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PLANNED PARENTHOOD FEDERATION OF AMERICA, INC. v. GONZALES

BLAKE MASON*

In one of the most pivotal cases of the Fall 2006 Term, the United States Supreme Court upheld the Partial-Birth Abortion Ban Act of 2003[1] by a vote of 5-4.[2] Stating that the Act was not "void for vagueness" and that it did not impose "an undue burden on a woman's right to abortion based on its overbreadth or lack of a health exception,"[3] the Court found the Act to be facially valid, despite the absence of an exception for cases in which an abortion is necessary to preserve the health of the mother.[4] The case signaled a departure from the Court's long-standing abortion jurisprudence, and provided an enormous amount of insight into the "Roberts Court." The decision was the first major indication of how the Court will deal with abortion, how the Court feels about precedent, and how much deference the Court will give congressional findings of fact.

I. BACKGROUND

In 1992, the Supreme Court revisited its monumental decision in *Roe v. Wade*[5] and upheld the "central holding" of the case—"the woman's right to terminate her pregnancy before viability."[6] However, the Court discarded the rigid trimester framework employed by *Roe*,[7] and held that an "undue burden standard" should be used to determine whether a regulation restricting abortion before the fetus is

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* 2008 J.D. Candidate, Duke University School of Law

1. 18 U.S.C. § 1531 (2006).
2. Gonzales v. Carhart, 127 S. Ct. 1610 (2007).
3. *Id.* at 1627.
4. *Id.* at 1639.
5. Roe v. Wade, 410 U.S. 113 (1973).
6. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 871 (1992).
7. *Id.* at 873.

viable is constitutional.[8] Later, in 2000, the Supreme Court had the opportunity to apply these principles to a Nebraska statute banning "partial-birth abortion."[9]

To fully understand the application of the Nebraska statute reviewed by the Court in *Stenberg v. Carhart* and the similar federal statute involved in *Planned Parenthood Federation of America, Inc. v. Gonzales* one must have a basic understanding of at least two types of post-first trimester abortion methods—non-intact dilation and evacuation ("D&E") and intact dilation and evacuation ("intact D&E," also known as "partial-birth abortion"). Each type of D&E is a surgical procedure consisting of two steps: "dilation of the cervix and surgical removal (evacuation) of the fetus."[10]

The first step, cervical dilation, which is "necessary so that the doctor may insert an instrument . . . through the cervix and into the uterus in order to remove the fetus," is the same for both forms of D&E.[11] The second step, on the contrary, differs for each form of D&E.

During non-intact D&E, "the doctor, under ultrasound guidance, grasps a fetal extremity and attempts to bring the fetus through the cervix." The traction from the cervix is then used to "disarticulate, or break apart," the fetus. Next, the doctor makes additional passes into the uterus "to remove the remaining parts of the fetus, causing further disarticulation," and finally, the doctor removes "any remaining material using a suction tube . . . and a spoon-like instrument . . . ."[12]

In performing an intact D&E, "the doctor, rather than using multiple passes of the forceps to disarticulate and remove the fetus, removes the fetus in one pass, without any disarticulation occurring." In the case of a vertex presentation, the doctor first collapses the head, and then "uses forceps to grasp the fetus and extracts it through the cervix." In the case of a breech presentation, "the doctor begins by grasping a lower extremity and pulling it through the cervix, at which point the head typically becomes lodged in the cervix." Then, "the

8. *Id.* at 877.
9. Stenberg v. Carhart, 530 U.S. 914 (2000).
10. Planned Parenthood Fed'n of Am., Inc. v. Gonzales, 435 F.3d 1163, 1166 (9th Cir. 2006).
11. *Id.* at 1167.
12. *Id.*

doctor can either collapse the head and then remove the fetus or continue pulling to disarticulate at the neck."[13]

In a 5-4 decision in *Stenberg v. Carhart*, the Supreme Court held that Nebraska's statute banning "partial-birth abortion" violated the Federal Constitution "for at least two independent reasons."[14] First, the Court found the statute unconstitutional because it lacked an exception for the preservation of the health of the mother.[15] In addition, the Court found that the plain language of the statute covered both non-intact and intact D&Es,[16] and thus "result[ed] in an undue burden upon a woman's right to make an abortion decision."[17]

