

THE PARTIAL-BIRTH ABORTION BAN ACT OF 2003

The Partial-Birth Abortion Ban Act of 2003 [hereinafter “the 2003 Act”] was the third time in eight years that Congress attempted to ban the procedure referred to as “partial-birth abortion.”¹ Similar bills passed Congress in 1996 and 1997 but were each vetoed by President Clinton.² In 2002, a new bill was passed by the House,³ but was never voted on by the then Democrat-controlled Senate.⁴ In 2003, however, the Senate was in Republican hands and President Bush had promised to sign a bill banning partial-birth abortion into law.⁵ As a result, the 2003 Act easily passed both houses of Congress and was signed into law in early November 2003.⁶

Although the ban is at least a temporary victory for opponents of partial-birth abortion, and abortion opponents generally, it is likely that the 2003 Act does not represent the closing shot of what has been a long and bitterly contested struggle. Like previous attempts by states to regulate abortion processes and procedures, the Supreme Court will likely have the final word on the fate of this federal law.⁷

If a challenge to the Act reaches the Court as currently constituted, it will likely be found to be an unconstitutional violation of Substantive Due Process, following the precedent of *Stenberg v. Carhart*, because of its failure to include an exception for the health of the mother.⁸ Proponents of the 2003 Act will probably find that their impassioned arguments concerning the grisly details of the procedure will not distract the Justices of the Supreme Court from this constitutional defect, as it may have members of Congress.⁹

By the time any such challenge might reach the Court, however, it is likely that one or more of the Justices in the *Carhart* majority will have retired, with Justices O’Connor and Stevens considered the most likely candidates.¹⁰ It is therefore very difficult to predict how the Court might eventu-

¹ See Sheryl Gay Stolberg, *Abortion Vote Leaves Many in the Senate Conflicted*, N.Y. TIMES, Oct. 23, 2003, at A22.

² See *id.*

³ See 147 Cong. Rec. H5373–74 (daily ed. July 24, 2002) (voting 274-151 to pass H.R. 4965).

⁴ Congressional Information Service, 2002 Bill Tracking, H.R. 4965, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR04965://bss/d107query.html>.

⁵ See Debra Rosenberg, *A Firefight Over Abortion*, NEWSWEEK, Nov. 3, 2003, at 44.

⁶ See Richard W. Stevenson, *Bush Signs Ban on a Procedure for Abortions*, N.Y. TIMES, Nov. 6, 2003, at A1.

⁷ See, e.g., *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992); *Planned Parenthood Ass’n of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476 (1983); *Bellotti v. Baird*, 428 U.S. 132 (1976); *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52 (1976); *Roe v. Wade*, 410 U.S. 113 (1973).

⁸ *Stenberg v. Carhart*, 530 U.S. 914, 938 (2000).

⁹ See *infra* text accompanying notes 39–42.

¹⁰ At the time this Recent Development was written, Justice O’Connor was seventy-four years old, and Justice Stevens was eighty-four years old. The decision in *Carhart* was 5-4, meaning that a single change in the personnel of the Court could lead to an opposite judgment in a future case.

ally rule. Ultimately, the determination of the 2003 Act's constitutionality may rest on the composition of the Supreme Court if and when it hears a challenge to the law.

Under the 2003 Act, any physician who, in or affecting interstate commerce, knowingly performs a partial-birth abortion, and thereby kills a human fetus, shall be fined, imprisoned for not more than two years, or both.¹¹ An exception is provided to save the life of a mother when she is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.¹² No exception is made for health risks to the mother that are less than life threatening.¹³ The 2003 Act defines partial-birth abortion as when "the person performing the abortion deliberately and intentionally vaginally delivers a living fetus . . . for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus."¹⁴

While the 2003 Act does not specifically refer to any medically recognized procedure by name, the procedure that would most likely be affected is what is known as "dilation and extraction" or "intact dilation and evacuation," or simply "D&X."¹⁵ According to the description provided by the American College of Obstetricians and Gynecologists (ACOG), D&X involves four steps.¹⁶ First, the cervix of the woman is dilated over the course of approximately three days.¹⁷ After sufficient dilation, the fetus is positioned in a "footling breach" position (i.e., feet first), and then the body is delivered except for the head.¹⁸ The doctor then punctures the skull of the fetus, and removes the contents of the head by suction.¹⁹ This collapses the skull, and allows for the removal of the fetal head from the mother.²⁰

The wording of the 2003 Act responds to the Supreme Court's decision in *Carhart* striking down a Nebraska statute that sought to ban partial-birth abortion.²¹ The Nebraska statute, in language similar to the 2003

¹¹ See 18 U.S.C.A. § 1531(a) (West Supp. 2004).

¹² See *id.*

¹³ See *id.*

¹⁴ See *id.* § 1531(b).

