INTRODUCTION

Abortion rates do not appear to be affected by the legality of abortion; instead, the legal status affects the safety of the abortion procedure.\textsuperscript{1} A recent, global study by the World Health Organization and the Guttmacher Institute concluded that the legal status of abortion does not influence a woman’s decision whether to have an abortion.\textsuperscript{2} The study found that the legality affects and increases the dangers involved with the procedure.\textsuperscript{3} In an illegal environment, the abortive procedure is likely to be unsafe.\textsuperscript{4} In contrast, when abortion is legal, the procedure will likely be provided in a safe manner.\textsuperscript{5} Since the United States Supreme Court decided \textit{Roe v. Wade}\textsuperscript{6} in 1973, American women have had the option to obtain safe and sanitary abortive procedures, not only for elective abortions, but also for terminations that are necessary for the health or life of the woman.\textsuperscript{7} This Note argues that the recent United States Supreme Court decision in \textit{Gonzales v. Carhart}\textsuperscript{8} could lead to a chilling effect in medicine and have a detrimental impact on women’s health and society.\textsuperscript{9}

This Note proceeds in three sections.\textsuperscript{10} First, this Note examines a brief history of the privacy right that encompasses a woman’s right

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\item \textit{Id.} “A comprehensive global study of abortion has concluded that abortion rates are similar in countries where it is legal and those where it is not, suggesting that outlawing the procedure does little to deter women seeking it.” \textit{Id.}
\item \textit{Id.}
\item \textit{Id.} “The study indicated that about 20 million abortions that would be considered unsafe are performed each year and that 67,000 women die as a result of complications from those abortions, most in countries where abortion is illegal.” \textit{Id.}
\item \textit{Id.}
\item 410 U.S. 113 (1973).
\item \textit{See generally} \textit{Roe v. Wade}, 410 U.S. 113 (1973) (holding that up to the end of the first trimester the decision whether to terminate a pregnancy must be left to the woman and the medical judgment of her physician, and after viability, the state may regulate and proscribe abortion except where necessary to preserve the life or health of the woman).
\item 127 S. Ct. 1610 (2007).
\item \textit{See infra} notes 264-457 and accompanying text.
\item \textit{See infra} notes 15-482 and accompanying text.
\end{enumerate}
to choose whether to terminate her pregnancy. This Note then advances the argument that the Supreme Court's decision in Gonzales substantially deviated from its decision in Stenberg v. Carhart seven years earlier and, in turn, could have a detrimental effect on society as congressional findings replaced medical judgment. Finally, this Note concludes with a brief synopsis of the argument and proposes that the legislative and the judicial branches should leave determinations of medical necessity to licensed, practicing physicians who care for patients on an individualized basis in an effort to provide the best possible medical care.

BACKGROUND

A. PRE-ROE HISTORY OF ABORTION IN THE UNITED STATES

Before the United States Supreme Court's decision in Roe v. Wade recognized a woman's right to choose whether to terminate her pregnancy, and effectively legalized pre-viability abortion, some American women were desperate to find physicians who would perform abortions in safe and clean environments. While some women successfully obtained referrals to skilled physicians, others were unable to obtain such referrals and resorted to inept, non-physician abortionists. Prior to Roe, urban police officers confirmed that the image of an unsavory man performing abortions on pregnant women in cheap hotel rooms was an accurate account of some of the abortions performed. It was in this type of atmosphere and under these kinds of procedures that a woman could end up hospitalized with an infection, bleeding, or even dead. Among other methods, non-physician

11. See infra notes 15-263 and accompanying text.
13. See infra notes 264-457 and accompanying text.
14. See infra notes 458-82 and accompanying text.
17. Id. at 27. Gorney provides the following account: 'Legally, I [physician] can't do anything. I cannot do anything. And legally I cannot refer you to anybody.' But Schwartz [the physician] made a referral anyway—illegally, by pointing to a certain listing in the Yellow Pages of the telephone directory. St. Louis in the 1960s maintained its share of inept abortionists, like every urban area in the United States.
18. Id.
19. See infra note 26 and accompanying text. Gorney noted the following account: It was a problem because illegal abortion made a lot of women sick. It was a problem because there were urban public hospitals, like Philadelphia General and Los Angeles County, in which entire wards had been ceded to patients trying to recover from illegal abortions; at Los Angeles County, on any given afternoon during the late 1950s and early 1960s, fifty to one hundred patients
abortionists used household products and utensils to terminate a woman's pregnancy, such as bicycle spokes, Lysol douche, garden hoses, potassium permanganate corrosive tablets, a slippery elm stick, turpentine by mouth, bleach douche, intrauterine installation of kerosene and vinegar, or a coat hanger.\textsuperscript{20}

Women had serious complications from these illegal, non-medical abortions, and physicians who cared for the sick women referred to the intensive care units as the "infected OB."\textsuperscript{21} During the 1950s and 1960s, on any given afternoon in Los Angeles County, the hospital treated fifty to one hundred women in the "infected OB" unit.\textsuperscript{22} The women in these units were jaundiced from infection, were in shock with foul-smelling substances emanating from their uteruses, and some died, foaming at the mouth, from congestive heart failure.\textsuperscript{23} In

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GORNEY, supra note 16, at 25 (statement of Gail Anderson, the Los Angeles medical professor who was hired in 1958 as head physician for the OBGYN service at Los Angeles County General Hospital).
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20. GORNEY, supra note 16, at 21-22. Gorney described the specific devices used by women and abortionists to terminate pregnancies leading up to the 1960s:

Lysol douche, hexol douche, bleach douche, green soap and glycerine douche, powdered kitchen mustard douche, hydrogen peroxide douche, potassium permanganate corrosive tablets, intrauterine installation of kerosene and vinegar, gauze packing, artist's paintbrush, curtain rod, slippery elm stick, garden hose, rubber tube, polyethylene tube, glass cocktail stirrer, ear syringe, telephone wire, copper wire, coat hanger (wire), nut pick, pencil, cotton swabs, clothespin, knitting needle, rubber catheter, woven silk catheter, catheter with stylette, chopsticks, bicycle pump and tube, football pump and plastic straw, plastic tube with soap solution, gramophone needle, bulb syringe, caster oil by mouth, quinine by mouth, ergot by mouth, Humphries No. 11 tablets by mouth, turpentine by mouth. A roster of terrible specificity accumulated, in the years leading up to the late 1960s, and was committed to print in the journals of American medicine. This is what she did it with, the examining physician must have murmured to each other as the bedside curtains were drawn: this was found in the cervix, or identified in the bloodstream, or extracted with forceps from the uterine wall in which it had lodged. Sometimes a woman could be persuaded to describe the device she had pushed inside herself or the fluid she had drunk or the particular tools she believed the abortionist had used; sometimes the doctors could look inside the vaginal area, or open an abdomen at autopsy, and recognize the markers left behind.

\textit{Id.} at 21-22.


22. \textit{Id.}

23. \textit{Id.}
addition, thousands of women died from septic abortions.\textsuperscript{24} Despite the fact the abortions were illegal, some women in desperate situations sought to terminate their pregnancies, and many paid with their lives.\textsuperscript{25} For example, a physician in Sedalia, Missouri, was called into the emergency room to assess a woman who had obtained an illegal abortion:

That was when this call came, in the middle of the night, and when Duemler [Robert Duemler, physician] walked into the emergency room what he saw, in more places than he would have thought possible, was blood. There was blood on the walls. There was blood on the floor. There was blood on the gurney and on the towels and on the hands and arms of the emergency crew, who were silent now, and no longer moving rapidly. Beneath them lay a woman whose skin had gone pallid and slack, and when Duemler lifted her legs into the stirrups and cleaned some of the blood away, he saw that someone had pushed inside her vagina with a sharp instrument and aimed it toward the cervix and thrust straight up. The blood vessels to either side of the cervix had emptied all over the air force emergency room and in the car in which the woman's husband had driven her twenty miles, which was the distance between the hospital and the abortionist. The husband told Duemler they had five children already.\textsuperscript{26}

Before Roe, some women sought to terminate their pregnancies despite the illegality of abortions.\textsuperscript{27} Many of these women suffered significant health complications, and thousands died from infection.\textsuperscript{28} Therefore, before Roe, some women were subjected to non-medical, illegal abortions and suffered negative health consequences, including death.\textsuperscript{29}

B. AMERICAN LAW INSTITUTE'S MODEL PENAL CODE INCLUDED JUSTIFIED ABORTIONS

The American Law Institute ("ALI") proposed a Model Penal Code section on abortion in 1962 that included a subsection on lawful, justifiable abortions.\textsuperscript{30} Approximately twenty-five percent of the states implemented the ALI Model Penal Code as a pattern for new legisla-

\textsuperscript{25} Gorney, supra note 16, at 20, 25.
\textsuperscript{26} Id. at 16.
\textsuperscript{27} Id. at 20-21.
\textsuperscript{28} Id. at 25; Wright et al., supra note 24, at 9.
\textsuperscript{29} See supra notes 15-28 and accompanying text.
tion. For example, Georgia's legislature utilized the ALI Model Penal Code to formulate its 1968 criminal abortion statute, replacing statutory language that had been in effect for nearly a century. The 1876 Georgia statute, like many other states' statutes, made abortion a crime unless it was necessary to preserve the woman's life. In contrast, the abortion provision of the 1968 Criminal Code of Georgia mimicked the ALI Model Penal Code and provided an exception to the crime. The exception stated that the criminal statute would not apply if a physician believed, based on medical judgment, the pregnancy

(2) Justifiable Abortion. A licensed physician is justified in terminating a pregnancy if he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse. All illicit intercourse with a girl below the age of 16 shall be deemed felonious for purposes of this subsection. Justifiable abortions shall be performed only in a licensed hospital except in case of emergency when hospital facilities are unavailable.

(3) Physicians' Certificates; Presumption from Non-Compliance. No abortion shall be performed unless two physicians, one of whom may be the person performing the abortion, shall have certified in writing the circumstances that they believe to justify the abortion. Such certificate shall be submitted before the abortion to the hospital where it is to be performed and, in the case of abortion following felonious intercourse, to the prosecuting attorney or the police. Failure to comply with any of the requirements of this Subsection gives rise to a presumption that the abortion was unjustified.

MODEL PENAL CODE § 230.3. See also Gorney, supra note 16, at 48 ("The statute (Model Penal Code), if states chose to adopt it, would create for the first time the formal legal concept of Justifiable Abortion. Not Therapeutic, with its implications of urgent medical necessity, but Justifiable . . . a woman and her physician were to be permitted to end another human life, legally, in a hospital, with the codified approval of society around her, because her situation justified it.").

32. Id.
33. Id. at 182-83, 182 n.4 (citing 1876 Ga. Laws No. 130, § 2, 113). Georgia Law provided:

(1) The willful killing of an unborn child, so far developed as to be ordinarily called "quick," by any injury to the mother of such child . . . shall be guilty of a felony, and punishable by death or imprisonment for life . . . .

(2) . . . Every person who shall administer to any woman pregnant with a child, any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or mother be thereby produced, be declared guilty of an assault with intent to murder.

(3) . . . Any person who shall willfully administer to any pregnant woman any medicine, drug or substance, or anything whatever, or shall employ any instrument . . . with intent thereby to procure the miscarriage or abortion of any such woman, unless the same shall have been necessary to preserve the life of such woman, unless the same shall have been advised by two physicians to be necessary for that purpose, shall, upon conviction, be punished . . .

1876 Ga. Laws No. 130, §2, 113.
34. Doe, 410 U.S. at 182. The Doe court, in app. A to the Opinion of the Court, cites the GA. CODE ANN. §§ 26-1201—03 (West 1972 & Supp. 1977), which provides:

26-1201. Criminal Abortion . . . . a person commits criminal abortion when he administers any medicine, drug or other substance whatever to any woman or
endangered the health or life of the woman, or the fetus would suffer from a lethal or irremediable anomaly, or the pregnancy resulted from rape. While both the 1968 Criminal Code of Georgia and the ALI Model Penal Code provided an exception to the crime of abortion, the codes also required that the authorizing physician submit a written statement to the hospital describing the circumstances under which the physician believed the abortion was justified. An additional physician’s judgment had to support the statement. Under the ALI Model Penal Code, an abortion could be justified if the physician believed there was a substantial risk to the woman’s physical or mental health, the child would be born with a serious defect, or because the pregnancy resulted from felonious intercourse, such as rape or incest.

C. **Griswold v. Connecticut**: The United States Supreme Court Recognized Marital Privacy Within the Privacy Right Guaranteed by the Penumbras of the Bill of Rights

In *Griswold v. Connecticut*, the United States Supreme Court determined that a number of the guarantees found within the Bill of Rights had penumbras, which supported the enumerated rights. To-

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when he uses any instrument or other means whatever upon any woman with intent to produce a miscarriage or abortion.

26-1202. Exception. (a) Section 26-1201 shall not apply to an abortion performed by a physician duly licensed to practice medicine and surgery . . . based upon his best clinical judgment that an abortion is necessary because:

(1) A continuation of the pregnancy would endanger the life of the pregnant woman
or would seriously and permanently injure her health; or
(2) The fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect; or
(3) The pregnancy resulted from forcible or statutory rape.

(b) No abortion is authorized or shall be performed under this section unless each of the following conditions is met:

(3) Such physician’s judgment is reduced to writing and concurred in by at least two other physicians duly licensed to practice medicine and surgery . . . who certify in writing that, based upon their separate personal medical examinations of the pregnant woman, the abortion is, in their judgment, necessary because of one or more of the reasons enumerated above.

(4) Such abortion is performed in a hospital licensed by the State Board of Health and accredited by the Joint Commission on Accreditation of Hospitals . . .

**Ga. Code Ann. §§ 26-1201—03.**


36. *Id.* at 202-07 app. A, B.


38. *Id.*


gether, those penumbras created zones of privacy.\textsuperscript{41} Without those peripheral rights, the Court noted the specific, enumerated rights in the United States Constitution would be less secure.\textsuperscript{42} In \textit{Griswold}, Estelle T. Griswold ("Griswold"), the Executive Director of the Planned Parenthood League of Connecticut, and C. Lee Buxton ("Buxton"), a physician and professor at Yale Medical School, appealed their convictions, as accessories, for violating Connecticut's birth control law by distributing information and medical advice to married couples to prevent conception.\textsuperscript{43} Connecticut's aiding and abetting statute allowed the state to charge Griswold and Buxton as the principle offenders.\textsuperscript{44} In the Circuit Court for the Sixth Circuit of Connecticut, Griswold and Buxton were prosecuted and found guilty of violating Connecticut's statute that prohibited the use of contraception because they assisted a married couple in obtaining contraception information.\textsuperscript{45} Under Connecticut's contraception statute, a guilty party could be fined not less than fifty dollars, imprisoned at most one year, or could be both fined and imprisoned.\textsuperscript{46} In the circuit court, Griswold and Buxton challenged the Connecticut statutes and argued that the statutes violated the Fourteenth Amendment.\textsuperscript{47} Griswold and Buxton claimed the statutes deprived their patients, and themselves as the couple's physicians, of their liberty without due process.\textsuperscript{48} Further, Griswold and Buxton alleged both the aiding and abetting and contraception statutes were an unjustifiable invasion of privacy the Fourth, Ninth, and Fourteenth Amendments protected.\textsuperscript{49} The circuit court fined Griswold and Buxton each one hundred dol-

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\item Griswold, 381 U.S. at 484.
\item Id. at 482-83.
\item Id. at 480. See also id. (quoting CONN. GEN. STAT. §§ 53-32, 54-196 (1958) (repealed 1971)). CONN. GEN. STAT. §§ 53-32, 54-196 provided:
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\item (53-32) Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.
\item (54-196) Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.
\end{itemize}
\item Id. 53-32, 54-196.
\item Id.
\item Id.
\item Id. Griswold and Buxton claimed CONN. GEN. STAT. §54-196 as applied violated the Fourteenth Amendment. Id.
\item Brief of Appellant at 3, 6-9, Griswold v. Connecticut, 381 U.S. 479 (1965) (No. 496), 1964 WL 95215.
\item Id.
\end{enumerate}
Both the Appellate Division of the Circuit Court and the Supreme Court of Errors affirmed the judgments.\footnote{Griswold, 381 U.S. at 480.} Griswold and Buxton appealed the Supreme Court of Errors' decision to the United States Supreme Court, which reversed the convictions.\footnote{Id.} The Court found that the relationship between a professional and a married couple was within the zone of privacy created by the penumbras surrounding fundamental constitutional guarantees.\footnote{See id. (challenging the defendants' convictions as invasions of their constitutional rights).} Specifically, the Court stated that the penumbras of the First, Third, Fourth, Fifth, and Ninth Amendments protected individuals' privacy.\footnote{Id. at 485. The Griswold court provided: The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.' Id. at 484.} The Court explained that its previous decisions demonstrated that the right of privacy was legitimate and the Court should recognize the right.\footnote{See id. (stating various guarantees in the Bill of Rights have penumbras and create zones of privacy).} By prohibiting the use of contraceptives, the Court determined Connecticut's aiding and abetting statute, as well as the contraception statute, had the maximum destructive effect on the relationship between a husband and wife and their relationship with a physician.\footnote{Id. at 485.} The Court reasoned Connecticut's statute forbade the use of contraceptives, instead of simply regulating the sale or manufacture of such products.\footnote{Id.} The Court stated such restrictions could not be valid when analyzed under the common principle that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." Further, the Court reasoned this invasion, or the mere idea of such invasion, into the marital bedroom was repulsive to the notions of privacy because the right to marry was older and more fundamental than the Bill of Rights.\footnote{Id. at 486.} The Court explained that marriage
promoted a way of life, and that such an association had as worthy a purpose as the purposes involved in the Court's previous decisions regarding the right to privacy.\textsuperscript{60} The Court stated that such rights of privacy included marital privacy, making the Connecticut statutes in \textit{Griswold} an unconstitutional intrusion upon that right.\textsuperscript{61} Therefore, the Court struck down Connecticut's contraception statutes because the statutes violated the right to privacy the penumbras of the First, Third, Fourth, Fifth, and Ninth Amendments guaranteed.\textsuperscript{62}

