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I-01-07

The Honorable Scott Fitzgerald
State Senator
202 South, State Capitol
Madison, WI 53707

The Honorable Michael Huebsch
State Representative
211 West, State Capitol
Madison, WI 53708

Dear Senator Fitzgerald and Representative Huebsch:

You have requested my opinion about the effect of the United States Supreme Court's April 18, 2007, decision in *Gonzales v. Carhart*, ___ U.S. ___, 127 S. Ct. 1610, on 1997 Wisconsin Act 219, Wis. Stat. §§ 939.62(2m)(a)2., 973.0135(1)(b)2. and 940.16, all relating to a type of late-term pregnancy termination commonly known as "partial birth abortion."

In Wisconsin, the Attorney General's power and authority is defined by and limited by statute. *State v. City of Oak Creek*, 2000 WI 9, ¶ 32, 232 Wis. 2d 612, 605 N.W.2d 526. By statute, the Attorney General is authorized to give written opinions on any question of law only to the Legislature, to either house thereof, to the Senate or Assembly Committees on Organization or to the heads of any department of state government. Wis. Stat. § 165.015(1).

The Department of Justice, however, is authorized to appear for and defend state officers and employees in civil suits growing out of their duties. Wis. Stat. § 165.25(6)(a). In that capacity, Department of Justice attorneys defended then-Attorney General Doyle and then-Dane County District Attorney Diane Nicks, as a representative of the class of Wisconsin district attorneys, in a federal court challenge to Wisconsin's partial birth abortion statutes; viz. *Planned Parenthood of Wisconsin, et al. v. Doyle, et al.*, Case No. 98-C-305-S (W.D. Wis.). That case was appealed to and resulted in a published Seventh Circuit opinion, *Hope Clinic v. Ryan*, 195 F.3d 857 (1999), and was further appealed to the United States Supreme Court, which remanded the case for reconsideration in light of the Court's invalidation of Nebraska's partial birth abortion statute in *Stenberg v. Carhart*, 530 U.S. 914 (2000). *Planned Parenthood v. Doyle*, 530 U.S. 1271 (2000). On remand, the Seventh Circuit remanded the matter to the district court, with instructions that it enjoin the defendants from enforcing Wis. Stat. § 940.16, Wisconsin's criminal prohibition of partial birth abortions. *Hope Clinic v. Ryan*, 249 F.3d 603, 606 (7th Cir. 2001). On May 25, 2001, Judge Shabaz entered the injunction as instructed. In

light of the Department of Justice's prior involvement in the *Planned Parenthood v. Doyle* litigation, I will construe your letter as an inquiry about the effect of the *Gonzales* decision on the injunction entered in *Planned Parenthood v. Doyle*.

In *Stenberg*, the United States Supreme Court held that a Nebraska statute that criminalized the performance of partial birth abortions violated the United States Constitution for at least two independent reasons. First, Nebraska's law lacked any exception for the preservation of the health of the mother. Second, Nebraska's statute imposed an undue burden on a woman's ability to choose a "dilation and evacuation" abortion, thereby unduly burdening the right to choose abortion.¹ *Stenberg*, 530 U.S. at 930. The Court described the Nebraska statutory provisions at issue as follows, *id.* at 921-22:

"No partial birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself." Neb.Rev.Stat. Ann. § 28-328(1) (Supp. 1999).

The statute defines "partial birth abortion" as:

"an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery." § 28-326(9).

¹The Court's decision in *Stenberg* summarizes the various common abortion methods and their variations, employed during the first and second trimesters of pregnancy. *Stenberg*, 530 U.S. at 923-29. During the first trimester (when 90% of all abortions occur), vacuum aspiration is the most common abortion method. *Id.* at 923-24. Ten percent of abortions are performed during the second trimester (12-24 weeks). *Id.* at 924. Ninety-five percent of all abortions performed between 12 and 20 weeks use a procedure called dilation and evacuation ("D&E"). *Id.* The characteristics common to variations in the D&E procedure are "(1) dilation of the cervix; (2) removal of at least some fetal tissue using nonvacuum instruments; and (3) (after the 15th week) the potential need for instrumental disarticulation or dismemberment of the fetus or the collapse of fetal parts to facilitate evacuation from the uterus." *Id.* at 925. The abortion procedure at issue in *Stenberg* and *Gonzales*, was a variation of the D&E procedure, which the Court described by two interchangeable technical terms, *i.e.*, "breech-conversion intact D&E" or "dilation and extraction" ("D&X"). *Id.* at 927-28; *see also Gonzales*, 127 S. Ct. at 1621-23.