¹⁵ The use of the term "partial-birth abortion" to refer to the procedure at issue is itself a controversial aspect of the Act. The term was created by then-Representative (and now Judge) Charles Canady (R-Fla.) and his aides in 1995 while they prepared to introduce a ban on certain abortions. Debra Rosenberg, *Chipping Away At Roe*, NEWSWEEK, Mar. 17, 2003, at 40. Failing to find a name for the procedure in any medical texts, Canady and his aides created the name "partial-birth abortion." See *id.* The name has stuck, much to the dismay of the ban's opponents.

¹⁶ See Brief of Amici Curiae American College of Obstetrics and Gynecologists et al. at 6, *Carhart* (No. 99-830).

¹⁷ See *id.*

¹⁸ See *id.*

¹⁹ See *id.*

²⁰ See *id.*

²¹ *Carhart*, 530 U.S. at 945-46.

Act, stated, “[n]o partial birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.”²² Therefore, evaluating the current ban’s ability to withstand constitutional scrutiny requires a close look at what the Court found problematic in the Nebraska statute.

Writing for the majority, Justice Breyer set out the question presented to the Court: Did Nebraska’s statute, making criminal the performance of a “partial birth abortion,” violate the U.S. Constitution,²³ as interpreted in *Casey*²⁴ and *Roe*?²⁵ Justice Breyer answered the question in the affirmative and found the law unconstitutional for two separate reasons: (1) the law lacked a health exception for the mother, and (2) the procedure banned was described so vaguely as to apply to other permissible methods of abortion, and thus constituted an undue burden on the right to choose to have an abortion.²⁶

In so finding, the Court rejected Nebraska’s arguments that the absence of a health exception was permissible because the prohibited procedure would never be necessary to protect the health of the mother.²⁷ In arguments strikingly similar to those that would be made by congressional supporters of the 2003 Act, the petitioners asserted that “safe alternatives remain available” and that “a ban on partial-birth abortion/D&X would create no risk to the health of women.”²⁸ The Court responded, “The problem for Nebraska is that the parties strongly contested this factual question in the trial court below; and the findings and evidence support Dr. Carhart.”²⁹

Undaunted by the unfavorable findings below, petitioners argued to the Court that those findings were “irrelevant, wrong, or applicable only in a tiny number of instances.”³⁰ Nebraska also argued that the lack of medical studies establishing the procedure’s safety as well as the lack of any specifically identified situation in which D&X was the only appro-

²² NEB. REV. STAT. ANN. § 28-328(1) (2003).

²³ See *Carhart*, 530 U.S. at 929–30.

²⁴ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

²⁵ *Roe v. Wade*, 410 U.S. 113 (1973).

²⁶ *Carhart*, 530 U.S. at 930. Because the lack of a health exception seems to be the more obvious constitutional weakness of the 2003 Act, this Recent Development will deal only with that issue. Although the 2003 Act defines the procedure to be banned more specifically than did the one struck down in *Carhart*, some Congressmen argue that that the definition of the procedure similarly fails to pass constitutional muster. See 149 CONG. REC. H9143–44 (daily ed. Oct. 2, 2003) (statements of Rep. Nadler).

²⁷ See *Carhart*, 530 U.S. at 931–32.

²⁸ See Brief of Petitioners at 40, *Carhart* (No. 99-830).

²⁹ *Carhart*, 530 U.S. at 931–32.

³⁰ *Id.* at 933.

priate procedure combined to prove that no health exception was necessary.³¹ Unconvinced, the Court responded:

The upshot is a District Court finding D&X significantly obviates health risks in certain circumstances, a highly plausible record-based explanation of why that might be so, a division of opinion among some medical experts over whether D&X is generally safer, and an absence of controlled medical studies that would help answer these medical questions. Given these medically related evidentiary circumstances, we believe the law requires a health exception.³²

In a familiar role, Justice O'Connor served as the crucial "swing" vote in *Carhart*. According to her concurring opinion, the Nebraska statute was "necessarily" irreconcilable with *Casey* due to the absence of a health exception.³³ Responding to the dissents of Justices Kennedy and Thomas, O'Connor joined the Court in denying that the necessity for a health exception arose from the "individual views of Dr. Carhart and his supporters."³⁴ Instead, she explained that

where "a significant body of medical opinion believes a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view," then Nebraska cannot say that the procedure will not, in some circumstances, be "necessary to preserve the life or health of the mother."³⁵

Accordingly, Justice O'Connor concluded, Supreme Court "precedent requires that the statute include a health exception."³⁶

Despite her vote against the Nebraska statute, Justice O'Connor was careful to set out a partial-birth ban that she would support as constitutional. Citing statutes from Utah, Kansas, and Montana, she noted that these bans were more "narrowly tailored" to apply only to D&X.³⁷ If the Nebraska statute had included a health exception and had been limited to apply only to D&X, it would most likely have met with Justice O'Connor's approval.³⁸ The Nebraska statute at issue in *Carhart*, however, met neither of these requirements and thus failed either to gain her vote or attain constitutional status.

