No.

In the Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

v.

LEROY CARHART, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Partial-Birth Abortion Ban Act of 2003 (the Act), Pub. L. No. 108-105, 117 Stat. 1201 (to be codified at 18 U.S.C. 1531), prohibits a physician from knowingly performing a "partial-birth abortion" (as defined in the statute) in or affecting interstate commerce. § 3, 117 Stat. 1206-1207. The Act contains an exception for cases in which the abortion is necessary to preserve the life of the mother, but no corresponding exception for the health of the mother. Congress, however, made extensive factual findings, including a finding that "partial-birth abortion is never medically indicated to preserve the health of the mother." § 2(14)(O), 117 Stat. 1206. The question presented is as follows:

Whether, notwithstanding Congress's determination 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.

PARTIES TO THE PROCEEDING

Petitioner is Alberto R. Gonzales, Attorney General of the United States. Respondents are LeRoy Carhart, William G. Fitzhugh, William H. Knorr, and Jill L. Vibhakar.

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The Solicitor General, on behalf of the Attorney General of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 413 F.3d 791. The memorandum and order of the district court (Pet. App. 26a-588a) are reported at 331 F. Supp. 2d 805.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 (to be codified at 18 U.S.C. 1531), is reproduced in the appendix to this petition (Pet. App. 589a-601a).

STATEMENT

This case concerns the constitutionality of the federal Partial-Birth Abortion Ban Act of 2003. That statute prohibits a physician from knowingly performing a "partial-birth abortion," a particular abortion procedure that Congress found to be "gruesome and inhumane." Because Congress determined (after nine years of hearings and debates) that partial-birth abortion is "never medically indicated to preserve the health of the mother," Congress did not include a statutory health exception. The court of appeals held that, notwithstanding Congress's determination, the statute was facially invalid because it lacked a health exception. The court of appeals dismissed Congress's factual findings and instead suggested that this Court's decision in *Stenberg* v. *Carhart*, 530 U.S. 914 (2000), requires a statute regulating an abortion procedure to contain a health exception as long as "'substantial medical authority' supports the medical necessity of [the] procedure in some instances."

1. The phrase "partial-birth abortion" is commonly used to describe a late-term abortion procedure known interchangeably as dilation and extraction (D&X) or intact dilation and evacuation (intact D&E). In that procedure, a physician partially delivers the fetus intact (*i.e.*, without first dismembering it) and then kills the fetus, typically by puncturing its skull and vacuuming out its brain. In 1995, Congress began holding a series of hearings and debates on proposals to prohibit partial-

birth abortion. In the years that followed, Congress received oral and written testimony from experts who stated that partial-birth abortion was not necessary to preserve the health of the mother in any circumstances; that claims that partial-birth abortion was safer than other late-term abortion procedures were either incorrect or speculative; and that partial-birth abortion in fact posed distinctive safety risks. In 1996 and 1997, Congress passed bills that would have banned partial-birth abortion, but the President vetoed them. Between 1992 and 2000, at least 30 States enacted bans of their own. *Stenberg*, 530 U.S. at 927-928; Pet. App. 2a; Gov't C.A. Br. 34-41.

2. In 2000, this Court invalidated a Nebraska statute that banned "partial birth abortion" (as defined in that statute) unless the procedure was necessary to preserve the life of the mother. *Stenberg* v. *Carhart*, *supra*. In doing so, the Court applied the "undue burden" standard articulated in the joint opinion in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992), for reviewing statutes regulating abortion. *Stenberg*, 530 U.S. at 921. Under that standard, "[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Casey*, 505 U.S. at 878 (opinion of O'Connor, Kennedy, and Souter, JJ.).

In *Stenberg*, the Court held that the Nebraska statute at issue was invalid "for at least two independent reasons." 530 U.S. at 930. First, the Court held that the statute was unconstitutional because, while it contained an exception for cases in which a partial-birth abortion was necessary to preserve the life of the mother, it lacked a corresponding exception for the

health of the mother. *Id.* at 930-938. The Court explained that a health exception was necessary when a statute regulating an abortion procedure would pose "significant health risks for women." *Id.* at 932. Relying on the findings of the district court, the Court noted that "substantial medical authority support[ed] the proposition that banning a particular abortion procedure could endanger women's health," *id.* at 938, and that, in response, Nebraska had "fail[ed] to demonstrate that banning [partial-birth abortion] without a health exception may not create significant health risks for women," *id.* at 932. "Given these medically related evidentiary circumstances," the Court explained, "we believe the law requires a health exception." *Id.* at 937.

