UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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NATIONAL ABORTION FEDERATION,
MARK I. EVANS, M.D.,
CAROLINE WESTHOFF, MD, MSC;
CASSING HAMMOND, MD,
MARK HELLER, MD,
TIMOTHY R.B. JOHNSON, MD,
STEPHEN CHASEN, MD,
GERSON WEISS, MD,
on behalf of themselves and
their patients,

Plaintiffs,

v. 03 Civ. 8695 (RCC)

JOHN ASHCROFT, in his official
capacity as Attorney General
of the U.S., along with his
officers, agents, servant,
employees, and successors
in office,

Defendants.

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New York, N.Y.
June 22, 2004
10:00 a.m.

Before:

HON. RICHARD CONWAY CASEY

District Judge

APPEARANCES

THE ROGER BALDWIN FOUNDATION OF THE ACLU, INC.
Attorneys for Plaintiffs

BY: LORIE A. CHAITEN

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(Trial resumed)
THE DEPUTY CLERK: Plaintiffs ready?
MR. HUT: Yes, sir. Plaintiffs are ready.
THE DEPUTY CLERK: Defendants ready?
MS. GOWAN: Yes, your Honor.
THE DEPUTY CLERK: Counsel, please identify yourselves for the record.
MR. HUT: Stephen Hut for the plaintiffs, your Honor.
MS. PARKER: Kimberly Parker for the plaintiffs.
MS. WIGMORE: Amy Wigmore for the plaintiffs.
MS. LIU: Mimi Lieu for the plaintiffs.
MS. CHAITEN: Lorie Chaiten for the plaintiffs.
MS. STERNBERG: Julie Sternberg for the plaintiffs.
THE COURT: Good morning to you all.
MS. GOWAN: Assistant United States Attorney Sheila Gowan for the defendant.
MR. LANE: Assistant United States Attorney Sean Lane for the defendant.
MR. PANTOJA: Assistant United States Attorney Joseph Pantoja for the defendant.
MS. WOLSTEIN: Assistant United States Attorney Elizabeth Wolstein for the defendant.
THE COURT: Good morning to you all.
All right, Mr. Hut. You may proceed.
MR. HUT: Thank you, your Honor, and may it please the

Court.

The evidence that this Court has heard over the course of the three-week trial in April shows two principal points and it shows them overwhelmingly.

First, the intact variation of dilation and evacuation or intact D&E is performed by responsible physicians because, in their view, it is a form of second trimester abortion that is safer for their patients than the alternatives. It is taught at leading medical schools across the nation and its safety has been confirmed by a now published peer-reviewed study.

On such an evidentiary showing Stenberg v. Carhart requires that the law be enjoined for want of health exception.

This Court recognizes much in its TRO order when it concluded that the plaintiffs were substantially likely to prevail on the merits. And, a fair reading of Stenberg really makes this, your Honor, an easy case on the evidence presented to the Court.

THE COURT: Mr. Hut, I wouldn't try and interpret the Court's granting of a TRO unless I said so.

But before you go any further, let me ask you, who bears the burden of demonstrating that the act must include a health exception?

MR. HUT: I don't know that the cases speak directly to that, your Honor, but I am prepared to assume for purposes

of the argument and going forward today that we do. But I think we have.

Now, in addition to the evidence bearing on health exception and despite the linguistic contortions performed by the government in its proposed findings, the language of --

THE COURT: Did Congress' factual findings satisfy the burden for the government?

MR. HUT: No, they do not, your Honor, for a variety of reasons that I can elaborate here or later at such time as I was planning to get there.

THE COURT: It is your position that you, the plaintiffs, have the burden.

All right, go ahead.

MR. HUT: As I said, I am prepared to assume that burden for today because I think we amply meet it for the reasons that I will show to the Court.

The language of the statute that is before the Court, and this is the second language that I will show later today to the second that it can be understood at all is so wrong as to reach procedures performed in more than 99 percent of second trimester abortions. These include not just intact D&E but also dismemberment D&E and even induction abortions. And the Act reaches those procedures whether they are used for induced abortion or to treat spontaneous abortion or miscarriage.

Accordingly, the ban places an undue burden on a

woman's right to reproductive autonomy and is void for vagueness, is therefore unconstitutional on both those grounds as well.

Now, in a very important sense, Judge Casey, there were unheard-from actors in the trial. Those actors are the thousands of women who each year need safe second trimester abortions. The evidence shows --

THE COURT: They aren't before me, are they, Mr. Hut? It makes for a good argument but they're not before me, are they?

MR. HUT: They are not parties, but the plaintiffs --

THE COURT: Nor are there any evidence before the Court to that point.

MR. HUT: There is ample evidence as to why women seek second trimester abortions, your Honor, and the plaintiff's asserted rights of their --

THE COURT: The patients of those who testified. But when you start talking about women across the country, that is great rhetoric but it is not before this Court.

MR. HUT: I don't think I talked about women across the country, I talked about thousands of women who seek second trimester abortions.

THE COURT: Well, I won't be picky as to what the exact words were but just the same you are arguing things not before the Court.

MR. HUT: I think on the contrary they are most certainly before the Court. They are before the Court because plaintiffs assert the rights of themselves and the rights of their patients to safe treatment.

The evidence shows, and there is ample evidence to this point, your Honor, that women have abortions in midtrimester pregnancy for a variety of reasons and it is indisputably true, your Honor, that many of those reasons are born of circumstances that are undeniably tragic for what is an issue in many of the instances testified to by the plaintiffs in this courtroom and by the government's witnesses as well, is the unfortunate need to end wanted pregnancies.

The Court heard, for example, from Dr. Grunebaum and Dr. Chasen, each of whom practice maternal fetal medicine at New York Presbyterian and teach at Weil-Cornell Medical College. Each testified that some 95 percent of his patients are ending wanted pregnancies. They are usually doing so because their fetuses will be born with abnormal conditions. Many of those like trisomy 13 and 18 are incompatible with life or incompatible with life free from pain, or are ultimately a cruel and harrowing early death.

Often, as the Court has heard, these conditions are not diagnosed until the middle of the second trimester because even technological advances like amniocentesis, like ultrasound, do not permit earlier diagnosis.

Women seeking second trimester abortions are also sometimes doing so because they have to make the horribly wrenching choice between their own health endangered by conditions like heart disease, like cancer, and continuing a very much wanted pregnancy.

Can any of us imagine having to make such a decision?

To be sure --

THE COURT: The government wasn't able to test any of that, were they, because at every turn where medical records were sought, the medical institution resisted the production of the records, is that not right?

MR. HUT: That is not true, your Honor. The University of Michigan did not. It searched for records, it had no records.

It is true that New York --

THE COURT: That's because everything was done down the street at the clinic, isn't that correct?

MR. HUT: That's not entirely true, your Honor, I don't think. A good deal of --

THE COURT: Isn't that true, they don't do abortions at University of Michigan, they do them down the street I think at the Planned Parenthood clinic.

MR. HUT: They do do abortions at University of Michigan, they certainly do induction abortions at the University of Michigan.

The government's inquiry sought to inquire about that, there turned out to be no documents responsive to the demand. It is true that New York --

THE COURT: And the abortions done down the street by the testimony of Dr. Johnson, isn't that correct?

MR. HUT: Many or most surgical abortions are done down the street. That was not the sum and substance of the government's discovery. With respect to New York Presbyterian, it is true that they resisted. It is also true that before resolution of the matter --

THE COURT: Isn't it also true of Northwestern? Isn't it true of the situation in Philadelphia?

MR. HUT: It is true of the situation in Philadelphia. But with respect to the situation in Philadelphia, Dr. Evans did not testify so ultimately that became a moot point.

It is true with respect to Dr. Hammond at Northwestern. It is also true that the Seventh Circuit upheld the institution's right not to produce documents affirmed the quashing of the subpoena.

It is also true that with respect to New York Presbyterian, the government ultimately abandoned its subpoena despite --

THE COURT: They were resisted at every turn for the production of those records which is the only means anyone could have of checking the testimony of these doctors, isn't

that correct?
MR. HUT: No. No, it is hardly the only means.
One does not, when an expert comes into court and testifies on the basis of the enormity of his past medical experience typically --
THE COURT: Yes, but all the records are claimed to be hospital records, not the doctor's records. And the hospitals, in turn, availed themselves --
MR. HUT: That's quite true.
THE COURT: -- of the production on HIPAA and resisted production, therefore the government could not obtain the records, they could only obtain the oral testimony of the doctors, isn't that correct?
MR. HUT: It is true, your Honor, as with every expert that I know of who has testified on medical maters in a trial.
Parties are not able to delve behind expert testimony by forcing or requiring, pursuant to subpoena, that expert to cough up all of her or his background medical records that speak to their experience.
THE COURT: I don't know about that, Mr. Hut, but in my experience doesn't it also go to the fact that if anybody wanted to do a controlled study they couldn't get records? Isn't that so?
MR. HUT: No, they could get at the records if they submitted --

THE COURT: If the patients consented.

MR. HUT: Or if the institution's institutional review board reviewed the relevant submitted protocol and determined that the matter could go forward.

Controlled studies of surgical procedures.

THE COURT: And if they didn't it wouldn't go forward, correct?

MR. HUT: That's correct, your Honor.

THE COURT: Okay. Go ahead.

MR. HUT: Controlled studies of surgical procedures are extraordinarily difficult to accomplish.

There was testimony about the inability of the noted obstetrician gynecologist Dr. David Grimes to accomplish a controlled study with respect to comparison of D&E and induction because women refused to participate and to enroll and to consent to participation in the study.

It is very difficult to do, as Dr. Nuland testified, and it is also for reasons that I will elaborate on later, extraordinarily unnecessary in order to conclude that a particular procedure is safe or safer than other available alternatives.

Now, in addressing the health exception issue I want to set out my argument this way, your Honor. I want first to discuss three legal points. First is the Stenberg standard. I then want to address two ways in which the government misreads

and, I respectfully suggest, your Honor, confuses Stenberg and after that I will turn to summarizing the extensive evidence that the Court heard on the health issue to show that the correct application of Stenberg compels the conclusion that health exception is required.

And then I want finally to discuss the legal issue that concerns the appropriate treatment of Congressional findings concerning medical facts in light of Stenberg to which I made reference a moment ago in response to the Court's question.

Now, the question in this case is whether women in the circumstances I just described confronting the wrenching decision whether to terminate a pregnancy will have access to a procedure that their doctors regard as offering safety advantages for them. Or, are they consigned to alternative procedures that, while they may be safe, are viewed by their treating physicians as less safe either in general or for their particular condition?

THE COURT: Well, the only controlled study which we now have, correct, Dr. Chasen's study, basically comes down to the bottom line that both D&X and D&E are safe, correct?

MR. HUT: Absolutely.

THE COURT: And they're about even, according to Dr. Chasen's testimony, correct?

MR. HUT: Dr. Chasen's study and his testimony reflect

that the complication rate of both at about 5 percent to a statistical significance level of about 99.9 percent are the same.
THE COURT: Didn't all of your clients --
MR. HUT: However --
THE COURT: Just one second, please.
Before you go any further, when did you receive the Chasen study? When did you as lawyers for the plaintiff receive the Chasen study?
MR. HUT: I would have to check for sure, your Honor, but I think January, a couple of weeks --
THE COURT: When was it completed?
MR. HUT: That I don't know, your Honor. There is no testimony or evidence in the record on the subject.
THE COURT: I didn't ask the record, Mr. Hut, I'm asking you, you're their lawyer.
MR. HUT: I don't know.
THE COURT: When you filed the lawsuit in November --
MR. HUT: And I did not know at the time.
THE COURT: You never heard of the Chasen study.
MR. HUT: Correct, your Honor. You are absolutely right.
THE COURT: When did you find out about it?
MR. HUT: As I said a moment ago, your Honor, January.
THE COURT: So at that point in time, as of January of

this year, that study was in the possession of the plaintiffs, correct?

MR. HUT: At approximately a week or two later in the possession of the government.

THE COURT: But I am only trying to establish for the Court, Mr. Hut, the significance of when you received it. And that's January of this year, so it was in the possession of the plaintiffs as of that time, is that not correct?

MR. HUT: That's correct.

THE COURT: Okay, go ahead.

MR. HUT: The Supreme Court jurisprudence from Roe v. Wade and Planned Parenthood v. Casey and through Stenberg v. Carhart has steadfastly emphasized concern for maternal health as its touchstone.

Following that guidepost, Stenberg, as the Court observed in its summary judgment order, holds that where a significant body of medical opinion believes that a procedure may have safety benefits for some women in some circumstances and states the reasons for this belief, then the legislature cannot ban that procedure without an exception for women's health. The Act impermissibly fails to include such an exception and so the issue in this case is not whether in some platonic sense the intact D&E variation is safer than for some women in some circumstances, though we think that the evidence shows that it is. And it is not whether the plaintiffs have

proved by a preponderance of the evidence that intact D&E has safety advantages, those we think that we have. The question is, instead, as the Court recognized on summary judgment this --

THE COURT: I wish you would not be referring to what I recognized, Mr. Hut.

First of all, the Chasen study was not attached to your papers for your application of the temporary restraining order, was it?

MR. HUT: No, your Honor.

THE COURT: Okay. Then, I wouldn't draw any conclusions. I wouldn't keep referring to that. It was granted.

MR. HUT: Talking about the summary judgment order, your Honor, which was denied but in which the Court staked out, in clear terms, the operative controlling Stenberg test.

Now, with respect to the Chasen study, let me harken back to that, although I was going to speak to it later but you have raised it again, Dr. Chasen's study shows and he testified that the complication rates for the two groups are the same but what he testified to, what Dr. Grunebaum testified to and what Dr. Westhoff testified to -- Dr. Westhoff, I should say, by the way, is an epidemiologist. She holds a position at the Mailman School in Public Health at Columbia University. She was the only witness qualified to testify as an expert in epidemiology.

What the three witnesses testified to, your Honor, and what is significant, is the difference in gestational ages between the two cohorts that were examined.

THE COURT: I am stopping you there. Not one of them, other than Dr. Chasen -- even though the Chasen report was in the possession of the plaintiffs -- not any one of them testified concerning the Chasen report, did they?

MR. HUT: Absolutely they did, both of them. They testified in the way I am about to describe. Both Grunebaum and Dr. Westhoff said that what is significant about the Chasen study is the difference in gestational age of two cohorts.

The intact D&E group had average gestational age of 23 weeks. The dismemberment D&E group had an average gestational age of, I think it is between 20 and 21 weeks. That is an extraordinary difference. Fetuses grow substantially during that intervening two weeks. A fetus at the age of 23 weeks, testimony shows, is about 50 percent larger than in 21 weeks the procedure undertaken.

THE COURT: As to the risk of premature birth?

MR. HUT: I'm sorry, your Honor?

THE COURT: Pointed out in the Chasen study, did any of them testify to that?

MR. HUT: Surely Dr. Chasen --

THE COURT: Not talking about Dr. Chasen, the other doctors.

MR. HUT: No, they were not examined of that.
THE COURT: No, they were not but the report was in your hands.
MR. HUT: And in the government's hands.
THE COURT: Yes, but not asked by you. Did you not have an obligation to bring that out?
MR. HUT: Absolutely not and I will tell you why. Let me first make the point I was going to make about the complication rate, because it is a critical one.
The procedures at 23 weeks are much more difficult. There is much more risk attached to them so it would have been expected, as each of these doctors testified, that the complication rate would have been substantially higher for the intact D&E cohort. The fact, the proven fact that the complication rates were the same therefore shows, in the opinions of the three doctors that I have identified, that intact D&E is a far safer procedure. That's the question on the complication rate.
Let me address, since your Honor has raised it, the question of subsequent preterm delivery.
The point of the Chasen study, the point that Dr. Chasen makes in the study is that there is no statistical significance between the different occurrences in the two cohorts. None.
When there is no statistical significance, your Honor,

that means, as Dr. Howell explained on rebuttal, there is no scientific significance, none.

THE COURT: I noticed in your rebuttal you didn't -- you called Dr. Howell, you didn't call Dr. Chasen. You didn't call the coauthor of the report. You didn't call the peer reviewer. You called a doctor who is not even an obstetrician gynecologist, is that not true?

MR. HUT: It is absolutely true, your Honor.

Dr. Howell is --

THE COURT: I know what he is but he is not any of those things.

MR. HUT: No. All he does is run the scientific and medical research program at the University of Michigan.

THE COURT: He is an administrator.

MR. HUT: No. He is an expert, a qualified expert that the Court recognized as such in the interpretation of scientific studies.

THE COURT: But he isn't an obstetrician or gynecologist and had nothing to do with that report.

MR. HUT: And it didn't matter whether he did or not.

THE COURT: Well, that's your position.

MR. HUT: That is absolutely my position and let me explain it, your Honor. It didn't matter because the sole purpose of his testimony was to make clear on the record and to the Court the concepts of statistical significance and why,

when there is no statistical significance there is no scientific significance.

And it is just laughable to hear such intellectual dishonesty as this Court heard from Dr. Clark on the other proposition. That man purported to be shocked -- shocked -- by what he saw in terms of the statistical disparity with respect to preterm delivery.

THE COURT: And you weren't?

MR. HUT: I was not that shocked, your Honor. It was about as real as the shock expressed by Captain Louis Renault in Casablanca upon discovering that there was gambling going on in Rick's Cafe. There was simply no basis for that shock.

THE COURT: Please.

MR. HUT: And there was no basis for the worry because that man --

THE COURT: According to you?

MR. HUT: According to me, according to Dr. Howell and the evidence you heard because that man knows. He knows --

THE COURT: Would it have been much weightier had you called a coauthor?

MR. HUT: Not to testify ---

THE COURT: If you had called a peer reviewer who was an obstetrician gynecologist?

MR. HUT: Well, in the first place, your Honor --

THE COURT: Who had personal knowledge of the study?

MR. HUT: There is testimony on the record from Dr. Chasen about the insignificance of the point.

THE COURT: Well, you laugh at Dr. Clark, Mr. Hut, but according to the record which I reviewed, he appears to be the most qualified of any witness called in the entire trial, more credentials than anybody who took that stand.

MR. HUT: I beg to differ, your Honor. On the contrary, among other things he has performed at most a dozen surgical abortions.

THE COURT: Well, as long as you bring that up, do you think that no one is qualified to testify concerning abortion unless they perform them?

MR. HUT: I think that nobody is as qualified to testify --

THE COURT: Does that mean that a pathologist isn't qualified to testify in a murder trial because he has never committed a murder?

I mean, that is a little absurd, isn't it, Mr. Hut? You laced the papers with that statement that every witness, they haven't performed an abortion so therefore they aren't qualified to talk about the subject.

MR. HUT: The proposition you asserted, your Honor, is absolutely true, but it has nothing to do with the proposition here. We are not talking about testimony about murder, your Honor, we are talking about testimony concerning surgical and

medical procedures, as to which and I would beg to say, that those who perform them on a daily basis are more qualified to testify as even Dr. Lockwood agreed, that than those who do not.

So, with respect to Dr. Clark, my submission to you is that on the subject of the --

THE COURT: One of the experts called in the original Supreme Court case, as I read Stenberg, doesn't even have credentials to practice at any hospital, that being Dr. Carhart himself. Isn't that a fact?

MR. HUT: I have no idea what Dr. Carhart's credentials are.

THE COURT: If you read that in the Supreme Court opinion -- I assume you read that before you came to court?

MR. HUT: I have read it many, many times.

THE COURT: And do they not say that in the opinion, that he does not have privileges at any hospital, he performs his service at a clinic? Isn't that true?

MR. HUT: He may very well do that.

THE COURT: It is in the opinion. Mr. Hut, please don't play games with me. Do you deny that it is in the opinion?

MR. HUT: No. I don't remember, your Honor.

THE COURT: Go ahead. Go on.

MR. HUT: But it hardly matters.

You heard from nine or 10 doctors on the plaintiff's side, each of whom are privileged to perform their medical arts at the most distinguished hospitals in the country.

My submission to you, with respect to Dr. Clark is, to put it bluntly he lied to the Court. He told you that just as there is only -- as there is as high as a 30 percent likelihood that the difference in cohorts with respect to subsequent preterm delivery resulted by random chance that there is a 70 percent likelihood that it didn't. That is just bunk. It is just wrong. It is wrong for the reasons that Dr. Howell said.

THE COURT: Wouldn't it have been more meaningful if what you say is true if you had the author or his coauthor or his peer come and say that as an obstetrician gynecologist?

MR. HUT: Two answers to that, your Honor. No and, we did. We had it in the direct examination and on cross-examination for Dr. Chasen.

THE COURT: Mr. Hut, Dr. Clark hadn't testified to that point.

Go ahead. Move on.

MR. HUT: The question on the health exception then is whether the evidence shows that a significant body of responsible physicians practice in and who are familiar with the area of medicine believe that intact D&E is safer for some women and whether that belief is founded on reason.

If plaintiffs have shown that there is a reasonable

debate among a substantial number of responsible physicians knowledgeable about abortion then we have prove what we are required to prove under Stenberg. If so, the ban must be struck down beyond any question we have.

Now, to be sure, the Roe case against Stenberg all say that a health exception is required whenever the banned procedure is, "necessary and appropriate medical judgment," to preserve maternal life or health.

The government here proposes findings constructed on the notion that what this means is that so long as there exists some other medical procedure that can terminate a pregnancy, then a D&E involving intact extraction is not medically necessary.

The logic of the government's position would justify a ban on any abortion procedure whenever a hysterotomy were available even though the government, to be sure, does not press the logic that far.

Instead, the government posits that for many -- but as I shall show, not all -- for many women induction or D&E with dismemberment are available and safe procedures or second trimester abortions. This is the constant refrain of the government's description of its evidence. It talks about acute fatty liver pregnancy, for example, it says D&E or medical abortion would be appropriate. The same for cancer, same for heart disease and on and on.

So, the government argues that a procedure may be banned so long as it is not the only option to preserve maternal health.

THE COURT: Not the only option. Chasen's study, albeit witnesses question asking the sufficiency of the power of the study. It does point out that they're equal as far as risk, the D&E and the D&X, and it does reflect the possibility, again maybe under power, but risks to a woman in premature births, does it not?

MR. HUT: No, it does not, to either of those. It certainly does not to the second.

THE COURT: Well, witnesses testified that it did and if so, do you maintain there is no obligation on the doctor in the interest of full disclosure and consent to a woman that they have to report that too, the reports of that controlled study?

MR. HUT: In describing the alternatives between dismemberment D&E?

THE COURT: Yes.

MR. HUT: And in fact D&E?

THE COURT: When you sit down with a woman and she is considering an abortion, isn't the obligation of a physician, the only controlled study out there, to tell her the findings? I don't say every line every word, but the findings of that only existing controlled report and study?

MR. HUT: There is certainly no obligation to report the results which are not findings, I don't believe the purported data points --

THE COURT: They don't have an obligation to tell them while setting forth their options?

MR. HUT: I'm sorry, I did not finish. They don't have an obligation with respect to data that the authors' studies and people who testified in this courtroom say are statistically insignificant. Those are not findings.

THE COURT: Dr. Howell did. I didn't hear one obstetrician say it was insignificant.

MR. HUT: The report, the study says so, your Honor, and there is certainly no obligation to disclose those.

The question of informed consent and disclosure.

THE COURT: How can you give informed consent if you don't tell them, Mr. Hut that -- aren't we putting, as you started at the opening, aren't we putting thousands of women and their babies at risk if we don't have an obligation to tell women who are considering abortion?

MR. HUT: Absolutely not, your Honor, because there is nothing to tell with respect to the results as to preterm delivery. Those results are statistically insignificant.

And of course there is one other point, a point that Dr. Clark neglected to tell the Court until it was brought out on cross-examination; that is that the women in the intact D&E

cohort were at substantially greater risk for subsequent preterm delivery than were the counter-parts in the dismemberment D&E cohort.

THE COURT: You have that backwards. It was your client's report. You bring out anything you want. You didn't question or -- your colleague questioned Dr. Clark about it but you had the obligation to bring that out.

MR. HUT: I don't think we had any obligation to bring anything out with respect to statistically insignificant data. When the government brought it out --

THE COURT: And you don't think there is an obligation to tell women, when obtaining so-called informed consent?

MR. HUT: No.

THE COURT: You don't think there is an obligation, or there is one today to tell them of that report?

MR. HUT: To tell them about the data with respect to subsequent preterm delivery? No, because it is not statistically significant.

The whole concept of informed consent is a matter that the act at issue before this Court doesn't deal with. This is not an informed consent statute. I have not talked to and certainly did not examine --

THE COURT: I didn't say it was, Mr. Hut. I am just asking what your position was on it.

MR. HUT: And our position is clear. That those

particular findings don't have any scientific significance, so I hardly know what the woman who received informed consent about them would be expected to make of them.

Does a woman who is told these data but then told, oh, but by the way, those are data only to a P value of .3. What in God's name, your Honor, is she supposed to do with that piece of information?

I can't imagine a woman going through the agony of having made a decision to terminate a wanted pregnancy being exposed if a doctor, in his or her best judgment, decides it is a part of the informed consent process.

THE COURT: Have you explained it in terms that she can understand?

