"Partial-Birth" Abortion and the 2006 Term of the U.S. Supreme Court

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January 4, 2007

Congressional Research Service
7-....
www.crs.gov
RL33778

CRS Report for Congress
Prepared for Members and Committees of Congress

Summary

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This report examines *Gonzales v. Carhart* and *Gonzales v. Planned Parenthood*, the partial-birth abortion decisions from the Eighth and Ninth Circuits. In spring 2006, the U.S. Supreme Court agreed to review the two decisions. This report provides background information on the PBABA and explores the arguments put forth by the parties.

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In spring 2006, the U.S. Supreme Court agreed to review *Gonzales v. Carhart* and *Gonzales v. Planned Parenthood*, the partial-birth abortion decisions from the Eighth and Ninth Circuits. This report reviews the two cases and discusses the arguments put forth by the parties. The report also provides background information on the PBABA.

Background

The PBABA was enacted after numerous attempts by Congress to limit the performance of an abortion procedure commonly referred to as "intact dilation and evacuation" or "dilation and extraction" ("D&X") by the medical community. Legislation to prohibit this procedure, described as "partial-birth abortion" by its opponents, was first passed by Congress in 1995 during the 104th Congress.[4] The PBABA of 1995 was vetoed by President Clinton because it did not include an exception that would allow the procedure to be used to protect the health of the mother. The President stated that "the bill does not allow women to protect themselves from serious threats to their health."[5] By refusing to allow the D&X procedure to be performed when a woman's health was in jeopardy, the President contended that "Congress has fashioned a bill that is consistent neither with the Constitution nor with sound public policy."[6]

During the 105th and 106th Congresses, Congress again passed legislation to prohibit the D&X procedure.[7] In 1997, during the 105th Congress, the President vetoed a partial-birth abortion measure on the grounds that it did not include a health exception.[8] In 2000, during the 106th Congress, the Senate did not appoint conferees to resolve differences between the House and Senate-passed versions of the legislation.

The partial-birth abortion measure that was enacted in 2003 prohibits a physician from knowingly performing a "partial-birth abortion" and killing a human fetus. The term "partial-birth abortion" is defined as an abortion in which the person performing the abortion "deliberately and

[1] P.L. 108-105, 117 Stat. 1201 (2003).

[2] For additional information on the Partial-Birth Abortion Ban Act litigation, see CRS Report RL30415, *Partial-Birth Abortion: Recent Developments in the Law*, by (name redacted).

[3] *See* National Abortion Federation v. Gonzales, 437 F.3d 278 (2d Cir. 2006); Carhart v. Gonzales, 413 F.3d 791 (8th Cir. 2005); Planned Parenthood v. Gonzales, 435 F.3d 1163 (9th Cir. 2006).

[4] H.R. 1833, 104th Cong. (1995).

[5] Message to the House of Representatives Returning Without Approval Partial Birth Abortion Legislation, 32 Weekly Comp. Pres. Doc. 645 (Apr. 10, 1996).

[6] *Id.* For additional information on abortion generally, see CRS Report 95-724, *Abortion Law Development: A Brief Overview*, by (name redacted). In *Roe v. Wade*, 410 U.S. 113 (1973), the U.S. Supreme Court determined that a restriction on abortion is unconstitutional if it does not recognize an exception for abortions that are necessary to preserve the life or health of the mother. The Court has reaffirmed that position in subsequent abortion decisions.

[7] H.R. 1122, 105th Cong. (1997); H.R. 3660, 106th Cong. (2000); S. 1692, 106th Cong. (2000).

[8] Message to the House of Representatives Returning Without Approval Partial Birth Abortion Legislation, 33 Weekly Comp. Pres. Doc. 41 (Oct. 13, 1997).

intentionally" delivers a living fetus until a specified part of the fetus is outside the body of the mother for the purpose of performing an overt act that the person knows will kill the fetus, and performs the overt act that kills the fetus.[9]

Under the PBABA, a physician who knowingly performs a partial-birth abortion and kills a fetus will be subject to a fine, imprisonment for not more than two years, or both.[10] The act does not prohibit partial-birth abortions that are necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself. Thus, the PBABA allows an exception for partial-birth abortions to preserve the life of the mother. However, a similar exception to protect the health of the mother is not included in the act.

