

## **Supreme Court Agrees to Review Partial-Birth Abortion Ban Act**

By Dave Andrusko

Six years after the Supreme Court overturned Nebraska's ban on partial-birth abortions, a newly reconstituted High Court will hear arguments on a lower court ruling that blocked enforcement of the federal Partial-Birth Abortion Ban Act. The justices' February 21 decision came on the Court's first official day of business after Justice Samuel A. Alito, Jr., replaced Sandra Day O'Connor.

The justices will hear *Gonzales v. Carhart* in their next term, which begins in October.

When President Bush signed the Partial-Birth Abortion Ban Act into law, he said, "In passing this legislation, members of the House and Senate made a studied decision based upon compelling evidence. The best case against partial birth abortion is a simple description of what happens and to whom it happens. It involves the partial delivery of a live boy or girl, and a sudden, violent end of that life."

The President added, "Our nation owes its children a different and better welcome. The bill I am about to sign protecting innocent new life from this practice reflects the compassion and humanity of America."

Three different federal courts of appeals have blocked enforcement in the years since the President signed the measure November 5, 2003. Each has held that the federal law conflicts with *Stenberg v. Carhart*, the 2000 Supreme Court decision in which five justices invalidated Nebraska's ban on partial-birth abortion.

At issue in *Gonzales v. Carhart* is a ruling by the U.S. Court of Appeals for the 8th Circuit. In July 2005, the appeals court upheld a trial judge's conclusion that the law is unconstitutional.

The lead plaintiff is abortionist LeRoy Carhart, who was also the lead plaintiff in *Stenberg*.

In *Stenberg*, five justices of the Supreme Court, including the now retired Justice O'Connor, ruled that the abortion "right" originally created in *Roe v. Wade* allows an abortionist to perform a partial-birth abortion any time he sees a "health" benefit, even if the woman and her unborn baby are entirely healthy.

This ruling not only struck down Nebraska's ban on partial-birth abortion, it also rendered unenforceable similar bans that more than half the states had enacted.

The federal law bans "partial-birth abortion," a legal term of art, defined in the law itself as any abortion in which the baby is delivered "past the [baby's] navel ... outside the body of the mother," or "in the case of a head-first presentation, the entire fetal head is outside the body of the mother," before being killed. The law would allow the method if it were ever necessary to save a mother's life. However, it does not allow an abortionist to use the method any time he asserts that it might be slightly preferable to some other method, even for women with no health problems, which is what the five justices required in the 2000 ruling.

Last January, the federal courts of appeals for the 9th and 2nd Circuits also ruled that the federal law conflicts with the 2000 Supreme Court ruling. However, in *National Abortion Federation v. Gonzales*, the 2nd Circuit panel split 2-1.

Interestingly, Chief Judge John M. Walker, Jr., one of the two judges who voted against the federal Partial-Birth Abortion Ban Act, provided a powerful critique of the Supreme Court's ruling in the Nebraska case. Judge Chester J. Straub added a strong dissent.

## **New Justices since *Stenberg* Decided**

The two new justices—Chief Justice John Roberts and Associate Justice Samuel Alito—of course have not voted on the issue of partial-birth abortion. Six years ago three of the still-sitting justices (Antonin Scalia, Anthony Kennedy, and Clarence Thomas) voted to uphold the Nebraska law.

While Justice Kennedy did vote to uphold *Stenberg*, he has also joined four other justices (Breyer, Ginsburg, Souter, and Stevens) in voting in favor of *Roe*. That 1973 decision stands for the proposition that abortion must be allowed for any reason until “viability” (about five and one-half months) and for “health” reasons (broadly defined) even during the final three months of pregnancy.

As discussed at length in *National Right to Life News* and *Today’s News & Views*, another trial took place in the summer of 2004 in which the truth about partial-birth abortions appeared early and often. U.S. District Judge Richard Casey presided in New York and rigorously questioned a number of abortionists about how partial-birth abortions are performed.

Following the trial, on August 26, 2004, Judge Casey issued an opinion stating, “The Court finds that the testimony at trial and before Congress establishes that D&X [partial-birth abortion] is a gruesome, brutal, barbaric, and uncivilized medical procedure ... [and finds] credible evidence that D&X abortions subject fetuses to severe pain.”

Nevertheless, Judge Casey also ruled that the federal ban was in conflict with the 2000 Supreme Court ruling in *Stenberg*.

Meanwhile, waiting in the wings, is a request filed by the Commonwealth of Virginia. It has asked the Supreme Court to review a ruling by the U.S. Court of Appeals for the 4th Circuit.

The 4th Circuit held that a similar state law, banning “partial birth infanticide,” also contradicts *Stenberg*.

On March 17, the Supreme Court is scheduled to vote on whether to accept the case of *Herring v. Richmond Medical Center for Women*.