No. 05-1382

In The

Supreme Court of the United States

Alberto Gonzales,

Petitioner,

v.

Planned Parenthood Federation of America *et al*.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* CALIFORNIA MEDICAL ASSOCIATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Does Congress' use of the phrase "in or affecting interstate or foreign commerce" in 18 U.S.C. 1531(a), to describe those abortions that it seeks to criminalize, provide physicians who are considering performing an abortion constitutionally adequate notice under the due process clause of which abortions are covered by that provision?

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STATEMENT OF INTEREST[1]

The California Medical Association ("CMA") – California's largest medical association with more than 30,000 members – exists to promote the science and art of medicine, the care and well-being of patients, the protection of public health, and the betterment of the medical profession. CMA opposes the "Partial Birth Abortion Ban Act of 2003" ("PABA" or the "Act"), which lacks foundation in medical science, endangers the health of women throughout California, disrupts the physician-patient relationship, and makes criminals of highly trained physicians when they perform the safest and most common procedures available for second-trimester abortions.

CMA filed an *amicus* brief (with others) in the Ninth Circuit urging that the Act be declared unconstitutional. That brief argued that the Act is an unwarranted intrusion on the doctor-patient relationship, that it prevents physicians from carrying out their duty to protect the health and lives of their patients, and that the Act's requirements are unconstitutionally vague and therefore they unduly burden protected reproductive choice. CMA agrees with the briefs to be filed by respondents in this case and in the related case of *Gonzales* v. *Carhart*, No. 05-380, and by the *amici* supporting them, that the Act is unconstitutional for all the reasons urged by CMA in the court of appeals.

This brief is being filed to focus on an issue that is not as fully developed in other briefs and has a particular salience to CMA. Until the passage of the Act, abortions were regulated at the state level, and under California law CMA's members

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[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to this Court's Rule 37.6, *amicus* states that none of the parties or their counsel wrote the brief in whole or in part and that no one other than *amicus* and its counsel made any monetary contribution to the preparation or submission of the brief.

who perform abortions were able to choose among medically accepted procedures solely on the basis of their patients' welfare. But the Act changes all that by mandating a uniform federal criminal law banning what the Act calls partial birth abortions, even though they are legal under the laws of California, on the theory that the abortions covered by the Act should be regulated under the commerce clause. To carry out this unwarranted intrusion into what has previously been an area of state regulation, the Act makes only abortions "in or affecting interstate or foreign commerce" subject to its ban. But as this brief shows, that phrase is so vague in describing which abortions satisfy the commerce clause nexus that no physician, and quite possibly no lawyer or constitutional scholar, can know whether performing such an abortion will subject the doctor to criminal and civil liability. Because the Act will place members of CMA at personal risk, its vagueness may affect the exercise of their medical judgment, creating an incentive for them to choose a medical procedure that might be less legally risky for them, but less safe for their patients, precisely the kind of undue burden on reproductive choice that this Court has repeatedly condemned.

INTRODUCTION AND SUMMARY OF ARGUMENT

Abortion is an issue on which Americans are deeply divided. The result, in our federal system, has been that states – within the constitutional boundaries set by the due process clause of the Fourteenth Amendment – have taken dramatically different approaches. Some states have regulated or restricted access to abortion in every way that the Constitution permits. Other states, like California, have consciously refused to impose such limits, and have even chosen to subsidize the ability of women to obtain abortions. Of particular salience to this case, some states have declined to forbid the abortions arguably covered by section 1531, and have instead left to physicians and their patients decisions regarding which abortion procedure will be the safest and most appropriate given the patient's particular circumstances.

The Act before the Court in this case marks an unprecedented attempt by Congress to impose a national standard, purely as a policy matter and on the basis of highly contested and contestable factual "findings," on the choice among abortion procedures. From the text of the statute, it is clear that Congress grounds its authority to impose a national standard – to the exclusion of the individual states' judgments about how to regulate medical practice – on its authority under the commerce clause. For reasons set out in the briefs of respondents and other *amici curiae* supporting respondents, we believe that the Act runs afoul of the substantive liberty protected by the due process clause of the Fifth Amendment.

