



"Equal Justice under Law"

FALL 1997

The Pro-Life Legal Defense Fund Newsletter

NEW SEMINAR SERIES: WHAT EVERY PRO-LIFE LAWYER SHOULD KNOW

To counteract the legal assault on life, the Pro-Life Legal Defense Fund is holding a seminar series entitled *What Every Pro-Life Lawyer Should Know*. Beginning September 17, pro-life attorneys and law students have been meeting weekly at Boston College Law School to learn about the key cases that govern abortion and assisted-suicide law. The seminars will be held every Wednesday evening until the final meeting on October 22, which will look at legal resources we can use to face the danger and promise of the future.

The course is taught by Professor Dwight Duncan, Associate Professor at Southern New England School of Law, along with guest lecturers including attorneys Philip D. Moran and Francis H. Fox. Professor Duncan was the principal author of the legal brief which persuaded the U.S. Supreme court to allow the St. Patrick's Day Parade to uphold its traditions, a pro-life brief in the recently decided Supreme Court physician-assisted-suicide case, and a petition for a *writ of certiorari*, submitted to the Supreme Court in June, on behalf of pro-life activist and sidewalk counselor Barbara Bell.

Among the topics covered by the course are the so-called "right to die," euthanasia, and the philosophical basis of the pro-life position. Phil Moran spoke on the history of abortion law through *Roe v. Wade*, and on October 22 Fran Fox will address political spending and the First Amendment.

The course is not held for formal credit; its purpose is to give pro-life advocates vital information to counteract the anti-life forces in our country. Even strongly pro-life lawyers often lack the information necessary to speak knowledgeably about these critical issues. The course also provides like-minded persons with an opportunity to get together and discuss specific ways by which attorneys can advance the pro-life cause.

The weekly topics are designed to stand independently, so interested persons are welcome to attend any remaining classes. The course is free of charge, and meets Wednesdays, 7-9 p.m., in Boston College Law School's Stuart Hall, Room 315. Audio and/or videotapes are expected to be available in November. Those who want more information about the course may call Attorney Robert W. Joyce at (617) 969-8383. ∞

PARENTAL CONSENT LAW SURVIVES PLANNED PARENTHOOD CHALLENGE

The Supreme Judicial Court of the Commonwealth on March 18, 1997, denied Planned Parenthood's claim that the "Parental Consent" provision of the Massachusetts abortion laws violated a minor's rights of due process, equal protection, and equality contained in Articles 1, 10, and 12 of the Massachusetts Declaration of Rights. The Court held that a minor does not have the same freedom to act on her constitutional right to decide to have an abortion as does an adult woman. The SJC went on to conclude, however, that the requirement that a minor obtain the consent of both parents, if available, could not survive the plaintiff's constitutional challenge. The court also denied the motion of Massachusetts Citizens for Life (MCFL) to intervene.

In September 1996, MCFL was alerted that the Attorney General and Planned Parenthood had filed an action with the Supreme Judicial Court to determine the constitutionality of the "Parental Consent" provision of the abortion law. Planned Parenthood sought

to prevent parents from having any input in their child's decision concerning abortion. A review of the record showed that the parties had been meeting secretly for five years regarding the constitutionality issue and, as a result of their negotiations, filed 137 stipulations of fact with the court to help it determine the challenge. Of the 127 stipulations, only one could have been considered pro-life. There were never any lower court proceedings. No other parties were notified of the pending action. The Attorney General of this Commonwealth, a known public advocate of abortion rights, was positioned to be the sole defender of a statute with which he disagreed.

MCFL protested and notified the Pro-Life Legal Defense Fund (PLLDF) and requested it to defend MCFL's position. MCFL had been instrumental in the writing and passage of the law, as well as defending earlier challenges, and now felt aggrieved that no one

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IN MEMORIAM FORMER PLLDF PRESIDENT JOHN A. LAHIVE, JR.

On Saturday, June 14, 1997, the Pro-Life Legal Defense Fund, indeed the Pro-Life Cause, lost one of its heroes when John A. "Jack" Lahive, Jr., passed on to his eternal reward.

Jack was one of us and for that we are all proud. He touched us with his deeply held commitment to life and his belief that all life was sacred. He put that belief into practice in many ways. Supporters of the Pro-Life Legal Defense Fund will remember with deep gratitude his dedicated service over many years on our board, and his steady hand at the helm as our president for the past five years.

