CARHART v. STENBERG

11 F. Supp. 2d 1099 (1998) | Cited 0 times | D. Nebraska | July 2, 1998

MEMORANDUM AND ORDER

Because the State of Nebraska has imposed an undue burden on Dr. Carhart and his patients by adopting and threatening to enforce a vague "partial-birth" abortion law, I shall declare the law unconstitutional as applied to Dr. Carhart and his patients. I will also permanently enjoin enforcement of Nebraska's law against the doctor and his patients (and those who are similarly situated). However, I do not reach the question of whether the law is facially invalid. Pursuant to Federal Rule of Civil Procedure 52(a), my reasons for this decision are set forth below.

I. FINDINGS OF FACT

A. The Parties

1. Plaintiff LeRoy Carhart, M.D., practices medicine and surgery in Nebraska and performs abortions in Bellevue, Sarpy County, Nebraska. (Filing 1, Compl., at 3; Filing 9, Stenberg and Thomas Answer, at 2; Ex. 16, Carhart Curriculum Vitae, at 1, 5.)

2. Carhart received his Doctorate of Medicine in 1973; completed his internship at Malcolm Grow USAF Hospital at Andrews Air Force Base, Maryland, in 1974; and completed his general surgery residency at Hahnemann Medical College and Hospital in Philadelphia, Pennsylvania, and Atlantic City Medical Center in Atlantic City, New Jersey, in 1978. Carhart is a retired lieutenant colonel in the United States Air Force who served as chief of general surgery, chief of emergency medicine, and chairman of the department of surgery at Offutt Air Force Base in Nebraska from 1978 to 1985. As part of his duties at Offutt, Carhart supervised 20 to 25 other physicians, including obstetricians and gynecologists. (Tr. [1]" 193:25-194:5.) Carhart has been an assistant professor in the surgery departments of both Creighton University School of Medicine and the University of Nebraska Medical Center. (Ex. 16, Carhart Curriculum Vitae, at 2-4.) Since 1985 Carhart has operated a general medical practice with a specialized abortion facility. [2]" (Tr. 82:14-21.) He performs 800 abortions each year. (Tr. 83:3.) Carhart has never attempted to become certified by a medical specialty board and currently has no hospital privileges. (Tr. 139:2-25.) He is licensed to practice medicine in eight states. (Ex. 16, Carhart Curriculum Vitae, at 5.)

3. Defendant Don Stenberg is attorney general of the State of Nebraska. Defendant Gina Dunning is director of the Nebraska Department of Health and Human Services Regulation and Licensure. (Filing 1, Compl., at 3-4; Filing 9, Stenberg Answer, at 2; Order on Final Pretrial Conf. at 2.)

Defendant Mike Munch is the elected county attorney for Sarpy County, Nebraska, and is responsible for the enforcement of criminal law within Sarpy County. (Filing 1, Compl., at 3-4; Filing 11, Munch Answer, at 1.) Defendant Charles Andrews, M.D., is the Chief Medical Officer for Nebraska who has disciplinary authority over medical license holders in Nebraska, pursuant to Neb. Rev. Stat. § 81-3201 (Michie Supp. 1997).

B. Legislative Bill 23

4. On June 3, 1997, the Nebraska Unicameral passed Legislative Bill 23 ("LB 23") with an emergency clause making it effective upon the governor's signature on June 9, 1997. (Ex. 6.) On August 14, 1997, I enjoined Defendants from enforcing LB 23 against Dr. Carhart "regarding his performance of D&X abortions on nonviable fetuses." (Filing 19 at 58.)

5. Legislative Bill 23 prohibits "partial-birth abortions" in the State of Nebraska "unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself." LB 23 § 3(1), codified at Neb. Rev. Stat. § 28-328(1) (Michie 1997).

6. Legislative Bill 23 defines "partial-birth abortion" as follows:

Partial-birth abortion means an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery. For purposes of this subdivision, the term partially delivers vaginally a living unborn child before killing the unborn child means deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child.

