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11 **Pro hac vice* motion pending

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

16 PLANNED PARENTHOOD FEDERATION OF
17 AMERICA, INC. and PLANNED
PARENTHOOD GOLDEN GATE,
18 Plaintiffs,
19 v.
20 JOHN ASHCROFT, Attorney General of the
United States, in his official capacity,
21 Defendant.
22

Civil Action No.
COMPLAINT

23 Plaintiffs, by and through their attorneys, bring this complaint against the above-
24 named Defendant, his employees, agents, and successors in office, and in support thereof state
25 the following:
26

1 **I. INTRODUCTORY STATEMENT**

2 1. This is a constitutional challenge to S.3, the “Partial-Birth Abortion Ban Act of
3 2003” (to be codified at 18 U.S.C. § 1531) [hereinafter “the Act”]. The Act passed the House
4 and the Senate and was sent to the President for signature. It will take effect at 12:01 a.m. on the
5 day after it is signed. President Bush has repeatedly made clear his intention to sign this bill into
6 law. A copy of the Act is attached as Exhibit A.

7 2. Plaintiffs seek declaratory and injunctive relief against the Act, which bans what
8 the Act calls “partial-birth abortion.” Those physicians who provide banned abortions risk
9 criminal penalties and civil liability. The Act must be enjoined and declared unconstitutional
10 because it suffers from the identical two constitutional flaws as the Nebraska statute banning so-
11 called “partial-birth abortion” that was struck down by the United States Supreme Court in
12 *Stenberg v. Carhart*, 530 U.S. 914 (2000).

13 3. First, in contravention of the Supreme Court’s clear holding, the Act bans
14 abortion procedures without providing any exception for when such procedures are necessary or
15 appropriate for the pregnant woman’s health and without providing an adequate exception to
16 protect women’s lives. The Act thus deprives physicians of the discretion they need to make
17 appropriate medical judgments regarding which abortion procedure to use, and requires
18 physicians to use methods of abortion that impose unnecessary health risks upon patients.

19 4. Second, the term “partial-birth abortion,” which is not a recognized medical term,
20 is defined so broadly in the Act as to chill physicians from providing the safest and most
21 common methods of abortion used in the second trimester of pregnancy prior to viability. The
22 Act thus imposes an “undue burden” on the right to obtain previability abortions. Alternatively,
23 the Act is so vague that it fails to give physicians fair warning of which abortion procedures are
24 prohibited.

25
26

1 5. For these reasons, the Act violates the rights of Plaintiffs, their employees, their
2 agents, and their patients to privacy and due process guaranteed under the Fifth Amendment of
3 the United States Constitution.

4 **II. JURISDICTION AND VENUE**

5 6. Jurisdiction is conferred on this Court by 28 U.S.C. § 1331.

6 7. Plaintiffs' claim for declaratory and injunctive relief is authorized by 28 U.S.C.
7 §§ 2201 and 2202, by Rules 57 and 65 of the Federal Rules of Civil Procedure, and by the
8 general legal and equitable powers of this Court.

9 8. Venue is appropriate under 28 U.S.C. § 1391(e) because administrative offices
10 and healthcare facilities of Plaintiffs Planned Parenthood Golden Gate (PPGG) are located in this
11 district, and PPGG provides abortions that may be banned under the Act in this district. Plaintiff
12 Planned Parenthood Federation of America (PPFA) has a national office located in this district.
13 Therefore, a substantial part of the events or omissions giving rise to the Plaintiffs' claims occur
14 in this district.

15 **III. PARTIES**

16 **A. Plaintiffs**

17 9. Plaintiff PPFA is a not-for-profit corporation organized under the laws of New
18 York. One of PPFA's national offices is located in San Francisco, California. PPFA is the
19 leading national voluntary health organization in the field of reproductive health care. PPFA has
20 125 member-affiliates in 49 states and the District of Columbia. Cumulatively, Planned
21 Parenthood's member-affiliates serve over 2.5 million patients per year. Some Planned
22 Parenthood member-affiliates provide second-trimester abortions that fall within the
23 proscriptions of the Act, including dilation and evacuation (D&E) abortions, which are the most
24 common method for performing abortions in the second-trimester of pregnancy. These Planned
25 Parenthood member-affiliates reasonably fear that if they continue to provide second-trimester
26 abortions, they and their employees and agents will risk criminal prosecution and civil liability

