# High Court tackles ‘partial-birth’ abortion again: Question new law's protection for maternal health

News
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The man who may cast the deciding vote in the Supreme Court's first major abortion cases in six years tipped his hand little during oral arguments early this month.

Justice Anthony Kennedy asked a cascade of highly technical questions of attorneys for each side in the two related cases, Gonzales v. Carhart and Gonzales v. Planned Parenthood. Calmly and methodically during the arguments November 8, he inquired about the medical and legal specifics of a subject that has provoked heated political and social debate in recent years—a procedure opponents label "partial-birth abortion."

The cases involve the Partial-Birth Abortion Ban Act of 2003. Kennedy and his colleagues will consider whether the ban is unconstitutional because it does not contain an exemption designed to protect the health of the mother, because it is unconstitutionally vague, or because it places too heavy a burden on women seeking abortions.

Federal appeals courts ruled the law unconstitutional in both cases. Attorney General Alberto Gonzales appealed those decisions.

With the ban, Congress targeted an abortion procedure, known medically as "intact dilation and extraction," that involves the partial delivery of a fetus. The skull is then punctured and its contents evacuated to make it easier for the head to pass through the birth canal. Doctors say it is used only in exceedingly rare circumstances.

Statistics about the procedure are difficult to come by. However, the *Chicago Sun-Times* estimated that partial-birth abortions represent about 2,500 to 3,000 of the 1.25 million abortions performed each year—or about 1 out of every 500.

The last time the Supreme Court dealt with a similar law—in this case, a Nebraska state ban on the procedure—was in 2000. In Stenberg v. Carhart, the justices ruled 5-4 that the law was worded so vaguely as to possibly ban more common abortion procedures and that it violated the Constitution because it did not include a health exception.

The federal partial-birth ban does not provide a health exception, in violation of federal law. Instead, it cites congressional findings determining that the procedure is never medically necessary to protect a woman's health.

The decision will come from a Supreme Court different in ideological make-up from the one that found Nebraska's ban unconstitutional in 2000. The justice who decided that case by casting her vote with the five-member majority—Sandra Day O'Connor—voted frequently in favor of abortion rights.

Since then, she has retired and been replaced by Justice Samuel Alito, who was nominated by President Bush and is anti-abortion. Much of the controversy over Alito's appointment centered on whether he would vote to uphold abortion rights or restrict them.

In the 2000 case, Kennedy was in the minority and wrote a dissenting opinion describing his vehement distaste for partial-birth abortion.

However, in recent arguments, the justice seemed concerned with whether the congressional findings were correct: that intact dilation and extraction is never necessary to protect a woman's health.

"Do you have any idea in how many of those instances [there is] serious health risk to the mother that requires the procedure, as opposed to simply being an elective procedure? Are there any statistics on that?" Kennedy asked Priscilla Smith, who argued the case on behalf of Leroy Carhart. Carhart is a Nebraska abortion provider who challenged the ban. He also challenged the state statute that led to the earlier Stenberg v. Carhart decision.

Kennedy and his colleagues asked virtually no questions about the broader legal issues often raised in abortion cases -- the constitutional right to privacy on which legalized abortion rests, for instance. But they seemed extremely concerned with what, exactly, the procedure being banned is, whether the procedure is ever medically necessary to protect a woman's health, and whether the law's language

effectively bans that procedure without curtailing a woman's right to other forms of abortion.

Solicitor General Paul Clement, arguing on behalf of the federal government in both cases, said the procedure being banned is so barbaric that Congress has a right to prohibit it.

"The evidence [from medical professionals in hearings] before Congress was clear that partial-birth abortions were never medically necessary, and that safe alternatives were always available such that no woman would be prevented from terminating her pregnancy," Clement told the justices. "As a result, Congress was entitled to make a judgment in furthering its legitimate interests that they were going to ban a particularly gruesome procedure that blurred the line between abortion and infanticide."

But Smith and her colleagues said the congressional findings were politically motivated to satisfy people opposed to abortion. While medical opinion is divided, she said, there is a "significant body" of medical experts who believe that the procedure is sometimes necessary to prevent complications that could have "catastrophic" results for the mother's health.

"The only course here that preserves independence of the judiciary, that exemplifies the importance of stare decisis [the legal doctrine that a court's previous opinion on a subject should stand unless there is a strong reason to overturn it], not to mention the only course that will protect women from needless risks of uterine perforation, infertility, sepsis and hemorrhage, is to hold this act unconstitutional," she told the justices.

New Chief Justice John Roberts, whose precise abortion views are unknown but who was strongly supported in his confirmation hearings by anti-abortion groups, seemed eager to find ways that the federal law in question differed from the Nebraska law overturned in the Stenberg decision.

Alito, for his part, asked no questions during the two-hour argument sessions. While anti-abortion groups also supported his nomination, he appeared disengaged during the hearings, at times staring into his lap, at other times seeming to study the ornate courtroom's ceiling.

However, in an indication of the extreme emotions the subject of abortion raises, the argument session featured the first major disruption in recent memory at the high court. A few minutes into Smith's argument, a man began shouting anti-abortion slogans and was removed and arrested by Supreme Court police officers.

The justices are expected to issue a ruling in several months. –*Robert Marus, Associated Baptist Press*