



**NARAL**  
Pro-Choice America Foundation

## MEMORANDUM

To: Interested Parties  
From: NARAL Pro-Choice America Legal and Policy Research Department  
Date: April 19, 2007  
Re: Supreme Court Decision in Federal Abortion Ban Cases

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***"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."***

***- Justice Ruth Bader Ginsburg, dissenting***

Yesterday, in a stunning retreat from more than three decades of precedent, the U.S. Supreme Court upheld the first-ever federal ban on abortion. The ban outlaws certain second-trimester abortions and has no exception for cases when a woman's health is in danger. 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 upheld a dangerous and invasive federal law, it gave the green light to anti-choice politicians to enact new restrictions to test the shrinking contours of the right to privacy.

### **COURT UPHOLDS FIRST-EVER FEDERAL ABORTION BAN WITHOUT HEALTH EXCEPTION**

In *Gonzales v. Carhart* and *Gonzales v. Planned Parenthood Federation of America*, the Supreme Court handed down the most notable reproductive rights decision in at least 15 years.<sup>1</sup> In one fell swoop, it not only upheld the Federal Abortion Ban,<sup>2</sup> but created precedent that will negatively impact reproductive rights litigation for the foreseeable future.

***Past Supreme Court Precedent Protects Women's Health***

Prior Supreme Court caselaw had repeatedly reaffirmed that abortion restrictions must include health exceptions in order to be constitutional. But the Court's decision in the Federal Abortion Ban cases casts significant doubt on the continuing vitality of that protection. Earlier cases affirming the safeguard for women's health include:

- ***Roe v. Wade (1973)***:<sup>3</sup> The Supreme Court invalidated Texas' near-total abortion ban by a vote of 7-2. In its opinion, the Court placed great emphasis on the need to protect women's health, holding that after the first trimester a state may regulate abortion to promote women's health, and that after fetal viability abortion may be regulated or prohibited only if there are exceptions to protect the woman's life and health.
- ***Doe v. Bolton (1973)***:<sup>4</sup> Decided with *Roe v. Wade*, in *Doe* the Court held that a physician must be allowed to consider all factors relevant to a woman's health when providing abortion services.
- ***Planned Parenthood of Southeastern Pennsylvania v. Casey (1992)***:<sup>5</sup> By a narrow 5-4 vote, the Court reaffirmed *Roe v. Wade*'s essential holding, and reiterated that abortion restrictions must protect women's health. The Court recognized the right of a woman to choose abortion before viability and to obtain it without undue interference from the state, and affirmed a state's right to restrict abortion services after fetal viability, as long as the restriction contained exceptions to protect a woman's life and health.
- ***Stenberg v. Carhart (2000)***:<sup>6</sup> Again by a 5-4 margin, the Supreme Court held a Nebraska ban, which outlawed abortion care as early as the 12th week in pregnancy (a ban on so-called "partial-birth" abortion) unconstitutional. The Court struck the law down in large part because it had no exception for women's health. The Court also clarified that health exceptions must protect women against health risks caused by the pregnancy *as well as* health risks caused by a regulation that would force a doctor to choose a less medically appropriate procedure. "[A] risk to a woman's health is the same whether it happens to arise from regulating a particular method of abortion, or from barring abortion entirely."<sup>7</sup> The Court explicitly recognized that "the absence of a health exception will place women at an unnecessary risk of tragic health consequences."<sup>8</sup>

### ***Litigation History of Federal Abortion Ban***

In defiance of the *Stenberg* decision, an anti-choice Congress passed the Federal Abortion Ban, and anti-choice President Bush signed it into law in 2003. The federal ban is very similar to the Nebraska law at issue in *Stenberg*, and the lower federal courts that considered the Federal Abortion Ban unanimously found the law unconstitutional.<sup>9</sup> The courts declared the ban unconstitutional for the same two primary reasons the Court had addressed in *Stenberg*: First, the statute provides no exception for cases in which a woman's health is at risk. Second, the courts found that the statutory language was so broad that it could outlaw abortion as early as the 12th week of pregnancy. However, in the Federal Abortion Ban decision, the Supreme Court reversed the lower courts on both issues, ruling that a health exception is not an absolute requirement, and that the ban was limited to a particular procedure and was thus constitutional: "We conclude that the Act is not void for vagueness, does not impose an undue burden from any overbreadth, and is not invalid on its face."<sup>10</sup>

