

ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: DON STENBERG, ATTORNEY GENERAL OF
NEBRASKA, ET AL., Petitioners v. LEROY CARHART

CASE NO: 99-830 c-1

PLACE: Washington, D.C.

DATE: Tuesday, April 25, 2000

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Supreme Court U.S.

1 IN THE SUPREME COURT OF THE UNITED STATES

2 -X

3 DON STENBERG, ATTORNEY GENERAL :

4 OF NEBRASKA, ET AL., :
5 Petitioners :
6 v. : No. 99-830
7 LEROY CARHART :
8 -X

9 Washington, D.C.

10 Tuesday, April 25, 2000

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:10 a.m.

14 APPEARANCES:

15 DONALD B. STENBERG, ESQ., Attorney General, Lincoln,
16 Nebraska; on behalf of the Petitioners.

17 SIMON HELLER, ESQ., New York, New York; on behalf of the
18 Respondent.

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P R O C E E D I N G S

(10:10 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument

now in Number 99-830, Don Stenberg v. Leroy Carhart.

Mr. Stenberg.

ORAL ARGUMENT OF DONALD B. STENBERG

ON BEHALF OF THE PETITIONERS

GENERAL STENBERG: Mr. Chief Justice, and may it
please the Court:

In Roe v. Wade, this Court said that there is no right to terminate a pregnancy at whatever time, in whatever way, and for whatever reason a woman chooses. This is a legal principle, and the Casey undue burden test asks whether a State may prohibit a little-used form of abortion that borders on infanticide when safe, alternative forms of abortion are available to women who seek abortions.

Clearly, the State can constitutionally ban some abortion procedures. For example, the State can unquestionably prohibit an abortion procedure that is unsafe for the woman's health.

QUESTION: General Stenberg, I just would like to clarify one thing. You say, borders on infanticide. I thought that this case related only to pre-viability. Is that not so?

1 GENERAL STENBERG: Well, that -- the statute
2 would cover both pre-viability and post viability, Your
3 Honor, but I believe it was the legislature's observation
4 that, whether viable or not, that it's important --

5 QUESTION: This case concerns only the pre-
6 viable stage, is that not so?

7 GENERAL STENBERG: Yes. That's because the
8 district judge -- because Dr. Carhart testified that he
9 did not perform post viability partial birth abortions,
10 and therefore the Federal judge did not need to rule on
11 the post-viability aspect of the statute.

12 The statute itself covers --

13 QUESTION: I take it --

14 GENERAL STENBERG: Covers both, Your Honor.

15 QUESTION: I take it that save with respect to
16 a -- an exception to save the woman's life, and so on,
17 that post viability abortions are generally precluded, by
18 the State.

19 GENERAL STENBERG: I'm sorry, Your Honor.

20 QUESTION: Post viability abortions are
21 generally prohibited, I assume, by separate statute.

22 GENERAL STENBERG: Yes. There is a separate
23 statute that prohibits all post viability abortions except
24 to save the life or for the health of the mother. That is
25 under another statute.

1 But I believe, Your Honor, Justice Ginsburg,
2 that the State interest here is drawing a bright line
3 between infanticide and abortion, and that's such a strong
4 State interest that 30 States in our Nation have addressed
5 this issue and have voted to ban that procedure. In fact,
6 in Nebraska the sentiment was so strong on the State
7 interest to draw a bright line between infanticide --

8 QUESTION: But General, isn't the bright line
9 between infanticide and abortion at the -- a claim of
10 viability? Isn't that the statute that draws that bright
11 line?

12 GENERAL STENBERG: I think that 30 States --

13 QUESTION: It does draw that bright line,
14 doesn't it?

15 GENERAL STENBERG: Well, that would be a line.
16 That's not the bright line, however, that the legislature
17 drew in this instance, Your Honor.

18 QUESTION: No, but that is a bright line that
19 separates post viability from pre-viability abortions,
20 since one is legal and the other is illegal, under
21 Nebraska law?

22 GENERAL STENBERG: Well, that is under one
23 Nebraska statute, that's correct, Your Honor, but the
24 legislature has also been concerned about the partial
25 birth abortion procedure which led to the passage of this

1 particular statute.

2 QUESTION: General Stenberg, I took it that what
3 you meant when you said it bordered on infanticide had
4 nothing to do with the viability of the fetus, but that
5 the procedure looks more like infanticide --

6 GENERAL STENBERG: Yes.

7 QUESTION: -- when the child is killed outside
8 the womb than when it is killed inside the womb, and
9 therefore it can coarsen public perception to other forms
10 of killing fetuses or children outside the womb. Is that
11 not what the legislature was concerned about?

12 GENERAL STENBERG: That is precisely the point,
13 Your Honor, and that is precisely what motivated the
14 legislature of the State of Nebraska in this case.

15 In fact, the State interest here was so strong
16 that the statute passed the Nebraska legislature with only
17 one dissenting vote, with many pro-choice State
18 legislators voting in favor of this ban on partial birth
19 abortion.

20 Now, the respondent argues that drawing a bright
21 line between abortion and infanticide is not a valid State
22 interest. The respondent argues that there are only two
23 valid State interests, one being maternal health and the
24 other essentially discouraging abortions. However, Casey
25 specifically recognized that other State interests could

1 be weighed as part of the undue burden test, and at 505
2 U.S. 877 the Court said, quote, a statute which, while
3 furthering this interest in potential life or some other
4 valid State interest, and then goes on to describe the
5 substantial obstacle test, so the Court recognized that
6 there could be other State interests besides merely
7 maternal health and discouraging abortions.

8 Now, the respondent next argues that even if
9 there is a valid State interest, that it can only be
10 asserted if it creates no burden on a woman's right to
11 have an abortion. The respondent implicitly asks this
12 Court to adopt a no-burden test, or perhaps reestablish a
13 strict scrutiny test in place of Casey.

14 The respondent argues that, under the no-burden
15 test that any State regulation which increases the health
16 risk to a woman by even the slightest amount is
17 unconstitutional. This is contrary to Casey, which
18 held -- which upheld the 24-hour waiting period because it
19 did not create, quote, a real health risk, unquote, or a,
20 quote, a significant threat, unquote, to the health of a
21 woman.

22 The respondent also asks this Court to in fact
23 adopt an all-or-nothing test in place of the large
24 fraction test to judge the facial constitutionality of
25 abortion restrictions. In other words, the respondent

1 argues that unless a statute is constitutional in every
2 conceivable application, it must be struck down as
3 facially unconstitutional.

4 QUESTION: Was this a facial challenge, General
5 Stenberg? GENERAL STENBERG: And similarly situated

6 GENERAL STENBERG: This was pled as a facial
7 challenge. There's some language in the district court
8 decision as being applied. However, the State has never
9 applied this statute. This lawsuit was filed within 2 or
10 3 or 4 days after the statute took effect. The State has
11 never had a chance to attempt to apply the statute.

12 QUESTION: But General Stenberg, in the very
13 first paragraph of the Judge's opinion it says, I do not
14 reach the question of whether the law is facially invalid.

