

**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 e-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

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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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1 P R O C E E D I N G S

2 (10:10 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in Number 99-830, Don Stenberg v. Leroy Carhart.

5 Mr. Stenberg.

6 ORAL ARGUMENT OF DONALD B. STENBERG

7 ON BEHALF OF THE PETITIONERS

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

10 In Roe v. Wade, this Court said that there is no  
11 absolute right to terminate a pregnancy at whatever time,  
12 in whatever way, and for whatever reason a woman chooses.  
13 With that legal principle, and the Casey undue burden test  
14 in mind, the issue here today is whether a State may  
15 prohibit a little-used form of abortion that borders on  
16 infanticide when safe, alternative forms of abortion  
17 remain available to women who seek abortions.

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

22 QUESTION: General Stenberg, I just would like  
23 to clarify one thing. You say, borders on infanticide. I  
24 thought that this case related only to pre-viability. Is  
25 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?

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

remains available any time there is a health problem, and  
1 litigation. edure is available to --

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  
8 business day-in and day-out, year-in and year-out. studied

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. never

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 -- the legislature acted.

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? I don't believe that it would have been

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  
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.

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  
13 specifically found that there are always alternatives  
14 available to a woman in need of abortion if there is a  
15 health concern.

16 But to return briefly to the overall picture of  
17 statutory construction, I would strongly recommend that  
18 this Court adopt the corollary proposed in the Friend of  
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  
6 certify the question?

7 GENERAL STENBERG: In our answer we -- no, we  
8 did not. We did ask the court in our answer to the  
9 complaint to abstain so that the State courts could hear  
10 the case.

11 QUESTION: If you didn't suggest it at the  
12 district court level, did you suggest it at the Eighth  
13 Circuit level?

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

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

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

24 QUESTION: Did the other side ask for it to be  
25 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. ~~that the language~~  
3 ~~of the~~ GENERAL STENBERG: Well, no, Your Honor. ~~If perhaps~~  
4 this Court is going to construe Nebraska's statute ~~position~~  
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 -- ~~abortion? Which is~~  
8 ~~your p~~ QUESTION: Should certify it only if that makes  
9 a difference to us. ~~STENBERG: I think it's fair to say the~~  
10 ~~statute~~ GENERAL STENBERG: Only if it makes a ~~construction,~~  
11 difference. If this -- ~~the State's construction is a~~  
12 ~~reason~~ 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 ~~have we not,~~  
15 unconstitutional. ~~Court in construing a State statute is~~  
16 ~~obligat~~ GENERAL STENBERG: Yes, that's correct. If -- ~~true~~  
17 ~~is a r~~ QUESTION: I mean, if we interpret it that way.  
18 ~~court~~ 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 MR. HELLER: Yes.

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