No. 05-2417

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NORTHLAND FAMILY PLANNING CLINIC, INC., et al.,

Plaintiffs,

v.

MICHAEL A. COX, in his official capacity as the Attorney General of the State of Michigan, et al.,

Defendants,

and

STANDING TOGETHER TO OPPOSE PARTIAL-BIRTH-ABORTION,

Intervenor-Appellant.

On Appeal from the Eastern District of Michigan, No. 05-70779

BRIEF OF CERTAIN MICHIGAN SENATORS AND REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS AND REVERSAL OF THE EASTERN DISTRICT OF MICHIGAN

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STATEMENT OF INTEREST OF THE *AMICI CURIAE*

Amici Curiae, as Michigan Senators and Representatives, have a unique interest in the outcome of this case. In 2003, the Michigan Legislature initially passed Senate Bill 395, the "Legal Birth Definition Act" ("the Act"). While Governor Granholm vetoed the Act, the proper number of signatures of Michigan citizens was collected to bring the measure back before the Legislature. The measure was subsequently adopted by the Legislature on June 9, 2005, and was identical in form and substance to the Act initially passed by the Legislature and vetoed by the Governor.

Amici Senators James Barcia, Wayne Kuipers, Michelle McManus, and Dennis Olshove[1] and Representatives Leon Drolet, David Farhat, Robert Gosselin, Dave Hildenbrand, Jack Hoogendyk, Scott Hummel, Rick Jones, Jerry Kooiman, Gary McDowell, Brian Palmer, John Pastor, David Robertson,[2] Dudley Spade, John Stahl, Glenn Steil, Jr., Barbara VanderVeen, and Christopher Ward each support the Legal Birth Definition Act. These Senators and Representatives agree that the State has a compelling interest in protecting the lives of "legally born persons," as defined under the Act. *Amici* also affirm the rights of the State—as

[1] Senator McManus was the primary sponsor of Senate Bill 395. Senators Barcia, Kuipers, and Olshove were among the many co-sponsors.

[2] Representative Robertson was the sponsor in the Michigan House of Representatives. That bill was House Bill 4603.

well as of the individual citizens of the State—to pass laws aimed at protecting human life. Consequently, *Amici* file this brief on behalf of Defendants, urging this Court to reverse the judgment of the Eastern District of Michigan.

According to Fed. R. App. P. 29, Counsel for *Amici* has contacted the parties and has obtained consent to file this brief.

SUMMARY OF THE ARGUMENT

Michigan's Legal Birth Definition Act falls within the parameters set by the United States Supreme Court in *Roe v. Wade*. First, the Supreme Court has never defined, nor has it precluded the states from defining, the phrase "legally born person." Instead, the Court's abortion jurisprudence focuses exclusively on a woman's "right" to terminate her pregnancy. In fact, even under *Roe*, a child in the birth process should be afforded rights under the Fourteenth Amendment. As such, Michigan was not acting outside of the Supreme Court's guidance when it enacted the Legal Birth Definition Act.

This conclusion is fully supported by established medical science, which affirms that the killing of a child in the process of birth is not an abortion. Abortion is the termination of pregnancy, but because pregnancy is already terminated once birth has begun, killing a child in the process of birth cannot be considered anything other than homicide. As such, the Act does not regulate "abortion," as that term is legally and medically understood.

Furthermore, because the Act does not regulate abortion, rational basis analysis applies. Under this analysis, the Act is neither irrational nor are the State's interests hypothetical. As such, the Act should be upheld, and the decision of the Eastern District of Michigan should be reversed.

ARGUMENT

I. THE LEGAL BIRTH DEFINITION ACT FALLS SQUARELY IN LINE WITH *ROE V. WADE* AND DOES NOT EVEN REGULATE "ABORTION," AS THAT TERM IS MEDICALLY UNDERSTOOD

A. The Supreme Court has not defined nor precluded the States from defining the phrase "legally born person"

The U.S. Supreme Court has consistently formulated the abortion liberty as a woman's right to "terminate her pregnancy." For example, in *Roe v. Wade*, the U.S. Supreme Court stated: "This right of privacy . . . is broad enough to encompass a woman's decision whether or not to **terminate her pregnancy.**" 410 U.S. 113, 153 (1973) (emphasis added). Similarly, in *Planned Parenthood v. Casey*, the U.S. Supreme Court stated, "[f]rom what we have said so far it follows that it is a constitutional liberty of the woman to have some freedom to **terminate her pregnancy."** 505 U.S. 833, 869 (1992) (emphasis added).[3] In *Stenberg v.*

[3] In *Casey*, the U.S. Supreme Court repeatedly articulated the abortion liberty as a "woman's right to **terminate her pregnancy**":

"Yet 19 years after our holding that the Constitution protects **a woman's right to terminate her pregnancy** in its early stages, that definition of liberty is still questioned." *Casey*, 505 U.S. at 844 (internal citation omitted). "Constitutional protection of **the woman's decision to terminate her pregnancy** derives from the Due Process Clause of the Fourteenth Amendment." *Id.* at 846. "The extent to which the legislatures of the States might act to outweigh the interests of the woman in choosing to **terminate her pregnancy** was a subject of debate both in *Roe* itself and in decisions following it." *Id.* at 853. "We conclude that the basic decision in *Roe* was based on a constitutional analysis which we cannot now repudiate. The woman's liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in

Carhart, the Supreme Court affirmed the following three principles: 1) before "viability … the woman has a right to **choose to terminate her pregnancy**"; 2) "a law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal liability" is unconstitutional; and 3) "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or