15 GENERAL STENBERG: Well, I understand -- and I
16 mention --

17 QUESTION: He held it invalid as to this doctor.

18 GENERAL STENBERG: And frankly I think, Your
19 Honor, that the district court was simply wrong in its
20 characterization of this case. The State has not had an
21 opportunity to apply the statute to --

22 QUESTION: Well, the injunction is just limited
23 to against this doctor and his patients, isn't it?

24 GENERAL STENBERG: I think what the district
25 court may have had in mind --

1 QUESTION: Well, am I correct in that?

2 GENERAL STENBERG: I'm sorry, Your Honor?

3 QUESTION: Am I correct that the injunction only
4 applies to this doctor and his patients?

5 GENERAL STENBERG: And similarly situated
6 individuals, is the way I believe the court's order read,
7 Your Honor.

8 QUESTION: How did the court of appeals -- did
9 the court of appeals say whether it was treating this as a
10 facial challenge, or an as-applied challenge?

11 GENERAL STENBERG: It seems -- my reading of the
12 circuit court was that they viewed it as an applied -- or,
13 excuse me, as a facial challenge. I think what the
14 district judge may have thought when he said, as applied,
15 he may have meant as applied to pre-viability abortions,
16 drawing the distinction that Dr. Carhart testified that he
17 doesn't do post viability abortions.

18 QUESTION: Mr. Stenberg, do you take the
19 position that the State of Nebraska could also prohibit
20 the dilation and evacuation procedure for pre-viability
21 abortions?

22 GENERAL STENBERG: Well, under -- under
23 Danforth, Your Honor, that was still --

24 QUESTION: Well, I just wanted your position.

25 Yes or no?

1 GENERAL STENBERG: For purposes of this case,
2 the State's position would be that the State could not
3 prohibit the D&E procedure, but also the State has not
4 attempted to prohibit the D&E procedure.

5 QUESTION: I know that's the position you take,
6 but it is difficult to read the statute and be certain
7 that that is so. They're both rather gruesome procedures,
8 but in fact one may be very similar to the other --

9 GENERAL STENBERG: I think --

10 QUESTION: -- and I'm not certain whether the
11 statute might not prohibit the D&E procedure as well.

12 GENERAL STENBERG: It's our position, Your
13 Honor, that it does not prohibit the D&E procedure, and
14 I'd like to address that question first from a, kind of an
15 institutional standpoint and then turn specifically to the
16 language of the statute.

17 In the absence of a decision interpreting this
18 law by our State supreme court, the foremost legal
19 authority on the proper interpretation of State law is the
20 Office of the State Attorney General. The Attorney
21 General interprets the law, gives legal advice to State
22 agencies, the Governor, our administrative agencies,
23 appears in State court every week, appears before the
24 Nebraska supreme court virtually every time that it's in
25 session interpreting and arguing points of State law.

1 A U.S. district court, by comparison, spends
2 most of its time dealing with issues of Federal
3 constitutional law and Federal statutory interpretation.

4 QUESTION: Does the Attorney General in the
5 State of Nebraska issue rulings or opinion letters?

6 GENERAL STENBERG: We do, Your Honor. We did
7 not have the opportunity to do that. We were not asked,
8 while this statute was in the legislative process, to
9 issue an interpretation.

10 But the point I want to make here is that there
11 are approximately 20 of these cases in various stages in
12 various Federal courts throughout the Nation and, at least
13 so far as my staff can determine, no State Attorney
14 General has interpreted this law or similar laws in their
15 own States to ban the D&E procedure.

16 QUESTION: General Stenberg, one of the
17 authorities that you cited for deference was the
18 Arizonan's case where there was a formal opinion of the
19 State Attorney General, and yet when that case was
20 ultimately decided by the State's own supreme court, the
21 Arizona supreme court, they rejected the formal opinion of
22 the State Attorney General, so I think you can say that
23 you deserve respectful consideration, but no more than
24 that. We don't know what the supreme court of your State
25 would say about a position that you're taking in

1 litigation.

2 GENERAL STENBERG: Well, I understand that, Your
3 Honor. I guess my point is, is that for the Court to do
4 that, this Court would have to essentially tell the
5 Attorneys General of approximately 20 States that each and
6 every one of them misunderstood and misinterpreted their
7 own State law, even though that is their principal American
8 business day-in and day-out, year-in and year-out.

9 QUESTION: Well, outside of this litigation, has
10 your office or the Attorney General's office in Nebraska
11 taken a formal position that this statute does not apply
12 to the D&E procedure?

13 GENERAL STENBERG: Well, our formal position was
14 taken in the context of this litigation, Your Honor.

15 QUESTION: Of this litigation, but not -- in no
16 other form and in no other venue have you made that
17 statement or that representation?

18 GENERAL STENBERG: No, Your Honor, but I would
19 strongly recommend to this Court --

20 QUESTION: Mr. Stenberg, let me ask you another
21 question. There is no exception under this statute, as I
22 read it, for exceptions for the health of the woman, is
23 that correct?

24 GENERAL STENBERG: That is correct, Your Honor,
25 and it's not necessary here because the D&E procedure

1 remains available any time there is a health problem, and
2 that procedure is available to --

3 QUESTION: Was there no testimony to the effect
4 that there might be circumstances in which the health of
5 the woman required D&X versus D&E?

6 GENERAL STENBERG: There was -- there was
7 testimony that I would regard as speculation, Your Honor,
8 but both the American Medical Association and the American
9 College of Obstetricians and Gynecologists have studied
10 this issue and said that they could not identify a single
11 circumstance when a -- in which a partial birth abortion,
12 or a D&X abortion would be the only procedure available to
13 save the life --

14 QUESTION: Then why did you need an exception
15 for life, because if you say the D&X procedure is never
16 medically necessary, then what you're saying about no need
17 for a health exception would seem to apply as well to a
18 life exception.

19 GENERAL STENBERG: I think from a legal
20 standpoint it does apply. I think the legislature acted,
21 as legislative bodies do, as part of a political
22 compromise, as part of a, perhaps an effort to be
23 particularly careful when the life of the woman was
24 involved, but I don't believe that it would have been
25 necessary in order to have a constitutional statute.

1 QUESTION: If I read these correctly, and I'm
2 not a doctor, it seems to me a lot of the amici on the
3 other side representing medical organizations say that
4 there could be circumstances where this D&E procedure is
5 more risky for the health of the woman.

6 For example, hurting the womb so perhaps the
7 woman couldn't have children in the future, and there are
8 a whole lot of circumstances where labor-induced
9 abortion -- you know, induced labor can be more dangerous.
10 At least they list quite a few. So what are we supposed
11 to do where the medical opinion seems at least divided?

12 GENERAL STENBERG: Oh, I think the medical
13 opinion is divided, Your Honor, and I think what this
14 Court should do when the medical opinion is divided is
15 defer to the judgment of the State legislative body, which
16 is the proper fact-finder when we're dealing with --

17 QUESTION: All right. Well, if the medical
18 opinion is divided, and then if there are doctors who feel
19 it is necessary for the health of the mother, then what is
20 the excuse for the legislature not putting in an exception
21 for health, since, after all, if you're right on the
22 facts, it would make no difference, and if you're wrong on
23 the facts it would violate Roe and Casey?

