GRANTED

No. 99-830

IN THE

Supreme Court of the United States

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

Petitioners,

v.

LEROY H. CARHART, M.D.,

Respondent.

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

BRIEF *AMICUS CURIAE* OF THE KNIGHTS OF COLUMBUS IN SUPPORT OF PETITIONERS

PAT A. CIPOLLONE*
Supreme Advocate
CARL A. ANDERSON
Supreme Secretary
JOSEPH J. DESANCTIS
Counsel
KNIGHTS OF COLUMBUS
Attorneys for Amicus Curiae
One Columbus Plaza
New Haven, CT 06510
(203) 772-2130

* *Counsel of Record*

158150

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Authorities

INTEREST OF *AMICUS CURIAE*

The Knights of Columbus submits this brief *amicus curiae* in support of the petitioners.[1]

The Knights of Columbus is a charitable Catholic family fraternal organization of over 1.6 million members and their families, totaling approximately six million people. Founded in New Haven, Connecticut, in 1882 by Father Michael J. McGivney, the Knights of Columbus has grown into an international organization with nearly 12,000 local councils in all 50 states, the District of Columbia, Puerto Rico, Guam, the U.S. Virgin Islands, Canada, Mexico, the Philippines and other countries. The Knights of Columbus is the largest lay organization in the Catholic Church. The law before the Court in this case is from Nebraska, where there are currently nearly 20,000 Knights of Columbus families.

Since its founding, the Knights of Columbus has been dedicated to several purposes, including (1) rendering aid and assistance to its sick, needy and disabled members and their families; (2) promoting social and intellectual discourse among its members and their families; (3) promoting and conducting educational, charitable, religious, social welfare, war relief and public relief work; and (4) maintaining a life insurance program for the benefit of its members, their beneficiaries and their families. Last year alone, the Knights contributed more than $110 million to charitable causes and provided roughly 55 million hours of volunteer service.

1. Letters of consent to the filing of this brief have been filed with the Clerk of the Court. *See* Sup. Ct. R. 37. Counsel for *amicus curiae* Knights of Columbus wrote this entire brief. No person or entity other than *amicus* made any monetary contribution to the preparation of this brief.

The Knights of Columbus has a long history of advocacy in this Court in cases involving religious liberty, church-state relations, the family, education, parental rights, and other issues. For example, the Knights underwrote the litigation in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the landmark case in which this Court safeguarded the fundamental right of parents to direct the education of their children.

In addition, the Knights of Columbus has been a longstanding and consistent advocate of Life before this Court. We support the Right to Life of all human beings from the moment of conception until natural death. To this end, the Knights of Columbus has filed briefs in this Court in virtually every major case dealing with the issue of abortion, including *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Rust v. Sullivan*, 500 U.S. 173 (1991); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990); and *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). The Knights of Columbus remains committed to the ultimate reversal of *Roe v. Wade*.

Today, this Court is facing the issue of whether a state may outlaw the infanticide known as "partial-birth abortion." Our history, our respect for the Constitution, and our patriotism compel us once again to raise our voices in this Court in an effort to vindicate the rights of free people through the democratic process to protect the lives of children and to outlaw partial-birth abortion.

SUMMARY OF ARGUMENT

There is no constitutional right to kill a child during a live birth. During a partial-birth abortion, the abortionist delivers the baby alive into the birth canal, and then brutally kills the child. Partial-birth abortion, then, is not the "termination of pregnancy," but is the killing of a human child during an already-occurring live birth. The people of Nebraska have properly, and constitutionally, outlawed this barbaric practice.

Roe v. Wade, 410 U.S. 113 (1972), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), do not drive the result here because those cases did not establish and do not support the creation of a right to kill an infant during birth. Rather, *Roe* and *Casey* created the right to terminate "pregnancy," not "childbirth." *Casey* also vindicated the state's interest in protecting the lives of unborn children throughout pregnancy; in regulating pre-viability abortions so long as such laws do not create an "undue burden;" and in proscribing all post-viability abortions except when necessary to preserve the life or health of the mother. But neither *Roe* nor *Casey* can be read as creating a right to terminate a live birth, and therefore are not applicable to Nebraska's Partial-Birth Abortion Act.

