

Calendar No. 19108TH CONGRESS
1ST SESSION**S. 3**

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

IN THE SENATE OF THE UNITED STATES

FEBRUARY 14, 2003

Mr. SANTORUM (for himself, Mr. FITZGERALD, Mr. CAMPBELL, Mr. DEWINE, Mr. FRIST, Mr. BROWNBACK, Mr. ENSIGN, Mr. INHOFE, Mr. KYL, Mr. LUGAR, Mr. ALLARD, Mr. MCCAIN, Mr. ROBERTS, Mr. SHELBY, Mr. WARNER, Mr. MCCONNELL, Mr. HATCH, Mr. VOINOVICH, Mr. HAGEL, Mr. BUNNING, Mr. DOMENICI, Mr. SMITH, Mr. GRAHAM of South Carolina, Mr. ENZI, Mr. LOTT, Mrs. DOLE, Mr. ALLEN, Mr. CORNYN, Mr. NICKLES, Mr. GRASSLEY, Mr. TALENT, Mr. BOND, Mr. THOMAS, Mr. CRAIG, Mr. CHAMBLISS, Mr. SESSIONS, Mr. GREGG, Mr. BENNETT, Mr. COLEMAN, Mr. SUNUNU, Mr. COCHRAN, Mr. CRAPO, and Mr. MILLER) introduced the following bill; which was read the first time

FEBRUARY 24, 2003

Read the second time and placed on the calendar

A BILL

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

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Partial-Birth Abortion
3 Ban Act of 2003”.

4 **SEC. 2. FINDINGS.**

5 The Congress finds and declares the following:

6 (1) A moral, medical, and ethical consensus ex-
7 ists that the practice of performing a partial-birth
8 abortion—an abortion in which a physician delivers
9 an unborn child’s body until only the head remains
10 inside the womb, punctures the back of the child’s
11 skull with a sharp instrument, and sucks the child’s
12 brains out before completing delivery of the dead in-
13 fant—is a gruesome and inhumane procedure that is
14 never medically necessary and should be prohibited.

15 (2) Rather than being an abortion procedure
16 that is embraced by the medical community, particu-
17 larly among physicians who routinely perform other
18 abortion procedures, partial-birth abortion remains a
19 disfavored procedure that is not only unnecessary to
20 preserve the health of the mother, but in fact poses
21 serious risks to the long-term health of women and
22 in some circumstances, their lives. As a result, at
23 least 27 States banned the procedure as did the
24 United States Congress which voted to ban the pro-
25 cedure during the 104th, 105th, and 106th Con-
26 gresses.

1 (3) In *Stenberg v. Carhart* (530 U.S. 914, 932
2 (2000)), the United States Supreme Court opined
3 “that significant medical authority supports the
4 proposition that in some circumstances, [partial
5 birth abortion] would be the safest procedure” for
6 pregnant women who wish to undergo an abortion.
7 Thus, the Court struck down the State of Nebras-
8 ka’s ban on partial-birth abortion procedures, con-
9 cluding that it placed an “undue burden” on women
10 seeking abortions because it failed to include an ex-
11 ception for partial-birth abortions deemed necessary
12 to preserve the “health” of the mother.

13 (4) In reaching this conclusion, the Court de-
14 ferred to the Federal district court’s factual findings
15 that the partial-birth abortion procedure was statis-
16 tically and medically as safe as, and in many cir-
17 cumstances safer than, alternative abortion proce-
18 dures.

19 (5) However, the great weight of evidence pre-
20 sented at the *Stenberg* trial and other trials chal-
21 lenging partial-birth abortion bans, as well as at ex-
22 tensive Congressional hearings, demonstrates that a
23 partial-birth abortion is never necessary to preserve
24 the health of a woman, poses significant health risks

1 to a woman upon whom the procedure is performed,
2 and is outside of the standard of medical care.

