No. 99-830

In the Supreme Court of the United States

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Nebraska Revised Statutes Annotated Section 28-328(1) (Michie Supp. 1999) prohibits any "partial-birth abortion" except when "necessary to save the life of the mother," and § 28-326(9) defines "partial-birth abortion" as an "abortion procedure" in which a person "deliberately and intentionally deliver[s] 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." The question presented is whether this prohibition against "partial-birth abortion" unduly burdens the constitutional right of a woman to terminate a pregnancy, or is unconstitutionally vague.

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INTEREST OF THE UNITED STATES

Under certain circumstances where the federal government is responsible for an individual's medical care, the government will either provide or pay for abortion services. For example, the Indian Health Service (IHS) affords eligible individuals access to all health care services that an IHS facility has the capacity to provide and that a physician determines to be a medically appropriate course of treatment. In IHS facilities with the capacity to provide abortion services, eligible individuals are entitled to such services in cases of rape or incest, or when the pregnancy endangers the life of the woman. See 25 U.S.C. 1676; Pub. L. No. 106-113, App. D, § 509, 113 Stat. 1501A-274. Similarly, a pregnant inmate in the custody of the Bureau of Prisons (BOP) is entitled to abortion services at government expense when the pregnancy results from rape, or when the life of the woman would be endangered if the fetus were carried to term. See BOP Program Statement No. 6070.05 (Aug. 9, 1996). The Nebraska statute challenged in this case prohibits certain

methods of abortion even for victims of rape or incest, and indeed for some women with life-threatening conditions.[1] The challenged Nebraska statute, and similar statutes enacted in other States, could therefore affect the ability of the IHS and the BOP to provide or pay for abortion services for pregnant women for whose medical care they are responsible.

Under the Medicaid and Medicare programs, federal law guarantees payment for covered physician services, including abortion services in cases involving rape, incest, or endangerment of a woman's life. When the pregnancy results from rape or incest, Medicaid and Medicare will pay for abortion services even though the pregnancy may not endanger the woman's life. See 42 U.S.C. 1396a(a)(8), 1396a(a)(10)(A), 1396d(a)(5)(A), 1395k(a)(1), 1395x(s)(1), 1395y(a)(1)(A); H.R. Conf. Rep. No. 479, 106th Cong., 1st Sess. 569 (1999). Because, as noted above, the Nebraska provisions challenged in this case prohibit certain methods of abortion even for victims of rape or incest, and indeed for life-threatening conditions, the challenged provisions, and similar ones enacted by other States, could affect the ability of Medicaid and Medicare beneficiaries to obtain covered abortion services by the procedure that a physician determines to be the medically most appropriate abortion method for the individual woman.

In addition, both the 104th and the 105th Congresses passed, but the President vetoed, legislation to prohibit

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[1] The statute permits "partial-birth abortion" only when *that procedure* is necessary to preserve the woman's life. See Neb. Rev. Stat. Ann. § 28-328(1) (Michie Supp. 1999). Thus, even when an abortion is necessary to save the woman's life, a physician may not use a method of abortion covered by the statute if some other method of abortion would also save her life, even if the alternative procedure would impose far greater health risks on the woman. See Pet. App. 70-71 (dissenting opinion of Chief Judge Posner in *Hope Clinic* v. *Ryan*, 195 F.3d 857 (7th Cir. 1999) (en banc), petitions for cert. pending, Nos. 99-1152, 99-1156 and 99-1177).

"partial-birth abortion" except where necessary to save the life of the woman. The President's vetoes were based in part on concerns about the constitutionality of the bills as passed by the Congress. Similar legislation has been introduced in the 106th Congress, and the framing of that legislation has turned in part on a perceived need to avoid constitutional objections. The United States therefore has an interest in the clarification of the constitutional principles that would govern federal legislation similar to the statutes under review in this case.

STATEMENT

1. In 1997, the Nebraska legislature enacted into law provisions prohibiting an abortion method referred to as "partial-birth abortion." The statute provides the following definition:

> Partial-birth abortion means an abortion 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.

Neb. Rev. Stat. Ann. § 28-326(9) (Michie Supp. 1999). Section 28-328(1) further provides: "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." The "intentional and knowing performance of an unlawful partial-birth

abortion" in violation of the law is made a felony, *id.* § 28-328(2), and prosecution may be brought by either the Attorney General or a county attorney, *id.* § 28-328(5). The pregnant woman on whom the "partial-birth abortion" is performed may not be held criminally responsible, but the physician may be prosecuted, *id.* § 28-328(3) and (4).

2. Shortly after passage, respondent brought suit in district court to enjoin the operation of the partial-birth abortion statute as unconstitutional. Respondent contended that the statute is unconstitutionally vague; that by its terms it prohibits even the most widely used abortion procedures, including conventional dilation and evacuation (D&E) and suction curettage; and that even if, as petitioners argued, the statute is limited to the dilation and extraction (D&X) method of abortion (also known as intact D&E), it nonetheless imposes an unconstitutional undue burden on the right of a woman to terminate her pregnancy.

The district court, after taking testimony from respondent and expert medical witnesses for both sides, concluded that the statute was unconstitutional as applied to respondent, in light of respondent's medical practice. Pet. Supp. App. 56-60, 87-88. The court declined to make a determination whether the statute is valid on its face. *Id.* at 53-56. The district court agreed with all three of respondent's contentions. First, it concluded that, even if the Nebraska statute bans the D&X procedure alone, it is unconstitutional as applied to respondent because, for at least 10-20 patients treated by respondent in a year, the D&X method is the safest available method of abortion. *Id.* at 60-62. Second, the district court concluded that the terms of the statute also restrict respondent from performing the conventional D&E procedure. *Id.* at 74-85. Third, it found the statute unconstitutionally vague insofar as its proscription of a method of abortion turns on whether the physician delivers a "substantial portion" of a fetus into the vagina. *Id.* at 86-87.

