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Constitutional Law - Clarity or Confusion - The Constitutionality of a Nebraska Statute Prohibiting Partial-Birth Abortion Procedures - Stenberg v. Carhart, 120 S. Ct. 2597

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CONSTITUTIONAL LAW—Clarity or Confusion? The Constitutionality of a Nebraska Statute Prohibiting Partial-birth Abortion Procedures. *Stenberg v. Carhart*, 120 S. Ct. 2597 (2000).

INTRODUCTION

Over twenty-seven years ago, the United States Supreme Court recognized a woman's right to choose.[1] In recent years, through progress and developments in the field of medicine, a new class of late-term abortion procedures has evolved. These procedures, commonly known as "partial-birth abortions," have incited tremendous controversy and divisiveness throughout the nation. Recognizing the growing public concern and outrage over the graphic and objectionable nature of these procedures, many states have responded by passing statutory bans on partial-birth abortion.[2] In *Stenberg v. Carhart*, the United States Supreme Court held that one of these statutory bans, prohibiting partial-birth abortion in the state of Nebraska, was unconstitutional.[3]

On June 3, 1997, the Nebraska Legislature passed Legislative Bill 23 prohibiting "partial-birth abortion."[4] Nebraska's Governor signed the bill into law on June 9, 1997.[5] The statute states:

> No partial-birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.[6]

"Partial-birth abortion" is not a medically recognized term, thus the Nebraska Legislature defined the term to encompass any:

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1. *See* Roe v. Wade, 410 U.S. 113, 151-57 (1973).
2. Steven Grasz, *If Standing Bear Could Talk . . . Why There is No Constitutional Right to Kill a Partially-Born Human Being*, 33 CREIGHTON L. REVIEW 23, 24 (1999). Thirty states, in total, have passed some form of partial-birth abortion legislation. Stenberg v. Carhart, 120 S. Ct. 2597, 2633 (2000) (Kennedy, J., dissenting).
3. *Stenberg*, 120 S. Ct. at 2605.
4. Carhart v. Stenberg, 972 F. Supp. 507, 509 (Neb. 1997).
5. Carhart v. Stenberg, 192 F.3d 1142, 1145 (8th Cir. 1999).
6. NEB. REV. STAT. ANN. § 28-328(1) (LEXIS 1998).

> [A]bortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery. For purposes of this subdivision, the term partially delivers vaginally a living unborn child before killing the unborn child means deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child.[7]

The statute classifies the intentional violation of the statute by a physician as a Class III felony.[8]

Soon after the enactment of the statute, Dr. Leroy Carhart brought an action on behalf of himself and his patients, in federal district court, challenging its constitutionality.[9] Dr. Carhart claimed that Nebraska's ban on partial-birth abortion violates the Due Process Clause of the Fourteenth Amendment because it prohibits his patients from choosing a safe and preferred method for terminating their pregnancies before viability.[10] The district court held the Nebraska statute unconstitutional because it placed a substantial obstacle and an undue burden upon women seeking abortion procedures.[11] The United States Court of Appeals for the Eighth Circuit affirmed the judgment of the district court.[12] The United States Supreme Court then granted certiorari, and in a five-to-four decision, held the statute unconstitutional for two reasons: (1) The statute lacked any exception for the preservation of the health of the mother; and (2) the statute unduly burdened a woman's ability to choose a preferred method of abortion.[13]

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7. NEB. REV. STAT. ANN. § 28-326(9) (LEXIS 1998).

8. NEB. REV. STAT. ANN. § 28-328(2) (LEXIS 1998). A Class III felony conviction can carry a prison term of up to twenty years and a fine of up to $25,000. NEB. REV. STAT. ANN. § 28-105 (LEXIS 1998).

9. Carhart v. Stenberg, 972 F. Supp. 507 (Neb. 1997). Dr. Carhart is a Nebraska physician who operates a family medical practice with a specialized abortion facility in Bellevue, Nebraska. *Id.* at 509. Stenberg is the Attorney General for the State of Nebraska and was named as the defendant in this case. *Id.* at 507. Carhart had the "necessary standing to raise both his own rights and the rights of his patients." *Id.* at 520. Carhart faced significant risk of criminal prosecution; therefore he had a strong personal stake in the argument and standing to bring a cause of action. *Id.* Moreover, Carhart had standing to assert the interests of his patients because of the unique fiduciary doctor, patient relationship that existed. *Id.* at 521.

10. *Carhart*, 972 F. Supp. at 507, 520.

11. *Id.* at 509.

12. Carhart v. Stenberg, 192 F.3d 1142, 1152 (8th Cir. 1999).

13. Stenberg v. Carhart, 120 S. Ct. 2597, 2608 (2000).

This case note begins with a detailed and technical description of the relevant abortion procedures that are available and most commonly utilized by Dr. Carhart as well as other licensed physicians. The note then outlines the progress and the historical development of the law on abortion. It then examines and discusses the Supreme Court's interpretation and application of the abortion precedent set forth in *Roe v. Wade*[14] and *Planned Parenthood of Southeastern Pa. v. Casey,*[15] as applied to Nebraska Statute § 28-328. This note will analyze and support the Court's interpretation that the statute prohibits D & X as well as D & E procedures and will corroborate the majority's decision that the statute is unconstitutional because it lacked a required health exception. This case note will close by evaluating the ramifications that the *Stenberg* decision will have on a state's ability to implement and enforce partial-birth abortion legislation.

BACKGROUND

Approximately ninety percent of all abortions performed occur during the first trimester of pregnancy, before the twelfth week of gestation.[16] The most commonly used procedure during this gestational period is "vacuum aspiration."[17] Vacuum aspiration, which is generally performed using a local anesthetic and on an outpatient basis, involves dilating the cervix and inserting a suction device into the uterus.[18] The suction device is used to loosen and evacuate the contents of the uterus, thus aborting the fetus.[19] Vacuum aspiration is very effective during the initial twelve weeks of gestation.[20] However, as the fetus develops, this procedure becomes increasingly ineffective and difficult to perform, due to the increased size and rigidity of the fetal tissue.[21]

The abortion method most commonly performed during the second trimester of pregnancy, twelve to twenty-four weeks, is "dilation and evacuation" (D & E).[22] D & E is most prevalent and effective during the early to middle stages of the second trimester.[23] During a D & E pro-

14. 410 U.S. 113 (1973).
15. 505 U.S. 833 (1992).
16. *Stenberg*, 120 S. Ct. at 2605.
17. Carhart v. Stenberg, 972 F. Supp. 507, 511 (Neb. 1997). Vacuum aspiration is also known as suction curettage. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. Stenberg v. Carhart, 120 S. Ct. 2597, 2607 (2000).
22. *Id.* at 2606.
23. *Id.* D & E accounts for approximately ninety-five percent of all second trimester abortions performed during the twelfth and twentieth week of gestational age. *Id.*

cedure, the cervix is dilated and surgical instruments are inserted into the uterus to grasp and remove the friable fetal tissue.[24] The walls of the uterus are then scraped and suctioned to ensure that no fetal debris remains.[25]

During the later stages of the second trimester, the D & E technique must be modified to cope with the increased resistance and stiffness of the tissue.[26] Because the tissue is more rigid, it is difficult to dismember the fetus inside of the uterus.[27] Thus, surgical forceps are used to grasp and pull a part of the fetus outside of the uterus, through the cervix, and into the vagina.[28] The physician then utilizes the resistance created by the cervix to tear the fetal part from the fetal body.[29] This process is repeated until the entire fetus has been removed; at which time vacuum aspiration is performed to remove the remaining fetal debris.[30] Although D & E is favored by most physicians, there are certain dangers associated with this procedure. Sharp fetal bone fragments and the surgical instruments create the risk of perforating and damaging the uterus and surrounding organs.[31] There is also the possibility that a portion of fetal tissue will be left behind and cause complications within the uterus.[32]

In an attempt to reduce the risk of perforation, some physicians have opted to perform a relatively new and extremely controversial procedure called "intact D & E" or "dilation and extraction" (D & X).[33] This procedure is also performed on an outpatient basis and under local anesthesia.[34] During a D & X procedure, the cervix is deliberately dilated over a sequence of days.[35] Once dilated, the physician inserts surgical forceps into the uterus and forcibly rotates the fetus until it is in the optimal position for a feet first extraction.[36] The forceps are used to grasp

24. Carhart v. Stenberg, 972 F. Supp. 507, 512 (Neb. 1997). Friable is an adjective used to describe objects that can be easily broken, crumbly. WEBSTER'S SCHOOL AND OFFICE DICTIONARY 137 (New ed. 1978).
25. *Carhart*, 972 F. Supp. at 512.
26. *Id.* at 513.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. Stenberg v. Carhart, 120 S. Ct. 2597, 2607 (2000).
32. *Id.*
33. *Carhart*, 972 F. Supp. at 513.
34. Karen E. Walther, *Partial-Birth Abortion: Should Moral Judgment Prevail Over Medical Judgment?* 31 LOY. U. CHI. L.J. 693, 699 (2000).
35. *Carhart*, 972 F. Supp. at 514.
36. *Id.*

and pull the body of the living fetus out of the uterus and into the vaginal cavity, leaving the head within the uterus.[37] This procedure is usually performed during the later stages of the second trimester (i.e., nineteen to twenty-four weeks).[38] By this phase of development the fetus has matured to the point where the diameter of the head is too large to allow it to pass through the cervix intact.[39] Thus, the physician must perform a fetal head reduction procedure.[40] Using a pair of surgical scissors, a small incision is made at the base of the skull allowing a vacuum tube to be placed inside the cranium to evacuate its contents.[41] This evacuation permits the skull to be collapsed, effecting a vaginal delivery of a deceased but otherwise intact fetus.[42]

