

**INTEREST OF AMICI CURIAE**  
**SUBMITTED TO THE CONSTITUTIONAL COURT OF THE SLOVAK**  
**REPUBLIC**

**CASE: PL. US 12/01**

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## **INTEREST OF AMICI CURIAE**

The European Centre for Law & Justice (“ECLJ”) is an international law firm dedicated to protecting human rights and religious freedom for people of faith in Europe. Attorneys for the ECLJ have served as counsel in numerous cases before the European Court of Human Rights. Additionally, the ECLJ has special Consultative Status as an NGO before the United Nations.

The American Center for Law and Justice (ACLJ) is a public interest law firm committed to ensuring the ongoing viability of constitutional freedoms in the United States, including the defense of religious liberties. ACLJ attorneys have argued or participated as amicus curiae in numerous cases involving constitutional issues before the Supreme Court of the United States as well as lower federal and state courts.

Both the ECLJ and the ACLJ are public interest law firms dedicated, *inter alia*, to the defense of the sanctity of human life. The proper resolution of this case is a matter of substantial organizational concern to both the ECLJ and to the ACLJ because of the threat to human life that would leave first-trimester children unprotected, as well as undermine the importance, integrity, and well-being of family life in Slovakia.

## ARGUMENT

### **I. The Slovak Constitution Defines the Beginning of Life at Conception, and Life Formed at Conception is a Legal Entity Deserving Full and Equal Rights—Including the Protection of Life and Liberty.**

At the heart of this case are those pregnancies that pose no danger whatsoever to the life or health of the mother. Nothing in the language or history of the Slovak Constitution supports the notion that a woman can choose an abortion on demand to the detriment of another life, absent a life threatening situation. The Slovakian Constitution, in Article 15, ¶ 1, provides that life is formed at conception: “Human life is worthy of protection *even prior to birth.*”<sup>1</sup> The Constitution ascribes the same protection to all unborn children regardless of their stage of development. Thus, human life deserves full constitutional protection throughout a woman’s pregnancy; the first trimester may not be excluded.

The Law on Artificial Interruption of Pregnancy (“LAIP”) is in direct conflict with the Slovakian Constitution. LAIP provides that a woman’s pregnancy may be artificially interrupted “if she has requested so in writing, if the pregnancy does not extend past the 12th week, and if there are no health obstacles.”<sup>2</sup> Nothing more is required during the first 12 weeks; thereafter, LAIP requires a showing of danger to the mother’s life or health or a danger to the healthy development of the unborn child.<sup>3</sup> As such, LAIP discriminates against unborn children during the first twelve weeks of pregnancy by allowing abortion on demand. As such, LAIP violates an unborn child’s fundamental rights to life and liberty.<sup>4</sup> Article 15, ¶ 2 of the Slovakian Constitution provides that “[n]o one must be deprived of life.”<sup>5</sup> LAIP discards the protection of

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<sup>1</sup> ÚSTAVA SLOVENSKEJ REPUBLIKY [ÚSTAVA SR] [Constitution] art. 15, ¶ 1 (emphasis added).

<sup>2</sup> Law no. 73/1986 of Coll., as amended by law no. 419/1991 of Coll. [hereinafter, “LAIP”], § 4.

<sup>3</sup> LAIP, § 5 (requires a showing that the mother’s life or health is endangered or the genetic development of the fetus is disordered).

<sup>4</sup> See ÚSTAVA SR art. 15, ¶ 2 (Slovk.); *Id.* at 17, ¶ 1 (declaring “[p]ersonal freedom is guaranteed.”); *Id.* at art. 17, ¶ 2 (declaring “[n]o one must be . . . deprived of freedom other than for reasons and in a manner defined by law.”).

<sup>5</sup> See *Id.* at art. 15, ¶ 2.

*all* life provided by the Slovakian Constitution, and thus, LAIP must be overturned.

**A. The Text of the Constitution and Legislative History Show That “Before Birth” Means “Upon Conception.”**

The Slovakian Constitution fully protects the right to life as fundamental. The Constitution declares that such fundamental rights “are inviolable, inalienable, secured by law, and unchallengeable.”<sup>6</sup> The Constitution also declares that these inviolable rights are guaranteed to everyone regardless of status and without discrimination.<sup>7</sup> As such, the fundamental right to life must be protected equally at every stage of its development, from conception forward.

The Federal Assembly of the Czech and Slovak Federal Republic intended to constitutionally define life upon conception. Article 15 of the Constitution is derived directly from the Charter of Fundamental Rights and Freedoms. Article 6, ¶ 1 of the Charter states that, “[h]uman life is worthy of protection *already before birth*.”<sup>8</sup> The stenographic record from the Federal Assembly that enacted the Charter<sup>9</sup> corroborates this intent where one member noted an understanding that the purpose and goal of accepting the specific language in Article 6, ¶ 1, “already before birth,” was to protect life from conception.<sup>10</sup>

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<sup>6</sup> *Id.* at art. 12, ¶ 1: “People are free and equal in dignity and their rights. Basic rights and liberties are inviolable, inalienable, secured by law, and unchallengeable.”

<sup>7</sup> *Id.* at art. 12, ¶ 2: “Basic rights and liberties on the territory of the Slovak Republic are guaranteed to everyone regardless of sex, race, color of skin, language, creed and religion, political or other beliefs, national or social origin, affiliation to a nation or ethnic group, property, descent, *or another status*. No one must be harmed, preferred, or discriminated against on these grounds.” *Id.* (emphasis added).

<sup>8</sup> This language was adopted directly into the Slovak Constitution at Article 15, ¶ 1.

<sup>9</sup> The Federal Assembly of the Czech and Slovak Federal Republic adopted Constitutional Statute No. 23/1991 Coll. as an enactment of the Charter of Fundamental Rights and Freedoms in 1991.

