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IN THE
SUPREME COURT OF THE UNITED STATES

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

Petitioners,

v.

LEROY CARHART, M.D.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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BRIEF OF AGUDATH ISRAEL OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

ABBA COHEN
AGUDATH ISRAEL OF AMERICA
1730 Rhode Island Ave., NW
Washington, D.C. 20036
(202) 835-0414

DAVID ZWIEBEL*
EYTAN A. KOBRE
AGUDATH ISRAEL OF AMERICA
84 William Street
New York, NY 10038
(212) 797-9000

Attorneys for Amicus Curiae
Agudath Israel of America

* Counsel of Record

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INTEREST OF THE *AMICUS CURIAE*

Agudath Israel of America, a national Orthodox Jewish organization with constituents throughout the United States, respectfully submits this *amicus curiae* brief, with the

consent of the parties, for one express purpose: to highlight the abiding interest in both the protection of, and societal reverence for, human life upon which Nebraska's partial-birth abortion ban is predicated.

As an organization dedicated to the welfare of a major American faith group and the religiously-sourced values it holds dear, Agudath Israel often takes public positions, both in the courts and the halls of government, on moral issues of the day that manifest themselves in legal and legislative controversies. We view the maintenance of a societal climate that promotes traditional ethical values as essential not only for the flourishing of this country's diverse faith communities, but as well for the morally healthy social fabric on which the future of our Republic depends.

Consistent with this general perspective, Agudath Israel has long opposed the central holding in *Roe v. Wade*, 410 U.S. 113 (1973), that the right to abortion is "fundamental" and thereby protected against governmental abridgement absent a compelling governmental interest. Agudath Israel has articulated its position on this point in two prior *amicus curiae* presentations to this Court: in *Webster v. Reproductive Health Services* (Oct. Term 1988, No. 88-605), and in *Planned Parenthood of Southwestern Pennsylvania v. Casey* (Oct. Term 1991, Nos. 91-744, 91-902).

The case presently before the Court implicates a related but different aspect of the question of termination of fetal life: the issue of what has come to be known as "partial birth abortion." The procedure may be relatively rare, at least as compared to "typical" abortions, but it raises profound moral concerns whose gravity and centrality for our society cannot be overstated. Agudath Israel's position on partial birth abortion is embodied in the following public statement, issued in 1996:

> "Agudath Israel has for many years opposed legalized abortion on demand. Informed by the teaching of Jewish law that fetal life is entitled to significant protection, with termination of pregnancy authorized only under certain extraordinary circumstances, Agudath Israel is of the view that society, through its laws, should promote a social ethic that affirms the supreme value of life. Allowing abortion on demand, in contrast, promotes a social ethic that devalues life.
>
> "This devaluation is most strikingly evident in the context of a partial birth abortion — an abortion in which a living fetus is partially delivered, and then killed prior to completion of the delivery. Indeed, depending on the circumstances, killing a fetus after it has partially emerged from the birth canal may more properly be deemed infanticide than abortion, and Jewish law might not even recognize a "life of the mother" exception that would permit the procedure. It certainly behooves society at large to recognize the enormity of the moral issues surrounding this procedure, and to enact significant – if not absolute – restrictions on its use.
>
> "Accordingly, while Agudath Israel continues to call for even greater legal protections for fetal life, we welcome as at least a minimally appropriate step the enactment of legislation that would generally prohibit the destruction of life through the practice of partial birth abortions.
>
> "The laws of civilized societies reflect and shape the values of those societies. Laws that allow abortion on demand, or the killing of partially delivered fetuses, are harmful not only because they lead to the taking of innocent and defenseless lives, but because they pollute the moral climate all around us. Let ours be a society that protects and cherishes life."

It is to elaborate upon these societal interests that run counter to the legalization of partial birth abortion that we make this submission.