### *Three Opinions – Majority, Concurrence, and Dissent*

The Court delivered one decision, 5-4, in the two cases challenging the constitutionality of the Federal Abortion Ban. There were three opinions. Justice Kennedy authored the majority opinion, which upheld the ban. He was joined by Chief Justice Roberts and Justices Alito, Scalia, and Thomas. Justice Thomas wrote a brief concurring opinion, joined by Justice Scalia, to “reiterate [his] view that the Court’s abortion jurisprudence, including *Casey* and *Roe v. Wade*, 410 U.S. 113 (1973), has no basis in the Constitution.”<sup>11</sup> Interestingly, the concurrence also noted that the Court had not considered whether the Commerce Clause provided a sufficient basis for regulation in this case, because the issue had not been raised by the parties. Justice Ginsburg dissented and was joined by Justices Breyer, Souter, and Stevens.

### *The Majority Opinion*

The majority opinion, authored by Justice Anthony Kennedy – whose last-minute vote switch kept *Roe* from being overturned in 1992 in *Casey*<sup>12</sup> – sets distressing precedent not only from a legal perspective, but is also alarming in its incorporation of anti-choice rhetoric and propaganda. In the opinion, the Court focuses almost exclusively on the fetus, virtually dismissing out-of-hand both extensive medical evidence and all of the lower court findings that the banned procedures are sometimes necessary to protect women’s health.

In upholding the Federal Abortion Ban, the Court allowed Congress to prohibit certain previability abortions without providing any exception to protect women’s health, despite evidence that upholding the ban would force doctors to use less-safe procedures. This decision is squarely at odds with the Court’s holdings in *Roe* and its progeny, and cannot be credibly reconciled with the Court’s decision in *Stenberg* in 2000.

Justice Kennedy attempted to distinguish the ban decision from the Court’s opposite result in *Stenberg* on two grounds: “First, Congress made factual findings. . . . Second, and more relevant here, the Act’s language differs from that of the Nebraska statute struck down in *Stenberg*.”<sup>13</sup> But as the lower courts and the dissenting Justices in the current cases noted, Congress’ purported “factual findings” were fraught with errors, and the federal ban’s language, while slightly different from the Nebraska statute, is insufficient to provide doctors with enough guidance to know what conduct is prohibited. Furthermore, neither of these alleged justifications addresses the issue at the heart of *Stenberg*: that a restriction on abortion must contain an exception to protect women’s health.

The congressional findings put forth in the law were clearly drafted in an attempt to justify not including a health exception, and the Court’s endorsement of those extremely flawed findings is especially troubling. The findings were the result of a rushed and biased hearing process led by anti-choice lawmakers, and are riddled with legal, factual, and medical errors, as even the majority was forced to concede regarding some of the findings:

As respondents have noted, and the District Courts recognized, some recitations in the Act are factually incorrect. Whether or not accurate at the time, some of the important findings have been superseded. Two examples suffice. Congress determined no medical schools provide instruction on the prohibited procedure. The testimony in the District Courts, however, demonstrated intact D&E is taught at medical schools. Congress also found there existed a medical consensus that the prohibited procedure is never medically necessary. The evidence presented in the District Courts contradicts that conclusion.<sup>14</sup>

The federal district courts that evaluated the Congressional findings in detail following lengthy trials in the cases challenging the Federal Abortion Ban were less restrained in their criticism of the findings:

- “Congress’ grossly misleading and inaccurate language... appears to have been intentional.”<sup>15</sup> “Congress did not hold extensive hearings, nor did it carefully consider the evidence before arriving at its findings.”<sup>16</sup> “Congress was plainly mistaken,” and “the congressional record disproves the Congressional Findings.”<sup>17</sup> “[M]any of Congress’ legal interpretations are inaccurate,” and “pertinent congressional findings grossly mischaracterize the state of the trial evidence in *Stenberg*.”<sup>18</sup>
- Individual findings are “grossly misleading and inaccurate,” “factually wrong,” “legally irrelevant,”<sup>19</sup> and findings in general are “contraindicated by the record that Congress gathered,” and are “unreasonable and not supported by substantial evidence.”<sup>20</sup>
- “Even the Government’s own experts disagreed with almost all of Congress’s factual findings.”<sup>21</sup>

