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GONZALES V. CARHART: NO LIMITS TO WHAT CONGRESS MAY NOW "FIND"

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In April 2007, the Supreme Court of the United States in *Gonzales v. Carhart* reversed the Court of Appeals for the Eighth and Ninth Circuits and affirmed the constitutionality of the Partial Birth Abortion Ban Act of 2003 ("the Act") passed by President George W. Bush.[1] The Act bans a procedure, commonly known as partial birth abortion (also known as "D&X" or "D&E").[2] During a partial birth abortion, the doctor delivers the fetus until either the head or the entire fetal trunk except for the head is outside the mother's body, at which time the physician punctures the fetus' skull and removes the brains, killing the fetus.[3] In designing the Act, Congress relied on scientific findings that suggest the procedure is never medically necessary to preserve the health of the mother and, in fact, poses serious long-term risks to her well-being.[4] Therefore, Congress concluded that a health exception to the partial birth abortion prohibition is not required.[5] The Court's unquestioning deference to congressional findings is contrary to Court precedent, which indicates that Congress is afforded less deference when it seeks to overturn the Supreme Court's interpretation of the Constitution or circumvent a constitutional rule.[6] However, even under the most deferential standard, which requires that Congress draw reasonable inferences based on substantial evidence,[7] the *Gonzales* Court failed to recognize that, according to the Congressional Record itself, the medical consensus Congress used to justify the lack of a health exception simply does not exist.[8] As a result, the Court allowed Congress to create a law that ignores Court precedent and infringes on

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1. 127 S. Ct. 1610, 1639 (2007).

2. Partial Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531(b)(1) (Supp. III 2003).

3. *Id.*

4. Partial Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2, 117 Stat. 1201, 1204–06 (2003).

5. *Id.* at 1203.

6. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

7. Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180, 195 (1997); Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 666 (1994).

8. Planned Parenthood Fed'n of Am. v. Ashcroft, 320 F. Supp. 2d 957, 1026 (N.D. Cal. 2004).

the power of the judicial branch as established in *Marbury v. Madison*.[9]

I. THE CASE

On November 5, 2003, President George W. Bush signed the Partial Birth Abortion Ban Act into law.[10] The Act prohibits a physician from "deliberately and intentionally" delivering a fetus until either the entire head or, in the case of a breach position, the fetal trunk past the navel is outside the mother's body and then killing the fetus before delivering it fully.[11] In two separate actions against the United States Attorney General, physicians who performed this procedure, commonly known as "partial birth abortion," sought to enjoin enforcement of the Act.[12] In both cases, the United States district courts issued permanent injunctions, which the Courts of Appeals for the Eighth and Ninth Circuits affirmed.[13]

In *Planned Parenthood v. Ashcroft*, plaintiff physicians sought an injunction against enforcement of the Act on the grounds that: (1) the Act is overbroad and may be construed to prohibit pre-viability abortion procedures, dilation and extraction ("D&E") and induction, creating an undue burden on a woman's choice to have a pre-viability abortion;[14] (2) the Act is void for vagueness, providing insufficient notice to physicians of prohibited conduct by failing to define "partial birth abortion" in medical terminology;[15] and (3) the Act is unconstitutional because it fails to provide an exception for preservation of the health of the mother.[16] The district court agreed with the plaintiffs and found the Act unconstitutional on all three grounds.[17]

Specifically, with respect to the absence of a health exception, the court found that the Supreme Court in *Stenberg v. Carhart* established the health exception requirement as a "constitutional

9. 5 U.S. 137 (1803).

10. Partial Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (Supp. III 2003).

11. *Id.* § 1521(b)(1).

12. *Planned Parenthood*, 320 F. Supp. 2d at 960; Carhart v. Ashcroft, 331 F. Supp. 2d 805, 814 (D. Neb. 2004).

13. Planned Parenthood Fed'n of Am. v. Gonzales, 435 F.3d 1163, 1191 (9th Cir. 2006); Carhart v. Gonzales, 413 F.3d 791, 804 (8th Cir. 2005).

14. *Planned Parenthood*, 320 F. Supp. 2d at 968.

15. *Id.* at 975.

16. *Id.* at 979.

17. *Id.* at 1034–35.

fact."[18] When the legislature attempts to supersede a constitutional fact, its factual findings are not accorded the same deference as other legislative actions, such as economic regulations.[19] Therefore, the *Stenberg* Court expanded its analysis beyond the facts of that particular case to the state of medical studies and opinions that existed at the time, which included part of the Congressional Record for the Act.[20] However, even applying a "substantial deference" standard, the district court found that "Congress ha[d] not drawn reasonable inferences based on substantial evidence" and therefore needed to provide an exception for the health of the mother in the Act.[21] The Court of Appeals for the Ninth Circuit affirmed, finding that the Congressional Record itself clearly denies the existence of the medical consensus required under *Stenberg* to omit a health exception.[22]

Similarly, in *Carhart v. Ashcroft*, four doctors challenged the constitutionality of the Act on the grounds that, *inter alia*, it lacked an exception for the health of the mother.[23] The District Court issued a permanent injunction against enforcement of the Act, agreeing that a health exception is required to pass constitutional muster.[24] Even though the court recognized that congressional findings are afforded considerably less deference where, as here, Congress seeks to alter a judicial decision, the court held that Congress's factual findings should be given binding deference if the findings are reasonable and supported by substantial evidence.[25] According to the court, however, Congress's conclusion that there is a medical consensus that the partial birth abortion procedure is never necessary to preserve the health of the mother not only is unsupported by the trial record, but also is not supported by the Congressional Record.[26] Therefore, Congress's findings are not entitled to binding deference and an exception to preserve the health of the mother is still necessary.[27]

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18. *Id.* at 1012.

19. *Id.* at 1013; *see also* Dickerson v. United States, 530 U.S. 428, 437 (2000); United States v. Morrison, 529 U.S. 598, 614 (2000); City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

20. *Planned Parenthood*, 320 F. Supp. 2d at 1013.

