

THE PARTIAL-BIRTH ABORTION BAN ACT OF 2003: THE CONGRESSIONAL REACTION TO *STENBERG V. CARHART**

Melissa C. Holsinger

I.

INTRODUCTION

In *Stenberg v. Carhart*,¹ the Supreme Court struck down a Nebraska statute banning “partial birth” abortion.² The 1999 decision represented the Court’s first major ruling on abortion in nearly a decade.³ It followed several years of state and federal legislative efforts to ban so-called “partial birth” abortion.⁴ The ruling was welcomed by the pro-choice movement, although the narrow 5–4 margin caused some concern.⁵ Anti-abortion advocates, by contrast, were dismayed

* The Partial-Birth Abortion Ban Act of 2003 passed the Senate on March 13, 2003 by a vote of 64–33. At press time, it had been approved by the House Judiciary Committee but had yet to reach a vote before the full House of Representatives.

1. 530 U.S. 914 (2000).

2. *Id.* at 922.

3. Edward Walsh & Amy Goldstein, *Supreme Court Upholds Two Key Abortion Rights; ‘Partial Birth’ Ban Struck Down, 5-4; Clinic Protest Restrictions Upheld, 6-3*, WASH. POST, June 29, 2000, at A1.

4. H.R. REP. NO. 107–604, at 4–5 (2002). “Partial birth” abortion is not a term recognized by the medical establishment. See, e.g., Gail Glidewell, Note, “*Partial Birth*” Abortion and the Health Exception: Protecting Maternal Health or Risking Abortion on Demand?, 28 FORDHAM URB. L.J. 1089, 1095 (2001). Rather, abortion opponents coined the term to gain public support for partial birth abortion bans. *Id.* Those who advocate bans on partial birth abortion claim that the term is intended to refer to a single abortion procedure referred to by doctors as “dilation and extraction.” See *Stenberg*, 530 U.S. at 939 (2000). However, the Supreme Court struck down the Nebraska statute at issue in *Stenberg* in part because it found the term and its statutory definition so broad as to refer not only to dilation and extraction, but also to a more common procedure used both pre- and post-viability known as “dilation and evacuation.” *Id.*; see discussion Part II *infra*. The use of the term “partial birth” abortion in this Recent Development adheres to the Supreme Court’s interpretation of the term, presumptively referring to multiple abortion procedures used both pre- and post-viability.

5. Alissa J. Rubin, *Ruling May Energize Abortion Foes*, L.A. TIMES, June 29, 2000, at A12; see also Press Release, National Abortion Federation, Supreme Court Strikes Down Nebraska’s So-Called “Partial-Birth Abortion” Ban in *Stenberg v. Carhart* (June 28, 2000) (on file with the *New York University Journal of Legislation and Public Policy*).

by *Stenberg*.⁶ Congressional opponents of abortion vowed to redraft a federal partial birth abortion ban that would pass Constitutional muster.⁷

This Recent Development addresses the “Partial-Birth Abortion Ban Act of 2003,” the most recent attempt by anti-abortion lawmakers in Congress to draft a ban that satisfies the Constitutional demands of *Stenberg*.

II.

THE CONTEXT AND HOLDING OF *STENBERG V. CARHART*

In its landmark decision in *Roe v. Wade*,⁸ the Supreme Court established that a woman has a fundamental constitutional right to have an abortion.⁹ However, the *Roe* Court held that the privacy interest underlying a woman’s right to choose is qualified, and may be countered by the State’s interests in protecting maternal health and potential human life.¹⁰ To balance these competing interests, the Court devised *Roe*’s now-familiar trimester framework. In the first trimester of pregnancy, the State has no compelling interest in either maternal health or potential life that justifies regulations on abortion.¹¹ In the second trimester, the state’s interest in maternal health is compelling, and it may impose regulations that are reasonably related to the protection and preservation of maternal health.¹² Finally, after the point of viability, the state’s interest in potential life is compelling, and it may regulate and even prohibit abortion, so long as any such regulation provides an exception permitting an abortion that is necessary to protect a woman’s life or health.¹³

