Order Code RL30415

CRS Report for Congress

Partial-Birth Abortion: Recent Developments in the Law

Updated January 14, 2008

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Prepared for Members and Committees of Congress

Congressional Research Service

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Summary

The term "partial-birth abortion" refers generally to an abortion procedure where the fetus is removed intact from a woman's body. The procedure is described by the medical community as "intact dilation and evacuation" or "dilation and extraction" ("D & X") depending on the presentation of the fetus. Intact dilation and evacuation involves a vertex or "head first" presentation, the induced dilation of the cervix, the collapsing of the skull, and the extraction of the entire fetus through the cervix. D & X involves a breech or "feet first" presentation, the induced dilation of the cervix, the removal of the fetal body through the cervix, the collapsing of the skull, and the extraction of the fetus through the cervix.

Since 1995, at least thirty-one states have enacted laws banning partial-birth abortions. Although many of these laws have not taken effect because of temporary or permanent injunctions, they remain contentious to both pro-life advocates and those who support a woman's right to choose. This report discusses the U.S. Supreme Court's decision in *Stenberg v. Carhart*, a case involving the constitutionality of Nebraska's partial-birth abortion ban statute. In *Stenberg*, the Court invalidated the Nebraska statute because it lacked an exception for the performance of the partial-birth abortion procedure when necessary to protect the health of the mother, and because it imposed an undue burden on a woman's ability to have an abortion.

This report also reviews various legislative attempts to restrict partial-birth abortions during the 106th, 107th, and 108th Congresses. S. 3, the Partial-Birth Abortion Ban Act of 2003, was signed by the President on November 4, 2003. On April 18, 2007, the Court upheld the act, finding that, as a facial matter, it is not unconstitutionally vague and does not impose an undue burden on a woman's right to terminate her pregnancy. In reaching its conclusion in *Gonzales v. Carhart*, the Court distinguished the federal statute from the Nebraska law at issue in *Stenberg*.

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Partial-Birth Abortion: Recent Developments in the Law

Introduction

Since 1995, at least thirty-one states have enacted laws banning the so-called "partial-birth" abortion procedure. Although many of these laws have not taken effect because of permanent injunctions, they remain contentious to both pro-life advocates and those who support a woman's right to choose.[1] The concern over partial-birth abortion has been shared by Congress. Congress passed bans on the partial-birth abortion procedure in both the 104th and 105th Congresses.[2] Unable to overcome presidential vetoes during both congressional terms, the Partial-Birth Abortion Ban Act was reintroduced in each successive Congress until its enactment in 2003. S. 3, the Partial-Birth Abortion Ban Act of 2003, was passed by Congress in October 2003. The measure was signed by the President on November 5, 2003.

The U.S. Supreme Court has also addressed the performance of partial-birth abortions. In *Stenberg v. Carhart*, a 2000 case, the Court invalidated a Nebraska statute that prohibited the performance of such abortions. Prior to this decision, the U.S. Courts of Appeals remained divided on the legitimacy of state statutes banning partial-birth abortions.[3] In *Gonzales v. Carhart*, a 2007 case, the Court upheld the Partial-Birth Abortion Ban Act of 2003, finding that, as a facial matter, it is not unconstitutionally vague and does not impose an undue burden on a woman's right to terminate her pregnancy.[4] This report discusses the Court's decisions and the partial-birth abortion measures in the 106th, 107th, and 108th Congresses.

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[1] *See* Center for Reproductive Rights, *So-Called "Partial Birth Abortion" Bans*, at [http://www.crlp.org/st_law_pba.html] (last visited December 28, 2006).

[2] H.R. 1833, 104th Cong. (1995); H.R. 1122, 105th Cong. (1997).

[3] *See* Richmond Medical Center for Women v. Gilmore, 144 F.3d 326 (4th Cir. 1998) (Virginia Partial Birth Abortion Act is not unconstitutionally vague because it cannot "reasonably be read" to prohibit the D & E procedure); Hope Clinic v. Ryan, 195 F.3d 857 (7th Cir. 1999) (Illinois and Wisconsin statutes prohibiting partial-birth abortion are not unconstitutionally vague); Women's Medical Professional Corporation v. Voinovich, 130 F.3d 187 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998) (Ohio statute banning partial-birth abortion imposes an undue burden on the ability to have an abortion because it restricts both the D & X and D & E procedures).

