



Federal Abortion Ban

Partial Birth Abortion Ban Act of 2003¹

- Signed into law by President Bush on November 5, 2003.
- The term “partial birth abortion” does not describe an actual medical procedure, but rather a non-medical term created by abortion opponents to refer to various procedures used in second-trimester abortions.
- Targets 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.
 - 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.”
- The ban does not contain an exception for the woman’s health.
- 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.”
- 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.”

Background

- Nebraska’s “partial birth abortion” ban
 - Almost identical to the current Federal Abortion Ban
 - Outlawed abortion as early as 12 weeks
 - Had no exception for the woman’s health
- In a 5-4 opinion in *Stenberg v. Carhart*, 530 U.S. 914 (2000), the Supreme Court held that Nebraska’s “partial birth abortion” ban was unconstitutional.
 - Justice Breyer, joined by Justices Ginsburg, O’Connor, Stevens, and Souter, wrote for the majority:
 - “The absence of a health exception will place women at an unnecessary risk of tragic health consequences.”
 - 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.
 - Four separate dissents were written by Justices Rehnquist, Scalia, Kennedy, and Thomas.
 - 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.²

Legal Challenges to the Federal Abortion Ban

- The Partial Birth Abortion Ban Act of 2003 was challenged in three federal district courts
 - *Carhart v. Ashcroft*, 287 F. Supp. 2d 1015 (D. Neb. 2004)

¹ Center for Reproductive Rights, The Federal Abortion Ban, http://www.reproductiverights.org/crt_pba.html (last visited July 14, 2008).

² Center for Reproductive Rights, Reproductive Rights: Key Cases, *Stenberg v. Carhart*, 530 U.S. 914 (2000), http://www.reproductiverights.org/crt_roe_cases_carhart.html (last visited July 14, 2008).

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- U.S. District Court for the District of Nebraska, filed by Dr. LeRoy Carhart and three other physicians
- Planned Parenthood Federation of America v. Ashcroft, 320 F. Supp. 2d 957 (N.D. Cal. 2004)
 - U.S. District Court for the Northern District of California, filed by Planned Parenthood Federation of America and Planned Parenthood Golden Gate
- Nat'l Abortion Federation v. Ashcroft, 287 F. Supp. 2d 525 (S.D.N.Y. 2003)
 - U.S. District Court for the Southern District of New York, filed by National Abortion Federation (NAF) and seven individual physicians
- The district courts issued temporary injunctions to prevent enforcement of the ban.³
- All three courts found the ban unconstitutional on the following grounds:⁴
 - Carhart v. Ashcroft (Nebraska): (1) There was no exception for the health of the pregnant woman; and (2) it placed an undue burden on a woman's right to choose by banning some D&E procedures.
 - The judge in this case also noted that: (1) the court record disproves key Congressional Findings; and (2) the evidence presented at trial proves that the banned procedure is not only safe, but also medically necessary in certain circumstances.
 - PPFA v. Gonzales (California): (1) There was no exception for the health of the pregnant woman; (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; and (3) for vagueness, as doctors would not know what procedures were banned.
 - NAF v. Gonzales (New York): There was no exception for the health of the pregnant woman.
- The district court cases were upheld by the 8th, 9th, and 2d Circuit Courts of Appeal, respectively.
 - In July 2005, the 8th Circuit unanimously affirmed the district court's ruling in Carhart v. Ashcroft (Nebraska).⁵
 - The court ruled that: (1) the government had no new evidence in which to challenge the ruling made in Stenberg; and (2) the ban was unconstitutional due to the lack of a health exception.
 - The 8th Circuit did not, however, address the issue of the ban prohibiting certain D&E procedures.
 - On January 31, 2006, the 9th and 2d Circuits affirmed the lower courts' decisions in PPFA v. Gonzales (California) and NAF v. Gonzales (New York), respectively.⁶
 - The 9th Circuit affirmed the California district court's decision on all grounds.
 - The 2d Circuit affirmed, but then put the case on hold after the Supreme Court agreed to hear Gonzales v. Carhart.⁷
 - The Supreme Court granted certiorari to an appeal of the 8th Circuit ruling. Per the DOJ's request, it also agreed to review the 9th Circuit's ruling.⁸
 - The grant of certiorari reversed an earlier decision made by the Supreme Court regarding these precise issues six years earlier in Stenberg.

³ Center for Reproductive Rights, The Federal Abortion Ban, Fighting to Protect Women's Health, http://www.reproductiverights.org/crt_pba_timeline.html (last visited July 14, 2008).

⁴ Id.

⁵ Id.

⁶ Id.

⁷ 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 July 14, 2008).

⁸ Id.

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- Stare decisis is “the basic legal principle that commands judicial respect for a court’s earlier decisions and the rules of law they embody.” *Harris v. United States*, 536 U.S. 545 (2002).⁹
- There was no new evidence or facts in the matter, simply a change in the makeup of the bench.¹⁰
- In November 2006, the Court heard oral argument for *Gonzales v. Carhart* and *Gonzales v. Planned Parenthood* in tandem.

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.
 - The majority opinion was written by Justice Kennedy, who was 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.¹¹
 - 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, despite professional medical judgment to the contrary.¹²
 - The opinion employed non-medical terminology to describe doctors, patients and fetuses:¹³
 - “Abortion doctor” instead of ob-gyn, physician, or surgeon.
 - “Baby” or “unborn child” instead of fetus.
 - “Mother” instead of patient or pregnant woman.
 - 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. However, those findings were found by lower courts to be extremely flawed.
 - Kennedy dedicates a sizeable section of the opinion to making unsubstantiated statements about the moral qualms a woman faces before and after deciding to get an abortion: (1) whether or not to have an abortion “requires a difficult and painful moral decision;” (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”); and (3) if women only knew what the procedure really entailed, they would never consider having it done.
 - The Court prohibited further facial challenges to the Federal Abortion Ban, leaving open only the narrowest margin for “as applied” challenges.

⁹ Center for Reproductive Rights, *The Federal Abortion Ban*, *Federal Abortion Ban: Role of Stare Decisis*, http://www.reproductiverights.org/crt_pba_staredecisis.html (last visited July 14, 2008).

¹⁰ Center for Reproductive Rights, *The Federal Abortion Ban*, *In a Stunning Reversal, Supreme Court Rules Against Women’s Health, In Favor of Abortion Restrictions*, http://www.reproductiverights.org/crt_pba.html (last visited July 14, 2008).

¹¹ 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 July 14, 2008).

¹² *Id.*

¹³ Memorandum from NARAL Pro-Choice Am. Legal and Policy Research Dep’t to Interested Parties (April 19, 2007).

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- Justice Thomas wrote a concurrence, joined by Justice Scalia, in which he contended that Roe was wrongfully decided and ought to be overturned.
- 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.”¹⁴
 - 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.”¹⁵

Implications of the Upholding of the Federal Abortion Ban

- The federal ban overrides any state statutes or constitutions offering greater protections for reproductive rights.
- The ruling effectively reverses Stenberg. This may have dangerous implications for the application of stare decisis under the Roberts Court.
- 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. This, along with the anti-choice language, will likely encourage further efforts to establish fetal personhood.
- 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.
- The State’s ability to restrict abortions no longer depends on viability,¹⁶ 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 and summoning anti-choice politicians to propose even more severe state prohibitions on procedures, harsher penalties, “informed consent” mandates, and outright abortion bans like the one repealed in South Dakota in November 2006.
 - 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.¹⁷

¹⁴ Id. at 7.

¹⁵ Id. at 7.

¹⁶ Id. at 7-8.

¹⁷ Id. at 8.