No. 99-830

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 Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF FAMILY RESEARCH COUNCIL AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS - Continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES - Continued

STATUTES Page

OTHER Page

INTEREST OF AMICUS CURIAE

The Family Research Council is a non-profit public policy organization dedicated to preserving the integrity of the family and protecting the interests of mothers and children in the context of abortion. Our legal policy experts are continually sought out by federal and state legislators for assistance and advice on abortion and related issues. The Family Research Council has participated in numerous *amicus curiae* briefs in the United States Supreme Court and federal courts on the subject of abortion. Our research on current medical and legal issues surrounding abortion enables us to provide unique assistance to courts in cases such as this.

This brief is submitted with the written consent of all parties. No person or entity other than Family Research Council, its supporters, or its counsel has made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case squarely presents the question of where abortion ends and infanticide begins. Family Research Council respectfully submits that the interest advanced by partial birth abortion bans such as Nebraska's is the clear demarcation between infanticide and abortion. Indeed, it is precisely because the practice of partial birth abortion blurs that

distinction for many that lawmakers find it necessary to ban the practice and denounce it publicly.

Family Research Council further submits that a plain reading of the ban shows that it governs only those abortions performed on the child in the process of being born. It does not govern those abortions involving the delivery of *that child's body parts* (for example, conventional dismemberment techniques). Courts which have interpreted partial birth abortion bans more broadly have given undue weight to the self-interested and biased testimony of abortion practitioners who do not like any abortion laws, however carefully drafted.[1]

Because the law's interest in life is rational and compelling, and because its scope is limited (leaving alternative abortion procedures available), this Court can easily uphold Nebraska's partial birth abortion ban as a reasonable and necessary means of protecting neonatal and partially born human life.

ARGUMENT

I. NEBRASKA'S PARTIAL BIRTH ABORTION BAN AIMS TO PROTECT HUMAN LIFE, A LEGITIMATE AND COMPELLING STATE INTEREST.

[1] Indeed, Ohio's law banning partial birth abortion used different and far more specific language than Nebraska's. But challengers to this law, *represented by the same counsel*, raised *the very same objections* of vagueness to this differently worded law. *Women's Medical Professional Corp. v. Voinovich*, 911 F. Supp. 1051 and 130 F. 3d 187 (1997)[hereafter *Voinovich*]. This strongly suggests that the challenges to partial birth abortion bans are grounded not so much in the statutory wording as in opposition to legal oversight of abortion generally.

The statute at issue in this case is Nebraska's ban on partial birth abortion, also known as LB 23, which defines partial birth abortion as follows:

> (9) Partial birth abortion means an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery. Neb. Rev. Stat. Ann. Sec. 28-326(9)(1998 Supp.)[2]

Constitutional analysis of any statute requires recognition and understanding of the statute's aim, goal or interest. In enacting LB 23, Nebraska joined 29 states in an effort to protect human life generally, and neonatal human life in particular, specifically the newly and partially born human infant.[3]

The state's interest in protecting human life, both prenatal and neonatal, is uncontested, even in the

[2] The definition continues: "For purposes of this subdivision, the term partially delivers vaginally a living unborn child before killing the unborn child means deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child." Neb. Rev. Stat. Secs. 28-326, 28-328 (1998 Supp.)

[3] *See* Motion for Leave to File Brief of Amici Curiae (States) in *Stenberg, et al. v. Carhart*, in the Supreme Court of the Untied States, by Attorneys General and Bopp, Coleson, & Bostrom, at page 16 (list of states).

abortion context. This Court has affirmed the legitimacy and compelling nature of this goal. "[T]here is a substantial state interest in potential life throughout pregnancy." *Planned Parenthood v. Casey,* 505 U.S. 833 (1992)[hereafter *Casey*]. "The State has an interest in protecting the life of the unborn." *Id.* "The State has a legitimate interest in minimizing such offense [disrespect for human life]." *Id.*

Indeed, this Court has stated that American courts have given too little weight to this substantial interest in abortion cases. "It must be remembered that *Roe v. Wade* speaks with clarity in establishing not only the woman's liberty but also the State's important and legitimate interest in potential life ... That portion of the decision in *Roe* has been given too little acknowledgment and implementation." *Id.*

