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MEMORANDUM

TO: To Whom It May Concern
FROM: Mary Spaulding Balch, JD, Director, State Legislation Department
DATE: July 2013
RE: Constitutionality of the Model Pain-Capable Unborn Child Protection Act

The purpose of this memorandum is to explain why National Right to Life's Model Pain-Capable Unborn Child Protection Act, versions of which at this writing have been adopted by nine states (Alabama, Arkansas, Georgia, Idaho, Kansas, Louisiana, Nebraska, North Dakota, and Oklahoma), stands a good chance of being upheld as constitutional by a majority of the United States Supreme Court.

Succinctly:

1) **The critical question is whether five Justices will agree that states may successfully assert a compelling state interest in protecting the lives of unborn children from the stage at which there is substantial medical evidence that they are capable of feeling pain.** The states enacting this legislation are *not* asking the Supreme Court to overturn or replace its holding, first articulated in *Roe v. Wade* and reaffirmed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, that the state interest in unborn human life, which is "legitimate" throughout pregnancy, becomes "compelling" at viability. Rather, they are asking the Court to recognize a *separate and independent* compelling state interest in unborn human life that exists once the unborn child is capable of feeling pain. Justice Kennedy, widely recognized as the "swing vote" on abortion cases, has made clear in the Court's partial birth abortion cases that the interests states may assert are not limited to those previously recognized in prior abortion cases.

2) **States may make judgments based on substantial medical evidence even when there is medical dispute.** Whether unborn children can experience pain before nerves fully connect the thalamus to the cortex depends on whether the cortex is necessary to consciousness and the ability to experience pain. That is a question disputed among physicians and scientists, just as there was a dispute over whether partial birth abortions are ever safer means of abortion than alternative procedures. However, in the second partial birth abortion case (*Gonzales v. Carhart*), the Supreme Court made clear that the existence of such disputes does not prevent a state from acting based on its evaluation of which position is more accurate, as long as substantial evidence supports the state's position.

Detailed support for these points, as well as for narrowing the "health" exception, for employing an objective rather than a subjective standard for determining whether it is met, and

for requiring that abortions permitted under the health exception be performed in the manner most likely to produce a live birth, follow.

I. Rather Than Asking the Court to Overturn Precedent, the Pain-Capable Unborn Child Protection Act Would Present a Question of First Impression: Whether There Is a Compelling Interest in Protecting Unborn Children Who Are Capable of Experiencing Pain From Abortion– Separate and Apart from the Previously Recognized Compelling State Interest in Viable Unborn Children

Pro-abortion critics of the Pain-Capable Unborn Child Protection Act note that in *Planned Parenthood v. Casey*, 505 US 833, 869-70 (1992), the Supreme Court reiterated the acknowledgment in *Roe v. Wade*, 410 U.S. 113, (1973) of a compelling state interest in protecting the lives of unborn children only in the context of, and after, viability. However, Justice Anthony Kennedy – widely understood to be the decisive fifth vote in abortion cases – has written:

> [In *Casey*] We held it was inappropriate for the Judicial Branch to provide an exhaustive list of state interests implicated by abortion. 505 U.S. at 877. *Casey* is premised on the States having an important constitutional role in defining their interests in the abortion debate. It is only with this principle in mind that Nebraska's interests can be given proper weight. . . . States also have an interest in forbidding medical procedures which, in the State's reasonable determination, might cause the medical profession or society as a whole to become insensitive, even disdainful, to life, including life in the human fetus. . . . A State may take measures to ensure the medical profession and its members are viewed as healers, sustained by a compassionate and rigorous ethic and cognizant of the dignity and value of human life, even life which cannot survive without the assistance of others.
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> *Stenberg v. Carhart*, 350 U.S. 914, 958-59 (2000)(Kennedy, J., dissenting)[1].

The Supreme Court has never previously had occasion to consider whether the fact that after a certain stage of development the unborn child is capable of experiencing pain makes the State's interest in unborn life compelling after that point. **States' assertion of such an interest make this a case of first impression.** Recognizing a compelling state interest in the unborn child who is capable of experiencing pain would *not* require the Court to overturn, but only to supplement, its prior recognition of a compelling state interest in the unborn child after viability.[2]

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[1]While Justice Kennedy was in the minority in *Stenberg*, which struck down Nebraska's Partial Birth Abortion Ban Act, seven years later, with a differently composed Court, he wrote for the majority in *Gonzales v. Carhart*, 550 U.S. 124 (2007), the decision upholding the federal Partial Birth Abortion Ban Act.

