

Gonzales v. Carhart: Justice Kennedy at the Intersection of Life Interests, Medical Practice and Government Regulations

Casey A. Coyle*

I. INTRODUCTION

Over one million abortions are performed each year.¹ Nearly all abortions are performed during the first trimester.² Of the few abortions that are performed during the second trimester,³ nearly all are D&E, or “dilation and evacuation,” procedures.⁴

* J.D. Candidate, May 2009, Temple University James E. Beasley School of Law; Bachelor of Arts, May 2006, The Pennsylvania State University. Sincere thanks to my parents, Mary and Bernard, for all of the countless sacrifices they've made for me over the years. Thank you to my brothers and sister, particularly my brother Keith J. Coyle, Esq., for your all of your encouragement and support throughout law school. Special thanks to Professor Craig Green for all of your invaluable advice and guidance in writing this note; thank you to Carolyn R. Smart for her careful editing and feedback; thank you to the staff of the Temple Journal of Science, Technology & Environmental Law (TJSTEL) for all of your hard work.

¹ *Planned Parenthood Fed'n of Am. v. Ashcroft*, 320 F. Supp. 2d 957, 960 n.4 (N.D. Cal. 2004) (explaining that 1.3 million abortions occur each year), *aff'd sub nom.* *Planned Parenthood Fed'n of Am. v. Gonzales*, 435 F.3d 1163 (9th Cir. 2006), *rev'd sub nom.* *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007).

² *Planned Parenthood Fed'n of Am.*, 320 F. Supp. 2d at 961 n.4 (explaining of the 1.3 million abortions performed each year, eighty-five percent occur during the first trimester); BLACK'S MEDICAL DICTIONARY 637 (40th ed. 2004) (noting that the “first trimester” is the first three months, or twelve weeks, of pregnancy); *cf.* *Stenberg v. Carhart*, 530 U.S. 914, 926 (2000) (stating that D&E is a safer abortion procedure between the twelfth and twentieth weeks of gestation “than those accompanying induced labor procedures”).

³ BLACK'S MEDICAL DICTIONARY 637 (40th ed. 2004) (noting the “second trimester” is the second three months, or weeks thirteen to twenty-four, of pregnancy).

⁴ *See, e.g., Gonzales*, 127 S. Ct. at 1620 (noting that the surgical procedure referred to as “dilation and evacuation” or “D&E” is the usual abortion method in the second trimester); *Planned Parenthood Fed'n*

Every state regulates abortions⁵ and, as of roughly five years ago, more than half of states prohibit physicians from performing intact D&E procedures.⁶ However, the medical community remains divided on whether intact D&E is ever medically necessary to save the life of the mother.⁷

D&E is a regular second trimester abortion procedure.⁸ There is no uniform procedure for performing D&E, although the steps for any D&E procedure are generally the same.⁹ A physician will first dilate the cervix with osmotic dilators, with the resulting dilation being non-uniform.¹⁰ Once the cervix is dilated to the extent needed, the woman is placed under general anesthesia or conscious sedation.¹¹ The physician then removes “at least some fetal tissue using nonvacuum instruments”¹² and then suctions or scrapes out the remaining fetal material out of the uterus.¹³

Intact D&E, which stands for “dilation and extraction,” is a less-common second trimester abortion procedure;¹⁴ it is a variant of D&E, where the fetus is extracted largely intact.¹⁵ Intact D&E is used when the fetal skull becomes too large to remove through the cervix.¹⁶ Like D&E, intact D&E begins with the dilation of the cervix.¹⁷ Intact D&E then proceeds as per the presentation of the fetus.¹⁸ During a vertex presentation, the fetus presents head-first, the doctor collapses the skull and then removes the entire fetus from the cervix.¹⁹ During a breech presentation, the fetus presents feet-first, and “the doctor pulls the fetal body through the cervix,

of Am., 320 F. Supp. 2d at 961 (explaining that eighty-five to ninety-five percent of all second trimester abortions are performed through D&E).

⁵ See, e.g., ALA. CODE § 26-23A-4 (2007) (stating that a woman must give informed and voluntary consent before an abortion can be performed, except in the case of medical emergencies). See Center for Reproductive Rights, http://www.reproductiverights.org/st_laws.html (last visited Dec. 10, 2008), for an overview of the laws of each state affecting women’s reproductive rights.

⁶ Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2(2), 117 Stat. 1201, 1201 (codified as amended at 18 U.S.C. § 1531 (2006)). However, the American Medical Association (AMA) does not recognize “partial birth abortion” as a medical term and, instead, distinguishes between intact D&E and D&E. American Medical Association (AMA), *Late-Term Pregnancy Termination Techniques* (2007) H-5.982(1).

⁷ American Medical Association (AMA), *Late-Term Pregnancy Termination Techniques* (2007) H-5.982(2).

⁸ *Planned Parenthood Fed’n of Am.*, 320 F. Supp. 2d at 961.

⁹ *Gonzales*, 127 S. Ct. at 1620.

¹⁰ *Id.*

¹¹ *Id.* at 1621.

¹² *Stenberg v. Carhart*, 530 U.S. 914, 925 (2000); *Gonzales*, 127 S. Ct. at 1621 (“The doctor . . . inserts grasping forceps through the woman’s cervix and into the uterus to grab the fetus. The doctor grips a fetal part with the forceps and pulls it back through the cervix and vagina . . . The friction causes the fetus to tear apart. . . . The process of evacuating the fetus piece by piece continues until it has been completely removed.”).

¹³ *Gonzales*, 127 S. Ct. at 1621.

¹⁴ *Planned Parenthood Fed’n of Am. v. Ashcroft*, 320 F. Supp. 2d 957, 961 (N.D. Cal. 2004).

¹⁵ *Gonzales*, 127 S. Ct. at 1621 (citing *Nat’l Abortion Fed’n v. Ashcroft*, 330 F. Supp. 2d 436, 440 n.2 (S.D.N.Y. 2004)).

¹⁶ *Stenberg*, 530 U.S. at 927 (explaining that after 16 weeks into gestation the fetus skull becomes too large to remove it through the cervix (citing *Carhart v. Stenberg*, 11 F. Supp. 2d 1099, 1105 (D. Neb. 1998))).

¹⁷ *Id.*; *Gonzales*, 127 S. Ct. at 1621.

¹⁸ *Stenberg*, 530 U.S. at 927.

¹⁹ *Id.*

collapses the skull, and extracts the fetus through the cervix.”²⁰

In *Gonzales v. Carhart*,²¹ four physicians brought an action challenging the constitutionality of the Partial Birth Abortion Act of 2003²² (the “Act”).²³ The Act prohibited physicians from performing intact D&E.²⁴ In reversing the Eighth and Ninth Circuits, *Gonzales* held that the Act’s prohibition of intact D&E was not void for vagueness, the Act did not include prototypical D&Es, the Act did not pose a substantial obstacle to women seeking second trimester abortions, the Act furthered a legitimate medical purpose and the absence of a life exception for the health of the mother did not render the Act void.²⁵ *Gonzales* is the latest in line of Justice Kennedy opinions that find when a “life interest” and the practice of medicine intersect, it is a legitimate government interest,²⁶ whether state or federal, to regulate that medical practice, even despite medical uncertainty or physician objections.²⁷ “Life interest,” as used herein, is not a synonym for a “liberty interest;”²⁸ it connotes

²⁰ *Id.* Breech presentation is the most common form of intact D&E. *Id.* A more detailed medical general description of intact D&E by Dr. Martin Haskell, who operates three abortion clinics, was included in a House Judiciary Committee Report on the Partial Birth Abortion Act of 2003. H.R. REP. NO. 108-58, pt. 2, at 2-3 (2003). Here is a firsthand eye witness account from a registered nurse who has assisted Dr. Haskell in performing an intact D&E procedure:

Dr. Haskell went in with forceps and grabbed the baby’s legs and pulled them down into the birth canal. Then he delivered the baby’s body and the arms-everything but the head. The doctor kept the head right inside the uterus. . . . The baby’s little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby’s arms jerked out The doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby’s brains out. Now the baby went completely limp. . . . He cut the umbilical cord and delivered the placenta. He threw the baby in a pan, along with the placenta and the instruments he had just used.

Id.

²¹ 127 S. Ct. 1610 (2007).

²² 18 U.S.C. § 1531(a) (2006) (“Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both. This subsection does not apply to a partial-birth abortion that is necessary to save the life of a 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.”).

²³ *Gonzales*, 127 S. Ct. at 1619.

²⁴ 18 U.S.C. § 1531.

²⁵ *Gonzales*, 127 S. Ct. at 1627, 1629, 1632-33, 1639.

²⁶ *See, e.g., id.* at 1633 (“There can be no doubt the government ‘has an interest in protecting the integrity and ethics of the medical profession.’” (quoting *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997))).

²⁷ Of the following four cases, Justice Kennedy either wrote the majority opinion or a dissenting opinion, with the exception of *Glucksberg*, where he joined the majority opinion: *Gonzales*, 127 S. Ct. at 1632-35 (explaining that Congress has a legitimate interest in regulating partial birth abortions and can prohibit intact D&E, rather than deferring to physicians); *Gonzales v. Oregon*, 546 U.S. 243, 270-75 (2006) (explaining that Oregon has a legitimate interest in regulating assisted suicide, the Attorney General lacks the statutory authority to prohibit assisted suicide, and it is constitutional for Oregon to permit assisted suicide); *Stenberg v. Carhart*, 530 U.S. 914, 964 (2000) (Kennedy, J., dissenting) (explaining that Nebraska has a legitimate interest in regulating partial birth abortions and can prohibit intact D&E, rather than giving physicians a veto power over a choice made by democratically elected representatives); *Glucksberg*, 521 U.S. at 735 (explaining that Washington has a legitimate interest in regulating assisted suicide and it is constitutional for Washington to prohibit assisted suicide).

