Approved: May 24, 1999
Date

MINUTES OF THE SENATE COMMITTEE ON FEDERAL AND STATE AFFAIRS.

The meeting was called to order by Chairperson Senator Lana Oleen at 1:10 p.m. on April 27, 1999 in Room 313-S of the Capitol.

All members were present:

Committee staff present: Mary Galligan, Legislative Research Services
Russell Mills, Legislative Research Services
Theresa Kiernan, Revisors of Statutes
Judy Glasgow, Secretary

Conferees appearing before the committee on **Sub for HB 2007, SB142 and SB 357**:
Senator Nancey Harrington
Dr. Mike Mathews, Olathe
Dr. Douglas Brooks, Olathe
Cindy Patton
Tim Brownlee, Johnson County
Dr. Jared Pingleton, Kansas City
Beatrice Swoopes, Kansas Catholic Conference
Dr. Tracy Cowles
Mary Petrow
Erika Fox, Planned Parenthood of Kansas and Mid Missouri
Dr. Herbert Hodes
Gloria Schlossenberg
Erin Snodgrass
Barbara Duke, Kansas Choice Alliance
Rachael Pirner
Natalie Haag, Office of the Governor

Conferees appearing before the committee on **HB 2570** (minutes of hearing begin on page 4):
Representative Shari Weber
Frank Denning, Roeland Park Law Enforcement officer

Others attending: See Attached Sheet

Chairman Oleen recognized Sue Peterson, Kansas State University, who requested the introduction of a bill concerning a food service contract and consolidation of services at Kansas State University. Senator Becker moved for introduction of the bill. Senator Vratil seconded the motion. The motion carried.

Chairman Oleen opened hearings on **Sub for HB 2007, Abortion; prohibiting, exceptions**
SB 142, Abortion; prohibiting; exceptions
SB 357, Abortion; limiting partial birth, viability

Chairman Oleen asked Theresa Kiernan to review the three bills for the committee explaining the difference between them. The Chairman then indicated that each side (pro-choice and anti-choice) would have 20 minutes during which to present testimony, followed by 10 minutes for each side for committee questions. The process would continue until all conferees had an opportunity to testify.

Chairman Oleen recognized Senator Harrington, a proponent of **Sub HB 2007.** Senator Harrington supported **Sub HB 2007** with no mental health exception incorporated within the viability section of Kansas law. (Attachment 1). She stated that by allowing the mental health exception it would create a significant loophole. Senator Harrington stated that there were 587 abortions performed after 22 weeks in Kansas last reporting cycle; 58 of these were partial birth abortions, with none of these being Kansas residents. Senator Harrington distributed a letter from Dr. Byron C. Calhoune, M.D.,Tacoma, Washington to committee members regarding "Partial-birth abortions". (Attachment 2).

Chairman Oleen called on Dr. Michael Mathews, Olathe, Kansas. Dr. Mathews spoke as a proponent for **HB 2007.** Dr. Mathews stated that the mental health exception to a restriction on performing abortions is to allow the unrestricted performance of abortions. (Attachment 3). He urged the committee to vote in favor of **Sub HB 2007.**

Chairman Oleen recognized Dr. Douglas Brooks, Overland Park, Kansas. Dr. Brooks appeared as a proponent of **Sub HB 2007** and ask that the loophole in the abortion law that allows mental exceptions to the partial birth abortions be eliminated.. (Attachment 4).

Chairman Oleen called for questions from the committee members. Questions from the members concerned why the number of partial birth abortions had increased during the last reporting quarter when there had been none performed during the prior reporting quarter. The report for all 58 partial birth abortions was given as mental health of the mother and these came about as a result of the 1998 law as enacted which had eliminated life threatening anomalies and deformities.

Chairman Oleen recognized Dr. Tracy Cowles, Kansas City, Kansas. Dr. Cowles appeared as a proponent for **SB 142** and **SB 357.** (Attachment 5). Dr. Cowles stated that changes to the Kansas abortion laws beginning in 1998 have made counseling patients more difficult. She stated that in many cases prenatal diagnosis cannot be made with certainty prior to twenty-two weeks gestation. Dr. Cowles ask the committee to reinstate the original language regarding post viability termination for severe fetal abnormalities. She stated that this would provide an option for those who must deal with these devastating clinical situation.

Chairman Oleen called on Mary V. Petrow, a Kansas resident. Ms. Petrow was a proponent of **SB 142** and stated that from personal experience from a pregnancy with a severe fetal anomalies how important it is to allow exceptions for those tragic pregnancies. (Attachment 6). Ms. Petrow stated that there must be a trust between the physician and the patient regarding fetal health and if there is no exception for severe fetal abnormalities, the doctor may be reluctant to be truthful with the patient. She asked the committee to consider **SB 142** favorably.

Chairman Oleen recognized Erika Fox, Planned Parenthood, Kansas and Mid-Missouri, as a proponent to **HB 142**. Erika Fox stated that this bill repeals most of the vague and confusing portion of last year's enactment which has caused physicians to have to choose between their own legal well-being or the safety and constitutional rights of their patients.(Attachment 7) Ms. Fox stated that in order for Planned Parenthood to support **SB 357** in Section 65-6721 be amended and that the work "recklessly" be eliminated and the work "willfully" be inserted. She urged the committee to approve **SB 142** which would make it constitutional, fairer to physicians, and more compassionate for women and their families.

Questions were directed to Dr. Cowles concerning abnormalities and the reliability of diagnosis.

Chairman Oleen recognized Cindy Patton, Topeka, Kansas a proponent to **Sub HB 2007**. Ms. Patton stated that **Sub HB 2007** is not a bill that is clearly unconstitutional under the current standards that have been laid down by the Supreme Court and urged favorable consideration by the committee. (Attachment 8). She stated that she did not think that it was necessary that a mental health exception be included in order to pass constitutionality. She stated the courts should decide constitutionality and that the Legislature should pass what they believe to be sound public policy.

Chairman Oleen called on Timothy R. Brownlee, Shawnee, Kansas as a proponent to **Sub HB 2007**. Mr. Brownlee stated that the existing Kansas statutes are for the most part constitutional, however, they do contain inconsistent definitions of "viable" . (Attachment 9) Mr. Brownlee stated that any inconsistencies lend themselves to constitutional attacks because of vagueness. He stated that **Sub HB 2007** appears to be constitutionally defensible under current federal constitutional law and ask the committee to favorably consider it.

Jared P. Pingleton, Psy.D. was recognized by Chairman Oleen as a proponent to **Sub HB 2007.** Mr. Pingleton stated that as currently written legislation which allows for a late-term abortion for the "mental health" of the mother functionally permits persons who are not trained, experienced , or licensed in the diagnosis and treatment of psychological disorders to make such diagnoses in an unethical, and possibly dangerous manner. (Attachment 10). Mr. Pingleton urged the committee to favorably consider **Sub HB 2007.**

Chairman Oleen recognized Dr. Herbert Hodes, Overland Park, Kansas as a proponent to **SB 142.** Dr. Hodes stated that this bill is acceptable because it clarifies some of the confusion that has remained from the previous bills. (Attachment 11). Dr. Hodes stated that the American College of Obstetricians and Gynecologists supports the view that "Termination of pregnancy before viability is a medical matter between the patient and physician.... Opposes unnecessary regulations that limit or delay access to care and opposes the harassment of abortion providers and patients." (Attachment 12). Dr. Hodes ask that this committee favorably consider **SB 142.**

Chairman Oleen recognized Gloria Schlossenberg, Overland Park, Kansas as a proponent to **SB 142.** Ms. Schlossenberg stated that no woman is foolish to want a late term abortion unless there are serious reasons. (Attachment 13) She stated that the option of late-term abortion for reasons of mental health is necessary and told of her personal history concerning a pregnancy involving a severe fetal abnormally. Ms. Schlossenbert stated that the choice should be hers, not the state or federal legislators.

Erin Snodgrass, Topeka, Kansas, was recognized by Chairman Oleen as a proponent of **SB 142** and **SB 357.** Ms. Snodgrass stated that keeping the option of late-term abortion for reasons of mental health is necessary (Attachment 14). Ms. Snodgrass stated that late term abortions are not done on a whim, they are given under very extenuating and desperate circumstances. She ask for the committee support of **SB 142.**

Chairman Oleen recognized Rachael K. Pirner, of Triplett, Woolf & Garretson, Wichita, Kansas. Rachael Pirner appeared as a proponent to **SB 142.** (Attachment 15). Ms. Pirner stated that it is imperative that the legislature does not engage in vagaries and ambiguities. She stated that the law passed in 1998 has resulted in sheer confusion and confoundment as to what is meant. Ms. Pirner requested that the committee do what it could to restore the abortion decision to women, their families, their physicians and their god.

Beatrice E. Swoopes, Programs Director, Kansas Catholic Conference, was recognized by Chairman Oleen as a proponent of **Sub HB 2007**. Beatrice Swoopes stated that The Kansas Catholic Conference testified in favor of **HB 2007** but took exception to the Partial Birth Abortion Ban Section. (Attachment 16). She stated that the language contained in the substitute version if favored by her organization. She stated that the Kansas Catholic Conference supports measures that protect unborn babies and ask the committee to vote favorable for **Sub HB 2007.**

Chairman Oleen recognized Barbara Duke, President, Kansas Choice Alliance and Pro-Choice as a proponent to **SB 142.** Ms. Duke stated that Kansas law restricting post-viability abortion must all the exception to preserve the life or health of the woman.(Attachment 17) She stated that banning any medical procedure is an unprecedented intrusion into medical decision-making that ignores the physician's judgment as to what is in the best interest of the patient. Ms. Duke ask the committee to favorably consider **SB 142.**

Chairman Oleen noted that written testimony was provided the committee in support of **SB 142** from Barbara Holzmark, National Council of Jewish Women, Greater Kansas City Section (Attachment 18) and from Jessica Travis, National Organization for Women (Attachment 19).

Chairman Oleen recognized Natalie Haag, Office of the Governor, who spoke in favor of **SB 357.** Ms. Haag stated that the Governor's bill addresses the confusing issues caused by the bill passed by the legislative session in 1998 and bans partial birth abortion. She stated that the bill clarifies the mental health exception. (Attachment 20). Ms. Haag stated that the Governor had received many letters from legislators after the signing of last year's bill. Chairman Oleen requested that Ms. Haag provided the committee with copies of these letter to be made a part of the official record. (Attachment 21). Ms. Haag stated that by modifying the inconsistencies, the enforcement will improve and the law will be more likely to withstand constitutional challenge. She urged the committee to support the Governor bill and proposed amendments. Ms. Haag stated that the Governor will sign an abortion bill if it includes a mental health exception.

Senator Vratil ask each of the conferees if they could explain the meaning of "serious risk of substantial and irreversible impairment of a major bodily function." The universal answer by all conferees testifying before the committee was that this phrase could not be explained.

Questions about the legal requirement for protection of womens' mental health were directed to conferees.

Chairman Oleen closed the hearings on **SB 142, SB 357,** and **Sub HB 2007** and indicated that written testimony could be submitted any time during the wrap-up session.

Chairman Oleen opened the hearing on **HB 2570; establishing the task force on consolidation of public safety agencies.**

Russell Mills, Legislative Research Department reviewed the bill for the committee. The bill would provide for the task force to consist of 9 members; These would consist of three from the House; two appointed by the House Speaker; one from the House Appropriations Committee and one from the House Judiciary Committee, one member appointed by the House Minority Leader; three from the Senate; two appointed by the Senate President; one from the Senate Ways and Means Committee and one from the Senate Judiciary Committee and one by the Senate Minority Leader and three appointed by the Governor.

Chairman Oleen recognized Representative Shari Weber, a proponent of **HB 2570.** Representative Weber stated that the need for consolidation came to her attention as a member of the House Appropriation Committee as requests came to the committee from different agencies for the same type of services and same types of needs. Representative Weber stated that because these agencies often are required to respond to the same situations, a co-ordinator could better manage the resources. Representative Weber requested that the committee favorably consider this bill.

Questions from the committee concerned the cabinet level position and how it would effect areas such as the office of adjutant general and department of corrections. Representative Weber stated that these were some of the concerns that the task force would need to address; that the list of agencies included in the study were selected because they all concerned public safety.

Chairman Oleen called on Frank Denning, Kansas Peace Officers' Association, as an opponent to **HB 2570.** Mr. Denning stated that the Kansas Peace Officers' Association (KPAO) does not necessarily oppose the task force, however they feel that uniformity and centralization would be expensive. (Attachment 22) Mr. Denning stated that law enforcement in Kansas has always been very cooperative with one another. Mr. Denning requested that if the task force is proceeded with that the KPOA be a part of it since KPAO has membership representatives from all state law enforcement agencies.

Chairman Oleen called attention to written testimony submitted to the committee by Thomas K. Hayselden, of the Kansas Association of Chiefs of Police as an opponent to **HB 2570.** (Attachment 23).

The meeting adjourned at 5:45 p.m. The next meeting of the committee will be on call of the Chairman.

SENATE FEDERAL AND STATE AFFAIRS COMMITTEE
GUEST LIST
DATE: April 27, 1999

NAME	REPRESENTING
Cindy Patton	speaking in support of substitute HB2007
Timothy R Brownlee	testifying on SB 142, SB 357 & HB 2007
Erin Snodgrass	testifying on HB 2007
Cleta Reruyer	Right to Life of Ks.
Lana MacLeod	RTLK, Inc.
Dennis Hoover	Ks. Cath Conference against SB 142 & 357
Michael Mahoney MD	MD support of Sub HB 2007
Douglas G. Brooks MD	" " " " " "
Jared Pingleton, PsyD	testifying as per Senator Gordon's invitation
Mary V. Petrow	self
H.C. Hodes, MD	Self — Support of SB 142
Tracy Cowles	Self — " "
Jamie L. Haasl	Senate Minority office
Sue Peterson	K-State
Bill Sneed	KPOA
Frank Denning	KPOA

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COMMITTEE ASSIGNMENTS
VICE CHAIR: FEDERAL AND STATE AFFAIRS
MEMBER: JUDICIARY
TRANSPORTATION AND TOURISM

SENATE CHAMBER
APRIL 27, 1999

MEMBERS OF THE SENATE FEDERAL AND STATE AFFAIRS COMMITTEE.

MY COMMENTS WILL BE DIRECTED IN SUPPORT FOR HB 2007, AND IN OPPOSITION TO SB 142, AND PORTIONS OF SB 357 THAT WOULD ADD A MENTAL HEALTH EXCEPTION IN THE VIABILITY SECTION OF CURRENT KANSAS LAW.

ACCORDING TO BOSTON UNIVERSITY ETHICIST AND HEALTH LAW PROFESSOR GEORGE ANNAS, JD. MPH, AMERICANS SEE "A DISTINCTION BETWEEN FIRST TRIMESTER AND 2ND TRIMESTER ABORTIONS. THE LAW DOESN'T, BUT PEOPLE DO. AND RIGHTFULLY SO." HE EXPLAINED THAT AFTER APPROXIMATELY 20 WEEKS, THE AMERICAN PUBLIC SEE A BABY! AMERICAN MEDICAL NEWS, 3-3-97.

THE LAST MAJOR SUPREME COURT DECISION REGARDING ABORTION WAS CASEY VS. PLANNED PARENTHOOD OF PENNYSLVANIA.

IN CASEY THE COURT PERMITTED THE ESTABLISHMENT OF A HEALTH DEFINITION UNDER MEDICAL EMERGENCY. CASEY HAD NO MENTAL HEALTH EXCEPTION INCLUDED WITHIN THE HEALTH DEFINITION. WHICH IS: CONDITION WHICH, ON THE BASIS OF THE PHYICIANS GOOD FAITH CLINICAL JUDGMENT SO COMPLICATES THE MEDICAL CONDITION OF A PREGNANT WOMAN AS TO NECESSITATE THE IMMEDIATE ABORTION OF HER PREGNANCY TO AVERT HER DEATH OR FOR WHICH A DELAY WILL CREATE SERIOUS RISK OF SUBSTANTIAL AND IRREVERSIBLE IMPAIRMENT OF A MAJOR BODILY FUNCTION.

I WOULD CALL YOUR ATTENTION TO THE FACT THAT 38 OF THE STATES HAVE IN PLACE STATUTES LIMITING THE REASONS FOR WHICH ABORTION MAY BE PERFORMED LATE IN PREGNANCY. THE VAST MAJORITY OF THOSE STATUTES DO NOT CONTAIN AN EXPLICIT MENTAL HEALTH EXCEPTION. ACCORDING TO A WRITTEN OPINION BY U.S. SUPREME COURT JUSTICES THOMAS, KENNEDY, SOUTER, AND O'CONNOR.

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RETURNING TO THE CASEY COURT AND THE HEALTH DEFINITION. ONE MAY ARGUE THAT THE HEALTH DEFINITION IS PLACED WITHIN THE WOMAN'S RIGHT TO KNOW, 24 HOUR WAITING PERIOD. ESTABLISHMENT OF THE HEALTH DEFINITION WAS DISTINCT IN THAT EVEN UNDER AN EMERGENCY SITUATION MENTAL HEALTH WAS NOT CONSIDERED BY THE SUPREME COURT AS A NECESSARY EXCEPTION, OR THE COURT WOULD HAVE EXPRESSED SPECIFICALLY THE NEED FOR A MENTAL HEALTH EXCEPTION PROVISION. THE COURT DID NOT.

THE COURT ADDRESSED ROE VS. WADE IN CASEY AND ABANDONED THE TRIMESTER FRAME WORK AND THE STRICT SCRUTINY STANDARD OF JUDICIAL REVIEW OF ABORTION RESTRICTIONS. THE COURT ADOPTED A NEW ANALYSIS "THE UNDURE BURDEN." UNDUE BURDEN WAS DEFINED AS A "SUBSTANTIAL OBSTACLE IN THE PATH OF A WOMAN SEEKING AN ABORTION OF A NON-VIABLE FETUS."

UNDER CASEY, A PLAINTIFF CHALLENGING A STATUTE MUST PROVE "THAT IN A LARGE FRACTION OF THE CASES IN WHICH (THE ACT) IS RELEVANT," IT WILL OPERATE AS A SUBSTANTIAL OBSTACLE TO A WOMAN'S CHOICE. THE COURT ESTABLISHED THAT THE STATE HAS A PROFOUND INTEREST IN THE POTENTIAL LIFE OF THE UNBORN CHILD THROUGHOUT PREGNANCY. AND AFFIRMED ROE'S HOLDING THAT "SUBSEQUENT TO VIABILITY, THE STATE IN PROMOTING ITS INTEREST IN THE POTENTIALITY OF HUMAN LIFE MAY, IF IT CHOOSES, REGULATE, AND EVEN PROSCRIBE, ABORTION EXCEPT WHERE IT IS NECESSARY, IN APPROPRIATE MEDICAL JUDGMENT, FOR THE PRESERVATION OF THE LIFE AND HEALTH OF THE MOTHER.

THERE WERE 587 ABORTIONS PERFORMED AFTER 22 WEEKS IN KANSAS LAST REPORTING CYCLE, REPORTED KDHE. 58 PARTIAL BIRTH ABORTIONS WERE PERFORMED ON VIABLE BABIES USING THE MENTAL HEALTH EXCEPTION. OF THOSE 58 WOMEN, NONE WERE KANSAS RESIDENTS.

A MENTAL HEALTH EXCEPTION INCORPORATED WITHIN THE VIABILITY SECTION OF KANSAS LAW WOULD CREATE A SIGNIFICANT LOOPHOLE. ALLOWING FOR ABORTIONS ON DEMAND THROUGH ALL 9 MONTHS.

OFFICE OF ATTORNEY GENERAL
Commonwealth of Pennsylvania
FAX
Transmission Cover Sheet

FROM EQUIPMENT LOCATED AT: 717 (AREA CODE) 772-4526 (NUMBER)

TO EQUIPMENT LOCATED AT: 316 (AREA CODE) 942-6831 (NUMBER)

Number of Pages Including Cover Sheet: 2

TO: Nancy Harrington (NAME)
Senator (TITLE)
(PHONE)

FROM: Cristina Papson (NAME)
Dep. Atty. Gen. (TITLE)
717-783-1111 (PHONE)

TRANSMISSION: TIME 9:20 am DATE 4-23-99 INITIALS Cmay

SUBJECT: Casey vs. Planned Parenthood - Mental Health Exception

CLASSIFICATION: ___ SECRET ___ CONFIDENTIAL X UNCLASSIFIED

DELIVERY: ___ RUSH (1 HOUR) ___ ROUTINE (SAME DAY)

COMMENTS: NO MENTAL HEALTH EXCEPTION

STATE OF KANSAS

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TRANSPORTATION AND TOURISM

APRIL 27, 1999

SENATE FEDERAL AND STATE AFFAIRS COMMITTEE MEMBERS.

COMMENTS REGARDING A BALLOON PROPOSAL TO SB 357.

MY INTENTIONS ARE TO HAVE A CLEAN PARTIAL BIRTH ABORTION BAN BILL. SEPARATE AND APART FROM THE OTHER ISSUES IN HB 2007, AND EVEN SB 357. IF WE DO NOTHING MORE WITH THE ISSUE OF ABORTION THIS SESSION, EXCEPT BANNING THIS ABHORRENT PROCEDURE, ONE THAT MANY INCLUDING MYSELF BELIEVE TO BE INFANTICIDE. WE WILL HAVE SERVED THE MAJORITY OF THE PEOPLE OF OUR STATE WELL!

THE GOVERNOR IN A LETTER TO PRESIDENT CLINTON DATED SEPT. 22, 1997, SUPPORTED A BAN ON THE PROCEDURE. THE GOVERNOR ALSO CAMPAIGNED FOR RE-ELECTION AS TO HIS COMMITMENT TO THE BAN.

IN FACT, THE AMERICAN MEDICAL ASSOCIATION HAS TAKEN A PUBLIC STAND AGAINST THE PROCEDURE. ON MAY 19, 1997, THE AMA BOARD OF TRUSTEES ISSUED A STATEMENT SUPPORTING THEN-PENDING FEDERAL LEGISLATION TO OUTLAW THE D&X PROCEDURE. STATING THAT IT "IS A PROCEDURE WHICH IS NEVER THE ONLY APPROPRIATE PROCEDURE AND HAS NO HISTORY IN PEER REVIEW MEDICAL LITERATURE OR IN ACCEPTED MEDICAL PRACTICE DEVELOPMENT." THIS POSITION LATER RECEIVED THE ENDORSEMENT OF THE ENTIRE AMA HOUSE OF DELEGATES. AMERICAN MEDICAL NEWS, NO. 25(JULY 7, 1997).

THE STATE MUST DRAW THE LINE TO ERECT AN IMPENETRABLE WALL AGAINST INFANTICIDE.

THE PROCEDURE REQUIRES A PREGNANT WOMAN'S CERVIX TO BECOME DILATED, AND OVER A 3 DAY PERIOD, THE PHYSICIAN TURNS THE INFANT SO THE FEET CAN BE GRASPED, THEN PULLED THROUGH THE DILATED CERVIX INTO THE BIRTH CANAL. IF YOU WERE TO DELIVER THE HEAD FIRST, YOU WOULD HAVE THE NORMAL BIRTHING PROCESS-PROCEDURE. WITH PARTIAL BIRTH ABORTION 95 PERCENT OF THE CHILD IS OUTSIDE THE MOTHERS WOMB, ONLY THE HEAD REMAINS IN THE BIRTH CANAL.

ROE OR CASEY NEVER GAVE THE RIGHT TO KILL IN THE VAGINAL CANAL, WHERE THE BIRTHING PROCESS OCCURS!

