

Supreme Court Reopens Abortion Issue on Alito's First Day

By Linda Greenhouse

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WASHINGTON, Feb. 21 — The Supreme Court, at full strength with Justice Samuel A. Alito Jr. on the bench for the first time, opened the next chapter in its long-running confrontation with abortion today by agreeing to decide whether the first federal ban on a method of abortion is constitutional.

The court accepted, for argument next fall, the Bush administration's appeal of a decision invalidating the Partial-Birth Abortion Ban Act of 2003. The law makes it a crime for a doctor to perform an abortion during which a portion of the fetus, either the "entire fetal head" or "any part of the fetal trunk past the navel," is outside the woman's uterus at the time the fetus is killed.

While the law's supporters maintain that this technique is used only late in pregnancy, and that the law therefore does not present an obstacle to most abortions, abortion-rights advocates say the statute's description applies to procedures used to terminate pregnancies as early as 12 or 13 weeks.

The law makes an exception for instances in which the banned technique is necessary to save a pregnant woman's life, but not for preservation of her health, as the Supreme Court found necessary six years ago when it overturned a similar law from Nebraska.

In omitting a health exception, the federal law presents a direct threat to that precedent. In the federal statute, Congress included a "finding" that "partial-birth abortion is never medically indicated to preserve the health of the mother" and that "there is no credible medical evidence that partial-birth abortions are safe or are safer than other abortion procedures."

The four doctors who went to Federal District Court in Lincoln, Neb., to challenge the federal law, including Dr. Leroy Carhart, who had brought the earlier challenge to the Nebraska state law, disputed the Congressional findings. They said the method was safer under some conditions and could preserve some women's fertility by avoiding such complications as punctures from bone fragments inside the uterus.

The trial judge, Richard G. Kopf, who had earlier found the Nebraska law unconstitutional, said the plaintiffs had demonstrated that the Congressional findings were "unreasonable." He declared the federal law unconstitutional in a 269-page opinion, issued in September 2004. The United States Court of Appeals for the Eighth Circuit, in St. Louis, upheld that decision last July, leading to the administration's Supreme Court appeal, *Gonzales v. Carhart*, No. 05-380.

Last month, two other federal appeals courts, the Second Circuit in New York and the Ninth Circuit in San Francisco, declared the statute unconstitutional in separate lawsuits. All three courts issued injunctions barring enforcement of the law.

Ever since *Roe v. Wade* and its companion case, *Doe v. Bolton*, in 1973, the court has required exceptions for health as well as life in any regulation of abortion. But the vote in the Nebraska case, *Stenberg v. Carhart*, was 5 to 4, with Justice Sandra Day O'Connor in the majority. It is highly likely, therefore, that her successor,

Justice Alito, will be in the position to cast the deciding vote. The dissenters in the Nebraska case were Justices Antonin Scalia, Clarence Thomas and Anthony M. Kennedy, along with Chief Justice William H. Rehnquist, who has since been replaced by Chief Justice John G. Roberts Jr.

After the court's announcement this morning, groups on both sides of the abortion debate tried to attach some significance to the decision to accept the case. In fact, it would have been highly unusual for the court to turn down the appeal. A lower court's invalidation of a federal statute has an almost automatic claim on the justices' attention, even those justices who may view the decision as correct or those who may not necessarily agree in this instance with the Bush administration's description of the case as "extraordinarily important" and requiring immediate review.

The court had the administration's appeal under review since early January. It may have deferred action as a courtesy to Justice Alito, who participated in his first closed-door conference with the other justices last Friday.

Or, equally likely, the justices set the case aside while they finished work on a New Hampshire abortion case that also raised a question about a medical exception to an abortion regulation, in that instance a requirement that a teenage girl notify a parent and then wait 48 hours before obtaining an abortion.

In what proved to be Justice O'Connor's final opinion before retirement, that case, *Ayotte v. Planned Parenthood of Northern New England*, was decided on Jan. 18. The unanimous opinion restated the court's longstanding insistence on an exception for medical emergencies but, in its list of precedents, pointedly omitted reference to the Nebraska case from six years ago, its most recent treatment of the subject.

In the Bush administration's brief in the new case, Solicitor General Paul D. Clement said the appeals court should have given "substantial deference" to the Congressional findings on the lack of need for a health exception. Such deference was not at issue in the Supreme Court's earlier case, he said, because that case concerned a state rather than federal law.

Representing the plaintiffs, who include Drs. William G. Fitzhugh, William H. Knorr, and Jill L. Vibhakar, in addition to Dr. Carhart, the Center for Reproductive Rights told the justices in its brief that the Congressional findings were not entitled to the deference that courts usually apply when evaluating legislation.

"The facts at issue here involve the current state of medicine, physicians' testimony about patients they have cared for, medical conditions they have treated and the impact of abortion techniques on the health of these patients," the brief said, adding that Congress does not have "a particular expertise in the area of medicine, as it does in the area of nationwide economic regulatory schemes."

The organization, based in Manhattan, was known as the Center for Reproductive Law and Policy when it represented Dr. Carhart in the earlier case.