No. 04-3379
IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

LEROY CARHART, M.D., et al.,	)	
	)	
Plaintiff-Appellees,	)	
	)	
v.	)	Appeal from the
	)	United States District Court
JOHN ASHCROFT, in his official capacity as Attorney General of the United States,	)	for the District of Nebraska
	)	Civil Case No. 4:03CV3385
	)	
	)	
Defendant-Appellant.	)	

AMICUS BRIEF ON BEHALF OF THE AMERICAN CENTER FOR LAW AND JUSTICE AND VARIOUS MEMBERS OF CONGRESS, IN SUPPORT OF DEFENDANT-APPELLANT AND URGING REVERSAL

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES AND CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

INTEREST OF AMICI

Amicus the American Center for Law and Justice is a public interest law firm dedicated, *inter alia*, to the defense of the sanctity of human life. Amici members of the United States Congress supported enactment of the federal Partial Birth Abortion Ban Act (PBA Act). (A list of the individual members is attached as an Addendum.) Amici submit this brief with the consent of all parties.

INTRODUCTION

Partial birth legislation operates at the borderline between prenatal and postnatal human life. As a consequence of *Roe v. Wade*, 410 U.S. 113 (1973), this border separates, in the eyes of the federal judiciary, human non-persons from human persons, and constitutional "rights" from legal wrongs.

The U.S. Supreme Court in *Roe* held that human children *prior to birth* are not "persons" for purposes of the Fourteenth Amendment to the U.S. Constitution. This ruling is itself unconstitutional, as well as violative of fundamental human rights, because it drives a wedge between biological humanity (which prenatal human offspring undeniably have) and legal personhood (i.e., the right to the equal protection of the law). The repellant notion underlying *Roe* -- that there are "subhuman" members of the human species -- conflicts directly with the very purposes of the Thirteenth, Fourteenth, and Fifteenth Amendments, which undid the

great injustice of treating black Americans as slaves and property instead of as human beings entitled at law to full respect. Regrettably, the Supreme Court has not yet repudiated this holding of *Roe*, which it imposed upon the nation in 1973.

Born human children, by contrast, indisputably enjoy the basic rights secured to all "persons" under the Fourteenth Amendment. *E.g.*, *Levy v. Louisiana*, 391 U.S. 68, 70 (1968).

Governments plainly have a vital and compelling interest in preventing the spread of the practice of abortion into infanticide. The frequency of abortions throughout pregnancy, the grotesque and barbaric methods of destruction of children in the womb, and the consequent cheapening of human life in the eyes of society, reflected in the widespread phenomena of "dumpster babies" and violence against pregnant women, all threaten to lead to the acceptance of infanticide, especially in the first moments after birth. Partial birth procedures represent the beachhead of abortion's assault on postnatal life, the bridge between abortion and infanticide. Absent strong legal barriers and vigorous societal condemnation, partial birth procedures open the way to legal infanticide.

Governments -- and all their people -- therefore have a tremendously important stake in the unqualified prohibition of partial birth infanticide. The child who "crosses the goal line" -- by foot or head -- into the realm of judicially recognized

"personhood" must receive the full protection of the law if we are not to abandon, inexorably, the sanctity of postnatal life as well.

Critics of laws banning partial birth infanticide cynically charge that the very same prenatal child still faces death by other techniques -- such as poisoning or dismemberment -- which operate while the child remains entirely in the womb. Their objection has undeniable force -- allowing the cold-blooded slaying of unborn children represents a great failure of the legal system. But partial birth laws seek to halt the spread of that horror into infanticide. The child who breaks the plane of the mother's body "touches home plate," so to speak, and ought to be safe from destruction even though equally deserving children may be slain just inches away. This "bright line," while not as protective of preborn life as justice would dictate,[1] nevertheless represents an important barrier against the encroachment of abortion into infanticide.

Partial birth laws therefore embody essential prohibitions against infanticide. Like other laws against killing children, these laws need not contain exceptions for children conceived in rape or incest or for children whose death would improve the

[1]The federal statute at issue here draws a line which, while also "bright," is even more modest. Unless the baby's "entire . . . head" or the "trunk past the navel" is delivered "outside the body of the mother," the statute does not apply. 18 U.S.C. § 1531(b)(1)(A).

mother's health. Obviously, invoking such circumstances as reasons for killing an innocent child would be unthinkable.

The central premise of the federal partial birth statute is the defense of the border against the encroachment of abortion into infanticide. What matters most to this specific defense is the protection of all children who, while still alive and therefore capable of being protected, break the plane that currently marks the dividing line between non-personhood and personhood, between abortion and infanticide. The label the abortionist uses for his lethal procedure is irrelevant. The reason for using this macabre method of killing is irrelevant. What is crucial is maintenance of the bulwark against infanticide.

The federal government in this case has demonstrated convincingly why the Partial Birth Abortion Ban Act passes constitutional muster even assuming that *Roe v. Wade* and *Stenberg v. Carhart*, 530 U.S. 914 (2000), apply with full force to the constitutional review of this statute.

