Approved: March 15, 2000
Date

MINUTES OF THE SENATE FEDERAL AND STATE AFFAIRS.

The meeting was called to order by Chairperson Senator Lana Oleen at 11:00 a.m. on March 10 , 2000 in Room 245-N of the Capitol.

All members were present except: Senator Ben Vidricksen
Senator Sherman Jones

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

Conferees appearing before the committee: Ron Hein, Indian Nations in Kansas

Others attending: See Attached List

Mary Galligan, Legislative Research Department, provided the committee members with a summary of the Nebraska U.S. Supreme Court Case and discussed briefly the issues of the case. (Attachment 1).

Chairman Oleen stated that minutes were before the committee for March 2, 7 and 8, 2000. Senator Vratil moved to approved the minutes, Senator Biggs seconded the motion. The motion carried.

Chairman Oleen announced that several conferees had agreed to return today to respond to any questions that members might have on **Sub HB 2581**.

Dena Vogler responded to questions from Senators Harrington, Bleeker, and Gooch concerning her testimony of March 9, 2000 and how the current law affects the Women's Health Care Services..

Natalie Haag, Office of the Governor, responded to questions from committee members concerning her testimony of March 9, 2000.

Senator Harrington provided information in individual folders to all committee members which included : Testimony from April, 1999 from Jared P. Pingleton, Psy.D. a proponent of **Sub SB 2581.** (Attachment 2). A letter from the Office of the Attorney General, State of Nebraska, dated January 19, 2000. (Attachment 3), Constitutional and statutory Provisions involved in the Nebraska case (Attachment 4), The findings from The United States Court of Appeals for the Seventh Circuit on the Illinois case (Attachment 5), The dissent by Chief Judge Posner in the Illinois and Wisconsin cases. (Attachment 6). Senator Harrington provided recent cases on Constitutional Law Abortion Sixth Circuit which are available from the *Harvard Law Review Association* 1999 Harvard Law Review 111 Harv. L. Rev. 731 and information on George Voinoivich, Governor of Ohio et al v. Women's Medical Professional Corporation, et.al available from 118 Cr 1347; 199 *U.S. Lexis 1785:140 L.Ed. 2nd 496; 66 U.S.L.W. 3619 98 Daily Journal DAR.* A copy of the article "*Senate to look at suspect trade in fetal tissue"* from *The Wichita Eagle,* Thursday, February 17, 2000 was also handed out by Senator Harrington.

Chairman Oleen stated that the committee would return to **SB 607-- Interlocal agreements with Native American Indian tribes.** After discussion by the committee, Senator Bleeker who had voted on the prevailing side of the motion to amend the bill at its previous work session, moved to withdraw the motion and Senator Harrington second the motion. The motion passed.

Senator Vratil moved to report **SB 607** favorably to the full Senate. Senator Biggs seconded the motion. The motion carried.

Chairman Oleen reopened the hearing on

SB 608- Class B clubs

Chairman Oleen indicated that opponents had testified previously on the bill, so she recognized proponents to the bill.

Ron Hein appeared as a proponent of the bill. He stated he represented the Indian Nations in Kansas, who support this bill which would allow any class B club located on the premises of an Indian gaming facility operated by a Native American Indian Tribe to provide temporary membership while the person is using the facility. (Attachment 7) Current law allows temporary permits to be issued for a person who is staying at a hotel, motel, and other specified provisions.

John Peterson, representing Harrah's, offered some proposed amendments to the bill. He and Ron Hein responded to questions from the committee. Chairman Oleen closed the hearing on **SB 608**.

Senator Vratil moved to amend the bill restricting members to nonresidents of the county where the facility is located and waiver of the fee. Senator Gooch seconded the motion. The motion carried.

After discussion by the committee Senator Biggs moved to recommend the **SB 608** unfavorably to the full Senate. Senator Vratil seconded the motion. The motion carried.

Chairman Oleen announced that there would be a regular meeting of the committee at 11:00 a.m. and a 2:00 p.m. meeting to review the draft of **Sub HB 2581** on Monday, March 13, 2000.

The meeting adjourned at 12:15 p.m. The next meeting will be March 13, 2000, at 11:00 a.m.

SENATE FEDERAL AND STATE AFFAIRS COMMITTEE
GUEST LIST
DATE: MARCH 10, 2000

NAME	REPRESENTING
Helen Allegre	Lebo, Kansas
Danny Allegre	Lebo, KS
Bruce Dimmitt	Kansans for Life
Janet Stamper	Kansas NOW
Dena Vogler	Women's Hlth Care Srvcs
Barbara Dietz	AAUW
Carla Norvell-Mabry	Planned Parenthood
Barbara A. Soldevilla	Kansans for Life
[illegible]	KASB
Roger Francis	KGC
Natalie Haag	Governor's Office

KANSAS LEGISLATIVE RESEARCH DEPARTMENT
Rm. 545N–Statehouse, 300 SW 10th Ave.
Topeka, Kansas 66612-1504
(785) 296-3181 ◆ FAX (785) 296-3824
kslegres@klrd.state.ks.us
http://skyways.lib.ks.us/ksleg/KLRD/klrd.html

March 9, 2000

To: Senate Committee on Federal and State Affairs

From: Mary Galligan, Principal Analyst

Re: Partial Birth Abortion Cases

In response to the Committee's request, attached is a summary of the Nebraska partial birth abortion case that is pending review by the U.S. Supreme Court.

I have a complete copy of the circuit court's opinion that I will be glad to provide to any members who request it.

If you have questions, or need additional information, please feel free to contact me.

Sen. Federal & State Affairs Comm
Date: 3-10-00
Attachment: # 1-1

Stenberg, Donald, Nebraska Atty General v. Carhart, Leroy, et al.
99-0830
Appealed From: 8th Circuit Court of Appeals (192 F.3d 1142)
Oral Argument: April 25, 2000

Subject: Partial birth abortions, constitutionality

Question(s) presented: Whether a Nebraska law outlawing "partial-birth abortions" is unconstitutionally overbroad by putting an undue burden on women seeking abortions.

On June 9, 1997, Nebraska's Governor signed into law a bill enacted by the Nebraska Legislature prohibiting "partial-birth abortion." When the legislature passed the bill only six days earlier, it had incorporated an emergency clause making it effective upon the governor's signature.

Initial challenge of act for vagueness and undue burden.

Immediately thereafter, LeRoy Carhart, a doctor who performs abortions at a clinic in Bellevue, Neb., sued, claiming the law was unconstitutionally vague and placed an undue burden on himself and female patients seeking abortions. U.S. District Judge Richard Kopf enjoined the state from prosecuting Carhart during the time it took for him to decide the case.

The critical issue stems from two abortion techniques used in the second trimester. In the much more common dilation and evacuation (D&E) procedure, the fetus is pulled into the vagina and dismembered. In the dilation and extraction (D&X) procedure, the fetus is pulled into the vagina, where the skull is emptied by the doctor.

The medical community agrees that the D&E procedure is the best choice for second-trimester abortions.

The U.S. Supreme Court has made it unconstitutional to prohibit abortions, but the Court has allowed states to limit procedures as long as those limits don't cause an "undue burden" on the right of a woman to choose. Carhart argued that the state, in trying to ban the D&X procedure, also banned the D&E procedure, thereby placing an undue burden on him and his patients.

District court found act unconstitutional

After holding a trial on the merits, the district judge issued his ruling more than a year after the law was passed, holding it unconstitutional, enjoining its enforcement and awarding attorney's fees and costs to Carhart.

On appeal: Act found to impose undue burden. Vagueness not reached.

A unanimous 8th Circuit Court of Appeals panel affirmed, also holding the law unconstitutional. "Because we are holding the law unconstitutional on undue-burden grounds, it is not necessary for us to discuss the vagueness issue," the opinion stated.

The appeals court noted that the Nebraska law defines the partial-birth abortions it

bans as any procedures that "partially deliver vaginally a living unborn child before killing the unborn child and completing the delivery."

"The law refers to 'partial-birth abortion,' but this term, though widely used by lawmakers and in the popular press, has no fixed medical or legal content," wrote Judge Richard Arnold. "The closest thing we have to a medical definition comes from the American College of Obstetricians and Gynecologists (ACOG). The ACOG definition describes a method of abortion (commonly called dilation and extraction, or D&X) involving extraction, from the uterus and into the vagina, of all of the body of a fetus except the head, following which the fetus is killed by extracting the contents of the skull."

"The difficulty," the opinion continued, "is that the statute covers a great deal more. It would also prohibit, in many circumstances, the most common method of second-trimester abortion, called a dilation and evacuation (D&E)."

