Syllabus

SUPREME COURT OF THE UNITED STATES

STENBERG, ATTORNEY GENERAL OF NEBRASKA, et al. *v.* CARHART

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 99—830. Argued April 25, 2000–Decided June 28, 2000

The Constitution offers basic protection to a woman's right to choose whether to have an abortion. *Roe* v. *Wade,* 410 U.S. 113; *Planned Parenthood of Southeastern Pa.* v. *Casey,* 505 U.S. 833. Before fetal viability, a woman has a right to terminate her pregnancy, *id.*, at 870 (joint opinion), and a state law is unconstitutional if it imposes on the woman's decision an "undue burden," *i.e.*, if it has the purpose or effect of placing a substantial obstacle in the woman's path, *id.*, at 877. Postviability, the State, in promoting its interest in the potentiality of human life, may regulate, and even proscribe, abortion except where "necessary, in appropriate medical judgment, for the preservation of the [mother's] life or health." *E.g., id.*, at 879. The Nebraska law at issue prohibits any "partial birth abortion" unless that procedure is necessary to save the mother's life. It defines "partial birth abortion" as a procedure in which the doctor "partially delivers vaginally a living unborn child before killing the . . . child," and defines the latter phrase to mean "intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the [abortionist] knows will kill the … child and does kill the … child." Violation of the law is a felony, and it provides for the automatic revocation of a convicted doctor's state license to practice medicine. Respondent Carhart, a Nebraska physician who performs abortions in a clinical setting, brought this suit seeking a declaration that the statute violates the Federal Constitution. The District Court held the statute unconstitutional. The Eighth Circuit affirmed.

Held: Nebraska's statute criminalizing the performance of "partial birth abortion[s]" violates the Federal Constitution, as interpreted in *Casey* and *Roe.* Pp. 3—27.

(a) Because the statute seeks to ban one abortion method, the Court discusses several different abortion procedures, as described in the evidence below and the medical literature. During a pregnancy's second trimester (12

to 24 weeks), the most common abortion procedure is "dilation and evacuation" (D&E), which involves dilation of the cervix, removal of at least some fetal tissue using nonvacuum surgical instruments, and (after the 15th week) the potential need for instrumental dismemberment of the fetus or the collapse of fetal parts to facilitate evacuation from the uterus. When such dismemberment is necessary, it typically occurs as the doctor pulls a portion of the fetus through the cervix into the birth canal. The risks of mortality and complication that accompany D&E are significantly lower than those accompanying induced labor procedures (the next safest mid-second-trimester procedures). A variation of D&E, known as "intact D&E," is used after 16 weeks. It involves removing the fetus from the uterus through the cervix "intact," *i.e.*, in one pass rather than several passes. The intact D&E proceeds in one of two ways, depending on whether the fetus presents head first or feet first. The feet-first method is known as "dilation and extraction" (D&X). D&X is ordinarily associated with the term "partial birth abortion." The District Court concluded that clear and convincing evidence established that Carhart's D&X procedure is superior to, and safer than, the D&E and other abortion procedures used during the relevant gestational period in the 10 to 20 cases a year that present to Carhart. Moreover, materials presented at trial emphasize the potential benefits of the D&X procedure in certain cases. Pp. 3—10.

(b) The Nebraska statute lacks the requisite exception "for the preservation of the … health of the mother." *Casey*, *supra*, at 879 (joint opinion). The State may promote but not endanger a woman's health when it regulates the methods of abortion. Pp. 11—19.

(i) The Court rejects Nebraska's contention that there is no need for a health exception here because safe alternatives remain available and a ban on partial-birth abortion/D&X would create no risk to women's health. The parties strongly contested this factual question in the District Court; and the findings and evidence support Dr. Carhart. Pp. 13—14.

(ii) Nebraska and its supporting *amici* respond with eight arguments as to why the District Court's findings are irrelevant, wrong, or applicable only in a tiny number of instances. Pp. 14—15.