<sup>10</sup> According to the record, after debating the amending proposal that established the language of Article 6, paragraph 1 of the Charter, MP J. Horník explained why he accepted the proposal in a speech stating, “Therefore it is necessary . . . to defend life since its beginning and therefore I join in the proposal.”

## **B. Slovakian History Reflects a National Effort to Protect the Early Stages of Life.**

Slovakia has long protected life at all stages of pregnancy. Slovakian society, of which 84 percent have been estimated to hold religious beliefs,<sup>11</sup> has consistently supported the protection of life even at its early stages. In 2002, Slovakia argued for the protection of embryos with regard to cloning matters before the United Nations.<sup>12</sup> In fact, Slovakian Diplomat Peter Tomka chaired two committees that led the united effort to ban reproductive cloning of human beings due to “ethical, moral, religious, scientific and other concerns,” as well as “far-reaching implications for human dignity.”<sup>13</sup>

Moreover, Slovakia has accepted and fully implemented a provision of the 1997 Council of Europe Convention on Human Rights and Biomedicine, which prohibits creation of human embryos for research purposes<sup>14</sup> and ensures the protection embryos in vitro.<sup>15</sup> In 1998, Slovakia signed an additional protocol that introduced a total ban of human cloning into the country’s domestic laws.<sup>16</sup> Unauthorized cloning experimentation has been criminalized by the penal code since 2003, with punishment of up to twelve years in prison for unlawfully experimenting on a fetus or an inseminated egg.<sup>17</sup>

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<sup>11</sup> Slovak Republic Government Office, <http://www-8.vlada.gov.sk/> (follow “Slovakia” hyperlink) (last visited 17 Sept. 2007) (reporting the breakdown of religious believers as 68.9 percent Roman Catholic, 6.9 percent evangelical, 4.1 percent Greek Catholic, 2 percent Reform Christian, and 2.2 percent undetermined religion).

<sup>12</sup> Press Release, Fifty-seventh General Assembly, Legal Committee is told of Efforts to Reach Consensus in Formulating Convention Against Human Cloning, U.N. Doc. GA/L/3216 (17 Oct. 2002).

<sup>13</sup> As Chairman of both the Ad Hoc Committee and the Working Group on an International Convention against Reproductive Cloning of Human Beings, Tomka introduced reports of opposition to human cloning from Germany, Spain, Costa Rica, Cameroon, Mexico, Switzerland, Sudan, Brazil, Senegal, Liechtenstein, Gabon, Cyprus, Norway, the United States, Chile, Cuba, Greece, and the Holy See.

<sup>14</sup> Council of Europe, Convention on Human Rights and Biomedicine art. 18, ¶ 2, 4 Apr. 1997, CETS No. 164.

<sup>15</sup> *Id.* at ¶ 1.

<sup>16</sup> See Announcement of the Ministry of Foreign Affairs nr. 143/2001, art. 1 (signed 31 Mar. 1998).

<sup>17</sup> For the current code (effective since 1 Jan. 2006), see Penal Code law nr. 300/2005 § 161; for the original code (effective since 1 Sept. 2003 but superseded by the current code), see Penal Code law nr. 140/1961 § 246a.

Diplomatic advocacy for the protection of embryos and criminal prohibitions against tampering with unborn life—even at the earliest stage of an inseminated egg—demonstrate that Slovak law and public policy, notwithstanding the unconstitutional enactment of LAIP, have consistently supported the constitutional principle that life deserves protection from the point of conception forward.<sup>18</sup>

**C. Guarantees of Life and Liberty for the Unborn Under Slovakian Civil and Criminal Law Emphasize that Protection Must Begin From Conception.**

Slovakian law acknowledges civil eligibility for rights as well as criminal legal protection belonging to unborn children from conception. Slovakian civil law grants legal rights to and imposes obligation upon persons from birth, and additionally, provides that “[c]hildren *from conception* also share in these rights if born alive.”<sup>19</sup> Further, Slovakian criminal law provides stricter consequences in cases of injury to a pregnant woman where an abortion is induced or the unborn child is killed, than in the case of a similar act towards a non-pregnant woman.<sup>20</sup> Thus, Slovakian civil and criminal legal systems recognize unborn children from conception as deserving basic legal rights and guarantees, even prior to birth. Thus, LAIP represents a stark contradiction to Slovakian public policy. Justice and logic require that LAIP be overturned because such a contradiction is irreconcilable.

**D. LAIP Does Not Pass Constitutional Muster Because It Fails to Balance the Inferior Right of Privacy Against the Superior Right to Life.**

Abortion, barring exceptional circumstances of danger to the life or health of the mother, represents a fundamental clash of constitutional rights—the right to life for the child versus the mother’s right to privacy. Article 16 of the Slovakian Constitution addresses the right of privacy: “The inviolability of the person and its privacy is guaranteed. It can be limited only in

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<sup>18</sup> ÚSTAVA SR art. 15, ¶ 1 (emphasis added).

<sup>19</sup> See Civil Code law nr. 40/1964 § 7, ¶ 1 (emphasis added).

<sup>20</sup> See Criminal Codex § 89, ¶ 6, line g.

cases defined by law.”<sup>21</sup>

The Slovak Constitution binds legislators to balance conflicting constitutional rights prior to the passing of law or regulations: “When restricting constitutional rights and liberties, attention must be paid to their essence and meaning. These restrictions must not be used for any other than the set purpose.”<sup>22</sup> Under the Slovakian Constitution, Article 13, ¶ 4, legislators must evaluate and give deference to the “essence and meaning” of the constitutional rights or liberties that the proposed legislation seeks to restrain.<sup>23</sup> Granting a right to abortion-on-demand to mothers during the first twelve weeks of pregnancy, absent a threat to the health or life of the mother, fails to take into account the “essence and meaning” of the right to life.