The PBABA provides a cause of action for certain individuals affected by the performance of a partial-birth abortion. The father of the fetus, if married to the mother at the time a partial-birth abortion is performed, and the maternal grandparents of the fetus, if the mother is under 18 years of age at the time of the abortion, may obtain appropriate relief, except when the pregnancy is the result of the plaintiff's criminal conduct or the plaintiff consented to the abortion.[11] For purposes of the prescribed cause of action, appropriate relief includes money damages for all psychological and physical injuries that arise as a result of the abortion.

The most notable difference between the PBABA and the other partial-birth abortion bills previously passed by Congress is the inclusion of a significant findings section in the law.[12] Section 2 of the act, which comprises more than half of the measure, identifies Congress's findings with respect to partial-birth abortion. For example, in this section, Congress "finds and declares" that a "moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion . . . is a gruesome and inhumane procedure that is never medically necessary and should be prohibited."[13] Concerns about the safety of the procedure, raised in testimony received during hearings in past Congresses, are also described in this section. Finally, the findings section includes a discussion of Supreme Court cases involving the Court's deference to congressional findings.

In his introduction of the PBABA, the act's sponsor, former Senator Rick Santorum, indicated that Congress may not only engage in factfinding, but that the Court will defer to such factfinding.[14] Senator Santorum indicated that Congress "is entitled to reach its own factual findings—findings that the Supreme Court accords great deference—and may enact legislation based on these findings."[15]

[9] P.L. 108-105, § 3, 117 Stat. 1201, 1206 (2003).

[10] *Id.*

[11] *Id.*

[12] *See* P.L. 108-105, § 2, 117 Stat. 1201 (2003)

[13] *Id.*

[14] 149 Cong. Rec. S2523 (daily ed. Feb. 14, 2003) (statement of Sen. Santorum).

[15] *Id.*

Gonzales v. Carhart and *Gonzales v. Planned Parenthood*

The decision to review both *Carhart* and *Planned Parenthood* provides the Court with the opportunity to evaluate all of the legal theories asserted against the constitutionality of the PBABA. In *Carhart*, the Eighth Circuit found the act unconstitutional solely on the grounds that it does not include an exception for abortions to protect the health of the mother. In *Planned Parenthood*, however, the Ninth Circuit concluded that the act is unconstitutional for three distinct reasons: it does not include an health exception; it imposes an undue burden on a woman's ability to have an abortion by prohibiting both the D&X procedure and the standard dilation and evacuation ("D&E") procedure;[16] and it is unconstitutionally vague, thus depriving fair notice to physicians about what is prohibited.[17] The Court's decision to review *Planned Parenthood*, made nearly four months after its decision to review *Carhart*, was hailed by some members of the pro-choice community who believe that the Ninth Circuit decision provides a more complete record on the likely impact of the statute.[18]

The government has made three arguments in support of the PBABA.[19] First, the government maintains that the absence of a health exception does not impose an undue burden on a woman's ability to have an abortion. Second, the government contends that the act is not unconstitutionally vague or overbroad. Finally, the government argues that even if the Court is able to identify some aspect of the act that is invalid, it may be possible to craft narrower injunctive relief consistent with *Ayotte v. Planned Parenthood of Northern New England*, the Court's 2006 decision in which it held that the First Circuit erred in striking down a state parental consent statute in its entirety.[20]

Health Exception

In *Stenberg v. Carhart*, a 2000 case involving the constitutionality of a Nebraska partial-birth abortion statute, the Court invalidated the state law because it failed to include an exception to protect the health of the mother and because the language used to define the prohibited procedure was too vague.[21] The government asserts that a proper reading of *Stenberg* requires a statute that regulates abortion, but lacks an health exception, to be upheld unless it would create significant health risks and thereby impose an undue burden on a large fraction of women. The government maintains that congressional factfinding supports both the position that the absence of a health exception does not create significant health risks for a large fraction of women, and that partial-birth abortion is never medically indicated to preserve the health of a mother. According to the

[16] The standard D&E procedure is the most common method of abortion in the second trimester. The standard D&E procedure is distinct from the intact D&E procedure, which is performed generally in the latter part of the second trimester. For additional discussion on D&E, *see* Shimabukuro, *supra* note 2.