Second, the Court held that the Nebraska statute was unconstitutional because it covered not only the procedure known as D&X or intact D&E (and commonly known as "partial-birth abortion"), but also the more frequently used late-term abortion procedure known as standard dilation and evacuation (D&E), in which the physician typically dismembers the fetus while the remainder of the fetus is still in the womb. *Stenberg*, 530 U.S. at 938-946. For that reason, the Court explained, the statute imposed an undue burden on a woman's access to an abortion. *Id.* at 945-946.

3. In 2003, after further hearings and debates, Congress passed, and the President signed, the Partial-Birth Abortion Ban Act of 2003 (the Act), Pub. L. No. 108-105, 117 Stat. 1201 (to be codified at 18 U.S.C. 1531). In drafting the Act, Congress sought to remedy the deficiencies identified by this Court in the state statute at issue in *Stenberg*. See 149 Cong. Rec. S2523 (daily ed. Feb. 14, 2003) (statement of Sen. Santorum); *Partial-Birth Abortion Ban Act of 2002: Hearing Before the Subcomm. on the Constitution of the House*

Comm. on the Judiciary, 107th Cong., 2d Sess. 1-2 (2002) (statement of Rep. Chabot); *Partial-Birth Abortion Ban Act of 2003: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 108th Cong., 1st Sess. 37-38 (2003) (statement of Rep. Chabot). First, the statute contains a more precise definition of the phrase "partial-birth abortion." Specifically, it defines a "partial-birth abortion" as:

> an abortion in which the person performing the abortion—(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 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 (B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus.

§ 3, 117 Stat. 1206-1207 (to be codified at 18 U.S.C. 1531(b)(1)). The Act imposes criminal and civil sanctions only on a physician who "knowingly" performs such an abortion. § 3, 117 Stat. 1206 (to be codified at 18 U.S.C. 1531(a)). Like the Nebraska statute, the Act includes an exception for cases in which a partial-birth abortion is necessary to preserve the life of the mother. *Ibid.*

Second, based on "the testimony received during extensive legislative hearings during the 104th, 105th, 107th, and 108th Congresses," § 2(14), 117 Stat. 1204, the Act contains extensive factual findings concerning the medical necessity of partial-birth abortion, culminating in the ultimate finding that "partial-birth abor-

tion is never medically indicated to preserve the health of the mother," § 2(14)(O), 117 Stat. 1206. Among its subsidiary findings, Congress determined that "[t]here is no credible medical evidence that partial-birth abortions are safe or are safer than other abortion procedures," § 2(14)(B), 117 Stat. 1204, and that "[p]artial-birth abortion poses serious risks to the health of a woman undergoing the procedure," § 2(14)(A), 117 Stat. 1204. Although Congress acknowledged that the district court in *Stenberg* had made contrary factual findings, Congress noted that much of the evidence on which it was relying in making its own findings was not contained in the *Stenberg* record. § 2(5)-(8), 117 Stat. 1202.

4. Even before the Act was signed into law, respondents, four physicians who perform late-term abortions, brought suit against the Attorney General, seeking a permanent injunction against enforcement of the Act. Respondents contended that the Act was facially invalid because (1) it lacked a health exception; (2) it otherwise imposed an undue burden on a woman's access to an abortion because it prohibited not only D&X abortions, but also other types of abortions (including certain standard D&E abortions); (3) it was unconstitutionally vague in various respects; and (4) it contained an insufficient life exception.

After a bench trial, the district court granted judgment to respondents and entered a permanent injunction. Pet. App. 26a-588a. The court declared that the Act was unconstitutional "in all of its applications when the fetus is not viable or when there is a doubt about the viability of the fetus." *Id.* at 545a. The court held that the Act was invalid both because it lacked a health exception and because it reached certain standard D&E abortions as well as D&X abortions. *Id.* at 449a-450a.

