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See You in Court: An Analysis of Nebraska's Newest Abortion Legislation (LB 1103 – Pain-Capable Unborn Child Protection Act)

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Introduction

The bill formerly known as the Fetal Pain Prevention Act was passed by the 101st Legislature and approved by Governor Dave Heineman as the Pain-Capable Unborn Child Protection Act ("LB 1103") on April 13, 2010. LB 1103 marks yet another milestone in Nebraska's recent pro-life legislative activities. In the wake of the State's ban on partial-birth abortions[1] and passage of an informed consent law concerning ultrasound availability (LB 675), [2] LB 1103 is one more reason why the National Abortion Rights Action League (NARAL) Pro-Choice America grades Nebraska with an "F" on the issue of abortion.[3]

Unlike the majority of Nebraska bills, LB 1103 has attracted a broad array of national attention from various news outlets.[4] For some, LB 1103 has been recognized as legislation signifying the human dignity of the fetus.[5] For others, it is a "solution in search of a problem."[6]

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[1] Partial Birth Abortion Ban, 1997 Neb. Laws 35–39 (1997), *amended by* NEB. REV. STAT. §28-328 (2007).

[2] LB 675, 2009 Neb. Laws LB 675 (2009).

[3] *Nebraska: NARAL Pro-Choice America*, PROCHOICEAMERICA.ORG, http://www.prochoiceamerica.org/government-and-you/state-governments/state-profiles/nebraska.html (last visited Nov. 22, 2010).

[4] *E.g.*, Monica Davey, *Nebraska Law Sets Limits on Abortion*, N.Y. TIMES, April 13, 2010, http://www.nytimes.com/2010/04/14/us/14abortion.html?_r=1&ref=monica_davey; Emily Ingram, *Proposed Abortion Bill Focused on When Fetus Feels Pain*, ABC NEWS, Feb. 25, 2010, http://abcnews.go.com/Politics/fetal-pain-center-proposed-nebraska-abortion-ban/story?id=9947268; Marc A. Thiessen, *Bringing Humanity Back to the Abortion Debate*, WASH. POST, April 19, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/04/19/AR2010041902082.html.

In addition to receiving widespread media coverage, LB 1103 faced a great deal of legal scrutiny. Much of this scrutiny focused on what type and degree of judicial review LB 1103 would confront once it became formally operative on October 15, 2010. This controversial law will certainly face immediate legal action, but to what extent? Could LB 1103 reach the United States Supreme Court?

Whatever LB 1103's chances of reaching the nation's highest court, it is likely that it will see action at the Nebraska Supreme Court and the Federal District Court of the Eighth Circuit. In light of this, it is necessary to form a general understanding of the essential legal arguments that have been raised by both proponents and opponents of LB 1103. By discussing the scope and purpose of LB 1103 and outlining the contentious legal arguments, this article seeks to provide an additional avenue for continued dialogue on the merits of this politically, morally, ethically, medically, and legally polarizing debate on what has been called by Prof. Laurence Tribe as the "clash of absolutes, of life against liberty."[7]

There appear to be four major legal issues with LB 1103. First, LB 1103 sets a general prohibition on abortion at the 20-week fertilization age of the unborn child, under the assertion that, at this point of gestation, the unborn child feels pain. This general prohibition is unarguably a pre-viability ban, prompting an inquiry whether it would survive constitutional scrutiny. Thus, the primary issue is whether such a pre-viability ban would hold up against constitutional scrutiny. For Proponents of LB 1103, the understanding of the Supreme Court's (or more specifically, Justice Anthony Kennedy's) more recent jurisprudence on abortion has signified several shifts in thought. First, proponents interpret the Court's recent opinions as valuing a stronger emphasis on a state's interest in the abortion debate. Second, proponents see the Court as moving away from its traditional understanding of abortion law, namely, the distinction between pre- and post-viability bans on abortion. On the other hand, opponents of LB 1103 have criticized their adversaries for clinging onto dicta of individual justices, rather than holding fast to the expressed holdings of the Court. To this extent, opponents of LB 1103 argue that the Court has not moved away, nor will it move away, from its stance that prohibitions against abortion prior to viability are unconstitutional.