Jack was proud of the fact he was a "Triple Eagle" and he gave that phrase a whole new definition. He soared on eagles' wings and from his vantage point he realized that these are not dark days but they are great days. He truly believed that we all, according to our station, must play a part in the day to day challenges facing those who would stand for that truth that all men are created equal.

Two thousand year ago Sophocles wrote, "One must wait until the evening to see how splendid the day has been." When one looks at Marilyn and their six children; when one looks at the prestigious firm he created and built; when one looks at his commitment to his church and his community; when one looks at the part he played in our cause; one can take comfort in the fact the Jack Lahive can look back on the rich evening of his life and say, "The day indeed has been splendid." ☺



From Left to Right: President Phil Moran, Congressman Henry Hyde, Past President John A. Lahive, Jr.

PRO-LIFE SYMPOSIUM HELD AT HARVARD LAW SCHOOL

The Harvard Law School Society for Law, Life and Religion held a symposium entitled "Abortion, Religious Liberties and the Law" on April 12, 1997, at the Ames Moot Courtroom at Harvard Law School. The event was partially funded by the Pro-Life Legal Defense Fund.

The approximate 350 attendees were welcomed by Charles R. Hokanson, Jr., third year Harvard Law student and the president of the society. Mary Ann Glendon, Learned Hand Professor of Law at Harvard Law School, was the moderator. The large crowd was informed and entertained by three distinguished pro-life speakers: U.S. Congressman Henry J. Hyde of Illinois, Chairman of the House Judiciary Committee, Attorney Steven T. McFarland, Director of the Christian Legal Society's Center for Law and Religious Freedom, and the Honorable Kay Coles James, Dean of the School of Government at Regent University.

Congressman Hyde spoke concerning the pro-life battles being waged in Congress over various legislation, including the proposed ban on partial birth abortions. The Congressman, a former Chicago trial lawyer famed for his eloquence, provided the audience with many witty and thought-provoking observations regarding the abortion issue. He stated that the pro-abortion movement has been based on a series of lies: the assertion that "10,000 women per year were dying in back alley abortions" was a lie; the claim that Jane Roe of *Roe v. Wade* was a rape victim was a lie; and the present propaganda that "pro-lifers are uncaring" is a lie. If that allegation were true, he asked, why are there over 3,000 pregnancy help centers nationwide? He contrasted that movement

founded on lies with the pro-life movement which he called the most unique in the world because it is not based on anyone's self-interest.

Attorney McFarland, who has been at the cutting edge of pro-life litigation, discussed the Religious Freedom Restoration Act and whether it would withstand the constitutional challenge that was presently pending before the U.S. Supreme Court. He felt that it would be a close call. (He was ultimately proven correct since the Supreme Court, in *City of Boerne v. Flores*, recently struck down the statute by a 6 to 3 vote.)

Dean Kay Coles James, a veteran pro-life advocate, talked about her experiences in publicly debating abortions rights proponents. She noted that her opponents' arguments constantly shifted over the years once they realized that their positions were untenable. Dean James urged the audience to be persistent and uncompromising in defense of life. She stated that a three-pronged strategy should be used. In the educational sphere, pro-lifers should attempt to educate people in small groups at a time. In the political sphere, pro-lifers should, at a minimum, make it clear that they will not cast a vote for a politician who is not committed to protect unborn human life. In the cultural sphere, pro-lifers should ensure that their communities are always concerned with the welfare of their children and be "child-friendly."

The Pro-Life Legal Defense Fund was proud to play a part in this impressive symposium. It will continue to look for opportunities to encourage and support pro-life educational efforts. ☺

PRO-LIFE CENTURY DINNER IS SUCCESS

An enthusiastic crowd enjoyed the elegant surroundings of the Longwharf Marriot for this year's Pro-Life Century dinner held on January 11th. President John A. Lahive, Jr., warmly greeted the gathering and gave his annual report highlighting the Pro-Life Legal Defense Fund's defense of the Massachusetts parental consent law and the defense of Barbara Bell's constitutional right to counsel young women in front of abortion clinics in Brookline. Jack also proudly announced the organization's filing of its amicus brief to the United States Supreme Court in opposition to assisted suicide in the case of *Washington v. Glucksberg*.

