
Partial-Birth Abortion Ban Act

Model Legislation & Policy Guide



*Advancing the Human Right to Life
in Culture, Law, and Policy*

INTRODUCTION

“[T]he Federal [Partial-Birth] Abortion Ban is a law, and laws are up to interpretation,” remarked Planned Parenthood Federation of America’s Senior Medical Director, Dr. Deborah Nucatola, to undercover actors from the Center for Medical Progress (CMP) who were investigating Planned Parenthood’s trade in the body parts of aborted preborn children. CMP’s shocking investigative series uncovered potential violations of the federal ban on partial-birth abortion in the harvesting of fetal body parts and further confirmed the urgent need for effective state legislation to curb the abortion industry’s brazen and potentially lucrative practice of partial-birth abortion.

In 2000, the U.S. Supreme Court heard its first challenge to a prohibition on partial-birth abortion in *Stenberg v. Carhart*. By a 5-4 vote, it struck down Nebraska’s partial-birth abortion ban, as well as the prohibitions of 29 other states.¹ The Court’s majority held that the Nebraska prohibition was unconstitutional because it lacked an exception to protect the woman’s health and because it imposed an “undue burden” on a woman’s ability to choose a dilation and extraction (“D&E”) abortion (the most common method of abortion after the first trimester), before or after viability. However, the battle to end partial-birth abortion and to protect women did not, thankfully, end there.

In November 2003, President George W. Bush signed the federal *Partial Birth Abortion Ban Act of 2003*, which passed with strong bipartisan support in both the House and Senate, outlawing this unnecessary and gruesome procedure. That law was immediately challenged by Planned Parenthood, the American Civil Liberties Union (ACLU), and other abortion advocates and was enjoined (pending the outcome of litigation) by three federal district courts. Two of the three cases were ultimately heard by the U.S. Supreme Court.

On April 18, 2007, the Supreme Court issued its groundbreaking decision in *Gonzales v. Carhart*, upholding the federal ban on partial-birth abortion.² While the Court distinguished the federal ban from the state bans at issue in *Stenberg*, the Court in *Gonzales* also effectively threw out the result in *Stenberg*.³ The Court’s recent *Dobbs v. Jackson Women’s Health Org.*⁴ decision overturned *Roe v. Wade*⁵ and its progeny, leaving no doubt that states have constitutional authority to fully protect preborn human life through all nine months of pregnancy.

¹ 530 U.S. 914 (2000).

² 550 U.S. 124 (2007).

³ 505 U.S. 833 (1992).

⁴ 597 U.S. ___ (2022), slip op., Sup. Ct. No. 19-1392 (June 24, 2022).

⁵ 410 U.S. 113 (1973) (overruled, *Dobbs*, supra).

Although the federal Partial-Birth Abortion Ban Act is effective in all 50 states, state passage of partial-birth abortion prohibitions is still highly recommended for three important reasons.⁶

First, states can impose more stringent penalties for violating the state ban. Under the federal ban, violators can be fined or imprisoned for no more than two years, or both.⁷ Contrast that to the ban in Louisiana, passed after the *Gonzales* decision, which provides that a person violating the law “shall be imprisoned at hard labor for not less than one nor more than ten years, fined not less than ten thousand nor more than one hundred thousand dollars, or both.”⁸ Stronger penalties more effectively further the state interests, relied upon in *Gonzales*, to express reverence for human life and prevent the inevitable corruption of the medical profession that results when a horrific procedure like partial-birth abortion is accepted as legal.

Second, a state ban helps ensure timely and effective enforcement. If for some reason the U.S. Attorney General or a local (federal) U.S. Attorney decides not to enforce the federal ban or prosecute an offender, a state attorney general, along with local prosecutors, could step in and enforce a state ban. After the *Dobbs* decision, the presidential administration has refused to accept the Supreme Court’s repudiation of a constitutional “right to abortion,” and has instead done all that it can to promote abortion on demand. It is not beyond the realm of speculation that a pro-abortion federal government may decline to enforce the federal law, leaving states without an effective prohibition.

Third, the federal ban may not reach the actions of all abortion providers. In order for the federal ban to be triggered, the abortion provider must either be on federal property (or a federal employee) or engaged in interstate commerce. The gist of the “interstate commerce rule” is that a private individual or business must be engaged in the flow of

⁶ Ten states ban partial-birth abortion, and their laws apply throughout pregnancy and have either been upheld in court or mirror the federal partial-birth abortion ban: AZ, AR, LA, MI, MO, NH, ND, OH, UT, and VA.

Seven states ban partial-birth abortion, and their laws apply throughout pregnancy and have never been challenged in court: IN, KS, MS, OK, SC, SD, TN, and TX.

Three state ban partial-birth abortion only after viability: GA, MT, and NM.