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[5] Steven Ertelt, *Nebraska Bill to Ban Late-Term Abortions Based on Fetal Pain Passes First Vote*, LIFENEWS.COM, March 31, 2010, http://www.lifenews.com/state4943.html.

[6] Floor Debate, LB 1103, 101st Legislature (Second Session), at 173 (Neb., March 30, 2010) (statement of Senator Conrad).

[7] Laurence Tribe, ABORTION: THE CLASH OF ABSOLUTES 3 (W.W. Norton & Company 1990).

Second, prompted by LB 1103 is whether the institution of a 20-week post-fertilization age constitutes a fixed gestational period determining viability, thereby making it unconstitutional under *Colautti v. Franklin*.[8] For proponents of LB 1103, *Franklin* is not the relevant case law applicable to LB 1103. Instead, they would argue, *Planned Parenthood of Central Missouri v. Danforth* is the relevant case law applicable which, in turn, would allow upholding the 20-week post-fertilization age general prohibition.[9] For opponents of LB 1103, however, *Franklin* is indeed the relevant law, whereby LB 1103 would likely be struck down as setting a "fixed gestation period determining viability," which *Franklin* categorically rejected.[10]

The third major issue prompted by LB 1103 concerns the health exception that is provided in Section 5. The issue deals primarily with the scope of the exception. For proponents, although the health exception provided in LB 1103 is narrower than what has previously been considered to be constitutional, the exception is nonetheless constitutional and "represents a change that needs to be made" in the law.[11] However, for opponents, the health exception is blatantly unconstitutional, not to mention inhumane, since it does not sufficiently take into consideration various other factors pertaining to the health of the mother that have been mandated by the Court.[12]

Finally, the fourth major issue pertains to the "reasonable medical judgment" language of the Act. LB 1103 contains an objective standard when it comes to "reasonable medical judgment" of a physician in determining the post-fertilization age of unborn children, determining a medical emergency, and determining a health exception. The tension in this issue revolves around the application of language from the *Carhart* decisions. For proponents of LB 1103, the objective standard is permissible since it prevents "unfettered discretion" by a physician or group of physicians for which "*Casey* does not give precedence."[13] For opponents of LB 1103, an objective standard is violative of *Casey*'s standard that "'appropriate medical

[8] 439 U.S. 379 (1979).

[9] 428 U.S. 52 (1976).

[10] Judiciary Committee Hearing, LB 1103, 101st Legislature (Second Session), at 6 (Neb., Feb. 25, 2010) (statement of Senator Council).

[11] Floor Debate, LB 1103, 101st Legislature (Second Session), at 213 (Neb., March 30, 2010) (statement of Speaker Flood).

[12] *See infra* V. Health Exception.

[13] Stenberg v. Carhart, 530 U.S. 914, 965 (2000) (Kennedy, J., dissenting).

judgment' must embody the judicial need to tolerate responsible difference of medical opinion."[14]

As previously noted, the issues in this case hinge on how the Court, if it were to hear a challenge to LB 1103, would interpret its abortion jurisprudence. Currently, with Justice Kennedy as the crucial swing vote, there is much speculation as to the future direction of the Court on this contentious topic. Questions and issues such as the ones noted above not only prompt disagreement and debate among adversaries sitting on both sides of the issue, but also among colleagues who would typically agree with one another. To this extent, reasonable minds differ. In light of this, the following analysis will provide assistance in examining the presented issues.

II. SCOPE & PURPOSE

LB 1103, introduced by Speaker of the Legislature, Senator Mike Flood, was intended to be a "middle ground on which folks on both sides of the abortion divide might agree"[15] and "provide a needed protection for the unborn child who is 20 weeks of age from the painful procedures of an abortion."[16] According to the "Introducer's Statement of Intent," LB 1103 contains "findings concerning fetal development and ability to experience pain, abortion methods used at and after 20 weeks, anesthesia, and the state's interest in reducing or preventing actions that inflict pain."[17] More specifically, Section 3 of LB 1103 provides the legislative findings. The legislative findings state: "at least by twenty weeks after fertilization there is substantial evidence that an unborn child has the physical structures necessary to experience pain."[18] Additionally, "by twenty weeks after fertilization, unborn children seek to evade certain stimuli in a manner which in an infant or an adult would be interpreted as a response to pain."[19]

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[14] *Id.* at 917.