While the Slovak Constitution permits narrow exceptions to the right to life,<sup>24</sup> these must be proportional to the protection of the life of another in order to give proper deference to the “essence and meaning” of the right to life. The Constitutional Court of the Czech Republic has analyzed its constitutional provision that is identical to that which is contained in Article 13, ¶ 4 of the Slovakian Constitution, and discussed how to balance conflicting constitutional rights:

Even if their limitation is not presupposed by the constitutional provision, the fundamental rights and freedoms may be limited in case of their collision. In this context what is basic is *maxima* according to which it is possible to limit the fundamental right or freedom only in [the] interest of [another] fundamental right and freedom. In case of an outcome on justification of the priority of one of two colliding fundamental rights, the inevitable condition of the final decision is to use all possibilities of minimizing of intervention into the second of them. It is possible to deduce this conclusion also from the provision art. 4 par. 4 of the Declaration of fundamental rights and freedoms and in particular in the sense that the fundamental rights and freedoms must be protected not only by using provision on limitations of fundamental rights and freedoms, but also analogically in case of limitation of the impact of their mutual collision.<sup>25</sup>

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<sup>21</sup> ÚSTAVA SR art. 16, ¶ 1.

<sup>22</sup> ÚSTAVA SR art. 13, ¶ 4.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at art. 15, ¶ 4.

<sup>25</sup> sp.zn. Pl. ÚS 4/94.

Following the Constitutional Court of the Czech Republic's example of constitutional analysis, this Court should, when balancing the right to life against the right of privacy, accord the right to life the higher priority. Taking life is permanent, and thus, granting the right to abortion-on-demand under LAIP affords the right to life absolutely no weight whatsoever in the balance against privacy. The LAIP forsakes all considerations of the right to life by holding the right of privacy in a place of preeminence. However, intrusion upon the right of privacy, unlike the right to life, does not render irreversible damage and can be more readily limited by law. Considering that Slovakia's Constitution protects life from conception, according higher priority to the right to life is imperative in this case.

**E. Slovakian Constitutional Law is the Supreme Law of the Land and May Not Be Contradicted by Secondary Legislation.**

The Slovak Constitution, which was legally enacted in 1992, must be upheld and regarded as the superior law of the land. Compromising the Constitution with contradictory legislation leads to dangerous consequences. If the young Constitution is not treated with the reverence it deserves, as an absolute document delineating the collective and unalienable rights of the people, then it becomes a weakened instrument, vulnerable to the political winds of change.

The rule of law requires that legislators not act outside the boundaries established by the Slovak Constitution,<sup>26</sup> and the Constitution demands that human life deserves protection “even before birth.”<sup>27</sup> If the people decide that it is in the best interests of Slovakia to enact provisions

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<sup>26</sup> ÚSTAVA SR art. 123 (“Ministries and other bodies of state administration may, on the basis of laws and within their limits, issue generally binding legal regulations if empowered to do so by the law. These generally binding legal regulations are promulgated in a manner that will be specified by law.”).

<sup>27</sup> *Id.* at art. 15, ¶ 1.

such as LAIP, the proper process to amend the Constitution must be followed.<sup>28</sup> In the absence of such amendment, LAIP must be overruled as unconstitutional because it was enacted outside the bounds of the Slovak Constitution, which is superior to all domestic legislation.<sup>29</sup>

## **II. There is International and Regional Recognition of a State’s Authority to Protect the Life of the Unborn, Even in the First Trimester.**

Other democratic States recognize that life begins at conception and also provide constitutional protection for unborn children as early as the first trimester.<sup>30</sup>

First, the European Court of Human Rights in *Vo v. France*<sup>31</sup> recognized that,

it is not only legally difficult to seek harmonisation of national laws at Community level, but because of lack of consensus, it would be inappropriate to impose one exclusive moral code . . . the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere . . . [and] the issue of such protection has not been resolved within the majority of the Contracting States themselves . . . [and] there is no European consensus on the scientific and legal definition of the beginning of life.<sup>32</sup>

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<sup>28</sup> See *id.* at art. 84, ¶ 3 (governing the amendment process of the Slovak Constitution: “The agreement of at least a three-fifths majority of all deputies is required to pass and amend the Constitution and constitutional laws. . .”).

<sup>29</sup> *Id.* at art. 2, ¶ 2 (“State bodies can act only on the basis of the Constitution, within its limits, and to the extent and in a manner defined by law.”).

<sup>30</sup> In fact, the Austrian Universal civic legal code (ABGB) dating back to the year 1811 established that, “*also unborn children since the moment of conception have a demand for protection by laws.*” Austrian Universal civic legal code (ABGB) § 22 (emphasis added). Even in the United States, where abortion laws are the most liberal in the world, some significant abortion restrictions and fetal protections still apply. See *Family Law: Cases, Comments, and Questions* (Krause, Elrod, Garrison, Oldham eds., Thomson West 6th ed. 2007). These restrictions include limitations on fetal testing, as evidenced by the Supreme Court decision in *Planned Parenthood Ass’n v. Ashcroft*, 462 U.S. 476 (1983) (upholding state statutes requiring a pathology report on fetal tissue removed during an abortion and attendance of a second physician to try to preserve the life of the unborn child). *Id.* at 280.

The United States’ Federal Unborn Victims of Violence Act, 18 U.S.C. § 1841 (West. Supp. 2005), also established criminal punishment for killing or injuring an unborn child *at any stage of gestation* during the commission of a federal crime against the pregnant woman, and several U.S. States have enacted similar fetal homicide laws. *Id.*

Moreover, United States restrictions on federal and state public funding for abortions were upheld by two Supreme Court cases, *Maher v. Roe*, 432 U.S. 464 (1977), and *Beal v. Doe et al.*, 432 U.S. 438 (1977), as well as the Hyde Amendment, Pub. L. 94-439, 90 Stat. 1434 (1976) (prohibiting the use of federal funds to reimburse states for the cost of abortion under Medicaid—except in the cases of rape or incest). *Id.*

Finally, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), another Supreme Court decision, upheld as constitutional three state-imposed abortion restrictions, including written informed consent of the health risks associated with the procedure, a parental consent rule for minors, and a mandatory 24-hour waiting period for reflection before the procedure. *Id.*

<sup>31</sup> App. No. 53924/00, 40 E.H.R.R. 12, 2004 WL 1808739 Eur. Ct. H.R. ¶ 82 (2004).

