

SUPREME COURT OF THE UNITED STATES

ALBERTO R. GONZALES, ATTORNEY GENERAL

v.

LEROY CARHART et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ALBERTO R. GONZALES, ATTORNEY GENERAL

v.

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., et al.

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

**JUSTICE KENNEDY** delivered the opinion of the Court. [edited with footnotes and most citations omitted—SA] [THE COMPLETE TEXT CAN BE FOUND AT 550 US 124, 127 S.Ct. 1610 (2007)]

These cases require us to consider the validity of the Partial-Birth Abortion Ban Act of 2003 (Act), 18 U. S. C. §1531, a federal statute regulating abortion procedures. *Stenberg v. Carhart*, 530 U. S. 914 (2000), also addressed the subject of abortion procedures used in the later stages of pregnancy. Compared to the state statute at issue in *Stenberg*, the Act is more specific and more precise in its coverage. We conclude the Act should be sustained

In No. 05-380 (*Carhart*) respondents are doctors who perform second-trimester abortions. These doctors filed their complaint against the Attorney General of the United States in the United States District Court for the District of Nebraska. They challenged the constitutionality of the Act and sought a permanent injunction against its enforcement. In 2004, after a 2-week trial, the District Court granted a permanent injunction that prohibited the Attorney General from enforcing the Act in all cases but those in which there was no dispute the fetus was viable. The Court of Appeals for the Eighth Circuit affirmed. 413 F. 3d 791 (2005). We granted certiorari. 546 U. S. 1169 (2006).

In No. 05-1382 (*Planned Parenthood*) respondents are Planned Parenthood Federation of America, Inc. The Planned Parenthood entities sought to enjoin enforcement of the Act in a suit filed in the United States District Court for the Northern District of California. *Planned Parenthood Federation of Am. v. Ashcroft*, 320 F. Supp. 2d 957 (2004)..... In 2004, the District Court held a trial spanning a period just short of three weeks, and it, too, enjoined the Attorney General from enforcing the Act. The Court of Appeals for the Ninth Circuit affirmed. 435 F. 3d 1163 (2006). We granted certiorari.

## IA

The Act proscribes a particular manner of ending fetal life, so it is necessary here, as it was in *Stenberg*, to discuss abortion procedures in some detail. Three United States District Courts heard extensive evidence describing the procedures... We refer to the District Courts' exhaustive opinions in our own discussion of abortion procedures.

Abortion methods vary depending to some extent on the preferences of the physician and, of course, on the term of the pregnancy and the resulting stage of the unborn child's development. Between 85 and 90 percent of the approximately 1.3 million abortions performed each year in the United States take place in the first three months of pregnancy, which is to say in the first trimester. The most common first-trimester abortion method is vacuum aspiration (otherwise known as suction curettage) in which the physician vacuums out the embryonic tissue. Early in this trimester an alternative is to use medication, such as mifepristone (commonly known as RU-486), to terminate the pregnancy. The Act does not regulate these procedures.

Of the remaining abortions that take place each year, most occur in the second trimester. The surgical procedure referred to as "dilation and evacuation" or "D&E" is the usual abortion method in this trimester. Although individual techniques for performing D&E differ, the general steps are the same.

A doctor must first dilate the cervix at least to the extent needed to insert surgical instruments into the uterus and to maneuver them to evacuate the fetus. The steps taken to cause dilation differ by physician and gestational age of the fetus. A doctor often begins the dilation process by inserting osmotic dilators, such as laminaria (sticks of seaweed), into the cervix. The dilators can be used in combination with drugs, such as misoprostol, that increase dilation. The resulting amount of dilation is not uniform, and a doctor does not know in advance how an individual patient will respond.

After sufficient dilation the surgical operation can commence. The woman is placed under general anesthesia or conscious sedation. The doctor, often guided by ultrasound, inserts grasping forceps through the woman's cervix and into the uterus to grab the fetus. The doctor grips a fetal part with the forceps and pulls it back through the cervix and vagina, continuing to pull even after meeting resistance from the cervix. The friction causes the fetus to tear apart. For example, a leg might be ripped off the fetus as it is pulled through the cervix and out of the woman. The process of evacuating the fetus piece by piece continues until it has been completely removed. A doctor may make 10 to 15 passes with the forceps to evacuate the fetus in its entirety, though sometimes removal is completed with fewer passes. Once the fetus has been evacuated, the placenta and any remaining fetal material are suctioned or scraped out of the uterus. The doctor examines the different parts to ensure the entire fetal body has been removed.

Some doctors, especially later in the second trimester, may kill the fetus a day or two before performing the surgical evacuation. They inject digoxin or potassium chloride into the fetus, the umbilical cord, or the amniotic fluid. Fetal demise may cause contractions and make greater dilation possible. Once dead, moreover, the fetus' body will soften, and its removal will be easier. Other doctors refrain from injecting chemical agents, believing it adds risk with little or no medical benefit.

