AP Seminar | Activity 0924 | Name:
Dr. Paul L. Bailey | Friday, September 24, 2021

Supreme Court Gets It Right on Texas Abortion Law

Editors of the National Review
September 2, 2021

Just before midnight, the Supreme Court, over the incoherent objections of four dissenting justices, denied the request by Texas abortion providers for emergency relief against the Texas Heartbeat Act. The compelling procedural grounds on which five justices — Clarence Thomas, Samuel Alito, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett — ruled have no direct bearing on the substantive question whether the Court will overturn Roe v. Wade and Planned Parenthood v. Casey in next term's blockbuster abortion case, Dobbs v. Jackson Women's Health Organization. But the clarity, courage, and commitment to the rule of law that the five justices demonstrated in the midst of intense fury from the Left — and in the face of an exasperating cop-out by Chief Justice Roberts — are heartening indeed.

Enacted in May, the Texas Heartbeat Act, also known as S.B. No. 8, prohibits a physician from performing an abortion (other than in a medical emergency) "if the physician detected a fetal heartbeat for the unborn child." The fetal heartbeat is usually detectable at six weeks of gestation. The Act specifies an effective date of September 1.

In an ingenious effort to prevent abortion providers from blocking the Act from taking effect, the Act prohibits state officials from enforcing the Act in any way. It instead authorizes any private person to bring a civil action in state court against anyone who performs a post-heartbeat abortion or who knowingly aids or abets a post-heartbeat abortion. (Federal restrictions on standing — on who can sue — in federal court do not apply in state court.) It entitles successful plaintiffs to at least $10,000 in damages for each violation as well as to injunctive relief and attorney's fees.

Because state officials are barred from enforcing the Act, the usual path that abortion providers would take to prevent the Act from becoming effective — suing those officials to prevent them from enforcing the Act — is a dead end. Instead, abortion providers would be able to challenge the constitutionality of the Act only if and when private individuals pursued civil actions against them. (And they'd have to confront the widely overlooked fact that the Act itself explicitly confers on abortion providers an "affirmative defense to liability" in the event they demonstrate that a lawsuit brought under the Act "impose[s] an undue burden.")

In mid July, nearly two months after enactment of the Act, various abortion providers sued eight defendants in federal court: the Texas attorney general and four other state officials, a state district-court judge and a district-court clerk from Smith County (one of 254 counties in Texas), and a pro-life activist. But their lawsuit faced overwhelming jurisdictional hurdles. Among other things, none of the defendants was threatening to enforce the Act against them (so how was there even a live controversy?), and all seven of the governmental defendants had strong claims to sovereign immunity.

To make a long story short, when federal district judge Robert L. Pitman last week ruled against the governmental defendants' sovereign-immunity claims, the governmental defendants exercised their right to immediately appeal the ruling against them to the Fifth Circuit. Pitman then realized that he had lost authority to proceed against the government defendants and had to cancel the preliminary-injunction hearing against them. (The Left viciously faults a Fifth Circuit panel of conservative judges for the cancellation that Obama appointee Pitman had ordered.) The abortion providers suddenly found that they had dug themselves into a deep ditch: The September 1 effective date was fast approaching, and they had indefinitely sidetracked their own effort to obtain a preliminary injunction.

On August 30, the abortion providers made a desperate request to the Supreme Court to block the Act from taking effect. Set aside that they had waited two-and-a-half months to file their preliminary-injunction motion with Pitman. Set aside that they were asking the Court to rule on a set of issues that neither Pitman nor the Fifth Circuit panel had yet addressed. What's even more remarkable is that because Pitman had never ruled on their request to certify statewide defendant classes of judges and clerks, injunctive relief against the only eight defendants in the case wouldn't remotely prevent the injury the abortion providers allege they faced.

The Supreme Court majority saw clearly through the huge holes in the emergency application. There was no reason to address the substantive question whether the Act is consistent with Roe and Casey because the abortion providers had failed to meet their burden on the "complex and antecedent procedural questions" that their request presented. The Court has the power to "enjoin individuals tasked with enforcing laws, not the laws themselves," and the abortion providers hadn't shown that any of the defendants should be enjoined from doing anything.

The ruling should have been unanimous, as the patent weakness of the four dissents shows. Chief Justice Roberts, a sometime champion of jurisdictional limits on the federal judiciary, agrees that "existing doctrines [might] preclude judicial intervention," but he somehow imagines that the Court can intervene temporarily in order to enable the lower courts to figure out whether they can intervene permanently. Like the other dissenters, he doesn't hold the abortion

providers to the burden of proving their entitlement to relief. Nor do any of the dissenters, amidst their sound and fury, undertake to explain what relief they would order against which defendants in a way that would somehow prevent the millions of nonparty individuals from enforcing the Act in hundreds of Texas courts. Breyer, for example, posits that "it should prove possible to apply procedures adequate to that task here," but his idle speculation about possible alternatives never confronts the reality that those alternatives aren't available with respect to the only eight defendants in the case.

The private-enforcement mechanism in the Act is a brilliant response to the traps for pro-life legislation that Roe and Casey have illegitimately set. There are good reasons to question whether that mechanism is a desirable feature of a model abortion law. The right time to address that question is after Roe and Casey have been overturned. Let's hope that the chief justice shows much sounder judgment on that question in Dobbs and joins with the five members of today's majority to restore the people's constitutional power to enact strong legislative protections for unborn children.

Problem 1. Read this passage, and then respond to the following three questions.

(1) Identify the author's argument, main idea, or thesis. (3 points)
(2) Explain the author's line of reasoning by identifying the claims used to build the argument and the connections between them. (6 points)
(3) Evaluate the effectiveness of the evidence the author uses to support the claims made in the argument. (6 points)