108TH CONGRESS, 1st Session } HOUSE OF REPRESENTATIVES { REPORT 108–_____

PARTIAL-BIRTH ABORTION BAN ACT OF 2003

_____, 2003.—ORDERED TO BE PRINTED

Mr. Sensenbrenner, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany S. 3]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 3), to prohibit the procedure commonly known as partial-birth abortion, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment, insert the following:

1 **SECTION 1. SHORT TITLE.**

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

4 **SEC. 2. FINDINGS.**

5 The Congress finds and declares the following:

6 (1) A moral, medical, and ethical consensus ex-
7 ists that the practice of performing a partial-birth
8 abortion—an abortion in which a physician delib-
9 erately and intentionally vaginally delivers a living,
10 unborn child's body until either the entire baby's
11 head is outside the body of the mother, or any part
12 of the baby's trunk past the navel is outside the
13 body of the mother and only the head remains inside
14 the womb, for the purpose of performing an overt
15 act (usually the puncturing of the back of the child's
16 skull and removing the baby's brains) that the per-
17 son knows will kill the partially delivered infant, per-
18 forms this act, and then completes delivery of the
19 dead infant—is a gruesome and inhumane procedure
20 that is never medically necessary and should be pro-
21 hibited.

22 (2) Rather than being an abortion procedure
23 that is embraced by the medical community, particu-
24 larly among physicians who routinely perform other
25 abortion procedures, partial-birth abortion remains a
26 disfavored procedure that is not only unnecessary to

1 preserve the health of the mother, but in fact poses
2 serious risks to the long-term health of women and
3 in some circumstances, their lives. As a result, at
4 least 27 States banned the procedure as did the
5 United States Congress which voted to ban the pro-
6 cedure during the 104th, 105th, and 106th Con-
7 gresses.

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

20 (4) In reaching this conclusion, the Court de-
21 ferred to the Federal district court's factual findings
22 that the partial-birth abortion procedure was statis-
23 tically and medically as safe as, and in many cir-
24 cumstances safer than, alternative abortion proce-
25 dures.

1 (5) However, substantial evidence presented at
2 the Stenberg trial and overwhelming evidence pre-
3 sented and compiled at extensive Congressional
4 hearings, much of which was compiled after the dis-
5 trict court hearing in Stenberg, and thus not in-
6 cluded in the Stenberg trial record, demonstrates
7 that a partial-birth abortion is never necessary to
8 preserve the health of a woman, poses significant
9 health risks to a woman upon whom the procedure
10 is performed and is outside the standard of medical
11 care.
12 (6) Despite the dearth of evidence in the
13 Stenberg trial court record supporting the district
14 court's findings, the United States Court of Appeals
15 for the Eighth Circuit and the Supreme Court re-
16 fused to set aside the district court's factual findings
17 because, under the applicable standard of appellate
18 review, they were not "clearly erroneous". A finding
19 of fact is clearly erroneous "when although there is
20 evidence to support it, the reviewing court on the en-
21 tire evidence is left with the definite and firm convic-
22 tion that a mistake has been committed". Anderson
23 v. City of Bessemer City, North Carolina, 470 U.S.
24 564, 573 (1985). Under this standard, "if the dis-
25 trict court's account of the evidence is plausible in

1 light of the record viewed in its entirety, the court
2 of appeals may not reverse it even though convinced
3 that had it been sitting as the trier of fact, it would
4 have weighed the evidence differently". Id. at 574.
5 (7) Thus, in Stenberg, the United States Su-
6 preme Court was required to accept the very ques-
7 tionable findings issued by the district court judge—
8 the effect of which was to render null and void the
9 reasoned factual findings and policy determinations
10 of the United States Congress and at least 27 State
11 legislatures.
12 (8) However, under well-settled Supreme Court
13 jurisprudence, the United States Congress is not
14 bound to accept the same factual findings that the
15 Supreme Court was bound to accept in Stenberg
16 under the "clearly erroneous" standard. Rather, the
17 United States Congress is entitled to reach its own
18 factual findings—findings that the Supreme Court
19 accords great deference—and to enact legislation
20 based upon these findings so long as it seeks to pur-
21 sue a legitimate interest that is within the scope of
22 the Constitution, and draws reasonable inferences
23 based upon substantial evidence.
24 (9) In Katzenbach v. Morgan, 384 U.S. 641
25 (1966), the Supreme Court articulated its highly

1 deferential review of Congressional factual findings
2 when it addressed the constitutionality of section
3 4(e) of the Voting Rights Act of 1965. Regarding
4 Congress' factual determination that section 4(e)
5 would assist the Puerto Rican community in "gain-
6 ing nondiscriminatory treatment in public services,"
7 the Court stated that "[i]t was for Congress, as the
8 branch that made this judgment, to assess and
9 weigh the various conflicting considerations * * *. It
10 is not for us to review the congressional resolution
11 of these factors. It is enough that we be able to per-
12 ceive a basis upon which the Congress might resolve
13 the conflict as it did. There plainly was such a basis
14 to support section 4(e) in the application in question
15 in this case.". Id. at 653.
16 (10) Katzenbach's highly deferential review of
17 Congress' factual conclusions was relied upon by the
18 United States District Court for the District of Co-
19 lumbia when it upheld the "bail-out" provisions of
20 the Voting Rights Act of 1965, (42 U.S.C. 1973c),
21 stating that "congressional fact finding, to which we
22 are inclined to pay great deference, strengthens the
23 inference that, in those jurisdictions covered by the
24 Act, state actions discriminatory in effect are dis-
25 criminatory in purpose". City of Rome, Georgia v.

