UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL ABORTION FEDERATION, MARK I. EVANS, M.D., CAROLYN WESTHOFF, M.D., M.Sc., CASSING HAMMOND, M.D., MARC HELLER, M.D., TIMOTHY R.B. JOHNSON, M.D., STEPHEN CHASEN, M.D., GERSON WEISS, M.D., on behalf of themselves and their patients, Plaintiffs,

against

JOHN ASHCROFT, in his capacity as Attorney General of the United States, along with his officers, agents, servants, employees, and successors in office, Defendant.

-----[the full text of *National Abortion Federation v. Ashcroft* can be found by clicking on the case name at http://www.nysd.uscourts.gov/RulingsOfInterest.htm]

TABLE OF CONTENTS

[Note: the table of contents is included in its entirety to show you the extent and nature of the court's opinion, but much of the contents has been edited or removed. Page numbers deleted because of editing—SA]

I. BACKGROUND
- A. The Act
- B. Procedural History of This Case
- C. The Congressional Record
  - 1. 104th Congress
    - (a) June 1995 House Hearing
    - (b) November 1995 Senate Hearing
    - (c) March 1996 House Hearing
  - 2. 105th Congress
  - 3. 106th Congress
  - 4. 107th Congress
  - 5. 108th Congress
  - 6. Views of Advocacy and Medical Associations
    - (a) Associations Opposing the Act
    - (b) Associations Supporting the Act
    - (c) The American Medical Association
- D. Stenberg v. Carhart
  - 1. The Nebraska Statute
  - 2. The Majority Opinion
    - (a) The Facts before the Court
    - (b) The Court's Legal Analysis
  - 3. The Concurring Opinions
  - 4. The Dissenting Opinions

E. Trial Experts
1. Plaintiffs' Experts
2. The Government's Experts

F. Abortion Procedures
1. D&E
2. D&X
3. Induction
4. Hysterectomy and Hysterotomy
G. Trial Testimony Regarding Comparative Safety of Abortion Procedures
1. Comparison of D&E to Induction
2. Comparison of D&X to D&E
H. Testimony Regarding Possibility of Effecting Fetal Demise Prior to Abortion Procedure
I. Trial Testimony Regarding Congress's Factual Findings
1. Congress's Findings Regarding the Risks of "Partial-Birth Abortion"
2. Congress's Findings Regarding Other Aspects of "Partial-Birth Abortion"
II. FINDINGS OF FACT
III. CONCLUSIONS OF LAW
A. The Court Only Reaches the Health-Exception Issue
B. Level of Deference Owed to Congressional Findings
C. The Act Requires a Health Exception
IV. CONCLUSION

OPINION & ORDER

RICHARD CONWAY CASEY, United States District Court Judge

Plaintiffs, a non-profit organization providing abortion services, and seven individual physicians, seek to permanently enjoin enforcement of the Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (the "Act"), which imposes potential criminal and civil penalties if a physician performs a certain abortion procedure. The Act bans the procedure called "partial-birth abortion," and exempts from its prohibition only those abortions necessary to save the life of the mother. This medical procedure has been described by many, including Justices of the Supreme Court, as gruesome, inhumane, brutal, and barbaric. Plaintiffs challenge the Act on the grounds that the Constitution requires an exemption to permit the procedure when it is necessary to preserve maternal health; the Act imposes an undue burden on a woman's right to choose an abortion; it is unconstitutionally vague; the Act fails to serve any legitimate state interest; the life exception is constitutionally insufficient; and the Act violates women's rights to equal protection of the laws.

I. BACKGROUND

A. The Act

The Act prohibits any physician in the United States, "in or affecting interstate or foreign Commerce [from] knowingly perform[ing] a partial-birth abortion." 18 U.S.C. § 1531(a). Partial-birth abortion is defined under the Act as: an abortion in which the person performing the abortion (A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and (B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus.

