No. 05-1382

In The
# Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,

*Petitioner,*

v.

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., ET AL.,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF OF MATERCARE INTERNATIONAL, JACK A. ANDONIE, M.D., and RAYMOND F. GASSER, PH.D., AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

JAMES L. HIRSEN
*Adjunct Professor of Law*
TRINITY LAW SCHOOL
505 S. Villa Real Dr., Ste. 208
Anaheim Hills, CA 92807
Telephone: (714) 283-8880

NIKOLAS T. NIKAS
*Counsel of Record*
DORINDA C. BORDLEE
BIOETHICS DEFENSE FUND
6811 E. Voltaire Avenue
Scottsdale, AZ 85254
Telephone: (480) 483-3597

*Counsel for Amici Curiae*

August 3, 2006

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

BLANK PAGE

TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | iii |
| INTEREST OF THE *AMICI CURIAE* | 1 |
| SUMMARY OF THE ARGUMENT | 3 |
| ARGUMENT | 4 |
| I. AS JUSTICE MARSHALL COMMENTED DURING THE REARGUMENT OF *ROE*, KILLING A CHILD IN THE PROCESS OF BEING BORN "IS NOT AN ABORTION" | 4 |
| A. Abortion Related Legal Concepts like "Undue Burden" and "Health Exception" Do Not Apply to Congress's Ban on Killing a Child During the Process of Birth | 4 |
| B. The Right to "Terminate Pregnancy" Does Not Include the Right to Kill a Child During the Process of Birth; There Is no Such Thing as a Vaginal Abortion | 7 |
| 1. Medical science establishes that pregnancy is terminated by the onset of the birth process | 7 |
| 2. Abortion jurisprudence recognizes only a woman's right to terminate her pregnancy; this Court has never held that there is a right to kill a child in the process of being born | 11 |
| 3. The abortion-related concepts of "viability" and "health exception" are irrelevant | 15 |

TABLE OF CONTENTS – Continued

Page

II. THE ACT ADVANCES CONGRESS'S LEGITIMATE INTEREST IN PREVENTING THE EROSION OF THE LINE BETWEEN ABORTION AND INFANTICIDE ..... 18

III. THE DISTRICT COURT APPLIED AN APPARENT DOUBLE STANDARD WHEN ASSESSING THE CREDIBILITY OF THE GOVERNMENT'S MEDICAL EXPERTS ..... 22

CONCLUSION ..... 28

APPENDICES:

A. *Reargument of Roe v. Wade*, October 11, 1972.....App. 1

B. *Declaration of Jack A. Andonie, M.D.* (Oct. 1, 1998).....App. 4

C. *Declaration of Raymond Gasser, Ph.D.* (Oct. 1, 1998).....App. 11

# TABLE OF AUTHORITIES

Page

CASES

*Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) ..... 27

*Causeway Medical Suite v. Foster*, 43 F. Supp. 2d 604 (E.D. La. 1999), *aff'd*, 221 F.3d 811 (5th Cir. 2000) ..... 9

*Doe v. Bolton*, 410 U.S. 179 (1973) ..... 16

*Hope Clinic v. Ryan*, 195 F.3d 857 (7th Cir. 1999) (*en banc*) ..... 20

*Maher v. Roe*, 432 U.S. 464 (1977) ..... 12

*Nat'l Abortion Fed'n v. Gonzales*, 437 F.3d 278 (2d Cir. 2006) ..... 17

*Planned Parenthood Cincinnati Region v. Taft*, 444 F.3d 502 (6th Cir. 2006) ..... 26

*Planned Parenthood Fed'n of America v. Ashcroft*, 320 F. Supp. 2d 957 (N.D.Cal. 2004) ..... 4, 23, 24, 25

*Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983) ..... 13

*Planned Parenthood v. Casey*, 505 U.S. 833 (1992) ..... 3, 11, 15, 27

*Planned Parenthood v. Doyle*, 162 F.3d 463 (7th Cir. 1998) ..... 20

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

*Stenberg v. Carhart*, 530 U.S. 914 (2000) ..... 5, 10, 27

*Washington v. Glucksberg*, 521 U.S. 702 (1997) ..... 4, 18, 21

*Wynn v. Scott*, 449 F. Supp. 1302 (N.D. Ill. 1978), *appeal dismissed*, 439 U.S. 8 (1978), *aff'd sub nom., Wynn v. Carey*, 599 F.2d 193 (7th Cir. 1979) ..... 13

TABLE OF AUTHORITIES – Continued

Page

STATUTES

18 U.S.C. § 1531 (2003), Partial Birth Abortion Ban Act of 2003 ..... *passim*

Tex. Rev. Civ. Stat. Ann. art. 4512.5 ..... 6

OTHER SOURCES

Martin Haskell, M.D., *Dilation and Extraction for Late Second Trimester Abortion* (National Abortion Federation, Sept. 13, 1992) ..... 11

Peter Singer, *Practical Ethics* (2d ed., Cambridge Univ. Press 1997) ..... 19, 20

*Tex. Op. Atty. Gen.*, Opinion No. H-369 (August 13, 1974) ..... 6

Note, *Medical Responsibility of Fetal Survival Under Roe and Doe*, 10 Harv. Civ. Lib.-Civ. Rt. Rev. 444 (1975) ..... 13

BLACK'S LAW DICTIONARY (5th ed. 1979) ..... 18

DORLAND'S ILLUSTRATED MEDICAL DICTIONARY (24th ed. 1965) ..... 7, 8, 9

TABER'S CYCLOPEDIC MEDICAL DICTIONARY (18th ed. 1997) ..... 7, 8

## INTEREST OF *AMICI CURIAE*[1]

***Matercare International*** is a non-profit international organization of Catholic maternal health professionals (obstetricians, neonatologists, general practitioners, midwives and others) whose mission is to address and provide practical solutions to the poor state of maternal health throughout the world as indicated by the unacceptably high maternal mortality, morbidity and abortion rates. Healthcare professionals in the United States are an important part of Matercare International. In addition to collaborating with other health organizations to provide maternal health care in Ghana, Kenya and Rwanda, Matercare International members engage in research of the highest scientific and ethical standards to assist in the care of mothers both pre-natal and post-natal.

***Jack A. Andonie, M.D.***, served as a medical expert in the federal court challenge to the Louisiana Partial Birth Abortion Ban Act of 1997, at a time when he was Clinical Professor in the Department of Obstetrics and Gynecology at Louisiana State University Medical School. During the course of his over thirty-six years in obstetrics and gynecology, Andonie examined and/or treated approximately twenty thousand women and delivered approximately ten thousand babies. He is a medical expert in the areas of pregnancy, the process of birth and birth. Andonie, who received his bachelor's degree from Loyola

---

[1] Pursuant to Sup. Ct. R. 37.6, *amici* state that none of the counsel for the parties authored this brief in whole or in part. Monetary funding for the preparation of this brief has been requested in part from the Alliance Defense Fund. Pursuant to Sup. Ct. R. 37.3(a), the parties have consented to the filing of this brief. Letters of consent are being filed with the Clerk. Counsel for *amici* extend special thanks to Blackstone legal interns Sara F. Tappen and Joseph E. Giles.

University in New Orleans and earned his medical degree from LSU Medical School in 1962, is a diplomate of the American Board of Obstetrics and Gynecology and a fellow of the American College of Obstetrics and Gynecology. At the time of his affidavit included in this brief, Andonie was serving as Medical Director at Lakeside Hospital as well as teaching and practicing obstetrics-gynecology.

***Raymond F. Gasser, Ph.D.***, is professor of cell biology and anatomy, and an adjunct professor of obstetrics and gynecology at Louisiana State University Health Sciences Center. Since 1980, Dr. Gasser has served as course director for human prenatal development, and has received 13 teaching awards. A prolific author, he wrote one of the classic embryology texts entitled *Atlas of Human Embryos*. He has produced a variety of audio-visual anatomy teaching tools. He is the principal investigator of the *Virtual Human Embryo*, which provides electronic images of whole and sectioned human embryos. The *Virtual Human Embryo* is a major joint research and education project of the Louisiana State University Health Sciences Center and the Human Developmental Anatomy Center in Washington, D.C., which is funded by the National Institutes of Health (NIH). Dr. Gasser is also a member of the Federative International Committee on Anatomical Terminology, serving on the Subcommittee on Human Embryological Terms.

