1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ALBERTO R. GONZALES, :

4 ATTORNEY GENERAL, :

5 Petitioner :

6 v. : No. 05-380

7 LEROY CARHART, ET AL. :

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9 Washington, D.C.

10 Wednesday, November 8, 2006

11

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States

14 at 10:05 a.m.

15 APPEARANCES:

16 GEN. PAUL D. CLEMENT, ESQ., Solicitor General,

17 Department of Justice, Washington, D.C.; on behalf of

18 the Petitioner.

19 PRISCILLA SMITH, ESQ., New York, N.Y.; on behalf of the

20 Respondent.

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

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument

4 first this morning in case 05-380, Gonzales v. Carhart.

5 General Clement.

6 ORAL ARGUMENT OF GEN. PAUL D. CLEMENT

7 ON BEHALF OF PETITIONER

8 GENERAL CLEMENT: Mr. Chief Justice, and may

9 it please the Court:

10 Congress held six hearings over four

11 different Congresses and heard from dozens of witnesses

12 in determining that partial-birth abortions are never

13 medically necessary, pose health risks, and should be

14 banned. Under familiar principles of deference to

15 congressional factfinding, those determinations should

16 be upheld as long as they represent reasonable

17 inferences based on substantial evidence in the

18 congressional record.

19 That standard is amply satisfied here. The

20 evidence before Congress was clear that partial-birth

21 abortions were never medically necessary, and that safe

22 alternatives were always available such that no woman

23 would be prevented from terminating her pregnancy. As a

24 result, Congress was entitled to make a judgment in

25 furthering its legitimate interests that they were going

1 to ban a particularly gruesome procedure that blurred
2 the line between abortion and infanticide.
3 JUSTICE GINSBURG: General Clement, couldn't
4 a similar record be made with respect to what is the
5 more common procedure, the D&E, that involves
6 dismemberment of a fetus inside the womb. So assuming
7 you're right that it is constitutional for Congress to
8 ban the D&X proceeding, wouldn't the same reasoning
9 apply, couldn't Congress make similar findings with
10 respect to what is the most common method for second
11 trimester abortions?
12 GENERAL CLEMENT: I don't think so, Justice
13 Ginsburg, and I think that this Court's precedence, in
14 particular the Danforth case, would stand as an obstacle
15 to that piece of legislation, because in Danforth, this
16 Court struck down an effort to ban what was then the
17 majority method of inducing a second-term abortion.
18 And I think in the same way, there is quite
19 a different situation when Congress comes in and tries
20 to deal with the primary abortion method in the second
21 trimester. Here, though, Congress didn't go after the
22 dog, so to speak, it went after the tail. This very
23 aberrant procedure, atypical procedure. And the numbers
24 are hard to come by, but I don't think anybody suggests
25 that the D&X procedure is anything more than a very

1 small minority of second trimester abortions. And so I
2 do think --
3 JUSTICE GINSBURG: Even though we are told
4 by some of the medical briefs that the procedures are
5 basically the same, they start out in the same way and
6 that the difference -- the differences are not large in
7 particular cases.
8 GENERAL CLEMENT: Well, Justice Ginsburg,
9 let me make a couple of points in response to that. I
10 think -- taken at the broader level first, I think there
11 is one very important difference between these two
12 procedures that led Congress to ban one and allow the
13 other to stand. And that is whether fetal demise takes
14 place in utero, which is, of course, the hallmark of all
15 abortions, or whether fetal demise, the lethal act takes
16 place when the fetus is more than halfway out of the
17 mother.
18 Now, as to their suggestion, I think most
19 particularly by Respondents in the second case, that
20 there really is no meaningful difference between those
21 two procedures. And with respect, I just don't think
22 the record supports that. If you look at the record in
23 this case, it's very clear in the district court opinion
24 that you have some doctors, and examples would be
25 Plaintiff's expert, Dr. Creinin, or one of the Nebraska

1 Plaintiffs, Dr. Vibhakar. They go in, in each and every
2 case, and try to perform a dismemberment, or D&E,
3 procedure.
4 And because they're trying to perform the
5 D&E procedure, they need to dilate the cervix only
6 modestly. And so Dr. Creinin, for example, his
7 testimony is he only dilates the cervix two centimeters
8 or two and a half centimeters.
9 Now, in contrast, you have other doctors,
10 and here the examples I would point to are two of the
11 Plaintiff's experts, Dr. Chasen and Dr. Frederickson,
12 they, in every single case, set out to perform the D&X
13 procedure. And that has material differences. For
14 example, the dilation regimen that they use. And so
15 Dr. Frederickson, for example, uses multiple sets of
16 laminaria to dilate the cervix, and she gets a much
17 greater degree of dilation, 5 to 6 centimeters of
18 dilation.
19 And of course, not only do they set out to
20 perform different procedures, but they, in fact, perform
21 different procedures. So the evidence here again
22 reflects that Dr. Vibhakar, for example, in 100 percent
23 of the cases, ends up performing a dismemberment
24 procedure, or a D&E procedure. For Dr. Creinin, it's 99
25 percent.

1 Now, by contrast, Dr. Chasen and
2 Dr. Frederickson, when they set out to perform a D&X
3 procedure, they are successful in their objective less
4 often. There are different numbers for different
5 doctors, but it seems that, at most, they can achieve
6 their objective about a third of the time.
7 JUSTICE KENNEDY: Well, those doctors
8 testified in the congressional hearings or in the Eighth
9 Circuit or Ninth Circuit or the Second Circuit? There
10 are so many doctors here. Which are the two that you're
11 referring to that do not dilate the cervix fully? Did
12 they testify in any of the district court cases?
13 GENERAL CLEMENT: They did, Justice Kennedy,
14 and in particular, Dr. Creinin is an expert. I think
15 his deposition was taken, or his testimony was taken
16 principally in the California case, but it was
17 introduced in all three cases as part of the evidentiary
18 record. Dr. Vibhakar is one of the Plaintiffs in this
19 particular case. And Dr. Chasen and Dr. Frederickson
20 would also -- their testimony was in the record, I
21 think, in all three cases.
22 JUSTICE BREYER: Just from my going through
23 this record, I compare it with Stenhart, with what's in
24 Congress. We have two cases here. And it's a fair
25 conclusion that there are, in each case, before Congress

1 and in here, there are some doctors who think this is
2 safe and some doctors who think it isn't safe.
3 And if you look at the -- sort of by
4 counting, by numbers, I guess if you look by lines of
5 testimony or by different doctors, interestingly enough,
6 it seems to me there are more doctors in these two cases
7 and in front of Congress who said it is not safe than
8 there were when we considered the other case. And there
9 are fewer doctors who say it is safe even with the other
10 case. So I don't know if you're supposed to count
11 doctors or what.
12 My question would be, if this -- do we owe
13 more deference to a congressional finding or to Congress
14 than we owe to a State legislature? What is -- I mean,
15 I take it a State legislature is democratically elected,
16 and don't we owe similar deference to both?
17 GENERAL CLEMENT: Well, Justice Breyer, I
18 think you certainly owe deference to both. I think --
19 JUSTICE BREYER: Well, if we owe deference
20 to both, and I would have thought that we did, then I
21 think in the Nebraska case, despite the deference that
22 was owed, the Court came to the conclusion that the
23 statute of Nebraska was unconstitutional because it
24 lacked an exception for the health of the mother,
25 something that came from preceding cases. So if giving

