



The Bush Administration's Federal Abortion Ban

The Federal Abortion Ban:¹

- Is a criminal ban on certain second-trimester abortions
- Is part of a larger agenda to outlaw abortion entirely
- Is the first federal law ever to criminalize safe medical procedures
- Is opposed by doctors and medical societies
- Is not about banning late-term abortion; 40 states already ban late-term abortion² and NARAL Pro-Choice America does not oppose such restrictions³
- Does not provide an exception to protect a woman's health

The Federal Abortion Ban Criminalizes Safe and Medically Appropriate Procedures

In 2003, Congress passed the Federal Abortion Ban and President Bush signed it into law. The ban outlaws certain second-trimester abortions that doctors have said are necessary to protect some women's health. The law has no exception for cases when a woman's health is in danger.

- Doctors, medical school professors, and other experts have repeatedly testified in court and provided evidence that the banned procedures are safe and medically necessary to protect some women's health.⁴ When the ban was under consideration, such testimony was presented to Congress but ignored.⁵
- Leading medical and health organizations oppose the Federal Abortion Ban and/or similar measures at the state level: American College of Obstetricians and Gynecologists, American Public Health Association, American Nurses Association, American Medical Women's Association, Physicians for Reproductive Choice and Health, California Medical Association.⁶
- A peer-reviewed medical journal article published in 2004, after the ban's passage but before trials challenging the ban concluded, found that the outlawed procedures neither threaten women's health nor compromise future pregnancies.⁷ The Bush administration attempted to discredit this study in court but failed. The court wrote, "Mr. Ashcroft spent an enormous amount of time trying either to disparage or qualify away this study. He was not successful."⁸

Alarmingly, the U.S. Supreme Court Upheld the Federal Abortion Ban

In April 2007, in a stunning retreat from more than three decades of precedent, the U.S. Supreme Court under Chief Justice John Roberts upheld the first-ever federal ban on an abortion procedure. This decision represents a monumental departure from prior cases, and

with it, the Court effectively eliminated one of *Roe v. Wade*'s core protections: that a woman's health must always be paramount. Perhaps most ominously, President Bush's appointees to the Court cast the critical votes to uphold the ban, likely signaling a seismic shift in the Court's future rulings. The Roberts Court thus not only supported a dangerous and invasive federal law, it gave the green light to anti-choice politicians at all levels of government to enact new restrictions to test the shrinking contours of the right to privacy.

Historically, the Supreme Court Required a Health Exception, but the Federal Abortion Ban Case Departed From that Precedent

In *Roe v. Wade*, the U.S. Supreme Court made clear that abortion restrictions must contain exceptions to protect women's lives and health.⁹

That principle has been reaffirmed numerous times in the 35 years since *Roe* was decided,¹⁰ including in 2000 in *Stenberg v. Carhart*, when the Supreme Court struck down Nebraska's abortion ban, which outlawed abortion services as early as the 12th week in pregnancy.¹¹

- The Court invalidated Nebraska's law for two reasons: It imposed an undue burden upon a woman's right to choose because it banned more than one procedure as early as the 12th week of pregnancy, and it lacked an exception to protect women's health.¹²
- The Supreme Court explained that "the record shows that significant medical authority supports the proposition that in some circumstances, D&X [one of the procedures outlawed by the Federal Abortion Ban] would be the safest procedure."¹³ Indeed, the Court concluded that "a statute that altogether forbids D&X creates a significant health risk."¹⁴ As a result of *Stenberg* and/or lawsuits regarding other states' laws, bans similar to Nebraska's in at least 22 states are unconstitutional and unenforceable.¹⁵

However, in 2007 in *Gonzales v. Carhart* and *Gonzales v. Planned Parenthood Federation of America*, the Court upheld the Federal Abortion Ban without a health exception, reasoning that other procedures are available to women who would have undergone the banned procedure.¹⁶ In doing so, for the first time since *Roe* the Court held that the government may force a woman to undergo a more dangerous medical procedure than the one her doctor would have recommended.

The Roberts-led Court even went so far as to validate abortion opponents' unscientific and unsubstantiated views about abortion's effects, while simultaneously acknowledging it had no data on which to base its conclusion:

Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. **While we find no reliable data to measure the phenomenon**, it seems unexceptionable to

conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.¹⁷

The “source” the Court cites for this unquestionably non-legal and unscientific proposition is an amicus brief filed by an anti-choice law firm, which is similar to the brief the same firm filed in support of its recent efforts to re-open and overturn the Court’s decision in *Doe v. Bolton*, *Roe*’s companion case. Worse, the Court does not even attempt to offer a legal explanation as to how the fact that a woman might regret her choice to have an abortion should justify endangering her own health or the health of other women for whom it may be medically necessary to have a procedure that is now banned as a result of the Court’s decision.

