No. 99-830

**IN THE SUPREME COURT OF THE UNITED STATES**

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

v.

LEROY CARHART,
*Respondent.*

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# BRIEF OF THE NARAL FOUNDATION, THE FEMINIST MAJORITY FOUNDATION, THE NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, THE NATIONAL WOMEN'S LAW CENTER AND PEOPLE FOR THE AMERICAN WAY FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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Filed March 29, 2000

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## INTEREST OF AMICI CURIAE

The NARAL Foundation, the Feminist Majority Foundation, the National Partnership for Women & Families, the National Women's Law Center, and People for the American Way Foundation are organizations committed to protecting the right of every woman to make personal decisions regarding the full range of reproductive services, including preventing unintended pregnancy, bearing healthy children, and choosing legal abortion.[1] All of the *amici* have a strong interest in the Court's decision in this case, which will have a profound effect on the right of a woman to choose, in consultation with her doctor, to terminate a pregnancy before viability in the safest manner possible. *Amici* submit this brief to help inform the Court about the obligations of state legislatures to respect a woman's right to choose an abortion unobstructed by legislation crafted for improper purposes.

Descriptions of each of the *amici* are provided in the Appendix hereto.

## SUMMARY OF ARGUMENT

The Nebraska statute at issue in this case, Neb. Rev. Stat. § 28-328(1)-(4) (1999) ("the Nebraska Statute"), was enacted with the purpose of obstructing substantially a woman's right to choose an appropriate procedure for terminating a nonviable fetus. A statute with such a purpose,

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[1] This brief was not authored, in whole or in part, by any counsel for a party. No person or entity, other than the *amici curiae*, their members, or counsel contributed monetarily to the preparation or submission of this brief. The parties consented to the filing of this brief, and copies of their letters of consent have been lodged with the Clerk of the Court.

even independent of the statute's effect, is invalid under the constitutional principles set forth in *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992). Such a statute is invalid because "the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it." *Id.*

The improper purpose of the Nebraska Statute is evident from both the language of the Statute and its legislative history, as well as the social and historical context within which it and other so-called "partial-birth" abortion legislation has emerged. Each of these types of evidence is relevant to the Court's examination of a statute's true purpose. *See Edwards v. Aguillard*, 482 U.S. 578 (1987); *Epperson v. Arkansas*, 393 U.S. 97 (1968). A plethora of such evidence demonstrates that the true purpose of the Nebraska Statute was to create an undue burden on a woman's choice to undergo a pre-viability abortion.

Contrary to Petitioners' assertions, the Nebraska Statute was not narrowly designed to prohibit a single type of abortion procedure, but rather was formulated to create a broad barrier to a woman exercising her constitutional rights. According to Petitioners, the Nebraska Statute "regulate[s] the D&X procedure and no other." Brief of Petitioners ("Pet. Br.") at 7. Both the Statute's language and its legislative history, however, belie this assertion. Had the Nebraska legislature sought to regulate only the intact dilation and extraction ("D&X") procedure, it plainly could have written such a limitation into the legislation. It did not do so. Instead, the legislature specifically rejected amendments offered for this purpose and adopted other amendments that failed either to clarify or properly circumscribe the legislation's scope.

First, the Nebraska legislature rejected an amendment to replace the term "partial-birth" abortion with the medically accurate term, "intact dilation and extraction."



(J.A. 404.) During debate on this amendment, Senator Maurstad, the bill's sponsor, admitted that replacing "partial-birth" abortion with "intact dilation and extraction" would "change what the bill is designed to do." (J.A. 381.) Second, the legislature adopted an amendment to define "partially vaginally deliver" as "deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure the person performing such procedure knows will kill the unborn child and does kill the unborn child." (J.A. 424.) This language, quite contrary to Petitioners' contentions, reflects a conscious design of the Nebraska legislature to create a sphere of ambiguity with respect to the procedures to be prohibited. Indeed, several co-sponsors of the bill expressly admitted that the language is vague. Co-sponsor Senator Brashear said, "[t]here's no question there will be a fact question as to what is a substantial portion." (J.A. 444.) Likewise, co-sponsor Senator Hilgert acknowledged: "I think that everyone has an idea in their mind, that it's hard to quantify [what a 'substantial portion' is]. That's why I said it's probably a litigable issue." (J.A. 475.)

These and other comments of the sponsors of the legislation manifestly reveal that the purpose of the Nebraska Statute is to prohibit a variety of procedures as a barrier to pre-viability abortions.

The enactment of the Nebraska Statute was part of a nationwide campaign by organizations opposed to legal abortion. This campaign, led by the National Right to Life Committee ("NRLC"), is further evidence that the proponents of the Nebraska Statute, including its sponsors prior to its enactment, sought to imbue the Statute with ambiguity so that it would serve as an effective weapon against a variety of abortion procedures.

It is undisputed that one of the primary purposes of the NRLC is to end abortion – all abortion, whether pre- or post-viability. The NRLC has drafted, promoted, and vigorously lobbied for the passage of "partial-birth" abortion legislation. It has instructed legislatures in State after State on how to resist limiting or clarifying the scope of so-called "partial-birth" abortion legislation. Notably, all the States that enacted such legislation in 1996, 1997, or 1998 adopted language substantially similar to the model legislation espoused by the NRLC. Moreover, at least nine State legislatures, in addition to Nebraska's, specifically rejected attempts to narrow the definition of "partial-birth" abortion to one specific abortion procedure.

Courts that have examined so-called "partial-birth" abortion statutes have recognized that a legislature's failure to clarify the definition of "partial-birth" abortion indicates the legislature's intent to prohibit more than one procedure. For instance, the Superior Court for the Third District of Alaska concluded with respect to Alaska's "partial-birth" abortion Act:

> [T]he vagueness of the Act was brought to the attention of the legislature by a clearly worded and easily understood attorney general's opinion. Amendments were offered to correct the problem but were rejected. Having passed the Act with knowledge of the legal defects, it seems more likely than not that the unstated purpose of the Act was to cloud the scope of abortion procedures, i.e., to restrict abortion in general.

