No. 05-380

IN THE

Supreme Court of the United States

ALBERTO R. GONZALES,
ATTORNEY GENERAL,

Petitioner,

v.

LEROY CARHART, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE, 78 MEMBERS OF CONGRESS, AND THE COMMITTEE TO PROTECT THE BAN ON PARTIAL BIRTH ABORTION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Did Congress properly ban the partial birth abortion of a child, partly outside the mother's body, to create a legal bulwark between abortion and infanticide?

2. Did the court below err by categorically applying this Court's abortion jurisprudence, rather than the normal rational basis test, to a ban on the killing of a child in the birth process and partly outside the mother's body?

3. Does Congress have the authority reasonably to take sides on disputed medical questions, as in every other area of the law, including every abortion case aside from *Stenberg v. Carhart*?

4. Should this Court defer to the extensive fact-finding undertaken by Congress prior to passage of the Partial Birth Abortion Ban Act?

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INTEREST OF AMICI[1]

The American Center for Law and Justice ("ACLJ") is a public interest law firm dedicated, *inter alia*, to the defense of the sanctity of human life. The amici Members of the United States Congress who were in office at the time supported enactment of the federal Partial Birth Abortion Ban Act (PBA Act). All of the amici Members support Congress's proscription, within the proper limits of Congress's power,[2] of the brutal partial birth abortion procedure. (A list of the individual Members is attached as an Addendum.) The Committee to Protect the Ban on Partial Birth Abortion is a group of over 320,000 members of the ACLJ who have signed onto a petition declaring that partial birth abortion is "an abomination that should be outlawed in our country once and for all."

SUMMARY OF ARGUMENT

The court below held that this Court's decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000), controlled this case. That conclusion was erroneous.

First, *Stenberg* did not consider a ban on slaying a child partly

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[1] The parties in this case have consented to the filing of this brief. Copies of the consent letters are being filed herewith. No counsel for any party authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] The federal government does not have a general criminal police power. *United States v. Morrison,* 529 U.S. 598, 618-19 (2000); *United States v. Lopez*, 514 U.S. 549, 564, 566-67 (1995). Congress can only limit abortion in contexts where Congress has constitutional authority, e.g., the use of federal funds (as in *Harris v. McRae*, 448 U.S. 297 (1980)), the governance of federal territories (as in *United States v. Vuitch*, 402 U.S. 62 (1971)), and the regulation of interstate commerce (as with the PBA Act). The PBA Act contains an express link to interstate commerce. *See* 18 U.S.C. § 1531(a) ("in or affecting interstate or foreign commerce").

"outside the body of the mother," 18 U.S.C. § 1531(b)(1)(A). The federal partial birth abortion statute, which applies in precisely such a situation, is a valid, indeed essential, barrier against infanticide.

Second, *Stenberg* did not consider or decide whether this Court's *abortion jurisprudence* should apply to the killing of a child in the birth process and partly outside the mother's body. Regulation of such an act should not trigger this Court's heightened protection for "abortion." Instead, the usual rational basis test should apply.

Third, even if *Stenberg* could not be distinguished, it should not be followed. *Stenberg* inexplicably departed from the well-established rule, in both non-abortion and abortion cases, that the legislature may take sides on contested medical questions without awaiting unanimity in the medical profession. Whereas the lower court invalidated the federal PBA Act solely because of the existence of a *divergence in medical opinion* on the relative safety of partial birth abortion versus dilation and extraction (D&E) abortion, that judgment cannot stand.

Fourth and finally, *Stenberg* did not involve extensive congressional findings. Given the correct standard of allowing legislatures to make reasonable choices among competing medical opinions, this Court should defer to the findings of Congress and uphold the PBA Act.

ARGUMENT

The Eighth Circuit in this case struck down the federal PBA Act as unconstitutional. The Court's analysis began and ended with this Court's decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000). Pet. App. 7a-25a. The central question for this Court, then, is whether *Stenberg* does -- or should -- dictate the invalidity of the federal PBA Act. For the reasons set forth below, *Stenberg* neither does nor should control this case.

The federal statute at issue here, unlike the Nebraska statute in *Stenberg*, only applies to the partial birth abortion of a child partly "outside the body of the mother," 18 U.S.C. § 1531(b)(1)(A). *Stenberg* did not address or resolve the question whether under *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny the partial birth abortion of a child *partly outside the mother's body* is a valid, indeed essential, barrier against the practice of infanticide. Nor did *Stenberg* address or decide the question whether the abortion jurisprudence of *Roe* and its progeny should even apply in the first place when the child is *in the birth process* and *partly outside the mother's body*.

Moreover, insofar as *Stenberg* crafted a novel rule -- namely, that legislatures cannot act in the absence of a medical consensus -- *Stenberg* deviates from the well-established rule in every other area of the law, including abortion cases. *Stenberg's* departure from this established rule should not be followed.

Finally, *Stenberg* did not confront extensive congressional findings in support of the challenged act. In light of the normal rule of legislative flexibility in the face of divided medical opinion, this Court should defer to the extensive findings of Congress here.

I. THE PARTIAL BIRTH ABORTION BAN ACT IS AN IMPORTANT BULWARK AGAINST INFANTICIDE.

Stenberg did not consider the validity of a law that applied, like the federal PBA Act, only where the child is partly "outside the body of the mother," 18 U.S.C. § 1531(b)(1)(A). Hence, *Stenberg* is not binding precedent on the constitutionality of such a law. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) (prior decision that "did not expressly address the proposition" is "not binding in future cases" where the claim is "squarely before us").

The federal PBA Act operates at the borderline between

prenatal and postnatal human life. Under *Roe v. Wade*, 410 U.S. 113 (1973), this border separates human non-persons from human persons, and constitutional "rights" from legal wrongs.

