40th ANNIVERSARY of ROE V. WADE

NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

FACT SHEET

Roe v. Wade and the Right to Abortion.

The long-standing, well-established constitutional right to privacy places limits on the government's ability to interfere with a person's most basic, personal decisions – including the decision whether and when to bear children. The right to abortion was first recognized four decades ago, and the Supreme Court has repeatedly reaffirmed its central holding, yet this fundamental constitutional right is under ever-increasing attack.

The Constitutional Right to Privacy Predates *Roe v. Wade*

In a line of decisions going as far back as 1891, the Supreme Court recognized a right of privacy and bodily integrity, applying it to activities related to marriage, procreation, family relationships, and child rearing and education.[1] In *Griswold v. Connecticut*, the Supreme Court ruled that the constitutional right to privacy extends to a married couple's decision to use birth control. Building upon prior precedents including the right to educate one's children as one chooses,[3] the Court identified a "zone of privacy created by several fundamental constitutional guarantees."[4] Recognizing the importance of privacy to marriage, the Court in Griswold invalidated a state's attempt to prohibit married couples from using contraceptives. This right to contraception was soon extended to unmarried individuals in *Eistenstadt v. Baird* in 1972.[5] As the Supreme Court said, "If the right to privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[6]

The Decision to Have an Abortion is Protected under the Constitutional Right to Privacy

In the 1973 landmark case *Roe v. Wade*,[7] the Supreme Court applied this core constitutional principle of privacy and liberty to a woman's ability to terminate a pregnancy. In *Roe*, the Court held that the constitutional right to privacy includes a woman's right to decide whether to have an abortion. The Court made clear that as a basic right to privacy protected by the Due Process Clause of the Fourteenth Amendment, the woman's right is "fundamental," meaning that governmental attempts to interfere with the right are subject to "strict scrutiny." To withstand strict scrutiny, the government must show that its law or policy is necessary to achieve a compelling interest. The law or policy must also be narrowly tailored to achieve the interest and must be the least restrictive means for doing so.

Yet, the Court also concluded that the "right is not unqualified and must be considered against important state interests in regulation."[8] The Court identified those state interests as protecting women's health and protecting the "potentiality" of life.[9] The Court developed a way to balance the woman's right to abortion against these governmental interests: prior to fetal viability, a state could only regulate abortion if necessary to protect a woman's health, such as licensing doctors. After fetal viability, a government could regulate and even ban abortion to further its interest in the potentiality of life, but it must safeguard a woman's life and a woman's health.[10]

In the years after *Roe*, the Court struck down most attempts to restrict the right to decide whether to have an abortion,[11] facilitating a woman's ability to control her reproduction, her health, and indeed the course of her life itself.

The Evolution of the Constitutional Right to Abortion, Post-*Roe v. Wade*

Even after sustained attacks on *Roe v. Wade*, in 1992, in *Planned Parenthood v. Casey*, the Court reaffirmed *Roe*'s essential holding:

> Throughout this century, this Court also has held that the fundamental right of privacy protects citizens against governmental intrusion in such intimate family matters as procreation, childrearing, marriage, and contraceptive choice. . . . These cases embody the principle that personal decisions that profoundly affect bodily integrity, identity, and destiny should be largely beyond the reach of government. . . . In *Roe v. Wade*, this Court correctly applied these principles to a woman's right to choose abortion.[12]

The Court held that the Due Process Clause's guarantee that no individual shall be deprived of "liberty" applies to this most personal decision.[13]

Yet, the majority of the Court weakened *Roe v. Wade*'s protection of the right to abortion by replacing "strict scrutiny" with a new, highly subjective "undue burden" test. This means that the government no longer has to meet the high bar of justifying a restriction on abortion by showing a compelling interest for passing the restriction, as well as showing that the restriction is narrowly tailored to meet that interest. Instead, under the undue burden standard, the Court considers whether a restriction places an undue burden, or substantial obstacle, in the path of a woman who seeks to terminate her pregnancy. In *Casey*, which challenged a number of restrictions limiting a woman's access to abortion, the only restriction struck down by the Court as an undue burden was a requirement that a woman notify her husband before having an abortion. The decision in *Casey* led to states passing more restrictions on abortion and lower courts upholding them, including mandatory delays, biased counseling requirements, and restrictions on young women's access to abortion.