1 U.S., 472 F. Supp. 221 (D.D.C. 1979) aff'd City of
2 Rome, Georgia v. U.S., 446 U.S. 156 (1980).
3 (11) The Court continued its practice of defer-
4 ring to congressional factual findings in reviewing
5 the constitutionality of the must-carry provisions of
6 the Cable Television Consumer Protection and Com-
7 petition Act of 1992. See Turner Broadcasting Sys-
8 tem, Inc. v. Federal Communications Commission,
9 512 U.S. 622 (1994) (Turner I) and Turner Broad-
10 casting System, Inc. v. Federal Communications
11 Commission, 520 U.S. 180 (1997) (Turner II). At
12 issue in the Turner cases was Congress' legislative
13 finding that, absent mandatory carriage rules, the
14 continued viability of local broadcast television would
15 be "seriously jeopardized". The Turner I Court rec-
16 ognized that as an institution, "Congress is far bet-
17 ter equipped than the judiciary to 'amass and evalu-
18 ate the vast amounts of data' bearing upon an issue
19 as complex and dynamic as that presented here".
20 512 U.S. at 665–66. Although the Court recognized
21 that "the deference afforded to legislative findings
22 does 'not foreclose our independent judgment of the
23 facts bearing on an issue of constitutional law,'" its
24 "obligation to exercise independent judgment when
25 First Amendment rights are implicated is not a li-

1 cense to reweigh the evidence de novo, or to replace
2 Congress' factual predictions with our own. Rather,
3 it is to assure that, in formulating its judgments,
4 Congress has drawn reasonable inferences based on
5 substantial evidence." Id. at 666.

6 (12) Three years later in Turner II, the Court
7 upheld the "must-carry" provisions based upon Con-
8 gress' findings, stating the Court's "sole obligation
9 is 'to assure that, in formulating its judgments, Con-
10 gress has drawn reasonable inferences based on sub-
11 stantial evidence.'" 520 U.S. at 195. Citing its rul-
12 ing in Turner I, the Court reiterated that "[w]e owe
13 Congress' findings deference in part because the in-
14 stitution 'is far better equipped than the judiciary to
15 "amass and evaluate the vast amounts of data"
16 bearing upon' legislative questions," id. at 195, and
17 added that it "owe[d] Congress' findings an addi-
18 tional measure of deference out of respect for its au-
19 thority to exercise the legislative power." Id. at 196.

20 (13) There exists substantial record evidence
21 upon which Congress has reached its conclusion that
22 a ban on partial-birth abortion is not required to
23 contain a "health" exception, because the facts indi-
24 cate that a partial-birth abortion is never necessary
25 to preserve the health of a woman, poses serious

1 risks to a woman's health, and lies outside the
2 standard of medical care. Congress was informed by
3 extensive hearings held during the 104th, 105th,
4 107th, and 108th Congresses and passed a ban on
5 partial-birth abortion in the 104th, 105th, and
6 106th Congresses. These findings reflect the very in-
7 formed judgment of the Congress that a partial-
8 birth abortion is never necessary to preserve the
9 health of a woman, poses serious risks to a woman's
10 health, and lies outside the standard of medical care,
11 and should, therefore, be banned.

12 (14) Pursuant to the testimony received during
13 extensive legislative hearings during the 104th,
14 105th, 107th, and 108th Congresses, Congress finds
15 and declares that:

16 (A) Partial-birth abortion poses serious
17 risks to the health of a woman undergoing the
18 procedure. Those risks include, among other
19 things: an increase in a woman's risk of suf-
20 fering from cervical incompetence, a result of
21 cervical dilation making it difficult or impos-
22 sible for a woman to successfully carry a subse-
23 quent pregnancy to term; an increased risk of
24 uterine rupture, abruption, amniotic fluid embo-
25 lus, and trauma to the uterus as a result of

1 converting the child to a footling breech posi-
2 tion, a procedure which, according to a leading
3 obstetrics textbook, "there are very few, if any,
4 indications for * * * other than for delivery of
5 a second twin"; and a risk of lacerations and
6 secondary hemorrhaging due to the doctor
7 blindly forcing a sharp instrument into the base
8 of the unborn child's skull while he or she is
9 lodged in the birth canal, an act which could re-
10 sult in severe bleeding, brings with it the threat
11 of shock, and could ultimately result in mater-
12 nal death.

13 (B) There is no credible medical evidence
14 that partial-birth abortions are safe or are safer
15 than other abortion procedures. No controlled
16 studies of partial-birth abortions have been con-
17 ducted nor have any comparative studies been
18 conducted to demonstrate its safety and efficacy
19 compared to other abortion methods. Further-
20 more, there have been no articles published in
21 peer-reviewed journals that establish that par-
22 tial-birth abortions are superior in any way to
23 established abortion procedures. Indeed, unlike
24 other more commonly used abortion procedures,
25 there are currently no medical schools that pro-

