



Abortion Bans Without Exceptions Endanger Women's Health

Roe v. Wade stands as a milestone to women's freedom and equality, and one of its most fundamental protections is that a woman's health must always be paramount. Yet 38 years after the Supreme Court recognized the right to choose and the vital importance of women's health,¹ attacks on women's privacy, and on health protections in particular, continue. Despite the court's clear rulings protecting women's health, anti-choice activists, legislators, and jurists continue to target its legal safeguards. Time after time, anti-choice lawmakers vote down proposed health exceptions to abortion restrictions,² and prominent anti-choice leaders openly state their opposition to protecting women's health as required by law.³ With the addition of George W. Bush's appointees Chief Justice John Roberts and Justice Samuel Alito to the U.S. Supreme Court, the balance on the nation's highest court has shifted.⁴ The court's opinion in the jointly decided cases of *Gonzales v. Planned Parenthood Federation of America* and *Gonzales v. Carhart*⁵ offers insight into *Roe*'s fate. These two cases challenged the Federal Abortion Ban, a nationwide ban that, as written, could have outlawed abortion as early as the 12th week in pregnancy but, as interpreted by the court, outlaws a second-trimester abortion method, one that doctors have said is necessary to protect some women's health. Startlingly, this ban has no health exception.⁶ By upholding the federal ban in *Carhart*, the court retreated from more than three decades of precedent that ensured that a woman's health must always be paramount. Future decisions based on this new precedent may further undermine *Roe* and endanger women's health.

The Supreme Court Has Long Recognized the Importance of Protecting Women's Health

- ***Roe v. Wade* (1973):**⁷ By a vote of 7-2, the Supreme Court invalidated a Texas law that prohibited all abortion care except when necessary to save the woman's life. The court placed great emphasis on 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):**⁸ Decided with *Roe v. Wade*, *Doe* invalidated provisions of Georgia's very restrictive abortion law. The law included among other requirements that a woman secure the approval of three physicians and a hospital committee before she could obtain abortion care. The court held that a physician's decision to provide abortion services must rest upon "his best clinical judgment," which includes all factors relevant to the woman's health, including physical condition, mental health, psychological condition, family circumstances, and age.
- ***Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992):**⁹ By a narrow 5-4 vote, the court reaffirmed *Roe v. Wade*'s essential holdings, including the centrality of women's

health. The court recognized the right of a woman to choose to have an abortion before viability and to obtain it without undue interference from the state. This decision affirmed a state's right to restrict abortion services after fetal viability but required that any restrictions contain exceptions to protect a woman's life and health.

- ***Stenberg v. Carhart (2000)***:¹⁰ By a slim 5-4 majority, the Supreme Court held unconstitutional Nebraska's ban that outlawed abortion care as early as the 12th week in pregnancy (a ban on so-called "partial-birth" abortion). The court struck down the law in large part because it failed to provide any protection for women's health. The court clarified that the health exception must protect women against health risks caused by the pregnancy *as well as* health risks caused by a regulation that forces 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."¹¹ The court explicitly recognized that "the absence of a health exception will place women at an unnecessary risk of tragic health consequences."¹²
- ***Ayotte v. Planned Parenthood (2006)***: The Supreme Court accepted this case to review two questions, one relating to the requirement of health exceptions in laws restricting abortion.¹³ Specifically, the court agreed to consider the question of whether a parental-notification law requires a medical emergency provision. The case was decided on largely technical grounds and returned to the lower courts for a final decision, but the court did restate its precedent that the government may not endanger women's health when regulating abortion services: "New Hampshire does not dispute, and our precedents hold, that a State may not restrict access to abortions that are 'necessary, in appropriate medical judgment, for preservation of the life or health of the mother.'"¹⁴ (While the lower court was considering the remanded case, New Hampshire legislators repealed the parental notification law at issue in its entirety, rendering the remaining issue moot.¹⁵)

The Supreme Court's Decision to Uphold the Federal Abortion Ban Marks a Critical Departure from its Precedent of Protecting Women's Health

Though for 38 years the court has respected the sanctity of protections for women's health recognized in *Roe*, with its decision to uphold the Federal Abortion Ban, the Supreme Court held that the government may force a woman to undergo a more dangerous medical procedure than the one her doctor would have recommended.

