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1 UNITED STATES DISTRICT COURT  
1 SOUTHERN DISTRICT OF NEW YORK  
2 -----x

2  
3 NATIONAL ABORTION FEDERATION,  
3 MARK I. EVANS, M.D.,  
4 CAROLINE WESTHOFF, MD, MSC;  
4 CASSING HAMMOND, MD,  
5 MARK HELLER, MD,  
5 TIMOTHY R.B. JOHNSON, MD,  
6 STEPHEN CHASEN, MD,  
6 GERSON WEISS, MD,  
7 on behalf of themselves and  
7 their patients,

8  
8 Plaintiffs,

9 v.

03 Civ. 8695 (RCC)

10  
10 JOHN ASHCROFT, in his official  
11 capacity as Attorney General  
11 of the U.S., along with his  
12 officers, agents, servant,  
12 employees, and successors  
13 in office,

14  
14 Defendants.

15 -----x

New York, N.Y.  
April 19, 2004  
2:00 p.m.

17 Before:

18 HON. RICHARD CONWAY CASEY

19 District Judge

20  
21 APPEARANCES

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25 BY: JULIE STERNBERG, ESQ.

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1 (Trial resumed)  
2 THE COURT: Mr. Hut, as I understand it the plaintiffs  
3 wish to call or read some testimony from transcript and call a  
4 witness in rebuttal?  
5 MR. HUT: Yes, your Honor.  
6 THE COURT: Is that correct?  
7 MR. HUT: That is correct, your Honor.  
8 THE COURT: In what order do you prefer?  
9 MR. HUT: We would prefer to call Dr. Howell as the  
10 first order of business this afternoon.  
11 THE COURT: Go ahead and call him.  
12 MR. LANE: Your Honor, Sean Lane from the United  
13 States.  
14 THE COURT: Yes.  
15 MR. LANE: The government would like to be heard on  
16 the issue of Dr. Howell as a rebuttal witness.  
17 THE COURT: Fine. I inquired to find out if anything  
18 had come from the government.  
19 MR. LANE: We apologize, your Honor. Given the time  
20 constraints we weren't able to formally submit something but we  
21 did want to be heard on the issue.  
22 THE COURT: Sure.  
23 MR. LANE: And we do object to Dr. Howell being called  
24 for two reasons:  
25 First is that it's not proper rebuttal. Dr. Clark's

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1 testimony is that, as the Court is aware, this witness is  
2 called regarding the statistical significance or lack thereof  
3 regarding preterm birth and the information in the Chasen  
4 study.  
5 But as Dr. Clark testified last week, on cross  
6 examination elicited by plaintiff's counsel, the P value in the  
7 study of .3 is not statistically significant and that's on page  
8 2425 of the transcript, your Honor. He also testified that  
9 there is a good chance that it occurred by chance, and that's  
10 on page 2425.  
11 In fact, he said there was a 70 percent chance, that  
12 meant that it was a chance that it would be random and that's  
13 why you only called it a worrisome bit of information, and  
14 that's on page 2427 of the transcript.  
15 Finally, what he said, putting it in context, was that  
16 he was worried about the risk of preterm birth before the  
17 Chasen study and that this study, the Chasen study shows that  
18 it may be the case, and that's at 2420 to 2421 of the  
19 transcript.  
20 So, we don't believe that this evidence, this witness,  
21 Dr. Howell is proper rebuttal on that point because Dr. Clark  
22 did not say, didn't make a definitive statement regarding the  
23 preterm birth significance. In fact, Dr. Clark said there was  
24 a 30 percent chance that that would be random.  
25 Secondly, while some witnesses --

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1 THE COURT: Whether it may defend a statement he made  
2 a statement. I don't know that a statistician is going to  
3 rehabilitate the Chasen study. I just don't know, but go  
4 ahead.

5 What is your other reason?

6 MR. LANE: Secondly, your Honor, is that some  
7 witnesses have opined about the validity or the lack thereof of  
8 the Chasen study but this witness has not, and in fact he is  
9 not an obstetrician or gynecologist, nor is he a surgeon.

10 Instead, his expert report sets out a very different  
11 set of testimony which goes into three areas which is talking  
12 about how surgical innovation occurs, whether clinical trials  
13 are appropriate to evaluate surgical innovation and, three,  
14 whether D&X is a logical surgical innovation.

15 And in the letter from the plaintiff's counsel to the  
16 Court on the scope of the rebuttal testimony, Dr. Howell does  
17 not offer his opinion on any of these three areas, rather he is  
18 offering opinion on a third area which, as plaintiff's define  
19 it as the statistical principles as they are applied to medical  
20 research, and that is a different area and beyond the scope of  
21 Dr. Howell's expert report.

22 THE COURT: So, Dr. Howell was listed as an expert and  
23 he had this report and he doesn't touch upon this at all? Is  
24 that what you are saying?

25 MR. LANE: Well, your Honor, if I can provide maybe a

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1 little more detail that would be helpful.

2 When he is talking about whether clinical trials are  
3 appropriate to evaluate surgical innovation he is talking about  
4 the nature of the procedures and he is not doing any sort of  
5 statistical analysis, rather he has views about the ability to  
6 standardize procedures and randomize procedures but he nowhere  
7 presents any evidence about statistical analysis and how data  
8 should be analyzed.

9 THE COURT: Well, that does disturb me, Mr. Hut.

10 MS. CHAITEN: Your Honor, this is Ms. Chaiten  
11 speaking. If I might respond?

12 THE COURT: You are going to present this witness if  
13 he is allowed to testify?

14 MS. CHAITEN: Yes, your Honor.

15 And I guess I will start with the first point, which  
16 is that while Dr. Clark said many things that Mr. Lane says  
17 that he said, he also testified to certain points, for example,  
18 that there is a 70 percent chance that there is a significant  
19 increase in the risk of subsequent preterm birth and this is a  
20 point that we believe it is appropriate to offer rebuttal  
21 testimony on.

22 THE COURT: Doesn't the report speak for itself?

23 MS. CHAITEN: Doctor -- excuse me. Your Honor, I  
24 apologize, getting ready for the testimony, the report itself  
25 does talk about Dr. Howell's expertise with regard to --

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1 THE COURT: No, no. I'm talking about Chasen's  
2 report. What can Howell add to it?  
3 MS. CHAITEN: Dr. Howell can explain the concept of P  
4 values and statistical significance --  
5 THE COURT: He's not an author.  
6 MS. CHAITEN: -- which we believe that Dr. Clark  
7 distorted, your Honor.  
8 THE COURT: Oh, if that's what it is being offered for  
9 I don't really see that.  
10 MR. HUT: May I be heard, your Honor?  
11 Dr. Clark's report did not disclose anything about  
12 statistical significance or its concept.  
13 THE COURT: But Dr. Chasen did.  
14 MR. HUT: But Dr. Clark was permitted to address quite  
15 mistakenly, we submit.  
16 THE COURT: Well you think so, Mr. Hut.  
17 MR. HUT: May I finish?  
18 THE COURT: Yes.  
19 MR. HUT: He was permitted --  
20 THE COURT: Nobody has ever shut you off but I also  
21 will respond to you, Mr. Hut, when I see it coming at me.  
22 MR. HUT: Your Honor, he was -- Dr. Clark was  
23 permitted to testify about --  
24 THE COURT: Yes, I'm well aware of that.  
25 MR. HUT: The statistical significance and the

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1 significance of what he said was the 70 percent likelihood that  
2 this did not occur by chance which wholly, we would show, we  
3 would submit misstates the statistical constructs usable here.  
4 This witness who is familiar with statistical uses and  
5 statistical assessments and analyses in scientific and medical  
6 publications is here --  
7 THE COURT: But he didn't work on the study. He has  
8 no personal knowledge of this study at all.  
9 MR. HUT: But has knowledge of how statistics are used  
10 and misused.  
11 Dr. Clark didn't have any personal knowledge either.  
12 THE COURT: He read it but at least he is in maternal  
13 fetal medicine and obstetrics and gynecology.  
14 MR. HUT: But that doesn't --  
15 THE COURT: I'm not going to take the two of you,  
16 let's get that clear. Ms. Chaiten, Mr. Hut: I don't care who  
17 argues but there won't be two, is that clear?  
18 MR. HUT: It is clear, your Honor.  
19 THE COURT: But I don't see where that goes to  
20 anything.  
21 MR. HUT: It does not take, your Honor, a maternal  
22 fetal medicine specialist to understand what P value is and to  
23 understand that the reciprocal, the 70 percent has nothing to  
24 do with the 70 percent likelihood that this does not occur by  
25 chance. It takes a statistician, it takes somebody who is

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1 familiar with the medical literature.

2 THE COURT: Well, I don't know that he is. He didn't  
3 participate in the study, he is going to testify as the  
4 statistician?

5 MR. HUT: No.

6 THE COURT: You offered him originally for a totally  
7 different thing.

8 MR. HUT: As the defendant offered Dr. Clark for  
9 something more totally different.

10 THE COURT: You brought the Chasen study in late and  
11 he got it.

12 MR. HUT: And then the defendants offered 10 minutes  
13 before the Clark testimony the suggestion that he was going to  
14 speak to that.

15 THE COURT: But that was entered into the case. I  
16 don't see where this man really -- you are putting on a new  
17 uniform for him.

18 MR. HUT: This man is and was identified as somebody  
19 who is a head of a program that touches on assessing the design  
20 and interpretation of clinical studies and clinical materials.  
21 That was disclosed. His background was fully delved into on  
22 deposition. He is to bring that expertise to bear for what I  
23 believed and hoped would be of assistance to the Court.

24 THE COURT: Mr. Lane, do you have anything further to  
25 say?

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1 MR. LANE: Your Honor, if I may.

2 Again, the reason why I mentioned this witness'  
3 deposition testimony is to give the Court a flavor for what  
4 constituted the stuff of his opinion, which was talking about  
5 the history of medicine and offering historical perspective and  
6 how surgical innovation has been viewed throughout history.

7 THE COURT: We had one witness on that; I'm not sure  
8 whether he enlightened anybody but we had it.

9 MR. LANE: And the second point, your Honor, is that I  
10 think there is a difference in kind between Dr. Clark and this  
11 witness, that is, Dr. Clark did not provide a critique of the  
12 Chasen study but took the Chasen study at face value and opined  
13 about it as part of the medical literature, which plaintiffs  
14 have done in this case as well.

15 Instead this witness is going to provide a statistical  
16 look at the Chasen study. And again, while there are witnesses  
17 in this case who have done so, we don't believe that this is  
18 the proper witness to do so.

19 MR. HUT: May I respond to that, your Honor?

20 THE COURT: You may.

21 MR. HUT: Dr. Clark did opine, he changed his opinion  
22 based upon what he said was his shocking response to the Chasen  
23 study. That response fundamentally misunderstands and  
24 misconceives the Chasen study, and our purpose in calling  
25 Dr. Howell in rebuttal is to demonstrate that to the Court.

