



© 2003 Center for Reproductive Rights

www.reproductiverights.org

formerly the Center for Reproductive Law and Policy

No.

In The
Supreme Court of the United States

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

v.

LEROY CARHART, M.D.,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

DON STENBERG
Attorney General

L. STEVEN GRASZ
Deputy Attorney General
Counsel of Record
2115 State Capitol
Lincoln, NE 68509-8920
Tel: (402) 471-2682
Counsel for Petitioners

PETITION FOR A WRIT OF CERTIORARI

Nebraska Attorney General Don Stenberg respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit has not yet been officially reported. It can be found at 1999 WL 753919 and 1999 U.S. App. Lexis 23162. The opinion is set forth in the Appendix (App.1). The opinions of the United States District Court for the District of Nebraska in this case are reported at 972 F. Supp. 507 and 11 F. Supp.2d 1099.

The conflicting opinion of the United States Court of Appeals for the Seventh Circuit, *The Hope Clinic v. Ryan*, has not been officially reported. It can be found at 1999 WL 974098. This opinion is also set forth in the Appendix (App.23).

JURISDICTION

The opinion and the judgment of the United States Court of Appeals for the Eighth Circuit were entered on September 24, 1999. Jurisdiction in this Court exists under 28 U.S.C. § 12,54(1).

TABLE OF AUTHORITIES

Page

CASES

<i>Carhart v. Stenberg</i> , - F.3d ~ 1999 WL 753919 (8th Cir. 1999)	6, 7, 11, 15
<i>Carhart v. Stenberg</i> , 11 F. Supp.2d 1099 (D.Neb. 1998)	1, 4
<i>Carhart v. Stenberg</i> , 972 F. Supp. 507 (D.Neb. 1997).....	1, 13
<i>Dred Scott v. Sandford</i> , 19 How. 393, 15 L.Ed. 691 (1856)	13
<i>Evans v. Kelley</i> , 977 F. Supp. 1283 (E.D. Mich. 1997)	3
<i>Met. Life Insurance Co. v. Ward</i> , 470 U.S. 869, 105 S.Ct- 1676 (1985)	16
<i>Planned Parenthood of Southeastern Pennsylvania v. Casey</i> , 505 U.S. 833, 112 S.Ct. 2791 (1992)	11, 12, 13, 16, 17
<i>Planned Parenthood of Wisconsin v. Doyle</i> , 162 F.3d 463 (7th Cir. 1998)	10
<i>Planned Parenthood of Wisconsin v. Doyle</i> , 9 F. Supp.2d 1033 (W.D. Wis. 1998)	11
<i>Richmond Medical Center For Women v. Gilmore</i> , 144 F.3d 326 (4th Cir. 1998)	10
<i>Roe v. Wade</i> , 410 U.S. 113, 99 S.Ct. 705 (1973)	12, 14, 16
.....	
<i>Showry v. Texas</i> , 690 S.W.2d 689 (Tex. App. 1985).....	15, 16
<i>Standing Bear v. Crook</i> , 25 Fed. Cas. 695 (D.Neb. 1879)	13, 14, 15
<i>The Hope Clinic v. Ryan</i> , _ F.3d ~ 1999 WL 974098 (7th Cir. 1999)	1, 7, 9, 10

TABLE OF AUTHORITIES - Continued

Page

<i>Webster v. Reproductive Health Services</i> , 492 U.S. 490, 109 S.Ct. 3040 (1989)	9, 10
<i>Women's Medical Professional Corp. v. Voinovich</i> , 130 F.3d 187 (6th Cir. 1997)	10
STATUTES	
28 U.S.C. § 1254(l)	I
28 U.S.C. § 1291	6
720 Ill. Comp. Stat. § 513/5 (Cum. Supp. 1999)	8
Neb. Rev. Stat. § 28-326(9) (Supp.1998)	2, 8
Neb. Rev. Stat. § 28-328(l) - (4) (Supp.1998)	2
Wis. Stat. § 940.16(b) (Cum. Supp. 1999)	8
CONSTITUTIONAL PROVISIONS	
U.S. Const. amendment XIV	3, 12, 13, 14, 16
MISCELLANEOUS	
Hearing Before the Senate Judiciary Committee on H.R. 1833	4, 5
Note 112 Harv. L. Rev. 731 (1999)	10
Supreme Court Rule 10(a)	7, 9
Statistical Abstract of the United States, U.S. Bureau of the Census 117th ed. (1997)	14

LIST OF PARTIES

The Petitioners are 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. An additional Appellant/ Defendant below was Mike Munch, Sarpy County Attorney.