1 vide instruction on abortions that include the
2 instruction in partial-birth abortions in their
3 curriculum.
4 (C) A prominent medical association has
5 concluded that partial-birth abortion is "not an
6 accepted medical practice", that it has "never
7 been subject to even a minimal amount of the
8 normal medical practice development," that
9 "the relative advantages and disadvantages of
10 the procedure in specific circumstances remain
11 unknown," and that "there is no consensus
12 among obstetricians about its use". The asso-
13 ciation has further noted that partial-birth
14 abortion is broadly disfavored by both medical
15 experts and the public, is "ethically wrong,"
16 and "is never the only appropriate procedure".
17 (D) Neither the plaintiff in Stenberg v.
18 Carhart, nor the experts who testified on his
19 behalf, have identified a single circumstance
20 during which a partial-birth abortion was nec-
21 essary to preserve the health of a woman.
22 (E) The physician credited with developing
23 the partial-birth abortion procedure has testi-
24 fied that he has never encountered a situation
25 where a partial-birth abortion was medically

1 necessary to achieve the desired outcome and,
2 thus, is never medically necessary to preserve
3 the health of a woman.
4 (F) A ban on the partial-birth abortion
5 procedure will therefore advance the health in-
6 terests of pregnant women seeking to terminate
7 a pregnancy.
8 (G) In light of this overwhelming evidence,
9 Congress and the States have a compelling in-
10 terest in prohibiting partial-birth abortions. In
11 addition to promoting maternal health, such a
12 prohibition will draw a bright line that clearly
13 distinguishes abortion and infanticide, that pre-
14 serves the integrity of the medical profession,
15 and promotes respect for human life.
16 (H) Based upon Roe v. Wade, 410 U.S.
17 113 (1973) and Planned Parenthood v. Casey,
18 505 U.S. 833 (1992), a governmental interest
19 in protecting the life of a child during the deliv-
20 ery process arises by virtue of the fact that dur-
21 ing a partial-birth abortion, labor is induced
22 and the birth process has begun. This distinc-
23 tion was recognized in Roe when the Court
24 noted, without comment, that the Texas partu-
25 rition statute, which prohibited one from killing

1 a child "in a state of being born and before ac-
2 tual birth," was not under attack. This interest
3 becomes compelling as the child emerges from
4 the maternal body. A child that is completely
5 born is a full, legal person entitled to constitu-
6 tional protections afforded a "person" under
7 the United States Constitution. Partial-birth
8 abortions involve the killing of a child that is in
9 the process, in fact mere inches away from, be-
10 coming a "person". Thus, the government has
11 a heightened interest in protecting the life of
12 the partially-born child.

13 (I) This, too, has not gone unnoticed in
14 the medical community, where a prominent
15 medical association has recognized that partial-
16 birth abortions are "ethically different from
17 other destructive abortion techniques because
18 the fetus, normally twenty weeks or longer in
19 gestation, is killed outside of the womb". Ac-
20 cording to this medical association, the "'par-
21 tial birth' gives the fetus an autonomy which
22 separates it from the right of the woman to
23 choose treatments for her own body".

24 (J) Partial-birth abortion also confuses the
25 medical, legal, and ethical duties of physicians

1 to preserve and promote life, as the physician
2 acts directly against the physical life of a child,
3 whom he or she had just delivered, all but the
4 head, out of the womb, in order to end that life.
5 Partial-birth abortion thus appropriates the ter-
6 minology and techniques used by obstetricians
7 in the delivery of living children—obstetricians
8 who preserve and protect the life of the mother
9 and the child—and instead uses those tech-
10 niques to end the life of the partially-born child.
11 (K) Thus, by aborting a child in the man-
12 ner that purposefully seeks to kill the child
13 after he or she has begun the process of birth,
14 partial-birth abortion undermines the public's
15 perception of the appropriate role of a physician
16 during the delivery process, and perverts a
17 process during which life is brought into the
18 world, in order to destroy a partially-born child.
19 (L) The gruesome and inhumane nature of
20 the partial-birth abortion procedure and its dis-
21 turbing similarity to the killing of a newborn in-
22 fant promotes a complete disregard for infant
23 human life that can only be countered by a pro-
24 hibition of the procedure.

1 (M) The vast majority of babies killed dur-
2 ing partial-birth abortions are alive until the
3 end of the procedure. It is a medical fact, how-
4 ever, that unborn infants at this stage can feel
5 pain when subjected to painful stimuli and that
6 their perception of this pain is even more in-
7 tense than that of newborn infants and older
8 children when subjected to the same stimuli.
9 Thus, during a partial-birth abortion procedure,
10 the child will fully experience the pain associ-
11 ated with piercing his or her skull and sucking
12 out his or her brain.
13 (N) Implicitly approving such a brutal and
14 inhumane procedure by choosing not to prohibit
15 it will further coarsen society to the humanity
16 of not only newborns, but all vulnerable and in-
17 nocent human life, making it increasingly dif-
18 ficult to protect such life. Thus, Congress has
19 a compelling interest in acting—indeed it must
20 act—to prohibit this inhumane procedure.
21 (O) For these reasons, Congress finds that
22 partial-birth abortion is never medically indi-
23 cated to preserve the health of the mother; is in
24 fact unrecognized as a valid abortion procedure
25 by the mainstream medical community; poses

1 additional health risks to the mother; blurs the
2 line between abortion and infanticide in the killing
3 ing of a partially-born child just inches from
4 birth; and confuses the role of the physician in
5 childbirth and should, therefore, be banned.