24 GENERAL STENBERG: Well, Your Honor, the fact
25 is, is that the -- even the experts who testified for

1 Dr. Carhart here, that of the 60 or so doctors who have
2 testified in these partial-birth abortion cases all across
3 the country, only about three could be identified as
4 actually performing this procedure themselves. I don't
5 think that we can conclude, as a legislative policy ~~rt to~~
6 matter, that there are only -- that almost 60 of these
7 doctors are not properly caring, or significantly creating
8 a health risk for their women who are patients. ~~to the~~

9 This is a practice that is not used even by most
10 abortionists in the United States, and so it's very
11 difficult to conclude that there is any health risk when
12 both ACOG and the American Medical Association ~~the Am. Med. Assn.~~
13 specifically found that there are always alternatives
14 available to a woman in need of abortion if there is a
15 health concern. ~~conversacion~~

16 But to return briefly to the overall picture of
17 statutory construction, I would strongly recommend that ~~the~~
18 this Court adopt the corollary proposed in the Friend of ~~the~~
19 the Court brief authored by the State of Virginia, which
20 basically says that when a Federal court is faced with a
21 State statute that has not been construed by the State's
22 highest court, that the Federal court either defer to the
23 opinion of the Attorney General or -- of the State, or, if
24 the Court is unwilling, or finds that that would not be a
25 correct interpretation of the law, to certify the question

1 to the State supreme court, because that way --

2 QUESTION: Did you ask the district court to do
3 that?

4 GENERAL STENBERG: Pardon me, Your Honor?

5 QUESTION: Did you ask the district court to and
6 certify the question? gongly object, but his argument was

7 GENERAL STENBERG: In our answer we -- no, we if
8 did not. We did ask the court in our answer to the complaint to abstain so that the State courts could hear
9 the case. this controversy would not be resolved by

10 referring to the case. of course, if a court was going to
11 district court level, did you suggest it at the Eighth
12 Circuit level?

13 GENERAL STENBERG: No, Your Honor, we did not.
14 There was a conversation --

15 QUESTION: You know, that's one of the notable
16 differences between Arizonans and this case, is they had
17 the Attorney General from day 1 say to the district court,
18 please certify it to our State supreme court. They said
19 the same thing to the Ninth Circuit. But you're saying it
20 for the first time to this Court.

21 GENERAL STENBERG: Well, yes, Your Honor, we did
22 ask for abstention, but I suppose that --

23 QUESTION: Did the other side ask for it to be
24 certified?

1 GENERAL STENBERG: Not to my knowledge. There
2 was a discussion, Your Honor, in closing arguments between
3 Mr. Heller, counsel for Dr. Carhart, and the district
4 judge, closing arguments on the preliminary injunction,
5 and Judge Kopf brought up the issue of certification, and
6 Mr. Heller did not strongly object, but his argument was
7 that that would not resolve the controversy, that even if
8 the State supreme court would narrow the construction to
9 D&X the statute was still unconstitutional, and that
10 therefore the controversy would not be resolved by
11 referring it to the State supreme court and in essence
12 suggested, therefore, that the district court proceed.

13 QUESTION: Of course, if a court was going to
14 reach that resolution it wouldn't make any sense for a
15 court to certify it, would it?

16 GENERAL STENBERG: If it was going to decide
17 that the D&X was unconstitutional there would be no
18 reason --

19 QUESTION: Even interpreted the way you say it
20 should be interpreted, it would be wrong, I think, for the
21 court to ask for certification.

22 GENERAL STENBERG: Well, precisely right, and in
23 essence Judge Kopf commented, not in those words, but
24 generally to that effect.

25 QUESTION: So that it would be no more

1 appropriate for us to certify it. The same reasons would
2 apply, but you've just asked us to do that.

3 GENERAL STENBERG: Well, no, Your Honor. If --
4 this Court is going to construe Nebraska's statute --
5 contrary to the opinion of the Attorney General that it is
6 limited to D&X -- or, excuse me, that it includes D&E,
7 then you should certify it, but if --

8 QUESTION: Should certify it only if that makes
9 a difference to us.

10 GENERAL STENBERG: Only if it makes a difference.
11 If this --

12 QUESTION: You would acknowledge that we also
13 should not certify if, even, we agree with your
14 interpretation of the statute, we think it's unconstitutional.
15

16 GENERAL STENBERG: Yes, that's correct. If --

17 QUESTION: I mean, if we interpret it that way.

18 GENERAL STENBERG: Yes. The State's position
19 is, this statute bans the D&X procedure. If this Court
20 feels that ban is unconstitutional, then there would be no
21 need to certify that question. But if the question is,
22 does this statute ban the D&E procedure or not, and this
23 Court is uncertain on that, then it should certify that
24 question to the State supreme court, rather than, in my
25 opinion at least, incorrectly interpret Nebraska's own

1 statute.

2 QUESTION: Is it your position that the language
3 of the statute itself is incapable of covering D&E perhaps
4 because of the intent requirement, or is it your position
5 that there is a gray area, and the better interpretation
6 is the one in accordance with the legislative intent,
7 which was simply to get to the D&X abortion? Which is
8 your position?

9 GENERAL STENBERG: I think it's fair to say the
10 statute might be amenable to more than one construction,
11 but we believe that the State's construction is a
12 reasonable one. It's one that would uphold, hopefully
13 uphold the cons --

14 QUESTION: Well, and we have held, have we not,
15 that a Federal court in construing a State statute is
16 obligated to, if there's constitutional doubt to construe
17 in a reasonable way that will avoid the constitutional
18 doubt?

19 GENERAL STENBERG: Yes, that is exactly right,
20 Your Honor, and that's of course the rule that is followed
21 by the Nebraska supreme court as well.

22 QUESTION: Why is it, of course, because it
23 wasn't in Arizonans. In Arizonans, the State Attorney
24 General had offered a limited construction that would
25 remain within constitutional bounds, and then the Arizona

1 supreme court said no, we can't read the statute that way.
2 We read the statute as, in covering much more than the
3 Attorney General is arguing, and therefore it's
4 unconstitutional.

5 So whatever we say about our accounting with
6 respect to Federal legislation, certainly we can't say
7 what the State can do with its own legislation.

8 GENERAL STENBERG: That's true, Your Honor, and
9 that's why I think the State certification rule offered by
10 the State of Virginia removes the Federal court from a
11 source of friction with the States by either accepting the
12 interpretation placed on the statute by the Attorney
13 General, or certifying to the State supreme --

14 QUESTION: We don't always certify State
15 questions to the State courts, especially when there's
16 only one interpretation that would render the statute
17 constitutional and another one to render it
18 unconstitutional. It isn't the Federal law that we must
19 certify to State courts, is it?

20 GENERAL STENBERG: No, Your Honor, and I'm not
21 suggesting that. I only suggest certification if the
22 Court places -- it would place a different interpretation
23 on the statute than placed on it by the State Attorney
24 General.

25 QUESTION: General, may I ask you this question:

1 let's assume your construction of the statute is correct,
2 and then the question is whether, could the State ban just
3 D&X, and I understood you to say earlier that the American
4 College of Obstetricians and Gynecologists said you don't
5 need this procedure in substance.