*Planned Parenthood v. Alaska*, No. 3AN-97-6019, 11 (Super. Ct., 3d Dist. Alaska, Mar. 13, 1998) (footnotes omitted), *appeal docketed*, No. S-08610 (Alaska Apr. 16, 1998).



The Nebraska Statute is at least as vague as the Alaska "partial-birth" statute. That vagueness does not reflect inadvertence on the part of the Nebraska legislature. The Statute is ambiguous specifically because its proponents sought to ban a wide and unspecified variety of abortion procedures and thereby obstruct substantially a woman's ability to choose the most appropriate method in her case.

Further evidence of the improper purpose of the Nebraska Statute is the fact that it and its legislative history reflect no adequate consideration for a woman's health. Under the Court's well-established jurisprudence, a State may not impose any abortion regulation that could jeopardize the life or health of a pregnant woman. *Casey*, 505 U.S. at 880 (citing *Roe v. Wade*, 410 U.S. 113, 164). Consistent with this jurisprudence and the fundamental principles underlying it, a State may not force a pregnant woman or her physician to subordinate the health of the woman to the well-being of the fetus. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 768-69 (1986), *overruled in part on other grounds by Casey*, 505 U.S. 833, 870, 872-73, 882 (1992). Even after viability, when the State has the strongest interest in preserving fetal life, the State may not require a woman to sacrifice her health for the sake of the fetus. *Id.* at 879-80.

The Nebraska Statute contains no provision to protect any aspect of a woman's health. This omission was not by accident or oversight. The legislature was aware of how the Statute, even if it could be interpreted to ban only D&X, would harm women's health. The legislature heard testimony confirming such harm, yet nevertheless deliberately rejected amendments that were offered to protect women's health. For instance, it rejected an amendment that would have permitted a physician to perform an otherwise prohibited abortion procedure if other available procedures posed an equal or greater risk to the woman. (J.A. 372.) It also rejected an amendment to add an exception to preserve

the woman's fertility or her physical ability to carry future pregnancies to term. Further, it did not accept another amendment providing an exception for cases where the woman is at "serious risk of substantial impairment of a major bodily function." (JA 380, 405, 415.)

The right to choose to have an abortion includes the right to choose the safest procedure available for each individual woman. Whenever more than one abortion technique is available, a woman is entitled to have access to the safest method. *See Planned Parenthood v. Danforth*, 428 U.S. 52, 78-79 (1976). By rejecting even the very limited health exceptions proposed, the Nebraska legislature flagrantly ignored this right and the attendant requirement not to obstruct a woman's path to an appropriate abortion procedure.

The Nebraska legislature's intentional creation of a vague and overbroad abortion prohibition, together with its failure to include any exception from that prohibition to protect women's health, reveals the legislature's underlying purpose to limit a woman's choices to three unacceptable options: to undergo a riskier but legal procedure, to violate the law in order to obtain the safest procedure, or to refrain altogether from exercising the right to choose an abortion. Stated simply, the Nebraska legislature's purpose was to burden unduly a woman's right to elect an abortion. Because that purpose is plainly inconsistent with fundamental constitutional principles and the established jurisprudence of this Court, the Nebraska Statute, even independent of its unconstitutional effect, is invalid under *Casey*.



## ARGUMENT

### I. UNDER THIS COURT'S JURISPRUDENCE, DETERMINING THE CONSTITUTIONALITY OF A STATUTE REGULATING ABORTION PROPERLY INVOLVES CONSIDERATION OF THE STATUTE'S PURPOSES.

#### A. A Statute Is Invalid if Its Purpose Is to Obstruct a Woman's Right to Obtain an Abortion Prior to Viability.

This Court has held that a law restricting abortion is invalid if *either* its purpose *or* its effect is to place a "substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992). The Constitution forbids a State from enforcing an abortion restriction enacted with an improper purpose "because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it." *Id.*

Since deciding *Casey*, the Court has addressed the "improper purpose" prong of *Casey's* dictate in only one case: *Mazurek v. Armstrong*, 520 U.S. 968 (1997) (per curiam).[2] In *Mazurek*, the Court found that certain evidence alleged to establish the existence of an improper purpose for an abortion statute, including particular medical data and the fact that an antiabortion group drafted the legislation, did not

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[2] The lower courts have applied the "improper purpose" prong of *Casey* in a variety of cases. *See, e.g., Jane L. v. Bangerter*, 102 F.3d 1112 (10th Cir. 1996) (finding a statute regulating abortions after the gestational period of twenty weeks to be unconstitutional because it was enacted for the improper purpose of obstructing women's choice to abort a nonviable fetus after that period), *cert. denied*, 520 U.S. 1274 (1997).

suffice to support the imposition of a preliminary injunction on the statute's enforcement. *Id.* at 973-74. The Court stated: "One searches the Court of Appeals' opinion in vain for any mention of any evidence suggesting an unlawful motive on the part of the Montana legislature." *Id.* at 972.[3]

There is no similar lack of evidence in this case. As discussed in detail *infra*, a plethora of evidence reveals that the Nebraska legislature intended the statute at issue here, Neb. Rev. Stat. § 28-328(1)-(4) ("the Nebraska Statute"), to place a substantial obstacle in the path of a woman seeking an abortion prior to fetal viability. That body of evidence is more than sufficient to support the judgment below that the Nebraska Statute imposes an undue burden on a woman's right to an abortion and therefore is invalid under *Casey*.

### B. A Full Review of a Statute's Legislative History Is Required to Determine Whether an Unconstitutional Motive Led to the Statute's Enactment.

