No. 05-1382

In The
Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
Petitioner,

v.

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., *ET AL.*,
Respondents.

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

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BRIEF *AMICI CURIAE* OF CHRISTIAN LEGAL SOCIETY, NATIONAL ASSOCIATION OF EVANGELICALS, PRO-LIFE LEGAL DEFENSE FUND, ALLIANCE DEFENSE FUND AND CONCERNED WOMEN FOR AMERICA IN SUPPORT OF PETITIONER

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STATEMENTS OF INTEREST OF *AMICI CURIAE*[1]

The Statements of Interest of *Amici Curiae* Christian Legal Society, National Association of Evangelicals, Pro-Life Legal Defense Fund, Alliance Defense Fund and Concerned Women for America are set out in Appendix A hereto. All are nonprofit membership or advocacy organizations that have taken public positions against partial-birth abortion and have sought to end its practice by means of legislative action, education and legal advocacy.

SUMMARY OF ARGUMENT

For as long as the American public has known about partial-birth abortion, we have—by comfortable and consistent margins—agreed with former Senator Daniel Patrick Moynihan that this gruesome practice is "infanticide, and one would be too many." Meet the Press (NBC television broadcast, Mar. 2, 1997). Whether we oppose elective abortions as a matter of moral principle or regard a woman's legal access to abortion as a component of ordered liberty; whether we regret this Court's decisions in *Roe v. Wade,* 410 U.S. 113 (1973), and *Planned Parenthood v. Casey,* 505 U.S. 833 (1992), as occasions of dramatic and damaging judicial overreaching or as vindications of privacy and autonomy; and whatever our views might be on a wide range of economic, social, and political questions, we have repeatedly and overwhelmingly concluded, in jurisdiction after jurisdiction, that partial-birth abortion is a barbarism that may and should be prohibited. The Court's *Amici*

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[1] *Amici curiae* file this brief by consent of the parties, and copies of the letters of consent are on file with the Clerk of the Court. Counsel for *Amici* authored this brief in its entirety. No person or entity, other than the *amici curiae*, their supporters, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

believe this conclusion is entirely consistent with our shared, abiding commitment to individual freedom under and through the rule of law, and it is one that our Constitution permits us to embrace. In our "democratic society," the debate over partial-birth abortion continues, and this Court should not cut it short. *Cf. Washington v. Glucksberg,* 521 U.S. 702, 735 (1997) ("Our holding permits this debate to continue, as it should in a democratic society.").

This case presents the question whether the United States Court of Appeals for the Ninth Circuit erred in concluding that the Partial-Birth Abortion Ban Act of 2003 ("the Act"), Pub. L. No. 108-105, 117 Stat. 1201, is unconstitutional. *Amici* believe it did. As Petitioner the United States makes quite clear, the Act defines the prohibited conduct with sufficient precision, *Gonzales v. Carhart,* No 05-380, Petition for a Writ of Certiorari, at 2-3, and is supported by Congress's extensive factual findings and conclusion that "partial-birth abortion is never medically indicated to preserve the health of the mother," *id.* at 3 (quoting Sec. 2(14)(O), 117 Stat. at 1206). The decision below is neither required nor justified by this Court's previous partial-birth abortion decision, *Stenberg v. Carhart,* 530 U.S. 914 (2000), or by *Casey* and *Roe.*

In this brief, *Amici* respectfully submit that the task appropriately before the Court is not so much to parse the opinions in *Stenberg* or to identify the distinctions between the Act under review here and the one previously invalidated. Instead, the central issue that the Court may and should resolve here is whether *Stenberg* should be overruled. Although, as the United States has demonstrated, the Act *can* be distinguished meaningfully from the Nebraska law struck down in *Stenberg,* we believe that this Court's time and constitutional powers would be better spent, and the rule of law better served, if *Stenberg* were abandoned as wrongly decided and inconsistent with *Casey's* promise that to uphold

a basic right to abortion was not to disable entirely We the People from reasonably regulating the exercise of that right, let alone from outlawing so brutal and brutalizing a practice as partial-birth abortion.

Accordingly, *Amici* in this brief address two principal matters: *First,* the appropriate weight of *stare decisis* to be applied in this case; and *second,* the majority's misguided embrace in *Stenberg* of an extreme and unreasonable understanding of the "health"-related reasons thought to override limits on late-term abortion procedures.

With respect to the first point, we submit that *stare decisis* need not, and should not, preclude reconsideration and rejection of *Stenberg*. That case is recent; it was decided by a closely divided Court, over strenuous – and persuasive – dissents; it has not been reaffirmed repeatedly, nor has it served as the foundation for a body of law or line of cases; it is an outlier even in its relatively discrete area; it cannot reasonably be regarded as having created reliance interests; and, most important, it was wrongly decided.

Given all these circumstances and considerations, the Court's *stare decisis* case-law poses no barrier to revisiting *Stenberg.* As this Court has emphasized repeatedly, *stare decisis* is not an "inexorable command;" it is instead a "'principle of policy and not a mechanical formula of adherence to the latest decision.'" *Payne v. Tennessee,* 501 U.S. 808, 828 (1991) (quoting *Helvering v. Hallock,* 309 U.S. 106, 119 (1940)). This Court has on regular occasions, upon careful reflection, overruled what it regards as wrongly decided cases and unwarranted divergences from earlier, settled law. *See, e.g., Lawrence v. Texas,* 539 U.S. 558 (2003); *Atkins v. Virginia,* 536 U.S. 304 (2002); *Agostini v. Felton,* 521 U.S. 203 (1997). Indeed, even in *Planned Parenthood v. Casey*, this Court – while reaffirming what it characterized as the "central holding" of *Roe v. Wade*, *Casey,*