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fetal development the State's interest in life has sufficient force so that **the right of the woman to terminate the pregnancy** can be restricted." *Id.* at 869. "We conclude the line should be drawn at viability, so that before that time the woman has a right to **choose to terminate her pregnancy**." *Id.* at 870. "The woman's right to **terminate her pregnancy** before viability is the most central principle of *Roe v. Wade*." *Id.* at 871. "Though **the woman has a right to choose to terminate** or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed." *Id.* at 872. "*Roe* did not declare an unqualified 'constitutional right to an abortion,' as the District Court seemed to think. Rather, the right protects the woman from unduly burdensome interference with **her freedom to decide whether to terminate her pregnancy**." *Id.* at 874 (quoting *Maher v. Roe*, 432 U.S. 464, 473-74 (1977)). "All abortion regulations interfere to some degree with a **woman's ability to decide whether to terminate her pregnancy**." *Id.* at 875. "Not all burdens on the right to decide whether **to terminate a pregnancy** will be undue." *Id.* at 876. "Our adoption of the undue burden analysis does not disturb the central holding of *Roe v. Wade*, and we reaffirm that holding. Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision **to terminate her pregnancy** before viability." *Id.* at 879. "Whether the mandatory 24-hour waiting period is nonetheless invalid because in practice it is a substantial obstacle to **a woman's choice to terminate her pregnancy** is a closer question." *Id.* at 885. "Rather, the right protected by *Roe* is a **right to decide to terminate a pregnancy** free of undue interference by the State." *Id.* at 887 (emphasis added to all quotations).

health of the mother." 530 U.S. 914, 921 (2000) (quoting *Casey*, 505 U.S. at 870, 877, 879) (emphasis added). Thus, even as recently as *Stenberg*, a woman's "right" to an abortion was framed as her "right to choose to terminate her pregnancy."

On the other hand, the Supreme Court has never defined the term "born," nor has it precluded the states from doing so. *See generally*, *Roe*, 410 U.S. 113. In *Roe*, the state of Texas and supporting *amici* argued that a "fetus" is a "person" within the language and meaning of the Fourteenth Amendment.[4] *Id*. at 156. The Court acknowledged that if that definition prevailed, those challenging the Texas abortion statute would lose, as the right to life of the "fetus" would be specifically guaranteed by that Amendment. *Id*. at 156-57.

The Court, however, concluded that the Fourteenth Amendment's definition of "person" did not include a "*fetus*." *Id*. at 157 (emphasis added). In providing examples of the Amendment's context, the Court first stated, "[i]n defining 'citizens,' [the Fourteenth Amendment] speaks of 'persons *born* or naturalized in the United States.'" *Id*. (emphasis added). In drawing from this context, the Court in *Roe* automatically placed a distinction between a fetus and a "born" person. The Court ruled that the term "person" does not include the "unborn"; it did not conclude that the states cannot define the term "born." Later, the Court again

[4] U.S. CONST. amend. XIV.

stated that "the *unborn* have never been recognized in the law as persons in the whole sense." *Id*. at 162 (emphasis added). The Court did not define "born" nor did it preclude the states from recognizing the born or those in the process of being born as persons.

The Court also indicated that use of the word "person" in the Constitution does not apply "pre-natal[ly]." *Id*. at 157. However, the "prenatal" stage is medically defined as "preceding birth."[5] STEDMAN'S MEDICAL DICTIONARY 1134 (24th ed. 1982); *see also* TABER'S CYCLOPEDIC MEDICAL DICTIONARY 1475 (16th ed. 1989) (defining "prenatal" as "[b]efore birth").[6] Birth, in turn, is defined as "the act of being born" and the "passage of a child from the uterus." TABER'S CYCLOPEDIC MEDICAL DICTIONARY 223 (18th ed. 1997); TABER'S at 214 (16th ed.). In other words, the birth stage starts when the living child begins exiting the womb into the birth canal. *See infra* Part I.B. Thus, the Supreme Court in *Roe* ruled that a child is not a "person" if it has not yet begun exiting the womb into the birth canal. The Court did not preclude a child in the birth process from being

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[5] In *Roe,* the U.S. Supreme Court's understanding of abortion was informed by medical definitions. *See, e.g*., *Roe*, 410 U.S. at 159 ("[the pregnant woman] carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus") (citing DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 478-79, 547 (24th ed. 1965)).

[6] TABER'S also defines "prenatal diagnosis" as a diagnosis that occurs "*in utero*." TABER'S at 1475 (16th ed.) (emphasis added).

considered a "person" under the Fourteenth Amendment. Instead, a child that has begun the process of birth is no longer "prenatal," and as such should be afforded Fourteenth Amendment rights.

This conclusion is supported by the 1972 reargument of *Roe*, in which the U.S. Supreme Court discussed whether the term "abortion" encompassed killing a child during the process of birth. The following exchange between Justice Marshall and counsel for the State of Texas occurred in the context of a discussion about the Texas parturition statute, which had not been challenged as unconstitutional:

> ***
>
> **JUSTICE MARSHALL:** What does that [parturition] statute mean?
>
> **MR. FLOWERS:** Sir?
>
> **JUSTICE MARSHALL:** What does it mean?
>
> **MR. FLOWERS:** I would think that --
>
> **JUSTICE STEWART:** That it is an offense to kill a child **in the process of childbirth**?
>
> **MR. FLOWERS:** Yes sir. It would be immediately before childbirth, or right in the proximity of the child being born.
>
> **JUSTICE MARSHALL: Which is not an abortion.**
>
> **MR. FLOWERS:** Which is not -- would not be an abortion, yes, sir. You're correct, sir. It would be homicide.
>
> ***

Reargument of Roe v. Wade, Oct. 11, 1972 (emphasis added).[7]

This exchange followed Flowers' comment that the plaintiffs had attacked Texas' abortion statutes, found at Articles 1191 through 1196, with the exception of Article 1195. Flowers then quoted the entirety of the *unchallenged* Article 1195, which provided:

> Whoever shall during parturition of the mother destroy the vitality **or** life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life **or** for not less than five years.[8]

The U.S. Supreme Court's decision in *Roe* acknowledged that Texas' parturition statute was "not attacked." *Roe*, 410 U.S. at 117, 117 n.1.[9]

B. The fact that killing a child in the process of birth "is not an abortion" is fully supported by established medical science

The development of a human being takes place in two stages. The first stage is pregnancy, which begins at conception and ends when the living child is

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[7] The entire written transcript of the October 11, 1972 reargument, along with a link that plays the audio tape, is available at http://www.oyez.org/oyez/resource/case/334/resources.

