Nos. 05-1382 & 05-380

IN THE

Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,

Petitioner,

v.

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

Respondents.

ALBERTO R. GONZALES, ATTORNEY GENERAL,

Petitioner,

v.

LEROY CARHART, M.D., ET AL.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH AND EIGHTH CIRCUITS

BRIEF OF AMICI CURIAE, 52 MEMBERS OF CONGRESS IN SUPPORT OF PLANNED PARENTHOOD FEDERATION, INC., ET AL., AND MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME IN SUPPORT OF RESPONDENTS LEROY CARHART, M.D., ET AL., IN RELATED CASE NO. 05-380

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF RESPONDENTS IN RELATED CASE

52 Members of Congress, hereby move for leave to file a brief *amici curiae* in support of Respondents in the related case, *Gonzales v. Carhart*, No. 05-380.

On February 21, 2006, this Court granted *certiorari* in *Gonzales v. Carhart* to review the judgment of the U.S. Court of Appeals for the Eighth Circuit invalidating the Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 ("Act").

Gonzales v. Carhart raises the same constitutional questions, concerns the same Act of Congress, involves the same petitioner, and will be argued on the same day as the instant case. Furthermore, *amici's* legislative perspective and knowledge of the process which resulted in the Act are equally relevant to both cases.

Pursuant to a letter dated September 19, 2006, Petitioner Gonzales has consented to the filing of this brief *amici curiae* in both cases,[1] and will not be prejudiced in any way by the granting of this Motion since Petitioner will have the opportunity to respond to this brief in his Reply Brief.

Accordingly, *amici curiae* request that the Court grant them leave to file a jointly-captioned brief in support of

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[1] All parties have consented to the filing of this brief *amici curiae* in both cases. Copies of the consent letters have been provided to the Court with the brief.

Respondents, and direct the Clerk to accept this brief out-of-time in *Gonzales v. Carhart*, No. 05-380, and to docket the brief in both cases.

Respectfully submitted,

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INTERESTS OF AMICI CURIAE[1]

Amici curiae are members of the United States Congress who share a concern for the continued vitality of protections first established in *Roe v. Wade*, 410 U.S. 113 (1973), which for the past thirty years have secured and defined a woman's constitutional right to decide whether to continue or terminate a pregnancy free from unnecessary governmental interference, and choose, in consultation with her physician, the safest and most appropriate method of effectuating her decision. Amici here seek to focus specifically on the legislative process that resulted in the Partial-Birth Abortion Ban Act of 2003 (the "Federal Abortion Ban" or the "Ban"), Pub. L. 108-105, 117 Stat. 1201 (codified at 18 U.S.C. § 1531). Many of the amici advocated against passage of the Ban in the form it was enacted. Amici share with the Court their legislative perspective and knowledge of a process that was neither rational nor balanced, and deliberate only with respect to its disregard of this Court's decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000), which invalidated a virtually identical ban, lacking a health exception.

While Congress is not foreclosed from legislating in this area, it must adhere to this Court's constitutional guidelines. Those who wish to ban abortion procedures cannot exploit Congress' fact-finding ability to usurp this Court's authority. Nor should they expect deference to ersatz findings that a health exception is not required when there was no new medical evidence before Congress to support this

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[1] Pursuant to Rule 37.6 of the Rules of this Court, amici state that no counsel for a party has authored this brief and that no person or entity, other than amici or their counsel, has made a monetary contribution to the preparation or submission of this brief. Letters of consent have been filed with the Clerk of the Court.

conclusion. Finally, amici wish to protect the legislative process. This Court cannot, and should not, attempt to rescue this statute by imposing a limited injunction when it is evident from the legislative record that the Ban's supporters would rather have no law than a law that contains a health exception.

SUMMARY OF THE ARGUMENT

> *Why are we here? We are here because the Supreme Court defended the indefensible. They defended the indefensible. We have responded to the Supreme Court. I hope the Justices read this record because I am talking to you…*

(Sponsor Sen. Santorum on this Court's decision in *Stenberg v. Carhart*, 149 Cong. Rec. S3484 (Mar. 11, 2003)).

> *If you vote for [the Feinstein Amendment], you basically vote to kill the bill and replace it with nothing…No one who votes for this can say they are for the partial-birth abortion ban, because they are not. They are for eliminating that ban and replacing it with current law, a restatement of Supreme Court law, which is nothing as far as doing anything about this brutal procedure.*

(Sponsor Sen. Santorum on including a proposed health exception in the Federal Abortion Ban, 149 Cong. Rec. S3605-07 (Mar. 12, 2003)).

For three consecutive congressional sessions leading up to this Court's decision in *Stenberg*, supporters of a federal abortion procedure ban sought to pass legislation substantially similar to the Ban at issue here. The first

version, H.R. 1833, was passed by both houses in 1996, but vetoed by President Clinton because it lacked an exception to protect either the life or the health of a woman in contravention of this Court's abortion decisions. *See* 142 Cong. Rec. H3338 (Apr. 15, 1996). The second version, H.R. 1122, the model for the Nebraska ban found unconstitutional in *Stenberg*, failed to allow a health exception as President Clinton requested, and was vetoed for the same reasons. *See* 143 Cong. Rec. H8891 (Oct. 21, 1997). Finally, in June 2000, differing versions of the ban (H.R. 3660 and S. 1692) which each lacked a health exception were passed by their respective chambers, but never sent to conference given this Court's ruling that year in *Stenberg* requiring a health exception. *Stenberg*, 530 U.S. at 936-37; H.R. Rep. No. 108-58, at 13 n. 68 (2003).

With no new evidence before it, and concluding only that *Stenberg* was based on a "weak record"[2] and "very questionable findings,"[3] Congress enacted the Ban. Unlike the bills that came before it, the Ban incorporates several pages of findings (the "Findings") purporting to explain why Congress decided it could dispense with the health requirement of *Roe*, *Casey*, and *Stenberg*. However, the record on which Congress based its Findings is the same as existed before *Stenberg*, and accordingly, deference to such findings here is inappropriate. Supporters of the Ban did not provide any new evidence disputing the safety of or medical need for the banned procedure that was not already presented during Congress' initial hearings on the subject and before this Court when it concluded that a ban on D&X could endanger women's health. *Stenberg*, 530 U.S. at 938. As such, the Ban is simply a fourth bite of the same rotten apple.

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[2] *See* 149 Cong. Rec. S3384 (Mar. 10, 2003) (statement of Sen. Santorum).

[3] Pub. Law. 108-105, 117 Stat. 1202 at § 2(7).

Throughout the debates, sponsors of the Ban made no secret of the fact that they disagreed with this Court's ruling in *Stenberg* and the constitutional standard it reaffirmed. However, substantial medical authority not only considers D&X to be within the standard of care, but supports the proposition that banning the procedure would endanger women's health. In light of such facts Congress cannot, without some new or compelling shift in the evidence, reverse this Court's ruling by *ipse dixit* "finding" the opposite is true.

By the same token, this Court should not assume the legislature's role when determining the appropriate remedy here. The supporters of the Ban had sufficient constitutional guidance to inform their drafting decisions, and actively chose to flout this Court's rulings. Since it would be impossible for this Court or the lower federal courts on remand to save the statute and remain faithful to legislative intent, the Ban must be facially invalidated.