[17] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the U.S. Supreme Court concluded that a restriction on abortion that imposes an undue burden on woman's right to terminate a pregnancy would be found unconstitutional. The *Casey* Court defined an undue burden as "a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." For additional information on *Casey*, *see* Lewis and Shimabukuro, *supra* note 6 at 14.

[18] *See* Linda Greenhouse, *Justices to Expand Review of "Partial-Birth" Abortion Ban*, N.Y. Times, June 20, 2006, at A14.

[19] Brief for the Petitioner, Gonzales v. Carhart (No. 05-380), 2006 WL 1436690; Brief for the Petitioner, Gonzales v. Planned Parenthood (No. 05-1382), 2006 WL 2282123.

[20] 126 S.Ct. 961 (2006).

[21] 530 U.S. 914 (2000).

government, the testimony of physicians who appeared before Congress and other evidence in the legislative record emphasize that a ban on partial-birth abortion would not endanger a woman's health because the procedure is never medically necessary.

In addition, the government argues that congressional factfinding should be afforded a high degree of deference. Citing *Turner Broadcasting System, Inc. v. FCC*, two cases from 1994 and 1997, commonly referred to as *Turner I* and *Turner II*,[22] involving federal cable legislation and "must-carry" obligations imposed on cable operators, the government notes that the Court has "deferred to congressional factual findings in a wide variety of contexts and with regard to a wide variety of constitutional claims."[23] In *Turner I*, the Court indicated that reviewing courts must accord substantial deference to the predictive judgments of Congress when evaluating the constitutionality of a statute. The Court observed that a reviewing court's sole obligation is "to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence."[24]

The respondents, Planned Parenthood and Carhart, challenge the government's reliance on Congress's findings and the belief that the Court owes great deference to such findings, and also argue that the government's use of a "significant health risks" standard is inappropriate.[25] Planned Parenthood maintains that the *Stenberg* Court was guided by *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court's 2002 abortion decision, and the conclusion that a medical emergency exception should be broad enough to ensure that compliance with an abortion restriction would not in any way pose a significant threat to the life or health of a woman. Thus, in *Stenberg*, the Court held that to prevent a significant threat to the life or health of a woman, a "method-specific ban" must have a health exception if substantial medical authority supports the proposition that banning that method could endanger women's health.

Planned Parenthood contends that by requiring substantial medical authority "as the quantum of proof for whether a health exception is constitutionally required," individual physicians are prevented from acting with unfettered discretion and reasonable differences of medical opinion are tolerated.[26] In short, Planned Parenthood argues that the government's failure to address the "substantial medical authority" standard articulated in *Stenberg* is not "constitutionally tolerable."[27] By considering only whether significant health risks are imposed on a large fraction of women, some women could be forced to endure significant health risks in contravention of *Roe*'s essential holding, that the health of pregnant women must remain paramount when regulating abortion.

Planned Parenthood and Carhart dispute the government's position that a partial-birth abortion is never medically necessary. They assert that during consideration of the act, numerous physicians and medical groups expressed concerns about the legislation preventing them from using the safest procedures.[28] Examples of specific circumstances when D&X offered particular advantages

[22] 512 U.S. 622 (1994) ("Turner I"); 520 U.S. 180 (1997) ("Turner II").

[23] Brief for the Petitioner at 21, *Carhart* (No. 05-380).

[24] *Turner I*, 512 U.S. at 666.

[25] Brief of Respondents, Gonzales v. Planned Parenthood (No. 05-1382), 2006 WL 2725691; Brief of Respondents, Gonzales v. Carhart (No. 05-380), 2006 WL 2345934.

[26] Brief of Respondents at 13, *Planned Parenthood* (No. 05-1382).

[27] *Id.* at 14.

[28] *Id.* at 5 ("In 2003, during the 108th Congress which enacted the act, highly-credentialed physicians and nationally (continued...)

were also identified. Some physicians stated that D&X involves less risk of uterine perforation or cervical laceration, and reduces the risk of retained fetal tissue. The respondents contend that a reduced risk of complications is particularly important for women with serious medical problems because such women do not have the "physiological reserves" to cope with the complications.[29] Additional support for the use of D&X under certain circumstances to preserve the health of the woman was also identified during the district court trials of the two cases.

