No. 05-380

IN THE

Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
Petitioner,
v.

LEROY CARHART, ET AL.
Respondents.

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

---

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

MARK K. MOLLER
THE CATO INSTITUTE
1000 Massachusetts Ave., N.W.
Washington, D.C. 20001
(202) 842-0200

JONATHAN D. HACKER
(*Counsel of Record)*
GARRETT W. WOTKYNS
CHARLES E. BORDEN
ARTHUR W.S. DUFF
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 1

INTRODUCTION 2

BACKGROUND 3

ARGUMENT 5

I. THIS COURT'S PAST PRECEDENTS DO NOT REQUIRE DEFERENCE TO CONGRESSIONAL FACT-FINDING IN THIS CASE. 7

II. THE COURT SHOULD APPLY A "HARD LOOK" REVIEW TO CONGRESSIONAL FINDINGS THAT IMPLICATE FUNDAMENTAL RIGHTS. 11

III. PRINCIPLES OF STRUCTURAL FEDERALISM AND INSTITUTIONAL COMPETENCY REQUIRE HEIGHTENED SCRUTINY OF CONGRESSIONAL FACT-FINDING IN THIS CASE. 15

A. Principles of Structural Federalism Require Heightened Scrutiny of Congressional Fact-Finding When Congress Seeks to Regulate Matters of Traditional State Concern. 16

TABLE OF CONTENTS
(continued)

Page

B. Congress Lacks the Institutional Expertise to Regulate Matters of Medical Practice. 21

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

CASES

Alden v. Maine,
527 U.S. 706 (1999) 20
Astoria Fed. Sav. & Loan Ass'n v. Solimino,
501 U.S. 104 (1991) 21
Barsky v. Bd. of Regents of the Univ. of the State of New York,
347 U.S. 442 (1954) 17
Brown v. Bd. of Education,
347 U.S. 483 (1954) 13
City of Boerne v. Flores,
521 U.S. 507 (1997) ..... *passim*
Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.,
508 U.S. 602 (1993) 10
Dent v. West Virginia,
129 U.S. 114 (1889) 18
Dickinson v. Zurko,
527 U.S. 150 (1999) 10
Edwards v. Aguillard,
482 U.S. 578 (1987) 13
Employment Div., Dep't of Human Res. of Oregon v. Smith,
494 U.S. 872 (1990) 12
Exxon Mobil Corp. v. Allapattah Servs., Inc.,
125 S. Ct. 2611 (2005) 13
Gonzales v. Oregon,
126 S. Ct. 904 (2006) 18
Gregory v. Ashcroft,
501 U.S. 452 (1991) 17
Hamdan v. Rumsfeld,
126 S. Ct. 2749 (2006) 14

TABLE OF AUTHORITIES
(continued)

Page(s)

Hawker v. New York,
170 U.S. 189 (1898) 19
Herrera v. Collins,
506 U.S. 390 (1993) 22
Jacobsen v. Massachusetts,
197 U.S. 11 (1905) 18
Katzenbach v. Morgan,
384 U.S. 641 (1966) 4, 8, 9, 11
Lamprecht v. Fed. Commc'ns Comm'n,
958 F.2d 382 (D.C. Cir. 1992) 12
Linder v. United States,
268 U.S. 5 (1925) 20
Medina v. California,
505 U.S. 437 (1992) 22
Medtronic, Inc. v. Lohr,
518 U.S. 470 (1996) 18
Metropolitan Life Ins. Co. v. Massachusetts,
471 U.S. 724 (1985) 18
New York v. United States,
505 U.S. 144 (1992) 20
Oregon v. Mitchell,
400 U.S. 112 (1970) 9
Planned Parenthood of Se. Pa. v. Casey,
505 U.S. 833 (1992) 6, 11
Rice v. Santa Fe Elevator Corp.,
331 U.S. 218 (1947) 20
Stenberg v. Carhart,
530 U.S. 914 (2000) 3, 4, 6, 22
Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n,
512 U.S. 622 (1994) ..... *passim*
Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n,
520 U.S. 180 (1997) ..... *passim*

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Darby,
312 U.S. 100 (1941) 20
United States v. Gainey,
380 U.S. 63 (1965) 16
United States v. Lopez,
514 U.S. 549 (1995) 5, 17, 21, 22
United States v. Morrison,
529 U.S. 598 (2000) 5
Walters v. Nat'l Ass'n of Radiation Survivors,
473 U.S. 305 (1985) 16

STATUTES AND CONSTITUTIONS

21 U.S.C. § 301 19
42 U.S.C. § 301 19
117 Stat. 1201 ..... 3, 4, 8
U.S. Const. amend. X 20

OTHER AUTHORITIES

Vikram David Amar, *How Much Protection Do Injunctions Against Enforcement of Allegedly Unconstitutional Statutes Provide?*, 31 Fordham Urb. L.J. 657 (2004) 15

TABLE OF AUTHORITIES
(continued)

Page(s)

