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# The Supreme Court Revisits the Partial Birth Abortion Issue

## *Gonzales v. Carhart and Gonzales v. Planned Parenthood*

On Nov. 8, 2006, the U.S. Supreme Court will hear oral argument in two cases that challenge the constitutionality of the Federal Partial Birth Abortion Ban Act of 2003. The related cases, *Gonzales v. Carhart* and *Gonzales v. Planned Parenthood*, offer the high court an opportunity to revisit an issue it last addressed in 2000, in *Stenberg v. Carhart*. That 5-4 decision struck down a similar state statute in part because it contained an exception only in cases where a woman's life is in danger and did not allow a similar exception to protect a woman's health. In addition, the majority in *Stenberg* found that the statute could reasonably be interpreted by doctors to include not only the partial birth procedure but other abortion methods as well, and therefore imposed an unconstitutional burden on women seeking an abortion.

Although it has only been six years since *Stenberg* was decided, changes in the composition of the high court raise the possibility of a different outcome this time. The recent retirement of Justice Sandra Day O'Connor – the fifth and deciding vote in *Stenberg* – and her replacement by the more conservative Justice Samuel Alito create the prospect of a five-vote majority in favor of upholding the federal partial birth abortion ban and possibly even reversing the precedent set in *Stenberg*.

Under the law in question, a doctor cannot perform what opponents call partial birth abortion (the medical community and abortion rights advocates prefer the terms dilation and extraction, D&X or "intact dilation and evacuation") unless the pregnant woman's life is in danger. The statute, which was enacted in 2003, was immediately challenged in several lower federal courts, all of which cited *Stenberg* in issuing injunctions barring enforcement of the act. In *Carhart* and *Planned Parenthood*, the 8th and 9th U.S. Circuit Courts of Appeals, respectively, specifically ruled that the fed-

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## LEGAL BACKGROUND

eral law was unconstitutional because it did not contain an exception in cases in which the mother's health (not just her life) was in danger. The 9th Circuit also found that the language of the law was too vague and thus could unintentionally ban other types of abortion procedures.

The Bush administration, which is defending the federal law banning the procedure, argues that an abortion statute that omits a health exception is not automatically invalid and only runs afoul of prior Supreme Court precedent if it would create "significant health risks" for a woman seeking to terminate her pregnancy. In this case, the administration argues, Congress included significant factual findings in the statute showing that partial birth abortion "is never medically necessary." The high court has traditionally given deference to legislative findings, the administration says, and should do so in this case as well.

The Planned Parenthood Federation of America, which is a party in the case, and other abortion rights advocates counter that the Supreme Court should let stand the lower court decisions striking down the federal statute. They contend that *Stenberg* and other cases plainly require an explicit health exception and that the D&X procedure is often medically necessary. They also argue that the congressional findings were tainted by political considerations and should neither outweigh Supreme Court precedent nor be accepted as an accurate description of the D&X procedure.

## *Origins and History of the Controversy*

The term "partial birth abortion" refers to a medical procedure known as intact dilation and extraction. D&X involves dilating the cervix, extracting from the uterus the body of

the fetus except the head, puncturing the skull and removing the brain tissue through suction. The resulting collapse of the skull allows for easy removal of the otherwise intact fetus through the birth canal. D&X is performed most often late in the second trimester of pregnancy, between the 20th and 24th weeks, but in some cases it is performed during the third trimester as well.

There are no published estimates on the number of these procedures performed in the United States during the last few years. The most recent statistics are from six years ago and are published by the Alan Guttmacher Institute, a reproductive health group affiliated with Planned Parenthood. The institute reported that in 2000, D&X procedures were "quite rare" in the United States, with only 2,200 performed by 31 providers, accounting for 0.17% of all abortions that year. Anti-abortion groups contend that Guttmacher's figures underestimate the number of D&X procedures performed each year, pointing to anecdotal evidence from newspaper stories as well as statistics compiled by a small number of states in the mid-1990s.

Other more common abortion procedures include suction curettage and dilation and evacuation (D&E). Suction curettage involves dilating the cervix and vacuuming the embryo or fetus, placenta and other uterine contents out of the uterus. Suction curettage is used in the first trimester of pregnancy, when most abortions take place, and is performed far more frequently than any other abortion procedure.