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1 THE COURT: He had nothing to do with the Chasen  
2 study, did not participate.  
3 MR. HUT: He did not.  
4 Had Dr. Clark included the Chasen study and his  
5 assessment of its statistical significance in his report, we  
6 could have met that anticipatorily.  
7 THE COURT: You could have circulated Chasen's report  
8 to any number of your experts if you wanted to bolster that.  
9 MR. HUT: We don't want to bolster it because we  
10 didn't know that the statistics would be misused in the way  
11 they were by Dr. Clark.  
12 THE COURT: You had cross-examination on him but I  
13 don't know that you reach out to find somebody who is a totally  
14 different player in this whole thing to try to put a spin on  
15 one piece of one of the defendant's witnesses.  
16 MR. HUT: Respectfully, your Honor, that is exactly  
17 what the defendant did with Dr. Clark and his view of the  
18 Chasen study.  
19 THE COURT: Clark was listed all along for what he was  
20 called for. The Chasen study was later brought in and other  
21 people opined on it and Dr. Chasen went into it.  
22 You had every opportunity to go into the P factor with  
23 him. As I recall, I believe it was gone into with Dr. Chasen.  
24 MR. HUT: We did go over it with him.  
25 THE COURT: For whatever it was worth.

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1 MR. HUT: The Chasen study was not belatedly brought  
2 into this, it was supplied to the government long before the  
3 deposition of Dr. Clark.  
4 THE COURT: You may think so. I think it is rather  
5 new in the sense that it only came into play after the first of  
6 the year and I don't know or remember the exact date it was  
7 turned over to defendant, but it's relatively new.  
8 MR. HUT: Right. It's four pages long and it was  
9 supplied to the defendant long before the testimony or the  
10 deposition of Dr. Clark.  
11 THE COURT: Well, and there was a lot of play on it  
12 and the copyright lawyer and all that business which all  
13 sounded very strange to me.  
14 MR. HUT: Well, it may sound strange, your Honor, but  
15 I can speak to it, there was nothing strange about it. They  
16 could have disclosed it and did disclose it to any witness they  
17 wanted to without any interference or objection from us.  
18 THE COURT: After they got it Mr. Hut I'm talking. It  
19 may not sound strange to you but it does to the Court and you  
20 are saying it doesn't necessarily change the thinking.  
21 MR. HUT: If your Honor would share with me the  
22 respect in which it sounds strange I could alleviate the  
23 Court's concern.  
24 THE COURT: I doubt you could.  
25 MR. HUT: If you would share it with me I would like

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1 the opportunity to try, sir.

2 THE COURT: I think all you have to do is listen to  
3 your own words.

4 I will tell you what, I will take a five minute break  
5 and think about it for a moment but I have grave reservations.  
6 If not we have testimony in the form of transcript, is that  
7 correct?

8 MR. HUT: That's correct, your Honor.

9 (Recess)

10 (Continued next page)

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1 THE COURT: I have reviewed the doctor's curriculum  
2 vitae and Mr. Hut's letter proposing -- Howell is how you  
3 pronounce it?

4 MR. HUT: Yes, your Honor.

5 THE COURT: -- Dr. Howell as a rebuttal witness. I  
6 will let the plaintiffs call Dr. Howell as a witness. But  
7 seeing that he has been offered as a rebuttal witness for the  
8 area mentioned in the letter, it will be restricted to that.  
9 We are not reopening the plaintiffs' case to put him on for  
10 purposes for which he was originally offered.

11 In reviewing the curriculum vitae, I will await the  
12 establishment of the witness's credentials. I have grave  
13 reservations as to what it is he is an expert in, especially in  
14 the area for which the letter states that he is being called.  
15 However, it may go to the weight of the witness. For the  
16 moment I will allow the plaintiffs to call him, and I will  
17 await the offer of the plaintiffs as to the recognition they  
18 seek from the Court as to what area that he is an expert in.

19 I tried to review the curriculum vitae of the witness,  
20 and I have grave problems with that as to how it brings him  
21 within the realm of that which he is being offered for. He  
22 seems more -- well, I will leave that be. I think at least his  
23 curriculum vitae shows at the moment. You may call him, but we  
24 will see what he is ultimately offered for. He will be  
25 limited, in any event, to the subject matter of rebuttal

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1 mentioned in the letter today.  
2 Ms. Chaiten, you may call the witness.  
3 MS. CHAITEN: Thank you, your Honor.  
4 JOEL HOWELL,  
5 called as a witness by the plaintiffs,  
6 having been duly sworn, testified as follows:  
7 THE CLERK: Please state and spell your full name  
8 slowly for the record.  
9 THE WITNESS: Joel Howell, J-O-E-L H-O-W-E-L-L.  
10 THE COURT: Ms. Chaiten, you may inquire.  
11 MS. CHAITEN: Thank you, your Honor. Before we begin,  
12 may I present the witness and the Court's clerk and the  
13 defendant with a binder of exhibits?  
14 THE COURT: You certainly may.  
15 MS. CHAITEN: Thank you.  
16 DIRECT EXAMINATION  
17 BY MS. CHAITEN:  
18 Q. Good afternoon, Dr. Howell. Could you please introduce  
19 yourself.  
20 A. I am Joel Howell.  
21 Q. Where are you currently employed?  
22 A. The University of Michigan.  
23 Q. Where is that located?  
24 A. Ann Arbor, Michigan.  
25 Q. Are you a medical doctor?

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1 A. Yes, I am.  
2 Q. What positions do you hold at the University of Michigan?  
3 A. I am a professor in the department of internal medicine at  
4 the medical school. I am also a professor in the department of  
5 health management and policy in the School of Public Health, as  
6 well as a professor in the department of history in the College  
7 of Literature, Science, and the Arts.  
8 Q. Do you hold any special titles or chairs?  
9 A. Yes, I do. I am the Victor Vaughan Collegiate Professor of  
10 the History of Medicine, and I am also the co-director in the  
11 process of transitioning to become the director of the Robert  
12 Wood Johnson Clinical Scholars program at the University of  
13 Michigan.  
14 Q. How long have you been on the faculty at the University of  
15 Michigan?  
16 A. 20 years.  
17 Q. Dr. Howell, why are you here today?  
18 A. To offer an expert opinion.  
19 Q. Are you a plaintiff in this case?  
20 A. No, I am not.  
21 Q. On what subject or subjects do you intend to offer opinions  
22 in this case?  
23 A. The design and interpretation of clinical trials and the  
24 development of medical techniques.  
25 Q. Do you consider yourself qualified --

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1 MR. LANE: Objection, your Honor. It goes to scope  
2 that was discussed by the Court earlier.

3 THE COURT: I think it goes beyond what was in the  
4 letter.

5 MS. CHAITEN: Your Honor, it is a description of his  
6 area of expertise.

7 THE COURT: You asked him what he intends to testify  
8 to. That wasn't what was offered to the Court in the letter to  
9 the Court. Would you read the letter, Ms. Chaiten, as to what  
10 you would testify about, perhaps not aloud.

11 MS. CHAITEN: Yes, your Honor, I will. "Plaintiffs  
12 seek to offer the testimony" --

13 THE COURT: I said perhaps not out loud.

14 MS. CHAITEN: Excuse me? Not out loud?

15 THE COURT: I said perhaps not out loud, so that you  
16 wouldn't be telegraphing to the witness.

17 MS. CHAITEN: OK.

18 THE COURT: Mr. Lane, what areas are you saying were  
19 not in the letter? That part you can say.

20 MR. LANE: Your Honor, the letter is fine, and that is  
21 what the Court had mentioned earlier.

22 THE COURT: What in his statement is not in the  
23 letter?

24 MR. LANE: In his statement he is asked what he  
25 intends to offer testimony on, and it is beyond the scope of

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1 the letter, your Honor. It talks about the design and  
2 interpretation of clinical trials as well as --

3 THE COURT: That isn't in the letter, is it?

4 MR. LANE: -- as well as the development of medical  
5 techniques.

6 THE COURT: Is that in the letter?

7 MR. LANE: No, your Honor. As I understand, what the  
8 letter I says is -- if the Court would like me to read it out  
9 loud, I am happy to do so.

10 THE COURT: I think you either agree or I am going to  
11 excuse the witness and get into this. We are not going to go  
12 beyond what that was offered for, Ms. Chaiten.

13 MS. CHAITEN: Your Honor, if I might have a moment  
14 with Mr. Lane, maybe we can agree.

15 THE COURT: Maybe you can.

16 (Pause)

17 MS. CHAITEN: Your Honor, I will withdraw that  
18 question. We can establish Dr. Howell's credentials through  
19 his testimony and then move on to the substance.

20 THE COURT: All right. Withdraw the question. The  
21 answer is stricken.

22 BY MS. CHAITEN:  
23 Q. Dr. Howell, I would like to ask you a bit about your  
24 background and experience. Where did you obtain your medical  
25 degree?

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- 1 A. The University of Chicago.  
2 Q. When was that?  
3 A. 1979.  
4 Q. Aside from your medical degree, did you receive any other  
5 medical training?  
6 A. Yes, I did.  
7 Q. Can you describe that for us, please.  
8 A. I was an intern and resident in internal medicine at the  
9 University of Chicago from 1979 to 1982.  
10 Q. Have you had any other training beyond medical school?  
11 A. I have indeed. I was a Robert Wood Johnson Clinical  
12 Scholar at the University of Pennsylvania from 1982 to 1984.  
13 Q. What did you do as a Robert Wood Johnson Clinical Scholar?  
14 A. As a Robert Wood Johnson Clinical Scholar, I studied how to  
15 study health and healthcare, the design of clinical trials. I  
16 focused as well on the history of the development of medical  
17 techniques and technologies.  
18 Q. Did you also study the interpretation of clinical data?  
19 A. Yes, I did.  
20 Q. Besides your medical degree, do you have any other advanced  
21 degrees?  
22 A. Yes, I do. I have a Ph.D in the history and sociology of  
23 science from the University of Pennsylvania, awarded in 1987.  
24 Q. Do you currently practice medicine?  
25 A. I do.

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44jrnat2 Howell - direct

- 1 Q. How long have you practiced medicine?  
2 A. 22 years.  
3 Q. Do you have any specialties in your medical practice?  
4 A. Yes, I do: Internal medicine.  
5 Q. Has internal medicine been your specialty throughout your  
6 medical career?  
7 A. Yes, it has.  
8 Q. Do you have any board certifications in that area?  
9 A. I am board certified in internal medicine.  
10 Q. When did you get your board certification?  
11 A. 1982.  
12 Q. Dr. Howell, in what setting or settings do you currently  
13 treat patients?  
14 A. I treat patients in both the out-patient and the in-patient  
15 setting.  
16 Q. For what types of problems or conditions do you treat  
17 patients?  
18 A. I practice general internal medicine. That means I see  
19 adults, some of whom come to me when they are healthy seeking  
20 to go remain so, so preventive medicine. I also see people  
21 with a wide range of diseases that afflict adults: Cancer,  
22 diabetes, lung disease, etc.  
23 Q. Doctor, do you perform abortions?  
24 A. No, I do not.  
25 Q. Do you have any responsibility for training other

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1 physicians?  
2 A. Yes, I do.  
3 Q. Can you describe those, please.  
4 A. I am responsible for training physicians at all levels of  
5 their training. I give lectures to medical students in the  
6 first and second year of the curriculum. I supervise their  
7 work --  
8 THE COURT: What do you give lectures on, Doctor?  
9 THE WITNESS: I give lectures on the history of  
10 medicine. I give lectures on human experimentation.  
11 THE COURT: This is currently?  
12 THE WITNESS: Yes, sir.  
13 THE COURT: History of medicine, and what was the  
14 other one?  
15 THE WITNESS: I lecture on human experimentation, and  
16 as part of my teaching on boards I give instruction to medical  
17 students on everything ranging from the care of patients to the  
18 interpretation of studies that they are presented with that may  
19 help to guide them in the care of patients.  
20 THE COURT: Go ahead. Next question.  
21 Q. Doctor, you testified earlier that you are the co-director  
22 of the University of Michigan Robert Wood Johnson Clinical  
23 Scholars program and are transitioning to become the director,  
24 is that correct?  
25 A. That is correct.

