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House Bill 4109 (Substitute H-3 as passed by the House)  
House Bill 4110 (as passed by the House)  
Sponsor: Representative Kevin Daley (H.B. 4109)  
Representative Ben Glardon (H.B. 4110)  
House Committee: Families, Children, and Seniors  
Senate Committee: Judiciary

Date Completed: 9-26-11

## **CONTENT**

**House Bill 4109 (H-3) would add the "Partial-Birth Abortion Ban Act" to the Michigan Penal Code to do the following:**

- **Provide that a person who performed a partial-birth abortion would be guilty of a felony punishable by imprisonment for up to two years and/or a maximum fine of \$50,000.**
- **Make an exception for a partial-birth abortion that was necessary to save the mother's life.**
- **Provide that a woman who obtained a partial-birth abortion would not be guilty of a violation.**
- **Allow the mother's spouse or, if the mother were a minor, her parents, to bring a civil action against the person who performed a partial-birth abortion.**

**The bill also would include enacting section language regarding the Legislature's intent concerning construction and severability of the proposed Act.**

**House Bill 4110 would amend the Code of Criminal Procedure to include performing or assisting in a partial-birth abortion in the sentencing guidelines as a Class G felony against a person with a statutory maximum sentence of two years' imprisonment.**

House Bill 4110 is tie-barred to House Bill 4109. Both bills would take effect on January 1, 2012.

House Bill 4109 (H-3) is described in detail below.

### Penalty

Under the bill, except as otherwise provided, a physician, an individual performing an act, task, or function under the delegatory authority of a physician, or any other individual who was not a physician or not otherwise legally authorized to perform an abortion, who knowingly performed a partial-birth abortion and killed a human fetus would be guilty of a felony punishable by imprisonment for up to two years and/or a fine of up to \$50,000.

It would not be a violation if, in the physician's reasonable medical judgment, a partial-birth abortion were necessary to save the life of a mother whose life was endangered by a physical disorder, physical illness, or physical injury.

A woman who obtained or sought to obtain a partial-birth abortion would not be a conspirator to commit a violation of the proposed Act.

"Partial-birth abortion" would mean an abortion in which the physician, an individual acting under the delegatory authority of the physician, or any other individual performing the abortion

deliberately and intentionally vaginally delivers a living fetus until, in the case of a headfirst presentation, the entire fetal head is outside the body of the mother, or in the case of a 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 performs the overt act, other than completion of delivery, that kills the partially delivered living fetus.

"Physician" would mean an individual licensed by the State to engage in the practice of medicine or osteopathic medicine and surgery under the Public Health Code.

#### Civil Action by Spouse or Parent

The spouse of the mother, or, if she were younger than 18 at the time of the partial-birth abortion, either of her parents, could file a civil action against the physician or other individual who performed the procedure for a violation of the proposed Act unless the pregnancy were a result of the plaintiff's criminal conduct or the plaintiff consented to the procedure. A plaintiff who prevailed in a civil action could recover both of the following:

- Actual damages, including damages for emotional distress.
- Treble damages for the cost of the partial-birth abortion.

#### Construction & Severability

Enacting section 2 of the bill states, "Every provision in this amendatory act and every application of the provisions in this amendatory act are severable from each other. If any application of a provision in this amendatory act to any person or group of persons or circumstances is found by a court to be invalid, the remainder of this amendatory act and the application of the amendatory act's provisions to all other persons and circumstances may not be affected. All constitutionally valid applications of this amendatory act shall be severed from any applications that a court finds to be invalid, leaving the valid applications in force, because it is the legislature's intent and priority that the valid applications be allowed to stand alone. Even if a

reviewing court finds a provision of this amendatory act invalid in a large or substantial fraction of relevant cases, the remaining valid applications shall be severed and allowed to remain in force."

Enacting section 2 further states, "The provisions of this amendatory act shall be construed, as a matter of state law, to be enforceable up to but no further than the maximum possible extent consistent with federal constitutional requirements, even if that construction is not readily apparent, as such constructions are authorized only to the extent necessary to save the amendatory act from judicial invalidation. If any court determines that any provision of this amendatory act are unconstitutionally vague, it shall interpret this amendatory act, as a matter of state law, in a manner that avoids the vagueness problem while enforcing the amendatory act provision to the maximum possible extent consistent with federal constitutional requirements."

