No. 99-830

IN THE SUPREME COURT OF THE UNITED STATES

DON STENBERG,
Attorney General of the State of Nebraska, et al.,
Petitioner,

v.

LEROY CARHART,
Respondent.

BRIEF OF AMICI CURIAE RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE, FIFTY-THREE OTHER RELIGIOUS ORGANIZATIONS AND RELIGIOUSLY AFFILIATED ORGANIZATIONS, AND FOURTEEN CLERGY AND LAYPERSONS IN SUPPORT OF RESPONDENT

Filed March 29, 2000

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INTEREST OF AMICI CURIAE

Amici are religious organizations, religiously affiliated organizations, and individual clergy and laypersons dedicated to preserving religious freedom for all persons, and to protecting a woman's right to terminate her pregnancy in consultation with her religion, values, and conscience.[1] The statements of interest provided by individual organizations, representatives, and individuals, included in Appendix A to this brief, demonstrate their varied perspectives on abortion, and their shared support of the Constitution's protection of a woman's right to make reproductive choices in accord with her individual conscience and free from governmental interference. A full listing of the fifty-four organizations and fourteen individuals signing this brief as amici curiae appears in Appendix B.

Because amici recognize the many divergent theological perspectives regarding abortion, amici agree that all women should be free to follow their religious convictions and to seek the best available medical advice, without governmental coercion or constraint, in making the difficult decision about whether and how to terminate a pregnancy. Amici believe that the Court should not allow

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[1] Amici submit this brief amici curiae with the consent of the parties. Letters providing the consent of the parties are being filed with the Clerk of the Court concurrently with the filing of this brief. Pursuant to Supreme Court Rule 37.6, amici state that the brief in its entirety was drafted by amici curiae and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than amici curiae, their members, or their counsel.

Nebraska or any other state to undermine the Constitution's respect for religious liberty and personal conscience.

SUMMARY OF ARGUMENT

Nebraska's so-called "partial-birth abortion" ban – which drastically curtails access to pre-viability abortions – unacceptably interferes not only with the right to privacy, but also with the freedom of religion and conscience that underlies and defines that privacy right. As the Court explained in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the right of individual privacy prevents governmental interference into certain of an individual's most critical decisions about family, including whether to marry or divorce, and whether to conceive and bear a child. Those decisions undeniably implicate religious concerns, as they are made and guided by religious teachings and individual conscience. Freedom of religion and conscience, therefore, demands that the utmost latitude be accorded to decisions in the family sphere.

This position is compelled both by the founders' wisdom and the history of the divisive debate on the scope of the right of privacy. The intense debate about abortion in our country, including "partial-birth abortion," has been, and continues to be, driven by profound disagreement among and even within religions. Religious views on the topic range from the belief that abortion is a sin, to the belief that abortion may be a religious obligation under certain circumstances, to the belief that

women must be free to make their own decisions free of governmental interference. A brief examination of the religious beliefs of the different traditions, including the Catholic, Protestant and Jewish traditions, reveals immensely varied views on the issue.

Where religious people have such profound and sincere differences – even within denominations and faith groups – the right of privacy prevents government from enacting restrictive abortion legislation that interferes with the exercise of personal and religious conscience. A woman who is faced with the difficult moral decision of whether to undergo an abortion must be free to decide how to respond, in consultation with her family, her doctor, and her religious beliefs. Nebraska's ban on "partial-birth abortions," Neb. Rev. Stat. §§ 28-326(9), 28-328(1)-(4) [hereinafter "Act"], which is so broad as to ban the safest and most common abortion procedures used prior to viability without any exception for the woman's health, impermissibly interferes with the religious liberty and freedom of conscience that shape the right to privacy.

For this reason, as well as those asserted by respondent, the Court of Appeals for the Eighth Circuit properly held that the Act constitutes an undue burden on a woman's right to terminate a pregnancy prior to viability in violation of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). It is only through semantics and word play that several amici who have filed briefs in support of petitioners contend that *Casey* does not provide the relevant analytical framework. The Act does not regulate the process of "birth," despite the name given to it by its proponents. Nor does it deal with

infanticide. Nor is it a late-term ban. Rather, it is so broadly worded that it bans a range of abortion procedures without regard to fetal viability. That is impermissible under *Casey*, and the Eighth Circuit's judgment should be affirmed in order to afford the vital protection for freedom of conscience in making basic family decisions, which is required by the Constitution.