D&E is the most common form of abortion performed in the second trimester. During this procedure, the cervix is dilated and the fetus is dismembered inside the uterus with forceps. The remnants of the fetus are then removed from the uterus, either with forceps or suction.

The D&X or partial birth abortion procedure was developed in 1983 by the late Dr. James McMahon as a second and third trimester alternative to D&E. The latter procedure requires the use of sharp instruments, which may damage a woman's uterus. Furthermore, bone remnants of the dismantled fetus may be sharp enough to potentially injure the uterus. McMahon, a Los Angeles obstetrician, found that terminating the fetus while intact and largely removed from the vagina prevents these complications from occurring.

By the early 1990s, a small number of doctors were routinely using the D&X procedure, mostly for women seeking abortions during the later stages of their second trimester of pregnancy. Around the same time, abortion opponents began marshaling their forces against D&X, arguing – as did the American Catholic bishops in 1996 – that it is “more akin to infanticide than abortion.” By the middle of the 1990s, abortion foes were mounting intense lobbying campaigns against the procedure at both the state and federal levels.

In 1995 and again in 1997, Congress passed legislation banning partial birth abortion, a term coined by Rep. Charles Canady (R-Va.), who sponsored versions of these measures in the House of Representatives. Both bills would have prohibited the procedure during the entire pregnancy and allowed an exception to the ban only in cases in which a woman's life was in danger.

President Clinton vetoed both measures, saying that he would sign legislation banning the procedure only if it contained an exception for “serious health consequences.” But supporters of the bills argued that adding a health excep-

tion would essentially render the legislation meaningless because it would allow doctors to find a justification for using D&X under almost any circumstance, including broad catch-alls such as “emotional well-being.”

Meanwhile, similar legislation was making its way through dozens of state legislatures.

During the mid- to late 1990s, 31 states (mostly in the South and Midwest) enacted laws prohibiting partial birth abortion. In 26 of these states, the ban applied throughout a woman's pregnancy. The remaining five states prohibited the procedure

after fetal viability. In only two states – Georgia and Kansas – did partial birth statutes contain broad health exceptions.

## EARLIER COURT DECISIONS

Many of the partial birth bans enacted by states were almost immediately challenged by abortion rights advocates, usually in federal courts. In 18 of these states, including Michigan, Virginia and Wisconsin, statutes were blocked by court-ordered injunctions. In a smaller number of cases, courts upheld statutes banning the procedure.

Since the Supreme Court had not yet weighed in on the issue – and would not do so until 2000 – these lower court decisions relied upon guidelines established in earlier high court abortion rulings, notably its landmark 1973 decision in *Roe v. Wade* and its 1992 ruling in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.

In *Roe*, the Supreme Court ruled 7-2 that a woman has a constitutional right to terminate her pregnancy. But the majority opinion in *Roe*,

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penned by Justice Harry Blackmun, also recognized that states have “an important and legitimate interest” in protecting the health of the mother and even, at a certain point, “the potentiality of human life” inside of her. More specifically, Blackmun determined that after the first three months, or first trimester, of a pregnancy, states could impose regulations aimed at protecting maternal health, as long as they did not limit a woman’s access to abortion services. State interest in the welfare of the fetus did not arise until after fetal viability, or about 24 to 28 weeks into the pregnancy, the court said. At that point, states could regulate and even ban abortion, as long as the procedure was still available to protect a woman’s life or health.

In the decades that followed, the Supreme Court repeatedly reaffirmed *Roe’s* basic premise, that a woman has a fundamental, constitutional right to an abortion. At the same time, however, the high court expanded the states’ authority to regulate abortion, most notably in its decision in *Casey*, handed down 19 years after *Roe*. In *Casey*, the court extended the state’s interest in fetal life to encompass the entirety of a woman’s pregnancy. The court thus concluded that states could regulate abortion before fetal viability. But these pre-viability regulations could not pose an “undue burden” on a woman’s right to an abortion. The court defined undue burden to be any regulation that “has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion.”

