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Constitutional Law II

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OPINION

The case that comes before this Court today brought by NARAL Pro-Choice Ohio and the American Civil Liberties Union of Ohio (collectively "plaintiffs") alleges a facial challenge to the constitutionality of Ohio Senate Bill 127, known as the Pain-Capable Unborn Child Protection Act. Plaintiffs seek a preliminary injunction to block the law before it can go into effect.

DISCUSSION

In the words of the Supreme Court, abortion is "a unique act," one that is "fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 832 (1992). An act which "some deem nothing short of an act of violence against innocent human life . . . depending on one's beliefs." *Casey*, 505 U.S. at 832. It is with this knowledge that we address the Plaintiffs' arguments.

I. SB 127 is facially unconstitutional because it categorically bans some abortions before viability.

Plaintiffs argue that Section 2919.201(A), which prohibits abortions after the fetus has reached 20 weeks or 22 weeks after their last menstrual period, is facially unconstitutional because it bans abortions before viability. The State has an "important and legitimate interest in protecting the potentiality of human life," *Roe,* 410 U.S. at 162. However, before the point of viability, the State's interests are "not strong enough to support a prohibition of abortion" or "the imposition of a substantial obstacle to the woman's effective right to elect the procedure." *Casey*, 505 U.S. at 846. The Supreme Court has affirmed that the essential holding of *Roe* is "the right of the woman to choose to have an abortion before viability" and "to obtain it without undue interference from the State." 505 U.S. at 846. The court may find an "undue burden" when a state regulation "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877.

According to 2014 data from The Center for Disease Control and Prevention (CDC), 91.5% percent of legal abortions were performed at less than 13 weeks and 7.2% were performed at 14 to 20 weeks. Only 1.3% were performed at 21 weeks or more.[1] The reasons women seek abortion in the second trimester are largely due to logistical delays.[2] Women report difficulties finding a provider, securing insurance coverage, raising money, and making travel arrangements as the reason for having an abortion in the second trimester.[3] The State's ban on abortions on 20 weeks sets an arbitrary time restriction before viability which prevents women from exercising their constitutionally protected right to have a previable abortion. For these reasons, this Court agrees with Plaintiffs that § 2919.201(A) is unconstitutional on its face.

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[1] Jatlaoui TC, Shah J, Mandel MG, et al. Abortion Surveillance — United States, 2014. MMWR Surveill Summ 2017;66(No. SS-24):1–48. DOI: http://dx.doi.org/10.15585/mmwr.ss6624a1.
[2] Foster DG and Kimport K, Who seeks abortions at or after 20 weeks? Perspectives on Sexual and Reproductive Health, 2013, 45(4):210–218, http://onlinelibrary.wiley.com/doi/10.1363/4521013/pdf.
[3] Ibid.

Similarly, § 2919.201(B)(1)(b) only allows women to seek abortions after 20 weeks in cases where the abortion is necessary to "prevent the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function." Because the State cannot ban abortion before viability without violating a woman's right to choose an abortion, § 2919.201(B)(1)(b) prescribing when women can obtain an abortion before 20 weeks is subsequently invalid.

II. SB 127 is facially unconstitutional because it requires hospitalizations and the presence of an attending physician for some abortions.

Plaintiffs argue that Section 2919.201(D)(3), which requires that abortions provided under the exception must be performed in a hospital or facility with "appropriate neonatal services for premature infants," is facially unconstitutional because it imposes an undue burden on women seeking abortions. Plaintiffs similarly challenge the constitutionality of § 2919.201(D)(6), which requires that a second physician be present to provide "immediate medical care . . . to preserve the life and health of the unborn child" after the abortion.

The State has an important and legitimate interest in ensuring that abortion, like any other medical procedure, is "performed under circumstances that insure maximum safety for the patient." *Roe*, 410 U.S. at 150. This interest extends to "the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise." *Id.* However, state health regulations that "[have] the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends. " *Casey*, 505 U.S. at 877.

First-trimester abortions are one of the safest medical procedures and pose minimal health risks. Less than one percent of abortions - 0.5% to be exact - result in major complications requiring hospitalization, surgery or transfusion.[4] For these reasons, abortions are typically outpatient procedures performed at abortion clinics.[5] Imposing hospitalization requirements on abortion procedures that rarely require hospitalizations do not legitimately further the State's interest in the safety of the patient. State health regulations that have no valid medical justifications impose an undue burden on women seeking an abortion. *Casey*, 505 U.S. at 877.

Similarly, requiring a second physician to be present interferes with a physician's right to practice. If a physician is licensed by the State, the State recognizes that the physician is "capable of exercising acceptable clinical judgment." *Doe v. Bolton*, 410 U.S. 179, 199 (1973). If the physician fails to do this, the State may seek to revoke their medical license and pursue professional censure. *Doe*, 410 U.S. at 199. For these reasons, this Court agrees with Plaintiffs that § 2919.201(D)(3) and § 2919.201(D)(6) are facially unconstitutional.

III. SB 127 is facially unconstitutional because it lacks an exception for cases where a woman's health is threatened.

Plaintiffs argue that Section 2919.201(B)(2), which provides that "[n]o abortion shall be considered necessary . . . on the basis of a claim or diagnosis . . . related to the woman's mental health," is facially unconstitutional because it does not provide an exception for the life or health of the mother. While the State can regulate and prohibit abortions post-viability, the State must provide exceptions for cases "where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'" *Roe*, 410 U.S. at 165. The Supreme Court has

[4] White K, Carroll E and Grossman D, Complications from first-trimester aspiration abortion: a systematic review of the literature, Contraception, 2015, 92(5):422–438, doi:10.1016/j.contraception.2015.07.013.
[5] Ibid.

invalidated state regulations on abortion for failing to provide an exception for the life and health of the mother. *See Stenberg v. Carhart ("Carhart I")*, 530 U.S. 914 (2000) (striking down Nebraska's partial-birth abortion ban).

In declaring when abortions are not medically necessary, the State interferes with the physician's discretion to exercise medical judgement. A physician may make medical recommendations for abortions "in light of all factors . . . relevant to the wellbeing of the patient," which includes "physical, emotional, psychological, familial and age" factors. *Doe v. Bolton*, 410 U.S. 179, 192 (1973). This Court can conceive of scenarios in which a physician might recommend a patient have an abortion because pregnancy threatened her life or her physical and mental health. One scenario we could imagine would be a pregnant woman who has been diagnosed with a major depressive disorder and has a history of suicidal tendencies that is at risk of harming herself. Under the State's law, a physician would be prohibited from helping the patient and the woman's life and health would be at a substantial risk. For these reasons, this Court agrees with Plaintiffs that § 2919.201(B)(2) is facially unconstitutional.

CONCLUSION

For the foregoing reasons, we conclude that the Plaintiffs are likely to succeed on the merits of their claims and **GRANT** the Plaintiffs' motion for a preliminary injunction.