Constitutionality of Legislation Banning Dismemberment Abortions

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*Executive Summary*

This memorandum evaluates the constitutionality of legislation that would prohibit performance of dismemberment abortions on live, unborn children. On the basis of a thorough review of the relevant precedents, the memorandum concludes that the Supreme Court would strike down such legislation, at least to the extent that it would apply to pre-viability abortions. In particular, nothing in Justice Kennedy's dissenting opinion in *Stenberg v. Carhart*, 530 U.S. 914 (2000), or his majority opinion in *Gonzales v. Carhart*, 550 U.S. 124 (2007), even remotely suggests that he would vote to sustain the constitutionality of a ban on the most commonly used second-trimester abortion procedure. Indeed, as this memorandum demonstrates, his opinions indicate precisely the opposite. Moreover, the fact that such legislation would not apply where "fetal demise" occurs *before* the procedure begins would not likely affect the Court's decision. There is little or no evidence that the known methods of causing fetal demise can be used throughout the second trimester of pregnancy, are within the skill set of physicians who perform second-trimester abortions and are as safe (for the pregnant woman) as not causing fetal demise. It is not surprising, therefore, that in each State where a dismemberment ban has been challenged to date (Alabama, Kansas, Louisiana and Oklahoma), the ban has not been allowed to go into effect.

*Description of the Dismemberment Abortion Procedure*

In a dismemberment abortion, a physician first dilates the woman's cervix with osmotic dilators (*e.g.*, laminaria) and/or drugs, then inserts forceps or other instruments into her uterus and, using traction, "disarticulates," *i.e.*, dismembers, the unborn child, removing parts of the child's body, piece-by-piece, from the woman's uterus, until no part of the child's body remains inside of her. Dismemberment causes the child's death. The medical term for this procedure is dilation and evacuation (D&E) This procedure must be distinguished from dilation and extraction (D&X). In a D&X procedure, the physician first dilates the woman's cervix. After he has achieved sufficient dilation, he delivers (extracts) the child intact up to its head, punctures the base of the child's head ("pithing the skull") with a pair of scissors or other instrument (which causes instantaneous death) and then, using suction, evacuates the contents of the child's head, which causes the head to collapse so that it can be removed from the woman's body (in a variation on this method, the physician crushes the child's skull with forceps before removing the skull from the uterus). D&X abortions are also referred to as "intact D&E" abortions or, more commonly, "partial-birth abortions." Partial-birth abortions on live, unborn children are prohibited by the federal "Partial-Birth Abortion Ban Act of 2003," which the Supreme Court upheld in *Gonzales v. Carhart*.

*Frequency of Use of the Dismemberment Abortion Procedure*

Dismemberment D&E abortions account for approximately 95% of all second-trimester abortions performed before the twentieth week of pregnancy, and approximately 85% of those performed thereafter. *See Stenberg*, 530 U.S. at 924, *Gonzales*, 550 U.S. at 140. The principal

alternative abortion procedure used during the second trimester is induction (approximately 5% before the twentieth week and 15% thereafter). *Gonzales*, 550 U.S. at 140. In an induction abortion, a physician first gradually dilates the woman's cervix, which can take up to two or three days, then, after the woman cervix is sufficiently dilated, he administers prostaglandin (or another drug) to induce contractions and premature labor, which results in the child's death. Two other rarely used methods are hysterotomy (an early C-section) and hysterectomy (removal of the entire uterus) which, together, account for less than 1/10 of 1% of second-trimester abortions. *Id*. In 2013, more than 6,700 pre-viability, second-trimester abortions were performed in Texas, almost 80% of which (from the fifteenth week of gestation) were dismemberment D&Es.

*Applicable Legal Principles*

In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court held that a pregnant woman has a fundamental constitutional right to obtain an abortion. *Id.* at 152–56. Under *Roe's* "trimester framework," the States may not regulate abortion at all during the first trimester, except in limited areas (*e.g*., allowing only licensed physicians to perform abortions); during the second trimester, the States may, in the interest of promoting maternal health, regulate (but not prohibit) abortion; after viability (when the unborn child is capable of sustained life outside the mother, with or without medical assistance), the States may, in the interest of protecting the "potential life" of the unborn child, prohibit abortion, so long as such prohibition contains exceptions for those abortions that are necessary to preserve the life or health of the mother. *Id*. at 163-65.

In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), a plurality of the Supreme Court, in a Joint Opinion authored by Justices O'Connor, Kennedy and Souter, abandoned the "rigid construct" of the "trimester framework" of *Roe*, *Casey*, 505 U.S. at 872–73, and adopted a new standard for evaluating abortion regulations, the "undue burden" standard. *Id*. at 877. A regulation imposes an "undue burden" and is unconstitutional, "if it has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id*. This standard allows a broader measure of regulation of abortion that had been allowed under *Roe*. *Id*. at 881–87 (upholding detailed informed consent requirements and a waiting period). A majority of the Court has applied the "undue burden" standard in subsequent cases.