When examining the purpose of a statute, the Court looks to the statute's language, its legislative history, the social and historical context of the statute and other legislation concerning the same subject matter. The inquiry

[3] Following *Mazurek*, in *Okpalobi v. Foster*, 190 F.3d 337 (5th Cir. 1999*), reh'g en banc granted,* 201 F.3d 353 (2000), the Fifth Circuit struck down a Louisiana law creating tort liability for abortion providers as unconstitutionally placing an undue burden on a woman's right to an abortion. In *Okpalobi*, the court considered several factors in determining that the statute was enacted for an improper purpose, including: (1) the language of the challenged act; (2) the act's legislative history; (3) the social and historical context of the legislation; and (4) other legislation concerning the same subject matter as the challenged act. 190 F.3d at 354, *citing Shaw v. Hunt*, 517 U.S. 899 (1996).



must be exacting to ensure that a facially inoffensive statute enacted for an improper purpose does not escape constitutional scrutiny. As the Court emphasized in *Edwards v. Aguillard*, 482 U.S. 578 (1987): "While the Court is normally deferential to a State's articulation of a [purportedly legitimate] purpose, it is required that the statement of such purpose be sincere and not a sham." *Id.* at 586.

In evaluating the legislature's purpose in *Edwards*, which involved a Louisiana statute requiring that "creation-science" be taught in public schools if evolution was taught, the Court reviewed the full record of the statute's legislative history, including the statements of the statute's principal sponsor, to ascertain the sincerity of the legislature's stated goals. The Court observed:

> It is clear from the legislative history that the purpose of the legislative sponsor, Senator Bill Keith, was to narrow the science curriculum. During the legislative hearings, Senator Keith stated: "My preference would be that neither [creationism nor evolution] be taught."

*Id.* Despite the legislature's stated purpose of providing academic freedom, the Court recognized that it "need not be blind in this case to the legislature's preeminent religious purpose in enacting this statute." *Id.* at 590; *see also Stone v. Graham*, 449 U.S. 39 (1980) (finding that an avowed secular purpose does not demonstrate a statute's constitutionality where the preeminent purpose of the statute was plainly religious).

In addition to legislative history, the social and historical context of a statute is also an important factor that the Court may consider in determining whether the statute was enacted for an improper purpose. In both *Edwards* and

*Epperson v. Arkansas*, 393 U.S. 97 (1968), the Court noted that the challenged statutes were "'a product of the upsurge of "fundamentalist" religious fervor' that has long viewed this particular scientific theory as contradicting the literal interpretation of the Bible." *Edwards,* 482 U.S. at 590 (quoting *Epperson*, 393 U.S. at 98). In *Epperson*, after reviewing the history of the anti-evolution statutes, the Court concluded that there was no doubt that the Arkansas legislature had a religious motive in enacting that State's anti-evolution statute, as did the legislatures of other States with similar statutes. *Epperson*, 393 U.S. at 109.

Likewise, in numerous other contexts in which statutes have been challenged as unconstitutional, the Court has examined the legislative history, the historical background, and the specific events leading to the statute's enactment, including the statements of both the legislators involved and others who encouraged the enactments. *See, e.g., Church of the Lukumi Babablu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (holding that evidence relevant to discerning an unlawful discriminatory purpose includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body); *see also Hunt v. Cromartie*, 526 U.S. 541, 599-50 (1999) (in determining that there were triable issues regarding whether the State legislature's congressional redistricting plan was racially motivated, the Court considered, *inter alia*, expert affidavit testimony alleging that the State ignored traditional districting criteria and statistical and demographic evidence regarding the precincts included within the district and those excluded); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) (condemning a tax statute "because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated



device in the guise of a tax to limit the circulation of information.").

In this case, not only the text of the Nebraska Statute and its legislative history, but also the social and historical context from which it emerged, all demonstrate that it was enacted for the improper purpose of obstructing a woman's choice to terminate a pregnancy prior to fetal viability. The existence of this purpose alone, even disregarding the fact that the Statute also has the *effect* of obstructing such a choice, renders the Statute invalid under the established abortion jurisprudence of this Court.

## II. THE HISTORY AND SURROUNDING CONTEXT OF THE NEBRASKA STATUTE REVEAL THAT IT WAS ENACTED FOR THE IMPROPER PURPOSE OF OBSTRUCTING A WOMAN'S RIGHT TO SAFE ABORTION PROCEDURES.

### A. The Legislative History of the Nebraska Statute Demonstrates That the Statute Was Enacted to Create a Substantial Obstacle to Women Seeking Abortion Not Merely by Banning One Medically Safe Procedure.

Petitioners vigorously assert that the Nebraska Statute "regulate[s] the D&X procedure and no other." Brief of Petitioners ("Pet. Br.") at 7. This assertion cannot be reconciled with either the Statute's language or its legislative history. In Nebraska, as in other States across the country, the legislature specifically rejected attempts to limit the legislation to a single procedure. Had the Nebraska legislature sought to regulate only the intact dilation and extraction ("D&X") procedure, it plainly could have written

such a limitation into the legislation.[4] By deliberately eschewing this option, the legislature demonstrated a broader intent to ban a variety of abortion procedures and thereby reinforce exponentially the intended barrier to a woman's ability to exercise her right to choose a safe abortion.

### 1. The Nebraska Legislature Explicitly Rejected Replacing the Rhetorical Term "Partial-Birth" Abortion with the Medical Term "Intact Dilation and Extraction."

On May 14, 1997, the Nebraska legislature rejected an amendment to replace the term "partial-birth" abortion with the medically accurate term, "intact dilation and extraction."[5] (J.A. 404.) During debate on this amendment,

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[4] Even if the legislature had, in fact, banned the D&X procedure alone, the resulting law would not have been constitutional: banning a medically safe abortion procedure does not comport with constitutional dictates. *See Planned Parenthood v. Danforth*, 428 U.S. 52, 78-79 (1975).