21. *Id.* at 1013–14.

22. Planned Parenthood Fed'n of Am. v. Gonzales, 435 F.3d 1163, 1174 (9th Cir. 2006).

23. Carhart v. Ashcroft, 331 F. Supp. 2d 805, 814 (D. Neb. 2004).

24. *Id.* at 809.

25. *Id.* at 1007.

26. Planned Parenthood Fed'n of Am. v. Ashcroft, 320 F. Supp. 2d 957, 1026, 1115 (N.D. Cal. 2004).

27. *See id.* at 1048; *Carhart*, 331 F. Supp. 2d at 1007.

The Court of Appeals for the Eighth Circuit affirmed the district court's decision.[28] Like the district court in *Planned Parenthood v. Ashcroft*, the court viewed the health exception as a "per se constitutional rule" and when a consensus does not exist, the law must err on the side of protecting the woman.[29] Furthermore, the court noted that whether a medical consensus exists is a question of law and not a question of fact, requiring *de novo* review.[30] When an appellate court conducts a *de novo* review, it determines whether the lower court's conclusion (in this case, Congress's conclusion) is supported by the evidence on record.[31] Therefore, no deference at all is given to those conclusions in a particular case.[32] If "substantial medical authority" does not support the need for a health exception, then none is required.[33] However, since the record in *Carhart*, which is similar to the record in *Stenberg*, shows substantial medical disagreement about the necessity of the abortion procedure, a health exception is necessary.[34]

The Supreme Court of the United States granted certiorari to consider the constitutional validity of the Partial Birth Abortion Ban Act of 2003 and whether to uphold the permanent injunctions against its enforcement issued by the Eighth and Ninth Circuits.[35]

II. LEGAL BACKGROUND

The Supreme Court of the United States has recognized the right of a woman to obtain an abortion subject to state regulation, provided the regulation is narrowly tailored to serve a compelling state interest.[36] The Court has recognized two compelling interests held by the state in regulating abortion: (1) protecting the life and health of the mother, and (2) protecting the potential life of the fetus.[37] In addition, the regulation must not place an undue burden on the woman, meaning the regulation must not create a substantial obstacle in the path of

28. Carhart v. Gonzales, 413 F.3d 791, 792 (8th Cir. 2005).
29. *Id.* at 796.
30. *Id.* at 797–98.
31. *Id.*
32. *Id.* at 798.
33. *Id.*
34. *Id.* at 803.
35. Gonzales v. Carhart, 127 S. Ct. 1610, 1620 (2007).
36. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 929, 932 (1992); Roe v. Wade, 410 U.S. 113, 154 (1973).
37. *Roe*, 410 U.S. at 162.

obtaining an abortion.[38] Finally, Court precedent requires that laws regulating methods of abortion that may be necessary to preserve the health of the mother contain an exception for those circumstances.[39]

The courts are empowered to review congressional actions and findings.[40] However, when Congress makes predictive judgments or draws conclusions based on complex economic evidence, the courts accord Congress substantial deference, recognizing that Congress has superior fact-finding abilities and is better equipped to analyze vast amounts of information.[41] In those situations, then, a court declines to substitute its own judgment for that of Congress's.[42] On the other hand, the courts are far less inclined to defer to Congress when Congress attempts to alter a constitutional interpretation issued by the Supreme Court in a previous case, even if Congress produces "findings" to support its action.[43] Whether courts will defer to congressional findings, then, turns on the nature of the issue at hand.

A. Abortion Regulation and the Requirement of a Health Exception

In the landmark decision of *Roe v. Wade*, the Supreme Court held that a Texas law that almost completely banned abortion violated a woman's "fundamental right" to privacy under the Due Process Clause of the Fourteenth Amendment.[44] The Court set out a trimester system for abortion regulation, with a different rule for each of the three trimesters.[45] In the first trimester, the state may not ban or closely regulate abortion since the state has no compelling interest in protecting the mother's health during this time.[46] In the second trimester, the state may regulate abortion to protect the mother's life or health, since the risk of injury is greater.[47] Finally, the state has a compelling interest during the third trimester in protecting the health of the mother and the life of the fetus, since the fetus is viable during

38. *Casey*, 505 U.S. at 876–77.

39. *Id.* at 879; *Roe*, 410 U.S. at 164–65.

40. Marbury v. Madison, 5 U.S. 137, 177 (1803).

41. Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180, 196 (1997); Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 665–66 (1994).

42. *See Turner I*, 512 U.S. at 666.

43. City of Boerne v. Flores, 521 U.S. 507, 536 (1997); United States v. Lopez, 514 U.S. 549, 564, 567 (1995).

44. Roe v. Wade, 410 U.S. 113, 122, 164 (1973).

45. *Id.* at 164–65.

46. *Id.* at 164.

47. *Id.*

this time.[48] This means that the State may closely regulate, or even ban, abortion during the third trimester.[49] However, the regulation must include an exception for circumstances where the procedure is necessary to preserve the life or health of the mother.[50]

Since *Roe*, the Court has clarified its decision through a number of other abortion rights cases.[51] One such case is *Planned Parenthood v. Casey*, which considered the Pennsylvania Abortion Control Act.[52] The Pennsylvania law required (1) that a woman seeking an abortion give her informed consent and undergo a 24-hour waiting period after receiving certain information; (2) that a minor secure consent from her parents prior to obtaining an abortion; and (3) that a married woman's husband consent to the procedure.[53] All three requirements were subject to a "medical emergency" exception.[54] The Court upheld the informed consent and parental consent requirements, but struck down the spousal consent requirement as an unconstitutional "undue burden" on the woman's right to choose.[55]

In reaching this conclusion, the *Casey* Court reaffirmed the "essential holding" of *Roe*, which it found to embody three principles: (1) "a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State;" (2) any state regulation on post-viability abortion must contain exceptions for when the life or health of the woman is in danger; and (3) from the beginning of the pregnancy, the State has legitimate interests in protecting the health of the woman and the potential life of the fetus.[56] The Court held that the decisions since *Roe* had not given enough weight to the State's interest in protecting the potential life of the fetus.[57] Therefore, *Casey*'s undue burden standard replaced *Roe's* trimester approach.[58] This new standard allows a state to impose regulations on abortion procedures at any time during the pregnancy, in order to protect the health of the mother and the

48. *Id.* at 164–65.