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

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

9 **"CHAPTER 74—PARTIAL-BIRTH**
10 **ABORTIONS**

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

11 **"§ 1531. Partial-birth abortions prohibited**

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

23 "(b) As used in this section—

1 "(1) the term 'partial-birth abortion' means an
2 abortion in which the person performing the
3 abortion—
4 "(A) deliberately and intentionally
5 vaginally delivers a living fetus until, in the
6 case of a head-first presentation, the entire
7 fetal head is outside the body of the mother, or,
8 in the case of breech presentation, any part of
9 the fetal trunk past the navel is outside the
10 body of the mother, for the purpose of per-
11 forming an overt act that the person knows will
12 kill the partially delivered living fetus; and
13 "(B) performs the overt act, other than
14 completion of delivery, that kills the partially
15 delivered living fetus; and
16 "(2) the term 'physician' means a doctor of
17 medicine or osteopathy legally authorized to practice
18 medicine and surgery by the State in which the doc-
19 tor performs such activity, or any other individual
20 legally authorized by the State to perform abortions:
21 *Provided, however,* That any individual who is not a
22 physician or not otherwise legally authorized by the
23 State to perform abortions, but who nevertheless di-
24 rectly performs a partial-birth abortion, shall be sub-
25 ject to the provisions of this section.

1 "(c)(1) The father, if married to the mother at the
2 time she receives a partial-birth abortion procedure, and
3 if the mother has not attained the age of 18 years at the
4 time of the abortion, the maternal grandparents of the
5 fetus, may in a civil action obtain appropriate relief, unless
6 the pregnancy resulted from the plaintiff's criminal con-
7 duct or the plaintiff consented to the abortion.

8 "(2) Such relief shall include—

9 "(A) money damages for all injuries, psy-
10 chological and physical, occasioned by the viola-
11 tion of this section; and

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

14 "(d)(1) A defendant accused of an offense under this
15 section may seek a hearing before the State Medical Board
16 on whether the physician's conduct was necessary to save
17 the life of the mother whose life was endangered by a
18 physical disorder, physical illness, or physical injury, in-
19 cluding a life-endangering physical condition caused by or
20 arising from the pregnancy itself.

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

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

6 (b) CLERICAL AMENDMENT.—The table of chapters
7 for part I of title 18, United States Code, is amended by
8 inserting after the item relating to chapter 73 the fol-
9 lowing new item:

"74. Partial-birth abortions ..... 1531".

And the House agree to the same.

S. 3—Continued

Managers on the part of the HOUSE	*Managers on the part of the* SENATE
Mr. Sensenbrenner	
Mr. Hyde	
Mr. Chabot	
Mr. Nadler	
Ms. Lofgren	

S. 3

Managers on the part of the HOUSE	*Managers on the part of the* SENATE
	Mr. Hatch
	Mr. Santorum
	Mr. DeWine
	Mrs. Feinstein
	Mrs. Boxer

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 3), to prohibit the procedure commonly known as partial-birth abortion, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The House amendment struck all of the Senate bill after the enacting clause and inserted a substitute text.

The Senate recedes from its disagreement to the amendment of the House with an amendment that is a substitute for the Senate bill and the House amendment. The differences between the Senate bill, the House amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes.

Section 1. Short Title

Section 1 of the conference report is identical to Section 1 of the House amendment and Section 1 of the Senate bill. Section 1 states that the short title of this measure is the "Partial-Birth Abortion Ban Act of 2003."

Section 2. Findings

Paragraph (1) in Section 2 of the conference report is substantially similar, with clarifications, to paragraph (1) in Section 2 of the House passed bill and paragraph (1) in Section 2 of the Senate passed bill. In paragraph (1) Congress finds that a moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion--an abortion in which a physician deliberately and intentionally vaginally delivers a living, unborn child's body until either the entire baby's head is outside the body of the mother, or, any part of the baby's trunk past the navel is outside the body of the mother and only the head remains inside the womb, for the purpose of performing an overt act (usually the puncturing of the back of the child's skull and removing the child's brains) that the person knows will kill the partially delivered living infant, performs this act, and then completes delivery of the dead infant--is a gruesome and inhumane procedure that is never medically necessary and should be prohibited.

Paragraph (2) in Section 2 of the conference report is identical to paragraph (2) in Section 2 of the House amendment and paragraph (2) in Section 2 of the Senate bill. In paragraph (2), Congress finds that rather than being an abortion procedure that is embraced by the medical community, particularly among physicians who routinely perform other abortion procedures, partial-birth abortion remains a disfavored procedure that is not only unnecessary to preserve the health of the mother, but in fact poses serious risks to the long-term health of women and in some circumstances, their lives. Congress also finds that as a result, at least 27 States banned the procedure as did the United States Congress which voted to ban the procedure during the 104th, 105th, and 106th Congresses.

Paragraph (3) in Section 2 of the conference report is identical to paragraph (3) in Section 2 of the House amendment and paragraph (3) in Section 2 of the Senate bill. In paragraph (3), Congress finds that in *Stenberg* v. *Carhart*, 530 U.S. 914, 932 (2000), the United States Supreme Court, which did not have in front of it the extensive factual record compiled by Congress, construed the record in that case to support "the proposition that in some circumstances, [partial-birth abortion] would be the safest procedure" for pregnant women who wish to undergo an abortion. Congress also finds that as a result of having reached this conclusion the Court struck down the State of Nebraska's ban on partial-birth abortion procedures, concluding that it failed to include an exception for partial-birth abortions deemed necessary to preserve the "health" of the mother, and placed an "undue burden" on women seeking abortions.