²⁸ BLACK’S LAW DICTIONARY 371 (3d pocket ed. 2006) (defining “liberty interest” as “[a]n interest protected by the due-process clauses of state and federal constitutions”).

those acts which extinguish life, regardless of whether or not there is a liberty interest to those acts protected by the Fourteenth Amendment.²⁹ For example, there is a liberty interest to an abortion, but no liberty interest to physician-assisted suicide; however, each procedure implicates a life interest.³⁰

In reaffirming that the government has a legitimate interest in regulating partial birth abortions,³¹ *Gonzales* held that prohibiting intact D&E did not pose a substantial obstacle to a mother choosing to have an abortion.³² In applying the undue burden standard³³ required by *Planned Parenthood of Southeastern Pennsylvania v. Casey*,³⁴ the Court extended deferential review to the facts submitted by Congress,³⁵ an act more consistent with rational basis review.³⁶ Through this review, the Court affirmed Congress' finding that intact D&E was never medically necessary to save the life of the mother.³⁷ Consequently, the Court held that the Act was not unconstitutional for omitting a life exception to safeguard the health of the mother.³⁸ The Act, however, should have been deemed unconstitutional for its misapplication of the undue burden standard and applying a rational basis review in its absence.³⁹ This misapplication of the undue burden standard is rooted in Justice Kennedy's aforementioned emphasis on the Act implicating a life interest.⁴⁰

Section II discusses prior abortion law and Justice Kennedy's opinions where a life interest intersects a government regulation of a medical procedure. Section III explains the facts and procedural history of *Gonzales*. Section IV details the

²⁹ *Glucksberg*, 521 U.S. at 720-21 (“[T]he Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition,’ [citation omitted] and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’” (quoting *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 503 (1977) (plurality opinion); *Palko v. Connecticut*, 58 S. Ct. 149, 152 (U.S. 1937))).

³⁰ *E.g.*, *Glucksberg*, 521 U.S. at 731 (holding there is no liberty interest in physician-assisted suicide); *Roe v. Wade*, 410 U.S. 113, 154 (1973) (holding there is a liberty interest to an abortion).

³¹ *Gonzales*, 127 S. Ct. at 1633.

³² *Id.* at 1641 (Ginsburg, J., dissenting).

³³ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (plurality opinion) (“A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”).

³⁴ *Gonzales*, 127 S. Ct. at 1626-27.

³⁵ *Id.* at 1637.

³⁶ BLACK’S LAW DICTIONARY 592-93 (3d pocket ed. 2006) (defining “rational-basis test” as “[t]he criterion for judicial analysis of a statute that does not implicate a fundamental right or a suspect or quasi-suspect classification under the Due Process or Equal Protection Clause, whereby the court will uphold a law if it bears a reasonable relationship to the attainment of a legitimate governmental objective”).

³⁷ *Gonzales*, 127 S. Ct. at 1638.

³⁸ *Id.* at 1639. *But see id.* at 1641 (Ginsburg, J., dissenting) (noting that this is the first time the Supreme Court found a statute that did not include a health exception to be constitutional).

³⁹ *Id.* at 1641 (Ginsburg, J., dissenting) (“Today’s decision is alarming. It refuses to take *Casey* and *Stenberg* seriously. . . . It blurs the line, firmly drawn in *Casey*, between previability and postviability abortions. And, for the first time since *Roe*, the Court blesses a prohibition with no exception safeguarding a woman’s health. . . . [T]he Court upholds an Act that surely would not survive under the close scrutiny that previously attended state-decreed limitations on a woman’s reproductive choices.”).

⁴⁰ *See id.* at 1632-35 (majority opinion) (explaining that Congress has a legitimate interest in regulating partial birth abortions and can prohibit intact D&E, rather than deferring to physicians). *But see Gonzales*, 127 S. Ct. at 1652 (Ginsburg, J., dissenting) (“[T]he 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—and with increasing comprehension of its centrality to women’s lives.”).

Gonzales opinion and Justice Ginsburg's dissent.⁴¹ Section V will analyze Justice Kennedy's imperfect analogy between the government's interest in regulating physician-assisted suicide and partial birth abortion and its consequences on the undue burden standard.

II. PRIOR LAW ON THE INTERSECTION OF LIFE INTERESTS, MEDICAL PRACTICES AND GOVERNMENT REGULATIONS

A. Regulating Assisted-Suicide

In *Washington v. Glucksberg*, Washington prohibited physicians from assisting terminally ill patients in committing suicide.⁴² The plaintiffs in *Glucksberg* argued that there was a liberty interest for "mentally competent, terminally ill adult[s] to commit physician-assisted suicide" that was protected by the Fourteenth Amendment.⁴³ *Glucksberg* held that when the life interest of the right to die intersected with the medical practice of assisted suicide it was a legitimate government interest to prohibit the medical practice.⁴⁴

The Court found that physician-assisted suicide was not a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment,⁴⁵ given the long tradition of prohibiting the practice in nearly every state.⁴⁶ Although the Court found no liberty interest in assisted suicide, it was required to determine whether the state prohibition against assisted suicide was rationally related to a legitimate government interest.⁴⁷ The Court held the statute was constitutional⁴⁸ because it was rationally related to the state's interests of preserving life⁴⁹ and

⁴¹ This comment will not discuss Justice Thomas's concurring opinion. *Id.* at 1639-40 (Thomas, J., concurring).

⁴² 521 U.S. 702, 707 (1997). Justice Kennedy joined the majority opinion written by Chief Justice Rehnquist. *Id.* See generally WASH. REV. CODE ANN. § 9A.36.060 (West 2007) ("(1) A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide. (2) Promoting a suicide attempt is a class C felony."); WASH. REV. CODE ANN. § 9A.20.021 (defining the punishment for a class C felony). But see WASH. REV. CODE ANN. § 70.122.070(1) ("The withholding or withdrawal of life-sustaining treatment from a qualified patient pursuant to the patient's directive in accordance with the provisions of this chapter shall not, for any purpose, constitute a suicide or a homicide.").

⁴³ *Glucksberg*, 521 U.S. at 708 (quoting *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1456-57 (W.D. Wash. 1994)).

⁴⁴ See *id.* at 735 (holding the statute prohibiting physician-assisted suicide was constitutional).

⁴⁵ *Id.* at 729. The Court noted that in order to be considered a liberty interest protected by the Due Process Clause of the Fourteenth Amendment, the asserted interest must be "deeply rooted in this Nation's history and tradition," . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Id.* at 720-21 (citing *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 503 (1977) (plurality opinion); *Palko v. Connecticut*, 58 S. Ct. 149, 152 (U.S. 1937)). See also *id.* at 723 (finding a liberty interest in the right to assisted suicide would require overturning the policy choice of nearly every state).

⁴⁶ *Glucksberg*, 521 U.S. at 710 (noting in nearly every state assisting suicide was a crime). See also *id.* at 717 (noting that Washington voters rejected permitting physician-assisted suicide in 1991).

⁴⁷ *Id.* at 728.

⁴⁸ *Id.* at 735.

⁴⁹ *Id.* at 728 ("The State's prohibition on assisted suicide, like all homicide laws, both reflects and advances its commitment to this interest.").

“protecting the integrity and ethics of the medical profession.”⁵⁰

In reaching its judgment, the Court in *Glucksberg* used restraint in deciding the issue of assisted suicide, rather than interjecting itself into the highly controversial state-by-state issue of assisted suicide.⁵¹ The Court’s holding allowed each state to determine for itself whether or not to permit assisted suicide and ensured that the federal government would not foreclose this decision from the voters and legislators of each state.⁵²

In *Gonzales v. Oregon*,⁵³ the U.S. Attorney General challenged the constitutionality of the Oregon Death with Dignity Act (ODWDA),⁵⁴ arguing it violated the federal Controlled Substances Act (CSA).⁵⁵ *Oregon* held that when a state government regulated the life interest of the right to die and imposed requirements for medical practice, such as assisting in the suicide of terminally-ill patients in certain circumstances, the federal government cannot impede on the rights of the state government to enforce the state regulations of this medical practice.⁵⁶

Under the ODWDA, Oregon physicians who dispensed or prescribed lethal doses of drugs to terminally ill patients were exempted from civil and criminal liability.⁵⁷ The drugs that were typically prescribed under the ODWDA, however, were subject to regulation by the CSA.⁵⁸ According to the CSA, controlled substances could only be prescribed by a registered physician and only for a “legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.”⁵⁹ The U.S. Attorney General issued an Interpretive Rule that challenged the ODWDA, arguing that prescribing controlled substances to assist in suicide did not constitute a legitimate medical purpose and, therefore, was in violation of the CSA.⁶⁰

In finding the ODWDA constitutional,⁶¹ the Court found that the CSA did not grant the U.S. Attorney General the explicit authority to make “a rule declaring illegitimate a medical standard for care and treatment of patients that is specifically

⁵⁰ *Glucksberg*, 521 U.S. at 731 (“[P]hysician-assisted suicide could . . . undermine the trust that is essential to the doctor-patient relationship by blurring the time-honored line between healing and harming.”).

⁵¹ *Id.* at 735.

⁵² *Id.* (“Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.”).

⁵³ 546 U.S. 243 (2006). Justice Kennedy delivered the majority opinion of the Court. *Id.*

⁵⁴ OR. REV. STAT. ANN. § 127.800 (West 2007); OR. REV. STAT. ANN. § 127.885(1) (“No person shall be subject to civil or criminal liability or professional disciplinary action for participating in good faith compliance with ORS 127.800 to 127.897. This includes being present when a qualified patient takes the prescribed medication to end his or her life in a humane and dignified manner.”).

⁵⁵ 21 U.S.C. § 801 (2006); *Oregon*, 546 U.S. at 249.

⁵⁶ See *Oregon*, 546 U.S. at 270-75 (holding that the CSA does not authorize the U.S. Attorney General to prohibit physicians from prescribing drugs for use in physician-assisted suicide, as per the ODWA).

⁵⁷ *Id.* at 251-52.

⁵⁸ *Id.*

⁵⁹ 21 C.F.R. § 1306.04 (2005); *Oregon*, 546 U.S. at 250.