The abortion procedure that was the impetus for the numerous bans on "partial-birth abortion," including the Act, is a variation of this standard D&E. ...For discussion purposes this D&E variation will be referred to as intact D&E. The main difference between the two procedures is that in intact D&E a doctor extracts the fetus intact or largely intact with only a few passes. There are no comprehensive statistics indicating what percentage of all D&Es are performed in this manner.

Intact D&E, like regular D&E, begins with dilation of the cervix. Sufficient dilation is essential for the procedure. To achieve intact extraction some doctors thus may attempt to dilate the cervix to a greater degree....

In an intact D&E procedure the doctor extracts the fetus in a way conducive to pulling out its entire body, instead of ripping it apart. One doctor, for example, testified:

"If I know I have good dilation and I reach in and the fetus starts to come out and I think I can accomplish it, the abortion with an intact delivery, then I use my forceps a little bit differently. I don't close them quite so much, and I just gently draw the tissue out attempting to have an intact delivery, if possible."

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Intact D&E gained public notoriety when, in 1992, Dr. Martin Haskell gave a presentation describing his method of performing the operation. ....[The entire 2 pages of detailed description of the surgical procedures has been omitted, but is available in the full text of the case--SA]

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D&E and intact D&E are not the only second-trimester abortion methods. Doctors also may abort a fetus through medical induction. The doctor medicates the woman to induce labor, and contractions occur to deliver the fetus. Induction, which unlike D&E should occur in a hospital, can last as little as 6 hours but can take longer than 48. It accounts for about five percent of second-trimester abortions before 20 weeks of gestation and 15 percent of those after 20 weeks. Doctors turn to two other methods of second-trimester abortion, hysterotomy and hysterectomy, only in emergency situations because they carry increased risk of complications. In a hysterotomy, as in a cesarean section, the doctor removes the fetus

by making an incision through the abdomen and uterine wall to gain access to the uterine cavity. A hysterectomy requires the removal of the entire uterus. These two procedures represent about .07% of second-trimester abortions.

## B

After Dr. Haskell's procedure received public attention, with ensuing and increasing public concern, bans on " 'partial birth abortion' " proliferated. By the time of the *Stenberg* decision, about 30 States had enacted bans designed to prohibit the procedure. In 1996, Congress also acted to ban partial-birth abortion. President Clinton vetoed the congressional legislation, and the Senate failed to override the veto. Congress approved another bill banning the procedure in 1997, but President Clinton again vetoed it. In 2003, after this Court's decision in *Stenberg*, Congress passed the Act at issue here. H. R. Rep. No. 108-58, at 12-14. On November 5, 2003, President Bush signed the Act into law. It was to take effect the following day. 18 U. S. C. §1531(a) (2000 ed., Supp. IV).

The Act responded to *Stenberg* in two ways. First, Congress made factual findings. Congress determined that this Court in *Stenberg* "was required to accept the very questionable findings issued by the district court judge, but that Congress was "not bound to accept the same factual findings," .Congress found, among other things, that "[a] moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion ... is a gruesome and inhumane procedure that is never medically necessary and should be prohibited." Second, and more relevant here, the Act's language differs from that of the Nebraska statute struck down in *Stenberg*.

The operative provisions of the Act provide in relevant part:

Any physician who, in or affecting interstate or " (a) foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both. This subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself. This subsection takes effect 1 day after the enactment.

As used in this section— " (b)

the term 'partial-birth abortion' means an abortion in " (1) which the person performing the abortion—

deliberately and intentionally vaginally delivers a " (A) living fetus until, in the case of a head-first presentation, *the entire fetal head is outside the body of the mother*, or, in the case of breech presentation, *any part of the fetal trunk past the navel is outside*

*the body of the mother*, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; [emphasis added—SA] and

performs the overt act, other than completion of “(B) delivery, that kills the partially delivered living fetus; ...

A defendant accused of an offense under this section “(d)(1) may seek a hearing before the State Medical Board on whether the physician’s conduct was necessary to save the life of the mother whose life was endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.

The findings on that issue are admissible on that issue “(2) at the trial of the defendant. Upon a motion of the defendant, the court shall delay the beginning of the trial for not more than 30 days to permit such a hearing to take place.

A woman upon whom a partial-birth abortion is performed “(e) may not be prosecuted under this section, for a conspiracy to violate this section, or for an offense under section 2, 3, or 4 of this title based on a violation of this section.” 18 U. S. C. §1531

## C

The District Court in *Carhart* concluded the Act was unconstitutional for two reasons. First, it determined the Act was unconstitutional because it lacked an exception allowing the procedure where necessary for the health of the mother. Second, the District Court found the Act deficient because it covered not merely intact D&E but also certain other D&Es.

