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SIGNIFICANT RISKS: GONZALES v CARHART AND THE FUTURE OF ABORTION LAW

The Supreme Court's five-to-four upholding of the facial constitutionality of the Partial-Birth Abortion Ban Act (PBABA) of 2003 in April 2007 represented at least a symbolic break from its previous major abortion ruling, *Stenberg v Carhart*, in 2000. The Court's grant of certiorari in *Gonzales v Carhart* was announced on Justice Samuel A. Alito's first public day on the bench, February 21, 2006, and most commentators believed that Alito's replacement of Justice Sandra Day O'Connor, who had cast the decisive fifth vote when *Stenberg* narrowly voided a Nebraska law banning "partial-birth" abortions, promised a different outcome in this case. That proved correct, yet the crucial Justice, and author of an unusually intriguing majority opinion, was Anthony M. Kennedy, who was challenged to square his angry dissent in *Stenberg* with his insistent, ongoing support for his reading of the landmark controlling opinion in *Planned Parenthood of Southeastern Pennsylvania v Casey*, which he had so famously—or infamously—joined fifteen years earlier in June 1992. Kennedy's opinion in *Gonzales v Carhart* drew considerable editorial obloquy,[1] but a close and open-minded reading of the

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[1] See, e.g., Charles Fried, "*The Supreme Court Phalanx*": *An Exchange*, New York Review of Books (Dec 6, 2007) (available at http://www.nybooks.com/articles/20877) (asserting

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decision suggests that the ruling represents as narrow as possible an upholding of PBABA. Such a reading also indicates that Kennedy's insistence that he has remained entirely true to what he said and signed onto in *Casey* is a highly credible contention that his critics have failed to consider carefully or fairly. Furthermore, a thorough and inclusive review of *Gonzales v Carhart*'s actual impact—upon the medical practice of abortion, upon abortion politics and legislation, and upon abortion litigation to date—reveals that in all three arenas the decision has had and likely will continue to have far more modest consequences than many critics and commentators initially proclaimed.

I

The origins of the federal PBABA of 2003 reach back to 1993, the year after the Supreme Court's stunning but explicitly circumscribed reaffirmation of the core holding of *Roe v Wade* in *Planned Parenthood v Casey*. Early that year, abortion opponents began to publicize an unpublished seminar paper that an Ohio abortion provider, Dr. Martin Haskell, had presented at a National Abortion Federation meeting in September 1992. In it, Dr. Haskell had described in full medical detail a procedure he used for late second-trimester abortions that differed significantly from the standard second-trimester procedure of dilation and evacuation, or "D&E." Haskell's approach was to remove the fetus as intact as possible, and he introduced the new name dilation and extraction, or "D&X," for his procedure. The key to Haskell's method was what he termed "fetal skull decompression," so that the largest part of the fetus could fit through the cervical os rather than require piecemeal removal as in a standard D&E.[2]

By midyear, abortion opponents' efforts to draw attention to Haskell's method were receiving prominent news coverage in the medical trade press, which also reported that another physician, Dr.

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that "Justice Kennedy's decision is incompatible not only with precedent but with his own strongly expressed profession of principle").

[2] See Jenny Westberg, *Grim Technology for Abortion's Older Victims*, Life Advocate (February 1993) (available at http://www.lifeadvocate.org/arc/arc.htm); Martin Haskell, *Dilation and Extraction for Late Second Trimester Abortion* (Sept 13, 1992), in *Second Trimester Abortion: From Every Angle* 27–33 (1992), cited in David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* 719, 966 n 29 (updated ed 1998). Perhaps surprisingly, no PDF copy of Haskell's paper is universally available. See, however, *2nd Trimester Abortion: An Interview with W. Martin Haskell, M.D.*, Cincinnati Medicine 18–19 (Fall 1993).

James T. McMahon of Los Angeles, used the same procedure and termed it "intact D&E." Both doctors explained to *American Medical News*, published by the American Medical Association, that intact as opposed to dismembered evacuation minimized the dangers of perforation, tearing, or hemorrhaging for the woman, notwithstanding how intact removal "makes some people queasy." Dr. McMahon explained his perspective: "Once you decide the uterus must be emptied, you then have 100% allegiance to maternal risk. There's no justification to doing a more dangerous procedure because somehow this doesn't offend your sensibilities as much."[3]

Two years passed before abortion opponents initiated a move that brought Haskell and McMahon's method to widespread public attention, a time span which included the enactment of the Freedom of Access to Clinic Entrances (FACE) Act of 1994, the most significant abortion-rights measure ever passed by the U.S. Congress. In early June 1995, Douglas Johnson, federal legislative director of the National Right to Life Committee (NRLC), told the *Washington Times* that Florida Republican Representative Charles T. Canady, chairman of the House Judiciary Committee's subcommittee on the Constitution, would soon be introducing a bill to ban what Johnson called "partial-birth" or "brain suction" late-term abortions.[4] Johnson's announcement, and the *Times*' story, marked the very first public appearance of the "partial-birth" label. In later interviews, Keri Harrison Folmar, an assistant counsel to Canady's subcommittee and former NRLC staffer who actually drafted Canady's bill, recalled how she, Johnson, and Canady came up with the "partial-birth" phrase while also considering a handful of other possible names—"partial-delivery abortion" as well as "brain suction abortion"—for the procedure they hoped to ban. "We called it the most descriptive thing we could call it," Folmar explained. "We wanted a name that rang true."[5]

On June 8, Canady and Nevada Republican Representative Barbara Vucanovich circulated a "Dear Colleague" letter seeking cosponsors for the bill, and on June 14 Canady introduced H.R. 1833, the Partial-Birth Abortion Ban Act of 1995. It authorized up to two

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[3] Diane M. Gianelli, *Shock-Tactic Ads Target Late-Term Abortion Procedure*, American Medical News 3 (July 5, 1993).

[4] Joyce Price, *Pro-Life Attack on Partial Birth Abortion Bears Fruit*, Washington Times A4 (June 4, 1995).

[5] Cynthia Gorney, *Gambling with Abortion*, Harper's Magazine 33, 38 (Nov 2004).

years in prison for any doctor who "partially vaginally delivers a living fetus before killing the fetus and completing the delivery." The very next day Canady convened a subcommittee hearing on his bill that featured detailed medical testimony both for and against the measure, and within little more than twenty-four hours the phrase "partial-birth abortion" was in the pages of scores of newspapers all across the United States.[6] It represented the beginning of an important turning point in the abortion debate, a strategic innovation which put the abortion-rights proponents who had triumphed in *Casey* and then with FACE constantly on the political defensive for the next twelve years.

Canady's bill passed the House on November 1, 1995, by a vote of 288 to 139, and, after a hearing that featured three additional doctors, the Senate approved an amended version by a margin of 54 to 44 on December 7. The House ratified that measure by 286 to 129 on March 27, 1996, after conducting an additional hearing, but President Clinton vetoed it on April 10. While the House in September mustered an override vote of 285 to 137, a Senate tally of 58 to 40 fell well short of the necessary two-thirds.

The following spring, at the outset of the new 105th Congress, after a joint House-Senate hearing that featured six interest-group spokespersons and one physician, the House again approved a Partial-Birth Abortion Ban bill, H.R. 1122, which incorporated the same description of the banned procedure as used in Canady's 1995 measure. The House vote of 295 to 136 on March 20, 1997, was soon followed by Senate passage of a slightly amended bill on a tally of 64 to 36. The House approved that version in October 1997 by 296 to 132, but two days later President Clinton again exercised his veto power. In July 1998, the House overrode the president by 296 to 132, but in September 1998 a Senate roll call of 64 to 36 fell three votes short of an override.

In the fall of 1999, the Senate passed S. 1692, a Partial-Birth Abortion Ban bill that featured a revised and expanded description

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[6] In the nation's premier newspapers, the phrase first appeared in the *Washington Post* on June 14, and two days later in the *New York Times*. See Kevin Merida, *Antiabortion Measures Debated; House Republicans Push for New Restrictions in Several Areas*, Washington Post A4 (June 14, 1995); and Jerry Gray, *Emotions High, House Takes Up Abortion*, New York Times A19 (June 16, 1995). See also Tamar Lewin, *Method to End 20-Week Pregnancies Stirs a Corner of the Abortion Debate*, New York Times A10 (July 5, 1995).

of the procedure it sought to prohibit,[7] by a vote of 63 to 34. In April 2000, the House approved a similar bill, H.R. 3660, by 287 to 141, but efforts to reconcile the measures in conference ended once the *Stenberg* decision was handed down on June 28.[8]

Two years then passed before action resumed with Ohio Republican Representative Steve Chabot's introduction of H.R. 4965 on June 19, 2002. In the interim, of course, President Clinton had left office and George W. Bush had become president. Almost equally important, Chabot's bill included a fifteen-page, thirty-paragraph section of congressional "Findings" aimed at rebutting, and trumping, much of the fact-finding and analysis contained in the *Stenberg* majority opinion. In particular, those findings included a declaration that "a partial-birth abortion is never necessary to preserve the health of a woman."[9] In addition, Chabot's bill also employed a significantly different and more anatomically detailed definition of the targeted procedure. Now a "partial-birth abortion" was one in which a doctor

> (A) deliberately and intentionally vaginally delivers 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 a 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; and
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> (B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus . . . .[10]

Three weeks later, a brief House hearing heard two doctors testify in favor of the measure, and two weeks after that the House passed

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[7] S 1692, 106th Cong, 1st Sess, defined the "partial-birth" procedure as "an abortion in which the person performing the abortion deliberately and intentionally (a) vaginally delivers some portion of an intact living fetus until the fetus is partially outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the fetus while the fetus is partially outside the body of the mother; and (b) performs the overt act that kills the fetus while the intact living fetus is partially outside the body of the mother."

[8] The state statute voided by *Stenberg*, Neb Rev Stat Ann § 28-326(9) (Supp 1999), defined a prohibited "partial-birth" abortion as "deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child."

[9] HR 4965, 107th Cong, 2d Sess, § 2(13).

[10] Id at § 3(b)(1).

the bill on a vote of 274 to 151. The Senate did not act on it, and so in February 2003, Representative Chabot and Senator Rick Santorum reintroduced the legislation as H.R. 760 and S. 3 in the new 108th Congress. The Senate passed a slightly amended S. 3 on March 12 by 64 to 33, and, after a very brief, one-doctor hearing on March 25, the House approved H.R. 760 by 282 to 139 in early June. Following a conference committee report, in October the two houses approved S. 3 by votes of 281 to 142 and 64 to 34. President Bush signed the Partial-Birth Abortion Ban Act into law on November 5, 2003.[11]

II

The nine years of public and congressional debate that culminated with President Bush signing legislation equivalent to that which President Clinton twice had vetoed demonstrated sustained and overwhelming majority support for the federal criminalization of a medical procedure that the *Stenberg* majority had concluded was sometimes necessary to protect pregnant women's health. That looming conflict led reproductive rights litigators to file three separate but coordinated constitutional challenges to PBABA—in federal district courts in Nebraska, New York City, and San Francisco—even before President Bush signed the measure into law.[12] In Nebraska, Judge Richard G. Kopf—who previously had presided over the trial in *Stenberg*—issued a temporary restraining order (TRO) covering the four physician plaintiffs who practiced in his state within hours of the president's signature.[13] The following day, ruling in the New York case filed by the National Abortion Federation, whose members included hundreds of doctors all across the entire country, Judge Richard C. Casey issued a similar TRO whose effect was nationwide.[14]

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[11] Succinct but comprehensive summary accounts of congressional activity on partial-birth abortion bills from 1995 through 2003 appear in both U.S. House of Representatives, *Partial Birth Abortion Ban Act of 2003*, Report 108-58, 108th Cong, 1st Sess, 12–14, and Jay Alan Sekulow, et al, Amicus Brief of the American Center for Law and Justice, et al, *Gonzales v Carhart*, No 05-380 (filed May 22, 2006), 18–25.

[12] Sheryl Gay Stolberg, *3 Suits Filed to Block an Abortion Bill That Bush Intends to Sign*, New York Times A30 (Nov 1, 2003).

[13] *Carhart v Ashcroft*, 287 F Supp 2d 1015 (D Neb 2003). See also *Carhart v Ashcroft*, 292 F Supp 2d 1189 (D Neb 2003) (continuing the temporary restraining order indefinitely).

[14] *National Abortion Federation v Ashcroft*, 287 F Supp 2d 525 (SD NY 2003). Although unreported, an additional TRO also was issued in the San Francisco case. See *Planned Parenthood Federation of America v Ashcroft*, 320 F Supp 2d 957, 967 (ND Cal 2004).

As judges Kopf and Casey both highlighted,[15] PBABA's most glaring contradiction with *Stenberg* lay in the act's lack of a statutory exception for instances in which the banned procedure could protect a pregnant woman's health. Writing for the *Stenberg* majority, Justice Stephen G. Breyer had stated that Nebraska "fails to demonstrate that banning D&X without a health exception may not create significant health risks for women, because the record shows that significant medical authority supports the proposition that in some circumstances, D&X would be the safest procedure."[16] Breyer went on to note that the District Court—Judge Kopf—had "agreed that alternatives, such as D&E and induced labor, are 'safe' but found that the D&X method was significantly *safer* in certain circumstances."[17] Observing that "a statute that altogether forbids D&X creates a significant health risk," the *Stenberg* majority went on to hold that "where substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health, *Casey* requires the statute to include a health exception." This, the majority added, was "simply a straightforward application" of *Casey*'s own holding.[18] However, in an additional concurrence, Justice O'Connor stated that "[i]f there were adequate alternative methods for a woman safely to obtain an abortion before viability, it is unlikely that prohibiting the D&X procedure alone would 'amount in practical terms to a substantial obstacle to a woman seeking an abortion,'" the standard declared in *Casey*.[19]

On March 29, 2004, trials commenced in all three cases and lasted between two and three weeks apiece. Each of the three district judges heard testimony from between twelve and eighteen different doctors, and, following the trials, the three judges issued opinions that ran to 58, 79, and 270 pages (Judge Kopf) in the Federal Supplement. All three courts held PBABA unconstitutional, and all three jurists found its lack of a health exception to be a fatal flaw pursuant to *Stenberg* and *Casey*. First to announce her decision was Judge Phyllis J. Hamilton of the Northern District of California, who, in words that directly echoed *Stenberg*, found that "intact D&E is in fact the safest medical option for some women in some cir-

[15] 287 F Supp 2d at 1016, 287 F Supp 2d at 526.