THIS IS AN AREA WHERE PRO-CHOICE SUPPORTERS OF ROE, AND PRO-LIFE ADVOCATES CAN FIND COMMON GROUND.

7912 98th Ave, S.W.
Tacoma, WA 98498
27 Apr 99

[illegible]

My name is Dr Byron C. Calhoun, MD, FACOG, FACS. I am a resident and practicing physician of the State of Washington. I am a Board Certified Maternal-Fetal Medicine (high risk obstetrician) who is as a member of Physicians' Ad-hoc Coalition for Truth (PHACT) representing over 600 physicians who seek to provide medical information on the "partial-birth abortion" issue.

The Kansas House will soon take up the issue again to see the whether or not they will pass House Bill 2007 to ban late term abortions and partial birth infanticide. The debate has been loud and full of misinformation. You have heard from people with a vested special interest. You've heard from all the politicians. May I now speak?

In my practice as a Washington State physician, I deal exclusively with pregnant women carrying high risk pregnancies. No longer am I able to sit silently by while abortion activists, the media, and even the President continue to trot out erroneous medical information about partial-birth abortion. The acute lack of medical credibility and out right lying on the side of those supporting this procedure has forced me-for the first time in my professional life-to depart from the sidelines to dispel the disinformation regarding "partial-birth abortions."

The debate on this issue began when those whose real agenda is to keep all abortion legal-at any stage of pregnancy, for any reason- waged what would be noted as an orchestrated misinformation blitz.

Initially, the National Abortion Federation and other pro-abortion groups like Planned Parenthood claimed the procedure was non-existent. When the paper by Dr Haskell, who invented the procedure with Dr McMahon, was produced, the abortionists changed their story, claiming that the procedure was done only to save a woman's life. Then, Dr Haskell, the main practitioner of this grisly procedure, was caught on tape admitting that 80% of his partial-birth abortions were "purely elective" with no medical indication whatsoever in the mother.

Some proponents claimed that only rarely are these procedures performed. The truth is we don't know exactly how many are being done nationally or locally. The State of Washington Department of Health Center for Health Statistics reported in 1996 (the last full year available) there were approximately 591 late abortions done at $\geq$ 20 weeks to term. Any of these late abortions could be "partial-birth"since the State generated reporting forms are incomplete thereby making it entirely possible that these procedures remain under-reported.

Next, we heard the anesthesia fairy tale. The American public was told that the abortion didn't kill the baby, the anesthesia administered before the procedure did. This farcical claim was soundly, strenuously, and immediately denounced by the American Society of Anesthesiologists, who called the claim "entirely inaccurate." Yet Planned Parenthood and its allies chose to continue to spread the myth, causing significant concern in our patients who hear the claims and were scared that the epidurals during labor, or anesthesia for needed surgeries, would kill their babies.

The President himself entered the hyperbole with the unsupported statement that if mothers who chose partial-birth abortions had delivered naturally, the women's bodies would

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have been "eviscerated" or "ripped to shreds" and they "could never have another baby." Let's be realistic. That statement is totally and utterly false. Think of all the women who have vaginal or cesarean delivery of their babies-are they "eviscerated"? Contrary to what the abortion activists try to persuade us, partial-birth abortion is never medically necessary to protect a woman's health or fertility. The opponents of the Bill conveniently omit that one of the five women who had this procedure done had five miscarriages subsequent to her procedure.

The procedure involves forcible dilation of the cervix which may lead to an incompetent (weakened) cervix with possible deliveries. The internal podalic version of the baby (reaching into the uterus and turning the baby feet first to pull it through the cervix) is dangerous. It may lead to tearing the uterus, bleeding, and/ or infection. The final step of placing a sharp, heavy scissors blindly into the posterior portion of the baby's skull is frightfully dangerous since it may produce razor-like shards of bone fragments or may cut into the uterus causing bleeding, shock, and death. Some studies have even shown that patients undergoing "partial-birth abortions" may in fact suffer from increased negative mental health consequences.

Opponents of this Bill state the "partial-birth abortion" is necessary to deal with babies with extra chromosomes (trisomies), anencephalics (babies with poorly developed brains), hydrocephaly (fluid around the brain), hydramnios (extra fluid in the uterus), diabetes, or other physical anomalies. This is patently absurd and unsubstantiated by any medical literature. There is no patient in my complicated obstetrical practice that could not be delivered by other means presently recognized in the obstetrical literature.

It is indeed fascinating that President Clinton refused to meet with women, who delivered babies with the same conditions as the five who appeared on national television, yet suffered no damage whatsoever to their health or future fertility! So much for equal time.

Even the former Surgeon General of the United States C. Everett Koop noted that one child with such a defect "with a huge omphalocele (a sac containing the baby's abdominal organs) much bigger than her head"-survived to become the head nurse in his pediatric intensive care unit years later.

Opponents have further argued that banning "partial birth abortions would interfere in a decision between a woman and her doctor. But in actuality, the State routinely regulates medical practice. The mere fact physicians must be licensed and are guided in the performance of certain actions (i.e. infanticide is illegal by statutes in every state) illustrates the State's involvement in the patient-physician relationship. Further, the US Congress passed, in September, 1996 (with your approval) the *"Federal Prohibition of Female Genital Mutilation Act of 1995"* which prohibits a physician from performing female circumcisions.

Pondering these medical realities, one can only come to the conclusion that the women who thought they underwent partial-birth abortion for "medical" reasons were tragically misled. And those who allege to speak for women's health don't seem to be the least concerned.

So whom are you going to believe? The abortionists who don't let the truth get in the way of their agenda? The politicians who reap financial benefits in their political action committees from the activists. Or those of us who are physicians who are armed only with the facts and the truth?

B Calhoun MD

Byron C. Calhoun, MD, FACOG, FACS
Maternal-Fetal Medicine
Tacoma, Washington

April 27, 1999

Thank you Senators, ladies and gentlemen, for allowing my written and oral testimony. I am Dr. Michael Mathews. I have been in the private practice of family medicine for 17 years in Olathe, Kansas. My training and practice have included Internal Medicine, Pediatrics, Psychiatry, Obstetrics and Gynecology. I am board certified by the American Academy of Family Physicians and I am on part time faculty staff for Kansas University Family Practice Residency.

During the early years of my practice, I had the privilege and joy of delivering many "unwanted teenage pregnancies" that were referred through a local adoption agency. The youngest patient I delivered was 14. Most of the patients verbalized that one or more of the following factors greatly influenced their decision to adopt out their child: 1. parental disapproval, 2. physical inconvenience, 3. emotional distress, 4. psychiatric illness such as severe depression with or without suicidal ideation, 5. their young age, 6. poverty, and 7. lack of health insurance coverage for their obstetrical care and their baby's care. Most of these immature unemancipated minors discussed their delicate situation with their parent(s), made a willful decision to love their child, gave of their time, and physically and emotionally endured the pain of childbirth and the signing of adoption papers during the following 24 hours. These teenagers and their delivering physician did not feel that "an abortion was necessary to protect the physical or mental health of the pregnant woman."

As legislators and physicians, we all understand that a physical or mental health exception to a restriction on performing abortions is tantamount to allowing the unrestricted performing of abortions in our state. The 1998 KDHE Abortions in Kansas Preliminary Report showed that all 58 reported "so called" partial birth abortions were necessary to prevent substantial and irreversible mental impairment. I seriously doubt that all of these 58 abortions were the most appropriate carefully chosen therapeutic option for each patient's diagnosis. As a physician I am very confused as to the meaning or defining diagnoses of a "substantial and irreversible mental impairment".

See separate page, "Health" or "Serious Health" of the Mother = Abortion on Demand

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"HEALTH" OR "SERIOUS HEALTH" OF THE MOTHER = ABORTION ON DEMAND

Legal Definition of Health: U.S. abortion law defines "health" to include "all factors — physical, emotional, psychological, familial, and the woman's age — relevant to the well-being of the patient" (1973 Supreme Court decision in *Doe v. Bolton*).

Depression = Health Exception

- Abortionist Dr. James McMahon, a 'pioneer' of the partial-birth abortion method, submitted a chart to the House Judiciary Committee in June 1995, describing partial-birth procedures he had performed for "maternal indications." He cited 39 abortions which were performed because of the mother's "depression." Another nine "flawed fetuses," were aborted because they had "cleft-lip," Dr. McMahon reported.

Purely Elective = Health Exception

- Ohio abortionist Dr. Martin Haskell, who has performed more than 1,000 partial-birth abortions, told *American Medical News* in July 1993, "I'll be quite frank: most of my abortions are elective in that 20-24 week range. . . . In my particular case, probably 20% are for genetic reasons. And the other 80% performed are purely elective."

Being a Teenager = Health Exception

- Dr. James McMahon also testified that, "After 26 weeks [six months], those pregnancies that are not flawed are still non-elective. They are interrupted because of maternal risk, rape, incest, *psychiatric or pediatric indications"* [emphasis added]. Dr. McMahon, indicated that "pediatric indications" is his terminology for the youth of the mothers, who in most of these cases are teenagers.
- A National Abortion Federation (NAF) letter dated June 12, 1995, and sent to members of the House of Representatives noted that late abortions are sought by, among others, "very young teenagers...who have not recognized the signs of their pregnancies until too late."

Being Poor or Without Insurance = Health Exception

- A 1993 National Abortion Federation (NAF) internal memorandum distributed by the then-executive director acknowledged, "There are many reasons why women have later abortions: life endangerment, fetal indications, *lack of money or health insurance,* social-psychological crises, lack of knowledge about human reproduction, etc." [emphasis added].

Fear of Open Places = Health Exception

- In his testimony in a 1995 lawsuit, Dr. Martin Haskell testified that women come to him for partial-birth abortions with "a variety of conditions. Some medical, some not so medical." Among the "medical" examples he cited was "agoraphobia" (fear of open places).

Clinton's Phony "Health Exception": In his veto ceremony on April 10, 1996, President Clinton said that he would only sign the ban if the "health" of the mother was included in the legislation. Thus, President Clinton's position to protect the "health" of the mother would render the entire bill meaningless, making every partial-birth abortion legal for any reason.

As physicians, we are trained to nurture and sustain life and not to extinguish it. In the original text the so called Hippocratic Oath of the 4th Century B.C. prohibited participation in abortions. The Christian Church at the Synod of Elvira (305 A.D.) specified excommunication till the deathbed for all who procured abortions or made drugs to further abortions. In all of American history, I have found very few instances of women being prosecuted for having abortions. The good protective laws which existed in every state until the early sixties, and which saved the lives of millions of unborn children and their mothers, sought to punish, discourage and stigmatize the abortionist.

Allow me to quote several of our country and world's prominent leaders:

"Life is the division of human cells, a process that begins with conception...The (Supreme Court's ruling) was unjust, and it is incumbent on the Congress to correct the injustice...I have always been supportive of pro-life legislation. I intend to remain steadfast on the issue..I believe that the life of the unborn should be protected at all costs." ---Rep. Richard Gephardt, Missouri Democrat, 1977.

In 1984 Senator Al Gore wrote a constituent of his "deep personal conviction that abortion is wrong," and he voted to amend the Civil Rights Act to define the word "person" to "include unborn children from the moment of conception."

In 1977 Rev. Jesse Jackson wrote an article for National Right to Life News that said: "It takes three to make a baby: a man, a woman and the Holy Spirit. What happens to the mind of a person, and the moral fabric of a nation, that accepts the aborting of the life of a baby without a pang of conscience? What kind of a person and what kind of a society will we have 20 years hence if life can be taken so casually?"

On Sunday, August 15, 1993, Pope John Paul II addressed a crowd of over 375,000 people from 70 different countries in a Mass celebrated at Cherry Creek State Park, Colorado, not far from Columbine High School, as a part of "World Youth Day": "A culture of death seeks to impose itself on our desire to live, and live to the full...In our own century, as at no other time in history, the culture of death has assumed a social and institutional form of legality to justify the most horrible crimes against humanity: genocide, final solutions, ethnic cleansings and massive taking of lives of human beings even before they are born..."

On February 3, 1994, Mother Teresa spoke at the National Prayer Breakfast in Washington, D.C. before an audience of 3,000, which included President and Mrs. Bill Clinton and Vice-President Al Gore. The frail 83 year old Mother Teresa spoke simply, yet with a powerful directness to America, saying:

> Jesus died on the Cross because that is what it took for Him to do good to us—to save us from our selfishness in sin....to show us that we too must be willing to give up everything to do God's will....
>
> But I feel that the greatest destroyer of peace today is abortion, because it is a war against the child, a direct killing of the innocent child, murder by the mother herself and if we accept that a mother can kill even her own child, how can we tell other people not to kill one another?
>
> How do we persuade a woman not to have an abortion? As always, we must persuade her with love and we remind ourselves that love means to be willing to give until it hurts. Jesus gave even His life to love us. So the mother who is thinking of abortion, should be helped to love, that is, to give until it hurts her plans or her free time, to respect the life of her child.
>
> The father of that child, whoever he is, must also give until it hurts. By abortion, the mother does not learn to love, but kill even her own child to solve her problems. And, by abortion, the father is told that he does not have to take any responsibility for the child he has brought into the world. The father is likely to put other women into the same trouble. So abortion just leads to more abortion.
>
> Any country that accepts abortion is not teaching its people to love, but to use violence to get what they want. That is why the greatest destroyer of love and peace is abortion.
>
> Many people are very, very concerned with the children of India, with the children of Africa where quite a few die of hunger, and so on. Many people are also concerned about all the violence in this great country of the United States. These concerns are very good. But often these same people are not concerned with the millions who are being killed by the deliberate decision of their own mothers....
>
> We have sent word to the clinics, to the hospitals and police stations: "Please don't destroy the child; we will take the child." So we always have someone tell the mothers in trouble: "Come, we will take care of you, we will get a home for your child." And we have a tremendous demand from couples who cannot have a child....
>
> Jesus said, "Anyone who receives a child in my name, receives me." By adopting a child, these couples receive Jesus but by aborting a child, a couple refuses to receive Jesus.
>
> Please don't kill the child. I want the child. Please give me the child. I am willing to accept any child who would be aborted and to give that child to a married couple who will love the child and be loved by the child. From our children's home in Calcutta alone, we have saved over 3,000 children from abortion....
>
> If we remember that God loves us, and that we can love others as He loves us, then America can become a sign of peace for the world. From here, a sign of care for the weakest of the weak—the unborn child—must go out to the world. If you become a burning light of justice and peace in the world, then really you will be true to what the founders of this country stood for. God bless you![27]

I urge you to vote in favor of Substitute for House Bill 2007. I urge you to vote against Senate Bills 142 and 357 due to their amendments that include the physical or mental health exceptions to abortion restrictions.

Michael W. Mathews, M.D.

Residence Address:	15731 Beckett Lane Olathe, Kansas 66062
Work Address:	Associates in Family Care – Olathe 801 N. Murlen Olathe, KS 66062 913-782-7515
Born:	9/29/53
Married:	Christine Johns Mathews, R.N 4 children: Andrew, Brett, Kyle, and David
Education:	
1979-1983	Residency, Baptist Medical Center – Family Practice
1975-1979	M.D., University of Missouri-Columbia Medical School (Honors in certain clinical blocks)
1975	B.A. – Chemistry, Cum Laude, Southern Methodist University, Dallas, TX
1971	Center Senior High, Kansas City, MO
Board Certification:	American Board of Family Practice – Recertified 1994 National Board of Medical Examiners, Parts I, II, III passed
Licensure:	Kansas State Medical License
Employment:	
1992-Present	Physician, Associates in Family Care – Olathe, Olathe Medical Services, Inc., Olathe, KS
1986-1992	Physician, Associates in Family Care, Olathe, KS
1982-1983	Assistant Clinical Professor, UMKC Department of Family Practice, Truman Medical Center East (part-time)
1982-1986	Physician, Olathe Family Care Center (Partner, Physician, Financial Manager, Personnel Manager)
1979-1982	Resident Physician, Baptist Medical Center, Kansas City, MO
1975,1976,1978	Counselor, Kanakuk Kamp for Boys
1972-1974	Laborer, North American Van Lines
1970	Laborer, Rocky Mountain Prestress, Inc.
1970	Assembly Line, Merritt Foods (Ice Cream Factory)
1969-1971	Sacker, Stocker, Porter, Wolferman's Grocery Store
Medical Staff:	Olathe Medical Center, Inc. – Active Staff
Memberships:	American Academy of Family Physicians Kansas Academy of Family Physicians

Medical Professional Service Activities:

1998	Missions Trip to Ecuador (medical care to prisoners) with Christian Medical Society
1985-Present	Advisory Board Member, Johnson County Pregnancy Center
1985-Present	Advisory Board Member, Olathe Chapter Kansans for Life
1990	Supervising Pediatrician, EKU Baptist Hospital, Nigeria

Additional Training:

1998 recert	Advanced Cardiac Life Support Provider
1998 recert	Neonatal Resuscitation

Volunteer Activities:

1985, 1990, 1991	City union Mission Camp Physicals
1986-Present	Volunteer Physician, Olathe School District Sports Physicals
1980s-1991, 1997	Volunteer Physician, Play Hospital
1990-1991	Auction Donor, Tomahawk Elementary School Fun Fair
1994-Present	AIDS Lectures, Olathe East High School
1991	AIDS Lectures, Sophomore Health Classes, Olathe South High School
1985	Volunteer Physician, Blackbob Elementary School Health Fair
1983-1985 and 1994-1998	Camp Physician, Kanakuk Kamp
1982-1983	Assistant Coach, Little League Boys Basketball Teams
	Team Physician, Olathe South and North High Schools, MidAmerica Nazarene College Football Games
1983	Hypertension Workshop for Pediatric Screening, Olathe School District Nurses

To: Members of the Senate Federal and State Affairs Committee
Re: Testimony in support of Substitute for House Bill No. 2007
From: Douglas G. Brooks, MD
Date: April 27, 1999

I wish to thank you for the opportunity to speak to you today about a subject that is very important to me and to the citizens of this state. All too often, physicians have stood by quietly while the abortion debate goes on. Often, the physicians who do speak are vocal proponents of abortion rights. Too frequently, the silence of we physicians opposed to the loss of innocent life through abortion has been mistaken for tacit approval of the process. I am here today to tell you that I can no longer stand quietly by as the debates about viability, mental health, and parental consent take place here and across the state. We must consider the effect the thousands of abortions each year in this state have on the women who are having them. As a physician who practices obstetrics and gynecology within my family practice of medicine, I see the effects daily. Let me try to explain.

As an eager young physician starting out in private practice back in 1990, I felt I knew everything. I soon learned, however, that I knew very little about real life. I never realized how having two letters after my name would permit me to hear the most intimate details of people's lives, things not even their spouses knew. As my practice grew, I began to see a pattern develop over and over again. Women in their third and fourth decades of life presenting with overwhelming physical and psychological problems ranging from fatigue to anxiety to depression. These women were from all social and economic classes. They were single, married, and divorced. Some would be considered highly successful. Some would not be highly thought of. Many had seen many physicians in their quest to find peace and happiness. Most had been medicated with various drugs with little or no relief. Some had turned to legal and illegal drugs to try to forget their sorrows. Many had even tried suicide to try to escape. I was frustrated that I could not help them any more than any of the other doctors could. Then one day I finally stumbled on a question that provided the missing link to connect all of these women and their problems. I happened to ask one of them about previous abortions. I had never really asked the question before because I did not really think it was a very common procedure. As a child growing up in western Pennsylvania I had seen the signs protesting abortion in the yard of the local Catholic church, but it never dawned on me what was really taking place. I guess I assumed that it just happened to the girls from the other side of town. That day I learned a very valuable lesson. I learned that I always needed to ask the abortion question because it seemed to magically open the door so many of these women had slammed shut so many years ago. This particular woman had never told anyone about the pregnancy and subsequent abortion she had some twenty years ago. Yet, it had haunted her every minute of every day since she had it done. That day she wept more than I have ever seen anyone cry. To this day she carries a tremendous amount of guilt for killing her unborn child. She is, however, able to carry on her life now without the constant hidden pain that she carried all those years. Likewise, as I saw these women back in the office in the following months and years, they all eventually admitted to having had an abortion as younger people and that they had suppressed their feelings through the years because of such tremendous guilt and shame. Interestingly, they all said to me that they knew at the time that they were killing their baby even though they were told that it was just a "blob of tissue". I really

To: Members of the Senate Federal and State Affairs Committee
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wish all of you could have been a part of these sessions because it would finally force you, as it did me, to stop and consider exactly what abortion is and what it does to the woman for the rest of her life.

I would love to cite some statistics on post-abortive mental illness. The problem is that there is not much good information out there yet. Not everyone is asking the right questions. No one knows how long the effects can be suppressed, either. My observation is that it can take a long time. We are only now approaching three decades of legalized abortion on demand in the United States. As the millions of women who have aborted over the years approach their middle life years, I predict we will see a continued increase in mental illness as the suppressed truth finally surfaces in various ways.

I wonder aloud today how many of these women had their abortions for "mental health" reasons. I find it fascinating that of the fifty-eight people having "partial birth" procedures in Kansas in 1998, all of them were done for mental health reasons[1]. Are we all naive enough to believe this to be true? Does it not seem more reasonable to suspect that a large majority, if not all of these women, will suffer worse mental health problems when they realize that they killed their unborn child? Would it not be better for all of us to eliminate this loophole from the law that allows abortion of viable human infants to proceed without restriction, thereby preventing a lifetime of mental health problems for these women?

In conclusion, let me challenge each one of you to consider how devastating it would be to know that you killed your own child. Imagine living your life knowing that you alone were responsible for your child's death. Could you live with yourself? Just the thought is a horrible thing. Those of us who have never had an abortion will never be able to imagine how terrible it really is. But there are thousands and thousands of women in Kansas who know all too well how it feels. Let us prevent it from continuing to be a leading cause of mental health problems for women in our state by closing this glaring loophole in the law that is so brazenly misused by the abortion industry today.

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[1]KDHE, Center for Health and Environmental Statistics, Office of Health Care Information, 1998.

Douglas G. Brooks, MD

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EDUCATION

1979-1983	*Franklin and Marshall College, BA, biology*
1983-1987	*University of Kansas School of Medicine, MD*
1987-1988	*1st Year Family Practice Residency, St. Mary's Hospital, Kansas City, MO*
1988-1990	*2nd and 3rd Years Family Practice Residency, St. Joseph Medical Center, South Bend, IN*

EMPLOYMENT

1990-1995	*Private Practice of Family Medicine, Associates in Family Care, Olathe, KS*
1995-present	*Private Practice of Family Medicine, Stoll Park Family Care, Overland Park, KS*

PROFESSIONAL APPOINTMENTS

1995	*Treasurer, Olathe Medical Center Medical Staff*
1997-1998	*Chairman, Department of Obstetrics and Pediatrics, Olathe Medical Center*
1999	*President-elect of the Medical Staff, Olathe Medical Center*

PERSONAL DATA

- *Married to Christina J. Brooks*
- *Children: Caroline, age 12 and Jonathan, age 5*
- *Hobbies and interests include perennial gardening, farming, coaching and playing softball*
- *Active member of Christ Presbyterian Church, Kansas City, MO*

Testimony of Tracy Cowles, M.D.
April 27, 1999

Thank you for allowing me to address the committee. My name is Tracy Cowles; I am a perinatologist practicing in Kansas City. I went to medical school and did my residency at the University of Kansas after which I was a full-time faculty member in the Department of OB/GYN for three years. I then completed fellowships in both Maternal-Fetal Medicine and Medical Genetics at the University of Texas in Houston. I currently am an Associate Professor at the University of Missouri, Kansas City and at the University of Kansas. I am also involved in a private perinatology practice.

