

**“WHAT IF *ROEFELL*?” 2007
A REPORT FROM THE CENTER FOR REPRODUCTIVE RIGHTS
FACT SHEET**

**Change in Supreme Court Composition Spurs Groundswell of State Legislation
Designed to Reverse *Roe* and Undermine Abortion Rights**

On July 1, 2005 Justice Sandra Day O’Connor announced her retirement. She was long considered a pivotal vote in abortion cases, and when she was replaced with the more conservative Justice Samuel Alito, it signaled the start of a new era. Emboldened by the change in the Court, anti-choice activists rushed to introduce new legislation in the states, specifically abortion bans. In the year following O’Connor’s retirement, nearly a dozen states introduced bans, fully aware that doing so would violate federal law. Their goal: to trigger a Supreme Court review and reversal of *Roe v. Wade*, the historic ruling protecting abortion rights.

In the last three years, an unprecedented number of abortion bans have been introduced – 38 bans have been introduced in 17 states. This is the largest number of bills to ban abortion in all stages of pregnancy considered by the states since the early 1990s.

The 2007 *What if Roe Fell* report – an update and expansion of a report released by the Center three years ago – documents the efforts of the anti-choice movement to advance a new strategy, one designed not only to overturn *Roe* but also to lay the foundation for a post-*Roe* nation. The new approach relies on three different legislative strategies, some old and some new:

1. **Abortion Bans-In-Waiting:** The newest strategy – and perhaps the most insidious – these state-level bans are not effective immediately but instead would go into effect after *Roe* is overturned. Because they are not yet law, they cannot yet be challenged in court. And because they are not yet in effect, they are perceived as less threatening to abortion rights and so are harder to mobilize against. Once *Roe* is overturned, these bans would not require any legal action to go into effect.

While there were no bans-in-waiting introduced in 2004, by 2007, four states had passed them – **Louisiana, Mississippi, North Dakota and South Dakota** – and another five states – **Kentucky, Missouri, Oklahoma, Texas and Utah** – had considered them.

2. **Immediate Abortion Bans:** Bans that intentionally violate the basic tenets of *Roe v. Wade* with the goal of triggering a Supreme Court challenge. The expectation is that by the time a challenge reaches the Court, the Court's composition will have shifted as a result of retirements, with a new Court even more disposed to vote against *Roe*.

Since 2004, 27 immediate bans have been introduced in 14 states: Alabama, Colorado, Georgia, Indiana, Kentucky, Louisiana, Michigan, Mississippi, Missouri, North Dakota, Ohio, South Dakota, Tennessee and West Virginia.*

3. *Pre-Roe Bans:* Bans that were enacted before *Roe* was decided; some have been enjoined by a court, others have not. But either way, they remain on the books and could be revived if *Roe* is reversed.

The states with pre-*Roe* bans on the books that have not been blocked by a court are Alabama, Delaware, Massachusetts, and Wisconsin.

The states with pre-*Roe* bans on the books that have been blocked by a court are Arizona, Arkansas, Colorado, Michigan, New Mexico, Oklahoma, Rhode Island, Utah, Vermont, and West Virginia.

Changes on the Supreme Court Trigger Groundswell of Legislation Aimed at Banning Abortion

In the two years following Justice O'Connor's 2005 retirement, the increase in state-level legislation aimed at banning abortion is staggering: there was a 3.5 fold increase in the number of immediate bans introduced and a 4.5 fold increase in the number of bans-in-waiting introduced.

2004

- 2 immediate bans introduced (Michigan, South Dakota)
- No bans-in-waiting introduced

2005

- 4 immediate bans introduced (Georgia, Ohio, South Dakota, West Virginia)
- 2 bans-in-waiting introduced (both in South Dakota)
- 1 ban-in-waiting enacted (South Dakota)

2006

- 10 immediate bans introduced (Alabama (2), Georgia, Indiana, Kentucky, Louisiana, Missouri, South Dakota, Tennessee, West Virginia)
- 3 bans-in-waiting introduced (Kentucky, Louisiana, Missouri)
- 1 ban-in-waiting enacted (Louisiana)

2007

- 11 immediate bans introduced (Alabama (2), Colorado, Georgia, Missouri, Mississippi (3), North Dakota, Ohio, South Dakota)
- 6 bans-in-waiting introduced (Mississippi, North Dakota, Oklahoma, Texas (2), Utah)
- 2 bans-in-waiting enacted (Mississippi, North Dakota)

Geography Will Define Abortion Rights in a Post-Roe World – 30 States are Poised to Outlaw Abortion

In a post-*Roe* world, the right to abortion will no longer extend to all women. It will instead depend on what state a woman lives in. No other fundamental right is subject to the whims of state legislatures. Almost overnight, women's lives and women's health will be at risk by virtue of geography. According to the Center's research, only a minority of states – 20 – are positioned to protect abortion rights in the event of *Roe*'s reversal. Thirty states are likely to restrict or outlaw abortion altogether.

