

# Federal Abortion Ban

## Partial Birth Abortion Ban Act of 2003

The bill, signed into law on November 5, 2003, vaguely outlaws “partial birth abortion,”<sup>1</sup> a term that does not describe an actual medical procedure, but rather is a non-medical term created by abortion opponents to refer to various procedures used in second-trimester abortions.<sup>2</sup>

- The ban makes it a federal crime to “deliberately and intentionally vaginally deliver a living fetus” past certain anatomical landmarks “for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus.”<sup>3</sup>
  - There was fear that this vagueness meant that the ban would refer to both the D&X (dilation & extraction) procedure, which is used in some second-trimester abortions, and the D&E (dilation & evacuation) procedure, which is the most common and the safest method of surgical abortion after 14 weeks.<sup>4</sup>
- The ban does not contain an exception for the woman’s health.<sup>5</sup>
- The American College of Obstetricians and Gynecologists (ACOG), which represents 90% of all board certified ob-gyns, opposes the Federal Abortion Ban as “inappropriate, ill advised and dangerous.”<sup>6</sup>
- The American Medical Women’s Association (AMWA) opposes the ban, saying it “is gravely concerned with governmental attempts to legislate medical decision-making through measures that do not protect a woman’s physical and mental health, including future fertility, or fail to consider other pertinent issues, such as fetal abnormalities.”<sup>7</sup>

## Background

- Nebraska’s “partial birth abortion” ban, which had very similar language to the Federal Abortion Ban, was challenged in *Stenberg v. Carhart*.<sup>8</sup>
- In a 5-4 opinion, the Supreme Court held that Nebraska’s “partial birth abortion” ban was unconstitutional.<sup>9</sup>
  - Justice Breyer, joined by Justices Ginsburg, O’Connor, Stevens, and Souter, wrote for the majority:
    - “[T]his Court has made clear that a State may promote but not endanger a woman’s health when it regulates the methods of abortion.”<sup>10</sup>
    - The health exception should not only protect against the risks of pregnancy, but also against the risks from a doctor having to perform a less medically appropriate procedure or a procedure that is not as safe as the one banned.<sup>11</sup>
  - Four separate dissents were written by Justices Rehnquist, Scalia, Kennedy, and Thomas.<sup>12</sup>
    - Justice Kennedy wrote that the majority failed because it did not recognize the State’s asserted interests, not only in the fetus, but also in being able to decide if there were “moral differences” between different abortion procedures.<sup>13</sup>

## Legal Challenges to the Federal Abortion Ban

- The Partial Birth Abortion Ban Act of 2003 was challenged in three federal district court cases. All three courts found the ban unconstitutional on the following grounds:
  - *Carhart v. Ashcroft* (Nebraska): (1) There was no exception for the health of the pregnant woman;<sup>14</sup> and (2) it placed an undue burden on a woman’s right to choose by banning some D&E procedures.<sup>15</sup>
    - The judge in this case also noted that: (1) the court record disproves key Congressional Findings;<sup>16</sup> and (2) the evidence presented at trial proves that the banned procedure is not only safe, but also medically necessary in certain circumstances.<sup>17</sup>

## Federal Abortion Ban

- PPFA v. Ashcroft (California): (1) There was no exception for the health of the pregnant woman;<sup>18</sup> (2) it placed an undue burden on a woman's right to choose as the bill could ban procedures used in more than 90% of second-trimester abortions;<sup>19</sup> and (3) on vagueness grounds, as doctors would not know what procedures were banned.<sup>20</sup>
- NAF v. Ashcroft (New York): There was no health exception.<sup>21</sup>
- The district court cases were upheld by the Eighth, Ninth, and Second Circuit Courts of Appeal, respectively.<sup>22</sup>
  - The Supreme Court granted certiorari to an appeal of the 8th Circuit ruling. Per the Department of Justice's request, it also agreed to review the 9th Circuit ruling.<sup>23</sup>

### Gonzales v. Carhart and Gonzales v. Planned Parenthood Federation of America, Inc.

- On April 18, 2007, the Supreme Court ruled 5-4 that the Federal Abortion Ban was constitutional and therefore enforceable in all states.<sup>24</sup>
  - The majority opinion was written by Justice Kennedy, joined by Chief Justice Roberts and Justice Alito.
    - Kennedy stated that the "State's interest in promoting respect for human life at all stages in the pregnancy" outweighed the interest in the health and safety of the pregnant woman, by the State or by the pregnant woman herself.<sup>25</sup>
    - The majority held that when there is "medical uncertainty" surrounding an issue, Congress (or another lawmaking body) has the right to decide on the best course of medical action for a doctor.<sup>26</sup>
    - Upholding the ban in the absence of a health exception is in direct conflict with Stenberg. Kennedy tried to differentiate the two cases by using the current congressional findings.<sup>27</sup> However, those findings were found by lower courts to be extremely flawed.<sup>28</sup>
    - Kennedy also states that: (1) whether or not to have an abortion "requires a difficult and painful moral decision;"<sup>29</sup> (2) some women come to regret their decision to have an abortion so greatly that they suffer from "post-abortion syndrome" (admitting there is no reliable data to support this "phenomenon");<sup>30</sup> and (3) if women only knew what the procedure really entailed, they would never consider having it done.<sup>31</sup>
    - The Court prohibited further facial challenges to the Federal Abortion Ban, leaving open only the narrowest margin for "as applied" challenges.<sup>32</sup>
  - Justice Thomas wrote a concurrence, joined by Justice Scalia, in which he contended that Roe was wrongfully decided and ought to be overturned.<sup>33</sup>
  - Justice Ginsburg wrote the dissent, which was joined by Justices Stevens, Breyer, and Souter:
    - The Court's upholding of the Federal Abortion Ban "cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court."<sup>34</sup>
    - Ginsburg also called attention to the non-medical language used by Kennedy throughout his opinion:<sup>35</sup>
      - "Abortion doctor" instead of ob-gyn, physician, or surgeon.
      - "Baby" or "unborn child" instead of fetus.
    - The dissent points out that the majority admits that their own moral views are at work, and that these views could prohibit any and all abortions. "The Court's hostility to the right Roe and Casey secured is not concealed."<sup>36</sup>

