No. 05-380

IN THE
SUPREME COURT OF THE UNITED STATES

ALBERTO R. GONZALES, ATTORNEY GENERAL,

Petitioner,

— v. —

LEROY CARHART, M.D., WILLIAM G. FITZHUGH, M.D., WILLIAM H. KNORR, M.D., and JILL L. VIBHAKAR, M.D., on behalf of themselves and the patients they serve,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

JERRY M. HUG
ALAN G. STOLER, P.C., L.L.O.
Historic Library Plaza
1823 Harney Street
Suite 1004
Omaha, NE 68102
(402) 346-1733

PRISCILLA J. SMITH
(*Counsel of Record*)
JANET CREPPS
NAN E. STRAUSS
Center for Reproductive Rights
120 Wall Street
New York, NY 10005
(917) 637-3600

Counsel for Respondents

QUESTIONS PRESENTED

Whether the Court of Appeals correctly held that the "Partial-Birth Abortion Ban Act of 2003," Pub. L. No. 108-105, 117 Stat. 1201 (to be codified at 18 U.S.C. 1531) ("the Act"), which bans certain abortion procedures, is unconstitutional on its face because it lacks any exception for the preservation of women's health.

Whether the Court of Appeals correctly held that Congressional Findings, which are contradicted by the trial court record and the evidence in the Congressional record itself, could not sustain the Act.

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INTRODUCTION

In *Stenberg v. Carhart*, 530 U.S. 914 (2000), this Court struck down a Nebraska statute banning so-called "partial-birth abortions" because it did not provide an exception for circumstances in which the procedure was necessary to protect the health of women seeking abortions. *Id.* at 937-38. The core principle of this Court's decision was the holding 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.'" 530 U.S. at 938 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 879 (1992)).

The Congressional findings make clear that in passing the Act Congress was seeking to overturn this Court's decision in *Stenberg*. *See* Partial Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2, 117 Stat. 1201 (2003); PA 589a-601a. This case differs from *Stenberg*, however, only in that the evidentiary record offers even stronger support for the conclusion that the Act must provide a health exception.

Recognizing that it cannot overcome the evidentiary record in this case, the Government seeks, in effect, to have this Court overrule *Stenberg*. The grounds asserted in support of the petition do not, however, provide a sound basis on which to revisit the holding of that case, decided by this Court just five years ago.

The Government seeks to uphold the Act on the grounds that Congressional findings that a health exception is not necessary control the outcome of this case under *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*"). The Government's misapplication of the *Turner* standard of deference to permit congressional findings, rather than evidence tested by cross-examination at trial, to determine the necessity of a health exception would

manufacture a conflict between *Turner* and *Stenberg* that does not exist.

Moreover, the Government's argument that this facial challenge should be governed by application of the "no set of circumstances" test under *United States v. Salerno*, 481 U.S. 739, 745 (1987) should also be rejected, as this Court did not apply *Salerno* in either *Casey* or *Stenberg*.

Given that the Court of Appeals faithfully followed this Court's decision in *Stenberg*, and particularly in light of the strong factual record in this case demonstrating that prominent Obstetrician/Gynecologists teaching at major universities across the country believe that intact D&E procedures provide significant safety advantages for some women, reconsideration of *Stenberg* is unwarranted. Moreover, any weakening of *Stenberg's* holding regarding the circumstances in which a health exception is required would represent a significant retreat from more than three decades of this Court's jurisprudence striking down any abortion regulation that failed to protect pregnant women's health, regardless of the interests otherwise served by the regulation. *See, e.g., Casey*, 505 U.S. 833; *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), *overruled in part on other grounds by Casey*, 505 U.S. 833; *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973). Therefore, the petition should be denied.

COUNTERSTATEMENT

As in *Stenberg*, the record in this case establishes that the procedures banned by the Act provide significant safety benefits to women. In particular, the evidence shows that the Act would cause significant harm to specific women and would materially increase the risk of sterilization, infection, and other serious health consequences. The record in this case differs from *Stenberg* in that the evidence in support of the safety benefits of intact D&E is *even stronger*. The

testimony of numerous highly-credentialed physicians practicing in hospitals, academic institutions, and clinics, establishes that intact D&E is a commonly performed and safe procedure. Moreover, the evidence shows that, without a health exception, the Act would, in the opinion of many physicians, including professors of obstetrics and gynecology and chairs of Ob/Gyn departments, significantly undermine the safety of abortion services.

I. The Record Establishes That a Health Exception Is Necessary.

A. Trial Evidence

The District Court found that "the overwhelming weight of the trial evidence proves that the banned procedure is safe and medically necessary in order to preserve the health of women under certain circumstances." PA[1] 479a-480a, 497a. The trial record fully supports this finding.

In *Stenberg* the District Court heard testimony from three physicians in support of intact D&E procedures, *Carhart v. Stenberg*, 11 F. Supp. 2d 1099, 1116 (D. Neb. 1998). In this case 16 physicians testified, based on their extensive experience performing abortions and their clinical judgment, that intact D&E offers safety advantages to women. *See* PA 123a, 132a, 137a-138a, 145a, 150a, 156a-157a, 162a, 168a-169a, 174a, 182a, 189a, 195a-196a, 472a-476a, PA 498a-499a. They identified four safety benefits of the intact D&E procedure. *See generally*, PA 279a-288a.

As the District Court found, one benefit is that "the intact procedure reduces the need for placing forceps into the uterus thus reducing the risk of trauma to the uterus and cervix." PA 480a-481a, 497a. *See also, e.g.,* PA 178a-179a, 265a-266a,

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[1] The Appendix to the Petition for Certiorari is cited herein as "PA" and the Petition itself is cited as "Pet." The Appendix to this brief is cited as "RA."

280a, 285a-286a, 358a-359a. *See also* PA 274a, RA 81-87 (uterine perforation may result in "catastrophic hemorrhage" requiring hysterectomy to prevent death). A second safety advantage is that "the intact procedure reduces the possibility of retaining fetal parts or fluids in the uterus." PA 481a, 497a. *See also, e.g.,* PA 265a, 281a, 284a, 400-401a, 474a. The third advantage is that intact removal "reduces the possibility of exposing maternal tissues to sharp bony fragments stemming from the dismemberment of the fetus." PA 481a, 497a-498a. *See also, e.g.,* PA 265a, 277a, 279a, 287a, 401a, 474a. Fourth, "the intact procedure is faster than the standard D&E, thus reducing the time and expense of the operation, the risk of hemorrhage, and the risk of complications from anesthesia." PA 481a, 498a. *See also, e.g.,* PA 279a, 282a-285a.

