STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

March 31, 2017

Opinion No. 17-24

Constitutionality of Proposed Legislation Related to Abortion

Question

Does any part of House Bill 101/Senate Bill 766, 110th Tenn. Gen. Assem. (2017) or House Bill 1189/Senate Bill 1180, 110th Tenn. Gen. Assem. (2017) violate constitutional standards?

Opinion

House Bill 101/Senate Bill 766 would amend Tennessee's criminal abortion statute by extending several of its existing restrictions to apply to pregnancies when the fetus has reached a gestational age of 20 weeks. The proposed legislation is constitutionally infirm because its hospitalization requirement does not include the constitutionally-mandated medical emergency exception and because under current, controlling United States Supreme Court precedent a state may not prohibit the pre-viability termination of a pregnancy.

House Bill 1189/Senate Bill 1180 would enact a new "Tennessee Infants Protection Act." Parts of the new Act are also constitutionally suspect, particularly with respect to the proposed post-viability abortion ban and the viability testing requirement.

ANALYSIS

House Bill 101/Senate Bill 766

House Bill 101/Senate Bill 766 would amend subsections (c)(2) and (c)(3) of Tenn. Code Ann. § 39-15-201, Tennessee's criminal abortion statute. If amended as proposed, subsection (c)(2) would require that any abortion undertaken after three months, but before 20 weeks, of pregnancy or viability of the fetus be performed by a licensed physician in a hospital licensed by the State. And, if amended as proposed, subsection (c)(3) would prohibit abortions once the fetus has reached a gestational age of 20 weeks, unless the attending physician certifies that the abortion is necessary to preserve the life or health of the mother. As explained below, these amendments are constitutionally suspect.

The United States Supreme Court has held that a state may regulate, and even proscribe, abortion, but it may not do so when abortion is necessary, in appropriate medical judgment, to preserve the life or health of the mother. *Planned Parenthood v. Casey*, 505 U.S. 833, 878-79 (1992). The second-trimester hospitalization requirement already in § 39-15-201(c)(2) contains no medical necessity exception as required under *Casey*, and, for that reason the Tennessee Supreme Court concluded in 2000 that the second-trimester hospitalization requirement

unconstitutionally "places a substantial obstacle in the path of a woman seeking an abortion." *Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1, 19 (Tenn. 2000).

Since the proposed amendment to § 39-15-201(c)(2) does not include the constitutionally-required medical necessity exception, it, too, would be constitutionally infirm.

The proposed amendment to § 39-15-201(c)(3) that would extend the current prohibition on abortion during fetal viability to include pregnancies when the fetus has attained a gestational age of at least 20 weeks is also constitutionally suspect. This would prohibit the termination of a pregnancy before viability of the fetus, which is unconstitutional under current, controlling U.S. Supreme Court precedent.

Based on that controlling precedent, for example, the Ninth Circuit Court of Appeals enjoined enforcement of a similar Arizona law that forbade, except in a medical emergency, abortion of a fetus of a gestational age of at least 20 weeks. *Isaacson v. Horne,* 716 F.3d 1213, 1217 (9th Cir. 2013). The court explained that

> [u]nder controlling Supreme Court precedent, Arizona may not deprive a woman of the choice to terminate her pregnancy at any point prior to viability. Section 7 effects such a deprivation, by prohibiting abortion from twenty weeks gestational age through fetal viability. The twenty-week law is therefore unconstitutional under an unbroken stream of Supreme Court authority, beginning with *Roe* [*v. Wade*] and ending with *Gonzales* [*v. Carhart*]. Arizona simply cannot proscribe a woman from choosing to obtain an abortion before the fetus is viable.

Id. at 1231.

The proposed 20-week amendment to Tenn. Code Ann. § 39-15-201(c)(3) is constitutionally suspect for the same reason. Under current, controlling U.S. Supreme Court precedent, a state cannot prohibit the termination of a pregnancy before viability of the fetus.

House Bill 1189/Senate Bill 1180

House Bill 1189/Senate Bill 1180 would repeal paragraph (c)(3) of Tenn. Code Ann. § 39-15-201, and replace it with a new "Tennessee Infants Protection Act." The proposed new Act contains a post-viability abortion ban:

> No person shall purposely perform or induce, or attempt to perform or induce, an abortion upon a pregnant woman when the unborn human is viable.

For purposes of the post-viability ban, any fetus of at least 24 weeks gestational age would be rebuttably presumed to be viable. But it would be a defense to a violation of the post-viability ban if, assuming certain additional conditions are met, the abortion is performed by a licensed physician, and that physician determines, in her good faith medical judgment, based on the facts known to her at the time, (1) that the abortion is necessary to prevent the death of the pregnant woman or a serious risk of substantial and irreversible impairment of a major bodily function of the pregnant woman, or (2) that the unborn human is not viable.

