

RECENT DEVELOPMENTS

INTRODUCTORY REMARKS	621
CONSTITUTIONAL LAW—AFFIRMATIVE ACTION—UNITED STATES SUPREME COURT GRANTS WRIT OF CERTIORARI ON TWO PREUNIVERSITY LEVEL PUBLIC SCHOOL AFFIRMATIVE ACTION PLANS— <i>Parents Involved in Community Schools v. Seattle School District No. 1</i> , 126 S. Ct. 2351 (2006); <i>Meredith v. Jefferson County Board of Education</i> , 126 S. Ct. 2351 (2006).....	622
CONSTITUTIONAL LAW—ABORTION—UNITED STATES SUPREME COURT GRANTS WRIT OF CERTIORARI ON TWO ABORTION CASES— <i>Gonzales v. Carhart</i> , 126 S. Ct. 1314 (2006); <i>Gonzales v. Planned Parenthood Federation of America, Inc.</i> , 126 S. Ct. 2901 (2006).	631
CONSTITUTIONAL LAW—A PHYSICALLY PRESENT INHABITANT'S EXPRESS REFUSAL OF CONSENT TO A POLICE SEARCH IS DISPOSITIVE AS TO HIM, REGARDLESS OF THE CONSENT OF A FELLOW OCCUPANT, MAKING A SEARCH UNREASONABLE UNDER THE FOURTH AMENDMENT— <i>Georgia v. Randolph</i> , 126 S. Ct. 1515 (2006).	640
CONSTITUTIONAL LAW—THE ATTORNEY GENERAL DOES NOT HAVE THE POWER TO IMPOSE AN INTERPRETIVE RULE ON THE GENERAL MEDICAL PRACTICES WHICH ARE MEANT TO BE GOVERNED BY STATE LAW— <i>Gonzales v. Oregon</i> , 126 S. Ct. 904 (2006).	645
TORTS—CLASS ACTIONS—PUNITIVE DAMAGES—SMOKERS' CLASS ACTION SUIT SEEKING DAMAGES AGAINST TOBACCO COMPANIES AND INDUSTRY ORGANIZATIONS FOR ALLEGED SMOKING-RELATED INJURIES— <i>Engle v. Liggett Group, Inc.</i> , 31 Fla. L. Weekly S464 (Fla. July 6, 2006).....	652

INTRODUCTORY REMARKS

For this installment of the Recent Developments, we examine two upcoming United States Supreme Court decisions, two recent United States Supreme Court decisions, and one recent Florida Supreme Court decision. Note One examines *Parents Involved in Community Schools v. Seattle School District No. 1*¹ and *Meredith v. Jefferson County Board of Education*,² which are two preuniversity level affirmative action cases on which the United States Supreme Court recently granted writ of certiorari.³ The Note will attempt to predict what action the Supreme Court will take. The second Note also examines two cases on which the Supreme Court recently granted certiorari, *Gonzales v. Carhart*⁴ and *Gonzales v. Planned Parenthood Federation of America, Inc.*,⁵ which both deal with the contentious is-

1. 126 S. Ct. 2351 (2006).
 2. *Id.*
 3. Jeremy W. Harris contributed this note.
 4. 126 S. Ct. 1314 (2006).
 5. 126 S. Ct. 2901 (2006).

sue of abortion.⁶ This Note will also attempt to predict what action the Supreme Court will take.

We move from the predictive to the descriptive in Note Three, which examines *Georgia v. Randolph*,⁷ a recent Supreme Court decision concerning the Fourth Amendment, unreasonable searches, and cotenant consent.⁸ Note Four examines *Gonzales v. Oregon*,⁹ where the Supreme Court explored the power of the United States Attorney General and Oregon's Death with Dignity Act.¹⁰

Finally, Note Five will move from federal to state law with *Engle v. Liggett Group, Inc.*,¹¹ where the Florida Supreme Court addressed punitive damage and class action issues in tobacco litigation.¹²

CONSTITUTIONAL LAW—AFFIRMATIVE ACTION—UNITED STATES SUPREME COURT GRANTS WRIT OF CERTIORARI ON TWO PREUNIVERSITY LEVEL PUBLIC SCHOOL AFFIRMATIVE ACTION PLANS—*Parents Involved in Community Schools v. Seattle School District No. 1*, 126 S. Ct. 2351 (2006); *Meredith v. Jefferson County Board of Education*, 126 S. Ct. 2351 (2006).¹³

On June 5, 2006, the United States Supreme Court agreed to consider two preuniversity level public school affirmative action cases, which are to be argued in tandem.¹⁴ This is the second time in the past three years that the Supreme Court has visited the issue. On June 23, 2003, the Supreme Court decided two affirmative action cases coming out of the state of Michigan, with one involving the University of Michigan¹⁵ and the other involving the University of Michigan Law School.¹⁶ The Court struck down the university's action plan¹⁷ and upheld the law school's plan.¹⁸ This Note will focus on *Parents Involved in Community Schools v. Seattle School District No. 1* and *Meredith v. Jefferson County Board of Education* by explaining

6. Roland Hermida contributed this note.

7. 126 S. Ct. 1515 (2006).

8. Andrew Collinson contributed this note.

9. 126 S. Ct. 904 (2006).

10. Noah Nadler contributed this note.

11. 31 Fla. L. Weekly S464 (Fla. July 6, 2006).

12. Rick Engelbright contributed this note.

13. The U.S. Supreme Court issued its opinion in this case before this issue of the *Florida State University Law Review* went to press. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (holding the schools' use of racial classifications unconstitutional).

14. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 126 S. Ct. 2351 (2006); *Meredith v. Jefferson County Bd. of Educ.*, 126 S. Ct. 2351 (2006).

15. *Gratz v. Bollinger*, 539 U.S. 244 (2003).

16. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

17. *Gratz*, 539 U.S. at 275.

18. *Grutter*, 539 U.S. at 306.

the holdings below and by providing a prediction for what the Supreme Court will ultimately decide.

PARENTS INVOLVED IN COMMUNITY SCHOOLS V. SEATTLE SCHOOL
DISTRICT NO. 1

Seattle has never had a judicially imposed desegregation order.¹⁹ A majority of the city's white students live north of the downtown area, while a majority of the city's nonwhite students live south of the downtown area.²⁰ The Seattle School District (District) has voluntarily explored various options for ending this de facto segregation for over forty years.²¹ The plan in question (Plan) was implemented for the 2001-2002 school year for the District's ten public schools.²² The Plan specifically applies to all students entering the high school system and seeks to provide choice between the District's ten schools by allowing students to apply to any school within the District.²³ If a District is "oversubscribed" (meaning there are more applications than the school can accommodate), then the District applies a series of tiebreakers to determine who the school admits.²⁴ If the student is not admitted to the school of his or her choice based on one of the tiebreakers, the process either begins anew for the student's second choice or the student is placed into the school that is geographically closest to the student's home.²⁵ Five of the ten schools were oversubscribed during the school year that this litigation addresses.²⁶

When deciding who to admit into an oversubscribed school, the District employs four tiebreakers in the following order: (1) if the student's sibling is already a student, the student is admitted; (2) if the oversubscribed school is "racially imbalanced," race is considered; (3) the distance between the student's home and school; and (4) a lottery system. The first and third tiebreakers are determinative in 85-95% of all cases.²⁷

"Racially imbalanced" is defined as

meaning that the racial make up of [a high school's] student body differs by more than 15 percent from the racial make up of the students of the Seattle public schools as a whole—and if the sibling preference does not bring the oversubscribed high school within

19. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1166-67 (9th Cir. 2005).

20. *Id.* at 1166.

21. *Id.* at 1166-67.

22. *Id.* at 1168-69.

23. *Id.* at 1169.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 1169-72.

plus or minus 15 percent of the District's demographics, the race-based tiebreaker is 'triggered' and the race of the applying student is considered.²⁸

During the school year at issue in the litigation, the race tiebreaker was used in three of the District's ten schools to place approximately 300 of the incoming 3000 students.²⁹ The placement of these 300 students affected the racial balance of four of the District's schools by 10-20%.³⁰

Parents Involved in Community Schools (Parents) is composed of parents whose children were negatively affected by the racial tiebreaker, meaning the children did not receive admission to the school of their choice because of the tiebreaker.³¹ Parents sued the District alleging various violations of state and federal law. Most notably, Parents alleged a violation of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.³² The district court upheld the Plan under both state and federal law.³³ A three-judge panel for the Ninth Circuit subsequently reversed the district court, holding that the Plan violated state law.³⁴ The Ninth Circuit withdrew its opinion and certified the state law question to the Washington Supreme Court, which held that the Plan did not violate state law.³⁵ The three judge panel of the Ninth Circuit then held that the Plan violated the Fourteenth Amendment because it was not narrowly tailored to a compelling state interest.³⁶ The Ninth Circuit granted an en banc hearing and affirmed the district court's ruling that the affirmative action plan did not violate state or federal law.³⁷

The Ninth Circuit applied the Supreme Court's various affirmative action cases, including *Grutter v. Bollinger* and other educational and noneducational cases, in determining whether the Plan violated the Fourteenth Amendment.³⁸ The Ninth Circuit applied the "strict scrutiny standard, which requires that the policy in question be narrowly tailored to achieve a compelling state interest."³⁹ The Ninth Circuit noted that the *Grutter* court found the societal and educational benefits of racial diversity to be compelling state interests.⁴⁰

28. *Id.* at 1169-70.

29. *Id.* at 1170.

30. *Id.* at 1170-71.

31. *Id.* at 1171.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 1172.

37. *Id.*

38. *Id.* at 1172-79.

39. *Id.* at 1172.

40. *Id.* at 1173.

The District asserted two compelling interests in implementing the Plan: (1) to obtain the societal and educational benefits of diversity and (2) to avoid the harms associated with segregated schools.⁴¹

The District identified three social and educational benefits of diversity in secondary schools. First, the District, through expert witnesses, argued that diversity increases the critical thinking skills of white and nonwhite students, allowing them to challenge and understand views that are different from their own.⁴² Second, the District presented evidence concerning the “socialization and citizenship advantages” of racially diverse schools, which included the “improvement in race-relations, the reduction of prejudicial attitudes, and the achievement of a more . . . inclusive experience for all citizens.”⁴³ Third, the District, using expert witnesses, argued that racially diverse schools open “opportunity networks in areas of higher education and employment” and lead to students later living in diverse neighborhoods and having cross-racial friendships.⁴⁴

The Ninth Circuit pointed out that these interests are very similar to the interest the law school in *Grutter* identified and reasoned that they were at least as compelling (if not more so) at the secondary school level.⁴⁵ The Ninth Circuit noted that secondary schools serve a unique and important function for transmitting the values of our democratic society and that younger people are more amenable to the benefits of diversity.⁴⁶

The District claimed it was attempting to avoid racially isolated schools, which was a very real possibility considering the racial segregation present in the city’s neighborhoods, because such schools would be “characterized by much higher levels of poverty, lower average test scores, lower levels of student achievement, with less-qualified teachers and fewer advanced courses.”⁴⁷ The Ninth Circuit believed that curing de facto segregation, which is segregation that is not caused by the intentional acts of the government, was a legitimate compelling state interest.⁴⁸

The Ninth Circuit found that the Plan was narrowly tailored to these compelling state interests.⁴⁹ However, this discussion is unimportant to the prediction that follows and therefore will not be discussed.