⁶⁰ *Oregon*, 546 U.S. at 254. In claiming that the ODWDA violated the CSA, the Attorney General concluded that physicians who dispensed controlled substances under the ODWDA could face license suspension or revocation. *Id.*

⁶¹ *Id.* at 257.

authorized under state law.”⁶² In support of this argument, the Court found that the structure of the CSA demonstrated Congress’ “unwillingness to cede medical judgments to an Executive official who lacks medical expertise.”⁶³ Moreover, the CSA did not grant the U.S. Attorney General the implicit power to enact this Interpretative Rule.⁶⁴ While acknowledging the debate and uncertainty surrounding assisted suicide,⁶⁵ the Court found that the Interpretative Rule was directly at odds with the intent of the CSA, which was deliberately silent on regulating uniform medical practices outside of recreational drug use.⁶⁶

B. Regulating Abortions

Gonzales operates within the constitutional abortion framework established in *Casey*.⁶⁷ In *Casey*, a plurality of the Court held a provision of the Pennsylvania Abortion Control Act of 1982⁶⁸ was unconstitutional because it created an undue burden on a woman’s right to choose.⁶⁹

Although the Court reaffirmed *Roe v. Wade*’s⁷⁰ essential holding,⁷¹ it rejected *Roe*’s “rigid” trimester framework.⁷² A plurality of the Court adopted the point of viability as the fulcrum for state regulation.⁷³ Before viability, a “woman has a right to choose to terminate her pregnancy”⁷⁴ and the State cannot prohibit that exercise; however, after viability the State’s interest in preserving the life of the child can override the mother’s right to terminate the pregnancy.⁷⁵ At any time, before or after viability, the regulations imposed by the State cannot produce an undue burden for a

⁶² *Id.* at 258.

⁶³ *Id.* at 266.

⁶⁴ *Oregon*, 546 at 267 (finding that Congress did not grant the Attorney General such broad authority).

⁶⁵ *Id.*

⁶⁶ *Id.* at 272. In so finding, the Court explained that “Oregon’s regime is an example of the state regulation of medical practice that the CSA presupposes. Rather than simply decriminalizing assisted suicide, ODWDA limits its exercise to the attending physicians of terminally ill patients, physicians who must be licensed by Oregon’s Board of Medical Examiners.” *Id.* at 271.

⁶⁷ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (plurality opinion).

⁶⁸ 18 PA. CONS. STAT. ANN. § 3203 (West 2007).

⁶⁹ 18 PA. CONS. STAT. ANN. § 3209 (West 2007) (requiring married women who seek abortions to provide a signed statement from her husband acknowledging that the husband was aware of the abortion before a physician could perform an abortion). See 18 PA. CONS. STAT. ANN. § 3209 (removing consent of husband in the event of a medical emergency).

⁷⁰ 410 U.S. 113 (1973).

⁷¹ The *Casey* Court interpreted the essential holding of *Roe* to be that (1) a woman has a right to obtain an abortion before viability “without undue influence from the State,” (2) the State can regulate abortions after viability, as long as they include a health exception for the life of the mother, and (3) the State has a legitimate interest in preserving the health of the mother and the fetus that may become a child from conception. *Casey*, 505 U.S. at 846.

⁷² *Id.* at 875 (finding that “in practice [the trimester framework] undervalues the State’s interest in the potential life within the woman”).

⁷³ *Id.* at 870.

⁷⁴ *Id.* The Court relied on its interpretation that “[t]he woman’s right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*.” *Id.* at 871.

⁷⁵ *Casey*, 505 U.S. at 870 (“[Viability] is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman.”). The Court explained that “a woman who fails to act before viability has consented to the State’s intervention on behalf of the developing child.” *Id.*

woman's right to choose to terminate her pregnancy.⁷⁶ A State produces an "undue burden" on a woman's right to choose to terminate her pregnancy where "a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."⁷⁷ Any regulation imposed after viability must include a health exception for the life of the mother.⁷⁸

Prior to *Gonzales, Stenberg v. Carhart* was the leading case on the constitutionality of regulating partial birth abortions.⁷⁹ In *Stenberg*, the medical practice of performing partial birth abortions implicated the life interest of the right to an abortion, which clashed with a government regulation prohibiting all partial birth abortions.⁸⁰ *Stenberg* held that, although it is a the legitimate government interest to regulate partial birth abortions, the government cannot prohibit partial birth abortions previability.⁸¹

In *Stenberg*, the Nebraska legislature prohibited physicians from performing partial birth abortions,⁸² except when "necessary to save the life of the mother."⁸³ The Court found that the statute had two flaws.⁸⁴ First, because the aforementioned life exception did not distinguish between partial birth abortions performed before viability and those performed after viability, the Court found the statute applied to all partial birth abortions.⁸⁵ The Court reaffirmed that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion *except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.*"⁸⁶ The Court

⁷⁶ *Id.* at 874 (holding that only when a regulation poses an undue burden on a woman's right to choose is it unconstitutional). Further, a regulation causes an undue burden when a statute places a "substantial obstacle" in the path of a woman's choice to undergo an abortion. *Id.* at 877.

⁷⁷ *Id.* at 877.

⁷⁸ *Casey*, 505 U.S. at 879 ("[S]ubsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." (quoting *Roe v. Wade*, 410 U.S. 113, 164-65 (1973))).

⁷⁹ *Stenberg v. Carhart*, 530 U.S. 914 (2000).

⁸⁰ *Id.* at 922-23.

⁸¹ *See id.* at 945-46 (holding the Nebraska statute unconstitutional for prohibiting partial birth abortions previability).

⁸² NEB. REV. STAT. § 28-326 (2007) (defining "partial birth abortion" as "an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery").

⁸³ NEB. REV. STAT. § 28-328.

⁸⁴ *Stenberg*, 530 U.S. at 938, 946.

⁸⁵ *Id.* at 930 ("Since the law requires a health exception in order to validate even a postviability abortion regulation, it at a minimum requires the same in respect to previability regulation." (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 880 (1992) (plurality opinion)). The Court further explained that "a State may promote but not endanger a woman's health when it regulates the methods of abortion." *Id.* at 931 (citing *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 768-69 (1986); *Colautti v. Franklin*, 439 U.S. 379, 400 (1979); *Doe v. Bolton*, 410 U.S. 179, 197 (1973)).

⁸⁶ *Id.* at 930 (quoting *Casey*, 505 U.S. at 879 (1992), in turn quoting *Roe v. Wade*, 410 U.S. 113, 164-65 (1973)). *See also Casey*, 505 U.S. at 870 (holding the point of viability is the fulcrum for state regulation); *id.* at 870-71 (holding *before* viability, a "woman has a right to choose to terminate her pregnancy" and the State cannot prohibit that exercise; however, *after* viability the State's interest in preserving the life of the child can override the mother's right to terminate the pregnancy); *id.* at 874, 877 (holding at any time, before or after viability, the regulations imposed by the State cannot produce

found that the Nebraska statute lacked any health exception for the preservation of the life of the mother,⁸⁷ which was required by *Casey*.⁸⁸ Second, while the statute was arguably intended to prohibit only intact D&E,⁸⁹ the language was read by the Court to prohibit both intact D&E and D&E.⁹⁰ This had the effect of putting physicians in fear of “prosecution, conviction and imprisonment” for using any D&E procedure, the most common previability second trimester abortion procedure.⁹¹ In applying the statute to *Casey*’s undue burden analysis,⁹² the Court held that the statute posed an undue burden a women’s right to choose to have a partial birth abortion before viability.⁹³

In his dissent, Justice Kennedy argued that the Nebraska statute did not prohibit any woman from obtaining a partial birth abortion and it did not pose a substantial obstacle to a woman’s right to choose.⁹⁴ Justice Kennedy argued the intersection of a life interest, the right to an abortion, and a medical practice, performing partial birth abortions, permitted the government to prohibit partial birth abortions.⁹⁵

First, the Act furthered the legitimate government interest of choosing a side in the abortion debate⁹⁶ and ensuring that medical procedures do not allow the medical community or society to become “disdainful” of the right to life.⁹⁷ Justice Kennedy argued that “[a] State may take measures to ensure the [members of the] medical profession . . . are viewed as healers, sustained by a compassionate and rigorous ethic and cognizant of the dignity and value of human life.”⁹⁸ Justice Kennedy argued that *Casey* grants states a tangible power to promote a respect for life.⁹⁹

an undue burden for a woman’s right to choose to terminate her pregnancy); *id.* at 879 (holding that any regulation imposed after viability must include a health exception for the life of the mother).

⁸⁷ *Stenberg*, 530 U.S. at 930; *id.* at 932 (“[T]he record shows that significant medical authority supports the proposition that in some circumstances, D&X would be the safest procedure.”); *id.* at 938 (finding that forbidding D&X creates a “significant health risk”); *id.* at 934 (“[T]he State cannot prohibit a person from obtaining treatment simply by pointing out that most people do not need it.”).

⁸⁸ *Id.* at 933.

⁸⁹ *Stenberg*, 530 U.S. at 938-40.

⁹⁰ “[W]e can find no difference, in terms of *this* statute, between the D&X procedure as described and the D&E procedure as it might be performed.” *Id.* at 940 (construing NEB. REV. STAT. § 28-326 (2007) (defining “[p]artially delivers vaginally a living unborn child before killing the unborn child” as “deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child”)).

⁹¹ *Id.* at 945.

⁹² *Id.* at 938 (“[W]here substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women’s health, *Casey* requires the statute to include a health exception when the procedure is ‘necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.’” (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992) (plurality opinion))).

⁹³ *Id.* at 946.

⁹⁴ *Stenberg*, 530 U.S. at 957 (Kennedy, J., dissenting).

⁹⁵ *Id.*

⁹⁶ *Id.* at 960 (“In light of the description of the D&X procedure, it should go without saying that Nebraska’s ban on partial birth abortion furthers purposes States are entitled to pursue.”).

⁹⁷ *Id.* at 961 (noting that States can favor preserving the life of the fetus in the abortion debate to prevent the medical profession or society becoming “disdainful” of life).

⁹⁸ *Id.* at 962 (citing *Washington v. Glucksberg*, 521 U.S. 702, 730-34 (1997)).