1 under the Act. Some Planned Parenthood member-affiliates train medical residents in the
2 provision of second-trimester abortions. These member-affiliates reasonably fear that if they
3 continue to train residents in the provision of second-trimester abortions, they and their
4 employees and agents, and the medical residents and their faculty supervisors, will risk criminal
5 prosecution and civil liability under the Act. PPFA sues on its own behalf, on behalf of its
6 member-affiliates that provide second-trimester abortions, on behalf of all current and future
7 physicians, medical residents and their faculty supervisors, and all member-affiliate employees,
8 staff, servants, officers, and agents who perform, participate or assist in the performance of,
9 supervise, and/or train in the provision of, second-trimester abortion services at Planned
10 Parenthood member-affiliates and/or on Planned Parenthood patients, and who are at risk of
11 criminal prosecution and civil lawsuits under the Act, and on behalf of patients seeking abortions
12 at Planned Parenthood member-affiliates nationwide.

13 10. Plaintiff PPGG is a health care provider that provides clinical, educational, and
14 counseling services to men and women at 7 health care centers in the Northern Bay Area. PPGG
15 provides a full range of reproductive health services, including: pregnancy diagnosis and
16 counseling; contraceptive counseling; provision of all methods of contraception; HIV/AIDS
17 testing and counseling; testing, diagnosis, and treatment of sexually transmitted infections;
18 support services for pregnant women; cancer screening for cervical and breast cancer;
19 colposcopy and cryosurgery; and abortion services through 18 weeks of pregnancy as measured
20 from the first day of the woman's last menstrual period (LMP), including D&E abortions. PPGG
21 also provides primary care services. PPGG employs and/or contracts with physicians who
22 perform second-trimester abortion procedures that may fall within the proscriptions of the Act,
23 including D&E abortions. PPGG and its employees, staff, servants, and agents reasonably fear
24 that if they continue to provide second-trimester abortion procedures, they will suffer criminal
25 prosecution and civil lawsuits under the Act. PPGG sues on its own behalf, on behalf of its
26 current and future physicians, medical residents and their faculty supervisors, and all PPGG

1 employees, staff, servants, officers, and agents who perform, participate or assist in the
2 performance of, supervise, and/or train in the provision of, second-trimester abortion services at
3 PPGG facilities and/or on PPGG patients, and who are at risk of criminal prosecution and civil
4 lawsuits under the Act, and on behalf of its patients.

5 **B. Defendant**

6 11. Defendant John Ashcroft is the Attorney General of the United States and heads
7 the United States Department of Justice, which is the agency of the United States government
8 responsible for enforcement of federal laws, including the Act. Defendant Ashcroft is sued in his
9 official capacity, as are his successors.

10 **IV. THE STATUTORY FRAMEWORK**

11 12. The Act makes it a crime for any physician, “in or affecting interstate or foreign
12 commerce,” to “knowingly perform[] a partial-birth abortion.” 18 U.S.C. § 1531(a). A “partial-
13 birth abortion” is defined as:

14 an abortion in which the person performing the abortion --

15 (A) deliberately and intentionally vaginally delivers a living fetus
16 until, in the case of a head-first presentation, the entire fetal head is
17 outside the body of the mother, or, in the case of breech
18 presentation, any part of the fetal trunk past the navel is outside the
19 body of the mother, for the purpose of performing an overt act that
20 the person knows will kill the partially delivered living fetus; and

21 (B) performs the overt act, other than completion of delivery, that
22 kills the partially delivered living fetus

23 18 U.S.C. § 1531(b)(1). This prohibition applies throughout pregnancy, regardless of fetal
24 viability.

25 13. The Act contains a single limited exception. Only where a so-called partial-birth
26 abortion “is necessary to save the life of a mother whose life is endangered by a physical
disorder, physical illness, or physical injury” is the Act inapplicable. 18 U.S.C. § 1531(a). The
exception does not appear to apply to the Act’s civil penalties.

1 14. Violation of the Act is punishable by up to two years imprisonment or a fine, or
2 both. 18 U.S.C. § 1531(a).

3 15. In addition to criminal penalties, the Act provides for civil lawsuits. It allows the
4 woman’s husband, if she is married, or her parents, if she is under 18 years of age, to bring a
5 civil action against any physician who allegedly performs a so-called “partial-birth abortion.”
6 18 U.S.C. § 1531(c)(1). The plaintiff in such a lawsuit may seek, *inter alia*, money damages for
7 “all injuries, psychological and physical,” resulting from the so-called “partial-birth abortion.”
8 18 U.S.C. § 1531(c)(2). A person whose criminal conduct caused the pregnancy or a person who
9 consents to the abortion cannot be a plaintiff in such a civil action. 18 U.S.C. § 1531(c)(1). This
10 provision thus operates as a *de facto* spousal and/or parental consent requirement for second-
11 trimester abortions.