The Respondent is LeRoy H. Carhart, M.D.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	
LIST OF PARTIES	
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVI SIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	18

QUESTIONS PRESENTED

- I. Whether the Eighth Circuit's adoption of a broad unconstitutional reading of Nebraska's ban on partial-birth abortion, which directly conflicts with the narrower constitutional construction of similar statutes by the Seventh Circuit Court of Appeals and that of the State officials charged with enforcement of the statute, violates fundamental rules of statutory construction and basic principles of federalism in contradiction of the clear direction of this Court in *Webster v. Reproductive Health Services*?
- II. Whether the Eighth Circuit misapplied this Court's instructions in *Planned Parenthood v. Casey* by finding that a law banning cruel and unusual methods of killing a partially-born child, is an undue burden" on the right to abortion?
- III. Whether a living human being delivered from its mother's body up to its head is a person for purposes of the Fourteenth Amendment?
- IV. Whether, in light of the physical cruelty of abortion; the termination of over 38 million unborn and partially born children since 1973; the extensive litigation that continues unabated on this divisive issue; the polarization of the body politic; the ability of elected lawmakers to balance competing interests; and the lack of any constitutional textual basis, the Court should now recognize that abortion is more properly a public policy legislative matter than a constitutional issue for judicial decision?

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

Neb. Rev. Stat. § 28-326(9) (Supp.1998):

Partial-birth abortion means an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery. For purposes of this subdivision, the term partially delivers vaginally a living unborn child before killing the unborn child means deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child.

Neb. Rev. Stat. § 28-328(1) - (4) (Supp.1998):

(1) No partial-birth abortion shall be performed *in* this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.

(2) The intentional and knowing performance of an unlawful partial-birth abortion in violation of subsection (1) of this section is a Class III felony.

(3) No woman upon whom an unlawful partial-birth abortion is performed shall be prosecuted under this section or for conspiracy to violate this section.

(4) The intentional and knowing performance of an unlawful partial-birth abortion shall result in the automatic suspension and revocation of an attending physician's license to practice medicine in Nebraska by the Director of Regulation and Licensure

III. U.S. Const. amendment XIV:

The Fourteenth Amendment provides in pertinent part: "Nor shall any State Deprive any person of life, liberty, or property without due process of law."

STATEMENT OF THE CASE

In the past four years, nearly two-thirds of the State legislatures, as well as the United States Senate and House of Representatives, have each addressed growing public concern over a controversial medical procedure legally denominated as "partial-birth abortion" and now referred to medically as "D&X" abortion. So repulsed by the procedure were legislators across the country that statutory bans on partial-birth abortion were passed by thirty States and both houses of Congress. As one federal court described it, partial-birth abortion "is gruesome and inhumane." *Evans v. Kelley*, 977 F. Supp. 1283, 1319 n.38 (E.D. Mich. 1997). Even some abortion practitioners believe it "is a particularly hideous procedure." *Id.*

The United States District Court for the District of Nebraska described the partial-birth abortion/D&X procedure as follows, based on testimony in the present case:

When the fetus is presented feet first, Carhart, using forceps, pulls the feet of the living

fetus from the uterus into the vaginal cavity and then pulls the remainder of the fetus, except the head, into the vaginal cavity to a point where the base of the fetal skull is lodged in the uterine side of the cervical canal. At that point, the size of the head will not permit him to pull it through the cervical canal into the vaginal cavity. To decompress the fetal skull and evacuate the contents in order to pull it through the cervical canal, Carhart uses an instrument to either

tear or perforate the skull to allow insertion of a cannula and removal of the cranial *contents*. Sometimes he will crush the skull rather than pierce it in order to reduce the size of the skull. Brain death occurs sometime during this two-to-three-second reduction procedure, but fetal heart function may continue for several seconds or minutes after the fetus's skull is decompressed.