Roy Scarpato, one of the founding members and first president of Massachusetts Citizens For Life and the person most responsible for the concept of the Pro-Life Legal Defense Fund, then made a special presentation to Jack Lahive for his years of service and dedication to the cause.

Philip D. Moran, the master of ceremonies, presented this year's Thomas More Award to Mary Ann Glendon, the Learned Hand Professor of Law at Harvard University Law School. Mr. Moran compared Professor Glendon's sense of commitment to that of St. Thomas More. An admirer of both Robert Bork and Thurgood Marshall, an opponent of abortion yet a supporter of welfare rights, Professor Glendon, like Thomas More, follows her conscience and is not swayed by the politically correct. She has written several books and has been the recipient of a number of literary awards including the Scribe Book Award and the Order of the Coif Triennial Book Award.

Professor Glendon serves as a member of the Pontifical Council for the Laity and in 1995 led the 22 member delegation of the Holy See to the Fourth U.N. Women's conference in Beijing. A native of Dalton, Massachusetts, she lives with her husband Edward Lev and their three daughters in Chestnut Hill and was a truly deserving recipient of the Thomas More Award.

The principal speaker of the evening was Hadley Arkes, the Edward Ney Professor of Jurisprudence and American Institutions

at Amherst College where he has been a member of the faculty since 1966. Professor Arkes, a well known author and legal scholar, stated that the very first Supreme Court would have insisted on the "possibility of moral understanding and the existence of moral truths as the only intelligible grounds on which men could claim the authority of office and presume to render judgments that were justified and binding." He asked if one could see the difference between justices such as James Wilson, whom he quoted above, and Justice Harry Blackman, the author of *Roe v. Wade*.

In his introduction, Mr. Moran introduced Professor Arkes as a breath of fresh air, a philosopher and constitutional scholar, but most importantly a good guy. Professor Arkes in his talk that evening proved once again that he was each of the above. ☞



Pro-Lifers enjoying themselves at the annual Pro-Life Century Dinner. From left to right: PLLDF Board Member, Dwight G. Cuncan, Attorney Cornelius J. Sullivan, Massachusetts Blacks for Life President, Barbara Bell, PLLDF Board Member, Luke Stanton, and Attorney Brenda E. Walsh Sullivan.

IS PARTIAL BIRTH ABORTION LEGAL? by Dawn Marie O'Brien

How familiar are you with the procedure known as partial birth abortion?

While many of us followed the debates on the bill to ban partial birth abortions in the US Congress, oftentimes the rhetoric got in the way of what the procedure is actually about. In this respect, the presentation by Dr. Martin Haskell, a recently deceased abortion provider who performed over 700 of these abortions, to the National Abortion Federation Risk Management Seminar, is dispationately informative.¹

In his own words, Dr. Haskell provides a step-by-step explanation of Dilation and Extraction, the procedure more commonly known as partial birth abortion, "[T]he surgeon introduces a large grasping forcep(s), such as a Bierer or Hern, through the vaginal and cervical canals into the corpus of the uterus... The surgeon is able to open

and close its jaws firmly and reliably grasp a lower extremity..."

"With a lower extremity in the vagina, the surgeon uses his fingers to deliver the opposite lower extremity, then the torso, the shoulders, and the upper extremities."

"The skull lodges at the internal cervical os (opening). Usually, there is not enough dilation for it to pass through..."

"The right handed surgeon slides the fingers of the left hand along the back of the fetus and 'hooks' the shoulders of the fetus with the index and ring fingers."

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¹The seminar was conducted on September 13, 1992. If you would like a copy of the presentation, please contact the Pro-Life Legal Defense Fund.

(Is Partial Birth Abortion Legal?, continued from page 3)

"The surgeon takes a pair of blunt curved Metzenbaum scissors in the right hand. He carefully advances the tip, curved down, along the spine and under the tip of the middle finger."

"...the surgeon then forces the scissors into the base of the skull...he spreads the scissors to enlarge the opening."

"The surgeon removes the scissors and introduces a suction catheter into this hole and evacuates the skull contents. With the catheter still in place, he applies traction to the fetus, removing it completely from the patient."