49. *Id.*

50. *Id.*

51. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992); Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 759 (1986).

52. *Casey*, 505 U.S. at 844.

53. *Id.*

54. *Id.*

55. *Id.* at 882, 885, 898–900.

56. *Id.* at 846.

57. *Id.* at 871.

58. *Id.* at 873, 875.

potential life of the fetus, as long as they do not place an undue burden on the woman.[59]

The issue of partial birth abortion came to the fore in *Stenberg v. Carhart*.[60] The Supreme Court held that where an abortion procedure is safer for the mother in some circumstances, the State may not completely ban the procedure without an exception for the health and life of the mother.[61] In *Stenberg*, a Nebraska doctor who performed clinical abortions sought an injunction against enforcement of a state statute that criminalized a partial birth abortion procedure called dilation and extraction ("D&X"), except when the procedure is necessary to save the life of the mother.[62] The Court struck down the statute for the lack of a health exception, among other reasons,[63] and held that when "significant medical authority supports the proposition that in some circumstances, D&X would be the safest procedure," as the trial record in this and other cases indicated, then a health exception is required.[64] Although Nebraska claimed that it had evidence showing that D&X is never necessary to preserve the health of the mother, the Court pointed out that "the division of medical opinion about the matter at most means uncertainty, a factor that signals the presence of risk, not its absence."[65] Only when a state can show that a procedure is *never* necessary to preserve the health of the mother may it omit a health exception from a statute.[66]

B. Judicial Response to Congress

The Supreme Court, in the landmark decision of *Marbury v. Madison*, established the doctrine of judicial review, meaning the Court has the authority to review acts of Congress and scrutinize their constitutional validity.[67] Oftentimes, crafting legislation involves analyzing and interpreting vast amounts of facts and data.[68] The Court recognizes that, of the three branches, Congress is in the best position to process these facts and reach informed conclusions, especially when dealing with regulations concerning economically or technologically

59. *Id.* at 877.
60. 530 U.S. 914 (2000).
61. *Id.* at 938.
62. *Id.* at 921–22.
63. *Id.* at 937–38.
64. *Id.* at 932.
65. *Id.* at 937.
66. *Id.* at 938.
67. Marbury v. Madison, 5 U.S. 137, 177 (1803).
68. *See* Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 665 (1994).

changing industries.[69] Accordingly, the Court in *Turner Broadcasting Systems, Inc. v. FCC* demanded that the judiciary afford "substantial deference to the predictive judgments of Congress."[70] This does not require the courts to unquestioningly defer to congressional judgments or to forego judicial review of Congress's findings.[71] Instead, the Court's holding provides that as long as Congress has "drawn reasonable inferences based on substantial evidence," the courts shall not disturb congressional findings.[72]

Turner called into question the constitutionality of the Cable Television Consumer Protection and Competition Act of 1992 and, specifically, its "must-carry" provisions.[73] These provisions required cable operators to carry a specified number of commercial broadcast and noncommercial educational television stations that requested carriage.[74] After three years of hearings, Congress concluded that certain aspects of the cable industry were endangering the future viability of broadcast television stations and the "must-carry" provisions were vital to their survival.[75] The Supreme Court found that the "must-carry" provisions burdened the cable providers' free speech rights under the First Amendment and therefore the provisions could only be justified to the extent they redressed past evils or avoided future harms.[76] Furthermore, Congress must adequately demonstrate that real harms exist, or potentially exist, through reasonable legislative findings based on substantial evidence.[77] On remand, the district court was able to expand and develop the factual record and found the "must-carry" provisions constitutional because Congress reasonably concluded, based on substantial evidence—including studies, anecdotal evidence, and data—that the health and survival of the broadcast industry depended on the "must-carry" provisions.[78] The Supreme Court affirmed, holding that it is within Congress's authority to make predictive judgments and that Congress had a substantial factual basis to support its conclusions.[79]

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69. Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180, 196 (1997).
70. *Turner I*, 512 U.S. at 665.
71. *Id.* at 666.
72. *Id.*
73. *Id.* at 630.
74. *Id.* at 630–31.
75. *Id.* 632–34.
76. *Id.* at 664.
77. *Id.* at 664–66.
78. Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180, 187–88 (1997).
79. *Id.* at 200; *see also* Katzenbach v. Morgan, 384 U.S. 641 (1996). In *Katzenbach*, the Supreme Court accorded substantial deference to Congress's findings in enacting the Voting

However, the Court does not always apply this deferential standard to Congress's conclusions. When Congress attempts to overrule a Supreme Court decision or supersede a constitutional rule, the Court is less likely to find that Congress acted within its constitutional authority.[80] For example, the Court in *United States v. Morrison* concluded that Congress went beyond its Commerce Clause power in enacting the Violence Against Women Act of 1994, notwithstanding congressional findings that gender-motivated violence substantially impacted interstate commerce.[81] The Court said, "[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so," meaning, the courts make the final determination on that issue.[82] Citing its decision in *United States v. Lopez*, the Court feared that if it deferred to congressional findings and upheld the Violence Against Women Act, Congress could effectively remove the constitutional distinction between national and local power under the authority of the Commerce Clause.[83]

Although Congress may enact legislation to remedy an undesirable decision in some Supreme Court cases, when the Court establishes a constitutional rule or interprets constitutional requirements, Congress may not enact legislation overturning those decisions.[84] For example, in *City of Boerne v. Flores*, the Court