3 (6) Despite the dearth of evidence in the
4 Stenberg trial court record supporting the district
5 court’s findings, the United States Court of Appeals
6 for the Eighth Circuit and the Supreme Court re-
7 fused to set aside the district court’s factual findings
8 because, under the applicable standard of appellate
9 review, they were not “clearly erroneous”. A finding
10 of fact is clearly erroneous “when although there is
11 evidence to support it, the reviewing court on the en-
12 tire evidence is left with the definite and firm convic-
13 tion that a mistake has been committed”. *Anderson*
14 *v. City of Bessemer City, North Carolina* (470 U.S.
15 564, 573 (1985)). Under this standard, “if the dis-
16 trict court’s account of the evidence is plausible in
17 light of the record viewed in its entirety, the court
18 of appeals may not reverse it even though convinced
19 that had it been sitting as the trier of fact, it would
20 have weighed the evidence differently” (*Id.* at 574).

21 (7) Thus, in *Stenberg*, the United States Su-
22 preme Court was required to accept the very ques-
23 tionable findings issued by the district court judge—
24 the effect of which was to render null and void the
25 reasoned factual findings and policy determinations

1 of the United States Congress and at least 27 State
2 legislatures.

3 (8) However, under well-settled Supreme Court
4 jurisprudence, the United States Congress is not
5 bound to accept the same factual findings that the
6 Supreme Court was bound to accept in *Stenberg*
7 under the “clearly erroneous” standard. Rather, the
8 United States Congress is entitled to reach its own
9 factual findings—findings that the Supreme Court
10 accords great deference—and to enact legislation
11 based upon these findings so long as it seeks to pur-
12 sue a legitimate interest that is within the scope of
13 the Constitution, and draws reasonable inferences
14 based upon substantial evidence.

15 (9) In *Katzenbach v. Morgan* (384 U.S. 641
16 (1966)), the Supreme Court articulated its highly
17 deferential review of Congressional factual findings
18 when it addressed the constitutionality of section
19 4(e) of the Voting Rights Act of 1965. Regarding
20 Congress’ factual determination that section 4(e)
21 would assist the Puerto Rican community in “gain-
22 ing nondiscriminatory treatment in public services,”
23 the Court stated that “[i]t was for Congress, as the
24 branch that made this judgment, to assess and
25 weigh the various conflicting considerations. . . . It

1 is not for us to review the congressional resolution
2 of these factors. It is enough that we be able to per-
3 ceive a basis upon which the Congress might resolve
4 the conflict as it did. There plainly was such a basis
5 to support section 4(e) in the application in question
6 in this case.” (Id. at 653).

7 (10) Katzenbach’s highly deferential review of
8 Congress’s factual conclusions was relied upon by
9 the United States District Court for the District of
10 Columbia when it upheld the “bail-out” provisions of
11 the Voting Rights Act of 1965, (42 U.S.C. 1973c),
12 stating that “congressional fact finding, to which we
13 are inclined to pay great deference, strengthens the
14 inference that, in those jurisdictions covered by the
15 Act, state actions discriminatory in effect are dis-
16 criminatory in purpose”. *City of Rome, Georgia v.*
17 *U.S.* (472 F. Supp. 221 (D. D. Col. 1979)) *aff’d*
18 *City of Rome, Georgia v. U.S.* (46 U.S. 156 (1980)).

19 (11) The Court continued its practice of defer-
20 ring to congressional factual findings in reviewing
21 the constitutionality of the must-carry provisions of
22 the Cable Television Consumer Protection and Com-
23 petition Act of 1992. See *Turner Broadcasting Sys-*
24 *tem, Inc. v. Federal Communications Commission*
25 (512 U.S. 622 (1994) (Turner I)) and *Turner*

1 Broadcasting System, Inc. v. Federal Communica-
2 tions Commission (520 U.S. 180 (1997) (Turner
3 II)). At issue in the Turner cases was Congress’ leg-
4 islative finding that, absent mandatory carriage
5 rules, the continued viability of local broadcast tele-
6 vision would be “seriously jeopardized”. The Turner
7 I Court recognized that as an institution, “Congress
8 is far better equipped than the judiciary to ‘amass
9 and evaluate the vast amounts of data’ bearing upon
10 an issue as complex and dynamic as that presented
11 here” (512 U.S. at 665–66). Although the Court
12 recognized that “the deference afforded to legislative
13 findings does ‘not foreclose our independent judg-
14 ment of the facts bearing on an issue of constitu-
15 tional law,’” its “obligation to exercise independent
16 judgment when First Amendment rights are impli-
17 cated is not a license to reweigh the evidence de
18 novo, or to replace Congress’ factual predictions with
19 our own. Rather, it is to assure that, in formulating
20 its judgments, Congress has drawn reasonable infer-
21 ences based on substantial evidence.” (Id. at 666).