Amici submit this brief to explain why *Roe* and *Stenberg* should not even apply to partial birth infanticide in the first place.

Under either rationale -- that of the federal government or that of amici -- the judgment below must be reversed.

ARGUMENT

Plaintiffs contend that the federal Partial Birth Abortion Ban Act ("PBA Act") violates a federal constitutional "right" to abortion. The threshold question is whether, and to what extent, a federal constitutional right to abortion prevents *federal* protection for babies *partly outside their mother's bodies, in the process of delivery*.

Plaintiffs cannot prevail under a mere application of *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny, including *Stenberg v. Carhart*, 530 U.S. 914 (2000). Rather, plaintiffs' claim depends upon at least three fundamental *extensions* of *Roe*. First, plaintiffs must stretch the abortion precedents regarding termination of *pregnancy* to include the destruction of a child *in the delivery process*, indeed *partially outside the mother's body*. Second, plaintiffs must stretch *Roe*'s holding that an *unborn* child is not a person to cover a *partially born* child. Third, plaintiffs must import the *Fourteenth* Amendment abortion jurisprudence of *Roe* and its progeny, which governs *state* law, wholesale into the *Fifth* Amendment, which governs *federal* law.

This Court should decline plaintiffs' invitation to undertake such an expansion of *Roe* and *Stenberg*. Because plaintiffs' assertion that the PBA Act violates a right to abortion depends upon this Court's embrace of *each* of the three major extensions plaintiffs request, plaintiffs' claim must fail, and the contrary judgment of the district court must be reversed.

I. *STENBERG* DOES NOT COMPEL INVALIDATION OF THE FEDERAL PARTIAL BIRTH ABORTION BAN ACT.

The district court believed that *Stenberg* required the court to strike down the federal PBA Act. But the PBA Act is no mere clone of the Nebraska statute overturned in *Stenberg*. Rather, as explained in greater detail in this brief, there are important distinctions between the PBA Act and the Nebraska statute, distinctions which preclude a wooden application of *Stenberg*:

- the federal PBA Act only applies to children partly delivered "outside the body of the mother," 18 U.S.C. § 1531(b)(1)(A) (the Nebraska statute contained no such limitation);
- the federal PBA Act's limitation to children partly "outside the body of the mother" raises the question whether such partly born children are entitled independently to constitutional protection as "persons," a question as yet unresolved by the Supreme Court (*Roe* only spoke of "unborn" children, and *Stenberg*, which dealt with a statute *not* limited to babies partly outside the mother's body, did not address the issue);
- the federal PBA Act is a *federal* law, not a state law; hence, the threshold question is one of "reverse incorporation" of *Fourteenth*

Amendment holdings (*Roe* and *Stenberg*), which limit *states*, into the *Fifth* Amendment, which limits the *federal* government.

In short, this appeal requires more than the mindless invocation of *Stenberg*. The substantial distinctions at play here instead call for a more sophisticated review, one which, amici contend, requires the conclusion that the federal PBA Act passes constitutional muster.

II. *ROE* AND *STENBERG* DO NOT APPLY TO THE PROCESS OF DELIVERY.

The jurisprudence of *Roe* and *Stenberg* is inapplicable here for a fundamental reason: the PBA Act applies, not to termination of *pregnancy*, but to slaying a child *in the process of delivery*, indeed partly "outside the body of the mother," 18 U.S.C. § 1531(b)(1)(A).

Roe itself observed the distinction between pregnancy termination and destroying a child in the process of delivery. *Roe*, 410 U.S. at 117 n.1 (noting that a separate provision, making it an offense "'during parturition of the mother [to] destroy the vitality or life in a child in a state of being born and before actual birth,'" was "not attacked here"). The Supreme Court later *rejected* the argument, "remarkable in its candor," that "'the abortion patient has a right not only to be rid of the growth, called a fetus in her body, but also has a right to a dead fetus.'" *Planned*

Parenthood Ass'n of Kansas City, Missouri, Inc. v. Ashcroft, 462 U.S. 476, 483 n.7 (1983) (quoting testimony of Dr. Robert Crist) (upholding "second physician" requirement designed to save babies aborted alive).

Stenberg did not hold to the contrary. The Supreme Court's opinion was limited to the question whether the statute at issue comported with *Roe* and *Casey*, *see Stenberg*, 530 U.S. at 929-30, which presupposed that the *Roe* abortion right was applicable. Moreover, the statute challenged in *Stenberg* was not limited to children partially outside their mothers' bodies. *Compare* 530 U.S. at 922 ("'delivering into the vagina'") *with* 18 U.S.C. § 1531(b)(1)(A) (fetal "head" or "trunk past the navel" must be "outside the body of the mother").