3. The court of appeals affirmed on the ground that the statute restricts conventional D&E abortion; it did not reach the other two bases for the district court's decision. Pet. App. 1-22.[2] Centrally, the court rejected petitioners' contention that the statute by its terms reaches only the D&X procedure, in which, as petitioners define it, a physician removes all of the intact fetus, except for its head, from the uterus into the vagina and then performs a procedure designed to bring about fetal demise. The crucial problem with that argument, the court stated, is that the ban also operates when the physician removes a "substantial portion" of a fetus into the vagina before fetal demise. "[I]f 'substantial portion' means an arm or a leg—and surely it must –-then the ban created by [the law] encompasses both the D&E and the D&X procedures. * * * [I]n any sensible and ordinary reading of the word, a leg or arm is 'substantial.'" *Id.* at 16 (internal quotation marks omitted). Because the law, under the court of appeals' reading, "prohibit[s] the most common procedure for second-trimester abortions," the court found that it imposes "an undue burden on a woman's right to choose to have an abortion." *Id.* at 19.

SUMMARY OF ARGUMENT

Nebraska's statutory ban on "partial-birth abortion" is unconstitutional for three reasons.

First, as the court of appeals concluded, the statutory definition of partial-birth abortion, on its face, is so broad that it reaches the abortion procedure most commonly used in the second trimester of pregnancy, conventional dilation and evacuation (D&E). In some circumstances the statute may also reach the abortion procedure most often used in the first trimester of pregnancy, suction curettage. There is no

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[2] Although the district court had considered only the validity of the statute as applied to respondent, the court of appeals suggested that the facial validity of the statute was before it. See Pet. App. 15.

dispute that, if the Nebraska statute does in fact reach so far as to prohibit either conventional D&E or suction curettage, then it is unconstitutional. Although petitioners present various arguments to show that the Nebraska legislature actually intended to prohibit only one abortion procedure, dilation and extraction (D&X), those arguments lack a firm basis in the text of the challenged statute.

Petitioners argue that, under principles of federalism, the federal courts should accept as controlling the construction of the statute (as limited to D&X) offered by the Nebraska Attorney General. That argument is wide of the mark because the Nebraska Attorney General has not been delegated the responsibility for construing the ban, which is a criminal proscription enforceable in the courts, and even if the Nebraska Attorney General could limit his office's prosecutions under the statute to the D&X procedure, he could not control prosecutions under the statute by county attorneys, who are independent under state law. Petitioners also invoke the canon that courts should construe statutes to avoid constitutional doubt, but that principle is of little utility here, for the statute is not fairly susceptible of petitioners' construction. Even if it were, petitioners' construction would not avoid constitutional questions in this case, but would simply shift the grave constitutional issue to the question whether a ban on the D&X procedure, with an exception only to save the life of the woman, unduly burdens a woman's constitutional right to terminate a pregnancy.

Second, the statutory ban on partial-birth abortion is unconstitutionally vague. "Partial-birth abortion" is not a generally accepted medical term nor a term of art with common-law roots. Its reach, therefore, must be discerned by reference to the statutory definition accompanying the ban. But, contrary to petitioners' submission, that statutory definition provides no assurance that the ban is limited to the D&X procedure. Even if a reading of the ban as reaching conventional D&E and suction curettage is not com-

pelled, the statute on its face is certainly readily susceptible of such a construction, and the statute gives no clear guidance as to which procedures are included within the ban and which are not. Further, because the conventional D&E and D&X procedures have features in common, it is particularly important that a criminal statute purporting to distinguish between the two define the proscribed behavior with clarity, which this statute does not do. Absent a definite and controlling construction of this criminal proscription by the courts, therefore, a physician considering whether to perform even more regularly used abortion procedures would proceed at considerable peril, given the uncertainty of the statute's reach. That uncertainty also creates a chilling effect on the exercise of constitutionally protected rights in this sensitive area.

Third, even if the statute's proscriptive reach is limited to the D&X procedure, the ban is unconstitutional because the statute fails to provide an exception to preserve the pregnant woman's health. The statute therefore prohibits the D&X method even when a physician concludes that that method is best suited to preserve the health of a particular woman. Indeed, this law is so broadly written that it prohibits the D&X method even when termination of a pregnancy is necessary to avoid serious adverse health consequences to the pregnant woman, and other methods would cause an increased risk of harm to her. Petitioners suggest that alternative abortion procedures remain available to pregnant women in such circumstances. But for at least some women, those other procedures would jeopardize their health. Conventional D&E, for example, may involve significantly greater risk of uterine perforation, and the labor-induction procedure also presents a greater risk of complications for some women. The ban therefore forces at least some pregnant women to forego a safer abortion method for one that would compromise their health. In so doing, it creates a substantial obstacle to obtaining an

abortion for the pregnant women for whom the statute is relevant.

ARGUMENT

A. Nebraska's Ban On Partial-Birth Abortion Proscribes The Abortion Procedures Most Widely Used Before Fetal Viability, And Is Therefore Unconstitutional

1. We begin with the principle that the Constitution protects the right of a woman to choose to terminate her pregnancy. See *Planned Parenthood* v. *Casey*, 505 U.S. 833, 870 (1992) (joint opinion). That right, an aspect of liberty protected by the Due Process Clause of the Fourteenth Amendment, means that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." *Id.* at 879. Even after viability, the woman's "constitutional liberty * * * to have some freedom to terminate her pregnancy," *id.* at 869, is sufficiently weighty that a State may not prohibit abortion "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, 164-165 (1973)); see also *id.* at 872 (under *Roe*, State may prohibit abortion after viability "provided the life or health of the mother is not at stake").

Casey also recognized that a State may, throughout a woman's pregnancy, seek to advance legitimate interests in the pregnant woman's health and safety and in "protecting the potentiality of human life." 505 U.S. at 875-876; see *id.* at 871. Before viability, however, the State's interest in the protection of potential life does not extend to unduly burdening the right of a woman to obtain an abortion should she so choose. Rather, it permits the State to enact regulations to ensure that the woman's choice is "thoughtful and informed," and that she understands that "there are philosophical and social arguments of great weight" on both sides of the abortion question. *Id.* at 872. Thus, "the State may take

measures to ensure that the woman's choice is informed," and may even seek to persuade a pregnant woman "to choose childbirth over abortion." *Id.* at 878.