D. \textit{People v. Belous}: The Supreme Court of California
Determined the Fundamental Right for Women to Choose Whether to Have an Abortion Proceeded from the United States Supreme Court's Repeated Recognition of a Privacy Right in Matters Related to Family, Marriage, and Sex

In \textit{People v. Belous},\textsuperscript{63} the Supreme Court of California determined a woman's fundamental right to choose whether to have a child proceeded from the United States Supreme Court's and the Supreme Court of California's repeated recognition of a right of liberty or privacy in matters related to family, marriage, and sex.\textsuperscript{64} Further, the Supreme Court of California stated merely because the California Constitution and the United States Constitution did not mention that the right to choose whether to bear a child was a fundamental right, it did not mean that those constitutions were an impediment to the existence of such a fundamental right.\textsuperscript{65}

In \textit{Belous}, Dr. Leon Phillip Belous ("Belous"), a physician and surgeon licensed in California, appealed his conviction for abortion and conspiracy to commit an abortion to the Supreme Court of California.\textsuperscript{66} A jury convicted Belous for violating California state law by

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\item \textsuperscript{60} \textit{Id.}
\item \textsuperscript{61} The right of "association," like the right of belief, is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful.
\item \textsuperscript{62} \textit{Id.} at 483.
\item \textsuperscript{63} \textit{See id.} at 480-86 (noting the privacy surrounding the marital relationship falls within the zone of privacy created by constitutional guarantees).
\item \textsuperscript{64} \textit{See supra} notes 39-61 and accompanying text.
\item \textsuperscript{65} \textit{Belous}, 458 P.2d at 194 (Cal. 1969).
\item \textsuperscript{66} \textit{People v. Belous}, 458 P.2d 194, 199 (Cal. 1969).
\item \textsuperscript{67} \textit{Belous}, 458 P.2d at 200.
\item \textsuperscript{68} \textit{Id.} at 195, 197 & n.2 (citing \textsc{Penal Code} § 274 (West 1988 & Supp. 1999) (repealed 2000)). Section 274 provides:
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Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the mis-
providing a woman with the contact information of an abortionist. The jury found Belous violated the state statute because he provided the means to obtain an abortion for a woman who had the intent to procure a miscarriage. Further, the woman's termination did not fit within the statutory exception to the crime because the termination was not necessary to preserve the woman's life.

On appeal, the Supreme Court of California concluded the abortion statute was invalid and therefore reversed Belous' conviction. The court reasoned the statute was invalid because of its vagueness and the court's inability to ascertain the definition of the statutory term necessary to preserve. The court noted it could not ascertain a fixed meaning for the word necessary because the court could not determine whether necessary meant that the woman's life must be in imminent peril or something less than that. The court stated it was evident that imminent death was not a precondition for a lawful abortion under the statute. The court reasoned that the woman's ill health and the possibility of the woman ending her own life was sufficient to surpass the statutory requirement necessary to preserve her life. Moreover, the court found that abortion implicated two rights

Carriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the State prison not less than two nor more than five years.

Cal. Penal Code § 274.

67. See Belous, 458 P.2d at 195, 196 (stating that after a jury trial Belous was convicted of two felonies—abortion and conspiracy to commit abortion).

68. See id. (noting that Dr. Belous was arrested after police found his name in a contact notebook as a doctor that referred patients to Karl Lairtus for abortions). The Belous Court provided the following facts:

Dr. Belous testified that he was very familiar with the abortion business in Tijuana. He had visited the clinics there to learn about conditions and knew that women who went to Tijuana were taking their lives in their hands. He met Karl Lairtus while in Tijuana and knew from personal observation that Lairtus, licensed to practice in Mexico but not California, was performing skilled and safe abortions in Mexico. Lairtus wanted to obtain a California license, and sought out Belous help on a number of occasions. When Lairtus moved from Mexico to Chula Vista, he gave Dr. Belous his address and phone number. When Lairtus moved to Los Angeles, he gave the doctor a Hollywood address, and made it known to the doctor that he was performing abortions. It was Lairtus' number that Belous gave to Cheryl and Clifton. Although he had given out Lairtus' number before, in similar situations, where distraught pregnant women insisted they would do anything, Dr. Belous had no idea how many women actually went to Lairtus.

Id. at 196.

69. See id. at 195, 196, 197 (quoting Cal. Penal Code § 274).

70. Id. at 194, 206.

71. Id. at 205.

72. Id. at 198.

73. Id.

74. Id. at 199. See also People v. Ballard, 218 Cal. App. 2d 295, 298, 32 Cal. Rptr. 233 (1963) (noting the women were in a "bad state of health"); People v. Abarbanel, 239 Cal. App. 2d 31, 48 Cal. Rptr. 336 (1965) (disclosing the doctor performed the abortion
of the woman: the right to life and the right to choose to have a child.\textsuperscript{75} Thus, the court reasoned that a definition, or an interpretation of a definition, that required evidence of imminent death would violate the woman's constitutional rights.\textsuperscript{76}

The Supreme Court of California also discussed the central problem with the provision of the penal code under which Belous was convicted.\textsuperscript{77} The court stated the statute's vagueness was more problematic because the statute delegated the duty to a physician to decide if a particular woman had the right to receive an abortion.\textsuperscript{78} The court reasoned this delegation produced a problematic situation for the physician because the physician would be subjected to criminal prosecution, and possibly a temporary suspension from practicing medicine, if the physician reached the wrong conclusion.\textsuperscript{79} While the statute placed pressure on physicians to remain impartial in their decision-making process, the statutory penalties were skewed to encourage physicians to refuse to perform abortions because the statute contained no criminal penalties if the woman should die.\textsuperscript{80} The physician was subtly encouraged by the statutory provisions to choose risking the woman's health or life over performing an abortive procedure.\textsuperscript{81} Therefore, the court concluded that the delegation of decision-making power to the physician violated the Fourteenth Amendment because the ultimate effect of that delegation might have been to deny a woman an abortion when such procedure was necessary.\textsuperscript{82} The court determined that because a physician was required to decide whether an abortion was necessary for a particular woman, at the physician's own peril, a woman with a life-threatening condition was "effectively condemned to death," as if California law had prohibited abortions altogether.\textsuperscript{83}

\textsuperscript{75} Belous, 458 P.2d at 199. "The woman's right to life is involved because childbirth involves risks of death." \textit{Id.}

\textsuperscript{76} \textit{Id.}

\textsuperscript{77} \textit{See id.} at 206 (stating the statute delegates the decision-making power to the physician to determine whether a woman has a right to an abortion, which violates the Fourteenth Amendment because the physician can no longer be an impartial individual because the physician has a direct interest in determining a woman should not obtain an abortion).

\textsuperscript{78} \textit{Id.}

\textsuperscript{79} \textit{Id.}

\textsuperscript{80} \textit{Id.} But criminal penalties shall result if the woman was found to have not been qualified for the exception because the procedure was not necessary to preserve her life. \textit{Id.}

\textsuperscript{81} \textit{Id.}

\textsuperscript{82} \textit{Id.}

\textsuperscript{83} \textit{Id.}
E. **Roe v. Wade**: The United States Supreme Court determined that a woman's choice to procure an abortion was included in the right to privacy and the state was required to provide an exception for the health or life of the woman

In *Roe v. Wade*, the United States Supreme Court concluded a woman's decision whether to have an abortion was included in the right of privacy as the Court recognized to exist under the Constitution. In *Roe*, Jane Roe ("Roe") sought a declaratory judgment against the District Attorney of Dallas County, Texas, requesting that the Texas state laws criminalizing abortion be found unconstitutional because the statutes infringed on a woman's right to personal privacy. Roe also sought to enjoin the District Attorney from enforcing such statutes. The Texas statutes at issue made it a crime to obtain or attempt to obtain an abortive procedure unless, based on medical judgment, it was necessary to save the woman's life. In the United States District Court for the Northern District of Texas, Roe alleged she was pregnant, unmarried, and wanted a licensed, competent physician, under a safe, medical environment to perform an abortion to terminate her pregnancy. Roe further argued a legal abortion was unavailable to her in Texas because her pregnancy did not appear to be a life-threatening condition. Roe alleged the Texas statutes that criminalized abortion were vague and unconstitutional as an abridg-
ment of her personal privacy right.\textsuperscript{90} The Texas statutes Roe challenged as unconstitutional had been in effect for nearly a century.\textsuperscript{91}

The district court consolidated Roe's action with \textit{Doe v. Bolton},\textsuperscript{92} a case wherein twenty-four individuals including physicians, nurses, clergymen, social workers, and two non-profit corporations, alleged a similar Georgia statute was unconstitutional.\textsuperscript{93} While the Georgia statute at issue in \textit{Doe} was similar to the Texas statute in \textit{Roe}, the Georgia statute incorporated the modern ALI model legislation approach with its advanced medical knowledge.\textsuperscript{94} The Georgia statute reflected the advancement of medical knowledge that prior statutes lacked, such as techniques of antisepsis and the ability of a physician to perform an abortion without endangering the woman.\textsuperscript{95} The incorporation of advanced medical knowledge was important because it was no longer necessary for the statutory language to restrict the legality of an abortive procedure to only the situation where a physician deemed it necessary for the preservation of the woman's life.\textsuperscript{96} The district court held that the fundamental right of women to choose whether to have a child was protected by the Ninth Amendment, by virtue of the Fourteenth Amendment.\textsuperscript{97} The district court determined the Texas statutes were unconstitutionally vague and an infringement of Ninth Amendment rights, but the district court dismissed the plaintiffs' request for injunctive relief holding abstention was warranted.\textsuperscript{98} Roe then appealed the district court's judgment denying injunctive relief to the United States Supreme Court.\textsuperscript{99}

The United States Supreme Court found the Texas statutes were too broad, and thus unconstitutional, as a violation of the Fourteenth Amendment because the statutes failed to draw a distinction between the different stages of a pregnancy.\textsuperscript{100} In addition, the Court also stated the Texas statutes were too broad because the statutes included only one situation in which abortion was legally justified: saving the woman's life.\textsuperscript{101} The Court reasoned a right of personal privacy, or a zone of privacy, existed under the Constitution, and this right of personal privacy extended, in some degree, to activities re-

\textsuperscript{90.  Id.}
\textsuperscript{91.  Id. at 116.}
\textsuperscript{92.  410 U.S. 179 (1973).}
\textsuperscript{93.  \textit{Roe}, 410 U.S. at 116, 121.}
\textsuperscript{94.  Id. at 116; \textit{Doe}, 410 U.S. at 182.}
\textsuperscript{95.  \textit{Roe}, 410 U.S. at 116; \textit{Doe}, 410 U.S. at 190-91.}
\textsuperscript{96.  \textit{Doe}, 410 U.S. at 190-91.}
\textsuperscript{97.  \textit{Roe}, 410 U.S. at 122.}
\textsuperscript{98.  Id.}
\textsuperscript{99.  Id.}
\textsuperscript{100.  Id. at 164.}
\textsuperscript{101.  Id.}
lated to procreation, contraception, and child-rearing. The Court determined the right of privacy, despite where it was found within the Constitution, was broad enough to include a woman's decision to terminate her pregnancy. While the Court concluded the abortion decision was included in the right of privacy, the Court also stated that this right was a qualified right. The Court found that important state interests could be considered in governmental abortion regulation.

The Court reasoned a regulation that placed a limitation on the right to abortion could only be justified by a compelling state interest. The Court stated that the compelling point for the state's interest in the health of the woman existed at the end, or approximately the end of the first trimester. Essentially, the state's legitimate interest in the fetus became compelling at viability—the end of the first trimester. The state had a compelling interest at viability because at that point and thereafter, the fetus had the potential capability of a meaningful life outside the woman. From that point forward, a state had the option to regulate abortive procedures in an effort to preserve and protect the woman's health. In essence, the Court stated that, prior to reaching the compelling point of pregnancy, the woman and her physician were free to decide, based on the physician's medical judgment, if the woman should terminate her pregnancy. The Court reasoned the decision to terminate a pregnancy should be made without state interference or regulation. By finding the Texas statutes unconstitutional, the Court vindicated the physician's right to provide proper medical treatment, in accordance with the physician's professional knowledge and opinion, until the point when the state's interests became compelling.

102. Id. at 152-53.
103. Id. at 153.
104. Id. at 154.
105. Id.
107. Id. at 163.
108. Id.
109. Id.
110. Id. The Roe court provided examples:
Requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.
111. Id.
112. Id.
113. Id. at 165-66.
decision to perform an abortive procedure remained primarily a medical decision.\textsuperscript{114}

F. **States Retain Trigger Statutes That are Immediately Enforceable if Roe is Overturned**

Even after the Roe Court concluded that a woman's decision whether to have an abortion was included in the right of privacy under the Ninth Amendment, several states retained their pre-1973 abortion ban statutes.\textsuperscript{115} In addition, after the Roe decision several states enacted laws that would become effective as soon as the Court permitted states to make abortion illegal.\textsuperscript{116} These laws are referred to as trigger statutes.\textsuperscript{117} For example, a Louisiana statute requires that, in order to be lawful, a physician may only terminate a woman's pregnancy under three specific situations: (1) to preserve the health or life of the unborn child, (2) to preserve the health or life-sustaining organs of the woman, or (3) to prevent the death or serious bodily injury of the woman, which could result from a physical injury or permanent impairment.\textsuperscript{118}

\begin{itemize}
  \item \textsuperscript{114} Id. at 166; Doe, 410 U.S. at 192. In Doe, medical judgment was defined very broadly: "Medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the wellbeing of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment." Doe, 410 U.S. at 192.
  \item \textsuperscript{115} Roe, 410 U.S. at 153, 154 (1973). See also Jeffery Rosen, The Day After Roe, ATLANTIC, June 2006. "In at least seven of these eleven states (Arkansas, Louisiana, Michigan, Oklahoma, South Dakota, Texas, and Wisconsin), the draconian abortion bans had never been blocked by state courts as violations of state constitutional rights, and therefore could, in theory, be immediately enforced." Rosen, supra. A few states have pre-1973 abortion bans still on the books, which legal experts say could be reinstated. Id.
  \item \textsuperscript{117} Jeffery Rosen, The Day After Roe, ATLANTIC, June 2006. "In at least seven of these eleven states (Arkansas, Louisiana, Michigan, Oklahoma, South Dakota, Texas, and Wisconsin), the draconian abortion bans have never been blocked by state courts as violations of state constitutional rights, and therefore could, in theory, be immediately enforced." Id. A few states have pre-1973 abortion bans still on the books, which legal experts say could be reinstated. Id.
  \item \textsuperscript{118} LA. REV. STAT. ANN. § 14.87. Section 14.87 provides:
    \begin{itemize}
      \item (1) Abortion is the performance of any of the following acts, with the specific intent of terminating a pregnancy:
        \begin{itemize}
          \item Administering or prescribing any drug, potion, medicine or any other substance to a female; or
          \item Using any instrument or external force whatsoever on a female.
        \end{itemize}
    \end{itemize}
    (2) This Section shall not apply to the female who has an abortion.
\end{itemize}
Unlike Louisiana, Michigan maintains a pre-\textit{Roe} statute that states that any person that willfully administers medication or uses instruments to intentionally cause the miscarriage of a woman's pregnancy is guilty of a felony unless such procedure was necessary to preserve the woman's life.\textsuperscript{119} Arkansas also has an anti-abortion statute that was not repealed after \textit{Roe}.\textsuperscript{120} Arkansas' statute provides that it is unlawful for anyone to administer any medicine to a pregnant woman with the intention of procuring a miscarriage of a fetus whether before or after quickening.\textsuperscript{121} Additionally, Wisconsin, Texas, and Oklahoma have similar statutes that were not repealed after the \textit{Roe} decision.\textsuperscript{122} The Wisconsin statute provides that a physician is guilty of a felony if the physician terminates any pregnancy, even before viability, unless at least two other physicians agree that the abortion is necessary to save the woman's life.\textsuperscript{123} Similarly, Oklahoma's statute

\begin{itemize}
\item B. It Shall not be unlawful for a physician to perform any of the acts described in Subsection A of this Section if performed under the following circumstances:
\begin{enumerate}
\item The physician terminates the pregnancy in order to preserve the life or health of the unborn child or to remove a stillborn child.
\item The physician terminates a pregnancy by performing a medical procedure necessary in reasonable medical judgment to prevent the death or substantial risk of death due to a physical condition, or to prevent the serious, permanent impairment of a life-sustaining organ of a pregnant woman . . .
\end{enumerate}
\end{itemize}

\textit{Id.}\textsuperscript{119}. \textit{Compare} \textsc{La. Rev. Stat. Ann.} § 14.87 (stating abortion is permissible under specific circumstances), \textit{with} \textsc{Mich. Comp. Laws Ann.} § 750.14 (West 2004) (statute limited by \textsc{People v. Higuera}, 625 N.W.2d 444 (Mich. Ct. App. 2001) (providing that unless an abortion is necessary to preserve the life of the mother, any person who intentionally causes the miscarriage of a pregnant woman is guilty of a felony). Section 750.14 provides:

Any person who shall willfully administer to any pregnant woman any medicine, drug, substance, or thing whatever, or shall employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, shall be guilty of a felony, and in case the death of such pregnant woman be thereby produced, the offense shall be deemed manslaughter.

