

ORIGINAL



2023 OK 24
IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

OKLAHOMA CALL FOR REPRODUCTIVE)
JUSTICE, on behalf of itself and its members;)
TULSA WOMEN'S REPRODUCTIVE CLINIC,)
LLC, on behalf of itself, its physicians, its staff, and)
its patients; ALAN BRAID, M.D., on behalf of)
himself and his patients; COMPREHENSIVE)
HEALTH OF PLANNED PARENTHOOD GREAT)
PLAINS, INC., on behalf of itself, its physicians, its)
staff, and its patients; and PLANNED)
PARENTHOOD OF ARKANSAS & EASTERN)
OKLAHOMA, on behalf of itself, its physicians, its)
staff, and its patients,)

Petitioners,)

v.)

GENTNER DRUMMOND, in his official capacity as)
Attorney General for the State of Oklahoma; VICKI)
BEHENNA, in her official capacity as District Attorney)
for Oklahoma County; STEVE KUNZWEILER, in)
his official capacity as District Attorney for Tulsa)
County; LYLE KELSEY, in his official capacity as)
Executive Director of the Oklahoma State Board of)
Medical Licensure and Supervision; BRET S.)
LANGERMAN, in his official capacity as President)
of the Oklahoma State Board of Osteopathic)
Examiners; KEITH REED, in his official capacity as)
the Commissioner of the Oklahoma State Board of)
Health,)

Respondents.)

FILED
SUPREME COURT
STATE OF OKLAHOMA

MAR 21 2023

JOHN D. HADDEN
CLERK

Case No. 120,543

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PUBLICATION

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**APPLICATION TO ASSUME ORIGINAL JURISDICTION FOR
DECLARATORY AND INJUNCTIVE RELIEF AND/OR A WRIT OF
PROHIBITION**

¶0 The Petitioners filed an application to assume original jurisdiction seeking declaratory relief and to enjoin enforcement of two laws which criminalize abortion. They assert the laws are unconstitutional and the Oklahoma Constitution protects a woman's right to terminate a pregnancy. We hold there is a limited right to terminate a pregnancy that is protected by the Oklahoma Constitution. We assume original jurisdiction, grant declaratory relief in part and deny injunctive relief and writ of prohibition.

**ORIGINAL JURISDICTION ASSUMED; DECLARATORY RELIEF
GRANTED IN PART; INJUNCTIVE RELIEF AND WRIT OF
PROHIBITION DENIED**

Kelley Bodell, Barnum & Clinton, Norman, Oklahoma for Petitioners

Linda Cecilia Goldstein, Meghan Ann Agostinelli, Dechert LLP, New York, New York for Petitioners Oklahoma Call for Reproductive Justice, Tulsa Women's Reproductive Clinic, LLC, and Alan Braid, M.D.

Jerome A. Hoffman and Rachel Maura Rosenberg, Dechert LLP, Philadelphia, Pennsylvania for Petitioners Oklahoma Call for Reproductive Justice, Tulsa Women's Reproductive Clinic, LLC, and Alan Braid, M.D.

Jonathan S. Tam, Dechert LLP, San Francisco, California for Petitioners Oklahoma Call for Reproductive Justice, Tulsa Women's Reproductive Clinic, LLC, and Alan Braid, M.D.

Rabbia Claire Muqaddam, Center for Reproductive Rights, New York, New York for Petitioners Oklahoma Call for Reproductive Justice, Tulsa Women's Reproductive Clinic, LLC, and Alan Braid, M.D.

Diana Olga Salgado, Planned Parenthood Federation of America, Washington, D.C. for Petitioners Comprehensive Health of Planned Parenthood Great Plains, Inc. and Planned Parenthood of Arkansas & Eastern Oklahoma

Camila Vega, Planned Parenthood Federation of America, New York, New York
for Petitioners Comprehensive Health of Planned Parenthood Great Plains, Inc. and
Planned Parenthood of Arkansas & Eastern Oklahoma

Zach West, Solicitor General, and Audrey A. Weaver, Assistant Solicitor General,
Office of Attorney General, State of Oklahoma, Oklahoma City, Oklahoma for
Respondents

PER CURIAM:

¶1 The Petitioners consist of healthcare providers, Tulsa Women's Reproductive Clinic, LLC, Alan Braid, M.D., Comprehensive Health of Planned Parenthood Great Plains, Inc., Planned Parenthood of Arkansas & Eastern Oklahoma and an advocacy group, the Oklahoma Call for Reproductive Justice. The Respondents consist of the Attorney General of the State of Oklahoma, the district attorneys of Oklahoma and Tulsa counties, and the heads of various Oklahoma medical agencies.¹ The Petitioners filed this original proceeding asking this Court to assume original jurisdiction and grant declaratory relief concerning the constitutionality of two statutes, 21 O.S. 2021, § 861² and 63 O.S. Supp. 2022, § 1-

¹ The names of the Attorney General of Oklahoma, District Attorney of Oklahoma County and President of the Oklahoma State Board of Osteopathic Examiners have been updated to reflect the current persons serving in those positions. 12 O.S. 2021, § 2025 (D).

² 21 O.S. 2021, § 861:

Every person who administers to any woman, or who prescribes for any woman, or advises or procures any woman to take any medicine, drug or substance, or uses or employs any instrument, or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life shall be guilty of a felony punishable by imprisonment in the State Penitentiary for not less than two (2) years nor more than five (5) years.

731.4³, which criminalize performance of certain abortions. They request this Court either issue an injunction preventing the enforcement of these statutes or, alternatively, issue a writ of prohibition preventing the Respondents from enforcing these statutes. The Petitioners allege the two statutes violate inherent rights and substantive due process rights guaranteed by sections 2⁴ and 7⁵ of article II of the

³ 63 O.S. Supp. 2022, § 1-731.4:

A. As used in this section:

1. The terms “abortion” and “unborn child” shall have the same meaning as provided by Section 1-730 of Title 63 of the Oklahoma Statutes; and

2. “Medical emergency” means a condition which cannot be remedied by delivery of the child in which an abortion is necessary to preserve the life of a pregnant woman whose life is endangered by a physical disorder, physical illness or physical injury including a life-endangering physical condition caused by or arising from the pregnancy itself.

B. 1. Notwithstanding any other provision of law, a person shall not purposely perform or attempt to perform an abortion except to save the life of a pregnant woman in a medical emergency.

2. A person convicted of performing or attempting to perform an abortion shall be guilty of a felony punishable by a fine not to exceed One Hundred Thousand Dollars (\$100,000.00), or by confinement in the custody of the Department of Corrections for a term not to exceed ten (10) years, or by such fine and imprisonment.

3. This section does not:

a. authorize the charging or conviction of a woman with any criminal offense in the death of her own unborn child, or

b. prohibit the sale, use, prescription or administration of a contraceptive measure, drug or chemical if the contraceptive measure, drug or chemical is administered before the time when a pregnancy could be determined through conventional medical testing and if the contraceptive measure, drug or chemical is sold, used, prescribed or administered in accordance with manufacturer instructions.

4. It is an affirmative defense to prosecution under this section if a licensed physician provides medical treatment to a pregnant woman which results in the accidental or unintentional injury or death to the unborn child.

⁴ Okla. Const. art. 2, § 2:

All persons have the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry.

⁵ Okla. Const. art. 2, § 7:

Oklahoma Constitution. The gravamen of their argument is, following the recent decision of the United States Supreme Court in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), wherein the Court held there was no constitutional right to an abortion in the United States Constitution, that the Oklahoma Constitution provides an independent right to terminate a pregnancy and that right is unaffected by the *Dobbs* opinion. In addition, the Petitioners allege the statutes are unconstitutionally vague and that § 861 was repealed by implication by § 1-731.4.

¶2 This Court has discretion in determining whether to assume jurisdiction over a controversy in which both this Court and the district courts have concurrent jurisdiction. *Edmondson v. Pearce*, 2004 OK 23, ¶10, 91 P.3d 605, 613. Two themes run through most cases where original jurisdiction has been assumed: 1) the matter concerns the public interest, i.e., the case is *publici juris* in nature; and 2) there must be some urgency or pressing need for an early decision. *Id.* ¶11, 91 P.3d at 613. Here there is no question whether the matter is *publici juris* in nature, dealing as it does with laws that affect the right of a woman to terminate a pregnancy. We also believe there is a pressing need to rule on this matter as soon as possible due to the many challenges to laws which affect abortion following the recent *Dobbs* opinion and their effects on the people of this state. The Oklahoma Constitution

No person shall be deprived of life, liberty, or property, without due process of law.

gives the Supreme Court the authority to determine jurisdiction and such determination is final. Okla. Const. art. 7, § 4.⁶ Original jurisdiction is assumed.⁷

⁶ One dissent implies that there is concurrent jurisdiction between this Court and the Court of Criminal Appeals in deciding the constitutionality of the two criminal statutes at issue in this matter, arguing a potential conflict would arise if a later challenge is presented to the Court of Criminal Appeals. The Oklahoma Constitution makes abundantly clear that in any jurisdictional conflict, the Supreme Court's determination of jurisdiction is final. Okla. Const. art. 7, § 4.