Notwithstanding the plurality's abandonment of the "trimester framework" of *Roe*, a majority of the Court in *Casey* reaffirmed the "central holding of *Roe v. Wade*," that, "[r]egardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." *Casey*, 505 U.S. at 879. *See also*, *id*., at 846 (reaffirming holding in *Roe* that a woman has a right "to choose to have an abortion before viability and to obtain it without undue interference from the State"), 860 ("viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on non-therapeutic abortions"). In no case decided since *Casey* has a majority of the Court suggested or implied that the States may prohibit abortions before viability. Indeed, in his dissent from the Court's decision striking down Nebraska's partial-birth abortion statute (discussed below), Justice Kennedy stated unequivocally that

"Nebraska must obey the legal regime which has declared the right of the woman to have an abortion before viability." *Stenberg v. Carhart*, 530 U.S. at 963–64 (Kennedy, J., dissenting). The Fifth Circuit, which hears appeals from the federal district courts sitting in Louisiana, Mississippi and Texas, has repeatedly reiterated the continuing validity of the viability rule. *See*, *e.g.*, *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, 748 F.3d 583, 589–90 (5th Cir. 2014); *Whole Woman's Health v. Cole*, 790 F.3d 563, 576 (5th Cir. 2015) (*per curiam*), *as modified*, 790 F.3d 598 (5th Cir. 2015), *rev'd on other grounds sub nom. Whole Woman's Health v. Hellerstedt*, ___U.S.___ (June 27, 2016).

*Application of the Foregoing Principles to Statutes Prohibiting Specific Abortion Procedures*

The Supreme Court has decided three cases involving statutes prohibiting specific abortion procedures. In the first case, the Court struck down a state law banning saline amniocentesis abortions because the ban would have outlawed what was then the most commonly performed second-trimester abortion procedure. In the second case, the Court struck down a state ban on partial-birth abortions because the statute, in the Court's judgment, also banned the most commonly performed second-trimester abortion procedure, dismemberment (D&E) abortions. And in the third case, the Court upheld a federal ban on partial-birth abortions precisely because the statute did not affect the legality of dismemberment (D&E) abortions.

In *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), the Court struck down a Missouri statute that banned induction abortions using a saline solution. In this procedure, a physician withdraws fluid from the amniotic sac and replaces it with a highly concentrated saline solution which, in turn, causes labor contractions and premature labor. At the time, saline amniocentesis abortions accounted for 68% to 80% of all abortions after the first trimester. *Danforth*, 428 U.S. at 77. The only other procedures then available were hysterotomy or hysterectomy, each of which constitutes major surgery and is used only in an emergency. The Court determined that these surgical procedures were not acceptable alternatives because they are "significantly more dangerous and critical for the woman than the saline technique," and noted that "the mortality rate for normal childbirth exceeds that where saline amniocentesis is employed." *Id*. at 76. Although a safer induction procedure using prostaglandins had been developed, prostaglandin induction abortions were not yet generally available or widely used. The Court observed that the challenged statute "would prohibit the use of a method which the record shows is the one most commonly used nationally by physicians after the first trimester and which is safer, with respect to maternal mortality, then even continuation of the pregnancy until normal childbirth." *Id.* at 78. "[A]s a practical matter, [the statute] forces a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed," *id* at 79 (referring to hysterotomy and hysterectomy). Because inductions using prostaglandins were not generally available at the time of trial, the Court concluded that "the outright legislative proscription of saline fails as a reasonable regulation for the protection of maternal health." *Id.* Rather, it constitutes "an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority of abortions after the first 12 weeks. As such, it does not withstand constitutional scrutiny." *Id*. *Danforth* stands for the unremarkable

proposition that the Supreme Court would not uphold a ban on a particular abortion procedure unless other procedures of comparable safety are generally available and widely used.

In *Stenberg v. Carhart*, the Supreme Court struck down a state statute banning partial-birth abortions, and in *Gonzales v. Carhart* the Court upheld the federal statute banning partial-birth abortions. Although the results in these two cases diverged (in part because of the better drafting of the federal statute and in part because of the replacement of Justice O'Connor with Justice Alito), they share a common principle, *i.e.*, a statute that, by its express terms or by construction, prohibits the most commonly used second-trimester abortion procedure — dismemberment abortions — would be held unconstitutional as imposing an "undue burden" upon a pregnant woman seeking a second-trimester abortion. In *Stenberg*, the Court, having determined that the statute *could* apply to dismemberment D&Es, as well as to intact D&Es, concluded that

> using this law some present prosecutors and future Attorneys General may choose to pursue physicians who use D&E procedures, the most commonly used method for performing previability second trimester abortions. All those who perform abortion procedures using that method must fear prosecution, conviction, and imprisonment. The result is an undue burden upon a woman's right to make an abortion decision. We must consequently find the statute unconstitutional.