The Court should not create a nontextual constitutional right to terminate childbirth by expanding the right created in *Roe* and *Casey* to give it effect during birth as well as pregnancy. By doing so, the Court would be establishing a new constitutional right that would have no defensible legal or logical boundaries. Indeed, this would be tantamount to creating a right to infanticide. The crime of infanticide should not be enshrined as a fundamental right. But the reasoning

employed in striking down Nebraska's partial-birth abortion law would immediately or ultimately do just that.

Because there is no right to terminate a live birth, this Court should reverse the Eighth Circuit's holding in *Carhart v. Stenberg*, 192 F.3d 142 (8th Cir. 1999), and give effect to Nebraska's law banning partial-birth abortion.

STATEMENT OF THE CASE

The Knights of Columbus adopts the Statement of the Case set forth in the brief of Petitioners, Don Stenberg, Attorney General of the State of Nebraska, et al. However, the basic facts concerning the partial-birth abortion procedure are undisputed. In fact, the grim business of partial-birth abortion is almost defiantly described in all of its frightening detail in the brief submitted on behalf of respondent Carhart: "In such a procedure, he draws the fetus out of the uterus up to the head and then compresses the fetal head either by crushing it or by removing the cranial contents using suction." (*See* Respondent's Brief in Opposition to the Writ of Certiorari at 4.) Respondent unabashedly admits that he "deliberately and intentionally deliver[s] into the vagina a living unborn child, or substantial portion thereof;" and does so " 'for the purpose of performing a procedure' he 'knows will kill the unborn child and does kill the unborn child.' " *Id.*

One experienced registered nurse describes the procedure, absent euphemisms, as follows:

> I stood at the doctor's side and watched him perform a partial-birth abortion on a woman who was six months pregnant. The baby's heartbeat was clearly visible on the ultrasound screen. The doctor delivered the baby's body and arms, everything but his little head. The baby's body was moving. His little fingers were clasping together. He was kicking his feet. The doctor took a pair of scissors and inserted them into the back of the baby's head, and the baby's arms jerked out in a flinch, a startle reaction, like a baby does when he thinks that he might fall. Then the doctor opened the scissors up. Then he stuck the high-powered suction tube into the hole and sucked the baby's brains out. Now the baby was completely limp. Next [the doctor] delivered the baby's head. He cut the umbilical cord and delivered the placenta. He threw the baby in a pan, along with the placenta and the instruments he had just used. I saw the baby move in the pan. . . . I never went back to the clinic. But I am still haunted by the face of that little boy. It was the most perfect, angelic face I have ever seen.[2]

Nebraska, along with numerous other states, has outlawed partial-birth abortion.

2. Statement of Brenda Pratt Shafer before the Subcommittee on the Constitution, Committee on the Judiciary, U.S. House of Representatives, March 21, 1996, concerning a partial-birth abortion she witnessed after being assigned to an abortion clinic by her nursing agency.

ARGUMENT

I. THERE IS NO CONSTITUTIONAL RIGHT TO KILL A CHILD DURING CHILDBIRTH.

There is no constitutional right to kill a child in the process of birth, whether or not that child has emerged fully from the birth canal. Because no right to terminate birth exists, Nebraska's clearly drafted statute proscribing a procedure that results in the killing of a child in the process of being born alive is fully consistent with the U.S. Constitution. As set forth below, neither *Roe* nor *Casey* can be said to include, or provide the basis for creating, a "right to terminate birth." Those cases concerned only the right to "terminate pregnancy."[3] Indeed, *Casey* limited and sought to define the boundaries of the right created in *Roe*, and cannot provide the basis for an unprecedented metamorphosis of that "right" into a license to kill children during childbirth.

3. *See, e.g., Roe v. Wade*, 410 U.S. 113, 153 ("This right to privacy . . . is broad enough to encompass a woman's decision whether or not to terminate pregnancy."); *Planned Parenthood v. Danforth*, 482 U.S. 52, 60 (1976) (*Roe v. Wade* established a constitutional right to "terminate pregnancy."); *Planned Parenthood v. Casey*, 505 U.S. 833 ("[I]t is a Constitutional liberty of the woman to have some freedom to terminate her pregnancy."; and "The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*."). Further, *Roe* and *Casey* both affirm that, after viability, "the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions." *Casey*, 505 U.S. at 835-36; *see also Roe v. Wade*, 410 U.S. 113, 163-64 ("State regulation protective of fetal life after viability thus has both logical and biological justifications. If the state is interested in protecting fetal life after viability, it may go so far as to proscribe abortions during that period, except when it is necessary to preserve the life or health of the mother.").