In the interest of preventing the erosion of the legal and medical line between abortion and infanticide, *amici curiae* seek to inform this Court of the medical understanding of the definitions of pregnancy, the process of birth and birth in order to inform this Court's analysis of the legal implications that distinguish in utero abortion

procedures and the act of destroying a living child who is in the inevitable process of birth.

## SUMMARY OF THE ARGUMENT

This Court's decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000) does not control this case because *Stenberg* did not directly address a ban on the killing of a child in the birth process who is partly "outside the body of the mother." *See* 18 U.S.C. § 1531(b)(1)(A).

The abortion liberty has always been defined by this Court as a woman's right to "terminate her pregnancy." *See, e.g., Planned Parenthood v. Casey,* 505 U.S. 833, 844 (1992). Medical science establishes that the onset of the birth process terminates pregnancy. Therefore, any ban on killing after the onset of the process of birth and when the child is partly outside the body of the mother does not interfere with the right to terminate pregnancy. Consequently, this Court's abortion jurisprudence, including analytical concepts such as undue burden, health exceptions and viability do not govern the question of whether the Congressional ban is constitutional. As Justice Marshall commented during the second oral argument in *Roe v. Wade,* 410 U.S. 113 (1973), killing a child in the process of birth "is not an abortion."[2]

Because abortion is not prevented by the Congressional ban on killing a child in the birth process who is partly outside the mother's body, Congress's ban is constitutional if it is rationally related to a legitimate government

[2] *See* Transcript of Reargument of *Roe v. Wade, infra* Section I(A).

interest. *See Washington v. Glucksberg,* 521 U.S. 702 (1997). Congress's ban on killing a child who is in the process of birth and partly outside the mother's body is reasonably related to its interest in preventing the erosion of the line between abortion and infanticide.

On a separate matter, the district court below applied an apparent double standard when assessing the credibility of the Government's medical expert witnesses. Specifically, the district court expressly highlighted and negatively commented on the pro-life beliefs, practices and associations of the Government's medical experts, while making no mention of the self-interested pro-abortion rights views and associations of respondents' experts. *Planned Parenthood Federation of America v. Ashcroft,* 320 F. Supp. 2d 957, 998 (N.D.Cal. 2004).

## ARGUMENT

### I. AS JUSTICE MARSHALL COMMENTED DURING THE REARGUMENT OF *ROE,* KILLING A CHILD IN THE PROCESS OF BEING BORN "IS NOT AN ABORTION"

#### A. Abortion Related Legal Concepts like "Undue Burden" and "Health Exception" Do Not Apply to Congress's Ban on Killing a Child During the Process of Birth.

Since 1973, this Court has consistently defined the abortion liberty as the right of a woman to choose "whether or not to **terminate her pregnancy**." *Roe v. Wade,* 410 U.S. 113, 153 (1973) (emphasis added). As set forth below, medical science establishes that the onset of the birth process terminates pregnancy. Therefore, Congress's

ban of killing a child in the birth process who is partly outside the mother's body addresses conduct that intentionally occurs *after* termination of the pregnancy. Consequently, the Partial Birth Abortion Ban Act of 2003 ("the Act")[3] does not interfere with the right to terminate pregnancy. This Court's decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000) does not control this case because *Stenberg* did not directly address a ban on the killing of a child in the birth process who is partly "outside the body of the mother." *See* 18 U.S.C. § 1531(b)(1)(A). Consequently, this Court's abortion jurisprudence, including the undue burden standard and the ostensible requirement of a "health" exception, does not govern the question of whether the Act is a constitutional exercise of legislative authority.

During the 1972 reargument of *Roe*, this Court discussed whether the term "abortion" encompassed killing a child during the process of birth. The following exchange between Justice Marshall and counsel for the State of Texas occurred in the context of a discussion about the Texas parturition statute, which had not been challenged as unconstitutional:

. . . .

**JUSTICE MARSHALL:** What does that [parturition] statute mean?

**MR. FLOWERS:** Sir?

**JUSTICE MARSHALL:** What does it mean?

**MR. FLOWERS:** I would think that –

---

[3] Partial Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2003) ("the Act").

> **JUSTICE STEWART:** That it is an offense to kill a child in the process of childbirth?
>
> **MR. FLOWERS:** Yes sir. It would be immediately before childbirth, or right in the proximity of the child being born.
>
> **JUSTICE MARSHALL:** *Which is not an abortion.*
>
> **MR. FLOWERS:** Which is not – would not be an abortion, yes, sir. You're correct, sir. It would be homicide.

*Reargument of Roe v. Wade*, October 11, 1972 (emphasis added).[4]

---

[4] This exchange between Justice Marshall and Mr. Flowers, counsel for the State of Texas, occurred during the 1972 reargument of *Roe* in the context of a discussion about the Texas parturition statute, which had not been challenged as unconstitutional. The entire written transcript of the October 11, 1972 reargument can be found at http://www.oyez.org/oyez/resource/case/334/reargument/transcript (last checked July 31, 2006).

This exchange followed Flowers's comment that the plaintiffs had attacked Texas's abortion statutes, found at Articles 1191 through 1196, with the exception of Article 1195. Flowers then quoted the entirety of the **unchallenged** Article 1195, which provided: "Whoever shall during parturition of the mother **destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive,** shall be confined in the penitentiary for life or for not less than five years." (emphasis added). This provision is currently codified at Tex. Rev. Civ. Stat. Ann. art. 4512.5.

This Court's decision in *Roe* acknowledged in footnote 1 that Texas' parturition statute was "**not attacked.**" 410 U.S. at 117 n.1. In 1974, a Texas Attorney General opinion echoed Justice Marshall, concluding that Article 1195 is "unaffected" by *Roe* because the element requiring that the child "**be in a state of being born**" means that the article "**is not, in truth, an abortion statute.**" *Tex. Op. Atty. Gen.*, Opinion No. H-369 at 3 (August 13, 1974) (emphasis added).

### B. The Right to "Terminate Pregnancy" Does Not Include the Right to Kill a Child During the Process of Birth; There is no Such Thing as a Vaginal Abortion.

Justice Marshall's comment that killing a child in the process of birth "is not an abortion" is fully supported by established medical science. It is also confirmed by this Court's consistent definition of the abortion liberty as the right to terminate pregnancy.

#### 1. Medical science establishes that pregnancy is terminated by the onset of the birth process.

In *Roe,* this Court's understanding of abortion was informed by medical science: "[the pregnant woman] carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young, in the human **uterus**." 410 U.S. at 159 (emphasis added) (*citing* DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 478-479, 547 (24th ed. 1965)). Congress, like this Court in *Roe* and its progeny, also relied upon medical definitions when it enacted the Partial Birth Abortion Ban Act of 2003. Because medical science establishes that pregnancy is terminated by the onset of the birth process, **the Act does not regulate "abortion," as that term is understood both medically and legally**.

The development of a human being takes place in two stages. The first stage is pregnancy, which begins at conception and ends when the living child is delivered or removed from the uterus into the birth canal. *See* TABER'S CYCLOPEDIC MEDICAL DICTIONARY 1543, 2046 (18th ed. 1997) (defining *pregnancy* as the "condition of carrying an

embryo [or fetus] in the uterus;" defining *uterus* as "[a] reproductive organ for containing and nourishing the embryo and fetus . . . to the time the fetus is born"). As such, the pregnancy stage is confined to the development of the child while in the uterus of his or her mother.

The stage after pregnancy is birth, followed by the whole process of postnatal growth through adulthood and old age. The birth stage starts when the living child begins to exit the womb into the birth canal.[5] *See* TABER'S at 223 (defining *birth* as the "passage of a child from the uterus"); *see also* DORLAND'S at 202 (28th ed. 1994) (defining *birth* as "the act or process of being born" and distinguishing *complete birth* as "the complete separation of the infant from the maternal body (after cutting the umbilical cord)").[6]

Vaginal birth is an irreversible process, not a single event. As a matter of medical fact, pregnancy is terminated and the process of birth has begun once the membranes of the amniotic sac are ruptured and the living fetus emerges from the uterus, beyond the cervical os and into the vaginal (birth) canal. *See Declaration of Jack A. Andonie, M.D.,* ¶¶ 8-10 (Appendix B); *Declaration of Raymond Gasser, Ph.D.*, ¶¶ 10-11 (Appendix C). Thus, there is a significant medical distinction between the locus

---

[5] The terms womb and uterus are interchangeable. *See* DORLAND'S at 1846 (womb is defined as "the uterus").

