Dakota testified in opposition to the bill. (Testimony attached.)

SALLY ORMLAND, representing the American Association of University Women who live in North Dakota testified. (Testimony attached.)

JANE SUMMERS, Grand Forks Citizens for Reproductive Rights testified. (Testimony attached.)

ANNE SUMMERS, testified on behalf of the North Dakota ACLU. (Testimony attached.)

Hearing closed on Senate Bill 2254.

1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB2254

House Human Services Committee

❑ Conference Committee

Hearing Date March 22, 1999

Tape Number	Side A	Side B	Meter #
1	x		0.0-19.9
1		x	27.2-end
2	x		0.0-9.2
Committee Clerk Signature			

Minutes:

Rep. CLARA SUE PRICE began the discussion on the amendments prepared at the request of Chairman PRICE by SCOTT HUIZENGA, Intern for the House Human Services Committee, in conjunction with the Attorney Generals Office. There were two proposed amendments identified with LC numbers "90337.0105" and "90337.0106".

DOUGLAS BAHR, Acting Solicitor General, North Dakota Attorney Generals Office, appeared at the request of the committee to provide information. He said that the bill is on a continuum of constitutionality. As originally proposed, SB2254 was blatantly unconstitutional. With the proposed amendments the constitutionality of the bill is less likely to be challenged in court. He then discussed in more detail some of the features of the two versions of the amendments. In response to questions from the committee Mr. BAHR said that changing the penalty to a class B felony is not constitutionally incorrect, it does make more sense to leave it as a class A penalty to

provide consistency with other statutes. He believes that current law would forbid a late term partial birth abortion. He further stated that the bill, in its current form, is not an abortion bill but is a bill relating to a partially born person and would be argued in court as such. The fiscal note, originally recommended by the Attorney Generals Office was for the purpose of court defense of the bill in its original form. With the current form it is less likely it will be challenged so the fiscal note is not as important.

The committee held additional discussions relating to the viability of the child, the definition of viability in law and the need for its mention in the bill. The committee then decided to take some time before deciding on the bill.

Closed COMMITTEE DISCUSSION.

Reopened COMMITTEE DISCUSSION.

Rep. AMY KLINISKE presented proposed amendments (attached) and explained the changes to the committee. In discussion she noted that she did not intend to leave the "twenty weeks" language in section 1, part 2.

Rep. PAT GALVIN moved to accept the amendment proposed by Rep. AMY KLINISKE with the changes already noted: removal of "twenty weeks" language in section 1 and change "section" to "act" in Section 2, #2. Rep. BLAIR THORESON seconded the motion. Discussion included strong opinions expressed about exceptions for the life of the mother, the inclusion of an "incest or rape" clause and the inclusion of a twenty week criteria. The motion PASSED on a roll call vote: 8 YES, 5 NO, 2 ABSENT.

Rep. ROXANNE JENSEN moved to amend the bill by including an effective date of August 1, 2001, seconded by Rep. BRUCE ECKRE. The motion FAILED on a roll call vote: 6 YES, 7 NO, 2 ABSENT.

Rep. CAROL NIEMEIER moved to amend the bill by including the "twenty weeks" language in the definition of "partial birth" and providing an exception when the mother's health is in jeopardy. Rep. ROXANNE JENSEN seconded the motion. The motion FAILED on a roll call vote: 5 YES, 8 NO, 2 ABSENT.

Rep. ROBIN WEISZ made a motion to amend the bill by adding the "twenty week" language, seconded by Rep. ROXANNE JENSEN. The motion failed on a roll call vote: 6 YES, 7 NO, 6 ABSENT.

Rep. AMY KLINISKE moved DO PASS AS AMENDED, seconded by Rep. BLAIR THORESON. The motion PASSED on a roll call vote: 8 YES, 5 NO, 2 ABSENT.

CARRIER: Rep. AMY KLINISKE.

Closed COMMITTEE DISCUSSION

Prepared by the Legislative Council Staff
for Representative Price

PROPOSED AMENDMENTS TO SENATE BILL NO. 2254

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act relating to causing the death of a child during delivery; and to provide a penalty.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Definitions. As used in this Act:

1. "Living child" means any member of the human species, born or unborn, who has a heartbeat or discernible spontaneous movement.

2. "Partial birth abortion" means a procedure that contains all of the following elements:

   a. Deliberate dilation of the cervix;

   b. Instrumental conversion of the fetus to a footling breech;

   c. Breech extraction of the body excepting the head; and

   d. Partial evacuation of the intracranial contents of a living fetus to effect vaginal delivery of a dead but otherwise impact fetus.

3. "Sharp curettage or suction curettage abortion" means an abortion in which the developing child and products of conception are evacuated from the uterus with a sharp curettage or through a suction cannula with an attached vacuum apparatus.

SECTION 2. Prohibition - Exception.

1. Any person who intentionally or knowingly causes the death of a child by performing a partial birth abortion is guilty of a class B felony. The mother of a living child that dies during a partial birth abortion may not be prosecuted for a violation of this Act or for conspiracy to violate this Act.

2. This Act does not apply to a sharp curettage or suction curettage abortion.

3. This Act does not prohibit a physician from taking measures to save the life or health of a mother whose life is endangered by a physical or mental disorder, illness, or injury, if every reasonable precaution is also taken, in such cases, to save the child's life.

SECTION 3. Hearing. A physician charged with an offense under this Act may seek a hearing before the state board of medical examiners on whether the physician's conduct was necessary to save the life or health of a mother whose life was endangered by a physical or mental disorder, illness, or injury, and whether the physician took every reasonable precaution to save the child's life. The findings of the board are admissible at the trial of the defendant. Upon the motion of the defendant, the court shall delay the beginning of the trial for not more than thirty days to permit the hearing to be conducted."

enumber accordingly

Date: 3-22-99
Roll Call Vote #: 1

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. ~~SB 2254~~ SB2254

House Human Services Committee

☐ Subcommittee on _____
or
☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken Move Accept .0106 Amendments w/ verbal changes

Motion Made By Rep Galvin Seconded By Rep Thoreson Sec 1 #2 + Sec 2 #2

Representatives	Yes	No	Representatives	Yes	No
Clara Sue Price - Chairwoman	✓		Bruce A. Eckre		✓
Robin Weisz - Vice Chairman		✓	Ralph Metcalf		
William R. Devlin		✓	Carol A. Niemeier		✓
Pat Galvin	✓		Wanda Rose	✓	
Dale L. Henegar			Sally M. Sandvig	✓	
Roxanne Jensen		✓			
Amy N. Kliniske	✓				
Chet Pollert	✓				
Todd Porter	✓				
Blair Thoreson	✓				

Total **Yes** 8 **No** 5
Absent 2

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

90337.0103
Title.

Prepared by the Legislative Council staff for
Representative Jensen
March 12, 1999

PROPOSED AMENDMENTS TO SENATE BILL NO. 2254

Page 1, line 1, remove "and" and after "penalty" insert "; and to provide an effective date"

Page 2, after line 14, insert:

"**SECTION 5. EFFECTIVE DATE.** This Act becomes effective on August 1, 2001."

Renumber accordingly

Amend 2

Defeated

7 - 2

6 - ~~1~~ - ~~1~~

Date: 3-22-99
Roll Call Vote #: 2

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2254

House Human Services Committee

☐ Subcommittee on _____
or
☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken Add Amendment for Effective Date of August 1, 2001.

Motion Made By Rep Jensen Seconded By Rep Eckre.

Representatives	Yes	No	Representatives	Yes	No
Clara Sue Price - Chairwoman	✓		Bruce A. Eckre	✓	
Robin Weisz - Vice Chairman	✓		Ralph Metcalf		
William R. Devlin	✓		Carol A. Niemeier	✓	
Pat Galvin		✓	Wanda Rose		✓
Dale L. Henegar			Sally M. Sandvig		✓
Roxanne Jensen	✓				
Amy N. Kliniske		✓			
Chet Pollert		✓			
Todd Porter		✓			
Blair Thoreson		✓			

Total **Yes** 6 **No** 7
Absent 2

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Prepared by the Legislative Council staff for
Representative Niemeier
March 22, 1999

PROPOSED AMENDMENTS TO SENATE BILL NO. 2254

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act relating to causing the death of a child during delivery; and to provide a penalty.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Definitions. As used in this Act:

1. "Living child" means any member of the human species, born or unborn, who has a heartbeat or discernible spontaneous movement.

2. "Partially born" means the child's intact body, with the entire head attached, is delivered after the first twenty weeks of pregnancy so that any of the following has occurred:

   a. The child's entire head, in the case of a cephalic presentation, or any portion of the child's torso above the navel, in the case of a breech presentation, is delivered past the mother's vaginal opening; or

   b. The child's entire head, in the case of a cephalic presentation, or any portion of the child's torso above the navel, in the case of a breech presentation, is delivered outside the mother's abdominal wall.

3. "Sharp curettage or suction curettage abortion" means an abortion in which the developing child and products of conception are evacuated from the uterus with a sharp curettage or through a suction cannula with an attached vacuum apparatus.

SECTION 2. Prohibition - Penalty - Exception.

1. Any person who intentionally or knowingly causes the death of a child while that child is partially born is guilty of a class B felony. A mother whose living child dies while partially born may not be prosecuted for a violation of this Act or for conspiracy to violate this Act.

2. This Act does not apply to a sharp curettage or suction curettage abortion or to any offense committed under chapter 12.1-17.1 or chapter 14-02.1.

SECTION 3. Hearing. Section 2 does not prohibit a physician from taking measures to save the life or health of a mother whose life is endangered by a physical disorder, illness, or injury, if every reasonable precaution is also taken, in this case, to save the child's life. A physician charged with an offense under section 2 may seek a hearing before the state board of medical examiners on whether the physician's conduct was necessary to save the life of a mother whose life was endangered by a physical disorder, illness, or injury, and whether the physician took every reasonable precaution to save the child's life. The findings of the board are admissible at the trial of the defendant. Upon the motion of the defendant, the court shall delay the beginning of the trial for not more than thirty days to permit the hearing to be conducted."

Renumber accordingly

Proposed Amendment #3

Date: 3-22-99
Roll Call Vote #: 3

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2254 (Abort)

House Human Services Committee

☐ Subcommittee on _____
or
☐ Conference Committee

Legislative Council Amendment Number ~~#~~ AA

Action Taken Amend to Add 20 weeks + Mothers Health provisions

Motion Made By Rep Niemeier Seconded By Rep Jensen.

Representatives	Yes	No	Representatives	Yes	No
Clara Sue Price - Chairwoman		✓	Bruce A. Eckre	✓	
Robin Weisz - Vice Chairman	✓		Ralph Metcalf		
William R. Devlin	✓		Carol A. Niemeier	✓	
Pat Galvin		✓	Wanda Rose		✓
Dale L. Henegar			Sally M. Sandvig	~~AC~~	✓
Roxanne Jensen	✓				
Amy N. Kliniske		✓			
Chet Pollert		✓			
Todd Porter		✓			
Blair Thoreson		✓			

Total **Yes** 5 **No** 8
Absent 2

Floor Assignment _____

Defeated

If the vote is on an amendment, briefly indicate intent:

Date: 3-22-99
Roll Call Vote #: 4

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2254 (Abort)

House Human Services Committee

☐ Subcommittee on _____
or
☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken Amend to add 20 week provision

Motion Made By Rep Weisz Seconded By Rep Jensen

Representatives	Yes	No	Representatives	Yes	No
Clara Sue Price - Chairwoman	✓		Bruce A. Eckre	✓	
Robin Weisz - Vice Chairman	✓		Ralph Metcalf		
William R. Devlin	✓		Carol A. Niemeier	✓	
Pat Galvin		✓	Wanda Rose		✓
Dale L. Henegar			Sally M. Sandvig		✓
Roxanne Jensen	✓				
Amy N. Kliniske		✓			
Chet Pollert		✓			
Todd Porter		✓			
Blair Thoreson		✓			

Total **Yes** 6 **No** 7
Absent 2

Floor Assignment _____

Defeated

If the vote is on an amendment, briefly indicate intent:

Adopted by the Human Services Committee
March 22, 1999

VR
3/23/99

HOUSE AMENDMENTS TO SENATE BILL NO. 2254 HUMSER 3/23/99

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act relating to the performance of partial-birth abortions; and to provide a penalty.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Definitions. As used in this Act:

1. "Living child" means any member of the human species, born or unborn, who has a heartbeat or discernible spontaneous movement.

2. "Partially born" means the child's intact body, with the entire head attached, is delivered so that any of the following has occurred:

   a. The child's entire head, in the case of a cephalic presentation, or any portion of the child's torso above the navel, in the case of a breech presentation, is delivered past the mother's vaginal opening; or

   b. The child's entire head, in the case of a cephalic presentation, or any portion of the child's torso above the navel, in the case of a breech presentation, is delivered outside the mother's abdominal wall.

3. "Sharp curettage or suction curettage abortion" means an abortion in which the developing child and products of conception are evacuated from the uterus with a sharp curettage or through a suction cannula with an attached vacuum apparatus.

SECTION 2. Prohibition - Penalty - Exception.

1. Any person who intentionally or knowingly causes the death of a child while that child is partially born is guilty of a class AA felony. A mother whose living child dies while partially born may not be prosecuted for a violation of this Act or for conspiracy to violate this Act.

2. This Act does not apply to a sharp curettage or suction curettage abortion or to any offense committed under chapter 12.1-17.1 or chapter 14-02.1.

SECTION 3. Hearing. Section 2 does not prohibit a physician from taking measures to save the life of a mother whose life is endangered by a physical disorder, illness, or injury, if every reasonable precaution is also taken, in this case, to save the child's life. A physician charged with an offense under section 2 may seek a hearing before the state board of medical examiners on whether the physician's conduct was necessary to save the life of a mother whose life was endangered by a physical disorder, illness, or injury, and whether the physician took every reasonable precaution to save the child's life. The findings of the board are admissible at the trial of the defendant. Upon the motion of the defendant, the court shall delay the beginning of the trial for not more than thirty days to permit the hearing to be conducted."

Renumber accordingly

Date: 3-22-99
Roll Call Vote #: 5

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB2254

House Human Services Committee

☐ Subcommittee on _____
or
☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken To Pass as Amended

Motion Made By Rep Kliniski Seconded By Rep Thoreson

Representatives	Yes	No	Representatives	Yes	No
Clara Sue Price - Chairwoman	✓		Bruce A. Eckre		✓
Robin Weisz - Vice Chairman		✓	Ralph Metcalf		
William R. Devlin		✓	Carol A. Niemeier		✓
Pat Galvin	✓		Wanda Rose	✓	
Dale L. Henegar			Sally M. Sandvig	✓	
Roxanne Jensen		✓			
Amy N. Kliniske	✓				
Chet Pollert	✓				
Todd Porter	✓				
Blair Thoreson	✓				

Total Yes 8 No 5
Absent 2

Floor Assignment Rep Kliniske

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2254: Human Services Committee (Rep. Price, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (8 YEAS, 5 NAYS, 2 ABSENT AND NOT VOTING). SB 2254 was placed on the Sixth order on the calendar.

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act relating to the performance of partial-birth abortions; and to provide a penalty.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Definitions. As used in this Act:

1. "Living child" means any member of the human species, born or unborn, who has a heartbeat or discernible spontaneous movement.

2. "Partially born" means the child's intact body, with the entire head attached, is delivered so that any of the following has occurred:

   a. The child's entire head, in the case of a cephalic presentation, or any portion of the child's torso above the navel, in the case of a breech presentation, is delivered past the mother's vaginal opening; or

   b. The child's entire head, in the case of a cephalic presentation, or any portion of the child's torso above the navel, in the case of a breech presentation, is delivered outside the mother's abdominal wall.

3. "Sharp curettage or suction curettage abortion" means an abortion in which the developing child and products of conception are evacuated from the uterus with a sharp curettage or through a suction cannula with an attached vacuum apparatus.

SECTION 2. Prohibition - Penalty - Exception.

1. Any person who intentionally or knowingly causes the death of a child while that child is partially born is guilty of a class AA felony. A mother whose living child dies while partially born may not be prosecuted for a violation of this Act or for conspiracy to violate this Act.

2. This Act does not apply to a sharp curettage or suction curettage abortion or to any offense committed under chapter 12.1-17.1 or chapter 14-02.1.

SECTION 3. Hearing. Section 2 does not prohibit a physician from taking measures to save the life of a mother whose life is endangered by a physical disorder, illness, or injury, if every reasonable precaution is also taken, in this case, to save the child's life. A physician charged with an offense under section 2 may seek a hearing before the state board of medical examiners on whether the physician's conduct was necessary to save the life of a mother whose life was endangered by a physical disorder, illness, or injury, and whether the physician took every reasonable precaution to save the child's life. The findings of the board are admissible at the trial of the defendant. Upon the motion of the defendant, the court shall delay the beginning of the trial for not more than thirty days to permit the hearing to be conducted."

Renumber accordingly

1999 SENATE JUDICIARY

SB 2254

CONFERENCE COMMITTEE

1999 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB2254

Senate Judiciary Committee

☒ Conference Committee

Hearing Date April 5, 1999

Tape Number		Side A	Side B	Meter #
	1	x		0 - 3627
4-7-99	1	x		0 - 1685
4-8-99	1	x		0 - 1358
Committee Clerk Signature		Jackie Follman		

Minutes:

SB2254 relates to partial-birth abortion.

SENATOR STENEHJEM opened the Conference Committee hearing on SB2254.

Senator Stenehjem, Senator Traynor, Senator Nelson, Representative Kliniske, Representative Porter, and Representative Sandvig.

REPRESENTATIVE KLINISKE explained the amendments. We looked at other states to see how they have stood up to the Constitutional challenges. The language before you is what is being considered in Florida now. We still need to look at the definition of living child. We did not carry this out throughout the statute so anywhere you see the word child, we need to insert living child. In Section 3, all the House conferees are in agreement with removing this section. We will need to retitle Section 3 exceptions for life of mother.

CHRIS DODSON spoke on the amendments to SB2254. He explained how this is being considered in Florida and Missouri.

SENATOR STENEHJEM asked if he had anything to offer us by way of legislation that passed in the state and that has not been successfully challenged in the Court where there is not an injunction pending.

CHRIS DODSON stated no, most of those states that enacted something. The Court has not struck down the Texas statute.

SENATOR STENEHJEM asked hasn't Utah done something that has survived in the courts.

CHRIS DODSON stated that the Utah statute has not been challenged. It has a health exception.

SENATOR TRAYNOR asked has any U.S. of Appeals Court ruled on this.

CHRIS DODSON stated the Seventh Circuit has ruled on this.

SENATOR STENEHJEM stated they struck the Wisconsin statute down. Wasn't that largely because the standard involved the viability of the child.

CHRIS DODSON stated the definition was too broad and vague.

DOUG BAHR explained his opinion of the amendments. I am more comfortable with it now, but there are some things that have not been challenged. The Texas statute has never been challenged. It is a very broad statute. It may have never been applied to an abortion type claim.

SENATOR STENEHJEM asked if it would be an improvement, instead of living child to introduce the concept of viability.

DOUG BAHR stated the concept of viability may be beneficial because in Roe a different standard applies. The greatest thing for the statute to pass is to introduce an exception for health.

REPRESENTATIVE PORTER asked if we introduce an exception for health exception, does this include psychological also.

DOUG BAHR stated that health of the mother is very broad so yes.

ANN SOMMERS spoke on her feelings concerning this bill and the amendments.

DAVE PRESKE spoke for the Medical Association. They have not taken a stand on this bill. The Association has proposed an amendment.

SENATOR STENEHJEM asked if the exception in the bottom part of your amendment is the defense that could be presented during the course of the physician then presenting his or her defense during his or her criminal trial.

DAVE PRESKE stated yes.

SENATOR TRAYNOR asked if Section 1 were eliminated and we just adopted Section 2, would that work.

DOUG BAHR stated that no, this would be unconstitutionally vague. I think the biggest strength of the amendments is that it clearly defines.

SENATOR STENEHJEM asked about the status of the Utah statute.

DOUG BAHR stated that the Utah statute has never been challenged. There really is no teeth to it because of the exception.

SENATOR STENEHJEM asked if viability would improve this bill. Instead of describing a living child as a member of the human species born or unborn.

DOUG BAHR stated that I think that would remove one argument yet the poor health of this statute would have to be reviewed under the Roe and Casey standards. After viability that would it make it more defenseable

under that standard.

SENATOR NELSON stated she believes this bill has greatly changed dramatically from the beginning when it left our committee. The definition of living child has changed from 2 months to 20 weeks. We had a specific procedure and now there isn't. I had a problem with this when it was in our committee and I still have a problem.

DOUG BAHR stated it would be harder to defend with specific medical procedures.

SENATOR STENEHJEM asked about the viability issue rather than the living child, if the House would be in agreement with this.

REPRESENTATIVE KLINISKE stated they would need to think about it.

SENATOR STENEHJEM CLOSED the conference committee hearing on SB2254.

APRIL 7, 1999 TAPE 1, SIDE A

SENATOR STENEHJEM opened the Conference Committee hearing on SB2254.

All were present.

