

**Calendar No. 19**108TH CONGRESS  
1ST SESSION**S. 3**

To prohibit the procedure commonly known as partial-birth abortion.

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**IN THE SENATE OF THE UNITED STATES**

FEBRUARY 14, 2003

Mr. SANTORUM (for himself, Mr. FITZGERALD, Mr. CAMPBELL, Mr. DEWINE, Mr. FRIST, Mr. BROWNBACK, Mr. ENSIGN, Mr. INHOFE, Mr. KYL, Mr. LUGAR, Mr. ALLARD, Mr. MCCAIN, Mr. ROBERTS, Mr. SHELBY, Mr. WARNER, Mr. MCCONNELL, Mr. HATCH, Mr. VOINOVICH, Mr. HAGEL, Mr. BUNNING, Mr. DOMENICI, Mr. SMITH, Mr. GRAHAM of South Carolina, Mr. ENZI, Mr. LOTT, Mrs. DOLE, Mr. ALLEN, Mr. CORNYN, Mr. NICKLES, Mr. GRASSLEY, Mr. TALENT, Mr. BOND, Mr. THOMAS, Mr. CRAIG, Mr. CHAMBLISS, Mr. SESSIONS, Mr. GREGG, Mr. BENNETT, Mr. COLEMAN, Mr. SUNUNU, Mr. COCHRAN, Mr. CRAPO, and Mr. MILLER) introduced the following bill; which was read the first time

FEBRUARY 24, 2003

Read the second time and placed on the calendar

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**A BILL**

To prohibit the procedure commonly known as partial-birth abortion.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

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 delivers  
9 an unborn child’s body until only the head remains  
10 inside the womb, punctures the back of the child’s  
11 skull with a sharp instrument, and sucks the child’s  
12 brains out before completing delivery of the dead in-  
13 fant—is a gruesome and inhumane procedure that is  
14 never medically necessary and should be prohibited.

15 (2) Rather than being an abortion procedure  
16 that is embraced by the medical community, particu-  
17 larly among physicians who routinely perform other  
18 abortion procedures, partial-birth abortion remains a  
19 disfavored procedure that is not only unnecessary to  
20 preserve the health of the mother, but in fact poses  
21 serious risks to the long-term health of women and  
22 in some circumstances, their lives. As a result, at  
23 least 27 States banned the procedure as did the  
24 United States Congress which voted to ban the pro-  
25 cedure during the 104th, 105th, and 106th Con-  
26 gresses.

1           (3) In *Stenberg v. Carhart* (530 U.S. 914, 932  
2           (2000)), the United States Supreme Court opined  
3           “that significant medical authority supports the  
4           proposition that in some circumstances, [partial  
5           birth abortion] would be the safest procedure” for  
6           pregnant women who wish to undergo an abortion.  
7           Thus, the Court struck down the State of Nebras-  
8           ka’s ban on partial-birth abortion procedures, con-  
9           cluding that it placed an “undue burden” on women  
10          seeking abortions because it failed to include an ex-  
11          ception for partial-birth abortions deemed necessary  
12          to preserve the “health” of the mother.

13          (4) In reaching this conclusion, the Court de-  
14          ferred to the Federal district court’s factual findings  
15          that the partial-birth abortion procedure was statis-  
16          tically and medically as safe as, and in many cir-  
17          cumstances safer than, alternative abortion proce-  
18          dures.

19          (5) However, the great weight of evidence pre-  
20          sented at the *Stenberg* trial and other trials chal-  
21          lenging partial-birth abortion bans, as well as at ex-  
22          tensive Congressional hearings, demonstrates that a  
23          partial-birth abortion is never necessary to preserve  
24          the health of a woman, poses significant health risks

1 to a woman upon whom the procedure is performed,  
2 and is outside of the standard of medical care.

3 (6) Despite the dearth of evidence in the  
4 Stenberg trial court record supporting the district  
5 court’s findings, the United States Court of Appeals  
6 for the Eighth Circuit and the Supreme Court re-  
7 fused to set aside the district court’s factual findings  
8 because, under the applicable standard of appellate  
9 review, they were not “clearly erroneous”. A finding  
10 of fact is clearly erroneous “when although there is  
11 evidence to support it, the reviewing court on the en-  
12 tire evidence is left with the definite and firm convic-  
13 tion that a mistake has been committed”. *Anderson*  
14 *v. City of Bessemer City, North Carolina* (470 U.S.  
15 564, 573 (1985)). Under this standard, “if the dis-  
16 trict court’s account of the evidence is plausible in  
17 light of the record viewed in its entirety, the court  
18 of appeals may not reverse it even though convinced  
19 that had it been sitting as the trier of fact, it would  
20 have weighed the evidence differently” (*Id.* at 574).

