

**INSTITUTE FOR
REPRODUCTIVE
HEALTH ACCESS**

The Institute for Reproductive Health Access played a vital role in the recent Supreme Court case involving access to second trimester abortions, *Gonzales v. Carhart*. The Institute collected over 150 stories from women across the nation who shared their second trimester abortion experiences. The collected stories were used in an Amicus Brief drafted and filed by attorneys at Orrick, Herrington & Sutcliffe, LLP in support of the parties challenging the so-called federal “partial-birth abortion” ban. The brief reveals the very personal, usually tragic, circumstances that lead a woman to need an abortion late in a pregnancy. Through these brave women, many of whom have shared their stories in the media, we were able to help the Court and the general public understand the human side of this unfortunate debate.

<http://www.chicagotribune.com/news/nationworld/chi-0611060211nov06,1,5263533.story>

Chicago Tribune
— ONLINE EDITION —

<http://www.chicagotribune.com/news/nationworld/chi-0611060211nov06,1,5263533.story>

'Partial-birth abortion' ban goes to high court

Justices to hear 2 challenges to '03 law

By Judy Peres
Tribune staff reporter

November 6, 2006

Carrie and Corey Elliott were picking out strollers when they found out the child they had tried so long to conceive had tetrasomy 22, a rare genetic abnormality. At 21 weeks of pregnancy, sonograms showed the unborn baby they had decided to call Emma was beginning to suffer kidney failure.

"I don't believe she was ever going to come home," said Carrie Elliott, 41. "It was just a question of, do we make it fast or drag it out and make her suffer? So we decided to terminate."

The procedure doctors chose to end Elliott's pregnancy with the least risk to her health may well have been one of those Congress has banned, calling it a "partial-birth abortion."

The U.S. Supreme Court on Wednesday will hear arguments in two cases challenging the 2003 ban, which has been on hold, and likely will rule on them next spring. The outcome is seen as a major test of the political effort to restrict abortion, as well as a test of whether legislators or judges should have the last word.

Since 1973, when *Roe vs. Wade* was decided, the court has consistently held that women have a constitutional right to terminate a pregnancy. Although states may regulate abortion and even outlaw it when the fetus can survive outside the womb, the court has insisted that any ban contain an exception for cases in which the life or health of the pregnant woman is at risk.

New faces on court

In 2000, the court struck down a Nebraska ban on what legislators there called partial-birth abortion, in part because it had no exception for protecting the woman's health (although it did have one for cases in which her life was in danger). Then-Justice Sandra Day O'Connor joined the four liberals on the bench to create a 5-4 majority.

But O'Connor is now gone, and there are two new court members: Chief Justice John Roberts Jr. and Justice Samuel Alito.

Legal observers expect that Justices Antonin Scalia, Clarence Thomas and Anthony Kennedy will vote to uphold the ban. And Alito's writings indicate he would overturn *Roe vs. Wade*.

"The chief justice is the biggest question mark, because his views aren't particularly on record," said Andrew Koppelman, a professor of law and political science at Northwestern University.

Nevertheless, he said, "if I had to bet, I'd bet on the court upholding the ban on partial-birth abortion, just because of what we know about where Roberts' general sympathies lie."

If the court upholds the ban, it would be deferring to Congress in an area where the legislature flatly disagreed with judicial rulings.

To get around the Supreme Court's requirement that any ban on abortion contain an exception to preserve the health of the mother, one federal appellate court wrote, Congress "found and declared" that "partial-birth abortion . . . is a gruesome and inhumane procedure that is never medically necessary."

"This is really about more than just abortion," said Priscilla Smith of the Center for Reproductive Rights, lead counsel in the case, *Gonzales vs. Carhart*. "It's about whether the court will continue its role in our three-branch system of government -- being the interpreter of the Constitution and the protector of individual liberties.

"If Congress can make 'findings' that say, 'We disagree with the court,' then the court loses its role entirely and the legislature can decide which rights you're allowed to have," Smith said.

The high court's other objection to the Nebraska ban was that it was worded so broadly that it applied to the vast majority of abortions performed after the first trimester. Opponents say the federal ban has the same fatal flaw because "partial-birth abortion" is not a medical term.

The federal Partial-Birth Abortion Ban Act of 2003 says a physician who "knowingly performs a partial-birth abortion and thereby kills a human fetus" may be imprisoned for

up to 2 years. It defines partial-birth abortion as a procedure in which the clinician "delivers a living fetus" until part of the fetus is "outside the body of the mother" and then "performs the overt act . . . that kills the partially delivered living fetus."