REPRESENTATIVE KLINISKE explained the two sets of proposed amendments. Amendments attached. There are objections to both viable and living child definitions. Perhaps we need some work with these two terms.

SENATOR NELSON had an objection that the amendments were available to certain organizations before she received them.

REPRESENTATIVE KLINISKE stated she would take full responsibility for that and apologized.

REPRESENTATIVE KLINISKE stated we need to comply with the Courts on any amendments we make. We will need to make some compromises.

SENATOR STENEHJEM stated the opposition is on the terminology and not on the effect. I agree with Representative Kliniske. We need to find a term that is agreeable to everyone.

SENATOR TRAYNOR asked about the objection to viable, it is that the professional performing the procedure who determines if the fetus is viable. Is that correct.

DOUG BAHR stated that it is his understanding that those who are opposed to that term being included, that is the reason why.

SENATOR TRAYNOR asked about the decisions he has read, is it true that the viability of the fetus is determined by the physician performing the procedure.

DOUG BAHR stated that under the US Supreme Court precedence is a factual matter to be determined by the medical professionals. I believe it is by the physician performing the procedure.

REPRESENTATIVE KLINISKE asked about the language in section 3, has that been challenged.

DOUG BAHR stated not to his knowledge.

SENATOR TRAYNOR asked what would be the reaction be if after subsection 3 in section 1 which discusses viability, we added the same provisions as we have in subsection 2 of section 3 about the two other license physicians participating in that fact that there is viability.

DOUG BAHR stated the I haven't read the case that was referred to me earlier. If there is not a valid reason to require a second professional judgment, then I think that will be inappropriate to

put in there. Typically a Court will sever a part if it is determined to be unconstitutional.

Viability comprises a stronger argument against a challenge.

REPRESENTATIVE PORTER asked if we are looking at banning the procedure, why do we need to make mention of viability. If we look at the defense standpoint, after looking at what Utah did, are we better off to take that approach than try to come up with the abortion standpoint.

DOUG BAHR stated that Utah's approach does include viability and the health of the mother. There is a definition to partial-birth abortion. There is an exception to the life and health of the mother. There has been no challenge to that.

SENATOR STENEHJEM stated that Utah talks about a living intact fetus. It does talk about viability. We may want to take out both definitions and put in living intact fetus.

SENATOR TRAYNOR asked about adding this amendment to 08, part 3 of section 1 talks about viable, leave the sentence in there that is and add viable is a question of fact determined by a physician who certifies in writing, and then look down at the bottom of the page, setting forth in detail the facts upon which. The same language that we had.

SENATOR NELSON asked if there are places in North Dakota where it would not be possible to find two other doctors to verify the opinion of the first doctor.

Someone will check on that.

APRIL 8, 1999 TAPE 1, SIDE A

SENATOR STENEHJEM opened the hearing on SB2254.

All were present.

SENATOR STENEHJEM stated that Representative Kliniske and him have worked out some amendments. We took out the living child definition and then utilizes the Utah definition which is a living intact fetus and then follows through with the prohibitions that we had in the bill before.

REPRESENTATIVE KLINISKE stated the other change was we removed the two physicians having to verify the fact there was an emergency that the mother's life was in danger. We put in that the physician has to certify in writing that it was indeed an emergency.

REPRESENTATIVE PORTER moved the amendments 112 and that the House recede from its amendments and adopt these amendments, Representative Kliniske seconded. Discussion. Dave Peske stated that within a smaller facility may not be equipped to have two physicians to examine the woman whose life is in danger. There is a committee that discusses these procedures and based on the presentation they will decide which procedure needs to be done.

SENATOR STENEHJEM asked if this is a standard medical practice with conferring in a committee type. Dave Peske stated yes. Senator Nelson stated that she has a problem with the title language.

Roll call vote was taken. Motion carried. 5 - 1 - 0

Prepared by the Legislative Council staff for
Representative Kliniske
April 6, 1999

PROPOSED AMENDMENTS TO SENATE BILL NO. 2254

That the House recede from its amendments as printed on pages 876 and 877 of the Senate Journal and pages 933 and 934 of the House Journal and that Senate Bill No. 2254 be amended as follows:

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act relating to the performance of partial-birth abortions; and to provide a penalty.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Definitions. As used in this Act:

1. "Partially born" means the child's intact body, with the entire head attached, is delivered so that any of the following has occurred:

   a. The viable child's entire head, in the case of a cephalic presentation, or any portion of the viable child's torso above the navel, in the case of a breech presentation, is delivered past the mother's vaginal opening; or

   b. The viable child's entire head, in the case of a cephalic presentation, or any portion of the viable child's torso above the navel, in the case of a breech presentation, is delivered outside the mother's abdominal wall.

2. "Sharp curettage or suction curettage abortion" means an abortion in which the developing viable child and products of conception are evacuated from the uterus with a sharp curettage or through a suction cannula with an attached vacuum apparatus.

3. "Viable" means the ability of a fetus to live outside the mother's womb, albeit with artificial aid.

SECTION 2. Prohibition - Penalty - Exception.

1. Any person who intentionally causes the death of a viable child while that viable child is partially born is guilty of a class AA felony. A mother whose viable child dies while partially born may not be prosecuted for a violation of this Act or for conspiracy to violate this Act.

2. This Act does not apply to a sharp curettage or suction curettage abortion or to any offense committed under chapter 12.1-17.1 or chapter 14-02.1.

SECTION 3. Exception for life of mother. Section 2 does not prohibit a physician from taking measures that in the physician's medical judgment are necessary to save the life of a mother whose life is endangered by a physical disorder, illness, or injury, if:

1. Every reasonable precaution is also taken, in this case, to save the child's life; and

2. The physician first certifies in writing, setting forth in detail the facts upon which the physician relies in making this judgment, and then receives the

concurrence of two other licensed physicians who have examined the mother. This certification and concurrence are not required in the case of an emergency and the procedure is necessary to preserve the life of the mother."

Renumber accordingly

Prepared by the Legislative Council staff for
Representative Kliniske
April 6, 1999

PROPOSED AMENDMENTS TO SENATE BILL NO. 2254

That the House recede from its amendments as printed on pages 876 and 877 of the Senate Journal and pages 933 and 934 of the House Journal and that Senate Bill No. 2254 be amended as follows:

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BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Definitions. As used in this Act:

1. "Living child" means any member of the human species, born or unborn, who has a heartbeat or discernible spontaneous movement.

2. "Partially born" means the child's intact body, with the entire head attached, is delivered so that any of the following has occurred:

   a. The living child's entire head, in the case of a cephalic presentation, or any portion of the living child's torso above the navel, in the case of a breech presentation, is delivered past the mother's vaginal opening; or

   b. The living child's entire head, in the case of a cephalic presentation, or any portion of the living child's torso above the navel, in the case of a breech presentation, is delivered outside the mother's abdominal wall.

3. "Sharp curettage or suction curettage abortion" means an abortion in which the developing living child and products of conception are evacuated from the uterus with a sharp curettage or through a suction cannula with an attached vacuum apparatus.

SECTION 2. Prohibition - Penalty - Exception.

1. Any person who intentionally causes the death of a living child while that living child is partially born is guilty of a class AA felony. A mother whose living child dies while partially born may not be prosecuted for a violation of this Act or for conspiracy to violate this Act.

2. This Act does not apply to a sharp curettage or suction curettage abortion or to any offense committed under chapter 12.1-17.1 or chapter 14-02.1.

SECTION 3. Exception for life of mother. Section 2 does not prohibit a physician from taking measures that in the physician's medical judgment are necessary to save the life of a mother whose life is endangered by a physical disorder, illness, or injury, if:

1. Every reasonable precaution is also taken, in this case, to save the child's life; and

2. The physician first certifies in writing, setting forth in detail the facts upon which the physician relies in making this judgment, and then receives the concurrence of two other licensed physicians who have examined the mother. This certification and concurrence are not required in the case of

an emergency and the procedure is necessary to preserve the life of the mother."

Renumber accordingly

Prepared by the Legislative Council staff for
Senator W. Stenehjem
April 7, 1999

PROPOSED AMENDMENTS TO SENATE BILL NO. 2254

That the House recede from its amendments as printed on pages 876 and 877 of the Senate Journal and pages 933 and 934 of the House Journal and that Senate Bill No. 2254 be amended as follows:

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act relating to the performance of partial-birth abortions; and to provide a penalty.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Definitions. As used in this Act:

1. "Partially born" means the living intact fetus's body, with the entire head attached, is delivered so that any of the following has occurred:

   a. The living intact fetus's entire head, in the case of a cephalic presentation, or any portion of the living intact fetus's torso above the navel, in the case of a breech presentation, is delivered past the mother's vaginal opening; or

   b. The living intact fetus's entire head, in the case of a cephalic presentation, or any portion of the living intact fetus's torso above the navel, in the case of a breech presentation, is delivered outside the mother's abdominal wall.

2. "Sharp curettage or suction curettage abortion" means an abortion in which the developing child and products of conception are evacuated from the uterus with a sharp curettage or through a suction cannula with an attached vacuum apparatus.

SECTION 2. Prohibition - Penalty - Exception.

1. Any person who intentionally causes the death of a living intact fetus while that living intact fetus is partially born is guilty of a class AA felony. A mother whose living intact fetus dies while partially born may not be prosecuted for a violation of this Act or for conspiracy to violate this Act.

2. This Act does not apply to a sharp curettage or suction curettage abortion or to any offense committed under chapter 12.1-17.1 or chapter 14-02.1.

SECTION 3. Exception for life of mother. Section 2 does not prohibit a physician from taking measures that in the physician's medical judgment are necessary to save the life of a mother whose life is endangered by a physical disorder, illness, or injury, if:

1. Every reasonable precaution is also taken, in this case, to save the child's life; and

2. The physician first certifies in writing, setting forth in detail the facts upon which the physician relies in making this judgment. This certification is not required in the case of an emergency and the procedure is necessary to preserve the life of the mother."

Renumber accordingly

REPORT OF CONFERENCE COMMITTEE
(ACCEDE/RECEDE) - 420

07398

(Bill Number) SB2254 (, as (re)engrossed):

Your Conference Committee

For the Senate:

Senator Stenehjem Y
Senator Traynor Y
Senator Nelson N

For the House:

Representative Kliniske Y
Representative Porter Y
Representative Sandvig Y

☐ recommends that the (SENATE/HOUSE) (ACCEDE to) (RECEDE from)
723/724 725/726 S724/H726 S723/H725
the (Senate/House) amendments on (SJ/HJ) page(s) _____ - _____

☐ and place _____ on the Seventh order.
727

☒ , adopt (further) amendments as follows, and place SB2254 on the Seventh order:

☐ having been unable to agree, recommends that the committee be discharged and a new committee be appointed. 690/515

((Re)Engrossed) _____ was placed on the Seventh order of business on the calendar.

DATE: 4/8/99

CARRIER: _____

LC NO. _____ . _____ of amendment

LC NO. _____ . _____ of engrossment

Emergency clause added or deleted _____

Statement of purpose of amendment _____

(1) LC (2) LC (3) DESK (4) COMM.

REPORT OF CONFERENCE COMMITTEE

SB 2254: Your conference committee (Sens. W. Stenehjem, Traynor, C. Nelson and Reps. Kliniske, Porter, Sandvig) recommends that the **HOUSE RECEDE** from the House amendments on SJ pages 876-877, adopt amendments as follows, and place SB 2254 on the Seventh order:

That the House recede from its amendments as printed on pages 876 and 877 of the Senate Journal and pages 933 and 934 of the House Journal and that Senate Bill No. 2254 be amended as follows:

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act relating to the performance of partial-birth abortions; and to provide a penalty.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Definitions. As used in this Act:

1. "Partially born" means the living intact fetus's body, with the entire head attached, is delivered so that any of the following has occurred:

   a. The living intact fetus's entire head, in the case of a cephalic presentation, or any portion of the living intact fetus's torso above the navel, in the case of a breech presentation, is delivered past the mother's vaginal opening; or

   b. The living intact fetus's entire head, in the case of a cephalic presentation, or any portion of the living intact fetus's torso above the navel, in the case of a breech presentation, is delivered outside the mother's abdominal wall.

2. "Sharp curettage or suction curettage abortion" means an abortion in which the developing child and products of conception are evacuated from the uterus with a sharp curettage or through a suction cannula with an attached vacuum apparatus.

SECTION 2. Prohibition - Penalty - Exception.

1. Any person who intentionally causes the death of a living intact fetus while that living intact fetus is partially born is guilty of a class AA felony. A mother whose living intact fetus dies while partially born may not be prosecuted for a violation of this Act or for conspiracy to violate this Act.

2. This Act does not apply to a sharp curettage or suction curettage abortion or to any offense committed under chapter 12.1-17.1 or chapter 14-02.1.

SECTION 3. Exception for life of mother. Section 2 does not prohibit a physician from taking measures that in the physician's medical judgment are necessary to save the life of a mother whose life is endangered by a physical disorder, illness, or injury, if:

1. Every reasonable precaution is also taken, in this case, to save the child's life; and

2. The physician first certifies in writing, setting forth in detail the facts upon which the physician relies in making this judgment. This certification is not required in the case of an emergency and the procedure is necessary to preserve the life of the mother."

Renumber accordingly

SB 2254 was placed on the Seventh order of business on the calendar.

1999 TESTIMONY

SB 2254

NDRL

North Dakota Right to Life Association

Testimony before the SENATE JUDICIARY COMMITTEE

Regarding SENATE BILL 2254

February 2, 1999

Chairman Stenehjem, members of the committee, I am Stacey Pfliiger, Executive Director of the North Dakota Right To Life Association. I am here today in support of SB 2254 which relates to the performance of partial-birth abortions; and to provide a penalty. Chairman Stenehjem, if you would allow it, this testimony will be a dual testimony by myself and Dr. Robert Bury who will provide you with the scientific description of the partial-birth abortion procedure.

The Partial-Birth Abortion Ban Act in SB 2254 is the same legislation that has been passed in the United States House, passed in the United States Senate, but vetoed by President Clinton. North Dakota, we need to send a message to Washington, D.C. that we do NOT want the partial-birth abortion procedure in our state or in our country. By passing this legislation we will be sending a message to Congress, President Clinton, and the Supreme Court.

514 8th Street North, Suite 2 • P.O. Box 551 • Bismarck, North Dakota 58502 • (701) 258-3811 • Fax (701) 224-1963 • 1-800-247-0343

As some of you may already know, partial-birth abortion bans have been passed in 25 states in the last two years. Of those, 18 were initially enjoined. Seven bans are currently in effect. The important thing to remember is that all of these cases are still working their way through the court process. To date, there is no final Circuit Court decision, let alone any guidance from the United States Supreme Court.

Court action against partial-birth abortion bans is par for the course regarding protective pro-life legislation. Almost every piece of pro-life legislation is subjected to a court challenge. For instance, there are currently 22 states that have parental involvement laws in effect, but this has not always been the case. Over the past 26 years the Supreme Court has had to rule nine times regarding parental involvement laws.

Litigation regarding parental involvement laws that have been upheld by the Supreme Court has been spread out over 26 years. With partial-birth abortion bans, 25 states have passed a ban in the past two years. This is an amazing accomplishment. Since so many bans have been passed in such a short time, all the litigation is coming up at once. The surprise isn't in the fact that 18 are enjoined, the surprise lies in the fact that 7 are not enjoined.

North Dakota meets only every other year. Since 25 states have already passed a ban, we cannot afford to wait another two years before passing a ban, we need to act NOW! North Dakota, we need to add our voice to the rest of the country by passing SB 2254.

Are partial-birth abortion procedures performed in North Dakota? According to statistics published by the North Dakota Department of Health, in 1997 there were 1,217 suction curettage abortions performed, 1 sharp curettage abortion performed, and 1 abortion performed where the procedure is not stated. (See Attachment A.) The procedure that is not stated may or may not be a partial-birth abortion.

Partial-birth abortions are performed at 20 weeks gestation and beyond, so, how many abortions are performed at 20 weeks gestation and beyond in North Dakota? In analyzing the statistics for the past 14 years, there have been 6 abortions performed at 20-28 weeks gestation. An additional 70 abortions have been performed at an Unknown gestational age. (See Attachment B.) Ron Fitzsimmons, Executive Director of the National Coalition of Abortion Providers estimates that up to 5,000 partial-birth abortions are performed annually, and that "they're primarily done on healthy women of healthy fetuses."

At this time I would like to turn testimony over to Dr. Robert Bury who will provide you with the scientific background of the partial-birth abortion procedure. After Dr. Bury's testimony he and I will be happy to answer any questions you may have for us.

ATTACHMENT A

TABLE OF PP BY FC

PP(PRIMARY PROCEDURE)

Frequency	FC(FACILITY ID.) FARGO	Total
SUCTION CURETTAGE	1217	1217
SHARP CURETTAGE	1	1
NOT STATED	1	1
Total	1219	1219

PATIENT STATE OF RESIDENCE

ST_RES	Frequency	Cumulative Frequency
ILLINOIS	1	1
MINNESOTA	341	342
MONTANA	3	345
NEW MEXICO	1	346
NEW YORK	1	347
NORTH DAKOTA	824	1171
SOUTH DAKOTA	37	1208
ALASKA	1	1209
HAWAII	1	1210
CENTRAL AMERICA	1	1211
MANITOBA	5	1216
SASKATCHEWAN	2	1218
ONTARIO	1	1219

TABLE OF AGE BY ED

AGE(MOTHERS AGE) ED(PTS. EDUCATION)

Frequency	GRADES 1-9	GRADES 10-12	1-4 YEARS OF COLLEGE	5+ YEARS OF COLLEGE	NOT STATED	Total
U-15	9	0	1	0	0	10
15-17	22	82	0	1	0	105
18-19	0	122	42	0	1	165
20-24	8	163	205	26	11	413
25-29	6	86	119	23	4	238
30-34	3	49	81	16	5	154
35-39	1	34	43	9	3	90
40-44	0	10	21	6	0	37
45+	0	0	2	2	1	5
N/S	0	0	2	0	0	2
Total	49	546	516	83	25	1219

Attachment B

In a partial-birth abortion the abortionist pulls the baby's feet, arms and shoulders from the uterus and then stops within inches of a complete delivery. With only the baby's head in the uterus, he forces a blunt, curved scissors into the base of the skull. The scissors are spread to enlarge the opening. A suction catheter now evacuates the skull contents. The baby is then fully removed. This procedure is performed at 20 weeks gestation and beyond.

"America is just inches from INFANTICIDE"

A Partial-Birth Abortion is performed at 20 weeks gestation and beyond. In reviewing statistics compiled by the North Dakota Health Department, the following was concluded:

YEAR	13-19 weeks	20 weeks	22 weeks	24 weeks	25 weeks	28 weeks	Unknown
1997	150						
1996	127			1			2
1995	140				1	1	2
1994	121	1	1				2
1993	108	1					7
1992	158						1
1991	161						2
1990	Not Available						
1989	121						1
1988	148						1
1987	141						8
1986	131						6
1985	160						1
1984	*1,223						28
1983	134						9
TOTALS	3,023	2	1	1	1	1	70

*1984 there were 1,135 abortions when the fetus was 13-16 weeks old, 88 abortions when the fetus was 17 weeks and older.

In summary, there has been the potential of **6 to 76 partial birth abortions** performed at 20 weeks gestation and beyond in the great state of North Dakota in the past 14 years.

NORTH DAKOTA CATHOLIC CONFERENCE

NDCC

Representing the Diocese of Fargo and the Diocese of Bismarck

Christopher T. Dodson
Executive Director and
General Counsel

To: Senate Judiciary Committee
From: Christopher T. Dodson, Executive Director
Subject: Senate Bill 2254 (Partial-Birth Abortion)
Date: February 2, 1999

The North Dakota Catholic Conference supports Senate Bill 2254 to ban partial-birth abortions in North Dakota.

You have already heard details concerning this horrific procedure. That testimony alone demonstrates the need for a ban on partial-birth abortions. In the words of American Medical Association President Daniel Johnson, Jr., M.D., "the partial delivery of a living fetus for the purpose of killing it outside the womb is ethically offensive to most Americans and physicians."[1] We are certain that it is offensive to most North Dakotans and most North Dakotans would want our state to be one that tried to protect human life from this procedure.

Anytime we attempt to protect human life prior to natural birth, we face difficult challenges. Almost invariably, such attempts face legal challenges and, again almost invariably, there are set backs at the lower court level. This has certainly happened with regards to partial-birth abortion legislation. We nevertheless urge this committee to move forward with this legislation for several reasons.

First, it would be remiss to stand by and wait for another state to pursue this matter to the U.S. Supreme Court. By not acting now, we allow partial-birth abortions to occur in North Dakota until some unknown time in the future. We would also have the undesirable distinction of being one of the few states that did not take action to prevent this procedure.

