ACLJ
American Center
for Law & Justice

MEMORANDUM

TO: **Interested Parties**

FROM: **American Center for Law and Justice**

RE: **Summary of *Gonzales v. Carhart* (the Partial-Birth Abortion case)**

DATE: **April 19, 2007**

I. Short Summary and Analysis.

On April 18, 2007, in *Gonzales v. Carhart*,[1] the Supreme Court of the United States upheld the federal Partial-Birth Abortion Ban Act of 2003 ("Act") by a 5-4 vote. The Court adopted many of the arguments that the American Center for Law and Justice raised in an *amicus curiae* brief filed on behalf of 78 members of Congress and over 320,000 Americans. The decision is a significant victory for the millions of pro-life Americans who believe that partial-birth abortion is nothing more than infanticide.

Perhaps the most important aspect of the Supreme Court's decision in *Carhart* is the set of directions it provides for states wishing to enact and defend commonsense abortion regulations and policies. In the *Planned Parenthood v. Casey*[2] decision, the Court had purported to give states a freer hand to adopt sensible limits on abortion practices. The *Stenberg v. Carhart*[3] decision, by contrast, reverted to a super-strict, virtual zero-tolerance rule for abortion laws. Now, the Court has returned to the *Casey* approach. In particular, the Court held that:

[1] Case No. 05-380 (Apr. 18, 2007).
[2] 505 U.S. 833 (1992).
[3] 530 U.S. 914 (2000).

- The government's interest in protecting unborn children extends **throughout** pregnancy.
- This interest is **legitimate** and **substantial**.
- The government may pursue this interest both by "its voice" (*i.e.*, declared **public policy and public education**) and "its regulatory authority" (*i.e.*, **legal limits on abortion practices**).
- Laws restricting abortion need only have a **rational basis** and not impose an **undue burden**.
- Medical uncertainty over the relative risks of competing abortion practices does **not** automatically doom a restriction on one or the other of those practices. In fact, medical uncertainty about the need for the restricted practice can be sufficient to **reject** a facial challenge to the restriction. In other words, if it is not clear that a particular procedure is **essential** for maternal health, and if a "commonly used and generally accepted" **alternative** to the restricted practice is available, the practice can be outlawed.
- Abortionists do not get to call all the shots. As the Court put it, "The law need not give abortion doctors unfettered choice in the course of their medical practice . . . ."
- Laws restricting abortion **should not be challenged on their face**, but rather in an "as-applied" context, where particular medical risks can be asserted. That means abortion laws should generally be upheld, with only case-by-case challenges resulting, at most, in the invalidation of the laws as applied to particular sets of circumstances.
- Laws restricting abortion should, when possible, be interpreted by the courts in a manner that will result in those laws being upheld rather than struck down.

In sum, the Court's decision in *Carhart* sends a clear message that states are permitted to take reasonable measures to protect both unborn life and women contemplating abortion. While the Court has not given a green light to a prohibition on abortion as such, there are many commonsense measures that states now plainly have the power to enact in their efforts to protect the unborn and to prevent women from making uninformed and potentially disastrous choices.

II. The Partial-Birth Abortion Procedure.

While all forms of abortion result in the taking of innocent human life, "partial-birth abortion" is particularly gruesome and inhumane. The *Carhart* decision contains an abortion doctor's description of this procedure:

> [T]he right-handed surgeon slides the fingers of the left [hand] along the back of the fetus and "hooks" the shoulders of the fetus with the index and ring fingers (palm down).
> While maintaining this tension, lifting the cervix and applying traction to the shoulders with the fingers of the left hand, the surgeon takes a pair of blunt curved Metzenbaum scissors in the right hand. He carefully advances the tip, curved down, along the spine and under his middle finger until he feels it contact the base of the skull under the tip of his middle finger.
> [T]he surgeon then forces the scissors into the base of the skull or into the foramen magnum. Having safely entered the skull, he spreads the scissors to enlarge the opening.
> The surgeon removes the scissors and introduces a suction catheter into this hole and evacuates the skull contents. With the catheter still in place, he applies traction to the fetus, removing it completely from the patient.[4]