1 deference to Nebraska, we reach that conclusion there,
2 and if the deference that is owed is the same, and if
3 the evidence is about the same on both sides, how can we
4 reach a different conclusion here?
5 GENERAL CLEMENT: Well, Justice Breyer, I
6 mean, obviously I'm at a certain deficit to you in
7 discussing what this Court held in the Stenberg opinion,
8 which you wrote. But my reading of that opinion is that
9 this Court did not focus on what was before the Nebraska
10 legislature. But this Court focused on what the
11 district court found. And in particular, in the
12 critical part of the opinion, which would be Section
13 2(A) of the opinion, as I read the opinion, what this
14 Court did is it confronted Nebraska's argument that the
15 D&X procedure was not, in fact, safer.
16 And the first thing this Court did is said,
17 well, that argument faces quite a burden, because the
18 district court made a contrary finding. And then this
19 Court in 2(A)(1) of the opinion referenced that finding,
20 and four different times cited the district court
21 record, and then so on and so forth. It then noted the
22 various eight arguments were made by the State in its
23 amici to the contrary. And as I read the opinion, it
24 basically said the latter, the objections don't
25 outweigh the former, the findings.

1 Now, I think if you compare the record
2 before the courts and before Congress, compare that to
3 what was before the district court in Stenberg, I think
4 there is a much more robust factual record here. If you
5 look at the Stenberg case --
6 JUSTICE STEVENS: General Clement, are not
7 some of the findings by Congress clearly erroneous? For
8 example, there is a statement that no current medical
9 schools provide instruction in the procedure. Now
10 that's clearly wrong, isn't it?
11 GENERAL CLEMENT: Well, I mean, specifically
12 what Congress found in that finding was that none of
13 them provided it as part of a curriculum. And I think
14 what the record here clearly reflects -- you know, I
15 don't know that the idea of a curriculum -- I don't know
16 exactly what Congress had in mind. But clearly, is a
17 matter of sort of what you teach residents --
18 JUSTICE STEVENS: Do you think that finding
19 is correct?
20 GENERAL CLEMENT: I don't know if it's
21 correct, based on the curriculum.
22 JUSTICE STEVENS: Supposing there was a lot
23 of evidence introduced in the district court that there
24 were schools like Yale and New York University that did
25 include this as part of a curriculum, could the district

1 court disregard that finding and make a contrary
2 finding?
3 GENERAL CLEMENT: I think if the evidence in
4 the district court were overwhelmingly to the contrary,
5 I think that the district court could effectively
6 undermine that one finding. I don't think in this case
7 anything turned --
8 JUSTICE STEVENS: Well, on other findings,
9 is there a different standard of review of what the
10 district court found as opposed to what Congress found?
11 GENERAL CLEMENT: Well, Justice Stevens, I
12 would answer you this way. You might first want to
13 isolate those situations where, if the district court
14 was addressing something, an issue that just wasn't
15 before Congress at all, but it's somehow relevant, and
16 makes factual findings, I suppose the district court is
17 entitled to the normal kind of deference on review.
18 But I think if you have situations, which
19 you have in this case, where the district court heard
20 some of the same witnesses who testified before Congress
21 and before the district court, and the district court
22 makes a different credibility finding than the Congress
23 made, I don't think that's a basis for the district
24 court to be able to overcome the contrary findings of
25 Congress.

1 JUSTICE STEVENS: Well, I don't understand
2 Congress to have made credibility findings. As I read
3 the -- I read the whole finding. There were six or
4 seven pages of findings, and I don't find a single
5 reference in those findings to the performance of an
6 abortion on a nonviable fetus. All of the language in
7 the findings seem to be referring to viable fetuses just
8 inches away from becoming a person. And I don't think
9 you can even find the word fetus in those findings. The
10 findings as opposed to the text of the statute.
11 GENERAL CLEMENT: Sure, Justice Stevens, I
12 think I need to clarify an important point there, which
13 is to say, the statute didn't focus on viable versus
14 nonviable, because it applies to both sides of the
15 viability line.
16 JUSTICE STEVENS: I'm talking about the
17 findings. Is there a single word in the findings that
18 refers to a viable fetus? It maybe refers to a
19 nonviable fetus.
20 GENERAL CLEMENT: I don't think there is,
21 Justice Stevens, but I wouldn't find that at all
22 remarkable in a statute that applies and bans certain
23 procedures without regard to whether the procedure is
24 applied to a viable or nonviable fetus and when
25 Congress does make specific findings that the procedure

1 it's banning would have the effect of preventing a
2 lethal act on a fetus just inches from being born. It's
3 not --
4 JUSTICE STEVENS: May I interrupt?
5 GENERAL CLEMENT: Sure.
6 JUSTICE STEVENS: It's not preventing the
7 lethal act, it is requiring that the lethal act be
8 performed prior to any part of the delivery, because
9 there is no doubt there will be a lethal act. The only
10 issue is when it may be performed.
11 GENERAL CLEMENT: The issue is whether --
12 JUSTICE STEVENS: Yes.
13 GENERAL CLEMENT: Yes. Because the issue is
14 to whether it's going to be performed in utero, or when the
15 child is more than halfway outside the womb, and that of
16 course --
17 JUSTICE STEVENS: Whether the fetus is more
18 than halfway out, and some of these fetuses I understand
19 in the procedure, are only four or five inches long.
20 They are very different from fully formed babies.
21 GENERAL CLEMENT: Justice Stevens, again,
22 you're right.
23 JUSTICE SCALIA: When it's halfway out, I
24 guess you can call it either a child or a fetus. It's
25 sort of half and half isn't it?

1 GENERAL CLEMENT: I think you could use
2 either terminology, Justice Scalia. My point is,
3 nothing turns on the terminology. I mean, the
4 terminology that Congress chose to use is a living
5 fetus. I think the point, though, is that when fetal
6 demise is induced in utero, whatever else you think
7 about that procedure that is classically an abortion, as
8 it has been always understood. But when fetal demise is
9 induced when the, when the living fetus is over halfway
10 outside of the womb, then I think Congress --
11 JUSTICE STEVENS: Wouldn't the fetus be -- I
12 think it suffer a demise in seconds anyway.
13 GENERAL CLEMENT: Well it may be seconds, it
14 may be hours; it depends on -- because even a pre --
15 JUSTICE STEVENS: Do you not agree that it
16 has no chance of survival, in most cases?
17 GENERAL CLEMENT: If we are talking about
18 previability then by definition chances are it won't
19 survive.
20 JUSTICE STEVENS: Yes, that's right.
21 GENERAL CLEMENT: But again, I don't think
22 that, you know, that anything in this act --
23 JUSTICE STEVENS: Congress has made the
24 judgment that it is far preferable to ensure that fetal
25 demise takes place before any delivery begins. That's

1 the big issue.

2 GENERAL CLEMENT: Well, I'm not sure if it's

3 whether, that's a fair, that's a fair summary. I mean,

4 you know, the line isn't that fetal demise has to be

5 done before any delivery begins, but the basic point of

6 this statute is to draw a bright line between a

7 procedure that induces fetal demise in utero and one

8 where the lethal act occurs when the child or the fetus,

9 whichever you want to call it, is more than halfway

10 outside of the mother's womb.

11 JUSTICE SCALIA: Would it, would it be

12 lawful or would it be infanticide to deliver the fetus

13 entirely and just let it expire without any attempt to

14 keep it alive?