The legislative history of LB 23 confirms that legislators have acted to protect and safeguard human life. Senator Maurstad, the primary sponsor of LB 23, advocated its passage with the following:

> "The discussion before us is the practice of partial birth abortion. **This is a debate about human life** and **whether a partially-born human life deserves protection** under the laws of the State of Nebraska ... We, as elected representatives of the people of the state of Nebraska, have a duty **to protect innocent human life.**"[4] [emphasis added]

[4] Transcript of the Legislature of Nebraska by Transcriber's office, April 11, 1997, at 3956 (1640 of record of LB 23) and at 3957 (1641 of record of LB 23). At the federal level, and in state legislatures around the country, elected officials expressed the same general concern: "By voting to ban this procedure, we ... **restore a sense of humanity and dignity to our public life.**" [emphasis added], Senator Santorum, "Santorum Remains Hopeful about Partial Birth Abortion," Cong. Press Release, Oct. 21, 1999. "I recognize that the American people remain deeply divided on this issue [of abortion]. But where there is common ground, **we need to move forward and protect life.**" [emphasis added] Senator Ashcroft, "Ashcroft Supports Senate Bill to End Partial Birth Abortion," Cong. Press Release, April 30, 1999. "The government's role is to **protect its most vulnerable.**" *The Kansas City Star,* Quoting State Rep. Hartzler of Mo., "Abortion at Center of Attention," Sept. 16, 1999 at A1.

II. NEBRASKA'S PARTIAL BIRTH ABORTION BAN AIMS TO PROTECT PARTIALLY AND NEWLY BORN HUMAN INFANTS.

A. Are partial birth abortion bans reasonable?

The ability of citizens to protect human life (that is, the life of the child in pregnancy) in the abortion context is limited. This Court has construed the United States Constitution such that the option of abortion must remain available to American women without undue interference by law.[5] Banning one abortion method, unknown and unused by most in abortion practice, including seasoned abortion practitioners, on its face does not unduly interfere with the abortion option, since alternative methods remain available.[6]

[5] *Planned Parenthood v. Casey,* 505 U.S. 833 (1992).

[6] This Brief argues that this is the correct interpretation of the statute, notwithstanding court opinions saying the language is vague. *See* Text at 20-22. It is worth noting that many abortion proponents who now claim the statutory language is vague and therefore incomprehensible, have revealed that they understand what procedure the law targets. For example, the expert witnesses

But some Courts have focused precisely on the availability of alternative abortion procedures as evidence of the law's inadequacy to meet its stated goal (the protection of human life). If the child in pregnancy may be legally destroyed by other means, the argument goes, how does the elimination of one abortion method protect that child's life?

The dissenting opinion for the Seventh Circuit Court of Appeals in *The Hope Clinic, et al. v. Ryan*, 195 F.3d 857 (7th Cir. 1999) (en banc) [hereafter *Hope Clinic*], is an example of this type of criticism. There the minority opinion stated:

> "To understand the issue [facing the Court] requires understanding of the peculiar and questionable character of these statutes. They do not protect the lives of fetuses either directly or by seeking to persuade a woman to reconsider her decision to seek an abortion. For the statutes do not forbid the destruction of any class of fetuses, but merely criminalize a *method*

testifying against the ban in this case, Dr. Stanley Henshaw, testified that "to my knowledge, there are only a few doctors nationally who do large numbers of D&X abortions." Transcript of Preliminary Injunction Hearing at 78. ("D & X" refers to dilation and extraction, another term for the partial birth abortion method. "D & E" refers to dilation and evacuation, the term for more conventional dismemberment techniques of abortion). Counsel for Plaintiff has also indicated comprehension of the law in public statements: "The number of procedures that clearly meet the definition of partial birth abortion is very small, probably only 500 to 1,000 a year." Statement by the Center for Law and Reproductive Policy to *New York Times*, March 28, 1996.