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1 Q. Can you please describe what that program involves.  
2 A. The Clinical Scholars program is a two-year post-residency  
3 fellowship program for clinicians in many medical specialties.  
4 It endeavors to teach them how to do research on healthcare on  
5 a wide range of topics --  
6 THE COURT: Slow down a little, Doctor. Our reporters  
7 are wonderful, but there are limits.  
8 THE WITNESS: Yes, your Honor, I will attempt to do  
9 so.  
10 A. I supervise these fellows in the study of a wide range of  
11 topics from all medical specialties.  
12 Q. Can you describe what that supervision entails.  
13 A. Yes. I am responsible for helping them come up with a  
14 research question, formulate the research question. I oversee  
15 them as they design the clinical study, obtain IRB approval for  
16 that study, obtain the data, analyze the data, and then present  
17 the data either in an oral presentation or for written  
18 publication.  
19 Q. Do you have any responsibilities that you haven't described  
20 for us in connection with the Robert Wood Johnson Foundation  
21 Clinical Scholars program?  
22 A. Yes. As the director, I oversee the entire program. Thus,  
23 I am responsible for the administration of the program. I am  
24 also responsible for organizing the curriculum that is offered  
25 to the scholars. And I participate in teaching the curriculum

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- 1 as well, in organizing the seminars, inviting speakers, and  
2 deciding basically what will be included in their education.  
3 Q. Doctor, as a part of your work in the Clinical Scholars  
4 program, have you supervised any fellows conducting research in  
5 the field of obstetrics and gynecology?  
6 A. Yes.  
7 Q. Have you supervised any fellows conducting research in the  
8 field of surgery?  
9 A. Yes.  
10 Q. Doctor, have you authored any articles?  
11 A. Yes.  
12 Q. On what subjects?  
13 A. On a wide range of subjects, most of them connected with  
14 how we have changed our practice of medicine, the development  
15 of clinical techniques and medical technologies. I have also  
16 written on human experimentation, on the history and practice  
17 of human experimentation, and other topics as well.  
18 Q. Have you authored any books?  
19 A. Yes, I have.  
20 Q. How many?  
21 A. I have edited two and authored one.  
22 Q. What is the subject of the book that you authored?  
23 A. The book Technology in the Hospital is a history of  
24 development of medical techniques and technologies in the  
25 United States from 1900 to 1925.

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- 1 Q. Doctor, has any of your writing been peer-reviewed?  
2 A. Most of it.  
3 Q. Do you serve as a peer reviewer?  
4 A. Yes, I do.  
5 Q. In what context?  
6 A. I peer review books for publication by major university  
7 presses. I peer review journal articles for publication by  
8 most of the major journals in the United States and elsewhere.  
9 THE COURT: Is this in the area of medical history?  
10 THE WITNESS: Some of it is and much of it is not.  
11 THE COURT: The article on human experimentation, was  
12 that an area of qualitative analysis?  
13 THE WITNESS: I have published several articles on  
14 human experimentation. Some of them have been qualitative,  
15 some of them have been very intensely quantitative.  
16 THE COURT: What is the one you wrote that involves  
17 quantitative?  
18 THE WITNESS: There is an experiment that was done at  
19 the Willowbrook state school involving hepatitis. It has been  
20 the subject of considerable controversy over the years. In  
21 this article, which was published I think about six months ago,  
22 we reanalyzed the data that was presented by the authors and  
23 demonstrated that the data that was presented by the authors  
24 did not in fact support the conclusions that the authors  
25 attempted to draw.

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1 THE COURT: Is that listed on your curriculum vitae?

2 THE WITNESS: I believe it is, sir. It is conceivable  
3 that it was published since the version that was sent. I can  
4 certainly check if you wish.

5 THE COURT: I sure would appreciate that.

6 BY MS. CHAITEN:

7 Q. Doctor, you have a copy of your CV in the binder in front  
8 of you. I believe it is at tab 102.

9 A. I have it in front of me. Yes, the author is listed, and  
10 it is listed as in press. It has subsequently been published.  
11 Would you like me to read the title?

12 THE COURT: Yes.

13 THE WITNESS: The title is "Writing Willowbrook,  
14 Reading Willowbrook: The Recounting of a Medical Experiment."

15

16 THE COURT: You are the author?

17 THE WITNESS: I am the co-author along with Robbie  
18 Heywood. There are two authors.

19 THE COURT: Go ahead. And that had to do with  
20 hepatitis?

21 THE WITNESS: Yes, sir.

22 THE COURT: Next question.

23 Q. Doctor, do any of the journals for which you are a peer  
24 reviewer rate the quality of their reviewers?

25 A. Yes, they do.

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1 Q. Which ones?

2 A. The Annals of Internal Medicine, which is perhaps the most  
3 prestigious internal medicine journal in the world, routinely  
4 rates the qualities of the reviews themselves and sends  
5 reviewers letters advising them of that.

6 Q. Have you been rated as a reviewer by that journal?

7 A. I have consistently been rated among their very best  
8 reviewers.

9 Q. Does any of the peer review that you do involve the  
10 evaluation, quantitative and qualitative, of clinical medical  
11 research?

12 A. Yes, it does.

13 Q. Doctor, have you been elected to any professional  
14 organizations?

15 A. Yes, I have.

16 Q. Can you give us some examples.

17 A. I was elected to fellowship in the American College of  
18 Physicians, which is the leading internal medicine organization  
19 in this country. I was also elected to the American Society  
20 for Clinical Investigation, perhaps the premier organization  
21 for clinical investigation in this country, a very competitive  
22 and difficult election. And I believe I was the first and I  
23 believe I am still the only person to be elected to membership  
24 in that society with a primarily historical focus to his  
25 research.

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1 Q. Doctor, I would like you to turn back to the document at  
2 tab 102 in your binder. Even though we have looked at this  
3 already, would you please identify that to the Court.  
4 A. This is my curriculum vitae.  
5 Q. Is this document an accurate summary of your education and  
6 experience?  
7 A. It is accurate as of December 2003.  
8 MS. CHAITEN: Your Honor, we move the entry of  
9 Plaintiffs' Exhibit 102 into evidence.  
10 MR. LANE: No objection, your Honor.  
11 THE COURT: It will be received.  
12 (Plaintiff's Exhibit 102 received in evidence)  
13 MS. CHAITEN: Your Honor, we also tender Dr. Howell as  
14 an expert in the quantitative and qualitative interpretation of  
15 clinical medical research pursuant to Federal Rule of Evidence  
16 702.  
17 THE COURT: Mr. Lane?  
18 MR. LANE: Your Honor, we have no objection to that  
19 designation on the narrow scope for which he is offered by  
20 plaintiffs.  
21 THE COURT: The Court does. I think he qualifies as  
22 an expert in medical history with some knowledge of  
23 quantitative and qualitative research, but I don't know about  
24 being an expert in it. With that designation, I will allow you  
25 to go ahead, Ms. Chaiten. But as the doctor says himself,

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1 recognized in that prestigious group with a heavy concentration  
2 and focus in medical history. Go ahead, Ms. Chaiten.  
3 BY MS. CHAITEN:  
4 Q. Dr. Howell, are you receiving any compensation for your  
5 work in this matter?  
6 A. Only my expenses.  
7 Q. Is the payment of your expenses contingent in any way on  
8 the outcome of this case?  
9 A. No, it is not.  
10 THE COURT: Doctor, are you acquainted with Dr.  
11 Johnson at the University of Michigan medical school?  
12 THE WITNESS: Yes, sir, I am.  
13 THE COURT: Would you consider yourself a friend of  
14 his?  
15 THE WITNESS: A friend in the sense that we are  
16 collegial. Not a friend in the sense that I don't think we  
17 have ever done anything outside of work together.  
18 THE COURT: Did he ask you to testify in this case?  
19 THE WITNESS: No, sir.  
20 THE COURT: Next question, Ms. Chaiten.  
21 Q. Dr. Howell, would you please turn in your binder to tab 23A  
22 and identify that document for the Court.  
23 A. Counsel, there appears to be nothing at 23A in this binder.  
24 MS. CHAITEN: Excuse me for one minute, please.  
25 Your Honor, may I approach the witness?

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1 THE COURT: You may.  
2 Q. Doctor, I have handed you what has been marked Plaintiffs'  
3 Exhibit 23A. Can you identify that for the Court, please.  
4 A. It is an article entitled "Dilation and Evacuation at  
5 Greater Than or Equal to 20 weeks: Comparison of Operative  
6 Techniques."  
7 Q. Have you read this article?  
8 A. Yes, I have.  
9 Q. Doctor, please turn to the tab marked "Clark Testimony" in  
10 your binder. Hopefully, you will have a document there. Do  
11 you?  
12 A. Yes, I do.  
13 Q. This is the testimony of Dr. Steven Clark given on April  
14 15, 2004, in this case. Have you had an opportunity to read  
15 this testimony?  
16 A. Yes, I have.  
17 Q. Doctor, Dr. Clark states that "The Chasen study shows that  
18 the rate of preterm birth after intact D&E is incredibly  
19 disturbing, downright shocking, and that intact D&E may pose  
20 significant hazards to future pregnancies in the long term in  
21 terms of preterm birth."  
22 Doctor, do you have any opinions regarding this  
23 testimony?  
24 A. Yes, I do.  
25 THE COURT: Whoa, whoa. Is there an objection?

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1 MR. LANE: Yes, your Honor. I would like to know what  
2 page.  
3 THE COURT: How in the world, given what you have  
4 offered him to be an expert on, can you offer his opinion on  
5 preterm birth and obstetrics and gynecology? It is totally  
6 outside what you offered him for.  
7 MS. CHAITEN: Your Honor, the testimony of Dr. Clark  
8 was based on the Chasen study. I am simply asking Dr.  
9 Howell --  
10 THE COURT: You don't slip past it that way. He is  
11 not an expert in it.  
12 MS. CHAITEN: Your Honor, he is simply going to  
13 testify about the statistical significance of the --  
14 THE COURT: No, that isn't what you are asking, Ms.  
15 Chaiten. You are asking about the testimony you just read of  
16 Dr. Clark, and he isn't qualified as an expert to opine on such  
17 subject.  
18 MR. LANE: Your Honor, Sean Lane from the government.  
19 In fact, the question was, "Doctor, do you have any opinions  
20 regarding his testimony," the substantive testimony.  
21 THE COURT: I know that. As I keep reminding you, I  
22 am blind, not deaf. I heard exactly what she asked.  
23 Sustained.  
24 BY MS. CHAITEN:  
25 Q. Dr. Howell, based on your reading of the data presented in

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1 the Chasen study, do you believe that it is possible to  
2 conclude that intact D&E would pose a significant hazard to  
3 future pregnancies in the long term in terms of preterm birth?

