GRANTED

No. 99-830



In The

# Supreme Court of the United States

DON STENBERG, et al.,

*Petitioners,*

v.

LEROY CARHART, M.D.,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## BRIEF *AMICUS CURIAE* OF FAMILY FIRST, IN SUPPORT OF PETITIONERS

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## INTEREST OF THE AMICUS[1]

*Amicus curiae*, Family First, is a 501(c)(3), non-profit, non-partisan research and educational organization dedicated to strengthening Nebraska families. Established in association with Dr. James Dobson's Focus on the Family, Family First links experts in law, medicine, media and education to help families deal with the problems facing our communities, our State and our Nation. The mission of Family First is to equip and encourage the people of Nebraska to create communities where families are valued, nurtured and strengthened. Consistent with that mission and the respect for human life which that mission implies, Family First submits the following Brief in support of petitioners and in defense of the Nebraska partial-birth abortion act.

## SUMMARY OF ARGUMENT

The stark and somber issue presented by this case is whether the State of Nebraska has the constitutional authority to ban a cruel and grotesque abortion procedure defined legally as "partial-birth abortion" and known medically as dilation and extraction (D & X) or intact dilation and evacuation (intact D & E). In this procedure, as practiced and described by respondent herein, the physician vaginally delivers a living unborn

[1] Counsel for the *amicus* authored the Brief in whole. No person or entity other than the *amicus* has made a monetary contribution to the preparation or submission of the Brief. This Brief is filed with the consent of the parties. Letters of consent have been filed with the Clerk.

child up to the head, then either crushes the child's skull with forceps or pierces the child's skull with sharp instruments and suctions out the brains, killing the child. Without deciding whether Nebraska may prohibit the D & X procedure, for which neither the American College of Obstetricians nor the American Medical Association could find any justifiable medical purpose, the court of appeals held that the State's effort to end this abhorrent practice is unconstitutional because the language defining the offense is overbroad,[2] sweeping within its scope not only the rarely used D & X procedure, but also the conventional D & E procedure, the most commonly used technique for second-trimester abortions. *Carhart v. Stenberg*, 192 F.3d 1142, 1149-50 (8th Cir. 1999). Given this interpretation, the lower court concluded that the statute "imposes an undue burden on a woman's right to choose to have an abortion," and, therefore, is unconstitutional under this Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). *Carhart*, 192 F.3d at 1153.

For the reasons set forth in petitioners' brief, *amicus curiae* believes that the court of appeals' reading of the

[2] "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. . . . [T]he 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." NEB. REV. STAT. § 28-326(9) (Supp. 1997).



statute is fundamentally flawed and that the statute, when properly and reasonably construed to apply only to the D & X procedure, is constitutional. But the efforts of the State of Nebraska and twenty-nine other States to vindicate their constitutional authority to proscribe a procedure that borders on infanticide have been largely unavailing because of the concerns expressed by physicians (and accepted by courts) that partial-birth abortion statutes are either overbroad, reaching constitutionally protected abortion procedures, or vague, arguably encompassing such procedures, or both. As a result of this asserted overbreadth or vagueness, physicians have claimed that they will be "chilled" in their abortion practice if these statutes are allowed to go into effect. Few of the physicians in these cases, however, actually perform the procedure which the statutes were intended to prohibit, the D & X. Upwards of sixty named plaintiff physicians have challenged twenty-one partial-birth abortion statutes to date. Yet, only three of these physicians – Dr. Marvin Haskell, Dr. Dennis Christensen, and respondent, Dr. Leroy Carhart – forthrightly and unequivocally admit to using the D & X procedure. And of the three courts of appeals which have reviewed statutes affecting the conduct of these physicians, only one even reached the question as to whether the State could ban the D & X procedure, and that court held that it could. *Compare Hope Clinic v. Ryan*, 195 F.3d 857 (7th Cir. 1999) (*en banc*) (upholding Wisconsin partial-birth abortion statute), *petitions for certiorari pending*, Nos. 99-1156, 99-1177, *with Women's Medical Professional Corp. v. Voinovich*, 130 F.3d 187, 197-203 (6th Cir. 1997) (not deciding whether the D & X procedure could be prohibited, but holding that "the