41. *Id.* at 1174.

42. *Id.*

43. *Id.* at 1174-75.

44. *Id.* at 1175.

45. *Id.* at 1175-76.

46. *Id.*

47. *Id.* at 1177.

48. *Id.* at 1178-79.

49. *Id.* at 1192-92.

MEREDITH V. JEFFERSON COUNTY BOARD OF EDUCATION

In 1975, a federal court imposed a desegregation order on the Jefferson County Public School Board (Board).⁵⁰ This order was a result of two federal lawsuits that alleged that the Board maintained a segregated school system.⁵¹ The Board employed various programs over the next twenty-five years with the purpose of maintaining desegregated schools.⁵² As the result of a 1999 lawsuit, this order was dissolved in 2000, and the Board was ordered to discontinue racial quotas at the school in question.⁵³ However, the Board believed that this court order was limited in nature and therefore adopted the 2001 Student Assignment Plan (2001 Plan).⁵⁴

The 2001 Plan contains three basic organizing principles: (1) management of broad racial guidelines, (2) creation of school boundaries or “resides” areas and elementary school clusters, and (3) maximization of student choice through magnet schools, magnet traditional schools, magnet and optional programs, open enrollment and transfers. Using these principles, [the Board] provides a form of managed choice in student assignment for its students individually and for the system as a whole.⁵⁵

The 2001 Plan requires that each school seek a black enrollment of no less than 15% and no more than 50%.⁵⁶ Race is only considered after a range of other factors, such as “place of residence, school capacity, program popularity, random draw and the nature of the student’s choices.”⁵⁷ Race can, and does, determine whether a black or white student receives his or her school of choice.⁵⁸

Each school has a designated geographic attendance area, which is called its “reside area.”⁵⁹ Students are then assigned a “resides school” based on their address.⁶⁰ A majority of elementary school students and middle school students and just under a majority of high school students attend their resides school.⁶¹ Students are al-

50. *McFarland v. Jefferson County Bd. of Educ.*, 330 F. Supp. 2d 834, 836 (W.D. Ky. 2004), *aff’d*, 416 F.3d 513 (6th Cir. 2005), *cert. granted sub nom. Meredith v. Jefferson County Bd. of Educ.*, 126 S. Ct. 2351 (2006).

51. *Id.* at 841.

52. *Id.* at 841-42.

53. *Id.* at 841.

54. *Id.*

55. *Id.* at 842.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

lowed to apply to several specialized and magnet schools outside of their resides area.⁶²

The plaintiffs were parents of children who obtained dissatisfactory results with the 2001 Plan and, therefore, were seeking to enjoin the use of the 2001 Plan as a violation of the Equal Protection Clause of the Fourteenth Amendment.⁶³ The district court upheld the 2001 Plan,⁶⁴ and the Sixth Circuit affirmed the district court's decision in a *per curiam* opinion.⁶⁵

The district court applied the same strict scrutiny analysis utilized in *Parents Involved in Community Schools v. Seattle School District No. 1* in determining whether the 2001 Plan was constitutional.⁶⁶ The Board articulated the following as the benefits of the 2001 Plan: "(1) a better academic education for all students; (2) better appreciation of our political and cultural heritage for all students; (3) more competitive and attractive public schools; and (4) broader community support for all [Board] schools."⁶⁷ Once again, these interests were very similar to the asserted interests in *Grutter*.⁶⁸ The Board also believed the 2001 Plan improved the education of all students and improved the system as a whole by "creating a system of roughly equal components, not one urban system and another suburban system, not one rich and another poor, not one Black and another White."⁶⁹ The district court held that the 2001 Plan was narrowly tailored to these interests.⁷⁰

WHAT WILL THE SUPREME COURT DO?

These two cases, *Parents Involved in Community Schools v. Seattle School District No. 1* and *Meredith v. Jefferson County Board of Education*, are to be argued in tandem. The striking similarity they share may provide an insight for what will ultimately happen. Neither affirmative action plan seeks to cure de jure segregation, which is segregation caused by intentional acts of the government. Instead, both plans are aimed at curing de facto segregation, which is segregation that happens without the intentional acts of the government.

62. *Id.*

63. *Id.* at 836-38.

64. *Id.* at 837. The district court did strike part of the plan as a violation of the Equal Protection Clause because it unnecessarily separated students into racial categories. *Id.* at 837. This portion of the 2001 Plan will not be discussed any further in this Note.

65. *McFarland v. Jefferson County Bd. of Educ.*, 416 F.3d 513 (6th Cir. 2005), *cert. granted sub nom. Meredith v. Jefferson County Bd. of Educ.*, 126 S. Ct. 2351 (2006).

66. *McFarland*, 330 F. Supp. 2d at 848-49.

67. *Id.* at 850.

68. *Id.* at 850.

69. *Id.* at 853-54.

70. *Id.* at 855-56. Once again, this discussion is not relevant to this Note and will not be discussed further.

The Seattle School District has never had a judicially imposed decision attempting to cure de jure segregation,⁷¹ and the Jefferson County Board of Education had been released from the federal order attempting to cure its past intentional discrimination.⁷² The Supreme Court has endorsed only two compelling state interests in the public education context.⁷³ First, “the Court has allowed racial classifications to remedy past racial imbalances in schools resulting from past de jure segregation. Second, the Court has allowed undergraduate and graduate universities to consider race as part of an overall, flexible assessment of an individual’s characteristics to attain student body diversity.”⁷⁴ The crucial question presented to the Supreme Court is whether an affirmative action plan beneath the university level can be validated by the second interest, which is “student body diversity.”

The dissent in *Parents Involved in Community Schools v. Seattle School District No. 1* may offer helpful insight in determining how the Supreme Court will answer this question. The dissent first points out that although the majority talks of “segregation,” it is really addressing de facto segregation.⁷⁵ The dissent notes that the use of racial classifications is only permissible to cure de jure segregation.⁷⁶ According to the dissent, the majority uses this rhetorical ploy because if it is not curing de jure segregation, then it is engaging in racial balancing, which the Supreme Court has explicitly held unconstitutional.⁷⁷

The dissent does not believe the interests asserted by the District are valid under *Grutter* because “[t]he *Grutter* ‘diversity’ interest focuses upon the individual, of which race plays a part, but not the whole. The District’s asserted interest, however, focuses only upon race, running afoul of equal protection’s focus upon the individual.”⁷⁸ The majority counters that these differences are unimportant because “context matters.”⁷⁹ The dissent, unconvinced, argues that context does not make a plan that focuses solely on race constitutional, especially in light of the *Grutter* opinion, which allows race to be merely a factor or a plus in the admissions process.⁸⁰

71. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1166-67 (9th Cir. 2005), cert granted, 126 S. Ct. 2351 (2006).

72. *McFarland*, 330 F. Supp. 2d at 841-42.

73. *Parents Involved in Cmty. Sch.*, 426 F.3d at 1200-01 (Bea, J., dissenting).

74. *Id.* at 1200-01 (emphasis and citation omitted).

75. *Id.* at 1197.

76. *Id.* at 1197 (citing *Freeman v. Pitts*, 503 U.S. 467, 494 (1992)).

77. *Id.* at 1197-98 (citing *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003)).

78. *Id.* at 1201-02.

79. *Id.*

80. *Id.* at 1202-03.

Furthermore, the dissent doubts the validity of the sociological evidence presented by the District in support of its asserted interests and contends that the evidence relies heavily on racial stereotypes, such as the notion that a heavily white school is better than a heavily minority school.⁸¹ The majority, much like the majority in *Grutter*, gives great deference to the government on this issue.⁸² However, the dissent does not believe the deference was warranted because of the difference in the “context.”⁸³ The *Grutter* court granted such deference largely based on the First Amendment and “academic freedom” interest present at the postsecondary school level.⁸⁴ Secondary schools, however, lack this notion of academic freedom.⁸⁵ The dissent also believes the benefits of diversity are more important at a postsecondary level where the schoolroom experience expands beyond the classroom into the dormitories and the like and where the Socratic method of teaching is employed.⁸⁶

Although the Supreme Court could decide literally anything with these two cases, the most plausible outcomes are that (1) it embraces both of these cases and allows racial classifications to be used for more than just curing de jure segregation at the preuniversity level or (2) it embraces a position similar to the dissent in *Parents Involved in Community Schools v. Seattle School District No. 1* and holds that preuniversity racial classifications can only be justified as an attempt to cure de jure or intentional segregation. With the current make-up of the Supreme Court, the second option seems far more likely.⁸⁷

When the *Grutter* and *Gratz* decisions were decided, Sandra Day O'Connor was still a member of the Court. In fact, Justice O'Connor wrote the *Grutter* opinion and was in the majority for both opinions. *Grutter* was a 5-4 split, with Justices Stevens, Souter, Breyer, and Ginsburg joining O'Connor in the majority.⁸⁸ The main dissent—composed of Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas—believed that the law school's program was nothing more than an attempt to achieve racial balancing.⁸⁹ The main dissent further argued that far too much deference was granted to the law

81. *Id.* at 1203-08.

82. *Id.* at 1207.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 1207-08.

87. The Supreme Court's current make-up also suggests that the Supreme Court might overrule *Grutter* altogether. While this is a very real possibility, it seems unlikely that the Supreme Court would choose preuniversity level cases to overrule a postsecondary level decision.

88. *Grutter v. Bollinger*, 539 U.S. 396, 311 (2003).

89. *Id.* at 378-79.

school and that the strict scrutiny analysis was far too weak.⁹⁰ *Gratz* amounted to a 6-3 decision to strike down the university's affirmative action plan with Rehnquist penning the majority that was joined by O'Connor, Scalia, Kennedy, and Thomas.⁹¹ O'Connor wrote a concurring opinion that was joined in part by Breyer, which gave the majority the sixth vote to strike down the plan.⁹² Souter, Stevens, and Ginsburg all dissented through several disjointed opinions.⁹³ The majority held that the university's policy, "which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program."⁹⁴

Rehnquist and O'Connor have now been replaced by Chief Justice John Roberts and by Justice Samuel Alito. Both are widely believed to be hostile to affirmative action. Roberts was criticized during his confirmation hearings for a memorandum he wrote during his tenure with the Reagan White House which suggested that affirmative action programs in favor of women may be "unconstitutional"⁹⁵ and for his work to limit court-imposed busing orders.⁹⁶ Roberts, as a private practitioner, represented "clients opposed to government affirmative action programs."⁹⁷ In fairness, these were not necessarily his own personal views, as he was always acting as counsel for another person or entity when putting forth these positions. Justice Alito has a similar background of working for the Reagan Administration against affirmative action, assisting in three major cases that reached the United States Supreme Court on the issue, and he has attested in writing that he personally believes in the legal positions he advocated in this regard.⁹⁸ As a judge, both times that a white plaintiff or plaintiffs challenged an affirmative action plan that favored minorities, he sided with the white plaintiff(s).⁹⁹

90. *Id.* at 380-87.

91. *Gratz v. Bollinger*, 539 U.S. 244, 249 (2003).