A. *Roe* and *Casey* Do Not Establish or Support a Right to Terminate a Live Birth.

Here, respondent seeks a constitutional right to terminate a live birth. But he can find no solace in *Roe* or *Casey*. Whatever those cases mean, nothing in them suggests that the Constitution contains a nontextual right to terminate birth once it has begun. Such a new "right" was never contemplated by *Roe* or *Casey* and, in fact, would directly contradict the language and reasoning in those cases. By their express terms, *Roe, Casey,* and every other abortion case decided by this Court concerned the "right to terminate *pregnancy*." "Pregnancy" is "the condition resulting from the fertilized ovum. The existing of the condition beginning at the moment of conception and terminating with the delivery of the child."[4] In stark contrast, "partial-birth abortion" involves inducing childbirth and then killing the living child during the birth process, in the birth canal. Logic establishes what medicine confirms: once birth begins, pregnancy is over.

That the *Roe* Court never contemplated extending a woman's "right to terminate pregnancy" out of the womb and into the birth canal is clearly evident in the opinion itself. The *Roe* majority noted that the Texas law criminalizing the killing of a child in the birth canal during the process of childbirth was not even being challenged in the case. Specifically, the Court recognized that Article 1195 of the Texas Penal Code provided and still provides that "Whosoever shall during parturition of the mother destroy the vitality or life in a child *in a state of being born and before actual birth*, which child would otherwise have been

4. *Black's Law Dictionary*, 1179 (6th ed. 1990).

born alive, shall be confined to the penitentiary for life or for not less than five years." *Roe*, 410 U.S. 113, 118, n.1 (emphasis added). Surely the *Roe* Court could not have let stand a law punishing with life imprisonment an act which the Court thought to be a fundamental right protected by the Constitution. Nor would the Court have noted the existence of the law without any adverse comment if it felt the law contravened the newly-born privacy right discovered in *Roe* itself.

B. *Casey* Limited, And Did Not Expand, the "Right To Terminate Pregnancy" Discovered in *Roe*, And Affirmed the State's Interest In Protecting Human Life.

In *Casey*, this Court, *if anything*, sought to place limits on — and not expand — *Roe*'s reasoning. In fact, *Casey* expressly overruled such post-*Roe* cases as *Thornburgh*[5] and *Akron I*[6] that read *Roe* too broadly, thereby unreasonably limiting a State's ability to protect unborn children through legitimate laws restricting abortion.[7] *Casey* further held that the state has a "profound interest" in protecting the lives of unborn children "throughout pregnancy." *Casey*, 505 U.S. at 878.[8]

5. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

6. *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983).

7. *See Casey* 505 U.S. at 870 ("[W]e must overrule those parts of *Thornburgh* and *Akron I* which, in our view, are inconsistent with *Roe*'s statement that the State has a legitimate interest in promoting the life or potential life of the unborn.").

8. *Casey*, 505 U.S. at 871 ("Yet 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 by the Court in its subsequent cases.").

Rather than expand *Roe*, *Casey* redefined its holding to ensure that the State's interest in protecting human life was respected. *Casey* rejected *Roe*'s rigid trimester system precisely because of this "basic flaw in the trimester framework: even in *Roe*'s terms, in practice it undervalues the State's interest in the potential life within the woman." *Casey*, 505 U.S. at 875. Ultimately, *Casey* held that, prior to viability, abortion may be regulated as long as state laws do not pose an "undue burden" to a woman seeking to terminate pregnancy.[9] After viability, the "undue burden" standard no longer applies, and a state may proscribe all abortion, except where it is necessary for the preservation of the life or health of the mother. *Casey*, 505 U.S. at 878. The Court stated in *Casey* that

> viability, as we noted in *Roe*, is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman.

Casey, 505 U.S. at 870.

Therefore, even the right "to terminate pregnancy" announced in *Roe* and redefined in *Casey* is not absolute, and is subject to significant restriction by the people acting

9. Further, the Court noted that "[t]he very notion that the state has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted. Not all burdens on the right to decide whether to terminate a pregnancy will be undue." *Casey*, 505 U.S. at 876.

through their legislatures to enact laws protecting the lives of unborn children.[10] *Roe* and *Casey*, then, directly contradict any attempt to create a new privacy right to "terminate childbirth" by reference to or reliance on the "right to terminate pregnancy" created in *Roe*.