505 U.S. at 853, 855, 858 – overruled two previous decisions that it came to see as excessive, unjustified extensions of *Roe*. 505 U.S. at 882 (overruling in part *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), and *City of Akron v. Akron Center for Reproductive Health*, *Inc.*, 462 U.S. 416 (1983)). This case presents the Court with a welcome opportunity to reconsider *Stenberg*'s similarly unwarranted and extreme extension of that case.[2]

Turning to our second point: *Stenberg,* which was the basis for the decision below, was wrongly decided. The Ninth Circuit Court of Appeals invalidated the will of the People as expressed in the Act because of *Stenberg*. *See Planned Parenthood v. Gonzales*, 435 F.3d 1163, 1175 (2006) ("[W]e are compelled [by *Stenberg*] to hold that a health exception is constitutionally required."). However, nothing in the text, history, or structure of our Constitution, nothing in our traditions, none of this Court's precedents, and none of our deeply rooted values support the conclusion that the Constitution disables the American people from affirming our commitments to democracy, individual freedom, and the lives of vulnerable unborn – or, in this case, being-born – children by rejecting partial-birth abortion. This Court has affirmed repeatedly that governments have compelling interests in protecting the lives of unborn children, particularly after they are able to live outside their mother's body. *See, e.g., Casey,* 505 U.S. at 871; *Stenberg,* 530 U.S. at 961 (Kennedy, J., dissenting); *id.* at 1006-07 (Thomas, J., dissenting). Further, if any government interest is *especially* compelling, it is the interest in preventing a

[2] *Amici* believe that *Roe* was wrongly decided and is best regarded – in Justice White's words – as an exercise of "raw judicial power." *Roe,* 410 U.S. at 222 (White, J., dissenting). There is no need, however, to revisit *Roe,* or *Casey,* in order to reject *Stenberg* and affirm the constitutional validity of the Act.

procedure that is, in effect, infanticide – the intentional killing a living human being in the process of being born. *Id.* at 960 (Kennedy, J., dissenting) ("[I]t should go without saying that Nebraska's ban on partial birth abortion furthers purposes States are entitled to pursue."); *id.* at 953 (Scalia, J., dissenting). Nothing in *Roe* or *Casey* supports, let alone compels, the extreme conclusion that the right to abortion is so unyielding and sweeping as to trump the public's repeated efforts to reject partial-birth abortion. In *Stenberg,* a bare majority of this Court held that the Nebraska partial-birth abortion law under review was invalid because, although it permitted the procedure in cases where it is necessary to save a mother's *life*, it did not include a similar exception for cases where a partial-birth abortion is necessary to preserve a mother's *health*. *Stenberg,* 530 U.S. at 930-38. As the court below stated, "*Stenberg* holds that an abortion regulation that fails to contain a health exception is unconstitutional except when there is a medical consensus that no circumstance exists in which the procedure would be necessary to preserve a woman's health." *Planned Parenthood,* 435 F.3d at 1172. *See also Carhart v. Gonzales*, 413 F.3d 791, 792 (8th Cir. 2005), *cert. granted*, 126 S.Ct. 1314 (2006) ("[T]he Court [in *Stenberg*] determined the law was unconstitutional because it did not contain an exception to preserve the health of the mother."). And, the court below concluded, "*Stenberg* reaffirms . . . that the Constitution requires that *any* abortion regulation must contain such an exception." *Planned Parenthood,* 435 F.3d at 1172 (emphasis added); *see also Carhart*, 413 F.3d at 796; *Richmond Medical Center for Women v. Hicks,* 409 F.3d 619, 625 (4th Cir. 2005).

The majority in *Stenberg* asserted that where "substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health," the statute must include a health exception. *Stenberg*, 530 U.S. at 938. Imposing an impossible evidentiary burden upon the States, the majority concluded

that Nebraska "fail[ed] to demonstrate that banning [partial-birth abortion] without a health exception may not create significant health risks for women." *Id.* at 932. In fact, however, as Congress found, "partial-birth abortion is never medically indicated to preserve the health of the mother," Sec. 2(14)(O), 117 Stat. at 1206, and "[t]here is no credible medical evidence that partial-birth abortions are safe or are safer than other abortion procedures." Sec. 2(14)(B), 117 Stat. at 1204. In the face of Congress's careful investigation of the matter, and its repeated and well considered conclusion that partial-birth abortions – *i.e.,* these *particular* methods of abortion – are never medically necessary to protect a mother's health, it was in *Stenberg,* and would be in this case, a dramatic and unjustifiable act of judicial hubris and overreaching to invalidate the public's conclusion that partial-birth abortion may and should be prohibited.

In addition to questions relating to the deference due to Congress's judgments about medical necessity, or to the merits of the view that *every* regulation of abortion – *i.e.,* not only prohibitions, but also what might be thought of as time, place, or manner regulations – requires a "health" exception, there is in this case a more fundamental question about the constitutionalization of a practically limitless definition of "health." The understanding at work in *Stenberg,* and thus in the opinion of the court below, is so sweeping as to include *any* reason a woman might have for wishing to end the life of her unborn, or partially-born, viable child. On that understanding, derived from *Doe v. Bolton,* 410 U.S. 179 (1973), it is apparently not even enough for legislatures to carve out of abortion regulations exceptions relating to serious dangers to a women's physical health. Instead, they must effectively gut the regulations, yielding to a "health" exception that accounts for "all factors – physical, emotional, psychological, familial, and the woman's age – relevant to the well-being of the patient." *Id.* at 192.

This Court should take the opportunity presented in this case to correct *Stenberg*'s mistaken view that, in *any* case where there is *any* disagreement about the need for a health-related exception from *any* abortion-related regulation, the absence of such an exception is fatal to the regulation. It should also re-examine and refine the definition of "health" that was constitutionalized in *Bolton* and other cases, and should make clear that, given the compelling public interest in protecting viable unborn human life, any health-exception requirement need not and should not function as a loophole permitting elective abortion up to and including the moment before birth.