In response to the Supreme Court's decision in *Stenberg v. Carhart*, Congress passed the Partial-Birth Abortion Ban Act of 2003.[18] While the federal statute closely resembles the statute the Court struck down in *Stenberg v. Carhart*, the language of the statute is slightly different. In drafting the federal statute, Congress included the requirement of delivery beyond certain anatomical landmarks and the performance of an "overt-act, other than completion of delivery, that kills the partially delivered living fetus" before liability is triggered for the doctor performing the abortion.[19]

However, as with the Nebraska statute, no exception for the health of the mother was included in the federal statute. Instead of including a health exception, "Congress made several findings of fact in support of its determination that the Act's prohibition did not require a health exception."[20] These included findings that "the facts indicate that a partial-birth abortion is never necessary to preserve the health of a woman, poses serious risks to a woman's health, and lies outside the standard of medical care,"[21] and that "[a] moral, medical, and ethical consensus exists that the practice of performing a

13. *Id.*
14. *Stenberg*, 530 U.S. at 930.
15. *Id.* at 937–38.
16. *Id.* at 939–40.
17. *Id.* at 946.
18. 18 U.S.C. § 1531 (2006).
19. 18 U.S.C. § 1531(b)(1) (2006).
20. Planned Parenthood Fed'n of Am., Inc. v. Gonzales, 435 F.3d 1163, 1169 (9th Cir. 2006).
21. Partial-Birth Abortion Ban Act of 2003 § 2(13), 18 U.S.C. § 1531 (2003).

partial-birth abortion . . . is a gruesome and inhumane procedure that is never medically necessary and should be prohibited."[22]

Immediately after the Act was signed into law, Planned Parenthood Federation of America, Inc. filed a suit challenging the constitutionality of the statute, and the City and County of San Francisco intervened as a plaintiff to protect the interests of its healthcare providers.[23] The district court initially issued a temporary injunction against enforcement of the Act.[24] After a three-week trial, at which thirteen expert witnesses testified, the district court entered a permanent injunction against enforcement of the Act, finding it to be unconstitutional on three separate grounds.[25] First, despite the difference between the language of the two statutes, the district court found that the Act covered non-intact as well as intact D&E procedures, and thus "imposed an undue burden on a woman's right to choose to terminate her pregnancy before viability."[26] In addition, the district court held that the Act was unconstitutionally vague because it "failed to put physicians on notice as to what procedures would violate the statute."[27] Finally, the district court found that Congress's factual findings about the necessity of a health exception were "not entitled to controlling deference," and therefore the lack of a health exception rendered the statute unconstitutional.[28]

The Government then appealed the District Court's decision, and the Ninth Circuit also held the Act unconstitutional on three distinct grounds.[29] First, the appellate court held that "under even the most deferential level of review" it could not defer to Congress's finding "that there is a consensus in the medical community that the prohibited procedures are never necessary to preserve the health of women choosing to terminate their pregnancies,"[30] and thus the Act was unconstitutional due to its lack of a health exception.[31] Second, the court found that "neither the differences . . . between the language

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22. *Id.* at § 2(1).
23. *Planned Parenthood Fed'n of Am., Inc.*, 435 F.3d at 1169.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at 1170.
28. *Id.*
29. *Id.* at 1171.
30. *Id.* at 1174.
31. *Id.* at 1176.

of the Act and the Nebraska statute nor the scienter requirements contained in the Act limit its application to the intact D&E procedure."[32] Thus, the court determined that the Act would produce a "chilling effect on doctors' willingness to perform previability post-first trimester abortions," thereby imposing an unconstitutional "'undue burden upon a woman's right to make an abortion decision.'"[33] Third, the appellate court held the Act was unconstitutionally vague because the statute did not "provide fair warning of the prohibited conduct to those it regulates and because the Act permits arbitrary and discriminatory enforcement."[34]