MR. HUT: No, because when he explains it or she explains it in terms of the woman can understand, the bottom line is that there is nothing to these data so I can't imagine what there is to explain.

To the point that the government makes that the banned procedure, in order to garner a health exception must be the only option, that misunderstands Stenberg which in fact addresses and undermines the government's point.

THE COURT: Let me stop you one more time and I will let you go on.

But referring to Stenberg, the Supreme Court opinion, the Supreme Court did not have, since it was only published

last month didn't have the Chasen report before it in the record they had, correct?
MR. HUT: That's true, your Honor.
THE COURT: And they didn't have before it the testimony of Dr. Anand concerning fetal pain, did it? He had hadn't testified in this case at that point.
MR. HUT: That's absolutely true.
THE COURT: So, it is a different record.
And in the Stenberg case itself, other than Dr. Carhart, was the only other doctor who testified on behalf of Dr. Carhart, Dr. Stubblefield.
MR. HUT: I'm not sure he was the only other one. I thought Dr. Doe testified in that case as well. I may be wrong about that.
THE COURT: That's why I am asking you.
MR. HUT: I will get to Dr. Anand's testimony.
THE COURT: I am sure you will but I just wanted to make sure that I didn't forget that I had it clear in my mind as to what the record was before the Supreme Court and what the record is here.
MR. HUT: Well, I am certain that Dr. Anand did not give testimony in the Stenberg trial.
THE COURT: Okay.
MR. HUT: I will double check with my colleagues concerning who, if anyone, other than Dr. Stubblefield.

THE COURT: The Court, meaning the District Court which the Supreme Court makes reference to on at least two if not more occasions, they did not have any findings concerning the Chasen report because it didn't exist and they didn't have any findings concerning Dr. Anand, correct?

MR. HUT: Correct.

THE COURT: Go ahead.

MR. HUT: Let me speak to the Chasen report in two respects, your Honor, however.

First, had they had the Chasen report it would have only fortified the decision that the Court in Stenberg made.

THE COURT: Oh, I wouldn't be so presumptuous as to say what happened in the minds of other people, Mr. Hut.

MR. HUT: Well, sometimes you have to be, your Honor.

THE COURT: You can say what you think but I don't think I would be so presumptuous.

It is sort of like your submission to me of findings of fact in which they are proposed by you but you phrased them on numerous occasions that "the Court finds." I didn't make any finding at all. It is a little presumptuous on your part. It is a style perhaps, you might wish to say.

MR. HUT: It is a style. It was one I was advised early on by my seniors to adopt. It is a style that numerous other Courts before whom I have been privileged to appear have not only welcomed but actually adopted. If it gave offense to

your Honor, I'm sorry.
THE COURT: If they adopted, that's fine, but if they don't.
MR. HUT: They are only proposed for your Honor's adoption. You, obviously I don't have to tell you, are free to do with them what you will.
THE COURT: Thank you.
MR. HUT: Back to the Stenberg point, however, which is the legal point and what to make of the suggestion that a banned procedure must be the only one in order to make it medically necessary. That is simply not what Stenberg says.
This is a legal point. I think it is quite divorced from the factual record but what the Stenberg Court says is that the word necessary -- and I am quoting from page 937 U.S., in phrase, necessary and appropriate medical judgment for the preservation of the life or health of the mother cannot refer to an absolute necessity.
THE COURT: That's based on the opinion of doctors that didn't have, aside from what your interpretation of the Chasen study is, it is a medical profession that did not have either Dr. Anand's testimony or that report, so we don't know what the medical interpretation would have been.
MR. HUT: The point here, your Honor, is that a banned procedure to require a health exception need not be the only medical option and so, for example, the fact that induction is

a safe option or dismemberment D&E is a safe option, neither of which proposition is disputed by the plaintiffs, simply doesn't address the question whether if, as we have shown, intact D&E is a safer option than the constitutional jurisprudence that the Supreme Court requires a health exception.

THE COURT: It is a riskier option because premature birth to the mother and the child --

MR. HUT: If a Court were to conclude that there is evidence by a preponderance from responsible medical authorities that it were riskier, then I suppose that a legislature could determine that a health exception is not required.

THE COURT: And you thought it was a draw. Should we allow it to continue at the risk of thousands of women out there? Maybe hundreds of thousands?

MR. HUT: You keep referring to the risk to women but there is no evidence of that because --

THE COURT: Well you don't interpret it that way but there was testimony. I am saying if it were, say, a study with more power and it was a fact.

MR. HUT: If it were a fact, if it showed risk --

THE COURT: Then the Court says that there is a draw in posing that question, a draw as to opinion.

MR. HUT: No. No. If there is a draw then the default, a tie goes to the doctor and the doctor's patient and

the doctor's good faith judgment in the safety of the procedure he recommends.

THE COURT: Should not the protection of women, Mr. Hut, a draw shouldn't go to them?

MR. HUT: No, because there is no --

THE COURT: What are they supposed to say, what the heck, let them try it?

MR. HUT: No, your Honor.

THE COURT: So there is a risk.

MR. HUT: By the very premises of the Court, if there is a draw that means that there is as much evidence suggesting that the procedure is safer and that by denying a woman and her doctor the liberty to choose the safer procedure, that that is how the legislature is placing a woman's health at risk and so, if there is a draw, the Supreme Court's jurisprudence, I think says, as Stenberg substantially does say, you resolve.

THE COURT: I don't think it says that at all. It says, there is a difference of opinion on the record they have.

MR. HUT: Yes, there is a difference of opinion on the record they have. The difference of opinion here clearly shows that there is a reasonable, at a minimum a reasonable debate amongst qualified doctors as to whether the intact D&E procedure provides to women safety advantages. And under those circumstances Stenberg says a health exception is required.

Let me come back, by the way, to Dr. Clark one more

time, because what the record shows with respect to the Clark testimony is that he ultimately conceded the statistical irrelevance and therefore the scientific irrelevance of the subsequent preterm delivery data and the government does not even make anything of those disparities, of that disparity in its proposed findings.

So, I think the Court would be on, respectfully, very, very shaky and thin ice if it were to conclude that that study shows anything at all that is worthwhile or valid on that subject.

Now, the government is also wrong when it proposes conclusions that would permit the Court to uphold the ban without health exception on the ground that whatever safety benefits may be offered by intact D&E, those safety benefits are now somehow "significant."

(Continued on next page)

MR. HUT: The government reads Stenberg to ask whether the ban procedure is, quote, significantly safer, unquote, than the alternative procedures, such that the ban would, quote, create significant health risks, unquote.

That formulation, your Honor, is not the Stenberg test. And it also ignores other cases in the Supreme Court's abortion jurisprudence. Even if it were the standard, the evidence shows that the ban would create an -- increased safety risks that are indeed significant.

First, focussing on Stenberg. The operative test, as articulated by the Court, which I have quoted above, does not contain the significant risk language. It refers to the belief of a significant body of medical opinion that a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view.

Later, in the same opinion, it refers to, quote, where medical or substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health. Casey requires a health exception. So there's nothing with respect to the significant language in the operative Stenberg test.

Second, Thornberg vs. American College of Obstetricians and Gynecologists emphatically and unambiguously rejects the government's formulation. There the statute under review permitted the banned procedure only when the

alternatives posed, quote, a significantly greater medical risk to the life or health of the pregnant woman, unquote. The Supreme Court ruled this significant risk formulation, the same as proposed here by the government, was not good enough. It was inadequate because the statute would require a, quote, trade-off, unquote -- the Court's language -- between a woman's health and fetal survival. It did not make a woman's health the paramount determinate as statutes were required to do.

Third, the evidence here meets a significant risk test in any event. For one thing, the theme that underlies some of the government's proposed findings, that many of the conditions that the evidence addresses are rare, that's of no consequence. The Courts have made short shrift of the notion that the statutory health exception can be dispensed with just because a particular condition that can be treated with the banned procedure is greater.

Stenberg itself, for example, 530 US 934, quote from Justice Breyer, the D&X is an infrequently used health procedure, but the health exception question is whether protecting a woman's health requires an exception for those infrequent occasions. A rarely used treatment might be necessary to treat a rarely occurring disease that could strike anyone. The State cannot prohibit a person from obtaining treatment simply by pointing out that most people do not need it.

Likewise, Chief Judge Posner writing in Hope Clinic vs. Illinois for the side that ultimately prevailed in the Supreme Court said, and I'm quoting, it is slight consolation to be told while the state has forbidden the optimal treatment of your medical problem, that problem happily is rare.

So, any permissible inquiry about significance must be qualitative: How serious the condition potentially avoided or more safely addressed by using the banned procedure is; and not the quantitative question: How many or how few people suffer from it. And once understood this way, it becomes clear that the Supreme Court has already decided the question.

If the Stenberg Court did apply a significant benefit or significant risk test, it found the risks in question significant. It is decided safety benefits offered by intact D&E are indeed significant, the very same safety benefits advocated, and I submit proved and demonstrated here.

THE COURT: But a woman's health is the paramount concern according to Stenberg, correct?

MR. HUT: Absolutely. And women's health means the safety of a woman undergoing a procedure. It means whether, as we have shown in numerous respects, an intact D&E is generally safer for most women. And I'll get to those reasons, and they are very substantial and they are very significant, in a moment.

Now, the Court heard much at trial about the

procedures available to a woman for a second trimester abortion. I had outlined points that I was going to make very briefly about those, but my time is running short.

THE COURT: Go right ahead.

MR. HUT: I think I'll just let the record speak for itself.

As the Court knows, those are essentially medical abortion or induction on the one hand, surgical abortion or D&E on the other.

THE COURT: I'd be happy to have you go into it.

MR. HUT: I'm just trying to allocate my time appropriately, your Honor.

THE COURT: I haven't restricted you on any tight times.

MR. HUT: I understand that, your Honor.

THE COURT: I'd be interested to hear that, because I was rather taken with the description, although you say it's not relevant here, of informed consent as to the options given by your clients when they described how the different procedures would be performed and what they entail. And I remember very clearly how witnesses testified in connection with, say, D&E, that they were -- they would disarticulate the fetus. And when I pressed them as to whether or not they told the woman considering this very, very personal and serious decision that what that meant was you were going to tear the

fetus limb from limb, they espoused that, no, they wouldn't do that. And there were witnesses who also testified that probably, as I recall it, the women might not understand the word disarticulation.

MR. HUT: And I don't think, in my recollection, that the witnesses ever said that they used that word that a woman would --

THE COURT: Some did, some didn't. But they didn't tell the witness in simple, unsugarcoated, if there were such a word, language that what you're doing is tearing the arms and legs off the baby.

MR. HUT: And it should be understood, your Honor -- let me address this point. I was --

THE COURT: So I'd be happy to have you go into the different procedures and what's necessary and the benefits.

MR. HUT: Very well.

THE COURT: And I think the same was true when they described what happens in a D&X or partial birth abortion, whatever your choice of the procedure's label; that they insert a pair of scissors in the base of the skull of the baby and then suck his brain out, or use such term as reducing the fetal skull, which means crushing it. All of these choice of terms are interesting to me.

MR. HUT: Well, this is not, of course, a statute that regulates the informed process, informed consent process or

that mandates any particular disclosures.
But on the subject of the testimony that was offered at trial, and I certainly do recall questions from the Court on the subject, I think what you heard is that there were a variety of different procedures. I think that what you heard is the informed consent is largely a matter of the individual judgment of the doctor based on his or her well informed assessment of his or her patient, and that patient --
THE COURT: Didn't it sound more, Mr. Hut, as if the doctors were informed and the women consented?
MR. HUT: I don't think so at all, your Honor. I think this is a very delicate issue as to which sophisticated, experienced doctors bring to bear years and years of judgment that we lawyers -- we lawyers cannot begin to appreciate.
THE COURT: It's not the doctor's consent, it's the woman's consent.
MR. HUT: And it's the doctors that understand the women that are patients and those patients --
THE COURT: Isn't that terribly patronizing when it's the woman who's making the decision?
MR. HUT: I think it's hardly patronizing or paternalistic in any way as compared to the arrogance of legislature that would dictate to a doctor and to a woman what safe procedure they may or may not be.
THE COURT: Those are legislators who are elected by

men and women of this country, are they not?
MR. HUT: Certainly they are, and they didn't speak to the informed consent process.
THE COURT: And are they not carrying out the will of their constituents, or supposedly, theoretically?
MR. HUT: Theoretically, of course.
THE COURT: So I assume when they do that, they're trying to carry out the desires, whereas the doctor, by not telling them in simple, clear language, I find the subject of informed consent a misnomer.
MR. HUT: Well, I don't think there is anything in the testimony here that would support that determination, your Honor. What you heard on the subject, for example, from Dr. Nuland on the first day of the trial, from many of the physicians who testified --
THE COURT: He never performed an abortion either, did he?
MR. HUT: Excuse me?
THE COURT: Go ahead.
MR. HUT: I missed the question, your Honor.
THE COURT: He's not an obstetrician, is he?
MR. HUT: No, he's not. He's a surgeon who's written on the history of surgery --
THE COURT: Yes, I recall.
MR. HUT: He won a Pulitzer Prize.

THE COURT: I know, you brought that up.
MR. HUT: I certainly hope we did, your Honor.
THE COURT: A lot. Didn't have anything to do with obstetrics, but it was interesting.
MR. HUT: I think it does qualify the quality of the judgments that he brings to bear on his speciality in the history of medicine.
But in any event, the specific judgment --
THE COURT: I think in the old days they'd call that a stage-setter.
Go ahead.
MR. HUT: I hope it was.
The specific judgment of the physicians that you heard varies substantially. For example, you heard from Dr. Grunebaum. He said that he tells the patient everything, including each and every graphic detail. I believe you asked him about the scissors. I believe you asked him in terms of limb from limb, and I think he told you he used those words. Others don't do that by their own candid admission.
Dr. Lockwood, the government's expert, the first one that they led off with, told you that he believed that from an ethical perspective, the greater harm to the patient, unless that patient specifically asked, would be to disclose what he described as the graphic details. That's his language, not mine.

However the Court may see the relevance of informed consent disclosures, however, there is no legal basis for sustaining the Act as constitutional based on what the Court may perceive to be deficient disclosures by doctors.

Let me now come back to the procedures we're talking about here. Why, for example, do doctors perform D&Es at all? Why don't they instead use inductions? Two broad possibilities were advanced at the trial: Either the doctors work in consultation with their patients to decide what procedure is best, given the patient's circumstances, the safety of the procedure, the physician's expertise; or they choose D&E because they can get more women in and out of the operating room faster and make more money doing so. To state these alternatives, of course, is to answer the question.

There is not an iota of evidence, none, that profit motive animates physician preference for D&E. The plaintiffs' witnesses who addressed the issue squarely refuted any such notion. And Dr. Lockwood, the only government witness to address the issue, and the only one to head a department that actually performed intact D&E, Dr. Lockwood treated the very idea with derision.

The record is replete with the actual and compelling reasons why patients in consultation with their physicians choose D&E over induction, and they do so by a factor of something like 19 to 1; 95 percent. Inductions, as many

witnesses acknowledge, require hospitalization; D&E doesn't. Inductions take from a low of 4 to as many as 48 hours or more. The surgical performance of the D&E as described by Dr. Westhoff takes 20 minutes or so.

THE COURT: But you throw out the statistic 19 to 1, but we have no basis of knowing whether those women who chose it were informed that the procedure requires dismemberment or tearing the fetus limb from limb. We don't know that, do we?

MR. HUT: We do not know --

THE COURT: And we don't know whether or not the doctor told them in compiling these 19-to-1 statistics that they were informed of the testimony of the study of Dr. Anand that if that fetus is beyond 20 weeks, that it has cognitive ability and feels pain. So we don't know when a woman made that choice 19 to 1, that she knew her baby was going to be torn limb from limb and could feel the pain of that procedure, do we, Mr. Hut?

MR. HUT: We don't know because the record does not tell us what the woman --

THE COURT: That's all I want to make sure that the record now tells us.

MR. HUT: Let me address, since your Honor has raised it a number of times, and let me take it up out of order, the testimony of Dr. Anand.

Dr. Anand acknowledged that no one could be sure that

fetuses do feel pain. Your Honor mentioned 20 weeks. That was not the testimony of Dr. Anand. The 20-week figure is from gestation, and I believe that the record reflects that, in fact, what Dr. Anand was talking about was as measured from the last menstrual period, as all of the other witnesses who testified spoke to.

Dr. Anand, of course, as you point out with Dr. Nuland, Dr. Anand is not a gynecologist. Dr. Anand testified that the actual gestational age about which he was offering his opinion that fetuses might at that age feel pain was 22 weeks, LMP. Dr. Anand --

THE COURT: Going back we still don't know if the woman 19 to 1 who chose the procedure was told this.

MR. HUT: No, and what would the woman be told? That there are doctors who think that after 22 weeks, although acknowledging that we cannot be sure that technology does not permit us the sophistication to know, that there is some possibility, some theoretical basis of thinking the fetus can feel --

THE COURT: Mr. Hut, no one can see pain, can we?

MR. HUT: I think people actually can.

THE COURT: You can't see -- you can see reaction to pain, can't you, but you can't see pain.

MR. HUT: I don't know whether there are not internal measurements.

THE COURT: Not even a human being, just talking in terms of a baby or fetus.
MR. HUT: I don't know, your Honor.
THE COURT: You don't know --
MR. HUT: I would not be at all surprised to learn that there may be ways of imaging nerve or neuron reactions.
THE COURT: Do you know of any?
MR. HUT: I certainly do not, and I haven't investigated it, though it's a problem I worry about a lot.
THE COURT: When you have a headache, can you see it, Mr. Hut?
MR. HUT: Of course I cannot see it, but I don't know if I --
THE COURT: You feel it, though, don't you?
MR. HUT: I don't know if I were hooked up to some machine that a doctor taking the relevant medical measurements could not see my headache.
THE COURT: This is a fetus in a woman's body, right?
MR. HUT: Of course.
THE COURT: Quite a different step.
But nonetheless, we don't know if that statistic that you threw out so glibly of choosing it 19 to 1, going back to the basic point, we don't know whether the woman who made the decision was aware of the details of the procedure or that it might cause fetal pain to the baby.

MR. HUT: Yes, that's true. But a couple of additional points here, your Honor, as long as we are here. One, you mentioned Dr. Anand's testimony about the cognitive ability of a fetus. I think that Dr. Anand was careful to admit he had no information at all whether fetuses experience the level of consciousness that is required in order for pain to be experienced.

Second, what he clearly did say is that -- and acknowledged is that if there is any pain felt by a fetus at 22 weeks LMP or beyond, that pain would be much more severe in the procedure that your Honor was just now addressing; that is, the dismemberment D&E, much more severe than it would be in an intact D&E. He also said --

THE COURT: But also that maybe as you're doing a D&X, could feel the pain of the scissors being inserted.

MR. HUT: Yes.

THE COURT: One might be more severe than the other, but he could feel it. And in that instance he's experiencing the pain in a different context.

MR. HUT: So -- on the doctor's supposition and hypothesis, but what rationality could there possibly be to a procedure that is designed supposedly to alleviate some hypothetical fetal pain that it would, in fact, drive doctors and their patients to a procedure that imposes more severe pain by the acknowledgement of the government's own expert? That

cannot make rational sense. It cannot be a Constitutional justification for a ban like this. Not only did Dr. Anand acknowledge and admit that a dismemberment D&E would create more severe pain for a fetus on the hypothetical assumption --

THE COURT: An induction would cause less, right?

MR. HUT: No, on the contrary. He did not say. He did not make a comparison between induction and D&E.

THE COURT: He said there was a possibility of it, did he not?

MR. HUT: I don't know that he did say that. He acknowledged that induction, which of course is the expulsion of the fetus through forceful titanic contractions, and which --

THE COURT: Same ones that occur in child birth, right?

MR. HUT: No. At the second trimester they are more severe. That's the clear and unrefuted testimony of the witnesses you heard, that that asphyxiation and that contraction process causes and imposes great pain, or pain certainly, on the fetus. I don't think he was asked to make a comparison between the level of pain in an induction and a D&E intact or by dismemberment. But induction-caused pain led to the cytocidal agents --

THE COURT: An injection with an agent that would kill it before the expulsion, correct?

MR. HUT: That, too, yes. And he acknowledged that that, too, would cause pain, the administration of the injection.

THE COURT: A pin prick.

MR. HUT: I don't think he described it that way. And I don't -- frankly, I've never had a KCI injection in my heart; I hope I never do. So I don't know, I don't think anybody does.

On the subject of induction of fetal demise, let me say this: I think the whole question of fetal demise in this case shows that what Congress purports to say about its concern for the health of a woman is just simply a phoney.

Here's what Congress has said: We worry about cervical incompetence. Well, there is no testimony that there is any rational basis for any such concern. There are no controlled studies on the subject of controlled studies.

THE COURT: You're calling Congress' concern phoney?

MR. HUT: I am calling it phoney, and I will tell you why. And I am calling their concern about excessive dilation phoney.

And the reason it's phoney is because the way to avoid this ban, this ban that has been enacted for these supposed reasons, is to effect fetal demise seconds or moments before you perform the procedure, so that the same dilation, if accompanied by fetal demise, is going to take place. And it's

going to have the same consequences, whether or not there is fetal demise, only in one circumstance the doctor will not have violated the statute and in the other he will. That, to me, is crystal clear evidence that Congress and the congressional manifestation of concern about excess dilation makes no sense.

Likewise, internal podalic version, that's going to occur whether or not the doctor has induced fetal demise, and with the same medical consequences. We believe that it's perfectly clear, once again, there are no controlled studies and each of the witnesses who testified here, including the government's own witnesses, expressed the view that there were no support, or substantially no support for Congress' findings. But if there are problems with internal podalic version, those problems don't get eliminated because the government induces fetal demise. The same, the very same medical consequences will result on the assumption, unproven, untested and simply imagined that there are medical consequences.

Now, there are other reasons why women choose D&E over induction. Inductions, unlike D&E, carry the pain and the discomfort of labor. Dr. Clark acknowledged they are psychologically draining. Unlike labor at term, induction involves the labor and delivery process without the joy of live birth at its conclusion. They are even often performed, the testimony describes, on the labor floor, so that women undergoing abortions and grieving a dead fetus may be

surrounded by joyous mothers welcoming a healthy new-born. Now, to be sure this combination of factors is --

THE COURT: But this is a dead fetus that they ordered killed, correct?

MR. HUT: I certainly wouldn't describe it that way, your Honor, but it is certainly the dead fetus, and it was certainly the decision of the woman to cause the fetal death.

THE COURT: It didn't -- we aren't talking about where a fetus dies in the mother's womb without any interference or action by a physician. This is where a doctor performs an act that causes the death of the fetus, right?

MR. HUT: The doctor causes the death of the fetus, often a very much wanted one. If the suggestion is --

THE COURT: I didn't say that, but in this instance, this isn't where there's a stillbirth. This is where the doctor performs an abortion.

MR. HUT: Of course, your Honor, but it may be -- it is a fact, it may be an inconvenient fact but it is still a fact, that many of these dead fetuses, as you describe them, are wanted fetuses. So the cruelty that is involved in consigning the woman for the labor to have an induction --

THE COURT: Mr. Hut, please, don't talk through me. It was a mother who ordered the abortion, correct?

MR. HUT: Stipulated, your Honor.

THE COURT: All right.

MR. HUT: That does not -- but it begs the question, with all respect, your Honor, that does not make the process of going through an induction that could last up to a matter of days on the labor floor surrounded by happy mothers a prospect that I would willingly consign anyone to. And I don't think that constitutionally Congress can either.

Some women cannot have inductions even if they otherwise wanted to. Virtually all witnesses on both sides agree with this proposition. Women who have certain prior uterine scarring, for example, are usually advised not to have inductions. As plaintiffs -- excuse me. As plaintiffs' witnesses and as Drs. Lockwood and Sprang and Clark agree, that kind of scarring can result, for example, from Cesarean sections of which more than a million are performed each year, or they can result from uterine surgery like myomectomy or hysterectomy -- excuse me, hysterotomy.

The classic or vertical C-section scar is the one that places the woman at the greatest risk of uterine rupture caused by the force of contractions during subsequent labor regarding induction. And while the classic scar is not common, even Dr. Clark acknowledged that it results in 1 to 2 percent of all Cesareans.

And so the government's own evidence shows that from 10,000 to 20,000 women each year have Cesarean sections resulting in classic scars, making inductions considerably more

dangerous for them than D&E. That is a very, very large and each year self-replenishing pool of women for whom induction is contraindicated and for whom D&E is much preferred.

No one, your Honor, suggests that uterine scarring itself is a condition that will require an end to pregnancy. That and other circumstances similarly described by the government is assembling a straw mat. But if a woman with a scarred uterus needs a second trimester abortion, then the experts overwhelmingly agree that she should not have an induction.

Induction is, likewise, not advisable for a woman diagnosed with placenta previa, as the Court will remember as the condition in which the placenta seals off the cervix. It's a dangerous condition in which labor must be avoid and for which D&E is preferable. And women at increased risk of bleeding or infection ought not undergo induction, as Dr. Johnson, whose own hospital himself performs more inductions as D&Es, as he testified.