*Casey’s* undue burden test was the foundation for a number of important early partial birth decisions, including *Women’s Medical Professional Corporation v. Voinovich*, a 1997 ruling by the 6th U.S. Circuit Court of Appeals. In *Voinovich*, the 6th Circuit determined that Ohio’s partial birth ban could be read to prohibit not only the partial birth, or D&X, procedure but the D&E procedure as well. Since

D&E was the most common form of second trimester abortion, the court concluded that banning it would create a “substantial obstacle in the path of a woman seeking an abortion” and hence constituted an “undue burden.”

## THE SUPREME COURT WEIGHS IN

*Stenberg* involved a challenge by Leroy Carhart, a physician who performs late term abortions, to a 1996 Nebraska law prohibiting “partial birth abortion ... unless such procedure is necessary to save the life of the mother.” The statute defined partial birth abortion as “an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery.”

In a 5-4 decision, the Supreme Court ruled that the Nebraska law violated the Constitution, as interpreted by *Roe* and *Casey*. First, the court said, the statute lacked the requisite exception for preserving the health of the mother. Both *Roe* and *Casey* make clear, Justice Stephen Breyer pointed out in the majority opinion, that after fetal viability, states may regulate and even proscribe abortion but only as long as an exception is made “for the preservation of the life or health of the mother.”

The Nebraska statute, which banned the procedure throughout a woman’s pregnancy, further “aggravates the constitutional problem,” Breyer wrote, because partial birth abortions are performed before as well as after fetal viability. “Since the law requires the health exception in order to validate even a post-viability abortion regulation, it at a minimum requires the same in respect to pre-viability regulation,” he wrote.

The majority in *Stenberg* also found the wording of the Nebraska law to be unconstitutionally vague because it could reasonably be inter-

preted by doctors to include not only the D&X procedure but other abortion methods as well. “Even if the statute’s basic aim is to ban D&X, its language makes clear that it also covers a much broader category of procedures,” Breyer wrote, noting that “the language does not track the medical differences between D&E and D&X,” even though the procedures can, in many ways, be quite similar. As in *Voinovich*, this ambiguity posed an “undue burden” on women seeking abortions, Breyer wrote, as well as on all who perform abortions using methods similar to partial birth, and who would fear prosecution, conviction and imprisonment under the statute in question.

In separate concurring opinions, Justices John Paul Stevens and Ruth Bader Ginsburg both argued that Nebraska’s partial birth abortion ban does nothing to advance legitimate state interests, such as protecting a woman’s health or that of the fetus. There is no “reason to believe that the procedure that Nebraska here claims it seeks to ban is more brutal, more gruesome, or less respectful of ‘potential life’ than the equally gruesome procedure Nebraska claims it still allows,” Stevens wrote, referring to D&E. Furthermore, he wrote, given the court’s earlier holding in *Roe* establishing a constitutional right to abortion, “it is impossible ... to understand how a state has any legitimate interest in requiring a doctor to follow any procedure other than the one that he or she reasonably believes will best protect the woman in her exercise of this constitutional liberty.”

Justice Anthony Kennedy, in his dissent in the case, specifically criticized Stevens’ and Ginsburg’s view that Nebraska does not have a

“legitimate state interest” in distinguishing the moral acceptability of one abortion procedure from another. *Roe* and *Casey* have granted states such an interest, he pointed out, and in this case, Nebraska made a judgment that killing the fetus after partial delivery poses greater moral problems than killing it while it is still largely in the uterus. “D&X’s stronger resemblance to infanticide means Nebraska could conclude the procedure presents a greater risk of disrespect for life,” Kennedy wrote.

In his dissent, Justice Antonin Scalia took another tack. The problem is not that *Casey* has been misapplied, he argued, the real problem is that *Roe*, *Casey* and the entirety of abortion jurisprudence are not based on the Constitution, which maintains “silence on the subject” of abortion. As a result, Scalia contended, abortion decisions inevitably rest on “a democratic vote by nine lawyers, not on the question

whether the text of the Constitution has anything to say about this subject (it obviously does not) ... but upon the pure policy question whether this limitation upon abortion ... goes too far.” In *Stenberg*, he added, “those who believe that a 5-to-4 vote on a policy matter by unelected lawyers should not overcome the judg-

ment of 30 state legislatures have a problem, not with the application of *Casey*, but with its existence. *Casey* must be overruled.”