A nurse who witnessed a partial-birth abortion of a 26½-week unborn child gave the following testimony before the Senate Judiciary Committee:

> Dr. Haskell went in with forceps and grabbed the baby's legs and pulled them down into the birth canal. Then he delivered the baby's body and the arms—everything but the head. The doctor kept the head right inside the uterus. . . .
> The baby's little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby's arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall.
> The doctor opened up the scissors, stuck a highpowered suction tube into the opening, and sucked the baby's brains out. Now the baby went completely limp.
> . . . He cut the umbilical cord and delivered the placenta. He threw the baby in a pan, along with the placenta and the instruments he had just used.[5]

It is this disgusting procedure that Congress outlawed when it passed the Act.

III. Procedural History and Factual Background.

During the 1990s, Congress twice enacted bans on partial-birth abortion that were vetoed by former President Clinton. When the Supreme Court considered a challenge to Nebraska's partial-birth abortion statute in 2000 in *Stenberg v. Carhart*, thirty states had enacted partial-birth abortion laws. In a 5-4 decision, the Court held that Nebraska's statute was unconstitutional for

[4] *Carhart*, slip op. at 7.
[5] *Id.* at 8.

two reasons. First, since the district court concluded that partial birth abortion is safer than the more common "intact D&E" procedure in some instances, the statute needed to have an exception for the preservation of the health of the mother.[6] Second, the statute imposed an undue burden on a woman's right to have an abortion because, in the Court's view, its language was broad enough to cover both partial-birth abortion and the much more common D&E procedure.[7]

Justice Scalia noted in his dissenting opinion in *Stenberg* that "[t]he method of killing a human child—one cannot even accurately say an entirely unborn human child—proscribed by this statute is so horrible that the most clinical description of it evokes a shudder of revulsion."[8] Justice Kennedy argued in his dissenting opinion that "[t]he political processes of the State are not to be foreclosed from enacting laws to promote the life of the unborn and to ensure respect for all human life and its potential."[9]

In 2003, Congress addressed the Court's two primary concerns in *Stenberg* when it passed the Act. First, Congress made its own extensive factual findings on issues addressed by the Court in *Stenberg*. Congress found that "[a] moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion . . . is a gruesome and inhumane procedure *that is never medically necessary* and should be prohibited."[10] Second, Congress ensured that the language used in the Act was more specific than that of the Nebraska statute in *Stenberg* to avoid potential vagueness problems. The Act clearly defined partial-birth abortion by drawing specific anatomical lines and included an exception for pregnancies that endanger the life of the mother.

Several abortion doctors challenged the Act, alleging that it was unconstitutional because there was no health exception and the definition of partial-birth abortion was broad enough to

[6] *Stenberg*, 530 U.S. at 930-38.
[7] *Id.* at 938-45.
[8] *Id.* at 953 (Scalia, J., dissenting).
[9] *Id.* at 957 (Kennedy, J., dissenting).
[10] *Carhart*, slip op. at 7 (citation omitted) (emphasis added).

cover the "intact D&E" abortion procedure. The district court granted a permanent injunction which prevented the Attorney General from enforcing the Act.[11] The United States Court of Appeals for the Eighth Circuit affirmed, addressing only "the lack of a health exception."[12] A companion case, *Gonzales v. Planned Parenthood Federation of America, Inc.*, challenged the Act on similar grounds.[13] The United States Court of Appeals for the Ninth Circuit affirmed, holding that the Act was vague and also required a health exception because there was "substantial disagreement" in the medical community on the necessity of the procedure.[14] The Supreme Court granted certiorari to determine the Act's constitutionality.