[4] 127 S. Ct. 1610 (2007).

Background

The Supreme Court has held that a woman has a constitutional right to choose whether to terminate her pregnancy.[5] Although a state cannot prohibit a woman from having an abortion, it can promote its interest in potential human life by regulating, and even proscribing, abortion after fetal viability so long as it allows an exception for abortions that are necessary for the preservation of the life or health of the mother.[6] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court expanded a state's authority to regulate abortion by permitting regulation at the pre-viability stage so long as such regulation does not place an "undue burden" on a woman's ability to have an abortion.[7]

The term "partial-birth abortion" refers generally to an abortion procedure where the fetus is removed intact from a woman's body. The procedure is described by the medical community as "intact dilation and evacuation" or "dilation and extraction" ("D & X") depending on the presentation of the fetus.[8] Intact dilation and evacuation involves a vertex or "head first" presentation, the induced dilation of the cervix, the collapsing of the skull, and the extraction of the entire fetus through the cervix.[9] D & X involves a breech or "feet first" presentation, the induced dilation of the cervix, the removal of the fetal body through the cervix, the collapsing of the skull, and the extraction of the fetus through the cervix.[10] This report uses the term "D & X" to encompass both procedures.

D & X is one of several abortion methods. The principal methods of abortion are suction curettage, induction, and standard dilation and evacuation ("D & E").[11] The decision to perform one abortion method over another usually depends on the gestational age of the fetus. During the first trimester, the most common method of abortion is suction curettage.[12] Suction curettage involves the evacuation of the uterine cavity by suction. The embryo or fetus is separated from the placenta either by scraping or vacuum pressure before being removed by suction. Induction may be performed either early in the pregnancy or in the second trimester. In this procedure, the fetus is forced from the uterus by inducing preterm labor.

D & E is the most common method of abortion in the second trimester.[13] Suction curettage is no longer viable because the fetus is too large in the second

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[5] Roe v. Wade, 410 U.S. 113 (1973). *See also* CRS Report RL33467, *Abortion: Legislative Response*, by Jon O. Shimabukuro and Karen J. Lewis.

[6] *Roe*, 410 U.S. at 164-65.

[7] 505 U.S. 833 (1992).

[8] *See* Stenberg v. Carhart, 530 U.S. 914, 927 (2000).

[9] *Id*.

[10] *Id*.

[11] *See Hope Clinic*, 195 F.3d at 861.

[12] *See Voinovich*, 130 F.3d at 198.

[13] *Id*.

trimester to remove by suction alone. D & E involves the dilation of the cervix and the dismemberment of the fetus inside the uterus. Fetal parts are later removed from the uterus either with forceps or by suction.

D & X is typically performed late in the second trimester between the twentieth and twenty-fourth weeks of pregnancy. Although the medical advantages of D & X have been asserted, the nature of the procedure has prompted pro-life advocates to characterize D & X as something akin to infanticide.[14]

In *Women's Medical Professional Corporation v. Voinovich*, the U.S. Court of Appeals for the Sixth Circuit discussed the differences between the D & E and D & X procedures in reference to an Ohio act that banned partial-birth abortions:

> The primary distinction between the two procedures is that the D & E procedure results in a dismembered fetus while the D & X procedure results in a relatively intact fetus. More specifically, the D & E procedure involves dismembering the fetus in utero before compressing the skull by means of suction, while the D & X procedure involves removing intact all but the head of the fetus from the uterus and then compressing the skull by means of suction. In both procedures, the fetal head must be compressed, because it is usually too large to pass through a woman's dilated cervix. In the D & E procedure, this is typically accomplished by either suctioning the intracranial matter or by crushing the skull, while in the D & X procedure it is always accomplished by suctioning the intracranial matter.[15]

The procedural similarities between the D & E and D & X procedures have contributed to the concern that the language of partial-birth abortion bans may prohibit both methods of abortion.

Plaintiffs challenging partial-birth abortion statutes have generally sought the invalidation of such statutes on the basis of two arguments: first, that the statutes are unconstitutionally vague, and second, that the statutes are unconstitutional because they impose an undue burden on a woman's ability to obtain an abortion. The Supreme Court has held that an enactment is void for vagueness if its prohibitions are not clearly defined.[16] Vague laws are found unconstitutional because they fail to give people of ordinary intelligence a reasonable opportunity to know what is prohibited and thus allow them to act lawfully.[17] Moreover, the inability to provide explicit standards is feared to result in the arbitrary and discriminatory enforcement of a statute.

