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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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GONZALES, ATTORNEY GENERAL *v.* CARHART ET AL.

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

No. 05–380. Argued November 8, 2006—Decided April 18, 2007*

Following this Court's *Stenberg* v. *Carhart*, 530 U. S. 914, decision that Nebraska's "partial birth abortion" statute violated the Federal Constitution, as interpreted in *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, and *Roe* v. *Wade*, 410 U. S. 113, Congress passed the Partial-Birth Abortion Ban Act of 2003 (Act) to proscribe a particular method of ending fetal life in the later stages of pregnancy. The Act does not regulate the most common abortion procedures used in the first trimester of pregnancy, when the vast majority of abortions take place. In the usual second-trimester procedure, "dilation and evacuation" (D&E), the doctor dilates the cervix and then inserts surgical instruments into the uterus and maneuvers them to grab the fetus and pull it back through the cervix and vagina. The fetus is usually ripped apart as it is removed, and the doctor may take 10 to 15 passes to remove it in its entirety. The procedure that prompted the federal Act and various state statutes, including Nebraska's, is a variation of the standard D&E, and is herein referred to as "intact D&E." The main difference between the two procedures is that in intact D&E a doctor extracts the fetus intact or largely intact with only a few passes, pulling out its entire body instead of ripping it apart. In order to allow the head to pass through the cervix, the doctor typically pierces or crushes the skull.

The Act responded to *Stenberg* in two ways. First, Congress found that unlike this Court in *Stenberg,* it was not required to accept the District Court's factual findings, and that that there was a moral,

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*Together with No. 05–1382, *Gonzales, Attorney General* v. *Planned Parenthood Federation of America, Inc., et al.,* on certiorari to the United States Court of Appeals for the Ninth Circuit.

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medical, and ethical consensus that partial-birth abortion is a gruesome and inhumane procedure that is never medically necessary and should be prohibited. Second, the Act's language differs from that of the Nebraska statute struck down in *Stenberg*. Among other things, the Act prohibits "knowingly perform[ing] a partial-birth abortion . . . that is [not] necessary to save the life of a mother," 18 U. S. C. §1531(a). It defines "partial-birth abortion," §1531(b)(1), as a procedure in which the 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 [mother's] body . . . , or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the [mother's] body . . . , for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus"; and "(B) performs the overt act, other than completion of delivery, that kills the fetus."

In No. 05–380, respondent abortion doctors challenged the Act's constitutionality on its face, and the Federal District Court granted a permanent injunction prohibiting petitioner Attorney General from enforcing the Act in all cases but those in which there was no dispute the fetus was viable. The court found the Act unconstitutional because it (1) lacked an exception allowing the prohibited procedure where necessary for the mother's health and (2) covered not merely intact D&E but also other D&Es. Affirming, the Eighth Circuit found that a lack of consensus existed in the medical community as to the banned procedure's necessity, and thus *Stenberg* required legislatures to err on the side of protecting women's health by including a health exception. In No. 05–1382, respondent abortion advocacy groups brought suit challenging the Act. The District Court enjoined the Attorney General from enforcing the Act, concluding it was unconstitutional on its face because it (1) unduly burdened a woman's ability to choose a second-trimester abortion, (2) was too vague, and (3) lacked a health exception as required by *Stenberg*. The Ninth Circuit agreed and affirmed.

Held: Respondents have not demonstrated that the Act, as a facial matter, is void for vagueness, or that it imposes an undue burden on a woman's right to abortion based on its overbreadth or lack of a health exception. Pp. 14–39.

1. The *Casey* Court reaffirmed what it termed *Roe*'s three-part "essential holding": First, a woman has the right to choose to have an abortion before fetal viability and to obtain it without undue interference from the State. Second, the State has the power to restrict abortions after viability, if the law contains exceptions for pregnancies endangering the woman's life or health. And third, the State has legitimate interests from the pregnancy's outset in protecting the

health of the woman and the life of the fetus that may become a child. 505 U. S., at 846. Though all three are implicated here, it is the third that requires the most extended discussion. In deciding whether the Act furthers the Government's legitimate interest in protecting fetal life, the Court assumes, *inter alia,* that an undue burden on the previability abortion right exists if a regulation's "purpose or effect is to place a substantial obstacle in the [woman's] path," *id.,* at 878, but that "[r]egulations which do no more than create a structural mechanism by which the State . . . may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose," *id.,* at 877. *Casey* struck a balance that was central to its holding, and the Court applies *Casey*'s standard here. A central premise of *Casey*'s joint opinion—that the government has a legitimate, substantial interest in preserving and promoting fetal life—would be repudiated were the Court now to affirm the judgments below. Pp. 14–16.