To be sure, the termination of pregnancy before viability will necessarily *result*, under current technology, in the death of the child. But this is a function only of the limits of contemporary medical practice. The advent of artificial wombs, or even womb-to-womb transfer, imply a future where a woman who concludes that she cannot bear a child may be able to surrender that child, not to sure death, but rather to the womb of another woman, or to a temporary synthetic womb, in a prenatal adoption or foster placement. The Supreme Court has already upheld state efforts to ensure that a child aborted alive survives. *See Planned Parenthood v. Ashcroft*, 462 U.S. at 482-86 ("second physician" requirement).

In short, there is a very real difference between "not being pregnant anymore" and "having a dead baby." The PBA Act regulates, not whether a woman can terminate a pregnancy, but rather what is lawful in the process of delivery. The issue is not whether she will terminate this particular pregnancy, but rather whether the child will be delivered alive (perhaps to survive, perhaps to die because of prematurity) or will be deliberately killed in the process.

Roe created a right to terminate a pregnancy, not a right to slay a child in the delivery process. The jurisprudence of *Roe* and *Stenberg* is inapplicable to regulation of the *process of delivery*.

III. A PARTIALLY BORN CHILD IS, OR AT LEAST MAY BE TREATED BY CONGRESS AS, A PERSON WITH A RIGHT TO LIFE.

Roe and *Stenberg* are categorically inapplicable for another fundamental reason. The human being who is partially outside the mother's body is a person entitled to the equal protection of the law under the Fifth Amendment (as well as the Fourteenth). At a minimum, Congress *may* -- and perhaps must -- treat partially born children as persons entitled to legal protection.

A. The Term "Person" Under the Fifth Amendment Includes All Human Beings.

The Fifth Amendment to the Constitution of the United States provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of

law." U.S. Const. amend. V. The Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.* amend. XIV, § 1. These amendments secure protection for the basic, minimum human rights any government must respect. It is imperative that categories of human beings are not read out of the terms of these amendments.

If ever there were a term whose broad scope demands unconditional respect, it is the term "person." For whoever is not a person lacks not only the privileges of citizenship, but even the barest minimum of human rights. A person need not have every right -- prisoners, minors, and aliens, for example, do not possess the full panoply of rights and privileges afforded under the Constitution -- but a non-person has *no* rights whatsoever. A non-person is no better off then property, entirely subject to the whim of the owner and whatever permissible regulation the government may deign to impose.

The constitutional protection for "persons" simply cannot function if each individual or class of human beings must prove explicit inclusion in some unwritten catalogue of "persons."[2] Does the term "person" include mentally disabled

[2] The importance of this fundamental point cannot be stressed enough: The idea of human rights is based upon the notion that certain rights obtain *by* (continued...)

individuals? Citizens of hostile nations? Children under the age of three? Convicted misdemeanants or felons? Comatose individuals? Each of these classes of human beings lacks either the legal or physical ability to exercise certain rights, yet each is unquestionably a class of persons. This is so, not because members of each class can *prove* their particular inclusion under the Fifth and Fourteenth Amendments, but because they are included *by virtue of their humanity*. "They are humans, live, and have their being." *Levy v. Louisiana*, 391 U.S. 68, 70 (1968) (discussing illegitimate children). Therefore, "[t]hey are clearly 'persons'" within the meaning of the Constitution. *Id.*

Human offspring who are partially born are likewise "humans, live, and have their being." If wholly *unborn* children are "a form of human life," *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 520 (1989) (plurality opinion); *see also Planned Parenthood v. Casey*, 505 U.S. 833, 898 (1992) (joint opinion) (referring to "the life of the child [a woman] is carrying"), then so are *partially* born children. As human

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[2](...continued)
virtue of being human and *may be conditioned upon no other requirement*. An attempt to restrict entitlement to those rights by the creation of criteria other than mere humanness is incompatible with the idea of "human rights" . . .

Gorby, *The "Right" to an Abortion, the Scope of Fourteenth Amendment "Personhood," and the Supreme Court's Birth Requirement*, 1979 S. Ill. U.L.J. 1, 10 n.58 (emphasis added).

beings, partially born children do not need to overcome any additional hurdles in order to establish their right to inclusion within the term "person" as used in the Constitution.[3]

The Supreme Court did not foreclose this argument in either *Roe* or *Stenberg*. As already noted, *Roe* addressed the status of *unborn* children and *Stenberg* did not address at all the question whether partially born children are persons. On the contrary, the *Stenberg* Court had denied certiorari on precisely the question of personhood. *See* 68 U.S.L.W. 3376 (Dec. 7, 1999) (petition for certiorari in *Stenberg v. Carhart*, No. 99-830) (Question 3: "Is living human being delivered from the mother's body up to its head person for purposes of 14th Amendment?"); *Stenberg v. Carhart*, 528 U.S. 1110 (2000) (granting certiorari "limited to Questions 1 and 2"). "Of course, the denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." *Missouri v. Jenkins*, 515 U.S. 70, 85 (1995) (internal quotation marks and citation omitted).

