

Stricken language would be deleted from and underlined language would be added to the law as it existed prior to this session of the General Assembly.

1 State of Arkansas
2 87th General Assembly
3 Regular Session, 2009
4

As Engrossed: H2/3/09
A Bill

HOUSE BILL 1113

5 By: Representatives D. Creekmore, Lea, Dismang, English, Greenberg, G. Smith, Rice, J. Burris, S.
6 Malone, Clemmer, M. Martin, Ragland, Barnett, Garner, Baird, *Breedlove, J. Dickinson, Glidewell,*
7 *Lowery, Summers, Wells*
8 By: Senators Bledsoe, Glover, G. Baker, Trusty, J. Taylor, Altes
9

10
11 **For An Act To Be Entitled**

12 AN ACT TO PROHIBIT PARTIAL-BIRTH ABORTIONS; AND
13 FOR OTHER PURPOSES.
14

15 **Subtitle**

16 THE PARTIAL-BIRTH ABORTION BAN ACT.
17
18

19 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
20

21 SECTION 1. Arkansas Code Title 20, Chapter 16 is amended to add an
22 additional subchapter to read as follows:

23 20-16-1201. Title.

24 This subchapter shall be known and may be cited as the "Partial-Birth
25 Abortion Ban Act".
26

27 20-16-1202. Definitions.

28 As used in this subchapter:

29 (1) "Partial-birth abortion" means an abortion in which the
30 person performing the abortion:

31 (A) Purposely vaginally delivers a living human fetus
32 until, in the case of a head-first presentation, the entire fetal head is
33 outside the body of the female or, in the case of breech presentation, any
34 part of the fetal trunk past the navel is outside the body of the female, for
35 the purpose of performing an overt act that the person knows will kill the
36 partially delivered living human fetus; and



1 (B) Performs the overt act, other than completion of
2 delivery of a living human fetus, that kills the partially delivered living
3 human fetus;

4 (2) "Person with standing" means:

5 (A) A prosecuting attorney;

6 (B) A female upon whom a partial-birth abortion has been
7 performed;

8 (C) The parent of a minor upon whom a partial-birth
9 abortion has been performed; and

10 (D) The father of the unborn child that has been the
11 subject of a partial-birth abortion that has been performed; and

12 (3)(A) "Physician" means a doctor of medicine or osteopathy
13 legally authorized to practice medicine and surgery in this state, or any
14 other individual legally authorized by the state to perform abortions.

15 (B) However, any individual who is not a physician or not
16 otherwise legally authorized by the state to perform abortions, but who
17 nevertheless directly performs a partial-birth abortion, is subject to this
18 subchapter.

19
20 20-16-1203. Partial-birth abortions prohibited – Penalty – Exception.

21 (a) Any person who knowingly performs a partial-birth abortion and
22 thereby kills a human fetus is guilty of a Class D felony.

23 (b) A female upon whom a partial-birth abortion is performed shall not
24 be prosecuted under this subchapter.

25
26 20-16-1204. License suspension or revocation and fines.

27 (a)(1) After proper notice and an opportunity to be heard, the
28 Arkansas State Medical Board may assess a civil fine against a physician who
29 violates this subchapter.

30 (2) The civil fine shall not exceed:

31 (A) Twenty-five thousand dollars (\$25,000) for the first
32 violation;

33 (B) Fifty thousand dollars (\$50,000) for the second
34 violation;

35 (C) One hundred thousand dollars (\$100,000) for the third
36 violation; and

1 (D) For each subsequent violation, any amount over one
2 hundred thousand dollars (\$100,000) sufficient to deter future violations.

3 (b) The board may suspend or revoke the physician's license in
4 accordance with procedures established under § 17-95-410.

5 (c)(1) All fines assessed and collected under this section shall be
6 remitted into the Treasurer of State.

7 (2) The Treasurer of State shall deposit the entire amount of
8 any fines collected under this section in the State Treasury as general
9 revenues.

10 (d) The civil fine assessed under this section is in addition to the
11 criminal penalty imposed under § 20-16-1203.

12
13 20-16-1205. Affirmative defense.

14 In any proceeding under this subchapter relating to the performance of
15 a partial-birth abortion, it is an affirmative defense that the defendant
16 performed the partial-birth abortion because it was necessary to save the
17 life of a female whose life was endangered by a physical disorder, physical
18 illness, or physical injury, including without limitation, a life-endangering
19 physical condition caused by or arising from the pregnancy itself.

20
21 20-16-1206. Standing.

22 (a) A person with standing may maintain an action in circuit court
23 against the performance of a partial-birth abortion except as allowed under §
24 20-16-1205.

25 (b) A prosecuting attorney may maintain an action in circuit court
26 only against a person shown to have performed or to be about to perform a
27 partial-birth abortion.