It further defines “partially delivers vaginally a living unborn child before killing the unborn child” to mean

“deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child.” *Ibid.*

After the Supreme Court remanded *Planned Parenthood v. Doyle* to the Seventh Circuit for reconsideration, 530 U.S. 1271, the Seventh Circuit concluded that Wisconsin’s partial birth abortion criminal statute, Wis. Stat. § 940.16, shared the same constitutional flaws as Nebraska’s statute; *i.e.*, it lacked any exception for the preservation of the health of the mother, and imposed an undue burden on a woman’s right to choose a D&E abortion. *Planned Parenthood*, 249 F.3d 603, 604 (7th Cir. 2001). The Seventh Circuit remanded the case to the district court, with instructions to enjoin the Wisconsin defendants (the Attorney General and the class of Wisconsin district attorneys) from enforcing Wis. Stat. § 940.16. *Id.* at 606.

Wisconsin Stat. § 940.16 provides:

(1) In this section:

(a) “Child” means a human being from the time of fertilization until it is completely delivered from a pregnant woman.

(b) “Partial-birth abortion” means an abortion in which a person partially vaginally delivers a living child, causes the death of the partially delivered child with the intent to kill the child, and then completes the delivery of the child.

(2) Except as provided in sub. (3), whoever intentionally performs a partial-birth abortion is guilty of a Class A felony.

(3) Subsection (2) does not apply if the partial-birth abortion is necessary to save the life of a woman whose life is endangered by a physical disorder, physical illness or physical injury, including a life-endangering physical disorder, physical illness or physical injury caused by or arising from the pregnancy itself, and if no other medical procedure would suffice for that purpose.

In 2003, after the *Stenberg* decision, Congress passed, and President Bush signed an Act banning partial birth abortions on a national basis. Title 18 U.S.C. § 1531 provides, in relevant part (quoted in *Gonzales*, 127 S. Ct. at 1624) (emphasis in original):

“(a) Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both. This subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself. This subsection takes effect 1 day after the enactment.

“(b) As used in this section—

(1) the term ‘partial-birth abortion’ means an abortion in which the person performing the abortion—

“(A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and

“(B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus; and

“(2) the term ‘physician’ means a doctor of medicine or osteopathy legally authorized to practice medicine and surgery by the State in which the doctor performs such activity, or any other individual legally authorized by the State to perform abortions: *Provided, however,* That any individual who is not a physician or not otherwise legally authorized by the State to perform abortions, but who nevertheless directly performs a partial-birth abortion, shall be subject to the provisions of this section.

After identifying four essential features of the federal statute, *Gonzales*, 127 S. Ct. at 1627-28, the Court rejected the argument that the federal statute was unconstitutionally vague, and distinguished it from the Nebraska statute at issue in *Stenberg*. The Court stated, *Gonzales*, 127 S. Ct. at 1628 (internal citations omitted):

Unlike the statutory language in *Stenberg* that prohibited the delivery of a “substantial portion” of the fetus—where a doctor might question how much of the fetus is a substantial portion—the Act defines the line between potentially criminal conduct on the one hand and lawful abortion on the other. Doctors performing D & E will know that if they do not deliver a living fetus to an anatomical landmark they will not face criminal liability.