As to the lack of a health exception, the court rejected the government's contention that Congress's findings, including its ultimate finding that partial-birth abortion was never medically indicated to preserve the health of the mother, were entitled to deference. *Id.* at 461a. The court seemingly recognized, citing this Court's decision in *Turner Broadcasting System, Inc.* v. *FCC*, 520 U.S. 180 (1997) (*Turner II*), that Congress's findings were entitled to "binding deference" as long as the findings were reasonable and supported by substantial evidence. Pet. App. 458a. The court stated, however, that the "case-deciding question" was whether "there [was] substantial evidence in the relevant record from which a reasonable person could conclude that there is *no substantial medical authority* supporting the proposition that banning 'partial-birth abortions' could endanger women's health." *Id.* at 460a-461a. Applying that standard, the court determined that Congress's findings were not entitled to deference because "a substantial body of contrary, responsible medical opinion was presented to Congress," *id.* at 463a, and because "the trial evidence establishes that a large and eminent body of medical opinion believes that partial-birth abortions provide women with significant health benefits in certain circumstances," *id.* at 476a-477a. As to the scope of the statute, the court reasoned that, even if it were read to require the physician to act with "specific intent," the statute would reach certain standard D&E abortions in which the physician partially delivered the fetus intact and only then killed the fetus by dismembering it. *Id.* at 519a-520a.[1]

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[1] The district court rejected respondents' other claims, holding (1) that the Act was not unconstitutionally vague (provided that it was read to require the physician to act with "specific intent") and

5. The court of appeals affirmed. Pet. App. 1a-25a. As a preliminary matter, the court determined that the appropriate standard for reviewing respondents' facial challenge was not the "no set of circumstances" standard articulated in *United States* v. *Salerno*, 481 U.S. 739 (1987), but rather "the test from *Stenberg*." Pet. App. 6a. On the merits of respondents' claim that the Act was invalid because it lacked a health exception, the court reasoned that *Stenberg* required such an exception when "'substantial medical authority' supports the medical necessity of a procedure in some instances." *Id.* at 10a. "In effect," the court continued, "we believe when a lack of consensus exists in the medical community, the Constitution requires legislatures to err on the side of protecting women's health by including a health exception." *Ibid.*

The court of appeals proceeded to reject the government's argument that Congress's factual findings concerning the medical necessity of partial-birth abortion were entitled to deference. Pet. App. 12a-16a. The court concluded that "the government's argument regarding *Turner* deference is irrelevant to the case at hand." *Id.* at 15a. The court explained that, while "[w]hether a partial-birth abortion is medically necessary in a given instance would be a question of fact," "whether the record in a particular lawsuit reflects the existence of 'substantial medical authority' supporting the medical necessity of such procedures is a question that is different in kind." *Id.* at 12a-13a. The court added that, "[u]nder the 'substantial medical authority' standard, our review of the record is effectively limited

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(2) that the Act contained a sufficient life exception. Pet. App. 522a-532a. Respondents did not challenge those holdings on appeal.

to determining whether substantial evidence exists to support the medical necessity of partial-birth abortions without regard to the factual conclusions drawn from the record by the lower court (or, in this case, Congress)." *Id.* at 13a.

The court of appeals then asserted that the medical necessity of a particular abortion procedure was a question of legislative, rather than adjudicative, fact. Pet. App. 16a-20a. The court of appeals observed that, in *Stenberg*, this Court had determined that "substantial medical authority" supported the need for a health exception. *Id.* at 18a. The court of appeals asserted that "[n]either we, nor Congress, are free to disagree with the Supreme Court's determination because the Court's conclusions are final on matters of constitutional law." *Ibid.* Although the court conceded that *Stenberg* did not stand for the proposition that "legislatures are forever constitutionally barred from enacting partial-birth abortion bans," it determined that legislatures could enact such bans only if, "at some point (either through an advance in knowledge or the development of new techniques, for example), the procedures prohibited by the Act will be rendered obsolete." *Id.* at 19a-20a. And while the court recognized that "[t]here is some evidence in the present record indicating each of the advantages discussed in *Stenberg* are incorrect and the banned procedures are never medically necessary," it concluded that the government had failed to "demonstrate that relevant evidentiary circumstances (such as the presence of a newfound medical consensus or medical studies) have in fact changed over time." *Id.* at 22a. In light of its holding that the Act was facially invalid because it lacked a health exception, the court did not reach the question whether the Act was also facially

invalid because it reached other types of abortions besides D&X abortions. *Id.* at 25a.