In 2000, the Supreme Court applied the undue burden test in *Stenberg v. Carhart*.[14] In a sharply divided 5-4 decision, the Court struck down a Nebraska criminal law that banned a medically-approved abortion procedure because the law's definition of the procedure was so loose that it covered even the most commonly used procedure for abortions as early as the 12th week of pregnancy, constituting an undue burden. In addition, the law had no exception that would allow these abortion procedures to be used when necessary for the protection of the health of the woman, as explicitly required under *Roe* and *Casey*.

More recently, the Court in 2007 in *Gonzales v. Carhart* considered a dangerous federal abortion ban similar to the Nebraska ban struck down in *Stenberg v. Carhart*. Yet, this time the Court in a 5-4 decision upheld the ban, which contains no exception for the health of a woman.[15] It is important to note that between 2000 – when *Stenberg v. Carhart* was decided – and 2007 – when *Gonzales v. Carhart* was decided – there was a change in who sat on the Supreme Court bench. Chief Justice Roberts and Justice Alito joined the Court, replacing Chief Justice Rehnquist and more significantly, Justice O'Connor, who had been in the majority in the 2000 case.

In *Gonzales v. Carhart*, the Court held that a woman's decision to follow her physician's advice can be overridden by the government, based on a new principle never advanced or documented by either side in the case: protecting "the bond of love the mother has for her child."[16] The Court determined that abortion has serious harmful effects on women, including severe psychological consequences. Even though the Court admitted that this determination was based on "no reliable data,"[17] it decided that criminalizing a medically-approved abortion procedure was an acceptable way for the state to protect women from the "harmful" consequences of their own decisions that it decided to recognize. In other words, the Court deprived women of the right to make the best choice for themselves and their families because it is *for their own good*. Justice Ginsburg recognized that this reasoning "reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited."[18]

The Current Landscape – *Roe* and the Right to Abortion is Under Constant Attack

Since *Gonzales v. Carhart*, opponents of abortion have continued to push the boundaries in an attempt to further challenge the core constitutional protections for a woman's decision to have an abortion. In the last two years, for example, states have passed a record number of abortion restrictions.[19] Many of these laws restrict

access to abortion by making it more difficult or expensive to obtain and have the intent of coercing, shaming, or judging a woman. These laws include requirements that a woman undergo a medically unnecessary and physically invasive ultrasound before obtaining an abortion,[20] requirements that a woman wait a significant amount of time before obtaining an abortion,[21] and prohibitions on purchasing a comprehensive health insurance plan that includes coverage of abortion.[22]

Other abortion opponents have sought to overrule *Roe v. Wade* directly. These efforts include so-called "personhood" initiatives that would establish legal rights for fertilized eggs, which could result not only in a ban on all abortions, but could also outlaw certain forms of contraception and fertility treatment. The abortion opponents pushing direct challenges have made it clear that their goal is to find a case that will result in the Supreme Court overturning *Roe v. Wade*. If *Roe* is overturned, it would leave abortion decisions to politicians in Congress and states. Groups on both sides of this issue agree that at least 30 states are poised to make abortion illegal within a year if that were to happen.[23]

In the four decades since *Roe v. Wade* was decided, women and their families have come to rely upon the fundamental constitutional protection of a woman's decision to have an abortion. Although *Roe* – and the right to privacy and liberty upon which it relies – has been repeatedly reaffirmed by the Supreme Court, attacks upon the right continue. Attempts to erode the constitutional underpinning of a right upon which women and their families rely threaten both women's decision-making and ability to play an equal role in society.

