

STATE OF NEBRASKA
Office of the Attorney General

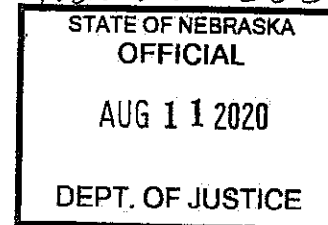
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No. 20-008

RECEIVED

AUG 11 2020



CLERK OF THE LEGISLATURE

SUBJECT: Constitutionality of LB 814 – A Bill for an Act Relating to Abortion

REQUESTED BY: Senator Ernie Chambers
Nebraska Legislature

WRITTEN BY: Douglas J. Peterson, Attorney General
James A. Campbell, Solicitor General

INTRODUCTION

On August 10, 2020, you requested our opinion on the constitutionality of LB 814. That bill is pending before the Legislature, and the legislative session is scheduled to conclude on August 13, 2020, just three business days after your request was submitted to our office. Given this timeline, we have tried to respond as quickly as possible. The fast turnaround has forced us to limit our research and abbreviate our legal analysis.

For the reasons explained below, and based on the information available to our office at this time, we conclude that LB 814 is likely constitutional. Under binding U.S. Supreme Court precedent recently clarified by Chief Justice John Roberts in *June Medical Services LLC v. Russo*, 140 S. Ct. 2103, 2133-42 (2020), it does not appear that LB 814, if enacted, will impose a substantial obstacle on access to abortion in Nebraska.

ANALYSIS

LB 814 would prohibit any person from performing “a dismemberment abortion” on “a living unborn child” unless “a dismemberment abortion is necessary due to a medical emergency as defined [in state law].” LB 814, §§ 2 & 3. The bill defines a “dismemberment abortion” to mean “an abortion in which, with the purpose of causing the death of an

unborn child, a person purposely dismembers the body of a living unborn child and extracts him or her one piece at a time from the uterus through use of clamps, grasping forceps, tongs, scissors, or similar instruments that, through the convergence of two rigid levers, slice, crush, or grasp a portion of the unborn child's body to cut or rip it off." *Id.* § 2. A prohibited dismemberment abortion "does not include: (i) An abortion in which suction is used to dismember the body of an unborn child by sucking fetal parts into a collection container; or (ii) The use of instruments or suction to remove the remains of an unborn child who has already died." *Id.*

In your request, you say that LB 814 "bans the D & E (dilation and evacuation) procedure" for abortion. That is not correct. LB 814 permits abortion providers to use the D & E procedure—which, according to the U.S. Supreme Court, involves dilating a woman's cervix, inserting forceps into the uterus, "grab[bing] the fetus," tearing it apart, and "evacuating" it "piece by piece," *Gonzales v. Carhart*, 550 U.S. 124, 135-36 (2007)—so long as providers do not perform that procedure on "a living unborn child." LB 814, § 2. In other words, LB 814 allows the D & E procedure so long as the abortion provider first causes what is known as "fetal demise"—that is, the death of the fetus—before dismembering its body. Doctors performing a D & E may bring about fetal demise by, among other ways, "inject[ing] digoxin or potassium chloride into the fetus, the umbilical cord, or the amniotic fluid." *Gonzales*, 550 U.S. at 136.

The U.S. Supreme Court has affirmed States' authority to regulate abortion procedures, including laws that substitute some procedures for others. As that Court has stated, "[w]here it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn." *Id.* at 158.

Just over a month ago, Chief Justice John Roberts outlined the relevant constitutional analysis in his concurring opinion in *June Medical Services LLC v. Russo*, 140 S. Ct. 2103, 2133-42 (2020) (Roberts, C.J., concurring in judgment). And just last week, the United States Court of Appeals for the Eighth Circuit confirmed that the Chief Justice's "separate opinion is controlling" in future cases challenging abortion regulations. *Hopkins v. Jegley*, --- F.3d ---, 2020 WL 4557687, at *2 (8th Cir. Aug. 7, 2020) (per curiam).