With a few exceptions, *Stenberg* nullified those state partial birth bans that had not already been blocked by lower courts. Only five states, including Georgia and Kansas, had laws containing some form of health exception, and hence were still enforceable

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-President George W. Bush*

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under the precedent established by Breyer and the majority in *Stenberg*.

## PARTIAL BIRTH ABORTION BAN ACT OF 2003

When the Partial Birth Abortion Ban Act of 2003 was signed into law on Nov. 5, 2003, President Bush declared that “at last, the American people and our government have confronted the violence and come to the defense of the innocent child.” Critics, however, like Sen. Barbara Boxer of California, expressed concern for the women who would be affected by the measure. “How could we pass a bill that would say, even if a woman’s health is threatened, this procedure can’t be used?” she asked during congressional debate on the legislation.

The 2003 law is similar to earlier measures that, as already noted, were vetoed by President Clinton. The Act prohibits a physician from knowingly performing a partial birth abortion. The term “partial birth abortion” is defined as a procedure in which a substantial part of the fetus is deliberately and intentionally delivered and then killed. Under the law, a physician who knowingly performs a D&X, or partial birth abortion, is subject to a fine of up to \$250,000, imprisonment for up to two years or both.

The statute allows a doctor to perform a D&X only if it is necessary to save the life of the mother; the exception includes cases involving serious physical illness or injury. However, a broader exception to protect the general health of the mother is not included in the Act.

The statute also allows, in some circumstances, the husband and even the parents of a woman who has had a partial birth abortion to bring a suit for monetary damages against the physician who performed the procedure. The husband, if he is married to the mother at the time the procedure is performed, or the mother’s parents, if the woman is under 18 years of age at the time of the abortion, can seek compensation for any injuries resulting from a violation of the Act, including psychological injury.

The most notable difference between the 2003 statute and the earlier partial birth abortion bills passed by Congress is the inclusion of a lengthy section of “factual findings.” Congress often includes “findings” in a bill to explain why such legislation is needed and to assist courts and others in interpreting its specific provisions. In this case, the findings include the assertion that a “moral, medical and ethical consensus” exists that partial birth abortion is “a gruesome and inhuman procedure that is never medically necessary and should be prohibited.” Moreover, the findings state that the weight of medical evidence presented in court cases and at congressional hearings shows that the procedure is “never necessary to preserve the health of the woman” and that it “poses significant health risks” to her. Finally, the authors of the legislation assert that the Supreme Court is obligated to defer to congressional findings and cite a number of high court decisions mandating such deference.

Legal challenges were brought within two days of the bill being signed into law. By September 2004, federal district courts in Nebraska, California and New York had

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declared the law unconstitutional. The U.S. Courts of Appeals for the 2nd, 8th and 9th circuits later affirmed these three lower court decisions. In February 2006, the Supreme Court agreed to review the 8th Circuit's decision in *Carhart*. Later, it agreed to review the 9th Circuit's decision in *Planned Parenthood*.

## *Gonzales v. Carhart and Gonzales v. Planned Parenthood*

The decision by the Supreme Court to review both *Carhart* and *Planned Parenthood* gives the court the opportunity to evaluate all of the major legal challenges to the constitutionality of the 2003 Partial Birth Abortion Ban Act.

In *Carhart*, the 8th Circuit found the law unconstitutional solely on the grounds that it does not include an exception for the D&X procedure to protect the health of the mother. In *Planned Parenthood*, however, the 9th Circuit concluded that the Act is unconstitutional for two additional reasons. First, the appeals court ruled that the law imposes an undue burden on a woman's ability to have an abortion, by prohibiting not only the D&X or partial birth procedure but also the much more common D&E procedure. And second, the court found the statute to be unconstitutionally "vague," making it difficult for physicians to know exactly what is and is not prohibited under the law.