The manner in which the State seeks to promote the interests recognized as legitimate in *Casey* must not so impinge on the woman's constitutional liberty as to create an "undue burden" on her right to choose to terminate her pregnancy. "A finding of an undue burden is a shorthand for the conclusion that a state regulation 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. Pursuant to that standard, a State may further its interest in potential life only with the purpose "to inform the woman's free choice, not hinder it," and may not advance even a permissible purpose in such a way that has an unduly restrictive effect on the woman's ability to choose to terminate her pregnancy. *Ibid.*; see also *id.* at 878.

2. Under the principles of *Casey*, the Nebraska provisions challenged in this case are unconstitutional. In examining the effect of the challenged statute on a woman's right to terminate her pregnancy, it is important to bear in mind that the statute applies throughout pregnancy. It is neither framed nor intended as a regulation of abortion procedures only after viability. Moreover, the abortion methods prohibited by the statute are all used prior to fetal viability and prior to the third trimester; this is true for the dilation and extraction (D&X) procedure—which all agree is banned by the statute—as well as the more widely used conventional dilation and evacuation (D&E) and suction curettage methods of abortion.[3]

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[3] Indeed, respondent testified that he generally performs D&X abortions only up to 20 weeks' gestation. After that point, when the woman's health so permits, he usually attempts, as part of the abortion procedure, to cause fetal demise inside the uterus. See Pet. Supp. App. 18-19.

The statute makes abortion illegal unless fetal demise occurs before any "substantial portion" of the fetus emerges into the vagina.[4] That restriction fails to take account of the medical fact that, in the most common methods of abortion currently used in the first and second trimester—conventional D&E and suction curettage—fetal demise in many cases does not occur prior to the removal of at least some part of the fetus into the vagina.[5] That medical fact carries significant constitutional implications for this case, for petitioners do not dispute that, if the statutory definition of "partial-birth abortion" does reach either conventional D&E or suction curettage, then it is unconstitutional, for it would unduly burden the ability of women to obtain abortion services.

The lower courts correctly concluded that Nebraska's statutory definition of "partial-birth abortion" is on its face so broad that it reaches the most common method of abortion in the second trimester of pregnancy, conventional D&E. See Pet. App. 16-17; Pet. Supp. App. 74-85. The challenged law prohibits any "partial-birth abortion" except where the procedure is necessary to save the life of the

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[4] The statute does not appear to reflect a state interest in promoting fetal life. It does not prohibit abortion procedures in which fetal demise occurs inside the uterus, nor does it implicate the abortion procedures of hysterotomy and hysterectomy, in which the fetus is surgically removed from the uterus through an abdominal incision rather than through the vagina.

[5] In some circumstances, it is possible to perform an abortion by inducing fetal demise inside the uterus and then removing the fetal material from the uterus. The evidence in this case, however, established that this procedure is available only after 20 weeks' gestation. See Pet. Supp. App. 18-19, 59, 63. Ironically, therefore, the statute might have the effect of encouraging women to delay their abortions until after 20 weeks' gestation. The district court found that there is no maternal health benefit in forcing women to wait until after 20 weeks' gestation so that an abortion may be performed in that manner, and that there is "appreciable risk to maternal health in doing so." *Id.* at 63.

pregnant woman, Neb. Rev. Stat. Ann. § 28-328(1) (Michie Supp. 1999), and defines partial-birth abortion as follows:

> Partial-birth abortion means an abortion 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.

Id. § 28-326(9).

This language on its face reaches the conventional D&E abortion procedure, which is used as early as the 13th week of pregnancy. See Pet. Supp. App. 9. The crucial language covers "deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof," with the purpose of causing fetal demise. As the district court observed (*id.* at 76), "a surgeon cannot perform a standard D & E in the usual case" without delivering a substantial portion of the fetus into the vagina. The standard D&E operation involves inserting a forceps inside the uterus and pulling fetal tissue out of the uterus through the cervix into the vagina, emptying the uterus as safely as possible for the woman.[6] See *id.* at 12; J.A. 55. Fetal demise does not necessarily take place inside the uterus but rather may occur after a substantial portion of the fetus has been delivered from the uterus into the vagina. Pet. Supp. App. 12-13.

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[6] To minimize the use of forceps inside the uterus and increase safety, physicians may "bring as much of the fetus into the vagina as possible when performing a D & E." *Eubanks* v. *Stengel*, 28 F. Supp. 2d 1024, 1035 (W.D. Ky. 1998), appeal pending, No. 98-6671 (6th Cir. argued Dec. 15, 1999).

The definition of partial-birth abortion in the Nebraska statute also appears to reach the abortion procedure most widely used in the first trimester (and most widely used overall), suction curettage, typically used from the 6th through the 12th week of pregnancy. See Pet. Supp. App. 7.[7] In that procedure, the cervix is dilated, a small tube (cannula) attached to a vacuum device is inserted through the vagina into the uterus, and vacuum suction is used to remove the fetus from the uterus. *Id.* at 8. The vacuum procedure itself causes fetal demise, which may occur after the fetus or embryo has passed from the uterus. See *id.* at 9, 28.

Because the challenged statute proscribes the conventional D&E and suction curettage methods of abortion, the most widely used abortion procedures before viability, the statute places an undue burden on the right of women to terminate pregnancy and is unconstitutional. Cf. *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 77 (1976) (in holding ban on saline amniocentesis as form of abortion unconstitutional, Court stressed that the procedure was "employed in a substantial majority * * * of all post-first-trimester abortions").

3. Petitioners argue, however, that the Nebraska legislature intended the provisions challenged here to reach only the D&X procedure, and so the court of appeals' decision adopting a broader construction of the statutory language should be rejected. Pet. Br. 22-23. They also argue that, because the Attorney General prosecutes violations of the partial-birth abortion ban, the Court should defer to his

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[7] Although the lower courts did not in this case reach the question whether the Nebraska statute bars suction curettage, the same panel of the court of appeals, in two other cases involving closely similar statutory proscriptions in Iowa and Arkansas, concluded that the language does reach suction curettage. See *Planned Parenthood* v. *Miller*, 195 F.3d 386, 389 (8th Cir. 1999), petition for cert. pending, No. 99-1112; *Little Rock Family Planning Servs., P.A.* v. *Jegley*, 192 F.3d 794, 798 (8th Cir. 1999).

limited construction of the statute as controlling (*id.* at 12-13), and that the Court should also adopt that limited construction in order to avoid constitutional doubts about the statute (*id.* at 24-28).