[6] In *Roe*, this Court did not "resolve the difficult question of when **life** begins," because "the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." 410 U.S. at 159 (emphasis added). Here, by contrast, there is no need to speculate about when **birth** begins. There is no raging debate or lack of consensus about the process of birth among "those trained in the respective disciplines of medicine, philosophy, and theology." *Id.*

where intrauterine fetal stasis is maintained (*i.e.*, pregnancy), and the dynamic process of birth. Pregnancy has never occurred or been maintained in the vaginal canal.[7] The delivery of the child into the birth canal means that pregnancy has been terminated thus making the complete **birth** of the child **inevitable**.[8]

Indeed, in the medical vernacular, the onset of the birth process is one method of terminating a pregnancy, while induced abortion is another.[9] Medically, then, it is an oxymoron to speak in terms of "aborting" a living fetus that is partially vaginally delivered. This is so because induced abortion is any procedure that causes fetal death **in utero**, thereby causing "the premature expulsion from the uterus of the products of conception."[10] In other words, there is no such thing as a "vaginal abortion." That non-medical term, sometimes used by abortion providers to describe what they refer to as "intact D&X," is simply a euphemism for the criminal termination of the life of a child after the pregnancy has already been terminated by the onset of the process of birth.

---

[7] App. 8, *Andonie Decl.* at ¶ 10; App. 16, *Gasser Decl.* at ¶ 11.

[8] The Declarations of Dr. Andonie and Dr. Gasser are part of the official record in the Louisiana partial birth abortion case that was pending in the United States Court of Appeals for the Fifth Circuit at the time this Court ruled in the 2000 case of *Stenberg v. Carhart. Causeway Medical Suite v. Foster,* 43 F. Supp. 2d 604 (E.D. La. 1999), *aff'd*, 221 F.3d 811 (5th Cir. 2000). These basic and unquestionable medical facts testified to by Louisiana's medical experts were not controverted.

[9] App. 8, *Andonie Decl.* at ¶ 6.

[10] DORLAND'S at 4; App. 8, *Andonie Decl.* at ¶¶ 6-7. Actually the phrase "fetal death in utero" is a tautology because "fetal death" means "death in utero." DORLAND'S at 430.

Therefore, in enacting the Partial Birth Abortion Act of 2003, Congress was not regulating abortion at all, as that term is medically and legally understood. Rather, Congress proscribed the killing of a child after the process of birth has begun and when the child is partly outside the woman's body, and labeled that crime "*partial birth* abortion."[11]

That the Act is not in fact regulating abortion is a conclusion supported by medical science. The intentional delivery of a living child from the uterus into the vaginal canal and partly outside the women's body signals a momentous medical, and now legal, event. Thus, where the Act speaks in terms of "deliberately and intentionally vaginally delivers a living fetus,"[12] it has thereby given effect to the medical distinction between pregnancy and birth. By its terms, then, the Act regulates the process of birth, also referred to as parturition. The terms of Congress's ban are clearer and more explicit than those of the Nebraska statute considered by this Court in *Stenberg v. Carhart*, in that the federal Act does not regulate the in utero procedure of dismembering the unborn child known as the "classic D&E" abortion method.[13] The Act narrowly bans killing the child in the unstoppable process of birth.

---

[11] Although "partial birth abortion" is a not a medical term used by abortion providers, it has become a legal term of art that was adopted by Congress to describe the crime of killing a child in the process of being born.

[12] Act at § 3(b)(1)(A), 117 Stat. 1206 (2003).

[13] In 1992, the pioneer of the partial birth abortion procedure, Dr. Martin Haskell, distinguished his so-called "intact D&X" procedure from the "established D&E" method: "Classic D&E is accomplished by dismembering the fetus ***inside the uterus*** with instruments and removing the pieces through an adequately dilated cervix." Martin

(Continued on following page)

### 2. Abortion jurisprudence recognizes only a woman's right to terminate her pregnancy; this Court has never held that there is a right to kill a child in the process of being born.

This Court has consistently formulated the abortion liberty as a woman's right to "terminate her pregnancy." For example, in *Roe*, this Court stated,

> This right of privacy . . . is broad enough to encompass a woman's decision whether or not to **terminate her pregnancy**.

*Roe*, 410 U.S. at 153 (emphasis added).

Similarly, in *Casey*, this Court stated:

> From what we have said so far it follows that it is a constitutional liberty of the woman to have some freedom to **terminate her pregnancy**.[14]

*Casey*, 505 U.S. at 869 (emphasis added).

---

Haskell, M.D., *Dilation and Extraction for Late Second Trimester Abortion* 28 (NAF, Sept. 13, 1992) (emphasis added).

[14] In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), this Court repeatedly articulated the abortion liberty as a "woman's right to **terminate her pregnancy**":

> "Yet 19 years after our holding that the Constitution protects **a woman's right to terminate her pregnancy** in its early stages . . . , that definition of liberty is still questioned." *Id.* at 844. "Constitutional protection of **the woman's decision to terminate her pregnancy** derives from the Due Process Clause of the Fourteenth Amendment." *Id.* at 846. "The extent to which the legislatures of the States might act to outweigh the interests of the woman in choosing **to terminate her pregnancy** was a subject of

(Continued on following page)

Once the child has moved from the pregnancy stage to the birth process, a woman's right to "terminate her

---

debate both in *Roe* itself and in decisions following it." *Id.* at 853. "We conclude that the basic decision in *Roe* was based on a constitutional analysis which we cannot now repudiate. The woman's liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State's interest in life has sufficient force so **that the right of the woman to terminate the pregnancy** can be restricted." *Id.* at 869. "We conclude the line should be drawn at viability, so that before that **time the woman has a right to choose to terminate her pregnancy**." *Id.* at 870. "The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*." *Id.* at 871. "Though **the woman has a right to choose to terminate or continue her pregnancy** before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed." *Id.* at 872. " 'Roe did not declare an unqualified constitutional right to an abortion, as the District Court seemed to think. Rather, the right protects the woman from unduly burdensome interference with **her freedom to decide whether to terminate her pregnancy**.' " *Id.* at 874 (quoting *Maher v. Roe*, 432 U.S. 464, 473-474 (1977) (internal quotation marks omitted)). "All abortion regulations interfere to some degree with a **woman's ability to decide whether to terminate her pregnancy**." *Id.* at 875. "Not all burdens on the right to decide whether **to terminate a pregnancy** will be undue." *Id.* at 876. "Our adoption of the undue burden analysis does not disturb the central holding of *Roe v. Wade*, and we reaffirm that holding. Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision **to terminate her pregnancy** before viability." *Id.* at 879. "Whether the mandatory 24-hour waiting period is nonetheless invalid because in practice it is a substantial obstacle to a **woman's choice to terminate her pregnancy** is a closer question." *Id.* at 885. "Rather, the right protected by *Roe* is a **right to decide to terminate a pregnancy** free of undue interference by the State." *Id.* at 887 (emphasis added to all quotations).

pregnancy" is not implicated because there is no longer a pregnancy to terminate. After the commencement of the birth process, the intentional ending of the life of a partially born child is not an abortion at all, but rather the unlawful killing of a human being.

In *Wynn v. Scott*, federal District Judge Marshall addressed a hypothetical statute providing that if a physician had a choice of procedures to terminate the pregnancy, both of equal risk to the woman, the state could require the physician to choose the procedure which is least likely to kill the fetus. The court concluded that "[t]his choice would not interfere with the woman's right to terminate the pregnancy. **It never could be argued that she had a constitutionally protected right to kill the fetus. She does not.**" 449 F. Supp. 1302, 1321 (N.D. Ill. 1978) (emphasis added), *appeal dismissed*, 439 U.S. 8 (1978), *aff'd sub nom.*, *Wynn v. Carey*, 599 F.2d 193 (7th Cir. 1979) (citing Note, *Medical Responsibility of Fetal Survivor Under Roe and Doe*, 10 Harv. Civ. Lib.-Civ. Rt. Rev. 444 (1975)).