REASONS FOR GRANTING THE PETITION

The court of appeals affirmed the district court's decision holding the Partial-Birth Abortion Ban Act of 2003 unconstitutional in all of its pre-viability applications and permanently enjoining the government from enforcing the Act. Because the decision below holds an Act of Congress unconstitutional and is inconsistent with decisions of this Court, further review is warranted.

I. THE COURT OF APPEALS HAS INVALIDATED AN ACT OF CONGRESS

The court of appeals held that the Act was unconstitutional on its face because it lacked a health exception, and upheld the district court's permanent injunction against enforcement of the Act. That decision, striking down a carefully considered, landmark Act of Congress, clearly warrants plenary review. Although no other court of appeals has yet passed on the constitutionality of the Act, certiorari is merited. This Court's ordinary practice is to grant certiorari when a court of appeals holds a federal statute unconstitutional, even in the absence of a circuit conflict. See, *e.g.*, *Ashcroft* v. *ACLU*, 542 U.S. 656 (2004); *United States* v. *Morrison*, 529 U.S. 598 (2000); *National Endowment for the Arts* v. *Finley*, 524 U.S. 569 (1998); *Babbitt* v. *Youpee*, 519 U.S. 234 (1997); *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995); *United States* v. *National Treasury Employees Union*, 513 U.S. 454 (1995); *United States* v. *Edge Broad. Co.*, 509 U.S. 418 (1993); *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307 (1993); cf. Robert L. Stern et al., *Supreme Court Practice* 244 (8th ed. 2002) ("Where the decision below holds a federal statute unconstitutional

* * *, certiorari is usually granted because of the obvious importance of the case."). That practice is consistent with this Court's admonition that declaring a statute unconstitutional is the "gravest and most delicate" of judicial tasks, *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.), and also with this Court's own guidelines concerning certiorari review, which indicate that certiorari is appropriate when "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

II. THE COURT OF APPEALS' DECISION IS ERRONEOUS AND CONFLICTS WITH THIS COURT'S PRECEDENTS

Certiorari is also warranted because the court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

A. The Court Of Appeals Erred By Holding That Congress's Factual Findings Were Not Entitled To Substantial Deference

1. In *Turner Broadcasting System, Inc.* v. *FCC*, 520 U.S. 180 (1997), this Court articulated the standards for judicial review of congressional findings of fact that bear on the constitutionality of federal statutes. Specifically, the Court held that, "[i]n reviewing the constitutionality of a statute, 'courts must accord substantial deference to the predictive judgments of Congress,'" and that "[the] sole obligation [of reviewing courts] is 'to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.'" *Id.* at 195 (quoting *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 665-666 (1994) (*Turner I*) (plurality opinion); see *id.* at 211 (stating that "the question is

whether the legislative conclusion was reasonable and supported by substantial evidence in the record before Congress"). In engaging in "substantial evidence" review, the Court elaborated, reviewing courts cannot "reweigh the evidence *de novo*, or * * * replace Congress' factual predictions with [their] own"; instead, they should defer to a congressional finding even if two different conclusions could be drawn from the supporting evidence. *Ibid.* Indeed, where congressional factfinding is at issue, "substantiality is to be measured * * * by a standard more deferential" than even the standard applicable to agency factfinding. *Id.* at 195. Such a high degree of deference is appropriate, the Court explained, both because Congress "is far better equipped than the judiciary to amass and evaluate * * * data bearing upon legislative questions," *ibid.* (citations and internal quotation marks omitted), and "out of respect for [Congress's] authority to exercise the legislative power," *id.* at 196.

The principles of deference articulated in *Turner II* were not novel; to the contrary, they have been applied in a wide variety of contexts to a wide variety of constitutional claims. In *Turner II* itself, in rejecting a Free Speech Clause challenge to the FCC's "must-carry" rules, the Court deferred to congressional findings that the rules were necessary to preserve the health of local television stations. See 520 U.S. at 195-196 (noting that, "[e]ven in the realm of First Amendment questions where Congress must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided and to the remedial measures adopted for that end"). In *Board of Education* v. *Mergens*, 496 U.S. 226 (1990), in rejecting an Establishment Clause challenge to a statute mandating equal access to school facilities for religious groups, the

Court deferred to a congressional finding that high schools were unlikely to confuse an equal-access policy with state sponsorship of religion. See *id.* at 251 (asserting that "we do not lightly second-guess such legislative judgments, particularly where the judgments are based in part on empirical determinations").