Of course, petitioners' interpretation of the statute "is of some importance and merits attention, for they are the officials charged with enforcement of the statute." *Bellotti* v. *Baird*, 428 U.S. 132, 143 (1976). Nevertheless, both lower courts have now construed the Nebraska statute before the Court, and both have found it to be significantly broader than petitioners suggest. This Court normally defers to an interpretation of state law that has been reached by two lower courts. See *Casey*, 505 U.S. at 880. In any event, the limited construction proffered by petitioners is unpersuasive because it lacks grounding in the text of the statute.

a. Petitioners first argue (Pet. 15-16) that the term "partial-birth abortion" is commonly understood to refer only to the D&X procedure. "Partial-birth abortion," however, is not a term recognized by the medical profession, see Pet. Supp. App. 5; J.A. 36, nor is it a term of art with a settled common law meaning. The Nebraska legislature therefore deemed it necessary to provide a statutory definition of the term. When a legislature defines a term in a statute, courts are obligated to follow that definition. *Meese* v. *Keene*, 481 U.S. 465, 484-485 (1987). And if petitioners were correct that the legislature intended the ban to cover only the dilation and extraction procedure, then one would have expected the legislature to have expressly defined "partial-birth abortion" to mean "dilation and extraction," which is a term with a discernable meaning known to the medical profession, see Pet. Supp. App. 15-16; J.A. 599-601, or simply to ban dilation and extraction *in haec verba*; yet the legislature did not do so.

Second, petitioners suggest (Pet. Br. 16-18) that the statute distinguishes between the overall abortion "procedure" regulated by the law and the separate and distinct

"procedure" by which the physician causes fetal demise. They argue that the D&X procedure differs from other abortion procedures because the process by which the contents of the fetal skull are removed by suction is a separate "procedure" within the overall abortion "procedure." The statutory language, however, does not support petitioners' submission that the legislature intended to distinguish between the two "procedures." Rather, the statute defines "partially delivers vaginally" to mean delivery of the fetus (or a substantial portion thereof) into the vagina *for the purpose of* performing a procedure to cause fetal demise, not *before* performing a procedure designed to do so. See Neb. Rev. Stat. Ann. § 28-326(9) (Michie Supp. 1999).

Finally, petitioners contend that the statute was intended to reach only the situation where the physician delivers all of the fetus, except for the head, into the vagina intact, before causing fetal demise, and therefore does not reach the conventional D&E procedure. Even if that reading were correct (and for the reasons given at pp. 10-13, *supra*, it is not), the ban would still in many cases reach suction curettage, which, because of the extremely small size of the fetus or embryo, often involves the removal of the fetus intact, and before fetal demise, into the vagina. See Pet. Supp. App. 9; J.A. 42, 44, 257, 259.

b. Petitioners further urge (Pet. Br. 28) that the courts should defer to their limited interpretation of the partial-birth abortion ban, under a "variation" of the administrative-law principle of *Chevron U.S.A. Inc.* v. *National Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). That argument is inapposite for several reasons. First, Nebraska's ban is a criminal statute, enforceable through prosecutions in the courts. See Neb. Rev. Stat. Ann. § 28-328(2) (Michie Supp. 1999) (defining "intentional and knowing performance of an unlawful partial-birth abortion" as a felony). Thus, while the Nebraska prosecuting authorities undoubtedly have "a very specific responsibility to determine for [them-

selves] what this statute means, in order to decide when to prosecute," this Court has not held that the interpretation of a criminal statute by those charged with prosecuting offenses under it is entitled to deference. See *Crandon* v. *United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in the judgment).[8]

Second, the Nebraska Attorney General does not have exclusive authority to bring prosecutions under the partial-birth abortion statutes. The county attorneys of Nebraska also have such authority. See Neb. Rev. Stat. Ann. § 23-1201(1) (Michie 1999) (duty of county attorneys to bring

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[8] This case does not involve a situation where proscriptions in a statute administered by an agency may be enforced through both civil and criminal processes. Nebraska's partial-birth abortion statute provides that, upon the filing of a criminal charge for violation of the ban, the Attorney General shall also commence administrative delicensure proceedings against the physician charged with performing the allegedly unlawful abortion. Neb. Rev. Stat. Ann. § 28-328(5) (Michie Supp. 1999). In that delicensure proceeding, the physician is afforded the opportunity to demonstrate that the abortion was necessary to save the life of the pregnant woman, and it appears that the physician has the burden of proof on that issue, see *ibid.*, a feature of the statute that presents serious constitutional concerns in the criminal context, see *United States* v. *Vuitch*, 402 U.S. 62, 70-71 (1971). The Director of Regulation and Licensure is empowered to make findings on that question, and those findings are admissible at the criminal trial of the physician. Neb. Rev. Stat. Ann. § 28-328(5) (Michie Supp. 1999).