[8] This provision is currently codified at TEX. REV. CIV. STAT. ANN. art. 4512.5 (emphasis in the original).

[9] In 1974, a Texas Attorney General opinion echoed Justice Marshall, concluding that Article 1195 is "unaffected" by *Roe* because the element requiring that the child "be **in a state of being born**" means that the article **"is not, in truth, an abortion statute."** Tex. Op. Att'y Gen. No. H-369 (Aug. 13, 1974) (emphasis added).

delivered or removed from the uterus into the birth canal. *See* TABER'S at 1543, 2046 (18th ed.) (defining "pregnancy" as the "condition of carrying an embryo [or fetus] in the uterus" and defining "uterus" as "[a] reproductive organ for containing and nourishing the embryo and fetus . . . to the time the fetus is born"). As such, the "pregnancy" stage is confined to the development of the child while *in the uterus* of his or her mother.

The stage after pregnancy is birth, followed by the entire process of postnatal growth through adulthood and old age. The birth stage starts when the living child begins to exit the womb into the birth canal.[10] *See* TABER'S at 223 (18th ed.) (defining *birth* as the "passage of a child from the uterus"); *see also* DORLAND'S at 202 (28th ed.) (defining "birth" as "the act or process of being born" and "complete birth" as "the complete separation of the infant from the maternal body (after cutting of the umbilical cord)").

As a matter of medical fact, pregnancy is terminated and the process of birth has begun once the membranes of the amniotic sac are ruptured and the living fetus emerges from the uterus, beyond the cervical os and into the vaginal (birth) canal. *See Declaration of Jack A. Andonie, M.D.*, ¶¶ 8-10 ("Andonie Decl.") (Appendix

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[10] The terms "womb" and "uterus" are interchangeable. *See* DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1846 (28th ed. 1994) (defining "womb" as "the uterus").

A); *Declaration of Raymond Gasser*, Ph.D., ¶¶ 10-11 ("Gasser Decl.") (Appendix B). [11] Thus, there is a significant medical distinction between the locus where intrauterine fetal stasis is maintained (*i.e.*, pregnancy), and the dynamic process of birth. Pregnancy has never occurred or been maintained in the vaginal canal.[12] The delivery of the child into the birth canal means that the complete birth of the child is inevitable.

In the medical vernacular, the onset of the birth process is one method of terminating a pregnancy, while induced abortion is another.[13] Medically, then, it is an oxymoron to speak in terms of "aborting" a living fetus that is partially vaginally delivered. This is so because induced abortion is any procedure that causes fetal death in utero, thereby causing "the premature expulsion from the uterus of the products of conception."[14] In other words, there is no such thing as a

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[11] The Declarations of Dr. Andonie and Dr. Gasser are part of the official record in *Causeway Med. Suite v. Foster*, 43 F. Supp. 2d 604 (E.D. La. 1999), *aff'd*, 221 F.3d 811 (5th Cir. 2000), a federal case concerning the constitutionality of Louisiana's ban on partial birth abortion. *See* LA. REV. STAT. § 14:32:9. These basic and unquestionable medical facts, to which Louisiana's medical experts testified, were uncontroverted.

[12] *Andonie Decl.* at ¶ 10; *Gasser Decl.* at ¶ 11.

[13] *Andonie Decl.* at ¶ 6.

[14] *Andonie Decl.* at ¶¶ 6-7; DORLAND'S at 4-5 (28th ed.). Actually, the phrase "fetal death in utero" is a tautology because "fetal death" means "death in utero." DORLAND'S at 430 (28th ed.).

"vaginal abortion." That non-medical term is simply a euphemism for the criminal termination of the life of a child after the pregnancy has already been terminated by the onset of the process of birth.

C. The Legal Birth Definition Act does not regulate "abortion"

Based upon the foregoing discussion, it is clear that the Legal Birth Definition Act does not regulate "abortion." First, it does not at all concern the "termination of pregnancy," which is the only right discussed in *Roe*, *Casey*, and *Stenberg*. In addition, the Act itself does not prescribe any form of abortion.[15] Instead, the Act states that a "perinate" is a "legally born person" and defines a "perinate" as a "live human being at any point after which any anatomical part of the human being is known to have passed beyond the plane of the vaginal introitus until the point of complete expulsion or extraction from the mother's body."[16]

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[15] The Act states that "[n]othing in this act shall abrogate any existing right, privilege, or protection under criminal or civil law that applies to an embryo or fetus." MICH. COMP. LAWS § 333.1084.

[16] The "vaginal introitus" is the entrance into the vagina; therefore, under the Act a child is considered a "perinate" once a portion of its body passes through the entrance of the vagina. *See* STEDMAN'S at 721. A human being is "live" if it demonstrates 1) a detectable heartbeat; 2) evidence of breathing; 3) evidence of spontaneous movement; or 4) umbilical cord pulsation. MICH. COMP. LAWS § 333.1085(c). Persons are *immune* from liability under the Act if the perinate is expelled as a result of a spontaneous abortion; if the perinate dies in an effort to save the life of the mother, and every reasonable effort was made to preserve the life of both mother and perinate; and the perinate dies in an effort to avert an imminent threat to the physical health of the mother, and any harm to the perinate

MICH. COMP. LAWS §§ 333.1083(a) and 333.1085(d).

