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23-005
STATE OF NEBRASKA
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APR 25 2023

DEPT. OF JUSTICE

SUBJECT: Interpretation of the Nebraska Heartbeat Act (LB 626)

REQUESTED BY: Senator Joni Albrecht
Nebraska Legislature

WRITTEN BY: Mike Hilgers, Attorney General
Eric J. Hamilton, Solicitor General

INTRODUCTION

The Nebraska Heartbeat Act (the "Act") would make it unlawful for physicians to perform abortions of certain unborn children having detectable fetal heartbeats. LB 626, § 4. You have asked whether violations of the Act would become crimes under Neb. Rev. Stat. § 28-336 and whether physicians performing abortions for victims of sexual assault must satisfy law-enforcement reporting requirements before performing an abortion. We conclude that violations of the Act would not become crimes under § 28-336 because the Act would not change which "medical procedures" are "accepted" to "perform[] . . . an abortion." Neb. Rev. Stat. § 28-336. Nor would the Act require physicians performing abortions for victims of sexual assault to file a law-enforcement report before performing an abortion. That requirement may be satisfied before or after an abortion is performed.

BACKGROUND

If enacted, the Act would bar physicians from performing or inducing the abortion of certain unborn children having a fetal heartbeat. LB 626, § 4. The Act requires physicians to search for a fetal heartbeat before performing an abortion. *Id.* § 4(1). If an unborn child has a fetal heartbeat, abortion is prohibited unless there is a medical emergency or the patient's pregnancy resulted from sexual assault or incest. *Id.* § 4(2), (3). In addition, the Act imposes record-keeping obligations on physicians performing abortions. *Id.* § 5. In relevant part, the Act requires physicians performing an abortion under the Act's sexual-assault or incest exceptions to "certify in writing . . . that the physician complied with all the duties of a health care provider required by" Nebraska's health provider law-enforcement reporting statute. *Id.* § 5(2) (citing Neb. Rev. Stat. § 28-902). The Act subjects violators to professional discipline by providing that violations constitute "unprofessional conduct." *Id.* §§ 7-13.

While the Act would amend the Nebraska Uniform Credentialing Act, separate abortion statutes in the Nebraska Criminal Code also apply to physicians performing abortions. Section 28-336 provides that "[t]he performing of an abortion by using anything other than accepted medical procedures is a Class IV felony." Two statutes prohibit abortion based on the unborn child's stage of development. Section 28-329 provides that "[n]o abortion shall be performed after the time at which, in the sound medical judgment of the attending physician, the unborn child clearly appears to have reached viability" See *also* Neb. Rev. Stat. § 28-332 (making "[t]he intentional and knowing violation" of Neb. Rev. Stat. § 28-329 a Class IV felony). Section 28-3,106 bars the abortion of an unborn child having a "probable postfertilization age of . . . twenty or more weeks." See *also* Neb. Rev. Stat. § 28-3,108 (making "intentional[]" or "reckless[]" violations of Neb. Rev. Stat. § 28-3,106 a Class IV felony). Exceptions apply to both the post-viability and twenty-week bans. See Neb. Rev. Stat. §§ 28-329; 28-3,106. The Act does not amend these statutes or any other provision in the Nebraska Criminal Code.

ANALYSIS

I. **Violations of the Act Would Not Become Crimes Under Neb. Rev. Stat. § 28-336**

We conclude that physicians violating the Act would not violate Neb. Rev. Stat. § 28-336. As explained, the Nebraska Criminal Code contains separate statutes criminalizing the performance of abortions through certain medical procedures (§ 28-336) and upon certain unborn children (§§ 28-329, 28-3,106). The medical-procedures statute's proscription against "[t]he performing of an abortion by using anything other than accepted medical procedures" turns on the type of abortion procedure used and whether that procedure is "accepted." Neb. Rev. Stat. § 28-336. The Act would force physicians to take certain steps before an abortion is performed, LB 626, § 4(1), and prohibits the abortion of certain unborn children having fetal heartbeats, *id.* § 4(2). But the Act does not change which procedures physicians may use to perform an abortion.