The Court of Appeals for the Eighth Circuit addressed only the lack of a health exception. 413 F. 3d, at 803-804. The court began its analysis with what it saw as the appropriate question—“whether ‘substantial medical authority’ supports the medical necessity of the banned procedure.” This was the proper framework, according to the Court of Appeals, because “when a lack of consensus exists in the medical community, the Constitution requires legislatures to err on the side of protecting women’s health by including a health exception. The court rejected the Attorney General’s attempt to demonstrate changed evidentiary circumstances since *Stenberg* and considered itself bound by *Stenberg’s* conclusion that a health exception was required. ...It invalidated the Act.

## D

The District Court in *Planned Parenthood* concluded the Act was unconstitutional “because it (1) pose[d] an undue burden on a

woman's ability to choose a second trimester abortion; (2) [was] unconstitutionally vague; and (3) require[d] a health exception as set forth by ... *Stenberg*."

The Court of Appeals for the Ninth Circuit agreed. Like the Court of Appeals for the Eighth Circuit, it concluded the absence of a health exception rendered the Act unconstitutional. The court interpreted *Stenberg* to require a health exception unless "there is *consensus in the medical community* that the banned procedure is never medically necessary to preserve the health of women." Even after applying a deferential standard of review to Congress' factual findings, the Court of Appeals determined "substantial disagreement exists in the medical community regarding whether" the procedures prohibited by the Act are ever necessary to preserve a woman's health.

The Court of Appeals concluded further that the Act placed an undue burden on a woman's ability to obtain a second-trimester abortion....

Finally, the Court of Appeals found the Act void for vagueness. *Id.*, at 1181. Abortion doctors testified they were uncertain which procedures the Act made criminal. The court thus concluded the Act did not offer physicians clear warning of its regulatory reach. ...

## II

The principles set forth in the joint opinion in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833 (1992) , did not find support from all those who join the instant opinion. Whatever one's views concerning the *Casey* joint opinion, it is evident a premise central to its conclusion—that the government has a legitimate and substantial interest in preserving and promoting fetal life—would be repudiated were the Court now to affirm the judgments of the Courts of Appeals.

*Casey* involved a challenge to *Roe v. Wade*, 410 U. S. 113 (1973) . The opinion contains this summary:

"It must be stated at the outset and with clarity that *Roe*'s essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each."

Though all three holdings are implicated in the instant cases, it is the third that requires the most extended discussion; for we must determine whether the Act furthers the legitimate interest of the Government in protecting the life of the fetus that may become a child.

To implement its holding, *Casey* rejected both *Roe*'s rigid trimester framework and the interpretation of *Roe* that considered all pre-viability regulations of abortion unwarranted. On this point *Casey* overruled the holdings in two cases because they undervalued the State's interest in potential life....

We assume the following principles for the purposes of this opinion. Before viability, a State "may not prohibit any woman from making the ultimate decision to terminate her pregnancy. It also may not impose upon this right an undue burden, which exists if a regulation's "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." On the other hand, "[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." *Casey*, in short, struck a balance. The balance was central to its holding. We now apply its standard to the cases at bar.

### III

We begin with a determination of the Act's operation and effect. A straightforward reading of the Act's text demonstrates its purpose and the scope of its provisions: It regulates and proscribes, with exceptions or qualifications to be discussed, performing the intact D&E procedure.

Respondents agree the Act encompasses intact D&E, but they contend its additional reach is both unclear and excessive. Respondents assert that, at the least, the Act is void for vagueness because its scope is indefinite. In the alternative, respondents argue the Act's text proscribes all D&Es. Because D&E is the most common second-trimester abortion method, respondents suggest the Act imposes an undue burden. In this litigation the Attorney General does not dispute that the Act would impose an undue burden if it covered standard D&E.

We conclude that the Act is not void for vagueness, does not impose an undue burden from any overbreadth, and is not invalid on its face.

### A

The Act punishes "knowingly perform[ing]" a "partial-birth abortion." It defines the unlawful abortion in explicit terms. §1531(b)(1).

First, the person performing the abortion must “vaginally delive[r] a living fetus.” The Act does not restrict an abortion procedure involving the delivery of an expired fetus. The Act, furthermore, is inapplicable to abortions that do not involve vaginal delivery (for instance, hysterotomy or hysterectomy). The Act does apply both pre-viability and post-viability because, by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb. We do not understand this point to be contested by the parties.

Second, the Act’s definition of partial-birth abortion requires the fetus to be delivered “until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother.” The Attorney General concedes, and we agree, that if an abortion procedure does not involve the delivery of a living fetus to one of these “anatomical ‘landmarks’ ”—where, depending on the presentation, either the fetal head or the fetal trunk past the navel is outside the body of the mother—the prohibitions of the Act do not apply.