Nearly twenty years later, the Court rejected *Roe*’s trimester framework in *Planned Parenthood v. Casey*.¹⁴ *Casey* held that the point of viability is the dividing line for determining when the State’s interest in potential life outweighs a woman’s interest in choosing whether to have an abortion.¹⁵ Furthermore, the Court determined that the State’s interest in potential life exists throughout pregnancy,

6. Walsh & Goldstein, *supra* note 3.

7. Jim Abrams, *Late-Term Abortion Ban Faces Bumps*, A.P. ONLINE, Jan. 26, 2001, 2001 WL 9870222.

8. 410 U.S. 113 (1973).

9. *Id.* at 162.

10. *Id.*

11. *Id.* at 163.

12. *Id.*

13. *Id.* at 163–64.

14. 505 U.S. 833 (1992).

15. *Id.* at 870.

and thus a regulation on abortion is constitutional at any point during pregnancy so long as it does not place an “undue burden” on a woman’s right to choose.¹⁶ An undue burden is any regulation that places a “substantial obstacle” in the path of a woman seeking an abortion.¹⁷

In *Stenberg*, the Court applied the *Casey* test to a Nebraska statute banning partial birth abortion. The statute in question banned partial birth abortion except when “necessary to save the life of the mother.”¹⁸ Though ostensibly aimed at prohibiting an abortion procedure known as “dilation and extraction” (D & X),¹⁹ the Nebraska law did not refer to D & X, and instead defined 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.”²⁰ The statute specified that it prohibited the deliberate and intentional delivery “into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child.”²¹

In applying *Casey*, the Court examined the Nebraska statute as it applied to both pre- and post-viability abortions. Under *Casey*, a state may regulate pre-viability abortions so long as the regulation does not constitute an undue burden on a woman’s right to choose.²² The *Stenberg* Court held that the Nebraska statute’s vague language rendered it unconstitutional with regard to pre-viability abortions.²³ In examining the statute’s definition of partial birth abortion, the Court found that the language applied to both D & X and to a different procedure known as “dilation and evacuation” (D & E).²⁴ D & E is the most common procedure used for pre-viability second trimester abor-

16. *Id.* at 876.

17. *Id.* at 877.

18. *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000).

19. *See id.* at 938.

20. *Id.* at 922.

21. *Id.*

22. *Id.* at 921.

23. *Id.* at 945–46.

24. *Id.* at 939. D & E involves dilation of the cervix and the removal of fetal tissue; when used after the 15th week of pregnancy, it may require instrumental disarticulation or dismemberment of the fetus, which occurs as the doctor pulls a portion of the fetus through the cervix into the birth canal. *Id.* at 925. D & X involves dilation of the cervix and the removal of an intact fetus from through the cervix. *See id.* at 927–28. The Court held that both procedures may require a physician to pull a “substantial portion” of a living fetus into the vagina prior to the death of the fetus in violation of the Nebraska statute. *Id.* at 938–39.

tions.²⁵ Because the statute had the effect of banning the pre-viability use of D & E, it constituted an undue burden on a woman's right to choose under *Casey*.²⁶

Under *Casey*, a state may regulate post-viability abortions so long as the regulation provides an exception permitting an abortion that is necessary to protect a woman's life or health.²⁷ The *Stenberg* Court held that the Nebraska statute was unconstitutional because it lacked a health exception.²⁸ Nebraska argued that medical evidence demonstrated that D & X is never necessary to protect a woman's health,²⁹ and thus the lack of a health exception to a ban on post-viability D & X procedures would not pose significant health risks to women.³⁰ The Court rejected this argument and held that "significant medical authority" indicated that D & X is in some cases the safest abortion procedure available.³¹ The Court recognized the factual dispute within the medical community about the comparative safety of D & X, but concluded that differences in medical judgment must be tolerated and that a health exception is therefore necessary given the "significant body" of medical data supporting the relative safety of D & X.³² Thus, the Nebraska statute's lack of a health exception rendered it unconstitutional as applied to post-viability abortions under the *Casey* standard.

