STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

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Opinion No. 17-15

Constitutionality of Senate Bill 244/House Bill 108, 110th Tenn. Gen. Assem. (2017)

Question

Is Senate Bill 244/House Bill 108, 110th Tenn. Gen. Assem. (2017), constitutional?

Opinion

Senate Bill 244/House Bill 108, 110th Tenn. Gen. Assem. (2017), filed in January 2017, would make certain changes to Tennessee's criminal abortion statute. While some of the proposed changes are constitutionally defensible, the proposed prohibition on abortion, absent a medical emergency, after the detection of a fetal heartbeat and before viability of the fetus, is constitutionally suspect.

ANALYSIS

Tennessee currently makes it a crime to perform an abortion or to procure a miscarriage unless the abortion or procurement of a miscarriage is performed under certain specified circumstances. Tenn. Code Ann. § 39-15-201. If enacted into law, Senate Bill 244/House Bill 108, would make two significant changes to Tenn. Code Ann. § 39-15-201.

First, absent a medical emergency as defined in the statute, the person who intends to perform an abortion or procure a miscarriage would be required to determine whether the fetus carried by the pregnant woman has a detectable heartbeat. An ultrasound[1] would have to be performed to determine the presence of a fetal heartbeat, results would have to be recorded in the pregnant woman's medical record, the woman would have to be informed in writing if a heartbeat is detected, and the person who performs the ultrasound would have to give the pregnant woman the option to view or hear the fetal heartbeat.

Second, the proposed legislation would prohibit an abortion after the detection of a fetal heartbeat and before viability of the fetus, unless there is a medical emergency. "Medical emergency" is currently defined as "a condition that, on the basis of the physician's good faith medical judgment, so complicates a medical condition of a pregnant woman as to necessitate an immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function." Tenn. Code Ann. § 39-15-202(f)(1)(2016 Supp.). The proposed legislation would require the physician who performs an abortion under the medical emergency exception to document in writing in the woman's medical

[1]The bill would require that the ultrasound testing be consistent with standard medical practice, but states that this does not require a transvaginal ultrasound.

record the specific condition that constitutes the medical emergency and that the procedure is asserted to address, and the medical rationale for the conclusion that the procedure is necessary to address the medical emergency. Similar documentation would be required when, due to a medical emergency, an abortion is performed without first determining by ultrasound whether the fetus has a detectable heartbeat.

Recent judicial decisions support the conclusion that the proposed legislative prohibition upon pre-viability abortions after detection of a fetal heartbeat is constitutionally suspect, but that the other proposed changes to Tenn. Code Ann. § 39-15-201 are constitutionally defensible.

A similar 2013 North Dakota law was declared unconstitutional in *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 770 (8th Cir. 2015). The law extended North Dakota's general prohibition on post-viability abortion to the point in pregnancy when the fetus possesses a detectable heartbeat. Like S.B. 244/H.B. 108, the North Dakota law focused upon two new requirements. First, it required a physician performing an abortion, absent a medical emergency, to determine if the fetus has a detectable heartbeat. Second, it prohibited a physician from performing an abortion when a heartbeat has been detected, again absent a medical emergency. *Id.* There was expert testimony in the case that fetal cardiac activity and/or a heartbeat is detectable by about 6 to 8 weeks and that a fetus is not viable until about 24 weeks.[2] The District Court permanently enjoined the law because it "clearly prohibits pre-viability abortions in a very significant percentage of cases in North Dakota, thereby imposing an undue burden on women seeking to obtain an abortion." *Id.* at 771, citing *MKB Mgmt. Corp. v. Burdick*, 16 F. Supp. 3d 1059, 1074-75 (D.N.D. 2014). The Eighth Circuit Court of Appeals affirmed, stating that it was bound by the United States Supreme Court's precedents as summarized in *Gonzales v. Carhart*, 550 U.S. 124 (2007) and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992):

> Before viability, a State "may not prohibit any woman from making the ultimate decision to terminate her pregnancy." It also may not impose upon this right an undue burden, which exists if a regulation's "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." On the other hand, "[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose."

