

Gonzales v. Planned Parenthood Federation of America, Inc. (2007)

Gonzales v. Planned Parenthood Federation of America, Inc. (Gonzales v. Planned Parenthood) was the 2007 US Supreme Court case in which the Court declared the Partial Birth Abortion Ban Act of 2003 constitutional, making partial birth abortions illegal. In 2003, the US Congress passed the Partial-Birth Abortion Ban Act, which prohibited an abortion technique called partial birth abortion. A partial birth abortion is similar to, but not the same as, a Dilation and Extraction or D&X abortion, which is what the Ban was intended to prohibit. Gonzales v. Planned Parenthood eventually reached the Supreme Court, where the Court ruled that the Ban was constitutional. In Gonzales v. Planned Parenthood, the Court ruled for the first time that it was constitutional to ban a method of abortion without providing an exception for cases where a pregnant woman's life was endangered.

On 5 November 2003, the United States Congress passed the Partial-Birth Abortion Ban Act, hereafter the Ban. The Ban outlawed partial birth abortions. As defined in the Ban, a partial birth abortion occurs when a physician partially delivers a fetus before terminating that fetus. Under the Ban, a fetus being delivered feet first is partially delivered if any part of the fetus's trunk above the navel is outside the pregnant woman. If a fetus is being delivered head first, the Ban defines a fetus as partially delivered once the fetus's head is fully outside the pregnant woman. At that point, the physician performs some act to terminate the fetus before completing the delivery. The Ban was an attempt to target what is more commonly referred to in the medical community as a D&X abortion, or intact Dilation and Extraction. A D&X is typically used when a woman seeking an abortion is more than twenty weeks pregnant. A D&X involves dilating the pregnant woman's cervix and then pulling the fetus out through the birth canal. After twenty weeks, though, the fetus may be too large to be removed safely through the cervix and the procedure may involve pulling the fetus out through the birth canal up to its head. The physician then uses some sharp instrument to puncture the head and compress the skull so that the fetus may pass through the cervix more easily. In a D&X or partial birth abortion, the termination of the fetus does not occur until after the head has passed through the cervix.

A D&X is a relatively uncommon abortion procedure. In the year 2000, 0.2 percent of abortions performed were D&X abortions. According to NPR health correspondent Julie Rovner, physicians sometimes perform D&Xs on an otherwise healthy pregnant woman and fetus, but the procedure is also preferred by physicians who perform abortions on pregnancies that are no longer viable. For instance, in cases where the fetus develops hydrocephalus, which cannot be detected early in pregnancy, the skull of the fetus can swell up to two and a half times the usual size and cause severe brain damage to the fetus. It can also endanger the pregnant woman if she were to carry the fetus to term and deliver it. Rovner argues that in such cases a D&X is preferable because it allows the abortion provider to abort the pregnancy without damaging the woman's cervix.

Following passage of the Ban in 2003, Planned Parenthood argued that the Ban unconstitutionally restricted the rights of women to obtain an abortion. After the 1973 ruling in *Roe v. Wade*, women had the right to obtain an abortion and laws could not impose undue burdens on women seeking abortions, such as high costs or overly restricted abortion techniques. States had the right to individually regulate abortions in the later months of pregnancy so long as state laws did not impinge on the rights of women to obtain an abortion. Prior to the Court's ruling in *Gonzales v. Planned Parenthood*, laws regulating abortion had to make an exception for women if they needed an abortion to preserve their health. In November 2003, Planned Parenthood sued the Attorney General of the United States, John Ashcroft, to protest the Ban. They filed their lawsuit in the Northern

District Court of California. In the District Court, Planned Parenthood argued that the Ban was unconstitutional because it violated the requirement for a health exception that the Supreme Court had mandated in their ruling in *Stenberg v. Carhart* earlier in 2000.

The District Court ruled in favor of Planned Parenthood in 2004, preventing the Ban from going into effect. Abortion providers filed two other lawsuits against the Ban simultaneously in Nebraska and New York in 2003, and those District Courts ruled in favor of the abortion providers as well. All three decisions were quickly appealed by Ashcroft. The Ninth Circuit Court of Appeals heard the appeal involving Planned Parenthood.

