

1. WHERE IT ALL BEGAN: NEBRASKA—“THE GOOD ‘LIFE’”

As you cross the bridge that separates it from neighboring Iowa, Nebraska, whose state motto is “The Good Life,” welcomes you into a land of cornfields, the College World Series, and an unwavering belief held by many of its residents that just as there is no contradiction in being a registered Democrat who hasn’t voted against a Republican candidate in decades, there is also no contradiction in believing the government’s interference should be outlawed in every instance except when it comes to a woman’s right to choose.

So when State Senator Danielle Conrad stood in front of the state’s unicameral legislature in Lincoln in March 2010, she no doubt knew she was already the champion of a lost cause. The Pain-Capable Unborn Child Protection Act, a new and unprecedented piece of legislation introduced by Nebraska senator (and speaker of the legislature) Mike Flood and extensively advocated for by Nebraska Right to Life, the state’s powerful anti-abortion lobbying group, had already been sponsored by twenty-two members of the legislature—nearly half of its forty-nine senators. Even if she couldn’t defeat the bill, Conrad wanted at least to expose the medical fallacies, distortions and legal snares residing in its language, as well as its intent to try to end abortion under the guise of “saving babies from excruciating pain.”

“It was important to create a legal record,” Conrad said, explaining why she put so much effort into countering the bill. “If Nebraska Right to Life supports a bill it is going to become law. But it needed to be shown that there was not unanimous consent, that the evidence presented wasn’t undisputed, and the variety of issues that weren’t being taken into account when the law was crafted.”¹

In many ways, Nebraska was an obvious choice to fire the opening shot in the battle to overturn *Roe v. Wade*, as the state offered several advantages when it came to testing a piece of model anti-abortion legislation before it was fed to other restriction-friendly states across the country. First, owing to Nebraska's unicameral legislature, the Pain-Capable Unborn Child Protection Act would require only one body to vote it through, eliminating the risk that it would be derailed by critics or watered down with amendments in a compromise between the house and senate. Also, the small number—Nebraska has the smallest legislature in the country—of lawmakers to woo, many of whom already opposed abortion in nearly every circumstance, made passage of the bill certain, something the Right to Life activists needed in order to build their momentum as they began their push to challenge *Roe*. The hearings on the bill would provide them a platform to voice their talking points on a fetus's alleged ability to feel pain, their justification for why *Roe v. Wade* should be reviewed and reconsidered.

Furthermore, there was the added bonus of potentially eliminating the practice of Dr. LeRoy Carhart. A long-term provider of abortions in Nebraska, Carhart became the sole practitioner to openly perform later-term abortions in the Midwest after the 2009 murder of Dr. George Tiller in Kansas. A thorn in the side of anti-abortion activists in the Cornhusker State since the late 1980s, Carhart had fought vehemently against restrictions meant to undermine a pregnant woman or teen's ability to access an abortion, including parental notification laws and bans on certain types of later-term abortion procedures. Anti-abortion forces had been trying for years to force Carhart to close up shop. On the day a parental notification law was passed in 1991, for example, Carhart was the victim of a mysterious fire at his farm, which killed many of his horses and a few house pets.² While the fire department said it could not determine the cause of the blaze, Carhart received a letter the following day at his clinic in which

the anonymous writer took credit for the fire and cited the abortions Carhart performed as the reason. It was that act of violence that turned Carhart from a doctor who provided abortions into an unapologetic activist.

In 2000, Carhart filed his first lawsuit to try to halt Nebraska’s attempts to restrict abortion, suing the state for outlawing a type of procedure used primarily in later-term abortions. Dubbed “partial-birth abortion” by abortion foes, the term didn’t adhere to an exact medical procedure per se but was vague enough to potentially criminalize any kind of dilation and extraction (D&E) abortion, a type of procedure usually performed once the patient is sixteen weeks or beyond. In an additional affront to a woman’s right to choose, the bill also took a direct and determined swing at *Roe v. Wade* by not allowing an exception for the health of the mother. The reason, according to the state legislature, was that there is no such thing as a medically necessary abortion.

