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

BRIEF OF THE PLANNED PARENTHOOD RESPONDENTS IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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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) ("Act"), is unconstitutional on its face because it effectively bans all forms of dilation and evacuation ("D&E") abortions, the most commonly used previability second-trimester abortion method, and therefore imposes an undue burden on a woman's right to end a previability pregnancy?

Whether the Court of Appeals correctly held that the Act is unconstitutionally vague because it fails to provide fair warning of the medical procedures it bans and permits arbitrary and discriminatory enforcement?

Whether the Court of Appeals correctly held that the Act is unconstitutional on its face, even if it is construed as banning only the intact form of D&E abortion, because it bans such abortions even when they are safer for the woman?

PARTIES TO THE PROCEEDING

Petitioner is Alberto R. Gonzales, Attorney General of the United States.

Respondents are Planned Parenthood Federation of America, Inc.; Planned Parenthood Golden Gate; and the City and County of San Francisco.

Respondents Planned Parenthood Federation of America, Inc. and Planned Parenthood Golden Gate are not-for-profit corporations that do not have parent corporations and are not owned in any part by a publicly held company.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases PAGE

INTRODUCTION

Respondents Planned Parenthood Federation of America, Inc. and Planned Parenthood Golden Gate ("Planned Parenthood") urge this Court to grant plenary review of the decision by the United States Court of Appeals for the Ninth Circuit and to consider this case ("*Planned Parenthood Federation*") jointly with *Gonzales v. Carhart*, No. 05-380 (*cert. granted* U.S. Feb. 21, 2006) ("*Carhart*").[1] The District Court and Ninth Circuit here ruled on two fact-intensive, threshold constitutional claims that were not decided by the court of appeals in *Carhart*. Given the District Court fact-finding on these claims, conducting plenary review, rather than holding the Petition until *Carhart* is decided (as Attorney General Alberto R. Gonzales ("Government") requests), will assist the Court in ruling on the constitutionality of the Act on all of the grounds on which it was enjoined by the lower courts.[2] Planned Parenthood further urges the Court to adopt the Questions Presented herein because the sole Question Presented in the Petition does not adequately identify all three legal bases on which the lower courts here invalidated the Act.[3] *Cf.* note 8, *infra*.

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[1] Planned Parenthood agrees with Respondents in *Carhart* that the petition in that case should have been denied, *see* Respondents' Brief in Opposition, *Gonzales v. Carhart* (U.S. Nov. 18, 2005) (No. 05-380), but that issue is now moot.

[2] Planned Parenthood joins in the Government's request that if plenary review is conducted, oral argument in this matter be consolidated with oral argument in *Carhart*. Pet. at 8.

[3] The questions presented in this brief are identical to those contained in the brief of Respondents City and County of San Francisco.

COUNTER-STATEMENT

Like *Carhart*, this case challenges the constitutionality of the Act, which bans the safest and most common methods by which second-trimester, previability abortions are performed in this country—and does so without an exception for the pregnant woman's health.[4] Unlike *Carhart*, which was decided by the United States Court of Appeals for the Eighth Circuit exclusively on the grounds that the Act lacks a constitutionally mandated health exception, *Carhart v. Gonzales*, 413 F.3d 791, 803-04 (8th Cir. 2005) (declining to rule on other constitutional claims), the Ninth Circuit in this case struck down the law on three independent constitutional grounds—undue burden, vagueness, and lack of a health exception—"each of which is sufficient to justify" striking the law in its entirety. Pet. App. 14a, 54a. The Ninth Circuit's holdings, which are described below, are based in significant part on the detailed factual findings of the District Court. These factual findings are amply supported by the record.

A. The Court of Appeals' Undue Burden Holding

The Ninth Circuit found that—independent of whether the Act must contain a health exception—the Act is

[4] The Act was simultaneously challenged in three separate lawsuits—the instant case, *Carhart,* and *National Abortion Federation v. Ashcroft*, 330 F. Supp. 2d 436 (S.D.N.Y. 2004) ("*National Abortion Federation*") (finding Act unconstitutional based on lack of health exception), *aff'd*, 437 F.3d 278 (2d Cir. 2006) (affirming unconstitutionality due to lack of health exception, but seeking additional briefing on the appropriate remedy). After the Second Circuit's merits ruling, *National Abortion Federation* was stayed until after this Court's ruling in *Carhart*. *National Abortion Federation v. Gonzales*, No. 04-5201-cv (2d Cir. March 7, 2006) (order granting motion to stay supplemental briefing pending resolution of *Gonzales v. Carhart*).

unconstitutional because it imposes an "undue burden" on a woman's right to choose to end her pregnancy prior to viability. *Id.* at 23a-24a, 32a-33a, *citing Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) (striking down Nebraska statute banning so-called "partial-birth" abortions because it would ban D&Es by all forms and therefore would impose an undue burden on women seeking previability second-trimester abortions) ("*Stenberg*"). It based this conclusion in large part on the District Court's detailed fact-finding, Pet. App. 80a-85a (District Court fact-finding on undue burden claim).