In holding Nebraska's law an unconstitutionally undue burden on the right to an abortion, the appeals court rejected Nebraska's argument that *Roe v. Wade* doesn't apply to partial-birth abortion. The state claimed that the U.S. Supreme Court referred only to the "unborn." Once substantial parts of a live fetus have passed into the vagina from the uterus, the fetus has been born, the state argued.

Viability as a factor.

The appeals court said this argument was outside the bounds of its decision, finding that the term "born" most naturally applies to a viable fetus, and that the case before them applied to non-viable fetuses.

About 30 states have passed laws banning "partial-birth" abortions, but many have been struck down by district and circuit courts as unconstitutional.

The appeals court's decision joined similar decisions in other circuits.

The U.S. Supreme Court granted *certiorari* on Jan. 14, 2000. The case will be argued in April.

South Carolina, Idaho, Louisiana, Ohio, Pennsylvania, Rhode Island, South Dakota, Utah have joined the appeal as *amici curiae*.

Attorneys in this case:

For Stenberg (Nebraska):
L. Steven Grasz
James D. Smith
Nebraska Attorney General's Office
2115 State Capitol
PO Box 98920
Lincoln, NE 68509
(402) 471-2662

For Carhart:
Simon Heller
Center for Reproductive Law and Policy
120 Wall Street
18th Floor
New York, NY 10005
(212) 514-5534

Source: This brief written by Greg Jonsson, Medill School of Journalism
Formatted and annotated by Mary Galligan, KLRD

Partial Birth Abortion decisions by the 8th Circuit Court of Appeals:

Arguments in **Arkansas** and **Nebraska** cases were heard by the Eighth Circuit on April 19, 1999.

The Arkansas case, *Little Rock Family Planning Services v. Jegley* (No. 99-1004EA (8th Cir. Sept. 24, 1999)), arose from a district court decision issued in November, 1998, which found the state's "partial-birth abortion" law was vague, placed an undue burden on a woman's right to choose, and failed to protect the life and health of the woman.

Because the Eighth Circuit found the case to be similar to the other two, the **Iowa** decision was issued without a hearing. In *Niebyl v. Miller* (No. 99-1372SI (8th Cir. Sept. 24, 1999)), the district court determined the state's "partial-birth abortion" law was unconstitutional in December 1998.

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.

STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NEBRASKA 68509-8920
(402) 471-2682

DON STENBERG
ATTORNEY GENERAL

January 19, 2000

VIA FAX 785-296-6718

Senator Nancy Harrington
State Capitol
Topeka, Kansas 66612-1504

RE: ***Stenberg v. Carhart*** - Partial-birth abortion - U.S. Supreme Court

Dear Senator Harrington:

This letter is in response to your inquiry regarding the U.S. Supreme Courts' recent decision to grant certiorari in Nebraska's partial-birth abortion case.

As you are aware, in the past four years nearly two-thirds of the State legislatures, as well as large majorities in both the United States Senate and House of Representatives have each addressed public concern over this cruel and unnecessary procedure by passing bans on its use. Now, the High Court has agreed to Nebraska's request to decide the validity of these laws. The fact that the Court agreed to take our case, rather than simply allowing the lower courts' decisions to stand, is significant. We are optimistic the Supreme Court will reverse the circuit court and allow Nebraska's statute to go into effect. The language of Nebraska's statue was patterned after the federal legislation and is very similar to language upheld in Wisconsin and Illinois by the Seventh Circuit. Action by the Kansas legislature at this time would send a strong and timely signal as to the importance of this issue and the legitimate concerns of the States about this procedure.

Sincerely,

DON STENBERG
Attorney General

1-861-21

Sen. Federal & State Affairs Com
Date: 3-10-00
Attachment: # 3-1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. Neb. Rev. Stat. § 28-326(9) (Supp.1998):

> Partial-birth abortion means an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery. For purposes of this subdivision, the term partially delivers vaginally a living unborn child before killing the unborn child means deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child.

II. Neb. Rev. Stat. § 28-328(1) – (4) (Supp.1998):

> (1) No partial-birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.
>
> (2) The intentional and knowing performance of an unlawful partial-birth abortion in violation of subsection (1) of this section is a Class III felony.
>
> (3) No woman upon whom an unlawful partial-birth abortion is performed shall be prosecuted under this section or for conspiracy to violate this section.

> (4) The intentional and knowing performance of an unlawful partial-birth abortion shall result in the automatic suspension and revocation of an attending physician's license to practice medicine in Nebraska by the Director of Regulation and Licensure. . . .

III. U.S. Const. amendment XIV:

> The Fourteenth Amendment provides in pertinent part: "Nor shall any State Deprive any person of life, liberty, or property without due process of law."

STATEMENT OF THE CASE

In the past four years, nearly two-thirds of the State legislatures, as well as the United States Senate and House of Representatives, have each addressed growing public concern over a controversial medical procedure legally denominated as "partial-birth abortion" and now referred to medically as "D&X" abortion. So repulsed by the procedure were legislators across the country that statutory bans on partial-birth abortion were passed by thirty States and both houses of Congress. As one federal court described it, partial-birth abortion "is gruesome and inhumane." *Evans v. Kelley*, 977 F. Supp. 1283, 1319 n.38 (E.D. Mich. 1997). Even some abortion practitioners believe it "is a particularly hideous procedure." *Id.*

The United States District Court for the District of Nebraska described the partial-birth abortion/D&X procedure as follows, based on testimony in the present case:

> When the fetus is presented feet first, Carhart, using forceps, pulls the feet of the living

In the
United States Court of Appeals
For the Seventh Circuit

No. 98-1726

THE HOPE CLINIC, *et al.*,

Plaintiffs-Appellees,

v.

JAMES E. RYAN, Attorney General of Illinois, and RICHARD K. DEVINE, State's Attorney of Cook County, Illinois,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 97 C 8702—**Charles P. Kocoras**, *Judge*.

Nos. 99-2528 & 99-2533

DENNIS D. CHRISTENSEN, *et al.*,

Plaintiffs-Appellants,

v.

JAMES E. DOYLE, Attorney General of Wisconsin, and DIANE M. NICKS, District Attorney for Dane County, Wisconsin,

Defendants-Appellees.

Appeals from the United States District Court
for the Western District of Wisconsin.
No. 98-C-0305-S—**John C. Shabaz**, *Chief Judge*.

ARGUED SEPTEMBER 22, 1999—DECIDED OCTOBER 26, 1999

GAVIN JACOBSON, NEVILLE SENDER, Plaintiffs - Appellants (99-2533): Simon Heller, CENTER FOR REPRODUCTIVE LAW & POLICY, New York, NY USA. Roger K. Evans, Roger K. Evans, PLANNED PARENTHOOD FEDERATION OF AMERICA, Legal Action for Reproductive Rights, New York, NY USA.

For PLANNED PARENTHOOD OF WISCONSIN, GARY T. PROHASKA, FREDRIK F. BROEKHUIZEN, GAVIN JACOBSON, NEVILLE SENDER, Plaintiffs - Appellants (99-2533): Simon Heller, CENTER FOR REPRODUCTIVE LAW & POLICY, New York, NY USA. Roger K. Evans, Roger K. Evans, PLANNED PARENTHOOD FEDERALTION OF AMERICA, Legal Action for Reproductive Rights, New York, NY USA.

For JAMES E. DOYLE, DIANE M NICKS, Defendants - Appellees (99-2533): Susan K. Ullman, OFFICE OF THE ATTORNEY GENERAL, Wisconsin Department of Justice, Madison, WI USA.

For THOMAS J. BACK, Defendant - Appellee (99-2533): Scott D. Obernberger, Milwaukee, WI.

For FREDRIC K. BUFORD, II, Defendant - Appellee (99-2533): Richard E. Coleson, BOPP, COLESON & BOSTROM, Terre Haute, IN USA.

For WISCONSIN RIGHT TO LIFE, INCORPORATED, 55 WISCONSIN STATE LEGISLATORS, SCOTT MCCALLUM, Lieutenant Governor, Amicus Curiae (99-2533): Richard E. Coleson, BOPP, COLESON & BOSTROM, Terre Haute, IN USA.

JUDGES: Before Posner, Chief Judge, and Coffey, Flaum, Easterbrook, Manion, Kanne, Rovner, Diane P. Wood, and Evans, Circuit Judges. * Posner, Chief Judge, with whom Rovner, Diane P. Wood, and Evans, Circuit Judges, join, dissenting.

* Circuit Judge Ripple did not participate in the consideration or decision of these cases.