The testimony established that these safety benefits, which are always present, are even more important to preserve the health of pregnant women in "special cases." PA 481a. As Dr. Westhoff, professor of ob/gyn at Columbia University, testified, patients with serious underlying medical conditions gain the greatest benefit from intact D&E because it reduces the likelihood of complications that would be unusually risky, even catastrophic, to these women. PA 187a, 287a; RA 102-103.

Thus, experts testified at trial that the banned procedures are the safest for patients with infections, including chorioamnionitis (infection of the amniotic membranes) and sepsis (a severe systemic infection), which can lead to clotting disorders and a heightened risk of maternal hemorrhage. In these circumstances, the intact D&E is the optimal method "because it decreases the risk of cervical laceration and hemorrhage and shortens the procedure time for a patient facing potential multiorgan failure." PA 288a-289a; RA 73-77. As Dr. Hammond from Northwestern University explained, patients with chorioamnioitis have a "higher risk of uterine perforation because the uterine wall is

not healthy and does not have its usual rigidity; more importantly, manipulating [the] interior of [an] infected uterus with multiple instrument passes may seed infection from [the] uterine lining into the bloodstream causing sepsis." PA 289a, 498a; RA 91-93. Dr. Hammond further testified that the banned procedures are also safer for women with various bleeding or clotting disorders and for those with heart problems, because in those cases it is particularly important to limit the procedure time and to reduce the risk of hemorrhage. PA 290a-291a; RA 88-98. Further, Dr. Cain representing the American College of Obstetricians and Gynecologists, ("ACOG"), testified that the intact D&E procedure is "much safer" for certain women with "cancer of the placenta" where "instrumentation on the uterine wall should be avoided as much as possible." PA 434a-435a, 481a.

The Government's expert, Dr. Charles Lockwood, Chairman of the Department of Obstetrics, Gynecology and Reproductive Services at Yale University, acknowledged that intact D&E might be the safest procedure in some circumstances. For example, for a woman with chorioamnionitis or placenta previa (a condition in which the placenta covers the cervical opening) who also had a viral infection such as HIV or hepatitis, Dr. Lockwood conceded that intact D&E may be the best alternative. RA 20-24, 35.

On the issue of whether "a substantial body of medical opinion" believes the intact D&E procedure is the safest for some women, the District Court summarized the evidence as follows:

> The "significant body of medical opinion" that has come to these opinions [that the banned procedure is "safer" and "necessary"] include doctors who have experience practicing at major metropolitan or teaching hospitals, such as: Dr. Doe, an internationally certified obstetrician and gynecologist

who has practiced at several big-city hospitals in this and other countries, and who has been performing abortions since 1972; Dr. Vibhakar, a board-certified obstetrician and gynecologist and assistant professor at the University of Iowa; Dr. Broekhuizen, a board-certified obstetrician and gynecologist at the Medical College of Wisconsin; Dr. Creinin, a board-certified obstetrician and gynecologist at the University of Pittsburgh; Dr. Westhoff, a board-certified obstetrician and gynecologist and a professor at Columbia University who has performed abortions since 1978; Dr. Hammond, a board-certified obstetrician and gynecologist and assistant professor at Northwestern University who has performed abortions for 15 years and who supervises Northwestern's two-year fellowship program in family planning and contraceptive research, which includes teaching abortion procedures; Dr. Paul, a board-certified obstetrician and gynecologist, editor-in-chief of one of the standard references on abortion, and an associate professor at the University of California at San Francisco, where she teaches abortion techniques to residents and health care providers; and Dr. Chasen, a board-certified physician in obstetrics and gynecology and fetal and maternal medicine, who is an associate professor at the Weill Medical College of Cornell University, where he directs the High-Risk Obstetric Clinic and teaches surgical abortion methods, including the D&E and D&X procedures.

That "significant body of medical opinion" also includes practicing physicians like Dr. Carhart, who headed the surgery department at the Offut Air Force Base Hospital; Dr. Knorr, a board-certified obstetrician and gynecologist who has performed as many as 5,000 to 6,000 abortions a year; and Dr.

> Fitzhugh, a board-certified obstetrician and gynecologist and former assistant chief of the obstetrics and gynecology department at the Malcom Grow Medical Center, Andrews Air Force Base.

PA 498a-499a.[2]

Moreover, Defendants' expert Dr. Lockwood testified that he supervised physicians performing intact D&E's and plans to allow intact procedures to be performed at the Yale University School of Medicine. PA 28a, 219a, 471a-472a (there are "compelling enough arguments as to [the banned technique's] safety, that I certainly would not want to prohibit its use in my institution.") RA 23, 33-34. In addition, Dr. Lockwood and Government expert Dr. Bowes agreed that there is a body of medical opinion, which consists of a responsible group of physicians, who believe that D&Es in which the fetus is extracted intact or relatively intact may be the safest procedure for some women in some circumstances. PA 394a, 470a-472a.

B. The Congressional Record

The District Court concluded that "the Congressional Record disproves" Congress's finding that the banned procedures are never medically necessary. PA 464a. Specifically, the Court found that the information presented to Congress by physicians actively providing surgical abortions, including the intact D&E procedure, showed that the banned procedures provided overall safety benefits for women undergoing second trimester abortions. *See, e.g.,* PA 74a, 75a (Dr. Martin Haskell – an experienced abortion provider who presented a paper on the method at a medical conference – believed that intact D&E "minimizes trauma to the uterus," "minimizes blood loss," and "shortens surgical time"); PA 82a, 84a (Dr. Warren Hern – assistant clinical

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[2] This summary makes clear that "Congress was incorrect in finding that the intact D&E is not taught at medical teaching institutions." PA 421a.

professor of obstetrics and gynecology at the University of Colorado and author of a leading textbook and numerous papers on abortion – stated that "possible advantages" to the procedure are reduced risk of perforation of the uterus and elimination of the risk of cerebral embolism); PA 90a (Dr. William Rashbaum – professor of obstetrics and gynecology at Albert Einstein College of Medicine and Cornell School of Medicine – stated that the intact D&E procedure does not require the use of instruments that pose a risk during D&E procedures).

