U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

May 10, 2007

BY HAND

Honorable Thomas Asreen
Acting Clerk of Court
United States Court of Appeals
for the Second Circuit
40 Foley Square
New York, New York 10007

Re: National Abortion Federation, et al. v. Gonzales, Dkt. 04-5201-cv

Dear Mr. Asreen:

The Government respectfully submits this letter-brief in accordance with the Court's April 26, 2007 Order directing the parties to set forth their views on the appropriate disposition of this appeal in light of the Supreme Court's decision in Gonzales v. Carhart, Nos. 05-380, 05-1382, 127 S. Ct. 1610, 2007 WL 1135596 (April 18, 2007) ("Carhart"). For the reasons that follow, Carhart requires this Court to vacate its January 31, 2006 decision; vacate the district court's judgment; and remand the matter to the district court with instructions to dismiss the complaint of plaintiffs-appellees ("plaintiffs") with prejudice and enter judgment for the Government. We are submitting an original and three copies of this letter-brief for distribution to the panel that heard this appeal.

Background

In this action, plaintiffs mounted a facial constitutional challenge to the Partial-Birth Abortion Ban Act of 2003 (the "Act") on a variety of grounds. After a bench trial, the district court held that the Act was unconstitutional because it lacked an exception permitting the performance of partial-birth abortion to protect the health of the mother. (SPA 90, 97, 105). On that basis, the court permanently enjoined the Government from enforcing the Act against plaintiffs, their members, and others acting on plaintiffs' behalf. (SPA 106-08). The district court did not rule on any of the other arguments that plaintiffs advanced as grounds for invalidating the Act. (SPA 89-90).[1] The Government appealed the district court's judgment.

In a January 31, 2006 decision, this Court affirmed the district court's "declaration of the Act's unconstitutionality," and "rule[d] that the Act is unconstitutional for lack of a health exception." National Abortion Fed'n v. Gonzales, 437 F.3d 278, 281, 290 (2d Cir. 2006); see also id. at 288 (same). At the same time, the Court "defer[red] a ruling as to the appropriate

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[1] In addition to arguing that the Act was unconstitutional for lack of a health exception, plaintiffs contended that the Act was unconstitutionally vague, imposed an undue burden on the abortion right, did not serve a legitimate state interest, violated equal protection of laws, and contained a constitutionally inadequate life exception. (SPA 15) (district court's description of plaintiff's claims); (JA 28-46) (complaint).

remedy," and ordered the parties to submit supplemental letter-briefs on that question, in light of the Supreme Court's then-recent decision in Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320 (2006). NAF, 437 F.3d at 290. The Court did not reach the other grounds on which plaintiffs challenged the constitutionality of the Act before this Court. See id. at 290 (stating that Court would not consider plaintiffs' claims that Act was unconstitutionally vague, overbroad, and imposed an undue burden on the abortion right "until we make a determination concerning the remedy").

Subsequently, upon the Supreme Court's grant of certiorari in Carhart, this Court stayed its supplemental briefing order pending the Court's resolution of Carhart. As a result, judgment has not been entered.

Carhart Supersedes this Court's Decision Declaring the Act Unconstitutional for Lack of a Health Exception

In Carhart, the Supreme Court reversed the judgments of the United States Courts of Appeals for the Eighth and Ninth Circuits, which had struck down the Act as unconstitutional, and upheld the constitutionality of the Act. See Carhart, 127 S. Ct. at 1639. The Supreme Court held that the Act is not void for vagueness and does not "impose[] an undue burden on a woman's right to an abortion based on its overbreadth or lack of a health exception." Id. at 1637. To the contrary, the Court concluded,

"the Act does not require a health exception." Id. at 1637.

In so ruling, Carhart supersedes this Court's January 31, 2006 decision holding the Act unconstitutional for lack of a health exception. The Supreme Court's declaration that the Act is not unconstitutional for lack of a health exception also renders legally insupportable the permanent injunction the district court granted based on its contrary ruling. This Court should therefore vacate its January 31, 2006 decision and vacate the judgment of the district court permanently enjoining enforcement of the Act. In addition, because the Supreme Court has held that the Act is constitutional, there is no need for briefing as to remedy.

Plaintiffs' Other Claims Should Be Dismissed With Prejudice Because They Are Either Foreclosed by Carhart or Legally Baseless

In addition to vacating the injunction, the Court should also remand the case to the district court with instructions to dismiss the complaint with prejudice because plaintiffs' remaining claims - that the Act does not serve a legitimate state interest, contains a constitutionally inadequate life exception, and violates the equal protection rights of women - are either foreclosed by Carhart or devoid of merit as a matter of law.

1. Legitimate State Interest

First, plaintiffs' claims that the Act fails to serve a legitimate state interest and that its life exception is

constitutionally inadequate are barred by Carhart. Carhart expressly held that Congress's stated objectives in singling out partial-birth abortion for regulation reflect "legitimate government interests," 127 S. Ct. at 1635, namely, Congress's interests in promoting "respect for life"; protecting the integrity of the medical profession; proscribing a medical procedure that bears a "'disturbing similarity to the killing of a newborn infant,'" thereby drawing a bright line between abortion and infanticide; and preventing the perversion of "'a process during which life is brought into the world.'" Id. at 1633-35 (quoting congressional findings); see also id. at 1633 (Congress could "conclude that the type of abortion proscribed by the Act requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition"). Accordingly, plaintiffs' argument that the Act "fail[s] to serve any legitimate state interest" (JA 45 (complaint)) is foreclosed by Carhart.

2. Life Exception

Carhart also bars plaintiffs' facial challenge to the Act's life exception, which permits doctors to perform partial-birth abortion when the procedure "is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy

itself." 18 U.S.C. § 1531(a).

The Supreme Court noted that the Act's life exception obviates the need to bring an as-applied challenge where the ban threatens a woman's life, confirming that the exception permits the performance of partial-birth abortion in such circumstances. See Carhart, 127 S. Ct. at 1639. The Court's observation would seem to render an as-applied challenge to the life exception unnecessary under any circumstances, because the Act would not bar the procedure in any life-threatening case. In any event, to the extent that the life exception is claimed not to permit the performance of a partial-birth abortion to save a woman's life in particular circumstances, plaintiffs may seek to bring an as-applied challenge in those circumstances. See id. at 1639 ("The Act is open to a proper as-applied challenge in a discrete case."). Whatever the scope for as-applied challenges to the life exception, plaintiffs' facial challenge to that exception is clearly foreclosed by Carhart. See 127 S. Ct. at 1638 ("proper means to consider exceptions" to ban on partial-birth abortion "is by as-applied challenge;" facial challenges to Act before the Court "should not have been entertained in the first instance").

3. Equal Protection

Finally, although Carhart did not address whether the Act violates the equal protection rights of women as plaintiffs'

complaint alleged (JA 45), because the claim is meritless as a matter of law, the Court should instruct the district court on remand to dismiss the claim with prejudice. In this claim, plaintiffs allege that the Act violates equal protection "by endangering the health and lives of women, but not men." (JA 45 (complaint)).

As an initial matter, the Supreme Court has grounded the right to abortion in the due process clause, not equal protection principles. See, e.g., Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 846 (1992) ("Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause . . . . "). The Supreme Court's decision in Carhart that the Act does not violate the due process clause of the Fifth Amendment does not leave any room for plaintiffs to turn around and argue that the Act violates the equal protection component of the same clause.

In any event, plaintiffs' equal protection claim is insubstantial on its own terms, as plaintiffs themselves appear to recognize in failing to pursue the claim on appeal, even as they advanced every other alternative basis for affirmance raised in their complaint. See Brief for Plaintiffs-Appellees at 49-69 (arguing that this Court could affirm district court based on plaintiffs' alternative arguments that Act was unconstitutionally vague, contained an inadequate life exception, and failed to

serve a legitimate state interest). The "Equal Protection Clause is essentially a direction that all persons similarly situated should be treated alike." Tuan Anh Nguyen v. Immigration and Naturalization Serv., 533 U.S. 53, 63 (2001) (internal quotations marks omitted). Because men cannot have abortions, however, men and women are not similarly situated, and the Act's regulation of a particular abortion procedure cannot not violate the equal protection rights of women.

Following Carhart, there can be no serious dispute that the Act serves the important governmental objectives of, among other things, promoting respect for life, protecting the integrity of the medical profession, and drawing a bright line between abortion and infanticide, see supra at 4-5, and that banning partial-birth abortion bears a substantial relationship to those objectives. See Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 469 (1981) (to withstand equal protection challenge, gender-based classification must "bear a substantial relationship to important governmental objectives") (internal quotation marks omitted). Accordingly, plaintiffs' equal protection claim cannot proceed in the wake of Carhart.

Conclusion

In sum, Carhart requires that this Court vacate its January 31, 2006 decision holding the Act unconstitutional for lack of a health exception and the district court's judgment permanently

enjoining enforcement of the Act. In addition, because none of plaintiffs' remaining claims - i.e., those that were not addressed by the district court or this Court - would be viable on remand as a matter of law, the Court should remand the case to the district court with instructions to dismiss the complaint with prejudice and enter judgment for the Government.

Thank you for your consideration of this matter.

Respectfully submitted,

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