Carhart brought suit against Don Stenberg, the then Republican attorney general of Nebraska, challenging the partial-birth ban on several fronts, including the lack of a women’s health exception. Carhart argued that without such an exception, the law failed even the lowered “undue burden” standard for permissible abortion restrictions first articulated in a dissenting opinion by Justice Sandra Day O’Connor in *Akron v. Akron Center for Reproductive Health* and later adopted in *Planned Parenthood v. Casey*. Those cases ruled that states were allowed to put “reasonable” restrictions on pre-viability abortions as long as they did not place extreme hardship on women trying to obtain them.

Carhart’s challenge was successful in federal district court as well as in an appeal filed in the Eighth Circuit Court of Appeals. When the Supreme Court agreed to review the lower court decisions, it represented one of the first true tests of the *Casey* “undue burden” standard as well as an opportunity to survey the cultural shift in the high court away from viewing abortion access as a component of a woman’s liberty and toward protecting the liberty of potential fetal life.

Justice Stephen Breyer delivered the majority decision in *Stenberg v. Carhart*, striking down the Nebraska law, but it ultimately turned out not to be the victory pro-choice advocates had hoped for, as the decision established a legal standard that would later be leveraged by conservatives to chip away at women's ability to access abortion care. Citing *Casey*, Breyer wrote that any abortion law that imposed an "undue burden" on a woman's "right to choose" was unconstitutional and that, in this case, the Nebraska law failed because it caused those who sought or procured abortion to fear prosecution, conviction and imprisonment. Though it was not apparent at the time, the focus of the court's analysis had permanently shifted, as no longer would it first consider the individual liberty rights of a woman. Instead, it would assume a legitimate state interest in protecting fetal rights, then balance the woman's rights against that. Women had officially become a secondary consideration in the debate over abortion access.

Justices Ruth Bader Ginsberg and Sandra Day O'Connor each wrote concurring opinions. Ginsberg's concurrence stated unequivocally that the state could not force physicians to use procedures other than those they felt were safe based on their own judgment and training. Importantly, she tied this prohibition on state action to the individual "life and liberty" protection under the Constitution. It was an analytical framework Breyer had either accidentally or intentionally disregarded in his majority opinion. Justice O'Connor agreed with Ginsberg's concurrence and reinforced that any law that sought to regulate out of existence a particular medical procedure would have to be applied only to prevent unnecessary partial-birth abortions and would have to include an exception for the health of the woman. Since the Nebraska law did not, O'Connor said it could not stand.

Justice Anthony Kennedy wrote the court's dissenting opinion, arguing that the Nebraska ban was permitted under *Casey* and that the state had a legitimate interest in protecting prenatal life. Because the State of Nebraska had concluded that partial-

birth abortions were never medically necessary, Kennedy argued there could be no “undue burden” on a woman’s “right to choose” since she would never be in a position to “choose” this procedure in an emergency. The rest of the conservative wing of the court added predictably blistering dissents. Justice Antonin Scalia even referred back to his earlier dissent in the *Casey* ruling, calling the standard “unprincipled” in its origin and “doubtful” in its application. Scalia wrote that he believed not only this decision, but also *Casey*—and by implication *Roe*—should be overturned, suggesting that “undue burden” was so broad as to allow pro-choice activists to claim any regulation of abortion would be “burdensome,” making states unable to regulate abortion. It was an argument that turned both logic and decades of constitutional jurisprudence on their heads.

While the court ultimately struck down the Nebraska partial-birth ban by a five to four majority, the victory for pro-choice advocates would be short-lived. Over the next ten years, a more conservative Supreme Court, an entirely different Department of Justice and a repudiation of decades of legal precedent would reveal just how tenuous the basic protections of *Roe* had become.

In November 2003, President George W. Bush signed into law the federal Partial-Birth Abortion Ban Act, a copycat version of the law that had been struck down as unconstitutional in Nebraska three years earlier. It was challenged almost immediately by abortion rights advocates, including Planned Parenthood and LeRoy Carhart. Because of the near-identical nature of the two pieces of legislation, several lower courts, including the Eighth Circuit, found the Partial-Birth Abortion Ban Act unconstitutional, relying on the reasoning and the precedent established in *Stenberg*. When the Supreme Court agreed to review the case in 2006, it became clear it wanted to revisit *Stenberg*, if only to address the differences between states enacting specific abortion procedure bans and the federal government doing so. By this time, the court had become

more conservative than the one that had ruled on *Stenberg* just a few years prior, primarily because Justice O'Connor had retired and been replaced by abortion foe Samuel Alito. With this change in its makeup, the new court made clear that it wanted an opportunity to revisit abortion rights, and the Bush administration's top lawyer, Alberto Gonzalez, was going to make sure it had its chance.