Numerous others expressed concern in the congressional record that the Act would prevent physicians from using the safest procedures. *See* PA 69a (Dr. Courtland Robinson – faculty member at Johns Hopkins University School in the Department of Gynecology and Obstetrics – stated "that sometimes it is necessary to deliver the fetus intact to perform the safest method of abortion"); PA 78a (Dr. Dru Carlson – Director of Reproductive Genetics at Cedars-Sinai Medical Center and assistant professor at the UCLA School of Medicine – stated that, compared to the usual methods for termination due to fetal anomaly in the second trimester, the procedure banned by the Act involves "passive dilation" that helps preserve future fertility); PA 84a, 85a (Dr. James Schreiber – head of obstetrics and gynecology at the Washington University Medical Center – believed that for abortions performed between 20 and 22 weeks due to fetal anomaly, "this technique of abortion can be the safest for the mother"); PA 87a (Dr. Donald M. Sherline – Cook County Hospital Department of Obstetrics and Gynecology – stated that "compared to the other methods of late second trimester abortion, [the banned procedure] would be judged the safest for the mother when carried out by an experienced operator"); PA 88a (Dr. Samuel Edwin – ob/gyn from Michigan – stated that "[t]he D&X procedure is the safest option for many women faced with medical emergencies during pregnancy;" the ban would "prevent me from

providing the best possible care for my patients"); PA 107a (Dr. Natalie Roche – assistant professor of obstetrics – and Dr. Gerson Weiss – Professor and Chair of the Department of Obstetrics and Gynecology and Women's Health at New Jersey Medical College – stated that the intact D&E "is sometimes a physician's preferred method of termination" because, among other things, it provides less chance of uterine perforations, tears, and cervical lacerations); PA 118a-120a (Dr. Vanessa Cullins – former assistant professor at Johns Hopkins University and Vice President of Medical Affairs for Planned Parenthood Federation of America – stated that intact D&E involved "less risk of uterine perforation or cervical laceration," reduced the risk of retained fetal tissue, and required less operating time).

Physicians also provided Congress with numerous examples of specific circumstances where intact D&E offered additional advantage. Dr. Antonio Scommegna – a doctor at the University of Illinois at Chicago College of Medicine, PA 86a – described a situation in which intact removal was necessary for a woman who presented in premature labor with a high fever and infection. The alternative, a Cesarean section, "would have 'increased significantly' the risk of "spreading infection, affecting her future fertility and perhaps compromising her life." PA 86a-87a.

Dr. David Grimes – former Chief of the Department of Obstetrics, Gynecology and Reproductive Sciences at San Francisco General Hospital, PA 99a – described a case in which a patient suffered from severe preeclampsia, in "'a dangerous and extreme form' known as 'HELLP syndrome' involving liver failure and an abnormal blood-clotting ability," where "an intact D&E was the fastest and safest option available." PA 99a-100a; 107 Cong. Rec. 4,521 (1997); *see also* PA 225a. Dr. Cullins testified that intact D&E "may be especially useful in the presence of fetal

abnormalities, such as hydrocephalus" because reduction of fetal skull reduces the risk cervical injury. PA 119a-120a.

In response to a request by a Senator for "specific examples of the need for the banned procedure to preserve the physical health of a woman," PA 465a-466a, Dr. Philip Darney, professor and Chief of Obstetrics, Gynecology and Reproductive Sciences at San Francisco General Hospital and the University of California, San Francisco, PA 110a-111a, described two cases. In one, a patient suffered from placenta previa and a clotting disorder, and in the other the patient suffered from placenta accreta. Intact D&E was used to avert the risk of dangerous hemorrhaging and hysterectomy in both cases, and Dr. Darney believed that "the 'intact D&E' technique was critical to providing optimal care." PA 111a-113a, 465a-466a.

Summarizing the congressional record, the District Court found that 10 of 11 doctors with recent surgical abortion experience opposed the ban. PA 464a. Moreover, "even the one dissenter acknowledged that he had used, and would use, the banned procedure to save the life of a woman." *Id*. Significantly, "[o]pposition to the ban and support for the banned procedure in certain circumstances came from ACOG, the nation's leading medical association concerned with obstetrics and gynecology." PA 463a.[3]

Based on this testimony, the District Court found that "a significant body of medical opinion" contradicts the congressional finding that the banned procedures are never medically necessary, and that "no reasonable person could come to a contrary decision." PA 501a. Thus, the District

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[3] In addition to the amicus brief and position statement submitted by ACOG in *Stenberg*, both of which are part of the Congressional record in this case, this Court now also has the benefit of the deposition of ACOG, explaining the overall safety advantages of intact D&E and identifying medical conditions where the procedures banned by the Act would be the safest. PA 433a-435a.

Court found that "Congress was wrong, and unreasonably so, when it found . . . that the banned procedure is 'never necessary to preserve the health of a woman.'" PA 477a (citation omitted). Moreover, the District Court found that the record thus disproves Congress's finding that a "medical consensus" exists that that "the practice of performing a partial-birth abortion . . . is never medically necessary." Pub. L. No. 108-105 § 2. In fact, among physicians "with experience in surgical abortions," "the congressional record establishes that there was a 'consensus' in favor of the banned procedure." PA 461a-463a.

II. The Evidence Establishes That the Intact D&E Procedure Does Not Pose a Serious Risk to Women's Health.

Congress found that the banned procedures "pose[] serious risks" to women's health. Cong. Finding (14)(A), PA 463a-464a. Specifically, Congress "found" that the banned procedures increase risks of cervical incompetence, that version – turning the fetus in utero – is dangerous, and that "blind" use of a "sharp instrument" during "partial-birth" abortions is dangerous. However, the evidence at trial overwhelmingly supports the District Court's conclusion that the banned procedures do not pose additional risks to women's health.[4] PA 480a, 482a.

