national RIGHT TO LIFE committee, inc.
512 10th Street, NW Washington, DC 20004-1421
(202) 626-8800 FAX: (202) 737-9189 Website: www.nrlc.org

QUESTIONS AND ANSWERS ABOUT THE ABORTION PAIN PREVENTION ACT

What Does the Abortion Pain Prevention Act Do?

Recognizing that medical science demonstrates that certainly by 20 weeks after fertilization unborn children are capable of experiencing pain, the Act prevents abortions thereafter in the absence of a significant risk to the mother.

Do Unborn Children Really Experience Pain?

By twenty weeks after fertilization, all the physical structures necessary to experience pain have developed.[1] In the words of Dr.Richard T.F.Schmidt, Past President of the American College of Obstetricians and Gynaecologists, "It can be clearly demonstrated that fetuses seek to evade certain stimuli in a manner which in an infant or an adult would be interpreted as a reaction to pain." [2] Moreover, increases in their stress hormones have been measured when unborn children received a painful stimulus.[3]

Can Abortions Constitutionally Be Prevented on Pain-Capable Unborn Children?

Much depends on the "swing" Supreme Court Justice, Anthony Kennedy. In his opinion for the majority of the Court in *Gonzales v. Carhart*, 550 U.S. 124, 159-60 (2007), which upheld a ban on partial-birth abortions before as well as after viability, Justice Kennedy wrote, "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 fast-developing brain of her unborn child, a child assuming the human form." Of the most common second-trimester abortion method, dilation and extraction (D &E), he has written, "The fetus, in many cases, dies just as a human adult or child would: It bleeds to death as it is torn limb from limb."[4]

Kennedy has also stated, "[T]he States hav[e] an important constitutional role in defining their interests in the abortion debate. It is only with this principle in mind that Nebraska's interests can be given proper weight. . . . States ... have an interest in forbidding medical procedures which, in the State's reasonable determination, might cause the medical profession or society as a whole to become insensitive, even

disdainful, to life, including life in the human fetus. . . . A State may take measures to ensure the medical profession and its members are viewed as healers, sustained by a compassionate and rigorous ethic and cognizant of the dignity and value of human life, **even life which cannot survive without the assistance of others.**"[5] (Emphasis added.) He may well prove sympathetic to a Nebraska decision to prevent abortions when the unborn child is capable of feeling pain.[6]

What if the Health of the Mother Is at Stake?

The Act accounts for circumstances in which, in reasonable medical judgment, the mother has a condition which so complicates her pregnancy as to necessitate abortion to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function. This is language upheld by the U.S. Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 880 (1992). It is an objective standard, the grounds for which the Act requires must be reported to the state Department of Health and Human Services.

In such circumstances, the method of abortion most likely to result in the survival of the child must be used unless it would increase risk to the mother.

Doesn't the Judgment of Whether the Mother's Health Should Authorize an Abortion Have to Be Left to the Subjective Decision of the Abortionist?

For many years, the majority of the Supreme Court both interpreted maternal "health" so broadly that it included "all factors– physical, emotional, psychological, familial, and the woman's age– relevant to the well-being of the patient"[7] and required that abortionists be given absolute discretion to apply it in each individual case. But, as noted, the *Casey* decision upheld a narrower definition of health. In the 2000 case that struck Nebraska's partial birth abortion ban, Justice Kennedy dissented, writing:

> [T]he Court holds the ban on the D & X procedure fails because it does not include an exception permitting an abortionist to perform a D & X whenever he believe it will best preserve the health of the woman. ... [T]he Court awards each physician a veto power of the State's judgment that the procedures should not be performed. ... Requiring Nebraska to defer to Dr. Carhart's judgment is no different than forbidding Nebraska from enacting a ban at all; for it is now Dr. Leroy Carhart who sets abortion policy for the State of Nebraska, not the legislature or the people. *Casey* does not give precedence to the views of a single physician or a group of physicians regarding the relative safety of a particular procedure.[8]

Then, in *Gonzales v. Carhart*, Justice Kennedy, this time writing for the majority of a differently composed Supreme Court, *upheld* Congress' ban on partial birth abortions, stating, "The . . . premise, that the State, from the inception of the pregnancy, maintains its own regulatory interest in protecting the life of the fetus that may become a child,

cannot be set at naught by interpreting *Casey*'s requirement of a health exception so it becomes tantamount to allowing a doctor to choose the abortion method he or she might prefer."[9]

Thus, it is now constitutional for states rationally to define an objective standard for determining whether there is a genuine, significant threat to the mother's health.

How Is the Stage of Pregnancy To Be Determined in An Individual Case?

Unless there is a medical emergency, before any abortion is performed, the Act requires the abortionist or a referring doctor to determine what, in reasonable medical judgment, will with reasonable probability be the unborn child's age since fertilization at the time the abortion is planned to be performed. This is an objective standard, whose method and basis must be reported to the state Department of Health and Human Services.

SOURCES

1. Dr. Jean Wright, a Savannah, Georgia anesthesiologist specializing in Pediatric Critical Care Medicine at Memorial Health University Medical Center and previously professor and pediatric chair of Mercer School of Medicine, notes, "[A]n unborn fetus after 20 weeks of gestation, has all the prerequisite anatomy, physiology, hormones, neurotransmitters, and electrical current to close the loop and create the conditions needed to perceive pain. In a fashion similar to explaining the electrical wiring to a new house, we would explain that the circuit is complete from skin to brain and back." From testimony before the U.S. House Judiciary Committee Subcommittee on the Constitution , Nov. 1, 2005. Testimony available at http://commdocs.house.gov/committees/judiciary/hju24284.000/hju24284_0f.htm .

2. Statement, February 13, 1984.

3. "Studies have demonstrated that certain stress hormones . . . increased significantly in fetuses given blood transfusions through a needle placed, under ultrasound guidance, in the intra-hepatic vein . . . , whereas no consistent responses occurred in the fetuses transfused via a needle placed at the insertion of the umbilical cord (which is not innervated). The magnitude of the stress hormone responses was correlated with the duration of the painful stimulation." Dr. Kanwaljeets J. S. Anand, professor of pediatrics, anesthesiology, pharmacology, neurobiology, and developmental sciences at the University of Arkansas for Medical Sciences College of Medicine, "Expert Report" submitted Jan. 15, 2004 to U.S. Federal District Court reviewing the Partial Birth Abortion Ban Act available at http://www.nrlc.org/abortion/fetal_pain/AnandPainReport.pdf .

4. *Stenberg v. Carhart*, 350 U.S. 914, 958-59 (Kennedy, J., dissenting).

5. *Id*. at 962.

6. In *Planned Parenthood v. Casey*, 505 US 833, 869-70 (1992) *Casey*, Justice Kennedy joined the pivotal opinion accepting viability as dividing line, stating, "there is no line other than viability which is more workable. . . . In some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child." He was not then presented with the possibility of a state statute preventing abortions once the unborn child is capable of feeling pain, and it could be argued such a line is even more "workable" since it is based on an inherent characteristic of the developing child, rather than the changeable capacity of medical science to sustain premature infants.

7. *Doe v. Bolton,* 410 U.S. 179, 192 (1973).

8. *Stenberg v. Carhart*, 530 U.S. 914, 964-70 (2000)(Kennedy, J., dissenting).

9. *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007).