SUPREME COURT OF THE UNITED STATES

No. 99–830

DON STENBERG, ATTORNEY GENERAL OF NEBRASKA, ET AL., PETITIONERS *v.* LEROY CARHART

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

[June 28, 2000]

JUSTICE O'CONNOR, concurring.

The issue of abortion is one of the most contentious and controversial in contemporary American society. It presents extraordinarily difficult questions that, as the Court recognizes, involve "virtually irreconcilable points of view." *Ante*, at 1. The specific question we face today is whether Nebraska's attempt to proscribe a particular method of abortion, commonly known as "partial-birth abortion," is constitutional. For the reasons stated in the Court's opinion, I agree that Nebraska's statute cannot be reconciled with our decision in *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992), and is therefore unconstitutional. I write separately to emphasize the following points.

First, the Nebraska statute is inconsistent with *Casey* because it lacks an exception for those instances when the banned procedure is necessary to preserve the health of the mother. See *id.*, at 879 (joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.). Importantly, Nebraska's own statutory scheme underscores this constitutional infirmity. As we held in *Casey*, prior to viability "the woman has a right to choose to terminate her pregnancy." *Id.*, at 870. After the fetus has become viable, States may substantially regulate and even proscribe abortion, but

any such regulation or proscription must contain an exception for instances "'where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'" *Id.*, at 879 (quoting *Roe* v. *Wade*, 410 U. S. 113, 165 (1973)). Nebraska has recognized this constitutional limitation in its separate statute generally proscribing postviability abortions. See Neb. Rev. Stat. Ann. §28–329 (Supp. 1999). That statute provides that "[n]o abortion shall be performed after the time at which, in the sound medical judgment of the attending physician, the unborn child clearly appears to have reached viability, *except when necessary to preserve the life or health of the mother*." *Ibid.* (emphasis added). Because even a postviability proscription of abortion would be invalid absent a health exception, Nebraska's ban on previability partial-birth abortions, under the circumstances presented here, must include a health exception as well, since the State's interest in regulating abortions before viability is "considerably weaker" than after viability. *Ante*, at 11. The statute at issue here, however, only excepts those procedures "necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury." Neb. Rev. Stat. Ann. §28–328(1) (Supp. 1999). This lack of a health exception necessarily renders the statute unconstitutional.

Contrary to the assertions of JUSTICE KENNEDY and JUSTICE THOMAS, the need for a health exception does not arise from "the individual views of Dr. Carhart and his supporters." *Post*, at 14 (KENNEDY, J., dissenting); see also *post*, at 35–36 (THOMAS, J., dissenting). Rather, as the majority explains, where, as here, "a significant body of medical opinion believes a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view," *ante*, at 19, then Nebraska cannot say that the procedure will not, in some circumstances, be "necessary to preserve the life or health of the

mother." Accordingly, our precedent requires that the statute include a health exception.

Second, Nebraska's statute is unconstitutional on the alternative and independent ground that it imposes an undue burden on a woman's right to choose to terminate her pregnancy before viability. Nebraska's ban covers not just the dilation and extraction (D&X) procedure, but also the dilation and evacuation (D&E) procedure, "the most commonly used method for performing previability second trimester abortions." *Ante*, at 27. The statute defines the banned procedure as "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." Neb. Rev. Stat. Ann. §28–326(9) (Supp. 1999) (emphasis added). As the Court explains, the medical evidence establishes that the D&E procedure is included in this definition. Thus, it is not possible to interpret the statute's language as applying only to the D&X procedure. Moreover, it is significant that both the District Court and the Court of Appeals interpreted the statute as prohibiting abortions performed using the D&E method as well as the D&X method. See 192 F. 3d 1142, 1150 (CA8 1999); 11 F. Supp. 2d 1099, 1127–1131 (Neb. 1998). We have stated on several occasions that we ordinarily defer to the construction of a state statute given it by the lower federal courts unless such a construction amounts to plain error. See, *e.g.*, *Bishop* v. *Wood*, 426 U. S. 341, 346 (1976) ("[T]his Court has accepted the interpretation of state law in which the District Court and the Court of Appeals have concurred even if an examination of the state-law issue without such guidance might have justified a different conclusion"); *The Tungus* v. *Skovgaard*, 358 U. S. 588, 596 (1959). Such deference is not unique to the abortion context, but applies generally to state statutes addressing all areas of the law.

See, *e.g.*, *UNUM Life Ins. Co. of America* v. *Ward*, 526 U. S. 358, 368 (1999) ("notice-prejudice" rule in state insurance law); *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 499 (1985) (moral nuisance law); *Runyon* v. *McCrary*, 427 U. S. 160, 181 (1976) (statute of limitations for personal injury actions); *Bishop* v. *Wood*, *supra*, at 346, n. 10 (city employment ordinance). Given this construction, the statute is impermissible. Indeed, Nebraska conceded at oral argument that "the State could not prohibit the D&E procedure." Tr. of Oral Arg. 10. By proscribing the most commonly used method for previability second trimester abortions, see *ante*, at 5, the statute creates a "substantial obstacle to a woman seeking an abortion," *Casey*, *supra*, at 884, and therefore imposes an undue burden on a woman's right to terminate her pregnancy prior to viability.

It is important to note that, unlike Nebraska, some other States have enacted statutes more narrowly tailored to proscribing the D&X procedure alone. Some of those statutes have done so by specifically excluding from their coverage the most common methods of abortion, such as the D&E and vacuum aspiration procedures. For example, the Kansas statute states that its ban does not apply to the "(A) [s]uction curettage abortion procedure; (B) suction aspiration abortion procedure; or (C) dilation and evacuation abortion procedure involving dismemberment of the fetus prior to removal from the body of the pregnant woman." Kan Stat. Ann. §65–6721(b)(2) (Supp. 1998). The Utah statute similarly provides that its prohibition "does not include the dilation and evacuation procedure involving dismemberment prior to removal, the suction curettage procedure, or the suction aspiration procedure for abortion." Utah Code Ann. §76–7–310.5(1)(a) (1999). Likewise, the Montana statute defines the banned procedure as one in which "(A) the living fetus is removed intact from the uterus until only the head remains in the uterus; (B) all or a part of the intracranial contents of the fetus

are evacuated; (C) the head of the fetus is compressed; and (D) following fetal demise, the fetus is removed from the birth canal." Mont. Code Ann. §50–20–401(3)(c)(ii) (Supp. 1999). By restricting their prohibitions to the D&X procedure exclusively, the Kansas, Utah, and Montana statutes avoid a principal defect of the Nebraska law.

If Nebraska's statute limited its application to the D&X procedure and included an exception for the life and health of the mother, the question presented would be quite different than the one we face today. As we held in *Casey*, an abortion regulation constitutes an undue burden if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." 505 U. S., at 877. If there were adequate alternative methods for a woman safely to obtain an abortion before viability, it is unlikely that prohibiting the D&X procedure alone would "amount in practical terms to a substantial obstacle to a woman seeking an abortion." *Id.*, at 884. Thus, 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 in my view.

Nebraska's statute, however, does not meet these criteria. It contains no exception for when the procedure, in appropriate medical judgment, is necessary to preserve the health of the mother; and it proscribes not only the D&X procedure but also the D&E procedure, the most commonly used method for previability second trimester abortions, thus making it an undue burden on a woman's right to terminate her pregnancy. For these reasons, I agree with the Court that Nebraska's law is unconstitutional.