[5] Throughout their brief, Petitioners attempt to portray the vague language of the Nebraska Statute as clear by using the term "partial-birth abortion/D&X." "D&X," however, was not used in the Statute and was specifically rejected by the Nebraska legislature. Petitioners also assert that the "partial-birth" abortion technique is "now medically known as D&X," implying that at the time the legislature rejected the term "D&X" and passed the statute without reference to D&X, the term was unknown. The record proves the contrary: Senator Maurstad, the principal sponsor of the Nebraska Legislation, had read and even quoted portions of a well-known 1992 medical presentation on D&X. *See* Martin Haskell, "Dilation and Extraction for Late Second Trimester Abortion" *in Second Trimester Abortion: From Every Angle, Fall Risk Management Seminar* (National Abortion Federation, Sept. 13-14, 1992) (cited in 142 Cong. Rec.

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Senator Maurstad, the bill's sponsor, admitted that replacing "partial-birth" abortion with "intact dilation and extraction" would "change what the bill is designed to do." (J.A. 381.) At one point, Senator Maurstad described "partial-birth abortion" as a procedure in which "a child is partially delivered. Every part of the child is outside the womb of the mother except for its head." (J.A. 366.) Yet he refused to add language to the bill to reflect this description, explaining that "partially delivered" could mean that as little as "a foot" is past the woman's cervix. (J.A. 367.) While averring that his previous description of the procedure was "an accurate example of the definition provided in the bill," he conceded that was "*not the only example*." (J.A. 383.) (Emphasis added.)

Had the Nebraska legislature sought to ban the D&X procedure alone, it would not have rejected the language offered for this stated purpose, and certainly not on the ground that the proposed language would conflict with the bill's design. By rejecting the proffered language, the legislature made clear that its intent was not narrowly focused, but rather was to obstruct broadly and substantially women's access to safe abortion procedures.

### 2. The Legislature Knew That the Legislation Was Vague and Would Ban Abortion Procedures Other Than D&X.

On May 20, 1997, the Nebraska legislature adopted an amendment to define "partially vaginally deliver" as "deliberately and intentionally delivering into the vagina a

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H2913-H2914 (daily ed. Mar. 27, 1996)); *see also* J.A. 713-14 (memorandum from Senator Maurstad to co-sponsors of LB 23 (Apr. 1997), quoting Haskell).

living unborn child, or a substantial portion thereof, for the purpose of performing a procedure the person performing such procedure knows will kill the unborn child and does kill the unborn child."[6] (J.A. 424.) Petitioners argue that this language was adopted to clarify the scope of the legislation and to exclude from its prohibition the dilation and evacuation ("D&E") procedure, one of the most common second trimester abortion procedures. Pet. Br. at 22. This contention, however, is at odds with the record, which indicates that the legislature knew that the legislation was vague and would ban a variety of abortion procedures.

For example, when asked whether the definition could include a procedure in which the fetus was not in a breech position, Senator Maurstad admitted that the language could include D&E. "That certainly could be the case and it could, at that point, delivery stopped [sic] and either the child dismembered or the child be killed in the manner that I spoke of earlier." (J.A. 443.) In addition, when asked to define "substantial portion," Senator Maurstad answered that it meant "a great deal of," "a lot of," or "more than a little bit has been delivered into the vagina." (J.A. 429, 430, 442.) When asked whether two people might interpret the phrase differently, he conceded: "Yes, substantial would be subjective." (J.A. 431.)

Several co-sponsors of the bill also agreed that the definition of the procedure was vague. Co-sponsor Senator Brashear said: "There's no question there will be a fact question as to what is a substantial portion." (J.A. 444.) Echoing this sentiment, co-sponsor Senator Hilgert acknowledged: "I think that everyone has an idea in their mind, that it's hard to quantify [what a 'substantial portion' is]. That's why I said it's probably a litigable issue." (J.A. 475.) Senator Hilgert also said that the descriptions and illustrations of the procedure offered during committee hearings were not exclusive of what would be covered by the legislation. "This bill does encompass more than [the] specific examples that people related and the illustrations presented [at the hearings]." (J.A. 478, 479.) When asked whether a physician reading the phrase "substantial portion" would know what is prohibited, co-sponsor Senator Bromm answered, "I think it would be difficult . . . I think their inclination would be simply not to take the risk." (J.A. 456.)

The comments of these legislators – the principal sponsor and the co-sponsors of the legislation – reveal that the purpose of the Nebraska Statute is not to ban one abortion procedure, as Petitioners now assert, but rather to prohibit a variety of procedures, chill medical practice, and threaten physicians with lengthy prison terms and litigation over interpretive questions.

### B. Legislative History from Other States Corroborates That the Purpose of the Legislation Was to Prohibit a Variety of Abortion Procedures.

Nebraska's decision to enact a ban on so-called "partial-birth" abortion was part of a nationwide campaign by organizations opposed to legal abortion.[7] The ban was

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[6] This definition tracks an amendment that the U.S. Senate had adopted the same day. 143 Cong. Rec. S4694 (1997).

[7] One anti-abortion strategist advised activists that "[I]t would be imprudent to confront the Court with a general prohibition on abortion. A wiser strategy is to match the natural rhythms of the reversal process by confronting the Court with a series of specific, carefully considered issues calculated to open life-sapping wounds in the *Roe* doctrine." Victor G. Rosenblum & Thomas J. Marzen, "Strategies for Reversing Roe v. Wade through the Courts," *in Abortion and the Constitution: Reversing Roe v. Wade through the Courts*, 193, 199 (Dennis J. Horan, et al eds., 1987).

contrived following a 1992 National Abortion Federation Risk Management Seminar where a well-respected physician and abortion provider, Dr. Martin Haskell, gave a presentation on the D&X technique he had developed. Anti-choice activists obtained his monograph and the National Right to Life Committee ("NRLC") first used it to galvanize opposition to the then-pending federal Freedom of Choice Act.[8]

In 1996, the NRLC sent a memorandum to State advocates with model language for so-called "partial-birth" abortion bills.[9] The memorandum indicates that the definition of "partial-birth" abortion is "crucial" and "should be retained in any legislation dealing with partial birth abortion that is introduced in any state legislature." Under the heading "Dangers of Changing the Definition of Partial-Birth Abortion," this NRLC memorandum strongly warns against any changes in the name of the banned procedure or in the definition of that procedure. It advises:

[8] Diane M. Gianelli, *Shock-Tactic Ads Target Late-Term Abortion Procedure*, Am. Med. News, July 5, 1993, at 3.