Born human children indisputably enjoy the basic rights secured to all "persons" under the Fourteenth Amendment. *E.g.*, *Levy v. Louisiana*, 391 U.S. 68, 70 (1968). It therefore "cannot be doubted" that there is a "legitimate and compelling state interest" in protecting such children from harm, *see Schall v. Martin*, 467 U.S. 253, 264 (1984) (internal quotation marks and citation omitted). Hence, governments have a compelling interest in preventing the spread of the practice of abortion into infanticide. The PBA Act furthers precisely that interest. As one judge recently phrased it, the PBA Act protects the unborn child's "emerging right to life" and furthers the "compelling interest in protecting the line between abortion and infanticide," *Nat'l Abortion Fed'n v. Gonzales*, 437 F.3d 278, 312 (2d Cir. 2006) (Straub, J., dissenting).

The frequency of abortions throughout pregnancy,[3] the gruesome and barbaric methods used,[4] and the consequent devaluing of human life in the eyes of society, as reflected in the

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[3] According to the Alan Guttmacher Institute (AGI), which is the research arm of Planned Parenthood, there were 1.29 million abortions in 2002. AGI, *Induced Abortion in the United States* (May 18, 2005) (*available at* www.agi-usa.org/pubs/fb_induced_abortion.html) (citing Finer & Henshaw, *Estimates of U.S. Abortion Incidence in 2001 and 2002*, AGI (2005)). Abortions are done throughout pregnancy. *Id*. (pie chart showing breakdown by stage of pregnancy).

[4] *See Stenberg v. Carhart*, 530 U.S. 914, 923-28 (2000) (describing abortion methods); *id*. at 946 (Stevens, J., concurring) ("gruesome procedures"); *id*. at 958-59 (Kennedy, J., dissenting) (in D&E procedure, "[t]he fetus, in many cases, dies just as a human adult or child would: It bleeds to death as it is torn limb from limb"; in D&X procedure, "the abortionist tears open the skull").

widespread phenomena of "dumpster babies"[5] and violence against pregnant women,[6] all threaten to lead to the acceptance of infanticide, especially in the first moments after birth.[7] Partial birth procedures represent the beachhead of this assault on postnatal life, the bridge between abortion and infanticide. Absent strong legal barriers and vigorous societal condemnation, partial birth procedures open the way to legal infanticide.[8] *See*

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[5] *See* Diane Sussman, *Abandoned Babies: Legislators, Health Officials Unite to Curb Recent Trend* (Mar. 16, 2000) (*available at* www.nurseweek.com/features/00-03/abandon.html) (13 dumpster babies reported within 10 months in Houston; incidents reflective of national concern).

[6] Chang, Berg, Saltzman & Herndon, *Homicide: A Leading Cause of Injury Deaths Among Pregnant and Postpartum Women in the United States, 1991-1999*, 95 Am. J. Pub. Health 471 (2005).

[7] Indeed, prominent academic voices already have sought to justify infanticide. *See* Peter Singer, *Writings on an Ethical Life* (2000) pp. 160 ("If the fetus does not have the same claim to life as a person, it appears that the newborn baby does not either"), 161 ("the grounds for not killing persons do not apply to newborn infants"); Francis Crick, 220 Nature 429-30 (1968).

[8] In fact, witnesses made that precise point at congressional hearings.

> If partial birth abortions remain legal -- if Congress allows them to continue -- what next? Killing a child who has emerged from the womb three or four more inches or maybe killing them a few hours later after the opportunity to examine whether or not they suffer from some disability? All of these have already been suggested by scholarly writers who support late term abortions. Opponents of this bill keep asking whether it will be a first step in an effort to ban all abortions, but the real question is whether allowing this procedure is not a step towards legalized infanticide.

Partial-Birth Abortion Ban Act of 1995: Hearing on H.R. 1833 Before the Senate Comm. on the Judiciary, 104th Cong., 1st Sess. 114-15 (1995) [hereinafter Nov. 1995 Senate Hearing] (Statement of Helen Alvare of the National Conference of Catholic Bishops); *see generally id*. at 112-19 (entire Alvare statement); *see also, e.g., Partial-Birth Abortion Ban Act of*

(continued...)

Stenberg, 530 U.S. at 961 (Kennedy, J., dissenting) (states have an interest in "forbidding medical procedures which, in the State's reasonable determination, might cause the medical profession or society as a whole to become insensitive, even disdainful, to life, including life in the human fetus").

Governments -- and all their people -- therefore have a tremendously important stake in the unqualified prohibition of partial birth infanticide. The child who "crosses the goal line" -- by foot or head -- into the realm "outside the body of the

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[8] (...continued)
2002: Hearing on H.R. 4965 before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 107th Cong., 2d Sess. 27 (2002) [hereinafter July 2002 House Hearing] (Statement of Dr. Curtis Cook) ("blurring the line between abortion and infanticide"); *id*. at 13 (testimony of Dr. Kathi A. Aultman).

Members of Congress voiced the same concern. *See Partial-Birth Abortion: Joint Hearing Before the Senate Comm. on the Judiciary and the Subcomm. on the Constitution of the House Comm. on the Judiciary,* 105th Cong., 1st Sess. (1997) [hereinafter March 1997 Joint Hearing] (Statement of Sen. Hatch) ("[T]he real issue is whether knowingly permitting this procedure to continue would serve as a first step towards legalized infanticide"); *see also, e.g., Partial-Birth Abortion Ban Act of 1995*, H.R. Rep. No. 104-267, 104th Cong., 1st Sess. 11 (1995) ("The difference between partial-birth abortion and infanticide is a mere three inches. The 'Partial-Birth Abortion Ban Act' would protect children from being killed during the delivery process"); Nov. 1995 Senate Hearing (Statement of Sen. Grassley) ("But the bottom line is really legal, stopping the head just short of the birth is a legal fig leaf for a procedure that doesn't look like abortion at all, it looks like infanticide"); *id*. (Remark of Sen. Thompson) ("[I]t seems to me that the question is whether or not a partial birth abortion should be treated as infanticide"); July 2002 House Hearing 1 (Statement of Rep. Chabot) ("Partial birth abortion is the termination of the life of a living baby just seconds before it takes its first breath outside the womb. The procedure is violent. It's gruesome. It's infanticide"); *id.* at 49 (Statement of Rep. Forbes) ("The difference between partial birth abortion procedure and infanticide is a mere 3-inches").

mother," 18 U.S.C. § 1531(b)(1)(A), must receive the full protection of the law if we are not to abandon, inexorably, the sanctity of postnatal life as well.