[16] *Stenberg v Carhart*, 530 US 914, 932 (2000).

[17] Id at 934 (quoting 11 F Supp 2d at 1125–26).

[18] Id at 938.

[19] Id at 950 (quoting 505 US at 884).

cumstances" and that "under certain circumstances" it is "significantly safer than D&E by disarticulation."[20]

Judge Hamilton also held that PBABA's wording, like that of the Nebraska statute struck down in *Stenberg*, was sufficiently inclusive to cover nonintact D&Es and thereby violate *Casey*'s "substantial obstacle" standard,[21] and that the statute was unconstitutionally vague,[22] but she voiced barely concealed contempt for the medical evidence Congress relied upon to justify PBABA's lack of a health exception. Summarizing the congressional hearing record from 1995 through 2003, she observed that "over a period of approximately eight years, Congress entertained live testimony from a total of eight physicians, six of whom supported the ban."[23] Judge Hamilton further asserted, with reference to a 1998 opinion article in the *Journal of the American Medical Association* coauthored by two physicians, one of whom had testified before Congress and the other of whom was a government witness in all three PBABA trials, that "[m]any of the congressional 'findings' mirror substantially the conclusions reached in Dr. Sprang's article."[24] She added that "this court indicated at trial that it found the article itself to be lacking in trustworthiness."[25] Looking in particular at congressional activity in 2002–2003, Judge Hamilton concluded that "at the time that it made its findings, Congress did not have before it any *new* medical evidence or studies not available to both the district court and Supreme Court in *Stenberg*, at the times the courts issued their decisions."[26] All in all, she found, "Congress's conclusion that the procedure is never medically necessary is not reasonable and is not based on substantial evidence."[27]

In late August 2004, Judge Casey in Manhattan issued his decision

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[20] *Planned Parenthood Federation of America v Ashcroft*, 320 F Supp 2d 957, 1002 (ND Cal 2004).

[21] Id at 971.

[22] Id at 977–78.

[23] Id at 1019. See also Neal Devins, *Tom DeLay: Popular Constitutionalist?* 81 Chi Kent L Rev 1055, 1060 (2006) (describing how "[a]n increasingly ideological, increasingly polarized Congress sees hearings as staged events in which each side can call witnesses who will explain their views to the public," rather than call "nonpartisan witnesses").

[24] Id (referencing M. LeRoy Sprang and Mark G. Neerhof, *Rationales for Banning Abortions Late in Pregnancy*, 280 JAMA 744 [1998]).

[25] Id at 1019–20.

[26] Id at 1023.

[27] Id at 1024.

and likewise targeted the inadequacy of Congress's fact-finding. "Congress did not hold extensive hearings, nor did it carefully consider the evidence before arriving at its findings," he wrote. "Even the Government's own experts disagreed with almost all of Congress's factual findings" in their testimony at trial.[28] In particular, Judge Casey observed, "[t]here is no consensus that D&X is never medically necessary, but there is a significant body of medical opinion that holds the contrary."[29] His conclusion was almost identical to Judge Hamilton's: "Congress's factfindings were not reasonable and based on substantial evidence."[30]

In early September 2004, Judge Kopf rendered the last of the District Court decisions. Much like the other two jurists, he too concluded that "the congressional record proves the opposite of the Congressional Findings."[31] In particular, Congress's assertion that a medical consensus existed that the partial-birth procedure was never necessary to protect a woman's health "is both unreasonable and not supported by substantial evidence," Judge Kopf found.[32] Indeed, "the trial evidence established that a large and eminent body of medical opinion believes that partial-birth abortions provide women with significant health benefits in certain circumstances."[33] The evidence further demonstrated "that Congress was wrong, and unreasonably so," in its findings, for "the overwhelming weight of the trial evidence proves that the banned procedure is safe and medically necessary in order to preserve the health of women under certain circumstances." In fact, "the banned procedure is, sometimes, the safest abortion procedure to preserve the health of women," Judge Kopf found.[34]

The Justice Department appealed all three adverse district court rulings to their respective circuit courts of appeal, and in July 2005, an Eighth Circuit panel became the first to rule when it affirmed Judge Kopf's decision. Quoting from *Stenberg*, the panel unani-

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[28] *National Abortion Federation v Ashcroft*, 330 F Supp 2d 436, 482 (SD NY 2004).

[29] Id.

[30] Id at 488.

[31] *Carhart v Gonzales*, 331 F Supp 2d 805, 1012 (D Neb 2004).

[32] Id at 1015.

[33] Id at 1016.

[34] Id at 1016, 1017. Judge Kopf held the act unconstitutional both for its lack of a health exception and because it contravened *Casey* and *Stenberg*'s "undue burden" standard. Id at 1048, 1031.

mously held that "[w]e believe the appropriate question is whether 'substantial medical authority' supports the medical necessity of the banned procedure."[35] Thus, "when 'substantial medical authority' supports the medical necessity of a procedure in some instances," the panel concluded, "*Stenberg* requires the inclusion of a health exception."[36]

In late September, the Solicitor General petitioned the Supreme Court to hear the government's appeal in *Gonzales v Carhart*. He asserted that in passing PBABA, the Congress had acted "on the basis of a different (and fuller) evidentiary record" than the *Stenberg* court had had before it.[37] In addition, he asserted that *Stenberg* had established that "the critical question was whether the statute being challenged would pose '*significant* health risks for women.'"[38] In a subsequent reply brief in early December, the Solicitor General suggested that Congress had considered "the latest and best available medical evidence" before passing PBABA.[39] He further asserted that "the correct inquiry" in the case at hand "is simply whether there was sufficient evidence to suggest that *Congress's* determination was reasonable" when it adopted the statute.[40]

Before the Court acted on the petition, both the Second and Ninth Circuits issued their decisions on the same day. The Ninth Circuit ruling, written by Judge Stephen Reinhardt, affirmed the District Court's judgment on all points.[41] The Second Circuit decision, written by Judge Jon O. Newman and joined in full by Chief Judge John M. Walker, Jr., featured both an energetic dissent by Judge Chester J. Straub and, more importantly, a perceptive and significant additional concurrence by Judge Walker.[42] Acknowledging how his court was required to follow *Stenberg*, Judge Walker

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[35] *Carhart v Gonzales*, 413 F3d 791, 796 (8th Cir 2005).

[36] Id at 796, 797. The Eighth Circuit did not reach Judge Kopf's conclusion that the act also constituted an undue burden. Id at 803–04.

[37] Paul D. Clement, Petition for a Writ of Certiorari, *Gonzales v Carhart*, No 05-380 (filed Sept 23, 2005), 17.

[38] Id at 20 (quoting 530 US at 932 and adding emphasis).

[39] Paul D. Clement, Reply Brief for the Petitioner, *Gonzales v Carhart*, No 05-380 (filed Dec 2, 2005), 3.

[40] Id at 8. In a footnote, quoting from *Turner Broadcasting System v FCC*, 520 US 180, 195 (1997) and adding emphasis, Clement explained that "the precise inquiry is whether, 'in formulating its judgment, Congress has drawn *reasonable inferences* based on substantial evidence.'" Id at 8 n 4.

[41] *Planned Parenthood Federation of America v Gonzales*, 435 F3d 1163 (9th Cir 2006).

[42] *National Abortion Federation v Gonzales*, 437 F3d 278 (2d Cir 2006).

nonetheless harshly criticized that decision, emphasizing how *Stenberg*'s analysis of a ban on the D&X procedure "equates the denial of a potential health benefit (in the eyes of some doctors) with the imposition of a health risk and, in the process, promotes marginal safety above all other values."[43] In so doing, *Stenberg* "denies legislatures the ability to promote important interests above the conferral upon some citizens of a marginal health benefit."[44] On the other hand, Judge Walker stressed, there was "substantial evidence that, even if the D&X procedure is wholly prohibited, a woman can obtain a safe abortion in almost every conceivable situation." At most, a ban on D&Xs "might deny some unproven number of women a marginal health benefit," he contended.[45]

At the same time, Judge Walker also noted, just as all three trial judges had, the glaring contradictions that underlay PBABA's findings. When Representative Chabot first introduced the bill in June 2002, "complete with the same detailed factual findings that were ultimately enacted into law," Judge Walker observed, Congress had not yet conducted any relevant post-*Stenberg* hearings, and thus in actuality "had not considered any new evidence" whatsoever.[46] In response, Judge Straub asserted that "it is irrelevant that the text of the Act was introduced prior to hearings," for "[w]e are not empowered to review Congress's internal procedures or methods."[47]

Two weeks after the Second and Ninth Circuit rulings, the Solicitor General filed a supplemental brief highlighting Judge Walker's critical statement about how *Stenberg*'s approach to partial-birth bans "promotes marginal safety above all other values."[48] One week later the Supreme Court unsurprisingly granted certiorari,[49] and when the Solicitor General subsequently filed a petition for certiorari in the Ninth Circuit case, asking that it be held pending

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[43] Id at 291.

[44] Id at 292.

[45] Id at 296.

[46] Id at 293 n 9.

[47] Id at 300 n 11 (citing *U.S. v Ballin*, 144 US 1 [1892]).

[48] Paul D. Clement, Supplemental Brief for the Petitioner, *Gonzales v Carhart*, No 05-380 (filed Feb 14, 2006), 5.

[49] *Gonzales v Carhart*, 546 US 1169 (2006). See also Linda Greenhouse, *Justices to Review Federal Ban on Disputed Abortion Method*, New York Times A1 (Feb 22, 2006) (observing that "[a] lower court's invalidation of a federal statute has an almost automatic claim on the justices' attention").

the Court's decision in *Gonzales v Carhart*,[50] the Court instead granted certiorari in *Gonzales v Planned Parenthood Federation of America* as well.[51] In mid-August the Court scheduled oral arguments in both cases for November 8, 2006.

Shortly before the Court added the Ninth Circuit case to its argument calendar, Solicitor General Paul D. Clement had filed his merits brief in *Gonzales v Carhart*. He asserted that the evidence "at most suggests that partial-birth abortion may be *marginally* safer than more common abortion procedures in some narrow circumstances," and he highlighted how "one of the express purposes of the Act is to 'draw a bright line that clearly distinguishes abortion and infanticide.'"[52] More boldly, the Solicitor General also contended that "[t]o the extent that the Court concludes that *Stenberg* compels the conclusion that the Act is facially invalid, however, *Stenberg* should be overruled."[53]

"To be sure," the Solicitor General admitted, "some language in the Court's opinion in *Stenberg*"—namely, the "substantial medical authority" standard identified and adopted by the Eighth Circuit panel below—"could be read, in isolation, to suggest that a statute prohibiting a particular abortion procedure would be unconstitutional as long as there is *conflicting evidence* as to whether the statute at issue would create significant health risks."[54] But "the proper understanding" of *Stenberg*, Clement continued, would require that the plaintiffs "must actually prove that the regulation at issue would create significant health risks for women" and thus that the absence of a health exception would represent an undue burden.[55] In a footnote, the Solicitor General underscored how repeatedly *Stenberg* had employed the word "significant,"[56] and he asserted that the applicable standard should be whether a regulation creates "signif-

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[50] Paul D. Clement, Petition for a Writ of Certiorari, *Gonzales v Planned Parenthood Federation of America*, No 05-1382 (filed May 1, 2006), 2. See also Paul D. Clement, Reply Brief for the Petitioner, *Gonzales v Planned Parenthood Federation of America*, No 05-1382 (filed May 25, 2006), 1 (same).

[51] *Gonzales v Planned Parenthood Federation of America*, 126 S Ct 2901 (2006).

[52] Paul D. Clement, Brief for the Petitioner, *Gonzales v Carhart*, No 05-380 (filed May 22, 2006), 10, 11 (quoting Act § 2[14][G]).

[53] Id at 11.

[54] Id at 16–17.

[55] Id at 18.

[56] Id at 19 n 3 (quoting 530 US at 931, 932, 938).

icant health risks in a large fraction of its applications."[57]

Clement repeated his earlier claim that "Congress made its findings based on a more recent, and more robust, evidentiary record," and he again reiterated that the Court should determine only "whether there is sufficient evidence to suggest that *Congress's* determination was reasonable."[58] The medical evidence indicated that "any differences in safety are debatable and sufficiently marginal" and that "substantial evidence supported Congress's ultimate finding that partial-birth abortion is never necessary to preserve the mother's health."[59] Absent proof that a partial-birth ban would create "significant health risks," it would not constitute an undue burden. In closing, Clement declared that "[t]he protection of innocent human life—in or out of the womb—is the most compelling interest the government can advance."[60]

The merits briefs filed by the Center for Reproductive Rights (CRR), in the Nebraska case, and Planned Parenthood Federation of America (PPFA) as the lead appellee in the Ninth Circuit case, both took dead aim at PBABA's underlying legislative infirmities. CRR declared that "the congressional findings were not reasonable," while PPFA termed them "patently unreasonable."[61] Hoping to highlight PBABA's contradiction of *Stenberg* in a manner that might most motivate Justices such as Anthony Kennedy to void the statute, CRR asserted that "Congress has not merely promulgated a measure that poses a significant threat to women's health," but also "has issued a rebuke to this Court, challenging its pre-eminence as the branch of government whose duty it is 'to say what the law is.'"[62]

Claiming that PBABA "must be struck down unless the Court overturns *Stenberg*," CRR emphasized *Stenberg*'s finding that "substantial medical authority" attested to how such a ban could endanger women's health.[63] It quoted Judge Kopf's conclusion that

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[57] Id at 20. See also id at 26 (reiterating the phrase "significant health risks").

[58] Id at 29, 31.

[59] Id at 39, 40.

[60] Id at 40, 41.

[61] Priscilla J. Smith, Brief of Respondents, *Gonzales v Carhart*, No 05-380 (filed Aug 10, 2006), 2; Eve C. Gartner, Brief of Planned Parenthood Respondents, *Gonzales v Planned Parenthood Federation of America*, No 05-1382 (filed Sept 20, 2006), 24.

[62] Smith, Brief of Respondents, 15 (quoting *Marbury v Madison*, 5 US [1 Cranch] 137, 177 [1803]).