[9] Memorandum from Douglas Johnson, NRLC Federal Legis. Dir., and Mary Spaulding Balch, NRLC State Legis. Dir., to NRLC State Affiliates and Other Interested Parties (Nov. 22, 1996). This memorandum also went to state legislators to use to draft the legislation. *See* Letter from David S. Niss, Staff Attorney, Montana Legis. Servs. Div. to Montana State Rep. Dan McGee (Dec. 18, 1996) ("Because the material I was provided from the National Right to Life Committee, Inc. on this subject purported to apply the definition of a "partial-birth" abortion to an abortion at any stage of development of the fetus without regard to its viability, I have drafted the legislation in the same manner, assuming it was your intent to prohibit partial-birth abortion at any stage of a pregnancy . . . . Because the enclosed legislation is not likewise . . . limited, it's my belief that the bill, as drafted, is unconstitutional.").



> When someone attacks the definition as "unclear" or as overly sweeping, simply keep reading the definition and asking, "What part of this is not clear? Please describe in detail the procedures that you want to do that you believe would be banned by this definition." Generally, the pro-abortion side quickly drops this discussion, as it serves mainly to focus the discussion on the grisly mechanics of late-term abortions.

Plainly, the primary proponents of so-called "partial-birth" abortion legislation knew that the scope of the legislation was not, in fact, limited to a specific technique. And the NRLC knew this well in advance of court decisions finding the language of the bills overly broad and vague.[10]

It is undisputed that one of the primary purposes of the NRLC is to end abortion – all abortion, whether pre- or post-viability. The NRLC drafted, promoted, and vigorously lobbied for the passage of the "partial-birth" abortion legislation. The NRLC's prominent role in the legislative process is significant. As Justice Powell noted in his concurring opinion in *Edwards,* although the Louisiana statute at issue in that case itself did not express a religious purpose, statements of the organizations supporting the legislation made clear that the statute had such a purpose. *Edwards*, 482 U.S. at 601-02 ("Information on . . . these organizations is part of the legislative history, and a review of their goals and activities sheds light on the nature of

[10] The first court case reviewing a so-called "partial-birth" abortion statute was *Evans v. Kelly*, 977 F. Supp. 1283 (E.D. Mich. 1997). The temporary restraining order in *Evans* was issued on April 23, 1997, five months after the NRLC memorandum was written.

creation science as it was presented to, and understood by, the Louisiana Legislature."). Similarly, in *McLean v. Arkansas Bd. of Educ.*, where the district court evaluated legislation nearly identical to the statute at issue in *Edwards*, the court found evidence of legislative purpose in the overt religious purpose of the private sector drafter of the legislation, which was adopted nearly wholesale by the Arkansas legislature. *See McLean*, 529 F. Supp. at 1261-63. As in *Edwards*, the religious purpose of the drafter was relevant in *McLean* because, in adopting the model legislation, Arkansas took no steps to mitigate the legislation's improper religious implications. *Cf. Planned Parenthood v. Atchison*, 126 F.3d 1042, 1049 (8th Cir. 1997) (state authorities' response to efforts of anti-abortion group, among other factors, easily supported district court finding that intent of state authorities was to impede or prevent access to abortion and therefore constituted an undue burden; "the groups opposed to abortion have a perfect right to lobby . . . . Our concern, however, chiefly lies in the state authorities' response to these lobbying efforts.").

The NRLC instructed legislatures in State after State on how to resist limiting or clarifying the scope of so-called "partial-birth" abortion legislation. Notably, all the States that enacted such legislation in 1996, 1997, or 1998 adopted language substantially similar to the model legislation espoused by the NRLC. Moreover, at least nine State legislatures, in addition to Nebraska's, specifically rejected attempts to narrow the definition of "partial-birth" abortion to one specific abortion procedure.[11] For example, four State

[11] The nine States in addition to Nebraska (J.A. 380) are: Alaska, Indiana, Iowa, Kansas, Michigan, Missouri, Tennessee, Virginia, and Wisconsin. *See* Alaska Senate Journal, Apr. 9, 1997; Indiana Senate Bill 61 (1997) (Senate Motion SB61-4 (failed Feb. 4, 1997)); Iowa Senate Journal, Feb. 5, 1998 at 211; Kansas Senate Journal, Apr. 10, 1997 at 792-94; Kentucky House

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legislatures – Iowa, Missouri, Virginia and Wisconsin – rejected amendments that would have used the medical definition of D&X outlined by the American College of Obstetrics and Gynecologists ("ACOG").[12]

Even when asked to exclude certain abortion procedures – abortion procedures clearly different from the rhetoric used to describe the "partial-birth" abortion legislation – legislatures refused. In Tennessee, the legislature rejected an amendment that explicitly stated that the legislation does not include D&E abortion. Tennessee House Journal, May 27, 1997, at 1705-07. Likewise, the Iowa legislature rejected an amendment to exclude the most common first and second trimester abortion procedures: "vacuum aspiration, suction aspiration, dilation and curettage, suction curettage, induction, [and] dilation and evacuation procedures." Iowa Senate Journal, Feb. 5, 1998,

*(footnote continued from previous page)*

Amendment 14, Doc. ID 983612 (defeated Mar. 19, 1998); NARAL/NARAL Foundation, *Who Decides? A State-by-State Review of Abortion and Reproductive Rights* 80 (1997 NARAL/NARAL Foundation), (Michigan HB 5889 (1996)); Missouri Senate Journal, Apr. 29, 1999; Tennessee House Journal, May 27, 1997 at 1707; Wisconsin Assembly Journal, May 20, 1997 at 164, 165; Wisconsin Senate Journal, Mar. 26, 1998 at 563 (amendment laid on table).