In addition to challenging the factual findings defended by the government, the respondents question the government's position that such findings demand great deference from the Court. In particular, the respondents dispute the government's reliance on *Turner I* and *Turner II*.

Carhart contends that the *Turner* cases are inapplicable with regard to the PBABA. Carhart argues that the Court has never deferred to congressional findings in a case where Congress uses such findings in an attempt to alter the meaning and scope of substantive constitutional rights.[30] Carhart maintains that an extension of *Turner* to this case would "effectively provide Congress with carte blanche to violate the Constitution simply by making carefully chosen 'findings.'"[31] According to Carhart, deference is appropriate only when legislation involves areas where Congress has particular expertise and courts have previously shown deference to congressional findings.

Moreover, Carhart stresses that the *Turner* cases require deference only with regard to Congress's predictive judgments. Carhart argues that these judgments pertain to "circumstances in which Congress must make its best predictions concerning how an industry will evolve or how individuals will respond to economic motivations."[32] From this viewpoint, Congress's findings on the medical necessity of the partial-birth abortion procedure do not involve similar predictions.

Like Carhart, Planned Parenthood believes that the factual findings are not entitled to deference. Planned Parenthood argues that the findings are "simply a bald-faced attempt to end-run *Stenberg*'s constitutional rule."[33] In addition, Planned Parenthood emphasizes that the *Turner* cases require deference only when Congress has drawn reasonable inferences based on substantial evidence. In this case, Planned Parenthood believes that Congress's findings are unreasonable and therefore not entitled to deference. Planned Parenthood notes that all three district courts to have considered the validity of the PBABA have concluded that the findings are not reasonable and merit no deference. For example, the federal district court in *Planned Parenthood* found that "all of the government's own witnesses disagreed with many of the specific congressional findings."[34]

(...continued)

recognized major medical groups, including [the American College of Obstetricians & Gynecologists], submitted statements to Congress opposing the act.").

[29] *See* Brief of Respondents at 22, *Planned Parenthood* (No. 05-1382).

[30] Brief of Respondents at 24, *Carhart* (No. 05-380).

[31] *Id.*

[32] *Id.* at 32.

[33] Brief of Respondents at 24, *Planned Parenthood* (No. 05-1382).

[34] *See Id.* at 27.

Undue Burden and the Overbreadth Doctrine

The Ninth Circuit's invalidation of the PBABA was based, in part, on the statute being unconstitutionally overbroad.[35] The overbreadth doctrine is concerned generally with a statute's precision and the possibility of restricting constitutionally protected activities. In *Stenberg*, the Court found that the Nebraska partial-birth abortion statute was improperly overbroad because it defined a "partial-birth abortion" in such a way as to prohibit the standard D&E procedure as well as the D&X procedure. As a result, the statute imposed an undue burden on a woman's access to an abortion. Similar arguments have been made against the PBABA.

The government maintains that the federal definition for a "partial-birth abortion" is different from the Nebraska definition and thus, should not imperil the statute. The government argues that the federal definition differs in two critical ways. First, by identifying "anatomical landmarks," a partial-birth abortion under the act could not encompass the D&E procedure.[36] Under the act, a partial-birth abortion involves the delivery of the fetus until either the entire fetal head or any part of the fetal trunk past the navel is outside the body of the mother. During a D&E procedure, the government asserts, only a small portion of the fetus, such as a foot or an arm, may be brought outside the body of the mother. Second, the government contends that the federal statute applies only where the person performing the abortion also completes an "overt act" that kills the fetus.[37] Thus, by requiring the overt act, the act does not apply to the D&E procedure, where the delivery of a portion of the fetus and the dismemberment of the fetus are indistinguishable.

The respondents maintain that the act's definition for a partial-birth abortion could still encompass abortions involving the D&E procedure. Findings by the district court in *Planned Parenthood* indicate that there is no standard degree to which a fetus is extracted during a D&E procedure before an obstructing part of the fetus may be disarticulated or reduced in size. Thus, the respondents argue that the extraction of the fetus to the point of the anatomic landmarks may occur during a standard D&E abortion.

