IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WOMANCARE OF SOUTHFIELD, P.C., *et al.*,

Plaintiffs,

v.

JENNIFER M. GRANHOLM, Attorney General,

Defendant.

CIVIL ACTION
NO: 00-70585

MARK I. EVANS, M.D., *et al.*,

Plaintiffs,

v.

JENNIFER M. GRANHOLM, Attorney General,

Defendant.

CIVIL ACTION
NO: 00-70586

Consolidated Cases
Hon. Arthur J. Tarnow

REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Confirming the appropriateness of resolving this case on summary judgment, Defendant does not dispute any of the facts that render Mich. Comp. Laws § 750.90g (the Act) facially invalid under Stenberg v. Carhart, 120 S. Ct. 2597 (2000): that the Act bans D&X abortions and

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some D&E abortions, and that the Act lacks a health exception, even though some women need abortions to preserve their health. See Pls.' Mem. Supp. Summ. J. at 8-9.

Defendant nevertheless attempts to avoid summary judgment principally by characterizing the Act as only incidentally an abortion statute. Having previously interpreted the Act to ban only certain abortions, see Opin. Granting Prelim. Inj. at 34, Defendant now makes three arguments: 1) the Act has constitutional applications outside the abortion context; 2) because of those applications, the Act cannot be facially invalid; and 3) the Act survives even an as-applied challenge. These arguments are legally incorrect, and are transparent attempts to distract the Court from the Act's plain operation. Because the Act bans pre-viability abortions with no exception for a woman's health, it is unconstitutional as a matter of law under controlling Supreme Court and Sixth Circuit authority.

1. The Act is Unconstitutional On its Face.

Under the Supreme Court's decision in Carhart, the Act is unconstitutional on two grounds. First, the Act lacks a health exception, which the Constitution would require even if the Act banned only D&X procedures. See Carhart, 120 S. Ct. at 2609, 2613. Notwithstanding this clear precedent, Defendant asserts that the Act elevates the state's interest in the life of a non-viable fetus—any part of which is outside the woman—above the woman's interest in her own health. See, e.g., Def.'s Opp. Summ. J. at i, 2, 12. With this argument, Defendant challenges an unbroken line of Supreme Court decisions: the Court has never wavered in holding that the state may not at any point in pregnancy regulate abortion in a way that "fail[s] to require that maternal health be the physician's paramount consideration." Thornburgh v. ACOG, 476 U.S. 747, 768-69 (1986) (citation omitted) (striking post-viability "choice of method" statute "because it required a

'trade-off' between the woman's health and fetal survival"), overruled in part on other grounds, Planned Parenthood v. Casey, 505 U.S. 833, 870 (1992); see also Planned Parenthood v. Danforth, 428 U.S. 52, 78-79 (1976) (striking abortion method ban as unconstitutional where "as a practical matter, it forces a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed"); Jane L. v. Bangerter, 61 F.3d 1493, 1504 (l0th Cir. 1995) ("The importance of maternal health is a unifying thread that runs from Roe to Thornburgh and then to Casey."), rev'd in part on other grounds and remanded, 518 U.S. 137 (1996). Indeed, even post-viability, the state may not force "a 'trade-off' between the woman's health and additional percentage points of fetal survival." Colautti v. Franklin, 439 U.S. 379, 400 (1979). Thus, this lack of health exception, alone, renders the Act facially unconstitutional. See Carhart, 120 S. Ct. at 2609 ("Since the law requires a health exception in order to validate even a postviability abortion regulation," "[t]he fact that [the Act] applies both pre- and postviability aggravates the constitutional problem presented.").

Second, even if the Act banned only those abortions Defendant has conceded—D&Xs and some D&Es—it imposes an undue burden on pre-viability abortions. See Carhart, 120 S. Ct. at 2609, 2613; see also Def.'s Opp. Summ. J. at 1 (admitting that Act bans some pre-viability abortions). This undue burden alone renders the Act facially invalid. See, e.g., Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187, 202 n.14 (6th Cir. 1997) (stating it is consistent with Casey to invalidate a law on its face if it imposes an undue burden, noting that the Casey Court facially invalidated a spousal notification requirement because it imposed an undue burden pre-viability, without considering the requirement's application post-viability). See also Causeway Med. Suite v. Foster, 221 F.3d 811, 811 (5th Cir. 2000) (affirming district court's facial

invalidation of "partial-birth abortion" ban because it imposed an undue burden); Richmond Med. Ctr. For Women v. Gilmore, 224 F.3d 337, 338-39 (4th Cir. 2000) (same); Eubanks v. Stengel, 224 F.3d 576, 577 (6th Cir. 2000) (same); Planned Parenthood v. Farmer, 220 F.3d 127, 141-46 (3d Cir. 2000) (same); A Choice for Women v. Butterworth, No. 00-1820-CIV-Lenard/Turnoff, slip op. at 6 (S.D. Fla. July 11, 2000) (facially invalidating law similar to Act as undue burden) (Exh. A to Pls.' Mem. Supp. Summ. J.).

