



To: Judiciary Committee
From: Marion Miner, Associate Director for Pro-Life & Family
Nebraska Catholic Conference
Subject: LB 814 (Prohibit Dismemberment Abortion) (Support)
Date: February 20, 2020

Chairman Lathrop and Members of the Judiciary Committee,

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. I am here to express the Conference's support for LB 814.

LB 814 bans dismemberment abortion, a procedure that Justice Ruth Bader Ginsburg has compared to the now-federally banned partial-birth abortion method as being equally "brutal, involving as it does tearing a fetus apart and ripping off its limbs."¹ Justice Anthony Kennedy has described the procedure as "laden with the power to devalue human life."² And we have heard about the toll the procedure takes on the medical staff who perform it. I have attached as exhibits one study and one article from the *Los Angeles Times*, both attesting to that reality.

My testimony is going to focus on LB 814's constitutionality.

The abortion case law that binds us at this time says that a law must advance a legitimate state interest without imposing an undue burden (or "substantial obstacle") to abortion access for women affected by the law. Senator Geist has laid out the state interests: to protect and promote society's respect for human life, and to preserve the integrity of the medical profession. That gets us to the substantial obstacle question.

As you may know, 12 states have passed a ban on dismemberment abortion. Three (North Dakota, Louisiana, and Kentucky) have stipulated not to enforce the law before litigation elsewhere plays out. One (Ohio) has been partially upheld and partially enjoined. One (Oklahoma) was fully upheld in state district court, before the state Supreme Court temporarily enjoined it pending appeal.

Two (West Virginia and Mississippi) are fully in effect and have been since 2016, with no legal challenges.

Five (Alabama, Kansas, Arkansas, Indiana, and Texas) have been enjoined.

¹ *Gonzales v. Carhart*, 550 U.S.124, 182 (2007) (Ginsburg, J., dissenting).

² *Gonzales*, 550 U.S. at 158.

What makes Nebraska different from the states where dismemberment bans have been enjoined?

Whole Women's Health v. Hellerstedt and its progeny in the circuit courts have made very clear that the undue burden question is highly fact-specific. In a facial challenge to an abortion statute, the threshold question asked is *whether there is a "substantial obstacle" to abortion access for a "large fraction" of women to whom the restriction applies.*

In enjoining the law in Arkansas, the district court relied heavily on the fact that "100%" of second-trimester abortions in Arkansas are dismemberment ("D&E") abortions.³ In Nebraska, by contrast, 18% of our second-trimester abortions are by dismemberment.

In enjoining the law in Alabama, the 11th Circuit relied heavily on the fact that "99%" of abortions after 15 weeks in Alabama are dismemberment abortions.⁴ In Nebraska, 37% of our abortions after 15 weeks are by dismemberment.

In Texas and Indiana, the district courts did not cite *state* statistics, but relied heavily on the fact that *nationwide*, "up to 95%" of abortions in the second trimester were by dismemberment.⁵ Again, in Nebraska, that number is 18%. 18% and 37% are not "large fractions" according to the case law. Federal circuits "that have applied the large fraction test to facial challenges to abortion regulations have . . . only found a large fraction when *practically all* of the affected women would face a substantial obstacle."⁶

Even when we drill into the smallest details—let's say weeks 16-18—the numbers in Nebraska do not support assertions that a dismemberment ban would impose a substantial obstacle for anyone, much less to a "large fraction" of women.

There were 53 "D&X" abortions performed in Nebraska in 2018, which many abortionists will tell you are only done after 18 weeks. *But there were only 21 abortions—total—done in Nebraska after 18 weeks in 2018.* That tells us they are already, in Nebraska, performing D&X abortions—*most* D&X abortions—prior to 18 weeks.

Going back a week, to week 17, there were six more abortions, bring the state total to 27. That is still 26 fewer *total abortions* in Nebraska in weeks 17+ than the number of D&X abortions *alone*. In week 16, there were 24 more, bringing the total for weeks 16+ to 51 abortions—still two fewer abortions *total* than the number of D&X abortions *alone*, without even accounting for the 32 dismemberment abortions that occurred during the same time frame. It is clear they already are and have been performing D&X abortions in Nebraska not only prior to week 17, but prior to week 16 as well.

³ *Hopkins v. Jegley*, 267 F.Supp.3d 1024 (E.D. Ark. 2017).

⁴ *W. Ala. Women's Ctr. v. Williamson*, 900 F.3d 1310 (11th Cir. 2018).

⁵ *Bernard v. Individual Members of the Ind. Med. Licensing Bd.*, No. 1:19-cv-01660 (S.D. Ind. June 28, 2019); *Whole Women's Health v. Paxton*, No. 1:17-cv-00690-LY (W.D. Tex. Aug. 31, 2017).

⁶ *Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 373-74 (6th Cir. 2006) (citing cases) (emphasis added). *See also Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953, 960 (8th Cir. 2017); *June Med. Servs. L.L.C. v. Gee*, 905 F.3d 787, 815 (5th Cir. 2018); *A Woman's Choice-E. Side Women's Clinic v. Newman*, 305 F.3d 684, 698-700 (7th Cir. 2002) (Coffey, J., concurring).

Prior to week 16, by far the most common abortion procedure done in Nebraska is “suction curettage,” which was performed 766 times in 2018.

This is highly significant for the constitutional analysis because it illustrates that LB 814, while banning one specific, dehumanizing procedure, places no obstacle in the path of abortion access for anyone in Nebraska, much less a “substantial” one, much lesser still a substantial obstacle to a “large fraction” of women. The facts that make Nebraska’s landscape different than those in Arkansas, Alabama, and elsewhere are the facts specific to Nebraska that, under *Hellerstedt*, put LB 814 on constitutionally solid ground.

The Conference respectfully urges that you advance LB 814 to General File as quickly as possible.