

A Brilliant Defense

BY Dave Andrusko

On page four of this edition of the “pro-life newspaper of record,” you’ll read about many of the details along with the atmospherics that were a part of the November 8 oral hearings before the United States Supreme Court. At issue was a law that NRLC was able to pass over incredible odds—the Partial-Birth Abortion Ban Act. That was possible for the same reason anything NRLC is able to accomplish is possible: grassroots pressure.

Speculation is rampant about how the two new justices will rule. While understandable, that’s a colossal waste of time. All we can say for sure is thus far in their tenures on the bench, Chief Justice John Roberts and Associate Justice Samuel Alito have both given every indication they are extremely thoughtful, considerate jurists.

Alito did not ask questions in the two challenges to the Partial-Birth Abortion Ban Act heard last month. Roberts carefully prodded and probed, requiring the plaintiffs in the two cases and Solicitor General Paul Clement to fill in the gaps in their arguments.

What can we say, after listening to the oral arguments in *Gonzales v. Carhart* and *Gonzales v. Planned Parenthood*, and reading the transcripts? Actually, much more than most media accounts caught.

Well, for starters, Paul Clement is the kind of litigator you definitely want on your side. Whereas lawyers for the plaintiffs occasionally stumbled, coming up with less than coherent responses to inquiries from the justices, Clement was unflappable, completely prepared for the rabbit trails various justices tried to lead him down. Even by the elevated standards of Supreme Court oral arguments, this was a tour de force.

Understand what the ban on partial-birth abortions is about. The Supreme Court still stubbornly protects the “right” to abortion. While the ban’s sweep is narrow, it is critically important and furthers legitimate interests the Court has recognized in prior cases.

As Clement put it in his brief, “The Act implicates not only the government’s compelling interest in protecting human life, but also the government’s specific (and no less compelling) interest in prohibiting a particular type of abortion procedure that closely resembles infanticide.” (Elsewhere he talks about maintaining the “bright line” between abortion and infanticide.)

He quotes from Justice Kennedy’s dissent in the 2000 case of *Stenberg v. Carhart*, where Kennedy concluded, “Nebraska’s ban on partial birth abortion furthers purposes States are entitled to pursue” and that “Nebraska was entitled to find the existence of a consequential moral difference between the [D&X and D&E] procedures.”

To which Clement forcefully added in court, “I don’t think anyone thinks the law is or should be indifferent to whether fetal demise takes place in utero or outside the mother’s [body].” The one is abortion, “the other is murder.”

The plaintiffs' attacks were largely two-fold. Find some example—one in a million—where a partial-birth abortion was supposedly the “best” technique, on the one hand; “prove” that the ban on partial-birth abortions would also ban more common abortion attempts, on the other.

Clement calmly disputed that there were two special cases for which partial-birth abortion was necessary—pre-eclampsia combined with maternal cancer and placenta previa. In his brief he wrote, “The underlying evidence on which that court relied does not support respondents' claims with regard to either of those conditions.”

He added, “With regard to safety in specific circumstances, the district court ... found that ‘[i]n no case ... could Plaintiffs point to a specific patient or actual circumstance in which D&X [partial-birth abortion] was necessary to protect a woman's health.’ Numerous experts, including several of respondents' own experts, testified that there was no particular circumstance in which partial-birth abortion was medically necessary.”

Clement pointed to a peer review study led by an abortionist who was a plaintiff in another case that challenged the law. That study “concludes that partial-birth abortion and standard D&E abortion had no significant differences in short-term complication rates, blood loss, or procedure time”

Clement then coupled this rebuttal with something he had developed in one of his briefs—that same study revealed an increased risk of subsequent premature deliveries associated with the use of the partial-birth abortion technique!

The plaintiffs' other major tack was to maintain that other commonly used abortion techniques, such as “D&E” (Dilation and Evacuation), would be prohibited. In response Clement patiently (and repeatedly!) walked the justices through the language of the law. The child must be alive and the abortionist must be “performing an overt act” [not something accidental or inadvertent] that the abortionist “knows will kill” a living fetus that has been partially delivered.

Absent from all the accounts I read was any mention of Clement's beautiful use of courtroom ju-jitsu—taking arguments made by opponents and using them against them—that Clement used to devastating effect. He did it repeatedly; let me mention just one example.

That involved the issue of “risk.” Clement argued that to overturn the law, the justices would have to overturn their own jurisprudence in Casey.

“If all you needed to do is point to some marginal risk,” he wrote, “then this Court should have struck down the 24-hour waiting period in the Casey decision, because the plaintiffs there said the 24-hour waiting condition has imposed significant risks. They were backed in that point by an amicus brief by ACOG [the American College of Obstetricians and Gynecologists]. But this Court didn't say, well, you know, you're right, there's marginal risks, we're going to apply a zero tolerance rule.

“The Court instead upheld the 24-hour period, even though it required overruling Akron I's contrary decision and this Court pointed, of course, to Akron I as an exemplar of the pre-Casey decisions that put too little weight on the legitimate countervailing interest that the government has in this area.”

The first month I was at NRLC I was advised not to try to “read tea leaves”—figure out where a justice would come down, based on his or her questions. That is why I would not speculate about Justices Roberts or Alito.

Likewise for Justice Kennedy. As noted above, Kennedy filed a spirited dissent in the Stenberg decision where on a 5-4 vote the Court invalidated Nebraska's state ban on partial-birth abortion.

What I can say is that it would likely be impossible to offer a better defense of the Partial-Birth Abortion Ban Act than that on display November 8.