Although a woman may have a qualified right to an empty womb, this Court has never held that she has a right to a dead child. *Cf. Planned Parenthood v. Ashcroft*, 462 U.S. 476, 483 n.7 (1983) (plurality) (describing as "remarkable" testimony of abortion provider Dr. Robert Crist that " 'the abortion patient has a right not only to be rid of the growth, called the fetus in her body, but also a right to a dead fetus' ").

Yet, at least one of respondents' experts fails to understand this as revealed by the following disturbing testimony by abortion provider Dr. Creinin in the California district court:

Q. Doctor, if a woman's cervix was so dilated the fetus could be delivered in [sic] intact it would not be necessary to collapse the skull because the fetus could pass through the cervix, right?

A. Correct.

Q. But you would not allow the fetus to pass intact if the fetus were at or about 24 weeks in gestation, correct?

A. Correct.

Q. Because if the fetus were close to 24 weeks, and you were performing a transvaginal surgical abortion **you would be concerned about delivering the fetus entirely intact because that might result in a live baby that may survive, correct**?

A. **You said I was performing an abortion, so since the objective of the abortion is to not have a live fetus, then that would be correct.**

Q. In your opinion, if you were performing a surgical abortion at 23 or 24 weeks and the cervix was so dilated that the head could pass without compression, you would **do whatever you needed to do in order to make sure that the live baby was not delivered, wouldn't you**?

A. **Whatever, I needed, meaning whatever surgical procedures I needed to do as part of the procedure? Yes. Then, the answer would be: Yes.**

Q. And one step you would take to avoid delivery of a live baby would to be to deliver or hold

the fetus' head on the internal side of the cervical os in order to collapse the skull: is that right?

A. Yes, because the objective of my procedure is to perform an abortion.

Q. **And that would ensure that you did not deliver a live baby?**

A. **Yes.**

Tr. Vol. 5 at 747:18-748:23 (Creinin).

It is obvious from this testimony that this Court's jurisprudence concerning a woman's right to "terminate her pregnancy" has been distorted into the erroneous belief that abortion practitioners have a right to take the lives of children even *after* pregnancy has been terminated by the onset of the birth process and when part of the child is outside the mother's body. Therefore, Congress acted reasonably to reinforce the line between abortion and infanticide. *See* Section II, *infra.*

### 3. The abortion-related concepts of "viability" and "health exception" are irrelevant.

*Amici* recognize the principle outlined in *Casey* that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion." *Casey*, 505 U.S. at 846. However, because medical science establishes that pregnancy is terminated by the onset of the birth process, the Act does not regulate "abortion," as that term is understood both medically and legally.

"Viability" is about gestation; "partial birth abortion" is about location. Viability is a variable in the equation

this Court developed to determine the strength of the state's interest in protecting an unborn child, as weighed against the right of the woman to choose to terminate her pregnancy. The issue of whether Congress may protect the life of an unborn child necessarily arises prior to the time that the pregnancy has been terminated, *i.e.*, while the fetus is gestating in the womb. Thus, the pregnancy stage provides the only occasion where the decision of whether or not to permit the killing of a human being is dependent upon his or her viability.

When the child has been delivered from the uterus into the vaginal canal, the woman is no longer "pregnant." Thus, abortion jurisprudence regarding viability does not provide the proper analytical framework to assess an asserted right to kill a child after the pregnancy has been terminated by the onset of the birth process. Congress's authority to ban killing during the birth process should not, therefore, depend on whether the partially born child's gestational age is nine months or five months; whether the birth has begun naturally or has been artificially induced; or whether the child is "viable" or "nonviable." The only relevant inquiry after the child is in the birth canal is whether the child is "living," and is outside of the mother's body. Act at § 3(b)(1)(A).

Likewise, this Court has stated that, in the context of abortion, the issue of maternal "health" can override a governmental interest. *See, e.g.*, *Doe v. Bolton*, 410 U.S. 179, 192 (1973). Here, where Congress is regulating the process of birth to prevent the slide to infanticide, the issue of maternal health, absent risk to the mother's life, also does not override the state's interest.

To expand the concept of viability and so-called health exceptions to the process of birth would transform the right to terminate pregnancy into a new constitutional right to kill a child even after the pregnancy is terminated. As recognized by Judge Straub's dissent in the Second Circuit partial birth abortion challenge to the Act, application of abortion principles to statutes regulating birth would thus erode the barrier between abortion and infanticide.[15]

---

[15] Second Circuit Judge Chester Straub said the following in his dissent in *Nat'l Abortion Fed'n v. Gonzales*, 437 F.3d 278, 296-314 (2d Cir. 2006):

> I find the current expansion of the right to terminate a pregnancy to cover a child in the process of being born morally, ethically, and legally unacceptable. *Id.* at 312.
>
> * * *
>
> Although I acknowledge that no court has held that there is a special constitutional standard of protection for the fetus in the process of being born, a woman's right to terminate a pregnancy has never extended to the destruction of a child during parturition. *Id.* at 312 (*citing Roe*, 410 U.S. at 117 n.1).
>
> * * *
>
> If the intent of the mother controls the scope of her right to destroy her offspring, there is no reason why she should not be able to destroy the child after it has completely been separated from her body.
>
> I disagree with Chief Justice Walker that the fact that the Act is not limited to post-viability abortions necessarily vitiates the compelling interest of the State in preventing the procedure to distinguish abortion from infanticide. Once a fetus is born, its viability ceases to be relevant to determining the constitutional protections to which it is entitled. *Id.* at 311 n.14.

## II. THE ACT ADVANCES CONGRESS'S LEGITIMATE INTEREST IN PREVENTING THE EROSION OF THE LINE BETWEEN ABORTION AND INFANTICIDE.

The Act regulates the process of birth, not abortion. Consequently, the subjective medical judgment of the abortion provider must give way to Congress's regulation as long as it has a rational basis. The Act is rationally related to Congress's legitimate interest in preventing the erosion of the line between abortion and infanticide.[16] The Court's recent decision in *Washington v. Glucksberg*, 521 U.S. 702 (1997), is instructive on this point.

In *Glucksberg*, this Court held that government has the right to proscribe, not merely regulate, physician-assisted suicide notwithstanding a physician's best medical judgment that assisted suicide is the best and most appropriate way to relieve the patient's pain or terminal illness. *Id.* at 734. The State of Washington argued that "permitting assisted suicide will start it down the path to voluntary and perhaps involuntary euthanasia." *Id.* at 732. This Court agreed: "Washington's ban on assisted suicide prevents such erosion." *Id.* at 733. Because no fundamental right was implicated, a rational basis analysis was applied to reach the conclusion that "Washington's ban on assisted suicide is at least reasonably related to [its] promotion and protection" against abuses that could lead to the involuntary euthanasia of vulnerable neonates or elderly adults. *Id.* at 734.

---

[16] The term **infanticide** is defined as

> The murder or killing of an infant soon after its birth. The fact of the birth distinguishes this act from 'feticide' or 'procuring abortion,' which terms denote the destruction of the fetus **inside the womb**.

BLACK'S LAW DICTIONARY 699 (5th ed. 1979) (emphasis added).

Like Washington's ban on assisted suicide, Congress's ban on killing a child in the process of birth who is partly outside the mother's body is reasonably related to its interest in preventing the erosion of the line between abortion and infanticide. Stated differently, the Act creates a firewall against infanticide.

Congress's concern with avoiding the slippery slope to infanticide is neither hypothetical nor irrational. It is not hypothetical because serious proposals for the legalization of infanticide have been championed by prominent academicians. For example, Professor Peter Singer, who holds an endowed chair at Princeton University, justifies infanticide based on his position that "[i]f the fetus does not have the same claim to life as a person, it appears that the newborn baby does not either, and the life of a newborn baby is of less value to it than the life of a pig, a dog, or a chimpanzee is to the nonhuman animal." Peter Singer, *Practical Ethics* 169 (2d ed., Cambridge Univ. Press 1997). The following passage illustrates Singer's reasoning:

> [T]he fact that a being is a human being, in the sense of a member of the species Homo sapiens, is not relevant to the wrongness of killing it; it is, rather, characteristics like rationality, autonomy, and self-consciousness that make a difference. Infants lack these characteristics. Killing them, therefore, cannot be equated with killing normal human beings, or any other self-conscious beings. This conclusion is not limited to infants who, because of irreversible intellectual disabilities, will never be rational, self-conscious beings . . . No infant – disabled or not – has as strong a claim to

> life as beings capable of seeing themselves as distinct entities, existing over time.[17]

*Id.* at 182.