> of abortion - they thus have *less* to recommend them than the antiabortion statutes invalidated in *Roe v. Wade*, 410 U.S. 113 (1973)." *Hope Clinic.*

The Court's minority proceeded to deem the law as irrational. *Id.*

The opinion also intimated that supporters of such legislation around the country acted in bad faith by passing such laws. *Id.* However, an extraordinary number of elected officials have supported partial birth abortion legislation such as Nebraska's, including many who generally support legal abortion.[7] It is unlikely that irrationality, ignorance and bad faith (or a combination thereof) should afflict so many lawmakers, of such different political persuasions, throughout so much of the country. Upon examination of the record, it is clear that legislators sought to protect human life from an abortion method that appeared to be more infanticide than abortion.

B. Partial birth abortion approximates infanticide.

Courts are correct to point out that all abortion methods, upon examination, are gruesome and violent.[8] Family Research Council has unambiguously

[7] This includes the majority of state legislators in 30 states, most of their Governors, as well as veto proof majorities in the United States House of Representatives and a majority in the United States Senate. *See also* Motion for Leave to File Brief of Amici Curiae, *supra* note 3 at page 15.

[8] *Women's Medical Professional Corp. v. Voinovich*, 911 F. Supp. 1051 (1995): "This Court fails to see how the [D & X] procedure is more cruel than the D & E procedure, which involves dismemberment of the fetus."

championed this view in its efforts to fight abortion and persuade Americans of its wrongfulness.[9] Still, the American public has reacted differently to the partial birth abortion method.[10]

The difference between partial birth abortion and conventional abortion techniques is the evident similarity between the partial birth abortion method and infanticide. Partial birth abortion destroys the human child in a visible, open and explicit way, moments before birth, while conventional abortion methods do not. This explains the different public reaction to it, and why even legislators supportive of legal abortion have voted in large numbers to ban it: All recognize that this abortion method, unlike others, involves killing a child who is in the birth canal, in the process of being born. This renders the procedure indistinguishable from infanticide.

Nebraska Senators, like elected officials throughout the country, understand that allowing

[9] *The Truth in Black and White*, Family Research Council, January 1999. ("Family Research Council acknowledges the fact that the dismemberment of a child within the womb is, of course, as much a violation of that child's human rights as stabbing the child's head when he or she is almost fully outside the womb. Every form of abortion involves the violent destruction of innocent human beings and is therefore an egregious wrong.")

[10] It should also be noted that citizens do not have the option of protecting the child from all abortion methods, given present abortion jurisprudence. "[Family Research Council is] aware that courts would probably invalidate laws providing [more widespread] protection, given current precedents of the United States Supreme Court. Precedent, however, does allow citizens to protect the human infant from abortions during the process of birth ..." *Id.*

partial birth abortion means inviting a slide into full-blown infanticide since, as one legislator said, the difference between the newly born infant and the partially born infant is a matter of mere inches.[11]

For example, LB 23 passed with only one dissenting vote. The link between the partial birth abortion method and infanticide was made explicit several times during legislative debate:

> "LB 23 does not prevent a woman from having an abortion. In fact, it may not prevent a single abortion. The purpose of LB 23 is to prevent an abortion procedure. *What LB 23 does prevent is near infanticide.*"[12] [emphasis added]

> "It's hard for me to understand how [the procedure] can be justified ... *because the delivery is almost complete before the abortion ... before the child is killed.*[13] [emphasis added]

> *"It's a living baby,* and it's in such a far advanced stage of pregnancy, I think that's why so many of us, pro-choice and pro-life people both, have

[11] Rep. Bill Luetkenhaus of Missouri, as quoted in Bill Bell, "The Moment of Truth is Here for the Abortion Measure," *St. Louis Post Dispatch*, Sept. 12, 1999 at page A8.

[12] Opening Statement of Sen. Maurstad, Transcript of the Legislature of Nebraska by Transcriber's office, April 11, 1997, at 3958 (1642 of record of LB 23).