LB 23 § 2(9), codified at Neb. Rev. Stat. § 28-326(9) (Michie 1997).

7. Legislative Bill 23 makes the "intentional and knowing performance of an unlawful partial-birth abortion" a Class III felony, as well as grounds for automatic suspension and revocation of an attending physician's license to practice medicine in Nebraska. LB 23 § 3(2) & (4), codified at Neb. Rev. Stat. § 28-328(4)&(5) (Michie 1997).

8. "Partial-birth abortion" is not a recognized medical term. (Tr. 88: 18-89:6, Carhart Test.; Tr. 216:3-13, Hodgson Test.)

C. Abortion Procedures

9. Carhart performs abortions in a clinic setting from a gestational age of 3 weeks until fetal viability,

[3]" with gestational age being measured from the first day of a woman's last menstrual period, as verified by ultrasound. (Tr. 83:9-84:5; 141: 20-22.) Of the 800 women on whom Carhart performed abortions in 1996, 200 were past their 14th week of pregnancy. (Tr. 83:1-3; 185:14-24.) As far as he knows, Carhart is the only abortion provider in Nebraska who performs elective abortions past 16 weeks' gestation. (Tr. 132:10-18.)

10. If a woman wants an abortion after viability and the abortion is not medically indicated, Carhart refers the patient elsewhere. (Tr. 87:13-22.) If a patient comes to him for an abortion and "there is any concern of fetal viability," Carhart does not use his own judgment to determine viability, but instead insists on a specific referral from the patient's physician identifying fetal flaws, stating that the fetus is not viable, and stating that the patient needs an abortion. (Tr. 174:4-16.)

11. Carhart performs abortions on patients whose health, rather than life, would be preserved by having an abortion, such as those with severe renal disease, severe diabetes that has required hospitalization, and hyperemesis gravidarum, a condition characterized by constant vomiting throughout pregnancy such that the pregnant woman loses a good portion of her body weight. Carhart has also performed abortions on patients who indicated that if abortion had not been an option for them, they would have considered attempting a self-induced abortion or suicide. (Tr. 133:16-134:11.)

12. Carhart selects the abortion procedure he will use on various patients based on gestational age and other medical factors. (Tr. 84:6-12.)

13. The parties have stipulated to the admission of Exhibit 7, which is a portion of the American Medical Association's (AMA's) "Report of the Board of Trustees on Late-Term Abortion." The board of trustees prepared and submitted the report to the AMA's board of delegates in May, 1997, in response to the passage of a 1996 resolution by the delegates calling for the AMA to conduct a study of late-term pregnancy termination techniques. (Filing 13 P 2; Tr. 326:7-327:16.) Hereinafter, Exhibit 7 shall be referred to as the "AMA report." [4]"

14. The parties have also stipulated to the admission of Exhibit 24, which is a January, 1997, statement of policy issued by the American College of Obstetricians and Gynecologists Executive Board on "intact dilatation and extraction."

1. Suction Curettage or Vacuum Aspiration

15. The AMA report indicates that suction curettage, or vacuum aspiration, is the most common means of inducing abortion from the 6th through the 12th week of gestation. (Ex. 7, at 7:29-30.) The AMA report describes this procedure as follows:

Prior to the procedure a pelvic examination is done to determine the size and position of the uterus.

A speculum is used to visualize the cervix, a local anesthetic such as a paracervical block is administered, and the cervix is then dilated using rigid dilators (e.g., the Pratt dilator). Osmotic dilators may be used prior to the procedure. Once the cervix is sufficiently dilated, a suction tube is inserted and rotated inside the uterus to loosen and remove the contents. The suction tube may be attached to a suction machine or syringe. A curette may be used to scrape the endometrium, thereby ensuring the removal of any remaining tissue. These procedures are typically performed on an outpatient basis.