<sup>32</sup> *Id.*

Therefore the Court decided to leave the issues of when life begins and what protection it deserves to the individual determinations of national courts, a significant number of which have decided that life begins at conception and that abortions are unconstitutional.<sup>33</sup>

**A. The Polish Constitutional Court and Supreme Court Respect Human Life from Conception.**

The highest courts in Poland similarly ruled that human life must be protected even from conception. Ruling on a law that would permit abortion in Poland, *inter alia*, the Constitutional Court quoted the Polish Supreme Court, which stated:

The basic attribute of a man is his life. Deprivation of his life annihilates a man as a subject of rights and duties . . . [and] under the rule of law . . . the respect for the value of human life from its conception . . . must be obeyed.

The democratic country under the rule of law gives priority to a man and the goods most valuable to him. Life is a value that in a democratic country must be constitutionally protected in its every stage.

Life is a value protected by a constitution and life in a prenatal stage cannot be differentiated. There are no satisfactorily precise and proved criteria allowing for such differentiation depending on the particular stage of human life. From conception, however, human life is a value constitutionally protected. It concerns the pre-natal stage as well.<sup>34</sup>

Additionally, this same Polish court recognized that the U.N. Convention on the Rights of the Child includes protecting the unborn child from conception.<sup>35</sup> The Constitutional Court agreed. The democratic state Poland, therefore, protects unborn life from conception. The Constitutional Court, acting well within its jurisdiction, overruled abortion legislation that violated Polish constitutional law.

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<sup>33</sup> *Id.*

<sup>34</sup> Decision of the Constitutional court of the Polish Republic sp.zn. K 26/96, published in OTK ZU from year 1997, Nr 2, cmt. 19.

<sup>35</sup> *Id.*

**B. Germany’s 1975 Pre-Unification Abortion Case Provides An Example of Constitutional Interpretation that Slovakia May Follow to Protect the Life of the Unborn Under Slovakian Constitutional Law.**

Before the reunification of Germany in 1989, Germany had rejected abortion-on-demand for women in their first twelve weeks of pregnancy. Prior to reunification, an important case in Germany showcased the Constitutional Court’s ability to overrule abortion legislation.

The 1975 Decision of the Federal Constitutional Court of the Federal Republic of Germany, the “German abortion decision,”<sup>36</sup> involved a reform to the national penal law that allowed for the termination of pregnancy during the first twelve weeks without punishment.<sup>37</sup> The Constitutional Court, voiding the reform law as unconstitutional, held that the liberal abortion law was,

incompatible with Article 2, Paragraph 2, Sentence 1,<sup>38</sup> in conjunction with Article 1, Paragraph 1,<sup>39</sup> of the Basic Law and is null insofar as it excepts the interruption of pregnancy from criminal liability when no reasons are present which, in the sense of the reasons for this decision, have validity in the ordering of values of the Basic Law.<sup>40</sup>

Concerning protection for the unborn, the Constitutional Court affirmed “[t]hat human life even before birth is a legal value which is worthy of protection and which requires protection. The Basic Law . . . has made a value decision for life . . . .”<sup>41</sup> The Constitutional Court also affirmed that the fundamental rights enumerated above rest on the fact that “every individual life enjoys the protection of the fundamental right but even more decisively that violations of the fundamental right with respect to (biological) life lead to the total annihilation

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<sup>36</sup> BVerfGE 39, 1 (1975).

<sup>37</sup> *Id.* at § IA.

<sup>38</sup> “Every person shall have the right to life and physical integrity.” GG Art. 2(1).

<sup>39</sup> “Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.” GG Art. 1(1).

<sup>40</sup> *Id.* at § I.

<sup>41</sup> *Id.* at § IA6.

of the basis of human existence.”<sup>42</sup>

Furthermore, the Constitutional Court explained that the state has a duty to protect unborn life, and the removal of a “protection of the penal law which has existed for a hundred years” undermined that duty.<sup>43</sup> In addition,

a) The legislature would violate its duty by legally allowing the destruction of unborn life within the first twelve weeks of pregnancy, if the only condition of the destruction is that it be performed by a physician with the consent of the pregnant woman. The allowance of abortion by the penal law cannot be interpreted in any other way than in the sense of legal approval.

b) Furthermore . . . repealing the punish-ability of abortions during the first twelve weeks[] deprives prenatal life in the future of the socio-ethical appreciation of its value among people. That penal norms possess power to form the standards of socio-ethical judgment for the citizenry corresponds to proven findings of legal sociology.<sup>44</sup>

In light of these compelling reasons, the German federal Constitutional Court held that the unborn enjoys the highest constitutional protection and that the state is bound by a duty to protect the lives of the unborn, even in the first trimester. As such, the German Constitutional Court rejected abortion on demand in the first twelve weeks, exercising its authority to overrule unconstitutional abortion legislation. This Court has the same authority and, under the Constitution of Slovakia, should follow Germany’s example in the 1975 German abortion decision.