Paragraph (4) in Section 2 of the conference report is identical to paragraph (4) in Section 2 of the House amendment and paragraph (4) in Section 2 of the Senate bill. In paragraph (4),

Congress finds that the Court's decision was based on the Federal district court's factual findings that the partial-birth abortion procedure was statistically and medically as safe as, and in many circumstances safer than, alternative abortion procedures – findings which are contradicted by Congress's extensive factual record presented and compiled during the 104th, 105th, 107th, and 108th Congresses.

Paragraph (5) in Section 2 of the conference report is substantially similar, with clarifications, to paragraph (5) in Section 2 of the House passed bill and paragraph (5) in Section 2 of the Senate passed bill. In paragraph (5) Congress finds that substantial evidence presented at the *Stenberg* trial, and the overwhelming evidence that was presented and compiled at extensive Congressional hearings, much of which was compiled after the district court hearing in *Stenberg*, and thus not included in the *Stenberg* trial record, demonstrates that a partial-birth abortion is never necessary to preserve the health of a woman, poses significant health risks to a woman upon whom the procedure is performed, and is outside of the standard of medical care.

Paragraph (6) in Section 2 of the conference report is identical to paragraph (6) in Section 2 of the House amendment and paragraph (6) in Section 2 of the Senate bill. In paragraph (6), Congress finds that despite the dearth of evidence in the *Stenberg* trial court record supporting the district court's findings, the United States Court of Appeals for the Eighth Circuit and the Supreme Court refused to set aside the district court's factual findings because, under the applicable standard of appellate review, they were not "clearly erroneous." Congress also finds that a finding of fact is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed" *Anderson v. City of Bessemer, North Carolina*, 470 U.S. 564, 573 (1985). Congress also finds that under this standard, "if the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* at 574.

Paragraph (7) in Section 2 of the conference report is identical to paragraph (7) in Section 2 of the House amendment and paragraph (7) in Section 2 of the Senate bill. In paragraph (7), Congress finds that in *Stenberg*, the United States Supreme Court was required to accept the very questionable findings issued by the district court judge – the effect of which was to render null and void the reasoned factual findings and policy determinations of the United States Congress and at least 27 State legislatures.

Paragraph (8) in Section 2 of the conference report is identical to paragraph (8) in Section 2 of the House amendment and paragraph (8) in Section 2 of the Senate bill. In paragraph (8), Congress finds that under well-settled Supreme Court jurisprudence, it is not bound to accept the same factual findings that the Supreme Court was bound to accept in *Stenberg* under the "clearly erroneous" standard. Congress also finds that it is entitled to reach its own factual findings – findings that the Supreme Court accords great deference – and to enact legislation based upon these findings so long as it seeks to pursue a legitimate interest that is within the scope of the

Constitution, and draws reasonable inferences based upon substantial evidence.

Paragraph (9) in Section 2 of the conference report is identical to paragraph (9) in Section 2 of the House amendment and paragraph (9) in Section 2 of the Senate bill. In paragraph (9), Congress finds that in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Supreme Court articulated its highly deferential review of Congressional factual findings when it addressed the constitutionality of section 4(e) of the Voting Rights Act of 1965. Regarding Congress' factual determination that section 4(e) would assist the Puerto Rican community in "gaining nondiscriminatory treatment in public services," the Court stated that "[i]t was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations . . . . It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did. There plainly was such a basis to support section 4(e) in the application in question in this case." *Id.* at 653.

Paragraph (10) in Section 2 of the conference report is substantively identical, with technical clarifications, to paragraph (10) in Section 2 of the House amendment and paragraph (10) in Section 2 of the Senate bill. In paragraph (10), Congress finds that *Katzenbach's* highly deferential review of Congress's factual conclusions was relied upon by the United States District Court for the District of Columbia when it upheld the "bail-out" provisions of the Voting Rights Act of 1965, (42 U.S.C. 1973c), stating that "congressional fact finding, to which we are inclined to pay great deference, strengthens the inference that, in those jurisdictions covered by the Act, state actions discriminatory in effect are discriminatory in purpose." *City of Rome, Georgia v. U.S.*, 472 F. Supp. 221 (D. D.C. 1979), *aff'd,* 446 U.S. 156 (1980).

Paragraph (11) in Section 2 of the conference report is identical to paragraph (11) in Section 2 of the House amendment and paragraph (11) in Section 2 of the Senate bill. In paragraph (11), Congress finds that the Court continued its practice of deferring to congressional factual findings in reviewing the constitutionality of the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992. *See Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622 (1994) (*Turner I*) and *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 520 U.S. 180 (1997) (*Turner II*). Congress finds that at issue in the *Turner* cases was Congress' legislative finding that, absent mandatory carriage rules, the continued viability of local broadcast television would be "seriously jeopardized." Congress finds that the *Turner I* Court recognized that as an institution, "Congress is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon an issue as complex and dynamic as that presented here." 512 U.S. at 665-66. Although the Court recognized that "the deference afforded to legislative findings does 'not foreclose our independent judgment of the facts bearing on an issue of constitutional law,'" its "obligation to exercise independent judgment when First Amendment rights are implicated is not a license to reweigh the evidence de novo, or to replace Congress' factual predictions with our own. Rather, it is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." *Id.* at 666.