Emily Bazelon, *Invisible Men*, Slate (Mar. 27, 2006), http://www.slate.com/id/2138750..... 14
Brief for Senators Graham and Kyl as Amicus Curiae in Support of Respondents, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), 2006 WL 467689 14
Lyle Denniston, Analysis: Hamdan and a Few Minutes in the Senate, Scotusblog (Mar. 23, 2006), http://www.scotusblog.com/movabletype/archives/2006/03/analysis_hamdan.html 14
The Federalist No. 51 (J. Madison) (Jacob E. Cooke ed., 1961)..... 17
The Federalist No. 78 (Alexander Hamilton) (Jacob E. Cooke ed. 1961)..... 5
Katherine L. MacPherson, *Devising An Appropriate Standard of Review: An Analysis of Congress's Findings of "Fact" Within the Partial-Birth Abortion Ban Act of 2003*, 2005 Mich. St. L. Rev. 713 (2005)..... 15
Note: Deference To Legislative Fact Determinations In First Amendment Cases After Turner Broadcasting, 111 Harv. L. Rev. 2312 (1998) 10, 11
Edward P. Richards, *The Police Power and the Regulation of Medical Practice: A Historical Review and Guide For Medical Licensing Board Regulation of Physicians in ERISA-Qualified Managed Care Organizations*, 8 Annals Health L. 201 (1999)..... 19

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

The Cato Institute respectfully submits this brief as *amicus curiae* in support of respondents. Letters of consent have been filed with the Clerk.[1]

INTEREST OF AMICUS CURIAE

The Cato Institute ("Cato") was established in 1977 as a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government, especially the idea that the U.S. Constitution establishes a government of delegated, enumerated, and thus limited powers. Toward that end, the Institute and the Center undertake a wide range of publications and programs, including, notably, publication of the *Cato Supreme Court Review*. The instant case raises the question of what constitutional constraints, if any, apply when Congress seeks to subject the private practice of medicine – historically the province of the States – to expansive and intrusive federal regulation, and is thus of central interest to the Cato Institute and its Center for Constitutional Studies.

---

[1] Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part. No person or entity, other than *amicus*, its members, or counsel made a monetary contribution to the preparation and submission of this brief.

INTRODUCTION

The concept of checks and balances is a fundamental part of our constitutional framework. The Framers, having recently fought a war for independence from a nation governed by a monarch and a legislature not bound by a written constitution, were well aware that unchecked governmental power - whether it be legislative or executive in nature - posed a threat to individual liberty and therefore developed a system of safeguards to ensure that the various branches of government did not exceed their lawful authority. Thus, since the Founding, the federal courts generally and this Court in particular have utilized their authority to define and interpret the law to serve as a bulwark against legislative and executive aggrandizement of power.

The effectiveness of this system, however, depends on the ability of the judiciary to guarantee that the coordinate branches of government respect judicial pronouncements. If Congress can essentially legislate around this Court's constitutional rulings, then the judicial "check" on legislative authority becomes a check in name only. Yet that is precisely what Congress has tried to do in this case. In enacting the Partial-Birth Abortion Ban Act of 2003, Congress attempted to circumvent a recent constitutional holding of this Court by asserting the authority to make legislative findings entitled to mandatory deference. Simply put, while not challenging the power of this Court to define the law, Congress in effect asserted the power to define the factual reality in which the law operates.

It is essential that this Court reject Congress's effort to carve such an equilibrium-destroying loophole in the constitutional landscape. Although there are some instances in which some deference to Congressional fact-finding may be warranted, no such deference is warranted here. Congress has no inherent expertise in discerning facts relating to the practice of medicine. Nor does it possess institutional

competence of any sort in this area; the regulation of medical practice has historically fallen in the domain of the states. As such, if this Court grants Congress the deference that it claims, then, as a practical matter, Congress will be authorized to bypass indirectly many of the restrictions that this Court has placed on legislative power. And if Congress is permitted to achieve through the back door what is cannot achieve through the front, then this Court's jurisprudence in many areas may be potentially in jeopardy. Accordingly, this Court should affirm the judgment of the court below.

BACKGROUND

Six years ago, in *Stenberg v. Carhart* 530 U.S. 914 (2000), this Court struck down Nebraska's partial-birth abortion ban because, *inter alia*, the ban lacked a health exception. 530 U.S. at 930. Relying on factual findings made by the trial court in that case, this Court found that there were some instances in which the abortion procedures banned by the Nebraska statute represented the safest means of performing an abortion. *Id.* at 936-37. Given that context, this Court concluded that a partial-birth abortion ban that lacked a health exception constituted an undue burden on women's liberty interests and therefore was unconstitutional. *Id.* at 937-38.