6 But I notice in their brief they have a
7 sentence, depending on the physician's skill and
8 experience, the D&X procedure can be the most appropriate
9 abortion procedure for some women in some circumstances,
10 and then they have a footnote to the -- a finding of the
11 district court that there are at least 10 to 20 Nebraska
12 women each year for whom the D&X is the most appropriate
13 procedure.

14 Now, do we have to disagree with that finding to
15 hold this statute valid?

16 GENERAL STENBERG: No, I don't believe so, Your
17 Honor. I think you need to accept that the legislature
18 could consider all of the competing --

19 QUESTION: And it can ban the most appropriate
20 procedure for a small number of women?

21 GENERAL STENBERG: Well, I don't -- I believe
22 that the district court was simply erroneous --

23 QUESTION: Well, that's what I'm asking you. Do
24 we have to find that finding erroneous in order to sustain
25 your position?

1 GENERAL STENBERG: I don't believe so, Your
2 Honor. Dr. Carhart testified that he attempts
3 approximately 200 D&X abortions a year, but only
4 successfully completes 10 or 20 of them, and a procedure
5 that is completed so rarely, and that is practiced so
6 rarely across the United States, even by persons in the
7 practice of abortion, simply prohibiting that procedure
8 can simply not be considered to present any significant
9 threat to a woman's health if that procedure's not
10 available.

11 QUESTION: Well, but I mean, you could make the
12 same argument about the exception to save life. There are
13 very rarely instances, probably, in the whole spectrum of
14 abortion practice in which the life exception is
15 necessary, but you can't thereby simply say, well, we're
16 going to allow the legislature to ignore those cases and
17 eliminate a life exception even in your later term
18 prohibition, so why, I guess, should the legislature be
19 more cavalier in overruling medical judgment in this
20 circumstance?

21 GENERAL STENBERG: Well, I think the
22 overwhelming weight of medical judgment, as opposed to the
23 district court judge's view, comes from the American
24 Medical Association and ACOG that this particular
25 procedure is never necessary to save the life or preserve

1 the health of the woman.

2 QUESTION: Well, I think when we're talking
3 about most appropriate procedure, as Justice Stevens is
4 quoting their brief as doing, I think normally we take --
5 at least I take that to mean the procedure which is most
6 conducive to an uncomplicated abortion and hence one that
7 does not present any health risks that can be avoided, so
8 I find your assumption hard to accept if we are entitled
9 to take into consideration the position stated in the OB-
10 GYN brief.

11 GENERAL STENBERG: Well, under Casey, Your
12 Honor, if the test were a no-burden test, or if there
13 could be not even the smallest possible health
14 consideration, then Casey would have come out differently
15 on the 24-hour waiting period. The whole concept of undue
16 burden is the word, undue, and it seems the respondent
17 wants to argue here for a no-burden test, so the --

18 QUESTION: General Stenberg, I thought that
19 Casey indicated that there were two interests throughout
20 pregnancy, and one is the health of the woman and the
21 other is the potential life of the fetus.

22 And whatever this particular ban does, it
23 certainly can't be urged that it is passed in the
24 interests of the health of the woman, and it doesn't serve
25 the interests of the potential life of the fetus, because

1 it just says, as you said, there's always another way to
2 do it.

3 So it doesn't serve either of the purposes that
4 we recognized in Casey as central, and therefore seems to
5 be out of the balance that this Court set for legitimate
6 pre-viability regulation.

7 GENERAL STENBERG: Well, as I mentioned earlier
8 in my argument when I quoted from Casey, the Court in very
9 general terms recognized other State interests, presumably
10 to be recognized and defined in subsequent case law, and I
11 believe that case is now here.

12 Mr. Chief Justice, if I might reserve the
13 remainder of my --

14 QUESTION: Just, what does a waiting -- a 24-
15 hour waiting period, how does that affect either of those
16 two interests?

17 GENERAL STENBERG: Well, there was --

18 QUESTION: Either the health of the -- you know,
19 the potential viability of the fetus or the health of the
20 mother? Doesn't that have another interest in --

21 GENERAL STENBERG: There was testimony in the
22 Casey decision, recorded in the Casey decision about, that
23 the 24-hour waiting period might require more travel. It
24 might, in fact, lead to delays of more than 24 hours, that
25 any delay leads to some theoretical increase, the passage

1 of each day --

2 QUESTION: The State interest that it protects
3 is certainly not a State interest in either the health of
4 the mother or the viability, the potential viability of
5 the fetus, is it, the 24-hour wait?

6 GENERAL STENBERG: No. That was -- that --

7 QUESTION: It's a totally different State
8 interest.

9 GENERAL STENBERG: That's correct, Your Honor.

10 QUESTION: You don't think the waiting period,
11 the object behind the waiting period is its tendency to
12 induce second thoughts about having the abortion?

13 GENERAL STENBERG: Yes, that is -- that is --
14 or, I think -- I would -- yes, Your Honor, I would think
15 it --

16 QUESTION: So I think that does go to the
17 potential life involved in the viability of the fetus,
18 when the fetus, at the stage it would become viable and
19 hence subject to full protection.

20 GENERAL STENBERG: Yes. It could lead the
21 mother to decide --

22 QUESTION: And indeed wasn't that the purpose
23 that the State put forward, that by giving an interval,
24 the woman might change her mind?

25 GENERAL STENBERG: Yes.

1 QUESTION: So it quite clearly was intended to
2 serve the -- what the Court described as the interest in
3 the potential life of the fetus.

4 GENERAL STENBERG: Yes, that's correct, Your
5 Honor.

6 If I might reserve the rest of my time.

7 QUESTION: Very well, General Stenberg.

8 Mr. Heller, we'll hear from you.

9 ORAL ARGUMENT OF SIMON HELLER

10 ON BEHALF OF THE RESPONDENT

11 MR. HELLER: Mr. Chief Justice, and may it
12 please the Court:

13 The Nebraska statute before this Court aims to
14 eliminate the two central principles of Roe v. Wade and
15 Planned Parenthood v. Casey. It seeks to reverse the
16 supremacy of women's health over fetal interests
17 throughout pregnancy, and it seeks to replace the
18 viability line established in this Court's jurisprudence
19 with a new line, one based on the location of the fetus
20 inside the woman's body.

21 I want to focus on three main reasons that the
22 Nebraska ban is unconstitutional.

23 First, it's so broadly written that it could
24 prohibit most second trimester abortions as they are
25 performed in Nebraska today.

1 QUESTION: Well, but are -- are you defending
2 the court of appeals' construction of the statute here?
3

4 MR. HELLER: Yes.

5 QUESTION: Do you think the court of appeals
6 followed our admonition that when you have two plausible
7 constructions available and one would avoid constitutional
8 difficulty, you should follow that, even though it's a
State statute?

9 MR. HELLER: Absolutely, Your Honor. That
10 principle is -- only holds where the two alternative
11 constructions are both reasonable.

12 In this case, the standard canons of statutory
13 construction, those applied by the Nebraska Supreme Court
14 and this Court, all indicate that the Nebraska statute is
15 much broader than a prohibition just on the D&X technique.