12 16. Pursuant to federal law establishing accessory and accomplice liability, Planned
13 Parenthood member-affiliates, and employees, staff, servants, officers, or agents of member-
14 affiliates that assist in the performance of abortions or supervise abortions, and/or medical
15 residents and their faculty supervisors that are training in the provision of abortions at Planned
16 Parenthood member-affiliates, could be prosecuted and/or sued in a civil action under the Act for
17 any abortion performed at a Planned Parenthood member-affiliate and/or on a Planned
18 Parenthood patient that is deemed to violate the Act.

19 **V. THE EFFECTS OF THE ACT**

20 **A. Effect on Women’s Health**

21 17. Women seek abortions for a variety of deeply personal reasons, including the
22 inability or hardship of raising a child, the fact that the pregnancy results from rape or incest,
23 because continuing the pregnancy threatens their lives and/or health, or because they are carrying
24 a fetus with congenital anomalies. For all these women, the inability to obtain an abortion due to
25 the Act would be devastating.

1 18. The effect of the Act on women seeking later abortions would be particularly
2 tragic. Although only about 12% of abortions performed nationwide occur in the second
3 trimester of pregnancy, women seeking these abortions are frequently in difficult life
4 circumstances. For example, women carrying fetuses with serious abnormalities such as
5 anencephaly (absence of a brain) or trisomies 13 and 18 (chromosomal abnormalities that cause
6 multiple disabilities and mental retardation) are forced to seek abortions in the second trimester
7 because the diagnosis of the abnormalities is not possible, or much more difficult, until then. In
8 addition, women may be seeking abortions to avert a risk to their health, which may not have
9 arisen or become apparent until the second trimester.

10 19. Women face other hurdles that may delay their ability to seek an abortion. For
11 example, a woman may have been unable to raise the funds for the abortion earlier in pregnancy.
12 Many women must travel long distances for an abortion due to the severe shortage of abortion
13 providers. Arranging for an abortion in a distant city may be time-consuming. Many women
14 delay having abortions due to the difficulty in taking time off work and/or arranging for child
15 care. A disproportionate number of women seeking second trimester abortions are teenagers,
16 who do not recognize the signs of pregnancy, or ignore or deny them, or are delayed by lack of
17 funds or reluctance to involve their parents.

18 20. The sole exception to the Act's ban is ineffective to protect women's life and
19 health. The exception permits a physician to perform a so-called "partial-birth abortion" only
20 when it "is necessary to save the life of a mother whose life is endangered by a physical disorder,
21 physical illness, or physical injury." 18 U.S.C. § 1531(a). The flaws in this exception are
22 several. First, the Act fails to allow a banned abortion when the woman's health is endangered
23 by the pregnancy but the physician cannot certify that her life is threatened. For example, the
24 condition of a woman with heart disease or diabetes may deteriorate during a pregnancy to the
25 point where, if the pregnancy is allowed to progress to term, she may suffer permanent cardiac or
26 kidney impairment, yet she might survive. In such circumstances, an abortion may be warranted

1 to save a woman’s health, although her life is not at risk. But the Act does not permit a banned
2 procedure in this situation. The Act, therefore, imposes severe criminal penalties on a physician
3 who acts according to his or her best medical judgment.

4 21. Second, the Act does not permit a banned procedure where, regardless of the
5 woman’s health status, in the best medical judgment of the physician, that procedure would be
6 the safest or most medically appropriate for a particular patient. It may, therefore, force women
7 to undergo riskier procedures. It thus fails to protect the health of women seeking abortions.

8 22. Third, the Act does not even adequately protect women’s lives because it may be
9 read as allowing use of a banned procedure only when the so-called “partial-birth abortion” is
10 literally “necessary” to save a woman’s life, and thus procedures that are not strictly “necessary,”
11 because another – albeit riskier – abortion procedure (such as hysterotomy or hysterectomy) is
12 available, would be banned.

13 23. Fourth, the inadequacy of the exception is exacerbated by its failure to provide
14 any mens rea requirement for the finding that a “partial-birth abortion” is “necessary” to save the
15 pregnant woman’s life. Given the “is necessary” standard, a physician who relies on his or her
16 best medical judgment that an abortion is necessary for the woman’s life may face severe
17 criminal penalties if other physicians disagree about the necessity of the procedure. The lack of
18 a mens rea requirement is likely to chill the provision of lifesaving health care.