Third, to fall within the Act, a doctor must perform an “overt act, other than completion of delivery, that kills the partially delivered living fetus.” For purposes of criminal liability, the overt act causing the fetus’ death must be separate from delivery. And the overt act must occur after the delivery to an anatomical landmark. This is because the Act proscribes killing “the partially delivered” fetus, which, when read in context, refers to a fetus that has been delivered to an anatomical landmark.

Fourth, ...the physician must have “deliberately and intentionally” delivered the fetus to one of the Act’s anatomical landmarks. If a living fetus is delivered past the critical point by accident or inadvertence, the Act is inapplicable. In addition, the fetus must have been delivered “for the purpose of performing an overt act that the [doctor] knows will kill [it].” If either intent is absent, no crime has occurred. ...

## B

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The Act provides doctors “of ordinary intelligence a reasonable opportunity to know what is prohibited.” ... Doctors performing D&E will know that if they do not deliver a living fetus to an anatomical landmark they will not face criminal liability.

This conclusion is buttressed by the intent that must be proved to impose liability....

Respondents likewise have failed to show that the Act should be invalidated on its face because it encourages arbitrary or

discriminatory enforcement. [T]he Act's anatomical landmarks provide doctors with objective standards, ...The Act is not vague.

## C

We next determine whether the Act imposes an undue burden, as a facial matter, because its restrictions on second-trimester abortions are too broad. A review of the statutory text discloses the limits of its reach. The Act prohibits intact D&E; and, notwithstanding respondents' arguments, it does not prohibit the D&E procedure in which the fetus is removed in parts.

## 1

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The Act excludes most D&Es in which the fetus is removed in pieces, not intact. If the doctor intends to remove the fetus in parts from the outset, the doctor will not have the requisite intent to incur criminal liability. A doctor performing a standard D&E procedure can often "tak[e] about 10-15 'passes' through the uterus to remove the entire fetus." Removing the fetus in this manner does not violate the Act because the doctor will not have delivered the living fetus to one of the anatomical landmarks or committed an additional overt act that kills the fetus after partial delivery.

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...In *Stenberg* the Court found the statute covered D&E. at 938. Here, by contrast, interpreting the Act so that it does not prohibit standard D&E is the most reasonable reading and understanding of its terms.

## 2

Contrary arguments by the respondents are unavailing.

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## IV

Under the principles accepted as controlling here, the Act, as we have interpreted it, would be unconstitutional "if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Casey*, 505 U. S., at 878 (plurality opinion). *The abortions affected by the Act's regulations take place both pre-viability and post-viability*; so the quoted language and the undue burden analysis it relies upon are applicable. The question is whether the Act, measured by its text in this facial attack, imposes a substantial obstacle to late-term, but pre-viability, abortions. The Act does not on its face impose a

substantial obstacle, and we reject this further facial challenge to its validity. [emphasis added—SA]

## A

The Act's purposes are set forth... A description of the prohibited abortion procedure demonstrates the rationale for the congressional enactment. The Act proscribes a method of abortion in which a fetus is killed just inches before completion of the birth process. Congress stated as follows: "Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life." Congressional Findings (14)(N), in notes following 18 U. S. C. §1531 (2000 ed., Supp. IV), p. 769. The Act expresses respect for the dignity of human life.

Congress was concerned, furthermore, with the effects on the medical community and on its reputation caused by the practice of partial-birth abortion. The findings in the Act explain:

"Partial-birth abortion ... confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child, whom he or she had just delivered, all but the head, out of the womb, in order to end that life." Congressional Findings (14)(J), *ibid.*

There can be no doubt the government "has an interest in protecting the integrity and ethics of the medical profession." ...Under our precedents it is clear the State has a significant role to play in regulating the medical profession.

*Casey* reaffirmed these governmental objectives. The government may use its voice and its regulatory authority to show its profound respect for the life within the woman. ....Where it has a *rational basis to act*, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn. [emphasis added—SA]

The Act's ban on abortions that involve partial delivery of a living fetus furthers the Government's objectives. No one would dispute that, for many, D&E is a procedure itself laden with the power to devalue human life. ...Congress determined that the abortion methods it proscribed had a "disturbing similarity to the killing of a newborn infant," ...and thus it was concerned with "draw[ing] a bright line that clearly distinguishes abortion and infanticide." Congressional Findings (14)(G), *ibid.*...

Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as

well. Whether to have an abortion requires a difficult and painful moral decision. ...

In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used, confining themselves to the required statement of risks the procedure entails...

It is, however, precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State....

It is a reasonable inference that a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term, thus reducing the absolute number of late-term abortions. The medical profession, furthermore, may find different and less shocking methods to abort the fetus in the second trimester, thereby accommodating legislative demand. The State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion.