21 (7) Thus, in *Stenberg*, the United States Su-  
22 preme Court was required to accept the very ques-  
23 tionable findings issued by the district court judge—  
24 the effect of which was to render null and void the  
25 reasoned factual findings and policy determinations

1 of the United States Congress and at least 27 State  
2 legislatures.

3 (8) However, under well-settled Supreme Court  
4 jurisprudence, the United States Congress is not  
5 bound to accept the same factual findings that the  
6 Supreme Court was bound to accept in *Stenberg*  
7 under the “clearly erroneous” standard. Rather, the  
8 United States Congress is entitled to reach its own  
9 factual findings—findings that the Supreme Court  
10 accords great deference—and to enact legislation  
11 based upon these findings so long as it seeks to pur-  
12 sue a legitimate interest that is within the scope of  
13 the Constitution, and draws reasonable inferences  
14 based upon substantial evidence.

15 (9) In *Katzenbach v. Morgan* (384 U.S. 641  
16 (1966)), the Supreme Court articulated its highly  
17 deferential review of Congressional factual findings  
18 when it addressed the constitutionality of section  
19 4(e) of the Voting Rights Act of 1965. Regarding  
20 Congress’ factual determination that section 4(e)  
21 would assist the Puerto Rican community in “gain-  
22 ing nondiscriminatory treatment in public services,”  
23 the Court stated that “[i]t was for Congress, as the  
24 branch that made this judgment, to assess and  
25 weigh the various conflicting considerations. . . . It

1 is not for us to review the congressional resolution  
2 of these factors. It is enough that we be able to per-  
3 ceive a basis upon which the Congress might resolve  
4 the conflict as it did. There plainly was such a basis  
5 to support section 4(e) in the application in question  
6 in this case.” (Id. at 653).

7 (10) Katzenbach’s highly deferential review of  
8 Congress’s factual conclusions was relied upon by  
9 the United States District Court for the District of  
10 Columbia when it upheld the “bail-out” provisions of  
11 the Voting Rights Act of 1965, (42 U.S.C. 1973c),  
12 stating that “congressional fact finding, to which we  
13 are inclined to pay great deference, strengthens the  
14 inference that, in those jurisdictions covered by the  
15 Act, state actions discriminatory in effect are dis-  
16 criminatory in purpose”. *City of Rome, Georgia v.*  
17 *U.S.* (472 F. Supp. 221 (D. D. Col. 1979)) *aff’d*  
18 *City of Rome, Georgia v. U.S.* (46 U.S. 156 (1980)).

19 (11) The Court continued its practice of defer-  
20 ring to congressional factual findings in reviewing  
21 the constitutionality of the must-carry provisions of  
22 the Cable Television Consumer Protection and Com-  
23 petition Act of 1992. See *Turner Broadcasting Sys-*  
24 *tem, Inc. v. Federal Communications Commission*  
25 (512 U.S. 622 (1994) (Turner I)) and *Turner*

1 Broadcasting System, Inc. v. Federal Communica-  
2 tions Commission (520 U.S. 180 (1997) (Turner  
3 II)). At issue in the Turner cases was Congress’ leg-  
4 islative finding that, absent mandatory carriage  
5 rules, the continued viability of local broadcast tele-  
6 vision would be “seriously jeopardized”. The Turner  
7 I Court recognized that as an institution, “Congress  
8 is far better equipped than the judiciary to ‘amass  
9 and evaluate the vast amounts of data’ bearing upon  
10 an issue as complex and dynamic as that presented  
11 here” (512 U.S. at 665–66). Although the Court  
12 recognized that “the deference afforded to legislative  
13 findings does ‘not foreclose our independent judg-  
14 ment of the facts bearing on an issue of constitu-  
15 tional law,’” its “obligation to exercise independent  
16 judgment when First Amendment rights are impli-  
17 cated is not a license to reweigh the evidence de  
18 novo, or to replace Congress’ factual predictions with  
19 our own. Rather, it is to assure that, in formulating  
20 its judgments, Congress has drawn reasonable infer-  
21 ences based on substantial evidence.” (Id. at 666).