In effect, then, the killing of a perinate is prescribed because the perinate is a person with constitutional rights. Yet even given this effect, the Legal Birth Definition Act does not regulate "abortion," as medical science establishes that *pregnancy* is terminated by the onset of the birth process. In *Roe*, the U.S. Supreme Court did not "resolve the difficult question of when life begins," because "the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." *Roe*, 410 U.S. at 159. Here, by contrast, there is no need to speculate about when birth begins or when a child is "born." There is no raging debate or lack of consensus about the process of birth among "those trained in the respective disciplines of medicine, philosophy, and theology." *Id.*

Therefore, in enacting the Legal Birth Definition Act, the people of Michigan were not regulating abortion at all, as the term "abortion" is *legally* and *medically* understood. Rather, the Act in effect proscribes the killing of a child after that child has been "born." The Act thereby gives effect to the medical

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was incidental to treating the mother and not a known or intended result. *Id*. at § 333.1083(2).

distinction between pregnancy and birth.[17] Once the child has moved from the pregnancy stage to the birth stage, a woman's "right" to "terminate her pregnancy" is not implicated because there is no longer a pregnancy to terminate. After commencement of the birth process, intentionally ending the life of a child in the birth process is not an abortion at all, but rather the unlawful killing of a human being. Even under *Roe*, states have a compelling interest in protecting against the killing of "born" human beings.

II. BECAUSE THE ACT DOES NOT REGULATE ABORTION, RATIONAL BASIS ANALYSIS APPLIES

The Legal Birth Definition Act defines when a person is "legally born" and thereby regulates the process of birth. Because the Act simply defines when a child is "born" and because medical science establishes that pregnancy is terminated by the onset of the birth process, the Act does not regulate "abortion," as that term is understood both medically and legally. As such, the subjective medical judgment of an individual abortion provider must give way to the State's regulation as long as the State has a rational basis. Here, the Act is rationally related to the legitimate interest in protecting the lives of legally born persons.

The U.S. Supreme Court's decision in *Washington v. Glucksberg* is instructive on this point. 521 U.S. 702 (1997). In *Glucksberg*, the Court held that

[17] The process of birth is also referred to as "parturition," as it was used in *Roe*. *Roe*, 410 U.S. at 117 n.1.

a state has the right to proscribe, not merely regulate, physician-assisted suicide notwithstanding a physician's best medical judgment that assisted suicide is the best and most appropriate way to relieve a patient's pain or terminal illness. *Id.* at 734-35. The State of Washington argued that "permitting assisted suicide will start it down the path to voluntary and perhaps involuntary euthanasia." *Id.* at 732. The Court agreed: "Washington's ban on assisting suicide prevents such erosion." *Id.* at 733. Because no fundamental right was implicated, a rational basis analysis was applied to reach the conclusion that "Washington's ban on assisted suicide is at least reasonably related to [its] promotion and protection" against abuses that could lead to the involuntary euthanasia of vulnerable neonates or elderly adults. *Id.* at 735. Likewise, the "fundamental right" to abortion is not implicated under the Act, and as such rational basis analysis applies.

Furthermore, because the Act does not regulate abortion, the abortion-related concept of viability is irrelevant. *Amici* recognize the principle outlined in *Casey* that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion." *Casey*, 505 U.S. at 846. However, viability is a variable in the equation the U.S. Supreme Court developed to determine the strength of a state's interest in protecting an unborn child, as weighed against the right of the woman to choose to *terminate* her pregnancy. The issue of whether the State may

protect the life of the unborn child necessarily arises prior to the time that the pregnancy has been terminated, *i.e.*, while the fetus is gestating in the womb. Thus, the pregnancy stage provides the only occasion where the decision of whether or not to permit the killing of a human being is dependent on his or her viability.

When the child has been delivered from the uterus into the vaginal canal, the woman is no longer "pregnant." Thus, abortion jurisprudence regarding viability does not provide the proper analytical framework to assess an asserted right to kill a child after the pregnancy has been terminated by the onset of the birth process. A state's authority to ban killing during the birth process should not, therefore, depend on whether the partially born child's gestational age is nine months or five months;[18] whether the birth has begun naturally or has been artificially induced; or whether the child is "viable" or "nonviable." [19]

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[18] "Birth" is defined as occurring "irrespective of gestational age." STEDMAN'S at 173. *See also Nat'l Abortion Fed'n v. Gonzales*, 2006 U.S. App. LEXIS 2386, *96 n.14 (2nd Cir. Jan. 31, 2006) (Straub, J., dissenting) ("Once a fetus is born, its viability ceases to be relevant to determining the constitutional protections to which it is entitled.").

[19] The U.S. Supreme Court has stated that, in the context of abortion, the issue of maternal "health" can override a state's interest. *See, e.g., Doe v. Bolton*, 410 U.S. 179, 192 (1973). Here, where the State is defining the term "born," the issue of maternal health, absent a risk to the mother's life, also does not override the State's interest.

To expand the concept of viability to the definition of "legally born" would transform the right to terminate a pregnancy into a new constitutional right to kill a child even after pregnancy is terminated and birth has begun. Application of abortion principles to statutes regulating birth would thus erode the barrier between abortion and infanticide.

III. THE LEGAL BIRTH DEFINITION ACT SURVIVES RATIONAL BASIS ANALYSIS

In Section 2 of the Legal Birth Definition Act, the following findings are listed:

> (a) That in *Roe v. Wade* the United States Supreme Court declared that an unborn child is not a person as understood and protected by the constitution, but any born child is a legal person with full constitutional and legal rights.
>
> (b) That in *Roe v. Wade* the United States Supreme Court made no effort to define birth or place any restrictions on the states in defining when a human being is considered born for legal purposes.
>
> (c) That, when any portion of a human being has been vaginally delivered outside his or her mother's body, that portion of the body can only be described as born and the state has a rational basis for defining that human being as born and as a legal person.
>
> (d) That the state has a compelling interest in protecting the life of a born person.

MICH. COMP. LAWS § 333.1082. Based upon these findings, the State declares that a "perinate" is a "legally born person for all purposes under the law." *Id*. at § 333.1083.

