No. 05-1382

In The

Supreme Court of the United States

ALBERTO R. GONZALES,

Petitioner,

v.

PLANNED PARENTHOOD FEDERATION OF AMERICA, *et al.*,

Respondents.

ON *WRIT OF CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION,

in support of the *Petitioner*

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INTEREST OF AMICUS CURIAE[1]

The National Legal Foundation (NLF) is a 501c(3) non-profit corporation organized to defend, restore, and preserve constitutional liberties, family rights, and other inalienable freedoms. The NLF and its donors and supporters are vitally concerned with the outcome of this case because of its public interest litigation and educational activities relating to the issue of abortion.

SUMMARY OF THE ARGUMENT

There is a long history of both Congress and various state legislatures recognizing the need to protect the life of unborn children. This has been expressed by both the Unborn Victims of Violence Act and various state fetal homicide laws. While these laws have been challenged as unconstitutional multiple times, they have consistently been upheld by the courts.

The Partial Birth Abortion Ban Act is the natural and logical extension of the Unborn Victims of Violence Act. It would be inconsistent to uphold statutes recognizing the fundamental right to life of unborn children and then strike down a ban on a form of abortion which grotesquely violates this right.

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[1] The parties have consented to the filing of this brief. Copies of the letter of consent accompany this brief. No counsel for any party has authored this brief in whole or in part. No person or entity has made any monetary contribution to the preparation or submission of this brief, other than the *Amicus Curiae*, its members, and its counsel.

ARGUMENT

I. THIS COURT SHOULD UPHOLD THE PARTIAL BIRTH ABORTION BAN ACT BECAUSE IT IS THE LOGICAL EXTENSION OF THE UNBORN VICTIMS OF VIOLENCE ACT

On April 1, 2004, Congress enacted the Unborn Victims of Violence Act, 18 U.S.C. § 1841 (LEXIS through Pub. Law 109-245)[2], which officially recognized the fact that

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2 The Unborn Victims of Violence Act reads as follows:

(a) (1) Whoever engages in conduct that violates any of the provisions of law listed in subsection (b) and thereby causes the death of, or bodily injury (as defined in section 1365) to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense under this section.

(2) (A) Except as otherwise provided in this paragraph, the punishment for that separate offense is the same as the punishment provided under Federal law for that conduct had that injury or death occurred to the unborn child's mother.

(B) An offense under this section does not require proof that--

(i) the person engaging in the conduct had knowledge or should have had knowledge that the victim of the underlying offense was pregnant; or

(ii) the defendant intended to cause the death of, or bodily injury to, the unborn child.

(C) If the person engaging in the conduct thereby intentionally kills or attempts to kill the unborn child, that person shall instead of being punished under subparagraph (A), be punished as provided under sections 1111, 1112, and 1113 of this title for intentionally killing or attempting to kill a human being.

(D) Notwithstanding any other provision of law, the death penalty shall not be imposed for an offense under this section.

(b) The provisions referred to in subsection (a) are the

unborn children may be separate victims of violence. As will be demonstrated below, a sizable majority of states either preceded or followed Congress in recognizing unborn children as potential victims of violence, and when such legislation has been challenged, courts have consistently upheld these laws. It would then be illogical for the courts to recognize the fact that unborn children have a distinct right to life as a separate identity inside the womb and, therefore, to be protected from violence; but then to refuse to uphold a ban on such a gruesome practice as partial-birth abortion. This Court is well aware of the violence committed against the unborn child during a partial birth abortion, having itself described it as follows:

> Like other versions of the D&E technique, it begins with induced dilation of the cervix. The procedure then involves removing the fetus from the uterus through the cervix "intact," i.e., in one pass, rather than in several passes. It is used after 16 weeks at the earliest, as vacuum aspiration becomes ineffective and the fetal skull becomes too large to pass through the cervix. The intact D&E proceeds in one of two ways, depending on the presentation of the

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following: [list of section numbers omitted]
(c) Nothing in this section shall be construed to permit the prosecution--
(1) of any person for conduct relating to an abortion for which the consent of the pregnant woman, or a person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law;
(2) of any person for any medical treatment of the pregnant woman or her unborn child; or
(3) of any woman with respect to her unborn child.
(d) As used in this section, the term "unborn child" means a child in utero, and the term "child in utero" or "child, who is in utero" means a member of the species homo sapiens, at any stage of development, who is carried in the womb.