In *Rostker* v. *Goldberg*, 453 U.S. 57 (1981), in rejecting an equal protection challenge to male-only draft registration, the Court deferred to a congressional finding that, because women then served only in noncombat roles, any need for women to serve in those roles could be met by volunteers. See *id.* at 82-83 (concluding that "[t]he District Court was quite wrong in undertaking an independent evaluation of this evidence, rather than adopting an appropriately deferential examination of *Congress'* evaluation of that evidence"). Finally, in *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985), in rejecting a procedural due process challenge to a statutory limitation on the fee payable to attorneys representing veterans on benefits claims before the Veterans' Administration, the Court deferred to congressional findings that attorneys were generally unnecessary in those proceedings because the proceedings were relatively uncomplicated. See *id.* at 330 n.12 (observing that, "[w]hen Congress makes findings on essentially factual issues such as these, those findings are of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue").

Moreover, this Court has specifically deferred to congressional findings on issues of medical or scientific judgment. In *Jones* v. *United States*, 463 U.S. 354 (1983), in rejecting a due process challenge to a statutory scheme providing for the indefinite civil commit-

ment of certain individuals acquitted by reason of insanity, the Court deferred to a congressional finding that those individuals were likely to be dangerous. See *id.* at 365 n.13 (noting that "[t]he lesson we have drawn is not that government may not act in the face of * * * uncertainty [in psychiatric research], but rather that courts should pay particular deference to reasonable legislative judgments"). Similarly, in *Marshall* v. *United States*, 414 U.S. 417 (1974), in rejecting an equal protection challenge to a statute mandating incarceration rather than treatment for drug addicts with two prior felony convictions, the Court deferred to Congress's apparent determination that those addicts were less likely to be rehabilitated. *Id.* at 427 (reasoning that, "[w]hen Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation, even assuming, *arguendo*, that judges with more direct exposure to the problem might make wiser choices").

In *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), in rejecting a due process challenge to a statutory provision prohibiting reliance on negative X-rays in the denial of disability claims, the Court deferred to a congressional determination that such X-ray evidence was unreliable. See *id.* at 33-34 (observing that "the reliability of negative X-ray evidence was debated forcefully on both sides before the Congress"). Finally, in *Lambert* v. *Yellowley*, 272 U.S. 581 (1926), in rejecting a contention that physicians were constitutionally entitled to prescribe alcohol for patients for whom they believed it to be medically necessary, the Court deferred to an "implicit congressional finding" that alcohol had no medicinal uses, *id.* at 594-595, in the absence of a consensus to the *contrary*. See *id.* at 589-591 (recog-

nizing that "practicing physicians differ[ed] about the value" of using alcohol for medicinal purposes, but noting that the American Medical Association had declared that alcohol had no medicinal uses).

2. The court of appeals erroneously rejected the government's argument that Congress's findings concerning the medical necessity of partial-birth abortion were entitled to substantial deference, on the ground that the argument was "irrelevant to the case at hand." Pet. App. 15a. The court concluded that, under *Stenberg*, its review was "effectively limited to determining whether substantial evidence exists to support the medical necessity of partial-birth abortions without regard to the factual conclusions drawn from the record by the lower court (or, in this case, Congress)." *Id.* at 13a. Nothing in *Stenberg*, however, suggests that courts considering challenges to statutes regulating abortion (or a particular type of abortion procedure) should discount, let alone disregard altogether, congressional findings. Although the Court did note that "substantial medical authority support[ed] the proposition that banning a particular abortion procedure could endanger women's health," 530 U.S. at 938, it did so in a case in which there was no federal statute at issue—and in which there were no legislative findings relevant to the absence of a health exception. Accordingly, *Stenberg* had no occasion to discuss, let alone displace, this Court's decisions specifically addressing the weight to be given to congressional findings. To the extent that *Stenberg* could be said to have held that a statute regulating an abortion procedure requires a health exception upon a showing of "substantial medical authority" that such an exception is necessary, it at most established a rule of decision for cases in the *absence* of

congressional findings—not a rule of decision applicable even in the face of such findings.