It is objected that the standard D&E is in some respects as brutal, if not more, than the intact D&E, so that the legislation accomplishes little. What we have already said, however, shows ...it was reasonable for Congress to think that partial-birth abortion, more than standard D&E, "undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world." ...In sum, we reject the contention that the congressional purpose of the Act was "to place a substantial obstacle in the path of a woman seeking an abortion."

## B

The Act's furtherance of legitimate government interests bears upon, but does not resolve, the next question: whether the Act has the effect of imposing an unconstitutional burden on the abortion right because it does not allow use of the barred procedure where " 'necessary, in appropriate medical judgment, for [the] preservation of the ... health of the mother.' " The prohibition in the Act would be unconstitutional, under precedents we here *assume* to be controlling, if it "subject[ed] [women] to significant health risks." ...Here, whether the Act creates significant health risks for women has been a contested factual question. The evidence presented in the trial courts and before Congress demonstrates both sides have medical support for their position. [emphasis added—SA]

Respondents presented evidence that intact D&E may be the safest method of abortion,...

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There is documented medical disagreement whether the Act's prohibition would ever impose significant health risks on women. ...The three District Courts that considered the Act's constitutionality appeared to be in some disagreement on this central factual question. ...The District Court for the Southern District of New York was more skeptical of the purported health benefits of intact D&E. It found the Attorney General's "expert witnesses reasonably and effectively refuted [the plaintiffs'] proffered bases for the opinion that [intact D&E] has safety advantages over other second-trimester abortion procedures."

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The question becomes whether the Act can stand when this medical uncertainty persists. The Court's precedents instruct that the Act can survive this facial attack. The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty...

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Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts. The medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden.

The conclusion that the Act does not impose an undue burden is supported by other considerations. Alternatives are available to the prohibited procedure. As we have noted, the Act does not proscribe D&E. ...If the intact D&E procedure is truly necessary in some circumstances, it appears likely an injection that kills the fetus is an alternative under the Act that allows the doctor to perform the procedure.

...Here the Act allows, among other means, a commonly used and generally accepted method, so it does not construct a substantial obstacle to the abortion right.

In reaching the conclusion the Act does not require a health exception we reject certain arguments made by the parties on both sides of these cases. On the one hand, the Attorney General urges us to uphold the Act on the basis of the congressional findings alone. Although we review congressional factfinding under a deferential standard, we do not in the circumstances here place dispositive weight on Congress' findings. The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake...

As respondents have noted, and the District Courts recognized, some recitations in the Act are factually incorrect. ...Two examples suffice. Congress determined no medical schools provide instruction on the prohibited procedure. The testimony in the District Courts, however, demonstrated intact D&E is taught at medical schools. Congress also found there existed a medical consensus that the prohibited procedure is never medically necessary. The evidence presented in the District Courts contradicts that conclusion. Uncritical deference to Congress' factual findings in these cases is inappropriate.

On the other hand, relying on the Court's opinion in *Stenberg*, respondents contend that an abortion regulation must contain a health exception "if 'substantial medical authority supports the proposition that banning a particular procedure could endanger women's health.'" ...

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...The Act is not invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve a woman's health, given the availability of other abortion procedures that are considered to be safe alternatives.

## V

The considerations we have discussed support our further determination that these facial attacks should not have been entertained in the first instance. In these circumstances the proper means to consider exceptions is by as-applied challenge. The Government has acknowledged that pre-enforcement, as-applied challenges to the Act can be maintained. This is the proper manner to protect the health of the woman if it can be shown that in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used. In an as-applied challenge the nature of the medical risk can be better quantified and balanced than in a facial attack.

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...It is neither our obligation nor within our traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop.

The Act is open to a proper as-applied challenge in a discrete case. No as-applied challenge need be brought if the prohibition in the Act threatens a woman's life because the Act already contains a life exception. 18 U. S. C. §1531(a) (2000 ed., Supp. IV).

\* \* \*

Respondents have not demonstrated that the Act, as a facial matter, is void for vagueness, or that it imposes an undue burden on a woman's right to abortion based on its overbreadth or lack of a health exception. For these reasons the judgments of the Courts of Appeals for the Eighth and Ninth Circuits are reversed.

*It is so ordered.*

JUSTICE THOMAS, **with whom** JUSTICE SCALIA **joins, concurring.** [omitted]

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JUSTICE GINSBURG, **with whom** JUSTICE STEVENS, JUSTICE SOUTER, **and** JUSTICE BREYER **join, dissenting.**

In *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833, 844 (1992) , the Court declared that "[l]iberty finds no refuge in a jurisprudence of doubt."