³¹ See *id.* at 933–34.

³² *Id.* at 936–37.

³³ See *id.* at 947 (O'Connor, J., concurring).

³⁴ *Id.* at 948 (O'Connor, J., concurring).

³⁵ *Id.* (O'Connor, J., concurring).

³⁶ *Id.* (O'Connor, J., concurring).

³⁷ *Id.* at 950 (O'Connor, J., concurring).

³⁸ *Id.* at 951 (O'Connor, J., concurring).

Without question, D&X is a gruesome-sounding procedure, and congressional proponents of the 2003 Act were quick to use its gory details to their advantage. During the House debates, Representative Forbes asked, “Is there no limit, is there no amount of pain, is there no procedure that is so extreme that we can apply to this unborn child or this fetus that we are willing as a country to say that just goes too far?”³⁹ Other supporters of the bill asked if the line between murder and medical procedure should depend on the difference of a few more inches of delivery. If the baby’s head were outside the mother’s body, they argued, its destruction would be considered murder.⁴⁰ Only those few undelivered inches denied the baby autonomy separate from the right of its mother to choose treatments for her own body.⁴¹ The bill’s proponents noted that the American Medical Association had described partial-birth abortion as ethically distinct from other abortion procedures because the fetus is killed outside the womb.⁴²

Emotional rhetoric aside, these appeals against D&X do not, in themselves, provide a sufficient constitutional reason to prohibit its use. Arguments against the procedure based on the unpleasantness of its specific details are overcome by a larger point: any abortion, regardless of the procedure used, results in a dead fetus. While D&X is certainly a procedure that many view as gruesome, unnecessarily exposing women to potentially serious health risks is arguably no less horrific, and carries the additional problem of being constitutionally impermissible. As one doctor said, “the goal of any abortion procedure is the destruction of the fetus. Given that that is the reality, it doesn’t seem to me we ought to have a legislative mandate that likely increases the risk to the woman.”⁴³

This comment touches on a key issue in the debate, which was heavily disputed by both sides: is D&X ever medically necessary to preserve the health of the mother? The authors of the 2003 Act were aware that answering this question in the negative was essential if they hoped to gain the Supreme Court’s approval. Their problem, however, was that this question had seemingly already been ruled upon in *Carhart*, which was now controlling precedent. *Carhart* held that because significant medical authority supported the proposition that partial-birth abortion would, in

³⁹ 149 CONG. REC. H9146 (daily ed. Oct. 2, 2003) (statement of Rep. Forbes).

⁴⁰ See 149 CONG. REC. H4928 (daily ed. June 4, 2003) (statement of Rep. Pitts).

⁴¹ See 149 CONG. REC. H4935 (daily ed. June 4, 2003) (statement of Rep. Stearns); see also *id.* at H4943 (daily ed. June 4, 2003) (statement of Rep. King) (“[The] child is one inch from screaming for its own mercy. If ultrasound could hear the silent scream, we would not be in this debate tonight.”)

⁴² See 149 CONG. REC. H8992 (daily ed. Sept. 30, 2003) (statement of Rep. Sensenbrenner).

⁴³ Mary Duenwald, *Likely Ban on Abortion Technique Leaves Doctors Uneasy*, N.Y. TIMES, Apr. 22, 2003, at F5.

some circumstances, be the safest procedure for pregnant women who wish to undergo an abortion, a health exception was constitutionally required.⁴⁴

The 2003 Act's authors attempted to avoid the contrary precedent through a series of congressional findings, and by claiming that those findings would be given more weight by the Supreme Court than the factual findings of *Carhart*. Section 2 of the Act consists of fourteen separate congressional findings, which supporters of the bill believe demonstrate that D&X is never medically necessary to preserve the health of the mother. This alleged lack of medical necessity leads to the conclusion that the prohibition requires no health exception.⁴⁵ According to the Act, "a moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion . . . is a gruesome and inhumane procedure that is never medically necessary and should be prohibited."⁴⁶

The Act further contends that partial birth abortion "is not only unnecessary to preserve the health of the mother, but in fact poses serious risks to the long-term health of women and in some circumstances their lives."⁴⁷ During the congressional debates, supporters of the Act referred to these findings while arguing not only that partial-birth abortion is a gruesome procedure that is never medically necessary, but that is also untested, unproven, and potentially lethal.⁴⁸