\textsc{Mich. Comp. Laws Ann.} § 750.14.\textsuperscript{120}

\textit{Ark. Code Ann.} § 5-61-102 (2005). Section 5-61-102 provides:

\begin{enumerate}
\item It is unlawful for any person to administer or prescribe any medicine or drug to any woman with child with the intent to produce an abortion or premature delivery of any fetus before or after the period of quickening or to produce or attempt to produce the abortion by any other means.
\item Any person violating a provision of this section is guilty of a Class D felony.
\item Nothing in this section shall be construed to allow the charging or conviction of a woman with any criminal offense in the death of her own unborn child in utero.
\end{enumerate}

\textit{Id.}\textsuperscript{121}. \textit{See also} \textsc{Black's Law Dictionary} 712 (8th ed. 2005). The Black's Law Dictionary defines "quickening" as "The first motion felt in the womb by the mother of the fetus, usu. occurring near the middle of the pregnancy." \textsc{Black's Law Dictionary, supra}.\textsuperscript{122}


\textsc{Wis. Stat. Ann.} § 940.04. Section 940.04 provides:
provides that unless an abortion is necessary to preserve the life of the woman, any person who assists a woman with obtaining an abortion is guilty of first-degree manslaughter. The Oklahoma statute, however, does not require multiple physicians to agree that the procedure is necessary to save the woman's life. Contrary to the Wisconsin and Oklahoma statutes, the Texas statute does not provide an exception for the life of the woman. The Texas statute provides that any person who terminates a woman's pregnancy before actual birth shall be sentenced to prison for not less than five years. While these

(1) Any person, other than the mother, who intentionally destroys the life of an unborn child is guilty of a Class H felony.

(2) Any person, other than the mother, who does either of the following is guilty of a Class E felony:
   (a) Intentionally destroys the life of an unborn quick child; or
   (b) Causes the death of the mother by an act done with intent to destroy the life of an unborn child. It is unnecessary to prove that the fetus was alive when the act so causing the mother's death was committed.

(3) Any pregnant woman who intentionally destroys the life of her unborn child or who consents to such destruction by another may be fined not more than $200 or imprisoned not more than 6 months or both.

(4) Any pregnant woman who intentionally destroys the life of her unborn quick child or who consents to such destruction by another is guilty of a Class I felony.

(5) This section does not apply to a therapeutic abortion which:
   (a) Is performed by a physician; and
   (b) Is necessary, or is advised by 2 other physicians as necessary, to save the life of the mother; and
   (c) Unless an emergency prevents, is performed in a licensed maternity hospital.

(6) In this section "unborn child" means a human being from the time of conception until it is born alive.

Id. 124. OKLA. STAT. ANN. tit. 21, § 714. Section 714 provides:

Every person who administers to any woman pregnant with a quick child, or who prescribes for such woman, or advises or procures any such woman to take any medicine, drug or substance whatever, or who uses or employs any instrument or other means with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, is guilty in case the death of the child or of the mother is thereby produced, of manslaughter in the first degree.

Id. 125. Id.

126. Compare OKLA. STAT. ANN. tit. 21, § 714 (stating “unless the same shall have been necessary to preserve the life of such mother”) and WIS. STAT. ANN. § 940.04 (providing that “this section does not apply to a therapeutic abortion which: (a) is performed by a physician; and (b) is necessary, or is advised by 2 other physicians as necessary, to save the life of the mother”), with TEX. REV. CIV. STAT. ANN. § 4512.5 (stating “whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years”).

127. TEX. REV. CIV. STAT. ANN. § 4512.5. Section 4512.5 provides:

Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years.
statutes are currently not enforceable because of the *Roe* decision and the Court's subsequent decisions affirming the central holding of *Roe*, these statutes could conceivably be enforced if states are permitted to regulate abortion, or if *Roe* were overturned.128

G. **Akron v. Akron Center For Reproductive Health: The United States Supreme Court Reaffirmed Roe and Determined Ordinance Provisions Restricting Abortion Were Unconstitutional**

A decade after *Roe*, in *Akron v. Akron Center For Reproductive Health*,129 the United States Supreme Court reaffirmed *Roe* despite arguments from the dissenting members of the Court that the Court erred in interpreting the Constitution in the *Roe* decision.130 In *Akron*, a physician and three corporations, all of whom operated clinics that performed abortions, filed suit in the United States District Court for the Northern District of Ohio against the City of Akron ("Akron") and three city officials challenging Akron's Regulation of Abortion ordinance.131 Akron's ordinance set forth seventeen provisions, of

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128. See generally Jeffery Rosen, The Day After Roe, ATLANTIC, June 2006. Rosen notes, "In at least seven of these eleven states (Arkansas, Louisiana, Michigan, Oklahoma, South Dakota, Texas, and Wisconsin), the draconian abortion bans have never been blocked by state courts as violations of state constitutional rights, and therefore could, in theory, be immediately enforced." Id. A few states have pre-1973 abortion bans still on the books, which legal experts say could be reinstated. Id.


131. Akron III, 462 U.S. at 425. See also *id.* at 422, 423, 424, 425 n. 2-8 (citing Akron, Ohio, Ordinance 160-1978 (Feb. 1978)). Akron, Ohio, Ordinance 160-1978 provides:

(1870.03) No person shall perform or induce an abortion upon a pregnant woman subsequent to the end of the first trimester of her pregnancy, unless such abortion is performed in a hospital.

(1870.05) (A) No physician shall perform or induce an abortion upon an unmarried pregnant woman under the age of 18 years without first having given at least twenty-four (24) hours actual notice to one of the parents or the legal guardian of the minor pregnant woman as to the intention to perform such abortion, or if such parent or guardian cannot be reached after a reasonable effort to find him or her, without first having given at least seventy-two (72) hours constructive notice to one of the parents or the legal guardian of the minor pregnant woman by certified mail to the last known address of the parents or the legal guardian, computed from the time of mailing, unless the abortion is ordered by a court having jurisdiction over such minor pregnant woman . . .

(1870.06) (A) An abortion otherwise permitted by law shall be performed or induced only with the informed written consent of the pregnant woman, and one of her parents or her legal guardian whose consent . . . given freely and without coercion. (B) In order to insure that the consent for an abortion is truly informed consent, an abortion shall be performed or induced upon a pregnant woman only after she, and one of her parents or her legal guardian . . . have been orally informed by her attending physician of the following facts, and have
which, five were at issue in the case.\textsuperscript{132} The five provisions at issue were parental notification for minors, required dialogue Akron provided that physicians had to read to patients before an abortion to ensure proper informed consent, a twenty-four hour waiting period between the informed consent process and the actual procedure, and a regulation on the disposal of fetal remains.\textsuperscript{133} The district court found four of the ordinance's provisions invalid.\textsuperscript{134} The court reasoned the parental notice and consent provision was invalid because the provision vested an impermissible right in the minor's parent to veto the minor's informed decision whether to obtain an abortion.\textsuperscript{135} The dis-

signed a consent form acknowledging that she, and the parent or legal guardian where applicable, have been informed as follows: (1) That according to the best judgment of her attending physician she is pregnant. (2) The number of weeks elapsed from the probable time of conception of her unborn child, based upon the information provided by her as to the time of her last menstrual period or after a history and physical examination and appropriate laboratory tests. (3) That the unborn child is a human life from the moment of conception and that there has been described in detail the anatomical and physiological characteristics of the particular unborn child at the gestational point of development at which time the abortion is to be performed, including, but not limited to, appearance, mobility, tactile sensitivity, including pain, perception or response, brain and heart function, the presence of internal organs and the presence of external members. (4) That her unborn child may be viable, and thus capable of surviving outside of her womb, if more than twenty-two (22) weeks have elapsed from the time of conception, and that her attending physician has a legal obligation to take all responsible steps to preserve the life and health of her viable unborn child during the abortion. (5) That abortion is a major surgical procedure which can result in serious complications, including hemorrhage, perforated uterus, infection, menstrual disturbances, sterility and miscarriage and prematurely in subsequent pregnancies; and that abortion may leave essentially unaffected or may worsen any existing physiological problems she may have, and can result in severe emotional disturbances. (6) That numerous public and private agencies and services are available to provide her with birth control information, and that her physician will provide her with a list of such agencies and the services available if she so requests . . . (C) at the same time the attending physician provides the information required by paragraph (B) of this Section, he shall, at least orally, inform the pregnant woman, and one of her parents or her legal guardian . . . of the particular risks associated with her own pregnancy and the abortion technique to be employed including providing her with at least a general description of the medical instructions to be followed subsequent to the abortion in order to insure her safe recovery, and shall in addition provide her with such other information which in his own medical judgment is relevant to her decision as to whether to have an abortion or carry her pregnancy to term . . .

\textsuperscript{1870.07} No physician shall perform or induce an abortion upon a pregnant woman until twenty-four (24) hours have elapsed from the time the pregnant woman, and one of her parents or her legal guardian whose consent is required . . . have signed the consent form . . . and the physician so certifies in writing that such time has elapsed.

\textit{Id.}

132. \textit{Akron III}, 462 U.S. at 422.

133. \textit{id.} at 422-24.

134. \textit{id.} at 425.

district court found the parental veto right impermissible because a state could not require a minor to obtain her parent's consent to a first trimester abortion unless the state established an alternative procedure. An alternative procedure was required so that a pregnant minor had the option to demonstrate to a court that she was capable of providing informed consent to an abortive procedure separate from her parent's wishes.

The district court also determined the provision requiring a physician disclose specific information in an effort to assist women with the decision was unconstitutional. The court determined that a state could not specify exactly what a physician must tell each patient. The disclosure requirement was an impermissible state interference with a woman's right to consult a physician because the physician would be unable to counsel the patient based on each individual patient's needs. The district court noted that such state regulation would place an undesired straitjacket on the physician.

However, the district court found several of the ordinance's provisions constitutional. The provisions the district court found constitutional required hospitalization for second trimester abortions, disclosure to the pregnant woman of particular risks of pregnancy and the specific abortive technique to be performed, and the twenty-four hour waiting period provision. The court reasoned that the twenty-four hour waiting period provision was constitutional because the provision furthered the state's interest that a woman's decision would be made after careful consideration and time to deliberate on all of the facts surrounding her situation. The district court determined the disclosure provision was constitutional because the provision furthered the state's interest in the health of the woman; the requirement was a necessary component of the special relationship that existed between a physician and patient because it required the physi-

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(requiring notification and consent of an unmarried minor's parents before an abortion may be performed).


Id. See Bellotti v. Baird, 443 U.S. 622, 643, 99 S. Ct. 3035, 3048 (1979) (concluding that a state which requires parental consent for a pregnant minor to obtain an abortion must also employ an alternative method by which the minor can obtain authorization for an abortion).

Akron I, 479 F. Supp. at 1203. See also Akron, Ohio, Ordinance 160-1978, §1870.05(B) (1978) (requiring parental notification to the parent or guardian of a minor woman before the performance of an abortion).

Akron I, 479 F. Supp. at 1203.

Id.

Id.

Akron II, 462 U.S. at 425.

Id. at 422-26, 422 nn.2-8 (citing Akron, Ohio, Ordinance 160-1978, §§1870.03, 1870.06(C), 1870.07).

Akron I, 479 F. Supp. at 1204, 1205.
cian performing the procedure, instead of a counselor, to counsel the woman.\textsuperscript{145} Finally, the district court determined the hospitalization provision was constitutional because, according to \textit{Roe}, a state had a compelling interest in the protection of the health of the woman following the end of the first trimester.\textsuperscript{146}

Both parties then appealed the district court's decision to the United States Court of Appeals for the Sixth Circuit, which affirmed the district court's judgment in part and reversed in part.\textsuperscript{147} Three petitions for certiorari were filed with the United States Supreme Court.\textsuperscript{148} The Court granted two of the petitions because of the importance of the issues presented and conflicting determinations of law in the lower courts.\textsuperscript{149} The Sixth Circuit affirmed the second-trimester hospitalization provision, whereas the Eighth Circuit invalidated a similar provision.\textsuperscript{150} The Court reasoned the hospitalization provision placed a significant obstacle in the path of a woman seeking to obtain an abortive procedure.\textsuperscript{151} The Court determined the ordinance's hospitalization provision placed a monetary burden on a woman because the procedure would cost at least two times as much in a

\begin{itemize}
\item[145.] Id. at 1204.
\item[146.] \textit{Akron III}, 462 U.S. at 425, 432, 433. \textit{See also APHA Recommended Program Guide for Abortion Services}, 70 AM. J. PUBLIC HEALTH 652, 654 (1980); \textit{American College of Obstetricians and Gynecologists, Standards for Obstetric-Gynecologic Services} 54 (5th ed. 1982). The \textit{Akron III} Court discussed the increasing safety of second trimester abortions:
\begin{quote}
Current data show that abortions occurring in the second trimester can be safely performed by the Dilation and Evacuation (D and E) procedure . . . Requirements that all abortions after 12 weeks of gestation be performed in hospitals increase the expense and inconvenience to the woman without contributing to the safety of the procedure.
\end{quote}
\begin{quote}
It recommends that abortions performed in a physician's office or outpatient clinic be limited to 14 weeks of pregnancy, but it indicates that abortions may be performed safely in 'a hospital-based or in a free-standing ambulatory surgical facility, or in an out-patient clinic meeting the criteria required for a free-standing surgical facility,' until 18 weeks of pregnancy.
\end{quote}
\textit{American College of Obstetricians and Gynecologists, supra.}
\item[147.] \textit{Akron III}, 462 U.S. at 426. The circuit court affirmed the hospitalization requirement (Akron, Ohio, Ordinance 160-1978, § 1870.03) was constitutional, and it also affirmed that §§ 1870.05, 1870.06(B), and 1870.16 were unconstitutional. The circuit court reversed the district court's decision on §§ 1870.06(C) and 1870.07, finding that these provisions were also unconstitutional. \textit{Akron III}, 462 U.S. at 426.
\item[148.] \textit{Akron III}, 462 U.S. at 426.
\item[149.] Id.
\item[151.] \textit{Akron III}, 462 U.S. at 434.
\end{itemize}
hospital as in a clinic. The Court not only found this regulation to be a financial burden on the woman, but that the regulation also posed additional health risks because a woman might have to travel a greater distance to locate facilities, because many hospitals did not perform second trimester abortions.

The Court reversed the Sixth Circuit's judgment upholding the hospitalization requirement, but affirmed the rest of the Sixth Circuit's decision to invalidate the provisions. The Court reasoned that because abortion was a medical procedure, it was essential that a physician be given the leeway needed to make the best medical judgment to ensure a woman's fundamental right. Further, the Court reasoned the physician's ability to provide medical judgment was two-fold: assisting the woman with the actual decision whether to have an abortion and then carrying out her decision to have an abortive procedure.