4 MR. LANE: Objection, your Honor.

5 THE COURT: Sustained. Ms. Chaiten, I made it quite  
6 clear what the Court was prepared to entertain as far as the  
7 area of this witness's testimony. I made it quite clear what  
8 the Court was recognizing as his area of expertise. I suspect  
9 that you have no difficulty hearing. That being the case, I  
10 would hope you would restrict your questions to the area which  
11 the Court has recognized the witness.

12 MS. CHAITEN: May I inquire?

13 THE COURT: You may, ma'am. But I would like an  
14 assurance from you that you heard me loud and clear and will  
15 restrict your questions to the appropriate area.

16 MS. CHAITEN: Your Honor, I have heard you and I will  
17 do my best.

18 THE COURT: Thank you, ma'am. You may proceed.

19 BY MS. CHAITEN:

20 Q. Dr. Howell, could you please turn to page 3 of Exhibit 23A,  
21 the Chasen study. If you will look at the last sentence  
22 beginning on the bottom of column 1 and carrying over to the  
23 top of column 2. Would you read that sentence aloud for us,  
24 please.

25 A. "Spontaneous preterm birth occurred in 2 of 17 (11.8

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1 percent). Pregnancies in the intact D&X group compares with 2  
2 of 45 (4.4 percent), and the dilation and evacuation group (P  
3 equals 3.0)."

4 Q. Doctor, you said P equals 3.0. Did you perhaps misread  
5 that?

6 A. I'm sorry. My apologies to the Court. I did in fact  
7 misread that. It should be P equals .30.

8 Q. Thank you, Doctor. Doctor, can you tell us what does it  
9 mean when it says P equals .30?

10 A. A P of .30 means that if you were to perform this same  
11 comparison over and over and over and over again, that in .30  
12 of the experiments, that is to say 30 percent of the  
13 experiments, you would expect to see the difference that you  
14 observed or a greater difference simply due to chance alone,  
15 that is, to random variation alone.

16 Q. Doctor, does this suggest a threefold rate of the  
17 occurrence happening again?

18 A. No, it does not. May I explain?

19 Q. Please.

20 A. Were I to take a coin and flip it four times right here  
21 right now, and were it to come up heads three times and tails  
22 once, that would certainly be a 3-to-1 ratio of heads to tails.  
23 It would also be a clear trend of more heads than tails in the  
24 coin flipping. Yet I don't think that we would conclude on the  
25 basis of that experiment that the coin I held in my hand was

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1 somehow malfunctioning, that it was not a coin that truly had  
2 an equal chance of being heads or tails.  
3 Q. What would you need in order to reach the conclusion that  
4 the coin was a troubled coin?  
5 THE COURT: Is there an objection?  
6 MR. LANE: Objection, your Honor. I am concerned --  
7 THE COURT: The witness hasn't been qualified to  
8 determine what is a troubled point. Ms. Chaiten, I have warned  
9 you you must limit it to the areas in which the witness is  
10 qualified to testify. He is not an obstetrician or  
11 gynecologist.  
12 MS. CHAITEN: Your Honor, I am referring to the coin  
13 that he used in his example, not point.  
14 THE COURT: Read the question again then.  
15 (Question read)  
16 THE COURT: "Troubled coin," what does that mean?  
17 MS. CHAITEN: Your Honor, I will move on.  
18 Q. Doctor, how would you apply this example that you have  
19 given us to the issue of subsequent preterm labor in the Chasen  
20 study?  
21 A. In order to understand whether or not the findings that  
22 were seen were due to chance or not, you would need to  
23 calculate the likelihood that they were simply due to chance.  
24 In this case, the authors have provided us with that  
25 calculation, and that calculation is that the P value is equal

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1 to .30.  
2 What that means is, just like in the coin flip we  
3 would not be likely to conclude that the coin was not a true  
4 coin, similarly in this instance, given that in 30 percent of  
5 the times one would do this experiment one would see the same  
6 kind of difference or a greater difference, one would not  
7 conclude that this was a statistically significant difference.  
8 Q. What would a statistically significant difference be?  
9 A. The standard for statistically significant differences in  
10 medical research is either a P of less than or equal to .05 or  
11 a P of less than or equal to .01.  
12 Q. What does that mean?  
13 MR. LANE: I am going to object here, your Honor. I  
14 am concerned that the question is going to elicit stuff beyond  
15 the scope of what this witness has been offered for, which is  
16 set forth in the letter.  
17 THE COURT: I am going to allow him to continue for a  
18 while. He is a trained and experienced in the field of medical  
19 history. I don't know that he can go beyond this study. As  
20 far as I know, he has been qualified as having participated in  
21 the study. He just read it. So I will allow it for a while  
22 and let counsel go a little further.  
23 Q. What do you mean when you refer to .05, Doctor?  
24 A. A P value of less than or equal to .05 -- well, let me take  
25 a step back. We start with the assumption that we have two

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1 groups and that in fact are identical. We then do an  
2 experiment and we see a difference. I have flipped the coin  
3 four times, I saw a difference. The question that we then ask  
4 is: How likely is it that this difference is simply due to  
5 random variation, that it is simply due to chance alone?

6 A P value of less than .05 says that were we to do  
7 this experiment over and over and over and over again, we would  
8 only see a difference as big or bigger than the one we observed  
9 in 5 percent of the cases. We would then take this as an  
10 indication of statistical significance. If we wanted to be  
11 more stringent, we could take a P value of less than or equal  
12 to .01, which would be that you would only see that difference  
13 in 1 percent of the cases.

14 THE COURT: If the groups aren't identical, Doctor,  
15 would it throw all this in a cocked hat?

16 THE WITNESS: The calculation of these statistics  
17 assumes that the groups are comparable.

18 THE COURT: So if they weren't, your statement  
19 wouldn't have any meaning, would it?

20 THE WITNESS: The P value is an attempt to decide if  
21 indeed there is a significant difference between the two  
22 groups.

23 THE COURT: All right. Next question.

24 Q. Doctor, does the Chasen study reflect any differences  
25 between the two groups that are being compared that would

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1 affect this analysis?

2 A. Yes, it does.

3 MR. LANE: Objection, your Honor.

4 THE COURT: What is the objection?

5 MR. LANE: The objection is that this witness has been  
6 offered as to the meaning of the statistical results, and this  
7 is now getting into the substance of the actual study.

8 THE COURT: I will allow him. He has read it. The  
9 exhibit is in evidence and he has been asked about the P  
10 factor. I would allow him to go a little further.

11 A. Counselor, could you repeat the question, please.

12 THE COURT: Read it back, Mr. Reporter.

13 (Question read)

14 A. Yes, it does.

15 Q. Could you explain is that, please.

16 A. May I quote from the exhibit?

17 Q. Yes, you may, if you would please direct our attention to  
18 the place where you are quoting.

19 A. The top on the second column on the third page, lines 195  
20 through 198. "Since both spontaneous premature births in the  
21 intact D&X group occurred in woman at high risk for  
22 prematurity." In other words, when I look at the difference,  
23 which is not statistically significant anyway, and I wonder if  
24 we have two groups, one of whom was already at higher risk of  
25 the event in question than the other, then this attenuates

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- 1 whatever -- it is not a significant result anyway, and this  
2 attenuates whatever meaning it might be thought to have. This  
3 might simply be the result of one group being at higher risk  
4 than the other.  
5 Q. Doctor, you have talked previously about P equals .30 and  
6 that that reflects a 30 percent chance -- and I am going to try  
7 to get this right -- that if you were to do the comparison over  
8 and over and over again, there would be a difference 30 percent  
9 of the time, is that right? Maybe I didn't get it quite right.  
10 Why don't you tell us what the 30 percent means.  
11 A. It is a test of the assumption that the two groups are  
12 equal. What it means is if we were to do the experiment over  
13 and over and over again and there really was no difference at  
14 all, that we would expect to see a difference as great or  
15 greater 30 percent of the time.  
16 Q. If that is what is happening 30 percent of the time, what  
17 does the 70 percent indicate?  
18 A. 70 percent of the time you would expect to see a difference  
19 that was less than the difference observed.  
20 Q. Doctor, does the small number of patients observed in  
21 connection with subsequent pregnancies in the Chasen study, in  
22 your opinion, render the overall study meaningless?  
23 A. No, it does not.  
24 Q. Why is that?  
25 A. First of all, this was one part of a much larger study that

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- 1 involves considerably more patients.  
2 THE COURT: How do you know that, Doctor?  
3 THE WITNESS: I'm sorry. I believe the papers  
4 indicate that this was a subanalysis of one group of patients  
5 that were studied. I'm sorry, your Honor. Is that not  
6 responsive to your question?  
7 THE COURT: Go ahead. Next question.  
8 Q. Was there a second reason? I think you said.  
9 A. Yes. You asked if this renders the study of no value.  
10 This is exactly the sort of study that one would expect to see  
11 logically when a new surgical technique --  
12 MR. LANE: Objection, your Honor. The objection is  
13 that this witness is going to opine beyond the scope of what he  
14 is offered for, and I believe he is going to talk about what he  
15 was originally offered for by plaintiffs in this case, that is,  
16 surgical innovation and the role of studies.  
17 THE COURT: Sustained.  
18 MS. CHAITEN: Your Honor, I may have no further  
19 questions right now.  
20 THE COURT: Mr. Lane.  
21 MR. LANE: If I could have just one moment, your  
22 Honor?  
23 THE COURT: Surely.  
24 CROSS-EXAMINATION  
25 BY MR. LANE:

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- 1 Q. Good afternoon, Dr. Howell.  
2 A. Good afternoon.  
3 Q. Doctor, I would like to talk about your background for a  
4 moment. You are not a surgeon, correct?  
5 A. That is correct.  
6 Q. You don't perform procedures in operating rooms?  
7 A. That is correct.  
8 Q. You have never been qualified as an expert in surgery by a  
9 court of law?  
10 A. That is correct.  
11 Q. You are also not an obstetrician or gynecologist, correct?  
12 A. That is correct.  
13 Q. You are not board certified in obstetrics or gynecology,  
14 correct?  
15 A. Correct.  
16 Q. You have never performed an abortion?  
17 A. Correct.  
18 Q. Or seen an abortion?  
19 A. Correct.  
20 Q. Doctor, I would like to turn to the Chasen study that is  
21 Plaintiffs' Exhibit 23A. You would agree that an important  
22 limitation in the study is the relatively small number of  
23 patients receiving prenatal care at the same institution?  
24 A. A limitation of the study is that it involves only a single  
25 institution, that is correct.