**C. Prior to Its Shift to Communism, Spain’s Constitutional Court Properly Exercised It’s Authority When it Held That Removing Penalties for Abortion Violated the Constitution.**

Spain’s Constitutional Court decided in 1985 that a legislative bill which removed penalties for abortion was an “unconstitutional violation of article 15 of the Constitution: “[a]ll

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<sup>42</sup> *Id.* § II 2.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

have the right to life and to physical and moral integrity . . . .”<sup>45</sup> With its shift to communist rule, Spain has since liberalized its abortion laws; however, when operating under more democratic principles, the Spanish Constitutional Court exercised its authority to overrule unconstitutional abortion legislation. While political motivations may have influenced Spain’s current views on abortion, Slovakia must accord weight to its own democratic Constitution and timeless principles with regard to the right to life which begins from conception. The Spain Constitutional Court’s 1985 abortion decision provides an important example of the exercise of constitutional authority that Slovakia may exercise under its democratic form of government. This Court has the authority to ensure legislative compliance with the supreme law of the land, the Slovakian Constitution.

In reaching its conclusion in 1985, the Spain Constitutional Court established twelve foundational principles (Legal Foundation, hereinafter “L.F.”):

Human life is a superior constitutional value (L.F. 3) and a Social State such as Spain has an affirmative duty to secure it by law (L.F. 4). This life is a reality distinct from the mother from the beginning of gestation and, therefore, the “one to be born” (*nasciturus*) must be considered a “legal good” . . . . accorded protection by the Constitution. Legislative history indicates that the framers of the Constitution intended this result (L.F. 5) . . . .”<sup>46</sup>

Additionally, supporting the Court’s analysis, Spanish medical associations unanimously agreed “that the unborn child is a living human being.”<sup>47</sup>

The Court also interestingly found,

that the one to be born has not been shown to possess any constitutional rights. At the same time, the fetus is protected by the Constitution, and indeed is protected by the sentence “All have the right to life . . . .”<sup>48</sup>

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<sup>45</sup> Richard Stith, *New Constitutional and Penal Theory in Spanish Abortion Law*, 35 J. AM. COMP. L., 513, 517 (1987) (quoting Decision of the Constitutional Court of Spain from April 1985).

<sup>46</sup> *Id.* at 517-18.

<sup>47</sup> *Id.* at 521. The government submitted no contrary evidence to these medical associations, which argued for a scientific consensus that life began at conception. *Id.* at 521-22, n.28.

<sup>48</sup> *Id.* at 519.

Although the Court did not directly address the issue of legal personality, it found that the unborn life did not possess a “subjective constitutional right to life.”<sup>49</sup> Richard Stith, in his analysis of the Court’s 1985 decision, has concluded that the Court’s reasoning was not contradictory—he opines that the decision can be understood as protecting the unborn as a legal “good” for the community:

The Constitutional Court in effect takes the traditional concept of the unborn as a protected legal good and inserts it into the constitutional “system of values” (LL.FF. 3, 4, 9). Since the Constitution emanates from the community, it would seem . . . that the unborn are a legal good or value of “the community”. But because of the superiority of the Constitution to ordinary legislation, the community has in effect made a commitment to the value of the unborn life such that it no longer retains a right freely to dispose of that life by legislation. The community could also be seen to be simply acknowledging a preexisting and binding inherent value in such life. In either case, one might say that the one to be born has become not so much a good “of” the community, in a proprietary sense, but a good “for” the community, a good at whose furtherance the community is aiming.<sup>50</sup>

The key to understanding the Spanish Constitutional Court’s ruling lies in the traditional Spanish legal doctrine concerning legal goods and property ownership. The Spanish Supreme Court noted that, “[h]uman life in formation is a good that constitutionally merits protection, is a constitutional legal good, a legal good of the community and not an individual legal good . . .”; the Constitutional Court agreed.<sup>51</sup>

Finally, the Court considered Spain’s value order, and concluded that life is a “‘superior value’ (L.F. 3), a ‘fundamental value’ (L.F.5), and a ‘central value’ (L.F. 9) . . . noting that life is a presupposition for all other rights, and by reflecting up on the placement of the right to life at the head of the list of constitutional protections (L.F. 3).<sup>52</sup> It held that elective abortion is

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<sup>49</sup> *Id.* at 521.

<sup>50</sup> *Id.* at 523.

<sup>51</sup> *Id.* at 522-23.

<sup>52</sup> *Id.*

unconstitutional:

If elective abortion were permissible, there would be no constitutional life-related value infringed upon even where an abortion were [sic] done outside the statutory provisions. By insisting that these provisions be strictly enforced *in order to protect the unborn*, the Court has clearly held the complete depenalization of abortion to be unconstitutional. As a fundamental public value, developing human life cannot be converted into purely private property.<sup>53</sup>

Therefore, Spain affirmed protection for the unborn as a constitutional, communitarian, central, fundamental, and superior value—for the good of the community. This Court should follow Spain’s 1985 abortion case example and exercise its authority to overrule LAIP as an unconstitutional conflict with existing Slovakian law and public policy.

### **III. The Law on Artificial Interruption of Pregnancy (“LAIP”) is Inconsistent with International Human Rights Law, Which the Slovak Constitution Defines as Authoritative.**

Czechoslovakia signed and ratified the U.N. Convention on the Rights of the Child (“Convention”)<sup>54</sup> on 30 September 1990 and 7 January 1991, respectively.<sup>55</sup> Slovakia thus adopted the Convention by succession on 28 May 1993.<sup>56</sup> In ratifying the Convention, Slovakia accepted an obligation to respect, protect, promote and fulfill the enumerated rights—including the obligation to adopt or change national laws and policies that implement the provisions of the Convention or Protocols.<sup>57</sup> Article 11 of the Slovak Constitution states: “International treaties on human rights and basic liberties that were ratified by the Slovak Republic and promulgated in a manner determined by law *take precedence over its own laws*, provided that they secure a greater

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<sup>53</sup> *Id.* at 524-25.

<sup>54</sup> United Nations Convention on the Rights of the Child, 20 Nov. 1989, 1577 U.N.T.S. 2 [hereinafter Convention].