As a perinatologist, I take care of women who have become critically ill because of their pregnancy and women who have preexisting medical complications such as hypertension or diabetes. I spend a lot of time in the hospital trying to prevent preterm birth. However, a large portion of my practice is devoted to prenatal diagnosis. This involves counseling couples who are at increased risk for genetic diseases, using ultrasound technologies to detect birth defects in fetuses and invasive procedures to determine chromosomal abnormalities.

Most patients who come to our offices receive reassuring information regarding their pregnancy. However, not infrequently, I must give less than happy news to a couple. Sometimes this may involve a minor structural abnormality that can corrected surgically after the baby is born; sometimes it involves a series of devastating birth defects. Sometimes the baby's chromosomes are unbalanced, resulting in severe mental retardation and difficulties with growth. Occasionally, the baby has inherited a genetic mutation from each parent that will result in a very shortened life complicated by severe illness and mental retardation.

Most couples seek prenatal diagnosis expecting good news. In most cases, the pregnancy is planned with much love and anticipation and the diagnosis of a severe abnormality is devastating for a family. Many are very uncertain as to what to do. Some, despite the very worst diagnoses, choose to carry a pregnancy to term because for that couple, continuation of the pregnancy is the right decision. Others choose to terminate a pregnancy when faced with a horrific diagnosis because for their family that choice is the right one.

The changes to the Kansas abortion laws beginning in 1998 have made counseling patients more difficult. In many cases, prenatal diagnosis can not be made with certainty prior to twenty-two weeks gestation. Sometimes birth defects become more detectable sonographically as a fetuses matures. In other cases, molecular diagnosis of a particular disorder simply takes too much time to make the exact diagnosis prior to the twenty-two week cutoff.

While the intent of the current legislation may include the provision for post viability terminations when the fetus has a "lethal" abnormality, this provides a great difficulty for those of us involved in prenatal diagnosis. Some severe abnormalities are not immediately lethal; with support, a newborn could linger for variable periods of time. Many conditions, while lethal in almost all cases, will have the occasional newborn who survives.

At this time, while this committee is reconsidering the various aspects of abortion legislation, I would encourage you to give thought to reinstating the original language regarding post viability termination for severe fetal abnormalities. While this clinical situation is not one that anyone would one of their family members to be involved in, it does happen. When a family is faced with these tragic diagnoses, they must make agonizing and very personal decisions. I believe that the patient and the doctor should be able to make these decisions together without excessive governmental interference.

Allowing terminations for severe fetal abnormalities does not significantly affect the abortion rate in Kansas. These terminations are not accomplished by partial birth abortions. However, the inclusion of a post viability exception to allow termination for severe fetal abnormalities would provide an option for those unfortunate couples who must deal with these devastating clinical situations.

Thank you for your consideration.

#6

Testimony of Mary V. Petrow, Kansas Resident.

Support of SB 142

Personal experience with severe fetal abnormality.

The importance of allowing exceptions for severe fetal abnormalities.

The importance of a Mental health exception.

The importance of the doctor/patient relationship.

Compassion for families.

Compassion for the suffering of the unborn child.

Protecting the right to future pregnancies.

Sen. Federal & State Affairs Comm.
Date: 4-27-99
Attachment: #6-1

Planned Parenthood®
of Kansas and Mid-Missouri

Testimony of Erika Fox

Vice President for Public Policy

on

April 27, 1999

before the

Senate Federal & State Affairs Committee

of the

Kansas Legislature

concerning

HB 2007, SB 142 and SB 357

Sen. Federal & State Affairs Comm.
Date: 4-27-99
Attachment: # 7-1

1001 East 47th Street • Kansas City, Missouri 641

Thank you for the opportunity to talk to you today. Last year, fueled by overriding political considerations, Kansas enacted a law making changes in the rules governing abortion practice in the last half of pregnancy. Unfortunately, that law was not grounded in an examination of its consequences for the women who may need abortions or the physicians who provide them. There were no hearings and the language was thrown together at the last minute to try to satisfy the various political constituencies of the moment. It is encouraging to see that this year, the legislature is taking the time to study this issue, beginning with interim hearings last summer through committee hearings in both chambers this session.

Nationally, abortions after twenty weeks of pregnancy represent less than 1% of all abortions performed. But they are sought at these later stages for a variety of serious reasons. Some women do not recognize that they are pregnant until the pregnancy is well advanced. This is particularly true for young teenagers but may also affect women in menopause or others who menstruate irregularly. Other pregnancies may have been planned and very much wanted, until tragedy strikes—such as the death of a spouse, a job loss, the diagnosis of a debilitating disease. A woman might choose abortion later in pregnancy if continuing that pregnancy might worsen serious health problems or if she requires treatments that may damage a developing fetus. And the results of the most important prenatal diagnostic tests are generally not available until well into the second trimester of pregnancy when a woman may wish to end the pregnancy rather than give birth to a child who will suffer and die in infancy or who will have severe disabilities.

It should also be noted that the ever-increasing restrictions on and harassment of physicians who provide abortions, and their patients, are also a source of delay when women choose to terminate their pregnancies. Waiting periods, lack of funding, parental notification requirements and physician shortages all contribute to the difficulty in obtaining an abortion earlier in pregnancy.

While much of last year's bill was directed at post-viability abortions, the new testing and reporting requirements—combined with the ambiguous changes in the definition of viability—caused confusion and apprehension for physicians providing abortions prior to viability. This created a chilling effect that caused some physicians to scale back their services to avoid possible criminal and licensing penalties, and forced women to travel further for or forgo what should have been constitutionally protected abortion procedures.

The effect of the amendments relating to post-viability practice was truly ironic. The combination of the creation of a new section purporting to ban so-called "partial birth abortion" (that, as far as we know, had never been performed in Kansas), and the repeal of the general post-viability exception for cases of severe fetal anomalies without providing a clear exception for mental health, resulted in actually creating a demand for these much-maligned procedures. This unintended result was produced by failing to provide a constitutionally required exception that unequivocally covers more than physical health problems in K.S.A. 1998 Supp. Section 65-6703, and by ignoring the fact that women in tragic circumstances cannot be brushed away with the stroke of the pen.

As we know, the Supreme Court chose not to consider the constitutional issues brought directly before it concerning the new abortion law. However, those agencies charged with

enforcing the new law mercifully interpreted it in ways to mitigate some of its worst constitutional flaws, and refused to highlight those defects by refraining from bringing charges demanded by anti-abortion extremists. Changes in those agencies in the future may unleash the zealots and, therefore, create additional reasons for the Legislature to fix the mess they have created.

Predictably, proponents of the House-passed HB 2007 have chosen to deal with these issues by ignoring all constitutional problems and expanding physician reporting and prosecutorial responsibilities. While they would repeal Section 65-6721 (that section outlawing so-called "partial birth abortion), they retain an ambiguous and insufficient enumeration of exceptions in Section 65-6703. Planned Parenthood opposes Senate passage of HB 2007.

On the other hand, we wholeheartedly support SB 142. This bill repeals most of the vague and confusing portions of last year's enactment which cause physicians to have to choose between their own legal well-being, or the safety and constitutional rights of their patients—whether in the second or third trimester. It repeals the tortured, confusing and conflicting new definition of viability that requires abortion providers to pretend to be neonatologists in determining the possibility of survival of a fetus in the best equipped hospital in the world. It also repeals the new onerous testing and reporting requirements which have a chilling effect on a physician's willingness to provide abortion—even prior to the point of fetal viability—and the vague and ambiguous requirement (in Section 65-6712) that state-mandated information be provided to women whether or not they have abortions. Most importantly, it eliminates the procedure ban in Section 65-6721 and provides for the ban on all post-viability abortions that there be an exception broad enough to protect a woman's physical **and** mental health.

SB 357 falls in the middle in Planned Parenthood's view. It does not go far enough in its attempts to remedy the problems created by last year's bill. And it goes farther than is constitutionally permissible in withdrawing a health exception from the procedure ban in Section 65-6721. The addition of an unambiguous health exception to Section 65-6703 that covers both physical and mental health considerations, does not save the lack of any health exception to the so-called "partial birth abortion" prohibition.

SB 357 adopts yet a third definition of "viability" which avoids some of the vagueness problems of last year's enactment but is not an improvement on the definition long-used in Kansas law. This bill also alleviates some of the unacceptable legal dangers to physicians found in last year's testing and reporting requirements by including scienter requirements that violations of these laws must be done "intentionally, knowingly, or recklessly" in order to be the basis for prosecution. We would suggest that the word "recklessly" be eliminated here. In the scienter requirement for Section 65-6721 (if that section is going to be retained), we suggest using the word "willfully" to make it clear that a physician can't be punished for performing a procedure he or she did not start out to do.

Like SB 142, SB 357 includes a health exception to Section 65-6703 that unambiguously protects women who have serious mental health problems late in pregnancy. But both bills would be improved it they included a third explicit exception to the ban on post-viability abortions. It should not be necessary that a woman prove that her mental health is compromised

in order to be allowed to choose to abort a fetus that is affected by a severe or life-threatening deformity. Planned Parenthood strongly advocates that such a compassionate exception be restored to Kansas law.

In conclusion, we urge this Committee to reject HB 2007, to approve SB 142 with the third exception, or—at least—to adopt SB 357 with amendments that make it constitutional, fairer to physicians and more compassionate for women and their families.

#8

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Statement of Cynthia J. Patton, Attorney, in Support of Substitute Bill 2007 regarding late term abortion.

Substitute Bill for No. 2007 is a law that was designed to place some limitations on when late term abortions can occur. The Bill also has substantial provisions that deal with reporting of abortions and insuring that decisions by an abortionist regarding gestational age of the fetus and determinations regarding viability are made according to accepted obstetrical or neo-natal standards of care and practice applied by physicians in the same or similar circumstances. It also requires that women be given information regarding the fact that after viability abortions would only be performed if it was necessary to preserve the life of the pregnant woman or a continuation of the pregnancy will cause substantial and irreversible impairment of a major bodily function of the pregnant woman.

The State's regulation of abortion has been proscribed by Supreme Court decisions. There are only certain limited areas where the State can get involved in abortion legislation.

The landmark case of Planned Parenthood vs. Casey, 505 U.S. 833, 120 L. Ed 2nd 674, a 1992 case, reaffirmed Roe vs. Wade but also made some distinctions between Roe and what the law is today. Planned Parenthood vs. Casey involved a Pennsylvania abortion control act that upheld informed consent and upheld parental consent laws. Basically three of the judges were in favor of changing the Roe vs. Wade standard but also not overruling it. There were also three justices who thought that Roe vs. Wade should be overruled and that made up the plurality opinion which upheld certain portions of the Pennsylvania Abortion Control Act.

The justices in that case decided that viability would be the major demarcation with regard to how states were able to legislate in this area. Before viability, the standard was whether a particular provision was an undue burden on the woman's decision to have an abortion.

"An undue burden exists and therefore a provision of law is invalid if its purpose or affect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability".

This legislature has been able to pass parental notification and informed consent laws which meet the Supreme Court line of cases of Casey.

Sen. Federal & State Affairs Comm
Date: 4-27-99
Attachment: # 8-1

What we are trying to do today with the substitute for House Bill 2007 is pass some legislation in the area of late term abortions after viability. Casey stated that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify legislative ban on non-theraputic abortions". What the court is indicating is that at the point when a physician determines that the unborn child is viable, i.e. can exist outside the womb, then it is constitutionally okay based on the State's interest in the fetal life to actually have a legislative ban on non-theraputic abortions. In Casey, the Supreme Court continued to uphold Roe's holding that,

"subsequent to viability the State in promoting its interest in the potentiality of human life, may if it chooses, regulate and even prescribe abortion except where it is necessary in appropriate medical judgment for the preservation of the life or health of the mother".

We know from a 10th Circuit case that we can't just define viability at a particular point in time such as 22 weeks. The cases have been clear that this type of determination has to be made by the physician as opposed to the legislature. Substitute for House Bill No. 2007 is mindful of that requirement and does make the physician responsible to make that determination as to whether the unborn child is viable. But it also sets out the standard that that decision has to be made according to accepted obstetrical or neo-natal standards of care and practice applied by physicians in the same or similar circumstances.

There has been a lot of controversy about whether that term, health of the mother, includes the mental health of the mother or if it is soley related to physical problems which the mother may experience. I think that we have to say that the Supreme Court has not explored that issue. There is one 6th Circuit Court case that has looked at that particular issue. The 6th Circuit ruled that if a State chooses to prescribe post viability abortions, it must provide a health exception. However, in defining the health exception, it indicated that a health exception could be drafted to only include restrictions where the woman is faced with the risk of severe psychological or emotional injury which may be irreversible.

I think first of all I would like to address the fact how binding is the 6th Circuit opinion. The way the judicial system is set up, the final word precedent which must be followed is that of the U.S. Supreme Court. There are many times when you are going to have a division of opinion between different circuit courts. At this point we have one

definitive circuit court opinion from the 6th Circuit, however, if this law were taken up to the 10th Circuit, the 10th Circuit would be free to decide this issue differently. I think if the legislative body of Kansas is really serious about limiting late term abortion in Kansas, the best option would be to use this law as a vehicle for determining whether the mental health exception has to be a part of that law. I think this issue is completely open for determination by the 10th Circuit. The Supreme Court cases have not been clear in indicating that you have to have a mental health exception and that issue has not been specifically addressed in any of the abortion laws that have gone up before the U.S. Supreme Court in a late term abortion restriction.

There was a petition to the Supreme Court from that 6th Circuit decision to have that case heard by the Supreme Court. Cert was denied by the Supreme Court. It should be noted that a lot of times the Supreme Court will deny cert until there are several circuit court opinions showing that there is a difference of opinions among the circuit courts. There was a dissent by 3 justices of the Supreme Court who indicated that they thought they should have accepted cert to the Supreme Court on this issue. The opinion by justice Thomas was extremely critical of the 6th Circuit opinion. He specifically stated that he did not think previous Supreme Court decisions supported the proposition that after viability a mental health exception is required as a matter of federal constitutional law. Justice Thomas indicated in his dissent that the vast majority of the 38 states that have an active post viability abortion restriction have not specified whether such abortions must be permitted on mental health grounds. I think as more and more of these statutes become areas of litigation, you are going to see some courts going the other way and indicating that it is not necessary to have a mental health exception in a ban on late term abortions.

I would like to address the issue of the other two bills that have been introduced regarding late term abortions, Senate Bill 142 and Senate Bill 357. Both of those bills contain mental health exceptions. What I am wondering is if the proponents of those bills are specifically relying on the 6th Circuit opinion to say that substitute for House Bill 2007 is unconstitutional, they should also take a look of that opinion in terms of what it says would be a reasonable restriction on abortion with regard to mental health.

Specifically, that 6th Circuit decision addressed an argument made by pro-lifers that a broad maternal health exception will render meaningless the State's compelling interest in protecting fetal life and it's right to actually pro-

scribe post viability abortions. The 6th Circuit states, "However we emphasize that we are holding that a maternal health exception must encompass severe irreversible risks of mental and emotional harm. The State's substantial interest in potential life must be reconciled with the woman's constitutional right to protect her own life and health. Therefore, it stated that the State if it prescribes post viability abortions must provide a health exception that includes situations where a women is faced with the risk of severe psychological or emotional injury which may be irreversible. I would say that if this legislature wants to put in a mental health exception, they should include in that definition of mental health that it only encompasses severe irreversible risks of mental and emotional harm to the mother.

I would reiterate however that I do not think that it is necessary that a mental health exception be included in order to pass constitutional must.

Finally, I would just indicate that this legislature needs to be deciding public policy, not constitutionality. The legislative body is determining what is the proper public policy in this instance. As indicated, I think this body has an interest in protecting the lives of unborn children after they reach viability. At that point, there is no question that we are dealing with a human life. Nobody disputes that fact. I think most Kansans are very uncomfortable with late term abortions and the killing at this stage of development. There really is no reasonable basis for distinguishing children at viability from children who are already born. We certainly would never think of allowing the destruction of children after they were born. So my question is, why do we hesitate to go as far as we can in protecting unborn children in the womb after they reach viability? We should let the courts do what the courts do best which is to determine how the constitutional requirements of Roe vs. Wade and Casey impact that legislative policy decision. Quite frankly, this legislative body is not equipped to make those kinds of judicial determinations. I would also ask that as a legislative body we not make a mockery of this late term issue by providing exceptions that make it a hollow limitation on late term abortions.

I think it is clear from the Casey decision that post viability abortions can be banned except where it is necessary by an appropriate medical judgment for the preservation of the life or health of the mother. I think substitute bill for House Bill 2007 recognizes that language in Casey. It does have a provision that provides for an exception in the case of the life or health of the mother as determined by

the physician. There has also been an attempt to clearly define the standard by which the physician makes that determination and should this Bill come before the Supreme Court or ones like it, I think that the Supreme Court under the standards of Casey could very well approve such regulation. At any rate, it would be a question of first impression before the Supreme Court. This is not a bill that is clearly unconstitutional under the current standards that have been laid down by the Supreme Court. I would therefore urge passage of substitute for House Bill 2007.

#9

THE SENATE OF THE STATE OF KANSAS

COMMITTEE ON FEDERAL AND STATE AFFAIRS

HEARING ON SB142, SB 357, & SUB. HB 2007

WRITTEN TESTIMONY OF TIMOTHY R. BROWNLEE[1]

April 27, 1999

Three bills are before the Committee on the subject of abortion: Senate Bill 357 dated 3-30; Senate Bill 142 dated 1-26; and Substitute for House Bill 2007 dated 4-02. Each bill proposes amendments to the abortion statutes of the State of Kansas.

THE BILLS UNDER CONSIDERATION

Generally speaking, Senate Bill 357 (SB 357) adds the impairment of a mental function of the pregnant woman to the definition of "medical emergency" under KSA 65-6701 and to the maternal health exception to the ban on abortion of viable fetuses in KSA 65-6703. SB 357 also changes the definition of viability as used in the abortion statutes and removes the provision that a partial birth abortion can be performed when the continuation of the pregnancy will cause substantial impairment to the physical or mental function of the pregnant woman.

[1] Timothy R. Brownlee is a partner in the law firm Crews, Waits, Brownlee, Berger & Hoop. Mr. Brownlee has practiced law since 1986 and has had an active litigation practice in the Federal and State

Senate Bill 142 (SB 142) amends KSA 65-445 to delete the provision allowing the identity of the medical doctor to be revealed to the Attorney General for disciplinary action or criminal proceedings. It would amend KSA 65-6703 to remove all requirements that physicians determine the gestational age of fetuses prior to abortion, and delete the reporting requirements related to the determinations of gestational age and viability. This bill also would repeal the partial birth abortion statute found in KSA 65-6721.

Substitute for House Bill 2007 (Sub. HB 2007) would amend KSA 65-445 to require the reporting of the confidential code number of the physicians who make the determinations that an abortion is necessary and would change the definition of viability in the abortion statutes. This bill rewrites the definition of viable in KSA 65-6701 and deletes the other definition of viable found in KSA 65-6703. The bill would also amend §6703 to require greater detail in the reporting required under KSA 65-445. This bill also corrects a portion of KSA 65-6709 to make it consistent with §6703 and it also repeals the partial birth abortion prohibition in 65-6721.

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courts in Kansas and Missouri since 1989. Mr. Brownlee and his family have resided in Shawnee, Kansas for ten years.

PURPOSE OF THE TESTIMONY

This testimony is a constitutional law analysis of the three bills under consideration by the Committee. The analysis focuses on the mental health exception, the definitions of viability, and the ruling of the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania vs. Casey* and its progeny.

THE "MENTAL" HEALTH PROVISIONS

The most notable, and perhaps the most disputed, difference between these three bills is the inclusion of "mental" function in the medical emergency and maternal health exceptions to the ban on post-viability abortions. SB 357 and SB 142 each add the word "mental" to the exceptions allowing abortions of viable fetuses. Sub. HB 2007 does not. The United States Supreme Court in *Planned Parenthood vs. Casey*, 505 U.S. 833 (1992) did not require a mental health exception to uphold the constitutionality of a ban of post-viability abortions. The Court in *Casey* held that once a fetus becomes viable, "the State .... may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Casey* at page 879. Neither this ruling nor the analysis and discussion leading up to the ruling contain any discussion or mention of

the mental health of the mother. Nontheless, the *Casey* decision upholds the constitutionality of the medical emergency exception in the Pennsylvania abortion statutes.

The medical emergency provision of the statute at issue in *Casey* describes a medical emergency as a condition which, in the physician's judgment, "so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function." The Supreme Court held that, while the definition could be interpreted in an unconstitutional manner, the Court of Appeals construed the statute to assure that compliance with the Pennsylvania abortion regulations would not in any way pose significant threat to the life or the health of a woman. The Supreme Court found that this definition imposes no undue burden on a woman's abortion right and upheld the constitutionality of this provision.

THE *VOINOVICH* DECISION

Since the United States Supreme Court has not required a mental health exception for post-viability abortion bans, the inclusion of "mental health" in SB 142 and SB 357 is apparently based on a common misconception of the scope and application of the Sixth Circuit United

States Court of Appeals case entitled *Woman's Medical Professional Corporation vs. Voinovich*, 130 F.3d187 (1997). In the *Voinovich* case, the Sixth Circuit Court of Appeals struck down an Ohio statute that restricted post-viability abortions. The *Voinovich* decision held that a maternal health exception must encompass severe irreversible risks of mental and emotional harm in order to survive constitutional attack. However, the ruling in *Voinovich* is questionable on its merits and is certainly not binding precedential law outside the jurisdiction of the Sixth Circuit of the United States Court of Appeals.

THE QUESTIONABLE RATIONALE OF THE *VOINOVICH* CASE

The *Voinovich* decision relies on two cases, *Doe vs. Bolton*, 410 U.S. 179, and *US vs. Vuitch*, 402 U.S. 62, which each dealt with constitutional challenges to statutes which included psychological as well as physical well-being in the determination whether an abortion is "necessary." In both *Doe* and *Vuitch*, the Supreme Court found the statutes were not unconstitutionally vague. However, the rulings in *Doe* and *Vuitch* that the laws in question were not vague because they included emotional and psychological considerations in no way means that post-viability bans must have a mental health exception. The cases simply did not consider or decide that question.

In fact, the *Voinovich* Court admits that its ruling is not in agreement with the Supreme Court holding in *Casey*. The *Voinovich* decision states: "We believe the Court will hold, **despite its decision in *Casey***, that a woman has a right to obtain a post-viability abortion if carrying a fetus to term would cause severe non-temporary mental and emotional harm." (Emphasis added). This statement is an express admission that its decision is inconsistent with *Casey*.

PRECEDENTIAL VALUE OF *VOINOVICH*

The *Voinovich* case is a U.S. Sixth Circuit case and is not binding precedent for the states outside the Sixth Circuit. The State of Kansas is located in the Tenth Federal Judicial Circuit. The United States Supreme Court denied certiorari and declined to review the decision in *Voinovich*. It's frequently argued by non-lawyers, and indeed by some persons trained in the law, that the denial of certiorari by the Supreme Court implies that the Supreme Court agrees with the lower Court's decision. This is simply not true. The Supreme Court's denial of certiorari has no precedential value. It does not mean that the United States Supreme Court agreed or disagreed with the merits of the lower Court decision and it can not be used to expand the precedential value of the case beyond the Sixth Circuit. The United States Supreme Court itself has held that its denial of certiorari

has no legal binding or precedential value. *U.S. vs. Carver*, 260 U.S. 482 (1923) and *Teague vs. Lane*, 489 U.S. 288 (1989).