OPINIONBY: EASTERBROOK

OPINION: Easterbrook, Circuit Judge. We must decide whether state laws prohibiting partial-birth abortions are unconstitutionally vague or unduly burden women's rights. Acting without an evidentiary hearing, a district court held the Illinois statute unconstitutional and entered a permanent injunction. *Hope Clinic v. Ryan, 995 F. Supp. 847 (N.D. Ill. 1998)*. But after a trial, another district court concluded that the Wisconsin statute is valid. *Planned Parenthood of Wisconsin v. Doyle, 44 F. Supp. 2d 975 (W.D. Wis. 1999)*. [*2] A panel of this court earlier had ordered preliminary relief against Wisconsin's law, see *Planned Parenthood of Wisconsin v. Doyle, 162 F.3d 463 (7th Cir. 1998)*, and plaintiffs say that this decision, applying *Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992)*, justifies permanent injunctions against both states' rules. To ensure consistency, we heard the appeals en banc. We conclude that both laws can be applied in a constitutional manner. Whether that will occur depends on state courts, which alone can settle questions about the construction of the statutes. To ensure that physicians are not deterred from performing other medical procedures while issues wend their way through state tribunals, we hold that both sets of plaintiffs are entitled to injunctive relief that will limit the statutes' application to the medical procedure that each state insists is its

sole concern.

I

Induction, suction curettage, and dilation and evacuation (D&E) are the principal methods of performing abortions in the United States. Prohibiting any one of these would conflict with the right of abortion recognized [*3] by cases such as *Casey*, 505 U.S. at 877 (plurality opinion) (adopting "undue burden" as the constitutional standard), and Planned Parenthood of *Central Missouri v. Danforth, 428 U.S. 52, 75-79, 49 L. Ed. 2d 788, 96 S. Ct. 2831 (1976)* (holding that a state may not forbid saline amniocentesis, at the time the principal means of induction). Our cases involve an uncommon procedure known to the medical community as "intact dilation and extraction" or just "dilation and extraction (D&X)," and to the public as "partial-birth abortion."

Some medical background is essential to understanding the issues. Induction means inducing preterm labor, which causes the expulsion of the conceptus. Methotrexate or mifepristone (ru-486, now in clinical trials), in combination with misoprostol, can be used for this purpose early in pregnancy; saline amniocentesis and injected prostaglandins serve the same function in the second trimester. Suction curettage (vacuum aspiration), the most common surgical method of abortion early in pregnancy, refers to evacuation of the uterine cavity; the embryo or fetus is separated from the placenta either by scraping or vacuum pressure, then is [*4] removed by suction. When these methods are inappropriate, or do not work, physicians employ the D&E procedure. To perform a D&E, the physician dilates the cervix and dismembers the fetus inside the uterus using forceps. Fetal parts are removed with forceps or by suction.

A D&X is a variant of a D&E in which the fetus is removed without dismemberment. The American College of Obstetricians and Gynecologists (ACOG) defines D&X as follows: "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." Martin Haskell, the physician who developed the D&X procedure, see Dilation and Extraction for Late Second Trimester Abortion (1992), reprinted in 139 Cong. Rec. E1092 (Apr. 29, 1993), believes that how the head is diminished in size so that it can pass through the cervix is not important: mechanically crushing the skull serves the same end as evacuating its contents, which causes its collapse. It is this combination of coming [*5] so close to delivering a live child with the death of the fetus by reducing the size of the skull that not only distinguishes D&X from D&E medically but also causes the adverse public (and legislative) reaction. Opponents deem the D&X procedure needlessly cruel and bordering on infanticide, and all three states in this circuit have enacted statutory restrictions.

The statute in Illinois has three sections with legal significance:

720 ILCS § 513/5. Definitions

In this Act: "Partial-birth abortion"

means an abortion in which the person performing the abortion partially vaginally delivers a living human fetus or infant before killing the fetus or infant and completing the delivery. The terms "fetus" and "infant" are used

interchangeably to refer to the biological offspring of human parents.

720 ILCS § 513/10. Partial-birth abortions prohibited

Any person who knowingly performs a partial-birth abortion and thereby kills a human fetus or infant is guilty of a Class 4 felony. This Section does not apply to a partial-birth abortion that is necessary to save the life of a mother because her life is endangered by a physical disorder, physical illness, or physical injury, [*6] including a life-endangering condition caused by or arising from the pregnancy itself, provided that no other medical procedure would suffice for that purpose.

720 ILCS § 513/15. Civil action

The maternal grandparents of the fetus or infant, if the mother has not attained the age of 18 years at the time of the abortion, 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. The relief shall include money damages for all injuries, psychological and physical, occasioned by the violation of this Act and statutory damages equal to 3 times the cost of the partial-birth abortion.

The Indiana statute defines "partial-birth abortion" in identical terms. Ind. Code § 16-18-2-267.5. Like Illinois it forbids partialbirth abortions unless that procedure is necessary to save the mother's life, and no other procedure would suffice. Ind. Code § 16-34-2-1(b). The Indiana statute has never been challenged and has been in effect since July 1, 1997.

Wisconsin has taken a slightly different approach. Its statutes provide:

Wis. Stat. § 895.038 Partial-birth abortions; liability. [*7]

(1) In this section:

(a) "Child" has the meaning given in § 940.16 (1) (a).

(b) "Partial-birth abortion" has the meaning given in § 940.16 (1) (b).

(2) (a) Except as provided in par. (b), any of the following persons has a claim for appropriate relief against a person who performs a partial-birth abortion:

1. If the person on whom a partial-birth abortion was performed was a minor, the parent of the minor.

2. The father of the child aborted by the partial-birth abortion.

(b) A person specified in par. (a) 1. or 2. does not have a claim under par. (a) if any of the following apply:

1. The person consented to performance of the partial-birth abortion.

2. The pregnancy of the woman on whom the partial-birth abortion was performed was the result of a sexual assault in violation of § 940.225, 944.06,

948.02, 948.025, 948.06 or 948.09 that was committed by the person.

(3) The relief available under sub. (2) shall include all of the following:
(a) If the abortion was performed in violation of § 940.16, damages arising out of the performance of the partial birth abortion, including damages for personal injury and emotional and psychological distress.

(b) Exemplary damages [*8] equal to 3 times the cost of the partial-birth abortion.

(4) Subsection (2) applies even if the mother of the child aborted by the partial-birth abortion consented to the performance of the partial-birth abortion.

Wis. Stat. § 940.16 Partial-birth abortion.

(1) In this section:

(a) "Child" means a human being from the time of fertilization until it is completely delivered from a pregnant woman.

(b) "Partial-birth abortion" means an abortion in which a person partially vaginally delivers a living child, causes the death of the partially delivered child with the intent to kill the child, and then completes the delivery of the child.

(2) Except as provided in sub. (3), whoever intentionally performs a partial birth abortion is guilty of a Class A felony. 3 years in prison

(3) Subsection (2) does not apply if the partial-birth abortion is necessary to save the life of a woman whose life is endangered by a physical disorder, physical illness or physical injury, including a life-endangering physical disorder, physical illness or physical injury caused by or arising from the pregnancy itself, and if no other medical procedure would suffice for that purpose.

Wisconsin's definition of partial-birth [*9] abortion is substantially the same as Illinois', but the mental-state elements differ, as do the maximum penalties: Illinois makes unjustified partialbirth abortion a Class 4 felony, with a maximum penalty of three years; in Wisconsin the offense is a Class A felony, for which Wis. Stat. § 939.50(3)(a) provides a penalty of life imprisonment.

Because Wisconsin and Illinois use similar language to define partial-birth abortions, we illustrate plaintiffs' concerns with the latter's statute:

"Partial-birth abortion" means an abortion in which the person performing the abortion partially vaginally delivers a living human fetus or infant before killing the fetus or infant and completing the delivery. The terms "fetus" and "infant" are used interchangeably to refer to the biological offspring of human parents.

This legal definition is an imperfect match for the medical definition of D&X. It is easy to see why a legislature would be chary of the ACOG's specification:

then any small variation (such as a change in the method of reducing the head size, or snipping off a toe to defeat the "otherwise intact" specification) would take the abortion outside the prohibition, [*10] even though the reasons why the technique has been deemed objectionable would be unaffected. But, as is common with legislation, the price of avoiding loopholes is generality. Section 513/5 captures the idea, central to the D&X procedure, that an intact fetus moves from uterus to vagina before death occurs. But it also uses the words "delivers" and "delivery," which many physicians understand to refer to any removal of fetal material from the uterus. The law might be read to prohibit the extraction of dismembered parts following a D&E, or to prohibit abortion by induction if by chance the fetus survives until it reaches the birth canal. Moreover, physicians performing a D&E sometimes do not complete the dismemberment inside the uterus, and some fear that this could lead the procedure to be characterized as a partial delivery under the statute.