II. SUPREME COURT'S DECISION

On April 18th, in a somewhat surprising decision, the Supreme Court reversed the Ninth Circuit's ruling.[35] Justice Kennedy wrote for the majority of the Court and dealt with each of the Ninth Circuit's holdings in reverse order. First, the Court held that the Partial-Birth Abortion Ban Act of 2003 is not unconstitutionally vague.[36] In making that determination, the Court emphasized four portions of the Act that explicitly define the type of abortion it prohibits, which keeps it from being unconstitutional[37]—(1) "the person performing the abortion must vaginally deliver a living fetus;" (2) the fetus be delivered beyond one of the "anatomical landmarks" defined by the Act; (3) the "doctor must perform an overt act, other than completion of delivery, that kills the partially delivered living fetus;" and (4) the Act has a scienter requirement[38]—and stated that based on those requirements, the Act. The majority then stated that those four requirements ensure that ordinary doctors can understand what type of conduct is prohibited by the Act and do not encourage arbitrary and discriminatory enforcement; thus, the Act did not meet the requirements of the "void-for-vagueness doctrine."[39]

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32. *Id.* at 1177.
33. *Id.* at 1180–81 (quoting Stenberg v. Carhart, 530 U.S. 914, 946 (2000)).
34. *Id.* at 1184.
35. Gonzales v. Carhart, 127 S. Ct. 1610, 1639 (2007).
36. *Id.* at 1627.
37. *Id.* at 1627.
38. *Id.* at 1627–28 (internal quotation marks omitted).
39. *Id.* at 1628–29.

Second, the Court held that the Act is not overbroad because it does not prohibit non-intact D&E.[40] In making that determination, the Court once again focused on the Act's intent requirements.[41] In addition, the Court emphasized the differences in the Act and the Nebraska statute struck down in *Stenberg*. The Court highlighted the ways the Act differed from the Nebraska statute by again pointing to characteristics like the Act's inclusion of the phrase "delivering a living fetus," identification of the specific "anatomical landmarks," and addition of the overt-act requirement.[42] Additionally, the Court dispelled the respondent's fears that any D&E may violate the Act—because doctors do not always know whether their actions will result in a non-intact or intact D&E before they begin an abortion—by stating that the scienter requirements make the Act applicable exclusively to doctors who intend to perform an intact D&E from the outset of the procedure.[43]

Next, the Court held that the lack of a health exception did not render the Act invalid on its face.[44] The majority first acknowledged that "[t]here is documented medical disagreement whether the Act's prohibition would ever impose significant health risks on women."[45] However, the opinion then stated both that federal and state legislatures have wide discretion to pass legislation in areas of medical and scientific uncertainty and that "medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts."[46] Therefore, the Court concluded that "the medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden."[47] This conclusion regarding the "undue burden" standard was supported by other factors as well, such as the fact that alternative forms of late-term abortion would still be available.[48]

40. *Id.* at 1629.
41. *Id.*
42. *Id.* at 1630–31.
43. *Id.* at 1631–32.
44. *Id.* at 1638.
45. *Id.* at 1636.
46. *Id.* at 1637.
47. *Id.*
48. *Id.*

Interestingly, the majority did not rely on the congressional findings that had been the subject of much debate in the lower courts in determining that the lack of a health exception did not invalidate the Act. While the Court acknowledged that it reviews congressional factfinding "under a deferential standard," it stated that the Court "retains an independent constitutional duty to review factual findings where constitutional rights are at stake."[49] The majority then went as far as to point out that some of the congressional findings were "factually incorrect," including Congress' determination that there was a "medical consensus that the prohibited procedure is never medically unnecessary."[50]

Lastly, the majority, somewhat surprisingly, stated that "these facial attacks should not have been entertained in the first instance."[51] Instead, the opinion stated that "the proper means to consider exceptions is by as-applied challenge."[52] The Court based this determination on the fact that an as-applied challenge would provide a more concrete factual scenario for analyzing an attack against the lack of a medical exception and the "heavy burden" that broad facial challenges impose upon the plaintiffs.[53]

III. THE DISSENT

In a bitter dissent, Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, called the majority's opinion "alarming"[54] and strongly attacked the majority's decision to uphold an abortion restriction that does not contain a health exception.[55] In addition, the dissent questioned the majority's determination that the Act advances the Government's interest in promoting fetal life[56] and its conclusion that a facial attack was not the proper means for challenging the statute.[57]

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49. *Id.*
50. *Id.* at 1638.
51. *Id.*
52. *Id.*
53. *Id.* at 1639.
54. *Id.* at 1641 (Ginsburg, J., dissenting).
55. *Id.* at 1640–46.
56. *Id.* at 1646–50.
57. *Id.* at 1650–52.

