United States Court of Appeals,
Eighth Circuit.
LeRoy **CARHART,** M.D., on behalf of themselves and the patients they serve; William G. Fitzhugh, M.D., on behalf of themselves and the patients they serve; William H. Knorr, M.D., on behalf of themselves and the patients they serve; Jill L. Vibhakar, M.D., on behalf of themselves and the patients they serve, Appellees,
v.
Alberto **GONZALES,** in his official capacity as Attorney General of the United States, and his employees, agents, and successors in office, Appellant,

No. 04-3379.

Submitted: April 14, 2005.
Filed: July 8, 2005.

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Full text of opinion may be found at 413 F.3d 791.

Background: Four physicians brought action against Attorney General challenging constitutionality of the Partial-Birth Abortion Ban Act of 2003. The United States District Court for the District of Nebraska, Richard G. Kopf, J., 331 F.Supp.2d 805, held Act unconstitutional on several grounds. Attorney General appealed.

Holding: The Court of Appeals, Bye, Circuit Judge, held that Act was unconstitutional due to its failure to contain exception for instances in which procedure was necessary to preserve health of mother.
Affirmed.

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Before LOKEN, Chief Judge, FAGG, and BYE, Circuit Judges.

BYE, Circuit Judge.

This case presents a challenge to the federal Partial-Birth Abortion Ban Act of 2003, Pub.L. No. 108-105, 117 Stat. 1201 (codified at 18 U.S.C. § 1531). The day the President signed the Act into law, plaintiffs filed suit in the United States District Court for the District of Nebraska seeking an injunction against enforcement of the Act. After a trial, the district court [FN1] held the Act unconstitutional on several grounds. The government appeals. We affirm the judgment of the district court.

I
A

In 2000, the Supreme Court handed down its decision in *Stenberg v. Carhart,* 530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000), which found Nebraska's partial-birth abortion ban unconstitutional for two separate reasons. First, the Court determined the law was unconstitutional because it did not contain an exception to preserve the health of the mother. Second, ***793** the Court determined the law was worded so broadly it covered the vast majority of late-term abortions and thus imposed an undue burden on the right to abortion itself.

In the eight years before the Court's decision in *Stenberg,* at least thirty states passed laws banning partial-birth abortions. *See id.* at 983, 120 S.Ct. 2597 (Thomas, J., dissenting). In 1996 and 1997, Congress enacted prohibitions on partial-birth abortions, however, President Clinton vetoed them. *Id.* at 994 n. 11, 120 S.Ct. 2597 (Thomas, J., dissenting). In 2003, Congress enacted, and President George W. Bush signed, the Partial-Birth Abortion Ban Act of 2003. The Act exposes "[a]ny physician who, in or affecting interstate or foreign commerce, knowingly performs

a partial-birth abortion and thereby kills a human fetus" to up to two years of imprisonment. 18 U.S.C. § 1531(a). The Act goes on to define a "partial-birth abortion" as an abortion in which the person performing the abortion:

> (A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head first presentation, the entire fetal head is outside the body of the mother, or, in the case of a breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and
>
> (B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus ....

Id. § 1531(b)(1).

The Act contains an exception allowing the performance of "a partial-birth abortion that is necessary to save the life of the mother." *Id.* § 1531(a). The Act does not, however, contain an exception for the preservation of the health of the mother.

Presumably recognizing that the Act is similar (though not identical) to the Nebraska law found unconstitutional in *Stenberg,* Congress made several findings and declarations in the Act. Congress "f[ound] and declare[d]" that "under well-settled Supreme Court jurisprudence, the United States Congress is not bound to accept the same factual findings that the Supreme Court was bound to accept in *Stenberg.*" Partial-Birth Abortion Ban Act of 2003 § 2(8), 117 Stat. at 1202. Congress concluded that a "moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion ... is a gruesome and inhumane procedure that is never medically necessary and should be prohibited." § 2(1), 117 Stat. at 1201. In addition to determining there is "substantial evidence" that partial-birth abortions are never medically necessary, Congress also concluded partial-birth abortions "pose [ ] serious risks to the health of the mother undergoing the procedure." § § 2(13), 2(14), 117 Stat. at 1203-04.

After a trial, the district court found the Act unconstitutional on two separate grounds. First, the district court concluded Congress's finding regarding a medical consensus was unreasonable and thus the Act was unconstitutional due to its lack of health exception. Second, the district court concluded the Act covered the most common late-term abortion procedure and thus imposed an undue burden on the right to an abortion.