There is dispute within the medical community as to whether the D & X procedure is safer or more effective than the D & E procedure.[43] There has been no decisive scientific consensus in support of one procedure over the other.[44] However, courts have generally determined that D & X is safer and more effective.[45] In *Carhart v. Stenberg*, the district court held that there was clear and convincing evidence that the D & X procedure is superior to, and safer than D & E and other abortion procedures performed after the first trimester of pregnancy.[46] The court found that D & X allowed for minimal instrumentation to pass through the cervix, reduced operating time and blood loss, and decreased risk of leaving fetal parts within the uterus, that could potentially cause serious compli-

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37. *Id.*
38. *Id.* at 513-14.
39. *Id.* at 514.
40. Walther, *supra* note 34, at 700.
41. *Id.*
42. Stenberg v. Carhart, 120 S. Ct. 2597, 2607 (2000). Other less common abortion procedures include induction, hysterotomy, and hysterectomy. Induction accounts for five percent of all abortion procedures performed after the first trimester of pregnancy. Walther, *supra* note 34, at 700. During induction, a saline solution is inserted into the uterus to induce labor and cause fetal demise. Carhart v. Stenberg, 972 F. Supp. 507, 517 (Neb. 1997). Hysterotomy and hysterectomy procedures are generally considered extremely rare and invasive. Hysterotomy involves the premature surgical removal of the fetus through an incision in the abdomen. *Id.* at 517. Hysterectomy necessitates the surgical removal of the entire uterus and fetus, resulting in the sterilization of the woman. *Id.* Due to the increased risks associated with these procedures, they are generally less preferable than the D & E and D & X. Walther, *supra* note 34, at 701.
43. Stenberg v. Carhart, 120 S. Ct. 2597, 2612 (2000).
44. *See generally id.* at 2609-12.
45. *Id.* at 2610.
46. Carhart v. Stenberg, 11 F. Supp. 2d 1099, 1126 (1998).

cations.[47] Other federal courts have heard and weighed similar expert scientific evidence and have come to the same conclusion.[48]

Relevant Case Law

In the landmark decision *Roe v. Wade*, a pregnant single woman challenged the constitutionality of a Texas criminal law prohibiting all abortions, except when necessary to save the life of the mother.[49] The *Roe* Court held that a woman has a fundamental right to choose, a right protected by an individual's right to privacy as established by the Fourteenth Amendment.[50] The Supreme Court noted that although the Constitution does not explicitly mention any right of privacy, the Court has held that the Constitution does protect an individual's right to personal privacy.[51] In *Roe*, the Court determined that this recognized right is broad enough to encompass a woman's decision to undergo an abortion procedure, although the outer limits of this right have not been defined.[52] The Court also established that the Fourteenth Amendment does not include or protect an unborn and nonviable fetus. Thus, before viability, the right of a woman to have an abortion overrides the interests of the unborn nonviable child.[53] However, the Court did note that a woman's right to have an abortion is not unconditional.[54]

The Court determined that a state has an important and legitimate interest in safeguarding the health of the mother and protecting the potential life of the fetus.[55] As a result, the Court established a trimester framework for determining when a state may regulate and even prohibit abortion.[56] During the first trimester of pregnancy a state may not limit

47. *Stenberg*, 120 S. Ct. at 2610.

48. *Id.* (citing Rhode Island Med. Soc'y v. Whitehouse, 66 F. Supp.2d 288, 314 (D.R.I. 1999); Evans v. Kelley, 977 F. Supp. 1283, 1304-11 (E.D.Mich. 1997); Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187 (6th Cir. 1997); Causeway Med. Suite v. Foster, 43 F. Supp.2d 604, 613-14 (E.D.LA. 1999); Richmond Med. Ctr. for Women v. Gilmore, 11 F. Supp.2d 795, 827, n.40 (E.D.Va. 1998)).

49. Roe v. Wade, 410 U.S. 113 (1973).

50. *Id.* at 152-53.

51. *Id.* at 152 (citing Stanley v. Georgia, 394 U.S. 557 (1969); Terry v. Ohio 392 U.S. 1 (1968); Katz v. United States 389 U.S. 347 (1967)).

52. *Id.* at 153.

53. *Id.* at 158.

54. *Id.* at 155.

55. *Id.* at 163.

56. *Id.* at 164. The trimester framework breaks down the gestational development of a child into three separate phases. The first three months of pregnancy, or the initial twelve weeks of gestation, is defined as the first trimester. The second trimester encompasses the second three months of pregnancy, or the thirteenth through twenty-fourth week of gestation. The third trimester describes the final three months of pregnancy,

or regulate abortion procedures performed by licensed physicians. Rather, the abortion decision must be left to the judgment of the woman and her attending physician.[57] Throughout the second trimester of pregnancy a state, in promoting its interest in the health of the mother, may regulate abortion procedures in ways that are reasonably related to maternal health.[58] During the third trimester, the stage subsequent to viability, a state may promote its interest in potential human life by regulating and even proscribing abortion procedures, unless the procedure might be necessary to preserve the health or the life of the mother.[59] In *Doe v. Bolton*, a case that was decided concurrently with *Roe*, the Supreme Court determined that factors such as physical, familial, emotional, and psychological well-being can all be taken into consideration when evaluating the health of the mother.[60]

In *Planned Parenthood of Southeastern Pa. v. Casey*, five abortion clinics and a physician challenged the constitutionality of several provisions in the Pennsylvania Abortion Control Act of 1982.[61] In this case, the Supreme Court adopted a new standard for determining when and how a state may regulate abortion procedures.[62] The Court discarded the trimester framework it established in *Roe* and adopted a less rigid standard.[63] In an attempt to reconcile a woman's right to terminate her pregnancy with the profound and legitimate state interest in promoting and protecting potential life, the Court adopted the "undue burden" standard.[64] An undue burden exists if the purpose or effect of the law is to place a substantial obstacle in the path of a woman seeking an abortion.[65]

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from the twenty-fifth week, on until birth. *Id.*

57. *Id.* at 166.

58. *Id.* at 164.

59. *Id.* at 164-65. Viability is defined as the initial point at which there is a realistic possibility that an unborn child could survive outside the womb of the mother. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 870 (1992).

60. 410 U.S. 179, 192 (1973).

61. 505 U.S. 833 (1992). The provisions challenged were in the Pennsylvania Abortion Control Act of 1982. 18 PA. CONS. STAT. ANN. §§ 3205, 3206, 3209, 3203, 3207(b), 3214(a), 3214(f) (West 1191). *Id.*

62. *Casey*, 505 U.S. at 878.

63. *Id.*

64. *Id.* at 875-77. The Court tried to accommodate and give more power to the state's interests in the area of abortion, noting that not all regulations should be deemed unwarranted. *Id.*

65. *Id.* at 878. The Court determined that a spousal notification provision in the Pennsylvania act was a substantial barrier and thus an undue burden. *Id.* at 893. However, the Court held that informed consent requirements, a parental consent provision, reporting and record keeping requirements, and a twenty-four hour waiting period after a consultation with the abortion physician was not an undue burden upon a woman. *Id.* at 875-901.

A state is prohibited from enacting a law that imposes an undue burden on a woman's decision to choose an abortion procedure before viability.[66] Although the undue burden standard gives states more power to regulate abortions, the Court reaffirmed *Roe's* central holdings: (1) Before fetal viability, the woman has the right to choose to terminate her pregnancy; and (2) Subsequent to viability, "[t]he state in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[67]

Prior to *Stenberg, Planned Parenthood of Ctr. Mo. v. Danforth* was the only case in which the Supreme Court addressed the constitutionality of a state law prohibiting a specific late-term abortion procedure.[68] In *Danforth*, two licensed physicians and a non-profit organization challenged the constitutionality of a Missouri abortion statute.[69] The Missouri statute prohibited the saline induction abortion procedure, the most common and safest second trimester abortion procedure at that time (1976).[70] The Court determined that the statute was unconstitutional because it was designed to prevent the vast majority of abortion procedures performed after the first trimester of pregnancy.[71] Although the Court in *Danforth* applied the trimester framework set forth in *Roe*, *Danforth* provided useful direction for lower courts to follow when deciding similar cases under the current "undue burden standard" set forth in *Casey*.[72]

Before the decision in *Stenberg*, several federal circuit courts had addressed state statutes prohibiting partial-birth abortion procedures.

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66. *Id.* at 879.