The District Court found that "[I]t borders on ludicrous to assert that the banned procedure is dangerous." PA 486a. This conclusion is supported by the testimony of both Plaintiffs' and Defendant's witnesses. PA 166a, 277a-278a,

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[4] This determination incorporates the parallel conclusion that the Congressional Finding that "[t]here is no credible medical evidence that partial-birth abortions are safe or are safer than other abortion procedures," Congressional Finding 14(B), Pub. L. No. 108-105 § 2, was also incorrect.

487a. For example, in describing the relative risks of second trimester procedures, Government witness Dr. Lockwood "agreed that 'after 20 weeks, D&E, *intact* D&Es and medical induction abortions are comparable in terms of safety.'" PA 485a; *see also* PA 263a. In addition, Dr. Lockwood testified that the intact D&E may reduce the risk of disseminated intravascular coagulation (a condition which interferes with blood clotting, PA 288a), and he did not agree that version of the fetus during an intact D&E was riskier than version during a D&E. PA 389a; RA 26-29. Similarly, Government witness Dr. Steven Clark, "said that any suggestion that the intact D&E is less safe than a standard D&E is 'pure speculation' and has 'no place in a scientific discussion,'" although he expressed concern about the potential impact of the procedure on subsequent preterm births. PA 492a-493a. Dr. Clark explicitly disagreed with the congressional finding that "partial-birth abortion" increases a woman's risk of suffering from uterine rupture, abruption, amniotic fluid embolus, uterine trauma, hemorrhaging, and shock. PA 492a-493a. Dr. Bowes outright disagreed with the congressional finding that intact D&E poses serious risks to the long-term health of women. PA 388a, 493a.

As specifically found by the District Court, there is no basis for concluding that intact D&Es cause, or increase the risk of, cervical incompetence. PA 378a-380a, 383a, 413a. In fact, induction and childbirth involve greater and sometimes more rapid cervical dilation, PA 167a, 267a-268a, and the Government's experts conceded that any concerns about pre-term birth following intact D&E are hypothetical and unproven. PA 386a-387a; RA 13-14,15-19.[5]

No data supports the claim that converting the fetus to a breech presentation during an abortion procedure is

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[5] In fact, the Government's witnesses testified that they use the same dilation techniques in their own practices. *See, e.g.,* PA 203a, 211a, 216a, 220a; RA 8-13.

dangerous. In fact, conversion to breech presentation is a routine part of many D&Es, PA 165a-166a, 178a, 389a-390a, 413a, 419a; *see also* RA 2-3, and there is no evidence that conversion increases the risk of amniotic fluid embolus or uterine rupture. *See* PA 390a. Moreover, abruption ("premature separation of the placenta from the uterus") is a "severe complication" for live births because of the risks posed to the fetus, but separation and removal of the placenta from the uterus is an integral part of every abortion. PA 390a.

In addition, there is no basis for the assertion that D&Es in which the calvarium is decompressed with an instrument involves more blind instrumentation in the uterus than other D&Es. In fact, doctors who perform this procedure testified that it is done under direct visualization or ultrasound guidance. PA 130a-131a, 277a-278a, 414a, 419a-420a.

The District Court, unlike Congress, had the benefit of a peer-reviewed study reporting on the intact D&E procedure. PA 489a (discussing Pls.' Ex. 27 ("PX 27"), at 13, Stephen T. Chasen, et al., Dilation and Evacuation at >20 Weeks: Comparison of Operative Techniques, 190 Am. J. Obstet. & Gyencol. 1180 (2004)). The Chasen study compared the complication rates of women undergoing D&E's at a median gestational age of 21 weeks with the complications rates of women undergoing intact D&E's at a median gestational age of 23 weeks. RA 31, 62. The study found that the complication rates were similar, as were the outcomes of subsequent pregnancies, even though the intact procedures were performed at later gestational ages and thus would be expected to have higher complication rates. PA 357a-358a, 490a-491a; *see also* RA 31-32, 62-63, 99-100, 103-104; PX 27. The fact that the later D&Es with intact extraction were of equal safety to the earlier D&Es with disarticulation suggests that the D&Es with intact extraction are safer. RA 64-68, 103-104; PX 27.

Based on the fact that Congress had no "substantial evidence" before it that established that the banned procedure was dangerous, and in light of the evidence to the contrary, the District Court correctly concluded not only that the finding was unsupported, but in fact that "the congressional record disproves the Congressional Findings," on this point. PA 464a.[6]

REASONS FOR DENYING THE WRIT

I. The Court of Appeals' Ruling is Mandated by *Stenberg v. Carhart.*

This case is governed by *Stenberg v. Carhart*, 530 U.S. 914 (2000). In that case, this Court applied the well-established rule that a restriction on abortion "requires an exception where it is necessary, in appropriate medical judgment for the preservation of the life or health of the mother, for this Court has made clear that a State may promote but not endanger a woman's health when it regulates the methods of abortion." *Id*. at 931 (internal quotation omitted). In *Stenberg*, this Court held that even if the Nebraska statute had banned only pre-viability intact D&Es, it was unconstitutional, because it did not contain a health exception. The Court noted that state regulations cannot "force women to use riskier methods of abortion." *Id*. at 931.

This Court in *Stenberg* concluded that given "a District Court finding that D&X significantly obviates health risks in certain circumstances, [and] a highly plausible record-based explanation of why that might be

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[6] Notably, four of the six congressional hearings relied on by the Government in support of the Act were considered by this Court in *Stenberg*. The post-*Stenberg* Congressional testimony by physicians supporting the Act reveals no significant differences from the medical professionals who testified before. C*ompare* Court Exhibit ("CX") 8, at 6-14, 256-59 and CX 9, at 22-35, 40-43, 80-86, *with* CX 4, at 38-44, CX 5, at 75-83, 109-112, 214-17, 228-29, and CX 7, at 122-24.

so," . . . "we believe the law requires a health exception." *Id*. at 936-37.

Here, given that the Act bans at least intact D&E procedures and the fact that the record establishes that the same findings as *Stenberg* have been even more strongly established, this case is, as the Eighth Circuit found, wholly governed by the decision in *Stenberg*.[7]

The evidence overwhelmingly supports the District Court's conclusion that the intact D&E procedure provides *significant* safety advantages to women. PA 480a-482a, 495a-501a, *supra* at 3-4, 7-9. *Cf. Stenberg*, 530 U.S. at 967 (Kennedy, J., dissenting) (the evidence established at best "marginal" "difference[s] in physical safety"). In addition, the evidence provides, and the District Court found, "a highly plausible record-based explanation" of why intact D&E "significantly obviates health risks in certain circumstances." *Stenberg*, 530 U.S. at 936; PA 479a-482a, *supra* at 4-5, 9-11.