[13] Statement of Sen. Dierks, Transcript of the Legislature of Nebraska by Transcriber's office, April 11, 1997, at 3961 (1645 of record of LB 23).

kind of a shuddering feeling when you think of the procedure itself.[14] [emphasis added]

Similar views supported the veto-proof votes in the United States House of Representatives and the majority votes in the United States Senate.[15]

Senator Ashcroft: "I also want to share a word of caution with those claiming that a ban on partial birth abortion is unconstitutional. If they truly believe that outlawing this procedure is impermissibly vague, *the inevitable conclusion people will draw is that infanticide and abortion are indistinguishable.*[16] [emphasis added]

Senator Specter: "Partial birth abortion *crosses the line between abortion and infanticide.*"[17] [emphasis added]

[14] Statement of Sen. Crosby, Transcript of the Legislature of Nebraska by Transcriber's office, April 11, 1997, at 6385 (1658 of record of LB 23).

[15] The U.S. House of Representatives and the U.S. Senate first voted to override President Clinton's veto of the federal *Partial Birth Abortion Ban Act* in September 1996 (Cong. Rec. H10642, roll call #422; (vote: 285 to 137); Cong. Rec. S11337-11361, S11366-11389, roll call #307 (vote: 58 to 40). The second override vote was in July and September of 1998 (Cong. Rec. H6212-6213, roll call #325 (vote: 296-132); Cong. Rec. S10564, roll call #277 (vote: 64-36).

[16] Sen. John Ashcroft, "Ashcroft Supports Senate Bill to End Partial Birth Abortion," Cong. Press Release, April 30, 1999.

[17] Sen. Arlen Specter ("an ardent advocate of abortion rights"), as quoted in "Santorum Vows to Keep Fighting for Late-Term Abortion Ban," Anick Jesnanum, Associated Press, September 18, 1998.

Senator Lott: "The linkage ... between abortion and infanticide has become all too clear with the practice of partial birth abortion." [18]

Senator Ben Nighthorse Campbell: "[Partial birth abortion] is an atrocity which is inflicted on a fetus so far along in its development, *it is nearly an infant. I am pro-choice*! I have a 100 percent voting record with the National Abortion Rights Action League. I do not consider this ... to be a choice issue."[19] [emphasis added]

State legislators expressed the same view:

Rep. Gary Simrill of South Carolina: "If you ever look into what the partial birth abortion is, clearly, it is infanticide. There is no question about it."[20]

Senator Posthumus of Michigan: "This practice of aborting a fully developed baby is so extreme that even some of the most liberal members of Congress oppose it."[21]

[18] "Majority Leader Commits to Enactment of Partial Birth," Cong. Press Release, January 15, 1998.

[19] U.S. Senator Ben Nighthorse Campbell as quoted in "No Moral Support for Partial Birth Abortion," Ann Donnelly, *The Columbian* (Vancouver, WA), June 15, 1997 at page 11.

[20] As quoted in Sharyn Lucas, "Abortion Bill Bans Some Procedures, Sparks Emotion," *The Herald*, February 28, 1997 at page 1B.

[21] As quoted in "U.S. state bars partial birth abortion," Deutsche Presse-Agentur, June 14, 1996.

> Rep. Ray Allen of Texas: "It's fairly plain that partial-birth abortion is infanticide and it should be against the law."[22]

Indeed, in Missouri, legislators have re-named the ban the "Anti-Infanticide Act," with sponsors advocating it as a response to infant killing: "All this does is make it illegal to kill a baby while it is being born."[23]

In sum, many view partial birth abortion as *indistinguishable from infanticide*; or, at least so similar that it blurs a line that should be crystal clear (the line between abortion and infanticide). That is why partial birth abortion constitutes a much greater threat to the newly born human infant than traditional abortion practice.

III. AMERICANS PERCEIVE THAT INFANT HOMICIDE IS ON THE RISE AND DEMAND THAT A PROTECTIVE, LEGAL LINE BE DRAWN TO PREVENT KILLING OF THE HUMAN FETUS/INFANT ONCE HE OR SHE EMERGES FROM THE WOMB.

The concern among Nebraska legislators and others that human infants are at risk in American society today is valid. For instance, one leading scholar,

[22] As quoted in "Abortion Foes Seek New Limits," *The Forth Worth Star*, January 18, 1998 at page 1.

[23] State Sen. Ted House, as quoted on House Bill 427 in "Senate Nullifies Abortion Bill Veto, Legislators Again Rebuff (Governor) Carnahan, Vote to Outlaw Late-Term Procedure," Will Sentell, *The Kansas City Star*, at page A1.