Congress's concern is not irrational because the Act is reasonably related to preventing the slippery slope to infanticide. In the first round of partial birth litigation, Chief Judge Posner of the United States Court of Appeals for the Seventh Circuit criticized bans on partial birth abortion as being "irrational" because such bans would not prevent "killing the [same] fetus in utero." *Planned Parenthood v. Doyle*, 162 F.3d 463, 471 (7th Cir. 1998) (Posner, J); *see also Hope Clinic v. Ryan*, 195 F.3d 857, 878-879 (7th Cir. 1999) (*en banc*) (Posner, J., dissenting). Judge Posner's criticism misses the point. Congress's purpose was not to prevent the killing of a fetus in utero (abortion); rather, its purpose is to prohibit the killing of a child in the process of birth who is partly outside the mother's body so as to prevent the erosion of the line between abortion and infanticide.

---

[17] Professor Singer contends that "the life of a fetus . . . is of no greater value than the life of a nonhuman animal at a similar level of rationality." Singer then "admit[s] that these arguments apply to the newborn baby as much as to the fetus. A week-old baby is not a rational and self-conscious being, and there are many nonhuman animals whose rationality, self-consciousness, awareness, capacity to feel, and so on, exceed that of a human baby a week or a month old." Singer then states that the "widely accepted views about the sanctity of infant life . . . need to be challenged." To support his position in favor of infanticide, Singer reasons that "we should put aside feelings based on the small, helpless, and – sometimes – cute appearance of human infants" whose "helplessness or innocence" should not be preferred to the equally helpless and innocent fetus, "or, for that matter, to laboratory rats who are 'innocent' in exactly the same sense." *Id.* at 169-170.

In *Glucksberg*, this Court recognized the "reasonableness of the widely expressed skepticism about the lack of a principled basis for confining the right [to assisted suicide]." *Glucksberg*, 521 U.S. at 733 n.23 (quoting *Brief for the United States as Amicus Curiae* 26 ("Once a legislature abandons a categorical prohibition against physician assisted suicide, there is no obvious stopping point")); *see also id.* at 785 (Souter, J., concurring) ("[t]he case for the slippery slope is fairly made out here, . . . because there is a plausible case that the right claimed would not be readily containable"). Just as Washington's ban on assisted suicide is reasonable because there is no principled basis for confining the "right," so Congress's ban on killing a child in the process of birth is reasonable because there would be no principled basis for confining that "right" either.

For example, if a doctor may kill a child whose body has been intentionally delivered into the birth canal except for the head, why may he not also kill a child who has been partially delivered head first? And if he may kill a child who has been partially delivered head first, why may he not kill the child whose entire body is outside of the mother except for one the child's feet which he holds in the birth canal? And if he may kill a child whose foot or little toe is held in the birth canal, why, then, may the doctor not kill the child who is completely expelled from her mother's body, but still attached to the umbilical cord?

## III. THE DISTRICT COURT APPLIED AN APPARENT DOUBLE STANDARD WHEN ASSESSING THE CREDIBILITY OF THE GOVERNMENT'S MEDICAL EXPERTS.

Ordered liberty, the goal of the United States Constitution, and especially of Article III courts, rests on the bedrock principles of fundamental fairness and equal justice. Fairness and justice imply and require a single standard of judgment for all. Double standards undermine such traditional core notions of fair play and justice by undercutting the rule of law and engendering a cynical disregard for the integrity of the judiciary.

Unfortunately, the district court below applied an apparent double standard[18] when assessing the credibility

[18] While this brief highlights an apparent double standard in the California district court's **credibility** determination, the following cases on the issue of **admissibility** are instructive of the underlying double standard that was expressly acknowledged by at least one Appellate Court Judge:

> In *Richmond Medical Center for Women v. Hicks*, 409 F.3d 619, 642-644 (4th Cir. 2005), the district court granted summary judgment after discrediting both of the government's experts' testimony by striking Dr. Giles' testimony as a whole and striking selected portions of Dr. Seeds' testimony. *Id.* at 509-512. Nowhere in the district court's opinion are Dr. Seeds' credentials listed. But Judge Niemeyer's dissent on appeal emphasizes the sufficiency of Dr. Seeds' credentials (expert in maternal/fetal medicine; "highly qualified"). *Id.* at 644. Judge Niemeyer's dissent explains that the district court's exclusion of Dr. Giles' and Dr. Seeds' testimony **"created a double standard and was an abuse of discretion."** . . . "The exclusion of Dr. Seeds' testimony is so highly irregular that it is difficult for me to conceive of the motive of the district court's ruling" . . . **"The District Court concluded solely from the fact that Dr. Seeds does not perform abortions that his testimony was unreliable."** *Id.* at 644 (emphasis added).

(Continued on following page)

of the Government's medical expert witnesses. Specifically, the district court expressly highlighted and negatively commented on the pro-life beliefs, practices and associations of the petitioner's experts, while making no mention of the self-interested pro-abortion rights views and associations of respondents' experts. *Planned Parenthood Federation of America v. Ashcroft*, 320 F. Supp. 2d 957, 998 (N.D.Cal. 2004).

Under the section of the district court's opinion entitled "Credibility of Witnesses," the court "found all of the plaintiffs' experts not only qualified to testify as experts, but **credible** witnesses based largely on their **vast experience in abortion practice.**" *Id.* at 998 (emphasis added). Contrary to this blanket approval given to all of respondents' abortion provider experts, the district court's analysis of the credibility of the petitioner's experts began with the telling statement that all of the Government's experts "revealed a strong objection either to abortion in general or, at a minimum," to partial birth abortion. *Id.*

The district court then concluded that the petitioner's experts' "objections to entirely legal and **acceptable** abortion procedures color, to some extent, their opinions . . . ." *Id.* (emphasis added). This characterization of "acceptable" precisely reveals the prejudgment at the

---

In *Evans v. Kelley*, 977 F. Supp. 1283, 1288, 1295 (E.D. Mich. 1997), Dr. Cook was singled out as holding pro-life associations/views. *Id.* at 1288. His testimony was afforded less credibility on the grounds that "given Dr. Cook's limited experience with abortion . . . his opinions are clearly outweighed by the otherwise uniform evidence to the contrary presented by the doctors who have great familiarity with both procedures." *See id.* at 1295 n.17 – and this despite the fact that the court describes him as an expert ObGyn concerning high-risk pregnancies, including termination of such pregnancies. *See id.* at 1288.

heart of the double standard applied by the district court. What constitutes an "entirely legal and acceptable abortion procedure" both begs the legal question at issue and injects an extra-judicial value judgment.

In light of this prejudgment or bias, the district court's analysis of the credibility of the petitioner's witnesses is suspect. For example, in the "Credibility of Witnesses" section of the district court opinion, the court made the following comments regarding the Government's medical experts:

> Dr. Sprang testified that he 'wouldn't be comfortable actually taking the life of the fetus.' In his 'practice, if patients want to have an abortion, they are referred to abortion providers.' 320 F. Supp. 2d at 998-99 (*quoting* Tr. Vol. 7 at 1060:6-7 (Sprang)).
>
> Dr. Shadigian is a member of AAPLOG, the American Association of Pro-Life Obstetricians and Gynecologists, and likewise, will not personally perform an abortion on a previable fetus that has not already died unless 'the woman is so sick that the only way she is going to survive is to have the pregnancy ended.' *Id.* at 999 (*citing* Tr. Vol. 8 at 1210:6-21 (Shadigian)).
>
> Dr. Bowes similarly testified that he would not personally perform an abortion even to save the life of one of his patients unless he believed that there was at least a 50% likelihood that she would die absent the abortion – even if the

> pregnancy was the result of rape or incest. *Id.* (*citing* Tr. Vol. 6 at 977:1-12 (Bowes)).[19]
>
> Additionally, Dr. Cook testified that because of his beliefs, he will not perform abortions for 'elective' reasons. *Id.* (*quoting* Tr. Vol. 9 at 1353:25-1354:2 (Cook)).

Absolutely no mention was made of the obviously self-serving beliefs and pro-abortion practices of the respondents' physicians who routinely perform many abortions. Nor did the district court discuss whether the abortion providers belong to any medical or abortion trade associations that support or advocate for unregulated legalized abortion.