B

The procedures in question in this case are used during late-term abortions and we therefore must, for context, present some basic information regarding these procedures. There are three primary methods of late-term abortions: medical induction; dilation and evacuation (D & ***794** E); and dilation and extraction (D & X). In a medical induction, formerly the most common method of second-trimester abortion, a physician uses medication to induce premature labor. *Stenberg,* 530 U.S. at 924, 120 S.Ct. 2597. In a D & E, now the most common procedure, the physician causes dilation of the woman's cervix and then "the physician reaches into the woman's uterus with an instrument, grasps an extremity of the fetus, and pulls." *Women's Med. Prof'l Corp. v. Taft,* 353 F.3d 436, 439 (6th Cir.2003). "When the fetus lodges in the cervix, the traction between the grasping instrument and the cervix causes dismemberment and eventual death, although death may occur prior to dismemberment." *Id.* This process is repeated until the entire fetus has been removed.

D & X and a process called intact D & E are what are "now widely known as partial birth abortion." *Id.* In these procedures, the fetus is removed "intact" in a single pass. If the fetus presents head first, the physician collapses the skull of the fetus and then removes the "intact" fetus. *Stenberg,* 530 U.S. at 927, 120 S.Ct. 2597. This is what is known as an intact D & E. If the fetus presents feet first, the physician "pulls the fetal body through the cervix, collapses the skull, and extracts the fetus through the cervix." *Id.* This is the D & X procedure. "Despite the technical differences" between an intact D & E and a D & X, they are "sufficiently similar for us to use the terms interchangeably." *Id.* at 928, 120 S.Ct. 2597.

II

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III

We begin our analysis with the Supreme Court's decision in *Stenberg.* That case has engendered some

disagreement as to the proper standard for evaluating the necessity of a health exception. The proper reading of *Stenberg* is a question of law and therefore is reviewed *de novo*. *See, e.g., Jeffries*, 405 F.3d at 684. The government argues *Stenberg* merely examined the specific factual record before the Court, and thus a health exception is only required when a banned procedure is actually "necessary, in appropriate medical judgment, for the preservation of the health of the mother." *Stenberg*, 530 U.S. at 930, 120 S.Ct. 2597 (internal quotations omitted). Plaintiffs, in contrast, contend that "where substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health, *Casey* requires the statute to include a health exception when the procedure is " 'necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.' " " *Stenberg*, 530 U.S. at 938, 120 S.Ct. 2597 (quoting *Casey*, 505 U.S. at 879, 112 S.Ct. 2791 (quoting *Roe v. Wade*, 410 U.S. 113, 165, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973))).

The government argues that *Stenberg* embodies a lenient standard, and further urges that congressional factfinding must be afforded deference under *Turner Broadcasting v. FCC*, 512 U.S. 622, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) (*Turner I*), and *Turner Broadcasting v. FCC*, 520 U.S. 180, 117 S.Ct. 1174, 137 L.Ed.2d 369 (1997) (*Turner II*). ...

The other end of the spectrum on potential readings of *Stenberg* is exemplified by a recent decision in which the Fourth Circuit addressed *Stenberg* 's health exception requirement standard in a case involving a state partial-birth abortion statute. *Hicks*, 409 F.3d at 625-26. The Fourth Circuit held that *Stenberg* "established the health exception requirement as a *per se* constitutional rule." *Id.* at 625. ....

[2] We agree with the Fourth Circuit that *Stenberg* establishes a per se constitutional rule in that the constitutional requirement of a health exception applies to all abortion statutes, without regard to precisely how the statute regulates abortion. *See Heed*, 390 F.3d at 59 (applying *Stenberg* to parental notification law). As the Ninth Circuit recently explained: "Any abortion regulation must contain adequate provision for a woman to terminate her pregnancy if it poses a threat to her life or her health." *Wasden*, 376 F.3d at 922. While *Stenberg* 's health exception rule undoubtedly applies to all abortion statutes, such a proposition does not explain how to evaluate *whether* a given restriction poses a constitutionally significant threat to the mother's health.

[3] We believe the appropriate question is whether "substantial medical authority" supports the medical necessity of the banned procedure. *See Stenberg*, 530 U.S. at 938, 120 S.Ct. 2597; *id.* at 948, 120 S.Ct. 2597 (O'Connor, J., concurring); ...The *Stenberg* Court determined medical necessity (as that term was used in *Casey*) does not refer to "an absolute necessity or to absolute proof"... Thus, when "substantial medical authority" supports the medical necessity of a procedure in some instances, a health exception is constitutionally required. In effect, we believe when a lack of consensus exists in the medical community, the Constitution requires legislatures to err on the side of protecting women's health by including a health exception.

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[4] Although the *Stenberg* majority did not believe the rule it announced gave individual doctors an absolute veto over legislatures, it emphasized that a health exception is required where "substantial medical authority" supports the medical necessity of a procedure. *Id.* at 938, 120 S.Ct. 2597. ...In sum, we conclude *Stenberg* requires the inclusion of a health exception whenever "substantial medical authority" supports the medical necessity of the prohibited procedure.

