No. 05-380

In The Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
Petitioner,

v.

LEROY CARHART, ET AL.,
Respondents.

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

AMICUS CURIAE BRIEF OF THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, notwithstanding Congress's decision that a health exception was unnecessary to preserve the health of the mother, the Partial-Birth Abortion Ban Act of 2003 is invalid because it lacks a health exception or is otherwise unconstitutional on its face.

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INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is an international civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing free legal representation to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have represented parties before the U.S. Supreme Court in numerous First Amendment cases such as *Frazee v. Dep't of Employment Sec.*, 489 U.S. 829 (1989), *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666 (1998), *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98 (2001) and *Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426 (2002). The Institute has also filed briefs as an *amicus* of the Court on many occasions. Institute attorneys currently handle over one hundred cases nationally, including many cases that concern the interplay between the government and its citizens.

One of the purposes of The Rutherford Institute is to foster respect for the uniqueness and paramount worth of human life. These values are deeply rooted in America's common law constitutional tradition and its morality and values. Diminishing the value and respect for life, including prenatal life, diminishes, in one form or another, the lives of all citizens. The Rutherford Institute believes that this case concerning the power of Congress to regulate abortion is important to constitutional jurisprudence and the growth and progress of the nation.

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[1] *Amicus Curiae* The Rutherford Institute files this brief by consent of counsel for all parties. Copies of the letters of consent are on file with the Clerk of the Court.

STATEMENT OF THE CASE

This brief incorporates by reference the statement of facts contained in the principal brief of the Petitioner, Alberto R. Gonzales.

SUMMARY OF ARGUMENT

The Partial-Birth Abortion Ban Act of 2003 is not a frontal attack on this Court's settled abortion precedents, most notably *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Instead, this Act illustrates a wise, prudent and constitutional decision by Congress to protect a small number of innocent unborn children from a horrific and barbaric procedure. Physicians clearly should have the right, uninhibited by law, to make good faith medical judgments that result in the termination of a pregnancy to save the mother's life or to protect her from life-threatening physical harm—something that physicians have done from time immemorial. Such a right, however, must not extend to the practice of brutally killing unborn children for the sake of protecting the mother's non-physical medical problems and to enhance a medical industry dedicated to organ harvesting.

The so-called medical procedure that this Act seeks to prohibit is, in fact, a brutal, gruesome action that no society should permit. The procedure includes an extremely painful act, fully experienced by a living child, whereby the abortionist punctures the base of the baby's skull without anesthesia and terminates its life by sucking out the baby's brains. This procedure undermines good medicine and certainly mocks sound legal judgment. To allow this procedure to occur in America, the proclaimed epicenter of the rule of law and human rights, aligns our nation with those nations renowned for moral bankruptcy. Indeed, no civilized society should permit such a heinous act to occur under its laws.

Furthermore, to circumvent Congress's wise and prudent choice here would raise the abortion right to an unprecedented super-status of an absolute right. As this Court has consistently and wisely ruled, no right, not even fundamental rights, is without exceptions. In passing this Act, Congress drew a firm line that it insightfully recognized as necessary to protect our society from barbarism. As such, this Court should leave standing Congress's sound judgment in this matter by upholding the Partial-Birth Abortion Ban Act of 2003 in its entirety.

ARGUMENT

I. THE PARTIAL-BIRTH ABORTION BAN ACT OF 2003 IS NOT A FRONTAL ASSAULT ON *ROE V. WADE*.

In passing the Partial-Birth Abortion Ban Act of 2003, Congress did not intend to, nor did its actions result in, any kind of attack on the central holding of *Roe v. Wade*, *supra*. Instead, in the instant case, Congress merely sought to proscribe, pursuant to this Court's holding in *Planned Parenthood v. Casey*, *supra*, one rare and particularly gruesome method of abortion referred to as partial-birth abortion, also known as D&X abortion.

The congressional action here only reaches a very small number of total abortions performed in America each year. According to the Alan Guttmacher Institute, which conducts a census of all known abortion providers every four years, there were approximately 2,200 D&X abortions performed in 2000.[2] More importantly, those 2,200 partial-birth abortions merely comprised 0.17% of all abortions performed that year. *Id*. These statistics are very similar to

[2] Finer LB, Henshaw SK. Abortion Incidence and Services in the United States in 2000. Perspect Sex Reprod. Health 2003; 35:6-15.

those found by a member of the National Coalition of Abortion Providers (hereinafter "NCAP") around the same time. According to a key spokesperson for the NCAP, statistics from 1999 suggest that of the approximately 1,221,585 abortions performed in the U.S., only 3,000-5,000 were partial-birth abortions. *See* James Bopp, Jr. & Curtis R. Cook, *Partial-Birth Abortion: The Final Frontier of Abortion Jurisprudence*, 14 ISSUES L. & MED. 3, 13 (Summer 1998).