…The Act applies regardless of the stage of pregnancy and thus bans partial-birth abortions both before and after fetal viability. The Act subjects physicians to possible criminal and civil penalties. A violation of the statute constitutes a felony that carries a sentence of not more than two years' imprisonment, and/or a fine. Terms also used to describe the procedure include "dilation and extraction" or "D&X," "intact dilation and evacuation" "intact D&X," "intact dilation and extraction," "intact dilation and evacuation," the "intact variation of D&E," and "the breech extraction variant of D&E." …As one physician who submitted written testimony to Congress stated, "[T]here is no uniformly accepted medical terminology for the [abortion] method that is the subject of this legislation." (Partial-Birth Abortion Ban Act of 2002: Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary, 107th Cong. 52 (July 9, 2002) [July 2002 Hearing] (testimony of Dr. Pamela Smith); …However, "partialbirth abortion" is a frequently used legal term as demonstrated by the many state statutes to employ it. See Stenberg v. Carhart, 530 U.S. 914, 994-95 (2000) (Thomas, J., dissenting). ..

The Court will refer to the procedure as D&X. In doing so, the Court does not suggest either that the Act narrowly defines the term "partial-birth abortion" so as to prohibit only D&X or that the Act is so broad as to encompass D&E. …Viability "is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb." Planned Parenthood v. Casey, 505 U.S. 833, 870 (1992) (plurality opinion). A fetus is generally viable between twenty-three and twenty-four weeks from the first day of the woman's last menstrual period …

In terms of potential civil liability, the Act allows the putative "father" of the fetus (if he is married to the woman) or the putative "maternal grandparents of the fetus" (if the woman has not attained the age of eighteen) to "obtain appropriate relief" in a civil action, "unless the pregnancy resulted from the plaintiff's criminal conduct or the plaintiff consented to the abortion." Id. § 1531(c)(1). Such relief may include: "(A) money damages for all injuries, psychological and physical, occasioned by the violation of [the Act]; and (B) statutory damages equal to three times the cost of the partial-birth abortion." Id. § 1531(c)(2). The Act permits a partial-birth abortion if it is necessary to preserve maternal life. The life exception states, "This subsection does not apply to a partial-birth abortion that is necessary to save the life of a 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." Id. § 1531(a). The Act bans the procedure in all other instances.

The Act does not include a health exception because Congress determined that partial-birth abortion is never medically necessary to preserve maternal health and, in fact, may pose serious health risks to the mother. Congress therefore concluded that a health exception was unnecessary and made several findings to this effect. In section 2(14) of the Act, Congress found that "partial-birth abortion is never medically indicated to preserve the health of the mother; is in fact unrecognized as a valid abortion procedure by the mainstream medical community; [and] poses additional health risks to the mother." § 2(14)(O), Pub. L. No. 108-105, 117 Stat. 1201, 1206. Congress also concluded that there is "no credible medical evidence that partial-birth abortions are safe or are safer than other abortion . The mother of the aborted fetus is explicitly exempted from prosecution. See 18 U.S.C. § 1531(e).

The President signed the Act into law on November 5, 2003, and it went into effect at 12:01 a.m. the following day. See 18 U.S.C. § 1531(a) (stating that the Act would take effect one day after enactment).

B. Procedural History of This Case

Plaintiffs initiated this action on November 4, 2003, asserting several constitutional defects…Plaintiffs contend that the Act violates the Fifth Amendment's Due Process Clause by failing to provide a health exception from its proscription of partial-birth abortion. Plaintiffs also challenge the Act on the grounds that it: (1) contains an inadequate life exception; (2) defines the term "partial-birth abortion" so broadly as to also ban D&E and induction termination —other methods of second trimester abortion involving vaginal delivery of the fetus—and thus imposes an undue burden on a woman's right to reproductive choice; (3) is impermissibly vague in defining the banned conduct; (4) fails to serve a legitimate state interest; and (5) violates women's right to equal protection guaranteed by the Fifth Amendment. If Plaintiffs are correct on any one of these grounds, the Act is unconstitutional and must be permanently enjoined. See, e.g., Stenberg v. Carhart, 530 U.S. 930, 937, 946 (2000); Planned Parenthood Fed'n of Am. v. Ashcroft, 320 F. Supp. 2d 957, 960, 1034-35 (N.D. Cal. 2004).

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C. The Congressional Record

> [The court here summarizes the testimony gathered at congressional hearings. The testimony, omitted here, is available in the full text of the *National Abortion Federal v. Ashcroft* opinion at the web site for the NY Federal District Ct.]

