

Gonzales v. Carhart (2007)

In *Gonzales v. Carhart* (2007), the US Supreme Court held in a five-to-four decision that the 2003 Partial-Birth Abortion Ban Act passed by the US Congress was constitutional. Although the Court previously ruled in *Stenberg v. Carhart* (2000) that a Nebraska law that prohibited partial-birth abortions was unconstitutional, Gonzales reversed this decision. Gonzales created the precedent that anyone who delivers and kills a living fetus could be subject to legal consequences, unless he or she performed the procedure to save the life of the mother.

Before the Gonzales decision, both the US Court of Appeals for the Eighth Circuit and the US Court of Appeals for the Ninth Circuit had ruled that the federal Partial-Birth Abortion Ban Act of 2003 was unconstitutional. The ban outlawed all partial-birth abortions—any procedure in which the physician partially delivers and then kills a living fetus—that were not necessary to preserve the life of the mother. In the US, between eighty-five and ninety percent of the 1.3 million abortions that were performed annually at the time took place during the first trimester, or first three months of pregnancy. The most common procedures performed during the first trimester do not include partial-birth abortion and, therefore, the law does not regulate them. Of the remaining abortions that occurred, most were done during the second trimester. The most common method for performing a second trimester abortion is the dilation and evacuation procedure, or D&E. Congress passed the Partial-Birth Abortion Ban Act to regulate the practice of a form of D&E known as intact D&E, dilation and extraction (D&X), or intact D&X, in which the fetus's legs and torso are extracted and its brain is suctioned out so that its skull collapses and can more easily pass through the cervix.

The Partial-Birth Abortion Ban Act was tested in two separate cases. A group of physicians who performed second-trimester abortions, led by LeRoy Carhart, challenged the law in the US District Court in Nebraska in 2003's *Carhart v. Ashcroft*, while the organization Planned Parenthood Federation of America did so in the US District Court in the Northern District of California in 2004's *Planned Parenthood Federation of America v. Ashcroft*. Both district courts prohibited the US Attorney General from upholding the Partial-Birth Abortion Act, and the Courts of Appeal for the Eighth and Ninth Circuits upheld those decisions. Alberto Gonzales, the US Attorney General, appealed to the US Supreme Court, which consolidated both cases into *Gonzales v. Carhart*.

Justice Anthony Kennedy's majority opinion outlined the reasons that the Supreme Court chose to overrule the decisions of the lower courts. Chief Justice John Roberts and Justices Samuel Alito, Clarence Thomas, and Antonin Scalia joined Kennedy in the majority opinion. Relying on the precedent set in *Planned Parenthood of Southeastern Pa. v. Casey* (1992), the majority held that the Partial-Birth Abortion Ban Act was valid as the government has a "legitimate and substantial interest in preserving and promoting fetal life." Kennedy notes that the two circuit courts had ruled the law unconstitutional primarily because it lacked an exception allowing the procedure when necessary to maintain the health of the mother. However, Kennedy argues, the federally established Partial-Birth Abortion Ban Act accounted for such an exception because it did not prohibit ordinary D&E, but rather it prevented physicians only from performing the more controversial intact D&E. In an intact D&E, the doctor first delivers a living fetus past its navel, and then performs an overt act that kills the partially delivered fetus. As the law allowed intact D&Es to be performed when necessary to save the mother's life, it therefore did not endanger the health of the mother.

In response to concerns regarding the Partial-Birth Abortion Act's vagueness, Kennedy held that unlike other unconstitutional partial-birth abortion laws, the new ban specifically defined the prohibited procedure. In fact, the law prevented only overt acts causing the living fetus's death after it had been delivered past the anatomical landmark of its navel or, in the case of a head-first deliv-

ery, after the entire fetal head was outside the mother's body. The ban did not extend to D&Es in which the fetus is removed in pieces or D&Es in which the fetus is killed via lethal injection in utero. According to Kennedy's decision, the Partial-Birth Abortion Ban Act also did not impose an undue burden on the mother to find alternatives, as several other options existed for a legal abortion after the first trimester.

A dissenting opinion was written by Justice Ruth Bader Ginsburg and supported by Justices David Souter, John Paul Stevens, and Stephen Breyer. Ginsburg argued that the outcome of *Gonzales* did not follow the precedents established by the US Supreme Court in its 1992 *Casey* and in its 2000 *Stenberg* decisions, which together prevented limitations from being imposed on abortions. Furthermore, Ginsburg argued that federal intervention should not be tolerated regarding intact D&Es, as the American College of Obstetricians had found the procedure necessary and proper in certain instances. Ginsburg concluded that the ruling was a reversal of prior abortion rulings.

Gonzales influenced the modern abortion debate. While previous rulings had legalized abortions in general, the extent to which they could be performed was still a largely contested topic. In validating the Partial-Birth Abortion Ban Act of 2003, *Gonzales* established a new legal precedent allowing such prohibitory laws to be created. Since *Gonzales*, several medical organizations and scientific publications, including the *New England Journal of Medicine*, have disparaged the precedent as posing a threat to physicians who perform legal D&Es. Similarly, others condemn the ruling as shifting the focus of abortion from women's health to preserving societal morality.

Sources

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