The possibility that § 513/10 might discourage risk-averse physicians from performing the D&E procedure led the district court in Illinois to declare that it is too vague to be enforced, and a similar concern animated our panel's decision to require preliminary relief against Wisconsin's law. Moreover, if these laws needlessly raise the effective [*11] costs of induction, suction curettage, or D&E, then they would unduly burden the right of abortion, another concern expressed not only by the district court in the Illinois case but also by the panel in the Wisconsin case. But after a trial on remand, the district court in Wisconsin concluded that physicians who perform abortions recognize that the statutory formula, however vague or broad these words appear to lay eyes, refers to the D&X procedure alone. The court held that, as so limited, the statute does not substantially burden any woman's right to an abortion, because D&X is never the only safe procedure.

Litigation elsewhere has produced results mirroring the divergence between the outcomes in Illinois and Wisconsin. The sixth circuit held that Ohio's ban on partial-birth abortions is unconstitutional, *Women's Medical Professional Corp. v. Voinovich, 130 F.3d 187 (6th Cir. 1997)*, but the fourth circuit issued a stay preventing interference with Virginia's statute. *Richmond Medical Center for Women v. Gilmore, 144 F.3d 326 (4th Cir. 1998)*, motion to vacate stay denied, *1998 U.S. App. LEXIS 18547*. Both of those decisions were rendered over [*12] dissents. A single panel of the eighth circuit recently held three states' partial-birth-abortion laws unconstitutional, but only after first concluding that all three statutes forbid the D&E procedure. *Carhart v. Stenberg, 1999 U.S. App. LEXIS 23162* (8th Cir. Sept. 24, 1999) (Nebraska); *Little Rock Family Planning Services, P.A. v. Jegley, 1999 U.S. App. LEXIS 23165* (8th Cir. Sept. 24, 1999) (Arkansas); *Planned Parenthood of Greater Iowa, Inc. v. Miller, 1999 U.S. App. LEXIS 23166* (8th Cir. Sept. 24, 1999) (Iowa).

II

Plaintiffs would like us to employ the approach of our panel's opinion in the Wisconsin case and declare both states' laws unconstitutional without ado. But different statutes have different language, which may be important. Litigants also have made distinctive arguments-- for example, Illinois relies on *United States v. Salerno, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987)*, for the proposition that, except in first amendment cases, a law may be held unconstitutional only when "no set of circumstances exists under which the Act would be valid." Moreover, two events since the panel wrote call for [*13]

fresh analysis. First, that opinion dealt with preliminary relief and observed that "the full trial may cast the facts in a different light". *162 F.3d at 466*. That trial has been held in Wisconsin, and its results must be considered. Second, both the panel's decision in the Wisconsin case and the district court's opinion in the Illinois case conclude that the statute as written is vague. A more recent decision of the Supreme Court, *Chicago v. Morales, 144 L. Ed. 2d 67, 119 S. Ct. 1849 (1999)*, stresses that state courts are entitled to construe state laws to reduce their ambiguity, and that federal courts should evaluate state laws as they have been construed, not just as they appear in the statute books. See also, e.g., *Parker v. Levy, 417 U.S. 733, 41 L. Ed. 2d 439, 94 S. Ct. 2547 (1974); Civil Service Commission v. Letter Carriers, 413 U.S. 548, 37 L. Ed. 2d 796, 93 S. Ct. 2880 (1973)*. This implies that Illinois and Wisconsin are entitled to interpret their own laws--that federal courts should not enjoin all application before enforcement and thus prevent the state courts from having a chance to save their statutes.

Salerno offers [*14] a potential ground for giving the states that chance. It would be hard to say that every possible instance of the D&X procedure is protected by the Constitution. Along similar lines are the many cases saying that outside the domain of the first amendment, vagueness challenges must be assessed "as applied." See, e.g., *Maynard v. Cartwright, 486 U.S. 356, 361, 100 L. Ed. 2d 372, 108 S. Ct. 1853 (1988); Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494-95, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (1982)*. But we are reluctant to rely too heavily on this approach, because Morales shows that three Justices believe that this language is too sweeping, see *119 S. Ct. at 1858-59 & n.22* (Stevens, J., joined by Souter & Ginsburg, JJ.), and the Supreme Court has on occasion resolved constitutional challenges to statutes that do not involve speech without asking whether every conceivable application would be unconstitutional. E.g., *Romer v. Evans, 517 U.S. 620, 134 L. Ed. 2d 855, 116 S. Ct. 1620 (1996); Kolender v. Lawson, 461 U.S. 352, 358-59 n.8, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983); Nash v. United States, 229 U.S. 373, 57 L. Ed. 1232, 33 S. Ct. 780 (1913)*. [*15] Only one Justice offered any support for Salerno's approach in Morales, and he did so in a dissenting opinion. *119 S. Ct. at 1867-72* (Scalia, J., dissenting). Justice Scalia identified many cases that articulate Salerno's requirement, and many others that bypass the inquiry. Courts of appeals are divided on the question whether Salerno applies to abortion legislation. Compare *Jane L. v. Bangerter, 102 F.3d 1112, 1116 (10th Cir. 1996)*, with *Barnes v. Moore, 970 F.2d 12, 14 n.2 (5th Cir. 1992)*. The safest course for a court of appeals, when confronted with inconsistent lines of precedent, is to decide on other grounds if at all possible. Here it is possible, for we think that the Supreme Courts of Illinois and Wisconsin could read their laws in ways that comport with the Constitution.

1. One means of doing this would be to assimilate the statutory definitions to the medical definition of D&X, with allowance for different ways of reducing the head size and other immaterial variations. Both states are concerned about the D&X procedure and did not set out to forbid any other. The Attorneys General of Illinois and Wisconsin, the principal defendants, [*16] tell us that their statutes are concerned only with the D&X procedure and will be enforced only against its use. That assurance might be enough by itself, in the absence of any contrary indication from the state judiciary, to resolve immediate vagueness concerns. See *Frisby v. Schultz, 487 U.S. 474, 483, 101 L. Ed. 2d 420, 108 S. Ct. 2495 (1988)*; cf. *Arizonans for Official English v. Arizona, 520 U.S. 43, 76-80, 137 L. Ed. 2d 170, 117 S. Ct. 1055 (1997)*. Although

local prosecutors (States' Attorneys in Illinois, District Attorneys in Wisconsin) initiate criminal prosecutions, representatives of these prosecutors have been named as parties in each case, and they agree with the Attorneys General. Plaintiffs object that this approach would rewrite rather than interpret the law, but we doubt this. Both medical and popular literature equate "partialbirth abortion" (the statutory term) with the D&X procedure. See Janet E. Gans Epner, Harry S. Jonas & Daniel L. Seckinger, Late-term Abortion, 280 J. Am. Medical Ass'n 724 (Aug. 26, 1998); M. LeRoy Sprang & Mark G. Neerhof, Rationale for Banning Abortions Late in Pregnancy, 280 J. Am. Medical Ass'n 744 (Aug. 26, 1998). [*17] The district court in Wisconsin found that this is the statute's aim. *44 F. Supp. 2d at 984* (relying on the Attorney General's concession). Using a medical definition to supplement a vague lay definition does not strike us as revisionism or an exercise in deconstruction.

But if this approach would nonetheless be an example of brute force used to save a statute-- well, courts do it all the time. Florida had a law forbidding "the abominable and detestable crime against nature". Placement in the code showed that this crime had something to do with sex, but what? Did it forbid incest? Necrophilia? Bestiality? A legal historian might give an answer, but to lay readers of the statute, and even to most lawyers, the words are Delphic. The state's highest court filled in the blank by saying that the object was sodomy--and the Supreme Court of the United States rebuffed a charge of unconstitutional vagueness, given the state court's prestidigitation. *Wainwright v. Stone, 414 U.S. 21, 38 L. Ed. 2d 179, 94 S. Ct. 190 (1973)*. Only if vagueness remains after judicial interpretation is there a constitutional problem, the Court held. See also, e.g., *United States v. Lanier, 520 U.S. 259, 137 L. Ed. 2d 432, 117 S. Ct. 1219 (1997)*; [*18] *Rose v. Locke, 423 U.S. 48, 46 L. Ed. 2d 185, 96 S. Ct. 243 (1975)*; *Lanzetta v. New Jersey, 306 U.S. 451, 455-57, 83 L. Ed. 888, 59 S. Ct. 618 (1939)*; *Kolender, 461 U.S. at 355-57*. Federal courts have performed equally dramatic feats. As written, the Federal Election Campaign Act is hopelessly vague and overbroad. *Buckley v. Valeo, 424 U.S. 1, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976)*, saved the bulk of the statute by adding details. In two recent cases we predicted that state courts would follow suit with comparable state laws. See *Wisconsin Right to Life, Inc. v. Paradise, 138 F.3d 1183 (7th Cir. 1998)*; Brownsburg Area Patrons Affecting Change v. *Baldwin*, 137 F.3d 503 (7th Cir. 1998). In the latter case, because we were not completely confident that the state judiciary would follow Buckley's path of freewheeling interpretation, we certified the issue to the Supreme Court of Indiana-- which responded that it indeed possesses, and is inclined to use, that power. Brownsburg Area Patrons Affecting Change v. *Baldwin, 714 N.E.2d 135 (Ind. 1999)*.