This Court's decision in *Casey* reaffirmed the "central holding" of *Roe,* but it did not purport to so cripple the democratic process, or so entirely subordinate the considered judgments of the American people, as to make it impossible to find common ground and compromise in our national debates over abortion. The majority's decision in *Stenberg* can only be seen as a repudiation of the balancing, deliberation, and compromise by the respective assemblies of the States and the United States that *Casey* invited. As Justice Kennedy wrote in *Stenberg:*

> The political processes of the State are not to be foreclosed from enacting laws to promote the life of the unborn and to ensure respect for all human life and its potential. . . . The State's constitutional authority is a vital means for citizens to address these grave and serious issues, as they must if we are to progress in knowledge and understanding and in the attainment of some degree of consensus.
>
> The Court's decision today, in my submission, repudiates this understanding[.]

Stenberg, 530 U.S. at 957 (Kennedy, J., dissenting). This repudiation of the proper political processes of the States and

the United States can, and should, be undone.

ARGUMENT

I. PRINCIPLES OF *STARE DECISIS* DO NOT REQUIRE CONTINUED ADHERENCE TO *STENBERG V. CARHART*.

In *Stenberg v. Carhart*, a narrow majority of this Court found in its abortion precedents a constitutional right to partial-birth abortion, one that effectively immunizes this controversial practice from democratically enacted and broadly supported regulations. A partial-birth abortion – also known as "dilation and extraction" (D & X) or "intact dilation and evacuation" (intact D & E) – is a late gestation abortion procedure whereby a physician partially delivers the intact, living unborn child up to the head (in the case of a breech presentation) or up to the waist (in the case of a head-first presentation) and then, just before the moment of birth, kills the nearly born child by puncturing his or her skull and vacuuming out the brain. As the dissent in *Stenberg* noted, one witness to the procedure described it this way:

> The baby's little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby's arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall. The doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby's brains out. Now the baby went completely limp.

Stenberg, 530 U.S. at 1007 (Thomas, J., dissenting); *see also id.* at 959-60 (Kennedy, J., dissenting) ("With only the head of the fetus remaining in utero, the abortionist tears open the skull. According to Dr. Martin Haskell, a leading proponent of the procedure, the appropriate instrument to be used at this

stage of the abortion is a pair of scissors. . . . Brain death does not occur until after the skull invasion, and, according to Dr. Carhart, the heart of the fetus may continue to beat for minutes after the contents of the skull are vacuumed out."). As Justice Scalia noted in that case, "[this] method of killing a human child – one cannot even accurately say an entirely unborn human child – proscribed by [the Nebraska law] is so horrible that the most clinical description of it evokes a shudder of revulsion." *Id.* at 953 (Scalia, J., dissenting). Nevertheless, the majority in *Stenberg* struck down the Nebraska law – and, in so doing, nullified dozens of similar laws enacted by the States – as impermissibly vague, because it assertedly applied more broadly than just to partial-birth abortions, *id.* at 939-40, and because it failed to include a "health" exception, *id.* at 938.

As we discuss in more detail below, *Amici* are confident that *Stenberg* is neither required nor justified by the Constitution, and was an unwarranted and improper expansion of, and departure from this Court's decision in *Planned Parenthood v. Casey*. In brief, *Stenberg* was a mistake that this Court may and should correct.[3] That is, if a majority of the Justices of this Court, after careful re-consideration of the arguments presented and endorsed in *Stenberg,* is persuaded that the case was wrongly decided, then *stare decisis* considerations do not preclude this Court from overruling it. Such a course would both respect and vindicate the rule of law.

A. *Stare Decisis* is a Doctrine of Judicial Policy, not

[3] Again, we do not reject the possibility that there are differences between the Act and the law invalidated in *Stenberg,* and do not deny that the Act may be upheld by distinguishing and limiting, rather than overruling, *Stenberg.* Nevertheless, it is our view that *Stenberg* should be overruled and that *stare decisis* considerations pose no obstacle to overruling it.

a Constitutional Requirement of Strict and Unyielding Adherence to Mistaken Precedents.

This Court has consistently made clear that the doctrine of *stare decisis* is not an "inexorable command" of unquestioning adherence to the most recently decided case. It is not, as Justice Frankfurter once put it, the "imprisonment of reason." *United States v. Int'l Boxing Club of N.Y., Inc.,* 348 U.S. 236, 249 (1955) (Frankfurter, J., dissenting). Rather, it is a principle of sound judicial *policy*. *Planned Parenthood v. Casey*, 505 U.S. 833, 854-55 (1992) (collecting and quoting cases); *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (*stare decisis* is "a policy judgment" rather than an inflexible requirement); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 63 (1996) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940) and *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)) ("[W]e always have treated *stare decisis* as a 'principle of policy' . . . and not as an 'inexorable command'"); *Payne*, 501 U.S. at 827-30 & n.1 (collecting cases); *Patterson v. McLean Credit Union*, 491 U.S. 164, 171-75 (1989); *id.* at 172 (*stare decisis* is a "basic self-governing principle within the Judicial Branch" but the Court has "overruled prior decisions where the necessity and propriety of doing so has been established"); *Helvering*, 309 U.S. at 119 ("*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision"). As Justice O'Connor noted in *Adarand Constructors, Inc. v. Pena*:

> Remaining true to an "intrinsically sounder" doctrine established in prior cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it; the latter course would simply compound the recent error and would likely make the unjustified break from previously established doctrine complete.

