No. 05-1382

In the Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

v.

PLANNED PARENTHOOD FEDERATION
OF AMERICA, INC., ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

PAUL D. CLEMENT
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

GREGORY G. GARRE
Deputy Solicitor General

GREGORY G. KATSAS
Deputy Assistant Attorney General

KANNON K. SHANMUGAM
Assistant to the Solicitor General

MARLEIGH D. DOVER
CATHERINE Y. HANCOCK
TEAL LUTHY MILLER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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 Planned Parenthood Federation of America, Inc.; Planned Parenthood Golden Gate; and the City and County of San Francisco.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case:

Constitution and statutes:

In the Supreme Court of the United States

No. 05-1382

ALBERTO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

v.

PLANNED PARENTHOOD FEDERATION
OF AMERICA, INC., ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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 Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-54a) is reported at 435 F.3d 1163. The order of the district court (Pet. App. 55a-218a) is reported at 320 F. Supp. 2d 957.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case presents a facial challenge to the constitutionality of the federal 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). On February 21, 2006, the Court granted certiorari in *Gonzales* v. *Carhart*, No. 05-380, to resolve the constitutionality of the same Act. This petition for certiorari therefore should be held pending the decision in *Carhart* and disposed of accordingly.

1. The factual background to Congress's enactment of the Act is set forth in greater detail in the statement of the government's petition for certiorari in *Carhart*. 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 which 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. After years of hearings and debates, Congress passed, and the President signed, the Partial-Birth Abortion Ban Act of 2003. In drafting the Act, Congress deliberately sought to remedy the deficiencies identified by this Court in the state partial-birth abortion statute that the Court invalidated in *Stenberg* v. *Carhart*, 530 U.S. 914 (2000).

First, the federal Act contains a more precise definition of the phrase "partial-birth abortion" than the stat-

ute at issue in *Stenberg*. 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.

Act § 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 statute at issue in *Stenberg*, the Act includes an exception for any 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," Act § 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 abortion 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.

2. Respondents brought suit against the Attorney General, seeking a declaration that the Act is unconstitutional on its face and a permanent injunction against enforcement of the Act. Respondents contended that the Act was facially invalid under the Fifth Amendment 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; and (3) it was unconstitutionally vague in various respects.

After a bench trial, the district court granted judgment to respondents and entered a permanent injunction. Pet. App. 55a-218a. The district court agreed with respondents that the Act was facially invalid on all three asserted grounds. Most significantly, the court held that the Act was facially invalid because it lacked a health exception. *Id.* at 96a-217a. The court rejected the government's argument that Congress's factual findings concerning the medical necessity of partial-birth abortion were entitled to deference on the ground that, under *Stenberg*, the relevant question was whether "significant medical authority supports the proposition that in some circumstances, [intact D&E] is the safest procedure." *Id.* at 214a (citation omitted). The court determined, *inter alia*, that "there continues to be a division of opinion among highly qualified experts regarding the

necessity or safety of intact D&E," *id.* at 215a, and on that basis refused to defer to Congress's ultimate finding that partial-birth abortion was never medically indicated to preserve the health of the mother, *id.* at 212a. The district court also held that the Act was facially invalid on the ground that it imposed an undue burden on a woman's access to an abortion by reaching "several second trimester abortion procedures in addition to intact D&E," *id.* at 85a; see *id.* at 73a-89a, and on the ground that it was unconstitutionally vague because it "fail[ed] to clearly define the prohibited medical procedures and d[id] not use terminology that is recognized in the medical community," *id.* at 89a; see *id.* at 89a-96a. The district court thus permanently enjoined the government from enforcing the Act against respondents and their employees. *Id.* at 218a.