Relying on *Colautti v. Franklin, 439 U.S. 379, 58 L. Ed. 2d 596, 99 S. Ct. 675 (1979)*, [*19] the sixth circuit concluded in Women's Medical Professional Corp. v. Voinovich that any statute concerning abortion is unconstitutionally vague, no matter how precise an interpretation state courts eventually develop, unless it requires proof that the physician knows that a given act has been forbidden. If this were so, then the approach to avoiding vagueness that we have just sketched would be untenable. But it is not so; never has the Supreme Court held that all criminal laws (or even just all criminal laws affecting abortion) depend on scienter. Cases we have mentioned already (and more that we cite later) hold that a statute may be sustained against a charge of vagueness if, as construed, it gives reasonable notice of the forbidden conduct. That the notice does not sink in--that some people close their eyes (or

minds) and thus do not learn of the law's contents or appreciate its application to their conduct--does not prevent a state from enforcing its rules. See *United States v. Wilson*, 159 F.3d 280, 288-89 (7th Cir. 1998). This subject received sustained attention in *Karlin v. Foust*, 188 F.3d 446, 460-64 (7th Cir. 1999). For the reasons laid out in Karlin [*20] we respectfully disagree with the sixth circuit's understanding of this question. See also Note, 112 Harv. L. Rev. 731 (1999) (criticizing Women's Medical Professional Corp.).

2. Although the Constitution does not compel states to ameliorate vagueness problems by using a mental-state requirement to limit prosecutions to situations in which the defendant knows that his acts are forbidden, they are free to do so. This is the path the Supreme Court took in *Screws v. United States*, 325 U.S. 91, 89 L. Ed. 1495, 65 S. Ct. 1031 (1945), and *United States v. Kozminski*, 487 U.S. 931, 101 L. Ed. 2d 788, 108 S. Ct. 2751 (1988), to save 18 U.S.C. §§ 241 and 242. These companion statutes, the poster children for a vagueness campaign, make it a crime to deprive anyone of any constitutional right (or conspire to do so). These statutes are written entirely in terms that have been difficult to pin down, such as "under color of any law" and "rights, privileges, or immunities secured or protected by the Constitution . . . of the United States". Section 242 contains the word 'willfully', and in Screws the Court read this to mean that a person [*21] commits the offense only if he knows that his acts deprive someone of a constitutional right. A person who actually recognizes his legal obligation can't complain that he lacked notice. Many cases since Screws use a knowledge requirement to prevent unfair surprise when the statute is vague or complex. E.g., *Cheek v. United States*, 498 U.S. 192, 112 L. Ed. 2d 617, 111 S. Ct. 604 (1991) (tax laws); *Staples v. United States*, 511 U.S. 600, 128 L. Ed. 2d 608, 114 S. Ct. 1793 (1994) (gun-control laws).

Both Illinois and Wisconsin put mental-state elements in their statutes. Attorneys General of both states contend that under their laws a procedure may be deemed a "partial-birth abortion" only if at the outset of the procedure the physician intends to perform all of the steps that mark the D&X. We think that the Supreme Courts of both states could go even farther and read the statutes to require knowledge of the legal rules, and thus to follow the trail blazed in Screws.

The critical language in Illinois reads: "Any person who knowingly performs a partial-birth abortion and thereby kills a human fetus or infant is guilty of a Class 4 felony." 720 ILCS § 513/10 (emphasis [*22] added). If the Supreme Court of Illinois reads "knowingly" in § 513/10 the same way the Supreme Court of the United States read "willfully" in § 242, then there is no vagueness problem with § 513/10. And we can't see any impediment to giving "knowingly" such a reading. In context, the word sounds distinctly like a requirement that the physician know that the medical procedure being performed is a "partial-birth abortion" and not simply that the physician know that he is performing particular physical acts. The most natural reading is one that requires knowledge of the law's application to the medical procedure being performed. Federal courts have been creative with knowledge requirements as a means of saving statutes against constitutional infirmity. E.g., *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 130 L. Ed. 2d 372, 115 S. Ct. 464 (1994). Section 513/10 readily supports a construction that eliminates all concern about vagueness, which makes it inappropriate for a federal court to enjoin its application. (In Morales, the Supreme Court's most recent vagueness opinion, the lead opinion stressed that the statute lacked any mental-state

requirement.)

Wisconsin [*23] uses the word "intentionally" rather than the word "knowingly." Its statute has two intent elements: a partial-birth abortion is defined as one in which the physician acts with "the intent to kill the child", Wis Stat. § 940.16(1)(b), and the section defining the offense reads: "Whoever intentionally performs a partial-birth abortion is guilty of a Class A felony." Wis. Stat. § 940.16(2). The reference to "intent" in § 940.16(1)(b) must mean "that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result." Wis. Stat. § 939.23(4) (defining "with intent to"). The reference to "intentionally" in § 940.16(2) has at least potentially a broader scope. Although § 939.23(3) defines "intentionally" as "a purpose to do the thing or cause the result specified", a "partial-birth abortion" is neither a thing nor a result; it is a defined legal term. It is therefore a distinct possibility that the Supreme Court of Wisconsin will read this reference as equivalent to "wilfully" or "knowingly" notwithstanding the caution in § 939.23(5) that criminal intent "does not require proof of knowledge [*24] of the . . . scope or meaning of the terms used in" a statute. The question here is not whether a physician understands the terms of § 940.16(1)(b) in the abstract, but whether the physician intends that the plan of action add up to a "partial-birth abortion." In cases such as X-Citement Video, Cheek, and Staples, the Supreme Court of the United States was exceptionally creative with statutory allusions to mental states; plaintiffs have not established that the Supreme Court of Wisconsin would be unwilling to save its statutes the way the Supreme Court of the United States saved *18 U.S.C. § 242*.

3. Still a third interpretive approach is open to the state courts. They may elect to apply the statute to its central core of meaning, the D&X, while working out in common law fashion its outer boundaries. See *United States v. Pitt-Des Moines, Inc., 168 F.3d 976, 986-90 (7th Cir. 1999)*. This is how the Supreme Court has chosen to proceed with respect to the Sherman Antitrust Act, *15 U.S.C. §§ 1, 2*, a statute much less precise than the partial-birth-abortion laws. Long before the development of a body of antitrust rules, or even of a [*25] clear distinction between the domains of the per se rule and the rule of reason, the Court rebuffed a vagueness challenge, remarking that "law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." *Nash, 229 U.S. at 377* (Holmes, J.). The Court took the same approach in Parker v. Levy for Article 133 of the Uniform Code of Military Justice, which makes it a crime for a commissioned officer to engage in "conduct unbecoming an officer and a gentleman." That statute, compared to which § 513/5 and § 940.16(1)(b) are paragons of specificity, was sustained against a vagueness challenge because the military courts had added details over many years, and the Supreme Court anticipated that they would continue to do so as new situations arose. Letter Carriers applies the same approach to vague provisions of the Hatch Act. Parker cannot be passed off as a sport of military law; it is just one illustration of the proposition that vagueness may be overcome incrementally, as well as by an all-at-once construction. Consider *United States v. Powell, 423 U.S. 87, 46 L. Ed. 2d 228, 96 S. Ct. 316 (1975)*, [*26] a civilian case dealing with *18 U.S.C. § 1715*, which makes it a crime to mail a firearm capable of being concealed on the person. A Derringer unquestionably qualifies, and although larger guns pose tough questions, the combination of a core meaning plus size as a metric for adjudication enabled the Court to hold that borderline cases could

until after the state has provided additional specificity, by statutory amendment, regulations, or judicial interpretation (which could arise either from civil litigation, see Part IV below, or from criminal prosecutions in which the parties disagree about whether the medical procedure properly may be labeled a D&X). With that assurance in hand, plaintiffs would not face any substantial threat of prosecution.

A skeptic might respond: what's the basis for an injunction without a finding of actual constitutional violation? The basis [*30] is the risk that plaintiffs face. See *Ex parte Young, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908)*. Whenever suit is brought against a statute that has yet to be enforced, there is a chance that against a statute that has yet to be enforced, there is a chance that what the federal court does will be unnecessary or even advisory--for in the absence of relief the statute might never be enforced in a way that plaintiffs fear, or that would violate their rights. Everything depends on probabilities. Plaintiffs believe that the probability of improper prosecution is so high that the statutes must be enjoined root and branch. We think that the probability of improper prosecution is low, but non-zero; and a prosecution for performing a D&E not only raises vagueness concerns but also could unduly burden women's rights (see Part III below). That risk can be reduced to a constitutionally acceptable level with a simple injunction based on Bouie.