Subsections 4(1) and (2)(a) of the Act create procedural prerequisites to an abortion. The physician must “[e]stimate the gestational age of the unborn child,” “[p]erform an ultrasound in accordance with standard medical procedure to determine if a fetal heartbeat is present,” and make certain records. *Id.* § 4(1). A physician’s failure to perform these procedures does not implicate the medical-procedures statute because the failure to estimate gestational age or perform an ultrasound is not “[t]he performing of an abortion.” Neb. Rev. Stat. § 28-336. As used in the medical-procedures statute, “[a]bortion means the use or prescription of any instrument, medicine, drug, or other substance or device intentionally to terminate the pregnancy of a woman known to be pregnant” Neb. Rev. Stat. § 28-326(1). Failing to estimate a gestational age or to perform an ultrasound does not “terminate the pregnancy of a woman.” *Id.* Instead, those procedures or their omission occur independently of “[t]he performing of an abortion.” Neb. Rev. Stat. § 28-336. Thus, violations of Subsection 4(1) and (2)(a) of the Act would not violate the medical-procedures statute.

Next, nothing in Subsections 4(2)(b) or (3) changes which procedures may be used to perform an abortion. Subsections 4(2)(b) and (3) prohibit abortions of unborn children having fetal heartbeats unless there is a medical emergency or the pregnancy resulted from sexual assault or incest. Violations depend on the unborn child’s stage of development, the pregnant woman’s health, and the circumstances surrounding the conception of the unborn child. By contrast, violations of the medical-procedures statute depend on the type of “medical procedure[.]” “us[ed].” Neb. Rev. Stat. § 28-336. Nothing in the Act expands or limits the categories of “medical procedures” that are “accepted.” *Id.* Thus, these subsections also do not affect which “medical procedures” for “[t]he performing of an abortion” are not “accepted” under the medical-procedures statute.

Nor do Sections 7 through 12 of the Act, which add disciplinary sanctions for violations of the Act, change this conclusion. Under existing law, physicians may face discipline for any “[u]nprofessional conduct.” Neb. Rev. Stat. § 38-178(24). That term broadly includes “any departure from or failure to conform to the standards of acceptable and prevailing practice of a profession or the ethics of the profession . . . or conduct that is likely to deceive or defraud the public or is detrimental to the public interest.” Neb. Rev. Stat. § 38-179; *accord* Neb. Rev. Stat. § 38-2021. The statute enumerates multiple categories of conduct included within the term like cheating on a credentialing exam. Neb. Rev. Stat. § 38-179. The Act provides for professional discipline by adding violations of the Act to the list of enumerated categories of unprofessional conduct. See LB 626, §§ 8, 12; *see also id.* § 7. Separately, Sections 10 and 11 of the Act mandate license revocation if a “licensee perform[s] or induce[s] an unlawful abortion in violation of section 4” of the Act. *See also id.* § 9.

The Act’s amendments to these statutes do not bring violations of the Act within the medical-procedures statute. The licensing statutes amended by the Act forbid a range of conduct not included within the medical-procedures statute’s prohibition of “[t]he performing of an abortion by using anything other than accepted medical procedures.” Neb. Rev. Stat. § 28-336. A physician can “depart[.] from . . . the standards of acceptable

and prevailing practice” of his profession or cheat on a credentialing exam without violating the medical-procedures statute. See Neb. Rev. Stat. § 38-179(4). Thus, the Act’s inclusion of Nebraska Heartbeat Act violations alongside credentialing exam cheating and other categories of unprofessional conduct does not automatically bring that conduct within the medical-procedures statute. To the extent that the licensing statutes and medical-procedures statute forbid the same conduct, that conduct is “[t]he performing of an abortion by using anything other than accepted medical procedures.” Neb. Rev. Stat. § 28-336. But as explained, because the Act does not change which abortion “medical procedures” are “accepted,” a physician would not violate the medical-procedures statute through a violation of the Act.