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[3] In keeping with approved usage, and giving terms their ordinary meaning, the word "person" is synonymous with the term "human being." An offspring of human parents cannot reasonably be considered to be other than a human being, and therefore a person, first within, and then in normal course outside, the womb . . . .

Commonwealth v. Cass, 392 Mass. 799, 801, 467 N.E.2d 1324, 1325 (1984) (construing vehicular homicide statute).

B. <u>There is No Justification for Excluding From the Term "Person" the Class of Partially Born Human Beings</u>.

In *Roe*, the Supreme Court read into the term "person" in the Fourteenth Amendment an exception for *unborn* children.[4] The Court's support for that conclusion is so precarious, indeed riddled with error, that it certainly should not be extended to swallow up *partially born* human beings under the Fifth Amendment.

1. *Roe v. Wade* Supplies No Valid Basis for Denying that Partially Born Children Are Persons.

The *Roe* Court made several arguments for concluding that the word "person" does not include the unborn. These arguments are deeply faulty. *A fortiori*, none of these arguments supports denying that *partially born* children are persons.

a. Alleged absence of precedent

First, the Supreme Court observed that "no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment." *Roe v. Wade*, 410 U.S. at 157.

This observation was factually incorrect. *See Steinberg v. Brown*, 321 F. Supp. 741, 745-47 (N.D. Ohio 1970) (three-judge court). Moreover, an absence or dearth

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[4] "The primary question presented in *Roe* was this: may the Court create substantive exceptions to the enjoyment of fundamental rights where none appear in the Constitution?" Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 Cal. L. Rev. 1250, 1288 (1975).

of case support for personhood is irrelevant. There may not be any cases holding newborn infants to be persons. This does not mean, however, that such children are beyond the scope of the Fifth or Fourteenth Amendments.

b. Postnatal application of other constitutional provisions

Second, the Supreme Court noted that the use of the word person in "nearly all" other parts of the Constitution "is such that it has application only postnatally. None [of these uses] indicates, with any assurance, that it has any possible prenatal application." *Roe*, 410 U.S. at 157 (footnote omitted). But this begs the question. Those provisions that *cannot* apply prenatally explicitly limit the class of human beings to which they do apply. *E.g.*, U.S. Const. art. I, § 2, cl. 2 (person must be at least age twenty-five to be a Representative); *id.* art. I, § 3, cl. 3 (person must be at least age thirty to be a Senator); *id.* amend. XIV, § 1 (person who is born, if born in the United States, is a citizen). Such exclusions do not imply that those excluded (e.g., with respect to Representatives, those under age twenty-five) are not persons.

c. Apparent inconsistency of state anti-abortion laws with personhood

Third, the Supreme Court pointed to alleged fatal inconsistencies between Texas' claim of fetal personhood and its legal treatment of abortion (e.g., allowing an exception to save the mother's life). *Roe*, 410 U.S. at 157 n.54.

Here the *Roe* Court confused two distinct issues: the constitutionality of the Texas abortion laws, and the constitutional personhood of unborn children.

The government, of course, may not exclude from the general protection of the criminal law a particular class of innocent persons. This fundamental obligation does not disappear simply because the government fails to comply with it. In *Brown v. Board of Education*, 347 U.S. 483 (1954), for example, it would have been outrageous to suggest that the long history and widespread practice of segregated public education meant that black people were not persons.

Similarly, the denial of equal *statutory* treatment to partially born children does not support a categorical denial of *constitutional* protection to such children. If the state or federal government in fact denies due process or equal protection to a class of humans, the remedy is to declare the discrimination unconstitutional, not to deny that members of the victimized class are persons.

d. Alleged laxity of nineteenth century abortion laws

Fourth, the Supreme Court cited its "observation" that "throughout the major portion of the 19th century prevailing legal abortion practices were far freer" than in 1973, *Roe*, 410 U.S. at 158, presumably as evidence that the framers and those who ratified the Fourteenth Amendment did not regard unborn children as human persons.

This argument by its own terms cannot apply to the *Fifth* Amendment, which was adopted before the Nineteenth Century even began.[5] Moreover, *Roe* did not purport to find evidence that the abortion of *partially born* children was "freer" in prior years.[6]

Furthermore, the assumption by the *Roe* Court that abortion was freely and legally available, even in the early part of the nineteenth century, ignores reality. Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. Pitt. L. Rev. 359, 371-76 (1979). Dellapenna, "Abortion and the Law," in *Abortion and the Constitution* 137, 146 (D. Horan et al. eds. 1987).[7]

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[5]Even as to the Fourteenth Amendment, *Roe* refutes itself. The Fourteenth Amendment was adopted in 1868, precisely the time when the scientific discovery of the humanity of the unborn had become widely known, and precisely at the time when this discovery prompted vigorous opposition to abortion by means of numerous statutory bans. *See* 410 U.S. at 129, 141-42.