Act's ban on the D & X procedure is unconstitutional because the definition of the procedure encompasses the more commonly employed D & E procedure and, therefore, places a substantial obstacle in the path of a woman seeking pre-viability abortions), *cert. denied*, 118 S.Ct. 1347 (1998), and *Carhart v. Stenberg*, 192 F.3d 1142, 1146 n.4 (8th Cir. 1999) (not deciding "whether the law creates an undue burden by prohibiting the D & X procedure"). Overbreadth and vagueness claims thus not only have resulted in the invalidation of partial-birth abortion statutes in many States where none of the plaintiff physicians challenging them performs (or intends to perform) the D & X procedure, but also have effectively prevented courts in other States from deciding whether the D & X procedure may be prohibited in those few instances where it *is* used.[3]

Until recently, there was no practical way of knowing whether physicians' alleged concerns about the scope and application of partial-birth abortion statutes to conventional first and second-trimester abortion procedures

[3] Dr. Carhart testified that he actually performs only 10-20 D & X abortions per year. *See Carhart v. Stenberg*, 11 F. Supp.2d 1099, 1121 (D. Neb. 1998). In the challenge to the Wisconsin partial-birth abortion case, Dr. Christensen testified that he performs only two or three D & X procedures per year. *See Planned Parenthood of Wisconsin v. Doyle*, 44 F. Supp.2d 975, 979 (W.D. Wis. 1999) ("Among the plaintiff physicians, only Christensen regularly performs the D & X procedure and he performs just 2-3 such procedures each year"). And Dr. Haskell, who invented the procedure and frequently uses it, admitted in the same case that "the D & X procedure is never medically necessary to save the life or preserve the health of a woman." *Id.* at 980.



were genuine or feigned, real or illusory, rational or irrational. Fortunately, that is no longer the case. There is now a large body of official abortion reporting data from those States whose partial-birth abortion laws have been allowed to go into effect which proves beyond question that the professed fears of physicians regarding the impact of these laws have no foundation in fact. This data, which was not available at the time the district court entered its permanent injunction on July 2, 1998, establishes that enactment of partial-birth abortion statutes has neither prevented physicians from performing conventional first and second-trimester abortion procedures, including suction curettage (vacuum aspiration) and dilation and evacuation (D & E), nor resulted in an increase of induction (instillation) procedures. There is also no evidence that these statutes have compelled physicians to send their patients out of State for conventional abortion procedures or have caused them to modify their abortion techniques in any way that would jeopardize the health of their pregnant women patients.[4]

*Amicus curiae* seeks to bring this critical data to the Court's attention because it dispels the fears that enforcement of a partial-birth abortion act will prevent women

[4] During the two weeks that the Wisconsin partial-birth abortion act was in effect, one of the plaintiff physicians, Dennis Christensen, issued a press release stating that he would comply with the Act as he understood it "only by altering his procedure in a way that would impose greater health risks on women." *Planned Parenthood of Wisconsin v. Doyle*, 44 F. Supp.2d 975, 981 (W.D. Wis. 1999). At the trial on the permanent injunction, Dr. Christensen acknowledged that during this two-week period, the rate of complications from abortions did not go up in a "statistically significant fashion." *Id.*

from obtaining conventional first and second-trimester abortions and enables the Court to focus on the ultimate issue in this case, whether the State of Nebraska, or any State, may ban the D & X procedure.

## ARGUMENT

### PLAINTIFF'S OVERBREADTH AND VAGUENESS CLAIMS SHOULD BE REJECTED BECAUSE OFFICIAL STATE ABORTION REPORTING DATA PROVES THAT THE ENACTMENT OF PARTIAL-BIRTH ABORTION STATUTES HAS NOT PREVENTED PHYSICIANS FROM PERFORMING CONVENTIONAL FIRST AND SECOND-TRIMESTER ABORTION PROCEDURES, INCLUDING SUCTION CURETTAGE AND DILATION AND EVACUATION, IN THOSE STATES WHERE THE STATUTES HAVE BEEN ALLOWED TO GO INTO EFFECT.