[12] A widely used and quoted ACOG statement on D&X notes that the descriptions in the legislation are "vague and do not delineate a specific procedure recognized in the medical literature. Moreover, the definitions could be interpreted to include elements of many recognized abortion and operative obstetric techniques." The ACOG statement defines D&X as including the following elements: (1) deliberate dilatation of the cervix; (2) instrumental conversion of the fetus to a footling breech; (3) breech extraction of the body excepting the head; and (4) partial evacuation of the intracranial contents of a living fetus to effect vaginal delivery of a dead but otherwise intact fetus. *See* J.A. 599-600.

at 211. The Iowa legislature went even farther when it rejected an amendment providing:

> It is the intent of the general assembly that the provisions of this Act shall only apply to one singular procedure. It is also the intent of the general assembly that this Act comply with the constitutional limitations imposed on the states by the United States Supreme Court precedents which are in effect on the effective date of this Act.[13]

By refusing to eliminate even first trimester abortion procedures from the scope of their "partial-birth" abortion prohibitions, these legislatures demonstrated that their true purpose was to ban a variety of abortion procedures.[14]

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[13] Iowa House Journal, Feb. 18, 1998 at 286. Similarly, the sponsors of the federal legislation indicated that that legislation was not limited to one procedure. For example, in a "Dear Colleague" letter urging support for the House version of the legislation, its sponsor, Representative Charles Canady, expressly explained that "[t]he ban would have the effect of prohibiting *any abortion* in which a child was partially delivered and then killed – no matter what the abortionist decides to call his particular technique." Letter from Rep. Charles T. Canady to Members of Congress, at 1 (Mar. 18, 1996).

[14] The Nebraska legislature, like these other legislatures, omitted from its "partial birth" abortion legislation any reference to a specific gestational age. By its terms, the Nebraska Statute applies to abortion procedures at any stage of pregnancy, including first-trimester abortions. The fact that Statute is not targeted at post-viability procedures reflects an apparent strategy designed by anti-abortion groups for advancing provocative abortion legislation: "the main intention is the passage of legislation offering an opportunity for a willing Supreme Court to begin the [*Roe*] reversal process by discarding 'viability' as a valid criterion for

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Courts that have examined so-called "partial-birth" abortion statutes have recognized that a legislature's failure to clarify the meaning of "partial-birth" abortion indicates the legislature's intent to prohibit more than one procedure. For instance, the Superior Court for the Third District of Alaska concluded with respect to Alaska's "partial-birth" abortion act:

> [T]he vagueness of the Act was brought to the attention of the legislature by a clearly worded and easily understood attorney general's opinion. Amendments were offered to correct the problem but were rejected. Having passed the Act with knowledge of the legal defects, it seems more likely than not that the unstated purpose of the Act was to cloud the scope of abortion procedures, i.e., to restrict abortion in general.

*Planned Parenthood v. Alaska*, No. 3AN-97-6019, 11 (Super. Ct., 3rd Dist. Alaska, Mar. 13, 1998) (footnotes omitted), *appeal docketed*, No. S-08610 (Alaska Apr. 16, 1998). *See also Planned Parenthood v. Miller*, 30 F. Supp. 2d 1157, 1165 (S.D. Iowa 1998), *aff'd*, 195 F.3d 386 (8th Cir. 1999), *pet. for cert. filed*, No. 99-1112 (U.S. Dec. 23, 1999); *Causeway Med. Suite v. Foster*, 43 F. Supp. 2d 604, 619 (E.D. La. 1999) ("Defendants' claim that this law applies only to the D&X procedure is not particularly credible. Were that the case, the legislature could have done

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the onset of a compelling state interest in protecting life." Victor G. Rosenblum & Thomas J. Marzen, "Strategies for Reversing Roe v. Wade through the Courts," *in Abortion and the Constitution: Reversing Roe v. Wade through the Courts*, 193, 199 (Dennis J. Horan, et al eds., 1987).

a number of things to ensure that application."), *appeal filed*, No. 99-30324 (5th Cir. Apr. 5, 1999); *A Choice for Women v. Butterworth*, 54 F. Supp. 2d 1148, 1155 (S.D. Fla. 1998) ("If the Florida legislature had intended to prohibit only the intact D&X procedure they could have easily done so by incorporating the language set forth in the ACOG statement of policy."), *appeal dismissed*, No. 99-4002 (11th Cir. Mar. 2, 1999); *Rhode Island Med. Soc. v. Whitehouse*, 66 F. Supp. 2d 288, 305 (D.R.I. 1999), *appeal filed*, Nos. 99-2141 (1st Cir. Sept. 20, 1999 and Oct. 5, 1999); *Planned Parenthood v. Verniero*, 41 F. Supp. 2d 478, 496 (D.N.J. 1998), *appeal filed*, No. 99-5042 (3d Cir. Jan. 6, 1999); *Eubanks v. Stengel*, 28 F. Supp. 2d 1024, 1035-38 (W.D. Ky. 1998), *appeal filed*, No. 98-6671 (6th Cir. Dec. 4, 1998). In *Hope Clinic v. Ryan*, 195 F.3d 857, 863 (7th Cir. 1999), the Seventh Circuit suggested that the rejection by the Wisconsin State legislature of the ACOG definition of the D&X procedure was understandable since any small variation in the procedure would render the abortion outside the scope of the challenged statute's prohibition. The fact that the legislature considered the ACOG definition as a clarification of the bill's scope, however, demonstrates that the legislature was aware of significant concerns about the legislation's vague and overbroad scope.