And contrary to the opinion you heard from Dr. Clark, the evidence shows that women at risk for bleeding can more easily undergo the relatively short surgery involved with D&E than they can with induction. They can do so because, as Drs. Westhoff and Hammond, from Western Medical School testified, for a short period of time drugs can be used that supply clotting capability in lieu of missing platelets, but such

drugs cannot be used through the entire potentially lengthy period required for induction, a procedure that itself and incontrovertibly involves a lot of bleeding.

There are other indications, of course, for which, in the view of numerous witnesses, inductions are absolutely or relatively contraindicated. Those are set out in our findings, paragraph 94, among others.

Finally, some inductions fail, and when they do, the doctor is required to perform a D&E in any case, and there is a very distinct possibility ranging as high as one in three that the placenta will not deliver by induction. And it will require surgical removal.

There is also a chance that the fetus itself will not deliver or become stuck and will have to be removed surgically. Thus, because of both patient preference and safety considerations, as I said earlier, more than 95 percent of women who undergo second trimester abortion choose D&E.

And because of that, your Honor, the availability of induction is no answer to a ban that reaches D&E. Period. The Supreme Court has unequivocally made that clear. As the Court held in Stenberg, if a ban reaches D&E, it places an undue burden on a woman's right to terminate her pregnancy, and it must fall, notwithstanding the availability of induction.

Now, it may well be that there is a debate in the medical community about whether a particular condition is a

contraindication for induction. Indeed, the trial evidence at times presents precisely such a debate.

But the point is not which doctor may be correct about which condition may be contraindicated; the point is that in medicine there may not be only one correct answer about which is better, which is safer for a particular maternal condition. Different doctors may have different judgments. The same condition may merit different treatment for different patients. In the words of Dr. Cook, this is why we are familiar with the phenomenon of seeking a second opinion.

And so long as reasonable, doctors must be given the leeway to recommend particular ways to terminate a pregnancy. So women must be allowed to choose D&E. And as between dismemberment D&E and intact D&E, there is widespread agreement among experts in D&E practice who testified in this courtroom that intact D&E is safer.

The plaintiffs and their experts who performed D&E first base their views on their own clinical experience. Among plaintiffs' witnesses, as we describe at length in our findings, that experience is extensive. Five of the plaintiffs' witnesses actually performed the intact D&E variation, and these and other among plaintiff's witnesses also have extensive experience with dismemberment D&Es.

That experience stands in sharp contrast to the four obstetrician gynecologists who testified for the government.

Among them they have never performed an intact D&E, except for Dr. Clark, who as I mentioned earlier has performed at most a dozen dismemberment D&Es. None of them has ever done a dismemberment D&E on a live fetus. Not only that, but except for Dr. Lockwood, who did converse at some length with a doctor he hired --

THE COURT: You persist in this rationale, but you have to have done it in order to be able to be capable of giving an expert opinion.

MR. HUT: No.

THE COURT: And I suggested to you before that a pathologist doesn't go out and commit murders but he's perfectly capable, or she is, of testifying as to what happened and what the cause of death was.

MR. HUT: No. What I suggest to your Honor is not that they are incapable, but that there are doctors, when they have performed the medical procedure or surgical procedure in question, who are more capable.

To the point on the pathologist, a pathologist or coroner make --

THE COURT: It may be that some of these doctors that testified for the government, I'm not going to argue with you but it's very possible their credentials are far superior to those who were plaintiffs in this action, even though they don't perform; but they are highly educated, highly trained,

highly experienced physicians in the field of obstetrics.
MR. HUT: Some are, some are not.
THE COURT: And you tried to put this barrier that they aren't capable. I don't know that that applies.
MR. HUT: I resist the characterization that they are not capable. I don't think I've said that. I don't think I've used that term. What I do say is that --
THE COURT: So you dismiss them, it would appear, out of hand because they don't perform. It's a nice way of getting rid of them, but I don't think it holds water.
MR. HUT: Well, I don't necessarily dismiss it out of hand. That's not my term. I do say that the weight of their testimony is far less than the weight of doctors who actually do the work in question, the work that is the subject of the lawsuit. They did not even, except for Dr. Lockwood, talk to any intact provider.
Dr. Lockwood, of course, did. He not only talked to the woman doctor that he hired at NYU to manage the abortion practice at that hospital and who did do intact D&Es during his chairmanship. They say that they read the Haskell and McMahon procedure, those are nine and eleven years old. And they are outdated.
And none of them ever saw an intact D&E performed --
THE COURT: But you didn't offer any proof that although they may be some years ago, that they're inaccurate or

erroneous. You offered no witness on fetal pain, did you? Isn't that a fact, Mr. Hut?
MR. HUT: We offered no witness -- did you say on fetal pain, your Honor?
THE COURT: Yes.
MR. HUT: That's correct. As I --
THE COURT: That's all I wanted to make sure, that I hadn't missed something.
MR. HUT: As our motion in limine makes clear, your Honor, as I hope I made clear a moment ago, we don't --
THE COURT: I ruled on that, but I asked you simply, did you offer any witness to contradict Dr. Anand? The answer is you're just saying it's all old. You aren't saying it's inaccurate, you're just saying that he did it some years ago.
MR. HUT: Well, I think -- let's divide those two things. We did not offer a witness in response to Dr. Anand because we did not think that Dr. Anand and the evidence that he offered was consequential or appropriate.
THE COURT: That's your judgment, but you didn't, is the basic bottom line.
MR. HUT: With respect to the Haskell and McMahon papers, each and every one of the doctors that testified, or at least the five that did, do intact D&Es. Currently I believe all of them do; that would be Dr. Westhoff, Dr. Grunebaum, Dr. Chasen, Dr. Hammond and Dr. Frederiksen. All of them

testified to the ways in quite some detail that they perform intact D&Es.

And I think the Court will find if it examines the testimony, and I don't have it available to me readily, that the ways in which they perform intact D&Es are markedly different from the ways Drs. Haskell and McMahon perform D&Es as described in their papers.

The intact D&E assessment of safety by the plaintiffs' witnesses is confirmed by the carefully considered views of their professional association, that is, the American College of Obstetricians and Gynecologists, or ACOG. Those views were first expressed in 1987.

THE COURT: I'm glad you brought that up. ACOG, the organization you just mentioned, American College of Obstetricians and Gynecologists, their policy papers is 1997, correct?

MR. HUT: And it's been reaffirmed twice in 2000 and 2002.

THE COURT: But that was their policy and they refused to testify in this case, correct, as did Dr. Carver. Mr. Hut, you're on the record as having told me they refused.

MR. HUT: Yes.

THE COURT: On more than one occasion.

MR. HUT: We asked both of them and they declined to come to New York.

THE COURT: Now, going back to their report, you also put into your papers that this organization represents 44,000, I believe, obstetricians?
MR. HUT: I believe that's the correct number, your Honor, yes.
THE COURT: Now, this particular policy that you referred to in 1997, as we found out in the course of the trial, was done by a panel, correct, and then submitted to the board for their approval?
MR. HUT: Correct. It was a panel of very well-credentialed physicians, some of whom were abortion --
THE COURT: We've never had introduced what the vote of the board was, did we?
MR. HUT: I don't believe we did, your Honor.
THE COURT: And I don't believe, as the testimony pointed out, there was never a vote of the 44,000 members, was there?
MR. HUT: Correct, as there never is with respect to the adoption of any policy --
THE COURT: I don't care whether there is or isn't. There wasn't.
MR. HUT: That's true.
THE COURT: So when you puff up your chest and say ACOG, 44,000 members, that isn't really what happened because it's a board of a limited number of, what was it, 12 or 15?

MR. HUT: I think the Court's recollection is correct on that score.
THE COURT: And they approved it at an unknown vote that could have been 75, for all we know.
MR. HUT: It could have, for all we know, but that certainly adds a good 7 more to that body of substantial medical opinion.
THE COURT: But in any event, when we introduce it in the papers and waved 44,000, that isn't quite accurate, is it?
MR. HUT: I think it is, your Honor, and I think --
THE COURT: Any organization that has 44,000 members -- but they were not consulted in the sense that they were asked to vote on it.
MR. HUT: And not in that sense, that's right, your Honor. There are two points to be made on that subject.
THE COURT: Well, they could come to a meeting and object if they wanted to, right?
MR. HUT: No. There are internal ways, there are ways through written communications, written communications through which they were --
THE COURT: But they weren't solicited in the form of a vote.
MR. HUT: That's true. And what Dr. Lockwood testified on the subject is that, given the representativeness and the qualifications of those physicians who comprise the

executive board of ACOG, he is certain that there was a substantial minority -- excuse me, majority, though he recognizes there may have been some dissenters, but that the dissenters were nothing like a majority.

THE COURT: He never testified he was present or had the results, did he?

MR. HUT: Present where, your Honor?

THE COURT: It's just his belief.

MR. HUT: Yes, his belief based on a fellow of the college --

THE COURT: And when the Supreme Court wrote in Stenberg and referenced ACOG several times, they didn't point out there that there was no vote of the organization. There was just the board voted on a report issued by a panel that we have no knowledge as to the makeup of the panel, no knowledge of the vote of the panel. We have no knowledge of the makeup of the board and no knowledge of the vote of the board. Is that not correct?

MR. HUT: I'm trying to remember whether Dr. Cain, who of course gave deposition testimony in this proceeding, and that's the basis, I think, for some of the Court's questions.

THE COURT: Yes.

MR. HUT: Whether she described --

THE COURT: Part of it.

MR. HUT: Whether she described the makeup of the

executive board. She may simply have described or characterized that board as made up of high --
THE COURT: I believe it was her belief also, correct?
MR. HUT: I think she knows the board members, that they are made up of very well-credentialed -- and she was the designated Rule 30(B)(6) deponent on the subjects, including the nature of the vote --
THE COURT: But she didn't know the vote and she didn't know how many of each character -- category, namely those opposed to abortion, those who provided abortion, those who were pro-choice --
MR. HUT: I don't know if there was any vote opposed to the adoption of the policy.
THE COURT: We don't know.
MR. HUT: What we --
THE COURT: That's the whole point, Mr. Hut, we don't know, except that it was approved.
MR. HUT: Yes, by a group that is representative, according to Dr. Lockwood, of the district and national composition of ACOG and comprised of very well-credentialed physicians --
THE COURT: But he never testified who they were or established that they were, in fact, representative. It was just his opinion, correct?
MR. HUT: That's true, but unless the Court is

prepared to assume somehow that ACOG was captured by some rogue group of abortion providers and their fellow travellers, I can't see there is any basis --

THE COURT: You're suggesting. I don't know if it's true. If you know that, I wish you'd tell me.

All I'm saying is we have to face what we have, and what we have is that the board approved the policy. But I don't want the record to be unclear that that was not based on a vote of the 44,000 members. So we should know exactly what its value is.

MR. HUT: Yes. Here's what I think we know: That this -- the policy statement was drafted by a well-credentialed task force. It was drafted and then submitted to and reviewed -- the task force reviewed it after surveying the relative literature and talking amongst themselves about some 25 or 30 instances. It was then submitted to the executive board. That is a representative body comprised also of capable, well-credentialed physicians.

THE COURT: If one person says it isn't, it was never tested, was it?

MR. HUT: How do you test it except on the examination of a particular witness? How would you have tested it if Dr. Cain had been in this courtroom, except on her testimony to the same end, as I assume?

THE COURT: I might have asked what basis she had to

make that conclusion --
MR. HUT: Indeed.
THE COURT: -- as she appeared here.
MR. HUT: And so could the litigant in this case, the government, done deposition testimony, and had they done so, it could have presented that testimony to the Court for consideration, but apparently it was not asked.
THE COURT: True.
MR. HUT: But what happened here is that this task force prepared this report. It was submitted to the executive board pursuant to the regular protocols of the board; that is a representative well-credentialed body, and the testimony --
THE COURT: You keep adding in these adjectives that really aren't established, "well-credentialed body." You know, you haven't established that. You have one person who says they believe it without identifying any of the people or proving that. I just wouldn't overstate it, Mr. Hut, what is really established here.
MR. HUT: I think I'm, respectfully, not overstating it, your Honor. But obviously the Court will make the findings and the Court will make its own determination.
THE COURT: That's why I ask the questions of you. I want to make very clear, very clear what is actually established here, what has been proven, what has not been proven and whether this record is different from Stenberg,

whether it's a different record, what evidence was here that was not there and what evidence perhaps that was in Stenberg now has been brought into question.

MR. HUT: I think the record --

THE COURT: That's why I ask the questions, Mr. Hut.

MR. HUT: Let me just say one more thing about ACOG and then talk about the record comparatively with Stenberg, and that is, once again, to identify Dr. Lockwood.

Dr. Lockwood is a fellow of the college. Dr. Lockwood has served on a number of, I believe, committees or task forces of the college. He is the dean of -- I'm sorry, a chair of the department at Yale medical school. He is former chair of the department of OB-GYN at NYU. He is, by all accounts, a well-credentialed, and by our candid acknowledgement, a well-credentialed OB-GYN.

The record here is somewhat different than it was in Stenberg. In Stenberg, as your Honor has described, there were relatively few testifying OB-GYNs. Here you had a very substantial number. I believe the credentials of doctors who spoke here on the basis of their clinical experience will speak for itself.

In short, and this was understandable because we're several years later, we know a lot more and we have a lot more information to put in the record. I think it is a far more fulsome record and far more fulsomely supports the safety

methods of the intact D&E than the record did in Stenberg, a record that was thought less sufficient by the Supreme Court because it reflected clearly there was a substantial or significant body of opinion that believed that there were safety benefits, and then he stated the reasons therefore.

So no one in this courtroom wants this record to be clearer, your Honor, I can assure you, than the plaintiffs do, because we think the clarity in the record overwhelmingly demonstrates the proposition I started out with at the outset, that this is really a easy case given the Stenberg rule.

(Continued on next page)

MR. HUT: Let me touch upon that but let me also raise a concern that I have. I have been at pains to respond to the Court's questions. I hope I have done so candidly and forthrightly. I apologize to the extent I have stepped over the Court in colloquy.

THE COURT: It happens, Mr. Hut. I am not going anywhere.

MR. HUT: Somehow, I didn't think so, your Honor.

I have not gotten through the entirety of my argument.

THE COURT: Mr. Hut, I am not cutting you off. Go right ahead and finish it. Please do. I want the benefit of everything you have to say. This is too important an issue and I, in no way, intend to treat it lightly. It is of the gravest importance to the people of this country and I think those involved should make every effort to have everything considered as seriously as we possibly can, so please do not concern yourself with time.

And if I have interrupted you, take a deep breath and head right back in.

MR. HUT: I apologize to the Court about giving the impression if I have been breathless at any point.

THE COURT: No, I am not suggesting that. I just say sometimes a good deep breath. You know how it is, sort of like time out between plays.

Go right ahead.

MR. HUT: I think a cleansing breath is I think what the yogas call it.

Let me touch upon the safety advantages that I think the evidence overwhelmingly shows here attached to the intact D&E method or variation.

First, fewer passes with the forceps with intact D&E means greater safety because there is less risk of uterine perforation and less risk of cervical laceration.

Second, no dismemberment means that bony feel fragments are avoided and thus those as well as a source of perforation and laceration.

Third, one of the most difficult aspects of the D&E is the extraction of the fetal head. That sometimes requires many extra instrument passes to extract. The intact variation of D&E avoids that problem if the head remains attached and it is extracted along with the rest of the fetal body.

Fourth, dismemberment risks, fetal parts being left behind in the uterus, and those can be a source of serious infection. Numerous experts testified that that risk is not eliminated by the use of ultrasound but with intact removal it is.

Fifth, providers who are familiar with both intact and dismemberment D&E agree that the intact variation can typically be completed in a shorter period of time. A shorter procedure has substantial patient safety benefits including less blood

loss, reduced risk of trauma, reduced infection and reduced exposure to anesthesia. And those risks may not be common in any absolute sense but when they occur they are, the testimony makes this clear beyond question, serious. Avoiding them unambiguously promotes women's health.

Six, as between the two variations of D&E abortion, the intact variation, if successful, will provide a substantially intact fetus and so intact D&E permits pathologic testing for fetal anomalies in ways that the dismemberment variation will not. Of course, while some anomalies are chromosomal and will not benefit for diagnostic purposes for intact fetus, others are structural and clearly do.

The Court heard from Dr. Baergen, professor of clinical pathology and laboratory medicine and chief of perinatal pathology at Cornell Weill Medical College, testified to the benefits that intact fetus can supply.

THE COURT: By the way, as a pathologist I don't think she had ever performed an abortion either, correct?

MR. HUT: Correct. She was here to testify about the benefits that an intact fetus can afford for pathological testing purposes.

THE COURT: I understand that.

MR. HUT: Seventh, and relatedly we have talked about this to this extent already, some women have terminated pregnancy because their fetus had anomalies and want to grieve,

to hold the fetus. The intact variation D&E allows this because the face and front of the fetal head remain intact as Dr. Westhoff and Grunebaum testified despite the suctioning of the intercranial contents.

THE COURT: Are you arguing that this is reason -- and I questioned this during the trial, Mr. Hut -- you are saying the argument, one of the reasons why D&X is better is because telling me that -- and doctors said this -- that women who have ordered, after full disclosure, have ordered the killing of their baby by reason of the D&X, that the doctor force a pair of scissors into the base of the skull of their baby and then suction off, suck out its brain whereas Dr. Frederiksen said she does it with her finger, pulls the brain out of the skull; these women want to hold that fetus they've ordered killed as part of the mourning process? Is that what you are telling me?

MR. HUT: That is absolutely what I am telling you, your Honor, and --

THE COURT: All right, I just want that record to be absolutely clear.

MR. HUT: As do I. This is an increasingly important aspect of the way pregnancy terminations are dealt with at major hospitals from which you heard attending physicians testify. They are increasingly focusing on facilitating the grieving process and intact D&E aids in that effort.

THE COURT: We aren't talking about a fetus that is a

stillborn fetus, this is one they've ordered killed.
MR. HUT: Yes. Under the circumstances that I described at the outset.
THE COURT: Okay.
MR. HUT: Now, in addition to the safety advantages to which I have just made reference, Judge Casey, which benefit really any and all women, there are also safety benefits to intact D&E testified to by the witnesses that will benefit women with particular health conditions.
Plaintiffs' experts, for example, agree that women at heightened risk for hemorrhage or infection will do better with intact D&E for it, as I just mentioned, reduces the risk of bleeding and sepsis.
Even more specifically, women with a condition called chorioamnionitis about which the Court heard -- and a plague for the court reporters -- regrettably, are particularly likely to do better with intact D&E.
Dr. Lockwood gave substantial testimony to this point and to the advantage that intact D&E presents for such a woman whose uterine wall may be, as he described it, damaged and thin from that condition.
Certain fetal anomalies are also more safely addressed with intact D&E than with the dismemberment variation. A fetus with severe hydrocepahly was one example testified to by a number of the witnesses in the courtroom.

There was, in addition to the live testimony that you heard in court, your Honor, deposition testimony that was read into the record and that supports these very same safety advantages, testimony supplied by Dr. Paul, Planned Parenthood Golding Gate, who was editor in chief on the leading text on abortion procedures; testimony by Dr. Creinin, professor of obstetrics, gynecology and reproductive science at Pittsburgh Medical School; and testimony as well from Dr. Joanna Cain, who testified on behalf of ACOG, is herself a director for the Center of Women's Health, Oregon Health Sciences University and who supported the very same safety benefits.

In addition to the testimony from the plaintiffs based on their own clinical experience, you have also heard testimony about the ACOG position and we have discussed that here this morning at great length and I will go through that again.

THE COURT: The witnesses who testified by way of deposition, were they supplied with copies of Dr. Chasen's study before their depositions were taken?

MR. HUT: I know that, although I am not sure it appears on the record, but I can assure the Court that Dr. Creinin was supplied a copy because I believe and I hope I am --

THE COURT: Before?

MR. HUT: Well before his deposition -- I hope I am at liberty to disclose it but I will disclose it in any event. He

was, we believe, one of the peer-reviewers for one of the journals of the Chasen study.

So, we are certain that he had --

THE COURT: The one that rejected his study or the one that accepted it?

MR. HUT: That I don't know.

THE COURT: Because his study was rejected by a journal first and then resubmitted to a second journal, isn't that a fact, as I recall the testimony?

MR. HUT: That is correct, your Honor. And I believe there is also testimony about the process of submission to journals that establishes that that is a very, very, very common process.

THE COURT: I am just saying it was rejected and then it was accepted by the second journal it was submitted to but we don't know which journal Dr. Creinin was reviewer for, is that correct?

MR. HUT: That is correct.

THE COURT: Okay. So it may be that Dr. Creinin rejected it, huh?

MR. HUT: I also know that he did not -- but I don't really want to testify, it is not appropriate for me to do so.

THE COURT: We don't know.

MR. HUT: I think the record, the testimony does make clear that at least in the belief of Dr. Chasen, that the

OB/GYN Journal turned the article down not for substantive reasons but for space purposes.

THE COURT: Again, we don't know and I don't think it is fair to put it in the record if it is the operation of people's minds that we haven't had here in Court to question. We don't know.

MR. HUT: That's true, so I suppose there is nothing to infer from the fact of that rejection.

Now, the Court also is aware of the statements in the record in the legislative history which is Plaintiff's Trial Exhibit 1 by the American Medical Women's Association with 10,000 women, physician and medical student members, and the American Public Health Association with 50,000 members, each of which speaks to the safety advantages for intact D&E.

THE COURT: Again, let me interrupt. Do we know whether any of those organizations were given copies of the Chasen report?

MR. HUT: I don't know, your Honor.

THE COURT: Do we know? I believe the testimony reflected, despite these enormous numbers and everything else, again, it was a board that issued these letters and policy statements without a vote of these large numbers of members, correct?

MR. HUT: Correct.

THE COURT: There is nothing in the record reflecting

50,000 or 12,000 or anything ever voted on these things but a majority of some board approved them.

MR. HUT: No, and I think we can assume from the record that there wasn't 50,000 or 10,000 storming the halls of Congress about this legislation either, but I think it is equally inferrible that --

THE COURT: If you are going to throw these numbers out, Mr. Hut, I think the record has to be clear, lest we will find it in a Supreme Court opinion that this organization of 44,000 or this organization of 50,000 endorsed this or that and that isn't what happened. For whatever it is worth the board approved it, fine. For whatever weight it should be given, fine. But I am just a little hesitant when people start throwing huge numbers around.

MR. HUT: I think your Honor is understating, respectfully, the significance of those actions. These are duly constituted governing bodies.

THE COURT: I didn't say they weren't duly constituted. I merely wanted to state exactly what it is worth.

MR. HUT: As do I, and they were appointed or elected.

THE COURT: Nothing more, nothing less.

MR. HUT: For the purpose of expressing, amongst other things, the views publicly of the organization and it is one of their purposes.

THE COURT: We don't know that.
MR. HUT: I think we do, your Honor.
THE COURT: That is going into the operation of the members' mind and we don't know that. They were elected to the board, they were given this power, they did --
MR. HUT: I believe there is testimony, I have not double checked it in the deposition transcripts, with respect to the powers of the boards of the organization.
THE COURT: But these could all be, as we have in courts today, 5/4 opinions. We don't know because it was never introduced.
MR. HUT: Correct, nor were the opinions or expression and views ever called back despite the fact that as we know there is an ACOG process for doing so.
THE COURT: Fine.
MR. HUT: Now, the Court heard also briefly --
THE COURT: Just, again, I want the record to be exactly what it is. No puffing, just what it is.
MR. HUT: I think I have been careful, I hope I have, not to puff. The numbers are what the numbers are. As Dr. Lockwood said, it is fair to --
THE COURT: I am not going to fault you, I want to make that record harsh. You are an advocate and you are doing what you should be doing and that's okay, but it is my job to try and cut through the facts and separate the wheat from the

chaff.
MR. HUT: Here is just another additional kernel of wheat. I have lobbed the kernel once before or perhaps twice before, let me do it again.
You have the informed view of Dr. Lockwood that he believes that the views of the ACOG board represent a majority of the views of the ACOG fellows so I think we can count 22,000 of one at a minimum.
THE COURT: Maybe. He is one anyway and again it is his opinion which was less than solid, but we will get into that and I will actually give you and your opponent an advance warning. I never was able to figure out why he was called as a government witness but, that being the case, it was done.
MR. HUT: We do rely on substantial portions of his testimony, your Honor.
THE COURT: Yes, I certainly have noticed that.
MR. HUT: You also heard --
THE COURT: I think you slipped him into the pile and they didn't see it. He has been your expert witness for years.
MR. HUT: I wish I had thought to be so clever, your Honor.
The American Medical Association, there has not been much mention of that that we do know that that statement that is in the legislative record as are all these others, by the way, offered not for the truth but merely for the fact that the

organization said what they said.
The AMA's decision-making is prudently the result of the decision-making process gone amuck. They hired or retained Booz Allen to investigate the AMA's process and Booz Allen determined that it was the least democratic, least systematic decision-making process.
But the AMA does not support the act here and it has, is on record as describing intact D&E as something that may minimize trauma to the uterine, cervix and other vital organs and may be preferred by some physicians.
THE COURT: And none of these groups have the Chasen study, correct?
MR. HUT: At the time of the statements that has to be so, your Honor, yes.
THE COURT: So, for whatever it is worth.
MR. HUT: There is other evidence that there is a significant body of medical opinion. Within the meaning of Stenberg we know that intact D&E is taught at leading medical schools -- NYU, Columbia, Cornell, Michigan, Northwestern. Albert Einstein.
We know that there are additional materials in the legislative history including the views of a number of other doctors experienced as abortion providers who have submitted written views to Congress and, in some cases, testified.
Defendants' own experts admit that there are

substantial number of second trimester abortion providers, the aforementioned Dr. Lockwood in comprising a responsible group of physicians, that is, Dr. Wattson Bowes retained by the government but not called to Court here by it for reasons that appear, from the record and to us, at least to be perfectly understandable.