Not only does the Act implicate the limitations on any government's right to restrict access to abortions contained in the due process clauses (here, of the Fifth Amendment), but it also raises the question whether the Act would otherwise reflect a permissible exercise of one of Congress' enumerated powers. *Amicus* believes that it does not. Despite its ostensible invocation of Congress' commerce clause powers, the Act in fact fails to provide constitutionally adequate notice to the physicians whom it purports to regulate as to which abortions fall within its scope. This failure arises not only for the reasons set out by the court of appeals below, see *Planned Parenthood Fed'n* v. *Gonzales*, 435 F.3d 1163, 1183-85 (CA9 2006), and foreshadowed by this Court's decision in *Stenberg* v. *Carhart*, 530 U.S. 914 (2000), but also because of its imprecision with respect to whether a particular abortion is performed "in or affecting interstate or foreign commerce."[2] This vagueness is especially problematic in light of the serious federalism concerns implicated by Congress' decision to forbid the abortions covered by the Act, despite many states' best judgment that those abortions are appropriate in circumstances where the

[2] For the sake of convenience, we omit further references to "foreign" commerce.

physician concludes that the procedure is necessary to protect the health and welfare of his or her patient.

One fundamental problem with the statute that Congress passed is that its jurisdictional element is so vague that no physician can know whether he or she is violating the law because there is no guidance, and no regulatory agency to provide it, on which abortions do and do not fall within the statute. Moreover, because the Act imposes serious penalties on physicians – imprisonment for up to two years, a fine of up to $250,000, or both – uncertainty about its scope is likely to have a substantial harmful effect on the constitutional rights of the women whom those physicians serve. To avoid prosecution, physicians may decline to use the abortion procedure indicated by their best medical judgments – either refusing to perform an abortion at all or choosing the method that best protects them, rather than their patients.

Finally, this statute implicates the federalism concerns that underlie this Court's recognition that Congress' commerce power is not unlimited. Health and safety laws, including those regulating the medical profession and the performance of abortions, have historically been the province of the States, not Congress, and yet the Act preempts every State law that reaches a different conclusion about the propriety of particular abortion techniques, with no showing that this is an issue requiring a single national answer.

ARGUMENT

I. Because Its Jurisdictional Element Fails to Define Clearly Which Abortions Are Prohibited, Section 1531 Is Not a Permissible Exercise of the Commerce Power.

The statute at issue in this case, 18 U.S.C. 1531, makes it a federal crime for a physician to perform certain abortions,

even if their performance would be permitted by state law.[3] As this Court observed in *United States* v. *Lopez*, 514 U.S. 549, 561 n.3 (1995), "[w]hen Congress criminalizes conduct already denounced as criminal by the States, it effects a change in the sensitive relation between federal and state criminal jurisdiction" (internal quotation marks omitted). *A fortiori*, when Congress "displace[s] state policy choices in . . . that its prohibitions apply even in States that have chosen not to outlaw the conduct in question," *ibid.* (internal quotation marks omitted), that shift is even greater.

It is undisputed after *Lopez* that "limitations on the commerce power are inherent in the very language of the Commerce Clause." 514 U.S. at 553. Thus, if the Court were simply to assume that the commerce clause was properly invoked in a given statute, it would require the Court "to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated" and that there can "never . . . be a distinction between what is truly national and what is truly local." *Id.* at 567-68.

A. Section 1531 Relies on a Commerce Clause-Based Jurisdictional Element to Describe the Class of Abortions Congress Is Purporting to Restrict.

In recognition of *Lopez*, Congress limited the scope of PABA's criminal prohibition in two ways. First, the statute contains a definitional provision – section 1531(b)(1) – that purports to outlaw only some abortions. The attempt to narrow the category of forbidden abortions is constitutionally

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[3] The statute also makes the physician potentially liable in a damages action by the patient's husband or her parents, if she is a minor. 18 U.S.C. 1531(c). The prospect of civil liability creates a further, substantial chilling effect, because physicians may face costly civil suits in situations where prosecutors would decline to charge them, or juries would decline to convict them, because all the elements of a section 1531 violation could not be proven beyond a reasonable doubt.

infirm for the reasons set out by the courts of appeals in this case, see *Planned Parenthood Fed'n* v. *Gonzales*, 435 F.3d 1163, 1182-85 (CA9 2006), and the Eighth Circuit in *Carhart* v. *Gonzales*, 413 F.3d 791, 797-804 (2005) (cert. granted, Feb. 21, 2006), and foreshadowed by this Court's decision in *Stenberg* v. *Carhart*, 530 U.S. 914 (2000). We will not further address those issues here.