Based on that fact-finding, the Ninth Circuit compared the scope of the Act with the scope of the Nebraska statute struck down in *Stenberg*, and concluded that although the two Acts differ, the differences "do[ ] not limit the Act's reach to intact D&Es and, as a result do[ ] not eliminate the undue burden the Act imposes." *Id.* at 27a. The Ninth Circuit concluded that, like the law struck down in *Stenberg*, the Act bans both the intact and non-intact forms of D&E, the abortion method used in the vast majority of previability second-trimester abortions.[5] *Id.* at 23a-33a.

In particular, the Ninth Circuit concluded that "the record demonstrates and the district court found" that in both intact and non-intact D&Es, a doctor may extract a "living fetus" to the point where either a "part of the

[5] The courts below used the terms "intact D&E" and "non-intact D&E" rather than "D&X" and "D&E," respectively. As the Ninth Circuit stated, "[t]he labeling of the procedure is of no consequence to our analysis; however, for simplicity's sake we prefer intact and non-intact D&E. What is relevant, however, is that one could substitute D&X for intact D&E wherever the latter term appears in our opinion and nothing would change in any respect." *Id.* at 3a-4a & n.3. This brief uses the same terminology as the opinion below.

fetal trunk past the navel" or "the entire fetal head" is "outside the body of the mother." *Id.* at 27a-28a (quoting 18 U.S.C. § 1531(b)(1)(A)).[6] Relying on the District Court fact-finding, the Ninth Circuit further found that in both intact and non-intact D&Es, if the fetus has been brought "outside the body of the mother" to the point specified in the Act, "a doctor may then, in order to complete the abortion safely, need to perform an 'overt act,' other than completing delivery, that the physician knows the fetus cannot survive, if it is still living, and that 'kills' the fetus." Pet. App. 29a-30a. Finally, it found that in both intact and non-intact D&Es, the actions doctors perform that would be banned by the Act "can be performed with the requisite intent" to violate the Act. *Id.* at 31a. Indeed, the Ninth Circuit noted a particular circumstance described in the record in which a physician performing a non-intact D&E would meet all of the requirements of the procedure banned by the Act. *Id.* The Ninth Circuit concluded, in sum, that the Act does not "adequately differentiat[e] between the two forms of D&E . . . either by tracking the medical differences between intact D&E and other forms of D&E or by specifying that the forms of D&E other than the

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[6] By its terms, the Act criminalizes the conduct of any doctor who:

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

18 U.S.C. § 1531(b)(1).

intact version are not covered by the prohibition." As a result, it imposes an unconstitutional burden on women's right to previability second-trimester abortions. *Id.* at 26a-27a, 32a-33a.

B. The Court of Appeals' Vagueness Holding

The Ninth Circuit's vagueness ruling was also based in significant part on the record below, Pet. App. 92a-96a (District Court fact-finding on vagueness claim). The Ninth Circuit affirmed the District Court ruling that "the Act's unconstitutional vagueness constitutes an independent ground" for invalidation. *Id.* at 33a. Relying on the testimony of expert physicians who testified in the District Court, the Ninth Circuit found that even though "a painstaking legal analysis" reveals that the Act covers both the intact and non-intact forms of D&E, the Act "taken as a whole, is not sufficiently clear . . . to guide the conduct of . . . medical practitioners." *Id.* at 33a-35a. The Court of Appeals noted that the scope of the Act was "certainly" vague if the legislative intent was to limit the Act's scope to intact D&Es because the statutory language does not contain such a limitation. *Id.* at 35a. In addition, the Ninth Circuit affirmed the District Court's conclusion that specific terms in the Act's definition are "fatally ambiguous." *Id.* For example, relying on the testimony of the expert physicians who testified at trial, the Ninth Circuit held that the term "overt act" "can plausibly encompass a range of acts involved in non-intact D&E, . . . [and thus] does nothing to remedy the statute's failure to provide adequate notice of what forms of D&E the Act prohibits and to prevent its arbitrary enforcement." *Id.* at 38a.