> fetus. If the fetus presents head first (a vertex presentation), the doctor collapses the skull; and the doctor then extracts the entire fetus through the cervix. If the fetus presents feet first (a breech presentation), the doctor pulls the fetal body through the cervix, collapses the skull, and extracts the fetus through the cervix.

Stenberg v. Carhart, 530 U.S. 914, 927 (U.S. 2000).

The illogic is highlighted by the fact that children fully within the womb would receive more protection from violence that those children who have been partially delivered.

In addition to the protection offered by the Unborn Victims of Violence Act, mentioned above, thirty-five states have enacted laws recognizing that unborn children may be considered victims.[3] State Homicide Laws That Recognize

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[3] Although comments will follow on several of the states, a complete list is also instructive. Massachusetts provides protection through judicial interpretation of its laws. *Commonwealth v. Lawrence*, 536 N.E.2d 571 (Mass. 1989); *Commonwealth v. Cass*, 467 N.E.2d 1324 (Mass. 1984). Thirty-four additional states provide protection by statute and one does so by judicial interpretation of a statute. They are as follows: 2006 Ala. Laws Act 2006-419 (H.B. 19); 2006 Alaska Sess. Laws Ch. 73; Ariz. Rev. Stat. Ann. §§ 13-1102 to -1105 (LEXIS through 2005 legislation); Ark. Code Ann. §§ 5-1-102(13)(B), 5-10-101 to -105 (LEXIS through 2006 First Extraordinary Sess.); Cal. Penal Code § 187 (LEXIS through 2006 legislation); Fla. Stat. §§ 316.193, 782.071 to -.09 (LEXIS through 2006 Reg. Sess.); Ga. Code Ann. §§ 16-5-20, -28, -29, 80 (LEXIS through 2006 Reg. Sess.); Idaho Code Ann. § 18-4001 (LEXIS through 2006 Reg. Sess.); 720 Ill. Comp. Stat. 5/9-1.2, -2.1, -3.2, 5/12-3.1, -4.4 (LEXIS through Pub. Act 94-942); Ind. Code. Ann. §§ 35-42-1-1, -3, -4 (LEXIS through 2005 Reg. Sess.); Ky. Rev. Stat. Ann. §§ 507A.010-.060 (LEXIS through 2005 Reg. Sess.); La. Rev. Stat. Ann. §§ 14:32.5 – 8 (LEXIS through 2006 First Extraordinary Sess); Md. Code Ann., Crim. Law § 2-103 (LEXIS through 2005 Reg. Sess.); Mich. Comp. Laws §§ 750.90(a)-(f) (LEXIS through Pub. Act 214); Minn. Stat. §§ 609.21, -.266, -.2661 to -.2665, -.268(1) (LEXIS through 2005 legislation); Miss. Code Ann. § 97-3-37 (LEXIS through 2005 Reg. Sess.); Mo. Rev. Stat.

Unborn Victims, http://www.nrlc.org/Unborn_Victims /Statehomicidelaws092302.html (June 16, 2006). Missouri, for example, has declared that unborn children have their own human identity separate from their mothers and that they deserve the full protection the law has to offer. Mo. Rev. Stat. § 1-205 (LEXIS through 2005 legislation). Other states, such as Indiana, Massachusetts, and Alabama, have explicitly incorporated unborn children into their already existing violent crime statutes through legislative action or judicial interpretation. Ala. Code § 13A-6-1 (LEXIS through 2005 First Spec. Sess.); Ind. Code §§ 35-42-1-1, -3, -4 (LEXIS through 2005 Reg. Sess.); *Commonwealth v. Lawrence*, 536 N.E.2d 571 (Mass. 1989); *Commonwealth v. Cass*, 467 N.E.2d 1324 (Mass. 1984). Others still, such as Kentucky, Louisiana, and Pennsylvania, have enacted additional statutes creating the crimes of feticide or homicide