515 U.S. 200, 231 (1995) (Opinion of O'Connor, J., joined by Kennedy, J.)

In accord with the judicial policy of *stare decisis,* it is well to adhere to a course of settled decisions, and not to depart from or upset it, absent a special justification for overruling prior precedents that otherwise might be conceded to have been erroneous. *Casey*, 505 U.S. at 854 (joint opinion) ("[W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case."); *Payne*, 501 U.S. at 828 (noting that "the Court [had] during the past 20 Terms overruled in whole or in part 33 of its previous constitutional decisions"); *id.* at 842-43 (Souter J., joined by Kennedy, J., concurring) ("[W]hen this Court has confronted a wrongly decided, unworkable precedent calling for some further action by the Court, we have chosen not to compound the original error, but to overrule the precedent."). Such "special justification" exists when precedent is "inconsistent with the decisions that came before it" because following such precedent "would simply compound the recent error." *Adarand,* 515 U.S. at 231 (Opinion of O'Connor J., joined by Kennedy J.). It exists also when the precedent "lack[s] constitutional roots," *id.* at 232 (quoting *United States v. Dixon,* 509 U.S. 688, 704 (1993)), or was an "abrupt and largely unexplained departure from precedent," *id.* at 233 (quoting *Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36, 47 (1977)). *See also, e.g., Seminole Tribe*, 517 U.S. at 63 (quoting *Payne,* 501 U.S. at 827) ("'[W]hen governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent.'").

The policy of *stare decisis* does and should exercise a weaker pull on the Court's decisionmaking in constitutional

cases. After all, such decisions may only be reversed by the Court itself, or through the very difficult method of constitutional amendment. *Agostini*, 521 U.S. at 235 (*stare decisis* is "at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions"); *Seminole Tribe*, 517 U.S. at 63 (quoting *Payne*, 501 U.S. at 828) ("Our willingness to reconsider our earlier decisions has been 'particularly true in constitutional cases, because in such cases correction through legislative action is practically impossible.'"); *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962) (noting the Court's "considered practice not to apply *stare decisis* as rigidly in constitutional as in nonconstitutional cases"); *Smith v. Allwright*, 321 U.S. 649, 665 (1944) ("In constitutional questions… this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions."); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 94 (1936) (Stone & Cardozo, JJ., concurring in the result) ("The doctrine of *stare decisis* . . . has only a limited application in the field of constitutional law.").

Indeed, in *Casey* itself – where this Court, on *stare decisis* grounds, re-affirmed what it described as the "central holding" of *Roe,* 505 U.S. at 854-69 – this Court clearly modified the relevant constitutional rules and *Roe*'s rigid "trimester" framework, *id.* at 872-73. The Court did not hesitate in *Casey* to overrule outright two prior decisions that had gone too far in expanding the right to abortion and tying the hands of legislators, *see id*. at 882 (overruling in part *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), and *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983)).

In sum, any blanket claim that *stare decisis* principles or rule-of-law commitments *require* strict adherence to

precedent, no matter how misguided that precedent may be, is untenable. Indeed, and ironically, such a claim would be *unprecedented*, given that this Court's cases teach consistently and clearly that the doctrine of *stare decisis* is a flexible, practical one that admits of substantial judicial discretion as to how the policies underlying the doctrine should be applied in any given set of circumstances.

B. The Principles of *Stare Decisis* Permitting Reconsideration of Prior Decisions Support the Reconsideration and Overruling of *Stenberg*.

Given the principles and practices outlined above, this Court's decision in *Stenberg* properly may be overruled. In fact, a number of considerations weigh strongly against affirming *Stenberg* simply on *stare decisis* grounds. First, the decision is of very recent origin. *See Adarand,* 515 U.S. at 231 (Opinion of O'Connor J., joined by Kennedy, J.) (following "intrinsically sounder doctrine" serves *stare decisis* more "than would following a more recently decided case inconsistent with the decisions that came before it"); *Payne*, 501 U.S. at 828-30 (overruling recent decisions in *Booth v. Maryland,* 482 U.S. 496 (1987), and *South Carolina v. Gathers,* 490 U.S. 805 (1989)). Next, the decision in *Stenberg* was issued by a deeply divided Court, and produced several powerful dissents. *See Payne*, 501 U.S. at 828-30 (*stare decisis* a lesser consideration when a prior decision was made on a close vote over "spirited dissents").

Another fact that weighs heavily against according *Stenberg* constraining precedential weight is that the decision in that case was itself a striking departure from earlier precedent. *Stenberg,* 530 U.S. at 957 (Kennedy, J., dissenting) (noting that *Stenberg* "repudiate[d]" the *Casey* Court's understanding that "[t]he political processes of the State are not to be foreclosed from enacting laws to promote the life of the unborn and to ensure respect for all human life

and its potential"); *see also, e.g., Adarand*, 515 U.S. at 231, 233 (Opinion of O'Connor, J., joined by Kennedy, J.) (noting diminished *stare decisis* weight where a decision is "inconsistent with the decisions that came before it" or "an abrupt and largely unexplained departure from precedent"). That is, *Stenberg* is not well grounded in the Constitution's text, history, or structure; and its unwarranted extension of earlier cases (and repudiation of *Casey*) means that it can be said to "lack constitutional roots." *Id.* at 232.

It is also important to appreciate that *Stenberg* has not been reaffirmed in subsequent cases of this Court, has not enjoyed or inspired the sustained acquiescence and endorsement of the public or of other branches of government, and has not become embedded in our practices or traditions. *Cf. Dickerson v. United States,* 530 U.S. 428, 443 (2000) (*stare decisis* strongly supported *Miranda v. Arizona*, 384 U.S. 436 (1966), because its rule had become "embedded in routine police practice to the point where the warnings have become part of our national culture"). Quite the contrary: The legislatures of most states, like the Congress of the United States, have banned partial-birth abortion. *Cf. Atkins v. Virginia,* 536 U.S. 304, 314-16 (2002) (many of the states had, in the years after *Penry v. Lynaugh,* 492 U.S. 302 (1989), taken steps to exempt developmentally disabled persons from death-eligibility). Nor is *Stenberg* the rare case in which the Court could plausibly be said to have invested its own prestige in the merits and survival of the precedent. *Cf. Casey*, 505 U.S. at 866-69.