Pursuant to Rule 37.6 of the Rules of this Court, the

undersigned counsel for Agudath Israel represent that they are the sole authors of this brief, and that no person or entity other than Agudath Israel made any monetary contribution toward the preparation or submission of this brief. (Counsel acknowledge the significant assistance of Moshe Klein, a third-year student at the Columbia Law School, in the research and preparation of this brief.)

ARGUMENT

A STATUTORY BAN ON THE "D&X" PROCEDURE DOES NOT IMPOSE AN UNDUE BURDEN ON WOMEN SEEKING ABORTION WHERE IT HAS THE PURPOSE OF PROMOTING THE STATE'S PROFOUND INTEREST IN PROTECTING HUMAN LIFE AND IN HAVING ITS LAWS REFLECT THE SOCIETAL CONSENSUS THAT EXISTS OPPOSING PARTIAL-BIRTH ABORTION

In granting *certiorari*, the Court agreed to decide whether a statute that outlaws the "D&X" procedure places an undue burden -- under the standard announced in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 876 (1992) -- upon a woman seeking to have an abortion.

An important consideration in this inquiry is whether the "D&X" procedure may, at times, be the medically preferable option for a woman undergoing an abortion, in which event a "D&X" ban may constitutionally require an exception for instances where that procedure is necessary to protect the woman's health. In this regard, we proceed on the basis of the holding in *Hope Clinic v. Ryan*, 195 F.3d 857 (7th Cir. 1999), that there is a sufficient factual basis for a legislature to conclude that the above-mentioned procedure is not the best medical option in any identified situation.

An equally crucial factor, however, in determining the constitutionality of a "D&X" prohibition is the nature and scope of the governmental interests expressed by such law. And it is precisely the fundamental nature and broad scope of the state interests underlying such statutes that makes states' exercise of legislative oversight regarding this procedure an entirely proper one. Indeed, upon closer analysis, one can discern several distinct, albeit cognate, interests that states may have in outlawing the use of the "D&X" abortion method.

I.

The Court Has Recognized The Right Of States To Advance Their Interest In Human Life Through Regulations That, Like A "D&X" Ban, Seek To Influence Women Not To Undergo Abortions

We begin by reprising the relevant teachings of *Casey*, *supra*, the Court's most recent comprehensive treatment of the abortion issue. The Court therein noted that although "*Roe v. Wade* was express in its recognition of the State's 'important and legitimate interest in . . . protecting the potentiality of human life,'" the trimester framework fashioned in *Roe* was "incompatible with the recognition that there is a substantial state interest in potential life throughout pregnancy." 505 U.S. at 876. The Court rejected that aspect of *Roe* and subsequent cases which "undervalue[d] the State's interest in the potential life within the woman [by] . . . . treat[ing] all governmental attempts to influence a woman's decision on behalf of the potential life within her as unwarranted." 505 U.S. at 875-76.

Instead, *Casey's* insistence on "the State's profound interest in potential life" led it to formulate an undue burden standard for judicial scrutiny of state abortion regulations. Under that standard, "[r]egulations which do no more than

create a structural mechanism by which the State . . . may express profound respect for the life of the unborn . . . [or that are] designed to persuade her to choose childbirth over abortion" must be upheld so long as they are reasonably related to those goals and do not "place a substantial obstacle in the path of a woman seeking an abortion" of a nonviable fetus. See 505 U.S. at 877-78.

State prohibitions on use of the "D&X" procedure clearly operate to foster "profound respect for the life of the unborn." They further serve to highlight the nature of that and other abortion procedures in a way that may well "persuade [a woman contemplating an abortion] to choose childbirth over abortion." Accordingly, so long as such proscriptions do not unduly burden a woman's right to choose by placing, in specific instances, the medically preferable abortion procedure beyond her reach, they must be upheld as legitimate advancements of the significant interest that states possess in the preservation of fetal life.