Bioethics Professor Peter Singer of Princeton University's Center for Human Values, has seriously argued that infanticide is morally acceptable and should be put into practice.[24]

A. Reports and studies show an increase in infant homicide.

The actual incidence of infanticide is growing. While the reporting of infant homicide is not uniform throughout the country and estimates vary with the diligence of state officials, the most recent and reliable studies show that the rate of infanticide is increasing.

The most recent and publicized study appeared in late 1998 in the New England Journal of Medicine. It was the largest examination of infant homicide ever conducted and showed a marked increase in the rate of infanticide.[25] Press coverage was dramatic (the *New York Times*, for example, announced "Infant Homicide Found to be Rising in U.S.").[26] These findings are in keeping with other sources' reporting on neonaticide, including FBI statistics, which show that the number of

[24] Singer has contended that "the life of a fetus...is of no greater value than the life of a nonhuman animal at a similar level of rationality..." Singer contends that his arguments apply equally to newborn children. *Practical Ethics* (2d Ed., Cambridge Univ. Press), at page 169.

[25] Wissow, and Overpeck, et. al., "Risk Factors for Infant Homicide in the United States," *New England Journal of Medicine*, Oct. 22, 1998 at 1239-1241 and 1211-1216, respectively.

[26] *See* Gilbert,"Infant Homicide Found to be Rising in U.S.," *New York Times*, Oct. 27, 1998

children under a week old who are murdered has increased 92% since 1973.[27]

State authorities (who investigate and verify infant homicide cases) confirm the trend. One report in Texas stated: "The homicide rate for children less than a year old has been climbing steadily since 1979, from 4.86 per 100,000 babies to the current 11.6, which is higher than the country's overall murder rate of 10 persons per 100,000."[28] And while the numbers tend to fluctuate and vary with reporting practices, those involved affirm that "there has been a steady rise over time" in child deaths.[29]

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[27] As reported in Marc Peyser, "Death in a Dumpster," *Newsweek*, December 16, 1997.

[28] Ira J. Hadnot, "Au pair case spotlights shaken baby syndrome," *The Dallas Morning News*, 16 Nov 1997, iJ, detailing interview with prosecutors in Tarrant County, Texas.

[29]Elizabeth Simpson, "Group Reviews Child Deaths in Hopes of Finding Answers," The Virginia-Pilot, 20 April 1998, B1 (interviews with members of the Hampton Roads Child Fatality Review Team). Even with higher numbers of child fatalities, authorities confirm that numbers in official reporting systems (such as those compiled by State Departments of Health or State Criminal Divisions and then submitted to the Center for Health Statistics) are unreliable and drastically low. "[T]here is strong evidence that both homicides and fatal cases of child abuse are undercounted." Overpeck, et al., *supra* note 25. In fact, one study published in 1992 on the inaccurate reporting in Missouri prompted many states to establish "Child Fatality Review Teams" to review cases more thoroughly. ("Child maltreatment fatalities are drastically underreported as such in Missouri because of inadequate investigations, lack of information sharing between investigators and agencies, and reporting systems that fail to capture the contribution of maltreatment as a cause of death.") Ewigman, et al, "The Missouri Child Fatality Study: Underreporting of maltreatment Fatalities Among Children

B. Recent highly publicized infanticide cases reinforce the conviction that the problem is growing.

Press reports of infant killings are also on the rise, reinforcing the conviction among members of the public and elected officials that it is increasingly difficult to protect infant human life. A lexus search on infant homicide/killing, neonaticide and infanticide reveals that the number of newspaper accounts of infant killing increased more than tenfold since the 1970s.

Two recent cases, highly publicized and provoking strong public reaction, illustrated what many see as a complete disregard for human infant life. Amy S. Grossberg and Brian C. Peterson, two middle class college students, delivered their baby in a hotel room in Delaware and then threw the baby in an outside trash bin in 1996.[30] Melissa Drexler, an 18-year-old New Jersey woman, gave birth during her senior prom in the banquet hall's bathroom, then dropped the baby in a garbage can to return to the dance and finish

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Younger than Five Years of Age, 1983-1986," Pediatrics 1992; 91:330-7. The work of these Review Teams, however, slows down official reporting. This explains the stabilization in numbers appearing in homicide and child fatality tables dating from approximately 1993 onward (most notably in State reports to the National Center for Health Statistics).