Second, the statute contains a "jurisdictional element" in section 1531(a) that imposes criminal liability only on "[a]ny physician who, in or affecting interstate or foreign commerce, knowingly performs" the specified procedure. Congress quite clearly included the jurisdictional element in response to this Court's decision in *Lopez*. There, this Court held that Congress had exceeded its commerce power in enacting a provision that made it a federal offense for any individual knowingly to possess a firearm within a school zone. 18 U.S.C. 922(q)(2)(A). One of the infirmities that the Court identified was the statute's failure to contain a "jurisdictional element which would ensure, through case-by-case inquiry," that the charged violation "affects interstate commerce." *Lopez*, 514 U.S. at 561.

Section 1531 has been challenged on the ground that it violates the substantive liberty protected by the due process clause of the Fifth Amendment. But this Court need reach that question only if it first concludes that the statute would otherwise represent a permissible use of one of Congress' enumerated powers.

The jurisdictional element and legislative history of section 1531 both reveal that Congress has relied entirely on its commerce power in enacting PABA. *Amicus* has no quarrel with the underlying factual premise that providing abortion services can have effects on interstate commerce and that the commerce power can be used in some circumstances to impose federal regulation on them. The Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. 248(a)(1), (3), for example, prohibits interference with individuals who are seeking to obtain or provide reproductive health services,

(or facilities providing such services) including abortions. The courts of appeals have unanimously upheld FACE as within Congress' power to regulate "activities that substantially affect interstate commerce." See, *e.g.*, *Hoffman* v. *Hunt*, 126 F.3d 575, 582-88 (CA4 1997), cert. denied, 523 U.S. 1136 (1998); *United States* v. *Wilson*, 73 F.3d 675, 680-84 (CA7 1995), cert. denied, 519 U.S. 806 (1996); *Cheffer* v. *Reno*, 55 F.3d 1517, 1519-21 (CA11 1995).

Congress has not, however, chosen to regulate abortions generally in PABA. Nor has Congress concluded that the subset of all abortions that it has sought to regulate invariably affects interstate commerce. Thus, PABA is quite unlike the comprehensive scheme for regulating marijuana at issue in *Gonzales* v. *Raich*, 125 S. Ct. 2195 (2005), which this Court upheld even when it extended to its intrastate, noncommercial cultivation, possession, and use.

Instead, Congress has ostensibly chosen to criminalize only some abortions, and then on a case-by-case basis, where the particular abortion in question is "in or affecting interstate commerce." While the jurisdictional element addresses one potential constitutional difficulty, it creates other constitutional difficulties under the due process clause because it fails to give adequate notice of the line between criminal and non-criminal conduct.

The jurisdictional element appears expressly within section 1531(a) itself and thus is an element of the criminal offense: Prosecutors must prove, beyond a reasonable doubt, in every prosecution, that the physician who performed the abortion was "in or affecting . . . interstate commerce." See *Russell* v. *United States*, 471 U.S. 858, 862 (1985) (recognizing that use of a building had to be in or affecting commerce to prove a violation under the federal arson statute, 18 U.S.C. 844(i));[4] *United States* v. *Bass*, 404 U.S. 336, 347

[4] In *Jones* v. *United States*, 529 U.S. 848 (2000), this Court unanimously construed the federal arson statute not to reach the destruction of purely residential property. The Court noted that the

(1971) (holding that the government must show a nexus to interstate commerce to prove felon-in-possession-of-handgun offense under 18 U.S.C. App. 1202(a)). Congress clearly understood that it was imposing such a requirement: the House Report accompanying PABA quoted *Lopez*:

> H.R. 760 also contains a jurisdictional requirement, "[a]ny physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion . . . ," which will "ensure, through case-by-case inquiry, that" *the partial-birth abortion "in question affects interstate commerce*."