Defendant attempts to avoid these well-established and controlling principles by asserting that the Act bans only "rare" abortions. Def.'s Opp. Summ. J. at 1, 7-8, 11. But, as the Supreme Court has stated, "the State cannot prohibit a person from obtaining treatment simply by pointing out that most people do not need it." Carhart, 120 S. Ct. at 2611. Moreover, even were Defendant correct that only D&Xs and some D&Es violated the Act,[1] physicians would still be chilled in performing D&Es generally, as the Supreme Court has recognized that any D&E can progress in the fashion that Defendant has conceded is a felony under the Act. See Carhart, 120 S. Ct. at 2606 (noting that despite "variations in D&E[s] . . ., the common points" include "the potential need for . . . dismemberment of the fetus or the collapse of fetal parts to facilitate evacuation from the uterus") (emphases added). Defendant has conceded the Act bans D&Xs and D&Es that "involve[] crushing the skull." See Def.'s Opp. Summ. J. at 7. A law with such

[1] Plaintiffs have moved for summary judgment based on Defendant's concession that the Act bans abortions using the D&X method, as well as some abortions using the D&E method. Although this motion is based on these narrow grounds, Plaintiffs maintain their position that the Act criminalizes an array of critical medical care, including essentially all abortion methods, treatment of miscarriage, and some obstetrical procedures. This position is based both on the undisputed testimony in this case by Dr. Timothy Johnson, as well as the plain language of the Act, which criminalizes actions taken when any non-severed fetal part, no matter how small, is outside the woman's body, not just when all of the fetus is delivered except the head.

potentially broad application imposes an undue burden. See Carhart, 120 S. Ct. at 2617 ("partial-birth abortion" ban creates an undue burden because "[a]ll those who perform abortion procedures using that [D&E] method must fear prosecution"). Defendant's frequency argument simply ignores the Act's chilling effect on constitutionally protected medical procedures.

Finally, Defendant's frequency argument also ignores that, as Casey established and Carhart clarified, an undue burden is measured by its impact on the women for whom it is relevant. See Casey, 505 U.S. at 894; Carhart, 120 S. Ct. at 2611; see also Voinovich, 130 F.3d at 194 (discussing Casey and appropriate application of large fraction test to group, regardless of size, for whom abortion ban is relevant). No number of fanciful scenarios Defendant conjures, see, e.g., Def.'s Opp. Summ J. at 11, can alter the key point in this case: for the women for whom the Michigan Act would be relevant, its impact would be both tragic and unconstitutional.[2]

2. Neither Reliance on *Salerno* Nor Fabricated "Non-Abortion" Applications Can Save the Act from Facial Invalidation.

Defendant argues that Plaintiffs cannot succeed on their facial challenge because, she contends, the undue burden standard applies only to spousal notification provisions such as that struck down on its face in Casey. Defendant argues that all other abortion restrictions are to be judged under the "no set of circumstances" test of United States v. Salerno, 481 U.S. 739, 745 (1987). See Def.'s Opp. Summ. J. at 6. This argument ignores not only the decision in Casey itself, see 505 U.S. at 878-79 (adopting the undue burden standard for assessing all pre-viability

[2]Defendant also claims that the Act would be constitutional as applied to ban D&Xs and some D&Es, notwithstanding that the Act does not contain a health exception. See Def.'s Opp. Summ. J. at 11, 12. As discussed, this assertion is clearly incorrect under both of the holdings in Carhart. See 120 S. Ct. at 2609, 2613. Accordingly, Defendant's as-applied argument (on which Defendant does not move for summary judgment) similarly fails.

abortion restrictions, and applying the undue burden standard in its analysis of each type of abortion restriction at issue in the case), but also the Sixth Circuit's decision in Voinovich, 130 F.3d at 194-95 (rejecting Salerno standard in favor of undue burden standard for facial challenges to abortion statutes). Defendant's contention is flatly incorrect and her argument must be rejected.[3]

Defendant further argues that the Act is facially valid because it has "constitutional applications outside the abortion context" as a law "limit[ing] abortion and medical practice to physicians"; as a ban on killing "fully born infants"; and as a law that protects "infants in the process of birth." Def.'s Opp. Summ. J. at 1-2, 4-5. Even if Defendant were in any way correct that constitutional applications of the Act could prevent a finding that the Act is facially invalid under the undue burden standard, each of Defendant's three purported constitutional applications is either not an application of the Act or is not constitutional. Indeed, each is unsupported by the language of the Act or has been previously rejected by the United States Supreme Court and other federal courts.