92. *Id.* at 276 (O'Connor, J., concurring).

93. *Id.* at 282-303.

94. *Id.* at 270.

95. *Roberts Knocked Affirmative Action*, CBS NEWS, Aug. 18, 2005, available at <http://www.cbsnews.com/stories/2005/08/18/supremecourt/main786870.shtml>.

96. *Civil Rights Groups Cite Concerns Over Roberts*, BOSTON GLOBE, July 22, 2005, available at http://www.boston.com/news/nation/washington/articles/2005/07/22/civil_rights_groups_cite_concerns_over_roberts/.

97. *Id.*

98. NAACP LEGAL DEF. & EDUC. FUND, INC., REPORT ON THE NOMINATION OF JUDGE SAMUEL A. ALITO, JR. TO THE SUPREME COURT OF THE UNITED STATES 12-15 (2005), available at http://www.naacpldf.org/content/pdf/alito/Report_on_the_Nomination_of_Judge_Samuel_A_Alito_Jr_to_the_Supreme_Court_of_the_United_States.pdf.

99. *Id.* at 24-26.

Roberts and Alito both pledged to take due account of stare decisis during their confirmation hearings.¹⁰⁰ However, striking down the two affirmative action plans at issue could be done without overruling *Grutter* or *Gratz* by simply distinguishing between secondary and postsecondary education. In any event, these two cases will be crucial in both defining the judicial philosophies of these new justices and in shaping the composite of American schools.

CONSTITUTIONAL LAW—ABORTION—UNITED STATES SUPREME COURT GRANTS WRIT OF CERTIORARI ON TWO ABORTION CASES—*Gonzales v. Carhart*, 126 S. Ct. 1314 (2006); *Gonzales v. Planned Parenthood Federation of America, Inc.*, 126 S. Ct. 2901 (2006).¹⁰¹

Once again, the issue of abortion is before the Supreme Court.¹⁰² The Court granted writ of certiorari on two cases involving the Partial-Birth Abortion Act of 2003.¹⁰³ Both cases involved suits against Attorney General Alberto R. Gonzales challenging the constitutionality of the Act as passed by Congress.¹⁰⁴

GONZALES V. CARHART

In petitioning for writ of certiorari, the government asserted that the Eighth Circuit Court of Appeals erred in finding the Partial-Birth Abortion Ban Act of 2003 invalid.¹⁰⁵ More specifically, the government stated that the court of appeals erred in finding the Act invalid by failing to give substantial deference to findings made by Congress, concluding that partial-birth abortions are “never medically indicated to preserve the health of the mother.”¹⁰⁶ The Act as proposed by Congress prohibits physicians from conducting partial-birth abortions.¹⁰⁷ The partial-birth abortions referred to in the statute describes an abortion procedure performed late in the pregnancy term known as dilation and extraction (D & X) or dilation and evacuation (D & E).

In drafting the statute, Congress provided an exception to the Act

100. *Abortion, Race on Court's Agenda; Observers Are Watching for a Rightward Lean that Could Affect Previous Decisions, Including One in a Nebraska Case*, OMAHA WORLD-HERALD, Oct. 2, 2006, at 4A.

101. The U.S. Supreme Court issued its opinion in this decision before this issue of the *Florida State University Law Review* went to press. *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007) (upholding the Partial-Birth Abortion Ban Act of 2003).

102. *Gonzales v. Carhart*, 126 S. Ct. 1314 (2006); *Gonzales v. Planned Parenthood Fed'n of Am., Inc.*, 126 S. Ct. 2901 (2006).

103. Pub. L. No. 108-105, 117 Stat. 1201 (to be codified at 18 U.S.C. 1531).

104. *Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005); *Planned Parenthood Fed'n of Am., Inc. v. Gonzales*, 435 F.3d 1163 (9th Cir. 2006).

105. Petition for Writ of Certiorari at 11-24, *Gonzales*, 126 S. Ct. 1314 (No. 05-380).

106. *Id.* at 11 (quoting *Turner Broad. Sys., Inc. v. Fed. Comm'ns Cmm'n*, 512 U.S. 622, 665-66 (1994)).

107. Pub. L. No. 108-105, 117 Stat. 1201 (to be codified at 18 U.S.C. 1531).

for mothers who required the procedure to save their lives.¹⁰⁸ However, no exception was provided for protecting the health of the mother.¹⁰⁹ In omitting the health exception from the statute, Congress relied on findings derived from written and oral testimony on the subject.¹¹⁰ The testimony began in 1995 with Congress holding hearings and debates on proposals to end partial-birth abortions. According to Congress, the common finding among the experts testifying was that partial abortion was never necessary to preserve the health of the mother and instead was actually quite dangerous. Congress passed bills invalidating partial-birth abortions in 1996 and 1997, but President Clinton vetoed both.¹¹¹ Despite the failure of those two bills, more than thirty states enacted statutes banning partial-birth abortions.¹¹²

The precedent used by the Eighth Circuit to invalidate the Act arose in the Supreme Court case of *Stenberg v. Carhart*.¹¹³ In *Stenberg*, the Supreme Court examined the validity of a Nebraska statute forbidding the use of partial-birth abortions.¹¹⁴ Like the Act at issue, the Nebraska statute contained a provision allowing partial-birth abortions when necessary to preserve the life of the mother. However, no such exception was provided for the health of the mother. Citing the absence of a health exception, the Court found the statute unconstitutional.¹¹⁵ The majority in *Stenberg* found that a health exception was required when “substantial medical authority” supports the medical necessity of a procedure.¹¹⁶

The second reason the Court invalidated the Nebraska Statute was because of the extent of its ban—that is, its abolishment of not only the D & X procedure but also the D & E procedure created an undue burden on a woman’s access to an abortion.¹¹⁷ Under the Court’s reasoning, an undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.¹¹⁸

Three years after the ruling in *Stenberg*, Congress passed the Partial-Birth Abortion Ban Act of 2003. The Act reflected Congress’s attempt to write an effective partial-birth abortion ban by curing the

108. *Id.*

109. *Id.*

110. *Carhart v. Gonzales*, 413 F.3d 791, 793 (8th Cir. 2005).

111. *Id.*

112. *Id.*

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

114. *Id.* at 915.

115. *Id.* at 938.

116. *Id.*

117. *Id.*

118. *Id.*; *see Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

deficiencies identified by the Supreme Court in the Nebraska Statute in *Sternberg*. In doing so, Congress took additional measures in writing the statute to ensure that it would survive any challenge. The first modification came with a more specific definition of partial-birth abortion. Under the Act, partial-birth abortion is defined as

an abortion in which the person performing the abortion (A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and (B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus.¹¹⁹

More importantly for the issue at hand, in drafting the Act, Congress also relied on extensive findings on the medical necessity of partial-birth abortion.¹²⁰ Based on these findings, Congress concluded that partial-birth abortion is never medically necessary to preserve the health of the mother. Although such findings directly conflict with those made by the Court in *Stenberg*, Congress contends that its based its decision on different facts.¹²¹ Therefore, no such exception exists in the Act as presented by Congress.

As discussed above, before the Act was passed into law, four physicians sought a permanent injunction of the Act, giving rise to the present action. The district court granted the injunction.¹²² The court found the Act was invalid based on its lack of a health exception and its inclusion of both D & E and D & X abortions.¹²³ As to the former issue, the government cited the *Turner* cases in arguing that Congress's findings regarding the medical necessity of partial-birth abortions are owed binding deference.¹²⁴ The government argued that the court's application of the "substantial medical authority" standard from *Stenberg* was directly inconsistent with the rule stated in the

119. 18 U.S.C. § 1531(b) (Supp. 2003).

120. *Carhart v. Gonzales*, 413 F.3d 791, 793, 797 (8th Cir. 2005).

121. *Id.*

122. *Carhart v. Ashcroft*, 331 F. Supp. 2d 805 (D. Neb. 2004) (During the course of the case Attorney General Gonzales succeeded Attorney General Ashcroft. Thus, Gonzales' name automatically supplanted Ashcroft's on all subsequent documents.).

123. *Id.* at 1048.

124. *Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n*, 520 U.S. 180 (1997). *Turner* dealt with a First Amendment challenge to a law requiring cable stations to carry public broadcast stations and local commercials. *Id.* at 185. Congress based the law on the findings of three years of congressional hearings. *Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n*, 512 U.S. 622, 632-34 (1994). In the first *Turner* case, the Court remanded the case to the district court for an evidentiary hearing, despite the congressional findings. However, the Court stated that "courts must accord substantial deference to the predictive judgments of Congress." *Id.* at 665.

Turner cases. The government explained that the proper application of the *Stenberg* standard is in the absence of congressional findings on the issue. The district court agreed with the government that congressional findings are due binding deference. However, the court said such deference is only required when specific circumstances exist—that is, when “the legislative conclusion was reasonable and supported by substantial evidence.”¹²⁵

In rejecting the government’s contention and affirming the district court’s decision, the Eighth Circuit stated that the government mistakenly believed that the “substantial medical authority” standard was a question of fact.¹²⁶ The court explained that where the question at issue is one asking “whether there is a certain quantum of evidence to support a particular answer,” it is usually treated as a matter of law.¹²⁷ Thus, the court found the government’s argument for deference under *Turner* was irrelevant.

In so finding, the court held that the ruling in *Stenberg* is a per se constitutional rule.¹²⁸ The court reasoned that in *Stenberg*, the Supreme Court was provided with all available medical evidence on the issue partial-birth abortions.¹²⁹ Using that information, the Court found that “substantial medical authority” indicated a need for a health exception and stated that “[n]either we, nor Congress, are free to disagree with the Supreme Court’s determination because the Court’s conclusions are final on matters of constitutional law.”¹³⁰ The Eighth Circuit did not go so far as to state that the Court’s findings were forever conclusive on the issue. Rather, the court conceded the rapid development of medical technology and knowledge could render the Court’s finding in 2000 obsolete down the road.

In applying such reasoning to the facts before them, the Eighth Circuit looked to whether the government provided sufficient evidence to find that “substantial medical authority” no longer supports the Court’s finding in *Stenberg*.¹³¹ Thus, the court looked to the *Stenberg* court’s evidentiary circumstances upon which it based its ruling. Such circumstances consisted of the conclusion that the D & X procedure “significantly obviates health risks in certain circumstances” and that there exists a “division of opinion among medical experts regarding the procedure . . . and an absence of controlled medical studies that address the safety and medical necessity of the banned

125. *Carhart*, 331 F. Supp. 2d at 1007 (quoting *Turner*, 520 U.S. at 211).

126. *Carhart v. Gonzales*, 413 F.3d 791, 793, 797 (8th Cir. 2005).

127. *Id.*

128. *Id.* at 796 (agreeing with the Fourth Circuit in *Richmond Medical Center v. Hicks*, 409 F.3d 619 (4th Cir. 2005)).