D. Stenberg v. Carhart

As stated above, the Supreme Court passed on the constitutionality of Nebraska's partial-birth abortion statute in 2000. Because of its importance to the resolution of this case, this Court describes in some detail the facts and majority, concurring, and dissenting opinions in Stenberg.

The plaintiff in the case was Dr. Leroy Carhart, an abortion-provider who had challenged a Nebraska statute which banned partial-birth abortion. After a trial, the district court held the statute unconstitutional. See Carhart v. Stenberg, 11 F. Supp. 2d 1099 (D.Neb. 1998). The Eighth Circuit affirmed. See Stenberg v. Carhart, 192 F.3d 1142 (8th Cir.1999). In a 5-4 decision, the Supreme Court applied its earlier ruling in

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) (plurality opinion), to hold that the statute was unconstitutional for two reasons: (1) it did not provide an exception when the procedure was necessary, in appropriate medical judgment, for the preservation of the health of the mother; and (2) it imposed an undue burden on a woman's ability to choose an abortion. Because this Court does not reach the undue burden question, it will confine its summary of Stenberg to the issue of a health exception.

1. The Nebraska Statute

The Nebraska statute read as follows: 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. (quoting Neb. Rev. Stat. Ann. § 28-328(1)). The statute defined "partial birth abortion" as "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." …The penalty section of the statute classified the prohibited conduct as a felony carrying a prison term of not more than twenty years, a fine of up to $25,000, and automatic revocation of a physician's license to practice medicine in the state.

2. The Majority Opinion

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(b) The Court's Legal Analysis

The majority's point of departure were the principles established in Casey. First, before fetal viability, "the woman has a right to choose to terminate her pregnancy." Casey, 505 U.S. at 870. Second, a law enacted to further a State's interest in fetal life is unconstitutional if it "imposes an undue burden on the woman's decision before fetal viability." Id. at 877. Third, "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life and health of the mother." Id. at 879 (quoting Roe v. Wade, 410 U.S. 113, 164-65 (1974)). It is the third of these principles that guided the Stenberg Court in striking down the Nebraska statute. According to the Court, because "a State may promote but not endanger a woman's health when it regulates the methods of abortion," any statute that regulates abortion must contain an exception when appropriate medical judgment believes it necessary to protect the mother's life or health. Stenberg, 530 U.S. at 931. The Court also rejected the argument that the state interests meant to be furthered by the statute eliminated the need for a health exception. Those interests were: to show concern for the life of the unborn, to prevent cruelty to partially born children, and to preserve the integrity of the medical profession. Id. The fact that these interests were different than the state interest in the potentiality of human life, which the plurality opinion in Casey held required a health exception even for post-viability abortions, see Casey, 505 U.S. at 879, did not alter the Court's analysis. In the Court words, "[W]e cannot see how the interest related differences could make any difference to the question at hand, namely the application of the 'health' requirement." Stenberg, 530 U.S. at 931. According to the majority, the district court record demonstrated that "significant medical authority

supports the proposition that in some circumstances, D & X would be the safest procedure." Id. at 932. The district court had found that D&X decreases the amount of necessary instrumentation, which: reduces operating time, blood loss and risk of infection; reduces complications from bony fragments; reduces instrument-inflicted damage to the uterus and cervix; prevents the most common causes of maternal mortality and eliminates the possibility of 'horrible complications' arising from retained fetal parts. Id. (quoting Carhart, D. Neb., 11 F. Supp. 2d at 1126). In objecting to the district court's findings, Nebraska offered eight arguments: …The Supreme Court held that these arguments did not belie the need for a health exception. The Court determined that the frequency of the procedure's use and the number of doctors who used it had little relevance. In the Court's view, "the State cannot prohibit a person from obtaining treatment simply by pointing out that most people do not need it." …The Supreme Court also concluded that, in both the district court record and amici submissions, there was evidence contradicting Nebraska's medically based arguments. …In addition, the Court agreed that there were no general medical studies documenting D&X's comparative safety…Thus, the Supreme Court found Nebraska's arguments "insufficient to demonstrate that Nebraska's law needs no health exception." Id. at 934. The Court based its conclusion on a confluence of evidentiary circumstances: (1) the district court's finding that D&X obviates health risks in some situations, (2) plausible record-based support for that finding, (3) "a division of opinion among some medical experts over whether D&X is generally safer," and (4) "an absence of controlled medical studies that would help answer these medical questions." …The majority found the lack of consensus among members of the medical community highly significant. The Court noted that "necessary" in the phrase "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother" does not mean absolutely necessary or require absolute proof of the procedure's necessity because "[m]edical treatments and procedures are often considered appropriate (or inappropriate) in light of estimated comparative health risks (and health benefits) in particular cases." …The Supreme Court emphasized that the disagreement among qualified experts about the safety and advantages of D&X favored the requirement of a health exception: Where a significant body of medical opinion believes that a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view, we cannot say that the presence of a different view by itself proves the contrary.