15 GENERAL CLEMENT: Well, in the

16 postviability context it would clearly be, it would

17 clearly be infanticide. I think in the previability

18 context, if you have a complete delivery but the child

19 isn't going to survive, I don't think it would be

20 infanticide to necessarily let the child expire --

21 JUSTICE GINSBURG: Mr. --

22 GENERAL CLEMENT: But I do think by contrast

23 if somebody tried to, with the fetus, you know,

24 perfectly alive and in the hours that it might have to

25 live, if somebody came in and ripped its head open, I

1 think we'd call that murder, and in fact Congress passed
2 another statute --
3 JUSTICE GINSBURG: General Clement, that's
4 not what this case is about, because I think you have
5 recognized, quite appropriately, that we're not talking
6 about whether any fetus will be preserved by this
7 legislation. The only question that you are raising is
8 whether Congress can ban a certain method of performing
9 an abortion. So anything about infanticide, babies, all
10 that, is just beside the point because what this bans is
11 a method of abortion. It doesn't preserve any fetus
12 because you just do it inside the womb instead of
13 outside.
14 GENERAL CLEMENT: Justice Ginsberg, that's
15 right, but I don't think that's to trivialize Congress's
16 interest in maintaining a bright line between abortion
17 and infanticide. And the way I would illustrate it is
18 that line, even if you might think it has a temporal
19 line, in the sense that viability versus previability is
20 relevant, it clearly has a spatial dimension as well and
21 the best illustration of that I think is think about a
22 lawful postviability abortion. There is a problem with
23 the mother's health, there is a problem with her life so
24 it's a lawful postviability abortion. I don't think
25 anybody thinks that the law is or should be

1 indifferent to whether in that case fetal demise takes
2 place in utero or outside the mother's womb. The one is
3 abortion, the other is murder.
4 And I think that just recognizes that even
5 in the postviability context you have a very important
6 line which is a spatial line, and that line is basically
7 in womb, outside of womb, and what Congress tried to do
8 in this statute is to draw that line and differentiate
9 between one procedure where fetal demise takes place in
10 utero --
11 JUSTICE GINSBURG: But if this case were
12 limited to postviability abortions it would be a
13 different matter. But isn't it so that the vast
14 majority of these abortions are going to be performed
15 previability?
16 GENERAL CLEMENT: I think that's probably
17 right, Justice Ginsburg, but I think the point I would
18 make is that Congress has an interest in maintaining the
19 spatial line between infanticide and abortion, even with
20 respect to previability fetuses and that's true for at
21 least two reasons.
22 JUSTICE BREYER: If -- I see what you're
23 driving at in terms of the procedure. We are focusing
24 on a universe where the fetus is not going to survive no
25 matter what, right?

1 GENERAL CLEMENT: Right.

2 JUSTICE BREYER: Okay. So we are not

3 talking about anyone being born and living. They are

4 not going to.

5 GENERAL CLEMENT: Well, with the caveat that

6 the statute does apply both --

7 JUSTICE BREYER: And that's the area of

8 focus.

9 GENERAL CLEMENT: Right.

10 JUSTICE BREYER: Now, Congress has said that --

11 the doctor, you can achieve that result through method A,

12 but not through method B, and you're saying Congress had

13 good reason for doing that. I take it Congress also

14 agrees that if method B, which they don't want, were to

15 be necessary for the safety or health of the mother, the

16 Constitution would require it being done. I didn't see

17 anything here about Congress disagreeing with that.

18 GENERAL CLEMENT: Oh, I think that's right,

19 Justice Breyer. I think this, Congress --

20 JUSTICE BREYER: All right. If that's

21 right --

22 GENERAL CLEMENT: -- took this Court's

23 Stenberg's decision as a given --

24 JUSTICE BREYER: Right. Fine. Okay. They

25 make a finding that although we don't disagree with

1 that, we don't think it's ever necessary for the health
2 or safety of the mother. That's where we are. Now as I
3 look at the record, I see many, many, many doctors
4 telling Congress and everybody else that it is
5 necessary, and safe. And I see other doctors telling
6 Congress primarily, but in court, too, that it isn't
7 necessary, ever for safety.
8 And so if medical opinion is divided, and
9 I'm not advocating what I'm about to say, I just want to
10 know your reaction. If medical opinion is divided, why
11 wouldn't it be up to this Court or could this Court say
12 this use of this procedure, we enjoin the statute to
13 permit its use but only where appropriate medical
14 opinion finds it necessary for the safety or health of
15 the mother?
16 Now, if Congress is right, there will be no
17 such case so it's no problem. But if Congress is wrong,
18 then the doctor will be able to perform the procedure
19 and Congress couldn't object to that because the
20 Congress isn't worried about, I mean Congress, then
21 Congress was wrong. They agreed that we had a health or
22 safety exception.
23 GENERAL CLEMENT: With respect, Justice
24 Breyer, here is the problem with that way of approaching
25 the statute. That might be a permissible way of

1 approaching it if what the evidence on the other side
2 was, that well you know there are cause-specific reasons
3 why you need this procedure. There are particular
4 conditions where you need this procedure. But that's
5 not the evidence on the other side. What their doctors
6 say, the doctors who perform this D&X procedure, the
7 Dr. Chasens, the Dr. Fredericksons, what they will tell
8 you is that every single case the D&X procedure is
9 better and safer and they want to do it. And so it
10 doesn't make, I mean Congress can't pass a statute that
11 bans procedure A, and that ban doesn't apply any time a
12 doctor prefers procedure A.
13 JUSTICE BREYER: No. It just wouldn't be a
14 question of the doctor's preference. You would have to
15 refer back to prior cases, and what the prior cases talk
16 about including Stenberg is not that that the doctor
17 simply has a preference, but rather that there has to be
18 a significant body of medical opinion that says that
19 this is safer procedure and necessary for the safety of
20 the mother.
21 Now, where that's true, the Court has
22 previously said that the Constitution protects the
23 right. And I don't see anything in what Congress says
24 that wants to change that law. They simply have a
25 different view of the facts.

1 GENERAL CLEMENT: Well, they do have a
2 different view of the facts. And I guess the question
3 --
4 JUSTICE BREYER: So if they have a different
5 view of the facts, why can't we leave it up to whatever
6 facts develop? If there is an appropriate body of
7 medical opinion that does in fact believe this is
8 necessary for the health of the mother, so be it, and
9 the abortion could be performed and the injunction would
10 say that.
11 GENERAL CLEMENT: Well, I think --
12 JUSTICE BREYER: And otherwise not.
13 GENERAL CLEMENT: If this Court rejects the
14 facial challenge to this statute it is still going to be
15 open for litigants in the future to try to identify
16 specific conditions where this procedure is the safer
17 alternative.
18 JUSTICE KENNEDY: Can you tell me a
19 hypothetical instance in which where an as applied
20 challenge could be brought if we sustain the statutue
21 on its face? The procedure has to take place within 24,
22 48, 72 hours. How would as applied challenge take place?
23 You know, I read all the doctors' testimony
24 in this case, hundreds of pages, and I'm familiar with
25 the area generally. But it takes a while to get up to

