

Unconstitutional Assault on the Right to Choose: Federal Abortion Ban Is an Affront to Women and to the U.S. Supreme Court

On June 29, 2000, in *Stenberg v. Carhart*, 530 U.S. 914 (2000), the U.S. Supreme Court held that Nebraska's sweeping ban on abortion—misleadingly labeled a ban on so-called "partial-birth abortion"—was unconstitutional. The Center for Reproductive Rights represented LeRoy Carhart, M.D., the Nebraska physician who challenged the ban. The Court's decision exposed the Nebraska ban and the numerous, similar statutes that had been enacted across the country as unconstitutional, deceptive and extreme attempts to outlaw abortion even early in pregnancy.

In *Stenberg v. Carhart*, a case successfully litigated by the Center for Reproductive Rights, the Court first found that the ban does not prohibit only one type of abortion procedure, but instead outlaws several methods, including the safest and "most commonly used method for performing pre-viability second trimester abortions," *Carhart*, 530 U.S. at 945, and therefore constituted an undue burden on women's right to choose. Second, the Court ruled that any ban on methods of abortion must provide an exception for women's health, and also struck down the Nebraska law for failing to include such an exception. The Court noted that "a State may promote but not endanger a woman's health when it regulates the methods of abortion" and that "the absence of a health exception will place women at an unnecessary risk of tragic health consequences." *Carhart*, 530 U.S. at 931, 937.

After a two-year lull, Congress again began moving forward in 2002 with a similarly unconstitutional, deceptive and extreme abortion ban, which was passed by Congress in October 2003 and signed by President George W. Bush on November 5, 2003. The new law contains the same constitutional flaws as the statute struck down in *Carhart*, and defies the Court's ruling on both grounds: it prohibits more than one procedure including the safest and most commonly used abortion technique in the second trimester, and it contains no health exception. This ban, which has already been exposed as a sham by the U.S. Supreme Court, should be seen for what it is: an inflammatory attempt to criminalize abortions and to re-ignite an anti-abortion campaign to severely erode *Roe v. Wade*.

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I. The History of So-Called “Partial-Birth Abortion” Bans

Since 1995, anti-choice fringe groups have waged a campaign to eliminate the right to abortion, as established in the landmark Supreme Court case, *Roe v. Wade*.¹ As part of their campaign, these organizations have worked to enact so-called “partial-birth abortion” bans throughout the country on both the state and federal level. These bans are unconstitutional, deceptive and extreme measures aimed at making abortion virtually unattainable for women. Falsely touted as a ban on one particular method of post-viability abortion used late in pregnancy, these laws actually represent an attempt to criminalize numerous abortion procedures including the safest and most commonly used pre-viability abortion methods – even early in pregnancy.

In June 2000 in *Stenberg v. Carhart*,² a case brought by Center for Reproductive Rights, the U.S. Supreme Court struck down Nebraska’s abortion ban, which was similar to laws that had been enacted in 30 other states. The Court ruled that Nebraska’s ban was unconstitutional because it failed to contain a health exception and posed an “undue burden” on a woman’s right to choose. The Court’s ruling had the effect of rendering invalid similar laws throughout the country and exposed these bans for what they are: deceptive and extreme attempts to outlaw the safest and most common methods of pre-viability abortion.

On June 19, 2002, however, anti-choice forces ignored this crucial Supreme Court ruling and introduced a new federal abortion ban in Congress (H.R. 4965).³ Sweeping through the House of Representatives in just five weeks, the bill was passed on July 24, 2002 by a vote of 274-151, but was not considered in the Senate. Undeterred, in February 2003, anti-choice forces reintroduced this bill in the 108th Congress, known as the so-called “Partial-Birth Abortion Ban Act of 2003” (H.R. 760, S. 3). The bill was signed into law by President George W. Bush on November 5, 2003. This new ban suffers from the same fatal flaws and constitutional defects as the earlier versions. Nevertheless, the anti-choice congressional leadership and President Bush were determined to enact this legislation criminalizing numerous pre-viability abortion methods, thereby legislating the first-ever federal ban on abortion.

Once the bill was passed by both the House and Senate, and before the president signed it into law, the Center for Reproductive Rights immediately filed a challenge to the new law in Nebraska federal court on behalf of Dr. LeRoy Carhart, the lead plaintiff in the U.S. Supreme Court case *Stenberg vs. Carhart*.

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The Mounting Campaign to Pass a Federal Abortion Ban

- 1996 – The U.S. Congress passed the first nationwide ban on abortion, which was vetoed by President Clinton. Although abortion foes were able to override the President’s veto in the House, the Senate sustained the President’s action and prevented the act from becoming law.
- 1997 – Congress passed a slightly amended version of the law, which was immediately vetoed by President Clinton.
- 1998 – Once again, the House overrode the President’s veto and the Senate sustained the President’s action.
- 1999-2000 – The Senate and House passed the 1997 version of the ban. However, the bill died with the end of the congressional session.
- June 2000 – In *Stenberg v. Carhart*, a case brought by Center for Reproductive Rights, the U.S. Supreme Court struck down a Nebraska abortion ban, which had been modeled on the federal ban.
- July 2002 – The House passed a new abortion ban that failed to remedy the flaws in the statute found unconstitutional in *Stenberg v. Carhart*. With the end of the congressional session, the bill died.
- February 2003 – The new federal abortion ban was reintroduced in both the House and Senate.
- November 2003 – President George W. Bush signs an unconstitutional ban on so-called “partial-birth” abortions—the country’s first-ever federal abortion ban—into law. The Center for Reproductive Rights challenges the bill in federal court on behalf of Dr. LeRoy Carhart of Nebraska and three other doctors.

As Justice Breyer states in the majority opinion, “Even if the statute’s basic aim is to ban D & X, its language makes clear that it also covers a much broader category of procedures.” *Stenberg v. Carhart*, 530 U.S. 914, 939 (2000).

II. The Abortion Bans Are Unconstitutional

A woman’s right to terminate her pregnancy is firmly rooted in the Constitution, as recognized by *Roe v. Wade* and its progeny. *Roe*’s essential holding that a woman may terminate her pregnancy prior to viability, and that her health must prevail throughout pregnancy, even after the point of viability, has been repeatedly reaffirmed by the Supreme Court.⁴ For example, in *Planned Parenthood v. Casey*,⁵ the Supreme Court held that “[t]he woman’s right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce.”⁶ So-called “partial-birth abortion” statutes are a direct attack on this firmly established right.