Each of the State's findings is fully supported by the Court's decision in *Roe* and by medical evidence, as discussed above. *See supra* Part I. Furthermore, the State's compelling interest in protecting the life of a born person translates into an interest in protecting against the slide from abortion to infanticide.[20] Under rational basis analysis, the State's interest in protecting and defining "legally born persons" is not irrational, and its related interest in preventing the slide toward infanticide is not hypothetical.

A. The State's interest in protecting "legally born persons" and its definition of "perinate" are not irrational

The State's concern with protecting the lives of born persons and in avoiding the slippery slope to infanticide is not irrational. First, the State's definition of "perinate" is not irrational; it is actually supported by the Supreme Court's evaluation of the term "person" under the Fourteenth Amendment. *See supra* Part I.A. In *Roe*, the Court determined that a "pre-natal" fetus is not a person under the Fourteenth Amendment. However, the Act does not define "perinate" to include prenatal fetuses, as that term is medically understood. Instead, the Act defines

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[20] The term "infanticide" is defined as:

> The murder or killing of an infant soon after its birth. The fact of the birth distinguishes this act from 'feticide' or 'procuring abortion,' which terms denote the destruction of the fetus **inside the womb**.

BLACK'S LAW DICTIONARY 699 (5th ed. 1979) (emphasis added).

"perinate" to include a child that has already begun passing from the mother's uterus. That child is no longer a "prenatal" fetus. As such, the State is free to consider that child a "person" under the Fourteenth Amendment.

Moreover, the Court has never precluded the states from defining the phrase "legally born." It is not irrational to conclude that any portion of a child that has been delivered from the mother's uterus is "born." In fact, just the opposite is true: it is irrational to conclude that a hand, an arm, or a leg that has been delivered outside of the mother's body is in any way "fetal." Equally irrational is to term anything that is not "prenatal" as "fetal."

In the recent *National Abortion Federation v. Gonzales* decision, Circuit Judge Straub demonstrated his understanding and support of this interpretation under *Roe*. In his dissent, he stated:

> Once a fetus is "born," i.e. crosses the threshold between its mother's womb and the outside world, it is a "person" and entitled to all constitutional protections. Although under *Roe*, a fetus *in utero* is not a "person" entitled to the protections afforded by the *Fourteenth Amendment*, when the fetus leaves the body of its mother, it may not be "deprived … of life … without due process of law." At this point, the mother's right to privacy, autonomy, and bodily integrity are waning in importance, and the fetus's increases in strength. Just as viability is the point during the gestation of the fetus when the interest of the State in potential life become paramount, birth is the point during gestation when the State's "unqualified interest in the preservation of human life," and the child's right to life have sufficient force to restrict the privacy and autonomy rights of a woman.

Nat'l Abortion Fed'n, 2006 U.S. App. LEXIS 2386 at **95-96 (Straub, J., dissenting) (emphasis in the original) (internal citations omitted).

In addition, Michigan's definition of "born" is justified by the comments of Justice Marshall during the reargument of *Roe*. Moreover, the Act falls squarely in line with the Texas parturition statute that was not challenged as nor ever determined unconstitutional. That statute prohibits anyone from killing a child "*in a state of being born and before actual birth*." Justice Marshall acknowledged that such an act would not be an abortion. The Legal Birth Definition Act goes no farther and is no more restrictive than this constitutional parturition statute. The Act simply, and only in effect, proscribes the killing of a "legally born" person.

Medically speaking, the Act does not even go as far as it could. Because pregnancy is terminated when the birth process begins, even under *Roe* the State could have regulated abortion as soon as a portion of the child's body begins exiting the womb. *See supra* Part I.B. The Act does not go this far, however, but simply defines a child as "legally born" once a portion of the child passes the vaginal introitus.

B. Concern over the slide to infanticide is not hypothetical

Concern in preventing infanticide is not hypothetical because serious proposals for the legalization of infanticide have been championed by prominent academicians. For example, Professor Peter Singer, who holds an endowed chair

at Princeton University, justifies infanticide based on his position that "[i]f the fetus does not have the same claim to life as a person, it appears that the newborn baby does not either, and the life of a newborn baby is of less value to it than the life of a pig, a dog, or a chimpanzee is to the nonhuman animal." PETER SINGER, PRACTICAL ETHICS 169 (2nd ed. 1997). The following passage illustrates Singer's reasoning:

> [T]he fact that a being is a human being, in the sense of a member of the species Homo sapiens, is not relevant to the wrongness of killing it; it is, rather, characteristics like rationality, autonomy, and self-consciousness that make a difference. Infants lack these characteristics. Killing them, therefore, cannot be equated with killing normal human beings, or any other self-conscious beings. This conclusion is not limited to infants who, because of irreversible intellectual disabilities, will never be rational, self-conscious beings…. No infant—disabled or not—has as strong a claim to life as beings capable of seeing themselves as distinct entities, existing over time.

Id. at 182.

In *Glucksberg*, the U.S. Supreme Court recognized the "reasonableness of the widely expressed skepticism about the lack of a principled basis for confining the right [to assisted suicide]." *Glucksberg*, 521 U.S. at 733 n.23 (citing Brief for United States as *Amicus Curiae* at 26 ("Once a legislature abandons a categorical prohibition against physician assisted suicide, there is no obvious stopping point.")); *see also id*. at 785 (Souter, J., concurring) ("[t]he case for the slippery slope is fairly made out here . . .because there is a plausible case that the right

claimed would not be readily containable"). Just as Washington's ban on assisted suicide is reasonable because there is no principled basis for confining that "right," so Michigan's definition of "perinate" and effective ban on killing a "legally born person" is reasonable because there would be no principled basis for confining that "right," either.