You may have asked yourself, "How is this legal?", and as an attorney you may be wondering, "What can I do to stop it?" After all, the responsibility to challenge the legality of partial birth abortion must ultimately fall upon the shoulders of attorneys.

A consideration of how the Supreme Judicial Court has viewed the personhood of the fetus in terms of the wrongful death and homicide statutes would lead a rational person to conclude that the performance of a partial birth abortion is either murder or an excused homicide--the taking of another person's life that we are willing to excuse because the woman is exercising her Choice.

For example, did you know that the SJC has stated:

"In keeping with approved usage, and giving terms their ordinary meaning, the word 'person' is synonymous with the term 'human being'. An offspring of human parents cannot reasonably be considered to be other than a human being, first within, and then in normal course outside, the womb...By use of the terms 'person' and 'the public', the legislature has given no hint of a contemplated distinction between pre-born and born human beings."

Commonwealth v. Daniel I. Cass, 392 Mass 799, 801 (1984).

"We look to the common law as to whether a viable fetus can be the victim of homicide and conclude that it can." *Commonwealth v. Daniel I. Cass*, 392 Mass 799, 801 (1975).

"We hold that a fetus is a person for the purposes of our wrongful death statute where, as here, the parties agree that it is viable, or, in the absence of such agreement, the fact-finding tribunal finds that it is viable." *Mone v. Greyhound Lines, Inc.* 368 Mass 354, 355 (1995).

"In *Mone v. Greyhound Lines, Inc.*, the Court concluded that there could be recovery for a stillborn if the fetus was viable at the time of the injury." *Thibert v. Milka*, 419 Mass 693, 695 (1995).

How can a viable fetus be a person for the purposes of the wrongful death and homicide statutes, but not for the purposes of the 14th Amendment? Such a distinction can only survive if pro-life lawyers fail to convince our courts that, before the surgeon's Metzenbaum scissors pierce the skull, the child's interest in life predominates over the woman's right to terminate pregnancy. It can only prevail if pro-life lawyers fail to compel our courts to refer to such a partially born child as "life" itself rather than as

"potentiality of human life". Pro-life attorneys should not rest until our laws have established that the need for the Commonwealth's protective intervention, when all but the unborn child's head is delivered, is compelling.

In *Planned Parenthood of Southeastern Pennsylvania V. Casey*, 505 U.S. 833, (1992), the Court upheld certain state restrictions on abortion. The Massachusetts legislature is already contemplating proscribing partial birth abortions. Both the state senate, through Senate Bill 875, and the state house of representatives, through House Bill 2889, are currently considering banning the procedure in the state of Massachusetts.

But must we rely solely on legislative action? We don't know for certain if partial birth abortions are being performed in Massachusetts. However, considering the 1997 confession of Ron Fitzsimmons, executive director of the National Abortion Federation, that he "lied through (his) teeth" in a 1995 interview and that the annual number of partial birth abortions performed is 3,000-4,000 rather than the 500 he initially claimed, it is likely that they are. And if indeed they are, couldn't a petitioner be appointed administrator of the estate of a child who died as the result of such an abortion, and bring an action for wrongful death on that child's behalf? Since partial birth abortions occur in both the second and third trimesters, fetuses killed by them, through born stillborn, are often viable at the time of the injury (the insertion of the Metzenbaum scissors and catheter) which caused their deaths. Though the mother, or even the father, of such a child may have been in part responsible for the decision to abort him, the contributory negligence of one parent or beneficiary does not bar recovery of the others, such as siblings, in a wrongful death action. See *Arnolds V. Jacobs*, 319 Mass 130 (1945). It is true that Massachusetts law requires consciousness of the injury to recover for pain and suffering, and that therefore a court for conscious pain and suffering within the wrong death context would be difficult to make. But wrongful death is actionable in Massachusetts even without conscious pain and suffering. Isn't it the duty of pro-life lawyers to present such a wrongful death claim to the courts and give a judge the opportunity to issue a well reasoned opinion which upholds what should be the clear rights of the unborn child?

These are the type of questions we encourage you to consider and discuss with fellow attorneys and law students. It is our hope that a commitment to discussion of the issues will lead to action in dealing with legal contradictions which protect viable children from homicide and wrongful death, but not partial birth abortion.

