GRANTED

No. 99-830

IN THE

Supreme Court of the United States

DON STENBERG, Attorney General of the State of Nebraska, GINA DUNNING, Director of Regulation and Licensure of the Nebraska Department of Health and Human Services, and CHARLES ANDREWS, M.D., Chief Medical Officer of the State of Nebraska,

Petitioners,

v.

LEROY H. CARHART, M.D.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF ON BEHALF OF NATIONAL ASSOCIATION OF PROLIFE NURSES, INC. IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE

The National Association of Prolife Nurses, Inc. hereby requests, pursuant to Rules 21.2(b) and 37.3 of the Rules of this Court, leave to file the accompanying brief as *amicus curiae* in support of petitioners. *Amicus* has requested consent to file this brief from counsel for petitioners and respondent, but both parties have withheld consent.

The National Association of Prolife Nurses ("the Association") is a non-profit organization with several hundred members engaged in the profession of nursing. The members live and work in some 46 states of the United States of America. The members are united by a shared dedication to the ideals of their caring and ministering profession, the promotion of health, the alleviation of suffering, and the respect for and preservation of human life.

The Association strives to foster among its members, in the nursing profession in general, in the larger medical community, and in society at large an appreciation of the worth and dignity of human life. The Association shares the judgment of Congress, most state legislatures, and the vast majority of American citizens (as reflected in polling data) that, whatever differences of opinion may exist on the issue of abortion, the medical procedure(s) popularly identified as partial-birth abortion are beyond the pale of decency and should not be tolerated by a civilized and humane society.

When a medical procedure is allowed which shocks the conscience of a great many people, the damage is wide-ranging. Among those who suffer a distinct harm are the nurses who are called upon to participate in the procedure in

derogation of their moral, ethical, and professional values. These nurses' own right to self-definition of the principles by which they will live and act is compromised, along with their livelihoods and careers. And often it is the nurses who can provide witness to the gravest of abuses. For example, Brenda Pratt Shafer, R.N., in offering a first-hand account of the enormity of partial-birth abortion to the Senate Judiciary Committee, disclosed the stark and appalling brutality of the process. Hearing Before the Senate Judiciary Committee on H.R. 1833, Nov. 17, 1995, Hearing Transcript at 17-18.

Nurses should not be subjected to assisting the performance of partial-birth abortions. The health care profession should not be distracted, demeaned, and insensitized by tolerance or acceptance of partial-birth abortion. And the overwhelming judgment of the American people should not be disregarded and its democratic will flouted by judicial refusals to prohibit a practice that the people find intolerable.

Amicus believes that it offers, from the context of the nursing profession, a valuable perspective on this case which will assist the Court in evaluating Nebraska's action, through its legislative and executive branches, to establish strict limits on partial-birth abortion and the Eighth Circuit's invalidation of that state law.

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

INTEREST OF *AMICUS CURIAE*

The National Association of Prolife Nurses, Inc. respectfully submits this brief as *amicus curiae* in support of petitioners[1]. The interest of *Amicus* is fully set forth in the Motion for Leave to File Brief as *Amicus Curiae*, printed herewith *ante*.

SUMMARY OF ARGUMENT

Amicus is concerned that proponents of an ethic profoundly disrespectful of human life are thwarting the will of the American people and the results of the democratic process by preventing laws which impose a non-absolute ban on partial-birth abortion from going into effect. The vast majority of our citizens and their lawmakers have concluded that partial-birth abortion simply goes too far and cannot be tolerated by a civilized and humane society. The practitioners of, and the advocates for, partial-birth abortion not only claim that it is medially indistinguishable from other abortion methods but suggest that it cannot be defined or described in any way that allows an adequately clear differentiation to be made. *Amicus* supports the drawing of medical and ethical distinctions to prevent further degradation in the respect accorded human life. It believes that partial-birth abortion, by its very nature, falls outside the scope of the abortion rights articulated by this Court, but that, even if it is simply "another method of abortion," the non-absolute prohibition worked by the Nebraska statute does not impose an undue burden on abortion rights.

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1. Counsel for *Amicus* is solely responsible for the authorship of this brief. No one other than *Amicus*, its members, and its counsel has made a monetary contribution to the preparation or submission of the brief.