For example, if a doctor may kill a child whose body has been intentionally delivered into the birth canal except for the head, why may he not also kill a child who has been partially delivered head first? And if he may kill a child who has been partially delivered head first, why may he not kill the child whose entire body is outside of the mother except for one of the child's feet which he holds in the birth canal? And if he may kill a child whose foot or little toe is held in the birth canal, why, then, may the doctor not kill the child who is completely expelled from the mother's body, but still attached to the umbilical cord?

For each of these reasons, the Act's definition of "perinate" as a "legally born person" is not irrational nor is the State's prevention of the slide toward infanticide hypothetical. Even under *Roe*, states have authority to define the term "born" and have compelling interests in protecting "legally born" humans. Therefore, the Legal Birth Definition Act should be upheld and the decision of the district court must be reversed.

CONCLUSION

The decision of the Eastern District of Michigan should be reversed.

Respectfully Submitted,

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February 24, 2006

CERTIFICATE OF COMPLIANCE

Counsel for *Amici Curiae* hereby certifies that the foregoing Brief of *Amici Curiae* complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,569 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirement of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font, Times New Roman font style.

Mailee R. Smith
Counsel for Amici Curiae

No. 05-2417

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NORTHLAND FAMILY PLANNING CLINIC, INC., et al.,

Plaintiffs,

v.

MICHAEL A. COX, in his official capacity as the Attorney General of the State of Michigan, et al.,

Defendants,

and

STANDING TOGETHER TO OPPOSE PARTIAL-BIRTH-ABORTION,

Intervenor-Appellant.

On Appeal from the Eastern District of Michigan, No. 05-70779

APPENDICES

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

CAUSEWAY MEDICAL SUITE, et al.,

PLAINTIFFS **Civil Action**

v.

No. 97-2211

MURPHY J. FOSTER, JR., Governor
For the State of Louisiana, et al.,

DEFENDANTS.

DECLARATION OF JACK A. ANDONIE, M.D.

I, Jack A. Andonie, M.D., declare under the penalty for perjury that the following is true:

1. I am a Clinical Professor in the Department of Obstetrics and Gynecology at LSU Medical School. I am board-certified in obstetrics/gynecology and I am the Founder of Lakeside Women's Specialty Center, Ltd. in Metairie, Louisiana. I received my Medical Degree from LSU Medical School in 1962. I serve as Medical Director at Lakeside Hospital and serve on the current board of the LSU Board of Supervisors. I teach and practice obstetrics-gynecology. I am a licensed medical doctor in the state of Louisiana. A more complete statement of my credentials and training are provided in my attached curriculum vitae. *See Attachment A.*

2. During the course of my thirty-six year medical career in obstetric/gynecology, I have examined and/or treated approximately twenty thousand

women and delivered approximately ten thousand babies. I am a medical expert in the areas of pregnancy, the process of birth, and birth. It is based upon my years of experience as a physician specializing in obstetrics and gynecology, my education, training, and the ongoing study of the relevant medical literature and statistical data normally relied upon by doctors of obstetrics and gynecology in their practices that I offer the following expert opinions.

3. Pursuant to a request by representatives of the Office of the Attorney General for the State of Louisiana, I have reviewed Act 906 of the 1997 Regular Session of the Louisiana Legislature ("the Act"), which creates "the crime of partial-birth abortion." La. R.S. 14:32.9(D). I have been asked to review the Act and offer my expert medical opinion on what the Act proscribes and whether or not a reasonable physician, upon reading the Act, will be sufficiently apprized of what is and what is not permitted under the Act.

4. The Act, with certain detailed exceptions (e.g., the life of the mother), proscribes what it refers to as "partial-birth abortion." The Act defines "partial-birth abortion" as

> the performance of a procedure on a female by a licensed physician or any other person whereby a living fetus or infant is partially delivered or removed from the female's uterus by vaginal means and with specific intent to kill or do great bodily harm is then killed prior to complete delivery or removal. La. R.S. 14:32.9(A)(1).

5. The plain language of the Act proscribes any procedure that is intended to kill an infant in the process of being born. By its very terms, then, the Act does not include within its proscription any abortion procedure.

6. Induced abortion is one method of terminating a pregnancy, the onset of the birth process is another.

7. Induced abortion is any procedure which causes fetal death *in utero*, thereby causing "the premature expulsion *from the uterus* of the products of conception." *Dorland's Illustrated Medical Dictionary* 4-5 (28th edition 1994) (Dorland's).

8. The process of birth begins, and complete birth is inevitable, once the membranes of the amniotic sac are ruptured, and the infant begins its emergence from the uterus through the cervical os (opening of the uterus) and into the vaginal canal.

9. The delivery or removal of any part of a living fetus from the uterus, beyond the cervical os, and into the vaginal canal after the membranes of the amniotic sac have been ruptured is a significant medical event X an event that is acknowledged under the Act. It is medically significant because pregnancy has ended and the process of birth has begun.

10. Pregnancy describes the locus where intrauterine fetal stasis is maintained. Pregnancy has never occurred or been maintained in the vaginal canal.

11. Because it is a medical fact that pregnancy is over (terminated) once the process of birth has begun, the Act's plain language regulates the birth process, not any abortion procedure. This is made plain because the Act proscribes the intentional killing of a living fetus or infant who has been *partially delivered or removed from the female's uterus by vaginal means*. In medical terms, the Act does not prohibit those procedures undertaken to terminate *pregnancy,* because the Act's terms address specific intent to kill a living fetus or infant *after* the pregnancy has already been terminated.

12. Where the Act describes a "living fetus or infant [that] is partially delivered or removed from the female's uterus by vaginal means" it has, thereby, given effect to the medical distinction between (1) the locale where intrauterine fetal stasis is maintained (i.e., pregnancy) and (2) the dynamic irreversible process of birth. "Birth" is a process, not a single event. The birth process *begins* when the membranes of the amniotic sac are ruptured and the fetus emerges beyond the cervix into the vaginal canal, and *ends* with the complete separation from the mother.