⁷ The Respondents admit that the Petitioners' have properly presented to this Court the question of whether there exists a right to an abortion under the Oklahoma Constitution. However, they challenge this Court's jurisdiction to address the Petitioners' arguments concerning unconstitutional vagueness of the two challenged criminal statutes and implied repeal of 21 O.S. § 861. They assert the interpretation of these issues is within the sole authority of the Oklahoma Court of Criminal Appeals (OCCA).

The Respondents rely upon our precedent wherein we have found deference to the decisions of the Oklahoma Court of Criminal Appeals in matters relating to its construction of criminal statutes and whether they violate the Oklahoma Constitution. In *Ikard v. Russell*, a relator was charged with nepotism under a statute that defined the term as well as provided criminal misdemeanor punishment and forfeit of office for a violation of the statute. 1912 OK 425, 124 P. 1092. The relator filed a writ of prohibition in this Court challenging the district court's jurisdiction based upon a previous decision of this Court. We denied the writ and noted since our previous decision the OCCA had handed down a decision on point which was contrary in its conclusion to our earlier opinion. We determined "[i]t is settled policy of the Supreme Court to follow the construction given to criminal statutes by the Criminal Court of Appeals, since the enforcement of such statutes must be in accordance with such construction." *Id.* ¶1, 124 P. at 1093. The wisdom behind this policy was to avoid a situation where the OCCA would adhere to its construction while this Court adhered to its previous construction, thus allowing an important class of criminal offenses to go unpunished. *Id.* ¶3, 124 P. at 1093.

In *Ex parte Meek*, 1933 OK 473, ¶9, 25 P.2d 54, 55, this Court held:

This court is the supreme judicial court of the state of Oklahoma in all civil matters, passing by as not material to this discussion the relative rank of the state Senate when it is sitting as a court of impeachment. Our construction of legislation as being constitutional or otherwise judged by our own Constitution is supreme and final. It is possible that in the execution of the law complained of, or a similar law, i. e., one that is civil in its general purposes as distinguished from one that is criminal, but which might carry provisions making nonobservance or a violation of its provisions a crime and specifying the punishment therefor, that the construction of the portions thereof relating to the crime and its punishment by the Criminal Court of Appeals might differ from the construction of the law as generally construed by this court from a civil standpoint. But if we hold an act generally to be repugnant to our Constitution, such a construction would be paramount and the law of the state of Oklahoma, even though it might be in conflict with the construction of the Criminal Court of Appeals.

Here, the matter before us is not a criminal case. The challenges to vagueness and repeal by implication are specifically related to the two statutes challenged in this matter. The Respondents have cited no opinion of the OCCA deciding whether 21 O.S. § 861 or 63 O.S. § 1-731.4 are unconstitutionally vague or that 21 O.S. § 861 has been repealed by implication. Further, Respondents note that the Petitioners have properly raised in this Court the question of the constitutionality of these statutes concerning a right to an abortion. That issue addresses the constitutionality of 21 O.S. § 861 and 63 O.S. § 1-731.4. It is unclear how they would believe one constitutional challenge should be brought to this Court yet another challenge, on the same statutes, should be brought to the OCCA in the same controversy. If we were to agree, we would potentially end up with the very situation that we avoided in *Russell*.

I. ANALYSIS

A. The Oklahoma Constitution protects a limited right to an abortion

¶3 The Petitioners claim the two statutes, which outlaw most abortions, restrict a woman's right to have control over her own body and to make decisions concerning reproduction in violation of the Oklahoma Constitution. Therefore, we must first determine whether the Oklahoma Constitution provides a right, or at least some right, to terminate a pregnancy and if so what is the appropriate standard for determining when a state regulation violates that right.

¶4 The Petitioners assert a woman's right to terminate a pregnancy is protected by article II, section 7 of the Oklahoma Constitution (the state due process section), and article II, section 2 of the Oklahoma Constitution (inherent rights). Article II, section 7 of the Oklahoma Constitution provides:

No person shall be deprived of life, liberty, or property, without due process of law.

Until recently, the U.S. Constitution's Due Process Clause of the Fourteenth Amendment had been the basis for a national right to terminate a woman's pregnancy before viability of the fetus.⁸ A woman's federal constitutional right to

⁸ Our state due process section is nearly identical to the Due Process Clause found in the Fourteenth Amendment of the U.S. Constitution, which provides:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law.

terminate her pregnancy was found to exist by the U.S. Supreme Court in 1973. In *Roe v. Wade*, 410 U.S. 113, 153 (1973) the Court held that a right of privacy founded in the Fourteenth Amendment's concept of personal liberty was broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The Court further determined that a right of personal privacy, which included the termination decision, was not unqualified and that it must be considered against important state interests in regulation. *Id.* at 154. It held that where certain fundamental rights are involved, regulations limiting such rights are only justified by a compelling state interest which must be narrowly drawn to express only the legitimate state interests at stake. *Id.* at 154-55. It held the compelling point for the state corresponded with the viability of the fetus. *Id.* at 163.

¶5 Nineteen years later, the U.S. Supreme Court revised its decision in *Roe*. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 860, 878 (1992), the Court retained the central holding in *Roe*, i.e., "that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions." *Id.* at 860. However, it found that *Roe*'s prohibition of state abortion regulation in the first trimester was unwarranted. *Id.* at 875-76. It created an "undue burden" standard to determine whether a state regulation placed an unconstitutional burden on a woman's right to terminate a pregnancy prior to the viability of the fetus. The Court

defined the undue burden test several ways in the opinion but it can best be summarized as “a statute which, while furthering the interest in potential life or some other valid state interest” is “invalid” and creates an “undue burden” if “its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.” *Id.* 876-78. It held that such “undue burden” was an “unconstitutional burden.” *Id.* at 877. The Court found that a state may enact regulations, as it can with any other medical procedure, to further the health or safety of a woman seeking an abortion. *Id.* at 878. However, “unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion [pre-viability] impose an undue burden on the right.” *Id.* at 878. The Court then reaffirmed *Roe*’s holding that “subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion **except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.**” *Id.* at 879 (quoting *Roe* at 164-65) (emphasis added).

¶6 On June 24, 2022, the U.S. Supreme Court overruled *Roe* and *Casey*. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284 (2022). After forty-nine years of respecting a woman’s right to terminate a pregnancy under the federal Due Process Clause, the U.S. Supreme Court held the federal Constitution does not grant that right. The Court found that in order for a fundamental right to be

recognized as a component of the liberty protected in the Due Process Clause such right must be deeply rooted in our Nation's history and tradition. *Id.* at 2246, 2260. It determined that was not the case based upon the fact that prior to the *Roe* decision "abortion had long been a *crime* in every single State." *Id.* at 2248. The Court explained, there was no "fundamental constitutional right to an abortion because such right had no basis in the Constitution's text or in our Nation's history." *Dobbs*, at 2283. Therefore, it determined the appropriate standard of review is a rational-basis review when state abortion regulations undergo federal constitutional challenges. *Id.* It held "[t]he Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* abrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives." *Id.* at 2284. *Dobbs* took the issue of abortion out of the U.S. Constitution and placed it squarely with the states.

¶7 Since *Roe*, this Court has followed the U.S. Supreme Court's interpretation of the federal Due Process Clause when deciding issues related to abortion. It was unnecessary for this Court to determine whether there existed an independent right to terminate a pregnancy under the Oklahoma Constitution. Although we have refrained from finding a right to terminate a pregnancy in the Oklahoma Constitution, we have never ruled such right did not exist. *See Oklahoma Coalition for Reproductive Justice v. Cline*, 2019 OK 33, ¶17, 441 P.3d at 1151. If

we adopted the *Dobbs* analysis we would have to find a right to terminate a pregnancy was deeply rooted in Oklahoma's history and tradition. *Dobbs* relied upon various state statutes that criminalized abortion to help determine whether abortion rights were deeply rooted in this nation. Even during the Oklahoma Territory there were laws outlawing certain terminations of pregnancy. *See* Okla. (Terr.) Stat. §§ 2187, 2188 (1890). Soon after statehood and the adoption of the Oklahoma Constitution these laws persisted and were recodified several times. For many years these laws have been codified in Sections 861 and 862 of title 21 of the Oklahoma Statutes. Section 862 has since been repealed but § 861 still exists. *See* 2021 Okla. Sess. Laws ch. 308, § 1, S.B. 918. Section 861 provides:

Every person who administers to any woman, or who prescribes for any woman, or advises or procures any woman to take any medicine, drug or substance, or uses or employs any instrument, or other means whatever, with intent thereby to procure the miscarriage of such woman, **unless the same is necessary to preserve her life** shall be guilty of a felony punishable by imprisonment in the State Penitentiary for not less than two (2) years nor more than five (5) years. (emphasis added).