The Ninth Circuit Appeals Court affirmed the District Court's decision. In the Appeals Court, the attorney general argued that the Ban only explicitly banned a specific type of abortion, a partial-birth abortion. However, the court held that the Ban was worded broadly enough to be applied to other, more common abortion procedures including the D&X and D&E procedures. According to the court, that interpretation of the Ban imposed an undue burden on women seeking abortions because it limited access to abortions based on technique. That rendered the Ban unconstitutional. The Appeals Court ruled further that the Ban's lack of exception for cases where a partial-birth abortion may be medically necessary was also unconstitutional. The Appeals Court ruled that the Ban was unconstitutionally vague, because terms like partial-birth abortion were too ambiguous to offer clear guidance to physicians about what was or was not a legal abortion procedure. The Appeals Court's decision again prevented the Ban from going into effect. That decision was appealed to the Supreme Court by Ashcroft. In the interim, Ashcroft was replaced as the attorney general by Alberto Gonzales in 2005.

The Supreme Court heard arguments for *Gonzales v. Planned Parenthood* on 8 November 2006. Nine Justices heard the case, including the chief justice, John G. Roberts, Jr., as well as justices John Paul Stevens, Antonin Scalia, Anthony M. Kennedy, David H. Souter, Clarence Thomas, Ruth Bader Ginsburg, Stephen G. Breyer, and Samuel A. Alito, Jr. Attorney Paul D. Clement was appointed to represent the US government's interests in court and argued on behalf of Gonzales, the Attorney General of the US. Planned Parenthood was represented by attorney Eve C. Gartner.

The main issue at stake in *Gonzales v. Planned Parenthood* was whether the Ban was unconstitutional because it imposed an undue burden on women seeking abortions by prohibiting a common abortion procedure. Other questions included whether the Ban was unconstitutionally vague, and whether the ban was unconstitutional because it made no exceptions for preserving the health of the woman. Clement, on behalf of the US government, and Gartner, on behalf of Planned Parenthood, both offered oral arguments before the Supreme Court addressing the issues and questions of the constitutionality of the Ban. The Court later provided their official ruling on the case in the form of a majority opinion, as well as dissenting and concurring opinions.

Clement argued that partial-birth abortions were not medically necessary to preserve the life or health of pregnant women, meaning that the Ban did not require an exception for those cases where a pregnant woman might be harmed by delivering her fetus. Clement cited findings from the Congressional hearings held prior to passing the Ban, where Congress heard from experts in order to inform their policy making. In those findings, Congress claimed that partial-birth abortions were an uncommon procedure because of the potential negative health risks to the mother. Clement further argued that the intent of the abortion provider was just as important as the abortion provider's actions, and therefore an abortion provider could not be prosecuted unless the provider intended to partially-birth the fetus. The language of the Ban was clear, according to Clement, that in order for an abortion provider to be breaking the law they had to start the abortion with the intent of terminating a partially delivered fetus and performing an overt act that resulted in fetal demise. In other words, abortion providers who intended to perform a different type of abortion, such as a D&E, or performed an abortion in haste because of emergency circumstances and inadvertently partially delivered the fetus while it was still living were not the target of the Ban and should not face prosecution. Clement also suggested that under certain interpretations the Ban did not prohibit all partial-birth abortions, just those performed on a living fetus. In other words, under the law, a doctor could initiate fetal demise with an injection of abortifacient drugs while the fetus was still in the womb and then perform the partial-birth abortion on the already aborted fetus in order to remove the remains from the mother's uterus and not be subject to any prosecution under the

Ban.

Clement next addressed the question of whether the Ban was void because it was unconstitutionally vague. Clement argued that the Ban was not unconstitutionally vague because the language of the Ban gave specific guidance to physicians on what qualified as a partial-birth abortion. The language of the Ban also provided anatomical landmarks so doctors could determine to what extent the fetus had to pass the cervix in order to be considered partially delivered.

Gartner presented oral arguments to the Supreme Court on behalf of Planned Parenthood, and argued that the Ban was unconstitutional for its lack of health exception, a requirement that had been a Supreme Court precedent since *Roe v. Wade*, the Supreme Court case that legalized abortion in the US. Previously, the Court had overturned laws that regulated abortion if those laws did not make an exception allowing for medically necessary abortions. The precedent was reaffirmed less than seven years prior to *Gonzales v. Planned Parenthood* in the 2000 case *Stenberg v. Carhart*, where the Supreme Court struck down a Nebraska law that prohibited partial birth abortions and did not include any exception to protect a pregnant woman's health. Gartner rebutted Clement's argument that a partial birth abortion was never medically necessary. Gartner argued that a partial birth abortion posed less risk to women than other abortion procedures that could be performed at a late stage of pregnancy, stating that by banning the procedure, the law would be taking away what may have been a woman's safest option for an abortion and placing the woman's health at unnecessary risk.