129. *Id.*

130. *Id.*

131. *See id.* at 797.

procedures.”¹³² The court found that government’s evidence was not sufficient to distinguish the evidence relied on in *Stenberg*.¹³³ Therefore, the court held the government’s reliance on such evidence in excluding a health exception from the Act was misplaced and the Act was unconstitutional. Upon reaching the conclusion that the lack of the health exception rendered the Act unconstitutional, the court decided that there was no need to address the district court’s finding that the Act imposed an undue burden on women seeking an abortion.¹³⁴

With the Eighth Circuit’s affirmation of the district court’s decision, the government petitioned the Supreme Court.¹³⁵ In petitioning for writ of certiorari, the government advanced two primary reasons why the Court should hear its appeal: the Eighth Circuit (1) invalidated an act of Congress and (2) failed to follow the Court’s precedent by not deferring to congressional findings.¹³⁶ Under the first reason, the government simply argued that the importance of an act of Congress alone requires that the Supreme Court grant writ of certiorari.¹³⁷ The second reason advanced by the government is the same it argued to the court of appeals regarding the deference due to congressional findings.¹³⁸ Again, the government pointed to the rulings in the *Turner* cases in arguing that the findings of Congress are owed deference and that the Eighth Circuit’s failure to give such deference constituted error. The Court granted writ of certiorari on February 21, 2006.

GONZALES V. PLANNED PARENTHOOD FEDERATION OF AMERICA., INC.

Following in the footsteps of *Gonzales v. Carhart* is *Gonzales v. Planned Parenthood Federation of America, Inc.*¹³⁹ Like the four physicians in *Carhart*, Planned Parenthood also challenged the Partial-Birth Abortion Act in 2003. Also like the physicians in *Carhart*, Planned Parenthood wasted no time in bringing its challenge.¹⁴⁰ Before the ink denoting President George W. Bush’s signature on the Act could dry, it challenged the Act under the Fifth Amendment. In doing so, it asserted four reasons why the Act was facially invalid: (1) the Act places an undue burden on a woman’s right to choose whether or not to have an abortion, (2) it does not contain a health

132. *Id.* at 801.

133. *Id.* at 803.

134. *Id.* at 803-04.

135. Petition for Writ of Certiorari, *Gonzales v. Carhart*, 126 S. Ct. 1314 (2006) (No. 05-380).

136. *Id.* at 10-11.

137. *Id.*

138. *Id.* at 11.

139. *Gonzales v. Planned Parenthood Fed’n of Am., Inc.*, 126 S. Ct. 2901 (2006).

140. President George W. Bush signed the Act into law on November 5, 2003. Planned Parenthood brought its challenge on November 6, 2003.

exception, (3) the language of the Act is unconstitutionally vague, and (4) the Act violates a woman's due process right to bodily integrity.¹⁴¹ The district court agreed and found the statute invalid for the first three reasons asserted by Planned Parenthood.¹⁴² The district court explained that the Act created an undue burden by broadly defining the procedures prohibited under the Act.¹⁴³ Thus, because the procedures prohibited encompassed almost all post-first trimester abortions, the district court found the Act "placed a substantial obstacle in the path of abortion-seekers."¹⁴⁴ Further, the district court's finding that the Act was vague stemmed from the use of a number of terms and phrases which would fail to provide notice to physicians that performing certain procedures would violate the Act.¹⁴⁵ Finally, the district court found the Act unconstitutional because it lacked a health exception as required by *Stenberg*.¹⁴⁶

Once again, the government advanced the argument that Congress based the Act on factual findings it conducted over several years. Thus, because they are congressional findings, they are owed deference. In laying out the district court's decision, the Ninth Circuit also noted similar findings in other federal courts.¹⁴⁷ The court of appeals cited three courts all holding the Act unconstitutional.¹⁴⁸ The first cited the Eighth Circuit's decision in *Carhart v. Gonzales* and the district court's findings in that case as outlined above. The court also pointed to the Southern District of New York case *National Abortion Federation v. Ashcroft*,¹⁴⁹ which invalidated the Act because of its lack of a health exception.

The Ninth Circuit upheld the district court's ruling for the same three reasons: (1) the lack of a health exception, (2) the imposition of an undue burden on women seeking an abortion, and (3) the Act's vague language. In explaining its finding that the Act's lack of a health exception rendered it unconstitutional, the court relied on the Supreme Court's decision in *Stenberg* that abortion regulations require a health exception when it may be necessary to preserve a woman's life.¹⁵⁰ The court continued to explain that the *Stenberg* ruling held that the absence of a health exception was unconstitutional

141. *Planned Parenthood Fed'n of Am. v. Ashcroft*, 320 F. Supp. 2d 957, 967 (N.D. Cal. 2004).

142. *Id.* at 1034-35.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Planned Parenthood Fed'n of Am., Inc. v. Gonzales*, 435 F.3d 1163, 1170 (9th Cir. Cal. 2006).

148. *Id.*

149. 330 F. Supp. 2d 436 (S.D.N.Y. 2004).

150. *Planned Parenthood*, 435 F.3d at 1172-73.

unless there is “medical consensus that no circumstances exist in which the procedure would be necessary to preserve a woman’s health.”¹⁵¹ In defining “medical consensus,” the court stated that complete unanimity was unnecessary. Rather, consensus exists when there is “no significant disagreement” regarding the issue within the medical community.¹⁵² Thus, the relevant question identified by the Ninth Circuit was whether Congress properly concluded that there was consensus in the medical community that partial-birth abortions are never necessary to preserve the health of the mother.¹⁵³ However, the court of appeals acknowledged that in answering that question, the court must resolve an important issue: how much deference to give to the legislative findings relied on in passing the Act.¹⁵⁴ Once again, the government argued that that the line of *Turner Broadcasting System* cases should rule on the issue.¹⁵⁵ Specifically, the *Turner* standard held that when reviewing the facts upon which the constitutionality of a statute is based, a court must find that Congress based its “reasonable inferences” on “substantial evidence.”¹⁵⁶

In laying the foundation for its ultimate rejection of the government’s argument, the court first addressed the lack of certainty stemming from the Supreme Court’s decisions on what level of deference to afford congressional findings.¹⁵⁷ In furtherance of its point, the Ninth Circuit cited cases where congressional findings were given different levels of deference.¹⁵⁸ However, the court found that deciding what level of deference to afford the congressional findings relied on in passing the Act was a question it need not answer. Instead, the court stated that regardless of the level of deference, the congressional findings at issue clearly show that no consensus exists in the medical community that partial-birth abortion is never necessary.¹⁵⁹ Therefore, while the court ultimately dodged the deference question, it did not pass up the opportunity to suggest that it would not find in favor of the government. Thus, in finding a lack of medical consensus in Congress’s factual record, the court held that the health exception must be included.¹⁶⁰

Along with the lack of the health exception, the Ninth Circuit went on to find the Act also failed by posing an undue burden on

151. *Id.* (quoting *Stenberg v. Carhart*, 530 U.S. 914, 937 (2000)).

152. *Id.* at 1172.

153. *Id.*

154. *Id.* at 1173-74.

155. *Id.* at 1174.

156. *Id.* at 1173 (quoting *Turner Broad. Sys., Inc. v. Fed. Comm’n Comm’n*, 512 U.S. 622, 666 (1994)).

157. *Id.* at 1174.

158. *Id.*

159. *Id.*

160. *Id.* at 1176.

women seeking an abortion. In so finding, the court cited Congress's deliberate choice to create a broad prohibition of abortion procedures.¹⁶¹ Congress achieved the broad prohibition, the court explained, by defining the banned procedure in a way that excludes both intact and nonintact D & E abortions.¹⁶² Thus, like the Nebraska statute in *Stenberg*, the court found the Act posed an undue burden on women seeking an abortion.¹⁶³

In response, the government pointed to three distinct differences between the Act and the Nebraska statute ruled invalid in *Stenberg*.¹⁶⁴ The government first argued that unlike the Nebraska statute, the Act applies only when the fetus is delivered outside the body of the mother. Because of that distinction, the government suggested, the Act does not apply to nonintact D & E.¹⁶⁵ The Ninth Circuit disagreed. Although the court noted the change in verbiage from Nebraska statute to the Act, it found the result of the language remained the same¹⁶⁶—that is, the Act excludes both intact and nonintact D & E's. For its second reason, the government argued that the language limiting the banned abortion to those where either the “entire fetal head” or “any part of the fetal trunk past the navel” is delivered for the purpose of abortion.¹⁶⁷ Once again, the court disagreed. Again, despite the change in the language used in the Act, the court found the application remained the same.¹⁶⁸ Finally, the third reason advanced by the government why the Act differed from the Nebraska statute centered upon the intent required by the physician.¹⁶⁹ The government argued that the insertion of the phrase “overt act” in the intent language of the statute clearly established that the Act does not apply as broadly to other abortion procedures like the Nebraska statute.¹⁷⁰ However, the court again found the government's argument less than compelling. Thus, the court found the Act, like the statute in *Stenberg*, created a “substantial obstacle” for women seeking an abortion.¹⁷¹

Finally, the court addressed the issue regarding the language of the Act being unconstitutionally vague.¹⁷² The court explained that the vagueness creates havoc by failing to clearly define the prohib-

161. *Id.* at 1177.

162. *Id.*

163. *Id.*

164. *Id.* at 1178.

165. *Id.*

166. *Id.*

167. *Id.* (citing 18 U.S.C. §1531(b)1(A) (Supp. 2003)).

168. *Id.* at 1179.

169. *Id.*

170. *Id.*

171. *Id.* at 1179-80.

172. *Id.* at 1181.

ited medical procedures.¹⁷³ That failure, the court explained, “deprive[s] doctors of fair notice and encourag[es] arbitrary enforcement.”¹⁷⁴ While the court acknowledged that it could construe the Act to cover both forms of D & E abortions, it decided it would cause too many problems for the physicians trying to decide which procedures it permits or prohibits.¹⁷⁵ For that reason, the court found the Act unconstitutionally vague. Specifically, the court pointed to the government’s use of the terms “partial-birth abortion,” “overt act,” and “living fetus” as terms causing the most confusion.¹⁷⁶ The court stated that the government’s failure to define “partial-birth abortion” using clinical terms to define the scope of the procedures encompassed by the acts prohibition would cause too many problems for physicians trying to comply with the Act.¹⁷⁷

As for “overt act,” the government argued that the term has been used numerous times in federal statutes. However, the court found that its particular use here was vague. The court explained that term used in conjunction with the phrase “overt act, other than completion of delivery” could include a range of acts involved in abortion procedures.¹⁷⁸ Therefore, the court found the language did “not provide the definitiveness about the statute’s scope.”¹⁷⁹

In upholding the district court’s decision, the Ninth Circuit made clear that its decision was not based solely on the lack of a health exception.¹⁸⁰ As evidenced by its opinion, the court also found that it imposes an undue burden on women seeking abortions and is unconstitutionally vague.¹⁸¹

In petitioning for writ of certiorari, the government seems content with attacking the Eighth and Ninth Circuit’s decisions that the absence of a health exception rendered the Act unconstitutional. Despite acknowledging the two other grounds upon which the Ninth Circuit rested its opinion, the government is willing to consolidate the two cases. However, the government has argued that while the Eighth Circuit did not review the other two grounds, the Supreme Court could address them as well as the necessity of a health exception. Despite the change in faces on the panel since *Stenberg*, it seems unlikely that the Court is ready to overrule its decision in that case and uphold the Act as written. It is possible that the government could earn a small victory based on the law as stated in the

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* (finding that such terms were “fatally ambiguous”).

177. *Id.* at 1182-83.