[15] Judiciary Committee Hearing, LB 1103, 101st Legislature (Second Session), at 2 (Neb., Feb. 25, 2010) (statement of Speaker Flood).

[16] *Id.* at 4.

[17] Senator Mike Flood, Statement of Intent for LB 1103 (Feb. 25, 2010), http://www.nebraskalegislature.gov/FloorDocs/Current/PDF/SI/LB1103.pdf (last visited Aug. 20, 2010).

[18] Pain-Capable Unborn Child Protection Act, 2010 Neb. Laws 874, Section 3(1) (2010); *See* Judiciary Committee Hearing, LB 1103, 101st Legislature (Second Session), at 13–29, 44–55 (Neb., Feb. 25, 2010) (presenting testimony and additional evidence in support of the medical findings for LB 1103).

[19] *Id.* at Section 3(2).

Furthermore, "anesthesia [for pain relief] is routinely administered to unborn children 20 weeks of age who undergo prenatal surgery."[20]

Based on these findings, LB 1103 "assert[s] a compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain."[21] Thus, unless a medical emergency exists, "no abortion shall be performed . . . unless the physician . . . has made a determination of probable post-fertilization age of the unborn child."[22] If the "probable post-fertilization age of the child is twenty or more weeks," then the general prohibition on abortion is triggered, unless "in reasonable medical judgment" a medical emergency exists "as to necessitate the abortion"[23] or "it is necessary to preserve the life of an unborn child."[24]

III. VIABILITY

As to viability, the issue is ultimately whether the Supreme Court would be willing to accept a pre-viability ban based on the ability of unborn children to feel pain. Professor Teresa Stanton Collett, professor of law at the University of St. Thomas in Minneapolis, structured the issue well when she stated that the "current standard is viability . . . but the [C]ourt has never said that's the exclusive standard and the [C]ourt has never been presented with the question of fetal pain."[25] To this extent, even Senator Danielle Conrad, who voted against LB 1103, conceded that this issue is one of first impression.[26] Within this inquiry, a major factor concerns speculation as to how Justice Anthony Kennedy, widely understood as a swing vote on the abortion issue, would be willing to treat a pre-viability ban on abortion based on his prior judicial statements in abortion jurisprudence. Or, as it was more broadly stated by Senator Brad Ashford,

[20] *Id.* at Section 3(3).

[21] *Id.* at Section 3(5).

[22] *Id.* at Section 4(1).

[23] *Id.* at Section 5(1).

[24] *Id.* at Section 5(2). This provision was included in contemplation of a situation that was heard during the Judiciary Committee Hearing. Floor Debate, LB 1103, 101st Legislature (Second Session), at 160 (Neb. March 30, 2010) (statement of Speaker Flood). There, the mother was pregnant with twins suffering from twin to twin transfusion syndrome and the abortion was undertaken at 22-weeks to save the life of one of the unborn children. *Id.; See also* Judiciary Committee Hearing, LB 1103, 101st Legislature (Second Session), at 88-90 (Neb., Feb. 25, 2010).

[25] Judiciary Committee Hearing, LB 1103, 101st Legislature (Second Session), at 31 (Neb., Feb. 25, 2010) (statement of Professor Collett).

[26] Floor Debate, LB 1103, 101st Legislature (Second Session), at 166 (Neb., March 30, 2010) (statement of Senator Conrad).

Chairman of the Judiciary Committee, the issue is about "how far we can go under today's interpretations of our [C]onstitution."[27]

The proponents of LB 1103 have pointed out various portions within the Supreme Court's more recent abortion jurisprudence that would allude to the fact that viability, although the long held standard, is the not the exclusive standard. Opponents of LB 1103, however, point to the traditional legal rules and holding of *Roe v. Wade*[28] and its progeny, which have consistently upheld fetal viability as the hard and fast standard which cannot be violated by means of a pre-viability ban of the abortion procedure.