This limited administrative proceeding does not provide a basis for affording deference to petitioners' construction of the ban under principles similar to *Chevron*. The delicensure proceeding is essentially ancillary to the criminal trial. Moreover, it is far from clear that, at the delicensure proceeding, the physician has any opportunity to contend that the procedure was not a "partial-birth abortion" within the meaning of the statute, or that the Director of Regulation and Licensure is empowered to make a determination to that effect. In any event, even if the Director could in such a proceeding provide an administrative construction of the partial-birth abortion ban, the Nebraska courts plainly have primary authority to interpret that statute through the criminal process.

criminal prosecutions); *id.* § 28-328(5) (noting that county attorney may file criminal charges under partial-birth abortion statute). While the Attorney General has authority to "consult with and advise the county attorneys, when requested by them, in all criminal matters," *id.* § 84-205(3), it does not appear that the Attorney General may compel the county attorneys (who are independently elected, see *id.* § 32-522) to follow his interpretation of state criminal statutes in deciding whether to bring a criminal prosecution. Thus, even if the Attorney General's limited construction of the partial-birth abortion statute were binding in any future prosecutions brought by his office, there is no reason to believe that the county attorneys would be so bound.

c. Petitioners also argue that the courts should accept their construction of the partial-birth abortion statute under the principle that courts should adopt constructions of statutes that avoid casting doubt on the constitutionality of those statutes, where such a construction is reasonable. We of course have no disagreement with the proposition that, when a court is faced with two reasonable constructions of a statute, and one places the statute in constitutional doubt while the other avoids a constitutional question, the courts should adopt the latter. Indeed, this Court has followed that rule of construction in some of its prior abortion cases. See, *e.g.*, *Planned Parenthood Ass'n* v. *Ashcroft*, 462 U.S. 476, 493-494 (1983) (opinion of Powell, J.). But that canon operates only when the narrower construction of the statute is "fairly possible," and "[i]t is qualified by the proposition that avoidance of a difficulty will not be pressed to the point of disingenuous evasion." *Rust* v. *Sullivan*, 500 U.S. 173, 191 (1991) (internal quotation marks omitted); see also *Thornburgh* v. *American College of Obstetricians & Gynecologists*,

476 U.S. 747, 768-769 (1986).[9] For the reasons given above (pp. 10-13, *supra*), we do not believe it is "fairly possible" to restrict Nebraska's ban to the D&X procedure.

Furthermore, even if we assume otherwise, the principle of avoiding constitutional doubt is still of limited utility here, for adopting petitioners' construction of the partial-birth abortion statute does not avoid a constitutional question; rather, it creates one. Cf. *Rust*, 500 U.S. at 191 (observing, when choosing among proffered interpretations of a statute, that "it was likely that any set of regulations promulgated by the Secretary [to implement the statute] * * * would be challenged on constitutional grounds"). To be sure, the constitutional question created by petitioners' narrower construction of the Nebraska statute is somewhat different from that created by the broader construction reached by the court of appeals, which petitioners acknowledge would be unconstitutional (Pet. Br. 25 n.10). And the Court might well conclude that the Nebraska legislature should not be presumed to have adopted a statute that even the State's Attorney General would not defend against constitutional challenge.[10] But even if petitioners' construction were adopted, the statute would nonetheless present the grave constitutional question, addressed at pp. 22-30, *infra*, whether a ban on the D&X procedure—without any exception to preserve the health of the pregnant woman—constitutes an

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[9] *Thornburgh* v. *American College of Obstetricians & Gynecologists* was overruled in part on other grounds, relating to informed-consent and waiting-period requirements, in *Casey*, see 505 U.S. at 870.

[10] The district court observed, however, that the legislative history did not demonstrate that the Nebraska legislature intended to prohibit only the D&X procedure, and that the legislature may not have understood that the procedure "varies in only small ways from the standard D & E technique." Pet. Supp. App. 83.

undue burden on the woman's right to terminate her pregnancy.[11]

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[11] Although petitioners have not previously asked the federal courts to certify to the Nebraska Supreme Court the question whether the partial-birth abortion statute reaches any method of abortion other than the D&X method, and do not request such certification now (Pet. Br. 25 n.10), petitioners observe that this Court might find it useful to certify various questions to the Nebraska Supreme Court after oral argument (*ibid.*). This Court has expressed strong approval of the certification procedure, see *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 75-80 (1997), and has certified questions of statutory interpretation to state supreme courts when (as in this case) one proffered reading of a statute would be clearly unconstitutional whereas another reading would present different, but nonetheless substantial, constitutional questions. See *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383, 393-394 (1988); *Bellotti* v. *Baird*, 428 U.S. at 144-146. Such certification, if it clarifies the scope of the statute under review here, could significantly assist the Court's task in adjudicating the constitutionality of that statute.

We note, however, some potential drawbacks to certification in this case. First, the Court also has pending certiorari petitions presenting the question of the constitutionality of similarly worded statutes in Iowa, Illinois, and Wisconsin. See *Miller* v. *Planned Parenthood*, No. 99-1112 (filed Dec. 23, 1999) (Iowa); *Hope Clinic* v. *Ryan*, No. 99-1152 (filed Jan. 10, 2000) (Illinois); *Planned Parenthood* v. *Doyle*, No. 99-1156 (filed Jan. 10, 2000) (Wisconsin); *Christensen* v. *Doyle*, No. 99-1177 (filed Jan. 14, 2000) (Wisconsin). The supreme courts of those States would not necessarily interpret their statutes in a manner identical to that adopted by the Supreme Court of Nebraska. Thus, even if the Nebraska Supreme Court were to issue a definitive ruling clarifying the scope of Nebraska's law, the Court would not necessarily avoid reaching some of the constitutional questions raised by that law in the present posture of this case, because the same questions might be presented in the Iowa, Illinois, or Wisconsin cases. Second, respondent's vagueness objections to the Nebraska statute include the contentions that the statute does not give fair warning of the scope of its proscription, and that several kinds of procedures other than the D&X procedure might fall within its scope. In this circumstance, certification may be less useful, because "no single adjudication [by the state supreme court] could eliminate the constitutional difficulty. Rather it would require extensive adjudications, under the impact of a variety of factual situations, to bring the challenged statute * * * within the

B. The Nebraska Statute Is Unconstitutionally Vague

Our discussion above shows that the statute under challenge reaches abortion procedures other than what petitioners contend to be its principal target, the D&X procedure. It may be argued that a broad reading of the statute is not *compelled*. But even so, the statute is certainly readily susceptible of an interpretation that gives it a scope far broader than petitioners suggest. That being so, the statute presents serious problems of fair notice, for it fails to differentiate with adequate precision the procedures that are within its reach from those that are not.