H.R. Rep. No. 108-58, at 26 (2003) (emphasis added). Thus, Congress expressly declined to presume that *every* abortion that fits within section 1531(b)(1) *also* satisfies section 1531(a)'s jurisdictional element: if it did, there would be no need for a "case-by-case inquiry." Indeed, to read section 1531(a) as proscribing all the abortions described in section 1531(b)(1) would render the jurisdictional element superfluous, violating the "cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or

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statute "required that the damaged or destroyed property *must itself* have been used in commerce or in an activity affecting commerce," rather than simply that the building's destruction "might affect interstate commerce." *Id.* at 854 (emphasis added; internal quotation marks omitted). While the Court recognized that it would be *possible* to read the statute more broadly, it reiterated that "when choice must be made between two readings of what conduct Congress has made a crime, it is appropriate, before choosing the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *Id.* at 858.

The same considerations obtain here. Congress provided that the specific abortion that a physician performed must *itself* have a substantial effect on interstate commerce, rather than presuming that all abortions are covered.

word shall be superfluous, void, or insignificant." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (citations and internal quotations omitted); see also *Ratzlaf* v. *United States*, 510 U.S. 135, 140-41 (1994) (explaining that resistance to treating statutory terms as surplusage "should be heightened when the words describe an element of a criminal offense").

B. Section 1531 Fails to Provide Constitutionally Sufficient Notice as to Which Abortions Fall Within the Statute.

Having enacted a statute that requires that the "abortion in question affects interstate commerce," H.R. Rep., *supra*, Congress provided no guidance as to which facts would be relevant to that inquiry. Although PABA contains lengthy "findings" that set out what it claims to be the "moral, medical, and ethical consensus" surrounding the abortions it sought to outlaw, and that address at length the case law regarding judicial deference given to prior examples of congressional factfinding, the text of the law notably omitted *any* factual findings with regard to the effects on interstate commerce of the subset of abortions that it sought to ban. See, *e.g.*, *Perez* v. *United States*, 402 U.S. 146, 147 n.1, 156 (1971) (noting that the federal loan-sharking statute upheld there as a permissible use of the commerce power contained detailed, formal congressional findings regarding the effects on interstate commerce).

In one sense, all abortions involve commercial activity because there will always be some goods or services that must be purchased in order to perform the abortion. Some of these goods and services may be obtained from outside the state where the abortion is performed, and thus if the Act purported to regulate all abortions on the ground that the provision of abortion services as a whole had a substantial effect on interstate commerce, that would raise a different question regarding Congress' reliance on the commerce clause. But that is not the scheme that Congress has created, both because the Act covers only some abortions and because it requires a

determination, on a case-by-case basis, that the abortion in question be one that is "in or affecting interstate commerce."

The problem is that section 1531(a) imposes criminal liability on individual physicians, but provides no guidance to physicians to enable them to conduct a case-by-case inquiry to distinguish between those abortions that are performed "in or affecting interstate commerce" and those that are not. For example, PABA does not expressly limit its coverage only to abortions performed on women who have traveled across state lines to obtain them or by doctors who have traveled across state lines to perform them. Cf. 18 U.S.C. 2261(a)(1) (making it a crime to "travel in interstate commerce" to commit domestic violence); compare Allan Ides, *The Partial-Birth Abortion Ban Act of 2003 and the Commerce Clause*, 20 Const. Comment. 441, 458 (2004) (questioning whether a patient traveling interstate is sufficient to fulfill the jurisdictional requirement), with Robert J. Pushaw, *Does Congress Have the Constitutional Power to Prohibit Partial-Birth Abortion?*, 42 Harv. J. on Legis. 319, 351 (2005) (an abortion may be "in" interstate commerce if either the doctor or patient traveled out-of-state for the abortion).[5]

Nor does PABA apply only to abortions in which the performing physician uses particular surgical instruments or medical supplies that have traveled in interstate commerce.