The Court recognized that until viability, a woman must be allowed, in consultation with a physician, to decide and effectuate her decision whether to have an abortion free from state interference. However, the Court also stated that certain state regulations that had no significant impact on the woman's right, or the exercise thereof, may be permissible if the state had an important health objective to justify the regulation. The Court explained it had previously unanimously upheld two first trimester regulations that required the woman to provide written informed consent, and the physician to maintain certain records. The state's purported rationale behind those regulations was that the regulations furthered legitimate, health-related state concerns. However, the Court continued to note that even these permissible, minor regulations during the first trimester could not interfere with either the woman's consultation with her physician or the woman's ultimate choice between abortion and childbirth. Therefore, the Court reasoned the state must have

152. Id. at 434-35. In a hospital an abortive procedure is $850-900, whereas D&E in a clinic is $350-400. Id. at 435.
153. Id. at 435.
154. Id. at 426.
155. Id. at 427 (citing Doe, 410 U.S. at 192).
156. Id.
157. Id. at 429-30 (citing Roe, 410 U.S. at 163).
158. Id. at 430.
159. Id.
160. Id. "For example, we concluded that recordkeeping, 'if not abused or overdone, can be useful to the State's interest in protecting the health of its female citizens, and may be a resource that is relevant to decisions involving medical experience and judgment.'" Id. at 430 n.13 (citing Planned Parenthood of Ctr. Mo. v. Danforth, 428 U.S. 52, 81 (1976)).
161. Id.
a legitimate, important interest to justify regulation of abortive procedures, but during the first trimester, the ultimate decision remained with the woman and her physician.\(^{162}\)

**H. Planned Parenthood of Southeastern Pennsylvania v. Casey: The United States Supreme Court Reaffirmed the Central Holding of Roe But Replaced Trimester Framework With Undue Burden Standard**

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,\(^ {163}\) the United States Supreme Court retained and reaffirmed the central holding of *Roe*.\(^ {164}\) The Court explained the central holding of *Roe* had three parts.\(^ {165}\) First, before viability, the woman possessed a right to choose whether to have an abortion without undue state interference.\(^ {166}\) Second, after viability, the state had the power to regulate abortions as long as such statutes contained exceptions for the life and health of the woman.\(^ {167}\) Finally, from the outset of a pregnancy, a state had a legitimate interest in the protection of not only the health of the woman, but also the life of the fetus.\(^ {168}\) The Court determined the state's interest in the potential life of the unborn fetus and maternal health became compelling at different times.\(^ {169}\) In furtherance of the potential life, the state was not permitted to regulate the ultimate performance of abortions until after viability.\(^ {170}\) The Court reaffirmed the central holding of *Roe* based on individual liberty and the rule of stare decisis.\(^ {171}\)

For the protection of liberty, the Court reasoned personal decisions concerning family, contraception, procreation, marriage, and child rearing were afforded constitutional protection under the laws of the United States.\(^ {172}\) The Court's previous decisions recognized that an individual had the right to be free from unwarranted governmental intrusion into personal matters, such as the decision whether to have a child.\(^ {173}\) The Court noted the issues involved in protection of liberty cases often involved the most important, intimate, and personal deci-

\(^{162}\) Id. at 427, 428, 429-30.


\(^{164}\) *Casey*, 505 U.S. at 846.

\(^{165}\) Id.

\(^{166}\) Id.

\(^{167}\) Id.

\(^{168}\) Id.

\(^{169}\) See id. at 873, 877 (determining *Roe*'s trimester framework has two basic flaws: the framework misconceives the nature of a pregnant woman's interest, and undervalues a state's interest in the potential life).

\(^{170}\) Id. at 879.

\(^{171}\) Id. at 845-46, 853.

\(^{172}\) Id. at 851.

\(^{173}\) Id.
sions a person would make, and those choices involved liberty, which
the Fourteenth Amendment protected. If a state were to define in-
dividual beliefs about these important matters, people would be de-
prived of their liberty.

In addition to the protection of individual liberty, the Court also
upheld the central holding of Roe based on the doctrine of stare deci-
sis. The Court explained that when the Court reexamined a prece-
dent, its determination was informed by a number of considerations
designed to test the rule of law and gauge the costs of either reaffirm-
ing or overruling a decision. The Court had to determine whether
the central ruling of Roe was unworkable or unjustifiable and whether
serious inequity would result to those persons who have relied on the
ruling if the case were overruled. The Court found the central hold-
ing in Roe was not unworkable. The Court explained there had
been no erosion in the principle of liberty underlying the Roe decision
and no development or change in the facts that rendered viability in-
appropriate as the compelling point at which the Court could balance
personal autonomy against a state's interests in potential human
life. Further, the Court found that to overrule Roe:

... would be simply to refuse to face the fact that for two decades
of economic and social developments, people had organized
intimate relationships and made choices that defined their
views of themselves and their places in society, in reliance on
the availability of abortion in the event that contraception
should fail.

The Court stated the Constitution served human values, and the
costs of overturning Roe could not be dismissed. The costs of over-
turning Roe would be enormous because Roe's stance was an integral
component of personal liberty and equality between men and wo-
men. Therefore, the Court determined that the central ruling of
Roe should be affirmed because the Roe holding was still workable and
the costs of overruling the decision would be too high.

In Casey, five abortion clinics and one physician challenged the
constitutionality of the Pennsylvania Abortion Control Act of 1982

174. Id. “At the heart of liberty is the right to define one's own concept of existence,
of meaning, of the universe, and of the mysteries of human life.” Id.
175. Id.
176. Id. at 853, 854.
177. Id. at 854.
178. Id. at 855.
179. Id.
180. Id. at 860-61.
181. Id. at 856.
182. Id.
183. Id. at 912 (Stevens, J., concurring in part, dissenting in part).
184. See supra notes 163-83 and accompanying text.
The United States District Court for the Eastern District of Pennsylvania found that all the provisions of PACA were unconstitutional and entered a permanent injunction against its enforcement. The United States Court of Appeals for the Third Circuit affirmed in part and reversed in part, upholding all of the provisions of PACA except for the husband notification requirement. The United States Supreme Court granted certiorari to review the principles that formed the foundation and defined the right of a woman to choose whether to terminate her pregnancy.

The Court upheld the central right Roe recognized but rejected the rigid trimester framework of the Roe decision. The Court adopted a new standard, the undue burden test, to determine whether a state's regulation of abortion was an unconstitutional intrusion on the woman's right to decide whether to terminate her pregnancy. The Court stated that it was settled law that the United States Constitution limited a state's ability to interfere with a person's decision respecting family and parenthood. The Court stated the Constitution provided protection for a person's decisions regarding marriage, contraception, child rearing, and family relationships. Furthermore, the Court noted that previous case law acknowledged an individual's right to be free from unjustified governmental intrusion into matters fundamentally affecting a person, such as the decision whether to have a child. The Court found, before viability, the woman's right to decide to terminate her pregnancy was a component of liberty and a rule of law that could not be renounced. Therefore, the Court reasoned the state could not prohibit any woman from ultimately choosing to terminate her pregnancy before viability.

185. Casey, 505 U.S. at 845.
186. Id.
187. Id.
188. Id.
189. Id. at 873.
190. Id. at 878.
191. Id. at 849.
192. Id. at 851.
193. Id. (citing Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).
194. Id. at 871. The Casey court described the liberty as:

The liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture.

195. Id. at 852.
The Court rejected the *Roe* trimester framework because it suffered from two flaws. First, the Court stated that the framework's formulation misconceived the nature of the woman's interest. Second, the court found that the trimester framework in practice minimized the state's interest in potential life. The Court reasoned that all abortion regulations interfered with a woman's decision and right to some degree; however, only when that interference placed an undue burden on the ability of the woman to make the choice did the state impede on the liberty the Due Process Clause of the Fourteenth Amendment protected. The Court determined that a state statute must inform the woman's decision whether to have an abortion, not hinder that decision. As a result, a judicial finding of an undue burden on the woman's right to choose meant the regulation was an unconstitutional burden. However, the Court stated that if a state regulation was designed to foster the health of the woman who was seeking an abortion, the regulation was valid if it did not constitute an undue burden on her. The Court then reaffirmed the central holding of *Roe* that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." Therefore, even though the state may regulate the abortive procedure, it is the woman's ultimate decision, before viability, whether to terminate her pregnancy. Additionally, after viability, the physician's medical judgment that an abortive procedure was necessary to preserve the woman's health or life must be an exception to any state regulation.

196. *Id.* at 873.
197. *Id.*
198. *Id.*
199. *Id.* at 874, 875.
200. *Id.* at 877.
201. *Id.* The *Casey* court stated:

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. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it.

*Id.*

202. *Id.* at 878.
203. *Id.* at 879.
204. *Id.*
205. *Id.*
I. **Stenberg v. Carhart**: The United States Supreme Court Held Partial-Birth Abortion Ban Unconstitutional for Lack of Exception for Life or Health of the Woman

In *Stenberg v. Carhart,* the United States Supreme Court held that a Nebraska statute banning the so-called "partial birth abortion" procedure was unconstitutional. In *Stenberg,* Dr. Leroy Carhart ("Carhart"), a licensed Nebraska physician, brought suit in the United States District Court for the District of Nebraska seeking a declaratory judgment that the so-called "partial birth abortion" ban in Nebraska was unconstitutional. Carhart also sought an injunction to prohibit enforcement of the statute. The Nebraska statute specifically banned a particular abortive procedure, a dilation and extraction ("D & X"), which involved fetal extraction from the uterus into the vagina, and the physician terminating the fetus by extracting the contents of its skull. However, the statute as written also prohibited the dilation and evacuation ("D & E") abortive procedure, which was the most common second-trimester abortion procedure. The district court held the statute violated the United States Constitution because the statute imposed an undue burden on the woman and the physician by denying the physician the ability to perform the safest medical procedure available, and instead required the physician to use a riskier medical procedure. The State of Nebraska and the county attorney appealed to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit affirmed the district court's de-

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207. See Neb. Rev. Stat. § 28-328(1) (Supp. 1999), which provides:
No partial birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself. The statute defines "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."

Id.
210. *Id.* at 922.
211. *Carhart v. Stenberg (Carhart II),* 192 F.3d 1142, 1145 (8th Cir. 1999), aff'd, 530 U.S. 914 (2000). The *Carhart* court acknowledged its use of the terms interchangeable to describe the procedure that the statute attempted to ban, despite the technical, medical distinction between an intact D & E and D & X. *Stenberg v. Carhart (Carhart III),* 530 U.S. 914, 928 (2000). This procedure has been called a "partial birth abortion." *Id.* at 929.
212. *Carhart II,* 192 F.3d at 1145.
214. *Carhart II,* 192 F.3d at 1145.
cision reasoning the statute placed an undue burden on a woman's right to decide whether to terminate her pregnancy.\textsuperscript{215}

The United States Supreme Court granted certiorari because the Seventh and Eighth Circuits reached different legal conclusions on similar statutes.\textsuperscript{216} The Court concluded the Nebraska statute was unconstitutional because the statute did not contain an exception for the preservation of the woman's health.\textsuperscript{217} The Court also determined the statute imposed an undue burden on the woman's option of a particular abortive procedure, a D & E, which, in turn, created an undue burden on a woman's right to choose whether or not to have an abortion at all.\textsuperscript{218} The Court determined that the state failed to prove that banning the D & X procedure would not create significant health risks because the district court record established that in certain circumstances the D & X procedure was the safest option for the woman.\textsuperscript{219} The Court reasoned its previous decisions had consistently invalidated regulations of abortion methods because, in the process, the regulations imposed significant health risks.\textsuperscript{220} Additionally, the Court found that an infrequently used treatment might be required to treat an infrequently occurring disease that could affect anyone.\textsuperscript{221} The Court reasoned a state cannot prohibit a person from obtaining the treatment just by stating that most people will not need it.\textsuperscript{222} Therefore, the Court determined the law required a health exception because a significant body of medical research demonstrated the D & X procedure might be safer for some women.\textsuperscript{223} The American College of Obstetricians and Gynecologists ("ACOG") convened a panel that

\textsuperscript{215} Id. at 1145, 1146.
\textsuperscript{216} Stenberg, 530 U.S. at 922-23. See also Hope Clinic v. Ryan, 195 F.3d 857 (7th Cir. 1999), vacated, 530 U.S. 1271 (2000) (considered a similar statute to Nebraska's so-called "partial birth" abortion ban, but reached a different legal conclusion).
\textsuperscript{217} Stenberg, 530 U.S. at 930.
\textsuperscript{218} Id.
\textsuperscript{219} Id. at 932. See also Brief for American College of Obstetricians and Gynecologists, American Medical Women's Association, National Abortion Federation Physicians for Reproductive Choice and Health, and American Nurses Association as Amici Curiae Supporting Respondent at 22-23, Stenberg v. Carhart, 530 U.S. 914 (2000) (No. 99-830), 2000 WL 340117 [hereinafter Brief for Amici Curiae Supporting Respondent], providing:

Especially for women with particular health conditions, there is medical evidence that D & X may be safer than available alternatives... D & X may also be the most appropriate abortion method in the presence of certain fetal indications. For example, D & X "may be especially useful in the presence of fetal abnormalities, such as hydrocephalus"... In addition, "intactness allows unhindered evaluation of structural abnormalities" in the fetus and can thus aid in diagnosing fetal anomalies...

Brief for Amici Curiae Supporting Respondent, supra, at 22-23.
\textsuperscript{220} Stenberg, 530 U.S. at 931.
\textsuperscript{221} Id. at 934.
\textsuperscript{222} Id.
\textsuperscript{223} Id. at 937.
concluded that the D & X procedure may be the most appropriate abortive procedure, under certain circumstances, to preserve the life or health of the woman.\textsuperscript{224} As compared to the D & E procedure, the D & X procedure may have some safety advantages for terminations that were performed during the same gestational age of the fetus.\textsuperscript{225} The D & X procedure had less risk for uterine perforation or cervical laceration because the D & X procedure did not involve dismemberment of the fetus, which required the physician to make more passes into the uterus with surgical instruments.\textsuperscript{226} There was also significant evidence that the D & X procedure minimized the risk of the woman retaining fetal tissue, a serious complication that could cause death.\textsuperscript{227} The Court reasoned that uncertainty among physicians likely meant that in some circumstances the D & X procedure could be the safest option for a woman.\textsuperscript{228} Further, because of the lack of medical consensus, the Court determined that the absence of a health exception could place the unnecessary risk of tragic health effects on a woman; as a result, the statute was deemed unconstitutional.\textsuperscript{229}

\section{Gonzales v. Carhart: The United States Supreme Court Upheld Partial Birth Abortion Ban Without Exception for Life or Health of the Woman}

In \textit{Gonzales v. Carhart},\textsuperscript{230} the United States Supreme Court held that the federal Partial-Birth Abortion Ban Act of 2003 ("PBABA") could ban an abortion procedure called a dilation and extraction ("D & X") without imposing an undue burden on a woman's right to choose whether to terminate her pregnancy.\textsuperscript{231} The Court differentiated the most common type of second-trimester abortive procedures: the D & E, in which the fetus was removed in parts, from the D & X procedure the PBABA was intended to prohibit.\textsuperscript{232} The PBABA prohibited a physician from performing a D & X.\textsuperscript{233} In a D & X, the fetus is vaginally delivered to an anatomical landmark, usually when the entire head of the fetus is outside the woman's body, and then the physi-

\begin{itemize}
\item \textsuperscript{224} Brief for Amici Curiae Supporting Respondent, \textit{supra} note 219, at 22-23.
\item \textsuperscript{225} \textit{Id.} at 21.
\item \textsuperscript{226} \textit{Id.}
\item \textsuperscript{227} \textit{Id.} at 21-22.
\item \textsuperscript{228} \textit{Stenberg}, 530 U.S. at 937.
\item \textsuperscript{229} \textit{Id.} at 937, 946.
\item \textsuperscript{230} 127 S. Ct. 1610 (2007).
\item \textsuperscript{231} \textit{See} Gonzales v. Carhart (\textit{Gonzales II}), 127 S. Ct. 1610 (2007) (concluding the Act (PBABA) does not impose an undue burden, is not void for vagueness, and is not invalid on its face).
\item \textsuperscript{232} \textit{Gonzales II}, 127 S. Ct. at 1610, 1620, 1621, 1622, 1623.
\item \textsuperscript{233} \textit{Id.} at 1629.
\end{itemize}
cian performs an overt act to terminate the fetus. To qualify as a banned procedure, the PBABA required the fetus be living at the time of the procedure and that the physician have the intention to perform such procedure. However, the Court recognized that the D & X might truly be necessary under certain circumstances. In situations in which the D & X procedure might truly be necessary, the Court found that it was likely that a physician could avoid violating the PBABA by injecting potassium chloride into the fetus to terminate the fetus before the procedure so the D & X would no longer involve a living fetus.