Justice Kennedy wrote the majority opinion in *Gonzalez v. Carhart*, upholding the constitutionality of the partial-birth ban and ruling that Dr. Carhart and Planned Parenthood had failed to show that Congress lacked authority to outlaw this specific abortion procedure. Abortion had once again become an area of federal concern; despite the Supreme Court's increasing interest in limiting the power of the federal government, when it came to abortion, the conservative justices had no issue with Congress prohibiting specific medical procedures and dictating practices to doctors across the country. Furthermore, once again showing a willingness to defer to legislative assertions that D&E abortions were never needed to protect the health of a pregnant woman, Kennedy also held that a health exception was unnecessary—correcting what the anti-abortion wing of the court perceived as the greatest flaw in the *Stenberg* decision. The court also determined that Congress was entitled to regulate in an area where the medical community has not reached a “consensus,” thus granting anti-abortion foes an opening to drive the “evidence” behind legislation targeting reproductive health care and choice.

Most significantly of all, the court decided to “assume . . . for the purposes of this opinion” that the principles of *Roe v. Wade* and *Planned Parenthood v. Casey* governed. In other words, the majority signaled that *Roe* and *Casey* were in effect . . . for the moment. For court watchers everywhere, this was a visible and blatant nod to anti-abortion forces signaling that *Roe* could be overturned in its entirety by the court if the right case were brought before it. Justice Kennedy wrote that he believed the lower courts had wrongly decided a central premise of *Casey* in ruling that a

woman’s right to choose abortion superseded a state’s ability to place burdens on abortion in the interest of preserving fetal life. Since the federal ban fit that state interest, Kennedy wrote, it did not create an undue burden on a woman’s right to choose. Kennedy held that “ethical and moral concerns,” including an interest in fetal life, represented “substantial” state interests which could be a basis for legislation pertaining to all stages of pregnancy, not just after viability as posited in *Roe* and limited in *Casey*. This effectively erased the pre-viability/post-viability distinction and rendered meaningless any previous understanding of how an “undue burden” on a woman’s right to chose would be measured.

However, it was in its explanation of its abandonment of *Stenberg* that the conservative shift in the court became most apparent. The court held that the state statute at issue in *Stenberg* was more ambiguous than the later federal statute at issue in *Carhart*, despite the nearly identical language and findings supporting both laws. More strikingly, the majority avoided all previous abortion case precedent by not analyzing the federal ban under a “due process” standard. Instead, they simply stated that the court disagreed with the conclusion of the Eighth Circuit that the federal statute conflicted with due process considerations, without explaining how it arrived at this conclusion.

Justice Ruth Bader Ginsberg led the dissent, joined by Justices David Souter, John Paul Stevens and Stephen Breyer. She argued passionately that the ruling was an “alarming” one that ignored Supreme Court abortion precedent and “refuse[d] to take *Casey* and *Stenberg* seriously.” Referring in particular to the court’s holding in *Casey*, Ginsberg sought to reground the court’s abortion jurisprudence in its previous acceptance of women’s personal autonomy and equal citizenship rather than the more nebulous and shifting approach centering around privacy. “Thus,” she wrote, “legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman’s autonomy to determine

her life's course, and thus to enjoy equal citizenship stature." Due process cannot be ignored, according to Ginsberg, unless the court disregards women as full and equal citizens under the law.

Ginsberg also took issue with the lack of a health exception in the federal ban, writing that "the absence of a health exception burdens *all* women for whom it is relevant—women who, in the judgment of their doctors, require an intact D&E because other procedures would place their health at risk." In general, her dissent criticized the usurpation of medical decision making by legislators and the minimization of "the reasoned medical judgments of highly trained doctors . . . as 'preferences' motivated by 'mere convenience.'" While Justice Kennedy's majority opinion in *Carhart* did not explicitly overrule *Roe* or *Casey*, in her dissent, Ginsberg made it clear that it might as well have. "*Casey's* principles, confirming the continuing vitality of 'the essential holding of *Roe*,' are merely 'assume[d]' for the moment . . . rather than 'retained' or 'reaffirmed.'" Ginsberg concluded by criticizing the majority for abandoning the principle of *stare decisis*, by which the rules set forth in previous judicial decisions are adhered to, writing that "a decision so at odds with our jurisprudence should not have staying power." But staying power is exactly what the *Carhart* decision has had.