Dissenting Opinion Refutes Majority’s Reasoning and Makes Implications of Decision Clear

Justice Ginsburg authored an incisive and compelling dissent from the majority’s decision, arguing that the Court should have struck down the Federal Abortion Ban just as it did Nebraska’s ban in *Stenberg*. Justices Breyer, Souter, and Stevens joined in the dissent.

Ginsburg’s dissent thoroughly dissects Kennedy’s majority opinion, and sums up the enormity of the departure from precedent:

Today’s decision is alarming. It refuses to take *Casey* and *Stenberg* seriously. It tolerates, indeed applauds, federal intervention to ban nationwide a procedure found necessary and proper in certain cases by the American College of Obstetricians and Gynecologists (ACOG). It blurs the line, firmly drawn in *Casey*, between previability and postviability abortions. And, for the first time since *Roe*, the Court blesses a prohibition with no exception safeguarding a woman’s health.¹⁸

The four dissenting Justices were not persuaded by the majority’s tortured logic and mischaracterization of case law. The dissent suggested that the majority was guided more by personal opposition to abortion than by the Constitution or prior case law:

- “The Court offers flimsy and transparent justifications for upholding a nationwide ban on intact D&E *sans* any exception to safeguard a women’s health.”¹⁹
- “Ultimately, the Court admits that ‘moral concerns’ are at work, concerns that could yield prohibitions on any abortion.”²⁰
- “The Court’s hostility to the right *Roe* and *Casey* secured is not concealed.”²¹
- “[T]he Act and the Court’s defense of it cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court—and with increasing comprehension of its centrality to women’s lives.”²²
- “Congress imposed a ban despite our clear prior holdings that the State cannot proscribe an abortion procedure when its use is necessary to protect a woman’s health. Although Congress’ findings could not withstand the crucible of trial, the Court defers to the

legislative override of our Constitution-based rulings. A decision so at odds with our jurisprudence should not have staying power.”²³

- “And, most troubling, *Casey*’s principles, confirming the continuing vitality of ‘the essential holding of *Roe*,’ are merely ‘assume[d]’ for the moment, rather than ‘retained’ or ‘reaffirmed’ [as they were in *Casey*].”²⁴

The Bush Administration Tried to Invade Women’s Private Medical Files; Will Politicians Trample Privacy to Enforce the Federal Abortion Ban?

While it remains to be seen how government officials may seek to enforce the Federal Abortion Ban, there is cause for concern that women’s private medical files may be at risk for public exposure under future administrations hostile to the right to choose. In its aggressive defense of the Federal Abortion Ban, the Department of Justice under President Bush went so far as to attempt to obtain women’s medical records without their knowledge or consent.

- The Department of Justice issued at least a dozen subpoenas to health-care facilities demanding they turn over the medical records of thousands of patients who had received abortion care.²⁵
- Former Attorney General John Ashcroft claimed that the goal of obtaining the records was to establish that the banned procedures are never medically necessary,²⁶ but as at least one judge pointed out, the women were not parties to these lawsuits, and the harm caused by invading their personal medical files far outweighed any evidentiary benefit Department of Justice lawyers claimed would result.²⁷
- Bush’s Department of Justice argued that federal law does not recognize doctor-patient privilege²⁸ and that “patients no longer have a reasonable expectation that their [medical] histories will remain private.”²⁹
- Fortunately, all three trials challenging the constitutionality of the ban concluded without any health-care facilities being forced to turn over private patient files.³⁰ That result only came about, however, because health-care providers went to court to stop the Department of Justice from rifling through their patients’ files; the Bush administration refused to acknowledge the lack of necessity for the records and the privacy invasion that would result if the records were disclosed.

The Bush administration’s past efforts in support of the Federal Abortion Ban provide a chilling harbinger of possible future enforcement efforts should opponents of abortion rights once again lead the executive branch.

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¹ Partial-Birth Abortion Ban Act of 2003, 18 U.S.C.A. § 1531 (2003).