<sup>55</sup> Ratification and Reservations on the Convention on the Rights of the Child, *available at* <http://www.ohchr.org/english/countries/ratification/11.htm>.

<sup>56</sup> *Id.*

<sup>57</sup> *See generally supra* note 54.

extent of constitutional rights and liberties.”<sup>58</sup>

The Convention secures greater constitutional rights and liberties to children by detailing human rights that are inherent to the harmonious development of every child everywhere, including: the right to survival; the right to develop to the fullest; protection from harmful influences, abuse and exploitation; and the right to participate fully in family, cultural and social life. Section 4 of LAIP violates the Convention. By allowing abortion-on-demand in the first twelve weeks of pregnancy, the law fails to respect, protect, promote or fulfill the rights of the child as enumerated in the Convention for *all* children, specifically those unborn children in their first twelve weeks of life.

**A. The Convention Ensures Protection Throughout the Entire Pre-natal Period.**

The Convention’s Preamble recognizes the “inherent dignity and the equal and inalienable rights of all members of the human family,” giving special recognition that “the child by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, *before as well as after birth.*”<sup>59</sup> The Jurisdictional Article reads that “a child means every human being below the age of eighteen years.”<sup>60</sup> By applying the international standard of interpretation under the Vienna Convention on the Law of Treaties (“VCLT”)<sup>61</sup> to Article 1 in context with subsequent articles, the Convention extends this definition to the unborn.

The VCLT, reflecting customary international law, states that a treaty “shall be

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<sup>58</sup> ÚSTAVA SR art. 11 (emphasis added). *See also* Charter of Fundamental Rights and Freedoms § 1 (9 Jan. 1991) (specifying that international treaties concerning human rights and fundamental freedoms that have been ratified by the CSFR are self-executing and prevail over ordinary domestic legislation).

<sup>59</sup> Convention, *supra* note 54, at pmb., ¶ 9 (emphasis added) (quoting United Nations Declaration of the Rights of the Child (proclaimed by General Assembly Resolution 1386 (XIV) of 20 Nov. 1959)). The Declaration served as the basis of the Convention of the Rights of the Child adopted by the U.N. General Assembly 30 years later on 20 November 1989. The Convention on the Rights of the Child was entered into force on 2 September 1990.

<sup>60</sup> Convention, *supra* note 54, at art. 1.

<sup>61</sup> Vienna Convention on the Law of Treaties, 23 May 1969, art. 31(1), 1155 U.N.T.S. 331 [hereinafter VCLT].

interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>62</sup> The context of the Convention, for the purposes of interpretation, comprises “the text, including its *preamble* and annexes.”<sup>63</sup> Specifically, the Preamble of the Convention “serves to set out the general considerations which motivate the adoption of the treaty.”<sup>64</sup> It is therefore imperative to consider the importance placed on protecting the child “*before* as well as after birth” when interpreting the meaning of “child.” In this context, when the Convention is viewed in its entirety, “child” includes even those voiceless unborn children at the mercy of their mothers.

When Article 1 of the Convention, which defines the right-holder as a “human being,” is read in context with the right to pre-natal care,<sup>65</sup> the definition of “human being” extends from conception onward.<sup>66</sup> Article 24 states that “1. States Parties recognize the *right* of the child to the enjoyment of the highest attainable standard of health . . . . 2. States Parties shall pursue full implementation of *this right* and, in particular, shall take appropriate measures: . . . . (d) To ensure appropriate *pre-natal* and post-natal care for mothers.”<sup>67</sup> Article 24 is significant because “it expressly says that babies have human rights during the pre-natal period.”<sup>68</sup> Article 24 of the Convention first recognizes the child’s right to the highest attainable standard of health. Second, it specifies a number of positive obligations the State must take for the “full implementation of

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<sup>62</sup> VCLT, *supra* note 61.

<sup>63</sup> VCLT, *supra* note 61, at art. 31(2) (emphasis added).

<sup>64</sup> See The Secretary-General, *Technical Review of the Text of the Draft Convention on the Rights of the Child*, ¶¶ 44, 47, U.N. Doc. E/CN.4/1989/WG.1/CRP.1/Add. 1 (carried out by the Secretariat prior to adoption by the General Assembly).

<sup>65</sup> Convention, *supra* note 54, at art. 24.

<sup>66</sup> The preambular language considered in the context of Article 1 and Article 24, strengthens the proposition that “human being” was intended to include children “before and after birth.”

<sup>67</sup> Convention, *supra* note 54, at art. 24 (emphasis added).

<sup>68</sup> Bruce Abramson, *Violence Against Babies: Protection of Pre- and Post-natal Children Under the Framework of the Convention on the Rights of the Child* 61 (World Family Policy Center, revised ed., 2006) (2005).

this right.”<sup>69</sup> Finally, in paragraph 2, sub-section (d), the State is obligated to ensure pre-natal care.<sup>70</sup> Therefore, the child’s right to health includes pre-natal care. Since *pre-natal* care by definition only applies prior to birth, children prior to birth are right-holders under the Convention.<sup>71</sup>

More importantly, the right to pre-natal care is not qualified by starting at the twelfth week after conception. Similarly, the right to life granted under Article 6 of the Convention, which states that “every child has the inherent right to life. . . [and that State] parties shall ensure to the maximum extent possible the survival and development of the child”<sup>72</sup> must also then extend to the entire pre-natal period. A recent submission to the U.N. Study on Violence Against Children cogently stated,

[a] boy or girl who does not receive proper care and assistance during the pre-natal period will probably not be able to enjoy all of the rights that form the vision of human dignity reflected in international human rights law. For instance, the right of a child to develop ‘to the maximum extent possible’ (article 6(2)), to experience ‘the highest attainable standard of health’ (article 24(1)), and to develop the ‘personality, talents, and mental and physical abilities to their fullest potential’ (article 29(1)(a)), all depend upon the child’s being able to fully enjoy the rights to life, survival, and development (article 6(1& 2)) during the entire pre-natal stage of life.<sup>73</sup>

### **1. The Convention’s Legislative History Confirms the Rights of the Unborn.**

The VCLT permits consulting legislative records to confirm an “ordinary meaning” interpretation.<sup>74</sup> The Convention’s legislative history with regard to the Preamble’s development

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<sup>69</sup> Convention, *supra* note 54, at art. 24 (emphasis added).