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- 1 Q. Wouldn't you agree that that is an important limitation?  
2 A. It is a limitation. It is a limitation that one would  
3 expect to see at this stage in the development of a new  
4 surgical technique.  
5 Q. Doctor, could you turn to page 4 of the Chasen study. I am  
6 looking at line 251.  
7 A. Yes, sir.  
8 Q. It says there, "Another important limitation is the  
9 relatively small number of patients receiving prenatal care at  
10 our hospital in subsequent pregnancies."  
11 A. Yes, sir.  
12 Q. Have I read that correctly?  
13 A. Yes, sir.  
14 Q. That is from the study we are discussing?  
15 A. Yes, sir.  
16 Q. One can't be certain that the outcomes in subsequent  
17 pregnancies at that institution are representative of outcomes  
18 in all subsequent pregnancies?  
19 A. No, one could not.  
20 Q. In fact, the authors acknowledge the study's lack of power  
21 to conclude that subsequent pregnancy outcomes are not  
22 different, correct?  
23 A. That is correct.  
24 Q. In fact, this lack of power was criticized by one of the  
25 peer reviewers of this article, who noted that only 62

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- 1 subsequent pregnancies were available for follow-up while 321  
 2 were not. Are you aware of that?  
 3 A. Are you quoting to me from the peer review of this article?  
 4 Q. Yes. I am asking you whether you are aware of the peer  
 5 reviewer's observation about having only 62 of subsequent  
 6 pregnancies available for follow-up while 321 were not. I am  
 7 wondering if you are aware of that.  
 8 A. Counselor, normally peer reviews are kept confidential.  
 9 No, I have not seen that peer review. I am not aware of that.  
 10 Q. So the answer is you are not aware of that?  
 11 A. No.  
 12 Q. So you wouldn't be aware that the peer reviewer found that  
 13 to be a major concern?  
 14 A. I have not seen the peer reviews, no.  
 15 Q. Is it safe to say that you wouldn't be aware that the peer  
 16 reviewer suggested that the author's contact the remaining 321  
 17 women to determine the absolute number of subsequent  
 18 pregnancies and their outcomes and that this would greatly  
 19 improve the study?  
 20 A. I have not been able to -- I have not read any of the peer  
 21 reviews.  
 22 Q. Are you aware that Dr. Chasen testified in this case that  
 23 he had not done such a follow-up?  
 24 A. No, I am not aware of that.  
 25 THE COURT: Have you talked with Dr. Chasen or any of

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- 1 the authors of this report?  
 2 THE WITNESS: No, sir.  
 3 Q. As you understand it, Dr. Clark agreed that the P value of  
 4 .3 is not statistically significant, isn't that right?  
 5 A. I have carefully read Dr. Clark's testimony.  
 6 THE COURT: The question is -- read the question, Mr.  
 7 Reporter.  
 8 (Question read)  
 9 THE COURT: Simple question, Doctor.  
 10 THE WITNESS: Yes, sir. But he opined several times  
 11 about the importance, and I don't know which time I am being  
 12 asked about.  
 13 Q. Certainly. Let me make this easier for you, Doctor. Could  
 14 you turn to page 2425 of Dr. Clark's testimony.  
 15 A. Yes, sir.  
 16 Q. Starting at line 15:  
 17 "Q. And a P value of .30 is not statistically significant  
 18 difference, is it?  
 19 "A. Correct."  
 20 Are you aware that Dr. Clark testified in that manner?  
 21 A. Yes, I am.  
 22 Q. Do you understand that Dr. Clark agreed with plaintiffs'  
 23 counsel that there is a 30 percent chance that the preterm  
 24 outcome occurred by chance?  
 25 A. Yes, sir.

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- 1 Q. Doctor, you had testified about the importance of two  
 2 groups being equal, right?  
 3 A. I said comparable.  
 4 Q. Comparable. The two groups here are not comparable, are  
 5 they, Doctor?  
 6 A. No, they are not.  
 7 Q. In fact, there is a statistically significant difference in  
 8 preoperative cervical dilation between the group undergoing D&X  
 9 and the group undergoing D&E, is that correct?  
 10 A. I believe so, yes.  
 11 Q. In the end, Doctor, given the small numbers of the study,  
 12 all you can really conclude is that the women in this study  
 13 undergoing a D&X had a higher rate of preterm birth than the  
 14 women in the study undergoing a D&E, correct?  
 15 A. Could the court reporter repeat the question, please.  
 16 THE COURT: Mr. Reporter.  
 17 (Question read)  
 18 A. I take "conclude" to have two meanings here. If you mean  
 19 to have any significant clinical conclusions, the answer is no.  
 20 If you mean to take literally the numbers on the page for this  
 21 small number, the answer is yes.  
 22 Q. And for this study, spontaneous preterm birth occurred in 2  
 23 of 17 subsequent pregnancies in the intact D&X group, correct?  
 24 A. Correct.  
 25 Q. By comparison, spontaneous preterm birth occurred in 2 of

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- 1 45 subsequent pregnancies in the D&E group, correct?  
 2 A. Correct.  
 3 Q. Doctor, you note that the study gives an explanation about  
 4 2 of the women who had a subsequent preterm birth in the D&X  
 5 group, correct?  
 6 A. Correct.  
 7 Q. It is also correct, though, that there is no explanation of  
 8 whether the women in the D&E group suffered from any increased  
 9 risk of preterm birth, isn't that correct?  
 10 A. I believe, so yes.  
 11 MR. LANE: No further questions, your Honor.  
 12 THE COURT: Doctor, who originally asked you to  
 13 testify in this case?  
 14 THE WITNESS: The name of the attorney who originally  
 15 contacted me?  
 16 THE COURT: Who approached you to testify? Or did you  
 17 volunteer?  
 18 THE WITNESS: No, sir, I did not volunteer. I believe  
 19 it was -- do you mean the name of the person who originally  
 20 called me about this particular case?  
 21 THE COURT: Yes, that is what I am asking you.  
 22 THE WITNESS: Louise Melling of the American Civil  
 23 Liberties Union.  
 24 THE COURT: Have you testified before for the ACLU?  
 25 THE WITNESS: No, sir.

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1 THE COURT: Any redirect?  
2 MS. CHAITEN: May we have just one minute, your Honor?  
3 THE COURT: Yes.  
4 MS. CHAITEN: No redirect, your Honor.  
5 THE COURT: Doctor, thank you very much. You may step  
6 down.  
7 (Witness excused)  
8 THE COURT: Is our next piece of business the reading  
9 of the transcript of the deposition?  
10 MR. HUT: That is correct, your Honor.  
11 THE COURT: Who will be conducting that, Mr. Hut?  
12 MR. HUT: I will be reading the examination, your  
13 Honor, and, in a departure from the norm, I will actually be  
14 reading for myself. However, we are continuing our cross-  
15 gender approach to the responsive reading, which will be read  
16 as Dr. Bowes by my colleague Ms. Liu.  
17 THE COURT: All right. Would you make sure your  
18 opponents are on the same page and line.  
19 MR. HUT: Absolutely.  
20 THE COURT: And we will get under way.  
21 MR. HUT: This is a reading from the deposition of  
22 Watson A. Bowes, Jr., MD, taken February 19, 2004, in Chapel  
23 Hill, North Carolina. Reading from page 8/line 20:  
24 "Q. Would you please state your full name for the record.  
25 "A. My name is Watson A. Bowes, Jr.

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1 "Q. What is your business address, Doctor, or home address if  
2 you are retired?  
3 "A. I'm retired. My home address is 211 Huntington drive,  
4 Chapel Hill, North Carolina.  
5 "Q. You have been deposed before, Dr. Bowes?  
6 "A. Yes, I have.  
7 "Q. How many times, approximately?  
8 "A. Oh, it would average 2 or 3 times a year since 1975, in  
9 various situations.  
10 "Q. Some of those cases have involved challenges to state bans  
11 to partial-birth abortion, correct?  
12 "A. Yes.  
13 "Q. Have you testified in other types of cases?  
14 "A. Yes.  
15 "Q. In deposition?  
16 "A. Yes.  
17 "Q. What types of cases constitute the remaining 2 to 3 per  
18 year for the past number of years?  
19 "A. Almost all were medical/legal cases in which I was asked to  
20 testify as an expert witness.  
21 "Q. 'Medical/legal,' can you expound a bit on that, sir?  
22 "A. Generally, I'm an obstetrician, and these cases involved  
23 situations where there was alleged medical negligence about  
24 some obstetrical complication.  
25 "Q. Have you testified in these cases as a party or an expert,

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1 if you understand the difference?  
 2 "A. As an expert witness, yes."  
 3 Reading from line 23 on page 10.  
 4 "Q. In cases in which you've testified, have you been permitted  
 5 by judges to offer expert testimony at trial?  
 6 "A. Yes.  
 7 "Q. Do you recall how many times?  
 8 "A. The question is, have judges allowed me to testify?  
 9 "Q. Sure, as an expert.  
 10 A. Yes. I assumed the judge knew I was an expert in the all  
 11 of those cases in which I was testifying. I'm not sure I quite  
 12 understand that question.  
 13 "Q. I'm driving at something that may be a technical legal  
 14 distinction. Let me ask the question a different way. Have  
 15 there been any cases in which judges have refused or declined  
 16 to accept an opinion testified to by you as an expert?  
 17 "A. Not that I know of."  
 18 At page 35/line 12:  
 19 "Q. Doctor, you received an MD from the University of Colorado  
 20 School of Medicine in 1959, correct?  
 21 "A. Yes, I did."  
 22 At line 19 on the same page.  
 23 "Q. You then were an intern at Mary Hitchcock Memorial  
 24 Hospital, correct?  
 25 "A. Yes.

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1 "Q. Where is that located?  
 2 "A. In Hanover, New Hampshire. It is associated with Dartmouth  
 3 Medical School.  
 4 Page 36/line 3.  
 5 Q. You were a resident in obstetrics and gynecology at  
 6 Colorado School of Medicine from 1962 to 1965, correct?  
 7 "A. Yes.  
 8 "Q. Did you receive training in methods of performing abortion  
 9 during that residency?  
 10 "A. Yes.  
 11 "Q. Can you describe the training you received.  
 12 "A. Well, as a resident, through our graduated training of the  
 13 3 years, we performed techniques of completing and complete  
 14 abortions. We also performed medically indicated induced  
 15 abortions in both the first and second trimesters.  
 16 "And our training involved various techniques that  
 17 were used at that time, which were, for the abortions in the  
 18 first trimester we used D&C. It was dilatation and curettage  
 19 as described. And for the abortions after the first trimester,  
 20 at that time we were using induction of labor with various  
 21 techniques such as introduction of saline and the use of  
 22 oxytocin, a drug used to induce labor.  
 23 Page 41/line 24.  
 24 "Q. You're a professor emeritus at North Carolina School of  
 25 Medicine?