By any measure, your Honor, there is, we suggest, a responsible debate among doctors and a significant body of medical evidence that believes that the intact D&E variation provides safety benefits to some patients and that is all that Stenberg requires.

We have talked about the Chasen study. That study, as you know, appeared in the American Journal of Obstetricians and Gynecology. That journal is one of the two leading journals on the subject in the area and so I'm not going to dwell at length on the construct of the study.

You also know, I am certain, that the only three very serious complications discerned the authors arose in the dismemberment cohort. The authors, however, do not ascribe statistical significance to that fact. They do not conclude this distribution itself proves the intact variation is safer and I suggest that it is equally appropriate to infer, as the government wrongly asks the Court to infer, that the less serious complication of cervical laceration which was in fact observed more frequently in the intact group will occur more

often with that variation. Again, no statistical significance ascribable to those numbers.

I have mentioned to the Court the significance that not only Dr. Chasen but also Dr. Westhoff and Dr. Grunebaum ascribed to the fact that the complication rate was the same even though the gestational age in the cohort made it very likely in their estimation that there should have been more complications with the intact group.

I have described the correct way to view the data points -- not findings, not conclusions -- reported in the Chasen study about the incidence of subsequent preterm delivery in the cohort undergoing intact D&E and the reason why that is without scientific significance including the fact --

THE COURT: Let me ask you one more time.

Assuming, as the government or certainly Dr. Clark, that the three-fold chance of having premature birth after D&X procedure, three-fold chance for woman consistent with Stenberg, is it incumbent as Stenberg says, the health of the woman is the primary concern that the Court must take this into consideration? Assuming it is correct three-fold, that this is a serious health threat?

MR. HUT: No, it is not.

THE COURT: If it is accurate, I said. Is that not a serious health threat to women?

MR. HUT: If it is statistically significant.

THE COURT: I said if it is accurate.

MR. HUT: It is accurate, your Honor. There is the numbers are the numbers and these are careful reputable scientists and they are reporting what they find.

THE COURT: And I know there is the attack, for lack of power, but say it was done with a larger group and the study held up, would that not be a serious threat to the health of women?

MR. HUT: No, your Honor, because the Stenberg test is not defeated by one set of data like this.

THE COURT: I didn't ask you Stenberg test, I asked you is it not a serious threat to the health of women and then we will move on to Stenberg.

MR. HUT: You know, I cannot speak to the seriousness of the health threat. I think that we know that preterm delivery is not a good thing and the risk --

THE COURT: It is bad, isn't it? Do you dispute that Dr. Clark says that it is one, if not the most, I think he said serious health threat in obstetrics and pediatrics today? That means the woman and the child? Do you dispute that statement?

MR. HUT: I have no basis to dispute it, your Honor. No.

THE COURT: Okay.

MR. HUT: So I am prepared to assume that it is bad. I am not prepared to assume that the premise is incorrect.

THE COURT: I understand. I postured the question if it were true. I understand.
MR. HUT: And I am not prepared to assume that it would have consequence, or Stenberg, which I thought was the departure point for the Court's question because Stenberg --
THE COURT: Did the Court not say that the primary concern was women's health?
MR. HUT: Yes, as determined by the opinion of a significant body of responsible physicians.
THE COURT: But he was dealing with a totally different record and no Chasen study, so we don't know what the Court might say to that, but.
MR. HUT: This Court --
THE COURT: Or the Court did.
MR. HUT: -- has had before it testimony from numbers of doctors, all of whom were familiar with the Chasen study and the plaintiffs' experts, including Dr. Westhoff, including Dr. Grunebaum, including Dr. Chasen and others, all stated that they believe, despite that familiarity and actually in large part because of their familiarity with the safety benefits reported in the Chasen study, that intact D&E provided greater safety to their patients.
That, I respectfully suggest, in addition to the testimony from the ACOG representative who reiterated that the views expressed in the ACOG policy statement in 1997 remain the

views of that of the college today.
THE COURT: Yes, but he didn't or she didn't, rather, have the report.
MR. HUT: There is no record in evidence to suggest --
THE COURT: Remember she didn't so we can't attach that to it. She wasn't confronted with it. I didn't know about it or I wasn't asked but she wasn't here.
That's why I encouraged you over and over again, as the government, to have them here in Court because maybe we could have had all of the answers but, alas, we have to deal with what we have.
MR. HUT: We did our best and the government was represented at deposition by very able counsel.
I want to spend a little time on the significant body standard in Stenberg and the government's rejoinder to the effect, as I understand it, that that really is not operative because Congress, according to the government, is free to reach conclusions about safety benefits of intact D&E contrary to what the Supreme Court said in Stenberg, and is that the Court, under that circumstance, must give substantial deference to the findings of Congress as supposedly mandated by the Supreme Court in the Turner cases.
I think the government misreads those cases and that any such approach would lead the Court into serious error. Let me tell you four or five reasons why.

First, the notion that Congress can undo constitutional adjudication by the Supreme Court by purportedly finding facts differently from what the Court found and relied on would, if accepted, cause great mischief.

The Supreme Court has condemned the substantial equivalent of that kind of effort in City of Hurney and elsewhere.

This is especially true because the factual record before Congress was essentially identical to the materials before the Supreme Court in Stenberg. In the three years following Stenberg, for example, Congress heard a grand total of three hours of additional testimony and the only two physicians who testified to Congress after Stenberg and in support of the ban had expressed their views on materials that were already before the Supreme Court in the Stenberg case.

Second, the government fails to reconcile the Stenberg and Turner cases. On one level the approach mandated by Stenberg and the approach in Turner are very difficult to reconcile. Turner seems to say that so long as there is substantial evidence supporting Congress, Congress' fact finding must stand even if there is persuasive evidence supporting the view opposite the one that Congress chose.

But, under Stenberg, a key question is whether there is substantial medical opinion that intact D&E offers safety advantages, opinion that need not be unanimous or even

preponderant.

In other words, whereas the existence of a reason to debate under Stenberg requires a health exception, a reasoned debate is irrelevant under Turner. And to the extent that the two approaches are inconsistent, it is Stenberg which prescribes the substantive constitutional test that must control. But the incompatibility, if there is one between Stenberg and Turner, I think need not concern the Court here because Turner is distinguishable on a number of bases. We have outlined these in our proposed conclusions but let me touch on it.

First of all, in many cases where it is examined, Congressional finding, the Supreme Court has not relied on Turner or applied Turner-style deference. Instead it has engaged in full plenary independent review, most notably in United States v. Morrison which invalidated the Violence Against Women Act, notwithstanding findings by the Congress that these actions affected or were interstate commerce.

The Court simply said because Congress may conclude, "that a particular activity substantially affects interstate commerce does not necessarily make it so."

A second fundamental distinction is that whereas this case involves a very unusual Congressional effort to curtail constitutionally protected activity, Turner involved a law that was appropriately understood as a content-neutral regulation

intended, actually, to protect speech.

And so this case, in the view of the plaintiffs, is better analogized to those First Amendment cases like Landmark Communications v. Virginia where the Court declined to defer to legislative determinations but certain kinds of speech were harmful and should be curtailed.

Also, Turner, by its terms, directs courts to give substantial deference to, "predictive judgments" of Congress. In this area the Court recognized a superior institutional capacity in the legislature to draw predictive conclusions about inherently unknowable matters.

It is important too, to recall that, Turner was decided against a background that Congress described as "involving Congressional judgments concerning regulatory schemes of inherent complexity and assessments about the likely interaction of industries undergoing rapid economic and technological change." Neither of those factors -- not a need to make predictive judgments, not the history was evident in Turner of long, more than 50 years. In fact, Congressional familiarity with regulation of and oversight of the telecommunications industry is present here.

So, for all of those reasons, Turner-like deference would be inappropriate.

Fourth, if it were possible to reconcile --

THE COURT: Are you suggesting no deference to the

findings of Congress whatsoever?
MR. HUT: Yes. I am exactly suggesting that for the reasons that I have just articulated that Turner does not require it, that other cases more directly analogous to this one don't require it.
THE COURT: Despite what Turner talks about, their abilities for fact finding, the hearings they held here over a number of years despite your reference to its most recent witnesses, etc., but also the very limited record, as I understand it, that formed the basis of the Stenberg opinion?
We have got two doctors, maybe three but only in my record two that I know of, and this goes up. And other than that, the Court had policy opinions of groups we now know is just a board with a vote, we don't know what it is. It could have been as close as five to four and that is a pretty skimpy record.
So I am wondering, shouldn't we give some deference to Congress' findings under Turner?
MR. HUT: No, your Honor; for the reasons I said --
THE COURT: These are coequal branches of government. You don't think the Court -- how about this Court, I should give some deference to the hearings they held, various people came before them?
MR. HUT: The hearings that the Court held as our proposed findings I think clearly demonstrate, and the

materials that were before the Congress were substantively not different than the record or from the record that the Supreme Court had before it in Stenberg from which it reached abundant conclusions about the safety benefits of the intact D&E.

Congress had, at most, I think just slightly in excess of 20 of hearings. The materials submitted to the Congress were essentially recycled over and over again.

The witnesses, the only witnesses testifying to Congress --

THE COURT: The reports were recycled to the Supreme Court, were they not? I mean, we can't knock them on the one hand and say they must be given great deference on the other because the Supreme Court read them. They're the same reports, aren't they? Didn't ACOG file with Congress?

MR. HUT: Yes, ACOG filed an amicus brief.

THE COURT: ACOG filed a lot, which seems to me --

MR. HUT: With the Supreme Court, and the ACOG amicus brief was also ignored and were in toto by the Congress, even though to us it --

THE COURT: We don't know that it was ignored, Mr. Hut. Again, you are going into the operation of their minds. They had it. I assume somebody read it but I don't know that either but they had it.

MR. HUT: No, but at a minimum it establishes I would think, in and of itself, a significant body and the reasons for

the opinion held by the significant body.
THE COURT: We have some boards, as we have seen, that have voted in an unknown vote.
MR. HUT: Let me address the question of deference too, your Honor.
THE COURT: Yes.
MR. HUT: If it were possible to reconcile Stenberg and Turner, Congress would be required to make findings that address the substantively material constitutional test -- whether there exists a significant body of medical opinion. Had Congress made that finding one way or the other, then it might be argument that Turner requires some deference to it. But Congress didn't. Congress ignored the substantively controlling test.
It did find, in paragraph 14B, that there is no credible evidence that partial birth abortions are safe or safer than other abortion procedures but by credible evidence in that context Congress seems to have meant that there were then --
THE COURT: Exactly what the Chasen study showed, right?
MR. HUT: No, not at all.
THE COURT: I mean, does Chasen support Congress' finding?
MR. HUT: Certainly Chasen's study supports a

proposition that directly refutes Congress' assertion that there is no credible evidence that partial birth abortions are safe. They are astoundingly safe. The complication rate was reported to a statistical significance level of 99.9 to be the same very low 5 percent.

THE COURT: Three-fold greater. It is not all the same?

MR. HUT: Your Honor, I think we are going over plowed ground here, you and I. If you ignore notions of statistical significance. And you not only have to ignore notions of statistical significance, you have to ignore them by a wide mile.

Recall, if you will, that the P value for that finding is .3. That means a 30 percent possibility that those are random results.

THE COURT: Or 70 percent chance.

MR. HUT: Not at all. That is not what the 70 percent means.

The 70 percent means that it is 70 percent likely that the two cohorts would in fact have closer results. That's what Dr. Howell testified to and unambiguously, that is correct.

If the Court would have access to statistical treatises you will see that the Dr. Clark's reference of the 70 percent is intellectually dishonest. There is just no other way to say it -- with all respect to him.

THE COURT: He didn't bring Chasen back or a co-author or peer reviewer to say that, did you?
MR. HUT: We brought the expert on statistics and statistical significance.
THE COURT: I noticed that. I noticed that.
MR. HUT: Whatever Congress may have brought about the existence of non-controlled studies on the subject of safety, it is constitutionally irrelevant under Stenberg which also noted the absence of studies but dismissed that absence as inconsequential.
In short -- and I, with trepidation, harken back, your Honor, to your order on the TRO but, as you determined, Congress never made a substantively probative find. And to the extent Congress meant to say in paragraph 14B that there were no physicians, no credible physicians who thought that so-called partial birth abortion was safer than other techniques, there is no need to defer to that finding because it is patently unreasonable and it is unworthy of deference.
A Court does not have to defer to a finding by Congress that something is black when it is clear to everybody that it is white. The incorrect finding is demonstrable from the Congressional record itself. It is demonstrable from the evidence introduced at trial in this courtroom.
I have a series of notes, your Honor, on the subject of the patent deficiencies in the Congressional findings which

are very important because, as the Court has observed, the only way that Congress can lawfully undo the Court's holding in Stenberg is through the compilation of a factually compelling set of findings and it has not done that.

I have made mention of the fact that the record that Congress in fact compiled was remarkably slight. 24 hours of hearings in eight years. Seven witnesses giving testimony on the safety of intact D&E. Only two of those had experience in regularly performing abortions and each opposed the ban.

Indeed, as the 11 physicians who submitted views to Congress based on their experience as abortion providers -- excuse me, of those, whether oral or written in that submission, all but one opposed the ban.

The government's own witnesses also undermine their findings and they do so dramatically.

Dr. Lockwood, about whom the Court has made observations, said that he agrees with very little in the findings that Congress made about the potential risks of partial birth abortion and he said, specifically, that Congress exaggerated those risks.

Dr. Clark testified that he disagrees with almost all the findings in Section 14A of the Act which sets forth a laundry list of alleged risks of partial birth abortion.

And Dr. Bowes, about whom I made observations, testified by deposition that there was no evidence supporting

many of the Act's findings including the findings in paragraphs 14A, 14B and 14F.

I have made reference to some of the deficiencies in the finding, let me tick off a few others.

First, and the easiest example, is the inaccurate finding as to the teaching of intact D&E in medical schools.

Paragraph 14B says that, in part, there are currently no medical schools --

THE COURT: Well, it is a limited number, is it not? It is not taught at a vast majority of medical schools, is it?

MR. HUT: Five or six of some of the most prominent medical schools in the nation.

THE COURT: I am not saying they're not prominent, it is a limited number.

MR. HUT: It is not none as Congress stated.

On the subject of controlled studies, Stenberg renders that question irrelevant, assuming it was still accurate, which it is not, and let me note that it is passing strange that the government and Congress would assert the absence of studies when Congress made findings about alleged safety risks that are, themselves, utterly unsupported by any studies.

There has been some reference to Dr. Nuland. He gave testimony, the Court has it in the record, about why the shortage, and at the time Congress has studied the absence of controlled studies, is neither surprising nor should it be

worrying to the Court. I am not going to summarize that testimony, it is in the record and we have made proposed findings.

THE COURT: Going back to what we discussed before, there are a surprising absence but also it would appear that those you represent could keep it from ever happening and so we would never get beyond, we would never be able to pierce the shield, isn't that true?

MR. HUT: Well, I guess I have two responses to that, your Honor. First of all, it would certainly never happen if the procedure is banned because there won't be anybody who can legally perform it.

Second, I suppose that over the past decade it would have been possible for scientists, all of whom were performing with what seemed to them intuitively and then in case studies to be a very promising procedure that they could have all gotten together and conspired not to perform studies and to suppress any confounding thoughts they had but for what possible reason? Because they are anxious in their --

THE COURT: How many years has it been since Dr. Haskell did his? He did the first one, did he not?

MR. HUT: I think he did in 1992, I think, or 1995. So, it was --

THE COURT: That's when he appeared before the NAF, wasn't it? Didn't he do it back in '89?

MR. HUT: I think it was 1992. My colleagues are reassuring me that my recollection is, in this case at least accurate, of course.
THE COURT: It is a lot of time and it doesn't seem like anybody is rushing to get conclusive evidence.
MR. HUT: And the reasons are not difficult to understand. It is difficult to do these studies.
THE COURT: And it is difficult to get the information to do these studies too.
MR. HUT: That's part --
THE COURT: As we have seen.
MR. HUT: That is exactly part of the problem, your Honor.
It is also difficult to get women to sign up for them. Dr. Grimes was unable to do that down at North Carolina.
THE COURT: Is that justification to just let it continue?
MR. HUT: It is just --
THE COURT: It seems to me it is pretty risky if you were to give some weight again back to the Chasen study. It seems an enormous risk that you are asking women to take.
MR. HUT: I think, your Honor --
THE COURT: This lack of study by people who are in this profession.
MR. HUT: With respect, you must put the data in the

Chasen study in appropriate perspective. These were two women who were --

THE COURT: And I understand all of that. I said if it is true.

MR. HUT: Let me make clear the record in this respect.

They were already at risk based on their terminal history of risk of premature birth.

They, in subsequent pregnancies, actually went beyond the point where they had gone in the pregnancy that was subject of the study or of the data point in the Chasen study so that if you draw anything, any conclusion from that you might say that the intact D&E enhances their chances of successful pregnancy.

THE COURT: See, that wasn't the opinion. And probably the most highly credentialed witness in this case who was very concerned -- very concerned -- how would this sound --

MR. HUT: I know, your Honor. He was shocked.

THE COURT: I know it is a grim humor to you and I enjoy Casablanca too, but it just might be that he is. I believe he has written 278 peer-reviewed papers. He was voted one of the top 10 doctors in the nation and he is concerned and you sort of shove this off with a cavalier comical attitude. I am a little more concerned about those women that he is concerned about and I'm not sure what to do yet, but it does

give me serious concern despite your allusions to Rick's Place.
And I think a little more deference to those women, it would behoove you to give them that.
MR. HUT: Well, your Honor, we have engaged in colloquy about this. I obviously mean no disrespect to these women. I believe that I am serving them better by standing at this podium and telling you about the testimony, reminding the Court about the testimony concerning the profound safety benefits that accrue to women from the availability of this procedure.
I am telling you that the evidence demonstrates that there is no statistical significance to the numbers than appear to have concerned the Court.
THE COURT: The best I can do is let it go on and let malpractice cases resolve what perhaps this Court should be facing up to?
MR. HUT: Rather than let the Congress deprive thousands of women of a safe property, sure.
THE COURT: The same report said there are other safe procedures, it was a wash between the D&E and the D&X. A wash?
MR. HUT: And the clinical experience of the doctors who testified here and their professional association and their judgment that in fact a wash clearly understates the benefits of intact D&E all militate so clearly --
THE COURT: Are you saying there is no merit to what

Dr. Chasen found?

MR. HUT: I am not saying that there is --

THE COURT: Are you saying his conclusion that the threats to women's health is even, that it is a wash? Are you saying that it is not worthy of belief?

MR. HUT: No. There is considerable merit to what Dr. Chasen found.

What Dr. Chasen found is that on the most conservative view they are equally safe so Congress would be taking away from them a safe procedure.

Then, on the appropriate view, the data tend to show that intact D&E is safer and so Congress would be taking away a safer procedure and Congress would be doing --

THE COURT: You are not attacking it for lack of power, you say it ought to be accepted?

MR. HUT: On the complication. Let's distinguish here, your Honor, between the side of the study that assess complications.

THE COURT: Some parts are more valid than others.

MR. HUT: Some parts are more powered, some parts have statistical significance, some parts don't. The one that shows equal complication rates --

THE COURT: It is accepted by peers, was it not? After peer-review it was published, right?

MR. HUT: Yes, but the peers and the authors were at

pains to say that with respect to the data on preterm delivery that that is not statistically significant.

If anything, it tends to show --

THE COURT: Did she say that in the study?

MR. HUT: Yes, they did. That's the P equals .3.

THE COURT: I know.

MR. HUT: It is what is set forth in the study together what this shows, your Honor.

THE COURT: The power significant in the rest of the study?

MR. HUT: The study on the complication rate is amply powered and the data is of high statistical significance, that is, the data that equates the complication rates notwithstanding the difference and disparity in gestational age.

The sum and substance of what you have before you, your Honor, and the reason why you should strike this law is because you have the debate amongst reasonable medical experts, including the debate, if you want to credit Dr. Clark for all of his testimony is worth -- I think it is worth very little -- including debate of the significance of those data.

And where you have debate, the resolution is in favor of the need for health exception. Stenberg could not be clearer on the point.

THE COURT: It should be in favor of health risk to

women? In you turn and look at it the other way?
In other words, to allow your clients to keep applying your trade shouldn't we allow this risk to continue if we accept Dr. --
MR. HUT: Stenberg says that you do, yes, your Honor, so long as there is a debate, so long as you conclude that there is an absence of debate or that the reasons for the debate and for the belief of a significant body that there are safety advantages that are not unworthy.
Your Honor, let me turn, if I can -- I apologize to the Court for the time -- on the language of the Act.
THE COURT: No need.
MR. HUT: The language of the Act presents two separate, though related, constitutional deficiencies. I referred to those at the outset.
First, the terms of the Act cause the ban to be intolerably vague and so it fails to give fair warning to potential violators and fails, appropriately, to circumscribe the discretion of law enforcement.
Second, to the extent that it can be understood, the ban constitutes an undue burden because it covers virtually all second trimester abortion methods including dismemberment D&Es, inductions, in addition to intact D&E, which is purported to be the focus of the Congressional concern.
The Court heard testimony for doctors that the terms

of the act were vague. The Court heard no testimony from any doctor to the contrary. For one thing, the Act uses terms that are nebulous and medically unknown terms like partial birth abortion, like overt act.

But, in addition to the problem with the terms, there was a confounding lack of symmetry between what the findings say the act prohibits and what the words of the ban themselves say, an absence of symmetry that fosters understandable confusion.

For example, the findings describe a procedure performed on a fetus whose body has been delivered up to the head which remains in the womb.

The language of the Act bans an overt act, to kill a fetus or any part of the fetal trunk past the navel that has been delivered outside the body of the woman.

(Continued next page)

MR. HUT: The findings describe the overt act that is criminal as usually the puncturing of the fetal skull. But the ban itself prescribes only an overt act that the doctor knows what killed the fetus. The findings describe the use of a sharp instrument. The ban does not. The findings specify conversion to a footling breech. The ban note makes no mention of any such conversion.

The testimony by Dr. Lockwood was eloquent affirmation of the vagueness at the core of the Act. The Court may recall that he testified that when he first read the act in the quiet of his study, he thought that the Act was vague and would ban far more than D&E with intact removal. It was only after he conferred with government counsel and learned --

THE COURT: Their offices weren't quiet.

MR. HUT: You'll have to put that question to Miss Gowan.

THE COURT: You do add a certain color.

MR. HUT: I don't want to answer that, Judge.

THE COURT: I can see that whole panel study now.

MR. HUT: Quiet or not, it was only after conferring with government counsel, learning government counsel's views about the intent requirement, that he thought --

THE COURT: Maybe Dr. Lockwood needed your assistance.

MR. HUT: But doctors who face prosecution under the Act would not, of course, have the same luxury of consulting

with government counsel in a quiet study or a noisy place about the possible scope and nuances of this law. They would have to cope with the language as written, and they cannot be made, I respectfully suggest, to do so consistently with the Constitution.

The government defends the Act against a void for vagueness challenge on the ground that its supposed intent or scienter requirement saves it from Constitutional attack and makes essentially the same argument in defense of the Act against our claim that it imposes an undue burden on a woman's right to abortion. And so in a few minutes I will address the intent-based argument in that context.

Here I just want to identify for the Court the line of holdings, including in such cases as Verniero, a state partial birth abortion ban case cited in our papers, which Court held that a scienter requirement does not work to save a vague statute, quote, if it is satisfied by an intent to do something that is itself ambiguous. That is the vice here.

With respect to undue burden, the overwhelming and unrebutted testimony before the Court establishes that the definition of partial birth abortion in the Act reaches not only intact D&E but also dismemberment D&E, and even induction. And it reaches induction -- excuse me, it reaches not only induced abortions but also surgical treatment of miscarriage.

Now, the Supreme Court has made clear again in

Stenberg that only the definition of partial birth abortion in the Act matters for purposes of construing the statutory scope. General assumptions about the meaning of partial birth abortion or what Congress could conceivably have intended are irrelevant. The Act's explicit definition of partial birth abortion, is it therefore significant to note, makes no mention of intactness. The Act nowhere requires that a fetus be intact for the physician to have performed a partial birth abortion.

Likewise, the Act's definition of partial birth abortion makes no mention of fetal viability. Indeed, it makes no mention whatever of any gestational age. Procedures performed at any point in the second trimester, as early, therefore, as 14 weeks, are banned, as long as they encompass the steps that are set forth in the definition.