Proposed MCL 750.90h (H.B. 4109)  
MCL 777.16d (H.B. 4110)

#### **BACKGROUND**

##### *Roe v Wade* (410 U.S. 113)

In 1973, the U.S. Supreme Court held that a Texas law that criminalized abortions except those necessary to save the mother's life, without regard to pregnancy stage and without recognition of the other interests involved, violated the Due Process Clause of the Fourteenth Amendment. The Court found that the constitutional right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy...but that this right is not unqualified and must be considered against important state interests in regulation"; and, "a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision".

The Court concluded that, for the stage before the approximate end of the first trimester, the abortion decision and its

effectuation must be left to the medical judgment of the pregnant woman's attending physician. For the stage after the approximate end of the first trimester, the state, in promoting its interest in the health of the mother, may regulate the abortion procedure in ways that are reasonably related to maternal health. For the stage subsequent to viability, the state, in promoting its interest in the potentiality of human life, may regulate and even proscribe abortion except when it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

*Planned Parenthood of Southeastern Pennsylvania v Casey* (505 U.S. 833)

In this 1992 plurality opinion, which dealt with the issue of informed consent to abortion, the U.S. Supreme Court reaffirmed the essential holdings in *Roe* that: A woman has the right to terminate her pregnancy before fetal viability occurs without any undue interference from the state; a state has the power to restrict abortions after viability, if the law contains exceptions for a pregnancy that endangers the woman's life or health; and the state has a legitimate interest from the outset of a pregnancy in protecting the health of the woman and the potential life of the fetus that may become a child. The Court, however, also affirmed an earlier decision in *Webster v Reproductive Health Services* (492 U.S. 490) to reject the rigid trimester framework outlined in *Roe*, reasoning that that approach was incompatible with the state's interest in potential life throughout the pregnancy.

The plurality *Casey* opinion adopted an "undue burden" standard for evaluating a state's abortion restrictions and held that an undue burden exists when a provision of law has the purpose or effect of placing a "substantial obstacle" in the path of a woman seeking an abortion before fetal viability. Using this standard, the Court ruled that Pennsylvania's informed consent provisions--including a 24-hour waiting period and fetal descriptions--did not pose an undue burden on a woman's right to terminate a pregnancy, although the Court did reject a spousal notification requirement. In upholding major portions of Pennsylvania's statute, the Court overruled earlier informed consent decisions that, according to *Casey*, were inconsistent with

the acknowledgment in *Roe* of an important interest in potential life.

*Stenberg v Carhart* (530 U.S. 914)

In 2000, the U.S. Supreme Court addressed the constitutionality of Nebraska's ban on partial-birth abortion. The Court declined to revisit the established legal principle "that the Constitution offers basic protection to the woman's right to choose". Rather, it applied to the Nebraska law three other established principles to determine the constitutionality of the partial-birth abortion ban.

The three principles are: 1) Before viability, a woman has the right to choose termination of her pregnancy; 2) a law restricting abortion is unconstitutional if it imposes an undue burden on the woman's decision before fetal viability and that undue burden is "shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus"; and 3) "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother". Considering these principles, the Court held that the Nebraska statute was unconstitutional.

After reviewing various abortion procedures, the Court determined that Nebraska's law criminalizing partial-birth abortion violated the Constitution for at least two reasons. Quoting *Casey*, the Court concluded that "the law lacks any exception 'for the preservation of the...health of the mother'" and that "it 'imposes an undue burden on a woman's ability' to choose a D&E abortion, thereby unduly burdening the right to choose abortion itself". (The Court identified dilation and evacuation, or D&E, as the most commonly used procedure in second trimester abortions.) The Court also determined that the Nebraska statute did not further an interest in the potential human life of the fetus because it would not save the fetus from destruction, but would regulate only a method of performing abortion.

## Federal Prohibition

In 2003, Congress passed and President George W. Bush signed into law the Partial-Birth Abortion Ban Act (18 USC 1531). The Act prohibits a physician, acting in or affecting interstate or foreign commerce, from knowingly performing a partial-birth abortion, thereby killing a human fetus. The prohibition "does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself". The Act prescribes a criminal penalty of a fine or up to two years' imprisonment and includes provisions for civil actions.

The Act defines "partial-birth abortion" as an abortion in which the person performing the procedure "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."

## Gonzales v Carhart (550 U.S. 124)

In April 2007, the U.S. Supreme Court overturned lower courts and upheld the Federal Partial-Birth Abortion Ban Act. The Court stated, "Compared to the state statute at issue in *Stenberg*, the Act is more specific concerning the instances to which it applies and in this respect more precise in its coverage." Since the prohibited procedure involves delivery of a fetus to certain "anatomical landmarks" (i.e., the presentation of the head or, in a breech birth, the presentation of the trunk past the navel), the Court held that the Act affords doctors a reasonable opportunity to know what is prohibited: "Unlike the statutory language in *Stenberg* that prohibited delivery of a 'substantial portion' of the fetus—where a doctor might question how much of the fetus is a substantial portion—the Act defines the line between potentially criminal conduct on the one hand and lawful abortion on the other."