In *Gonzales*, the Court consolidated *Carhart v. Gonzales* and *Planned Parenthood Federation of Am. v. Gonzales*, in which both the Eighth Circuit and Ninth Circuit enjoined the United States Attorney General ("Attorney General") from enforcing the PBABA. In the first of the two cases, *Carhart*, four physicians who performed second-trimester abortive procedures filed suit in the United States District Court for the District of Nebraska against the Attorney General challenging the constitutionality of the federal PBABA. The physicians alleged the PBABA was void for vagueness and imposed an undue burden on a woman's right to choose whether to have an abortion because PBABA was overly broad and lacked an exception for the health of the woman. The district court granted the physicians' request for a permanent injunction to prohibit the enforcement of the PBABA in all cases except those in which it could not be disputed that

234. *Id.* at 1624.
235. *Id.*
236. *Id.* at 1637; *See also* Brief for Amici Curiae Supporting Respondent, *supra* note 219, at 22-23. The Brief for Amici Curiae Supporting Respondent explained why the D & X procedure may be the most appropriate abortive procedure in some circumstances by stating:

"Especially for women with particular health conditions, there is medical evidence that D & X may be safer than available alternatives... D & X may also be the most appropriate abortion method in the presence of certain fetal indications. For example, D & X "may be especially useful in the presence of fetal abnormalities, such as hydrocephalus"... In addition, "intactness allows unhampered evaluation of structural abnormalities' in the fetus and can thus aid in diagnosing fetal anomalies..."

Brief for Amici Curiae Supporting Respondent, *supra* note 219, at 22-23. *See also* Brief for American College of Obstetricians and Gynecologists as Amicus Curiae Supporting Respondents, *Gonzales v. Carhart*, 120 S. Ct. 1610 (2007) (No. 05-380), 2006 WL 2867888, at 10 (determining that the D & X procedure could be the most appropriate or best option, under particular circumstances, to preserve the woman's health or to save her life).

238. 413 F.3d 791 (8th Cir. 2005).
239. 435 F.3d 1163 (9th Cir. 2006).
240. *Gonzales II*, 127 S. Ct. at 1619, 1620.
241. *Id.* at 1619.
242. *Id.* at 1639.
the fetus was at viable gestation.\textsuperscript{243} The Attorney General appealed to the United States Court of Appeals for the Eighth Circuit, which affirmed the district court's ruling.\textsuperscript{244} On appeal by the Attorney General, the United States Supreme Court granted certiorari to consider whether the PBABA was unconstitutional because it lacked a health exception, or if the PBABA was unconstitutional on its face for a different reason.\textsuperscript{245}

The second case the Court consolidated was \textit{Planned Parenthood Federation of America v. Gonzales}.\textsuperscript{246} In \textit{Planned Parenthood}, two Planned Parenthood entities, along with the city and county of San Francisco, filed suit in the United States District Court for the Northern District of California requesting the court to enjoin the enforcement of the PBABA.\textsuperscript{247} The district court granted the plaintiffs' request to enjoin the Attorney General from enforcing the PBABA.\textsuperscript{248} On appeal by the Attorney General, the United States Court of Appeals for the Ninth Circuit affirmed the district court's ruling.\textsuperscript{249} The Attorney General then appealed to the United States Supreme Court, and the Court granted certiorari to consider whether the PBABA was unconstitutional because it lacked a health exception, or if the PBABA was unconstitutional on its face for a different reason.\textsuperscript{250}

In \textit{Gonzales}, LeRoy Carhart and the Planned Parenthood entities set forth two reasons why the Court should affirm the district courts' and courts of appeals' rulings that enjoined enforcement of the PBABA.\textsuperscript{251} First, the parties argued the PBABA was void for vagueness because its scope was indefinite.\textsuperscript{252} In the alternative, the parties argued the PBABA applied to all D & E procedures, thereby creating an undue burden on women and physicians because D & E procedures were the most common type of second-trimester abortions.\textsuperscript{253} The Court concluded the PBABA was not void for vagueness and did not impose an undue burden because it was not overly broad.\textsuperscript{254} The Court found the PBABA described the illegal procedure

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{243} \textit{Id.} at 1619.
\item \textsuperscript{244} \textit{Id.}
\item \textsuperscript{245} \textit{See Gonzales II}, 127 S. Ct. at 1619-39 (explaining its conclusion that the Act (PBABA) is not void for vagueness, not invalid on its face, and does not impose an undue burden).
\item \textsuperscript{246} \textit{Id.} at 1619.
\item \textsuperscript{247} \textit{Id.} at 1619-20.
\item \textsuperscript{248} \textit{Id.} at 1620.
\item \textsuperscript{249} \textit{Id.} at 1619.
\item \textsuperscript{250} \textit{See id.} at 1620-39 (explaining its conclusion that the Act (PBABA) is not void for vagueness, not invalid on its face, and does not impose an undue burden).
\item \textsuperscript{251} \textit{See infra} notes 252-63 and accompanying text.
\item \textsuperscript{252} \textit{Gonzales II}, 127 S. Ct. at 1627.
\item \textsuperscript{253} \textit{Id.}
\item \textsuperscript{254} \textit{Id.}
\end{enumerate}
\end{footnotesize}
in explicit terms and clearly defined the line between potential criminal conduct and permissible, lawful abortive procedures. The Court went so far as to say that as long as a fetus was removed in parts, a physician could not violate the PBABA.

Next, the parties argued the PBABA imposed an undue burden on a woman's right to choose whether to terminate her pregnancy because the PBABA's restrictions on second-trimester abortions were too broad. The Court determined the PBABA did not prohibit the D & E procedure because the physician would not have to violate the PBABA's requirements to perform the procedure. To incur criminal liability under 18 U.S.C. § 1531, a physician had to deliver a living fetus to an anatomical landmark and then commit an overt act to terminate the fetus after the fetus had been partially delivered. According to the Court, the physician could avoid liability by performing a D & E procedure, or if a D & X procedure was necessary, the physician could inject the fetus with digoxin or potassium chloride to cause fetal demise before conducting the procedure. The Court distinguished Gonzales from Stenberg, arguing the PBABA in Gonzales was different from the statute in Stenberg because the statute in Stenberg encompassed the commonly performed D & E procedure by including the language "substantial portion." The language "substantial portion" encompassed the D & E procedure because a physician routinely pulled a "substantial portion" of a living fetus into the vagina prior to the fetus' death. Gonzales limited a woman's right to choose whether to terminate her pregnancy because the Gonzales Court effectively banned a procedure that a woman's physician may have deemed necessary, under certain circumstances, to preserve her health or maybe even her life.

255. Id. at 1628, 1629.
256. Id. at 1629.
257. Id.
258. Id.
259. Id. at 1628, 1629.
260. Id. at 1621, 1629, 1637.
261. Id. at 1629-30.
262. Id.
263. See supra notes 230-62 and accompanying text.
ARGUMENT

A. THE UNITED STATES SUPREME COURT HAS SLOWLY RESTRICTED, TO THE POINT OF ERODING, A WOMAN'S FUNDAMENTAL RIGHT TO CHOOSE WHETHER TO END HER PREGNANCY

In Gonzales v. Carhart, the United States Supreme Court effectively banned an abortive procedure without providing an exception for the use of the procedure when necessary to preserve the life or health of the woman. The Court's decision was a significant departure from both Roe v. Wade and Stenberg v. Carhart. In Roe, the Court held any restrictions on a woman's ability to obtain an abortion after viability must contain an exception for the health or life of the woman. The Court in Planned Parenthood v. Casey affirmed the requirement that post-viability abortion restrictions must contain an exception for the life or health of the woman, and then expanded that requirement to include pre-viability restrictions in Stenberg. The Court had been vacillating on permitting a state to regulate abortion since Roe, but until the Gonzales decision, the Court had not upheld a restriction on abortion that did not provide an exception for the health of the woman. Consequently, the Court's decision in Gonzales limited a woman's right to choose as provided under Roe.

1. The United States Supreme Court's Decisions Affecting Women's Reproductive Rights Have Gradually Become More Restrictive Over the Past Thirty Years

a. The United States Supreme Court in Roe v. Wade and Doe v. Bolton Provided Strong Protections for a Woman's Right to Choose Whether to Terminate her Pregnancy

In Roe v. Wade, the United States Supreme Court acknowledged that a right of personal privacy existed under the United States Constitution and determined that right included a woman's ability to choose whether to terminate her pregnancy. The Court in Roe established the legal framework for a woman's right to choose an abortion and laid out three specific provisions. First, the Court

266. 410 U.S. 113 (1973).
267. 530 U.S. 914 (2000); See infra notes 268-366 and accompanying text.
270. See infra notes 273-366 and accompanying text.
271. See infra notes 273-366 and accompanying text.
272. See infra notes 273-366 and accompanying text.
274. Id. at 164-65.
determined that prior to the end of the first trimester, the decision whether to terminate a pregnancy had to be left to the medical judgment of the woman's physician.\(^\text{275}\) Second, the Court found that after the end of the first trimester, the state could regulate an abortive procedure if the regulations promoted the state's interest in the woman's health.\(^\text{276}\) Finally, the Court stated that after viability of the fetus, the state may regulate or even proscribe abortion except where a physician, using sound medical judgment, determined the procedure was necessary for the preservation of the health or life of the woman.\(^\text{277}\)

In the companion case to \textit{Roe}, \textit{Doe v. Bolton},\(^\text{278}\) the Court provided further guidance on interpreting \textit{Roe}'s legal framework by expounding on the definition of medical judgment.\(^\text{279}\) The Court stated "medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient."\(^\text{280}\) The \textit{Doe} Court's definition, broad in scope, coincided with the \textit{Roe} Court's rationale to "vindicat[e] the right of the physician to administer medical treatment according to his professional judgment," and to properly assess the health of the woman.\(^\text{281}\) Therefore, the Court's decisions in \textit{Roe} and \textit{Doe} provided strong protections for a woman's right to choose whether to terminate her pregnancy.\(^\text{282}\)

2. \textbf{The United States Supreme Court Reaffirmed Roe and Determined That Every Provision of Akron's Abortion Ordinance was Unconstitutional}

In \textit{Akron v. Akron Center for Reproductive Health},\(^\text{283}\) the United States Supreme Court reaffirmed \textit{Roe}'s central holding that the right of privacy as recognized under the Constitution encompassed a wo-

\(^{275}\) Id. at 164.
\(^{276}\) Id.
\(^{277}\) Id. at 164-65.
\(^{278}\) 410 U.S. 179 (1973).
\(^{280}\) Doe, 410 U.S. at 192. This definition, broad in scope, allowed a physician to use his best medical judgment to assess the health of the woman. \textit{Id.}
\(^{281}\) Compare \textit{Roe}, 410 U.S. at 165-66 ("The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician."). with \textit{Doe}, 410 U.S. at 192 (stating that "medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman.").
\(^{282}\) See supra notes 273-81 and accompanying text.
man's right to choose whether to terminate her pregnancy.284 The Court also affirmed the United States Court of Appeals for the Sixth Circuit's decision in Akron determining the provisions of Akron's abortion ordinance were unconstitutional.285 However, the Court reversed the portion of the Sixth Circuit's decision that sustained the constitutionality of a hospitalization requirement.286 The Court held the provision requiring second-trimester abortions be performed in a hospital was unconstitutional because the provision imposed an unnecessary, undue burden on a woman's access to an abortive procedure.287 The Court determined the hospitalization requirement placed a significant obstacle in the woman's path to seek an abortion.288 The Court stated the regulation was not reasonable because it imposed an unnecessary burden on a woman's access to a medical procedure that would otherwise be available and less expensive.289 The Court ruled that current medical knowledge undermined Akron's justification for a hospitalization requirement for all abortive procedures after the first trimester because during the early weeks of the second trimester, the abortive procedure could be performed as safely in an outpatient clinic as in a hospital.290 The Court reiterated, as it had recognized in Doe, that an abortion was a medical procedure, and a woman's physician must be allowed the leeway needed to make the best medical judgment when the woman was deciding whether to have an abortion.291 Similar to the Roe Court, the Akron Court did not decide that the right to choose an abortive procedure was an unqualified right.292 The Akron Court merely determined that a restrictive state regulation must have a compelling state interest.293 Therefore, the Akron Court provided continued protection of a woman's right to choose whether to termi-

286. Id.
287. Id. at 433, 438.
288. Id. at 434.
289. Id. at 438, 439.
290. Id. at 437. "At trial Akron relied largely on the former position of the various medical organizations concerning hospitalization during the second trimester." Id. at 437 n.26.
291. Id. at 427 (citing Doe, 410 U.S. at 192).
292. Compare Roe, 410 U.S. at 154 (concluding "that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation."); with Akron III, 462 U.S. at 427 (acknowledging that "the woman's fundamental right is not unqualified and must be considered against important state interests in abortion.").
293. Akron III, 462 U.S. at 427. The Court explained that two such interests have been recognized by the Court, and could justify state regulation of abortion. Id. First, the state has legitimate interest in the protection of human life. Id. Second, the state may have an important interest in the protection of health and medical standards. Id. at 428, 429-30.
nate her pregnancy when the Court found multiple state regulations unconstitutional.294

3. The United States Supreme Court Departed from the Broad Freedom Given to Women Under Roe’s Trimester Framework When the Court Applied the Undue Burden Standard in Planned Parenthood v. Casey

The United States Supreme Court in Planned Parenthood v. Casey295 overruled portions of its precedent regarding a state’s ability to adopt pre-viability regulations on a woman’s right to choose whether to have an abortion.296 The Court concluded that a woman’s right to choose to have an abortion ended at viability of the fetus.297 The Court also stated that although a woman had a right to choose whether to terminate her pregnancy before viability, the state could still enact rules and regulations.298 The Court noted that even in the early stages of pregnancy, the state could enact rules and regulations to ensure the woman was well informed and able to make a thoughtful decision regarding the continuation of her pregnancy.299

The Casey Court determined all abortion regulations caused some interference with a woman’s right to choose whether to continue her pregnancy.300 According to the Casey Court, only when regulations created an undue burden on a woman’s decision to have an abortion were the regulations unconstitutional.301 The Court determined an undue burden meant the regulation placed a substantial obstacle in the way of a woman seeking a pre-viability abortive procedure.302 According to the Casey Court, not all burdens on a woman’s right to

294. See supra notes 283-93 and accompanying text.
297. Casey, 505 U.S. at 870. The Court stated, “The woman’s right to terminate her pregnancy before viability is the most central principle of Roe v. Wade. It is a rule of law and a component of liberty we cannot renounce.” Id. at 871. The Court also rejected the trimester framework of Roe and stated that it did not consider it part of the essential holding of Roe. Id. at 873.
298. Id. at 872.
299. Id. The Casey court added:

The state may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as to a certain degree of state assistance if the mother chooses to raise the child herself.

Id.
300. Id. at 875.
301. Id. at 874. The Court stated, “In our considered judgment, an undue burden is an unconstitutional burden.” Id. at 877.
302. Id. at 877.
choose were undue burdens. The Court stated regulations that merely created a structural mechanism wherein the state could express respect for potential life were permitted as long as the regulation was not an obstacle to the woman’s ability to decide whether to terminate her pregnancy. Thus, a state could regulate abortion by designing statutes that persuaded a woman to choose childbirth over an abortion, as long as the regulation was designed to promote the state’s goal of protecting the woman’s health and did not constitute an undue burden.

In Casey, the Court found multiple portions of the Pennsylvania statute constitutional, thus allowing restrictions on abortion. The Casey court upheld a more extensive informed consent process to ensure the woman’s decision was educated and thoughtful. The Court upheld a twenty-four hour waiting period and determined the waiting period did not constitute an undue burden because the waiting period did not impose any real health risk to the woman. The Casey Court also upheld a parental notification requirement for minors as long as a judicial bypass procedure existed. Finally, the Court upheld a record keeping and reporting provision of the statute.

The Casey Court also determined certain provisions were unconstitutional. The Casey Court found the mandatory spousal notification to be an undue burden on a woman's right to choose and was thus unconstitutional. The Casey Court found spousal notification to be unconstitutional.

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303. Id. at 876.
304. Id. at 877. The Casey court stated:

Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal. Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.

Id. at 878.

305. Id. at 878.
306. Id. at 880, 884, 885, 886, 899.
307. Id. at 882, 883.
308. Id. at 886, 887. The Casey court further noted:

Yet, as we have stated, under the undue burden standard a State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest. And while the waiting period does limit a physician's discretion, that is not, standing alone, a reason to invalidate it . . . we cannot say that the waiting period imposes a real health risk . . . we are not convinced that the 24-hour waiting period constitutes an undue burden.

Id.