1 Roe v. Wade, 410 U.S. 113, 152-153 (1973) (identifying cases recognizing a right to privacy).
2 Griswold v. Connecticut, 381 U.S. 479 (1965).
3 *Id*. at 513-14 (referencing Pierce v. Society of Sisters, 268 U.S. 510 (1925) and Meyer v. Nebraska, 262 U.S. 390 (1923)).
4 *Id*. at 515.
5 Eisenstadt v. Baird, 405 U.S. 438 (1972).
6 *Id*. at 453 (emphasis added) (citation omitted).
7 410 U.S. 113 (1973).
8 Roe v. Wade, 410 U.S. 113, 154 (1973).
9 *Id*. at 162.
10 A case that accompanied *Roe, Doe v. Bolton*, explained that "health" must be understood "in light of all factors – physical, emotional, psychological, familial, and the woman's age – relevant to the well-being of the patient. All these factors may relate to health." Doe v. Bolton, 410 U.S. 179, 192 (1973).
11 *See, e.g*., Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) (invalidating a husband consent requirement, requirement that physicians preserve the life and health of the fetus at every stage of pregnancy, and a prohibition on a particular method of abortion); City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) (invalidating a requirement that physicians give women anti-abortion information, a 24-hour mandatory delay requirement, a requirement that all abortions after the first trimester be performed in a hospital, a parental consent requirement, and a requirement related to the disposal of fetal remains).
12 Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 926-927 (1992) (internal citations omitted).
13 *Id*. at 846 ("Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. . . . The controlling word in the cases before us is 'liberty.'").
14 Stenberg v. Carhart, 530 U.S. 914 (2000).
15 Gonzales v. Carhart, 550 U.S. 124 (2007).
16 *Id*. at 159.
17 *Id*.
18 *Id*. at 185 (Ginsburg, J., dissenting) (citations omitted).
19 In 2012, states passed 43 restrictions on access to abortion services, the second highest number of new abortion restrictions passed in a year, second only to 2011, when states enacted 92 provisions limiting access to abortion, almost triple the previous record. *2012 Saw Second-Highest Number of Abortion Restrictions Ever*, GUTTMACHER INSTITUTE, Jan. 2, 2013, http://www.guttmacher.org/media/inthenews/2013/01/02/index.html; *States Enact Record Number of Abortion Restrictions in 2011*, GUTTMACHER INSTITUTE, Jan. 5, 2012, http://www.guttmacher.org/media/inthenews/2012/01/05/endofyear.html.
20 Eight states now require women to undergo a medically unnecessary and physically invasive ultrasound before obtaining an abortion. *State Policies in Brief: Requirements for Ultrasound*, GUTTMACHER INSTITUTE, Jan. 1, 2013, http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf.
21 Many states require that a woman wait 24 hours between receiving state-mandated counseling and obtaining an abortion. *State Policies in Brief: Counseling and Waiting Periods for Abortion*, GUTTMACHER INSTITUTE, Jan. 1, 2013, http://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf. In 2012, Utah passed a law requiring women to wait 72 hours.
22 Twenty states now prohibit women from buying an insurance plan that includes abortion coverage, either in an exchange or in any private insurance plan offered in the state. *State Bans on Insurance Coverage of Abortion Endanger Women's Health and Take Health Benefits Away from Women*, NATIONAL WOMEN'S LAW CENTER, Jan. 15, 2013, http://www.nwlc.org/resource/state-bans-insurance-coverage-abortion-endanger-women%E2%80%99s-health-and-take-health-benefits-awa.
23 *See, e.g*., Editorial, *If Roe v. Wade Goes*, N.Y. TIMES, Oct. 15, 2012, *available at* http://www.nytimes.com/2012/10/16/opinion/if-roe-v-wade-goes.html?_r=0; Center for Reproductive Rights, What if Roe Fell?, Sept. 2004, *available at* http://www.crlp.org/pdf/bo_whatifroefell.pdf; Associated Press, *Many States Would Ban Abortion*, Report Finds, Oct. 5, 2004 (saying Tony Perkins, President of the Family Research Council, a leading abortion opponent, agrees with CRR's figure), *available at* http://www.msnbc.msn.com/id/6184949/.