16 First, its plain language describes the elements
17 of most second trimester abortion procedures, in
18 particular the dilation and evacuation method, as both the
19 district court and the court of appeals found. And they
20 found that based not simply on this text of the statute,
21 but the text of the statute interpreted in light of the
22 testimony of the witnesses, both the witnesses for Dr.
23 Carhart and the State's own witnesses who acknowledged
24 that this statute could be broad enough to prohibit --

25 QUESTION: Do we ordinarily go into the

1 testimony of witnesses? These were witnesses at a trial?

2 MR. HELLER: That's correct.

3 QUESTION: And what -- what authority do they
4 have to speak to the construction of a statute?

5 MR. HELLER: No, I'm not talking about their
6 authority to speak to the construction of the statute, but
7 describing how abortion procedures actually occur and how
8 they are performed and then comparing that to the language
9 of the statute to see if the steps that occur in
10 abortion --

11 QUESTION: These witnesses compared it to the
12 language of the statute?

13 MR. HELLER: No. The -- the court did. The
14 court relied on the descriptions of abortion procedures by
15 the witnesses.

16 QUESTION: Well, I -- I must say I don't
17 understand -- I don't understand that conclusion. The
18 statute prohibits a procedure in which the person
19 performing the abortion partially delivers vaginally a
20 living, unborn child before killing the unborn child and
21 completing the delivery.

22 Now, how does that occur in D&E? As I
23 understand what happens in D&E sometimes is that they --
24 is that they -- is your argument that in breaking off a
25 leg and dismembering the fetus inside the womb, when you

1 -- when you pull the leg out of the womb, that amounts to
2 delivering, partially delivering a living, unborn child?
3 Pulling out a -- a torn-off leg is -- is delivering a
4 living, unborn child?

5 MR. HELLER: The factual findings of the
6 district court are quite clear that the way the D&E
7 typically occurs is that the physician partially delivers
8 the intact, living fetus into the vagina while it --
9 before fetal demise has occurred, so that there is a
10 living, unborn child partially in the uterus and partially
11 outside the uterus.

12 QUESTION: But in order to -- for the purpose of
13 killing it, partially delivers -- the term partially
14 delivers a living -- the unborn child means deliberately
15 and intentionally delivering into the vagina a living,
16 unborn child. Now, in - in a D&E, does -- is that what
17 the -- is that what the physician tries to do, tries to
18 intentionally deliver into the vagina a living, unborn
19 child for the purpose of -- of then killing it?

20 MR. HELLER: Yes.

21 QUESTION: Yes?

22 MR. HELLER: In every pre-viability --

23 QUESTION: That's not my understanding of the
24 D&E at all. My understanding is that -- that you -- you
25 try to dismember it if possible before the delivery.

1 MR. HELLER: That's not what the district court
2 found. All the expert testimony shows that to -- if the
3 physician were to attempt to induce fetal demise while the
4 fetus is still in the uterus, that would impose increased
5 health risks on the woman.

6 And that's really what this case is about. It's
7 about shifting the location of the abortion procedure into
8 the uterus at the expense of women's health.

9 QUESTION: You mean that some of the time D&E
10 could be that, or all the time? My impression in reading
11 it was that some significant part of the time this could
12 -- this statutory wording would be satisfied with the D&E.

13 MR. HELLER: That's right. In fact, in the
14 majority of the cases --

15 QUESTION: The majority?

16 MR. HELLER: That's right. That -- that the way
17 a D&E is performed matches the statutory elements. In
18 fact, the Attorney General of Nebraska told the district
19 court that anytime a living fetus is brought part way into
20 the vagina, before fetal demise has occurred, and is then
21 killed by some step, that that constitutes a --

22 QUESTION: No, but it has to be more than just
23 bringing it. It has to be the object of the physician to
24 do it that way. And I do not understand it to be the case
25 that this is what you set out to do when you do a D&E.

1 MR. HELLER: Actually Dr. Carhart, in each
2 second trimester abortion by D&E that he performs, sets
3 out to bring as much of the fetus out of the uterus at
4 once as possible because it reduces risks to -- to the
5 women. It reduces the risks of uterine perforation and
6 infection.

7 QUESTION: Well --

8 MR. HELLER: So, his intention is always to do
9 that, if possible.

10 QUESTION: As you describe these two procedures,
11 which in your view seem to come close together, the
12 American Medical Association and the Association of
13 American Physicians and Surgeons are just confused on this
14 point?

15 MR. HELLER: Well, the American Medical
16 Association described the D&X technique as a form of D&E.
17 It is in the record in their report on abortion that's in
18 the record. They describe the D&X technique as a form of
19 D&E, and that's because it basically involves the same
20 steps as a D&E. It involves the same procedure of
21 delivering the fetus vaginally. And pre-viability, that
22 inevitably results in fetal demise.

23 QUESTION: Where -- where is that? Will you
24 give us the citation in the record? I did not understand
25 that to be the case.

1 MR. HELLER: Certainly. The citation occurs in
2 exhibit 7, which is on pages 482 through 500 of the joint
3 appendix. In particular, on page 492 of the joint
4 appendix, the AMA report calls the D&X method a form of
5 D&E and, in fact, goes on to state -- the AMA states
6 further that the D&X technique may be preferred by some
7 physicians precisely because it reduces risks to the
8 woman. That's the opinion of the American Medical
9 Association, consistent with the opinion of the specialty
10 group, the American College of Obstetricians and
11 Gynecologists.

12 QUESTION: Well, they -- they describe it as a
13 form of DE -- D&E not in that, like D&E, it involves
14 partial birth of the child. That isn't the respect in
15 which they say it's a form of D&E.

16 MR. HELLER: Well, the factual findings of the
17 district court established that in all D&E's the fetus is
18 brought through the vagina and out of the woman's body.
19 That's how the abortion --

20 QUESTION: Ultimately, yes, but not -- not
21 always intact and not always alive.

22 MR. HELLER: Typically intact and alive. Those
23 are the findings in the district court, and that's what
24 Dr. Carhart does in most of the D&E abortions he performs,
25 including those in which he's able to perform the D&X

1 technique. So, that's one reason that we believe the
2 statute encompasses the D&E method.

3 QUESTION: Why -- why would you be able to do a
4 D&E and -- as I understand it, the -- the D&X is only
5 possible 90 to 95 percent of the time that he attempts it.
6 Right?

7 MR. HELLER: Well, it's possible about -- he is
8 able to do it about 10 percent of the time.

9 QUESTION: Yes. He's -- I'm sorry. Just the
10 opposite. It's not possible to do it 90 to 95.

11 MR. HELLER: Right.

12 QUESTION: What makes it impossible? I thought
13 what made it impossible is the inability to take out the
14 -- the fetus from the vagina intact and still alive.

15 MR. HELLER: Well --

16 QUESTION: And if -- if you can do it and if
17 that -- if that's the same thing you do for D&E, then I
18 don't understand any difference at all between the two
19 procedures.

20 MR. HELLER: There are a variety of factors that
21 determine how exactly a physician, whether it's Dr.
22 Carhart or any other physician, performs the D&E when you
23 -- if you were to measure what parts are delivered and so
24 forth.

25 QUESTION: I mean, just -- just tell me what it

1 means to say that -- that 90 percent of the time he can't
2 do a D&X, but he can do a D&E? What does that mean?