It bears emphasis that the provision under review is a criminal statute touching on sensitive constitutional rights. In that context, the need for precision is particularly great, for uncertainty about the scope of permissible conduct may deter activity that is constitutionally protected, but nonetheless arguably falls within the reach of the criminal proscription. See *Colautti* v. *Franklin*, 439 U.S. 379, 390-391 (1979), limited in part on other grounds, *Webster* v. *Reproductive Health Servs.*, 492 U.S. 490, 516-521 (1989) (opinion of Rehnquist, C.J.); see also *Baggett* v. *Bullitt*, 377 U.S. 360, 379 (1964). The matter must be viewed from the perspective of a physician attempting to decide whether an abortion procedure he or she has determined to be medically most appropriate would, or would not, render the physician liable to criminal prosecution: Does the Nebraska statute provide a physician about to perform a particular procedure with sufficient guidance so that the doctor can know whether the procedure is lawful?

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bounds of permissible constitutional certainty." *Procunier* v. *Martinez*, 416 U.S. 396, 401 n.5 (1974) (internal quotation marks omitted) (referring to abstention), overruled in part on other grounds, *Thornburgh* v. *Abbott*, 490 U.S. 401 (1989); see also *Baggett* v. *Bullitt*, 377 U.S. 360, 376-378 (1964) (also abstention).

In our view it does not. Rather, it "conditions potential criminal liability on confusing and ambiguous criteria." *Colautti*, 439 U.S. at 394. As we have noted, "partial-birth abortion" does not have a medically or historically rooted meaning. The Nebraska legislature undertook to define it, but the legislature's definition is highly problematic. One aspect of the problem is that the ban operates whenever the doctor delivers a fetus, "or a substantial portion thereof," into the vagina. Neb. Rev. Stat. Ann. § 28-326(9) (Michie Supp. 1999). No guidance is provided as to what constitutes a "substantial portion" of a fetus. Petitioners suggest that the statute applies only when all but the head of the fetus has passed through the cervix prior to fetal demise. The legislature did not, however, limit the statute to that specific situation. The physician, in conducting an abortion procedure, is therefore required to guess whether the extent to which a fetus has emerged from the uterus before fetal demise is sufficiently minimal to fall outside the statute's reach, or is substantial enough to constitute a crime.[12]

There is, moreover, a more basic problem presented by the statute: there are not always bright lines distinguishing one surgical abortion procedure from another. "Names are given to certain types of abortion methods, but each time

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[12] The statute's reference to a "living" fetus also presents a serious vagueness problem. The statute punishes one who delivers a substantial portion of a living fetus into the vagina with the intention to cause fetal demise, and who then causes fetal demise. In many abortion procedures, however, it is uncertain when exactly fetal demise occurs. In both suction curettage and conventional D&E procedures, fetal demise does not necessarily occur immediately after the first part of the fetus is brought into the vagina. See J.A. 62-64; Pet. Supp. App. 19. Fetal demise may occur only after the doctor has removed the greater portion, and certainly a "substantial portion," of the fetus from the uterus into the vagina. See Pet. Supp. App. 29. In that situation, the doctor might find that he violated the statute even though he had no intention of removing the fetus *intact* before causing fetal demise, and in fact had not done so.

those methods are performed, their progression depends on the particulars of the physician and the patient. The physician cannot know, before the abortion begins, what steps will be necessary and she cannot know, during or after the abortion, where and when fetal demise occurs, unless the fetus is still living upon delivery." *Planned Parenthood* v. *Verniero*, 41 F. Supp. 2d 478, 494 (D.N.J. 1998). In addition, in some surgical situations, it may simply be impossible for the physician to control the portion of the fetus that is removed from the uterus, or the timing of that removal in relation to fetal demise. See J.A. 42, 151. For example, given the very small size of the fetus or embryo in early pregnancy, it is not clear that a physician conducting suction curettage could carry out the operation in such a way as to ensure fetal demise prior to the fetus emerging from the uterus intact.[13]

In all those situations, the physician would be placed in serious peril of criminal liability, for he might have delivered a "substantial portion" of the fetus into the vagina before bringing about fetal demise. In light of that peril and the minimal surgical distinctions among some abortion procedures, it is particularly essential that a statute regulating such a procedure state with clarity what is proscribed and what is permitted. Otherwise, many physicians might well decide to avoid performing abortions, a constitutionally protected activity, altogether. That is precisely the concern at which the vagueness doctrine is directed, and is sufficient reason to find the Nebraska statute invalid. See *Colautti*, 439 U.S. at 394, 396.[14]

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[13] Suction curettage is performed as early as the sixth week of pregnancy, when the embryo is approximately 4-5 mm. in length. F. Gary Cunningham et al., *Williams Obstetrics* 152 (20th ed. 1997).

[14] The Court has also emphasized that vague statutes present a concern about arbitrary enforcement. See *City of Chicago* v. *Morales*, 527 U.S. 41, 60-64 (1999); *Kolender* v. *Lawson*, 461 U.S. 352, 357-358 (1983).

C. The Nebraska Statute Is Invalid Because, Even If It Is Clearly Limited To Dilation And Extraction, It Endangers The Health Of Some Women

Even if, contrary to our submission, the statute under review is clearly and definitely limited to the D&X procedure, it is nevertheless unconstitutional. Although the statute expressly permits the procedure when it is "necessary to save the life of the mother," Neb. Rev. Stat. Ann. § 28-328(1) (Michie Supp. 1999), it contains no exception at all to preserve the pregnant woman's health. Thus, the statute forbids the D&X procedure even when any alternative procedure would compromise the woman's health. This Court's decisions do not permit the State to subordinate a woman's health in that manner. Just as a State may not ban abortion when continuing the pregnancy would endanger a pregnant woman's health, see *Roe*, 410 U.S. at 165-166, and *Casey*, 505 U.S. at 879-880, so too a State may not restrict a particular method of abortion when so doing would endanger a woman's health, see *Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U.S. at 768-769; *Danforth*, 428 U.S. at 79.