## Implications of the Upholding of the Federal Abortion Ban

- The federal ban overrides any state statutes or constitutions offering greater protections for reproductive rights.<sup>37</sup>
- The ruling effectively reverses *Stenberg*. This may have dangerous implications for the application of *stare decisis* under the Roberts Court.<sup>38</sup>
- The majority pits the State's interest in women's health against its interest in potential fetal life, disregarding the former and elevating the latter.<sup>39</sup>
- Until now, in the face of medical debate about the need for a health exception, the Court has always deferred to the experts—physicians. Now, in the face of such debate, the Court defers instead to politicians.<sup>40</sup>
- The State's ability to restrict abortions no longer depends on viability,<sup>41</sup> as the ban makes no distinction between pre-viability and post-viability abortions.
- The standard has been lowered for the constitutionality of abortion restrictions.
  - For the first time in its history, the Court upheld an abortion restriction that lacked a health exception, thereby diminishing one of the central tenets of *Roe*.<sup>42</sup>
  - The majority opinion included “rational basis” language, possibly signaling the continuing degeneration of the standard of review for abortion restrictions from strict scrutiny in *Roe* to the “undue burden” standard established in *Casey* to the lowest standard applicable for evaluation of government regulations.<sup>43</sup>

<sup>1</sup> 18 U.S.C. § 1531(a) (2003).

<sup>2</sup> *CTR. FOR REPRODUCTIVE RIGHTS, UNCONSTITUTIONAL ASSAULT ON THE RIGHT TO CHOOSE 5* (2003), available at [http://reproductiverights.org/sites/default/files/documents/pub\\_bp\\_uncon\\_assault.pdf](http://reproductiverights.org/sites/default/files/documents/pub_bp_uncon_assault.pdf).

<sup>3</sup> 18 U.S.C. § 1531(a).

<sup>4</sup> *CTR. FOR REPRODUCTIVE RIGHTS, supra note 2*, at 7.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 13.

<sup>7</sup> *Id.* at 14.

<sup>8</sup> *Stenberg v. Carhart*, 530 U.S. 914 (2000).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 931.

<sup>11</sup> *Id.* at 934.

<sup>12</sup> *Id.* at 952 (Rehnquist, C.J., dissenting); *Id.* at 953 (Scalia, J., dissenting); *Id.* at 956 (Kennedy, J., dissenting); & *Id.* at 980 (Thomas, J., dissenting); respectively.

<sup>13</sup> *Id.* at 963 (Kennedy, J., dissenting).

<sup>14</sup> See *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 1004 (D. Neb. 2004).

<sup>15</sup> See *id.* at 1030.

<sup>16</sup> See *id.* at 1012, 1015, 1018, & 1024.

<sup>17</sup> *Id.* at 1012.

<sup>18</sup> *Planned Parenthood Fed'n of America v. Ashcroft*, 320 F. Supp. 2d 957, 1033 (N.D. Cal. 2004).

<sup>19</sup> *Id.* at 975.

<sup>20</sup> *Id.* at 976.

<sup>21</sup> *Nat'l Abortion Fed'n v. Ashcroft*, 330 F.Supp.2d 436, 483 (S.D.N.Y. 2004).

<sup>22</sup> See *Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005); *Planned Parenthood Fed'n of America, Inc. v. Gonzales*, 435 F.3d 1163 (9th Cir. 2006); *Nat'l Abortion Fed'n v. Gonzalez*, 437 F.3d 278 (2d Cir. 2006).

<sup>23</sup> American Civil Liberties Union, Case Summaries: U.S. Supreme Court Upholds Federal Ban on Abortion Methods, <http://www.aclu.org/reproductiverights/abortion/29778res20070518.html> (last visited June 5, 2009).

<sup>24</sup> *Gonzalez v. Carhart*, 550 U.S. 124 (2007).

<sup>25</sup> *Id.* at 163.

<sup>26</sup> *Id.* at 164.

<sup>27</sup> See *id.* at 141.

<sup>28</sup> See e.g. *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 1012, 1015, 1018, & 1024 (D. Neb. 2004).

<sup>29</sup> *Gonzalez v. Carhart*, 550 U.S. at 159.



# Federal Abortion Ban

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<sup>30</sup> Id.

<sup>31</sup> See id. at 160.

<sup>32</sup> Id. at 167-8.

<sup>33</sup> Id. at 169 (Thomas, J., concurring).

<sup>34</sup> Id. at 191 (Ginsberg, J., dissenting).

<sup>35</sup> Id. at 187 (Ginsberg, J., dissenting).

<sup>36</sup> Id. at 186 (Ginsberg, J., dissenting).

<sup>37</sup> Memorandum from NARAL Pro-Choice America Legal and Policy Research Department to Interested Parties 10 (April 19, 2007), available at <http://www.prochoiceamerica.org/assets/files/federal-abortion-ban-legal-memo.pdf>.

<sup>38</sup> See id. at 9.

<sup>39</sup> See id. at 4.

<sup>40</sup> See id. at 4, 8.

<sup>41</sup> Id. at 7-8.

<sup>42</sup> See id. at 2.

<sup>43</sup> Id. at 8.