As in *Stenberg*, there was in this case a "division of opinion among some medical experts over whether D&X is generally safer [than D&E]." *Stenberg*, 530 U.S. at 936-37. PA 461a-467a, 470a-476a, 479a-482a, 493a-501a. But that division was not enough to save the ban in *Stenberg*. *See Stenberg*, 530 U.S. at 937. In this case, the "division" is weighted heavily towards physicians who believe that the intact D&E is the safest procedure in some circumstances. *Supra* at 5-7, 10-11. The record permits no other conclusion but that "significant medical authority supports the

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[7] The trial court found that, even accepting the Government's proffered construction – that the Act required specific intent to perform banned procedures – the Act banned more than intact D&Es, and thus posed an undue burden on the right to abortion. PA 521a. Notably, the Government never offered a construction of the Act that would have limited the ban to intact D&E. PA 520a-521a & nn.164-166. *Cf. Stenberg*, 530 U.S. at 940 (Nebraska proposed construction limiting Act to intact procedures); *id*. at 977 (Kennedy, J., dissenting).

proposition that in some circumstances D&X would be the safest procedure." *See Stenberg*, 530 U.S. at 932. Given that this case is indistinguishable from *Stenberg*, except for the fact that the evidence here even more strongly establishes the need for a health exception, the Attorney General's request for review should be denied.

Finally, the Government's contention that the Court should grant certiorari simply because the Eighth Circuit declared unconstitutional an act of Congress is unpersuasive. To the contrary, statutory amendments made in 1988 explicitly give the Court the discretion to reject such petitions. *See* Pub. L. No. 100-352, 102 Stat. 662 (1988) (repealing 28 U.S.C. § 1252, which required the Court to hear such cases). Moreover, all the cases cited by the Government to support its proposition, *see* Pet. at 10-11, were cases of first impression. In none of those cases did the Court grant certiorari to review a decision that followed its precedent to revisit issues that had already been decided by the Court.

II. The Court of Appeals' Ruling that the Congressional Findings Do Not Save the Act Does Not Conflict with *Turner II*, and No Circuit Courts Disagree.

The Government strains to interpret *Turner II* so as to bring it into conflict with this Court's opinion in *Stenberg* and thereby create a certiorari-worthy conflict, Pet. At 11-12, but its analysis is incorrect. *Turner* deference simply does not apply here.[8]

In addition, perhaps because all three trial courts applied *Turner* deference in an abundance of caution and still

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[8] *See* PA 457a; *Planned Parenthood Fed'n of Am. v. Ashcroft*, 320 F. Supp. 2d 957, 1013-14 (N.D. Cal. 2004); *Nat'l Abortion Fed'n v. Ashcroft*, 330 F. Supp. 2d 436, 487 (S.D.N.Y. 2004).

rejected the congressional findings,[9] the Government proposes on appeal a watered down version of the *Turner* test, erroneously asserting that "deference to Congress's findings is appropriate (where those findings are supported by substantial evidence) . . . ." Pet. at 16. In so framing the test, the Government omits the critical first part of the test, which asks whether Congress's conclusion was "reasonable," *Turner II*, 520 U.S. at 211, or whether Congress has "drawn reasonable inferences" based on the evidence. *Id.* at 195. Congress's findings are due substantial deference only if "Congress has drawn reasonable inferences based on substantial evidence." *Id*. The existence of some quantum of evidence that supports congressional findings, no matter how meager, is not alone sufficient to satisfy *Turner*.

Of course, this Court accords "great weight to the decisions of Congress." *E.g., Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973). But the Government asks this Court to go too far and to grant Congress *carte blanche* to violate the Constitution simply by making carefully chosen "findings." To do so would be to upset the centuries-old balance of power between the legislative and judicial branches by which "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177

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[9] For this reason, the question of whether *Turner* deference applies is somewhat academic; all three courts reviewing the constitutionality of the Act found that the Congressional Findings were unreasonable even applying *Turner* deference. PA 449a-450a, 454a-455a, 460a-461a ("[A]pplying the *Turner* standard of review to the *Stenberg* substantive legal principle," and holding the Act unconstitutional); *Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 487 (applying the *Turner* standard because even under that standard, the Act is unconstitutional); *Planned Parenthood Fed'n of Am.*, 320 F. Supp. 2d at 1013-14 (even under highly deferential *Turner* standard, the Congressional findings at issue were not due substantial deference because "Congress has not drawn reasonable inferences based on substantial evidence").

(1803); *see also Tennessee v. Lane*, 541 U.S. 509, 539 (2004) (Rehnquist, J., dissenting) (warning against allowing Congress to "usurp this Court's responsibility to define the meaning of the Fourteenth Amendment").

A. The Court of Appeals' Ruling Does Not Conflict with *Turner II* Because *Turner II* Does Not Apply to this Case.

The relevant congressional findings in this case are 1) that "partial-birth abortion" is "never necessary to preserve the health of a woman;" 2) that it "poses serious risks to a woman's health;" and 3) that a "consensus" exists that it is "never medically necessary and should be prohibited." Pub. L. No. 108-105, §§ 2(1), (13), (14)(A), (14)(B). *Turner* deference is inapplicable here because it does not apply where the legislative findings are not predictive, where a fundamental right is burdened, or where Congress is attempting to usurp this Court's role in interpreting the scope of protected rights or the breadth of Congressional power to legislate. PA 456a-457a; *Nat'l Abortion Fed'n v. Ashcroft*, 330 F. Supp. 2d 436, 484-87 (S.D.N.Y. 2004); *Planned Parenthood Fed'n of Am. v. Ashcroft*, 320 F. Supp. 2d 957, 1011-13 (N.D. Cal. 2004). All three of these circumstances are present in this case.