1 speed. I don't know if you could just go to a district
2 judge and say I need an order, the judge would take --
3 would have to take many hours to understand that.
4 GENERAL CLEMENT: Justice Kennedy, what I
5 think I have in mind principally would be a
6 preenforcement challenge that was an as applied
7 challenge. And what I have in mind, you know that's
8 something that there is in other areas of the law,
9 Steffl against Thompson is an example. But what you
10 would have in mind is a doctor who had standing under
11 this Court's abortion jurisprudence would come in and
12 say, look, in my practice I've seen that this procedure
13 would be particularly useful in dealing with
14 preeclampsia or placental previa or some condition.
15 JUSTICE KENNEDY: Why isn't that already in
16 the record in the Ninth Circuit, in the Second Circuit
17 and in the Eighth Circuit, in the district courts,
18 proceedings in those circuits?
19 GENERAL CLEMENT: Well, there is an effort
20 to make that showing. I don't think that it's been a
21 successful effort to make that showing. In fact I think
22 if you look at the findings of the district courts in
23 these cases, two of the three district courts found that
24 there was no particular condition where the D&X abortion
25 was medically necessary or had marginal safe benefits --

1 safety benefits. In this case, the Nebraska case, the
2 district court identified only two conditions,
3 preeclampsia combined with maternal cancer, and placenta
4 previa. And as to those particular findings as we point
5 out in our reply brief, there are problems with each of
6 those findings.
7 JUSTICE KENNEDY: General Clement, I'm just
8 thinking, trying to imagine how an as applied challenge
9 would be really much different from what we have seen
10 already.
11 GENERAL CLEMENT: Well, I don't think, I
12 mean, they've challenged everything including every
13 application of the statute and they've tried to pick off
14 some particular conditions. What I'm imagining is in
15 the future you might have, you might have additional
16 evidence, you might have additional experience with
17 doctors, and they might come in and target their
18 challenge to particular conditions and try to say --
19 JUSTICE GINSBURG: But General -- General
20 Clement, conditions don't show up in the abstract.
21 Wouldn't it often be the case that it depends on the
22 vulnerability of the particular patient and you couldn't
23 bring a preenforcement challenge as to that. Maybe
24 it's a question of hemorrhaging, that -- it's a
25 combination of what the condition is and the

1 vulnerability of the particular patient and I don't see
2 how that could be tested in advance.
3 GENERAL CLEMENT: Well, Justice Ginsburg my
4 understanding is even when you talk about an
5 idiosyncratic condition, I mean, the doctors who perform
6 these abortions perform, you know, hundreds of them a
7 year and they can identify those conditions and they
8 have names for those conditions and I think it would be
9 amenable to bringing a more as applied challenge.
10 CHIEF JUSTICE ROBERTS: General, do you
11 understand the scope of this statute to be different
12 than the scope of the statute at issue in Stenberg,
13 focusing in particular on the deliberate and intentional
14 language?
15 GENERAL CLEMENT: I certainly do, Mr. Chief
16 Justice, and I think that this statute, unlike the
17 Nebraska statute, clearly uses an anatomical landmark
18 approach that is based in the text of the statute and
19 clearly distinguishes between the D&E procedure on the
20 one hand and the D&X on the other hand.
21 JUSTICE SOUTER: But isn't it quite
22 independent of the anatomical approach that the health
23 exception is denied? I mean that's an -- that does not
24 depend on the anatomical approach. The anatomical
25 approach may well be an answer at the facial

1 challenge stage, to problems of vagueness, for example.
2 But the health excepton problem is not affected by that.
3 And the difficulty that I have with your argument that
4 somehow the health exception issue should be left to an
5 as applied challenge is the statement in Stenberg, and
6 it's on 938.
7 I'm quoting: "But where substantial medical
8 authority supports the proposition that banning a
9 particular abortion procedure could endanger women's
10 health, Casey requires the statute to include a health
11 exception where the procedure is necessary in
12 appropriate medical judgment for the preservation --"
13 -- excuse me -- "of the life or health of the mother."
14 Now, your position, it seems to me, requires
15 us to do one of three things. Either we, we overrule
16 Stenberg in that respect, or we, we find -- I don't know
17 how but we might find, well, in this case, there is no
18 substantial medical authority, and therefore on the face
19 of the statute there seems to be no impediment in the
20 Stenberg statement. Or three, we say well, there seems
21 to be a tension between the showing of substantial
22 medical authority which occurred in the litigation in
23 these cases and the findings made by Congress, and under
24 those circumstances in effect we are required to ignore
25 the record in the cases and go with Congress's

1 apparently contrary judgment.
2 Which of the three do we take?
3 GENERAL CLEMENT: Well, we would urge you to
4 take any one of them.
5 JUSTICE SOUTER: Take all three.
6 (Laughter.)
7 JUDGE SOUTER: No, but seriously --
8 GENERAL CLEMENT: But in fairness, I mean,
9 you know, we have an obligation to defend the statute.
10 So our first, you know, our first effort would be to say
11 we distinguish the --
12 JUSTICE SOUTER: Okay, but the problem, I
13 guess -- focus the problem this way. The, the Stenberg
14 opinion talks about substantial medical authority as
15 triggering this requirement for a statutory element.
16 That problem is not focused simply by saying Congress
17 made some findings and the district court made other
18 findings and Congress should prevail.
19 The fact is the substantial medical judgment
20 finding I would suppose is satisfied by the, by the
21 record in the district courts in these cases. This is
22 not one doctor's idiosyncratic judgment and a court can
23 reasonably find, it seems to me, that there is
24 substantial medical judgment. If we are going to defer,
25 as you say we should defer to Congress, haven't we got

1 to overrule that statement?

2 GENERAL CLEMENT: I don't think so, Justice

3 Souter. Let me just -- I'd like to save some time for

4 rebuttal, but let me try to answer it this way, which is

5 our way of looking at Stenberg is Stenberg really

6 doesn't address what you do when there are congressional

7 findings. And there is some tension between Stenberg

8 and Turner on this, because Stenberg seems to suggest,

9 well, when there is a doubt, the kind of doubt that

10 would normally get you past a summary judgment, you

11 defer to the doctors, and Turner seems to suggest when

12 you have a doubt, conflicting evidence, the kind of

13 doubt that might get you past summary judgment normally,

14 you defer to Congress. And it has to be one or the

15 other. It can't go both ways, can't go opposite ways,

16 and we would say resolve that tension, but when there is

17 congressional findings, something that you obviously

18 didn't have to confront in Stenberg, defer to the

19 congressional approach.

20 If Stenberg means something contrary, that

21 even in the face of congressional findings that you have

22 to defer to a minority opinion of doctors and, you know,

23 kind of invert what would normally be the way of

24 approaching it, we think then that would be inconsistent

25 with this Court's decision in Casey, among others, and

1 you should revisit Stenberg to that effect, to that
2 extent.
3 Thank you.
4 CHIEF JUSTICE ROBERTS: Thank you, General.
5 Miss Smith.
6 ORAL ARGUMENT OF PRISCILLA SMITH
7 ON BEHALF OF RESPONDENT
8 MS. SMITH: Mr. Chief Justice and may it
9 please the Court:
10 The Government throughout this case has
11 quarreled with the plaintiff's statement of Stenberg and
12 Congress quarreled clearly with the district court
13 findings, but their real argument here is with this
14 Court in the Court's ruling in Stenberg, particularly in
15 light of the congressional findings that are, that are
16 frankly unsupported by either the congressional record
17 or the additional evidence presented to the district
18 courts. The only course here that preserves the
19 independence of the judiciary, that exemplifies the
20 importance of stare decisis, not to mention the only
21 course that will protect women from needless risks of
22 uterine perforation, infertility, sepsis and hemorrhage,
23 is to hold this act unconstitutional.
24 JUSTICE KENNEDY: Can you tell me -- I
25 didn't find it in the materials. Maybe the statistics