13. By its own terms, then, the Act clearly regulates the process of birth which begins when the living fetus begins to exit the womb as described above. (The terms womb and uterus are synonymous. Dorland's at 1846 ("womb" is defined as "the uterus")).

14. The Act's plain language proscribes only those procedures wherein a living fetus (infant) is partially delivered or removed into the vaginal canal itself. A fetus or fetal part suctioned out through an enclosed vacuum tube running through the vagina would not, in medical terminology, be characterized as a fetus who is "partially delivered or removed from the female's uterus by vaginal means."

15. There is no question that the Act *does not* proscribe the destruction of a fetus *in utero*, i.e. abortion, because by its very terms the Act proscribes only those procedures designed to kill an infant that has been partially delivered out of the uterus at which point pregnancy has ended, the process of birth has begun, and abortion is no longer a medical possibility.

16. Though the term "partial-birth abortion" is not a medical term, it is descriptive of a medical procedure(s), as defined by the Act, that is practiced by some abortion doctors who refer to the procedure by various terms including "D&X," "intact dilation and extraction," "intact dilation and evacuation," "intact D&E," and "intact D&X."

17. Plaintiffs' own description of the "D&X procedure" would clearly qualify as a procedure prohibited by the plain terms of the Act:

> The intact D&E, "D&X," or "intact D&X" procedure is a variant of the traditional D&E procedure. . . . [T]he cervix is gradually dilated and the fetus is removed intact. . . . [T]he physician then creates a small opening at the base of the skull and evacuates some of the contents, allowing the calvarium [now emptied skull] to pass through the cervical opening. Alternatively, once the fetus is partially extracted, the physician crushes the skull with forceps. . . . The intact removal of the fetus is what distinguishes an intact D&E procedure from a traditional D&E procedure. [*Complaint* at 41.]

18. The Act proscribes doing "great bodily harm . . ." to "a living fetus or infant" that is "partially delivered . . . ." Medically speaking, you can do "great bodily harm" only to an intact "living fetus" or "infant." Therefore, a reasonable medical doctor reading the Act would understand "living fetus" and living "infant" to mean the living fetal (infant) organism as opposed to living fetal cells or dismembered fetal limbs or body parts.

19. Medical science recognizes that the living fetal (infant) organism is living if it shows signs of life, such as beating of the heart, pulsation of the umbilical cord or movement of voluntary muscles.

20. The Act's plain language clearly does not proscribe the cephalocentesis procedure, which is removal of fluid from an enlarged head of a fetus with the most severe form of hydrocephalus. In such a procedure, a needle is inserted into the enlarged ventricle of the brain (the space containing cerebrospinal fluid). Fluid is then withdrawn which results in reduction in the size of the head so that delivery can occur. This procedure is not intended to kill the fetus, and, in fact, is often associated with the birth of a live infant. This is an important distinction between a needle cephalocentesis, which is intended to facilitate the birth of a living fetus, and the procedure described in the Act, which involves specific intent to kill a living fetus which has been partially delivered.

22. Upon reading the Act, a reasonable physician will certainly understand that destruction of the fetus *in utero*, i.e., abortion, remains protected in the law, and that the only procedure prohibited is partial delivery or removal of a living fetus or infant into the vaginal canal for the purpose of pausing the birth process to carry out a second step of intentionally killing the infant prior to complete delivery or removal.

I affirm under the penalties of perjury that the statements in my Declaration are true.

Date

_____
Jack A. Andonie, M.D.

Expert Witness Disclosure Required by Fed. R. Civ. P. 26(a)(2)(B)

1. The disclosure of my opinions, basis, reasons, data, qualifications are given in the attached affidavit.
2. My list of all publications within the last ten years is provided in the attached curriculum vitae.
3. My compensation is reasonable expenses, but no fee.
4. I have never before testified as an expert at trial or by deposition.

Date _____
Jack A. Andonie, M.D.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

CAUSEWAY MEDICAL SUITE, et al.,

PLAINTIFFS **Civil Action**

v.

No. 97-2211

MURPHY J. FOSTER, JR., et al.,

DEFENDANTS.

DECLARATION OF RAYMOND GASSER, PH.D.

I, Raymond Gasser, Ph.D., declare under the penalty for perjury that the following is true:

1. I am a Professor in the Department of Cell Biology and Anatomy at LSU Medical School (LSUMC), and, since 1980, I have been the course Director for Human Prenatal Development. I have been an Adjunct Professor of Obstetrics and Gynecology since 1994. I have been a member of the International Anatomical Nomenclature Committee since 1991 and I head the subcommittee on human embryological terms. Since 1991 I have been on the Advisory Committee, Human Developmental Anatomy Center, Armed Forces Institute of Pathology in Washington D.C. Also, since 1991 I have been Adjunct Curator for the Carnegie Collection of Human Embryos, Human Developmental Anatomy Center, Armed Forces Institute of Pathology, Washington D.C. My other credentials and experience are provided in my attached curriculum vitae. *See*

Attachment A -Curriculum Vitae.

2. Based on my education, training, research, years of experience as a Professor of Anatomy and Ob/Gyn, personal knowledge, study of the relevant medical literature and statistical data recognized as reliable in the medical profession, I offer the following expert opinions.

3. Pursuant to a request by representatives of the Office of the Attorney General for the State of Louisiana, I have reviewed Act 906 of the 1997 Regular Session of the Louisiana Legislature ("the Act"), which creates "the crime of partial-birth abortion." La. R.S. 14:32.9(D). I have been asked to review the Act and offer my expert opinion on what the Act proscribes and whether or not a reasonable physician, upon reading the Act, will be sufficiently apprized of what is and what is not permitted under the Act.

4. The Act, with certain detailed exceptions (e.g., the life of the mother), proscribes what it refers to as "partial-birth abortion." The Act defines partial-birth abortion as

> the performance of a procedure on a female by a licensed physician or any other person whereby a living fetus or infant is partially delivered or removed from the female's uterus by vaginal means and with specific intent to kill or do great bodily harm is then killed prior to complete delivery or removal. La. R.S. 14:32.9(A)(1).