Paragraph (12) in Section 2 of the conference report is identical to paragraph (12) in Section 2 of

the House amendment and paragraph (12) in Section 2 of the Senate bill. In paragraph (12), Congress finds that three years later in *Turner II*, the Court upheld the "must-carry" provisions based upon Congress' findings, stating the Court's "sole obligation is 'to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.'"520 U.S. at 195. Congress finds that, citing its ruling in *Turner I*, the Court reiterated that "[w]e owe Congress' findings deference in part because the institution 'is far better equipped than the judiciary to "amass and evaluate the vast amounts of data" bearing upon' legislative questions," *Id.* at 195, and added that it "owe[d] Congress' findings an additional measure of deference out of respect for its authority to exercise the legislative power." *Id.* at 196.

Paragraph (13) in Section 2 of the conference report is substantively identical, with technical clarifications, to paragraph (13) in Section 2 of the House amendment and paragraph (13) in Section 2 of the Senate bill. In paragraph (13), Congress finds that there exists substantial record evidence upon which Congress has reached its conclusion that a ban on partial-birth abortion is not required to contain a "health" exception, because the facts demonstrate that a partial-birth abortion is never necessary to preserve the health of a woman, poses serious risks to a woman's health, and lies outside the standard of medical care. Congress also finds that it has been informed by extensive hearings held during the 104th, 105th, 107th, and 108th Congresses and passed a ban on partial-birth abortion in the 104th, 105th, and 106th Congresses. Congress finds that these findings reflect its very informed judgment that a partial-birth abortion is never necessary to preserve the health of a woman, poses serious risks to a woman's health, and lies outside the standard of medical care, and should, therefore, be banned.

Paragraph (14) in Section 2 of the conference report is substantively identical, with technical clarifications, to paragraph (14) in Section 2 of the House amendment and paragraph (14) in Section 2 of the Senate bill. In paragraph (14), Congress, pursuant to the substantial and credible testimony received during extensive legislative hearings during the 104th, 105th, 107th, and 108th Congresses, lists its declarations regarding the partial-birth abortion procedure:

> Paragraph (14)(A) in Section 2 of the conference report is identical to paragraph (14)(A) in Section 2 of the House amendment and paragraph (14)(A) in Section 2 of the Senate bill. In paragraph (14)(A), Congress declares that a partial-birth abortion poses serious risks to the health of a woman undergoing the procedure. Those risks include, among other things: an increase in a woman's risk of suffering from cervical incompetence, a result of cervical dilation making it difficult or impossible for a woman to successfully carry a subsequent pregnancy to term; an increased risk of uterine rupture, abruption, amniotic fluid embolus, and trauma to the uterus as a result of converting the child to a footling breech position, a procedure which, according to a leading obstetrics textbook, "there are very few, if any, indications for . . . other than for delivery of a second twin"; and a risk of lacerations and secondary hemorrhaging due to the doctor blindly forcing a sharp instrument into the base of the unborn child's skull while he or she is lodged in the birth canal, an act which could result in severe bleeding, brings with it the threat of shock, and could ultimately result in maternal

death. Therefore, Congress concludes that those who express the view that partial-birth abortion may be a safer method of abortion in some circumstances have never examined the severe risks of the procedure to the health of the mother and have not demonstrated that this procedure is a safe, medically accepted, standard of care.

Paragraph (14)(B) in Section 2 of the conference report is identical to paragraph (14)(B) in Section 2 of the House amendment and paragraph (14)(B) in Section 2 of the Senate bill. In paragraph (14)(B), Congress declares that there is no credible medical evidence that partial-birth abortions are safe or are safer than other abortion procedures. Congress also declares that no controlled studies of partial-birth abortions have been conducted nor have any comparative studies been conducted to demonstrate its safety and efficacy compared to other abortion methods. Congress further declares that there have been no articles published in peer-reviewed journals that establish that partial-birth abortions are superior in any way to established abortion procedures. Congress also declares that unlike other more commonly used abortion procedures, there are currently no medical schools that provide instruction on abortions that include the instruction in partial-birth abortions in their curriculum.

Paragraph (14)(C) in Section 2 of the conference report is identical to paragraph (14)(C) in Section 2 of the House amendment and paragraph (14)(C) in Section 2 of the Senate bill. In paragraph (14)(C), Congress declares that a prominent medical association has concluded that partial-birth abortion is "not an accepted medical practice," that it has "never been subject to even a minimal amount of the normal medical practice development," that "the relative advantages and disadvantages of the procedure in specific circumstances remain unknown," and that "there is no consensus among obstetricians about its use." The association has further noted that partial-birth abortion is broadly disfavored by both medical experts and the public, is "ethically wrong," and "is never the only appropriate procedure."

Paragraph (14)(D) in Section 2 of the conference report is identical to paragraph (14)(D) in Section 2 of the House amendment and paragraph (14)(D) in Section 2 of the Senate bill. In paragraph (14)(D), Congress declares that those who espouse the view that partial-birth abortion "may" be the most appropriate abortion procedure for some women in "some" circumstances, such as the plaintiff in *Stenberg v. Carhart* and the experts who testified on his behalf, have failed to identify such circumstances and base their opinion on theoretical speculation, not actual evidence that demonstrates the relative safety of this abortion procedure.

