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HAS STARE DECISIS BEEN ABORTED?

In abortion case, U.S. Supreme Court has ignored long-standing protections of women's health

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Just three months ago, the U.S. Supreme Court not only eroded a woman's right to choose, it did away with any exception for the health of the woman; and did nothing to decrease the number of abortions performed at any time during pregnancy.

The opinion in *Gonzales v. Carhart*, 127 S. Ct. (2007) set women back to where a woman's health is not even a consideration. *Casey* affirmatively resolved the issue of a woman's health and *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) together set the precedent followed in *Stenberg v. Carhart*, 530 U.S. 914 (2000), which held that there must be an exception carved out for the health of the woman; the court there held a Nebraska statute which did not do so unconstitutional.

The *Gonzales* Court reviewed challenges to the validity of the Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. Section 1531 (2000 ed. Supp. IV) which was passed by Congress as a reaction to the Supreme Court's decision in *Stenberg*. *Stenberg's* famous predecessors, *Casey*, 505 U.S. 833 (1992) and *Roe v. Wade*, 410 U.S. 113 (1973) left the *Stenberg* Court no wiggle room concerning a woman's health. At issue in *Gonzales* was: Whether the prohibition of the use of a procedure known as "intact dilation and evacuation (D&E)," providing no exception for the health of the woman, was constitutional.

Stenberg, written by Justice Stephen G. Breyer, who was joined by Justices John Paul Stevens, Sandra Day O'Connor, David H. Souter and Ruth Bader Ginsburg, examined the constitutionality of a Nebraska statute which criminalized the performance of any "partial-birth abortion", which was not necessary to save the life of the mother. In *Stenberg*, O'Connor in her concurring opinion stated:

"First, the Nebraska statute is inconsistent with *Casey* because it lacks an exception for those instances where the banned procedure is necessary to preserve the health of the mother."

She went on to state " . . . even a post viability proscription of abortion would be invalid absent a health exception."

"The statute at issue here, however, only excepts those procedures 'necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness or physical injury.'"

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(Citations omitted.) This lack of a health exception necessarily renders the statute unconstitutional."

In response to *Stenberg*, in 2003 Congress passed the statute at issue in *Gonzales v. Carhart*, which not only makes the performance of an "intact D&E" criminal, but also provides no exception for the health of the woman, notwithstanding the mandates of *Roe*, *Casey* and *Stenberg*.

Letting the Decision Stand

We all know the doctrine of stare decisis. When the highest court of the land has decided that abortion is legal, as was the case in *Roe v. Wade*, subsequent trial and appellate courts must uphold that finding. *Casey* not only followed the holding of *Roe v. Wade*, but made it clear that the health of the woman was paramount. *Stenberg* followed the holdings of *Roe* and *Casey*; the Supreme Court in *Gonzales* was compelled, under the doctrine of stare decisis, to follow the precedent already strongly established by that Court. It did not.

Our legal system is based on an number of components. One, of course, is the Constitution. Another is certain bodies of state law. Finally, law is basically determined by the decisions of prior appellate courts or precedent. The doctrine of stare decisis literally means "to stand by a decision." Therefore, a trial court is bound by appellate court decisions regarding specific legal issues. When the highest appellate court of the land makes a decision, the following Supreme Courts of the United States must follow precedent or prior decisions of the same court. Although the United State Supreme Court can reverse itself, when it has precedent as strong as *Roe* and *Casey*, it is unacceptable to take the position the *Gonzales* Court did and do away with a provision that was the heart and soul of the precedential cases - the health of the woman. This Court has blatantly ignored the lynchpin of both *Casey* and *Stenberg*. Poor women will certainly continue to die because many do not even know that they are pregnant until late into the pregnancy. The majority's reversal of the high court's prior holdings recalls a bygone era of paternalism, where women were viewed as property. This is outdated nonsense.

In *Gonzales v. Carhart*, the majority, comprised of Justice Anthony M. Kennedy, Chief Justice John G. Roberts Jr. and Justices Antonin Scalia, Clarence Thomas and Samuel A. Alito Jr., ruled that the statute passed in response to *Stenberg* was not void for vagueness, did not impose an undue burden from overbreadth, and withstood a facial attack. It is this writer's opinion that many women will suffer and perhaps die in order to demonstrate that an analysis of the statute under scrutiny in *Gonzales* on an "as applied" basis will have a severely chilling effect on women being able to choose with their physicians a procedure which provides for the safest abortion method for the health of the woman.

The majority in *Gonzales* stated as follows:

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"Under the principles accepted as controlling here, the Act, as we have interpreted it, would be unconstitutional 'if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus obtains viability.' ", citing *Casey*, 505 U.S. at 878.