A. TWO GROUNDS FOR UNCONSTITUTIONALITY: UNDUE BURDEN AND LACK OF HEALTH EXCEPTION

Like the new federal abortion ban, the statute under consideration in *Stenberg v. Carhart* was a broadly worded abortion ban that would have criminalized numerous abortion procedures, including the most common method of abortion used early in the second

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trimester. In striking down the law, the Court's majority relied on "established principles" of Supreme Court jurisprudence affirming a woman's right to choose,⁷ finding that the law violated the U.S. Constitution "for at least two independent reasons":⁸

- The abortion ban posed an undue burden on the right to choose an abortion in the second trimester because it banned several procedures including the safest and most common method; and
- The abortion ban failed to contain a health exception.

1. The Nebraska Law Posed an Undue Burden on the Right to Choose Pre-viability Abortion in the Second Trimester

The Court found that the Nebraska law would criminalize more than one abortion procedure, including the safest and most commonly used method of second-trimester abortion, and therefore constituted an undue burden on women's right to obtain an abortion. The proponents of the Nebraska law claimed that it banned a particular second trimester abortion procedure known as dilation and extraction (D & X).⁹ However, the Court found that Nebraska's law outlawed not only the D & X technique, it also prohibited the commonly used pre-viability second-trimester abortion method, dilation and evacuation (D & E),¹⁰ of which D & X is a variant. The Court found that "[e]ven if the statute's basic aim is to ban D & X, its language makes clear that it also covers a much broader category of procedures."¹¹

Under *Casey*, states are free to regulate a woman's decision to terminate a pregnancy unless the regulation poses an "undue burden" on her right to choose. The Court held that the Nebraska law would impose "an undue burden on a woman's ability' to choose a D & E abortion, thereby unduly burdening the right to choose itself."¹² The Court concluded by stating the following:

In sum, using this law some present prosecutors and future Attorneys General may choose to pursue physicians who use D & E procedures, the most commonly used method for performing pre-viability second trimester abortions. All those who perform abortion procedures using that method must fear prosecution, conviction, and imprisonment. The result is an undue burden upon a woman's right to make an abortion decision. We must consequently find the statute unconstitutional.¹³

Because the abortion ban would criminalize not just one limited abortion procedure, but also covers a much broader category of procedures, the U.S. Supreme Court struck down the ban as unconstitutional.

2. Any Abortion Method Ban Must Contain a Health Exception.

The Court also struck down Nebraska's law because it failed to contain a health exception. In *Carhart*, the Court reaffirmed the importance of the health exception in abortion jurisprudence, emphasizing that the government "may promote but not endanger a woman's health when it regulates the methods of abortion."¹⁴ The Court noted that both *Roe* and *Casey* "make clear that a risk to a woman's health is the same whether it happens to arise from regulating a particular method of abortion, or from barring abortion entirely,"¹⁵ and that "the absence of a health exception will place women at an unneces-

As Justice Ginsburg states in her concurrence, "A state regulation that 'has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus' violates the Constitution. Such an obstacle exists if the State stops a woman from choosing the procedure her doctor 'reasonably believes will best protect the woman in [the] exercise of [her] constitutional liberty.'" *Carhart*, 530 U.S. at 952 (Ginsburg, J., concurring).

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sary risk of tragic health consequences.”¹⁶ The Court noted that “[o]ur cases have repeatedly invalidated statutes that in the process of regulating the *methods* of abortion, imposed significant health risks,”¹⁷ and found that “where substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women’s health, *Casey* requires the statute to include a health exception[.]”¹⁸ It therefore struck the law down on the basis of this constitutional defect.

For any abortion ban to be constitutional, it must contain a health exception. For example, the Court found that because D & X may be the safest abortion method available to some women,¹⁹ even a ban that was limited to the D & X procedure must contain an exception when the procedure is “necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”²⁰ The Court stated “a statute that altogether forbids D & X creates a significant health risk. The statute consequently must contain a health exception.”²¹ Consequently, since the Nebraska ban contained no health exception for the abortion methods it prohibited, it was struck down as unconstitutional.

As Justice Breyer stated in his majority opinion, “where substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women’s health, *Casey* requires the statute to include a health exception.” *Stenberg v. Carhart*, 530 U.S. 914, 938 (2000).

B. THE NEW FEDERAL ABORTION BAN HAS THE SAME OLD FLAWS

Any restriction on abortion must satisfy these two requirements set forth by the Supreme Court. Yet the new federal abortion ban flagrantly defies the Court’s ruling.

1. The Federal Bill is Similar to the Nebraska Law

The new federal ban is similar to the Nebraska law²² struck down in *Carhart*. The federal law states in part:

Partial-birth abortions prohibited

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

(b) As used in this section—

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

(A) the person performing the abortion deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and

(B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus;²³

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Like the Nebraska law, the federal ban fails to limit the stage of pregnancy to which the law's provisions apply, so the ban criminalizes abortions throughout pregnancy (*not* just post-viability or "late term" abortions, as the bill's sponsors often claim). Like the Nebraska law, the federal ban fails to limit its prohibitions to abortions involving an "intact" fetus, fails to explicitly exclude the D & E technique or the suction curettage abortion method from the law's prohibitions, and fails to include definitions of key terms such as "living" or "completion of delivery;" therefore, it is broad enough to criminalize numerous safe abortion procedures (*not* just one abortion procedure, as the bill's sponsors misleadingly imply). Like the Nebraska law, the federal ban also fails to include the constitutionally mandated health exception.²⁴ For these reasons, as discussed in greater detail below, the federal ban must be struck down as unconstitutional for the same reasons as the Nebraska law in *Carhart*.

2. The Federal Ban Poses an Undue Burden

In addition to banning the D & X method of abortion, the definition of "partial-birth abortion" in the federal law, like that contained in the Nebraska bill, is broad enough also to encompass, at the very least, the D & E procedure, which is the safest and most common method of abortion used in the second trimester.²⁵ Indeed, the language used in the federal law is substantially similar to the language that was struck down in *Carhart* for posing an undue burden. As the Court held in *Carhart*, "we can find no difference, in terms of *this* statute, between the D & X procedure as described and the D & E procedure as it might be performed."²⁶ Furthermore, under the revised wording of the new federal law, other safe methods of abortion are banned.