*Id*. at 945–46.

The fact that there is an alternative procedure to D&E procedures (induction) did not affect the Court's conclusion that the statute, as interpreted by the Court, was unconstitutional. First, and most importantly, the Court cited studies showing that "the risks of mortality and complication that accompany the D&E procedure between the 12th and 20th week of gestation *are significantly lower* than those accompanying induced labor procedures (the next safest midsecond trimester procedures)." *Stenberg*, 530 U.S. at 926 (emphasis added). Second, as the Court noted, *id*. at 939, for at least some women, "induction of labor would be particularly dangerous," and, therefore, would be contraindicated. Beyond these stated reasons, it must be noted that induction procedures are lengthier than D&E abortions (because of the need to achieve a greater degree of dilation) and usually must be performed in a hospital on an in-patient basis, which is far more expensive (and less available) than performing a D&E in an abortion facility.

In *Gonzales*, the Court concluded that the "Partial-Birth Abortion Ban Act of 2003" did not prohibit dismemberment D&E abortions, only "partial-birth abortions" (intact D&E or D&X). *See Gonzales*, 550 U.S. at 150–56. If the Act *had* prohibited "the vast majority of D&E abortions," then, as Justice Kennedy acknowledged, it would have been held invalid on that basis, *id*. at 156, as the Government conceded, *id*. at 147. It must be emphasized that, although Justice Kennedy identified *other* state interests in addition to maternal health and fetal life (*e.g.*, the State's interest in maintaining the integrity of the medical profession), at no point in his opinion did he suggest that those interests are "compelling" or would justify imposing an "undue burden" on pre-viability abortions.

*Is Causing "Fetal Demise" a Practical Alternative to a Ban on Dismemberment Abortions?*

All of the bills that have been introduced to date prohibiting dismemberment D&E abortions (including H.R. 3515, the federal "Dismemberment Abortion Ban Act of 2015") have been limited to those procedures that are performed on "live, unborn children." The prohibitions do not apply if the physician causes "fetal demise," *i.e.*, *death*, before he dismembers the fetus.

The theoretical availability of methods of causing fetal demise before beginning a dismemberment (D&E) abortion (discussed below) would not affect the Supreme Court's conclusion that a ban on dismemberment abortions is unconstitutional. That is because there is little or no evidence currently available that the known methods of causing fetal demise can be used throughout the second trimester of pregnancy, are within the skill set of physicians who perform second-trimester abortions and are as safe (for the woman) as not causing fetal demise.

Although there is evidence that, before performing a dismemberment D&E abortion beginning around eighteen to twenty weeks gestation, *some* physicians will cause fetal demise by injecting the fetus with digoxin or potassium chloride, which causes heart failure, there is no little or no evidence that physicians do so before eighteen weeks. Nor are there studies demonstrating that causing fetal demise before eighteen weeks poses no additional, measurable risk to the health of the pregnant woman or, for that matter, that most physicians who perform dismemberment D&E abortions are competent to use this method (injecting digoxin or potassium chloride). Moreover, even with respect to late D&E abortions there is a dispute, as the AMA has noted, as to whether causing fetal demise before beginning the procedure is as safe as not doing so.

The other method of causing fetal demise is transecting the umbilical cord, which causes the unborn child to bleed to death. A recent study concluded that causing fetal demise by transecting the umbilical cord immediately prior to performing a D&E abortion "was found to be effective and safe." Tocce, K, *et al.*, "Umbilical Cord Transection to Induce Fetal Demise Prior to Second-Trimester D&E Abortion," *Contraception* 2013; 712–16. The study, however, has significant limitations. It was based on the records of one physician at one clinic, was not a randomized, controlled trial and did not indicate the earliest gestational age at which UCT is feasible. The study's main limitation, the authors said is "a potential lack of generalizibility." *Id.*

*Conclusion*

The Supreme Court would unquestionably strike down legislation prohibiting dismemberment D&E abortions, the most commonly used method of second-trimester abortions, on the authority of its decisions in *Danforth*, *Casey*, *Stenberg* and *Gonzales*. The Court would conclude that such legislation had the effect of placing a "substantial obstacle" in the way of a pregnant woman seeking a pre-viability abortion, thereby violating the "undue burden" standard of *Casey*.