Finally, *Stenberg* simply cannot be thought to have created reasonable reliance interests in the availability-on-demand of this particular type of elective abortion procedure. Congress, like the legislatures of most states and the overwhelming majority of the American people, has considered and rejected the idea that the availability of this *particular* – and particularly troubling – abortion procedure

is essential to a woman's right to an abortion. *See Stenberg,* 530 U.S. at 957 (Kennedy, J., dissenting) (noting that the Nebraska ban on partial-birth abortion "denie[d] no woman the right to choose an abortion and place[d] no undue burden upon the right"). Certainly, no men or women have "ordered their thinking and living" around an imagined constitutional right to obtain an abortion via this particular method. *Cf. Casey,* 505 U.S. at 856.

In case after case, each one of these factors has been recognized by this Court as justifying overruling or departing from a prior case or line of cases that is recognized as unsound. Thus, if this Court concludes – as we believe it should – that *Stenberg* was wrongly decided, neither *stare decisis* nor our commitment to stability and the rule of law requires continued adherence to that decision. This Court's decisions involving the content and application of the *stare decisis* principle weigh heavily in favor of discarding *Stenberg.*

C. President Lincoln's Statements Concerning the Weight of Judicial Precedents Provide a Useful Benchmark for Deciding When it is Appropriate to Overrule Prior Decisions.

This Court's cases involving the *stare decisis* doctrine bear a strong and instructive resemblance to principles set forth by Abraham Lincoln, when he was a candidate for the United States Senate. Lincoln confronted the argument that the Court's decision in the *Dred Scott* case (*Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857)) was settled, binding law, and that those who would seek to have it overruled were disrespectful of judicial authority and of the Constitution. Lincoln's response merits quotation at length:

> Judicial decisions have two uses – first, to absolutely determine the case decided, and secondly,

> to indicate to the public how other similar cases will be decided when they arise. For the latter use, they are called "precedents" and "authorities."
>
> We believe… in obedience to, and respect for the judicial department of government. We think its decisions on Constitutional questions, when fully settled, should control, not only the particular cases decided, but the general policy of the country, subject to be disturbed only by amendments of the Constitution as provided in that instrument itself. More than this would be revolution. But we think the Dred Scott decision is erroneous. We know the court that made it, has often overruled its own decisions, and we shall do what we can to have it to over-rule this.
>
> If this important decision had been made by the unanimous concurrence of the judges, and without any apparent partisan bias, and in accordance with legal public expectation, and with the steady practice of the departments throughout our history, and had been in no part, based on assumed historical facts which are not really true; or, if wanting in some of these, it had been before the court more than once, and had there been affirmed and re-affirmed through a course of years, it then might be, perhaps would be, factious, nay, even revolutionary, to not acquiesce in it as a precedent.
>
> But when, as it is true, we find it wanting in all these claims to the public confidence, it is not resistance, it is not factious, it is not even disrespectful, to treat it as not having yet quite established a settled doctrine for the country….

Abraham Lincoln, Speech at Springfield, Illinois (June 26, 1857), *reprinted in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 1832-58: SPEECHES, LETTERS, AND MISCELLANEOUS WRITINGS, THE LINCOLN-DOUGLAS

DEBATES 390, 390-92 (Library of America ed., 1989). Lincoln's statement of principles is characteristically compelling. And, it is consistent with this Court's own statements concerning the force of precedent. The Court's *Amici* submit that the principles he defended supply important guidance as to when it is proper for this Court to overrule its prior decisions.

First, Lincoln notes that the Court's decisions *absolutely* determine the individual cases decided, even if one might think the Court's judgments erroneous. Later, in his First Inaugural, Lincoln elaborated that such decisions "must be binding in any case, upon the parties to a suit." Abraham Lincoln, First Inaugural Address (March 4, 1861), *reprinted in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 1859-65: SPEECHES, LETTERS, MISCELLANEOUS WRITINGS, PRESIDENTIAL MESSAGES AND PROCLAMATIONS 215, 221 (Library of America ed., 1989). While it is "obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be over-ruled, and never become a precedent for other cases, can better be borne than could the evils of a different practice." *Id.* at 221. This Court, of course, has long embraced this principle. *Cf. Cooper v. Aaron,* 358 U.S. 1 (1958). This does not mean, however – it *could not* mean – that the Court's decisions, as *precedents*, are absolutely binding and immune from reconsideration. Rather, such constitutional decisions control the general policy of the nation only when they have become "*fully settled" by virtue of a sustained course of judicial decision and public acquiescence by other actors in our constitutional system*. Abraham Lincoln, Speech at Springfield, Illinois (June 26, 1857), *supra,* at 393.

In Lincoln's day (as in ours) it was widely recognized that the Court "has often overruled its own decisions," *id*., and that it was appropriate to seek to have the Court overrule

a case like *Dred Scott*. Again, this Court's doctrine is similar: While every judgment of the Court is authoritative and binding, *no* precedent is beyond the Court's reconsideration, if there are persuasive reasons to believe the decision wrong and continued adherence to it would be harmful. Only if a decision has been *fully settled by long practice and acceptance* does it become so sufficiently part of the fabric of the law as to be exempt from this usual rule permitting overruling. Abraham Lincoln, Speech at Springfield, Illinois (June 26, 1857), *supra,* at 393 (noting significance of whether a decision accords with "legal public expectation, and with the steady practice of the departments throughout our history"). Thus it is that even a case like *Plessy v. Ferguson,* 163 U.S. 537 (1896) – though used as a basis for other decisions over a period of more than half a century, and surely relied on to some extent by many – remained deeply contested and thus unsettled. The Court's decision to reconsider and overrule it in *Brown v. Board of Education*, 347 U.S. 483 (1954), was fully consistent with Lincoln's principle. *See Casey*, 505 U.S. at 862-64 (noting propriety of *Brown*'s overruling of *Plessy*).