The constitutional analysis begins by asking whether the State has "a 'legitimate purpose'" for enacting the law and whether "the law [is] 'reasonably related to that goal.'" *June Medical*, 140 S. Ct. at 2138 (Roberts, C.J., concurring) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992) (plurality op.)); accord *Hopkins*, 2020 WL 4557687, at *2 (same). As the lead sponsor of LB 814 has publicly stated, the purposes of her bill are "to protect living unborn children from having to endure the brutality of dismemberment," preserve the integrity of and "public trust in the medical profession," and promote "the value of human life." Judiciary Committee Hearing Transcript at 31 (Feb. 20, 2020). The Supreme Court has already recognized that these are legitimate government interests. *Gonzales*, 550 U.S. at 156-58 (acknowledging that the State may

enact abortion regulations “to show its profound respect for the life within the woman,” to “protect[] the integrity and ethics of the medical profession,” and to “express[] respect for the dignity of human life” in general). And a law that forbids doctors from “purposely dismember[ing] the body of a living unborn child . . . through use of . . . instruments that . . . slice, crush, or grasp a portion of the unborn child’s body to cut or rip it off,” LB 814, § 2, is rationally related to—and directly furthers—those legitimate goals.

Once this rational-basis showing is satisfied, “the only question for a court is whether a law has the ‘effect of placing a substantial obstacle in the path of a woman seeking an abortion.’” *June Medical*, 140 S. Ct. at 2138 (Roberts, C.J., concurring) (quoting *Casey*, 505 U.S. at 877); accord *Hopkins*, 2020 WL 4557687, at *2 (same); see also *Casey*, 505 U.S. at 877 (recognizing that an “undue burden” is “shorthand” for a “substantial obstacle”). To facially invalidate an abortion regulation as unconstitutional, a challenger must show that the statute “will operate as a substantial obstacle to a woman’s choice to undergo an abortion” in “a large fraction of the cases in which [the law] is relevant.” *Planned Parenthood of Ark. & E. Kan. v. Jegley*, 864 F.3d 953, 958 (8th Cir. 2017) (quoting *Casey*, 505 U.S. at 895). Because dismemberment abortions are specific to the second trimester, LB 814 is “relevant” only to women seeking second trimester abortions. See *id.* LB 814 is thus constitutional unless it creates a substantial obstacle for a large fraction of women seeking second trimester abortions. Because the facts available to our office at this time indicate that LB 814, if enacted, will not operate as a substantial obstacle for a large fraction of that group of women, it appears that LB 814 is constitutional.

In 2019, 181 total abortions were performed in Nebraska on fetuses between 13 and 20 weeks’ gestation. See Nebraska 2019 Statistical Report of Abortions, Dep’t Health and Human Servs., at 10 (June 2020). Yet only six of those abortions used the D & E procedure, *id.* at 4, which means that procedure accounted for only three percent of all second trimester abortions in Nebraska (and only 0.3% of all abortions in the State). While LB 814 would *affect* that three percent of second trimester abortions, it would *not ban* them. Rather, it would simply require that abortion providers begin the D & E procedure with one of the recognized methods of fetal demise. A law that merely alters the manner in which Nebraska abortion providers perform three percent of second trimester abortions does not impose a substantial obstacle on a large fraction of women for whom the law is relevant.

Your request says that “former Nebraska Attorney General Don Stenberg agreed” during oral argument in *Stenberg v. Carhart*, 530 U.S. 914 (2000), that the D & E procedure “could not be banned.” In that case, Attorney General Stenberg was asked whether he took “the position that the State of Nebraska could also prohibit the [D & E] procedure for pre-viability abortions” in addition to a ban on partial-birth abortions. Oral Argument Transcript at 9, *Stenberg v. Carhart*, 530 U.S. 914 (2000). In response, he said: “For purposes of this case, the State’s position would be that the State could not prohibit the D & E procedure, but also the State has not attempted to prohibit the D & E procedure.” *Id.* at 10 (emphasis added). General Stenberg was thus clear that his

statement applied only to that case and that the State had not attempted to prohibit D & E. But even if his statement applied more broadly, it says nothing about LB 814's unconstitutionality since that bill, again, does not ban the D & E procedure but simply requires that it begin with fetal demise.