In support of the argument that partial-birth abortion threatens women's health, the Act lists several serious risks posed by the procedure. Citing testimony before legislative hearings during the 104th, 105th, and 107th Congresses, the list includes: an increased risk of cervical incompetence, as a result of cervical dilation making it difficult or impossible for a woman to carry a subsequent pregnancy to term successfully; an increased risk of uterine rupture, abruption, amniotic fluid embolus, and trauma to the uterus as a result of converting the child to a footling breech position (which would otherwise rarely, if ever, be indicated, because head-first is the preferred method of delivering a child); and a risk of lacerations and secondary hemorrhaging (due to the doctor's blindly forcing a sharp instrument into the base of the unborn child's skull while he or she is lodged in the birth canal) that could result in severe bleeding, bringing with it the threat of shock, and could ultimately result in maternal death.⁴⁹

In the Senate, Majority Leader Bill Frist (R-Tenn.) drew on his own medical background to argue in favor of the ban. After criticizing the procedure as "repulsive" because of the pain experienced by the fetus as

⁴⁴ See *Carhart*, 530 U.S. at 932, cited in Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2(3), 117 Stat. 1201, 1201 (2003).

⁴⁵ See Partial-Birth Abortion Ban Act § 2(14)(O).

⁴⁶ *Id.* § 2(1).

⁴⁷ *Id.* § 2(2).

⁴⁸ See 149 CONG. REC. H9142 (daily ed. Oct. 2, 2003) (statement of Rep. Sensenbrenner).

⁴⁹ Partial-Birth Abortion Ban Act § 2(14)(A).

the scissors are pushed into the back of its head,⁵⁰ he criticized the notion that partial-birth abortion could be necessary to preserve the health of the mother.⁵¹ He contended that claims that D&X was the best alternative in medical emergencies were not true and that D&X is itself a dangerous procedure.⁵² Senator Frist then boiled the entire debate down to one question: Does partial-birth abortion “carry the danger of doing unnecessary harm to a mother, to an infant, and to our conscience as a nation that values the sanctity of human life?”⁵³ His answer was yes.⁵⁴

Other supporters of the Act pointed to the fact that partial-birth abortion is not taught in medical schools as proof that the procedure is never medically necessary.⁵⁵ Yet the majority of the arguments made by proponents of the Act ignored the constitutional problem of the a lack of a health exception, and dealt instead with fervent positions against the procedure itself.⁵⁶

The 2003 Act’s authors contend that its findings that partial-birth abortion is never medically necessary will save the Act from unconstitutionality. This is because, according to the authors, it was the district court’s findings to the contrary in *Carhart* that led to the invalidation of the ban in that case.⁵⁷ Supporters of the Act noted that the factual findings of lower courts at times bind the Supreme Court, and that in *Carhart* the Court had been bound to accept the factual findings of the lower court due to the “clearly erroneous” standard of review applied in that case.⁵⁸

The 2003 Act states that under this standard, “if the district court’s account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.”⁵⁹ As a result, the Act’s authors argued, the Supreme Court had no choice but to accept the “very questionable findings” of the district court.⁶⁰ Senator Rick Santorum (R-Pa.), a leading supporter of the Act, defended this argument by stating that “in [*Carhart*] . . . it was a very weak record, and the court made a decision based on that record. They will have a different record before them in this case . . . and I be-

⁵⁰ 149 CONG. REC. S3457 (daily ed. Mar. 11, 2003) (statement of Sen. Frist).

⁵¹ *See id.* at S3458 (statement of Sen. Frist).

⁵² *See id.*

⁵³ *Id.* at S3459 (statement of Sen. Frist).

⁵⁴ *See id.*

⁵⁵ *See* 149 CONG. REC. H4932 (daily ed. June 4, 2003) (statement of Rep. Brady).

⁵⁶ *See, e.g., id.* at H4946 (statement of Sen. DeLay) (arguing that D&X was a procedure that had “its violence . . . unleashed for the convenience of the doctor, not the health of the patient”).

⁵⁷ *See* Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2(4), 117 Stat. 1201, 1202 (2003).

⁵⁸ *Id.* § 2(6).

⁵⁹ *Id.* (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985)).

⁶⁰ *See id.* § 2(7).

lieve the record will be clear and dispositive that no health exception is necessary.”⁶¹

The authors of the Act argued that congressional findings were traditionally given “great deference” by the Supreme Court, and cited several cases in support of that view.⁶² During Senate debate, Senator Santorum argued that Congress had the right to make a finding of fact on the health exception issue because it did “a heck of a lot more exhaustive study, in our deliberations with hearings and other testimony, than the Supreme Court can. They have to rely on the record of the lower court and the arguments made to that lower court.”⁶³

In the House, this argument was taken up by Representative James Sensenbrenner (R-Wis.), who said that the Supreme Court had previously recognized that the institutional structure of Congress put it in a better position than the judiciary to assess facts upon which policy determinations are made.⁶⁴ While he conceded that the Supreme Court was not required to accept congressional findings, Representative Sensenbrenner hoped that the Court would “give the same type of deference that it has done in the past civil rights and employment cases.”⁶⁵

