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Arizona Abortion Law if Roe v. Wade is Overturned

Guidance

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The United States Supreme Court is in the process of deciding whether to overturn the landmark abortion rights case *Roe v. Wade*, and a draft decision has been leaked and publicized. *See* Samuel Alito, *Dobbs v. Jackson Women's Health Org.* (Feb. ___, 2002), https://s3.documentcloud.org/documents/21835435/scotus-initial-draft.pdf (draft decision). The leaked decision, which the Court has confirmed to be authentic, overturns *Roe*, and we presume that there will ultimately be a majority on the court willing to support an opinion similar to the draft. This memo analyzes the effect on certain Arizona laws if the draft decision were to become law.

If the draft were to become law, any unrepealed statute that was invalidated by Roe would become effective once again, unless the statute were invalid for some other reason. The Arizona Supreme Court has stated that "when later opinions of the [United States] Supreme Court show our constitutional interpretations to be incorrect, we must overrule them and bring our decisions into conformity with Supreme Court precedent." *State v. Davis*, 206 Ariz. 377, ¶ 34 n.4 (2003). Thus, our state supreme court would analyze anew any pre-Roe statutes that have not been repealed by our legislature despite being invalidated by *Roe*. Such unrepealed statutes include A.R.S. § 13-3603, which creates a criminal offense if a person intends to cause a woman to miscarry via instruments or substances, and A.R.S. § 13-3605, which prohibits advertising to produce abortion or prevent conception.

Similarly, any abortion law that the state has passed since *Roe* will immediately take effect if the draft decision becomes law, even if the statute would have been considered unconstitutional under *Roe* when the statute was passed. SB 1164, which prohibits physicians from performing abortions beyond fifteen weeks, is an example of such a law.

There may be concern that § 13-3603 will be applied to women who get abortions, not just third parties who induce or perform unlawful abortions. Section 13-3603 provides:

> A person who provides, supplies or administers to a pregnant woman, or procures such woman to take any medicine, drugs or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless it is necessary to save her life, shall be punished by imprisonment in the state prison for not less than two years nor more than five years.

Although § 13-3603 does not expressly state that the "person" who commits the offense cannot be the pregnant woman herself and thus the statutory language is arguably ambiguous in that regard, there are extrinsic reasons to believe that the legislature did not intend for this statute to apply to the pregnant woman. No appellate case interpreting § 13-3603 involves the prosecution of the pregnant woman herself. And indeed, for most of its existence and until last year, § 13-3603 was paired with a neighboring statute, A.R.S. § 13-3604, that separately provided a criminal offense for a pregnant woman who obtained an abortion. The legislature repealed § 13-3604 last year without replacing it, suggesting an intent to remove the criminal penalty for a pregnant woman who obtains an abortion. *See* Laws 2021, Ch. 286, § 3 (repealing § 13-3604).

To the extent that § 13-3605 prohibits advertising to prevent conception, it would likely be ruled invalid even if Roe is overturned. The Alito draft expressly declines to strike down the right to use contraceptives established in *Griswold v. Connecticut*, 381 U.S. 479 (1965). See Draft decision at 62 (expressly rejecting the argument that the draft "threatens" the holding in *Griswold* by reasoning that abortion is a "unique act"). Because such a right exists, it is unconstitutional to completely suppress truthful commercial speech about contraceptives. In *Carey v. Population Servs., Int'l*, 431 U.S. 678, 700 (1977), the U.S. Supreme Court struck down a New York statute that, much like § 13-3605, prohibited any advertisement of contraceptives. The court reasoned that under First Amendment precedent regarding commercial speech, the state may not completely suppress truthful speech about lawful activity, even commercial activity. Although First Amendment jurisprudence regarding commercial speech has developed since *Carey*, *see, e.g.*, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566, (1980), *Carey* remains good law and blanket bans on contraceptive like § 13-3605 would remain unconstitutional under the Alito draft decision. *See Cent. Hudson*, 447 U.S. at 565 (citing *Carey* with approval); Draft decision at 31-32 (mentioning both *Griswold* and *Carey* in distinguishing abortion from the right to obtain contraceptives).