IV

A

Having identified the proper question, we now turn to determining how this question should be answered. The government argues the *Turner* line of cases requires courts to " 'accord substantial deference to the predictive judgments of Congress,' " and the "sole obligation" of reviewing courts "is 'to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.' " *Turner II*, 520 U.S. at 195, 117 S.Ct. 1174 (quoting *Turner I*, 512 U.S. at 665-66, 114 S.Ct. 2445). Thus, under the government's formulation, we would be bound by Congress's determination that a "moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion" is never medically necessary, so long as this apparent factual

determination is reasonable and supported by substantial evidence.

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[5] This case differs slightly from the typical case in which we review the evidence to determine if the record is sufficient to support the lower court's conclusion. Under the "substantial medical authority" standard, our review of the record is effectively limited to determining whether substantial evidence exists to support the medical necessity of partial-birth abortions without regard to the factual conclusions drawn from the record by the lower court (or, in this case, Congress). .... Under this standard, we must examine the record to determine if "substantial medical authority" supports the medical necessity of the banned procedures. If it does, then a health exception is constitutionally required. If the need for a health exception is not supported by "substantial medical authority," by contrast, then the state is free to impose the restriction without providing a health exception.

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As a result, the government's argument regarding *Turner* deference is irrelevant to the case at hand. Our review is based on the record and is guided, as described below, by the legal conclusions reached by the Supreme Court in prior cases. Therefore, we need not address the government's assertions that federal courts must defer to congressional factfinding.

B

...The medical necessity of particular abortion procedures clearly falls into this latter category, as such procedures are either sometimes medically necessary or they are not: the answer to this question does not vary from place to place or party to party.

[6] In the specific context of a ban on partial-birth abortions, we join the reasoning of the Fourth Circuit and some of the district courts that have treated *Stenberg* as a per se constitutional rule. In *Stenberg,* the Court surveyed all of the available medical evidence (including the formal district court record, the district court records from other partial-birth abortion cases, amicus submissions, and some congressional records) and determined that "substantial medical authority" supported the need for a health exception. "[T]his body of medical authority does not have to be reproduced in every subsequent challenge to a 'partial birth abortion' statute lacking a health exception." *Hicks,* 409 F.3d at 625. ...

This is not to say, however, that because the Supreme Court concluded "substantial medical authority" supported the need for a health exception in 2000, legislatures are forever constitutionally barred from enacting partial-birth abortion bans. Rather, the "substantial medical authority" test allows for the possibility that the evidentiary support underlying the need for a health exception might be reevaluated under appropriate circumstances. Medical technology and knowledge is constantly advancing, and it remains theoretically possible that at some point (either through an advance in knowledge or the development of new techniques, for example), the procedures prohibited by the Act will be rendered obsolete. Should that day ever come, legislatures might then be able to rely on this new evidence to prohibit partial-birth abortions without providing a health exception.

V

[7] *Stenberg* identified what some refer to as "evidentiary circumstances" upon which the Court purportedly relied in determining whether "substantial medical authority" supported the need for a health exception. ...In evaluating the government's case, we take *Stenberg* as the baseline and then determine if the government has proffered evidence sufficient to distinguish the present situation from *Stenberg*'s 'evidentiary circumstances." If the government marshals such evidence, we must then determine whether the evidence on the other side remains "substantial medical authority." Because we conclude the government has not adduced evidence distinguishing this case from *Stenberg,* we need not attempt to define the precise contours of "substantial medical authority." [FN4]

We know from *Stenberg* that "substantial medical authority" supports the conclusion ***802** that the banned procedures obviate health risks in certain situations. For example, there is "substantial medical authority" (in the form of expert testimony and amici submissions) that these procedures reduce the risk of uterine perforation and

cervical laceration because they avoid significant instrumentation and the presence of sharp fetal bone fragments. Stenberg, 530 U.S. at 930-34, 120 S.Ct. 2597. There is also evidence the procedure takes less time and thus reduces blood loss and prolonged exposure to anesthesia. *Id.* The banned procedure may also eliminate the risk posed by retained fetal tissue and embolism of cerebral tissue into the woman's bloodstream. *Id.* Moreover, there is evidence regarding the health advantages the banned procedures provide when the woman has prior uterine scarring or when the fetus is nonviable due to hydrocephaly. *Id.*

There is some evidence in the present record indicating each of the advantages discussed in *Stenberg* are incorrect and the banned procedures are never medically necessary. *See* Carhart, 331 F.Supp.2d at 822-51. There were, however, such assertions in *Stenberg* as well. *See* Stenberg, 530 U.S. at 933-34, 120 S.Ct. 2597; *id.* at 964-66, 120 S.Ct. 2597 (Kennedy, J., dissenting). Though the contrary evidence now comes from (some) different doctors, the substance of this evidence does not distinguish this case from *Stenberg* in any meaningful way.