In his complaint, respondent alleged that "[b]ecause the definition of so-called 'partial-birth abortion' is both vague and broad, physicians may face prosecution for performing what are the safest and most common abortion procedures used after the first trimester of pregnancy and before fetal viability." Complaint, ¶ 2.[5] In his

[5] *See also* ¶ 39: "Because of the breadth and ambiguity in the Act's definition of 'partial-birth abortion,' the Act could reach nearly every abortion performed after the first trimester, with the exception of hysterotomy or hysterectomy." ¶ 42: "The Act fails to give physicians fair warning as to which abortion procedures are made criminal. The Act forces physicians to guess whether their performance of a safe, accepted medical procedure will subject them to imprisonment and loss of their medical license. This will chill physicians from providing safe abortion procedures after the first trimester."



testimony at the hearing on the preliminary injunction, respondent expressed concern that the Act also applied to first-trimester abortion procedures as well, specifically vacuum aspiration (suction curettage). J. Tr. at 352, 360-65. Respondent's "fears" about the scope and application of the Nebraska partial-birth abortion act can be shown to have no foundation in fact.

Thirty States have enacted statutes prohibiting partial-birth abortions.[6] Abortion providers have challenged the statutes in twenty-one of these States and have succeeded in preventing eighteen of them from going into effect.[7] This Brief examines official abortion reporting

[6] Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, New Jersey, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia and Wisconsin.

[7] Statutes have been challenged in Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Illinois, Iowa, Kentucky, Louisiana, Michigan, Missouri, Montana, Nebraska, New Jersey, Ohio, Rhode Island, Virginia, West Virginia and Wisconsin. Enforcement of the statutes in all but three of these States has been enjoined. In two of those States, Alabama and Georgia, the statutes have been construed to apply only to post-viability abortions. *See Summit Medical Associates, P.C. v. James*, 984 F. Supp. 1404, 1414-15 (M.D. Ala. 1998) (Attorney General interpretation), *aff'd in part, rev'd in part and remanded with directions*, 180 F.3d 1326 (11th Cir. 1999) (discussing Eleventh Amendment issues only); *Midtown Hospital v. Miller*, Civil Action No. 1:97-CV-1786-JOF (N.D. Ga. Sep. 2, 1998) (consent order). In the third State, Virginia, the law is in force by virtue of a stay order entered by the Fourth Circuit Court of Appeals from the district court's permanent injunction. *See Richmond*

data from five of the nine States whose partial-birth abortion statutes have not been challenged (Indiana, Mississippi, South Carolina, South Dakota and Tennessee) and the one State whose statute has been allowed to go into effect during litigation (Virginia).[8]

Indiana, Mississippi and South Dakota all enacted partial-birth abortion bans that became effective on July 1, 1997. *See* IND. CODE ANN. § 16-18-2-267.5 (Michie 1998) (defining offense); § 16-34-2-1(b) (Michie Supp. 1999) (prohibition); MISS. CODE ANN. § 41-41-71 *et seq.* (1999); S.D. CODIFIED LAWS § 34-23A-27 *et seq.* (Michie Supp. 1999). None of these statutes has been construed by any state or federal court.

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*Medical Center for Women v. Gilmore*, No. 98-1930 (4th Cir. Sep. 14, 1999) (staying injunction).

[8] Comparative abortion data is not available from the eighteen States whose partial-birth abortion acts have been enjoined, from the four States whose laws apply (or have been interpreted to apply) only to post-viability abortions (*see* n. 7, *supra*, for Alabama and Georgia, and *see also* KAN. STAT. ANN. § 65-6721 (Supp. 1999), and UTAH CODE ANN. § 76-7-310.5 (1999)), from one State (Oklahoma) which does not publish or disclose reported abortion data, and from one State (North Dakota) whose law was enacted too recently to allow for comparison. *See* SENATE BILL 2254 (1999 Session).