This law has changed very little since the days of the Oklahoma Territory. In 1973, the Court of Criminal Appeals of Oklahoma declared that because of the decision in *Roe* both sections are “unconstitutional as being violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.” *Jobe v. State*, 1973 OK CR 51, ¶4, 509 P.2d 481, 482. However, enforcement of § 861 was revived by

law when *Dobbs* overruled *Roe* and *Casey*. See 2021 Okla. Sess. Laws ch. 308, § 18, S.B. 918, as amended by, 2022 Okla. Sess. Laws ch. 133, § 1, S.B. 1555.

¶8 In its finding that the various state laws did not support a history or tradition of a national right to an abortion, *Dobbs* focused on the criminal element of such statutes. However, that is only half the story in Oklahoma. As much as § 861 had always outlawed abortion it also always acknowledged a limited exception. The law in Oklahoma has long recognized a woman’s right to obtain an abortion in order to preserve her life (“unless the same is necessary to preserve her life”). Our history and tradition have therefore recognized a right to an abortion when it was necessary to preserve the life of the pregnant woman. This right can be viewed as protected by the Oklahoma due process section. It can also be viewed as a right protected under the inherent rights provided in article II, section 2 of the Oklahoma Constitution. This section provides:

All persons have the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry.⁹

It creates an “inherent right to life” as well as “liberty” and stands as the basis for protecting a pregnant woman’s right to terminate a pregnancy in order to preserve her life.

⁹ The U.S. Constitution does not contain a section identical to art. 2, § 2, Okla. Const.

¶9 We hold that the Oklahoma Constitution creates an inherent right of a pregnant woman to terminate a pregnancy when necessary to preserve her life. We would define this inherent right to mean: a woman has an inherent right to choose to terminate her pregnancy if at any point in the pregnancy, the woman's physician has determined to a reasonable degree of medical certainty or probability that the continuation of the pregnancy will endanger the woman's life due to the pregnancy itself or due to a medical condition that the woman is either currently suffering from or likely to suffer from during the pregnancy. Absolute certainty is not required, however, mere possibility or speculation is insufficient.

¶10 We make no ruling on whether the Oklahoma Constitution provides a right to an elective termination of a pregnancy, i.e., one made outside of preserving the life of the pregnant woman as we have defined herein.

¶11 We must also determine what standard should be applied when reviewing challenges to state laws affecting the inherent right to preserve the life of the pregnant woman. *Dobbs* held there was no right to an abortion under the **federal Constitution** and therefore the applicable standard to apply would be the highly deferential rational-basis test when state abortion laws were challenged under **federal law**. **Here**, we are concerned with an inherent right to terminate a pregnancy to preserve the woman's life which is protected under the **Oklahoma Constitution**. Regulations that significantly impair an inherent right must survive strict scrutiny.

See State ex rel. Oklahoma Bar Ass'n v. Porter, 1988 OK 114, ¶¶24-25, 766 P.2d 958, 967-68. The state may prevail only upon showing its subordinating interest is compelling and such interest must be narrowly tailored to avoid unnecessary abridgement of the right. *Id.* ¶24, 766 P.2d at 967-68. In *Porter* we held:

A mere showing of state interest is insufficient; the interest must be paramount, of vital importance, and the burden is on the government to show its existence. Further it is not enough to show a rational relationship between the means chosen and the end sought to be accomplished. The advance of the subordinating interest must outweigh the loss of protected rights and the government must employ means closely drawn to avoid unnecessary abridgement. If the state has open to it a less drastic method of satisfying its legitimate interest it may not validly choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.

Id. ¶25, 766 P.2d at 968.

B. The Constitutionality of the Two Statutes

¶12 Both § 861 and § 1-731.4 are statutes which criminalize the performance of certain abortions. As mentioned, § 861 provides a narrow exception if it is necessary to “preserve” the life of the woman. However, the scheme in § 1-731.4 is much more invasive to a woman’s right to terminate a pregnancy in order to preserve her life. Section 1-731.4 (A) (2) first defines a “medical emergency” as:

[A] condition which cannot be remedied by delivery of the child in which an abortion is necessary to preserve the life of a pregnant woman whose life is endangered by a physical disorder, physical illness or

physical injury including a life-endangering physical condition caused by or arising from the pregnancy itself.

Next, it provides in paragraph (B)(1):

Notwithstanding any other provision of law, a person shall not purposely perform or attempt to perform an abortion except to save the life of a pregnant woman in a medical emergency.

The language, “except to save the life of a pregnant woman in a medical emergency” is much different from “preserve her life” found in § 861. It restricts the performance of an abortion to only a pregnant woman who is “in a medical emergency” which includes that her life “is endangered.” We read this section of law to require a woman to be in actual and present danger in order for her to obtain a medically necessary abortion. We know of no other law that requires one to wait until there is an actual medical emergency in order to receive treatment when the harmful condition is known or probable to occur in the future. Requiring one to wait until there is a medical emergency would further endanger the life of the pregnant woman and does not serve a compelling state interest. We hold this section of law, 63 O.S. Supp. 2022, 1-731.4, cannot meet the test of strict scrutiny and is therefore void and unenforceable. Having found the statute to be void and unenforceable, there is no need to address Petitioners’ other constitutional challenge, i.e., the statute is unconstitutionally vague.

¶13 The Petitioners also allege § 861: 1) violates rights protected under the Oklahoma Constitution; 2) is unconstitutionally vague, due to conflicts with its

language and other enacted statutes, including § 1-731.4; and 3) was repealed by implication. For the above mentioned reasons, we do not find § 861 violates the Oklahoma Constitution as it allows the termination of a pregnancy in order to preserve the life of the pregnant woman. Again, we make no ruling on whether an elective abortion is constitutional. Nor do we find the language in § 861 itself is unconstitutionally vague. This opinion clarifies what it means to preserve the life of the pregnant woman. The Oklahoma Court of Criminal Appeals has addressed what constitutes unconstitutional vagueness:

Due process requires that a criminal statute give fair warning of the conduct which it prohibits. Specifically, the Supreme Court of the United States has held that: “The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.”

Hughes v. State, 1994 OK CR 3, ¶20, 868 P.2d 730, 735 (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954)). The Petitioners’ arguments largely rely on alleged conflicts between the language in § 861 and § 1-731.4 which they believe create unconstitutional vagueness in violation of due process. However, having determined § 1-731.4 to be void and unenforceable there is no potential conflict with § 861. Further, Petitioners allege § 861 is in conflict with two so-called civil

“vigilante” enforcement Acts.¹⁰ Neither Act is part of the challenge before us today. The two Acts are currently before this Court in another matter, *Oklahoma Call for Reproductive Justice v. State of Oklahoma*, Case No. 120, 376. We do not find that § 861 fails to unambiguously specify the activity proscribed and the penalties available upon conviction and therefore it is not unconstitutionally vague. *See United States v. Batchelder*, 442 U.S. 114, 123 (1979).

¶14 The Petitioners additionally assert that § 861 was repealed by implication by a later enacted law. Since *Jobe*, § 861 had been found to be unconstitutional only because of the United States Supreme Court decision in *Roe*. In 2021, S.B. 918 was enacted and consisted of many repealer sections. The Act had a conditional effective date that provided the entire Act would become effective when the Oklahoma Attorney General certifies that *Roe* and *Casey* had been overruled by the United States Supreme Court. The following year, S.B. 1555 (2022) amended the conditional effective date section of S.B. 918. It also repealed all but one of S.B. 918 repealer sections. The amended effective date now provides that section 1 of S.B. 918 would become effective when the attorney general certifies that *Roe* and *Casey* had been overruled by the Supreme Court “such that the State of Oklahoma may enforce Section 861 of Title 21 of the Oklahoma Statutes or enact a

¹⁰ The two Acts are H.B. 4327 (2022 Okla. Sess. Laws ch. 321) and S.B. 1503 (2022 Okla. Sess. Laws ch. 190), which both provide certain bans on abortion and each are exclusively enforced in a private civil action.

similar statute prohibiting abortion throughout pregnancy” On June 24, 2022, the attorney general made the required certification and stated “the State of Oklahoma may enforce Section 861 of Title 21 of the Oklahoma Statutes or enact a similar statute prohibiting abortion throughout pregnancy.” The Petitioners assert that the conjunction “or” in S.B. 1555 meant that any other later enacted law to criminalize abortion, i.e., 63 O.S. Supp. 2022, § 1-731.4, would repeal § 861 by implication. Section 1-731.4 became effective in August of 2022 (S.B. 612, 2022 Okla. Sess. Laws ch. 11) and therefore was enacted after § 861. Repeals by implication are not favored and all statutory provisions must be given effect if possible. *City of Sand Springs v. Dept. of Public Welfare*, 1980 OK 36, ¶28, 608 P.2d 1139, 1151. Nothing short of irreconcilable conflict between statutes accomplishes a repeal by implication. *Sesow v. Swearingen*, 1976 OK 97, ¶4, 552 P.2d 705, 706. Where such a conflict exists, the later modifies the earlier, even where both sections were enacted into the same official codification. *Ex parte Burns*, 1949 OK CR 11, 202 P.2d 433. Where statutes conflict in part, the one last passed, which is the later declaration of the Legislature, should prevail, superseding and modifying the former statute only to the extent of such conflict. *Consumers Co-op Ass’n. v. Titus*, 1949 OK 86, ¶7, 205 P.2d 1162, 1163.