First, Defendant erroneously asserts that the Act's exception—allowing an otherwise banned procedure if performed by a physician who believes it necessary to save the woman's life—permissibly limits abortion practice to physicians. In fact, the Act's prohibition applies to any "person who performs a procedure or takes any action," to kill a live fetus that has partly emerged from the woman's body. Mich. Comp. Laws § 750.90(g)(3) (emphasis added). Defendant's attempt to characterize the Act as a physician-only statute is plainly incompatible

[3] Defendant's reliance on Rust v. Sullivan, 500 U.S. 173 (1991), to support the argument that Salerno is the applicable test, is unpersuasive. Rust was decided prior to the Court's enunciation of the undue burden standard in Casey.

with the Act's language, and must be rejected. See Carhart, 120 S. Ct. at 2615 (court must reject state's statutory interpretation if it is incompatible with statutory language); Voinovich, 130 F.3d at 199 (same); Evans v. Kelley, 977 F. Supp. 1283, 1303 & n.23 (E.D. Mich. 1997) (same).

Second, Defendant incorrectly contends that the Act criminalizes acts taken against "fully born infants." The Act protects a "live infant," which the Act defines as "a human fetus at any point after any part of the fetus is known to exist outside of the mother's body and has" one of the statutorily defined indicia of life. Mich. Comp. Laws § 750.90g(6)(a) (emphases added). The Act thus protects a "fetus," which exists only "from seven or eight weeks after fertilization until birth," "birth" meaning being "wholly brought into separate existence." Black's Law Dictionary 169, 621 (6th ed. 1990) (emphases added); see also Stedman's Medical Dictionary 173, 521 (24th ed. 1982) (same). The Act thus has no post-birth applications because it applies only to a fetus, and a fetus does not exist after birth. It is irrelevant that "live infant" ordinarily means a person born—for it is axiomatic that "[w]hen a statute includes an explicit definition, [a court] must follow that definition, even if it varies from that term's ordinary meaning." Carhart, 120 S. Ct. at 2615. Because the Act explicitly defines "live infant" as a fetus, and not a "fully born infant," it has no application as a ban on killing infants after birth. This Court must therefore reject Defendant's proffered interpretation that "live infant" means "human organism," Def.'s Opp. Summ. J. at 18, as incompatible with the actual statutory definition, which is "human fetus." See, e.g., Carhart, 120 S. Ct. at 2615 (rejecting attorney general's interpretation as incompatible with statutory definition); Voinovich, 130 F.3d at 199 (same).

The third application Defendant proposes as constitutional—protecting "infants in the process of birth"—merely couches in the nomenclature of birth the consistently rejected theory

that—Roe and Casey notwithstanding—a state may ban abortion by declaring that a fetus is a person even though it is not yet born, and is not entirely outside the woman. This "application" of the Act constitutes an abortion ban that applies both pre- and post-viability; that lacks a health exception; and that therefore violates Roe v. Wade, 410 U.S. 113 (1973), Planned Parenthood v. Casey, 505 U.S. 833 (1992), and Carhart, 120 S. Ct. 2597.

Attempting to avoid this result, Defendant proposes that "abortion jurisprudence does not govern" when a non-severed fetal part passes outside the woman. See Def.'s Opp. Summ. J. at 2.[4] This proposition was rejected by the Carhart Court, which struck Nebraska's "partial-birth abortion" law despite the state's insistence that it banned abortions in which, before the physician kills the fetus, "the body of the fetus . . . [is] outside the woman's body," 120 S. Ct. at 2624 (Kennedy, J., dissenting) (citing Nebraska's brief); id. at 2639 (Thomas, J., dissenting) (same) (citing Nebraska's evidence). Defendant thus simply errs in asserting that the Carhart Court "did not consider" the state's interest in "an infant [sic] that has at least partly left the *body* of the mother" and that Carhart therefore does not control this case. Def.'s Opp. to Summ. J. at 8. As the Court held in Roe, a person does not exist until born alive, 410 U.S. at 156-62, which does not occur until "after complete expulsion or extraction from mother." Black's Law Dictionary 184 (6th ed. 1990) (emphasis added). See e.g., Farmer, 220 F.3d at 143 (rejecting argument that Roe and Casey do not apply to law that "prohibit[s] 'the deliberate killing of a living human being who has almost completed the process of birth'") (quoting state's brief); id. at 144 (rejecting argument that Roe Court's non-review of Texas parturition law bears on analysis of law that bans

[4] Indeed, Defendant's statement of the issues presented is premised on the notion that a fetus with any non-severed part outside of the woman's body has, by definition, "gained personhood." Def.'s Opp. Summ. J. at i.

killing "partially born" fetuses).[5] Hence, this supposedly constitutional, non-abortion application of the Act is nothing but a plainly unconstitutional abortion ban.

Thus, each of the three applications that Defendant suggests is either not a valid application of the language of the Act, or is not constitutional.

CONCLUSION

For the reasons stated above, and in Plaintiffs' Memorandum in Support of Motion for Summary Judgment, Plaintiffs' motion should be granted.

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[5] Carhart definitively forecloses Defendant's theory that there is a "termination of pregnancy"--and thus a termination of the right to end pregnancy under Roe and Casey -- when a fetus "extends outside its mother's body." See Def.'s Opp. Summ. J. at 11. As the Sixth Circuit has stated, "[p]regnancy' describes the woman's condition, which we do not believe is terminated until the abortion has been completed." Voinovich, 130 F.3d at 199.

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