21 States at High Risk: Alabama, Arkansas, Colorado, Delaware, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, and Wisconsin.

9 States at Moderate Risk: Arizona, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, New Hampshire, and Pennsylvania.

20 States Likely Protected: Alaska, California, Connecticut, Florida, Hawaii, Maine, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Jersey, New Mexico, New York, Oregon, Tennessee, Vermont, Washington, West Virginia, and Wyoming.

Poor Women Will be Most at Risk

The banning of abortion will have the most devastating impact on low-income women—who often struggle just to secure the resources to pay for an abortion and will likely have difficulty affording travel to a state where abortion remains legal.¹ Yet of the 10 poorest states in the nation,² seven are highly likely to ban abortion within a year of a *Roe* reversal, and two of these states, Mississippi and Louisiana, have already enacted bans-in-waiting. Notably, these states also contain large populations of color, creating a reality where poor women of color will have the most difficulty obtaining an abortion in a post-*Roe* world.

¹ Tabulations made using state-specific abortion provider numbers from the GUTTMACHER INSTITUTE. Information is available at <http://www.guttmacher.org/statecenter/index.html> (accessed July 18, 2007)

² According to the latest U.S. Census data.

Carhart II Proved Threat to Roe is Real

On April 18, 2007, the Supreme Court ruled in *Carhart v. Gonzales* to uphold the first-ever federal ban on a safe abortion procedure without including an exception to protect women's health. This marked a decisive retreat from *Roe*. The decision effectively overturned more than thirty years of established law protecting women's health and rights and, in doing so, rejected the advice of medical experts, including The American College of Obstetricians and Gynecologists. It also signaled the Roberts' Court's openness to a direct challenge to *Roe*.

In an impassioned dissent, Justice Ruth Bader Ginsburg noted that the majority's hostility to abortion rights was "not concealed", that its disregard for women's health and doctor's ability to ensure that health was "alarming", and described as "flimsy and transparent" the majority's justifications for upholding a ban that did not, as all prior cases had, include an exception to protect the health of the woman. It was clear that she viewed the decision as yet another blow to *Roe*.

This erosion of women's fundamental rights in the United States stands in stark contrast to the gains seen in countries around the world. At the same time as courts and legislatures in the United States have been increasingly restricting women's reproductive rights, even such traditionally anti-choice countries as Colombia, Mexico and Hungary have recognized that reproductive rights, including abortion, are human rights crucial to women's health, equality and dignity.

What Can Be Done to Protect Women's Right to Abortion?

The *Carhart* ruling takes the nation one perilous step closer to a complete reversal of *Roe v. Wade*. Despite assurances that they would uphold precedents, a majority of justices on the Court effectively kicked open the door for states to impose broader restrictions on *Roe*, restrictions that will sacrifice women's health for the sake of ideological gains. After Justice O'Connor's retirement, there was a flood of ban legislation. The *Carhart* ruling is sure to precipitate an even greater onslaught of overt and covert attacks on *Roe*. The Center for Reproductive Rights will continue to track such efforts, and work to defeat them. It will also work with pro-choice lawmakers and activists to move quickly and decisively to protect women's lives by:

- Enacting the Freedom of Choice Act (FOCA), federal legislation protecting a woman's ability to make reproductive health decisions, including abortion, without government interference even if *Roe v. Wade* is no longer the law of the land;
- Enacting state-level FOCA legislation;
- Repealing pre-*Roe* state laws banning abortion;
- Monitoring state constitutional developments in the courts and in the legislatures; and
- Preparing now to block the passage of new abortion bans.

What if *Roe Fell* is available at <http://www.reproductiverights.org>

###

*Some states have considered both immediate bans and bans-in-waiting and therefore appear in both lists.