ARGUMENT

I. THE ACT IMPERMISSIBLY INTRUDES UPON INDIVIDUAL DECISIONS ABOUT FAMILY PROTECTED BY THE RIGHT OF INDIVIDUAL PRIVACY AND RELIGIOUS LIBERTY.

In reaffirming the essential holding of *Roe v. Wade*, 410 U.S. 113 (1973), the Court stated in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), that it is "a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Id.* at 847. Fundamentally, this promise means that the "Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood." *Id.* at 849. That prohibition on governmental interference includes the freedom to make personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. *Id.* at 851 (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977)). As the Court observed:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Id. at 851.

The Court also recognized that "[m]en and women of good conscience can disagree . . . about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage." *Id.* at 850; *see also Roe*, 410 U.S. at 116 (acknowledging "awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires"). Under those circumstances, the Court recognized that "[o]ur obligation is to define the liberty of all, not to mandate our own moral code." *Casey*, 505 U.S. at 850. Where reasonable people of good conscience disagree, the Court held, government *cannot* adopt the position of one set of persons over all others when doing so would intrude upon a protected liberty. *Id.* at 851 (*citing Texas v. Johnson*, 491 U.S. 397 (1989); *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)).

Thus, as set forth in *Casey*, the right to privacy that protects a woman's right to make her own reproductive choices has two aspects: *first*, the individual's right to make crucial, life-defining decisions free of governmental interference, and *second*, the need for the government not to adopt one position over all others where reasonable persons disagree about decisions of such importance.

The *Roe-Casey* formulation of the right to privacy helps to ensure the religious freedoms guaranteed by the Establishment and Free Exercise clauses. The concerns set forth in *Casey* are precisely the concerns that have motivated the Court's protection for religious liberty under the First Amendment religion clauses. The Court has observed that the constitutional prohibition against legislation "respecting an establishment of religion or prohibiting the free exercise" thereof has a "double aspect." *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). "On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion." *Id.*

Thus, it is an "individual's freedom of conscience [that is] the central liberty that unifies the various Clauses in the First Amendment." *Wallace v. Jaffree*, 472 U.S. 38, 50 (1985). The "individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority." *Id.* at 52. This conclusion "derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful." *Id.* at 53. Thus, the Court has held that " '[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to

confess by word or act their faith therein.' " *Id.* at 55 (quoting *Barnette*, 319 U.S. at 642); *see also School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 226 (1963) ("The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel . . . .").

Thus, by preserving the right to privacy in *Casey*, the Court also furthers the constitutional objectives that have long been served by the Court's First Amendment religious jurisprudence: Matters of individual conscience require protection from governmental interference, and adoption of one "creed" by the state over all others impermissibly and unconstitutionally impedes the exercise of individual conscience. This overlap is not surprising. For many if not most Americans, the decisions whether to marry or divorce and whether to conceive and bear a child are simultaneously matters of individual choice and religious significance. "These matters, involving the most intimate and personal choices a person may make in a lifetime," *Casey*, 505 U.S. at 851, are by nature shaped by the beliefs an individual holds most sacred. *See also Roe*, 410 U.S. at 116 ("One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion."). The Constitution prohibits governmental

interference into crucial family decisions for which individuals look to the guidance of religious teachings and individual conscience.[2] Where reasonable persons of good conscience disagree – as they do when it comes to abortion, *see infra* – the Constitution mandates that the government refrain from imposing one view over all others.

The Court's holding in *Casey*, therefore, that prior to viability, regulations on abortion are permitted only if they do not impose an "undue burden" on a women's ability to decide whether or not to terminate her pregnancy, derives from a woman's right to privacy, but it also protects her freedom of conscience guaranteed by the religion clauses. This Court has properly respected the need for a woman's autonomy in making such decisions, which must be made based on an individual woman's circumstances, her own personal or religious conscience, and the best available medical advice. Thus, the Court's position says that every woman must be free to make decisions about when to have children, according to her

[2] Historically, of course, the Court's decisions according protection to basic decisions regarding family have drawn significantly on both the First Amendment's guarantees of religious freedom and the right to privacy founded in the Fourteenth Amendment. *See, e.g., Eisenstadt v. Baird*, 405 U.S. 438 (1972) (privacy); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (privacy); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (free exercise). For example, the Court has guaranteed parents the right to select private, religious schools for their children, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and the right to an exemption from compulsory schooling laws where those laws interfered with a particular religious way of life, *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

own conscience and religious beliefs. Nebraska's Act, therefore, violates the sanctity of individual decisions about family life protected by both the right of individual privacy and freedom of conscience.