Second, we believe that a partial-birth abortion ban can be upheld. Most of the challenges to partial-birth abortion bans center on the statutory definition and whether a person would have adequate notice of what procedure was prohibited. SB 2254 provides such notice. To violate the statute, an abortion provider must (1) deliver a fetus or a substantial portion thereof, (2) while the fetus is living, (3) into

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[1] *New York Times*, May 26, 1997.

the vagina. The statute also includes two critical *mens rea* requirements. The statute does not prohibit the mere delivery of a living fetus or substantial portion thereof into the vagina, but, rather, prohibits only the deliberate and intentional delivery of such a fetus into the vagina. Indeed, even the intentional and deliberate delivery of a living fetus into the vagina does not violate the statute unless such delivery is for the specific purpose of performing a procedure the provider knows will kill the fetus. In short, the requirements in SB 2254 are very specific.[2]

Even the American Medical Association, whose general policy is to "oppose legislation criminalizing medical practice or procedure," supported a proposed federal ban on partial-birth abortions on the grounds that the procedure was "narrowly defined" so that "physicians will be on notice as to the exact nature of the prohibited conduct."[3] With regards to the definition, our understanding is that SB 2254 is identical to that supported by the American Medical Association. Some minor differences may exist concerning other parts of the bill and we are willing to work with the North Dakota Medical Association address those differences.

The American Medical Association's second requirement for supporting the legislation is that the procedure was not "medically indicated." By doing so, the AMA joined much of the medical community in recognizing that partial-birth abortion is never necessary.[4] In fact, distinguished

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2 See, *Richmond Medical Center v. Gilmore*, 144 F.3d 326 (4th Cir. 1998), finding that a definition substantially identical to that in SB 2254 was sufficiently specific and did not prohibit the more commonly used procedures of suction curettage or dilation and evacuation.

3 Letter from P. John Seward, MD, Executive Vice President of American Medical Association to the Senator Rick Santorum, May 19, 1997. (A copy is attached.)

4 The medical consensus is demonstrated by the following quotes:

"The partial delivery of a living fetus for the purpose of killing it outside the womb is ethically offensive to most Americans and physicians. Our panel could not find any identified circumstance in which the procedure was the only safe and effective abortion method." AMA President Daniel Johnson, Jr., M.D., in *New York Times*, May 26, 1997.

"According to the scientific literature, there does not appear to be any identified situation in which intact D & X is the only appropriation procedure to induce abortion, and ethical concerns have been raised about D & X." Report by Board of Trustees of

medical experts in obstetrics and gynecology have disputed any claim that the procedure is necessary to preserve the health or fertility of the mother.[5] A leading abortion expert has even stated that the procedure is more dangerous to the woman than other procedures.[6]

The North Dakota Catholic Conference has only one suggestion for the bill. Under North Dakota law, the intentional killing of an unborn child, as well as infanticide, are Class AA felonies. From a moral perspective and from a factual perspective, partial-birth abortion is no different. We, therefore, suggest that the bill be amended to make performance of a partial-birth abortion a Class AA felony.

We urge a **Do Pass** recommendation on this bill.

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the American Medical Association, May 1997.

"A select panel convened by ACOG could identify no circumstances under which this procedure . . .would be the only option to save the life or preserve the health of the woman." American College of Obstetricians and Gynecologists Statement of Policy, January 12, 1997.

"I have very serious reservations about this procedure. . . You really can't defend it. . . I would dispute any statement that this is the safest procedure to use." Abortionist Warren Hern in *American Medical News*, November 20, 1995, p.3.

"None of this risk is ever necessary for any reason. We and many other doctors across the U.S. Regularly treat women whose unborn children suffer the same conditions as those cited by the women who appeared at Mr. Clinton's veto ceremony. Never is the partial-birth abortion necessary." Drs. Nancy Romer, Pamela Smith, Curtis Cook and Joseph De Cook of Physicians' Ad Hoc Coalition for Truth (PHACT) in *Wall Street Journal*, September 19, 1996, p. A 22.

5 See, e.g. Comments of Dr. Frank Boehm, Director of Obstetrics, Vanderbilt University Medical Center, Nashville, in *The Washington Times*, May 6, 1996, p. A1.

6 See comments of Dr. Warren Hern in *American Medical News*, Nov. 20, 1995, p.3.

American Medical Association
Physicians dedicated to the health of America

P. John Seward, MD
Executive Vice President

516 North State Street
Chicago, Illinois 60610

312 464-5000
312 464 4184 Fax

May 19, 1997

The Honorable Rick Santorum
United States Senate
120 Russell Senate Office Bldg.
Washington, DC 20510

Dear Senator Santorum:

The American Medical Association (AMA) is writing to support HR 1122, "The Partial-Birth Abortion Ban Act of 1997," as amended. Although our general policy is to oppose legislation criminalizing medical practice or procedure, the AMA has supported such legislation where the procedure was narrowly defined and not medically indicated. HR 1122 now meets both those tests.

Our support of this legislation is based on three specific principles. First, the bill would allow a legitimate exception where the life of the mother was endangered, thereby preserving the physician's judgment to take any medically necessary steps to save the life of the mother. Second, the bill would clearly define the prohibited procedure so that it is clear on the face of the legislation what act is to be banned. Finally, the bill would give any accused physician the right to have his or her conduct reviewed by the State Medical Board before a criminal trial commenced. In this manner, the bill would provide a formal role for valuable medical peer determination in any enforcement proceeding.

The AMA believes that with these changes, physicians will be on notice as to the exact nature of the prohibited conduct.

Thank you for the opportunity to work with you towards restricting a procedure we all agree is not good medicine.

Sincerely,

P. John Seward, M.D.

P. John Seward, MD

Is this abortion infanticide?

■ Arguing point is whether mother's health involved

When Congress returns, it will decide whether to override the president's veto of the Partial-Birth Abortion Ban Act. When the bill first came before the House, Rep. Pat Schroeder, D-Colo., tried mightily, and unsuccessfully, to prevent the showing — during debate on the floor — of line drawings of this procedure.

Her concern was logical since she opposes the bill. As the drawings showed, what happens to between at least 600 and 2,000 fetuses a year — during second- and third-trimester abortions — is that a doctor delivers the intact fetus, feet first, through the birth canal. All but its head is then exposed. A surgical scissors is inserted into the base of the fetus' skull; the scissors is opened to expand the hole; and a suction catheter sucks out the brains, thereby causing the skull to collapse and enabling the head to be extracted.

In most cases, the fetus is alive until the final attack. Sen. Daniel Patrick Moynihan, D-N.Y., who is not a pro-life warrior, says of this procedure: "It is as close to infanticide as anything I have come upon."

This is not as hyperbolic as it may appear. According to Roe v. Wade, once the fetus is born, it is a "person" under the Constitution. When, however, the fetus is only inches away from having those constitutional rights, is killing him or her so close to actual infanticide that the procedure is, to say the least, uncivilized?

The arguments for sustaining the president's veto include the claim that, due to the anesthesia, the fetus is already dead before the scissors penetrate the skull. So what's all the fuss?

In testimony before Congress, however, the American Society of Anesthesiologists insisted there is "absolutely no basis in scientific fact" for making the anesthetist the terminator because the anesthesia would not kill the fetus.

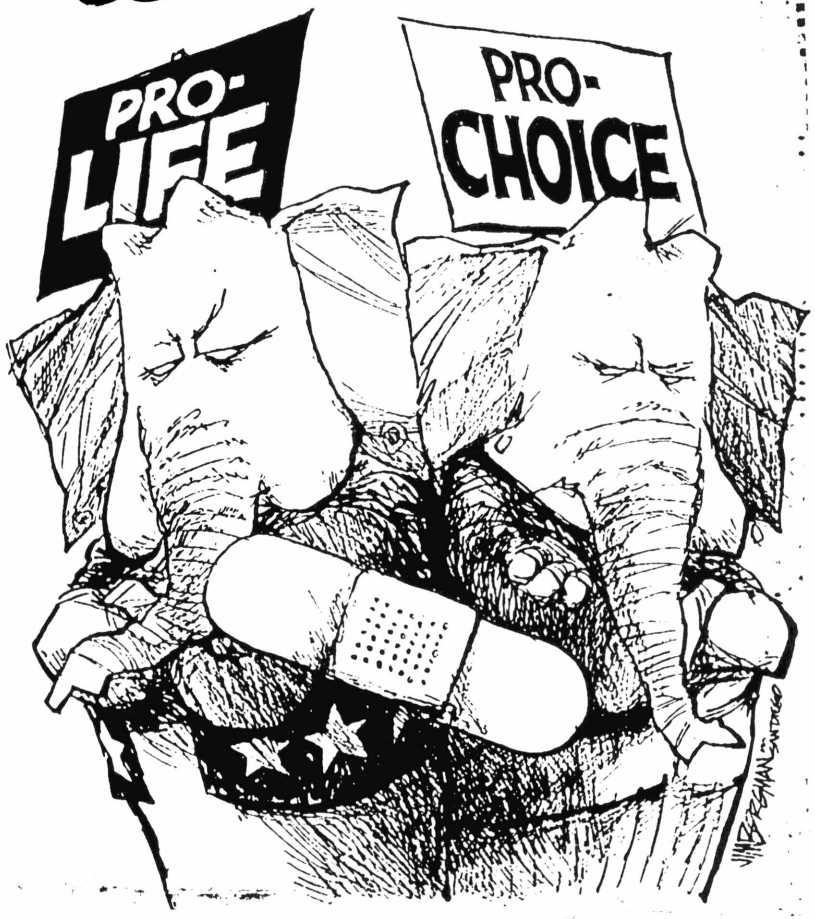
Supporters of the president's veto of the bill banning these particular late-term abortions claim they are only performed when the fetus is severely deformed and could cause great harm to the mother or even her death.

Nat Hentoff

The president has said that "under the circumstance s" if a woman does not undergo this kind of abortion, her body would be "ripped to shreds" — and she might never be able to have children again.

There is extensive medical evidence to the contrary. Dr. Martin Haskell of Dayton, Ohio, has performed many of these particular late-term abortions. In a 1993 taped-recorded interview, he told American Medical News — published by the American Medical Association — that 80 percent of his late-term abortions in this category were elective. There are other physicians specializing in this abortion technique who also do not claim the life of the woman is at issue in the majority of their cases. (American Medical News, Nov. 20, 1995.)

As for the president's claim that, in some cases, there is no alternative because of the extreme danger to the mother, a number of practicing experts in this field emphatically disagree. Pamela Smith, director of Medical Education, Department of Obstetrics and Gynecology at Mount Sinai Medical Center in Chicago, says: "There are absolutely no obstetrical situations encountered in this country which require a partially delivered human fetus to be destroyed to preserve the life of the mother."



Dr. Joseph DeCook, a fellow of the American College of Obstetricians and Gynecologists, has been practicing for 31 years. He points out that the need to open the cervix four or five centimeters creates "great exposure to infection, and the (partial-birth abortion) can also lead to tearing the uterus. ... This procedure is not taught by any residency program in the country."

The ban, nonetheless, has an exception that allows a partial-birth abortion when necessary to save the life of the mother. But the president wants a further exception permitting the procedure in order to "prevent serious health consequences" — otherwise unspecified. This could include maternal depression and other psychological states, thereby allowing a wide range of non-emergency partial-birth abortions.

Dr. C. Everett Koop was one of the nation's leading pediatric surgeons — and an expert on saving severely disabled infants — before he became surgeon general. He says, "In no way can I twist my mind to see that partial-birth abortion is a medical necessity for the mother."

But others regard this virtual infanticide as a political pro-choice necessity.

(Nat Hentoff is a national authority on the First Amendment and the rest of the Bill of Rights. His column appears on Saturdays in the Tribune.)

TESTIMONY OF DOUGLAS A. BAHR
SENATE BILL NO. 2254

Senate Judiciary Committee
February 2, 1999

Chairman Stenehjem, members of the Senate Judiciary Committee, I am Doug Bahr, Acting Solicitor General with the North Dakota Attorney General's Office. I am here today on behalf of the Attorney General's Office to provide you with some information about the likely consequences of passage of Senate Bill 2254.

If Senate Bill 2254 is enacted into law, there is little doubt that its constitutionality will be challenged in the courts. To date the United States Supreme Court has not addressed the constitutionality of a statute similar to SB 2254. However, the federal courts that have addressed the constitutionality of statutes prohibiting partial-birth abortions have found them to be unconstitutional. As it is currently written, in the view of the Attorney General's Office, a court reviewing Senate Bill 2254 would likely hold the bill unconstitutional. Our concern with the constitutionality of Senate Bill 2254 is based on a long line of decisions of the United States Supreme Court and the specific cases addressing statutes similar to SB 2254.

In June 1992, in a case entitled Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992), the United States Supreme Court refused to overturn Roe v. Wade, which, as I am sure you know, established a woman's right of choice in the abortion context. Based on Casey, the current constitutional law is that states may regulate abortions but only

if such regulations do not impose an "undue burden" on a woman's right to obtain an abortion. In Casey Justice O'Connor stated the undue burden test as follows: "An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus obtains viability." 112. S. Ct. at 2821.

Since Casey, a number of courts have addressed the constitutionality of statutes prohibiting partial-birth abortions. Although the statutes in each case may differ slightly, the decisions in those cases are instructive.

In Planned Parenthood of Wisconsin v. Doyle, 162 F.3d 463 (7th Cir. 1998), the Eleventh Circuit Court of Appeals found unconstitutional a Wisconsin statute that decreed life imprisonment for anyone who performs a partial-birth abortion. The court said the "statute impermissibly burdens the constitutionally recognized right to an abortion in three respects. First, it contains no exception for cases in which the fetus is not yet viable." Id. at 466. Next, according to the court, the statute impermissibly burdens the constitutionally recognized right to an abortion because it contains no exception for the case in which the procedure, "either before or after viability, is necessary for the preservation of the mother's health." Id. at 467. The Wisconsin statute, like SB 2254, only provided an exception when the mother's life was at stake. Finally, the court said the statute was vague. Id. at 469.

Similarly, in Women's Medical Professional Corp. v. Voinovich, 130 F.3d 187 (6th Cir. 1997), cert. denied, 118 S. Ct. 1347 (1998), the Sixth Circuit Court of Appeals invalidated an Ohio statute prohibiting partial-birth (D & X procedure) abortions. The court stated, "a statute which bans a common abortion procedure would constitute an undue burden. An abortion regulation that inhibits the vast majority of second trimester abortions would clearly have the effect of placing a substantial obstacle in the path of a woman seeking a pre-viability abortion." Id. at 201. Like the statute in Voinovich, SB 2254 does not distinguish between viable and nonviable fetuses.

The Illinois Partial-Birth Abortion Ban Act was challenged in Hope Clinic v. Ryan, 995 F.Supp. 847 (N.D. Ill. 1998). In addition to finding the Act unconstitutionally vague, id. at 856, the court found the Act unconstitutional because it imposes an undue burden on the constitutional rights of women seeking abortions. The court explained:

> For two reasons, the court finds that [the Act] imposes an undue burden on a woman's constitutional right to choose to terminate her pregnancy before viability. First, the statute as written, has the potential effect of banning the most common and safest abortion procedures. It does so without regard for the viability of the fetus. Second, the statute does not permit a physician to use the prohibited procedure when it is necessary to protect the woman's health,

whether mental or physical, or when an alternative abortion procedure would compromise the woman's health. As such, [the Act] is clearly unconstitutional.

Id. at 857. See also Summit Medical Associates, P.C. v. James, 984 F. Supp. 1404 (M.D. Ala. 1998)(holding challenge to Alabama's Partial-Birth Abortion Ban Act presents a claim because the statute is unconstitutionally vague and limits the woman's "choice of an appropriate abortion method, creating the possibility that a preferred method may be proscribed except where there exists a medical emergency satisfying certain specific requirements"); Planned Parenthood of Southern Arizona, Inc. v. Woods, 982 F. Supp. 1369 (D. Ariz. 1997)(finding statute criminalizing partial birth abortion unconstitutional because it "imposes an undue burden on a woman's right to terminate a nonviable fetus," "does not provide an exception where the proscribed conduct is in the best interest of the health of a woman," and is unconstitutionally vague); Planned Parenthood of Greater Iowa, Inc. v. Miller, 1 F. Supp.2d 958 (S.D. Iowa 1998)(granting preliminary injunction against enforcement of Iowa Partial Birth Abortion statute because it is unconstitutionally vague and unduly burdens a woman's constitutional right to an abortion); Eubanks v. Stengel, 28 F. Supp.2d 1024 (W.D. Ky. 1998)(declaring Kentucky's partial Birth Abortion Act facially unconstitutional because it bans partial-birth abortions no matter when in pregnancy they are performed); Evans v. Kelley, 977 F. Supp. 1283 (E.D. Mich. 1997)(declaring partial-birth abortion statute unconstitutional because it "is vague and overbroad and unconstitutionally imposes an undue burden on a woman's right to seek a pre-viability second trimester abortion"); Carhart v. Stenberg, 11 F. Supp.2d 1099 (D. Neb.

1998)(finding Nebraska's law banning partial-birth abortions unconstitutional because it endangers the health of women to further the well-being of nonviable fetal life). But see Richmond Medical Center for Women v. Gilmore, 144 F.3d 326 (4th Cir. 1998)(limited statute to cover only intact dilation and extraction procedure, not suction curettage or conventional dilation and evacuation, and granted application to stay preliminary injunction because plaintiffs did not perform procedures prohibited by statute and thus lacked standing).

The above cases found three constitutional flaws with the challenged partial-birth abortion statutes—the statutes were vague and operated without regard for the viability of the fetus or the woman's health. SB 2254 also fails to distinguish between viable and nonviable fetuses or make an exception for the procedure when it is necessary to preserve the mother's health. The language of SB 2254 is also similar to the language in some of the statutes found to be unconstitutionally vague. If SB 2254 is amended to address these concerns it would have a greater likelihood of surviving a constitutional challenge.

As previously mentioned, if Senate Bill 2254 becomes law, we anticipate that there will be a lawsuit challenging the constitutionality of the bill. Although SB 2254 is more likely to be upheld if amended, it will likely be challenged even if it is amended. It is difficult to estimate the cost of a lawsuit defending SB 2254. Cases in other jurisdictions indicate substantial discovery will be required. Discovery will include

information regarding partial-birth abortion procedures, the medical benefits and detriments of the procedure, how often partial-birth abortions are performed, at what stage of pregnancy are they typically performed, a comparison of partial-birth abortions with alternative procedures, etc. Experts will likely be required, substantially increasing the cost of litigation. If the statute is found unconstitutional, it is likely the state will be required to pay the plaintiff's attorney's fees and costs. Although normally each side must pay its own attorneys fees in a lawsuit, a lawsuit challenging SB 2254 will likely be brought pursuant to the federal civil rights act. Under the federal civil rights act the state would be required to pay all attorneys fees and costs to a prevailing plaintiff. Depending on the amount of fact discovery required and to what level the case is appealed, I estimate the costs of the lawsuit would be in the range of $200,000 to $700,000.

I suggest that if the committee recommends a do pass on the bill, that a fiscal note be requested and a contingent appropriation for the defense of the bill be included.

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Testimony before Senate Judiciary Committee

February 2, 1999

RE: SB2254

Mr. Chairman, members of the committee, my name is Carol Gass. I am the lobbyist for Red River Women's Clinic, a facility offering family planning and abortion services.

SB2254 is a Trojan horse. In the guise of prohibiting so called "partial-birth abortions" anti-choice advocates have launched a broad assault against the rights guaranteed by Roe v. Wade. Many people believe this ban targets only late term abortions or a specific procedure. This is not true.

The alleged "partial-birth abortion" ban is the cornerstone of a carefully crafted strategy to eliminate all legal abortions. SB2254 is so vaguely worded that it could be interpreted by judges to outlaw nearly any type of abortion. The language is modeled after the 1997 Federal legislation vetoed by the president because it was "consistent neither with the Constitution nor sound public policy."

Twenty-eight states have passed similar bans. Legal challenges have been mounted in 20 states with the following results. (See Attachment A).

1. 19 out of 20 states have had their laws enjoined or limited;
2. 17 courts have issued temporary or permanent injunctions;
3. One attorney general limited enforcement of the law;
4. One court limited enforcement of the law.

Court challenges are quickly draining the coffers of both plaintiffs and defendants in these cases.

For the state to have to defend what we all know is unconstitutional legislation is both costly and ridiculous.

Line 5 of SB2254 defines "fetus". I want to remind the committee Roe stated that a fetus is not a "person" under the Fourteenth Amendment, nor may the state justify restrictions on abortion based on one theory of when life begins.

Lines 6-7 "partial-birth abortion" is a political term not a medical term. The term has no precise scientific definition and is not found in medical textbooks, courses or manuals. However, this definition could also apply to first and second trimester abortions in which the embryo or fetus is destroyed by vacuum aspiration or suction curettage – the standard method for surgical abortion.

Lines 8-11 are not limited to any particular trimester. The definition does not mention weeks of pregnancy, or any other time period. There also is no distinction between procedures that take place before or after fetal viability. As defined, the safest and most common abortion procedures would be prohibited. That is unconstitutional as determined by the United States Supreme Court in Roe.

Lines 12-17 include only a life exception -- no exceptions for rape and incest, no exception for genetic defect and fetal anomaly, and, no exception for a woman's health. In Doe v. Bolton, Roe's companion case, the Court defined "health" to include "all factors – physical, emotional, psychological, familial, and the woman's age – relevant to the well-being of the patient." Mental and physical well-being are together cast as conditions so important that they are worth protecting, even if such protection means the termination of pregnancy.