Persons who believe that the risk of improper prosecution is so high that all prosecution under the statute should be enjoined are poorly situated to contend that the risk also is so low that the plaintiffs lack standing under *Los Angeles v. Lyons, 461 U.S. 95, 75 L. Ed. 2d 675, 103 S. Ct. 1660 (1983)*. [*31] When this case began the plaintiffs faced a real risk and therefore had standing; and no one thinks that defendants' representations about their projected course of enforcement have made the controversy moot. If as plaintiffs believe the Constitution requires an injunction against everything Illinois and Wisconsin have enacted, despite these assurances, then the Constitution can't simultaneously forbid an injunction against potential misuses of state power in the enforcement of these laws. Article III does not limit a federal court's choice to enjoining nothing, or enjoining everything. The path we choose allows the states to interpret their laws and supply more concrete rules, see *Bellotti v. Baird, 428 U.S. 132, 146-47, 49 L. Ed. 2d 844, 96 S. Ct. 2857 (1976)*; the path the plaintiffs (and our dissenting colleagues) prefer would foreclose now and forever all interpretation by the state judiciary. By filing suit against a novel and ambiguous law in federal court, litigants can't preclude interpretation by the state judiciary. Our precautionary approach preserves the state judiciary's role while protecting plaintiffs' (and their patients') legitimate interests in the interim. [*32]

4. In the Wisconsin case our panel expressed concern that even if the probability of unanticipated application is low, the penalty is so high (life imprisonment) that physicians would avoid performing the D&E procedure. *162 F.3d at 469*. This cannot be said of Illinois, where the maximum penalty is three years' imprisonment. Although the threat of life in prison has a greater potential to induce caution than does the threat of three years in prison, the precautionary injunction discussed above should reduce the risk of improper or unanticipated application to a trivial level. The right constitutional objection to a Draconian penalty is not vagueness (a statute's scope is equally clear or uncertain whether the penalty is a $ 10 fine or 20 years in prison) but a contention that severe criminal punishment for a medical misunderstanding

would inflict cruel and unusual punishment. Plaintiffs themselves do not make such an argument. However, they object to the substance of the state laws, not to the punishment available on conviction. The penalty is an afterthought, scarcely mentioned in their briefs. If Wisconsin should some day impose a lengthy prison term for a violation [*33] of § 940.16(2), then it will be time to consider arguments based on the eighth amendment.

5. For the last two years, a natural experiment has been conducted in the United States. Thirty states enacted laws forbidding most partial-birth abortions. Judges prohibited the application of these laws in two-thirds of these states; in the other third the statutes have been in force. One way to perform a reality check on the district court's conclusion in the Wisconsin case that physicians know that these statutes cover only the D&X is to see what has happened in the states where the laws have been permitted to take effect. Vagueness could affect physicians in either or both of two ways. First, they might send women seeking second-trimester abortions to other states that do not regulate partial-birth abortions. The result would be a decrease in second-trimester abortions as a percentage of all abortions in the state. Second, physicians might select a different procedure-- principally substituting induction for a D&E--even though the replacement was medically inferior. This would produce a change in the ratio of inductions to D&E procedures in the affected state.

Indiana supplies a nice test, [*34] because its law took effect on July 1, 1997, so it is easy to compare the first six months of 1997 to the second six. Moreover, Indiana is surrounded by states that lack an effective prohibition on partial-birth abortions (because of the Illinois injunction and the sixth circuit's ruling in Women's Medical Professional Corp.), so it was relatively easy for physicians to send their patients elsewhere. Although the maximum penalty in Indiana is not steep (an unjustified partialbirth abortion there is a Class C felony, Ind. Code § 16-34-2-7(a), for which the punishment is four years' imprisonment, Ind. Code § 35-50-2-6(a)), no state or federal court has construed the statutory term, so whatever uncertainty the raw text of the statute engenders is unabated.

During 1997 a total of 13,208 abortions were performed in Indiana. (These data come from tables prepared by Indiana's State Epidemiologist.) During the first six months, 74 late-second-trimester abortions were performed: 72 by D&E and 2 by intra-uterine prostaglandin injection. During the second six months (that is, after the partial-birth-abortion law took effect), 87 late-second-trimester abortions were performed, all by D&E. Thus [*35] physicians did not substitute induction for D&E in order to reduce risk to themselves. Nor did they avoid the D&E procedure by sending women to other states. Abortion by D&E during the first six months represented 1.03% of all abortions performed in Indiana (72 of 6,950). Abortion by D&E during the second six months represented 1.39% of all abortions in the state (87 of 6,258). These data are incompatible with plaintiffs' a priori belief that the partial-birth-abortion statutes will discourage the performance of the D&E procedure or cause the physician to substitute an inferior procedure. Perhaps things have turned out differently in other states, or perhaps physicians behaved differently in 1998 or 1999. We do not mean to preclude plaintiffs from submitting the data in Indiana and other states to rigorous analysis. A few procedures were classified in the tables as "unknown," which may mask some effects--though the number of "unknown" procedures did not change much from the

first to the second half of 1997. Our point is only that a simple inquiry reinforces the findings of fact made in the Wisconsin case and implies that partial-birth-abortion statutes need not have the baleful effects [*36] that plaintiffs foresee.

III

Plaintiffs in both cases contend that, even if the statutes are precise enough to be enforced, they create an undue (and therefore unconstitutional) burden on abortion. The eighth circuit reached this conclusion in Carhart and its two companion cases, but only after first holding that the state laws effectively prohibit the D&E procedure. If we thought that the Illinois or Wisconsin laws forbade D&E, then Planned Parenthood of Central Missouri v. Danforth would require us to agree with the eighth circuit. For reasons we have already given, however, we believe that state courts are entitled to accept the view of both states' Attorneys General that their laws do not forbid, or even affect, the D&E procedure. The question we must address, then, is whether a statute limited to D&X unduly burdens abortion.

One reason why this might be so is that neither state's law contains an exception for situations in which the D&X procedure is necessary to protect the woman's health. A second argument is that any prohibition of any medical procedure unduly burdens a woman's right to abortion. The first line of argument finds some support in Casey, which held that [*37] any regulation of abortion must make an exception for procedures that protect "the woman's life or health", *505 U.S. at 846* (emphasis added), as well as our panel's decision in the Wisconsin case, *162 F.3d at 467-68, 470-71*. But we do not think that the plurality in Casey meant this as a universal rule, one applicable even when the procedure in question lacks demonstrable health benefits. The point that the plurality made was that a statute that lacks a "health exception" may unduly burden the woman's right to obtain an abortion before the fetus has reached viability; when state law offers many safe options to that end, the regulation of an additional option does not produce an undue burden.

Section 513/10 of the Illinois statute contains an exception for "a partial-birth abortion that is necessary to save the life of a mother because her life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering condition caused by or arising from the pregnancy itself, provided that no other medical procedure would suffice for that purpose." It does not contain a comparable exception for a partial-birth abortion that promotes [*38] the woman's health. Wisconsin's law has a similar structure. Both sets of plaintiffs contend that the lack of an exception for a woman's health dooms the statute. Coming from the Illinois plaintiffs, this is a weak argument indeed, for none of the plaintiff physicians or clinics in Illinois uses the D&X, and none asserts any desire to start. Whether the D&X procedure sometimes would protect a woman's health is therefore immaterial to these physicians and the women in their care. But several of the plaintiff physicians in the Wisconsin case do employ the D&X procedure on occasion, so we must consider the merits of the argument.

After a trial, the district court in the Wisconsin case concluded that the D&X procedure is never necessary from the perspective of the patient's health. *44 F. Supp. 2d at 979-82*. This conclusion cannot be called clearly erroneous; as things transpired, it was not a seriously contested issue. None of the plaintiff

physicians in that case testified to the contrary. The district court summed up:

None of the physicians would state unequivocally that the D&X procedure is safer than the D&E procedure. Broekhuizen conceded that further study [*39] of the procedures is required. Smith admitted that he had never encountered a situation where D&X would have been the best procedure to use. Haskell, who invented the procedure, admitted that the D&X procedure is never medically necessary to save the life or preserve the health of a woman. Giles agreed.

Id. at 980. The judge added that, although the D&X procedure has been used for more than a decade, no published study compares the risks of D&X to those of D&E. *Id. at 979*. Some authors believe that the D&X procedure is more hazardous. See Sprang & Neerhof, supra, 280 J. Am. Medical Ass'n at 746 ("Intact D&X (partial-birth abortion) should not be performed because it is needlessly risky, inhumane, and ethically unacceptable."); Nancy G. Romer, The Medical Facts of PartialBirth Abortions, *3 Nexus 57 (1998)*.