Proponents

Sen. Flood, in the Judiciary Committee Hearing on LB 1103, stated that the Supreme Court has defined viability as "23 to 24 weeks gestation or perhaps earlier."[29] As stated by Justice Kennedy, speaking for the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, "before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure."[30] Additionally, in *Casey*, Justice Kennedy stated that "before viability, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy.'"[31] Thus, the State "may not impose upon this right an undue burden, which exists if a regulation's 'purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'"[32] Nonetheless, LB 1103 would generally prohibit abortion three-to-four weeks prior to what this current understanding of the law.

With these strong judicial statements in mind, the issue turns on the rationale for the proponent's assertion that this legislation would not only "provok[e] a constitutional challenge . . . but also . . . prevail[] in [a] constitutional challenge."[33] The proponent's logic seems to rest

[27] *Id.* at 164 (Statement of Senator Ashford).

[28] 410 U.S. 113 (1973).

[29] Judiciary Committee Hearing, LB 1103, 101st Legislature (Second Session), at 4 (Neb., Feb. 25, 2010) (statement of Speaker Flood).

[30] 505 U.S. 833, 846 (1992).

[31] *Id.* at 879.

[32] *Id.* at 878.

[33] Judiciary Committee Hearing, LB 1103, 101st Legislature (Second Session), at 30 (Neb., Feb. 25, 2010) (statement of Professor Collett).

chiefly on two reasoned predictions of where the Court is moving on the abortion issue. First, there is the interpretation that the Court is allotting State's "an important constitutional role in defining their interests in the abortion debate."[34] Additionally, "States also have an interest in forbidding medical procedures which, in the State's reasonable determination, might cause the medical profession, or society as a whole to become insensitive, even disdainful, to life, including life in the human fetus."[35] Because of this, "[a] State may take measures to ensure the medical profession and its members are viewed as healers, sustained by a compassionate and rigorous ethic and cognizant of the dignity and value of human life, *even life which cannot survive without assistance of others*."[36]

Second, there is an understanding that the Court has been moving away from its traditional understanding of abortion law. As Sen. Flood stated during Floor Debate, Justice Ruth Bader Ginsburg in her dissent in *Gonzales* noted that "[*Gonzales*] blurs the line, firmly drawn in *Casey*, between pre-viability and post-viability abortion."[37] Additionally, Justice Ginsburg understood the holding in *Gonzales* as nothing "other than an effort to chip away at a right declared again and again by this Court."[38] To top it all off, "most troubling," according to Justice Ginsburg, was that "*Casey*'s principles, confirming the continuing vitality of 'the essential holding of *Roe*,' are merely 'assume[d]' for the moment [in *Gonzales*], rather than 'retained' or 'reaffirmed.'"[39] To this extent, Justice Ginsburg herself was predicting a shift in the jurisprudence of the Court based on the implications of the Court's holdings in *Gonzales*.

For proponents, then, *Roe* "did not settle the abortion debate in our nation."[40] In his closing remarks to the Judiciary Committee, Sen. Flood noted that it was not necessary to take his or Professor Collett's opinion, but that even "Professor Erwin Chemerinsky has stated [that] '*Gonzales* signaled a major shift in the law that is likely to have significant long-term

[34] *Id.* at 3 (statement of Speaker Flood) (citing *Stenberg*, 530 U.S. at 961 (Kennedy, J., dissenting)).

[35] *Stenberg*, 530 U.S. at 961.

[36] *Stenberg*, 530 U.S. at 962 (emphasis added).

[37] Floor Debate, LB 1103, 101st Legislature (Second Session), at 174 (Neb., March 30, 2010) (statement of Speaker Flood) (citing *Gonzales v. Carhart*, 550 U.S. 124, 171 (2007) (Ginsburg, J., dissenting)).

[38] *Gonzales*, 550 U.S. at 191 (Ginsburg, J., dissenting).

[39] *Id.* at 186–87.