22 (12) Three years later in Turner II, the Court  
23 upheld the “must-carry” provisions based upon Con-  
24 gress’ findings, stating the Court’s “sole obligation  
25 is ‘to assure that, in formulating its judgments, Con-

1       gress has drawn reasonable inferences based on sub-  
2       stantial evidence.’” (520 U.S. at 195). Citing its  
3       ruling in *Turner I*, the Court reiterated that “[w]e  
4       owe Congress’ findings deference in part because the  
5       institution ‘is far better equipped than the judiciary  
6       to “amass and evaluate the vast amounts of data”  
7       bearing upon’ legislative questions,” (Id. at 195),  
8       and added that it “owe[d] Congress’ findings an ad-  
9       ditional measure of deference out of respect for its  
10      authority to exercise the legislative power.” (Id. at  
11      196).

12           (13) There exists substantial record evidence  
13      upon which Congress has reached its conclusion that  
14      a ban on partial-birth abortion is not required to  
15      contain a “health” exception, because the facts indi-  
16      cate that a partial-birth abortion is never necessary  
17      to preserve the health of a woman, poses serious  
18      risks to a woman’s health, and lies outside the  
19      standard of medical care. Congress was informed by  
20      extensive hearings held during the 104th, 105th,  
21      and 107th Congresses and passed a ban on partial-  
22      birth abortion in the 104th, 105th, and 106th Con-  
23      gresses. These findings reflect the very informed  
24      judgment of the Congress that a partial-birth abor-  
25      tion is never necessary to preserve the health of a



1 woman, poses serious risks to a woman’s health, and  
2 lies outside the standard of medical care, and  
3 should, therefore, be banned.

4 (14) Pursuant to the testimony received during  
5 extensive legislative hearings during the 104th,  
6 105th, and 107th Congresses, Congress finds and  
7 declares that:

8 (A) Partial-birth abortion poses serious  
9 risks to the health of a woman undergoing the  
10 procedure. Those risks include, among other  
11 things: an increase in a woman’s risk of suf-  
12 fering from cervical incompetence, a result of  
13 cervical dilation making it difficult or impos-  
14 sible for a woman to successfully carry a subse-  
15 quent pregnancy to term; an increased risk of  
16 uterine rupture, abruption, amniotic fluid embo-  
17 lus, and trauma to the uterus as a result of  
18 converting the child to a footling breech posi-  
19 tion, a procedure which, according to a leading  
20 obstetrics textbook, “there are very few, if any,  
21 indications for . . . other than for delivery of  
22 a second twin”; and a risk of lacerations and  
23 secondary hemorrhaging due to the doctor  
24 blindly forcing a sharp instrument into the base  
25 of the unborn child’s skull while he or she is

1 lodged in the birth canal, an act which could  
2 result in severe bleeding, brings with it the  
3 threat of shock, and could ultimately result in  
4 maternal death.

5 (B) There is no credible medical evidence  
6 that partial-birth abortions are safe or are safer  
7 than other abortion procedures. No controlled  
8 studies of partial-birth abortions have been con-  
9 ducted nor have any comparative studies been  
10 conducted to demonstrate its safety and efficacy  
11 compared to other abortion methods. Further-  
12 more, there have been no articles published in  
13 peer-reviewed journals that establish that par-  
14 tial-birth abortions are superior in any way to  
15 established abortion procedures. Indeed, unlike  
16 other more commonly used abortion procedures,  
17 there are currently no medical schools that pro-  
18 vide instruction on abortions that include the  
19 instruction in partial-birth abortions in their  
20 curriculum.

21 (C) A prominent medical association has  
22 concluded that partial-birth abortion is “not an  
23 accepted medical practice,” that it has “never  
24 been subject to even a minimal amount of the  
25 normal medical practice development,” that

1 “the relative advantages and disadvantages of  
2 the procedure in specific circumstances remain  
3 unknown,” and that “there is no consensus  
4 among obstetricians about its use”. The asso-  
5 ciation has further noted that partial-birth  
6 abortion is broadly disfavored by both medical  
7 experts and the public, is “ethically wrong,”  
8 and “is never the only appropriate procedure”.

9 (D) Neither the plaintiff in *Stenberg v.*  
10 *Carhart*, nor the experts who testified on his  
11 behalf, have identified a single circumstance  
12 during which a partial-birth abortion was nec-  
13 essary to preserve the health of a woman.