Now, the Court heard in testimony a variety of examples testified to by witnesses for plaintiffs that explained how even dismemberment D&Es and even inductions were easily comprised within the language of the ban.

THE COURT: Did your clients do this in the benefit of your study?

MR. HUT: I'm certain that I can safely say, your Honor, that I never had a client in my study, no.

THE COURT: All right. Did the officers at the ACLU. All right, go ahead.

MR. HUT: For example --

THE COURT: You did prepare them, didn't you?
MR. HUT: We certainly spoke with the witnesses in advance of their testimony, yes, your Honor.
THE COURT: Are you afraid to use the phrase -- didn't you prepare them?
MR. HUT: I'm certain that we did prepare them, yes, your Honor.
THE COURT: Most trial lawyers aren't shy of that. That's your job.
MR. HUT: Even in a dismemberment D&E, depending on the extent of dilation and the size of the fetus and the presentation of the fetus and the internal conditions at any gestational age, the entirety of the fetal trunk may be brought outside the woman's body with one pass of a forceps or manually. And then, because the fetal head is lodged at the surface, the physician must take one out of a number of acts other than completion of the delivery that he or she knows will kill the fetus.
As Dr. Gerson Weiss testified, every act taken by the physician in a D&E is deliberate and intentional. And any dismemberment D&E can encompass each of the steps set forth in the Act's definition. So to take -- as an example Dr. Cassing Hammond explained that in any D&E it can happen that the physician is able to remove the fetus in breech presentation until part of the fetal trunk past the navel is outside the

body of the woman. He then may disarticulate or disjoin or dismember the fetus --

THE COURT: Or tear off.

MR. HUT: Or tear off the fetus at the pelvis, for example, knowing as he does so that it is a lethal act and that the then living fetus cannot survive. He will then complete the removal of the fetus from the uterus acting in all steps deliberately and intentionally. He will accordingly have violated the Act, according to the terms of the ban.

Take another example. Dr. Grunebaum and Dr. Westhoff testified that in any dismemberment D&E the physician could dismember a leg and then bring the rest of the still living fetus down until the fetal trunk past the navel is outside the body of the woman and the head lodges at the cervix. Parenthetically, the fetal body to that extent is outside the body of the woman frequently because the cervical os, or opening, is usually instrumentally brought down to the vaginal opening or introitus. So to say that a part of the fetus is outside the woman's body is essentially or often no different from saying that it is outside or beyond the cervix.

To revert to my example, then when the fetus or while the fetus had a heartbeat, the physician could either collapse the fetal head or cut the umbilical cord knowing that either of those acts is lethal. The doctor would then complete delivery of the fetus. These doctors testified that, of course, the

steps taken at each and every point of the procedure is deliberate or are deliberate and intentional.

Take another scenario. Under the Act's definition, in any D&E with the fetus in breech presentation, the physician could first grasp and remove part of the fetal abdomen, part of the fetal thorax or the back, but a part beyond the navel, and remove that tissue or that part from a woman. That part of the fetal trunk past the navel would then be outside the body of the woman. The physician could then take some step or act, such as continued dismemberment, knowing that some such continued act would be lethal to the fetus.

I made mention a moment ago on the undue burden point, as in vagueness, the government argues that the intent requirement works to limit the Act's reach. And the government hangs its hat on the quote, "for the purpose of" language in the Act arguing that, as I understand it, a physician can violate the Act only if she or he forms a specific intent before the delivery of the fetus to the specified anatomical threshold to perform an overt act in mid-delivery of the fetus at that specified threshold that will kill the partially delivered fetus.

For several reasons, this reliance on intent or scienter requirements is unavailable. First of all, and perhaps most importantly, the argument rests on the fundamental misunderstanding of how doctors perform abortions. In no

abortion method does the physician remove the fetus to any particular anatomical point for the purpose of performing a lethal act. The physician may stop the evacuation of the fetus at a particular point but will do so only because further delivery is obstructed and the obstruction must be removed in order to continue the safe delivery.

So, if one, in fact, were to adopt the defendants' interpretation, the Act would ban nothing at all, including intact D&Es. But if the clause "for the purpose of" is meant to capture D&Es involving intact removal, as of course the government maintains, then it can only mean that the physician removes the relevant anatomical part of the fetus knowing that the safest way to proceed may be to perform a lethal overt act following such removal. And in that case the act sweeps within its scope all D&Es, whether used to terminate a pregnancy or to treat a spontaneous abortion.

For that intent characterizes any D&E. In any D&E the doctor may deliver a part of the fetus past the navel, whether attached to the rest of the fetal body or not, and thereafter, intentionally perform a lethal act on a still-living fetus. The same is true as well with an induction.

And in the interest of time, your Honor, let me respectfully refer the Court, for purposes of gaining appreciation of the ambiguity and imprecision of the statutory language, to the colloquy between Judge Kopf in the District of

Nebraska and government counsel. There at the conclusion of that trial, if the Court has the transcript in that case, you will find the colloquy at pages 1897 to 1911. If the Court does not, we will be happy to supply it.

The case law on which the government relies, and this is the second point on intent, really casts further doubt on the argument. The government, for example, places heavy reliance on a case called United States vs. Bailey, the case from the Supreme Court. That case says, and I'm quoting now, a person who causes a particular result is said to act purposefully if he consciously desires that result. That standard, that conscious desire standard, does not exclude from the Act's ban physicians who intend to remove the fetus as intact as possible. Those physicians consciously desire to remove as much of the fetus in one pass as they can.

All of the doctors who testified in this courtroom said that in the performance of any D&E, their objective is to remove as much of this fetus as possible in as few passes as possible, and one, if at all possible. If in effectuating that objective to remove as much as possible they remove two legs and part of the torso past the navel, or all of the fetus up to the point of the aftercoming head before they perform the lethal act, they will have violated the ban. If they wind up unable to effect intact removal and to dismember the fetus instead, they will not have violated the ban but their intent

is the same in both cases.

Third -- the case law establishes the specific intent may be performed in an instant and need not exist more than a nanosecond prior to the time of the prohibited act. Cases as, for example, a case called Thomerson vs. AL Lockhart at 835 F.2d 1257, decided by the Eighth Circuit in 1997, established this point.

Fourth time, and, again, defendants' discussion of the act makes clear that he conceives of the act as reaching those cases where the physician removes the fetus intact until the fetus head lodges. That is the procedure that the government claims is prohibited and, therefore, it's the procedure that the government claims a physician must intend to perform in order to violate the Act. But for reasons mentioned a moment ago, this is simply not what the Act says. The Act does not state that the fetus must be intact. It does not state the fetus must be removed to the point of the aftercoming head.

Finally, your Honor, Congress's failure to enact a precisely worded ban that would not impose an undue burden on women is all the more objectionable because it would have been so easy to narrow and tailor this statute. Congress could readily have used the word intact as one obvious example. Congress could readily have followed the four-part definition elaborated by the American College of Obstetricians and Gynecologists to cite another example. Congress could easily

have expressly excluded in terms dismemberment D&Es, as some state statutes have done and as Justice O'Connor commented upon in her Stenberg occurrence.

THE COURT: Are you saying that if they inserted the word "intact," that would be perfectly acceptable with you and that would be a Constitutional statute?

MR. HUT: No. I am not. I think that there would -- it certainly would --

THE COURT: I didn't think you were going that far.

MR. HUT: It certainly would not cure the vices of this statute. In a more carefully and appropriately worded statute, it would undoubtedly go a long way in the failure to go even part of the way down that road. I think this speaks volumes about what was at work with this Congress in this case.

I want to end -- and I really am going to end now, your Honor -- these remarks where I began, and that is by focussing on the patients who will be affected by the ban that's being challenged today and on whose behalf the individual doctors have brought this action.

The Court has heard testimony from doctors about women who find themselves in the horrible situation --

THE COURT: They're bringing it on behalf of themselves, aren't they? There's no woman in the title of this caption.

MR. HUT: No, but they assert their standing, as they

are appropriately permitted to do by the case law, on behalf of themselves and their patients.

These women, their patients, find themselves in the horrible situation of having to determine whether to end a wanted pregnancy. Dr. Chasen, who is in the courtroom today, testified eloquently on the point. He said, and I'm quoting, almost all the patients I see have desired pregnancies. Planned or unplanned, they have been very happy to be pregnant and at some point recently they have received some devastating news.

He went on to explain, and I quote again, many patients confide with me that what they are going to do violates every moral and religious belief they may have had to that point. But they are choosing to do that because they think it is the most appropriate thing for them to do. That is the choice that these patients have a right to make. That is unambiguous, and we're not here to discuss that today. They have a right to make that choice, whatever may be their reasons for the decision to terminate the pregnancy.

THE COURT: Well, we can't get at the record so we don't know whether that statement is accurate or not, do we? We can't test it?

MR. HUT: You only have the word under oath of the doctors.

THE COURT: Yes, I understand that. But there are

witnesses under oath here every day in every one of these courtrooms in this building, and they are tested. But we can't do that in this case.

Go ahead.

MR. HUT: Nor can there be a test of -- in typical cases of any expert who comes in on the basis of his and her compilation of records over a lifetime. But Supreme Court precedent makes clear --

THE COURT: I don't think that's quite an accurate statement. Many times they have their work records that can be tested against their testimony. I think you're overstating what experts do in these courtrooms in this building every day of the week.

MR. HUT: Well, perhaps, your Honor. I am certainly familiar with work records that relate to the work performed in the case. And so, for example, with respect to Dr. Chasen's study, his work papers were provided to the government. I am not familiar with a case in which an expert is called upon to cough up a lifetime worth of material on the off chance that it might reflect on some opinion to which he or she has testified. I defer to the Court's vastly greater experience.

THE COURT: You say "lifetime." There was attempt to get current records and they could not get those either.

MR. HUT: Even going back a matter of years, if it is going back beyond --

THE COURT: They didn't even get one year, did they, Mr. Hut?

MR. HUT: They got Dr. Chasen's records and they abandoned their requests for the records in the custody of New York Presbyterian.

THE COURT: Aside from that, they didn't get them, correct?

MR. HUT: This case, this case, your Honor -- they did not get them.

This case, your Honor, is about what happens after the patients make that decision; how a woman and how her doctor may proceed in terminating her pregnancy once that heart-wrenching decision has been made. In that situation everyone agrees that the primary concern is finding the safest and most expeditious way to accomplish the termination. To quote ACOG, quote, only the doctor in consultation with the patient based upon a woman's particular circumstances can make this decision, unquote.

In this case, Congress has overstepped its bounds in many respects. It has attempted to alter Supreme Court precedent without following the amendment procedures mandated in the Constitution. It has made findings of fact that are unsupported and, in numerous cases, patently false. And it has ventured into the operating room, smack into the middle of the patient/doctor relationship by prescribing how medical

procedures can and cannot be performed.

This attempt to override the judgment of patients and their physicians is dangerous and paternalistic, but it is not just bad policy, and we're not here to debate the policy; for it goes to the very heart of constitutional privacy concerns. And it unconstitutionally deprives women of autonomy over their bodies and of their ability and their right to make medical choices that are safest and most appropriate for them under the circumstances.

For all of those reasons, your Honor, the Court's temporary injunction against the Partial Birth Abortion Act of 2003 must be made permanent and the Act permanently enjoined.

If the Court has no further questions, that concludes my remarks.

THE COURT: Thank you, Mr. Hut.

I think we could all use a little break, given the hour. I'm going to take a luncheon recess and we'll reconvene with the government's argument at 2:00.

Court will stand in recess.

(Luncheon recess)

AFTERNOON SESSION
2:20 p.m.
THE COURT: Go ahead, Miss Gowan.
MS. GOWAN: Thank you, your Honor.
To be just is to search for and find the truth, and so we must start at the beginning. This necessarily means, your Honor, a brief survey of the legislative history focussing on the hearings conducted by Congress; four by the House of Representatives, one by the Senate and one held jointly.
But first, it is instructed to listen to the words spoken by the chairman of the Senate committee on the judiciary on the day it convened for a hearing on HR-1833, the Partial Birth Abortion Ban Act of 1995.
November 17, 1995, the chairman, quote, it is important to understand that the measure before us is not remotely a general ban on abortion. It bans one specific method of abortion.
The November 20, 1995, American Medical News describes this method of abortion as follows: The procedure usually involves the extraction of an intact fetus, feet first, through the birth canal with all but the head delivered. The surgeon forces scissors into the base of the skull, spreads them to enlarge the opening and uses suction to remove the brain. This is a method used in some second and third trimester abortions.
I will place in the record a September 13, 1992,

descriptive presentation entitled Dilation and Extraction for Late Second Trimester Abortion by Martin Haskell, a practitioner of this method. It appeared in second trimester abortion from every angle prepared by the National Abortion Federation in 1992. I want the record to reflect that I personally invited Dr. Haskell to testify this morning. He has declined our invitation, closed quote. Record at 1.

Previously on June 8, 1995, two members of the House of Representatives sent a letter to their colleagues informing them of the proposed bill. The representatives described the abortion procedure in their letter and included a diagram. Only days later, on June 12, 1995, NAF sent its own letter to house members. The letter was signed by Vicky Saporta, NAF's executive director who also submitted a TRO declaration in this case.

Miss Saporta's letter claimed, among other things, that according to Dr. Robinson from Johns Hopkins University, the diagram sent to the House membership was, quote, highly imaginative and artistically designed but with little relationship to the truth or medicine, closed quote.

The letter went on to state that while in some cases the fetus is removed intact from the woman in dilation and evacuation abortion, quote, as with standard D&E, fetal demise is virtually always introduced by the combination of steps taken to prepare for the abortion procedure, closed quote.

6/15/95, record at 46-47.

On November 7, 1995, Kate Michelman, the president of the National Abortion and Reproductive Rights Action League, otherwise known as NARAL, held a news conference, 3/21/96 at nine. Michelman stated that there was expert testimony by physicians who performed the procedure that the anesthesia that is given to the woman prior to the procedure causes the death of the fetus. She said, quote, these are difficult procedures to talk about, but we have to try to remember these are extraordinary medical circumstances that call for extraordinary intervention, closed quote.

Anesthesia given to the woman kills the fetus before the fetus is taken from the woman in the abortion? Extraordinary medical circumstances call for this extraordinary intervention? What was medical fact? What was fiction?

The plaintiffs in this case, of course, do not now make any claim that the fetus is killed by the anesthesia, nor do they argue that extraordinary medical circumstances call for extraordinary intervention; that is, the use of this procedure. These, it turns out, are phantom claims that evaporated into thin air after Congress fully examined them.

This does not stop plaintiffs, however, from criticizing Congress in their post-trial findings at number 131 for spending hours on the anesthesia issue, implying that Congress somehow fritted away its time when it should have been

collecting other more, quote, substantial evidence, closed quote.

It is important, your Honor, to discuss these matters today, as well as other claims about the procedure made to Congress, because it reveals exactly how Congress exercised its fact-finding mission in legislating partial birth abortion, and because it directly bears on the credibility and evaluation of some of the medical evidence considered by Congress.

THE COURT: Miss Gowan.

MS. GOWAN: Yes, your Honor.

THE COURT: Is it true that in the eight years that Congress held hearings on partial birth abortion, only seven doctors testified before Congress?

MS. GOWAN: Your Honor, on the June 15, 1995 hearing before the House, Dr. Robinson testified, Dr. Smith testified, Dr. Robert White testified and a nurse testified.

On the November 17, 1995, Senate hearing, Dr. Robinson testified, again, who I may add, testified on behalf of NAF. Dr. Smith testified, again. Dr. Mary Campbell testified for the first time. She's a Planned Parenthood representative, your Honor. Dr. Norig Ellison testified, Dr. Nancy Romer testified and a nurse testified.

On a March 21, 1996, House hearing, Dr. Ellison testified again. The nurse, Brenda Schafer, testified again. Dr. David Birnbach testified, Dr. David Chestnut, and Dr. Gene

Wright.

On the March 11, 1997, which was a joint hearing, Dr. Curtis Cook testified for the first time.

On the July 9, 2002, hearing which was before the House Dr. Cook testified again. Dr. Kathy Altman testified for the first time.

On the March 25, 2003, House hearing, Dr. Mark Neerhof testified for the first time. Aside from, as I understand it, Dr. Campbell and Dr. Robinson, no other doctors were presented by the minority membership, notwithstanding that there are letters in the record from the majority membership inviting opposing testimony.

THE COURT: But could you just tell me, there were eight years of hearing, correct?

MS. GOWAN: Correct. Well, your Honor --

THE COURT: And how many doctors testified in opposition to the legislation?

MS. GOWAN: Let me count.

THE COURT: I mean, I was trying but I --

MS. GOWAN: Well, your Honor, the doctors that testified about the anesthesia weren't testifying in opposition to the Act. They were testifying --

THE COURT: I'm just asking how many in support of the Act.

MS. GOWAN: Oh, in support of the procedure? Two.

THE COURT: Two in support. How many in opposition to the Act?

MS. GOWAN: That, I have to count. It appears six [testified in opposition to the procedure], your Honor.

THE COURT: OK. And am I correct in the information I believe I gleaned from the papers that -- is it accurate to say that since September, since the Supreme Court decided that case, there have been just two doctors who testified live, as opposed to people who may have submitted letters or opinions, but two have testified since that decision in opposition to legislation?

MS. GOWAN: No, your Honor.

THE COURT: Or in support of the legislation as opposed to opposition of partial birth abortion?

MS. GOWAN: There would be three. The Supreme Court decision was on June 28, 2000. There was a House hearing on July 9, 2002, where a Dr. Cook testified and Dr. Altman testified, and there was a House hearing on March 25, 2003, where Dr. Neerhof testified.

THE COURT: Cook and Altman were re -- they had testified prior to the opinion, correct?

MS. GOWAN: Not Dr. Altman. She testified once and that was July 9, 2002.

THE COURT: OK.

MS. GOWAN: Dr. Cook, yes, your Honor, had testified

previously.
THE COURT: OK. And but this is the body of professional testimony against the bill over that eight years ban, is that correct?
MS. GOWAN: Yes. As we just described, certainly the defenders of the procedure, if you will, as I said before, were invited to bring witnesses. And there is a Senate rule that permits the minority membership to bring witnesses. They did bring women to testify about the procedure. And the lawyer who argued the Stenberg case on behalf of Dr. Carhart, Simon Heller, also came to testify. But they did not offer any medical personnel concerning the procedure.
THE COURT: But the lawyer for Dr. Carhart in the case testified?
MS. GOWAN: That's correct, twice post-Stenberg.
THE COURT: All right. Go ahead.
MS. GOWAN: Your Honor, as I was saying, the other reason that it's important to go through, I think, these matters relating to the anesthesia issue and other claims that were presented to Congress was in addition to showing how it informed Congress' fact-finding, it also bears on the credibility and evaluation of the medical evidence that Congress considered, which was weighed when it found the facts that underlie its findings and conclusions that partial birth abortion is never medically necessary for the health of the

woman and that the fetus feels pain during the procedure and that it should be banned.

Now, the first hearing was on June 15, 1995. The chairman opened the hearing by saying that the intention was to hear primarily from medical experts. And that while both Dr. Haskell and Dr. McMahon had been invited to testify and both had apparently initially agreed, both had cancelled at the last moment.

The chairman referred to NAF's letter to House members about the diagram and the issue of fetal death. The chairman noted that these claims made by NAF that the fetus was dead at the start of the procedure were inconsistent with statements made by both Dr. Haskell and Dr. McMahon. And the chairman pointed out that Dr. Haskell had told the American Medical News that, in fact, the drawings that had been sent to House members were accurate from a technical point of view. And he pointed out that both Dr. Haskell and Dr. McMahon had told the American Medical News that the majority of fetuses aborted in this way are alive until the end of the procedure.

He quoted a reported statement of Dr. Haskell, quote, when I do the instrumentation on the skull, it destroys the brain sufficiently so that even if it falls out at that point, it's definitely not alive.

As for the implication in NAF's letter that the procedure was only performed in unusual circumstances, the

chairman said that neither Dr. Haskell nor Dr. McMahon claimed that the procedure was used only in limited circumstance. The record at 2 and 3.

Concerning the procedure itself, Dr. Robinson, an OB-GYN who identified himself as testifying on behalf of NAF, said that he had read Congress' description of Haskell's method which he said was, quote, a very rare technique, closed quote. But, he told Congress, that notwithstanding NAF's statement in its letter to the House membership, that the diagram shows, quote, exactly probably what is occurring in the hands of these two physicians, closed quote, meaning Dr. Haskell and Dr. McMahon.

And in response to a direct question from Congress, he said, I know a lot about abortion. I know a lot about the attempts to describe what is being done. But as a medical piece of information, this is not widely known. It is not generally known. It has not been published in literature. It has not been published in scientific journals. It hasn't even been mentioned in throw-away journals. Record at 64 through 65, 88 and 89.

Dr. Smith, who is the director of medical education at Mount Sinai Hospital in Chicago, and who was trained at Cornell University, Yale University and University of Chicago, told Congress that from her perspective the procedure was strikingly similar to fetal breech extraction, which is used by

obstetricians to deliver live infants in the management of twin pregnancies or single-infant pregnancies complicated by abnormal positions of the preborn infant.

She explained that when a doctor delivers a breech baby, cervical entrapment is sometimes a complication. She suggested that with partial birth abortion, the provider wants the head to get trapped because if the baby gets past the cervix and slips out of the woman, then the baby's status changes from an abortus to a living person.

As for the suggestion that partial birth abortion is only performed in unusual circumstances, such as when the life of the mother is at grave risk, she told Congress that she had practiced obstetrics for 15 years and had never encountered a case where it would be necessary to kill the fetus this way to save the mother's life. She said there are cases in which acute emergencies occur during the second half of pregnancy making it necessary to get the baby out fast, but that no doctor would use the method as described by Haskell in those circumstances. Record at 38 through 41.

Concerning the anesthesia question, Dr. Robinson said, when an intact fetus is removed in the process of abortion, as is sometimes the case, fetal demise is induced either by an artificial medical means or through the combination of steps taken as the procedure is begun. Thus, in no case is pain induced to the fetus, closed quote.

He further claimed that if neurological development at the gestational age of the abortion being performed even made the experience of pain by the fetus possible, analgesia and anesthesia given to the woman would neutralize any pain that may be perceived by the fetus. Record at 64 through 65.

Dr. Robert White, a brain surgeon and neuroscientist trained at Harvard Medical School and the Mayo Clinic, testified. He told Congress that by the 20th week of gestation, the fetus has in place the neuro circuitry to feel pain. He said that studies show that even at 8 weeks through 13 weeks there is enough neuro circuitry present so that pain and noxious stimuli could be perceived by the fetus. He said that beyond the 20th week of gestation, not only are the fiber tracks in place from the circuits of the skin in through the spinal cord and to the areas of the brain where pain can be felt, but that the system, which is important in the modulation and suppression of pain, is not yet mature as the system conducting the pain.

He said that some authorities feel that fetuses at that gestation can perceive pain to a greater degree than an adult. He told Congress that the procedure with its compression and pulling must be a painful experience for the fetus as it advances into the birth canal.

THE COURT: When did he testify?

MS. GOWAN: He testified, your Honor, at the first

House hearing, June 15, 1995.

For him, though, what was the most disturbing was what he called the surgical procedure itself. He said, quote, you are talking about a brain operation on a fetus who has reached an age where I would be called as someone trained and experienced in pediatric neurosurgery to operate, closed quote. He said, we would never consider any procedure giving us access to this premium central nervous system without sophisticated anesthesia. He summed up by simply saying the fetus is at an age of gestation where he or she can perceive pain, and possibly more exquisitely than he or she would if they were allowed to be born. Record at 67 through 70.

November 17, 1995, the Senate held its first hearing on that day. It took up the anesthesia issue, too. Dr. Robinson testified again. This time he did not say that he was testifying on behalf of NAF or that the diagrams Congress had might in a technical sense represent an approximation of what occurs in partial birth abortion. He did, however, continue to claim that the fetus was killed at the start of the procedure and that the anesthesia to the woman neutralizes all pain to the fetus. He claimed, quote, no one doing these procedures is partially delivering a living fetus, closed quote. Record at 104.

Dr. Norig Ellison, the president of the American Society of Anesthesiologists testified. He told Congress that

he was appearing for one reason only: To take issue with the statement of Dr. McMahon repeated by NORAL, impliedly adopted by NAF and published widely by the media, that anesthesia given to the mother as part of the procedure eliminates any pain to the fetus and that a medical coma is induced in the fetus causing neurological fetal demise, or in lay terms, brain death.

Why was he concerned? He was concerned that the widespread publicity given to this claim might cause pregnant women to delay necessary and perhaps even life-saving medical procedures totally unrelated to the birthing process due to misinformation regarding the effect of anesthetics on the fetus. In other words, he was concerned that a pregnant woman, let's say for example, needed an appendectomy, would be afraid to have that procedure because her fetus might be killed by the anesthesia that was given to her to remove her appendix.

Dr. Ellison said that the fact is that when general anesthesia is administered to the woman, only a portion of it reaches the fetus, and that anesthetics administered regionally have little effect on the fetus. He testified that he had not spoken with one anesthesiologist who agreed with Dr. McMahon's conclusion and that, in his judgment, it is contrary to scientific fact.