5. The Act is clear, in medical/anatomical terms, about the location of the "living fetus or infant" that cannot, with specific intent, be killed.

6. The clarity of the Act is manifest because by its very terms it describes a living fetus or infant who is in the process of being born.

7. A living fetus or infant is in the process of being born when he or she begins to emerge from the uterus through the cervical os into the vaginal canal, which occurrence denotes the medical fact that the inevitable and unstoppable process of birth has begun.

8. Because the Act addresses a procedure that involves specific intent to kill a living fetus or infant who has been intentionally partially removed from the uterus into the vaginal canal, the Act regulates the process of birth, not the induced abortion of an unborn fetus.

9. Induced abortion is one method of terminating a pregnancy, the onset of the birth process is another.

10. The significant medical distinction between pregnancy and the process of birth is best made by describing the anatomical structure of the woman with reference to the locus of the living fetus within that structure: *See Exhib. D-5, "Uterus, Vagina and Supporting Structures."*

a. The uterus is the muscular organ in a female in which a developing embryo and fetus is nourished.

b. The cervix is the neck of the uterus which opens into the vagina. The cervical os is the opening of the cervix.

c. The amniotic sac is the protective membrane between the cervical os and the vaginal canal.

d. The vagina is the canal in the female, extending from the vulva to the cervix.

As long as the fetus remains within the uterus a woman is pregnant. When, however, the membranes of the amniotic sac have been ruptured and any part of the living fetus or infant is delivered through the cervix, past the cervical os and into the vaginal canal, pregnancy has ended and the process of birth has begun.

11. The medical/anatomical distinction between pregnancy and the process of birth is underscored by the fact that pregnancy has never occurred or been maintained in the vaginal canal.

12. "Fetus" is the medical term to describe "the unborn offspring in the postembryonic period, after major structures have been outlined, in humans from nine weeks after fertilization until birth." DORLAND'S *ILLUSTRATED* MEDICAL DICTIONARY 617 (28th Ed. 1994). The term "fetus" means only the unborn child, not the umbilical cord or the placenta, although those structures are of fetal origin. *See Exhibit D-6, Lennart Nilsson photograph.*

14. Where the Act speaks of a "living fetus or infant that is partially *delivered or removed from the female's uterus by vaginal means*" it can, of medical/anatomical necessity, only mean that the living fetus or infant is removed from the uterus into the vaginal canal and does not include the suction of a fetus or fetal parts "into an enclosed suction cannula [tube]" running through the vagina.

15. In medical terms *fetus* means preborn human offspring 9 weeks after conception, and is expressly defined in the Act as meaning "the biological offspring of human parents."

16. *Infant*, as expressly defined in the Act means "the biological offspring of human parents." *Infant* is defined as "...human young from birth to 12 months; it includes the newborn or neonatal period." DORLAND'S *ILLUSTRATED* MEDICAL DICTIONARY 836 (28th Ed. 1994).

17. The Act proscribes doing "great bodily harm . . ." to "a living fetus or infant" that is "partially delivered . . . ." Medically/anatomically speaking, you can do "great bodily harm" only to an intact "living fetus" or "infant." Therefore, a reasonable medical doctor reading the Act would understand "living fetus" and living "infant" to mean the living fetal (infant) organism as opposed to living fetal cells or dismembered fetal limbs or body parts.

18. The fetal/infant organism is living if it shows signs of life, such as beating of the heart, pulsation of the umbilical cord or movement of voluntary muscles.

19. I have reviewed the artist's illustration that was used by Dr. Jack Andonie to explain partial birth abortion to the Louisiana House and Senate committees considering the Act at issue (a copy of which is attached hereto as "*Attachment B*"). It is my expert opinion that the illustration accurately depicts a baby 8-10 inches long, measured to scale to the doctor's hand. This corresponds exactly to the size of a baby during the 20-24 week range of pregnancy. Thus, the illustration accurately depicts the anatomical structures of the fetus, then partially born infant and female as described by Dr. Haskell in his 1992 paper entitled "Dilation and Extraction for Late Second Trimester Abortion." [*See* Defendants' Exhibit D-2].

20. Plaintiffs' own description of the "D&X procedure" mirrors the illustration described in paragraph 19 above and would clearly qualify as a procedure prohibited by the plain terms of the Act:

> The intact D&E, "D&X," or "intact D&X" procedure is a variant of the traditional D&E procedure. . . . [T]he cervix is gradually dilated and the fetus is removed intact. . . . [T]he physician then creates a small opening at the base of the skull and evacuates some of the contents, allowing the calvarium [now emptied skull] to pass through the cervical opening. Alternatively, once the fetus is partially extracted, the physician crushes the skull with forceps. . . . The intact removal of the fetus is what distinguishes an intact D&E procedure from a traditional D&E procedure. [*Complaint* at 41.]

21. A reasonable person reading the Act will have no doubt that he/she is prohibited only from intentionally killing a living fetus or infant that has been partially delivered into the vaginal canal.

I affirm under the penalties of perjury that the statements in my *Declaration* are true.

Date

_____
Raymond Gasser, Ph.D.

Expert Witness Disclosure Required by Fed. R. Civ. P. 26(a)(2)(B)

1. The disclosure of my opinions, basis, reasons, data, qualifications are given in the attached affidavit.
2. My list of all publications within the last ten years is provided in the attached curriculum vitae.
3. My compensation is reasonable expenses, but no fee.
4. I have testified as an expert at trial or by deposition in the following:

Date _____ Raymond Gasser, Ph.D.

PROOF OF SERVICE

I hereby certify that on February 25, 2006, I served two paper copies of the foregoing Brief of Amicus Curiae to counsel listed below by depositing said copies in U.S.P.S. first-class mail, postage paid.

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