Of the six States whose reporting data is discussed in this Brief, four (Indiana, Mississippi, South Carolina and South Dakota) do not define the phrase "partially vaginally delivers a living fetus," while the other two (Tennessee and Virginia) define the phrase, as Nebraska does, to include a living fetus (or unborn child) *"or a substantial portion thereof."* *See* TENN. CODE ANN. § 39-15-209(a)(2) (1997); VA. CODE ANN. § 18.2-74.2(D) (Michie Supp. 1999).



A comparison of abortion data from these three States for the first half of 1997, when none of the statutes was in effect, to data for the second half of 1997, when all of these statutes were in effect, leaves no doubt that plaintiff's expressed fears of being prosecuted for performing conventional first and second-trimester abortion procedures (suction curettage and dilation and evacuation) are baseless.[9] In the words of Federal District Court

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[9] Rule 201 of the Federal Rules of Evidence permits a court to take judicial notice of facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." FED. R. EVID. 201(b)(2). "[A] court may take judicial notice of records and reports of administrative bodies." *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986) (internal citation omitted). Judicial notice may be taken "at any stage of the proceedings," FED. R. EVID. 201(f), including on appeal. In *Barber v. Ponte*, 772 F.2d 982 (1st Cir. 1985) (*en banc*), *cert. denied*, 475 U.S. 1050 (1986), the First Circuit took judicial notice of census data and health statistics, including abortion reporting data, for the first time on appeal. *Id.* at 998-99 & nn. 4-16. Other circuits have taken judicial notice of census data on appeal, which is similar to the abortion reporting data which *amicus* seeks to bring to the Court's attention. *See Goins v. Allgood*, 391 F.2d 692, 697 (5th Cir. 1968); *Mitchell v. Rose*, 570 F.2d 129, 132, n.2 (6th Cir. 1978), *rev'd on other grounds*, 443 U.S. 545 (1979); *United States v. United Brotherhood of Carpenters & Joiners of America, Local 169*, 457 F.2d 210, 214 n.7 (7th Cir. 1972), *cert. denied*, 409 U.S. 851 (1972); *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421, 426 n.4 (8th Cir. 1970); *United States v. Esquivel*, 88 F.2d 772, 726-27 (9th Cir. 1996), *cert. denied*, 519 U.S. 985 (1996); *Moore v. Comfed Savings Bank*, 908 F.2d 834, 841 n.4 (11th Cir. 1990). *Amicus* emphasizes that none of the state abortion reporting data from 1997 and 1998 discussed in this Brief would have been available at any stage of the proceedings in the district court, which entered its permanent injunction on July 2, 1998. The unavailability of this data at trial underscores the need for the

Judge Shabaz, "plaintiffs' alleged confusion concerning the meaning of the Act is a demon of their own creation." *Planned Parenthood of Wisconsin v. Doyle*, 44 F. Supp.2d 975, 985 (W.D. Wis. 1999), *aff'd*, 195 F.3d 857 (7th Cir. 1999) (*en banc*), *petitions for certiorari pending*, Nos. 99-1156, 99-1177. "Everyone understands what partial birth abortion is and what is not. It *is* the D & X procedure. It is *not* the suction curettage procedure, the induction procedure or the D & E procedure." *Id.* (emphasis in original). *See also Rhode Island Medical Society v. Whitehouse*, 66 F. Supp.2d 288, 295 (D. R.I. 1999) ("doctors recognize the difference between the D & E and the D & X"), *appeal stayed*, No. 99-2095 (1st Cir. Nov. 22, 1999). Review of this data allows the Court, in the words of the Seventh Circuit, "to perform a reality check" on the allegations that respondent would not be able to perform first or second-trimester abortion procedures if the Nebraska law were allowed to go into effect. *Hope Clinic v. Ryan*, 195 F.3d 857 at 870.