28 (c) A person with standing under § 20-16-1202(2)(c) and, except to
29 enjoin other individuals from performing or attempting to perform a partial-
30 birth abortion on the relative of the person with standing, a person with
31 standing under § 20-16-1202(2)(D) or § 20-16-1202(2)(E) may maintain an
32 action in circuit court only against a person who performed or attempted to
33 perform the partial-birth abortion that is the source of the person's
34 standing.

35
36 20-16-1207. Hearings before the Arkansas State Medical Board.

1 (a) A physician accused of a violation of this subchapter may seek a
2 hearing before the Arkansas State Medical Board to determine whether the
3 physician's conduct was necessary to save the life of the female under § 20-
4 16-1205.

5 (b) Findings from a hearing held under subsection (a) of this section
6 are admissible at the trial of the physician on the issue of whether the
7 physician's conduct was necessary to save the life of the female under § 20-
8 16-1205.

9 (c) Upon a motion of the physician, the circuit court shall delay the
10 beginning of the trial for not more than *ninety (90)* days to permit a hearing
11 under subsection (a) of this section to take place.

12
13 20-16-1208. Injunctive relief.

14 (a) A party who brings an action in circuit court against the
15 performance of a partial-birth abortion may seek a temporary restraining
16 order, a preliminary injunction, and a permanent injunction.

17 (b) For the purposes of this section, it is presumed that pecuniary
18 compensation would not afford adequate relief for a partial-birth abortion
19 sought to be enjoined.

20 (c)(1) If oral or documentary information is sought from any defendant
21 or witness by the plaintiff through discovery or other means and the
22 defendant or witness claims a privilege against self-incrimination, the
23 circuit court shall rule on whether the defendant or witness is entitled to
24 claim the privilege.

25 (2) If the circuit court rules that the privilege is properly
26 claimed:

27 (A) The circuit court shall issue an order identifying the
28 matter that is subject to the privilege; and

29 (B) Neither the identified material nor any evidence
30 derived from it may thereafter be used in any criminal prosecution against
31 the person from whom it was obtained after the claim of privilege unless the
32 prosecutor proves that it was obtained from an independent source.

33 (d) The circuit court shall direct that the information given use
34 immunity under this section be provided to the plaintiff.

35
36 20-16-1209. Civil contempt.

1 (a) A person who knowingly violates the terms of an injunction against
2 the performance of partial-birth abortions is subject to civil contempt and
3 shall be fined:

4 (1) Twenty-five thousand dollars (\$25,000) for the first
5 violation;

6 (2) Fifty thousand dollars (\$50,000) for the second violation;

7 (3) One hundred thousand dollars (\$100,000) for the third
8 violation; and

9 (4) For each succeeding violation, any amount over one hundred
10 thousand dollars (\$100,000) sufficient to deter future violations.

11 (b) The fines set out in subsection (a) of this section are the
12 exclusive penalties for contempt under this section.

13 (c) Each performance of a partial-birth abortion in violation of the
14 terms of an injunction under this subchapter is a separate violation.

15 (d)(1) Fines assessed under this section are cumulative.

16 (2) However, no fine shall be assessed against the female upon
17 whom a partial-birth abortion is performed or attempted.

18
19 20-16-1210. Attorney's fees.

20 (a) In a action brought under this subchapter, the circuit court shall
21 render judgment for reasonable attorney's fees in favor of the plaintiff
22 against the defendant if:

23 (1) Judgment is rendered in favor of the plaintiff in any action
24 for an injunction based on a finding that the defendant performed a partial-
25 birth abortion, knowing or with reckless disregard for whether it was a
26 partial-birth abortion; or

27 (2) A defendant is adjudged in contempt of a temporary
28 restraining order, preliminary injunction, or permanent injunction under this
29 subchapter.

30 (b)(1) The attorney's fees shall be assessed and collected as other
31 costs of the action and paid to the attorney for the plaintiff.

32 (2) If the attorney is a prosecuting attorney, the attorney's
33 fees shall be paid into the county treasury.

34 (c) No attorney's fees shall be assessed against the female upon whom
35 a partial-birth abortion is performed.

36

1 20-16-1211. Civil action.

2 (a) A person with standing may maintain an action in circuit court
3 against a person who knowingly performed a partial-birth abortion.

4 (b) The action may seek fifty thousand dollars (\$50,000) in exemplary
5 damages and triple whatever actual damages the plaintiff may have sustained.

6 (c) A person with standing under § 20-16-1202(2)(C), § 20-16-
7 1202(2)(D), or § 20-16-1202(2)(E) may maintain an action only against a
8 person who performed the partial-birth abortion that is the source of the
9 person's standing.

10 (d) No person is estopped from recovery in a suit under this section
11 on the ground that either the plaintiff or the female upon whom the partial-
12 birth abortion was performed gave consent to the abortion.

13 (e) A contract of indemnification for damages under this subchapter is
14 void.

15 (f) No damages may be assessed against the female upon whom a partial-
16 birth abortion is performed.

17
18 20-16-1212. Provision for anonymity of female.