Taking care to speak plainly, the *Casey* Court restated and reaffirmed *Roe's* essential holding. First, the Court addressed the type of abortion regulation permissible prior to fetal viability. It recognized "the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State." Second, the Court acknowledged "the State's power to restrict abortions *after fetal viability*, if the law contains exceptions for pregnancies which endanger the woman's life *or health*." *Ibid.* (emphasis added). Third, the Court confirmed that "the State has legitimate interests from the outset of the pregnancy in protecting *the health of the woman* and the life of the fetus that may become a child." (emphasis added).

In reaffirming *Roe*, the *Casey* Court described the centrality of "the decision whether to bear . . . a child," *Eisenstadt v. Baird*, 405 U. S. 438, 453 (1972) , to a woman's "dignity and autonomy," her "personhood" and "destiny," her "conception of . . . her place in society." Of signal importance here, the *Casey* Court stated with unmistakable clarity that state regulation of access to abortion procedures, even after viability, must protect "the health of the woman."

Seven years ago, in *Stenberg v. Carhart*, 530 U. S. 914 (2000), the Court invalidated a Nebraska statute criminalizing the performance of a medical procedure that, in the political arena, has been dubbed "partial-birth abortion."<sup>1</sup> With fidelity to the *Roe-Casey* line of precedent, the Court held the Nebraska statute unconstitutional in part because it lacked the requisite protection for the preservation of a woman's health. *Stenberg*, 530 U. S., at 930;

Today's decision is alarming. It refuses to take *Casey* and *Stenberg* seriously. It tolerates, indeed applauds, federal intervention to ban nationwide a procedure found necessary and proper in certain cases by the American College of Obstetricians and

Gynecologists (ACOG). It blurs the line, firmly drawn in *Casey*, between pre-viability and post-viability abortions. And, for the first time since *Roe*, the Court blesses a prohibition with no exception safeguarding a woman's health.

I dissent from the Court's disposition. Retreating from prior rulings that abortion restrictions cannot be imposed absent an exception safeguarding a woman's health, the Court upholds an Act that surely would not survive under the close scrutiny that previously attended state-decreed limitations on a woman's reproductive choices.

I

A

As *Casey* comprehended, at stake in cases challenging abortion restrictions is a woman's "control over her [own] destiny." "There was a time, not so long ago," when women were "regarded as the center of home and family life, with attendant special responsibilities that precluded full and independent legal status under the Constitution." Those views, this Court made clear in *Casey*, "are no longer consistent with our understanding of the family, the individual, or the Constitution." Women, it is now acknowledged, have the talent, capacity, and right "to participate equally in the economic and social life of the Nation." Their ability to realize their full potential, the Court recognized, is intimately connected to "their ability to control their reproductive lives." Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature. See, e.g., Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of equal Protection, 44 Stan. L. Rev. 261 (1992); Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955, 1002-1028 (1984).

In keeping with this comprehension of the right to reproductive choice, the Court has consistently required that laws regulating abortion, at any stage of pregnancy and in all cases, safeguard a woman's health. ("[O]ur precedents hold ... that a State may not restrict access to abortions that are necessary, in appropriate medical judgment, for preservation of the life or health of the [woman]." "Since the law requires a health exception in order to validate even a postviability abortion regulation, it at a minimum requires the same in respect to previability regulation.").

We have thus ruled that a State must avoid subjecting women to health risks not only where the pregnancy itself creates danger, but also where state regulation forces women to resort to less safe methods of abortion. See *Planned Parenthood of Central Mo. v. Danforth*, 428 U. S. 52, 79 (1976) (holding unconstitutional a ban on

a method of abortion that “force[d] a woman ... to terminate her pregnancy by methods more dangerous to her health”). ...

In *Stenberg*, we expressly held that a statute banning intact D&E was unconstitutional in part because it lacked a health exception. 530 U. S., at 930, 937. We noted that there existed a “division of medical opinion” about the relative safety of intact D&E, *id.*, at 937, but we made clear that as long as “substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women’s health,” a health exception is required, *id.*, at 938. We explained:

“The word ‘necessary’ in *Casey*’s phrase ‘necessary, in appropriate medical judgment, for the preservation of the life or health of the [pregnant woman],’ cannot refer to an absolute necessity or to absolute proof. Medical treatments and procedures are often considered appropriate (or inappropriate) in light of estimated comparative health risks (and health benefits) in particular cases. Neither can that phrase require unanimity of medical opinion. Doctors often differ in their estimation of comparative health risks and appropriate treatment. And *Casey*’s words ‘appropriate medical judgment’ must embody the judicial need to tolerate responsible differences of medical opinion ... .”

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## B

In 2003, a few years after our ruling in *Stenberg*, Congress passed the Partial-Birth Abortion Ban Act—without an exception for women’s health. See 18 U. S. C. §1531(a) (2000 ed., Supp. IV).<sup>4</sup> The congressional findings on which the Partial-Birth Abortion Ban Act rests do not withstand inspection, as the lower courts have determined and this Court is obliged to concede. “[N]one of the six physicians who testified before Congress had ever performed an intact D&E. Several did not provide abortion services at all; and one was not even an obgyn... . “Congress arbitrarily relied upon the opinions of doctors who claimed to have no (or very little) recent and relevant experience with surgical abortions, and disregarded the views of doctors who had significant and relevant experience with those procedures.”),...