The Court also concluded that, unlike the Nebraska statute at issue in *Stenberg*, the federal statute does not impose an undue burden on a woman’s right to choose a D&E abortion, because the federal statute “does not prohibit the D&E procedure in which the fetus is removed in parts.” *Gonzales*, 127 S. Ct. at 1629. The Court stated, *id.* at 1630-31:

[T]he Act departs in material ways from the statute in *Stenberg*: It adopts the phrase “delivers a living fetus,” § 1531(b)(1)(A) (2000 ed., Supp. IV), instead of “delivering . . . a living unborn child, or a substantial portion thereof,” 530 U.S., at 938, (quoting Neb. Rev. Stat. Ann. § 28-326(9) (Supp. 1999)). The Act’s language, unlike the statute in *Stenberg*, expresses the usual meaning of “deliver” when used in connection with “fetus,” namely, extraction of an entire fetus rather than removal of fetal pieces. . . . The Act thus displaces the interpretation of “delivering” dictated by the Nebraska statute’s reference to a “substantial portion” of the fetus. *Stenberg, supra*, at 944 (indicating that the Nebraska “statute itself specifies that it applies *both* to delivering ‘an intact unborn child’ *or* ‘a substantial portion thereof’”). In interpreting statutory texts courts use the ordinary meaning of terms unless context requires a different result. See, e.g., 2A N. Singer, Sutherland on Statutes and Statutory Construction § 47:28 (rev. 6th ed. 2000). Here, unlike in *Stenberg*, the language does not require a departure from the ordinary meaning. D&E does not involve the delivery of a fetus because it requires the removal of fetal parts that are ripped from the fetus as they are pulled through the cervix.

The identification of specific anatomical landmarks to which the fetus must be partially delivered also differentiates the Act from the statute at issue in *Stenberg*. § 1531(b)(1)(A) (2000 ed., Supp. IV). The Court in *Stenberg* interpreted “substantial portion” of the fetus to include an arm or a leg. 530 U.S., at 939. The Act’s anatomical landmarks, by contrast, clarify that the removal of a small portion of the fetus is not prohibited. The landmarks also

require the fetus to be delivered so that it is partially “outside the body of the mother.” § 1531(b)(1)(A). To come within the ambit of the Nebraska statute, on the other hand, a substantial portion of the fetus only had to be delivered into the vagina; no part of the fetus had to be outside the body of the mother before a doctor could face criminal sanctions. *Id.*, at 938-39.

By adding an overt-act requirement Congress sought further to meet the Court’s objections to the state statute considered in *Stenberg*. Compare 18 U.S.C. § 1531(b)(1) (2000 ed., Supp. IV) with Neb. Rev. Stat. Ann. § 28-326(9) (Supp. 1999). The Act makes the distinction the Nebraska statute failed to draw (but the Nebraska Attorney General advanced) by differentiating between the overall partial-birth abortion and the distinct overt act that kills the fetus. See *Stenberg*, 530 U.S., at 943-944. The fatal overt act must occur after delivery to an anatomical landmark, and it must be something “other than [the] completion of delivery.” § 1531(b)(1)(B). This distinction matters because, unlike intact D&E, standard D&E does not involve a delivery followed by a fatal act.

Finally, the Court concluded that the absence in the federal statute of an exception to criminal liability where the procedure was necessary to preserve the health of the mother was not a fatal defect in the context of the facial challenge with which it was presented, because there was “documented medical disagreement whether the Act’s prohibition would ever impose significant health risks on women.” *Id.* at 1636. *Gonzales* allowed the federal statute to withstand a facial challenge notwithstanding documented medical disagreement about the relative safety of intact D&E and other abortion techniques. *Id.* at 1636-37. *Stenberg*, by contrast, struck down the Nebraska statute in part because of a division of medical opinion about the relative safety for some women of intact D&E and other abortion techniques. *Stenberg*, 530 U.S. at 934-37. In this regard, *Gonzales* may represent a substantial change in controlling case law—although the *Gonzales* majority opinion did not explicitly vacate or reverse *Stenberg* on this issue. *Cf. Gonzales*, 127 S. Ct. at 1642-43 (Ginsburg, J., dissenting).

With this background in mind, I turn to your question concerning the effect of the *Gonzales* decision on the district court’s injunction in *Planned Parenthood v. Doyle*, Case No. 98-C-305-S, preventing the Attorney General and Wisconsin district attorneys from enforcing Wis. Stat. § 940.16.

Rule 60(b) of the Federal Rules of Civil Procedure allows an enjoined party to seek relief from a judgment or order on various grounds, including the following reason: “(5) . . . a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.”