[40] Judiciary Committee Hearing, LB 1103, 101st Legislature (Second Session), at 58 (Neb., Feb. 25, 2010) (statement of Schleppenbach).

consequences.' So long as states do not ban all abortion this case is a 'signal that they can adopt much greater restrictions on abortion.'"[41]

Overall, these two reasoned predictions (i.e., emphasis on the State's interest in the abortion debate and the movement away from traditional abortion jurisprudence) are the impetus for overturning or, at least, circumventing the viability standard that is the current threshold under *Roe* and its progeny, and upholding as constitutional a pre-viability ban on abortions based on unborn children's ability to feel pain.

Opponents

Where proponents have relied on shifting progressions of the law by the Supreme Court Justices, opponents have heavily criticized this reliance. For instance, Senator Conrad, during Floor Debate, criticized the use of dicta by Senator Flood and Senator Bob Krist, stating that such legal analysis is "not controlling in a legal sense and not relevant in this or a court of law or this forum."[42] Simply stated, the proponent's analysis, while perhaps interesting, is pointless for constitutional purposes. In fact, if the proponent's analysis does anything, it shows that there is no legal sufficiency for implementing a pre-viability ban.[43]

For the opponents, the dispositive language in this whole constitutional analysis is that "before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the [abortion] procedure."[44] Sen. Conrad noted that such a standard on viability has been "our history, our case law, for over 35 years and [the Court has] never once wavered from that standard."[45] Most importantly, the *Gonzales* case "did not alter the constitutional jurisprudence regarding viability" like the proponents would like to assert.[46] Furthermore, to the extent that *Gonzales* may be applicable as departing or modifying abortion jurisprudence, as the proponents claim, Senator

[41] Judiciary Committee Hearing, LB 1103, 101st Legislature (Second Session), at 93 (Neb., Feb. 25, 2010) (statement of Speaker Flood).

[42] Floor Debate, LB 1103, 101st Legislature (Second Session), at 187 (Neb., March 30, 2010) (statement of Senator Conrad).

[43] *Id.* at 191 (statement of Senator Council) ("Inherent in that statement is an acknowledgment that the [C]ourt has not evolved to that point yet. And ergo this law is unconstitutional on it's [sic] face.").

[44] *Casey*, 505 U.S. at 846.

[45] Floor Debate, LB 1103, 101st Legislature (Second Session), at 165 (Neb., March 30, 2010) (statement of Senator Conrad).

[46] *Id.* at 169.

Conrad begged to differ, noting that the case is a "limited holding to a specific procedure."[47] Thus, to violate the viability standard would impose an "undue burden" on a woman's constitutional right to an abortion of a non-viable fetus.

Overall, to the opponents, the answer to the issue of a pre-viability ban is easy. They conclude that the Court has not, in its expressed holdings, departed from viability as the "earliest point at which the state's interest in fetal life is constitutionally adequate to justify a legislative ban on non-therapeutic abortions."[48]

IV. FIXED GESTATIONAL PERIODS

Another issue that was presented during debate of LB 1103 was the issue of the 20-week ban and whether such a ban is unconstitutional as a fixed gestational period determining viability. Under *Colautti v. Franklin*, the Court stated:

> [V]iability is reached when, in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support. Because this point may differ with each pregnancy, neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability – be it weeks of gestation or fetal weight or any other single factor – as the determinant of when the State has a compelling interest in the life or health of the fetus.[49]

The key issue here is determining the applicability of this provision from *Franklin*. For the proponents, this is the not the applicable case law since LB 1103 is not a determination of viability, but a ban based on fetal pain (again, an issue that has yet to reach the Court). For the opponents, however, *Franklin* is on point, causing the general prohibition instated at 20 weeks to become an unconstitutional fixed gestational period.

Proponents

In response to a question by Sen. Conrad about the *Franklin* standard, Professor Collett stated that *Franklin* was not the case on point for determining the constitutionality of the 20-

[47] *Id.*

[48] *Id.* at 191 (statement of Senator Council).