IV. General Framework of *Roe* and *Casey*.

Justice Kennedy authored the opinion of the Court upholding the Act which was joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito. A significant aspect of the *Carhart* decision is that the Court did *not* reaffirm the validity of *Roe v. Wade*[15] or *Casey* but merely applied those decisions to the case at hand.[16] The Court explained that, regardless of one's views on *Casey*, "it is evident a premise central to its conclusion—that the government has a legitimate and substantial interest in preserving and promoting fetal life—would be repudiated were the Court now to affirm the judgments of the Court of Appeals."[17]

Casey had three central holdings:

- a woman has the right to have an abortion before viability without undue interference from the government,
- after viability, the state may restrict abortion so long as the law does not jeopardize the life or health of the woman, and

[11] *Carhart v. Ashcroft*, 331 F. Supp. 2d 805 (D. Neb. 2004).
[12] *Carhart v. Ashcroft*, 413 F.3d 791, 796, 803-04 (8th Cir. 2005).
[13] 320 F. Supp. 2d 957, 1034-35 (N.D. Cal. 2004).
[14] 435 F.3d 1163, 1175-81 (2006).
[15] 410 U.S. 113 (1973).
[16] *Carhart*, slip op. at 15-16.
[17] *Id.* at 14.

- the government has a legitimate interest from the beginning of the pregnancy in protecting the health of the woman and the life of the unborn child.[18]

The Court stated that it must "determine whether the Act furthers the legitimate interest of the Government in protecting the life of the fetus that may become a child."[19] In discussing *Casey*, the Court stated "[w]e assume the following principles for the purposes of this opinion."[20] As Justice Ginsburg pointed out in her dissent, the Court failed to state that it supported the right to abortion recognized in *Roe* and *Casey*.

V. The Act is Not Vague or Overbroad.

The abortion doctors argued that, while the Act clearly applied to partial-birth abortion, its language is broad enough to apply to *all* D&E abortions.[21] The Court rejected this argument, concluding that "the Act is not void for vagueness, does not impose an undue burden from any overbreadth, and is not invalid on its face."[22] The Court explained that the Act uses specific "anatomical landmarks" to ensure that it only applies to the partial delivery of a living fetus.[23] There is an intent requirement for the killing of the fetus that is separate from the delivery of the fetus, which must be delivered "for the purpose of performing an overt act that the [doctor] knows will kill [it]."[24]

The Court determined that "[t]he Act provides doctors 'of ordinary intelligence a reasonable opportunity to know what is prohibited.'"[25] The language of the Act draws a clearer line than the statute struck down in *Stenberg*, and the Act's intent requirements ensure that it

[18] *Id.* at 14-15.
[19] *Id.* at 15.
[20] *Id.* at 16.
[21] *Id.*
[22] *Id.*
[23] *Id.* at 17.
[24] *Id.* at 17-18.
[25] *Id.* at 18.

only applies to partial-birth abortion.[26] Congress was aware of the Court's concerns over vagueness in *Stenberg* and took steps to ensure that the language of the federal Act was more specific.[27]

In addition, the canon of constitutional avoidance requires courts to interpret statutes in a manner that keeps them from being unconstitutional whenever possible.[28] Even if it were true that, in rare cases, a D&E abortion could accidentally fall within the statute's "anatomical landmarks," the Act's intent requirements ensure that the abortion would not be covered.[29] The Court noted that the reality is that most, if not all, partial-birth abortions occur due to the doctor's choice, not happenstance.[30]

VI. The Act Does *Not* Impose an Undue Burden on Abortion Rights.

The Court stated, "[u]nder 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 attains viability.'"[31] The Court concluded "[t]he Act does not on its face impose a substantial obstacle, and we reject this further facial challenge to its validity."[32]

In describing the rationale for the Act, the Court noted that Congress found that "[i]mplicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent

[26] *Id.* at 19.
[27] *Id.* at 21-22.
[28] *Id.* at 23.
[29] *Id.* at 24.
[30] *Id.* at 25.
[31] *Id.* at 26 (quoting *Casey*, 505 U.S. at 878).
[32] *Id.*

human life, making it increasingly difficult to protect such life."[33] In the Court's view, "[t]he Act expresses respect for the dignity of human life."[34] Congress explained that

> [p]artial-birth abortion . . . confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child, whom he or she had just delivered, all but the head, out of the womb, in order to end that life.[35]

The Court observed that "[t]here can be no doubt the government 'has an interest in protecting the integrity and ethics of the medical profession.'"[36]

The Court reiterated that "[t]he government may use its voice and its regulatory authority to show its profound respect for the life within the woman."[37] *Casey* does not stand for the proposition that a doctor is free to choose any abortion method that he or she prefers.[38] While many people believe that D&E devalues human life to the same extent as partial-birth abortion, Congress was entitled to conclude that partial-birth abortion has a "disturbing similarity to the killing of a newborn infant."[39] The Court then observed:

> Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. . . . While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude *some women come to regret their choice to abort the infant life they once created and sustained. . . . Severe depression and loss of esteem can follow*.[40]

The Court also noted that the Act served to further the State's interest in ensuring that women are fully informed when considering an abortion:

> In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used, confining themselves to

[33] *Id.* at 26.
[34] *Id.* at 27.
[35] *Id.*
[36] *Id.* (citation omitted).
[37] *Id.*
[38] *Id.* at 28.
[39] *Id.*
[40] *Id.* at 28-29 (emphasis added).

> the required statement of risks the procedure entails. . . . This is likely the case with the abortion procedures here in issue. . . .
>
> It is, however, precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State. . . . The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fastdeveloping brain of her unborn child, a child assuming the human form.[41]

In other words, "[t]he State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion."[42]

VII. No Health Exception is Required Because Congress Concluded that Partial-Birth Abortion is Never Necessary to Preserve a Woman's Health.

It is quite significant that the Court deferred to Congress's judgment that partial-birth abortion is never medically necessary to preserve the life or health of the mother. The Court noted that "[t]here is documented medical disagreement whether the Act's prohibition would ever impose significant health risks on women,"[43] and "[t]he question becomes whether the Act can stand when this medical uncertainty persists."[44] In a wide variety of cases, "[t]he Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and unscientific uncertainty."[45] This means that "[p]hysicians are not entitled to ignore regulations that direct them to use reasonable alternative procedures. *The law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate*

[41] *Id.* at 29.
[42] *Id.* at 30.
[43] *Id.* at 32.
[44] *Id.* at 33.
[45] *Id.*

their status above other physicians in the medical community."[46] In other words, "[m]edical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts."[47]

The abortion doctors argued that, under *Stenberg*, "an abortion regulation must contain a health exception if 'substantial medical authority supports the proposition that banning a particular procedure could endanger women's health.'"[48] The Court held, however, that "the Act does not require a health exception."[49] Although "*Stenberg* has been interpreted to leave no margin of error for legislatures to act in the face of medical uncertainty,"[50] the Court responded by explaining:

> A zero tolerance policy would strike down legitimate abortion regulations, like the present one, if some part of the medical community were disinclined to follow the proscription. This is too exacting a standard to impose on the legislative power . . . to regulate the medical profession. Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends. When standard medical options are available, mere convenience does not suffice to displace them; and if some procedures have different risks than others, it does not follow that the State is altogether barred from imposing reasonable regulations.[51]

The Court concluded by holding that as-applied challenges to the Act may be brought "to protect the health of the woman if it can be shown that in discrete and well-defined instances a particular condition has or is likely to occur in which [partial-birth abortion] must be used."[52] While the abortion doctors focused their arguments on specific medical complications that may arise during a pregnancy, the Court noted that the Act "applies to all instances in which the