Gartner then argued that the language of the Ban was problematic because it was so broad and vague that it could potentially be used to ban other types of abortions. According to her, the Ban did not draw a distinction between a partial-birth abortion and the more common D&E abortion procedure. In a D&E abortion procedure, the fetus is terminated before being removed from the uterus via the birth canal with the aid of surgical instruments and suction. In a D&X or partial birth abortion, the termination of the fetus does not occur until after the head has passed through the cervix.

Gartner highlighted circumstances where a D&E may be similar enough to what the Ban described as a partial birth abortion to violate the law. For instance, an abortion provider may choose to partially deliver the fetus before terminating it in order to lower the pregnant woman's risk of injury. For example, by partially delivering a fetus before terminating it, a physician could lower the risk of perforating the woman's uterus with surgical tools. In cases like that, a D&E may potentially violate the partial birth abortion ban even though D&E procedures were not explicitly banned. According to Gartner, that made the Ban unconstitutionally vague, meaning the law did not offer enough guidance to abortion providers on what procedures were allowed.

The Supreme Court released their opinion on *Gonzales v. Planned Parenthood* on 18 April 2007. The Court ruled in favor of *Gonzales* in a five to four majority. Justice Kennedy, joined by Scalia, Roberts, Thomas, and Alito, wrote and delivered the majority opinion that reversed the lower courts' decisions and ruled that the Ban was constitutional. In the majority opinion, the Court stated that the Ban was not unconstitutionally vague because of the anatomical landmarks specified, which indicated that the fetus had to be delivered up to the navel or past the head and then aborted in order to qualify as a partial-birth abortion.

The Court also clarified the intent of the law, affirming that the Ban only applied if two requirements were met. First, the abortion provider had to intend to perform a partial-birth abortion. That meant that abortion providers who performed D&E abortions that narrowly met the definition of partial birth abortion as defined by the Ban were not subject to prosecution under the Ban, as long as the abortion of a partially delivered fetus was not the original intent. Second, the abortion provider must deliberately partially deliver the fetus and then perform an act other than the completion of the delivery that results in the death of the fetus, such as the use of surgical instruments to puncture the skull. With those clarifications, the Court dismissed any questions of vagueness.

The Court also held that the Ban was not unconstitutional despite lacking a health exception. The Court reasoned that since there was uncertainty among the medical community if a partial-birth abortion was ever necessary over other abortion methods, the Ban did not need to make an exception for health. Justice Thomas, joined by Scalia, filed a concurring opinion.

Justice Ginsberg, joined by Souter, Stevens, and Breyer, wrote a dissenting opinion in which she disagreed with the Court's decision. Ginsberg argued in her opinion that the Court's ruling in *Gonzales v. Planned Parenthood* disregarded precedent set in prior cases like *Planned Parenthood v. Casey* and *Stenberg v. Carhart*. Both rulings set precedents of protecting women's health, which Ginsberg argued was threatened by the lack of medical exception in the Ban. Ginsberg noted that in *Stenberg v. Carhart*, a state law that banned partial-birth abortion was declared unconstitutional by the Supreme Court because it lacked an exception for health. Because the Ban in *Gonzales v. Planned Parenthood* made no exception for protecting women's health, Ginsberg dissented from the majority.

The Supreme Court's decision in *Gonzales v. Planned Parenthood* overturned the ruling of the Northern District Court of California and the Ninth Circuit Court of Appeals. Once the Supreme Court affirmed that the Ban was constitutional, the Ban went into effect and is still in effect as of 2018. Though partial birth abortions and D&X abortions are not synonymous, the definition of partial birth abortions in the Ban effectively prohibits most D&X abortions. However, there remain some cases where D&X abortions are not prohibited by the Ban, such as a D&X done to remove a fetus after a miscarriage. The Supreme Court's decision overturned longstanding precedent that required abortion laws to contain health exceptions. Legal scholar George J. Annas noted that the reversal of precedent is the first time the Court has allowed Congressional judgement to outweigh medical judgment with regard to women's health. The reversal of that precedent may allow states to pass future laws regulating abortions without including a health exception.

Sources

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