When the Supreme Court denied certiorari and chose not to review the *Voinovich* decision, Justice Thomas, Chief Justice Rehnquist, and Justice Scalia dissented in an opinion written by Justice Thomas. In this descent, the Justices explained that the *Voinovich* decision impermissibly expanded the United States Supreme Court holding in *Casey*. However, just as the decision to deny certiorari has no precedential value, neither does the dissenting opinion on the denial have precedential value. So, although the dissent opinion is a clear summary of the obvious errors in the *Voinovich* ruling, it is not a binding statement of law.

VOINOVICH NOT CONSISTENTLY FOLLOWED

Until the Supreme Court rules differently, *Voinovich* is the law in the 6th Circuit. Elsewhere the decision has not been consistently followed. A United States District Court in the District of Louisiana in the case of *Okpakobi vs. Foster*, 981 F.Supp. 977 (1998), declined to follow the *Voinovich* ruling on what standard a Court must use to determine a facial constitutional challenge to a state statute. Also, as of the date of this testimony, my computer updated research shows that neither the Federal

Tenth Circuit Court of Appeals nor any United States District Court within the Tenth Circuit has cited or followed the *Voinovich* decision.

CASEY REMAINS THE LAW OF THE LAND

Since the *Voinovich* case is not binding law in Kansas, and since its holding is not consistent with the Supreme Court and has been questioned by other Courts, the clearest and safest path for the Kansas Legislature is to follow the clear ruling of the United States Supreme Court in *Casey* and not include "mental" in the maternal health exceptions to post-viability abortion bans. While it is not absolutely clear that including the mental health language in the exceptions would make the statutes constitutionally infirm, the best chance for the Kansas Legislature to reduce the risk that its statute will be found unconstitutional, is to follow the United States Supreme Court ruling in *Casey*.

THE DEFINITION OF "VIABLE"

Another point on which the current statutes and the bills differ is the definition of "viable." SB 142 would eliminate the definition of "viable" which appears in KSA 65-6703, and leave in place the current definition of "viable" contained in Sec. 6701. SB 357 and Sub. HB 2007, on the other hand, both eliminate the definition of "viable" in Sec. 6703 and both

replace the definition of "viable" in Sec. 6701. In this respect, both SB 357 and Sub. HB 2007 are much more in accord with current constitutional law than SB 142.

CONSTITUTIONAL HISTORY OF "VIABLE"

The constitutional law related to the definition of viability begins with the decision in *Roe vs. Wade*, 410 U.S. 113 (1973). In Roe, the Court defined viability as the point at which the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid" and presumably capable of "meaningful life outside the mother's womb." (Roe at 160, 163) The *Casey* decision reaffirmed the central holding of Roe and restated the definition of viability as "the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb." (Sec. IV of *Casey*) Further, the *Casey* decision cited with approval portions of *Planned Parenthood of Central Missouri vs. Danforth* and reaffirmed the *Danforth* holding which upheld the Missouri statutory definition of "viability." The Missouri statute defines viability as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life supportive systems." *Danforth* at 63. Not only did the Supreme Court uphold the constitutionality of the *Danforth* definition of viability, but it further

explained that the words "continued indefinitely outside the womb" as used in *Danforth* may occur later in the pregnancy than "potentially able to live outside the mother's womb" as used in *Roe*. So, the viability definition in *Danforth* is perhaps even less restrictive than would be allowed under *Roe*.

"VIABILITY" IN THE BILLS UNDER CONSIDERATION

The definition of viability contained in Substitute HB 2007 is nearly identical to the *Danforth* definition and the definition in SB 357 is very similar to the *Danforth* definition. In terms of constitutionality the definition of viability, Sub. HB 2007 is the best, and SB 357 is almost as clearly constitutional. Either of these bills are much preferable to SB 142 in terms of the constitutionality of the definition of viability.

CONSTITUTIONALITY OF K.S.A. § 65-6703

It has been suggested by some that the provisions in K.S.A. § 65-6703 which relate to the determination of a gestational age of 22 weeks, might cause the current statute to be unconstitutional. This argument is based on the Tenth Circuit case of *Jane L. vs. Bangerter* dealing with the State of Utah's abortion restrictions. However, the Bangerter case expressly states that it is not ruling on whether a 20 week restriction

would be a permissible definition of viability. Furthermore, neither the current Kansas statutes nor the bills under consideration include 22 weeks in the definition of viability. The existing statute, SB 357, and Sub. HB 2007 simply use the 22 week mark as a threshold at which a viability decision must be made by a physician, and the point at which there are certain reporting requirements.

CONSTITUTIONAL PROBLEMS WITH SB 142

SB 142 would eliminate many of the provisions of K.S.A. § 6703 as well as repealing § 6721. If SB 142 is enacted into law, the requirement for a determination of gestational age, the requirements to report the reasons for the decision to abort a viable fetus, and the severability clause of the abortion restrictions would be eliminated. The elimination of all of these provisions is not in accord with the rationale and the ruling of the *Casey* decision.

The *Casey* case, in overruling the trimester framework of *Roe vs. Wade*, pointed out that the basic flaw in *Roe* was that "it undervalues the State's interests in the potential life within the woman." The Court went on to hold that "the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child." Eliminating most of the provisions of K.S.A. §

6703 as proposed in SB 142, would be following down the path of the post-*Roe* and pre-*Casey* cases which the *Casey* decision condemned and sought to correct.

In *Casey* the Supreme Court held that the State has a profound interest in a potential life throughout the pregnancy such that not all regulations must be deemed unwarranted. The kind of regulations that SB 142 would eliminate are precisely the kind of record keeping and reporting requirements which the Supreme Court upheld in *Casey*.

CONSTITUTIONAL PROBLEMS WITH THE EXISTING STATUTES

The existing Kansas statutes are for the most part constitutional. However, they do contain inconsistent definitions of "viable" found in 6701(k) and 6703(e). Any inconsistencies lend themselves to constitutional vagueness attacks. Also, the definition in existing K.S.A. § 65-6701 includes the requirement that "the fetus is capable of sustained survival outside the uterus without the application of extraordinary means." This language is inconsistent with the *Roe* definition: "potentially able to live outside the mother's womb, albeit with artificial aid." Also, this language is inconsistent with the holding in *Casey* that *Roe* and its progeny undervalue the State's profound interests in the potential life within the woman. Substitute HB 2007 remedies these potential constitutional

weaknesses, and is much more solid than the current statutes. And, Sub. HB 2007 does so without the constitutional questions injected by the inclusion of "mental" in the other two bills.

CONCLUSION

From a constitutional law standpoint, it is submitted that SB 142 is not consistent with the current state of constitutional law as articulated in the *Casey* decision. SB 357 and Sub. HB 2007 hold up much better under constitutional scrutiny; however, the inclusion of "mental health" (which appears at least five times in SB 357) makes the constitutionality of SB 357 weaker than Sub. HB 2007. Also, SB 357 eliminates the maternal health exception to the partial birth abortion ban of Sec. 65-6721. This deletion might be constitutionally fatal to K.S.A. § 6721.

For all the reasons discussed above, Sub. HB 2007 appears to be the best bill from a constitutional law standpoint. Substitute HB 2007 appears to be constitutionally defensible under current federal constitutional law.

Respectfully submitted:

Timothy R. Brownlee
14514 W. 61st Street
Shawnee, Kansas 66216-1500

Expert Testimony of
Jared P. Pingleton, Psy.D.
Licensed Clinical Psychologist
KANSAS STATE SENATE
April 27, 1999

RE: Mental Health Exceptions for Late Term Abortion Legislation

A. Definition Problems:

1. Doe vs. Bolton decision never clearly or specifically defined "health" vis-a-vis the mother's abortion of her child.

2. Martin Haskell, M.D. has testified in Congressional hearings that he never once performed a late-term abortion for the mother's health.

3. As is currently written, legislation which allows for a late-term abortion for the "mental health" of the mother functionally permits persons who are not trained, experienced, or licensed in the diagnosis and treatment of psychological disorders to make such psychological diagnoses in an unethical, and possibly dangerous and illegal manner.

B. Conceptual Problems:

1. No proof exists that intrinsically severe mental/emotional trauma ensues from the pregnancy and delivery of a child.

2. Logical non-sequitur: If part of the baby can be delivered without causing mental/emotional trauma, then why can't the rest of the baby be delivered resulting in a viable birth?

3. In no other realm of mental health does the supposed or alleged mental/emotional well being of one person necessitate the harm, suffering, traumatization, or destruction of another.

C. Clinical Problems:

1. Anyone who is experiencing even severe mental health disorders while pregnant can be successfully treated without harm to themselves or their child.

2. No psychological or medical data exists which states the mother's health is improved by the death of a viable post-twenty-week old baby.

3. A preponderance of clinical evidence, in fact, exists verifying that many women experience Post-Abortion Syndrome (PAS) -- which often is an extremely pervasive and persistent complex mental health disorder resulting in a myriad of psychological and relational difficulties consistent with the diagnosis of Post Traumatic Stress Disorder (which may be manifested years later). The symptomology of PAS includes the following characteristics:

a. guilt
b. anxiety
c. psychological "numbing"
d. depression and thoughts of suicide:
    -sad mood, dysphoria
    -sudden and uncontrollable crying episodes
    -deterioration of self-concept
    -sleep, appetite, and sexual disturbances
    -reduced motivation
    -disruption in interpersonal relationships
    -anhedonia
e. Anniversary Syndrome
f. re-experiencing the abortion
g. preoccupation with becoming pregnant again
h. anxiety over fertility and childbearing issues
i. interruption of the bonding process with present and/or future children
j. survival guilt
k. development of eating disorders
l. alcohol and drug abuse
m. other self-punishing or self-degrading behaviors
n. brief reactive psychosis.

Herbert C. Hodes, MD, FACOG

Memo

To: Members of Senate Committee

From: Herbert C. Hodes, MD, FACOG

CC: Any interested parties

Date: 04/26/99

Re: ***S 142, S 357, Sub H 2007***

Ladies and Gentlemen

I have attached a copy of my *Curriculum Vitae*. I hope that you will have time to look this over and tell me where I have lost contact with mainstream medicine. In July of 1970, I began my residency in Obstetrics and Gynecology at the K.U.Medical Center in Kansas City, KS. There I saw things I had never seen before--women who were pregnant and did **not** want to be--or could not afford to be--or were too: **(fill-in the blank)** old, young, poor, ill. These women sought the services of the physicians at the Medical Center to help them address their problem. They had pregnancy terminations and thanked us graciously for helping them. Those who did not know about our services sought out unskilled, illegal providers; or tried to cause themselves to miscarry. We treated these women by completing the "botched" job, giving antibiotics, and sometimes performing a hysterectomy if we were too late to prevent complications. I saw several women who had placed animal or chicken blood in their underpants and claimed they were "miscarrying" on their own. Remember, they came to us. We did not seek them out.

I left KU for two years to serve in the Navy in Jacksonville, FL. I moonlighted in civilian Family Planning clinics where even more women sought out fellow physicians and urged and begged us to help them out of their unplanned and undesired pregnancies. We did not go out and seek them. Despair in these women increased as my military practice grew and other physicians were less willing to help them. I returned to KU in the spring of 1973. As my skills and responsibilities grew, so did the number of women who sought out the services of my fellow residents and me. I left KU for a "traditional" private practice in Hutchinson, KS for a period of about three years. I avoided providing pregnancy termination services in this setting, because "it wasn't done in the community" according to the other physicians in the clinic. It was apparent to me that the practice of Obstetrics and Gynecology **should** include the full range of services for all women at all times. I left Hutchinson and set up my own private office in Overland Park, where I have been for over 22 years.

Why is all this important in this committee meeting in Topeka today? I do not relish the idea of being here today. Abortion providers did not ask non-physicians to decide how we practice medicine, or dictate which surgical procedures we may or may not do. What I would like to know is why am I here defending procedures that are part of the mainstream of medicine. What is it about **this** part of medicine and **these** patients that is so different? **WHY** are there countless hours of legislative debate over new laws and restrictions, waiting periods, color brochures, reporting documents, parental notification/consent, and other issues? I would like a legislator to sit in my office and hear a patient tell her own personal story. Then let that legislator tell the woman that what she has agonized over "should not" or "can not" be done. Remember that physicians do not seek these women. They are asking us to provide a safe (currently legal) procedure to solve a crisis in their lives. These women do not take

Sen. Federal & State Affairs Comm
Date: 4-27-99
Attachment: #1-1

.ıeir decisions lightly. No patient has ever told me she "wants" to have an abortion. All she wishes is to put her life **back** to the way it was weeks or months ago when she was not pregnant. We do not claim to cure poverty or illness; but we can give a patient a second chance to restore her previous state of health.

What else do I do every day in my practice? I provide complete health care for women of all ages, I do major and minor surgery, I treat women with menopausal problems, I deliver babies; and I provide pregnancy termination services. I feel I am better qualified to speak on the true medical implications of these proposed bills better than anyone else is in this room. I did not look forward to speaking in front of this group of people. The last time I appeared at a similar committee hearing, I was treated rudely by some of the legislators, and I vowed "never again." I agreed to appear today as a service to the women of Kansas, because they have no voice before you. They are "just" normal women of all ages, races and educational backgrounds. Statistics prove about one in ten women of childbearing age will have an abortion in a given year, and over 40% of women will have had at least one abortion in their lifetime. The pool of patients who seek out pregnancy termination services is huge, but voiceless to this body. Nevertheless, I am here defending my medical practices. I am here before you today asking you to define your views. I am the voice of thousands of Kansas's women who seek these services each year. The ***Statement of Policy*** of the American College of Obstetricians and Gynecologists supports me in my views in this area. ***"The American College of Obstetricians and Gynecologists is the national medical organization representing nearly 39,000 physicians who provide health care for women."***

The current ***Statement of Policy*** entitled **"ACOG Policy on Abortion"** includes some notable comments:

"Termination of pregnancy before viability is a medical matter between the patient and physician..."
"ACOG opposes unnecessary regulations that limit or delay access to care."
"ACOG opposes the harassment of abortion providers and patients."

I respectfully ask each of you to consider how knowledgeable you are regarding some of the **medical** issues involved in these three bills. What does each of you know about the difference between "viable, nonviable or post-viable"? What do you know about *Trisomy* 10, 13, 14, 15, 18, or 21? What about *Trisomy/Mosaics*? What do you know about Potter's Syndrome, open vs. closed neural tube defect, holoprosencephaly, hydrocephalus or anencephaly? What about hypoplastic left heart, ectopic cordis, diaphragmatic hernia, omphalocele, or gastrochisis? What can you tell me about "lethal vs. life-threatening anomalies"? What is "quality of life"? What about the quality of life for the woman and her other children? What is a "major bodily function"? What is involved in qualifying a woman's "Mental health"? What exactly is a **"partial birth abortion"?** How does that term relate to a woman admitted to Labor and Delivery at 23 weeks gestation with ruptured membranes and premature labor? ALL of the above issues are **medical,** as is the decision between a woman and her doctor. Remember the ***Statement of Policy***: "ACOG Policy on Abortion"

These Bills involve MEDICAL issues, which should be <u>between the patient and physician</u>.

They also involve <u>unnecessary regulations that limit or delay access to care.</u>

Lastly, they involve regulations that <u>harass abortion providers and patients.</u>

In summary, **SB 142** is acceptable to me as a physician only because it clarifies some of the confusion remaining in previous bills. However, **SB 357** and **HB 2007 (Sub HB2007)** are totally unacceptable because they each represent attempts by **non-physicians** to define and regulate medical / surgical issues about which they have poor, inaccurate, or incomplete knowledge.

Thank you for the opportunity to appear before you, and I welcome your questions.

CURRICULUM VITAE

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Birth Date:	August 6, 1943	Kansas City, MO	
High School:	Shawnee Mission East	Prairie Village, KS	
College:	University of Missouri	Columbia, MO	B.A., 1965
Medical School:	University of Kansas	Kansas City, KS	M.D., 1969
Internship:	St. Francis Hospital	Wichita, KS	7/69---6/70
Residency:	Kansas University Medical Center	(Kansas City, KS)	7/70---6/71
	Department of Obstetrics & Gynecology		3/73--12/74
	(Kermit E. Krantz, MD, FACOG; Professor and Chairman)		
Military Service:	U.S.Naval Hospital	Jacksonville NAS, FL	7/71---2/73
Private Practice:	Hutchinson, KS	12/74---9/77	
	Overland Park, KS	10/77---Present	
Board Certification:	American Board of Obstetrics and Gynecology		11/76

Academic Appointments: Clinical Assistant Professor, Dept. of Ob-Gyn, Univ. of KS Med Center
Lecturer, Dept. of Ob-Gyn, Univ. of MO (Kansas City) School of Medicine

Hospital Appointments:

Menorah Medical Center	Overland Park, KS
Shawnee Mission Medical Center	Overland Park, KS
Overland Park Regional Medical Center	Overland Park, KS
Surgicenter of Johnson County	Overland Park, KS
St. Luke's South	Overland Park, KS
Baptist Medical Center	Kansas City, MO

Organizations:
Fellow, American College of Obstetricians and Gynecologists
American Association of Gynecological Laparoscopists
Certified in Advanced Laparoscopy, AAGL Accreditation Council (12/95)
Kansas City Gynecological Society
Johnson County Medical Society Kansas Medical Society
Kermit E. Krantz Society
Association of Reproductive Health Professionals
American Society for Colposcopy and Cervical Pathology
Physicians for Reproductive Choice & Health

LICENSES:

KANSAS	#14447	(7/70)
MISSOURI	#R5071	(7/73)

1/97

ACOG *Statement of Policy*

As issued by the ACOG Executive Board

STATEMENT ON INTACT DILATATION AND EXTRACTION

The debate regarding legislation to prohibit a method of **abortion**, such as the legislation banning "partial birth **abortion**," and "brain sucking **abortions**," has prompted questions regarding these procedures. It is difficult to respond to these questions because the descriptions are vague and do not delineate a specific procedure recognized in the medical literature. Moreover, the definitions could be interpreted to include elements of many recognized **abortion** and operative obstetric techniques.

The American College of Obstetricians and Gynecologists (ACOG) believes the intent of such legislative proposals is to prohibit a procedure referred to as "Intact Dilatation and Extraction" (Intact D & X). This procedure has been described as containing all of the following four elements:

1. deliberate dilatation of the cervix, usually over a sequence of days;
2. instrumental conversion of the fetus to a footling breech;
3. breech extraction of the body excepting the head; and
4. partial evacuation of the intracranial contents of a living fetus to effect vaginal delivery of a dead but otherwise intact fetus.

Because these elements are part of established obstetric techniques, it must be emphasized that unless all four elements are present in sequence, the procedure is not an intact D & X. **Abortion** intends to terminate a pregnancy while preserving the life and health of the mother. When **abortion** is performed after 16 weeks, intact D & X is one method of terminating a pregnancy. The physician, in consultation with the patient, must choose the most appropriate method based upon the patient's individual circumstances.

According to the Centers for Disease Control and Prevention (CDC), only 5.3% of **abortions** performed in the United States in 1993, the most recent data available, were performed after the 16th week of pregnancy. A preliminary figure published by the CDC for 1994 is 5.6%. The CDC does not collect data on the specific method of **abortion**, so it is unknown how many of these were performed using intact D & X. Other data show that second trimester transvaginal instrumental **abortion** is a safe proc

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Terminating a pregnancy is performed in some circumstances to save the life or preserve the health of the mother.

Intact D & X is one of the methods available in some of these situations. A select panel convened by ACOG could identify no circumstances under which this procedure, as defined above, would be the only option to save the life or preserve the health of the woman. An intact D & X, however, may be the best or most appropriate procedure in a particular circumstance to save the life or preserve the health of a woman, and only the doctor, in consultation with the patient, based upon the woman's particular circumstances can make this decision. The potential exists that legislation prohibiting specific medical practices, such as intact D & X, may outlaw techniques that are critical to the lives and health of American women. The intervention of legislative bodies into medical decision making is inappropriate, ill advised, and dangerous.

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Approved by the Executive Board
January 12, 1997

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Testimony of Gloria Schlossenberg
10124 W. 96th St. Overland Park, KS 66212
(913) 492-2210 April 27, 1999

I was in the sixth month of pregnancy when the doctor told me things were very wrong and my baby would be terribly malformed, maybe born dead. I sat in shock as he called my husband. We asked could he abort this pregnancy. He said no, it would be best to go through with it and wait until nature aborted it.

Nature wasn't kind. This nightmare lasted until the beginning of my ninth month. The lack of Roe vs. Wade forced me to go through the worst possible kind of torture for the next few months.

Shock was replaced by reality. I had nightmares, the worst one that little monsters were spewing forth from me. My mother moved in with us so my husband could work.

There I was, in maternity clothes, feeling this doomed child in me, sometimes it moved. I was a prisoner of my body. What could I say when someone would exclaim happily on my pregnancy. I felt unclean, unworthy because I wasn't capable of the simple act of giving birth. Because of the nightmares I was afraid to sleep. I alternated between bouts of furious cleaning until I was exhausted or else sat in a numbed state.

I knew I had to fight through. It seemed I was able not to go into a breakdown only by hanging on by the slenderest thread. Finally my water broke. I went through a painful but mercifully short birth. I remember my dear mother saying, "It's over, honey, now you can get on with your life."

It wasn't over. Right after I came home the nightmares began again. I went into the deepest case of depression. It was months before I came out of it.

Ladies, would you want to go through this, have your daughters live through this? Gentlemen, would you want your wife or daughters to go through this?

These punitive bills only cast more grief on suffering women. No woman is foolish enough to want a late term abortion unless there are serious reasons. The choice should be hers, not state or federal legislators.

I still relive these dreadful memories when these cruel bills come up.

I am a religious person. Last night I prayed to the dear Lord that I could sway some of you to vote against these bills. I also prayed that at least you would feel guilt and remorse if you voted for them.

Thank you for listening to me.

Erin Snodgrass, Topeka wife and mother

Resident of Topeka for nine years

Master's degree student in social work

For a project for one of my classes, I chose to follow bill 2007 and events around it. However, speaking here is not a class requirement; I am doing this because I strongly believe that keeping the option of late-term abortion for reasons of mental health is necessary. I am here to speak for myself, and for others who believe this is necessary.

I respect the views of those who disagree with partial-birth abortions, for whatever reason. Everyone should have the right to make a decision which makes sense to them. However, they are not me, nor should they be able to make this decision for all women. I understand that this is a very emotional issue, and, like most people, I do not take it lightly.

It may be tempting to outlaw these types of abortions because one feels the decisions these women make are reckless and selfish. However, let's look at some of the reasons for making this choice. Partial-birth abortions in late pregnancy are not done on a whim; they are given under very extenuating and desperate circumstances.

We cannot imagine how it would feel to suffer a brutal rape. To have this compounded by the horror of realizing one is pregnant by her rapist would be devastating. Perhaps the pregnant women is a young girl, or an older women who has gone through (or is going through) menopause. In both cases, menstruation is irregular or absent. She does not discover she is pregnant until after 22 weeks of pregnancy. How will this women feel to know she is bound by law to bear this child? Perhaps she would feel desperate enough to take matters into her own hands.

Another example is of incest. Recently, a 12 year-old who came here to obtain a late-term abortion having been impregnated by her own brother. Her family was from a culture which would have ostracized the family forever had the girl had the child. In fact, her parents were desperate for her to have the pregnancy terminated.

Still another example is of the couple whose unborn child is missing a vital organ. Currently, a woman cannot obtain a late-term abortion because the fetus has some abnormality. This is understandable, as there are persons who may take this to the extreme and obtain a late-term abortion because the fetus has a mild abnormality. However, what about a couple who discovers their unborn child is missing a brain? What is gained by forcing this woman to carry her baby to term, and to go through the process of labor, knowing the outcome?