Moreover, the sponsors of the federal bill ignored clear instructions from the Supreme Court showing how a statute could be written to exclude the D & E from its reach. They neither provided a clear exception for D & E, nor "track[ed] the medical differences between D & E and D & X," as suggested by the Court.²⁷ One of the witnesses *supporting* the 2002 federal bill confirmed in her testimony at the House Judiciary Subcommittee on the Constitution hearing that the legislation is not limited to a ban on only one procedure, but is intended to cover others as well.²⁸

Like the Nebraska bill, the federal ban imposes severe criminal penalties on doctors for performing D & E's, including fines and imprisonment.²⁹ Enactment of a federal abortion ban will effectively result in a national ban on D & E's due to doctors' justifiable fears of prosecution and imprisonment. Moreover, the statute's broad reach as well as the vagueness of key statutory terms could also have a significant chilling effect even beyond the reach of the statute. Therefore, in addition to creating an unprecedented intrusion into medical practice, the federal ban imposes an undue burden on a woman's right to choose to terminate her pregnancy.

3. The Federal Ban Lacks a Constitutionally Mandated Health Exception

As explained above, the Supreme Court has consistently held that any ban on abortion methods must contain an exception to preserve women's health. Even Attorney General John Ashcroft recently conceded in a brief filed by the Justice Department that some type

**"[T]he absence of a health exception will place women at an unnecessary risk of tragic health consequences."
Carhart, 530 U.S. at 937.**

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of health exception is required for legislation banning abortions.³⁰ The new federal ban, in a direct challenge to this most fundamental principle of abortion jurisprudence, fails to provide any health exception.

Substituting the political will of Congress in place of the medical judgment of doctors, the sponsors acknowledge in the text of the federal bill that it does not include a health exception, claiming that the abortion methods banned by the legislation are “never necessary to preserve the health of a woman.”³¹ Furthermore, in the 2002 markup of the bill, the committee rejected two amendments that would have permitted women whose health was at risk to undergo the banned procedures.³² Instead, the ban contains only a limited *life* exception, allowing an abortion when it is necessary to save a woman’s life, but even then only when the woman’s life is endangered by a *physical* condition (which also calls into question the constitutionality of the life exception as written in the bill):

This subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.³³

In refusing to include a health exception, the sponsors of the federal abortion ban inaccurately argue that Congress is not bound to follow the Supreme Court’s ruling in *Carhart*. They claim that the *Carhart* decision was based on “very questionable findings,”³⁴ asserting that Congress is better equipped to assess the evidence since it held “extensive” hearings on the subject.³⁵ Claiming that congressional findings demonstrate that a health exception is unnecessary, they argue that the Supreme Court should accord “great deference”³⁶ to these findings. However, as demonstrated in the next section, Congress does not have the power to overturn decisions of the Supreme Court by passing a bill that contains contrary Congressional findings.

4. A Renegade Congress Flouts the U.S. Supreme Court

In the new law, the sponsors claim that the Supreme Court must defer to Congress’s legal conclusion that a health exception is unnecessary. Not only is this untrue, but such a rule would violate the principle of separation of powers underlying our tripartite system of government. As the Supreme Court noted recently in *United States v. Morrison*:

Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury*, that “[I]t is emphatically the province and duty of the judicial department to say what the law is.”³⁷

In *Morrison*, the Court held that Congress’s legal conclusions – based on substantial congressional findings – were unsupportable, and struck down portions of the law at issue as a result. Similarly, Congress hid behind legislative “findings” to support a law that is clearly contrary to Supreme Court precedent. Congress cannot simply ignore a legal ruling it dislikes by adopting conflicting legislative “findings.”

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a. Federal Courts Do Not Blindly Defer to Congressional Fact Findings, But Must Conduct an Independent Review of Facts Bearing on an Issue of Constitutional Law

The Court has repeatedly held, including in cases relied upon by the bill’s sponsors, that whatever deference is accorded legislative findings does not “insulate[] [those findings] from judicial review,” nor does it “foreclose [the judiciary’s] independent judgment of the facts bearing on an issue of constitutional law.”³⁸ Rather, “[i]t is . . . a ‘permanent and indispensable feature of our constitutional system’ that ‘the federal judiciary is supreme in the exposition of the law of the Constitution.’”³⁹ As Chief Justice Burger has explained:

A legislature appropriately inquires into and may declare the reasons impelling legislative action but the judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and if so whether the legislation is consonant with the Constitution.⁴⁰

b. The Supreme Court Has Rejected Congressional Fact Findings

The Supreme Court has rejected congressional findings or found them inadequate to inform a constitutional inquiry in many cases. For example, in a case relied on by the sponsors themselves, *Turner Broadcasting System Inc. v. F.C.C.*,⁴¹ the plaintiffs challenged a federal law mandating that cable channels carry local broadcasting stations. Even though Congress had held hearings over a *three-year* period prior to passage of the law, the Court found a “paucity of evidence” and many “deficienc[ies] in the record.”⁴² Rather than blindly deferring to Congress, the Court remanded the case to the lower court – the same forum that the sponsors now find inadequate – for further factual findings.

Similarly, in *Morrison*, the Court rejected congressional findings outright. The Violence Against Women Act (VAWA) was enacted after Congress held hearings over a *four-year* period on the impact of domestic violence on interstate commerce. Despite the “numerous” Congressional findings that domestic violence impacted interstate commerce,⁴³ the Court struck down the civil remedy provision of VAWA, noting that “[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.”⁴⁴

As these cases demonstrate, the courts have the power and the duty to independently assess evidence and have no obligation to defer to congressional findings. As Justice Clarence Thomas has noted,

We know of no support...for the proposition that if the constitutionality of a statute depends in part on the existence of certain facts, a court may not review [Congress’s] judgment that the facts exist. If [Congress] could make a statute constitutional simply by ‘finding’ that black is white or freedom, slavery, judicial review would be an elaborate farce. At least since *Marbury v. Madison*, that has not been the law.⁴⁵

Thus, the sponsors of the federal abortion ban are clearly wrong in their assertion that the courts will adjudicate the bill differently because it contains congressional findings.