[46] *Id.* (emphasis added).
[47] *Id.* at 34.
[48] *Id.* at 36.
[49] *Id.* at 35.
[50] *Id.*
[51] *Id.* at 36-37.
[52] *Id.* at 37.

doctor proposes to use the prohibited procedure, not merely those in which the woman suffers from medical complications."[53]

VIII. Justice Thomas's Concurring Opinion.

Justice Thomas wrote a short concurring opinion that was joined by Justice Scalia. The opinion explained:

> I join the Court's opinion because it accurately applies current jurisprudence, including *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). I write separately to reiterate my view that the Court's abortion jurisprudence, including *Casey* and *Roe v. Wade*, 410 U. S. 113 (1973), has no basis in the Constitution. . . .[54]

IX. Justice Ginsburg's Dissenting Opinion.

Justice Ginsburg wrote the only dissenting opinion, which was joined by Justices Stevens, Souter, and Breyer.[55] The dissenting opinion declared:

> Today's decision . . . refuses to take *Casey* and *Stenberg* seriously. It tolerates, indeed applauds, federal intervention to ban nationwide a procedure found necessary and proper in certain cases by the American College of Obstetricians and Gynecologists (ACOG). It blurs the line, firmly drawn in *Casey*, between previability and postviability abortions. And, for the first time since *Roe*, the Court blesses a prohibition with no exception safeguarding a woman's health.[56]

The dissent began by criticizing the majority for not giving sufficient weight to the district courts' factual findings which emphasized the safety of partial-birth abortion in certain cases. The dissent stated that, in considering the Act, Congress relied upon untrustworthy and

[53] *Id.* at 38.
[54] *Id.* at 1-2 (Thomas, J., concurring).
[55] *Id.* (Ginsburg, J., dissenting).
[56] *Id.* at 2-3.

incorrect information without giving proper weight to the more credible evidence relied upon by the district courts.[57]

Additionally, the dissent argued that the Act "scarcely furthers" the state's interest in "preserving and protecting fetal life" because the law "saves not a single fetus from destruction, for it targets only a *method* of performing abortion."[58] The dissent further criticized the majority for labeling intact D&E abortions as more "brutal" than partial-birth abortions simply because the unborn child resembles an infant.[59] The dissent contended that the "moral concerns" behind allowing prohibitions on abortions "dishonor [the Court's] precedent" and go against the obligation of the Court to define liberty rather than enforce its own beliefs.[60] Thus, the dissent concluded that the Court's concern about women's emotional health was misplaced.[61]

The dissent was troubled by use of a rational basis standard instead of heightened scrutiny as well as the fact that the majority only *assumed* the viability of *Roe* and *Casey* "for the moment."[62] In addition, the dissent disagreed with the majority's decision to allow an as-applied challenge rather than a facial challenge since the Court had upheld a facial challenge in *Stenberg*.[63] The dissent claimed that the decision "jeopardized" women's health and placed doctors in an "untenable position" because doctors now "risk criminal prosecution, conviction, and imprisonment if they exercise their best judgment as to the safest medical procedure for their patients."[64] The dissent concluded by accusing the majority of refusing to follow previous abortion cases.[65] The dissenters claimed that the Act does not "further[] any legitimate

[57] *See id.* at 7-12.
[58] *Id.* at 13-14.
[59] *Id.* at 14.
[60] *Id.* at 15.
[61] *Id.* at 17-18.
[62] *Id.* at 19-20.
[63] *Id.* at 20.
[64] *Id.* at 22-23.
[65] *Id.* at 23-24.

governmental interest" and that the Court's decision "cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court . . . ."[66]

X. Conclusion.

The Court's decision in *Gonzales v. Carhart* upholding the Partial-Birth Abortion Ban Act of 2003 was a major victory for the defenders of unborn human life. The decision ensures that the gruesome, inhumane partial-birth abortion procedure will be illegal in the United States. The decision also confirmed that states may take reasonable measures to protect both unborn life and women contemplating abortion.

[66] *Id.* at 24.