[6]To the extent that physicians might have resorted at times to crushing the baby's head to save the mother in a life-threatening labor, this represented a practice neither desired at the time nor medically necessary today. It certainly did not represent a constitutional liberty to abort, much less a denial that the child killed was a person.

[7]It would therefore be all the more nonsensical to claim that women had a legal "liberty to abort" during the period preceding enactment of the *Fifth* Amendment.

The disposal of "unwanted" children was effectuated instead by infanticide. *Id.* (citing numerous authorities). By *Roe*'s faulty logic, this latter fact would mean infants were not persons under the Fourteenth Amendment.[8]

Roe's faulty holding regarding *unborn* children should not be extended to *partially born* children.

2. No Other Basis Exists For Excluding Partially Born Children from the Category of "Persons."

Logic, law, and justice all militate against the imposition of any such arbitrary limitation on personhood as a "total birth" requirement.

a. Logic

The difference between "partial birth" and "total birth" utterly fails to qualify as a logical distinction between liberty and murder. The child is the same, whether the physician catches the baby after delivery or manually halts the baby's descent through the birth canal in order to apply lethal measures.[9]

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[8]*See also* Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 St. Mary's L.J. 29, 31 (1985) (extensive legal and historical analysis to demonstrate that "the legislatures ratifying the fourteenth amendment did consider human fetuses to be persons").

[9]Presumably no member of the Supreme Court would deny that "a newborn infant, whether the product of a normal birth or an abortion," *Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft*, 462 U.S. 476, 503 n.10 (1983) (Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting), is a person under the Fifth (continued...)

The Fourteenth Amendment does distinguish between born and unborn children of the same age for purposes of citizenship. *See* U.S. Const. amend. XIV, § 1 ("persons born . . . in the United States . . . are citizens"). But citizenship is a political classification, the boundaries of which are necessarily arbitrary.[10] Personhood, in contrast, entitles an individual to the basic, minimal protections accorded to humanity. Whether the mother in labor while traveling interstate gives birth in Mexico today or Texas tomorrow is a question with political ramifications for the child; such incidental details, however, cannot reasonably determine whether the child may be slain with impunity.

The complete meaninglessness of "total birth" as a criterion for personhood is more apparent today than ever, when induced, "scheduled" deliveries are commonplace, and when babies are "totally" removed from the womb for surgery and then placed back within their mothers. Birth changes *where* the person is, not *what* the person is.

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[9](...continued)
and Fourteenth Amendments. *See also* Born Alive Infant Protection Act, 1 U.S.C. § 8 (2004).

[10]Congress, pursuant to its enforcement powers, U.S. Const. amend. XIV, § 5, presumably has some leeway in specifying the precise meaning of "born." Congress could, for example, define "born" to specify that partially born children are citizens.

Plaintiffs may object that a child need not be viable to be partially born. But a child need not be viable to be totally born, either. Infants born with conditions incompatible with life may live only a few hours. But they are unquestionably as much persons as are adults who are dying after a fatal accident. There is no right to slay the dying.

b. Legal consistency

The integrity of the law would not be served, but rather would be harmed, by the arbitrary exclusion of partially born children from constitutional protection. The history of legal developments of the past century and a half regarding prenatal human life has been a history of increasing recognition and protection of *unborn* children. For example, the courts have overwhelmingly recognized the right of a live child to recover for prenatal injuries, even if inflicted prior to viability. Annotation, *Liability for Prenatal Injuries*, 40 A.L.R.3d 1222, 1226-28 (1971 & Supp. 2003). Likewise, the courts generally allow recovery for the wrongful death of a child born alive whose injuries were inflicted before birth. *Id.* Similarly, the courts of a lopsided majority of jurisdictions now allow recovery for the wrongful death of a viable unborn child who dies while still in the womb. Annotation, *Right to Maintain Action or to Recover Damages for Death of Unborn Child*, 84 A.L.R.3d 411 (1978 & Supp. 2003). And states have amended their criminal codes to specify that the destruction of an unborn

child is not just a tort but a crime.[11] Congress has recently done the same. *See* Unborn Victims of Violence Act, 18 U.S.C. § 1841 (2004).

Imposition of a "total birth" requirement as a predicate for personhood would be to constitutionalize, in extreme form, a distinction that the civil and criminal law is in the process of repudiating.

The consequences in terms of respect for the law are all too obvious. The physician who strangles a newborn is guilty of murder, but the physician who strangles a partially born baby is exercising a "liberty." A disabled child may recover large sums to compensate for harm suffered in the delivery process, but the mother could have had that same child killed in that same delivery process because she did not want a handicapped baby.

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[11] *E.g.*, Cal. Penal Code § 187 (West 1988) (murder); Ill. Comp. Stat. Ann. ch. 38, paras. 9-1.2, -2.1, 9-3.2 (West 1991) (homicide and manslaughter of unborn child); La. Rev. Stat. Ann. §§ 14:32.5-32.8 (West Supp. 1992) (feticide); Minn. Stat. Ann. §§ 609.2661-609.2665, 609.268(1) (West 1987 & Supp. 1992) (murder, manslaughter, and felony death of unborn child); N.D. Cent. Code §§ 12.1-17.1-02 to 12.1-17.1-04 (Supp. 1991) (murder, manslaughter, and negligent homicide of unborn child).