[30] *State v. Amy S. Grossberg*, ID No. 9611007818; *State v. Brian C. Peterson*, Jr., ID No. 9611007811 (1996 Del. Super. Lexis 545), December 6, 1996.

her dinner.[31] Both incidents came on the heels of other, equally disturbing reports of infant killings by younger women.[32]

In addition, infant abandonment cases are becoming so commonplace in certain areas that at least eight states have, or are considering, legislation targeting the problem.[33] (In the Houston area alone, there were 13 cases of infant abandonment within a 10

[31] *State of New Jersey v. Melissa Drexler*, Case No. 97091673, Oct. 29, 1998.

[32] Patricia Pearson, *When She Was Bad* (Viking Penguin Group 1997), Chapter 3 (detailing the case of Amy Ellwood, an 18 year old from Long Island who delivered her baby in the shower, placed him in a garbage bag and then in a bucket, and then finally in a cooler in her car. That evening she dumped the baby and the cooler in a lake.). Person elaborates further on the baby killing trend in Suffolk County, New York: "A colleague of Ellwood's father watched his daughter, Loretta Campbell, plead innocent in Hempstead to charges of second-degree manslaughter for smothering a boy she'd given birth to on January 1, 1991 ... leaving him in a garbage bag. Two weeks earlier, a C.W. Post College sophomore had been charged with first-degree manslaughter for gagging her baby with toilet paper and dumping him in a dorm hallway garbage can. Then there was the twenty-one-year-old Uniondale woman who pled guilty to first-degree manslaughter for killing her newborn boy, and a twenty-year old Brentwood woman who threw her baby out the window, and an East Northport woman who left her infant to drown in the tub. Other babies in Suffolk County were found by the police, but never connected to those who destroyed them." *Id.* at 70.

[33] Those states are: Alabama (Child Abandonment Act , Code of Alabama 1975, Section 26-18-6.); California (S.B. No. 1368); Colorado (S.B. 00-1710; Georgia (H.B. 1261); Kentucky (H.B. 546 & 367; S. 188); Minnesota (S. F. No. 2615); Oklahoma (H.B. 2148) and Texas (H.B. 3423).

month period. [34]) These bills allow mothers to leave their babies at designated spots (fire stations or hospitals, for example).

Lenient sentencing is also seen as contributing to the loss of respect for life and a threat to human infants. For example, Amy Grossberg was sentenced to just 2 ½ years imprisonment after pleading guilty to manslaughter of her baby; Brian C. Peterson was sentenced to just two years. Melissa Drexler pleaded guilty to aggravated manslaughter, a plea agreement which renders her eligible for parole after just three years in prison.[35] These sentences are not exceptional. As one survey explained, "Due to a lack of evidence or inability to prove the mother's state of mind, some prosecutors decline to bring charges against a mother who kills her child. Furthermore, judges are known to provide leniency to mothers found guilty of killing their infants."[36] Tom Morgan, a member of the U.S. Advisory Board on Child Abuse and Neglect who spent two years studying child fatalities, stated:

[34] Jim Yardley & Angela Shah, "Houston Baffled By Rise in Baby Abandonment," *The Austin American Statesmen*, December 26, 1999 at page B1; Stacy A. Teicher, "Rescuing Babies From Abandonment," *The Christian Science Monitor*, January 24, 2000 at page 3.

[35] *State v. Grossberg* and *State v. Peterson* (*see supra* note 30), Sentencing Order, July 9, 1998. *See also* "Killing babies," *The Washington Post*, 11 July 1998 at A18 (editorial); Blaine Harden, "New Jersey 'Prom Mom' Accepts Plea Agreement; Woman Who Threw Newborn Into Trash at Dance Could be paroled in 3 years," 21 Aug. 1998 at A04.

[36] Brenda Barton, "When Murdering Hands Rock the Cradle: An Overview of America's Incoherent Treatment of Infanticidal Mothers," 51 SMU L.Rev. 591 (March / April 1998), at 606.