Paragraph (14)(E) in Section 2 of the conference report is identical to paragraph (14)(E) in Section 2 of the House amendment and paragraph (14)(E) in Section 2 of the Senate bill. In paragraph (14)(E), Congress declares that the physician credited with developing the partial-birth abortion procedure has testified that he has never encountered a situation where a partial-birth abortion was medically necessary to

achieve the desired outcome and, thus, is never medically necessary to preserve the health of a woman.

Paragraph (14)(F) in Section 2 of the conference report is identical to paragraph (14)(F) in the House amendment and paragraph (14)(F) in the Senate bill. In paragraph (14)(F), Congress declares that a ban on the partial-birth abortion procedure will advance the health interests of pregnant women seeking to terminate a pregnancy.

Paragraph (14)(G) in Section 2 of the conference report is identical to paragraph (14)(G) in the House amendment and paragraph (14)(G) in the Senate bill. In paragraph (14)(G), Congress declares that in light of this overwhelming evidence, Congress and the States have a compelling interest in prohibiting partial-birth abortions. Congress also declares that in addition to promoting maternal health, such a prohibition will draw a bright line that clearly distinguishes abortion and infanticide, that preserves the integrity of the medical profession, and promotes respect for human life.

Paragraph (14)(H) in Section 2 of the conference report is identical to paragraph (14)(H) in the House amendment and (14)(H) in the Senate bill. In paragraph (14)(H), Congress declares that based upon *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Planned Parenthood* v. *Casey*, 505 U.S. 833 (1992), a governmental interest in protecting the life of a child during the delivery process arises, in part, by virtue of the fact that during a partial-birth abortion, labor is induced and the birth process has begun. Congress further declares that this distinction was recognized in *Roe* when the Court noted, without comment, that the Texas parturition statute, which prohibited one from killing a child "in a state of being born and before actual birth," was not under attack. Congress declares that this interest becomes compelling as the child emerges from the maternal body. Congress declares that a child that is completely born is a full, legal person entitled to constitutional protections afforded a "person" under the United States Constitution. Congress declares that partial-birth abortions involve the killing of a child that is in the process, in fact mere inches away from, becoming a "person." Partial birth gives the fetus an autonomy that is separate and distinct from that of the mother. Thus, the government has a heightened interest in protecting the life of the partially-born child.

Paragraph (14)(I) in Section 2 of the conference report is identical to paragraph (14)(I) in Section 2 of the House amendment and paragraph (14)(I) in Section 2 of the Senate bill. In paragraph (14)(I), Congress declares that the distinction between a partial-birth abortion and other abortion methods has been recognized by the medical community, where a prominent medical association has recognized that partial-birth abortions are "ethically different from other destructive abortion techniques because the fetus, normally twenty weeks or longer in gestation, is killed outside of the womb." According to this medical association, the "'partial birth' gives the fetus an autonomy which separates it from the right of the woman to choose treatments for her

own body."

Paragraph (14)(J) in Section 2 of the conference report is identical to paragraph (14)(J) in Section 2 of the House amendment and paragraph (14)(J) in Section 2 of the Senate bill. In paragraph (14)(J), Congress declares that a partial-birth abortion also confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child, whom he or she had just delivered, all but the head, out of the womb, in order to end that life. Congress further declares that a partial-birth abortion thus appropriates the terminology and techniques used by obstetricians in the delivery of living children--obstetricians who preserve and protect the life of the mother and the child--and instead uses those techniques to end the life of the partially-born child.

Paragraph (14)(K) in Section 2 of the conference report is identical to paragraph (14)(K) in Section 2 of the House amendment and paragraph (14)(K) in Section 2 of the Senate bill. In paragraph (14)(K), Congress declares that by aborting a child in the manner that purposefully seeks to kill the child after he or she has begun the process of birth, partial-birth abortion undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world, in order to destroy a partially-born child.

Paragraph (14)(L) in Section 2 of the conference report is identical to paragraph (14)(L) in Section 2 of the House amendment and paragraph (14)(L) in Section 2 of the Senate bill. In paragraph (14)(L), Congress declares that the gruesome and inhumane nature of the partial-birth abortion procedure and its disturbing similarity to the killing of a newborn infant promotes a complete disregard for infant human life that can only be countered by a prohibition of the procedure.

Paragraph (14)(M) in Section 2 of the conference report is identical to paragraph (14)(M) in Section 2 of the House amendment and paragraph (14)(M) in Section 2 of the Senate bill. In paragraph (14)(M), Congress declares that the vast majority of babies killed during partial-birth abortions are alive until the end of the procedure. Congress further declares that it is a medical fact, however, that unborn infants at this stage can feel pain when subjected to painful stimuli and that their perception of this pain is even more intense than that of newborn infants and older children when subjected to the same stimuli. Evidence compiled by Congress demonstrates that fetuses on whom in utero surgery is performed for medical reasons feel pain from needles and instruments and are provided anesthesia. Pain management is an important part of care provided to infants cared for in neonatal units who are of the same gestational ages as those subject to partial-birth abortion. Partial-birth abortion is an extremely painful procedure for the fetus and, during a partial-birth abortion procedure, the child will fully experience the pain associated with piercing his or her skull and sucking out his or her brain.

Paragraph (14)(N) in Section 2 of the conference report is identical to paragraph

(14)(N) in Section 2 of the House amendment and paragraph (14)(N) in Section 2 of the Senate bill. In paragraph (14)(N), Congress declares that implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life. Congress further declares that as a result it has a compelling interest in acting--indeed it must act--to prohibit this inhumane procedure.