- ***Gonzales v. Planned Parenthood Federation of America and Gonzales v. Carhart (2007)***: The Supreme Court voted 5-4 to uphold the Federal Abortion Ban, a measure that outlaws certain second-trimester abortions and has no exception for cases when a woman's health is in danger. Changing course from their earlier decision in *Stenberg* which found unconstitutional a similar state ban in Nebraska, the justices reasoned that other procedures are available to women who would have undergone the banned procedure.¹⁶ The court's majority opinion also cited its unfounded concern that a woman might regret her choice to have an abortion as a reason for banning the medically appropriate procedure, without

offering a legal explanation as to how this concern justified endangering her own health or the health of other women for whom the procedure might be a medical necessity.¹⁷ Perhaps most ominously, President Bush's appointees to the court cast the critical votes to uphold the ban, signaling the first time the court has turned its back on *Roe's* core holding safeguarding women's health.

Legal Abortion Can Save Women's Lives and Safeguard Women's Health

Any regulation of abortion care must recognize the full range of health risks pregnant women face. Indeed, a clear majority of Americans believe that abortion must remain safe and legal to preserve a woman's health.¹⁸

Many women welcome pregnancy and can look forward to a safe childbirth; however, for some, pregnancy can be dangerous. Abortion restrictions that do not contain exceptions to protect women's health endanger these women. Without health exceptions, women who have dangerous pregnancies would be forced to continue the pregnancy at the expense of their own health and sometimes lives:

- Vikki Stella, a diabetic, discovered during her 32nd week of pregnancy that the fetus she was carrying suffered from several major anomalies and had no chance of survival. Because of Vikki's diabetes, her doctor determined that induced labor and Caesarian section were both riskier procedures for Vikki than an abortion. The procedure not only protected Vikki from immediate medical risks, but also ensured that she would be able to have children in the future.¹⁹
- Jennifer Peterson was 35 and pregnant when she discovered a lump in her breast. Tests showed she had invasive breast cancer.²⁰ The cancer and its treatment, separate and apart from the pregnancy, were a threat to her health. A health exception recognizes the added threat to her health posed by pregnancy during the onset and treatment of her cancer, while without such an exception Jennifer would have been forced to continue her dangerous pregnancy. About one in 3,000 pregnant women also has breast cancer during her pregnancy, and for these women, a health exception is absolutely necessary.²¹
- Beth Whalen, a 40-year-old mother of one, was diagnosed with heart disease after the birth of her son. She learned that any subsequent pregnancy could shave 10 years off her life.²² Without a health exception that considers the risk that pregnancy poses to Beth's long-term survival, Beth and women like her would be forced to carry dangerous pregnancies to term.
- Doctors report that many pregnant women with heart-valve disorders die each year from blood clots which, absent pregnancy, would not be life threatening.²³ A physician who specializes in maternal cardiac medicine said that there are "extreme pregnancy-associated risks" for women with these heart conditions. The doctor explained that: "A high risk of maternal mortality has implications not just for the mother but also for any potential baby and siblings at home. And even if she survives the pregnancy, the woman may have a reduced life expectancy or suffer from limited physical capacity."²⁴ For a woman presenting late in a pregnancy with a severe heart disorder, a health exception recognizes the totality of

the risks she faces and allows her to make the best decision for her health, her life, and her family.

A health exception also must account for the mental-health problems that may occur in pregnancy. Severe fetal anomalies, for example, can exact a tremendous emotional toll on a pregnant woman and her family.