While these statutes, due to their focus on one specific method of abortion, may not produce the direct result of saving specific fetal lives, it cannot be gainsaid that their passage has helped highlight in the public's mind the extreme hideousness of the procedure they prohibit. The enactment of "D&X" bans, after extensive public debate, by legislatures across the country and by both houses of Congress, has touched off a firestorm of shock and revulsion among the American public at the existence and use of a procedure that has been described as being "literally seconds and inches away from being classified as a murder by every State in the Union." *Partial-Birth Abortion: Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary*, 104th Cong. 39 (June 15, 1995) (testimony of Pamela Smith, M.D.). The resultant public exposure of this practice and its similarities to the "D&E" and other procedures, has, in turn, "cast a bright light on the alternative

[abortion] procedures that are equally gruesome . . . [and] could foreseeably cause mothers seeking abortions to have second thoughts, thus giving the potential life in which the state unquestionably has an interest another chance to live." *Planned Parenthood of Wisconsin v. Doyle*, 162 F.3d 463, 476 (7th Cir. 1998) (Manion, J., dissenting).

Thus, for the Court to uphold a law banning the "D&X" procedure based on its function of informing expectant women of what an abortion entails, is fully consonant with the holding of *Casey* that an abortion regulation may legitimately strive to provide women with an informed choice by focusing their attention on the "consequences to the fetus, even where those consequences have no direct relation to her health." 505 U.S. at 882.

II.

A State Law Banning The "D&X" Procedure Advances That State's Significant Interests In Protecting Life By Erecting A Bulwark Against Outright Infanticide And In Expressing The Prevailing Consensus Of Moral Opposition To The "D&X" Procedure

Proscriptions on the use of the "D&X" method may also serve two additional, and related, governmental interests: the creation of a legal and moral bulwark against what a state's legislature may reasonably perceive to be the threat of a creeping social legitimization of infanticide, and the need for that body to give legal expression to the important moral convictions of both the citizenry they represent and society at large.

Recent events in our national life have worked a subtle erosion of the profound, indeed innate, reverence for all human life that has been at the very core of this nation's values since its founding. As this tendency toward the

devaluation of life proceeds, states have an ever more vital interest in making clear, by banning abortion procedures that are nearly indistinguishable from actual infanticide, that the latter practice is irreversibly beyond the pale of civilized society.

Standing in symmetry to the battle over the protection of nascent life is the ongoing controversy, at the other end of life's spectrum, regarding the legality and ethics of assisted suicide. *See, e.g., Washington v. Glucksberg*, 117 S.Ct. 2258 (1997). One state, Oregon, has already given its sanction to this practice, and legal and legislative efforts on its behalf loom in other jurisdictions. One need only read reports of the contemporary Dutch experience with legalized assisted suicide and the ensuing slide into full-fledged euthanasia, to appreciate just how quickly society can traverse the short distance from state-authorized life-ending procedures to the taking of life in a manner that our society presently equates with murder. *See generally* Agudath Israel's *amicus curiae* brief in *Vacco v. Quill* and *Washington v. Glucksberg* (Oct. Term 1996, Nos. 95-1858, 96-110).

Nor are societal attitudes regarding termination of the lives of the elderly and infirm of little relevance to the abortion context. Peter Singer, the influential philosopher of ethics who directs Princeton University's Center for Human Values, argues forcefully in his *Practical Ethics* (2d Ed., Cambridge University Press, 1993) that humans who, although sentient, lack rationality and self-consciousness, should be denied, for moral and legal purposes, the status of personhood. Citing the prevalence of infanticide in ancient Greece as precedent, Singer would legalize the killing of some disabled newborn infants because "infanticide is not necessarily more morally important than abortion, which is morally negligible." (George F. Will, "Life and Death at Princeton," *Newsweek,* Sept. 13, 1999 at 80.)

It is against this backdrop of an increasing desensitization to the sanctity of life at its most defenseless that the interests that a state may seek to promote through its prohibition of the "D&X" procedure must be evaluated. *Casey*'s affirmation of the role abortion regulations may play in furthering the State's "profound interest in potential life" should properly be understood to encompass state laws that have the purpose of stemming and reversing trends that, if left unaddressed, could result in a wholesale slouching toward, and ultimate sanctioning of, outright infanticide.