The Court also discussed the Act's lack of a health exception, but held, "The Act is not invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve a woman's health, given the availability of other abortion procedures that are considered to be safe alternatives." The Court concluded, "The medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis to conclude...that the Act does not impose an undue burden."

## Michigan Law

Legal Birth Definition Act. In 2003, the Legislature approved Senate Bill 395, which proposed the Legal Birth Definition Act, and sent the bill to Governor Granholm, who vetoed the measure. The Act then was proposed by initiative petition and passed into law by the Legislature, without the Governor's signature, becoming Public Act 135 of 2004 (as allowed under Article 2, Section 9 of the State Constitution). While the Act remains on the books, it has been found unconstitutional.

The Legal Birth Definition Act does not refer directly to any abortion procedure, but provides that a "perinate" is considered a legally born person for all purposes under the law. The Act defines "perinate" as "a live human being at any point after which any anatomical part of the human being is known [sic] to have passed beyond the plane of the vaginal introitus until the point of complete expulsion or extraction from the mother's body". "Live" means evidence of breathing, evidence of spontaneous movement, or umbilical cord pulsation. "Anatomical part" means any portion of the anatomy of a human being that has not been severed from the body, but not including the umbilical cord or placenta.

The Act includes an immunity provision for performing any procedure that results in injury or death of a perinate if the perinate is being expelled from the mother's body as a result of spontaneous abortion; or if, in the physician's reasonable medical judgment and in compliance with the applicable standard of practice and care, the procedure was necessary either 1) to save the life of the mother and every reasonable effort was made to preserve the life of both the mother and the perinate, or 2) to avert an imminent threat to the physical health of the mother,

and any harm to the perinate was incidental to treating the mother and not a known or intended result of the procedure performed.

In June 2007, the U.S. Sixth Circuit Court of Appeals affirmed the ruling of the U.S. District Court that the Legal Birth Definition Act is unconstitutional, in *Northland Family Planning Clinic v Cox* (487 F.3d 323). The Court of Appeals found that "Michigan's law fails to comply with the explicit limitations that the Supreme Court has established for statutes regulating abortion".

The Court pointed out that, unlike the Federal prohibition upheld in *Gonzales*, the Michigan statute does not rely on anatomical landmarks, but essentially would prohibit any abortion procedure in which any anatomical part of a live fetus is removed from the mother's body. The Court opined that this "necessarily means it applies to D&E procedures" and also could apply to other protected abortion procedures. The Court stated, "*Gonzales* left undisturbed the holding from *Stenberg* that a prohibition on D&E amounts to an undue burden on a woman's right to terminate her pregnancy". "[I]t is apparent that the Michigan statute would prohibit D&E, and under the framework of *Stenberg* and *Gonzales*, impose an unconstitutional undue burden."

Regarding the health exception in the Michigan statute, the Court of Appeals found that it could affirm the District Court's ruling that the Act failed to protect the health of the woman "without addressing the complicated implications of *Gonzales*". The Court of Appeals stated, "The bottom line is that the life and health exceptions are *exceptions* to an unconstitutional and unfixable general prohibition on certain abortion procedures" (emphasis in original).

On January 7, 2008, the United States Supreme Court declined to review the decision of the U.S. Court of Appeals.

Partial-Birth Abortion Ban Act. In 2008, the Legislature approved Senate Bill 776, which proposed the "Partial-Birth Abortion Ban Act". Governor Granholm vetoed the measure, stating, "Medical professionals oppose this legislation because it does not contain a valid exception for the health of the mother. They believe that medical decisions of this nature should be made by

women and their doctors, not politicians. I agree."

Legislative Analyst: Patrick Affholter

### **FISCAL IMPACT**

The bills would have an indeterminate fiscal impact on State and local government. There are no data to indicate how many offenders would be convicted of the proposed offense. An offender convicted of the Class G offense under the bills would receive a sentencing guidelines minimum sentence range of 0-3 months to 7-23 months, with a maximum sentence of two years. Local governments would incur the costs of incarceration in local facilities, which vary by county. The State would incur the cost of felony probation at an annual average cost of \$2,500, as well as the cost of incarceration in a State facility at an average annual cost of \$35,000. Additional penal fine revenue would benefit public libraries.

Fiscal Analyst: Matthew Grabowski

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.