Critics of laws banning partial birth infanticide cynically charge that the same prenatal child still faces death by other techniques -- such as poisoning or dismemberment -- which operate while the child remains entirely in the womb. Their objection has undeniable force, but is legally irrelevant: "Those who oppose abortion would agree, indeed would insist, that both procedures are subject to the most severe moral condemnation, condemnation reserved for the most repulsive human conduct." *Stenberg*, 530 U.S. at 963 (Kennedy, J., dissenting). *See also Planned Parenthood v. Casey*, 505 U.S. 833, 850 (1992) ("Some of us as individuals find abortion offensive to our most basic principles of morality"); *id*. at 852 (abortions are "procedures some deem nothing short of an act of violence against innocent human life"). But this is "not inconsistent . . . with the further proposition that as an ethical and moral matter [partial birth abortion] is distinct . . . and is a more serious concern for medical ethics and the morality of the larger society . . ." *Stenberg*, 530 U.S. at 963 (Kennedy, J., dissenting). The partial birth procedure "perverts the natural birth process," *id*. at 962-63. Crucially, the federal PBA Act seeks to halt the *extension* of gruesome abortion practices into gruesome infanticide. The child who breaks the plane of the mother's body "touches home plate," so to speak, and ought to be safe from destruction even though equally deserving children regrettably may be slain just inches away. This "bright line,"[9] while not as protective of preborn life as justice might dictate, nevertheless represents an

[9] The federal statute at issue here draws a line which, while "bright," is very modest. Unless the baby's "entire . . . head" or the "trunk past the navel" is delivered "outside the body of the mother," the statute does not apply. 18 U.S.C. § 1531(b)(1)(A).

essential barrier against the encroachment of abortion into infanticide.

Critics find fault with the absence of a "health" exception in the PBA Act. But partial birth laws are an expression of Western Civilization's longstanding prohibition of infanticide, and such laws need not contain exceptions for children whose death would improve the mother's health. Invoking an adult's "health" as a reason for killing an innocent child should be unthinkable in a civilized society. In any event, Congress reasonably found that the partial birth procedure is never the only medically necessary or available option. *Partial-Birth Abortion Ban Act of 2003*, H.R. Rep. No. 108-58, 108th Cong., 1st Sess. 12, 14-19 & n.83 (2003).[10] *See also infra* § III. A mandatory "health" exception, moreover, improperly "awards each physician a veto power over the State's judgment that the procedures should not be performed." *Stenberg*, 530 U.S. at 964 (Kennedy, J., dissenting).

The central goal of the federal partial birth statute is the defense of the border between abortion and infanticide. *See*

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[10] *See also*, *e.g.*, *Partial-Birth Abortion: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong., 1st Sess. 38-44 (June 15, 1995) [hereinafter June 1995 House Hearing] (testimony of Dr. Pamela Smith); Nov. 1995 Senate Hearing 75-83, 109-112 (testimony of Drs. Nancy Roemer and Pamela Smith); March 1997 Joint Hearing 120-24 (testimony of Dr. Curtis R. Cook); July 2002 House Hearing 12, 26-28 (testimony of Drs. Curtis R. Cook and Kathi A. Aultman); *Partial-Birth Abortion Ban Act of 2003: Hearing before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 108th Cong., 1st Sess. 6-10 (Mar. 25, 2003) [hereinafter March 2003 House hearing] (testimony of Dr. Mark G. Neerhof); 149 Cong. Rec. S13,127-29, 108th Cong., 1st Sess. (Oct. 23, 2003) (Letters from Drs. Nathan Hoeldtke, Susan E. Rutherford, T. Murphy Goodwin, Daniel J. Wechter, and Byron C. Calhoun to Sen. Santorum submitted by Sen. Santorum); 141 Cong. Rec. S18,196-97, 104th Cong., 1st Sess. (Dec. 7, 1995) (Letters from Drs. Dorothy Czarnecki, L. Laurie Scott, Mary Davenport, Margaret Nordell, and Karin E. Shinn to Senator Smith).

supra note 8. What matters most to this specific defense is the protection of all children who, while still alive and therefore capable of being protected, break the plane that currently marks the dividing line between abortion and infanticide. The label the abortionist uses for his lethal procedure is irrelevant. The reason for using this macabre method of killing is irrelevant. What is crucial is maintenance of the bulwark against infanticide, a bulwark that would be pulverized by allowing "a procedure many decent and civilized people find so abhorrent as to be among the most serious of crimes against human life," *Stenberg*, 530 U.S. at 979 (Kennedy, J., dissenting).

II. LAWS THAT PROHIBIT THE KILLING OF A CHILD *IN THE BIRTH PROCESS* AND *PARTLY OUTSIDE THE MOTHER'S BODY* SHOULD NOT BE SUBJECTED TO ABORTION JURISPRUDENCE.