II. THE VARIETY OF RELIGIOUS VIEWS ABOUT ABORTION PROHIBITS NEBRASKA FROM ENACTING LEGISLATION THAT INTERFERES WITH A WOMAN'S RIGHT TO TERMINATE HER PREGNANCY.

As *Casey* acknowledges (and the Court's First Amendment jurisprudence concurs), where fundamental rights are implicated, it is precisely because reasonable persons of good conscience disagree that the government should refrain from acting. In enacting a ban on "partial-birth abortions," the Nebraska Legislature has violated this basic tenet of constitutional law. The Act is, therefore, unconstitutional.

The diverse religious groups in this country disagree profoundly about abortion. *See Roe*, 410 U.S. at 160.[3] This disagreement is not only over when life begins, but also over whether and how much the government should

[3] The structure of this discussion is derived in part from the Brief Amicus Curiae for American Jewish Congress, Board of Homeland Ministries – United Church of Christ, National Jewish Community Relations Advisory Council, The Presbyterian Church (U.S.A.) by James E. Andrews as Stated Clerk of General Assembly, the Religious Coalition for Abortion Rights, St. Louis Catholics for Choice, and thirty other religious groups filed in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

interfere with a woman's decision to terminate or continue her pregnancy and whether abortion may be required if the mother's life or health is endangered. For example, the official doctrine of the Roman Catholic Church holds that life begins at conception, and declares abortion to be immoral. *See* The Declaration on Abortion of the Sacred Congregation for the Doctrine of the Faith (1974). Some Roman Catholics, however, have explored and advocated religious views that would tolerate abortion under some circumstances. *See, e.g.*, Gregory Baum, "Abortion: An Ecumenical Dilemma," *Commonweal*, Nov. 30, 1973, at 231; *Abortion and Catholicism: The American Debate* (Patricia Beattie Jung & Thomas A. Shannon eds., 1988); Mary C. Segers, "Abortion and the Culture," *in Abortion* 229 (Sidney Callahan & Daniel Callahan eds., 1984). One Catholic organization has recently stated that there "is much in the Catholic tradition that supports the pro-choice position. . . . [A] careful reading of church documents shows that while the prohibition of abortion is a serious teaching, room remains for Catholics to support the legalization of abortion and even its morality in a wide range of circumstances." Catholics for a Free Choice, *Prayerfully Pro-Choice: Resources for Worship* (Religious Coalition for Reproductive Choice 1999).[4]

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[4] According to a recent poll, eighty-two percent of Catholics in this country believe that abortion should be legal either under certain circumstances or without restrictions. Moreover, thirty-nine percent believe that a woman should be able to decide to have an abortion no matter what the reason. Only fifteen percent of Catholics believe that abortion should be illegal in all circumstances. Time/CNN Nationwide Poll (Sept. 27-28, 1995), *cited in* Catholics for a Free Choice, *The Catholic Vote and Abortion*.

In contrast to traditional Catholicism, as a matter of religious belief, many Protestant theologians and scholars maintain that "human personhood . . . does not exist in the earlier phases of pregnancy." *McRae v. Califano*, 491 F. Supp. 630, 701 (E.D.N.Y.), *rev'd on other grounds sub nom. Harris v. McRae*, 448 U.S. 297 (1980); Virginia Ramey Mollenkott, *Respecting the Moral Agency of Women* (undated) ("[T]he fetus is biologically human only in the sense that any part of a human body is human: every cell carries the full genetic code. . . . The full human personhood of the embryo from the moment of conception is therefore a theological assumption that cannot be proved."); Paul D. Simmons, *Personhood, the Bible, and the Abortion Debate* (undated); *Roe*, 410 U.S. at 160 ("There has always been strong support for the view that life does not begin until live birth. . . . It may be taken to represent . . . the position of a large segment of the Protestant community, insofar as that can be ascertained; organized groups that have taken a formal position on the abortion issue have generally regarded abortion as a matter for the conscience of the individual and her family."). Protestant groups disagree, however, about the proper approach to abortion.