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1 "A. Yes, I am.  
2 "Q. Do you have any duties or responsibilities as a professor  
3 emeritus?  
4 "A. Yes.  
5 "Q. What are those?  
6 "A. I serve on what's called the IRB, the institutional review  
7 board that reviews research projects. I attend teaching  
8 conferences at the weekly teaching conferences of the OB-GYN  
9 department. And I occasionally give lectures or attend  
10 symposiums or seminars with the residents. It's a teaching  
11 function.  
12 "Q. When you say attend lectures or symposiums, do you do any  
13 teaching or instruction yourself or is it received as a  
14 student?  
15 "A. No. I'm asked to participate in teaching the residents,  
16 not bedside teaching. But we discuss various procedures,  
17 obstetrical procedures and when they're indicated, and so  
18 forth.  
19 "Q. And the lectures and symposia that you attend, how do they  
20 differ from the teaching conferences of the OB-GYN department  
21 that you attend?  
22 "A. Well, each week there's a conference which is called grand  
23 rounds where some subject is presented by one of the faculty  
24 members or a visiting faculty member. And that's followed by  
25 case conferences called, they called them M&M conferences,

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1 morbidity and mortality conferences, in which cases during the  
2 week are presented and discussed, and I attend those.  
3 At page 63/line 3.  
4 "Q. Do you agree that during the course of the D&E in which the  
5 physician intends to effect dismemberment at the outset, it can  
6 occur that with merely one pass the entirety of the fetal body  
7 can be extracted intact up to the head?  
8 "A. Do I agree that that might happen on some occasions?  
9 "Q. Yes.  
10 "A. Yes, it might happen."  
11 At page 77/line 6.  
12 "Q. What about the feasibility study? Did you discuss with  
13 Messrs. Lang, Quimbleton, and Henry yesterday?  
14 "A. It seemed to me to suggest, in my view, it was not  
15 surprising to me that Dr. Grimes and his colleagues were not  
16 able to get more women to redo the study, because primarily Dr.  
17 Grimes has been an outspoken advocate for a long time about the  
18 superiority of D&E procedures over induction procedures, and  
19 that information he's disseminated, I think, extensively to  
20 physicians performing abortions. So that most of the  
21 abortions, midtrimester abortions that are done, many of them,  
22 I would say the predominant number now are D&E's. So it isn't  
23 surprising to that women, given fully informed consent about  
24 it, would say I think I would prefer to have the one that you  
25 think is safer, Doctor.

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1 "Q. In fact, have you looked at or do you review on any regular  
2 basis CDC or other data concerning complication incidents of  
3 particular abortion procedures?

4 "A. Yeah. I look at the MMWR data.

5 "Q. And it's true that those data show that D&E is overall a  
6 safer procedure than induction, correct?

7 "A. I think the recent data does show that overall."

8 Page 80/line 20.

9 "Q. Do you have any reason to think that outside of the setting  
10 in which Dr. Grimes attempted to do his study, that there would  
11 be any greater ease or possibility of conducting a randomized  
12 study looking to compare inductions to D&E's?

13 "A. Well, if you're talking about a prospective controlled  
14 trial, I think it would be difficult. One caveat is that the  
15 induction procedure that Dr. Grimes was offering these patients  
16 was a relatively new one using mifepristone rather than simply  
17 other methods of induction of labor. There is some evidence  
18 that that procedure is a somewhat shorter one than the previous  
19 induction procedures, suggesting he's not offering the  
20 classical, I say quote classical, the previous procedures that  
21 were performed.

22 "But I still think, given the evidence in the  
23 literature of the efficacy or the superiority of the D&E  
24 procedure over the induction procedures, that most situations  
25 in this country it would be difficult. Now, Dr. Grimes did

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1 suggest in that article that if you went to a developed country  
2 where they were not doing D&E's, you might be able to conduct  
3 that study where only induction procedures were done."

4 Page 91/line 4.

5 "Q. Now, this ACOG policy statement of 1997, Dr. Bowes,  
6 describes a technique that it refers to as intact D&X, correct?

7 "A. Yes.

8 "Q. Either by reference to the document or otherwise, do you  
9 recall whether the procedure that is the subject of this policy  
10 statement comprises four steps?

11 "A. That's what they state here.

12 "Q. And those steps are deliberate dilatation of the cervix,  
13 usually over the sequence of days, instrumental conversion to a  
14 footling breech, breech extraction to the head, and partial  
15 evacuation of the intracranial contents, correct?

16 "A. Yes.

17 "Q. The Partial-Birth Abortion Act of 2003 is not limited, is  
18 it, to the procedure described in the ACOG policy statement?

19 "A. The descriptions are not identical.

20 "Q. And in your view, the legislation bans a wider spectrum of  
21 procedures than the procedure that's described by ACOG,  
22 correct?

23 "A. Yes, I said that.

24 "Q. You mentioned the fact that the borrower bans and the Act  
25 bans a certain procedure in the case of a head-first

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- 1 presentation, right?  
 2 "A. Yes. It describes that in the Act, yeah.  
 3 "Q. The Act is not limited to banning a procedure in which  
 4 there is podalic version, is there?  
 5 "A. It's not limited to that?  
 6 "Q. Correct.  
 7 "A. Yes.  
 8 "Q. Yes, it's not limited?  
 9 "A. Yes, it's not limited.  
 10 "Q. Right. The Act is not limited to situations of extraction  
 11 of the fetal body to the head, is it?  
 12 "A. It's not limited?  
 13 "Q. Or in the breech position?  
 14 "A. No, it's not limited.  
 15 "Q. The Act can be violated, can't it? In order to evacuate  
 16 the fetus from a woman's body, the fetal head is crushed rather  
 17 than evacuated by means of incision and suction?  
 18 "A. It would include -- I mean it would include that, yes.  
 19 "Q. It would include both situations that I just described?  
 20 "A. Yes."  
 21 On page 106/line 9.  
 22 "Q. But you wouldn't say that a hysterotomy in all but very  
 23 rare circumstances would be preferable to, say, intact D&X,  
 24 would you?  
 25 "A. No."

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- 1 Page 111/line 16.  
 2 "Q. You would agree that there is a debate in the medical  
 3 community as to whether it is the safest for some women in some  
 4 circumstances?  
 5 "A. Yes.  
 6 "Q. And it's a position asserted by a responsible group of  
 7 physicians?  
 8 "A. Yes.  
 9 "Q. But there is no consensus in the medical community that the  
 10 procedure is never medically necessary?  
 11 "A. There is no consensus."  
 12 Page 116/line 18.  
 13 "Q. How do you define an intact D&X?  
 14 "A. An intact D&X is a procedure which has been generally  
 15 referred to as a procedure in which the fetus, after the cervix  
 16 has been dilated, the fetus is turned to a breech position,  
 17 delivered up to the point where the head cannot be delivered,  
 18 an instrument is then inserted into the fetal head, the  
 19 contents of the skull are suctioned out, and after the fetal  
 20 head collapses the fetus is then delivered.  
 21 "Q. The ban doesn't require a conversion to breech, does it?  
 22 "A. It does not require it, no.  
 23 "Q. It doesn't require that extraction be as far as the head,  
 24 does it?  
 25 "A. No, I don't think it says completely to the head."

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1 "Q. It doesn't describe a particular way of securing the  
 2 passage of the head through the cervical os, does it?  
 3 "A. No."  
 4 Page 119/line 13  
 5 "Q. Do you recall, Dr. Bowes, giving deposition testimony in  
 6 the New Jersey partial-birth abortion case in August 1998?  
 7 "A. Yes.  
 8 "Q. Do you recall that this question was asked and this answer  
 9 given: 'What is the physician's intent in starting an  
 10 induction abortion?  
 11 "'A. It is to end the pregnancy.'  
 12 "Do you recall testifying that way?  
 13 "A. If you're quoting from the testimony transcript, I did say  
 14 that.  
 15 "Q. And do you agree with that today?  
 16 "A. Yes.  
 17 "Q. Do you recall testifying as follows:  
 18 "'Q. How about in doing a D&E?  
 19 "'A. Same'?'  
 20 "A. Yes.  
 21 "Q. You would agree with that today?  
 22 "A. I agree with that.  
 23 "Q. And then question, 'How about in doing the Haskell  
 24 procedure?  
 25 "'A. It's the same.'

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1 "Do you remember that?  
 2 "A. Yes.  
 3 "Q. And do you agree with that today?  
 4 "A. Yes.  
 5 "Q. 'Q. And doing the McMahon procedure?'  
 6 "'A. The same.'  
 7 "Do you remember that?  
 8 "A. Yes.  
 9 "Q. And do you agree with that today?  
 10 "A. I agree with that.  
 11 "Q. 'Q. And in doing the four-step D&X procedure that ACOG  
 12 describes, what is intent of such procedure?  
 13 "'A. The same.'  
 14 "Do you remember that?  
 15 "A. Yes.  
 16 "Q. And do you agree with that today?  
 17 "A. I agree with that.  
 18 "Q. 'Q. And what is that intent again?  
 19 "'A. To end the pregnancy.'  
 20 "Do you remember that?  
 21 "A. Yes.  
 22 "Q. Do you agree with that?  
 23 "A. Yes.  
 24 "Q. 'Q. In all of those cases, is the intent to end the  
 25 pregnancy the safest way possible for the woman?'

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1 "And you answered 'Yes.'  
2 "Do you remember that?  
3 "A. I don't remember saying that. I would disagree with that.  
4 I may have if what they're asking is in all of those cases is  
5 that the safest way to end that pregnancy.  
6 "Q. No, that's not what they're asking.  
7 "A. Well, tell me what they're asking.  
8 "Q. The question is, 'In all those cases is the intent to end  
9 the pregnancy the safest way possible for the woman?' And you  
10 answered 'Yes.'  
11 "A. Oh, the intent, yes.  
12 "Q. And you agree with that today?  
13 "A. Intent, yes."  
14 Page 130/line 7.  
15 "Q. You would not say, Dr. Bowes, would you, that before a  
16 particular variation in the surgical procedure can be utilized  
17 in obstetrics or gynecology, that their use must be preceded by  
18 a randomized controlled study, would you?  
19 "A. Not in all cases.  
20 "Q. How do you distinguish between the kind of procedure that in  
21 your view would require a randomized controlled study and the  
22 kind that would not?  
23 "A. I believe a procedure that can be -- that has been  
24 introduced often by trail and error and personal experience  
25 reaches a point where it is going to be widely used and

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1 suggested to be an alternative with equal efficacies and safety  
2 to another procedure. You must have the evidence that that is  
3 the case.  
4 "Q. How do you define wide use?  
5 "A. Wide use?  
6 "Q. Yes. You said before it is widely used, you must have  
7 evidence as to efficacy.  
8 "A. Yeah. Before it becomes part of the armamentarium of  
9 physicians performing that particular procedure statewide,  
10 country wide. But in the last 15 or 20 years it's become  
11 common practice to establish efficacy and safety of new  
12 innovative procedures in medicine or new medications, new  
13 procedures, in acceptable epidemiological ways. One of which,  
14 and the best way, the premier way, is doing a randomized  
15 controlled trial. Now, it's not the only way to establish  
16 efficacy and safety, but it's by far the best way."  
17 I should just interject here, your Honor, portions of  
18 what was just read were included at the request of the  
19 government for completeness.  
20 THE COURT: You are reading this all together?  
21 MR. HUT: I think in two situations, your Honor, we  
22 did include at Mr. Lane's request additional testimony that we  
23 had not otherwise designated as a matter of completeness.  
24 THE COURT: The government will read some additional  
25 portions?

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1 MR. HUT: I believe they have one additional  
 2 designation following.  
 3 THE COURT: All right.  
 4 MR. HUT: At page 135/line 9.  
 5 "Q. If the procedure to be tested had been banned, you couldn't  
 6 do appropriate controlled scientific studies on that procedure,  
 7 could you?  
 8 "A. If it had been banned so there were no procedures done or  
 9 not a sufficient number of them conducted, you couldn't do such  
 10 a study.  
 11 "Q. Prospectively, if it were banned, you could not do a  
 12 randomized controlled study, could you?  
 13 "A. That's correct."  
 14 At page 136/line 12.  
 15 "Q. And if you don't discern any complications or unduly high  
 16 rate of complications, you would rely and could rely and should  
 17 rely on the informed judgment of responsible, reliable  
 18 physicians with respect to the utilization of the procedure,  
 19 correct?  
 20 "A. I would agree with that."  
 21 Page 147/line 4.  
 22 "Q. So you would agree, would you not, that there is no  
 23 reliable medical basis upon which to say that intact D&X is  
 24 more dangerous to a woman than any other abortion method,  
 25 correct?