19 (a) In every proceeding or action under this subchapter, the circuit
20 court shall rule whether the anonymity of any female upon whom a partial-
21 birth abortion is performed should be preserved from public disclosure if the
22 female does not give her consent to the disclosure.

23 (b)(1) Upon its own motion or upon motion by a party to the proceeding
24 or action under this subchapter, the circuit court shall make a ruling
25 concerning the anonymity of any female upon whom a partial-birth abortion is
26 performed.

27 (2) Upon determining that the anonymity should be preserved, the
28 circuit court shall issue orders to the parties, witnesses, and counsel and
29 shall direct the sealing of the record and exclusion of individuals from
30 courtrooms or hearing rooms to the extent necessary to safeguard the female's
31 identity from public disclosure.

32 (3) Each order under subdivision (b)(2) of this section shall be
33 accompanied by a specific written finding explaining:

34 (A) Why the anonymity of the female should be preserved
35 from public disclosure;

36 (B) Why the order is essential to that end;

1 (C) How the order is narrowly tailored to serve that
2 interest; and

3 (D) Why no reasonable, less restrictive alternative
4 exists.

5 (c) In the absence of written consent of the female upon whom a
6 partial-birth abortion has been performed, any person other than a public
7 official who brings an action under this subchapter shall do so under a
8 pseudonym.

9 (d) This section shall not be construed to conceal the identity of the
10 plaintiff or of a witness from the defendant.

11
12 SECTION 2. Arkansas Code Title 5, Chapter 61, Subchapter 2 is
13 repealed.

14 ~~5-61-201. Title.~~

15 ~~This subchapter may be cited as the "Partial-Birth Abortion Ban Act of~~
16 ~~1997".~~

17
18 ~~5-61-202. Definitions.~~

19 ~~As used in this subchapter, "partial-birth abortion" means an abortion~~
20 ~~in which the person performing the abortion partially vaginally delivers a~~
21 ~~living fetus before taking the life of the fetus and completing the delivery~~
22 ~~or as defined by the United States Supreme Court.~~

23
24 ~~5-61-203. Partial-birth abortions prohibited.~~

25 ~~(a) Any person who knowingly performs a partial-birth abortion and~~
26 ~~thereby takes the life of a human fetus is guilty of a Class D felony.~~

27 ~~(b) A woman upon whom a partial-birth abortion is performed may not be~~
28 ~~prosecuted under this section for conspiracy, solicitation, attempt, or~~
29 ~~complicity to violate this section.~~

30 ~~(c) It is an affirmative defense to a prosecution under this section,~~
31 ~~which must be proved by a preponderance of the evidence, that the partial-~~
32 ~~birth abortion was performed by a physician who reasonably believed:~~

33 ~~(1) The partial-birth abortion was necessary to save the life of~~
34 ~~the woman upon whom it was performed; and~~

35 ~~(2) No other form of abortion would suffice for that purpose.~~

36 ~~(d)(1) Prior to charging a person under this section, a prosecutor~~

1 shall refer the investigation to the State Medical Board, which shall
2 determine whether the procedure at issue in the investigation is a partial-
3 birth abortion as defined by this subchapter.

4 (2) If the board determines that the procedure being
5 investigated is not a partial-birth abortion as defined by this subchapter,
6 the prosecutor shall not proceed with the case.

7 (e) This subchapter is operative and shall be enforced to the extent
8 permitted by the United States Constitution and laws.

9
10 5-61-204. Professional sanctions.

11 (a) Any person who knowingly performs a partial-birth abortion is
12 subject to disciplinary action by the State Medical Board.

13 (b) Disciplinary action taken by the board against a physician who
14 violates this subchapter shall include, as determined by the board:

15 (1) A fine not greater than ten thousand dollars (\$10,000);

16 (2) Suspension of the physician's license for a period not
17 greater than one (1) year; or

18 (3) Revocation of the physician's license.

19
20 SECTION 3. EMERGENCY CLAUSE. It is found and determined by the
21 General Assembly of the State of Arkansas that partial-birth abortion poses
22 serious risks to the health of a female undergoing the procedure; that those
23 risks include, among other things: an increase in a female's risk of
24 suffering from cervical incompetence, a result of cervical dilation making it
25 difficult or impossible for a female to successfully carry a subsequent
26 pregnancy to term; an increased risk of uterine rupture, abruption, amniotic
27 fluid embolus, and trauma to the uterus as a result of converting the child
28 to a footling breech position and a risk of lacerations and secondary
29 hemorrhaging due to the physician blindly forcing a sharp instrument into the
30 base of the unborn child's skull while he or she is lodged in the birth
31 canal, an act which could result in severe bleeding, brings with it the
32 threat of shock, and could ultimately result in maternal death. Therefore,
33 an emergency is declared to exist and this act being immediately necessary
34 for the preservation of the public peace, health, and safety shall become
35 effective on:

36 (1) The date of its approval by the Governor;

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(2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or

(3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.

/s/ D. Creekmore