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§§ 1.205, 565.020, .024 (LEXIS through 2005 Sess.); Neb. Rev. Stat. §§ 28-391 to -394 (LEXIS through 2005 First Sess.); 2006 Neb. Laws 57; Nev. Rev. Stat. § 200.210 (LEXIS through 73d (2005) Sess. and 22d Spec. (2005) Sess.); N.Y. Penal Law § 125.00 (McKinney through L.2006); N.D. Cent. Code §§ 12.1-17.1-01 to -04 (LEXIS through 2005 Sess.); Ohio Rev. Code Ann. §§ 2903.01 to -.07, -.09 (LEXIS through 126th Ohio Gen. Assemb.); Okla. Stat. tit. 21, §§ 652, 713, 714, 723 (LEXIS through 2005 Extraordinary Sess.); 18 Pa. Cons. Stat. 2601 to 2609 (L EXIS through 2005 Legislative Sess.); R.I. Gen. Laws § 11-23-5 (LEXIS through Jan. 2005 Sess.); 2006 S.C. Acts 325; S.D. Codified Laws §§ 22-16-1, -1.1, -15(5), -20, -41 (LEXIS through 2005 legislation); Tenn. Code Ann. §§ 39-13-201, -202, -210, -211, -213 to -215 (LEXIS through 2005 Sess.); Tex. Penal Code § 1.07(a)(26) (LEXIS through 2006 3d Called Sess.); Utah Code Ann. § 76-5-201 (LEXIS through 2006 Third Spec. Sess.); Va. Code Ann. § 18.2-32.2 (LEXIS through 2006 Reg. Sess.); Wash. Rev. Code § 9A.32.060(1)(b) (LEXIS through 2005 Gen. Election); W. Va. Code § 61-2-30 (LEXIS through 2006 First Extraordinary Sess.); Wis. Stat. §§ 939.75, -.24, -.25, 940.01, -.02, -.06, -.08 to -.10 (LEXIS through Jan. 6, 2006). Several states which now provide protection through statute previously provided protection via judicial interpretation of their other homicide laws. See generally, Alan S. Wasserstrom, Annotation, Homocide *Based on Killing of Unborn Child*, 64 A.L.R.5th 671 (Westlaw Update April 2005).

of an unborn child. Ky. Rev. Stat. Ann. §§ 507A.010-.060 (LEXIS through 2005 Reg. Sess.); La. Rev. Stat. Ann. §§ 14:2(11), 14:32.5-.8 (LEXIS through 2006 First Extraordinary Sess.); 18 Pa. Const. Stat. §§ 2601-09 (LEXIS through 2005 Act 96). Whatever their approach, these thirty-five states have sought to protect the right of the unborn to be free from violence and to establish the unborn as individual victims.

Although the Unborn Victims of Violence Act was signed into law in only 2004, criminal penalties for killing a fetus have existed for centuries, dating back to ancient Persia. Louis B. Wright, *Fetus v. Mother: Criminal Liability For Maternal Substance Abuse During Pregnancy*, 36 Wayne L. Rev. 1285, 1291 (1990). While ancient Greek and Roman civilizations did not generally criminalize fetal homicide, there was an exception if "the father's rights to the child had been violated." *Id.* The common law also recognized fetal homicide as a crime, but only if the baby was born alive and subsequently died as a result of injuries sustained while in utero. Sir William Blackstone, *Commentaries on the Laws of England*, 944 (3rd ed. 1903). The "born alive rule" has existed since at least 1368 primarily because of the difficulty of determining the cause of death of an unborn child. Robert M. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 Fordham L. Rev. 807, 815-827 (1973). As Sir William Blackstone put it:

> To kill a child in its mother's womb, is now no murder, but a great misprision: but if the child be born alive, and dieth by reason of the potion or bruises it received in the womb, it seems, by the greater opinion, to be murder in such as administered or gave them.

Id. Just because the "born alive rule" was necessary prior to advances in mortuary science does not mean that the rule must continue. In the words of Oliver Wendell Holmes, Jr.

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Address by Oliver Wendell Holmes, Jr., 10 Harv. L. Rev. 457, 469 (Jan. 8, 1897).[4]

Contrary to popular belief, the prospect of criminal penalties for the violence against the unborn is not a recent phenomenon. The modern movement to enact fetal homicide laws dates to the early 1970's. In 1970, when a California man learned of his ex-wife's pregnancy by another man, he accosted her on a mountain road, pulled her out of her car and told her "I'm going to stomp it [the baby] out of you!" *Keeler v. Superior Court*, 470 P.2d 617, 618 (Cal. 1970). He proceeded to assault her, ramming his knee into her abdomen. *Id.* The child, thirty-four to thirty-six weeks gestation, was stillborn with a fractured skull later that day. *Id.* Keeler was charged with multiple criminal counts including murder of the baby. *Id.* The California Supreme Court, following the common law "born alive" rule, said a fetus was not a human being within the provision of Calaifornia Peanl Code § 187.