- Gilda Restelli was nearly 30 weeks pregnant when doctors discovered that her fetus had only fragments of a skull and almost no brain. Medical experts told Gilda and her husband that their baby had almost no chance of survival after birth. She quit her job, not because she was physically incapacitated, but because she could no longer bear the hearty congratulations of strangers who were unaware of the tragic circumstances surrounding her pregnancy. The Restellis made the agonizing decision to end the pregnancy, and even though state law included a health exception, the couple had to battle government officials to ensure doctors would not be prosecuted for providing Gilda with abortion care.²⁵
- Claudia Crown Ades and her husband discovered in her second trimester that their fetus had a genetic disorder known as Trisomy 13, which caused the fetus to have “a fluid filled nonfunctional brain” and a “malformed heart.”²⁶ Following the advice of her doctor and two specialists, she had an abortion that helped protect her fertility and allowed her to have children in the future.²⁷
- During the seventh month of Coreen Costello’s third pregnancy her doctors determined that her fetus was suffering from a lethal neurological disorder. Because of their profound religious beliefs, the Costellos wanted to undergo a natural delivery process, but after Coreen’s health worsened, her doctors discovered that the head was too large to fit through Coreen’s cervix; a traditional delivery would have cost Coreen her fertility. After much anguish, Coreen accepted her physician’s recommendation that an abortion was the most appropriate option for her. She later stated: “Because of the safety of this procedure ... I can have another healthy baby.”²⁸
- When two doctors confirmed that, among other ailments, Tammy Watts’s fetus had no eyes and extensive internal organ abnormalities including kidneys that were already failing, Tammy and her husband recognized that their much-wanted child would never survive.²⁹ After her experience, Tammy said: “You can’t take this away from women and families. You can’t. It’s so important that we be able to make these decisions, because we’re the only ones who can.”³⁰
- Because Viki Wilson’s fetus suffered from encephalocele, two-thirds of its brain had formed outside its skull and it tragically would not survive. A traditional birthing process would have not only further harmed the fetus, but likely would have ruptured Viki’s uterus as well. Her doctor also determined that a caesarean section would be too dangerous. An abortion was the safest solution for Viki, who called the procedure their “salvation.”³¹

Eliminating the Health Exception Is An Anti-Choice Tactic to Dismantle *Roe*

Anti-choice activists have already succeeded in changing the legal standards for assessing restrictions on a woman's right to choose; in *Casey* (1992), the court abandoned the most exacting standard of legal review applied to fundamental rights, "strict scrutiny," and instead implemented the less protective standard of asking merely whether a restriction imposes an "undue burden" on a woman's right to choose.³² A second avenue of attack on *Roe* is to restrict or eliminate altogether its protections for women's health. Anti-abortion activists consider the protection of women's health to be a "loophole" that must be closed. As they see it, eliminating the health exception would destroy another of the pillars of *Roe* and make further assaults on the core right to legal abortion more likely to succeed.

- Anti-choice activists fought for more than a decade to outlaw safe, pre-viability, second-trimester abortion methods without an exception to protect a woman's health. With the Supreme Court's decision in *Carhart* to uphold the Federal Abortion Ban – a case in which President Bush's anti-choice appointees Chief Justice John Roberts and Justice Samuel Alito cast decisive votes against women's health – the anti-choice movement had its first significant Supreme Court victory in 15 years, and arguably made its biggest step yet towards overturning *Roe* and eliminating constitutional protection for women's health in the abortion context.³³
- Anti-choice activists lobbied for years for state abortion bans similar to the Federal Abortion Ban. Of the 31 states that enacted legislation banning safe and medically appropriate abortion (so-called "partial-birth" abortion bans),³⁴ 29 enacted laws are completely devoid of *any* health exception.³⁵ Most of these laws are unconstitutional and unenforceable as written due to the court's 2000 decision in *Stenberg*. As a result of the court's 2007 decision in *Carhart*, many states seized the opportunity to enact abortion bans without appropriate health exceptions, despite the existence of the nationwide ban. In 2009 Arizona and Arkansas passed legislation amending their existing bans to bring them in line with the *Carhart* standard.³⁶ In addition, women have been robbed of federal protections from overreaching state laws previously found within the judicial system. In the wake of *Carhart*, the U.S. Supreme Court remanded a case enjoining Virginia's abortion ban back to a lower court for reconsideration. While the court had previously found the ban unconstitutional, in 2009 in *Herring v. Richmond Med. Ctr. for Women*, the Fourth Circuit Court of Appeals allowed the law to go into effect.³⁷
- Anti-choice activists admit that "inducing the Court to define 'health' in a restrictive manner represent[s] a beneficial strategy in reversing *Roe*."³⁸ Five sitting justices on the Supreme Court have already made clear their hostility to the health exception as originally established in *Roe* and *Doe*.