3 MR. HELLER: For example, insufficient cervical
4 dilation may exist so that -- that the D&X is not possible
5 because there's not sufficient cervical dilation to
6 perform it.

7 QUESTION: Which would mean he cannot get out a
8 substantial portion of the living fetus.

9 MR. HELLER: Well, he --

10 QUESTION: I can understand that, but if it
11 means something other than that, then I -- it doesn't mean
12 anything to me. He can say that he can do a D&X only 10
13 percent of the time.

14 MR. HELLER: He nevertheless is able to, in
15 almost all D&E's, bring a substantial portion of the
16 living fetus into the vagina before any step is taken that
17 causes fetal demise.

18 And it's very clear from the legislative history
19 here that substantial portion was intended to be very
20 broad by the legislature. The chief sponsor wanted to
21 accord legal protection to the fetus anytime more than a
22 little bit of the fetus was brought into the vagina.

23 QUESTION: But the medical testimony certainly
24 acknowledges a general understanding of a difference
25 between D&X and D&E. Isn't that right?

1 MR. HELLER: The medical testimony shows that
2 they are -- that the D&X is a form of D&E. It has certain
3 specific elements, the same way as -- as any particular
4 type of surgery might --

5 QUESTION: Let me put the question differently.
6 The medical testimony certainly establishes that there is
7 a distinctive form of procedure known as D&X. Correct?

8 MR. HELLER: There's a distinctive variation of
9 the D&E that's called D&X.

10 QUESTION: Well, call it a variation, whatever.
11 It's a distinctive procedure. People talk about D&X.
12 We've been talking about it today --

13 MR. HELLER: That's right.

14 QUESTION: -- as though it is something
15 distinctive. It is.

16 MR. HELLER: Yes, it is.

17 QUESTION: So, the only question is whether this
18 statute covers only that distinctive procedure or
19 something beyond that.

20 MR. HELLER: That's one of the questions --

21 QUESTION: Can we agree that that distinctive
22 procedure is also generally called partial-birth
23 abortion --

24 MR. HELLER: Well --

25 QUESTION: -- and that that term is not normally

1 applied to D&E?

2 MR. HELLER: No. There is no -- first, again
3 the district court found that there was no medical
4 definition of partial-birth abortion.

5 QUESTION: I'm not asking whether there's a
6 medical definition. Is -- is the term partial-birth
7 abortion not normally applied to what we've been
8 discussing as D&X?

9 MR. HELLER: No, it's not normally applied.

10 QUESTION: You don't think so.

11 MR. HELLER: No.

12 QUESTION: If I find to the contrary, would --
13 would you lose?

14 MR. HELLER: No --

15 QUESTION: Because the statute does begin
16 partial-birth abortion means an abortion procedure in
17 which, and then goes on, blah, blah, blah.

18 MR. HELLER: No, of course, because the title of
19 the statute doesn't control its meaning in -- in the case
20 of the definition --

21 QUESTION: It isn't the title. It's part of the
22 text. It's part of the text.

23 MR. HELLER: -- or in case of the legislative
24 history.

25 QUESTION: Mr. Heller, what isn't part of this

1 statute -- all of this dispute would be out of the case if
2 the legislature had simply said, we ban D&X and not D&E.
3 And to me it's -- it's -- that's just glaring here that
4 they could have reduced all question of ambiguity if they
5 had simply said we ban a term that the doctors call D&X
6 and we don't ban D&E. Is there any explanation why they
7 didn't simply say if they meant to cut out D&X, D&X is
8 banned?

9 MR. HELLER: Well, there is. First, they --
10 they rejected an amendment that would have done just that.

11 Secondly, throughout the legislative history,
12 it's apparent that what they wanted to do was prohibit the
13 D&X technique, but also to prohibit many other forms of
14 abortion in which the living fetus was brought into the
15 vagina before demise was caused. That was their
16 intention. Indeed, that's the purpose that Mr. Stenberg
17 acknowledged today, that the purpose of the statute is to
18 accord legal protection to the fetus once it's emerged
19 from the womb.

20 But even if this statute were limited to the D&X
21 technique by some replacement of the existing definition
22 with, say, the ACOG definition of the D&X technique, it's
23 nevertheless unconstitutional under this Court's
24 precedents.

25 First, under both Casey and Roe, the State must

1 show that any regulation of abortions serves one of the
2 two recognized interests, maternal health or potential
3 life. There's no evidence before this Court --

4 QUESTION: Your -- your opponent argues the
5 language in Casey suggests that those are not the only
6 two. You disagree with that, I take it.

7 MR. HELLER: Well, there is language in Casey
8 that suggests that other valid State interests could
9 justify regulation of abortion. That's absolutely
10 correct. What I'm suggesting is that the two recognized
11 interests are not served.

12 I'll turn briefly to the -- the new interests
13 that are proposed. There's a sort of a laundry list of
14 about seven or eight new interests that the State suggests
15 could justify a prohibition on the D&X technique. We
16 believe none of those is sufficient to override the
17 woman's health.

18 For example, beginning with Roe and on through
19 Casey, this Court has consistently held that the woman's
20 interest in her health and in her bodily integrity
21 overrides the State interests in the fetus even after
22 viability. So, it follows from that some -- the
23 subsidiary interests suggested by Nebraska showing concern
24 for potential life, showing respect for potential life --
25 they certainly can't overcome the woman's health

1 interests and the woman's interest in her own bodily
2 integrity.

3 QUESTION: Certainly it depends upon how
4 significant the health interest is. If -- if there is an
5 insignificant difference between -- between using D&X and
6 using D&E, which -- which some of the medical testimony
7 seems to indicate, you're saying that there's no interest
8 whatever in -- in the State in -- in preventing the
9 coarsening of manners from -- from having the doctor and
10 those in attendance and those who know what goes on
11 witnessing the -- the destruction of a -- of a live human
12 creature outside the womb? There's no State interest in
13 that at all?

14 MR. HELLER: Well, first, the district court
15 found that a prohibition on the D&X technique would impose
16 appreciable risks on women, and that follows from the very
17 common sense findings of the district court that the D&X
18 technique reduces instrumentation in the uterus and
19 reduces, therefore, the risk of uterine perforation and
20 infection.

21 But even if the risks were less than
22 appreciable, anytime a State prohibits a safe abortion
23 technique, it is prohibiting a technique that will be the
24 safest for some women. And in this case, we have coupled
25 with that the very strong interests the woman has in

1 literally declining to have additional intrusions into her
2 body of surgical instruments. This is the sort of
3 interest that this Court in Glucksberg recognized as
4 having special protection under the Fourteenth Amendment.

5 So, we have a -- a conjunction of strong rights
6 here --

7 QUESTION: You can't destroy the fetus after
8 it's born if it's viable. Right? We -- we do make the -
9 - the distinction at that point.

10 MR. HELLER: That's correct, and that's a
11 distinction that this Court made in Roe for the very good
12 reason that once the fetus is outside the woman's body,
13 her right to control her own body is no longer at issue.

14 So, here -- but here what we're talking about is
15 her right to have an abortion by the safest possible
16 means. And there's -- there's nothing in this Court's
17 precedents that suggests that that right can be overridden
18 by any sort of fetal interest.