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Rights Act of 1965 under the authority of section 5 of the Fourteenth Amendment. The Act, which prohibited requiring a person who completed a sixth-grade education at a Spanish-speaking Puerto Rican school to be able to read and write in English in order to vote, conflicted with a New York statute which the same requirement. *Katezbach*, 384 U.S. at 643–45. In concluding that the Act was appropriate to remedy discrimination in violation of the Fourteenth Amendment, Congress weighed various conflicting considerations, including risk of discrimination, effectiveness of eliminating the New York law as a means of ending discrimination, and the effect of the legislation on the state's interest. *Id.* at 653. The Court held that as long as it could perceive a basis, as it could here, for Congress's factual conclusions, it would defer to congressional findings. *Id.*

80. *See* City of Boerne v. Flores, 521 U.S. 507, 507 (1997).

81. United States v. Morrison, 529 U.S. 598, 614, 617 (2000).

82. *Id.* at 614.

83. *Id.* at 617–18.

84. *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 437 (2000); *Boerne*, 521 U.S. at 536. As another example, in response to the Court's landmark decision in *Miranda v. Arizona*, which established the requirement that certain warnings be given before a defendant's statement is admissible in court, Congress enacted a statute that made the admissibility of a defendant's statement to turn only on whether it was voluntarily made. *Dickerson*, 530 U.S. at 435–36. This was, of course, in direct conflict with the Miranda rights. *Id.* at 437. The *Dickerson* Court, therefore, struck down the law on the grounds that it superseded the constitutional rule announced in *Miranda*. *Id.* Because the Court was interpreting a constitutional requirement and not "merely exercise[ing] its supervisory authority to regulate

declared unconstitutional a law that required courts to apply the strict scrutiny standard announced in *Sherbert v. Verner* to any rule of general applicability that substantially burdens the free exercise of religion.[85] Indeed, the Supreme Court had previously interpreted the Equal Protection Clause of the Fourteenth Amendment to require that state justifications for religious classifications survive if they pass a rational basis test, not the more challenging strict scrutiny test.[86] Whereas the former test merely requires that Congress have a rational basis for using the classifications, the latter demands Congress narrowly tailor the classification to serve a compelling state interest, which is a formidable standard to meet.[87] The Court declined to provide Congress with the power to determine constitutional standards.

III. COURT'S REASONING

The Supreme Court, in a 5-4 decision in *Gonzales v. Carhart*, upheld the constitutionality of the Partial Birth Abortion Ban Act of 2003 despite the facial attacks lodged against it, and reversed the lower courts' permanent injunctions against its enforcement.[88] Justice Kennedy, writing for the majority, recognized that the Act was passed in direct response to *Stenberg v. Carhart*—a 2003 Supreme Court decision striking down a similar Nebraska partial birth abortion statute—in two ways.[89] First, Congress made factual findings about the medical necessity of the partial birth abortion procedure.[90] Second, the language in the Act differs from that in *Stenberg* in order to clarify what procedure is actually prohibited. [91] The *Gonzales* Court also reaffirmed the three principles set out in *Planned Parenthood v. Casey*: (1) women have a right to choose to obtain an abortion prior to viability without undue interference from the State; (2) the State has the power to restrict post-viability abortions as long as there is an exception for those situations where the mother's life or health is in

evidence in the absence of congressional direction," Congress was not permitted to disturb the Court's decision. *Id.*

85. *Boerne*, 521 U.S. at 511–13.

86. Employment Div., Dept. of Human Res. of Or. v. Smith, 494 U.S. 872, 885–86 (1990).

87. Sherbert v. Verner, 374 U.S. 398, 402–03 (1963).

88. Gonzales v. Carhart, 127 S. Ct. 1610, 1619 (2007).

89. *Id.* at 1624.

90. *Id.*

91. *Id.* at 1624–25.

danger; and (3) the State has legitimate interests in protecting the health of the woman and the potential life of the fetus.[92]

Addressing the lack of the health exception in the Act, the Court acknowledged that the Act would impose an unconstitutional burden on the woman's right to obtain an abortion if "substantial medical authority supports the proposition that banning a particular procedure could endanger women's health."[93] Respondents presented evidence that intact D&X, which the Act prohibits, is the safest abortion procedure since it reduces the risk of cervical laceration, and requires less time, less passes into the uterus, and no removal of fetal body parts, as in other abortion procedures.[94] Other doctors who testified before Congress, however, concluded that the health advantages were not supported by scientific studies and were merely speculative.[95]

Nonetheless, the Court opined that the Act can survive medical uncertainty since Congress is given wide discretion to pass legislation to advance legitimate interests.[96] By allowing the Act to stand in the face of medical uncertainty, the Court renounced the interpretation of *Stenberg* that leaves no room for disagreement in the medical community.[97] Rather, the Court said that *Stenberg* allows Congress to balance the risks when crafting regulation to achieve legitimate ends.[98] Congress's discretion, however, is not accorded absolute deference; the Court retains the power to review congressional findings of fact.[99] Here, however, there was a sufficient basis for Congress to conclude that the Act does not need a health exception because the prohibited procedure is never medically necessary to preserve the health of the mother.[100]

Finally, the majority concluded that a facial attack on the constitutionality of the Act was not appropriate in the first place.[101] Rather, the Act is better addressed through as-applied challenges, even if they are pre-enforcement challenges, since the respondents had not shown that the Act would be unconstitutional in a "large fraction of

92. *Id.* at 1626.
93. *Id.* at 1635, 38.
94. *Id.* at 1635.
95. *Id.*
96. *Id.* at 1636.
97. *Id.* at 1638.
98. *Id.*
99. *Id.* at 1637.
100. *Id.*
101. *Id.* at 1638.

