



## Abortion Bans Endanger Women's Health

*Roe v. Wade* stands as a milestone to women's freedom and equality, and one of its most fundamental tenets is that a woman's health must always be protected. Yet 40 years after the Supreme Court recognized the right to choose and the vital importance of women's health,<sup>1</sup> attacks on women's privacy, and on health protections in particular, continue. Time after time, anti-choice lawmakers vote down proposed health exceptions to abortion restrictions,<sup>2</sup> and prominent anti-choice leaders openly state their opposition to protecting women's health.<sup>3</sup> And perhaps most ominously, 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.<sup>4</sup> The court's opinion in the jointly decided cases of *Gonzales v. Planned Parenthood Federation of America* and *Gonzales v. Carhart*<sup>5</sup> 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 somewhat more narrowly by the court, outlaws a second-trimester abortion method, one that doctors have said is necessary to protect some women's health.<sup>6</sup> Startlingly, this ban has no health exception.<sup>7</sup> By upholding the federal ban in *Carhart*, the court retreated from more than four decades of precedent that ensured a woman's health must always be protected. 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):**<sup>8</sup> By a vote of 7-2, the Supreme Court invalidated a Texas law that prohibited abortion in all cases except when necessary to save a 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):**<sup>9</sup> 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):**<sup>10</sup> 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 a woman's right to choose abortion before viability 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 include exceptions to protect a woman's life and health.

- ***Stenberg v. Carhart (2000)***:<sup>11</sup> By a slim 5-4 majority, the Supreme Court held unconstitutional Nebraska's ban that outlawed abortion care as early as the 12th week of pregnancy (a ban on so-called "partial-birth" abortion). The court struck down the law in large part because it had no exception 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."<sup>12</sup> The court explicitly recognized that "the absence of a health exception will place women at an unnecessary risk of tragic health consequences."<sup>13</sup>
- ***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.<sup>14</sup> Specifically, the court agreed to consider the question of whether a parental-notification law requires a medical emergency provision. The case was decided largely on 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.'"<sup>15</sup> (While the lower court was considering the remanded case, New Hampshire legislators repealed the parental-notification law at issue, rendering the remaining issue moot.<sup>16</sup> Unfortunately, several years later the New Hampshire legislature reenacted the law; it is now in force and does not have a fully adequate exception to protect young women's health.<sup>17</sup>)

### **Reconfigured Court with Bush Appointees Reverses Precedent**

Though for 40 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. Reversing 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.<sup>18</sup> The court's majority opinion also cited its unfounded concern that a woman might regret her choice to terminate a pregnancy as a reason for banning the doctor's recommended 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.<sup>19</sup> 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 protect a woman's health and safety.<sup>20</sup>

Many women welcome pregnancy and can look forward to a safe childbirth; however, for some, pregnancy can be medically risky. Abortion restrictions that have no exceptions to protect women's health are dangerous. Without health exceptions, women who have high-risk 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.<sup>21</sup>
- Jennifer Peterson was 35 and pregnant when she discovered a lump in her breast. Tests showed she had invasive breast cancer.<sup>22</sup> 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.<sup>23</sup>
- 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.<sup>24</sup> 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.<sup>25</sup> 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: "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."<sup>26</sup> 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.

- Danielle Deaver was 22 weeks pregnant when her water broke. Tests showed that Danielle had suffered anhydramnios, a premature rupture of the membranes before the fetus has achieved viability. Without sufficient amniotic fluid, the fetus likely would be born with a shortening of muscle tissue that results in the inability to move limbs. In addition, the fetus likely would suffer deformities to the face and head, and the lungs were unlikely to develop beyond the 22-week point. The couple, in counsel with their doctor, explored every possible action to save the pregnancy. However, there was less than a 10-percent chance that, if born, the baby would be able to breathe on its own and only a two-percent chance the baby would be able to eat on its own. They decided to terminate the pregnancy, but care was unavailable because an abortion ban in their state lacked a health exception. Eight days later, after Danielle endured intense pain and infection, their daughter Elizabeth was born and survived for just 15 minutes.<sup>27</sup>
- Christy Zink was 21 weeks pregnant when she learned the fetus she was carrying was suffering from multiple severe anomalies including agenesis of the corpus callosum — a rare birth defect in which the central connecting structure of the brain is absent. Even more severe, the brain had developed in small globular splotches, meaning effectively that an entire hemisphere of the brain was missing. Christy and her husband consulted medical experts around the world and were told that, if the fetus survived the pregnancy, which was uncertain, the baby would be in a state of near-constant seizures, requiring numerous surgeries to remove what little of the brain matter remained. Christy made the decision to terminate the pregnancy, a difficult, but critical choice that a health exception must protect for all women.<sup>28</sup>
- 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."<sup>29</sup>