In *Stenberg*, this Court reviewed Nebraska's ban on partial birth abortion under this Court's current abortion jurisprudence. 530 U.S. at 921. This Court did *not* consider whether such jurisprudence might be inapplicable, or applicable only with modifications, where the child is *in the birth process* and *partly outside the mother's body*. Whereas the *Stenberg* Court did not consider or pass upon that question, there is no binding precedent on the matter. *See Domino's Pizza v. McDonald*, 126 S. Ct. 1246, 1251 (2006) (prior cases that "did not discuss, much less decide," an issue, do not control: "The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions, and such assumptions -- even on jurisdictional issues -- are not binding in future cases that directly raise the questions") (internal quotation marks and citation omitted).

The instant case presents an especially compelling occasion to confront the question whether a partial birth procedure should

be treated as "simply" an abortion, or as something different. As a judge on the Second Circuit recently observed, the federal PBA Act presents "a unique circumstance," *Nat'l Abortion Fed'n v. Gonzales*, 437 F.3d 278, 311 (2d Cir. 2006) (Straub, J., dissenting), namely, it applies only when the child is substantially "*outside the body of the mother*," *id.* (quoting 18 U.S.C. § 1531(b)(1)(A)) (emphasis added). In a partial birth "abortion," the child is being slain both *in the birth process* and while *partly outside the mother's body*.

There is no obvious reason why the killing of a child in these unique circumstances should woodenly be categorized as an "abortion" under *Roe* and *Casey*. To the contrary, there are very good reasons for treating these barbaric acts as *sui generis*.

First, this procedure takes place literally at the borderline between abortion and infanticide. By definition, partial birth procedures are *not* "ordinary" abortions. And, as noted above, *supra* § I, the government has a compelling interest in maintaining a strong firewall at this border.

Second, this Court's cases presuppose a distinction between terminating a *pregnancy* and terminating a *child being born*. In *Roe*, this Court expressly left untouched the Texas ban on destroying a child "during parturition." 410 U.S. at 117 n.1. In *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983), this Court upheld the requirement that a second physician be available, during certain abortions, to care for any child born alive. *See id.* at 485 (plurality) ("A second physician . . . may be of assistance . . . in preserving the health and life of the child"). And in *Ashcroft* this Court, with evident revulsion, described as "remarkable" the testimony of an abortionist who asserted that "'the abortion patient has a right not only to be rid of the growth, called a fetus in her body, but also has a right to a dead fetus.'" *Id.* at 483 n.7 (plurality) (quoting Dr. Robert Crist).

Third, that the mother is pregnant when the procedure starts

does *not* logically mean that the procedure is necessarily, in all respects, an "abortion" regardless of what ensues. For example, if a physician does a hysterotomy -- essentially a caesarian delivery -- and the "aborted" baby emerges alive, it is not an "abortion" for the physician to throttle the baby or drown the child in a bucket of water. Nor would shoving the child back into the womb, clamping the umbilical cord, and awaiting the child's death, be an "abortion."

Here, of course, the child is not put back into the womb to be slain but instead is deliberately extracted part of the way out, not just from the womb, but from the mother's body. This unique circumstance amply warrants taking the PBA statute out of the Court's abortion jurisprudence.

Instead of applying *Roe* and its progeny, this Court should apply standard rational basis scrutiny to this infanticide prevention measure. *E.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (asking whether ban on assisted suicide was "rationally related to legitimate government interests"); *see also Williamson v. Lee Optical,* 348 U.S. 483, 488 (1955) ("the day is gone when this Court uses the Due Process Clause . . . to strike down . . . laws . . . because they may be . . . out of harmony with a particular school of thought").

III. THERE SHOULD BE NO "*STENBERG* EXCEPTION" TO THE RULE THAT LEGISLATIVE BODIES MAY RATIONALLY CHOOSE BETWEEN COMPETING MEDICAL VIEWS.

"When a legislature undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad . . ." *Marshall v. United States*, 414 U.S. 417, 427 (1974). The court below, in the name of following *Stenberg*, ruled directly contrary to this well-established rule of deference to the legislative resolution of medical controversies. Insofar as

Stenberg countenanced such a deviation from the settled rule, *Stenberg* should not be followed.

Central to the Eighth Circuit's decision to strike down the federal PBA Act was its understanding of this Court's decision in *Stenberg*. The court below viewed *Stenberg* as holding that whenever there was a "division of medical opinion" (Pet. App. 10a, quoting *Stenberg*, 530 U.S. at 937) on whether a certain abortion procedure might hypothetically be of marginal relative value to maternal health, it was unconstitutional to proscribe that procedure. In effect, under this reading of *Stenberg*, the legislature cannot conclude that a forbidden procedure is medically unnecessary unless all credible medical authorities agree. But in every area of the law, including abortion cases aside from *Stenberg*, the rule is that medicine need *not* be unanimous on a question before a legislature may act thereon. Insofar as *Stenberg* purports to create a different, anomalous rule, that decision should be repudiated.[11]

There is, of course, no constitutional rule in any other area of law that says that whenever physicians are in reasonable disagreement, they may do whatever they see fit. To the contrary, a host of federal and state laws rest on precisely the opposite premise. The banning of certain controversial, unapproved treatments, *e.g., United States v. Rutherford*, 442 U.S. 544 (1979) (Laetrile), the imposition of vaccines, *Jacobsen v. Massachusetts*, 197 U.S. 11 (1905), the disallowance of allegedly therapeutic uses of Schedule I controlled substances, *e.g.*, *United States v. Oakland Cannabis Buyers' Coop.*, 532

[11] *Stenberg* can hardly be said to have created any reliance interests that would weigh in favor of *stare decisis* on this question. No one orders his or her life around the possibility of recourse to partial birth abortions. Moreover, insofar as the *Stenberg* rule -- *viz.,* in case of a medical dispute no regulation is allowed -- disturbs the normal rule, it actually *upsets* expectations and creates uncertainty as to the scope of this new rule.