Lincoln appreciated, as have the Justices of this Court, that some precedents carry less authority than others. Judicial decisions, he observed, "are of greater or less authority as precedents, according to circumstances. That this should be so, accords both with common sense, and the customary understanding of the legal profession." Abraham Lincoln, Speech at Springfield, Illinois (June 26, 1857), *supra,* at 393*; cf. Casey*, 505 U.S. at 854 (noting that "when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations" designed to "gauge" the appropriate weight of prior decisions and the costs and benefits of overruling in a particular instance). The reasons invoked by Lincoln as proper grounds for overturning precedent are remarkably similar to the ones identified by this Court's recent doctrine:

It is relevant whether the decision is one of extremely long standing, such that its rule has become entrenched in established practice and accords with "legal public expectation, and with the steady practice of the departments throughout our history." Lincoln, Speech at Springfield, Illinois (June 26, 1857), *supra,* at 393. Similarly, this Court has treated precedent as being strongest where public institutions, or private reliance interests, have grown up around a decision. *See, e.g., Payne*, 501 U.S. at 828 ("Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved"); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 34 (1989) (Scalia, J., concurring in part and dissenting in part) (noting significant public institutional reliance on Court's earlier sovereign immunity decisions for nearly a century "and the difficulty of changing, or even clearly identifying, the intervening law that has been based on that answer"). In this respect, *stare decisis* can be seen as "the application to judicial precedents of a more general principle that the settled practices and expectations of a democratic society should generally not be disturbed by the courts." *Payne*, 501 U.S. at 834-35 (Scalia, J., concurring). As Lincoln noted, the converse is equally true: Where the settled practices and expectations of a democratic society do *not* agree with a judicial precedent, the precedent cannot be regarded as having become a fully settled part of the fabric of the law.

The degree to which a decision has commanded unanimous or near-unanimous support within the Court is also relevant, especially with respect to precedents of recent vintage. As Lincoln put it, it would certainly have mattered had *Dred Scott*, or any other decision, "been made by the unanimous concurrence of the judges, and without any apparent partisan bias." Abraham Lincoln, Speech at Springfield, Illinois (June 26, 1857), *supra,* at 393*; cf. Payne,* 501 U.S. at 828-29 (noting that "*Booth* and *Gathers*

were decided by the narrowest of margins, over spirited dissents").[4]

Finally, Lincoln remarked that, even if a decision were "wanting" in some of the usual attributes of enduring precedents, it might nonetheless be "factious . . . to not acquiesce in it as a precedent" if the issue "had been before the court more than once, and had there been affirmed and re-affirmed through a course of years[.]" Abraham Lincoln, Speech at Springfield, Illinois (June 26, 1857), *supra,* at 393. Surely, a case that has been re-affirmed often and regularly will enjoy great precedential weight and deference. At the same time, a relatively recent case that has not been reaffirmed or settled into a body of law or line of cases would not necessarily deserve the same treatment. To be sure, there have been judicial decisions and doctrines that, even though reaffirmed repeatedly, were so wrong as to be beyond the reach of this kind of respect. For example, *Plessy* stood for fifty-eight years, and was a premise for many subsequent decisions of this Court before *Brown v. Board of Education* interred its unsound holding. Thus, while it is true that long adherence to a judicial doctrine may be a factor in favor of its retention (at least in doubtful or close cases), that consideration should not override all others. At the very least, the time period and degree of

[4] To be clear: We do not mean to suggest that *Dred Scott* should have been accepted as a precedent, or validly could be thought immune to reconsideration, had it been unanimous. (The decision was 7-2 in support of the Court's disposition and opinion.) Rather, we note the descriptive correctness of Lincoln's evaluation that the degree of judicial consensus certainly matters to the authority any particular precedent may be thought to carry for future decisions, as does the persuasiveness (or lack thereof) of the Court's reasoning. These factors certainly detracted from the precedential weight, and deference, to be accorded the Court's *Dred Scott* decision.

reaffirmation necessary to consider a course of judicial decisions as having "settled" a debatable proposition of constitutional law should be very extensive indeed. Lincoln's proposition is perhaps most persuasive when formulated in the negative: The *absence* of a long period of sustained judicial embrace of a questionable doctrine is an important factor *against* according such decisions strong *stare decisis* weight.

The application of Lincolnian principles to *Stenberg* is, we submit, quite obvious, and accords with the earlier discussion of this Court's *stare decisis* cases. If this Court believes that *Stenberg* was wrongly decided – *i.e.,* an incorrect interpretation of the Constitution, and an unsound extension of prior case law judicial doctrine – it should be overruled. The decision was not "made by the unanimous concurrence of the judges," but a hotly contested 5-4 decision, supported by a narrow concurring opinion. *See* 530 U.S. at 947-51 (O'Connor, J., concurring). The decision is not "in accordance with legal public expectation" and "the steady practice of the departments throughout our history." Abraham Lincoln, Speech at Springfield, Illinois (June 26, 1857), *supra,* at 393. Rather, it is a still-recent and tendentious departure from prior decisions of the Court, *see Stenberg,* 530 U.S. at 957 (Kennedy, J., dissenting) ("The Court's decision . . . repudiates [*Casey*'s] understanding[.]"). It certainly has not received the approbation of the other departments of government. And, this six-year-old decision has not been "before the court more than once" or "affirmed and re-affirmed through a course of years." Abraham Lincoln, Speech at Springfield, Illinois (June 26, 1857), *supra,* at 393. What Lincoln said of *Dred Scott* is true of *Stenberg:* "But when, as it is true we find it wanting in all these claims to the public confidence, it is not resistance, it is not factious, it is not even disrespectful, to treat it as not having yet quite established a settled doctrine for the country." *Id.*