178. *Id.* at 1183.

179. *Id.*

180. *Id.* at 1185.

181. *Id.*

Turner cases and have the case remanded. However, it is far from clear that the congressional findings will stand up against scrutiny even if the binding deference standard is applied. That is, the government may have a hard time proving that the findings are as conclusive on the issue as it believes.

Regardless of whether the Court would “like” to pass such a prohibition on these abortion procedures, the Act as written may be too flawed to save. As outlined by the Ninth Circuit, there are numerous problems with the statute. Thus, even if a majority of the Court desires to validate this Act, Congress did not put them in a good situation to do so. Therefore, for the Court to come out and remedy the entire Act would be quite a statement. It is a statement that it is not likely willing to make at this point in time. However, it is possible that even an affirmation of the circuit courts’ decisions could provide a more definite outline of what a proper abortion act should look like. If the Court wants to ultimately see such a statute passed, look for a detailed description of what Congress may do with its findings. What is guaranteed is that if the Act is held invalid, it will not be the last abortion-ban legislation.

CONSTITUTIONAL LAW—A PHYSICALLY PRESENT INHABITANT'S EXPRESS REFUSAL OF CONSENT TO A POLICE SEARCH IS DISPOSITIVE AS TO HIM, REGARDLESS OF THE CONSENT OF A FELLOW OCCUPANT, MAKING A SEARCH UNREASONABLE UNDER THE FOURTH AMENDMENT—*Georgia v. Randolph*, 126 S. Ct. 1515 (2006).

Respondent, Scott Randolph, claimed the police violated his Fourth Amendment freedom from unreasonable searches because (1) they entered his home without a search warrant and (2) although his wife consented to the search, he explicitly did not.¹⁸² Randolph’s motion to suppress evidence of his cocaine use that was seized during the search was denied by the trial court, but the Supreme Court of Georgia sustained a reversal of the denial.¹⁸³ On appeal by the State of Georgia, the United States Supreme Court affirmed and found that one occupant may not give effective consent to search shared premises against a cotenant who is present and refuses the search.¹⁸⁴

On the morning of July 6, 2001, Respondent’s wife complained to the police that after a domestic dispute Respondent had taken their son away from her.¹⁸⁵ When the police arrived at the house, Respondent’s wife told them that Respondent was a cocaine user.¹⁸⁶ Shortly

182. *Georgia v. Randolph*, 126 S. Ct. 1515, 1519 (2006).

183. *State v. Randolph*, 604 S.E.2d 835, 837 (Ga. 2004).

184. *Randolph*, 126 S. Ct. at 1528.

185. *Id.* at 1519.

186. *Id.*

after the police arrived, Respondent returned home and explained that he had moved his son to a neighbor's house out of concern that his wife might try to leave town with him.¹⁸⁷ He denied that he was a cocaine user and claimed that it was, in fact, his wife who abused drugs and alcohol.¹⁸⁸

After the couple's son was returned home by the police, Respondent's wife persisted in her complaints about her husband's drug abuse and offered that there were "items of drug evidence" in the house.¹⁸⁹ The police sergeant asked Respondent for permission to search the house and Respondent unequivocally refused.¹⁹⁰

The sergeant then asked Respondent's wife for consent to search and she readily agreed.¹⁹¹ Respondent's wife then led the police into the house and upstairs to a bedroom that she identified as being the Respondent's.¹⁹² The police noticed a portion of a drinking straw with a powdery substance he suspected was cocaine.¹⁹³ The sergeant left the house to retrieve an evidence bag from his car and to call the district attorney's office, which instructed him to stop the search until he obtained a warrant.¹⁹⁴ The police took the Randolphs and the straw to the police station and awaited the warrant.¹⁹⁵ Upon the issuance of the search warrant, the police returned to the house and seized further evidence of drug use.¹⁹⁶

Respondent moved to suppress the evidence obtained by the police on the basis that it was product of a warrantless search of his house disallowed by his express refusal, despite his wife's consent.¹⁹⁷ The trial court denied the motion, ruling that Respondent's wife had common authority to consent to the search.¹⁹⁸

The Court of Appeals of Georgia reversed, and its holding was sustained by the Georgia Supreme Court on the reasoning that, "the consent to conduct a warrantless search of a residence given by one occupant is not valid in the face of the refusal of another occupant who is physically present at the scene to permit a warrantless search."¹⁹⁹ The U.S. Supreme Court granted certiorari to determine whether one occupant may give effective consent to search shared

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Randolph v. State*, 590 S.E.2d 834, 836 (Ga. Ct. App. 2003).

198. *Id.* at 835.

199. *State v. Randolph*, 604 S.E.2d 835, 836 (Ga. 2004).

premises against the interests of a cotenant who is present at the time and refuses to consent to the search.²⁰⁰

In deciding this case, the majority distinguished the facts of *Randolph* from the Court's earlier ruling in *United States v. Matlock*, which recognized the validity of searches with the voluntary consent of a fellow occupant who shared common authority over property when the suspect was absent.²⁰¹ To do this, the Court evaluated the source of the co-occupant consent rule recognized by *Matlock*. In its evaluation, the Court found, "the constant element in assessing Fourth Amendment reasonableness in the consent cases . . . is the great significance given to widely shared social expectations, which are . . . influenced by the law of property, but not controlled by its rules."²⁰² In *Matlock*, the social expectation was that a co-inhabitant could consent to a search of a shared premises because that co-inhabitant had common authority over the premises.²⁰³

Sixteen years after *Matlock*, the Court revisited the issue of social expectation and approached the issue raised by Respondent when it held in *Minnesota v. Olson* that overnight houseguests have a legitimate expectation of privacy in their temporary quarters.²⁰⁴ Therefore, the Court determined that, "[i]f that customary expectation of courtesy or deference is a foundation of Fourth Amendment rights of a houseguest, it presumably should follow that an inhabitant of shared premises may claim at least as much . . ."²⁰⁵ In assessing the relative privacy rights of cotenants, the Court looked to property law to assess the strength of a cotenant's rights and determined that each cotenant has an equal right.²⁰⁶ Thus, wrote the Court, "[s]ince the cotenant . . . has no recognized authority in law or social practice to prevail over a present and objecting tenant, his disputed invitation . . . gives a police officer no better claim to reasonableness in entering than the officer would have in the absence of any consent at all."²⁰⁷

200. *Randolph*, 126 S. Ct. at 1520.

201. 415 U.S. 164, 170 (1974).

202. *Randolph*, 126 S. Ct. at 1521.

203. *Matlock*, 415 U.S. at 170.

204. 495 U.S. 91 (1990). The *Olson* Court invalidated a warrantless search of a houseguest's room, basing its decision on the presumption that "it is unlikely that [the host] will admit someone who wants to see or meet with the guest over the objection of the guest." *Id.* at 99 (alteration in original).

205. *Randolph*, 126 S. Ct. at 1522.

206. *Id.* at 1523. In making this determination, the Court relied in part on the scholarship of Richard R. Powell: "Each cotenant . . . has the right to use and enjoy the entire property as if he or she were the sole owner, limited only by the same right in the other cotenants." R. POWELL, *POWELL ON REAL PROPERTY* §50.03[1] (M. Wolf ed., 2005). The Court further assessed the rights of cotenants by looking at the ability of cotenants to obtain a decree of partition (when the relationship was co-ownership) and determined that this helped demonstrate that no one cotenant's interests trumped any other cotenant's interests. *Randolph*, 126 S. Ct. at 1523.

207. *Id.*

The majority, in reaching its decision, made clear that its ruling was a narrow one limited to the facts of the case.²⁰⁸ To the Court, “if a potential defendant with self-interest in objecting is in fact at the door and objects, the cotenant’s permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out.”²⁰⁹ In the majority opinion, the reason for this distinction was “the practical value” in the clarity of two rules: one valuing a cotenant’s permission in the absence of his cotenant, the other valuing a cotenant’s right to refuse consent to search.²¹⁰

In his concurrence, Justice Breyer emphasized that the decision by the Court was limited to the facts of the case and evaluated the facts not on social expectations or property rights, but on the Fourth Amendment’s protections against “unreasonable searches and seizures.”²¹¹ Breyer noted that the Court measures reasonableness “by examining the totality of the circumstances.”²¹² Looking at the circumstances of the case, Breyer found the search to be unreasonable.²¹³ Here, the search was solely for evidence and the officers had not justified their search by trying to prevent possible evidence destruction.²¹⁴ Additionally, the police could have secured the home while awaiting a valid search warrant.²¹⁵ To Breyer, such circumstances were insufficient to “justify abandoning the Fourth Amendment’s traditional hostility to police entry into a home without a warrant.”²¹⁶ If the circumstances were different, however, Breyer would have changed his vote.²¹⁷ Were the objector not present or if there was a risk of an ongoing crime in the house (such as domestic violence), there would be special reason for the police to enter.²¹⁸

The principle dissent by Chief Justice Roberts criticized the majority’s approach, finding that it randomly protects co-occupants who happen to be at the front door, while affording no protection to co-occupants who might be sleeping or watching television.²¹⁹ Roberts

208. *Id.* at 1527.

209. *Id.*

210. *Id.* The Court made clear that it would be impermissible for the police to remove a potentially objecting tenant from the entrance for the purpose of dodging a denial of consent. *Id.*

211. *Id.* at 1529-30 (Breyer, J., concurring).

212. *Id.* at 1529 (quoting *Ohio v. Robinette*, 519 U.S. 33, 39 (1996)).

213. *Id.* at 1530.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.* Breyer places special emphasis on the need for the police to immediately intervene in the case of domestic violence, despite the direct objection of a cotenant, and makes clear that the Court’s decision will not hamper such law enforcement action. *Id.*

219. *Id.* at 1531 (Roberts, C.J., dissenting). In *United States v. Matlock*, the Court found no violation when police arrested defendant in the front yard of his house and placed

expressed his fear that such a random protection could protect the nonconsenting abuser from a search of his home, though the abused spouse would likely give consent to such a search.²²⁰ To Roberts, the correct approach to deciding this case was to find that “[i]f an individual shares information, papers, or places with another, he assumes the risk that the other person will . . . share access . . . with the government.”²²¹ Roberts pointed out that the Court had previously decided that co-occupants have “assumed the risk that one of their number might permit [a] common area to be searched.”²²²

Roberts further disagreed with the majority’s focus on assessing Fourth Amendment reasonableness in light of social expectations.²²³ In Roberts’ view, the problem with this assessment was that what the Constitution protects is privacy, not social expectations.²²⁴ Roberts wrote, “Our common social expectations may well be that the other person will not . . . share what we have shared with them with another—including the police—but that is the risk we take in sharing.”²²⁵ Though many social conventions shape how one acts when given access to private information, Roberts argued, “[t]he Constitution . . . protects not these but privacy, and once privacy has been shared, the shared information, documents, or places remain private only at the discretion of the confidant.”²²⁶ Thus, Roberts would have the Court recognize that “a decision to share a private place, like a decision to share a secret or confidential document, necessarily entails the risk that those with whom we share may . . . choose to share . . . with the police.”²²⁷

In a separate dissent, Justice Thomas noted that the Court should have decided the case relying on *Coolidge v. New Hampshire*.²²⁸ In *Coolidge*, the Court found that no Fourth Amendment search occurs where the spouse of a suspect voluntarily leads the police to potential evidence of wrongdoing.²²⁹ The foundation for *Coolidge* came from *Burdeau v. McDowell*,²³⁰ in which the Court ruled that only the ac-

him in a patrol car before obtaining permission to search a shared bedroom for evidence of a bank robbery. 415 U.S. 164, 166 (1974). In *Illinois v. Rodriguez*, the Court similarly found no violation when defendant was actually asleep in the apartment when police obtained consent to search from cotenant. 497 U.S. 177, 179 (1990).