19 Let me just add that many of the other interests
20 suggested by the State have no support in the record. And
21 it would -- we believe it's appropriate that if the State
22 is going to ask this Court to recognize new valid
23 interests that can override constitutional rights, that
24 the State provide some evidence at least that one of those
25 interests is actually promoted by the statute.

1 Let me take one example, if I may, the interest
2 in the integrity of the medical profession. Quite to the
3 contrary, all the evidence suggests that the integrity of
4 the medical profession is promoted when physicians are
5 able to treat their patients in the most appropriate and
6 safest possible manner. So --

7 QUESTION: As -- as determined by the individual
8 physician.

9 MR. HELLER: As determined by the individual
10 physician in light of medical standards and the standards
11 of the medical community.

12 QUESTION: Well, there are certain objective
13 standards that the profession as a whole can adopt and --
14 and recommend to the courts. Is that not true?

15 MR. HELLER: That is true, and in -- in this
16 instance, both the specialty group of American College of
17 Obstetricians and Gynecologists and the AMA have
18 recognized the D&X technique is the most appropriate
19 procedure in some circumstances. So, with the weight of
20 that professional support behind it, we believe it's -- it
21 undermines the integrity of the medical profession to take
22 away the most appropriate procedure in a particular case.

23 In fact, most of the evolution in safety of
24 abortion since Roe has been due to the protection that's
25 been accorded to the physician's judgment about how to

1 carry out the abortion prior to viability.

2 QUESTION: Roe -- Roe -- neither Roe nor Casey
3 are written in the Constitution. They may not have
4 mentioned all of the -- all of the appropriate interests
5 that may be taken into account. Why is it not an
6 appropriate interest that the State is worried about
7 rendering society callous to infanticide?

8 There were very many highly civilized societies,
9 including the Ancient Greeks, who permitted infanticide,
10 who said that the right of parents included the right not
11 to be burdened with a child they didn't want, especially a
12 deformed child. And therefore, in order to prevent other
13 societies descending into that degree of callousness, the
14 -- the numerous States that have enacted these laws -- I
15 don't think it's so much a concern with -- with medical
16 matters. I think it's a concern with the horror of
17 seeing, you know, a -- a live human creature outside the
18 womb dismembered.

19 MR. HELLER: Well, again, let me start by saying
20 that --

21 QUESTION: Why can't that be a valid societal
22 interest --

23 MR. HELLER: There's certainly --

24 QUESTION: -- whether it's expressed in Roe and
25 Casey or not?

1 MR. HELLER: There's certainly a valid State
2 interest in preventing or prohibiting infanticide. And of
3 course, Nebraska, like virtually every other State,
4 already does so through its general homicide statutes, so
5 that Nebraska protects the fetus, even the pre-viable
6 fetus, if it has an independent existence from the woman.

7 But to say that an abortion procedure that is
8 safest for the woman, a pre-viability abortion procedure,
9 is so horrific and so like infanticide, any of the -- any
10 of the abortion procedures -- that could be said about any
11 abortion procedure because every abortion procedure pre-
12 viability involves fetal demise. They all do.

13 This is an interest which, if recognized and if
14 it could override the woman's right to -- to health and
15 bodily integrity, would authorize States to prohibit any
16 abortion method and prohibit, indeed, all abortions. So
17 that it's irreconcilable ultimately with the right
18 recognized in Roe and Casey.

19 I want to turn also to -- to a second reason
20 that the D&X -- prohibition on the D&X technique is
21 invalid if, indeed, the statute could be so limited. And
22 that is the recognition in Casey that a statute which has
23 the purpose of imposing an undue burden on the woman's
24 right to obtain a pre-viability abortion is also invalid.

25 Here the only purpose suggested, indeed, the

1 primary purpose identified by the Attorney General of
2 Nebraska, is precisely to elevate the status of the fetus
3 based on its location within the woman's body, not in its
4 location once it's born, not on viability. And this is an
5 interest. If this elevation were permitted, it would
6 authorize States to prohibit all abortions. That's an
7 impermissible purpose under Casey. Coupled with this
8 impermissible effect of effectively depriving women in
9 Nebraska of the safest and most medically appropriate
10 method of second trimester abortion, the statute simply
11 can't survive under this Court's decisions.

12 Indeed, when you -- when you consider the State
13 interests there -- some of the other State interests that
14 are proposed, not even they are served by the statute.
15 The interest in, for example, cruelty to the fetus.
16 There's no evidence that that interest is served here. In
17 fact, the statute doesn't say anything about cruelty to
18 the fetus at all.

19 So, we're looking at a statute that doesn't
20 serve either of the recognized State interests. It
21 doesn't -- there's no evidence that it serves any of the
22 proposed new State interests by permissible means, and at
23 the same time, it imposes some health risks on women.
24 That sort of statute -- the balancing in that sort of
25 statute is decisively against the constitutionality of the

1 statute under any interpretation, whether broad or narrow.

2 For example, again, if -- if the State -- if the
3 State couldn't really prohibit a more dangerous procedure
4 for abortions such as hysterotomy because those methods
5 are most medically appropriate for some women. And to
6 take one method like the D&X technique out of the hands of
7 physicians performing pre-viability abortions inevitably
8 makes abortion more dangerous for women.

9 So, when this Court, for example, in Danforth
10 struck down the -- Missouri's prohibition on saline
11 abortions, it took a step that enabled physicians to
12 continue to develop newer, safer methods of abortion.

13 That really relates to one of the points made by
14 Mr. Stenberg in his opening, which is that, well, why
15 aren't all these other physicians around the country doing
16 this if it's so safe? The reason is that it's new. Any
17 new surgical technique, any new medical technique is at
18 the beginning going to be used only in a scattered way.

19 QUESTION: So, we can look forward to this being
20 more widespread in the years to come. Is that right?

21 MR. HELLER: We don't know and that's because we
22 don't know whether in the future even new methods will
23 replace this method as the safest for women.

24 But this Court's jurisprudence has always pushed
25 in the direction of allowing physicians to exercise

1 judgment so that they could determine the safest possible
2 means of performing abortion not State legislators. It
3 should be the doctor deciding how surgery is performed,
4 not the Nebraska Senators.

5 So, with the improper purpose and with the lack
6 of service of any State interest, we believe the statute
7 is unconstitutional.

8 But I want to turn to yet an additional problem
9 with the statute which is -- which is its lack of any
10 health exception.

11 This is a problem which even the Attorney
12 General doesn't suggest, well, go ahead, we think it
13 should be interpreted to have a health exception. They
14 don't want it to have a health exception. They resist
15 that interpretation which could ameliorate one of the
16 constitutional problems with the statute.

17 QUESTION: Well, but hasn't there been some
18 criticism of the health exception as it has been used in
19 some circumstances as a way of simply avoiding the
20 prohibition entirely by a doctor who says there's always a
21 health exception?