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1 "A. At this time I don't think there is any evidence to say  
 2 that.  
 3 "Q. Let me ask you to look back to Plaintiffs' Trial Exhibit  
 4 69, which is a copy of the Act. Dr. Bowes, have you read the  
 5 findings that constitute the first six or five and a half pages  
 6 of the Act set forth in Plaintiffs' Trial Exhibit 69?  
 7 "A. Yes.  
 8 "Q. Directing your attention to finding number 2 on page 1, in  
 9 part that finding states, 'Partial-birth abortion remains a  
 10 disfavored procedure that is not only necessary to preserve the  
 11 health of the mother but in fact poses serious risks to the  
 12 long-term health of women and in some circumstances their  
 13 lives.'  
 14 "You don't agree with that finding, do you, Doctor?  
 15 "A. No.  
 16 "Q. And there is in fact no valid scientific evidence that  
 17 supports it, is there?  
 18 "A. Not in my view.  
 19 "Q. Now, could you turn to page 4 and look at finding 14A. Why  
 20 don't you read finding 14A to yourself. I don't think there is  
 21 any need at this point to have you read the entire thing into  
 22 the record, which would take some time.  
 23 "You would agree, would you not, Dr. Bowes, that there  
 24 is no reliable and valid scientific evidence that supports the  
 25 statements made in that finding, is there?

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1 "A. No. There are risks that they mention here that are risks.  
2 But compared to other procedures that would have -- I mean, you  
3 can't make this statement, I believe, in the absence of saying  
4 compared to what.

5 "Q. And, for example, with respect to the sentence that begins  
6 the paragraph, 'Partial-birth abortion poses serious risks to  
7 the health of the woman undergoing the procedure,' unless you  
8 have compared it to some other procedure through a valid  
9 scientific study, there is no reliable basis upon which anyone  
10 could make that statement, correct?

11 "A. That's correct.

12 Q. And you know of any reliable scientific evidence or study,  
13 Dr. Bowes, do you, that reliably demonstrates that 'partial-  
14 birth abortion' poses any of the risks enumerated here on a  
15 more serious or frequent basis than any other abortion  
16 procedure, do you?

17 "A. No.

18 "Q. If you would look at finding 14B, that states in part,  
19 'There is no credible medical evidence that partial-birth  
20 abortions are safe or are safer than other abortion procedures.  
21 No controlled studies of partial-birth abortions have been  
22 conducted nor have any comparative studies been conducted to  
23 demonstrate its safety and efficacy compared to other abortion  
24 methods.'

25 "The paragraph goes on to say at the end, 'Unlike

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1 other, more commonly used abortion procedures, there are  
2 currently no medical schools that provide instruction on  
3 abortions that include the instruction in partial-birth  
4 abortion in their curriculum.'

5 "Now, you know the last sentence that I just quoted to  
6 be untrue, do you not?

7 "A. I assume the statements made in the testimony or the expert  
8 reports of the other witnesses suggests that it is being taught  
9 in medical school."

10 Page 150/line 22.

11 "Q. Turn to paragraph 14F. It states, 'A ban on the partial-  
12 birth abortion procedure therefore advances the health  
13 interests of pregnant women seeking to terminate a pregnancy.'  
14 In your opinion, Dr. Bowes, there is no valid, reliable  
15 scientific evidence that supports Congress's findings set out  
16 in 14F, is there?

17 "A. No."

18 Page 153/line 4.

19 "Q. And all things equal, you agree, don't you, that  
20 minimization of instrumentation in the uterine cavity is a good  
21 thing?

22 "A. Intuitively, yes."

23 Page 154/line 19.

24 "Q. With respect to intactness and its ability to allow  
25 unhampered evaluation of structural abnormalities, the absence

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- 1 of significant brain tissue would interfere with discerning  
2 abnormalities of the nervous system but not other structural  
3 abnormalities, for example, of the skeletal system below the  
4 head, correct?  
5 "A. That's correct.  
6 "Q. When a physician performs a D&E, Dr. Bowes, he or she tries  
7 to do it with as little trauma and blood loss for the woman as  
8 possible, correct?  
9 "A. Yes.  
10 "Q. And he or she tries to do it as quickly as possible,  
11 correct?  
12 "A. Within the bounds of is being a safe procedure, yes.  
13 "Q. And with as few insertions of the forceps as possible,  
14 correction?  
15 "A. Inasmuch as that allows them to complete the procedure,  
16 yes."  
17 At line 16 on page 155.  
18 "Q. In testimony in New Jersey on October 2, 1998, you were  
19 asked the question: 'And don't you try to do it,' referring to  
20 a D&E, 'with as few insertions of the forceps as possible?'  
21 "And you answered 'Yes.'  
22 "A. Yes.  
23 "Q. Was that truthful testimony then?  
24 "A. Yes.  
25 "Q. And you agree with that now, don't you?

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- 1 "A. Yes.  
2 "Q. And you agree, don't you, Doctor, that intuitively, even if  
3 not conclusively, a technique that reduces the number of  
4 insertions of sharp instruments might offer some safety  
5 advantages?  
6 "A. Yes."  
7 At page 158/line 9.  
8 "Q. And these procedures identified at pages 150 and 151 of Dr.  
9 Paul's book are intended to ensure fetal demise before the  
10 procedure commences, correct?  
11 "A. Yes.  
12 "Q. In fact, you are to believe, are you not, that there are  
13 risks to using either of these kinds of injections?  
14 "A. Risks to the?  
15 "Q. To the mother.  
16 "A. Very small risks.  
17 "Q. What about the risk of punctured maternal bowel, for  
18 example. You would agree that that's such a risk, wouldn't  
19 you?  
20 "A. Extremely rare.  
21 "Q. Can these injections practicably be given to all women in  
22 all circumstances?  
23 "A. To all women in all circumstances?  
24 "Q. Correct.  
25 "A. The answer would have to be no.

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1 "Q. For example, it would be more difficult, would it not, to  
2 do any of those injections or supply any of those injections to  
3 a morbidly obese woman?

4 "A. Correct.

5 "Q. And even though the risk of puncturing a woman's bowel  
6 might be, I think in your words, extremely rare, there would be  
7 no reason to attempt an extra procedure, even if the risk were  
8 extremely rare, to attempt fetal demise in connection with any  
9 abortion, would there?

10 "A. If the intention was not to deliver a live baby, and that  
11 might be important to this mother, not for medical reasons but  
12 for emotional reasons, those risks would be worth taking.

13 "Q. And that would be a risk that would be assumed by the  
14 patient after she received appropriate information and guidance  
15 about the risks and benefits, correct?

16 "A. Yes.

17 "Q. But you agreed I think in your last answer that there's no  
18 medical reason to subject a woman to such risks, correct?

19 "A. That's correct."

20 Page 161/line 7.

21 "Q. With respect to injections of potassium chloride into a  
22 fetal heart, you would agree, Dr. Bowes, would you not, that  
23 not all physicians have the skill to perform such an injection?

24 "A. I would agree."

25 Page 166/line 6.

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1 "Q. Are you aware of contraindications for induction in the  
2 second trimester of pregnancy?

3 "A. Yes.

4 "Q. And what are they?

5 "A. Well, I think you would certainly have to be -- consider a  
6 relative contraindication to be used in a woman who had had a  
7 classical Cesarean delivery. In other words, she has a scar on  
8 her uterus at a relatively vulnerable place for rupture, and  
9 you would have to very carefully consider the alternatives  
10 there."

11 Page 198/line 18.

12 "Q. Dr. Bowes, do you agree that the safest and most  
13 appropriate abortion procedure for a particular woman depends  
14 in part on the stage of the woman's pregnancy?

15 "A. Yes.

16 "Q. You agree that the safest and most appropriate abortion  
17 procedure for a particular woman depends in part on that  
18 woman's health?

19 "A. Yes, in certain circumstances. Let me think about that  
20 question for a minute. The answer is yes, because I've already  
21 described a situation in which I think one abortion procedure  
22 might be somewhat more risky than another. So the answer to  
23 the question would have to be yes.

24 "Q. Do you agree that the safest and most appropriate abortion  
25 procedure for a particular woman depends in part on any medical

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1    contraindications a woman might have?  
 2    "A. Yes.  
 3    "Q. Do you agree that the safest and most appropriate abortion  
 4    procedure for a particular woman depends in part on the  
 5    training, skill, and experience of her physician?  
 6    "A. Yes.  
 7    "Q. Do you agree that the safest and most appropriate abortion  
 8    procedure for a particular woman depends in part on her prior  
 9    surgical history, if any?  
 10    "A. Yes.  
 11    "Q. Do you agree that the safest and most appropriate abortion  
 12    procedure for a particular woman depends in part on whether the  
 13    woman desires to preserve future fertility?  
 14    "A. Read that again, please.  
 15    "Q. Sure. That the safest and most appropriate procedure for a  
 16    particular woman depends in part on whether she desires to  
 17    preserve future fertility.  
 18    "A. I'm trying to think of an abortion procedure where it would  
 19    intentionally eliminate her fertility. A hysterectomy would be  
 20    one, but you would only do that in really extraordinary  
 21    circumstances. So the abortion procedures we do preserve  
 22    fertility. I mean, they're not designed to interfere with  
 23    fertility.  
 24    "Q. Do you agree, finally, that the safest and most appropriate  
 25    abortion procedure for a particular woman depends in part on

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1    whether she or her doctor desires to remove the fetus intact to  
 2    permit or complete pathological testing?  
 3    "A. If -- yeah, if that was absolutely necessary, sure, it  
 4    would affect the way you would do it."  
 5            That completes the plaintiffs' designation of  
 6    testimony from the deposition of Dr. Bowes, your Honor.  
 7            THE COURT: Very well. Is the government going to  
 8    read a portion?  
 9            MR. LANE: Yes, your Honor. We only have one thing  
 10   that we are going to read. And in light of that, I was going  
 11   to be presumptuous enough to play Mr. Hut and Dr. Watson Bowes.  
 12            THE COURT: Very well.  
 13            MR. LANE: Page 110/line 6.  
 14   "Q. I'm asking you a distinct question. I'm asking whether,  
 15   taking the ACOG statement and the plaintiffs' statements and  
 16   the fact of the procedure being taught at what you identify as  
 17   fine medical schools, there is a significant body of medical  
 18   opinion, whether or not you agree with it, that the intact D&X  
 19   may be the safest procedure for some women in some  
 20   circumstances.  
 21   "A. If you would just eliminate the term 'significant,' I would  
 22   say there is a group of practitioners who feel this procedure  
 23   is acceptable."  
 24            That is all the government has, your Honor.  
 25            THE COURT: That concludes reading the transcript and

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1 it concludes our rebuttal testimony, is that correct? With the  
2 proviso that we have a ruling yet to come from our brothers and  
3 sisters in the Second Circuit, I take it both sides rest at  
4 this point?

