

April 19, 2007

TO: Interested Parties
FROM: Rachel Laser, Director of the Culture Project
RE: The Facts about the Supreme Court Partial-Birth Abortion Decision

Yesterday, for the first time since Justice Samuel Alito replaced Justice Sandra Day O'Connor on the Supreme Court, the Court ruled on a case involving abortion. This ruling marks the first time the Court has sanctioned an abortion procedure ban, but more strikingly, the first time since *Roe v. Wade* that the Court has deemed constitutional an abortion prohibition with no exception for when a woman's health is at risk. The odds of a successful challenge to this ban are now slim to nil, since experts agree that the chances of prevailing on an "as applied" challenge (brought when a woman has or could imminently suffer harm to her health based on the ban) are remote, given that the Court already had before it a plethora of concrete evidence of the ban's potential harm to a woman's health.

Also noteworthy is the newly composed Court's demonstrated antipathy to *Roe*. Though the Court did not reverse *Roe*, it departed from its previous affirmations, and merely "assume[d]" the right to an abortion "for the purposes of this opinion." The Court also chose deliberately provocative terms throughout the opinion, such as "abortion doctors" and the "killing" of the fetus. Finally, today's decision will have zero impact on reducing the number of abortions in America, since, by the Court's own admission, there are other abortion procedures available for women to whom the ban would be applicable.

Following are some answers to basic questions about the Court's decision:

Question: What is this case about?

Answer: This case was a challenge to the Partial-Birth Abortion Ban Act of 2003, which is a federal ban on the intact D&E or "partial-birth" abortion procedure that lacks an exception for where the health of the woman is in jeopardy. The lawsuit challenged the constitutionality of the Act and sought to prevent its enforcement.

Question: What did the Court rule today?

Answer: Justice Kennedy, writing for the Court and joined by Justices Scalia, Thomas, Roberts and Alito, upheld the federal Partial-Birth Abortion Ban Act of 2003 as constitutional without a health exception, reversing the judgments of both lower federal courts of appeals. Specifically, the Court found that the ban was not overly vague or broad and that its lack of a health exception did not impose an undue burden on a woman's right to an abortion.

Question: What does this decision mean?

Answer: This means that there is now a federal law that can be enforced that makes it a crime punishable by up to two years in prison plus a fine for a doctor who “deliberately and intentionally” performs the intact D&E—or “partial-birth”—abortion procedure—even if the doctor chooses the procedure because it is the safest one for the woman. A woman who would have otherwise had such an abortion can still have an abortion, but through a different type of procedure, such as a D&E or a hysterectomy, to name a few.

Question: What’s different and new about this?

Answer: The most striking departure from former Supreme Court abortion decisions is the fact that the Court found the ban constitutional despite its lack of a health exception. As stated above, in the words of the dissent (written by Justice Ginsburg, and joined by Justices Stevens, Souter and Breyer): “[F]or the first time since *Roe*, the Court blesses a prohibition with no exception safeguarding a woman’s health.”

Also unprecedented is the Court’s antipathy to *Roe* (see below).

Question: What does this decision say about the essential holding of *Roe v. Wade*?

Answer: Today’s decision does not reverse the essential holding of *Roe*, but it demonstrates hostility towards the decision. As Justice Ginsburg, writing for the dissent, points out, the majority opinion did not “reaffirm” or “retain” the essential holding of *Roe*, but rather only “assume[d]” it “for the purposes of this opinion.” This is in sharp contrast to past cases, such as *Casey v. Planned Parenthood* (1992), which “retained and . . . reaffirmed” *Roe* and *Stenberg v. Carhart* (2000), which did “not revisit those legal principles.” In addition, Justice Thomas, joined by Justice Scalia, wrote a one paragraph concurring opinion boldly declaring: “I write separately to reiterate my view that the Court’s abortion jurisprudence, including *Casey* and *Roe v. Wade* . . . has no basis in the Constitution.”

The majority opinion also repeatedly uses unprecedented and incendiary language about abortion. For the first time, the Court repeatedly chose “kill” to describe the abortion procedure in its own words and used the derogatory “abortion doctors.”

Question: On what basis did the Court permit the Act to stand as constitutional despite its lack of a health exception?

Answer: The Court formulated a new test—so long as there are other “safe” procedures still available, an Act is not invalid on its face where there is “medical uncertainty” over whether the barred procedure “creates significant health risks.” Thus, despite even the American College of Obstetricians and Gynecologists’ opinion that the banned procedure is sometimes necessary to safeguard a woman’s health, the Court did not take issue with the lack of a health exception.

Today's Court decision rejected the Court's previous standard (articulated in *Stenberg*, relying on both *Planned Parenthood v. Casey* and *Roe v. Wade*) that an abortion regulation must contain a health exception "if 'substantial medical authority supports the proposition that banning a particular procedure could endanger women's health.'" This decision deemed this standard "too exacting a standard to impose on the legislative power . . . to regulate the medical profession."

Question: Is the partial-birth abortion issue finally legally settled or will there be more battles to come?

Answer: It's probably settled for now. Experts agree that although the Court left open the door for an "as applied" challenge to the statute—which could arise if a woman's health is imminently at risk or has already been compromised because of the ban—the challenge would be unlikely to prevail, given that the Court already has ample evidence before it about the ban's potential harm to women's health.

Question: Will this decision reduce the number of abortions in America?

Answer: No. There were 1.3 million abortions in America last year and, under this decision, there will be 1.3 million abortions next year. The Court's own reasoning for upholding the ban relied on the fact that there are other procedures available for a woman who falls under the ban. And, "partial-birth" abortions account for only .17% of the 1.3 million abortions in America every year.

Question: Who sued who?

Answer: Several doctors who perform second-trimester abortions sued the Attorney General of the United States in federal court in Nebraska and Planned Parenthood Federation of America, along with some of its California affiliates, sued him in federal court in California. (A third challenge to the ban was brought by the National Abortion Federation and seven individual physicians, but the U.S. Court of Appeals for the Second Circuit put that case on hold until the Supreme Court issued a decision in the other two cases. Today's Supreme Court decision requires that the ban be upheld in this case as well.)

Question: Didn't the Supreme Court already rule on partial-birth abortion (in *Stenberg v. Carhart* in 2000)?

Answer: Yes it did. In the *Stenberg v. Carhart* decision in 2000, the Court struck down Nebraska's very similar ban on partial-birth abortions. The Court held that the Nebraska statute was unconstitutional because (1) it failed to include a "health exception" for circumstances in which the banned method would be the safest form of abortion for a woman and (2) the definition of the banned procedure was so broad that it could include the most common procedure for second trimester abortions, which starts at 12 weeks of pregnancy (D&Es)—and thus imposed an undue burden on a woman's abortion rights.

I am available to answer any other questions you have about the case by email (rlaser@third-way.com) or phone (202-775-3768 x202).