Opponents of the Act argued that there was no meaningful difference between the 2003 Act and the Nebraska statute that had been declared unconstitutional just three years previously. Representative Jerrold Nadler (D-N.Y.) argued that the Supreme Court had never said Congress could use findings of fact to expand the legislative power, and that regardless of any past deference shown to congressional findings, case law showed that the Supreme Court, not Congress, was the final arbiter of fact.⁶⁶ He found the idea that congressional findings in the bill would eliminate the constitutional need for a health exception “laughable” and added, “I do not believe any Member who knows anything about constitutional law can seriously and honestly suggest anything other than that.”⁶⁷

Representative John Conyers Jr. (D-Mich.) was even more pointed in his criticism of the notion that congressional findings could overcome constitutional requirements. He noted that despite the fact that similar bills lacking health exceptions had been repeatedly struck down, the authors of the 2003 Act believed that somehow “this bill is now going to be okay

⁶¹ 149 CONG. REC. S3384 (daily ed. Mar. 10, 2003) (statement of Sen. Santorum).

⁶² Partial-Birth Abortion Ban Act § 2(11) (citing *Turner Broad. Sys., Inc. v. Fed. Communications Comm’n*, 520 U.S. 180 (1997); *Turner Broad. Sys., Inc. v. Fed. Communications Comm’n*, 512 U.S. 622 (1994); *City of Rome v. United States*, 446 U.S. 156 (1980); *Katzenbach v. Morgan*, 384 U.S. 641 (1966)).

⁶³ 149 CONG. REC. S3384 (daily ed. Mar. 10, 2003) (statement of Sen. Santorum).

⁶⁴ 149 CONG. REC. H4925 (daily ed. June 4, 2003) (statement of Sen. Santorum) (citing *Rostker v. Goldberg*, 453 U.S. 54 (1981), *Fullilove v. Klutznick*, 448 U.S. 448 (1980), *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94 (1973)).

⁶⁵ *Id.* at H4925 (statement of Rep. Sensenbrenner).

⁶⁶ *See id.* at H4926 (statement of Rep. Nadler).

⁶⁷ *Id.*

because we have congressional findings.”⁶⁸ According to Representative Conyers, the key difference between cases in which the judiciary showed deference to congressional findings and the 2003 Act was that the latter simply stated that the District Court erred in its findings of fact and law.⁶⁹ “Gainsaying, no matter how presented, is not the same as fact-findings Congress cannot simply refute findings of fact made by the District Court by presenting its own ‘findings’ that are contrary to the evidence the Court depended upon to make its ruling.”⁷⁰

In addition to arguing against congressional findings to refute Supreme Court rulings, the ban’s opponents also strenuously objected to the factual assertion that partial-birth abortion was never medically necessary for the health of the mother. Despite conceding that D&X was a particularly gruesome form of abortion, they argued that situations arise annually where D&X is necessary to protect the life and health of the mother.⁷¹ Credible medical evidence has indicated that D&X is safer in some instances than other available procedures, and when such situations arise, Congress should ensure that women have safe and appropriate medical procedures available.⁷² To support this assertion, they read into the record testimony of women who, due to unforeseen medical circumstances and on the advice of their doctors, had terminated wanted pregnancies through D&X.⁷³

During the House debate, Representative Nancy Johnson (R-Conn.) pointed out that according to the American College of Obstetricians and Gynecologists, while D&X was never the only procedure that could be performed, in a particular circumstance D&X may be the best and most appropriate abortion procedure available.⁷⁴ She argued that despite the

⁶⁸ *Id.* at H4925 (statement of Rep. Conyers).

⁶⁹ *See id.*

⁷⁰ *Id.*

⁷¹ *See id.* at H4924–25 (statement of Rep. Green).

⁷² *See id.* at H4932 (statement of Rep. Filner).

⁷³ *See* 149 CONG. REC. S3461 (daily ed. Mar. 11, 2003) (statement of Sen. Boxer) (reading testimony of Coreen Costello, “This procedure allowed me to deliver my daughter intact. My husband and I were able to see and hold our daughter Having this time with her allowed us to start the grieving process. I don’t know how we would have coped if we had not been able to hold her We cannot tie the hands of physicians in these life-saving matters. It is simply not right.”); *id.* at S3468 (statement of Sen. Durbin) (referring to the case of Vicki Stella, who relied on the advice of both her OB-GYN and her physician husband that a D&X was the most appropriate procedure to terminate her late pregnancy in which the fetus was found to have serious abnormalities and whose delivery would endanger her health). A proponent of the Act, Senator Santorum, replied by entering into the record a letter written by Dr. Curtis Cook, (Maternal Fraternal Medicine, Michigan State College of Human Medicine) who argued that Costello had been intentionally misled by bad medical advice. *See id.* at S3470 (statement of Sen. Santorum). Senator Durbin sharply criticized the idea that a doctor uninvolved with the case and Congress should overrule a woman’s personal OB-GYN. *See id.* at S3471 (statement of Sen. Durbin).