1. "Tr." denotes the transcript from the hearing on the preliminary injunction. See Carhart v. Stenberg, 972 F. Supp. 507 (D. Neb. 1997) (granting preliminary injunction) (Carhart I). Pursuant to Fed. R. Civ. P. 65(2), the parties agreed that the testimony and exhibits received in evidence at the hearing on the preliminary injunction were admissible at the trial on the merits as part of the trial record and need not be repeated at trial. (Order on Final Pretrial Conf., at 3.)

2. Carhart learned to perform abortions on rotation in a civilian hospital while on active duty with the Air Force. He was not permitted to perform abortions in Air Force hospitals. (Tr. 194:6-15.)

3. Carhart testified that fetal viability may occur around 22 weeks' gestation, but it can vary depending upon maternal habits such as drug and alcohol use and lack of prenatal care. (Tr. 174:17-175:7.)

4. Exhibit 3, a certified "rough draft transcript" of the floor debate on LB 23, and Exhibit 8, an informational booklet addressing fetal development entitled "If you are Pregnant..." which was prepared by the Nebraska Department of Health pursuant to state law, were also received into evidence, but not to prove the truth of the matters asserted therein. (Tr. 7:23-9:25.)

5. Carhart describes curettage as a method of removing fetal debris, placental fragments, and potentially cancerous growths from the uterine wall, thereby reducing the risk of infection, greater bleeding, and passing fetal material into the mother's bloodstream. (Tr. 164:6-165:7.)

6. Carhart testified that the type of osmotic dilator he uses is seaweed that has been sterilized and medically prepared. He also referred to this osmotic dilator as laminaria. (Tr. 98:1-4; 99:1-3.) With this particular procedure, Carhart waits 12 to 72 hours before completing the abortion in order to allow for adequate dilation. (Tr. 98:6-14.)

7. Carhart testified he also vacuum aspirates the uterus to ensure that no tissue fragments are left on the uterine wall. (Tr. 98:15-18.)

8. The cervical os is the mouth or opening of the cervical canal. STEDMAN'S MEDICAL DICTIONARY 996 (4th unabridged law. ed. 1976).

9. Dr. Hodgson received her M.D. and M.S. in obstetrics and gynecology from the University of Minnesota School of Medicine; completed her internship and residency at the Jersey City Medical Center in New Jersey; and completed a fellowship in obstetrics and gynecology at the Mayo Clinic in Rochester, Minnesota. (Ex. 14, Hodgson Curriculum Vitae,

at 2.) Dr. Hodgson has performed or supervised at least 30,000 abortions as the director of numerous medical clinics throughout the country since 1973, and has delivered at least 5,000 babies. (Tr. 197:14-20.) Dr. Hodgson has been a board member of Planned Parenthood, belongs to the National Abortion Federation and the Abortion Rights Council, and is currently a board member for the Center For Reproductive Law & Policy, for whom Plaintiff's lawyers also work. (Ex. 14, Hodgson Curriculum Vitae, at 3.)

10. The ACOG statement of policy on intact dilatation and extraction states that "unless all four elements [dilatation of cervix, instrumental conversion of fetus to footling breach, breech extraction of body excepting head, and partial evacuation of intracranial contents of living fetus to effect vaginal delivery of dead, but otherwise intact, fetus] are present in sequence, the procedure is not an intact D & X." (Ex. 24.) The policy statement states that the intact D&X is one method of terminating a pregnancy after 16 weeks' gestation, and concludes that: Terminating a pregnancy is performed in some circumstances to save the life or preserve the health of the mother. Intact D & X is one of the methods available in some of these situations. A select panel convened by ACOG could identify no circumstances under which this procedure, as defined above, would be the only option to save the life or preserve the health of the woman. An intact D & X, however, may be the best or most appropriate procedure in a particular circumstance to save the life or preserve the health of a woman, and only the doctor, in consultation with the patient, based upon the woman's particular circumstances can make this decision. The potential exists that legislation prohibiting specific medical practices, such as intact D & X, may outlaw techniques that are critical to the lives and health of American women. The intervention of legislative bodies into medical decision making is inappropriate, ill advised, and dangerous. (Ex. 24 (bold in original).)