First, the United States seeks to extend *Turner*'s deference regarding "predictive" findings beyond its express limitations to apply it to findings about the current state of medicine. In *Turner I* and *Turner II*, the Court noted that Congress has a distinct institutional advantage in analyzing and making predictions about the *future* impact of legislation, especially the impact of certain economic regulations, such as the cable legislation at issue in that case. *Turner II*, 520 U.S. at 196 (noting that courts should not "infringe on traditional legislative authority to make predictive judgments

when enacting nationwide regulatory policy"). [10] Those are circumstances where empirical data is unavailable, and Congress must make its best predictions concerning how an industry will evolve or how behavior will be impacted by economic motivations. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 666 (1994) ("*Turner I*"); *Id*. at 674 (Stevens, J., concurring) (noting deference is appropriate where questions are "not at present susceptible of reliable answers").

This Court's decision in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), underscores this point. In that case, the Court applied *Turner* deference when reviewing a Congressional prediction about the impact of banning the use of soft money by national party committees. *Id.* at 165 (finding that Congress's prediction that donors would try to circumvent bans on soft money was based on its experience with other campaign finance laws and was thus due "substantial deference"). On the other hand, the Court did not apply *Turner* deference to its review of Congressional conclusions about the *current* state of the campaign-finance system, nor even mention the case once in its discussion. *Id.* at 129-32.

The facts at issue here involve the current state of medicine, physicians' testimony about patients they have cared for, medical conditions they have treated, and the impact of abortion techniques on the health of these patients. These are not questions that call out for guesswork or predictions about the interplay of free-market principles. Nor does Congress have a particular expertise in the area of medicine, as it does in the area of nationwide economic regulatory schemes. The issues in this case raise the types of questions that require expert testimony subject to cross-

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[10] As the district court noted, "the Supreme Court's language about 'substantial deference' in the *Turner* cases is explicitly related to 'predictive judgments of Congress.'" PA 456a (internal quotations omitted).

examination, and as such, fall outside the cloak of deference provided to some congressional findings by *Turner*.

Second, *Turner* deference is inappropriate in cases such as this one, involving a burden on a constitutional right, infringement of which is subject to heightened scrutiny. As Justice Stevens explained, "factual findings accompanying economic measures that are enacted by Congress itself and that have only incidental effects on speech merit greater deference than those supporting content-based restrictions on speech." *Turner I,* 512 U.S. at 671 n.2 (Stevens, J., concurring) (citing *Sable Commc'ns of Cal. v. FCC,* 492 U.S. 115, 129 (1989); *Landmark Commc'ns, Inc. v. Virginia,* 435 U.S. 829, 843 (1978));[11] *see also Turner II,* 520 U.S. at 225 (Stevens, J., concurring).

Applying this principle, in *Sable* this Court struck down a statute denying adult access to indecent, but not obscene, telephone messages, rejecting, though "not ignor[ing]," Congress's findings that the regulations were necessary to protect minors. *Sable Commc'ns*, 492 U.S. at 129. Similarly, in *Landmark* this Court failed to apply *Turner* deference to the Virginia Legislature's finding that the publication of information about ongoing investigations of judicial misconduct constituted a "clear and present danger" to the orderly administration of justice, holding that courts should decide in each instance what constituted a clear and present danger. *Landmark Commc'ns*, 435 U.S. at 843. In cases like *Sable, Landmark,* and this one, legislative findings do not foreclose this Court's "independent judgment" of the facts, because "[d]eference to a legislative finding cannot limit judicial inquiry when [constitutional] rights are at stake." *Id*. at 843; *Sable Commc'ns*, 492 U.S. at 129 ("[W]hatever deference is due legislative findings would not foreclose our

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[11] The cable legislation in *Turner* had only an "incidental effect" on First Amendment rights. *Turner I*, 512 U.S. at 671 n.2.

independent judgment of the facts bearing on an issue of constitutional law. . . .").

Most recently, this Court declined, over protest by the dissent, to apply *Turner* deference to Congressional findings in a case involving content-based regulation of speech. In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253-54 (2002), a challenge to a statute seeking to prevent child pornography, the Court rejected a congressional finding that virtual images of child pornography would increase pedophilia, stating that the Government had shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse. *Compare id.* (also rejecting finding that use of virtual images increases difficulty of prosecuting real images of child pornography as "implausible") *with id.* at 267-68 (Rehnquist, C.J., dissenting) (majority should have deferred to predictive finding).

The United States points to four cases in which it claims that this Court has deferred to congressional findings on issues of medical or scientific judgment. Pet. at 13-15. But none of those cases involved deference to legislative findings. Those were cases in which the Court was simply examining whether Congress had articulated justification for legislation that was rationally related to its intended purposes.[12] In contrast, the Act is subject to a heightened level of scrutiny.

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[12] This Court has also distinguished the issues involved in these cases, noting that cases involving drug and alcohol abuse and mental illness are different from other medical diagnoses because of the inherent uncertainties in the field, *see Marshall v. United States*, 414 U.S. 417, 426-27 (1974); *see also Jones v. United States*, 463 U.S. 354, 370 (1983), and that evidentiary rules in benefit programs are "not within specialized judicial competence," but rather are questions "primarily for Congress." *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 33 (1976).

For example, in *Marshall v. United States*, 414 U.S. 417 (1974), the question was not whether Congress can choose sides in a medical debate when doing so would infringe a fundamental right, nor even whether any "findings" were reasonable in light of the evidence in the congressional or trial records. Rather, the question was whether Congress's funding decision about which drug addicts would most benefit from drug treatment was "rationally related to the intended purpose" of an "experimental" program. *Id*. at 425 (reviewing "policy choice in an experimental program"); *see also Jones v. United States*, 463 U.S. 354, 364 (1983) (examining "reasonableness" of Congress's decision to mandate an indefinite period of civil commitment for defendant acquitted of crime by reason of insanity); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) (examining whether "legislature has acted in an arbitrary and irrational way" in setting up compensation program for victims of black-lung disease and imposing partial liability for effects of disease bred in the past on previous employers, rather than spreading cost on all current mine operators); *Lambert v. Yellowley*, 272 U.S. 581, 589, 594-95 (1926) (examining whether Congress's choice to limit prescription of "spirituous liquor" for medical use was "arbitrary" and bore a "real or substantial" relationship to the Eighteenth Amendment).