¶15 The legislative intent behind S.B. 1555’s conditional effective date language is not clear. The use of the conjunction “or” could mean there is a choice

as to whether to provide enforcement pursuant to § 861 or another later enacted statute. S.B. 612 which enacted § 1-731.4 makes no mention of § 861 nor does it contain any repealer sections or any type of conditional language. If the Legislature had intended to conditionally repeal § 861, it could have easily done so in that bill. A repeal by implication compares the language of two statutes to determine if there is an irreconcilable conflict. Here, however, we find § 1-731.4 to be void and unenforceable and therefore we do not find it poses a conflict or in any way repealed § 861 by implication.

II. CONCLUSION

¶16 We hold the Oklahoma Constitution under the provisions of article II sections 2 and 7 protects the right of a woman to terminate her pregnancy in order to preserve her life. Having determined the Oklahoma Constitution protects the right of a woman to terminate her pregnancy in order to preserve her life, we hold that 63 O.S. Supp. 2022, § 1-731.4 does not pass strict scrutiny review and is void and unenforceable. We hold, 21 O.S. 2021, § 861 does not violate this protection as it allows a woman to terminate her pregnancy, as defined herein, in order to preserve her life. Therefore we grant Petitioner declaratory relief as to 63 O.S. Supp. 2022, § 1-731.4 but deny declaratory relief as to 21 O.S. 2021, § 861. Having found § 1-731.4 is unconstitutional and therefore unenforceable, it is unnecessary to address the Petitioners' request for injunctive relief and/or writ of prohibition. Petitioners

request for injunctive relief and/or a writ of prohibition is denied. *See Hunsucker v. Fallin*, 2017 OK 100, ¶37, 408 P.3d 599, 612.

**ORIGINAL JURISDICTION ASSUMED; DECLARATORY RELIEF
GRANTED IN PART; INJUNCTIVE RELIEF AND WRIT OF
PROHIBITION DENIED**

**KAUGER (by separate writing), WINCHESTER, EDMONDSON, COMBS
(by separate writing) and GURICH, JJ. - CONCUR**
**KANE, C.J. (by separate writing), ROWE, V.C.J. (by separate writing),
DARBY (by separate writing) and KUEHN, JJ. (by separate writing) –
DISSENT**

ORIGINAL



2023 OK 24

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

OKLAHOMA CALL FOR REPRODUCTIVE)
JUSTICE, on behalf of itself and its members;)
TULSA WOMEN'S REPRODUCTIVE CLINIC,)
LLC, on behalf of itself, its physicians, its staff, and)
its patients; ALAN BRAID, M.D., on behalf of)
himself and his patients; COMPREHENSIVE)
HEALTH OF PLANNED PARENTHOOD GREAT)
PLAINS, INC., on behalf of itself, its physicians, its)
staff, and its patients; and PLANNED)
PARENTHOOD OF ARKANSAS & EASTERN)
OKLAHOMA, on behalf of itself, its physicians, its)
staff, and its patients,)

Petitioners,)

v.)

GENTNER DRUMMOND, in his official capacity as)
Attorney General for the State of Oklahoma; VICKI)
BEHENNA, in her official capacity as District Attorney)
for Oklahoma County; STEVE KUNZWEILER, in)
his official capacity as District Attorney for Tulsa)
County; LYLE KELSEY, in his official capacity as)
Executive Director of the Oklahoma State Board of)
Medical Licensure and Supervision; BRET S.)
LANGERMAN, in his official capacity as President)
of the Oklahoma State Board of Osteopathic)
Examiners; KEITH REED, in his official capacity as)
the Commissioner of the Oklahoma State Board of)
Health,)

Respondents.)

FILED
SUPREME COURT
STATE OF OKLAHOMA

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JOHN D. HADDEN
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Case No. 120,543

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COMBS J., with whom Edmondson, J., joins, concurring specially:

¶1 I concur in the majority opinion.

¶2 I write separately to express my opinion on the scope of the provisions of Article II, Section 2 of the Oklahoma Constitution. This provision does not have a similar counterpart in the federal Constitution. Article II, Section 2 provides every Oklahoman, regardless of sex, the inherent right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry—a substantive right to life, liberty, and pursuit of happiness rather than a procedural right. The use of the term “inherent” right is defined in Webster’s dictionary as “firmly or permanently contained or joined; infixed; . . . belonging by nature; inalienable.”¹

¶3 Of note, the Oklahoma Constitution also provides that no person shall be denied life, liberty, or property without due process of law. *See* Okla. Const. art. II, § 7. Section 7 would provide a similar procedural right to due process as provided in the Fourteenth Amendment to the United States Constitution. The Oklahoma Constitution thus provides a substantive right to life, liberty and the pursuit of happiness as well as a procedural right to due process such that the right to life, liberty or property cannot be denied - a purposeful combination, that confers greater rights than that conferred in the United States Constitution.²

¹ *Webster’s New International Dictionary of the English Language* 1109 (rev. ed. 1922).

² Justice Kuehn states in her dissent that this Court would agree that the plain language of our Constitution does not protect a woman’s right to terminate her pregnancy. She states that the framers of our Constitution did not include such a right. The per curiam opinion, however, found the Constitution protects a limited right to terminate a pregnancy which has been a consistent part of our history. It is clear the laws allowing a woman to terminate a pregnancy to

¶4 At the very core of the inherent right of life, liberty and the pursuit of happiness is the principle that an individual should be free to make choices about how to conduct their own lives, to have the right to personal autonomy. The Oklahoma Constitutional provisions provide for every individual to have the right to life and liberty which would include a right to privacy and personal autonomy. Many states have reached similar conclusions. *See Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 440 P.3d 461 (2019). “Every human being of adult years and sound mind has a right to determine what shall be done with their own body.” *Schloendorff v. Soc’y of N.Y. Hosp.*, 211 N.Y. 125, 129-30, 105 N.E. 92 (1914). “[E]veryone has a fundamental right to the sole control of his or her person.” *In re Guardianship of Browning*, 568 So. 2d 4, 10 (Fla. 1990). “Each of us has a right to the inviolability and integrity of our persons, a freedom to choose or a right of bodily self-determination, if you will.” *In re Brown*, 478 So. 2d 1033, 1039 (Miss. 1985). Each of these concepts of control over one’s body and of self-determination have

preserve her life existed prior to statehood, carried through the passage of our Constitution and were again codified after statehood in the 1910 Revised Laws. Section 2 of the Schedule to the Oklahoma Constitution provides:

All laws in force in the Territory of Oklahoma at the time of the admission of the State into the Union, which are not repugnant to this Constitution, and which are not locally inapplicable, shall be extended to and remain in force in the State of Oklahoma until they expire by their own limitation or are altered or repealed by law.

When the 1910 Revised Laws again allowed procurement of a miscarriage to preserve the life of the mother it provided an unbroken history acknowledging such right. The Third Legislature of the State of Oklahoma was surely aware of the framers’ work and did not consider such laws to be “repugnant” to our Constitution. The per curiam opinion finds this historical right is protected under Sections 2 and 7 of Article II of the Oklahoma Constitution which have been part of our Constitution since its ratification in 1907. The opinion does not create a right where none existed. The opinion only points out that it had been unnecessary in the past for this Court to make that determination when a right to terminate a pregnancy had previously been found to exist under the federal Constitution.

roots in common law, as noted by the United States Supreme Court in *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250, 251 (1891).

¶5 In light of the provisions of Article II and the state's historical protection for the life of the mother, the majority opinion finds the constitutional protection of the right to life does embody the right to choose to terminate a pregnancy to preserve the life of the mother, without discussion of the viability of the fetus. Any statutory provision banning the procedure or limiting the access to the procedure must be viewed with strict scrutiny.³

³ The Vice Chief Justice's dissent states that this Court has avoided answering the question in our previous decisions as to whether the Oklahoma Constitution provides a right to terminate a pregnancy. He notes that thirty years ago we were asked to review the constitutionality of a proposed ballot measure which would have criminalized abortion except for four limited circumstances: (1) to save the life of the mother or avoid grave impairment of her physical or mental health, (2) where the pregnancy resulted from rape, (3) where the pregnancy resulted from incest, and (4) where the unborn child would be born with a grave physical or mental defect. *In re Initiative Petition No. 349, State Question No. 642*, 1992 OK 122, ¶11, 838 P.2d 1, 6. The dissent asks "why did the Court prevent the People from deciding these rights thirty years ago?" The reason is simple. Thirty years ago the right to terminate a pregnancy was based upon the United States Supreme Court's interpretation of the U.S. Constitution, which it had found, protects a woman's right to choose prior to the viability of the fetus. The initiative petition in *In re Initiative Petition No. 349* criminalized abortion without consideration of the rights of the mother that were protected by the U.S. Constitution as interpreted at that time. We could not have held that a woman in Oklahoma has less rights under the proposed state constitutional amendment when the U.S. Constitution, at that time, protected those rights. The dissent is also inconsistent with the position taken in the dissent to *In re State Question No. 807, Initiative Petition No. 423*, 2020 OK 57, 468 P.3d 383 (Rowe, J. dissenting). In that case the dissent asserted a proposed state constitutional amendment legalizing marijuana would be preempted by federal law (The Controlled Substances Act, 21 U.S.C. §§ 801-904). Therefore, the position taken by the dissent in that opinion would have prevented the people from deciding the right to legalize marijuana based upon an alleged federal preemption. An entirely inconsistent position concerning federal supremacy.