In its support of the Partial Birth Abortion Ban Act, the Bush administration argues that the

lower courts in *Carhart* and *Planned Parenthood* were wrong on every count. The administration contends that the statute does not need a health exception, does not impose an undue burden on a woman's right to an abortion and is not unconstitutionally vague. Furthermore, the government argues, even if one of the arguments against the law proves to be correct, in whole or in part, the court should be able to craft a narrow injunction that remedies a specific constitutional defect of the statute but that otherwise allows the law to be enforced.

### THE HEALTH EXCEPTION

Perhaps the most significant argument leveled against the statute by abortion rights advocates is that it contains no explicit health exception. This omission, they contend, places the law in direct conflict with the entirety of the court's abortion jurisprudence, from *Roe* to *Stenberg*.

The administration asserts that *Stenberg* does not actually require that a specific health exception be included in the statute. Instead, it argues, a law that regulates abortion but contains no health exception should only be held to be unconstitutional if it creates "significant health risks" for a large percentage of women seeking to terminate their pregnancies. The government points to congressional findings in the statute

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stating that the absence of a health exception in this particular law does not create significant health risks for a large number of women. The findings refer to congressional testimony by physicians, as well as others, who state that the procedure is never medically necessary.

The government also argues that factual findings included in a statute should be afforded a high degree of deference by the court. It cites two Supreme Court decisions from 1994 and 1997, both named *Turner Broadcasting System, Inc. v. FCC* (and commonly referred to as *Turner I* and *Turner II*), to argue that the court “deferred to congressional factual findings in a wide variety of contexts and with regard to a wide variety of constitutional claims.” In *Turner I*, the Supreme Court indicated that courts must accord substantial deference to the predictive judgments of Congress when evaluating the constitutionality of a statute. It further observed that the sole obligation of a reviewing court is to ensure that, in formulating its factual findings, “Congress has drawn reasonable inferences based on substantial evidence.”

The parties challenging the statute – Planned Parenthood Federation of America and Dr. Carhart – reject these claims, beginning with the government’s contention that an explicit health exception is not needed as long as the abortion restriction poses no “significant health risks” to women.

In its brief, Planned Parenthood points out that in *Casey* the Supreme Court mandated that restrictive abortion statutes must contain medical exemptions broad enough to ensure that compliance with the law does not “in any way pose a significant threat to the life or health of a woman.” The brief further argues that in *Stenberg*, the Supreme Court reaffirmed this rule, adding that a law that banned a specific abortion procedure, like the one at issue, must have an explicit health exception if “substantial medical authority” believes that such a ban could endanger a woman’s health. The

challengers then contend that by only considering whether a statute poses “significant health risks,” the government is ignoring the very clear standards established in prior Supreme Court cases.

In this case, according to Planned Parenthood and Dr. Carhart, “substantial medical authority” has clearly established that banning D&X could threaten the health of at least some women seeking abortions. Specifically, they point to the testimony during the lower court trials in both cases of numerous medical experts who stated that D&X is “the safest medical option for some women.” They also dispute the government’s argument that a partial birth abortion is “never medically necessary.” During congressional hearings on the Act, they contend, a number of physicians expressed concern that the legislation could prevent them from using the safest procedures when performing abortions. Specifically, some physicians testified that the D&X procedure is much less likely than other procedures to damage a woman’s uterus and cervix or lead to infection caused by retained fetal tissue.

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In addition to challenging the factual findings defended by the government, Planned Parenthood and Dr. Carhart question the government’s position that such findings demand great deference from the court. In his brief, Dr. Carhart

notes that the court has never deferred to congressional findings in a case where Congress uses such findings to attempt to alter the meaning and scope of substantive constitutional rights. Dr. Carhart maintains that an extension of the holding in the *Turner* cases to this situation would “effectively provide Congress with *carte blanche* to violate the Constitution simply



by making carefully chosen ‘findings.’” Such deference is appropriate only when legislation involves areas where Congress has particular expertise and courts have previously shown deference to congressional findings, Carhart’s brief contends.