67. *Id.*

68. Walther, *supra* note 34, at 704 (citing Planned Parenthood of Ctr. Mo. v. Danforth, 428 U.S. 52 (1976)).

69. *Danforth*, 428 U.S. at 52.

70. *Id.* at 53-54. The statute prohibited, "[A]fter the first 12 weeks of pregnancy the abortion procedure of saline amniocentesis as "deleterious to maternal health." *Id.* 428 U.S. at 52 (quoting V.A.M.S. § 188.050 s(9) (citation omitted)).

71. *Id.* at 54. The Court in *Danforth*, like the Court in *Roe*, held that the right to privacy and a woman's right to an abortion is founded in the Fourteenth Amendment's concept of personal liberty and restrictions on state action. *Id.* at 60. *Danforth* is closely analogous to *Stenberg* in that the statutes in both cases were interpreted as prohibiting the most commonly performed second trimester abortion procedures. The Missouri statute was interpreted to prohibit saline induction, the most common second trimester abortion procedure during the 1970s and early 1980s. *Id.* at 53-54. The Nebraska statute was interpreted to prohibit D & X, the most common second trimester abortion procedure during the late 1980s and 1990s. Stenberg v. Carhart, 120 S. Ct. 2597, 2617 (2000).

72. *Danforth* was decided in 1976, *Casey* was decided in 1992.

In *Women's Medical Professional Corp. v. Voinovich*, the Sixth Circuit held an Ohio state law regulating partial-birth abortion unconstitutional.[73] The Ohio statute specifically prohibited the D & X procedure but was silent as to whether the D & E procedure was also prohibited.[74] However, the court construed the language of the statute to encompass and proscribe both the D & X and D & E procedure and held that prohibiting the D & E procedure placed a substantial obstacle in the path of women seeking pre-viability abortions, thus unduly burdening their right to choose.[75]

In *Planned Parenthood of Central New Jersey v. Farmer*, the Third Circuit held a partial-birth abortion statute unconstitutional.[76] The case was adjudicated before the Supreme Court's opinion in *Stenberg* was released; thus *Casey* was the controlling law.[77] The New Jersey statute was almost identical in wording to the Nebraska statute.[78] The Third Circuit held that the statute was void for vagueness and was unconstitutional because it "unduly burdened a woman's constitutional right to obtain an abortion."[79] The court broadly interpreted the statute as prohibiting many conventional abortion methods, including D & E.[80] The court

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73. 130 F.3d 187, 190 (6th Cir. 1997).

74. OHIO REV. CODE ANN. § 2919.15(B) (Anderson 1996). The statute provides in pertinent part, "No person shall knowingly perform or attempt to perform a dilation and extraction procedure upon a pregnant woman." *Id.* The D & X procedure is defined as "[T]he termination of a human pregnancy by purposely inserting a suction device into the skull of a fetus to remove the brain." *Id.* "Dilation and extraction procedure does not include either the suction curettage procedure of abortion or the suction aspiration procedure of abortion." *Id.* at § 2919.15(A).

75. *Voinovich*, 130 F.3d at 200, 202-03.

76. No. 99-5042, 2000 WL 1025617, at *1, 23 (3d Cir. 2000). A health care facility and several physicians brought an action against the New Jersey attorney general and state agencies, challenging the constitutionality of a New Jersey partial-birth abortion statute. *Id.* at *1. The Third Circuit also affirmed the essential holding in Roe, that a woman has a constitutional right, under the Fourteenth Amendment, to choose to terminate her pregnancy. *Id.* at *13.b.

77. The opinion in *Farmer* was published subsequent to *Stenberg*, consequently the majority opinion in *Farmer* states that its decision confirms and supports the controlling decision made by the Supreme Court in *Stenberg*. *Id.* at *1. The majority noted that their decision was not at odds with the Court's decision in *Stenberg* and went on to imply that if it were at odds they would have modified their decision to comply with the *Stenberg* holding. *Id.*

78. *Id.* (citing N.J. STAT. ANN. § 2A:65A-6(e) (LEXIS 1998)). The statute prohibited "an abortion in which the person performing the abortion partially vaginally delivers a living human fetus before killing the fetus and completing the delivery." *Id.*

79. *Id.* at *13.

80. *Id.*

also found that the statute was unconstitutional because it did not provide for a health exception as required by *Casey*.[81]

In *Richmond Medical Center for Women v. Gilmore*, the Fourth Circuit upheld the constitutionality of a Virginia partial-birth abortion statute.[82] There, the court ruled in favor of the state, staying the district court's preliminary injunction of Virginia Code § 18.274.2(A).[83] The wording of the statute was very similar to the wording of the Nebraska statute, and the district court interpreted it to include and prohibit D & E as well as vacuum aspiration.[84] However, the Fourth Circuit narrowly interpreted the Virginia statute to have a different meaning and with assurances from the Commonwealth of Virginia, determined that the statute was only intended to prohibit D & X procedures.[85] Since the plaintiffs in *Gilmore* did not perform D & X procedures, the court granted the stay, reasoning that the plaintiffs probably lacked standing to bring a cause of action because they did not face a reasonable fear of prosecution.[86]

In *Hope Clinic v. Ryan*, the Seventh Circuit also upheld the constitutionality of two partial-birth abortion statutes,[87] concluding that both statutes could be applied in a constitutional manner.[88] Based in part on assurances by both the Wisconsin and Illinois attorney generals that neither statute applied to D & E, the Seventh Circuit determined that the statutes only prohibited D & X procedures.[89] The court reasoned that

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81. *Id.*

82. 144 F.3d 326, 327 (4th Cir. 1998). Several physicians and medical clinics brought an action to enjoin enforcement of a Virginia partial-birth abortion statute. *Id.* at 326.

83. VA. CODE ANN. § 18.2-74.2(A) (LEXIS 1998). The statute provides in part: "[A] physician shall not knowingly perform a partial-birth abortion that is not necessary to save the life of a mother." *Id.* ("A partial-birth abortion is defined as an abortion in which the person performing the abortion deliberately and intentionally delivers a living fetus or a substantial portion thereof into the vagina for the purpose of performing a procedure the person knows will kill the fetus, performs the procedure, kills the fetus and completes the delivery.")

84. *Gilmore*, 144 F.3d at 331.

85. *Id.* at 331-33.

86. *Id.* at 332.

87. 720 ILL. COMP. STAT. ANN. § 513/5, 513/10, 513/15 (West 1999); WIS. STAT. ANN. § 940.16. (West 1998). The wording in both statutes and in Nebraska's, Arkansas', and Iowa's statute is similar.

88. 195 F.3d 857, 861 (7th Cir. 1999) ("Abortion providers brought suit against Illinois Attorney General and State's Attorney, challenging constitutionality of Illinois statute prohibiting partial-birth abortions, and sought preliminary and permanent injunctions."). Abortion providers also brought a separate action challenging a Wisconsin partial-birth abortion statute, and on appeal, the two cases were consolidated. *Id.*

89. *Hope Clinic*, 195 F.3d at 869.

" . . . States have a powerful interest in working out the details of their criminal laws in their own courts."[90] However, in response to the plaintiff's contention that the statutes were vague and thus potentially unduly burdensome, the Seventh Circuit, on remand, ordered the district court to enter precautionary injunctions, prohibiting the application of the statutes to D & E or induction until the states provided additional specificity as to the meaning of the statutes.[91] The Seventh Circuit also considered whether the prohibition of the D & X procedure, without a health exception, was unconstitutional. The court determined that proscribing D & X is constitutional, even if the statute did not provide for a health exception, stating that no state could otherwise regulate any abortion procedure.[92] The court reasoned that a doctor would only use the D & X procedure if he believed it to be the best procedure for preserving the health of the mother.[93]

In addition to *Stenberg*, the Eighth Circuit has presided over two cases pertaining to partial-birth abortion statutes. The two statutes in question contained similar language. The Eighth Circuit, applying the undue burden standard set forth in *Casey*, deemed each to be unconstitutional.[94] In *Planned Parenthood of Greater Iowa, Inc. v. Miller*, several physicians brought an action against the Iowa Attorney General challenging the constitutionality of Iowa's partial-birth abortion statute.[95] The Eighth Circuit determined that the Iowa statute prohibited D & X as well as D & E, thus unduly burdening women seeking abortions by placing a substantial obstacle in their path.[96] The court broadly interpreted

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90. *Id.*

91. *Id.* The court wanted the states to somehow clarify exactly what the statutes did and did not prohibit. *Id.*

92. *Id.* at 873.

93. *Id.*

94. The Eighth Circuit based its decisions on the Supreme Court's core holding in *Roe* that "[A] woman has a constitutional right to choose whether to terminate a pregnancy." *See* Carhart v. Stenberg, 192 F.3d 1142, 1148 (8th Cir. 1999) (citing Roe v. Wade 410 U.S. 113, 153 (1973).

95. 195 F.3d 386 (8th Cir. 1999).