ARGUMENT

I. The Federal Abortion Ban Is Based On The Same Record As Was Before This Court In *Stenberg*

A. The Pre-*Stenberg* Record

1. 104th Congress. The 104th Congress held three hearings on the subject of "partial-birth abortion." The number of physician-witnesses was quite small,[4] and their testimony was based principally on policy considerations rather than medical authority.[5]

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[4] *See Carhart v. Ashcroft*, 331 F.Supp.2d 805, 822-23 (D. Neb. 2004).

[5] *See Planned Parenthood Federation of America v. Ashcroft*, 320 F.Supp.2d 957, 1014-15, 1017 (2004).

During the first hearing held by the House Judiciary Committee's Subcommittee on the Constitution, Congress heard from four medical witnesses.[6] Only two of these witnesses, Drs. Pamela Smith and J. Courtland Robinson, touched on the potential health implications of the proposed ban.[7] The Senate Judiciary Committee held its own hearing in late 1995 and heard from six medical professionals. Dr. Norig Ellison testified on the impact of anesthesia on the fetus and did not address the safety of or need for the banned procedure.[8] The remaining witnesses were divided as to whether the ban would be detrimental to women's health. The third and final hearing, in March 1996, focused on the impact on the fetus of anesthesia administered to a woman undergoing an abortion,[9] and did not address the safety or necessity of the banned procedure.

Additional written materials were submitted into the record for the hearings, as well as during floor debates. These materials included submissions from physicians who both supported and opposed the ban. In addition, Congress

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[6] *See Partial-Birth Abortion: Hearing before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong., 38-42, 63-65, 67-69, 76-79 (1995) (hereinafter "1995 House Hearing").

[7] Dr. Smith, the Director of Medical Education in the Department of Obstetrics and Gynecology at Mt. Sinai Hospital in Chicago, testified as the president-elect of the American Association of Pro-Life Obstetricians and Gynecologists in support of the proposed ban, while Dr. Robinson, an Associate Professor at John Hopkins University School of Medicine, testified on behalf of the National Abortion Federation in opposition to the ban.

[8] *See The Partial-Birth Abortion Ban Act of 1995: Hearing before the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. 107 (1995) (hereinafter the "1995 Senate Hearing").

[9] *See Effects of Anesthesia During a Partial-Birth Abortion: Hearing before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. (1996) (hereinafter the "1996 House Hearing").

received letters from medical center directors and university professors who explained why, in their medical opinion, the ban would be detrimental to women's health and their future reproductive ability.

The record also contains submissions from numerous medical organizations which opposed the legislation. These groups include the American College of Obstetricians and Gynecologists ("ACOG"), the California Medical Association ("CMA"), the American Nurses Association ("ANA"), the American Medical Women's Association ("AMWA"), and the American Public Health Association ("APHA").[10] Only one organization supported the ban: the Physician's Ad Hoc Coalition for Truth ("PHACT"), an organization created solely to advocate for partial-birth abortion legislation, of which Representative Tom Coburn and Hearing witnesses Pamela Smith, Nancy Romer and Curtis Cook were founding members.[11] While some members who supported the bill found it significant that a group of 12 doctors on the American Medical Association's ("AMA") Council on Legislation endorsed the bill, the AMA did not accept the Council's recommendation and decided to remain neutral.[12]

H.R. 1833 passed both chambers, but was vetoed by President Clinton on April 10, 1996.[13]

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[10] *See* 142 Cong. Rec. S11350-51 (Sept. 26, 1996); 141 Cong. Rec. S18190-91 (Dec. 7, 1995); 141 Cong. Rec. S17896 (Dec. 4, 1995); 141 Cong. Rec. H11595 (Nov. 1, 1995).

[11] *See* 142 Cong. Rec. S11370-71, S11388 (Sept. 26, 1996); 142 Cong. Rec. H10637-38 (Sept. 19, 1996).

[12] *See* 141 Cong. Rec. H11786 (Nov. 7, 1995) (statement of Rep. Bryant); 142 Cong. Rec. S11271 (Sept. 25, 1996) (statement of Sen. Nickles); 141 Cong. Rec. H11609 (Nov. 1, 1995) (statement of Rep. Ros-Lehtinen).

[13] 142 Cong. Rec. H3338 (Apr. 15, 1996).

2. 105th Congress. When the veto of H.R. 1833 was sustained, new legislation, H.R. 1122, was introduced in the 105th Congress. The House Subcommittee on the Constitution and the Senate Judiciary Committee held a Joint Hearing in March 1997.[14] Again, the testimony was primarily policy-based, as most of the witnesses were representatives of various public interest groups who advocated for and against the bill.[15] Once again, additional written materials were submitted into the record reflecting the conflicting views of physicians and professional organizations on the subject. For example, Dr. David Grimes, former Chief of the Department of Obstetrics, Gynecology and Reproductive Sciences at the San Francisco General Hospital, described a situation in which several unsuccessful attempts were made to induce labor in a woman suffering from severe preeclampsia, and it became necessary to perform an intact D&E.[16] Dr. Grimes stated that under the circumstances, "an intact D&E was the fastest and safest option available."[17]

The Physicians for Reproductive Choice and Health ("PRCH"), an organization comprised of 2,800 physician members, joined the ACOG, the CMA, the ANA, and the AMWA in opposing the ban.[18] That same term, the AMA

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[14] *See Partial-Birth Abortion: The Truth: Joint Hearing on S. 6 and H.R. 929 Before the Senate Comm. on the Judiciary and the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1997) (hereinafter the "1997 Joint Hearing").

[15] Dr. Curtis Cook, Associate Director of Maternal-Fetal Medicine at Butterworth Hospital in Grand Rapids, Michigan, supported the ban and was the only physician to provide live medical testimony concerning the safety or need for the banned procedure. *See* 1997 Joint Hearing at 122.

[16] 143 Cong. Rec. S4521 (May 15, 1997).

[17] *Id.*

[18] *See* 143 Cong. Rec. S4434 (May 14, 1997); 143 Cong. Rec. S4714 (May 20, 1997); 143 Cong. Rec. S4573-74 (May 15, 1997); 143 Cong.

issued a letter in support of the legislation.[19] PHACT also submitted new material in support of the ban.[20] After passage by both chambers, the President vetoed the bill,[21] which veto was again sustained in the fall of 1998.[22]

3. 106th Congress. Both chambers continued to debate different versions of an abortion procedure ban during the 106th Congress.[23] These efforts coincided with the Eighth Circuit's decision invalidating Nebraska's partial-birth abortion ban[24] and this Court's decision to grant certiorari to consider the matter.[25] While no further hearings were held during this legislative term, additional materials were submitted into the record during the floor debates.[26] Importantly, the AMA withdrew its controversial endorsement of the legislation before this Court's decision in *Stenberg*.[27]

Rec. S4549-50 (May 15, 1997); 143 Cong. Rec. S4701 (May 20, 1997); 144 Cong. Rec. S10479 (Sept. 17, 1998).

[19] *See* 143 Cong. Rec. S4698-99 (May 20, 1997).

[20] *See* 143 Cong. Rec. S4549-50 (May 15, 1997).

[21] *See* 143 Cong. Rec. H8891 (Oct. 21, 1997).

[22] *See* 144 Cong. Rec. S10564 (Sept. 18, 1998).