5 MR. HUT: Your Honor, the plaintiffs have two  
6 additional pieces of business with respect to exhibits. First,  
7 plaintiffs would seek reconsideration of the Court's ruling not  
8 to admit in evidence Plaintiffs' Trial Exhibit No. 6. That is  
9 the ACOG policy statement from 1997 as to which the Court  
10 sustained the government's objection.

11 The basis for the ruling is the Court's observation --  
12 albeit I stress, your Honor, it was a different context and the  
13 Court may continue to find it distinguishable -- but you  
14 mentioned on Friday in the context of offers to admit exhibits  
15 by Ms. Gowan that, given the nonjury situation, that obviated  
16 certain objections that we had made. I suggest the same  
17 analysis ought to apply here. So I would like the Court to  
18 admit that policy statement, Plaintiffs' Trial Exhibit 6 in  
19 evidence.

20 THE COURT: I will adhere to my original ruling. I  
21 think there is quite a bit of distinction. Go ahead. My  
22 ruling stands.

23 MR. HUT: The next exhibit we move in evidence is  
24 Plaintiffs' Trial Exhibit 1. That is a compilation, a rather  
25 large one, of legislative history. We do so pursuant to a

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1 stipulation between the government and plaintiffs that is set  
2 out at page 4 of the pretrial order. Let me read it to the  
3 Court.

4 "The parties agree and stipulate that for purposes of  
5 the trial and addition herein:

6 "1. The following materials comprise the legislative  
7 history of the Partial-Birth Abortion Act of 2003 (hereinafter  
8 'the Act'):

9 "(a) The materials contained on the CD furnished by  
10 defendant to the Court on November 19, 2003, and

11 "(b) All additional materials contained in any  
12 congressional proceedings and debates as published in the  
13 Congressional Record and at congressional hearings and any  
14 congressional reports concerning the Partial-Birth Abortion Ban  
15 Act of 2003 or any previous Partial-Birth Abortion Ban Act  
16 introduced during the 104th, 105th, 106th, 107th, and 108th  
17 Congresses.

18 "2. The legislative history was material before  
19 Congress when it passed the Act."

20 There is a third aspect to what the government and  
21 plaintiffs have now agreed with respect to this exhibit, and  
22 that is that with the exception of two portions of it which I  
23 will identify, this is not being offered by either side for the  
24 truth of any matter contained in any document that comprises  
25 the legislative history. The exceptions relate to two exhibits

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1 already admitted by the Court, namely, Plaintiffs' Trial  
2 Exhibit 15 and Plaintiffs' Trial Exhibit 69, the latter of  
3 which is a copy of the Act itself.

4 THE COURT: 15 is what?

5 MR. HUT: 15 is the letter to Congressman Nadler, I  
6 believe it is, from AMWA, the American Medical Women's  
7 Association, which was admitted during the reading of that  
8 deposition.

9 THE COURT: That was offered for the truth of it or  
10 just that it was sent to Congressman Nadler?

11 MR. HUT: It was offered without restriction, your  
12 Honor, and admitted.

13 MS. GOWAN: Your Honor, if I may, Mr. Hut and I had  
14 agreed to language specifically, and I would like to read that  
15 language. This would be stipulation (b) (3).

16 "Neither the legislative history nor any parts of that  
17 history are offered for the truth of the matter asserted. The  
18 only exception are two parts that this Court previously  
19 separately admitted into evidence in these proceedings:  
20 Plaintiffs' Exhibit 15, AMWA letter to representative Nadler,  
21 and Plaintiffs' Exhibit 69, the Partial-Birth Abortion Ban Act  
22 of 2003."

23 THE COURT: I don't recall any discussion as to the  
24 Exhibit 15 being offered for the truth of it, just that it was  
25 sent. And that was in the context of a deposition, was it not?

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1 MR. HUT: It was in the context of the deposition,  
2 your Honor.

3 THE COURT: Yes. Was there any objection as to the  
4 truth of it?

5 MR. LANE: Yes, your Honor. I believe there was an  
6 objection by the government, and it was one in a line of  
7 documents. I believe the first objection by the government,  
8 Mr. Pantoja at the time had made the objection and perhaps did  
9 not give a full explanation of the hearsay problem that plagues  
10 the exhibit, namely, the lack of foundation for the business  
11 record exception.

12 THE COURT: If I made a ruling different from that,  
13 the business exception, I will allow it to stay in evidence,  
14 but not as to the truth of it; only of the fact that it was  
15 sent to Congressman Nadler, for whatever it is worth.

16 MR. HUT: Your Honor, we think another basis, not of  
17 course to prolong this, which I may be in the process of  
18 doing --

19 THE COURT: I hardly think the case is going to turn  
20 on that Exhibit 15. In all due respect to Congressman Nadler,  
21 it is very nice, but . . .

22 MR. HUT: We think that statement and the ACOG  
23 statement and the APHA statement also are admissible as an  
24 exception to the hearsay Rule under 807 as trustworthy,  
25 reliable, and the deponents were there fully to explain any

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1 aspect about it.  
2 MR. LANE: Certainly, your Honor, we are happy to  
3 address that, if the Court thinks it is appropriate.  
4 THE COURT: I am going to stay with my ruling on that.  
5 MR. LANE: Thank you, your Honor.  
6 MS. GOWAN: Your Honor, the government has two --  
7 THE COURT: Let me ask you just one other thing. With  
8 this CD, aside from the CD, is there a printed list of all the  
9 exhibits that appear thereon, or does one have to listen to all  
10 the CD?  
11 MR. HUT: Your Honor, if I may. The CD is only a  
12 portion and a relatively small portion of the legislative  
13 history.  
14 THE COURT: I had no idea how much was there.  
15 MR. HUT: I believe it is in six volumes of notebooks  
16 that we supplied to the government a month ago. They have  
17 reviewed it. I believe it is a trustworthy and reliable  
18 compilation. With an index.  
19 THE COURT: It has an index?  
20 MR. HUT: We will supply it to chambers.  
21 THE COURT: That is what I wanted to make sure of.  
22 MS. GOWAN: Your Honor, with respect to the CD, on  
23 December 22, 2003, I had submitted an affidavit which  
24 identifies which portions of the Congressional Record are on  
25 the CD. Counsel is correct that all of those portions are also

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1 in the printed materials that plaintiffs will supply to the  
2 Court.  
3 THE COURT: All right.  
4 MS. GOWAN: I had marked as Government Exhibit U4 the  
5 CD, and I would like to include that with the materials being  
6 submitted to the Court today, as well as those excerpts of the  
7 legislative history that had been identified by the government  
8 in its initial disclosures. Those carry exhibit numbers U5,  
9 U6, U8, V1, V3, V4, V5, V6, V7, V8, W, W1.  
10 Lastly, your Honor --  
11 MR. HUT: Your Honor, can I speak to that for a  
12 moment?  
13 THE COURT: Yes. I assume these were all agreed upon,  
14 were they not?  
15 MR. HUT: Well, not precisely, but somewhat. Let me  
16 elaborate on that for a moment. These are all included in the  
17 aforementioned six volumes with index. Why exactly the  
18 government is offering these redundant materials escapes us.  
19 So to that extent we would object, because they are redundant  
20 and duplicative.  
21 In any event, we certainly suppose that the government  
22 is not offering them for the truth of any matters asserted  
23 therein, consistent with point number 3 that Ms. Gowan read to  
24 the Court that is part of the stipulation between the parties.  
25 THE COURT: Is that correct, Ms. Gowan?

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1 MS. GOWAN: Yes, your Honor, it is.

2 THE COURT: I will accept it even though I realize  
3 there probably is some duplicativeness here. But I don't think  
4 it will be the first time in this case. Let's go ahead.

5 MS. GOWAN: Thank you, your Honor. We did receive the  
6 Court's order granting the motion for leave to file the amicus  
7 brief by the Physicians for Reproductive Choice and Health and  
8 62 individual physicians. I know that together with that order  
9 or that application there was an affirmation filed indicating  
10 that both parties have consented to the filing of the brief.  
11 The government did consent to the filing of the brief and we  
12 did so without having seen the brief.

13 We still consent to the filing of this amicus brief,  
14 as we had given our consent to the filing of all other amicus  
15 briefs to date. However, we would like to note that to the  
16 extent that any of these amicus filings address evidentiary  
17 issues, that those are not appropriate, in the government's  
18 view, for consideration by the Court. I believe that the  
19 amicus brief by Physicians for Reproductive Choice and Health  
20 does go on at some length on matters of evidence. Certainly  
21 the evidence that was presented to your Honor is the evidence  
22 to be accorded weight in this proceedings.

23 THE COURT: You can be assured that the briefs are  
24 taken for their opinions and for nothing more. It is not  
25 evidence in this trial.

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1 MS. GOWAN: Thank you, your Honor.

2 THE COURT: I refer you to the question of amicus  
3 briefs to the Honorable Justice of the Supreme Court Ruth Bader  
4 Ginsburg on this very subject.

5 MS. GOWAN: I see we are on the same page. Thank you,  
6 your Honor.

7 THE COURT: As I recall from Justice Ginsburg, they  
8 are besieged with amicus briefs, and she has opined on it at  
9 length.

10 Does that complete our offers?

11 MR. HUT: For the plaintiffs, yes, it does, your  
12 Honor.

13 MS. GOWAN: Yes, your Honor.

14 THE COURT: Both sides rest. We will gather here at 2  
15 p.m. tomorrow to see what news there is from the Rialto, I  
16 guess.

17 MS. GOWAN: To see if the government truly rests, your  
18 Honor.

19 THE COURT: Whether they truly rest or whether our  
20 friends across the street decide that we are going on, we will  
21 deal with that when we find out.

22 MR. HUT: Your Honor, there does remain the question  
23 that was briefly adverted to Friday afternoon concerning the  
24 timetable for submission of proposed findings and conclusions  
25 at such time as there is a rest.

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1 THE COURT: You may have saved the day for your side,  
2 Mr. Hut, with your devotion to the blue. I would say my  
3 current inclination is to grant your application for 30 days.  
4 But before I tell you that the clock is running or when it will  
5 start to run, let us await the news from the 17th floor across  
6 the street.

7 MR. HUT: Very well, your Honor.

8 THE COURT: And we will discuss that tomorrow. You  
9 could at least go home or your home away from home tonight with  
10 your colleagues and enjoy dinner knowing that you have 30 days  
11 from someday. It is better than 10 from today, isn't it.

12 MR. HUT: Very much so, your Honor.

13 THE COURT: If both sides think it is appropriate, I  
14 have no reason to disagree. But let's see what they say. I  
15 can't pick a date anyway. What if they say that the trial goes  
16 on for a bit if there are some records or something. Then to  
17 set a date at this moment would be meaningless. But you can  
18 rest assured over that nice dinner and a fine bottle of wine  
19 that it is 30 days.

20 MR. HUT: We will toast the Maras and Tisches.

21 THE COURT: I hope you will. They are both wonderful  
22 folks. We wish them well on Saturday. If there is nothing  
23 else, the Court will stand in recess until 2 o'clock tomorrow.

24 (Adjourned to 2:00 p.m., April 20, 2004)  
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