C. Even Under a *Roe* and *Casey* Analysis, the Nebraska Act is Constitutional.

As stated, *Roe* and *Casey* do not apply here by their own terms. But the Nebraska Partial-Birth Abortion Act, properly read, is constitutional even under a *Roe-Casey* analysis. The law plainly does not contravene either the "undue burden" test, which applies only to pre-viable fetuses,[11] or *Casey*'s post-viability "health" exception.

> Central to this legal conclusion is the fact, accepted by the American Medical Association, that "[partial-birth abortion] is not the best or safest option in any articulable category of

10. *See, e.g.*, *Casey*, 505 U.S. at 887 ("Even the broadest reading of *Roe*, however, has not suggested that there is a constitutional right to abortion on demand."); *Roe*, 410 U.S. 113, 153 ("[A]ppellant and some amici argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree.").

11. Neither should any expansive reading of the "undue burden" test of Casey be accepted to strike down Nebraska's law. Under the "undue burden" test, states have significant room to regulate abortions, and "[t]he fact that a law which serves a valid purpose . . . has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." *Casey*, 505 U.S. at 874.

> situations." The AMA's Policy H-5.982 concludes, among other things, that "there does not appear to be any identified situation in which [partial-birth abortion] is the only appropriate procedure."

Hope Clinic v. Ryan, 195 F.3d 857, 872 (7th Cir. 1999). The AMA Board of Trustees also stated, with the endorsement of the entire AMA House of Delegates, that partial-birth abortion "is a procedure which is never the only appropriate procedure and has no history in peer reviewed medical literature or in accepted medical practice development." *Women's Medical Professional Corporation v. Voinovich*, 130 F.3d 187, 214 (1997) (Boggs, J., dissenting), citing 40 American Medical News, No. 25 (July 7, 1997).[12]

A contrary interpretation of the *Roe-Casey* "health" exception would swallow the rule. The problem, as everyone knows, arises over the meaning of the word "health." Can it mean that after viability a state can proscribe abortions except for those that an abortionist is willing to deem "medically necessary?" Some have argued that every abortion is "medically necessary," because the woman seeking it can claim to be harmed in some way, at least emotionally or psychologically, if she is denied.

Yet if "health" can mean anything, then *Casey* means nothing. "A constitutionally based health exception for every procedure, coupled with a prohibition against review of physicians' beliefs about which procedures are safest, would

12. *See also* American Medical Association letter to U.S. Senator Rick Santorum, May 19, 1997, supporting the federal Partial-Birth Abortion Ban Act of 1997 ("Thank you for the opportunity to work with you towards restricting a procedure we all agree is not good medicine.").

amount to a rule that anything goes." *Hope Clinic v. Ryan*, F.3d at 874. But this would mean that there is no right as vigorous as a nontextual one, expanding as needed and constituting only a "verbal shell game" used to "conceal raw judicial policy choices concerning what is 'appropriate' abortion legislation." *Casey*, 505 U.S. at 833 (Scalia, J., dissenting).

II. CREATION OF A NEW RIGHT TO TERMINATE CHILDBIRTH COULD NOT BE CONSTRAINED AND WOULD CONSTITUTIONALIZE INFANTICIDE.

This Court has repeatedly reaffirmed that states have an "unqualified interest in the preservation of human life." *See Washington v. Glucksberg*, 512 U.S. 702, 728 (1997). In *Glucksberg* the Court refused to recognize a privacy right to commit suicide with the help of a doctor, and also held that the "viability" of life has no bearing on the state's interest in protecting it. *Id.* at 728. The Constitution simply does not create an unenumerated right to terminate non-viable human life.

Proponents of a constitutional right to assisted suicide had argued that a state's interest in preserving life extends only to "those who can still contribute to society and enjoy life." *Id.* at 729. The Court rejected this disturbing reasoning, and vindicated the right of the citizens to enact a law that "insists that all persons' lives, from beginning to end, regardless of physical or mental condition, are under the full protection of the law." *Id.* at 729.[13]

13. *Glucksberg* also recognized two other valid state interests that are directly implicated here: (1) the "interest in protecting vulnerable groups;" and (2) the interest in preventing acts that "undermine the trust that is essential to the doctor-patient relationship by blurring the time-honored line between healing and harming." *Glucksberg*, 521 U.S. at 731.