In the case of *Planned Parenthood v. Doyle*, one or more of the defendants would have to demonstrate to the district court that the Supreme Court's judgment in *Stenberg*, upon which the injunction against enforcement of Wis. Stat. § 940.16 is based, has been reversed, or vacated, or that it is no longer equitable that the injunction should continue. To meet that burden, one or more of the defendants would have to demonstrate that the Wisconsin statute does not impose an undue burden on a woman's right to choose a D&E abortion and would have to show that the absence of an exemption in the statute's ban on partial birth abortion to allow the procedure where necessary to preserve the woman's health is not a fatal constitutional defect. *Gonzales* suggests that, a defendant might be able to demonstrate that the absence of a health exception is not fatal in a facial challenge to a ban on partial birth abortions because *Gonzales* arguably overruled *Stenberg* on whether the absence of a health exception was fatal in a facial challenge where there was medical evidence in the record that intact D&E was safer than the alternatives for some women. However, no *Planned Parenthood v. Doyle* defendant could establish that *Gonzales* effectively overruled *Stenberg* on whether a partial birth abortion statute like Wisconsin's imposed an undue burden on a woman's right to choose a D&E abortion.

The features of the federal ban on partial birth abortions that *Gonzales* found persuasive to distinguish it from the Nebraska statute similarly distinguish Wisconsin's enjoined statute from the facially valid federal ban. First, both the Nebraska statute and Wis. Stat. § 940.16 prohibit the delivery of an indeterminate portion of the fetus, whereas the federal statute defines the line between potentially criminal conduct and lawful abortion in terms of delivery of a fetus to a specific anatomical landmark. *Cf.* Neb. Rev. Stat. § 28-326(9) (1999) ("partially delivers vaginally a living unborn child") and Wis. Stat. § 940.16(1)(b) ("partially vaginally delivers a living child") with 18 U.S.C. § 1531(b)(1)(A) ("vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother"). *See also Gonzales*, 127 S. Ct. at 1628.

Second, both the Nebraska statute and Wis. Stat. § 940.16 criminalize D&E abortions by banning the vaginal delivery of a fetal part, such as an arm or leg, whereas the federal statute "expresses the usual meaning of 'deliver' when used in connection with 'fetus,' namely, extraction of an entire fetus rather than removal of fetal pieces." *Gonzales*, 127 S. Ct. at 1630. *Cf.* Neb. Rev. Stat. § 28-326(9) ("delivering . . . a living unborn child, or a substantial portion thereof") and Wis. Stat. § 940.16(1)(b) ("partially vaginally delivers a living child") with 18 U.S.C. § 1531(b)(1)(A) ("delivers a living fetus").

Third, both the Nebraska statute and Wis. Stat. § 940.16 fail to draw the distinction between the overall partial birth abortion and the distinct overt act that kills the fetus, whereas the federal statute clearly distinguishes between them. *Gonzales*, 127 S. Ct. at 1630-31. *Cf.* Neb. Rev. Stat. § 28-326(9) (partial birth abortion occurs where "the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and

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completing the delivery”) and Wis. Stat. § 940.16(1)(b) (partial birth abortion occurs where “a person partially vaginally delivers a living child, causes the death of the partially delivered child with the intent to kill the child, and then completes the delivery of the child”) with 18 U.S.C. § 1531(b)(1)(B) (fatal overt act must occur after delivery to an anatomical landmark, and must be something “other than completion of delivery”).

As long as Wis. Stat. § 940.16 shares the constitutionally fatal features of Neb. Rev. Stat. § 28-326(9) identified in *Stenberg* and *Gonzales*, no Rule 60 motion could successfully convince the district court that the Attorney General or any Wisconsin district attorney is entitled to relief from the injunction against the enforcement in state court of Wisconsin’s ban on partial birth abortion. The continuing injunction against enforcement in state courts by state prosecutors, however, has no effect on the ability of federal prosecutors to enforce in Wisconsin’s federal district courts the federal ban on partial birth abortions, pursuant to the terms and procedures contained in 18 U.S.C. § 1531.

Sincerely,



J.B. Van Hollen
Attorney General

JBVH:BAO:ajw