*Indiana*

The Indiana State Department of Health reported that 13,208 abortions were performed in 1997, of which 12,429 were suction curettage, 87 sharp curettage, 159 dilation and evacuation (D & E), and two intra-uterine prostaglandin instillation. *See* Appendix A-2.[10] The data

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Court to give this data the weight it deserves in evaluating plaintiff's claims of vagueness and overbreadth. The original documents authenticating the data set forth in the appendices have been lodged separately with the Clerk.

[10] In addition, there were 371 unknown procedures and 160 procedures not otherwise classified. Of the former, 193 (52.02%)



reflects that 46.92% of the suction curettage procedures (5,832 of 12,429), 42.25% of the sharp curettage procedures (37 of 87), 54.71% of the dilation and evacuation procedures (87 of 159), and neither of the prostaglandin instillation procedures were performed in the second half of the year, during which time the Indiana partial-birth abortion act was in effect. As this data shows, the partial-birth abortion act did not prevent physicians in Indiana from performing D & E's, nor did it cause them to substitute induction for D & E's (no inductions were performed in the second half of the year). Nor is there any evidence that physicians sought to avoid the D & E procedure by sending their patients out of State. Dilation and evacuation procedures accounted for 1.03% of all abortion procedures performed during the first six months of 1997 (72 of 6,950), when the partial-birth abortion act was *not* in effect, but 1.39% of all procedures performed during the second six months of 1997 (87 of 6,258), when the act *was* in effect. "These data," as the Seventh Circuit noted, "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." *Hope Clinic v. Ryan*, 195 F.3d 857, 870 (7th Cir. 1999) (*en banc*), *petitions for certiorari pending*, Nos. 99-1152, 99-1156 and 99-1177. In the eighteen months after the Indiana partial-birth abortion statute took effect, there were 286 D & E's, while in the eighteen months before the statute took effect, there were

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were performed in the second half of the year; of the latter, approximately 2/3 (109 of 160) were performed in the second half of the year.

263 D & E's. *See* INDIANA TERMINATED PREGNANCY REPORT 1996, Table 20 (Jan. 1998), and Appendix A-4. This certainly does not suggest that physicians in Indiana were "chilled" from performing D & E's by the enactment of the partial-birth abortion statute. Data from other States confirms the Seventh Circuit's sense that "partial-birth abortion statutes need not have [and, in fact, have not had] the baleful effect the plaintiffs foresee." *Id.*

*Mississippi*

The Mississippi State Department of Health reported that 4,325 abortions were performed in Mississippi in 1997, of which 2,494 were suction curettage, one sharp curettage, 1,788 dilation and evacuation (D & E), and 23 intra-uterine prostaglandin instillation. *See* MISSISSIPPI VITAL STATISTICS 1997, Table F3 at 43.[11] A breakdown of this data by procedure and month discloses that 47.95% of the suction curettage procedures (1,196 of 2,494), 41.94% of the dilation and evacuation procedures (750 of 1,788), and

[11] In addition, there were 19 procedures not otherwise classified. All of these procedures are defined in the MISSISSIPPI STATE BOARD OF HEALTH'S HANDBOOK ON REGISTRATION & REPORTING OF VITAL EVENTS: INDUCED TERMINATION OF PREGNANCY, Appendix A (January 1, 1999). Suction curettage (or vacuum aspiration) is described as a procedure in which "a flexible tube (cannula) is inserted into the uterine cavity [after the cervical canal has been dilated by the successive insertion of dilators], and the fetal and placental tissues are then suctioned out by an electric vacuum pump." Dilation and evacuation is described as a procedure "used most frequently in the second trimester" which "involves opening the cervix (dilation) and using primarily sharp techniques, but also suction and other instrumentation such as forceps for evacuation."