Anti-abortion obstetricians say the ban refers to D&X (dilation and extraction) or intact D&E (dilation and evacuation). Dr. LeRoy Sprang, an Evanston obstetrician and a clinical professor of obstetrics at Northwestern, has said D&X entails risks of its own, is inhumane and is never medically necessary because other procedures are available.

But doctors who perform abortions say D&X is merely a variant of D&E, and virtually any D&E can run afoul of the law. They say the only way to be sure of not tripping the ban is to kill the fetus before removing it or to cut it out of the woman's body, both of which are riskier to the woman.

Roger Evans, legal director of Planned Parenthood Federation of America, a respondent in the second case, said the law is a "hoax."

"It's not some rare, aberrant, 'late-term,' barbaric procedure that the act is banning," he said. "It's banning a wide range of second-trimester abortions that proceed according to methods deemed safest for the patient."

Dr. Cassing Hammond, an obstetrician at Northwestern Memorial Hospital, said that if the ban goes into effect "it will put the health and lives of many of my patients at risk. I won't be able to do the procedure in the way that's safest for the patient. And I really don't want politicians in my operating room, telling me how I'm supposed to help my patients."

Carrie Elliott was not a candidate for a first-trimester abortion. When she was in her third month, a test indicated a possible problem. But doctors couldn't be certain.

"Both my husband and I wanted the baby very much," she wrote in a brief filed with the Supreme Court, "and neither one of us was willing to terminate on a 'maybe.'" By the time they knew for sure the fetus would be severely malformed and likely would not survive, she was in her fifth month.

Elliott, who lives in the Southwest U.S., said the only procedure available to her was a D&E, which doctors assured her would be a "painless passing" for the fetus and the safest thing for her.

Family in mourning

The Elliotts are still mourning the loss of the baby who would have been 5 months old now. And they would rather grieve privately, they said, but both felt it was important to speak out.

If the procedure she underwent were banned, said Carrie Elliott, "I would have been forced to carry to term, or make a rushed decision at 12 weeks. But having the extra time, we could make a reasoned decision based on more facts. And it could have gone the other way--it could have turned out she was OK."

<http://www.madison.com/tct/opinion/editorial/index.php?ntid=103035>

THE CAPITAL TIMES

Madison, WI

Editorial: Signs are no burden

A Cap Times editorial, Oct. 13, 2006

At a time when social conservative activists and cynical politicians are waging open warfare on the right of women to have access to birth control, it is not merely wise but necessary for the city of Madison to intervene on behalf of law-abiding residents who seek access to emergency contraception.

Ald. Zach Brandon's proposal to require pharmacists to post signs in their front windows if they don't offer emergency contraception is a good step in the right direction. The signs would explain that emergency contraception is safe and guide women to nearby pharmacies that stock the drugs.

The measure would also require Madison hospitals to display information about emergency contraception.

By providing women with basic information in an easily accessible manner, the signs effectively would address those circumstances where pharmacists choose, for religious or political reasons, to deny women safe and legal treatments. Instead of having to confront a pharmacist who has made such a choice for directions to a competing pharmacy, a woman could simply review the information on the sign and get the help she needs.



This is such a rational approach that it boggles the mind that there would be any opposition. But, of course, there are those who believe that no requirements should be placed on local businesses. They rest their case on the argument that signs of this kind pose an undue burden on businesses.

That's a comic claim.

When a business that is supposed to provide essential services decides not to care for Madison residents who find themselves in emergency situations, it is perfectly reasonable for the city to make sure that those people can quickly and easily find assistance from more sensitive and responsible businesses.

The Institute for Reproductive Health Access spent the last

**INSTITUTE FOR
REPRODUCTIVE
HEALTH ACCESS**

The Institute for Reproductive Health Access is happy to report a recent success in our efforts to encourage pharmacists to stock and dispense EC in Wisconsin! During the month of October, the Institute, the Center for Reproductive Rights, and NARAL Pro-Choice Wisconsin worked closely with the Madison City Council to introduce pharmacy signage legislation. This bill will require any pharmacy that does not stock or dispense EC to conspicuously post a sign indicating that EC is not sold at that pharmacy. The signs allow women to know in advance if their neighborhood pharmacy carries EC products, and can avoid waiting at one or several stores to locate EC when time is of the essence. The Board of Health for Madison and Dane County unanimously recommended the EC Access ordinance for passage. The ordinance has the support of the Mayor and is expected to easily pass through a full city council vote in late November.