Sections 3 and 4 expose physicians to civil and criminal liability and do not provide physicians with fair warning as to what conduct <u>is</u> permitted. These sections create a chilling effect between a woman and her physician.

The American College of Obstetricians and Gynecologists (ACOG) representing 39,000 members rejects "partial-birth abortion bans" as "inappropriate, ill advised, and dangerous."

SB2254 is deceptive, unconstitutional, and extreme. Everyone on this committee should comfortably vote a Do Not Pass.

NORTH DAKOTA CATHOLIC CONFERENCE
NDCC

Representing the Diocese of Fargo and the Diocese of Bismarck

Christopher T. Dodson
Executive Director and
General Counsel

To: House Human Services Committee
From: Christopher T. Dodson, Executive Director
Subject: Senate Bill 2254
Date: March 16, 1999

The North Dakota Catholic Conference supports Senate Bill 2254. Senate Bill 2254 has only one purpose -- to prohibit the killing of a child while that child is partially born. This bill was not introduced for political purposes, without regard for its constitutionality. Nor was the bill intended to prohibit procedures other than those that destroy a child's life while being born. Although the North Dakota Catholic Conference opposes all forms of abortion and infanticide, the purpose of *this* bill is to address only one set of procedures.[1]

We believe that Senate Bill 2254, as it is before you, is a good bill. However, in recent months similar legislation has faced serious court challenges. Almost as soon as the bill was introduced, we began looking for ways to improve the bill in light of what we could learn from those court cases. We felt this was the right thing for the pro-life movement to do as participants in a democracy. Moreover, I personally felt this was my ethical duty as a member of the bar.

Obtaining information on how to improve the bill involved extensive consultation with and between lawyers and physicians around the nation and even a trip to Washington. The process took too long to get information to the Senate Judiciary Committee. However, the committee was informed of our efforts, as was the Attorney General's office.

The attached amendments reflect those efforts. We believe that these amendments provide the bill with a better chance of withstanding a constitutional challenge while still vigorously prohibiting the conduct Senate Bill 2254 was intended to stop. We urge you to consider them.

[1] Contrary to the claims of some opponents of such bills, bills like Senate Bill 2254 are not intended to prohibit only a particular procedure. There are actually several procedures developed by abortionists that involve killing the child while partially born. The purpose of the bill is to prohibit these procedures and any others than might be developed that would involve killing the child while the child is partially born.

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The Amendments

The attached amendments are written as the bill would look like, if amended, and are not yet in correct amendment draft form. Although each of the main parts of Senate Bill 2254 are preserved, much of the language is rewritten.

The amendments primarily address two issues. The first issue is the definition. Some courts have found definitions like that used in Senate Bill 2254 too vague or too broad to give sufficient notice to a physician as to what conduct the law prohibits. Then, having found the definition too broad, courts have gone on to conclude that so much conduct is possibly prohibited that the law would constitute an "undue burden" on a woman's "right to abortion." The proposed amendments address this issue by more narrowly and more specifically defining the prohibited conduct.

The second issue addressed by the amendments is the legal context under which the court reviews the law. Courts have tended to review "partial-birth abortion" statutes under the difficult to meet standards of traditional abortion jurisprudence. We believe this is a mistake. Despite the claims of some abortion rights proponents, *Roe v. Wade* did not establish an absolute right to abortion. Indeed, the Court expressly rejected that idea. Nor did *Roe* or any other case establish an absolute right for a physician to choose any method to terminate a pregnancy.

Perhaps more important, *Roe v. Wade* applies only to "unborn" human beings. It does not apply to partially born human beings. In fact, the Supreme Court left standing in *Roe* a Texas statute that prohibited the destruction of a child "in a state of being born and before actual birth." Senate Bill 2254 is intended to prohibit the very same type of conduct. The proposed amendments address this issue by giving the state flexibility to argue before a court that it should not review Senate Bill 2254 under traditional abortion jurisprudence.[2]

Definitions

The adverse court cases have primarily focused on the definition of the prohibited act. To address

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2 Even if traditional abortion jurisprudence is applied, we believe the law could withstand a constitutional challenge.

these concerns, the definitions are completely rewritten. To help understand the context of the definitions, you may want to look first at the prohibition in Section 2 of the bill. The section prohibits killing a "living child while that child is partially born." Returning to the definition section, you will note that both "living child" and "partially born" are defined.[3]

The bill states: "Partially born" means the child's intact body, with entire head attached, is delivered so that any of the following has occurred:

a. There has been delivered past the mother's vaginal opening (i) the child's entire head, in the case of a cephalic presentation, or (ii) any portion of the child's torso above the navel, in the case of a breech presentation.
b. There has been delivered outside the mother's abdominal wall (i) the child's entire head, in the case of a cephalic presentation, or (ii) any portion of the child's torso above the navel, in the case of a breech presentation.

We believe that this definition is much more specific than the definition used in Senate Bill 2254, as introduced. It makes clear what part of the child's body has to have been delivered and what part of the mother's body it has to have passed.[4]

However, even while the definition is more specific, it does not allow anything that we intended to prohibit when the bill was introduced. If the amendment, in fact, prohibits less conduct than the original language prohibits, that is because of an unintended scope in the original bill.

To further clarify, the bill expressly does not apply to sharp curettage or suction curettage abortions and those terms are defined. The proposed language excludes these procedures because some physicians consulted thought an argument could be made that the curettage apparatus used in these

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3 Schedules and time constraints prevented us from securing medical expert testimony for this hearing. However, we are arranging for written testimony on medical issues concerning the definition to be delivered shortly.

4 Subsection (b) of the definition applies the same criteria to hysterotomy type abortions. These abortions are similar to Caesarean sections. The definition would prohibit killing a living child while the child is passing through abdominal wall.

abortions could be construed as killing an intact child somewhere around or past the vaginal opening.

Prohibitions and Exceptions

Section 2 of the new language states that anyone who intentionally or knowingly kills a living child while that child is partially born commits a class AA felony. As introduced, Senate Bill 2254 used only the word "knowingly." "Intentional" was added because it better reflects the levels of culpability already used in the Criminal Code.

Moreover, by using "intentionally or knowingly" the bill would better reflect the language used in both North Dakota's unborn homicide (N.D.C.C. Chp. 12.1-17.1) and homicide (N.D.C.C. Chp. 12.1-16) statutes. If we are going to argue that the prohibited conduct is not an "abortion" for constitutional purposes, the crime of killing a child while that child is partially born should mirror as much as possible the crimes of unborn homicide and infanticide.

Senate Bill 2254 made the act a class B felony. We feel that a class AA felony is both more appropriate and improves the bill's chances before a court. Again, if we are going to argue that this conduct is not an "abortion" for constitutional purposes, we need to treat it as such by making the penalty consistent with the crimes of unborn homicide and infanticide. Both of those acts are class AA felonies in North Dakota.

As mentioned, subsection (2) of Section 2 expressly states that the law does not apply to sharp curettage or suction curettage abortions. Subsection 3 of Section 2 makes it clear that whether the act in this bill called "infanticide" or "abortion," nothing in this bill means approval of those acts. Subsection 4 is the life of the mother exception more clearly stated.

Civil Remedies and Attorney's Fees

The changes to this section mostly reflect differences in language. In subsection 3, the sentence regarding the awarding of attorney's fees to the defendant if the suit was frivolous or brought in bad faith was removed because it already exists in the Code (N.D.C.C. §§ 28-26-01, 28-26-31.) So as to make it clear, a non-exclusive remedy clause was added as a subsection 4.

Hearing

At the request of the North Dakota Medical Association, the amendments include a new Section 4 to allow a hearing before the State Board of Medical Examiners. The findings of the board would be admissible in a trial.

The Section 4 of the original bill would not be necessary since the penalty is addressed in Section 2 of the amendments.

We still believe that Senate Bill 2254 is a good bill. However, we also believe that we can make it a better bill by adopting these amendments. The amendments strengthen the bill and responsibly respond to the adverse court cases. At the same time, they are not a step backwards. The procedures covered are the same procedures Senate Bill 2254 was intended to cover.

We cannot, of course, guarantee success in the courts. Nor can we guarantee that no one will challenge the law. Threats of lawsuits, however, should not deter us from engaging in a responsible approach to protecting human life. We urge your support for Senate Bill 2254 and the proposed amendments.

A BILL for an Act relating to the performance of partial-birth abortions; and to provide a penalty.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Definitions. For purposes of this Act, unless the context otherwise requires:

1. "Living child" means any member of the human species, born or unborn, who has a heartbeat or discernible spontaneous movement.

2. "Partially born" means the child's intact body, with entire head attached, is delivered so that any of the following has occurred:

   a. There has been delivered past the mother's vaginal opening (i) the child's entire head, in the case of a cephalic presentation, or (ii) any portion of the child's torso above the navel, in the case of a breech presentation.

   b. There has been delivered outside the mother's abdominal wall (i) the child's entire head, in the case of a cephalic presentation, or (ii) any portion of the child's torso above the navel, in the case of a breech presentation.

3. "Sharp curettage or suction curettage abortion" means an abortion in which the developing child and products of conception are evacuated from the uterus with a sharp curettage or through a suction cannula with an attached vacuum apparatus.

SECTION 2. Prohibition - Exception.

1. Any person who intentionally or knowingly kills a living child while that child is partially born commits a class AA felony. The mother of a living child killed while that child is partially born may not be prosecuted for a violation of this Act or for conspiracy to violate this Act.

2. Nothing in this Act applies to a sharp curettage or suction curettage abortion.

3. Nothing in this Act means approval of other types of infanticide or abortion, which remain subject to applicable laws.

4. Nothing in this Act prohibits a physician from taking measures necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, if every reasonable precaution is also taken, in such cases, to save the child's life.

SECTION 3. Civil remedies - Attorney's fees.

1. The mother of a living child killed while that child was partially born, the father of the child, or if the mother is less than eighteen years of age at the time of the procedure, a maternal grandparent of the child, may bring a claim for relief against a person for violating section 2 of this Act, unless the pregnancy resulted from the plaintiff's criminal conduct or the plaintiff consented to the procedure violating section 2 of this Act.

2. In a claim for relief brought under this section, appropriate relief may include any of the following:

   a. Compensatory damages for all injuries, psychological and physical, resulting from the violation of section 2 of this Act.

   b Statutory damages equal to three times the cost of the procedure that violated section 2 of this Act.

3. If the judgment under this section is rendered in favor of the plaintiff, the court shall award reasonable attorney's fees to the plaintiff.

4. This section does not preclude any other claims a person may have under law.

SECTION 4. Hearing. A physician accused of an offense under this Act may seek a hearing before the state board of medical examiners on whether the physician's conduct was necessary to save the life of a mother whose life was endangered by a physical disorder, physical illness, or physical injury and that every reasonable precaution was also taken, in such cases, to save the child's life. The findings on that issue are admissible on that issue at the trial of the defendant. Upon a motion of the defendant, the court shall delay the beginning of the trial for not more than thirty days to permit such a hearing to take place.

NDRL

North Dakota Right to Life Association

Testimony before the HOUSE HUMAN SERVICES COMMITTEE

Regarding SENATE BILL 2254

March 16, 1999

Chairman Price, members of the committee, I am Stacey Pfliiger, Executive Director of the North Dakota Right To Life Association. I am here today in support of SB 2254 which relates to the performance of partial-birth abortions; and to provide a penalty.

I would first like to briefly describe the three day procedure of the partial-birth abortion. This procedure is the delivery of a living child, usually feet first. A substantial part of the child is delivered. The abortionist then punctures the base of the child's skull with a sharp instrument and sucks out the brain contents, killing the child and allowing the skull to collapse. A dead child is then delivered. This description is based upon the technique of Abortionist Haskell who terms this procedure "Dilation and Extraction (D&X)".

The abortion industry cannot even agree on a name for this procedure. The late Abortionist McMahon called the procedure "Intact Dilation and Evacuation (Intact D&E)". Planned Parenthood calls this procedure D&X. The National Abortion Federation prefers the procedure to be called Intact D&E. Supporters of the Partial-Birth Abortion ban have consistently labeled this procedure a partial-birth abortion. The term 'partial-birth abortion' is meant to be a legal term, not a medical term. According to the Physicians Ad Hoc Coalition for Truth, "there is no proper medical name for partial-birth abortion, only medically sounding ones."

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The Partial-Birth Abortion Ban Act is the same type of legislation that has been passed in the United States House, passed in the United States Senate, but vetoed by President Clinton. North Dakota, we need to send a message to Washington, D.C. that we do NOT want the partial-birth abortion procedure in our state or in our country. By passing this legislation we will be sending a message to Congress, President Clinton, and the Supreme Court.

As some of you may already know, partial-birth abortion bans have been passed in 25 states in the last two years. Of those, 18 were initially enjoined. Seven bans are currently in effect. The important thing to remember is that all of these cases are still working their way through the court process. To date, there is no final Circuit Court decision, let alone any guidance from the United States Supreme Court.

Court action against partial-birth abortion bans is par for the course regarding protective pro-life legislation. Almost every piece of pro-life legislation is subjected to a court challenge. For instance, there are currently 22 states that have parental involvement laws in effect, but this has not always been the case. Over the past 26 years the Supreme Court has had to rule nine times regarding parental involvement laws.

Litigation regarding parental involvement laws that have been upheld by the Supreme Court has been spread out over 26 years. With partial-birth abortion bans, 25 states have passed a ban in the past two years. This is an amazing accomplishment. Since so many bans have been passed in such a short time, all the litigation is coming up at once. The surprise isn't in the fact that 18 are enjoined, the surprise lies in the fact that 7 are not enjoined.

North Dakota meets only every other year. Since 25 states have already passed a ban, we cannot afford to wait another two years before passing a ban, we need to act NOW! North Dakota, we need to add our voice to the rest of the country by passing SB 2254.

Are partial-birth abortion procedures performed in North Dakota? According to statistics published by the North Dakota Department of Health, in 1997 there were 1,217 suction curettage abortions performed, 1 sharp curettage abortion performed, and 1 abortion performed where the procedure is not stated. (See Attachment A.) The procedure that is not stated may or may not be a partial-birth abortion.

Partial-birth abortions are performed at 20 weeks gestation and beyond, so, how many abortions are performed at 20 weeks gestation and beyond in North Dakota? In analyzing the statistics for the past 14 years, there have been 6 abortions performed at 20-28 weeks gestation. An additional 70 abortions have been performed at an Unknown gestational age. (See Attachment B.) Ron Fitzsimmons, Executive Director of the National Coalition of Abortion Providers estimates that up to 5,000 partial-birth abortions are performed annually, and that "they're primarily done on healthy women of healthy fetuses."

As stated by Mr. Dodson, language on the partial-birth abortion procedure is changing rapidly. We have worked closely with our national leaders to submit to you the best language available at this time. I strongly encourage you to adopt the amendments presented by North Dakota Catholic Conference; however, the passage of the bill in its original form is also acceptable to North Dakota Right To Life.

At this time I would be available to answer any questions you might have.

PHACT

Physicians' Ad Hoc Coalition for Truth

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For Immediate Release
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PARTIAL-BIRTH ABORTION: THE NAME GAME

"The author has coined the term Dilation and Extraction or D&X to distinguish it from dismemberment-type D&E's."
–Dr. Martin Haskell, *"Dilation and Extraction in Late Second Trimester Abortion,"* 9/13/92

"[Dr. James] McMahon has developed his own method that he calls intrauterine cranial decompression."
– *Los Angeles Times Magazine*, 1/7/90

"Only Dr. Haskell, James T. McMahon and a handful of other doctors perform the D&X procedure, which Dr. McMahon refers to as 'intact D&E.'"
– *The American Medical News*, 7/5/93

"Intact D&E (dilation and evacuation) is a medical procedure that would be outlawed by H.R. 1833, the so-called 'Partial-Birth Abortion Ban' Act."
–National Abortion Federation information sheet, 2/96

"The attempt to ban dilation and extraction (D&X), a late abortion procedure that is used very rarely and in the most tragic circumstances..."
– Planned Parenthood information sheet, 3/21/96

"The American College of Obstetricians and Gynecologists (ACOG) believes the intent of such legislative proposals is to prohibit a procedure referred to as 'Intact Dilatation and Extraction' (Intact D&X)."
– ACOG Statement of Policy, 1/12/97

"The U.S. House of Representatives and Senate recently passed legislation that would criminalize intact dialation (sic) and evacuation, which the bill describes as 'partial-birth abortion.'"
– Newsletter of the American College of Obstetricians and Gynecologists (ACOG), 1/96

"Eleven states have enacted bans on the procedure, know medically as 'intact dilation and evacuation.'"
– *New York Times* reporter Katharine Q. Seeyle, "As Federal Ban Faces A Veto, States Outlaw Late Abortion," 5/5/97.

"...in anticipation of next week's vote on a proposed ban on the procedure, known medically as intact dilation and extraction or evacuation."
– *New York Times* reporter Katharine Q. Seeyle, "Democratic Leader Proposes Measure to Limit Abortion," 5/9/97.

Supporters of the Partial-Birth Abortion Ban have been consistent in referring to the procedure by one term alone: Partial-Birth Abortion. Congress intends this term to be a legal one, not medical. On the other hand, advocates for the continued use of partial-birth abortion have coined any number of names for the procedure, claiming each new coinage is a proper medical term. As the above quotes show, they cannot agree even among themselves as to just what the "proper medical name" for the procedure is.

There is a reason for this: <u>*there is no proper medical name for partial-birth abortion*</u>, only medically sounding ones. What all these names share in common is that none of them can be found in any of the standard medical textbooks or databases. Indeed, the procedure itself is not recognized by the medical community, nor is it taught as a formally recognized medical procedure.

The term partial-birth abortion, on the other hand, according to maternal-fetal specialist and PHACT member Watson Bowes, M.D. "is accurate as applied to the procedure described by Dr. Martin Haskell in his 1992 paper entitled 'Dilation and Extraction For Late Second Trimester Abortion,' distributed by the National Abortion Federation." Dr. Pamela Smith, a founding member of PHACT and former director of medical education, ob/gyn at Mt. Sinai Hospital in Chicago, calls both the name partial-birth abortion and its legal definition "straightforward" and notes that "this definition covers this procedure and no other."

The very variety of names that have been coined for it are proof that there is no single, standard, medical term for partial-birth abortion. Claims that there is such a medically recognized name are false. The only purpose for medically-sounding coinages is to give the general public the impression that the partial-birth abortion procedure possesses a degree of medical legitimacy, which it does not.

Call It "Partial-Birth Abortion" — It's the Law!

By Douglas Johnson
NRLC Federal Legislative Director

WASHINGTON (June 16) - - You may have read in the paper that both houses of Congress have approved a bill "banning a medical procedure known as intact dilation and extraction," or words to that effect.

But actually, Congress never passed such a bill.

Rather, the House and Senate have given preliminary approval to a bill (HR 1122) to ban **partial-birth abortion** (unless necessary to save a mother's life). (The House must vote again on the bill to approve minor amendments made by the Senate, before it is sent to President Clinton, who says he will veto it.)

However, whenever the media uses the term chosen by Congress, **partial-birth abortion**, some opponents of the Partial-Birth Abortion Ban Act object because, they argue, "it is not a medical term."

Many journalists have been receptive to such pressure. Some recent wire service accounts of the congressional debate on the Partial-Birth Abortion Ban Act, for example, referred only to "certain late-term abortions" and contained no mention of the term "partial-birth abortion," and no description whatever of the type of abortion that would be banned by the measure.

A recent *Associated Press* dispatch, headlined "Bill Titles Can Be Distortions," claimed, "'Partial-birth' is the nonclinical name for a procedure known more scientifically as 'dilation and extraction.' "

That sort of comment is itself a distortion. When such mischaracterizations of the bill appear in the press, they should be challenged by knowledgeable pro-lifers on the grounds discussed below.

First, the term **partial-birth abortion** is now a ***legal term of art***. That is, **partial-birth abortion** has been adopted by numerous state legislative bodies as the "official" ***legal*** term to refer to a very specific and carefully defined method of killing partly born human beings. As of this writing, 13 states had enacted bills to ban **partial-birth abortion**, and it appears that several others may do so before the end of the year.

Second, the term **partial-birth abortion** is *not* equivalent to any of the terms of pseudo-medical jargon that pro-abortion groups insist are the proper "medical" or "clinical" terms.

Third, the term **partial-birth abortion** is not a "distortion" of reality, nor is the term in any way misleading. Rather, the term **partial-birth abortion** accurately conforms to terminology in related areas of law and medicine.

These points are expanded on below.

Partial-Birth Abortion: A Legal Term of Art

As of June 16, 1997, 13 states have already made it illegal to perform a **partial-birth abortion**, and three more such bills are awaiting action by governors.

In addition, lopsided majorities of both houses of Congress have voted to put the term **partial-birth abortion** into the U.S. Criminal Code.

All of these bills define **partial-birth abortion** in essentially the same way: an abortion in which the living baby is partly delivered before being killed. The proposed federal bill (HR 1122), which has served as the basic model for the state bills, would define **partial-birth abortion** as "an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery."