Like Dr. Carhart, Planned Parenthood asserts that the factual findings in the Act are not entitled to deference and are “simply a bald-faced attempt to end-run *Stenberg’s* constitutional rule.” In its brief, Planned Parenthood emphasizes that the *Turner* cases require deference only when Congress has drawn reasonable inferences based on substantial evidence. In this case, Planned Parenthood argues no such evidence exists. In fact, the brief points out, the federal district court in the *Planned Parenthood* case found that “all of the government’s own witnesses disagreed with many of the specific congressional findings.”

## UNDUE BURDEN AND OVERBREADTH

Another argument leveled against the Partial Birth Abortion Ban Act is that it is written too broadly. The overbreadth doctrine is concerned with a statute’s level of precision and the possibility that insufficiently precise language could unintentionally restrict constitutionally protected activities. For instance, in *Stenberg* the Supreme Court found that the Nebraska partial birth abortion statute was impermissibly broad because it defined a partial birth abortion in such a way as to prohibit the D&E procedure as well as the D&X procedure the legislature intended to ban. In other words, the court concluded that the statute did not define the restricted activity precisely enough, and as a result, the law imposed an “undue burden” on a woman’s access to an abortion. As already noted, in *Casey* the court found that laws that impose such a burden on women seeking abortions are unconstitutional.

The government maintains that the definition of partial birth abortion in the federal law differs in two important ways from that used in the Nebraska statute struck down in *Stenberg*. First, the Act gives a more anatomically specific description of the procedure, defining it as the delivery of the fetus until either the entire fetal head or any part of the fetal trunk past the navel is outside the body of the mother. During a D&E procedure, the government asserts, only a small portion of the fetus, such as a foot or an arm is brought outside the body of the mother. Second, the government contends that the federal statute applies only where the person performing the abortion also completes an “overt act” that kills the fetus. By requiring an overt act, the government contends, the statute specifically excludes the D&E procedure. The government argues that is because during a D&E procedure, the delivery of a portion of the fetus and the dismemberment of the fetus are indistinguishable; thus, the physician does not perform any additional, overt act that kills the fetus.

Those challenging the statute maintain that its definition for partial birth abortion could still encompass abortions involving the D&E procedure. Findings by the district court in the *Planned Parenthood* case indicate that during D&E there is no standard degree to which a fetus is extracted before it is dismembered or reduced in size. Thus, Planned Parenthood and Dr. Carhart argue, the extraction of the fetus to the point of the anatomic landmarks indicated in the statute may occur during a standard D&E abortion.

Planned Parenthood and Dr. Carhart also dispute the government’s reliance on the completion of an overt act as sufficient to distinguish the D&X from the D&E procedure. For instance, Carhart notes that an overt act such as fetal dismemberment or the compression of fetal parts can occur during a standard D&E.

## VAGUENESS IN THE LAW'S LANGUAGE

The issue of vagueness is in many ways similar to the issue of overbreadth in that it involves questions of clarity in statutory language. The language of a statute must be sufficiently clear to inform people of exactly what is illegal. In *Planned Parenthood*, the 9th Circuit concluded that the Partial Birth Abortion Ban Act failed to clearly define the medical procedures that are prohibited, and thus deprived physicians of fair notice of improper conduct and encouraged arbitrary enforcement.

The government contends that the Constitution does not require “impossible standards of clarity.” Rather, a statute must simply give a person of ordinary intelligence a “reasonable opportunity” to know what is prohibited, so that he or she may act accordingly. The government maintains that the Partial Birth Abortion Ban Act “readily satisfies the relatively modest requirements of the void-for-vagueness doctrine.”

Planned Parenthood and Dr. Carhart counter that the Act is unconstitutionally vague because it not only fails to clearly define the prohibited procedure but also forces physicians to “guess at [the Act’s] meaning and differ as to its application.” As with their arguments concerning excessive broadness, they stress that some D&E abortions fall under the anatomical landmark definitions prescribed by the Act, and thus would seem to constitute partial birth abortions under the statute. Similarly, they say, some acts undertaken as part of a D&E procedure may, for purposes of

the statute, constitute an overt act, thus exposing a physician to liability.