The dissent also asserts there is a pending joint resolution in the Oklahoma House of Representatives calling for a referendum on the "Oklahoma Abortion Law Act of 2023." As the dissent notes, there currently is no substantive language in the joint resolution. The joint resolution is a shell at this stage and this Court cannot speculate what it may or may not contain in the future or how whatever language it may contain will be voted on by the people. As the United States Supreme Court has determined, pending legislation throws little light on the policy of the Legislature. *See United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 550 (1940). Pending legislation is no obstacle to this Court deciding a matter properly presented to this body.

¶6 The medical community in determining within a reasonable degree of medical certainty the steps to preserve and protect the life of the mother is not without boundaries. During the course of pregnancy, there exists a timeline of urgency. We must define the right to preserve the life of the mother to mean something more than waiting until she actually has a life threatening medical emergency before she is allowed to receive treatment to terminate a pregnancy. If not, the healthcare practitioner will continue to face the impossible dilemma of deciding how close to death the woman must be to provide medical care while fearing such actions are outside the confines of the law. How imminent must death be?⁴

¶7 To be clear the State of Oklahoma has a legitimate interest in protecting the life of a viable unborn fetus. The medical timeline of urgency in a pregnancy crosses a moment in time where the physician must also protect the life of the viable

⁴ Justice Darby's dissent suggests that our precedents would require application of the rational basis standard of review, quoting *Edmondson v. Pearce*, 2004 OK 23, 91 P.3d 605, for the proposition that courts may not annul a statute "as being in violation of substantive due process unless it is clearly irrelevant to the policy the Legislature may adopt or is arbitrary, unreasonable or discriminatory." Darby, J., Dissenting Op. ¶ 10 (quoting *Pearce*, 2004 OK 23, ¶ 35, 91 P.3d at 624). His dissent further quotes the *Pearce* case for the propositions that "[t]he inherent right to 'life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own labor' guaranteed to the people by Sec. 2, Art. 2, of the state constitution, is subject to reasonable regulation in the exercise of the police power" and that such "rights guaranteed in OKLA.CONST. art. 2, § 2 are qualified. They are not absolute." Darby, J., Dissenting Op. ¶ 12 (quoting *Pearce*, 2004 OK 23, ¶¶ 34–35, 91 P.3d at 624). But the *Pearce* case itself concerned cockfighting, and whether Article II, Sections 2 and 7 of the Oklahoma Constitution gave rise to a constitutional right to engage in cockfighting that would invalidate a law enacted by the people of Oklahoma to ban the practice. This case concerns people's lives. Just because we applied the rational basis standard of review to a statute that banned cockfighting, that doesn't mean we must—or even should—apply the same standard of review to a statute that could dictate the deprivation of a woman's life. A woman's right to life is more important than society's right to watch roosters fighting each other, and it should consequently be afforded greater protection—including the application of heightened scrutiny toward any statute that would deprive her of life.

fetus in addition to the life of the mother. However, at that point in the pregnancy, the medical profession must turn its focus to not only the mother but the viable fetus and the protections of life, liberty and pursuit of happiness must attach to that life as well. With the advancements of medicine and science, whether or not a bright line for a determination of viability is necessary to provide some protection for the viable fetus as well as a clear boundary for both the medical practitioners and all Oklahomans becomes a policy question for the people of the State of Oklahoma.

ORIGINAL

2023 OK 24



IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

OKLAHOMA CALL FOR)
REPRODUCTIVE JUSTICE, on behalf)
of itself and its members; TULSA)
WOMEN'S REPRODUCTIVE CLINIC,)
LLC, on behalf of itself, its physicians,)
staff, and its patients; ALAN BRAID,)
M.D., on behalf of himself and his)
patients; COMPREHENSIVE HEALTH)
OF PLANNED PARENTHOOD GREAT)
PLAINS, INC., on behalf of itself, its)
physicians, its staff, and its patients;)
and PLANNED PARENTHOOD OF)
ARKANSAS & EASTERN OKLAHOMA,)
on behalf of itself, its physicians, its)
staff, and its patients,)

Petitioners,)

v.)

GENTNER DRUMMOND, in his official)
capacity as Attorney General for the)
State of Oklahoma; VICKI BEHENNA,)
in her official capacity as District)
Attorney for Oklahoma County; STEVE)
KUNZWEILER, in his official capacity)
as District Attorney for Tulsa County;)
LYLE KELSEY, in his official capacity)
as Executive Director of the Oklahoma)
State Board of Medical Licensure and)
Supervision; BRET S. LANGERMAN, in)
his official capacity as President of the)
Oklahoma State Board of Osteopathic)
Examiners; KEITH REED, in his official)
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Oklahoma State Board of Health,)

Respondents.)

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CLERK

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KANE, C.J., dissenting:

¶1 Driven most certainly by a commendable kindness of heart, the majority engages in legal contortions to protect pregnant women who are in medical peril by fashioning Oklahoma Constitutional precepts of abortion law that simply do not exist. There is no expressed or implied right to abortion enshrined in the Oklahoma Constitution. In interpreting our Constitution, this Court must guard against the innate human temptation to confuse what is provided in the Oklahoma Constitution with what one wishes were provided.

¶2 Today, the Court has elected to retain jurisdiction over the construction of two criminal statutes (for which we are not the Court of last resort), seemingly holding that one anti-abortion statute is constitutional,¹ yet expressing no opinion upon the constitutionality of the very same statute.² The other anti-abortion statute³ is discarded as vague and contrary to a newly discovered inherent constitutional right to abortion in Oklahoma.

¹ See 21 O.S.2021, § 861.

² At paragraph 10 of the majority opinion, the Court states: "We make no ruling on whether the Oklahoma Constitution provides a right to an elective termination of a pregnancy, i.e., one made outside of preserving the life of the pregnant woman as we have defined herein."

³ See 63 O.S. Supp. 2022, § 1-731.4.

¶3 At the time of ratification, the Oklahoma Constitution was the most detailed state governing document in the United States.⁴ Oklahoma's Constitution is still currently the third-most detailed Constitution in the nation, now containing almost 85,000 words.⁵ Had the framers chosen to classify abortion under any scenario as a fundamental Oklahoma right, rather than a felony, they certainly would have done so explicitly, not by implication. Our Constitution is a highly detailed enumeration of rights, not a broad, sweeping statement of concepts. Nowhere, broadly or specifically, is a right to abortion enumerated.

¶4 Much is made of the fact that the anti-abortion statutes in effect shortly before and shortly after Statehood had "life of the mother" exceptions. However, little is spoken of the fact that abortion, generally, was a criminal offense which would send one to prison. While the legislators of the time appeared unwilling to make abortions that saved the life of the mother a matter of criminal law subjecting offenders to prison, this is completely different from enumerating a fundamental right to abortion. Indeed, it takes more to be a fundamental right than merely to be exempted from criminal prosecution.

⁴ <https://oklahoma.gov/labor/transparency/oklahoma-state-constitution.html#:~:text=At%20its%20ratification%2C%20the%20Oklahoma,been%20approved%20by%20Oklaho,ma%20voters.>

⁵ [https://en.wikipedia.org/wiki/State_constitution_\(United_States\)#:~:text=The%20shortest%20is%20the%20Constitution,long%2C%20but%20rewritten%20in%202022.](https://en.wikipedia.org/wiki/State_constitution_(United_States)#:~:text=The%20shortest%20is%20the%20Constitution,long%2C%20but%20rewritten%20in%202022.) In contrast, the Vermont Constitution is only 1/10 the length of our Constitution, with merely 8,565 words.

¶5 The reason that the “life of the mother” exceptions do not resolve the question is because the majority analysis wholly disregards the interest of the unborn. The unborn have no voice, say, or consideration in the opinion of the majority. The thorny medical, philosophical, and practical debate of balancing the developing life of the unborn against the life of the mother, and the government’s involvement in those decisions, is a necessary and worthy dialogue for the people to commence, but our existing Constitution pronounces no fundamental right to abortion to consider as part of that dialogue.