96. *Miller*, 195 F.3d at 388-89 (citing IOWA CODE ANN. § 707.8A(2) (West 1999)). The statute reads in pertinent part, "A person shall not knowingly perform or attempt to perform a partial-birth abortion. This prohibition shall not apply to partial-birth abortion that is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury." *Id.* IOWA CODE ANN. § 707.8A(1)(c) (West 1999). " 'Partial-birth abortion' means an abortion in which a person partially vaginally delivers a living fetus before killing the fetus and completing the delivery." IOWA CODE ANN. § 707.8A(1)(d) (West 1999). "Vaginally delivers a living fetus means deliberately and intentionally delivering into the vagina a living fetus or substantial portion of a living fetus for the purpose of performing a procedure the person knows will kill the fetus, and then killing the fetus." *Id.*

the statute to include D & E, reasoning that delivering an arm of a fetus into the vagina was a substantial portion of the living fetus, and since such a delivery commonly occurs in a D & E procedure, the statute prohibited it.[97] In *Little Rock Family Planning Services v. Jegley*, a case decided along with *Stenberg*, the court held that an Arkansas statute prohibiting partial-birth abortions "covered too much," meaning that the statute intended to prohibit D & X as well as D & E, thus unduly burdening women seeking abortions before fetal viability.[98]

In *Carhart v. Stenberg*, Dr. Carhart challenged the constitutionality of Nebraska's ban on partial-birth abortion.[99] The district court held the statute unconstitutional.[100] On appeal, the Eighth Circuit broadly interpreted Nebraska Statute § 28-328(1) to include the prohibition of D & E, the most common abortion procedure performed during the second semester.[101] Therefore, the court determined that the statute placed a substantial obstacle in the path of a woman seeking an abortion and thus unduly burdened her right to choose.[102]

The Eighth Circuit, as well as the district court, extensively examined medical findings as well as testimony proffered by various physicians, regarding the subject of abortion.[103] The testimony of Dr. Carhart revealed that he employs special variations when performing the various procedures described above.[104] For example, during a D & X procedure, Dr. Carhart testified that he does not attempt to rotate the fetus to effect a feet first extraction.[105] Instead, he removes the fetus in the position that he finds it, although preferably feet first.[106] Furthermore, Dr. Carhart attempts to perform his variation of the D & X procedure primarily on living fetuses between the sixteenth and twentieth weeks, instead of between the twentieth and twenty-fourth week.[107] After the twentieth week of gestation, Carhart usually induces fetal death by

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97. *Miller*, 195 F.3d at 389.

98. 192 F.3d 794, 795 (8th Cir. 1999). Abortion physicians brought an action challenging the constitutionality of an Arkansas partial-birth abortion statute. *Id.* at 794 (citing ARK. CODE ANN § 5-61-202 (Michie 1997)). The statute prohibited abortions "in which the person performing the abortion partially vaginally delivers a living fetus before taking the life of the fetus. . . ." *Id.*

99. 972 F. Supp. 507, 509 (Neb. 1997).

100. *Id.*

101. Carhart v. Stenberg, 192 F.3d 1142, 1150-51 (8th Cir. 1999).

102. *Id.* at 1151.

103. *See id.* at 1145-50; Carhart, 972 F. Supp. at 510-20.

104. *Carhart*, 972 F. Supp. at 521-22.

105. *Id.*

106. *Id.*

107. *Id.* at 522.

injection of a lethal substance, before attempting to remove the fetus from the uterus.[108] Under the Nebraska statute, a physician is only prohibited from partially delivering a living unborn child before terminating its life.[109] Thus Dr. Carhart is primarily at risk of prosecution for abortion procedures he performs between the sixteenth and twentieth week, while during partial delivery, the child is still alive.[110]

Dr. Carhart does not perform abortions on viable fetuses.[111] Fetal viability usually occurs around the twenty-fourth week of gestational maturity and is defined as the time " . . . at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman."[112] Dr. Carhart did not challenge Nebraska's right to promote fetal life by prohibiting partial-birth abortions after a fetus has reached viability. Rather, Dr. Carhart argued:

> Nebraska's ban on the partial-birth abortion procedure has the effect of subjecting his patients to an appreciably greater risk of injury or death than would be the case if these women could rely on him to perform his variant of the banned procedure on nonviable fetuses when medically advisable. Such a ban, therefore, is an "undue burden" to women seeking abortions, and it violates the Due Process Clause of the Fourteenth Amendment.[113]

Dr. Carhart also alleged that the statute was invalid because it was unconstitutionally vague.[114]

The district court held the Nebraska statute unconstitutional as applied to Dr. Carhart and his patients, because it fails the "undue burden" test established in *Casey*.[115] The district court did not reach a conclusion as to Dr. Carhart's vagueness argument.[116] The United States Court of Appeals for the Eighth Circuit affirmed the judgment of the

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108. *Id.*
109. NEB. REV. STAT. ANN. § 28-326(9) (LEXIS 1998).
110. *Carhart*, 972 F. Supp. at 522.
111. *Id.* at 521.
112. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 870 (1992).
113. *Carhart*, 972 F. Supp. at 509.
114. *Id.*
115. *Id.*
116. *Id.* It was unnecessary, given their conclusion that the statute was unconstitutional under the "undue burden" argument. *Id.*

district court, and the United States Supreme Court subsequently granted *certiorari*.[117]

PRINCIPAL CASE

In *Stenberg*, the Court affirmed the Eighth Circuit's determination that Nebraska's partial-birth abortion statute was unconstitutional.[118] The majority held that the statute violated the Fourteenth Amendment of the Constitution on two independent bases.[119] First, the law lacked any exception for the preservation of the health of the mother, and second the statute was unconstitutional because it applied to D & E as well as D & X, thus imposing an undue burden on a woman's ability to choose D & E, ". . . thereby unduly burdening the right to choose abortion itself."[120]

Health Exception

Justice Breyer, delivering the majority opinion, first considered whether the Nebraska statute required a health exception to be considered constitutional. The statute states, in pertinent part: "No partial-birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother . . .."[121] Note that this statute does not constitute a health exception. This statute only constitutes a life exception, which is a much higher bar for women and physicians to overcome. Applying the standard set forth in *Casey*, the majority held that a statute requires a health exception where it is necessary, in appropriate medical judgment for the preservation of the life or health of the mother.[122] The majority also reiterated that a state may promote but may never endanger the health of a woman, when furthering its own interests by regulating abortion.[123]

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117. *Id.* at 509 *cert. granted*, 120 S. Ct. 2597 (2000).

118. Stenberg v. Carhart, 120 S. Ct. 2597, 2617 (2000).

119. Eight opinions were filed in the case. Justice Breyer delivered the majority opinion in which Justices Stevens, O'Connor, Souter, and Ginsburg joined. Justice Stevens filed a concurring opinion, in which Justice Ginsburg joined. Justice O'Connor filed a concurring opinion. Justice Ginsburg filed a concurring opinion, in which Justice Stevens joined. Chief Justice Rehnquist filed a dissenting opinion. Justice Scalia filed a dissenting opinion. Justice Kennedy filed a dissenting opinion in which Chief Justice Rehnquist joined. Justice Thomas filed a dissenting opinion in which Chief Justice Rehnquist and Justice Scalia joined.

120. 120 S. Ct. at 2609.

121. NEB. REV. STAT. ANN. § 28-328(1) (LEXIS 1998).

122. *Stenberg*, 120 S. Ct. at 2609.

123. *Id.*

The state of Nebraska argued that partial-birth abortion laws only require a health exception when there is a need for such a health exception, and there is no such need for a health exception when a state is only trying to prohibit D & X.[124] Nebraska set forth eight separate arguments demonstrating why its law limiting abortion needed no such health exception. Nebraska argued:

1) The D & X procedure is rarely used.
2) When D & X is used, it is only performed by a handful of doctors.
3) D & E and induction are always safer alternatives to D & X.
4) A ban on D & X would not increase a woman's risk of several rare abortion complications.
5) D & X creates special risks of serious complications during surgery.
6) There are no medical studies comparing the safety of D & X to other partial-birth abortion procedures, or even studies proving the safety of D & X itself.
7) There are no identifiable situations in which intact D & X is the only appropriate procedure needed to induce abortion.
8) The American College of Obstetricians and Gynecologists could identify no situation in which the D & X procedure could be the only option for preserving the health of the mother.[125]

The majority found these eight arguments insufficient to establish that Nebraska's statute did not require a health exception. The Court responded to each of Nebraska's eight arguments, as follows:

1) The infrequent use of D & X is irrelevant, because "[T]he health exception question is whether protecting women's health requires an exception for those infrequent situations."
2) The fact that only a handful of doctors perform D & X may not accurately reflect the contention that late second-term abortions are comparatively rare.
3) D & E and induction are safe; however, D & X was significantly safer in some circumstances.

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124. *Id.* at 2610.