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c. Similar Attempts by Congress to Overturn Supreme Court Precedents Have Failed

There have been several instances in the past where congressional attempts to overturn Supreme Court precedents have failed. For example, Congress passed the Religious Freedom Restoration Act (RFRA) in response to an earlier Supreme Court decision.⁴⁶ As in the case with the new federal abortion ban, Congress held separate hearings to assess the issues and made independent findings prior to enacting the law. In striking down RFRA, the Supreme Court held that Congress “has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation.”⁴⁷ The Court further held that “The power to interpret the Constitution in a case or controversy remains in the Judiciary”⁴⁸ and “RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.”⁴⁹

Similarly, Congress attempted to overturn the requirements set out by the Supreme Court in *Miranda v. Arizona*⁵⁰ by enacting a new “voluntariness” standard in their place. In *Dickerson v. United States*,⁵¹ the Supreme Court reviewed the law, and in striking it down held that “*Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress,”⁵² and “Congress may not legislatively supersede our decisions interpreting and applying the Constitution.”⁵³

Here, again, Congress is attempting to overturn Supreme Court precedent on a matter of constitutional law by enacting a law that clearly violates the Supreme Court’s ruling. As in those cases, Congress has overstepped its bounds – the federal abortion ban does not pass constitutional muster.

III. The Abortion Bans Are Deceptive

Anti-choice extremists have propagated numerous myths about the abortion bans. The new federal statute is part of a deceptive nationwide campaign to eviscerate the key protections guaranteed to American women by *Roe*, *Casey* and *Carhart*. Contrary to the way its proponents characterized the legislation, its prohibitions are limited neither to one medical procedure nor to post-viability abortions late in pregnancy.

A. THE ABORTION BANS ARE NOT LIMITED TO ONLY ONE PROCEDURE

First, despite a deceptive public strategy that has propagated the myth that these bans target a single, specific abortion procedure, the federal ban is not limited to one specific procedure. “Partial-birth abortion” is a fabricated term that anti-choice activists concocted in an attempt to make almost all abortions illegal. There is no medical procedure known as a “partial-birth abortion.” Anti-choice extremists created the term as a smoke screen to divert the public’s attention away from the true scope of the law, which makes most current second trimester abortions illegal.

In the case of Nebraska, proponents of the statute attempted to convince the Supreme Court that the ban was limited to D & X. But the Court noted in *Carhart* “there is no language in the statute that supports it.”⁵⁴ In fact, the Nebraska legislature rejected an amendment that would have limited the law to only one narrowly defined procedure. As discussed above, the federal ban similarly fails to limit the ban to the D & X procedure

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and exacerbates the vagueness of the bill's proscriptions by including no less than two different descriptions of what is banned.⁵⁵

B. THE ABORTION BANS ARE NOT LIMITED TO POST-VIABILITY ABORTIONS LATE IN PREGNANCY

Another myth is that these laws ban post-viability abortions late in pregnancy. However, neither the state laws nor the federal law contain any reference to the stage of pregnancy to which they apply. The vast majority of states already have laws prohibiting most post-viability abortions, and most of them have been in place since the early 1970s. These laws generally adhere to fundamental constitutional principles establishing that women have the right to chose abortion pre-viability, but that states may more strictly regulate and even forbid abortions after viability, except where necessary to preserve the woman's health or life.

Therefore, the new federal abortion ban primarily impacts the legality of *pre-viability* abortions—although proponents of the bill deliberately confuse this issue. In fact, Rep. Steve Chabot, the lead sponsor of the bill, has admitted that the legislation is primarily intended to ban pre-viability abortions.⁵⁶ Furthermore, the committee considering H.R. 4965 in 2002 rejected an amendment that would have limited the law to post-viability abortions, again exposing their true intentions.⁵⁷

IV. The Abortion Bans Are Extreme

The abortion bans are extreme measures promoted by anti-choice politicians and advocacy groups to eliminate a woman's access to the safest methods of abortion. Because the bans are so extreme, medical organizations and the American public oppose them.

A. THE ABORTION BAN PROHIBITS THE SAFEST METHODS FOR MANY WOMEN

The nationwide legalization of abortions after *Roe* led to dramatic health advances for women and substantial decreases in the total number of abortion-related deaths and complications. Between 1973 (the year that *Roe* was decided) and 1985, the number of abortion-related deaths dropped eight-fold: from 3.3 deaths per 100,000 in 1973 to 0.4 deaths per 100,000 in 1985. Similarly, abortion-related complications resulting in hospitalization fell sharply during the 1970s, with the steepest drop following *Roe* in 1973.⁵⁸ The federal ban produces a significant rollback of these health gains.

As noted earlier, the new law bans D & E—the safest second-trimester abortion method for many women that accounts for nearly all abortions performed from 12 to 20 weeks.⁵⁹ The D & X technique, which is also prohibited under the federal ban, is the safest abortion method for some women,⁶⁰ and the U.S. Supreme Court has recognized the body of medical opinion supporting this fact.⁶¹ In fact, in *Carhart*, the only expert witness testifying *in favor of* Nebraska's law and deemed credible by the District Court, conceded that D & X could well be safer than other D & E variants.⁶²

Furthermore, lower courts throughout the country have reviewed a wide range of medical evidence and concluded that D & X is safe. The factual records in *Carhart* and many other cases demonstrate that D & X is in fact the safest and best abortion technique in

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some cases. Though acknowledging the lack of statistical studies comparing the safety of the D & X technique with other abortion methods, every federal court in the country, with the exception of one, has agreed that D & X is a safe procedure that may well be safer for women in certain situations.⁶³

A ban on D & E abortions, including the D & X variant, forces women to undergo riskier and unnecessary medical procedures and deprive many women of access to the method of abortion that would be safest in their own individual circumstances. The federal ban harms women's health, renders abortions more dangerous, and infringes upon women's right to privacy.⁶⁴

B. THE FEDERAL ABORTION BAN REFLECTS THE SPONSORS' EXTREMISM

In addition to drafting the extreme language contained within the federal bill that disregards women's safety, the sponsors also pushed the bill through the U.S. House of Representatives in an extreme fashion, sweeping through the House in a five-week whirlwind during the summer of 2002. It was introduced on June 19, 2002. On July 10, 2002, the House Subcommittee on the Constitution held a hearing on the bill, and on July 11, 2002, the Subcommittee reported the bill favorably by a vote of 8-3. On July 17, 2002, the House Committee on the Judiciary marked up the bill and reported it favorably out of committee by a vote of 20-8. On July 23, 2002, the House Rules Committee reported the bill to the House of Representatives under a closed rule, forbidding any amendments to the bill during its consideration by the full House. On July 24, 2002, the bill passed the House by a vote of 274-151. A motion to recommit with instructions to the Judiciary Committee failed 187-241.