[49] 439 U.S. at 388–89.

week period. Professor Collett responded that LB 1103 does not establish viability and therefore cannot be examined under *Franklin*.[50] Rather, the "determinative constitutional standard" applicable to LB 1103 is to be found under *Danforth*.[51] According to Professor Collett, LB 1103 "absolutely relies on the medical judgment as to the gestational age in order to trigger the prohibition and [falls] squarely within *Danforth*'s approval of that method of determining medically significant facts."[52] In other words, because LB 1103 is not determining viability, the 20-week general prohibition on abortion cannot be found unconstitutional under *Franklin*'s prohibition against fixed gestational periods determining viability. Instead, the prohibition is tied to a reasonable medical judgment for determining a prohibition on abortion, thereby falling under *Danforth*.

Opponents

For the opponents of LB 1103, reasonable minds can differ on the proper application of the case law.[53] To this extent, it is reasonable that *Franklin* is the determinative case concerning the 20-week fixed prohibition on abortion. Because of *Franklin*'s application, Senator Conrad pointed out the need for the "ascertainment of viability" since "this point may differ with each pregnancy" rather than a broad prohibition that goes into effect at 20 weeks.[54] Departure from this standard would be not only unconstitutional but also would not "recognize that individuals have different issues, different needs that arise in the course of their individualized pregnancy [e.g., fetal anomaly]."[55]

Overall, then, the issue ultimately revolves around the appropriate relevance and application of the Supreme Court's case law. For proponents, there is the argument that *Franklin* is inapplicable, thereby leaving no hindrance on a 20-week across-the-board ban. For opponents, however, is the argument that *Franklin* is applicable, thereby creating another constitutional problem with the legislation and yet another reason for LB 1103's rejection or amendment.

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[50] Judiciary Committee Hearing, LB 1103, 101st Legislature (Second Session), at 33-34 (Neb., Feb. 25, 2010) (statement of Professor Collett).

[51] *Danforth*, 428 U.S. at 33.

[52] *Id.*

[53] *Id.* at 32 (statement of Senator Council).

[54] Floor Debate, LB 1103, 101st Legislature (Second Session), at 170 (Neb., March 30, 2010) (statement of Senator Conrad).

[55] *Id.*; *See also* Judiciary Committee Hearing, LB 1103, 101st Legislature (Second Session), at 88–89 (Neb. Feb. 25, 2010) (providing testimony of fetal development abnormality).

V. HEALTH EXCEPTION

Another major issue that arose during debate of LB 1103 was the constitutionality of the health exception included in the legislation. Specifically, the issue is whether the health exception included was broad enough to pass constitutional muster. Section 5 of LB 1103 states:

> No person shall perform or induce or attempt to perform or induce an abortion…unless, in reasonable medical judgment (1) she has a condition which so complicates her medical condition as to necessitate the abortion of her pregnancy to avert her death or avert serious risk of substantial and irreversible physical impairment or a major bodily function.[56]

For proponents, the health exception included in LB 1103 is "not only constitutional" but "represents a change that needs to be made."[57] In other words, the health exception in LB 1103 is a constitutional departure from what is understood to be the current state of the law, and the departure marks a needed change in public policy and upholding the human dignity of unborn children.

For opponents, the health exception provided for in LB 1103 "does not provide a constitutionally sound or humane exception for women's health."[58] LB 1103 is too narrow and does not meet the constitutional demands that have been set by the Court.

Proponents

Ultimately, the impetus for narrowing the health exception in LB 1103 by proponents has to be understood in light of *Doe v. Bolton*,[59] the companion case to *Roe v. Wade*. According to Greg Schleppenbach, Director of Pro-Life Activities for the Nebraska Catholic Conference, although *Roe* allowed for "reasonable provisions allowing states to ban third trimester abortions except when a mother's health or life are in danger," the reasonable provisions were "eviscerated

[56] Pain-Capable Unborn Child Protection Act, 2010 Neb. Laws 875, §5(1) (2010).

[57] Floor Debate, LB 1103, 101st Legislature (Second Session), at 213 (Neb., March 30, 2010) (statement of Speaker Flood).

[58] *Id.* at 212 (statement of Senator Conrad).