In addition, the court overlooked the fact that the Government's maternal-fetal medicine and ObGyn experts, while not doing abortions per se, have experience doing technically comparable procedures (namely procedures on dead fetuses or labor inductions for live fetuses who must be delivered early). *See, e.g.*, Tr. Vol. 6 at 881:1-883:16 (Bowes); Tr. Vol. 7 at 1035:1-1036 (Sprang); Tr. Vol. 8 at 1193:22-1204:13 (Shadigian); Tr. Vol. 9 at 1347:4-1361:2 (Cook) (describing comparable procedures to D&E and intact D&X where the fetus is already dead and the

[19] Tellingly, the district court described the testimony of one of the pro-life witnesses as "particularly credible" when referencing points on which the witness's statements could be read as being in disagreement with Congress's findings. Apparently, medical experts who do not perform abortions for reasons of conscience are most valued under this double standard when they serve the abortion side of the litigation.

procedure is used to complete or terminate the pregnancy).[20]

Singling out for negative treatment only the pro-life views and associations of petitioner's experts while giving

---

[20] In *Planned Parenthood Cincinnati Region v. Taft*, 444 F.3d 502, 514-515 (6th Cir. 2006), the Appellate Court acknowledges that the limitations imposed by the district court on Dr. Crockett's expert testimony **were suspect**, that the district court ignored her testimony concerning a large portion of her experience, and that **"the only conceivable reason for failing to recognize Dr. Crockett as an expert on elective medical and surgical abortion was, in fact, because she does not perform elective abortions."** *Id.* at 515 (emphasis added). The majority opinion of the Sixth Circuit in *Taft* used an interesting example to illustrate the "abuse of discretion" in failing to admit the testimony of non-abortion performing medical experts:

> During the evidentiary hearing on the preliminary injunction, the district court recognized the State's witness, Dr. Crockett, as an expert in the areas of obstetrics, gynecology and the FDA approval process but refused to allow Dr. Crockett to testify as an expert regarding medical and surgical abortion or the critical review of medical literature. The State argues that refusing to recognize Dr. Crockett as an expert on medical and surgical abortion because she did not perform elective abortion procedures was an abuse of discretion. The State argues that performing elective abortion procedures is not a prerequisite to being an expert on such procedures and points out that such a rule would make it extremely difficult for governmental entities to secure the services of expert witnesses in such cases. The practical point is well taken, and the legal principle is sound. As with any other procedure or topic, an individual can acquire expertise regarding elective abortion procedures through a variety of means other than actually performing the precise procedure at issue. *See, e.g., Berry v. City of Detroit*, 25 F.3d 1342, 1350 (6th Cir. 1994) **(observing that an aeronautical engineer would be qualified to testify about the flight of a bumblebee based on general flight principles even if he had never actually seen a bumblebee).**

*Id.*

a free pass to the respondents' experts is a clear and corrosive double standard. This double standard is all the more egregious because of this Court's recognition that opposition to abortion, even among physicians, is widespread, reasonable, respectable and in good faith.

This Court's abortion jurisprudence reflects the understanding that the practice of human abortion has "profound moral and spiritual implications," *Planned Parenthood v. Casey*, 505 U.S. 833, 850 (1992), and that "men and women of good conscience can disagree" about those implications and can find abortion "offensive to [their] most basic principles of morality." *Id.* Although legal, this Court has recognized that "reasonable people" will differ as to the morality of abortion, *id.* at 853, and "there are common and respectable reasons for opposing it." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993). This Court also understands that millions of citizens "recoil at the thought of a law that would permit" abortion. *Stenberg*, 530 U.S. 914, 920 (2000).

Even as far back as *Roe v. Wade*, this Court expressed an "awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, **even among physicians**, and of the deep and seemingly absolute convictions that the subject inspires." 410 U.S. 113, 116 (1973) (emphasis added). And as recently as the 2000 *Stenberg* decision, this Court recognized "the controversial nature" of abortion, and that "[m]illions of Americans believe that life begins at conception and consequently that an abortion is akin to causing the death of an innocent child," *Stenberg v. Carhart*, 530 U.S. at 920.

Despite this Court's longstanding and insightful awareness of the good faith opposition to abortion by millions of Americans, including physicians, the district court treated the pro-life beliefs and associations of petitioners' experts as grounds for discounting the relative credibility of their testimony. This double standard, if upheld by this Court and applied by other federal district courts, would effectively relegate to second-class status the expert testimony of many physicians who would agree to testify in support of federal or state regulations and restrictions touching on the issue of abortion. Such a double standard must be rejected.

Categorically diminishing the value of the testimony of well-qualified medical experts merely on the basis of their principled opposition to abortion, while failing to factor in the self-interest of abortion providers who practice the very procedure at issue is blatantly unfair, undermines the perception of an unbiased judiciary, and effectively erects a *per se* and *a priori* rule discounting the testimony of every physician who respects and protects the life of their unborn patients before they ever step into a federal courtroom.

## CONCLUSION

This Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

JAMES L. HIRSEN
*Adjunct Professor of Law*
TRINITY LAW SCHOOL
505 S. Villa Real Dr., Ste. 208
Anaheim Hills, CA 92807
Telephone: (714) 283-8880

NIKOLAS T. NIKAS
*Counsel of Record*
DORINDA C. BORDLEE
BIOETHICS DEFENSE FUND
6811 E. Voltaire Avenue
Scottsdale, AZ 85254
Telephone: (480) 483-3597

*Counsel for Amici Curiae*

August 3, 2006

BLANK PAGE

## APPENDICES

Page

A. *Reargument of Roe v. Wade*, October 11, 1972 ..App. 1

B. *Declaration of Jack A. Andonie, M.D.* (Oct. 1, 1998) .....App. 4

C. *Declaration of Raymond Gasser, Ph.D.* (Oct. 1, 1998) .....App. 11

## APPENDIX A

Excerpt from the Transcript of the reargument of *Roe v. Wade*, 410 U.S. 113 (1973) (Reargued on October 11, 1972). The entire transcript and audio file can be found at http://www.oyez.org/oyez/resource/case/334/reargument/transcript

* * *

JUSTICE MARSHALL: Is there any statute in Texas that prohibits the doctor from performing any operation, other than an abortion?

MR. FLOWERS: I don't – I don't think so, sir. And there is another thrust of our argument. If we declare, as the appellees in this case have asked this Court to declare, that an embryo or a fetus is a mass of protoplasm similar to a tumor, then of course the State has no compelling interest whatsoever.

JUSTICE MARSHALL: But there is no – the only operation that a doctor can possibly commit that will bring on a criminal penalty is an abortion?

MR. FLOWERS: Yes, sir.

JUSTICE MARSHALL: Why?

MR. FLOWERS: As far as –

JUSTICE MARSHALL: Well, why don't you limit some other operations?

MR. FLOWERS: Because this is the only type of operation that would take another human life.

JUSTICE MARSHALL: Well, a brain operation could.

MR. FLOWERS: Well, there again that would be – I think that in every feat that a doctor performs that he is constantly making this judgment.

JUSTICE MARSHALL: Well, if a doctor performs a brain operation and does it improperly, he could be guilty of manslaughter, couldn't he?

MR. FLOWERS: I would think so, if he was negligent.

JUSTICE MARSHALL: Well, why wouldn't you charge him with manslaughter if he commits an abortion?

MR. FLOWERS: In effect, Your Honor, we did, in the Statute 1195 that has been very carefully avoided all throughout these proceedings. It's not attacked as unconstitutional, for some reason. If you will permit me to –

JUSTICE MARSHALL: But is it at issue here?

MR. FLOWERS: No, sir. You asked the question about whether we had made manslaughter – or an abortion manslaughter.

JUSTICE MARSHALL: Maybe the reason is: Why have two statutes?

MR. FLOWERS: Well, this was in context with – this is 1195. They are attacking 1191 through 1196, but omitted 1195.

Here's what 1195 says – provides: "Whoever shall, during the parturition of the mother, destroy the vitality or life in a child in a state of being born, before actual birth and before actual birth – which child would have otherwise been born alive, which – shall be confined to the penitentiary for life, or not less than five years."