ARGUMENT

I.

NEBRASKA'S PARTIAL-BIRTH ABORTION STATUTE DEFINES ITS SUBJECT MATTER WITH ADEQUATE SPECIFICITY AND CANNOT REASONABLY BE INTERPRETED AS APPLYING TO CONVENTIONAL ABORTION METHODS.

Nebraska, along with the majority of the 50 states, has enacted legislation to impose a fairly comprehensive ban on an especially shocking procedure for destroying human children when they are partly inside and partly outside their mothers' wombs. Neb. Rev. Stat. §§ 28-326(9) and 28-328(1)-(4) ("the Act" or "the Statute"). This procedure occupies a shadowy place in the nether world between abortion and infanticide and is most frequently referred to as "partial-birth abortion." In the arenas of politics and public debate, the participants — supporters and opponents alike — have appeared to possess quite a clear understanding of what partial-birth abortion is. With the commencement of litigation, however, what has been clear is suddenly claimed to be intolerably murky.

Indeed, the principal challenge mounted by respondent is to the alleged overbreadth and vagueness of the Statute, which respondent contends, and the lower courts have agreed, should be read as embracing not only the relatively rare procedure of partial-birth abortion (or, as it is denominated in medical literature, "intact dilation and evacuation" or, more frequently, "dilation and extraction" ["D&X"]), but also the most common method of second-trimester abortion, "dilation and evacuation" ("D&E"). *Carhart v. Stenberg*,

192 F.3d 1142, 1145 (8th Cir. 1999). *Amicus* finds it curious that statutory language painstakingly developed with input from an array of legal, political, and medical professionals (including both opponents and supporters of the broad availability of conventional abortions) could fall so short of the mark as to be overbroad and vague to the point of unconstitutionality. If the statutory language is, in fact, so hopelessly vague, partial-birth abortion may be unique among medical procedures (and, for that matter, among human acts in general) in being literally indescribable. This seems most unlikely. Unspeakable it may be, but scarcely indescribable.

A more plausible explanation suggests itself: the source of all this vagueness is not the text of the Act, but the dictates of legal strategy. Respondent's effort has been to expand through interpretation the scope of the Act so that it imposes restrictions on more commonly performed methods of abortion. The lower courts' apparent course was, not to read the Statute narrowly and in conformity with its intent and with constitutional limitations, but to import breadth and ambiguity into language that aims at being specific and precisely tailored. By so doing, respondent and the lower courts were able to point to the obvious unconstitutionality, under *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny, of a law which they professed to view as banning not only the D&X but also the D&E procedure, and therefore imposing an undue burden on abortion rights.

Amicus leaves to the parties the details of the debate over statutory construction. *Amicus* notes, however, the inherent implausibility and unsustainability, of the common pattern of action in Nebraska and other states. Legislature after legislature has responded to the overwhelming wish of

their electorates to ban a medical procedure that offends the public's senses of decency and humanity; and judge after unelected judge has struck down these bans after finding that no draftsman seems capable of adequately describing the intolerable act. (This outcome is not invariable. One circuit court of appeals has found the text of states' partial-birth abortion statutes to be both comprehensible and constitutional. *Hope Clinic v. Ryan*, 195 F.3d 857 [7th Cir. 1999].) *Amicus* hopes that this Court will impart sufficient clarity to the subject of drafting restrictions on partial-birth abortion to enable the democratic will of the people of the United States to be fulfilled.

II.

THIS COURT HAS NEVER ARTICULATED A CONSTITUTIONAL RIGHT TO TERMINATE THE LIFE OF A HUMAN CHILD OUTSIDE THE WOMB.

In ordinary thought and speech, a mother's womb has long been considered the place of ultimate peace and safety, from which a child emerges to begin to face the travails of the outside world. In current American constitutional law, ironically, the womb is a place of unparalleled danger. Inside, an unborn child is at the mercy of its mother's constitutional right to abort (a right first discovered in 1973); once safely outside, however, the child may face many perils, but no one is at liberty to kill it, deliberately, directly, and with impunity. Partial-birth abortion presents a situation where a child is neither wholly inside nor wholly outside the womb. The doctor performing the procedure has partially delivered the living baby, but has left the head inside the womb, and then proceeds to make an opening into the cranial cavity, suction out the baby's brains, and often crush its skull, prior

to removing the head from the womb. Statement of Brenda Pratt Shafer, R.N., at Hearing Before the Senate Judiciary Committee on H.R. 1833, Nov. 17, 1995, Hearing Transcript at 17-18.