The House Judiciary Committee considered and rejected numerous amendments that would have made the legislation less severe, including proposals that would:

- provide an exception for abortions “performed before fetal viability, or... performed after fetal viability where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother;”
- provide an exception for abortions “performed before viability where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother, or to such a procedure performed after fetal viability if it is to protect the mother from serious, adverse physical health consequences;”
- strike the civil cause of action against physicians and women undergoing an abortion that falls within the bill's definition;
- strike the congressional findings of fact as unsubstantiated;
- ban all post-viability abortions except those abortions that in the medical judgment of the attending physician were necessary to preserve the life of the woman or to avert serious adverse health consequences to the woman; and

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- strike the penalties for performing an abortion that falls within the bill’s definition.

By rejecting these amendments, the bill’s proponents demonstrated a complete disregard for women’s health, as well as a desire to supplant the sound medical judgment of doctors with the will of politicians in Congress.

The bill’s legislative history demonstrates that its sponsors were intent on adopting a broad ban on pre-viability abortion methods with little, if any, regard for the health of pregnant women.⁶⁵ Representative Steve Chabot (R-OH), a primary sponsor of the bill, acknowledged the bill’s impact on pre-viability abortions during the markup when he claimed that “limiting the prohibition to only viable fetuses would exempt the vast majority” of abortions that would be criminalized under this legislation.⁶⁶

Furthermore, proponents of the ban maintained that once a woman has decided to have an abortion, politicians in Congress can dictate to a woman what medical procedures she can and cannot undergo, regardless of the medical judgment of her doctor. Representative Randy Forbes (R-VA) acknowledged that the bill would not prevent any abortions from occurring, but instead that its intent is to limit the types of abortion methods that are available to women and their physicians: “This bill is not about having an abortion. It’s about whether or not you can have a partial-birth abortion”—a fictitious term invented by anti-choice forces. Moreover, Representative Mike Pence (R-IN) suggested that abortions should be performed by caesarian section instead less invasive techniques.⁶⁷ These statements clearly indicate that the intent of the ban is to force women to have more risky procedures by criminalizing the safest abortion methods for many women, and demonstrates the sponsors’ contempt for women who have abortions.

C. MEDICAL ORGANIZATIONS OPPOSE THE ABORTION BANS

Abortion bans interfere with doctors’ medical discretion, create severe health risks for women and impose strict penalties on doctors, including imprisonment and fines. For these reasons, major U.S. medical organizations have publicly opposed these bills.

The American College of Obstetricians and Gynecologists (ACOG), representing over 90 percent of all ob-gyn specialists, has rejected the abortion bans as “an inappropriate, ill-advised and dangerous intervention into medical decision making.”⁶⁸ ACOG reiterated its opposition to the bans in 2002, stating:

- “[T]here are circumstances under which this type of procedure [included within the abortion ban] would be the most appropriate and safest procedure to save the life or health of a woman.”
- “This bill violates a fundamental principle at the very heart of the doctor-patient relationship: that the doctor, in consultation with the patient, based on that patient’s individual circumstances, must choose the most appropriate method of care for the patient.”
- “It fails to use recognized medical terminology and fails to define explicitly the prohibited medical techniques it criminalizes.”⁶⁹

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The American Medical Women's Association (AMWA) also opposes the abortion bans, stating that it is "gravely concerned with governmental attempts to legislate medical decision-making through measures that do not protect a woman's physical and mental health, including future fertility, or fail to consider other pertinent issues, such as fetal abnormalities."⁷⁰

The American Medical Association (AMA) initially lent support to a 1997 federal bill that was defeated; however, an internal audit indicated that the organization "blundered" and that this support was politically, not medically, motivated. The AMA has declined to support subsequent abortion bans.⁷¹

Finally, five medical groups, the American College of Obstetricians and Gynecologists, the American Nurses Association, the American Medical Women's Association, Physicians for Reproductive Choice and Health, and the National Abortion Federation, signed onto an *amicus curie* brief in *Carhart* arguing against the Nebraska ban. The Supreme Court relied on their medical expertise when rendering the *Carhart* decision.⁷²

D. THE AMERICAN PUBLIC OPPOSES THE ABORTION BANS

In addition to medical groups, the American public has flatly rejected these bans as well. Indeed, after voters in Colorado, Maine, and Washington, were educated about the abortion bans, ballot initiatives on this issue were defeated in all three states.⁷³ No other states have included abortion bans on a ballot initiative since those initiatives were rejected.

Additionally, according to Center for Reproductive Right's 1998 poll of registered voters:

- 77% were seriously concerned that the abortion bans are extreme, allowing no exceptions for serious harm to a woman's health;
- 69% were seriously concerned that the abortion bans are deceptive, banning the safest and most commonly used abortion procedures; and
- 68% were concerned that courts have ruled that the abortion bans are unconstitutional.⁷⁴

V. Conclusion

The U.S. Supreme Court has already struck down legislation containing the exact same constitutional flaws contained in the federal version of the abortion ban. It is a violation of the public trust for elected officials to pass laws that are known to be unconstitutional. Through this new law, Congress has violated fundamental principals of separation of powers upon which this nation was founded, in unabashedly contravening direct U.S. Supreme Court precedent. The federal abortion ban is the latest attempt to attack a woman's basic right to choose, and would force women to undergo abortion procedures that are more dangerous. This ploy must be recognized as an unconstitutional, deceptive and extreme attempt to violate women's constitutional rights.

For more information about *Stenberg v. Carhart* and the federal abortion ban, visit the Center for Reproductive Rights' website at www.reproductiverights.org.