⁹⁹ *See Stenberg*, 530 U.S. at 964 (Kennedy, J., dissenting) (“The Court’s holding contradicts *Casey*’s assurance that the State’s constitutional position in . . . promoting respect for life is more than marginal.”).

When a state has established a moral difference between medical procedures in order to further a respect for life, the Court should defer to state's determination.¹⁰⁰ Since Nebraska had determined a moral difference between D&E and intact D&E, with D&E representing a stronger respect for life than intact D&E, the Court should honor this determination.¹⁰¹

Second, Justice Kennedy argued that the majority was incorrect in determining the Act was unconstitutional for not including a life exception to perform intact D&E when a physician believed it would necessary to preserve the health of the mother.¹⁰² Rather than relying on legislative fact finding,¹⁰³ the majority gave "each physician a veto power of the [s]tate's judgment that the procedur[e] should not be performed."¹⁰⁴ Nebraska was entitled to conclude that prohibiting intact D&E did not pose a substantial obstacle to the life of the mother because there were no identified circumstances where intact D&E was the only procedure to save the life of the mother.¹⁰⁵ In the presence of medical uncertainty, Justice Kennedy contended that the majority should have deferred to the state legislature, rather than giving deference to a physician's treatment decision.¹⁰⁶

Third, Justice Kennedy argued that the majority misapplied the doctrine of statutory construction in construing the Act to apply to both intact D&E and D&E.¹⁰⁷ In doing so, the majority subjected the Nebraska legislature to "unattainable standards of statutory draftsmanship," which, in effect, prohibit state regulation entirely.¹⁰⁸ Medical descriptions about partial birth abortion procedures supported the interpretation that the terms used in the Act only applied to intact D&E.¹⁰⁹ Therefore, Justice Kennedy argued that the majority was incorrect for subjecting the Act to a "strict scrutiny review," rather than allowing Nebraska leeway.¹¹⁰

In 2003, after the Supreme Court's decision in *Stenberg*, the 108th Congress passed the Partial Birth Abortion Act of 2003 (the Act).¹¹¹ The Act was a direct

¹⁰⁰ *Id.* at 964.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 964 (reasoning that it is not the role of the courts to determine the relative worth of surgical procedures); *Stenberg*, 530 U.S. at 968 (Kennedy, J., dissenting) (arguing that courts need to defer to legislatures because they have "superior fact finding capabilities" and that courts are "not suited to be 'the Nation's *ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States (citation omitted)'").

¹⁰⁴ *Id.* at 964.

¹⁰⁵ *Id.* at 965 ("Nebraska . . . was entitled to conclude that its ban . . . deprived no woman of a safe abortion and therefore did not impose a substantial obstacle on the rights of any woman."); *id.* at 965-66 (noting that the American College of Obstetricians and Gynecologists . . . found no circumstances where intact D&E was the only available procedure to save the life of the mother); *id.* at 967-68 (adding the marginal safety differences between intact D&E and D&E do not amount to a substantial obstacle to the right to an abortion).

¹⁰⁶ *Stenberg*, 530 U.S. at 970 (Kennedy, J., dissenting).

¹⁰⁷ *Id.* at 973.

¹⁰⁸ *Id.* ("Like the ruling requiring a physician veto, requiring a State to meet unattainable standards of statutory draftsmanship in order to have its voice heard on this grave and difficult subject is no different from foreclosing state participation altogether.").

¹⁰⁹ *Id.* at 975-76.

¹¹⁰ *Id.* at 976-77 (noting that not only does *Casey* reject strict scrutiny review, but states must be given latitude when regulating medical procedures).

¹¹¹ 18 U.S.C. § 1531 (2006). *See also* *Gonzales v. Carhart*, 127 S. Ct. 1610, 1623 (2007).

response to *Stenberg*.¹¹² First, Congress chose not to accept the district court's "very questionable" fact findings in *Stenberg*.¹¹³ Instead, congressional hearings found that intact D&E "[was] never necessary to preserve the health of a woman, never pose[d] significant health risks to a woman upon whom the procedure [was] performed and [was] outside the standard of medical care."¹¹⁴ Second, the text of the Act varied considerably from the unconstitutional text in *Stenberg*.¹¹⁵

III. FACTS AND PROCEDURAL HISTORY OF *GONZALES V. CARHART*

In *Carhart v. Ashcroft*, one of the two district court cases that was later consolidated into *Gonzales v. Carhart*, four physicians brought an action against the U.S. Attorney General challenging the constitutionality of the Partial Birth Abortion Act of 2003 (the Act).¹¹⁶ The district court engaged in exhaustive fact finding¹¹⁷ and concluded that the Act was unconstitutional on two grounds.¹¹⁸ First, the Act failed to include the necessary health exception for the life of the mother, which was proscribed by *Casey*.¹¹⁹ In doing so, the district court rejected the congressional findings¹²⁰ and adopted its own findings in regard to intact D&E.¹²¹ Second, the Act covered both intact D&E as well as other forms of D&E.¹²² On appeal, the Court of Appeals for the Eighth Circuit only addressed the lack of the life exception issue.¹²³ The Eighth Circuit found the evidentiary record the same as it was in *Stenberg* and, therefore, it was bound by *Stenberg*'s requirement of a health

¹¹² *Gonzales*, 127 S. Ct. at 1624.

¹¹³ Partial Birth Abortion Act of 2003, Pub. L. No. 108-105(S 3)(§ 2) (2003).

¹¹⁴ *Id.*

¹¹⁵ *Gonzales*, 127 S. Ct. at 1624. Compare 18 U.S.C. § 1531(1) (limiting the definition of "partial-birth abortion" to intact D&E procedures), with NEB. REV. STAT. § 28-326(9) (2007) (defining "partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery" in such a way to include D&E as well as intact D&E procedures).

¹¹⁶ *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 814 (D. Neb. 2004).

¹¹⁷ *Id.* at 814-1001 (noting that nearly two hundred pages of the opinion described the facts of the case).

¹¹⁸ *Id.* at 1004-37, 1048.

¹¹⁹ *Id.* at 1004 ("While the government is not required to 'grant physicians 'unfettered discretion' in their selection of abortion methods[,] . . . where substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health,' the Constitution 'requires the statute to include a health exception when the procedure is 'necessary, in appropriate medical judgment, for the preservation of the . . . health of the mother.'") (quoting *Stenberg v. Carhart*, 530 U.S. 914, 938 (2000), in turn quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992) (plurality opinion), in turn quoting *Roe v. Wade*, 410 U.S. 113, 164-65 (1973)); *id.* at 1041 ("[W]hether an abortion is 'necessary' to preserve the woman's life or health is determined in the context of the treating physician's professional judgment under the circumstances presented to him or her while caring for the patient.").

¹²⁰ *Carhart v. Ashcroft*, 331 F. Supp. 2d at 1008 (noting that once a plaintiff demonstrates the "need for a particular surgical procedure," the burden shifts to the government to "convince[] us that a health exception is never necessary to preserve the health of women" (citation omitted)).

¹²¹ Congressional findings were "not supported by competent medical evidence," intact D&E is "sometimes[] the safest abortion procedure to preserve the health of women," and intact D&E is "the safest abortion procedure to preserve the health of women in special cases." *Id.* at 1017-18.

¹²² *Id.* at 1031 (holding that by covering both D&E and intact D&E the Act caused an undue burden on a woman's right to choose).

¹²³ *Gonzales v. Carhart*, 127 S. Ct. 1610, 1625 (2007); *Carhart v. Gonzales*, 413 F.3d 791, 803-04 (8th Cir. 2005).

exception for the life of the mother.¹²⁴ Since the Act did not contain a health exception, it was unconstitutional.¹²⁵

In *Planned Parenthood Federation of America v. Ashcroft*, the second district court case later consolidated into *Gonzales v. Carhart*, Planned Parenthood sought an injunction permanently enjoining the enforcement of the Act.¹²⁶ The district court found the Act unconstitutional, again citing the similarities between the Act and the Nebraska statute that was found unconstitutional in *Stenberg*, but for slightly different reasons.¹²⁷ First, the district court held that the Act posed an undue burden on a woman's right to choose to have an abortion.¹²⁸ Second, the district court held that the Act was constitutionally vague.¹²⁹ Third, the district court found that the Act was unconstitutional for not containing a health exception for the life of the mother.¹³⁰ The district court ordered a permanent injunction preventing enforcement of the Act.¹³¹

On appeal, the Court of Appeals for the Ninth Circuit affirmed the district court's holdings and its granting of a permanent injunction.¹³² Like the district court and the Eighth Circuit, the Ninth Circuit held that the Act was unconstitutional for not including a life exception for preserving the health of the mother.¹³³ The Ninth Circuit also held that, since the textual differences in the Act were insufficient to distinguish between intact D&E and D&E, the Act posed an undue burden on women seeking second trimester abortions.¹³⁴ Finally, the Ninth Circuit held that the Act was constitutionally vague because the Act did not "offer physicians clear

¹²⁴ There is "no consensus in the medical community as to the safety and medical necessity of the banned procedures" and in the absence of such a consensus the district court is "bound by the Supreme Court's conclusion [in *Stenberg*] that 'substantial medical authority' supports the medical necessity of a health exception (emphasis added)." *Carhart v. Gonzales*, 413 F.3d at 803.

¹²⁵ *Id.* at 803-04.

¹²⁶ *Planned Parenthood Fed'n of Am. v. Ashcroft*, 320 F. Supp. 2d 957, 960 (N.D. Cal. 2004).

¹²⁷ *Id.* at 960, 1034-35.

¹²⁸ *Id.* at 971 (finding that despite the "linguistic differences" from the Nebraska statute, the Act poses an undue burden because "the Act encompasses not only intact D&E procedures, but other previability D&E procedures and possibly inductions as well, in violation of the Supreme Court's holding"); *id.* at 975 (finding the Act placed a substantial obstacle in the path of a woman's right to choose because it did not distinguish between previability and postviability).

¹²⁹ *Id.* at 978.