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[5] While Congress used the boilerplate language "in or affecting interstate commerce," it is clear that this case is really about only abortions that "affect" interstate commerce. An abortion performed on a mode of transportation traveling in interstate commerce would fall squarely within the "in commerce" portion of the Act, and a physician who performed such an abortion would have reasonable notice that his conduct met the jurisdictional prerequisite. But the likelihood that any of the abortions that Congress sought to ban would be done in such circumstances approaches zero, and hence the Act can be upheld only on a theory that the prohibited abortions have a substantial effect on interstate commerce.

Cf. 18 U.S.C. 842(i) (making it a crime for certain persons to possess "any explosive which has been shipped or transported in or affecting interstate or foreign commerce"). Thus, nothing in the text (or, indeed, the legislative history) answers the question whether a doctor who performs an abortion on a woman who lives in the state where he practices has acted "in or affecting interstate commerce" by performing that single medical procedure.[6]

Moreover, given the grammatical structure of section 1531(a), it is unclear whether whatever scienter requirement the statute contains even applies to the jurisdictional element, thereby threatening to expose physicians to federal criminal liability even if they do not know whether a particular abortion affects interstate commerce. The word "knowingly" appears after the jurisdictional phrase, immediately adjacent to the word "performs." This suggests that knowledge is required, at most, with respect to whether abortions fall within the definitional provision of section 1531(b), but not with respect to whether a particular abortion occurs in or affecting interstate commerce. In *United States* v. *Yermian*, 468 U.S. 63, 68-69 (1984), and *United States* v. *Feola*, 420 U.S. 671, 676-77 n.9 (1975), for example, this Court held that

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[6] To be sure, the House Judiciary Committee Report accompanying the Act explained the factual basis for its conclusion that the Act properly relied on the commerce clause (pp 31-36). But those facts do not appear among the multiple "findings" contained within the Act itself to which petitioner asks this Court to defer, and none of the findings relates in any way to the interstate commerce aspects of the abortions that the Act criminalizes. Even when Congress has included "findings" in support of its assertion of its commerce clause powers within legislation passed by both Houses and signed by the President, this Court has rejected them when it has concluded that the connection is too attenuated. See *United States* v. *Morrison*, 529 U.S. 598, 614 (2000).

"the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute." But in *United States* v. *X-Citement Videos*, 513 U.S. 64 (1994), the Court read a statute criminalizing the acts of "any person who . . . knowingly transports or ships in interstate commerce . . . any visual depiction, if . . . the producing of such visual depiction involves the use of a minor engaged in sexually explicit conduct," 18 U.S.C. 2252, to require proof of knowledge that the person depicted was a minor. 513 U.S. at 72 n.3. The Court expressed concern that otherwise the statute would criminalize behavior that a defendant could legitimately believe to be constitutionally protected. *See id.* at 72-78. The same is true here with respect to many physicians who perform the abortions Congress sought to outlaw: absent the "jurisdictional element" of "in or affecting . . . interstate commerce," their use of appropriate medical judgment to perform abortions legal under state law would be no offense at all.

C. The Jurisdictional Element of Section 1531 Suffers From Additional Problems With Vagueness.

The inherent problems with section 1531(a)'s jurisdictional element are exacerbated by the absence of any mechanism for seeking clarification prior to acting. In contrast, for example, to the Clean Water Act provision at issue last term in *Rapanos* v. *United States*, 126 S. Ct. 2208 (2006), there is no federal regulatory agency charged with the responsibility for issuing rules that limit the transactions that fall within the Act. See *id.* at 2235-36 (2006) (Roberts, C.J., concurring); *id.* at 2249 (Kennedy, J., concurring) ("Absent more specific regulations, however, the Corps must establish a significant nexus on case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries.").

Although the language and structure of section 1531 clearly contemplate a distinction between physicians acting "in or affecting interstate . . . commerce" and those who do not, neither the Act nor any federal regulatory official provides any guidance to a physician who seeks to determine into which category each abortion he contemplates performing falls. Moreover, unlike other statutes, this inquiry is not a one-time analysis for which physicians or hospitals could call on their lawyers to assist them in making the constitutional judgment. Rather, physicians must determine with regard to each procedure performed whether the performance will be in or affecting interstate commerce, often in circumstances in which the health, and perhaps the life, of the patient may be at stake. Forcing physicians to make such a choice, with all its attending uncertainties, is precisely the kind of federal interference with the physician-patient relationship that caused *amicus* to present the issues raised in this brief.