Furthermore, the Partial-Birth Abortion Ban Act of 2003 represents a permissible post-viability abortion regulation recognized by this Court in *Planned Parenthood v. Casey, supra*. Congress's action here essentially protects babies in the latest terms of pregnancy. As a consequence, many of the babies affected by this brutal procedure are either fully developed or almost fully developed. According to Dr. Curtis R. Cook's testimony given to Congress in consideration of the Act at issue, these partial-birth abortions generally take place from fifteen to twenty-six weeks gestation. *See* Curtis R. Cook, *Testimony of Dr. Curtis R. Cook at a Joint Hearing Before the U.S. Senate Judiciary Committee*, 14 ISSUES L. & MED. 65, 66 (1998). More shocking, however, is Dr. Cook's testimony that this procedure is performed up to the ninth month of pregnancy. *Id.* The importance of this statistical data is critical. As *The New England Journal of Medicine* has pointed out: "Because the actual number of 'partial-birth abortion' procedures done in the United States is small, and the alternative procedures are more readily available, the effect of the bill on the total number of abortions done and on access to abortion services should be minimal." Michael F. Greene, M.D., and Jeffrey L. Ecker, M.D., *The New England Journal of Medicine*, Volume 350:184-186, Jan. 8, 2004, at 2.

Moreover, to the extent that this Court's prior precedents demand that abortion statutes preserve the health of the mother, the statute at issue is safe. The partial-birth

abortion procedure banned by this Act rarely, if ever, is used as a necessary means to further this Court's demand for the preservation of the health of the mother. More importantly, in the few cases where this procedure may be used to stave off a bona fide health concern of the mother, other procedures are equally or more safe than the D&X procedure.

As the court in *Nat'l Abortion Fed'n v. Ashcroft*, 330 F. Supp. 2d 436, 480 (S.D. N.Y. 2004) determined, "many of the purported safety advantages of D&X are only theoretical," or even "false." Other courts have recognized this as well. In *Daniel v. Underwood*, 102 F.Supp. 2d 680, 684-85 (S.D. W. Va. 2000), the court recognized that no scientific data exists to establish the safety of D&X abortions.[3] In fact, it has been widely pointed out that a policy statement of the American College of Gynecologists suggests that there seems to be no circumstance in which a D&X abortion is the only procedure available to preserve the life or health of the mother.

Some of the nation's leading abortionists also confirm that D&X procedures are usually performed in non-emergency situations. According to Dr. Martin Haskell, a leading abortionist, "probably 20% [of D&X abortions] are for genetic reasons, and the other 80% are purely elective in the 20-24 week range of fetal gestation." Diane Gianelli, *Bill Banning Partial-Birth Abortion Goes To Clinton*, Am. Med. News (Apr. 15, 1996), at 9, 10. Another renowned abortionist, Dr. James McMahon, confirmed this as well. He has stated that of the more than 2,000 partial-birth abortions he has performed, only 9% of them involved "maternal health indications," the most common of which was maternal depression—not relating to physical health. Nancy G.

[3] *See also Women's Med'l Prof'l Corp. v. Voinovich*, 911 F. Supp. 1051, 1068-69 (S.D. Ohio 1995) (recognizing that no peer review journal has published studies measuring the benefits of the D&X procedure).

Romer, *The Medical Facts of Partial Birth Abortion*, 3-Fall Nexus: J. Opinion 57, 59 (1998).

Even when maternal health is a concern late in the pregnancy, partial-birth abortion is unnecessary. As obstetrician Dr. Nancy Romer has noted, when a mother's health is a concern during the second trimester of her pregnancy, what is required to save her life and protect her health is not the death of her baby but separation of the baby from the mother. *Partial-Birth Abortion Ban Act of 1995: Hearing on H.R. 1833 Before the House Comm. on the Judiciary*, 104th Cong. 109 (1995) (Statement of Dr. Nancy Romer).[4] To this point, the Alan Guttmacher Institute has determined that at twenty-one weeks or more into the pregnancy, the mother's risk of death from abortion is 1 in 6,000 and exceeds her risk of death from childbirth, which is 1 in 13,000. *Facts in Brief: Induced Abortion*. New York, NY: Alan Guttmacher Institute; 1996.