Nonetheless, the majority opinion endorses some of the findings and fails to refute others, tacitly validating them as well. As noted by the dissenting Justices:

The congressional findings on which the Partial-Birth Abortion Ban Act rests do not withstand inspection, as the lower courts have determined and this Court is obliged to concede. . . . Many of the Act’s recitations are incorrect. . . . More important, Congress claimed there was a medical consensus that the banned procedure is never necessary. But the evidence ‘very clearly demonstrate[d] the opposite.’<sup>22</sup>

### ***Shifting Focus Away From Women With Anti-Choice Rhetoric***

As it turned its back on historical protections for women’s health, the Court adopted additional protections for “potential life.” Kennedy wrote: “*Casey* reaffirmed . . . [that] the government may use its voice and its regulatory authority to show its profound respect for the life within the woman. A central premise of the opinion was that the Court’s precedents after *Roe* had ‘undervalue[d] the State’s interest in potential life.’”<sup>23</sup> However, while the Court had previously recognized that the government has an interest in protecting potential life, never before had the Court held that that interest, prior to viability, should trump a woman’s right to terminate a pregnancy, particularly if her health is endangered.

The Court's adoption of anti-choice rhetoric as fact is particularly distressing, as noted in the dissent:

The Court's hostility to the right *Roe* and *Casey* secured is not concealed. Throughout, the opinion refers to obstetrician-gynecologists and surgeons who perform abortions not by the titles of their medical specialties, but by the pejorative label 'abortion doctor.' *Ante*, at 14, 24, 25, 31, 33. A fetus is described as an 'unborn child,' and as a 'baby,' *ante*, at 3, 8; second-trimester, previability abortions are referred to as 'late-term,' *ante*, at 26; and the reasoned medical judgments of highly trained doctors are dismissed as 'preferences' motivated by 'mere convenience,' *ante*, at 3, 37.<sup>24</sup>

The 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. *Casey, supra*, at 852-853 (opinion of the Court). **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. See Brief for Sandra Cano et al. as *Amici Curiae* in No. 05-380, pp. 22-24. Severe depression and loss of esteem can follow. See *ibid.*<sup>25</sup>

The "source" the Court cites for this unquestionably non-legal 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 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.

Only after expanding the protection for "potential life" to the detriment of women and endorsing the flawed congressional findings, does the Court finally turn to the issue of women's health, 31 pages into the opinion. Justice Kennedy rather dismissively minimizes the issue raised by women who may need a banned procedure to protect their health, focusing instead on the wide range of cases in which the ban will apply:

We note that the statute here applies to all instances in which the doctor proposes to use the prohibited procedure, not merely those in which the woman suffers from medical complications. It is neither our obligation nor within our traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop.<sup>26</sup>

In fact, Supreme Court precedent has *consistently* resolved similar issues regarding the constitutionality of restrictions on abortion by examining the potential impact of the law on

women. Where those restrictions presented a threat to women's health, the Court declared the laws unconstitutional, as it did in *Stenberg*.

### ***Court Purports to Distinguish Stenberg, Casey, and Roe***

Rather than directly confronting the discrepancies between prior case law and its ruling, the majority sidestepped the issue by asserting that its decision is consistent with *Casey*, *Roe*, and even *Stenberg*. Notably however, the majority did not reaffirm those cases, instead referring to them as "precedent[s] we here assume to be controlling."<sup>27</sup> The Court's seemingly disingenuous decision will likely further muddy the waters in reproductive rights jurisprudence and may foreshadow a larger reconsideration of core protections for a woman's right to choose. As Justice Ginsburg explained in her dissent: "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*]."<sup>28</sup>

### ***Limited Safeguard for Doctors and Women***

Only two points in the majority opinion provide any hope of protection for women's health. First, the Court held that the ban only applies if a doctor providing an abortion has the requisite specific intent to perform a banned procedure. In articulating the intent needed, the Court somewhat limited the scope of the ban as drafted by Congress. However, the Court's clumsy and non-medical description of procedures in the decision could prove difficult for doctors – and prosecutors, juries, and judges – to apply. This may allow doctors to continue to provide some second-trimester abortions, but given the threat of criminal prosecutions, it is unclear how many doctors will be willing to take that risk. Particularly troubling is the likelihood that the Department of Justice will subpoena women's medical records in an attempt to seek out evidence with which to prosecute their doctors.