125. *Stenberg*, 120 S. Ct. at 2610-11. In their fifth argument the state relied on an Amici Brief by the Association of American Physicians and Surgeons, Stenberg v. Carhart, 120 S. Ct. 2597 (2000) (No. 99-830). In their seventh argument, the state relied upon Late Term Pregnancy Termination Techniques, AMA Policy H-5.982 (1997). *Id.*

4) There were advantages to D & X, such as the elimination of the risk of an embolism due to tissue entering the blood stream.
5) The D & X procedure normally does not pose greater risks than alternative abortion procedures.
6) There are no medical studies documenting the comparative safety of D & X to other procedures.
7) The Court did not deny the statement made by the AMA, as pointed out in Nebraska's seventh separate argument.
8) The Court refuted Nebraska's final argument by quoting the American College of Obstetricians and Gynecologist's brief, which stated that " . . . depending on the physician's skill and experience, the D & X procedure can be the most appropriate abortion procedure for some women in some circumstances."[126]

In sum, the majority determined that a statute which entirely prohibits the D & X procedure, without a health exception, creates a significant health risk to women and is therefore unconstitutional under the law set forth in *Casey*.[127]

The Majority's Analysis of the Undue Burden Standard

Applying the standard set forth in *Casey*, the majority had to determine whether the statute had the " . . . effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[128] Nebraska argued that the statute, when properly interpreted, imposed no limitation on a woman's ability to choose D & E because the statutory term "substantial portion" only applies when a physician delivers a fetus up to its head (D & X) and does not apply when a physician delivers anything less than an entire fetal body into the birth canal, with intentions of dismemberment (D & E).[129]

Nebraska also argued that the Court should defer to the state's

126. *Id.* at 2610-11. In response to Nebraska's fifth argument, the majority relied on the American College of Obstetricians and Gynecologist's Brief, Stenberg v. Carhart, 120 S. Ct. 2597 (2000) (No. 99-830). The majority agreed with Nebraska's sixth argument. In response to Nebraska's eighth argument, the majority quoted Brief for American College of Obstetricians and Gynecologists et al. as Amici Curiae 21, Stenberg v. Carhart, 120 S. Ct. 2597 (2000) (No. 99-830).

127. *Id.* at 2613.

128. *Id.* (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 877 (1992)).

129. *Id.* at 2614.

interpretation of its own statute.[130] The majority did not accept the Attorney General's narrow interpretation of the statute; instead, it followed the lower federal court's broader interpretation.[131] The Court held that pulling an arm or leg into the birth canal, before dismemberment, (D & E) would also constitute delivering a "substantial portion" of an unborn child.[132] Therefore, the majority concluded that the D & E procedure fell within the statutory prohibition; thus the statute placed a substantial obstacle in the path of a woman seeking a D & E abortion.[133] In short, the majority held that the statute was unconstitutional because it imposed an undue burden on a woman's right to choose the most commonly performed abortion technique after the first trimester of pregnancy.[134]

Concurring Opinions

Justice Stevens, with whom Justice Ginsburg joined, wrote a short concurring opinion.[135] In his opinion, Justice Stevens wrote, "it is impossible for me to understand how a state has any legitimate interest in requiring a doctor to follow any procedure other than the one that he or she reasonably believes will best protect the woman in her exercise of this constitutional liberty."[136] He also stated that the D & X procedure is no more brutal, more gruesome, or less respectful of potential human life than D & E, which Nebraska claimed it still allows.[137]

Justice O'Connor also wrote a concurring opinion. In her opinion, she stated that a partial-birth abortion statute that only prohibits D & X and includes an exception for the health of the mother, would be constitutional.[138] She determined that prohibiting D & X alone would not amount in practical terms to a substantial obstacle in the path of a woman seeking an abortion, if there were safer, adequate alternative

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130. *Id.*

131. *Id.* The Eighth Circuit broadly interpreted the phrase "substantial portion" as describing and therefore prohibiting the D & E procedure. Carhart v. Stenberg, 192 F.3d 1142, 1150 (8th Cir. 1999).

132. *Stenberg*, 120 S. Ct. at 2613.

133. *Id.* at 2617.

134. *Id.*

135. *Id.* at 2617 (Stevens, J., concurring). Justice Ginsburg also wrote a short concurring opinion in which Justice Stevens joined. *Id.* at 2620 (Ginsburg, J., concurring).

136. *Id.* at 2617 (Stevens, J., concurring).

137. *Id.* (Stevens, J., concurring). Justice Stevens reasoned that the two procedures were equally gruesome and that it would be irrational for a state, in furthering its own legitimate interest, to ban one procedure but not the other. As a result, he determined that Nebraska was not actually attempting to further its own legitimate interest in the potentiality of human life when it enacted the statute. *Id.*

138. *Id.* at 2620 (O'Connor, J., concurring).

methods available, from which a woman and her physician could choose.[139]

Dissenting Opinions

Justice Kennedy, with whom Chief Justice Rehnquist joined, filed a lengthy dissent. Justice Kennedy first criticized the majority's failure to accord any weight to the interests of separate states. Justice Kennedy urged that, "*Casey* is premised on the States having an important constitutional role in defining their interests in the abortion debate."[140] He also contended that the issue was not whether the Court could discern the difference between the D & X and D & E procedures; the issue was whether the state of Nebraska could.[141] According to Justice Kennedy, Nebraska should be entitled to differentiate between the two procedures.[142] Citing *Casey*, Justice Kennedy argued, " . . . where the difference in physical safety is, at best, marginal, the State may take into account the grave moral issues presented by a new abortion method."[143] Observing that there are no studies supporting the contention that D & X is safer than other conventional methods, Justice Kennedy urged that state legislatures should be given the widest latitude when making judgments in which the medical community in is vast disagreement.[144]

Justice Kennedy also expressed his disapproval of the majority's holding that the statute lacked a health exception, stating that there is never a medical need to perform the D & X procedure.[145] D & X also has disadvantages "versus other methods because it requires a high degree of surgical skill to pierce the skull with a sharp instrument in a blind procedure."[146] Disagreeing with the majority's conclusion that the D & X procedure is a part of standard medical practice, Justice Kennedy suggested that Nebraska's law did not deny any woman a safe or superior medical abortion procedure.[147] "The most to be said for the D & X is it may pre-

139. *Id.* (O'Connor, J., concurring). She did however state that a state's interest in regulating abortions before viability is considerably weaker than after viability. *Id.* at 2618 (O'Connor, J., concurring).

140. *Id.* at 2625 (Kennedy, J., dissenting).

141. *Id.* at 2626 (Kennedy, J., dissenting).

142. *Id.* (Kennedy, J., dissenting).

143. *Id.* at 2628 (Kennedy, J., dissenting).

144. *Id.* at 2628, 2630 (Kennedy, J., dissenting).

145. *Id.* at 2628 (Kennedy, J., dissenting) (quoting Dr. Boehm, a supporter of abortion rights). Dr. Boehm is, however, opposed to the D & X procedure. *Id.*

146. *Id.* (Kennedy, J., dissenting) (citing Dr. Haskell, 139 Cong. Rec. 8605 (1993)). Dr. Haskell is a leading proponent of and expert on the D & X procedure. *Id.*

147. *Id.* (Kennedy, J., dissenting).

sent an unquantified lower risk of complication for a particular patient but that other proven safe procedures remain available . . .."[148] He contended that the unsubstantiated, marginal health differences that the majority relied upon did not amount to a substantial obstacle in a woman's path.[149]

Justice Kennedy addressed Justice O'Connor's assurance that a state statute solely prohibiting D & X and including a health exception would be constitutional. He asserted that the assurance is meaningless.[150] Justice Kennedy reasoned that if the health exception is left up to the medical judgment of a physician, the physician will always assert that there is a health exception, thus always allowing him to perform the procedure.[151]

Justice Kennedy further concluded that the majority misinterpreted the text of the statute, stating that the text demonstrates that the statute was only intended to apply to the D & X procedure.[152] He relied on a "commonsense" interpretation of the word "delivery," emphasizing that it could only be understood to mean the removal of an intact fetus (D & X).[153] According to Justice Kennedy, the term "delivery" could not be used to describe how a fetus is brought out of the uterus and into the vagina during a D & E procedure; rather the term "emerges" or "a physician pulling" better describes how a fetus is removed.[154] Looking at "the statutory text, the commonsense understanding must be that the statute covers only the D & X procedure."[155] Kennedy validated this argument by quoting the American Medical Association (AMA), which wrote: "The partial-birth abortion legislation is by its very name aimed exclusively at a procedure by which a living fetus is intentionally and deliberately given partial-birth and delivered for the purpose of killing it. There is no other abortion procedure which could be confused with that de-

148. *Id.* (Kennedy, J., dissenting).

149. *Id.* at 2628-29 (Kennedy, J., dissenting). This infers that there is no need for a health exception because D & X is, at best, marginally safer. Thus there would never be a need, with regards to safety, to opt for the D & X procedure over any other accepted procedure. *See id.* (Kennedy, J., dissenting).

150. *Id.* at 2631 (Kennedy, J., dissenting).

151. *Id.* (Kennedy, J., dissenting).

152. *Id.* at 2632 (Kennedy, J., dissenting).

153. *Id.* (Kennedy, J., dissenting).

154. *Id.* (Kennedy, J., dissenting). Thus, the statute could not be interpreted to include the D & E procedure. Justice Kennedy also pointed out that the majority used the words "a physician pulling" rather than "a physician delivering" when addressing the D & E procedure. *Id.* (Kennedy, J., dissenting).