Twelve state laws banning partial-birth abortion are enjoined (most were invalidated by the U.S. Supreme Court’s 2000 decision in *Stenberg v. Carhart* and have not been re-enacted under the auspices of the Court’s later decision in *Gonzales v. Carhart*): AL, AK, FL, ID, IL, IA, KY, NE, NJ, RI, WV, and WI.

⁷ 18 U.S.C. § 1531(a).

⁸ LA. REV. STAT. § 14:32.10(E).

business across state lines in order for an offense to be considered federal in nature. It is hard to imagine an abortion provider that does not in some way engage in business across state lines. Women may come from across state lines; the abortion provider may fly in from out of state; and the clinic surely purchases items or instruments from businesses in other states. However, to best ensure the eradication of partial-birth abortion, each state should pass its own ban.

Since 2017, several states have considered partial birth abortion ban legislation. The most recent state to enact this legislation was Texas, which did so in 2017. With the increased virulence of the presidential administration's pro-abortion position in the wake of *Dobbs*, states must continue to demonstrate the political will to confront the barbarous practice of late-term abortion through legislation such as the Partial Birth Abortion Ban Act.

For more information and drafting assistance, please contact AUL at Legislation@AUL.org.

PARTIAL-BIRTH ABORTION BAN ACT

HOUSE/SENATE BILL No. _____
By Representatives/Senators _____

Section 1. Title.

This Act may be known and cited as the “Partial-Birth Abortion Ban Act.”

Section 2. Legislative Findings and Purposes.

(a) The [Legislature] of the State of [Insert name of State] finds that:

- (1) Partial-birth abortion is a gruesome and inhumane procedure that is never medically necessary and, as such, should be prohibited.
- (2) In 2003, the 108th United States Congress passed the *Partial-Birth Abortion Ban Act of 2003* (18 U.S.C. §1531), and President George W. Bush signed it into law.
- (3) Later, on April 18, 2007, the U.S. Supreme Court upheld the *Partial-Birth Abortion Ban Act of 2003* (“the federal ban”) in *Gonzales v. Carhart*, 550 U.S. 124 (2007), specifically ruling that a ban on partial-birth abortion need not include a maternal “health” exception to be constitutional.
- (4) This Act’s language stems from and uses as its primary influence the language of the federal ban as upheld in *Gonzales v. Carhart*.
- (5) This Act—a state ban on partial-birth abortion—is needed to supplement the federal ban. Importantly, the federal ban was narrowly tailored to reach only those partial-birth abortion procedures that implicate Congress’ power to regulate interstate or foreign commerce. U.S. CONST. art. 1, § 8, cl. 3. Without this Act, partial-birth abortions performed, but not affecting these categories of commerce, are not prohibited under the federal ban.
- (6) Partial-birth abortions pose serious risks to women’s long-term health.
- (7) There is a substantial evidentiary record upon which the [Legislature] of the State of [Insert name of State] has based its conclusion that a maternal “health” exception is not constitutionality required in a state ban on partial-birth abortion.

- (8) Moreover, the medical evidence clearly supports the informed judgment of the State of [*Insert name of State*] that a partial-birth abortion is never medically necessary to preserve a woman's health and instead poses serious health risks to the woman.
- (9) Specifically, partial-birth abortion poses serious risks including, but not limited to: an increased risk of cervical incompetence, as a result of cervical dilation that makes 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, as a result of the physician blindly forcing a sharp instrument into the base of the preborn child's skull while he or she is lodged in the birth canal—an act which could result in severe bleeding and subsequent shock.
- (10) There is no credible medical evidence that partial-birth abortions are safer than other abortion procedures. No controlled studies of partial-birth abortion have been conducted nor have any comparative studies been conducted to demonstrate its safety and efficacy compared to other abortion methods. Furthermore, 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.
- (11) In light of this overwhelming evidence, the State of [*Insert name of State*] has a compelling interest in prohibiting partial-birth abortion. This interest is specifically implicated during a partial-birth abortion because labor is induced and the birth process is begun before an abortion is attempted or the child is actually aborted [*or killed*].
- (12) In fact, partial-birth abortion kills a child who is mere inches away from birth. Thus, the State of [*Insert name of State*] clearly has a heightened interest in protecting the life of the partially-born child.
- (13) The public's perception of the appropriate role of a physician during a child's birth [*or delivery*] is undermined by aborting a child in the manner that purposefully seeks to kill the child inches from birth [*or legal personhood*].

- (14) Partial-birth abortion is disturbingly similar to the killing of a newborn infant and blurs the legal and moral lines between infanticide and abortion. This Act reinforces that line at birth—while also preserving the integrity of the medical profession and promoting respect for human life.
- (15) The vast majority of infants killed during partial-birth abortions are alive until the very end of the procedure. Medical science has established that a preborn child can feel pain when subjected to painful stimuli like that inflicted during a partial-birth abortion procedure. Moreover, fetal pain experts believe that a preborn child’s perception of pain can be even more intense than that of newborn infants and older children subjected to the same stimuli.