The undue burden standard was adopted by the Court in *Casey*. In that case, the Court held that a state could enact abortion regulations at the pre-viability stage so long as an "undue burden" is not placed on a woman's ability to have an abortion.

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[14] *Hope Clinic*, 195 F.3d at 883.

[15] *Voinovich*, 130 F.3d at 199.

[16] *See* Grayned v. City of Rockford, 408 U.S. 104 (1972).

[17] *Id*.

Any regulation which "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion" creates an undue burden and is invalid.[18]

The Sixth Circuit was the first to consider whether a ban on partial-birth abortions imposes an undue burden on a woman's ability to have an abortion. In *Voinovich*, the court found that an Ohio statute that attempted to ban the D & X procedure was unconstitutional under *Casey*. The court determined that the language of the statute targeted the D & X procedure, but encompassed the D & E procedure. Because the D & E procedure is the most common method of second trimester abortions, the court contended that the statute created an undue burden on women seeking abortions at this point in their pregnancies.

Stenberg v. Carhart

In *Stenberg v. Carhart*, a Nebraska physician who performed abortions at a specialized abortion facility sought a declaration that Nebraska's partial-birth abortion ban statute violated the U.S. Constitution.[19] The Nebraska statute provided:

> No partial birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.[20]

The term "partial birth abortion" was defined by the statute 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."[21] The term "partially delivers vaginally a living unborn child before killing the unborn child" was further defined as "deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child."[22]

Violation of the statute carried a prison term of up to twenty years and a fine of up to $25,000. In addition, a doctor who violated the statute was subject to the automatic revocation of his license to practice medicine in Nebraska.

Among his arguments, Dr. Carhart maintained that the meaning of the term "substantial portion" in the Nebraska statute was unclear and thus, could include the common D & E procedure in its ban of partial-birth abortions. Because the Nebraska legislature failed to provide a definition for "substantial portion," the U.S. Court of Appeals for the Eighth Circuit interpreted the Nebraska statute to proscribe both the

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[18] *Casey*, 505 U.S. at 877.

[19] 530 U.S. 914 (2000).

[20] Neb. Rev. Stat. § 28-328(1).

[21] Neb. Rev. Stat. § 28-326(9).

[22] *Id*.

D & X and D & E procedures: "if 'substantial portion' means an arm or a leg - and surely it must - then the ban ... encompasses both the D & E and the D & X procedures."[23] The Eighth Circuit acknowledged that during the D & E procedure, the physician often inserts his forceps into the uterus, grasps a part of the living fetus, and pulls that part of the fetus into the vagina. Because the arm or leg is the most common part to be retrieved, the physician would violate the statute.[24]

The state argued that the statute's scienter or knowledge requirement limited its scope and made it applicable only to the D & X procedure. According to the state, the statute applied only to the deliberate and intentional performance of a partial birth abortion; that is, the partial delivery of a living fetus vaginally, the killing of the fetus, and the completion of the delivery.[25] However, the Eighth Circuit found that the D & E procedure involves all of the same steps: "The physician intentionally brings a substantial part of the fetus into the vagina, dismembers the fetus, leading to fetal demise, and completes the delivery. A physician need not set out with the intent to perform a D & X procedure in order to violate the statute."[26]

The Supreme Court affirmed the Eighth Circuit's decision by a 5-4 margin. The Court based its decision on two determinations. First, the Court concluded that the Nebraska statute lacked any exception for the preservation of the health of the mother. Second, the Court found that the statute imposed an undue burden on the right to choose abortion because its language covered more than the D & X procedure.

Despite the Court's previous instructions in *Roe* and *Casey*, that abortion regulation must include an exception where it is "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother," the state argued that Nebraska's partial-birth abortion statute did not require a health exception because safe alternatives remained available to women, and a ban on partial-birth abortions would create no risk to the health of women.[27] Although the Court conceded that the actual need for the D & X procedure was uncertain, it recognized that the procedure could be safer in certain circumstances.[28] Thus, the Court stated, "a statute that altogether forbids D & X creates a significant health risk . . . [t]he statute consequently must contain a health exception."[29]

In its discussion of the undue burden that would be imposed if the Nebraska statute was upheld, the Court maintained that the plain language of the statute

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[23] *Carhart*, 192 F.3d at 1150.