Many of us believe that in most cases, women should not be given late-term abortions because these babies would be adopted by loving parents. To this belief, I ask: What about all the children waiting to be adopted right now? They may not all be perfect newborns, but they desperately need good homes too. Why is the same amount of attention and energy not being paid to them? It is disturbing that the energy and controversy which surrounds the issue of abortion is not equal toward our children who have already been born. If it were in my power, all the money, time and energy which has been spent on this issue in recent years would be directed to children who have already been born who live, for example, in poverty and with abuse.

The bottom line of my viewpoint regarding late-term abortions is this: If people are desperate enough to terminate a late-term pregnancy, they will take matters into their own hands. This is what happened before Roe v. Wade. Wouldn't this be moving us backward, instead of forward?

TESTIMONY OF RACHAEL K. PIRNER
BEFORE THE
FEDERAL AND STATE AFFAIRS COMMITTEE

Chairwoman Oleen and other senators thank you for this opportunity to appear before the committee, Rachael K. Pirner of Triplett, Woolf & Garretson, LLC. I represented Women's Health Care Services, PA and Dr. George Tiller in a Mandamus action filed in the Kansas Supreme Court this summer.

I am here today as an attorney, relatively well versed in the law governing abortion restrictions and a citizen concerned about the present status of the law and the additional proposed restrictions.

At the outset, I note that a recent rating system, devised by NARAL[1] foundation, compared and scored restrictions on abortion between all 50 states. The study found that on a classroom-style A through F grading system that Kansas scored an F, finding that the current restrictions gravely imperil the right of women to make choices about their reproductive health. This is of concern to me.

I do also note that as of September 10, 1998, 19 of 20 states in which "partial birth abortions" have been challenged the legislation or the legislation has been severely limited or enjoined.

A Health Exception Must Be Included In Post-Viability Abortion Restrictions

The appropriate analysis, of the 1998 legislative changes is contained in the briefs filed with the Kansas Supreme Court. Many of the deficiencies in the law are to detailed to adequately address here today. However, there are certain aspects of the law, which are implicated in the proposed legislation before this body.

While there may be substantial disagreement by some individuals about the morality of the present constitutional thresholds of the law, the area, as laid out by the United States Supreme Court, is uncomplicated and uncompromising. It is this area of the health exception to post-viability abortion to which I intend to direct my remarks today.

The current law and that proposed in HB 2007 provides an exception to post-viability abortions where "a continuation of the pregnancy ***will cause*** a substantial and irreversible impairment of a major bodily function of the pregnancy woman." This is in conflict with the definition found under K.S.A. 65-6701(e) (Medical Emergency) which allows an immediate abortion which will "avert her death or for which a delay ***will create serious risk*** of substantial and irreversible impairment of a major bodily function." Furthermore, the term "irreversible impairment of a major bodily function" is vague in

[1] National Abortion and Reproductive Rights Action League Foundation.

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that is does not include a health exception as required by the U. S. Constitution. ***Roe v. Wade***, 410 U.S. 113 (1973).

The United States Constitution requires that women be allowed access to post-viability abortion services where it is "necessary" in a physician's "best clinical judgment". That judgment should be exercised in light of all attendant circumstances relevant to the well being of the patient, including psychological, emotional and physical factors. ***United States v. Vuitch***, 402 U.S. 62, 69-72 (1971) ***Doe v. Bolton***, 410 U.S. 179, 191-92 (1973).[2]

A state may "regulate or prohibit abortions after a fetus is viable, *except where an abortion is necessary in the appropriate medical judgment fore the preservation of the life or health of the mother.*" ***Roe v. Wade***, 410 U.S. 113 (1973). The word "preservation" suggests maintenance of the status quo of a woman's health.

Courts have made clear that the woman's health must be the state's "paramount consideration" in the context of abortion even where a pregnancy is post-viability. ***Jane L. v. Bangerter***, 102 F.3d 11112, 11118 (10th Cir. 1996).

In a ***Woman's Choice-East Side Women's Clinic v. Newman***, 671 N.E.2d 104 (Ind. 1996), the Indiana Supreme Court considered three questions certified to it by the United States District Court for Southern District of Indiana. The court found that "substantial and irreversible impairment of a major bodily function" was constitutional because it implicitly included a mental health element. The Indiana Supreme Court concluded that the language ". . .contemplates that all relevant factors pertaining to a woman's health can, indeed must, be considered whether to dispense with the statute's informed consent provisions." ***Woman's Choice-East Side Women's Clinic v. Newman***, 671 N.E.2d 104, 108-09 (1996). The court held that the brain conducts mental processes and that the brain is an organ and properly included within the term "bodily function." ***Newman***, 671 N.E.2d at 111. In other words, the Court held that a woman's brain conducts a major bodily function.

Most recently a number of courts have struck down unconstitutional abortion restrictions:

LOUISIANA

On March 4, 1999, in ***Causeway Medical Suite v. Foster***, Judge Porteous found that Louisiana's law was unconstitutional because "*it fails to provide a health exception, provides only an inadequate life exception, and deprives physicians of the freedom to exercise their best medical judgment in choosing the most prudent treatment for their patients.*"

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[2] The State of Kansas recognized this rule of law in response at page 29-30 to Dr. Tiller's application for Mandamus in the Kansas Supreme Court.

IOWA

On December 21, 1998, in ***Niebyl v. Miller***, Judge Pratt found that the "partial-birth abortion" law was unconstitutional because "*it imposes an undue burden on women seeking abortions by denying them access to pre-viability abortions and prohibiting physicians from performing the most common, readily available, and safest post-viability procedures.*"

FLORIDA

On November 24, 1998, in ***A Choice for Woman v. Butterworth***, Judge Donald L. Graham permanently blocked the abortion law from taking effect. In a 27-page opinion, Judge Graham wrote, "*In drafting this Act, it appears that the Florida legislature intentionally chose broad and amorphous language.*" The decision determined that the law was unconstitutional because it is vague and thus fails to give the physician fair warning of the prohibited conduct, places an undue burden on a woman's right to choose abortion, and fails to adequately protect the life and health of the woman.

ARKANSAS

On November 13, 1998, in ***Little Rock Family Planning Services v. Huckabee***, Judge Cavanaugh wrote, "*The law at issue in this case, although termed a ban on partial-birth abortion, goes far beyond the popular concept of that term and actually prohibits a greater range of procedures.*" In addition, the decision determined that the law was unconstitutional because it is vague and thus fails to give the physician fair warning of the prohibited conduct, places an undue burden on a woman's right to choose abortion, and fails to adequately protect the life and health of the woman.

WISCONSIN

On November 3, 1998, in ***Planned Parenthood of Wisconsin v. Doyle***, Judge Richard A. Posner wrote, "*Wisconsin is taking chances of unknown magnitude with the health of pregnant women. This the Supreme Court's decisions do not permit.*" The ruling was based on three deficiencies in the law. First, it bans pre-viability abortions; second, it does not contain a health exception to preserve the life of the mother; and third, the statute is vague, and the severe punishment of life imprisonment may have the effect of making doctors unwilling to perform abortions.

The Kansas Attorney General has repeatedly issued opinions recognizing that both a life and health exception are necessary in order for abortion restrictions to pass constitutional muster. ***Kan. Atty. Gen. Opinion***, No. 85-131 (***Roe*** permits a state to regulate, or even prohibit, abortion after viability, except where it is necessary to preserve the life or health of the mother); ***Kan. Atty. Gen. Opinion***, No. 89-32, states recognizing that the **life** or **health** of the mother is a tantamount interest to that of the viable fetus; ***Kan. Atty. Gen. Opinion***, No. 89-98, states there must be an exception to post-viability

abortion where the **life** or **health** of the mother is at stake; *Kan. Atty. Gen. Opinion*, No. 91-130 ". . . [t]he state may not prohibit abortions at any stage when the woman's **life** or **health** is at risk." (Emphasis added.) I do note that these opinions were issued prior to Attorney General Stovall's term in office.

It is clear that if the Legislature seeks to restrict the law as it relates to abortion it may not jeopardize a woman's health or life for the sake of carrying a pregnancy to term. This is an impermissible trade-off between a woman's life and health and her pregnancy.

Inclusion Of A Mental Health Exception Is Required By Law And Good Public Policy

In their brief filed in the Kansas Supreme Court, the Kansas Attorney General, Kansas Department of Health and Environment and the Kansas State Board of Healing Arts', stated:

> Next, [Dr. Tiller] claim[s] that the Constitution requires a statutory exception for a prohibited post-viability abortion if continuation of the pregnancy will cause a substantial and irreversible impairment of a **mental** function of the pregnant woman. According to [Dr. Tiller], the Act violates the Constitution because it only provides a statutory exception for a prohibited post-viability abortion if the continuation of the pregnancy will cause a substantial and irreversible impairment of **physical**, as opposed to **mental**, bodily function of the pregnant woman.
>
> [Dr. Tiller's] interpretation of the Act is not correct. *Several cases which have interpreted identical or similar phrases to the one used in the Act have interpreted the phrase to refer to **both** physical and mental bodily functions. Doe v. Bolton*, 410 U.S. 179, 191-92, 93 S.Ct. 739, 747, 35 L.Ed.2d 201 (1973) (the requirement that a post-viability abortion can only occur if the abortion is "necessary" in a physician's "best clinical judgment" was interpreted to allow the physician to make his or her determination, as to whether an abortion was necessary, in light of all attendant circumstances that were relevant to the well-being of the patient, including psychological, emotional and physical factors); *United States v. Vuitch*, 402 U.S. 62, 69-72, 91 S.Ct. 1294, 1299, 28 L.Ed.2d 601 (1971) (the requirement that a post-viability abortion can only occur if the abortion is "necessary for the preservation of the mother's life or health" was interpreted to allow the physician to make his or her determination as to whether an abortion was necessary to preserve the mother's health or life, in light of all the

> attendant circumstances that were relevant to the well-being of the patient, including psychological, emotional and physical factors); *Women's Choice-East Side Women's Clinic v. Newman*, 671 N.E.2d 104 (Ind. 1996) the state abortion law contained the identical phrase "major bodily function" in its medical emergency exception; the Indiana Supreme Court found that the [sic] language must include a mental element).
>
> ***Thus, in order to construe this statute as constitutional, the court must interpret the phrase "major bodily function" as referring to both physical and mental bodily functions. As such, the Act does contain an exception to allow post-viability abortions in order to prevent the substantial and irreversible impairment of a major mental function of the pregnant woman***. With such exception, the Petitioner's challenge fails. *State Board of Nursing v. Ruebke*, 259 Kan. 599, 613, 913 P.2d 142 91996) (". . .[I]t is the duty of the court to uphold the statute under attack, whenever possible, rather than defeat it, and if there is any reasonable way to construe the statute as constitutionally sound, that should be done.").

Respondents' Response to Petitioners' Application for Temporary Restraining Order and Temporary Injunction, pp. 28-30. (Emphasis added.)

The obvious absence of a mental health exception in the current law and certain proposed bills renders them unconstitutional. (***See***, citations immediately listed above.) Determination as to the particulars of the medical procedure to be employed in the event of terminating a pregnancy should be left to the physician and patient's sole judgment. They may not be circumscribed by the Legislature's judgment. The law has found that a ban on "partial birth" abortion procedures has the effect of subjecting patients to an appreciably greater risk of injury or death when medically advisable. Therefore, such a ban constitutes an "undue burden" to women seeking abortions and violates the Constitution. ***Carhart v. Stenberg***, 972 F.Supp. 507, 509 (D. Neb. 1998).

I remind the committee that unlike the provision of other medical services, you have chosen to make the laws which relate to the provision of abortion services criminal in nature. In fact, a felony may be committed if the law is violated. Therefore, the constitution requires that you say what you mean and mean what you say. Do not purposely engage in vagaries and ambiguities. You must specify the conduct which is prohibited by physicians in order to meet the constitutional requirements of Due Process. Such vagaries were included in the 1998 amendments. The result? Nothing less than sheer confusion and confoundment of members of this body about what was meant by the law passed in 1998.

In closing, I note a Statement of Policy made by the American College of Obstetricians and Gynecologist, "[t]*he intervention of legislative bodies into medical decision making is inappropriate, ill advised, and dangerous." (Emphasis in original).* I respectfully request that this committee do what it can to restore the abortion decision to women, their families, their physicians and their god.

TESTIMONY

Substitute H.B. 2007
S.B. 142
S.B. 357

SENATE FEDERAL AND STATE AFFAIRS COMMITTEE
Tuesday – April 27, 1999 – Room 313S

KANSAS CATHOLIC CONFERENCE
Beatrice E. Swoopes, Programs Director

Chairperson Oleen, committee members, I am Beatrice Swoopes, Programs Director of the Kansas Catholic Conference, which represents the Roman Catholic Bishops of Kansas. Thank you for the opportunity to speak in support of **Substitute H.B. 2007** which restricts post viable abortions.

First of all we commend the Interim Judiciary Committee for its efforts in attempting to answer concerns resulting from the passage last year of similar legislation, (H.B. 2531). The original H.B. 2007 was the culmination of that effort. The Kansas Catholic Conference testified in favor of H.B. 2007 in the House Committee but took exception to the Partial Birth Abortion Ban Section. We favor the language contained in the substitute version with the removal of this section.

As we see it **Substitute H.B. 2007** retains the major portion of the law passed last year. This new version serves to "clean-up" inconsistencies pertaining to definitions and eliminates duplicity where needed.

We especially support the sections defining "viability"; the second doctor requirement; limited exceptions; determining gestational age, and reporting requirements.

We as Catholics believe all human life is sacred. We celebrate life from conception to natural death. In Pope John Paul II's Encyclical, *Evangelium Vitae*, he states: "It is impossible to further the common good without acknowledging and defending the right to life, upon which all the other inalienable rights of individuals are founded and from which they develop."

That belief is carried further in the recent statement by the United States Bishops, "Living the Gospel of Life: A Challenge to American Catholics". The bishops state: "Bringing a respect for human dignity to practical politics can be a daunting task ... Good people frequently disagree on which problems to address,

which policies to adopt and how best to apply them. But for citizens and elected officials alike, the basic principle is simple: We must begin with a commitment never to intentionally kill, or collude in the killing, of any innocent human life, no matter how broken, unformed, disabled or desperate that life may seem ... Direct abortion is never a morally tolerable option. It is always a grave act of violence against a woman and her unborn child."

I am here today because it is the Church's role to call attention to the moral and religious dimensions of secular issues, to keep alive the values of the gospel as a norm for social and political life.

By restricting abortion, especially late term, some babies will be saved. **Substitute H.B. 2007** is working toward that end.

In regards to a ban on partial birth abortions, the Kansas Catholic Conference has in the past lobbied for the federal language passed by both houses of the U.S. Congress (copy attached).

Even Governor Graves endorsed this language as evidenced in a letter to President Clinton, September 22, 1997, urging him to sign H.R. 1122. He stated: "I am writing to express my strong support for the partial-birth abortion ban contained in H.R. 1122...".

However no version of this proposal drafted in Kansas has contained the federal language including S.B. 357.

S.B. 142 and S.B. 357 only weaken the law as passed last year.

The Kansas Catholic Conference supports measures that protect unborn babies. **Therefore we urge you to vote Substitute H.B. 2007 favorable for passage without amendments**.

ISSUES IN LAW & MEDICINE, Volume 14, No. 1, 1998

Partial-Birth Abortion: The Final Frontier of Abortion Jurisprudence

James Bopp, Jr., J.D.*
and Curtis R. Cook, M.D.**

ABSTRACT: Partial-birth abortion bans patterned after the federal bill passed by both houses of Congress are constitutional. The clear legislative definition can be easily distinguished from other abortion procedures. Abortion precedents do not apply to such bans because the abortion right pertains to *unborn* human beings, not to those partially delivered. Such bans are also rationally-related to legitimate state interests. Even if abortion jurisprudence is deemed to apply in the partial-birth abortion context, a ban is still constitutional under *Casey* because a ban on partial-birth abortions does not impose an undue burden on the abortion right.

*Attorney, Bopp, Coleson, & Bostrom, Terre Haute, Indiana; Of Counsel, Webster, Chamberlain & Bean, Washington, DC; General Counsel, National Right to Life Committee, Inc.; President, National Legal Center for the Medically Dependent & Disabled, Inc.; Editor-in-Chief, *Issues in Law & Medicine*; B.A., Indiana University, 1970; J.D., University of Florida, 1973. The authors are grateful to Richard E. Coleson, staff attorney, National Legal Center for the Medically Dependent & Disabled, Inc., and Douglas Johnson, Legislative Director, National Right to Life Committee, Inc., for their assistance in legal research and writing of a preliminary draft of the manuscript; Barry A. Bostrom, Executive Editor, *Issues in Law & Medicine*, for his assistance in editing the manuscript; and Heidi Forster, Assistant Editor, *Issues in Law & Medicine*, for her assistance with sources and citations.

**Associate Director of Maternal-Fetal Medicine, Butterworth Hospital, Grand Rapids, Michigan; Assistant Clinical Professor, Michigan State College of Human Medicine, Lansing, Michigan; A.B., Wabash College, 1985; M.D., Indiana University School of Medicine, 1989; Board Certified in Maternal-Fetal Medicine and Obstetrics-Gynecology; Fellow of the American College of Obstetrics & Gynecology.

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Partial-Birth Abortion Ban Act of 1997

105 H.R. 1122

FULL TEXT

105TH CONGRESS; 1ST SESSION
IN THE 105TH CONGRESS
AS ENROLLED

H. R. 1122

1997 H.R. 1122; 105 H.R. 1122

SYNOPSIS:
An Act To amend title 18, United States Code, to ban partial-birth abortions.

DATE OF INTRODUCTION: MARCH 19, 1997

DATE OF VERSION: OCTOBER 9, 1997 — VERSION: 5

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

SECTION 1. SHORT TITLE.
This Act may be cited as the "Partial-Birth Abortion Ban Act of 1997".

SEC. 2. PROHIBITION ON PARTIAL-BIRTH ABORTIONS.
(a) IN GENERAL.-TITLE 18, UNITED STATES CODE, IS AMENDED BY INSERTING AFTER CHAPTER 73 THE FOLLOWING:
"CHAPTER 74 - PARTIAL-BIRTH ABORTIONS

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

"(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 two years, or both. This paragraph shall not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, illness, or injury. This paragraph shall become effective one day after enactment.

"(b) (1) As used in this section, the term 'partial-birth abortion' means an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery.

"(2) As used in this section, 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.

"(3) As used in this section, the term 'vaginally delivers a living fetus before killing the fetus' means deliberately and intentionally delivers into the vagina a living fetus, or a substantial portion thereof, for the purpose of performing a procedure the physician knows will kill the fetus, and kills the fetus.

"(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, illness or injury.

"(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."

(b) CLERICAL AMENDMENT — THE TABLE OF CHAPTERS FOR PART I OF TITLE 18, UNITED STATES CODE, IS AMENDED BY INSERTING AFTER THE ITEM RELATING TO CHAPTER 73 THE FOLLOWING NEW ITEM: "74. Partial-birth abortions 1531."

16-5

The Kansas Choice Alliance

MAJORITY for CHOICE

April 27, 1999

Testimony of Barbara Duke, President, Kansas Choice Alliance and Pro-Choice Chair of the Kansas American Association of University Women
902 Pamela Lane, Lawrence, KS 66049
785-749-0786, E-mail: BarbaraDuke@compuserve.com

Senator Oleen and Members of the Senate Federal and State Affairs Committee:

My name is Barbara Duke. I am president of the Kansas Choice Alliance or KCA. KCA is a statewide coalition of 20 diverse organizations dedicated to ensuring access to a full range of reproductive choices, including a woman's right to choose abortion, and to the promotion of comprehensive reproductive health care and human sexuality education. My own organization is the American Association of University Women (AAUW). AAUW has supported abortion rights since 1970. In regard to the bills before you today: S.B. 142, S.B. 357, and H.B. 2007, I wish to raise the following points:

The *Roe v Wade* decision allows a State to proscribe abortion after viability except when the abortion is necessary to preserve the life or health of the woman. Kansas law restricting post-viablity abortion must allow such exceptions.

When the need arises women should have access to the safest procedure for their particular medical circumstance. The ban on so-called "partial birth abortion" or "PBA" selectively denies some women the safest medical procedure for legal abortion. Banning any medical procedure is an unprecedented intrusion into medical decision-making that ignores the physician's judgment as to what is in the best interest of the patient.

State laws restricting late-term abortion and banning "PBA" that do not include exceptions for the life and health of the woman have been declared unconstitutional when tested in the courts.

Women and their families have been benefited enormously by medical tests that allow them to know early in pregnancy if a fetus suffers from serious problems. At that point, they have the right to decide whether continuing the pregnancy is in the best interest of all concerned. But sometimes serious problems are not detected until late in the pregnancy. An exception to the ban on late-term abortion should be made for severe, long-lasting fetal deformities and abnormalities. Unfortunately none of these three bills provide such an exception.

Nevertheless, we support S.B. 142 which adds a mental health exception for late term abortion and eliminates detailed and convoluted language to do with the determination of viability. SB 142 retains the current PBA ban with life and mental health exceptions. We do not support S.B. 357. Though it adds a health exception for late-term procedures it removes it from the "PBA" ban. We strongly oppose H.B. 2007.

Barbara Duke

Sen. Federal & State Affairs Comm
Date: 4-27-99
Attachment: # 17-1

NATIONAL COUNCIL OF JEWISH WOMEN
GREATER KANSAS CITY SECTION

April 27, 1999

Written Testimony of Barbara Holzmark
Kansas Public Affairs Chair, National Council of Jewish Women, Greater Kansas City Section
8504 Reinhardt Lane, Leawood, Kansas 66206
(913)381-8222 (913)381-8224 (fax) bjbagels@aol.com (e-mail)

Re: SB 142, SB 357 and HB 2007
Members of the Senate Federal and State Affairs Committee

Dear Senator Oleen and Members of the Committee:

I support SB 142 and oppose SB 357 and HB 2007.

I am writing to you as the Kansas Public Affairs Chair of the National Council of Jewish Women, Greater Kansas City Section. (NCJW) We are the oldest "National" Jewish Women's organization in the country, having been founded in 1893, while the Greater Kansas City Section was founded in 1894. We have advocated in the metropolitan area since the early 1900's and continue to do so today. Both the Kansas and Missouri legislators have been recipients of our section's issues. We are proud to say that we are involved in both states and wish to express our concerns over the proposed abortion restrictions before your committee today. Our National organization has recently reconfirmed it's priorities for the coming "three" years in which the "Advancement of the Well-Being and Status of Women" and "Ensuring Individual and Civil Rights" are two of our "five" priorities.

To further explain our priorities, to advance the well-being and status of women, we specifically endorse and resolve to work for comprehensive, confidential, accessible family planning and reproductive health services for all, regardless of age or ability to pay. To ensure individual and civil rights, we specifically endorse and resolve to work for the protection of every female's right to reproductive choice, including safe and legal abortion, and the elimination of obstacles that limit reproductive freedom. HB 2007, for one, does not allow for accessible reproductive health services, especially where confidentiality is considered. It further lacks a clear health exception on post viability abortions. It is unacceptable to NCJW. SB 357 does not include a mental health exception or an exception for fetal abnormalities, thus causing further restrictions on a woman's right to choose. SB 142 attempts to clarify the confusion of the bill passed in the 1998 legislative session.

Women should be able to make their own decisions without being forced to prove mental incompetence. No woman makes a decision, on a whim, to abort when clear reasons that fetal abnormalities exist. I encourage you, on behalf of the nearly 1000 members of NCJW in the metropolitan Kansas City area, to vote no on any further restrictions to a woman's right to her own reproductive freedom. Thank you.