Dawn Marie O'Brien is a Pro-Life Legal Defense Fund Summer Intern. She is a second year law student at Boston College Law School and the President of BC Law for Life. ∞

PLLDF BOARD MEMBERS FILE WRIT OF CERTIORARI

Attorneys Dwight Duncan and Luke Stanton, both members of the PLLDF Board of Directors, recently filed in the Supreme Court of the United States a petition for a writ or certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts on behalf of sidewalk counselor and Massachusetts Blacks for Life President, Barbara Bell. Bell has been a consistent presence outside the Planned Parenthood clinic located at 1031-1033 Beacon Street for over eight years, pleading with pregnant women entering the clinic to choose life.

The petition is based on the argument that the preliminary injunction issued against Bell by Middlesex Superior Court Judge Margaret Hinkle, which forbids Bell from entering within fifty feet of the clinic, is a content-based restriction on her freedom of speech. The injunction was upheld by the SJC.

In arguing that the restriction was content-based, Duncan and Stanton noted that the SJC quoted Bell's specific language in its opinion and referred to the "upsetting" nature of her comments. They went on to argue that even if the injunction were content-neutral, it was still unconstitutional because it burdened more speech than was necessary to protect a legitimate governmental interest. Moreover, by effectively placing Bell across the trolley tracks on Beacon Street in Brookline, the court prevented her from leafleting and speaking at a normal conversational distance. The petition concluded by stating that the court had recently emphasized the importance of "communicating from a normal conversational distance or handing leaflets to people who are walking on public sidewalks . . . both because of the type of speech involved and the nature

of the location." Schenck, 117 S. Ct. at 867. "If the Bell decision stands," Duncan and Stanton noted, "These words might just as well have not been written."

Bell has had two prior injunctions issued against her and has agreed to one Stipulation and Order forbidding her from blocking clinic access, wearing a pinny implying that she is in any way affiliated with Planned Parenthood, and using voice amplification devices. After the prior injunctions were issued, Bell avoided using voice amplification devices, did not block patient access, and substituted the words "Choose Life" for the label "Clinic Escort" on her pinnys. However, Planned Parenthood sought and was granted the fifty-foot permanent injunction after asserting that Bell has violated the previous injunctions and that even without amplification, her voice was audible in the clinic waiting room. Planned Parenthood sought the expanded injunction without first pursuing the less restrictive means of asking Bell to lower her voice and filing contempt charges for what Planned Parenthood perceived to be violations of the pinny and blocking restrictions.

The cost of printing and filing the petition was covered by PLLDF and the legal services of Attorneys Duncan and Stanton were provided pro-bono. They were assisted by Southern New England School of Law student Clark Whaley, PLLDF summer intern Dawn Marie O'Brien, a student at Boston College Law School, and Boston College graduate student Jerome D. Maryon, Esq.. Bell and her PLLDF team expect to hear sometime in October whether or not the Supreme Court will grant certiorari. ∞

PRO-LIFE LAW STUDENTS LINK WITH PRO-LIFE ATTORNEYS

Pro-Life Law Students (PLLS) is a new network linking law students with like-minded practicing attorneys for volunteer, work-study or fully-paid positions. It has student contacts at several local law schools and plans to expand in the New England area. PLLS (pronounced "pulse") helps law students to "monitor the vital signs" of our legal system on life-related issues. It seeks to catalyze pro-life action by getting attorneys and future attorneys to work together. This network will support participating students in their pro-life convictions whether they begin with life-and-death projects or general legal work.

Attorneys who wish to see resumes from pro-life law students may call Colbe Mazzarella at (617) 969-8383, or contact the following students directly:

Brian Burt

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Room G, Story Hall, 12 Everett St.
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MaryClare Flynn

Southern New England Law School
P.O. Box 2215
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PLLDF TESTIFIES ON BEACON HILL IN OPPOSITION TO PHYSICIAN-ASSISTED SUICIDE

On May 8, 1997, the Joint Committee on the Judiciary held a hearing on House Bill 1543, An Act to Regulate Physician Aid-Injuring, which would legalize physician-assisted suicide for the terminally ill in Massachusetts.