⁷⁴ *See* 149 CONG. REC. H4943 (daily ed. June 4, 2003) (statement of Rep. Johnson) (citing News Release, American College of Obstetricians and Gynecologists, Statement on So-Called “Partial Birth Abortion” Laws by the American College of Obstetricians and

fact that Congress would not be present in the operating room if and when that circumstance arose, the bill's supporters were still prepared to "tell the physician you cannot do this."⁷⁵ In the view of many of the Act's opponents, it made little sense to foreclose medical options as a matter of law when medical experts were divided as to which of those options would be best for patients.⁷⁶

To support the argument that it was incorrect to claim that partial-birth abortion was never medically necessary and that it was inappropriate for legislators to make medical decisions, Senator Barbara Boxer (D-Cal.) presented a letter written by Drs. Natalie E. Roche and Gerson Weiss.⁷⁷ The letter was written on behalf of Physicians for Reproductive Choice and Health, a group of practicing OB-GYNs and academics in obstetrics, gynecology, and women's health. Drs. Roche and Weiss stated that it is "wrong to assume that a specific procedure is never needed; what is required is the safest option for the patient, and that varies from case to case Until a surgeon examines the patient, she does not necessarily know which technique or procedure would be in the patient's best interest."⁷⁸

The doctors responded to the contention that D&X had no support in the medical community by showing that many physicians thought it was dangerous to patients for Congress to take this option away from their obstetricians.⁷⁹ They cited both the American College of Obstetricians and Gynecology, representing 45,000 OB-GYNs, and the American Medical Women's Association, as holding this view.⁸⁰ The letter also mentioned the advantages of D&X, which included offering a woman a chance to see the intact outcome of a desired pregnancy, thus speeding up the grieving process; providing a greater chance of acquiring valuable information regarding hereditary illness or fetal anomaly; and decreasing risk of injury to the woman, as the procedure is quicker than induction and involves less use of sharp instruments in the uterus, providing a lesser chance of uterine perforations or tears and cervical lacerations.⁸¹

Gynecologists (Feb. 13, 2002), available at http://www.acog.org/from_home/publications/press_releases/nr02-13-02.cfm).

⁷⁵ *Id.*

⁷⁶ *See, e.g.*, 149 CONG. REC. S3471 (daily ed. Mar. 11, 2003) (statement of Sen. Durbin).

⁷⁷ *See* 149 CONG. REC. S3385–86 (daily ed. Mar. 10, 2003) (statement of Sen. Boxer).

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⁷⁸ *Id.* at S3385 (statement of Sen. Boxer).

⁷⁹ *See id.*

⁸⁰ *See id.* During the House debate, Representative Sheila Jackson-Lee (D-Tex.) stated that the American Nurses Association, the American Public Health Association, and other medical groups also opposed the bill. *See* 149 CONG. REC. H4937 (daily ed. June 4, 2003) (statement of Rep. Jackson-Lee).

⁸¹ *See* 149 CONG. REC. S3385–86 (daily ed. Mar. 10, 2003) (statement of Sen. Boxer).

With Republicans in control of both Congress and the White House, getting the bill passed and signed into law presented only minor hurdles. Getting the federal courts to rule in favor of the law's constitutionality, however, will present a much more formidable obstacle. As mentioned previously, the fate of the 2003 Act may very well rest on the composition of the Supreme Court if it hears the case. If such a case were to come before the current Court, it would almost certainly meet the same 5-4 defeat that befell its Nebraska forerunner. The absence of a health exception would seem to prevent the Justices of the *Carhart* majority from changing their votes. It could be years before the law reaches the Supreme Court, however, and by then, Justice O'Connor, and perhaps Justice Stevens, may no longer be sitting on the bench. This possibility has likely not been lost on those supporting the ban. Opponents of the 2003 Act have speculated that its supporters are counting on the fact that the Court that hears the case will be more sympathetic than the one that decided *Carhart*.⁸²

The disdain showed by many Members of Congress toward partial-birth abortion during the debate on the 2003 Act perhaps explains their attempt to pass a statute that clearly violates recent Supreme Court precedent. Despite various claims to the contrary, the 2003 Act unmistakably suffers from one of the same defects the Supreme Court declared unconstitutional in *Carhart*, the lack of an exception to the ban to protect the health of a patient. The idea that congressional findings alone will satisfy the requirements set out in *Carhart* is astonishing. If Congress could simply reverse a Supreme Court decision by "finding" facts different from those found in the case, the judiciary would be rendered a mere legislative tool.