[2]The federal Partial Birth Abortion Ban Act was upheld although it made no distinction based on viability: "The [Partial Birth Abortion Ban] Act does apply both previability and postviability because, by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb." *Gonzales*, 550

It is critically important to understand that the interest asserted here is *not* just one in diminishing or eliminating unborn children's pain. Rather, it is that the fact of the unborn child's having the capacity to experience pain is a significant developmental milepost making the unborn child at that point sufficiently akin to an infant or older child to trigger a compelling state interest.[3]

In *Casey*, 505 U.S. at 869, the Joint Opinion by Justices O'Connor, Souter, and Kennedy, after acknowledging "a criticism that always inheres when the Court draws a specific rule from what in the Constitution is but a general standard" nevertheless concluded that "[l]iberty must not be extinguished for want of a line that is clear." After citing *stare decisis* in support of viability "so that before that time the woman has a right to choose to terminate her pregnancy" the opinion said "there is no line other than viability which is more workable." *Id*. at 870. "In some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child." *Id.*

The stage of development at which the unborn child is capable of experiencing pain – not presented as a potential basis for a compelling state interest in *Casey* or in any other Supreme Court case dealing with abortion – is at least as "clear" and "workable" as viability. While viability is predominately an extrinsic measurement of the capacity of medical science to sustain the life of a premature infant, the capacity to feel pain is an intrinsic, innate feature of the unborn child at a particular stage of development. Moreover, it may as equally be said of this stage as of viability that "a woman who fails to act before [it] has consented to the State's intervention on behalf of the developing child."

II. When Substantial Medical Evidence Supports a Legislative Finding, The Fact That Some Dispute It Does Not Invalidate Legislation Based on the Finding.

While some dispute the capacity of the 20-week unborn child to experience pain, Justice Kennedy's opinion for the Court in *Gonzales* makes clear that medical unanimity is not required in order for legislatures to make and act on determinations of medical fact. Kennedy's majority opinion acknowledged that:

> There is documented medical disagreement whether the [Partial Birth Abortion Ban] Act's prohibition would ever impose significant health risks on women. ... The question becomes whether the Act can stand when this medical uncertainty persists. The Court's precedents instruct that the Act can survive this facial

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U.S. at 147. Indeed, in dissent Justice Ginsburg complained that the Court's ruling "blurs the line, firmly drawn in *Casey,* between previability and postviability abortions." *Id*. at 170 (Ginsburg, J., dissenting).

[3]A claim that anesthetization of the unborn child before the abortion would be a more narrowly drawn way of vindicating the state's interest in preventing unborn pain than banning abortion of the pain-capable child misunderstands the state interest at stake. The states are not asserting merely an interest in preventing unborn children from experiencing pain during an abortion; they are asserting that the ability of the unborn child to feel pain raises the state's interest in the life of the unborn, recognized as "legitimate" throughout pregnancy, to the level of a "compelling" interest.

> attack. The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty. See . . . *Marshall v. United States*, 414 U. S. 417, 427 (1974) ('When Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad.').[Other citations omitted.] . . . The law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community. . . . Medical uncertainly does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts.
> *Gonzales*, 550 U.S. at 162-64.

This holding was foreshadowed by Justice Kennedy's dissent in *Stenberg v. Carhart*, 530 U.S. 914, 964-70 (2000), in which the then-majority struck down Nebraska's Partial Birth Abortion Ban Act seven years before the *Gonzales* Court upheld a similar Congressional enactment. Justice Kennedy noted:

> [T]he Court holds the ban on the D & X procedure fails because it does not include an exception permitting an abortionist to perform a D & X whenever he believes it will best preserve the health of the woman. ... [T]he Court awards each physician a veto power of the State's judgment that the procedures should not be performed. ... Requiring Nebraska to defer to Dr. Carhart's judgment is no different than forbidding Nebraska from enacting a ban at all; for it is now Dr. Leroy Carhart who sets abortion policy for the State of Nebraska, not the legislature or the people. *Casey* does not give precedence to the views of a single physician or a group of physicians regarding the relative safety of a particular procedure.
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> . . . .
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> . . . . The question here is whether there was substantial and objective medical evidence to demonstrate the State had considerable support for its conclusion . . . . In other contexts, the State is entitled to make judgments where high moral authority is in disagreement.[4]

Justice Kennedy went on to cite the decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) upholding compulsory vaccination over the claim by "members of the medical profession that the vaccination was of no value and, in fact, was harmful." He noted that the "*Jacobson* Court quoted with approval a recent state-court decision which observed, in words having full application today:

> The fact that the belief is not universal [in the medical community] is not controlling, for there is scarcely any belief that is accepted by everyone. The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the legislature has the right to pass laws which,

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[4]Justice Kennedy acknowledged that pre-*Casey* abortion cases had indeed subjected State abortion regulations to veto power by the abortion doctor but emphasized that approach had been repudiated by *Casey*. *Gonzales*, 530 U.S. at 968-69 (Kennedy, J., dissenting).