Carhart v. Stenberg, 11 F. Supp.2d 1099, 1106 (D.Neb. 1998).

One nurse who personally observed the partial-birth abortion/ D&X procedure stated, "I have been a nurse for a long time, and I have seen a lot of death - people maimed in auto accidents, gunshot wounds, you name it. I have seen surgical procedures of every sort. But in all my professional years, I had never witnessed *anything* like this." Hearing Before the Senate Judiciary Committee on H.R. 1833, Nov. 17, 1995, Hearing Transcript at pp. 17-18 (Statement of Brenda Pratt Shafer, R.N.).

Nurse Shafer described the procedure's effect on a partially-born child as follows:

[The physician] brought the ultrasound in and hooked it up so that he could see the baby.

On the ultrasound screen, I could see the heart beat. As [the doctor] watched the baby on the ultrasound screen, *the baby's heartbeat was clearly visible on the ultrasound screen.*

[The doctor] went in with the forceps and *grabbed the baby's legs and pulled them down into the birth canal.* Then he delivered the baby's body and the arms - everything but the head. *The doctor kept the head right inside the uterus.*

The baby's little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby's arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall.

The doctor opened up the scissors, stuck a high powered suction tube into the opening, and sucked the baby's brains out. Now the baby went completely limp.

I was really completely unprepared for what I was seeing. I almost threw up as I [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 asked another nurse, and she said it was just reflexes.

Id.

The Nebraska Legislature, with only one dissenting vote, passed a statutory ban on partial-birth abortion which was signed into law on June 9, 1997. Nebraska's statute was patterned closely after language passed by

both houses of Congress. On June 12, 1997, LeRoy Carhart, M.D., a Bellevue, Nebraska physician who performs late-term abortions, filed a Complaint challenging the constitutionality of Nebraska's statute. On June 17, 1997, the United States District Court for the District of Nebraska entered a Temporary Restraining Order suspending enforcement of LB 23, which remained in effect pending disposition of the Plaintiff's Motion For Preliminary Injunction. A preliminary injunction hearing was held on July 17 and 18, 1997. On August 14, 1997, the court granted a preliminary injunction.

Following additional discovery, a trial on the merits was held on March 24, 1998, at which time additional testimony and evidence was received. On July 2, 1998, the district court permanently enjoined enforcement of the statute. Final Judgment was entered on August 10, 1998. An appeal was taken to the Eighth Circuit Court of Appeals pursuant to 28 U.S.C. § 1291, and on September 24, 1999, that court affirmed the judgment of the district court.

Notwithstanding the position of the Nebraska Attorney General that the D&E abortion procedure was not encompassed by the statute, the Eighth Circuit panel construed Nebraska's statute as banning not only the partial-birth abortion/D&X procedure, but also the more common D&E procedure. The panel concluded that such a prohibition "imposes an undue burden on a woman's right to choose to have an abortion." *Carhart v. Stenberg*, F-3d - 1999 WL 753919 (8th Cir. 1999) (App.19).

REASONS FOR GRANTING THE WRIT

1. The Eighth Circuit's Reading of Nebraska's Partial Birth Abortion Statute Directly Conflicts With the Seventh Circuit's Reading of Partial-Birth Abortion Statutes Enacted By the States of Wisconsin and Illinois.

The Court should grant certiorari in this case to resolve a conflict between two United States courts of appeals on the same important matter.

On September 24, 1999, the United States Court of Appeals for the Eighth Circuit declared Nebraska's partial-birth abortion statute to be unconstitutional. *Carhart v. Stenberg*, _ F.3d _ 1999 WL 753919 (8th Cir. 1999) (App.1). On October 26, 1999, the United States Court of Appeals for the Seventh Circuit, sitting en banc, upheld partial-birth abortion statutes enacted by the States of Wisconsin and Illinois. *The Hope Clinic v. Ryan and Christensen v. Doyle*, _ F.3d _ 1999 WL 974098 (7th Cir. 1999) (en banc) (App.23). The Eighth Circuit's broad unconstitutional reading of Nebraska's partial-birth abortion statute directly conflicts with the Seventh Circuit's decision in *Hope Clinic*. Thus, "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Supreme Court Rule 10(a).