Three years later, Congress enacted the statute at issue here – the Partial-Birth Abortion Ban Act of 2003. 117 Stat. 1201 *et seq.* (2003). The federal ban essentially mirrored the Nebraska ban at issue in *Stenberg* in all relevant respects and it too lacked a health exception. Congress, however, attempted to circumvent this Court's holding in *Stenberg* by altering the factual predicate on which *Stenberg* was based. In connection with the federal statute, Congress adduced "legislative findings" ostensibly indicating that the abortion procedures covered by the federal statute are *never* the safest means for performing an abortion. *Id.* at 1202 ("[S]ubstantial evidence presented at the Stenberg trial and

overwhelming evidence presented and compiled at extensive congressional hearings . . . demonstrates that a partial-birth abortion is never necessary to preserve the health of a woman, poses significant health risks to a woman upon whom the procedure is performed and is outside the standard of medical care."). Thus, according to Congress, a ban on those procedures could in no event impose a constitutionally impermissible undue burden on a woman's right to choose, since a woman seeking an abortion would always have a safer option to which she could turn. *Id.* at 1204-06.

Furthermore, in enacting the federal partial-birth abortion ban, Congress sought to compel this Court to defer to its legislative findings rather than follow the factual findings made in *Stenberg* or otherwise exercise independent judgment. Congress specifically noted in the bill that it was not bound by the factual findings made by the federal district court in *Stenberg* and included in the legislation an extensive discussion of this Court's decisions in *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622 (1994) ("*Turner I*"); and *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 520 U.S. 180 (1997) ("*Turner II*"). *See* 117 Stat. 1202-03. According to Congress, these cases compel this Court to accept Congress's factual findings in adjudicating the constitutionality of the federal statute. *Id.* at 1202 ("[T]he United States Congress is entitled to reach its own factual findings – findings that the Supreme Court accords great deference – and to enact legislation based upon these findings so long as it seeks to pursue a legitimate interest that is within the scope of the Constitution, and draws reasonable inferences based upon substantial evidence.").

ARGUMENT

A core role of the judiciary in the American legal system is to protect citizens' fundamental liberties from encroachment by legislative bodies. *See* The Federalist No. 78, at 525 (Alexander Hamilton) (Jacob E. Cooke ed. 1961) ("[T]he courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority."). From the Founding, it has been understood that legislatures sometimes will attempt to promulgate laws that infringe upon basic liberties in the pursuit of short-term policy objectives. *Id.* Accordingly, the Constitution includes multiple bulwarks designed to restrain legislative – and in particular, Congressional – authority so as to preserve individual freedom. *See United States v. Lopez*, 514 U.S. 549, 575-76 (1995) (Kennedy, J., concurring).

For the judiciary to fulfill this role, however, it must have certain powers at its disposal. Among the most important of them is the power to expound on what the Constitution means. *See* The Federalist No. 78, at 525 (Alexander Hamilton) (Jacob E. Cooke ed. 1961) ("The interpretation of the laws is the proper and peculiar province of the courts."). As this Court has recognized, if Congress is permitted to define when it may invoke its Article I power, *see United States v. Morrison*, 529 U.S. 598 (2000), or to define the scope of Constitutional rights, *see City of Boerne v. Flores*, 521 U.S. 507 (1997), then it will be very difficult for the judiciary to keep legislative power within constitutionally prescribed limits. Simply put, if Congress has the power to define the scope of its constitutional power, then the Constitution effectively imposes no limits on the matters upon which Congress may legislate. *City of Boerne*, 521 U.S. at 529 ("If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be superior paramount law,

unchangeable by ordinary means. . . . Under this approach, it is difficult to conceive of a principle that would limit congressional power." (quotations omitted)).

This proceeding implicates a necessary corollary to that fundamental principle. Here, Congress has not directly attempted to redefine constitutional rights, but has instead attempted to redefine the factual context in which those rights operate. But this is nothing more than the other side of the same coin. Congress may not have directly challenged the scope of the liberty interest defined in *Stenberg* and *Planned Parenthood of Southeastern Pennsylvania. v. Casey*, 505 U.S. 833 (1992), but by making legislative findings that facts relied on in *Stenberg* are wrong and by asserting that this Court must defer to those legislative findings, it is essentially trying to use its legislative power to render *Stenberg* a dead letter. This case is thus about more than just *Stenberg*: if this Court ratifies Congress's effort to reverse a constitutional decision through legislative findings, then numerous other decisions of the Court that Congress disfavors surely stand in jeopardy. Even more important, the judiciary's basic authority to restrain legislative power and protect essential liberty will be severely compromised, for Congress will be empowered to do indirectly what, based on *City of Boerne*, it cannot do directly. Accordingly, if the judiciary is to fulfill its constitutionally-mandated function and serve as the final interpreter of the Constitution's meaning, then it must have the power to prevent such end-runs around this Court's constitutional holdings. And that means that the judiciary must be able to scrutinize legislative factual findings.

This is not to suggest that this Court should never defer to congressional findings. There are occasions where, as a result of its institutional role or because it possesses particular expertise, according *some* deference to congressional findings might be warranted. But extensive

deference to congressional findings of fact – as opposed to congressional policy judgments – is never warranted. And deference is particularly unwarranted when fundamental rights are at stake, since excessive deference could easily induce a legislative violation of constitutionally-protected liberties.