Whatever the medical purpose, if any, of the partial-birth abortion procedure,[2] its legal purpose would seem to be to offer a basis for characterizing the procedure as an act of "abortion" (since a portion of the baby has not emerged from the womb before the baby's death) rather than an act of infanticide. The practitioners and defenders of partial-birth abortion therefore claim that the procedure is entitled to the constitutional protections accorded the broad category of acts constituting "abortion," as those protections were first enunciated in *Roe v. Wade* and refined and developed in the progeny of *Roe*.

This argument, however, does not survive a careful reading of *Roe v. Wade* and the succeeding cases of this Court. The Texas statutes at issue in *Roe* (and the conduct they dealt with) concerned the termination of fetal life while the fetus was still in its mother's womb. The Court's opinion in *Roe* expressly noted that *another* Texas statute, Article 1195 of Chapter 9 of Title 15 of the Texas Penal Code, was *not* being challenged. 410 U.S. at 117 n.1. Article 1195 imposed (and still imposes, for it has never been invalidated or repealed) criminal penalties on anyone who "shall during parturition of the mother destroy the vitality or life in a child *in a state of being born and before actual birth*, which child

2. It is questionable, at best, that there is any legitimate medical reason to use partial-birth abortion rather than some other abortion method. Even the American Medical Association, which supports the broad availability of abortion in general, has taken the position that use of partial-birth abortion is never medically indicated.

would otherwise have been born alive. . . ." *Id.* (emphasis added) Clearly Article 1195 covers that very middle ground — when a baby is "in a state of being born" but "before actual birth" — which partial-birth abortion attempts to occupy and exploit. However, just as *Roe v. Wade*, in enunciating the general constitutional right to abortion, did nothing to impair the operation of Article 1195, so no subsequent decision of this Court has done what *Roe* did not do.[3]

Consequently, respondent and the courts below are mistaken in applying the analysis and protections of *Roe v. Wade* and its progeny outside the scope of the conduct at issue in those cases — termination of fetal life within the womb. The Eighth Circuit is attempting at respondent's urging, a significant expansion of the Supreme Court's abortion jurisprudence so as to remove from the judgment of the states the authority to adopt reasonable legislation governing partial-birth abortion.

3. Article 1195 is still valid Texas law. It is now found at Tex. Rev. Civ. Stat. art. 4512.5. Not long after *Roe v. Wade*, the Attorney General of Texas rendered a formal opinion, explaining that Article 1195 was able to survive *Roe* because it was not, strictly speaking, an *abortion* statute. Texas Att'y Gen. Op. H-369 (Aug. 13, 1974). Indeed, partial-birth abortion has been recognized (even by strong supporters of abortion of rights) to be a form of infanticide rather than a form of abortion.

III.

EVEN IF PARTIAL-BIRTH ABORTION IS DETERMINED TO FALL WITHIN THE SCOPE OF "ABORTION" AS IT IS GOVERNED BY THE HOLDINGS IN *ROE v. WADE* AND ITS PROGENY, THE NEBRASKA STATUTE DOES NOT RUN COUNTER TO THOSE HOLDINGS OR INFRINGE UPON THE RIGHT TO ABORTION ARTICULATED BY THIS COURT.

Assuming, for the sake of argument, that (despite footnote 1 of *Roe v. Wade*) *Roe* and its progeny are held to govern partial-birth abortions, *Amicus* asserts that there is nothing in that case law warranting the invalidation of the Act. The Act does not prevent, or even interfere in any substantial way with, the exercise of the abortion rights recognized by this court. The essence of those rights is a pregnant woman's ability to choose *whether or not* to terminate her pregnancy. The rights do not go deeper to give her a constitutional right to terminate her pregnancy *in any way she may choose*, or in any way her physician may choose.