<sup>70</sup> *Id.* at ¶ 2.

<sup>71</sup> In a formal proposal submitted to the *U.N. Study on Violence Against Children*, Bruce Abramson adds that “[s]ub-paragraph (d) identifies the recipient of the pre-natal care as the mother, which is understandable since what is typically done for the physical well-being of the developing child is done through the medium of the mother’s body. Although the State fulfills the right by providing care to the mother’s body, the right-holder is the child.” Abramson, *supra* note 68, at 61.

<sup>72</sup> Convention, *supra* note 54, at art. 6.

<sup>73</sup> Abramson, *supra* note 68, at 56.

<sup>74</sup> VCLT, *supra* note 61, art. 31(2):

serves as textual evidence that *confirms* that the Convention provides rights to the unborn. Although the Convention was modeled after the Declaration of the Rights of the Child, which contained the language “before or after birth,”<sup>75</sup> the original working draft for the Convention did not.<sup>76</sup> Delegates strongly objected to this omission and proposed an amendment to include “before or after birth” in the preamble. In anticipation of disagreement,

[a] number of delegations agreed in support of the amendment on the grounds that their national legislation contained provisions protecting the rights of the unborn child *from the time of conception*. They stated that the purpose of the amendment was not to preclude the possibility of abortion, since many countries had adopted legislation providing for abortion in certain cases, such as a threat to the health of the mother.<sup>77</sup>

Ultimately, delegates adopted the phrase “before and after birth,” quoting the 1959 Declaration verbatim to reflect the rights of the unborn child from the time of conception.

Preambles typically do not create rights, but serve as a guide to the treaty’s interpretation by “set[ting] out the general considerations which motivate[d] the adoption of the treaty.”<sup>78</sup> However, since the delegates adopted the proposed amendment to reflect the States’ legislation protecting the entire pre-natal period, protecting the unborn child at all stages of life is a consideration that must be read into the motivating purpose for the Convention. The Convention’s Preamble asserts that the child needs special care and assistance in the pre-natal period of life. However, the Convention would fail to ensure such assistance if the rights were

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Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order *to confirm* the meaning resulting from the application of article 31. ... ” (emphasis added). However, if it is impossible to arrive at an interpretation using the “ordinary meaning,” then the VCLT suggests using the “legislative history” to “determine the meaning when the interpretation according to article 31 [either] (a) leaves the meaning ambiguous or obscure; or (b) leads to a result that is manifestly absurd or unreasonable.

<sup>75</sup> See *supra* note 59.

<sup>76</sup> U.N. Doc E/CN.4/L.1542, p.1 (1980) (adopting the draft convention in U.N. Doc. E/CN.4/1349 (1979)).

<sup>77</sup> Sharon Detrick, *The United Nations Convention on the Rights of the Child: A Guide to the “Travaux Préparatoires,”* 102 (1992) (excerpting U.N. Doc. E/CN.4/L.1542, pp. 2-5, para. 6 (emphasis added)).

<sup>78</sup> See *Technical Review of the Text of the Draft Convention on the Rights of the Child*, U.N. Doc. E/CN.4/1989/WG.1/CRP.1/Add. 1 (1989) at ¶¶ 44, 47. This review was carried out by the Secretariat prior to adoption by the General Assembly.

limited only to children from the “moment of birth.” Additionally, the language “asserts that the child needs *legal protection* during the pre-natal period.”<sup>79</sup> Legal protection can only be provided by the State Party, in this case, Slovakia.

Finally, the Preamble uses “child,”—the same term used in Article 1 of the Convention—signifying parallel definitions that include the entire pre-natal period. Most importantly, the Preamble places no limitation on when this need for care or legal protection begins. To the contrary, the express purpose of adding this language was to include the entire pre-natal period from conception.<sup>80</sup>

Like the Preamble, the issue of whether to further define “child” by including the term “unborn” under Article 1 was discussed and debated.<sup>81</sup> In fact, the drafters specifically removed “from the moment of birth” from the original draft of Article 1, so as to ensure that the Convention included “the entire period from the moment of conception.”<sup>82</sup> The working group finally decided to use the terms “child” and “human being.”<sup>83</sup> Thus, the U.N. lawmakers consciously considered limiting the rights of the Convention to after birth, but deliberately rejected this limitation by removing the language, “from the moment of birth,” from Article 1 and by retaining the Preamble’s recognition of the child’s rights before birth.

## **2. A Majority of State Parties Report to Understand the Convention as Including Protection for the Unborn.**

State parties to the Convention have “consistently recognized the human rights of pre-

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<sup>79</sup> See *supra* note 68, at 76.

<sup>80</sup> See *supra* note 77 and accompanying text.

<sup>81</sup> U.N. Doc. E/CN.4/L.1542, pp. 5-6, ¶¶ 29-31 (1980).

<sup>82</sup> See *supra* note 77, at 115 (excerpting U.N. Doc. E/CN.4/L.1542, pp. 5-6, ¶ 29). At the first meeting in 1979, the Working Group adopted Poland’s revised draft as “the basic working document.” *Id.* at 94. The revised draft included “from the moment of his birth” clause in the text of Article 1. At the third meeting in 1980, the restriction was deleted. *Id.* at 115, ¶¶ 29-31. The U.N. lawmakers had thus consciously considered limiting the rights of the Convention to after birth, but they then deliberately rejected this limitation.