All three statutes reviewed by the Seventh and Eighth Circuits in *Hope Clinic* and *Carhart* define partial birth abortion in substantially the same terms. The Illinois legislature defined partial-birth abortion as "an abortion in which the person performing the abortion partially vaginally delivers a living human fetus or infant

before killing the fetus or infant and completing the delivery." 720 111. Comp, Stat. § 513/5 (App.27). The Wisconsin legislature defined partial-birth abortion as "an abortion in which a person partially vaginally delivers a living child, causes the death of the partially delivered child with the intent to kill the child, and then completes the delivery of the child." Wis. Stat. § 940.16(b) (App.29). Similarly, the Nebraska legislature defined partial-birth abortion as "an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery." Neb. Rev. Stat. § 28-326(9).

In discussing the Illinois and Wisconsin statutes in light of the Eighth Circuit's decision, the Seventh Circuit stated:

Plaintiffs in both [the Illinois and Wisconsin] cases contend that, even if the statutes are precise enough to be enforced, they create an undue (and therefore unconstitutional) burden on abortion. The eighth circuit reached this conclusion in *Carhart* and its two companion cases, but only after first holding that the state laws effectively prohibit the D&E procedure. If we thought that the Illinois or Wisconsin laws forbade D&E, then *Planned Parenthood of Central Missouri v. Danforth* would require us to agree with the eighth circuit. For reasons we have

already given, however, we believe that state courts are entitled to accept the view of both states' Attorneys General that their laws do not forbid, or even affect, the D&E procedure. The question we must address, then, is whether a statute limited to D&X unduly burdens abortion. *Hope Clinic*, - F.3d _ (App.48).

Thus, the Seventh Circuit appropriately adopted a saving construction of the Illinois and Wisconsin statutes, while the Eighth Circuit chose a broad unconstitutional reading of Nebraska's statute. This was despite the fact that the Nebraska Attorney General, like those of Illinois and Wisconsin, took the position that the D&E procedure was not prohibited by the statute. These two decisions create a clear conflict pursuant to Supreme Court Rule 10(a) which should be resolved by this Court.

11. The Eighth Circuit's Broad Reading of Nebraska's Partial-Birth Abortion Statute Violates Fundamental Rules of Statutory Construction and Basic Principles of Federalism in Contradiction of the Clear Direction of this Court and in Conflict with the Reading of Such Statutes by the Seventh Circuit Court of Appeals.

The Court should grant certiorari in this case to

address the failure of the Eighth Circuit panel to follow the Court's previous decisions upholding important principles of federalism as reflected in fundamental rules of statutory construction which favor constitutional interpretations of State statutes.

In *Webster v. Reproductive Health Services*, 492 U.S. 490, 109 S.Ct. 3040 (1989), the Court considered the constitutionality of a Missouri statute that required viability testing "[b]efore a physician performs an abortion on a woman he has reason to believe is carrying an unborn child of twenty or more weeks gestational age. . . ." *Id.* at 3054. In its opinion the Court chastised the Eighth Circuit panel (which had declared the statute unconstitutional)

for its interpretation of the statute which "runs 'afoul of the well-established principle that statutes will be interpreted to avoid constitutional difficulties.'" Id. at 3054 (quoting *Frisby v. Schultz*, 487 U.S. 474, 483 (1988)). As in *Webster*, the Eighth Circuit panel in the present case failed to follow this basic rule of statutory construction.

This rule of construction favoring constitutionality of State statutes is rooted in important concepts of federalism, and is particularly important when considering State partial-birth abortion statutes. See Note, 112 Harv.L.Rev. 731 (1999). As noted by Sixth Circuit Judge Boggs, "The Supreme Court has reminded us time and again that, rather than reaching out to strike down statutes that are arguably unconstitutional, the federal courts are to interpret statutes so as to avoid difficult constitutional questions where possible." *Women's Medical Professional Corp. v. Voinovich*, 130 F.3d 187, 212 (6th Cir. 1997) (Boggs, dissenting). See also *id.* ("the majority's opinion strains to interpret Ohio's partial-birth abortion statute so as to make the burden ... undue in violation of *Casey*."); *Richmond Medical Center For Women v. Gilmore*, 144 F.3d 326, 332 (4th Cir. 1998) (Circuit Judge Luttig discussing the district court's failure to construe Virginia's partial-birth abortion statute according to rules of construction and federalism). Compare *The Hope Clinic v. Ryan*, _ F.3d _ (7th Cir. 1999) (App.48) (employing a saving construction of Illinois' and Wisconsin's partial birth abortion statutes); *Planned Parenthood of Wisconsin v. Doyle*, 162 F.3d 463, 474 (7th Cir. 1998) (Manion, dissenting) ("The district court has given the statute its proper (and logical) narrow construction, thus confining the ban to the D & X abortion procedure."); *Planned*