309. Id. at 899.
310. Id. at 900-01.
311. Id. at 894, 895.
312. Id. at 894. The Casey Court discussed why mandatory spousal notification was unconstitutional stating:

The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion. It does not merely make abor-
unconstitutional because a large number of women were victims of domestic abuse, and spousal notification allowed a husband to veto the woman’s decision whether to terminate her pregnancy.\textsuperscript{313} The Court found the husband’s interest in the potential life of the fetus could not outweigh the woman’s liberty interest, and a state could not give a man the same kind of dominion over his spouse as parents exercise over one of their children.\textsuperscript{314}

The \textit{Casey} Court determined a state could regulate the abortive process before viability.\textsuperscript{316} In \textit{Roe}, the Court first recognized the state’s interest in promoting regulations to protect the potential life of the fetus.\textsuperscript{316} The \textit{Roe} Court reasoned the state had an interest in the potential life of the fetus because as long as there was at least potential for life, the state had an interest beyond protecting the health of the woman.\textsuperscript{317} The \textit{Roe} Court determined that prior to the end of the first trimester, the decision whether to terminate a pregnancy had to be left to the medical judgment of the woman’s physician.\textsuperscript{318} The \textit{Roe} Court also found that after the end of the first trimester, the state could regulate an abortive procedure if the regulations promoted the state’s interest in the woman’s health.\textsuperscript{319} The \textit{Casey} Court also determined the state had an interest in protecting the potential life of the fetus.\textsuperscript{320} The \textit{Casey} Court’s rationale was that because the state has an interest in the potential life, it must follow that not all state regulations before viability were unwarranted and void.\textsuperscript{321} Unlike \textit{Roe}, the \textit{Casey} Court permitted a state to regulate abortion pre-viability as well as during the first trimester.\textsuperscript{322} Unlike the Court’s previous

\textsuperscript{313} Id. at 893-94.
\textsuperscript{314} Id. at 897.
\textsuperscript{315} See infra notes 316-26 and accompanying text.
\textsuperscript{316} \textit{Roe}, 410 U.S. at 163, 164.
\textsuperscript{317} Id. at 150.
\textsuperscript{318} Id. at 164.
\textsuperscript{319} Id.
\textsuperscript{320} \textit{Casey}, 505 U.S. at 871.
\textsuperscript{321} Id. at 876.
\textsuperscript{322} Compare \textit{Roe}, 410 U.S. at 164-65 (holding the state may promote its interest in potential life by regulation or promotion subsequent to viability, except when necessary for the preservation of the life or health of the mother), \textit{and Akron III}, 462 U.S. at 428 (determining that the state’s interest in potential life becomes compelling at viability even though the state’s interest exists throughout the pregnancy), \textit{with Casey}, 505 U.S. at 876 (determining that “before viability, \textit{Roe} and subsequent cases treat all governmental attempts to influence a woman’s decision on behalf of the potential life within her as unwarranted. This treatment is, in our judgment, incompatible with the recognition that there is a substantial state interest in potential life throughout pregnancy.”).
holdings in *Roe* and *Akron*, the Court in *Casey* determined that treating all the state's pre-viability attempts to influence a woman's decision as unwarranted intrusions were not compatible with the acknowledgment that the state has a interest in potential life throughout pregnancy. In contrast to *Roe*, the *Casey* Court permitted pre-viability regulations of abortions. By permitting pre-viability abortion regulations, the *Casey* Court limited the protections *Roe* afforded. Therefore, the *Casey* Court substantially departed from the *Roe* Court by determining that a state could regulate the abortive process before viability.

4. **The United States Supreme Court Returned to a Stricter Guideline For States When the Court Determined a Health Exception Was Required For Any Abortion Regulations**

In *Stenberg v. Carhart*, the United States Supreme Court determined that a Nebraska statute banning dilation and extraction procedures ("D & X") was unconstitutional because the statute lacked a health exception for the woman and created an undue burden on the woman's ability to terminate her pregnancy. The Court determined the statute was unconstitutional because the statute created an undue burden on a woman's right to decide to terminate her pregnancy. In *Stenberg*, the Court invalidated Nebraska's statute banning D & X abortions and held the statute violated the United States Constitution. The Court concluded there were two reasons why the statute violated the Constitution. First, Nebraska's statute did not

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323. Compare *Roe*, 410 U.S. at 164 (holding the state may promote its interest in potential life by regulation or promotion subsequent to viability except when necessary for the preservation of the life or health of the mother), and *Akron III*, 462 U.S. at 428 (determining that the state's interest in potential life becomes compelling at viability even though the state's interest exists throughout the pregnancy), with *Casey*, 505 U.S. at 876 (determining that "before viability, *Roe* and subsequent cases treat all governmental attempts to influence a woman's decision on behalf of the potential life within her as unwarranted. This treatment is, in our judgment, incompatible with the recognition that there is a substantial state interest in potential life throughout pregnancy.").

324. Compare *Roe*, 410 U.S. at 164-65 (holding the state may promote its interest in potential life by regulation or promotion subsequent to viability except when necessary for the preservation of the life or health of the mother), with *Casey*, 505 U.S. at 876 (determining that "before viability, *Roe* and subsequent cases treat all governmental attempts to influence a woman's decision on behalf of the potential life within her as unwarranted. This treatment is, in our judgment, incompatible with the recognition that there is a substantial state interest in potential life throughout pregnancy.").

325. See supra notes 295-324 and accompanying text.

326. See supra notes 295-324 and accompanying text.

327. *Stenberg v. Carhart*, 530 U.S. 914, 930 (2000). The *Stenberg* court stated this statute was commonly referred to as banning "partial birth abortion." *Id.* at 921.


329. *Id.* at 929-30.

330. *Id.* at 930.
include an exception for the health of the woman.\textsuperscript{331} Second, the statute burdened the woman's right to choose an abortion because the statute imposed an undue burden on her ability to choose the D & E procedure.\textsuperscript{332} The Court reiterated that the governing standard, determined in \textit{Roe} and affirmed in \textit{Casey}, required a statute to contain an exception to any strict regulation of abortion where, in appropriate medical judgment, it is necessary to preserve the health or life of the woman.\textsuperscript{333} The Court noted a state could promote a woman's health, but could not endanger her health when the state regulated an abortive procedure.\textsuperscript{334}

The \textit{Roe} Court reasoned that after the first trimester, a state could regulate abortion to promote the health of a woman.\textsuperscript{335} Additionally, the Court in \textit{Roe} noted that after viability, a state could regulate or even proscribe abortion in an effort to promote its interest in potential human life.\textsuperscript{336} The \textit{Roe} Court did, however, note that if a state chose to proscribe abortion the proscription must have an exception for the preservation of the woman's health.\textsuperscript{337} The \textit{Casey} Court reaffirmed \textit{Roe}'s requirement of a health exception to any strict regulation of abortion.\textsuperscript{338} The \textit{Casey} Court determined a state could regulate abortion even in the earliest stages of a woman's pregnancy, as long as that regulation did not pose an undue burden on a woman's right to decide whether to terminate her pregnancy.\textsuperscript{339} Then in \textit{Stenberg}, the Court determined that a state's interest in regulating abortion pre-viability was considerably weaker than post-viability.\textsuperscript{340} Further, the \textit{Stenberg} Court broadened the health exception requirement in \textit{Roe} and \textit{Casey} to include a health exception requirement to

\textsuperscript{331} \textit{Id.}
\textsuperscript{332} \textit{Id.} The most commonly used procedure, for second trimester abortions, is called dilation and evacuation ("D & E"). \textit{Id.} at 924. D & E "accounts for approximately 95\% of all abortions performed from 12 to 20 weeks of gestational age." \textit{Id.} There are variations in the procedure, "however, the common points are that D & E involves (1) dilation of the cervix; (2) removal of at least some fetal tissue using nonvacuum instruments; and (3) (after the 15th week) the potential need for instrumental disarticulation or dismemberment of the fetus or the collapse of fetal parts to facilitate evacuation from the uterus." \textit{Id.} at 925.
\textsuperscript{333} \textit{Id.} at 931 (citing \textit{Casey}, 505 U.S. at 879).
\textsuperscript{334} \textit{Id.}
\textsuperscript{335} \textit{Roe}, 410 U.S. at 164.
\textsuperscript{336} \textit{Id.} at 164-65.
\textsuperscript{337} \textit{Id.}
\textsuperscript{338} \textit{Casey}, 505 U.S. at 879.
\textsuperscript{339} \textit{Id.} at 872, 874.
\textsuperscript{340} \textit{Stenberg}, 530 U.S. at 930.
any pre-viability regulations. Therefore, the Stenberg Court re-
verted back to fewer restrictions on pre-viability abortions.

5. In Gonzales v. Carhart, the United States Supreme Court 
Undermined the Roe Decision When the Court Permitted the 
Government to Regulate Abortion Pre-viability, Upheld a 
Restrictive Statute Without a Health Exception, and Interfered 
with a Physician's Ability to Perform Necessary Medical 
Procedures

The United States Supreme Court in Gonzales v. Carhart limited 
Roe by permitting regulations of pre-viability abortions, limiting a 
physician's medical judgment, and not requiring a woman's health ex-
ception for a restrictive abortion statute. In 2007, the Court in 
Gonzales sustained the validity of a restrictive abortion statute simi-
lar to the Nebraska statute the Stenberg Court held unconstitu-
tional. In Gonzales, the Court considered the constitutionality of 
the federal Partial Birth Abortion Ban Act of 2003 ("PBABA"), 
which specifically regulated and proscribed the performance of an 
abortive procedure called a dilation and extraction ("D & X"). The 
PBABA did not contain an exception for the life or health of the 
woman. The Court determined that the PBABA's lack of a health ex-
ception did not place an undue burden on the woman's right to choose

341. Compare Stenberg, 530 U.S. at 930 ("The state's interest in regulating abortion pre-viability is considerably weaker than post-viability."), with Casey, 505 U.S. at 876 ("Before viability, Roe and subsequent cases treat all governmental attempts to influ-
ence a woman's decision on behalf of the potential life within her as unwarranted. This 
treatment is, in our judgment, incompatible with the recognition that there is a sub-
stantial state interest in potential life throughout pregnancy.").
342. See supra notes 327-42 and accompanying text.
343. See infra notes 344-66 and accompanying text.
344. See infra notes 345-66 and accompanying text.
provides:

First, the person performing the abortion must 'vaginally delive[re] a living fe-
tus'. Second, the Act's definition of partial-birth abortion requires the fetus 
to be delivered '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'. Third, to fall within the Act, a doctor must perform an 'overt act, other than 
completion of delivery, that kills the partially delivered living fetus'. Fourth, 
the act contains scienter requirements concerning all the actions involved in 
the prohibited abortion. To begin with, the physician must have 'deliberately 
and intentionally' delivered the fetus to one of the Act's anatomical landmarks. 
If a living fetus is delivered past the critical point by accident or inadvertence, 
the Act is inapplicable. In addition, the fetus must have been delivered 'for the 
purpose of performing an overt act that the [doctor] knows will kill [it]'. If ei-
ther intent is absent, no crime has occurred.

whether to terminate her pregnancy because a documented disagreement among physicians existed whether the statute's prohibition could ever impose any significant health risks on women. The Court stated that medical uncertainty provided a sufficient foundation to determine the PBABA did not impose an undue burden by failing to require a woman's health exception. The Court found that the lack of an exception for the health of the woman was not an undue burden. Further, the Court also sustained the PBABA's application to pre-viability and post-viability abortion procedures.

The Gonzales Court limited the protections Stenberg provided because the Court upheld a restrictive abortion regulation without a woman's health exception. The Stenberg Court determined that the governing standard required a health exception because a state could not endanger a woman's health when the state regulated the abortion process. The Stenberg Court reasoned that because the Court's precedent required an exception for the woman's health when a state regulated post-viability abortions, the law must also require an exception if the state regulated pre-viability abortions. The Stenberg Court also noted that medical research found that the D & X procedure banned by the Nebraska statute was necessary under certain circumstances. Therefore, the Stenberg Court found the ban unconstitutional.

Unlike in Stenberg, the Gonzales Court determined that a health of the woman exception was not necessary because there was no medical consensus that the procedure was necessary and alternative procedures existed.

348. Gonzales II, 127 S. Ct. at 1636, 1637. "The Act is not invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve a woman's health, given the availability of other abortion procedures that are considered to be safe alternatives." Id. at 1638.
349. Id. at 1636, 1637, 1638.
350. Id. at 1637.
351. Id. at 1632.
352. See infra notes 353-66 and accompanying text.
353. Stenberg, 530 U.S. at 931.
354. Id. at 930.
355. Id. at 934.
356. Id. at 929, 930.
357. Compare Stenberg, 530 U.S. at 937 ("The word 'necessary' in Casey's phrase 'necessary, in appropriate medical judgment, for the preservation of the life or health of the mother,' cannot refer to an absolute necessity or to absolute proof . . . Neither can that phrase require unanimity of medical opinion . . . Where a significant body of medical opinion believes a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view, we cannot say that the presence of a different view by itself proves the contrary. Rather, the uncertainty means a significant likelihood that those who believe that D & X is a safer abortion method in certain circumstances may turn out to be right.")., with Gonzales II, 127 S. Ct. at 1636-37 (determining that "There is documented medical disagreement whether the Act's prohibition would ever impose significant health risks on women . . . The question becomes whether
In Gonzales, the PBABA not only applied post-viability, but also pre-viability, and the Court upheld the PBABA's constitutionality without a health exception under both circumstances.\footnote{Gonzales II, 127 S. Ct. at 1632.} In Gonzales, the Court cited congressional findings that claimed there existed a medical consensus that the banned D & X procedure was never necessary.\footnote{Id. at 1644 (Ginsburg, J. dissenting).} However, there was substantial evidence before the district courts from experienced medical experts who stated, in certain circumstances, the D & X procedure was safer than alternative procedures and necessary to preserve the woman's health.\footnote{Id.} In addition, the congressional findings contained statements from the American College of Obstetricians and Gynecologists and other professional medical associations asserting that the banned procedure had meaningful safety advantages as compared to alternatives.\footnote{Id.} The record contained no medical support for banning the procedure.\footnote{Id.} The Court noted that the district courts rejected the congressional findings because the courts found that the weight of the medical evidence did not support the findings.\footnote{Id. at 1645.} The Court disregarded this evidence and determined that PBABA could stand when medical uncertainty persisted.\footnote{Id.} Unlike the Stenberg Court, which determined the lack of medical consensus meant that the procedure should be permitted, the Gonzales Court used the lack of medical consensus to outlaw a medical procedure.\footnote{Compare Stenberg, 530 U.S. at 937 ("The word 'necessary' in Casey's phrase 'necessary, in appropriate medical judgment, for the preservation of the life or health of the mother,' cannot refer to an absolute necessity or to absolute proof . . . Neither can that phrase require unanimity of medical opinion . . . Where a significant body of medical opinion believes a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view, we cannot say that the presence of a different view by itself proves the contrary. Rather, the uncertainty means a significant likelihood that those who believe that D & X is a safer abortion method in certain circumstances may turn out to be right."), with Gonzales II, 127 S. Ct. at 1636-37 ("There is documented medical disagreement whether the Act's prohibition would ever impose significant health risks on women . . . The question becomes whether the Act can stand when this medical uncertainty persists. The Court's precedents instruct that the Act can survive this facial attack. The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty . . . The medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden.").} Therefore, the Gonzales Court failed to follow over
thirty years of precedent that required an exception for the preservation of the health of the woman when the state chose to strictly regulate abortions.366

B. THE GONZALES COURT FAILED TO FOLLOW THIRTY YEARS OF PRECEDENT THAT REQUIRED A HEALTH EXCEPTION WHEN A STATE STRICTLY REGULATED ABORTION WHEN THE COURT UPHELD A PARTIAL-BIRTH ABORTION BAN VIRTUALLY IDENTICAL TO THE BAN STRUCK DOWN IN STENBERG SEVEN YEARS EARLIER

The United States Supreme Court's recent decision in Gonzales v. Carhart was the first time in history the Court determined a physician could be prohibited from performing a medical procedure the physician found necessary to ensure the woman's health.367 The longstanding tradition of the Court had been to defer to the medical profession to define what was medically necessary.368 The Court in Stenberg v. Carhart determined that medical uncertainty about whether a procedure was necessary required the Court to err on the side of protecting the woman.369 Therefore, the Stenberg Court required the restriction on abortion procedures to include a health of the woman exception.370 Seven years later, the Gonzales Court stated that medical uncertainty permitted the Court to follow congressional findings that the procedure should be prohibited because the procedure was never medically necessary.371 In failing to follow the Stenberg precedent, the Gonzales Court did not adhere to the Court's longstanding tradition of deferring to the medical profession to define what is medically necessary and, as a result, limited a woman's right to choose as recognized by the Court in Roe.372

In Stenberg, a Nebraska statute banned a particular abortive procedure, dilation and extraction ("D & X"), because the D & X procedure cant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden.").

366. Compare Roe, 410 U.S. at 164-65 ("For the stage 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.") and Casey, 505 U.S. at 879 (reaffirming Roe's holding), with Gonzales II, 127 S. Ct. at 1637 (concluding that "the Act does not require a health exception.").