He also submitted this written statement, quote, drugs administered to the mother, either local anesthesia

administered in the paracervical area or sedatives, analgesics administered intramuscularly or intravenously, will provide no to little analgesia to the fetus. Record at 107 through 108 and 226.

Medical fact or fiction?

Dr. Mary Campbell, the medical director for Planned Parenthood, also testified at the hearing. In her prepared statement she did not say anything about fetal death and anesthesia. But after hearing from Dr. Ellison, Senator Abraham asked Dr. Campbell if she wished to comment on Dr. Ellison's statement that fetal death is not related to the anesthesia that the mother received. He specifically wanted to know if she thought the anesthesia caused the fetus' death. She said, I do not know what causes the fetus to die. The fetuses are dead when delivered.

Senator Abraham pressed her about a fact sheet that she had prepared relating to the legislation in which she claimed that the fetus dies of an overdose of anesthesia given to the mother intravenously. She said -- she was quoting from Dr. McMahon at the time, and that, quote, I have not said brain death -- I'm not saying -- I am saying no spontaneous respiration, no movement.

She was then confronted with the clear statement in her fact sheet that the fetus dies of an overdose of anesthesia and that her statement contained no qualification about

breathing. What was her response? Quote, I simplified that for Congress. I do not believe that you want a full discussion of when death occurs, closed quote.

The record shows that Congress did want a full discussion of when death occurs, and Senator Abraham reminded her that it was Congress' job to make those decisions. Record at 153 to 154.

Concerning the procedure itself, Dr. Campbell told Congress that partial birth abortion is safer than medical induction, and that contrary to the testimony of Dr. Pamela Smith, a woman is twice as likely to die with induction abortion than with D&E abortion. Dr. Campbell claimed that her statements were supported by an article published by Dr. Grimes.

But the Grimes article concludes that the greater comparative safety of D&E stems primarily from its advantage in the 13- to 15-week interval. At 16 or greater weeks of gestation, the risks of death from D&E and installation abortion, which as your Honor heard at the trial was a form of medical induction abortion not used today since the new prostaglandins have been developed, are similar and statistically indistinguishable.

According to the Grimes article, beyond the 13- to 15-week stage of pregnancy -- and I might add, which is beyond that period is when partial birth abortion is performed --

quote, the distinction between D&E and installation abortion blurs in terms of safety. Hence, other considerations, such as cost, convenience and compassion may be more important in determining the method used for second trimester abortion, closed quote. Record at 100 through 124 and 132 through 133.

Dr. Campbell also told Congress that the threshold for viability was 25 weeks. This was similar to a fact sheet distributed by NORAL which claimed that very few infants survive at 24 weeks; that the chance of survival at 25 weeks is 10 to 15 percent; and that a 50 percent survival rate is only achieved when the fetus reaches 27 weeks. Record at 5499. Medical fact or fiction?

Dr. Watson Bowes gave Congress published data showing that this information was old. He gave Congress a study conducted at seven institutions showing that at 23 weeks there was a survival rate of 23 percent and at 24 weeks there was a rate of 34 percent.

The study also showed that there were wide interinstitutional variations in survival at each gestational age. For example, at 24 weeks where Dr. Campbell and NORAL posited the very few infants survive, the study showed that survival rates, in fact, varied from 10 percent to as high as 57 percent. Record at 54.

Dr. Nancy Romer, an OB-GYN from Dayton, Ohio, testified. She is a board certified OB-GYN and a member of

ACOG. She told Congress that the reality is that partial birth abortion is not performed in rare and tragic circumstances. She noted that Dr. Haskell had said that the majority of his procedures were elective.

She testified that she was the vice chair of a hospital where over 5,000 deliveries are performed annually; that the hospital has an active high-risk pregnancy practice where second trimester abortions were performed from maternal and fetal indications. She said that she and her colleagues had never found it necessary to perform the procedure and had always found safe alternatives. Record at 109.

She also told Congress about Dr. Haskell's center in Dayton. She said that Dr. Haskell was not board certified; that he was a family practitioner who did not have hospital privileges in the Dayton area. She said that because the abortions were being done in his outpatient facility, there was no objective quality review of the indications, complications or outcomes of his procedures. She told Congress that there were no studies in the medical literature describing the procedure or reporting on its complications and safety. Record at 109 through 112.

(Continued on next page)

MS. GOWAN: Congress asked all of the doctors whether they knew of Dr. Warren Hern of Colorado, the author of the text, abortion practice.

Dr. Robinson spoke favorably of Dr. Hern's competency and reputation. He said that Dr. Hern published about late-term abortions and that his book had detail about the risks and benefits and safety of these abortions. He said that Dr. Hern is good.

Congress asked about statements attributed to Dr. Hern in the AMA's publication, American Medical, in particular Dr. Hern's statement that while he opposed the bill because he thought that Congress had no business dabbling in the practice of medicine and because more anti-abortion legislation would follow, he said that he, "had very serious reservations about this procedure." "You really can't defend it. I'm not going to tell somebody else that they should not perform a procedure but I'm not going to do it." "I think at the same time that this is the safest procedure to use."

Congress also pointed out --

THE COURT: That was Dr. Hern?

MS. GOWAN: Dr. Warren Hern, your Honor.

THE COURT: All right.

MS. GOWAN: Congress also pointed out that Dr. Hern was also quoted as saying turning the fetus to a breech position is potentially dangerous. You have to be concerned

about causing amniotic fluid embolism or placental abruption if you do that. Record at 120.

Congress asked the doctors to comment on these statements.

Dr. Campbell from Planned Parenthood disputed that Dr. Hern is a leading authority on third trimester abortion. She claimed that "his reference to the podalic, internal podalic version as being dangerous showed that he was unaware that the podalic version is not procedure of choice in doing intact D&E."

Dr. Robinson, the NAF representative, said I think he has not done obstetrics for a long time so his concepts of internal podalic version are rather old. He said, I don't think Dr. Hern thinks of himself as the expert, although he certainly has been tremendously involved. But he conceded that Dr. Hern's comments about the legislation, "are going to be a burden for us."

For her part, Dr. Romer pointed out that in February 1993 Dr. Hern had published an article in ACOG's publication. That article was entitled, "Outpatient Abortion for Fetal Anomaly and Fetal Death from 15 to 34 Menstrual Weeks' Gestation, Techniques and Clinical Management."She told Congress that the article neither describes nor mentions partial birth abortion. Record at 119-121.

Senator Hatch specifically asked the doctors if they believed the procedure was ever medically necessary. Both Dr. Romer and Dr. Smith said no. Senator Hatch said that he was pursuing the question because of some of the hard cases that Congress had been told about, about the women who had come to testify, cases of women carrying fetuses with severe abnormalities.

Dr. Smith told a senator that while she had cared for patients with fetuses with these very same abnormalities she used induction abortions with prostaglandin and oxytocin and that the patients delivered in 12 hours in the hospital where they were comforted and cared for.

Senator Hatch asked whether, "There were any circumstances in which a deformed baby's head might be so large as to require this procedure and if that is, what would the doctor recommend as an alternative?"

Dr. Romer said the one condition she could imagine where the size of the baby's head would be a consideration would be hydrocephaly. She told Congress that standard treatment for that is not using a suction catheter to remove the brains but instead to use a small needle to drain the fluid from the head to permit delivery. Record at 156-158.

Senator Lee sent the doctor some written questions after the hearing. One question asked, what conditions involving the life or health of the mother would justify a

third trimester abortion, that is, abortion after 25 weeks or post viability?

Dr. Romer and Dr. Smith responded: None. They responded that while there may be circumstances in which separation of the fetus from the woman is required, death of the fetus is not required and there were simply no advantage to delivery of a dead fetus over a live one. As Dr. Romer put it, "We deliver a live pre-term infant and allow both mother and infant to receive the intensive care that they need to survive. The success rate in level III intensive care nurseries for babies born in the third trimester are all universally good and keep us from having to choose between the life of the mother and the life the baby in the third trimester." Record at 216-217 and 229.

March 11th, 1996. The House held its second hearing. Once again it took up the anesthesia issue. The hearing was held because, in the words of the chairman, "I believe that it is important to the health of pregnant women to set the record straight." Congress' concern was phony?

The chairman referred to a NAF fact sheet setting forth questions and answers about a particular type of late abortion procedure to be banned by Congress that posited the facts this way. "What are the misconceptions about this procedure? Anti-abortion groups claim that the fetus is still alive until the very end of the procedure. This is absolutely

untrue. Neurological fetal demise is induced either before the procedure begins or early on in the procedure by the steps taken to prepare the woman for surgery. This includes narcotic analgesia, extensive cervical dilation and rupture of membranes."

The chairman referred to NARAL's statement, "the other side grossly distorted the procedure. There is no such thing as partial birth abortion. The fetus, I mean, it is a termination of fetal life. There is no question about that and the fetus is, before the procedure begins -- the anesthesia that they give the woman already causes the demise of the fetus. That is, it is not true that they are born partially. This is a gross distortion and it is really a disservice to the public to say this."

The chairman referred to Dr. Campbell's printed statement. "The fetus dies of an overdose of anesthesia given to the mother intravenously. The mother gets the anesthesia for each insertion of the dilators twice a day. This induces brain death in a fetus in a manner of minutes." Fetal demise occurs at the beginning of the procedure while the fetus is still in the womb. Record at 1-5.

The fetus is killed with narcotic analgesic? Extensive cervical dilation? Ruptured membranes? It is not true that fetuses are born partially? Medical fact or fiction? Dr. Birnbaum, the director of obstetric anesthesiology at St.

Luke's Roosevelt Center here in New York President of anesthesia and perinatology told Congress that there was no scientific or clinical evidence that a properly administered maternal anesthetic causes fetal death.

Dr. Chestnut, the editor of the medical textbook obstetric anesthesia, principles and practice, told Congress there was no scientific basis for the claim that the fetus dies from the anesthesia and that the statements made by Dr. Campbell were, "false claims."

As for NAF's claim that the dilation of the cervix or ruptured membranes kills the fetus, Representative Coburn, a practicing physician who has delivered more than 3,000 babies told his colleagues that this statement is, "absolutely untrue."

Dr. Coburn testified that while rupture of the membranes could lead to fetal death, this would only occur if infection set in or if there was some other complication associated with the abortion procedure itself. Record at 140, 143-146, 147.

Concerning the issue of fetal pain. Dr. Chestnut said that giving the drugs Verced and Fentanyl to the woman may provide some pain relief to the fetus. The extent to which this renders the procedure pain free is unknown. He noted that obstetricians observed fetal withdrawal responses during the performance of invasive procedures in utero. Record at 144.

Dr. Wright, the medical director of Eggleston Children's Hospital at Emory testified about the developmental aspects of pain in the neonate, the increased sensitivity of preterm infants to pain as compared to term infants and the effects of maternal anesthesia on the infant. Record at 146-147.

Congress asked the doctors about a letter that it had received from Dr. Mitchell Creinin. Dr. Creinin was one of the plaintiffs' experts in this case before your Honor. In his letter Dr. Creinin wrote, "I can assure you that there is no such thing as pain to a fetus, plain and simple. Pain does not exist to a fetus. Any doctor who states otherwise is flat out lying and twisting medical data." He went on to say that a fetus in the uterus has no level of consciousness therefore the fetus can experience no pain. Record at 289.

Dr. Ellison had this to say. I read that letter over there, I find it inconceivable that any physician would make or would attach his name to a letter like that.

Dr. Burnbach, having administered anesthesia for fetal surgery, I know that on occasion we need to administer anesthesia directly to the fetus because even at these early ages the fetus moves away from the pain of the stimulation so I cannot agree at all.

Dr. Chestnut. I agree with my colleagues and would also note that at the University of California at San

Francisco, which is the leading center in the world for performance of fetal surgery, that even though the mother is receiving heavy, deep doses of general anesthesia, those physicians give additional anesthetic drugs directly to the fetus during surgery in order to make certain that the fetus does not experience pain.

Dr. Wright. There is no science to substantiate that letter. I believe that all of us submitted to you journal articles that have been reviewed by our peers. There is no science behind that claim by Dr. Creinin.

Record at 288.

Congress had invited Dr. Haskell and Kate Michelman from NARAL to testify to the subject of fetal pain but they declined. Indeed, the Congressional majority had invited the minority to bring expert witnesses to testify on the subject but no such experts were offered. Record 302, 304 and 307.

March 11th, 1997. On March 11th, 1997, Congress held a joint hearing. In the words of the chairman, the members of the House and Senate judiciary committees helped to "set the record straight, correct the false statements and clarify any resulting misconceptions about the timing method and frequency of partial birth abortion." Record at 1.

The presence of NARAL and Planned Parenthood and Vicky Saporta of NAF testified together with representatives of the National Conference of Catholic Bishops and the National Right

to Life Committee, as well as some women who had undergone abortions.

Renee Chilean, the administrator of three abortion centers in Detroit also testified. She told Congress that, "for those rare but necessary" partial birth abortions performed after 20 weeks "doctors must be able to use this method because of a serious health threat posed to the patient or because of severe fetal anomaly."

Ms. Chilean was confronted with the statement that she had made previously. That statement, as it relates to medical necessity, was as follows: The spin out of Washington was that it was done only for medical necessity, even though we knew it wasn't so. I kept waiting for NAF to clarify it and they never did.

She said, we knew the numbers were no longer those very, the small numbers that were talked about in the rare cases. I knew that they were being done and so did other providers, that this method was being performed pre-viability or between 20 and 24 weeks. Record at 18, 74-75.

Vicky Saporta claimed that NAF has always said that the procedure was used both pre and post-viability and that post-viability, the procedure was being performed for the reasons, "we have brought forward women like Vicky Wilson, Vicky Stella, Tammy Watts and Corrine Costella, all who testified before the subcommittee." Record at 79.

Dr. Cook, who of course appeared before your Honor, testified for the first time at that hearing. He told Congress that he had gotten involved in the issue of partial birth abortion when the medical misinformation about anesthesia began circulating. He said that he was concerned about the use of multiple dilators put in a woman's cervix leading to potential cervical complications. He expressed concern about the internal podalic version.

He said that as a maternal fetal specialist he cares for patients with the same diagnoses given to the various women who have testified at Congress about their abortions and that he did not think that partial birth abortion was required to care for the patients. He could think of no reason why the procedure would ever be a medical necessity. Record at 121-122.

For her part, Vicky Saporta criticized Dr. Cook for giving his opinion about the women who testified because he had not reviewed their medical records or personally physically examined them. Ms. Saporta claimed that Dr. Cook could not say "with certainty or responsibly" whether partial birth abortions were medically necessary in those cases. But the record before Congress and this Court is clear that those women would not release their medical records. Record at 34, 102, 103, 132-33; 142; trial transcript at 2510.

And while, in Ms. Saporta's words "the women were

brought forward to testify," neither NAF, NARAL, Planned Parenthood nor anyone else brought their doctors forward to testify about the medical necessity for these abortions.

July 9th, 2002.

On July 9th 2002 the House held a hearing to consider the Partial-Birth Abortion Ban Act of 2002. In his opening remarks the chairman stated that to address concerns raised by the Supreme Court in Stenberg, the new proposed bill contained a more precise definition of the ban procedure and that it contained a section setting forth factual findings based on evidence that had been received during the 104th and 105th Congressional hearings. He said that the hearing was convened so that Congress could take additional testimony on the new bill. Record at 1-2.

That is when Congress heard for the first time from Dr. Cathy Altman. Congress heard again from Dr. Cook and, as I mentioned before, Simon Heller, Dr. Carhart's lawyer in the Supreme Court as well as another law professor.

Dr. Altman is an OB/GYN. She had previously served as a medical director for Planned Parenthood. She previously performed D&E. She testified that partial birth abortion was not medically necessary, that it had not been subject to any peer reviewed controlled studies comparing risks and benefits to other methods and that there was an adequate data on its mortality and morbidity rates.

She told Congress that the risks of partial birth abortion were similar to the risks of D&E, namely hemorrhage, infection, embolus, retained tissue and cervical incompetence but that she believed that there was an increased risk because the procedure was being done at later gestational ages.

She also submitted a lengthy statement in which she described, in detail, the partial birth abortion procedure as well as other second trimester and first trimester abortion methods and cephalocentesis which, as your Honor knows is the procedure used to drain fluid from the brain of the fetus with hydrocepahly. Record at 4-8, 10-11 and 33.

Congress asked Dr. Altman whether she agreed with the statement by the AMA. The procedure is not medically indicated in any situation. She said, Yes, I do.

And I think there is one thing to remember here, that if, I can't imagine, I cannot imagine where this would occur but if there ever was an instance where it was critical for some woman's health, the one easy thing that can be done is the fetus can be given an intracardiac injection of potassium chloride or injection of digoxin or the cord could be cut before the beginning of the procedure. Record at 30.

Dr. Altman said that when she was first asked to testify in 2002, one of the questions posed to her was, Had there been any change, any studies on the procedure? She told Congress that she had performed an extensive literature search

and found nothing at all. Record at 42.

Dr. Cook told Congress that in his high-risk clinical practice he treated women with diabetes, high blood pressure, cardiac disease and cancer and women carrying fetuses with severe fetal anomalies but he never experienced a clinical situation where partial birth abortion was required or considered superior to some other method. Record at 25-26.

March 25th, 2003. On that day Congress held its last hearing on partial birth abortion and heard from Dr. Mark Neerhof, an associate professor of obstetrics and gynecology at Northwestern University Medical School. He told Congress that he had practiced maternal fetal medicine for 14 years and is familiar with the methods of terminating pregnancy.

Concerning medical necessity, Dr. Neerhof told Congress that there are no credible studies that evaluate or attest to the safety of partial birth abortion. He said that patients who undergo the procedure are at risk for the potential complications associated with any surgical abortion.

He said that in addition to these complications, the procedure put patients at risk for two additional complications -- an increased risk of uterine rupture from the use of the internal podalic version which he said carries risks of uterine rupture, abruption, amniotic fluid embolus and trauma to the uterus, risks which had never been adequately quantified.

He also said that the procedure posed a risk of laceration and hemorrhage caused by the physician's use of scissors to puncture the fetus' skull while lodged in the birth canal.

Once again, as he said, risks that have never been quantified. He said that none of these risks are medically necessary because there are other procedures available for late abortion.

He told Congress that the appropriate way to evaluate the safety of any obstetrical or gynecological procedure would be to take a group of patients, randomize the procedure, have end points of comparison for complications such as hemorrhage, blood loss, infection and perforation. Record 6-7 and 22.

Now, the record for this hearing also contains two letters signed by Dr. Gerson Weiss, a plaintiff in this case. For the most part the letters are the same. There are a few key differences. The first letter, dated March 10th, 2003, which he signed in his capacity as a professor and chair at the New Jersey Medical College says, "there is a dearth of data on D&X as it is an uncommon procedure." Government Exhibit B6 at S-3656.

Dr. Weiss went on to claim, however, that it is sometimes a doctor's preferred method because there is "a decreased risk of injury to the woman as the procedure is quicker than induction and involves less use of sharp

instruments in the uterus providing decreased chance of uterine perforations or tears and cervical laceration."

The second letter, dated March 12th, two days after the first letter, which he signed together with a number of doctors including Dr. Marilyn Frederikson who also testified before your Honor, abandons the dearth of data statement and instead says, "there is limited medical literature on D&X." Government Exhibit B3 at S-3385.

Well, first of all, your Honor, Congress certainly knew that as of March 12th that the truth was that there was no medical literature at all on the procedure. In fact, there was a dearth of data.

Moreover, instead of simply saying that D&X is an uncommon procedure as did the first letter, the March 12th letter says that the reason is that there is limited literature, "because D&X is an uncommonly used variant of D&X."

A variant of D&X? That's what the letter says.

I submit, your Honor, that in their zeal to obfuscate the signatories of the letter made a typographical error and changed the word "procedure" in the March 10th letter to a variant of D&X in the March 12th letter. I'm sure they meant to type a variant of D&E which of course, as your Honor knows, is just another name for the procedure that has been bandied about by the plaintiffs in this case. More semantics I submit.

But, most importantly, the second letter seeks to link

the statement about the purported advantages over induction to ACOG. It now reads as to the alleged decreased risk that "the American College of Obstetricians and Gynecologists address this in their statement in opposition to so-called partial birth abortion when they said that D&X may be the best or most appropriate procedure in similar circumstance."

Of course, there is no evidence at all that ACOG's official position is that partial birth abortion carries with it a decreased risk, and Congress certainly knew that.

The 2003 hearing record also contains a statement that Dr. Westhoff's colleague, Dr. Davis gave to Congress, as was shown at trial. The statement in part is very similar to the TRO affidavit that Dr. Westhoff submitted in this case. It identifies various maternal conditions of which there is no evidence that partial birth abortion is medically necessary.

The statement, Dr. Davis' statement, also makes a wholly unsupported claim that, "according to ACOG, intact D&Es provide the following potential safety advantages." And then goes on to detail the ones plaintiffs offer in this case Dr. Davis goes on to say that, "because of the safety advantages ACOG has stated that intact D&E may be the best or most appropriate procedure." Record at 194.

One again there is no evidence that ACOG has ever officially identified these claimed safety advantages, let alone that they relate to the policy statement and Congress

certainly knew that.

We submit, your Honor, that the only possible source for Dr. Davis' claim is the amicus brief submitted in the Stenberg case. That brief, which was filed on behalf of NAF and ACOG, as well as other associations, was prepared by plaintiffs' counsel in this case. In that brief to support the statement that partial birth abortion provides certain safety advantages the primary citation is to two pages of a chapter in the NAF compendium, clinician's guide. That chapter was written by Dr. Martin Haskell who, in turn, footnotes to Dr. McMahon.

Your Honor, we have come full circle.

I don't pretend to have addressed all the material in the legislative record. It contains other testimonial statements, letters, policy statements by various medical associations, several of which have been the subject of testimony in this case; scientific articles, news articles, transcripts of congressional floor debate, and I have attempted to address to some degree the testimony of those witnesses who appear live before Congress to offer medical evidence and who were questioned by Congress as well as some of the documentary material.

To go through and discuss all of that evidence piece by piece, evaluate, weigh it, as it relates to the totality of the evidence would take a long time, more time than we have

today. That's not the role of this Court in any event. It was for Congress to weigh the factual evidence before it and makes its own judgment in enacting the law and making the determination that a health exception is not required. That's our system of government.

Turner replies to this case, medical necessity is an evidentiary issue and involves Congress' superior fact-finding ability as in our national legislature. It is for this Court to review the reasonableness of Congress' factual findings about partial birth abortion and determine whether they're supported by substantial evidence in the Congressional record, substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support Congress' conclusions.

It is also the role of this Court to take additional evidence to help this Court, as needed, to assess and supplement the record before Congress in order to determine the reasonableness of Congress' judgment.

Now, before discussing the substantive legal question I want to take a moment to address the issue of the Stenberg record.

First, that record is not controlling. Congress is and was entitled to make its own record on partial birth abortion so the question isn't as counsel posits it, what is new here. I disagree with that formulation. But even if it

were, certainly entirely different doctors testified before Congress than in the Stenberg district court case or where I may add, trial took one day.

THE COURT: The Carhart case took one day?

MS. GOWAN: The trial took one day, your Honor. I went and checked the online docket sheet because I wasn't sure if it was one or two days, and I think in the letter that we previously submitted to the Court where you had asked us about that I had spoken with the attorney general's office in Nebraska and his recollection was it was either one or two days. In fact, the trial was one day.

Dr. Carhart testified and your Honor is absolutely correct, as pointed out in the Stenberg decision, he is nonboard certified with no hospital privileges.

Dr. Henshaw, the statistician from Guttmacher Institute, testified live and Dr. Stubblefield testified live.

I understand that the Court took into the record the preliminary injunction hearing testimony of Dr. Jane Hodgson and the preliminary injunction testimony of Dr. Riegel. And then there was a video deposition of Dr. Boehm.

So, certainly Congress heard more from more doctors than testified in Stenberg and also received many more letters and considered other documentary evidence.

And then, if you consider, I know your Honor was asking counsel about what's the new evidence before this Court.

I was making some notes. We have the Chasen study, we have the Clark expert on women's health, we have Dr. Lockwood on prematurity, we have Dr. Anand, we have the Haskell tape talking about the internal podalic version. Sometimes it is hard to get the conversion of the fetus. We have gone behind the ACOG statement, talked to the AMA, AMWA, the APHA. We know those are just policy statements. We have NAF evidence on complications for D&E, we have evidence about the usefulness and the trend in medical science for evidence-based medicine and its importance and use in the medical community.

THE COURT: Is it your position that we have a totally different record here in this case before this Court than was had in the Stenberg case and therefore this Court is free to make findings --

MS. GOWAN: Absolutely.

THE COURT: -- that are different from Stenberg?

MS. GOWAN: Absolutely.

THE COURT: Do you know the Stenberg ruling? Is there still a significant body of medical evidence on both sides? Or has that changed?

MS. GOWAN: I don't think that's the question, your Honor.