> according to common belief of the people, are adapted to [address medical matters]."
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> *Stenberg*, 530 U.S. at 970-72 (Kennedy, J., dissenting), citing *Jacobson*, 197 U.S. at 35 (quoting *Viemeister v. White*, 179 N.Y. 235, 241, 72 N.E. 97, 99 (1904)).

III. The Supreme Court Is Likely to Be Sympathetic to Recognition of a Compelling State Interest Based on the Ability of Unborn Children to Feel Pain

When Justice Kennedy cast the deciding vote to uphold the federal Partial Birth Abortion Act and authored the majority opinion in *Gonzales*, he wrote:

> Respect for human life finds an ultimate expression in the bond of love the mother has for her child. . . . Whether to have an abortion requires a difficult and painful moral decision. . . .While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. ... Severe depression and loss of esteem can follow.
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> In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used, confining themselves to the required statement of risks the procedure entails. . . .
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> It is, however, precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State. . . . It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.
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> *Id.* at 159-60 (Citations and internal quotations omitted.)

What Justice Kennedy for the Court stated to be true with regard to partial birth abortion, its impact on the mother, and the State's interest may equally be applied to those abortions performed when the unborn child is capable of experiencing, and does experience, pain from the abortion technique. "Anguished grief" and "profound sorrow" may well be the consequence when a mother learns after the event that "the way in which the fetus [was] killed" entailed substantial pain for "a child assuming the human form."

Justice Kennedy himself has described the gruesome nature of the most common abortion technique used in the second trimester, dilation and evacuation or D & E, in terms that make clear that it would be extremely painful: "[F]riction causes the fetus to tear apart. For example, a leg might be ripped off the fetus . . . ." *Id.* at 135. Contrasting the partial birth or "intact D&E" abortion, he wrote, "In an intact D&E procedure the doctor extracts the fetus in a way conducive to pulling out its entire body, instead of ripping it apart."*Id*. at 137; see also *id*. at 152. "No one would dispute," he said, "that, for many, D & E is a procedure itself laden with the power to devalue human life." *Id.* at 158. Justice Kennedy used even more graphic descriptions of D&E abortions in his dissent in Stenberg v. Carhart, 350 U.S. 914, 958-59 (Kennedy, J., dissenting), stating, "The fetus, in many cases, dies just as a human adult or child would: It bleeds to death as it is torn limb from limb."

IV. Constitutionality of Limiting Health Exception to Need To Avert Death or Serious Risk of Substantial and Irreversible Physical Impairment of a Major Bodily Function, Not Including Psychological or Emotional Conditions

In *Roe v. Wade* and its companion case *Doe v. Bolton*, the Supreme Court held that even after viability abortions must be permitted for the mother's "health" – and defined health very broadly. ("[T]he medical judgment may be exercised in the light of all factors–physical, emotional, psychological, familial, and the woman's age–relevant to the well-being of the patient. All these factors may relate to health.")[5] If such an exception were permitted for abortions once the unborn child is capable of feeling pain, the Pain-Capable Unborn Child Protection Act would be unlikely to prevent any abortion at any stage of pregnancy that an abortion doctor was willing to perform. Instead, the law includes a modified version of language upheld in *Casey*.

The *Casey* decision affirmed an appellate holding deeming acceptable the phrase "to avert the woman's death or to avert a serious risk of substantial and irreversible impairment of a major bodily function**."**[6] The Pain-Capable Unborn Child Protection Act amends this provision to exclude "mental health" abortions by inserting "physical" before "impairment," and by explicitly excluding psychological or emotional conditions or a threat by the mother to commit suicide or to mutilate herself.

Casey stated that if the plaintiffs' position that the challenged statute's medical emergency exception did not cover "some significant health risks" were correct, "we would be required to invalidate the restrictive operation of the provision, for the essential holding of *Roe* forbids a State to interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health."[7] However, the Court upheld the exception after citing the Court of Appeals' construction of the medical emergency language as assuring "that compliance with its abortion regulations would not in any way pose a significant threat to the life or health of the woman,"[8] stating, "as construed by the Court of Appeals, the medical emergency definition imposes no undue burden on a woman's abortion right."