[63] Id at 16, 18.

trial evidence demonstrated that "a large and eminent body of medical opinion" supported that finding, and it reached out to embrace the additional holding that the Ninth Circuit, unlike the Eighth, had rendered, arguing that PBABA's "definition of 'partial-birth abortion' does not clearly distinguish between D&E and intact D&E procedures in a way that would allow physicians to control their actions during a D&E to prevent them from running afoul of the Act."[64]

PPFA's brief repeatedly stressed how intact abortions were "meaningfully safer" and "significantly safer" than other alternatives, and it highlighted Judge Hamilton's finding that the procedure was "the safest medical option for some women."[65] It stated that "there is more and better evidence of 'substantial medical evidence' here than in *Stenberg*" and made a passing reference to "the primacy of maternal health" while also arguing that "the scienter provisions do not limit the Act in a manner on which physicians can rely."[66] Most notably of all, however, it quoted from *Casey* a phrase which Justice Kennedy also had cited in his opinion for the Court in *Lawrence v Texas* to remind the Justices that "[w]hile the Act serves an interest in promoting a moral judgment against intact D&E, this Court has repeatedly held that its 'obligation is to define the liberty of all, not to mandate our own moral code.'"[67]

In his reply brief, the Solicitor General evinced a decidedly more defensive tone while nonetheless continuing to insist upon what he termed "Congress's superior capacity to root out raw data."[68] Seeking to minimize the import of Judge Hamilton and Judge Kopf's evaluations of the medical testimony their courts had taken, Clement maintained that "[t]he constitutionality of nationwide legislation properly depends on the credibility judgments of Congress, not those of individual district court judges."[69] He contended that PBABA "denies no woman the ability to obtain a safe abortion,"

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[64] Id at 34, 38.

[65] Gartner, Brief of Planned Parenthood Respondents, i, 10, 15.

[66] Id at 23, 24, 43.

[67] Id at 32 (quoting 505 US at 850 and 539 US at 571).

[68] Paul D. Clement, Reply Brief for the Petitioner, *Gonzales v Carhart* and *Gonzales v Planned Parenthood Federation of America*, Nos 05-380 and 05-1382 (filed Oct 25, 2006), 7 n 3. That note went on to acknowledge that "Congress held two post-*Stenberg* hearings in which it heard testimony from two physicians . . . who had not previously testified . . . and received new documentary evidence."

[69] Id at 11.

and tellingly argued that "respondents appear to concede that standard D&E abortions are generally safe."[70] He avowed that "partial-birth abortion is not safer than other types of abortion either generally or in any specific circumstances," and he quoted Justice Kennedy's statement in dissent in *Stenberg* that federal courts "are ill-equipped to evaluate the relative worth of particular surgical procedures."[71] Clement also insisted that PBABA "unambiguously excludes standard D&E abortions" and "does not reach partial-birth abortions carried out by physicians who had intended to perform standard D&E abortions instead" but instead found themselves confronted with a fetal evacuation that went beyond PBABA's anatomical landmarks.[72]

III

When oral arguments in first *Gonzales v Carhart* and then *Gonzales v Planned Parenthood Federation of America* both took place on November 8, 2006, Justice Breyer posed a suggestive early question to Solicitor General Clement. "If medical opinion is divided," Breyer asked, "could this Court say 'this use of the procedure, we enjoin the statute to permit its use but only where appropriate medical opinion finds it necessary for the safety or health of the mother?'"[73] Knowledgeable observers understood Justice Breyer to be alluding, although not by name, to the Court's unanimous resolution ten months earlier of *Ayotte v Planned Parenthood of New England*, an abortion case in which a New Hampshire parental notification statute failed to include an exception for instances in which an immediate abortion was necessary to protect a pregnant minor's health.[74] There, in Justice O'Connor's final opinion before she left the bench, the Court had explained that "[w]e prefer . . . to enjoin only the unconstitutional applications of a statute, while leaving

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[70] Id at 1, 18.

[71] Id at 15, 21.

[72] Id at 25. See also Paul D. Clement, Brief for the Petitioner, *Gonzales v Planned Parenthood Federation of America*, No 05-1382 (filed Aug 3, 2006), 32 (stating that PBABA "applies only where the person performing the abortion has the specific intent, at the outset of the procedure, to deliver the requisite portion of the fetus for the purpose of performing the ultimate lethal act").

[73] Transcript of Argument, *Gonzales v Carhart*, No 05-380 (Nov 6, 2006), 19.

[74] 546 US 320 (2006).

other applications in force."[75] The Court had remanded the case so that a more narrowly drawn injunction might be entered in place of the lower courts' previous invalidation of the statute.[76]

Clement parried Justice Breyer's suggestion, noting that some doctors preferred to use the D&X procedure for every late second-trimester abortion, not just specific ones, but Breyer reiterated his point "that there has to be a significant body of medical opinion that says that this is a safer procedure and necessary for the safety of the mother" in particular, identifiable circumstances.[77] Justice Kennedy then asked the Solicitor General how "an as-applied challenge could be brought if we sustain" PBABA against the present preenforcement facial challenges. "I have read all the doctors' testimony in this case, hundreds of pages," Kennedy explained, and was "trying to imagine how an as-applied challenge would be really much different from what we have seen already." Clement replied that in the future doctors "might come in and target their challenge to particular conditions."[78]

When Priscilla Smith of CRR came to the podium, she was able to utter just two sentences before Justice Kennedy interrupted. "In those cases where intact D&Es or D&Xs are performed," he asked, "in how many of those instances is there serious health risk to the mother that requires the procedure as opposed to simply being an elective procedure?" No statistics were available, Smith replied, and a few moments later Kennedy intervened again to ask "[i]f there is substantial evidence that other procedures or alternate procedures are available," what obstacles precluded their usage?[79] Kennedy grasped "the government's argument that there are alternative

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[75] Id at 328–29. The *Ayotte* Court acknowledged that this preference had not governed its most recent prior abortion case, as "the parties in *Stenberg* did not ask for, and we did not contemplate, relief more finely drawn" than the voiding of the entire Nebraska partial-birth ban statute. Id at 331.

[76] Id at 331–32. Following New Hampshire's June 2007 repeal of the statute, the District Court dismissed the case as moot. See *Planned Parenthood of Northern New England v N.H. Attorney General*, 2007 WL 329709 (D NH 2007); see also Pam Belluck, *New Hampshire to Repeal Parental Notification Law*, New York Times A22 (June 8, 2007); Norma Love, *N.H. Repeals Parental Notice Law*, Union Leader (Manchester) A2 (June 30, 2007).

[77] Transcript of Argument (cited in note 73), 20. See also Jeffrey Rosen, *Partial Solution*, New Republic 8 (Dec 11, 2006) (highlighting Justice Breyer's effort to point the Court toward "allowing the federal ban to be enjoined only for specific categories of medical conditions in which substantial numbers of doctors believe that D&X abortions are safer than D&E abortions").

[78] Id at 21, 23.

[79] Id at 28–29, 30.

mechanisms," but when Chief Justice John G. Roberts, Jr., asked whether a marginal benefit in safety would be enough to save the procedure from proscription, Smith responded that "I don't believe a marginal benefit in safety is enough and I don't believe that's what we have here."[80] Toward the end of her time, Justice Kennedy asserted that "[i]t seems to me that your argument is that there is always a constitutional right to use what the physician thinks is the safest procedure," but Smith immediately demurred, explaining that pursuant to *Stenberg* and *Casey* there has to be "a substantial body of medical opinion, an objective standard that in fact supports the use of that procedure."[81]

At the very outset of his argument in the second case, the Solicitor General pointed out that "if a doctor really thinks the D&X procedure is the way to go, he can induce fetal demise at the outset of the procedure" and thereby not fall within PBABA's explicit prerequisite that its prohibition applies only in cases of *living* fetuses.[82] "If you look through the record on this point," Clement continued, "I think you will not find any testimony that supports a significant risk from that injection" which would induce fetal demise—"the risks are not significant."[83] Seeking to portray his adversaries' stance as extreme, Clement stated that "it's very clear that their position is one of zero tolerance for any marginal risk to maternal health." That immediately led Justice Kennedy to muse about the meaning of "significant,"[84] but Clement soon returned to his characterization of the appellees' arguments, noting that "their doctors don't think that this is a safer procedure in rare cases, they think it's a safer procedure every single time." In essence, "it's just a question ultimately of whether you're going to defer to individual doctors' judgments," Clement contended. "[T]he question is, when you have a perfectly safe alternative, and you have some doctors who like to do it a different way, can Congress countermand

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[80] Id at 31, 36–37. In subsequent colloquies, Smith erroneously stated that "doctors perform the same dilation protocols whether they are going to perform a D&E or an intact D&E" and that "they are always looking for a minimal amount of dilation." Id at 40, 41.

[81] Id at 50.

[82] Transcript of Argument, *Gonzales v Planned Parenthood Federation of America*, No 05-1382 (Nov 8, 2006), 4.

[83] Id at 5.

[84] Id at 6.

the doctors' judgment or do the doctors get the final word?"[85]

Justice Kennedy quizzed the Solicitor General on the statute's intent requirement, commenting that "that's important to me because . . . in reading the medical testimony it seemed to me that D&Es . . . result in intact deliveries quite without the intent of the doctor." He challenged Clement that "you pin your whole case on the availability of D&E even though D&Es sometimes inadvertently turn into intact D&Es," but Clement reassured him that "the statute requires the intent at the outset of the procedure."[86]

When PPFA's Eve Gartner's turn came, she warned the Court that with the fetal demise alternative, "the injection procedure carries significant risks for some women." She stated that D&X is "a procedure that is not marginally safer but significantly safer" than a standard D&E, an assertion that immediately led Chief Justice Roberts to ask whether the difference between "marginally safer and significantly safer" was constitutionally meaningful.[87] Like Priscilla Smith, Gartner too answered that "[m]arginal safety would not be enough," but she emphasized that "what Congress has done here is take away from women the option of what may be the safest procedure for her."[88]

In rebuttal, Paul Clement reminded the Court that if it "allows this statute to go into operation, it will not foreclose the possibility of a future pre-enforcement as-applied challenge that focuses on particular medical conditions."[89] His closing words eloquently summarized the government's position: "fetal demise that takes place in utero is one thing. That is abortion as it has been understood. But this procedure, the banned procedure, is something different. This is not about fetal demise in utero. This is something that is far too close to infanticide for society to tolerate."[90]

IV

Experienced observers of the Court believed Justice Kennedy's comments at argument "suggested that he had not made up

[85] Id at 14–15.

[86] Id at 16, 25.

[87] Id at 42, 43, 44.

[88] Id at 44, 46.

[89] Id at 51–52.

[90] Id at 53.

his mind" about PBABA's constitutionality notwithstanding his extremely forceful dissent six years earlier in *Stenberg*.[91] In that opinion, Kennedy repeatedly employed the pejorative label "abortionist" to characterize physicians covered by the Nebraska statute[92] while declaring that "[s]tates may take sides in the abortion debate and come down on the side of life."[93] He endorsed "Nebraska's right to declare a moral difference between the procedures" used in D&X and D&E abortions because "D&X perverts the natural birth process to a greater degree than D&E."[94] Emphasizing that "as an ethical and moral matter D&X is distinct from D&E," Kennedy went on to say that "[n]o studies support the contention that the D&X abortion method is safer than other abortion methods."[95] Indeed, "[s]ubstantial evidence supports Nebraska's conclusion that its law denies no woman a safe abortion. The most to be said for the D&X is it may present an unquantified lower risk of complication for a particular patient but that other proven safe procedures remain available even for this patient."[96]

Justice Kennedy's *Stenberg* dissent also criticized what he termed the majority's "physician-first view." States are "entitled to make judgments where high medical authority is in disagreement," he wrote, and the majority's "immense constitutional holding" required complete deference to individual physicians' unfettered preferences.[97] "[M]edical procedures must be governed by moral principles having their foundation in the intrinsic value of human life, including life of the unborn," Kennedy preached. By confronting "an issue of immense moral consequence," Kennedy declared, Nebraska had targeted "a procedure many decent and civilized people find so abhorrent as to be among the most serious of crimes against human life."[98]

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[91] Linda Greenhouse, *Justices Hear Arguments on Late-Term Abortion*, New York Times A25 (Nov 9, 2006). See also Lyle Denniston, *Commentary: Kennedy Vote in Play on Abortion*, Scotusblog (Nov 8, 2006) (available at http://www.scotusblog.com/wp/commentary-and-analysis/commentary-kennedy-vote-in-play-on-abortion/); Joan Biskupic, *Abortion Case Draws Throngs to High Court*, USA Today A3 (Nov 9, 2006); and Charles Lane, *No Pointers to Ruling in Abortion Case*, Washington Post A3 (Nov 9, 2006).

[92] 530 US at 957, 959, 960, 964, 965.

[93] Id at 961.

[94] Id at 962–63.

[95] Id at 963, 966.

[96] Id at 967.

[97] Id at 969–70, 978.

[98] Id at 979. See also *Hill v Colorado*, 530 US 703, 765, 780, 790 (2000) (Kennedy, J,

Despite the uncertain impression conveyed by Justice Kennedy's comments at oral argument, when the decision in *Gonzales v Carhart* came down on April 18, 2007, he was the author of a five-man majority opinion also joined by Justices Antonin Scalia, Clarence Thomas, Samuel Alito, and Chief Justice Roberts.[99] At the very outset, Kennedy stressed that the PBABA was both "more specific" and "more precise" than the Nebraska statute voided in *Stenberg*.[100] In contrast to his dissent there, Kennedy now spoke of "abortion doctors"[101] and a mention of "the unborn child's development" was balanced by references to "embryonic tissue," "the fetus," and "the entire fetal body."[102]

As his majority included two Justices who had dissented angrily in *Casey*, Scalia and Thomas, Kennedy carefully explained how among the principles "[w]e assume . . . for the purposes of this opinion" was *Casey*'s conclusion that states "may not impose . . . an undue burden" on a woman's right to secure a pre-viability abortion. But he emphasized that *Casey* "struck a balance" between that right and the state's prerogative to "'express profound respect for the life of the unborn,'" a "balance that was central to its holding."[103] He then proceeded, by means of a painstaking analysis of PBABA's precise language, to reject the appellees' contentions that the statute's medical terminology was both unconstitutionally vague and might also prohibit standard D&Es, a breadth of coverage which even the government acknowledged "would impose an undue burden."[104]

Kennedy explained, just as the Solicitor General had emphasized at argument, that "[t]he Act does not restrict an abortion procedure involving the delivery of an expired fetus."[105] Furthermore, § 3(b)(1) expressly stated, Kennedy continued, that "the overt act causing the fetus' death must be separate from delivery. And the overt act must

dissenting) (calling abortion "a profound moral issue," suggesting abortion may be "a profound moral wrong" and terming abortion an act of "profound moral consequence").