The practical effect of the court of appeals' decision is to create an "abortion-only" exception to the rule articulated in *Turner II* that congressional findings bearing on the constitutionality of federal statutes are entitled to substantial deference. There is no suggestion to that effect in *Stenberg*, or in the Court's other cases involving either abortion or legislative factfinding. There is no basis, moreover, for according deference to congressional findings in cases involving free speech (*Turner II*), equal protection (*Rostker*), and procedural due process (*Walters*), but not in cases involving access to an abortion. And there is no basis for according deference to congressional findings on questions regarding drug addiction (*Marshall*), diagnostic techniques (*Turner Elkhorn*), and the medicinal uses of alcohol (*Lambert*), but not to findings on questions concerning the medical necessity of a particular abortion procedure. In the abortion context, as in other contexts, deference to Congress's findings is appropriate (where those findings are supported by substantial evidence) out of respect for Congress's superior factfinding capacity and its role as the legislative branch. See *Turner II*, 520 U.S. at 195.

In addition, the court of appeals erroneously concluded that Congress was precluded from making findings concerning the medical necessity of partial-birth abortion by the findings made in *Stenberg*, on the ground that the medical necessity of partial-birth abortion was an issue of "legislative" rather than "adjudicative" fact. Pet. App. 16a-20a. The court reasoned that Congress was not "free to disagree with the Supreme Court's determination [concerning the medical necessity of partial-birth abortion] because the Court's con-

clusions are final on matters of constitutional law." *Id.* at 18a. The court of appeals' analysis is flawed. The facts that formed the basis for a constitutional decision of this Court are neither constitutional rules nor somehow forever beyond the ken of Congress's factfinding authority. While Congress plainly cannot supersede constitutional *rules* announced by this Court, the medical necessity of partial-birth abortion is merely a "factual question" relevant to determining the *applicability* of the relevant constitutional rule. *Stenberg*, 530 U.S. at 931-932. Nor is it clear how the court of appeals' distinction between legislative and adjudicative facts alters the analysis. Even assuming that the medical necessity of partial-birth abortion is accurately labeled a "legislative" fact, it does not follow that this Court's determination on a question of "legislative" fact forecloses Congress from subsequently making contrary findings on the same question, on the basis of a different (and fuller) evidentiary record. After all, the very concept of "legislative" facts is premised on the assumption that such facts are ones that the *legislature* is uniquely well-equipped to find, in light of the legislature's superior capacity to "amass and evaluate the vast amounts of data" relevant to such factfinding. *Turner II*, 520 U.S. at 195 (citations omitted).

In *Stenberg*, moreover, the Court did not purport to make any determinations of "legislative" fact concerning the medical necessity of partial-birth abortion; instead, the Court repeatedly relied on the factual findings (and evidence) presented to the district court. See, *e.g.*, 530 U.S. at 931-932 (noting that "the parties strongly contested this factual question [*i.e.*, the medical necessity of partial-birth abortion] in the trial court below[,] and the findings and evidence support [the plaintiff]"); *id.* at 934 (asserting that "the record re-

sponds to Nebraska's * * * medically based arguments"); *id.* at 936-937 (citing various "medically related evidentiary circumstances," including "a District Court finding that D&X significantly obviates health risks in certain circumstances" and "a highly plausible record-based explanation of why that might be so"). The district court, in turn, citing "the absence of specific evidence about other doctors and patients," made clear that it was considering the partial-birth abortion procedure only as it was performed by the particular plaintiff at issue. *Carhart* v. *Stenberg*, 11 F. Supp. 2d 1099, 1120, 1126 (D. Neb. 1998). The necessary implication of the court of appeals' decision, therefore, is that the factual findings of the *district court* in *Stenberg*, based on the particular circumstances of the case before it, precluded Congress from making contrary findings on the same topic. Nothing in this Court's jurisprudence concerning deference to congressional findings mandates such a peculiar result. The court of appeals therefore erred by refusing to accord deference to Congress's findings, including its ultimate finding that "partial-birth abortion is never medically indicated to preserve the health of the mother."