See also Commonwealth v. Lawrence, 404 Mass. 378, 536 N.E.2d 571 (1989) (homicide laws apply to slaying of viable unborn child); *Commonwealth v. Cass*, 493 Mass. 799, 467 N.E.2d 1324 (1984) (viable unborn child is "person" under vehicular homicide statute); *State v. Horne*, 282 S.C. 444, 319 S.E.2d 703 (1984) (viable unborn child is "person" for purposes of criminal homicide); *State v. Burrell*, 237 Kan. 303, 699 P.2d 499 (1985) (applying involuntary manslaughter statute to death of viable unborn child).

Such contrasts make a mockery of the law. The malleable and arbitrary lines separating "partial birth" from "total birth" simply cannot support the difference between constitutional rights and crimes, between homicidal torts and constitutional liberties.

Either the partially born child is a person, or that child is not a person. While the law in theory can consider someone a person for some purposes and not for others, in practice such artificiality results in contempt for a legal system full of technicalities that contradict reality. The integrity of the legal system calls for inclusion, not exclusion, of partially born children within the term "person" in the Fifth Amendment.

c. Justice

Finally, considerations of justice call for the renunciation of the arbitrary denial of equal protection to children who happen for the moment to reside partially outside their mothers' bodies.

Not everyone has *every* right. But no one except a person has *any* rights. The issue here is not whether partially born children should receive the *full* range of the rights, such as the right to vote, but whether they may lay claim to the barest minimum of human rights: "the right to *survive* on a basis of equality with human beings generally," *Rosen v. Louisiana State Bd. of Med. Exam'rs*, 318 F. Supp. 1217,

1226 (E.D. La. 1970) (emphasis added), *vacated*, 412 U.S. 902 (1973). There is a crucial difference in kind between partially born children and tonsils, worms, or trees. This difference is personhood.

This difference relates to "our basic concept of the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 22 (1990) (internal quotation marks and citation omitted).

> At bottom the battle has been waged on moral grounds. The country has debated whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death.

Furman v. Georgia, 408 U.S. 238, 296 (1972) (Brennan, J., concurring) (overturning Georgia death penalty). If this observation holds true with regard to the life of a convicted felon, it is much more so for the innocent baby dangling partially outside the mother's body.

Society "must treat its members with respect for their intrinsic worth as human beings," for "if the deliberate extinguishment of human life has any effect at all, it more likely tends to lower our respect for life and brutalize our values." *Id.* at 270, 303 (Brennan, J., concurring). "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable

Rights, that among these are *Life*, Liberty and the pursuit of Happiness." The Declaration of Independence para. 2 (U.S. 1776) (emphasis added).

Roe created an exception to personhood where none existed or could exist. This Court should not compound this fundamental injustice by extending *Roe* to deny the personhood of partially born children.

C. The Personhood of Partially Born Children Requires the Rejection of Plaintiffs' Attack Upon the PBA Act.

Plaintiffs predicate their challenge upon an alleged "abortion right." Such a "right," however, is fundamentally inconsistent with the right to life of persons who are partially born. A "right" to abort, where the life of a person is a stake, would make no more sense than "a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person's body," *Michael H. v. Gerald D.*, 491 U.S. 110, 124 n.4 (1989) (plurality opinion). "For, the very idea that one man may be compelled to hold his life . . . at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). As the *Roe* Court acknowledged, "[i]f this suggestion of personhood is established, the [challengers'] case, of course, collapses, for the [child's] right to life would then be guaranteed

specifically by the [Fourteenth] Amendment." 410 U.S. at 156-57. The same reasoning holds here with regard to the Fifth Amendment.

IV. THERE IS NO FIFTH AMENDMENT RIGHT TO SLAY A PARTIALLY BORN CHILD.

Plaintiffs' assertion that the PBA Act violates a right to abortion -- and especially plaintiffs' heavy reliance upon *Stenberg* -- hinges upon a crucial, but erroneous, threshold premise: that the Supreme Court's *Fourteenth* Amendment abortion jurisprudence applies wholesale to the *Fifth* Amendment's limits on federal government action.

A. It is an Open Question Whether, and to What Extent, the Fifth Amendment Contains a Right to Abortion.

This is, however, an open question. In *Roe v. Wade*, the Supreme Court held that there is a right to abortion under "the Due Process Clause of the Fourteenth Amendment." *Id.* at 164. *See also id.* at 153. The Court mentioned the Fifth Amendment only in passing, *id.* at 152, 157, and did not claim to be construing that provision. Indeed, in addressing the defense argument that the preborn child is a "person," the Court focused exclusively on the meaning of the Fourteenth Amendment. *Id.* at 156-59.