By 2010, emboldened by an explicitly sympathetic Supreme Court, with John Roberts having replaced William Rehnquist as chief justice (while he joined with the anti-abortion wing of the court, Rehnquist had not been a judicial conservative the caliber of Roberts), anti-abortion activists turned their attention to their next crusade: fetal pain. The Pain-Capable Unborn Child Protection Act, like many abortion restrictions, was created by pro-life activists and lawyers as a piece of model legislation that could be fed to friendly legislators to propose in local governments across the country—in particular, in conservative, abortion-restriction loving states in the Midwest and South.

Written by lawyers from the National Right to Life Committee, the Pain-Capable Unborn Child Protection Act was considered the next logical step in “fetal pain” legislation, building off a 2003 Minnesota law that mandated that abortion providers must offer women seeking abortions the following statement: “Some experts have concluded the unborn child feels physical pain after twenty weeks gestation. Other experts have concluded pain is felt later in gestational development. This issue may need further study.”³ Further study was in fact done, with a 2005 article in the *Journal of the American Medical Association* concluding that, after reviewing multiple studies, “evidence regarding the capacity for fetal pain is limited but indicates that fetal perception of pain is unlikely before the third trimester.”⁴ Despite this finding, at the end of January 2010 Nebraska speaker Mike Flood, one of the state’s most actively anti-abortion senators, introduced the Pain-Capable Unborn Child Protection Act, a bill Nebraska Right to Life called their “priority legislation for 2010.”⁵

A young senator who had quickly made a name for himself as a politician to watch, Flood was named to *Time* magazine’s “40 Under 40” list in 2010 as part of “a new generation of civic leaders . . . already at work trying to fix a broken system—and restore faith in the process.”⁶ Elected in 2004 from Norfolk, Nebraska, and becoming speaker just three years later, Flood claims he wrote the Pain-Capable bill not as a challenge to *Roe* but “to stop Dr. LeRoy Carhart of Bellevue from becoming the region’s main provider of late-term abortions.”⁷ Mary Spaulding Balch, the state legislative director for National Right to Life in Nebraska, was more blunt about the intentions of the bill. “I think National

*The Royal College of Obstetricians and Gynaecologists published their own study in June 2010 that confirmed it was “apparent that connections from the periphery to the cortex are not intact before 24 weeks of gestation and, as most neuroscientists believe that the cortex is necessary for pain perception, it can be concluded that the fetus cannot experience pain in any sense prior to this gestation.”

Right to Life wants to see something go to the Supreme Court that would provide more protection to the unborn child,” she told the *Omaha World Herald* in February 2010. “What I would like to bring to the attention of the court is, there is another line. This new knowledge is something the court has not looked at before and should look at.”⁸

Introduced on January 21, 2010, the Pain-Capable Unborn Child Protection Act was declared a priority bill on February 19, allowing it to fast track through the unicameral legislature. Senator Danielle Conrad, who became the face of opposition to the bill, filed numerous amendments to try to add exceptions for fetal anomaly and health of the mother, all of which were defeated. Only one change to the ban ultimately made it through—an allowance for abortion in the case that the procedure could save the life of another child in utero. This extremely narrow exception was created to address the testimony of Tiffany Campbell, a South Dakota woman who discovered late in her pregnancy that her fetuses suffered from a rare condition known as twin-to-twin transfusion syndrome. Fetuses with this syndrome are identical twins who, due to chromosomal issues, share a placenta with abnormal blood vessels that connect the umbilical cord and the shared circulatory system. It is a condition that in its most severe cases can kill both fetuses before birth. According to Campbell, one twin’s heart was doing the work for both, and the effort of driving blood through two bodies was weakening him to the point that both would die. As her husband, Chris, explained to NPR in 2009, “Brady’s heart was doing all the work. He was pumping all the blood, and he was starting to show the effects of the strain . . . and he was really at severe risk of cardiac arrest.”⁹