JUSTICE MARSHALL: *What does that statute mean?*

MR. FLOWERS: *Sir?*

JUSTICE MARSHALL: *What does it mean?*

*MR. FLOWERS: I would think that –*

JUSTICE STEWART: *That it is an offense to kill a child in the process of childbirth?*

MR. FLOWERS: *Yes, sir. It would be immediately before childbirth, or right in the proximity of the child being born.*

JUSTICE MARSHALL: *Which is not an abortion.*

MR. FLOWERS: *Which is not – would not be an abortion, yes, sir. You're correct, sir. It would be homicide.*

* * *

## APPENDIX B

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF LOUISIANA**

**CAUSEWAY MEDICAL SUITE, et al,**

***PLAINTIFFS*** **Civil Action**

**v.**

**No. 97-2211 "T"**

**MURPHY J. FOSTER, JR. Governor for the State of Louisiana, et al,**

***DEFENDANTS.***

### DECLARATION OF JACK A. ANDONIE, M.D.

I, Jack A. Andonie, M.D., declare under the penalty for perjury that the following is true:

1. I am a Clinical Professor in the Department of Obstetrics and Gynecology at LSU Medical School. I am board-certified in obstetrics/gynecology and I am the Founder of Lakeside Women's Specialty Center, Ltd. in Metairie, Louisiana. I received my Medical Degree from LSU Medical School in 1962. I serve as Medical Director at Lakeside Hospital and serve on the current board of the LSU Board of Supervisors. I teach and practice obstetrics-gynecology. I am a licensed medical doctor in the state of Louisiana. A more complete statement of my credentials and training are provided in my attached curriculum vitae. *See Attachment A.*

2. During the course of my thirty-six year medical career in obstetric/gynecology, I have examined and/or treated approximately twenty thousand women and delivered approximately ten thousand babies. I am a

medical expert in the areas of pregnancy, the process of birth, and birth. It is based upon my years of experience as a physician specializing in obstetrics and gynecology, my education, training, and the ongoing study of the relevant medical literature and statistical data normally relied upon by doctors of obstetrics and gynecology in their practices that I offer the following expert opinions.

3. Pursuant to a request by representatives of the Office of the Attorney General for the State of Louisiana, I have reviewed Act 906 of the 1997 Regular Session of the Louisiana Legislature (the "Act"), which creates "the crime of partial-birth abortion" La. R.S. 14:32.9(D). I have been asked to review the Act and offer my expert medical opinion on what the Act proscribes and whether or not a reasonable physician, upon reading the Act, will be sufficiently apprized of what is and what is not permitted under the Act.

4. The Act, with certain detailed exceptions (e.g., the life of the mother), proscribes what it refers to as "partial-birth abortion." The Act defines "partial-birth abortion" as

> the performance of a procedure on a female by a licensed physician or any other person whereby a living fetus or infant is partially delivered or removed from the female's uterus by vaginal means and with specific intent to kill or do great bodily harm is then killed prior to complete delivery or removal. La. R.S. 14:32.9(A)(1).

5. The plain language of the Act proscribes any procedure that is intended to kill an infant in the process of being born. By its very terms, then, the Act does not include within its proscription any abortion procedure.

6. Induced abortion is one method of terminating a pregnancy, the onset of the birth process is another.

7. Induced abortion is any procedure which causes fetal death *in utero,* thereby causing "the premature expulsion *from the uterus* of the products of conception." *Dorland's Illustrated Medical Dictionary* 4-5 (28th edition 1994) (Dorland's).

8. The process of birth begins, and complete birth is inevitable, once the membranes of the amniotic sac are ruptured, and the infant begins its emergence from the uterus through the cervical os (opening of the uterus) and into the vaginal canal.

9. The delivery or removal of any part of a living fetus from the uterus, beyond the cervical os, and into the vaginal canal after the membranes of the amniotic sac have been ruptured is a significant medical event – an event that is acknowledged under the Act. It is medically significant because pregnancy has ended and the process of birth has begun.

10. Pregnancy describes the locus where intrauterine fetal stasis is maintained. Pregnancy has never occurred or been maintained in the vaginal canal.

11. Because it is a medical fact that pregnancy is over (terminated) once the process of birth has begun, the Act's plain language regulates the birth process, not any abortion procedure. This is made plain because the Act proscribes the intentional killing of a living fetus or infant who has been *partially delivered or removed from the female's uterus by vaginal means*. In medical terms, the Act does not prohibit those procedures undertaken to terminate *pregnancy,* because the Act's terms address

specific intent to kill a living fetus or infant *after* the pregnancy has already been terminated.

12. Where the Act describes a "living fetus or infant [that] is partially delivered or removed from the female's uterus by vaginal means" it has, thereby, given effect to the medical distinction between (1) the locale where intrauterine fetal stasis is maintained (i.e., pregnancy) and (2) the dynamic irreversible process of birth. "Birth" is a process, not a single event. The birth process *begins* when the membranes of the amniotic sac are ruptured and the fetus emerges beyond the cervix into the vaginal canal, and *ends* with the complete separation from the mother.

13. By its own terms, then, the Act clearly regulates the process of birth which begins when the living fetus begins to exit the womb as described above. (The terms womb and uterus are synonymous. Dorlands at 1846 ("womb" is defined as "the uterus")).

14. The Act's plain language proscribes only those procedures wherein a living fetus (infant) is partially delivered or removed into the vaginal canal itself. A fetus or fetal part suctioned out through an enclosed vacuum tube running through the vagina would not, in medical terminology, be characterized as a fetus who is "partially delivered or removed from the female's uterus by vaginal means."

15. There is no question that the Act *does not* proscribe the destruction of a fetus *in utero,* i.e. abortion, because by its very terms the Act proscribes only those procedures designed to kill an infant that has been partially delivered out of the uterus at which point pregnancy has ended, the process of birth has begun, and abortion is no longer a medical possibility.

16. Though the term "partial-birth abortion" is not a medical term, it is descriptive of a medical procedure(s), as defined by the Act, that is practiced by some abortion doctors who refer to the procedure by various terms including "D&X," "intact dilation and extraction," "intact dilation and evacuation, "intact D&E," and "intact D&X."

17. Plaintiffs' own description of the "D&X procedure" would clearly qualify as a procedure prohibited by the plain terms of the Act:

> The intact D&E, "D&X," or "intact D&X" procedure is a variant of the traditional D&E procedure. . . . [T]he cervix is gradually dilated and the fetus is removed intact. . . . [T]he physician then creates a small opening at the base of the skull and evacuates some of the contents, allowing the calvarium [now emptied skull] to pass through the cervical opening. Alternatively, once the fetus is partially extracted, the physician crushes the skull with forceps. . . . The intact removal of the fetus is what distinguishes an intact D&E procedure from a traditional D&E procedure. [*Complaint* at ¶ 41.]

18. The Act proscribes doing "great bodily harm . . . " to "a living fetus or infant" that is "partially delivered. . . . " Medically speaking, you can do "great bodily harm" only to an intact "living fetus" or "infant." Therefore, a reasonable medical doctor reading the Act would understand "living fetus" and living "infant" to mean the living fetal (infant) organism as opposed to living fetal cells or dismembered fetal limbs or body parts.

19. Medical science recognizes that the living fetal (infant) organism is living if it shows signs of life, such as

beating of the heart, pulsation of the umbilical cord or movement of voluntary muscles.

20. The Act's plain language clearly does not proscribe the cephalocentesis procedure, which is removal of fluid from an enlarged head of a fetus with the most severe form of hydrocephalus. In such a procedure, a needle is inserted into the enlarged ventricle of the brain (the space containing cerebrospinal fluid). Fluid is then withdrawn which results in reduction in the size of the head so that delivery can occur. This procedure is not intended to kill the fetus, and, in fact, is often associated with the birth of a live infant. This is an important distinction between a needle cephalocentesis, which is intended to facilitate the birth of a living fetus, and the procedure described in the Act, which involves specific intent to kill a living fetus which has been partially delivered.

21. Upon reading the Act, a reasonable physician will certainly understand that destruction of the fetus *in utero*, i.e., abortion, remains protected in the law, and that the only procedure prohibited is partial delivery or removal of a living fetus or infant into the vaginal canal for the purpose of pausing the birth process to carry out a second step of intentionally killing the infant prior to complete delivery or removal.