Despite the fact that § 13-3605 would remain partially unconstitutional even if the Alito draft becomes law, the Alito draft might make the ban on abortion advertising in § 13-3605 valid once again if all abortions became unlawful, because unconstitutional portions can be severed from a law if the valid portions can be effectively enforced independently from the invalid portions. *Fann v. State*, 251 Ariz. 425, ¶37 (2021). However, because early-term abortions would remain lawful under SB 1164, it is an open question whether the blanket ban on abortion advertising in § 13-3605 would become valid. Unlike contraceptive use, to which there is a constitutional right, there would be no constitutional right to an abortion once *Roe* is repealed. Instead, early term abortions would be lawful only because the legislature had chosen not to ban them. The standard First Amendment test for bans on lawful commercial advertising would presumably apply. Under that test, advertising bans are unconstitutional unless the state can show 1.) a substantial governmental interest in banning the advertising; 2.) that the ban directly advanced that interest; and 3.) that a complete ban was necessary to serve that interest. *See Cent. Hudson*, 447 U.S. at 566.

It may be counterintuitive that the state has the power to completely ban all advertising of an activity by making it illegal, but may not have the power to completely ban all advertising of that same activity if it chooses not to make it illegal, even though the latter exercise of power is arguably just a subset of the former. Yet that is how the Court has interpreted the First Amendment. For example, legislatures undoubtedly have the power to completely ban tobacco sales for well-known health reasons, but if a state chooses to leave some tobacco sales legal, advertising bans of legal tobacco products must pass the *Central Hudson* test or they are unconstitutional. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561 (2001) (striking down tobacco advertising restriction).

Another legislative concern is the interaction of newly effective abortion statutes that have never been enforced together. We are aware of possible concern about how courts might resolve a conflict between § 13-3603, which establishes without any express limitation a criminal offense and a 2–5-year sentence for those that perform abortions, and S.B. 1164, which impliedly allows licensed physicians to perform early-term abortions. The concern is that a court or a prosecutor might interpret § 13-3603 to somehow override S.B. 1164 and criminalize all abortions, even those performed by licensed physicians. While its possible that someone will attempt to argue for such an interpretation, it is unlikely that a court will adopt it.

In general, Arizona courts will attempt to harmonize conflicts between statutes and give both statutes effect. *UNUM Life Ins. Co. of Am. v. Craig*, 200 Ariz. 327, ¶ 11 (2001) ("When two statutes appear to conflict, we will attempt to harmonize their language to give effect to each."). Conversely, courts will avoid interpreting a conflict between two statutes in a way that renders one of the statutes inert by giving it no effect; the presumption is that legislatures do not pass laws that never apply and do nothing. *See Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, ¶ 8 (2007). Moreover, a more recent and specific statute will be interpreted to apply over an older, more general statute. *In re Guardianship/Conservatorship of Denton*, 190 Ariz. 152, 157 (1997). Here, harmonizing the newer statutes created by SB 1164 and the older § 13-3603 appears to be straightforward; the statutes created by SB 1164 would apply to licensed physicians who perform abortions, and § 13-3603 would apply to everyone else. Thus, the criminal offense in § 13-3603 would not apply to licensed physicians who perform abortions, and a licensed physician would be generally permitted to perform an abortion before fifteen weeks.

This interpretation is consistent with the rules of construction and statement of legislative intent included with SB 1164. The legislature has advised that the amended statutes do not repeal § 13-3603, and this interpretation gives § 13-3603 effect. Nor does this interpretation "[c]reate or recognize a right to abortion or alter generally accepted medical standards." The statute allows a physician to perform an abortion before fifteen weeks but does not bestow a right to one. Nor does this interpretation "make lawful an abortion that is currently unlawful," as current federal law under Roe and Casey permits physicians to perform early-term abortions. Finally, the legislature has indicated that it "intends . . . to restrict the practice of nontherapeutic or elective abortion to the period up to fifteen weeks of gestation"—not to eliminate elective abortions altogether.

More information

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