[23] H.R. 3660 (Feb. 15, 2000) and S. 1692 (Oct. 5, 1999).

[24] *Carhart v. Stenberg*, 192 F.3d 1142 (8th Cir. 1999).

[25] *Stenberg v. Carhart*, 528 U.S. 1110 (2000).

[26] These materials consisted primarily of letters that had previously been submitted into the record or letters from medical organizations reaffirming their respective views on the legislation. *See e.g.*, 145 Cong. Rec. S12867-71 (Oct. 20, 1999); 145 Cong. Rec. S12891-92 (Oct. 20, 1999); 145 Cong. Rec. S12982 (Oct. 21, 1999).

[27] The AMA withdrew its support on October 21, 1999, citing Congress' failure to remove the criminal sanctions from the bill. *See Partial-Birth Abortion Ban Act of 2003: Hearing before the Subcomm. on the*

B. The Post-*Stenberg* Record

Following this Court's decision in *Stenberg*, during the 107th Congress, Representative Steve Chabot introduced H.R. 4965, confident that the President-elect would sign an abortion ban into law.[28] Responding to *Stenberg*, the Ban set forth a series of "Findings." Drafted and introduced before

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Constitution of the House Judiciary Comm., 108th Cong., 212 (2003) (hereinafter the "2003 House Hearing"). However, when the AMA announced its endorsement of the ban in 1997, it was immediately criticized for supporting the legislation. *See* Frank Rich, "Hypocritic Oath," *N.Y. Times*, May 29, 1997, § A, at 21 (noting that the same day that the AMA issued its letter supporting the 1997 bill, its executive vice-president sent an eight-page letter to Speaker of the House setting forth the AMA's detailed "wish-list" for Medicare reform); *see also* Albert Hunt, "Politics and People: Daschle Charts Common Ground on Abortion," *The Wall Street Journal*, May 22, 1997, § A, at 15 ("The American Medical Association became steeped in politics this week when it surprisingly endorsed the [partial-birth abortion] ban; there are credible reports that the doctor's lobby secretly struck a deal with GOP leaders over Medicare reimbursement in return for the endorsement"); 143 Cong. Rec. H8661 (Oct. 8, 1997) (statement of Rep. Bentsen – "isn't it surprising that the very day that the AMA announced its switcheroo, its executive vice president, P. John Seward, sent an eight-page letter to Newt Gingrich that lists the AMA requests in the budget negotiations concerning Medicare spending"). Concerned that its change in position appeared to be politically driven, the AMA engaged an independent consulting firm, Booz-Allen & Hamilton, to review its decision-making processes. The consulting firm's final report provided a critical analysis of the process and timeline of events leading up to the AMA's decision to support H.R.1122. *See* 2003 House Hearing at App. at 244-279 (attaching the complete report which concluded that "the combined effect of AMA policies was to allow the most critical, controversial and high-visibility policy issues to be addressed using the least democratic, least researched, and least systematic decision-making process").

[28] *See* 148 Cong. Rec. E1096 (June 19, 2002) (statement of Rep. Chabot – "[w]e now have a President who is equally committed to the sanctity of life, a President who has promised to stand with Congress in its effort to ban this barbaric and dangerous procedure").

Congress had an opportunity to hold any further hearings on the subject,[29] these Findings contradicted the factual findings of the trial court in *Stenberg* and this Court's conclusion that a "statute that altogether bans D&X creates significant health risks." *Stenberg*, 530 U.S. at 938.

The Congressional hearing that followed the drafting of the Findings was politically biased and transparently partisan, calculated to highlight testimony from supporters of the ban. Congress held one hearing during the 107th Congress to consider the medical and legal issues raised by this new legislation, which lasted a mere one hour and thirty-five minutes.[30] At that hearing, two physicians testified in support of the ban. Their testimony did not differ in any material respect from the testimony presented during the 104th and 105th Congresses.[31] Additional materials from medical professionals were submitted into the record. However, the bulk of the documents included in the hearing appendix consisted of hearing testimony and written materials previously submitted during the 104th and 105th Congresses.[32] H.R. 4965 passed the House, but the Senate never considered the legislation.

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[29] *See* H.R. Rep. No. 108-58 at 84 (2003). As Judge Walker noted in his concurring opinion in *NAF v. Ashcroft*, following the *Stenberg* ruling, a bill containing the "same detailed factual findings that were ultimately enacted into law" was introduced before Congress held any additional hearings or considered any new evidence. 437 F.3d 279, 292 n.9 (2d Cir. 2006) (Walker, J., concurring).

[30] *See Hearing on the Partial-Birth Abortion Ban of 2002 Before the House Subcomm. on the Constitution of the Comm. on the Judiciary*, 107th Cong. (2002) (hereinafter, the "2002 House Hearing").

[31] Dr. Kathi Aultman, a board certified obstetrician-gynecologist, testified that there had not been any peer-reviewed, controlled studies on the comparative safety of D&X, and that in her view, it was a dangerous experimental procedure. *Id.* at 8. Dr. Cook appeared again and provided essentially the same testimony that he gave in 1997. *Id.* at 26.

[32] *Id.*, App. at 47-280. The amicus briefs that ACOG and the Association

In early 2003, H.R. 760 and S. 3, bills virtually identical to H.R. 4965, were simultaneously introduced in the House and Senate. The Senate held no hearings on the Ban, and it rejected a motion to recommit to the Judiciary Committee, even though it had not conducted any hearings on the issue since the 1997 Joint Hearing.[33]

In March 2003, the House Judiciary Committee's Subcommittee on the Constitution held the only hearing on the Ban, which lasted one hour and thirty minutes. During that hearing, one medical witness testified in person, Dr. Mark Neerhof. Dr. Neerhof supported the Ban and his testimony echoed the testimony previously provided by Dr. Pamela Smith.[34]

However, materials submitted to Congress by health care professionals identified the safety benefits of D&X and expressed concern that the Ban would jeopardize women's health by forcing women to undergo less safe procedures. Dr. Vanessa Cullins, former Assistant Professor at John Hopkins University and Vice President of Medical Affairs for Planned Parenthood Federation of America, submitted written testimony that, "D&X is within the accepted standard of care and is not only safe, but for some woman may be

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of American Physicians and Surgeons ("AAPS") filed with this Court in *Stenberg* were also entered into the record during the markup session held by the Subcommittee on the Constitution and were attached to the House Judiciary Committee's Report on H.R. 4965. H.R. Rep. 107-604 at 93-107, 110-134 (2002).

[33] *See* 149 Cong. Rec. S3428-29 (Mar. 11, 2003); 149 Cong. Rec. S3570 (Mar. 12, 2003); 149 Cong. Rec. S3580 (Mar. 12, 2003).