After meeting with several doctors, it was determined that the only option was to abort the second twin, allowing the first twin’s heart to do less work and keep Tiffany out of danger, too. “It was awful,” Tiffany told reporters. “How do you give up on one of your children? But we were forced to make a decision. We

don't regret our decision. We regret having to make that decision to choose one child over the other. We live . . . every single day with what we did. But then we look at Brady and say, 'Wow, he would not be here otherwise.'"¹⁰

After that experience, Campbell began testifying at anti-abortion hearings, explaining the real-life consequences of restrictions that don't take into account the medical condition of the fetus unless the mother carrying it is in imminent danger of losing her life. She spoke out first against South Dakota's proposed full abortion ban ballot initiative in 2008 and two years later at the Nebraska fetal pain hearing. "We could let nature run its course and pray miraculously by the grace of God that both our boys would survive or we could abort the sicker of the two and give one of our sons a fighting chance to survive. We decided to abort one of our sons at twenty-two weeks," she told the legislature during testimony on the bill.¹¹

While the exception allowed women in Campbell's situation to choose an abortion, it did not offer any such protection for those whose fetuses had other life-threatening complications. Women whose fetuses had severe birth defects, for example, would not have the same option under the Pain-Capable Unborn Child Protection Act, despite the low likelihood of the baby's survival after birth. There was no exception for fetuses with anencephaly, a neural tube disorder that causes a fetus to grow despite missing part or all of its brain, a condition that is incompatible with life even if the baby survives birth. There was also no exception for fetuses with trisomies, which create fatal defects of the heart that would force those fetuses that did survive outside the womb to live short, painful lives for the hours or days they would be on life support. There was no exception for fetuses with severe gastroschisis, a condition wherein a fetus's intestines grow outside the abdominal cavity and need to be surgically inserted back inside the abdomen via surgery after birth, even though the organs are sometimes so damaged that they cannot be repaired.

Most important, the law did not allow a medical exception for cases like that of Nebraska resident Dawn Mosher, whose fetus was diagnosed with the severest possible form of spina bifida, another neural tube disorder in which the spinal canal doesn't fuse closed.¹² Should her fetus have survived birth (Mosher had an abortion), the baby's short life would have been filled with the kind of suffering that Flood, his supporters and the National Right to Life movement claimed they created the bill to protect babies from feeling.

Although exceptions for nonviable fetuses were proposed during the hearings on the bill, Flood dismissed them all, saying that although he did not want to "hurt people" with his ban, all fetuses are humans who deserve to be born, whatever "disabilities" they had. "I also ask the question, why does a baby that's going to be born with a disability become a better candidate for an abortion? Does their disability make them less human? Are they less deserving of the state's protection?"¹³ Senator Conrad quickly rebuked the speaker: "We are not talking about engineering perfect pregnancies. We are talking about pregnancies incompatible with life."¹⁴

The testimony for the first fetal pain bill in the country set the stage for what would become the basic pattern in every other state that proposed legislation based on the same model. Anti-abortion medical experts would first present "evidence" that a fetus could feel pain by twenty weeks. In the Nebraska case, the expert witnesses were Dr. Jean Wright, chair of pediatrics at Mercer University School of Medicine, and Dr. Kanwaljeet (Sunny) Anand of Arkansas Children's Hospital Research Institute and the University of Arkansas College of Medicine. Dr. Wright had been a featured speaker at the Focus on the Family Conference of Medical Professionals and Spouses in 2008.¹⁵ A "traditional family values" organization launched in 1977 by Dr. James Dobson, Focus on the Family is against abortion in any form and even some types of contraception they claim are "abortifacient"—an

erroneous belief that said contraception can cause a fertilized egg not to implant in the womb. By 2010, Wright and Anand had become the go-to experts when it came to using fetal pain as a basis of passing anti-abortion laws. Both had testified in front of Congress to support the Partial-Birth Abortion Ban Act, using their experiences in dealing with micro preemies and surgery done in utero as a basis for their claims that a fetus can feel “extreme” pain by, at the latest, twenty weeks post-gestation. As evidence of their assertion, Wright and Anand referred to fetuses in utero “recoiling” from needles and to an increase in stress hormones that quantify fear and pain. However, most mainstream medical professionals consider these reactions to be involuntary reflexes that cannot be attributed to actual experience of pain since they can be seen in patients in vegetative states as well.¹⁶