² Forty states have laws addressing abortion post-viability: AL, AZ, AR, CA, CT, DE, FL, GA, ID, IL, IN, IA, KS, KY, LA, ME, MD, MA, MI, MN, MO, MT, NE, NV, NY, NC, ND, OH, OK, PA, RI, SC, SD, TN, TX, UT, VA, WA, WI, WY. See generally NARAL PRO-CHOICE AMERICA FOUNDATION, *Who Decides? The Status of Women's Reproductive Rights in the United States* (19th ed. 2010), available at www.prochoiceamerica.org/whodecides.

³ NARAL Pro-Choice America supports the framework established in *Roe v. Wade* and does not oppose restrictions on post-viability abortion so long as they contain adequate exceptions to protect the life and health of the woman.

⁴ *Stenberg v. Carhart*, 530 U.S. 914, 934-38 (2000); *Carhart v. Gonzales*, 331 F. Supp. 2d 805, 923-29, 1012-18 (D. Neb. 2004); *Nat'l Abortion Fed'n v. Gonzales*, 330 F. Supp. 2d 436, 470-82 (S.D.N.Y. 2004); *Planned Parenthood Fed'n of Am. v. Gonzales*, 320 F. Supp. 2d 957, 1028-29, 1033-34 (N.D. Cal. 2004).

⁵ Partial-Birth Abortion Ban Act of 2003: Hearing on H.R.760 Before the House Comm. on the Judiciary, Subcomm. on Constitution, 108th Cong. (2003) (Testimony of Simon Heller, Esq.); Partial-Birth Abortion Ban Act of 2002: Hearing on H.R.4965 Before the House Comm. on the Judiciary, Subcomm. on Constitution, 107th Cong. (2002) (Testimony of Simon Heller, Esq.); Partial-Birth Abortion: The Truth: J. Hearing Before the House Comm. on the Judiciary and the Senate Comm. on the Judiciary, 105th Cong. (1997) (Testimony of Renee Chelian, President, National Coalition of Abortion Providers).

⁶ ACOG Statement of Policy, *Statement on Intact Dilatation and Extraction* (July 12, 1997); Letter from Fernando M. Treviño, Executive Director, American Public Health Association, to President Clinton, The White House (Apr. 10, 1996); Letter from Geri Marullo, Executive Director, American Nurses Association, to Honorable Barbara Boxer, United States Senate (Nov. 8, 1995); Letter from Jean L. Fourcroy, President, American Medical Women's Association, Inc., to President William J. Clinton, The White House (Mar. 4, 1996); Letter from Eugene S. Ograd, II, President, California Medical Association, to Rep. Sam Farr (Oct. 24, 1995); Physicians for Reproductive Choice and Health, *Statement on Santorum Bill (H.R.1122/S.6) Banning a Procedure Known Medically As Dilatation and Extraction* (May 20, 1997), at 145 CONG. REC. S12,867 (1999).

⁷ Stephen T. Chasen, MD, Robin B. Kalish, MD, Meruka Gupta, Jane E. Kaufman, MD, William K. Rashbaum, MD, and Frank A. Chervenak, MD, *Dilation and Evacuation at ≥20 Weeks: Comparison of Operative Techniques*, 190 AM. J. OBSTETRICS & GYNECOLOGY 1180, (2004).

⁸ *Carhart v. Ashcroft*, 331 F. Supp. 2d at 1022.

⁹ *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁰ See, e.g., *Planned Parenthood of Idaho v. Wasden*, 376 F.3d 908 (9th Cir. 2004) (striking down parental-consent statute because it does not provide a constitutionally adequate exception to protect the health of minors who require an abortion to avert serious threats to their health); *Planned Parenthood of the Rocky Mountains, Corp. v. Owens*, 287 F.3d 910 (10th Cir. 2002) (striking down law mandating parental consent before a minor may obtain an abortion for failing to contain an exception for women's health); *Richmond Med. Ctr. for Women v. Gilmore*, 219 F.3d 376 (4th Cir. 2000) (striking down ban on abortion procedures because the Supreme Court has "unequivocally held" that to be constitutional, any ban on abortion must include an exception for the health of the woman); *Richmond Med. Ctr. for Women v. Hicks*, 409 F.3d 619 (4th Cir. 2005) (affirming a district court decision that struck down ban on abortion procedures for