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Endnotes

- 1 410 U.S. 113 (1973) (“*Roe*”).
- 2 530 U.S. 914 (2000) (“*Carhart*”).
- 3 Partial Birth Abortion Ban Act of 2002, H.R. 4965, 107th Cong. (2d Sess. 2002).
- 4 See generally, *Thornburgh v. American College of Obstetricians*, 476 U.S. 747, 774 (1986) (“Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman’s decision – with the guidance of her physician and within the limits specified in *Roe* – whether to end her pregnancy. A woman’s right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.”); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 427-28 (1983) (“[i]n *Roe v. Wade*, the Court held that the ‘right of privacy,...founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action,...is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy. Although the Constitution does not specifically identify this right, the history of this Court’s constitutional adjudication leaves no doubt that ‘the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution.’ Central among these protected liberties is an individual’s ‘freedom of personal choice in matters of marriage and family life.’ The decision in *Roe* was based firmly on this long-recognized and essential element of personal liberty.”).
- 5 505 U.S. 833 (1992) (“*Casey*”).
- 6 See *id* at 871.
- 7 The Court stated “...aware that constitutional law must govern a society whose different members sincerely hold directly opposing views, and considering the matter in light of the Constitution’s guarantees of fundamental individual liberty, this Court, in the course of a generation, has determined and then redetermined that the Constitution offers basic protection to the woman’s right to choose. We shall not revisit those legal principles. Rather, we apply them to the circumstances of this case.” See *Carhart* at 921, citing *Roe* and *Casey* (citations omitted). The Court then proceeded to discuss the “[t]hree established principles [that] determine the issue before us.” See *id*.
- 8 See *id* at 930.
- 9 The Court found that the term “D & X” involved dilation of the cervix, conversion of the fetus to a breech position, breech extraction of the body and partial evacuation of intracranial contents. See *id* at 928, ¶ 8.
- 10 The Court found that “[t]he most commonly used procedure is called ‘dilation and evacuation’ (D & E). That procedure (together with a modified form of vacuum aspiration used in the early second trimester) accounts for about 95% of all abortions performed from 12 to 20 weeks of gestational age.” See *id* at 924, ¶ 2. Relying on an AMA report, the Court defined D & E as referring “generically to transcervical procedures performed at 13 weeks gestation or later.” See *id*, ¶ 3, and further explained that D & E involves dilation of the cervix, removal of at least some fetal tissue using nonvacuum instruments, and, after the 15th week, manipulation of fetal parts to facilitate evacuation from the uterus. See *id* at 924-25. These procedures would also be criminalized by the ban.
- 11 See *id* at 939.
- 12 See *id* at 930.
- 13 See *id* at 945-46.
- 14 See *Carhart*. at 931.
- 15 See *id*. In addition to the majority opinion in *Carhart*, three justices wrote concurring opinions. Justice O’Connor, author of *Casey*, which opened the door to pre-viability restrictions, clarified her position that any restriction, whether pre- or post-viability, “would be invalid absent a health exception.” See *id* at 948. (O’Connor, J., concurring). O’Connor also pointed to the “significant body of medical opinion” which supported the use of D & X in some instances as safest for women. See *id*.
- 16 See *id* at 937.
- 17 See *id* at 931.
- 18 See *id* at 938.
- 19 The Court in *Carhart* carefully reviewed the medical evidence in the record, noting that there was no clear medical consensus on the issue. The Court, however, found that the division of medical opinion supported, rather than undermined, the argument that a health exception was needed, since the vigorous debate between “highly qualified knowledgeable experts on both sides” indicated that there was no true consensus and that therefore there was *no* clear evidence that a health exception was *not* needed. See *id* at 937. The Court stated, “[w]here a significant body of medical opinion believes a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view, we cannot say that the presence of a different view by itself proves the contrary. Rather, the uncertainty means a significant likelihood that those who believe that D & X is a safer abortion method in certain cir-

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cumstances may turn out to be right.” See *id* at 937; see also *infra* notes 34, 61.

20 See *id* at 930, citing *Casey* at 879 (emphasis removed).

21 See *id*.

22 The Nebraska law stated, “No partial birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.” Neb. Rev. Stat. Ann. §28-328(1) (Supp. 1999). The Nebraska law defined “partial-birth abortion” as “an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery.” *Id.* at §28-326(9). It further defined this phrase to mean “deliberately and intentionally delivering into the vagina a living unborn child, or substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child.” *Id.*; see also *Carhart* at 939.

23 The full text of the operative provisions of H.R. 760 and S. 3 state:

Sec. 1531. Partial-birth abortions prohibited

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

“(b) As used in this section—

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

“(A) the person performing the abortion deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and

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

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

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

“(2) Such relief shall include—

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

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

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

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

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

24 See H.R. 760, S. 3. The federal bill also contains “intent” requirements similar to those in the Nebraska bill, requiring the physician to act “deliberately or intentionally . . . for the purpose of performing” either a “procedure,” as in the Nebraska bill, or an “overt act,” as in the federal bill, that the physician “knows” will cause fetal demise and which does cause fetal demise

25 Note that the sponsors of H.R. 760 and S. 3 have used two different descriptions of “partial-birth abortion” in the bill – the description the operative

