

## Stenberg v. Carhart (2000)

In *Stenberg v. Carhart*, the US Supreme Court in Washington D.C. ruled on 28 June 2000 that a Nebraska state law banning partial birth abortions was unconstitutional. Though the US Supreme Court case *Roe v. Wade* in 1973 had set a precedent that protected women's rights to abortions under the US Constitution, some states established limitations on certain types of abortion procedures. When Nebraska's state government criminalized partial birth abortions, physician LeRoy Carhart challenged the constitutionality of the case. Don Stenberg, the state Attorney General located in Lincoln, Nebraska, represented the state of Nebraska. Stenberg determined that states could not create undue burdens on women's right to terminate their pregnancies, and that specific restrictions on abortion procedures must include exceptions to protect women's health and lives.

The Stenberg decision relied on the precedent *Planned Parenthood v. Casey*. In 1992 the US Supreme Court decided the *Casey* case and added several stipulations to the *Roe* verdict. The court in *Casey* decided that a woman could obtain an abortion only before her fetus was viable, a legal term then defined as the time period before the twenty-eighth week of pregnancy. However, the *Casey* case also allowed for such abortions to be performed in cases when necessary to preserve the life or health of the woman.

In the year 2000, when the Stenberg case was argued, ninety percent of reported abortions were performed during the first trimester of pregnancy, thus, before fetal viability, and the remainder of abortions occurred during the second and, rarely, third trimesters. The most common procedure in second trimester abortions is called dilation and evacuation, or D&E. In ordinary D&Es, a doctor dilates the woman's cervix and surgically evacuates the contents of the uterus. Doctors use D&E procedures up to a pregnancy's sixteenth week, but after sixteen weeks, they use a type of D&E called an intact D&E. The intact method uses only one evacuation of the fetus from the uterus, as opposed to several. In an intact D&E, the doctor dilates the woman's cervix, and then collapses the fetus' skull in order to extract it through the cervix. Depending on the position of the fetus in the uterus, the doctor in rare cases partially extracts part of the intact, living fetus through the cervix, which is why this procedure could be defined as a partial birth abortion.

Doctors such as Carhart feared that the 1997 Nebraska statute against partial birth abortions, Legislative Bill 23, could be used to prosecute doctors who performed D&E abortions, although the law aimed to ban a different type of procedure. Doctors who performed D&Es could face prison terms of up to twenty years, fines of up to twenty-five thousand dollars, and automatic revocations of their medical licenses in Nebraska. Carhart performed abortions in a Bellevue, Nebraska, clinic. He filed a lawsuit in the Federal District Court in Nebraska against the Nebraska State Attorney General, Don Stenberg. Carhart claimed that the Nebraska statute was unconstitutional and sought an injunction to stop its enforcement.

In the District Court case, The Association of American Physicians and Surgeons, headquartered in Tucson, Arizona, submitted an amicus curiae brief claiming that intact D&E had health risks to the pregnant woman. The American College of Obstetricians and Gynecologists, headquartered in Washington, DC, filed an amicus curiae brief in support of Carhart and his lawyers, stating that intact D&E was not only safe, but safer than the alternative procedures. The District Court decided in 1998 that the Nebraska statute violated the US Constitution. This decision was affirmed on appeal at the Federal Eighth Circuit Court of Appeals in St. Louis, Missouri in 1999. Both courts stated that a ban in partial birth abortions placed undue burden on a woman seeking an abortion.

The Supreme Court in Washington, DC, decided to review the Stenberg case because several US circuit courts had differing decisions on partial birth abortion restrictions. Stenberg defended the

Nebraskan law at the US Supreme Court trial, and he argued that partial birth abortions were unnecessary because alternative procedures were available. In its published decision, The Supreme Court noted that there were no medical studies to support specific assertions of safety. In the absence of such studies, and in the presence of plausible explanations that intact D&E is safer, the Supreme Court decided that intact D&E should be allowed. The court wrote that uncertain medical evidence did not mean that D&E should be banned in all cases, and the court decided that procedures should be left to “appropriate medical judgment,” as stated in *Casey*.

Writing for the majority opinion that included Justices Ruth Bader Ginsburg, John Paul Stevens, Sandra Day O’Connor, and David Souter, Stephen Breyer outlined two reasons for the court’s five to four decision. The Supreme Court concluded that the Nebraska statute banning partial birth abortions, without medical exceptions, was unconstitutional.

First, the court held that the law contained no exception to ensure the health of the pregnant women. Stenberg claimed that the law did not require a health exception, as partial birth abortions were unnecessary and that safe alternative procedures remained available. Second, the court noted that because the statute banned all D&E abortions, it imposed an “undue burden on a woman’s ability” to choose to have an abortion in general. Specifically, because the law didn’t distinguish which type of D&E it prohibited, the court perceived it as being too limiting of a woman’s right to acquire an abortion. Therefore, as the law was inconsistent with precedents set in *Roe* and *Casey*, the court deemed it unconstitutional.

The Supreme Court also rejected Stenberg’s claim that the Nebraska statute only banned a more specific type of partial birth abortion and thus did not apply to intact D&E procedures. This would have avoided the issue of constitutionality. But the Supreme Court referred to previous Nebraskan case law to show that the Nebraskan higher courts typically relied on decisions made by the lower courts, not the Attorney General. They also noted that Stenberg did not seek to narrow the definition of partial birth abortion in the previous cases. Justices Stevens, O’Connor, and Ginsberg wrote statements to concur with the court’s decision. Justices William Rehnquist, Anthony Kennedy, Clarence Thomas, and Antonin Scalia wrote dissenting statements.

The decision in *Stenberg* reinforced women’s rights under the US Constitution to receive abortions. Some legal scholars argue that *Casey* had mitigated rights protected in *Roe*, in that it added various conditions to a woman’s right to choose to have an abortion, and that *Stenberg* was a victory for pro-choice advocates. *Stenberg* led the US Supreme Court in 2007 to consider *Gonzales v. Carhart*.

## Sources

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