relevant cases."[102] The relevant cases include not just those where the woman's doctor determines her health is in danger, but in all those cases where a woman seeks to obtain the prohibited procedure.[103] In contrast to a facial challenge, as-applied challenges more fully quantify and analyze the medical risk of the ban.[104]

Although joining the Court's majority opinion, Justice Thomas, joined by Justice Scalia, wrote separately to express his view that the Court's abortion jurisprudence, such as *Casey* and *Roe*, has no constitutional basis.[105] He also questioned Congress's power to enact the legislation under its Commerce Clause authority, even though the issue was not presented below.[106]

Justice Ginsburg, joined by Justices Stevens, Breyer, and Souter, dissented, criticizing the majority for upholding an abortion ban that lacked a health exception for a procedure which the American College of Obstetricians and Gynecologists deemed necessary in certain cases.[107] The *Casey* Court affirmed women's right to take part in the economic and social life of the nation and the corresponding right to reproductive choice.[108] To prevent unduly burdening that right, the state must provide an exception to preserve the health of the mother in any abortion regulation, including not only when the pregnancy itself presents the danger, but also where the woman must seek less safe methods of abortion because of the law.[109] Since the *Stenberg* Court, when confronted with a division in medical opinion, requires a health exception where "substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health," the *Gonzales* dissent argued that a health exception is required in the Partial Birth Abortion Ban Act of 2003.[110]

Furthermore, although Congress concluded that substantial medical authority shows that the prohibited procedure is never medically necessary, the dissent pointed out that these findings "do not withstand inspection."[111] Indeed, many of the findings are factually

102. *Id.* at 1638–39.
103. *Id.* at 1639.
104. *Id.*
105. *Id.* (Thomas, J., concurring).
106. *Id.* at 1640.
107. *Id.* at 1641 (Ginsburg, J., dissenting).
108. *Id.*
109. *Id.* at 1642.
110. *Id.* at 1642–43.
111. *Id.* at 1643.

incorrect.[112] For instance, Congress found that no medical schools teach intact D&E.[113] However, there are numerous schools that do teach the procedure, including Cornell, Yale, New York University, and University of Chicago.[114] Congress concluded that a medical consensus exists that the banned procedure is never medically necessary.[115] However, the Congressional Record clearly supports the opposite conclusion.[116]

Moreover, Justice Ginsburg pointed to the district court trials, which provided much more evidence concerning the medical necessity of the banned procedure, with both sides presenting their best experts and scientific evidence.[117] Medical experts at the trial testified that intact D&X is, in fact, a safer procedure for women in some circumstances and is necessary to preserve the health of the mother in certain cases.[118] For example, women who suffer from certain medical conditions such as uterine scarring, heart disease, or weakened immune systems would benefit from the many safety advantages of intact D&X.[119] In fact, after reviewing the trial evidence, both district courts found Congress's conclusions unreasonable and unsupported by the evidence.[120] In contrast, the courts concluded that "significant medical authority supports the proposition that in some circumstances, intact D&E is the safest procedure."[121] Therefore, a health exception is necessary.[122] The Supreme Court, argued Justice Ginsburg, should respect the lower courts' findings and conclusions.[123] Instead, the majority rejected them.[124]

Justice Ginsburg also argued that a facial attack on the lack of a health exception is permissible, since the Act burdens all women for whom the health exception is relevant, namely those whose doctors determine intact D&X is the safest abortion procedure for them.[125] This is the relevant class of women, not all the women who seek an

112. *Id.*
113. *Id.*
114. *Id.* at 1643–44.
115. *Id.* at 1644.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at 1644–45.
120. *Id.* at 1645.
121. *Id.*
122. *Id.* at 1642.
123. *Id.* at 1646.
124. *Id.*
125. *Id.* at 1651.

abortion.[126] For this reason, she argued, the majority mistakenly upheld the Act against the facial attack on it because was not shown that the ban would be unconstitutional in a large fraction of the cases.[127]

IV. ANALYSIS

The Supreme Court, in *Gonzales v. Carhart*, upheld the Partial Birth Abortion Ban Act of 2003, even though it lacked a health exception that is required by earlier abortion jurisprudence.[128] For the purposes of a health exception, the Act is identical to the Nebraska statute that the Court struck down in *Stenberg v. Carhart* just seven years earlier.[129] The difference between *Stenberg* and *Gonzales* is that after *Stenberg*, Congress held hearings and made certain findings, concluding that there is a consensus among the medical community that D&X is never necessary to preserve the health of the mother and ought to be banned.[130] The Court, however, inappropriately deferred to these congressional findings. As the Court of Appeals for the District of Columbia said,

> 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 an elaborate farce. At least since *Marbury v. Madison*, that has not been the law.[131]

The Supreme Court should have rejected Congress's findings either because (A) Congress attempted to change an interpretation of a constitutional requirement regarding abortion regulation made by the Court in earlier cases; or, alternatively (B) the findings offered by Congress were unreasonable and contradicted the very Congressional Record from which Congress drew its conclusions.

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126. *Id.*

127. *Id.*

128. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992); Roe v. Wade, 410 U.S. 113, 165 (1973).

129. *See* Stenberg v. Carhart, 530 U.S. 914, 921–22 (2000).

130. *See* Partial Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2, 117 Stat. 1201, 1201, 1206–07 (2003).

131. Lamprecht v. FCC, 958 F.2d 382, 392 n.2 (1992) (internal citations omitted).

A. The Court Allowed Congress to Change a Constitutional Interpretation of the Court in Roe v. Wade *and its Progeny.*

Justice Marshall, in the landmark decision of *Marbury v. Madison*, said that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[132] When the Supreme Court interprets the Constitution, Congress may not substitute its judgment for the Court's by passing a law altering the Court's interpretation.[133] In *Roe v. Wade*, the Supreme Court interpreted the Constitution as requiring a health exception in a ban on a particular abortion procedure when that procedure is necessary to preserve the health of the mother.[134] The Court reaffirmed this requirement in subsequent cases, most recently in *Stenberg v. Carhart*.[135] By passing the Partial Birth Abortion Ban Act of 2003, which bans the intact dilation and extraction procedure (D&X) and is without a health exception,[136] Congress sought to change the substantive requirements of the Constitution as interpreted by the Supreme Court. Since this is inconsistent with the doctrine of separation of powers, the Court should not have allowed Congress to successfully pass the Act by upholding it as a constitutional exercise of Congress's legislative prerogative.