Virtually every Supreme Court abortion decision since *Roe* has addressed *state* and *local* restrictions on abortion; each such decision turns on the Fourteenth

Amendment, not the Fifth. *E.g.*, *Doe v. Bolton*, 410 U.S. 179, 201 (1973); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 426-27 (1983); *Planned Parenthood v. Casey*, 505 U.S. 833, 846-48 (1992).

The Supreme Court has never invalidated any *federal* statute or regulation touching upon abortion. On the contrary, such federal laws have all been upheld. *See United States v. Vuitch*, 402 U.S. 62, 72-73 (1971) (rejecting vagueness challenge to District of Columbia abortion law and declining to address other, substantive due process grounds for a constitutional challenge); *Harris v. McRae*, 448 U.S. 297 (1980) (upholding federal Hyde Amendment restrictions on tax funding of abortions); *Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding federal Title X regulations limiting abortion counseling). Thus, the Supreme Court has had no occasion to hold that the Fifth Amendment contains any "right to abortion." Even if the Court had declared in one of its opinions that there was a Fifth Amendment abortion right -- which the Court has apparently *not* done -- such a declaration would have been *dicta*. It is therefore an open question in the Supreme Court whether, and to what extent, the Fifth Amendment protects abortion against the *federal* government.

B. Declining to Recognize a Fifth Amendment Right to Abortion Would Not Mean the Federal Government Could Ban Abortion Outright. Congress May Only -- as with the PBA Act -- Legislate Where Federal Concerns are Present.

At this point plaintiffs might protest that, if there is no right to abortion under the Fifth Amendment, then the federal government could ban all abortions, and *Roe v. Wade* would be a nullity. This objection is misguided for at least two important reasons.

First, in the present case, the Court need not decide whether there is *no* right to abortion under the Fifth Amendment. To reject plaintiffs' claim, this Court need only hold that, *whatever* the scope of any Fifth Amendment right to abortion, such right does not subsume the species of infanticide at issue here.

Second, the federal government does not have a general criminal police power. *United States v. Morrison*, 529 U.S. 598, 618-19 (2000); *United States v. Lopez*, 514 U.S. 549, 564, 566-67 (1995). Congress cannot pass a national ban on abortion any more than it can pass a national ban on shoplifting or assault. Congress can only limit abortion in contexts where Congress has constitutional authority, e.g., the use of federal funds (as in *Harris* and *Rust*), the governance of federal territories (as in *Vuitch*), and the regulation of interstate commerce (as with the PBA Act). Thus, even

if there were *no* right to abortion under the Fifth Amendment *whatsoever*, the federal government's role would remain limited.

C. The Constitutional Protections under the Due Process Clauses of the Fifth and Fourteenth Amendments Are Not Identical.

Plaintiffs may object that because the Fifth and Fourteenth Amendments each use the identical terms "liberty" and "due process," those terms must be construed to have identical content. But the Supreme Court has never so held. To the contrary, the Supreme Court has read the due process guarantees of the Fifth and Fourteenth Amendments in strikingly disparate ways.

For example, the Supreme Court has read the Due Process Clause of the Fourteenth Amendment as "incorporating" various rights under the First Amendment, *e.g.*, *Lovell v. Griffin*, 303 U.S. 444, 450 (1938) (free speech and press), the Fourth Amendment, *e.g.*, *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (freedom from unreasonable searches and seizures), the Fifth Amendment, *e.g.*, *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (protection against double jeopardy), and other guarantees found in the Bill of Rights. Were the Due Process Clause of the Fifth Amendment construed to contain these same rights, then the provisions separately enumerating those rights in the First, Fourth, Fifth, Sixth, and Eighth Amendments would be redundant and superfluous. Needless to say, the Supreme Court has never so held.

Conversely, the Supreme Court has construed the Due Process Clause of the Fifth Amendment to contain an "equal protection component." *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 542 n.21 (1987) (and cases cited). The Fourteenth Amendment, unlike the Fifth, contains an explicit equal protection guarantee. But the Equal Protection Clause of the Fourteenth Amendment would be pointless if the Due Process Clause of the Fourteenth Amendment, like that of the Fifth, was to be read as already guaranteeing equal protection.

Nor can it be claimed that the Supreme Court has mindlessly equated the rights applicable to the state and federal governments. The Seventh Amendment, for example, does not apply to suits in state courts. *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 719 (1999). Likewise, the grand jury requirement of the Fifth Amendment does not apply to the states. *Campbell v. Louisiana*, 523 U.S. 392, 399 (1998); *Hurtado v. California*, 110 U.S. 516, 538 (1884).

In short, the Supreme Court has definitely not held that the terms "liberty" and "due process" have identical meanings under the Fifth and Fourteenth Amendments. Even in those areas where the Supreme Court has read limits on *federal* power into the due process limits on *state* power, the Court has not always equated the two. *E.g.*, *Hurtado* (grand jury element of Fifth Amendment does not bind states). *Cf. Zelman v. Simmons-Harris*, 536 U.S. 639, 677-80 & n.3 (2002) (Thomas, J., concurring) (and

cases cited) (constitutional rights can and sometimes should apply differently to state and federal governments).