[99] 127 S Ct 1610 (2007).

[100] Id at 1619.

[101] Id at 1625, 1631, 1632.

[102] Id at 1620, 1621.

[103] Id at 1626, 1627 (quoting 505 US at 877). See also *Hill v Colorado*, 530 US 703, 791 (Kennedy, J, dissenting) (invoking "the reasoned, careful balance" which Kennedy said "was the basis for the opinion in *Casey*").

[104] Id at 1627.

[105] Id.

occur after the delivery to an anatomical landmark. This is because the Act proscribes killing 'the partially delivered fetus,'" which meant "has been delivered" already.[106] What's more, Kennedy said, the statute's specification that a doctor act "deliberately and intentionally" meant that "[i]f a living fetus is delivered past the critical point by accident or inadvertence, the Act is inapplicable."[107]

Earlier in his opinion, Kennedy had highlighted how "[d]octors who attempt at the outset to perform intact D&E may dilate for two full days,"[108] a statement which echoed the Solicitor General's comment during oral argument that "the differences between the two procedures are probably most manifest in the dilation regimen."[109] Now Kennedy again reiterated that "a doctor performing a D&E will not face criminal liability if he or she delivers a fetus beyond the prohibited point by mistake" and emphasized that "[t]he scienter requirements narrow the scope of the Act's prohibition and limit prosecutorial discretion."[110] He stressed that PBABA "does not prohibit the D&E procedure in which the fetus is removed in parts," and underscored that "[t]he Act's intent requirements . . . limit its reach to those physicians who carry out the intact D&E after intending to undertake both steps"—the delivery then followed by the overt act—"at the outset." Kennedy then again repeated that "[i]f the doctor intends to remove the fetus in parts from the outset, the doctor will not have the requisite intent to incur criminal liability."[111]

Kennedy's insistent repetitiveness reflected an intense desire to draw as bright a line as possible between criminally prohibited conduct and medical procedures doctors could employ without worry. He restated how PBABA "departs in material ways from the statute in *Stenberg*," and graphically if not gratuitously explained that "D&E does not involve the delivery of a fetus because it requires the removal of fetal parts that are ripped from the fetus as they are pulled through the cervix."[112] A "standard D&E does not involve

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[106] Id at 1627–28.

[107] Id at 1628.

[108] Id at 1621.

[109] Transcript of Argument, *Gonzales v Planned Parenthood Federation of America* (cited in note 82), 11.

[110] *Gonzales v Carhart*, 127 S Ct at 1628, 1629.

[111] Id at 1629.

[112] Id at 1630.

a delivery followed by a fatal act," he again expounded, and "an intact delivery is almost always a conscious choice rather than a happenstance."[113]

The majority opinion's prescription was clear: "those doctors who intend to perform a D&E that would involve delivery of a living fetus to one of the Act's anatomical landmarks must adjust their conduct to the law by not attempting to deliver the fetus to either of those points."[114] Kennedy then addressed how PBABA, on its face, did not violate *Casey*'s "substantial obstacle" test, and he also reiterated, quoting *Casey*'s three-Justice plurality, that simply because a law "'has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.'"[115] That plurality's explicit recognition that the state can express "its own regulatory interest in protecting the life of the fetus that may become a child," Kennedy asserted, "cannot be set at naught by interpreting *Casey*'s requirement of a health exception so it becomes tantamount to allowing a doctor to choose the abortion method he or she might prefer. 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."[116]

That latter sentence represented the true crux of the majority's holding, and Kennedy expressly grounded it not on the protection of fetal life, but on the state's interest in controlling the particular methods by which fetal life legally could be taken. That holding also reaffirmed the continuing validity and applicability of *Casey*'s decisive undue burden test, and, in conjunction with the majority's earlier acknowledgment that a ban which covered standard D&E procedures would indeed violate that standard,[117] thus created a serious if not fatal impediment to this opinion serving as a direct stepping stone toward further prohibitions of second-trimester abortions.

However, Kennedy immediately added that "for many, D&E is

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[113] Id at 1631, 1632.

[114] Id at 1632.

[115] Id at 1632, 1633 (quoting 505 US at 874).

[116] Id at 1633.

[117] See text at note 104.

a procedure itself laden with the power to devalue human life."[118] Then he proceeded to deliver several memorable paragraphs of sermonic dicta. "Respect for human life finds an ultimate expression in the bond of love the mother has for her child," he began. "While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. See Brief for Sandra Cano et al. as *Amici Curiae* in No. 05–380, pp. 22–24. Severe depression and loss of esteem can follow. See *ibid*."[119]

Kennedy's citation of that amicus brief was notable and revealing, but far from odd or extraordinary. The three referenced pages consisted almost entirely of footnote material, quoting from some of the 178 affidavits excerpted in the brief's own ninety-six-page appendix, in support of just two sentences of actual text. Explaining that those women had been asked, "How has abortion affected you?" the two sentences stated that "Typical responses . . . included depression, suicidal thoughts, flashbacks, alcohol and/or drug use, promiscuity, guilt, and secrecy. Each of them made the 'choice' to abort their baby, and they have regretted their 'choices.'"[120] No one sought to demonstrate that these women's declarations were either fraudulent or dishonest, and the scores of affidavits certainly supported the brief's emphasis on what it called "the adverse emotional and psychological effects of abortion" and its claim that "abortion in practice hurts women's health."[121]

No jurist ought to be denounced or demonized for considering real women's real testimonies with the utmost seriousness while judging an abortion case, whether in 2007 or in 1971,[122] and Justice Kennedy certainly was attempting to do just that. "In a decision so fraught with emotional consequence," he then went on, doctors

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[118] *Gonzales v Carhart*, 127 S Ct at 1633.

[119] Id at 1634.

[120] Linda Boston Schlueter, Brief of Sandra Cano, et al, *Gonzales v Carhart*, No 05-380 (filed May 22, 2006), 22–24. For a discussion of this brief prior to Justice Kennedy's citation of it, see Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U Ill L Rev 991, 1025–26 n 142.

[121] Id at 1, 2.

[122] See, e.g., Nancy Stearns, Brief Amicus Curiae on Behalf of New Women Lawyers, et al, *Roe v Wade* and *Doe v Bolton*, Nos 70-18 and 70-40 (filed Aug 2, 1971), 7 (arguing that "[c]arrying, giving birth to, and raising an unwanted child can be one of the most painful and long-lasting punishments that a person can endure").

might understandably believe it in a patient's best interest "not to disclose precise details of the means that will be used."[123] Kennedy's reference to "emotional consequence" directly echoed a passage from *Casey*—"Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision . . ."—that five Justices there had endorsed.[124] But with regard to doctors not detailing the "means that will be used," Kennedy continued, it is "precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State."[125] After quoting *Casey*'s characterization of abortion as "a decision that has such profound and lasting meaning,"[126] Kennedy then opined that "[t]he state has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event . . . that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form."[127]

Kennedy's language may have been purposely graphic, but it also once again directly echoed a passage from *Casey*: "In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed."[128] Yet notwithstanding his gratuitous language, Kennedy proceeded toward what in its essence would be an exceptionally constricted affirmance of PBABA's facial constitutionality. "The prohibition in the Act would be unconstitutional, under precedents we here assume to be controlling," he again qualified, "if it 'subject[ed] [women] to significant health risks,'"[129] a phrase which

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[123] *Gonzales v Carhart*, 127 S Ct at 1634.

[124] 505 US at 852. See also *Hill v Colorado*, 530 US 703, 791 (2000) (Kennedy, J, dissenting) (also quoting *Casey*'s "fraught with consequences" language).

[125] *Gonzales v Carhart*, 127 S Ct at 1634.

[126] Id (quoting 505 US at 873).

[127] Id. See also *Hill v Colorado*, 530 US 703, 792 (Kennedy, J, dissenting) (calling abortion "one of life's gravest moral crises").

[128] 505 US at 882.

[129] *Gonzales v Carhart*, 127 S Ct at 1635.

he drew most directly from *Ayotte*[130] and indirectly from *Casey*.[131] Whether PBABA "creates significant health risks for women has been a contested factual question," Kennedy acknowledged, and "both sides have medical support for their position," he claimed.[132] "There is documented medical disagreement over whether the Act's prohibitions would ever impose significant medical health risks on women," and "[t]he question becomes whether the Act can stand when this medical uncertainty persists."[133]

"The State's interest in promoting respect for human life at all stages in the pregnancy," Kennedy stated, meant that it could mandate "reasonable alternative procedures" as it "need not give abortion doctors unfettered choice . . . nor should it elevate their status above other physicians in the medical community."[134] All in all, "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," Kennedy concluded. "Alternatives are available."[135] For one, "[i]f the intact D&E procedure is truly necessary in some circumstances, it appears likely that an injection that kills the fetus is an alternative." In addition, since, with standard D&Es, PBABA "allows . . . a commonly used and generally accepted method, so it does not construct a substantial obstacle to the abortion right."[136]

Finally, toward the very end of the majority opinion, Justice Kennedy addressed the question that had dominated so much of the two cases' earlier litigation and briefing. "[W]e do not in the circumstances here place dispositive weight on Congress' findings," he wrote. "The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake."[137] He acknowledged that "some recitations in the Act are factually incorrect," including Congress's finding that "there existed a medical consensus that the prohibited procedure is never medically nec-

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[130] See 546 US at 328 ("it would be unconstitutional to apply the Act in a manner that subjects minors to significant health risks").

[131] See 505 US at 880.

[132] *Gonzales v Carhart*, 127 S Ct at 1635.

[133] Id at 1636.

[134] Id.

[135] Id at 1637.

[136] Id.

[137] Id.

essary. The evidence presented in the District Courts contradicts that conclusion," and "[u]ncritical deference to Congress' factual findings in these cases is inappropriate."[138]

Nonetheless, Kennedy said, "[c]onsiderations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends." Thus, "if some procedures have different risks than others, it does not follow that the State is altogether barred from imposing reasonable regulations."[139] PBABA was not facially invalid "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." Lastly, Kennedy emphasized, physicians could mount "pre-enforcement, as-applied challenges" to PBABA "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."[140]

Only a single, very brief concurring opinion by Justice Thomas, joined by Justice Scalia, was appended to Anthony Kennedy's insistently detailed and tightly delimited opinion for the Court. Thomas reiterated his view that "the Court's abortion jurisprudence, including *Casey* . . . has no basis in the Constitution," but he then went on to add that the issue of "whether the Act constitutes a permissible exercise of Congress' power under the Commerce Clause is not before the Court" since the challengers had never raised that question.[141] Several earlier law review articles had analyzed PBABA's constitutional vulnerability in light of *United States v Lopez* and *United States v Morrison*,[142] but, as Neal Devins has highlighted, during congressional consideration of the legislation, "the bill's federalism implications" received "no meaningful attention."[143] Senator Dianne Feinstein, Democrat of California, "was

[138] Id at 1637–38 (internal citation omitted).

[139] Id at 1638.

[140] Id.

[141] Id at 1640 (Thomas, J, concurring).

[142] See Allan Ides, *The Partial-Birth Abortion Act of 2003 and the Commerce Clause*, 20 Const Comm 441 (2003–04); Robert J. Pushaw, Jr., *Does Congress Have the Constitutional Power to Prohibit Partial-Birth Abortion?* 42 Harv J Leg 319 (2005). See also Brannon P. Denning, *Gonzales v Carhart: An Alternate Opinion*, 2006–2007 Cato Supreme Ct Rev 167.

[143] Neal Devins, *How Congress Paved the Way for the Rehnquist Court's Federalism Revival: Lessons from the Federal Partial Birth Abortion Ban*, 21 St John's J Leg Comm 461, 464, 466 (2007).

the only lawmaker to suggest that the bill was inconsistent with Rehnquist Court federalism decisions."[144] Thomas's concurrence raised the surprising possibility that a broader-gauged constitutional attack on PBABA might have attracted an unexpected vote to strike down the statute, but at a minimum it suggested that Thomas aspires to a consistent application of his constitutional principles irrespective of their impact on his presumed policy preferences.

Justice Ruth Bader Ginsburg's dissent, joined by Justices John Paul Stevens, David H. Souter, and Stephen G. Breyer, called the majority's decision "alarming" and preposterously alleged that it "refuses to take *Casey* and *Stenberg* seriously."[145] Asserting that Justice Kennedy's opinion employed "flimsy and transparent justifications" to uphold PBABA, Ginsburg complained that the act failed to further the government's professed interest in protecting fetal life since "[t]he law saves not a single fetus from destruction, for it targets only a *method* of performing abortion."[146] Failing to confront fairly and frontally Kennedy's argument that government's interest in regulating the practice of medicine allowed it to draw a moral bright line between different methods of fetal demise,[147] Ginsburg instead mused rhetorically that "[o]ne wonders how long a line that saves no fetus from destruction will hold up in the face of the Court's 'moral concerns.'"[148] Ginsburg did accurately identify that "the Court determines that a 'rational' ground is enough to uphold the Act,"[149] and she conceded that the majority opinion did not "foreclose entirely a constitutional challenge" at a later time to PBABA. "One may anticipate that such a preenforcement challenge will be mounted swiftly," she rather suggestively declared.[150] In conclusion, she stated that "[a] decision so at odds with our jurisprudence should not have staying power" and asserted that "the notion" that PBABA "furthers any legitimate governmental interest is, quite simply, irrational."[151]

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[144] Id at 466.

[145] *Gonzales v Carhart*, 127 S Ct at 1641 (Ginsburg, J, dissenting).

[146] Id at 1646, 1647.

[147] See text at note 116 (quoting 127 S Ct at 1633).

[148] *Gonzales v Carhart*, 127 S Ct at 1650 (Ginsburg, J, dissenting) (quoting 127 S Ct at 1633).

