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March 12, 2015

ATTORNEY GENERAL OPINION NO. 2015- 5

The Honorable Randy Garber
State Representative, 62nd District
State Capitol, Room 166-W
300 S.W. 10th Avenue
Topeka, Kansas 66612

Re: Crimes and Punishments—Crimes Against Persons—Application of
Certain Crimes to an Unborn Child

State Departments; Public Officers and Employees—Attorney General—
Duties and Responsibilities; Authority to Prosecute and Defend

Constitution of the State of Kansas—Bill of Rights—Equal Rights

Synopsis: K.S.A. 2014 Supp. 21-5419(b) does not violate Section 1 of the Kansas
Bill of Rights. Unless a statute is clearly unconstitutional, the Attorney
General is required to defend the statute. Cited herein: K.S.A. 2014
Supp. 21-5419; K.S.A. 54-106; K.S.A. 2014 Supp. 75-702; Kan. Const.,
Bill of Rights, § 1.

* * *

Dear Representative Garber:

As State Representative for the 62nd District, you ask our opinion on two questions
related to the interaction between and among Section 1 of the Kansas Bill of Rights,
K.S.A. 2014 Supp. 21-5419(b),¹ and K.S.A. 2014 Supp. 75-702. The pertinent parts of
those three provisions are set forth below, respectively:

¹ K.S.A. 2014 Supp. 21-5419, known as Alexa's Law, applies certain crimes to an unborn child by defining
"person" and "human being" to also mean an unborn child in the enumerated crimes.

Bill of Rights. Section 1: “All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.”

K.S.A. 2014 Supp. 21-5419(b): “This section [Alexa’s Law] shall not apply to: (1) Any act committed by the mother of the unborn child; (2) any medical procedure, including abortion, performed by a physician or other licensed medical professional at the request of the pregnant woman or her legal guardian; or (3) the lawful dispensation or administration of lawfully prescribed medication.”

K.S.A. 2014 Supp. 75-702: “The attorney general shall appear for the state, and prosecute and defend any and all actions and proceedings, civil or criminal, in the Kansas supreme court, the Kansas court of appeals and in all federal courts, in which the state shall be interested or a party, and shall, when so appearing, control the state’s prosecution or defense. . . .”

Your first question is:

“Based on Section 1 of the Kansas Bill of Rights and the Kansas courts [sic] interpretation of the Kansas Bill of Rights, is sub section (b) of KSA 21-5419 constitutional?” [sic]

We are unaware of any Kansas court decisions that have interpreted Section 1 of the Kansas Bill of Rights in a manner that would suggest that K.S.A. 2014 Supp. 21-5419(b) might be unconstitutional. In general, the Legislature may be restricted by the Constitution in what conduct it may make criminal, or in how it may go about doing so,² but we are aware of no authority holding that Section 1 of the Kansas Bill of Rights *compels* the Legislature to make criminal any particular conduct. We are unaware of any court decision interpreting Section 1 of the Kansas Bill of Rights to impose a duty on the Legislature to enact statutes that subject any particular conduct to criminal sanctions and do not believe such a case exists because “[t]he Legislature alone has the authority to define crimes and prescribe punishments.”³

We also would note that when confronted with equal protection challenges to statutes similar to Alexa’s Law, courts in other states have held that equal protection principles are not offended by similar statutory exceptions to criminal liability for the mother of the unborn child.⁴

² See, e.g., *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 894 (2008) (statutes that offend constitutional rights may be stricken).

³ *State v. Todd*, 299 Kan. 263, 276, cert. denied, 135 S.Ct. 460 (2014).

⁴ See, e.g., *State v. Alfieri*, 724 N.E.2d 477, 482 (Ohio Ct.App. 1998) (for equal protection purposes, a criminal defendant who assaults a pregnant woman, causing the death of the unborn child she is carrying, is not similarly situated to a pregnant woman who elects to have her pregnancy terminated by one legally authorized to perform the act); *State v. Benson*, 822 N.W.2d 484, 488 (Wisc.Ct.App. 2012) (where the defendant is not similarly situated to the pregnant woman, there is no equal protection violation from the application of a statute which criminalizes a third-party’s acts against an unborn child but does not