The 2003 Act states that Congress "is entitled to reach its own factual findings . . . that the Supreme Court accords great deference."⁸³ It states further that Congress may "enact legislation based upon these findings so long as it seeks to pursue a legitimate interest that is within the scope of the Constitution, and draws reasonable inferences based upon substantial evidence."⁸⁴ In support of this assertion, the Act's authors cite *Katzenbach v. Morgan*⁸⁵ as providing evidence of the Supreme Court's "highly deferential review of congressional factual findings."⁸⁶ The Act also cites *Turner Broadcasting System, Inc. v. Federal Communications Commission (Turner I)*,⁸⁷ and a case between the same parties three years later

⁸² See 149 CONG. REC. H4935 (daily ed. June 4, 2003) (statement of Rep. Maloney) (quoting Ruth Marcus, "Partial Birth," *Partial Truths*, WASH. POST, June 4, 2003, at A27).

⁸³ Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2(8), 117 Stat. 1201, 1202 (2003).

⁸⁴ *Id.*

⁸⁵ 384 U.S. 641, 653 (1966) ("It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.")

⁸⁶ See Partial-Birth Abortion Ban Act § 2(9).

⁸⁷ 512 U.S. 622 (1994).

(*Turner II*),⁸⁸ to reiterate the proposition that the Court's role with regard to congressional findings is limited to "assur[ing] . . . Congress has drawn reasonable inferences based on substantial evidence."⁸⁹

These cases, however, are not all the Supreme Court has had to say on the issue of congressional findings. A case not cited in the Act is *United States v. Morrison*, in which the Supreme Court invalidated, as beyond congressional authority, the Violence Against Women Act.⁹⁰ In *Morrison* the Court noted that the statute at issue was supported by numerous findings regarding the serious impact that gender-motivated violence has on victims, and the relation between that impact and interstate commerce.⁹¹ While the Court commented that the "existence of such findings may 'enable us to evaluate the legislative judgment,'"⁹² it also stated bluntly that "[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so."⁹³ Indeed, in *Turner I*, one of the cases cited by Congress to show how much deference the Court pays its findings, the Court noted that "the deference afforded to legislative findings does 'not foreclose our independent judgment of the facts bearing on an issue of constitutional law.'"⁹⁴ So while a court faced with a challenge of the 2003 Act may desire to show deference to the congressional finding that there is a consensus in the medical profession about D&X never being a useful procedure, they will assuredly need to consider that statement against all of the physicians and physician groups that have expressed contrary opinions in *Carhart* and during recent congressional debates.⁹⁵ It is unlikely the Court will defer to a finding of medical "consensus" in the face of so much conflict of opinion. Instead, the Court will likely see this as an impermissible instance of congressional overreaching, due to the Legislature willfully blinding itself to the views of those in the medical community who disagree with their view of partial-birth abortion.

Justice O'Connor, always a key swing vote for the current Court, specifically stated in her concurring opinion in *Carhart* that she would not consider a ban on partial-birth abortion constitutional without a health exception.⁹⁶ Despite step-by-step instructions for how to win her vote,⁹⁷ the authors of the 2003 Act seem to have willfully ignored Justice O'Connor's requirements. Instead, knowing that they could get the bill both passed and signed into law, the 2003 Act's authors and supporters appear willing

⁸⁸ *Turner Broad. Sys., Inc. v. Fed. Communications Comm'n*, 520 U.S. 180 (1997).

⁸⁹ See Partial-Birth Abortion Ban Act §§ 2(11)–(12).

⁹⁰ 529 U.S. 598, 617 (2000).

⁹¹ See *id.* at 614.

⁹² *Id.* at 612.

⁹³ *Id.* at 614.

⁹⁴ *Turner Broad. Sys.*, 512 U.S. at 666.

⁹⁵ See *supra* text accompanying notes 73–74, 77–81.

⁹⁶ See *Carhart*, 530 U.S. at 947 (O'Connor, J., concurring).

⁹⁷ See *id.* at 950–51.

to gamble that by the time it is reviewed by the Supreme Court, Justice O'Connor (or another member of the *Carhart* majority) will be gone. The calculation is very straightforward: if one member of the *Carhart* majority is replaced by a Justice more sympathetic to the minority, the ban will be ruled constitutional. As Chief Justice Rehnquist reportedly remarked to a clerk in the late 1980s, "I used to worry about every little footnote. Now I realize you just need five votes."⁹⁸

Legal challenges to the Act began almost immediately. Soon after President Bush signed the bill into law, U.S. District Judge Richard G. Kopf of Nebraska issued a temporary restraining order against the new law's enforcement because of the lack of a health exception.⁹⁹ Although the judge acknowledged Congress's finding that a health exception was not needed, he found it, "at the very least, problematic whether I should defer to such a conclusion when the Supreme Court has found otherwise."¹⁰⁰ Judge Kopf's opinion was quite narrow however, in that it applied only to the four doctors who had brought the suit before him.¹⁰¹