Furthermore, the Court held that the lack of a health exception rendered the statute unconstitutional to the extent that its vague language functioned to ban pre-viability abortions.³³ Because the State's interest in regulating abortion pre-viability is more circumscribed than its interest in regulating abortion post-viability, the Court reasoned that the life and health exceptions required of post-viability abortion regulations are also required of pre-viability abortion regulations under *Casey*.³⁴ Since the Nebraska statute had the effect of proscribing pre-viability abortions,³⁵ its lack of a health exception rendered it unconstitutional as it applied to those abortions.

25. See *id.* at 924. For an exposition of various abortion procedures considered in the context of *Stenberg*, see Janeen F. Berkowitz, *Stenberg v. Carhart: Women Retain Their Right to Choose*, 91 J. CRIM. L. & CRIMINOLOGY 337, 349–54 (2001).

26. *Stenberg*, 530 U.S. at 945–46.

27. *Id.* at 921.

28. *Id.* at 938.

29. *Id.* at 933–34.

30. *Id.* at 931.

31. *Id.* at 932.

32. *Id.* at 937.

33. See *id.* at 930.

34. *Id.*

35. See *supra* notes 23–25 and accompanying text.

The Court's articulation of the Nebraska statute's two constitutional flaws appears to provide federal and state legislators with a clear formula for drafting constitutional bans on post-viability D & X procedures. Justice O'Connor's concurrence in *Stenberg* lays out that formula with even greater precision. She notes that if the Nebraska statute were limited to D & X and included a health exception, "the question presented would be quite different from the one we face today."³⁶ The remainder of this Recent Development considers whether, given the clear direction of the *Stenberg* majority and Justice O'Connor's even more pointed lesson to legislatures, Congress has taken *Stenberg* under advisement and succeeded in drafting a constitutional bill that would ban partial birth abortion on the federal level.

III.

THE PARTIAL-BIRTH ABORTION BAN ACT OF 2003

Prior to the *Stenberg* decision, anti-abortion lawmakers in Congress made several attempts to enact a federal ban on partial birth abortion. Bills to ban partial birth abortion passed both houses of Congress and were vetoed by President Bill Clinton during the 104th and 105th Congresses.³⁷ During the 106th Congress, separate bills passed the House of Representatives and the Senate, but neither reached the president's desk.³⁸

Each bill that Congress considered during this period contained language similar to that in the Nebraska statute. The earliest version—that of the 104th Congress—defined partial birth abortion as the act of vaginally delivering "a living fetus before killing the fetus and completing the delivery."³⁹ The variation adopted by the 105th Congress used language virtually identical to that in the Nebraska statute.⁴⁰ Finally, both bills introduced in the 106th Congress defined partial birth abortion as the vaginal delivery of "some portion of an intact living fetus" with the intention of "performing an overt act that

36. *Stenberg*, 530 U.S. at 950. *But see* Glidewell, *supra* note 4, at 1114 (arguing that ban on partial birth abortion need not contain health exception to be constitutional under *Stenberg*).

37. H.R. REP. NO. 107-604, at 5 n.5 (2002).

38. *Id.*

39. Partial-Birth Abortion Ban Act of 1995, H.R. 1833, 104th Cong. § 2(a) (1995).

40. Partial-Birth Abortion Ban Act of 1997, H.R. 1122, 105th Cong. § 2(a) (1997) (defining "partial birth" abortion as act of partially vaginally delivering living fetus before "killing the fetus and completing delivery," and specifying that prohibition applies to deliberate and intentional delivery "into the vagina a living fetus, or a substantial portion thereof," for purpose of performing procedure that person performing procedure "knows will kill the fetus, and does kill the fetus").

the person knows will kill the fetus.”⁴¹ None of these four bills included language restricting its application to either D & X or post-viability procedures. Furthermore, though each bill contained an exception permitting an abortion when a woman’s life is in danger, none contained a health exception. Thus, each of these pre-*Stenberg* bills exhibited the same two flaws that proved fatal to the Nebraska statute. Had any of these proposed bans been signed into law, it would have been presumptively rendered unconstitutional by *Stenberg*.