The respondents also dispute the government's reliance on the completion of an overt act as sufficient to distinguish the partial-birth abortion procedure from the standard D&E procedure.[38] They maintain that during a D&E abortion, a physician may have to perform the overt act of disarticulation or the compressing or decompressing of a fetal part to complete the abortion. These acts are distinct from the extraction of the fetus and would seem to constitute an overt act. The respondents state that even the government has found disarticulation to be an overt act. Carhart notes that the overt act requirement "does not effectively exclude D&E procedures . . . because, as the Government concedes, the overt act may include disarticulation."[39] If such an act

[35] *See Planned Parenthood*, 435 F.3d at 1179 ("Contrary to the government's claim, properly construed the act covers non-intact as well as intact D&Es. As a result, despite containing some provisions that are different in form from those in the Nebraska statute, the act is sufficiently broad to cause those who perform non-intact D&E procedures to 'fear prosecution, conviction, and imprisonment' (citation omitted). The resulting chilling effect on doctors' willingness to perform previability post-first trimester abortions would impose an undue burden on the constitutional rights of women.").

[36] Brief for the Petitioner at 31, *Planned Parenthood* (No. 05-1382).

[37] *Id.*

[38] *See* Brief of Respondents at 41, *Carhart* (No. 05-380).

[39] *Id.*

is necessary and the fetus has been extracted to the point of the anatomic landmarks, the physician will have arguably performed a partial-birth abortion.

Vagueness

The doctrine of vagueness involves the clarity of a statute. A statute must be drawn with sufficient clarity to inform people of the conduct that must be avoided to avert the statute's penalties. The Ninth Circuit concluded that the PBABA was void for vagueness because it failed to clearly define the medical procedures that are prohibited and thus deprived physicians fair notice of improper conduct and encouraged arbitrary enforcement.[40]

The government contends that the Constitution does not require "impossible standards of clarity."[41] Rather, a statute must simply give a person of ordinary intelligence a "reasonable opportunity" to know what is prohibited, so that he may act accordingly.[42] The government believes that the act "readily satisfies the relatively modest requirements of the void-for-vagueness doctrine."[43] The government maintains that the statute prohibits a particular type of abortion in which the physician "deliberately and intentionally" delivers a living fetus to a specific anatomical point outside the body of the mother for the purpose of knowingly performing an overt act that will kill the fetus. Moreover, the government asserts that the act contains no ambiguous terms or phrases.

The respondents maintain that the act is unconstitutionally vague because it not only fails to clearly define the prohibited procedure, but also forces physicians to "guess at [the act's] meaning and differ as to its application."[44] The respondents stress that some D&E abortions do satisfy the anatomical landmark requirements identified in the act, and thus would seem to constitute partial-birth abortions under the statute. Similarly, some acts undertaken as part of a D&E procedure may constitute an overt act for purposes of the statute, thus exposing a physician to liability. Arguing that physicians will have to guess at the meaning of the act's language and the government's "strained interpretations," the respondents maintain that the act is unconstitutionally vague.[45]

Narrower Injunctive Relief

Although it maintains firmly that the PBABA is constitutional, the government suggests that it may be possible to craft more narrow injunctive relief, rather than complete invalidation, if some aspect of the act is found unconstitutional.[46] In *Ayotte*, the Court concluded that the First Circuit acted inappropriately when it invalidated a state parental consent statute in its entirety. Although the state law at issue did not include a health exception, the Court held that a more narrow remedy was appropriate because only some aspects of the law raised constitutional concerns. The Court returned the case to the court of appeals with instructions to craft a narrower remedy.

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[40] *See Planned Parenthood*, 435 F.3d at 1181-82.

[41] *See* Brief for the Petitioner at 36, *Planned Parenthood* (No. 05-1382).

[42] *Id.*

[43] Brief for the Petitioner at 48, *Carhart* (No. 05-380).

[44] *See* Brief of Respondents at 44, *Planned Parenthood* (No. 05-1382).

[45] Brief of Respondents at 45, *Planned Parenthood* (No. 05-1382).