Moreover, even in evaluating the rationality of the provision in *Usery*, the Court noted that the Plaintiffs challenging Congress's decision "here suggest nothing new to add to the debate." *Id.* at 33.[13] In this case, on the other

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[13] Notably, in both *Usery* and *Lambert*, it was important to the Court's determination of rationality that Congress's policy choices offer more rather than less protection for those affected. *See Usery*, 428 U.S. at 32 (Congress "avoided the worst dangers of x-ray evidence" by insuring that sick miners would not bear the "burden of unreliability" of a negative X-ray diagnosis); *Lambert*, 272 U.S. at 594 (noting that Congress allowed prescription of alcohol in limited quantities "in deference to the belief" of

hand, the Plaintiffs offered much new evidence directly related to the Congressional findings, and this expert testimony was subjected to tests of reliability and cross examination. *Cf. Tennessee v. Lane*, 541 U.S. 509, 542 (2004) (Rehnquist, C.J., dissenting) (evidence before Congress was "unexamined, anecdotal evidence"). This process is exactly within the domain of courts and is a fundamental part of appropriate judicial review

Nor do the three cases cited by the Government to support its claim that the "principles of deference articulated in *Turner II* . . . have been applied . . . to a wide variety of constitutional claims," Pet. at 12, hold up on review. In *Walters v. National Association of Radiation Survivors*, 473 U.S. 305 (1985), the Court did not simply defer to the congressional findings at issue, but carefully evaluated the trial court evidence and compared it to the findings. After concluding that the findings were "entirely consistent" with the trial court evidence, the Court specifically declined to rely on them or to determine "what deference must be afforded on this congressional record." *Id.* at 330 n.12.

Rostker v. Goldberg, 453 U.S. 57 (1981) (upholding male-only draft registration), is also inapposite. There, the Court itself stressed the unique nature of its role with respect to Congress's judgments concerning the military, noting that "perhaps in no other area has the Court accorded Congress greater deference" than in cases involving Congress's authority over military affairs, *id.* at 64-65, and that "[i]t is difficult to conceive of an area . . . in which the courts have less competence." *Id.* at 66 (first alteration in original) (internal quotation omitted). Finally, in *Board of Education of the Westside Community Schools v. Mergens,* 496 U.S. 226 (1990), the Court accepted Congress's speculation that

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the minority view of the usefulness of spirituous liquors for medicinal purposes). In contrast, here the Act provides less protection for the health of women seeking abortions.

high school students are unlikely to confuse an equal access policy with state sponsorship of religion only *after* noting that the Court had come to the same conclusion in two other cases and referencing psychology research with similar findings. *Id.* at 250-51.

Third, *Turner* deference does not apply to cases where the statute under review has been enacted to subvert this Court's prior interpretation of a constitutional issue. It is well established that Congress may not effectively "overrule" the Court's constitutional interpretation by passing contrary legislation. *Dickerson v. United States*, 530 U.S. 428, 437 (2000) ("Congress may not legislatively supersede our decisions interpreting and applying the Constitution."); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (striking down the Religious Freedom Restoration Act of 1993, which attempted to directly supersede a prior decision of the Supreme Court).

Nor can factual findings immunize legislation from active judicial review. In *United States v. Morrison*, 529 U.S. 598 (2000), the Court rejected congressional findings made after numerous hearings, explaining that the constitutionality of a statute is "a judicial rather than a legislative question, and can be settled finally only by this Court." *Id.* at 614-17 (internal quotations omitted). In this case, Congress passed the Act in a blatant attempt to overrule contrary Supreme Court precedent. *Compare Stenberg*, 530 U.S. at 937-38, *with* Pub. L. No. 108-105, §§ 2(3)-(7), 14(A).

When, as here, Congress attempts to use its fact-finding authority to redefine the scope of a constitutional right,[14] it usurps the role of the judiciary by taking from the Supreme Court the ability to say what the Constitution means. *See* PA

[14] The congressional finding that "partial-birth abortion is never necessary to preserve the health of a woman," is essentially a conclusion about whether the underlying constitutional right is burdened. Pub. L. No. 108-105, § 2(5).

456a-457a. This is especially true in this case where Congress relied on essentially the same congressional record evidence that this Court considered in *Stenberg*, disregarded the findings of fact from the trial court in that case and in every other standing federal court decision on the issue, and simply announced its disagreement. Because Congress "explicitly intended to undercut *Stenberg*," PA 457a, and because the congressional findings would redefine the scope of a woman's right to protect her own health when obtaining an abortion, *Turner*'s deferential standard of review is not appropriate. Thus, the Government's claim that the Eighth Circuit's ruling conflicts with *Turner* is simply wrong.

B. Even If *Turner* Did Apply, the Court of Appeals' Ruling Is Consistent With *Turner* Because the Findings Were Unreasonable and Not Supported by Substantial Evidence.

Although holding that *Turner* deference should not apply in this case, the three district courts reviewing the constitutionality of the Act evaluated the congressional findings using the *Turner* standard. All three agreed that the findings were unreasonable and not supported by substantial evidence. *See* PA 460a-501a.[15]

When applying *Turner* deference, it is appropriate to examine the congressional findings in light of both the congressional record, and the trial record. *Turner II*, 520 U.S. at 196 (reviewing court "examine[s] first the evidence before Congress and then the further evidence presented to the District Court . . . to supplement the congressional determination"); *Turner I*, 512 U.S. at 667-68. Here, the

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[15] *See also Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 487 (even under *Turner*, the Act is unconstitutional because it lacks a health exception); *Planned Parenthood Fed'n of Am.*, 320 F. Supp. 2d at 1013-14 (even using the stringent *Turner* standard of "substantial deference," Congress's findings were not reasonable based on substantial evidence).

District Court first examined the congressional findings without reference to the trial record, and found:

> In summary, the congressional record proves that key Congressional Findings are unreasonable. The inferences that Congress drew from its record are not supported by substantial evidence contained within that record. *In fact, the congressional record proves the opposite of the Congressional Findings*. . . . No reasonable and unbiased person could come to a different conclusion.