We also considered whether similar provisions in the federal Constitution had been interpreted in a manner that might by analogy be imputed to Section 1 of the Kansas Bill of Rights. Section 1 of the Kansas Bill of Rights sometimes has been interpreted by Kansas courts as imposing due process and equal protection requirements similar to, though not identical to, those of the Fourteenth Amendment to the United States Constitution.⁵ We are aware of no judicial authority holding that the Fourteenth Amendment compels a state to prohibit, under threat of criminal sanction, the conduct described in K.S.A. 2014 Supp. 21-5419(b) or prohibits on equal protection grounds such a state enactment.⁶

The Kansas Supreme Court has clearly stated its approach to considering legal challenges to the constitutionality of Kansas statutes:

Courts are only concerned with the legislative power to enact statutes, not with the wisdom behind those enactments. Our standard of review is well known. When a statute's constitutionality is attacked, the statute is presumed constitutional and all doubts must be resolved in favor of its validity. If there is any reasonable way to construe that statute as constitutionally valid, this court has the authority and duty to do so.⁷

Consequently, we find no legal basis to conclude that K.S.A. 2014 Supp. 21-5419(b) violates Section 1 of the Kansas Bill of Rights. We think a Kansas court would find the Legislature had power to enact that statutory provision.

Your other question is:

“Based on Section 75-702: Duties and responsibilities; authority to prosecute, and your strongly held commitment to stand up for those who can’t stand up for themselves, is the Kansas Attorney General responsible to begin proceedings in the courts to clarify the constitutionality of sub section (b) of KSA 21-5419 above?” [sic]

criminalize the acts of the mother of the unborn child.); *Commonwealth v. Bullock*, 913 A.2d 207, 215-16 (Pa. 2006) (maternal exception in Pennsylvania statute that was “plainly aimed at protecting fetal growth and development from unlawful interference” satisfies rational basis scrutiny).

⁵ See, e.g., *Henry v. Bauder*, 213 Kan. 751, 752-53 (1974) (“The equal protection clause of the Fourteenth Amendment to the United States Constitution finds its counterpart in Sections 1 and 2 of the Bill of Rights of the Kansas Constitution which declares in substance that ‘all men are possessed of equal and inalienable natural rights, among which are life, liberty and the pursuit of happiness,’ and that ‘all free governments . . . are instituted for the equal protection and benefit (of the people).’ While these two provisions of our Bill of Rights declare a political truth, they are given much the same effect as the clauses of the Fourteenth Amendment relating to due process and equal protection of the law.”).

⁶ There is, however, federal case law holding that the United States Constitution *restricts* the power of states to criminalize certain conduct within the scope of K.S.A. 2014 Supp. 21-5419(b). See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (*due process clause of the Fourteenth Amendment restricts state action*); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

⁷ *Miller v. Johnson*, 295 Kan. 636, 646-47 (2012) (internal quotation marks and citations omitted).

As a general matter, one task of the Kansas Attorney General is to defend the laws properly enacted by the Legislature against legal challenges brought against them.⁸ The laws enacted by the Legislature are presumed to be constitutional.⁹ It is possible that in rare situations a statute might be so plainly in violation of the Kansas Constitution, federal law, or the United States Constitution that the Attorney General would have a duty to uphold those higher legal authorities in conflict with Kansas statute; however, for the reasons set forth in our response to your first question, the Legislature's enactment in K.S.A. 2014 Supp. 21-5419(b) does not present one of those rare situations. Therefore, the presumed responsibility of the Attorney General under K.S.A. 2014 Supp. 75-702 would be to defend the constitutionality of the Legislature's enactment in K.S.A. 2014 Supp. 21-5419(b) if ever it were attacked, not to initiate such an attack upon a duly enacted Kansas statute that suffers from no clearly apparent constitutional infirmity. Indeed, this office has successfully defended, and continues to defend, the overall constitutionality of Alexa's Law against legal attack by criminal defendants who have been, or are being, prosecuted under its provisions.¹⁰

Sincerely,

Derek Schmidt
Kansas Attorney General

Athena E. Andaya
Deputy Attorney General

DS:AA:sb

⁸ K.S.A. 2014 Supp. 75-702; See, e.g., K.S.A. 54-106 (prescribing oath of office of the attorney general).

⁹ *Boatright v. Kansas Racing Commission*, 251 Kan. 240, 243 (1992) ("It is axiomatic that a statute is presumed constitutional and all doubts must be resolved in favor of its validity. If there is any reasonable way to construe a statute as constitutionally valid, the court must do so. A statute must clearly violate the constitution before it may be struck down."); *State v. Miller*, 297 Kan. 516, 519 (2013).

¹⁰ See *State v. Bollig*, 14-CR-15 (District Court of Trego County, Kansas, filed February 25, 2014).