It is hard to see what justification journalists have for denigrating the legal terminology enacted in law by elected legislators, and substituting terms preferred by some pro-abortion advocacy groups. After all, several years ago when Congress defined certain firearms as "assault weapons," that is what they became - - in law and in the media - - even though manufacturers and users of such firearms prefer other terms.

The real reason that pro-abortion advocates dislike the term **partial-birth abortion**, of course, is that it gives the layperson a clear picture of how this type of abortion is performed. As Bear Atwood, president of the New Jersey chapter of the National Organization for Women (NOW), put it, "The whole term, 'partial-birth abortion' gives people pause." (*AP*, June 2)

Thus, pro-abortion advocates want to conceal the brutal reality behind a smokescreen of unintelligible pseudo-medical jargon.

However, the abortionists who perform partial-birth abortions, and their lobbyists, disagree among themselves as to what the "correct" jargon term should be. Indeed, various opponents of the bill have insisted on at least three *different* pseudo-"medical" terms: "intact dilation and evacuation," "dilation and extraction," and "intact dilatation and extraction."

Before Congressman Charles Canady (R-Fl.) introduced the Partial-Birth Abortion Ban Act in June, 1995, his staff researched the matter and found that none of those terms appeared in any medical dic-

tionary, nor in the Medline computer database, nor even in the standard textbook on abortion methods, *Abortion Practice* by Dr. Warren Hern.

The term "intact dilation and evacuation" (or "intact D&E") was invented by the late Dr. James McMahon, who is generally credited with developing the abortion method. But the national controversy over partial-birth abortion really began in 1993, when NRLC obtained a copy of a paper written in 1992 by Ohio abortionist Dr. Martin Haskell, in which Dr. Haskell explained step by step how to perform the procedure. In the paper, Dr. Haskell said that he had "coined" the term "dilation and extraction" or "D&X" to refer to the method.

McMahon, however, explicitly repudiated the use of the term "dilation and extraction" in a 1993 interview with *American Medical News*, saying, "I don't use the term D&X. . . . I think D&X has been defined in a way we don't want to embrace."

Besides being idiosyncratic terms, both "intact D&E" and "D&X" were very "blurry" terms. McMahon and Haskell never offered anything approximating rigid *definitions* of their coined terms. Because "intact dilation and evacuation" and "dilation and extraction" are not standard, clearly defined medical terms, Congressman Canady rejected them as useless for purposes of defining a criminal offense. A criminal statute that relied on such murky terms would be struck down by the federal courts as "void for vagueness."

[The term "***intact*** dilation and evacuation" should not be confused with "dilation and evacuation" (D&E), which is a procedure commonly used to perform second-trimester abortions, involving *dismemberment* of the baby *while still in the uterus*. HR 1122 does not apply to this method at all.]

The Abortionists' Pseudo-Medical Terms Are Not Equivalent to "Partial-Birth Abortion"

It is simply ***inaccurate*** for journalists to graft abortionists' jargon terms onto the Partial-Birth Abortion Ban Act, because none of the so-called "medical" terms is equivalent to the definition of **partial-birth abortion** contained in HR 1122. The definition of **partial-birth abortion** is in some respects narrower and in some respects broader than the abortionists' terms, as explained below.

To understand these distinctions, it is first important to grasp exactly how a partial-birth abortion is typically performed. The abortionist pulls a ***living*** baby feet-first out of the womb and into the birth canal (vagina), except for the head, which the abortionist purposely keeps lodged just inside the cervix (the opening to the womb).

The abortionist then punctures the base of the skull with a surgical instrument, such as a long surgical scissors or a pointed hollow metal tube called a trochar. He then inserts a catheter (tube) into the wound, and removes the baby's brain with a powerful suction machine. This causes the skull to collapse, after which the abortionist completes the delivery of the now-dead baby.

The terms "intact dilation and evacuation" and "dilation and extraction" were sometimes used by Dr. McMahon and Dr. Haskell, respectively, to refer to certain procedures that are *not* banned by the Partial-Birth Abortion Ban Act, and shouldn't be banned. For example, both abortionists used their terms to refer to procedures in which they removed babies who had died natural deaths *in utero*. Such a procedure is not an abortion of any kind.

On the other hand, some variants of partial-birth abortions - - that is, some abortions involving the partial delivery of a living baby who is then killed - - would not have been considered "intact dilation and evacuation" procedures by Dr. McMahon or "dilation and extraction" procedures by Dr. Haskell, because they used those terms to refer to their own specific variations, and not to other specific techniques for killing partly born babies.

In other words, the McMahon and Haskell terms *overlap* with the class of abortions that would be banned by the Partial-Birth Abortion Ban Act, but the abortionists' terms are not congruent with the definition of **partial-birth abortion** in the bill.

On January 12, 1997, the executive board of the American College of Obstetricians and Gynecologists (ACOG) (an organization strongly opposed to all anti-abortion legislation), adopted a "statement of policy" which defined a procedure it called "intact dilatation and extraction" - - in effect, a hybrid term drawn from both of the McMahon and Haskell terms cited above. However, ACOG's definition does not agree with either of the other abortionists' terms, nor with the definition of **partial-birth abortion** found in the bill.

The ACOG statement defined "intact dilatation and extraction" as containing "all of" a list of "elements." Among the components of the "ACOG definition" were "*partial* evacuation of the intracranial contents of a *living* fetus to effect vaginal delivery of a dead but otherwise intact fetus." [emphasis added]

Read literally - - which is the way that criminal laws *must* be read - - this definition would not even apply to the typical partial-birth abortion described in Dr. Martin Haskell's 1992 instructional paper.

The ACOG definition covers only procedures in which the brain is "partially" removed from a "living" fetus. But medical experts agree that, in most cases, the thrust of the surgical scissors (or other instrument) into the baby's skull would kill the baby, and this occurs *before* the abortionist inserts a suction tube to remove the brain. ["When I do the instrumentation on the skull . . . it destroys the brain tissue sufficiently so that even if it (the fetus) falls out at that point, it's definitely not alive," Dr. Haskell explained in an interview with the *Dayton Daily News*, published Dec. 10, 1989.] In some cases the baby may indeed survive the skull-puncturing long enough to be killed by the brain-removal - - but it would be practically impossible for the government to prove that this had occurred in any given case, after the fact.

Moreover, typically the brain is then *entirely* removed, not "partially" removed.

Thus, most partial-birth abortions would not even be covered by the ACOG definition.

The Term "Partial-Birth Abortion" Conforms to Other Legal and Medical Usage

The term chosen by Congress, partial-birth abortion, is in no sense misleading. In sworn testimony in an Ohio lawsuit on Nov. 8, 1995, Dr. Martin Haskell - - who authored the 1992 instructional paper that touched off the national controversy over the procedure - - explained that he first learned of the method when a colleague "described very briefly over the phone to me a technique that I later learned came from Dr. McMahon where they internally grab the fetus and rotate it and accomplish - - be *somewhat equivalent to a breech type of delivery.*" [emphasis added]

However, some of those who have objected to the term "partial-birth" insist that the phrase implies that the abortion procedures at issue are usually performed at full term, or nearly full term - - which is only rarely the case. This objection confuses "full-term" with "birth," but those are two completely different things, both legally and in common parlance.

A full-term pregnancy is 40 weeks. As NRLC has emphasized since the Partial-Birth Abortion Ban Act was introduced in June, 1995, *most* partial-birth abortions are performed in the fifth and sixth months (20 to 26 weeks LMP, i.e., after the mother's last menstrual period). Generally, the partial-birth abortion method is not used before 20 weeks. A baby who is expelled alive from the womb at this stage (for example, in a spontaneous miscarriage) has indeed been legally "born." If a baby at 20 weeks or later (1) is expelled completely from the mother, and (2) shows even the briefest signs of life - - attempts to breathe, movement of voluntary muscles, etc. - - legally a *live birth* has occurred. Just about everyone will agree that such a live-born but "pre-viable" baby is protected by the Constitution and state homicide laws during her brief life outside the womb.

Obstetricians and perinatologists confirm that even during this immediate "pre-viability" range of 20 through 22 weeks, if a baby is expelled or removed completely from the uterus, she will usually gasp for breath for some time. (Thus, the victim of a partial-birth abortion is indeed only "inches from her first breath" when the surgical scissors penetrates her skull, just as NRLC has said in various literature.)

Moreover, even at 20 to 23 weeks, such a child typically will move and will have a heartbeat - - which sometimes continues for an hour or more after birth - - as the infant struggles to hold on to life.

Beginning at 23 weeks, the baby has a substantial chance for survival, which rapidly climbs to over 80% by 26 weeks (still considered the second trimester).

In summary: if a fetus/baby at (say) 21 weeks is spontaneously expelled alive, or if the head accidentally emerges during an attempted partial-birth abortion, a legal "live birth" has occurred - - even though that baby is not yet considered "viable."

Thus, there is nothing inaccurate or misleading about saying that the same living baby, entirely delivered into the birth canal *except for the head*, is "partly born." Nor is it inaccurate or misleading to call such a delivery, when performed as an abortion method, a "partial-birth abortion," which is what the various legislative bodies have done.

Moreover, large numbers of physicians are quite comfortable with the term partial-birth abortion. For example, the Physicians' Ad Hoc Coalition for Truth, a group of nearly 600 physicians (predominantly professors and other specialists in ob/gyn) embraces the term and has defended it as accurate.

President Clinton has also repeatedly used the term "partial-birth abortion."

Terminology: "Late-Term Abortions" is Murky and Misleading

Sometimes, the bill has been referred to as simply restricting "late-term abortions." This usage is murky and can be misleading. The bill does ***not*** contain any reference to the gestational age of the fetus/baby. From available evidence, it appears that the **partial-birth abortion** method is generally used after 20 weeks (4-1/2 months). However, there are indications that the method at times has been used somewhat earlier - - and the bill bans the practice of **partial-birth abortion** at any point in pregnancy.

When supporters of abortion such as President Clinton or NARAL say "late-term," they are using the phrase as code for "third trimester." But the vast majority of the abortion procedures prohibited by the Partial-Birth Abortion Ban Act are performed in the **fifth and sixth months** of pregnancy, *not* in the third trimester. Most of the lawmakers who oppose the Partial-Birth Abortion Ban Act tell their constituents that they generally oppose "late-term" abortions, without (in most cases) explaining that their usage of the term does not apply to the fifth and sixth months.

When the media uses the phrase "late-term" to apply, without distinction, both to bills that apply *mainly* to the fifth and sixth months and to bills that apply *not at all* in the fifth and sixth months, the media thereby obscures profound policy differences. Some pro-abortion lawmakers find such murkiness politically helpful, but when journalists engage in such unnecessary imprecision, they do a disservice to their readers or viewers.

They should just call it what the law calls it - - ***partial-birth abortion***.

PHACT

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January 29, 1997

Fredric D. Frigoletto, Jr. M.D.
President of the Executive Board
American College of Obstetricians and Gynecologists

Dear Dr. Frigoletto:

We write to you on behalf of the hundreds of doctors nationwide who are members of the Physicians' Ad hoc Coalition for Truth (PHACT). PHACT was formed to address expertly one issue: partial-birth abortion. While the coalition includes physicians from all medical specialties, the vast majority of its members are obstetricians and gynecologists. Of these, a sizeable number are also Fellows of the American College of Obstetricians and Gynecologists (ACOG).

With this in mind, we are writing to express our surprise and concern over a recent statement issued by ACOG, dated January 12, 1997, on the subject of partial-birth abortion. Surprise, because those of us who are fellows were never informed that ACOG was even investigating this subject, with the goal of issuing a public statement, presumably on behalf of us and the others within ACOG's membership. And concern, because the statement that was issued, by endorsing a practice for which no recognized research data exist, would seem to be violating ACOG's own standards.

Let us address the latter concern -- content -- first.

The statement correctly notes at the outset that the procedure in question is not recognized in the medical literature. The same, it should be noted, can be said of the name you have chosen to call it -- "Intact Dilatation and Extraction," or "Intact D&X" -- and all the other names proponents of this procedure have concocted for it. We have closely followed the issue of partial-birth abortion -- again, it is the *only* issue PHACT addresses -- and the term Intact Dilatation and Extraction is new to us and would appear to be unique to you. The late Dr. James McMahon, until his death a leading provider of partial-birth abortions, called them "Intact Dilation and Evacuation (Intact D&E)" while another provider, Dr. Martin Haskell of Ohio, calls them "Dilation and Extraction (D&X)." Planned Parenthood, for example, calls them D&X abortions, while the National Abortion Federation prefers Intact D&E, so there is no agreement, even among proponents of this procedure, as to what to call it. Indeed, in its January, 1996 newsletter, ACOG then referred to it as "intact dialation (sic) and evacuation." Your new coinage would seem to be a combination of these various "names" floating about, but to what end is not clear. What is clear is that none of these terms, including your own "Intact D&X" can be found in any of the standard medical textbooks or databases.

It is wrong to say, as your statement does, that descriptions, at least the description in last year's Partial-Birth Abortion Ban Act, are "vague" and "could be interpreted to include elements of many recognized" medical techniques. The description in the federal legislation is very precise as to what is being proscribed and is based on Dr. Haskell's own descriptions. Moreover, the legislation is so worded as to clearly distinguish the procedure being banned from recognized obstetric techniques, and recognized abortion techniques, such as D&E, which would be unaffected by the proposed ban.

By far, however, the most disturbing part of ACOG's statement is the assertion that "An intact D&X, however, may be the best or most appropriate procedure in a particular circumstance to save the life or preserve the health of the mother."

On what possible basis does ACOG make this rather astounding assertion?

Many of our members hold teaching positions or head departments of obstetrics and gynecology or perinatology at universities and medical centers. To our knowledge there are no published peer-reviewed safety data regarding the procedure in question. It is not taught as a formally recognized medical procedure. We can think of no data that could possibly support such an assertion. If ACOG or its "select panel" has such data, we would, as teachers and practicing ob/gyns, certainly like to review it.

The best that your statement does to back this claim is the very vague assertion that "other data show that second trimester transvaginal instrumental abortion is a safe procedure." While this may be true, it is, as surely you must be aware, totally beside the point. Such data may exist regarding, e.g., second trimester D&E abortion, but this is irrelevant to the fact that no similar data, at least to our knowledge, exists with respect to partial-birth abortion (or, as you prefer, "intact D&X" or whatever other medical-sounding coinage supporters of this procedure may use). To include such an assertion that can only refer to second trimester abortion procedures *other* than partial-birth is deceptive and misleading at best.

ACOG clearly recognizes that in no circumstances is partial-birth abortion the only option for women. In other words, ACOG agrees that there are other, *medically recognized*, and standard procedures available to women other than partial-birth abortion. Given ACOG's acceptance of this medical fact, your claim that a totally unrecognized, non-standard procedure, for which no peer-reviewed data exist, can nonetheless be the safest and most appropriate in certain situations, simply defies understanding.

If ACOG is truly committed to standing by this claim, then it would appear to be violating its own standards by recommending the use of a procedure for which no peer-reviewed studies or safety data exist.

In contrast, our research of the subject leads us to conclude that there are no obstetrical situations that would necessitate or even favor the medically unrecognized partial-birth abortion procedure as the safest or most appropriate option. Indeed, we have concerns that this procedure may itself pose serious health risks for women.

Ordinarily, we would agree that the intervention of legislative bodies into medical decision making is usually inappropriate. However, when the medical decision making *itself* is inappropriate, and may be putting women at risk by subjecting them to medically unrecognized procedures, then the intervention of a legislative body, such as the U.S. Congress, may be the only way to protect mothers and infants threatened by the partial-birth abortion procedure.

In addition to these concerns over the content of the statement, we are also concerned as to the procedure by which it came to be issued.

As mentioned, the vast majority of PHACT members are specialists and sub-specialists (i.e. perinatologists) in obstetrics and gynecology, and many of these are also fellows of ACOG. After them, our membership consists largely of family practitioners and pediatricians. Former Surgeon General C. Everett Koop, perhaps the nation's leading pediatric surgeon, has been associated with PHACT and his public statements on partial-birth abortion are in agreement with PHACT. Our membership is open to any doctor, regardless of his or her political views on the larger question of abortion rights, precisely because our focus is strictly on the medical realities that relate to this procedure. (In fact, doctors who are pro-choice have publicly stated their opposition, on medical grounds, to the use of this abortion method).

We cannot recall receiving any notification whatsoever that the American College of Obstetricians and Gynecologists was even reviewing the issue of partial-birth abortion toward the end of issuing a statement of policy. We cannot recall ever being informed that ACOG was going to convene a "select panel" to accomplish this. We find it unusual that PHACT, a coalition of doctors formed for no other reason than to investigate medical claims made about partial-birth abortion, was not invited to participate in these deliberations. Those of us who are fellows of ACOG were kept completely in the dark as to what ACOG's leadership was doing in regard to this issue.

In truth, this statement is the product of a panel -- whose membership ACOG has not made public -- that was working behind closed doors and with no real participation from ACOG's membership itself. In crafting this statement, ACOG simply ignored its own members. There is the danger that in issuing this statement, ACOG is giving the larger public the impression that the statement somehow represents the thinking of its members on this subject. It does not. ACOG members had no knowledge of this statement until it was issued as a *fait accompli.*

In conclusion, this statement clearly does *not* represent a consensus among the nation's obstetricians and gynecologists as to the safety or appropriateness, under any circumstances, of the partial-birth abortion method. We ask you to provide the medical data, research and all other relevant materials which could possibly have led to such an assertion. We ask that you also make available the names of those on the select panel who arrived at such a conclusion. We would also ask that the leadership of ACOG officially withdraw this statement until the matter at issue -- partial-birth abortion -- has been subject to a thorough and open discussion among the members of ACOG and those doctors in related specialties who have significant knowledge regarding this issue. We look forward to your response.

Sincerely:

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TESTIMONY OF DOUGLAS A. BAHR
SENATE BILL NO. 2254

House Human Services Committee
March 16, 1999

Chairman Price, members of the House Human Services Committee, I am Doug Bahr, Acting Solicitor General with the North Dakota Attorney General's Office. I am here today on behalf of the Attorney General's Office to provide you with some legal information about the likely consequences of passage of Senate Bill 2254.

If Senate Bill 2254 is enacted into law in its current form, there is little doubt that its constitutionality will be challenged in the courts. To date the United States Supreme Court has not addressed the constitutionality of a statute similar to SB 2254. However, the federal courts that have addressed the constitutionality of statutes similar to SB 2254 have found them to be unconstitutional. Based on the long line of decisions of the United States Supreme Court and the specific cases addressing statutes similar to SB 2254, it would be an uphill battle to defend the constitutionality of SB 2254 in its current form.

In June 1992, in a case entitled Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992), the United States Supreme Court refused to overturn Roe v. Wade, which, as I am sure you know, established a woman's right of choice in the abortion context. Based on Casey, the current constitutional law is that states may regulate abortions but only if such regulations do not impose an "undue burden" on a woman's right to obtain an

abortion. In Casey Justice O'Connor stated the undue burden test as follows: "An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus obtains viability." 112. S. Ct. at 2821.

Since Casey, a number of courts have addressed the constitutionality of statutes prohibiting partial-birth abortions. Although the statutes in each case may differ slightly, the decisions in those cases are instructive.

In Planned Parenthood of Wisconsin v. Doyle, 162 F.3d 463 (7th Cir. 1998), the Eleventh Circuit Court of Appeals found unconstitutional a Wisconsin statute that decreed life imprisonment for anyone who performs a partial-birth abortion. The court said the "statute impermissibly burdens the constitutionally recognized right to an abortion in three respects. First, it contains no exception for cases in which the fetus is not yet viable." Id. at 466. Next, according to the court, the statute impermissibly burdens the constitutionally recognized right to an abortion because it contains no exception for the case in which the procedure, "either before or after viability, is necessary for the preservation of the mother's health." Id. at 467. The Wisconsin statute, like SB 2254, only provided an exception when the mother's life was at stake. Finally, the court said the statute was vague. Id. at 469.

Similarly, in Women's Medical Professional Corp. v. Voinovich, 130 F.3d 187 (6th Cir. 1997), cert. denied, 118 S. Ct. 1347 (1998), the Sixth Circuit Court of Appeals invalidated an Ohio statute prohibiting partial-birth (D & X procedure) abortions. The court stated, "a statute which bans a common abortion procedure would constitute an undue burden. An abortion regulation that inhibits the vast majority of second trimester abortions would clearly have the effect of placing a substantial obstacle in the path of a woman seeking a pre-viability abortion." Id. at 201. Like the statute in Voinovich, SB 2254 does not distinguish between viable and nonviable fetuses.

The Illinois Partial-Birth Abortion Ban Act was challenged in Hope Clinic v. Ryan, 995 F.Supp. 847 (N.D. Ill. 1998). In addition to finding the Act unconstitutionally vague, id. at 856, the court found the Act unconstitutional because it imposes an undue burden on the constitutional rights of women seeking abortions. The court explained:

> For two reasons, the court finds that [the Act] imposes an undue burden on a woman's constitutional right to choose to terminate her pregnancy before viability. First, the statute as written, has the potential effect of banning the most common and safest abortion procedures. It does so without regard for the viability of the fetus. Second, the statute does not permit a physician to use the prohibited procedure when it is necessary to protect the woman's health,

whether mental or physical, or when an alternative abortion procedure would compromise the woman's health. As such, [the Act] is clearly unconstitutional.