This ruling sparked a legislative battle in California to change the murder statute, unaltered since 1872, to add "or a fetus" to those protected under the murder statute. Assemb. B. 816, 1970 Reg. Sess. (Ca. 1970). Borden D. Webb, *Is The Intentional Killing of An Unborn Child*

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[4] For a review of states that previously or still import the common law born alive doctrine into various statutes through judicial interpretation (including both states with and without additional statutory protection), see, Alan S. Wasserstrom, Annotation, Homocide *Based on Killing of Unborn Child*, 64 A.L.R.5th 671 (Westlaw Update April 2005).

Homicide? California's Law to Punish The Willful Killing of a Fetus, 2 Pac. L. J. 170, 172 (1971). The original intent by the bill's author was to define a human being to include a fetus of at least twenty-weeks. *Id.* at 172. However, the legislature ultimately decided not to define fetus and leave the definition up to the courts. *Id.* at 183. This landmark legislation was quickly passed, only eight weeks after the *Keeler* decision. Anna Hua Hsu, *From Keeler v. Superior Court to People v. Davis: The Definition of Fetal Murder in California*, 23 W. St. U.L. Rev. 219 (1995).

After *Keeler* and the amendment of California Penal Code §187 in 1970, the California Courts of Appeals rendered numerous opinions defining "fetus" under the murder statute. *Id.* However the definition was not settled for almost a quarter century until the California Supreme Court addressed the issue in its decision in *People v. Davis*, 872 P.2d 591, 593 (1994). The court ultimately determined that viability was "not an element of fetal murder." *Id.* In its analysis, the court quoted *Roe v. Wade*, 410 U.S. 113 (1973), noting that the state has interests other than the rights of a woman, namely an "important and legitimate interest in protecting the potentiality of human life." *Id.* at 599.

On the other hand, one state, Massachusetts has not enacted legislation, but nonetheless provides protection of unborn life via judicial decision. In *Commonwealth v. Cass*, 467 N.E.2d 1324 (Mass. 1984), the defendant, who was driving at a high rate of speed, hit a pedestrian who was more than eight months pregnant, killing the baby within the womb. *Id.* The Supreme Judicial Court held that a fetus was included within the purview of the definition of "person" under the homicide statute. *Id.* (However, the court applied this definition prospectively only because of the potential that that defendant had "relied on the old rule.") *Id.* at 1328.

The court gave multiple rationales for extending its vehicular homicide statute to include the unborn. The first reason the court gave was that since the Massachusetts legislature had previously determined that a fetus was a

person for civil, wrongful death actions, it was presumably aware of its own definition of person and intended it to apply to homicide as well. Major Michael J. Davidson, *Fetal Crime and Its Cognizability as a Criminal Offense Under Military Law*, 1998 Army Law. 23, 25. Second, the court reasoned that a "person," being synonymous with "human being," included a child of a human, both within and without the womb of that human. *Id.* at 25-26.

In 1989 the Massachusetts Supreme Judicial Court confirmed its 1984 *Cass* decision by upholding a district court opinion in an appeal from a man convicted of the first degree murder of his sixteen year old girlfriend and involuntary manslaughter of her twenty-seven week old fetus. *Commonwealth v. Lawrence*, 536 N.E.2d 571 (Mass. 1989).[5]

After California's pioneering efforts and Massachusetts' unique judicial approach, the most important historical development to note is the recent flurry of state enactments. Many of these recent statutes listed in footnote 3 above (as well as the federal Unborn Victims of Violence Act, mentioned previously) were enacted in response to the highly publicized murders of Laci and Connor Peterson. Holly Auer, *Fetal Homicide Laws Stir Debate*, Post and Courrier (Charleston, S.C.), Mar. 14, 2006, at A1.