"Prosecutors all over the country will tell you that the easiest murder to get away with is the killing of an infant or small child by a parent or caretaker."[37]

Even publications not normally concerned with legal protection for the unborn have sounded the alarm. *The Washington Post*, upon reviewing infanticide cases (including serial killing by mothers) with lenient sentences, pronounced: "It is as though these babies are something less than real people and killing them is less than real murder."[38]

Such statements, along with the numerous reports of baby killing and abandonment cases, reinforce the public's accurate perception that legal protection for human beings during infancy should be stronger. The enactment of partial birth abortion bans throughout the country - that is, legislation that protects the human being as he or she emerges from the womb - is one legitimate response to the very real trend toward increased violence and abuse of both neonatal and partially born human life.

The specific practice of partial birth abortion, because of its recognized similarities to direct infant killing, has made this connection clear even to Americans normally supportive of legal abortion.

[37] Found in Charles A. Phipps, "Responding to Child Homicide: A Statutory Proposal," 89 Crim. L. & Criminology 535 (Winter 1999), footnote 5.

[38] Editorial, "Killer Mom," *The Washington Post*, 2 July 1999 at A26.

IV. NEBRASKA'S PARTIAL BIRTH ABORTION BAN, CORRECTLY CONSTRUED, IS NECESSARY TO PROTECT PARTIALLY BORN HUMAN LIFE AND IS REASONABLE AS A MEANS OF PROTECTING NEWLY BORN HUMAN LIFE.

A. Substantive due process means that a law cannot use arbitrary means to meet legitimate or compelling state ends.

Substantive due process means that a law cannot use arbitrary means to meet state ends. The connection between the means and the end depends upon the nature of the constitutional interest threatened by the law's operation.

This case poses an issue that is completely different from that presented in typical abortion cases, since Nebraska's law does not regulate abortion generally.[39] It bans only one uncommon abortion method. Banning one uncommon abortion method does not adversely affect any constitutional interest in choosing abortion, since common methods remain available.

Because no constitutional interest is threatened, this Court should scrutinize Nebraska's ban less strictly

[39] This was true of the statute at issue in *Roe v. Wade*, 410 U.S. 113 (1973)(Texas criminal statute governing abortion generally); as it was of the Missouri law in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (Mo. Rev. Stat.§§ 188.029 et al (1986)); and finally, of Pennsylvania's Abortion Control Act in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

than a standard abortion statute.[40] However, regardless of the standard of review, the interest advanced by Nebraska's partial birth abortion ban remains both legitimate and compelling (the protection of human life generally, and specifically the human child partially and newly born) and the means both rational and necessary.

B. Nebraska's ban, correctly interpreted, does not adversely affect any constitutional interest in choosing abortion.

1. *Nebraska's ban governs only partial birth abortion, not conventional dismemberment techniques.*

The scope of Nebraska's ban is a threshold matter before this Court. (As Assistant Attorney General, Steven Grasz, stated in Oral Argument before the Eight Circuit Court of Appeals: "Your Honors, if this Court believes that Nebraska's statute banning partial birth abortion also bans the D & E abortion procedure, then

[40] Traditional abortion jurisprudence offers a poor guide for evaluating a prohibition on one abortion method since most prior cases involved statutes seeking to regulate all abortions. *See* cases cited in footnote 39. This Court left intact (and parties never challenged) that provision of the Texas statute at issue in *Roe* which forbade abortions during delivery of the child ("during parturition"). See Tex. Civ. Stat. Ann. Art. 4512.5 (Vernon 1996); and *Roe*, 410 U.S. at 118, n.1. This has led others to argue that *Roe* and its progeny simply do not apply to abortions involving fetuses/infants as they emerge from the womb. *See* Brief of Amicus Curiae States of South Carolina, Idaho, Louisiana, Ohio, Pennsylvania, Rhode Island, South Dakota and Utah, filed in United States Court of Appeals for the Eighth Circuit, *Stenberg et. al v. Carhart*, at 4.

this is a simple case. The statute is unconstitutional."[41]) Traditional rules of statutory construction require that courts construe state laws so as to render them constitutional. *Postscript Enterprises, Inc. v. Whaley*, 658 F.2d 1249 at 1253 (8th Cir. 1981) ("A federal court is ... obliged to favor an interpretation which renders the statute constitutional."); and *Casbah, Inc. v. Thone*, 651 F.2d 551 (8th Cir. 1981) ("A federal court is obliged to ... presume a legislative intent to act within constitutional bounds.") Thus, where a court *can* interpret a law so that it is not vague or overbroad, it has a duty to do so.