[34] Significantly, Dr. Neerhof's testimony reached the same conclusions as a journal article he had co-authored, *see* Sprang & Neerhof, "Rationale for Banning Abortions Late in Pregnancy," 280 *JAMA* 744 (Aug. 26, 1998), which was part of the record before Congress pre-*Stenberg* and which was cited in *Stenberg*. *See* 530 U.S. at 933; *id.* at 1016 n.22; *id.* at 1017.

safer than other abortion methods."[35] These professionals also pointed out that there was no basis for the alleged risks set forth in the Ban's Findings. Dr. Anne Davis, Assistant Professor in Clinical Obstetrics and Gynecology at Columbia University, stated that "[t]here is no data supporting the assertion that the gradual and gentle dilation involved in intact D&E causes cervical incompetence … no support for the assertion that converting the pre-viable fetus to a breech presentation is dangerous, … and the risk of laceration and of damage from blind insertion of instruments is decreased – not increased – by removing the fetus intact."[36]

In addition to the written statements of Drs. Cullins and Davis, four physicians submitted new letters opposing the Ban. Dr. Gerson Weiss, Professor and Chair of the Department of Obstetrics and Gynecology and Women's Health at New Jersey Medical College, and Dr. Natalie Roche, Assistant Professor, stated that D&X "is sometimes the physician's preferred method of termination" because it *reduces* the risk of uterine perforations, tears, and cervical lacerations.[37] Dr. Felicia H. Stewart, an Adjunct Professor in the Department of Obstetrics, Gynecology and Reproductive Sciences at the University of California, San Francisco, and co-director of the Center for Reproductive Health Research and Policy, stated that the "options left open" by the Ban "are less safe for women who need an abortion after the first trimester of pregnancy," and described a series of underlying medical conditions which dictate that physicians be given the latitude to terminate a pregnancy in the safest manner possible.[38]

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[35] *See* 2003 House Hearing at 187-88.

[36] *Id.* at 194.

[37] *See* 149 Cong. Rec. S3385-86 (Mar. 10, 2003).

[38] *See* 2003 House Hearing at 189-91.

To rebut the Ban's sponsor's claims that Congress had never been provided with a specific case in which D&X would be medically indicated, a letter from Dr. Philip Darney, Chief of Obstetrics, Gynecology and Reproductive Sciences at San Francisco General Hospital, was introduced into the record during the Senate floor debates, which provided two examples in which patients presented with placenta previa and placenta accreta, where the procedure was "critical to providing optimal care."[39] Moreover, Dr. Darney stated that he was certain that a review of records from this major metropolitan hospital, which performs 2,000 abortions annually, would identify other instances "in which 'intact D&E' was the safest technique of pregnancy termination" such as in cases of "severe pre-eclampsia."[40] In addition, ACOG, PRCH, AMWA, and APHA submitted material opposing the Ban.[41]

Eight physicians submitted new letters supporting the Ban. Seven of these letters expressed disagreement with the medical examples offered in Dr. Darney's letter.[42] Dr. Anthony P. Levatino wrote to confirm the accuracy of demonstrative exhibits prepared under his supervision, and did not address the safety or need for D&X.[43] PHACT submitted a summary of testimony offered to the Health and Welfare Committee of the Rhode Island Senate by William

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[39] 149 Cong. Rec. S3600 (Mar. 12, 2003).

[40] *Id.*

[41] *See* 149 Cong. Rec. S3479-80 (Mar. 11, 2003); 149 Cong. Rec. S3656-57 (Mar. 13, 2003); 149 Cong. Rec. S11596-97 (Sept. 17, 2003); 149 Cong. Rec. S12932-33 (Oct. 21, 2003); 2003 House Hearing at 201-209.

[42] *See* 2003 House Hearing at 102-112 (letters of Daniel J. Weshter, M.D.; Watson A. Bowes, Jr., M.D.; Steve Calvin, M.D.; Nathan Hoeldtke, M.D.; Byron C. Calhoun, M.D.; T. Murphy Goodwin, M.D.; and Susan E. Rutherford, M.D.).

[43] *Id.* at 62.

Cashore, M.D., which did not discuss the risks of D&X or argue that the procedure was unsafe, but did take issue with the view that the procedure is safer or better than other methods of termination.[44]

The legislation passed both chambers, and the President signed the Ban into law on November 5, 2003.

II. The Ban's Findings Are Not Supported by the Record

The Ban's Findings assert that "overwhelming evidence . . . much of which was compiled after the district court hearing in *Stenberg*" demonstrates that the banned procedures are "never necessary to preserve the health of a woman."[45] Yet, the *Stenberg* Court did not confine its review to the trial record,[46] and the legislative record clearly shows that Congress did not base its Findings on any new body of evidence, but rather on *the same information that this Court had considered in Stenberg*. Indeed, as the Congressional history outlined above demonstrates, Congress marshaled no new evidence in support of the Ban.[47]

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[44] *Id.* at 95-99.

[45] *See* 117 Stat. 1202, § 2(7); § 2(5).

[46] *See Stenberg*, 530 U.S. at 932-33 (evaluating other trial courts' evidence); *id.* at 927, 929 (discussing treatment of banned procedures by medical texts and journals); *id.* at 933 (relying upon amicus briefs submitted to Supreme Court); *id.* at 929-30 (reviewing Congressional record); *see also id.* at 960, 966 (Kennedy, J., dissenting); *id.* at 987 & n.5, 993-96 & nn.11 & 13, 1016-17 & n.23 (Thomas, J., dissenting).

[47] For example, the House Judiciary Committee's report in support of the Ban relied principally upon testimony received during the pre-*Stenberg* 104th and 105th Congresses and cited to little else than the policy statements of the AMA, the testimony of the State's lead expert in *Stenberg*, and the briefs the Petitioner and amici AAPS filed with this Court in support of Nebraska's ban. H.R. Rep.. No. 108-58 at 14-23 (2003). Likewise, the testimony of the five physicians who testified before Congress concerning the alleged dangers posed by the banned

Just as Congress embraced evidence that this Court had already considered and found lacking in *Stenberg*, its Findings fly in the face of a significant body of medical opinion establishing the safety and necessity of the banned procedure. For example, the record does not support Congress' Finding that D&X is a "disfavored procedure" among "physicians who routinely perform other abortion procedures."[48] Several physicians specializing in obstetrics and gynecology who regularly perform abortions stated that they use the procedure. *See e.g.,* 1996 House Hearing at 130 (Dr. William Rashbaum); *id.* at 132 (Dr. Herbert Jones); 149 Cong. Rec. S3600 (Mar. 12, 2003) (Dr. Darney).

Nor does the record support Congress' Finding that "[a] moral, medical, and ethical consensus exists" that D&X is "never medically necessary,"[49] or the Finding that the procedure "poses serious risks to a woman's health, and lies outside the standard of medical care."[50] Congress was provided with numerous examples of situations in which physicians employed the intact D&E procedure because it was the safest option to preserve the health of the patient, which standing alone, completely debunk the claim that the banned procedure is "*never* medically necessary." *See, e.g.,* 141 Cong. Rec. S17892 (Dec. 4, 1995) (Dr. Scommegna); 1996 House Hearing at 132 (Dr. Herbert Jones); 143 Cong.

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procedures did not differ in any material respect from information they had previously presented to the Court through an amicus brief, *see* Br. Amici Curiae Assoc. Am. Physicians & Surgeons et al., in Support of Pets., *Stenberg v. Carhart*, 530 U.S. 914 (2000) (No. 99-830), available at 2000 WL 228448 (including as amici Drs. Aultman, Cook, Romer, and Smith); *id.* at 933, or through a journal article previously considered by the Court. *See* 530 U.S. at 933 (discussing article co-authored by Dr. Neerhof).

[48] 117 Stat. 1201, § 2(2).

[49] 117 Stat. 1202, § 2(1).

[50] 117 Stat. 1202, § 2(13).