[59] 410 U.S. 179 (1973).

by *Doe*'s exceedingly broad definition of health."[60] As Schleppenbach states, *Doe* is "an exception that swallows the rule."[61] Certainly this was part of the rationale behind Senator Flood's statement that LB 1103 "represents a change that needs to be made."[62] This, no doubt, represents the view of Senator John Wightman when he added, during Floor Debate, that "[d]amage to health has been used in cases all over the nation to justify abortion for almost any cause. Somewhere you can find a doctor that says it's probably going to damage the health, either physically or mentally."[63]

Overall, the view of the proponents of LB 1103 could be seen as bold and daring. There seems to be no question that the health exception in LB 1103 is a departure from the constitutional status quo. Perhaps the actions of the legislature can be summed up best by Senator Tony Fulton: "We are legislators. And the idea is that we're trying to set forward policy."[64] Proponents of LB 1103 are looking to legislate a baseline shift when it comes to thinking about the health exception of the mother. This baseline shift would place a limitation on what has been the traditional understanding in abortion jurisprudence. Most importantly, for the proponents, this would increasingly recognize the state's compelling interest in the life of unborn children.

Opponents

For opponents, the narrow exception in LB 1103 is not "constitutionally sound or humane."[65] Although states have an interest in banning abortion, that ban must include an exception "when abortion is necessary in appropriate medical judgment for the preservation of the life or the health of the woman."[66] LB 1103 only permits abortion where it is "necessary to

[60] Judiciary Committee Hearing, LB 1103, 101st Legislature (Second Session), at 58 (Neb., Feb. 25, 2010) (statement of Senator Conrad).

[61] *Id.*

[62] Floor Debate, LB 1103, 101st Legislature (Second Session), at 213 (Neb., March 30, 2010) (statement of Speaker Flood).

[63] *Id.* at 218 (statement of Senator Wightman).

[64] *Id.* at 210 (statement of Senator Fulton).

[65] *Id.* at 212 (statement of Senator Conrad).

[66] *Id.*

avert serious risk or substantial and irreversible physical impairments of a major bodily function" and, according to Sen. Conrad, this does not "meet [the] constitutional standard."[67]

In support for her view, [68] Sen. Conrad cited *Doe v. Bolton,*[69] *Thornburgh v. American College of Obstetricians & Gynecologists,*[70] and *Women's Medical Professional Corporation v. Voinovich.*[71] In fact, through an amendment to LB 1103, Senator Conrad sought to "set the health exception for women's lives and women's health at a place that is established and defined and workable under our existing parameters" by the Court.[72] Such an amendment would utilize all factors that "relate to health" such as "physical, emotional, psychological, familial, the woman's age, etcetera."[73] However, her amendment ultimately failed by a vote of 6-27.[74]

In general, the view of the opponents is to ensure that LB 1103 remains in tandem with current abortion jurisprudence, avoiding any redefinition of the boundaries as the proponents would prefer. As Senator Council stated, it is ultimately a matter of not "substitut[ing] our individual perceptions of what is in [the mother's] best [health] interest."[75] In other words, the obligation of the legislature is to "defend liberty for all, not to mandate [its] own moral code."[76]

Again, the issue for proponents of LB 1103 in the health exception provided is to blatantly challenge the *status quo* as it has been defined by the Supreme Court. As Senator Flood stated, "this is a change that needs to be made."[77] Additionally, the narrowness of the health exception conversely elevates the human dignity of unborn children by limiting what has

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[67] *Id.* at 212–13.

[68] *Id.* at 213.

[69] 410 U.S. 179.

[70] 476 U.S. 747 (1986).

[71] 130 F.3d 187 (1999).

[72] Floor Debate, LB 1103, 101st Legislature (Second Session), at 221 (Neb., March 30, 2010) (statement of Senator Conrad).

[73] *Id.*

[74] *Id.*

[75] *Id.* at 220 (statement of Senator Council).

[76] *Id.* at 165 (statement of Senator Conrad).

[77] *Id.* at 213 (statement of Senator Flood).

been previously understood as the woman's liberty interest in an abortion. However, for opponents of LB 1103, the health exception is neither constitutional nor humane.