220. *Randolph*, 126 S. Ct. at 1531.

221. *Id.*

222. *Id.* (quoting *United States v. Matlock*, 415 U.S. 164, 171 (1974)) (alteration in original).

223. *Id.* at 1533.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* at 1539.

228. 403 U.S. 443 (1971).

229. *Id.* at 486-90.

230. 256 U.S. 465 (1921).

tions of an agent of the government constituted a search within the meaning of the Fourth Amendment because the Amendment “was intended as a restraint upon the activities of *sovereign authority*, and was not intended to be a limitation upon other than governmental agencies.”²³¹ Believing that the facts of this case were substantially the same, Thomas believed that *Coolidge* was controlling and, since Mrs. Randolph was not an agent of the state, there was no Fourth Amendment violation.²³²

The majority, for its part, responded to Thomas’ dissent by recognizing a cotenant’s possible interest in reporting criminal activity in an attempt to deflect suspicion raised by sharing quarters with a criminal or for other reasons.²³³ The majority believed, however, that society could have the benefit of these interests “without relying on a theory of consent that ignores an inhabitant’s refusal to allow a warrantless search.”²³⁴ Thus, a cotenant could turn evidence over to the police on his own initiative and circumvent problems arising from this ruling.²³⁵ Furthermore, the majority expressed its view that this case had no bearing on the ability of the police to protect victims of domestic violence.²³⁶ To emphasize this point, the majority wrote, “the question whether the police might lawfully enter over objection in order to provide any protection that might be reasonable is easily answered yes.”²³⁷ Thus, as the majority readily points out, the holding in *Randolph* is exceedingly narrow and applies only to cases with exactly the same set of facts.²³⁸

CONSTITUTIONAL LAW—THE ATTORNEY GENERAL DOES NOT HAVE THE POWER TO IMPOSE AN INTERPRETIVE RULE ON THE GENERAL MEDICAL PRACTICES WHICH ARE MEANT TO BE GOVERNED BY STATE LAW—*Gonzales v. Oregon*, 126 S. Ct. 904 (2006).

The State of Oregon and a group of Oregon residents sued the United States Attorney General to challenge an interpretive ruling of the Controlled Substances Act (CSA).²³⁹ The rule, known as the “Ashcroft Directive,” held that medically assisted suicide through the use of federally controlled substances violated the CSA and that the Oregon Death with Dignity Act (ODWDA) was not a “legitimate medical

231. *Randolph*, 126 S. Ct. at 1541 (Thomas, J., dissenting) (quoting *Burdeau*, 256 U.S. at 475).

232. *Id.* at 1542.

233. *Id.* at 1524 (majority opinion).

234. *Id.*

235. *Id.*

236. *Id.* at 1525.

237. *Id.*

238. *Id.* at 1527.

239. *Gonzales v. Oregon*, 126 S. Ct. 904, 907 (2006).

purpose.”²⁴⁰ The Ninth Circuit Court of Appeals upheld invalidation of the Ashcroft Directive by ruling that making a medical procedure authorized under state law a federal crime created an imbalance between state and federal law that was not authorized by the CSA.²⁴¹ On appeal by the Attorney General, the United States Supreme Court affirmed the holding that the CSA was in direct conflict with the ODWDA.²⁴²

In 1994, Oregon became the first state to legalize assisted suicide when the state’s voters passed the ODWDA.²⁴³ The law protected physicians who followed certain procedural safeguards from civil liability when they dispensed or prescribed lethal drugs to patients who were terminally ill.²⁴⁴ The Oregon law required (1) the patient to obtain a medical judgment that he or she would die within six months, (2) the physician to determine whether the decision made by the patient was an informed decision that was not influenced by any outside source, (3) the patient to consult a second physician who must examine the patient and the medical records to confirm the findings of the original physician, and (4) the prescribing physician to not administer the lethal dose.²⁴⁵

Enacted in 1970, the CSA’s main objective was to combat drug abuse and control the trafficking of controlled substances.²⁴⁶ To issue lawful prescriptions of the Schedule II drugs (the category of drugs used by Oregon physicians for assisted suicides) physicians must “obtain from the Attorney General a registration issued in accordance with the rules and regulations promulgated by him.”²⁴⁷ The Attorney General may quash the physician’s registration if he determines it is not in the public’s “best interest.”²⁴⁸ The Attorney General looks at five factors in determining whether the physician’s registration is in the public’s interest.²⁴⁹ The CSA also leaves a role for the states in

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* at 911.

244. *Id.*

245. *Id.* at 912-13.

246. *Id.* at 911 (“[T]he CSA creates a comprehensive, closed regulatory regime criminalizing the unauthorized manufacture, distribution, dispensing, and possession of substances classified in any of the Act’s five schedules.”). The drugs are placed in a schedule depending on their potential for abuse. *Id.* There are five different schedules that act as a classifying system with one being the substances with the strongest restrictions and five having the least restrictions. *Id.* The substances in this case fell under Schedule II. *Id.*

247. *Id.*

248. *Id.*

249. *Id.* The factors the Attorney General shall consider are (1) the recommendation of the State licensing board, (2) the physician’s experience with respect to controlled substances, (3) the physician’s conviction record with regard to controlled substances, (4) whether the physician followed the law relating to controlled substances, and (5) whether the conduct may threaten the public health and safety. *Id.* at 412.

regulating the different substances.²⁵⁰ In 2001, without consulting Oregon or anyone outside his office, then-Attorney General John Ashcroft issued an interpretive rule finding that using controlled drugs monitored by the federal government to assist in medical suicides was not a legitimate medical practice and that the ODWDA was unlawful under the CSA.²⁵¹

The issue addressed by the Supreme Court was whether the Attorney General had the power under the CSA to prohibit the distribution of federally controlled substances for physician-assisted suicide, regardless of a state law which authorized such distribution.²⁵² The 6-3 Court ruled in favor of Oregon.²⁵³ The Court held the interpretive rule passed by Attorney General Ashcroft was not allowed within the powers granted by the CSA.²⁵⁴ The Court also held that Congress did not intend to alter the balance between federal and state governments and that this rule would infringe on the power Congress intended for the states to retain when dealing with general medical practices.²⁵⁵

The Supreme Court noted that the Ninth Circuit Court of Appeals held the interpretive rule was invalid because the usual constitutional balance between the States and the Federal Government was broken by the Attorney General “without the requisite clear statement that the CSA authorized such action.”²⁵⁶ “The Court of Appeals held the interpretive rule could not be ‘squared with the plain language of the CSA,’ which is intended to monitor only conventional drug abuse and bars the Attorney General from making decisions on medical policy.”²⁵⁷ The Supreme Court granted the government’s petition for certiorari.²⁵⁸

The Supreme Court, in affirming the ruling below, began its analysis by deciding the degree of deference the Court must grant to the interpretive rule’s substantive findings and even more importantly whether the rule is allowed under the CSA.²⁵⁹ The Court went into great detail discussing three cases that have guided how the Supreme Court decides what deference to give to an interpretive rule. In *Auer v. Robbins*²⁶⁰ the Supreme Court held there should be substantial deference given to an administrative rule when examining

250. *Id.*

251. *Id.* at 911.

252. *Id.* at 914.

253. *Id.*

254. *Id.* at 925.

255. *Id.*

256. *Id.* at 914 (quoting *Oregon v. Ashcroft*, 368 F.3d 1118, 1124-25 (9th Cir. 2004)).

257. *Id.* (citing *Oregon v. Ashcroft*, 368 F.3d at 1125-29).

258. *Id.*

259. *Id.*

260. 519 U.S. 452 (1997).

an ambiguous regulation that was passed by the issuing agency.²⁶¹ The second type is the deference the Supreme Court gave in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,²⁶² where the Court held an ambiguous statute may also receive substantial deference “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”²⁶³ The third type is the deference the Supreme Court gave in *Skidmore v. Swift & Co.*,²⁶⁴ which held that if the interpretive rule does not fall under one of the first two interpretations then it is given no deference and is only given respect in regards to its “power to persuade.”²⁶⁵

The Court began to sift through the three types of deference to determine which one should be applied to the Attorney General’s interpretive rule.²⁶⁶ In *Gonzales*, the Court held the interpretive rule should not receive the deference given in *Auer*.²⁶⁷ Unlike in *Auer*—where the Secretary of Labor’s interpretive rule gave more insight to underlying regulations that were created by the Department of Labor—the CSA in this case merely restated the statute created by Congress, and the Court held that the Attorney General was not elaborating on one of his own regulations.²⁶⁸

The Court next looked at whether the interpretive rule receives deference under *Chevron* and determined that it fails under this test as well.²⁶⁹ The Court held that for *Chevron* deference to be followed that the statute must be ambiguous and also the “rule must be promulgated pursuant to authority Congress has delegated to the official.”²⁷⁰ In this case, the Court held the CSA did not give the Attorney General power to create a rule outlawing a standard of medical treatment and care of patients that is legal under state law.²⁷¹ The Court held that the Attorney General’s opinion is also unpersuasive under *Skidmore*.²⁷² The Court under *Skidmore* only follows an agency rule “to the extent it is persuasive.”²⁷³ The Court ruled that case law shows that the CSA is only meant to restrict illegal drug dealing and

261. *Id.* at 461-63.

262. 467 U.S. 837 (1984).

263. *Id.* at 842-45 (citing *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)).

264. 323 U.S. 134 (1944).

265. *Id.* at 140.

266. *Gonzales v. Oregon*, 126 S. Ct. 904, 907 (2006).

267. *Id.*

268. *Id.*

269. *Id.* at 916.

270. *Id.* (citing *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)).

271. *Id.*

272. *Id.* at 922.

273. *Id.*

curtail when physicians may give out prescriptions.²⁷⁴ However, the Act does not intend to regulate the practice of medicine generally, and the CSA relies on state governments to regulate the general practices of the medical profession.²⁷⁵ The Court also noted the CSA's preemption provision as further evidence that Congress did not intend for the Attorney General to regulate in this area.²⁷⁶ The preemption provision (which says that unless there is a direct conflict with the Act and the state law, the state law should be followed) guides the federal government to defer to the state government in situations such as the law passed in Oregon.²⁷⁷ The Court also held that the CSA was mainly meant to prevent recreational drug abuse and that when Congress wished to grant power to the federal government in this Act, it did it explicitly.²⁷⁸

The dissent began its analysis of why the interpretive rule should be granted substantial deference by pointing out the three main objectives the Attorney General meant to accomplish.²⁷⁹ The first objective the Attorney General wished to accomplish was to interpret that physician-assisted suicides did not fall within the meaning of a legitimate medical purpose.²⁸⁰ Second, the Attorney General interpreted the Oregon law legitimizing the use of federally controlled substances to assist in suicide to be in direct conflict with the CSA.²⁸¹ Finally, those physicians who helped assist in suicides were acting in a way that was inconsistent with the public interest, and their registration could be revoked under the interpretive rule.²⁸²

The dissent felt that the majority disregarded "settled principals of interpretation" and that there were three separate grounds sufficient for reversing the lower decision and finding in favor of the government.²⁸³ The dissent then went into great detail discussing the three reasons why they felt the majority wrongly decided the out-

274. *Id.*

275. *Id.* at 923.