In *City of Chicago* v. *Morales*, 527 U.S. 41, 56 (1999), this Court noted that a criminal statute is unconstitutionally vague when it fails "to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits." In particular, "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *United States* v. *Bass*, 404 U.S. 336, 348 (1971) (quoting *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931) (Holmes, J.)); see *Sewell* v. *Georgia*, 435 U.S. 982, 986 (1978) (holding that a statute violates procedural due process when it fails to provide "a reasonable opportunity [for those regulated] to know what is prohibited, so that [they] may act accordingly" (quoting *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972)). The need for clear notice is even more pressing when a statute imposes criminal penalties on behavior that implicates constitutionally protected rights, see *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*,

455 U.S. 489, 498-99 (1982), as does a statute that trenches on a woman's fundamental liberty interest in deciding whether to continue a pregnancy. The line drawn by section 1531 simply does not distinguish in a reasonably clear manner between the abortions that it criminalizes and those that it does not.

Moreover, as this Court observed in *Bass*, there are situations in which "it is not unreasonable to imagine a citizen attempting to steer a careful course between violation of the statute and lawful conduct." 404 U.S. at 348 n.15 (quotation marks and internal brackets omitted) (quoting *United States* v. *Hood*, 343 U.S. 148, 151 (1952)). In particular, when federal law uses a jurisdictional element to criminalize conduct that states have chosen not to prohibit, "the notice problems of [the federal] law may be quite real." *Bass*, 404 U.S. at 348 n.15.

Section 1531 involves precisely such an area. Physicians who believe that the safest or most appropriate abortion technique in a particular context falls within section 1531(b)(1) may well find themselves trying to determine whether they should nonetheless perform the abortion using a less optimal technique because with respect to "the partial-birth abortion in question," H.R. Rep. No. 108-58, *supra*, at 26, they might be acting "in or affecting interstate . . . commerce." Because the statute fails to give adequate guidance on this question, the notice problem is both quite real and constitutionally unacceptable under the due process clause.

II. The Federalism-Related Values That Have Informed This Court's Recent Commerce Clause Cases Play an Especially Important Role Here.

The commerce power, while broad, is not a general police power. Thus, there remains "a distinction between what is truly national and what is truly local." *Lopez*, 514 U.S. at 567-68.

The statute before this Court implicates two distinctions this Court has repeatedly recognized. First, "regulation of health and safety is 'primarily, and historically, a matter of local concern,'" particularly when it comes to "the practice of medicine." *Gonzales* v. *Oregon*, 126 S. Ct. 904, 923 (2006) (quoting *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985)); see also *Washington* v. *Glucksberg*, 521 U.S. 702 (1997). Second, "[u]nder our federal system, 'the States possess primary authority for defining and enforcing the criminal law.'" *Lopez*, 514 U.S. at 561 n.3. Given this history, it is not surprising that this Court's prior decisions regarding government restrictions on a woman's right to obtain and a physician's right to perform particular abortions have all involved state laws.

As in *Lopez*, where "considerable disagreement exist[ed] about how best to accomplish th[e] goal" of keeping guns away from schools, 514 U.S. at 581 (Kennedy, J., concurring), so with respect to abortion, considerable disagreement exists about how to balance a variety of competing concerns. To be sure, the Fourteenth Amendment sets boundaries beyond which states may not go in restricting women's access to abortions. See, *e.g.*, *Planned Parenthood* v. *Casey*, 505 U.S. 833 (1992); *Stenberg* v. *Carhart*, 530 U.S. 914 (2000). But even within the range of permissible abortion-related regulations, states take strikingly different positions. Some states, for example, mandate parental involvement (subject to a judicial bypass) in a minor's decision to terminate her pregnancy. See *Ayotte* v. *Planned Parenthood of Northern New England*, 126 S. Ct. 961, 966 n.1 (2006) (noting that 44 states have such laws). Some of those laws require parental consent, while some require only notice. And six states have declined to mandate any particular level of parental involvement. Similarly, while some states have abortion-specific informed consent or mandatory waiting period requirements, other states leave these issues up to the best judgments of women and their

physicians. See generally Guttmacher Institute, State Policies in Brief: Mandatory Counseling and Waiting Periods for Abortion (Aug. 1, 2006), at http://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf.