The stand of the American Baptist Churches in the USA, for example, reflects the diversity of theological beliefs about abortion present within its membership. In 1988, the General Board adopted a resolution that states: "We grieve with all who struggle with the difficult circumstances that lead them to consider abortion. Recognizing that each person is ultimately responsible to God, we encourage women and men in these circumstances to

seek spiritual counsel as they prayerfully and conscientiously consider their decision." General Board, American Baptist Churches in the USA (1988). The General Board acknowledged that "[m]any of our membership seek legal safeguards to protect unborn life. Many others advocate for and support family planning legislation, including legalized abortion as being in the best interest of women in particular and society in general." *Id.*

The Episcopal Church reaffirmed in its 1994 General Convention its support for women's rights over their own bodies, which was first acknowledged through a resolution in 1967. That Convention expressed "its unequivocal opposition to any legislative, executive or judicial action on the part of local, state or national governments that abridges the right of a woman to reach an informed decision about the termination of pregnancy or that would limit the access of a woman to safe means of acting on her decision." 71st General Convention, Episcopal Church, Resolution No. 1994-A054 (1994). The General Convention explained: "We believe that legislation concerning abortions will not address the root of the problem. We therefore express our deep conviction that any proposed legislation on the part of national or state governments regarding abortions must take special care to see that the individual conscience is respected, and that the responsibility of individuals to reach informed decisions in this matter is acknowledged and honored as the position of this Church." *Id.*[5]

[5] At their annual meeting in 1978, the Episcopal Women's Caucus resolved: "We are deeply disturbed over the increasingly bitter and divisive battle being waged in legislative bodies to force continuance of unwanted pregnancies and to limit an American woman's right to abortion. We believe that all should be free to exercise their own consciences on this matter and that where widely differing views are held by substantial sections of the American religious community, the particular belief of one religious body should not be forced on those who believe otherwise."

Similarly, the General Synod of the United Church of Christ resolved in 1979 to reaffirm full freedom of choice for the persons concerned in making decisions regarding pregnancy, to affirm "the fact that, since life is less than perfect and the choices that people have to make are difficult, abortion may sometimes be considered," and to affirm that "God calls us when making choices, especially as these relate to abortion, to act faithfully." United Church of Christ, *Abortion, A Resolution of the 12th General Synod of the United Church of Christ* (1979). The General Synod reaffirmed the right of women to choose abortion in 1981, 1985, 1987, 1989, and 1991. In 1987, the 16th General Synod resolved to uphold the "right of men and women to have access to adequately funded family planning services, and to safe, legal abortions as one option among others," and to urge "pastors, members, local churches, conferences, and instrumentalities to oppose actively legislation and amendments which seek to revoke or limit access to safe and legal abortions." United Church of Christ, *Sexuality and Abortion: A Faithful Response, A Resolution of the 16th General Synod of the United Church of Christ* (1987).

With regard to "partial-birth abortion" bans, the Reverend Dr. Jay Lintner, Director, Washington Office, United Church of Christ, has stated: "Let the church and the

religious community offer its advice on this issue, advice to the women facing the choice. Let the medical community offer its advice. But keep the government out of it. Protect the fundamental religious responsibility of a woman to make this decision about her own body and her own responsibility for the developing life within her. This is the overwhelming religious consensus within our church." Rev. Dr. Jay Lintner, *Statement on Partial-Birth Abortions Urging the Senate To Sustain President Clinton's Veto of H.R. 1122* (Sept. 17, 1998).

Some Protestant groups treat abortion as a matter of individual conscience and believe that the government should not interfere in that matter because of the variety of views held by members of these groups. For example, the General Assembly of the Presbyterian Church (U.S.A.) adopted a resolution in 1983, and reaffirmed it in 1985, 1987, 1988, 1989, and 1991, which states that "The Presbyterian Church exists within a very pluralistic environment. Its own members hold a variety of views. It is exactly this pluralism of beliefs which leads us to the conviction that the decision regarding abortion must remain with the individual, to be made on the basis of conscience and personal religious principles, and free from governmental interference." *Covenant and Creation: Theological Reflections on Contraception and Abortion*, Minutes of the 195th General Assembly of the Presbyterian Church 369 (1983). The Presbyterian Church (U.S.A.) believes, therefore, that "[t]he legal right to have an abortion is a necessary prerequisite to the exercise of conscience in abortion decisions. Legally speaking, abortion should be a woman's right because, theologically speaking, making a decision about abortion is, above all, her

responsibility." *Id.* Thus, the Presbyterian Church (U.S.A.) has affirmed that "no law should impose criminal penalties against any woman who chooses or physician who performs a medically safe abortion." Minutes of the 204th General Assembly of the Presbyterian Church (U.S.A.) 372 (1992).

