NEBRASKA CATHOLIC CONFERENCE

TO: Judiciary Committee
FROM: Marion Miner, Associate Director of Pro-Life and Family Policy
Nebraska Catholic Conference
DATE: February 24, 2022
RE: LB933 (Adopt the Human Life Protection Act) (Support)

The Nebraska Catholic Conference advocates for the public policy interests of the Catholic Church and advances the Gospel of Life through engaging, educating, and empowering public officials, Catholic laity, and the general public.

From the first moment of his or her existence, a human being must be recognized as having the rights of a person—among which is the inviolable right of every innocent being to life.[1] Upon this right all other rights depend. Every instance of legally tolerated abortion violates an innocent person's right to life and undermines the very foundations of a state based on the rule of law.

As the late Fr. Richard John Neuhaus said in 2008, "The contention between the culture of life and the culture of death is not a battle of our own choosing. We are not the ones who imposed upon the nation the lethal logic that human beings have no rights we are bound to respect if they are too small, too weak, too dependent, [or] too burdensome."[2] We ask you today to contend for the culture of life.

At this time I will address as briefly as I can some elements of the bill's language to resolve any doubts about when the bill comes into effect, how it comes into effect, and its legality under Supreme Court precedent and the Nebraska Constitution.

I will address legality under Supreme Court precedent first. As we know, current U.S. Supreme Court precedent prevents the state from enacting protection of the human person before "fetal viability." LB933 is not challengeable as a violation of that precedent, because it would not come into effect unless and until that precedent is overturned.

Please direct your attention to Section 8, which is on page 3 of the bill. Any of the three "triggering" events—the reversal of *Roe v. Wade*, the passage of a U.S. constitutional amendment, or an act of Congress that enables the state to protect the preborn—only makes the act operative *if* it restores to the state the authority "to regulate abortion *to the extent set forth in the act*."

[1] *Catechism of the Catholic Church*, no. 2270.
[2] Neuhaus, "We Shall Not Weary, We Shall Not Rest." *First Things*, July 11, 2008. Accessed at: *https://www.firstthings.com/web-exclusives/2008/07/we-shall-not-weary-we-shall-not-rest*.

LB933 makes abortion illegal from fertilization. Any half-measure that does not authorize the state to make abortion illegal from fertilization would not allow any part of the act to become operative. If, for example, the Supreme Court were to overrule some aspect of *Roe*, saying that states may prohibit abortion after 12 weeks but no earlier, LB933 would remain completely inoperative. If, on the other hand, the Supreme Court were to overrule *Roe*, in whole or in part, *to the extent* that it restores the power of the states to protect life from fertilization, LB933 would come into effect. That is the plain language of LB933 and its contingency mechanism.

With regard to the Nebraska Constitution, some might argue that this bill, since it depends on conditions of fact that may or may not occur sometime in the future, is an unauthorized delegation of legislative power. That is not the case.

First, LB933 delegates no powers—it has simply designated that the bill is not to become operative until the happening of a certain contingency. These types of bills have a long history in Nebraska and in state legislatures all over the country in multiple subject areas, [3] not just abortion. The Nebraska Supreme Court itself has held on multiple occasions that "It is a well-recognized rule of law that: 'The legislature cannot delegate its powers to make a law, but it can make a law to become operative on the happening of a certain contingency or on an ascertainment of a fact upon which the law intends to make its own action depend.'"[4] The latter is exactly what LB933 does.

To take one directly analogous example, in *State v. Padley*, the Nebraska Supreme Court upheld a statute passed by the Legislature, part of which would only take effect "when the President terminates the Emergency Highway Conservation Act." The plaintiff in that case argued that the statute was "unconstitutional as an unauthorized delegation of power to the President of the United States." The court rejected that argument, holding that "the Legislature has not delegated its power to make the law but has designed its alternative provision to become effective on the happening of a certain contingency,"[5] which is perfectly within the power of the Legislature to do. That is just what LB933 does as well.

This is easily distinguished from cases such as *Whetstone v. Slonaker*, 193 N.W. 749 (Neb. 1923), which, in accord with well-established doctrines in other states, held that the Legislature—a creature of the state Constitution—went explicitly beyond bounds of the authority afforded to it by that state Constitution, and that this unlawful act could not be cured by a later vote of the people amending the state Constitution to expand the Legislature's authority *ex post facto*. LB933 suffers from no state constitutional infirmity. No court has held the Nebraska Constitution guarantees a "right to abortion," and as illustrated above, LB933 is not an unauthorized delegation of legislative power. It stands on firm ground established by multiple decisions of the Nebraska Supreme Court over a period of nearly 150 years. It is telling, also,

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[3] *See, e.g.*, in addition to *State v. Padley* below, *City of Milwaukee v. Sewerage Commission of City of Milwaukee*, 67 N.W.2d 624 (Wis. 1954), *Florka v. City of Detroit*, 120 N.W.2d 797 (Mich. 1963), and *State v. Dumler*, 559 P.2d 798 (Kan. 1977), among many others.

[4] *State v. Padley*, 237 N.W.2d 883, 884-85 (Neb. 1976) *citing Lennox v. Housing Authority of City of Omaha*, 290 N.W. 451 (Neb. 1940). *See also State ex rel. Pearman v. Liedtke*, 4 N.W. 75 (Neb. 1880), *Searle v. Yensen*, 226 N.W. 464 (Neb. 1929), and *McDonald v. Rentfrow*, 127 N.W.2d 480 (Neb. 1964).

[5] *Padley*, 237 N.W.2d at 884.

that twelve other states[6] have passed legislation similar or virtually identical to LB933 and none have been challenged in their respective state or federal courts.

Life is a human right. LB933 recognizes this most fundamental of all rights and applies it to "the least of these," the ones most in need of our protection. We respectfully urge your full support.

[6] North Dakota, South Dakota, Missouri, Oklahoma, Texas, Arkansas, Louisiana, Mississippi, Tennessee, Kentucky, Idaho, and Utah.