Shortly after Judge Kopf issued his ruling, U.S. District Court Judge Richard Conway Casey of the Southern District of New York similarly granted a temporary restraining order to the National Abortion Federation (NAF), a network of abortion providers, finding that they met the standard of showing both irreparable harm if he denied the order and a likelihood of success on the merits.¹⁰² At oral arguments, the Assistant United States Attorney admitted that "there remains a disagreement in the medical community as to whether the abortion procedures covered by the Act are ever necessary to protect a woman's health, and that Congress did not find a consensus on the matter."¹⁰³ Judge Casey, citing *Carhart's* health exception requirement, concluded that "the Court is constrained, at this time, to conclude that it is substantially likely that plaintiffs will succeed on the merits."¹⁰⁴

Although the restraining order applied only to the plaintiffs, the ruling has potentially wide application because NAF has 350 clinics in forty-seven states and claims to perform half of the abortions done in the nation (which amounts to approximately 700,000 abortions performed by NAF per year).¹⁰⁵

⁹⁸ Richard Lacayo & Viveca Novak, *How Rehnquist Changed America*, TIME, June 30, 2003, at 25.

⁹⁹ See *Carhart v. Ashcroft*, 287 F. Supp. 2d 1015, 1015 (D. Neb. 2003).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See *Nat'l Abortion Fed'n v. Ashcroft*, 287 F. Supp. 2d 525, 525–26 (S.D.N.Y. 2003).

¹⁰³ See *id.* at 525.

¹⁰⁴ *Id.* at 526.

¹⁰⁵ See Susan Saulny, *Court Blocks New Statute That Limits Abortion*, N.Y. TIMES, Nov. 7, 2003, at A18.

On March 19, 2004, however, Judge Casey refused to grant a request for summary judgment in favor of the NAF, finding that a “genuine issue of material fact exists as to whether a partial-birth abortion is ever medically necessary to protect a woman’s health.”¹⁰⁶ While holding that the constitutionality of the 2003 Act must be judged according to *Carhart*’s requirement that “abortion regulations must include a maternal health exception if ‘a significant body of medical opinion believes a procedure brings with it greater safety advantages,’”¹⁰⁷ he stated that the court had to weigh “the factual findings that Congress reached after eight years of hearings,” including the assertion that a “partial-birth abortion is never medically indicated to preserve the health of the mother.”¹⁰⁸ Given the disagreement between the finding of medical opinion in *Carhart* with the congressional findings, the judge noted a need for additional facts “extrinsic to the Congressional record” to evaluate the truth of Congress’s factual determinations.¹⁰⁹

Few issues are as emotionally charged in the United States as abortion. The views expressed by groups and individuals on each side seem to be so fundamentally opposed that compromise on the matter appears nearly impossible. The debate since *Roe* has focused on the legality of regulations concerning abortions in general, leaving the details of the procedure to be used in the hands of physicians. The 2003 Act, however, goes beyond such regulations and takes the dangerous step of explicitly forbidding physicians from performing a specific medical procedure while other procedures that produce the same result are allowed, regardless of whether the physician believes that the banned procedure is the optimal one to preserve a woman’s health. As opponents of the 2003 Act and the majority in *Carhart* point out, there is a serious problem with permitting members of a political branch to say that a medical procedure is *never* necessary under *any* circumstances. There is simply no way that they can make that determination. There is always the possibility that D&X *could* be the most appropriate procedure, in the judgment of a physician, for a particular patient.

Even among opponents of the 2003 Act, one would be hard-pressed to find anyone who explicitly favors D&X as a procedure. No one can credibly deny the gruesome nature of the particular procedure, but the nature of the procedure is not at issue. The main issue is whether or not legislatures, state or national, should be allowed to determine which medical procedures are available to physicians in order to preserve the health of their patients. That issue was squarely dealt with in *Carhart*, when the Supreme Court stated that any ban on an abortion procedure

¹⁰⁶ See Nat’l Abortion Fed’n v. Ashcroft, No. 03 Civ. 8695(RCC), 2004 WL 540470, at *4 (S.D.N.Y. Mar. 19, 2004).

¹⁰⁷ See *id.* at *3 (quoting *Carhart*, 530 U.S. at 937).

¹⁰⁸ See *id.*

¹⁰⁹ See *id.* at 4.

requires an exception for the health of the mother. Given the 2003 Act's almost brazen disregard for this instruction, it should meet the same fate as the Nebraska statute in *Carhart*. It is only the potentially changing membership of the Supreme Court that even renders the ultimate fate of the 2003 Act an open question.

—*Alex Gordon*