This Court's abortion jurisprudence clearly expresses this limitation. In *Maher v. Roe*, 432 U.S. 464 (1977), for example, the Court stated:

> Roe did not declare an unqualified "constitutional right to an abortion," as the District Court seemed to think. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide *whether* to terminate her pregnancy.

432 U.S. at 473-74 (emphasis added). In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the plurality opinion rejected the "trimester framework" announced in *Roe v. Wade*, because its application

> . . . has led to the striking down of some abortion regulations which in no real sense deprived women *of the ultimate decision*. . . . "the decision *whether* to bear or beget a child." (citation omitted)

505 U.S. at 875 (emphasis added).

In *Casey*, the plurality opinion favored replacing the "trimester framework" of *Roe* with a pre-viability and post-viability framework. Under the latter framework, "a State may not prohibit any woman from making *the ultimate decision to terminate her pregnancy* before viability." 505 U.S. at 879 (emphasis added) (reaffirming the Court's holding in *Roe*). After viability, a state may go so far as to "proscribe" abortion altogether "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." 505 U.S. at 879 (quoting verbatim from the Court's holding in *Roe*, 410 U.S. at 164-65).

Since neither of the foregoing standards is violated by the Statute, the fact that the Statute draws no distinction between the application of the partial-birth abortion method to unborn children before and after viability is of no moment. The Statute imposes nothing more than a non-absolute ban on one specific method of abortion. It does not prohibit a woman from making her "ultimate decision." And since it does not proscribe (or even apply to) abortion generally, there

is no requirement under *Roe* or *Casey* for either a life or a health exception.[4]

The state regulations of abortion considered by this Court in *Casey* and other cases — including such provisions as waiting periods, informed consent, parental consent, and spousal notice — typically are burdens on abortion generally. The Act does not impose any burden on a woman's ability to decide whether or not to have an abortion. According to the plurality opinion in *Casey*, it is only when a state regulation interferes with a woman's ability to make *that* decision that the state "reach[es] into the heart of the liberty protected by the Due Process Clause." 505 U.S. at 874. Finally, even interference with that decision must be *undue* interference before it can be held to be unconstitutional. The non-absolute prohibition of a single method of abortion (a method which is especially grisly and painful, which is never medically indicated, and which there are many legitimate state interests for banning) can scarcely be considered "undue."

Even so venerable a constitutional right as the First Amendment right of free speech — a right which is expressly set forth in the text of the Bill of Rights and which has been recognized for over 200 years — has been held to be capable of limitation by reasonable time, place, and manner restrictions. *Kovacs v. Cooper*, 336 U.S. 77 (1949). Is there any reason why the right to abortion — a right which is not expressly mentioned anywhere in the Constitution and which

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4. The Act does, of course, contain an exception for the life of the mother. In that respect, the Nebraska Legislature did not even go as far in limiting partial-birth abortion as it constitutionally could have gone under *Roe* and *Casey*.

has a pedigree of a mere 27 years — should be deemed exempt from similar reasonable restrictions? If there are legitimate and substantial reasons for the state to impose a limitation which does no more than reasonably channel the right's exercise, why should such a limitation not be allowed? And since a reasonable limitation of time, place, and manner in which the right to abortion can be exercised is, by definition, not a proscription of abortion, there is neither binding authority nor even a logical reason to require "life or health of the mother" exceptions to such a limitation.

It must be remembered that the "life and health of the mother" exceptions required under *Roe* are exceptions *to the absolute proscription of abortion*, not to its reasonable regulation. 410 U.S. at 164-65. Consider two simple examples, one actual and one hypothetical. First, all states have seen fit to categorize the performance of abortions as falling within the practice of medicine and limiting such performance to licensed physicians. Undoubtedly this regulation may impose *some* burden on a woman's ability to procure an abortion, if only because there is a limited supply of doctors and doctors may charge substantial fees for their services. But this burden — prohibiting the performance of abortions by those not licensed to practice medicine — although it obviously exists both before and after viability, has been held permissible by this Court without any "life or health of the mother" exceptions. *Mazurek v. Armstrong*, 520 U.S. 968 (1977).