Barbara

Barbara

5750 W. 95th STREET, SUITE 119
SHAWNEE MISSION, KANSAS 66207-2969
(913) 648-0747

Sen. Federal & State Affairs Com
Date: 4-27-99
Attachment: # 18-1

#18

STATEMENT OF THE KANSAS MEMBERS OF THE
NATIONAL ORGANIZATION FOR WOMEN

IN OPPOSITION TO HB 2007
IN SUPPORT OF SB 142
AND
IN SUPPORT OF SB 357
WITH PROPOSED MODIFICATIONS

BEFORE THE SENATE COMMITTEE
ON FEDERAL AND STATE AFFAIRS

by
JESSICA TRAVIS
REPRESENTATIVE AND LOBBYIST

April 27, 1999

Sen. Federal & State Affairs Com
Date: 4-27-99
Attachment: #19-1

Good afternoon. Thank you for allowing me the opportunity to speak. My name is Jessica Travis and I am a third year Washburn law student as well as the lobbyist for the Kansas National Organization for Women.

As others testifying today, Kansas NOW takes a pro-choice stance on the bills before the committee. We are opposed to HB 2007, in favor of SB 142, and, with proposed modifications, would support SB 357. I will briefly address each bill individually.

NOW opposes Substitute House Bill 2007 because the bill eliminates the exception to performing an abortion on a viable fetus when the fetus is affected by a severe or life-threatening deformity or abnormality. The bill takes the decision away from the woman, her spouse, and her doctor and places it in the hands of the far-removed legislature. The decision should remain with those closest to the fetus who are in the best position to examine the consequences that come with each varying and individual case surrounding fetal abnormality. Substitute House Bill 2007 will only cause additional grief and burden for the woman faced in the position of discovering her fetus is abnormal because she will not be allowed to make the decision she feels is in the best interest of the fetus, herself, and her family.

NOW supports Senate Bill 142 because for three reasons: (1) it eliminates the unconstitutional definition of viability imposed by last years legislation, (2) it eliminates several of the criminal penalties, and (3) it allows a mental health exception to the ban on performing an abortion on a viable fetus. In Casey v. Planned Parenthood, the United States Supreme Court held that before viability, the state may not "unduly burden" a woman's right to make reproductive decisions. Viability has traditionally been defined as that moment when the fetus is

able to survive outside the womb on its own. Last years legislation extend the definition to include when the fetus may survive outside the womb via artificial life support measures. By extending the meaning of viability beyond the traditional definition, last year's legislation extended into the time frame in which the woman's right to make reproductive choices is paramount. By stepping into this realm, the legislation unduly burdens the woman's right to make reproductive decisions. Further, last year's legislation also unduly burdened the woman's right by eliminating the mental health exception. Because the bill before us today seeks to eliminate some of the burden imposed upon women faced with making a reproductive decision, the Kansas Members of the National Organization for Women support SB 142.

Senate Bill 357 has several good points about it that also help eliminate some of this burden. It allows an exception to the ban on viable fetus abortions when the physical or mental health of the woman is in jeopardy. Also, instead of automatic criminal liability, it must be shown that the violation was done "intentionally, knowingly, and recklessly" before a person can be found guilty of violating the statute. Regardless of its good points, NOW cannot fully support SB 357 because it does not allow exception to the post-viability ban in situations of severe fetal abnormalities or deformities. Without modifying this provision, NOW opposes SB 357 for the same reason is opposes HB 2007: that the decision on whether to carry an abnormal fetus should be made by those in closest proximity because it is they who are in a better position to determine the consequences.

It is for these reasons that the Kansas members of the National Organization for Women oppose HB 2007, support SB 142, and would support SB 357 with modifications.

Testimony before the Senate Federal and State Affairs Committee
Natalie G. Haag, Chief Legal Counsel
Office of the Governor
April 27, 1999
Senate Bill 357

Thanks for the opportunity to address the committee regarding the Governor's proposed abortion bill, Senate Bill 357. As I am sure you all know, the Governor has consistently supported a ban on partial birth abortion. Abortion statistics released by the Department of Health and Environment in March establish that 58 partial birth abortions were performed in Kansas during 1998 as compared to no partial birth abortions during 1997. The history of the abortion law in Kansas created the scenario where physicians opted to perform partial birth abortions to avoid the uncertainties created by the 1998 bill. Understanding these uncertainties is critical to correcting the problem. Thus, I will quickly cover the history of the 1998 bill.

Prior to 1998 post-viability abortions were illegal in Kansas except to save the life of the mother or in cases of severe fetal abnormality. As introduced on the floor of the Senate, the 1998 bill modified these exceptions to allow post-viability abortion when necessary to preserve the life of the mother or when the continuation of the pregnancy will cause substantial and irreversible impairment of a major bodily function. The partial birth abortion amendment, also offered and adopted on the floor, banned partial birth abortions except when necessary to preserve the life of the mother or when the continuation of the pregnancy will cause a substantial and irreversible impairment of a major physical or mental function of the pregnant woman.

The Governor spent a significant amount of time reviewing the bill in an attempt to determine whether the use of different language in these two sections was intentional or merely the result of not having the opportunity for the revisor to clean up inconsistent language. Because the bill had no hearings, the legislative history was limited. Both the drafters of the legislation indicated in writing their intent to include mental health in the post-viability section of the bill. Additionally, the tape of the house floor debate reflects comments that the abortion law adopted in 1992 was unconstitutional because it did not include an exception for mental or physical health of the mother. Not a single legislator on the floor of the House stated that the bill would not include the constitutionally required mental health exception. Based upon this legislative history, encouragement from several legislators, and the expectation that the house would not sign pass an unconstitutional bill, the Governor signed the 1998 abortion bill.

Shortly after the bill was signed several legislators began disputing the legislative intent to include mental health in the post-viability provision of the bill. This action created controversy and confusion about the meaning of the term "major bodily function" in the post-viability section of the 1998 abortion bill. The confusion was further complicated by the refusal of the Kansas Supreme Court to accept a case and resolve this dispute. Thus, physicians were left with the alternative of facing potential criminal or

disciplinary action or performing partial birth abortions. They chose to perform partial birth abortions.

The Governor's bill will address these issues and ban partial birth abortion. The Governor's bill strikes the exception for substantial and irreversible impairment of a major mental and physical function from the partial birth abortion statute. Additionally, the post-viability section is amended to clarify the mental health exception. Due to the controversy over the intent of the language, this clarification is necessary to make the bill constitutional. Because the case law clearly and unambiguously requires a mental health exception, failure to address the mental health issue will substantially increase the possibility the entire act, including the partial birth abortion sections, will be found unconstitutional.

Specifically, the proposed changes have been made at several places in K.S.A. 65-6703(b) and (c) to clarify the constitutional requirement of a mental and physical health exception. The United States Supreme Court has clearly stated that a mental health exception is necessary for post-viability abortion restrictions to withstand constitutional scrutiny.

In *Roe v. Wade*, 410 U.S. 113, 163-164 (1973), the United States Supreme Court stated:

> If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, **except when it is necessary to preserve the life or health of the mother.** (Emphasis added).

In *United States v. Vuitch*, 402 U.S. 62, 71-72 (1971), the United States Supreme Court reviewed a District of Columbia statute making abortions criminal "unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine". Both the District Court and the United States Court of Appeals construed **the statute to permit abortions "for mental health reasons whether or not the patient had a previous history of mental defects."** *Id.* at 71-72. (Emphasis added.) The United Supreme Court stated:

> We see no reason why this interpretation of the statute should not be followed. Certainly this construction accords with the general usage and modern understanding of the word "health," which includes psychological as well as physical well-being. Indeed Webster's Dictionary, in accord with that common usage, properly defines health as the "[s]tate of being . . . sound in body [or] mind." Viewed in this light, the term "health" presents no problem of vagueness. Indeed, whether a particular operation is necessary for a patient's physical or

> mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered.

Id. at 72.

Following the decision of *Vuitch*, the United States Supreme Court in *Doe v. Bolton*, , 410 U.S.179, 192 (1973), stated:

> We agree with the District Court, 319 F.Supp., at 1058, that the **medical judgment may be exercised in the light of all factors- physical, emotional, psychological, familial, and the woman's age- relevant to the well-being of the patient**. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. (emphasis added).

In *Women's Medical Professional Corp. v. Voinovich*, 130 F.3d 187 (6th Cir. 1997), cert. denied, 118 S.Ct. 1347, 140 L.Ed.2d 496, ___ U.S. ___ (March 23, 1998), the Sixth Circuit Court of Appeals struck down as unconstitutional Ohio's post-viability ban on abortion, which provided that an abortion could be performed in order to avert the death of the pregnant woman, or to avoid a "serious risk of the substantial and irreversible impairment of a major bodily function." 130 F.3d at 206. The Act defined "serious risk of the substantial and irreversible impairment of a major bodily function" as follows:

> [A]ny medically diagnosed condition that so complicates the pregnancy of the woman as to directly or indirectly cause the substantial and irreversible impairment of a major bodily function, including, but not limited to, the following conditions:
>
> (1) Pre-eclampsia:
> (2) Inevitable abortion;
> (3) Prematurely ruptured membrane;
> (4) Diabetes;
> (5) Multiple sclerosis.

Ohio Rev. Code Ann. §2919.16(J); 130 F.3d at 206.

The Sixth Circuit Court of Appeals noted its belief the United States Supreme Court would hold that a woman has the right to obtain a post-viability abortion if carrying a fetus to term would cause **severe non-temporary mental and emotional harm**. 130 F.3d at 209.

Further, the Sixth Circuit relied upon the United States Supreme Court decisions of *Colautti v. Franklin*, 439 U.S. 379, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979) and *Doe v. Bolton*, 410 U.S. 179 (1973), which found it "**critical" that, in deciding whether an abortion was necessary, the physician's judgment "may be exercised in light of all factors—physical, emotional, psychological, familial, and the woman's age—**

relevant to the well-being of the patient". *Voinovich,* 130 F.3d at 209. (Emphasis added.)

> **[T]he constitution requires that if the State chooses to proscribe post-viability abortions, it must provide a health exception that includes situations where a woman is faced with the risk of severe psychological or emotional injury which may be irreversible.**

130 F.3d at 210 (emphasis added). The Sixth Circuit found the Ohio Act impermissibly limited the physician's discretion to determine whether an abortion is necessary to preserve the woman's health, because it limits the physician's consideration to physical health conditions. 130 F.3d at 209. Consequently, the restrictive medical necessity exception was declared unconstitutional. 130 F.3d at 210. On March 23, 1998, the United States Supreme Court denied the petition for a writ of certiorari, thereby declining to review or overturn the Ohio case.

As you can see from even a few of the cases on this issue, the United States Supreme Court clearly requires that post-viability abortion restrictions provide an exception for both the mental and physical health of the mother.

Quite simply, if the mental health exception is removed from the partial birth section and not clarified in the post-viability section, a woman's health will not be adequately protected and the entire act will be unconstitutional. A number of courts have issued injunctions against the enforcement of partial birth abortion bans that do not include a mental health exception. To minimize the risk of such an injunction in Kansas, woman must be provided with a save and medically reasonable alternative to partial birth abortion. If a medically reasonable and save alternative exist, the courts are more likely to uphold the banning of a specific procedure. Failure to clarify that the post-viability provision section includes a mental health exception creates significant risk, almost a guarantee, that the entire act, including the partial birth abortion section will be found unconstitutional.

The drafting of a bill on the floor of the Senate resulted in a number of other inconsistencies in the language and standards in the bill. The Governor's proposal addresses several of these clean up issues. For example, the current abortion law in Kansas contains multiple and inconsistent definitions of "viable". Thus, under existing law, one standard of viability applies to partial birth abortion and emergency abortions but a different definition of viability applies to post-viability abortion.

For purposes of a partial-birth abortion procedure, viable is defined as follows: "Viable" means that stage of gestation when, in the best medical judgment of the attending physician, the fetus is capable of sustained survival outside the uterus without the application of extraordinary medical means. K.S.A. 65-6701(k).

For purposes of other abortion procedures under the post-viability abortion provisions viable is defined as follows: As used in this section, "viable" means that stage

of fetal development when it is the physician's judgment according to accepted obstetrical or neonatal standards of care and practice applied by physicians in the same or similar circumstances that there is a reasonable probability that the life of the child can be continued indefinitely outside the mother's womb with natural or artificial life-supportive measures. K.S.A. 65-6703(e).

This issue has been addressed in the Governor's bill by eliminating the inconsistent definitions and substituting a definition consistent with those adopted by the United States Supreme Court.

In *Roe v. Wade, supra* at 163, the United States Supreme Court stated: "With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb."

In *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 63 (1976), the United States Supreme Court upheld as constitutional the definition of "viability" as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems."

In *Colautti v. Franklin*, 439 U.S. 388, 99 S.Ct. 675, 682 (1972), the United States Supreme Court stated: "[v]iability is reached when, in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support."

This case law supports the conclusion that the definition contained in the Governor's bill would withstand constitutional scrutiny. Striking the inconsistent definitions will make the law cleaner and more enforceable.

The 1998 bill also included multiple standards of care for physicians. In a medical emergency, a physician is required to make a decision based upon "the physician's good faith clinical judgment". When determining gestational age of the fetus, the physician must use "accepted obstetrical and neonatal practice and standards applied by physicians in the same or similar circumstances." If the fetus has a gestational age of 22 weeks or more the physician must determine whether the fetus is viable "by using and exercising that degree or care skill and proficiency commonly exercised by the ordinary skillful, careful and prudent physician in the same or similar circumstances." Further, no standard is set in the partial birth abortion section.

Confusing standards make a law too vague to withstand constitutional scrutiny. Further, the standard requiring all physicians to use accepted obstetrical and neonatal practice and standards attempts to hold a physician to a different standard than the legal and medical community use to assess the physicians standard of care. Basically, this provision is similar to holding all dentist to the medical standard of an oral surgeon. The general rule of law is that physicians will be held to the standard of care in their specific

field of practice in their community. Accordingly, this standard creates a means of challenging the entire act.

The Governor proposes the standard be consistent with throughout the bill.

The Governor's bill also amends the criminal provisions to clarify that a person must intentionally, knowingly, or willfully violate the act before the person can be guilty of a crime. Scienter is required for the conviction of any crime. This amendment makes clear that the laws passed can be enforced. Without this change the person violating the section can assert the law is unenforceable.

Under current law, a doctor can be convicted of a crime if his/her secretary unintentionally fails to mail in the reports required by statute.

The term "scienter" means "knowingly" and is used to signify a defendant's guilty knowledge. It requires that a defendant have some degree of guilty knowledge or culpability in order to be found criminally liable for some conduct. *Voinovich*, 130 F.3d at 203.

The Sixth Circuit Court of Appeals in *Women's Medical Professional Corp. v. Voinovich*, 130 F.3d 187 (6th Cir. 1997), cert. denied ___ U.S. ___ (March 23, 1998), concluded that the medical necessity and medical emergency provisions of the Ohio Abortion Act were unconstitutionally vague, because they lacked scienter requirements. 130 F.3d at 203.

The Ohio Act's "medical emergency" definition required the physician to determine "in good faith and in the exercise of reasonable medical judgment" whether an emergency exists. Ohio Rev. Code Ann. §2919.16(F). Similarly, the medical necessity exception to the post-viability ban required that the physician determine "in good faith and in the exercise of reasonable medical judgment" that the abortion is necessary. *See, id.* § 2919.17(A)(1); 130 F.3d at 204.

The court noted both of these provisions contain subjective and objective elements in that a physician must believe the abortion is necessary and his belief must be objectively reasonable to other physicians. The court concluded:

> This dual standard as written contains no scienter requirement. Therefore, a physician may act in good faith and yet still be held criminally and civilly liable if, after the fact, other physicians determine that the physician's medical judgment was not reasonable. In other words, a physician need not act wilfully or recklessly in determining whether a medical emergency or medical necessity exists in order to be held criminally or civilly liable; rather, under

> the Act, physicians face liability even if they act in good faith according to their own best medical judgment.

130 F.3d at 204.

The court also noted that given the controversial nature of abortion the State would almost always be able to find one doctor who disagreed with the decision of the physician performing the abortion. Thus, the lack of a scienter would have a chilling effect on the willingness of physicians to perform abortions and was therefore declared unconstitutional.

The final modification in the Governor's bill strikes vague language from the criminal section of the woman's right to know provisions. This language probably makes this provision unconstitutional and unenforceable. It is virtually impossible to tell when doctors are required to distribute the right to know materials and to whom. Thus, a doctor can potentially lose his/her license to practice medicine without committing any negligent or intentional act. As the case law cited above points out, vague statutes are unenforceable.

Modifying these inconsistencies will improve enforcement and make the law more likely to withstand constitutional challenge. The changes were made to reflect what appears to be the intent of the legislature in 1998. I urge you to support the Governor's proposed amendments to the abortion statutes.

ays D[illegible] News
nday, [illegible]ay 3, 1998

'Viability' was key in abortion bill language

Sen. Stan Clark

● R-Oakley

The abortion bill that I am very thankful the governor signed is the Kansas Legislature's attempt to allow two medical doctors to determine if an unborn fetus is viable before an abortion can be performed.

If the physicians determine the gestational age is less than 22 weeks, no other finding is necessary, the unborn is not viable and the abortion can proceed with the appropriate report filed with the Department of Health and Environment.

At a gestation age of 22 weeks, the statute creates a "trigger-point" and specific findings are required before an abortion is allowed:

1. Determination if the unborn fetus is viable by using the same degree of care that a prudent physician would exercise in similar circumstances.

2. If the fetus is determined not to be viable, an abortion can be performed and a report completed that includes the findings and reasons for the determinations.

3. If the fetus is determined to be more than 22 weeks and is determined to be viable, both physicians examining the woman can determine that an abortion is necessary to preserve the life of the pregnant woman or that a continuation of the pregnancy would cause a substantial and irreversible impairment of a major bodily function of the pregnant woman. For these reasons, an abortion can be performed and a report completed giving the findings and reasons.

In the statute, the term "viable" is defined as: "That stage of fetal development when it is the physician's judgment, according to accepted obstetrical neonatal standards of care and practice applied by physicians in the same or similar circumstances, that there is a reasonable probability that the life of the child can be continued indefinitely outside the mother's womb with natural or artificial life-supportive measures."

There are penalties if a doctor violates this statute; however, the biggest threat is action by the Board of Healing Arts, which could include revocation of the license to practice.

Over the last couple of weeks, most of the commentary has been over the lack of severe deformity or abnormality language in the statute. It was our goal in crafting the language to place the emphasis on "viability" instead of asking a doctor to subjectively determine when an abnormality is severe.

The chief author of the bill is Rep. Tim Carmody. His niece was born 10 years ago with her body organs outside the chest cavity. Upon birth, the organs were returned to their proper location, and I am told the only effect is that she has a "zipper" instead of a "belly-button."

Another area of comment was in the viable definition regarding "natural or artificial life-support systems." The entire abortion statute was amended on a bill that prohibited assisted-suicide, which establishes similar levels of care. Neither area requires "heroic efforts," but typical efforts that support life that I think are perfectly acceptable in today's society.

The issue does not determine when life begins, but it does return the issue to society as a whole.

There are limits that legislation can achieve.

In 1996, 11,181 abortions were performed in Kansas. 6,806 were Kansas residents, 4,375 were not. 678 abortions were performed at 24 weeks or later. Of these, only 46 were on Kansas women. Of the 6,806 abortions on Kansas residents, 35 resided in my 15-county legislative district, which contains 2 percent of the state population. Thomas, Scott and Trego counties had nine, eight and five abortions respectively; no other county had more than three abortions. One young lady was under 15 years old and no one was over 34. 34 million babies have been aborted in the United States over the last 25 years. Our nation faced the same issue 150 years ago. The Industrial Revolution took the work out of the home, where it had been a family industry, and transferred it to the factory. Cities were flooded with young adults trying to find work. But that is not all they found.

Living alone, without family guidance or protection, many were enticed into relationships that didn't last. Young women found themselves pregnant and abandoned, with nowhere to go, no one to help. They were an easy target for abortionists, who widely advertised their pills and potions in newspapers, and profited from their misery.

The number of abortions relative to the size of the population was about the same as it is today, even though it was illegal. But a transformation began.

Individuals whose hearts were torn by the decay of the cities launched a multi-pronged strategy. Laws were passed outlawing abortion. Journalists unveiled the acts of abortionists. Equal emphasis was placed on prevention. Scores started homes for unwed mothers, they founded adoption agencies and ran job training programs. They opened recreation centers and helped with housing. It was hard work, butit paid off. The abortion rate went down and it stayed down pretty much until the 1960s, when a new cycle of abortion began.

Continued progress in this area depends on our individual efforts much like our ancestors 150 years ago. The key is to influence the hearts of our neighbors, which ultimately will change our culture.

I can be contacted at my home this summer and fall at 205 U.S. Highway 83, Oakley, KS 67748, or by calling (785) 672-4280.

Pittsb[illegible] Morning Sun
Wednesday, May 6, 1998

Letters

Senator appreciates governor's courage

To the editor:

I am writing to express my support for Gov. Bill Graves following his action on a very difficult issue.

On the recent abortion-related bill that landed on his desk, the governor did what those of us in government should always do - and that is to very closely scrutinize the language contained in the bill and understand what it will mean for the people of Kansas. Please remember, the bill was crafted on the Senate floor. Public hearings and comment were held previously on specific but different language.

Governor Graves sought the views of independent medical experts - obstetricians, specialists in neo-natal care and psychiatrists - to determine the "real life" impact of this legislation. By the time he was done with his careful analysis, the governor understood the practical impact this legislation will have on our state's medical community and on Kansas women facing this very emotional and traumatic experience.

Bill Graves' actions on this very difficult, but very critical issue, speaks volumes to me about the kind of governor he is - thoughtful, logical and courageous. I applaud his decision to sign the bill.

Sen. Jim Barone
District 13

Letters

Sat. 5/10/98 Hutchinson News

Gov. Bill Graves shows he's a courageous leader

I am writing to express my strong support for Gov. Bill Graves. Even before he signed the controversial abortion bill recently, it was my opinion that he had done a superb job of leading the state for the past four years and should be given an opportunity to serve four more years. It has been a pleasure working with him.

I know the abortion bill received a great deal of his time and thoughtful study utilizing many involved parties, including proponents and opponents. This bill was developed by many legislators, representing

both pro-life and pro-choice viewpoints in attempting to reach a very delicate compromise. This process, typical of sensitive negotiations, involved many legislators during an extended period of time. The work product did not satisfy any group completely; however, as a pro-life senator, I am pleased that we have moved the process forward. We have helped remove the stigma of Kansas being known as "the abortion state."

I compliment Graves for his courageous act. This issue continues to divide people of good will who try to do the right thing. He sought the views of independent medical experts - obstetricians, specialists in neonatal care and psychiatrists - to determine the "real life" impact of this legislation. By the time he had completed his careful analysis, the governor understood the impact this legislation would have on our state's medical community and on Kansas women facing this emotional and traumatic experience.

Graves' actions speak volumes about the kind of governor he is - thoughtful, logical and courageous. To me, his action demonstrated statesmanlike leadership.

SEN. DON STEFFES

McPherson

Caney Chronicle
WEDNESDAY, MAY 6, 1998

Empson lauds Gov. Graves for leadership

Editor:

During the course of a normal legislative session, we hear, debate and ultimately act on some 300 to 400 pieces of legislation. While many of these significantly impact your lives and actions as citizens of the state, the ultimate ramifications are usually clear and my vote is made with this in mind.