In addition, through its General Assembly, the Presbyterian Church (U.S.A.) has stated that abortions should not be used as a method of birth control, but that abortions later in pregnancy should be an option, particularly in the case of women of menopausal age who do not discover they are pregnant until the second trimester, women who discover through fetal diagnosis that they are carrying a fetus with a grave genetic disorder, or women who did not seek or have access to medical care during the first trimester. *Covenant and Creation: Theological Reflections on Contraception and Abortion*, adopted by the 195th General Assembly of the Presbyterian Church (1983).[6]

Other Protestant churches support a woman's choice regarding abortion because of potential risks to the life or physical or mental health of the mother, because of concerns about the social situation in which the infant might be born, and because of instances of severe deformity of the fetus. *McRae*, 491 F. Supp. at 701 (citing testimony of

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[6] The 209th General Assembly of the Presbyterian Church (U.S.A.) in 1997 refused to call for a ban on the intact D&E procedure, and instead offered "moral guidance" on the subject. That guidance stated that the procedure is "of grave moral concern and should be considered only if the mother's physical life is endangered by the pregnancy."

Reverend John Philip Wogaman, United Methodist minister). The United Methodist Church, for example, believes in the "sanctity of unborn human life," but feels "equally bound to respect the sacredness of the life and well-being of the mother, for whom devastating damage may result from an unacceptable pregnancy." United Methodist Church, *The Book of Discipline of the United Methodist Church* ¶ 65 (1996). The Church maintains that "[g]overnmental laws and regulations do not provide all the guidance required by the informed Christian conscience." *Id.*

Accordingly, the church's General Conference has maintained a stance since 1970 that opposes restrictive abortion legislation. United Methodist Church, *Responsible Parenthood and the Church in Mission* 2 (1992). In 1988, the United Methodist Church resolved further that "We support the legal right to abortion as established by the 1973 Supreme Court decisions. We encourage women in counsel with husbands, doctors and pastors to make their own responsible decisions concerning the personal or moral questions surrounding the issue of abortion." United Methodist Church, *Resolution on Responsible Parenthood* (1988).

The Evangelical Lutheran Church in America stated in 1991 that "there can be sound reasons for ending a pregnancy through induced abortion. . . . We recognize that conscientious decisions need to be made in relation to difficult circumstances that vary greatly." Churchwide Assembly on the Evangelical Lutheran Church in America, Social Teaching Statement on Abortion (1991). The Church therefore believes that it may be morally responsible to terminate a pregnancy where necessary to protect the life of the mother, where pregnancy results from rape

or incest, or where the fetus has severe anomalies that are incompatible with life. *Id.* The Lutheran Women's Caucus resolved in 1990 to affirm that "a woman with an unintended pregnancy deserves the compassionate support of those closest to her, regardless of whether she terminates or continues her pregnancy." Lutheran Women's Caucus, Convocation Gathering (1990).

Within the Jewish tradition, there is considerable agreement that the fetus is not a person before birth, and that abortion is to be permitted, and may even be required in situations where the life of the mother is threatened. David M. Feldman, *Marital Relations, Birth Control, and Abortion in Jewish Law* 271-84 (1986); Raymond A. Zwerin & Richard J. Shapiro, *Abortion: Perspectives from Jewish Traditions* (undated) ("The fetus is not a person; it has no rights."); *see also* Hayim Halevy Donin, *To Be a Jew* 140-41 (1972) ("All halakhic scholars agree that therapeutic abortions – namely, abortions performed in order to preserve the life of the mother – are not only permissible but mandatory."). Beyond this, however, different branches of Judaism, and groups within each branch, hold divergent views about the legal and moral status of abortion and about the circumstances under which it is permitted.

