



national asian pacific american women's forum

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The Supreme Court and the Federal Abortion Ban

In 2003, Congress passed and Bush signed into law the first ever federal law banning abortions. Deceptively titled the "Partial-Birth Abortion Ban Act," the law would ban medically safe abortion procedures as early as 12 to 15 weeks in pregnancy, and does not include an exception to protect the health of pregnant women. Three lawsuits were promptly filed, and temporary restraining orders were granted to prevent the Act from going into effect. On November 8, 2006, the Supreme Court will hear oral arguments for two of those cases, *Gonzales v. Planned Parenthood* and *Gonzales v. Carhart*.

For Asian Pacific Islander (API) women, abortion is a critical issue. Approximately 35 percent of pregnancies end in abortion for API women, and between 1994-2000, abortion rates fell for all racial and ethnic groups *except* API women.¹ Clearly, the federal ban will severely limit the right to choose an abortion for countless API women.

The "Partial-Birth Abortion Ban Act"

Congress passed the Act as a direct challenge to a 2000 Supreme Court case, *Stenberg v. Carhart*.² In that case, the Court struck down Nebraska's ban on so-called partial birth abortions because it was so broadly worded that it constituted an "undue burden"³ on a woman's right to choose, and because the Nebraska ban did not include an exception to protect women's health. Despite the Supreme Court's ruling against the Nebraska ban, Congress drafted and passed a federal law that is remarkably similar. Notably, no new medical evidence has been found since the 2000 ruling. Rather, *the only thing that has changed is the make-up of the Supreme Court with the addition of Justices Roberts and Alito.*

The Myth of "Partial Birth Abortions"

"Partial-birth abortion" (PBA) is a deliberately misleading term intended to confuse the public.

PBA is not a medical term, but is used to refer to an array of abortion procedures, including the most common method of second-trimester abortion known as dilation and evacuation (D&E). Collectively, D&Es account for 95 percent of pre-viability⁴, second-trimester abortions. In short, there is no such thing as a partial-birth abortion.

The Act is a Federal Ban on Abortions

In addition to its deceptive title, the Act is problematic for many other reasons. First, *the law covers abortions as early as 12 to 15 weeks in pregnancy* and would outlaw abortions that doctors say are among the safest for women. There are a range of medical circumstances in which D&E has significant safety advantages over other methods because it reduces the risk of serious complications such as lacerations to the cervix and uterus, uterine perforation, and infection.⁵

Second, *the ban lacks an exception to protect women's health*, a safeguard that the courts have consistently required for more than thirty years. In fact, Congress intentionally bypassed this important women's health protection by holding hearings that the district court found were "not only unbalanced, but intentionally polemic," and "disproportionately from physicians opposed to abortion generally."⁶ Furthermore, Congress rejected amendments that would have added a health exception, eliminated the inaccurate congressional findings, and limited the Act's applicability to post-viability abortions.

Third, *all of the leading medical organizations oppose the ban*, including the American College of Obstetricians & Gynecologists (which represents more than 90 percent of all ob-gyn doctors in the country), the American Medical Association, and the American Public Health Association. The overwhelming opposition to the ban by major medical professionals makes clear



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that Congress passed the Act with little regard for the needs of women or the expertise of their doctors. In addition to the lack of a health exception, the ban makes no exception for cases involving severe fetal anomalies.

Thus, the Act clearly demonstrates the belief that some politicians have regarding personal decision-making—that it's okay for Congress to interfere with the medical decision-making process of women, their families and their doctors. Unfortunately, Congress' involvement with the Terri Schiavo case and President Bush's veto on funding for stem cell research show that such government intrusion has already taken place.

The Cases

Gonzales v. Carhart

Represented by the Center for Reproductive Rights, Dr. LeRoy Carhart and three other physicians in Nebraska filed a legal challenge to the ban in the U.S. District Court for the District of Nebraska. On September 8, 2004, the district court found the federal law unconstitutional because it (i) failed to include a women's health exception, and (ii) the ban applied to pregnancies as early as 12 weeks and was not limited to a single procedure. The government appealed the case to the U.S. Court of Appeals for the Eighth Circuit, and the panel unanimously affirmed the lower court's ruling on July 8, 2005. Subsequently, the government again filed an appeal and the Supreme Court granted a review of the lower court ruling.