¹³⁰ *Planned Parenthood Fed'n of Am.*, 320 F. Supp. 2d at 1006-07; *id.* at 1023 ("Following the district court's decision in *Stenberg* in 1998, Congress held only two hearings on the intact D&E procedure. None of the testimony received by Congress at those hearings can reasonably be considered 'new' medical evidence not available to the courts at the time *Stenberg* was decided.").

¹³¹ *Id.* at 1035.

¹³² *Planned Parenthood Fed'n of Am. v. Gonzales*, 435 F.3d 1163, 1166, 1171-72 (9th Cir. 2006).

¹³³ *Id.* at 1172; *id.* at 1174-75 ("[N]o medical consensus exists that the abortion procedures outlawed by the Act are never necessary to preserve the health of a woman."); *id.* at 1175 ("In reviewing the Act's lack of a health exception, the dispositive question is . . . whether there is general agreement in the medical community that there are no circumstances in which the procedure would be necessary to preserve a woman's health"); *id.* at 1175-76 (stating that the district court "cannot defer to Congress's finding that the procedures banned by the Act are never required to preserve the health of women," but instead finding the district court was "compelled to hold that a health exception is constitutionally required").

¹³⁴ *Planned Parenthood Fed'n of Am. v. Gonzales*, 435 F.3d at 1176-77 (finding the Act unconstitutional because it "would allow prosecutors to pursue physicians who 'use D&E procedures . . . ['] and would cause all doctors performing those procedures to 'fear prosecution, conviction, and imprisonment'" (citation omitted)).

warning of its regulatory reach.”¹³⁵

IV. ANALYZING KENNEDY AND THE *GONZALES* COURT

A. Overview

*Gonzales v. Carhart*¹³⁶ held that the Act’s prohibition of intact D&E was not void for vagueness, the Act did not include prototypical D&Es, the Act did not pose a substantial obstacle to women seeking second trimester abortions, the Act furthered a legitimate medical purpose, and the absence of a life exception for the health of the mother did not render the Act void.¹³⁷

B. The Act was not Void for Vagueness

The Court addressed the issue of whether the Act was facially void for vagueness.¹³⁸ The Court held that the Act was not facially void because “[d]octors performing D&E will know that if they do not deliver a living fetus to an anatomical landmark they will not face criminal liability.”¹³⁹

The respondents¹⁴⁰ argued that the Act was facially vague.¹⁴¹ In applying the void for vagueness doctrine,¹⁴² the Court found that the language of the Act allowed physicians performing D&E to perform actions short of “delivering a fetus to an anatomical landmark” without constituting criminal conduct.¹⁴³ Therefore, the Act was not void for vagueness because physicians had notice of its regulatory reach.¹⁴⁴

C. The Act did not Include Prototypical D&Es

The Court addressed the issue of whether the Act was facially overbroad¹⁴⁵ by prohibiting intact D&E and D&E during the second trimester.¹⁴⁶ Due to the language of the Act, most notably the linguistic differences from the Nebraska statute in *Stenberg*,¹⁴⁷ the Court held that the Act did not apply to D&E

¹³⁵ *Gonzales v. Carhart*, 127 S. Ct. 1610, 1626 (2007) (citing *Planned Parenthood Fed’n of Am. v. Gonzales*, 435 F.3d at 1181-84).

¹³⁶ *Gonzales v. Carhart* is the consolidated appeal for both the Eighth and Ninth Circuit Court of Appeals decisions on the constitutionality of the Partial Birth Abortion Act of 2003 (18 U.S.C. § 1531 (2006)).

¹³⁷ *Gonzales*, 127 S. Ct. at 1627, 1629, 1632-33, 1639.

¹³⁸ *Id.* at 1628. See generally BLACK’S LAW DICTIONARY 763-64 (3d pocket ed. 2006) (defining “void for vagueness” as “establishing a requirement or punishment without specifying what is required or what conduct is punishable, and therefore void because violative of due process”).

¹³⁹ *Gonzales*, 127 S.Ct. at 1628.

¹⁴⁰ *Id.* at 1619. The “Respondents” in *Gonzales v. Carhart* were four doctors who performed second-trimester abortions: LeRoy Carhart, William G. Fitzhugh, William H. Knorr, and Jill L. Vibhakar. *Id.*

¹⁴¹ *Id.* at 1629.

¹⁴² *Id.* (citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).

¹⁴³ *Gonzales*, 127 S. Ct. at 1628.

¹⁴⁴ *Id.* at 1629.

¹⁴⁵ BLACK’S LAW DICTIONARY 516 (3d pocket ed. 2006) (defining “overbreadth doctrine” as “[t]he doctrine holding that if a statute is so broadly written that it deters free expression, then it can be struck down on its face because of its chilling effect -- even if it also prohibits acts that may legitimately be forbidden”).

¹⁴⁶ *Gonzales*, 127 S. Ct. at 1629.

¹⁴⁷ While there are stark differences, which will be discussed in more detail, there are similarities between the two pieces of legislation. First, neither act differentiates between previability and

procedures.¹⁴⁸

First, the Court interpreted the plain language of the Act.¹⁴⁹ The Act had two requirements: the physician must deliver the fetus “until its head lodges in the cervix, which is usually past the anatomical landmark for a breech presentation[,]” and the physician must perform the overt act of extracting the contents of the fetus’ skull.¹⁵⁰ Therefore, the Court found that “[t]he Act prohibit[ed] a doctor from intentionally performing an intact D&E,” and not D&E.¹⁵¹

Second, the Court compared the Act’s language to the unconstitutional statute in *Stenberg*.¹⁵² Unlike the Nebraska statute in *Stenberg*, Congress adopted the phrase “delivering a living fetus,”¹⁵³ as opposed to “delivering into the vagina a living unborn child, or substantial portion thereof.”¹⁵⁴ This was evidence that Congress

postviability partial birth abortions. *See* 18 U.S.C. § 1531 (2006) (omitting to distinguish between previability and postviability); NEB. REV. STAT. § 28-326 (2007) (omitting to distinguish between previability and postviability). The government is granted more latitude in regulating abortion postviability than previability. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871-77 (1992) (plurality opinion). Before viability, the government cannot prohibit a woman from choosing to undergo an abortion, but after viability the government’s interest in preserving the life of the child can override the mother’s right to terminate the pregnancy. *Id.* at 870-72. Regardless of whether it is before or after viability, the regulations imposed by the government cannot produce an undue burden for a woman’s right to choose to terminate her pregnancy. *Id.* at 874, 877. Therefore, in drafting the Act, Congress must have determined that the Act was not vulnerable to a previability undue burden challenge. *See Gonzales*, 127 S. Ct. at 1630 (explaining that because the Act is seen as a direct response to the unconstitutional statute in *Stenberg*, it can only be assumed Congress did not determine the Act was vulnerable to a previability challenge). Second, each act includes the same life exception language. 18 U.S.C. § 1531(a); NEB. REV. STAT. § 28-328(1). Both state that their partial birth prohibitions acts do not apply when the banned 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.” 18 U.S.C. § 1531(a); NEB. REV. STAT. § 28-328(1). In the same manner as the absence of a previability and postviability distinction, in drafting the Act, Congress must have determined that this exception was not susceptible to a constitutionality challenge. *See Gonzales*, 127 S. Ct. at 1630 (finding that because the Act is seen as a direct response to the unconstitutional statute in *Stenberg*, it can only be assumed Congress did not determine the Act was vulnerable to a health exception challenge).

¹⁴⁸ *Gonzales*, 127 S. Ct. at 1629.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 1630.

¹⁵³ 18 U.S.C. § 1531 (2006).

¹⁵⁴ NEB. REV. STAT. § 28-326 (2007). While the Nebraska legislature intended for the statute to apply only to intact D&E, hence the usage of “a living unborn child,” the phrase “or a substantial portion thereof” contradicted that stated purpose. *Stenberg v. Carhart*, 530 U.S. 914, 939 (2000). Intact D&E requires delivering a fetus largely intact, by collapsing the fetus’ skull to kill the fetus, whereas D&E requires ripping the fetus apart while inside the cervix and vagina. *Gonzales*, 127 S. Ct. at 1621. The language “or substantial portion thereof” would rarely apply to intact D&E, but it would apply to D&E in every situation and those physicians who perform D&E would be subject to prosecution. *Stenberg*, 530 U.S. at 945. Therefore, the inclusion of the phrase “or substantial portion thereof” contradicted the stated purpose of the legislation and rendered the statute overbroad. *Id.* at 940. While the inclusion of “or a substantial portion thereof” contradicted the stated purpose of the Nebraska statute, the exclusion of any intact D&E-specific terminology contradicted the assertion that the statute prohibited only intact D&E. Nowhere in the statute do the words “breech presentation” or “vertex presentation” appear. *See* NEB. REV. STAT. §§ 28-326 to 28-345 (omitting in its text the words “breech” or “vertex” presentation). Nowhere in the statute do the words “collapse” or “skull” appear. *See id.* (omitting in its text the words “collapse” or “skull”). In fact, the words “intact D&E” or “dilation and extraction” are

directly responded to the Court's criticism in *Stenberg*.¹⁵⁵ In addition, the Court found the anatomical landmark of delivering the fetus into the vagina demonstrated that the Act applied only to intact D&E.¹⁵⁶ Furthermore, unlike the statute in *Stenberg*, Congress drew a distinction "between the overall partial-birth abortion and the distinct overt act that kills the fetus."¹⁵⁷ Since "D&E does not involve a delivery followed by a fatal act," the Act only applied to intact D&E.¹⁵⁸ Lastly, and unlike *Stenberg*, the intent requirement in the Act protected physicians who were attempting to perform D&E, but accidentally performed an intact D&E procedure, from prosecution.¹⁵⁹

D. The Act Furthered a Legitimate Government Purpose and did not pose a Substantial Obstacle to Women Seeking a Second Trimester Abortion

The Court addressed the issue of whether the Act posed a substantial obstacle to women seeking late-term abortions before viability.¹⁶⁰ The Court held that the Act did not pose a substantial obstacle to these women.¹⁶¹

First, the Court found that the government objectives in passing the Act furthered the objectives set forth in *Casey*.¹⁶² The Court stated that "Congress was concerned . . . with the effects on the medical community and on its reputation caused by the practice of partial-birth abortion."¹⁶³ As it did in *Glucksberg*, the Court noted that "[t]here can be no doubt the government 'has an interest in protecting the integrity and ethics of the medical profession.'"¹⁶⁴ Because the Court found that the Act

nowhere to be found in the statute. *See id.* (omitting any reference to intact D&E by any of its common names or aliases, which includes D&X). Rather than including specific terminology indicating to the Court that the statute was limited to intact D&E, the statute refers to all partial birth abortions. *Id.*; *Stenberg*, 530 U.S. at 940 ("[W]e can find no difference, in terms of *this* statute, between the D&X procedure as described and the D&E procedure as it might be performed.").