Glucksberg also forcefully made the point that there could be no constitutional right to physician assisted suicide precisely because such a right could not be contained. The Court held that a constitutional purpose for outlawing physician assisted suicide was that "the State may fear that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia." *Glucksberg* at 732. States, therefore, have a legitimate interest in preventing the slippery slope into euthanasia by recognizing that physician assisted suicide can swiftly become physician assisted homicide. Put another way, one reason a new constitutional right to suicide could not be recognized was precisely because such a discovered, non-textual right would have no obvious, defensible limits. *Id.* at 733 ("Thus, it turns out that what is couched as a limited right to 'physician assisted suicide' is likely, in effect, a much broader license, which could prove extremely difficult to police and constrain.").[14] This holding applies here *a fortiori*.

If the Court concludes in this case, explicitly or implicitly, that the Constitution creates a right to kill a living child during birth, there will be no way to define or control that so-called right, because there is no way to distinguish that act from infanticide. In fact, the reasoning used to establish such a right would support legal infanticide even after birth. This certainly cannot be said to have been intended by *Roe* and *Casey*. But this is precisely what will result. *See Glucksberg*, 521 U.S. 702, 735, quoting, *United States v. 12 200-ft Reels of Super 8mm Film*, 413 U.S. 123, 127, 93 S. Ct. 2665, 2668 (1973) ("Each step, when taken,

14. "The case for the slippery slope is fairly made out here . . . because there is a plausible case that the right claimed would not be readily containable. . . ." *Glucksberg*, 521 U.S. at 785 (Souter, J., concurring).

appears a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance.").

While "[l]iberty must not be extinguished for want of a line that is clear," *Casey*, 505 U.S. at 869, neither must innocent human life. Here, the child has been removed from the womb alive, and it is literally only a few inches from being out of the birth canal entirely. How can it be said that the Constitution forbids the citizens of a state from enacting laws which prohibit the killing of this child? Today, the Court must draw the line, at the very least, at the beginning of childbirth. That is a province where *Roe* and *Casey* must not have any effect. There is simply no right to remove a child alive, or begin removing a child alive, and then kill her.

If the Court has any doubt that creating this new right would be tantamount to constitutionalizing infanticide, then it need only survey some of the most recent literature. For example:

- Princeton University Professor Peter Singer argues explicitly that birth is no barrier to killing infants. According to Dr. Singer, "[I]f the fetus does not have the same claim to life as a person, it appears that the newborn baby does not either, and the life of the newborn baby is of less value than the life of a pig, a dog, or a chimpanzee." Peter Singer, *Practical Ethics*, 122-23 (Cambridge University Press, 1979). Singer concludes that there should be some period *after* live birth for parents to decide whether to kill their infant children.

- Singer warns that "in thinking about [infanticide] we should put aside feelings based on the small, helpless and — sometimes — cute appearance of human infants. . . . Nor can the helplessness or innocence of the infant *homo sapiens* be a ground for preferring it to the equally helpless and innocent fetal *homo sapiens*, or, for that matter, to laboratory rats who are 'innocent' in exactly the same sense as the human infant." *Id.* at 123-24.

- Singer concludes: "[I]f we can put aside these emotionally moving but strictly irrelevant aspects of the killing of a baby we can see that grounds for not killing persons do not apply to newborn infants." *Id.* at 124.

And Singer is by no means alone:

- Nobel laureates James Watson and Francis Crick, the discoverers of the structure of DNA, have supported a general right to infanticide. Watson has stated that children should not be "declared alive until three days after birth" so that parents may choose to kill their newborn child. *See* David Cannon, *Abortion And Infanticide: Is There a Difference?, Policy Review,* 1985 Spring, 12 (listing numerous examples of advocates of a right to infanticide). For his part, Crick has argued that "no newborn infant should be declared human until it has passed tests regarding its genetic endowment and . . . if it fails these tests, it forfeits the right to life." *Id.*

Examples are plentiful, but the point is made: Many prominent doctors, lawyers, philosophers, and so-called "ethicists" are openly arguing for a right to kill children.