276. *Id.*

277. *Id.*

278. *Id.* at 924.

279. *Id.* at 926 (Scalia, J., dissenting). Prior to identifying the three main objectives of the Attorney General, the dissent provides a portion of the relevant part of the interpretive rule which was as follows: "For the reasons set forth in the OLC Opinion, I hereby determine that assisting suicide is not a 'legitimate medical purpose' within the meaning of 21 CFR § 1306.04 (2001), and that prescribing, dispensing, or administering federally controlled substances to assist suicide violates the CSA. Such conduct by a physician registered to dispense controlled substances may 'render his registration . . . inconsistent with the public interest' and therefore subject to possible suspension or revocation under 21 U.S.C. [§] 824(a)(4)." (quoting 66 Fed. Reg. 56608 (2001)).

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.* at 926 (Scalia, J., dissenting).

come of the case.²⁸⁴ First, Justice Scalia felt that the interpretation of legitimate medical practice that was compiled by the Attorney General in the interpretive rule should be granted substantial deference under the *Auer* rule.²⁸⁵ The dissent noted that the straightforward rule in *Auer* applied and declared incorrect the majority's assertion that the statutory language was paraphrased, as the interpretive rule clarified ambiguous terms with which there could be multiple interpretations.²⁸⁶ Furthermore, the dissent reasoned the majority was wrong in assuming that even if the regulation simply cited the statute, it did not fall under the substantial deference rule created in *Auer*, because no case law supported that finding.²⁸⁷ Even if *Auer* deference was not applied, the dissent reasoned that the majority was wrong in assuming that the Attorney General did not receive the deference granted in *Chevron*.²⁸⁸ Justice Scalia accused the majority of forcing "term-of-art definitions into contexts where they plainly do not fit," which in turn created a misinterpretation of the powers granted to the Attorney General under the CSA.²⁸⁹

Second, even if the regulation is granted no deference, Justice Thomas felt that the most logical interpretation of the CSA was the one determined by the Attorney General.²⁹⁰ He stated that almost every source of binding significance supports the conclusion that the phrase "legitimate medical purpose" does not include physician-assisted suicides.²⁹¹ Justice Scalia said the majority barred the Attorney General's decision because the Court held that an executive official cannot make a medical practice illegal just because it may be inconsistent with one understanding of reasonable medical practice.²⁹² However, his problem with that finding is that the overpowering majority of authorities (including forty-seven of the states) consider the practice of legitimate medicine to not include assisted suicide.²⁹³ The dissent also points out that while the CSA is mainly in-

284. *Id.*

285. *Id.*

286. *Id.* at 928.

287. *Id.*

288. *Id.* at 929.

289. *Id.* at 930.

290. *Id.* at 931.

291. *Id.* at 932. Quoting a memorandum prepared for the Attorney General and attached as an appendix to the interpretive rule, the dissent reasoned that "virtually every medical authority from Hippocrates to the current American Medical Association (AMA) confirms that assisting suicide has seldom or never been viewed as a form of 'prevention, cure, or alleviation of disease,' and (even more so) that assisting suicide is not a 'legitimate' branch of that 'science and art.'" *Id.* (citation omitted).

292. *Id.*

293. *Id.*

tended to prevent the abuse of substances, there is no reason to believe that this is its only concern.²⁹⁴

Finally, Justice Scalia believed that even if the interpretation was wrong, the Attorney General's independent understanding of the term "public interest" is entitled to deference under the *Chevron* case.²⁹⁵ He stated that the Attorney General is explicitly granted the authority to register and deregister physicians and that his powers in doing so were left in very broad terms.²⁹⁶ Scalia further stated that the Attorney General has the power to refuse to register or deregister any physician he feels is acting in a manner inconsistent with the public interest.²⁹⁷ Moreover, Congress left terms such as "public interest" so broad so that the Attorney General (who is solely responsible for administering the registration and deregistration provisions) can have the authority to interpret those criteria. When Congress is explicit in its delegation, Scalia asserted, the Court may not substitute its own interpretation in place of the agency.²⁹⁸ Scalia also noted that the majority wrongly found the Secretary of Health and Human Services to have authority over all "scientific and medical determinations" because, while the Secretary has specific binding power over the Attorney General when it comes to "scheduling and addiction treatment," there is no mention of the Secretary when it comes to the registration provisions.²⁹⁹

Scalia concluded by stating that although making assisted suicide illegal may not be within the federal government's "enumerated powers," it has long been practice to use the federal commerce power to protect public morality, and this is a circumstance where using the commerce power to prevent assisted suicide is necessary.³⁰⁰ Scalia further declared that Congress has already tried to do this in the CSA, as any real meaning of the term "legitimate medical practice" would not include allowing prescription drugs to be used in assisting death.³⁰¹

294. *Id.* at 933.

295. *Id.* at 935.

296. *Id.* at 936.

297. *Id.*

298. *Id.*

299. *Id.* at 937.

300. *Id.* at 938.

301. *Id.* at 939.

TORTS—CLASS ACTIONS—PUNITIVE DAMAGES—SMOKERS' CLASS ACTION SUIT SEEKING DAMAGES AGAINST TOBACCO COMPANIES AND INDUSTRY ORGANIZATIONS FOR ALLEGED SMOKING-RELATED INJURIES—*Engle v. Liggett Group, Inc.*, 31 Fla. L. Weekly S464 (Fla. July 6, 2006).³⁰²

The Florida Supreme Court recently considered tobacco litigation, holding in *Engle v. Liggett Group, Inc.*³⁰³ that the Third District Court of Appeal misapplied the Florida Supreme Court's decision in *Young v. Miami Beach Improvement Co.*³⁰⁴ The Third District reversed a final judgment for compensatory and punitive damages for smoking-related injuries entered for a class of Florida smokers and against cigarette manufacturers and other industry organizations.³⁰⁵ Specifically, the Third District reversed a \$145 billion punitive damages award to the whole class and decertified the class of smokers.³⁰⁶ The Florida Supreme Court, while ultimately approving both holdings on other grounds, found error with the Third District's reasoning in reaching those conclusions.³⁰⁷

On October 31, 1994, the trial court certified the petitioners, a class of nationwide smokers and their survivors (Engle Class), under rule 1.220(b)(3), Florida Rules of Civil Procedure.³⁰⁸ Thereafter, Engle Class representatives filed an amended class action complaint seeking compensatory and punitive damages against several major cigarette companies and two industry organizations (Tobacco) for alleged smoking-related injuries.³⁰⁹ After Tobacco appealed, the Third District Court affirmed the certification of the class by the trial court but reduced the size of the class from United States smokers to Florida smokers.³¹⁰ The trial court issued an amended order recertifying the class on November 21, 1996.³¹¹

After recertification, the trial court issued a trial plan dividing the trial into three phases.³¹² Phase I of the trial considered common issues relating exclusively to the defendants' conduct and general health issues of smoking in order to determine issues of liability and

302. Before this issue of the *Florida State University Law Review* went to press, the *Engle* decision was withdrawn and superseded on rehearing, 945 So. 2d 1246 (Fla. 2006) (per curiam). In this subsequent decision, the Florida Supreme Court did not change its ruling but further explained its reasoning, remanding the case to the Third District for further proceedings.

303. 31 Fla. L. Weekly S464, S465 (Fla. July 6, 2006).

304. 46 So. 2d 26 (Fla. 1950).

305. *Liggett Group, Inc. v. Engle*, 853 So. 2d 434 (Fla. 3d DCA 2003).

306. *Id.*

307. *Engle*, 31 Fla. L. Weekly at S465.

308. *Id.*

309. *Id.* at S465-66.

310. *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39, 42 (Fla. 3d DCA 1996).

311. *Engle*, 31 Fla. L. Weekly at S466.

312. *Id.*

entitlement to punitive damages for the whole class.³¹³ At the end of Phase I, the jury found for the Engle Class on all counts, including finding entitlement to punitive damages.³¹⁴

Phase II was further divided into parts A and part B.³¹⁵ In Phase II-A the jury determined the amount of compensatory damages the three class representatives—Frank Amodeo, Mary Farnan, and Angie Della Vecchia—were entitled to and awarded them a total of \$12.7 million.³¹⁶ In Phase II-B, the jury determined a lump-sum punitive damages award for the whole class, awarding \$145 billion to the Engle Class.³¹⁷ At the conclusion of Phase II-B, the trial court granted two motions for directed verdict in favor of Tobacco,³¹⁸ but upheld all other counts in favor of the Engle Class and ordered payment of the \$145 billion punitive damages award.³¹⁹

Phase III of the trial plan called for new juries in order to determine “individual liability and compensatory damages claims for each class member.”³²⁰ After individual liability was established, the court would divide the Phase II-B punitive damages award equally amongst any successful class members.³²¹ At the end of Phase II, however, Tobacco filed an appeal with the Third District, which reversed the final judgment in favor of the Engle Class with instructions that the class be decertified.³²²

The Florida Supreme Court first took issue with the Third District’s application of the doctrine of *res judicata* under the court’s reasoning in *Young v. Miami Beach Improvement Co.*³²³ In *Young*, an association of citizens filed a claim asserting a public interest in a private parcel of oceanfront property.³²⁴ The supreme court barred the citizens’ claim because the city had been enjoined in a previous suit from asserting an interest in the parcel.³²⁵ The court found that “judgment against a municipal organization in a matter of general interest to all its citizens is binding on the latter, although they are

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.* Each class representative was awarded different amounts. *Id.*

317. *Id.*

318. *Id.* The trial court granted two of Tobacco’s motions for directed verdict: against class representative Amodeo on the basis that his claims violated the applicable statutes of limitations and against an Engle Class count for equitable relief. *Id.*

319. *Id.*

320. *Id.* The Engle Class consisted of some 700,000 members. *Id.*

321. *Id.*

322. *Liggett Group, Inc. v. Engle*, 853 So. 2d 434, 442 (Fla. 3d DCA 2003).

323. *Young v. Miami Beach Improvement Co.*, 46 So. 2d 26 (Fla. 1950); *Engle*, 31 Fla. L. Weekly at S467.

324. *Young*, 46 So. 2d at 26.