[46] Brief for the Petitioner at 49-50, *Carhart* (No. 05-380); Brief for the Petitioner at 40, *Planned Parenthood* (No. 05-1382).

The respondents assert that the act should be enjoined in its entirety. Citing *Ayotte*, they discuss the three "interrelated principles" identified by Justice O'Connor in that case that inform the Court's approach to remedies.[47] First, the Court should not nullify more of a statute than is necessary. Second, the Court must be mindful that its constitutional mandate and institutional competence are limited. Finally, the Court cannot use its remedial powers to circumvent the intent of the legislature. With regard to this third principle, Justice O'Connor noted: "After finding an application or portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all?"[48]

If the Court determines that the PBABA is unconstitutional because of its failure to include a health exception, the respondents contend that a remedy that somehow adds a health exception to the act would be inappropriate.[49] They argue that because Congress expressly rejected even a narrow health exception when it passed the act, the Court would engage in the kind of "line-drawing" it rejected in *Ayotte* if it permitted such a remedy.

Similarly, if the Court determines that the act is unconstitutional because it is vague or overbroad, the respondents argue that it would be impermissible to "engraft" either a narrower definition for the term "partial-birth abortion" or a clearer distinction between partial-birth abortion and a standard D&E abortion.[50] Acknowledging the Court's disposition of the Nebraska statute in *Stenberg*, the respondents contend that the federal law should be similarly invalidated in toto. According to the respondents, because the act implicates many, if not all, D&E abortions, it unduly burdens a large fraction of affected women and must be facially invalidated. Planned Parenthood also contends that any attempt to establish a distinction between a partial-birth abortion and a D&E abortion would "merely propagate the substantive problems with the act that lead to the need for a remedy in the first place. In other words, it would be no cure at all."[51]

Conclusion

The Court's consideration of *Carhart* and *Planned Parenthood* has garnered widespread interest not just because of the possible invalidation of the PBABA. Justice O'Connor's retirement in early 2006 and the appointment of two new seemingly conservative Justices have prompted many to believe that the Court may use this opportunity to establish new standards with regard to the evaluation of all laws that regulate abortion. For example, the Court may explore whether a health exception is always needed in an abortion-related statute. The Court may also clarify whether the term "health" should continue to be broadly understood to include not only physical, but mental and emotional health.

Considerable attention has focused on Justice Kennedy because of Justice O'Connor's retirement, his dissent in *Stenberg*, and his position as a "swing vote" on the Court. While Justice Kennedy has been protective of the Court's role in defining the scope of constitutional rights, his support for the Nebraska partial-birth abortion statute has been noted.

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[47] *See* Brief of Respondents at 47-48, *Carhart* (No. 05-380); Brief of Respondents at 48-49, *Planned Parenthood* (No. 05-1382).

[48] *Ayotte*, 126 S.Ct. at 968.

[49] Brief of Respondents at 48-49, *Carhart* (No. 05-380); Brief of Respondents at 47-48, *Planned Parenthood* (No. 05-1382).

[50] *See* Brief for Respondent at 49, *Planned Parenthood* (No. 05-1382).

[51] *Id.* at 50.

During the oral arguments in *Carhart* and *Planned Parenthood* before the Court on November 6, 2006, Justice Kennedy's questions and comments suggested arguably that he may have some skepticism about the act.[52] Justices Scalia and Thomas, both part of the dissent in *Stenberg*, are widely expected to support the validity of the PBABA. If they were joined by the Court's newest justices, Chief Justice Roberts and Justice Alito, as well as Justice Kennedy, the act would be upheld.

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[52] *See* Transcript of Oral Argument, Gonzales v. Carhart, No. 05-380 (2006), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-380.pdf; Transcript of Oral Argument, Gonzales v. Planned Parenthood, No. 05-1382 (2006), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-1382.pdf. In an exchange with the Solicitor General, Justice Kennedy stated that the D&X procedure could be warranted in some situations. In response to the Solicitor General's assertion that prohibiting the D&X procedure would pose little risk to a woman's health because the standard D&E procedure "has been well-tested and works every single time as a way to terminate the pregnancy," Justice Kennedy maintained: "[B]ut there is a risk if the uterine wall is compromised by cancer or some forms of preeclampsia and it's very thin, there's a risk of being punctured."