¹⁵⁵ *Gonzales*, 127 S. Ct. at 1630. By using the phrase "or," the Nebraska statute applied both to intact D&E and D&E; however, the absence of the words "or" as well as "substantial portion thereof" can only mean that the Act applies to intact D&E. *Id.* at 1628.

¹⁵⁶ *Id.* at 1630 ("The Act's anatomical landmarks . . . clarify that the removal of a small portion of the fetus is not prohibited . . . D&E does not involve the delivery of a fetus because it requires the removal of fetal parts that are ripped from the fetus as they are pulled through the cervix.").

¹⁵⁷ *Id.* at 1630-31.

¹⁵⁸ *Id.* at 1631.

¹⁵⁹ *Gonzales*, 127 S. Ct. at 1631-32 (noting that even if a physician accidentally performs an intact D&E by delivering the fetus beyond one of the Act's anatomical landmarks, he or she is only liable under the Act if he or she intended to perform an intact D&E at the outset); *id.* at 1632 (noting that the legislature has determined that "an intact delivery is almost always a conscious choice rather than a happenstance"); *id.* ("Respondents have not shown that requiring doctors to intend dismemberment before delivery to an anatomical landmark will prohibit the vast majority of D&E abortions.").

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Gonzales*, 127 S. Ct. at 1632-33 (holding that the life exception required by *Casey* cannot be interpreted so it "becomes tantamount to allowing a doctor to choose the abortion method he or she might prefer"); *id.* at 1626 ("[A] premise central to [*Casey's*] conclusion—that the government has a legitimate and substantial interest in preserving and promoting fetal life—would be repudiated were the Court now to affirm the judgments of the Courts of Appeals.").

¹⁶³ *Id.* at 1633.

¹⁶⁴ *Id.* (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)); *id.* at 1634 (reaffirming that the Supreme Court in the past upheld statutes that drew boundaries preventing particular practices that "extinguished life" and were "close to actions that [were] condemned"). *See Glucksberg*, 521 U.S. at

recognized a respect for human life, it was consistent with *Casey*,¹⁶⁵ noting that other less “brutal” alternatives existed for late-term abortions.¹⁶⁶

Second, the Court found that “[t]here [was] documented medical disagreement whether the Act’s prohibition would ever impose significant health risks on women.”¹⁶⁷ Despite the existence of medical uncertainty, the Court found it did not foreclose legislative action.¹⁶⁸ Since medical uncertainty existed, it could not definitively be said that the Act posed a substantial obstacle to a woman’s right to undergo a partial birth abortion previability.¹⁶⁹ The Court noted that alternatives procedures were available that were generally safer than intact D&E¹⁷⁰ and the Act allows the safest and most common method for second trimester previability abortions, D&E.¹⁷¹ While acknowledging the flaws in the congressional fact finding, the Court held that, given the availability of alternative procedures, the Act did not pose a substantial obstacle to late-term previability abortions.¹⁷²

E. The Absence of a Life Exception did not Render the Act Void

The Court addressed the issue of whether the Act was unconstitutional for omitting a life exception for the health of the mother, as required by *Stenberg*.¹⁷³ Due to the “discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used[,] . . . an as-applied challenge better quantifies and balances the medical risks involved in using an alternative to intact D&E than a facial attack.”¹⁷⁴ The Court held that the Act was constitutional for including “preenforcement, as-applied challenges.”¹⁷⁵

F. Ginsburg’s Dissent

Justice Ginsburg’s dissent charged Justice Kennedy, as well as those Justices joining in his judgment, with not taking the precedents of *Roe*, *Casey*, or *Stenberg* seriously.¹⁷⁶ According to Justice Ginsburg, not only was *Gonzales* inconsistent with stare decisis,¹⁷⁷ but because the Act did not contain a life exception for the health of the mother, past precedent dictated that the Act must be found

732 (“[T]he State may fear that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia.”).

¹⁶⁵ *Gonzales*, 127 S. Ct. at 1634.

¹⁶⁶ *Id.* at 1634-35 (“It was reasonable for Congress to think that partial-birth abortion, more than standard D&E, ‘undermines the public’s perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world (citation omitted).’”).

¹⁶⁷ *Id.* at 1636.

¹⁶⁸ *Id.* at 1637.

¹⁶⁹ *Id.*

¹⁷⁰ *Gonzales*, 127 S. Ct. at 1637.

¹⁷¹ *Id.*

¹⁷² *Id.* at 1638 (“When standard medical options are available, mere convenience does not suffice to displace them; and if some procedures have different risks than others, it does not follow that the State is altogether barred from imposing reasonable regulations.”).

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 1638-39.

¹⁷⁵ *Gonzales*, 127 S. Ct. at 1638-39 (“No as-applied challenge need be brought if the prohibition in the Act threatens a woman’s life because the Act already contains a life exception.”).

¹⁷⁶ *Id.* at 1641 (Ginsburg, J., dissenting).

¹⁷⁷ *Id.* at 1652.

unconstitutional.¹⁷⁸

Justice Ginsburg argued that the majority was incorrect in holding that the Act was constitutional, despite omitting a life exception.¹⁷⁹ Justice Ginsburg noted that every other abortion statute upheld by the Court has required to include a life exception for the health of the mother, at any stage of the pregnancy.¹⁸⁰ Another precedent was that “a State must avoid subjecting women to health risks not only where the pregnancy itself creates danger, but also where state regulation forces women to resort to less safe methods of abortion.”¹⁸¹ Where medical uncertainty existed, it is a factor that “signals the presence of risk, not its absence.”¹⁸²

Not only was the absence of a life exception inconsistent with precedent, but Justice Ginsburg argued that endorsing the Act’s questionable congressional findings, instead of the district courts’ findings of fact, was also inconsistent with precedent.¹⁸³ None of the six physicians who testified before Congress had ever performed intact D&E, several did not provide abortion services, and “one was not even an ob[/]gyn.”¹⁸⁴ Congress was incorrect that no medical schools taught intact D&E,¹⁸⁵ that “there was a medical consensus that the banned procedure is never necessary,”¹⁸⁶ and that there was no credible “medical evidence proving that [intact D&E] was as safe or safer than other abortion procedures.”¹⁸⁷ In endorsing the findings of the district courts, Justice Ginsburg found that intact D&E provides safety benefits over D&E in certain circumstances.¹⁸⁸ Therefore, the majority was not justified in abandoning the district courts’ findings.¹⁸⁹

V. PERSONAL ANALYSIS

A. Introduction

Unlike the Nebraska statute in *Stenberg*, the Act in *Gonzales* was not ambiguous,

¹⁷⁸ *Id.* at 1641 (“[T]he Court upholds an Act that surely would not survive under the close scrutiny that previously attended state-decreed limitations on a woman’s reproductive choices.”).

¹⁷⁹ *Id.* (citing *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 327-28 (2006); *Stenberg v. Carhart*, 530 U.S. 914, 930 (2000); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992) (plurality opinion)); *Gonzales*, 127 S. Ct. at 1642 (Ginsburg, J., dissenting) (“[A]s [long as] ‘substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women’s health,’ a health exception is required.”).

¹⁸⁰ *Id.* at 1641.

¹⁸¹ *Id.* at 1642.

¹⁸² *Id.* at 1643 (quoting *Stenberg*, 530 U.S. at 937).

¹⁸³ *Id.*

¹⁸⁴ *Gonzales*, 127 S. Ct. at 1643 (Ginsburg, J., dissenting).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* (quoting Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2(14), 117 Stat. 1201, 1204 (codified as amended at 18 U.S.C. § 1531 (2006)) (congressional findings section)).

¹⁸⁸ *Id.* at 1645 (“[I]ntact D&E minimizes the number of times a physician must insert instruments through the cervix and into the uterus, and thereby reduces the risk of trauma to, and perforation of, the cervix and uterus—the most serious complication associated with nonintact D&E.”).

¹⁸⁹ *Gonzales*, 127 S. Ct. at 1646 (Ginsburg, J., dissenting) (noting that in reaching their opinion the majority entirely disregarded the district courts’ “well-supported findings” negating “physicians who testified that intact D&E is never necessary to preserve the health of a woman”).

vague and overbroad;¹⁹⁰ it expressly applied to intact D&E and only intact D&E.¹⁹¹ *Gonzales*, however, is inconsistent with the life exception requirement of *Stenberg*.¹⁹² *Stenberg* and *Gonzales* rest on the same set of facts and the same determination of medical uncertainty, yet each reached a different conclusion.¹⁹³

While the constitutionality of the omission of a health exception is arguably attributed to the congressional fact finding in *Gonzales*,¹⁹⁴ it is the change in the position of one Justice on the Court, Justice Kennedy, which justifies its omission. While in *Stenberg* Justice Kennedy was in the minority of the Court,¹⁹⁵ in *Gonzales* Justice Kennedy was not only in the majority, but the author of the majority opinion.¹⁹⁶ Consequently, Justice Kennedy was able to restate an argument he has consistently endorsed: when a life interest and the practice of medicine intersect, it is a legitimate government interest,¹⁹⁷ whether state or federal, to regulate that medical practice, even despite medical uncertainty or physician objections.¹⁹⁸

While addressing the constitutionality of *Gonzales* in the spectrum of traditional abortion precedent, this section serves to highlight the tendencies of Justice Kennedy in interpreting regulations on life interests, most notably his usage of the rational basis standard,¹⁹⁹ which is evidenced by his decisions in *Glucksberg*,²⁰⁰ *Oregon*,²⁰¹ *Stenberg*²⁰² and *Gonzales*.²⁰³

B. Abortion and Physician-Assisted Suicide: One in the Same?

Aside from the aforementioned abortion precedent, *Gonzales* is premised on

¹⁹⁰ *Id.* at 1627 (majority opinion). Compare 18 U.S.C. § 1531(1) (2006) (defining “partial-birth abortion” with terms that were intact D&E-specific), with NEB. REV. STAT. § 28-326(9) (2007) (defining “partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery” with terms that applied to both D&E and intact D&E).