As noted above, the Partial Birth Abortion Ban Act, 18 U.S.C. § 1531 (LEXIS through Pub. Law 109-245), is a logical extension of the Unborn Victims of Violence Act. The Unborn Victims of Violence Act recognizes the individuality of unborn children and protects them from "external" violence. The Partial Birth Abortion Ban Act goes on to protect unborn children from particularly violent form of abortion. In making this extension, Congress

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[5] For other states that previously provided or still provide protection via judicial interpretation of homicide statutes see Alan S. Wasserstrom, Annotation, Homicide *Based on Killing of Unborn Child*, 64 A.L.R.5th 671 (Westlaw Update April 2005).

followed the pattern of both the Unborn Victims of Violence Act and the majority of the state fetal homicide laws which contained a maternal exception to shelter mothers from prosecution. Therefore, the Partial Birth Abortion Ban Act also contained a maternal exception.[6]

Not only have Congress and the majority of state legislatures recognized that an unborn child may be a separate victim of a violent attack, but the courts have universally upheld such statutes as constitutional. For example, in Missouri Revised Statutes § 1.205 (2006), the Missouri General Assembly declared that "the laws of [Missouri] shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state . . . ." This statute contains findings of that "(1) [t]he life of each human being begins at conception; (2) [u]nborn children have protectable interests in life, health, and well-being; [and] (3) [t]he natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn children." *Id.* This Court, in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), upheld the statute, holding that there was no facial conflict between the Missouri statute and *Roe v. Wade*.

Other courts have upheld state fetal homicide statutes against other challenges. *Eg.*, *People v. Davis*, 872 P.2d 591, 593, 599 (Cal. 1994) (challenge, based on *Roe*, to state legislature's addition of fetus to the murder statue and viability as an element failed); *People v. Dennis*, 950 P.2d 1035, 1058-59 (Cal. 1994) (challenge to capital punishment as cruel and unusual for killing a fetus failed); *Smith v.*

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6 The Unborn Victims of Violence Act also contains an abortion exception. One might argue that this exception negates the argument being made here. However, the abortion exception is applicable only to *legal* abortions. The Partial Birth Abortion Ban Act seeks to make a certain kind of abortion illegal and thus does not conflict with the Unborn Victims of Violence Act.

Newsome, 815 F.2d 1386, 1387-88 (11th Cir. 1987) (challenge to Georgia's feticide statute based on *Roe*, equal protection, and unconstitutional vagueness failed); *Brinkley v. State*, 322 S.E.2d 49, 51-52 (Ga. 1984) (challenge to unconstitutional vagueness and due process failed); *People v. Ford*, 581 N.E.2d 1189, 1199-1201 (Ill. App. Ct. 1991) (challenge based on equal protection and unconstitutional vagueness failed); *State v. Smith*, 676 So. 2d 1068, 1071-72 (La. 1996) (challenge based on double jeopardy failed); *State v. Merrill*, 450 N.W.2d 318, 321-24 (Minn. 1990) (challenge based on equal protection and unconstitutional vagueness failed); *State v. Bauer*, 471 N.W.2d 363 (Minn. App. 1991) (challenge based on establishment clause failed); *Pennsylvania v. Bullock*, 868 A.2d 516, 521-23 (Pa. Super. Ct. 2005) (challenge based on *Roe*, equal protection and unconstitutionally vague failed); *Pennsylvania v. Wilcott*, No. 2426 A & B of 2002 (Court of Common Pleas of Erie County, Pennsylvania, Criminal Division) (challenge to Pennsylvania's Crimes Against Unborn Children Act as unconstitutionally vague, violative of U.S. Supreme Court abortion cases and due process failed); *Utah v. MacGuire*, 84 P.3d 1171, 1174-75 (Utah 2004) (challenge as unconstitutionally vague failed); *State* v. *Black*, 526 N.W.2d 132, 134 (Wis. 1994) (challenge to due process failed).

As the above discussion demonstrates, it is widely established that unborn children may be treated as distinct individuals deserving of legislative protection. Courts, including this Court, have consistently upheld this legislative determination. Congress, in enacting the Partial Birth Abortion Ban Act, recognized, at least implicitly, that if unborn children may be victims when their right to life is violated through "external" violence, then they would also be victims when their right to life is violated through partial birth abortions. To strike down the Partial Birth Abortion Ban Act would therefore be inconsistent with the permissible legislative goal of protecting the unborn from acts of violence

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

This 3rd day of August, 2006

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