Those who argue for a right to infanticide take two basic approaches, both of which are founded on the concepts of "personhood" or "viability," which are discussed in *Roe* and *Casey*.[15] Proponents of infanticide claim that because the *Roe* Court held that the unborn child is not a legal "person" worthy of protection under the Fourteenth Amendment, and because a born child does not differ in any meaningful way

15. In *Roe*, the Court decided that unborn children are not "persons" worthy of protection under our laws. *Roe*, 410 U.S. 113, 158 ("[T]he word 'person,' as used in the Fourteenth Amendment, does not include the unborn."). And the Court recognized that the entire case hinged on this issue: "If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would be guaranteed specifically by the Amendment." *Id.* at 156-57. But the Court also held: "We need not resolve the difficult question of when life begins." *Id.* at 159. By this reasoning, the Court rested *Roe*'s foundation on a flawed distinction between human life and legal persons. The current debate over infanticide is, at least in part, the fruit of this distinction. The Court itself noted that unborn children had any number of legal rights, including in tort, property, criminal law, inheritance and other areas. They still do. So, it seems, one can be a plaintiff without being a person. Some legal scholars have noted ironically that one member of the *Roe* Court, shortly before *Roe*, wrote: "The ordinary corporation is a 'person' for purposes of the adjudicatory processes. . . . So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries . . . swampland, or even air. . . ." *Sierra Club v. Morton,* 405 U.S. 727, 742-43, 749 (1972) (Douglas J., dissenting), as quoted in William J. Mitchell, *A Modest Proposal*, 39 Catholic Lawyer, Nos. 2-3, 233, n.18. Justice Douglas soon after voted to reject "the unborn child's rights as an entity or person." *Id.*, citing *Doe v. Bolton,* 410 U.S. 179, 203 (1973) (Douglas J., concurring).

from an unborn child except for its physical location, born children are not legal "persons" either. Nearly all of these commentators admit that the fetus is a "human being," but argue that a child's status as a human being is not enough to vest that child, born or unborn, with the right to life. That is only available to "persons," narrowly and subjectively defined.

Professor Singer puts it this way:

> The pro-life groups were right about one thing: the location of the body inside or outside the womb cannot make such a moral difference. We cannot coherently hold that it is all right to kill a fetus a week before birth, but as soon as the baby is born everything must be done to keep it alive. The solution, however, is not to accept the pro-life view that the fetus is a human being with the same moral status as yours or mine. The solution is the very opposite: to abandon the idea that all human life is of equal worth.[16]

By and large, then, proponents of the right to kill both born and unborn children do not deny the humanity of these children,[17] but cleave a distinction between "human beings" and "persons."

16. David Cannon, *Abortion and Infanticide, Is There A Difference?*, Policy Review, 1985 Spring, quoting Peter Singer. It should be noted with interest that, although Professor Singer believes certain children can and should be killed, he has demonstrated against the mistreatment of chickens. *See* Span, "A Professor's Lively Ideas on Euthanasia," *The Washington Post*, Dec. 9, 1999, C1.

17. Feminist author Naomi Wolf discussed her response to a question concerning her own unborn child as follows: "Had I not been so nauseated and cranky . . . I might not have told what is the truth for me: 'Of course it's a baby.' " *See* Naomi Wolf, "Our Bodies, Our Souls: Rethinking Pro-Choice Rhetoric," *The New Republic*, October 16, 1995.

Under this bizarre logic, only a "person" has a right to life, but human beings who have not achieved this exalted and subjectively defined status may be killed.

The unborn child and now, the born infant, are by this reasoning relegated to the unprecedented status of human beings without basic human rights, the most basic of which is, of course, the right to life. Under this argument, human life has no intrinsic value, and we have no objective reason to protect it. If the parents want the child, then she is a "person" and they implicitly grant her "personhood," one presumes, by failing to kill her. If the parents decide they do not want the child, then they may determine subjectively that she is not a "person," has no rights and, although human, may be killed.

This philosophy was chillingly described in the July 5, 1993 edition of American Medical News by the late Dr. James McMahon, who performed thousands of partial-birth abortions: "After 20 weeks, where it frankly is a child to me, I really agonize over it because the potential is so imminently there. I think, gee, it's too bad that this child couldn't be adopted. On the other hand, I have another position, which I think is superior in the hierarchy of questions, and that is: "Who owns this child? It's got to be the mother." James Bopp, Jr. and Curtis R. Cook, M.D., *Partial Birth Abortion: The Final Frontier of Abortion Jurisprudence*, 14 Issues L. & Med. 3. This subjective determination of the "personhood" of human beings serves as a primary basis to argue for a right to infanticide.