Furthermore, the legislative findings at issue in this case are particularly poor candidates for deference. The statute that Congress seeks to justify with its findings clearly affects constitutionally-protected liberty interests. And Congress as an institution does not have any specialized knowledge or expertise in regulating medical practice. In fact, the regulation of medical practice has been historically left to the States, and therefore if deference is to be accorded to any entity here, it should be the States, who at least have experience in regulating the practice of medicine.

In sum, the Judicial Branch was charged by the Framers with the crucial task of preventing legislative over-reaching – a function *only* the Judicial Branch can perform. They realized that if the individual rights and limitations enshrined in the Constitution and Bill of Rights were to have meaning, a majoritarian legislative institution such as Congress cannot be expected simply to police itself. In this instance, Congress has attempted to circumvent limits on its power by using a back-door method to enact legislation that this Court has already concluded infringes on fundamental rights. Such gamesmanship cannot be tolerated if the constitutional design is to be preserved. Accordingly, Congress's – and petitioner's – claims of deference should be rejected.

I. THIS COURT'S PAST PRECEDENTS DO NOT REQUIRE DEFERENCE TO CONGRESSIONAL FACT-FINDING IN THIS CASE.

In enacting the partial-birth abortion ban, Congress expressly claimed that deference to its legislative factual findings is warranted under this Court's holdings in

Katzenbach v. Morgan, *Turner I*, and *Turner II*. Congress asserted that each of these cases affirm the proposition that the Court should accord "great deference" to Congress's factual findings and that Congress may legislate on the basis of its factual findings so long as it "draws reasonable inferences based upon substantial evidence." 117 Stat. 1202.

Those three cases, however, stand for nothing of the sort. None of those cases involved deference to Congress's factual *findings*; rather, all three are cases involving deference to congressional *judgment*s. Each case involved a statute – the Voting Rights Act in the case of *Katzenbach v. Morgan* and the Cable Television Consumer Protection and Competition Act of 1992 in *Turner I* and *Turner II* – that was predicated on certain congressional conclusions regarding what would occur if Congress intervened in particular policy areas. The relevant question in each case was whether Congress's conclusions – about the effect of English-only ballots on voter participation or the future of broadcast television – were reasonable based on the available evidence. What this Court concluded was that, in evaluating the reasonableness of a congressional judgment, this Court should exercise significant deference – particularly with respect to matters such as complex regulatory structures, concerning which Congress as an institution has specific expertise. *Turner II*, 520 U.S. at 224 ("*Judgments* about how competing economic interests are to be reconciled in the complex and fast-changing field of television are for Congress to make. . . . We cannot displace Congress' *judgment* respecting content-neutral regulations with our own, so long as its policy is grounded on reasonable factual findings supported by evidence that is substantial for a legislative determination." (emphasis added)); *Turner I*, 512 U.S. at 665 ("We agree that courts must accord substantial deference to the *predictive judgments* of Congress. Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on

deductions and inferences for which complete empirical support may be unavailable." (emphasis added) (citation omitted)); *Morgan*, 384 U.S. at 656 ("Here again, it is enough that we perceive a basis upon which Congress *might predicate a judgment* that the application of New York's English literacy requirement to deny the right to vote to a person with a sixth grade education in Puerto Rican schools in which the language of instruction was other than English constituted an invidious discrimination in violation of the Equal Protection Clause." (emphasis added)).

But deferring to congressional conclusions drawn from factual findings is not the same as deferring to factual findings themselves. Unlike conclusions or judgments, factual findings are essentially objective matters. The facts "are what they are" and therefore – even allowing for disputes and ambiguity – there is very little for Congress to analyze or decide in "finding" the facts. Congress can determine what facts are significant to policy-making, but it cannot alter what facts exist. At best, it can take sides in a situation where there is a factual dispute.

Even in that scenario, however, there is little reason for this Court to defer to Congress's positional choice in a factual debate unless Congress has some sort of expertise in the factual area at issue. Deference is accorded to legislative judgments when the legislature is better-equipped or better-positioned than a court to arrive at the correct result. *See City of Boerne*, 521 U.S. at 531 ("Judicial deference in most cases, is based not on the state of the legislative record Congress compiles but 'on due regard for the decision of the body constitutionally appointed to decide.'" (quoting *Oregon v. Mitchell*, 400 U.S. 112, 207 (1970) (Harlan, J., concurring)); *Turner II*, 520 U.S. at 196 ("Though different in degree, the deference owed to Congress is in one respect akin to deference to administrative agencies because of their expertise."). Thus, this Court defers to the factual findings

of trial courts, since the trial courts actually have evidence and witness testimony presented before them and are better positioned to make credibility determinations. *See Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 623 (1993). Similarly, this Court defers in certain circumstances to the determinations of administrative agencies, because those agencies have specialized knowledge in particular fields. *See Dickinson v. Zurko*, 527 U.S. 150, 160-61 (1999). But Congress is not well-situated to determine which side is correct in a factual dispute, unless the dispute is occurring in an area of particular institutional familiarity. Although Congress can more easily engage in certain types of fact-finding than courts, Congress's method of fact-finding – reviewing oral and written submissions from third parties – is no different from the method that a court would employ in performing the same task.[2]