After *Stenberg*, anti-abortion lawmakers vowed that any new federal bill to ban partial birth abortion would be constitutional.⁴² During the 107th Congress, the House passed a reconfigured bill to ban partial birth abortion.⁴³ That bill never reached a vote in the Senate. Identical bills were introduced in the House⁴⁴ and Senate⁴⁵ early in the 108th Congress. Those bills, both entitled the “Partial-Birth Abortion Ban Act of 2003” (PBABA), are the subject of this discussion.⁴⁶

A. *Applying Stenberg to PBABA*

The operative language of PBABA is substantially the same as that in the Nebraska statute and in the partial birth abortion bans considered by the four previous Congresses. PBABA creates criminal penalties for any individual who performs a partial birth abortion.⁴⁷ The bill’s drafters claim to have remedied one of the constitutional problems that plagued the Nebraska statute by defining partial birth

41. Partial-Birth Abortion Ban Act of 2000, H.R. 3660, 106th Cong. § 2(a) (2000); Partial-Birth Abortion Ban Act of 1999, S. 1692, 106th Cong. § 2(a) (1999).

42. See Abrams, *supra* note 7.

43. Julie Eilperin, *House Alters Measure on Abortions*, WASH. POST., July 25, 2002, at A4.

44. Partial-Birth Abortion Ban Act of 2003, H.R. 760, 108th Cong. (2003).

45. Partial-Birth Abortion Ban Act of 2003, S. 3, 108th Cong. (2003).

46. In addition to the two bills cited *supra* notes 44–45, two additional bills relating to late-term abortion have been introduced in the 108th Congress to date. See Late Term Abortion Ban Act of 2003, H.R. 679, 108th Cong. (2003); Late Term Abortion Restriction Act, H.R. 809, 108th Cong. (2003). These bills differ significantly in their language and structure from each of the partial birth abortion bills considered by Congress in the past eight years. Neither uses the “partial birth” language, and each contains some form of a health exception. This piece focuses on the Partial-Birth Abortion Ban Act of 2003 because all indications suggest that it is the latest iteration of the bills to ban partial birth abortion that Congress has considered in the past eight years. The other two bills appear to be newer forms of late-term abortion bans that raise new and distinct questions of constitutionality in light of *Stenberg*, and are beyond the scope of this Recent Development.

47. H.R. 760, § 3(a). Because the House and Senate bills cited *supra* notes 44–45 are identical, the relevant provisions appear in both versions in identically enumerated sections. For the remainder of this Recent Development, I have cited to the House version alone in the interest of simplicity.

abortion more precisely so to exclude D & E procedures from the scope of bill's prohibition.⁴⁸ The bill easily could have been drafted to exclude D & E by specifically limiting the prohibition to either D & X or post-viability procedures. Instead, like earlier versions, the bill employs non-medical terminology to define the procedures that would be prohibited under the bill.⁴⁹ Given the drafters' stated intention to exclude D & E procedures from the bill's scope, one can only speculate why they did not simply exclude such procedures on the face of the bill.

Additionally, though PBABA contains an exception permitting an abortion that is necessary to protect a woman's life,⁵⁰ it does not contain a health exception. Thus the bill fails to remedy the second constitutional flaw that the Supreme Court identified in the Nebraska statute because the bill lacks the health exception required of any regulation on pre- or post-viability abortions. Instead of addressing this constitutional defect outright, the drafters claim that the bill does not require a health exception, in direct contravention of *Stenberg*. They premise this claim on the novel but ultimately specious argument that the Supreme Court must defer to congressional "findings of fact" regarding the safety of D & X and the need for a health exception.