11. Carhart testified that lidocaine can induce seizures in people, so treating someone who has a seizure disorder with a medication that could trigger further seizures would be an "additional risk." (Tr. 170:16-171:1.)

12. Dr. Hodgson described it as a "victory" when an intact fetus is removed during a D&E without the intent to do so. (Tr. 211:8-12.)

13. The citation and the description of Haskell's procedure are offered as an explanation since various witnesses spoke about Dr. Haskell's procedure during the trial of this case. The court has not used these decisions or the evidence presented in WMPC I to satisfy the plaintiff's burden of proof.

14. A variant of the procedure was also used extensively by Dr. James McMahon before his death in 1995. See Partial Birth Abortion Ban, 1995: Hearings on H.R. 1833 Before Senate Judiciary Committee, 104th Cong. 1st Sess., available in Westlaw 1995 WL 685998 (F.D.C.H.) (database USTESTIMONY) (statement of Dr. Mary Campbell) (Nov. 17, 1995) (describing her observations of the procedure used by Dr. McMahon). See also n. 13, supra.

15. Dr. Henshaw received his Ph.D. in sociology from Columbia University and his A.B. in physics from Harvard. The Alan Guttmacher Institute is a nonprofit corporation for research and public education on issues relating to reproductive health services. (Ex. 15, Henshaw Curriculum Vitae, at 1; Tr. 44:15-25.) Dr. Henshaw has written approximately 40 to 50 articles on studies he has conducted related to abortion, and his studies have included secondary analysis of existing data. (Tr. 45:9-17.) Dr. Henshaw has been a member of the National Abortion Federation. (Ex. 15, Henshaw Curriculum Vitae, at 2.)

16. "Tr.2d" denotes the transcript from the trial on the merits.

17. These professional societies include the National Abortion Federation, The Planned Parenthood Association of America, and the American College of Obstetricians and Gynecologists.

18. According to Dr. Stubblefield, "Because the uterus is large and soft, it takes some skill to avoid perforation. . . . If one perforates, one can cause extensive harm. One can badly injure the bowel or bladder or the nearby organs, cause major blood loss and clearly major injury that will have to be surgically repaired with a major surgical procedure." (Tr.2d 32:12-17.)

19. Dr. Stubblefield described amniotic fluid embolism as a complication that occurs in one in 10,000 cases and is "usually fatal, where tissue from the fetus enters the mother's circulation through the big venous openings inside the uterus and travel[s] through her body to the lungs where they cause major troubles." (Tr.2d 32:23-33:4.)

20. Dr. Stubblefield described disseminated intravascular coagulopathy as a complication "where tissue from the fetus, smaller amounts, perhaps, enter the circulation of the mother, trigger clotting within her blood system that uses up the clotting factors, exhausts their supply, so that the patient then begins to bleed heavily and will require a treatment of blood products in order to replenish the clotting factors and stop the bleeding." (Tr.2d 32:18-33:12.)

21. Carhart stated that the complicating effects of anesthesia use during induction were responsible for one-third of the total deaths occurring as a result of abortion. It is not clear whether this was factored into the AMA report's statistics on the risk of the induction procedure. If not, the risk of induction would be higher than indicated in the AMA report. (Tr. 180:14-181:18.)

22. Carhart testified that he records intact D&E or D&X procedures under "Dilation and evacuation (D&E)," (Ex. 11), or "suction curettage," (Ex. 12), on various Nebraska abortion-reporting forms. (Tr. 128:1-129:24.)

23. These exhibits were received to the extent they are relevant to Carhart's fear of prosecution. (Tr. 6:18-7:23; 9:19-21.)