Dissenting in *Stenberg*, 530 U.S. at 964-70, the case that struck down Nebraska's Partial Birth Abortion Ban Act seven years before the *Gonzales* Court upheld a similar Congressional enactment, Justice Kennedy stated, "The standard of medical practice cannot depend on the individual views of Dr. Carhart and his supporters. The question here is whether there was substantial and objective medical evidence to demonstrate the State had considerable support for its conclusion that the ban created a substantial risk to no woman's health."[9]

To uphold the narrowed health exception, states can rely on evidence from medical experts that modern medicine can successfully treat complications of pregnancy that fall short of the physical conditions specified in the proposed bill without resort to abortion, so that the states

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[5] Doe v. Bolton, 410 U.S. 179, 191-92 (1973), *citing* United States v. Vuitch, 402 U.S. 62, 71-72 (1971).

[6] *Casey*, 505 U.S. at 879-80.

[7] *Id*. at 880.

[8] Planned Parenthood of Southeastern Pennsylvania v. Casey, 947 F. 2d 682, 701 (3 rd Cir. 1991).

[9] Stenberg v. Carhart, 350 U.S. 914, 964-70 (2000)(Kennedy, J., dissenting)

can constitutionally judge that no broader exception is needed to prevent significant risks to the mother's health.

V. The Supreme Court is Likely to Uphold an "Objective" Rather Than "Subjective" Standard for Determining Whether the Health Exception Applies

Earlier abortion cases required that abortion doctors be permitted subjectively to decide whether a health exception applies; in contrast, the Pain Capable Unborn Child Protection Act holds them to an objective malpractice-type standard: the determination must be in accord with "reasonable medical judgment."[10] Even before *Gonzales*, a law review note, drawing heavily on a Seventh Circuit decision, demonstrated the constitutionality of an objective standard:[11]

> Since an emergency exception that judges the physician subjectively is equivalent to "no ban at all," n159 [*Carhart, 530 U.S. at 972* (Kennedy, J., dissenting)] the emergency exception in an abortion statute may be written to judge the physician's determination objectively. An objective standard, though based on medical standards instead of the physician's personal beliefs, does not present one right solution for each situation and bar all other possible actions. According to the Seventh Circuit in Karlin v. Foust, n160 [*188 F.3d 446 (7th Cir. 1999)*] "in any given medical situation there is likely to be a number of reasonable medical options and disagreement between doctors over the appropriate course of action" and "the doctor who chooses [any of the] reasonable options will have acted within her reasonable medical judgment." n161[*Id. at 464*.] The challenged law in Karlin was a Wisconsin abortion informed consent statute that required a twenty-four hour waiting period before a woman could have an abortion. n162 [*Id. at 454.*] The waiting period could be waived if there was a medical emergency. n163 [*Id. at 455.*] Unlike the Casey definition of a medical emergency, Wisconsin required "medical indications supporting the physician's "reasonable medical judgment'" for a medical emergency. n164 [*Id. at 456* (quoting *Wis. Stat. 253.10(3)(f)*) (1996)).]
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> The Seventh Circuit began its analysis by declaring that an objective standard per se has never been held unconstitutional. n165 [*Id. at 460-63.*]

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[10] "Reasonable medical judgment" is defined by the Pain Capable Unborn Child Protection Act as "a medical judgment that would be made by a reasonably prudent physician, knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved."

[11] Andrew Willis, *Note: The Emergency Exception in Parental Laws and the Necessity of Post-Emergency Notifications*, 4 Ave Maria L. Rev. 171, 195-97 (2006).

> Several opinions discussed the objective standard in dicta, but not as part of their holdings. n166 [*Id. at 461 n.10.*] The court indicated "the incorporation of an objective element could pose some hazards," but the objective standard in itself is not enough to render a statute unconstitutional. n167[*Id. at 463.*] This is because "an abortion statute that imposes liability on a physician for erroneous medical determinations is void for vagueness only if it leaves physicians uncertain as to the relevant legal standard under which their medical determinations will be judged." n168 [Id.] Under the Wisconsin statute, there was no uncertainty as to the legal standard in effect; it was clear that physicians were held to an objective standard. n169 [*Id. at 464.*]
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> The objective standard in Karlin was also challenged for not providing "fair warning" to physicians as to what behavior was objectively reasonable. n170 [Id.] However, the Karlin court properly asserted that this is the same standard that physicians are held to for every other medical decision. n171 [Id.] Physicians must routinely make decisions in emergency situations "knowing that if they make an objectively erroneous determination they may be subject to civil liability," n172 [*Id. at 465.*] yet this has not halted the practice of medicine due to a fear of unexpected liability from an objective standard.
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> Based on Karlin, an objective standard provides a clear legal guide. A physician would be held to the same objective standard of care that guides every medical decision the physician made. Thus, an objective standard may be used to determine if there is a medical condition that necessitates an emergency abortion contrary to state law.