Plaintiffs have not identified any data that undercut the district court's finding of fact. Their principal medical reference is the ACOG's 1997 statement and technical bulletin on the D&X procedure, which concluded that, although D&X is never the only medically appropriate option, choice still should be reserved to the physician. [*40] Although the statement asserts that D&X sometimes may be the best option, the ACOG did not identify any concrete circumstance under which this would be so or provide support for the assertion. Several of the plaintiff physicians testified to like effect, again without specifics or data. No published medical study fills the gap. Cf. *Kumho Tire Co. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 1177-79, 143 L. Ed. 2d 238 (1999)*. Unelaborated avowals do not demonstrate that a finding of fact reached after a trial is clearly erroneous. When there is a conflict in the testimony--and that is the description most favorable to the plaintiffs--the finder of fact is entitled to choose. See *Anderson v. Bessemer City, 470 U.S. 564, 84 L. Ed. 2d 518, 105 S. Ct. 1504 (1985)*. We proceed on the assumption, which appears to be shared by the American Medical Association, that the D&X is not the best or safest option in any articulable category of situations. The ama's Policy H-5.982 concludes, among other things, that "there does not appear to be any identified situation in which intact D&X is the only appropriate procedure to induce abortion." The district court in Illinois [*41] did not make contrary findings, or indeed any finding; acting without a trial or even an evidentiary hearing, it could not properly have rendered "findings" about disputed issues. District courts in other circuits have disagreed with the conclusions the district judge reached in the Wisconsin case, but this does more to show that the issue is debatable among reasonable persons than to show that a particular view is in error.

The question in the end is not what one or another judge found on a given record; it is whether the state legislatures exceeded their constitutional powers. Factual premises underlying legislation normally are not subject to review by trial courts. *FCC v. Beach Communications, Inc., 508 U.S. 307, 315, 124 L. Ed. 2d 211, 113 S. Ct. 2096 (1993); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 463-65, 66 L. Ed. 2d 659, 101 S. Ct. 715 (1981); Vance v. Bradley, 440 U.S. 93, 111, 59 L. Ed. 2d 171, 99 S. Ct. 939 (1979); National Paint & Coatings Ass'n v. Chicago, 45 F.3d 1124, 1127 (7th Cir. 1995)*. The district court's findings, the statements of medical groups, and the inferences

to be drawn from what has happened [*42] in states that have implemented partial-birth-abortion statutes, are informative rather than conclusive on the question whether the underpinnings of the legislation are tenable. See Henry P. Monaghan, Constitutional Fact Review, *85 Colum. L. Rev. 229 (1985)*. Although "undue burden" analysis does not map neatly to the standard classifications ("rational basis," "strict scrutiny," and the like), making it hard to know the extent to which courts must respect legislative decisions about contestable factual matters, it is significant that none of the Supreme Court's decisions in abortion cases suggests that the same law would be constitutional in one state, and unconstitutional in another, depending on a district judge's resolution of factual disputes. Thus we treat the findings in the Wisconsin case, like the view of the ama, not as replacements for legislative conclusions, but as establishing that there is real, and not just hypothetical, support for a belief that the partial-birth-abortion laws do not pose hazards to maternal health. (This is the approach to evaluation of facts when the constitutional standard prescribes an intermediate level of analysis. See *Craig v. Boren, 429 U.S. 190, 199-204, 50 L. Ed. 2d 397, 97 S. Ct. 451 (1976).*) [*43]

Only if every regulation related to abortions must contain a case-by-case "health exception" is there a problem with these laws. Yet Casey did not say that health effects must be evaluated case by case, rather than procedure by procedure. Abortions are not havens for junk science--so that, for example, the state must let any chiropractor perform an abortion, if the chiropractor believes that manipulation of the spine is safest for the woman. Cases such as *Mazurek v. Armstrong, 520 U.S. 968, 138 L. Ed. 2d 162, 117 S. Ct. 1865 (1997)*, which held that states may limit performance of abortions to physicians, permit laws that regulate by class of procedures (or of medical providers). Cf. *United States v. Rutherford, 442 U.S. 544, 61 L. Ed. 2d 68, 99 S. Ct. 2470 (1979)* (fda may ban a generally ineffective drug, even though for a few people it may be the only cure). Doubtless some nurses are better than some physicians at performing abortions, so patients' health would be improved by allowing these nurses to perform abortions; yet the Court held that states may provide otherwise. Similarly, Illinois and Wisconsin concluded that the D&X procedure is not essential [*44] to protect the health of any woman, given the availability of other procedures. Compilation of additional information by the medical profession could call this conclusion into question. As things stand, however, interference with the operation of the state laws cannot be justified on the ground that the D&X procedure is necessary to protect women's health.

A requirement of a case-by-case "health exception" to every statute concerning abortion would amount to a rule that no state may regulate any abortion procedure. For a physician will use a particular procedure only if in the physician's judgment the procedure is superior in some way-- faster, safer, more likely to work (and thus indirectly safer because an abortion can be achieved with one procedure rather than two, with cumulative risks), or perhaps less expensive (and thus again indirectly safer, because the lower cost brings it within the reach of additional patients). Can plaintiffs, who object to the vagueness of the states' laws, really welcome a ruling under which every abortion creates the possibility of a prosecution in which the state invites a jury to disagree with the physician's assessment of the procedure's safety? [*45] A health exception, where jurors rather than physicians assessed health, would be an order of magnitude worse than the ambiguity plaintiffs perceive in the partial-birth-abortion laws. Perhaps plaintiffs believe that a "health exception" should make the physician's assessment of

prosecutors have nothing to do with civil suits. Relief against the public officials therefore would be pointless even if the civil-liability provisions were problematic. See *Summit Medical Associates, P.C. v. Pryor, 180 F.3d 1326 (11th Cir. 1999)*. There is no controversy between the parties to this case that can be resolved by a declaration concerning the civil-liability rules. But see *Okpalobi v. Foster, 1999 U.S. App. LEXIS 22785* (5th Cir. Sept. 17, 1999) (purporting to enjoin a private-civil-damages provision in a suit to which only state officers were defendants, without mentioning the eleventh circuit's conclusion in Summit Medical).

The judgments in both cases are vacated. The cases are remanded with instructions to enter the precautionary injunctions discussed in Part II. [*52] B of this opinion, to dismiss the challenges to the civil-liability provisions for want of a case or controversy, and otherwise to enter judgment for the defendants.

Vacated and Remanded

DISSENTBY: POSNER

DISSENT: Posner, Chief Judge, with whom Rovner, Diane P. Wood, and Evans, Circuit Judges, join, dissenting. Compromise holds seductive allure for a court faced with a hot issue, and there is none hotter than the issue of abortion rights. The Illinois and Wisconsin statutes criminalizing "partial birth" abortion are challenged here both as being unconstitutionally vague and as unconstitutionally burdening the right of abortion. (These are independent grounds; if either is valid, the statutes are invalid.) The court rejects both challenges yet orders the district courts to enjoin enforcement of the statutes against any method of abortion other than the one the medical community refers to as "intact D & E" (that is, intact dilation and evacuation) or, more commonly, "D & X" (dilation and extraction). This is the form of "partial birth" abortion that gave rise to these statutes, although they are not limited to it.

The court's decision is not a real compromise. It leaves intact the core of [*53] the statutory prohibitions, which unlawfully burden the right of abortion by outlawing the D & X procedure. The court does toss a bone to the plaintiffs, but at the cost of expanding federal judicial power over the states by a method that the Supreme Court has never countenanced and that violates Article III of the Constitution. It is a bone, incidentally, that the plaintiffs didn't ask for; neither side, in either case, requested this novel form of relief or commented on it in their briefs. We are taking a leap into the unknown without any input from the parties.

The "precautionary" injunctions that the court is directing the district courts to enter will forbid the enforcement of the statutes outside their core prohibition, thus placing the federal contempt power behind this court's interpretation of state statutes. The court does this while accepting the enforcers' assurances that they will not enforce the statutes outside the core, and concludes, therefore, "that the probability of improper prosecution is low." The states are nevertheless to be enjoined because the probability, though low, is greater than zero. The probability of improper prosecution under every criminal statute [*54] ever written is greater than zero; and so the court's decision, should it be followed outside the abortion context--and nothing in the decision suggests a principled limitation to that context--implies a radical

1998 U.S. LEXIS 1785 printed in FULL format.

GEORGE V. VOINOVICH, GOVERNOR OF OHIO, ET AL. v. WOMEN'S MEDICAL PROFESSIONAL CORPORATION, ET AL.