B. *PBABA's Misguided End-Run Around Stenberg's Health Exception Requirement*

PBABA includes an extensive "Findings" section stating that the *Stenberg* Court premised its decision on judicial findings of fact regarding the need for a health exception to a ban on partial birth abortion. According to PBABA, the Court's factual findings contradict the "great weight of the evidence."⁵¹ The "Findings" section concludes, contrary to *Stenberg*, that partial birth abortion is never medically necessary and that the procedure itself poses health risks to women.⁵² The section declares that congressional findings of fact supercede those of the judiciary,⁵³ and that a health exception is thus unnecessary in light of Congress's findings regarding the relative safety of partial birth abortion.⁵⁴

48. H.R. REP. NO. 107-604, at 6 (2002).

49. H.R. 760, § 3(a).

50. *See id.*

51. *Id.* § 2(5).

52. *See id.* § 2(14)(O).

53. *See id.* § 2(8).

54. *See id.* § 2(13).

According to PBABA's "Findings" section, Congress has found that a "moral, *medical*, and ethical consensus exists" that partial birth abortion is never medically necessary to protect a woman's health.⁵⁵ The "Findings" section avers that the trial record reveals a "dearth" of evidence supporting the conclusions that partial birth abortion may be the safest method of abortion in some circumstances and thus that the ban requires a health exception under *Casey*.⁵⁶ PBABA also indicates that under the applicable appellate standard of review, the Supreme Court in *Stenberg* was "required to accept the very questionable findings issued by the district court judge."⁵⁷

This mischaracterizes *Stenberg*. In discussing the evidence, the *Stenberg* Court noted that with only one exception, federal district courts that have addressed the issue have drawn similar factual conclusions regarding the relative safety of D & X.⁵⁸ Additionally, after reviewing the record in light of Nebraska's arguments that the district court findings were "irrelevant, wrong, or applicable only in a tiny number of procedures,"⁵⁹ the Court determined, to the contrary, that the record revealed a "highly plausible" explanation of why D & X may significantly reduce health risks to women in certain circumstances.⁶⁰ Though the record reflected a division of medical opinion, the Court concluded that a health exception was necessary because a "significant body" of medical opinion indicated that D & X obviates health risks to women.⁶¹ Furthermore, the Court held that the division of opinion regarding the relative safety of the D & X procedure *justified*, rather than undermined, the need for a health exception.⁶² Finally, the Court's consideration of the trial record did not indicate any consternation at being "required" to accept the district court's findings, as PBABA suggests.

PBABA posits that Congress, unlike the Supreme Court, is not required to accept the district court findings, and that the Supreme Court must in turn give great deference to congressional findings of fact.⁶³ However, the case law that PBABA cites is hardly conclusive. PBABA construes *Katzenbach v. Morgan* as holding that the Supreme Court will accept congressional findings of fact so long as it can "per-

55. *Id.*, § 2(1) (emphasis added).

56. *Id.* § 2(6).

57. *Id.* § 2(6)–(7).

58. See *Stenberg v. Carhart*, 530 U.S. 914, 932 (2000).

59. *Id.* at 933.

60. *Id.* at 936.

61. *Id.* at 937.

62. See *id.*

63. See H.R. 760, § 2(8).

ceive a basis upon which Congress might resolve the conflict as it did.”⁶⁴ Recently, though, the Court has taken a far less deferential view towards congressional findings of fact. In *United States v. Morrison*,⁶⁵ the Court struck down a federal statute creating a federal civil remedy for victims of gender-motivated violence because such violence does not have a substantial effect on interstate commerce, despite significant congressional findings regarding the impact of gender-motivated violence on victims and their families.⁶⁶ The Court held that congressional findings are not, by themselves, sufficient to sustain the constitutionality of legislation, and that it will not regard a conclusion as necessarily true simply because it is based on congressional findings of fact.⁶⁷