The Supreme Court defeated Congress's attempt to alter a Court interpretation of the Constitution in *City of Boerne v. Flores*.[137] *Boerne* challenged Congress's power to enact the Religious Freedom Restoration Act of 1993 (RFRA), which applied a standard of strict scrutiny to any law of general applicability that substantially burdened religious exercise.[138] This test came from *Sherbert v. Verner*, a previous Supreme Court decision that struck down a state law that denied unemployment compensation to a woman who refused to work on a Saturday because of her religious beliefs.[139] The Court held that the state may not substantially burden religious exercise without a compelling state interest.[140] However, the Supreme Court in *Employment Division v. Smith*, which reviewed a refusal of

132. Marbury v. Madison, 5 U.S. 137, 177 (1803).

133. Dickerson v. United States, 530 U.S. 428, 437 (2000).

134. Roe v. Wade, 410 U.S. 113, 165 (1973).

135. Stenberg v. Carhart, 530 U.S. 914, 938 (2000); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992).

136. Partial Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531(a) (Supp. III 2003).

137. City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

138. *Id.* at 515.

139. Sherbert v. Verner, 374 U.S. 398, 399–401 (1963).

140. *Id.* at 403.

unemployment compensation because the plaintiffs broke a generally applicable criminal law proscribing drug use when they ingested sacramental peyote, declined to apply the *Sherbert* test.[141] The Court ultimately upheld the state law denying unemployment compensation to the plaintiffs.[142]

The Court's decision in *Smith* created a whirlwind of controversy. Many members of Congress believed that the Court should have applied the *Sherbert* strict scrutiny test. Congress passed RFRA in direct response to the *Smith* decision, citing *Sherbert* and requiring the Court to apply strict scrutiny to all future cases dealing with neutral, generally applicable laws that substantially burden religious exercise.[143] The *Boerne* Court, however, struck RFRA down as an unconstitutional exercise of congressional power.[144] Justice Kennedy, writing for the majority, said that while Congress at times has the power to interpret the meaning of the Constitution when discharging its legislative duties, it may not enact any laws that are contrary to an interpretation of the Constitution issued by the Supreme Court.[145] Since the *Smith* Court interpreted the Free Exercise Clause as not requiring a compelling state interest in all cases where free religious exercise is burdened, and RFRA attempted to substantively alter that constitutional interpretation, RFRA was not within Congress's power.[146]

Similar to RFRA, Congress passed the Partial Birth Abortion Ban Act of 2003 in direct response to the Court's 2000 decision in *Stenberg v. Carhart*.[147] The *Stenberg* Court struck down a Nebraska law banning D&X in part because of the lack of a health exception required by previous Court decisions.[148] The Court opined that, since the record shows that "significant medical authority" found D&X to be the safest abortion procedure in some circumstances, the law needed to include an exception for the health of the mother.[149] In reaching this conclusion, the Court relied on medical testimony presented in the district court as well as Nebraska's evidence about the safety of

141. Employment Div., Dept. of Human Res. of Or. v. Smith, 494 U.S. 872, 884–85 (1990).

142. *Id.* at 890.

143. *Boerne*, 521 U.S. at 515.

144. *Id.* at 536.

145. *Id.* at 535–36.

146. *Id.*

147. Partial Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2, 117 Stat. 1201, 1201–02 (2003).

148. Stenberg v. Carhart, 530 U.S. 914, 938 (2000).

149. *Id.* at 932.

D&X.[150] Three years later, Congress enacted the Partial Birth Abortion Ban Act, stating that while the Supreme Court in *Stenberg* deferred to district court findings about the safety of D&X, Congress was not required to do the same.[151] After conducting hearings and investigations about the necessity of D&X, Congress concluded that "[a] moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion . . . is a gruesome and inhumane procedure that is never medically necessary . . . ."[152] In banning D&X, Congress declined to provide an exception for the health of the mother.[153] The Court in *Gonzales* upheld the Act as a constitutional exercise of congressional legislative power.[154]

The *Gonzales* Court should not have allowed Congress to successfully pass the Partial Birth Abortion Ban Act. The Act purposefully changed a Supreme Court interpretation of the constitutional protections from state abortion regulation afforded to pregnant women.[155] The health exception requirement was first established in *Roe v. Wade*, where the Court held that the State may regulate and even proscribe abortion except where the procedure is "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[156] Nineteen years later, in *Planned Parenthood v. Casey*, the Supreme Court reaffirmed this holding of the *Roe* Court.[157] In neither of these cases did the Court afford Congress any discretion in determining if a health exception is necessary, but rather just stated that one is required.[158] In fact, the *Roe* Court said that the Texas law in question in that case could not withstand the constitutional attack lodged against it since it allows abortions only in circumstances where an abortion is necessary to save the mother's life.[159] Notably, the Partial Birth Abortion Act allows D&X solely in that very circumstance, as well.[160]

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150. *Id.* at 932–38.

151. Partial Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2, 117 Stat. 1201, 1201–02 (2003).

152. *Id.* at 1201.

153. Partial Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531(a) (Supp. III 2003).

154. Gonzales v. Carhart, 127 S. Ct. 1610, 1639 (2007).

155. *See* Stenberg v. Carhart, 530 U.S. 914, 931 (2000); Partial Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2, 117 Stat. 1201, 1201–02 (2003).

156. Roe v. Wade, 410 U.S. 113, 165 (1973).

157. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992).