Paragraph (14)(O) in Section 2 of the conference report is identical to paragraph (14)(O) in Section 2 of the House amendment and paragraph (14)(O) in Section 2 of the Senate bill. In paragraph (14)(O), Congress declares that for these reasons, it finds that partial-birth abortion is never medically indicated to preserve the health of the mother; is in fact unrecognized as a valid abortion procedure by the mainstream medical community; poses additional health risks to the mother; blurs the line between abortion and infanticide in the killing of a partially-born child just inches from birth; and confuses the role of the physician in childbirth and should, therefore, be banned.

Section 3. Prohibition on Partial-Birth Abortions

Subsection (a) in Section 3 of the conference report is identical to subsection (a) in Section 3 of the House amendment and subsection (a) in Section 3 of the Senate bill. In subsection (a) of Section 3 Congress amends title 18 of the United States Code by inserting a new chapter 74 consisting of a new 18 U.S.C. § 1531:

Subsection (a) of the new section 1531 contained in Section 3(a) of the conference report is identical to subsection (a) of the new section 1531 proposed in Section 3(a) of the House amendment and subsection (a) of the new section 1531 proposed in Section 3(a) of the Senate bill. Subsection (a) prohibits any physician from, in or affecting interstate or foreign commerce, knowingly performing a partial-birth abortion and thereby killing a human fetus. A physician who does so shall be fined under this title or imprisoned not more than 2 years, or both. This paragraph does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself. This paragraph takes effect 1 day after the enactment.

Subsection (b)(1) of the new section 1531 contained in Section 3(a) of the conference report is substantively identical, with technical clarifications, to subsection (b)(1) of the new section 1531 proposed in Section 3(a) of the House amendment and subsection (b)(1) of the new section 1531 proposed in Section 3(a) of the Senate bill. Subsection (b)(1) states that a partial-birth abortion means an abortion in which the person performing the abortion deliberately and intentionally vaginally delivers an

intact living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus and the person performing the abortion performs the overt act (such as the removal of the intracranial contents), other than completion of delivery, that kills the partially delivered intact living fetus.

Subsection (b)(2) of the new section 1531 contained in Section 3(a) of the conference report is identical to subsection (b)(2) of the new section 1531 proposed in Section 3 (a) of the House amendment and subsection (b)(2) of the new section 1531 proposed in Section 3 (a) of the Senate bill. Subsection (b)(2) defines the term "physician" as 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.

Subsection (c)(1) of the new section 1531 contained in Section 3(a) of the conference report is identical to subsection (c)(1) of the new section 1531 proposed in Section 3 (a) of the House amendment and subsection (c)(1) of the new section 1531 proposed in Section 3 (a) of the Senate bill. Subsection (c)(1) provides for a civil cause of action for 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, unless the pregnancy resulted from the plaintiff's criminal conduct or the plaintiff consented to the abortion.

Subsection (c)(2) of the new section 1531 contained in Section 3(a) of the conference report is identical to subsection (c)(2) of the new section 1531 proposed in Section 3 (a) of the House amendment and paragraph (c)(2) of the new section 1531 proposed in Section 3 (a) of the Senate bill. Subsection (c)(2), in paragraph (A) provides that such relief shall include money damages for all injuries, psychological and physical, occasioned by the violation of this section; and in paragraph (B) that statutory damages equal to three times the cost of the partial-birth abortion.

Subsection (d)(1) of the new section 1531 contained in Section 3(a) of the conference report is identical to subsection (d)(1) of the new section 1531 proposed in Section 3 (a) of the House amendment and subsection (d)(1) of the new section 1531 proposed in Section 3 (a) of the Senate bill. Subsection (d)(1) allows a defendant accused of an offense under this section to seek a hearing before the State Medical Board on whether the physician's conduct was necessary to save the life of the mother whose life was endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.

Subsection (d)(2) of the new section 1531 contained in Section 3(a) of the conference report is identical to subsection (d)(2) of the new section 1531 proposed in Section 3 (a) of the House amendment and subsection (d)(2) of the new section 1531 proposed in Section 3 (a) of the Senate bill. Subsection (d)(2) provides that the findings on that issue are admissible on that issue at the trial of the defendant. It also provides that 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.

Subsection (e) of the new section 1531 contained in Section 3(a) of the conference report is identical to subsection (e) of the new section 1531 proposed in Section 3(a) of the House amendment and subsection (e) of the new section 1531 proposed in Section 3(a) of the Senate bill. Subsection (e) provides that 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.

Subsection (b) in Section 3 of the conference report is identical to subsection (b) in Section 3 of the House amendment and subsection (b) in Section 3 of the Senate bill. Subsection (b) is a clerical amendment to insert the new chapter in the table of chapters for part I of title 18, after the item relating to chapter 73.

Section 4 of the Senate bill had no counterpart in the House amendment, and it is not included in the substitute agreed to by the managers.

S. 3—Continued

Managers on the part of the HOUSE	*Managers on the part of the* SENATE
Mr. Sensenbrenner	
Mr. Hyde	
Mr. Chabot	
Mr. Nadler	
Ms. Lofgren	

S. 3

Managers on the part of the HOUSE	*Managers on the part of the* SENATE
	Mr. Hatch
	Mr. Santorum
	Mr. DeWine
	Mrs. Feinstein
	Mrs. Boxer