2. The Act, on its face, is not void for vagueness and does not impose an undue burden from any overbreadth. Pp. 16–26.

(a) The Act's text demonstrates that it regulates and proscribes performing the intact D&E procedure. First, since the doctor must "vaginally delive[r] a living fetus," §1531(b)(1)(A), the Act does not restrict abortions involving delivery of an expired fetus or those not involving vaginal delivery, *e.g.,* hysterotomy or hysterectomy. And it applies both previability and postviability because, by common understanding and scientific terminology, a fetus is a living organism within the womb, whether or not it is viable outside the womb. Second, because the Act requires the living fetus to be delivered to a specific anatomical landmark depending on the fetus' presentation, *ibid.,* an abortion not involving such partial delivery is permitted. Third, because the doctor must perform an "overt act, other than completion of delivery, that kills the partially delivered fetus," §1531(b)(1)(B), the "overt act" must be separate from delivery. It must also occur after delivery to an anatomical landmark, since killing "the partially delivered" fetus, when read in context, refers to a fetus that has been so delivered, *ibid.* Fourth, given the Act's scienter requirements, delivery of a living fetus past an anatomical landmark by accident or inadvertence is not a crime because it is not "deliberat[e] and intentiona[l], §1531(b)(1)(A). Nor is such a delivery prohibited if the fetus [has not] been delivered "for the purpose of performing an overt act that the [doctor] knows will kill [it]." *Ibid.* Pp. 16–18.

(b) The Act is not unconstitutionally vague on its face. It satisfies both requirements of the void-for-vagueness doctrine. First, it provides doctors "of ordinary intelligence a reasonable opportunity to know what is prohibited," *Grayned* v. *City of Rockford*, 408 U. S. 104,

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108, setting forth "relatively clear guidelines as to prohibited conduct" and providing "objective criteria" to evaluate whether a doctor has performed a prohibited procedure, *Posters 'N' Things, Ltd.* v. *United States*, 511 U. S. 513, 525–526. Second, it does not encourage arbitrary or discriminatory enforcement. *Kolender* v. *Lawson*, 461 U. S. 352, 357. Its anatomical landmarks "establish minimal guidelines to govern law enforcement," *Smith* v. *Goguen*, 415 U. S. 566, 574, and its scienter requirements narrow the scope of its prohibition and limit prosecutorial discretion, see *Kolender, supra*, at 358. Respondents' arbitrary enforcement arguments, furthermore, are somewhat speculative, since this is a preenforcement challenge. Pp. 18–20.

(c) The Court rejects respondents' argument that the Act imposes an undue burden, as a facial matter, because its restrictions on second-trimester abortions are too broad. Pp. 20–26.

(i) The Act's text discloses that it prohibits a doctor from intentionally performing an intact D&E. Its dual prohibitions correspond with the steps generally undertaken in this procedure: The doctor (1) delivers the fetus until its head lodges in the cervix, usually past the anatomical landmark for a breech presentation, see §1531(b)(1)(A), and (2) proceeds to the overt act of piercing or crushing the fetal skull after the partial delivery, see §1531(b)(1)(B). The Act's scienter requirements limit its reach to those physicians who carry out the intact D&E, with the intent to undertake both steps at the outset. The Act excludes most D&Es in which the doctor intends to remove the fetus in pieces from the outset. This interpretation is confirmed by comparing the Act with the Nebraska statute in *Stenberg*. There, the Court concluded that the statute encompassed D&E, which "often involve[s] a physician pulling a 'substantial portion' of a still living fetus . . . , say, an arm or leg, into the vagina prior to the death of the fetus," 530 U. S., at 939, and rejected the Nebraska Attorney General's limiting interpretation that the statute's reference to a "procedure" that "kill[s] the unborn child" was to a distinct procedure, not to the abortion procedure as a whole, *id.,* at 943. It is apparent Congress responded to these concerns because the Act adopts the phrase "delivers a living fetus," 18 U. S. C. §1531(b)(1)(A), instead of " 'delivering . . . a living unborn child, or a substantial portion thereof,' " 530 U. S., at 938, thereby targeting extraction of an entire fetus rather than removal of fetal pieces; identifies specific anatomical landmarks to which the fetus must be partially delivered, §1531(b)(1)(A), thereby clarifying that the removal of a small portion of the fetus is not prohibited; requires the fetus to be delivered so that it is partially "outside the [mother's] body," §1531(b)(1)(A), thereby establishing that delivering a substantial portion of the fetus into the vagina would not

subject a doctor to criminal sanctions; and adds the overt-act requirement, §1531(b)(1), thereby making the distinction the Nebraska statute failed to draw (but the Nebraska Attorney General advanced). Finally, the canon of constitutional avoidance, see, *e.g., Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575, extinguishes any lingering doubt. Interpreting the Act not to prohibit standard D&E is the most reasonable reading and understanding of its terms. Pp. 20–24.

(ii) Respondents' contrary arguments are unavailing. The contention that any D&E may result in the delivery of a living fetus beyond the Act's anatomical landmarks because doctors cannot predict the amount the cervix will dilate before the procedure does not take account of the Act's intent requirements, which preclude liability for an accidental intact D&E. The evidence supports the legislative determination that an intact delivery is almost always a conscious choice rather than a happenstance, belying any claim that a standard D&E cannot be performed without intending or foreseeing an intact D&E. That many doctors begin every D&E with the objective of removing the fetus as intact as possible based on their belief that this is safer does not prove, as respondents suggest, that every D&E might violate the Act, thereby imposing an undue burden. It demonstrates only that those doctors must adjust their conduct to the law by not attempting to deliver the fetus to an anatomical landmark. Respondents have not shown that requiring doctors to intend dismemberment before such a delivery will prohibit the vast majority of D&E abortions. Pp. 24–26.