The hearing commenced at 1:00 p.m. and did not end until after 9:00 that evening. The Ad Hoc Coalition to Defeat H. 1543 organized panels of physicians, ethicists, lawyers, persons with disabilities and other activists to present testimony against the bill from a variety of perspectives. The Joint Committee, chaired by Representative John Rogers and Senator William Keating, heard how the bill, if enacted, would create not a right to die, but a duty to die, how confidence in the medical profession as healers would be undermined, and how any protections the law would offer would quickly be eliminated, making assisted suicide an option for all rather than restricted to those who are terminally ill.

Dwight G. Duncan, Associate Professor of Constitutional Law and Bioethics at Southern New England School of Law and a member of the Pro-Life Legal Defense Fund Board of Directors, offered a cogent legal analysis of the bill. Professor Duncan stated that the restriction of right under the bill to the terminally ill was open to attack under equal protection grounds. "Don't the chronically ill, who will suffer indefinitely, have at

least as great a claim to relief from suffering? What about people in a coma, or in a persistent vegetative state, or otherwise incompetent?" stated Professor Duncan. He went on to say that while the bill as drafted contained certain safeguards, the courts would be in a position to eliminate those safeguards by invoking liberty and equality, and that in the meantime the law would have accepted the notion that the lives of some are worth more, and the lives of others worth less, in the eyes of the state.

Professor Duncan was joined in presenting testimony by Pro-Life Legal Defense Board member Henry C. Luthin, Esq., of Boston. One of the founders of the Pro-Life Legal Defense fund, Dr. Joseph R. Stanton, likewise presented eloquent testimony from his wheelchair on the devastating effects this bill would have on the medical profession and the tragic consequences enactment would have on the rights of the disabled. Other testimony was presented by panelists on how the situation in the Netherlands has evolved over the last 20 years from one where physician-assisted suicide was strictly regulated to the status today, where patients are given lethal injections without their consent, and handicapped newborns are euthanized.

Other members of the PLLDF present at the hearing were PLLDF President Philip Moran, Esq., Attorneys Thomas Harvey and Robert Joyce, and Roy Scarpato, M.S. ☞

(Consent Law, continued from page 1)

who supported the law was ever made aware of the challenge or of the five years of secret bargaining sessions. PLLDF filed a motion to intervene on behalf of MCFL and, after two days of argument before the single justice, the matter was reported to the full bench of the SJC.

Attorney Philip D. Moran represented MCFL and argued that the actions of the Attorney General and Planned Parenthood were collusive and that the Attorney General had a serious conflict of interest both personally as well as professionally. During the preparation of legal briefs, the assistant attorney general assigned to the case, in an apparent turnaround by the attorney general's office, cooperated with Moran and in fact requested that MCFL withdraw its motion to intervene and instead file an amicus brief. Moran declined.

Although the outcome was that the SJC acted as a legislative body in essentially rewriting the law so that only one parent need consent, in contrast to both if available under the prior law, the practical effect was that the law was upheld. The court held minors do not have the same rights, per se, as adults and Planned Parenthood was thereby stopped from allowing its representatives from being the only persons to counsel a minor client to decide whether to have an abortion.

In sum, MCFL and PLLDF, by standing their ground, made a pro-abortion attorney general do what he is supposed to do --- uphold the law. It appears that, as a result of MCFL's and PLLDF's pressure on the attorney general's office, the parental consent law in large measure remains intact. ☞

ADDRESS CORRECTION

We are encouraged by the success we have had thus far in establishing a database to keep in touch with our many friends and supporters.

However, if you are receiving more than one mailing or the mailing label needs a correction, please let us know by clipping this out and forwarding to us the correct information. THANKS!

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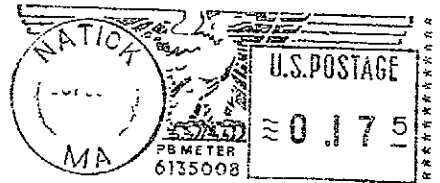
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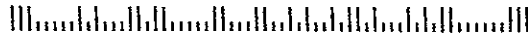
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Please consider making a contribution today. Your generosity allows The Pro-Life Legal Defense Fund to fulfill its mission to provide a trained and committed voice in the courtroom. So that you and others can continue Life-saving work. All contributions to The Pro-Life Legal Defense Fund are tax deductible.

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Mail any correspondence to:

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