Id. at 857. See also Summit Medical Associates, P.C. v. James, 984 F. Supp. 1404 (M.D. Ala. 1998)(holding challenge to Alabama's Partial-Birth Abortion Ban Act presents a claim because the statute is unconstitutionally vague and limits the woman's "choice of an appropriate abortion method, creating the possibility that a preferred method may be proscribed except where there exists a medical emergency satisfying certain specific requirements"); Planned Parenthood of Southern Arizona, Inc. v. Woods, 982 F. Supp. 1369 (D. Ariz. 1997)(finding statute criminalizing partial birth abortion unconstitutional because it "imposes an undue burden on a woman's right to terminate a nonviable fetus," "does not provide an exception where the proscribed conduct is in the best interest of the health of a woman," and is unconstitutionally vague); Planned Parenthood of Greater Iowa, Inc. v. Miller, 1 F. Supp.2d 958 (S.D. Iowa 1998)(granting preliminary injunction against enforcement of Iowa Partial Birth Abortion statute because it is unconstitutionally vague and unduly burdens a woman's constitutional right to an abortion); Eubanks v. Stengel, 28 F. Supp.2d 1024 (W.D. Ky. 1998)(declaring Kentucky's partial Birth Abortion Act facially unconstitutional because it bans partial-birth abortions no matter when in pregnancy they are performed); Evans v. Kelley, 977 F. Supp. 1283 (E.D. Mich. 1997)(declaring partial-birth abortion statute unconstitutional because it "is vague and overbroad and unconstitutionally imposes an undue burden on a woman's right to seek a pre-viability second trimester abortion"); Carhart v. Stenberg, 11 F. Supp.2d 1099 (D. Neb.

1998)(finding Nebraska's law banning partial-birth abortions unconstitutional because it endangers the health of women to further the well-being of nonviable fetal life). But see Richmond Medical Center for Women v. Gilmore, 144 F.3d 326 (4th Cir. 1998)(limited statute to cover only intact dilation and extraction procedure, not suction curettage or conventional dilation and evacuation, and granted application to stay preliminary injunction because plaintiffs did not perform procedures prohibited by statute and thus lacked standing).

The above cases found three constitutional flaws with the challenged partial-birth abortion statutes—the statutes were vague and operated without regard for the viability of the fetus or the woman's health. In its current form SB 2254 also fails to distinguish between viable and nonviable fetuses or make an exception for the procedure when it is necessary to preserve the mother's health. The language of SB 2254 is also similar to the language in some of the statutes found to be unconstitutionally vague. If SB 2254 is amended to address these concerns it would have a greater likelihood of surviving a constitutional challenge.

It is my understanding some amendments are being proposed. The draft amendments I had the opportunity to review would (1) decrease the likelihood SB 2254 will be challenged and (2) greatly increase the likelihood SB 2254 would be held constitutional. The proposed amendments clearly define "partially born," removing any concern that SB 2254 bans common abortion procedures. Challenges to partial-

birth abortion statutes in other jurisdictions were typically made by individuals or organizations performing common abortion procedures because they were concerned the statute prohibited the procedures. The proposed amendments remove this concern, reducing the likelihood of a challenge.

The proposed amendments also increase the likelihood SB 2254 would be held constitutional. First, the proposed amendments remove the vagueness problem by clearly defining the term "partially born." Not only does the definition address the vagueness concern, it also makes it clear that the statute would not ban common abortion procedures. This was a major concern by courts that reviewed partial-birth abortion statutes.

Next, if the amendments are adopted, SB 2254 will address killing a partially born child, not abortion or a specific abortion procedure. At least two states, Texas and Louisiana, have statutes prohibiting killing a child during birth. Neither of these statutes have been challenged. Roe v. Wade only addressed a mother's privacy rights and the State's interests in the context of unborn children; the Supreme Court has not addressed or balanced a mother's privacy rights and the State's interests when a baby is partially born. A mother's interest in terminating a pregnancy is, arguably, greatly reduced when the birth process has begun and the pregnancy will shortly be terminated by birth of the child. The State's interest in protecting the life of the child is, arguably, greatly enhanced when it is partially born and will soon reach the legal

status of personhood. Some legal scholars argue legislation protecting the life of partially born children does not fall within the scope of the abortion privacy right. The State's interests in protecting the partially born child and the rights of a partially born child constitute, at a minimum, a gray area yet undecided by the Supreme Court. Because sound arguments exist that SB 2254, if amended, should not be reviewed under the Roe and Casey analysis, the concerns addressed by other courts are removed. It is our opinion that the likelihood of SB 2254 being found constitutional would be greatly enhanced by adoption of the proposed amendments.

As previously mentioned, if Senate Bill 2254 becomes law, we anticipate that there will be a lawsuit challenging the constitutionality of the bill. It is difficult to estimate the cost of a lawsuit defending SB 2254. Cases in other jurisdictions indicate substantial discovery will be required. Discovery will include information regarding partial-birth abortion procedures, the medical benefits and detriments of the procedure, how often partial-birth abortions are performed, at what stage of pregnancy they are typically performed, a comparison of partial-birth abortions with alternative procedures, etc. Experts will likely be required, substantially increasing the cost of litigation. If the statute is found unconstitutional, it is likely the state will be required to pay the plaintiff's attorney's fees and costs. Although normally each side must pay its own attorneys fees in a lawsuit, a lawsuit challenging SB 2254 will likely be brought pursuant to the federal civil rights act. Under the federal civil rights act the state would be required to pay all attorneys fees and costs to a prevailing

plaintiff. Depending on the amount of fact discovery required and to what level the case is appealed, I estimate the costs of the lawsuit would be in the range of $200,000 to $700,000.

Although SB 2254 is less likely to be challenged if amended, a real possibility still exists. If amended, the issues involved in defending SB 2254 would be more legal than factual, likely reducing the amount of discovery and need for expert witnesses. If amended, I estimate the costs of the lawsuit would be in the range of $100,000 to $200,000.

I suggest that if the committee recommends a do pass on the bill, whether or not amended, that a fiscal note be requested and a contingent appropriation for the defense of the bill be included.

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Testimony of Red River Women's Clinic
Before House Human Services Committee
March 16, 1999
Re: SB 2254

Madam Chairman, members of the committee, my name is Carol Gass. I am appearing today representing the Red River Women's Clinic of Fargo, ND, a facility offering family planning and abortion services.

There are four compelling reasons why this committee should recommend a "Do Not Pass" on this bill. First, the language is broad and overreaching, which could result in constitutional challenges which this state can ill afford to defend. Second, the bill moves the state of North Dakota onto the slippery slope of governmental interference in the privileged relationship between doctor and patient. Third, this bill, often described by the proponents as a protection against "infanticide", in truth turns a legitimate and constitutionally protected medical procedure into a criminal act. Fourth, the NDCC Chapter 14-02.1-04 already limits post-viability abortions.

SB 2254 is a Trojan horse. In the guise of prohibiting so called "partial-birth abortions", in reality this bill is a veiled attack against the fundamental rights guaranteed under the U.S. Constitution as set out in Roe v. Wade. Many people have been led to believe that this bill targets only late term abortions or a specific procedure. This is not true.

The alleged "partial-birth abortion" ban as set forth in this bill is the cornerstone of a carefully crafted strategy to eliminate all legal abortions. SB 2254 is so vaguely worded that it could be interpreted to outlaw nearly any type of abortion, including those abortions now protected by the decisions of the U.S. Supreme Court and the language of NDCC Chapter 14.02.1, the Abortion Control Act.

We all must remember that a woman's right to an abortion is protected under the constitutional right to privacy in a physician-patient relationship. (Leigh v. Olson, 365 F. Supp. 255 at page 258 (US District Ct. ND NE Division 1974)). The U.S. Supreme Court has ruled that any restrictions on abortion must be narrowly tailored to serve a compelling state interest. But even when the state's interest becomes compelling, the state must allow abortions necessary to protect a woman's life and her physical and mental health.

The language of this bill is modeled after the 1997 Federal legislation vetoed by the president because it was "consistent neither with the Constitution nor sound public policy."

Twenty-eight states have passed similar bans. Legal challenges have been mounted in 20 states with the following results. (See Attachment A).

1. 19 out of 20 states have had their laws enjoined or limited;
2. 17 courts have issued temporary or permanent injunctions;
3. One attorney general limited enforcement of the law;
4. One court limited enforcement of the law.

Court challenges are quickly draining the coffers of both plaintiffs and defendants in these cases. I believe that a court challenge will be made against this bill and that given the tight fiscal constraints faced by this legislative assembly, North Dakota can ill afford the costs of defending what we all know is unconstitutional legislation.

Let me quickly point out to the committee the specific problem areas of the bill. On Line 5 of page 1 of the bill "fetus" is defined. I want to remind us all that in the U.S. Supreme Court decision of Roe v. Wade, the court stated that a fetus is not a "person" under the 14th Amendment, nor may a state justify restrictions on abortion based on one theory of when life begins.

On Lines 6-7 of page 1 of the bill, "partial birth abortion" as defined is a political term not a medical term. The term has no precise scientific definition and is not found in medical textbooks, courses or manuals. As written, the definition could also apply to first and second trimester legal abortions that utilize standard medical and surgical procedures.

Lines 8-11 of page 1 of the bill are not limited to any particular trimester. The definition does not mention weeks of pregnancy, or any other time period. There also is no distinction between procedures that take place before or after fetal viability. As defined, the safest and most common legal abortion procedures would be prohibited.

Lines 12-17 of page 1 of the bill include only a life exception – no exceptions are made for rape and incest, no exception for genetic defect and fetal anomaly, and, no exception for a woman's physical and mental health. In Doe v. Bolton, Roe's companion case, the Court defined "health"

to include "all factors – physical, emotional, psychological, familial, and the woman's age – relevant to the well-being of the patient." Mental and physical well-being are together cast as conditions so important that they are worth protecting, even if such protection means the termination of the pregnancy.

The ND Legislature in passing the Abortion Control Act, has also recognized that the woman's physical and mental health are legitimate considerations to warrant exceptions even after the point in pregnancy where the fetus may reasonably be expected to have reached viability (See NDCC section 14-02.1-04). (Attachment B).

Sections 3 and 4 of the bill expose physicians to civil and criminal liability and do not provide physicians with fair warning as to what conduct is permitted. These sections create a chilling effect between a woman and her physician. I do not believe any of us truly want governmental interference in the privileged relationship between doctor and patient. Yet that is the direction that this bill takes us. We should remember that not only does a woman have the right to choose to terminate her pregnancy, but that the physician also has an attendant right to perform abortions.

Standards for medical care are determined on the basis of all facts and circumstances involved in an individual case. The vague language of this bill means that doctors are going to be forced to ignore their medical training and skills and make their decisions relating to health care based on the prevailing political winds rather than on the basis of the health interests of their patients.

The American College of Obstetricians and Gynecologist (ACOG) representing 39,000 members, rejects any bans of "partial-birth abortions" as "inappropriate, ill advised, and dangerous."

Once again, the language of the bill in reality turns a legitimate and constitutionally protected medical procedure into a criminal act. Furthermore, NDCC section 14-02.1-04 presently provides all necessary and constitutional restrictions against post-viability abortions.

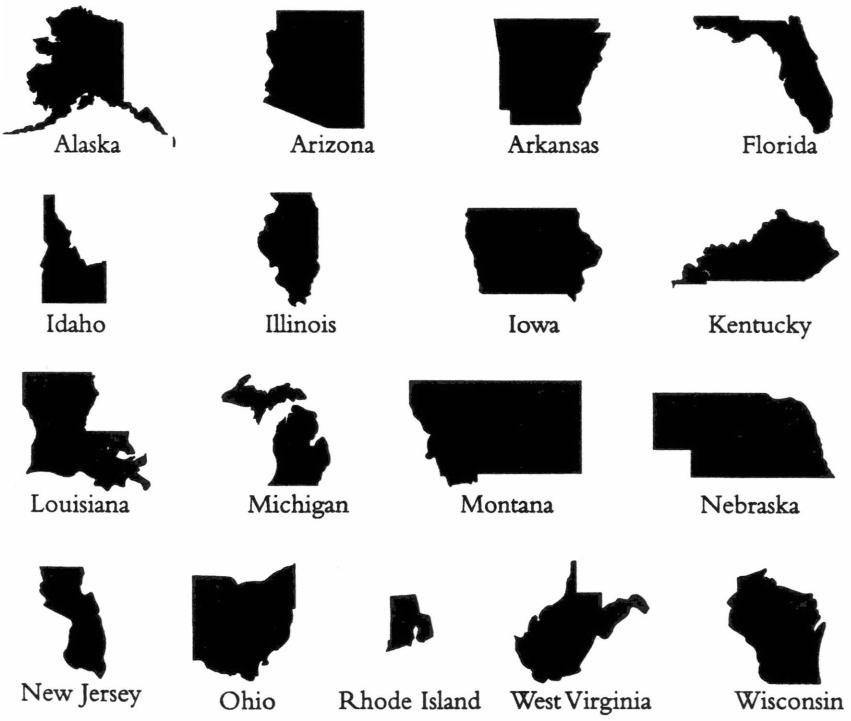
SB 2254 is deceptive, unconstitutional, and extreme. I have given this committee four compelling reasons to recommend a "Do Not Pass" and I believe that despite the political rhetoric, you can comfortably do the right thing.

A

Despite the efforts of extremists in states throughout the country, the courts have recognized the unconstitutionality of "partial-birth abortion" bans. The state laws in question, as well as the current federal legislation, are written to encompass virtually all abortion procedures, in clear violation of the constitutionally protected rights of women. Legal challenges have been mounted in 20 of the 28 states that have passed "partial-birth abortion" laws, with these results:

- **19 out of 20 states** have had their laws enjoined or severely limited;
- **17 courts** have issued temporary or permanent injunctions stopping laws from taking effect because they do not pass constitutional muster;
- **One attorney general** limited enforcement of the law;
- **One court** limited enforcement of the law;
- **Six states** where laws are enjoined used language identical to the federal bill vetoed by President Clinton in 1998.

Court-Enjoined "Partial-Birth Abortion" Bans



Enforcement Limited by Courts

Enforcement Limited by Order of State's Attorney General

Injunction Overturned

9/10/98

THE CENTER FOR REPRODUCTIVE LAW AND POLICY
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accompanied by specific written findings explaining why the anonymity of the woman should be preserved from public disclosure, why the order is essential to that end, how the order is narrowly tailored to serve that interest, and why no reasonable less restrictive alternative exists. This section may not be construed to conceal the identity of the plaintiff or of witnesses from the defendant.

Source: S.L. 1991, ch. 141, § 6.

14-02.1-04. Limitations on the performance of abortions - Penalty.

1. No abortion may be done by any person other than a licensed physician using medical standards applicable to all other surgical procedures.

2. After the first twelve weeks of pregnancy but prior to the time at which the fetus may reasonably be expected to have reached viability, no abortion may be performed in any facility other than a licensed hospital.

3. After the point in pregnancy where the fetus may reasonably be expected to have reached viability, no abortion may be performed except in a hospital, and then only if in the medical judgment of the physician the abortion is necessary to preserve the life of the woman or if in the physician's medical judgment the continuation of her pregnancy will impose on her a substantial risk of grave impairment of her physical or mental health.

An abortion under this subsection may only be performed if the above-mentioned medical judgment of the physician who is to perform the abortion is first certified by the physician in writing, setting forth in detail the facts upon which the physician relies in making this judgment and if this judgment has been concurred in by two other licensed physicians who have examined the patient. The foregoing certification and concurrence is not required in the case of an emergency where the abortion is necessary to preserve the life of the patient.

4. Any licensed physician who performs an abortion without complying with the provisions of this section is guilty of a class A misdemeanor.

5. It is a class B felony for any person, other than a physician licensed under chapter 43-17, to perform an abortion in this state.

Source: S.L. 1975, ch. 124, § 1; 1979, ch. 191, § 4.

DECISIONS UNDER PRIOR LAW.

Abortion by Physician.

An abortion by a physician was not excused through his acting in good faith and in the exercise of his best skill and understanding, and criminal intent was supplied by proof beyond a reasonable doubt that abortion was not necessary to save life. State v. Shortridge, 54 N.D. 779, 211 N.W. 336 (1926).

Abortion upon One's Self.

The performance of an abortion upon one's self was a crime. State v. Reilly, 25 N.D. 339, 141 N.W. 720 (1913).

Coconspirators.

PHYSICIANS AND MEDICAL ORGANIZATIONS AGAINST THE "PARTIAL-BIRTH ABORTION" BILL

The American College of Obstetricians and Gynecologists (ACOG), which represents 39,000 physicians, opposes the federal "partial-birth abortion" bill as "inappropriate, ill advised, and dangerous." Over 90% of all board certified ob-gyns in this country are members of ACOG. The American Women's Medical Association (AWMA) also opposes the ban, stating that it is "gravely concerned with governmental attempts to legislate medical decision-making."

American College of Obstetricians and Gynecologists (ACOG) Opposes the "Partial-Birth Abortion" Law

"(T)he proposed ban uses terms not recognized by the very constituency (physicians) whose conduct the law would criminalize."

"(I)t does not limit its scope to techniques performed after fetal viability - thus potentially affecting procedures at all stages of pregnancy."

Fact Sheet on ACOG Policy Statement

"The descriptions are vague and do not delineate a specific procedure recognized in the medical literature."

"(T)he definitions could be interpreted to include elements of many recognized abortion and operative obstetric techniques."

"The intervention of legislative bodies into medical decision making is inappropriate, ill advised, and dangerous." (emphasis in original)

ACOG Statement of Policy

American Medical Women's Association (AMWA) Opposes the "Partial-Birth Abortion" Law

"AMWA is gravely concerned with governmental attempts to legislate medical decision-making through measures that do not protect a woman's physical and mental health, including future fertility, or fail to consider other pertinent issues, such as fetal abnormalities."

"AMWA strongly opposes governmental efforts to interfere with physician-patient autonomy."

"AMWA resolutely opposes the levying of civil and criminal penalties for care provided in the best interest of the patient."

AMWA Statement on HR1122

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OUR VIEW

House should defeat N.D. abortion bill

A narrowly-drawn bill to regulate late-term abortions would be worthy of passage by the North Dakota Legislature.

The bill approved by the North Dakota Senate to outlaw partial-birth abortions does not fit the bill, and it should be defeated when it is considered by the House.

The measure approved by the Senate surely would be struck down by the federal courts, at substantial cost to North Dakota taxpayers. The attorney general's office cites case after case in which similar laws have been rejected as unconstitutional — Arizona, Alabama, Kentucky, Illinois, Iowa, Michigan, Nebraska, Ohio, Wisconsin.

If the Legislature approves the bill, it will have thumbed its nose at the legal advice it pays for. The attorney general's office says it would cost $200,000 to $700,000 to defend the measure, all spent in a lost cause.

That would be foolish.

The measure as passed by the Senate doesn't deal with late-term abortions. It does not address the viability of the fetus. It doesn't include rape and incest exceptions. It's not clear that what the bill defines as "partial-birth abortions" fits any particular procedure precisely, or might not apply to all abortion procedures.

Opponents of abortion rights often describe "partial-birth abortion" in gruesome terms, as if shock itself is an argument. When they refer to intact dilation and extraction, the descriptions can be gruesome — partially delivering a fetus and crushing its skull to allow it to be extracted.

The descriptions are not an argument. What most troubles many Americans about abortion are late-term abortions of fetuses that could otherwise be viable. The bill needs to deal in those terms. Simply outlawing "partial-birth abortions" does not do that.

Although the debate over abortion rights often is described as divisive, and the nation as divided, that description is wrong. In large measure, the terms of the Roe vs. Wade decision reflect a broad middle ground of American sentiment. Roe balances the interests of the government and the rights of the woman. It says that the woman's rights are strongest early in gestation, the government's late. For many people, that works about right.

One argument against bills such as the one passed by the North Dakota Senate is that they are subterfuges, either the first step in outlawing all abortions, or actual attempts to do so. But it ought to be possible under the terms of Roe to regulate late-term abortions while upholding the rights under which the overwhelming preponderance of abortions are performed.

The bill passed by the Senate looks in fact like a subterfuge, as if the sponsors are uninterested in a narrowly-drawn bill to regulate late-term abortions.

That being the case, the bill should be defeated.

The Bismarck Tribune 2/23/99

SB2254

AMERICAN ASSOCIATION OF UNIVERSITY WOMEN

Madam Chairman and members of the Committee:

My name is Sally Oremland and I represent the 432 members of the American Association of University Women (AAUW) who live in North Dakota.

The U.S. Supreme Court's 1973 ruling in Roe v. Wade legalized abortion for all women and found abortion to be a constitutionally protected "fundamental right." The Court determined that the right to privacy extends to the decision of a woman to terminate her pregnancy. The ruling also asserts that before viability, states may not interfere with a woman's right to make her own decisions about abortion; only regulations necessary to protect a woman's health are constitutionally permissible. However, after viability, Roe held that states could ban abortion--except when the woman's life or health is in danger. This provision was explicitly reaffirmed by the U.S. Supreme Counrt in Planned Parenthood v. Casey (1992).