There is very good reason to believe that Justice Kennedy would reject a constitutional objection that claimed a subjective, rather than an objective, medical standard is mandated. Dissenting in *Stenberg*, 530 U.S. at 964-70, Justice Kennedy noted:

> [T]he Court holds the ban on the D & X procedure fails because it does not include an exception permitting an abortionist to perform a D & X whenever he believe it will best preserve the health of the woman. ... [T]he Court awards each physician a veto power of the State's judgment that the procedures should not be performed. ... Requiring Nebraska to defer to Dr. Carhart's judgment is no different than forbidding Nebraska from enacting a ban at all; for it is now Dr. Leroy Carhart who sets abortion policy for the State of Nebraska, not the legislature or the people. *Casey* does not give precedence to the views of a single physician or a group of physicians regarding the relative safety of a particular procedure.[12]

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[12]Justice Kennedy acknowledged that pre-*Casey* abortion cases had indeed subjected State abortion regulations to veto power by the abortion doctor but emphasized that approach had been repudiated by *Casey*. *Stenberg*, 530 U.S. at 968-69 (Kennedy, J., dissenting).

In *Gonzales*, 530 U.S. at 163-64, this time writing for the Court's majority, Justice Kennedy made the same point: " The law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community."

VI. Constitutionality of Requirement to Use Abortion Method Most Likely to Produce a Live Birth

The Pain-Capable Unborn Child Protection Act requires that, when the narrowed health exception applies so that an abortion is permitted after the stage at which the unborn child is capable of feeling pain, the abortion doctor must employ the method of abortion most likely to facilitate a live birth so long as that does not pose a greater risk of the pregnant woman's death or substantial and irreversible physical impairment of a major bodily organ. It seems quite clear that states may do this under *Gonzales*:

> The . . . premise, that the State, from the inception of the pregnancy, maintains its own regulatory interest in protecting the life of the fetus that may become a child, cannot be set at naught by interpreting *Casey*'s requirement of a health exception so it becomes tantamount to allowing a doctor to choose the abortion method he or she might prefer. Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.
> 550 U.S. at 158.

Kennedy's majority opinion emphasized the importance of the State interest in developing unborn life:

> Whatever one's views concerning the *Casey* joint opinion, it is evident a premise central to its conclusion–that the government has a legitimate and substantial interest in preserving and promoting fetal life– would be repudiated were the Court now to [hold the partial birth abortion ban unconstitutional]. . . . Though all three holdings [of *Casey*] are implicated . . ., it is the third that requires the most extended discussion; for we must determine whether the Act furthers the legitimate interest of the Government in protecting the life of the fetus that may become a child.
> *Id.* at 145, 146.

VI. Conclusion

While no one can conclusively predict how the majority of the Supreme Court, and in particular Justice Anthony Kennedy, would rule on the constitutionality of the Pain-Capable Unborn Child Protection Act, the evolving development of the High Court's abortion litigation,

and particularly its decision in *Gonzales v. Carhart*, suggests that there might well be receptivity to a well-documented effort to demonstrate the substantial medical evidence for the reality of unborn pain and, based on that, to a state's preventing abortions after the point when the unborn child is capable of experiencing it.[13]

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[13]A clearly worried Justice Ruth Bader Ginsberg, writing for the four dissenting Justices in the *Gonzales* case (Stevens, Souter, Breyer and herself) noted,

> Though today's opinion does not go so far as to discard *Roe* or *Casey*, the Court, differently composed than it was when we last considered a restrictive abortion regulation, is hardly faithful to our earlier invocations of "the rule of law" and the "principles of *stare decisis*." . . .
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> . . . In candor, the [Partial Birth Abortion Ban] Act, and the Court's defense of it, cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court . . . .

550 U.S. at 191 (Ginsberg, J., dissenting).

> The Court's hostility to the right *Roe* and *Casey* secured is not concealed. Throughout, the opinion refers to obstetrician-gynecologists and surgeons who perform abortions not by the titles of their medical specialties but by the pejorative label "abortion doctor." A fetus is described as an "unborn child," and as a "baby"; second-trimester, previability abortions are referred to as "late-term"; and the reasoned medical judgments of highly trained doctors are dismissed as "preferences" motivated by "mere convenience." Instead of the heightened scrutiny we have previously applied, the Court determines that a "rational" ground is enough to uphold the Act. And, most troubling, *Casey*'s principles, confirming the continuing vitality of "the essential holding of *Roe*," are merely "assume[d]" for the moment, rather than "retained" or "reaffirmed".

Id. at 186-87 (internal citations omitted)(Ginsberg, J., dissenting).