1 aren't available. In the cases where intact D&E or D&X
2 are performed in the period I guess, what, 16 through
3 20, 21st, 22nd weeks, in how many of those instances, do
4 you have any idea, in how many of those instances is
5 there serious health risk to the mother that requires
6 the procedure as opposed to simply being an elective
7 procedure? Are there any statistics on that?
8 MS. SMITH: No. In terms of the underlying
9 medical conditions there really aren't, Your Honor, and
10 it varies dramatically according to the practice of the
11 physician. If a physician is in a high risk OBGYN
12 practice, he or she is much more likely to encounter
13 patients with serious underlying medical conditions such
14 as the ones that the doctors have testified about in
15 this case, the liver disease, kidney disease, heart,
16 cardiovascular disease, cancer of the placenta, bleeding
17 placenta previa, all of these issues and underlying
18 conditions that makes the impact and the risks that are
19 reduced by the intact D&E particularly important.
20 CHIEF JUSTICE ROBERTS: We have no evidence
21 either in the record before the Court or Congress as to
22 how often that situation arises?
23 MS. SMITH: No, we don't, Your Honor. We
24 know that in some practices it's quite frequent, in some
25 practices it's not as frequent because those are mostly

1 hospital-based practices. But on the other hand,
2 there's extensive evidence in this case, much more
3 evidence frankly, Your Honor, Justice Breyer, than there
4 was in the Stenberg case, of the, of the --
5 JUSTICE KENNEDY: I have just one other
6 question that, it's generally related to the first.
7 If there is substantial evidence that other procedures
8 or alternate procedures are available, alternate to D&X,
9 alternate to intact D&E, is your response that, although
10 they're available as a matter of science, as a matter of,
11 of medical expertise, they are not available because
12 hospitals don't allow the patients to be admitted? I
13 was going to ask that same question to the Government,
14 because there is some indication in the record that
15 certain hospitals just don't admit patients for this
16 purpose, which is -- goes back to my earlier question.
17 I was wondering if that's because it's surely elective.
18 MS. SMITH: Because it's what sir?
19 JUSTICE KENNEDY: Because it's purely
20 elective and not medically necessary.
21 MS. SMITH: No, Your Honor. Hospitals,
22 many, many hospitals throughout the United States refuse
23 to provide any abortions whatsoever as just a blanket
24 rule. There are some that will provide abortions in
25 certain, in certain circumstances where the woman is

1 obtaining the abortion because of a certain medical
2 condition. Then there are women who are obtaining an
3 abortion because they have chosen that that's the best
4 course for them who also have underlying medical
5 conditions. So if you're a woman who has chosen to
6 obtain an abortion and you have an underlying cardiac
7 disease, for example -- we had a case like this in
8 Louisiana. The hospital refused to do the abortion
9 because her chance of dying from the underlying medical
10 condition was not over 50 percent. So the availability
11 of hospital services is somewhat unrelated to this case,
12 but it is, it is quite limited in some circumstances.
13 JUSTICE KENNEDY: Well, it might be related
14 in the sense that the Government's argument that there
15 are alternate mechanisms is not a practical alternative.
16 I was going to ask the Government about that. On the
17 other hand, the fact that any number of hospitals don't
18 allow the procedure is also indicated, indication that
19 there is a medical opinion against it.
20 MS. SMITH: No, not at all, Your Honor. The
21 medical opinion in those cases is against abortion
22 whatsoever and a refusal to use one's facilities to
23 provide any abortion --
24 JUSTICE BREYER: So in terms of --
25 MS. SMITH: -- of any kind, not about any

1 particular procedure.

2 I'm sorry, Justice Breyer.

3 JUSTICE BREYER: I didn't like your

4 characterization and the Government's of the state of

5 the record. I asked my law clerk basically to go look

6 up every statement that was made in four forums. The

7 first was the first Stenberg case. Second was Congress.

8 Third is this, one of the cases here; and the fourth is

9 the other case here. Now, my own impression of that is

10 if you're talking about the medical need for such a

11 case, that is for intact D&E, that there is a risk

12 attached if you don't use it in some instances. The

13 fewest number of statements for that proposition was in

14 the first Stenberg.

15 MS. SMITH: Yes.

16 JUSTICE BREYER: More statements in

17 Congress, more statements that you -- doctors who say, I

18 need this procedure for safety.

19 MS. SMITH: There are many more in this --

20 JUSTICE BREYER: There are many more in this

21 case than there were -- in these two cases there are

22 many more than there were in Congress and in Congress

23 there are many more than they were in first Stenberg.

24 MS. SMITH: That's right.

25 JUSTICE BREYER: Now, if we look to the

1 other side of the coin, the doctors who say, no, it
2 isn't safe, there I'd have to say there are probably
3 many more in Congress than there are -- who say it isn't
4 safe, there are probably many more in Congress; and then
5 there are some in these cases, too; and there are hardly
6 any in Stenberg, not too many.
7 MS. SMITH: Well, there is --
8 JUSTICE BREYER: It was against you, in
9 other words.
10 MS. SMITH: There are many letters written
11 to Congress that are in the record. In terms of live
12 witnesses, Your Honor --
13 JUSTICE BREYER: Yes.
14 MS. SMITH: -- there were in Congress eight
15 live witnesses that testified.
16 JUSTICE BREYER: All right, so I'm left with
17 a record where I guess you have a subjective
18 characterization that there is at least as much evidence
19 in these cases supporting you and as much in Congress
20 supporting you as there was in the first Stenberg case.
21 But Congress made this finding, so what am I to do with
22 the finding?
23 MS. SMITH: Right. Well, the important
24 point, Your Honor, is that even if the Court applied the
25 highest level of deference under Turner, the findings

1 would be rejected and must be rejected, as all three
2 district courts held, because they're simply
3 unreasonable even under a Turner standard.
4 JUSTICE GINSBURG: Ms. Smith, was the
5 statement of the American College of Obstetricians and
6 Gynecologists before Congress?
7 MS. SMITH: Yes, Your Honor, it was, as was
8 the brief that was filed, the amicus brief that was
9 filed in this case in Stenberg was before Congress, and
10 also testimony from numerous physicians in the form of
11 letter. In terms of live witnesses, there were simply
12 not that many.
13 CHIEF JUSTICE ROBERTS: We'll give you an
14 extra 30 seconds. Proceed.
15 MS. SMITH: That's fine, Your Honor. I've
16 lost track of my train of thought, though, I think.
17 I think what I was saying was there were
18 eight witnesses who testified live.
19 JUSTICE BREYER: My question basically I
20 think you might have been going after is, I was saying
21 that I agreed with you in that there is more evidence
22 supporting your side in these cases than there was
23 before Congress, than there was in first Stenberg.
24 MS. SMITH: Yes.
25 JUSTICE BREYER: But still there was a

1 finding in Congress and there wasn't a finding in the
2 Nebraska legislature, and so does that fact of the
3 finding being in Congress and not in the Nebraska
4 legislature -- what kind of legal difference does that
5 make?
6 MS. SMITH: And Your Honor, what I would say
7 in this case, it makes none. While it's an extremely
8 interesting academic question about the level of
9 deference that should be applied in this kind of
10 circumstance, here it really is academic because under,
11 even under the Turner standard, if applied in a way that
12 Turner actually applied deference, to carefully review
13 the findings in light of the evidence in Congress and
14 again in light of the evidence in the district court --
15 JUSTICE STEVENS: May I ask you this
16 question about what you think we should do. If I
17 thought the evidence did support the conclusion that
18 it's never medically necessary, it merely -- the
19 evidence merely supports the proposition that a doctor
20 has to be a lot more careful if he goes one way rather
21 than the other because there are more risks involved in
22 one procedure rather than the other, would that be
23 sufficient to support the -- I can see the argument that
24 the intact delivery may have less risk of complications
25 and so forth without it not necessarily being absolutely

1 necessary.