U.S. 483 (2001), and the imposition of disclosure requirements as part of informed consent, *e.g., Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972), to list just a few familiar examples, all limit medical practice despite the presence of credible dissenting voices in the medical community. As this Court has explained, the existence of a medical dispute or controversy is not a basis for *precluding* legislative resolution; rather, "it is precisely where such disagreement exists that legislatures have been afforded the greatest latitude." *Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997). "When a legislature undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation." *Id.* at 370 (internal quotation marks and citation omitted). *Accord Jones v. United States*, 463 U.S. 354, 364 n.13 (1983) ("The lesson we have drawn is not that government may not act in the face of this uncertainty, but rather that courts should pay particular deference to reasonable legislative judgments"); *Marshall v. United States*, 414 U.S. 417, 427 (1974); *Lambert v. Yellowley*, 272 U.S. 581, 594-95 (1926) (Congress struck balance in dispute over medical value of alcohol).

There is no "privacy rights" exception to this rule of deference. "For example, physicians are presumably prohibited from using abortifacients that have not been approved by the Food and Drug Administration even if some physicians reasonably believe that these abortifacients would be safer for women than existing abortifacients." *Stenberg*, 530 U.S. at 1010-11 (Thomas, J., dissenting) (footnote omitted). Indeed, if under the *Stenberg* rule it were unlawful to restrict abortion or birth control whenever a given method were arguably necessary, in a hypothetical case, for marginal health benefits, then litigation over "medical consensus" would replace the FDA approval process for abortifacients like RU-486 and birth control

drugs and devices like Norplant and the Dalkon Shield. Rather than requiring tests and trials prior to approval, the government would be relegated to proscribing or delaying the use of only those measures that had no credible medical proponents.

Even in abortion context, however, this Court's cases -- at least aside from *Stenberg* -- foresaw and condoned legislation reflecting the legislature's adoption of particular medical judgments. There has never been any suggestion in this Court's pre-*Stenberg* cases of an anomalous requirement that medical opinion must be *unanimous* on a question before that opinion can support legislation.

Thus, in *Roe v. Wade*, this Court expressly approved *state regulations* (not just medical self-regulation) designed to further maternal health. 410 U.S. at 149-50, 154, 162-63, 165. The *Roe* Court also expressly approved the regulation of "the qualifications of the person who is to perform the abortion," the "facility in which the procedure is to be performed," "and the like." *Id.* at 163. There was no suggestion that such regulations would be unconstitutional whenever there was a credible argument that ignoring them might have marginal health benefits for a particular hypothetical woman.

In *Doe v. Bolton*, 410 U.S. 179 (1973), the Court indicated that licensing standards need only be "legitimately related to the objective the state seeks to accomplish," *id.* at 195.

In *Connecticut v. Menillo*, 423 U.S. 9 (1975) (per curiam), this Court perceived no constitutional flaw in a ban on abortions by nonphysicians. The Court explained that the "predicate" for an abortion right in *Roe* "holds true only if the abortion is performed by medically competent personnel under conditions insuring maximum safety for the woman." *Id.* at 11.

In *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52 (1976), the Court reaffirmed that the Constitution required only that regulations be "reasonably related to maternal

health," *id.* at 76 (quoting *Roe*, 410 U.S. at 164). *See also id.* at 80-81 (upholding recordkeeping and reporting requirements as "reasonably directed to the preservation of maternal health").[12]

In *Akron v. Akron Center for Reproductive Health,* 462 U.S. 416 (1983), *overruled in part by Casey*, 505 U.S. at 870, 882, the Court again reaffirmed the "reasonably related" test for maternal health regulations, 462 U.S. at 430-31, 434. The Court specifically noted that even in the first trimester, a safety regulation that does "not interfere with . . . the woman's choice between abortion and childbirth" is "permissible where justified by important state health objectives," *id.* at 430. "A State necessarily must have latitude in adopting regulations of general applicability in this sensitive area." *Id.* at 434. The "lines drawn" need only "be reasonable" and need "not correspond perfectly in all cases to the asserted state interest," *id.* at 438. *Cf. Planned Parenthood v. Ashcroft*, 462 U.S. at 487 (plurality) (pathology report requirement for all abortions upheld as "reasonably related to generally accepted medical standards"); *Simopoulos v. Virginia*, 462 U.S. 506, 519 (1983) (reaffirming state's "legitimate interest" in regulating "circumstances" of abortion to assure "maximum safety" for patients); *Thornburgh v. American College of Obstets. & Gynecs.*, 476 U.S. 747, 766 (1986) (acknowledging "reasonably directed . . . to maternal health" standard), *overruled in part on other grounds by Casey*, 505 U.S. at 870, 882.

In *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), the plurality, reaffirming the "reasonably related to

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[12] In *Colautti v. Franklin*, 439 U.S. 379 (1979), this Court noted a "disagreement among medical authorities about the relative merits and safety of different abortion procedures," *id.* at 399. However, the Court did "not address" the constitutionality of a legislative judgment in this area, *id.* at 400, because the Court found the relevant provision impermissibly vague, *id.* at 400-01.

maternal health" standard, *id.* at 516, endorsed the view that this standard should apply not just after the first trimester but rather throughout pregnancy, *id.* at 519 (citing dissenting view of Justice O'Connor in *Thornburgh*).