---

[2] This Court's statements in *Turner I* and *Turner II* are not to the contrary. In those cases, this Court observed that "[a]s an institution, moreover, Congress is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon an issue." *Turner I*, 512 U.S. at 665 (quotation omitted); *Turner II*, 520 U.S. at 195 (quoting *Turner I*). That observation, however, merely goes to Congress's capacity to gather information and make policy determinations based on the evidence collected, not Congress's ability to resolve disputed questions of fact as a general matter. Congress may have greater competence to do so than the judiciary in certain areas where Congress possesses particular expertise. But there is no reason to believe that is true in all circumstances. Indeed, if anything, the opposite may be true – "[r]ecent public choice scholarship has demonstrated the susceptibility of legislatures to interest group influence, which weakens the ability of political branches to protect individual rights and to accomplish accurate fact-finding." Note, *Deference To Legislative Fact Determinations In First Amendment Cases After Turner Broadcasting*, 111 Harv. L. Rev. 2312, 2322 (1998). Often there is nothing systematic or comprehensive about Congress's collection of "relevant facts" concerning legislation. Instead, the record is made up of "information from a variety of formal and informal sources – including lobbyists supporting or opposing [the]

Accordingly, nothing in *Katzenbach v. Morgan*, *Turner I*, or *Turner II* requires this Court to defer to Congress's factual findings regarding partial-birth abortion and its effect on women's health. In fact, the only circumstance in which this Court should give legislative findings any deference is when Congress is inherently better-suited than this Court to determine what are – and what are not – the material historical facts. But as set forth below, that is simply not the case in the context of private medical practice. Congress as an institution has no particular expertise in medicine and has virtually no experience in regulating medical practice.

II. THE COURT SHOULD APPLY A "HARD LOOK" REVIEW TO CONGRESSIONAL FINDINGS THAT IMPLICATE FUNDAMENTAL RIGHTS.

The truth is that Congress has it backwards. Far from deferring to Congress's factual findings regarding partial-birth abortion and other abortion-related procedures, this Court should scrutinize the legislative findings at issue here because they implicate fundamental liberty interests. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877-79 (1992). If courts must take legislative findings of fact concerning fundamental rights at face value, there is a serious risk that the Court and the judiciary generally will not be able to adequately protect such basic constitutional interests from legislative encroachment. As Justice Thomas has observed: "We know of no support . . . for the proposition that if the constitutionality of a statute depends in part on the existence of certain facts, a court may not review a legislature's judgment that the facts exist. If a legislature could make a statute constitutional simply by 'finding' that black is white or freedom, slavery, judicial review would be

---

legislation," and the various fact-finding hearings held by Congressional committees usually reflect little more than coordinated exchanges among witnesses and the bill's supporters. *Id.*

an elaborate farce." *Lamprecht v. Fed. Commc'ns Comm'n*, 958 F.2d 382, 392 n.2 (D.C. Cir. 1992) (per Thomas, Circuit Justice)

There can be little doubt about Congress's ability – and willingness – to legislate around this Court's judgments by redefining the "facts" deemed relevant to the disposition of a constitutional issue. For example, consider what would happen to this Court's decision in *City of Boerne v. Flores* if this Court were required to broadly defer to congressional findings of fact. In *City of Boerne*, Congress attempted to reverse this Court's decision in *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), regarding the scope of protection afforded citizens by the First Amendment's Free Exercise Clause. 521 U.S. at 512-13. In *Smith*, this Court had concluded that the Free Exercise Clause provided no protection from neutral rules of general applicability; in response, Congress passed the Religious Freedom Restoration Act ("RFRA"), a statute which purported to abrogate this Court's holding in *Smith* and required states to follow the pre-*Smith* rule. *Id.* at 515-16. This Court, however, noted that Congress's power under Section 5 of the Fourteenth Amendment – the authority on which RFRA's attempt to bind the states was predicated – was "remedial" in nature and afforded Congress no "power to determine what constitutes a constitutional violation." *Id.* at 519. Accordingly, this Court held that binding the states via RFRA was beyond Congress's authority, since there was no evidence that the states were violating citizens' Free Exercise rights as defined by *Smith*. *Id.* at 534-36.

But if this Court were required to accept congressional factual findings more or less as given, then Congress could easily circumvent *City of Boerne*. Congress would merely need to make findings that the state laws which it was attempting to reach with RFRA not only impinge upon Free Exercise rights as defined pre-*Smith*, but also impinge upon

Free Exercise rights as defined post-*Smith*. Whether this was in fact the case would be largely irrelevant; under the standard suggested by Congress in the preamble to the federal partial-birth abortion ban, as long as this finding was within reason, it would be entitled to deference. Thus, while *City of Boerne* would formally remain undisturbed, its practical effect would be eliminated.