Plaintiffs may argue that, regardless of any divergence between state and federal constitutional rights generally, a different rule applies to *fundamental* rights. *See National Abortion Federation v. Ashcroft*, 330 F. Supp. 2d 436, ___ n.32 (S.D.N.Y. 2004) (citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000)).[12] But even if the Supreme Court were to use the "fundamental" nature of guarantees to dictate *reverse* incorporation under the Fifth Amendment,[13] it is unclear, and arguably dubious, that the Supreme Court would deem abortion -- much less the commission of partial birth infanticide -- a "fundamental right." *Cf. Webster v. Reproductive Health Services*, 492 U.S. 490, 520 (1989) (plurality) (abortion a "liberty interest"); *Planned Parenthood v. Casey*, 505 U.S. at 852 ("woman's interest in terminating her pregnancy"); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (ambiguously listing abortion under conglomerate of "fundamental rights and liberty interests"); *Stenberg*, 530 U.S. at 920 (declining to "revisit" principles of *Roe* and *Casey*, noting

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[12]The district court's general equation of state and federal constitutional rights in *NAF v. Ashcroft* simply does not comport with the Supreme Court's actual precedents.

[13]The only apparent instance of "reverse incorporation" involved the right to equal protection. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

that those decisions were made "in light of the Constitution's guarantees of fundamental individual liberty," and referring simply to a "right to abortion").

D. *Stare* Decisis Does Not Dictate Whether or to What Extent the Fifth Amendment Contains a Right to Abortion.

Since the question whether, and to what extent, there is a right to abortion under the Fifth Amendment is one of first impression in the Supreme Court, considerations of *stare decisis* do not militate in favor of importing *Roe* and its progeny into the Fifth Amendment. To the contrary, in *Planned Parenthood v. Casey*, the majority strongly intimated that *Roe v. Wade* was in error and would not be followed absent *stare decisis*. *Id.* at 853, 858 (intimating that "*Roe* was in error"), 860, 861, 869, 871 (joint opinion) (questioning whether *Roe* was correct). Indeed, *Casey* overruled portions of *Roe*'s holding despite *stare decisis*. *Id.* at 873 (joint opinion) (rejecting *Roe*'s trimester framework). *Roe* should certainly not be *extended* beyond its current scope to create a right, effective against the federal government, to slay children partly outside of their mother's bodies.

E. Analyzing the Question Afresh, the Court Should Conclude that the Fifth Amendment Does Not Protect Partial Birth Infanticide.

Plaintiffs cannot seriously contend that the Fifth Amendment, analyzed independent of any precedential emanations from *Roe* and *Stenberg*, contains a right to slay a child in the delivery process and already partly outside the mothers' body.

Roe itself has prompted a barrage of criticism for its faulty analysis, including from those who support its result as a policy matter.[14] To compound *Roe*'s errors by inventing a right to partial birth infanticide under the Fifth Amendment would be consummate absurdity, as well as barbarism.

CONCLUSION

This Court should reverse the judgment of the district court.

Respectfully submitted,

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[14] *See*, *e.g.*, Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920 (1973); A. Cox, *The Role of the Supreme Court in American Government* 113-14 (1976); A. Bickel, *The Morality of Consent* 27-28 (1975); Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159; Paulsen, *The Worst Constitutional Decision of All Time*, 78 Notre Dame L. Rev. 995 (2003).

CERTIFICATE OF COMPLIANCE

Undersigned counsel for amici hereby certifies, pursuant to Rule 32(a)(7)(C), Fed. R. App. P., and 8th Cir. R. 28A(c), that the Amicus Brief on Behalf of the American Center for Law and Justice and Various Members of Congress, in Support of Defendant-Appellant and Urging Reversal was printed using WordPerfect version 10, Times New Roman proportional typeface in 14-point type size, and that the brief complies with the type-volume limitations of Rule 32(a)(7), Fed. R. App. P. Exclusive of material not counted under Rule 32(a)(7)(B)(iii), the brief contains 6,908 words.

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CERTIFICATE OF SERVICE

I hereby certify, pursuant to Rule 25(d), Fed. R. App. P., that an original and nine copies of the Amicus Brief on Behalf of the American Center for Law and Justice and Various Members of Congress, in Support of Defendant-Appellant and Urging Reversal, plus a diskette version, were sent this day to the clerk of this Court by first-class mail, postage-prepaid, and that two copies of the Amicus Brief on Behalf of the American Center for Law and Justice and Various Members of Congress, in Support of Defendant-Appellant and Urging Reversal, plus a diskette version, were served this day, by first-class mail, postage prepaid, upon counsel for all other parties to this case, as listed below. I hereby certify that the diskettes have been scanned for viruses and are virus-free.

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