National Right to Life’s Balch summarized this “expert” medical testimony to *LifeNews*. “By twenty weeks after fertilization, unborn children have pain receptors throughout their body, and nerves link these to the brain. These unborn children recoil from painful stimulation, which also dramatically increases their release of stress hormones. Doctors performing fetal surgery at and after twenty weeks now routinely use fetal anesthesia.”¹⁷ Wright and Anand’s testimony that pre-term babies in neonatal intensive care units often react to IVs and shots by crying or turning away was followed by a litany of rhetoric from supporters of the bill in the legislature. A few senators apologized that they could not eliminate abortion altogether but praised the bill as an excellent “first step.” One senator declared that people on both sides needed to stop using the “F word” (i.e., fetus) because it was “offensive and demeaning.” “He/she is an unborn child,” he said. “He is someone’s son. She is someone’s daughter. He is someone’s grandson. She is someone’s granddaughter.”¹⁸

The hearings grew even testier as senators began to debate the lack of a mental health exception to the bill. The omission was especially noticeable because Nebraska was concurrently debat-

ing and passing a bill that would mandate that abortion practitioners inform women that an abortion could be a mental health risk, and that a doctor must determine whether a woman was of “sound mental health” before allowing her to terminate a pregnancy. Senator Brenda Council of Omaha, an opponent of the fetal pain ban, pointed out the hypocrisy of lawmakers arguing in one bill that doctors were the sole decider of when a woman was mentally fit enough to receive an abortion, but in another bill have their decisions on a patient’s mental health rejected in favor of forcing a woman to carry her child to term. “I’m disturbed about the absolute blatant disregard of this legislature for the health and well-being of the mother,” Council stated during the hearing.¹⁹

After three rounds of hearings, the unicameral legislature overwhelmingly voted to enact the Pain-Capable Unborn Child Protection Act on April 13, 2010. Only five senators voted against it—including Council and Conrad. It was signed into law by Governor Dave Heineman later that day. Only one amendment made it through to final passage—a six-month moratorium on the bill to allow both sides to prepare for the lawsuit likely to follow. Most expected Dr. Carhart to challenge the bill both on its constitutional merits and on its obvious targeting of him as a provider. Carhart didn’t challenge. Instead, he began to practice at a new clinic in Germantown, Maryland, and considered the idea of performing later-term abortions in Council Bluffs, Iowa, just across the river from Omaha. The Iowa legislature responded to the news of his possible move by attempting to pass a ban on the opening of any new abortion clinics in the city of Council Bluffs. The bill eventually stalled out as the house fought to turn it into a full twenty-week fetal pain ban. However, by that point Carhart had given up on trying to open a clinic in the state.

In the weeks and months that followed, pro-choice activists and anti-abortion supporters waited for a challenge to the Nebraska fetal pain ban, assuming that someone somewhere

would have a case that would instigate it. None ever came. Instead, over the next two years, numerous states began proposing, and in some cases passing, their own versions of the law. Some, like Iowa and Arizona, strayed from the model legislation and based their bills not on twenty weeks post-fertilization but on twenty weeks LMP (last menstrual period), thereby moving the date of the ban prior to the point that many women will even have had a scan to see if there are genetic issues with their fetus. (Arizona’s ban passed²⁰; Iowa’s did not.²¹) In 2011, an Idaho woman named Jennie McCormack sued to challenge the state’s own twenty-week fetal pain ban, but the suit was dismissed for lack of standing, as her abortion had occurred before the law went into effect. She and her lawyer then launched another suit against that ban, as well as another ban on abortion in the state, which went to the Ninth Circuit for review. The following year, Arizona’s ban would be challenged by the Center for Reproductive Rights, which called it an unconstitutional ban on abortion prior to viability. The district judge disagreed, and that case also moved up to the Ninth Circuit, which put a temporary restraining order on the ban while it was being reviewed.

In the meantime, abortion opponents would have to look for a new type of law to challenge *Roe*, which they would do in Ohio, South Dakota, and Wisconsin.