## III. THE LEGISLATURE'S FAILURE TO GIVE ADEQUATE WEIGHT TO WOMEN'S HEALTH ALSO REVEALS THAT THE NEBRASKA STATUTE WAS INTENDED TO OBSTRUCT SUBSTANTIALLY A WOMAN'S ACCESS TO AN ABORTION.

The Nebraska legislature's intentional failure to give adequate weight to women's health in its "partial-birth" abortion prohibition is further evidence of the illegitimate purpose of the Nebraska Statute. This Court's well-established jurisprudence recognizes that a State may not impose any abortion regulation that could jeopardize the



life or health of a pregnant woman. As the Court affirmed in *Casey*, "the essential holding of *Roe* forbids a State to interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health." *Casey*, 505 U.S. at 880 (*citing Roe v. Wade*, 410 U.S. 113, 164 (1973)); *see also Harris v. McRae*, 448 U.S. 297, 316 (1980) ("[I]t could be argued that the freedom of a woman to decide whether to terminate her pregnancy for health reasons does in fact lie at the core of the constitutional liberty identified in [*Roe*]."). A legislature's invalid purpose to obstruct the path to an abortion is evident wherever the legislature disregards women's health.[15]

Consistent with the fundamental principle that a woman's health must be protected, the Court's jurisprudence prohibits a State from forcing a pregnant woman or her physician to subordinate the health of the woman to the well-being of the fetus. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 768-69 (1986), *overruled in part on other grounds by Casey*,

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[15] The Court's jurisprudence obligating legislatures to treat women's health as paramount when enacting laws to restrict abortion reflects the Court's recognition of the devastating effects that restrictions on abortion had on women's health prior to *Roe*. In 1965, illegal abortion accounted for an estimated 17 percent of all deaths due to pregnancy and childbirth. *See Vital Statistics of the United States, 1965: Vol. II Mortality*, Part A (U.S. Gov't Printing Office). One report published in 1968 estimated that "as many as 5,000 American women die each year as a direct result of criminal abortion. The figure of 5,000 may be a minimum estimate, inasmuch as many such deaths are mislabeled or unreported." Richard H. Schwarz, *Septic Abortion* 7 (1968). Today, the mortality rate from abortion at all stages of gestation is 0.6 per 100,000 procedures. *See* Maureen Paul et al., *A Clinician's Guide to Medical and Surgical Abortion* 19 (1999).

505 U.S. 833, 870, 872-73, 882 (1992); *Colautti v. Franklin*, 439 U.S. 379, 400 (1979) (finding a statute invalid where "it is uncertain whether the statute permits the physician to consider his duty to the patient to be paramount to his duty to the fetus, or whether it requires the physician to make a 'trade-off' between the patient's health and increased chances of fetal survival"). Even after viability, when the State has the strongest interest in preserving fetal life, the State may not require a woman to sacrifice her health for the sake of the fetus. *Casey*, 505 U.S. at 879-80.

Both the plain language and the legislative history of the Nebraska Statute demonstrate that, in enacting this so-called "partial-birth" abortion legislation, the Nebraska legislature intentionally disregarded the legislation's adverse health ramifications for women.

### A. The Nebraska Legislature Specifically Rejected Provisions to Protect Women's Health.

The Nebraska Statute contains no provision to protect any aspect of a woman's health. The Statute includes only a narrow exception to permit an abortion that is absolutely "necessary" to preserve the *life* of a woman "endangered by a physical disorder, physical illness, or physical injury," Neb. Rev. Stat. § 28-328(1). Thus, the Statute fails to protect a woman's health in any case where death is not probable and imminent.

It was not by accident or oversight that the Nebraska legislature omitted the required protections for women's health. The legislature was aware of how the Statute, even if it could be interpreted to ban only D&X, would harm women's health. The legislature heard testimony, for example, from Vikki Stella, a diabetic who had undergone an abortion using the D&X procedure, regarding the health implications of banning the procedure. Ms. Stella had



terminated her wanted pregnancy because the fetus suffered from "at least nine major anomalies," the most serious of which was a fluid-filled cranium with no brain tissue. Transcript of Hearing before Nebraska Committee on Judiciary 55-56 (Feb. 12, 1997). She explained:

> We were faced with the most difficult and painful decision of our lives. The only thing keeping [my son] Anthony alive was my body . . . . I made the agonizing decision to take my son off life support. As an insulin dependent diabetic, I don't heal as well as other people and infections can be deadly. Waiting for normal labor to occur or inducing labor early, or a C-section would have put my life and my health at risk. . . . But this procedure [D&X] was important to me not only because of my tenuous health but because we wanted another child. And as promised, the surgery preserved my fertility. . . . This procedure was not a matter of convenience. It was a medical necessity.

*Id.* at 56.

Despite this clear warning, the legislature deliberately rejected amendments that were offered to protect women's health. For instance, it rejected an amendment that would have permitted a physician to perform an otherwise prohibited abortion procedure if other available procedures posed an equal or greater risk to the woman. (J.A. 372.) The proposed amendment would have substituted a clause in the original version of the legislation stating "and no other medical procedure would suffice for [the] purpose [of

preserving a woman's life]" with the clause "any procedure would pose equal or greater medical risk."[16]

The legislature also rejected an amendment to add an exception to preserve the woman's fertility or her physical ability to carry future pregnancies to term, and did not accept another amendment providing an exception for cases where the woman is at "serious risk of substantial impairment of a major bodily function." (JA 380, 405, 415.) In opposing the latter amendment, Senator Maurstad, the bill's sponsor, stated without further elaboration that "partial-birth" abortion is "not medically necessary."[17] (JA 414.)

While a particular abortion procedure may not be the only procedure available for preserving a woman's life or health, it may be the best or more appropriate procedure in a specific circumstance. (J.A. 600-01.) The right to choose to have an abortion includes the right to choose the safest procedure available for each individual woman. Whenever more than one abortion technique is available, a woman is entitled to have access to the safest method. *See Planned Parenthood v. Danforth*, 428 U.S. 52, 78-79 (1976).[18] By rejecting even the very limited health exceptions proposed,

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[16] The life exception eventually codified in the Statute is restricted to procedures "necessary" to preserve the woman's life, which has the same effect as the clause "no other medical procedure would suffice for that purpose." Neb. Rev. Stat. § 28-328(1)-(4).