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failing to contain an exception to protect a woman's health); *Planned Parenthood of N. New England v. Heed*, 296 F. Supp. 2d 59 (D.N.H. 2003) (striking down law requiring parental notification before a minor may obtain an abortion for failing to contain an exception to protect a woman's health); *Summit Med. Assoc. v. Siegelman*, 130 F. Supp. 2d 1307 (M.D. Ala. 2001) (striking down ban on abortion procedures because it lacks an exception to protect a woman's health); *Daniel v. Underwood*, 102 F. Supp. 2d 680 (S.D. W. Va. 2000) (striking down ban on abortion procedures because it lacks an exception to protect a woman's health); *but see Women's Med. Prof'l Corp. v. Taft*, 353 F.3d 436 (6th Cir. 2003) (upholding as constitutional ban on abortion procedures containing a narrow health exception allowing banned procedures only if a woman's health is "endangered by a serious risk of the substantial and irreversible impairment of a major bodily function," which is "any medically diagnosed condition that so complicates the pregnancy of the woman as to directly or indirectly cause the substantial and irreversible impairment of a major bodily function.").

¹¹ *Stenberg*, 530 U.S. 914 (2000).

¹² *Stenberg*, 530 U.S. at 930, 933-940.

¹³ *Stenberg*, 530 U.S. at 932.

¹⁴ *Stenberg*, 530 U.S. at 938.

¹⁵ See generally NARAL PRO-CHOICE AMERICA & NARAL PRO-CHOICE AMERICA FOUNDATION, *Who Decides? The Status of Women's Reproductive Rights in the United States* (19th ed. 2010), available at http://www.prochoiceamerica.org/choice-action-center/in_your_state/who-decides/.

¹⁶ *Gonzales v. Carhart* and *Gonzales v. Planned Parenthood Federation of America*, 127 S.Ct. 1610 (2007).

¹⁷ *Carhart/PPFA*, 127 S.Ct. at 1634 (internal citations omitted)(emphasis added).

¹⁸ *Carhart/PPFA*, 127 S.Ct. at 1641 (Ginsburg, J., dissenting).

¹⁹ *Carhart/PPFA*, 127 S.Ct. at 1646 (Ginsburg, J., dissenting).

²⁰ *Carhart/PPFA*, 127 S.Ct. at 1647 (Ginsburg, J., dissenting).

²¹ *Carhart/PPFA*, 127 S.Ct. at 1650 (Ginsburg, J., dissenting).

²² *Carhart/PPFA*, 127 S.Ct. at 1653 (Ginsburg, J., dissenting).

²³ *Carhart/PPFA*, 127 S.Ct. at 1653 (Ginsburg, J., dissenting) (internal citations omitted).

²⁴ *Carhart/PPFA*, 127 S.Ct. at 1650 (Ginsburg, J., dissenting) (internal citations omitted).

²⁵ Mark Taylor, *John Ashcroft to Subpoena Medical Records of Abortions Patients*, DAILY NEWS ONLINE, from CHICAGO BUSINESS, Feb. 9, 2004; Robert Pear & Eric Lichtblau, *Administration Sets Forth a Limited View on Privacy*, N.Y. TIMES, Mar. 6, 2004, at A8; *Ashcroft Addresses Abortion Records Request*, ASSOCIATED PRESS, Feb. 13, 2004.

²⁶ Dan Eggen, *Ashcroft: Abortion Records Needed*, WASH. POST, Feb. 13, 2004, at A11.

²⁷ *Nat'l Abortion Fed'n v. Ashcroft*, No. 04 C 55, 2004 U.S. Dist. WL 292079, at 6 (N.D. Ill Feb. 6, 2004).

²⁸ Robert Pear & Eric Lichtblau, *Administration Sets Forth a Limited View on Privacy*, N.Y. TIMES, Mar. 6, 2004, at A8.

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²⁹ Robert Pear & Eric Lichtblau, *Administration Sets Forth a Limited View on Privacy*, N.Y. TIMES, Mar. 6, 2004, at A8.

³⁰ See, e.g., *Nat'l Abortion Fed'n v. Ashcroft*, No. 03 Civ. 8695(RCC), 2004 WL 555701 (S.D.N.Y. Mar. 19, 2004); *Planned Parenthood Fed'n of Am. v. Ashcroft*, No. C03-4872 PJH, 2004 WL 432222 (N.D. Cal. Mar. 5, 2004); *Nat'l Abortion Fed'n v. Ashcroft*, No. 04 C 55, 2004 WL 292079 (N.D. Ill Feb. 6, 2004), *aff'd*, *Northwestern Mem'l Hosp. v. Ashcroft*, 362 F.3d 923 (7th Cir., 2004).