A second small measure of protection for women's health in the decision relates to future potential challenges to the ban. The Court left open the possibility that "as-applied" challenges, rather than the facial challenges at issue in these cases, may be brought against the act. In a facial challenge, a suit challenges a law as unconstitutional on its face and addresses how a law *could* be enforced, while as-applied challenges require an individual woman or a class of women similarly situated to seek an injunction to stop a law from being applied based on her/their particular circumstances. Kennedy wrote that an as-applied challenge would be successful "if it can be shown that in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used."<sup>29</sup> But this solution is woefully inadequate to protect women's health on a larger scale, and undermines decades of precedent allowing doctors to sue to block enforcement of a law before it goes into force and endangers patients. As Justice Ginsburg wrote in her dissent, "[i]f there is anything at all redemptive to be said of today's opinion, it is that the Court is not willing to foreclose entirely a constitutional challenge to the Act."<sup>30</sup> However, the redemption is limited because "[a] woman 'suffer[ing] from medical complications,' *ante*, at 38, needs access to the medical procedure at once and cannot wait for the judicial process to unfold."<sup>31</sup>

## *The Dissenting Opinion*

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. Those four Justices, along with Justice O'Connor, formed the majority in *Stenberg*.

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.<sup>32</sup>

The four dissenting Justices were not persuaded by the majority's tortured logic and mischaracterization of case law. The dissent opined 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."<sup>33</sup>
- "Ultimately, the Court admits that 'moral concerns' are at work, concerns that could yield prohibitions on any abortion."<sup>34</sup>
- "The Court's hostility to the right *Roe* and *Casey* secured is not concealed."<sup>35</sup>
- "[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."<sup>36</sup>
- "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."<sup>37</sup>

## DECISION HAS FAR-REACHING IMPLICATIONS

Beyond the Federal Abortion Ban itself, the Court's decision establishes very troubling precedent for reproductive rights. Areas of particular concern include:

**Viability no longer the defining point:** The *Roe* court established and the *Casey* court clarified that viability was the bright-line rule for when the government may significantly restrict abortion. The Federal Abortion Ban decision blurs this line. The ban does not distinguish between pre- and

postviability abortions, and the Court's decision to uphold a previability ban that lacks a health exception seems to indicate that viability is no longer a bright-line test.

**A lower standard may apply to restrictions on abortion:** The majority opinion appears to lower the bar abortion restrictions must meet to be found constitutional; a standard that had already been lowered significantly in *Casey*.

In *Roe*, the Court declared that first-trimester abortion restrictions would be subject to strict scrutiny, and second-trimester restrictions would be subject to a slightly lower standard, and would be acceptable only if "the regulation reasonably relates to the preservation and protection of maternal health."<sup>38</sup> In *Casey* the Court eliminated the trimester framework, and replaced it with the previability/postviability distinction, creating the "undue burden" standard for review of previability abortion restrictions. Under that standard, a law is invalid if it has "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."<sup>39</sup>

By outlawing a particular procedure, the Federal Abortion Ban has both the purpose and effect of placing a substantial obstacle in the path of some women seeking to terminate a pregnancy prior to viability. The Court not only found to the contrary, however, it appeared to further increase the deference courts should give to restrictions on abortion, requiring only that the government have a "rational" basis for enacting such restrictions. As Justice Ginsburg explains: "Instead of the heightened scrutiny we have previously applied, the Court determines that a 'rational' ground is enough to uphold the Act."<sup>40</sup>

Rational basis is the lowest standard of review applicable to evaluation of government regulations. Using the rational basis test to review abortion restrictions would constitute a major shift in the Court's interpretation of those restrictions, and would be disastrous for reproductive rights. Many, if not most, restrictions could be upheld as long as anti-choice lawmakers could put forth any justification that was not clearly irrational to support a regulation.