II. THE CONSTITUTION DOES NOT REQUIRE ABORTION REGULATIONS TO INCLUDE SWEEPING AND SELF-DEFEATING "HEALTH" EXCEPTIONS.

The court below invalidated the Act because, in its view, *Stenberg* "requires that any abortion regulation must contain [a health] exception." *Planned Parenthood*, 435 F.3d at 1172. *See also Carhart*, 413 F.3d at 796 (*Stenberg* "establishes a *per se* constitutional rule" that "a health exception applies to all abortion statutes."). Noting that the Act does not contain such an exception, the Court of Appeals said that it was compelled to hold that "Congress's failure to include a health exception in the statute renders the Act unconstitutional." *Planned Parenthood*, 435 U.S. at 1176. *See also id.* at 1172 ("*Stenberg* holds that an abortion regulation that fails to contain a health exception is unconstitutional except when there is a medical consensus that no circumstance exists in which the procedure would be necessary to preserve a woman's health."); *Carhart*, 413 F.3d at 803 ("Because the Act does not contain a health exception, it is unconstitutional.").

In *Stenberg* itself, the narrow majority (citing *Casey,* 505 U.S. at 880) reasoned that, because "the law requires a health exception in order to validate even a postviability abortion regulation, it at a minimum requires the same in respect to previability regulation." *Stenberg*, 530 U.S. at 930; *see also id.* at 931 (*quoting Casey,* 505 U.S. at 879) ("[T]he governing standard requires an exception 'where it is necessary, in appropriate medical judgment for the preservation of the life or health of the mother[.]'"); *id.* at 938 (quoting *Casey,* 505 U.S. at 879) ("[W]here 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.'").

In our view, it simply is not the case that the Constitution, properly understood, requires every regulation of abortion *procedures* to include an amorphous, *Bolton*-style "health" exception. We agree with Petitioner, many other *Amici*, and Congress's investigation and findings regarding the lack of any medical necessity or health-protecting justifications for partial-birth abortion. That said, *Amici* urge this Court to revisit and clarify its decisions relating to health exceptions and abortion laws, and to clarify that the Constitution does not require legislators, and the People, to enact self-defeating and meaningless abortion regulations with health exceptions that, in effect, swallow the regulations themselves. *See, e.g., Stenberg,* 530 U.S. at 965 (Kennedy, J., dissenting) ("Requiring Nebraska to defer to Dr. Carhart's judgment is no different from forbidding Nebraska from enacting a ban at all[.]").

To be clear: The decision of the court below, like that of this Court in *Stenberg,* renders meaningless the assurances provided in *Casey – i.e.,* that notwithstanding the abortion right created in *Roe,* "the States retain a critical and legitimate role in legislating on the subject of abortion," *Stenberg*, 530 U.S. at 956-57 (Kennedy, J., dissenting) – in at least two ways. First, what might be called the "triggering condition" for the health-exception requirement is "appropriate medical judgment," which in effect "awards each physician a veto power over the State's judgment that the procedures should not be performed." *Id.* at 964 (Kennedy, J., dissenting). Justice Kennedy noted that Dr. Carhart, the plaintiff in both *Stenberg* and *Carhart*, "has made the medical judgment to use the D&X procedure in every case, regardless of indications, after 15 weeks' gestation." *Id.* at 964-65 (Kennedy, J., dissenting). Under the *Stenberg* majority's approach, a "single physician or

group of physicians" has the ability to "set[] abortion policy[,] . . . not the legislature or the people." *Id.* at 965 (Kennedy, J., dissenting). This complete evisceration of the State's legitimate role in determining what procedures are appropriate and which are not – and this substitution of an abortionist's veto for careful, balanced consideration of those interests – is inconsistent with the position outlined in the *Casey* joint opinion. *See Stenberg,* 530 U.S. at 956-57 (Kennedy, J., dissenting) (noting that, under *Casey*, government "retain[s] a critical and legitimate role" in regulating abortion and promoting respect for all human life).

As Petitioner makes clear – and as did the dissenting Justices in *Stenberg* – the record both in *Stenberg* and here establishes that partial-birth abortion is never, truly *medically* necessary. *Id.* at 965-67 (Kennedy, J., dissenting). In any event, courts are simply "ill-equipped to evaluate the relative worth of particular surgical procedures" and substitute their factual determinations for those of the legislature. *Id*. at 968 (Kennedy, J., dissenting). After nearly a decade of robust debate, Congress elected by a wide margin to prohibit partial-birth abortion, in substantial part because the procedure "is never medically indicated to preserve the health of the mother." § 2(14)(O), 117 Stat. 1206. The Constitution does not require this Court to substitute an interested party's *ipse dixit* for the considered, morally serious judgment of the Congress of the United States.

The second, and more basic, way in which this Court has hamstrung legislatures' legitimate right – recognized in *Casey* – to "promote the life of the unborn and to ensure respect for all human life and its potential," *Stenberg,* 530 U.S. at 957 (Kennedy, J., dissenting), has to do not with the "triggering condition" for the "health"-exception requirement, but with the *content* of that requirement.

Again, there is no legitimate *medical* justification for the partial-birth abortion procedure. However, the definition of "health" that was read into the Constitution in *Roe v. Wade* and in *Doe v. Bolton,* and that runs through so much of this Court's post-*Roe* case-law, *is not limited to medical considerations.* In practice, the stylized definition of "health" employed in this Court's abortion cases readily permits a construction and application that winds up requiring states to permit unrestricted abortion on demand, at any time and for any reason. Under *Doe*'s "health"-exception gloss on *Roe,* a woman may – if an abortion provider agrees – secure an abortion (or any method of abortion) for *any* medical-, emotional-, social-, mental- or family-related reason. *Doe,* 410 U.S. at 192. Such a definition – if, indeed, the term can plausibly be "defined" to include so much – permits, in practice, a much more extreme and democracy-blocking notion of the abortion right than the Court seemed to contemplate in *Casey.* Accordingly, this Court should give careful consideration to the definition of "health" in its prior decisions, and overrule or modify *Doe* to the extent that it admits of such an extreme and unreasonable exception to a late-term abortion restriction – an exception that, as *Stenberg* demonstrates, tends to swallow the rule.