158. *See id.*; *Roe*, 410 U.S. at 165.

159. *Roe*, 410 U.S. at 164.

160. Partial Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531(a) (Supp. III 2003).

If it is indeed the duty of the judicial branch to say what the law is, as *Marbury* held, then the Supreme Court's constitutional interpretation of a health exception requirement for abortion regulation should prevail against contrary expectations promulgated by Congress. However, as a consequence of the *Gonzales* decision, this is no longer the case. The Partial Birth Abortion Ban Act, which asserted that an exception to preserve the health of the mother is not necessary, is inconsistent with previous Court decisions.[161] This violates the principle of separation of powers by intruding on the judicial branch's power to interpret the law and the Constitution.[162] Therefore, the Act should have been struck down as unconstitutional.

B. Even If a Health Exception Relies on a Factual Determination of Whether Such an Exception is Necessary, the Court Failed to Recognize that Congress's Findings Did Not Pass Even the Most Lenient Standard of Review.

The Supreme Court has long recognized Congress's superior ability to engage in fact-finding and analyze vast amounts of information.[163] Generally, when it comes to predicting future impact or conclusions regarding economic regulations, the Court accords a substantial amount of deference to Congress's findings.[164] In these cases, the Court may not review the findings *de novo* or substitute its own judgment for that of Congress's.[165] This deference, however, is not without limit.[166] The Court makes clear that congressional findings are subject to some judicial scrutiny in that courts must conclude that Congress "[drew] reasonable inferences based on substantial evidence."[167] Therefore, if Congress had a reasonable basis on which to make the conclusions it did, then courts will accept those findings.[168]

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161. Partial Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2, 117 Stat. 1201, 1203 (2003).

162. Marbury v. Madison, 5 U.S. 137, 177 (1803).

163. *E.g.* Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180, 195 (1997); Walters v. Nat'l Assn. of Radiation Survivors, 473 U.S. 305, 330 n.12 (1985); Rosteker v. Goldberg, 453 U.S. 57, 83 (1981).

164. *See e.g. Turner II*, 520 U.S. at 196; Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 665 (1994).

165. *Turner I*, 512 U.S. at 666.

166. *Id.*

167. *Id.*

168. *E.g. Turner II*, 520 U.S. at 199–200.

The Partial Birth Abortion Ban Act of 2003 was a direct response to the Court's decision in *Stenberg v. Carhart*.[169] In striking down the Nebraska law, the majority relied on evidence presented in the district court that showed intact D&X may be the safest abortion procedure in some circumstances.[170] The Court said that "where substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health, *Casey* requires the statute to include a health exception . . . ."[171] Indeed, disagreement with those medical professionals that assert the necessity of a particular procedure does not prove that those professionals are wrong.[172]

Congress, in response to the outcome of *Stenberg*, proceeded to conduct hearings and investigations about the medical necessity of D&X.[173] Since Congress unsuccessfully tried to pass a similar ban under the Clinton Administration, it had evidence from legislative hearings in the 104th, 105th, 106th, 107th, and 108th Congresses.[174] From that evidence, Congress concluded, in part, that a health exception is not necessary because the procedure, D&X, is never necessary to preserve the health of the mother.[175] Furthermore, Congress asserted that "[a] moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion . . . should be prohibited."[176] The Court should not have deferred to these "findings" because they are unreasonable according to Congress's own record.

The Congressional Record shows that a medical consensus does not exist as to the necessity of the partial birth abortion procedure, D&X.[177] Even Dr. Mark G. Nerrhof, who testified before the House Subcommittee on the Constitution on March 25, 2003, in support of the Act said that "some clinicians have considered intact D&X necessary when hydrocephalus is present."[178] Among the

169. Partial Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2, 117 Stat. 1201, 1201–02 (2003).

170. Stenberg v. Carhart, 530 U.S. 914, 932 (2000).

171. *Id.* at 938.

172. *Id.* at 937.

173. Partial Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2, 117 Stat. 1201, 1202, 1204 (2003).

174. *Id.* at 1204.

175. *Id.* at 1203.

176. *Id.* at 1201.

177. Planned Parenthood Fed'n of Am. v. Ashcroft, 320 F. Supp. 2d 957, 1026 (N.D. Cal. 2004).

178. *Partial Birth Abortion Act of 2003, Hearing Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 108th Cong. 7 (2003).

numerous other physicians Congress heard from during its debates was Vanessa Cullins, M.D., a board-certified OBGYN and member of National Medical Association (NMA), the American Medical Association (AMA), and the American College of Obstetrics and Gynecologists (ACOG), who said that D&X carries significant health advantages over other abortion procedures performed during the same time period, including less risk of tears in the uterus and cervix, less time, and a reduced risk that fetal matter will be left in the uterus.[179] Felicia H. Stewart, M.D., co-director for the Center for Reproductive Health Research and Policy at the University of California, San Francisco, testified in opposition to the Act, saying that doctors must be given wide discretion to choose the safest possible method of abortion to avoid risk of infertility, coma, stroke, infection, and brain, liver, or kidney damage.[180] The Kansas Department of Health and Environment presented statistics that showed that of the "partial-birth" procedures performed, every one of them was necessary to "prevent substantial and irreversible impairment of a major bodily function."[181]

Similarly, several medical groups rose up in opposition to the Act for its lack of a health exception.[182] The American College of Obstetricians and Gynecologists posited that, although a select panel could not identify a situation where intact D&X would be the *only* procedure to preserve the health of the mother, the patient's doctor, weighing the woman's unique circumstances, might decide that it is the safest.[183] The American Medical Women's Association, which is composed of ten thousand women physicians and medical students, argued the Act is "unconscionable" because D&X "is the safest and most appropriate alternative available to save the life and health of the woman."[184] Other medical groups that opposed the Act include the American Medical Association,[185] the American Public Health

179. *Id.* at 187–88.