(b) Based on the findings in subsection (a) of this Act, the [Legislature]’s purposes are to:

- (1) Conclusively establish that partial-birth abortion is never medically indicated to preserve the health of the mother and instead poses significant maternal health risks;
- (2) Clearly define the line between abortion and infanticide; and
- (3) Safeguard the role of a physician during childbirth.

Section 3. Definitions.

As used in this Act only:

(a) “**Medical facility**” means any public or private hospital, clinic, center, medical school, medical training institution, healthcare facility, physician’s office, infirmary, dispensary, ambulatory surgical treatment center, or other institution or location wherein medical care is provided to any person.

(b) “**Partial-birth abortion**” means an abortion in which the person performing the abortion:

- (1) Deliberately and intentionally vaginally delivers a 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

- (2) Performs the overt act, other than completion of delivery, which kills the partially delivered living fetus.

(c) “**Physician**” means 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 person legally authorized by the State to perform abortions; provided, however, that any person 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 Act.

Section 4. Prohibition.

A person shall not knowingly perform or attempt to perform a partial-birth abortion.

Section 5. Limitations.

No person shall perform or induce a partial-birth abortion on a viable fetus unless such person is a physician and has a documented referral from another physician not legally or financially affiliated with the physician performing or inducing the abortion and both physicians determine that the life of the mother 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.

Section 6. Reporting.

(a) If a physician determines in accordance with the provisions of Section 5 that a partial-birth abortion is necessary and performs a partial-birth abortion on the woman, the physician shall report such determination and the reasons for such determination in writing to the medical facility in which the abortion is performed for inclusion in the report of the medical facility to the *[Insert appropriate state department, department head, or regulatory body]*; or if the abortion is not performed in a medical facility, the physician shall report the reasons for such determination in writing to the *[Insert appropriate state department, department head, or regulatory body]* as part of the written report made by the physician to *[Insert appropriate state department, department head, or regulatory body]*. The physician shall retain a copy of the written reports required under this Section for not less than five (5) years.

(b) Failure to report under this Section does not subject the physician to criminal or civil penalties.

(c) Subsection (b) does not preclude sanctions, disciplinary action, or any other appropriate action by the *[Insert appropriate citation or reference to state Medical Board or other appropriate agency]*.

Section 7. Criminal Penalties.

- (a) Any person who intentionally or knowingly violates this Act is guilty of a *[Insert appropriate offense/penalty classification]*.
- (b) Any physician who intentionally or knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined not less than ten thousand dollars (\$10,000) nor more than one-hundred thousand dollars (\$100,000) under this Act, or be imprisoned *[at hard labor]* not less than one (1) year nor more than ten (10) years, or both.

Section 8. Civil Penalties.

- (a) 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 eighteen (18) years at the time of the abortion, the maternal grandparents of the fetus may in a civil action obtain appropriate relief, unless the pregnancy resulted from the plaintiff's criminal conduct or the plaintiff consented to the abortion.
- (b) Such relief shall include:
- (1) Money damages for all injuries, psychological and physical, occasioned by the violation of this Act; and

Section 9. Penalties for Ambulatory Health Care Facilities.

- (a) An ambulatory healthcare *[or surgical]* facility licensed pursuant to *[Insert reference(s) to appropriate state statute(s) or administrative regulation(s)]* in which the partial-birth abortion is performed in violation of this Act shall be subject to immediate revocation of its license by the *[Insert name of appropriate state department or agency]*.
- (b) An ambulatory healthcare *[or surgical]* facility licensed pursuant to *[Insert references to appropriate state statute(s) or administrative regulation(s)]* in which the partial-birth abortion is performed in violation of this Act shall be debarred from eligibility for all state funding for *[Insert number]* years and will be required to reimburse the state for funds from the calendar *[or fiscal]* year in which the partial-birth abortion was performed.

Section 10. Prosecutorial Exclusion.

A woman upon whom a partial-birth abortion is performed may not be prosecuted under this Act for a conspiracy to violate Section 4 of this Act, or for any other inchoate or completed offenses arising out of this Act.

Section 11. Construction.

- (a) Nothing in this Act shall be construed as creating or recognizing a right to abortion.
- (b) It is not the intention of this Act to make lawful an abortion that is currently unlawful.

Section 12. Severability.

Any provision of this Act held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as to give it the maximum effect permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event such provision shall be deemed severable herefrom and shall not affect the remainder hereof or the application of such provision to other persons not similarly situated or to other, dissimilar circumstances.

Section 13. Right of Intervention.

The [Legislature], by joint resolution, may appoint one or more of its members who sponsored or cosponsored this Act in his or her official capacity to intervene as a matter of right in any case in which the constitutionality of this law is challenged.

Section 14. Effective Date.

This Act shall take effect on [Insert date].

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