Within the different strands of Orthodox Judaism, for example, there is disagreement as to whether a non-therapeutic abortion is homicide, whether avoiding severe mental anguish of the mother is an adequate basis for permitting an abortion of a fetus with severe defects, and whether it is permissible to include in the choice of an abortion consideration of the potential suffering of a severely disabled fetus carried to term. *See* Feldman,

supra, at 284-94; Donin, *supra*, at 141; Immanuel Jakobovits, "Jewish Views on Abortion," *in Jewish Bioethics* 118 (Fred Rosner & J. David Bleich eds., 1979); J. David Bleich, "Abortion in Halakhic Literature," *in Jewish Bioethics* 134 (Fred Rosner & J. David Bleich eds., 1979).

Conservative, Reform, and Reconstructionist branches of Judaism share a more liberal approach to abortion, and believe that individual women may treat an abortion decision in light of their own religious and moral views. The Central Conference of American Rabbis in 1980 reaffirmed that "Jewish legal literature permits therapeutic abortion," and that the "decision concerning any abortion must be made by the woman and not by the state or any other external agency." Similarly, over 700 Reform rabbis signed a letter in 1998 opposing the federal "partial-birth abortion" ban. That letter states: "As rabbis, we are often called upon to counsel families facing difficult decisions concerning reproductive health choices, including abortion. Like other members of the clergy, we turn to religious law and teachings for guidance in providing such counsel. Judaism has laws governing the issue of abortion, but each case is considered individually. . . . Abortion is a deeply personal issue. Women are capable of making moral decisions, often in consultation with their clergy, families and physicians, on whether or not to have an abortion. We believe that religious matters are best left to religious communities, not politicians." Letter of 729 Rabbis in Support of the President's Veto of H.R. 1122 (Sept. 10, 1998).

The United Synagogue of Conservative Judaism reaffirmed in 1991 that "under special circumstances, Judaism chooses and requires abortion as an act which affirms

and protects the life, well being and health of the mother. . . . [T]o deny a Jewish woman and her family the ability to obtain a safe, legal abortion when so mandated by Jewish tradition, is to deprive Jews of their fundamental right of religious freedom."

Even in these branches, however, authorities differ considerably about the circumstances under which abortion is permitted or required. Some consider abortion to be a religious duty when a pregnancy threatens a woman's life or health. Some would protect a woman's choice to abort simply as a matter of her right to control her own destiny. Morrison D. Bial, *Liberal Judaism at Home: The Practices of Modern Reform Judaism* 12-13 (Rev. ed. 1971). Others emphasize the harm to a woman's physical and emotional well-being that may be caused by a pregnancy as reasons for permitting abortion.

Unitarians have long supported abortion rights. The Unitarian Universalist Association affirmed a woman's right to choose to terminate her pregnancy in 1963 and has consistently reaffirmed that right since then. In 1987, the Association resolved to reaffirm "its historic position, supporting the right to choose contraception and abortion as legitimate aspects of the right to privacy." Unitarian Universalist Association, 1987 General Resolution, *Right to Choose*. Accordingly, in 1993, the Association resolved to urge passage of federal legislation to "guarantee the fundamental right of individual choice in reproductive matters." Unitarian Universalist Association, 1993 General Resolution, *Federal Legislation for Choice.*

It is obvious that many strongly held religious beliefs directly clash with the Act. In some circumstances, the

Act directly interferes with the religious lives of those who are adherents to certain beliefs. For those for whom abortion may be required by their religion in the case of a threat to their life or health, the Act interferes with their choice. For those whose religion dictates that authentic choice is an ethical necessity, the Act negates the freedom of that choice.

Under *Casey*, therefore, Nebraska's Act is unconstitutional. Given the range of beliefs about abortion, the state is not permitted to impose one view as orthodoxy where it would interfere with a fundamental right. By adopting the Act, which as the Eighth Circuit correctly held is so broad as to ban the safest and most common second trimester procedures, Nebraska did precisely what the government must not do under the Constitution. Nebraska has unconstitutionally imbedded into law certain religious beliefs over others. The Act, therefore, unconstitutionally infringes not only on the right to privacy, but also on the right of religious liberty that underlies that right.

III. THE ACT IMPOSES AN UNDUE BURDEN ON THE RIGHT OF WOMEN – RELIGIOUS AND NON-RELIGIOUS – TO DECIDE WHETHER OR NOT TO TERMINATE A PREGNANCY, AND IS THEREFORE UNCONSTITUTIONAL UNDER *CASEY*.