22 MR. HELLER: Well, there -- there has certainly
23 been criticism of that, of course.

24 But considering, for example, Nebraska's post-
25 viability abortion prohibition, which has exceptions for

1 the life and health of the woman without restriction,
2 there's -- there's no evidence, for example, that that
3 statute has ever been misapplied by a physician in
4 Nebraska. Nor is there a suggestion that similar statutes
5 have ever been misapplied by physicians in other States.
6 So that this sort of health exception which --

7 QUESTION: Well, then whence the criticism? Is
8 it just totally based on no evidence whatever?

9 MR. HELLER: Well, I think there's criticism,
10 for example, from some who oppose abortion entirely.

11 QUESTION: But how about -- are you saying that
12 there's simply no basis for saying that a health exception
13 could be used by doctors who wish to avoid the general
14 prohibition to get out of it in more cases than they
15 should?

16 MR. HELLER: I think there is no basis for that
17 -- that claim. A physician who used a different abortion
18 technique for a woman who was sick or dying and not
19 because it was the most appropriate technique would
20 already be subject to malpractice penalties and penalties
21 for unprofessional conduct. So, if this was going on, we
22 would see evidence of it. But in fact, what we see is
23 just increasing safety of abortion for women in the United
24 States.

25 The lack of a health exception is also one that

1 could not be, in our view, cured by any sort of
2 certification process, which has been suggested, because
3 it would really require just rewriting the statute, and -
4 - and we believe the Nebraska Supreme Court would do that,
5 nor would the Nebraska Attorney General want them to.

6 QUESTION: Do you think when you have a -- a
7 fully viable fetus that no State restrictions upon -- upon
8 the woman's right to abort could involve any risk whatever
9 to the woman's health? There has to be a health
10 exception?

11 MR. HELLER: Well, in -- in Thornburgh, this
12 Court required that a choice of methods statute not impose
13 risks on the woman's health --

14 QUESTION: Any -- any risk whatever.

15 MR. HELLER: Well --

16 QUESTION: If there's the slightest risk
17 whatever, the -- the State must allow the woman to dispose
18 of a fully viable fetus.

19 MR. HELLER: I don't think Thornburgh says that.
20 I think Thornburgh says that the State --

21 QUESTION: Do you think that that's the rule?

22 MR. HELLER: I think the rule is under
23 Thornburgh that the State cannot impose significant risks
24 on women's health after viability. Before viability where
25 the State interest in the fetus is much less than after --

1 QUESTION: I understand that, but it -- it's
2 possible that there is a similar rule applicable here,
3 that the State may not impose significant health risks
4 upon the woman. But that doesn't mean that there can't
5 be, you know, a minimal, virtually nonexistent health
6 risk, which is what your argument assumes, that you cannot
7 have any -- any risk whatever.

8 MR. HELLER: First, again the district court
9 findings say that there is an appreciable health risk from
10 prohibiting the D&X technique.

11 But secondly, again part of this calculus is
12 looking at the State interests, and the State -- there are
13 no State interests served by this statute, unlike the
14 post-viability statute which serves a very compelling
15 interest.

16 QUESTION: What if another district court makes
17 a different finding? I mean, do -- do we accept the
18 district court's findings on these general medical
19 questions as binding? Is it -- is it binding just in this
20 case? Or if we have another abortion case from another -
21 - from another circuit where the district judge makes a
22 different conclusion, the -- the nonmedical district
23 judge, do -- do we then accept that other conclusion too?

24 MR. HELLER: We believe that the conclusion here
25 must be drawn from much of the evidence that could not be

1 disputed in any case around the country, which is that the
2 AMA and the -- and ACOG both recognize that this, the D&X
3 procedure --

4 QUESTION: Is it -- is it the case that the risk
5 -- I thought the risks being insubstantial was of a kind
6 where we say one in a million. But once we've identified
7 the woman, for that woman it's no longer insubstantial, is
8 it?

9 MR. HELLER: That's absolutely correct. The
10 risks --

11 QUESTION: And -- and therefore a health
12 exception or a life exception helps that single woman.

13 MR. HELLER: Absolutely. And so, it helps the
14 10 to 20 women, for example, for whom Dr. Carhart is able
15 to perform the D&X technique.

16 QUESTION: Thank you, Mr. Heller.

17 General Stenberg, you have 3 minutes left.

18 REBUTTAL ARGUMENT OF DONALD B. STENBERG

19 ON BEHALF OF THE PETITIONERS

20 MR. STENBERG: Thank you, Your Honor.

21 First of all, on May 20th, 1997, the Nebraska
22 legislature adopted an amendment that was proposed to
23 Congress by the American Medical Association for the
24 purpose of making clear that the statute did not prohibit
25 the D&E procedure. And the best discussion of that can be

1 found on page 418 of the joint appendix.

2 QUESTION: Why didn't they just say that,
3 General Stenberg? Why didn't they just -- I mean, that
4 was proposed, Mr. Heller told us -- say that what's banned
5 is D&X, what's not banned is D&E? That was such a simple
6 way of clarifying it. Why didn't they do that?

7 MR. STENBERG: Because the Nebraska legislature
8 was relying on the American Medical Association and the
9 Congress of the United States and patterned their
10 legislation on that. And they felt that if this gained
11 the support of the American Medical Association and
12 Congress, which it did for the 1997 law, that they wanted
13 to pattern that and rely on the American Medical
14 Association and their lawyers and congressional lawyers.

15 QUESTION: Did the medical -- American Medical
16 Association recommend this text or did they simply say, in
17 our judgment, it's okay to ban D&X?

18 MR. STENBERG: No. They did -- they did both.
19 They -- they -- what they said is if the Congress would
20 adopt these amendments, which were the same as -- as what
21 Nebraska adopted, that they would then support the ban on
22 D&X abortion.

23 QUESTION: Well, is there any question that they
24 would have supported a ban that simply said what you tell
25 me the legislature meant, that is, we ban D&X and nothing

1 else?

2 MR. STENBERG: There's -- of course, there's
3 more than one way to achieve the same result, Your Honor.
4 The Nebraska legislature chose to --

5 QUESTION: You would just be saying that the AMA
6 liked this other text. Is there anything in the world to
7 indicate that they wouldn't have preferred the clarity
8 that we ban D&X would have brought?

9 MR. STENBERG: Well, of course, viewed from, I
10 think, the standpoint of a State Senator in -- in the
11 State of Nebraska, they're not really in a position to go
12 to the AMA and say, well, is there some other language
13 that might be just as good? They just took what was given
14 to them.

15 QUESTION: But there was a medical term. Is
16 there any reasonable doubt that a doctor would say -- a
17 medical term is what doctors use. Are you suggesting that
18 any legislator in -- in the State was genuinely in doubt,
19 whether if he had used D&X, the medical association would
20 have disapproved?

21 MR. STENBERG: Well, there was some doubt
22 because in 1997 there were several terms used to describe
23 this procedure, the D&X, the intact D&E, the intact D&X,
24 and the Haskell D&X. So, there were several different,
25 quote, medical terms that were being applied in 1997, and

1 the legislature chose to attack it by -- by describing the
2 procedure rather than using a medical term, which I
3 believe the legislature is free to do.

4 On this question of what is a D&E, Dr. Carhart
5 addressed that in his complaint on paragraph 30 in which
6 he pled, the intact removal of the fetus --

7 CHIEF JUSTICE REHNQUIST: Thank you, General
8 Stenberg.

9 The case is submitted.

10 (Whereupon, at 11:10 a.m., the case in the
11 above-entitled matter was submitted.)

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