**When and by whom challenges will be brought:** The Court's rejection of a facial challenge to the statute, and its reference to as-applied challenges as "the proper means to consider exceptions"<sup>41</sup> to the ban, casts doubt on the ability of doctors and advocates to enjoin restrictive laws before they are enforced and endanger any patient's health. Were as-applied challenges to become the rule instead of the exception as they have been since the 1970s, *Roe*'s protections would be rendered meaningless for the majority of women, especially those who lack the resources and/or time to bring a constitutional challenge against an anti-choice law. It is not clear how sweeping the Court meant its endorsement of as-applied challenges to be, but at the very least the Federal Abortion Ban decision could make it more difficult for pre-enforcement facial challenges by doctors and advocates to obtain injunctive relief in other cases challenging abortion restrictions.

**Politicians may essentially practice medicine without a license:** By expressly or tacitly endorsing virtually all of Congress' "findings," as discussed in more detail above, the Court emboldened anti-choice politicians to supplant the judgment of medical professionals, such as the American College of

Obstetricians and Gynecologists (the organization that represents 90 percent of the country's obstetricians and gynecologists), and courts.

## **BUSH'S APPOINTEES PROVIDE VOTES THAT EVISCERATE CORE PROTECTION OF ROE**

President Bush's additions to the Court, John Roberts and Samuel Alito, provided the votes necessary to uphold the Federal Abortion Ban. While these votes were not entirely unexpected given both Justices' anti-choice records, the decision validates pro-choice Americans' fears about the direction in which the Bush administration has moved the Court.

Both Chief Justice Roberts and Justice Alito made conflicting statements during their confirmation hearings. While they claimed to respect "settled law,"<sup>42</sup> their evasiveness on the issues of a woman's right to choose and the importance of precedent, combined with their prior anti-choice records, led NARAL Pro-Choice America and other pro-choice groups to strongly oppose their confirmations. Reproductive-rights advocates' worst fears were realized when, with the Federal Abortion Ban decision, it became clear that Roberts' and Alito's answers to the Senate Judiciary Committee were carefully tailored, leaving them room to eviscerate, and perhaps ultimately overturn, *Roe*.

Justice Ginsburg pointed out this shift in the Court in her dissent:

Though today's opinion does not go so far as to discard *Roe* or *Casey*, the Court, differently composed than it was when we last considered a restrictive abortion regulation, is hardly faithful to our earlier invocations of 'the rule of law' and the 'principles of *stare decisis*.'<sup>43</sup>

With respect to Alito in particular, the Federal Abortion Ban decision caps a long history of anti-choice legal activism. While an attorney at the Department of Justice during the Reagan administration, Samuel Alito wrote a memorandum to his superiors discussing then-pending abortion cases. He noted that *Roe* was unlikely to be overturned in the near future, but strategized about ways to undermine it until that ultimate goal was within reach: "What can be made of this opportunity to advance the goals of bringing about the eventual overruling of *Roe v. Wade* and, in the meantime, of mitigating its effects?"<sup>44</sup> More than 20 years later, by providing the decisive vote to uphold the Federal Abortion Ban, Alito took a significant step toward his immediate goal of "mitigating [the] effects" of *Roe*'s critical protections. While Alito's predecessor, Justice O'Connor, cast her vote seven years ago to protect women from overbroad abortion bans, Alito cast his to secure a Bush administration victory over women's health.

## **DECISION OPENS FLOODGATES FOR ANTI-CHOICE LEGISLATION**

The Court's upholding of the Federal Abortion Ban will surely prompt increased legislation, particularly in the states. While as a result of the 2006 elections Congress is now under pro-choice control, many state legislatures and governors' offices are dominated by anti-choice politicians who – encouraged by activists who have been hungry for a significant legal victory for more than 30 years – will be eager to provide the Roberts Court with opportunities to

further limit the constitutional right to privacy and a woman's right to choose. Fourteen states have fully anti-choice state legislatures and governors, and numerous other states have lawmakers who may not seek to impose near-total bans on abortion, but will likely attempt new incremental restrictions.<sup>45</sup>

