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Legal Sidebar

# Mississippi Court Halts Enforcement of New Abortion Law

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A federal district court in Mississippi has halted the enforcement of a new state law that prohibits the performance of an abortion once the gestational age of the fetus is greater than 15 weeks. While other states have enacted similar abortion restrictions, Mississippi is unique in prohibiting the procedure at such an early gestational age. Among the 25 states to adopt restrictions, most have generally limited the procedure once the post-fertilization age of the fetus is 20 or 24 weeks. Notably, state laws in Arizona and Idaho that prohibited abortions once the fetus reached a gestational age of 20 weeks were invalidated because they were found to be in conflict with Supreme Court precedent. An Arkansas law that prohibited abortions once the fetus had a detectable heartbeat and was at least a gestational age of 12 weeks was invalidated on the same grounds. Because similar abortion legislation has been introduced at the federal level, the district court's further consideration of Mississippi's Gestational Age Act (GAA) is likely to be of interest to Congress.

Under the GAA, a physician who intentionally or knowingly performs an abortion in violation of the law's restrictions will have his or her medical license suspended or revoked. The GAA's restrictions do not apply when there is a life-endangering medical emergency, if continuation of a pregnancy would create a serious risk of substantial and irreversible impairment of a major bodily function, or in the case of a severe fetal abnormality. Enactment of the GAA followed the Mississippi legislature's determination that abortion "carries significant physical and psychological risks to the maternal patient, and these physical and psychological risks increase with gestational age."

Whether the GAA is permanently enjoined remains to be seen. In issuing its temporary restraining order, the district court identified the Supreme Court's abortion jurisprudence and emphasized that a state cannot prohibit a woman from having an abortion before fetal viability, the point in a fetus's development when it is able to live outside the mother's womb, with or without artificial aid. In *Roe v. Wade*, the Court indicated that viability usually occurs at 28 weeks, but may occur as early as 24 weeks.

A review of the Court's abortion jurisprudence and recent decisions by two federal appellate courts would seem to suggest that the GAA might have difficulty surviving a constitutional challenge. The Court has continually emphasized that viability is the earliest point at which a state's interest in fetal life may justify a ban on abortions. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court maintained

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that a state "may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." This principle was later recognized as controlling by the Court in *Gonzales v. Carhart*.

More recently, in light of the Court's decisions, the U.S. Court of Appeals for the Eighth Circuit (Eighth Circuit) and the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) invalidated laws from Arizona, Arkansas, and Idaho that sought to prohibit the performance of an abortion at gestational ages younger than 24 weeks.

In *Isaacson v. Horne*, the Ninth Circuit concluded that Arizona's 20-week abortion restriction was unconstitutional "under an unbroken stream of Supreme Court authority, beginning with *Roe* and ending with *Gonzales*." The appellate court reversed a district court decision that upheld the state law, in part, on the grounds that it regulated rather than prohibited abortions at 20 weeks. The district court maintained that the Arizona law simply imposed a time limitation on when a woman could seek an abortion and that it was not a complete ban on pre-viability abortions because of an exception for medical emergencies.

Citing the Supreme Court's abortion decisions, however, the Ninth Circuit emphasized that a state may not prohibit the performance of abortion prior to viability. Unlike the district court, the Ninth Circuit contended: "[t]here is no . . . doubt that the twenty-week law operates as a ban on pre-viability abortion[.]" Moreover, the appellate court indicated that the presence of a medical emergency exception does not make an otherwise impermissible restriction constitutional.

In *McCormack v. Herzog*, the Ninth Circuit considered the constitutionality of Idaho's Pain-Capable Unborn Child Protection Act, which prohibited abortions once the fetus reached a gestational age of 20 weeks. The Idaho ban applied regardless of whether the fetus attained viability. While the court acknowledged that a state could act to protect the health and safety of a woman seeking an abortion, it maintained that the state may not restrict a woman's ability to have an abortion before viability. In evaluating the Idaho law, the court explained:

> [T]he broader effect of the statute is a categorical ban on all actions between twenty weeks gestational age and viability. This is directly contrary to the Court's central holding in *Casey* that a woman has the right to "choose to have an abortion before viability and to obtain it without undue interference from the State."

Ultimately, the Ninth Circuit concluded that the Idaho law was unconstitutional.

In *Edwards v. Beck*, the Eighth Circuit examined the Arkansas Human Heartbeat Protection Act, which prohibited abortions once the fetus had a detectable heartbeat and was at least a gestational age of 12 weeks. The Arkansas State Medical Board attempted to defend the law by characterizing the restriction as a regulation and not a ban on pre-viability abortions. It emphasized that abortions remained available for the first 12 weeks of a woman's pregnancy, and the law included exceptions to protect the mother's life and for medical emergencies. Like the Ninth Circuit, however, the Eighth Circuit viewed the law as an impermissible ban on abortions prior to viability. The Eighth Circuit maintained that it was bound by *Casey* and the assumption of *Casey*'s "principles" in *Gonzales*, noting that "[b]y banning abortions after 12 weeks' gestation, the Act prohibits women from making the ultimate decision to terminate a pregnancy at a point before viability."

Congress, which has considered similar legislation to restrict abortions, will likely follow the GAA as it proceeds through the courts. The Pain-Capable Unborn Child Protection Act (PCUCPA), which would prohibit the performance or attempted performance of an abortion if the probable post-fertilization age of the fetus is 20 weeks or greater, has been passed by the House of Representatives during the last three Congresses. H.R. 36, the current version of the PCUCPA, was passed by the House on October 3, 2017. In January, a vote to end debate on S. 2311, the Senate's version of the PCUCPA, fell short of the 60 votes needed for a final floor vote.

Although the PCUCPA would restrict abortions at a later gestational age than what is prescribed by the GAA, it would likely be examined in a similar fashion, if challenged. A reviewing court would probably review the measure in accordance with *Roe* and *Casey*, with the decisions of the Eighth and Ninth Circuits providing additional guidance for the court. In Mississippi, the temporary restraining order against the GAA's enforcement has been extended to April 13, 2018. Nevertheless, the district court is expected to decide soon whether to further enjoin the enforcement of the GAA and whether that relief should be consolidated with a trial on the merits.

## Author Information

Jon O. Shimabukuro
Legislative Attorney

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