2 MS. SMITH: Well, I think there is, there's

3 been some confusion about the word "necessary" and it's

4 been used sometimes to talk about whether there are

5 other procedures that could be used, as opposed to the

6 determination that it is the safest procedure that

7 reduces significantly the risk of very serious

8 complications, not the risks of minor complications.

9 CHIEF JUSTICE ROBERTS: I guess that gets

10 back to the point earlier. I mean, do you agree with

11 the discussion earlier that this act is not going to

12 prevent abortions?

13 MS. SMITH: No, not at all, Your Honor. I

14 -- the issue of the scope and breadth of the law is -- I

15 think the evidence clearly shows that this is a very

16 broad law that applies to D&E abortions and, contrary to

17 what the Solicitor General said about the intent of

18 abortions, abortion providers like Dr. Vibhakar and

19 others, they actually, their intent is always to remove

20 the fetus as intact as possible, and the district courts

21 have recognized that as an intent that's covered under

22 the terms of the act.

23 CHIEF JUSTICE ROBERTS: What degree of

24 marginal impact on safety do you think is necessary to

25 override the State's interest? I mean, if you have

1 complications under the D&E procedure in say 10 percent
2 of the cases, complications under D&X in 9.99 percent of
3 the cases, is that marginal benefit in safety enough to
4 override the State's articulated interest?
5 MS. SMITH: I don't believe a marginal
6 benefit in safety is enough and I don't believe that's
7 what we have here. The testimony from over, from at
8 least 11 board-certified OBGYNs, from the American
9 College of Obstetricians and Gynecologists, is that the
10 reduction in risk is significant and that it reduces the
11 risk of serious complications, such as uterine
12 perforation, which can lead to hysterectomy and
13 infertility.
14 CHIEF JUSTICE ROBERTS: But I thought your
15 submission earlier was that we don't have any record
16 evidence about how often the complications arise, so
17 it's hard to get a handle on exactly what the difference
18 is in terms of safety under your submission.
19 MS. SMITH: We don't have a quantification
20 of the safety. What we what we have is the clinical
21 experience of major leading physicians in the field,
22 who've testified that they've used both procedures. In
23 fact, many of them have testified that they perforated
24 uteruses in non-intact D&Es and they've never perforated
25 a uterus in an intact D&E. And that in fact is borne

1 out by the Chasen study, a very small study with very
2 small numbers, but it shows all the serious
3 complications are in the non-intact group.
4 JUSTICE GINSBURG: If we could go back to
5 the first question that the Chief asked you, you said
6 yes, it will prevent abortions because of this uncertain
7 line between the D&X and the D&E. Is there a way that
8 Congress could have written the statute that would have
9 insulated the physician who's performing a D&E?
10 MS. SMITH: Absolutely, Your Honor. I think
11 that the blueprint that this Court laid out, that
12 certainly is suggested in Justice O'Connor's concurrence
13 in Stenberg, was rejected by Congress. She references
14 three statutes, that if they had included a health
15 exception, she thinks would have been constitutional.
16 They all include the word intact.
17 I think there's another narrower
18 construction of the act too that is possible. Adding in
19 the word intact, reading in the word intact, it seems to
20 me, is not a reasonable interpretation of the statute as
21 it is, but certainly Congress could have done that and
22 other States have done it, but Congress set out not to
23 do that.
24 JUSTICE SOUTER: May I ask you to focus on
25 one particular problem that I think is implicated by

1 Justice Ginsburg's question. If I understood you
2 correctly a moment ago, and I think this is in your
3 briefs too, you said that the definitional problem is
4 that doctors always set out to do an intact procedure if
5 they can, because it involves less risk to the mother
6 from, from acts performed inside. And if that's the
7 case, then it would be, I guess in the real world, very
8 difficult for Congress to define a difference between
9 D&E and D&X, because the intention is always, as you
10 understand it, to have an intact result.
11 Your brother on the other side, the
12 Solicitor General says there certainly is testimony to
13 the effect that that is not so. That doctors who intend
14 to perform a D&E simply intend at the beginning to have
15 a lesser degree of dilation which will force them to do
16 the D&E and not have a totally intact procedure.
17 Would you comment on what I think is the
18 factual difference between you and the Solicitor General
19 there?
20 MS. SMITH: Yes, Your Honor. The -- the
21 problem with the law is that because it's not limited to
22 intact, it would in fact cover the procedures that are
23 performed by physicians who intend to perform a
24 procedure as intact as possible but simply don't expect
25 that.

1 JUSTICE SOUTER: I understand that.

2 MS. SMITH: Yes.

3 JUSTICE SOUTER: But could you start simply

4 with the factual predicate for your argument and his

5 argument. You seem to be starting from, if I understand

6 the two of you correctly, you seem to be starting from

7 basically different factual assumptions. Could you,

8 could you start by commenting on that?

9 MS. SMITH: Yes. The doctors perform the

10 same dilation protocols whether they are going to

11 perform a D&E or an intact D&E, and that's true for

12 Dr. Chasen and Dr. Westhoff, who performed both intact

13 and non-intact procedures.

14 CHIEF JUSTICE ROBERTS: I thought the

15 evidence was that you're looking for a different degree

16 of dilation if you're intending to perform D&E than if

17 -- and you're looking for a greater degree if you're

18 intending to perform a D&X.

19 MS. SMITH: It doesn't play out that way.

20 Doctors do have different dilation protocols, but they

21 are often looking for as much dilation as they can get.

22 On the other hand --

23 CHIEF JUSTICE ROBERTS: Is your submission

24 that there aren't different dilation protocols if you're

25 intending a D&E and if you're intending a D&X, they're

1 the same?

2 MS. SMITH: It varies by doctor. For

3 example, Dr. Carhart uses the same dilation protocol

4 whether he's going to do an intact or a non-intact.

5 Other doctors might try to do more dilation. And the

6 doctors, importantly, can't control the amount of

7 dilation they get, so a decision happens.

8 JUSTICE SOUTER: Well, they may not be able

9 to control it in an absolute sense, but can't they go

10 about it in a way that would tend to produce less rather

11 than more dilation?

12 MS. SMITH: Not --

13 JUSTICE SOUTER: It can't guarantee results,

14 but couldn't they at least start with a, I don't know

15 how you put it, a procedure that would be likely to

16 produce less rather than more, and hence come within the

17 safe harbor, if you will, of the statute?