Additionally, the congressional enactment considered by the *Katzenbach* Court is easily distinguishable from PBABA. At issue in *Katzenbach* was whether Congress intruded on powers reserved to the states under the Tenth Amendment in enacting section 4(e) of the Voting Rights Act.⁶⁸ Congress enacted the Voting Rights Act pursuant to the Fourteenth Amendment’s enforcement clause in order to secure the rights guaranteed under the Fourteenth Amendment to individuals who had attended Puerto Rican schools where classes were not taught in English.⁶⁹ Thus, the Voting Rights Act was an attempt by Congress to enforce a constitutional right; by contrast, PBABA represents a congressional effort to limit a constitutional right that has been articulated by the Supreme Court. Furthermore, the Voting Rights Act was neither enacted in response to nor in contravention of a previous Supreme Court case addressing the precise constitutional issues raised by the statute, while PBABA is by its own terms a response to the Court’s ruling in *Stenberg*.

At issue in the *Turner* cases to which PBABA cites⁷⁰ was whether the Cable Television Consumer Protection and Competition Act of 1992 (Cable Television Act) violated the First Amendment.⁷¹ The Cable Television Act required cable television systems to devote a portion of their channels to the transmission of local broadcast tele-

64. *Id.* § 2(9) (citing *Katzenbach v. Morgan*, 384 U.S. 641 (1966)).

65. 529 U.S. 598 (2000).

66. *See id.* at 627.

67. *See id.* at 614 (citing *United States v. Lopez*, 514 U.S. 549 (1995)).

68. *See Katzenbach*, 384 U.S. at 646.

69. *See id.* at 643–46.

70. H.R. 760, § 2(11)–(12).

71. *See Turner Broad. Sys. v. Fed. Communications Comm’n*, 520 U.S. 180, 185 (1997); *Turner Broad. Sys. v. Fed. Communications Comm’n*, 512 U.S. 622, 626 (1994).

vision stations.⁷² PBABA is more analogous to the Cable Television Act than to the Voting Rights Act because they both represent a potential statutory incursion into a constitutionally protected right. However, like the Voting Rights Act, the Cable Television Act differs significantly from PBABA because it was not enacted in response to an earlier Supreme Court decision.

The factual findings in the Cable Television Act may also be differentiated from those in PBABA because they relate to “predictive judgments” requiring the forecast of future events and the likely impact of those events.⁷³ The Court afforded those congressional judgments more deference because they involved complex regulatory schemes and the interaction of industries undergoing significant economic and technological changes.⁷⁴ PBABA relates neither to a complex regulatory scheme nor to an industry subject to significant economic and technological change. Thus, the deferential approach taken towards Congress’s findings in the *Turner* cases is not necessarily applicable in the Court’s consideration of PBABA.

C. A Closer Analogy

The Court articulated a more closely analogous standard of judicial deference to congressional findings of fact in *City of Boerne v. Flores*.⁷⁵ In *Boerne*, the Court considered whether Congress exceeded its powers under the Enforcement Clause of the Fourteenth Amendment in enacting the Religious Freedom Restoration Act of 1993 (RFRA).⁷⁶ RFRA was enacted in response⁷⁷ to the Supreme Court’s earlier decision in *Employment Division v. Smith*.⁷⁸ That decision subjected facially-neutral state laws which infringe on the free exercise of religion to the rational basis test, although the Court had previously required that such laws serve a compelling state interest and be narrowly tailored to that interest.⁷⁹ Congress disagreed with the *Smith* Court’s holding and attempted to reinstate the compelling interest test by enacting RFRA.⁸⁰

In determining whether Congress had the authority to enact RFRA, effectively overturning Supreme Court precedent interpreting

72. See *Turner*, 512 U.S. at 630.

73. *Id.* at 665.

74. See *Turner*, 520 U.S. at 196.

75. 521 U.S. 507 (1997).