[24] *Id*.

[25] *Id*.

[26] *Id*.

[27] *Stenberg*, 530 U.S. at 931 (quoting *Roe*, 410 U.S. at 164-65).

[28] *Stenberg*, 530 U.S. at 937.

[29] *Id*. at 938.

covered both the D & X and D & E procedures.[30] Although the Nebraska State Attorney General offered an interpretation of the statute that differentiated between the two procedures, the Court was reluctant to recognize such a view. Because the Court traditionally follows lower federal court interpretations of state law and because the Attorney General's interpretative views would not bind state courts, the Court held that the statute's reference to the delivery of "a living unborn child, or a substantial portion thereof" implicated both the D & X and D & E procedures.[31]

Because the *Stenberg* Court was divided by only one member, Justice O'Connor's concurrence raised concern among those who support a woman's right to choose. Justice O'Connor's concurrence indicated that a state statute prohibiting partial-birth abortions would likely withstand a constitutional challenge if it included an exception for situations where the health of the mother is at issue, and if it was "narrowly tailored to proscribing the D & X procedure alone."[32] Justice O'Connor identified Kansas, Utah, and Montana as having partial-birth abortion statutes that differentiate appropriately between D & X and the other procedures.[33]

Federal Proposals to Ban Partial-Birth Abortion

106th Congress

The Partial-Birth Abortion Ban Act of 1999, S. 1692, was introduced by then Senator Rick Santorum on October 5, 1999. The bill was approved by the Senate on October 21, 1999, by a vote of 63-34. H.R. 3660, the Partial-Birth Abortion Ban Act of 2000, was introduced by then Representative Charles T. Canady on February 15, 2000. H.R. 3660 was passed by the House on April 5, 2000, by a vote of 287-141. On May 25, 2000, the House passed S. 1692 without objection after striking its language and inserting the provisions of H.R. 3660. House conferrees were subsequently appointed, but no further action was taken.

Both S. 1692 and H.R. 3660 would have imposed a fine and/or imprisonment not to exceed two years for any physician who knowingly performed a partial-birth abortion. Partial-birth abortion was defined as an abortion in which a person "deliberately and intentionally ... vaginally delivers some portion of an intact living fetus until the fetus is partially outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the fetus" and actually

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[30] *Id*. at 939.

[31] *Id*. at 940.

[32] *Id*. at 950. *See also Stenberg*, 530 U.S. at 951 ("If there were adequate alternative methods for a woman safely to obtain an abortion before viability, it is unlikely that prohibiting the D & X procedure alone would 'amount in practical terms to a substantial obstacle to a woman seeking an abortion' [*citation omitted*] ... Thus, a ban on partial-birth abortion that only proscribed the D & X method of abortion and that included an exception to preserve the life and health of the mother would be constitutional in my view.").

[33] *See Stenberg*, 530 U.S. at 950.

performs the overt act that kills the fetus.[34] In addition to criminal penalties, S. 1692 and H.R. 3660 provided a private right of action for "[t]he father, if married to the mother at the time she receives a partial-birth abortion procedure, and if the mother has not attained the age of 18 years at the time of the abortion, the maternal grandparents of the fetus . . . unless the pregnancy resulted from the plaintiff's criminal conduct or the plaintiff consented to the abortion."[35]

When President Clinton vetoed a similar partial-birth abortion bill, H.R. 1122, during the 105th Congress, he focused on the bill's failure to include an exception to the ban that would permit partial-birth abortions to protect "the lives and health of the small group of women in tragic circumstances who need an abortion performed at a late stage of pregnancy to avert death or serious injury."[36] While S. 1692 and H.R. 3660 would have allowed a partial-birth abortion to be performed when it was necessary to save the life of the mother, such an abortion would not have been available when it was simply medically preferable to another procedure.

107th Congress

H.R. 4965, the Partial-Birth Abortion Ban Act of 2002, was introduced by Representative Steve Chabot on June 19, 2002. The bill was passed by the House on July 24, 2002, by a vote of 274-151. The measure was not considered by the Senate. H.R. 4965 would have prohibited physicians from performing a partial-birth abortion except when it was necessary to save the life of a mother whose life was endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself. The bill defined the term "partial-birth abortion" to mean an abortion in which "the person performing the abortion deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus."[37] Physicians who violated the act would have been subject to a fine, imprisonment for not more than two years, or both.