almost two-thirds of the prostaglandin instillation procedures (15 of 23) were performed in the second half of the year, during which time the Mississippi partial-birth abortion act was in effect. *See* Appendix B-4. Although the number of D & E's as a percentage of all abortions declined from 44.07% for the first six months of the year (1,038 of 2,355) to 38.07% for the second six months of the year (750 of 1,970), both the number of D & E's performed in the second half of the year (750) and the number of D & E's as a percentage of all abortions for the second half of 1997 (38.07%) leave little doubt that Mississippi's partial-birth abortion act has not prevented physicians in Mississippi from performing either first or second-trimester abortion procedures, including D & E's. Mississippi physicians would not have selected the D & E procedure as their method of choice in almost 40% of all the abortions they performed in the last six months of 1997 if they had been "chilled" in their practice by the enactment of the partial-birth abortion act. Moreover, the very small number of instillation procedures (15) and procedures not otherwise classified (9), which together account for roughly one percent of all abortions performed in Mississippi during the second half of 1997 (24 of 1,970) establishes that physicians in Mississippi did not substitute induction or some other procedure for the D & E procedure after the partial-birth abortion act became effective.

In 1998, the first full year after the Mississippi partial-birth abortion act took effect, almost one-third of all abortions performed in Mississippi (1,287 of 3,955) were D & E's. *See* MISSISSIPPI VITAL STATISTICS 1998, Table F3 at 43. This represents a slight decline from 1996, the last full

year before the partial-birth abortion act took effect, when approximately 37% of all abortions (1,553 of 4,206) were D & E's. *See* MISSISSIPPI VITAL STATISTICS 1996, Table F3 at 43. Nevertheless, the small number of instillation procedures (32) and procedures not otherwise classified (13), which together account for barely one percent of all abortion procedures performed in 1998 (45 of 3,955), suggests that Mississippi physicians did not substitute induction or some other procedure for the D & E procedure after the partial-birth abortion act became effective. But perhaps the most significant statistic is that more than 2,000 D & E's were performed in Mississippi in the eighteen months *after* the partial-birth abortion act became effective on July 1, 1997. *See* Appendix B-4 and MISSISSIPPI VITAL STATISTICS 1998, Table F3 at 43. In sum, there is no evidence whatsoever that physicians in Mississippi were in any way "chilled" in their practice from performing D & E's (or any other conventional abortion procedure) by the unchallenged partial-birth abortion act.

*South Dakota*

The South Dakota Department of Health reported that 919 abortions were performed in South Dakota in 1997, of which 702 were suction curettage and 217 were dilation and evacuation (D & E). *See* SOUTH DAKOTA VITAL STATISTICS & HEALTH STATUS 1997 at 67-68 & 77 (Figure 24).[12] A breakdown of this data by procedure and month reveals that 26.92% of the suction curettage procedures (189 of 702) and all but one of the dilation and evacuation

[12] No other abortion procedures were reported in 1997.



procedures (216 of 217) were performed in the second half of the year, during which time the South Dakota partial-birth abortion act was in effect. *See* Appendix C-2.[13] Quite obviously, the South Dakota partial-birth abortion act has not prevented physicians from performing D & E's in South Dakota. Remarkably, almost three times as many D & E's were performed in the eighteen months *after* the South Dakota partial-birth abortion act took effect (889 procedures) as in the eighteen months *before* the act took effect (307 procedures). *See* Appendix C-2, C-4.

*Virginia*

As the result of a stay of a preliminary injunction which stay was entered by a judge of the Fourth Circuit Court of Appeals on June 30, 1998, *see Richmond Medical Center for Women v. Gilmore*, 144 F.3d 326 (4th Cir. 1998) (Luttig, J., granting stay), the Virginia partial-birth abortion act (*see* VA. CODE ANN. § 18.2-74.2 (Michie Supp. 1999)) went into effect on July 1, 1998. The experience of physicians performing abortions in Virginia after the statute took effect completely belies the assertions of the plaintiff physicians at the hearing on the motion for a preliminary injunction that, in the words of the district

[13] That all but one of the D & E's were performed in the last four months of the year, when only 15 suction curettage procedures were performed, may have been attributable to the retirement of one abortion provider, who apparently preferred using suction curettage, and his replacement by another provider who prefers using the D & E procedure. The month of procedure was not stated for two suction curettage procedures.

court, "the Act is written so broadly and vaguely that a prosecutor could interpret the Act to include the procedures these physicians perform such as suction curettage and D & E [dilation and evacuation], as the plaintiffs perform them." *Richmond Medical Center for Women v. Gilmore*, 11 F. Supp.2d 795, 805 (E.D. Va. 1998). Accordingly, the plaintiffs' professed "fear [of] prosecution and the loss [of] their medical license to practice if they continue performing abortions in their normal course of procedure," *id.*, was shown to be groundless.

