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April 24, 2008

Opinion No. 08-97

Federal Partial Birth Abortion Act

QUESTION

Does the federal law currently make it a crime to perform a partial birth abortion in Tennessee and is such federal law constitutional?

OPINION

Yes. Under the federal Partial Birth Abortion Act, 18 U.S.C. § 1531, it is a federal crime for any physician to deliberately and intentionally perform an intact dilation and extraction procedure in Tennessee. In *Gonzalez v. Carhart*, 127 S.Ct. 1610 (2007), the United States Supreme Court upheld the Act against facial constitutional challenges.

ANALYSIS

18 U.S.C. § 1531 is a federal criminal statute that prohibits physicians from intentionally performing “partial-birth abortion[s],” as defined by the Act, unless “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.” In pertinent part, the statute provides:

(a) Any physician who . . . knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined . . . or imprisoned not more than 2 years, or both. This subsection does not apply to a partial-birth abortion that 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. . .

(b) As used in this section --

(1) the term “partial-birth abortion” means an abortion in which the person performing the abortion —

(A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and

(B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus;

...

(d)(1) A defendant accused of an offense under this section may seek a hearing before the State Medical Board on whether the physician's conduct was necessary to save the life of the mother whose life was endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.

(2) The findings on that issue are admissible on that issue at the trial of the defendant. Upon a motion of the defendant, the court shall delay the beginning of the trial for not more than 30 days to permit such a hearing to take place.

...

As construed by the United States Supreme Court in *Gonzalez v. Carhart*, 127 S.Ct. 1610 (2007), the statute prohibits only the so-called "intact Dilation and Evacuation" ("intact D & E") or "intact Dilation and Extraction" ("intact D & X") procedure that is used in late-term pregnancies. 127 S.Ct. at 1621, 1629. In this procedure, the cervix is dilated and the doctor extracts the live fetus in a way conducive to pulling out its entire body. *Id.* at 1622. As noted by the Court, the statute's prohibition has limited application. The usual abortion method in the second trimester is "Dilation & Evacuation ("D & E"), in which the fetus is removed in pieces. *Id.* at 1620-21. Performance of D & E is not prohibited by the statute. *Id.* at 1631.

In *Gonzales*, the United States Supreme Court applied the "undue burden" test established in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S.Ct. 2791 (1992), and concluded that the Act's omission of an exception for the preservation of the health of the woman did not render it facially invalid. The Court reached this conclusion because of its finding that there was uncertainty whether the banned procedure is ever necessary to preserve a woman's health, given the availability of other abortion procedures that are considered to be safe alternatives. 127 S.Ct. at 1638. However, the Court left open the possibility that successful "as-applied" challenges might be made to the Act – upon a showing that in discrete and well-defined instances a particular condition has or is likely to occur in which the prohibited procedure must be

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used. *Id.* at 1639.

In conclusion, under the federal Partial Birth Abortion Act, 18 U.S.C. § 1531, it is currently a federal crime for any physician to deliberately and intentionally perform an intact dilation and extraction procedure in Tennessee. The Act is facially constitutional.

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