The expansion of the definition of "health" started with what the Court in *Roe* and *Doe* held: Under the *Roe / Doe* framework, the right to abortion in the third trimester (that is, "subsequent to viability") may be limited by the state, "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Roe*, 410 U.S. at 164-65. (*Stenberg* cited and quoted this formulation exactly, 530 U.S. at 921.) "Health," however, turns out to be a legal term of art in the abortion context, as was made clear immediately in *Doe.*

In *Doe,* the Court considered whether a recent Georgia statute permitting an abortion where a doctor determines that

it is medically necessary was too narrow or restrictive of the right to abortion recognized in *Roe*. *Doe*, 410 U.S. at 182-83. The Court construed the Georgia exception broadly to embrace broad-ranging discretion for doctors to evaluate anything that might relate, directly or indirectly, to a woman's health, and found the statute constitutional because the health-of-the-mother exception, as so construed, was sufficiently broad to satisfy what the Court felt were the appropriate constitutional standards:

> [T]he medical judgment [of the physician] may be exercised in the light of all factors – physical, emotional, psychological, familial, and the woman's age – relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman.

Doe, 410 U.S. at 192. *Doe*'s description of relevant "health" considerations thus built on *Roe*'s identification of a woman's constitutionally protected interests in having an abortion in order to avoid "a distressful life and future," and its recognition of the "[m]ental and physical health" drains of caring for a child, the "distress, for all concerned, associated with the unwanted child," the "problem of bringing a child into a family already unable, psychologically and otherwise, to care for it," and the "difficulties and continuing stigma" of being an unwed mother. *Roe*, 410 U.S. at 153.

Doe's all-encompassing understanding of health – one that rendered hollow the Court's assurances in that case that a "woman does not have an absolute constitutional right to an abortion on her demand," *Doe*, 410 U.S. at 189 – has carried forward through the Court's abortion case-law (although, of course, *Roe*'s anachronistic "trimester"

framework was discarded in *Casey*). *See, e.g., Stenberg,* 530 U.S. at 930-31 (striking down Nebraska's ban on late-term partial-birth abortions on the ground that the statute did not contain a "health" exception required by *Casey*, *Roe*, and *Doe*). The effect of this understanding of "health" is to vest individual abortionists like Dr. Carhart with the plenary power to overrule any and all restrictions on abortion that a legislature might adopt, even those that apply after the child is viable outside the mother's body. Indeed, the result of this broad *Doe* "health" loophole is to render the purported pre-viability / post-viability line of allowable state regulation of abortion completely illusory. An abortionist may perform essentially any type of abortion he deems appropriate, at any time during pregnancy, for whatever reason the woman and abortionist agree is a sufficient emotional, psychological, or family "health" reason.

It is difficult to believe that this Court meant to embrace such an unrestricted abortionist's veto in *Casey*, in which the majority affirmed the legitimacy and propriety of state regulation to protect fetal human life once the point of viability is reached. *Doe*'s extreme conception of "health," and the carrying forward of such an extreme view in *Stenberg*, is not consistent with the approach of *Casey* and not supportable by the text of the Constitution. In light of *Casey*, the astounding breadth of *Doe*'s "health" loophole is truly a "remnant of abandoned doctrine," *Casey*, 505 U.S. at 855, that this Court should explicitly disapprove. The Court should overrule or modify *Doe*'s health exception to bring the law more faithfully in line with the right of the state, recognized in *Casey*, to restrict or prohibit abortion where the child could live outside his or her mother's womb. *Compare Casey*, 505 U.S. 881-83 (overruling in part *Thornburgh* and *Akron*, on similar grounds).

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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Appendix A

STATEMENTS OF INTEREST OF *AMICI*

The Christian Legal Society ("CLS"), founded in 1961, is a nonprofit interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and most law schools. Since 1975, the Society's legal advocacy division, the Center for Law and Religious Freedom, has litigated and educated on behalf of the sanctity of human life.

The National Association of Evangelicals ("NAE") is a nonprofit association of evangelical Christian denominations, churches, organizations, institutions, and individuals. It includes some 45,000 churches from 59 denominations and serves a constituency of approximately 30 million people. NAE is committed to defending the right to life as a precious gift of God and a vital component of the American heritage.

The Pro-Life Legal Defense Fund, Inc. ("PLLDF") is a Massachusetts not-for-profit corporation that provides pro bono legal services for the protection of human life. The PLLDF strongly opposes the partial-birth abortion procedure.

The Alliance Defense Fund ("ADF") is a nonprofit public interest law firm founded in 1993 to aggressively defend the sanctity of life, religious liberties, and traditional family values. ADF's goal is to reform American law so that all human life will be respected and protected from conception until natural death. To accomplish this goal, ADF has trained hundreds of attorneys to litigate sanctity of life issues. ADF's network of over 700 attorneys has participated in litigation and *amicus curiae* briefs opposing all forms of abortion, including "partial-birth" abortion,

public funding of abortion, and efforts to legalize euthanasia. ADF has also participated in litigation supporting parental consent and informed consent laws, and defending pro-life advocates' free speech rights.

Concerned Women for America ("CWA") is the nation's largest public policy organization for women. Located in Washington, D.C., CWA is a non-profit organization that provides policy analysis to Congress, state and local legislatures and assistance to pro-family organizations through research papers and publications. CWA seeks to inform the news media, the academic community, business leaders and the general public about marriage, family, cultural and constitutional issues that affect the nation. CWA has participated in numerous amicus curiae briefs in the United States Supreme Court, lower federal courts and state courts.