B. The Court Of Appeals Erred By Holding That An Abortion Statute That Lacked A Health Exception Was Facially Invalid If The Regulated Procedure Was Necessary To Preserve The Health Of The Mother "In Some Instances"

1. Under the standard articulated in *United States* v. *Salerno*, 481 U.S. 739 (1987), a plaintiff bringing a facial challenge to a statute (and thus seeking to render it void in all its applications) must demonstrate that "no set of circumstances exists under which the Act would be valid." *Id.* at 745. This Court has never expressly

held that a different standard applies in a facial challenge to a statute regulating abortion. In *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992), the Court, in invalidating on its face a statutory provision requiring a married woman to notify her husband before having an abortion, did note that, in a "large fraction" of cases, that statute would impose an undue burden on an affected woman's access to an abortion. *Id.* at 895. At most, however, the Court applied a distinct "large fraction" standard for facial challenges to spousal-notification provisions, and did not purport to alter the standard for facial challenges more broadly. Likewise, although the Court in *Stenberg* applied *Casey*'s "undue burden" test on the merits, it did not purport to apply the distinct "large fraction" standard for facial challenges, nor did it purport to alter the standard for facial challenges in any respect.

2. Even assuming that the appropriate standard for a facial challenge to any statute regulating abortion is that the plaintiff must show that the statute is invalid in a "large fraction" of its applications, the court of appeals' decision is inconsistent with that standard. The court of appeals reasoned that, in an earlier case involving a facial challenge to an abortion statute, it had rejected *Salerno*'s "no set of circumstances" standard and instead applied the *Casey* standard. Pet. App. 6a. In this case, however, the court of appeals ultimately decided to apply "the test from *Stenberg*," *ibid.*, and later stated that *Stenberg* held that a statute that regulated an abortion procedure but did not contain a health exception was facially invalid when "'substantial medical authority' supports the medical necessity of [the] procedure *in some instances*," *id.* at 10a (emphasis added). The court of appeals therefore seemingly suggested that a plaintiff could successfully bring a facial

challenge to an abortion statute that does not contain a health exception if the plaintiff merely demonstrates that the statute would impose a health risk "in some instances." That standard presumably would lead to the invalidation of a statute that was constitutional in a large fraction of its applications, based on the possibility of a few unconstitutional applications.

In *Stenberg*, however, this Court did not purport to adopt such a novel standard for facial challenges. To the contrary, the Court repeatedly noted that the critical question was whether the statute being challenged would pose "*significant* health risks for women." 530 U.S. at 932 (emphasis added); see *id.* at 931, 938 (same). That formulation appeared to state the constitutional test on the merits, as opposed to a standard for facial invalidation. Even if it is construed as the latter, however, it can readily be reconciled with *Casey*'s "large fraction" test if the plaintiff must demonstrate that the statute would pose a substantial health risk to (and therefore impose an "undue burden" on) at least a "significant" number of women affected by the statute. If the court of appeals' contrary reading of *Stenberg* were correct, it would suggest that the Court's opinion in *Stenberg* was inconsistent with the controlling opinion in *Casey*, to the extent that *Casey* required that a plaintiff bringing a facial challenge to an abortion statute demonstrate that the statute would be unconstitutional (*i.e.*, impose an "undue burden") in a "large fraction" of cases, not merely "in some instances." 505 U.S. at 895. Such a reading would belie the Court's assertion in *Stenberg* that the requirement of a health exception constituted "simply a straightforward application of [*Casey*'s] holding." 530 U.S. at 938. And it would seemingly turn the *Salerno* standard on its head, to the extent that it would allow a plaintiff to obtain facial in-

validation of a statute by showing the mere possibility of a few unconstitutional applications, rather than demonstrating that the statute is unconstitutional in all of its applications—a virtual presumption of facial invalidity that this Court has roundly rejected even in the unique context of the First Amendment. See *New York* v. *Ferber*, 458 U.S. 747, 772 (1982) ("We have never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application.") (quoting *Broadrick* v. *Oklahoma*, 413 U.S. 601, 630 (1973) (Brennan, J., dissenting)); see generally *Salerno*, 481 U.S. at 745 (noting that "[t]he fact that [a statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid").

The court of appeals' application of the incorrect standard for facial challenges was critical in this case, because respondents failed to show that the Act's prohibition of partial-birth abortion would affect the health of the mother in more than a small fraction of the cases to which the Act applies. Even putting to one side the court of appeals' failure to defer to Congress's factual findings as *Turner II* requires, therefore, the court of appeals erred by holding that the Act was facially invalid because its lack of a health exception could be problematic "in some instances."[2]

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[2] The district court in this case held that the Act was also facially invalid because it reached certain standard D&E, as well as D&X, abortions and therefore imposed an undue burden on a woman's access to an abortion. Pet. App. 515a-521a. The court of appeals did not reach the question whether the Act was facially invalid on that alternative ground. *Id.* at 25a. If this Court were to grant certiorari, and assuming that respondents contend that the court of appeals' decision should be affirmed on that alternative ground, it would be appropriate for this Court to consider that is-