18 MS. SMITH: Well, they are always looking

19 for a minimal amount of dilation. Then people who chose

20 to do another day of dilation, for example, that could

21 add additional dilation. But for the first day of

22 dilation, no, Your Honor. They don't seek more or less

23 over one day. They might do a second day or --

24 JUSTICE SOUTER: Well, you say they don't,

25 but my question is, can they? And the record may not

1 show this. I'm not asking you to answer the impossible,
2 but do we have evidence that would indicate that they
3 can or that they can't?
4 MS. SMITH: Not in the first day of
5 dilation, no. They can't control how much dilation is
6 going to occur. They need a minimal amount and they are
7 not going to shoot for less than that.
8 JUSTICE SOUTER: Can you tell us where to
9 look in the record for the evidence on that?
10 MS. SMITH: Each doctor testifies about
11 their own dilation protocols, Your Honor, and I believe
12 that's in the Eighth Circuit appendix. Those -- those
13 -- portions of that testimony, and are cited more
14 specifically in the Eighth Circuit briefs, which goes
15 more into the factual detail, Your Honor, but I don't
16 have the cites right now. I'm sorry.
17 JUSTICE GINSBURG: If there were a health
18 exception --
19 MS. SMITH: Yes.
20 JUSTICE GINSBURG: The health of the woman,
21 would that obviate the vagueness and overbreadth
22 problems that you bring up? Because then after we say
23 to the doctor, you put the health of your patients first
24 and if you think that it's riskier for her health to do
25 it one way than another way, then you pick the safer way.

1 If you had that, then wouldn't the concerns about
2 overbreadth fade?
3 MS. SMITH: Not if this is not limited to
4 intact, Your Honor, because then you would be limiting
5 D&E abortions, which is 95 percent of all abortions, to
6 circumstances where the doctor could prove that it was
7 in fact the safest procedure. And we've had doctors
8 testify in trial, for example, that they refused to
9 describe even intact -- regular D&Es to their patients
10 because they believe induction is always safer. So
11 those doctors, I think would still be at risk, and it
12 would put 95 percent of second trimester abortions at
13 risk in that case, to prosecution for performing a D&E
14 when you should have been performing an induction
15 procedure.
16 CHIEF JUSTICE ROBERTS: Do you think the, on
17 the same issue I think, that the addition of the
18 deliberately and intentionally language in the
19 congressional act addresses that concern?
20 MS. SMITH: No, Your Honor, because actually
21 that same language is in the Stenberg, the Nebraska
22 statute. It also was targeted at deliberately
23 intentionally. I do think that if there is a
24 construction that would narrow the law to a limited
25 amount of intact D&Es, if you read the "for the purpose

1 of" language in the statute, to be performing an overt
2 act for the sole purpose of completing delivery, then --
3 or rather -- I'm sorry. For the purpose of performing
4 an overt act that causes fetal demise, that does not
5 facilitate delivery of the statute -- of the fetus.
6 JUSTICE KENNEDY: That's what I was
7 wondering, because --
8 MS. SMITH: I'm sorry.
9 JUSTICE KENNEDY: Suppose, this might help,
10 suppose the physician testifies that I wanted to do a
11 non-intact, an in utero D&E, that that's, that was my
12 intent, that's what I wanted to do, that's what I always
13 want to do. In this case I had an intact delivery and
14 had no other choice. Are you saying that we could
15 interpret the statute to say that that is not the
16 prohibited criminal intent, he is immune from
17 prosecution in that case?
18 MS. SMITH: No. I don't believe that's the
19 line that could be drawn, Your Honor, because anyone who
20 does a D&E is intending to remove the fetus as intact as
21 possible, and always can have the intent to go to the
22 anatomical landmark that's here. I'm suggesting a
23 different interpretation that uses the "for the purpose
24 of" language where it says for the purpose of performing
25 an overt act that the person knows will kill the

1 partially delivered living fetus. If that language was
2 interpreted to be for the sole purpose of performing
3 fetal demise at that point, rather than what the doctors
4 do, which is perform the action that causes fetal demise
5 in order to facilitate delivery of the fetus. So if
6 it's not to facilitate delivery of the fetus --
7 JUSTICE KENNEDY: Well, give me one instance
8 in which your proposed interpretation would work in the
9 real world.
10 MS. SMITH: Well, there are allegations in
11 the Congressional Record, for example, in reference --
12 in Justice Thomas' dissent by Nurse Schaffer, Dr. Pamela
13 Smith, about circumstances where the physician actually
14 holds the fetus in the woman's body in order to cause
15 fetal demise, rather than causing fetal demise because
16 it's an integral part of removal of the fetus from the
17 woman's uterus. And those circumstances would be banned
18 under that interpretation.
19 But I want to get back to the Turner point,
20 if I may for a minute, the issue of deference to
21 congressional finding.
22 JUSTICE KENNEDY: Well, just on that last
23 point, I mean, we are interested of course in different
24 interpretations, but it just seems to me that your
25 interpretation would have very little practical effect.

1 MS. SMITH: Well, it would -- it would ban
2 certainly a certain type of intact procedure that was
3 discussed, and I think is the image many people have of
4 "partial-birth abortion" frankly, that this is something
5 that's done gratuitously, not as an integral part of
6 making this procedure the safest for the woman, and
7 avoiding instrumentation and avoiding perforation and
8 hysterectomies, which are serious complications that
9 though rare, when they occur, they are catastrophic and
10 life changing and disastrous. So the numbers are not
11 high of any complications, but the complications when
12 they occur are, are devastating. And this is what the
13 doctors are experiencing when they perform intact D&Es,
14 that they are not having these types of complications.
15 So -- if I can move to the deference point,
16 I would like to talk a little bit about deference to
17 congressional findings because there is significant
18 authority from this Court of course, saying that where
19 there are danger signs of constitutional risks, as the
20 Court recently said in Randall versus Sorrell, that the
21 Court must independently and carefully review
22 congressional findings. And the Court has rejected
23 findings that attempted to change either by findings of
24 fact or legal findings, that attempted to change a
25 constitutional standard.

1 But in any case, the findings in this case
2 are simply unreasonable and not supported by the
3 evidence. If you go to the findings themselves, the
4 ultimate finding in 14o, which claims that it is
5 actually relying on the preceding findings, it says,
6 "for these reasons, Congress finds that partial birth
7 abortion is never medically indicated," and then you go
8 backwards and look at the reasons. The reasons are the
9 findings that are not defended by the Government, that
10 were not defended by the Government witnesses and that
11 are blatantly false, except for perhaps one of them.
12 There are findings of, that partial-birth
13 abortion poses serious risks. The Government witnesses
14 agreed that this was not true.
15 Their findings that partial-birth abortion
16 is not taught in medical schools. Of course, we know
17 that is simply not true, it's an integral part of
18 abortion training at major medical institutions like
19 Cornell, Columbia, Yale, NYU, Northwestern, etc.
20 It says that abortion, partial-birth
21 abortion is a disfavored practice among abortion
22 providers. That is absolutely not true.
23 And it says that there are no comparative
24 studies. We know now that is not true because the
25 Chasen study has come out, and is the first study of its

1 kind to try to evaluate the differences between intact
2 and non-intact. It is still true that there are no
3 controlled studies, there is no randomized clinical
4 trial, but if that were the standard, no new and safer
5 abortion procedures could ever be developed.
6 Turning back, Your Honors, to the health issue.
7 CHIEF JUSTICE ROBERTS: Could I ask you just
8 one thing?
9 MS. SMITH: Yes.
10 CHIEF JUSTICE ROBERTS: The statute, of
11 course, refers to both feet first and vertex deliveries.
12 How common is the vertex delivery in the D&X?
13 MS. SMITH: Not very common. Not very
14 common, Your Honor. It would occur in circumstances
15 where there is a significant fetal anomaly and some kind
16 of a, something called a sides, or another type of fetal
17 anomaly where there is a distension of the abdomen, but
18 it's very rare.
19 CHIEF JUSTICE ROBERTS: And in giving your
20 arguments toward the safety benefits of the D&X, I
21 couldn't understand why they wouldn't also apply to the
22 total delivery of the fetus in a vertex delivery
23 situation.
24 MS. SMITH: I'm sorry. I don't know if I
25 understand.