Although H.R. 4965 did not provide an exception for the performance of a partial-birth abortion when the health of the mother was at issue, supporters of the measure maintained that the bill was constitutional. They contended that congressional hearings and fact finding revealed that a partial-birth abortion is never necessary to preserve the health of a woman, and that such an abortion poses serious risks to a woman's health.

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[34] S. 1692, 106th Cong. (1999); H.R. 3660, 106th Cong. (2000).

[35] *Id*.

[36] Message to the House of Representatives Returning Without Approval Partial Birth Abortion Legislation, 33 Weekly Comp. Pres. Doc. 41 (October 13, 1997).

[37] H.R. 4965, 107th Cong. § 3 (2002).

108th Congress

S. 3, the Partial-Birth Abortion Ban Act of 2003, was signed by the President on November 5, 2003 (P.L. 108-105). The House approved H.Rept. 108-288, the conference report for the measure, on October 2, 2003, by a vote of 281-142. The Senate agreed to the conference report on October 21, 2003, by a vote of 64-34.

In general, the act resembles the Partial-Birth Abortion Ban Act of 2002 in language and form. The act prohibits physicians from performing a partial-birth abortion except when it is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself. Physicians who violate the act are subject to a fine, imprisonment for not more than two years, or both.

Although the Supreme Court previously held that restrictions on abortion must allow for the performance of an abortion when it is necessary to protect the health of the mother, the act does not include such an exception. In his introductory statement for the act, then Senator Rick Santorum discussed the act's lack of a health exception.[38] He maintained that an exception is not necessary because of the risks associated with partial-birth abortions. Senator Santorum insisted that congressional hearings and expert testimony demonstrate "that a partial birth abortion is never necessary to preserve the health of the mother, poses significant health risks to the woman, and is outside the standard of medical care."[39]

Gonzales v. Carhart

Within two days of the act's signing, federal courts in Nebraska, California, and New York blocked its enforcement.[40] On April 18, 2007, the Court upheld the Partial-Birth Abortion Ban Act of 2003, finding that, as a facial matter, it is not unconstitutionally vague and does not impose an undue burden on a woman's right to terminate her pregnancy.[41] In *Gonzales v. Carhart*, the Court distinguished the federal statute from the Nebraska law at issue in *Stenberg*.[42] According to the Court, the federal statute is not unconstitutionally vague because it provides doctors with a reasonable opportunity to know what conduct is prohibited.[43] Unlike the Nebraska law, which prohibited the delivery of a "substantial portion" of the fetus, the federal statute includes "anatomical landmarks" that identify when an abortion procedure will be subject to the act's prohibitions. The Court noted: "[I]f an abortion procedure does not involve the delivery of a living fetus to one of these 'anatomical landmarks'

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[38] 149 Cong. Rec. S2523 (daily ed. February 14, 2003) (statement of Sen. Santorum).

[39] 149 Cong. Rec., at S2523.

[40] *Abortion Ban Blocked Again*, Wash. Post, November 7, 2003, at A2.

[41] Unlike "as-applied" challenges, which consider the validity of a statute as applied to a particular plaintiff, facial challenges seek to invalidate a statute in all of its applications.

[42] 127 S. Ct. 1610 (2007).

[43] *Id*. at 1628.

— where, depending on the presentation, either the fetal head or the fetal trunk past the navel is outside the body of the mother — the prohibitions of the act do not apply."[44]

The Court also maintained that the inclusion of a scienter or knowledge requirement in the federal statute alleviates any vagueness concerns. Because the act applies only when a doctor "deliberately and intentionally" delivers the fetus to an anatomical landmark, the Court concluded that a doctor performing the D & E procedure would not face criminal liability if a fetus is delivered beyond the prohibited points by mistake.[45] The Court observed: "The scienter requirements narrow the scope of the act's prohibition and limit prosecutorial discretion."[46]

In reaching its conclusion that the Partial-Birth Abortion Ban Act of 2003 does not impose an undue burden on a woman's right to terminate her pregnancy, the Court considered whether the federal statute is overbroad, prohibiting both the D & X and D & E procedures. The Court also considered the statute's lack of a health exception.