14 (E) The physician credited with developing  
15 the partial-birth abortion procedure has testi-  
16 fied that he has never encountered a situation  
17 where a partial-birth abortion was medically  
18 necessary to achieve the desired outcome and,  
19 thus, is never medically necessary to preserve  
20 the health of a woman.

21 (F) A ban on the partial-birth abortion  
22 procedure will therefore advance the health in-  
23 terests of pregnant women seeking to terminate  
24 a pregnancy.

1 (G) In light of this overwhelming evidence,  
2 Congress and the States have a compelling in-  
3 terest in prohibiting partial-birth abortions. In  
4 addition to promoting maternal health, such a  
5 prohibition will draw a bright line that clearly  
6 distinguishes abortion and infanticide, that pre-  
7 serves the integrity of the medical profession,  
8 and promotes respect for human life.

9 (H) Based upon *Roe v. Wade* (410 U.S.  
10 113 (1973)) and *Planned Parenthood v. Casey*  
11 (505 U.S. 833 (1992)), a governmental interest  
12 in protecting the life of a child during the deliv-  
13 ery process arises by virtue of the fact that dur-  
14 ing a partial-birth abortion, labor is induced  
15 and the birth process has begun. This distinc-  
16 tion was recognized in *Roe* when the Court  
17 noted, without comment, that the Texas partu-  
18 rition statute, which prohibited one from killing  
19 a child “in a state of being born and before ac-  
20 tual birth,” was not under attack. This interest  
21 becomes compelling as the child emerges from  
22 the maternal body. A child that is completely  
23 born is a full, legal person entitled to constitu-  
24 tional protections afforded a “person” under  
25 the United States Constitution. Partial-birth

1           abortions involve the killing of a child that is in  
2           the process, in fact mere inches away from, be-  
3           coming a “person”. Thus, the government has  
4           a heightened interest in protecting the life of  
5           the partially-born child.

6           (I) This, too, has not gone unnoticed in  
7           the medical community, where a prominent  
8           medical association has recognized that partial-  
9           birth abortions are “ethically different from  
10          other destructive abortion techniques because  
11          the fetus, normally twenty weeks or longer in  
12          gestation, is killed outside of the womb”. Ac-  
13          cording to this medical association, the “‘par-  
14          tial birth’ gives the fetus an autonomy which  
15          separates it from the right of the woman to  
16          choose treatments for her own body”.

17          (J) Partial-birth abortion also confuses the  
18          medical, legal, and ethical duties of physicians  
19          to preserve and promote life, as the physician  
20          acts directly against the physical life of a child,  
21          whom he or she had just delivered, all but the  
22          head, out of the womb, in order to end that life.  
23          Partial-birth abortion thus appropriates the ter-  
24          minology and techniques used by obstetricians  
25          in the delivery of living children—obstetricians

1           who preserve and protect the life of the mother  
2           and the child—and instead uses those tech-  
3           niques to end the life of the partially-born child.

4           (K) Thus, by aborting a child in the man-  
5           ner that purposefully seeks to kill the child  
6           after he or she has begun the process of birth,  
7           partial-birth abortion undermines the public’s  
8           perception of the appropriate role of a physician  
9           during the delivery process, and perverts a  
10          process during which life is brought into the  
11          world, in order to destroy a partially-born child.

12          (L) The gruesome and inhumane nature of  
13          the partial-birth abortion procedure and its dis-  
14          turbingly similar to the killing of a newborn in-  
15          fant promotes a complete disregard for infant  
16          human life that can only be countered by a pro-  
17          hibition of the procedure.

18          (M) The vast majority of babies killed dur-  
19          ing partial-birth abortions are alive until the  
20          end of the procedure. It is a medical fact, how-  
21          ever, that unborn infants at this stage can feel  
22          pain when subjected to painful stimuli and that  
23          their perception of this pain is even more in-  
24          tense than that of newborn infants and older  
25          children when subjected to the same stimuli.

1           Thus, during a partial-birth abortion procedure,  
2           the child will fully experience the pain associ-  
3           ated with piercing his or her skull and sucking  
4           out his or her brain.

5           (N) Implicitly approving such a brutal and  
6           inhumane procedure by choosing not to prohibit  
7           it will further coarsen society to the humanity  
8           of not only newborns, but all vulnerable and in-  
9           nocent human life, making it increasingly dif-  
10          ficult to protect such life. Thus, Congress has  
11          a compelling interest in acting—indeed it must  
12          act—to prohibit this inhumane procedure.