On the last day of the 1998 regular Session, House members were asked to vote "yes" or "no" on HB 2531, which had already passed the House dealing with assisted suicide. The day prior, on the Senate floor, the Senate added an amendment to this bill which made substantial changes to the state's abortion policy. When it returned to the House, we had no opportunity to make any changes and little time to fully understand all the implications of the new language.

While I have always believed strongly in a woman's right to choose, I also believe that unless there are extenuating circumstances, this choice should be made before the last trimester of pregnancy. I also believe partial birth abortions, for any reason, are abhorrent. I knew these provisions were contained in the amended bill.

When the governor received this bill, he did what we, as House members, were unable do. The governor closely scrutinized the language contained in the bill and tried to determine what its passage would ultimately mean to the people of Kansas. Since there were *no* public hearings on this substantial policy change, the governor personally elicited information from legal experts, physicians of pertinent specialties, administrators of public health policy, legislators, and other persons on both sides of this issue. His decision was ultimately based on this careful and thoughtful analysis.

It is unfortunate when we are asked to make quick decisions on substantial policy changes without adequate time for the normal legislative scrutiny, as well as the needed public input. Fortunately, the governor had the time and the foresight to provide that scrutiny and seek the needed input from independent medical experts, as well as the general public. Regardless of whether you agree or disagree with his ultimate decision, I truly believe it was an informed decision made after much thought and with the best information available.

I applaud Governor Graves. For me, this is just one more example of his excellent leadership. We are extremely fortunate to have a man of his caliber leading our state.

State Rep. Cindy Empson
Independence, Kan.

21-4

Wichita Eagle
Wednesday, May 6, 1998

Graves support

I am writing to express my strong support for Gov. Graves. Even before he signed the controversial abortion bill last week, he had done a superb job of leading the state for the past four years and should be given an opportunity to serve four more years. It has been a pleasure working with him.

I know the abortion bill received a great deal of his time and thoughtful study utilizing many involved parties, including proponents and opponents. This bill was developed by many legislators, representing both pro-life and pro-choice viewpoints in attempting to reach a very delicate compromise. This process, typical of sensitive negotiations, involved many legislators over an extended period of time. The work product did not satisfy any group completely; however, as a pro-life senator, I am pleased that we have moved the process forward. We have helped remove the stigma of Kansas being known as the "abortion state."

Gov. Graves is to be complimented for his courageous act. This issue continues to divide people of good will who are trying to do the right thing. He sought the views of independent medical experts — obstetricians, specialists in neo-natal care and psychiatrists — to determine the "real life" impact of this legislation. By the time he had completed his careful analysis, the governor understood the impact this legislation will have on our state's medical community and on women facing this emotional and traumatic experience.

SEN. DON STEFFES
R-McPherson

■

The governor signed the abortion bill last week and the accusations have begun. Neither side can prove the decision right or wrong. Neither side is happy, with one side saying the bill goes too far, the other saying it doesn't go far enough.

Both sides will criticize the governor and the Legislature's motives, values and intent. Both sides will try to use the bill to further their own political agendas. One side will say women are in jeopardy, the other side will say babies are still in jeopardy.

The governor's decision is congruent with the Legislature's 'ote; the Legislature is a representati body. I believe the governor and law.nakers have approached this issue in a thoughtful, sincere manner and have made an honest attempt to address this difficult issue.

Abortion has occupied a great amount of time during this legislative session and every session since I was elected in 1992. I believe it is time to turn our attention to other "pro-life" issues that impact women and children.

We need better child care, better health care and better prenatal care. We must stop child and spousal abuse. There's teen smoking and pregnancy and drug abuse to work on now. We need to stop violence in our communities. Everyone needs a safe environment, not just unborn babies.

There are enough "pro-life" needs to keep us all busy.

SEN. CHRISTINE DOWNEY
D-Inman

REPRESENTATIVE PHILL KLINE
18TH DISTRICT - SHAWNEE/LAKE QUIVIRA

April 29, 1998

The Honorable Bill Graves
Governor of the State of Kansas
Second Floor, State Capitol Building
Topeka, Kansas 66612-1590

Hand Delivered

Dear Governor Graves:

Thank you for your recent signing of House Bill 2531 which restricts late term abortions in our state. I appreciate your favorable consideration of this legislation and your recognition that life has inherent value. You are correct - "Life is Sacred" - and freedoms cannot be protected by any government which fails to protect the life of those most vulnerable.

I am also writing, however, to clarify some issues relating to the legislation. As with any new law, especially laws relating to abortion, there is initial confusion regarding legislative intent. You state in your message to the House:

> I am pleased this bill allows for additional health considerations of women by allowing post-viability abortions when necessary to prevent permanent and irreversible impairment of a pregnant woman's major bodily functions - mental and physical. The legislative intent to include this exception has been confirmed to me in writing by the principal House and Senate authors of this bill. (Message to the House of the State of Kansas, ¶ 3, page 1).

Again, the confusion surrounding new legislation is understandable; however, ***the late term abortion ban on viable unborn children does not contain an exception for the mother's mental health***. This portion of the bill only contains exceptions for the woman's physical health and life. Although, this does involve difficult choices, as does any abortion, those of us supportive of this measure firmly believe that the right to life is more fundamental for a viable child than emotional stress on the mother. The late term abortion ban only addresses children who are capable of living outside the womb - capable of life as all those involved in this debate understand life - at the time the abortion would be performed. Clearly, such life deserves protection as you have indicated by your actions.

Legislative intent to exclude the mental health of the mother as an exception for the abortion of viable children is also clear from the course of legislative debate, Kansas's case law and statute and Pennsylvania case law and statute.

As stated, the late term abortion ban contains only two exceptions. These exceptions are: (1) if the mother's life is in jeopardy; and (2) "that a continuation of the pregnancy will cause a substantial and irreversible impairment of a major bodily function of the pregnant woman... ." (HB 2531, §15(a)(4), page 24).

This language first entered the abortion debate in Kansas during the 1997 legislative session. At

HOME ADDRESS: 10624 W. 61ST STREET SHAWNEE, KS 66203•TOPEKA OFFICE: RM 170 WEST STATE CAPITOL BLDG. TOPEKA, KS 66612• HOME PHONE: 913-268-5402 HOME FAX: 913-962-4802
TOPEKA PHONE: 785-296-7693 TOPEKA FAX: 785-291-3446• E-MAIL: pkline@ink.org HOME PAGE ADDRESS: http://www.woodsland.com/kline

that time, I was appointed House Judiciary Subcommittee Chairman on Senate Bill 234. As you may recall, Senate Bill 234 is the initial partial birth abortion legislation passed by the Senate last year. The subcommittee on which I served as Chairman amended the bill to include a late term abortion ban. We also amended the bill to include the physical health exception for the mother, which has not been a part of Kansas's law. This physical health exception contains identical language as the language in House Bill 2531 - providing the exception for the "substantial and irreversible impairment of a major bodily function of the pregnant woman."

I researched various approaches to the constitutionally required exceptions for the mother's health during my tenure as subcommittee chairman. My intent was to draft language, which would meet constitutional parameters while restricting abortions on viable children as significantly as possible. As you probably have been informed during your careful consideration of this issue; language which allows an exception for the mother's "health" has been interpreted to allow abortions on children capable of survival when the mother's economic, physical and mental health are at minimum risk. Such exceptions and subsequent court interpretations essentially invalidate the legislative intent in passing late term restrictions in the first place. In other words, bans that contain such exception language are not bans at all but rather a license for abortion on demand.

For this reason I researched case law and the statutes of various states to draft restrictive language while recognizing the Supreme Court's requirement that some form of exception for the mother's health be included in any legislation restricting abortions. During this research, I found language in Pennsylvania statute relating to a physical health exception, which has been upheld by the United States Supreme Court. This language was taken directly from that statute and incorporated into SB 234 and is now in HB 2531.

The Pennsylvania legislature included the language as the definition of a medical emergency, which allows a minor child to avoid the requirement of parental notification under Pennsylvania law. If the delay associated with parental notification would result in a medical emergency - the irreversible damage to major bodily function - then such notification is not necessary. (See, 18 Pennsylvania Statutes Annotated, §3203 (1997 Supp)).

The State of Pennsylvania was sued by Planned Parenthood of Southeastern Pennsylvania soon after the new law took effect. Planned Parenthood, among other issues, claimed that the new law was unconstitutional because the definition of medical emergency was too narrow and resulted in an unconstitutional infringement on a woman's right to choose. The Federal District Court for the Eastern District of Pennsylvania agreed, however, their decision was overturned by the Third Circuit Court of Appeals. (See, ***Planned Parenthood v Casey***, 744 F. Supp. 1323 (E.D. Pa.); and 947 F.2d 682 (3rd Cir. 1991)).

In upholding the language now included in H.B. 2531, the Third Circuit Court of Appeals states: "the essence of the definition of §3203 is that it allows a woman and her doctors to forego many of the Act's requirements when there is a medical emergency to the **woman's physical health**...." **Id**. at 701 (*emphasis added*).

The Third Circuit Court of Appeals interpretation of this language and its finding of constitutionality was subsequently upheld and supported by the United States Supreme Court in ***Planned Parenthood v Robert P. Casey***, 505 U.S. 833, 879, 112 S.Ct. 2791 (1992). Accordingly, the United States Court of Appeals has already interpreted this language as relating to physical health and found the language constitutional and this finding has been upheld by the highest court in the land. This is the reason I amended the language into S.B. 234.

Other Pennsylvania statutes and court cases further support this position. In interpreting the word "bodily" in an insurance policy, the Pennsylvania Superior Court, the counter part to our Supreme Court, states: "bodily... connotes... physical... not mental...." ***Jackson v Travelers Insurance Company***,

606 A.2d 1384, 1387 (Pa. Super 1992)). The United States Supreme Court has made identical findings as well. (*See, e.g.,* ***Accident Insurance Company v. Crandal***, 120 US 527, 7 S.Ct. 685, 688).

Other portions of Pennsylvania statute also use the word "bodily." For example, Pennsylvania statutes, as Kansas's statute, provides that causing "bodily" harm is an aggravating circumstance in certain crimes. In defining "bodily injury" Pennsylvania statute states: "bodily injury (is) impairment of a physical condition... ." (18 Pennsylvania Statutes Annotated §2301).

The word has common understanding in Kansas's law as well. As early as 1957 the Kansas Supreme Court when interpreting legislative intent regarding the use of the word "bodily" states:

> Bodily... is defined as pertaining to the body... 'It is opposed to mental... physical is often synonymous with bodily; as, physical discomfort, physical suffering... " ***State v. Brown***, 181 Kan. 375, 389 (1957).

In fact the Brown case is quoted and cited in Words and Phrases, with cases from numerous jurisdictions, as demonstrating that bodily and bodily functions are indicative of physical, as contrasted with mental, conditions. Furthermore, the language of the bill has such a common understanding that it is quite remarkable that some may be confused regarding its interpretation.

Blacks Law Dictionary defines "bodily" as "pertaining to or concerning the body; of or belonging to the body or the physical constitution; not mental but corporeal." Black's also states that bodily infirmity is a general disease or ailment, which results in "some degree of general impairment of physical health and vigor." Webster's II New Revised Dictionary (1984) states the definition of bodily as "physical rather than mental or spiritual."

I only cite these matters to demonstrate that I, and others who supported this measure, had an understanding of the terms consistent with Kansas case law, Kansas statute and the general legal and cultural understanding of the terms. ***The actions and language interpretation of the Third Circuit Court of Appeals in Casey and the subsequent support by the United States Supreme Court for that interpretation of the relevant language and the constitutionality of the language; is by itself settles this issue***. To interpret legislative intent otherwise is creative revisionism.

Kansas legislative intent is further indicated by the allowance of the mental health exception in the partial birth abortion ban portion of the bill. That portion of HB 2531 does not provide any restrictions on aborting viable children. The legislature was only banning a procedure and, therefore, clearly recognized that under Supreme Court decisions a greater focus on the health of the woman is necessary in procedural bans. It is difficult to argue that the state has a greater constitutional interest in an unborn child who is aborted with one type of procedure over a child who is aborted by a different procedure. The state's interest in the unborn child is its interest in what the Supreme Court has called "potential life." Procedural bans, therefore, are interpreted as primarily relating to the health of the woman. The Kansas legislature indicated its ability to include a mental health exception in a clear and understandable fashion when it amended the partial birth abortion ban to include an exception stating "a continuation of the pregnancy will cause a substantial and irreversible impairment of a major physical or mental function of the pregnant woman." HB 2531, §18 (a)(2).

After the Senate provided this mental health exception and sent the bill to the House a meeting was convened in the Speaker's office to determine how this change may affect the clear intent to limit the late term abortion ban exceptions to the physical health of the mother. The meeting was attended by Representative Powell, at times Representative Carmody, and representatives of Kansans for Life. During that meeting, Representative Powell observed that the Senate amendments supported legislative intent in this regard. He stated that the mental health exception in the partial birth abortion ban is a clear indication that the legislature knew how to expressly include such an exception and it failed to

include this language in the late term abortion ban. A court, therefore, will be even more reluctant to infer an interpretation contrary to express language in the bill. I and others at the meeting concurred in his opinion and, therefore, decided to leave the language in the partial birth abortion ban untouched.

Furthermore, the debate regarding the late term abortion ban on the House floor clearly indicates that the bill did not contain a mental health exception. Those opposed to this bill forcefully argued that forcing a woman to carry an abnormal child to term, as under this bill, would cause substantial emotional harm to the woman and her family. In fact, that argument was the primary basis for opposition to the passage of the bill. Those of us who support the measure, although recognizing the compelling nature of this argument, decided that the life of a child capable of surviving outside the womb is a more compelling interest to protect.

As the Chief Executive Officer of the State, it will be your responsibility to enforce this law consistent with clear legislative intent and consistent with the clear understanding of the language used. Kansas law does not include a mental health exception that allows the abortion of children who are capable of surviving outside of the womb at the time the abortion is performed. The law must be enforced consistent with this clear language.

Sincerely,

Representative Phill Kline

Cc: Speaker Tim Shallenburger
Speaker Pro Tem Susan Wagle
Majority Leader Robin Jennison
Representative Tony Powell

State of Kansas

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TOPEKA

House of Representatives

COMMITTEE ASSIGNMENTS
MEMBER: APPROPRIATIONS
SUBCOMMITTEES:
EDUCATION
K-12 SCHOOL FINANCE

April 27, 1998
FOR IMMEDIATE RELEASE
Contact: Kenny A. Wilk 913-727-2453

WILK APPLAUDS SIGNING OF HB 2531

"Although some people will strongly question his decision, I believe the Governor made a prudent choice for Kansas, "said Rep. Kenny Wilk (R-Lansing) about today's passage of HB 2531. "Governor Graves signed HB 2531 today and completed what has actually been a long and complicated process in the Legislature."

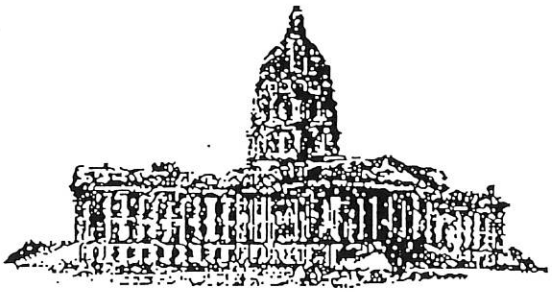
Wilk said he witnessed the Governor and his Statehouse staff working to carefully study this legislation for more than a year.

"I respect his bold leadership in tackling this issue," Rep. Wilk said. "More importantly, I deeply appreciate his ability to put aside politics and address the public policy offered in this new law."

Attending meetings with both proponents and opponents in the abortion debate, Wilk pointed out how the Governor diligently sought all points of view and took the time to understand the logic and reasoning behind the bill.

"Governor Graves has been extremely fair, and I personally know this was an arduous decision for him to reach," said Wilk about the signing of the new bill that takes effect July 1, 1998. "I applaud the Governor, and I am confident that time will prove that today he made the right decision for our state."

Wilk acknowledges the strong feelings on both sides of the issue. For those that did not support HB 2531 he suggested the bill is not as far reaching as they fear, and for those that did support the bill, we may find the bill is not as comprehensive as we would have liked.



State of Kansas-House of Representatives

SUSAN WAGLE

Speaker Pro Tem

NEWS RELEASE

For Immediate Release
Monday, April 27, 1998

For more Information
Contact: (785) 291-3500

Wagle pleased with Signature

Topeka--Today, in response to Governor Graves' signing of HB 2531, Speaker Pro Tem Susan Wagle said she was very pleased with the Governor's actions. Stated Wagle, "Today, the Governor has shown courage by signing a bill in the face of enormous pressure. There are three doctors in the United States who perform abortions on babies who can live outside the womb. Unfortunately, one of these doctors resides in Kansas. With his signature, the Governor has sent a strong message about Kansas values which is reverberating across the nation. The State of Kansas believes the life of a baby who is disabled is worth just as much as the life of a baby who is not. The Governor's signature is a victory for life, especially for some life which is undervalued in our society, that being the terminally ill and the unborn."

###

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STATE OF KANSAS

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS

MEMBER: EDUCATION
FEDERAL & STATE AFFAIRS
TAXATION

April 24, 1998

Governor Bill Graves
2nd Floor, State Capital
Topeka, Ks. 66612

Dear ~~Bill~~, Bill

I am writing you to ask for your support for the bill limiting late term abortions and assisted suicides. I know you are getting pressure from both sides of these issues and can appreciate the pressure you must be enduring. Kansans clearly support the late term abortion restrictions even if some media won't acknowledge it. Be assured there will be legislators, such as myself, who will help you justify the wisdom of this bill to the media if you sign it into law. My prayers are with you in hope that God gives you courage and wisdom in all your difficult decisions.

Sincerely,

Cliff

21-12

STATE OF KANSAS
HOUSE OF REPRESENTATIVES

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TOPEKA

COMMITTEE ASSIGNMENTS
VICE CHAIRMAN: TAXATION
MEMBER: HEALTH AND HUMAN SERVICES
JUDICIARY
RULES AND JOURNAL

MAJORITY WHIP

April 29, 1998

Hand Delivered

Honorable Bill Graves
Governor
State of Kansas
State Capitol, 2nd Floor
Topeka, Kansas 66612

Dear Governor Graves:

As one who was intimately involved in the drafting and passage of the abortion bill, I wanted to write to thank you for your signing of the abortion/assisted suicide bill, House Bill 2531, which restricts late term abortions, bans partial birth abortions, and strengthens our state's prohibitions against assisted suicide. I applaud the courage of your decision, and appreciated the serious approach you took to this matter. It was, as you stated, one of the most difficult decisions you have faced as Governor. I am particularly pleased with your statement that you believe "life is sacred."

However, I did want to express my concern over your statement in which you indicate that HB 2531's late term abortion provisions contain an exception for the "mental health" of the mother. Let me state unequivocally that a mental health exception is not provided for either by the clear and express language of the legislation or by legislative intent.

As Rep. Phill Kline as ably indicated in his letter to you, and whose legal analysis I strongly concur in, the express language of HB 2531 contains no mental health exceptions for allowing late term abortions. This legislative intent is further illustrated by the fact that the partial birth abortion section of the bill specifically uses the words "mental health" as an exception, while the late term abortion provisions use the terms "major bodily function." The rules of statutory construction require that where a term is specifically used in one place, and not used in another, such a term cannot be imputed in the other section. Therefore, since the legislature used specifically the terms "mental health" in the partial birth abortion section to mean a mental health exception, is does not follow that the words "major bodily function" encompass "mental health." If the legislature had intended to include mental health as an exception to late term abortions like

it had done with partial birth abortions, it would have expressly said so using the same language. Because the legislature did not, a mental health exception cannot be imputed as part of the late term abortion language.

Furthermore, as one of the members of the House charged with reviewing the legislation as passed by the Senate, I shared the view of Representative Kline, and other prolife members of the House, that a mental health exception was unacceptable as it creates a loophole too broad as to allow abortions for virtually any reason. In fact, when reviewing language in the relevant section in the Speaker's office with Representative Kline and others, we specifically agreed that mental health was not included as the words "mental health" were not present as they were in the partial birth abortion section, thereby requiring an interpretation that mental health was not included.

Finally, I would add that the debate on the House floor clearly indicated that both the opponents and supporters of this legislation knew that mental health was not a permissible exception as opponents decried the emotional harm this legislation could have upon women and supporters argued that the value of human life outweighed any potential emotional harm to woman.

Although the courts will no doubt be called upon to ultimately decide this question, I urge you, and all agencies enforcing this new law, to enforce all the provisions of HB 2531 until a court indicates otherwise.

Sincerely,

Tony Powell
State Representative

cc: Speaker Tim Shallenburger
Speaker Pro Tem Susan Wagle
Majority Leader Robin Jennison
Representative Phill Kline

STATE OF KANSAS
HOUSE OF REPRESENTATIVES

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MAJORITY WHIP

COMMITTEE ASSIGNMENTS
VICE CHAIRMAN: TAXATION
MEMBER: HEALTH AND HUMAN SERVICES
JUDICIARY
RULES AND JOURNAL

May 20, 1998

Honorable Bill Graves
State Capitol
Topeka, Kansas 66612

Dear Governor Graves,

I wanted to write you to tell you again how much my daughter's first grade class enjoyed their visit to the Capitol and especially their visit with you. I think all of them were awe-struck, including the adults! It really meant a lot to me personally that you took the time to meet with them. Thank you again so much.

I also wanted to properly thank you for signing the abortion bill. While I regret we have had some disagreements on the meaning of the bill, I know it took a lot of thought and careful consideration on your part to sign this measure into law. You took much heat over it, and you deserve credit for signing it. I know many pro-lifers greatly appreciate your act.

Finally, it was a pleasure to work with your staff on the BOTA bill. While we had some bumps along the way, I am confident that this measure will greatly improve that troubled agency. I look forward to talking with you about future appointments to the Board to ensure that our wishes for reform will be carried out.

Thank you again for every thing.

Very truly yours,

Tony Powell
State Representative

21-15

PRESS RELEASE

April 29, 1998

Rep. Tim Carmody

In the last two days a group of legislators have expressed disagreement with the Governors interpretation of HB 2531 on the issue of the existence or non-existence of a mental health exception for a post viable abortion. I have been told that I have misled my colleagues. I wish to take this opportunity to explain my position and explain what has gone on over the last two weeks.

On April 22, 1998, I sent a letter to the Kansas City Star, and stated "HB 2531 does contain an exception for the women's physical or mental health, as long as it is irreversible and results in impairment of a major bodily function.". A copy of this letter was provided on April 22 to, among others, Governor Graves, Representatives Powell, Wilk, Shallenburger, Farmer, Phill Kline, Jennison and Wagle as well as Senators Jordan, Brownlee, Harrington, Emert and Praeger. That letter was mailed April 22, 1998 and many, if not all of these individuals, received it prior to the release of the Governor's veto message on Monday. In addition, it is the understanding of several individuals involved in the development of the bill, specifically, Senator Jordan and Senator Harrington, that a narrow mental health exception did exist. Finally, this matter was explained when I carried the bill at the microphone during floor debate on HB 2531 on April 10th. I suggest a review of the taped transcript of the debate to verify this point.