The Virginia Department of Health reported that 26,115 abortions were performed in Virginia in 1998, of which 24,920 were suction curettage, 14 sharp curettage, 268 dilation and evacuation (D & E), 11 intra-uterine saline instillation and 98 intra-uterine prostaglandin instillation. *See* Appendix D-4.[14] Of these figures, 48.71% of the suction curettage procedures (12,140 of 24,920), five of the fourteen sharp curettage procedures, 46.26% of the dilation and evacuation procedures (124 of 268) and approximately one-half of the instillation procedures (55 of 109) were performed in the second half of the year during which time the Virginia partial-birth abortion act was in effect. Dilation and evacuation procedures accounted for 1.07% of all abortions performed in the first six months (144 of 13,341) and 0.97% of all abortions performed in the last six months (124 of 12,773). Although the number of D & E's declined by 13.8% from the first half of the year to the second half of the year (144

[14] The Department of Health also reported three hysterectomies, two hysterotomies, 76 unknown procedures and 723 procedures not otherwise classified.



to 124), both the number of D & E's performed in the second half of the year (124), and the fact that the number of instillation procedures remained virtually unchanged from the first half of the year (54) to the second half of the year (55), again suggests, as in the case of Mississippi, that the partial-birth abortion act did not prevent physicians in Virginia from performing D & E's or force them to use instillation procedures to avoid the effect of the law. More D & E's were performed in the last six months of 1998 (124), when the partial-birth abortion act *was* in effect, than in the last six months of 1997 (121), when the law was *not* in effect. *See* Appendix D-4, D-7.

To summarize the foregoing data, almost 1,200 D & E's and more than 19,000 suction curettage procedures were performed in just four States in the first six months *after* their partial-birth abortion acts went into effect.[15] The physicians in those States were not "chilled" in their practice or prevented from performing conventional first and second-trimester abortion procedures, including suction curettage and dilation and evacuation. Moreover, the fact that only 70 instillation procedures were performed in these four States in the first six months after their partial-birth abortion acts took effect proves that physicians practicing in these States did not substitute instillation for dilation and evacuation.

Abortion data from South Carolina and Tennessee, where few D & E's were performed in 1997 either before

[15] Dilation and evacuation: Indiana (87); Mississippi (750); South Dakota (216); Virginia (124). Suction curettage: Indiana (5,832); Mississippi (1,196); South Dakota (189); Virginia (12,140).

or after enactment of their partial-birth abortion acts, confirms that the statutes in these States did not "chill" physicians from performing suction curettage procedures or force physicians to use instillation procedures in lieu of dilation and evacuation. Neither statute has been construed by any state or federal court.

*South Carolina*

The South Carolina partial-birth abortion act became effective on March 26, 1997. *See* S.C. CODE ANN. § 44-41-85 (Law Co-op. Supp. 1999). The South Carolina Department of Health & Environmental Control reported that 9,212 abortions were performed in South Carolina in 1997, of which 9,158 were suction curettage, two dilation and evacuation (D & E), one intra-uterine saline instillation and twenty intra-uterine prostaglandin instillation. *See* Appendix E-3.[16] The data shows that slightly less than three-fourths of the suction curettage procedures (6,631 of 9,158) and three-fourths of the instillation procedures (15 of 21), and both D & E's were performed in the last nine months of the year, during which time the South Carolina partial-birth abortion act was in effect. There is no evidence that the law led to an increase in the number of induction procedures (an average of two procedures per month before the law went into effect and 1 2/3 such procedures per month after the law went into effect) or prevented physicians from performing D & E's. Although no D & E's were performed in 1998, the first full year