76. See *id.* at 511–12.

77. *Id.* at 512.

78. 494 U.S. 872 (1990).

79. See *id.*

80. See *Boerne*, 521 U.S. at 515–16.

the Constitution, the *Boerne* Court held that congressional findings “in the first instance” are entitled to much deference.⁸¹ However, Congress does not have power to “decree the substance” of the Fourteenth Amendment, or to enforce a right by changing or determining what that right is.⁸² To hold otherwise would contradict the principles necessary for maintaining the separation of powers inherent in the federal system.⁸³ The congressional findings underlying PBABA, like those behind RFRA, are not conclusions drawn by Congress “in the first instance.” Rather, they represent an effort to undermine a previous Supreme Court decision regarding the scope of a constitutional right.

Boerne dealt with a congressional attempt to expand a constitutional right in contravention of an earlier Supreme Court decision. In *Dickerson v. United States*,⁸⁴ the Court extended the *Boerne* rationale and struck down a congressional enactment that contracted, rather than expanded, a constitutional right in contravention of Supreme Court precedent outlining the contours of that right.⁸⁵

The statute in question in *Dickerson* was intended to override the Court’s earlier decision in *Miranda v. Arizona*,⁸⁶ which provided constitutional guidelines governing the admission of evidence obtained during the interrogation of a criminal suspect.⁸⁷ Under *Miranda*, such evidence is admissible only if law enforcement has given a suspect a specific set of warnings; absent those warnings, evidence obtained during interrogation is not admissible even if the suspect provided the information voluntarily.⁸⁸ In response to *Miranda*, Congress enacted a statute providing that the admissibility of evidence hinges on the voluntariness of a suspect’s statement.⁸⁹ The *Dickerson* Court recognized the inherent conflict between *Miranda* and the statute, and concluded that Congress did not have authority to legislatively supersede a Supreme Court decision interpreting and applying the Constitution.⁹⁰

Like the statute at issue in *Dickerson*, PBABA would have the effect of abridging or contracting the scope of a constitutionally protected right. Thus *Dickerson* is directly analogous to PBABA, and the *Dickerson* analysis should control. Despite the judicial deference that

81. *Id.* at 536.

82. *Id.* at 519.

83. *See id.* at 536.

84. 530 U.S. 428 (2000).

85. *See id.* at 436.

86. 384 U.S. 436 (1966).

87. *See id.* at 441–42.

88. *Id.* at 444–45.

89. *See Dickerson*, 530 U.S. at 436.

90. *Id.* at 437 (citing *City of Boerne v. Flores*, 521 U.S. 507, 517–21 (1997)).

may be afforded to Congress in some cases, PBABA represents an effort by Congress to abridge a constitutional right in direct contravention of a previous Supreme Court decision on the matter. No factual findings on Congress's part will change that, because what Congress is seeking to do in PBABA is to alter the substance of a constitutional right. Such substantive alteration is outside the province of congressional power.

IV.

CONCLUSION

PBABA is unconstitutional under *Stenberg v. Carhart*. The bill contains the same flaws that rendered unconstitutional the Nebraska statute banning partial birth abortion. First, its language does not explicitly limit its application to either D & X procedures or post-viability abortions. Thus, to the extent that it may function to ban pre-viability procedures, it constitutes an undue burden on a woman's right to choose.

Second, PBABA does not contain a health exception as required under *Casey* and *Stenberg*. Instead of directly addressing this problem, anti-abortion lawmakers in Congress have taken the same unconstitutional bill, appended a "Findings" section addressing the need for a health exception, and demanded that the Supreme Court defer to these findings. The "Findings" section, however, is merely a smoke screen for a congressional end-run around *Stenberg*, and represents a congressional effort to alter the scope of a constitutional right as interpreted by the Supreme Court. Under the Court's unequivocal holding in *Dickerson*, such reinterpretation is not within Congress's authority and thus PBABA cannot stand absent the health exception required by *Stenberg*.