Very clearly, the Partial-Birth Abortion Ban Act of 2003 does not in any way clash with this Court's central abortion rulings. To the contrary, this Act is a reasonable and insightful attempt by Congress to preserve the humanity and morality of American medical practice in the area of abortion. This Act seeks to protect the life of the mother, while ensuring the civility of abortion practice by prohibiting the cruel and barbaric killing of developed babies during live birth.

II. NO CIVILIZED SOCIETY SHOULD PERMIT THE BRUTAL, GRUESOME AND BARBARIC KILLING OF PARTIALLY BORN HUMAN BEINGS.

Throughout history, nations have been judged by the humanity and morality of their laws and mores. Partial-birth

[4] *See* also Nancy G. Romer, *The Medical Facts of Partial Birth Abortion*, 3-Fall Nexus: J. Opinion 57, 60 (1998).

abortion threatens the fabric of American morality and law. Infanticide, which is very similar to partial-birth abortion, has been condemned by countless historians and philosophers. Partial-birth abortion is certainly akin to infanticide. And like infanticide, it is a brutal, gruesome and inhumane procedure that should be condemned by all civilized societies. Indeed, a civilized society is lacking when its law and people turn their backs to the senseless killing of the weakest and most defenseless members among them. Partial-birth abortion is a barbaric procedure that causes extreme pain to the fetus and results in an industry involved in organ harvesting. To this end, it marks a dramatic decline in American civilization.

A. PARTIAL-BIRTH ABORTION IS A BARBARIC PROCEDURE.

As some physicians have described partial-birth abortion: "This procedure is closer to infanticide than it is to abortion." M. LeRoy Sprang, MD and Mark G. Neerhof, DO, *Rationale for Banning Abortions Late in Pregnancy*, Journal of The American Medical Association, Vol. 280, pp. 744-747, Aug. 26, 1998. This belief is shared among many. Most, if not all, of the people who have faced this issue, either in person or through second-hand account, agree that partial-birth abortion is barbaric and inhumane.

In *Nat'l Abortion Fed'n v. Ashcroft*, 330 F. Supp. 2d at 479, the court initiated its findings of fact by writing: "The Court finds that the testimony at trial and before Congress establishes that D&X is a gruesome, brutal, barbaric, and uncivilized medical procedure." In *Evans v. Kelley*, 977 F. Supp. 1283, 1319 n.38 (E.D. Mich. 1997), the court observed that even some abortion practitioners believe partial-birth abortion is a "particularly hideous" procedure.

Often referred to as the "brain suction procedure,"[5] D&X partial-birth abortions begin with the abortionist grabbing the fetus by the feet and pulling the legs, torso, shoulders and arms out of the uterus and into the vaginal cavity until the fetus's head lodges in the cervix with the spine facing up.[6] From there, the abortionist slides his/her fingers along the back of the fetus, hooking the shoulders of the fetus with his/her index and ring fingers.[7] The abortionist then takes a pair of blunt curved scissors and runs the scissors up the fetus's back until they reach the base of the fetus's skull.[8] As the fetus is mostly hanging outside the woman's body moving and kicking, literally inches from complete birth, the abortionist sticks the scissors in the back of the fetus's skull.[9] To kill the fetus and shrink the fetal head to accommodate complete delivery, the abortionist places a vacuum tube inside the fetal head and sucks the fetus's brains out, terminating the fetus's life.[10]

Brenda Pratt Shafer, an obstetric nurse who once considered herself staunchly in favor of a right to partial-birth abortion, has described her personal experience of witnessing this brutal procedure this way:

> Dr. Haskell brought the ultrasound in and hooked it up so that he could see the baby. On the ultrasound screen, I could see the heart beating. As Dr. Haskell watched the baby on the ultrasound screen, the baby's heartbeat was clearly visible on the ultrasound screen. Dr. Haskell went in with forceps and grabbed the baby's legs and pulled them down into the

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[5] *Women's Med'l Prof'l Corp. v. Voinovich*, 130 F.3d 187, 198 (6th Cir. 1997).
[6] *Id*. at 199.
[7] *Id*.
[8] *Id*.
[9] *Id*.
[10] *Id*.