To avoid *Stenberg,* the government cannot simply claim *Stenberg* was wrongly decided, for we are bound by the Supreme Court's conclusions. The facts in *Stenberg* were hotly contested, and simply asserting that the other side should have prevailed accomplishes nothing. Rather, to succeed, the government must demonstrate that relevant evidentiary circumstances (such as the presence of a newfound medical consensus or medical studies) have in fact changed over time.

If one thing is clear from the record in this case, it is that no consensus exists in the medical community. The record is rife with disagreement on this point, just as in *Stenberg.* In fact, one of the government's witnesses himself testified that no consensus exists in the medical community and further stated that there exists a "body of medical opinion," including the "position[s] taken by [the] American College of Obstetrics and Gynecologists" (ACOG) and "a responsible group of physicians," indicating that the procedures are indeed sometimes medically necessary. Carhart, 331 F.Supp.2d at 1012. The lack of consensus also extends to medical organizations. The American Medical Association believes the banned procedures to be medically unnecessary while ACOG believes these procedures can be the most appropriate in certain situations. *Id.* at 843, 997. The Supreme Court relied on the ACOG view in particular in Stenberg, 530 U.S. at 935-36, 120 S.Ct. 2597. Moreover, the congressional findings quote "a prominent medical association's" conclusion that "there is no consensus among obstetricians about its use." Partial Birth Abortion Ban Act of 2003 § 2(14)(C), 117 Stat. at 1204 (internal quotations omitted). In short, no medical consensus has developed to support a different outcome. [FN5] *See, e.g., Carhart,* 331 F.Supp.2d at 1009 (concluding Congress's determination that a consensus against the banned procedures existed is unreasonable and not supported by substantial ***803** evidence); *Nat'l Abortion Fed'n,* 330 F.Supp.2d at 488-89 (same); *Planned Parenthood Fed'n of Am.,* 320 F.Supp.2d at 1025 (same).

While the existence of disagreement among medical experts has not changed, there has been one new study on the safety of the banned procedures. A recent study by Dr. Stephen Chasen addressed the comparative health effects of the D & X and D & E procedures... No general conclusion regarding the medical necessity of the banned procedures in any given situation can be drawn from the study, which neither conclusively supports the position that the banned procedures are sometimes medically necessary, nor does it conclusively support the position that they are never medically necessary. The Chasen study therefore detracts in no way from the Supreme Court's prior conclusion, as there are still no medical studies addressing the medical necessity of the banned procedures.

...We need not belabor the point. The record in this case and the record in *Stenberg* are similar in all significant respects...There remains no consensus in the medical community as to the safety and medical necessity of the banned procedures. There is a dearth of studies on the medical necessity of the banned procedures. In the absence of new evidence which would serve to distinguish this record from the record reviewed by the Supreme Court in *Stenberg,* we are bound by the Supreme Court's conclusion that "substantial medical authority" supports the medical necessity of a health exception. "As a court of law, [our responsibility] is neither to devise ways in which to circumvent the opinion of the Supreme Court nor to indulge delay in the full implementation of the Court's opinions. Rather, our responsibility is to faithfully follow its opinions, because that court is, by constitutional design, vested with the ultimate authority to interpret the Constitution." *Richmond Med. Ctr. for Women v. Gilmore,* 219 F.3d 376, 378 (4th Cir.2000) (Luttig, J., concurring). Because the Act does not contain a health exception, it is unconstitutional. We therefore do not reach the district court's ***804** conclusion of the Act imposing an undue

burden on a woman's right to have an abortion.

VI

For the reasons stated above, the judgment of the district court is affirmed.

Footnotes:

FN4. Though the government argues at length that substantial evidence supports Congress's conclusion, it at no point engages the analysis undertaken by all three district courts to have addressed the constitutionality of the Act and one of the major points raised by the Appellees: that Congress's conclusion that a consensus has formed against the medical necessity of the procedures was unreasonable. The government has argued the district court adopted an erroneous reading of *Stenberg* by focusing on "substantial medical authority" and a lack of consensus against the procedures. Despite the fact that every federal court to have addressed the issue has rejected the government's position, the government never challenges the district court's conclusion that "substantial medical authority" supports the medical necessity of the banned procedures. By virtue of the government's failure to argue the issue in either its opening brief or in its reply, we could consider the issue waived. *See, e.g., Chay-Velasquez v. Ashcroft,* 367 F.3d 751, 756 (8th Cir.2004) (failure to raise issue in opening brief constitutes waiver). However, we decline to do so and will address the issue nonetheless.

FN5. The government argues the district court erred for various reasons in discounting the testimony of experts. We need not address this issue because giving full value to the government's witnesses would in no way alter our conclusion that no consensus has been reached by the medical community.