Op-Ed Contributor

Don’t Assume the Worst

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THE Supreme Court’s 5-to-4 decision this week, in Gonzales v. Carhart, to uphold the federal Partial-Birth Abortion Ban Act will undoubtedly harm the future reproductive health of some American women, and Justice Anthony M. Kennedy’s majority opinion patronized such women’s ability to make the sad and difficult decisions that late-term abortion often entails.

But let’s not exaggerate what this ruling means. The Carhart decision is an extremely limited upholding of the federal ban, one that promises to affect very few abortion providers and only a tiny percentage of their patients. The most recent and reliable national statistics, from the Guttmacher Institute, show that only about 30 American doctors ever use the “intact dilation and evacuation” method that has now been criminalized. Only some 2,200 of the 1.3 million abortions performed annually in the United States involve the banned procedure.

Moreover, Justice Kennedy explicitly and insistently limited the reach of the new prohibition. He emphasized that the ban covers only the relatively rare intact dilation and evacuation method, and does not in any way apply to standard dilation and evacuation, the most common method for late-term abortions, in which fetal tissue is removed from the womb piecemeal. Reiterating the standard he embraced 15 years ago in Planned Parenthood v. Casey, Justice Kennedy stated that the ban would impose an undue burden if it covered standard dilation and evacuation and thus would be unconstitutional.

Justice Kennedy also declared — repeatedly — that only purposeful violations of the prohibition can be prosecuted. What the law covers is the deliberate, almost-complete delivery of a living fetus, followed by a further intentional act that causes its demise. “If either intent is absent, no crime is committed,” Justice Kennedy wrote. On the other hand, “if the doctor intends to remove the fetus in parts from the outset,” he or she will not be criminally liable even if the procedure unexpectedly proceeds in ways that physically constitute an “intact” dilation and evacuation.

Writing on behalf of the four dissenters, Justice Ruth Bader Ginsburg correctly emphasized that under Justice Kennedy’s holding, “the law saves not a single fetus from destruction, for it targets only a method of performing abortion.”

Critics have suggested that the ruling vitiates the complete protection of women’s health that the Supreme Court had previously recognized. But though Justice Kennedy’s opinion certainly weakens the extent of that protection, it also quotes a unanimous 2006 Supreme Court ruling to state that the new ban would be unconstitutional “if it subjected women to significant health

risks." "Significant" is not a limitation that women's health advocates should welcome, but the value and importance of this caveat should not be unthinkingly demeaned or ignored.

In her dissent, Justice Ginsburg observed that the majority's ruling "places doctors in an untenable position." It's true that the court-approved criminalization of a practice accepted by the medical profession could create a "chilling effect," further reducing the already modest ranks of abortion doctors. But that's up to abortion providers themselves to determine, not the justices.

Pro-choice doctors — and their lawyers — must have the courage to take Justice Kennedy at his word and read this decision's explicit approval of all abortion procedures save one in a manner that will most expansively continue to protect women's reproductive rights. The Carhart ruling is undeniably harmful, but the extent of the damage it will do to American women will be determined more by the fortitude of their doctors than by the words of Justice Kennedy.

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