VI. REASONABLE MEDICAL JUDGMENT

LB 1103 also raises an issue on the difference between a subjective and objective medical standard in determining the post-fertilization age of unborn children, determining a medical emergency, and determining a health exception. LB 1103, in the definition section, defines a "reasonable medical judgment" as "a medical judgment that would be made by a reasonably prudent physician, knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved."[78] The objective, "reasonably prudent physician" standard is required under the provisions for determining the post-fertilization age, determining a medical emergency, and determining a health exception.

This objective standard creates tension with what is understood as the current state of abortion jurisprudence. The tension comes primarily from how the *Carhart* decisions would ultimately be rendered under LB 1103. On the one hand, proponents could point to language that permits state's to set an objective standard for how physicians ought to go about making a medical judgment. On the other hand, opponents could point to language in those very same cases pointing out that *stare decisis* has held that "'appropriate medical judgment' must embody the judicial need to tolerate responsible differences of medical opinion."[79]

Proponents

For proponents of LB 1103, the State has an interest in regulating the medical decision being made in abortion procedures. Although there might be convergences on how a medical professional might go about determining various aspects of LB 1103 (i.e. post-fertilization age, medical emergency, and health exception), the State has mandated that conduct ought to be in line with that of a "reasonably prudent physician." The support for this objective standard is buttressed on words in *Stenberg*, quoting Justice Kennedy from his dissent in that case: "By no means must a state grant physicians 'unfettered discretion' in their selection of abortion methods."[80] This language was also adopted by Justice Kennedy in the majority opinion he authored in *Gonzales*.[81] To this extent, allowing unfettered discretion would permit "the views

[78] Pain-Capable Unborn Child Protection Act, 2010 Neb. Laws 874, Section 2(6) (2010).

[79] *Stenberg*, 530 U.S. at 917.

[80] *Id.* at 938 (Stevens, J., dissenting).

[81] *Gonzales*, 550 U.S. at 163–64.

of a single physician or a group of physicians" to set "abortion policy for the state of Nebraska, not the legislature or the people" and "*Casey* does not give precedence to the views of a single physician or a group of physicians regarding the relative safety of a single procedure."[82]

Opponents

The opponents of LB 1103 will quickly point out, however, that "*Casey*'s words 'appropriate medical judgment' must embody the judicial need to tolerate responsible difference of medical opinion."[83] To this extent, by setting an objective standard, LB 1103 is violative of the subjective standard that has been embodied in the Court's abortion jurisprudence. In other words, LB 1103 does not properly allot the individual physician the ability to make proper medical determinations. In each case, as noted by Senator Conrad, this objective standard is contrary to the Court's insistence that such medical determinations "must be left to the physician's judgment, not to a legislature, not to a court, not to any other outside group, but the physician's judgment."[84]

By and large, the health exception issue very much centers on the way in which the Court will apply its prior case law to LB 1103. More specifically, as stated earlier in the Introduction, the issue can be more narrowly understood as to how Justice Kennedy, the swing vote, would respond to such a standard. For proponents of LB 1103, the health exception has been tailored to push the boundaries on current abortion jurisprudence by predicting Justice Kennedy's vote. For opponents of LB 1103, however, the objective standard is yet another reason why LB 1103 is blatantly unconstitutional and will be held as such, providing more justification as to why LB 1103 should not have been brought into law.

VII. CONCLUSION

This overview sought to increase understanding of the legislative history behind LB 1103, its legal framework, and the implications and ramifications of its language. In doing so, this overview outlined the many contentious legal issues that surround LB 1103. How these issues are ultimately resolved will be monumental to the state of Nebraska and will inevitably be litigated. Regardless of the outcome, the state of Nebraska, by placing itself at the forefront of an ongoing national debate on the merits of legalized abortion, will, once again, be a pioneer in this area of the law.

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[82] *Stenberg*, 530 U.S. at 965 (Kennedy, J., dissenting).

[83] *Id.* at 917.

[84] Floor Debate, LB 1103, 101st Legislature (Second Session), at 165 (Neb., March 30, 2010) (statement of Senator Conrad).