24. Dr. Carhart concedes that the court may avoid the "facial" challenge if the court finds the law invalid "as applied" to him. "This dual request by the plaintiff does not require the Court to consider the requests in any particular order, nor does it require the Court to reach both challenges if it finds for the plaintiff on one challenge." Plt's Post-Trial Br. at 1 n.1. (Citation omitted.)

25. Before arguing that the law is invalid because it is an "undue burden," the plaintiff asserts that he need not show an "undue burden." Essentially, the plaintiff argues that once a woman has chosen to have an abortion the state cannot constitutionally dictate the choice of method. I find it unnecessary to reach this argument.

26. "Partial-birth abortions" are "known medically as intact dilatation and extraction, or D & X." Julie Rovner, US Senate Rejects Post-Viability Abortion Ban, 349 THE LANCET 9064 (May 24, 1997). According to The Lancet, "The vast majority of D&X abortions are performed either before the fetus is viable or when viability is extremely doubtful." Id. The Lancet

is "the United Kingdom's leading medical journal." LaMontagne v. E.I. Du Pont De Nemours & Co., 41 F.3d 846, 850 (2d Cir. 1994).

27. The defendants object to my description of the procedure. While they do not suggest that I have been inaccurate, they suggest that I have not been graphic enough. For example, they would like me to state "that the procedure literally sucks the brains out of a living partially born child." Post-Trial Br. of Defs. at 11 n.2. It would not be helpful to respond to this objection and other provocative statements contained in defendants' otherwise well-written brief.

28. Other doctors use this variation as well. WMPC I, 911 F. Supp. at 1067 n.20 (Dr. Doe Number Two).

29. Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 90 L. Ed. 2d 779, 106 S. Ct. 2169 (1986), overruled in part on other grounds in Casey, 505 U.S. at 870, 882 (O'Connor, Kennedy, & Souter, JJ.).

30. Because of this holding, it is unnecessary to decide whether the legislature's purpose in enacting the law was to impose an undue burden.

31. The main initial brief of the defendants is 114 pages long.

32. Both the plaintiff and the defendants declined the court's invitation to appoint a medical expert for the court in this case.

33. Dr. Hern also told Congress that although he had not yet used the D&X procedures, he believed that the procedures sought to be banned by the proposed federal "partial-birth abortion" law "are followed by attending physicians throughout the nation when the safety of the woman having the abortion is at issue." Id. at 336 (footnote omitted). Dr. Hern is the author of "the principal medical textbook on abortion procedures, and a well-known authority on the subject." Id. at 335 & n.170.

34. Food and drug cases are therefore irrelevant.

35. Unlike Dr. Stubblefield, a teacher and user of the D&E procedure, Dr. Boehm has not performed a standard D&E procedure for 10 to 15 years. He does not teach the procedure either. As a consequence, it is not surprising that Dr. Boehm did not appreciate advances in the D&E technique, such as the D&X procedure.

36. For example, Dr. Boehm, who generally supports abortion rights, testified that he opposed the "D&X" procedure for what appeared to be tactical reasons; that is, "such a procedure should be banned so as to comfort the general public in this country that abortions are not in the hands of callous extremists." (Ex. 27, Videotaped Dep. of Dr. Boehm, at 66:23-68; Ex. 25 at 2.) This case is not, however, about what is the best political tactic to advance a particular viewpoint.

37. It is worth noting again that the defendants do not argue that the "medical exception" provision of LB 23 would permit Carhart to perform the D&X procedure if necessary to preserve the life or health of the patient. Carhart I, 972 F. Supp. at 529. The medical exception would not apply to Carhart's patients because risks to maternal health are not

considered and relative surgical risks are not considered either. Id.

38. I also note that even if the induction method were equally safe (and it is not) induction requires a patient to undergo labor in a hospital, with greater pain and economic cost, and induction procedures are not generally available to most women in Nebraska for elective abortions. As a consequence, the D&X ban would constitute an "undue burden" even if the induction procedure were as safe. Id. at 529 n.37.