Quoting extensively from the various opinions published in *Stenberg*, your request seems to suggest that *Stenberg* establishes that LB 814 is unconstitutional. It does not, for at least two reasons. First, *Stenberg* concluded that the law at issue there *banned* D & E procedures entirely, determining that “[a]ll those who perform abortion procedures using [the D & E] method must fear prosecution, conviction, and imprisonment.” 530 U.S. at 945 (emphasis added). But LB 814 allows the D & E procedure so long as it begins with fetal demise. Second, the *Stenberg* majority said that the record there—which was based on facts that are now more than 20 years old—established that the D & E procedure was “the most commonly used method for performing previability second trimester abortions,” and thus a ban on it imposed “an undue burden upon a woman’s right to make an abortion decision.” *Id.* at 945-46. Here, however, the facts demonstrate that the D & E procedure accounted for only three percent of second trimester abortions in Nebraska last year. Requiring Nebraska abortion providers to alter the way in which those infrequent procedures are performed does not impose a substantial obstacle on abortion.

Our research has revealed some judicial decisions invalidating abortion regulations similar to LB 814. *E.g.*, *W. Ala. Women’s Ctr. v. Williamson*, 900 F.3d 1310 (11th Cir. 2018). But not only are none of those decisions binding precedent in Nebraska, they are distinguishable on both factual and legal grounds. The facts in some of the other States that enacted those laws established that the D & E procedure was the overwhelmingly predominant method for second trimester abortions in their jurisdictions. *E.g.*, *id.* at 1321 (noting that 99 percent of abortions during the relevant gestational period used the D & E procedure). But here, as discussed above, D & E procedures are few and far between in Nebraska. This critical factual difference dictates a different outcome. See *June Medical*, 140 S. Ct. at 2141 n.6 (Roberts, C.J., concurring) (agreeing that the validity of an abortion regulation “depend[s] on numerous factors,” including the “factual record,” that “may differ from State to State”) (citation omitted).

In addition, those other cases were all decided before Chief Justice Roberts recently clarified the relevant constitutional analysis in *June Medical*. His discussion of “substantial obstacle” analysis is directly relevant to the constitutional issues addressed in those cases. For example, he stressed that “state and federal legislatures [have] wide discretion to pass legislation,” including abortion regulations, “in areas where there is medical and scientific uncertainty.” *June Medical*, 140 S. Ct. at 2136 (Roberts, C.J., concurring) (quoting *Gonzales*, 550 U.S. at 163) (alteration in original). In contrast, the courts that have invalidated abortion regulations similar to LB 814 did so based on their belief that legislatures may not “resolve questions of medical uncertainty.” *W. Ala. Women’s Ctr.*, 900 F.3d at 1325-26. These rulings, therefore, are based on an outmoded view of governing constitutional principles.

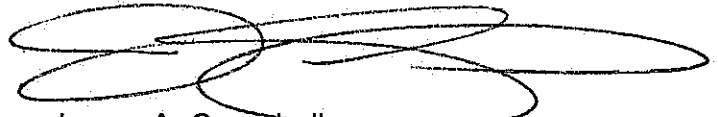
The Eighth Circuit's recent *Hopkins* decision proves this. That case includes a challenge to an Arkansas statute similar to LB 814. *Hopkins*, 2020 WL 4557687, at *1 (challenging "the Arkansas Unborn Child Protection from Dismemberment Abortion Act"). The Eighth Circuit "vacated" the trial court's decision invalidating that Arkansas law and "remand[ed] for reconsideration in light of Chief Justice Roberts's separate opinion in *June Medical*." *Id.* at *3. Like some of the other rulings mentioned above, the trial court in that case had relied on the notion that courts, not legislatures, "must resolve questions of medical uncertainty," but Chief Justice Roberts "emphasized the 'wide discretion' that courts must afford to legislatures in areas of medical uncertainty" surrounding abortion. *Id.* at *2 (citations omitted). Also, the trial court "weigh[ed] the asserted benefits" of the law "against the burden," *id.* at *2 n.2, yet Chief Justice Roberts directed courts not to employ a "balancing test in which unweighted factors mysteriously are weighed" because that would require judges "to act as legislators," *id.* at *1-2 (quoting *June Medical*, 140 S. Ct. at 2135-36). The Eighth Circuit's opinion in *Hopkins* thus cast serious doubt on the prior decisions striking down state laws similar to LB 814.

CONCLUSION

Based on the information currently available to us, we conclude that LB 814 is likely constitutional because it does not appear that it will impose a substantial obstacle on access to abortion in Nebraska.

Very truly yours,

DOUGLAS J. PETERSON
Attorney General



James A. Campbell
Solicitor General

Approved by:



Attorney General

pc Patrick J. O'Donnell
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