Id. at 772, citing *Gonzales*, 550 U.S. at 146 (quoting *Casey*, 505 U.S. at 879, 878, and 877).[3]

In an earlier decision, *Edwards v. Beck*, the Eighth Circuit had reached a similar result, enjoining enforcement of the Arkansas Human Heartbeat Protection Act. 786 F.3d 1113, 1117 (8th Cir. 2015). The law challenged in *Edwards* required physicians to test for a detectible fetal

[2]While the State of North Dakota submitted an expert declaration asserting that an unborn child is viable from conception because in vitro fertilization ("IVF") "allow[s] an embryonic unborn child to live outside the human uterus (womb) for 2 – 6 days after conception," the reviewing courts rejected this argument because its definition of viability differed from that used by the United States Supreme Court and the medical community generally. *Id.* at 771, 773.

[3] In *Casey*, the Supreme Court also "confirm[ed]" the "State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health." *Casey*, 505 U.S. at 846.

heartbeat before performing an abortion and prohibited physicians, except in instances such as medical emergencies, from performing an abortion of a fetus whose heartbeat had been detected and was of twelve weeks or greater gestation. *Id.* at 1115-16. The Court of Appeals was not persuaded by Arkansas' attempt to frame the law as a regulation, not a ban, on pre-viability abortions because abortions were still available under certain circumstances:

> Whether or not "exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." [Quoting *Casey*, 505 U.S. at 879.] By banning abortions after 12 weeks' gestation, the Act prohibits women from making the ultimate decision to terminate a pregnancy at a point before viability.

786 F.3d at 1117.

These decisions reflect currently controlling constitutional principles. *See Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292, 2300 (2016), which reaffirms *Casey*'s conclusion that provisions of law placing a substantial obstacle in the path of women seeking a pre-viability abortion constitute an undue burden on abortion access in violation of the Federal Constitution. Accordingly, the proposed prohibition on pre-viability abortions after detection of a fetal heartbeat in S.B. 244/H.B. 108 is constitutionally suspect because it is inconsistent with these controlling constitutional principles.

In contrast, the proposed statutory amendments that would require a pregnant woman, before an abortion and absent a medical emergency, to obtain ultrasound testing consistent with standard medical practice and to be given specified written information by her physician, are constitutionally defensible. In *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, the Fifth Circuit Court of Appeals upheld similar provisions that were challenged as violative of the First Amendment and as unconstitutionally vague. 667 F.3d 570, 584 (5th Cir. 2012). The Fifth Circuit noted that the provision of sonograms and detection of fetal heartbeat are routine measures in pregnancy medicine today and are viewed as "medically necessary" for the mother and fetus, and that the point of informed consent laws is to allow the patient to evaluate her condition and make the best decision under difficult circumstances. *Id.* at 579. It also focused upon the Supreme Court's decisions in *Casey* and *Gonzales,* which "emphasize that the gravity of the decision [whether to abort] may be the subject of informed consent through factual, medical detail, that the condition of the fetus is relevant, and that discouraging abortion is an acceptable effect of mandated disclosures." *Id.* The comparable provisions of Tennessee's proposed legislation are, similarly, constitutionally defensible, even though the outcome of potential litigation challenging the proposed provisions is far from certain.[4]

[4] For example, criticizing the Fifth Circuit's decision, the Fourth Circuit found a "Display of Real-Time View Requirement" unconstitutional: "This statutory provision interferes with the physician's right to free speech beyond the extent permitted for reasonable regulation of the medical profession, while simultaneously threatening harm to the patient's psychological health, interfering with the physician's professional judgment, and compromising the doctor-patient relationship." *Stuart v. Camnitz*, 774 F.3d 238, 249-50 (4th Cir. 2014). Notably, however, and in contrast to S.B. 244/H.B. 108, the North Dakota statute at issue in the case *required* the physician to display and describe the fetal image during the ultrasound, even if the woman actively "avert[ed] her eyes" and "refus[ed] to hear." *Id.* at 242.

Finally, we note that the proposed legislative regulation of post-viability abortion—i.e., allowing the abortion to be performed if there is a medical emergency, if it is performed by a licensed physician, and if it is performed in a licensed hospital—is constitutionally defensible. Long-standing United States Supreme Court precedent empowers states to restrict or prohibit abortions after fetal viability, if the law contains exceptions for pregnancies that endanger the woman's life or health. *See Casey*, 505 U.S. at 846. As held in *Roe v. Wade*, "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." 410 U.S. 113, 164-65 (1973).

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