19 24. Even if the Act bans only D&E abortions in which the fetus remains intact or
20 largely intact when it is extracted from the uterus (sometimes referred to as intact D&E or
21 dilation and extraction [“D&X”] abortions), an adequate life and health exception is necessary.
22 This is because such abortions may be the safest for some women in some circumstances.

23 **B. Effect on Women’s Access to Abortion and other Medical**
24 **Services**

25 25. The actions that the Act defines as constituting a “partial-birth abortion” could
26 occur in any D&E abortion, including but not limited to intact D&E abortions, as well as in any

1 induction abortion. (As used in this complaint, the term “D&E” includes “intact D&Es,” and the
2 term “intact D&E” is interchangeable with the term “D&X.”) This is because:

3 (a) in all D&E or induction abortions, the person performing the abortion
4 “deliberately and intentionally vaginally delivers a . . . fetus,” 18 U.S.C. §1531(b)(1)(A), and in
5 many instances, the fetus is “living” when that occurs;

6 (b) in any D&E or induction abortion, the fetus, while still “living,” may
7 emerge until “in the case of a head-first presentation, the entire fetal head is outside the body of
8 the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is
9 outside the body of the mother,” *id.*;

10 (c) in many instances – whether the abortion is a D&E or induction procedure
11 – after the fetus has emerged to the point that the Act specifies, the physician may “perform[] an
12 overt act,” *id.*, short of completing the delivery, that the physician knows may result in fetal
13 demise, and then will complete the procedure. This “overt act” (regardless of whether the
14 procedure is a D&E or induction abortion) could involve: collapsing the calvarium (fetal skull)
15 to enable it to be brought through the cervical os (opening), cutting the umbilical cord, or
16 disarticulating a piece of the fetus; and

17 (d) the physician’s “purpose,” *id.*, in performing any abortion procedure –
18 whether D&E, intact D&E or induction – is not to perform any particular act. Rather, the
19 purpose in any abortion is the same: to complete the delivery as safely and quickly as possible.
20 The “purpose” language therefore does not limit the Act’s reach.

21 26. While not all D&E or induction abortions will proceed in a manner that violates
22 the Act, physicians cannot know or predict in advance which abortions will so proceed.
23 Accordingly, performing any D&E or induction abortion places doctors at risk of violating the
24 Act.

25 27. Together, D&E and induction abortions account for more than 95% of pre-
26 viability abortions performed in the second trimester of pregnancy.

1 28. If neither D&E nor induction abortions were available, the only remaining
2 abortion option for women in the second trimester of pregnancy would be hysterotomy or
3 hysterectomy. Hysterotomy involves making a surgical incision into the uterus to deliver the
4 fetus. Hysterectomy involves surgical removal of the entire uterus. As major abdominal
5 surgery, both hysterotomy and hysterectomy involve many times the risk of either D&E or
6 induction procedures, and must be performed in a hospital. Moreover, hysterectomy precludes
7 future childbearing. For those reasons, they have been virtually abandoned as methods of
8 abortion.

9 29. If the Act were to take effect, Plaintiffs would be chilled from providing D&E or
10 induction abortions because of the reasonable fear of criminal prosecution and civil liability
11 under the Act. It therefore imposes an undue burden on women seeking second-trimester
12 abortions.

13 30. The Act's definition of "partial-birth abortion" fails to give Plaintiffs fair warning
14 as to what conduct is prohibited. In addition, the Act fails to give fair warning as to what
15 conduct is "in or affecting interstate . . . commerce." The Act thus forces physicians to guess –
16 under threat of criminal prosecution and civil liability – whether performing an accepted medical
17 procedure falls within the Act's proscription. Moreover, because of the Act's vagueness,
18 prosecuting attorneys may differ widely as to what conduct they believe is proscribed by the Act.
19 It thus subjects Plaintiffs to arbitrary and discriminatory prosecution.

20 31. If the Act is allowed to take effect, access to abortions in the second trimester of
21 pregnancy – with the exception of hysterotomy and hysterectomy – would be severely curtailed
22 in the United States because Plaintiffs and other abortion providers would be chilled from
23 performing D&E and induction abortion procedures in the safest manner because doing so could
24 result in a procedure that is banned by the Act. This would prevent some women from obtaining
25 an abortion altogether; delay some women who decide to go out of the country or to a distant
26 part of this country, to obtain a safe second-trimester abortion, thus increasing the medical risks

1 of the procedure; and force some women to have relatively riskier abortion procedures,
2 increasing the possibility of damage to their lives and health.