The abortion procedures which are approved by the Act can take place, both pre-viability and post-viability. The majority stated:

"The question is whether the Act, measured by its text in this facial attack, imposes a substantial obstacle to late-term, but pre-viability abortions. The Act does not on its face impose a substantial obstacle, and we reject this further facial challenge to its validity."

The majority, while purporting to rely on the tests of *Casey*, decided that the evidence presented to the trial courts and before Congress determined that both sides of the argument had medical support for the position ruling out a health of the mother exception. As Justice O'Connor stated in *Stenberg*, where there is no exception for the health of the mother, the legislation is unconstitutional.

At issue is a procedure known as "intact D&E." This method of abortion exists together with another method known as dilation and extraction (D&X) and intact D&X. The majority addressed the procedure known as "intact D&E" as the procedure banned by the statute passed by Congress. The medical evidence presented in the trial courts indicated that intact D&E starts with dilation of the cervix. As the majority in *Gonzales* stated:

"In an intact D&E procedure, the doctor extracts the fetus in a way conducive to pulling out its entire body, instead of ripping it apart."

The trial courts, found the Partial Birth Abortion Ban Act unconstitutional because it lacked an exception allowing the procedure where it was necessary for the health of the mother. Those courts were upheld by the 8th U.S. Circuit Court of Appeals and by the 9th U.S. Circuit Court of Appeals. The majority held the Act did not restrict an abortion procedure involving the delivery of an expired fetus. The majority also emphasized that whether the delivery of the fetus is pre-viability or post-viability is of no moment. The only prohibition is that the fetus must be destroyed before it is delivered vaginally and not after. To quote the majority:

"The Act prohibits intact D&E; and, notwithstanding respondent's arguments, it does not prohibit the D&E procedure in which the fetus is removed in parts."

Thus, the word "intact" referring to a D&E procedure simply means that if a physician delivers the fetus into the vagina without first mutilating it, that procedure is equivalent to a partial-birth abortion and is banned by the Act. The majority describes in gruesome detail how the procedure of destroying the fetus before it is pulled into the vagina is constitutional.

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Ginsburg wrote an eloquent dissent in *Gonzales*, in which she was joined by Stevens, Souter and Breyer. She stressed that the *Casey* Court required that state regulation of access to abortion procedures, even after viability, must protect the health of the woman."

Ginsburg also stated: "The term 'partial-birth-abortion' is neither recognized in the medical literature nor used by physicians who perform second trimester abortions."

She emphasized that the medical community refers to such a procedure as either dilation and extraction (D&X) or intact dilation and evacuation (intact D&E). The Dissent emphasized that the majority decision in *Gonzales* was alarming because it blurred the line which was firmly drawn in *Casey* between pre-viability and post-viability abortions and for the first time since *Roe v. Wade*, approved a prohibition with no exception for a woman's health. The Dissent further stated that there are safety advantages of intact D&E for women with certain medical conditions and addressed that the intact D&E decreased the likelihood that fetal tissue would be retained in the uterus, thereby causing infection, hemorrhage and infertility. Justice Ginsburg stated:

"The law saves not a single fetus from destruction for it targets only a *method* of performing abortion. (Citations omitted.)

The Court upholds the law that, while doing nothing to 'preserve . . . fetal life,' bars a woman from choosing intact D&E although her doctor 'reasonably believes that procedure will best protect her.' ", citing *Stenberg*.

Ginsburg concluded: ". . . the Court dishonors our precedent." She further opined: "A decision so at odds with our jurisprudence should not have staying power."

The majority found in favor of post-viability abortions which are not integrally necessary to protect the health of the mother, thereby obviating the findings in *Casey* and *Roe* which clearly hold that there is a legitimate state interest in post-viability abortions. This majority does not care when abortions are performed, so long as they are not done by the methodology of "intact D&E." This Court has approved legislation which provides no exception for the health of the woman.

A Setback to Jurisprudence

Tragically, *Gonzales v. Carhart* has seriously set back the status of women and our system of jurisprudence.

In the famous case of *Marbury v. Madison*, 5 U.S. 137, (1803), the Supreme Court determined that our system of government is a system based on checks and balances. That case stood for the proposition that the Supreme Court of the United States is the final arbiter of interpretation of the law. Congress and the President are elected; Supreme Court justices are appointed for life. In my view, they are meant to act apolitically. The Supreme Court in *Gonzales v. Carhart* did not show respect for *stare decisis* but rather imposed its own political and moral views on abortion. The

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result is the health of the woman has been totally set aside and post-viability abortion is now permitted so long as the destruction of the fetus is accomplished prior to the fetus being pulled into the vagina. The "as applied" challenges to *Gonzales v. Carhart* demonstrating the chilling effect of this egregious decision on women will only occur after unnecessary deaths of women.

The rule of stare decisis has truly been aborted. •

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