- When two doctors confirmed that, among other ailments, Tammy Watts' 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.<sup>30</sup> 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."<sup>31</sup>
- 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."<sup>32</sup>

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

Anti-choice activists 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.<sup>33</sup> A second avenue of attack on *Roe* is to restrict or eliminate altogether its protections for women's health. Anti-choice 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 pillar of *Roe* and make further attacks on the core right to legal abortion more likely to succeed.

- Anti-choice activists fought for more than a

### Anti-Choice Activists and Lawmakers 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?id=10681&search=doctors> (emphasis added) (last visited Nov. 3, 2014).*

*"In present-day practice of obstetrics in this country, having to choose between the life of one [woman] and the life of the other [fetus] as a practical matter that just doesn't come up. It just doesn't."*

-- Rep. Michael Burgess (R-TX)

Protect Life Ac: Hearing on H.R.358 Before the House Energy and Commerce Subcomm. on Health, 112<sup>th</sup> Cong. (2011).

*"With modern technology and science, you can't find one instance [of abortion necessary to save a woman's life]... There is no such exception as life of the mother, and as far as health of the mother, same thing."*

-- Rep. Joe Walsh (R-IL)

*Walsh, Duckworth Clash on Medicare, Abortion, at [http://articles.chicagotribune.com/2012-10-18/news/chi-walsh-duckworth-clash-on-medicare-abortion-20121018\\_1\\_democratic-challenger-tammy-duckworth-walsh-abortion-rights](http://articles.chicagotribune.com/2012-10-18/news/chi-walsh-duckworth-clash-on-medicare-abortion-20121018_1_democratic-challenger-tammy-duckworth-walsh-abortion-rights) abortion-rights*

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 toward overturning *Roe* and eliminating constitutional protection for women's health in the abortion context.<sup>34</sup>

- Anti-choice activists lobbied for years for state abortion bans similar to the Federal Abortion Ban. Of the 30 states with laws on the books banning safe and medically appropriate abortion procedures (so-called “partial-birth” abortion bans),<sup>35</sup> 29 have absolutely no health exception.<sup>36</sup> 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*, however, many states seized the opportunity to enact abortion bans without appropriate health exceptions, despite the existence of the nationwide ban. 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 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.<sup>37</sup>
- Anti-choice activists admit that “inducing the Court to define ‘health’ in a restrictive manner represent[s] a beneficial strategy in reversing *Roe*.”<sup>38</sup> Now, five sitting justices on the Supreme Court have made clear their hostility to the health exception as originally established in *Roe* and *Doe*.

### Conclusion

The Supreme Court long articulated that abortion regulations must protect a woman's health. Then President Bush reconfigured the court and within months it reversed course. In the meantime, anti-choice activists continue to press for abortion restrictions that endanger women's health and put their safety at risk. American women are relying on lawmakers and courts to reject such dangerous and unwise proposals.

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### Notes:

<sup>1</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>2</sup> 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

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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).