My comments at the microphone on the debate of this issue was prior to any vote being taken on the motion to concur. For legislators to now second guess and to say that if they had only known about a "mental health" exception they would not have voted for the bill is disingenuous. All members of the House present that day listened intently to the debate and if they were mislead it was because they chose not to listen. It is also unfortunate that a small clique of legislators and outside lobbying

groups are attempting to minimize the impact of this law. I call upon the leaders of the House of Representatives to be exactly that - leaders. Instead of trying to minimize a significant victory, instead of attacking those legislators and their creditability who attempted to develop a significant abortion bill they ought to be consolidating this victory, preparing for a possible court challenge and reviewing the bill for possible clean-up amendments. Instead, the debate has dribbled off onto a side track and has become a game of "he said - she said".

Since an issue has arisen about the existence or non-existence of a mental health exception I will address that directly. I take issue with those who say that there is a "mental health exception", per se, in the bill. I have consistently opposed such a blanket exception. Standing alone, the "exception" for mental health becomes the rule and the loophole becomes a gap through which a truck can be driven. This indeed was never intended by anyone in this process.

HB 2531 does not allow a post-viable abortion on the whim of the mother or the unilateral and unsubstantiated "diagnosis" of the abortionist. What HB 2531 does require is that two physicians determine viability, document such determination and file a report with KDHE. If the fetus is viable, the two physicians then determine if continuation of the pregnancy would result in substantial and irreversible impairment of a major bodily function. Whether this impairment is a "mental" one or a "physical" one it must then be determined, again by two physicians, operating within the parameters of general accepted medical practice and standards that such impairment is substantial and irreversible and they must also document which mental or physical function is so impaired. An opportunity to cavalierly ignore the viable abortion ban by simply "diagnosing" any negative feeling as a "mental health" exception is not allowed by this bill.

The judgement exercised by the two physicians in these cases, as in every other medical or surgical procedure, must be that of the prudent physician. This is an objective criteria capable of review - and enforcement - by the Kansas Board of Healing Arts. The physician or physicians who might choose to ignore these criteria do so at the risk of discipline by the Board of Healing Arts and criminal prosecution.

Finally, the legal analysis provided by Rep. Kline can be examined by those more conversant with constitutional law. However, the decision in Women's Medical Professional Corp. et al. vs. VOINOVICH, 130 F. 3Rd 187(6th CIR;1997) was at all times before those who discussed and developed HB 2531. The bill was drafted with the Voinovich decision before us. The pertinent part (to the debate) is as follows:

> "The issue whether a State may ban post-viability abortions except where necessary to preserve the woman's physical health, even if carrying the fetus to term would cause the woman to suffer severe mental or emotional harm, is a question of first impression for this Circuit. We believe the Court will hold, despite its decision in Casey, that a woman has the right to obtain a post-viability abortion if carrying a fetus to term would cause severe non-temporary mental and emotional harm. (My emphasis) Accordingly, the Act's medical necessity exception is unconstitutional, because it does not allow post-viability abortions where necessary to prevent a serious non-temporary threat to a pregnant woman's mental health.
>
> Defendants argue that a broad maternal health exception will render meaningless the State's compelling interest in protecting fetal life and its right to actually proscribe postviability abortions. We recognize the problems associated with a mental health exception. However, we emphasize that we are holding that a maternal health exception must encompass severe irreversible risks of mental and emotional harm. . . .The Constitution requires that if the State chooses to proscribe post-viability abortions, it must provide a health exception that includes situations where a woman is faced with the risk of severe psychological or emotional injury which may be irreversible.

Ohio case this decis is th controlg decis for 6th circ

Truth has been the weapon that has enabled pro-life people to achieve the success they have. But truth is a two-edged sword. We cannot selectively choose, after the fact, what was said or what was intended. Judge this bill on its merits, which are many.

Finally, KFL chooses to emphasize the fact that this bill ". . . is a long way from what is needed to restore full protection to all unborn children in

Supct ref to hear it

a month ago

Kansas. Unfortunately, Governor Graves has consistently fought attempts by pro-life legislators to enact any more meaningful legislation." KFL knows very well that the primary reason that we are unable to give gull protection to the unborn is not the legislature or Governor Graves, it is the U.S. Supreme Court. This bill takes Kansas close to the constitutional limit.

STATE OF KANSAS

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HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
CHAIR—JUDICIARY
MEMBER—FISCAL OVERSIGHT
—JOINT COMMITTEE ON SPECIAL CLAIMS AGAINST THE STATE

FAX COVER LETTER

6 Pages (including this cover page)

DATE: 4/22/98

TO: Gov. Bill Graves

OF:

TELEPHONE NO: 785-296-3232

FAX NO: 785-296-7973

RE: H.B. 2531

FROM: Tim Carmody

MESSAGE: Thanks you for the effort you put into this bill. Here is a copy of my response to the K.C. Star. My comments on p. 3 address some of your concerns (I think) Thanks - Tim C.

If transmittal is incomplete, please contact our firm at (913) 491-6332.

THANK YOU!

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STATE OF KANSAS

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HOUSE OF
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COMMITTEE ASSIGNMENTS
CHAIR—JUDICIARY
MEMBER—FISCAL OVERSIGHT
—JOINT COMMITTEE ON SPECIAL CLAIMS AGAINST THE STATE

April 22, 1998

The Kansas City Star
1729 Grand Ave.
Kansas City, MO 64108

RE: Kansas HB 2531

Dear Members of the Editorial Board:

Governor Graves should sign HB 2531, a bill which would strengthen the ban on assisted suicide, regulate the abortion of viable pre-born children and ban the procedure known as partial birth abortion.

Your recent editorials are a deliberate attempt to misrepresent the contents of the bill, belittle the motivation of its supporters and illustrate once again that invective, anecdote and opinion are more important to you than facts and thoughtful reflection.

Among other things, you complain that there were no committee hearings on the bill. As introduced the bill did have extensive hearings in both the House and Senate. The Kansas Medical Society and the Kansas Hospice Association were only two of the groups who appeared to support the ban on assisted suicide. When the bill reached the floor of the Senate the abortion provisions were amended into the bill. I would note, however, that the massive tax cut bill, as actually passed, had no committee hearings either but I haven't heard any complaints.

To say as you do that the abortion provisions are "new" is misleading. Abortion is debated every year in the legislature, in the press and in election campaigns. There are no "new" proposals, just new bills. To say that this or that proposal is "new" is disingenuous. All of the nuances in abortion regulation are familiar to legislators, thanks to the pro-choice and pro-life lobbyists. The contents of the bill draw heavily on laws already on the books in Missouri, Pennsylvania and Ohio.

21-21

The actual structure and content of the bill are really a result of the frustrating debate at the end of the 1997 session on the partial birth abortion ban in SB 234. Sen. Oleen, my counterpart on the conference committee, and I were both frustrated at our own lack of knowledge on the legal and medical issues surrounding what used to be called "third trimester" abortions. Therefore, at the beginning of the 1998 session we initiated a series of meetings with constitutional attorneys, legislative research personnel, public health officials, and medical professionals. We agreed that both sides of the debate depend too heavily on anecdote, opinion and invective (your editorials are prime examples) and that accurate information is sorely lacking, especially on post-viable abortions. We agreed in principle to establish a better reporting system but we could not agree on the details. The discussion then broadened to include several Senators and Representatives, pro-choice and pro-life, as well as Governor Graves. All of the participants were sincere in trying to better regulate post-viable abortions in Kansas, although not all agreed with the details. As a result of their efforts the final bill is the most significant step Kansas has ever taken in this area.

Contrary to what the Star says, the bill adopts the current legal philosophy and bases the whole process on the medical judgment of the physician. "Viable" has replaced "third trimester" or an arbitrary gestational age (eg. 24 weeks) because that is now the constitutional standard. "Viable" is defined by statute but is determined by the attending physician using his or her best medical judgment. Dr. Tiller and the Star's editorial board don't feel comfortable defining "viable". But did you know that Kansas defines "death"? (Read the Uniform Determination of Death Act adopted in most states.) If we can define "death", why can't we define "life"? The Star's sneering references to "perceived" viability or "potential" viability ignore the fact that current Kansas law prohibits abortions of a viable fetus. Dr. George Tiller apparently believes that physicians can't tell if a fetus is viable until it is born. By such statements he, and the Star, are saying that current Kansas law is a really a sham which can be routinely ignored because no one can determine viability. Viability is not a new concept. Viability is the standard in every state which regulates late-term abortions.

The bill also provides, by its silence, that if the gestational age is less than 22 weeks, as determined by the attending physician, an abortion can be performed for any reason (or no reason). The medical records are maintained by the

physician for five years but a detailed report is not sent to the Kansas Department of Health and Environment. However, if the gestational age is 22 weeks or more the attending physician, as well as a second physician, using their best medical judgment, must determine if the fetus is viable, that is, capable of living outside its mother. If it is not viable an abortion may be performed, no exception being necessary. If it is viable, an abortion may be performed only to save the life of the mother or to prevent an irreversible impairment of a major bodily function of the mother. All post-22 week abortions must be reported to KDHE, although the name of the patient is confidential.

Opponents of the bill have expressed three concerns: an exception would no longer be allowed for a severe fetal abnormality, the bill contains no exception for the mental health of the mother and it contains no exception for rape or incest. The first statement is correct, there would be no exception for severe fetal abnormality, a point to which I will return. Second, current Kansas law contains no exception for either the physical or mental health of the mother and is therefore patently unconstitutional. HB 2531 does contain an exception for the woman's physical or mental health, as long as it is irreversible and results in impairment of a major bodily function. Mental capacity and ability are certainly major bodily functions. The opponents, including the Star, passionately support and defend the current law which is both unenforceable and unconstitutional. Why? The answer is obvious. The current law does nothing to regulate abortions of a viable-fetus/child and Dr. Tiller and his apologists, like the Star, want to continue the elaborate charade that the current law is a "reasonable" compromise. What is reasonable about nothing? It is like announcing that one is on a diet but only pretending to lose weight.

Third, on the issue of a rape or incest exception, The Mainstream Coalition's latest "Urgent Action Alert" says that HB 2531 would remove "... all exceptions for...rape, or incest". Hello? Current Kansas law has no exception for rape or incest. Apparently the folks who wrote the 1992 law, which the Star so dearly loves, didn't consider it important enough to include. But is such an exception really necessary? Remember that the bill will not regulate pre-viable abortions. Would a rape victim carry the baby all the way to the stage of viability and then seek an abortion? If she does, why, in that case, after being carried for 6 months or longer, should the viable fetus/child forfeit its right to live? Remember, in the case of rape or

incest, we are no longer talking about a fetus/child with a defect. We are talking about a perfectly normal child.

I think that Laura Scott, who has received several awards from Planned Parenthood and has, I believe, served on its board, actually comes very close to articulating the heart of the issue when she says that we should abort the viable fetus/child if the child's life "...would take away the parents' time and resources from other children - current and perhaps future." This is the real kernel of the debate - over abortion, over euthanasia, over infanticide. Should someone in control of a dependent person have the right to determine the worth of that dependent and decide whether that dependent should live or die? Is a viable fetus/child a sub-human life form, forfeiting its right to live, when (in Dr. Tiller's terms) it "parasitically" demands an inordinate amount of time and resources from its family?

Or is that child, instead, an opportunity? An opportunity like our elderly and our frail. An opportunity like our brothers and sisters with AIDS. An opportunity like our mentally ill and our mentally retarded family and friends. An opportunity to learn how to give, to sacrifice, to share, to nurture, to care, to love. In other words, an opportunity to be more human.

A large ad recently ran in the Star challenging us to test all issues with the question, "Is it good for the children?" I believe that learning how to love, care and nurture one another, even the most helpless, is exactly what is good for our children. HB 2531 is a historic opportunity for Kansas to stand up and state that it is our public policy to nurture, support and defend life, at its beginning and at its end. If we cannot stand up for the most defenseless - the sick, the elderly, the viable fetus/child - then what do we stand for? What do we stand for?

Respectfully,

Tim Carmody,
State Representative

cc:
Gov. Bill Graves
2nd Floor, State Capital
Topeka, KS 66612

Olathe Daily News
Rep. Tony Powell
Sen. Nick Jordan
Rep. Ken Wilk
The Winfield Courier
The Topeka Capital-Journal
The Leaven
Rep. Tim Shallenberger
Rep. Mike Farmer

Rep. Phill Kline
Sen. Karin Brownlee
Sen. Nancy Harrington
Rep. Robin Jennison
The Wichita Eagle
The Johnson County Sun
Sen. Tim Emert
Rep. Susan Wagle
Sen. Sandy Praeger

21-25

CEY HARRINGTON
SENATOR TWENTY-SIXTH DISTRICT
603 N. CEDAR, P.O. BOX 697
GODDARD, KANSAS 67052
(316) 794-3775

STATE CAPITOL
ROOM 128-S
TOPEKA, KANSAS 66612-1504
(785) 296-7367

TOPEKA

SENATE CHAMBER

COMMITTEE ASSIGNMENTS
VICE CHAIR: FEDERAL AND STATE AFF
MEMBER: JUDICIARY
TRANSPORTATION AND TOURISM

April 30, 1998

EDITOR
THE WICHITA EAGLE
825 E DOUGLAS
WICHITA KS 67202

Dear Sir:

This letter is in response to Governor Graves signing of HB 2158, a bill banning most late term abortions in Kansas, including Partial Birth abortions. Governor Bill Graves is Pro-choice. I am a Pro-life senator, and was involved with the working group of legislators who drafted the language in the bill. I would like to take this opportunity to address what I believe to be by most media, a rabid and unfair response, to the Governor's signing and not vetoing of the legislation.

That the overwhelming majority of Kansans oppose abortions in the 7, 8, and 9th month of pregnancy, including Partial Birth abortions, and that Bill Graves governs Kansans, does not appear to matter to most editorial writers in the state.

That candidate, Bill Graves in 1994, ran as Pro-choice and comfortable with the 1992 abortion law, and is now being criticized by the Pro-abortion media and others to his supposedly changed position because of his signing of the bill is the most telling of the Pro-abortion camp.

The legislative process is a deliberative process. Legislation is introduced each year to be considered; for the Governor and legislators not to consider each new piece of proposed legislation makes them poor representatives of the process. Pro-abortion supporters are not deliberative, they support abortion on demand, through all 9 months, used as a birth control.

Kansas is unique in that it has an abortion provider, who advertises on the world wide web of his services, specializing in late term abortions. That most of his service is provided to women coming into Kansas from all over the country and even the world should have no bearing on Kansas policy makers in what is good policy for Kansas. George Tiller stated to the press that of all the late term abortions he preformed on women with severe fetal deformities last year, that 20 were on Kansas women. Hardly the huge numbers that the media has exploited as a concern of high cost and burdens to the families and the state as a result of the legislation.

The Supreme Court decision in Casey established that a state has an interest in protecting potential life of the unborn child in the 3rd trimester and that states can address abortions at that stage of pregnancy.

The right to life is precious; and if in the abortion debate Pro-choice legislators have been forced by the diligence of Pro-lifers to study the issue more closely and to discover themselves uncomfortable with how far abortion has gone in Kansas, I salute their courage to admit it, and vote for or sign legislation such as HB 2158.

Sincerely,

Nancey

Nancey Harrington
State Senator - 26th District

NH:lb

STATE OF KANSAS

N..CEY HARRINGTON
SENATOR TWENTY-SIXTH DISTRICT
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TOPEKA

SENATE CHAMBER

COMMITTEE ASSIGNMENTS
VICE CHAIR: FEDERAL AND STATE AFFAIRS
MEMBER: JUDICIARY
TRANSPORTATION AND TOURISM

April 30, 1998

Governor Bill Graves
2nd Floor, State Capitol
Topeka, Ks 66612-1590

Dear Governor Graves:

I have written you prior to this letter thanking you for your signing of HB 2158.

We even spoke in passing, you may recall, and I thanked you again at that time.

I do have some concern that needs to be clarified with regard to a quote from you in the Wichita Eagle concerning a mental health exception in the bill.

Surely, it is not your interpretation of the language, that a mental health exception would mean business as usual for someone like George Tiller of Wichita? I assure you it was never the intent of Pro-life legislators, and hopefully of Pro-choice legislators as well!

I encourage your support of assuring the people of Kansas that loopholes are not and will not be accepted interpretations of this legislation.

Thank you.

Most sincerely,

Nancey

Nancey Harrington
State Senator - 26th District

NH:lb

cc: Senator Tim Emert
Representative Tim Carmody

21-28

STATE OF KANSAS

TIM EMERT
SENATOR, 15TH DISTRICT
ALLEN, CHAUTAUQUA, SE COFFEY,
MONTGOMERY, WILSON, WOODSON COUNTIES
P.O. BOX 747
INDEPENDENCE, KANSAS 67301
(316) 331-4831
STATE CAPITOL BUILDING, ROOM 356-E
TOPEKA, KS 66612-1504
(913) 296-2497

KANSAS SENATE
OFFICE OF THE MAJORITY LEADER

COMMITTEE ASSIGNMENTS

CHAIRMAN:
CONFIRMATIONS OVERSIGHT

VICE-CHAIRMAN:
JUDICIARY
ORGANIZATION, CALENDAR & RULES

MEMBER:
EDUCATION
INTERSTATE COOPERATION
LEGISLATIVE COORDINATING COUNCIL
STATE FINANCE COUNCIL
JOINT COMMITTEE ON GAMING COMPACTS

April 24, 1998

The Honorable Bill Graves
State Capitol
Second Floor
Topeka, Kansas 66612-1590

Re: HB 2531

Dear Governor Graves:

As you know, I was one of the authors of the amendment to HB 2531 which deals with several issues regarding our abortion laws. Numerous questions arose during the drafting of the amendment and throughout an extended period of debate on the Senate floor the day it was adopted.

This letter is written to clarify one portion of that amendment and to offer some insight as to the legislative intent in regard to an exception which permits an abortion to be performed on a viable fetus, that specific exception being:

> "a continuation of the pregnancy will cause a substantial and irreversible impairment of a bodily function of the pregnant woman."

Throughout the debate on the Senate floor, there were numerous questions seeking clarification of this provision and since passage of the bill, there have been questions raised concerning the same.

The most often asked question is: Does this allow an exception for the woman's mental health as well as physical health? The answer is certainly, "yes".

In drafting these amendments and during weeks of work on the amendment with other supportive legislators, it was our intention that mental health be included with the idea that certainly mental capacity and ability are major bodily functions.

This question was asked not only prior to the offering of the amendment, but throughout the debate and was repeatedly answered in the affirmative.

It was certainly my intention and I believe the intention of the Legislature to allow for such a mental health exception.

I encourage your support of HB 2531 and would be available for any further discussion in this regard.

Yours very truly,

Tim Emert

TE:jc

HOUSE OF REPRESENTATIVES
WASHINGTON, D. C. 20515

VINCE SNOWBARGER
THIRD DISTRICT
KANSAS

5-12-98

Bill -

Just a short note to say "thank you" for the late term abortion bill you signed. I know you're taking a lot of heat and it's not likely to let up. But there are many pro-life supporters who recognize the significance of your actions and appreciate them.

I've been through the fire as well and know how uncomfortable it is. I hope you find comfort in the fact that you've done the right thing even if it hasn't been expedient in the short run. Thanks + you in our prayers.

Vince

21-31

NEWS FROM TODD TIAHRT

U.S. REPRESENTATIVE FROM THE FOURTH DISTRICT OF KANSAS

Contact: Dave Hanna
316-262-8992

4/27/98

Rep. Tiahrt Praises Gov. Graves for Signing Abortion Legislation

(Washington) Rep. Todd Tiahrt (R-KS) praised Gov. Bill Graves for signing legislation to place additional restrictions on euthanasia, third-trimester and partial-birth abortions.

Rep. Tiahrt said, "Those who stand for life in all its stages should make no mistake, this is a tremendous victory. Gov. Graves should be commended for signing this humane legislation with which the vast majority of Kansans agree. Partial birth abortions, a majority of which take place in the second trimester, will be banned in the state of Kansas thanks to this responsible step.

"This is the most significant legislative achievement in securing the right-to-life in Kansas since the Supreme Court erased all abortion restrictions in 1973. Governor Graves and the state legislators who voted to pass this legislation deserve our thanks and enduring gratitude. I commend the Governor for taking a hard look at this contentious issue and coming down on the side of life."

###

S[illegible]OWNBACK
[illegible]NSAS
(202) 224-6521 PHONE
(202) 228-1265 FAX

COMMITTEES:
COMMERCE, SCIE[illegible]
AND TRANSPORT
FOREIGN RELAT,
GOVERNMENTAL AFFAIRS
JOINT ECONOMIC COMMITTEE

United States Senate

WASHINGTON, DC 20510-1604

April 27, 1998

The Honorable Bill Graves
Governor of Kansas
2nd Floor
State Capitol
Topeka, Kansas 66612-1590

Dear Bill,

Thank you for your morally courageous decision to sign the abortion bill. I know you are a man of sound judgement and good character and that this deliberation was difficult. You absolutely did the right thing. You have saved innocent lives.

Years from now, people presently in public life will not be judged by how we divided the spoils of our prosperity but by what we did to defend the defenseless. No one remembers Lincoln for his support of an industrial tariff.

By your actions today you have helped to redeem us all. Thank you.

Sincerely,

Sam Brownback
United States Senator

Thank you so much for this courageous act!

"For thou dist form my inward parts,
thou didst knit me together in my
mother's womb."
Psalms 139:13

612 SOUTH KANSAS AVENUE
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(316) 276-1637 FAX

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WICHITA, KS 67202
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(316) 264-6078 FAX

11111 WEST 95TH, SUITE 246
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(913) 492-7253 FAX

21-33

SESSION OF 1999

HOUSE BILL NO. 2570
By Committee on Appropriations

As recommended by Kansas 2000 Select Committee

Presented to: Senate Federal and State Affairs Committee
Presented by: Frank Denning
Kansas Peace Officers' Association

We realize that this bill will create a task force regarding consolidation of public safety agencies within the State. The Kansas Peace Officers' Association (KPOA) does not necessarily oppose this task force. We do feel that uniformity and centralization will be expensive. Even the study will be quite costly. Law enforcement in this State has always been very cooperative with one another. The people of this State realize that law enforcement has an excellent reputation surrounded by professional leadership in each entity. It is working fine.

As most of you know, Kansas Law Enforcement has always cooperated closely with the Legislature. We have worked together well in proposing and passing good laws and sound public policy. KPOA prides itself in playing a vital role to ensure positive cooperation with the Legislature. We are asking to be a part of this task force if you proceed. On behalf of KPOA, I am requesting that you provide membership to this task force consisting of a member from each of the following organizations. One from the Kansas Peace Officers' Association, one from the Kansas Association of Chiefs' of Police and one from the Kansas Sheriffs' Association. An alternative here would be to select a member from the Kansas Peace Officers" Association. Our organization has membership representatives from all state law enforcement agencies. Thank you for your consideration.

Sen. Federal & State Affairs Comm
Date: 4-27-99
Attachment: #22-1

Senate Federal & State Affairs Committee

Senator Oleen and Members:

I am Thomas Hayselden, Police Chief for the City of Shawnee, Kansas and chairman of the legislation committee for the Kansas Association of Chiefs of Police.

Kansas must be blessed with the total cooperation among state, county and city law enforcement agencies. We all have and continue to accept the responsibility of enforcing the laws of Kansas and protecting persons and property and the preservation of peace in our communities throughout the state.

House Bill 2570 will create a task force to study consolidation of state level law enforcement agencies. If there is something wrong with the present state system, then I must be too close to see the problem(s). If it's not broken, keep up with good maintenance and go on. When the committee as stated in HB 2570 is placed in motion then I would request that it include representatives from the Kansas Association of Chiefs of Police, Kansas Sheriffs Association and the Kansas Peace Officers Association.

Sincerely,

T. Hayselden

Thomas K. Hayselden
Legislative Committee

Sen. Federal & State Affairs Com
Date: 4-27-99
Attachment: #23-1