[149] Id (quoting 127 S Ct at 1633, 1638).

[150] Id at 1651, 1652.

[151] Id at 1653.

V

When the decision in *Gonzales v Carhart* came down on the morning of April 18, many reactions were eminently predictable even if not particularly perceptive. Jay Sekulow of the American Center for Law and Justice, who had filed a substantive amicus brief in defense of PBABA, praised the ruling as "a monumental victory for the preservation of human life."[152] On the other hand, Dr. Douglas W. Laube, president of the American College of Obstetricians and Gynecologists, denounced the decision as "shameful and incomprehensible."[153] Far more accurately, attorney Bonnie Scott Jones of CRR castigated the majority for "directly overturning *Stenberg*'s mandate to protect women's health in the face of medical uncertainty" and warned that the holding "opens the door for legislatures to dictate medical treatment in virtually any area of medical practice."[154]

Among ostensibly less partisan observers, discernment also varied greatly. The dean of Supreme Court journalists, Lyle Denniston, quickly pronounced that *Gonzales v Carhart* was "a decision that surely is on a par, historically, with *Roe v Wade*," and predicted that the ruling "guarantees" further litigation to establish "whether anything remains legally and practically speaking of the constitutional right to abortion."[155] He opined that the case "almost certainly will infect relations among the Justices for some time to come" and that "the Court's work as a collegial institution may well suffer." Denniston added that "the decision's treatment of abortion precedents gives the impression that the work the Justices do . . . may not have any real enduring effect, if even one new Justice arrives." He

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[152] Tony Mauro, *High Court Upholds Ban on "Partial Birth" Abortion*, Legal Times (April 19, 2007) (available at http://www.law.com/jsp/article.jsp?id=1176887056341) (quoting Sekulow).

[153] Dr. Douglas W. Laube, *ACOG Statement on the U.S. Supreme Court Decision Upholding the Partial-Birth Abortion Ban Act of 2003* (April 18, 2007) (available at http://www.acog.org/from_home/publications/press_releases/nr04-18-07.cfm). See also R. Alta Charo, *The Partial Death of Abortion Rights*, 356 New England J Med 2125 (2007); Michael F. Greene, *The Intimidation of American Physicians—Banning Partial-Birth Abortions*, 356 New England J Med 2128 (2007); and George J. Annas, *The Supreme Court and Abortion Rights*, 356 New England J Med 2201 (2007).

[154] Bonnie Scott Jones, *A Sharp Reversal* (April 18, 2007) (available at http://www.scotusblog.com/wp/commentary-and-analysis/a-sharp-reversal-commentary-from-the-center-for-reproductive-rights/).

[155] Lyle Denniston, *Commentary: Some Consequences of Carhart II* (April 18, 2007) (available at http://www.scotusblog.com/wp/uncategorized/commentary-some-consequences-of-carhart-ii/).

did briefly acknowledge that Justice Kennedy's majority opinion "read like a narrow, perhaps even cautious decision," but he nonetheless insisted that it "makes a substantial revision of the present law of abortion."[156]

In contrast, other first-day news reports emphasized "the Court's balancing of the various interests" and highlighted as "[m]ost notable" Justice Kennedy's emphasis on "ethical and moral concerns."[157] As Yale law professor Jack Balkin accurately stressed, "[t]he actual interest the Court is asserting is not the interest in protecting potential life but rather an interest in not having the life of fetuses ended in ways that the legislature regards as particularly gruesome."[158] In addition, with regard to Justice Kennedy's weighty concern for the emotional consequences women could subsequently suffer once they fully understood what an intact abortion entailed, both Balkin and Columbia law professor Michael Dorf rightly pointed out how, in Balkin's words, "the appropriate remedy . . . would be *informing* the women about the nature of intact D&E, not preventing the women from choosing whether to undergo the procedure."[159] Balkin also suggested that Kennedy's emphatic anxiety about the adverse mental health consequences of abortion "might lead states to pass a wide range of new laws under the rubric of 'informed consent' that would require doctors to show women the results of ultrasound imaging of the fetus before it is aborted, to describe in gruesome detail how the fetus will be terminated, dismembered and removed," etc.[160]

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[156] Id.

[157] Linda Greenhouse, *In Reversal, Justices Back Ban on Method of Abortion*, New York Times A1 (April 19, 2007).

[158] Jack Balkin, *Gonzales v Carhart—Three Comments* (April 18, 2007) (available at http://balkin.blogspot.com/2007/04/gonzales-v-carhart-three-comments.html).

[159] Id. See also Michael C. Dorf, *Supreme Court Partial Birth Abortion Ruling* (April 18, 2007) (available at http://michaeldorf.org/2007/04/supreme-court-partial-birth-abortion.html). Additionally see Joanna Grossman and Linda McClain, *New Justices, New Rules: The Supreme Court Upholds the Federal Partial-Birth Abortion Ban Act of 2003*, Findlaw (May 1, 2007) (available at http://writ.lp.findlaw.com/commentary/20070501_mcclain.html), and Joanna Grossman and Linda McClain, *Gonzales v. Carhart: How the Supreme Court's Validation of the Federal Partial-Birth Abortion Ban Act Affects Women's Constitutional Liberty and Equality*, Findlaw (May 7, 2007) (available at http://writ.lp.findlaw.com/ commentary/20070507_mcclain.html) (both highlighting how Justice Kennedy's emphasis upon "emotional consequence" directly echoed *Planned Parenthood v Casey*).

[160] Jack Balkin, *The Big News About Gonzales v Carhart—It's the Informed Consent, Stupid* (April 19, 2007) (available at http://balkin.blogspot.com/2007/04/big-news-about-gonzales-v-carhart.html).

VI

While quickly composed newspaper editorials denounced the "fundamental dishonesty"[161] of an "unconscionable" decision,[162] more assiduous journalists interviewed experienced physicians and reported that the ruling "as a practical matter, is unlikely to have much of an effect" on the actual performance of abortions.[163] Citing data that the Alan Guttmacher Institute first published in 2003,[164] reporters highlighted how an estimated total of only 2,200 intact procedures had been performed in 2000, by just thirty-one abortion providers.[165] That represented less than one-fifth of 1 percent—0.17—of all U.S. abortions, and in part reflected not only how the U.S. abortion rate had dropped by 22 percent between 1987 and 2002,[166] but also how the proportion of abortions taking place in the second trimester of pregnancy—at thirteen weeks' gestation or later—had declined to only 11 percent of all abortions by 2001.[167] In the preceding decade, the proportion of abortions performed during the first eight weeks of pregnancy had risen from 52 to 59 percent of all procedures,[168] and for second trimester abortions, standard D&Es were used for 99 percent at thirteen to fifteen weeks, 94.6 percent at sixteen to twenty weeks, and 85 percent at twenty-one or more weeks in 2000.[169]

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[161] *Denying the Right to Choose*, New York Times A26 (April 19, 2007).

[162] *A U-Turn on Abortion*, Los Angeles Times (April 19, 2007) (available at http://www.latimes.com/news/opinion/la-ed-abortion19apr19,0,4748632.story?coll=la-opinion-leftrail).

[163] Gina Kolata, *Anger and Alternatives on Abortion*, New York Times A11 (April 21, 2007). See also David J. Garrow, *Don't Assume the Worst*, New York Times A15 (April 21, 2007) (stating that the "extremely limited" ruling will affect only a "tiny percentage" of abortions).

[164] Lawrence B. Finer and Stanley K. Henshaw, *Abortion Incidence and Services in the United States in 2000*, 35 Perspectives on Sexual and Reproductive Health 6, 13 (2003).

[165] David Brown, *Data Lacking on Abortion Method*, Washington Post A8 (April 19, 2007).

[166] Lawrence B. Finer, et al, *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 Perspectives on Sexual and Reproductive Health 110 (2005). See also Rachel K. Jones, et al, *Abortion in the United States: Incidence and Access to Services, 2005*, 40 Perspectives on Sexual and Reproductive Health 6 (2008).

[167] Lawrence B. Finer, et al, *Timing of Steps and Reasons for Delays in Obtaining Abortions in the United States*, 74 Contraception 334 (2006). In 1999, only 1.5 percent of all abortions, or a total of 9,643, were performed at or after 21 weeks' gestation. See Stephen T. Chasen, et al, *Dilation and Evacuation at >20 Weeks: Comparison of Operative Techniques*, 190 Am J Obstetrics and Gynecology 1180 (2004).

[168] Id.

[169] Phillip G. Stubblefield, et al, *Methods for Induced Abortion*, 104 Obstetrics and Gynecology 174, 179 (2004).

As a small number of diligent journalists soon highlighted, most physicians who previously had performed intact D&Es quickly concluded that the best way to cope with the Supreme Court's decision would be to insure that fetuses whom they desired to remove largely intact were no longer "living" prior to when delivery commenced. As Dr. Eve Espey of the University of New Mexico told David G. Savage of the *Los Angeles Times*, "most are planning on going to fetal injections" so as to insure prior fetal demise.[170] Indeed, two clinical research reports published in major medical journals in the years before PBABA's passage had previously detailed how almost all physicians who performed late-term abortions already chose to induce fetal death before delivery by injecting the drug digoxin into the amniotic sac so as to end fetal cardiac function.[171] The studies explained that proper placement of the injection needle could be confirmed by the aspiration of amniotic fluid, and that subsequent fetal heart activity could be monitored by ultrasound.[172] Doctors administered the digoxin a day before performing delivery, usually in conjunction with the insertion of osmotic laminaria intended to obtain wide dilation of the cervix.[173] Physicians preferred to induce prior fetal death for both medical and emotional reasons. After the fetus dies, "[t]he result is soft, macerated tissue, which many clinicians believe eases evacuation of the fetus and decreases procedure duration," one article explained.[174] In addition, over 90 percent of patients "stated a strong preference for fetal demise before abortion."[175]

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[170] David G. Savage, *Enigmatic Jurist Recasts the Debate on Abortion*, Los Angeles Times A22 (April 22, 2007).

[171] Rebecca A. Jackson, et al, *Digoxin to Facilitate Late Second-Trimester Abortion: A Randomized, Masked, Placebo-Controlled Trial*, 97 Obstetrics and Gynecology 471 (2001) ("in our nonrandom telephone survey of 20 D&E providers nationwide, 95% reported its routine use for terminations at or after 20 weeks gestation"); Eleanor A. Drey, et al, *Safety of Intra-Amniotic Digoxin Administration Before Late Second-Trimester Abortion by Dilation and Evacuation*, 182 Am J Obstetrics and Gynecology 1063 (2000).

[172] Jackson, et al, 97 Obstetrics and Gynecology at 472 (cited in note 171).

[173] Stubblefield, et al, 104 Obstetrics and Gynecology at 179 (cited in note 169), expressly states that an intact D&E "requires 2 or more days of laminaria treatment to obtain wide dilation of the cervix." See also Finer and Henshaw, 35 Perspectives on Sexual and Reproductive Health at 13 n (cited in note 164), who likewise state that intact procedures entail "deliberate dilation of the cervix, usually over several days."

[174] Jackson, et al, 97 Obstetrics and Gynecology at 471 (cited in note 171). See also National Abortion Federation, *2007 Clinical Policy Guidelines* (available at http://www.prochoice.org/pubs_research/publications/downloads/professional_education/cpgs_2007.pdf), 20 n 16 ("In addition to achieving fetal demise, fetocidal agents induce softening of fetal cortical bones").

[175] Id at 475. See also Drey, et al, 182 Am J Obstetrics and Gynecology at 1063 (cited in note 171) ("both the patient and the clinician may prefer to abort a dead fetus").

The first of the two clinical studies stated that "there are no reports of maternal side effects or complications as a result of this use of digoxin" and concluded that "digoxin injection appears safe."[176] The second article noted that contraindications for the use of digoxin included renal failure and uncontrolled hyperthyroidism, and reported that approximately 15 percent of patients experienced subsequent vomiting.[177] However, it too concluded that "[t]here were no complications associated with intra-amniotic injection."[178]

In the wake of *Gonzales v Carhart*, Dr. Nancy Stanwood, an assistant professor at the University of Rochester Medical Center, told the *Los Angeles Times*' David Savage that "[w]e physicians will make some slight changes in our practice. An injection for the fetus adds another risk to woman's health, and it means added time and money. But if that's what's necessary, that's what we will do."[179] Within weeks of the decision, Planned Parenthood Federation of America (PPFA) altered its *Manual of Medical Standards and Guidelines*, which PPFA lawyers explain "govern all of our affiliates,"[180] to require that "digoxin must be given for all pregnancy terminations at 20 weeks or more" as well as at eighteen and nineteen weeks' gestation if advance osmotic dilation of the cervix is initiated.[181] PPFA's *Manual* expressly states that "using digoxin for fetal demise is safe for the woman."[182]

In the months following the *Gonzales* decision, several other journalists confirmed and enriched those initial indications of how late-term abortion providers would cope with PBABA's strictures. Dr. Eleanor A. Drey of the University of California, San Francisco, a coauthor of the two digoxin studies, told Rebecca Vesely of the *Oakland Tribune* that some providers were using digoxin for pro-

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[176] Drey, et al, 182 Am J Obstetrics and Gynecology at 1063, 1066 (cited in note 171). See also National Abortion Federation, *2007 Clinical Policy Guidelines* at 20, n 16 (cited in note 174) (calling intra-amniotic digoxin and similar injections "safe, effective regimens").

[177] Jackson, et al, 97 Obstetrics and Gynecology at 472, 474 (cited in note 171).

[178] Id at 474.

[179] Savage, *Enigmatic Jurist* (cited in note 170).

[180] E-mail message from Eve C. Gartner (Deputy Director, Public Policy Litigation and Law, PPFA) to David J. Garrow, Nov 28, 2007 (on file with the author).

[181] Planned Parenthood Federation of America, *PPFA Manual of Medical Standards and Guidelines*, May 2007. This manual unfortunately is not publicly available, but its May 2007 *Digoxin Injection* update is on file with the author.