As the president of Operation Rescue, a leading anti-choice group, said in response to the decision: "This is the first legal crack in the crumbling *Roe v. Wade* foundation, and is the first, necessary step toward banning the horrific practice of abortion in this nation . . . If partial-birth abortions are unconstitutional, then all abortion should be as well."<sup>46</sup>

## **FEDERAL BAN TRUMPS STATE LAWS AND CONSTITUTIONS**

For the first time since *Roe* guaranteed all American women the right to choose, the federal government has eliminated the ability of states to provide additional protections for women pursuant to state laws. In the past, states have been able to compensate if the federal government attempted to restrict access to abortion. For example, while the Hyde amendment prohibited states from using federal funds to provide abortion services to Medicaid recipients, many states have ensured access for low-income women through their own state funds.

But the Federal Abortion Ban, which the Bush Department of Justice will soon be empowered to enforce, trumps state laws and constitutions that offer greater protection for a woman's right to choose than does the federal constitution. Solidly pro-choice states are now subject to an abortion restriction enacted by an anti-choice Congress. Sixteen states have constitutions that provide greater protection for a woman's right to choose than does the federal constitution (AK, AZ, CA, CT, FL, IL, IN, MA, MN, MT, NJ, NM, OR, TN, VT, WV), some of which would prevent a state law identical to the federal law from going into effect. And seven states (CA, CT, HI, ME, MD, NV, WA) have codified a woman's right to choose, making the protections of *Roe v. Wade* part of state law. But those protections are meaningless to the extent that they conflict with the Federal Abortion Ban, which applies nationwide.

## **CONCLUSION: ROE HANGS BY A THREAD**

The Federal Abortion Ban decision will have lasting legal, health, and political consequences. In *Webster v. Reproductive Health Services*, a Supreme Court case decided in 1989, only four Justices wrote that *Roe* should be upheld. *Roe's* author, Justice Blackmun, wrote of the Court's move away from *Roe's* strong protections, "the signs are evident and very ominous, and a chill wind blows."<sup>47</sup> The *Casey* decision in 1992 delayed a full retreat from *Roe*. But the Federal Abortion Ban decision provides a still more ominous sign for the future of a woman's right to choose.

**For more information about the legal or other policy implications of the Federal Abortion Ban decision, please contact:**

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Notes:

<sup>1</sup> *Gonzales v. Carhart* and *Gonzales v. Planned Parenthood Federation of America*, ---U.S.--- WL 1135596 (U.S. Apr. 18, 2007).

<sup>2</sup> Partial-Birth Abortion Ban Act of 2003, 18 U.S.C.A. § 1531 (2003).

<sup>3</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>4</sup> *Doe v. Bolton*, 410 U.S. 179 (1973).

<sup>5</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

<sup>6</sup> *Stenberg v. Carhart*, 530 U.S. 914 (2000).

<sup>7</sup> *Stenberg*, 530 U.S. at 931.

<sup>8</sup> *Stenberg*, 530 U.S. at 937.

<sup>9</sup> *Carhart v. Ashcroft*, 287 F. Supp. 2d 1015 (D. Neb. 2004), *aff'd sub nom. Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005), *cert. granted*, 126 S. Ct. 1314 (2006) (No. 05-380); *Nat'l Abortion Fed'n v. Gonzales*, 287 F. Supp. 2d 525 (S.D.N.Y. 2003), *aff'd*, *Nat'l Abortion Fed'n v. Gonzales*, 437 F.3d 278, (2d Cir. 2006); *Planned Parenthood Fed'n of Am. v. Gonzales*, 320 F. Supp. 2d 957 (N.D. Cal. 2004), *aff'd*, *Planned Parenthood Fed'n of Am. v. Gonzales*, 435 F.3d 1163, (9th Cir. 2006), *cert. granted*, 126 S. Ct. 2901 (2006) (No. 05-1382).

<sup>10</sup> *Carhart/PPFA*, at \*16.

<sup>11</sup> *Carhart/PPFA*, at \*30.

<sup>12</sup> Anne Gearan, *Roe v. Wade Author Was Worried of Politics*, ASSOC. PRESS ONLINE, March 4, 2004.

