

# HOUSE BILL ANALYSIS

## HB 1031

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**Title:** An act relating to limiting late-term and partial-birth abortions.

**Brief Description:** Limiting late-term and partial-birth abortions.

**Sponsors:** Representatives Sterk, Mulliken, Koster, Johnson, Thompson, D. Sommers, Boldt, Sheahan, Sherstad, Carrell, Bush, Smith, Chandler, D. Schmidt and Backlund.

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### HOUSE COMMITTEE ON LAW & JUSTICE

**Staff:** Bill Perry (786-7123).

**Background:** Abortion has been the subject of great debate and considerable legislative and judicial activity over the past few decades. Since 1973, both the United States and Washington State Supreme Courts have spoken on the subject, as have the federal Congress, the State Legislature, and the people of the state through the initiative process.

Particular attention has been paid in recent years to abortions performed late in a pregnancy or by a procedure involving partial delivery of the fetus.

FEDERAL COURT DECISIONS. The U.S. Supreme Court held in Roe v. Wade, 410 U.S. 113 (1973), that a woman could choose, in consultation with her doctor, whether or not to have an abortion during the first trimester of her pregnancy. State interference with such a decision was not allowed. The Court held, however, that during the second trimester of a pregnancy, state regulation was permissible at least to the extent of protecting the health of the pregnant woman. The Court further held that during the third trimester, or after "viability," state prohibition of an abortion was permissible, except to the extent that an abortion was necessary to preserve the health or life of the woman.

In 1992, in Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791 (1992), the Court significantly altered its holding in Roe. The Court did not overturn the basic premise of Roe that a woman has a constitutionally protected right to choose whether or not to have an abortion, although four of the Court's justices would have done so. The Court also retained "viability" as the critical point beyond which a state can prohibit abortions. However, the Court significantly expanded the authority of states to regulate abortions prior to viability. Under Casey, the test to be

employed in judging the constitutionality of a state law is whether or not the law is an "undue burden" on a woman's right.

This test prohibits state legislation that has the primary purpose of placing a substantial obstacle in the way of a woman seeking an abortion of a nonviable fetus. Permissible purposes include protection of a woman's health and expressing a preference for childbirth over abortion. The undue burden test prohibits interference with a woman's right to make the ultimate decision about abortion. The test does not prohibit laws that have incidental effects on the expense or difficulty of obtaining an abortion.

The Court has dealt to some extent with the issue of legislative attempts to proscribe particular abortion procedures. In Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976), the Court declared unconstitutional a state law banning a certain abortion procedure (saline amniocentesis after the 12th week of pregnancy). The court declared the law arbitrary in light of the fact that the method banned was in fact the most commonly used procedure and its ban would require the use of potentially more dangerous procedures in its place.

FEDERAL LEGISLATION. Recently, Congress passed legislation to generally prohibit "partial-birth" abortions. However, this legislation was vetoed by the President.

STATE COURT DECISIONS. Following Roe v. Wade, the state supreme court declared a parental consent requirement in Washington law unconstitutional. In State v. Koome, 84 Wn.2d 901 (1975), the court expressly relied on federal constitutional provisions in striking down the parental consent statute. The court has not addressed the question of whether, or to what extent, independent state constitutional provisions might be used to analyze various issues related to abortion. To date, the court has not considered a case related to regulation or prohibition of particular methods of performing abortions.

STATE LEGISLATION. In 1991, the voters of the state, by a vote of 756,653 to 752,354, approved Initiative 120 which codified the basic holding of Roe v. Wade. The initiative provides that "every woman has the fundamental right to choose or refuse to have an abortion," except as specifically limited by the terms of the initiative. The initiative further declares that, except as specifically permitted by the initiative, "the state shall not deny or interfere with a woman's fundamental right to choose or refuse to have an abortion prior to viability of the fetus."

The initiative prohibits interference with a woman's right prior to "viability," which is defined as the point in a pregnancy when "there is reasonable likelihood of the fetus's sustained survival outside the uterus without the application of extraordinary medical measures." Pregnancy is defined as beginning with the "implantation of an embryo."

The initiative also prohibits interference with a woman's right to choose an abortion "to protect her life or health." It is a class C felony to perform an abortion on a viable fetus for any reason other than the protection of a woman's life or health.

**Summary of Bill:** "Late-term" and "partial-birth" abortions are prohibited. Illegal performance of such an abortion is a class C felony.

With respect to late-term abortions, the crime is committed by one who intentionally performs an abortion with knowledge that the pregnancy is in the third trimester or that the fetus is viable. It is not a crime to perform such an abortion if the abortion is necessary to prevent the death of either the pregnant woman or her unborn child and every reasonable effort is made to preserve that life. "Viability" is defined as "reasonable likelihood of sustained survival of the fetus outside the womb, with or without artificial support."

With respect to partial-birth abortions, the crime is committed by one who intentionally "partially vaginally delivers a living fetus before terminating the life of the fetus and completing the delivery." It is not a crime to perform such an abortion with a reasonable belief that it is necessary to save the life of the woman and that no other abortion procedure would save her life. A civil cause of action is created against one who illegally performs a partial-birth abortion. Such an action may be brought by the mother or father of the fetus, or, in the case of a mother who is a minor, by the maternal grandparents of the fetus. Damages may be recovered for psychological and physical injuries, and "statutory" damages of three times the cost of the abortion may be recovered even if there was consent for the abortion. A woman upon whom a partial-birth abortion has been performed may not be prosecuted.

**Fiscal Note:** Not requested.

**Effective Date:** The bill contains an emergency clause and takes effect immediately.

Office of Program Research