

ASSEMBLY BILL NO. 2409
(First Reprint)
(Corrected Copy)

To the General Assembly:

Pursuant to Article V, Section I, Paragraph 14 of the New Jersey Constitution, I am returning Assembly Bill No. 2409 (First Reprint) (Corrected Copy), the "Partial-Birth Abortion Ban Act of 1997," with my recommendation that the bill be amended to prohibit all post-viability abortions, regardless of the procedure employed, except when the life of the mother is at stake or when there is a significant risk of serious physical injury or impairment to her. This recommendation is based upon advice from the Attorney General, the Office of Legislative Services, and my Chief Counsel that the bill in its current form is unconstitutional.

A. Summary of the Bill

This bill, known as the "Partial Birth Abortion Ban Act of 1997," purports to prohibit the performance at any time during a pregnancy of a medical procedure, which the bill calls "partial-birth abortion." The bill defines "partial-birth abortion" as an abortion "in which the person performing the abortion partially vaginally delivers a living human fetus before killing the fetus and completing the delivery." "Vaginally delivering," in turn, means "the deliberate and intentional delivering into the vagina of a living fetus, or a substantial portion thereof," for the purpose of performing a procedure that will kill the fetus. The bill provides severe civil penalties for physicians and health care professionals who perform "partial-birth abortions," and provides for immunity from civil or criminal liability for women

upon whom such an abortion is performed. Finally, the bill provides that such abortions may be performed if necessary to save the life of the mother when her life is endangered by a physical disorder, illness or injury.

B. Analysis

The debate over "partial-birth abortion" is the latest chapter in one of the most divisive controversies in our history: the issue of the extent to which government should regulate a woman's decisions with respect to pregnancy. Proponents of this bill have presented compelling evidence to support their opposition to "partial-birth abortion." I have listened to their arguments, heard their evidence, and understand the intense passion that those seeking to outlaw this procedure feel. I respect their courage in following the dictates of their consciences.

The procedure commonly known as "partial-birth abortion" is clearly horrific. I oppose it. No woman who has carried a child in her womb could fail to appreciate the value of a quickening life; no mother could fail to feel diminished when pregnancy is ended, especially in this manner.

It simply does not follow, however, as a matter of constitutional law or personal conscience, that opposition to abortion requires an extension of governmental oversight into the most intimate sanctum of human life. Limiting government's reach into people's everyday lives is a cornerstone of our state and federal constitutions, and has been a guiding principle of my public career and administration; we discard that principle in this most personal of contexts at our peril. Furthermore, I am firmly opposed to politicians

substituting their judgment for a medical decision best left to a physician.

I am advised by the Office of the Attorney General, the Office of Legislative Services, and my Chief Counsel that the "Partial-Birth Abortion Ban Act of 1997" is unconstitutional in several respects. First, the conduct that the bill purports to prohibit is defined so broadly as to sweep within its ambit not a single clearly identified procedure but, potentially, several commonly practiced medical procedures. Because the Act imposes severe penalties on physicians or health care professionals who violate it (immediate loss of license and \$25,000 fine per violation), those physicians or health care professionals are entitled as a matter of due process under the federal and state constitutions to adequate notice of which conduct will trigger the penalties. *State v. Maldonado*, 137 N.J.536, 562 (1994); *Connally v. General Const. Co.*, 269 U.S. 385 (1926). The Act fails to provide such notice.

Second, because the ban applies throughout pregnancy, and severely restricts medical options by applying to several distinct procedures, it is unconstitutional under United States Supreme Court precedent narrowly circumscribing the authority of the State to "place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Casey v. Planned Parenthood of Southeastern Pennsylvania*, 505 U.S. 833, 846 (1992).

Third, because the sole exception to the ban is for cases in which a partial-birth abortion is necessary "to save the life of the mother," the ban violates settled precedent holding that even when a fetus is viable, the state must permit abortions that are "necessary, in appropriate medical judgment, for the preservation of the life or health of

the mother." *Id.* At 879 (quoting *Roe v. Wade*, 410 U.S. 113, 164-65 (1973)). This bill makes no allowance for cases in which the proscribed procedure(s) are medically indicated to preserve maternal health; accordingly, it is unconstitutional.

As a matter of public policy, moreover, I believe that the bill's purported focus on a single method of abortion is misplaced. First, the difficulty in defining the procedure for purposes of this bill illustrates the futility of attempting to substitute a legislative hearing room for a physician's examining room. To the extent that the definition purports to reach a single procedure, it fails; to the extent that the definition is intended to reach several procedures, and to apply throughout pregnancy, it is a pretext for a broader and clearly unconstitutional agenda. More important, by focusing on a single method of abortion, the bill shifts attention away from the fundamental issue raised by its proponents: whether this State should regulate late-term abortions.