3. The Act, measured by its text in this facial attack, does not impose a "substantial obstacle" to late-term, but previability, abortions, as prohibited by the *Casey* plurality, 505 U. S., at 878. Pp. 26–37.

(a) The contention that the Act's congressional purpose was to create such an obstacle is rejected. The Act's stated purposes are protecting innocent human life from a brutal and inhumane procedure and protecting the medical community's ethics and reputation. The government undoubtedly "has an interest in protecting the integrity and ethics of the medical profession." *Washington* v. *Glucksberg*, 521 U. S. 702, 731. Moreover, *Casey* reaffirmed that the government may use its voice and its regulatory authority to show its profound respect for the life within the woman. See, *e.g.,* 505 U. S., at 873. The Act's ban on abortions involving partial delivery of a living fetus furthers the Government's objectives. Congress determined that such abortions are similar to the killing of a newborn infant. This Court has confirmed the validity of drawing boundaries to prevent practices that extinguish life and are close to actions that are condemned. *Glucksberg, supra,* at 732–735, and n. 23. The Act also

recognizes that respect for human life finds an ultimate expression in a mother's love for her child. Whether to have an abortion requires a difficult and painful moral decision, *Casey,* 505 U. S., at 852–853, which some women come to regret. In a decision so fraught with emotional consequence, some doctors may prefer not to disclose precise details of the abortion procedure to be used. It is, however, precisely this lack of information that is of legitimate concern to the State. *Id.,* at 873. The State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion. The objection that the Act accomplishes little because the standard D&E is in some respects as brutal, if not more, than intact D&E, is unpersuasive. It was reasonable for Congress to think that partial-birth abortion, more than standard D&E, undermines the public's perception of the doctor's appropriate role during delivery, and perverts the birth process. Pp. 26–30.

(b) The Act's failure to allow the banned procedure's use where " 'necessary, in appropriate medical judgment, for preservation of the [mother's] health,' " *Ayotte* v. *Planned Parenthood of Northern New Eng.*, 546 U. S. 320, 327–328, does not have the effect of imposing an unconstitutional burden on the abortion right. The Court assumes the Act's prohibition would be unconstitutional, under controlling precedents, if it "subject[ed] [women] to significant health risks." *Id.,* at 328. Whether the Act creates such risks was, however, a contested factual question below: The evidence presented in the trial courts and before Congress demonstrates both sides have medical support for their positions. The Court's precedents instruct that the Act can survive facial attack when this medical uncertainty persists. See, *e.g., Kansas* v. *Hendricks*, 521 U. S. 346, 360, n. 3. This traditional rule is consistent with *Casey*, which confirms both that the State has an interest in promoting respect for human life at all stages in the pregnancy, and that abortion doctors should be treated the same as other doctors. Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts. Other considerations also support the Court's conclusion, including the fact that safe alternatives to the prohibited procedure, such as D&E, are available. In addition, if intact D&E is truly necessary in some circumstances, a prior injection to kill the fetus allows a doctor to perform the procedure, given that the Act's prohibition only applies to the delivery of "a living fetus," 18 U. S. C. §1531(b)(1)(A). *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52, 77–79, distinguished. The Court rejects certain of the parties' arguments. On the one hand, the Attorney General's contention that the Act

should be upheld based on the congressional findings alone fails because some of the Act's recitations are factually incorrect and some of the important findings have been superseded. Also unavailing, however, is respondents' contention that an abortion regulation must contain a health exception if "substantial medical authority supports the proposition that banning a particular procedure could endanger women's health, " *Stenberg*, 530 U. S., at 938. Interpreting *Stenberg* as leaving no margin for legislative error in the face of medical uncertainty is too exacting a standard. Marginal safety considerations, including the balance of risks, are within the legislative competence where, as here, the regulation is rational and pursues legitimate ends, and standard, safe medical options are available. Pp. 31–37.

4. These facial attacks should not have been entertained in the first instance. In these circumstances the proper means to consider exceptions is by as-applied challenge. Cf. *Wisconsin Right to Life, Inc.* v. *Federal Election Comm'n*, 546 U. S. ___, ___. This is the proper manner to protect the woman's health if it can be shown that in discrete and well-defined instances a condition has or is likely to occur in which the procedure prohibited by the Act must be used. No as-applied challenge need be brought if the Act's prohibition threatens a woman's life, because the Act already contains a life exception. 18 U. S. C. §1531(a). Pp. 37–39.

No. 05–380, 413 F. 3d 791; 05–1382, 435 F. 3d 1163, reversed.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a concurring opinion, in which SCALIA, J., joined. GINSBURG, J., filed a dissenting opinion, in which STEVENS, SOUTER, and BREYER, JJ., joined.