Nor is *City of Boerne* the only judgment of this Court that would be jeopardized by such a standard. Another example might be *Casey* – Congress could circumvent this Court's decision in that case by simply enacting a statute which banned all post-viability abortions and which defined viability as occurring two seconds after conception. Congress might even be able to render *Brown v. Board of Education*, 347 U.S. 483 (1954), a dead letter by enacting a statute including factual findings that segregated facilities are equal and that racial segregation does not place African-Americans at societal disadvantage in any way.

Furthermore, it is highly likely that Congress would exploit this power if this Court accords it to Congress. As both RFRA and the Partial-Birth Abortion Ban Act illustrate, Congress already attempts to legislatively reverse decisions of this Court with which it disagrees. If this Court defers as a matter of course to factual findings by Congress, Congress will simply use that authority to accomplish indirectly what this Court precludes it from accomplishing directly. Legislative bodies have demonstrated in the past a willingness to fabricate legislative history to avoid constitutional prohibitions, *see Edwards v. Aguillard*, 482 U.S. 578 (1987), and there is general agreement that "legislative history can be manipulated," *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2630 (2005) (Stevens, J., dissenting); *see also id.* at 2626 (noting that legislative history can be unreliable because both members of Congress, as well as "unelected staffers and lobbyists,"

have the "power and incentive to attempt strategic manipulations of legislative history").

Indeed, this point is amply illustrated by the actions of certain members of Congress in the context of the Detainee Treatment Act ("DTA"), enacted late last year. As this Court is well aware, subsequent to the floor debate on the DTA, two Senators inserted a fabricated colloquy into the congressional record which was scripted to appear as though it occurred during the actual floor debate; in fact, the two Senators even included a non-existent interruption by a fellow Senator. *See* Lyle Denniston, *Analysis: Hamdan and a Few Minutes in the Senate*, Scotusblog (Mar. 23, 2006), http://www.scotusblog.com/movabletype/archives/2006/03/analysis_hamdan.html; Emily Bazelon, *Invisible Men*, Slate (Mar. 27, 2006), http://www.slate.com/id/2138750. This colloquy was inserted with the purpose of influencing this Court's determination of whether the DTA stripped this Court of jurisdiction to adjudicate *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), then pending in this Court, and those two Senators subsequently filed an *amicus* brief with this Court in the *Hamdan* proceeding, in which they heavily relied on this post-debate colloquy in urging this Court to adopt their favored interpretation of the DTA. Brief for Senators Graham and Kyl as Amicus Curiae in Support of Respondents, *Hamdan*, 126 S. Ct. 2749 (2006), 2006 WL 467689, at *14, 16-17. Although this Court ultimately rejected the two Senators' efforts, *see Hamdan*, 126 S. Ct. at 2766 n.10, the entire episode demonstrates the lengths that legislators can go to achieve their strategic goals. For that reason, according deference to legislative findings would all but ensure congressional manipulation of the relevant facts.

In short, since the Founding, one of the core roles of the judicial branch generally and this Court in particular has been to protect the American people from congressional attempts to abridge their fundamental liberties. The ability

of the judiciary to fulfill this constitutionally-mandated role will be compromised if Congress is permitted to define away prospective constitutional violations. Accordingly, just as heightened scrutiny applies to statutes that implicate fundamental rights, so should heightened scrutiny apply to the legislative findings on which such statutes are based. *See* Katherine L. MacPherson, *Devising An Appropriate Standard of Review: An Analysis of Congress's Findings of "Fact" Within the Partial-Birth Abortion Ban Act of 2003*, 2005 Mich. St. L. Rev. 713, 763 (2005) (proposing heightened standard of review for legislative findings of fact in legislation that affected constitutional rights); Vikram David Amar, *How Much Protection Do Injunctions Against Enforcement of Allegedly Unconstitutional Statutes Provide?*, 31 Fordham Urb. L.J. 657, 660 (2004) ("[T]he Court's level of deference – even in factual matters – ought to correspond more generally to the 'level of scrutiny' the Court applies in a given setting. Where 'intermediate' or 'strict' scrutiny has been adopted by the Court because of skepticism of legislative power in a given area, that skepticism ought to apply to legislative factual determinations as well as legal and policy judgments."). Any lesser degree of scrutiny has the potential to place fundamental rights in jeopardy.

III. PRINCIPLES OF STRUCTURAL FEDERALISM AND INSTITUTIONAL COMPETENCY REQUIRE HEIGHTENED SCRUTINY OF CONGRESSIONAL FACT-FINDING IN THIS CASE.