<sup>13</sup> *Carhart/PPFA*, at \*12.

<sup>14</sup> *Carhart/PPFA*, at \*28 (internal citations omitted).

<sup>15</sup> *Planned Parenthood Fed'n of Am.*, 320 F. Supp. 2d at 1030.

<sup>16</sup> *Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 482.

<sup>17</sup> *Carhart*, 331 F. Supp. 2d at 1010, 1015.

<sup>18</sup> *Planned Parenthood Fed'n of Am.*, 320 F. Supp. 2d at 1003, 1004.

<sup>19</sup> *Planned Parenthood Fed'n of Am.*, 320 F. Supp. 2d at 1024, 1030.

<sup>20</sup> *Carhart*, 331 F. Supp. 2d at 1008, 1010.

<sup>21</sup> *Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 482.

<sup>22</sup> *Carhart/PPFA*, at \*33-34 (Ginsburg, J., dissenting)(internal citations omitted).

<sup>23</sup> *Carhart/PPFA*, at \*23 (internal citations omitted).

<sup>24</sup> *Carhart/PPFA*, at \*39 (Ginsburg, J., dissenting).

<sup>25</sup> *Carhart/PPFA*, at \*23 (emphasis added).

<sup>26</sup> *Carhart/PPFA*, at \*29.

<sup>27</sup> *Carhart/PPFA*, at \*25.

<sup>28</sup> *Carhart/PPFA*, at \*39 (Ginsburg, J., dissenting)(internal citations omitted).

<sup>29</sup> *Carhart/PPFA*, at \*29.

<sup>30</sup> *Carhart/PPFA*, at \*41 (Ginsburg, J., dissenting).

<sup>31</sup> *Carhart/PPFA*, at \*41 (Ginsburg, J., dissenting).

Notes, cont'd:

<sup>32</sup> *Carhart/PPFA*, at \*31 (Ginsburg, J., dissenting).

<sup>33</sup> *Carhart/PPFA*, at \*37 (Ginsburg, J., dissenting).

<sup>34</sup> *Carhart/PPFA*, at \*37 (Ginsburg, J., dissenting).

<sup>35</sup> *Carhart/PPFA*, at \*39 (Ginsburg, J., dissenting).

<sup>36</sup> *Carhart/PPFA*, at \*42 (Ginsburg, J., dissenting).

<sup>37</sup> *Carhart/PPFA*, at \*42 (Ginsburg, J., dissenting)(internal citations omitted).

<sup>38</sup> *Roe*, 410 U.S. at 163.

<sup>39</sup> *Casey*, 505 U.S. at 877.

<sup>40</sup> *Carhart/PPFA*, at \*39 (Ginsburg, J., dissenting).

<sup>41</sup> *Carhart/PPFA*, at \*29.

<sup>42</sup> Memorandum from NARAL Pro-Choice America Legal and Policy Research Department, to Interested Parties, *The Artful Dodger: John Roberts Leaves Too Many Questions Unanswered* (Sept. 19, 2005); Memorandum from NARAL Pro-Choice America Legal and Policy Research Department, to Interested Parties, *Vital Questions Not Answered, A Clear Anti-Choice Record Not Disavowed: Alito Is Still Wrong for the Supreme Court* (Jan. 23, 2006).

<sup>43</sup> *Carhart/PPFA*, at \*42 (Ginsburg, J., dissenting).

<sup>44</sup> Memorandum to the Solicitor General from Samuel A. Alito re: *Thornburgh v. American College of Obstetricians and Gynecologists* no. 84-495; *Diamond v. Charles*, No. 84-1379, May 30, 1985, at 8.

<sup>45</sup> See [http://www.prochoiceamerica.org/choice-action-center/in\\_your\\_state/who-decides/introduction/key-findings-political.html](http://www.prochoiceamerica.org/choice-action-center/in_your_state/who-decides/introduction/key-findings-political.html).

<sup>46</sup> Press Release, Operation Rescue, U.S. Supreme Court Ruling is First Step to Outlawing Abortion (Apr. 18, 2007).

<sup>47</sup> *Webster v. Reproductive Health Services*, 492 U.S. 490, 560 (1989)