Certainly the Stenberg Court found that on the record before the District Court that in the 10 to 12 cases that Dr. Carhart did that there was a significant safety advantage

to his use of the procedure in those cases and that on that record there was a substantial body of medical opinion, i.e., evidence that supported that there was a safety advantage to his use of the procedure.

I think here the substantial body of medical opinion that we are talking about is what is the evidence, the weight of the evidence that was considered by Congress and, as needed, how was that evidence supplemented by the evidence presented to this Court.

THE COURT: Well, how do we deal with that, Ms. Gowan? We had a series of how many doctors for the plaintiff, I think a total of nine, some by way of deposition but I believe at least six were there? Or am I wrong on that number? But in that neighborhood, five or six testified live?

MS. GOWAN: Well, let me see. If you will just give me a minute I think I can -- well --

THE COURT: I don't think it is crucial but it is in that neighborhood, am I not correct?

MS. GOWAN: You know, there were an awful lot of plaintiffs' witnesses.

THE COURT: I think there was a total of nine.

MS. GOWAN: Seems to me there were more than that but that could be.

THE COURT: Well, certainly whether you agree with them or not, it would appear that there is a body of evidence

just by their testimony, is there not, that believe that there are advantages to the D&X procedure? Is that not so?
MS. GOWAN: Let's take the number nine. Let's assume that is the number, nine, so, sure, nine people testified that they think there is advantages to the procedure. I would posit in some way a lot of that testimony was cumulative but, it can't be that plaintiffs just bring in 15 witnesses.
THE COURT: Not whether or not they say the same thing, it is nine people.
MS. GOWAN: Nine people.
THE COURT: It is some sort of body, is it not?
MS. GOWAN: Sure. That is the body of people who share that view, I would agree with that. And your Honor is entitled to, as is any Court, to judge the credibility of that statement, their view; to consider it, to weigh it against the other evidence in the case. But just because there are nine people testifying that they think that there are safety advantages to the procedure doesn't all of a sudden say, okay, nine as opposed to three testified that there were advantages so nine wins and I vote for them. That is not how it works.
You have to take a look at --
THE COURT: How does it work? Even Justice Scalia said, in the Stenberg opinion said it was a pretty low standard that the Court has established, didn't he? I mean, I am not quoting him but in substance?

MS. GOWAN: It is not a division of medical opinion. It is not whether you can come forward with 12 people and I only have five people.

I think what you have to do is you have to take a look at the evidence presented, all of the evidence, and you have to make a determination about whether that evidence is reasonable and supports Congress' conclusions that the procedure is never necessary, i.e., that the procedure will not endanger women's health, that it does not present significant risk to women's health.

And I may add that the Supreme Court, when we cited those cases in our briefs, has said in the past that it is entirely in those circumstances where there is disagreement in the medical profession that it is appropriate for Congress to come in, take a look at the facts and legislate.

How can we -- it is not -- as I say, it is not nine People versus my five people. That could never be the standard.

What I would like to talk about is the substantive legal question and I just alluded to it a moment ago, and that is that the Supreme Court, Stenberg and the other cases, make clear that the state can't legislate in the way that we create a significant health risk for women.

So, I would posit the basic question, it is really a reiteration of what I said moments ago. The question is, is

there a reasonable evidentiary basis in the Congressional record as supported by the trial evidence that banning partial birth abortion would not impose significant harm on women? If not, no health exception is required.

Now, the Supreme Court's legal standard requires consideration of two medical issues which is the Casey standard. Does the evidence show that you need partial birth abortion to treat sick women? In other words, do you need it because there is something about the pregnancy that is threatening the health of the woman? She needs the abortion to get well and you need to use this method.

And then the other question is, is partial birth abortion significantly safer than alternative method such that the ban would create a significant health risk, which we, I think here in court before your Honor, sort of refer to as the safety issue as opposed to the maternal medical health issue.

As for the first question, whether you ever need to to treat sick women because there is something about the threat of the pregnancy, I don't think at this point there is any serious dispute that there is simply no maternal health conditions that require abortion by this method to help a sick woman get better, or that this would be the only method of abortion for any given maternal health circumstance.

And certainly Congress found that to be true based on the evidence presented by high risk maternal fetal medicine

specialists and the trial testimony of both the government's experts and the plaintiff's experts confirm that finding.

I would just like to refer your Honor to government proposed finding number 57 where we've martialled that evidence. Under no circumstance is partial birth abortion necessary to preserve the life or health of the mother.

Dr. Clark.

Dr. Lockwood cannot conceive of any circumstance where partial birth abortion would be necessary to preserve maternal health.

Dr. Cook cannot think of a single maternal medical condition in which partial birth abortion is medically necessary.

Dr. Johnson, plaintiff's expert, no maternal complication that would either require partial birth abortion or make it the only procedure that could be performed.

Dr. Grunebaum, plaintiff's expert: Partial birth abortion is absolutely not the only method of abortion in any given circumstance.

Plaintiff expert Gerson Weiss cannot think of a circumstance where it would be required to perform partial birth abortion for a maternal health condition.

I would also point out, your Honor, plaintiff's concessions on this score at pages 16 through 18 of their opposition to defendant's motion in limine to preclude five

plaintiffs from testifying at trial about the alleged necessity for partial birth abortions concessions, which at the time are certainly stunning to the government given plaintiffs' TRO declarations. I will just briefly read from page 16.

As with Dr. Westhoff, however, this discussion in Dr. Hammond's declaration -- that is referring to all of the illnesses, the diseases -- is not tied to the performance of any particular type of abortion procedure, nor does it include the opinion that any particular method of abortion was medically necessary.

Quoting further down on that same page, Dr. Hammond has never said, even for these women, that performance of the intact D&E variation of D&E was "required" as the only availability method.

Page 17; but like Drs. Westhoff and Hammond, Dr. Chasen has never claimed that the intact D&E variation of D&E is required or medically necessary as the only available approach for these women.

(Continued on next page)

THE COURT: But they think, do they not, that it's preferred in their opinion?
MS. GOWAN: They think that it's preferred --
THE COURT: In some conditions.
MS. GOWAN: Well, and I will address that. I think they -- they think it has the safety advantage, which is the second prong of the Casey standard and then they think that, yes, it may be preferred method in certain circumstances where a woman might have a medical complication.
THE COURT: And if that's so, does that run straight into the standard set down in Denver?
MS. GOWAN: No, your Honor, I don't think it does, but I think what plaintiffs are doing is they are really bootstrapping their safety argument. They're saying, we think that this procedure has safety advantages, and so, you know, when a woman is -- has a particular medical complication, it's even better for her because it has these safety advantages. Not because it has to be done for her or it's the only procedure for her or it's necessary that she have this procedure; it's because these safety advantages, you know, go even further with this sick woman.
And I would, you know, urge your Honor --
THE COURT: Is that the test, though, that Stenberg set down? Didn't the Court say if you deny what her personal physician believes is the safest, it's putting a hurdle in her

way, is it not?
MS. GOWAN: Stenberg did say, look at the safety advantages. And I want to take that head on right now. You know, as Dr. --
THE COURT: Good stuff. I always appreciate head on.
MS. GOWAN: As Dr. Clark testified, you know, and as confirmed by other evidence in the record for every single condition that plaintiffs identify, except for possibly two, either medical induction or D&E would be completely safe, unless D&E would be contraindicated because the woman had a bleeding problem with low blood platelets. The possible two exceptions are in cases that are not medical indications for abortions. And that's the prior classical C-section and the -- where, I may add, there's no scientific data to prove that medical abortion is contraindicated. But certainly I would agree, as the experts all testified, that there might be a risk benefit to D&E in those circumstances.
The second case was the case of placenta previa where D&E might be preferable. There's simply no evidence at all that D&E cannot and is not safely performed in cases of placenta previa and prior classical C-section.
I want to be fair to the plaintiffs, and I know counsel alluded to that this morning, that, you know, they claim that medical abortion might be relatively contraindicated in a host of other maternal conditions, so long as they satisfy

their claim that -- or if their claim that partial birth abortion is safer than D&E is accepted, then it would be -- the idea would be that partial birth abortion would be the safest of all in those cases. And those cases include preeclampsia, bleeding and clotting disorders, infections including chorioamnionitis, acute fatty liver pregnancy, cardiac ailments, pulmonary disease.

And, you know, I submit, your Honor, we went through every single one of these conditions at trial and more. And the government submits that Dr. Clark gave the definitive testimony on all of them.

With all due respect to the plaintiffs, testimony of Dr. Hammond and Dr. Westhoff and to a degree Dr. Grunebaum presented most of the maternal medical condition evidence, should be given less weight. Dr. Hammond has no subspecialty certification in maternal fetal medicine. He doesn't have any peer-reviewed articles to his credit. He's not engaged in any significant, if even any, research concerning maternal health conditions.

Similarly, to the extent that plaintiffs rely on Dr. Westhoff, she has no subspecialty certification in maternal fetal medicine, the care of sick women or high-risk obstetrics. She doesn't have any published peer-reviewed articles on the maternal medical conditions raised by the plaintiffs. She's a director of a service that only provides surgical abortion.

Dr. Grunebaum is a maternal fetal specialist but he doesn't currently conduct any medical or scientific research. He's written just 16 peer-reviewed articles, only three of which were published within the past ten years and none of which dealt with any of the maternal conditions that plaintiffs raised at trial.

I mean, as your Honor knows, Dr. Clark wrote the book on critical care obstetrics. It's in its fourth edition. He's presented research. He published on I would say the majority of the conditions that plaintiffs raised at trial. The fact is --

THE COURT: Well, there was some argument this morning attacking him. Did he not author -- does my memory serve me correctly, 278 --

MS. GOWAN: Your Honor, my count is 175 medical articles. He has numerous book chapters and ACOG bulletins that are all referenced on that. So perhaps if you counted everything that's listed up on his curriculum vitae, you would get to that number.

THE COURT: But it's 175, in any event?

MS. GOWAN: Medical articles, yes. And then there are the books and the chapters and the bulletins beyond that.

And he presented research as the principal author at 26 scientific meetings among other scholarly and professional activities. You know, I think it's very clear --

THE COURT: What was the award he was voted for in the top ten doctors?
MS. GOWAN: Yes --
THE COURT: As well as all the -- I won't belabor this point, but I believe he also testified for the service on committees of the National Institute of Health as well as international committees.
MS. GOWAN: Absolutely. He's internationally known. On a national basis --
THE COURT: I just wondered about that when the attack was put upon him this morning.
Go ahead. I'm sorry. It's all in the record.
MS. GOWAN: I mean, we know, the record is -- we now know, your Honor, that doctors perform partial birth abortion if they want to and if they can. It has nothing to do with the maternal medical conditions.
I just want to read to you Dr. Chasen's testimony, which is cited in our proposed findings. This is the transcript at 1683 to 1684, Dr. Chasen.
"Q. In your mind it all boils down to whether the intact extraction procedure is technically feasible to perform on that woman, correct?
"A. Yes, that's my practice."
And as reflected in their post-trial papers, I believe it is completely fair to say that they've limited their claim

for a health exception to the argument that the procedure has safety advantages over D&E, such that the ban would significantly harm women.

Their claim is that partial birth abortion is safer than D&E. To the extent that D&E is safer than induction, they claim because partial birth abortion is safer than D&E, then partial birth abortion is the safest of all.

Just before we move on I want to address the safety advantages, which, as I say, are really the heart of their claim. I do want to address briefly their mention of ACOG and their post-trial findings. They ask your Honor to find that the ACOG select panel found that for numerous medical conditions, including sepsis and certain forms of cancer, D&E involving intact removal offers safety advantages over all other available procedures. That's plaintiff's proposed finding, 107.

Now, there was discussion about this this morning, but we identified trial evidence in our proposed findings that shows that when the five ACOG select panel members met to discuss partial birth abortion, and they talked about 25 or 30 different types of cases where the procedure might have been used; that when they made their decision as reflected in their draft statement, they didn't refer to any of those cases. Their statement said that they could not identify any circumstances in which partial birth abortion would be the only

option to preserve the health of the woman.

It cannot credibly be said, as plaintiffs suggest, this select panel came to a judgment that in the case of sepsis or a certain form of cancer, that this was the best or most appropriate option. I mean, the evidence is that the sentence best or most appropriate, may be the best or most appropriate -- it's in the 1997 policy statement -- appears to have been tacked on to that statement by the executive board without any consultation with the select panel.

Now, in any event, this Court has the evidence from Dr. Clark that in cases of sepsis or chorioamnionitis, women are notoriously easy to put into labor and that in the vast majority of these cases, if it's earlier on, the women would be delivered with medical induction, but that D&E is safe, too, but that if there is a bad infection with low blood platelets, the last thing you would want to do is any kind of surgical intervention.

He also told us that cancer -- first of all, it's not an indication for abortion, but that if a woman with cancer chooses to terminate, either medical induction or D&E would be safe. So then that just takes us squarely to what are the purported safety advantages over D&E? I mean, it's less passes with instruments; less phoney parts resulting in a potential reduction in uterine perforation, laceration; less retained fetal parts resulting in a potential reduction in risk of

infection; less operating time resulting in a potential reduction in bleeding and risk of infection; time spent under anesthesia. This is what plaintiffs proffer, these are intuitive advantages relating to short-term risk only.

Congress rejected them because the procedure had not been studied. You asked this morning, when did Dr. Haskell, you know, first do these procedures? And we had -- the evidence is in the trial record on that. We played you the Haskell tape, which is from the 1992 NAF presentation. He said on the tape that it had been four years earlier that he first performed the procedure. That's Government Exhibit E. So that's 1988. Still --

THE COURT: I thought I had read someplace or heard testimony it occurred in the '80s.

MS. GOWAN: We played it for you, your Honor.

Lack of data to prove its efficacy is key, and there's no justification at this point why it hasn't been adequately cited.

And as your Honor -- we presented evidence that there are potential risks to the procedure, particularly the risks associated with the internal podalic version and the use of the scissors, as well as the potential for long-term risk concerning preterm birth. There's disagreement about those risks. You heard from counsel this morning about that.

Before we talk about the preterm issue, I want to talk

about the other short-term risk. So there's safe alternatives to the procedure. That's important. It's not merely that there's another method to use, it's that there are other methods that have proven and scientifically documented safety.

Everyone agreed at trial that the reported data shows that D&E is very safe. As Dr. Clark testified, the data shows that it is an incredibly safe procedure with almost a negligible risk of complication, that it would be difficult to imagine that partial birth abortion could be safer. It's the transcript at 2387.

Now, the well-known and documented risks associated with D&E are detailed in the government's proposed findings. In summary, that evidence includes, some of it from NAF as well as multiple other sources, as follows: The risk of excessive bleeding from D&E is no more than 1 percent. The risk of cervical laceration is no more than 1.2 percent. The risk of uterine perforation is reported at .2 percent to 1.4 percent per 1,000, with NAF putting it at less than one-half of 1 percent of all cases.

NAF says that the risk of infection, most of which are easily identified and treated, is in less than 3 percent of the cases. The evidence is that when antibiotics are given prophylactically, there is infection in less than 1 percent of cases. Indeed, Dr. Hammond testified that infection occurs in less than 1 percent of cases regardless of the number of times

an instrument is put in a woman.

NAF identifies the risk of retained tissue at less than 1 percent in all cases. I think that brings us to Dr. Chasen's study. Besides being at best inconclusive, the study does not show that partial birth abortion improves on these numbers or the safety of D&E in any way. It also shows that Congress was right not to give weight to letters in a congressional record like those written by Dr. Chasen's coauthor, Dr. Rashbaum.

Rashbaum wrote in a letter to Congress that, quote, outlying the D&X will -- emphasis on the original -- will result in higher maternal health risks and mortality, closed quote. 3/21/96 at 130.

The only explanation he gives for that is that D&E requires surgical instruments that could result in rare but severe damage to the mother, and the D&X procedure does not require the use of instruments.

Dr. Chasen's and Dr. Rashbaum's study does not prove that partial birth abortion is safe. In fact, as your Honor knows, when Dr. Chasen's first sent into ACOG's journal where it was rejected, one of the peer reviewers criticized his initial conclusion that partial birth abortion was as safe as D&E. The peer reviewer said that Dr. Chasen had not proved it, only that he had found that there were no obvious differences between the two procedures. That's the transcript at 1659.

Dr. Chasen changed the conclusions, published conclusions to, quote, our data affirmed that abortion after 20 weeks' gestation with intact D&X appears to have similar complication rates as dilation and evacuation when performed by experienced physicians. Transcript at 1661.

While there are no statistical differences in the short-term complication rates in the two groups studied, and the median blood loss and procedure time were the same, the evidence shows a trend of greater cervical laceration -- excuse me, cervical and genital tract trauma with partial birth abortion. And those percentages are in the government's proposed finding at 272.

You know, moreover, with all due respect to the San Francisco Court, the evidence before your Honor is that the Chasen study gives us absolutely no information about the major health complications as compared between D&E and partial birth abortion, and thus there can be no basis for any inference about the mortality rate.

And as your Honor knows, Dr. Chasen testified that the fact that the three cases have serious complications occurred in the D&E group says nothing at all about the safety of partial birth abortion because he could not have performed partial birth abortion on those women; that is, there's no way of knowing whether the outcomes would have been improved with partial birth abortion. That's at the transcript, 1665 through

1666, and his study says as much on its face. That's Plaintiff's Exhibit 23A at SC0161 line 276.

The study also shows a statistically significant difference in the amount of cervical dilation between the two procedures. And it shows a three-times increase in preterm birth.

Plaintiffs have a response on the preterm birth numbers, saying the women were prone to it, but the fact of the matter is that trend is concerning.

Your Honor recalled correctly Dr. Clark told you that if 1,000s and 1,000 obstetricians came into this courtroom and were asked, what's the number one problem in obstetrics and pediatrics, they would all say prematurity. It accounts for more morbidity and mortality than any other single condition in all of obstetrics. Transcript at 2393.

Your Honor, we know from the statistics that the majority, I would say large number of women who receive abortions at or beyond 21 weeks the gestational age at which partial birth abortion are performed are under 21 years of age, that their reproductive lives are ahead of them. That's at 1736.

Now, Dr. Clark told your Honor -- notwithstanding counsel's suggestion that no relationship between partial birth abortion and preterm delivery has been proven, he said that -- but he is very concerned about the trend shown in the Chasen

study. That's exactly what Dr. Cook told Congress. And Dr. Clark -- excuse me, Dr. Lockwood testified about his concern on this issue, too.

You know, your Honor, we called Dr. Lockwood as a witness. We knew that he didn't agree with the government on all points concerning the law. That's the problem with independent experts. You can't control them. But the fact is he unequivocally testified that his medical opinion is that partial birth abortion is never necessary to preserve maternal health, nor could he conceive of a situation where there would be an advantage to it over D&E. That's the transcript at 1758.

Moreover, he's an expert on preterm birth, and he testified that his clinical concern with partial birth abortion is that it may present a long-term health concern of prematurity. And we have those cites for you in our proposed findings.

There is a foundation of evidence as potential risks of partial birth abortion identified by Congress. Finally, plaintiffs' argument that partial birth abortion purportedly may be the safest method of all, if true, the D&E is safer than induction, is just an add-on. I mean, there is simply no scientific evidence that D&E is safer than medical abortion at 20 weeks' gestational age and greater. In fact, as we showed in our proposed findings, the evidence is that the opposite may be true, particularly with the advances in the types of

medications that are used for induction.

I think it's appropriate, too, for a moment to touch on the issue of potassium chloride or digoxin injections to kill the fetus before starting the abortion. Plaintiffs suggest that the government offers this as a way to permit them to avoid a constitutional problem with the Act; in other words, a kind of get-out-of-jail-free card.

The government does no such thing. We merely point out that the evidence at trial confirms the evidence in the congressional record. It shows that practitioners, including Dr. Chasen and Dr. Frederiksen, routinely and safely use these agents to kill the fetus before beginning an abortion. Thus, even if one were to accept the argument that there might be some as yet unknown circumstance where partial birth abortion could be medically necessary, there is simply no reason to pull a live fetus out of a woman to a point where it is inches of live birth to kill it before completing the delivery. Where is the science? What is there to back up?

The plaintiffs claims, in sum, your Honor, there is no evidence that banning partial birth abortion would present any significant risk to the health of women such that a health exception is required in the Act.

I'd like to turn briefly to plaintiffs' vagueness challenge. The Act prohibits abortion providers from knowingly performing a partial birth abortion. The procedure is

specifically defined as requiring three separate elements.
First, the provider must deliberately and intentionally vaginally deliver 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 a breech position, any part of the fetal trunk past the navel is outside the body of the mother; in other words, deliver the fetus to a certain anatomical point.
Second, the provider must deliver the living fetus to that point for the specific purpose of performing an overt act that the provider knows will kill the partially delivered fetus; in other words, the provider intends to deliver the fetus to that point to kill it.
Third, the other -- the provider must perform the overt act other than completion of delivery that kills the partially delivered fetus.
Now, plaintiffs take issue with the name partial birth abortion. They claim there's no such procedure. The San Francisco decision gives weight to plaintiffs' arguments on this score and cites comments made by dissenting legislator in the House report dated April 3rd, 2003, who was offering an amendment to strike the provision providing for imprisonment. The amendment was not for --
THE COURT: Providing for what?
MS. GOWAN: Imprisonment. It was not for definitional

change. And it's clear from the comments of that legislator that she was persuaded by arguments of doctors testifying before Congress, including Dr. Davis from Columbia, on the vagueness issue.

Your Honor, the constitutionality of the Act does not depend on whether one legislator, legislator who stated at that same debate that she thinks it's wrong to ban medical procedures, believes that what is being banned is unclear. That's at the April 3rd, 2003, House report 108-58 at 79.

The term partial birth abortion is a common-sense plain and descriptive name for a procedure first identified by Dr. Haskell and Dr. McMahon. Plaintiffs have offered more than a dozen different names for the procedure. And at least as of 1995, when Congress first introduced the legislation, the evidence in the congressional record showed that none of the names plaintiffs used were in the medical literature either. Moreover, under the law it is legislators that are given the task of defining terms of a medical nature that have legal significance.

I submit that nor does the fact that the operative language of the Act differs from some of the factual information in Finding 1 render the Act vague. That finding details some of the evidence that was before Congress, in particular that some doctors puncture the child's skull. But Congress also had evidence that some doctors crush, as opposed

to puncture, the skull. Your Honor mentioned this morning that some doctors use their fingers. The law does not obligate Congress to detail each and every possible way that a provider might kill a fetus delivered to the anatomical point specified in the Act. I mean, that phrase overt act is entirely appropriate and its use as an element of defined offense is common in our law.

Nor does the law require Congress to list procedures that the Act does not cover. For example, to explicitly say medical abortion, completing of spontaneous abortion, D&E, or to adopt ACOG's way of defining partial birth abortion, when the Stenberg Court suggested that that might have been a remedy for the Nebraska law, it was in the context of the Court's examination of a law that is different from this Act.

THE COURT: How is it different?

MS. GOWAN: That law described delivery into the vagina of a living unborn child or a substantial portion thereof. The vagueness focus in Stenberg had to do with what constituted a substantial portion thereof that is delivered into the vagina. The Court found that because D&E routinely involves pulling a substantial portion of a living fetus, such as an arm or a leg, into the vagina before dismembering occurs D&E fell within its scope.

That is simply not the case here. Congress' law is different.

THE COURT: Well, tell me how it's different.
MS. GOWAN: It is pulling -- it's the removal of a fetus outside of the body of a woman to a point, to the point of the umbilicus or beyond. It is not a substantial portion of a fetus in the vagina.
As for adopting ACOG's definition there is absolutely no reason why Congress is required to. The evidence at trial showed that partial birth abortion does not always involve conversion of the fetus, one of the steps in the ACOG division -- excuse me, definition. At the relevant gestational age, approximately one-third of the fetus is already presented in breech. You don't need to deal with the internal podalic portion, nor does the fact that the Act defines the fetus as living in terms of the viability render the act vague.
The analysis remains the same. Does the language of the Act tell physicians what they need to know ahead of time in order to steer clear of the unlawful conduct? Here Congress informs them to avoid liability, they must not begin an abortion with the intent of delivering a living fetus to a specific anatomic point outside the body of the woman for the purpose of performing an overt act they know will kill it.
With all due respect to the San Francisco Court, your Honor, I don't think you can write the specific scienter requirement out of the Act. The provider must intend to do all of the steps provided by the Act. And those steps define a

procedure with specificity. They don't describe what happens in the induction abortion, D&E or a spontaneous abortion. The provider does not intentionally partially deliver a living fetus to the specified anatomical point outside the body of a woman for the purpose of performing a lethal act in a medical induction abortion, in a D&E, in the treatment of spontaneous miscarriage.

And the Third Circuit's decision in Farmer upon which the San Francisco Court relies does not compel a contrary result. In Farmer, the Court said that in order for the scienter requirement to operate as a limit to the scope of New Jersey's partial birth abortion law, the procedure itself must be identifiable from the language of the Act. The language of the New Jersey act is different from the language of the federal act.

The problem with the definition in Farmer, your Honor, was that the New Jersey statute defined partial birth abortion as delivering into the vagina a living fetus or a substantial portion thereof; the very same language that Stenberg found encompassed D&E. It was the identification of this procedure that could not be limited by a scienter requirement in Farmer.