PA 469a (emphasis added). The court then went on to examine the congressional findings in light of the extensive trial record in this case and found:

> I find and conclude from the trial evidence that Congress's Finding – that a medical consensus supports the ban because partial-birth abortions are unnecessary – is both unreasonable and not supported by substantial evidence. *Congress was plainly mistaken.*

PA 476a (emphasis added).[16]

Under the Government's contorted reading of *Turner*, Congress could "find" anything. This is clearly not the law. As the court held in *Lamprecht v. FCC*, 958 F.2d 382, 392 n.2 (1992), where "the constitutionality of a statute depends in part on the existence of certain facts," courts may review a legislature's judgment that the facts exist. Otherwise,

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[16] Because the legislative findings cannot sustain the Act even when the *Turner* deference standard is applied, whether the medical necessity of the intact D&E is a legislative or adjudicative fact is irrelevant to the outcome of the case, and thus provides no basis for granting the petition. *Cf.* Pet. at 16-17.

> if a legislature could make a statute constitutional simply by "finding" that black is white or freedom, slavery, judicial review would be an elaborate farce.

Id. This Court should reject this attempt to manufacture a conflict between *Turner II* and *Stenberg*.

III. The Court of Appeals' Ruling that the Act Is Facially Invalid Does Not Conflict with This Court's Precedent, and No Circuit Courts Disagree.

The Government argues that the Court of Appeals erred by declining to require that Plaintiffs show that "no set of circumstances exists under which the Act would be valid." Pet. at 18 (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)).[17] But this Court resolved this issue in *Stenberg* when it declined to apply the *Salerno* test in evaluating the ban on abortion methods at issue there. The Court of Appeals simply applied this Court's precedent in *Stenberg* and *Casey* and thus the petition for certiorari should be denied.

The Government grudgingly admits that this Court did not apply *Salerno* in *Casey*. Pet. at 18-19. However, it attempts to limit *Casey's* implicit rejection of *Salerno* to the Court's invalidation of the spousal notification provision by tying the rejection of *Salerno* to the "large fraction" analysis applied by the Court. But the Court's rejection of the *Salerno* standard in *Casey* was not so limited. The Court also did not apply *Salerno* in its evaluation of the adequacy of the medical emergency provision, nor in its evaluation of the burdens imposed by the waiting period. Indeed, because both of those provisions clearly had *some* constitutional applications, if the Court had been applying *Salerno*, the rest

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[17] As the Government acknowledges, this argument may be addressed in *Ayotte v. Planned Parenthood*, No. 04-1144 (to be argued Nov. 30, 2005), as it relates to a challenge to a parental notification statute for abortion that lacks an adequate medical emergency exception women.

of its analysis of the constitutionality of the provisions would have been completely unnecessary.[18]

It is true, of course, that the "large fraction" analysis was not applied in evaluating whether the medical emergency exception in *Casey* or the abortion method ban in *Stenberg* on their face adequately protected women's health. In these cases, the Court has examined whether the restrictions "impose[] a *real* health risk." *See Casey*, 505 U.S. at 886 (emphasis added). While in *Casey* the Court held that the lower court's interpretation of the medical emergency exception prevented that risk, in *Stenberg* the Court held that "tragic health consequences" would result because the statute contained no exception whatsoever. *See Casey*, 505 U.S. at 880; *Stenberg*, 530 U.S. at 937-38.

The Government then attempts to distinguish *Stenberg* by rewriting it, claiming that *Stenberg* can only be reconciled with *Casey* if it is interpreted to require the plaintiff to demonstrate that the Act imposed health risks on "at least a 'significant' number of women affected by the statute." Pet. at 20. Otherwise, the Government argues, the decision would be inconsistent with *Casey* because it did not apply the "large fraction" test. *Id*. This argument is wrong for two reasons. First, as noted above, *Casey* did not apply the "large fraction" test to its evaluation of the medical emergency exception. Second, the Government's proposal is blatantly inconsistent with *Stenberg* itself, which held that the "relative rarity [of

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[18] Moreover, the large fraction analysis is not limited to spousal notification provisions. *See Planned Parenthood. v. Casey*, 510 U.S. 1309, 1310 (1994) (Souter, Circuit Justice) ("large fraction" analysis should apply in other challenges to waiting periods); *Fargo Women's Health Org. v. Schafer*, 507 U.S. 1013 (1993) (O'Connor, J., joined by Souter, J., concurring in denial of application to vacate stay) ("large fraction" analysis should have applied to review of other waiting period law). *See also, e.g.*, *A Woman's Choice-East Side Women's Clinic v. Newman*, 305 F.3d 684, 699 (7th Cir. 2002) (Coffey, J., concurring) (applying "large fraction" analysis to waiting period law).

D&X] is not highly relevant," *Stenberg*, 530 U.S. at 934. In truth, the argument is nothing more than a thinly-veiled invitation to reverse this Court's decision in *Stenberg* and provides a roundabout way of claiming that case was wrongly decided.

Finally, the Government misstates the test this Court applied in evaluating the impact on women's health of the restrictions in *Casey* and *Stenberg*, claiming that if the Court does not apply *Salerno*, Plaintiffs could invalidate the statute by "showing the mere possibility of a few unconstitutional applications." Pet. at 21. This Court has never invalidated a statute on its face "based upon a worst-case analysis that may never occur." *See Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 515 (1990). At the same time, the Court has fulfilled its duty to prevent citizens from unconstitutional intrusions by the State by striking statutes that would have harmed "many" women. *Casey*, 505 U.S. at 893-94.[19] By striking this careful balance, the Court assured itself that it was not overreaching in facial challenges, but was rather invalidating only the restrictions that posed serious risks of real harm to real women. *Cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring in part and concurring in the judgment) (discussing importance of "confin[ing] the Judicial Branch to its proper, limited role in the constitutional framework of Government").

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[19] This Court permits "overbreadth" facial challenges in the abortion context. *Sabri v. United States,* 541 U.S. 600,__, 124 S. Ct. 1941, 1948 (2004).

CONCLUSION

Because the court of appeals decision follows this Court's precedents faithfully, the petition should be denied.

Respectfully submitted,

JERRY HUG
ALAN G. STOLER, P.C., L.L.O.
Historic Library Plaza
1823 Harney Street
Suite 1004
Omaha, NE 68102
(402) 346-1733

PRISCILLA J. SMITH
(*Counsel of Record*)
JANET CREPPS
NAN E. STRAUSS
Center for Reproductive Rights
120 Wall Street, 14th Floor
New York, NY 10005
(917) 637-3600

Counsel for Respondents