Although very few abortions occur late in pregnancy, when the need arises women should have access to the safest procedure for their particular medical circumstances. The American Association of University Women opposes any ban that cuts back on Roe and fails to provide an exception to safeguard women's health. A right to safe, accessible, and comprehensive reproductive health care remains an integral part of AAUW's efforts to gain equity and justice for women.

This bill presents a direct constitutional challenge to Roe by selectively denying some women the safest medical procedure for legal abortion, regardless of the health consequences to the woman both before and after viability. The bill, as worded, is not limited to post-viability abortions. The bill is so broad that it would ban virtually every safe method of abortion used after the first trimester of pregnancy.

Private medical decisions should be made by women and their families, not politicians. Banning any medical procedure would be an unprecedented intrusion into medical decision-making that ignores the physician's judgment as to what is in the best interest of the patient.

The bill presents a direct constitutional threat to Roe vs Wade. We urge the committee to give SB 2254 a do not pass.

TESTIMONY ON SENATE BILL 2254

House Human Services Committee

Hearing, March 16, 1999

Testimony by Jane Summers, Grand Forks Citizens for Reproductive Rights

I am Jane Summers, from Grand Forks, where I have lived for almost 50 years. I am a mother, a grandmother, and a great-grandmother. I am here today to oppose this bill on behalf of the Citizens for Reproductive Rights.

I object to this bill for a very simple but important reason: it forces one person's beliefs onto other people. It interferes with a woman's right to privacy, and with her right to make medical decisions and choices, with the advice of her physician or anyone else she chooses to consult Previous testimony has made it clear that the broad, sweeping definition given in this bill would prohibit all vaginal abortions throughout pregnancy, which has already been found unconstitutional on more than one occasion. This is just a plain, simple abortion ban under another name. I believe a woman should have a right to choose a legal, safe abortion procedure. I believe in particular, that in late-term abortions which are especially traumatic, that a woman will not frivolously undergo the procedure. I have far more confidence in the women of this state to make their own decisions, with medical advice, than I do in legislative bodies interfering with that right. I hope you will vote against this expansion of institutional intrusion into private decisions which should be between patients and their physicians. And thank you for your consideration of these comments.

TESTIMONY OPPOSING SENATE BILL NO. 2254
before the House Human Services Committee,
March 16, 1999

Madame Chair and Members of the Committee:

I am Anne Summers testifying on behalf of the North Dakota ACLU, and I am urging you not to pass this bill.

This bill is typical of many around the country, most of which are currently in litigation or under court challenge or injunction. A bill like this one will not withstand a federal Constitutional challenge for a number of reasons, and I will explain some of them to the best of my ability.

The first is simply this: the bill is both vague and overbroad. There is no actual medical procedure called a "partial-birth abortion"; therefore, the term is defined in the bill itself. The definition is also so broad, however, that it can easily be read as prohibiting all abortions where the fetus is delivered vaginally. This "partial-birth abortion" ban would thus include virtually all abortions performed throughout pregnancy, not just late-term abortions. This is clearly unconstitutional. All of the safest and most common abortion procedures involve delivery of the fetus through the vagina. So don't be misled: this is not a "late term abortion" ban . A state law which would result in arguably prohibiting all abortions, will certainly be found unconstitutional if challenged.

And I would submit for your consideration, the thought that for North Dakota to enact deliberately into law a statute known to be unconstitutional, would be expensive and wasteful legislating.

In other states, there have been nineteen court challenges to very similar bills. Out of those nineteen, seventeen courts have enjoined the legislation; and in an eighteenth state, the law's effect is severely limited. As you have no doubt already heard in previous testimony, in a number of other states with similar enacted legislation, the state has not only borne the financial burden of attempting to defend the law, but has also been ordered to pay for the plaintiffs' attorneys fees.

In addition, this bill is fatally flawed constitutionally, because of its vagueness. In Section 2, it prohibits performance of partial-birth abortions. However, because again the term "partial-birth abortion" is not a medical term, it has no medical significance. Once more, we are required to look at the very broad definitions provided in Section 1, thereby requiring of physicians

that they also be lawyers and judges. With this ambiguous and non-medical terminology, physicians simply cannot know with any degree of confidence what procedures the ban prohibits. The ban thus violates the due process rights of physicians performing abortions who, being subject to criminal and civil penalties under the ban, would be forced to guess at what conduct is prohibited and would be subjected to potentially arbitrary enforcement under unclear standards. And further, conferring the right on the father of the fetus or the woman's parents if she is a minor, to sue the physician, even where the woman herself consented to the procedure, this ban imposes blatantly unconstitutional spousal, non-spousal, and parental consent requirements on a woman's right to terminate a pregnancy

Finally, even if the ban prohibited only the performance of a single, rarely-used abortion procedure, the ban would cripple a physician's ability to treat her patients according to her own best medical judgment. The Supreme Court has repeatedly held that a woman's health may never be compromised in order to promote a state interest in fetal welfare. Thus, it is irrelevant that other generally "safe" procedures might be available. A woman is constitutionally entitled to the procedure her physician deems the safest for her. This is surely a decision best left to a woman and her physician, rather than government. The decision to terminate a late-term pregnancy because of serious health or life endangerment reasons, is one which would not be made frivolously; and should not be made or interfered with by government. When women and families have difficult, heart-rending medical decisions to make, the intervention of a legislative body into that decision-making is "inappropriate, ill advised, and dangerous," according to the American College of Obstetricians and Gynecologists. In short, Legislatures should refrain from the temptation to micro-manage medical care.

For all these reasons, I urge you to vote "do not pass" on this bill. Thank you for listening.

Anne E. Summers 223-2099

CITATIONS

Planned Parenthood v. Vermiero, No. 97-6170(AET)(D.N.J.Dec.8,1998)

Planned Parenthood v. Miller, No. 4-98-CV-90149, 1998 U.S. Dist. LEXIS 20201 (S.D. Iowa Dec. 21, 1998)

A Choice for Women v. Butterworth, No 98-0774-CIV-GRAHAM, 1998 U.S. Dist. Lexis 18433 (S.D. Fla. Nov. 23, 1998

Planned Parenthood v. Doyle, 162 F.3d 463 (7th Cir. 1998)

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

The Hope Clinic v. Ryan, 995 F.Supp 847 (N.D.Ill. 1998)

Planned Parenthood v. Casey, 505 U.S. 833 (1992)

Wayne Maruska

To: Rep. Clara Sue Price, Chairman, House Human Services Committee

Cc: Members of the House Human Services Committee

From: Scott Huizenga, Intern, House Human Services Committee

Re: SB 2254

Members of the House Human Services Committee:

This memo addresses the proposed amendments to SB 2254 as attached. After consulting Douglas Bahr, these are the proposed changes at which we arrived. Other than simple grammatical clarifications, the version with the LC number "90337.0105" reflects six main changes to the set of amendments that Christopher Dodson of the North Dakota Catholic Conference proposed.

1. The reference to partial-birth abortions in the title of the bill is changed to "causing the death of a child during delivery." Although the title will not appear in the code, it may be important to distinguish partial-birth from a typical abortion procedure in every way possible.

2. In section 2, subsection 1, the penalty for violating the Act remains a class B felony, as the original bill proposed.

3. In section 2, subsection 3, "other types" of infanticide or abortion is replaced with references to sections of the Century Code. Doug Bahr felt that keeping the language would imply that this procedure is a variation of infanticide or abortion. Relating the procedure directly to these laws could make the law more difficult to defend.

4. In section 2, subsection 4, the life or health of the mother, "physical or mental," is added to the exception clause. After relaying this provision, Mr. Bahr felt that this provision makes the law less difficult to defend. However, Mr. Bahr also reiterated that the inclusion of the health of the mother greatly broadens the interpretation of the exception. Previous court decisions have given varied definitions of "health." This provision could weaken the law as it is currently proposed unless "health" is defined.

5. Section 3, "Civil remedies" is eliminated from the bill.

6. In section 4, on the first line, "accused of" is replaced with "charged with." Mr. Bahr noted that an accusation by itself may not warrant a hearing. This would allow the hearing if a physician was formally charged with violating this Act.

In the version with the LC number "90337.0106" I attempted to include some of the provisions provided by Carol Gass, who represents the Red River Women's Clinic of Fargo.

In this version, the definition of "partial-birth abortion" is given, rather than "partially born." The elements of this definition were provided by Ms. Gass as she received them from the American College of Obstetricians and Gynecologists. Because the definition is used as a verb, rather than a noun, subsection 1 of section 2 is changed slightly to reflect the change in definition.

Also, subsection 3 of section 2 as it appears in "0105" is eliminated. This provision distinguished this Act from existing laws pertaining to infanticide or abortion. The exclusion of this reference could reopen the possibility of including this Act within Title 12 or Title 14 of the North Dakota Century Code.

Section 3 remains the same.

If you have any questions, please call me in the Fort Union room at 328-3204. You can also e-mail me at huizenga@plains.nodak.edu.

For questions on these versions as they may pertain to legal issues or the Constitution, you may wish to call Douglas Bahr at 328-3625.

Scott M. Huizenga, Intern, House Human Services Committee

FIRST REGULAR SESSION

HOUSE BILL NO. 427

90TH GENERAL ASSEMBLY

INTRODUCED BY REPRESENTATIVES LUETKENHAUS, GRATZ, CIERPIOT, BARRY, CHRISMER, O'CONNOR, TREADWAY, GROSS (Co-sponsors), RANSDALL, HARTZLER (124), DOLAN, BARTELSMEYER, PATEK, LONG, FOLEY, BENNETT, FOSTER, AUER, PRYOR, CRAWFORD, GIBBONS, SALLEE, HOHULIN, FROELKER, SELBY, MARBLE, GREEN, REYNOLDS, SECREST, O'TOOLE, KISSELL, HARTZLER (123), FARNEN, PURGASON, KENNEDY, BERKSTRESSER, SURFACE, BLUNT, MILLER, ELLIOTT, HEGEMAN, LEVIN, TUDOR, HENDRICKSON, MYERS, KELLEY (47), BOATRIGHT, SUMMERS, ROBIRDS, NORDWALD, LINTON, AKIN, CHAMPION, OVERSCHMIDT, BURTON, MURPHY, LIESE, GAMBARO, GRIESHEIMER, MURRAY, BONNER, REID, SCHWAB, SCOTT, ALTER, BLACK, HAMPTON, REINHART, COOPER, HOLAND, HANAWAY, BOUCHER, NAEGER, CRUMP, LEAKE, ABEL, LOGRASSO, HICKEY, HOPPE, ENZ, BALLARD, GASKILL, RIDGEWAY, LEGAN, ROSS, HOWERTON, KASTEN, RICHARDSON, EVANS, WRIGHT, SHIELDS, RIZZO, McKENNA, WAGNER, KOLLER, BERKOWITZ, PARKER, BARNETT, LOUDON, MONACO, VOGEL, WARD, WIGGINS, SEIGFREID, RELFORD, GRAHAM (106), GEORGE, KING, MERIDETH, BARTLE, KLINDT, TOWNLEY, POUCHE, LAWSON, LUETKEMEYER AND McBRIDE.

Read 1st time January 14, 1999, and 1000 copies ordered printed.

ANNE C. WALKER, Chief Clerk

L1124.011

AN ACT

To amend chapter 565, RSMo, relating to offenses against the person by adding thereto one new section relating to infanticide, with a penalty provision.

Be it enacted by the General Assembly of the state of Missouri, as follows:

Section A. Chapter 565, RSMo, is amended by adding thereto one new section enacted in lieu thereof, to be known as section 565.300, to read as follows:

565.300. 1. As used in this section, the following terms shall mean:

(1) "Born", complete separation of an intact child from the mother, irrespective of the duration of pregnancy, and regardless of whether the umbilical cord is cut or the placenta detached;

(2) "Living infant", a human child, born or unborn, who has pulsation of the umbilical cord, definite movement of voluntary muscles, respiration, circulation, brain function, including brain stem function, or shows other evidence of life, and has not attained the age of one year post birth;

(3) "Partially born" or "partial birth", partial separation of a child from the mother with the child's head intact with the torso, irrespective of the duration of pregnancy. If vaginally delivered, a child is partially separated from the mother when the head in a cephalic presentation, or any part of the torso above the navel in a breech presentation, is outside the mother's external cervical os. If delivered abdominally, a child is partially separated from the mother when the child's head in a cephalic presentation, or any part of the torso above the navel in a breech presentation, is outside the mother's external abdominal wall.

2. A person is guilty of the crime of infanticide if such person knowingly and intentionally kills:

(1) A born living infant;

(2) A partially born living infant; or

(3) A living infant aborted alive.

3. The crime of infanticide shall be punished as in the case of second degree murder.

4. The provisions of this section shall not be construed to prevent a physician from using procedures consistent with usual and customary standards of medical practice to prevent the death of the mother during birth or to save the life of the mother or child regardless of whether such procedures may unintentionally or indirectly result in the death of the mother or child.

PROHIBITING PARTIAL–BIRTH INFANTICIDE INITIATIVE

AN ACT Relating to limiting partial-birth infanticide, adding a new chapter to Title 9A RCW; and prescribing penalties.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF WASHINGTON:

NEW SECTION. Sec. 1. The sovereign people hereby find that, in accordance with current scientific evidence, medical terminology and practice, and decisions of the United States supreme court in Roe v. Wade and other cases:

(1) Pregnancy begins with conception and ends when the process of birth begins.

(2) The process of birth begins when a living child begins to exit the uterus or womb by any means and ends when the child is fully delivered or expelled from the vagina or birth canal by any means.

(3) Birth is an irreversible process that, once begun, will inevitably result in the complete delivery or expulsion of an infant child.

(4) Even a living fetus that is prematurely and artificially extracted from the uterus or womb into the vagina or birth canal will be born alive if not killed during the process of birth.

(5) Scientifically, medically, and legally, a child in the process of birth is no longer a fetus, but an infant.

(6) The intentional killing of an infant child in the process of birth is infanticide.

(7) Abortion is the termination of a pregnancy by intentionally killing a living human fetus in the uterus or womb before the process of birth begins.

(8) Regulating partial-birth infanticide is not regulating abortion, but rather, is proscribing infanticide by restricting the killing of a live infant who is in the process of birth, that is, who has exited by any means, at least in part, the uterus or womb and has entered by any means, at least in part, the vagina or birth canal.

(9) Although the United States supreme court has declared a right to choose an abortion to terminate a pregnancy, it has never held that there is a fundamental or constitutional right to kill a partially born infant, that is, a child in the process of birth.

(10) Because abortion is the termination of a pregnancy, a prohibition against killing an infant child in the process of birth does not implicate abortion jurisprudence.

(11) This chapter is not intended to stop any abortion performed to terminate a pregnancy, but is intended to stop the killing of partially born infant children and to establish and maintain a clear and impenetrable barrier against partial-birth infanticide.

NEW SECTION. Sec. 2.

(1) "Partial-birth infanticide" means the killing of an infant in the process of birth by a person who deliberately and intentionally performs a procedure on the partially born infant that the person knows will terminate the life of the infant and the procedure does terminate the life of the infant.

(2) "Partially born infant" means a child in the process of birth.

(3) "Process of birth" means the pregnancy has ended and the process of being born has begun, that is, the point in time has occurred when the maternal cervix has become dilated, the protective membrane of the amniotic sac has become ruptured, and any part or member of an infant child has passed from the uterus or womb beyond the plane of the cervical os.

NEW SECTION. Sec. 3. It is a felony for a person to perform partial-birth infanticide.

NEW SECTION. Sec. 4. This chapter does not apply to partial-birth infanticide performed to prevent the death of a mother where no other procedure, including the induction of labor or cesarean section, would suffice to prevent the death of the mother.

NEW SECTION. Sec. 5. This chapter does not apply to any abortion performed to terminate a pregnancy, that is, any abortion performed in the uterus or womb prior to the point in time when the pregnancy has ended and the process of birth has begun, that is, any abortion performed in the uterus or womb prior to the point in time when the maternal cervix has become dilated, the protective membrane of the amniotic sac has become ruptured, and any part or member of an infant child has passed from the uterus or womb beyond the plane of the cervical os.

NEW SECTION. Sec. 6. The provisions of this chapter are to be liberally construed to effectuate the policies and purposes of this chapter. In the event of conflict between this chapter and any other provision of law, the provisions of this chapter shall govern.

NEW SECTION. Sec. 7. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 8. Sections 1 through 7 of this act constitute a new chapter in Title 9A RCW.

— END —

2254
chris -

Section. 1. Prohibition.

(1) Any person who intentionally kills a living child while that child is partially born commits a class AA felony. A child is "partially born" when there is a partial separation of the child's body from the mother's body.

Section. 2. Definitions.

For the purposes of this act:

(1) "Partial separation" means the child's entire body, with entire head attached, is delivered so that

> (a) there has been delivered outside the mother's vagina (i) the child's entire head, in the case of a cephalic presentation, or (ii) the child's torso above the navel, in the case of a breech presentation, or
>
> (b) there has been delivered outside the mother's abdominal wall (i) the child's entire head, in the case of a cephalic presentation, or (ii) the child's torso above the navel, in the case of a breech presentation.

(2) "Living child" means any member of the human species, born or unborn, who has a heartbeat, discernible spontaneous movement [alternative language: definite movement of voluntary muscles], respiratory function, or functioning brain stem.

Section. 3. Construction.

(1) Nothing in this act shall be construed to apply to a suction curettage abortion that, in the reasonable medical judgment of the physician performing the abortion, is performed in the first 15 weeks of pregnancy as determined from the onset of the woman's last menstrual period.

(2) This act and its enactment to prohibit one form of infanticide shall not be construed as implicit approval of other types of infanticide or of abortion, which remain subject to such other laws as are applicable in this State.

(3) Nothing in this Act shall be construed to prohibit a physician from taking such measures as are necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, provided that every reasonable precaution is also taken, in such cases, to save the child's life. Notwithstanding any provision in this chapter, an act permitted under this subsection shall be subject to all provisions concerning abortions under Chapter 14-02.1, Chapter 14-02.2 and Chapter 14-02.3.

Section 4 Hearing.

A defendant accused of an offense under this Act may seek a hearing before the state board of medical examiners on whether the physician's conduct was necessary to save the life of a mother whose life was endangered by a physical disorder,

physical ill~~ness~~, or physical injury and that every reasonable precaution was also taken, in such cases, to save the child's life. The findings on that issue are admissible on that issue at the trial of the defendant. Upon a motion of the defendant, the court shall delay the beginning of the trial for not more than thirty days to permit such a hearing to take place.
[Language requested by ND Medical Association.]

FLORIDA DEPARTMENT OF HEALTH

Jeb Bush
Governor

Robert G. Brooks, M.D.
Secretary

DATE: 3/26

TO: Rolf Sletten - N. Dakota Med. Examiners

FROM: Pamela King - FL. Board of Medicine

SUBJECT:

PHONE: 850/488-0595 FAX: 850/922-3040 # OF PAGES: 4

FLORIDA BOARD OF MEDICINE

2020 Capital Circle SE, Bin # C03
Tallahassee, FL 32399-3253

390.0111 Termination of pregnancies.--

(1) TERMINATION IN THIRD TRIMESTER; WHEN ALLOWED.--No termination of pregnancy shall be performed on any human being in the third trimester of pregnancy unless:

(a) Two physicians certify in writing to the fact that, to a reasonable degree of medical probability, the termination of pregnancy is necessary to save the life or preserve the health of the pregnant woman; or

(b) The physician certifies in writing to the medical necessity for legitimate emergency medical procedures for termination of pregnancy in the third trimester, and another physician is not available for consultation.

(2) PERFORMANCE BY PHYSICIAN REQUIRED.--No termination of pregnancy shall be performed at any time except by a physician as defined in s. 390.011.

(3) CONSENTS REQUIRED.--A termination of pregnancy may not be performed or induced except with the voluntary and informed written consent of the pregnant woman or, in the case of a mental incompetent, the voluntary and informed written consent of her court-appointed guardian.

(a) Except in the case of a medical emergency, consent to a termination of pregnancy is voluntary and informed only if:

1. The physician who is to perform the procedure, or the referring physician, has, at a minimum, orally, in person, informed the woman of:

a. The nature and risks of undergoing or not undergoing the proposed procedure that a reasonable patient would consider material to making a knowing and willful decision of whether to terminate a pregnancy.

b. The probable gestational age of the fetus at the time the termination of pregnancy is to be performed.

c. The medical risks to the woman and fetus of carrying the pregnancy to term.

2. Printed materials prepared and provided by the department have been provided to the pregnant woman, if she chooses to view these materials, including:

a. A description of the fetus.

b. A list of agencies that offer alternatives to terminating the pregnancy.

c. Detailed information on the availability of medical assistance benefits for prenatal care, childbirth, and neonatal care.

3. The woman acknowledges in writing, before the termination of pregnancy, that the information required to be provided under this subsection has been provided.