(iii) The eight arguments are insufficient to demonstrate that Nebraska's law needs no health exception. For one thing, certain of the arguments are beside the point. The D&X procedure's relative rarity (argument (1)) is not highly relevant. The State cannot prohibit a person from obtaining treatment simply by pointing out that most people do not need it. And the fact that only a "handful" of doctors use the procedure (argument (2)) may reflect the comparative rarity of late second term abortions, the procedure's recent development, the controversy surrounding it, or, as Nebraska suggests, the procedure's lack of utility. For another thing, the record responds to Nebraska's (and *amici's*) medically based arguments. As to argument (3), the

District Court agreed that alternatives, such as D&E and induced labor are "safe," but found that the D&X method was *safer* in the circumstances used by Carhart. As to argument (4)–that testimony showed that the statutory ban would not increase a woman's risk of several rare abortion complications–the District Court simply relied on different expert testimony than the State. Argument (5)–the assertion of *amici* Association of American Physicians and Surgeons et al. that elements of the D&X procedure may create special risks–is disputed by Carhart's *amici*, including the American College of Obstetricians and Gynecologists (ACOG), which claims that the suggested alternative procedures involve similar or greater risks of cervical and uterine injury. Nebraska's argument (6) is right–there are no general medical studies documenting the comparative safety of the various abortion procedures. Nor does the Court deny the import of the American Medical Association's (AMA) recommendation (argument (7)) that intact D&X not be used unless alternative procedures pose materially greater risk to the woman. However, the Court cannot read ACOG's qualification that it could not identify a circumstance where D&X was the "only" life- or health-preserving option as if, according to Nebraska's argument (8), it denied the potential health-related need for D&X. ACOG has also asserted that D&X can be the most appropriate abortion procedure and presents a variety of potential safety advantages. Pp. 15—18.

(iv) The upshot is a District Court finding that D&X obviates health risks in certain circumstances, a highly plausible record-based explanation of why that might be so, a division of medical opinion over whether D&X is generally safer, and an absence of controlled medical studies that would help answer these medical questions. Given these circumstances, the Court believes the law requires a health exception. For one thing, the word "necessary" in *Casey*'s phrase "necessary, in appropriate medical judgment, for the … health of the mother," 505 U.S., at 879, cannot refer to absolute proof or require unanimity of medical opinion. Doctors often differ in their estimation of comparative health risks and appropriate treatment. And *Casey*'s words "appropriate medical judgment" must embody the judicial need to tolerate responsible differences of medical opinion. For another thing, the division of medical opinion signals uncertainty. If those who believe that D&X is a safer abortion method in certain circumstances turn out to be right, the absence of a health exception will place women at an unnecessary risk. If they are wrong, the exception will simply turn out to have been unnecessary. Pp. 18—19.

(c) The Nebraska statute imposes an "undue burden" on a woman's ability to choose an abortion. See *Casey*, *supra*, at 874 (joint opinion). Pp. 20—27.

(i) Nebraska does not deny that the statute imposes an "undue burden" *if* it applies to the more commonly used D&E procedure as well as to D&X. This Court agrees with the Eighth Circuit that the D&E procedure falls within the statutory prohibition of intentionally delivering into the vagina a living fetus, or "a substantial portion thereof," for the purpose of performing a

procedure that the perpetrator knows will kill the fetus. Because the evidence makes clear that D&E will often involve a physician pulling an arm, leg, or other "substantial portion" of a still living fetus into the vagina prior to the fetus' death, the statutory terms do not to distinguish between D&X and D&E. The statute's language does not track the medical differences between D&E and D&X, but covers both. Using the law's statutory terms, it is impossible to distinguish between D&E (where a foot or arm is drawn through the cervix) and D&X (where the body up to the head is drawn through the cervix). Both procedures can involve the introduction of a "substantial portion" of a still living fetus, through the cervix, into the vagina–the very feature of an abortion that leads to characterizing such a procedure as involving "partial birth." Pp. 20—21.