We recognize that petitioners have publicly taken the position that the statute under review will only be enforced against a physician who performs the D&X procedure. It may be that, if the Attorney General nonetheless brought a prosecution under the statute against a physician who performed a conventional D&E or suction curettage procedure, that physician might have a valid due process defense to such a prosecution, as he had previously been assured by petitioners that his conduct was lawful. But as we have explained (p. 16, *supra*), it is not evident that the Attorney General can bind independent county attorneys in the State to the same prosecutorial policy. Thus, in light of the expansive terminology used in the statute, a physician in Nebraska who performed a conventional D&E or suction curettage procedure would legitimately be concerned that such conduct could be prosecuted under the partial-birth abortion statute. Given the controversy that surrounds abortion, there is a legitimate concern that abortion providers might in the future be the target of arbitrary prosecutions. Cf. *Baggett*, 377 U.S. at 373-374.

1. From the outset, this Court has made clear that preservation of the woman's health is an integral part of the constitutional right to terminate a pregnancy.[15] Thus, in *Roe* itself, the Court observed that the decision whether to terminate a pregnancy may turn on "[s]pecific and direct harm medically diagnosable," 410 U.S. at 153, and held that even after viability, a State may not proscribe abortion "where it is necessary, in appropriate medical judgment, for the preservation of the life *or health* of the mother," *id.* at 165 (emphasis added). In *Doe* v. *Bolton*, 410 U.S. 179 (1973), the Court invalidated requirements that any abortion be performed in an accredited hospital, with approval by a hospital staff abortion committee, and with confirmation of the performing physician's judgment, based on his examination of the patient, by two other doctors. The Court stressed that the abortion-committee approval requirement substantially overbore "[t]he woman's right to receive medical care in accordance with her licensed physician's best judgment," *id.* at 197, and that a requirement of concurrence by two independent doctors, even after the attending physician had determined "based upon his best clinical judgment [that] an abortion [was] necessary" (*id.* at 191), had "no rational connection with a patient's needs," *id.* at 199.

The Court also has invalidated restrictions on particular abortion procedures when the restrictions required women to forego a safer method of abortion for one that imposed

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[15] Even before *Roe*, in *United States* v. *Vuitch*, 402 U.S. 62 (1971), the Court stressed that professional medical judgments are in fact, and are considered in law, important to the decision to terminate a pregnancy. There, the Court construed the District of Columbia's abortion statute, which prohibited abortions except where necessary to preserve the woman's "life or health," to place the burden of proof on the prosecution as to whether the abortion was so necessary. The Court stressed that "doctors are encouraged by society's expectations, by the strictures of malpractice law and by their own professional standards to give their patients such treatment as is necessary to preserve their health." *Id.* at 71.

increased health risks. In *Danforth*, where the Court invalidated a ban on abortion by saline amniocentesis as a method of abortion after the first 12 weeks of pregnancy, the Court stressed that, "as a practical matter, [the ban] forces a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed." 428 U.S. at 79.

Even after viability, when the State's interest in regulating abortion is strongest, the Court has invalidated restrictions that would subject the pregnant woman to increased health risks. In *Colautti*, the Court held void for vagueness a requirement that a physician employ only that method of abortion that would most likely preserve fetal life, unless a different technique "would not be necessary in order to preserve the life or health of the mother." 439 U.S. at 397. The Court ruled that it was impermissibly uncertain under the statute whether the physician should consider his duty to the patient paramount to that of the fetus, or whether it required a "'trade-off' between the woman's health and additional percentage points of fetal survival." *Id.* at 400.

Likewise in *Thornburgh* v. *American College of Obstetricians & Gynecologists*, *supra*, the Court invalidated a requirement that a physician use the method that would most likely result in a live birth unless that method "would present a significantly greater medical risk to the life or health of the pregnant woman." 476 U.S. at 768. The Court concluded that the statute was "not susceptible to a construction that does not require the mother to bear an increased medical risk in order to save her viable fetus." *Id.* at 768-769.

This line of authority was not questioned in *Casey*. Indeed, in that decision, where the Court upheld informed-consent and waiting-period requirements except in cases of "medical emergency," the Court observed that the medical-emergency exception, which permitted an immediate abortion where "delay will create serious risk of substantial and

irreversible impairment of a major bodily function," did not (as had been contended) foreclose "the possibility of an immediate abortion despite some significant health risks." 505 U.S. at 879-880. Further, the Court stated, "[i]f the contention were correct [that the statute required delays that imposed health risks], we would be required to invalidate the restrictive operation of the provision, for the essential holding of *Roe* forbids a State to interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health." *Id.* at 880. Thus, because the State may not, in regulating methods of abortion, endanger a woman's health even after fetal viability, when the State's interest in protecting potential life is strongest (see *Thornburgh* v. *American College of Obstetricians & Gynecologists*, *supra*, and *Casey*, 505 U.S. at 879), *a fortiori* the State may not do so before viability.

2. Under these principles, the record establishes that the Nebraska statute is invalid. The Nebraska statute lacks any exception to preserve a pregnant woman's health. It requires some women to forego a safer method of abortion for one that escalates the risk to their health. This is an "undue burden" on the right to terminate a pregnancy, within the meaning of *Casey*. Whatever might be the State's interest in seeking to ban a particular method of abortion, such a restriction places a "substantial obstacle" in the path of the woman seeking to terminate a pregnancy, and is therefore impermissible under *Casey*, 505 U.S. at 877.[16]

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[16] In *Casey*, the Court made clear that the State may pursue two legitimate interests in regulating abortion: the health of the pregnant woman and the protection of potential life. 505 U.S. at 871. The statute under review, however, does not promote either of these interests (nor have petitioners argued that it does). Plainly it does not promote maternal health, for it may require women seeking abortions to undergo procedures that increase the risk to their health. And it does not protect potential life, for it prohibits only one method of abortion, and permits the woman to choose another, albeit possibly less safe, method to terminate

Petitioners argue (Pet. Br. 30-31, 35-36) that the statute nevertheless passes constitutional muster because women have available alternative methods of abortion, such as the D&E procedure and labor induction.[17] But even though those other procedures may be *generally* safe, in the sense that they satisfy a standard of medical care for the population at large, nonetheless for some women those procedures will be particularly risky. Those women, not the population at large, are the proper focus of the constitutional inquiry, for "[l]egislation is measured for consistency with the Constitution by its impact on those whose conduct it affects." *Casey*, 505 U.S. at 894.[18]

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the pregnancy. See Pet. App. 64-65 (dissenting opinion of Chief Judge Posner in *Hope Clinic*, *supra*).