13          (O) For these reasons, Congress finds that  
14          partial-birth abortion is never medically indi-  
15          cated to preserve the health of the mother; is in  
16          fact unrecognized as a valid abortion procedure  
17          by the mainstream medical community; poses  
18          additional health risks to the mother; blurs the  
19          line between abortion and infanticide in the kill-  
20          ing of a partially-born child just inches from  
21          birth; and confuses the role of the physician in  
22          childbirth and should, therefore, be banned.

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

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

1                   **“CHAPTER 74—PARTIAL-BIRTH**  
2                                   **ABORTIONS**

“Sec.

“1531. Partial-birth abortions prohibited.

3   **“§ 1531. Partial-birth abortions prohibited**

4           “(a) Any physician who, in or affecting interstate or  
5 foreign commerce, knowingly performs a partial-birth  
6 abortion and thereby kills a human fetus shall be fined  
7 under this title or imprisoned not more than 2 years, or  
8 both. This subsection does not apply to a partial-birth  
9 abortion that is necessary to save the life of a mother  
10 whose life is endangered by a physical disorder, physical  
11 illness, or physical injury, including a life-endangering  
12 physical condition caused by or arising from the pregnancy  
13 itself. This subsection takes effect 1 day after the date  
14 of enactment of this chapter.

15           “(b) As used in this section—

16                   “(1) the term ‘partial-birth abortion’ means an  
17 abortion in which—

18                           “(A) the person performing the abortion  
19 deliberately and intentionally vaginally delivers  
20 a living fetus until, in the case of a head-first  
21 presentation, the entire fetal head is outside the  
22 body of the mother, or, in the case of breech  
23 presentation, any part of the fetal trunk past  
24 the navel is outside the body of the mother for



1 the purpose of performing an overt act that the  
2 person knows will kill the partially delivered liv-  
3 ing fetus; and

4 “(B) performs the overt act, other than  
5 completion of delivery, that kills the partially  
6 delivered living fetus; and

7 “(2) the term ‘physician’ means a doctor of medicine  
8 or osteopathy legally authorized to practice medicine and  
9 surgery by the State in which the doctor performs such  
10 activity, or any other individual legally authorized by the  
11 State to perform abortions: *Provided, however,* That any  
12 individual who is not a physician or not otherwise legally  
13 authorized by the State to perform abortions, but who nev-  
14 ertheless directly performs a partial-birth abortion, shall  
15 be subject to the provisions of this section.

16 “(c)(1) The father, if married to the mother at the  
17 time she receives a partial-birth abortion procedure, and  
18 if the mother has not attained the age of 18 years at the  
19 time of the abortion, the maternal grandparents of the  
20 fetus, may in a civil action obtain appropriate relief, unless  
21 the pregnancy resulted from the plaintiff’s criminal con-  
22 duct or the plaintiff consented to the abortion.

23 “(2) Such relief shall include—

1           “(A) money damages for all injuries, psycho-  
2           logical and physical, occasioned by the violation of  
3           this section; and

4           “(B) statutory damages equal to three times  
5           the cost of the partial-birth abortion.

6           “(d)(1) A defendant accused of an offense under this  
7           section may seek a hearing before the State Medical Board  
8           on whether the physician’s conduct was necessary to save  
9           the life of the mother whose life was endangered by a  
10          physical disorder, physical illness, or physical injury, in-  
11          cluding a life-endangering physical condition caused by or  
12          arising from the pregnancy itself.

13          “(2) The findings on that issue are admissible on that  
14          issue at the trial of the defendant. Upon a motion of the  
15          defendant, the court shall delay the beginning of the trial  
16          for not more than 30 days to permit such a hearing to  
17          take place.

18          “(e) A woman upon whom a partial-birth abortion is  
19          performed may not be prosecuted under this section, for  
20          a conspiracy to violate this section, or for an offense under  
21          section 2, 3, or 4 of this title based on a violation of this  
22          section.”.

23          (b) CLERICAL AMENDMENT.—The table of chapters  
24          for part I of title 18, United States Code, is amended by

1 inserting after the item relating to chapter 73 the fol-

2 lowing new item:

**“74. Partial-birth abortions ..... 1531”.**

**Calendar No. 19**

108TH CONGRESS  
1ST SESSION

**S. 3**

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**A BILL**

To prohibit the procedure commonly known as  
partial-birth abortion.

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FEBRUARY 24, 2003

Read the second time and placed on the calendar