¶6 This Court should adhere to the Constitution given to us, not craft what we believe to be a “better” Constitution. That power lies with the people.⁶ As Justice Thomas noted in his dissent to *Obergefell v. Hodges*: “By straying from the text of the Constitution, substantive due process exalts judges at the expense of the People from whom they derive their authority.” 576 U.S. 644, 722 (2015) (Thomas, J., dissenting).

¶7 Certainly, the people of this great state have had the opportunity to amend the Oklahoma Constitution to speak to the debate over abortion rights. Although the Oklahoma Constitution has been amended over 150 times since statehood,⁷ there

⁶ The United States Supreme Court expressly held as follows, pertaining to abortion: “We therefore hold that the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives.” *Dobbs v. Jackson Women’s Health Org.*, 142 S.Ct. 2228, 2279 (2022).

⁷ See *supra* note 1.

has been no amendment passed to provide rights to abortion. Granted, since the surprising intervention in 1973 by the United States Supreme Court, creating an abortion right in *Roe v. Wade*, many on both sides of the debate felt that action to amend the Oklahoma Constitution to speak to abortion was rendered moot by the Federal preemptive effect of *Roe*.

¶18 What was the Oklahoma legislature's reaction to *Roe*? As the Petitioners critically note, the Oklahoma legislature has repeatedly striven since 1973 to enact legislation to protect the lives of unborn Oklahomans, given the limitations imposed by the United States Supreme Court. This Court was duty-bound to abide by *Roe v. Wade*, and we hence struck down many such legislative attempts to regulate abortion.

¶19 Recently the same United States Supreme Court revisited *Roe*, and concluded:

Roe was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. And far from bringing about a national settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and deepened division.

Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228, 2243.

¶10 *Dobbs* was well reasoned, and we would be well advised to follow the precise analysis and logic employed by the United States Supreme Court and conclude the obvious: the Oklahoma Constitution, as drafted and amended, contains no right to

abortion, and an analysis of Oklahoma history and traditions suggests that no fundamental right to abortion was designed into our governing document.

¶11 Had this Court so concluded, the proper standard of review of the statutes in question would have been to inquire as to whether or not the statutes merely had a rational basis,⁸ as opposed to the more stringent “strict scrutiny” analysis chosen by the majority. Employing rational-basis review clearly causes the statutes to pass constitutional muster, as the State clearly has a legitimate interest in protecting the unborn. Under what circumstances might a just and humane society limit the state’s right to regulate abortion? Much was said of this issue in the briefing, but our state Constitution, as presently constituted, provides this Court no power to make these policy choices. This power is reserved to the people.

¶12 Having noted at length my profound concerns with what I believe is a fundamentally flawed opinion by the majority, what will be the effect of our decision to weigh in on a matter of criminal law? Oklahoma is one of only two states in the union with two courts of last resort.⁹ While the Oklahoma Supreme Court indeed has

⁸ Indeed, this is precisely what the United State Supreme Court did in *Dobbs*. It held “[u]nder our precedents, rational-basis review is the appropriate standard for such challenges. As we have explained, procuring an abortion is not a fundamental constitutional right because such a right has no basis in the Constitution’s text or in our Nation’s history.” *Dobbs*, 142 S.Ct. at 2283.

⁹ “Oklahoma is one of only two states--the other being Texas--with two courts of last resort: one with civil appellate jurisdiction and the other criminal.” Greg Eddington, *The Jurisdictional Boundary Between the Oklahoma Supreme Court and the Court of Criminal Appeals: Blurred Lines*, 69 Okla. L. Rev. 203 (2017).

superintending control over all courts of this state,¹⁰ the court of last resort for all matters of criminal law is the Oklahoma Court of Criminal Appeals. The Oklahoma Supreme Court was certainly content to abide by the holdings of the Oklahoma Court of Criminal Appeals in 1973, when the Court of Criminal Appeals held that *Roe v. Wade* nullified criminal statutes against abortion, on Constitutional grounds. See *Jobe v. State*, 1973 OK CR 51, ¶ 4, 509 P.2d 481, 482.

¶13 Extant law suggests that if the Court of Criminal Appeals should later take up the Constitutionality of these same statutes and come to new or different conclusions, we will have a Constitutional crisis. Specifically, should a Constitutional challenge be presented to the Court of Criminal Appeals, and that Court rules upon the issues specifically not ruled upon herein, will that become the law of the land? As observed by the first Justice Kane in 1912: "It is the settled policy of the Supreme Court to follow the construction given to criminal statutes by the Criminal Court of Appeals since the enforcement of such statutes must be in accordance with such construction." *State v. Russell*, 1912 OK 425, 124 P. 1092, 1092.

¶14 Having improvidently created a new fundamental right under the Oklahoma Constitution, the majority almost, but not quite, upholds the constitutionality of 21 O.S.2021, § 861. Thereafter, 63 O.S. Supp. 2022, § 1-731.4 is rejected as vague. The net result of this opinion will be to raise more questions than it answers. Those who philosophically agree with the result may find the analysis provided by the slim

¹⁰ Okla.Const.art 7, § 4.

majority to be satisfying, but the lack of clarity existing prior to today's pronouncement is not improved. We have squandered the opportunity to clearly advise the people that the Oklahoma Constitution, as currently worded, does not expressed or hidden establish a fundamental abortion right under any circumstance. Any change to that status quo must come from the people or their elected representatives.

¶15 I dissent.

ORIGINAL



2023 OK 24
IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

OKLAHOMA CALL FOR REPRODUCTIVE)
JUSTICE, on behalf of itself and its members;)
TULSA WOMEN'S REPRODUCTIVE CLINIC,)
LLC, on behalf of itself, its physicians, its staff,)
and its patients; ALAN BRAID, M.D., on behalf)
of himself and his patients; COMPREHENSIVE)
HEALTH OF PLANNED PARENTHOOD)
GREAT PLAINS, INC., on behalf of itself, its)
physicians, its staff, and its patients; and)
PLANNED PARENTHOOD OF ARKANSAS &)
EASTERN OKLAHOMA, on behalf of itself, its)
physicians, its staff, and its patients,)

Petitioners,)

v.)

JOHN O'CONNOR, in his official capacity as)
Attorney General for the State of Oklahoma,)
DAVID PRATER, in his official capacity as)
District Attorney for Oklahoma County;)
STEVEN KUNZWEILER, in his official capacity)
as District Attorney for Tulsa County, LYLE)
KELSEY, in his official capacity as Executive)
Director of the Oklahoma State Board of)
Medical Licensure and Supervision; KATIE)
TEMPLETON, in her official capacity as)
President of the Oklahoma State Board of)
Osteopathic Examiners; KEITH REED, in his)
Official capacity as the Commissioner of the)
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ROWE, V.C.J., dissenting:

¶1 The Oklahoma Constitution declares that all political power in this state is vested in the People.¹ In today's post-*Roe* environment, abortion policy presents a political question that should be decided by the People.

¶2 The Oklahoma legislature forbid elective abortion in 1910, only three years after statehood. Title 21, Section 861 of the Oklahoma Statutes, initially enacted in 1910, provides:

Every person who administers to any woman, or who prescribes for any woman, or advises or procures any woman to take any medicine, drug or substance, or uses or employs any instrument, or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life shall be guilty of a felony punishable by imprisonment in the State Penitentiary for not less than two (2) years nor more than five (5) years.

21 O.S.2011, § 861. Section 861 prevailed in Oklahoma for 63 years until a United States District Court determined it was unconstitutional in light of the United States Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973). See *Henrie v. Derryberry*, 358 F.Supp 719 (1973).

¶3 Over many decades, when asked to review the constitutionality of regulations on abortion, this Court relied exclusively on the principles of federal

¹ Article II, § 1 of the Oklahoma Constitution provides:

All political power is inherent in the people; and government is instituted for their protection, security, and benefit, and to promote their general welfare; and they have the right to alter or reform the same whenever the public good may require it: Provided, such change be not repugnant to the Constitution of the United States.

supremacy and precedents of the Supreme Court of the United States recognizing a woman's right to an abortion, including *Roe v. Wade*, 410 U.S. 113; *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833; and their progeny.²

¶4 More than thirty years ago, in *In re Initiative Petition No. 349, State Question No. 642*, 1992 OK 122, 838 P.2d 1, we were asked to review the constitutionality of a proposed ballot measure in light of the Supreme Court's then-recent pronouncement in *Casey*. The initiative petition would have criminalized abortion except in four instances: (1) to save the life of the mother or avoid grave impairment of her physical or mental health, (2) where the pregnancy resulted from rape, (3) where the pregnancy resulted from incest, and (4) where the unborn child would be born with a grave physical or mental defect. *Id.* ¶ 11, 838 P.2d at 6. We found the petition unconstitutional, as it imposed on a woman's right to obtain an abortion before the fetus obtains viability.³ Justice Kauger, writing for the majority, outlined the limited nature of our review:

We are doubly bound to uphold the law of the land. Our limited role, like the role of all state courts in such cases, is to apply federal

² See *Okla. Coal. for Reprod. Just. v. Cline*, 2019 OK 33, ¶ 41, 441 P.3d 1145, 1160 ("Under United States Supreme Court precedent, H.B. 2684 is unconstitutional and therefore void and of no effect."); *Oklahoma Coal. for Reprod. Justice v. Cline*, 2012 OK 102, ¶ 3, 292 P.3d 27, 28 ("The challenged measure is facially unconstitutional pursuant to [*Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791.]; *Burns v. Cline*, 2016 OK 121, ¶ 19, 387 P.3d 348, 354 ("Under the guidance of [*Whole Woman's Health v. Hellerstedt*, 579 U.S. 582], SB 1848 creates a constitutionally impermissible hurdle for women who seek lawful abortions."); *In re Initiative Petition No. 349, State Question No. 642*, 1992 OK 122, ¶ 35, 838 P.2d 1, 12 ("After *Casey*, it became incontrovertibly clear that the petition could not withstand a constitutional challenge.").