368. See supra notes 15-263 and accompanying text; see also R. Alta Charo, The Partial Death of Abortion Rights, 356 NEW ENG. J. MED. 2127 (2007) (stating the tradition has been to permit the medical community to define the meaning of 'medically necessary').

369. Stenberg, 530 U.S. at 937.

370. Id. at 937.


372. Charo, supra note 368, at 2127, 2128.
involved fetal extraction from the uterus into the vagina, and then the physician terminating the fetus by extracting the contents of its skull.\textsuperscript{373} However, the statute as written also prohibited the most common form of second trimester abortion, the dilation and evacuation ("D & E") procedure.\textsuperscript{374} The D & E procedure involves dilation of the cervix, removal of at least some fetal tissue using non-vacuum instruments, and if after the fifteenth week, the potential need for instrumental disarticulation or dismemberment of the fetus or collapse of fetal parts to facilitate evacuation from the uterus.\textsuperscript{375} The \textit{Stenberg} Court concluded that the Nebraska statute was unconstitutional because the statute lacked a health exception for the woman.\textsuperscript{376} The Court stated the governing standard required an exception when, in appropriate medical judgment, an abortive procedure was necessary to preserve the woman's health or life.\textsuperscript{377} The Court recognized that a state could not be permitted to subject a woman to significant health risks by enacting regulations that would force a woman to receive a riskier medical procedure.\textsuperscript{378}

The \textit{Stenberg} Court examined the district court's record, including opinions by both an American College of Obstetricians and Gynecologists ("ACOG") panel and the American Medical Association ("AMA"), and determined no consensus existed in the medical community regarding the need for the D & X procedure.\textsuperscript{379} The ACOG panel concluded that, under certain circumstances, the D & X procedure might be the most appropriate option to preserve the woman's health.\textsuperscript{380} The ACOG panel could not identify a situation where the D & X procedure would be the only option to save a woman's life or preserve her health.\textsuperscript{381} However, the ACOG panel determined that the D & X procedure could be the most appropriate or best option, under particular circumstances, to preserve the woman's health or save her life.\textsuperscript{382} ACOG's policy on abortion stated that only a physician, in consultation with a woman, could make the medical decision regarding the ap-

\begin{itemize}
\item \textsuperscript{373} Carhart v. Stenberg (\textit{Carhart II}), 192 F.3d 1142, 1145 (8th Cir. 1999), aff'd, 530 U.S. 914 (2000).
\item \textsuperscript{374} \textit{Carhart II}, 192 F.3d at 1145.
\item \textsuperscript{375} \textit{Stenberg}, 530 U.S. at 925.
\item \textsuperscript{376} \textit{Id.} at 930.
\item \textsuperscript{377} \textit{Id.} at 931.
\item \textsuperscript{378} \textit{Id.}
\item \textsuperscript{379} \textit{Id.} at 933, 934.
\item \textsuperscript{380} \textit{Id.}: \textit{See also} American College of Obstetricians and Gynecologists (ACOG), ACOG Statement of Policy (July 2007) (on file with author).
\item \textsuperscript{381} Brief for American College of Obstetricians and Gynecologists as Amicus Curiae Supporting Respondents, Gonzales v. Carhart, 120 S. Ct. 1610 (2007) (No. 05-380), 2006 WL 2867888, at 10: \textit{See also} ACOG, supra note 380.
\item \textsuperscript{382} \textit{Id.}
\end{itemize}
propriate medical procedure to use to terminate a pregnancy.\textsuperscript{383} ACOG declared that legislation prohibiting specific medical practices, such as the D & X procedure, might outlaw medical techniques that are essential to women’s lives and health.\textsuperscript{384} In contrast, the AMA’s policy stated that the association could not determine, and it did not appear, that there was any situation where the D & X procedure would be the only appropriate option to terminate a pregnancy.\textsuperscript{385} While ACOG concluded the D & X procedure may be necessary, the AMA could not make such a determination.\textsuperscript{386} Therefore, the Stenberg Court noted that medical uncertainty existed regarding the need for the D & X procedure to save the woman’s life or her health.\textsuperscript{387}

The Stenberg Court noted that doctors often differ about appropriate medical treatment, and the governing standard could not be read to require unanimity of medical opinion.\textsuperscript{388} Instead, the Stenberg Court stated that appropriate medical judgment must be read to permit the Court to tolerate differences in medical opinion.\textsuperscript{389} The Stenberg Court determined that a division in medical opinions signaled the presence of risk.\textsuperscript{390} The Court stated medical uncertainty meant a significant likelihood existed that physicians who believed that the D & X procedure was appropriate under certain circumstances could be correct.\textsuperscript{391} The Court noted that if those physicians were accurate, the absence of a health exception for a woman would place her at an unnecessary risk of serious health complications.\textsuperscript{392} Therefore, the Stenberg Court determined that when conflicting medical judgments about the necessity of a procedure existed, a statute restricting a woman’s right to an abortion had to include an exception for the woman’s life or health.\textsuperscript{393}

Seven years later in Gonzales, the Court reached the opposite result when the Court validated a ban, similar to the ban in Stenberg, without an exception for the woman’s life or health.\textsuperscript{394} The PBABA

\begin{itemize}
\item \textsuperscript{383} ACOG, supra note 380.
\item \textsuperscript{384} Id.
\item \textsuperscript{385} Stenberg, 530 U.S. at 934.
\item \textsuperscript{386} Id. at 933, 934.
\item \textsuperscript{387} Id. at 937.
\item \textsuperscript{388} Id.
\item \textsuperscript{389} Id. “‘Appropriate medical judgment’ must embody the judicial need to tolerate responsible differences of medical opinion—differences of a sort that the American Medical Association and American College of Obstetricians and Gynecologists statements together indicate are present here.” Id.
\item \textsuperscript{390} Id.
\item \textsuperscript{391} Id.
\item \textsuperscript{392} Id. “If they are wrong, the exception will simply turn out to have been unnecessary.” Id.
\item \textsuperscript{393} Id. at 937-38.
\item \textsuperscript{394} See infra notes 395-434 and accompanying text.
\end{itemize}
prohibits a physician from intentionally performing a D & X.\textsuperscript{395} Under the PBABA, to be subjected to criminal liability, the physician must deliver the fetus to an anatomical landmark, and then commit an overt-act to terminate the fetus.\textsuperscript{396} However, the PBABA's ban on the D & X procedure does not include an exception for the woman's health.\textsuperscript{397}

In \textit{Gonzales}, the Court consolidated \textit{Carhart v. Gonzales}\textsuperscript{398} and \textit{Planned Parenthood Federation of Am. v. Gonzales}.\textsuperscript{399} In \textit{Carhart}, the United States District Court for the District of Nebraska found PBABA unconstitutional because PBABA lacked a woman's health exception.\textsuperscript{400} The Eighth Circuit affirmed the district court's opinion, stating that when a disagreement existed among the medical community, the Constitution required Congress to include a health exception and err on the side of protecting the woman's health.\textsuperscript{401} The Eighth Circuit reasoned that the rule announced in \textit{Stenberg} did not give physicians an absolute veto over legislatures.\textsuperscript{402} Instead, the \textit{Stenberg} Court required a health exception when substantial medical authority supported the necessity of a procedure.\textsuperscript{403} The Eighth Circuit affirmed.\textsuperscript{404}

In \textit{Planned Parenthood}, the United States District Court for the Northern District of California also concluded the PBABA was unconstitutional because the PBABA lacked a health exception for the woman as the \textit{Stenberg} Court required.\textsuperscript{405} The Ninth Circuit, like the Eighth Circuit, affirmed the district court, stating the PBABA was unconstitutional because PBABA lacked a woman's health exception.\textsuperscript{406} After a review of the congressional findings before the district court, the Ninth Circuit noted that the medical community was in disagreement about whether D & X was a necessary procedure.\textsuperscript{407} The Ninth Circuit interpreted the \textit{Stenberg} precedent to require a health exception if a medical consensus did not exist.\textsuperscript{408} The Ninth Circuit con-

\begin{thebibliography}{99}
\bibitem{395} Gonzales II, 127 S. Ct. at 1629.
\bibitem{396} Id.
\bibitem{397} Id. at 1637.
\bibitem{398} 413 F.3d 791 (8th Cir. 2005).
\bibitem{399} 435 F.3d 1163 (9th Cir. 2006); Gonzales II, 127 S. Ct. at 1619, 1620.
\bibitem{400} Gonzales II, 127 S. Ct. at 1625.
\bibitem{401} Id.
\bibitem{402} Carhart v. Gonzales (Gonzales I), 413 F.3d 791, 797 (8th Cir. 2005), rev'd, 127 S. Ct. 1610 (2007).
\bibitem{403} Gonzales I, 413 F.3d at 797.
\bibitem{404} Gonzales II, 127 S. Ct. at 1619.
\bibitem{405} Id. at 1619-20, 1625.
\bibitem{406} Id. at 1625.
\bibitem{407} Id.
\bibitem{408} Id.
\end{thebibliography}
cluded the PBABA was unconstitutional because PBABA lacked a woman's health exception.\textsuperscript{409}

On appeal, the \textit{Gonzales} Court determined that the PBABA was valid without an exception for the woman's health.\textsuperscript{410} The \textit{Gonzales} Court noted Congress passed the PBABA in response to \textit{Stenberg}.\textsuperscript{411} The \textit{Gonzales} Court further noted that Congress determined it was not bound to accept the same findings as the \textit{Stenberg} Court, but that Congress could make its own factual findings.\textsuperscript{412} The Court stated that Congress found "\[a\] moral, medical, and ethical consensus exist[ed] that the practice of performing a partial-birth abortion . . . is a gruesome and inhumane procedure that is never medically necessary and should be prohibited."\textsuperscript{413} The \textit{Gonzales} Court noted that a contested factual issue existed whether the PBABA created significant health risks for women.\textsuperscript{414} The Court stated medical support existed for both positions on whether the D & X procedure has health advantages and could be the safest abortion method under certain circumstances.\textsuperscript{415} The Court determined medical disagreement existed regarding whether PBABA's ban on the D & X procedure could ever impose significant risks to a woman's health.\textsuperscript{416} The Court reasoned its precedents provided wide discretion to state and federal legislatures to pass regulations in areas where medical uncertainty existed.\textsuperscript{417} The Court noted that there continued to be a division among experts' opinions on whether the D & X procedure was a necessary procedure, or safer under certain circumstances.\textsuperscript{418} The Court reasoned that medical uncertainty did not foreclose the exercise of Congressional power in abortion regulations because a zero tolerance policy would allow a part of the medical community to strike down a legitimate regulation if they were disinclined to follow the proscription.\textsuperscript{419} The \textit{Gonzales} Court stated that if a particular medical procedure had different risks than another procedure, that alone did not

\begin{itemize}
\item \textsuperscript{409} \textit{Id.}
\item \textsuperscript{410} \textit{Id.} at 1636, 1637.
\item \textsuperscript{411} \textit{Id.} at 1623-24.
\item \textsuperscript{412} \textit{Id.} at 1624.
\item \textsuperscript{413} \textit{Id.}
\item \textsuperscript{414} \textit{Id.} at 1636.
\item \textsuperscript{415} \textit{Id.} at 1635.
\item \textsuperscript{416} \textit{Id.} at 1636.
\item \textsuperscript{417} \textit{Id.}
\item \textsuperscript{418} \textit{Id.} "[T]here continues to be a division of opinion among highly qualified experts regarding the necessity or safety of intact D & E." \textit{Id.}
\item \textsuperscript{419} \textit{Id.} at 1637, 1638. "This is too exacting a standard to impose on the legislative power, exercised in this instance under the Commerce Clause, to regulate the medical profession. Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends." \textit{Id.} at 1638.
\end{itemize}
mean the state was prohibited from imposing regulations on that procedure.\footnote{420} The Gonzales Court determined that medical uncertainty meant Congress could ban the procedure.\footnote{421}

The Gonzales Court limited the protections provided in Roe by not following \textit{Stenberg} and determining that medical uncertainty meant Congress could outlaw an abortion procedure without including a health of the woman exception.\footnote{422} The \textit{Stenberg} Court determined that the governing standard required a woman’s health exception because a state was not permitted to endanger a woman’s health when the state regulated an abortion procedure.\footnote{423} The \textit{Stenberg} Court determined medical uncertainty regarding the need for a D & X procedure meant that Congress could not outlaw the procedure without including a woman’s health exception.\footnote{424} The \textit{Stenberg} Court reasoned that where substantial medical authority determined that banning a procedure could endanger a woman’s life, \textit{Planned Parenthood v. Casey} \footnote{425} required the statute to include a woman’s health exception because the absence of such exception could subject a woman to unnecessary health risks.\footnote{426} Unlike the \textit{Stenberg} Court, which determined the lack of medical consensus meant that the procedure should be prohibited, the Gonzales Court used the lack of medical consensus to outlaw the medical procedure.\footnote{427} While the \textit{Stenberg} Court stated that lack of medical consensus required regulation of an abortion procedure to include a health of the woman exception, the Gonzales Court determined that the lack of medical consensus did not prohibit Con-

\footnotesize{\textbf{\textsuperscript{420}} Id. at 1638.  
\textbf{\textsuperscript{421}} Id.  
\textbf{\textsuperscript{422}} See infra notes 423-34 and accompanying text.  
\textbf{\textsuperscript{423}} \textit{Stenberg}, 530 U.S. at 931.  
\textbf{\textsuperscript{424}} Id. at 937, 938.  
\textbf{\textsuperscript{426}} \textit{Stenberg}, 530 U.S. at 931, 937, 938.  
\textbf{\textsuperscript{427}} \textit{Compare Stenberg}, 530 U.S. at 937 (“The word ‘necessary’ in \textit{Casey}’s phrase ‘necessary, in appropriate medical judgment, for the preservation of the life or health of the mother,’ cannot refer to an absolute necessity or to absolute proof . . . Neither can that phrase require unanimity of medical opinion . . . Where a significant body of medical opinion believes a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view, we cannot say that the presence of a different view by itself proves the contrary. Rather, the uncertainty means a significant likelihood that those who believe that D & X is a safer abortion method in certain circumstances may turn out to be right.”), \textit{with Gonzales II}, 127 S. Ct. at 1636, 1637 (“There is documented medical disagreement whether the Act’s prohibition would ever impose significant health risks on women . . . The question becomes whether the Act can stand when this medical uncertainty persists. The Court’s precedents instruct that the Act can survive this facial attack. The Court has given state and federal legislators wide discretion to pass legislation in areas where there is medical and scientific uncertainty . . . The medical uncertainty over whether the Act’s prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden.”).}
gress from banning an abortion procedure without a health exception. Unlike the Stenberg Court, the Gonzales Court reasoned that medical uncertainty provided a sufficient basis for the Court to conclude that the PBABA does not impose an undue burden, especially when alternative procedures are available to the woman.

Unlike the Stenberg Court's determination that a health exception is required when medical uncertainty exists because a state may not endanger the health of a woman when it regulates abortion, the Gonzales Court determined that it was inappropriate to prohibit state legislatures from enacting regulations when the medical community was divided on the need for a particular procedure. Instead of following the Stenberg Court's determination that a woman's health exception is required if there is medical uncertainty, the Gonzales Court determined that it was appropriate to accept congressional findings rather than defer to the possibility that such ban could impose serious

428. Compare Stenberg, 530 U.S. at 937 ("Where a significant body of medical opinion believes a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view, we cannot say that the presence of a different view by itself proves the contrary. Rather, the uncertainty means a significant likelihood that those who believe that D & X is a safer abortion method in certain circumstances may turn out to be right. If so, then the absence of a health exception will place women at an unnecessary risk of tragic health consequences."), with Gonzales II, 127 S. Ct. at 1637, 1638 (stating "Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts. . . . A zero tolerance policy would strike down legitimate abortion regulations, like the present one, if some part of the medical community were disinclined to follow the proscription. This is too exacting a standard to impose on the legislative power, exercised in this instance under the Commerce Clause, to regulate the medical profession.").

429. Compare Stenberg, 530 U.S. at 937 ("Where a significant body of medical opinion believes a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view, we cannot say that the presence of a different view by itself proves the contrary. Rather, the uncertainty means a significant likelihood that those who believe that D & X is a safer abortion method in certain circumstances may turn out to be right. If so, then the absence of a health exception will place women at an unnecessary risk of tragic health consequences."), with Gonzales II, 127 S. Ct. at 1637, 1638 ("Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts. . . . A zero tolerance policy would strike down legitimate abortion regulations, like the present one, if some part of the medical community were disinclined to follow the proscription. This is too exacting a standard to impose on the legislative power, exercised in this instance under the Commerce Clause, to regulate the medical profession.").