The Act also contains a viability testing provision. It would prohibit abortions "after the beginning of the twentieth week of pregnancy, as measured by gestational age," unless the physician first determines "in the physician's good faith medical judgment," that the fetus is not viable. To make that determination, the physician would have to perform a medical examination of the pregnant woman and consider gestational age, weight, bi-parietal diameter, or other factors that a reasonable physician would consider in making a viability determination. This viability testing provision need not be complied with in a medical emergency.

Any physician intending to perform a post-viability abortion, having determined that an abortion is "necessary," would also have to (1) certify the necessity of the abortion in writing; (2) obtain written certification from a second, independent physician of the necessity of the abortion; (3) perform the abortion in a health care facility that has appropriate neonatal services for premature infants; (4) choose the abortion method that provides the best opportunity for the fetus to survive, unless it would pose a significantly greater risk of death to the pregnant woman, or a significantly greater risk of substantial and irreversible impairment of a major bodily function; (5) certify in writing the available methods considered and the reasons for choosing the method employed; and (6) secure the presence of a second physician at the abortion to provide immediate medical care for, and take all reasonable steps necessary to preserve the life and health of the unborn child. The physician need not comply with these conditions if the physician determines that a medical emergency exists.

A physician who fails to comply with the Act is subject to civil and criminal liability. Violation of the post-viability ban is a Class C felony; violation of the viability testing requirement is a Class A misdemeanor.

Under existing Sixth Circuit Court of Appeals precedent, the post-viability ban and the viability testing requirement proposed by HB 1189/SB 1180 are constitutionally suspect. In reviewing very similar Ohio legislation, the court concluded that the medical necessity and medical emergency provisions of the legislation were unconstitutionally vague because they lacked scienter requirements. *Women's Medical Professional Corp. v. Voinovich*, 130 F.3d 187 (6th Cir. 1997). Since the constitutionality of the post-viability regulations depended upon the constitutionality of these two provisions, the court struck down all the post-viability regulations. *Id.* at 203.

Statutes imposing criminal liability without a scienter requirement, *i.e.*, without requiring that the defendant have some degree of guilty knowledge or mental culpability, are generally disfavored. *Id.* at 203-04, citing *Staples v. United States*, 511 U.S. 600, 605-06 (1994). The absence of a scienter requirement is "little more than a trap for those who act in good faith." *Id.*, citing *Colautti v. Franklin*, 439 U.S. 379, 395 (1979) (quotation omitted).

> The perils of strict criminal liability are particularly acute here because of the uncertainty of the viability determination itself. As the record in this case indicates, a physician determines whether or not a fetus is viable after considering a number of variables. . . . Because of the number and the imprecision of these variables, the probability of any particular fetus' obtaining meaningful life outside the womb can be determined only with difficulty. . . . In the face of these uncertainties, it is not unlikely that experts will disagree. . . . The prospect of such disagreement, in

> conjunction with a statute imposing strict civil and criminal liability for an erroneous determination of viability, could have a profound chilling effect on the willingness of physicians to perform abortions . . . in the manner indicated by their best medical judgment.

Colautti, 439 U.S. at 395-96.

But a scienter requirement is lacking when, as in Ohio's statute and in the proposed new Tennessee Act, the physician is subject to criminal sanctions for a decision that is by definition based not on guilty knowledge or even recklessness, but on the physician's "good faith medical judgment." In other words, without a scienter requirement, such statutes impermissibly subject a physician to criminal liability even though he was acting in good faith in determining whether a medical emergency or medical necessity exists.

Accordingly, the medical emergency and medical necessity exceptions in HB 1189/SB 1180—which lack a scienter requirement—likely are unconstitutionally vague.

The proposed Act's medical necessity exception to the post-viability abortion ban is constitutionally suspect for an additional reason. The Act provides that "[n]o abortion shall be deemed authorized under this subdivision . . . if performed on the basis of a claim or a diagnosis that the woman will engage in conduct which would result in her death or substantial and irreversible impairment of a major bodily function or for any reason relating to her mental health." But *Voinovich* holds that "a maternal health exception [to proscription of post-viability abortions] must encompass *severe* irreversible risks of mental and emotional harm. . . . [T]he Constitution requires that if the State chooses to proscribe post-viability abortions, it must provide a health exception that includes . . . the risk of severe psychological or emotional injury which may be irreversible." 130 F.3d at 209-10 (emphasis in original). Thus, the proposed legislation banning abortion of a viable fetus is likely unconstitutional to the extent that it does not include severe mental and emotional harm in its medical necessity exception. *See id.*

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