[182] Id.

cedures as early as fourteen weeks' gestation.[183] Dr. Drey noted that fetal death could also be achieved by cutting the umbilical cord, but that no clinical data existed on the safety or efficacy of that practice. "There's no nice way of having a second trimester abortion and no nice way to talk about it," Drey explained. Her university's clinic at San Francisco General Hospital would continue to perform noninjection second trimester D&Es, she said, but "[w]e'll have fewer observers in the room and we will document the procedure as 'standard D&E.'"[184]

Most second-trimester providers, however, did expand their use of digoxin. In Michigan, Northland Family Planning, which operates three clinics in Detroit's suburbs, previously had used injections from twenty weeks' gestation "because doctors felt it made removal of the fetus easier" but now employed them as early as fourteen weeks.[185] WomanCare, with six clinics across Michigan, began using digoxin for every abortion from eighteen weeks' gestation. "It's awful. It's unnecessary. It's dangerous. It's more complicated. It makes the woman go through another procedure that's not necessary," Dr. Alberto Hodari told the *Detroit News*.[186] In Massachusetts, four major Boston-area hospitals began using digoxin from approximately twenty weeks' gestation, with Dr. Michael F. Greene, director of obstetrics at Massachusetts General, telling the *Boston Globe* that the injections are "trivially simple" and, in the *Globe*'s words, "add no risk."[187] At Oregon Health and Science University in Portland, digoxin injections were now required from twenty weeks' gestation, Professor Mark Nichols told the *Globe*. In addition, medical and nursing students "are no longer invited to watch later-term abortions, for fear one might misinterpret the procedure and lodge a criminal complaint," the *Globe* added.[188]

When all of the most revealing and well-informed medical commentary is considered, the conclusion that *Gonzales v Carhart* has

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[183] Rebecca Vesely, *Courts Force New Abortion Methods*, Oakland Tribune (June 4, 2007) (available at http://findarticles.com/p/articles/mi_qn4176/is_20070604/ai_n19199832/print).

[184] Id.

[185] Kim Kozlowski, *Abortion Procedure Fuels Debate*, Detroit News (July 30, 2007) (available at http://cul.detmich.com/detnews_jul30_2007/detnews_jul30_2007.html).

[186] Id. See also Carole Joffe, *The Abortion Procedure Ban*, Dissent 57, 58 (Fall 2007).

[187] Carey Goldberg, *Shots Assist in Aborting Fetuses*, Boston Globe (Aug 10, 2007) (available at http://www.boston.com/news/local/articles/2007/08/10/shots_assist_in_aborting_fetuses/).

[188] Id.

done little more than require the modest number of physicians who perform intact D&Es to utilize in all late second-trimester procedures an injection protocol that most of them already used and that credible clinical studies hold to be completely safe seems almost impossible to avoid. In light of both PBABA's own requirement that its prohibition applies only in cases of "living" fetuses, and Justice Kennedy's insistent articulation of a bright-line intent test, there frankly appears to be virtually no practical possibility that a plausible criminal prosecution under PBABA could be mounted by any U.S. attorney and the U.S. Department of Justice anywhere in the country. Doctors' own rational and understandable safeguards, such as now drastically minimizing the number of firsthand witnesses to any late-term abortion, further insulate physicians from any credible worries that a criminal indictment will ever be brought alleging a violation of PBABA's prohibition.

VII

If the medical consequences of *Gonzales v Carhart* now appear to be far more modest than activists and editorialists initially proclaimed, the decision's political impact also may be far more limited than some observers at first predicted. One week after the ruling, National Public Radio (NPR) asked PBABA's strategic and spiritual godfather, Douglas Johnson of the National Right to Life Committee (NRLC), where abortion opponents would turn next. In reply, Johnson noted that nine states—within days Georgia would become the tenth—already required abortion providers "to offer the woman an opportunity to view an ultrasound before she proceeds. I think you'll see more states adopting that type of legislation." Given the emphasis Justice Kennedy's opinion placed on pregnant women's understanding of the consequences of abortion, "I think that bodes well for these ultrasound full disclosure bills . . . allowing the woman the opportunity to see the ultrasound," Johnson added.[189]

Johnson's focus on fetal ultrasound appeared to signal a strikingly narrow and indeed cautiously incremental short-term agenda. However, William Saletan, a savvy abortion politics analyst, perceptively

[189] National Public Radio, *Morning Edition* (April 26, 2007) (available at http://www.npr.org/templates/story/story.php?storyId=9843340). See also Patrik Jonsson, *Ultrasound: Latest Tool in Battle Over Abortion*, Christian Science Monitor (May 15, 2007) (available at http://www.csmonitor.com/2007/0515/p03s03-ussc.htm).

highlighted the underlying tension between *Gonzales*'s reliance on where fetal demise occurs—inside or outside the womb—and abortion opponents' new emphasis on fetal imaging rather than "partial-birth." Ultrasound, Saletan explained, "has exposed the life in the womb to those of us who didn't want to see what abortion kills. The fetus is squirming, and so are we."[190] A policy focus on ultrasound shifts political debates away from abortion techniques to fetal growth, and from what happens when a fetus is *removed* from the womb, whether intact or in parts, to what is happening *within* the womb prior to the onset of *every* abortion procedure. Indeed, Saletan acknowledged, in comparison to various state efforts to force medically distorted, government-drafted screeds upon abortion patients under the guise of "informed consent," "ultrasound is the least onerous"[191] and perhaps the most objective and reasonable as well.

NRLC's incrementalist agenda meshed well with public opinion soundings taken soon after *Gonzales* came down. Respondents to a Gallup poll in early May 2007 were asked whether "a specific abortion procedure known as 'late term' abortion or 'partial birth' abortion . . . should be legal or illegal," and 72 percent said "illegal" versus only 22 percent who chose "legal."[192] In contrast, only 35 percent of those same respondents answered affirmatively when asked, "Would you like to see the Supreme Court overturn its 1973 *Roe* versus *Wade* decision concerning abortion, or not?" Fifty-three percent said no, although those numbers represented a significant shift from January 2006, when 66 percent had answered no and just 25 percent said yes.[193]

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[190] William Saletan, *Window to the Womb*, Washington Post B2 (April 29, 2007).

[191] Id.

[192] See Jeffrey M. Jones, *Slim Majority Approves of Supreme Court Following Partial-Birth Ruling*, Gallup News Service (May 15, 2007) (available at http://www.gallup.com/poll/27592/Slim-Majority-Approves-Supreme-Court-Following-PartialBirth-Ruling.aspx), and *Abortion and Birth Control* (available at http://www.pollingreport.com/abortion.htm). A Pew Research Center poll, conducted during August 2007 and using the exact same language as the Gallup question, showed 75 percent of more than 3,000 respondents choosing "illegal" and only 17 "legal" (available at http://www.pollingreport.com/abortion.htm). In contrast, an ABC News/*Washington Post* poll conducted in mid-July 2007 used a very differently and perhaps less clearly worded question—"The Supreme Court recently upheld a federal restriction on the procedure known as partial birth abortion, banning the procedure except when a woman's life is at risk. Do you approve or disapprove of this decision?"—that resulted in only 55 percent of respondents choosing "approve" versus 43 percent who said "disapprove" (also available at http://www.pollingreport.com/abortion.htm).

[193] Gallup Poll, May 10–13, 2007, and Jan 20–22, 2006 (available at http://www.pollingreport.com/abortion.htm).

Analyzing the more detailed results of the May 2007 poll, Gallup's Lydia Saad underscored how a total of 58 percent of respondents indicated they "think abortion should either be limited to only a few circumstances or illegal in all circumstances." In contrast, only 41 percent "think it should be legal in all or most circumstances."[194] She pointed out how "relatively few Americans are positioned at either extreme of the spectrum of beliefs—saying abortion should be legal in either all circumstances (26%) or illegal in all circumstances (18%)," and she likewise highlighted how "[j]ust 16%" said "they will only vote for candidates for major offices who share their views on abortion."[195] The CBS News/*New York Times* poll similarly asked respondents to choose from among three options: "Abortion should be generally available to those who want it; or, abortion should be available, but under stricter limits than it is now; or, abortion should not be permitted." In mid-May 2007, 37 percent of respondents answered "stricter limits" and 21 percent chose "not permitted"—a 58 percent total that matched Gallup's figure. Those answering "generally available" came to 39 percent in May, rose to 41 percent in mid-July 2007, but declined to 34 percent by early September 2007, as opposed to a total of 64 percent choosing either "stricter limits" (39) or "not permitted" (25).[196]

Those poll results clearly signaled that an incrementalist strategy aiming at "stricter limits" would continue to produce far more successful results for abortion opponents than any "absolutist" focus on outlawing all abortions or reversing *Roe v Wade*. Nonetheless, in late May a significant number of "absolutist" advocates publicly denounced right-to-life leaders such as Dr. James C. Dobson, chairman of Focus on the Family, who had praised and celebrated the *Gonzales* ruling. Emphasizing, like Justice Ginsburg's dissent, that "this ban cannot prevent a *single* abortion," they angrily complained about how "many national ministries have spent years using the PBA ban to motivate financial donations, all the while *misrepre-*

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[194] Lydia Saad, *Public Divided on "Pro-Choice" vs. "Pro-Life" Labels*, Gallup News Service (May 21, 2007) (available at http://www.gallup.com/poll/27628/Public-Divided-Pro Choice-vs-ProLife-Abortion-Labels.aspx).

[195] Id. The partisan breakdown on that latter question was 17 percent for Republicans and 14 percent for Democrats.

[196] CBS News/*New York Times* Poll, May 18–23, 2007, July 7–17, 2007, and Sept 4–9, 2007 (available at http://www.pollingreport.com/abortion.htm).

senting the legal effect of the ban."[197] The absolutists decried *Gonzales*'s careful distinctions between different methods of abortion as "more wicked than *Roe*,"[198] and Colorado Right to Life president Brian Rohrbough, a leading absolutist, deplored how "[t]he broader movement is claiming that we're saving lives, and we're not."[199]

The absolutists' fury toward the major national antiabortion groups was reminiscent of the outrage that gripped a significant portion of the right-to-life movement in the late 1980s after it became clear that not even the outspokenly "pro-life" presidency of Ronald Reagan would lead to any federal constitutional amendment or statute that would reverse or undercut *Roe*. That intense disillusionment spiraled downward into terrorist attacks that took the lives of three doctors, three other clinic personnel, and one law enforcement officer before dissipating in the wake of the 1994 enactment of the federal Freedom of Access to Clinic Entrances Act,[200] but in 2007 the new anger was instead channeled into efforts to propose and pass state constitutional amendments that would proclaim fertilized embryos to be "persons" in the eyes of the law. Such a declaration of fetal personhood would contradict federal constitutional protection of a woman's right to choose abortion at any stage of pregnancy and thereby create a head-on collision with *Roe v Wade*. Supporters especially focused on Georgia's Human Life Amendment, H.R. 536, which would need to receive two-thirds or more support in each legislative chamber in order to appear on the statewide ballot for majority ratification.[201]

As absolutists' efforts jelled, albeit with little notice by major news

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[197] Brian Rohrbough, et al, *An Open Letter to Dr. James Dobson*, May 23, 2007 (available at http://www.coloradorighttolife.org/openletter). See also Alan Cooperman, *Supreme Court Ruling Brings Split in Antiabortion Movement*, Washington Post A3 (June 4, 2007). A few abortion opponents had voiced similar criticisms as early as 1997. See Garrow, *Liberty and Sexuality* at 738 (cited in note 2) (quoting Matt Trewhella and Judie Brown).

[198] Id.

[199] Stephanie Simon, *Absolutists Turn Against Other Foes of Abortion*, Los Angeles Times A1 (June 6, 2007).

[200] Garrow, *Liberty and Sexuality* at 673, 702–14 (cited in note 2); David J. Garrow, *Abortion Before and After Roe v. Wade*, 62 Albany L Rev 833, 842–43, 846–48 (1999). See also David J. Garrow, *A Deadly, Dying Fringe*, New York Times A27 (Jan 6, 1995).

[201] Georgia HR 536 (available at http://www.legis.ga.gov/legis/2007_08/search/hr536.htm). See also Andy Peters, *Ga. Legislators Have Roe in Their Sites*, Fulton County Daily Report (Feb 4, 2008) (available at http://www.dailyreportonline.com/Editorial/News/singleEdit.asp?individual_SQL=2%2F4%2F2008%4021037); Mike Billips, *House Panel Tables Human Life Amendment*, Macon Telegraph (Feb 21, 2008) (available at http://www.macon.com/206/story/273390.html).

outlets, long-time prolife lawyer James Bopp, Jr., a veteran Supreme Court litigator who had submitted an amicus brief in *Gonzales v Carhart*, distributed an erudite and strongly argued warning memo to antiabortion colleagues. Writing in tandem with Richard Coleson, another experienced right-to-life attorney, Bopp reviewed the unhappy history of attempts to reverse *Roe* and prohibit abortion. In the 1970s and '80s, activists had hoped "a federal constitutional amendment or statute" might someday be adopted, but "prospects for doing so now or in the near future are nonexistent," Bopp bluntly stated.[202] At the Supreme Court, only a partial victory could be won, for even *Roe*'s most outspoken foe, Justice Antonin Scalia, "believes that the Constitution requires return of abortion regulation to the states, not that it requires protection of the unborn." Indeed, Bopp emphasized, "[t]he Supreme Court's current makeup assures that a declared federal constitutional right to abortion remains secure for the present. This means that now is not the time to pass *state* constitutional amendments or bills banning abortion," for any such enactments would immediately be struck down by lower federal courts and might not even be granted review by the Supreme Court. The result would be "yet another federal court decision declaring that state law on abortion is superseded by the federal constitution," plus "the pro-abortion attorneys who brought the legal challenge will collect statutory attorneys fees from the state that enacted the provision in the amount of hundreds of thousands of dollars." Any absolutist enactment will thus "have enriched the pro-abortion forces for no gain for the pro-life side."[203]

What's more, Bopp hypothesized, if the Supreme Court did consider an absolutist challenge to *Roe*, "there is the potential danger that the Court might actually make things worse than they presently are." Such a case would result in Justice Kennedy voting with the four *Gonzales* dissenters to strike down a complete prohibition of abortion, and that might allow Justice Ginsburg, author of the *Gonzales* dissent, to write on behalf of a majority or prevailing plurality. If so, Bopp warned, Ginsburg might reprise her *Gonzales* dissent, which Bopp read as silently abandoning *Casey* and *Stenberg*'s reliance upon Fourteenth Amendment substantive due process liberty as the

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[202] James Bopp, Jr. and Richard E. Coleson, to Whom It May Concern, *Pro-Life Strategy Issues* 2 (Aug 7, 2007) (available at http://www.personhood.net/docs/BoppMemorandum1.pdf).