As noted above, judicial deference to legislative fact-finding is informed by basic principles of constitutional structuralism and institutional expertise. Legislatures are sometimes better situated than courts to make complex factual determinations when crafting regulatory regimes or projecting the likely effects of national policies, and in such

circumstances deference to Congressional judgment is wholly appropriate. *See Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985) ("Congress is an institution better equipped to amass and evaluate the vast amounts of data."); *Turner II,* 520 U.S. at 196 (explaining that Congress enjoys a particular institutional advantage when developing factual records related to "regulatory schemes of inherent complexity and assessments about the likely interaction of industries undergoing rapid economic and technological change"); *United States v. Gainey*, 380 U.S. 63, 67 (1965) ("[I]n matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it."). Institutional considerations, however, can cut both ways. While considerations of structural integrity and institutional expertise may counsel deferential judicial scrutiny as to the policy judgments underlying matters of unique or traditional federal concern, they require the opposite – that is *heightened* judicial scrutiny – when congressional activity encroaches on matters traditionally left to the states. And it has long been recognized that the regulation of medical practices is fundamentally a matter of state concern. Accordingly, heightened scrutiny of Congress's factual findings regarding partial-birth abortion is appropriate for that reason as well.

A. Principles of Structural Federalism Require Heightened Scrutiny of Congressional Fact-Finding When Congress Seeks to Regulate Matters of Traditional State Concern.

Principles of structural federalism require close scrutiny of congressional fact-finding when the federal government seeks to regulate in an area of traditional state concern. The Framers made clear that the creation of dual spheres of government – with the state and federal governments

"controll[ing] each other," *see* The Federalist No. 51, at 351 (J. Madison) (Jacob E. Cooke ed., 1961) – was essential to preserving liberty:

> Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.
>
> . . . .
>
> In the tension between federal and state power lies the promise of liberty.

Gregory v. Ashcroft, 501 U.S. 452, 458-59 (1991). This structural division of authority informs the standard of deference owed to legislative findings of fact when Congress seeks to regulate an area in which states historically have served as the primary regulator. In that case, "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for [the Court] to admit inability to intervene when one or the other level of Government has tipped the scales too far." *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring).

Congress's attempt here to regulate the specific methods by which physicians perform partial-birth abortions is a bold incursion into regulatory terrain traditionally and consistently regulated by the States. From the very first days of the republic, States have regulated medical practices as part of the powers reserved to them in the Constitution and its early amendments. *Barsky v. Bd. of Regents of the Univ. of the State of New York*, 347 U.S. 442, 449 (1954) ("It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state's police power.") (upholding state authority to regulate medical licensing standards). Over the past hundred years this Court

consistently has recognized that the regulation of medical practices is a vital component of State police powers:

> Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens. Because these are "primarily, and historically, . . . matter[s] of local concern," the "States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons."

Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996) (omission in original) (citation omitted) (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985)); *see also Dent v. West Virginia*, 129 U.S. 114, 122 (1889) ("The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud."); *Jacobsen v. Massachusetts*, 197 U.S. 11, 25 (1905) ("According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety."). Consistent with the broad authority of states to regulate in this arena, the Court itself recognized just last term that medical practices are "traditionally supervised by the States' police powers." *Gonzales v. Oregon*, 126 S. Ct. 904, 925 (2006).

Medical practice is unambiguously a "creature of state regulation" because it is firmly grounded in the "nexus of three traditional areas of police power regulation":

> First, it is a profession like law, and as such, was subject to state regulation. Second, medical practitioners posed peculiar risks to the public heath and safety that other professions such as law did not

> pose. Third, and most important historically, physicians have been closely involved in the state public health regulations as they applied to epidemic disease and sanitation.

Edward P. Richards, *The Police Power and the Regulation of Medical Practice: A Historical Review and Guide For Medical Licensing Board Regulation of Physicians in ERISA-Qualified Managed Care Organizations*, 8 Annals Health L. 201 202 (1999). Physician licensing and qualification standards in particular have been recognized as virtually the sole province of state regulation. As the Court explained in 1898:

> No precise limits have been placed upon the police power of a State, and yet it is clear that legislation which simply defines the qualifications of one who attempts to practice medicine is a proper exercise of that power. Care for the public health is something confessedly belonging to the domain of that power.

Hawker v. New York, 170 U.S. 189, 193-194 (1898).

That Congress has from time to time endeavored to regulate certain health and public welfare matters does not displace the states as the primary regulator of medical practice. Such federal regulation in this arena uniformly has involved the intersection of health care issues and commerce – and not the type of core medical practices and procedures at issue here. For example, while the Federal Food, Drug & Cosmetic Act, 21 U.S.C. § 301, *et seq*. and the Social Security Act of 1935, 42 U.S.C. § 301 *et seq*., have expanded federal regulation related to public health issues, these initiatives do not infringe on state authority to regulate the physician-patient relationship or the delivery of medical care. By contrast, the categorical ban on a specific medical procedure established by the Partial-Birth Abortion Ban Act constitutes a direct intervention in the physician-patient relationship, which is a matter that this Court repeatedly has

recognized properly is subject to the States' broad police powers and therefore beyond federal regulatory reach. *See Linder v. United States*, 268 U.S. 5, 18 (1925) (concluding that "[i]ncidental regulation of [medical] practice by Congress through a taxing act [could] not extend to matters plainly inappropriate and unnecessary to reasonable enforcement of [the] measure" such as a physician's course of treatment).