The Act unconstitutionally interferes with a woman's right to make her own decision about whether and when to bear children, in consultation with her husband or partner and her faith. Thus, it was proper for the Eighth Circuit to conclude that the Act imposes an undue burden

on a woman's right to seek an abortion in violation of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). The ban is not limited to "late-term" procedures, nor is it a ban on abortions of viable fetuses. Rather, it effectively bans the safest and most common second trimester abortion procedures. As the Court of Appeals observed, "both the proof and the legal arguments in this case seem to be exclusively about nonviable fetuses." *Carhart v. Stenberg*, 192 F.3d 1142, 1151 (8th Cir. 1999) (20a).[7] Thus, the Act would ban a woman from acting consistently with her religious conscience in making the most personal decision whether to terminate her pregnancy long before viability.

For this reason, in 1996, sixty-nine national religious leaders signed a letter opposing the federal "partial-birth abortion" legislation. In that letter, those leaders stated that:

> We are convinced that each woman who is faced with such difficult moral decisions must be free to decide how to respond, in consultation with her doctor, her family, and her God. . . . [N]one of us can discern God's will as well as the woman herself, and that is where we believe the decision must remain.
>
> Indeed, where religious people have such profound and sincere differences – even within our own denominations and faith groups – the government must not legislate, and thus impose,

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[7] In fact, the evidence in the district court was clear that respondent only performs abortions of non-viable fetuses. 192 F.3d at 1146 (7a); *Carhart v. Stenberg*, 11 F. Supp. 2d 1099, 1101 (D. Neb. 1998) (Finding of Fact ¶ 9) (5sa).

> one religious view on all our citizens. To do so violates our most cherished tradition of religious freedom.

Letter to President Clinton from Religious Leaders (Apr. 29, 1996); Laurie Goodstein, "Religious Leaders Back Abortion Ban Veto," *Wash. Post*, Apr. 30, 1996, at A4.

Moreover, the Eighth Circuit properly rejected the argument asserted by amici for petitioners that *Roe* and *Casey* do not apply to the Act because it regulates the "process of birth" rather than abortion. Despite the misleading title of the Act – purporting to ban "partial-birth abortion," a term coined by proponents of the legislation which is *not* a medical term – the Act has nothing to do with "birth." Nor does it have anything to do with preventing infanticide of a "partly born child." The arguments of amici amount to nothing more than semantical word play. Rather, the procedure banned by the Act is defined so broadly that it bans pre-viability abortion procedures, in direct contravention of *Casey*.

The record in this case makes clear that women who choose to terminate their pregnancies do so for a variety of reasons, in light of their own religious convictions and conscience and in keeping with the professional judgment of their physicians. Some health conditions pose serious risks during pregnancy, and those risks may become critical as the pregnancy progresses. Other women seek abortions after learning of severe or fatal fetal anomalies. *See, e.g., Carhart v. Stenberg*, 11 F. Supp. 2d 1099, 1113 (D. Neb. 1998) (Finding of Fact ¶ 61) (36sa); *see also* John M. Swomley, "The 'Partial-Birth' Debate in 1998," *The Humanist*, Mar. 1998, at 5; Religious Coalition for Reproductive Choice, *Partial Compassion: Legislative Attacks on Abortion* (undated). The Act unconstitutionally interferes with the ability of those women to exercise their moral and legal rights to make their own judgments about whether and when to bear children, in consultation with their family, their physicians, and their faith.

CONCLUSION

The Court has stated that the "very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *Barnette*, 319 U.S. at 638. The Court's role in preserving space for religious freedom is never more crucial than when there is massive public turmoil surrounding a subject. Otherwise, majorities, or even effectively mobilized minorities, can invoke the power of the state to curb the religious freedoms of those whose views they do not like. If this role is to mean anything, the Court should preserve a woman's right to terminate her pregnancy consistent with her own personal or religious conscience, and reject Nebraska's attempt to interfere with that right.

For these reasons, and for those stated by respondent, we respectfully urge the Court to affirm the

judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

VERNON L. FRANCIS
CARRIE Y. FLAXMAN
(Counsel of Record)
DECHERT PRICE & RHOADS
4000 Bell Atlantic Tower
1717 Arch Street
Philadelphia, PA 19103
(215) 994-4000

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