Our conclusion that the Act would not change which procedures violate the medical-procedures statute is reinforced by the fact that separate criminal statutes prohibit abortions based on the unborn child’s stage of development. As explained above, § 28-329 prohibits abortions of unborn children who “have reached viability,” and § 28-3,106 prohibits abortions of unborn children having a “probable postfertilization age of . . . twenty or more weeks.” Reading the Act and the medical-procedures statute together to criminalize abortions performed on unborn children having fetal heartbeats would render both §§ 28-329 and 28-3,106 superfluous. All viable unborn children have fetal heartbeats, and fetal heartbeats become detectable weeks before unborn children reach a 20-week post-fertilization age. See *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 772 (8th Cir. 2015) (“[F]etal heartbeats are detectable at about 6 weeks.”). “[C]ourt[s] must attempt to give effect to all parts of a statute[.]” *Johnson v. City of Fremont*, 287 Neb. 960, 967, 845 N.W.2d 279, 286 (2014). “If a provision is susceptible of (1) a meaning that gives it an effect already achieved by another provision, or that deprives another provision of all independent effect, and (2) another meaning that leaves both provisions with some independent operation, the latter should be preferred.” ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 176 (2012). If enacted, the Act would not be read to “deprive[]” the viability and 20-week statutes “of all independent effect.” *Id.* The Act would have amended §§ 28-329 and 28-3,106 had it intended to add criminal penalties to the conduct it forbids. It does not change how the medical-procedures statute is applied.

II. The Act Would Not Require Physicians to File Law-Enforcement Reports Before Performing Abortions

We also conclude that physicians performing abortions under the Act’s sexual-assault exception may satisfy their law-enforcement reporting requirements before or after performing an abortion. Section 5(2) of the Act provides that “[i]f the physician performs or induces an abortion in the case of sexual assault or incest pursuant to subdivision (3)(b) or (c) of section 4 of this act, the physician shall certify in writing that the abortion was performed because of sexual assault or incest and that the physician complied with all the duties of a health care provider required by section 28-902 that are applicable to that case.” Section 28-902 requires health care providers to “immediately report to law enforcement” cases involving “physical injury which appear[] to have been

received” because of the commission of a crime unless the patient is the victim of sexual assault and was 18 years of age or older at the time of the crime. Neb. Rev. Stat. § 28-902(1), (2). If the exception applies, the victim must consent before the provider can report the crime. *Id.* § 28-902(2)(b). Section 28-902(3) requires providers to “provide law enforcement with a sexual assault evidence collection kit if one has been obtained.”

Nothing in the Act requires a physician to satisfy their law-enforcement reporting requirements or certify compliance with § 28-902 before performing an abortion. The Act makes clear that certification occurs after the abortion has been performed by using the past tense in describing the performance of the abortion. LB 626, § 5(2) (“[T]he physician shall certify . . . that the abortion *was performed* . . .”). To be sure, the law-enforcement reporting statute requires the filing of a report “immediately.” Neb. Rev. Stat. § 28-902(1). However, “courts generally hold that the word ‘immediately’ does not mean instantly” and instead “is to be construed as meaning within a reasonable time having regard to all the circumstances.” *Chapin v. Ocean Accident & Guarantee Corp.*, 96 Neb. 213, 216, 147 N.W. 465, 467 (1914). In the context of an abortion, the circumstances permit physicians to submit reports to law enforcement before or after the abortion is performed. Thus, if enacted, the Act would not require physicians to file law-enforcement reports before performing an abortion.*

CONCLUSION

As explained above, we conclude that violations of the Act would not become crimes under the medical-procedures statute because the Act does not change which abortion “medical procedures” are “accepted.” Neb. Rev. Stat. § 28-336. We also do not read the Act to require a physician to file a law-enforcement report before performing an abortion for a victim of sexual assault. The law-enforcement reporting requirement may be satisfied before or after an abortion is performed.

Sincerely,

MIKE HILGERS
Attorney General



Eric J. Hamilton
Solicitor General

* Though your letter does not ask whether a physician performing an abortion for a victim of incest must submit a law-enforcement report before performing an abortion, see LB 626, § 4(3)(c), we conclude for the same reasons that a report may be filed before or after an abortion is performed in cases of incest.

Senator Albrecht
Page 6

Approved by:

A handwritten signature in blue ink, appearing to read "L. H. H. H.", written over a horizontal line.

Attorney General

pc Brandon Metzler
Clerk of the Nebraska Legislature