Anti-Choice Activists Even Reject Exceptions to Protect a Woman's Life:

"There is never a reason in law or in practice to advocate a 'life of the mother' exception for abortion."

-- American Life League

Declaration: Protecting the Life of the Mother, at
<http://www.all.org/article.php>

- In 2007 in *Carhart*, Chief Justice Roberts and Justices Alito, Kennedy, Scalia, and Thomas upheld a nationwide ban on a pre-viability abortion method even though it lacked any health exception whatsoever.³⁹
- Seven years earlier in *Stenberg*,⁴⁰ Justices Scalia, Thomas, and Kennedy, joined by former-Chief Justice Rehnquist, voted to uphold Nebraska's abortion ban that is similar to the federal ban upheld in *Carhart*, but former Justice O'Connor cast the decisive vote to protect women's health.
- In *Voinovich v. Women's Medical Professional Corporation*,⁴¹ the majority of the court refused to consider a case in which the lower court barred enforcement of Ohio's ban on post-viability abortion care. The Sixth Circuit Court of Appeals had held that because Ohio's law lacked a mental-health exception, the Ohio law conflicted with the Supreme Court's decision in *Doe*. Then-Chief Justice Rehnquist and Justices Scalia and Thomas dissented from the denial of certiorari, disagreeing that a health exception encompassed mental health and writing that the Supreme Court's decision in *Doe* "in no way supports the proposition that, after viability, a mental-health exception is required as a matter of federal constitutional law."⁴²

Conclusion

The Supreme Court has long articulated the paramount importance of protecting a woman's health. However, anti-choice activists continue to marginalize women and their health concerns by restricting the circumstances in which a woman may exercise her right to choose. Any restriction on the right to choose must contain a health exception encompassing all aspects of a woman's health.

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Notes:

¹ *Roe v. Wade*, 410 U.S. 113 (1973).

² S.Amdt. 3083 to H.R.1833, Roll Call Vote 593, 104th Cong. (1995); S.Amdt 288 to H.R.1122, Roll Call Vote 69, 105th Cong. (1997); S.Amdt 289 to H.R.1122, Roll Call Vote 70, 105th Cong. (1997); S.Amdt. 2319 to S.1692, Roll Call Vote 335, 106th Cong. (1999); H.R.1122, Roll Call Vote 63, 105th Cong. (1997); H.R.1122, Roll Call Vote 64, 105th Cong. (1997); H.R.3660, Roll Call Vote 103, 106th Cong. (2000); H.R.4965, Roll Call Vote 342, 107th Cong. (2002); S.Amdt. 258 to S. 3, Roll Call Vote 45, 108th Cong. (2003); S. 3 Roll Call Vote 47, 108th Cong. (2003); S.Amdt. 260 to S. 3, Roll Call Vote 48, 108th Cong. (2003); S.Amdt. 259 to S. 3, Roll Call Vote 46, 108th Cong. (2003); S.Amdt. 261 to S. 3, Roll Call Vote 49, 108th Cong. (2003); H.Amdt. 154 to H.R.760, Roll Call Vote 240, 108th Cong. (2003); H.R.760, Roll Call Vote 241, 108th Cong. (2003).