³ "Initiative Petition No. 349 does not allow a woman to make a private decision to obtain an abortion at any time during the pregnancy—either before or after viability. It does not protect a woman's liberty interest as defined by *Casey*." *In re Initiative Petition No. 349*, 1992 OK 122, ¶ 11, 838 P.2d at 6 (emphasis in original).

constitutional law, not to make it nor to guess what it may become. By virtue of our constitutional oath of office, we have solemnly sworn to uphold the Constitution of the United States. *Roe* and *Casey* may be overruled. The Freedom of Choice Act of 1992, now pending before Congress, which would codify *Roe*, may be enacted. Or, the proponents may present a proper petition for submission to a vote of the people. Speculation as to which of many paths the law in a given area will take in the future is a transparent veil behind which people act out of their own policy preferences. “Guesses” about the future development of any rule of law have never been an acceptable rule of decision in Anglo American jurisprudence.

We will uphold the law of the land whatever it may be. Today, the law of the land is that a woman has a constitutionally protected right to make an independent choice to continue or to terminate a pregnancy before viability.

Id. ¶¶ 13-14, 838 P.2d at 7. This pronouncement has served as the bedrock of our abortion jurisprudence for the three decades since.

¶5 In *Oklahoma Coalition for Reproductive Justice v. Cline*, 2019 OK 33, 441 P.3d 1145, we struck down a law requiring abortion providers to adhere to an outdated Food and Drug Administration protocol when administering two drugs commonly used to perform medication abortions because it imposed an undue burden on a woman’s right to obtain an abortion. In doing so, we reaffirmed our commitment to federal supremacy and reiterated our position from *In re Initiative Petition No. 349* that we will uphold the law of land, **whatever it may be at the time**. *Cline*, 2019 OK 33, ¶ 43, 441 P.3d at 1161 (citing *In re Initiative Petition No. 349*, 1992 OK 122, ¶ [14], 838 P.2d at 7). **“Until overturned by the Supreme Court**, all of Oklahoma and each department are bound by the Supreme Court’s jurisprudence, and any legislation which places limits on a woman’s right to an

abortion of a pre-viable fetus must pass this undue burden test.” *Cline*, 2019 OK 33, ¶ 5, 441 P.3d at 1162 (Combs, J., concurring specially)(emphasis added).

¶6 Then, on June 24, 2022, the Supreme Court of the United States, in *Dobbs v. Jackson Women’s Health Organization*, 142 S.Ct. 2228, did overrule both *Roe* and *Casey*, finding that the United States Constitution does not provide a right to abortion. One of the Supreme Court’s reasons for overruling *Roe* and *Casey* was that those decisions improperly removed questions of public policy from the democratic process:

As the Court’s landmark decision in *West Coast Hotel* illustrates, the Court has previously overruled decisions that wrongly removed an issue from the people and the democratic process. As Justice White later explained, “decisions that find in the Constitution principles or values that cannot fairly be read into that document usurp the people’s authority, for such decisions represent choices that the people have never made and that they cannot disavow through corrective legislation. For this reason, it is essential that this Court maintain the power to restore authority to its proper possessors by correcting constitutional decisions that, on reconsideration, are found to be mistaken.” *Thornburgh*, 476 U.S. at 787, 106 S.Ct. 2169 (dissenting opinion).

Dobbs, 142 S.Ct. at 2265. Since *Dobbs* was decided, we have seen citizens in other states engage democratically to determine abortion policy for themselves. For instance, in August of 2022, voters in the State of Kansas rejected a constitutional amendment that would have affirmed that the State Constitution does not protect the right to an abortion.⁴

⁴ Lalee Ibssa, *Kansas Voters Preserve Abortion Access in High-Turnout Primary*, ABC News (Aug. 3, 2022, 9:28 AM), <https://abcnews.go.com/Politics/kansas-voters-preserve-abortion-access-high-turnout-primary/story?id=87750829>. In 2019, the Supreme Court of Kansas determined that the Kansas Constitution protects a right to abortion. *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461 (Kan. 2019).

¶7 In Oklahoma, two initiative petitions seeking to include abortion rights in the Oklahoma Constitution, State Questions 825 and 828, were filed with the Oklahoma Secretary of State in September and October 2022, respectively. State Question 825 failed to receive sufficient signatures, and State Question 828 was withdrawn in December 2022. As of this writing, a joint resolution has been proposed in the Oklahoma House of Representatives calling for a referendum on the “Oklahoma Abortion Law Act of 2023.”⁵ See H.R.J. Res. 1012, 59th Leg., 1st Sess. (Okla. 2023).

¶8 This Court has studiously avoided addressing the question of whether the Oklahoma Constitution protects a right to abortion, despite having been presented with numerous opportunities to do so.⁶ In light of the Court’s track record of diligently avoiding these issues, it is difficult to understand why now the majority believes “there is a pressing need to rule on this matter as soon as possible.”⁷ Perhaps a better question is, if the rights implicated by our decision today warrant such urgent attention, why did the Court prevent the People from deciding on these rights thirty years ago? Now, rather than allowing the democratic process to play out in Oklahoma, the majority has imposed its own

⁵ The substance of the “Oklahoma Abortion Law Act of 2023” is not included in the joint resolution at this time.

⁶ See, e.g., *Burns v. Cline*, 2016 OK 121, ¶ 4, 387 P.3d 348, 351 (“Burns identified multiple Oklahoma state constitutional challenges to SB 1848 in his district court petition. Before addressing the various state constitutional arguments of Burns and defendants, we must first acknowledge that SB 1848 is fatally flawed legislation under our federal Constitution and the recent pronouncements in *Hellerstedt*, *supra*.”).

⁷ Majority Op., ¶ 2.

policy preferences upon the People of our State. The majority's decision to intervene now does not reconcile with our prior jurisprudence.

¶9 Moreover, to the extent the Court has weighed in now, it has only further muddled the waters as to the rights of Oklahomans and our State's abortion policy. The majority claims that it makes no ruling on whether the Oklahoma Constitution provides a right to an elective termination of pregnancy,⁸ yet the majority rejects the constitutional challenge to 21 O.S. § 861, which explicitly prohibits elective abortions. In upholding our State's 113-year ban on elective abortion, the majority says, "We make no ruling on whether the Oklahoma Constitution provides a right to an elective termination of pregnancy, i.e., one made outside of preserving the life of the pregnant woman as we have defined herein."⁹ I can only read this language as an attempt by the majority to leave the door open to further constitutional challenges, and certainly not to resolve this issue.

¶10 The amount of Amicus Curiae filed in this cause is varied and numerous.¹⁰ It should not weigh lightly on our examination that most of the amicus

⁸ Majority Op., ¶ 10.

⁹ *Id.*

¹⁰ Those filing briefs in support of the Petitioners included the American College of Obstetricians and Gynecologists, American Medical Association, Oklahoma State Medical Association, and Society for Maternal Fetal Medicine; Erika Lucas, Vest Her, and Oklahoma Businesses and Business Leaders; Rev. Barbara Prose, Rev. Dr. Diana K. Davies, Rev. T. Sheri Dickerson, Rabbi Marc Boone Fitzerman, Rabbi Vered Harris, Rabbi Abby Jacobson, Rabbi Dan Kaiman, Rev. Dr. Marlin Lavanhar, and Rev. Dr. Lori Walke.