Gonzales v. Planned Parenthood

In this case, Planned Parenthood Federation of America and Planned Parenthood Golden Gate filed a legal challenge to the ban in the U.S. District Court for the Northern District of California. On June 1, 2004, the district court struck down the ban on the following grounds: (i) the law was unconstitutionally vague because it created a risk of criminal liability for physicians during virtually all abortions performed after the

first trimester, (ii) the law constituted an "undue burden" on a woman's right to choose to terminate her pregnancy prior to viability, and (iii) the Act failed to include a women's health exception. When taken up on appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed the lower court decision striking down the ban on January 31, 2006. The government asked the Supreme Court to review the lower court ruling, and was granted review.

The Role of Precedent

In the landmark case *Roe v. Wade*, the Supreme Court recognized for the first time that the constitutional right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."⁷ *Roe* legalized abortions nationwide, and set a legal precedent that affected nearly 30 subsequent Supreme Court cases involving restrictions on access to abortion.

Although abortion is still a hotly contested issue in the courts, some legal protections have long been upheld. Thus, the Supreme Court's decision to review *Gonzales v. Carhart* and *Gonzales v. Planned Parenthood* was unusual given the well-established rule that a restriction on abortion must include an exception to protect the health of the woman. Further, the issue regarding health exceptions was addressed by the Supreme Court just five years ago in *Stenberg v. Carhart*, where the Court struck down an almost identical ban in Nebraska because it lacked such an exception. Notably, the only difference between *Stenberg* and the cases at issue is that there is even *more* evidence on the record that demonstrates how the ban will harm women.

The Court's grant of review was also troubling because ***there is no conflict between the lower courts about the unconstitutionality of the Act.*** Normally, the Supreme Court will agree to review a case if there is a disagreement among two or more of the appellate courts regarding a particular issue. Thus, under usual circumstances, the role of the Supreme Court is to resolve such judicial



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conflicts and make sure the lower courts follow constitutional principles and precedent.

However, the Supreme Court surprised legal scholars by granting review in *Gonzales v. Carhart* and *Gonzales v. Planned Parenthood* because *every court that has examined the federal ban has found it unconstitutional*. Specifically, in the three trial court cases challenging the federal ban, all three courts struck it down because it lacked a women's health exception. The courts also held that the law was unconstitutional because it was too broad and would outlaw some of the safest abortion procedures performed as early as 12 weeks. These district court decisions were affirmed by three appellate courts—the Eighth, Ninth and Second Circuits. Thus, the Supreme Court's decision to review two of those cases was both unusual and alarming because the only factors that have changed since the Court decided *Stenberg* in 2000 is the composition of the Court with the addition of two Bush-appointed Justices, Roberts and Alito.⁸

Looking Ahead: The Future of Reproductive Justice

In the last year alone, over 500 bills restricting abortion and access to abortions were introduced by state legislators across the U.S. With several anti-choice ballot initiatives and existing state laws banning or severely restricting abortions, any erosion on a woman's right to choose on the federal level would have devastating consequences.

On November 8, 2006, all eyes will be on the Supreme Court when they hear oral arguments in support and opposition to the federal abortion ban. If the Court agrees with the lower court decisions and strikes down the federal ban, API women will continue to be able to choose from a range of medically safe abortion procedures. On the other hand, if the Court upholds the ban, API women nation-wide will suffer a huge set-back in their reproductive healthcare options because the Act

bans medically safe abortions as early as 12 to 15 weeks in pregnancy, even if an abortion is medically needed to protect the health of a woman. NAPAWF and reproductive justice advocates nation-wide urge the U.S. Supreme Court to protect women's health, privacy, and right to make personal decisions with themselves, their families, and their doctors.

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¹ Courtney Chappell, Reclaiming Choice, Broadening the Movement: Sexual and Reproductive Justice and Asian Pacific American Women.

² 530 U.S. 914 (2000).

³ The "undue burden" test comes from the case *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). In *Casey*, the Supreme Court ruled that state governments could pass laws that restricted abortions within state boundaries, as long as the restrictions did not have the "purpose or effect" of imposing an "undue burden" on women seeking abortions.

⁴ The point of viability has changed little over the past 30 years, and has remained at approximately 24 weeks. Viability is a medical term that refers to the point when a fetus reaches an "anatomical threshold" when critical organs, such as the lungs and kidneys, can sustain independent life. 99 percent of all abortions are performed before the point of viability.

⁵ Brief of Planned Parenthood Respondents, at 17, *Gonzales v. Planned Parenthood*, (No. 05-1382).

⁶ *Id.* at 4.

⁷ 410 U.S. 113 (1973).

⁸ The third case, *National Abortion Federation v. Gonzales*, is pending before the Second Circuit. It asked for further legal briefing to determine how to remedy the violation but postponed that briefing when the Supreme Court agreed to hear *Gonzales v. Carhart*.