[203] Id at 3.

constitutional grounding of the abortion right and instead invoking only the Equal Protection Clause in support of a woman's right to abortion.

Bopp's reading of Ginsburg's dissent was unprecedented—no previous commentator had identified the unacknowledged substitution that he discerned. Bopp highlighted how Ginsburg had stated that "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."[204] Ginsburg's use of "rather" seemed to dispense rather expressly with any reliance upon any constitutional privacy right, and the ensuing phrase clearly culminated with an emphasis upon "equal citizenship stature." In between "rather" and "equal citizenship," however, Justice Ginsburg had invoked "a woman's autonomy," and her one other, previous usage of "autonomy"—in a quotation from *Planned Parenthood v Casey*—had passingly signaled that "autonomy" indeed had been used multiple times as part of *Casey*'s articulation of a substantive due process liberty basis for the abortion right.[205] *Casey*'s usage of autonomy—"These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment"[206]—left no doubt that Ginsburg's invocation of "a woman's autonomy" did indeed thus place reliance on due process liberty, even if her construction quickly drew a reader's eye toward "equal citizenship" and rapidly past "autonomy."

Bopp's fear of a judicial transposition in abortion's constitutional foundation was nonetheless highly revealing. If an equal protection/gender equality rationale "gained even a plurality in a prevailing case," his memo warned, "this new legal justification for the right to abortion would be a powerful weapon in the hands of pro-abortion lawyers that would jeopardize all current laws on abortion," including measures such as parental involvement and mandatory waiting-period statutes. In addition, "states would likely have to

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[204] *Gonzales v Carhart*, 127 S Ct at 1641 (Ginsburg, J, dissenting).

[205] Id at 1640 (quoting 505 US at 851).

[206] 505 US at 851. *Casey* also employed "autonomy" in four additional instances, twice speaking of "personal autonomy" and once each invoking "economic autonomy" and "physical autonomy." See 505 US at 857, 860, 861, 884.

fund abortions that they are not currently required to fund in programs for indigent persons."[207]

More broadly, Bopp reiterated, "the pro-life movement must at present avoid fighting on the more difficult terrain of its own position, namely arguing that abortion should not be available in cases of rape, incest, fetal deformity, and harm to the mother." As poll after poll revealed, "public support for the pro-life side drops off dramatically whenever these 'hard' cases are the topic." Instead, "in the current environment, the public debate should be framed so that our opponents have to defend on their 'hardest' terrain, exposing them as unreasonable and outrageous. . . . That has been the genius of the vigorous effort to inform the public about PBA." Bopp explained that "[t]hose who object that the PBA ban leaves in place other means of abortion misunderstand or ignore the strategy and the profoundly favorable change in social attitudes wrought by the effort." He added that "doing the lesser implies no capitulation on the greater."[208]

Bopp also emphasized that the absolutists' public demand that incrementalists "repent for their alleged deception of the public and abandonment of the unborn . . . poses a serious threat to the cohesion necessary for the long-term success of any movement." The absolutists were endangering right-to-life unity while refusing to appreciate that their legislative efforts were fundamentally misdirected since "bans on the core abortion right at the state level are currently both useless and potentially dangerous." Instead, Bopp recommended, they should strive for enactments such as state partial-birth bans and the inclusion of "unborn victims in homicide laws." Interestingly, only at the very bottom of a long, twelve-item list did Bopp include statutes that would *require* "the woman to view ultrasound images of her unborn baby."[209]

Bopp's memo received a hostile and acerbic reception from absolutists. Robert J. Muise, an attorney at the Thomas More Law Center, a major backer of the Georgia Human Life Amendment, issued a lengthy rebuttal to Bopp in late September. Declaring that

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[207] Bopp and Coleson, *Pro-Life Strategy Issues* at 3, 4 (cited in note 202). See also id at 11 (arguing that if an embryonic personhood case reached the current Supreme Court, a majority is "likely to switch to a more absolutist equal protection rationale for the abortion right, and all current regulations on abortion would be subject to, and likely would be struck down under, this new rationale").

[208] Id at 5, 6.

[209] Id at 6–7, 8, 9.

"after 34 years of abortion on demand through all nine months of pregnancy, it is time to rethink pro-life strategy," Muise stressed that "ending all abortions is the ultimate goal." He avowed that the Georgia measure "should be the pro-life movements' main effort" since it "provides a historic opportunity to educate the general public regarding the harm caused by all abortions, not just late-term, partial-birth abortions, which, in comparison, are far fewer in number." Acknowledging that "[d]emonstrating the humanity of the victim is a key component in social reform," he insisted that "a case must be presented to the United States Supreme Court that challenges the central premise of *Roe*—that the unborn is not a person within the meaning of the law."[210]

Muise maintained that "an amendment to the Georgia Constitution has a very good chance of succeeding," and that after it was challenged in the federal courts, "there is hope that Justice Kennedy will be persuaded to do the right thing when the opportunity presents itself once again." Muise explicitly premised that hope on religious affiliation: "there is good reason to believe (and to pray) that Chief Justice Roberts and fellow Justices Alito, Scalia, and Thomas (all fellow Catholics) could influence Kennedy in a similar fashion. It is certainly worth the effort to try." More realistically, Muise added that "given the political landscape"—that is, who as president might be nominating new Justices from 2009 forward—"we may have to wait another generation to have as good a chance as we have at the moment."[211]

But the absolutists' anger at the incrementalists' partial-birth political strategy was profound. "[I]f prohibiting a rare and seldom used procedure by means of a ban that will not save one life is the great success of framing the abortion debate, then the pro-life movement has settled for failure," Muise complained. Indeed, he rather oddly went on, "one could argue that the *supporters* [emphasis added] of abortion succeeded in focusing the abortion debate on a relatively rare, late-term abortion procedure, leaving untouched the ground where the battle truly takes place—early term abortions." Adopting—or mocking—Bopp's use of the word "terrain," Muise added that "[t]he abortion debate over the past decade has thus focused

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[210] Robert J. Muise, to All Concerned Pro-Life Supporters, *Response to Bopp & Coleson Memo of August 7, 2007 re: Pro-Life Strategy Issues* (Sept 24, 2007), 1, 2, 3 (available at http://www.personhood.net/docs/MuiseResponse.pdf).

[211] Id at 3, 4.

not on the 'terrain' where over 90% of all abortions are performed . . . but on the 'terrain' that will not prevent the killing of one unborn child." At bottom, "the incremental approach has had the effect of making the abortion issue negotiable," whereby people can easily express opposition to the "partial-birth" procedure while simultaneously having no qualms about what Muise termed "the horrors of early term abortions."[212]

Abortion rights supporters and editorialists who viewed *Gonzales* as an unprecedented defeat of historical proportions ought to have reconsidered the insistent pessimism of their sky-is-falling, *Roe*-is-dead political mindset had they fully understood just how angrily divided and despairing their supposedly triumphant opponents actually were. Absolutists were hoping to mount 2008 embryonic personhood referenda in perhaps four other states in addition to Georgia—Colorado, Michigan, Mississippi, and Montana—but the few major news stories that reported their efforts all highlighted how "little support or funding from big national antiabortion groups" they were receiving.[213] The executive director of the National Right to Life Committee, David O'Steen, stated simply that NRLC was "not involved" with any such referenda.[214]

While the medical aftermath and impact of the *Gonzales* decision suggested that PBABA's upholding would have only a minimal impact upon the provision and availability of second-trimester abortions, the political fallout and effects of the ruling indicated that abortion opponents were unprepared or unwilling to take any significant advantage from what was widely heralded as an unparalleled, landmark victory. Experienced national antiabortion leaders like Douglas Johnson and James Bopp readily understood how well their incrementalist strategy of gradual rollback meshed with public opinion's complexities and ambivalences concerning abortion. But although a major new right-to-life focus on enacting fetal ultrasound statutes might well triumph in state after state while painting abortion rights adversaries as know-nothings who sought to deny women access to a truthful—and perhaps disturbing—scientific im-

[212] Id at 9, 10, 11.

[213] Nicholas Riccardi, *Foes of Abortion Shift to States*, Los Angeles Times A1 (Nov 23, 2007).

[214] Judith Graham and Judy Peres, *Rights for Embryos Proposed*, Chicago Tribune (Dec 3, 2007) (available at http://www.chicagotribune.com/news/nationworld/chi-eggsdec03,1,3297674.story?).

age, many of the movement's most zealous and energetic grassroots activists viewed *Gonzales* as a meaningless culmination of an illegitimate strategy and were instead intensely committed to championing an absolutist strategy destined for unquestionably certain defeat.

VIII

If the actual medical and political impacts of *Gonzales* confounded most commentators' expectations, the same unexpected truth—that the ruling appeared unlikely to have any major direct effects whatsoever—gradually seemed to also come true on the legal front as well. Soon after the decision came down, the Supreme Court vacated and remanded two cases it had been holding for *Gonzales*, one from Virginia and one from Missouri,[215] and shortly thereafter the Second Circuit Court of Appeals vacated its own previous ruling against PBABA, which the Solicitor General had not petitioned to the Supreme Court.[216] In late May a federal district court dissolved its earlier injunction against a state partial-birth ban law Utah adopted in 2004 that almost identically mirrored PBABA,[217] but in Wisconsin, state Attorney General J. B. Van Hollen refused requests to revive a state ban which echoed the Nebraska statute struck down in *Stenberg* and which had been enjoined in 2001.[218] In an impressive formal opinion delivered to state legislative leaders, Van Hollen explained that a request to lift the injunction "would have to demonstrate that the Wisconsin statute does not impose an undue burden on a woman's right to choose a D&E abortion." However, "both the Nebraska statute and Wis. Stat. § 940.16 criminalize D&E abortions by banning the vaginal delivery of a fetal part, such as an arm or leg," in contrast to the narrower and more precise definition of "delivery" used in PBABA and upheld in *Gonzales*.[219]

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[215] See *Herring v Richmond Medical Center for Women*, 127 S Ct 2094 (2007), and *Nixon v Reproductive Health Services of Planned Parenthood of the St. Louis Region*, 127 S Ct 2120 (2007). See also Jerry Markon, *Va. Law to Be Reconsidered in Wake of High Court Ruling*, Washington Post B6 (April 24, 2007).

[216] See *National Abortion Federation v Gonzales*, 224 Fed Appx 88 (2d Cir 2007).

[217] See *Utah Women's Clinic v Walker*, No 2:04CV00408 PGC, May 31, 2007 (D Utah); see also *Court Lifts Partial-Birth Injunction*, Salt Lake Tribune (June 1, 2007).

[218] See *Christensen v Doyle*, 249 F3d 603 (7th Cir 2001). See also *Christensen v Doyle*, 530 US 1271 (2000).

[219] J. B. Van Hollen to Scott Fitzgerald and Michael Huebsch, May 31, 2007, at 7

The Sixth Circuit Court of Appeals reached a similar conclusion in early June in affirming a district court decision holding Michigan's 2004 Legal Birth Definition Act unconstitutional. The unique law, avidly supported by the Thomas More Law Center, sought to prohibit "partial-birth" abortions by means of statutory language different from both Nebraska and PBABA. Concluding that "*Gonzales* left undisturbed the holding from *Stenberg* that a prohibition on D&E amounts to an undue burden," the Sixth Circuit held that "the Michigan statute, which applies when 'any anatomical part' of the fetus passes the vaginal introitus, is easily the most sweeping and the most burdensome of the three."[220] Thus it "would prohibit D&E" and "impose an unconstitutional undue burden" pursuant to both *Stenberg* and *Gonzales*.[221]

In mid-July, Louisiana became the first state to adopt a new, post-*Gonzales* partial-birth ban law that mirrored PBABA.[222] In contrast to the federal statute's maximum penalty of two years' imprisonment, the Louisiana measure specified up to ten years' punishment for physicians who violated it, but the enactment received almost no national press attention whatsoever.[223] Yet the balance of 2007 saw not a single other state follow Louisiana's lead, and the lack of activity prompted *Legal Times*' Tony Mauro to contrast that quiescence with the histrionic initial reactions to *Gonzales*. "[T]hose fears have not come true, with no prosecutions on the federal or state level, little legislative action, and quiet adjustments in abortion

(available at http://www.doj.state.wi.us/ag/opinions/2007_05_31Huebsch-Fitzgerald.pdf). See also Patrick Marley and Stacy Forster, *Abortion Ban Unenforceable, Van Hollen Says*, Milwaukee Journal Sentinel (May 31, 2007) (available at http://www.jsonline.com/story/index.aspx?id=613359).

[220] *Northland Family Planning Clinic v Cox*, 487 F3d 323, 336 (6th Cir 2007). See also *Planned Parenthood of Kansas and Mid-Missouri v Drummond*, No 07-4164-CV-C-ODS (WD Mo), 2007 WL 2463208 (Order Granting Temporary Restraining Order), and 2007 WL 2811407 (Order Granting Preliminary Injunction) (applying the undue burden test to abortion regulations and citing *Gonzales v Carhart*, 127 S Ct at 1626–27, as authority).

[221] *Northland Family Planning Clinic*, 487 F3d at 337. The Sixth Circuit also observed that "the Supreme Court's holding in *Stenberg* pertaining to the need for a health exception to otherwise valid D&X prohibitions was *modified somewhat* in *Gonzales*." Id at 340 (emphasis added). Early in 2008 the Supreme Court denied both Michigan's and the Thomas More Law Center's petitions for certiorari in the case without reported dissent. See *Cox v Northland Family Planning* and *Standing Together to Oppose Partial-Birth Abortion v Northland Family Planning Clinic*, 2008 WL 59327 and 59328.

[222] See Louisiana Acts 2007, No 473, § 1 (Louisiana RS 14 § 32.10–11 and 40 § 1299.35.17).