No. 97-934

SUPREME COURT OF THE UNITED STATES

118 S. Ct. 1347; 1998 U.S. LEXIS 1785; 140 L. Ed. 2d 496; 66 U.S.L.W. 3619; 98 Daily Journal DAR 2788

March 23, 1998, Decided

NOTICE: [*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

CORE TERMS: abortion, scienter, mental health, unconstitutionally vague, reasonable medical, good faith, subjective, viability, vagueness, postviability, viable, woman, fetus, medical necessity, void-for-vagueness, psychological, emotional, pregnant, induced, induce

SYLLABUS. ** No Official Syllabus provided by the Court. **

JUDGES: Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer. JUSTICE THOMAS, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

OPINION: Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

DISSENTBY: THOMAS

DISSENT: JUSTICE THOMAS, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

In 1995, the Ohio General Assembly passed, by an overwhelming majority, House Bill 135, which, among other things, places certain restrictions on abortions after fetal viability. To that end, it provides that--

"(A) No person shall purposely perform or induce or attempt to perform or induce an abortion upon a pregnant woman if the unborn human is viable, unless . . .

"(1) The abortion is performed or induced or attempted to be performed or induced by a physician, and that physician determines, in good faith and in the exercise of reasonable medical judgment, that the abortion is necessary to prevent the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant [*2] woman." Ohio Rev. Code Ann. § 2919.17 (1996).

The District Court enjoined the law as unconstitutional on its face, and a divided panel of the United States Court of Appeals for the Sixth Circuit affirmed. *130 F.3d 187 (1997)*. The panel majority held that the statute's limitation of postviability abortions is unconstitutionally vague and that it impermissibly lacks an exception for abortions based upon the "mental health" of the mother. Both of these conclusions are unwarranted extensions of our precedents. Moreover, reflecting our recent reaffirmation of the principle that a State's interests in restricting abortions are at their strongest after viability, see *Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 879, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992)* (joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.), over three-quarters of the States have in place statutes limiting the reasons for which abortions may be performed late in pregnancy. The vast majority of those statutes do not contain an explicit mental health exception. I would therefore grant the State's petition for certiorari to decide the constitutionality of House Bill 135's postviability restrictions.

mental health

The panel majority first found [*3] unconstitutional the Ohio statute's requirement that a physician's determination of medical necessity be made "in good faith and in the exercise of reasonable medical judgment." Ohio Rev. Code Ann. § 2919.17(A)(1) (1996). * Relying on our decision in *Colautti v. Franklin, 439 U.S. 379, 58 L. Ed. 2d 596, 99 S. Ct. 675 (1979)*, the panel held that the "combination of . . . objective and subjective standards without a scienter requirement" renders the medical necessity exception "unconstitutionally vague." *130 F.3d at 205*. The panel explained that the statute does not "adequately notify a physician that certain conduct is

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prohibited; rather, a physician may be held criminally and civilly liable for adhering to his or her own best medical judgment." *Id., at 206.*

If a physician makes such a determination, he must then comply with certain certification requirements, unless he determines, also "in good faith and in the exercise of reasonable medical judgment," that a medical emergency prevents compliance. See Ohio Rev. Code Ann. § 2919.17(B)(2) (1996). The panel majority found this requirement unconstitutional as well.

[*4]

This holding is simply not supported by Colautti. The statute in that case required physicians to adhere to a standard of care calculated to preserve the life and health of the fetus if the physician determined that "the fetus is viable" or "if there is sufficient reason to believe that the fetus may be viable." *Colautti v. Franklin, supra, at 391* (emphasis added; internal quotation marks omitted). Our conclusion that this formulation was void for vagueness in no way suggests that the Ohio statute's more specific language--"in good faith and in the exercise of reasonable medical judgment"--is unconstitutionally vague. The statutory language in Colautti was ambiguous because it could be read as imposing either a purely subjective or a mixed subjective and objective mental requirement, thereby leaving physicians uncertain of the relevant legal standard. *Colautti v. Franklin, supra, at 391-394.* House Bill 135, by contrast, plainly imposes both a subjective and an objective mental requirement, and thus its commands are clear.

The panel majority appears to have been concerned not so much with vagueness, but rather with the statute's lack of a scienter requirement [*5] relating to physician determinations about the medical necessity of an abortion. See *130 F.3d at 205* (stating that the statute was "especially troublesome" for this reason). Yet as the majority opinion implicitly recognized, see *id., at 204-205*, we have never held that, in the abortion context, a scienter requirement is mandated by the Constitution. To the contrary, in Colautti itself, we explicitly declined to address whether "under a properly drafted statute, a finding of bad faith or some other type of scienter would be required before a physician could be held criminally responsible for an erroneous determination of viability." See *Colautti v. Franklin, 439 U.S. at 396.* We only stated that the vagueness of the statute at issue was "compounded" by the fact that it lacked a scienter requirement. *Id., at 394;* cf. *130 F.3d at 216* (Boggs, J., dissenting) ("The principle invoked by the Court in Colautti . . . is . . . not that the absence of a scienter requirement will 'create' vagueness where it does not otherwise exist."). This Court should grant certiorari rather than allow a constitutional scienter requirement to be imposed under the guise of the void-for-vagueness [*6] doctrine.

The panel majority similarly wrenched this Court's prior statements out of context in finding the statute's lack of a mental health exception constitutionally infirm. The panel majority stated that the question of whether a maternal health exception may constitutionally be limited to physical health depends upon what we meant in Casey by abortions "'necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'" *130 F.3d at 208* (quoting Planned Parenthood of Southeastern Pa. v. Casey, supra, at 879). To answer this question, however, the panel relied on our conclusion in *Doe v. Bolton, 410 U.S. 179, 35 L. Ed. 2d 201, 93 S. Ct. 739 (1973)*, that an exception in Georgia's abortion statute for abortions performed when a physician determined, "'based upon his best clinical judgment[,] [that] an abortion [was] necessary,'" *id., at 183*, was not unconstitutionally vague because the phrase had been construed to allow physicians to consider "'all factors--physical, emotional, psychological, familial, and the woman's age--relevant to the well-being of the patient.'" *Id., at 192* (emphasis added). Our conclusion that the statutory phrase at [*7] issue in Doe was not vague because it included emotional and psychological considerations in no way supports the proposition that, after viability, a mental health exception is required as a matter of federal constitutional law. Doe simply did not address that question. As with its void-for-vagueness holding, the panel majority's quarrel with the wishes of the Ohio Legislature on this score appears to be grounded in abortion policy, not constitutional law.

The decision below, moreover, may do more than thwart the will of the Ohio Legislature. The vast majority of the 38 States that have enacted postviability abortion restrictions have not specified whether such abortions must be permitted on mental health grounds. See Brief for A Majority of Members of the Ohio General Assembly as Amicus Curiae 3-4. If the decision below stands, it is likely to create needless uncertainty about the constitutionality of many of those statutes as well. When state statutes on matters of significant public concern have been declared unconstitutional, we have not hesitated to review the decisions in question, even in the absence of a circuit split. See, e.g., *Romer v. Evans, 517 U.S. 620, 134 L. Ed. 2d 855, 116 S. Ct. 1620 (1996).* [*8] This case presents not only this compelling reason for certiorari, but also the ground that our failure

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to review the decision below may cast unnecessary doubt on the validity of other state statutes. I would grant the State's petition.

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HEIN AND WEIR, CHARTERED

Attorneys-at-Law
5845 S.W. 29th Street, Topeka, KS 66614-2462
Telephone: (785) 273-1441
Telefax: (785) 273-9243

Ronald R. Hein
Email: rhein@hwchtd.com

Stephen P. Weir*
Email: sweir@hwchtd.com
*Admitted in Kansas & Texas

Testimony before Senate Federal and State Affairs
Re: SB 608
Presented by Ronald R. Hein
on behalf of
Indian Nations In Kansas
February 22, 2000

Madam Chairman, Members of the Committee:

My name is Ron Hein, and I am legislative counsel for the Indian Nations in Kansas (INIK). INIK is an ad hoc coalition of three of the four Kansas Native American Indian Tribes, the Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas, the Prairie Band Potawatomi Nation, and the Sac and Fox Nation of Missouri.

The Indian Nations support SB 608, which allows any Class B club located on the premises of an Indian gaming facility operated by a Native American Indian Tribe which has entered into a gaming compact with the state to establish rules providing for a temporary membership in such club while such person is using the facility.

Pursuant to gaming contracts, Indian tribes are permitted to have Class B clubs operating in association with the Indian gaming facility. The tribes have also agreed pursuant to such compacts to have the alcohol laws of the State of Kansas applicable to such clubs. Currently, there is no provision for specifically allowing a club at the gaming facility to issue a temporary permit simply for the use of such facility.

Current law allows temporary permits to be issued for a person who is staying at a hotel or motel, and for specific provisions for other people, such as certain military personnel. However, there is no recognition specifically for the gaming facility itself.

In light of this, the Indian Nations would strongly urge you to support SB 608, and to approve such bill with the recommendation that it be passed.

Thank you very much for permitting me to testify, and I will be happy to yield to questions.