In *Casey*, a majority of this Court accepted the proposition, from the *Webster* plurality, that "the State has legitimate interests from the outset of pregnancy in protecting the health of the woman and the life of the fetus," *Casey*, 505 U.S. at 845. *See also id.* at 900 (joint opinion). In particular, "*[a]s with any medical procedure*, the state may enact regulations to further the health or safety of a woman seeking an abortion," *id.* at 878 (joint opinion) (emphasis added). Only "[u]nnecessary health regulations . . . presenting a substantial obstacle to a woman seeking abortion," run afoul of this standard. *Id.*

Thus, while diverging somewhat on the particulars, this Court's pre-*Stenberg* abortion cases uniformly adhered to a *reasonableness* test in assessing the connection between a regulation of abortion and the underlying goal of maternal health. There was *no* hint that the mere existence of credible medical counter-argument would suffice to invalidate the regulation. Indeed, in *Mazourek v. Armstrong*, 520 U.S. 968 (1997) (per curiam), this Court rejected a constitutional challenge that alleged that "*all* health evidence contradicts the [state's asserted] health basis for the law," *id*. at 973 (editing marks omitted; emphasis added), declaring this argument to be "squarely foreclosed by *Casey* itself," which held that states possess "broad latitude" in this area "even if an objective assessment" might suggest a contrary policy. 520 U.S. at 973 (editing marks and emphasis omitted).

Despite this consistent theme of deference to legislative judgment in contested medical matters, both in the abortion context and more generally, the *Stenberg* Court struck down a law because "significant medical authority" took a contrary

position regarding the law's potential impact on maternal health. *Stenberg*, 520 U.S. at 932. *See also id.* at 936 (legislation must fall in the face of a federal trial court's contrary finding on maternal risk, "a highly plausible record-based explanation" of that risk, "a division of opinion among some medical experts," and "an absence of controlled medical studies"). *Stenberg* thus represents a clear departure from settled constitutional law, a departure that calls into question the status of the vast array of medical laws and regulations.

This Court should therefore modify or repudiate *Stenberg* insofar as it disallows a legislative body from making reasonable judgments regarding contested medical questions. Uncertainty among experts is a reason for legislative latitude, not legislative paralysis. The "Constitution does not require a judicially imposed resolution of these difficult issues." *Maher v. Roe*, 432 U.S. 464, 480 (1977).

IV. THIS COURT SHOULD DEFER TO CONGRESS IN LIGHT OF THE EXTENSIVE CONSIDERATION CONGRESS GAVE TO THE PARTIAL BIRTH ABORTION BAN ACT.

Once the proper constitutional standard is applied -- deference to reasonable legislative choices among competing medical opinions -- it is clear that the federal PBA Act represents a permissible legislative course of action.

Congress devoted substantial time and effort to weighing the arguments for and against the challenged PBA Act, before reaching a considered bipartisan judgment that partial birth abortion should be prohibited. That judgment merits deference by this Court.

The Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531, P.L. 108-105, 117 Stat. 1201-06, signed by President Bush on November 5, 2003, became law only after more than eight

years of congressional deliberation and analysis. Four different Congresses conducted six hearings on such legislation and heard from dozens of doctors, nurses, medical associations, professors, Members of Congress and private citizens. After reviewing all the evidence before it, Congress concluded that the Act promoted salutary goals and that "partial-birth abortion is never necessary to preserve the health of a woman and should, therefore, be banned."[13] The federal judiciary should defer to these factual determinations. This Court should uphold the federal PBA Act.

A. The 104th Congress (1995-1996)

Congress first considered a partial birth abortion ban in 1995. Representative Charles Canady introduced H.R. 1833, the Partial-Birth Abortion Ban Act of 1995, on June 14, 1995.[14] The first of three hearings on this bill took place in the House on June 15, 1995.[15] Dr. Pamela Smith, Dr. Robert J. White, and a neonatal nurse named Mary Ellen Morton testified in favor of the ban at the hearing while Dr. J. Courtland Robinson and Tammy Watts, a woman who had undergone an abortion, testified against it.[16] The House also heard Professor David M. Smolin discuss the ban's constitutionality, and the record contains additional statements and research papers from doctors,

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[13] *Partial-Birth Abortion Ban Act of 2003*, H.R. Rep. No. 108-58, at 12 (Apr. 3, 2003).

[14] H.R. Rep. No. 108-58, at 12.

[15] *Nat'l Abortion Fed'n v. Ashcroft*, 330 F. Supp. 2d 436, 443 (S.D.N.Y. 2004); June 1995 House Hearing; H.R. Rep. No. 104-267, 104th Cong., 1st Sess. (1995).

[16] *Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 443 (citing June 1995 House Hearing).

advocacy groups, and a Member of Congress.[17] The record included Dr. Martin Haskell's 1992 paper, *Dilation and Extraction for Late Second Trimester Abortion*, the very paper that, according to Congress, "sparked a national debate over the partial-birth abortion procedure."[18] Additional statements about the ban by physicians such as Mitchell Creinin, Lewis H. Koplik, and Bruce Ferguson were introduced into the record during the November 1, 1995 House debates.[19] The House approved the bill by a bipartisan vote of 288-139.[20]

The Senate Judiciary Committee held the second hearing on H.R. 1833 on November 17, 1995.[21] Five physicians testified: Drs. Pamela Smith and J. Courtland Robinson reiterated the testimony they had given before the House committee, while Drs. Norig Ellison, Nancy Romer, and Mary Campbell also testified about the ban.[22] The committee also heard testimony from Brenda Pratt Schaefer (a registered nurse), Helen Alvare from the National Conference of Catholic Bishops, two law professors, and three women who had complications during the later stages of their pregnancies.[23] The numerous contributors to the hearing record included Dr. Warren M. Hern, women who

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[17] *Id.* at 443-44 (citing June 1995 House Hearing).

[18] H.R. Rep. No. 108-58, at 2 (citing Martin Haskell, M.D., *Dilation and Extraction for Late Second Trimester Abortions*, Presented at the National Abortion Federation Risk Management Seminar (Sept. 13, 1992)); *Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 443-44.

[19] *Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 444; *see also* 141 Cong. Rec. H11597-11612 (Nov. 1, 1995).

[20] H.R. Rep. No. 108-58, at 13.

[21] H.R. Rep. No. 108-58, at 13 (citing Nov. 1995 Senate Hearing).