> [The court's review of the concurring and dissenting opinion in *Stenberg* are omitted here. All that follows concerns the NY case, not *Stenberg*.]

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E. Trial Experts [in the NY case]

> [The court's summary of the <u>medical</u> testimony in the trial of the NY case is omitted]

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I. Trial Testimony Regarding Congress's Factual Findings

1. Congress's Findings Regarding the Risks of "Partial-Birth Abortion"

Congress made specific factual findings regarding the risks of "partial-birth abortion" in section 2(14) of the Act. Congress found that "partial-birth abortion poses risks to the

health of a woman undergoing the procedure" and that "partial-birth abortion is never medically indicated to preserve the health of the mother; is in fact unrecognized as a valid abortion procedure by the mainstream medical community; [and] poses additional health risks to the mother." Act, §§ 2(14)(A), (O), 117 Stat. at 1204, 1206. Plaintiffs offered testimony that Congress's findings are either patently false or were reached despite a division of medical opinion on the matter. The Government argues that obstetricians and gynecologists offered their views to Congress on the medical necessity of the procedure and that Congress was justified in relying on this testimony to arrive at its factual findings. Congress found that D&X posed the following risks to women: (1) "an increase in a woman's risk of suffering from cervical incompetence, a result of cervical dilation making it difficult or impossible for a woman to successfully carry a subsequent pregnancy to term"; (2) "an increased risk of uterine rupture, abruption, amniotic fluid embolus, and trauma to the uterus as a result of converting the child to a footling breech position"; and (3) "a risk of lacerations and secondary hemorrhaging due to the doctor blindly forcing a sharp instrument into the base of the unborn child's skull . . . which could result in severe bleeding." Id. § 2(14)(A), 117 Stat. at 1204.

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> [The court's description of competing trial arguments about whether Congress's "findings" are scientifically accurate is omitted. Below is the court's conclusion about those arguments]

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II. FINDINGS OF FACT

The Court finds that the testimony at trial and before Congress establishes that D&X is a gruesome, brutal, barbaric, and uncivilized medical procedure. Dr. Anand's testimony, which went unrebutted by Plaintiffs, is credible evidence that D&X abortions subject fetuses to severe pain. Notwithstanding this evidence, some of Plaintiffs' experts testified that fetal pain does not concern them, and that some do not convey to their patients that their fetuses may undergo severe pain during a D&X. Additionally, some of Plaintiffs's experts do not make full disclosures to women about what D&X entails. Furthermore, the Government's expert witnesses reasonably and effectively refuted Plaintiffs' proffered bases for the opinion that D&X has safety advantages over other second-trimester abortion procedures. The Government's experts, especially Dr. Clark, demonstrated that some of Plaintiffs' reasons necessitating D&X are incoherent; other reasons were shown to be merely theoretical. …In no case involving these or other maternal heath conditions could Plaintiffs point to a specific patient or actual circumstance in which D&X was necessary to protect a woman's health.

The testimony also demonstrated that many of the purported safety advantages of D&X are only theoretical. …After hearing all of the evidence, as well as considering the record before Congress, the Court does not believe that many of Plaintiffs' purported reasons for why D&X is medically necessary are credible; rather they are theoretical or false…. Nevertheless, the Court also finds that a significant body of medical opinion—consisting of physicians who expressed their views at trial and before Congress, and medical organizations representing experts in the field—holds that D&E has safety advantages over induction and that D&X has some safety advantages (however

hypothetical and unsubstantiated by scientific evidence) over D&E for some women in some circumstances.