22 (12) Three years later in Turner II, the Court
23 upheld the “must-carry” provisions based upon Con-
24 gress’ findings, stating the Court’s “sole obligation
25 is ‘to assure that, in formulating its judgments, Con-

1 gress has drawn reasonable inferences based on sub-
2 stantial evidence.’” (520 U.S. at 195). Citing its
3 ruling in *Turner I*, the Court reiterated that “[w]e
4 owe Congress’ findings deference in part because the
5 institution ‘is far better equipped than the judiciary
6 to “amass and evaluate the vast amounts of data”
7 bearing upon’ legislative questions,” (Id. at 195),
8 and added that it “owe[d] Congress’ findings an ad-
9 ditional measure of deference out of respect for its
10 authority to exercise the legislative power.” (Id. at
11 196).

12 (13) There exists substantial record evidence
13 upon which Congress has reached its conclusion that
14 a ban on partial-birth abortion is not required to
15 contain a “health” exception, because the facts indi-
16 cate that a partial-birth abortion is never necessary
17 to preserve the health of a woman, poses serious
18 risks to a woman’s health, and lies outside the
19 standard of medical care. Congress was informed by
20 extensive hearings held during the 104th, 105th,
21 and 107th Congresses and passed a ban on partial-
22 birth abortion in the 104th, 105th, and 106th Con-
23 gresses. These findings reflect the very informed
24 judgment of the Congress that a partial-birth abor-
25 tion is never necessary to preserve the health of a

1 woman, poses serious risks to a woman’s health, and
2 lies outside the standard of medical care, and
3 should, therefore, be banned.

4 (14) Pursuant to the testimony received during
5 extensive legislative hearings during the 104th,
6 105th, and 107th Congresses, Congress finds and
7 declares that:

8 (A) Partial-birth abortion poses serious
9 risks to the health of a woman undergoing the
10 procedure. Those risks include, among other
11 things: an increase in a woman’s risk of suf-
12 fering from cervical incompetence, a result of
13 cervical dilation making it difficult or impos-
14 sible for a woman to successfully carry a subse-
15 quent pregnancy to term; an increased risk of
16 uterine rupture, abruption, amniotic fluid embolus,
17 and trauma to the uterus as a result of
18 converting the child to a footling breech posi-
19 tion, a procedure which, according to a leading
20 obstetrics textbook, “there are very few, if any,
21 indications for . . . other than for delivery of
22 a second twin”; and a risk of lacerations and
23 secondary hemorrhaging due to the doctor
24 blindly forcing a sharp instrument into the base
25 of the unborn child’s skull while he or she is

1 lodged in the birth canal, an act which could
2 result in severe bleeding, brings with it the
3 threat of shock, and could ultimately result in
4 maternal death.

5 (B) There is no credible medical evidence
6 that partial-birth abortions are safe or are safer
7 than other abortion procedures. No controlled
8 studies of partial-birth abortions have been con-
9 ducted nor have any comparative studies been
10 conducted to demonstrate its safety and efficacy
11 compared to other abortion methods. Further-
12 more, there have been no articles published in
13 peer-reviewed journals that establish that par-
14 tial-birth abortions are superior in any way to
15 established abortion procedures. Indeed, unlike
16 other more commonly used abortion procedures,
17 there are currently no medical schools that pro-
18 vide instruction on abortions that include the
19 instruction in partial-birth abortions in their
20 curriculum.

21 (C) A prominent medical association has
22 concluded that partial-birth abortion is “not an
23 accepted medical practice,” that it has “never
24 been subject to even a minimal amount of the
25 normal medical practice development,” that

1 “the relative advantages and disadvantages of
2 the procedure in specific circumstances remain
3 unknown,” and that “there is no consensus
4 among obstetricians about its use”. The asso-
5 ciation has further noted that partial-birth
6 abortion is broadly disfavored by both medical
7 experts and the public, is “ethically wrong,”
8 and “is never the only appropriate procedure”.