Many of the Act’s recitations are incorrect.. For example, Congress determined that no medical schools provide instruction on intact D&E. But in fact, numerous leading medical schools teach the procedure.

More important, Congress claimed there was a medical consensus that the banned procedure is never necessary....

Similarly, Congress found that “[t]here is no credible medical evidence that partial-birth abortions are safe or are safer than other abortion procedures.” Congressional Findings (14)(B), in notes

following 18 U. S. C. §1531 (2000 ed., Supp. IV), p. 769. But the congressional record includes letters from numerous individual physicians stating that pregnant women's health would be jeopardized under the Act, as well as statements from nine professional associations, including ACOG, the American Public Health Association, and the California Medical Association, attesting that intact D&E carries meaningful safety advantages over other methods. No comparable medical groups supported the ban. In fact, "all of the government's own witnesses disagreed with many of the specific congressional findings." *Id.*, at 1024.

## C

In contrast to Congress, the District Courts made findings after full trials at which all parties had the opportunity to present their best evidence. The courts had the benefit of "much more extensive medical and scientific evidence . . . concerning the safety and necessity of intact D&Es."...

During the District Court trials, "numerous" "extraordinarily accomplished" and "very experienced" medical experts explained that, in certain circumstances and for certain women, intact D&E is safer than alternative procedures and necessary to protect women's health.

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Based on thoroughgoing review of the trial evidence and the congressional record, each of the District Courts to consider the issue rejected Congress' findings as unreasonable and not supported by the evidence. The trial courts concluded, in contrast to Congress' findings, that "significant medical authority supports the proposition that in some circumstances, [intact D&E] is the safest procedure." "[T]he record shows that significant medical authority supports the proposition that in some circumstances, [intact D&E] would be the safest procedure.").

The District Courts' findings merit this Court's respect. Today's opinion supplies no reason to reject those findings. Nevertheless, despite the District Courts' appraisal of the weight of the evidence, and in undisguised conflict with *Stenberg*, the Court asserts that the Partial-Birth Abortion Ban Act can survive "when ... medical uncertainty persists." This assertion is bewildering. Not only does it defy the Court's longstanding precedent affirming the necessity of a health exception, with no carve-out for circumstances of medical uncertainty, see *supra*, at 4-5; it gives short shrift to the records before us, carefully canvassed by the District Courts. Those records indicate that "the majority of highly-qualified experts on the subject believe intact D&E to be the safest, most appropriate procedure under certain circumstances."

The Court acknowledges some of this evidence, but insists that, because some witnesses disagreed with the ACOG and other

experts' assessment of risk, the Act can stand. In this insistence, the Court brushes under the rug the District Courts' well-supported findings that the physicians who testified that intact D&E is never necessary to preserve the health of a woman had slim authority for their opinions. They had no training for, or personal experience with, the intact D&E procedure, and many performed abortions only on rare occasions. Even indulging the assumption that the Government witnesses were equally qualified to evaluate the relative risks of abortion procedures, their testimony could not erase the "significant medical authority support[ing] the proposition that in some circumstances, [intact D&E] would be the safest procedure."

## II

### A

The Court offers flimsy and transparent justifications for upholding a nationwide ban on intact D&E *sans* any exception to safeguard a women's health. Today's ruling, the Court declares, advances "a premise central to [Casey's] conclusion"—*i.e.*, the Government's "legitimate and substantial interest in preserving and promoting fetal life." "[W]e must determine whether the Act furthers the legitimate interest of the Government in protecting the life of the fetus that may become a child." But the Act scarcely furthers that interest: The law saves not a single fetus from destruction, for it targets only a *method* of performing abortion. And surely the statute was not designed to protect the lives or health of pregnant women. ...In short, the Court upholds a law that, while doing nothing to "preserv[e] ... fetal life," bars a woman from choosing intact D&E although her doctor "reasonably believes [that procedure] will best protect [her]."

As another reason for upholding the ban, the Court emphasizes that the Act does not proscribe the non-intact D&E procedure. But why not, one might ask. Non-intact D&E could equally be characterized as "brutal," involving as it does "tear[ing] [a fetus] apart" and "ripp[ing] off" its limbs, "[T]he notion that either of these two equally gruesome procedures ... is more akin to infanticide than the other, or that the State furthers any legitimate interest by banning one but not the other, is simply irrational." *Stenberg*, 530 U. S., at 946-947 (STEVENS, J., concurring).