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[details of inconsistent medical testimony omitted]

The Court also finds that Congress did not hold extensive hearings, nor did it carefully consider the evidence before arriving at its findings. Congress only held two hearings after the Supreme Court issued its opinion in Stenberg. Those hearings were held before the 107th and 108th Congresses. Three physicians testified at those hearings, which lasted three hours, and only two of them were witnesses who had not previously testified before Congress regarding versions of the Act. In the eight years that Congress heard testimony regarding the Act, it held less than twenty-four hours of hearings and heard seven physicians testify live about the safety of D&X. This Court heard more evidence during its trial than Congress heard over the span of eight years. This Court also heard the testimony of more physicians regarding the safety of D&X than Congress did. Even the Government's own experts disagreed with almost all of Congress's factual findings.

The written record before Congress included statements from medical associations such as ACOG, AMWA, APHA, MMA, CMA, and ARHP expressing the organizations' belief that D&X has safety advantages over alternative procedures, while PHACT and AAPS supported the proposed ban. The written statements and letters that Congress received from physicians specializing in obstetrics and gynecology further evidence a division of medical opinion about the safety advantages of D&X.

Although the Court finds that the Government's experts offered testimony that was highly credible and reasoned, the Court cannot ignore that the evidence indicates a division of medical opinion exists about the necessity of D&X to preserve women's health. There is no consensus that D&X is never medically necessary, but there is a significant body of medical opinion that holds the contrary. The evidence indicates that the same disagreement among experts found by the Supreme Court in Stenberg existed throughout the time that Congress was considering the legislation, despite Congress's findings to the contrary.

III. CONCLUSIONS OF LAW

A. The Court Only Reaches the Health-Exception Issue

To decide this case, the Court need only reach the health-exception challenge. … The Act as a whole cannot be sustained because it does not provide for an exception to protect the health of the mother; addressing the other alleged constitutional defects is unnecessary to the resolution of this case. Therefore, this opinion will not address the alternative arguments that Plaintiffs have raised.

B. Level of Deference Owed to Congressional Findings

As a threshold matter, the Court must determine the appropriate level of deference owed to Congress's factual findings. The Government contends that the Court's "'sole obligation is to assure that, in formulating judgments, Congress has drawn reasonable inferences based on substantial evidence.'" Plaintiffs, on the other hand, argue that the

evidentiary standard established in Stenberg is incompatible with [such a] deferential standard.

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[Court's discussion of the abstract issue of how much deference courts should pay to Congressional "findings" omitted.]

While the plurality in *Casey* held that undue burden, and not strict scrutiny, was the test for evaluating the constitutionality of abortion regulations, it reaffirmed that there was a fundamental liberty right against unwarranted government interference in aborting a nonviable fetus. See 505 U.S. at 875-77. Such substantial deference to Congress's fact-findings would not comport with the Supreme Court's treatment of statutes burdening fundamental rights, whether the constitutional test is "the most exacting scrutiny," or undue burden.

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We know of no support . . . for the proposition that if the constitutionality of a statute depends in part on the existence of certain facts, a court may not review a legislature's judgment that the facts exist. If a legislature could make a statute constitutional simply by "finding" that black is white or freedom, slavery, judicial review would be an elaborate farce. At least since Marbury v. Madison . . . that has not been the law. Lamprecht v. FCC, 958 F.2d 382, 392 (D.C. Cir. 1992).

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These reasons make it highly doubtful that Congress's findings are entitled to the level of deference that the Government asserts. The standard of review that a court must employ when reviewing congressional findings of fact under the circumstances involved here, however, has not been established by a higher court. In this suit, it is Congress's factual findings and not its interpretation of the Constitution that is at odds with Supreme Court precedent. Rather than seek to confront a question not yet resolved by a higher court, this Court will apply the [more deferential]… standard because it concludes that, even under that standard, the Act is unconstitutional for lack of a health exception.

C. The Act Requires a Health Exception

The Supreme Court in *Stenberg* held that a statute which prohibits the performance of a particular abortion procedure must include an exception for circumstances in which the procedure is necessary, in appropriate medical judgment, to preserve a woman's life and health. See 530 U.S. at 938. This requirement is separate from the Court's conclusion that the government must not place an undue burden on a woman's right to choose a pre-viability abortion… "Since the law requires a health exception in order to validate even a postviability abortion regulation, it at a minimum requires the same in respect to previability regulation." Stenberg, 530 U.S. at 930. This Act, like Nebraska's statute struck down in *Stenberg*, makes no distinction between pre- and postviability abortions, thus "aggravat[ing] the constitutional problem presented."