1 CHIEF JUSTICE ROBERTS: Well, my
2 understanding is that the vertex, the skull and head are
3 already outside the mother.
4 MS. SMITH: Yes.
5 CHIEF JUSTICE ROBERTS: And the objection in
6 the feet first is that you want fewer instrument
7 passes and so on.
8 MS. SMITH: Yes.
9 CHIEF JUSTICE ROBERTS: But in that case,
10 it's not the skull itself that is preventing the
11 delivery of the fetus.
12 MS. SMITH: Right.
13 CHIEF JUSTICE ROBERTS: So your arguments
14 about why the D&X is safer than feet first, wouldn't
15 that apply in the case of total delivery of the fetus as
16 well? In other words, if you want as much of the fetus
17 intact and out as possible, why wait, stop it halfway?
18 Wouldn't the safety argument suggest delivery of the
19 fetus?
20 MS. SMITH: Yes, but these are circumstances
21 where the fetus can't be delivered. That's the point,
22 Your Honor, is that the fetus is obstructed and so the
23 overt act that takes place is --
24 CHIEF JUSTICE ROBERTS: In the case of a
25 vertex delivery, where is the obstruction?

1 MS. SMITH: The obstruction would come from
2 a distension of the abdomen, usually from a significant
3 fetal anomaly like a sides, which is, this is a serious
4 anomaly. It's lethal anomalies that I was talking
5 about. And in those circumstances, an overt act would
6 need to be performed that would in fact cause fetal
7 demise before the fetus could be, the delivery could be
8 continued.
9 JUSTICE KENNEDY: It seems to me that your
10 argument is that there is always a constitutional right
11 to use what the physician thinks is the safest
12 procedure.
13 MS. SMITH: No, Your Honor. I think the --
14 JUSTICE KENNEDY: I inferred that from your
15 comments.
16 MS. SMITH: I don't think so, Your Honor.
17 What, what the Court held in Stenberg in applying the
18 appropriate medical judgment standard of Casey, was that
19 there had to be a substantial body of medical opinion,
20 an objective standard that in fact supports the use of
21 that procedure. And that both, that balances concerns
22 against protecting a woman's health with a concern of
23 unfettered discretion, which the Court has rejected.
24 JUSTICE KENNEDY: So then, you think there
25 are instances in which the State can require that a

1 procedure be used, even if it's not the safest
2 procedure?
3 MS. SMITH: I'm sorry. I --
4 JUSTICE KENNEDY: So then, the --
5 MS. SMITH: Yeah.
6 JUSTICE KENNEDY: The obverse of the
7 proposition I put at first, it must be true that there
8 are some instances in which the State can prohibit a
9 procedure even if it is the safest procedure.
10 MS. SMITH: That's true, Your Honor, as long
11 as it doesn't pose an undue burden on the woman, which
12 as you know, certainly the circumstance with the D&E,
13 which is 95 percent of abortions, under the Stenberg
14 ruling.
15 CHIEF JUSTICE ROBERTS: Can I just follow up
16 on that?
17 MS. SMITH: Yes.
18 CHIEF JUSTICE ROBERTS: I don't understand
19 that. In other words, the fact that it's not the safest
20 procedure does not itself constitute an undue burden?
21 In other words, under Justice Kennedy's hypothetical --
22 MS. SMITH: I don't understand what you
23 mean.
24 CHIEF JUSTICE ROBERTS: He said that the
25 State can prohibit something even if it is the safest

1 procedure, and your answer was so long as it doesn't --
2 MS. SMITH: No.
3 CHIEF JUSTICE ROBERTS: -- pose an undue
4 burden. And I was just following up to say that so, in
5 some circumstances, prohibiting what you regard is the
6 safest procedure does not itself constitute an undue
7 burden.
8 MS. SMITH: No. I understood Justice
9 Kennedy's question to be, could the State prohibit what
10 it thinks is not the safest. And under the Stenberg
11 ruling, although the Court hasn't addressed that
12 question directly, under Stenberg what the Court has
13 said is, the Court can ban procedures only where there
14 is not significant medical authority supporting their
15 use as the safest procedure in some circumstances. So
16 perhaps I misunderstood your question.
17 But the Court has not ever addressed the
18 question, can we ban a procedure that's not the safest.
19 I think the ruling in Stenberg would say well, there has
20 to be significant medical authority that in some
21 circumstances it is the safest. The alternative
22 argument would be, but, if it is the procedure that's
23 used in 95 percent of the cases, or a vast majority of
24 the cases, and banning it would thereby deny women the
25 right to get an abortion and be a substantial obstacle

1 in their path in obtaining a legal abortion, that would
2 be another reason why you couldn't ban it.
3 CHIEF JUSTICE ROBERTS: Thank you,
4 Miss Smith.
5 MS. SMITH: Thank you.
6 CHIEF JUSTICE ROBERTS: General Clement, you
7 have two minutes remaining.
8 REBUTTAL ARGUMENT OF PAUL D. CLEMENT
9 ON BEHALF OF PETITIONER
10 GENERAL CLEMENT: Thank you, Mr. Chief Justice.
11 Let me make just a couple of points in rebuttal.
12 I'd like to start with Justice Kennedy's
13 question, about whether or not there are going to be
14 alternative methods available to end the pregnancy as a
15 practical matter. And the answer to that is there will
16 always be an alternative available as a practical matter.
17 The alternative will always be the D&E procedure, which
18 the district court in this case called the gold standard.
19 And the best evidence of that, Justice Kennedy, is that
20 their own witnesses like Dr. Chasen, for example, when
21 they set out to perform the D&X procedure, they are only
22 successful about 33 percent of the time. What happens
23 in the other 67 percent of the cases is they actually,
24 even though they tried to perform a D&X, will perform a
25 D&E. And so all of the clinics that provide D&X also

1 necessarily provide D&E, because the D&E is what they
2 end up with if they are not able to remove the fetus
3 intact. So in every single case, there are some, you
4 know, the induction procedure has to be done in a
5 hospital, but the D&X and D&E procedures are both
6 equally available in clinics, so no woman as either a
7 theoretical matter or a practical matter, is going to be
8 denied a safe alternative to end her pregnancy.
9 I wanted to pick up on Justice Souter's
10 question as well. You asked for factual citations in
11 the record on this dispute between us. I think the
12 record is really overwhelmingly in our favor. I point
13 you to Dr. Fitzhugh, who's one of the plaintiffs on this
14 side, 135a. He says he doesn't try for intact delivery
15 in every case because it would necessitate a second
16 round of dilation, a second round of laminarias, so he
17 doesn't do the second round, he gets dismemberment.
18 Dr. Knorr, another one of the plaintiffs, at page 142a,
19 he says the procedure would require greater dilation.
20 And if I could just finish on the citations,
21 Dr. Vibhakar, who does dismemberment 100 percent of the
22 time, 148a -- all of these are in the petition appendix
23 of the district court opinion -- Dr. Cranen explains his
24 procedure at 174a to 177a. Thank you
25 CHIEF JUSTICE ROBERTS: Thank you, General.

1 The case is submitted.

2 (Whereupon, at 11:07 a.m., the case in the

3 above-entitled matter was submitted.)

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