Second, suppose that a chemist devised a new substance — call it "Compound X" — which is a powerful and unstable explosive but also happens to be (as a feature of its non-explosive chemical properties) an extraordinarily sure and effective abortifacient. Can there be any doubt that a state

could constitutionally ban or restrict the possession and use of Compound X, including the absolute prohibition of its use as a method of abortion, without allowing any exceptions for the life or health of a pregnant woman who wishes her physician to use Compound X? Such regulation would not proscribe *abortion*, but only a particular method of abortion which the state would have legitimate and substantial reasons for proscribing.

In justification of the partial-birth abortion statute at issue in *Planned Parenthood v. Verniero*, 41 F. Supp. 2d 478 (D.N.J. 1998), the New Jersey Legislature identified nine separate interests which it defended as legitimate and compelling governmental interests.[5] Any of them standing alone could serve as an adequate reason for enacting New Jersey's non-absolute ban on partial-birth abortion, a statute comparable to Nebraska's partial-birth abortion statute. Consider just one of those interests — the state's interest in protecting a fetus from the intentional infliction of undue and unnecessary pain. This is an interest in preventing inhumane conduct which would easily justify the prohibition of cruel acts against even domestic animals, to say nothing of unborn babies.

In the case of unborn babies, of course, the State has the far more weighty interest of protecting human life. This interest is not nullified by adversion to *Roe*'s agnosticism about when human life begins. *Roe* did nothing more than

5. New Jersey was denied the opportunity to prove the compelling nature of those interests by the district court's refusal to allow expert testimony to prove material facts concerning those interests. In the case at bar, the opinions below do not include any analysis of the governmental interests furthered by the Nebraska partial-birth abortion statute.

state that this Court, in 1973, "at this point in the development of man's knowledge," could not supply the answer. 410 U.S. at 159. But the Court also acknowledged, in the companion case to *Roe*, that a State engaged in lawmaking possesses "the right to readjust its views and emphases in the light of the advanced knowledge and techniques of the day." *Doe v. Bolton*, 410 U.S. 179, 191 (1973).

No one can deny that scientific knowledge about fetal development has increased vastly since 1973. Nebraska has done nothing more than act on the basis of that new knowledge to prevent an exceptionally brutal assault on an unborn child in those vulnerable moments when it is partly inside and partly outside the womb.

It must be acknowledged that the Act does nothing more than ban one particular method of killing an unborn child. The child that isn't destroyed by partial-birth abortion can still legally be killed in other ways that are no less direct and effective, if not quite so blatantly horrific. But the State of Nebraska has acted to prevent a procedure that, in addition to being of no demonstrated medical value, is barbaric to the point of shocking indecency.

In so doing, the State has not attempted to infringe upon the constitutional rights established in *Roe* and *Casey*. It has merely acted in conformity with those cases' acknowledgment that, as pregnancies proceed, the State's legitimate interests in those unborn children grow greater, and also in conformity with the advances in medical knowledge since *Roe*, which march inexorably in the direction of demonstrating from how very early a stage in a human pregnancy a fetus is undeniably a living human being.

Nebraska has determined that a procedure in which a doctor partially delivers, and then proceeds to destroy, a human baby creates a constitutional context in which it can legitimately act. It has done so with considerable moderation: it has expressly exempted the women receiving partial birth abortion from criminal sanction; and it has recognized a "life of the mother" exception, so that if there ever is a case (unlikely though that may be) in which partial-birth abortion is needed to save a mother's life, resort to it can lawfully be made. It has chosen not to recognize a "health of the mother" exception, presumably because it perceives that, in the case of an almost-born baby, an actual life rather than a potential life is at issue and only the value of one life could conceivably outweigh the value of another life.

Amicus perceives nothing in any prior ruling of this Court which requires that the Statute be struck down. Beyond that, *Amicus* believes that nothing in the Statute violates any provision of the United States Constitution, which is profoundly respectful of both the legislative prerogatives of states and the protected status of innocent human life. U.S. Const. amend. X; U.S. Const. amend. XIV; *Levy v. Louisiana*, 391 U.S. 68 (1968). *Amicus* urges the Court to use the opportunity presented by this case to declare that the people and their lawmakers are not powerless to limit even the grossest assaults on innocent human life.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests this Court to reverse the decision of the United States Court of Appeals for the Eighth Circuit and to vacate the injunction on the enforcement of Nebraska's partial-birth abortion statute.

Respectfully submitted,

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