[17] Petitioners observe (Pet. Br. 35) that neither the American Medical Association nor the American College of Obstetricians and Gynecologists (ACOG) has found the D&X procedure to be the *only* appropriate procedure sufficient to preserve the health of the woman. The ACOG policy statement cited by petitioners further states, however, that the D&X procedure "may be the *best* or *most appropriate* procedure in a particular circumstance to save the life or preserve the health of a woman," J.A. 601 (emphasis added)—that is, D&X may be medically superior to other procedures in particular cases, taking into account the need to avoid increased risks to the woman's health.

[18] Thus, in *Casey*, where the Court invalidated a prohibition against performing an abortion on a married woman unless she had notified her husband of her intent to undergo an abortion, the Court assumed that the great majority of married women would notify their husbands of their plans to have an abortion, but nonetheless held that the restriction was invalid because of its effect on the small but appreciable class of women who did not intend to notify their husbands of their intent to do so. See 505 U.S. at 894-895. Similarly, in *Bellotti* v. *Baird*, 443 U.S. 622 (1979), the Court invalidated as excessively restrictive Massachusetts' parental-consent and judicial bypass provisions governing abortions for minors. The provisions imposed an "undue burden" on a minor's right to terminate pregnancy, in part because they required that parents be notified of any effort by a minor to invoke the judicial bypass procedure. The lead opinion stressed that, although most parents would probably not obstruct a

Petitioners argue, for example, that the conventional D&E procedure is safe and routinely performed (Pet. Br. 36). But precisely because the D&E procedure is used for the overwhelming majority of second-trimester abortions, one must presume that women who have abortions by other methods do so for medically appropriate reasons. And indeed, the record shows that the conventional D&E procedure has significant risks for some women that are avoided by the D&X procedure. For example, conventional D&E requires the physician to introduce a forceps several times into the uterus. Each insertion of the forceps into the uterus carries a risk of uterine perforation or laceration. See Pet. Supp. App. 20, 109. That risk is largely absent in the D&X procedure, which involves much less use of surgical instruments inside the uterus. See J.A. 101-102, 121, 151-152, 268, 275. Particularly for a woman whose uterus is weakened by a previous medical condition, the D&X procedure may be more appropriate because it reduces the chance of further damage to the uterus.[19]

Petitioners also suggest that the labor induction procedure remains available as an alternative method of abortion. In the labor induction method, a physician inserts a needle through the woman's abdomen into the amniotic sac and introduces either a saline solution or urea followed by prostaglandin. Those chemicals are intended to cause fetal demise and induce uterine contractions, resulting in expul-

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minor child's right to go to court to obtain a judicial order permitting an abortion, some parents might do so, and the children of those parents needed an avenue of redress not subject to such obstruction. *Id.* at 647 (opinion of Powell, J.).

[19] In addition, the record establishes that the D&X procedure avoids several other complications associated with the conventional D&E procedure, such as lacerations from sharp bone fragments passing through the cervical os and the risk that fetal tissue remaining in the uterus could cause infection or hemorrhaging. Pet. Supp. App. 19-22, 62-63; J.A. 102-103, 151, 269, 277.

sion of the uterine contents. Pet. Supp. App. 24. Labor induction, however, involves considerable stress on the woman's body, must be performed in a hospital, and takes significantly more time than other abortion procedures. *Id.* at 24-25, 35; J.A. 69-70, 273-274. Further, labor induction is impossible for some women, such as those who are carrying a severely deformed fetus with hydrocephalus, where the head of the fetus may be too large to pass through the cervix. Pet. Supp. App. 35-36; J.A. 286. Labor induction is also medically inappropriate for some women with hypertension, heart disease, or diabetes, and for other women who may have reactions to the drugs used to induce the labor. Pet. Supp. App. 25; J.A. 69-70, 287; see also Pet. Supp. App. 147-148 (listing other risks from inductions).

Finally, in some cases, an abortion may be performed without running afoul of the statute by inducing fetal demise in the uterus through an injection of Lidocaine or Digoxin and then evacuating the contents of the uterus through the cervix, which has been dilated. Respondent testified that he attempts to use this procedure when it is possible. See J.A. 64-67, 110-113; Pet. Supp. App. 18-19. The procedure entails significant risks, however, because it requires introduction of a needle through the woman's abdomen into the uterine cavity, and the needle may carry bacteria from the bowel into the uterus, where it can cause infection. The needle can also break blood vessels and introduce chemicals into the pregnant woman's bloodstream. J.A. 291-292. The danger of perforating the bowel is particularly significant before 20 weeks' gestation, when the uterus has not grown large enough to push other structures out of the way; respondent, therefore, does not perform this procedure before that point. J.A. 66. The procedure is also contraindicated for some

woman (even after 20 weeks) who have seizure disorders and heart disease. J.A. 67, 113.[20]

3. It may be true that, if the D&X procedure were not available, some or even most women seeking an abortion in the second trimester would find another method available. But as the district court's findings make clear, for at least some women, those other methods will be appreciably less safe than the D&X procedure. Yet at the same time, requiring women to undergo those other methods of abortion does not advance any interest in either potential life or the health of the woman. Thus, a ban on the D&X procedure without any health exception will endanger the health of some women. That result constitutes an undue burden on those women's right to terminate their pregnancies.

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[20] In addition, hysterotomy (surgical removal of the fetus from the uterus through the abdomen rather than through the cervix into the vagina) and hysterectomy (surgical removal of the entire uterus) are available as methods of abortion in some circumstances, but they present significantly greater risk to the pregnant woman and are used only in exceptional circumstances. J.A. 281-282; Pet. Supp. App. 26. (Petitioners do not suggest that these methods of abortion are adequate alternatives to the D&X method.) Suction curettage cannot be performed after 15 weeks' gestation. Pet. Supp. App. 8. Respondent also testified that the labor induction method is inadvisable in the second trimester. J.A. 69-70. Therefore, at least between 15 and 20 weeks' gestation, only the D&E and D&X methods of abortion are generally available.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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