155. *Id.* at 2633 (Kennedy, J., dissenting).

scription."[156] Justice Kennedy relied on the holding in *Frisby v. Schultz* to imply that the lower courts "ran afoul" by not interpreting the statute to avoid constitutional difficulties.[157] Justice Kennedy concluded by asserting that the Court ignored substantial medical and ethical opinion, and instead substituted " . . . its own judgment for the judgment of Nebraska and some thirty other States and sweeps the law away."[158]

Justice Thomas, with whom Chief Justice Rehnquist and Justice Scalia joined, also filed a lengthy dissent. Justice Thomas initially expressed his disapproval and disagreement with the decision handed down in *Roe v. Wade*.[159] According to Justice Thomas, a state has a legitimate interest in regulating abortion and fetal life during all stages of development.[160] He criticized the Court's application of *Casey's* undue burden standard, stating that if the Nebraska law " . . . is unconstitutional under *Casey*, then *Casey* meant nothing at all, and the Court should candidly admit it."[161]

Justice Thomas argued that the majority misinterpreted the meaning of the statute, stating " . . . we interpret statutes according to their plain meaning and we do not strike down statutes susceptible of a narrowing construction."[162] Justice Thomas also refuted several of the principal arguments upon which the majority based its interpretation of the statute:

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156. *Id.* (Kennedy, J., dissenting) (quoting AMA Factsheet 3) (internal quotation marks omitted). The Nebraska statute heading is entitled "Partial-birth abortion." Justice Kennedy is inferring that the phrase "no other abortion procedure" refers to D & E. Justice Kennedy also criticized the majority's reliance on other lower federal court's interpretation of similarly worded abortion statutes and suggested that the majority was trying to shield themselves from criticism. *See id.* at 2634 (Kennedy, J., dissenting). He stated that the lower courts have "no special competence" when it comes to interpreting abortion laws. *Id.* (Kennedy, J., dissenting). ("It is an abdication of responsibility for the Court to suggest its hand are tied by decisions which paid scant attention to Casey's recognition of the State's authority and misapplied the doctrine of construing statutes to avoid constitutional difficulty.") *Id.* (Kennedy, J., dissenting).

157. *Id.* (Kennedy, J., dissenting) (citing Frisby v. Schultz, 487 U.S. 474, 483 (1988)). Justice Kennedy is suggesting that the lower courts could have avoided constitutional difficulties by applying a narrow interpretation and excluding D & E from the meaning of the statute. *See id.*

158. *Id.* at 2634-35 (Kennedy, J., dissenting).

159. *Id.* at 2635 (Thomas, J., dissenting).

160. *Id.* at 2636 (Thomas, J., dissenting).

161. *Id.* at 2637 (Thomas, J., dissenting). Thomas was inferring that the Court misapplied the undue burden standard and completely disregarded a state's interest in regulating abortion.

162. *Id.* (Thomas, J., dissenting). "We," refers to the Supreme Court.

1) He rejected the contention that the Nebraska Legislature should have used medical nomenclature to describe the D & X procedure, contending that the term D & X did not have a medical meaning at the time the statute was constructed.
2) He stated that the term D & X was ambiguous on its face and that the term "partial-birth abortion" better described what the state legislature intended to prevent.
3) He rebutted the majority's argument that the Supreme Court generally defers to the lower federal courts' interpretations of state law. Justice Thomas cited Justice O'Connor's opinion in *Frisby v. Schultz*, which stated that the Court does not always follow the lower courts' construction of a state statute, especially when the lower courts endorse a broad reading of the law, which results in constitutional difficulties.[163]

Justice Thomas next addressed whether the statute was unconstitutional because it did not contain a health exception. According to Justice Thomas, even without a health exception the statute did not create a substantial obstacle to obtaining an abortion.[164] He argued that the majority could not identify any real or substantial barrier to women seeking an abortion and that, even if there were such an obstacle, it would not affect an adequate number of women to justify a facial invalidation of the law.[165] Lastly, Justice Thomas asserted that none of the Justices, in the majority or concurring opinions had identified the "significant body of medical opinion" that supports the finding that D & X may be safer than D & E.[166]

ANALYSIS

Roe and *Casey* clearly hold that a woman has a constitutional right to terminate her pregnancy. The state of Nebraska sought to erode this fundamental right through the enactment of partial-birth abortion legislation that substantially inhibited a woman's right to make an abor-

163. *Id.* at 2646-47 (Thomas, J., dissenting).
164. *Id.* at 2653 (Thomas, J., dissenting).
165. *Id.* (Thomas, J., dissenting).
166. *Id.* at 2654 (Thomas, J., dissenting). He asserted that the majority justified striking down the statute by relying on an uncorroborated "significant body of medical opinion." Chief Justice Rehnquist also filed a dissent. *Id.* at 2620-21 (Rehnquist, C.J., dissenting). In his dissent, he reiterated his disapproval with the majority's decision in *Casey* and supported Justice Kennedy and Justice Thomas' dissenting opinions. *See Id.* (Rehnquist, C.J., dissenting). Justice Scalia also filed a dissenting opinion. *Id.* at 2621-24 (Scalia, J., dissenting). Justice Scalia also expressed his disapproval with the decision in *Casey* and his will to return the decision of abortion back to the people of the separate states. *Id.* at 2623 (Scalia, J., dissenting).

tion decision.[167] The Supreme Court was correct in holding that the Nebraska statute was unconstitutional because it (1) placed an undue burden upon a woman seeking an abortion, and (2) lacked the required health exception needed to preserve the health and the life of the mother.[168]

The Undue Burden

The Court was correct to broadly interpret the meaning of the statute to prohibit D & E as well as D & X. It is evident that the Nebraska Legislature intended to regulate more than just the D & X procedure. The bill's legislative history indicates that the legislature was seeking to implement a broad ban on late-term partial-birth abortions.[169] The specific purpose of the act was not to ban any particular abortion procedure. Instead, as one of the bill's sponsors stated, the legislature "tried to be as encompassing as possible."[170]

Additionally, Senator Maurstad, the bill's chief sponsor, acknowledged that the law "could operate in the first trimester of pregnancy."[171] When addressing the meaning of the term "substantial" he stated that the meaning "would be subjective," recognizing that "one-third" of a fetus could be a "substantial portion" and "one-fourth" could be, depending on "which fourth."[172] He agreed "as small a portion of the fetus as a foot would constitute a substantial portion."[173] Perhaps the best

167. Brief Amicus Curiae of Family First at 8, Stenberg v. Carhart, 120 S. Ct. 2597 (2000) (No. 99-830). Twenty-nine other states have also created statutes that prohibit partial-birth abortions. These states include Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, New Jersey, North Dakota, Ohio Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wisconsin. *Id.*

168. *See Stenberg*, 120 S. Ct. at 2609.

169. The Nebraska legislative history for Legislative Bill 23 is unavailable to the author, however pertinent sections of the bill's history can be found in Petitioners' and Respondents' Briefs, Stenberg v. Carhart, 120 S. Ct. 2597 (2000) (No. 99-830).

170. Respondents' Brief at 4, Stenberg v. Carhart, 120 S. Ct. 2597 (2000) (No. 99-830) (quoting Nebraska legislative history of Legislative Bill 23 that is unavailable to the author but can be found in the Joint Appendix at 475-79 (Senator Hilgert)).

171. Respondents' Brief at 4, Stenberg (No. 99-830) (citing Nebraska legislative history of Legislative Bill 23 that is unavailable to the author but can be found in the Joint Appendix at 458-59). This supports the contention that the statute could be applied to more than D & X because D & X is not performed on a fetus during the first stage of pregnancy.

172. Respondents' Brief at 6, Stenberg (No. 99-830) (quoting Nebraska legislative history of Legislative Bill 23 that is unavailable to the author but can be found in the Joint Appendix at 430-31).

173. Respondents' Brief at 6, Stenberg (No. 99-830) (quoting Nebraska legislative

evidence that the Nebraska Legislature intended to prohibit both D & X as well as D & E is the fact that it defeated an amendment that would have substituted the term "partial-birth abortion" with the term "intact dilation and extraction"(D & X).[174] During the debate on the amendment, Senator Maurstad "admitted that replacing 'partial-birth' abortion with 'intact dilation and extraction; would 'change what the bill is designed to do.' "[175]

In Petitioners' brief, Attorney General Stenberg also relied upon Nebraska's legislative history to assert that the intent of the legislature and the purpose of the bill was to only prohibit the D & X procedure. He quoted the first words spoken by the sponsoring senator during legislative consideration of the bill: "My personal priority bill, LB 23, would prohibit the use of partial-birth abortion procedure, also know as dilation and extraction, in the state of Nebraska."[176] Petitioner pointed out that during the legislative session, there was an amendment that added the language "substantial portion" to the statute "for the purpose of clarifying that the D & E procedure was not covered by the bill."[177] He also quoted a statement made by Senator Maurstad during a floor debate: "The changed language is in the bill now: [it] makes it clear beyond any question that the accepted abortion procedure known as dilation and evacuation, also referred to as D & E, is not covered by the bill . . .."[178]

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history of Legislative Bill 23 that is unavailable to the author but can be found in the Joint Appendix at 452-53). Delivering a fetal hand or one-third of a fetus does not describe D & X; it describes D & E or possibly vacuum aspiration. ("Maurstad plainly acknowledged that dismembering the fetus after 'more than a little bit' of it had been delivered into the vagina would violated the Act."). Respondents' Brief at 6, Stenberg (No. 99-830) (quoting Nebraska legislative history of Legislative Bill 23 that is unavailable to the author but can be found in the Joint Appendix at 442-43). Thus D & E would violate the act.