[16] In addition, there were five unknown procedures and 26 procedures not otherwise classified.



after the partial-birth abortion act took effect, only 14 D & E's were performed in 1996, the last full year before the law took effect. *See* Appendix E-3. This represents less than one-sixth of one percent of all abortions performed in 1996 (9,326). The number of intra-uterine prostaglandin instillation procedures declined from 28 in 1996 to 10 in 1998, thus indicating that the partial-birth abortion statute, enacted in 1997, had no impact on the incidence of instillation procedures in South Carolina. *See* Appendix E-3.

*Tennessee*

The Tennessee partial-birth abortion act became effective on July 1, 1997. *See* TENN. CODE ANN. § 39-15-209 (1997). The Tennessee Department of Health reported that 18,283 abortions were performed in Tennessee in 1997, of which 18,212 were suction curettage, seven dilation and evacuation (D & E), 56 intra-uterine prostaglandin instillation and one intra-uterine saline instillation. *See* Appendix F-4.[17] The data indicates that 48.42% of the suction curettage procedures (8,819 of 18,212), three of the seven dilation and evacuation procedures, and 53.57% of the prostaglandin instillation procedures (30 of 56) and the saline instillation procedure were performed in the second half of the year, when the Tennessee partial-birth abortion act was in force. Although the number of instillation procedures as a percentage of the total number of abortions rose slightly from 0.276% (26 of

[17] There was one hysterectomy procedure and in six cases the procedure was unknown.

9,420) in the first half of the year to 0.338% (30 of 8,859) in the second half of the year,[18] there is no evidence that the law had any impact on the number of D & E's, forced physicians to do inductions instead of D & E's or made them refer their patients out of State because of the presence of the partial-birth abortion act. The statistics suggest that, like in South Carolina, few physicians in Tennessee used the D & E procedure in 1997. Significantly, in 1998, the first full year after the Tennessee partial-birth abortion act took effect, there were 66 D & E's, while in 1996, the last full year before the act took effect, there were only four. *See* Appendix F-8, F-9. A more than sixteen-fold increase in the number of D & E's hardly bespeaks evidence of "chilling." Whatever the reason for the increase, the enactment of the unchallenged partial-birth abortion statute obviously had no effect on physicians' choice of procedure.

Notwithstanding the lower court's conclusion that the Nebraska partial-birth abortion act encompasses both D & X procedures and D & E procedures, the experience in those States whose partial-birth abortion acts have been allowed to go into effect proves that physicians *do* understand the difference between what these statutes do and do not prohibit.

There is no statistical evidence that the enactment of partial-birth abortion statutes has "chilled" physicians from performing conventional first and second-trimester abortion procedures, including suction curettage and

[18] The month of occurrence was not stated for four abortions.



dilation and evacuation, in those States whose laws are in force. Nor is there any evidence that these statutes have forced physicians to use instillation procedures instead of D & E's where instillation would have been contraindicated or compelled these physicians to send their patients out of State for abortions. In fact, the evidence, as set forth in this Brief, is to the contrary. And there is no evidence that physicians have modified their abortion procedures to the detriment of their pregnant women patients, as Dr. Christensen wrongly predicted in the challenge to the Wisconsin partial-birth abortion statute. Partial-birth abortion statutes were not intended to affect (and have not affected) conventional abortion procedures. That, in turn, suggests that plaintiff's expressed concerns about the vagueness and overbreadth of the statute are unfounded and served only to divert the attention of the courts below from the ultimate issue in this case, to wit, whether the D & X procedure may be prohibited. That is the issue this Court must reach and decide. For the reasons set forth in petitioners' brief, *amicus curiae* submits that Nebraska has enacted a constitutional statute to end the barbaric and unnecessary practice of partial-birth abortion.

## CONCLUSION

For the foregoing reasons, as well as those set forth in petitioners' brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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