325. *Id.* at 30.

not parties to the suit.”³²⁶ Applying this reasoning, the Third District found that the 1997 Florida Settlement Agreement entered by the State of Florida and several of the defendants in the case (which settled claims by the state including Medicaid expenses for smoking-related injuries and punitive damages) barred the Engle Class’s punitive damages claim.³²⁷

The supreme court disagreed, finding that in *Young*, the city sued in its “parens patriae capacity, litigating the rights or interests common to the public at large and thereby representing the citizenry” of the city.³²⁸ The court distinguished when a state did not sue in its parens patriae capacity, holding that “[t]o the extent [the] claims involve injuries to purely private interests, which the State cannot raise, then the claims are not barred.”³²⁹ Applying this reasoning, the court found that as “the State had no right to pursue these types of private interests on behalf of its citizens, the punitive damages claims settled by the state in the FSA, if any, were distinct from the punitive damages sought by the Engle Class in the present case.”³³⁰ The Engle Class’s punitive damages claim was therefore not barred by the Florida Settlement Agreement.³³¹

Despite the claims not being barred by the doctrine of res judicata, the court agreed with the Third District that the jury’s finding of entitlement to punitive damages at the end of Phase I was inappropriate.³³² A majority of the court, under *Ault v. Lohr*,³³³ held that a finding of liability—which requires a breach of a duty, causation, and reliance—is required before entitlement to punitive damages can be found.³³⁴ Phase I of the trial consisted solely of issues relating to To-

326. *Id.*

327. *Engle*, 853 So. 2d at 467. In 1995, the State of Florida brought an action against several of the defendants in this case under the Medicaid Third-Party Liability Act, FLA. STAT. § 409.910 (1995), to recover Medicaid expenses for treating victims of tobacco-related illnesses, as well as punitive damages. *Engle*, 31 Fla. L. Weekly at S467. Several of the defendants settled with the State by entering into the Florida Settlement Agreement, which resolved “all present and future claims against all parties to [the] litigation relating to the subject matter of [the] litigation, which [were] or could have been asserted by any of the parties thereto.” *Id.*

328. *Engle*, 31 Fla. L. Weekly at S467. The court cited interests which were a concern to all citizens: oceanfront property, public nuisances, and zoning. *Id.*

329. *Id.* (quoting *Satsky v. Paramount Commc’ns, Inc.*, 7 F.3d 1464, 1470 (11th Cir. 1993)).

330. *Id.*

331. *Id.*

332. *Id.* at S468. “The last question on the Phase I verdict form asked the jury to determine whether ‘[u]nder the circumstances of this case, . . . the conduct of any Defendant rose to a level that would permit a potential award or entitlement to punitive damages.’ The jury answered ‘yes’ with respect to each of the defendants.” *Id.*

333. 538 So. 2d 454 (Fla. 1989).

334. *Engle*, 31 Fla. L. Weekly at S468. “The Third District ruled that the trial erred in awarding classwide punitive damages ‘without the necessary findings of liability and compensatory damages.’” *Id.* (quoting *Engle*, 853 So. 2d at 450). A separate majority of the

bacco's actions and "did not consider whether any class members relied on Tobacco's misrepresentations or were injured by Tobacco's conduct."³³⁵ As the jury had not determined whether Tobacco was liable to any member of the class, a determination of entitlement at the conclusion of Phase I was inappropriate.³³⁶

Furthermore, even if liability for punitive damages had been properly found, the Florida Supreme Court unanimously agreed with the Third District's finding that "the trial court erred in allowing the jury to determine a lump sum amount [for punitive damages] before it determined the amount of total compensatory damages for the class."³³⁷ The court stated that punitive damages cannot be outside "of all reasonable proportion" to the tortious conduct³³⁸ and cannot "result in economic castigation or bankruptcy of the defendant."³³⁹ Furthermore, in recognizing recent United States Supreme Court decisions, the court found due process limits on punitive damages existed and that "a review of the punitive damages award includes an evaluation of the punitive and compensatory amounts awarded to ensure a reasonable relationship between the two."³⁴⁰ The Florida Supreme Court therefore found that without knowing the total amount of compensatory damages for the Engle Class, it would be impossible to determine whether "a reasonable relationship" between compensatory and punitive damages existed.³⁴¹

The next issue the court addressed was the Third District's decertification of the Engle Class; it found error in the Third District's reason for decertification but ultimately decertified the Engle Class on other grounds.³⁴² At the beginning of the trial, an appeal by Tobacco caused the Third District to affirm the certification of the class by the trial court.³⁴³ At the conclusion of Phase II of the trial, the Third District reversed its previous ruling, finding that the Engle Class failed to meet the requirements of either "predominance" or "commonality" under rule 1.220(b)(3), Florida Rules of Civil Procedure.³⁴⁴ The supreme court disagreed, finding that rule 1.220(d)(1) "was not designed to allow a district court to decertify a class, contrary to its previous affirmance of class certification and after notice

court found that an award of compensatory damages is not a prerequisite to finding entitlement to punitive damages. *Id.*

335. *Engle*, 31 Fla. L. Weekly at S468.

336. *Id.*

337. *Id.*

338. *Id.* (citing *Arab Termite & Pest Control of Fla., Inc. v. Jenkins*, 409 So. 2d 1039, 1043 (Fla. 1982)).

339. *Id.* (citing *Bould v. Touchette*, 349 So. 2d 1181, 1186 (Fla. 1977)).

340. *Id.* (citing *State Farm Mutual Ins. Co. v. Campbell*, 538 U.S. 408 (2003)).

341. *Engle*, 31 Fla. L. Weekly at S469.

342. *Id.*

343. *Id.*

344. *Id.*

to thousands of Floridians, a two-year trial, and an entry of final judgment.”³⁴⁵ The court found that the doctrine of law of the case³⁴⁶ applied and therefore only a “clear manifest injustice” by its prior ruling would allow the Third District to reverse.³⁴⁷ Finding that no clear manifest injustice existed, the court quashed the Third District’s decertification.³⁴⁸

Despite this finding, the supreme court concluded that “continued class action treatment for Phase III of the trial plan [was] not feasible because individualized issues such as legal causation, comparative fault, and damages predominate.”³⁴⁹ In reaching its conclusion, the court cited rule 1.220(d)(4)(A), which states that “[w]hen appropriate . . . a claim or defense may be brought or maintained on behalf of a class concerning particular issues.”³⁵⁰ Finding no Florida case law addressing when it is appropriate to certify a class for only limited liability issues, the court reviewed Federal cases interpreting a similar Federal provision.³⁵¹ The court found that “United States Courts of Appeals have concluded that . . . a trial court can properly separate liability and damages issues, certifying class treatment of liability while leaving damages to be determined on an individual basis.”³⁵² Following this reasoning, the court decertified the Engle Class, but retained the core Phase I findings.³⁵³ These findings would then be given *res judicata* effect, allowing Engle Class members to use the findings in individual actions for damages.³⁵⁴

A fourth issue the supreme court addressed was the Third District’s reversal due to prejudicial remarks made by the Engle Class Counsel, Stanley Rosenblatt.³⁵⁵ The court disagreed.³⁵⁶ During the trial, Rosenblatt made several improper arguments, such as comparing the tobacco industry to slavery in an attempt to “incite racial

345. *Id.*

346. *Id.* The doctrine of law of the case “requires that questions of law actually decided on appeal must govern the case in the same court and the trial court, through all subsequent stages of the proceedings.” Fla. Dep’t of Transp. v. Juliano, 801 So. 2d 101, 105 (Fla. 2001).

347. *Engle*, 31 Fla. L. Weekly at S469 (citing *Juliano*, 801 So. 2d at 106) (“[A]n appellate court has the power to reconsider and correct an erroneous ruling that has become the law of the case where a prior ruling would result in a ‘manifest injustice.’”).

348. *Id.*

349. *Id.*

350. *Id.*

351. FED. R. CIV. P. 23(c)(4)(A) (“When appropriate . . . an action may be brought or maintained as a class action with respect to particular issues.”).

352. *Engle*, 31 Fla. L. Weekly at S470.

353. *Id.* The court did not allow retention on fraud and intentional infliction of emotional distress claims, which the court stated involved highly individualized determinations. *Id.* Moreover, the court did not allow the finding on entitlement to punitive damages to stand. *Id.*

354. *Id.*

355. *Id.* at S471.

356. *Id.*

passions” by appealing “to the jury’s sense of outrage for the injustices visited upon African-Americans in this country.”³⁵⁷ The court found that while the comments were condemnable and “ventured very close to the line of reversible error,” “under the totality of the circumstances,” reversal was not warranted.³⁵⁸

Next, the court found error in the Third District’s conclusion that two of the three class representatives, Farnan and Della Vecchia, were not properly part of the class and therefore not entitled to their Phase II-B judgments.³⁵⁹ The class was described as those “who have suffered, presently suffer or have died from diseases and medical conditions.”³⁶⁰ The Third District found that both Farnan and Della Vecchia did not fit the class description because they were not diagnosed until after the cutoff date.³⁶¹ First, the supreme court interpreted the cutoff date for the class as the date of final certification by the trial court, November 21, 1996.³⁶² Next, the court found that determination for inclusion in the class was not when a person was diagnosed with smoking-related injuries, as the Third District held, but instead “when the disease or condition first manifested itself.”³⁶³ Since the court found that both Farnan’s and Della Vecchia’s smoking-related injuries had manifested before final certification, the court quashed the Third District’s reversal of judgments in their favor.³⁶⁴

Finally, the supreme court agreed with the Third District’s findings that the applicable statutes of limitations barred the claims of Frank Amodeo, the third class representative.³⁶⁵ Furthermore, the final judgments for Farnan and Della Vecchia against defendants Liggett and Brooke were upheld as properly reversed, with insufficient evidence supporting their liability for damages.³⁶⁶

357. *Id.*

358. *Engle*, 31 Fla. L. Weekly at S472. The court held that context was crucial and the court could not consider such prejudicial statements in isolation. *Id.* Therefore, the court found that in the context of a two-year trial, the arguments and comments made by Rosenblatt did not rise to the level of a reversible error. *Id.*

359. *Id.*

360. *Id.* at S473.

361. *Id.* The Third District found the cutoff date for the class to be the original certification date, October 31, 1994. *Id.* at S465.

362. *Id.* at S473-74. The court found that the phrase “ ‘who have suffered, presently suffer, or have died’ . . . supports the view that the class should include only those people who were affected in the past or who were presently suffering at the time the class was recertified by the trial court.” *Id.*

363. *Id.* at S473.

364. *Id.*

365. *Id.*

366. *Id.* The Florida Supreme Court agreed with the Third District court finding that since the jury found the plaintiffs were zero percent at fault, the Liggett defendants could not be held jointly and severally liable for those damages. *Id.*

The court remanded the case back to the Third District Court of Appeal for further proceedings consistent with its opinion.³⁶⁷ Specifically, the court approved of a reversal of the \$145 billion punitive damages award but held that subsequent findings of punitive damages consistent with its opinion would not be barred under *Young*.³⁶⁸ The court quashed the Third District reversal due to Engle Class counsel's improper arguments and quashed its dismissal of judgments in favor of Farnan and Della Vecchia, but it upheld the reversals of judgments in favor Amodeo and against defendants Liggett and Brooke.³⁶⁹ Finally, the court remanded the Engle Class to be decertified, but it approved of the core Phase I findings, less those finding entitlement to punitive damages for the whole class.³⁷⁰ The court ordered that Engle Class plaintiffs could proceed individually, with Phase I findings to be given res judicata effect in any subsequent trial between a class member and the defendants, provided that such action was filed within one year of the mandate of the case.³⁷¹

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.*

371. *Id.*