I affirm under the penalties of perjury that the statements in my Declaration are true.

_____

Date

Jack A. Andonie, M.D.

**Expert Witness Disclosure Required by Fed. R. Civ. P. 26(a)(2)(B)**

1. The disclosure of my opinions, basis, reasons, data, qualifications are given in the attached affidavit.

2. My list of all publications within the last ten years is provided in the attached curriculum vitae.

3. My compensation is reasonable expenses, but no fee.

4. I have never before testified as an expert at trial or by deposition.

_____

Date

Jack A. Andonie, M.D.

## APPENDIX C

## IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

CAUSEWAY MEDICAL SUITE, ET AL.,

*PLAINTIFFS*

v.

MURPHY J. FOSTER, JR., ET AL.,

*DEFENDANTS.*

Civil Action

No. 97-2211 "T"

---

## DECLARATION OF RAYMOND GASSER, PH.D.

---

I, Raymond Gasser, Ph.D., declare under the penalty for perjury that the following is true:

1. I am a Professor in the Department of Cell Biology and Anatomy at LSU Medical School (LSUMC), and, since 1980, I have been the course Director for Human Prenatal Development. I have been an Adjunct Professor of Obstetrics and Gynecology since 1994. I have been a member of the International Anatomical Nomenclature Committee since 1991 and I head the subcommittee on human embryological terms. Since 1991 I have been on the Advisory Committee, Human Developmental Anatomy Center, Armed Forces Institute of Pathology in Washington D.C. Also, since 1991 I have been Adjunct Curator for the Carnegie Collection of Human Embryos, Human Developmental Anatomy Center, Armed Forces Institute of Pathology, Washington D.C. My other credentials and experience are provided in my attached curriculum vitae. *See Attachment A – Curriculum Vitae.*

2. Based on my education, training, research, years of experience as a Professor of Anatomy and Ob/Gyn, personal knowledge, study of the relevant medical literature and statistical data recognized as reliable in the medical profession, I offer the following expert opinions.

3. Pursuant to a request by representatives of the Office of the Attorney General for the State of Louisiana, I have reviewed Act 906 of the 1997 Regular Session of the Louisiana Legislature (the "Act"), which creates "the crime of partial-birth abortion" La. R.S. 14:32.9(D). I have been asked to review the Act and offer my expert opinion on what the Act proscribes and whether or not a reasonable physician, upon reading the Act, will be sufficiently apprized of what is and what is not permitted under the Act.

4. The Act, with certain detailed exceptions (e.g., the life of the mother), proscribes what it refers to as "partial-birth abortion." The Act defines "partial-birth abortion" as

> the performance of a procedure on a female by a licensed physician or any other person whereby a living fetus or infant is partially delivered or removed from the female's uterus by vaginal means and with specific intent to kill or do great bodily harm is then killed prior to complete delivery or removal. La. R.S. 14:32.9(A)(1).

5. The Act is clear, in medical/anatomical terms, about the location of the "living fetus or infant" that cannot, with specific intent, be killed.

6. The clarity of the Act is manifest because by its very terms it describes a living fetus or infant who is in the process of being born.

7. A living fetus or infant is in the process of being born when he or she begins to emerge from the uterus through the cervical os into the vaginal canal, which occurrence denotes the medical fact that the inevitable and unstoppable process of birth has begun.

8. Because the Act addresses a procedure that involves specific intent to kill a living fetus or infant who has been intentionally partially removed from the uterus into the vaginal canal, the Act regulates the process of birth, not the induced abortion of an unborn fetus.

9. Induced abortion is one method of terminating a pregnancy, the onset of the birth process is another.

10. The significant medical distinction between pregnancy and the process of birth is best made by describing the anatomical structure of the woman with reference to the locus of the living fetus within that structure: *See Exhib. D-5, "Uterus, Vagina and Supporting Structures."*

a. The uterus is the muscular organ in a female in which a developing embryo and fetus is nourished.

b. The cervix is the neck of the uterus which opens into the vagina. The cervical os is the opening of the cervix.

c. The amniotic sac is the protective membrane between the cervical os and the vaginal canal.

d. The vagina is the canal in the female, extending from the vulva to the cervix.

As long as the fetus remains within the uterus a woman is pregnant. When, however, the membranes of the amniotic sac have been ruptured and any part of the living fetus or infant is delivered through the cervix, past the cervical os and into the vaginal canal, pregnancy has ended and the process of birth has begun.

11. The medical/anatomical distinction between pregnancy and the process of birth is underscored by the fact that pregnancy has never occurred or been maintained in the vaginal canal.

12. "Fetus" is the medical term to describe "the *unborn* offspring in the postembryonic period, after major structures have been outlined, in humans from nine weeks after fertilization until birth." DORLAND'S *ILLUSTRATED* MEDICAL DICTIONARY 617 (28th Ed. 1994). The term "fetus" means only the unborn child, not the umbilical cord or the placenta, although those structures are of fetal origin. *See Exhibit D-6, Lennart Nilsson photograph.*

14. Where the Act speaks of a "living fetus or infant that is partially *delivered or removed from the female's uterus by vaginal means*" it can, of medical/anatomical necessity, only mean that the living fetus or infant is removed from the uterus into the vaginal canal and does not include the suction of a fetus or fetal parts "into an enclosed suction cannula [tube]" running through the vagina.

15. In medical terms *fetus* means preborn human offspring 9 weeks after conception, and is expressly defined in the Act as meaning "the biological offspring of human parents."

16. *Infant*, as expressly defined in the Act means "the biological offspring of human parents." *Infant* is defined as " . . . human young from birth to 12 months; it includes the newborn or neonatal period." DORLAND'S *ILLUSTRATED* MEDICAL DICTIONARY 836 (28th Ed. 1994).

17. The Act proscribes doing "great bodily harm . . . " to "a living fetus or infant" that is "partially delivered. . . ." Medically/anatomically speaking, you can do "great bodily harm" only to an intact "living fetus" or "infant." Therefore, a reasonable medical doctor reading the Act would understand "living fetus" and living "infant" to mean the living fetal (infant) organism as opposed to living fetal cells or dismembered fetal limbs or body parts.

18. The fetal/infant organism is living if it shows signs of life, such as beating of the heart, pulsation of the umbilical cord or movement of voluntary muscles.

19. I have reviewed the artist's illustration that was used by Dr. Jack Andonie to explain partial birth abortion to the Louisiana House and Senate committees considering the Act at issue (a copy of which is attached hereto as "*Attachment B*"). It is my expert opinion that the illustration accurately depicts a baby 8-10 inches long, measured to scale to the doctor's hand. This corresponds exactly to the size of a baby during the 20-24 week range of pregnancy. Thus, the illustration accurately depicts the anatomical structures of the fetus, then partially born infant and female as described by Dr. Haskell in his 1992 paper entitled "Dilation and Extraction for Late Second Trimester Abortion." [*See* Defendants' Exhibit D-2].

20. Plaintiffs' own description of the "D&X procedure" mirrors the illustration described in paragraph 19 above and would clearly qualify as a procedure prohibited by the plain terms of the Act:

> The intact D&E, "D&X," or "intact D&X" procedure is a variant of the traditional D&E procedure. . . . [T]he cervix is gradually dilated and the fetus is removed intact. . . . [T]he physician then creates a small opening at the base of the skull and evacuates some of the contents, allowing the calvarium [now emptied skull] to pass through the cervical opening. Alternatively, once the fetus is partially extracted, the physician crushes the skull with forceps. . . . The intact removal of the fetus is what distinguishes an intact D&E procedure from a traditional D&E procedure. [*Complaint* at ¶ 41.]

21. A reasonable person reading the Act will have no doubt that he/she is prohibited only from intentionally killing a living fetus or infant that has been partially delivered into the vaginal canal.

I affirm under the penalties of perjury that the statements in my *Declaration* are true.

Date

Raymond Gasser, Ph.D.

**Expert Witness Disclosure Required by Fed. R. Civ. P. 26(a)(2)(B)**

1. The disclosure of my opinions, basis, reasons, data, qualifications are given in the attached affidavit.
2. My list of all publications within the last ten years is provided in the attached curriculum vitae.
3. My compensation is reasonable expenses, but no fee.

4. I have testified as an expert at trial or by deposition in the following:

Date

Raymond Gasser, Ph.D.

BLANK PAGE