[22] *Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 444 (citing Nov. 1995 Senate Hearing).

[23] *Id.* (citing Nov. 1995 Senate Hearing).

had undergone an abortion, a Senator, lawyers testifying about the bill's implications and constitutionality, the National Abortion Federation, the American College of Obstetricians and Gynecologists, the American Nurses Association, and Planned Parenthood Federation of America.[24] During the Senate floor debate over H.R. 1833 from December 5-7, 1995, a letter from Dr. Antonio Scommegna was added to the record.[25] The Senate approved the bill, in amended form, by a bipartisan 54-44 vote on December 7, 1995.[26]

The final hearing on H.R. 1833, entitled *Effects of Anesthesia During a Partial-Birth Abortion*, was held on March 21, 1996 by the House Subcommittee on the Constitution.[27] Several physicians -- Drs. Norig Ellison (who testified before the Senate earlier), David Birnbach, David Chestnut, and Jean Wright -- all said that administering an anesthetic to the mother does not alleviate fetal pain during a partial birth abortion.[28] Previous Senate witnesses Brenda Pratt Shafer, Helen M. Alvare, and Coreen Costello reiterated their previous remarks at the hearing.[29] Also, Mary-Dorothy Line opposed the ban due to her past experience having undergone a partial birth abortion.[30]

On March 27, 1996, the House approved a slightly amended

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[24] *Id.* (citing Nov. 1995 Senate Hearing).

[25] *Id.* (citing 141 Cong. Rec. 17892-93 (Dec. 4, 1995)).

[26] H.R. Rep. No. 108-58, at 13 & n.67.

[27] *Id.* (citing *Effects of Anesthesia During a Partial-Birth Abortion: Hearing Before the House Comm. on the Judiciary, Subcomm. on the Constitution*, 104th Cong., 2d Sess. (Mar. 21, 1996) [hereinafter Mar. 1996 House Hearing]).

[28] *Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 444 (citing Mar. 1996 House Hearing).

[29] *Id.* (citing Mar. 1996 House Hearing).

[30] *Id.* (citing Mar. 1996 House Hearing).

version of the ban by a 286-129 vote,[31] but President Clinton vetoed the bill.[32] While the House overrode the veto by a vote of 285-137 on September 19, 1996, the Senate's vote of 58 to 40 in favor of override fell short of the necessary two-thirds.[33]

B. The 105th Congress (1997-1998)

Rep. Charles Canady introduced a partial birth abortion ban, H.R. 929, on March 5, 1997.[34] On March 11, the Senate Committee on the Judiciary and the House Subcommittee on the Constitution held a joint hearing on the bill.[35] The hearing and its record included statements from Dr. Curtis Cook and other physicians, a Centers for Disease Control official, women who had undergone partial birth abortions, Members of Congress, constitutional law scholars, representatives of the abortion industry, and pro-life and pro-abortion advocacy groups such as Planned Parenthood and the National Right to Life Committee.[36]

On March 20, 1997, the House debated a bill very similar to H.R. 929 (H.R. 1122, the Partial-Birth Abortion Ban Act of 1997) and approved it 295 to 136.[37] The Senate examined H.R. 1122 on May 15 and 20, 1997, and approved it 64-36.[38]

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[31] H.R. Rep. No. 108-58, at 13.

[32] *Id.*; *see also* H.R. Doc. No. 104-198, 104th Cong., 2d Sess. (1996) (the President's veto statement).

[33] H.R. Rep. No. 108-58, at 13.

[34] *Id.*

[35] *Id.*; Mar. 1997 Joint Hearing.

[36] H.R. Rep. No. 108-58, at 13; *Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 445-46 (citing Mar. 1997 Joint Hearing).

[37] H.R. Rep. No. 108-58, at 13.

[38] *Id.*

President Clinton again vetoed the bill.[39] The House voted to override the veto by a vote of 296 to 132 on July 23, 1998; the Senate's vote of 64-36 on September 18, 1998, fell just short of the two-thirds required for override.[40]

C. The 106th Congress (1999-2000)

During the 106th Congress, both Chambers approved versions of a ban but neither conducted additional hearings. Rep. Canady introduced H.R. 3660, a bill identical to the one approved by the House in the 105th Congress.[41] H.R. 3660 was eventually approved 287-141 by the House.[42] On October 5, 1999, Senator Rick Santorum introduced a bill in the Senate (S. 1692) banning partial birth abortion which differed from H.R. 3660 in some respects.[43] S. 1692 was considered by the Senate on October 19-21, 1999, and approved 63-34 on October 21.[44] When the House considered S. 1692, it amended the bill by inserting the text of H.R. 3660 and approved it on May 25, 2000.[45] Congress took no further action on the bill after the *Stenberg* decision was issued in June 2000[46] in order to study the decision and ensure that any future partial birth legislation would be consistent with it.[47]

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[39] *Id.*; *see also* H.R. Doc. No. 105-158, 105th Cong., 1st Sess. (1997) (the President's veto statement).

[40] H.R. Rep. No. 108-58, at 13.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.* at 13 n.68.

[47] *See*, *e.g.*, *id.* at 6, 63; *Partial-Birth Abortion Ban Act of 2002*, H.R. Rep. (continued...)