39. This is one reason why an "as applied" analysis, as opposed to a "facial" analysis, is preferable. In this case, rather than making generalizations about the relative safety of the D&X in all cases, the "as applied" analysis requires a focus on the particular procedures used by Dr. Carhart. Thus, the question is not whether the D&X is "always" safer. Rather, the question is whether it is safer in the 10 to 20 cases a year when Dr. Carhart uses his variant of the procedure. However, I also note that the difficulty in evaluating the safety of any surgical technique in specific settings is one reason why many doctors justifiably worry that legislatures may make life threatening mistakes when drafting sweeping legislation designed to deal with specific surgical techniques.

40. Despite this ruling, on June 25, 1998, the Seventh Circuit, with Judge Manion dissenting, enjoined enforcement of the Wisconsin law pending oral argument. Planned Parenthood of Wisconsin v. Doyle, No. 98 C 305 (June 25, 1998).

41. According to Dr. Stubblefield, these fetal parts routinely include legs or arms. (Tr.2d 31: 16-17.)

42. Dr. Stubblefield, an acknowledged expert on the use of the D&E, confirmed that the dismemberment did not occur in the uterus. (Tr.2d 30:23-25.)

43. As stated earlier, this alternative (causing fetal death by injection) has no maternal benefit, and carries with it real maternal risk, during the gestational stage that Carhart performs D&E and D&X abortions.

44. I do not decide if the law reaches the suction curettage method. The parties have focused upon the D&E and D&X procedures. In passing, Dr. Carhart testified that when performing the suction curettage method, he does not intend to remove the fetus or parts from the fetus by "delivering it partially into the vagina ... because it goes through the tube through the vagina" outside the woman's body. (Tr. 156:7-16.) However, he also testified that he frequently is required to remove the tube to free it from obstructions and then the uterus expels the contents into the vaginal cavity. (Tr. 155:18-20.) Because the parties' evidence and written arguments only briefly touch on the question of whether the suction curettage method customarily results in "delivery[] into the vagina" within the meaning of the statute, I decline to reach the question. Should Nebraska, contrary to its position in this case, move to enforce the law against doctors performing the suction curettage method, I would quickly issue injunctive relief until that issue could be addressed with more care. See, e.g., Planned Parenthood of Greater Iowa, 1 F. Supp. 2d 958, 1998 U.S. Dist. LEXIS 9851, 1998 WL 337011, at *6 (Iowa's law apparently included suction curettage).

45. This understanding of the mechanics of the D&E procedure distinguishes Planned Parenthood of Wisconsin v. Doyle, 975 F. Supp. 1177, 1998 WL 299912 (holding that a similar scienter provisions saved Wisconsin law). In that case, perhaps because the decision was based on affidavits rather than on a compete trial record, the judge had a different

understanding of the mechanics of the standard D&E.

46. Senator Dierks is a veterinarian. Clerk of the Legislature, Nebraska Blue Book at 301 (1996-1997 ed.).

47. The plaintiff also argues that other portions of the law, like "delivers" and "living," are vague. I need not reach these claims since resolution of the "substantial portion" issue, the one most hotly contested, ends the case. Moreover, these words take on particular meaning primarily when they are read with "substantial portion." Thus, it is difficult, if not impossible, to parse the meaning of these words when the term "substantial portion" is unconstitutionally vague. I note, however, that other courts have found these provisions unconstitutionally vague. Richmond Medical Center, No. 3:98cv309, slip. op. at 51-55; Hope Clinic, 995 F. Supp. at 854. I would likely do so as well.

48. For the second time, I decline the defendants' invitation to establish a new category of constitutional analysis for nonviable fetal life. Carhart I, 972 F. Supp. at 529. Accord Richmond Medical Center, No. 3:98cv309, slip. op. at 76 (stating that "Carhart is clearly right.")