Relying on the plain language of the act, the Court determined that the federal statute could not be interpreted to encompass the D & E procedure. The Court maintained that the D & E procedure involves the removal of the fetus in pieces. In contrast, the federal statute uses the phrase "delivers a living fetus."[47] The Court stated: "D&E does not involve the delivery of a fetus because it requires the removal of fetal parts that are ripped from the fetus as they are pulled through the cervix."[48] The Court also identified the act's specific requirement of an "overt act" that kills the fetus as evidence of its inapplicability to the D & E procedure. The Court indicated: "This distinction matters because, unlike [D&X], standard D&E does not involve a delivery followed by a fatal act."[49] Because the act was found not to prohibit the D & E procedure, the Court concluded that it is not overbroad and does not impose an undue burden a woman's ability to terminate her pregnancy.

According to the Court, the absence of a health exception also did not result in an undue burden. Citing its decision in *Ayotte v. Planned Parenthood of Northern New England*,[50] the Court noted that a health exception would be required if it subjected women to significant health risks.[51] However, acknowledging medical disagreement about the act's requirements ever imposing significant health risks on women, the Court maintained that "the question becomes whether the act can stand

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[44] *Id*. at 1627.

[45] *Id*. at 1628.

[46] *Id*. at 1629.

[47] 18 U.S.C. § 1531(b)(1)(A).

[48] *Gonzales*, 127 S. Ct. at 1630.

[49] *Id*. at 1631.

[50] 546 U.S. 320 (2006)

[51] *Gonzales*, 127 S.Ct. at 1635. For information on *Ayotte v. Planned Parenthood of Northern New England*, see CRS Report RL33467, *supra* note 5.

when this medical uncertainty persists."[52] Reviewing its past decisions, the Court indicated that it has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty.[53] The Court concluded that this medical uncertainty provides a sufficient basis to conclude in a facial challenge of the statute that it does not impose an undue burden.[54]

Although the Court upheld the Partial-Birth Abortion Ban Act of 2003 without a health exception, it acknowledged that there may be "discrete and well-defined instances" where the prohibited procedure "must be used."[55] However, the Court indicated that exceptions to the act should be considered in as-applied challenges brought by individual plaintiffs: "In an as-applied challenge the nature of the medical risk can be better quantified and balanced than in a facial attack."[56]

Justice Ginsburg authored the dissent in *Gonzales*. She was joined by Justices Stevens, Souter, and Breyer. Describing the Court's decision as "alarming," Justice Ginsburg questioned upholding the federal statute when the relevant procedure has been found to be appropriate in certain cases.[57] Citing expert testimony that had been introduced, Justice Ginsburg maintained that the prohibited procedure has safety advantages for women with certain medical conditions, including bleeding disorders and heart disease.[58]

Justice Ginsburg also criticized the Court's decision to uphold the statute without a health exception. Justice Ginsburg declared: "Not only does it defy the Court's longstanding precedent affirming the necessity of a health exception, with no carve-out for circumstances of medical uncertainty . . . it gives short shrift to the records before us, carefully canvassed by the District Courts."[59] Moreover, according to Justice Ginsburg, the refusal to invalidate the Partial-Birth Abortion Ban Act of 2003 on facial grounds was "perplexing" in light of the Court's decision in *Stenberg*.[60] Justice Ginsburg noted: "[I]n materially identical circumstances we held that a statute lacking a health exception was unconstitutional on its face."[61]

Finally, Justice Ginsburg contended that the Court's decision "cannot be understood as anything more than an effort to chip away at a right declared again and again by [the] Court — and with increasing comprehension of its centrality to

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[52] *Gonzales*, 127 S.Ct. at 1636.

[53] *Id*.

[54] *Id*. at 1637. The Court indicated that its conclusion was also supported by other considerations, including the availability of the D & E procedure.

[55] *Id*. at 1638.

[56] *Id*. at 1638-39.

[57] *Id*. at 1641.

[58] *Id*. at 1644-45.

[59] *Id*. at 1646.

[60] *Id*. at 1650.

[61] *Id*.

women's lives."[62] Citing the language used by the Court, including the phrase "abortion doctor" to describe obstetrician-gynecologists and surgeons who perform abortions, Justice Ginsburg maintained that "[t]he Court's hostility to the right *Roe* and *Casey* secured is not concealed."[63] She argued that when a statute burdens constitutional rights and the measure is simply a vehicle for expressing hostility to those rights, the burden is undue.[64]

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[62] *Id*. at 1653.

[63] *Id*. at 1650.

[64] *Id*. at 1653.