Beyond the need to employ the "D&X" proscription in defense of yet-to-be-born lives as a roadblock on the path leading down to infanticide, a state may assert yet another clear interest in prohibiting this procedure: to give voice, through its laws, to those ethical principles that are a matter of broad public consensus and thus constitute indispensable elements in the creation of a cohesive social fabric.

That government has a significant interest in expressing and preserving, through its laws, a moral consensus that exists among its citizens has been recognized by justices of the Court in a variety of contexts, ranging from the marriage laws addressed in *Zablocki v. Redhail*, 434 U.S. 374, 399 (1978) (Powell, J., concurring), to the state anti-sodomy statute upheld in *Bowers v. Hardwick*, 478 U.S. 186 (1986) as a legitimate expression of "majority sentiments about the morality of homosexuality." *id.* at 196, to several of the Court's decisions validating state regulation of obscenity as a proper exercise of the state's power to preserve moral standards. *See, e.g., Barnes v. Glen Theatre*, 501 U.S. 560, 569 (1991).

The case now before the Court deals with a method of terminating fetal life that, as noted earlier, has been characterized by physicians and political leaders on both sides of the abortion debate as one that is, in Senator Daniel Patrick

Moynihan's oft-quoted words, "as close to infanticide as anything I have come upon." Nat Hentoff, *Close to Infanticide* (Washington Post, Aug. 30, 1996, at A31). Indeed, from the perspective of classical Jewish law, the procedure most likely would in fact be deemed infanticide. *Mishna, Ahalot* 7:6; see generally J. David Bleich, *Abortion in Halakhic Literature*, reprinted in *Jewish Bioethics* (Hebrew Publishing Co. 1979) at 134. Public opinion polls have consistently registered the opposition of the overwhelming majority of respondents to the use of this procedure. The public's sentiment has, in turn, been enacted into law in thirty state legislatures and, several times, by both houses of Congress, only to be vetoed by the President.

It is difficult to find another matter of public controversy in the moral arena on which there exists a comparable level of national consensus. Surely, then, this is an area in which it is highly appropriate for states to pass laws that embody the moral opprobrium that their citizens, as part of a national majority, have heaped upon a procedure that is unequivocally "gruesome and inhumane." *Evans v. Kelly*, 977 F.Supp 1283, 1319 n.38 (E.D. Mich. 1997).

There may, of course, be those, like the majority in *Doyle*, *supra*, who fail to comprehend "how a rational legislature could sense a moral difference between [methods] of concededly lawful abortion . . . and the partial birth method that the state forbids . . . . " 162 F.3d at 470. Certainly, on as vexed a moral issue as abortion, reasonable persons can be expected to arrive at differing, even antithetical, conclusions.

However, as Judge Manion's dissenting opinion in *Doyle* points out, 162 F.3d at 477, it is in the province of each state's legislators to arrive at their own moral judgment on this issue, speaking on behalf of the citizens who elect them. And it is clear that the Nebraska legislature has made

precisely such a judgment in barring the "D&X" procedure. This judgment should not be disturbed.

CONCLUSION

The Court's ruling in *Casey* was premised in considerable part on "principles of institutional integrity" and the "rule of *stare decisis*". 505 U.S. at 845-46. Those considerations are absent here, where the Court is confronted for the first time with a procedure that approaches, or in fact is, infanticide, and where a broad moral consensus has developed in opposition to the procedure. Agudath Israel respectfully urges that the decision below be reversed.

Respectfully submitted,

ABBA COHEN
AGUDATH ISRAEL OF AMERICA
1730 Rhode Island Ave., NW
Washington, D.C. 20036
(202) 835-0414

DAVID ZWIEBEL*
EYTAN A. KOBRE
AGUDATH ISRAEL OF AMERICA
84 William Street
New York, NY 10038
(212) 797-9000

Attorneys for Amicus Curiae
Agudath Israel of America

* Counsel of Record

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