The Government contends that the lack of a health exception does not make the Act unconstitutional if, looking at the congressional record supplemented by the trial testimony, the Court determines that Congress was reasonable in its finding that D&X is never medically necessary to protect a woman's health. *Stenberg* does not countenance that approach. Instead, the relevant inquiry is whether Congress reasonably determined, based on substantial evidence, that there is no significant body of medical opinion

believing the procedure to have safety advantages for some women. See Stenberg, 530 U.S. at 937. Under that standard, Congress's factfindings were not reasonable and based on substantial evidence.

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There is no persuasive textual, precedential, or principled argument suggesting that the states may not ban D&X without a health exception but that the federal government may. If there is a due process right to abortion, as the Supreme Court has held that there is, then the constitutional restrictions on regulating abortion apply equally to the federal government as to the states. The ultimate conclusion reached by Congress is that there exists a "moral, medical, and ethical consensus" that D&X "is never medically necessary and should be prohibited." Act, § 2(1), 117 Stat. at 1201. The congressional record itself undermines this finding. …Testimony adduced at trial bolsters this conclusion. Testimony of both Plaintiffs' and the Government's experts established that no consensus exists. …Likewise, Congress was unreasonable to conclude that there is "no credible medical evidence that partial birth abortions are . . . safer than other procedures." Act, § 2(14)(B), 117 Stat. at 1204. Congress had before it the same body of evidence that the Supreme Court deemed to amount to a "significant body of medical authority [that] believes D & X may bring with it greater safety for some patients." Stenberg, 530 U.S. at 937. Yet, Congress found this same body of evidence not credible…

In addition, an examination of the congressional record and testimony presented at trial demonstrates that several of Congress's other factual findings are unsupported. …

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The Government's other arguments, many of which echo congressional findings, also fail to save the Act. Indeed, most of its arguments were made by the state of Nebraska and rejected in *Stenberg*. …

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Thus, the Government's interest-based, medically based, and institutional competency arguments all fail to meaningfully distinguish the evidentiary circumstances present here from those that Stenberg held required a health exception to a ban on partial-birth abortion. The lack of a health exception also renders this Act unconstitutional.

IV. CONCLUSION

While Congress and lower courts may disagree with the Supreme Court's constitutional decisions, that does not free them from their constitutional duty to obey the Supreme Court's rulings. As Judge J. Michael Luttig of the Court of Appeals for the Fourth Circuit stated in a concurring opinion soon after the Supreme Court decided *Stenberg*:

> As a court of law, ours is neither to devise ways in which to circumvent the opinions of the Supreme Court nor to indulge delay in the full implementation of the Court's opinions. Rather, our responsibility is to follow faithfully its opinions, because that court is, by constitutional design, vested with the ultimate authority

to interpret the Constitution. Richmond Med. Ctr. for Women v. Gilmore, 219 F.3d 376, at 378 (4th Cir. 2000).

Congress shares that same responsibility. The Supreme Court in *Stenberg* informed us that this gruesome procedure may be outlawed only if there exists a medical consensus that there is no circumstance in which any women could potentially benefit from it. A division of medical opinion exists, according to *Stenberg*, according to this Court, and even according to the testimony on which Congress relied in passing this law. Such a division means that the Constitution requires a health exception. *Stenberg* obligates this Court and Congress to defer to the expressed medical opinion of a significant body of medical authority. While medical science and ideology are no more happy companions than *Roe* and its progeny have shown law and ideology to be, *Stenberg* remains the law of the land. Therefore, the Act is unconstitutional.

For the foregoing reasons, Plaintiffs' application for a permanent injunction is GRANTED. The Attorney General of the United States, along with his officers, agents, servants, employees, successors, and all others acting in concert or participation with them are permanently enjoined from enforcing the Act against Plaintiffs, their members, officers, agents, servants, and employees.

So Ordered: New York, New York August 26, 2004
Richard Conway Casey, U.S.D.J.