



Fetal Viability and the Alabama Human Life Protection Act

Jon O. Shimabukuro
Legislative Attorney

May 16, 2019

Alabama's governor, Kay Ivey, recently signed the [Alabama Human Life Protection Act](#) (AHLPA), a measure that prohibits the performance or attempted performance of most abortions in the state. The new law is scheduled to take effect in six months. Unlike other state laws that restrict abortions once a fetus reaches a specified gestational age, the AHLPA prohibits the procedure for "an unborn child in utero at any stage of development." Gov. Ivey has [described](#) the new law as "a powerful testament to Alabamians' deeply held belief that every life is precious." At the same time, however, she acknowledges that the law may not be enforceable in light of the U.S. Supreme Court's abortion [jurisprudence](#). In fact, federal appellate courts have invalidated several state laws that attempted to prohibit the procedure prior to fetal viability, the point in a fetus's development when it is able to live outside the mother's womb, with or without artificial assistance. In *Roe v. Wade*, the Court's 1973 abortion decision, viability was identified as "usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." In light of *Roe* and the Court's subsequent abortion decisions, it seems that the AHLPA might have difficulty surviving a constitutional challenge under existing precedents. Nevertheless, Gov. Ivey and the AHLPA's sponsors appear to anticipate such a challenge, [maintaining](#) that "it is time, once again, for the U.S. Supreme Court to revisit this important matter[.]"

Alabama Human Life Protection Act

Under the AHLPA, the performance of an abortion is a Class A felony, which carries a prison sentence of not less than 10 years, but no more than 99 years. The attempted performance of an abortion is a Class C felony, which carries a prison sentence of not less than one year and one day, but no more than 10 years. Individuals convicted for violations of the AHLPA may also be subject to fines not to exceed \$60,000 for the performance of an abortion, and not to exceed \$15,000 for the attempted performance of an abortion.

Congressional Research Service

7-5700

www.crs.gov

LSB10299

The AHLPA includes an exception for abortions when “[i]n reasonable medical judgment, the child’s mother has a condition that so complicates her medical condition that it necessitates the termination of her pregnancy to avert her death or to avert serious risk of substantial physical impairment of a major bodily function.” The law indicates that such a condition can include, under specified circumstances, a diagnosed serious mental illness if there is a reasonable medical determination that the woman will engage in conduct that could result in her death or the death of the fetus.

Restricting Abortion before Fetal Viability

Since *Roe*, the Supreme Court has continued to recognize viability as the earliest point at which a state’s interest in fetal life may justify a ban on abortions. For example, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, its 1992 decision upholding *Roe*’s essential holding, the Court maintained that a state “may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.” The Court later recognized this principle as controlling in *Gonzales v. Carhart*, its 2007 decision involving the Partial-Birth Abortion Ban Act.

In light of the Court’s decisions, two federal appellate courts 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 U.S. Court of Appeals for 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 Ninth Circuit 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 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[.]” Further, the appellate court indicated that the presence of a medical emergency exception did 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. Although 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 could not restrict her ability to obtain the procedure before viability:

[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.”

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. The Board emphasized that abortions remained available for the first 12 weeks of a woman’s pregnancy, and that 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.”

Like the state laws invalidated by the Eighth and Ninth Circuits, the AHLPA restricts the performance of abortions prior to fetal viability. The Supreme Court's abortion jurisprudence and the Eighth and Ninth Circuit decisions might arguably suggest a similar outcome for the Alabama law. Critics of the AHLPA have indicated that they will [challenge](#) the new law. If such a challenge were ultimately considered by the Supreme Court, it may be possible that the Court could revisit its position on viability, something the law's sponsors said they hoped for when the measure was introduced. Notably, the Court declined to review *Isaacson* in 2014 and *Edwards* in 2016. However, with two new Justices appointed after those cases were decided, a similar denial of certiorari may not be guaranteed.