Finally, the evidence is not that just any abortion could proceed in a manner defined by the Act. The evidence is overwhelming that it is a specific method of abortion. Dr. Westhoff sought out someone who performed it so she could

observe it and then she learned it.

Dr. Grunebaum, who's performed over 1,000 abortions before he first saw someone do it in 2002, was so struck by it that he said, quote, wow, this is fantastic, closed quote.

Dr. Chasen learned how to do it from Dr. Rashbaum, and let me just do -- a side note here. I believe that the reason -- your Honor asked, and why didn't plaintiffs bring Dr. Rashbaum to testify in rebuttal concerning the report? As I understand it, Dr. Rashbaum is plaintiffs' nontestifying consulting expert in this case. That's why he wasn't brought here. The government --

THE COURT: Say that again?

MS. GOWAN: Counsel approached me and asked me -- told me that Dr. Rashbaum was a consulting expert for the plaintiffs in this case and, therefore, would the government not subpoena him to take his deposition. And I agreed because I understood that there were work product issues. I think that's why plaintiffs did not call Dr. Rashbaum to testify about his study.

Back to now the procedure. Dr. Chasen learned how to do it from Dr. Rashbaum. That's his trial testimony. In his paper he describes the procedure as delivering a fetus in the breech presentation to the same anatomical point, that is, the umbilicus or cord, as identified in the Act.

The first study plaintiffs have come up with in more

than a decade to show the purported safety of the procedure nearly tracks the language of the Act. Plaintiffs describe the serial dilation needed to permit the delivery of the fetus, namely at or after 20 weeks. They describe reaching into a woman, either with instruments or their fingers, to reach for the fetus' feet or legs to gently pull down the fetus using gauze to improve their grasp or wrapping a towel around the fetus because it's slippery, rotating the fetus to sweep its arms down.

They describe taking a scissors or some other instrument or their fingers and puncturing the back of the fetus' skull or crushing it. They describe sucking out the fetus' brains and then completing the rest of the delivery.

The evidence is clear that this is different from D&E, where the provider uses forceps to dismember or tear apart the fetus and uses the counterpressure or resistance of the woman's internal cervical os to help break apart the fetus.

The Act cannot fairly be interpreted to cover spontaneous abortion. Plaintiffs describe essentially two circumstances involving spontaneous abortion, one in which the woman presents to the hospital with her cervix already dilated to a point where the abortion can be performed, if needed, for example, because of infection. There's no evidence that D&E or induction could not safely be used to complete the miscarriage. Indeed, Dr. Hammond testified that he would use a D&E in this

circumstance but that he preferred intact delivery because he thought that it had the safety advantages that he testified about here today or at trial.

Dr. Grunebaum testified that the other circumstance -- I should said described the other circumstance as one in which a woman might present with the fetus already spontaneously partially delivered to a point where the head is stuck in the cervix. He said that he could wait until the head delivered spontaneously, or that he might have to go ahead and decompress the fetus' head because the woman might hemorrhage.

The Act cannot fairly be interpreted to cover this situation. In no way, shape or form did Dr. Grunebaum partially deliver the fetus to that point for the purpose of killing it. The woman's body expelled the fetus on its own.

And as for medical induction abortion, in that method of abortion, as your Honor learned, the woman receives drugs that cause the uterus to contract and expel the fetus. In no sense of the word can it be said that in administering drugs to the woman, the provider intentionally and deliberately vaginally delivers a fetus to a specific anatomic point for the purpose of killing the partially delivered fetus.

Again, the fact that that doctor might have to take steps to complete an induction abortion by removing a fetus with its head stuck in the cervix or knows that he or she may have to take such a step does not put the doctor in violation

of the Act. The specific intent called for is simply not there. The language of the Act gives an abortion provider of ordinary intelligence reasonable opportunity to know what is prohibited, and the scienter requirements ensure that that conduct and only that conduct is prohibited.

Your Honor, plaintiffs suggest that the sole issue before this Court is a medical one. At heart, their argument is that alleged intuitive safety advantages of partial birth abortion should be dispositive of this case on the merits and that any issue concerning fetal pain, fetal life or the ethics of abortion practice must be disregarded. They are wrong. The safety of abortion is a key issue. But it's not the only relevant issue.

The ban on partial birth abortion will not be properly evaluated by this Court unless all of the concerns that motivated Congress are considered. Abortion is not, as plaintiffs assert, a mere surgical procedure in which, according to Dr. Weiss, a provider sets out to make a woman, quote, unpregnant, closed quote.

Partial birth abortion involves the killing of a developing human life late in the second trimester, quite near the point at which or after which it could survive outside the womb to a process of taking it from the woman's body to a point mere inches from where its independent autonomy would be recognized whatever its stage of development.

Congress took considerable evidence as to the serious ethical issues raised by partial birth abortion and that evidence was confirmed at this trial. Trial firmly supports Congress' determination that the fetus can feel pain during the gestational age at which partial birth abortion is performed, and as your Honor recognized this morning, that evidence is unrefuted.

It is simply no response for plaintiffs to say that D&E also inflicts pain on the fetus. The focus of the Act is a particular method of abortion that not only inflicts severe pain, as Dr. Anand has testified, but does so through a procedure that presents a host of other medical and ethical concerns. It inflicts severe pain in a procedure that is never medically necessary, has no demonstrated safety advantages, poses potential serious risks and kills the unborn mere -- at a viable stage when it is mere inches from autonomy.

(Continued on next page)

MS. GOWAN: Congress is simply not required to address every circumstance in which a particular concern may arise but may legitimately focus its legislative effort to address specific harm.

The evidence also supports Congress' judgment that partial birth abortion is ethically different from other destructive abortion techniques because of its disturbing similarity to the killing of a newborn infant in which the fetus, normally 20 weeks or longer in gestation, is killed outside of the womb where it would have an autonomy of its own.

The evidence is that partial birth abortion appropriates the terminology and techniques used by obstetricians in the delivery of living children and uses those techniques to end the life of a partially born child. It involves fetal breech extraction.

When Dr. Grunebaum was asked about the first time that he witnessed the partial birth abortion he had this to say:

"Q And you had never seen that before, had you? You had never seen an intact fetus removed from the body of a woman before, right?

"A It happens all the time when I do a normal delivery."

The evidence at trial supports Congress' findings that partial birth abortions performed near and after 20 weeks when the fetus is most likely to be removed intact and at a time

near to viability. This Court heard graphic testimony about how the fetus is pulled out by the legs and then its arms and shoulders are swept down and out of the cervix one at a time. Your Honor heard about the use of gauze and towels to wrap and hold the fetus during the abortion.

I am going to take a brief moment, your Honor, to read an excerpt of Williams' Obstetrics that's in the Congressional record at November 17th, 1995 at 86. The excerpt is about delivering a live baby.

"During total extraction of a complete or uncomplicated breech, the obstetrician's hand is introduced through the vagina and both feet of the fetus are grasped. The ankles are held with the second finger lying between them. The feet are brought with gentle traction through the vulva. If difficulty is experienced in grasping both feet, first one foot should be drawn to the vagina but not through the introitus and then the other foot should be advanced in a similar fashion. Now both feet are grasped and pulled through the vulva simultaneously.

"As the legs begin to emerge through the vulva they should be wrapped in a sterile towel to obtain a firm grasp for the vernix caseosa renders them slippery and difficult to hold. Many obstetricians prefer the towel to be moistened. Gentle traction is then continued.

"As the legs emerge, successively higher portions are

grasped, first the calves and then the thighs. When the breech appears at the vulva, gentle traction is applied until the hips are delivered. As the buttock emerges, the back of the infant usually rotates to the interior. The thumbs are then placed in the sacrum and fingers over the hips and gentle downward traction is continued until the costal margins and the scapula becomes visible."

The excerpt goes on to describe two methods for delivering the shoulders including rotation of the fetus to free an arm that may be extended over the fetus' head in the uterus much like what was described to your Honor at trial takes place in partial birth abortion.

The excerpt concludes that after the shoulders are born, the head usually occupies an oblique diameter of the pelvis with the chin directed posteriorly. The fetal head then may be delivered with forceps or by a maneuver that involves flexing of the head. This is precisely why Congress found partial birth abortion disturbingly similar to infanticide.

The testimony of Drs. Westhoff, Chasen and Grunebaum demonstrates that Congress had a substantial basis in evidence to find that partial birth kills near viable life inches from autonomy using the process of birth.

Any suggestion that Congress' interest in protecting fetal life is not existent because the Act regulates a mere method of killing is baseless. An effort to draw ethical lines

in the methods of an abortion is a perfectly reasonable exercise of Congressional authority.

The line drawn here banning the killing of a human life after delivery to a specific point outside the body of the mother is a clear and understandable effort to prevent the extension of the right to destroy the fetus in utero to its destruction outside the body, particularly when it is so close to autonomy. By banning this particular method of abortion, Congress delivers the message that this procedure is wrong and that allowing it to proceed, in the words of Congress, "will further coarsen society to the humanity of life."

The value of life is [inherently] advanced when everyone, including those directly involved in the abortion process, must consider and acknowledge the limits to and the implications of their conduct.

Your Honor, thank you.

THE COURT: Ms. Gowan, before you sit down, may I ask you one more time, I find your presentation interesting but how do you overcome -- once again, how do you overcome the standard set down in Stenberg that if there is a conflicting body of medical opinion that you must allow the procedure? How do you overcome that test?

MS. GOWAN: Your Honor, I submit that is not the test.

THE COURT: Well tell me what it is, then.

MS. GOWAN: The test is --

THE COURT: Isn't that the crux of the whole thing?

MS. GOWAN: No, your Honor.

The Stenberg Court interpreted the governing standard to require a health exception where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. In other words, when substantial medical authority supports the proposition banning a particular procedure could endanger women's health.

Your Honor, appropriate medical judgment is the evidence. It is the evidence that was before Congress as supplemented by the evidence in this case.

So, the question then becomes where it is necessary, shown in the evidence, substitute appropriate medical judgment for the evidence. That's all the appropriate medical judgment is, is what is the evidence? Is it necessary for the preservation of the life or health of the mother?

THE COURT: You are saying the evidence presented before Congress supplemented by the evidence here at this trial reflects that no medical exception is necessary?

MS. GOWAN: That is right and that is because that evidence shows that banning this procedure will not endanger women's health.

In other words, there is substantial evidence, evidence before Congress, evidence before this Court, and we cite a case in our proposed findings, substantial evidence

means evidence that a reasonable mind would find adequate to support the proposition. We submit that Congress had before it and we have supplemented for your Honor the record to show that a reasonable mind would find Congress' conclusion, would find adequate the Congress' conclusion that a health exception is not necessary as supported by adequate evidence in the record. That is --

THE COURT: Stenberg had that Congressional record with the exception of the years subsequent to their decision, so are you saying the proof that is in this trial must be elicited before Congress after the Stenberg opinion?

MS. GOWAN: Well, the evidentiary record in Stenberg was the District Court record. Now, certainly the Supreme Court considered other materials that were not in the District Court record. For example, they considered NAF and ACOG's amicus brief but that record was limited and, yes, I understand that they looked at information that was in the Congressional record as well but the role of this Court is to look at what was in Congress's record from the 104th, 105th, 106th 108th's hearing, take a look at that evidence which we have tried to martial for you and then see, number one -- I mean that evidence I submit does it.

But to the extent that this Court has, wants to evaluate additionally looking for additional support, the Court takes a look at the evidence as presented at this trial to see

if it supports the decision that Congress made based on the evidence before it.
THE COURT: This Court that is nisi prius?
MS. GOWAN: I don't know what that means, your Honor.
THE COURT: Good.
MS. GOWAN: Where I went to school they wouldn't let the girls take Latin.
THE COURT: That is a shame.
MS. GOWAN: Yes, it is. I agree.
THE COURT: But that this Court can look at the record of this trial and see whether or not there is, as you suggest, no evidence of a necessity, even though the testimony of certain doctors claim that there is reason?
MS. GOWAN: Your Honor must evaluate that. It is not a division of opinion test, your Honor must look at all of the evidence and see whether Congress was right that banning this procedure does not endanger women's health.
THE COURT: So, we must decide whether it is right, not just that there is a body of evidence on both sides.
MS. GOWAN: You must review.
THE COURT: Or at least leave on both sides --
MS. GOWAN: The Court must review Congress' determinations based on its evidence and the Court may take a look at the evidence presented here and make a determination whether the ban, whether the Act is constitutional, that is,

that it does not endanger women's health, it does not present a significant risk of harm to women, that they not be permitted to have this procedure.

In other words, there is no significant safety advantage.

THE COURT: Thank you very much.

MS. GOWAN: Thank you.

THE COURT: The Court will stand in recess.

MR. HUT: Oh, your Honor, may I not be heard on rebuttal? I have short rebuttal, approximately 15 minutes, a little longer.

THE COURT: I didn't make any provision for that, nor did you ask for it, Mr. Hut and I don't see where you did do that at trial but this was final argument. I reserved no time for that.

MR. HUT: I thought that I had asked. There may have been a misunderstanding. I did not reserve it at the outset. I believe I did, in conversations, request it. I would hope that you would permit me to be heard in the interest of the clarity of the record.

THE COURT: Is there any request for reservation of time?

There was a request, then I will allow you to do it if you made the request.

MR. HUT: I will try very hard to be brief, your

Honor.

With respect to the question of medical, what is necessary in appropriate medical judgment, that does not mean that the banned procedure, in order to require a health exception must be the only option to deliver a safe procedure. The Stenberg Court could not have been more clear on the point. It said, the word "necessary" in the phrase "necessary and appropriate medical judgment" cannot refer to an absolute necessity or absolute proof. I am reading at 530 U.S. 937.

Medical treatments and procedures are often considered appropriate or inappropriate in light of the estimated comparative health risks and health benefits in particular cases, neither can that phrase require unanimity of medical opinion.

The Court inquired of me in the morning whether on whom was the burden and I said I was not aware at that point what the cases said, that I was prepared for argument's sake to assume it. I do think, however, that the Stenberg case also speaks with some clarity to that and in fact places the burden on the state in at least two places. At page 530 U.S. at 932 the Court says, "the state fails to demonstrate that babies without health exception may not create significance health risk."

THE COURT: I don't know that the burden is there. They make the comment that they fail to do so in their opinion

but I don't know that they say the burden is.
MR. HUT: I draw the inference when they say the state failed to do so that the burden is on the state when they tax the state.
THE COURT: I am saying that isn't so.
MR. HUT: I am trying to be responsive.
THE COURT: Are you flipping back that it is their burden not yours now, is that it?
MR. HUT: I did not say that it was ours, I said I was prepared to assume it. Over the lunch break I had an opportunity to look at Stenberg and at page 937, 530 U.S. 937 again Justice Breyer said Nebraska has not convinced us that a health exemption is never necessary. To be sure that is not an absolute allocation of a burden I think the Court has, as with us, can fairly infer that the Supreme Court at least thought that the burden was on the state.
Stenberg, by the way, assumes health risks. It assumes that the evidence before it showed some question about health risks that may have been posed by the procedure sought to be banned by the state of Nebraska. It, for example, took cognizance of a representation in amicus brief of the Association of American physicians as to the existence of concerns with cervical incompetence.
And so even if, your Honor, you were to find a basis for some concern about the pre-term delivery data in the Chasen

study as reflected in the Clark testimony, even so, that is simply one piece of data. It is one piece of data arrayed against a broad spectrum in which there is very, very substantial debate and divided and a very substantial opinion on the other side.

And so, even if you credit that for all it is worth and even if you said Congress could do so, it simply does not meet what the government needs to meet in achieving the Stenberg standard.

Ms. Gowan recited at some length the portions and extracts from the legislative history. To me that set of extracts showed two things.

One, that over time, since 1995, as one would expect, there has been an evolution as to the views of the procedure and the various understandings as to how it proceeded. And, second, what the legislative history reflects is the very kind of debate that Congress said must, if proved evidentially warrants a health exception.

That's the significance of the views of Dr. Hern whose hearsay views were apparently reported to Congress in the other people who spoke to the Congress.

With respect to fetal pain, I suggest to you that nowhere in the Court's jurisprudence is there any suggestion that fetal pain can be viewed as a legitimate state interest.

What is viewed as legitimate state interest is a

protection for potential fetal life. That is not remotely implicated with this act because this act assumes that there is going to be the destruction, the abortion of a fetus and Congress cannot well serve that interest in any rational way if it is going to divert providers to a method that, assuming there were fetal pain, a matter that is unproved, would inflict more.

There was some commentary by counsel about the role of anesthesia. I think the focus was on whether anesthesia kills the fetus and some conflicting testimony before Congress apparently on that score.

You heard testimony from Dr. Westhoff that anesthesia, general anesthesia does cross the placenta. That is something that Dr. Anand acknowledged and it does certainly function in some analgesic way to minimize or reduce pain.

There was some mention made of viability study referred to in the Congressional record by Dr. Boews with respect to the possibility of viability at 23 weeks. That was 23 weeks' gestational age, your Honor, that would translate to 25 weeks LMP. You heard no testimony and no testimony was provided with respect to that gestational age.

There was reference to the brief submitted as amicus curiae for the American College of Obstetricians and Gynecologists. It is worth pointing out that Justice Breyer's opinion for the Stenberg Court not only relied on that brief

and its enumeration of the safety benefits that the procedure at issue there could, in the judgment of the college offer, he quoted from it at considerable length.

Despite the fact that the Court pressed it twice, counsel did not answer, or at least I did not hear an answer to the question whether there is a substantial or whether there is substantial medical opinion on both sides. I think she said that that was not the relevant question.

We think that it is very much the relevant question and that she cannot answer it because the answer is overwhelmingly there absolutely is. That's what three weeks of trial testimony in this Court demonstrated.

We showed it not only through the nine witnesses that we presented on safety issues, some of those by deposition, but we presented it or we demonstrated it through two witnesses that were government witnesses, Drs. Lockwood and Dr. Bowes who, essentially, agreed with the existence of safety advantages, at least on a theoretical basis.

With respect to counsel's argument that the standard as set out in Stenberg is whether the banned procedure would provide a significantly safer procedure or eliminate significant risks, I think it is beyond question that the answer to that must be yes. The risks, like perforation of the uterus, like retained fetal parts that cause sepsis are very, very serious. Counsel supplied data during argument that

placed those risks in quantitative terms, at around the 1 to 1 and a half percent level, if I heard right.

Your Honor, there are approximately 140,000 D&Es done every year and if, as I assume for the present purposes the variety majority of those is by dismemberment, then the availability of intact extraction would eliminate a 1 to 1 and a half percent rate, something in the order of 1,400 to 2,000 cases of such very serious complications as uterine perforation, as sepsis. That is a record of safety that confers health benefits on women, significant health benefits on women by any measure, and for that reason there must be the health exception.

THE COURT: And if there is substance to the Chasen report on prematurity we may be adding to their problems.

MR. HUT: The Chasen report on prematurity makes no such suggestion.

THE COURT: Well, you disagree with Dr. Clark but if he is right then it adds to it, does it not?

MR. HUT: If he were right -- he doesn't say. Ms. Gowan --

THE COURT: If it is correct it proves that he --

MR. HUT: It acknowledges that he proves nothing but he is still alarmed by it, yes. I guess that is the state of the record.

So, if you assume away his concession that it proves

nothing and take only his alarm, that adds a piece of datum to the general posture of how safety risks and benefits are measured. And if there is substantial medical authority that believes they are safer, that requires a health exception under the test of Stenberg.

There was suggestion by counsel or comment by counsel on the ACOG statement and the testimony by Dr. Cain concerning the addition of the sentence about safety advantages and the ascription of those safety advantages to conditions like sepsis and certain forms of cancer. The testimony by Dr. Cain on that subject is clear. The executive board edited the sentence but that sentence had been tangible and quite explicit through all of the discussions of the task force.

And so, when the executive board added the sentence the task force believed that that was a fair reflection --

THE COURT: How do you know that, Mr. Hut, what the task force believed? There is no testimony to that.

MR. HUT: Yes, there is. Dr. Cain testified precisely to that, your Honor.

THE COURT: That the task force had believed something? How can she testify as to what was in the mind of a body of people?

MR. HUT: She was a member. She talked to them every day.

THE COURT: But this is a body of people.

MR. HUT: You can certainly understand and give testimony about the mind, what was in the minds and bodies of the people based on what such bodies tell you during the course of the deliberations. That's what she was doing.
THE COURT: Or an assumption on her part.
MR. HUT: Based upon daily interaction or frequent interaction that she had with the five or four other members.
With respect to the change in the Chasen study from language that was unsafe as to no difference in complication level, I think the only fair inference to draw from that is that the reviewer was concerned about the determination of what is safe.
The question was, was a 5 percent complication rate safe or was it not safe?
So, rather than make some generalization about safety, the authors changed the language to reflect the suggestion that they only talk about equivalent complication rates. A 5 percent rate of complication, Dr. Chasen believes, demonstrates safety and he testified to that.
With respect to the concerns that counsel identified that Dr. Lockwood supposedly has as to cervical incompetence, he testified that those concerns go to all abortions, not merely to or only to intact D&Es, that they extend of course to dismemberment D&Es and to induction. There is, after all, more dilation achieved during induction and for that matter

childbirth by considerable amount than there is in a surgical abortion during the second trimester.

Dr. Lockwood also agreed that not a single published study reliably suggested anything about the consequence of intact D&E or second trimester surgical abortion for any question of cervical incompetence. And he also acknowledged the Kalish study which shows a negative correlation between the degree of dilation and subsequent preterm issues.

With respect to --

THE COURT: Did you show him the Chasen study when you took his deposition?

MR. HUT: Oh, he had it, your Honor. He was aware of it.

With respect to effectuation of fetal demise through KCL introduction, just a word on that.

The testimony is clear, there are no medical advantages, there are some medical risks, there are some unpleasant side effects to digoxin. Some women cannot tolerate the injections that would affect fetal demise. For some it is medically impracticable, for example, in some cases of obesity and some doctors just cannot do it so that, we suggest, is no answer.

There was a good deal of argument at the end of the presentation by counsel for the government about the ethical implications of the procedure and the notion that this is a

fetus inches away from autonomy and that the procedure appropriates the techniques of obstetricians to inflict fetal death on an almost born fetus.

If that is a concern then it is hard, frankly, to understand why the government, why the Congress has such a preference for induction for induction is not merely partial birth, your Honor, induction is birth. It is the expulsion of a fetus during the labor process.

Finally --

THE COURT: The baby is already dead though, right?

MR. HUT: May or may not, your Honor.

Finally, while we heard a lot of argument, we never did hear the answer to the relevant question, the determinative question, whether there is a significant body of medical opinion that believes that intact D&Es may be safer for some women. There was just simply no answer to the question because that is what Stenberg requires the Court to determine and on the record I suggest it is easy for the Court to do that. There is substantial, overwhelming opinion about the safety of the procedure that Congress purports to ban and for that reason health exception is required and for that reason the law cannot stand.

That concludes my remarks. If the Court has no questions for me?

THE COURT: Thank you, Mr. Hut.

Since I allowed it, Ms. Gowan, do you have any closing remarks? No one can feel they were cut off, up to a point.

MS. GOWAN: There was an answer to the question, your Honor, about significant body of medical opinion, and the answer is the evidence before Congress establishes that that significant body of medical opinion is the evidence, what is the evidence, and the evidence before Congress showed that it is not necessary and that evidence has been supplemented by this Court by the government here.

The test is not division of medical opinion. That was a phrase that the Stenberg Court used in reference to the state of the record in the District Court in Stenberg and the Supreme Court said that Nebraska had not, in the face of the division of medical opinion. In the evidence in the District Court in that case Nebraska had failed to show that it was, there were not the advantages that Dr. Carhart had shown in the 10 or 12 cases.

THE COURT: Did Nebraska call any doctors? Did the state in that case? It only lasted one day but I did not know that.

MS. GOWAN: What Nebraska did, and it is on page 6, footnote 2 of our proposed conclusions of law, Nebraska submitted a video deposition of Dr. Boehm and the preliminary injunction hearing of a Dr. Riegel. I don't have with me, the letter that we submitted to your Honor in April and I could get

you another copy, but I set out in that letter the information I had which was that Nebraska had taken deposition of Dr. Carhart's witnesses or even Dr. Carhart.

They went into the preliminary injunction hearing, boom. Then the district court imported that testimony into the trial. No witness' testified live at trial for Nebraska. Nebraska had the video deposition of Dr. Boehm and the preliminary injunction hearing of Dr. Riegel. There was no live testimony presented by Nebraska.

THE COURT: All right, so you are suggesting that the, it is not just opinion but rather the actual evidence produced before Congress and in this courtroom --

MS. GOWAN: Yes.

THE COURT: -- proves that no medical exception is necessary, is that your position?

MS. GOWAN: Yes, that's right.

You look at the evidence in the record, the Supreme Court didn't announce a new standard, is there a division of medical opinion out there. And the Supreme Court cases that we cite in our proposed conclusions of law, the prior Supreme Court cases actually say when there is a division, quote unquote, of medical opinion, you look to Congress, that is an appropriate place for Congress to step in and legislate.

Thank you.

THE COURT: Thank you all very much. The court will

stand in recess.

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