180. 149 Cong. Rec. S12914, S12923 (daily ed. Oct. 21, 2003) (letter from Felicia H. Stewart, M.D.).

181. 149 Cong. Rec. S3456, S3471–72 (daily ed. March 11, 2003) (citing the case of Coreen Costello).

182. *E.g.* 149 Cong. Rec. S3456, S3479 (daily ed. March 11, 2003); 149 Cong. Rec. S12914, S12921 (daily ed. Oct. 21, 2003); 149 Cong. Rec. S3456, S3460 (daily ed. March 11, 2003).

183. 149 Cong. Rec. S3456, S3479–80 (daily ed. March 11, 2003).

184. 149 Cong. Rec. S12914, S12921 (daily ed. Oct. 21, 2003).

185. 149 Cong. Rec. S3456, S3460 (daily ed. March 11, 2003) ("The AMA also has long-standing policy opposing legislation that would criminalize medical practice or procedure. . . .[T]he AMA does not support this bill.").

Association,[186] and ethnic groups such as the National Latina Institute for Reproductive Health.[187]

In addition to testimony from doctors and medical professionals, Congress heard the tragic stories of numerous women whose doctors advised them to undergo an intact D&X procedure to protect their health.[188] For example, Coreen Costello shared her experience with D&X when she was seven months pregnant with her daughter, Katherine Grace.[189] When the doctors told her that Katherine was dying due to a neurological disorder and that fluid was puddling in Mrs. Costello's uterus, the Costellos were devastated.[190] Nevertheless, they refused to terminate the pregnancy.[191] Rather, they would induce labor and try to make Katherine's short life (she would die within moments of birth) as comfortable as possible.[192] However, because of Katherine's position in her mother's uterus as well as the amount of swelling of Katherine's head, natural delivery or induction was not possible.[193] All of Mrs. Costello's doctors, believing the risks of a C-section were too great, advised her to undergo an intact D&X abortion.[194] Had Katherine's heart not stopped beating half-way through the procedure, an incident which was completely unanticipated and unforeseeable, that procedure would have been illegal under the Act.[195]

Notwithstanding all the evidence in favor of a health exception for the Partial Birth Abortion Ban Act of 2003, Congress declared that it "found" a consensus that so-called partial-birth abortion is never medically necessary to preserve the health of the mother and should be banned.[196] The Congressional Record, however, clearly shows that no such consensus exists. Those who testified against the Act are legitimate and respected physicians and representatives of medical

186. 149 Cong. Rec. S11589, S11596–97 (daily ed. Sept. 17, 2003) ("APHA. . .oppose[s] the bill because it fails to include adequate health exception language in instances where certain procedures may be determined by a physician to be the best or most appropriate to preserve the health of the woman.").

187. 149 Cong. Rec. S12927, S12938 (daily ed. Oct. 21, 2003).

188. *E.g.* 149 Cong. Rec. S3456, S3460–61 (daily ed. March 11, 2003); 149 Cong. Rec. S3560, S3592–93 (daily ed. March 12, 2003).

189. 149 Cong. Rec. S3456, S3460 (daily ed. March 11, 2003).

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at S3461.

195. *Id.*

196. Partial Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2, 117 Stat. 1201, 1201 (2003).

organizations.[197] Certainly, there were also many physicians and medical organization representatives that testified in favor of the Act.[198] However, as Justice Breyer stated in *Stenberg*, "the division of medical opinion about [the necessity of the D&X procedure] at most means uncertainty, a factor that signals the presence of risk, not its absence."[199] Therefore, the Court should not have accepted as reasonable Congress's conclusions.

CONCLUSION

The Supreme Court in *Gonzales v. Carhart* upheld the Partial Birth Abortion Ban Act of 2003, signed into law by President George W. Bush.[200] In so doing, it accepted Congress's factual conclusions that the banned procedure, D&X, is never medically necessary to preserve the health of the mother, which the Court argues is the only way an abortion ban without a health exception can pass constitutional muster.[201] However, the Court should not have accorded such great deference to congressional findings. First, since the health exception requirement articulated by *Roe v. Wade* is an interpretation of a constitutional requirement made by the Court, the Court should not have allowed Congress to substantively change that constitutional interpretation by abolishing the need for a health exception.[202] Alternatively, even if the health exception is not a "constitutional fact," Congress's findings do not withstand even the most lenient scrutiny—that Congress came to reasonable conclusions based on "substantial evidence."[203] Therefore, the Supreme Court should have

197. *E.g.* 149 Cong. Rec. S3456, S3479–80 (daily ed. March 11, 2003) (letter from the ACOG); 149 Cong. Rec. S12914, S12921 (daily ed. Oct. 21, 2003) (letter from the American Medical Women's Association, Inc.); 149 Cong. Rec. S3456, S3460 (daily ed. March 11, 2003) (letter from the American Medical Association); *Partial Birth Abortion Act of 2003, Hearing Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 108th Cong. 187–88 (2003) (prepared statement by Dr. Vanessa Cullins).

198. *E.g. Partial Birth Abortion Act of 2003, Hearing Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 108th Cong. 6–8 (2003) (oral testimony and prepared statement of Dr. Mark G. Neerhof); *Id.* at 80–86 (prepared statement of Kathi A. Aultman, M.D.); *Id.* at 88–94 (prepared statement by Curtis Cook, M.D.); 149 Cong. Rec. S3456, S3470 (daily ed. March 11, 2003) (Letter from Physicians' Ad Hoc Coalition for Truth (PHACT)).

199. Stenberg v. Carhart, 530 U.S. 914, 936 (2000).

200. Gonzales v. Carhart, 127 S. Ct. 1610, 1639 (2007).

201. *See id.* at 1635.

202. See Roe v. Wade, 410 U.S. 113, 164–65 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992); City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

203. *See e.g.* Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 666 (1994).

struck down the Act as unconstitutional for lack of an exception for preservation of the health of the mother.