The Act, however, "forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring); see also *Gonzales* v. *Oregon*, 126 S. Ct. 904, 911 (2006) (noting that the effect of a federal rule prohibiting doctors nationwide from assisting in even state-approved decisions by terminally ill patients to end their lives would be to cut off "earnest and profound debate about the morality, legality, and practicality" of medical procedures that touch the most fundamental values in society (quoting *Washington* v. *Glucksberg*, 521 U.S. 702, 735 (1997)).

If section 1531 is upheld as a proper exercise of federal power, Congress will have been given the green light to regulate many other aspects of abortions that are currently the exclusive province of state laws, whether, as in this instance, to impose greater restrictions, or, in the future, to ease those that States have imposed that Congress finds too burdensome. Indeed, if this kind of abortion can be banned by Congress, it also would have the power to outlaw *any* "interstate" abortion, regardless of State law, subject only to whatever general constitutional limits remain. In short, sustaining the Act opens up the entire subject of abortion regulation to congressional second-guessing, thereby offending the basic balance between the federal and state governments on this issue.

And if regulation of abortion can be federalized, the same approach could permit Congress to re-work laws relating to marriage, divorce, adoption, probate, and the ownership of property, to name just a few other areas traditionally left to state and local regulation. Using the Act as an example, it would be relatively easy to find interstate effects from those

laws at least as substantial as those being conjured up for those abortions covered by the Act. And with those new laws, the federal system as it was created and followed throughout our history would be gone.[7]

The legislative history of section 1531 demonstrates no "serious inquiry into the necessity for federal regulation or the propriety of 'displac[ing] state regulation in areas of traditional state concern.'" *Raich*, 125 S. Ct. at 2238 (Thomas, J., dissenting) (quoting *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring)). As Justice Thomas further observed in *Raich*, "Our federalist system, properly understood, allows California and a growing number of other States to decide for themselves how to safeguard the health and welfare of their citizens." *Id.* at 2239; cf. *Jones* v. *United States*, 529 U.S. 848, 859-60 (2000) (Stevens, J., joined by Thomas, J., concurring) (explaining that federal criminal statutes should be construed narrowly, "[e]ven when Congress has undoubted power to pre-empt local law" "unless Congress conveys its purpose clearly" to "effectively displace a policy choice made by the State").

Holding section 1531 invalid because it fails to provide reasonable notice as to what it does and does not forbid would not preclude Congress from trying to clarify its reach in language that can be understood by the physicians who are subject to its criminal penalties. And in the course of attempting such clarification, Congress could also seek to assemble a record and make appropriate findings regarding

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[7] For a general argument against the expansion of federal criminal jurisdiction and the excessive use of the commerce clause to create federal crimes, see Rachel Barkow, *Our Federal System of Sentencing*, 58 Stan. L. Rev. 119, 121-24 (2005). As Justice Scalia observed in *Rapanos* v. *United States*, 126 S. Ct. at 2224 n.8, States sometimes acquiesce in a federal takeover in these areas because they find it "attractive to shift to another entity controversial decisions disputed between politically powerful, rival interests."

the need for uniform nationwide regulation of those abortions covered by the Act. Nor would such a ruling prevent Congress from enacting a statute with a more well-defined interstate nexus. To the contrary, such a decision would serve as an appropriate reminder to Congress that there are limits under the commerce clause and that, when Congress approaches areas where the States have traditionally regulated, it should proceed with far more caution and far more precision than it has done here in assuring a proper exercise of its powers. Of course, none of these responses would solve the other constitutional problems identified by the courts of appeals, but this Court need not reach those questions in this case if it agrees with the arguments raised in this brief.

CONCLUSION

For the foregoing reasons as well as those in respondents' briefs, the judgment should be affirmed.

Respectfully submitted,

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