In attacking the majority's decision to uphold the Act absent a health exception, the dissent began by pointing out that for "the first time since *Roe*, the Court blesses a prohibition with no exception safeguarding a woman's health."[58] Justice Ginsburg provided the dissent's understanding of the Court's holdings in *Casey* and *Stenberg* and stated that in *Stenberg* the Court made clear that where "banning a particular abortion procedure could endanger women's health, a health exception is required."[59] The dissent then emphasized that in *Casey*, the Court reasoned that a division in medical opinion, as was present in this case, is a "factor that signals the presence of a medical risk, not its absence," and thus, a complete ban on intact D&E abortions "consequently must contain a health exception."[60]

Additionally, the dissent reviewed the findings of Congress and the lower courts in regard to the safety benefits provided by intact D&E and highlighted the fact that the majority opinion even admitted that many of the congressional findings were incorrect, and that all three of the trial courts that heard challenges to the Act determined that "in some circumstances, intact D&E is the safest procedure."[61] Accordingly, the dissent called the majority's conclusion—that the existence of medical uncertainty over whether the Act creates a significant health risk is a sufficient basis to uphold the ban—"bewildering," stating that this position defied "the Court's longstanding precedent affirming the necessity of a health exception, with no carve-out for circumstances of medical uncertainty."[62]

In questioning the majority's assertion that the Act advances the Government's interest in preserving and promoting fetal life, the dissent concluded that the Act, in fact, scarcely promotes fetal life and then asserted that the majority's decision was truly based on "moral concerns."[63] In determining that the Act does little to preserve and promote fetal life, the dissent emphasized that the Act does not prevent any abortions, but rather prevents "only a *method* of performing abortion."[64] Additionally, the dissent stated that while the

58. *Id.* at 1641.
59. *Id.* at 1642 (internal quotation marks omitted).
60. *Id.* at 1643.
61. *Id.* at 1645 (internal quotation marks omitted).
62. *Id.* at 1646.
63. *Id.* at 1647.
64. *Id.* (emphasis in original).

Act does nothing to prevent abortions, it does have the effect of preventing a woman from choosing an intact D&E even when a doctor believes that is the safest procedure available to the woman.[65] In regards to the majority's decision being based on "moral concerns," the dissent stated that these concerns were not connected to "any ground genuinely serving the Government's interest in preserving life."[66] The dissent then concluded that by basing its decision on moral concerns instead of fundamental rights, the majority "dishonors our precedent."[67]

Lastly, in vehemently denying the majority's conclusion that a facial attack was not the proper means for challenging the Act, the dissent began by stating that "[t]his holding is perplexing given that, in materially identical circumstances we held that a statute lacking a health exception was unconstitutional on its face."[68] The dissent argued that based on *Casey* the majority's conclusion that the "respondents have not shown that the ban on intact D&E would be unconstitutional in a large fraction of relevant cases" was based on an improper determination of relevant cases.[69] The dissent stated that instead of basing the determination on all second trimester abortions, the determination should have been based on all women for whom intact D&E would be the safest procedure available.[70] Therefore, the dissent concluded the Act would be unconstitutional in every relevant case because "the absence of a health exception burdens *all* women for whom [the Act] is relevant."[71]

IV. IMPACT AND CONCLUSION

Although it may take quite some time to determine the full effect of the Court's departure from its long-standing abortion jurisprudence, *Gonzales v. Carhart* did provide an enormous amount of insight into the relatively new "Roberts Court." Three main areas in which the decision supplied information about the Court were: the Court's willingness, or lack thereof, to defer to Congressional findings

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65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 1650.
69. *Id.* at 1651 (internal quotation marks omitted).
70. *Id.*
71. *Id.* (emphasis in original).

of fact, the Court's willingness to depart from precedent, and how the Court is going to deal with abortion, generally.