(ii) The Court rejects the Nebraska Attorney General's arguments that the state law does differentiate between the two procedures–*i.e.,* that the words "substantial portion" mean "the child up to the head," such that the law is inapplicable where the physician introduces into the birth canal anything less than the entire fetal body–and that the Court must defer to his views. The Court's case law makes clear that the Attorney General's narrowing interpretation cannot be given controlling weight. For one thing, this Court normally follows lower federal-court interpretations of state law, *e.g., McMillian* v. *Monroe County,* 520 U.S. 781, 786, and rarely reviews such an interpretation that is agreed upon by the two lower federal courts. *Virginia* v. *American Booksellers Assn., Inc.,* 484 U.S. 383, 395. Here, the two lower courts both rejected the Attorney General's narrowing interpretation. For another, the Court's precedent warns against accepting as "authoritative" an Attorney General's interpretation of state law where, as here, that interpretation does not bind the state courts or local law enforcement. In Nebraska, elected county attorneys have independent authority to initiate criminal prosecutions. Some present prosecutors (and future Attorneys General) might use the law at issue to pursue physicians who use D&E procedures. Nor can it be said that the lower courts used the wrong legal standard in assessing the Attorney General's interpretation. The Eighth Circuit recognized its duty to give the law a construction that would avoid constitutional doubt, but nonetheless concluded that the Attorney General's interpretation would twist the law's words, giving them a meaning they cannot reasonably bear. The Eighth Circuit is far from alone in rejecting such a narrowing interpretation, since 11 of the 12 federal courts that have interpreted on the merits the model statutory language on which the Nebraska law is based have found the language potentially applicable to abortion procedures other than D&X. Regardless, were the Court to grant the Attorney General's views "substantial weight," it would still have to reject his interpretation, for it conflicts with the statutory language. The statutory words, "substantial portion," indicate that the statute does not include the Attorney General's restriction–"the child up to the head." The Nebraska Legislature's debates hurt the Attorney General's argument more than they help it, indicating that as small a portion of the fetus as a foot would constitute a "substantial portion." Even assuming that

the distinction the Attorney General seeks to draw between the overall abortion procedure itself and the separate procedure used to kill an unborn child would help him make the D&E/D&X distinction he seeks, there is no language in the statute that supports it. Although adopting his interpretation might avoid the constitutional problem discussed above, the Court lacks power do so where, as here, the narrowing construction is not reasonable and readily apparent. *E.g., Boos* v. *Barry*, 485 U.S. 312, 330. Finally, the Court has never held that a federal litigant must await a state-court construction or the development of an established practice before bringing the federal suit. *City of Lakewood* v. *Plain Dealer Publishing Co.*, 486 U.S. 750, 770, n. 11. But any authoritative state-court construction is lacking here. The Attorney General neither sought a narrowing interpretation from the Nebraska Supreme Court nor asked the federal courts to certify the interpretive question. Cf. *Arizonans for Official English* v. *Arizona*, 520 U.S. 43. Even were the Court inclined to certify the question now, it could not do so because certification is appropriate only where the statute is "fairly susceptible" to a narrowing construction, see *Houston* v. *Hill*, 482 U.S. 451, 468—471, as is not the case here. Moreover, the Nebraska Supreme Court grants certification only if the certified question is determinative of the cause, see *id.*, at 471, as it would not be here. In sum, because all those who perform abortion procedures using the D&E method must fear prosecution, conviction, and imprisonment, the Nebraska law imposes an undue burden upon a woman's right to make an abortion decision. Pp. 21—27.

192 F.3d 1142, affirmed.

Breyer, J., delivered the opinion of the Court, in which Stevens, O'Connor, Souter, and Ginsburg, JJ., joined. Stevens, J., filed a concurring opinion, in which Ginsburg, J., joined. O'Connor, J., filed a concurring opinion. Ginsburg, J., filed a concurring opinion, in which Stevens, J., joined. Rehnquist, C. J., and Scalia, J., filed dissenting opinions. Kennedy, J., filed a dissenting opinion, in which Rehnquist, C. J., joined. Thomas, J., filed a dissenting opinion, in which Rehnquist, C. J., and Scalia, J., joined.