Those filing briefs in support of the Respondents included the Elliot Institute and Oklahoma Faith Leaders; the American Center for Law & Justice and Forty-One Members of the Oklahoma Senate and House of Representatives; the Frederick Douglass Foundation and National Christian Hispanic Leadership Organization; the ProLife Center at the University of St. Thomas; Gateway Women's Resource Center, Inc.; Professor Carter Snead, the Roman Catholic Archdiocese of Oklahoma City, and Diocese of Tulsa; Oklahoma Business Leaders; and Lora Collier, MD; Alejandro De Santiago, DO; Joseph Eble, MD; George Erbacher, DO, FAOCR; Curtis E. Harris, MS, MD, JD; James J. Hutchins, MD; Jessica Keller, MD, FAACP,

arguments were grounded in policy. Policy making is the job of the legislature. *Griffin v. Mullinix*, 1997 OK 120, ¶ 18, 947 P.2d 177, 179 (“The Oklahoma Legislature, not this Court or Congress, is primarily vested with the responsibility to declare the public policy of this state.”). As a Court, we are not allowed to receive comments from the public, correspond with the public, or consider the public debate on an issue. More importantly, we do not serve constituents, and we are not elected. Simply put, this Court is neither empowered nor well-situated to craft policy for our State.

¶11 Yet today, the majority has attempted to craft an abortion policy that will do little to assuage the strong and polarizing opinions so many Oklahomans passionately hold on this issue. And just as *Roe* never resolved this issue on the federal level, today’s opinion will not resolve this issue within our state. In a Democracy, such as ours, this most divisive issue of our time can only—and should only—be resolved by the People.

¶12 Sadly, I find the majority’s opinion to be a premature intervention that undermines the democratic process on this issue and will serve to undermine our credibility with the People of Oklahoma. I dissent.

FCP; Abel Lau, MD; Phyllis W. Lauinger, MD; Michael A. Malloy, MD; Christy J. Mareshie, DO; Rita B. Sanders, DO; Frank Schmidt, Jr., MD; Michael Tanner, MD; Jessica Weber, DO; Leon J. Yoder, DO.

ORIGINAL



2023 OK 24

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Oklahoma Call For Reproductive Justice, on)
behalf of itself and its members, Tulsa Women's)
Reproductive Clinic, LLC, on behalf of itself, its)
physicians, its staff, and its patients, Alan Braid,)
M.D., on behalf of himself and his patients,)
Comprehensive Health Of Planned Parenthood)
Great Plains, Inc., on behalf of itself, its)
physicians, its staff, and its patients and Planned)
Parenthood Of Arkansas & Eastern Oklahoma, on)
behalf of itself, its physicians and its patients,)

Petitioners,)

v.)

Gentner Drummond, in his official capacity as)
Attorney General for the State of Oklahoma, Vicki)
Behenna, in her official capacity as District)
Attorney for Oklahoma County, Steve Kunzweiler,)
in his official capacity as District Attorney for)
Tulsa County, Lyle Kelsey, in his official capacity)
as Executive Director of the Oklahoma State Board)
of Medical Licensure and Supervision, Bret S.)
Langerman, in his official capacity as President of)
the Oklahoma State Board of Osteopathic)
Examiners and Keith Reed, in his official capacity)
as Commissioner of the Oklahoma State Board of)
Health,)

Respondents.)

DARBY, J., dissenting:

¶1 I dissent. After arrogating the states' right to regulate abortion for forty-nine years, the United States Supreme Court returned the authority to the people of each

FILED
SUPREME COURT
STATE OF OKLAHOMA

MAR 21 2023

JOHN D. HADDEN
CLERK

No. 120,543
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PUBLICATION

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Posted	FE
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state and their elected representatives. *See Dobbs v. Jackson Women’s Health Org.*, 213 L. Ed. 2d 545, 142 S. Ct. 2228, 2284 (2022). In response, the majority of this Court has created and defined a new Oklahoma constitutional right based on an exception in a statute. The Court invokes a strict standard of review, contrary to federal or state precedent, to find Oklahoma’s statute violative of Oklahoma’s Constitution. I disagree with the Court’s analysis, or lack thereof. And, finally, I am perplexed by the Court’s numerous declarations that it is not ruling on elective abortion, when in fact it is.

I. OKLAHOMA CONSTITUTIONAL RIGHTS REGARDING ABORTION

¶2 The Petitioners allege the two statutes in question violate inherent rights and substantive due process rights guaranteed by article II, sections 2 and 7 of the Oklahoma Constitution. Accordingly, the majority opinion proceeds to resolve the question of what right to abortion, if any, is protected under the Oklahoma Constitution.

A. Article 2, Section 7 Due Process Clause

¶3 The majority opinion purports to rely on *Dobbs*, by distinguishing Oklahoma law from the other statutes considered in *Dobbs*, in order to find that—based on the Oklahoma *statutory* exception allowing abortions when necessary to preserve the life of the mother—Oklahoma has a *constitutional* due process right to abortion if

necessary to preserve the life of the mother. *See* Maj. Op. ¶¶ 7–8. But review of *Dobbs* and its attached appendices, which considers laws of the 50 states and the District of Columbia at the founding of the country or statehood, shows that at least 40 out of 50 states plus the District of Columbia had language similar to Oklahoma’s which allowed limited exceptions from the state’s criminal ban on abortion if necessary to preserve the life of the mother. *See Dobbs*, 142 S. Ct., at 2285–300. Simply put: following *Dobbs* does not require this Court to find a state constitutional due process right to an abortion just because there was a limited exception to its illegality at statehood. If it did, the United States Supreme Court would have found such right under the United States Constitution—or at least discussed that possibility in *Dobbs*. It did not.

¶4 The majority there ends its analysis and finds a due process right to an abortion in Oklahoma’s Constitution. Justice Combs, in his separate writing, notes that the “Third Legislature of the State of Oklahoma was surely aware of the framers’ work and did not consider such laws to be ‘repugnant’ to our Constitution.” *See* Combs, J., Op. concurring specially, ¶ 3 n.2. I do not argue here that the exception to the criminality of abortion to preserve the life of the mother is unconstitutional. But just because the statutes allow an abortion in a limited circumstance and do not thereby offend our state Constitution, does not necessarily mean the exception is a

constitutional *right*. The schedule to the Oklahoma Constitution, which provided for prior laws to remain in force did not make those laws constitutional provisions.

b. Article 2, Section 2 Inherent Rights

¶5 The majority opinion next recognizes the inherent rights to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry which are protected for any person under the Oklahoma Constitution in article II, section 2 and finds that provision also “stands as the basis for protecting a pregnant woman’s right to terminate a pregnancy in order to preserve her life.” Maj. Op. ¶ 8. There is no further analysis on this point before the majority “hold[s] that the Oklahoma Constitution creates an inherent right of a pregnant woman to terminate a pregnancy when necessary to preserve her life.” Maj. Op. ¶ 9.

¶6 There is also no analysis on how or when article 2, section 2 may provide a right to life to the unborn child. Justice Combs notes that the state has a legitimate interest in protecting the life of a viable unborn fetus and identifies a “medical timeline of urgency” where a physician must at some point “also protect the life of the viable fetus in addition to the life of the mother.” *See* Combs, J., Op. concurring specially, ¶ 7. But the majority does not discuss *any* rights as they may apply to the unborn child.

¶7 The majority opinion immediately goes on to judicially define the new

constitutional right to terminate a pregnancy when necessary to preserve the life of the mother.

[A] woman has an inherent right to choose to terminate her pregnancy if at any point in the pregnancy, the woman's physician has determined to a reasonable degree of medical certainty or probability that the continuation of the pregnancy will endanger the woman's life due to the pregnancy itself or due to a medical condition that the woman is either currently suffering from or likely to suffer from during the pregnancy. Absolute certainty is not required, however, mere possibility or speculation is insufficient.

Maj. Op. ¶ 9. The majority creates this expansive constitutional right without any provided authority or analysis. That is not our role.

II. APPLIED STANDARD OF REVIEW

¶8 The majority then incorrectly states the standard of review. Prior to *Dobbs*, the United States Supreme Court applied two standards of review to challenges to regulations on abortion. Prior to the fetus's viability, the U.S. Supreme Court would apply the "undue burden" standard. *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 878, 112 S. Ct. 2791, 2821, 120 L. Ed. 2d 674 (1992), overruled by *Dobbs*, 142 S. Ct. 2228.¹ After viability, the U.S. Supreme Court reviewed regulations on

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"An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 878, 112 S. Ct. 2791, 2821, 120 L. Ed. 2d 674 (1992), overruled by *Dobbs v. Jackson Women's Health Org.*, 213 L. Ed. 2d 545, 142 S. Ct. 2228 (2022).

abortion for rational basis. *Casey*, 505 U.S., at 879.² *Dobbs* changed that and clearly stated that the federal standard governing all challenges to state abortion regulations under the United States Constitution is now rational basis. *Dobbs*, 142 L.Ed, at 2283. 2283.³ The United States Supreme Court has clearly found that the United States Constitution “does not prohibit the citizens of each State from regulating or prohibiting abortion.” *Id.*, at 2284. Thus post *Dobbs*, we now follow state law regarding the correct standard of review to apply to challenges to abortion regulations pursuant to the Oklahoma Constitution.

¶9 Generally, this Court follows well established principles in considering a statute’s constitutionality. See *In re Assessments for Year 2005 of Certain Real Prop. Owned by Askins Properties, L.L.C.*, 2007 OK 25, ