

## Supreme Court to Review Second Challenge to Partial-Birth Abortion Ban

BY Dave Andrusko

WASHINGTON—Having previously agreed to hear one appeal of a federal appeals court decision striking down the Partial-Birth Abortion Ban Act, the Supreme Court last month agreed to hear a second.

On February 21, the justices first agreed to hear an appeal by the Bush Administration of the decision by the U.S. Court of Appeals for the 8th Circuit based in St. Louis that declared the 2003 law unconstitutional. The expectation had been that the Court would take up the case shortly after the fall term opens in October.

However on June 19, over the Bush Administration's request that *Gonzales v. Carhart* be decided first, the justices agreed to hear a ruling out of the U.S. Court of Appeals for the 9th Circuit based in San Francisco, which also found the law unconstitutional in *Gonzales v. Planned Parenthood*.

The Solicitor General had argued there was no reason to "delay the ultimate resolution of the extraordinarily important question of the act's constitutionality" and that in significant aspects the issues raised were duplicative. But lawyers for Planned Parenthood maintained that the 9th Circuit decision was broader and provided "the most complete available record" on the statute's likely impact.

It is not known whether the High Court will hear the cases in tandem.

Generally speaking there are two broad lines of attack against the law: vagueness and undue burden. The 9th Circuit accepted the notion that Congress's definition of a partial-birth abortion is so "vague" that abortion techniques used commonly in the second trimester (such as "D&E") would also be prohibited.

By contrast, the 8th Circuit invalidated the law on the sole conclusion that it did not include a "health" exception, thus constituting an "undue burden" on a woman's right to abortion.

However, the 9th Circuit decision raises another significant issue. Last January, in *Ayotte v. Planned Parenthood of Northern New England*, the Supreme Court raised eyebrows by the way in which it vacated a lower court ruling.

The U.S. Court of Appeals for the 1st Circuit had concluded that New Hampshire's parental notification law must fall because it lacked an exception for abortions performed to protect a minor's health in a medical emergency situation. What made *Ayotte* especially intriguing is that the justices unanimously instructed the lower court to reconsider whether the law should be voided in its entirety or only in cases where there are health questions.

But the 9th Circuit concluded, as Congressional Quarterly noted, "that despite the *Ayotte* decision, the entire 2003 federal law is invalid, saying 'we believe that a narrow remedy designed to address the undue burden and vagueness concerns, as well as the health exception, would likely violate Congress' intent in passing the act.'"

Still another appeals court—the 2nd Circuit—held the law to be unconstitutional on the grounds that it lacked a health exception. But it “asked for additional briefings from the parties on the question of a remedy in light of the Ayotte decision,” according to Congressional Quarterly. “The 2nd Circuit then suspended its action on the case altogether after the Supreme Court agreed to hear the 8th Circuit case.”

Virginia’s partial-birth infanticide law was before the court but the justices did not accept review of that case.