³ Catholic Bishops' Statement on Partial Birth Abortion (Oct. 2000), at <http://www.priestsforlife.org/magisterium/bishops/00-10bpspba.htm> (last visited Oct. 24, 2010);

Notes, cont.

Americans United For Life, *Trojan Horse "Health" Exception Used To Strike Down Partial Birth Abortion Ban* (Sept. 8, 2004), on file with NARAL Pro-Choice America; American Life League, *Protecting the Life of the Mother...*, at <http://www.all.org/article.php?id=10681> (last visited Oct. 24, 2010); American Life League, *Declaration: Protecting the Mother: List* [List of Doctors Who Have Pledged That Abortion Is Never Necessary to Save the Life of the Mother] (Aug. 8, 2007), at <http://www.all.org/article.php?id=10682> (last visited Oct. 24, 2010).

⁴ In 2009 and 2010, President Obama had the opportunity to appoint two new justices to the Court, Justice Sonia Sotomayor, replacing Justice Souter, and Justice Elena Kagan, replacing Justice Stevens.

Currently neither Justice has a record on choice and thus their position if a challenge to *Roe* were to come before the Court remains to be seen.

⁵ *Gonzales v. Carhart and Gonzales v. Planned Parenthood Federation of America*, 127 S. Ct. 1610 (2007).

⁶ Partial-Birth Abortion Ban Act of 2003, 18 U.S.C.A. § 1531 (2003).

⁷ *Roe v. Wade*, 410 U.S. 113 (1973).

⁸ *Doe v. Bolton*, 410 U.S. 179 (1973).

⁹ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

¹⁰ *Stenberg v. Carhart*, 530 U.S. 914 (2000).

¹¹ *Stenberg*, 530 U.S. at 931.

¹² *Stenberg*, 530 U.S. at 937.

¹³ *Ayotte v. Planned Parenthood of N. New England*, 390 F.3d 53 (1st Cir. 2004), cert. granted, 544 U.S. 1048 (May 23, 2005) (No. 04-1144).

¹⁴ *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006).

¹⁵ H.B. 184, 1st Year, 160th Sess., Gen. Ct. (N.H. 2007).

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.

¹⁸ Telis Demos, *Not Black-and-White: Most Americans Back Health Exception to 'Partial-Birth' Abortion Ban*, ABCNEWS.COM, July 24, 2003, at http://abcnews.go.com/sections/living/goodmorningamerica/poll030724_abortion.html (last visited Oct. 24, 2010).

¹⁹ *Partial Birth Abortion Ban of 1995: Hearing on H.R.1833/S. 939 Before the Senate Comm. on the Judiciary*, 104th Cong. (1995) (testimony of Vikki Stella).

²⁰ Judy Foreman, *When Drugs Are The Only Choice For A Mother-To-Be*, Sept. 26, 2000, at http://www.myhealthsense.com/F20000926_drugs.html (last visited Oct. 24, 2010).

²¹ The National Cancer Institute, U.S. National Institutes of Health, *Breast Cancer and Pregnancy, Patient Information* (Sept. 19, 2002), at <http://www.cancer.gov/cancerinfo/pdq/treatment/breast-cancer-and-pregnancy/patient/> (last visited Oct. 24, 2010).

²² Tommy Craggs, *Between a Woman's Heart and Head: Health vs. a Baby Is Just One Dilemma Faced By Heart Patients*, KANSAS CITY STAR, Nov. 7, 2000, at E1.

Notes, cont.