C. The Court of Appeals' Health Exception Holding

Like the Eighth Circuit, the Ninth Circuit found the Act unconstitutional because it lacks a health exception. *Id.* at 14a, 22a. Notably, however, it reached this conclusion applying the deferential "substantial evidence" review of Congressional findings that the Government urges. In particular, the Ninth Circuit found "on the basis of the record before Congress, of the congressional findings themselves, and of evidence introduced in the district court [*see* Pet. App. 139a-147a for the District Court fact-finding on the health exception claim based on the trial evidence], that a substantial disagreement exists in the medical community regarding whether [the procedures banned by the Act] are necessary in certain circumstances [to preserve the health of women]." *Id.* at 22a. Given this "substantial disagreement," *id.*, and this Court's holding in *Stenberg*, the Ninth Court concluded that the Act is unconstitutional because "[w]ithout a medical consensus . . . that 'a health exception is never necessary to preserve the health of women' . . . any abortion regulation . . . without a health exception is unconstitutional." *Id.* at 16a (*quoting Stenberg*, 530 U.S. at 937-38 (internal quotation marks omitted in original)).

* * *

Given the Act's unconstitutionality on each of these three, independent grounds, the Ninth Circuit engaged in an extensive analysis of the proper remedy in light of this Court's holding in *Ayotte v. Planned Parenthood of Northern New England*, ___ U.S. ___, 126 S. Ct. 961 (2006). The Court of Appeals noted that the appropriate remedy depended on the basis for holding the Act unconstitutional, and concluded that for each independent basis, albeit for different reasons, the appropriate remedy was to enjoin completely enforcement of the

Act. It therefore affirmed the District Court's judgment, which enjoined the Act in its entirety as to Planned Parenthood and its agents nationwide. Pet. App. 40a-54a; 218a.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ, order plenary review in this case based on the Questions Presented herein, and consolidate the argument of this matter with argument in *Carhart* so that the legal challenges to the validity of the Act can be resolved at one time based on the most complete available record. It is particularly important that the Court grant the writ as to Questions 1 and 2 because any ruling by this Court in *Carhart* alone would not conclusively resolve these legal questions—unless this Court decides legal claims that were not decided by the Eighth Circuit. It is axiomatic, however, that "[w]here issues [were not] considered by the Court of Appeals, this Court will not ordinarily consider them." *Meyer v. Holley*, 537 U.S. 280, 292 (2003) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)) (internal quotation marks omitted). This is because "[i]n the absence of a decision by the Court of Appeals on the merits of [a] petitioner's contentions, th[e] case is not an appropriate vehicle to consider [such contentions]." *Davis v. United States*, 417 U.S. 333, 342 n.12 (1974); s*ee also F. Hoffman-La Roche v. Empagran S.A.*, 542 U.S. 155, 175 (2004) ("The Court of Appeals, however, did not address this argument, and, for that reason, neither shall we.") (citation omitted). As these cases make clear, contrary to the Solicitor General's unsupported assertions, *Carhart* is neither a "suitable" (Pet. at 7-8), nor "an attractive vehicle" for deciding the undue burden and vagueness claims (Supplemental Brief for the Peti-

tioner, *Carhart* (U.S. Dec. 2, 2005) (No. 05-380) ("*Carhart* Supp. Br."), at 8).[7]

Indeed, it would be particularly difficult for the Court to decide the vagueness challenge to the Act in the context of *Carhart* because that claim was not even preserved for review by the Eighth Circuit, let alone decided (*see Carhart* Supp. Br. at 9 n.2 (acknowledging that respondents in *Carhart* did not present the vagueness claim to the Eighth Circuit)). *See, e.g.*, *Adickes*, 398 U.S. at 148 n.2 ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *Lawn v. United States,* 355 U.S. 339, 362 n.16 (1958) (declining to reach issue raised before trial court but not preserved before Court of Appeals, as "[o]nly in exceptional cases will this Court review a question not raised in the court below.").

The Court's usual preference for not deciding claims that were not ruled on by the court of appeals applies with particular force here, given the public importance of the issues raised in this case and *Carhart*. *Cf. Bankers Life and Cas. Co. v. Crenshaw*, 486 U.S. 71, 79-80 (1988) (policies against reaching issue not raised before lower courts apply with "special force" to issues of par-

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[7] Moreover, this Court should reach these claims even if it finds the Act unconstitutional for lack of a health exception because, *inter alia*, these claims are likely to be relevant to the remedy determination. *See* Pet. App. 41a ("Our conclusion [as to the proper remedy] is dictated in part by the grounds on which we hold the Act unconstitutional.); *id.* at 47a ("we need not rest our decision as to the appropriate remedy solely on the omission of a health exception because we have determined that the Act is unconstitutional on other grounds as well . . . . [T]he nature of these constitutional errors [in addition to the omission of a health exception] precludes us from devising a remedy any narrower that the invalidation of the entire statute . . . .").

ticular importance); *Illinois v. Gates*, 462 U.S. 213, 224 (1983) ("Where difficult issues of great public importance are involved, there are strong reasons to adhere scrupulously to the customary limitations on our discretion. By doing so we promote respect . . . for the Court's adjudicatory process [and] the stability of [our] decisions.") (internal quotation marks and citations omitted).