birth canal. Then he delivered the baby's body and the arms—everything but the head. The doctor kept the baby's head just inside the uterus. The baby's little fingers were clasping and unclasping, and his feet were kicking. Then the doctor stuck the scissors through the back of his head, and the baby's arms jerked out in a flinch, a startle reaction, like a baby does when he thinks that he might fall. The doctor opened up the scissors, stuck a high-powered suction tube into the opening and sucked the baby's brains out. Now the baby was completely limp. I was really completely unprepared for what I was seeing. I almost threw up as I watched the doctor do these things. Mr. Chairman, I read in the paper that President Clinton says that he is going to veto this bill. If President Clinton had been standing where I was standing at that moment, he would not veto this bill. Dr. Haskell delivered the baby's head. He cut the umbilical cord and delivered the placenta. He threw that baby in a pan, along with the placenta and the instruments he'd used. I saw the baby move in the pan. I asked another nurse and she said it was just 'reflexes.' I have been a nurse for a long time and I have seen a lot of death—people maimed in auto accidents, gunshot wounds, you name it. I have seen surgical procedures of every sort. But in all my professional years, I had never witnessed anything like this. The woman wanted to see her baby, so they cleaned up the baby and put it in a blanket and handed the baby to her. She cried the whole time, and she kept saying, "I'm so sorry, please forgive me!" I was crying too. I couldn't take it. That baby boy had the most perfect angelic face I

> have ever seen. I was present in the room during two more such procedures that day, but I was really in shock. I tried to pretend that I was somewhere else, to not think about what was happening. I just couldn't wait to get out of there. After I left that day, I never went back. These last two procedures, by the way, involved healthy mothers with healthy babies. I was very much affected by what I had seen. For a long time, sometimes still, I had nightmares about what I saw in that clinic that day.[11]

To exacerbate the human tragedy occurring as a result of America's use of partial-birth abortion as an acceptable medical procedure, the remains of the deceased fetuses are discarded as sub-human—a mere commodity in the lucrative medical marketplace. It has been reported that abortion clinics sell the tissue and organs of babies who have been aborted via partial-birth abortion, resulting in the maximization of abortion clinics' profits.[12] These articles, which ultimately led to congressional inquiry, describe how abortion clinics and various actors in the medical industry use "a major loophole" in federal law to pursue a burgeoning growth industry in the sale of baby body parts.[13] According to the reports, abortionists are placed under heavy pressure to harvest "good specimens" from the partially aborted babies so their tissue and organs can be sold for research.[14]

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[11] *Partial-Birth Abortion Ban Act of 1995: Hearing on H.R. 1833 Before the House Comm. on the Judiciary*, 104th Cong. 109 (1995) (Statement of Brenda Pratt Shafer).

[12] See *Fetal Tissue Trafficking*, ABC News 20/20 Report (March 8, 2000); John Rossomando, *No Federal Law Broken In Sale of Fetal Body Parts, US Attorney Says*, CNS News (Sept. 11, 2001), *available at* http://www.cnsnews.com/ViewNation.asp?Page=/Nation/archive/200109/NAT20010911a.html

[13] *Id.*

[14] *Id.*

B. PARTIAL-BIRTH ABORTION PLACES A LIVE, PARTIALLY BORN HUMAN BEING UNDER PROLONGED, EXCRUCIATING PAIN.

Overwhelming medical evidence shows that during partial-birth abortions the partially born fetus faces "prolonged and excruciating pain." *Nat'l Abortion Fed'n v. Ashcroft*, 330 F. Supp. 2d at 466. In fact, Dr. Robert J. White, a brain surgeon and professor of surgery at Case Western Reserve University, testified to Congress that by the twentieth week of gestation a fetus has developed the capacity to feel pain and is possibly more sensitive to pain than at child birth. *Partial-Birth Abortion Ban Act of 1995: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong., 67, 69 (1995) (statement of Dr. Robert J. White). Dr. White explained that the partial-birth abortion procedure is a "painful experience for the human fetus…at or beyond twenty weeks gestation…[because] the nervous system is sufficiently advanced…[and] is able to perceive and appreciate noxious stimuli which is an intricate part of [the partial-birth abortion] procedure." L.G. Almeda, *Michigan's Ban on Partial Birth Abortions: Balancing Competing Interests*, 74 U. DET. MERCY L. REV. 685, 706 (1997) (quoting Dr. Robert J. White, *Partial-Birth Abortion: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. 1st Sess. 70 (June 15, 1995)).

Dr. Norig Ellison, then president of the American Society of Anesthesiologists, added that anesthesia provided to the mother during a D&X procedure would not eliminate pain to the fetus or cause the death of the fetus. *Partial-Birth Abortion: Hearing Before the Senate Comm. on the Judiciary*, 104th Cong., 107-08 (1995) (statement of Dr. Robert J. White). Dr. Ellison's testimony was also supported by three other anesthesiologists a few months after her

congressional testimony. *Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 445 (citing March 1996 Senate Hearing).