174. Brief of the Naral Foundation, the Feminist Majority Foundation, the National Partnership for Women & Families, the National Women's Law Center and People for the American Way Foundation at 13, Stenberg v. Carhart, 120 S. Ct. 2597 (2000) (No. 99-830) (quoting Nebraska legislative history of Legislative Bill 23 that is unavailable to the author but can be found in the Joint Appendix at 404). This acknowledgment readily supports the contention that the bill was designed to prohibit more that just D & X.

175. *Id.* (quoting Nebraska legislative history of Legislative Bill 23 that is unavailable to the author but can be found in the Joint Appendix at 381).

176. Petitioners' Opening Brief at 22, Stenberg v. Carhart, 120 S. Ct. 2597 (2000) (No. 99-830) (citing Nebraska legislative history of Legislative Bill 23 that is unavailable to the author but can be found in the Eighth Circuit Appendix at 1639). Petitioner quotes this statement to evidence that "from the very beginning the statute's intent was to ban the D & X procedure." *Id.*

177. *Id.*

178. *Id.* at 22-23 (quoting Nebraska legislative history of Legislative Bill 23 that is unavailable to the author but can be found in the Eighth Circuit Appendix at 1779). The

However, here is the fault. If the legislature truly wanted to make it clear, beyond any question, that D & E was not covered by the bill, why did the legislature not just amend the language to state that "D & E is not covered by the bill," instead of inserting the subjective term "substantial portion" to clarify the legislative bill?[179] As Justice Breyer pointed out, it seems that the legislature wanted to avoid "more limiting language."[180]

Legislative intent aside, the fact is that the statute can be reasonably interpreted to include more than the D & X procedure.[181] As the Eighth Circuit pointed out, the crucial problem with the statute is the use of the term "substantial portion."[182] It is conceded that there is no decisive consensus as to what would constitute a "substantial portion" of a fetus.[183] However, most should agree, as did the Eighth Circuit and the district court, that "[i]n any sensible and ordinary reading of the word, a leg or arm is substantial."[184] The statute specifically barred the intentional delivery of a substantial portion of the fetus for the purpose of aborting the unborn child.[185] During the D & E procedure, the physician will typically deliver a leg or arm into the vagina for the purpose of aborting the child; therefore, if "substantial" is interpreted to include an arm or a leg, a physician is violating the law whenever he performs a D & E.[186]

Justice Thomas and the state tried to argue that statutes should be

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changed language refers to the addition of the term "substantial portion."

179. Stenberg v. Carhart, 120 S. Ct. 2597, 2616 (2000). As the majority opinion noted, the term "substantial portion" is subject to a variety of interpretations and is therefore extremely unclear. However, language similar to "D & E is not covered by the bill," can only be read to mean one thing: D & E is not covered by the bill.

180. *Id.* at 2616. This language would have undesirably categorized the statute as only prohibiting D & X.

181. If the statute could be reasonably interpreted to prohibit more than D & X, a substantial barrier would be placed in the path of women. This interpretation would deter doctors form performing questionable procedures, for fear of prosecution, conviction, or imprisonment. *See* Stenberg, 120 S. Ct. at 2617.

182. Carhart v. Stenberg, 192 F.3d 1142, 1150 (8th Cir. 1999).

183. Senator Brasher, a supporter of the bill, was quoted as stating, "There's no question there will be a fact question as to what is a substantial portion." Respondents' Brief at 6, Stenberg v. Carhart, 120 S. Ct. 2597 (2000) (No. 99-830) (quoting Nebraska legislative history of Legislative Bill 23 that is unavailable to the author but can be found in the Joint Appendix at 444).

184. *Carhart*, 192 F.3d at 1150; Carhart v. Stenberg, 11 F. Supp.2d 1099, 1129 (D. Neb. 1998).

185. NEB. REV. STAT. ANN. § 28-326(9) (LEXIS 1998).

186. *Carhart*, 192 F.3d at 1150. As a result, the statute should be interpreted as prohibiting not only D & X but D & E as well, the most common second trimester abortion procedure. This places a substantial obstacle and an undue burden upon a woman's abortion decision and invalidates the statute.

reasonably interpreted to avoid constitutional difficulty.[187] However, as the Eighth Circuit correctly pointed out, it is not reasonably possible for the courts to "twist the words of the law and give them a meaning they cannot reasonably bear" in an effort to avoid constitutional difficulty.[188] The majority agreed, stating that they were "without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent."[189] The majority correctly concluded that it would not be "reasonable to replace the term 'substantial portion' with the Attorney General's phrase 'body up to the head.' "[190]

The state and Attorney General also argued that the Court "must defer to his views about the meaning of the state statute."[191] However the majority appropriately determined that the Attorney General's interpretative views should be given no controlling weight.[192] The majority cited *McMillian v. Monroe County* and *Brockett v. Spokane Arcades* to assert that they normally follow the lower federal courts' interpretations of state law.[193] Two lower courts rejected the Attorney General's narrowing interpretation of the statute, and the Court "rarely reviews a construction of state law agreed upon by the two lower federal courts."[194] Thus, the majority properly affirmed the lower courts' decision that D & E was also prohibited under the Nebraska state law.[195] Additionally, the state did not deny that if the statute applied to D & E as well as D & X, it would impose an "undue burden" upon a woman's decision to terminate her pregnancy.[196] Therefore, because the Court appropriately held the

187. Stenberg v. Carhart, 120 S. Ct. 2597, 2647 (2000) (Thomas, J., dissenting). Justice Kennedy also made the same argument. *Id.* at 2623 (Kennedy, J., dissenting). Petitioners' Opening Brief at 25, Stenberg v. Carhart, 120 S. Ct. 2597 (2000) (No. 99-830). They were contending that if the statute was narrowly read, it would avoid constitutional difficulty.

188. *Carhart*, 192 F.3d at 1150. The language of the statute could not be twisted and interpreted to mean that only D & X is prohibited.

189. *Stenberg*, 120 S. Ct. at 2616 (quoting Boos v. Barry, 485 U.S. 312, 330 (1988)).

190. *Id.* at 2616. If the Court had read "substantial portion" to mean "body up to the head," the statute would have only prohibited D & X and avoided constitutional difficulty.

191. *Id.* at 2614. The Nebraska State Attorney General viewed the statute as only prohibiting D & X.

192. *Id.*

193. *Id.* at 2614 (citing McMillian v. Monroe County, 520 U.S. 781, 786 (1997); Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 500, n.9 (1985)).

194. *Id.* at 2614 (quoting Virginia v. Am. Booksellers Ass'n, Inc. 484 U.S. 383, 395 (1988)).

195. *Id.* at 2613.

196. *See id.*

statute applicable to D & E, it is undisputed that the statute is unconstitutional under *Casey's* undue burden standard.[197]

The Health Exception

The majority properly applied *Casey* to hold that the statute was also invalid because it did not contain a required health exception.[198] Such an exception is needed to preserve the *health* of the mother.[199] Both the state and the majority agreed that there are no conclusive medical studies establishing the comparative safety of D & X to other procedures.[200] Furthermore, there is plausible evidence, from both sides supporting the contention that D & X is safer or not as safe as other procedures.[201] The majority however found the evidence, in support of D & X, more convincing and correctly determined that in certain circumstances, performing a D & X procedure may be necessary to preserve the health of the mother.[202] Dr. Carhart's testimony that D & X allows for minimal instrumentation and reduces possible complications is not only credible but also convincing.[203] Carhart's testimony is supported by a statement made in an amicus brief by the American College of Obstetricians and Gynecologists stating, "depending on the physician's skill and experience, the D & X procedure can be the most appropriate abortion procedure for some women in some circumstances."[204]

The majority also made a compelling argument by essentially saying "it is better to be safe than sorry." As the majority noted:

> [T]he division of medical opinion about the matter at most means uncertainty, a factor that signals the presence of risk, not its absence. [T]he uncertainty means a significant likelihood that those who believe that D & X is a safer abortion method in certain circumstances may turn out to be right. If so, then the absence of a health exception will place women at an unnecessary

197. *See id.*
198. *See id.*
199. *Id.*
200. *Id.* at 2611. If there were medical studies showing that D & X was unsafe or not as safe as other procedures, there would be no need for a health exception.
201. *Id.* at 2609-12.
202. *Id.* at 2612-13.
203. Carhart v. Stenberg, 11 F. Supp.2d 1099, 1125 (D. Neb. 1998).
204. *Stenberg*, 120 S. Ct. at 2612 (quoting Brief for American College of Obstetricians and Gynecologists et al. as Amici Curiae 21-22, Stenberg v. Carhart, 120 S. Ct. 2597 (2000) (No. 99-830)).