[223] Doug Simpson, *La. Becomes First State to Outlaw Late-Term Abortion Procedure*, Associated Press (July 13, 2007) (available in LexisNexis Newswires File).

procedures that have so far kept doctors on the safe side of the law," Mauro wrote.[224]

Perhaps the most significant and striking characterization of *Gonzales*'s significance, however, came in some remarkable off-the-bench statements by Justice John Paul Stevens, one of the decision's four dissenters. Asked by Jeffrey Rosen in a late June interview for the *New York Times Magazine* about the Court's upholding of PBABA, Justice Stevens responded that "[t]he statute is a *silly* statute." Repeating himself—"[i]t's a silly statute"—Stevens went on to say that "[i]t's just a distressing exhibition by Congress, but what we decided isn't all that important."[225] That latter statement was a truly memorable comment by the Court's senior Justice, and when Rosen then asked whether federal constitutional protection for abortion would survive, Stevens answered, "Well, it's up to Justice Kennedy." He added that "I don't know about the two new justices"—a reference to Chief Justice Roberts and Justice Alito's views on *Roe* and *Casey*—"but I kind of assume it may well be up to him." Yet Stevens also went on to say that Justice Kennedy indeed saw his stance in *Gonzales* as entirely congruent with *Casey*: "I don't think he thinks this requires him to change his views at all."[226]

IX

Gonzales v Carhart has changed the law, politics, and medicine of abortion far less than most early observers hastily thought. It has decisively confirmed *Ayotte*'s clear message from early 2006 that pre-enforcement facial challenges to statutes regulating abortion are now strongly disfavored, a shift that marks a very decisive change from previous federal judicial procedure. In state and lower

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[224] Tony Mauro, *Abortion Ban Back at 4th Circuit*, Legal Times (Oct 29, 2007) (available at http://www.law.com/jsp/article.jsp?id=1193389426200). As Mauro and other journalists also noted, at oral argument a majority of the Fourth Circuit Court of Appeals panel hearing *Richmond Medical Center for Women v Herring* on remand from the Supreme Court (see note 215 above) sounded unpersuaded by Virginia's effort to revive its previously enjoined state partial-birth ban statute in light of *Gonzales*. See also Robert Barnes, *Judges Appear Hesitant on Virginia "Partial Birth" Abortion Ban*, Washington Post A10 (Nov 2, 2007).

[225] Jeffrey Rosen, *The Dissenter*, New York Times Magazine 50 (Sept 23, 2007).

[226] Id. Justice Stevens also volunteered a critical opinion of Justice Harry A. Blackmun's opinion for the Court in *Roe v Wade*. "In all candor, I think Harry could have written a better opinion. I think if the opinion had said what Potter Stewart said very briefly [in an additional concurrence], it might have been much more acceptable, instead of trying to create a new doctrine that really didn't make sense." Stevens added that "a better opinion might have avoided some of the criticism."

federal courts, both the pro-life[227] and pro-choice[228] sides will continue to register small, little-noticed successes, and, in the very, very long run, the hypothesis that federal constitutional protection will eventually recede toward an end-of-the-first-trimester benchmark, after which any legal abortion will require case-by-case medical review and approval, remains the historical best guess as to how the controversy will reach stasis, notwithstanding the chorus of cynical pessimists who believe that the only remaining question about *Roe v Wade* is the date of its final, formal interment.[229] They would do well to acknowledge that even Justice Kennedy's opinion in *Gonzales* fails to provide any avenue by which abortion opponents can move toward the prohibition of other second-trimester abortion methods, the most ostensible next step in any incremental rollback of the basic abortion right, and indeed may instead represent an additional new obstacle to any such effort.

No matter how little, or how much, the U.S. Supreme Court ever substantively further limits or vitiates *Roe* and *Casey*, judicial self-image and institutional self-interest continue to be the highest possible hurdles to any explicit overruling of *Roe v Wade* or even *Planned Parenthood v Casey* and its much-mocked undue burden test. Pro-choice critics of *Gonzales v Carhart* would do well to recognize, and acknowledge, that Justice Kennedy's majority opinion once

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[227] See *Lawrence v State*, No PD-0236–07, Texas Court of Criminal Appeals, Nov 21, 2007 (available at http://www.cca.courts.state.tx.us/opinions/HTMLopinionInfo.asp?OpinionID=16213 and at 2007 WL 4146386). The Court upheld the application of Texas's murder statute, which allows capital punishment for anyone who knowingly and intentionally murders more than one individual, to a man who killed his girlfriend whom he knew was pregnant with a four- to six-week-old embryo. The court held that the Texas Penal Code's definition of an individual as "a human being who is alive, including an unborn child at every stage of gestation from fertilization" does not conflict with federal constitutional protection of abortion, for the federal case law "has no application to a case that does not involve the pregnant woman's liberty interest in choosing to have an abortion."

[228] See *Keisler v Dunkle*, CA No 07-3577, ED Pa, Nov 8, 2007 (permanently enjoining abortion opponent John D. Dunkle, pursuant to the FACE statute, from publishing the names and personal data of abortion clinic staffers or patients, and ordering the federal government to "monitor the Defendant's website and weblog to ensure that Defendant is in compliance with the terms of this Order"); and Doron Taussig, *The Terrorist and the Baby-Killer*, Philadelphia City Paper (Jan 31, 2008) (available at http://www.citypaper.net/articles/2008/01/31/the-terrorist-and-the-babykiller). See also Lisa Wangsness, *New Law Expands Abortion Buffer Zone*, Boston Globe B1 (Nov 14, 2007), and John C. Drake, *Buffer Zone Law Passes Its First Test*, Boston Globe B1 (Dec 9, 2007) (detailing Massachusetts's enactment and enforcement of a statute that expands to 35 feet from clinic entrances a buffer zone that previously had required abortion opponents to remain at least 6 feet away from clinic patrons within 18 feet of clinic entrances).

[229] See David J. Garrow, *Roe v Wade Revisited*, 9 Green Bag 2d 71, 79, 81 (2005).

again adopts and applies that standard. No matter how patronizing some readers may insist upon seeing Kennedy's opinion to be, the substantive truth remains that it upheld PBABA only in the narrowest and most carefully circumscribed manner. *Gonzales* will not significantly alter the medical practice of abortion, even for "late-term" procedures, nor has *Gonzales* brought about any measurable change in the basic dynamics of U.S. abortion politics.

Legally, however, *Gonzales v Carhart* does indirectly open a door to one category of very significant risks indeed. While there is little prospect of U.S. Attorneys or the U.S. Department of Justice using PBABA to institute criminal investigations or prosecutions of prudent and careful abortion providers, the likelihood that further states in addition to Louisiana and Utah will adopt "partial-birth" ban laws modeled on PBABA that can pass facial constitutional muster in the lower federal courts will increasingly give a far larger population of state and local prosecutors the statutory authority to prosecute, or persecute, reputable physicians who perform second-trimester abortions. Prosecutorial integrity may be a safe assumption at the federal level, but recent efforts in Kansas, instigated by former state Attorney General Phill Kline, who after his loss of that office in 2007 became district attorney for Johnson County, illustrate the dire danger that state PBABAs could pose to doctors in the hands of unscrupulous, politically motivated prosecutors.

While state Attorney General, Kline unsuccessfully attempted to pursue multiple charges against Dr. George Tiller of Wichita, one of the country's best-known providers of late-term abortions. A state judge dismissed Kline's charges, although Kline's successor subsequently filed different and far narrower accusations alleging that the required second opinions Tiller obtained attesting to the medical necessity of abortions on viable fetuses did not come from totally independent physicians, as Kansas law specifies.[230] Far more seriously, Kansans for Life, using an unusual provision of state law that allows for citizens to petition for the empanelment of a grand jury,

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[230] *Abortion Charges Dismissed*, New York Times A15 (Dec 23, 2006); *Charges Against Doctor Aren't Reinstated*, New York Times A28 (Dec 28, 2006); *Concern Over Abortion Records*, New York Times A13 (Jan 9, 2007); and *Doctor Faces Abortion Charges from New Attorney General*, New York Times A20 (June 29, 2007). See also *Alpha Medical Clinic v Anderson*, 128 P3d 364 (Kan 2006), and, for further background, Miriam E. C. Bailey, *The Alpha Subpoena Controversy: Kansas Fires First Shot in Nationwide Battle Over Child Rape, Abortion and Prosecutorial Access to Medical Records*, 74 UMKC L Rev 1021 (2006).

gathered almost eight thousand signatures calling for a special Sedgwick County grand jury to criminally target that one particular physician. Tiller unsuccessfully sought to block that interest group hijacking of the criminal system, first in federal court and then before the Kansas Supreme Court,[231] and in early 2008 the grand jury will convene, shortly before Tiller's scheduled trial on the earlier misdemeanor charges.[232]

While Kline's new district attorney post gives him no jurisdiction over Dr. Tiller, Johnson County does include the Overland Park headquarters of Planned Parenthood of Kansas and Mid-Missouri. In mid-October 2007 Kline filed a 107-count criminal complaint against the Planned Parenthood affiliate, alleging that the organization had repeatedly violated state laws regulating late-term procedures and the documentation required for such abortions.[233] A state district judge found probable cause to proceed, and Planned Parenthood faces fines totaling up to $2.5 million should the allegations be sustained at trial and after appeal.[234] Right-to-life champions heralded the charges as showing a new way to target abortion providers,[235] and within weeks Kansas abortion opponents mounted yet another citizens' petition drive, this one in Johnson County, which quickly garnered enough signatures to empanel a grand jury

[231] See *Tiller v Gale*, No 07-1269-JTM, D Kansas, Oct 11, 2007 (available at 2007 WL 2990558), and *Tiller v Corrigan*, No 99,434, Kansas Supreme Court, Nov 29, 2007 (available at http://www.kscourts.org/Kansas-Courts/Supreme-Court/Orders/99434_Tiller2.pdf).

[232] Stephanie Simon, *Pressure Rises for Abortion Provider*, Los Angeles Times A10 (Sept 17, 2007); Stephanie Simon, *Kansas GOP Tells Candidates to Forsake Abortion Focus*, Los Angeles Times A10 (Dec 1, 2007); Stephanie Simon, *Abortion Provider Must Turn Over Files*, Los Angeles Times A12 (Jan 31, 2008); *Tiller v Corrigan*, No 99,951, Kansas Supreme Court, Feb 5, 2008 (available at http://www.kscourts.org/Kansas-Courts/Supreme-Court/Orders/99,951-Tiller.pdf); Ron Sylvester, *High Court Postpones Subpoena on Tiller*, Wichita Eagle (Feb 6, 2008) (available at http://www.kansas.com/213/story/303361.html); Judy Peres, *Abortion Foes Put Grand Jury on Case*, Chicago Tribune (Feb 11, 2008) (available at http://www.chicagotribune.com/news/chi-abortion_peres_11feb11,0,1654594.story).

[233] See *State v Comprehensive Health of Planned Parenthood of Kansas and Mid-Missouri*, No 07 CR 0271, Johnson County District Court, Oct 15, 2007 (available at http://www.mainstreamcoalition.com/blog/Planned%20Parenthood%20Complaint.pdf).

[234] Initiation of Action, *State v Comprehensive Health of Planned Parenthood of Kansas and Mid-Missouri*, No 07 CR 0271, Johnson County District Court, Oct 17, 2007 (available at http://www.mainstreamcoalition.com/blog/Planned%20Parenthood%20Complaint.pdf). See also Laura Baker, *Planned Parenthood Says That Charges Are All About Politics*, Kansas City Star (Oct 18, 2007) (available at http://primebuzz.kstar.com/?q=node/7643).

[235] See Robert D. Novak, *A New Front in the Abortion Wars*, Washington Post A25 (Oct 25, 2007).

tasked with pursuing a further criminal probe aimed at Planned Parenthood.[236]

In the end, perhaps all of the Kansas criminal charges and investigations targeting Dr. Tiller and Planned Parenthood will come to naught, but the litigation costs imposed by defending against such politically motivated use of the criminal justice process will no doubt total many hundred thousands of dollars. While no such special interest hijacking of the prosecutorial function is likely to ever trouble abortion providers in Manhattan, San Francisco, or Chicago, the post-*Gonzales* events in Kansas highlight in an unusually stark fashion the significant risks that the upholding of PBABA could come to pose for physicians who practice in states where parallel statutes can win enactment *and* where state or local prosecutors decide to seek partisan advantage or personal benefit by means of an unscrupulous pursuit of wholly reputable medical entities like Planned Parenthood. With scholarly studies showing abortion services "increasingly concentrated among a small number of very large providers,"[237] the years ahead could well witness the increasing disappearance of providers, or particularly providers who offer services beyond first-trimester terminations, from states in which both the political culture and prosecutorial incentives are so openly hostile to abortion doctors as is already true in Kansas.[238] There is no imaginable end to federal constitution protection for abortion yet in sight, but *Gonzales v Carhart*'s upholding of PBABA indirectly creates the likelihood of significant risks indeed for phy-

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[236] Cheryl Wetzstein, *Grand Jury to Probe Abortion-Clinic Practices*, Washington Times A10 (Dec 5, 2007); Diane Carroll, *Grand Jury Is Selected for Planned Parenthood Investigation*, Kansas City Star (Dec 11, 2007) (available at http://www.kansascity.com/news/local/story/398274.html); Diane Carroll, *Johnson County Grand Jury Hires Special Counsel*, Kansas City Star (Dec 21, 2007) (available at http://www.kansascity.com/news/local/story/412766.html); Diane Carroll, *Johnson County Grand Jury Seeks Abortion Recipients' Medical Records*, Kansas City Star (Jan 31, 2008) (available at http://www.kansascity.com/news/local/story/468741.html); Diane Carroll, *Grand Jury Won't Indict Planned Parenthood*, Kansas City Star (March 4, 2008) (available at http://www.kansascity.com/105/story/515892.html).

[237] Finer and Henshaw, 35 Perspectives on Sexual and Reproductive Health at 12 (cited in note 164). See also id at 13 (noting "the continuing consolidation of abortion provision at clinics, particularly specialized clinics"), and Finer, et al, 37 Perspectives on Sexual and Reproductive Health at 111 (cited in note 166) (reporting that "providers that perform 2,000 or more abortions per year . . . performed 56% of all abortions in the United States in 2000").

[238] See Joffe, *The Abortion Procedure Ban* at 59 (cited in note 186) (arguing that "[i]n the long run, the major impact of [*Gonzales*] on abortion access will likely be a chilling effect on young physicians who contemplate entering this field").

sicians who provide abortions in locales where prosecutors are willing, and perhaps eager, to abuse the criminal process for political ends.