The Government tries to get around the fact that the vagueness claim was not preserved for review in the Eighth Circuit by asserting that this claim "substantially overlap[s]" with the undue burden analysis. *Carhart* Supp Br. at 9 n.2. But this is not correct. Both the District Court and the Court of Appeals in *Planned Parenthood Federation* considered the vagueness claim to be a distinct and independent basis for invalidating the Act. *See* Pet. App. 89a-96a; 33a-40a. Moreover, there is no doubt that, irrespective of any overlap between these claims, this Court would benefit from the lower courts' detailed factual findings and analysis on the vagueness claim in *Planned Parenthood Federation. Id.* at 34a n.24 (affirming use of expert testimony by a court as part of a vagueness inquiry); 92a-93a.

Even leaving aside the fact that the Eighth Circuit did not decide the vagueness and undue burden claims, the District Court's factual findings on these claims were more detailed in *Planned Parenthood Federation* than in *Carhart*. *Compare Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 1030-37 (D. Neb. 2004) (*Carhart* district court analysis of undue burden claim) and *id.* at 1037-41 (*Carhart* district court analysis of vagueness claim) *with* Pet. App. 80a-85a (*Planned Parenthood Federation* district court analysis of undue burden claim); Pet. App. 92a-96a (*Planned Parenthood Federation* district court

analysis of vagueness claim); Pet. App. at 23a-33a (*Planned Parenthood Federation* Court of Appeals analysis of undue burden claim); and *id.* at 33a-40a (*Planned Parenthood Federation* Court of Appeals analysis of vagueness claim). *See also* Counter-Statement §§ A and B, *supra*. Where, as here, difficult issues of public importance are involved, this Court should resolve the legal issues with the benefit of all of the findings available on those claims—meaning those in both the *Carhart* record and the *Planned Parenthood Federation* record. *Cf. Bankers Life and Cas. Co.*, 486 U.S. at 79-80 ("any ultimate review of the question that we might undertake will gain the benefit of a well-developed record and a reasoned opinion [from the court of appeals] on the merits" particularly given public importance of the issue). As the Court observed in relation to another difficult and contentious issue (there, a proposed limitation on the exclusionary remedy):

> [F]idelity to the [customary limitations on our discretion not to decide claims "not pressed or passed on below"] guarantees that a factual record will be available to us, thereby discouraging the framing of broad rules, seemingly sensible on one set of facts, which may prove ill-considered in other circumstances . . . .

Gates, 462 U.S. at 224 (internal quotation marks and citations omitted).

The Government, attempting to justify its clear preference that this Court restrict its plenary review to the record in *Carhart*, mischaracterizes the undue burden and vagueness claims as "alternative" or "subsidiary" to the "primary" claim, which, in its view, is the health

exception claim.[8] *Carhart* Supp. Br. at 8; *see also id.* (asserting that health exception claim was the "focus" in the lower courts). This is incorrect.[9] The threshold question for this Court is: may Congress constitutionally ban the abortions that the Act defines as "partial-birth abortions"? That question turns on the clarity and scope of the Act. If Congress may not ban the abortions prohibited by the Act—either because the Act does not define the prohibited conduct with sufficient clarity or because the Act sweeps within it virtually all previability second-trimester abortions and therefore imposes an undue burden on the abortion right—the Act must be invalidated. If, instead, this Court determines that it is constitutionally permissible to ban what Congress defines as "partial-birth abortion" in the way Congress has defined that term, then the Court must consider whether such a ban is unconstitutional without an exception for when the banned abortions are safer for the woman (*i.e.*, a "health exception"), and, if so, how to remedy such a deficiency. Because the undue burden and vagueness claims are threshold issues, the Court should conduct a plenary review of *Planned Parenthood Federation* so that it has the benefit of the record and the District Court fact-finding on those claims in a case where they were actually decided by the Court of Appeals.

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[8] It is notable that the Government is so intent on minimizing the significance of the undue burden and vagueness claims that it fails to mention them explicitly in its single Question Presented. As the Ninth Circuit recognized, however, these are independent constitutional grounds for invalidating the Act. Pet. App. 11a-12a.

[9] The undue burden and vagueness claims are certainly not "subsidiary" in the context of the formulation of the proper remedy if Planned Parenthood prevails on any of its claims. *See* Pet. App. 47a-48a; *see also* note 7, *supra*.

Finally, any ruling upholding the Act would require overturning this Court's very recent precedent in *Stenberg*. When this Court considers overturning its own precedent, "whether facts have . . . changed, or come to be seen . . . differently" is one of the "prudential and pragmatic considerations" to which this Court looks. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 854-55 (1992). Thus, having as complete a record as possible on which to make this determination is imperative.

CONCLUSION

This Court should grant the writ, order plenary review in this case on the basis of the Questions Presented herein, and consolidate the argument of this matter with argument in *Carhart.*

Respectfully submitted,

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