430. Compare Stenberg, 530 U.S. at 931 ("The governing standard requires an exception 'where it is necessary, in appropriate medical judgment for the preservation of the life or health of the mother' . . . for this Court has made it clear that a State may promote but not endanger a woman's health when it regulates the methods of abortion."), with Gonzales II, 127 S. Ct. at 1638 ("Stenberg has been interpreted to leave no margin of error for legislatures to act in the face of medical uncertainty . . . a zero tolerance policy would strike down legitimate abortion regulations, like the present one, if some part of the medical community were disinclined to follow the proscription. This is too exacting a standard to impose on the legislative power, exercised in this instance under the Commerce Clause, to regulate the medical profession.").
health complications on a woman if her circumstances, according to her physician’s judgment, would benefit from the prohibited procedure. Even though both the Stenberg and Gonzales Courts noted the existence of medical uncertainty on whether banning the D & X procedure created significant health risks for women, the Stenberg Court concluded it was necessary to include a health of the woman exception, whereas the Gonzales Court concluded such exception was not required. Therefore, the Gonzales Court did not follow the Stenberg Court’s precedent to defer to protection of a woman’s health when medical uncertainty exists. As a result, the Gonzales Court failed to follow over thirty years of precedent that required a health exception when a state strictly regulated abortion.

431. Compare Stenberg, 530 U.S. at 937 (“The word ‘necessary’ in Casey’s phrase ‘necessary, in appropriate medical judgment, for the preservation of the life or health of the mother,’ cannot refer to an absolute necessity or to absolute proof . . . Neither can that phrase require unanimity of medical opinion . . . Where a significant body of medical opinion believes a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view, we cannot say that the presence of a different view by itself proves the contrary. Rather, the uncertainty means a significant likelihood that those who believe that D & X is a safer abortion method in certain circumstances may turn out to be right.”), with Gonzales II, 127 S. Ct. at 1636, 1637 (“There is documented medical disagreement whether the Act’s prohibition would ever impose significant health risks on women . . . The question becomes whether the Act can stand when this medical uncertainty persists. The Court’s precedents instruct that the Act can survive this facial attack. The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty . . . The medical uncertainty over whether the Act’s prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden.”).

432. Compare Stenberg, 530 U.S. at 932, 937 (“[T]he record shows that significant medical authority supports the proposition that in some circumstances, D & X would be the safest procedure . . . Where a significant body of medical opinion believes a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view, we cannot say that the presence of a different view by itself proves the contrary. Rather, the uncertainty means a significant likelihood that those who believe that D & X is a safer abortion method in certain circumstances may turn out to be right.”), with Gonzales II, 127 S. Ct. at 1636, 1637 (“There is documented medical disagreement whether the Act’s prohibition would ever impose significant health risks on women . . . The question becomes whether the Act can stand when this medical uncertainty persists. The Court’s precedents instruct that the Act can survive this facial attack. The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty . . . The medical uncertainty over whether the Act’s prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden.”).

433. See supra notes 367-432 and accompanying text.

434. Compare Roe v. Wade, 410 U.S. 113, 164-65 (1973) (holding that “[f]or the stage 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.”); and Casey, 505 U.S. at 879 (reaffirming Roe’s holding), with Gonzales II, 127 S. Ct. at 1637 (concluding that “the Act does not require a health exception.”).
C. The United States Supreme Court's Restrictions on Abortion Rights Threaten a Woman's Right to Choose and Could Precipitate a Reversion to Pre-Roe Society with Illegal Abortions and Dangerous, Unhealthy Termination Practices

The United States Supreme Court in *Gonzales* replaced informed medical judgment with congressional findings and, in doing so, limited a woman's right to choose whether to terminate her pregnancy.\(^435\) While the *Gonzales* decision itself merely prohibited a particular procedure, the decision also revealed the Court's position that the Court might replace expert medical judgment with congressional findings.\(^436\) The Court's decision in *Gonzales* could have great implications because the Roberts Court has been reconsidering precedents.\(^437\) As Chief Justice William H. Rehnquist once observed, "stare decisis is not an inexorable command."\(^438\) As each year passes since the *Roe* decision, state legislatures enact more abortion restrictions, and ultimately, abortion rights could be restricted so much that the right will be hollow.\(^439\) Justice Ginsburg already recognized the *Gonzales* decision as a signal that the central premises of *Roe* are no longer supported: "In candor, the [PBABA], 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."\(^440\) If the Court were to reevaluate its precedent and reverse *Roe*, several states retain trigger laws waiting to make abortion illegal as soon as the Court permits states to ban abortions.\(^441\) For example, Louisiana has a statute that requires that, in order to be lawful, a physician must terminate a woman's pregnancy under three specific situations: (1) to preserve the

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\(^435\) See infra notes 436-57 and accompanying text.

\(^436\) See infra notes 436-57 and accompanying text.

\(^437\) See infra notes 438-41 and accompanying text. See also Terry Carter, Roberts Court Pressing on Precedent?, ABA J. E-Report, June 29, 2007, http://www.abanet.org/journal/ereport/jn29campaign.html. "Many believe that the plurality opinion in *Federal Election Commission v. Wisconsin Right to Life* could overturn a precedent of just three years standing." Carter, supra. "The middle of the court is overturning precedents without saying so." Id. See also Charo, supra note 368, at 2125. "The decision *Gonzales v. Carhart* thus opens the door to revisiting any number of state and federal efforts to restrict access to abortion services." Carter, supra.

\(^438\) Linda Greenhouse, Precedents Begin to Fall for Roberts Court, N.Y. Times, June 21, 2007.


\(^440\) Charo, supra note 368, at 2128.

health or life of the unborn child, (2) to preserve the health or life-
sustaining organs of the woman, or (3) to prevent the death or serious
bodily injury of the woman, which could result from a physical injury
or permanent impairment.\textsuperscript{442} Several states have pre-1973 abortion
bans still in their statute books.\textsuperscript{443} Additionally, Michigan has a statute
that requires any person that willfully administers medication or
uses instrumentation to intentionally cause the miscarriage of a wo-
man's pregnancy is guilty of a felony unless such procedure was neces-
sary to preserve the life of the woman.\textsuperscript{444} Arkansas also has a statute
that was not repealed after \textit{Roe}.\textsuperscript{445} Arkansas' statute provides that it
is unlawful for anyone to administer any medicine to a pregnant wo-
man with the intention of procuring a miscarriage of a fetus whether
before or after quickening.\textsuperscript{446} If \textit{Roe} were overturned, it is conceivable

\begin{footnotesize}
\begin{enumerate}
\item Abortion is the performance of any of the following acts, with the specific intent of terminating a pregnancy:
\begin{enumerate}
\item Administering or prescribing any drug, potion, medicine or any other substance to a female; or
\item Using any instrument or external force whatsoever on a female.
\end{enumerate}
\item This Section shall not apply to the female who has an abortion.
\end{enumerate}
\item It shall not be unlawful for a physician to perform any of the acts described in Subsection A of this Section if performed under the following circumstances:
\begin{enumerate}
\item The physician terminates the pregnancy in order to preserve the life or health of the unborn child or to remove a stillborn child.
\item The physician terminates a pregnancy by performing a medical procedure necessary in reasonable medical judgment to prevent the death or substantial risk of death due to a physical condition, or to prevent the serious, permanent impairment of a life-sustaining organ of a pregnant woman . . .
\end{enumerate}
\textit{Id.}
\item See Jeffery Rosen, \textit{The Day After Roe}, ATLANTIC, June 2006. "In at least seven of these eleven states (Arkansas, Louisiana, Michigan, Oklahoma, South Dakota, Texas, and Wisconsin), the draconian abortion bans had never been blocked by state courts as violations of state constitutional rights, and therefore could, in theory, be immediately enforced." \textit{Id.}
\begin{enumerate}
\item Any person who shall willfully administer to any pregnant woman any medicine, drug, substance, or thing whatever, or shall employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, shall be guilty of a felony, and in case the death of such pregnant woman be thereby produced, the offense shall be deemed manslaughter.
\textit{Id.}
\item \textit{Ark. Code Ann.} § 5-61-102 (2005). Section 5-61-102 provides:
\begin{enumerate}
\item It is unlawful for any person to administer or prescribe any medicine or drug to any woman with child with the intent to produce an abortion or premature delivery of any fetus before or after the period of quickening or to produce or attempt to produce the abortion by any other means.
\item Any person violating a provision of this section is guilty of a Class D felony.
\item Nothing in this section shall be construed to allow the charging or conviction of a woman with any criminal offense in the death of her own unborn child in utero.
\textit{Id.}
\item \textit{Ark. Code Ann.} § 5-61-102.
\end{enumerate}
\end{footnotesize}
that within a year or two, states would re-adopt draconian abortion restrictions throughout a woman's pregnancy.\textsuperscript{447}

Despite anti-abortion rhetoric, these harsh restrictions would not result in a dramatic change in the number of abortions performed nationwide.\textsuperscript{448} If a woman wants to terminate her pregnancy, she may, regardless of the procedure's legality.\textsuperscript{449} Instead of reducing the number of abortion procedures, outlawing or severely restricting abortion procedures could result in women with disposable incomes traveling to states that still perform abortions, while poor women would be forced to seek an abortive procedure from an illegal local provider.\textsuperscript{450} Poor women in rural areas bear the brunt of abortion restrictions; some of those women might have to pay with their lives.\textsuperscript{451}

Furthermore, if the central premises of Roe are eroded, society could return to a pre-Roe culture, and women who seek to terminate their pregnancies could be subjected to detrimental health effects, such as infection, jaundice, congestive heart failure, or even death.\textsuperscript{452} Non-physician abortion providers have multiple methods at their disposal to terminate a pregnancy.\textsuperscript{453} Among other methods, a non-physician abortion provider can use household products and utensils to terminate the woman's pregnancy, such as bicycle spokes, Lysol douche, garden hose, potassium permanganate corrosive tablets, slippery elm stick, turpentine by mouth, bleach douche, intrauterine installation of kerosene and vinegar, or a coat hanger.\textsuperscript{454} The time of

\textsuperscript{447} See Jeffrey Rosen, The Day After Roe, ATLANTIC, June 2006 (stating if Roe is overturned, some states would revive prior abortion bans and attempt to enact new abortion bans).

\textsuperscript{448} Id.

\textsuperscript{449} See infra notes 450-56 and accompanying text; see also Elizabeth Rosenthal, Legal or Not, Abortion Rates Compare, N.Y. TIMES, Oct. 12, 2007, at A8 (finding that outlawing abortion does not really deter women from seeking the procedure because abortion rates are comparable between countries where abortion is illegal and countries where its legal).

\textsuperscript{450} See Jeffrey Rosen, supra note 447 providing, "If you take Roe off the books, the focus will be on poor women in a handful of states trying to get illegal abortions."

\textsuperscript{451} Wright, supra note 439, at 9.


\textsuperscript{453} See infra note 454 and accompanying text.

\textsuperscript{454} GORNEY, supra note 452, at 21-22. Gorney described the specific devices used by women and abortionists to terminate pregnancies leading up to the 1960s:

Lysol douche, hexol douche, bleach douche, green soap and glycerine douche, powdered kitchen mustard douche, hydrogen peroxide douche, potassium permanganate corrosive tablets, intrauterine installation of kerosene and vinegar, gauze packing, artist's paintbrush, curtain rod, slippery elm stick, garden hose, rubber tube, polyethylene tube, glass cocktail stirrer, ear syringe, telephone wire, copper wire, coat hanger (wire), nut pick, pencil, cotton swabs, clothespin, knitting needle, rubber catheter, woven silk catheter, catheter with stylette, chopsticks, bicycle pump and tube, football pump and plastic straw, plastic tube with soap solution, gramophone needle, bulb syringe, caster oil by mouth,
illegal abortions, performed before Roe, has faded from people's memories, and the thousands of women that died from septic abortions have been forgotten. The battle against further restrictions of Roe is a fight to save lives, it is not a fight for choice. Because women could decide to terminate their pregnancies regardless of the legality of abortion procedures, the real question is whether society prefers to have women obtain safe abortions by licensed physicians in sterile medical offices, or instead possibly procure abortions with Lysol, bleach, and coat hangers, risking infection, medical complications, and death.

CONCLUSION

This Note argued that the United States Supreme Court's decision in Gonzales v. Carhart substantially deviated from the Court's decision in Stenberg v. Carhart, which could have a chilling effect on the practice of medicine and, in turn, a detrimental effect on society. First, this Note examined a brief history of pre-Roe society and the development of the privacy right that encompasses a woman's right to choose whether to terminate her pregnancy. Then, this Note discussed the Court's restriction of the privacy right first recognized in Roe v. Wade regarding a woman's right to choose. This Note then analyzed the Gonzales Court's failure to follow the Stenberg Court's determination that medical uncertainty about the necessity of a procedure required the Court to include a health exception for the woman. Finally, this Note proposed that the legislative and judi-

quinine by mouth, ergot by mouth, Humphries No. 11 tablets by mouth, turpentine by mouth. A roster of terrible specificity accumulated, in the years leading up to the late 1960s, and was committed to print in the journals of American medicine. This is what she did it with, the examining physician must have murmured to each other as the bedside curtains were drawn: this was found in the cervix, or identified in the bloodstream, or extracted with forceps from the uterine wall in which it had lodged. Sometimes a woman could be persuaded to describe the device she had pushed inside herself or the fluid she had drunk or the particular tools she believed the abortionist had used; sometimes the doctors could look inside the vaginal area, or open an abdomen at autopsy, and recognize the markers left behind.

Id.

455. Wright, supra note 439, at 9.
456. Id.
457. See supra notes 435-56 and accompanying text.
460. See supra notes 367-457 and accompanying text.
461. See supra notes 15-263 and accompanying text.
463. See supra notes 264-336 and accompanying text.
464. See supra notes 367-434 and accompany text.
cial branches should leave determinations of medical necessity to licensed physicians who care for patients on an individualized basis.465

Gonzales was the first time in history the United States Supreme Court held that a physician could be prohibited from performing a medical procedure the physician found necessary to ensure a patient's health.466 Before Gonzales, the Court's longstanding tradition was to defer to the medical profession to define what is medically necessary.467 State legislatures have been trying for years to overturn Roe.468 Every year, more and more restrictions on Roe are passed.469 Of these restrictions, the Court upheld a twenty-four hour waiting period, an extensive informed consent process, parental notification with judicial bypass, and after the Gonzales decision, a ban of a particular abortive procedure.470 Now that the Gonzales Court has shown the Court is willing to replace medical judgment with congressional findings, it is possible that Roe could be overturned.471

If restrictions on Roe continue to erode the precedent, or Roe is overturned, it could lead to a chilling effect on the practice of medicine and, perhaps more importantly, could have a detrimental effect on society by reverting back to a pre-Roe culture, where illegal abortions could result in needless suffering and death.472 Prior to Roe, women experienced serious complications from illegal, non-medical abortions.473 For example, women were jaundiced from infection, in shock with foul-smelling substances emanating from their uteruses, and thousands of women died from septic abortions.474 In addition, the Court in Planned Parenthood v. Casey475 acknowledged another problem with a reversion to pre-Roe culture:

But to do this would be simply to refuse to face the fact that for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that con-

465. See supra notes 435-57 and accompanying text.
468. 410 U.S. 113 (1973); see also supra notes 264-366 and accompanying text.
470. See supra notes 264-366 and accompanying text.
471. See supra notes 367-457 and accompanying text.
472. See supra notes 367-457 and accompanying text.
474. Gorney, supra note 473, at 25; Wright, supra note 469, at 9.
traception should fail . . . . The Constitution serves human values, and while the effect of reliance on Roe cannot be exactly measured, neither can the certain cost of overruling Roe for people who have ordered their thinking and living around that case be dismissed.476

Further, recent global research demonstrates the legality of abortion does not affect the number of women who choose to terminate their pregnancies.477 Instead, the legality of abortion affects the safety of the procedure, and the level of danger the woman is subjected to.478 After Gonzales, the real issue became whether women are able to access a less risky procedure that a physician deems necessary to preserve their life or health.479 Because the Gonzales Court chose not to follow Stenberg and require a woman's health exception if medical uncertainty exists about the necessity of the dilation and extraction ("D & X") procedure, women could be subjected to serious, unnecessary health consequences.480 The illegality of the D & X abortive procedure increases the level of danger for women whose physician believes that the D & X procedure is the safest option under her particular, individualized circumstances.481 The Gonzales Court failed to follow the Court's longstanding tradition to defer to the medical profession to define what is medically necessary, which could lead to detrimental health effects on women.482 Instead of replacing individualized medical judgment with congressional findings, the Court should revert to the protections afforded to women before Gonzales and require a health exception for all abortion regulations.

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478. Id.
479. See supra notes 367-457 and accompanying text.
480. See supra notes 367-457 and accompanying text.
481. See supra notes 367-457 and accompanying text.
482. See supra notes 264-457 and accompanying text.