Nothing in this paragraph is intended to prohibit a physician from providing any additional information which the physician deems material to the woman's informed decision to terminate her pregnancy.

(b) In the event a medical emergency exists and a physician cannot comply with the requirements for informed consent, a physician may terminate a pregnancy if he or she has obtained at least one

corroborative medical opinion attesting to the medical necessity for emergency medical procedures and to the fact that to a reasonable degree of medical certainty the continuation of the pregnancy would threaten the life of the pregnant woman. In the event no second physician is available for a corroborating opinion, the physician may proceed but [1]shall document reasons for the medical necessity in the patient's medical records.

(c) Violation of this subsection by a physician constitutes grounds for disciplinary action under s. 458.331 or s. 459.015. Substantial compliance or reasonable belief that complying with the requirements of informed consent would threaten the life or health of the patient is a defense to any action brought under this paragraph.

(4) STANDARD OF MEDICAL CARE TO BE USED DURING VIABILITY.--If a termination of pregnancy is performed during viability, no person who performs or induces the termination of pregnancy shall fail to use that degree of professional skill, care, and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. "Viability" means that stage of fetal development when the life of the unborn child may with a reasonable degree of medical probability be continued indefinitely outside the womb. Notwithstanding the provisions of this subsection, the woman's life and health shall constitute an overriding and superior consideration to the concern for the life and health of the fetus when such concerns are in conflict.

(5) PARTIAL-BIRTH ABORTION PROHIBITED; EXCEPTION.--

(a) No physician shall knowingly perform a partial-birth abortion.

(b) A woman upon whom a partial-birth abortion is performed may not be prosecuted under this section for a conspiracy to violate the provisions of this section.

(c) This subsection shall not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, illness, or injury, provided that no other medical procedure would suffice for that purpose.

(6) EXPERIMENTATION ON FETUS PROHIBITED; EXCEPTION.--No person shall use any live fetus or live, premature infant for any type of scientific, research, laboratory, or other kind of experimentation either prior to or subsequent to any termination of pregnancy procedure except as necessary to protect or preserve the life and health of such fetus or premature infant.

(7) FETAL REMAINS.--Fetal remains shall be disposed of in a sanitary and appropriate manner and in accordance with standard health practices, as provided by rule of the Department of Health. Failure to dispose of fetal remains in accordance with department rules is a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

(8) REFUSAL TO PARTICIPATE IN TERMINATION PROCEDURE.--Nothing in this section shall require any hospital or any person to participate in the termination of a pregnancy, nor shall any hospital or any person be liable for such refusal. No person who is a member of, or associated with, the staff of a hospital, nor any employee of a hospital or physician in which or by whom the termination of a pregnancy has been authorized or performed, who shall state an objection to such procedure on moral or religious grounds shall be required to participate in the procedure which will result in the termination of pregnancy. The refusal of any such person or employee to participate shall not form the basis for any disciplinary or other recriminatory action against such person.

(9) EXCEPTION.--The provisions of this section shall not apply to the performance of a

procedure which terminates a pregnancy in order to deliver a live child.

(10) PENALTIES FOR VIOLATION.--Except as provided in subsections (3) and (7):

(a) Any person who willfully performs, or actively participates in, a termination of pregnancy procedure in violation of the requirements of this section commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) Any person who performs, or actively participates in, a termination of pregnancy procedure in violation of the provisions of this section which results in the death of the woman commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(11) CIVIL ACTION PURSUANT TO PARTIAL-BIRTH ABORTION; RELIEF.--

(a) The father, if married to the mother at the time she receives a partial-birth abortion, and, if the mother has not attained the age of 18 years at the time she receives a partial-birth 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.

(b) In a civil action under this section, appropriate relief includes:

1. Monetary damages for all injuries, psychological and physical, occasioned by the violation of subsection (5).

2. Damages equal to three times the cost of the partial-birth abortion.

History.--s. 1, ch. 79-302; s. 1, ch. 80-208; s. 6, ch. 88-97; s. 6, ch. 91-223; s. 64, ch. 91-224; s. 694, ch. 95-148; s. 2, ch. 97-151; s. 1, ch. 98-1.

[1]**Note.**--The word "be" following the word "shall" was deleted by the editors.

Note.--Former s. 390.001.

Carol

SB2254

C · R · L · P

Center for Reproductive Law & Policy

Summary of Litigation on "Partial-Birth" Abortion Bans

These bans usually prohibit "partially vaginally delivering a living fetus before killing the fetus and completing the delivery."

State	Case Name and Citation	Current Status
Alabama*	Summit Medical Associates v. James, 984 F. Supp. 1404 (M.D. Ala. 1998); appeal docketed, No. 98-6129 (11th Cir. Mar. 23, 1998)	Order denying motion to dismiss in relevant part. State interprets law to apply post-viability only.
Alaska*	Planned Parenthood of Alaska v. State of Alaska, No. 3AN-97-6019 CIV (Alaska Sup. Ct. Mar. 13, 1998) appeal docketed, No. S-08610 (Alaska Apr. 13, 1998)	Permanent Injunction under Alaska Constitution.
Arizona	Planned Parenthood of Southern Arizona v. Woods, 982 F. Supp. 1369 (D. Ariz. 1997), appeal docketed No. 97-17377 (9th Cir. Dec. 22, 1997)	Permanent injunction.
Arkansas*	Little Rock Family Planning Services v. Huckabee, No. LR-C-97-581 (E.D. Ark. Nov. 13, 1998)	Permanently enjoined.
Florida*	A Choice For Women v. Butterworth, No. 98-0074-CIV-DLG, 1998 U.S. Dist. LEXIS 18433 (S.D. Fla. Nov. 23, 1998) Id. (S.D. Fl. Dec. 2, 1998) (amended)	Permanent injunction. (Amended Memorandum Opinion)
Georgia*	Midtown Hospital v. Miller, No. 1:97-CV-1786-JOF (N.D. Ga. Sept. 3, 1998)	Order approving settlement.
Idaho	Weyhrich v. Lance, No. 98-0117-S-BLW (D. Idaho Mar. 27, 1998)	Preliminary injunction.

SUMMARY OF LITIGATION ON
"PARTIAL-BIRTH" ABORTION BANS (CONTINUED)

Illinois	Hope Clinic v. Ryan, 995 F. Supp. 847 (1998), appeal docketed, No. 98-1726 (7th Cir. Mar. 23, 1998)	Permanently enjoined.
Iowa*	1998 U.S. Dist. LEXIS 20201 (S.D. Iowa Dec. 21, 1998) 1 F. Supp. 2d 958 (S.D. Iowa June 26, 1998) (1) Niebyl v. Miller, No. 4-98-CV-80228 (S.D. Iowa June 26, 1998) (2) Planned Parenthood of Greater Iowa v. Miller, No. 4-98-CV-90149 (S.D. Iowa June 26, 1998)	Order granting permanent injunction in consolidated case. Order granting preliminary injunction in consolidated case.
Kentucky	Eubanks v. Stengel, No. 3:98 CV 383-H, 1998 U.S. Dist. LEXIS 17579 (W.D. Ky. Nov. 5, 1998)	Permanently enjoined.
Louisiana*	Causeway Medical Suite v. Foster, No. 97-2211 (E.D. La. July 21, 1997)	Preliminary injunction
Michigan*	Evans v. Kelley, 977 F. Supp. 1283 (E.D. Mich 1997)	Permanent injunction.
Montana*	Intermountain Planned Parenthood v. State of Montana, No. BDV 97-477 (Mont. Dist. Ct. Jun. 23, 1998)	Permanent injunction under Montana Constitution.
Nebraska*	Carhart v. Stenberg, 1) 4:97-CV-3205, 972 F. Supp. 507 (D. Neb. 1997) 2) 11 F. Supp. 2d 1099 (D. Neb. 1998), appeal docketed, No. 98-3245 (8th Cir., Sept. 1, 1998)	Preliminary injunction. Permanent injunction. Bill uses the same language as the AMA-approved federal bill currently being considered by Congress.
New Jersey	Planned Parenthood of Central New Jersey v. Verniero, No. 97-6170 (AET) (D.N.J. Dec. 8, 1998)	Permanent injunction.
Ohio*	Women's Medical Professional Corp. v. Voinovich, 130 F.3d 187 (6th Cir. 1997), cert. denied, 118 S. Ct. 1347 (1998)	Permanent injunction affirmed by the Sixth Circuit. U.S. Supreme Court denied certiorari. Does not use "partial birth" language. Bans "dilation and extraction," defined as "the termination of a human pregnancy by purposely inserting a suction device into the skull of a fetus to remove the brain."
Rhode Island	Rhode Island Medical Society v. Pine, No. 97-416L (D.R.I. July 11, 1997)	TRO.

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Revised: January 19, 1999

SUMM[redacted] LITIGATION ON
"PARTIAL-BIRTH" ABORTION BANS (CONTINUED)

Virginia*	Richmond Medical Center for Women v. Gilmore, 1) 144 F.3d 326 (4th Cir. 1998) (Luttig, J.) (staying 6/25/98 district court opinion in 11 F. Supp. 2d 795 (E.D. Va. 1998)). 2) 1998 U.S. App. LEXIS 18547 (4th Cir. July 29, 1998)	Order granting stay of preliminary injunction issued by district court (allowing act to remain in effect) denying motion to vacate stay
West Virginia*	Daniel v. Underwood, No. 2:98-0485 (D. W.Va. Nov. 05, 1998)	Denying motion to dismiss.
Wisconsin*	Planned Parenthood of Wisconsin v. Doyle, 1) 1998 U.S. App. LEXIS 27992 (7th Cir. Nov. 3, 1998) 2) No. 98-C-305-S (W.D. Wis. May 12, 1998); No. 98-2197 (7th Cir. May 19, 1998) (appeal of TRO dismissed); No. 98-C-305-S (W.D. Wis. June 12, 1998) (denial of Preliminary Inj.); No. 98-2197 (7th Cir. June 25, 1998) (granting injunction pending appeal)	Granting preliminary injunction (Motion for Preliminary Injunction Denied; Appeal to 7th Circuit filed.); TRO granted; *remanded* (Nov. 3, 1998)

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What others say about Partial-Birth Abortion

Kate Fitzsimmons, executive director of the National Coalition of Abortion Providers, said that the vast majority of these abortions were performed in the 20 plus week range on healthy fetuses and healthy mothers. "The abortion rights folks know it, the anti-abortion folks know it, and so probably does everyone else," Fitzsimmons said. (March 3, 1997, AMERICAN MEDICAL ASSOCIATION NEWS, publication of the American Medical Association.)

John Leo. "This repellent procedure goes way too far. No other Western nation, to my knowledge, allows it." *U.S. NEWS & WORLD REPORT, November 20, 1995, page 42.*

Professor Robert White, Director of the Division of Neurosurgery and Brain Research Laboratory at Case Western Reserve School of Medicine. "Without question, all of this is a dreadfully painful experience for an infant subjected to such a surgical procedure." *PARTIAL BIRTH ABORTION BAN ACT OF 1995, September 27, 1995.*

Dr. Martin Haskell, Abortionist. "And I'll be quite frank; most of my abortions are elective in that 20-24 week range.—In my particular case, probably 20% are for genetic reasons. And the other 80% are purely elective." *Letter from Barbara Belsen, Editor, American Medical News, to Congressman Charles T. Canady (July 11, 1995) (on file with the subcommittee on the Constitution of the House Committee on the Judiciary).*

National Abortion Federation. "There are many reasons why women have late term abortions: life endangerment, fetal indications, lack of money or health insurance, social-psychological crises, lack of knowledge about human reproduction, etc." *Letter from Barbara Belsen, Editor, American Medical News, to Congressman Charles T. Canady (July 11, 1995) (on file with the subcommittee on the Constitution of the House Committee on the Judiciary).*

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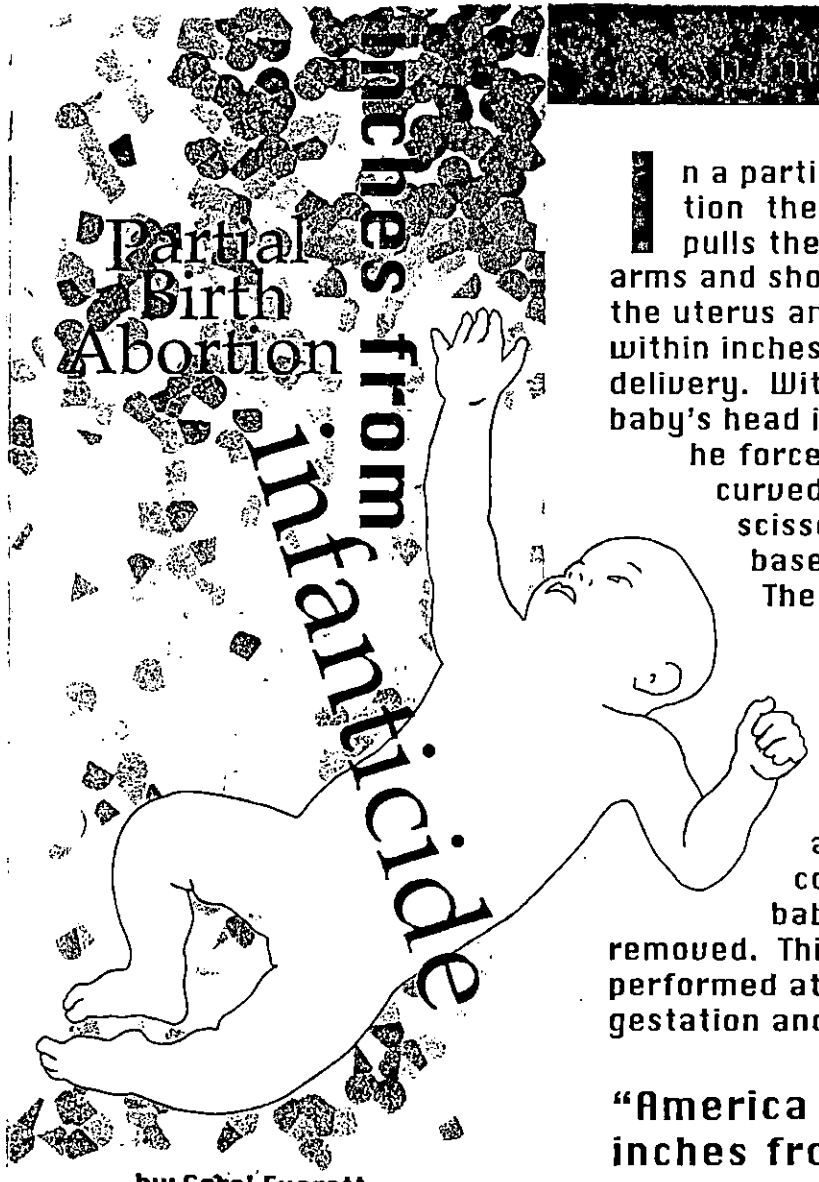
Partial Birth Abortion

inches from infanticide



by: Carol Everett
former abortion clinic owner

Carol Everett

former abortion clinic owner

In a partial-birth abortion the abortionist pulls the baby's feet, arms and shoulders from the uterus and then stops within inches of a complete delivery. With only the baby's head in the uterus, he forces a blunt, curved Metzenbaum scissors into the base of the skull. The scissors are spread to enlarge the opening. A suction catheter now evacuates the skull contents. The baby is then fully removed. This procedure is performed at 20 weeks gestation and beyond.

"America is just inches from infanticide"

Q. What do doctors say about the partial-birth abortion procedure?

A. Dr. Warren Hern, the author of *Abortion Practice*, the nation's most widely used textbook on abortion standards and procedures and a specialist in late term abortion, states: *"I would dispute any statement that this is the safest procedure to use. Turning the fetus to a breech position is potentially dangerous. You have to be concerned about causing amniotic fluid embolism or placental abruption if you do that."*

Pro-life physician Dr. Pamela Smith, Director of the Medical Education Department of OBGYN at Mt. Sinai Hospital in Chicago, adds two other concerns: (1) cervical incompetence in subsequent pregnancies caused by three days of forceful dilation of the cervix and (2) uterine rupture caused by rotating the fetus within the womb. *"There are absolutely no obstetrical situations encountered in this country which require a partially delivered human fetus to be destroyed to preserve the life of the mother."*

Questions & Answers

Q. Is the procedure limited to serious genetic defects or cases of serious health risk to the mother?

A. I was involved in 35,000 abortions. Over 5,000 abortions were performed during the second trimester or beyond. I never saw one abortion for genetic defect or serious health risk to the mother.

In a 1993 interview with American Medical Association News, Dr. Martin Haskell conceded that 80 percent of his late term abortions were elective. Dr. James McMahon, now deceased, said he would do an elective abortion after 26 weeks. In a chart he released to the U.S. House Judiciary Committee, depression was listed most often as the reason for a late term, non-elective abortion with maternal indications. Cleft lip was listed nine times under fetal indications.

Q. Is this a dangerous procedure for the mother?

A. This procedure is very dangerous to the mother because of blood loss and the fragility of the advanced pregnant uterus. In the last 18 months of my abortion industry experience, I saw one out of ev- 500 wor have hystermies, c stomies and one woman died following a partial-birth abortion procedure in our clinic. We moved her quickly out of the clinic so we could always say we'd never had a death there.

Q. In your opinion would a partial-birth abortion ever be done for the health of the mother?

A. Realizing that the partial-birth abortion is a three day procedure, two days for the dilation and one for the procedure, I believe everyone understands that if the woman's life were truly at risk, the physician would do an emergency C-section. This procedure would save the mother's life and perhaps the baby's life.

Q. What are the risks to the mother from a partial-birth abortion?

A. There are multiple risks to the woman at the time of the abortion and to her future fertility. Forcibly turning the child in the breech position, feet first, could pull the placenta off of the wall of the uterus causing hemorrhaging or even rupture the woman's uterus. According to Dr. Warren Hern, in turning the fetus to a breech position, there is concern about causing an amniotic embolism. There is also risk to the future fertility by the forceful dilation over the three-day procedure. The uterus might be considered incompetent (not able to clamp down properly during pregnancy).

Hundreds of OB/GYN's and Fetal Maternal Specialists along with former Surgeon General C. Everett Koop have come forward to unequivocally state that, "Partial-birth abortion is never medically necessary to protect the mother's health or her future fertility. In fact, the procedure can significantly threaten the mother's health or ability to carry future children to term."

Q. Is the baby given an anesthetic before the partial-birth procedure is performed?

A. No. Any anesthesia given to the mother does not affect the baby.

Q. Is this nothing more than infanticide?

A. This procedure is inches from—the measurement of the baby's head—infanticide. Many of the babies aborted in a partial-birth abortion could sustain life outside the womb. Like China where unwanted babies, especially girls, are killed after being born, the partial-birth abortion procedure is simply done because the mother does not want the baby. In the case of a true risk to the mother's life, a Cesarean section would be performed.

Q. Do you see America following this same progression toward infanticide?

A. In 1973 when abortion was legalized the pro-life movement talked about the slippery slope toward euthanasia. I believe partial-birth abortion is the slippery slope toward infanticide.

Q. What can citizens do to speak out against this procedure?

A. Overturning *Roe v. Wade* or enacting state and federal legislation would stop this abortion method. I believe only the ordinary citizens of America sharing the truth of this procedure in their sphere of influence, and standing against this procedure can stop it.

a is i inches from

The Partial-Birth Abortion Procedure

Dilation & Extraction (D&X)

DAY ONE: Dilation
The patient is evaluated with an ultra-sound, hemoglobin and Rh. A scale is used to interpret all ultra-sound measurements. In the operating room, the cervix is prepped, anesthetized and dilated to 9-11 millimeters. Dilapan or Laminaria dilators are placed in the cervix. The doctor packs wet gauze sponges around the cervix. The dilators absorb the moisture and gradually dilate the cervix. The woman usually experiences cramping. The patient goes home or to a motel for 24 hours.

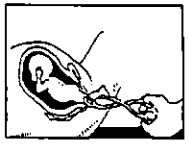
DAY TWO: More Dilation
The patient returns to the operating room where the previous day's Dilapan or Laminaria are removed. The cervix is scrubbed. For continued dilation the doctor adds additional Dilapan or Laminaria in the cervical canal. The doctor again packs wet gauze sponges around the cervix. The patient returns home or to a motel for 24 hours.

DAY THREE: The Operation
The patient returns to the operating room where the dilators are removed. The abortionist now performs the extraction of the fetus.

1.

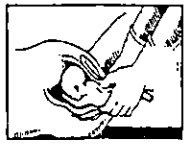
Guided by ultrasound, the abortionist grabs the baby's leg with forceps.

2.



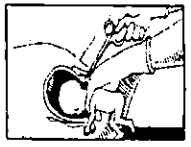
The baby's leg is pulled into the birth canal.

3.



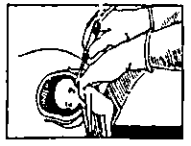
The abortionist delivers the baby's entire body except for the head.

4.



The abortionist inserts scissors into the baby's skull. The scissors are then opened to enlarge the hole.

5.



A suction tube is inserted. The child's brains are sucti out. The delivery of the dead baby is completed.