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

14 (E) The physician credited with developing
15 the partial-birth abortion procedure has testi-
16 fied that he has never encountered a situation
17 where a partial-birth abortion was medically
18 necessary to achieve the desired outcome and,
19 thus, is never medically necessary to preserve
20 the health of a woman.

21 (F) A ban on the partial-birth abortion
22 procedure will therefore advance the health in-
23 terests of pregnant women seeking to terminate
24 a pregnancy.

1 (G) In light of this overwhelming evidence,
2 Congress and the States have a compelling in-
3 terest in prohibiting partial-birth abortions. In
4 addition to promoting maternal health, such a
5 prohibition will draw a bright line that clearly
6 distinguishes abortion and infanticide, that pre-
7 serves the integrity of the medical profession,
8 and promotes respect for human life.

9 (H) Based upon *Roe v. Wade* (410 U.S.
10 113 (1973)) and *Planned Parenthood v. Casey*
11 (505 U.S. 833 (1992)), a governmental interest
12 in protecting the life of a child during the deliv-
13 ery process arises by virtue of the fact that dur-
14 ing a partial-birth abortion, labor is induced
15 and the birth process has begun. This distinc-
16 tion was recognized in *Roe* when the Court
17 noted, without comment, that the Texas partu-
18 rition statute, which prohibited one from killing
19 a child “in a state of being born and before ac-
20 tual birth,” was not under attack. This interest
21 becomes compelling as the child emerges from
22 the maternal body. A child that is completely
23 born is a full, legal person entitled to constitu-
24 tional protections afforded a “person” under
25 the United States Constitution. Partial-birth

1 abortions involve the killing of a child that is in
2 the process, in fact mere inches away from, be-
3 coming a “person”. Thus, the government has
4 a heightened interest in protecting the life of
5 the partially-born child.

6 (I) This, too, has not gone unnoticed in
7 the medical community, where a prominent
8 medical association has recognized that partial-
9 birth abortions are “ethically different from
10 other destructive abortion techniques because
11 the fetus, normally twenty weeks or longer in
12 gestation, is killed outside of the womb”. Ac-
13 cording to this medical association, the “‘par-
14 tial birth’ gives the fetus an autonomy which
15 separates it from the right of the woman to
16 choose treatments for her own body”.

17 (J) Partial-birth abortion also confuses the
18 medical, legal, and ethical duties of physicians
19 to preserve and promote life, as the physician
20 acts directly against the physical life of a child,
21 whom he or she had just delivered, all but the
22 head, out of the womb, in order to end that life.
23 Partial-birth abortion thus appropriates the ter-
24 minology and techniques used by obstetricians
25 in the delivery of living children—obstetricians

1 who preserve and protect the life of the mother
2 and the child—and instead uses those tech-
3 niques to end the life of the partially-born child.

4 (K) Thus, by aborting a child in the man-
5 ner that purposefully seeks to kill the child
6 after he or she has begun the process of birth,
7 partial-birth abortion undermines the public’s
8 perception of the appropriate role of a physician
9 during the delivery process, and perverts a
10 process during which life is brought into the
11 world, in order to destroy a partially-born child.

12 (L) The gruesome and inhumane nature of
13 the partial-birth abortion procedure and its dis-
14 turbing similarity to the killing of a newborn in-
15 fant promotes a complete disregard for infant
16 human life that can only be countered by a pro-
17 hibition of the procedure.

18 (M) The vast majority of babies killed dur-
19 ing partial-birth abortions are alive until the
20 end of the procedure. It is a medical fact, how-
21 ever, that unborn infants at this stage can feel
22 pain when subjected to painful stimuli and that
23 their perception of this pain is even more in-
24 tense than that of newborn infants and older
25 children when subjected to the same stimuli.

1 Thus, during a partial-birth abortion procedure,
2 the child will fully experience the pain associ-
3 ated with piercing his or her skull and sucking
4 out his or her brain.

5 (N) Implicitly approving such a brutal and
6 inhumane procedure by choosing not to prohibit
7 it will further coarsen society to the humanity
8 of not only newborns, but all vulnerable and in-
9 nocent human life, making it increasingly dif-
10 ficult to protect such life. Thus, Congress has
11 a compelling interest in acting—indeed it must
12 act—to prohibit this inhumane procedure.