Rec. S4521 (May 15, 1997) (Dr. Grimes); 149 Cong. Rec. S3600 (Mar. 12, 2003) (Dr. Darney).[51] Congress also heard from physicians practicing in reproductive genetics and high-risk obstetrics who have referred their patients to other physicians who perform intact D&Es because of the health benefits the procedure offers. *See* 1995 Senate Hearing at 144; 141 Cong. Rec. S17891 (Dec. 4, 1995) (Dr. Laurence Burd). Congress had all of this medical authority available to it, explaining why in the opinion of knowledgeable and qualified physicians, the banned procedure is both safe and necessary, and within the accepted standard of care.[52]

The record flatly disproves Congress' assertion that there is "no credible evidence" that D&X is "safe or safer than other abortion procedures."[53] The record contained many explicit statements from physicians (many who had actual experience or familiarity with surgical abortions) and medical organizations (the majority of which opposed the

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[51] In the opinion of many obstetricians-gynecologists who submitted materials in opposing the Ban, D&X offers several safety advantages over alternative procedures and the risk of uterine tears and cervical lacerations is *reduced* – not increased – by removing the fetus intact. *See* 1995 Senate Hearing at 100-101 (Dr. Mary Campbell); 2003 House Hearing at 187-88 (Dr. Vanessa Cullins); *id.* at 194 (Dr. Anne Davis); 149 Cong. Rec. S3385-86 (Mar. 10, 2003) (Drs. Gerson Weiss and Natalie Roche). Physician witnesses who cited these risks and the risks associated with performing a breech extraction conceded that these alleged risks have not been adequately quantified. *See* 1995 Senate Hearing at 78-79 (Dr. Pamela Smith); 2003 House Hearing at 7 (Dr. Neerhof).

[52] Notably, even amici Congressman Ron Paul and the AAPS acknowledge that "the practice has been incorporated into abortion texts and the curriculum of prestigious medical schools. *See* Brief of Amici Curiae Congressman Ron Paul and Association of American Physicians and Surgeons in Support of Petitioner, at 19 (citing 331 F.Supp.2d at 1010); *see also Ashcroft*, 320 F.Supp.2d at 1029.

[53] 117 Stat. 1204, § 2(14)(B).

Ban) who believed D&X may be safer than other techniques in certain circumstances.[54] Finally, Congress knew that the ACOG, the nation's most reputable organization of practicing obstetricians and gynecologists, steadfastly opposed the Ban and continued to express its opinion that "there are circumstances under which this type of procedure would be the most appropriate and safest procedure to save the life or health of a woman."[55] Nevertheless, supporters of the Ban found and placed great emphasis on the fact that there are no controlled medical studies on the comparative safety of D&X, a point which this Court treated as irrelevant in light of the significant body of medical opinion, which both it and Congress had before it, attesting to its safety advantages.[56]

Based on the evidence before it – a far more compelling evidentiary record than this Court found to require a health exception in *Stenberg* – the Ban's supporters could not have reasonably inferred that D&X is unsafe, much

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[54] *See e.g.*, 1995 Senate Hearing at 60 (Dr. Mary Campbell); 1996 House Hearing at 132 (Dr. Herbert Jones); 141 Cong. Rec. S17892 (Dec. 4, 1995) (Dr. Antonio Scommegna); 141 Cong. Rec. S17890 (Dec. 4, 1995) (Dr. James Schreiber); 141 Cong. Rec. S18192 (Dec. 7, 1995) (Dr. Samuel Edwin); 143 Cong. Rec. S4521 (May 15, 1997) (Dr. David Grimes); 2003 House Hearing 187-88 (Dr. Vanessa Cullins); 149 Cong. Rec. S3385-86 (Mar. 10, 2003) (Drs. Gerson Weiss and Natalie Roche); 2003 House Hearing 189-91 (Dr. Felicia Stewart); 149 Cong. Rec. S3600 (Mar. 10, 2003) (Dr. Darney).

[55] *Compare* 149 Cong. Rec. S12921 (Oct. 21, 2003) (March 6, 2003 Letter from Ralph Hale, Exec. V.P. of ACOG, reaffirming the ACOG's Statement on Intact Dilation and Extraction, Jan. 12, 1997); H.R. Rep. 108-58, at 98 (Brief of Amici Curaie American College of Obstetricians and Gynecologists, et al., in Support of Respondent); 2003 House Hearing at 197 (ACOG July 8, 2002 Policy Statement on the Subject of "Partial-Birth Abortion" Bans) *with Stenberg*, 530 U.S. at 928, 932, 935-36 (citing the ACOG 1997 Policy Statement and brief of amici ACOG).

[56] *Compare* 117 Stat. 1204 at § 2(14)(B); H.R. Rep 108-58, at 14-15 *with Stenberg*, 530 U.S. at 936-37.

less concluded that a new found consensus exists that it is never medically necessary.

III. The Federal Abortion Ban Is Governed By This Court's Abortion Decisions

Proponents of this legislation could not have reasonably concluded that the Ban falls outside of this Court's abortion jurisprudence. Remarkably, members of Congress who join Petitioner in defending the Ban nevertheless retreat to the same strained argument posited and rejected when the Nebraska ban was before this Court in *Stenberg*. They submit that *Roe* and its progeny are not dispositive here since this Court's abortion decisions are about the "unborn," whereas this legislation concerns the "partially born."[57] Advancing an argument, which by the Ban's sponsor's own admission, is squarely foreclosed by *Stenberg*,[58] they claim that two of this Court's decisions "presuppose" such a distinction.[59]

First, they reason that this Court somehow implicitly recognized in *Roe* that a two-tiered analysis should apply when the Court noted, without comment, that Texas' parturition statute, which prohibited one from killing a child "in the state of being born and before actual birth," was not under attack. *See Roe*, 410 U.S. at 118 n.1. Second, they rely on this Court's decision in *Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft*, 462 U.S. 476, 485-86 (1983), which upheld a requirement that a second physician be available during certain emergency third

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[57] *See* Amicus Brief of the American Center for Law and Justice, 78 Members of Congress, and the Committee to Protect the Ban on Partial Birth Abortion in Support of Petitioner ("78 Members' Brief") at 9-11.

[58] 149 Cong. Rec. S11593 (Sept. 17, 2003) (statement of Sen. Santorum).

[59] 78 Members' Brief at 10.

trimester abortions to assist in preserving the life and health of a child. However, the statute in *Ashcroft* applied in those rare circumstances where a *viable* fetus survives the abortion procedure and a *live birth* occurs, and the Court said nothing about the State's ability to interfere with the first physician's efforts to preserve the woman's health. *Id.* That is because consistent with this Court's precedents,[60] the statute at issue there specifically provided that the second physician only takes "steps … to preserve the life and health of the viable unborn child" which do "not pose an increased risk to the life or health of the woman." *Id.* at 483.