D. The 107th Congress (2001-2002)

Rep. Steve Chabot introduced H.R. 4965 on June 19, 2002, the first partial birth abortion bill after *Stenberg*.[48] On July 9, 2002, the House Subcommittee on the Constitution held a hearing on the bill.[49] The four witnesses testifying at the hearing were Dr. Kathi Aultman, Dr. Curtis Cook, Professor Robert A. Destro, and Simon Heller of the Center for Reproductive Law and Policy (who represented the plaintiff in *Stenberg*).[50] Representatives Steve Chabot and Randy Forbes also submitted material to the subcommittee,[51] and the record included medical papers, letters from physicians, and statements from the American Medical Association (AMA), the American College of Obstetricians (ACOG), and the Physicians' Ad Hoc Coalition for Truth (PHACT).[52] While the House approved H.R. 4965 on July 24, 2002, by a 274-151 vote, the Senate failed to take action on the bill.[53]

E. The 108th Congress (2003-2004)

A federal partial birth abortion ban was finally enacted during the 108th Congress. Rep. Steve Chabot introduced H.R. 760 --

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[47] (...continued)
No. 107-604, 107th Cong., 2d Sess. (2002); July 2002 House Hearing 2 (Statement of Rep. Chabot).

[48] H.R. Rep. No. 108-58, at 14.

[49] *Id.*; July 2002 House Hearing.

[50] H.R. Rep. No. 108-58, at 14.

[51] H.R. Rep. No. 107-604, at 22.

[52] *Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 447-48 (citing July 2002 House Hearing).

[53] H.R. Rep. No. 108-58, at 14.

identical to H.R. 4965 -- on February 13, 2003.[54] Senator Rick Santorum introduced a parallel bill (S. 3) the following day.[55] The Senate reviewed S. 3 on March 10-13, 2003, and approved an amended version of it by a 64-33 vote.[56] The record of the Senate debate includes statements from Drs. Natalie Roche, Gerson Weiss, and Curtis Cook as well as women who had undergone abortions.[57]

The House Subcommittee on the Constitution held a hearing on H.R. 760 on March 25, 2003.[58] Those testifying were Dr. Mark G. Neerhof, Simon Heller (for the second time), and Professor Gerard V. Bradley.[59] Those whose statements were offered into the record included Drs. Philip D. Darney, Daniel J. Wechter, Watson Bowes, Steve Calvin, Nathan Hoeldtke, Byron C. Calhoun, T. Murphy Goodwin, and Susan E. Rutherford as well as Physicians for Reproductive Choice and Health (PRCH), the American Medical Women's Association (AMWA), ACOG, and PHACT.[60] The House passed H.R. 760 by a 282-139 vote on June 4, 2003.[61] The House approved the conference report for S. 3 by a 281-142 vote on October 2, 2003,[62] while the Senate did

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[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *See* 149 Cong. Rec. S3384-3386 (Mar. 10, 2003); 149 Cong. Rec. S3457-3471 (Mar. 11, 2003).

[58] H.R. Rep. No. 108-58, at 14; March 2003 House Hearing.

[59] H.R. Rep. No. 108-58, at 14.

[60] *Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 448-49 (citing March 2003 House Hearing).

[61] *Id.* at 449.

[62] *Id.*; *see also* 149 Cong. Rec. H8992 (Sept. 30, 2003); 149 Cong. Rec. (continued...)

so by a 64-34 vote on October 21, 2003.[63] President Bush signed the Partial-Birth Abortion Ban Act of 2003 into law on November 5, 2003.[64]

* * *

In sum, Congress extensively considered the PBA Act over several years, both before and after the Court's *Stenberg* decision. Congress heard testimony by, and received submissions from, physicians, lawyers, organized groups, private individuals, and the like -- all different types of parties, and both proponents and opponents of this law -- about the importance of restricting this procedure, any claimed medical need for the procedure, the effects of the Act, and the Act's constitutionality. Congress's judgment that the procedure as defined in the PBA Act should be prohibited in order to reflect American society's horror at infanticide is entitled to considerable respect and deference. The Eighth Circuit's invalidation of that considered judgment was erroneous and should be reversed.

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[62] (...continued)
H9142-9146 (Oct. 2, 2003).

[63] *Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 449.

[64] 18 U.S.C. § 1531, P.L. 108-105, § 3(a), 117 Stat. 1201-06.

CONCLUSION

This Court should reverse the judgment of the Eighth Circuit.

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May 22, 2006

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Sen. Rick Santorum (Pennsylvania)
Rep. Robert B. Aderholt (Alabama – 4th District)
Rep. W. Todd Akin (Missouri – 2nd District)
Rep. J. Gresham Barrett (South Carolina – 3rd District)
Rep. Roscoe G. Bartlett (Maryland – 6th District)
Rep. Rob Bishop (Utah – 1st District)
Rep. Marsha Blackburn (Tennessee – 7th District)
Rep. Kevin Brady (Texas – 8th District)
Rep. Michael C. Burgess (Texas – 26th District)
Rep. Dan Burton (Indiana – 5th District)
Rep. Chris Cannon (Utah – 3rd District)
Rep. John Carter (Texas – 31st District)
Rep. Steve Chabot (Ohio – 1st District)
Rep. Tom Cole (Oklahoma – 4th District)
Rep. Barbara Cubin (Wyoming – At Large)
Rep. Jo Ann Davis (Virginia – 1st District)
Rep. John T. Doolittle (California – 4th District)
Rep. Tom Feeney (Florida – 24th District)
Rep. Jeff Flake (Arizona – 6th District)
Resident Commissioner Luis G. Fortuño (Puerto Rico)
Rep. Virginia Foxx (North Carolina – 5th District)
Rep. Trent Franks (Arizona – 2nd District)
Rep. Scott Garrett (New Jersey – 5th District)
Rep. Phil Gingrey (Georgia – 11th District)
Rep. Virgil H. Goode, Jr. (Virginia – 5th District)
Rep. Mark Green (Wisconsin – 8th District)
Rep. Gil Gutknecht (Minnesota – 1st District)
Rep. Ralph M. Hall (Texas – 4th District)
Rep. Melissa A. Hart (Pennsylvania – 4th District)
Rep. Robin Hayes (North Carolina – 8th District)
Rep. J.D. Hayworth (Arizona – 5th District)
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Rep. John N. Hostettler (Indiana – 8th District)
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