Parenthood of Wisconsin v. Doyle, 9 F. Supp.2d 1033, 1041, 1042 (W.D. Wis. 1998) (employing a narrow construction of Wisconsin's partial-birth abortion ban).

In construing Nebraska's statute, the Eighth Circuit acknowledged "The State argues that LB 23's ban on partial-birth abortion prohibits only the D&X procedure, and not the D&E." *Carhart*, _ F.3d _ (App.16). However, unlike the Seventh Circuit, the court refused to give the statute that construction. This Court should grant a writ of certiorari in this case to uphold its prior admonitions to federal courts concerning rules of construction and principles of federalism in the context of reviewing State legislative enactments.

III. **The Eighth Circuit has Misapplied the Court's Instructions in *Planned Parenthood v. Casey* by Finding a Ban on a Cruel and Unusual Method of Killing a Partially-Born Child to be an "Undue Burden" on the Right to Abortion.**

The Court should grant certiorari in this case to enforce and further clarify its undue burden test as set forth in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S.Ct. 2791 (1992), as the Court's important holdings in *Casey* concerning the legitimate interests of the States are not being implemented by the lower federal courts.

The American College of Obstetricians and Gynecologists, a staunch defender of abortion rights and an opponent of bans on partial-birth abortion, has reported that "A select panel convened by ACOG could identify no circumstances under which this [D&X] procedure ...

would be the only option to save the life or preserve the health of the woman." In other words, safe alternatives are available.

If a State cannot ban the partial-birth abortion/D&X procedure, there is effectively no limit on abortion at all. Such a result conflicts with the Court's decisions in both *Casey* and *Roe v. Wade*. In *Roe v. Wade*, the Court emphatically noted that "appellant 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.*" *Roe v. Wade*, 410 U.S. 113, 99 S.Ct. 705, 727 (1973) (emphasis added). Likewise, in *Casey*, the Court stated, "The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted. 1 Not all burdens on the right to decide whether to terminate a pregnancy will be undue." *Casey*, 505 U.S. at 876, 112 S.Ct. at 2820.

The Court has never elaborated on the application of the undue burden test since *Casey*, and should grant certiorari in this case to enforce and clarify the applicable standard, as well as reinforce the Court's holdings concerning the legitimate interests of the States.

IV. This Case Squarely Presents the Important Issue of Whether Partially-Born Human Beings, Like African Americans and Native Americans, are Persons for Purposes of the Fourteenth Amendment.

The Court should grant certiorari in this case to address the important question of whether a human

being delivered all but a few inches from the womb is a person for purposes of the Fourteenth Amendment.

As the federal district court below noted, "there is no precedent" regarding the treatment of partially-born children as persons. *Carhart*, 972 F. Supp. 507, 529 (D.Neb. 1997). Therefore, this question is a matter of first impression. In such cases, basic principles of federalism as well as this Court's admonitions in *Casey*, favor deference towards a State's legislative judgment. As the Court emphasized in *Casey*, the States' interests in preserving human life have not, heretofore, been given due regard by the lower courts. *Casey*, 112 S.Ct. at 2817. Since there is no precedent from this Court prohibiting States from protecting partially-born human beings, it is appropriate to defer to a State's legislative determination.