13 (O) For these reasons, Congress finds that
14 partial-birth abortion is never medically indi-
15 cated to preserve the health of the mother; is in
16 fact unrecognized as a valid abortion procedure
17 by the mainstream medical community; poses
18 additional health risks to the mother; blurs the
19 line between abortion and infanticide in the kill-
20 ing of a partially-born child just inches from
21 birth; and confuses the role of the physician in
22 childbirth and should, therefore, be banned.

23 **SEC. 3. PROHIBITION ON PARTIAL-BIRTH ABORTIONS.**

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

1 **“CHAPTER 74—PARTIAL-BIRTH**
2 **ABORTIONS**

“Sec.

“1531. Partial-birth abortions prohibited.

3 **“§ 1531. Partial-birth abortions prohibited**

4 “(a) Any physician who, in or affecting interstate or
5 foreign commerce, knowingly performs a partial-birth
6 abortion and thereby kills a human fetus shall be fined
7 under this title or imprisoned not more than 2 years, or
8 both. This subsection does not apply to a partial-birth
9 abortion that is necessary to save the life of a mother
10 whose life is endangered by a physical disorder, physical
11 illness, or physical injury, including a life-endangering
12 physical condition caused by or arising from the pregnancy
13 itself. This subsection takes effect 1 day after the date
14 of enactment of this chapter.

15 “(b) As used in this section—

16 “(1) the term ‘partial-birth abortion’ means an
17 abortion in which—

18 “(A) the person performing the abortion
19 deliberately and intentionally vaginally delivers
20 a living fetus until, in the case of a head-first
21 presentation, the entire fetal head is outside the
22 body of the mother, or, in the case of breech
23 presentation, any part of the fetal trunk past
24 the navel is outside the body of the mother for

1 the purpose of performing an overt act that the
2 person knows will kill the partially delivered liv-
3 ing fetus; and

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

7 “(2) the term ‘physician’ means a doctor of medicine
8 or osteopathy legally authorized to practice medicine and
9 surgery by the State in which the doctor performs such
10 activity, or any other individual legally authorized by the
11 State to perform abortions: *Provided, however,* That any
12 individual who is not a physician or not otherwise legally
13 authorized by the State to perform abortions, but who nev-
14 ertheless directly performs a partial-birth abortion, shall
15 be subject to the provisions of this section.

16 “(c)(1) The father, if married to the mother at the
17 time she receives a partial-birth abortion procedure, and
18 if the mother has not attained the age of 18 years at the
19 time of the abortion, the maternal grandparents of the
20 fetus, may in a civil action obtain appropriate relief, unless
21 the pregnancy resulted from the plaintiff’s criminal con-
22 duct or the plaintiff consented to the abortion.

23 “(2) Such relief shall include—

1 “(A) money damages for all injuries, psycho-
2 logical and physical, occasioned by the violation of
3 this section; and

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

6 “(d)(1) A defendant accused of an offense under this
7 section may seek a hearing before the State Medical Board
8 on whether the physician’s conduct was necessary to save
9 the life of the mother whose life was endangered by a
10 physical disorder, physical illness, or physical injury, in-
11 cluding a life-endangering physical condition caused by or
12 arising from the pregnancy itself.

13 “(2) The findings on that issue are admissible on that
14 issue at the trial of the defendant. Upon a motion of the
15 defendant, the court shall delay the beginning of the trial
16 for not more than 30 days to permit such a hearing to
17 take place.

18 “(e) A woman upon whom a partial-birth abortion is
19 performed may not be prosecuted under this section, for
20 a conspiracy to violate this section, or for an offense under
21 section 2, 3, or 4 of this title based on a violation of this
22 section.”.

23 (b) CLERICAL AMENDMENT.—The table of chapters
24 for part I of title 18, United States Code, is amended by

1 inserting after the item relating to chapter 73 the fol-

2 lowing new item:

“74. Partial-birth abortions 1531”.

Calendar No. 19

108TH CONGRESS
1ST SESSION

S. 3

A BILL

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