¹⁹¹ *Gonzales*, 127 S. Ct. at 1629.

¹⁹² *Id.* at 1642 (Ginsburg, J., dissenting).

¹⁹³ Compare *Stenberg v. Carhart*, 530 U.S. 914, 946 (2000) (holding the statute is unconstitutional for omitting a health exception and for being overbroad), with *Gonzales*, 127 S. Ct. at 1639 (holding the statute is not overbroad and is constitutional, despite omitting a health exception), and *id.* at 1641 (Ginsburg, J., dissenting) (finding the statute should be found unconstitutional, since it does not include a health exception).

¹⁹⁴ *Gonzales*, 127 S. Ct. at 1636-37.

¹⁹⁵ *Stenberg*, 530 U.S. at 956-79 (Kennedy, J., dissenting).

¹⁹⁶ *Gonzales*, 127 S. Ct. at 1610.

¹⁹⁷ *Id.* at 1633; *Washington v. Glucksberg*, 521 U.S. 702 (1997).

¹⁹⁸ *Gonzales*, 127 S. Ct. at 1632-35; *Gonzales v. Oregon*, 546 U.S. 243, 270-75 (2006); *Stenberg*, 530 U.S. at 964 (Kennedy, J., dissenting); *Glucksberg*, 521 U.S. at 735.

¹⁹⁹ *Gonzales*, 127 S. Ct. at 1641 (Ginsburg, J., dissenting). As Justice Ginsburg notes in her dissent:

Today’s decision is alarming. It refuses to take *Casey* and *Stenberg* seriously. . . . It blurs the line, firmly drawn in *Casey*, between previability and postviability abortions. And, for the first time since *Roe*, the Court blesses a prohibition with no exception safeguarding a woman’s health.

. . . [T]he Court upholds an Act that surely would not survive under the close scrutiny that previously attended state-decreed limitations on a woman’s reproductive choices.

Id.

²⁰⁰ *Glucksberg*, 521 U.S. at 702.

²⁰¹ *Oregon*, 546 U.S. at 243.

²⁰² *Stenberg*, 530 U.S. at 956 (Kennedy, J., dissenting).

²⁰³ *Gonzales*, 127 S. Ct. at 1610.

another life interest: physician-assisted suicide. Justice Kennedy, who authored the five-to-four majority opinion in *Oregon*²⁰⁴ and joined the majority opinion in *Glucksberg*,²⁰⁵ authored the majority opinion in *Gonzales*.²⁰⁶ Despite the fact Justice Kennedy does not cite *Oregon* in his majority opinion and cites *Glucksberg* only twice,²⁰⁷ his reliance on both cases is far from insignificant. These two cases form the foundation of Justice Kennedy's philosophy on life interests.

Abortion and physician-assisted suicide are more alike than they first appear. Each is a medical procedure that necessarily implicates a life interest, though arguably different life interests,²⁰⁸ and each is surrounded with medical uncertainty.²⁰⁹ While the life interests and medical procedures vary, the consequences are the same: each procedure extinguishes life.²¹⁰ Given this consequence, there should be no doubt that the government has a legitimate interest in regulating the medical community in these areas.²¹¹

Although *Glucksberg*, *Oregon*, *Stenberg*, and *Gonzales* facially appear to stand for divergent positions,²¹² all are entirely consistent with each other. In *Glucksberg*, the Supreme Court upheld a state statute prohibiting physician-assisted suicide,²¹³ whereas in *Oregon* the Supreme Court upheld a state statute authorizing physician-assisted suicide.²¹⁴ In *Stenberg*, the Supreme Court rejected a state statute prohibiting intact D&E,²¹⁵ whereas in *Gonzales* the Supreme Court upheld a federal statute prohibiting intact D&E.²¹⁶

In each opinion, the Supreme Court acknowledges the medical uncertainty surrounding the medical practice²¹⁷ as well as the varying state-by-state legislative response to the procedure.²¹⁸ Both physician-assisted suicide opinions are consistent

²⁰⁴ *Oregon*, 546 U.S. at 243.

²⁰⁵ *Glucksberg*, 521 U.S. at 702.

²⁰⁶ *Gonzales*, 127 S. Ct. at 1610.

²⁰⁷ *Id.* at 1633, 1634.

²⁰⁸ See, e.g., *Stenberg v. Carhart*, 530 U.S. 914 (2000) (noting that partial birth abortion implicates the right to choose); *Glucksberg*, 521 U.S. at 703 (noting that physician-assisted suicide implicates the right to die).

²⁰⁹ See, e.g., *Gonzales*, 127 S. Ct. at 1636 (acknowledging the medical uncertainty of intact D&E); *Glucksberg*, 521 U.S. at 735 (acknowledging the medical uncertainty regarding physician-assisted suicide).

²¹⁰ See, e.g., *Stenberg*, 530 U.S. at 924-29 (partial birth abortions extinguish the life of a fetus); *Glucksberg*, 521 U.S. at 705 (physician-assisted suicide extinguishes life).

²¹¹ See *Gonzales*, 127 S. Ct. at 1634 (finding that the State has a legitimate interest in regulating partial birth abortions).

²¹² Compare *Gonzales*, 127 S. Ct. at 1610, with *Gonzales v. Oregon*, 546 U.S. 243 (2006), *Stenberg*, 530 U.S. at 914, and *Glucksberg*, 521 U.S. at 702.

²¹³ *Glucksberg*, 521 U.S. at 707; WASH. REV. CODE ANN. § 9A.36.060 (West 2007) (prohibiting physician-assisted suicide). See WASH. REV. CODE ANN. § 9A.20.021 (defining the punishment for a class C felony). But see WASH. REV. CODE ANN. § 70.122.070(1) (forbidding prosecution for suicide or homicide of any person who withholds life-sustaining treatment to a patient as part of the patient's orders).

²¹⁴ *Oregon*, 546 U.S. at 274-75.

²¹⁵ *Stenberg*, 530 U.S. at 946.

²¹⁶ *Gonzales*, 127 S. Ct. at 1627, 1629, 1632-33, 1639.

²¹⁷ *Id.* at 1636; *Stenberg*, 530 U.S. at 932.

²¹⁸ Compare WASH. REV. CODE ANN. § 9A.36.060 (“(1) A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide. (2) Promoting a suicide attempt is a class C felony.”), with OR. REV. STAT. ANN. § 127.885(1) (West 2007) (“No person shall be

because the ultimate decision on regulating the life interest was left to the state, not to the courts.²¹⁹ While the state of Washington determined that physician-assisted suicide posed a threat to the doctor-patient relationship,²²⁰ the state of Oregon determined that physician-assisted suicide preserved the right of the terminally-ill to die with dignity.²²¹ Both partial birth abortion opinions by Justice Kennedy are consistent because the ultimate decision of regulating the life interest was left to the state or federal government, not to the courts.²²² Both Nebraska and Congress determined that prohibiting partial birth abortion furthered a legitimate government interest.²²³

All of Justice Kennedy's opinions in these four cases stand for the proposition that it is a legitimate exercise of government to regulate a medical procedure, whether physician-assisted suicide²²⁴ or partial-birth abortion,²²⁵ especially when it intersects with a life interest, whether the right to die²²⁶ or the right to choose an abortion.²²⁷ And while the government may vary in its approach to regulating the intersection of the life interest and the medical procedure,²²⁸ Justice Kennedy is consistent in honoring the State's decision.²²⁹

On the other hand, regulating abortion is doctrinally different from regulating assisted-suicide. Constitutionally speaking, abortion and assisted-suicide are polar

subject to civil or criminal liability or professional disciplinary action for participating in good faith compliance with ORS 127.800 to 127.897. This includes being present when a qualified patient takes the prescribed medication to end his or her life in a humane and dignified manner.”). *Compare* 18 U.S.C. § 1531(1) (2006) (prohibiting only intact D&E by its use of intact D&E-specific terms), *with* NEB. REV. STAT. § 28-326(9) (2007) (prohibiting both D&E and intact D&E by using generic language applicable to both procedures, although only intending to prohibit intact D&E).

²¹⁹ *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997); *Oregon*, 546 U.S. at 274.

²²⁰ *Glucksberg*, 521 U.S. at 731.

²²¹ *Oregon*, 546 U.S. at 248.

²²² *Gonzales v. Carhart*, 127 S. Ct. 1610, 1632 (2007); *Stenberg*, 530 U.S. at 964-65 (Kennedy, J., dissenting) (stating that courts need to defer to the “superior fact finding capabilities” of the legislature).

²²³ *Gonzales*, 127 S. Ct. at 1635 (“It was reasonable for Congress to think that partial-birth abortion, more than standard D&E, ‘undermines the public’s perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world.’” (quotations omitted)); *Stenberg*, 530 U.S. at 965 (Kennedy, J., dissenting) (“Nebraska, however, was entitled to conclude that its ban, while advancing important interests regarding the sanctity of life, deprived no woman of a safe abortion and therefore did not impose a substantial obstacle on the rights of any woman.”).

²²⁴ WASH. REV. CODE ANN. §§ 9A.36.060, 9A.20.021, 70.122.070(1) (West 2007); OR. REV. STAT. ANN. §§ 127.800-127.897 (West 2007).

²²⁵ 18 U.S.C. § 1531 (2006); NEB. REV. STAT. §§ 28-326, -328 (2007).

²²⁶ *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) (holding there is a right to die by physician-assisted suicide); *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997) (holding there is no right to die by physician-assisted suicide).