3. The court of appeals affirmed. Pet. App. 1a-54a.

The court of appeals first held that the Act was facially invalid because it lacked a health exception. Pet. App. 14a-22a. The court construed this Court's decision in *Stenberg* as holding that "an abortion regulation that fails to contain a health exception is unconstitutional except when there is a medical consensus that no circumstance exists in which the procedure would be necessary to preserve a woman's health." *Id.* at 15a. The court of appeals acknowledged that Congress had made various factual findings concerning the necessity of a health exception. *Id.* at 17a. Nevertheless, it held that, "[u]nder even the most deferential level of review," Congress's *threshold* finding that "[a] moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion * * * is never medically necessary," Act § 2(1), 117 Stat. 1201, would not be entitled to deference. Pet. App. 19a. The court thus rejected the

government's submission that the relevant question was whether deference was owed to Congress's *ultimate* finding that "partial-birth abortion is never medically indicated to preserve the health of the mother," Act § 2(14)(O), 117 Stat. 1206. Pet. App. 21a-22a.

Although the court of appeals' ruling that "Congress's failure to include a health exception in the statute renders the Act unconstitutional," Pet. App. 22a, was a sufficient basis to affirm the district court, the court went on to hold that the Act was facially invalid on the alternative grounds that it imposed an undue burden on a woman's access to an abortion (because it reached some other types of abortions besides D&X abortions) and that it was unconstitutionally vague (because it contained ambiguous language that arguably reached some other types of abortions). *Id.* at 23a-40a.

The court of appeals further held that the Act should be enjoined in its entirety. Pet. App. 40a-54a. As a preliminary matter, the court hypothesized that, if the Act were facially invalid solely because it lacked a health exception, the court "might have been able to draft a more 'finely drawn' injunction." *Id.* at 41a. The court nevertheless reasoned, however, that a narrower injunction would not have been appropriate even in that instance, because such an injunction would be inconsistent with Congress's intent in promulgating the Act. *Ibid.* The court explained that, in its view, the Act's sponsors believed that the Act would have little force or effect if it contained a health exception. *Id.* at 44a.

The court of appeals concluded, however, that "we need not rest our decision as to the appropriate remedy solely on the omission of a health exception" because the Act was also unconstitutional on other grounds. Pet. App. 47a. To remedy all the asserted constitutional defi-

ciencies, the court contended, it would "in effect have to strike the principal substantive provision that is now in the Act," leaving a statute that was substantially different from (and narrower than) the one that Congress enacted. *Ibid.* The court of appeals therefore concluded that "the appropriate remedy" was "to enjoin the enforcement of the statute in its entirety." *Id.* at 54a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit held that the Partial-Birth Abortion Ban Act of 2003 was facially invalid and permanently enjoined the government from enforcing the Act. The Court has already recognized the importance of the issues raised by such a ruling by granting certiorari in *Gonzales* v. *Carhart*, No. 05-380, to resolve the constitutionality of the Act. The court of appeals in *Carhart* held that the Act was facially invalid because it lacked a health exception—the primary ground on which the Act was challenged below—and therefore did not address the other arguments raised to challenge the Act's constitutionality. As the government explained in its supplemental brief in support of certiorari in *Carhart* (at 8-9 & n.2), however, *Carhart* would permit the Court to address both the necessity of a health exception and the other principal challenges to the Act—including the alternative grounds on which the Ninth Circuit relied below—if the Court chose to do so, because the *Carhart* plaintiffs have preserved those arguments. Likewise, as explained in the government's supplemental brief in *Carhart* (at 9-10), the Court could exercise its discretion to reach the remedial question in *Carhart* if it holds the Act unconstitutional in any respect.

Because *Carhart* presents a suitable vehicle for the Court to resolve the primary facial challenges that have

been made to the constitutionality of the Act, and because the merits briefing is already underway in *Carhart* (the government's opening brief is due May 22, 2006), the petition for a writ of certiorari in this case should be held pending the Court's decision in *Carhart*, and then disposed of as appropriate in light of that decision. If the Court were to determine, however, that plenary review would be appropriate in this case as well as in *Carhart*, the cases should be consolidated for oral argument.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Gonzales* v. *Carhart*, No. 05-380, and then disposed of accordingly.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

GREGORY G. GARRE
Deputy Solicitor General

GREGORY G. KATSAS
Deputy Assistant Attorney General

KANNON K. SHANMUGAM
Assistant to the Solicitor General

MARLEIGH D. DOVER
CATHERINE Y. HANCOCK
TEAL LUTHY MILLER
Attorneys

MAY 2006