



STATE OF WISCONSIN  
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WRITTEN TESTIMONY OF ATTORNEY GENERAL VAN HOLLEN  
REGARDING 2007 ASSEMBLY BILL 710

Chairman Suder and members of the Assembly Committee on Judiciary and Ethics. I am here today for information purposes to discuss the constitutionality of Assembly Bill 710, if enacted as it has been introduced. This bill relates to changes to existing Wisconsin law on partial birth abortions.

While I, or Department of Justice staff, have commented on many bills this session affecting the Department of Justice, criminal justice issues, or public safety issues, it has not been my regular practice to opine on the constitutionality of pending legislation at public hearings. I do so today because I have already provided a written informal opinion relating to the constitutionality of Wisconsin's current partial-birth abortion law.

As many of you may know, Assembly Speaker Michael Huebsch and the Senate Republican Leader, Senator Scott Fitzgerald, previously requested my opinion on the enforceability of 1997 Wisconsin Act 219 and § 940.16 of the Wisconsin Statutes in light of the United States Supreme Court's 2007 decision in *Gonzales v. Carhart*. The *Gonzales* case involved a federal law which defined an unlawful partial birth abortion by reference to a specific act taken by a doctor after fetal delivery to an anatomical landmark.

In *Gonzales*, the Supreme Court held (1) that the federal law was not unconstitutionally vague because it clearly defined the line between criminal conduct and permissible conduct while requiring a clear overt act (the killing of a fetus that has been partially delivered past an objectively identifiable anatomical landmark); (2) that the federal law did not impose an "undue burden" on a woman's right to choose an abortion; and (3) that an exception to criminal liability where necessary to preserve the mother's health was not constitutionally required to be specified in the statute.

My informal opinion to Speaker Huebsch and Senator Fitzgerald on this matter, however, concluded that current Wisconsin law—which may not be enforced today due to a court-ordered injunction—would likely continue to be unenforceable and unconstitutional because current Wisconsin law more closely resembles a Nebraska law found unconstitutional by the Supreme Court in *Stenberg v. Carhart*, rather than the federal law upheld in the *Gonzales* case.

The *Stenberg* decision, which was not overruled by the *Gonzales* decision, invalidated the Nebraska law criminalizing partial-birth abortion in part because the law imposed an undue burden on a woman's right to choose a "dilation and evacuation"(D&E) abortion because that law too broadly defined what constituted a partial birth abortion.

AB 710 is carefully patterned after the federal statute upheld in the *Gonzales* case. In particular, section 7 of the bill, which repeals and recreates § 940.16 of the Wisconsin Statutes, contains a definition of "partial birth abortion" that tracks the approach taken in the federal law upheld in *Gonzales*. The more precise definition of a partial birth abortion in AB 710 as compared to current law makes AB 710 more like the federal law upheld in *Gonzales* rather than the Nebraska law struck down in *Stenberg*. Thus, I believe that AB 710, if enacted as introduced, would survive a constitutional challenge. I provide no opinion as to whether the new law, if enacted, might be found to be unconstitutionally applied against the facts of a specific case.

I have submitted to the Committee a copy of my May 2007 informal opinion, should you wish to review a more thorough discussion of these cases.

I want to be clear that my testimony today is for information only, and I give it to you today in my capacity as Attorney General. My personal beliefs on the topic of abortion are no more relevant to my legal opinion today than they were when I informed Assembly Speaker Huebsch and Senate Republican Leader Fitzgerald that I believed that a court would continue to find current Wisconsin law unconstitutional. I believe that this is how the Attorney General opinion process should work. I provide legal analysis interpreting what the law is and whether it can be enforced. And you, as the state's elected legislative body, determine what the law should be.

I thank the Committee for the opportunity to present this information to you for your consideration as you consider AB 710.