²²⁷ *Gonzales*, 127 S. Ct. at 1632 (holding the statute was constitutional and did not cause an undue burden on a woman’s right to choose); *Stenberg*, 530 U.S. at 957 (Kennedy, J., dissenting) (arguing the statute was constitutional because it did not cause an undue burden on a woman’s right to choose).

²²⁸ *Compare* WASH. REV. CODE ANN. § 9A.36.060(1) (prohibiting physician-assisted suicide), *with* OR. REV. STAT. ANN. §127.885(1) (eliminating liability for physicians assisting in physician suicide). *Compare* 18 U.S.C. § 1531(1) (prohibiting only intact D&E by its use of intact D&E-specific terms), *with* NEB. REV. STAT. § 28-326(9) (prohibiting both D&E and intact D&E by using generic language applicable to both procedures, although only intending to prohibit intact D&E).

²²⁹ *Gonzales*, 127 S. Ct. at 1639; *Oregon*, 546 U.S. at 275; *Stenberg*, 530 U.S. at 976 (Kennedy, J., dissenting); *Glucksberg*, 521 U.S. at 735.

opposites.²³⁰ While there is a constitutional right to an abortion,²³¹ no such right extends to physician-assisted suicide.²³² The deference given to legislative regulations and the standard of review applicable to these regulations varies dramatically.²³³ Abortion is subject to an undue burden analysis, which is a heightened standard of review;²³⁴ physician-assisted suicide is subject to a rational basis analysis, which is a de minimis standard of review.²³⁵ Given these differences, courts should not apply the same level of scrutiny and review to abortion regulations as they do to physician-assisted suicide regulations.

C. What Happened to the Undue Burden Analysis?

However, this is exactly what Justice Kennedy does in *Gonzales*.²³⁶ Although acknowledging the flaws in congressional fact finding²³⁷ and the applicability of the undue burden analysis,²³⁸ Justice Kennedy upholds Congress' determination that a health exception is not required in the Act.²³⁹ In doing so, he relegates the abortion standard of review, undue burden, to that of physician-assisted suicide, rational relations.²⁴⁰ Consequently, *Gonzales* fails to signify that prohibiting intact D&E does not pose a substantial obstacle to a mother choosing to have an abortion.²⁴¹

While the government has a legitimate interest in regulating partial birth abortions,²⁴² unlike physician-assisted suicide, that interest is not absolute;²⁴³ it must not pose a substantial obstacle to a woman's right to choose.²⁴⁴ There is an inherent tension between *Glucksberg* and *Gonzales*,²⁴⁵ although Justice Kennedy unifies these

²³⁰ Compare *Glucksberg*, 521 U.S. at 728 (holding there is no liberty interest in the right to a physician-assisted suicide), with *Roe v. Wade*, 410 U.S. 113, 154 (1973) (holding there is a liberty interest in the right to an abortion).

²³¹ *Roe*, 410 U.S. at 154.

²³² *Glucksberg*, 521 U.S. at 728.

²³³ Compare *Stenberg*, 530 U.S. at 938 (applying *Casey*'s undue burden analysis to the Nebraska statute (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992) (plurality opinion))), with *Glucksberg*, 521 U.S. at 728 (applying rational relations review to Washington's prohibition on physician-assisted suicide).

²³⁴ *Casey*, 505 U.S. at 874, 877.

²³⁵ *Glucksberg*, 521 U.S. at 728 (explaining that because there is no liberty interest in a physician-assisted suicide any government regulation need only be rationally related to a legitimate government interest).

²³⁶ See *Gonzales v. Carhart*, 127 S. Ct. 1610, 1641 (2007) (Ginsburg, J., dissenting) (finding that the majority failed to apply the close scrutiny it had applied in previous abortion cases, which was the undue burden analysis).

²³⁷ *Id.* at 1638 (majority opinion).

²³⁸ *Id.* at 1632.

²³⁹ *Id.* at 1639.

²⁴⁰ See *id.* at 1641 (Ginsburg, J., dissenting) (noting that the Court applied something lower than *Casey*'s undue burden analysis).

²⁴¹ *Gonzales*, 127 S. Ct. at 1641 (Ginsburg, J., dissenting).

²⁴² *Id.* at 1633 (majority opinion).

²⁴³ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992) (plurality opinion) (holding that only when an abortion regulation poses an undue burden on a woman's right to choose is it unconstitutional).

²⁴⁴ *Id.* at 877 (holding that an abortion regulation causes an undue burden when a statute places a substantial obstacle in the path of a woman's choice to undergo an abortion).

²⁴⁵ *Gonzales*, 127 S. Ct. at 1634.

two cases.²⁴⁶ Justice Kennedy cites *Glucksberg* as evidence that in the past the Supreme Court has upheld statutes that drew boundaries preventing particular practices that “extinguished life” and were “close to actions that [were] condemned.”²⁴⁷ However, the government is permitted greater latitude when drawing boundaries for physician-assisted suicide than partial birth abortions, since physician-assisted suicide is not a liberty interest and is not subject to an undue burden analysis.²⁴⁸ But, by equating physician-assisted suicide and partial birth abortions, Justice Kennedy subordinates the role of undue burden analysis and the district courts’ findings.²⁴⁹

In the face of the medical uncertainty regarding the necessity of intact D&E,²⁵⁰ *Gonzales* improperly applied deferential review to the facts submitted by Congress.²⁵¹ In the physician-assisted suicide context, medical uncertainty does not foreclose prohibition because physician-assisted suicide is not a liberty interest.²⁵² If physician-assisted suicide was a liberty interest, however, government regulations of physician-assisted suicide would be subject to heightened standard of review, not rational relations.²⁵³ Conversely, since partial birth abortions implicate the liberty interest of the right to choose,²⁵⁴ government regulations are subject to an undue burden analysis.²⁵⁵ This analysis renders regulations invalid if they pose a substantial obstacle to a woman’s right to choose,²⁵⁶ a fact forgotten by Justice Kennedy.²⁵⁷

While Justice Kennedy believes the government can regulate partial birth abortions in the same manner as the government regulates physician-assisted suicide, as his opinions suggest, the analogy between the government’s legitimate interest in regulating physician-assisted suicide and partial birth abortions is misguided and problematic. In giving deference to the congressional findings, the Court extends deference to the ultimate issue in any abortion case: whether the regulation poses an undue burden to a woman’s right to choose.²⁵⁸

Although this is problematic in any abortion case, and inconsistent with past precedent, it is a blatant disregard of the undue burden analysis when these congressional findings contain numerous flaws, like the findings in *Gonzales*.²⁵⁹ Congressional fact finding should not circumvent the role of undue burden

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997).

²⁴⁹ *See Gonzales*, 127 S. Ct. at 1641 (Ginsburg, J., dissenting).

²⁵⁰ *Id.* at 1637 (majority opinion) (“Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts.”). *But see Stenberg v. Carhart*, 530 U.S. 914, 914 (2000) (stating that a “division of medical opinion . . . at most means uncertainty, a factor that signals the presence of risk, not its absence”).

²⁵¹ *Gonzales*, 127 S. Ct. at 1637; *id.* at 1642 (Ginsburg, J., dissenting).

²⁵² *Glucksberg*, 521 U.S. at 728.

²⁵³ *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992) (plurality opinion) (holding because abortion implicates a liberty interest it is subject to a higher standard of review than rational relations).

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 877.

²⁵⁷ *Gonzales v. Carhart*, 127 S. Ct. 1610, 1641 (2007) (Ginsburg, J., dissenting).

²⁵⁸ *See id.* (noting that the Court applied something lower than *Casey*’s undue burden analysis).

²⁵⁹ *Id.* at 1643 (listing the numerous flaws in the congressional fact finding).

analysis.²⁶⁰ The Court should not have affirmed Congress' finding that intact D&E was never medically necessary to save the life of the mother and should have held the Act unconstitutional.²⁶¹ Conversely, the Court should have affirmed the lower courts' findings that intact D&E was medically necessary to save the life of a mother in some circumstances, even finding it to be the safest abortion procedure for some women.²⁶² Without such a ruling, the undue burden standard is rendered meaningless, allowing congressional fact finding to trump its relevance²⁶³ and imposing an imperfect analogy between partial birth abortions and physician-assisted suicide.²⁶⁴

VI. CONCLUSION

Gonzales v. Carhart was a watershed case for abortion rights; it was the first case that permitted the federal government to prohibit an entire abortion procedure both previability and postviability,²⁶⁵ allowing the possibility of future congressional intervention in the abortion arena. While *Gonzales* will undoubtedly influence future state and federal abortion regulations, it is best seen as a continuation of an old idea. *Gonzales* is the latest in line of Justice Kennedy opinions that find when a life interest and the practice of medicine intersect, it is a legitimate government interest,²⁶⁶ whether state or federal, to regulate that medical practice, even despite medical uncertainty or physician objections.²⁶⁷ As long as Justice Kennedy continues to make the imperfect analogy between the government regulation of partial birth abortions and the government regulation of physician-assisted suicide due to the presence of life interests,²⁶⁸ the undue burden standard will remain entangled in uncertainty and irrelevance.

²⁶⁰ *Id.* at 1646.

²⁶¹ *Id.*

²⁶² *Gonzales*, 127 S. Ct. at 1646 (Ginsburg, J., dissenting).

²⁶³ *Id.* at 1641.

²⁶⁴ *Id.* Cf. *Stenberg v. Carhart*, 530 U.S. 914, 932 (2000) (noting that medical authority finds the absence of a health exception for intact D&E may create a risk to the health of the mother in those circumstances where it is the safest abortion procedure for the mother).

²⁶⁵ *Gonzales*, 127 S. Ct. at 1633-34.

²⁶⁶ *Id.* at 1633; *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997).

²⁶⁷ *Gonzales*, 127 S. Ct. at 1632-35; *Gonzales v. Oregon*, 546 U.S. 243, 270-75 (2006); *Stenberg*, 530 U.S. at 964 (Kennedy, J., dissenting); *Glucksberg*, 521 U.S. at 735.

²⁶⁸ *Gonzales*, 127 S. Ct. at 1634.