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Court won't take Arizona abortion ban case; lower court block remains

Patricia Zapor Catholic News Service | Jan. 13, 2014
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Arizona's law banning abortions at the 20-week stage remains unenforceable after the Supreme Court on Monday declined to hear the state's appeal of a lower court ruling that the 2012 law is unconstitutional.

Without comment, the court declined to take *Horne* v. *Isaacson*. In that case, the state appealed a May ruling by the 9th U.S. Circuit Court of Appeals that found the law banning abortions late in pregnancy is unconstitutional "under an unbroken stream of Supreme Court authority, beginning with *Roe* (v. *Wade*) and ending with *Gonzales* (v. *Carhart*). Arizona simply cannot proscribe a woman from choosing to obtain an abortion before the fetus is viable."

That unanimous ruling by the five-judge panel of the 9th Circuit reversed a lower court that had upheld the law.

The circuit court had been asked to uphold the law on the basis of evidence that fetuses as young as 20 weeks can feel pain. But the court was clear in finding that the constitutional line set in the 1973 *Roe* v. *Wade* decision is that states may not "deprive a woman of the choice to terminate her pregnancy at any point prior to viability," which is generally held to be several weeks later than the 20-week point.

Writing in a concurrence, 9th Circuit Judge Andrew J. Kleinfeld said "while the state may regulate the mode and manner of abortion prior to fetal viability, it may not proscribe a woman from electing abortion, nor may it impose an undue burden on her choice through regulation."

He wrote that the Arizona law's medical emergency exception, under which a doctor could decide whether abortion was medically necessary to save the woman's life or to prevent substantial injury to the mother, "is not the same as allowing a woman to decide whether to carry her own pregnancy to term," Kleinfeld added.

He observed that while the state arguably has a legal interest in protecting fetuses from pain before they are viable, that interest is not enough to justify prohibiting abortion at that stage.

Arizona's law has never gone into effect, pending resolution in the courts. The Supreme Court was asked to consider whether the viability line on which the 9th Circuit based its ruling continues to be the only critical factor in determining constitutionality, and whether the appeals court erred in declining to recognize that the state has enough of an interest in preventing fetal pain to justify the law.

The case was also proffered as a vehicle for potentially overturning *Roe* v. *Wade*'s precedents in light of recent medical developments.

The law made it a crime to perform an abortion after the 19th week of pregnancy, with exceptions for threats to the mother's life or likely "substantial and irreversible impairment of a major bodily function."

At least a dozen other states have passed similar laws with 20-week abortion bans, but Arizona's is the oldest, and thus the first to reach the Supreme Court. The Supreme Court often declines to accept major constitutional challenges unless there are conflicting rulings by lower courts.

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