During congressional hearings, some physicians even offered their personal experiences in addition to the hard science to illustrate that partially born fetuses feel pain during the procedure. For instance, Dr. Curtis R. Cook stated that the minority view that fetuses do not feel pain at gestational ages is "ridiculous." *Partial-Birth Abortion: Joint Hearing Before U.S. Senate Judiciary Comm.*, 105th Cong. 120 (March 1997). Dr. Cook continued to explain, "in the course of my practice…I have often observed babies five to six months gestation withdraw from needles and instruments, much like a pain response." *Id*. Dr. Cook described witnessing "standard grimaces and withdrawals" similar to the pain responses of a "more mature infant."[15]

Based on this testimony, Congress made a reasonable and responsible conclusion that partial-birth abortion is a brutal and barbaric act that results in the unnecessary pain of living babies. In other words, the fetuses are not only alive to experience their brutal demise; they also feel the "prolonged and excruciating pain" that accompanies their death.

III. TO REQUIRE CONGRESS TO INCLUDE A HEALTH EXCEPTION PROPELS ABORTION TO AN UNPRECEDENTED ABSOLUTE RIGHT.

A requirement that Congress include a health exception to the partial-birth abortion procedure undermines America's historically rooted and well documented indignation against infanticide. Our nation's laws, like those of most other advanced civilizations, provide no exception for a ban on infanticide. This fact is found in the commitment of all civilized societies to forbid the barbaric

[15] *Id.*

killing of an innocent and defenseless human being. This loyalty to the preservation of innocent human life and innate notion of fairness applies to Congress's ban against partial-birth abortion.

Furthermore, throughout American jurisprudence, this Court has routinely observed that no right is absolute. In *Kovacs v. Cooper*, 336 U.S. 77, 85 (1949), this Court stated: "Of course, even the fundamental rights of the Bill of Rights are not absolute." This restraint has been recognized even in the Constitution's most basic liberties. In *Rosenfield v. New Jersey*, 408 U.S. 901, 903 (1972), it was determined that even the right of free speech "has never been held to be absolute at all times and under all circumstances." Indeed, this principle has been applied, and even stressed, by this Court in the abortion context. This Court's first and most basic instance in finding a constitutional right to an abortion resolutely ensured America that the right to an abortion "cannot be said to be absolute." *Roe v. Wade*, 410 U.S. at 154. Also, this promise has been affirmed many times since *Roe*. *See Colautti v. Franklin*, 439 U.S. 379, 387 (1979); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983); *Planned Parenthood v. Casey*, *supra*.

This established precedent is founded on the notion that individual rights must sometimes yield to a compelling societal interest. Such an interest exists in the present case. While Congress's recognition that a mother's life is paramount to the killing of a partially born fetus, to take even one step further brings this nation perilously close to state-sponsored infanticide. The barbaric procedure at question in this case results in the painful killing of a partially born human being. As Congress correctly determined, to favor a mother's non-medical emergency over a prohibition against this type of killing of a mostly born human being is senseless and antithetical to any civilized society.

Besides, if the Court recognizes a broad health exception here, it essentially ties Congress's hands to regulate this procedure in any meaningful way. In fact, this Court's central holding in *Casey*, that Congress has a strong interest in promoting life post-viability and in fulfilling that interest may regulate and even proscribe post-viability abortions, is illusory if this Court determines that a broad health exception is necessary here. There will always be an abortionist willing to claim that a partial-birth abortion is necessary to preserve the health of the mother. Indeed, Dr. Martin Haskell, a leading abortionist, has already conceded that "probably 20% [of D&X abortions] are for genetic reasons, and the other 80% are purely elective in the 20-24 week range of fetal gestation." *See* Gianelli, *Bill Banning Partial-Birth Abortion Goes To Clinton, supra*. In effect, this means that virtually none are for the health of the mother. Even more convincing is the conclusion of another popular abortionist, Dr. James McMahon, who has concluded that of the small number of D&X abortions he has performed for so-called "health" reasons, the most common was maternal depression. Romer, *The Medical Facts of Partial Birth Abortion*, 3-Fall Nexus: J. Opinion at 59. To kill a mostly born innocent human being to spare a would-be mother from depression is unconscionable and undermines the basic fabric of a civilized society. This kind of broad and largely subjective health exception swallows the general rule granting the State the power to regulate and proscribe post-viability abortions.

As Justice Anthony Kennedy has keenly observed, a mandatory health exception to partial-birth abortion "awards each physician a veto power over the State's judgment that the procedures should not be performed." *Stenberg v. Carhart*, 530 U.S. 914, at 964 (2000). This Court must recognize that to the extent that its abortion precedents are in conflict, it should uphold the State's right in promoting innocent post-viability life and in prohibiting the barbaric procedure in question.

CONCLUSION

For the aforementioned reasons, this Court should affirm Congress's action in passing the Partial-Birth Abortion Ban Act of 2003.

Respectfully submitted,

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