> risk of tragic health consequences. If they are wrong, the exception will simply turn out to have been unnecessary.[205]

An additional argument in favor of Dr. Carhart and a health exception can be found in the language of the statute itself. The statute states "no partial-birth abortion shall be performed in this state, unless such procedure is necessary to save the *life* of the mother."[206] Moreover, the state argued that there is no circumstance under which the D & X procedure would be necessary to preserve the health or life of the mother.[207] Here is the flaw in that argument. If there is no circumstance under which the D & X procedure would be necessary to save the life of the mother, then why did the legislature include a life exception within the statute? The state directly contradicts itself. It is essentially conceding the fact that there may be a situation in which the D & X procedure may be safer or necessary to save the life of the mother. The state says there was no such need for a life exception, but it puts a life exception in the statute. This, to a large extent, ruined the credibility of the state's argument that there was no need for a life or a health exception. There was a need for a health exception, and it should have been included within the statute. As a result, the Court was correct in holding the Nebraska statute unconstitutional for lack of a health exception.

Impact of the Stenberg Decision

This case will have a significant impact on partial-birth abortion laws nationwide. As Justice Kennedy and Justice Thomas pointed out, approximately thirty states have passed laws prohibiting partial-birth abortions.[208] Most of these statutes do not pass constitutional muster, applying the standards set forth in *Roe*, *Casey*, and *Stenberg*.

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205. *Stenberg*, 120 S. Ct. at 2612-13. The "matter" refers to whether D & X is safer in certain circumstances.

206. NEB. REV. STAT. ANN. § 28-328(1) (LEXIS 1998). As noted before, this statement does not constitute a health exception. (Emphasis added). This statement only incorporates a life exception, which is a much higher bar for physicians and women to overcome. Under a life exception, a physician must show that without performing the procedure in question, the woman has a high probability of dying. While a health exception, is a much lower bar for physicians to overcome. The physician simply has to proffer a reason as to why it would be healthier or safer to perform the procedure in question, such as the procedure takes less time than other accepted procedures, thus less anesthesia is required. Therefore, in order for a statute to pass constitutional muster, under the health exception requirement set forth in Casey, a statute must state something to the effect of: "No partial-birth abortion shall be performed in this state, unless such procedure is necessary to save the health and life of the mother."

207. *Stenberg*, 120 S. Ct. at 2610.

208. *Id.* at 2635 (Kennedy, J., dissenting). *Id.* at 2656 (Thomas, J., dissenting).

The *Stenberg* decision set forth two new basic tenets with which all partial-birth abortion legislation must conform: A state is not allowed to (1) prohibit the D & E procedure, before fetal viability; nor (2) prohibit the D & X procedure, unless there is a health exception.[209] Justice O'Connor also made a significant point when she stated, "a ban on partial-birth abortion that only proscribed the D & X method of abortion and that included an exception to preserve the life and health of the mother would be constitutional . . .."[210] This would allow a state to further assert, into the pre-viability period of development, its own interests in the potentiality in human life. This additional credence given to a state's interests would have the effect of diminishing a woman's own interests in her personal well being and bodily integrity.

There is, however, a critical oversight with regards to the second tenet. Following the guidelines set forth in *Stenberg*, a state will never be able to effectively prohibit D & X, even if the legislature includes a health exception, because physicians only perform the D & X procedure when they consider it to be the safest procedure available. If a physician believes that the D & X method is not the safest method available, he will not attempt to perform the D & X but will rather opt for the procedure thought to be safer.[211] Thus, a physician will only perform the D & X procedure if, in his opinion, it is the safest and healthiest method available. This always gives the doctor a health exception and always allows him to perform the procedure.[212] As a result, if a state does prohibit D & X, using the guidelines set forth in the majority's opinion, it

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209. *Id.* at 2613.

210. *Id.* at 2620 (O'Connor, J., concurring). The majority opinion does not expressly state what Justice O'Connor suggested in her opinion at 2620. However the majority opinion did state: "[A] statute that altogether forbids D & X creates a significant health risk. The statute consequently must contain a health exception." This seems to imply that if a statute contains a health exception, it can altogether forbid D & X. Regardless of how Justice Stevens, Justice Ginsburg, Justice Souter, and Justice Breyer would side if this type of statute were ever presented, the four dissenting Justices would, at the very least, agree with Justice O'Connor's contention. Thus, if a statute that only prohibited D & X and included a health exception ever came before the Supreme Court, Justice O'Connor presumably would side with Chief Justice Rehnquist, Justice Scalia, Justice Kennedy, and Justice Thomas, and the statute would be upheld.

211. A health exception essentially means that the procedure would be healthier than any other. A doctor would not perform one procedure if he truly thought that there was another procedure that was safer, healthier, or more effective. The only time a health exception would seem to work is if there was no difference between the healthiness of D & X and another procedure. Then the health exception rule would prohibit the physician from performing D & X.

212. The health exception standard seems to be extremely broad, allowing the physician great leeway when determining whether a possible complication falls under the standard.

will have no real effect. Was the majority aware of this? The dissent seemed to recognize the flaw. Justice Kennedy wrote, "a ban which depends on the appropriate medical judgment of Dr. Carhart is no ban at all. He will be unaffected by any new legislation. This, of course, is the vice of a health exception resting in the physician's discretion."[213] Justice Thomas also expressed his disapproval over the health exception:

> If Nebraska reenacts its partial birth abortion ban with a health exception, the State will not be able to prevent physicians like Dr. Carhart from using partial birth abortion as a routine procedure. This Court has now expressed its own conclusion that there is "highly plausible" support for the view that partial birth abortion is safer, which, in the majority's view, means that the procedure is therefore "necessary." Any doctor who wishes to perform such a procedure under the new statute will be able to do so with impunity.[214]

The majority must have contemplated this possibility. Did the majority, in fact, covertly approve of the D & X procedure? Are they hiding behind the health exception in order to avoid the repercussions that would go along with the outright endorsement of the D & X technique?

Unlike D & E, which was readily endorsed by the Court, D & X is a relatively new, unconventional procedure that has come against great opposition by the general public. "The reaction to the development of this procedure has been truly unprecedented. Nation-wide, large bipartisan majorities consisting of both pro-choice and pro-life legislators have voted to ban the procedure in thirty States and both Houses of Congress."[215] The majority also acknowledged "the controversial nature of the problem."[216] The Court realized that the D & X technique is a relatively gruesome procedure and that most would wince at the sight or description of the technique, stating " . . . our discussion may seem clinically cold or callous to some, perhaps horrifying to others."[217] The majority, however, seemed to take the position that D & X is a medically

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213. *Stenberg*, 120 S. Ct. at 2631 (Kennedy, J., dissenting). Justice Kennedy was directly addressing Justice O'Connor's assurance that Nebraska could ban D & X with a health exception. *Id.* at 2620 (O'Connor, J., concurring).

214. *Id.* at 2652 (Thomas, J., dissenting). Justice Thomas concluded that there will always be support for D & X and there will always be doctors who are of the opinion that D & X is preferable.

215. Petitioners' Opening Brief at 4-5, Stenberg v. Carhart, 120 S. Ct. 2597 (2000) (No. 99-830).

216. *See Stenberg*, 120 S. Ct. at 2604.

217. *Id.* at 2605.

proven and arguably vital procedure that should not be prohibited, despite social and political disapproval. Thus, they may have been seeking "to shield themselves from criticism," while also allowing the D & X procedure to be performed.[218] The majority may have relied upon the health exception to justify the validation of D & X and escape accountability for the approval of an unpopular procedure.

Whatever the Court's intent, this decision will result in the unrealistic ability of a state to effectively prohibit and regulate the D & X procedure, even if a health exception is incorporated into the statute. The health exception requirement, under *Casey*, allows the physician great latitude when assessing which abortion procedure would be most beneficial for preserving the health and well-being of a woman. As a result, unless the health exception requirement in *Casey* is overturned, neither the federal government nor the states will be able to successfully prevent physicians from performing any controversial pre-viability abortion procedure, for which there is substantial medical authority supporting the contention that the procedure in question is comparatively safer. The physician would most likely be able to circumvent the statutory prohibition by establishing that either: (1) Prohibiting the abortion procedure places a substantial obstacle in the path of a woman seeking a common, proven, and preferred method of abortion (undue burden), or (2) The prohibited procedure would be the safest and most effective method available for terminating the life of the unborn fetus; thus, the procedure is necessary to preserve the health and life of the mother (health exception).

CONCLUSION

The majority in *Stenberg* correctly applied the principles set forth in *Roe* and *Casey* to hold that the Nebraska statute was unconstitutional. The majority properly deferred to the lower federal courts' broader interpretation of the statute to hold that the language prohibited D & E and thus placed an undue burden upon a woman's right to terminate her pregnancy. The majority also appropriately held that the statute lacked a required health exception needed to preserve the health and life of the mother. Although *Stenberg* did not alter the legal principles set

218. *Id.* at 2634 (Kennedy, J., dissenting).

forth in *Roe* and *Casey*, this decision should provide significant direction for the state legislatures and lower courts to follow when questions over partial-birth abortion arise.

M. JASON MAJORS