- <sup>3</sup> Catholic Bishops' Statement on Partial Birth Abortion (Oct. 2000), at <http://www.priestsforlife.org/magisterium/bishops/00-10bpspba.htm> (last visited Dec. 10, 2015); 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/get-involved/activist-materials/declaration-protecting-the-life-of-the-mother/> (last visited Dec. 10, 2015); 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/get-involved/activist-materials/protecting-the-life-of-the-mother-declaration-list/> (last visited Dec. 10, 2015).
- <sup>4</sup> 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. 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.
- <sup>5</sup> *Gonzales v. Carhart and Gonzales v. Planned Parenthood Federation of America*, 127 S. Ct. 1610 (2007).
- <sup>6</sup> See Also: NARAL Pro-Choice America, *Fact Sheet: The Federal Abortion Ban* at <http://www.prochoiceamerica.org/media/fact-sheets/abortion-bans-federal-abortion-ban.pdf> (last visited Dec. 10, 2015).
- <sup>7</sup> Partial-Birth Abortion Ban Act of 2003, 18 U.S.C.A. § 1531 (2003).
- <sup>8</sup> *Roe v. Wade*, 410 U.S. 113 (1973).
- <sup>9</sup> *Doe v. Bolton*, 410 U.S. 179 (1973).
- <sup>10</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).
- <sup>11</sup> *Stenberg v. Carhart*, 530 U.S. 914 (2000).
- <sup>12</sup> *Stenberg*, 530 U.S. at 931.
- <sup>13</sup> *Stenberg*, 530 U.S. at 937.
- <sup>14</sup> *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).
- <sup>15</sup> *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006).
- <sup>16</sup> H.B. 184, 1st Year, 160th Sess., Gen. Ct. (N.H. 2007).
- <sup>17</sup> 2011 N.H. Laws 205.
- <sup>18</sup> *Gonzales v. Carhart and Gonzales v. Planned Parenthood Federation of America*, 127 S.Ct. 1610 (2007).
- <sup>19</sup> *Carhart/PPFA*, 127 S.Ct. at 1634.
- <sup>20</sup> 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](http://abcnews.go.com/sections/living/goodmorningamerica/poll030724_abortion.html) (last visited Dec. 10, 2015).
- <sup>21</sup> *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).
- <sup>22</sup> Judy Foreman, *When Drugs Are The Only Choice For A Mother-To-Be*, Sept. 26, 2000, at <http://judyforeman.com/columns/when-drugs-are-only-choice-mother-be> (last visited Dec. 10, 2015).

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- <sup>23</sup> The National Cancer Institute, U.S. National Institutes of Health, *General Information About Breast Cancer Treatment and Pregnancy* (Dec. 3, 2010), at <http://www.cancer.gov/cancertopics/pdq/treatment/breast-cancer-and-pregnancy/HealthProfessional> (last visited Dec. 10, 2015).
- <sup>24</sup> 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.
- <sup>25</sup> *Drug Fear Endangers Pregnant Women: Many Aren't Taking Medicine They Need*, USA TODAY, Dec. 12, 2000.
- <sup>26</sup> Lisa Nainggolan, *Pregnant Pause: Evaluating Pregnant Women with Heart Disease* (Dec. 24, 2003), at <http://www.medscape.com/viewarticle/782854> (last visited Dec. 10, 2015).
- <sup>27</sup> Jason Clayworth, *Her Baby Wasn't Expected to Live, But Nebraska Law Banned Abortion*, DES MOINES REGISTER, Mar. 6, 2011.
- <sup>28</sup> Press Release, National Abortion Federation, *Statement of Christy Zink on Harmful Impact of HR 3803* (Feb. 21, 2012) at <http://prochoice.org/statement-of-christy-zink-on-harmful-impact-of-hr-3803/> (last visited Nov. 3, 2014).
- <sup>29</sup> *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).
- <sup>30</sup> *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).
- <sup>31</sup> *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).
- <sup>32</sup> *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).
- <sup>33</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).
- <sup>34</sup> *Carhart/PPFA*, 127 S. Ct. 1610 (2007).
- <sup>35</sup> States with laws banning 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, NE, NH, NJ, ND, OH, OK, RI, SC, SD, TN, UT, VA, WV, WI. NARAL Pro-Choice America & NARAL Pro-Choice America Foundation, *Who Decides?: The Status of Women's Reproductive Rights in the United States* (24rd ed. 2015), available at [www.WhoDecides.org](http://www.WhoDecides.org).
- <sup>36</sup> These states are: AL, AK, AZ, AR, FL, GA, ID, IL, IN, IA, KS, KY, LA, MI, MS, MO, NE, NH, NJ, ND, OK, RI, SC, SD, TN, UT, VA, WV, WI. NARAL Pro-Choice America & NARAL Pro-Choice America Foundation, *Who Decides?: The Status of Women's Reproductive Rights in the United States* (26th ed. 2017), available at [www.WhoDecides.org](http://www.WhoDecides.org).
- <sup>37</sup> *Richmond Med. Ctr. v. Herring*, Nos. 03-1821, 04-1255, 2009 WL 1783515 (4th Cir. June 24, 2009).
- <sup>38</sup> 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).