[17] This latter amendment was withdrawn after Senator Maurstad conferred with its sponsor. (J.A. 415.)

[18] In *Danforth*, the Court invalidated a ban on the use of the saline amniocentesis abortion method in part because the ban "forces a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed." *Danforth*, 428 U.S. at 78-79.



the Nebraska legislature flagrantly and deliberately ignored this right and the attendant requirement not to obstruct a woman's right to choose an appropriate abortion procedure for health reasons.

The Nebraska legislature's failure to tailor the Nebraska Statute to protect women's health was a part and product of a national campaign aimed at obstructing women's access to abortions at any cost. That campaign, waged in the halls of Congress and in State legislatures throughout the country, is relevant evidence that the Nebraska Statute was enacted with the impermissible intent to subordinate women's health to political expressions condemning and sensationalizing abortion procedures.

### B. The Nebraska Legislature, Members of Congress, and Other Proponents of So-Called "Partial-Birth" Abortion Statutes Have Ignored the Facts About Women's Health.

As noted above, the Nebraska Legislature was specifically informed about the adverse health implications of the Nebraska Statute prior to its enactment. The legislature's deliberate rejection of provisions to prevent the Statute from endangering women's health mirrors a pattern followed by anti-abortion advocates in Congress and in other State legislatures. At least ten times, proponents of the federal "partial-birth" abortion legislation succeeded in thwarting attempts to include in the legislation an exception to protect women's health.[19] As one of the principal

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[19] The House passed two rules prohibiting health exception amendments from being considered. *See* 141 Cong. Rec. H11602 (1995); 142 Cong. Rec. H2904, H2905 (1996). The Senate defeated one health exception amendment and two amendments providing for such an exception and limiting the ban to post-

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sponsors of the legislation made clear, in the proponents' view, a women's health is *never* an appropriate reason for an abortion, irrespective of the procedure: "a life for a life is certainly an even trade . . . . But when something less than a life is at risk, then I don't think the trade is equal." 141 Cong. Rec. S16761-03, S16764 (1995) (statement of Rep. Hyde).

This position cannot be reconciled with this Court's determination that restrictions on abortion procedures must not pose a threat to women's life *or* health. It also is painfully blind to the experiences of women whose health (either physical or mental) critically depended on the right to terminate a pregnancy. Compelling statements of women who have testified about their medically necessary abortions dramatically illustrate why restrictions such as those imposed by the Nebraska Statute impermissibly burden women's choice, even if those restrictions could somehow be interpreted to ban only D&X. The following two descriptions, among more than ten in the public record, are exemplary:

- Coreen Costello, a conservative Christian, testified that during the seventh month of her third pregnancy she began having premature contractions. Her doctors determined that her baby was suffering from a lethal neurological disorder and was unable to absorb the amniotic fluid. Because of their profound

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viability abortions. 141 Cong. Rec. S18198 (1995); 143 Cong. Rec. S4537, S4575 (1997). The House Judiciary Committee did the same. H. Rep. 105-24 (1997) at 21, 22. The House tabled a motion to recommit H.R. 1122 to committee with an amendment to add a health exception and limit the ban to post-viability abortions, and defeated a motion to recommit the bill with a health exception amendment. 143 Cong. Rec. H1228, H1230 (1997).



religious beliefs, the Costellos wanted to deliver their baby naturally. During the more than two weeks waiting for a natural birth, Coreen's health worsened as the amniotic fluid continued to accumulate in her uterus, a medical condition called polyhydramnios. The medical experts treating Coreen determined that the baby's head was too large to fit through Coreen's cervix. After much anguish, Coreen's physician recommended that she have a D&X abortion as the most appropriate option for her. Coreen concluded her testimony, "Because of the safety of this procedure, I am now pregnant again and will have another baby in June. Thanks to the grace of God and the skill and compassion of Dr. McMahon, I can have another healthy baby. If you outlaw this surgical procedure, other women like me will be denied that gift, that joy. They may lose their ability to have more children; they may lose their health; they may lose their lives." *Partial-Birth Abortion Ban Act of 1995: Hearings on H.R. 1833 Before the House Judiciary Subcommittee on the Constitution* (1996).

- Viki Wilson, a registered nurse, who in the 36th week of her third pregnancy discovered that her baby was suffering from an encephalocoele in which two-thirds of the baby's brain was on the outside of her skull. Because of the size of the encephalocoele, Viki's doctors were concerned that her uterus would rupture if she gave birth naturally, rendering her sterile. Her doctors did not recommend a cesarean section because the risk of the surgery could not be justified since there was no chance of saving the baby. She urged, "There will be families in the future faced with this tragedy because pre-natal testing is not infallible. I urge you, please don't take away the safest procedure available." *Partial-Birth Abortion Ban Act of 1995: Hearings on H.R. 1833 Before the*

*Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. 281-82 (1995).

Legislatures throughout the country, including Nebraska's, summarily dismissed the record of these and other women's similar experiences.

## CONCLUSION

The Nebraska legislature deliberately designed its so-called "partial-birth" abortion legislation to limit a woman's choice to one of three unacceptable options: to undergo a riskier but legal procedure, to violate the law in order to obtain the safest procedure, or to refrain altogether from exercising the right to choose a safe abortion. By intentionally crafting the Nebraska Statute so as to restrict a woman's choice in this manner, the Nebraska legislature imposed an undue burden on women's constitutional rights. For this reason alone, even independent of the Statute's unconstitutional effect, the Nebraska Statute is invalid under the fundamental principles articulated in *Casey*.

For the reasons set forth above, *amici* respectfully urge the Court to uphold the decision below.

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