The decision indicated that the current "Roberts Court" is going to be unwilling to place a disproportionate amount of weight on congressional findings of fact. Although the Court acknowledged that it reviews congressional findings of fact using a "deferential standard," it also reaffirmed its own position of power among the branches of government by stating that the Court "retains an independent constitutional duty to review factual findings where constitutional rights are at stake."[72] Additionally, by pointing out a number of inaccuracies in the congressional findings,[73] the Court indicated that it would not be willing to merely accept Congress' findings, but rather that it would review those findings and use them only as a portion of the facts presented in the case. The Court indicated that Congress will need to provide findings that are substantially supported in order for them to have any effect on the Court's ruling. Therefore, the Court sent a strong message that it will not allow Congress to "strong-arm" its decisions in controversial areas of the law where legislatures may benefit by taking definitive stances in order to please their constituents.

The decision sent mixed messages about the "Roberts Court's" willingness to depart from precedent. The Court's decision to uphold the Act seems to be a large departure from some of its recent abortion decisions, but the majority maintained throughout its opinion that it was not departing from the precedents of those cases. First, the majority maintained from the beginning of its opinion that it was applying the holding of *Casey*.[74] Secondly, the majority emphasized a number of differences between the Partial-Birth Abortion Ban Act and the Nebraska statute it struck down in *Stenberg*,[75] making a seemingly overt effort to indicate its ability to uphold the Act without overruling its decision in *Stenberg*.

The opinion indicates that the Court will not feel entirely obligated to follow its previous decisions, even when the issues presented in cases are quite similar. If the Court did not want to raise

72. *Id.* at 1637 (majority opinion).
73. *Id.* at 1638.
74. *Id.* at 1627.
75. *Id.* at 1629–31.

any questions concerning the viability of its previous abortion decisions, the majority could have easily struck down the Act by citing the similarities between the Act and the Nebraska statute challenged in *Stenberg* and Congress' explicit desire to overturn *Stenberg*. However, it also seems difficult to go as far as the dissent did and say that the majority "refuses to take *Casey* and *Stenberg* seriously."[76] This case seems to leave the Court somewhere in the middle, possibly leaving the door open for a challenge to the reasoning in *Casey*. Additionally, this case could also introduce the possibility of challenges in other controversial areas of the law despite the existence of similar, even recently decided decisions.

In regards to how the "Roberts Court" is going to deal with abortion generally, the decision seems to indicate what many people assumed when Justices Roberts and Alito were nominated by president Bush and confirmed by the Senate—that the "Roberts Court" is likely to have a more conservative view on the controversial issue of abortion. In addition, the decision shows that despite writing the majority opinion in *Casey*, Justice Kennedy, at least under the proper circumstances, is not unwilling to uphold bans on abortion, with or without exceptions for the health of the mother.

In the most extreme case, this decision could open the door to challenging *Roe v. Wade* and women's constitutional right to previability abortions. However, it seems somewhat unlikely that this will be the case because Justice Kennedy, the new swing vote on the Court, has previously supported women's right to choose. A more narrow, and seemingly more realistic, interpretation of the decision would limit its applicability to intact D&E, and not allow the prohibition to be expanded to non-intact D&E, thus, still providing a woman the right to choose abortion, even in the second trimester.

The most radical change to the Court's abortion jurisprudence brought about by the decision is the way exceptions in abortion bans will now need to be challenged. Individuals wanting to challenge exceptions will now need to bring as-applied challenges against the exceptions instead of facial attacks. This change not only redefines how challenges will need to be made, but, as the dissent points out, may cause a gray area for women "whose circumstances have not

76. *Id.* at 1641 (Ginsburg, J., dissenting).

been anticipated by prior litigation."[77] Though this change seems to drastically alter the Court's jurisprudence, it may also provide hope for individuals still wanting to challenge the Partial-Birth Abortion Ban Act because in concluding its opinion, the majority stated that "[t]his Act is open to a proper as-applied challenge in a discrete case."[78]

In conclusion, while it is yet to be determined whether this decision was, as Justice Ginsburg stated, "an effort to chip away" at a woman's right to abortion,[79] or rather the Court striking down one specific type of abortion that it felt to be overly heinous and unnecessary, one thing seems certain—litigation will soon begin in an attempt to determine the answer to exactly that question.

77. *Id.* at 1652.
78. *Id.* at 1639 (majority opinion).
79. *Id.* at 1653 (Ginsburg, J., dissenting).