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- definition contained in the bill is much broader than the description in the findings section. Compare §2(1) (describing breech presentation technique) with §3(a), ch. 74, §1531(b)(1)(A) (prohibiting both breech and cephalic presentation techniques). The 2002 House committee report also differs, as it interprets the legislation to “ban[] the partial-birth abortion procedure in which an intact living fetus is partially delivered until *some portion* of the fetus is outside the body of the mother before the fetus is killed and the delivery completed.” See H.R. Rep. No. 107-604 (2002), “Purpose and Summary” (emphasis added). Since the sponsors of the bill are unclear as to exactly what is criminalized by the legislation, then doctors have even more reason to be confused about what procedures may later be deemed illegal in prosecutions brought under the legislation.
- 26 See *Carhart* at 940.
- 27 See *id* at 939 (“Even if the statute’s basic aim is to ban D & X, its language makes clear that it also covers a much broader category of procedures. The language does not track the medical differences between D & E and D & X – though it would have been a simple matter, for example, to provide an exception for the performance of D & E and other abortion procedures.”).
- 28 The witness, Dr. Kathy Aultman, testified that the legislation as written “includes, *but is not limited to* D & X,” and even gave an example of another method that the law would also proscribe. *The “Partial-Birth Abortion Ban Act of 2002:” Hearing Before the Subcommittee on the Constitution of the House Comm. On the Judiciary*, 107th Cong. (2002) (Statement of Kathi A. Aultman, M.D. (emphasis added)).
- 29 See H.R. 760 and S. 3, § 1531. The federal bill also exposes women who have abortions to civil lawsuits.
- 30 Brief of Amicus Curiae United States of America, *Women’s Medical Corp. v. Taft*, (No. 01-4124) (2002).
- 31 See H.R. 760 and S. 3, §2(13).
- 32 One proposed amendment provided an exception for abortions “performed before fetal viability, or to a partial-birth abortion performed after fetal viability where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother;” and the other provided an exception for abortions “performed before viability where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother, or to such a procedure performed after fetal viability if it is to protect the mother from serious, adverse physical health consequences[.]” See H.R. Rep. No. 107-604 (2002), “Hearings.”
- 33 See H.R. 760 and S. 3, §1531(a). The inclusion of a life exception is an admission itself that the procedure is sometimes necessary; and thus it logically follows that if the procedure is sometimes necessary to save a woman’s life, then it is also sometimes necessary to protect a woman’s health.
- 34 See H.R. 760 and S. 3, § 2(7). Far from being “questionable,” the trial court’s findings in *Carhart* were based on consideration of evidence from experts on both sides of the issue, *including evidence from the congressional hearings themselves*. See *Carhart*, 530 U.S. at 929, 935. Nor was there a “dearth of evidence” in the trial court supporting the findings. See *Stenberg v. Carhart*, 11 F. Supp. 2d 1099, 1110-18 (D. Neb. 1998). Additionally, in reviewing the evidence, the Supreme Court acknowledged many of the points raised by the sponsors, such as the “division of medical opinion,” the risks of different abortion procedures, and the lack of medical studies establishing the safety of “partial-birth abortion/D & X.” *Carhart*, 530 U.S. at 926, 937. After reviewing all this evidence the Court found: “Where a significant body of medical opinion believes a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view, we cannot say that the presence of a different view by itself proves the contrary. Rather, the uncertainty means a significant likelihood that those who believe that D & X is a safer abortion method in certain circumstances may turn out to be right.” See *id* at 937.
- 35 See H.R. 760 and S. 3, §§ 2(9), (10), (11), (12), citing *Katzenbach v. Morgan*, 384 U.S. 641 (1966), *Turner Broadcasting System Inc. v. F.C.C.*, 512 U.S. 622 (1994) (“Turner I”), *Turner Broadcasting System Inc. v. F.C.C.*, 520 U.S. 180 (1997) (“Turner II”), and *City of Rome, Georgia v. United States*, 472 F. Supp. 221 (D. Colo. 1979), *aff’d*, 446 U.S. 156 (1980). Moreover, the cursory manner in which the House approached the bill in 2002 calls into question the claim that Congress is better equipped to assess the evidence since it held “extensive” hearings on the subject. See Section IV. B. of this briefing paper.
- 36 See H.R. 760 and S. 3, §§ 2(2), (8).
- 37 529 U.S. 598, 616 n.7 (2000) (quoting *United States v. Nixon*, 418 U.S. 683, 703 (1974) (quoting *Marbury v. Madison*, 1 Cranch 137, 176 (1803))).
- 38 *Turner I*, 512 U.S. 622, 666 (1994) (quoting *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989)); see also, e.g., *Landmark Communications Inc. v. Virginia*, 435 U.S. 829, 843 (1978) (“deference to a legislative finding cannot limit judicial inquiry when first amendment rights are at stake”); *Block v. Hirsch*, 256 U.S. 135,

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- 153 (1921) (“No doubt it is true that a legislative declaration of facts that are material only as the ground for enacting a rule of law. . . may not be held conclusive by the Courts”).
- 39 *Morrison*, 529 U.S. at 616 n.7 (quoting *Miller v. Johnson*, 515 U.S. 900, 922-23 (1995) (internal quotations omitted)).
- 40 *Landmark Communications*, 435 U.S. at 844.
- 41 512 U.S. 622 (1994) (“*Turner I*”).
- 42 *See id* at 667-68.
- 43 *See Morrison*, 529 U.S. at 614.
- 44 *Id* (quoting *United States v. Lopez*, 514 U.S. 549, 557 n.2 (1995)).
- 45 *Lamprecht v. FCC*, 958 F.2d 382, 392 n.2 (D.C. Cir. 1992) (per Thomas, Circuit Justice) (citations omitted).
- 46 *See Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) (holding that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling state interest).
- 47 *See City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).
- 48 *Id* at 524.
- 49 *Id* at 536.
- 50 384 U.S. 436 (1966) (“*Miranda*”).
- 51 530 U.S. 428, 435-36 (2000).
- 52 *Id* at 432.
- 53 *Id* at 437.
- 54 *See Carhart* at 918.
- 55 *See supra* note 25.
- 56 Representative Steve Chabot (R-OH), a primary sponsor of the bill, acknowledged the bill’s impact on pre-viability abortions during the markup when he claimed that “limiting the prohibition to only viable fetuses would exempt the vast majority of partial-birth abortions.” *See* H.R. Rep. No. 107-604 (2002), “Markup Transcript.”
- 57 *See id* at “Vote of the Committee.” This amendment would have banned all post-viability abortions, except those that, in the medical judgment of the attending physician, were necessary to preserve the life of the woman or to avert serious and adverse health consequences to the woman.
- 58 Council on Scientific Affairs, American Medical Association, *Induced Termination of Pregnancy Before and After Roe v. Wade*, 268 JAMA 3231, 3232, 3235 (1992).
- 59 The Court in *Carhart* noted that D & E is “[t]he most commonly used” second trimester abortion procedure, and “(together with a modified form of vacuum aspiration used in the early second trimester) accounts for about 95% of all abortions performed from 12 to 20 weeks.” *See Carhart* at 924.
- 60 It reduces instrumentation in the uterus that can cause damage to the uterus and cervix, reduces uterine or cervical perforation, prevents disseminated intravascular coagulopathy (DIC) and amniotic fluid embolus (among the most common causes of maternal mortality and complications), reduces the likelihood of retained tissue and reduces operative time which means less risk of hemorrhage, less total bleeding and less risk of infection. *See id* at 928-29.
- 61 The Court in *Carhart* found that “a significant body of medical opinion believes [D & X] may bring with it greater safety for some patients[.]” *See id* at 937.
- 62 *See Carhart v. Stenberg*, 11 F. Supp.2d 1099, 1114 -15 (D.Neb. 1998).
- 63 *See Planned Parenthood v. Woods*, 982 F. Supp. 1369, 1376 (D. Ariz. 1997) (the D & X method is one of several “safe, medically acceptable abortion methods in the second-trimester”); *Hope Clinic v. Ryan*, 995 F. Supp. 847, 852 (N.D. Ill. 1998) *affd in part, vacated in part*, 249 F.3d 603 (7th Cir. 2001) (“[D & X] reduces the risk of retained tissue and reduces the risk of uterine perforation and cervical laceration because the procedure requires less instrumentation in the uterus. [It] may also result in less blood loss and less trauma for some patients and may take less operating time.”); *Planned Parenthood of Central New Jersey v. Verneiro*, 41 F. Supp. 2d 478, 484-85 (D.N.J. 1998) *affd*, 220 F.3d 127 (3d Cir. 2000) (“The intact dilatation and extraction, or intact D & X, has not been the subject of clinical trials or peer-reviewed studies and, as a result, there are no valid statistics on its safety. As its ‘elements are part of established obstetric techniques,’ the procedure may be presumed to pose similar risks of cervical laceration and uterine perforation. However, because the procedure requires less instrumentation, it may pose a lesser risk.”); *Women’s Medical Professional Corp. v. Voinovich*, 911 F. Supp. 1051, 1070 (S.D. Ohio 1995) *cert. denied*, 434 U.S. 1070 (1978) (“[T]his Court finds that use of the D & X procedure in the late second trimester appears to pose less of a risk to maternal health than does the D & E procedure, because it is less invasive – that is, it does not require sharp instruments to be inserted into the uterus with the same frequency or extent - - and does not pose the same degree of risk of uterine and cervical lacerations . . . [T]he D & X procedure appears to have the potential of being a safer procedure than all other available abortion procedures”); *Rhode Island Medical Society v. Whitehouse*, 66 F. Supp. 2d 288, 298 (D.R.I. 1999) *affd*, 239 F.3d 104 (1st Cir. 2001) (“Doctors have not done statistical studies as to the relative risk of