3 32. If the Act were to take effect, it could also chill physicians from providing
4 necessary medical care to women who present at the hospital in the middle of a second trimester
5 miscarriage because the medical assistance provided to complete the miscarriage could violate
6 the terms of the Act.

7 33. If the Act were to take effect, physicians may be compelled to obtain parental
8 and/or spousal consent to all D&E abortions performed on women under the age of 18 and
9 married women in order to avoid the risk of civil lawsuits by a parent and/or spouse whose
10 daughter/wife had an abortion that the parent and/or spouse contends is a so-called “partial-birth
11 abortion.”

12 VI. INJUNCTIVE RELIEF

13 34. Plaintiffs have no adequate remedy at law and will suffer irreparable harm for
14 continued violations of their and their patients’ constitutional rights if the Act goes into effect.

15 35. Enforcement of the Act will cause irreparable harm by threatening Plaintiffs with
16 criminal prosecution and civil liability for providing, teaching, participating in, assisting in, or
17 supervising the provision of abortion services in the second trimester of pregnancy, thereby
18 chilling the provision of those services; prevent some patients from receiving abortion services in
19 the second trimester; force some women to obtain medical care that is more dangerous and/or
20 more likely to deprive them of the ability to bear children in the future; delay other women in
21 obtaining abortions, thus increasing the medical risks to their life or health; deprive women of
22 their right to determine the course of their own medical treatment; and compel doctors to abridge
23 patient confidentiality by obtaining parental and/or spousal consent to the abortion in order to
24 avoid potential civil liability.

25 VII. FIRST CLAIM FOR RELIEF

26 36. Plaintiffs hereby incorporate by reference Paragraphs 1 through 35 above.

1 37. By prohibiting health care facilities and physicians, at any stage of pregnancy,
2 from performing so-called “partial-birth abortions” where necessary to preserve the woman’s
3 health or where that procedure would be the most medically appropriate for the woman, and by
4 limiting the circumstances under which a physician can perform a so-called “partial-birth
5 abortion” to preserve the woman’s life, the Act violates the right of women to privacy, life, and
6 liberty guaranteed by the Due Process Clause of the Fifth Amendment.

7 **VIII. SECOND CLAIM FOR RELIEF**

8 38. Plaintiffs hereby incorporate by reference Paragraphs 1 through 37 above.

9 39. By prohibiting health care facilities and physicians from performing so-called
10 “partial-birth abortions,” at any time during pregnancy, the Act has the purpose and effect of
11 imposing an undue burden on women’s right to choose abortion, in violation of their right to
12 privacy and liberty guaranteed by the Due Process Clause of the Fifth Amendment.

13 **IX. THIRD CLAIM FOR RELIEF**

14 40. Plaintiffs hereby incorporate by reference Paragraphs 1 through 39 above.

15 41. By depriving women who have already decided to have a pre-viability abortion of
16 the right to have the medically accepted abortion procedure of their choice, and by forcing
17 women to obtain abortion procedures that are medically riskier, more intrusive, and more painful
18 than those banned by the Act, the Act violates the right to bodily integrity guaranteed by the Due
19 Process Clause of the Fifth Amendment.

20 **X. FOURTH CLAIM FOR RELIEF**

21 42. Plaintiffs hereby incorporate by reference Paragraphs 1 through 41 above.

22 43. By failing to give adequate notice of the procedures it proscribes, and by
23 encouraging arbitrary enforcement, the Act is impermissibly vague, thereby violating the right of
24 Plaintiffs and their employees and agents to due process, as guaranteed by the Fifth Amendment.

1 WHEREFORE, Plaintiffs ask this Court:

2 A. To issue a temporary restraining order, a preliminary injunction, and a
3 permanent injunction restraining Defendant, his employees, agents, and successors from
4 enforcing the challenged Act;

5 B. To enter judgment declaring the challenged Act to be in violation of the
6 United States Constitution;

7 C. To grant such other and further relief as this Court should find just and
8 proper, including attorneys' fees and costs.


9 DATED: October 31, 2003

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BINGHAM McCUTCHEN LLP

PLANNED PARENTHOOD FEDERATION OF
AMERICA

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