3. Although related questions are before the Court in *Ayotte* v. *Planned Parenthood of Northern New England*, No. 04-1144 (to be argued Nov. 30, 2005), this Court should grant certiorari in this case outright, rather than holding the petition pending the disposition of *Ayotte*. That case concerns the constitutionality of New Hampshire's Parental Notification Prior to Abortion Act, which, with certain exceptions, prohibits a physician from performing an abortion on an unemancipated minor until 48 hours after written notice is delivered to a parent or guardian. Although the New Hampshire statute contains a judicial-bypass provision, it contains no express exception for the health of the mother. *Ayotte* presents the questions whether a plaintiff facially challenging an abortion statute must show that the statute is invalid in all or a large fraction of its applications and whether an abortion statute must always contain an express health exception. As the government noted in its brief as *amicus curiae* in *Ayotte*, the Court's resolution of those questions may be relevant to the question presented here.

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sue as well, despite the court of appeals' failure to reach it. In *Stenberg*, the court of appeals held that the statute at issue was invalid only on the ground that it imposed an undue burden because it covered standard D&E, as well as D&X, abortions, see *Carhart* v. *Stenberg*, 192 F.3d 1142, 1146 n.4, 1150-1151 (8th Cir. 1999), but this Court nevertheless addressed both the question whether the statute was invalid because it lacked a health exception and the question whether the statute was invalid because it reached beyond D&X abortions. As in *Stenberg*, it would be appropriate for the Court to address both issues in this case, in order to resolve the principal issues concerning the constitutionality of the Act in a single decision rather than piecemeal. Unlike the statute at issue in *Stenberg*, the statute at issue here imposes no undue burden because it precisely defines the phrase "partial-birth abortion" and contains multiple intent requirements.

Nevertheless, the Court should not delay the resolution of this case on the merits by holding this case pending the resolution of *Ayotte*. This case involves the constitutionality of a significant Act of Congress that has been invalidated and permanently enjoined by the lower courts. Granting certiorari now would enable this Court definitively to address the constitutionality of the Act and, if the Court were to uphold the Act, to allow it to take effect as expeditiously as possible. On the other hand, holding this case for *Ayotte*, and then either granting plenary review or vacating the decision below and remanding the case to the court of appeals, would significantly delay the ultimate resolution of the Act's constitutionality.

Moreover, both this case and *Ayotte* would likely benefit from consideration and decision in the same Term. In that event, the Court could fully consider ramifications of any decision in *Ayotte* on the appropriate standard for facial challenges to abortion statutes and on the necessity for a health exception, and also consider whether differences between the parental notification and partial-birth abortion contexts counsel in favor of different, context-specific approaches. In addition, this case presents questions concerning deference to congressional findings that do not arise in *Ayotte*. If this Court defers to Congress's finding that a health exception is never medically necessary, it would uphold the constitutionality of the Act, without regard to the standard for facial challenges at issue in *Ayotte*.

This Court often grants review in more than one case (whether simultaneously or in close succession) in order more fully to consider particular constitutional issues, even in situations involving much greater overlap. See, *e.g.*, *Rumsfeld* v. *Padilla*, cert. granted, 540 U.S. 1173 (Feb. 20, 2004) (detention of enemy combatant); *Hamdi*

v. *Rumsfeld*, cert. granted, 540 U.S. 1099 (Jan. 9, 2004) (same); *Missouri* v. *Seibert*, cert. granted, 538 U.S. 1031 (May 19, 2003) (failure to give warnings prescribed by *Miranda* v. *Arizona*, 384 U.S. 436 (1966)); *United States* v. *Patane*, cert. granted, 538 U.S. 976 (Apr. 21, 2003) (same); *Fellers* v. *United States*, cert. granted, 538 U.S. 905 (Mar. 10, 2003) (same); *Strickland* v. *Washington*, cert. granted, 462 U.S. 1105 (June 6, 1983) (ineffective assistance of counsel); *United States* v. *Cronic*, cert. granted, 459 U.S. 1199 (Feb. 22, 1983) (same). Accordingly, there is no valid reason to delay plenary consideration of this case, in which an Act of Congress has been struck down as unconstitutional.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2005