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- a D & X, although the doctors testified that it was equal to or less than the risk of a D & E."); *Richmond Medical Center for Women v. Gilmore*, 55 F. Supp. 2d 441, 491 (E.D. Va. 1999) *aff'd*, 224 F.3d 337 (4th Cir. 2000) ("When the relative safety of the D & E is compared to the D & X, there is evidence that the D & X (which is but a type of D & E ...) has many advantages from a safety perspective.... For some women, then the D & X may be the safest procedure."); *but see Planned Parenthood of Wisconsin v. Doyle*, 162 F.3d 463, 467-468 (7th Cir. 1998) *aff'd*, 249 F.3d 603 (7th Cir. 2001) ("The D & X procedure is a variant of D & E designed to avoid both labor and the occasional failures of induction as a method of aborting the fetus, while also avoiding the potential complications of a D & E. For some women, it may be the safest procedure. So at least the plaintiff physicians believe, and these beliefs are detailed in affidavits submitted in the district court. *This is also the opinion of the most reputable medical authorities in the United States to have addressed the issue: the American Medical Association and the American College of Obstetricians and Gynecologists.*") (emphasis added).
- 64 *See generally* H.R. 760 and S. 3.
- 65 Representative Henry Hyde (R-IL), in an unusually frank glimpse into anti-choice lawmakers' position on women's function as vessels for developing fetuses, insisted that "We respect women. We genuflect before their ability to carry children to term." *See* H.R. Rep. No. 107-604 (2002), "Markup Transcript."
- 66 *See* H.R. Rep. No. 107-604 (2002), "Markup Transcript."
- 67 Mr. Pence elaborated: "But there is one medical procedure that has been around since the time of its namesake. It is called the Caesarian procedure, named after Julius Caesar, if my history serves, and it is the opening of the uterus through the abdomen and the nonviolent removal of the unborn child, not utilizing the God-given birth canal in that process. The process of the baby passing through the birth canal, having been present for the birth of all 3 of my children, is a very violent, very painful process. The Caesarian section spares, as it did my wife, that entire ordeal." *See id.*
- 68 The American College of Obstetricians and Gynecologists On The Subject Of "Partial-Birth Abortion" Bans, July 8, 2002.
- 69 *See id.*
- 70 American Medical Women's Association Statement on H.R. 1122 (1997), *available at* http://www.house.gov/harman/issues/statements/105/052197ST_AbortionBan.html.
- 71 *See* Rovner, Julie, "AMA Drops Support of 'Partial-Birth' Abortion Legislation," *National Journal's Congress Daily AM*, Oct. 21, 1999, at 13; *see also* Editorial, *The A.M.A.'s 'Partial Birth' Fiasco*, *N.Y. Times*, Dec. 7, 1998, at A24 ("The American Medical Association blundered badly when it endorsed a Republican bill last year banning so-called partial birth abortion. That blunt conclusion, reached long ago by many doctors, has now been echoed by consultants the A.M.A. hired to investigate the debacle... The group should correct its mistake on partial birth abortion before it causes more confusion and damage.").
- 72 The Supreme Court majority in *Carhart* cited with approval the *amicus curie* brief submitted by ACOG, American Nurses Association, American Medical Women's Association, Physicians for Reproductive Choice and Health and the National Abortion Federation, which summarized the opinion of all major medical groups supporting a woman's right to choose the safest method of abortion, including in some instances the D & X technique. *See Carhart* at 936.
- 73 *See* Martin Kasindorf, *No Broad Pattern Evident in Ballot-Initiative Results*, *USA Today*, Nov. 4, 1999, at 4A (Maine); Patrick O'Driscoll, *Voters Had Their Say in 44 States*, *USA Today*, Nov. 5, 1998, at 8A (Colorado and Washington).
- 74 *See* Peter D. Hart Research Associates, *Survey and Focus Group Results* (October 2000).