## NARROWER INJUNCTIVE RELIEF

Although the government firmly maintains that the Partial Birth Abortion Ban Act is constitutional, it suggests that the court could stop short of complete invalidation if only some aspects of the law are found to be unconstitutional. It points to the Supreme Court’s January 2006 abortion decision, *Ayotte v. Planned Parenthood of Northern New England*, in which the court concluded that the U.S. Court of Appeals for the 1st Circuit had acted inappropriately when it invalidated a state parental consent statute in its entirety. Although the

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state law at issue in that case did not include a health exception, the court held that a more narrow remedy might be appropriate because only some aspects of the law raised constitutional concerns. The court returned the case to the court of appeals and asked it to try to craft a narrower remedy that would satisfy constitutional concerns but would also be consistent with the New Hampshire legislature’s intent. (See *The Supreme Court’s Decision in Ayotte vs. Planned Parenthood of Northern New England*, <http://pewforum.org/docs/index.php?DocID=134>.)

Planned Parenthood and Dr. Carhart assert that the Act should be struck down in its entirety. Here they cite the three “interrelated principles” identified by then-Justice Sandra Day O’Connor in *Ayotte* that should inform the high court’s approach to remedies. According to those principles, first the court should not

nullify more of a statute than is necessary. Second, the court must be mindful that its constitutional mandate and institutional competence are limited. And third, the court cannot use its remedial powers to circumvent the intent of the legislature. With regard to this third principle, Justice O'Connor further noted: "After finding an application or portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all?"

If the court determines that the Partial Birth Abortion Ban Act is unconstitutional because of its failure to include a health exception, Planned Parenthood and Dr. Carhart contend, then a remedy that somehow adds a health exception to the Act would be inappropriate. Since Congress expressly rejected even a narrow health exception when it passed the Act, the court would be engaging in the kind of repair work it specifically rejected in *Ayotte*. Thus, Planned Parenthood and Dr. Carhart argue, the only alternative is to strike down the entire statute as unconstitutional.

Those challenging the statute also argue that if the court determines that the Act is unconstitutional because it is vague or overly broad, the court should not simply provide either a narrower definition for the term partial birth abortion or make a clearer distinction between the D&X and the standard D&E procedure.

Just as the court invalidated all of the Nebraska statute in *Stenberg*, they contend, the federal law should be similarly disposed of. In this case, they argue, the Act prohibits

many, if not all, D&E abortions, and thus unduly burdens a large percentage of affected women. Such a defect can only be remedied by full rather than partial invalidation, they conclude.

## Conclusion

The court's consideration of *Carhart* and *Planned Parenthood* has attracted great interest, and not simply because it involves a significant abortion law. Justice O'Connor's retirement in early 2006 and the appointment of two more conservative justices have prompted many to believe that the court may use these cases to establish new standards with regard to the evaluation of all laws that regulate abortion. For example, the court could use this opportunity to reconsider whether a health exception is always needed in an abortion-related statute. It could also use it to clarify whether the term "health" should continue to be broadly understood to include mental and emotional health.

Considerable attention has been focused on Justice Anthony Kennedy, whom many con-

sider to have replaced Justice O'Connor as the "swing vote" on the court. Justice Kennedy's support for the Nebraska partial birth abortion statute (declared in an impassioned dissent in *Stenberg*) suggests that he might favor upholding the Partial Birth Abortion Ban Act. If Justices John Roberts and Samuel Alito join

Justices Kennedy, Antonin Scalia and Clarence Thomas, each of whom dissented in *Stenberg*, the Partial Birth Abortion Ban Act could be upheld.

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Reversal of the court of appeals' decisions is by no means guaranteed, however. During their confirmation hearings, both Roberts and Alito discussed the importance of Supreme Court precedent, and the oral arguments may persuade them to follow the court's holding in *Stenberg*. If, on the other hand, Roberts or Alito is seeking a way to distinguish the Act from the Nebraska law invalidated in

*Stenberg*, he could point to the extensive congressional findings in the federal statute. These findings attempt to establish that the Act does not pose a significant health risk to women and is therefore constitutional. If either Roberts or Alito accept the statute's findings, he could vote to uphold the federal law without overturning the precedent established in *Stenberg*.

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