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[60] The principle that a mother's life and health, are at all times, paramount to all other interests the State might assert, is a bedrock of this Court's abortion jurisprudence. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 879 (1992) (reaffirming *Roe*'s holding that a State may advance its interest in a viable fetus by regulating or proscribing abortion, only if an exception is made for circumstances where "it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother"). Indeed, this Court has never approved a ban on the performance of a particular abortion procedure, finding that such regulations impermissibly placed a mother's health at risk. *See Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 768-69 (1986) (facially invalidating statute which failed to require that maternal health be the physician's paramount concern), *overruled in part on other grounds by Casey*, 505 U.S. at 870, 882; *Coulautti v. Franklin*, 439 U.S. 379, 400 (1979) (declaring statute unconstitutionally vague which did not clearly allow the physician to put the life and health of the mother first, and left the door open to a "trade-off" between maternal health and fetal survival that raised "serious ethical and constitutional difficulties"); *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 79 (1976) (finding ban which "force[d] a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed" unconstitutional). This Court's decision in *Stenberg* made clear that partial-birth abortion bans are to be treated no differently. *See Stenberg*, 530 U.S. at 937 (holding that State was unjustified in banning a procedure which may be safer for some patients without including a maternal health exception).

Under *Roe* and its progeny, a woman's health must always prevail, and this Court affirmed this protection when it invalidated a virtually identical ban in *Stenberg*. Therefore, members of Congress who defend this legislation cannot in good faith maintain that the Ban raises new questions that this Court has not previously examined.

The clear intent of the proponents of the Ban is made evident by a side-by-side comparison of the evidence Congress relied upon in enacting the statute and that which this Court rejected in *Stenberg*. In embracing this discredited evidence and reaching the opposite conclusion, Congress clearly sought to respond to this Court's earlier ruling in *Stenberg* and work a substantive change in general abortion law. The decision to omit a health exception was not based on any intervening change in medical fact, but founded upon a desire to challenge the prevailing constitutional standard that *Stenberg* reaffirmed.[61]

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[61] *See e.g.*, 149 Cong. Rec. S3606 (Mar. 12, 2003) (statement of Sen. Santorum – "To suggest we in Congress don't have the right to make these decisions, that we have to give it up to the courts – unelected people, just give it up to them; I don't need to be ruled by a bunch of judges"); 149 Cong. Rec. H4946 (June 4, 2003) (statement of Rep. DeLay – "I did not come to the House to make a decision for the courts. I came to the House to pass strong, important legislation, and then to fight in the courts for my position. I do not let the courts decide what direction I will go. If Members want to make decisions for the courts, then go down to the White House and get a nomination from the President"); 148 Cong. Rec. H5360 (July 24, 2002) (statement of Rep. Davis – "even if it were certain that this legislation as soon as it was passed would be struck down by an imperial judiciary, we must, as Members of Congress, discharge our duties to at least attempt to protect the civil rights of the most vulnerable, those least able to protect themselves").

IV. Five Successive Congresses Rejected Proposals To Include A Health Exception In Abortion Procedure Ban Legislation

Congress had ample opportunity to pass an abortion procedure ban with a health exception, but chose not to include one. *See* 149 Cong. Rec. S3605-07 (Mar. 12, 2003) (statement of Sen. Santorum – "[This amendment] strips out the language of the partial-birth abortion ban, replaces it with … the current law… To simply restate the law and then claim one is for the partial-birth abortion bill … falls hollow on the Chamber"); *see also* 149 Cong. Rec. S3577-78 (Mar. 12, 2003); 149 Cong. Rec. H4943 (June 4, 2003) (statement of Rep. King). Instead, supporters of the Ban were intent on passing a bill that contained no protection for the health of the woman, left no role for her treating physician, and entirely removed fetal viability from the constitutional equation.

1. 104th Congress. The first partial-birth abortion bill, H.R. 1833, contained no exception to protect the life or health of the pregnant woman and had only an affirmative defense for procedures necessary to save a woman's life.[62] Amendments replaced the affirmative defense with an exception for the pregnant woman's life.[63] Several members of the House and Senate attempted to offer and pass amendments providing for a health exception, but their efforts were rebuffed.[64] President Clinton vetoed H.R. 1833

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[62] *See* H.R. 1833, § 1531(e) (June 14, 1995).

[63] *See* 142 Cong. Rec. S18228 (Dec. 7, 1995) (Roll No. 596).

[64] *See* 141 Cong. Rec. S18034 (Boxer Amendment No. 3083) (Dec. 7, 1945); 142 Cong. Rec. H2895 (Mar. 27, 1996) (statement of Rep. Bielenson); H. Res. 389, 104th Cong. 2d Sess. (1996); *see also* 142 Cong. Rec. H2899 (Mar. 27, 1996) (statement of Rep. Frank); 142 Cong. Rec. H.2902 (Mar. 27, 1996) (statement of Rep. Schroeder); 142 Cong. Rec. H2903 (statement of Rep. Jackson-Lee) (Mar. 27, 1996); 142 Cong. Rec. H2928 (Mar. 27, 1996) (Roll No. 94).

because it did not include a health exception, and the veto was sustained.

2. 105th Congress. H.R. 1122, the second partial-birth abortion bill to be considered by Congress, also did not contain a health exception, only a narrow life exception.[65] The House Judiciary Committee rejected several proposed health exception amendments,[66] and the legislation was passed by the full House after consideration under a closed rule[67] limiting general debate and barring amendments.[68]

The Senate likewise considered and rejected two amendments to H.R. 1122 providing for a health exception,[69] and instead approved the legislation with an amendment relating to the life exception.[70] As in the previous session,

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[65] *See* H.R. 1122, § 1531(a) (Mar. 19, 1997).

[66] *See e.g.*, H.R. Rep. 105-24 at 21 (1997) (substitute amendment offered by Rep. Scott that "would ban post-viability abortions unless the abortionist determines the mother's life or 'health' is at risk" defeated in a roll call vote); *id*. (amendment offered by Rep. Jackson-Lee "to allow all pre-viability partial-birth abortions and to add an exception to the general prohibition of partial-birth abortions to allow the procedure if the abortionist determines that a mother's life or 'health' is at risk" defeated in a roll call vote); *id.* (amendment offered by Rep. Frank to add an exception for the "'physical health' of the mother" defeated in a roll call vote).

[67] *See* H.Res. 100, 105th Cong., 1st Sess. (1997).

[68] *See* 143 Cong. Rec. H1231 (Mar. 20, 1997) (Roll No. 65).

[69] *See* 143 Cong. Rec. S4614 (Feinstein Amendment No. 288) (prohibiting post-viability abortions except where "necessary to preserve the life of the woman or to avert serious adverse health consequences") (May 15, 1997) (Rec. Vote No. 69); 143 Cong. Rec. S4614-4615 (Daschle Amendment No. 289) ("It shall be unlawful for a physician to abort a viable fetus unless the physician certifies that the continuation of the pregnancy would threaten the mother's life or risk grievous injury to her physical health") (May 15, 1997) (Rec. Vote No. 70).

[70] *See* 143 Cong. Rec. S4715 (Oct. 8, 1997) (Roll No. 71).

House members attempted to win consideration of two amendments creating maternal health exceptions, but their requests were rejected,[71] and the bill was again submitted under a closed rule and agreed to by the House.[72] President Clinton again vetoed the legislation, and the Senate again was unable to garner the necessary votes to override the veto.

3. 106th Congress. During the next session of Congress, the House and Senate considered different versions of the procedure ban, S. 1692 and H.R. 3660, but neither version contained an exception for the health of the mother.[73] Members offered health exception amendments.[74] which

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[71] *See* H.R. Rep. 105-312 at 1 (1997) (motion of Rep. Slaughter for Hoyer amendment which would "ban all post-viability abortions except where continuation of the pregnancy would endanger the life of the woman or risk grievous injury to her health"); *id.* at 2 (motion of Rep. Slaughter for the Lowey amendment which would apply "only post-viability and would include an exception in order to avert serious adverse health consequences to the mother"); 143 Cong. Rec. H8640 (Oct. 8, 1997) (statement of Rep. Myrick).