C. Recommended Action

A woman's right to determine the course of her pregnancy is not absolute. The Supreme Court has recognized that the State may prohibit abortion once a fetus is "viable," i.e., "there is a realistic possibility of maintaining and nourishing a life outside the womb," *Casey*, 505 U.S. at 870, provided that "the law contains exceptions for pregnancies which endanger the woman's life or health." *Id.* at 846.

I am persuaded that New Jersey law should conform to these constitutional parameters. Once a pregnancy has progressed to such a point-that there is "a realistic possibility of maintaining and nourishing a life outside the womb," common sense

counsels what constitutional doctrine allows: protection of that potential life. At the same time, a pregnant woman is more than a mere birthing vessel; she is a human being, whose liberty, life and health also deserve protection.

Accordingly, I recommend that the bill be amended to ban all abortions once a fetus has attained viability, except those performed to protect the life or health of the mother. The determination of both viability and the necessity of the medical procedure is to be made by the attending physician, in accordance with regulations to be promulgated by the Commissioner of Health and Senior Services. I further recommend that "health" be defined to refer only to situations where there is "a significant risk of serious physical injury or impairment" to the mother.

This recommendation strikes the appropriate constitutional balance. It ends the misguided debate over ill-defined medical procedures by addressing the core concern: unregulated late-term abortions. By prohibiting such abortions except in cases implicating the mother's life and health, it allows governmental oversight only where such oversight is appropriate: to protect a potentially independent but otherwise helpless life. At the same time, by refusing to intrude in any way on a woman's pre-viability decision with respect to her pregnancy, it commits the decision in the first instance to her conscience. Under our Constitution, that is where the fundamental choice should be made.

I appeal, finally, to the good will of individuals on both sides of this issue to join together to prevent unwanted pregnancies. The only way to resolve this issue is to avoid having to face it. We must remind ourselves, and teach our children, to be guided in our lives, as in our politics, not by unthinking and transitory alliances, but by love. Working

together, we can make it less likely that any woman will confront the heart-wrenching choice that ending a pregnancy brings.

Therefore, I herewith return Assembly Bill No. 2409 (First Reprint) and recommend that it be amended as follows:

- | | |
|---------------------------------|---|
| Page 1, Title, Line 1: | Delete "partial-birth" insert "post-viability" |
| Page 1, Section 1, Line 7: | Delete "Partial-Birth" insert "Post-Viability" |
| Page 1, Section 2, Lines 12-13: | Delete "a partial-birth" insert "an"; delete "kill" insert "terminate"; after "a" insert "viable"; after "fetus." insert "For the purpose of this section, prior to the performance of an abortion, determination of viability shall be made by a physician based upon the physician's own best medical judgment. The physician shall determine whether, based on the particular facts of a woman's pregnancy that are known to the physician, and in light of medical technology and information reasonably available to the the physician, there is a realistic possibility of maintaining and nourishing a life outside of the womb, with or without temporary, artificial life-sustaining support." |
| Page 1, Section 2, Line 15: | Delete "a partial-birth" insert "an"; after "of" insert "or avoid a significant risk of serious physical injury or impairment" |

to"

Page 1, Section 2, Line 16:

Delete "whose life is endangered by a physical disorder, illness or injury" insert "when no other medical procedure would suffice for that purpose. Not later than 60 days after the days of enactment of this act, the Commissioner of Health and Senior Services shall establish regulations requiring a physician who performs an abortion of a viable fetus to certify that, in the best medical judgment of the physician, the abortion was necessary to save the life of or to avoid a significant risk of serious physical injury or impairment to the mother, and to describe the medical indications supporting the physician's judgment. Such regulations shall also include provisions to ensure the confidentiality of all information submitted pursuant to a certification required under this section."

Page 1, Section 2, Lines 19-20:

After "performs" insert "or assists in"; delete "a partial-birth" insert "an"

Page 1, Section 2, Line 21:

After "his" insert "or her"

Page 2, Section 2, Line 3:

Delete "a partial-birth" insert "an"

Page 2, Section 2, Line 5:

Delete "revocation" insert "review"

Page 2, Section 2, Line 6:
to penalties, including, but

After "Services" insert "and may be subject not limited to, revocation of its license"

Page 2, Section 2, Line 7-16:

Delete in entirety

Page 2, Section 3, Line 18 :

Delete "a partial-birth" insert "an"

Page 2, Section 4, Line 22:

Delete "immediately" insert "60 days after enactment"

Respectfully,

/s/ Christine Todd Whitman
GOVERNOR