Federal courts have faced similar questions throughout the history of the development of civil rights in the United States. In 1856, the Court held that a "free negro of the African race, whose ancestors were brought to this country and sold as slaves, is not a 'citizen' within the meaning of the Constitution of the United States" and "the special rights and immunities guaranteed to citizens do not apply to them." *Dred Scott v. Sandford*, 19 How. 393, 15 L.Ed. 691 (1856) (from syllabus 1 4, 5, 6). This infamous decision was eventually overturned on the battlefields of the Civil War. Despite the ratification of the Fourteenth Amendment in 1868, however, the treatment of some individuals as "nonpersons" persisted in the courts. In fact, Native Americans were not recognized as "persons" under the laws of the United States until 1879. *Standing Bear v. Crook*, 25 Fed. Cas. 695, 697 (D.Neb. 1879).

„nonpersons." If a corporation may be a "person," *Met. Life Ins. Co. v. Ward*, 470 U.S. 869, 105 S.Ct. 1676 n.9 (1985) (noting that "a corporation is a 'person' within the meaning of the Fourteenth Amendment"), surely a partially-born human being, just inches from complete independence, is a person as well. While "the unborn" have been denied status as persons under the Fourteenth Amendment, the partially-born have never been relegated to this sub-person status. *See Roe v. Wade*, 410 U.S. 113, 118 n.1, 93 S.Ct. 705 (1973); *Showry v. Texas*, 690 S.W.2d 689, 692 (Tex. App. 1985).

In sum, there is no logical basis to conclude that a child that is delivered all except its head is a "nonperson", but the same child delivered an additional few inches is a "person". Such a distinction is irrational and arbitrary. Irrational and arbitrary distinctions, especially in the context of life and death, are a cancer on the rule of law and breed disrespect and mistrust of the judicial system. Such a reading of the Fourteenth Amendment is contrary to sound logic and law, and is not dictated by any decision of this Court. The Fourteenth Amendment should not be read as excluding partially-born children from legal protection, and the Court should grant certiorari on this question to establish this important constitutional principle.

V, This Case Presents the Court with an Opportunity to Revisit the Underpinnings of Abortion jurisprudence in Light of Nearly Eight Years of Additional Litigation Experience in the Federal Courts Since the *Casey* Decision.

The unprecedented legislative action by thirty States to ban an abortion procedure, and the conflict which has

developed between the circuits on this issue, now presents the Court an opportunity to revisit the foundational underpinnings of abortion jurisprudence in light of nearly eight additional years of litigation experience in the federal courts since the *Casey* decision.

The fundamental public policy issue involved in abortion is one that defies judicial determination. That issue is when should an unborn human being's life be protected by law? When she has fingers and toes? When her heart begins to beat? When she has brain waves? When she can move her legs and press against her mother's stomach?

The fact is, the Constitution of the United States makes no attempt to comment upon, let alone decide, this issue. It is necessarily a value judgment and a moral judgment, not a Constitutional question. As such, it is a judgment to be made by elected lawmakers and not by the judiciary.

Does the mother have an interest in this question? Certainly. And the mothers, the fathers, **and their representatives** are fully capable of lobbying legislators, testifying at hearings and voting in elections to affect the legislative balance.

Chopping unborn children into pieces, or pulling first one arm off and then the other, as described by Dr. Carhart in his testimony about D&X and D&E abortions, is a ghastly, cruel and painful practice. It would be cruel and unusual punishment if inflicted on a convicted murderer. The proper place to balance the grotesque death of an unborn girl **or boy against the inconvenience and pain** of childbirth is in the state legislature.

In light of the physical cruelty of abortion; the termination of over 38 million unborn and partially-born children since 1973; the extensive litigation that continues unabated nationwide on this divisive issue; the polarization of the body politic; the ability of elected lawmakers to balance competing interests; and the lack of any constitutional textual basis for the right to abortion, the Court should now recognize that abortion is more properly a public policy legislative matter than a constitutional issue for judicial decision.

CONCLUSION

It shocks the conscience that in the United States of America a human child can be literally pulled from the womb and then cruelly killed by having his or her skull punctured and brains suctioned out. The State of Nebraska has a legitimate interest in banning this barbarous procedure, and the Petitioners respectfully request the Court to grant a writ of certiorari on each of the questions presented herein.

Respectfully submitted,

DON STENBERG

Attorney General of Nebraska

L. STEVEN GRASZ

Deputy Attorney General

Counsel of Record

2115 State Capitol

Lincoln, NE 68509-8920

(402) 471-2682

Counsel for Petitioners