[72] *See* H.Res. 262, 105th Cong. 1st Sess. (1997); 143 Cong. Rec. H8662-63 (Oct. 8, 1997) (Roll No. 500).

[73] *See* S. 1692, § 1531(a) (Oct. 5, 1999); H.R. 3660, § 1531(a) (Feb. 15, 1999).

[74] *See* 145 Cong. Rec. S12943 (Durbin Amendment No. 2319) (prohibiting post-viability abortions unless prior to abortion, the attending physician and an independent physician who will not perform nor be present during the procedure certifies that continuation of the pregnancy will threaten the life of the mother or risk grievous injury to her health) (Oct. 20, 1999) (Rec. Vote No. 335); *see also* 146 Cong. Rec. H.1773-1799 (H.R. 2149, the Hoyer-Greenwood-Taucher-Johnson "Late Term Restriction Act") (providing for a federal ban on all post-viability abortions except those needed to preserve the woman's life or to avert serious adverse health consequences) (Apr. 5, 2000); H.R. Rep. No. 106-559, (2000); 106th Cong., 2d Sess. at 2 (motion of Rep. Slaughter for Frank amendment, creating exception to "avert serious adverse long-term physical health consequences to the mother"); *id.* (motion by Rep. Slaughter for Edwards amendment banning post-viability abortions except where physician concludes abortion is "necessary to prevent the

were defeated or foreclosed by parliamentary procedures limiting debate or prohibiting amendments.[75] Ultimately, the differing versions of the procedure ban passed by the two chambers were never reconciled, in the wake of this Court's ruling in *Stenberg*.

4. 107th Congress. H.R. 4965, a bill substantially similar to the Federal Abortion Ban, was introduced in the House on June 19, 2002 and contained Findings virtually identical to those found in the Ban, including the Finding that D&X "is never medically necessary."[76] The bill was referred to the House Committee on the Judiciary the same day, and its Subcommittee on the Constitution held a markup session on July 17, 2002. During the markup session, three amendments were offered to include a health exception, which were all rejected.[77]

Again, the proposed legislation was submitted for consideration under a closed rule resolution.[78] During the Rules Committee session on July 23, 2002, four motions to make an amendment containing a health exception were made, and each was defeated.[79] Pursuant to the provisions of

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death of a woman or a substantial risk of serious impairment to her physical or mental health").

[75] *See* H. Res. 457, 106th Cong. 2d Sess. (2000); 146 Cong. Rec. H1778 (Apr. 5, 2000); 146 Cong. Rec. H1800 (Apr. 5, 2000) (Roll No. 103).

[76] *See* H.R. 4965, § 2(1) (June 19, 2002).

[77] *See* H.R. Rep. No. 107-604, House Subcomm. on the Constitution Markup Tr., at 59-77, 88-89, 138 (2002).

[78] *See* H. Res. 498, 107th Cong., 2d Sess. (2002).

[79] *See* H.R. Rep. No. 107-608, at 2 (2002) (motion by Rep. Frost for Edwards amendment which would "ban all post-viability abortions, except where the physician determines in good faith, according to his best medical judgment, that the abortion is necessary to prevent the death of the woman or to avert a substantial risk of serious impairment to her physical or mental health"); *id.* (motion by Rep. Slaughter for Baldwin

House Resolution 498, general debate on H.R. 4965 was confined to two hours, and no amendments or intervening motions were permitted except for a motion to recommit. Representative Baldwin moved to recommit to the Judiciary Committee, which motion failed.[80] The House then passed H.R. 4965,[81] but it was not considered by the Senate during that session.

5. 108th Congress. In February 2003, partial-birth abortion legislation lacking a maternal health exception was again proposed in each of the chambers.[82] During the House Subcommittee markup session of the House version of the bill, H.R. 760, Representatives Scott, Baldwin, and Jackson-Lee proposed an amendment that would have offered an exception to preserve the health of the pregnant woman, in accordance with *Casey* and *Stenberg*. This amendment was defeated in a party line vote.[83]

H.R. 760 was then reported to the House for consideration with one hour of general debate. The House spent one additional hour debating the Greenwood-Hoyer

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amendment which would include "an exception for the preservation of the life or health of the mother"); *id.* (motion by Rep. McGovern for Jackson-Lee amendment which would limit the ban to partial-birth abortions performed post-viability, and include "an exception to protect the health of the woman, as required by *Stenberg v. Carhart*"); *id.* at 3 (motion by Rep. McGovern for Hoyer amendment which would ban all post-viability abortions, "unless, in the medical judgment of the attending physician, it is necessary to preserve the life of the woman or to avert serious adverse health consequences to her").

[80] *See* 148 Cong. Rec. H5373 (July 24, 2002) (Roll No. 342).

[81] *Id.* (Roll No. 343).

[82] *See* H.R. 760 (Feb. 13, 2003); S. 3 (Feb. 14, 2003).

[83] *See* H.R. Rep. No. 108-58, House Subcomm. on the Constitution Markup Tr., at 66-73 (2003) (amendment to include an exception where the abortion "is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother").

Amendment,[84] which permitted the banned procedure only where necessary to protect the woman from serious adverse health consequences.[85] The Ban's proponents rejected this and other proposals, including a still narrower version of this amendment that would have limited its application to serious physical health consequences which was not permitted to be voted upon by the full House.[86] Representative Baldwin moved to recommit to the Judiciary Committee, but the motion failed.[87] The House voted to pass H.R. 760,[88] and moved to replace the language of the Senate bill with the provisions of H.R. 760.[89]

Two amendments proposing a health exception were offered during the floor debates of S.3. Both were rejected.[90]

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[84] *See* 2003 House Hearing, App. at 50; 149 Cong. Rec. H1771-1775 (Apr. 5, 2000).

[85] *See* 149 Cong. Rec. H4939 (Greenwood Amendment) (prohibiting all post-viability abortions except where, in the medical judgment of the attending physician, the abortion is necessary to preserve the life of the woman or to avert serious adverse health consequences to the woman) (June 4, 2003) (Roll No. 240).

[86] *See* 149 Cong. Rec. H4915 (June 4, 2003); 149 Cong. Rec. H4910 (June 4, 2003) (statement of Rep. Delahunt).

[87] *See* 149 Cong. Rec. H4948-50 (June 4, 2003) (Roll No. 241).

[88] *See* 149 Cong. Rec. H4922-23 (June 4, 2003).

[89] *See* 149 Cong. Rec. H4951-53 (June 4, 2003) (agreed to by voice vote).

[90] *See* 149 Cong. Rec. S3479-3482 (Durbin Amendment No. 259) (prohibiting post-viability abortions unless prior to abortion, the attending physician and an independent physician who will not perform nor be present during the procedure certifies that continuation of the pregnancy will threaten the life of the mother or risk grievous injury to her health) (Mar. 11, 2003) (Rec. Vote No. 46); 149 Cong. Rec. S3600-3611 (Feinstein Amendment No. 261) (prohibiting all post-viability abortions unless, in the medical judgment of the attending physician, the abortion is necessary to preserve the life or health of the woman) (Mar. 12, 2003) (Rec. Vote No. 249).