<sup>83</sup> U.N. Doc. E/CN.4/L. 1542, Annex p. 2 (1980).

natal children.”<sup>84</sup> In an exhaustive study performed for an official submission to the U.N. Study on Violence Against Children, Bruce Abramson found,

[o]f those countries that have submitted implementation reports, 85 States have expressly spoken of the child having the right to life prior to birth. For instance: “The protection of the right to life begins with the protection of intra-uterine life;” state law “recognizes the right of life of the unborn child;” and national law “protects the right to life from conception onwards.” An additional 43 States have implicitly recognized that the [Convention] applies prior to birth by stating, under the sections on article 1 (Definition of the Child) or article 6 (Right to Life), that national law protects the lives of unborn children. In other words, of the 176 States that have filed reports, 128 have said that the [Convention] protects children during the pre-natal period of their lives.<sup>85</sup>

In interpreting its obligation under the Convention, this Court should consider that a majority of states have found that “child” under Article 1 of the Convention applies to the unborn child.

**B. Slovakia, by Constitutionally Defining “Child” to Denote, “from Conception,” is Obligated to Apply the Provisions of the Convention Equally to the Unborn, Before and After Twelve Weeks Development.**

In addition to recognizing the Convention’s unambiguous extension of the rights of the child to the unborn, this Court should recognize the equally important point that the Convention allows individual nation states to define “child” under Article 1 according to their own determination.<sup>86</sup> Since Slovakia intended to include the entire pre-natal period when defining constitutional protection for children, Slovakia is obligated under the Convention to provide all rights afforded to the child from the point of conception onward.

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<sup>84</sup> See *supra* note 68, at 1.

<sup>85</sup> See *supra* note 68, at 51. “Moreover, while the other 48 States have been silent on the matter under these two sections of their reports, they often implicitly recognize that the [Convention] covers pre-natal children under other sections. What is more, no State Party report expressly denies that the [Convention] applies prior to birth . . . .” *Id.* at 52.

<sup>86</sup> In the preparatory work, the drafting group urged the following text be placed in the *travaux préparatoires*: “In adopting [the] preambular paragraph [to include before and after birth], the Working Group does not intend to prejudice the interpretation of Article 1 or any other provision of the Convention by State Parties.” U.N. Commission on Human Rights, *Report of the Working Group on a Draft Convention on the Rights of the Child*, 10, U.N. Doc. E/CN.4.1989/48 (1989).

Under Section 4 of LAIP, Slovakia fails to “take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of the parent(s).”<sup>87</sup> Abortion on demand entails “violence” in its most basic definition: “the intentional use of force . . . that . . . results in . . . injury [or] death.”<sup>88</sup> The government’s positive obligation to ensure a child’s protection from violence does not differ between an unborn child twelve weeks developed and an unborn child thirteen weeks developed. Section 4 of LAIP violates Article 9 of the Convention as well as Article 6, the right to life, because it fails to provide any justification as to why Slovakia can ignore the positive obligation to “protect the child from all forms of . . . violence,” including injury or death.

Whether considering the Convention’s application to the unborn child, or in the alternative, Slovakia’s constitutional definition of “child,” the Convention poses positive and negative obligations on the state for the protection of every child. Slovakia, in defining “child” from the point of conception, is thereby bound by the Convention to provide equal protection for all unborn children during the entire pre-natal period. Under the Convention, Slovakia is obliged to recognize that every child from conception “has the inherent right to life” and “shall ensure to the maximum extent possible the survival and development of the child.”<sup>89</sup>

Additionally, because Article 11 of the Slovakian Constitution recognizes the Convention, an international treaty, as higher than national law, the LAIP must not conflict with the superior rights afforded under the Convention. Thus, the court is obligated to recognize that

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<sup>87</sup> Convention, *supra* note 54, at art. 19 § 1.

<sup>88</sup> Paulo Sergio Pinheiro, *Concept Paper for the Secretary General’s Study on Violence Against Children*, U.N. Doc. E/CN.4/2004/68, Annex, pp. 3-8, at ¶ 13 (7 July 2003).

<sup>89</sup> Convention, *supra* note 54, at art. 6.

Section 4 of LAIP is inconsistent with International Human Rights Law and thus should be overruled pursuant to Article 11 of the Slovak Constitution.

### **CONCLUSION**

This brief has demonstrated that the Law on Artificial Interruption of Pregnancy was unconstitutionally enacted, fails to balance the fundamental right to life against the right of privacy, and therefore, violates the Slovakian Constitution. Not only does it represent unlawful discrimination against unborn children within their first twelve weeks development, but LAIP contradicts the Slovak Constitution's clear protection of human life from the point of conception.

Moreover, this Court has the authority, and should, construe LAIP as an unconstitutional legislative enactment where it conflicts with Slovakian constitutional law and public policy. This Court may follow other international constitutional courts' examples by requiring legislative enactments, such as LAIP, to comply with the supreme law of the land—the Slovakian Constitution. Such a holding will enforce the Slovakian society's right to determine for itself that life, from conception, is worthy of the law's full protection. The right to life has already been defined under the Slovakian Constitution, and subordinate legislation must remain consistent therewith.

Finally, LAIP violates the terms of the U.N. Convention on the Rights of the Child. Slovakia, as a signatory, has positive and negative obligations under the Convention to ensure the protection of unborn children from the point of conception. The enactment LAIP, which fails to protect unborn children who are within their first twelve weeks of development, represents an unconstitutional failure to give proper weight to the authority of international law above domestic law pursuant to Article 11 of the Slovakian Constitution.

For all of the foregoing reasons, amici curiae ECLJ and ACLJ respectfully request that

this Court hold LAIP as an unconstitutional legislative enactment.