- ²³ *Drug Fear Endangers Pregnant Women: Many Aren't Taking Medicine They Need*, USA TODAY, Dec. 12, 2000
- ²⁴ Lisa Nainggolan, *Pregnant Pause: Evaluating Pregnant Women with Heart Disease* (Dec. 24, 2003), at <http://www.theheart.org/article/124447.do> (last visited Oct. 24, 2010).
- ²⁵ William Raspberry, *Abortion: A Tough Case*, WASH. POST, Aug. 31, 1998, at A21; Felice J. Freyer, *Hospital Agrees to End Tragic Pregnancy*, PITTSBURGH POST-GAZETTE, Aug. 30, 1998, at A3.
- ²⁶ *Partial Birth Abortion Ban of 1995: Hearing on H.R.1833/S. 939 Before the Senate Comm. on the Judiciary*, 104th Cong. (1995) (testimony of Claudia Crown Ades).
- ²⁷ *Partial Birth Abortion Ban of 1995: Hearing on H.R.1833/S. 939 Before the Senate Comm. on the Judiciary*, 104th Cong. (1995) (testimony of Claudia Crown Ades).
- ²⁸ *Partial Birth Abortion Ban of 1995: Hearing on H.R.1833 Before the House Comm. on the Judiciary, Subcomm. on the Constitution*, 104th Cong. (1996) (testimony of Coreen Constello).
- ²⁹ *Partial Birth Abortion Ban of 1995: Hearing on H.R.1833/S. 939 Before the Senate Comm. on the Judiciary*, 104th Cong. (1995) (testimony of Tammy Watts).
- ³⁰ *Partial Birth Abortion Ban of 1995: Hearing on H.R.1833/S. 939 Before the Senate Comm. on the Judiciary*, 104th Cong. (1995) (testimony of Tammy Watts).
- ³¹ *Partial Birth Abortion Ban of 1995: Hearing on H.R.1833/S. 939 Before the Senate Comm. on the Judiciary*, 104th Cong. (1995) (testimony of Viki Wilson).
- ³² *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).
- ³³ *Carhart/PPFA*, 127 S. Ct. 1610 (2007).
- ³⁴ The states that have enacted bans on so-called “partial-birth” abortion or other abortion procedures are: AL, AK, AZ, AR, FL, GA, ID, IL, IN, IA, KS, KY, LA, MI, MS, MO, MT, NE, NJ, NM, ND, OH, OK, RI, SC, SD, TN, UT, VA, WV, WI. NARAL Pro-Choice America Foundation, *Who Decides? The Status of Women's Reproductive Rights in the United States* (20th ed. 2011), at www.WhoDecides.org.
- ³⁵ These states are: AL, AK, AZ, AR, FL, GA, ID, IL, IN, IA, KY, LA, MI, MS, MO, MT, NE, NJ, ND, OK, RI, SC, SD, TN, VA, WV, WI. NARAL Pro-Choice America Foundation, *Who Decides? The Status of Women's Reproductive Rights in the United States* (20th ed. 2011), at www.WhoDecides.org.
- ³⁶ See NARAL Pro-Choice America Foundation, *Who Decides? The Status of Women's Reproductive Rights in the United States* (20th ed. 2011), at www.WhoDecides.org.
- ³⁷ *Richmond Med. Ctr. v. Herring*, Nos. 03-1821, 04-1255, 2009 WL 1783515 (4th Cir. June 24, 2009).
- ³⁸ See Victor G. Rosenblum & Thomas J. Marzen, *Strategies for Reversing Roe v. Wade Through the Courts*, in ABORTION AND THE CONSTITUTION, REVERSING ROE V. WADE THROUGH THE COURTS 198 (Dennis J. Horan et al. eds., 1987).
- ³⁹ *Gonzales v. Carhart* and *Gonzales v. Planned Parenthood Federation of America*, 127 S.Ct. 1610 (2007).
- ⁴⁰ *Stenberg v. Carhart*, 530 U.S. 914, 934-38 (2000).
- ⁴¹ *Voinovich v. Women's Med. Profl Corp.*, 523 U.S. 1036 (1998).
- ⁴² *Voinovich*, 523 U.S. at 1049 (Thomas, J., dissenting) (emphasis added).