Supporters of this legislation have generally opposed such amendments, arguing that a maternal health exception that can be interpreted broadly by physicians will undercut the efficacy of the ban.[91] In the interest of providing the women who would be affected by this law some protection, many of amici proposed that Congress concentrate instead on crafting a more circumscribed health exception.[92] That these proposals failed is telling. Of greater import, though, is the fact that in the eight years that the legislation at issue was under consideration, proponents of the Ban never offered anything in the way of a counter-proposal to limit the factors to be considered in applying a health exception. Retired Justice O'Connor even provided Congress with a roadmap for drafting legislation that might cure some of the constitutional infirmities of the Ban. *Stenberg*, 530 U.S. at 950-51. The legislative record, however, shows that the clear intent of the proponents of the Ban was to defy this Court's decision in *Stenberg* and whittle away at *Roe's* core principles. As five successive Congresses, in dozens of recorded votes, refused to adopt any health exception, it would violate the intent of Congress to create such an exception by judicial fiat.

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[91] *See, e.g.,* 149 Cong. Rec. S11592-94 (Sept. 17, 2003) (statement of Sen. Santorum – health "is an exception that swallows the rule"); 149 Cong. Rec. H4944 (June 4, 2003) (statement of Rep. Gingrey – opposing health exception for "serious adverse" health consequences since "[t]here are physicians who, unfortunately, and for generous consultation fee, will readily certify that a woman's health is endangered by the pregnancy").

[92] *See e.g.*, 149 Cong. Rec. H. 4941 (June 4, 2003) (statement of Rep. Greenwood – "If the issue here is that we want to make sure that this procedure is only used where health requirements demand it, then we should be working together to create a very tight health exception not eliminating one entirely").

V. Facial Invalidation of the Ban Is the Only Appropriate Remedy

In devising judicial remedies, this Court should resist any inclination to invade the legislative domain and rewrite an unconstitutional statute, even if in doing so it seeks to save the legislation. *Ayotte*, 126 S. Ct. 961, 968 (2006). As this Court stressed in *Ayotte*, the "touchstone" for any remedial analysis must be legislative intent. *Id.* As the legislative history of the Ban makes clear, Congressional supporters of the Ban prefer no law to a law with a maternal health exception.[93]

Nor should this Court remand this action back to the lower federal courts to determine Congress' intent as to whether it would consider having a law with a maternal health exception. The Ninth Circuit already conducted a thorough and detailed analysis of the legislative history and rightly concluded that "[Congress] considered the omission of the exception to be a critical component of the legislation it was enacting." *Planned Parenthood Federation of America, Inc. v. Gonzales*, 435 F.3d 1163, 1186 (9th Cir. 2006).[94]

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[93] *See e.g.*, 149 Cong. Rec. S3573-74, S3604-05 (Mar. 12, 2003) (statement of Sen. DeWine); 149 Cong. Rec. S3577-78, S3608 (Mar. 12, 2003) (statement of Sen. Santorum); 149 Cong. Rec. S12943 (Oct. 21, 2003) (statement of Sen. Santorum); 149 Cong. Rec. H4939 (June 4, 2003) (statements of Rep. Franks and Rep. Sensenbrenner); 149 Cong. Rec. H4991 (June 4, 2003) (statement of Rep. Chabot); 149 Cong. Rec. H 4992 (June 4, 2003) (statement of Rep. King); 149 Cong. Rec. H4944 (June 4, 2003) (statement of Rep. Gingrey); 149 Cong. Rec. H4944 (June 4, 2003) (statement of Rep. Renzi); 149 Cong. Rec. H4995 (June 4, 2003) (statement of Rep. Davis); 149 Cong. Rec. H4947 (June 4, 2003) (statement of Rep. Hostettler).

[94] Notably, not one of the briefs submitted by Congressional amici dispute this fact or attempt to mask Congress' disdain for the prevailing constitutional standard. *See* 78 Members Brief, at 8 ("[i]nvoking an adult's 'health' as a reason for killing an innocent child should be unthinkable in a civilized society"); Brief of Amici Curiae American

To salvage this statute would require the Court to graft onto the Ban a health exception, which those who voted for the Ban deliberately rejected. Since it would be impossible to cure the constitutional defect in this statute and remain faithful to legislative intent, the only appropriate remedy is for this Court to affirm the decisions of the Eighth and Ninth Circuits invalidating the statute *in toto*. Whether and how a new statute should be drafted to conform to the current state of medical knowledge and this Court's constitutional requirements must be left to another Congress to decide.

Association of Pro Life Obstetricians, Sen. Tom Coburn, M.D., Congressman Charles Boustany, J.R., M.D., Congressman Michael Burgess, M.D., Congressman Phil Gingrey, M.D., Congressman Dave Weldon, M.D., C. Everett Koop, M.D., Edmund D. Pellegrino, M.D. in Support of Petitioner at 3-5 (contending that the governing standard "medically necessary to preserve the health of the woman" means "any abortion a provider agrees to perform for any reason" and urging this Court to reject the definition of health set forth in its prior precedents); Brief of Amici Curiae Congressman Ron Paul and Association of American Physicians and Surgeons in Support of Petitioner, at 9 (maintaining that "the willingness of some abortion providers and courts to define any pregnancy as a health risk justifying abortion" supports "Congress' determination that a health exception is neither necessary or desirable in this legislation").

CONCLUSION

For the foregoing reasons, as well as those in the Respondents' Briefs, the judgments of the Courts of Appeals should be *affirmed.*

Respectfully submitted,

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Appendix A
Amici Curiae – Members of Congress

Rep. Gary L. Ackerman

Rep. Tom Allen

Rep. Tammy Baldwin

Rep. Shelley Berkley

Rep. Howard L. Berman

Sen. Barbara Boxer

Rep. Lois Capps

Rep. Michael E. Capuano

Rep. John Conyers, Jr.

Rep. Danny K. Davis

Rep. Susan Davis

Rep. Peter DeFazio

Rep. Diana DeGette

Rep. Lane Evans

Rep. Sam Farr

Rep. Chaka Fattah

Rep. Bob Filner

Rep. Raul Grijalva

Rep. Jane Harman

Rep. Rush Holt

Rep. Michael Honda

Rep. Steve Israel

Rep. Jesse Jackson, Jr.

Rep. Sheila Jackson Lee

Rep. Carolyn Cheeks Kilpatrick

Rep. Dennis J. Kucinich

Sen. Frank Lautenberg

Rep. John Lewis

Rep. Nita Lowey

Rep. Carolyn Maloney

Rep. Carolyn McCarthy

Rep. Betty McCollum

Rep. Jim McDermott

Rep. James P. McGovern

Rep. Martin T. Meehan

Sen. Patty Murray

Rep. Jerrold Nadler

Rep. John W. Olver

Rep. Linda Sanchez

Rep. Janice Schakowsky

Rep. Brad Sherman

Rep. Louise M. Slaughter

Rep. Hilda Solis

Rep. Fortney Pete Stark

Rep. Ellen Tauscher

Rep. Bennie Thompson

Rep. Mike Thompson

Rep. Edolphus Towns

Rep. Debbie Wasserman Schultz

Rep. Maxine Waters

Rep. Henry Waxman

Rep. Robert Wexler