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Ultimately, the Court admits that "moral concerns" are at work, concerns that could yield prohibitions on any abortion. ...See, *e.g.*, *Casey*, 505 U. S., at 850 ("Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code."); *Lawrence v. Texas*, 539 U. S. 558, 571 (2003) (Though "[f]or many persons [objections to homosexual conduct] are not trivial concerns but profound and deep

convictions accepted as ethical and moral principles," the power of the State may not be used "to enforce these views on the whole society through operation of the criminal law." (citing *Casey*, 505 U. S., at 850)).

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...[T]he Court deprives women of the right to make an autonomous choice, even at the expense of their safety.

This way of thinking reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited. Compare, *e.g.*, *Muller v. Oregon*, 208 U. S. 412, 422-423 (1908) ("protective" legislation imposing hours-of-work limitations on women only held permissible in view of women's "physical structure and a proper discharge of her maternal funct[ion]"); *Bradwell v. State*, 16Wall. 130, 141 (1873) (Bradley, J., concurring) ("Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. ... The paramount destiny and mission of woman are to fulfil[ ] the noble and benign offices of wife and mother."), with *United States v. Virginia*, 518 U. S. 515, n. 12 (1996) (State may not rely on "overbroad generalizations" about the "talents, capacities, or preferences" of women; "[s]uch judgments have ... impeded ... women's progress toward full citizenship stature throughout our Nation's history"); *Califano v. Goldfarb*, 430 U. S. 199, 207 (1977) (gender-based Social Security classification rejected because it rested on "archaic and overbroad generalizations" "such as assumptions as to [women's] dependency" (internal quotation marks omitted)).

Though today's majority may regard women's feelings on the matter as "self-evident," this Court has repeatedly confirmed that "[t]he destiny of the woman must be shaped ... on her own conception of her spiritual imperatives and her place in society." "[M]eans chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it.");

## B

In cases on a "woman's liberty to determine whether to [continue] her pregnancy," this Court has identified viability as a critical consideration....

Today, the Court blurs that line, maintaining that "[t]he Act [legitimately] appl[ies] both previability and postviability because ... a fetus is a living organism while within the womb, whether or not it is viable outside the womb." Instead of drawing the line at viability, the Court refers to Congress' purpose to differentiate "abortion and infanticide" based not on whether a fetus can survive

outside the womb, but on where a fetus is anatomically located when a particular medical procedure is performed.

One wonders how long a line that saves no fetus from destruction will hold in face of the Court's "moral concerns." The Court's hostility to the right *Roe* and *Casey* secured is not concealed. Throughout, the opinion refers to obstetrician-gynecologists and surgeons who perform abortions not by the titles of their medical specialties, but by the pejorative label "abortion doctor." A fetus is described as an "unborn child," and as a "baby," second-trimester, pre-viability abortions are referred to as "late-term," and the reasoned medical judgments of highly trained doctors are dismissed as "preferences" motivated by "mere convenience." Instead of the heightened scrutiny we have previously applied, the Court determines that a "rational" ground is enough to uphold the Act, And, most troubling, *Casey's* principles, confirming the continuing vitality of "the essential holding of *Roe*," are merely "assume[d]" for the moment, rather than "retained" or "reaffirmed," *Casey*, 505 U. S., at 846.

### III-B

If there is anything at all redemptive to be said of today's opinion, it is that the Court is not willing to foreclose entirely a constitutional challenge to the Act. "The Act is open," the Court states, "to a proper as-applied challenge in a discrete case."...

The Court appears, then, to contemplate another lawsuit by the initiators of the instant actions....

The Court envisions that in an as-applied challenge, "the nature of the medical risk can be better quantified and balanced." But it should not escape notice that the record already includes hundreds and hundreds of pages of testimony identifying "discrete and well-defined instances" in which recourse to an intact D&E would better protect the health of women with particular conditions....

The Court's allowance only of an "as-applied challenge in a discrete case,"—jeopardizes women's health and places doctors in an untenable position. ...

### IV

As the Court wrote in *Casey*, "overruling *Roe's* central holding would not only reach an unjustifiable result under principles of *stare decisis*, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law." "[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable."...

...Congress imposed a ban despite our clear prior holdings that the State cannot proscribe an abortion procedure when its use is

necessary to protect a woman's health. Although Congress' findings could not withstand the crucible of trial, the Court defers to the legislative override of our Constitution-based rulings....

In sum, the notion that the Partial-Birth Abortion Ban Act furthers any legitimate governmental interest is, quite simply, irrational. The Court's defense of the statute provides no saving explanation. In candor, the Act, and the Court's defense of it, cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court—and with increasing comprehension of its centrality to women's lives. When "a statute burdens constitutional rights and all that can be said on its behalf is that it is the vehicle that legislators have chosen for expressing their hostility to those rights, the burden is undue."

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For the reasons stated, I dissent from the Court's disposition and would affirm the judgments before us for review.

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