Several courts have now shown that this can be done for partial birth abortion bans. *See Hope Clinic v.Ryan*, 195 F.3d 857 (7th Cir. 1999) (en banc); *Christensen v. Doyle*, WL 974098 (en banc); *Richmond Medical Center for Women, et. al. v. Gilmore*, 144 F.3d 326 (4th Cir. 1998) (allowing Virginia's partial birth abortion law to take effect) [hereafter *Richmond Medical Center]; Planned Parenthood of Wisconsin v. Doyle*, 975 F. Supp. 1177, No. 98-C-305 (W.D. Wis. 1998) (upholding Wisconsin's ban). *See also Summit Medical Associates v. James*, 984 F.Supp. 1404 (M.D. Ala. 1998) (partial upholding of Alabama partial birth abortion ban). These courts have declined to construe the statute beyond its plain meaning.

In the case at bar, the clear intent of the statute is to cover an abortion method where one "deliberately and intentionally" delivers "into the vagina a living unborn child, or a substantial portion thereof." Neb. Rev. Stat.

[41] Transcript of Oral Argument in the U.S. Court of Appeals for the Eighth Circuit, *Stenberg et al. v Carhart*, April 19, 1999.

Sec. 28-326, 328 (1998 Supp.). The construction of the sentence alone indicates that "substantial portion" is meant to approximate the entire "living unborn child," since the word "or" means the two terms are interchangeable. Thus, "substantial portion" cannot be a leg, or an arm, or any other *sole body part*, unless that part (or parts) was so substantial that it amounted to most of the child. As the Fourth Circuit Court of Appeals stated when construing a similar statute:

> "The statute prohibits only the delivery of the intact fetuses or substantial portions of intact fetuses. *It does not prohibit the extraction of dismembered body parts ...."*[42] *Richmond Medical Center* [emphasis added]

Finally, Courts should presume good faith on the part of elected officials enacting laws as well as the Attorneys General entrusted to enforce and defend them. Statements by Nebraska legislators as well as Nebraska's Attorney General are clear with respect to the scope of LB 23: It governs only the partial birth abortion method, not more conventional dismemberment techniques.[43]

[42] The wording of Virginia's ban is substantially like the wording of Nebraska's: "Partial birth abortion is an abortion in which the person performing the abortion deliberately and intentionally delivers a living fetus or substantial portion thereof into the vagina for the purpose of performing a procedure the person knows will kill the fetus, performs the procedure, kills the fetus and completes the delivery." Va. Code Section 18.2-74.2(D) (1998).

[43] *See supra* notes 4, 12-14, and accompanying text.

2. *Partial birth abortions are uncommon; therefore, partial birth abortion bans do not threaten a woman's constitutional interest in choosing abortion.*

The targeted method is uncommon and unusual. Challengers to the ban do not contest this.[44] As one seasoned abortion practitioner stated: "I've never seen or heard of anyone in my professional career (of over 25 years) performing such a procedure or needing to perform [it]."[45] Accordingly, a ban on the method will not affect abortion practice or the constitutional liberty of a woman to choose abortion.

CONCLUSION

In sum, Nebraska's partial birth abortion ban has the compelling state interest of protecting the partially or newly born human being. The law is a rational and necessary means to serve that interest. Americans perceive partial birth abortion to be a more direct threat to the newborn human infant than conventional abortion (in *utero*) since it approximates infanticide and further hardens sensitivities to human life.

Because the ban is limited in scope, it does not interfere with a woman's constitutional right to choose abortion. Therefore, this Court can easily uphold LB 23 as constitutional and Family Research Council respectfully requests that this Court do so.

[44] *See supra* note 6.

[45] Testimony of Dr. Harlan Giles, Transcript of bench trial *Richmond Medical Center v. Gilmore* at 338, ll. 23-25.

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