These beliefs — which would have given Herod pause — are now being encouraged in the academy. If the Court holds that the Constitution grants the right to kill children during birth, outside the uterus, then on what basis will

infanticide be opposed? Ironically, Judge Posner's dissent in *Hope Clinic v. Ryan*, 195 F.3d 857 (1999), provides some support for this point. Said Judge Posner: "From the standpoint of the fetus, and, I should think, of any rational person, it makes no difference whether, when the skull is crushed, the fetus is entirely within the uterus or its feet are outside the uterus. . . . [T]here is no meaningful difference between the forbidden and the privileged practice." *Id.* at 879. He concludes simply that "[c]ircumstances conspired, as it were, to produce a set of laws that can fairly be described as irrational." *Id.* at 880.

But this proves too much. If the location of the child cannot logically affect its status or its rights, if the child may be killed either in the womb during pregnancy or in the birth canal during birth, then what prevents the same child from being killed once it is outside the birth canal? Judge Posner declares, *ipse dixit*: "Line drawing is inescapable but the line between feticide and infanticide is birth. Once the baby emerges from the mother's body, no possible concern for the mother's life or health justifies killing the baby." *Id.* at 882. But why? Such a conclusion does not follow from Judge Posner's reasoning. If location of the child during this procedure is irrelevant, and making any distinction based on physical location is "irrational," then why does birth necessarily cut off any supposed parental rights to kill the very same child?

What, for that matter, is meant by the term "birth" in this analysis? When does the child officially qualify as worthy of protection from being killed? When the head emerges from the birth canal? When the torso emerges? When the entire body emerges? When the umbilical cord is cut? Can the child be killed if any part of her body, however small, is still remaining in the birth canal? For that matter, is birth a reversible condition? Can a child who slips from the birth canal be put back in and

killed? Or can a doctor actively prevent "birth," however defined, and hold the child in the birth canal long enough to kill her?

These questions are not academic. They must be considered and answered in this case. And the answers are critical. The most important question is this: If unborn children are not distinguishable from born infants based on their intrinsic characteristics, and if distinctions based on physical location are irrational, then why isn't *greater* and not *less* legal protection for unborn children warranted, or at least for children in the process of being born alive? More to the point, why would the Constitution prevent the people from deciding this issue for themselves?

This Court held in *Casey* that "[c]onsistent with other constitutional norms, legislatures may draw lines which appear arbitrary without the necessity of offering a justification. But courts may not. We must justify the lines we draw." *Casey*, 505 U.S. at 870. The Court should not recognize a constitutional right to kill a child during birth, because such a right cannot be logically distinguished from constitutionalized infanticide. The right created in *Roe* to "terminate pregnancy" must by its very terms end when birth begins. Extending this "right" into the birth process would effectively create a new nontextual right to terminate childbirth. Just as *Roe* and *Casey* would not be confined to pregnancy, neither could such a new right be limited to the birth process. The reasoning used to label as arbitrary any line confining *Roe* to the womb would be precisely the same logic used to argue that confining *Carhart* only to the birth canal is likewise arbitrary. The Court should draw a line in this case confining *Roe* and *Casey* to their established limits, protecting against infanticide, and preserving the rights of citizens to enact laws banning partial-birth abortion.

The Court must establish in this case that the monstrous arguments now being raised in favor of the killing of infants will never have legal effect. These arguments offend our Constitution, and the Court should clearly reject them. The Constitution must not be turned into a death warrant for millions of helpless, innocent children.

While some refer to the victims of partial-birth abortion in this country as the "products of conception," we know they are Americans. Can it be that under our laws a matter of inches separates a fundamental constitutional right from a capital crime? Of course not.

CONCLUSION

There is no constitutional right to terminate live childbirth. The Court should reverse the Eighth Circuit's decision in this case. Nebraska's Partial-Birth Abortion Act is constitutional.

Respectfully submitted,

PAT A. CIPOLLONE*
Supreme Advocate
CARL A. ANDERSON
Supreme Secretary
JOSEPH J. DESANCTIS
Counsel
KNIGHTS OF COLUMBUS
Attorneys for Amicus Curiae
One Columbus Plaza
New Haven, CT 06510
(203) 772-2130

* *Counsel of Record*