Congress's attempt to regulate abortion procedures (by substituting its own "factual findings" for professional medical judgments about a woman's health) thus happens in the shadow of a long tradition of nearly exclusive state regulation in this arena. And thus properly viewed, it is an impermissible federal encroachment on powers reserved to the States.[3] "[W]e start with the assumption that the historic police powers of the States" are not displaced by a federal statute "unless that was the clear and manifest purpose of Congress.'" *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947). Nothing in the Partial-Birth Abortion Ban Act

[3] The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States." U.S. Const. amend. X. Because medical practices traditionally have been regulated by the States, Tenth Amendment principles also counsel close scrutiny of Congressional fact-finding in this case. *See Alden v. Maine*, 527 U.S. 706, 713-14 (1999) ("Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of the national power."). Although Congress has regulated health care (as opposed to distinct medical procedures) in discrete areas that implicate interstate commerce, the States themselves have never ceded their historical role as the regulators of medical practices. As "the Tenth Amendment 'states but a truism that all is retained which has not been surrendered,'" *New York v. United States*, 505 U.S. 144, 156 (1992) (quoting *United States v. Darby*, 312 U.S. 100, 124 (1941)), it follows that regulation of medical practices falls within the province of the States.

indicates any intent by Congress to displace States' power to regulate in this area. "Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory." *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring). Those fundamental principles of structural federalism require heightened scrutiny of the legislative fact-findings relied on here to justify federal encroachment in an area of traditional State concern. Any other approach would effectively permit Congress to alter the superstructure of our constitutional system by cloaking acts of legislative aggrandizement as "factual findings" shielded from judicial review.

B. Congress Lacks the Institutional Expertise to Regulate Matters of Medical Practice.

While Congress possesses particular institutional competency for making certain factual determinations, *see* Section III, *supra*, Congress's investigative expertise is neither complete nor uniform, and the level of deference accorded to its fact-finding must vary accordingly. *See Turner II*, 520 U.S. at 196 ("Though different in degree, the deference to Congress is in one respect akin to deference owed to administrative agencies because of their expertise."). Amicus respectfully submits that this distinction directly affects the level of deference properly due Congress's factual findings in this case. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 113 (1991) ("[S]ince there is no reason to believe federal enforcement agencies are any less competent than their state counterparts [in enforcing the provisions of the Age Discrimination in Employment Act of 1967], it would be anomalous to afford more deference to one than the other.").

Here, an established history of state regulation – and the

concomitant and nearly complete absence of federal regulation – endows state legislatures with a superior pedigree for making factual determinations related to the regulation of medical practice. The Court previously has found that established patterns of state regulation mandate heightened deference to certain state legislative determinations. *See*, *e.g.*, *Herrera v. Collins*, 506 U.S. 390, 407 (1993) ("'Because the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition,' we have 'exercis[ed] substantial deference to legislative judgments in this area.'" (quoting *Medina v. California*, 505 U.S. 437, 445-446 (1992) (alteration in original)). In short, Congress's relative lack of institutional expertise here reinforces the justification for applying a heightened standard of scrutiny to the instant Congressional findings.[4]

* * * * *

"[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for [the Court] to admit inability to intervene when one or the other level of Government has tipped the scales too far." *Lopez*, 514 U.S. at 578 (Kennedy, J., concurring). In this case, where Congress has legislated inappropriately in an area of core State concern, *amicus* respectfully submits

[4]Applying a heightened standard of review to Congressional findings on the Partial-Birth Abortion Ban Act is consistent with, and logically follows from, this Court's decision in *Stenberg v. Carhart*, 530 U.S. 914, 930 (2000). In that case, the Court determined that the Nebraska legislature failed to demonstrate that the state partial-birth abortion ban act did not require a health exception. But the conclusion that the Nebraska legislature failed to make sufficient findings does not require greater deference to the same findings by Congress on the same issue. If anything, the strong presumption of state regulation in the area of medical practices and the relative expertise of the State's in this area subjects Congress to an even higher burden – one that has not been satisfied here.

that the Court should intervene to protect the principle of dual sovereignty embodied in the Tenth Amendment, by, at a minimum, subjecting Congress's factual findings to heightened scrutiny.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

MARK K. MOLLER
THE CATO INSTITUTE
1000 Massachusetts Ave., N.W.
Washington, D.C. 20001
(202) 842-0200

JONATHAN D. HACKER
(*Counsel of Record)*
GARRETT W. WOTKYNS
CHARLES E. BORDEN
ARTHUR W.S. DUFF
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Counsel for Amicus Curiae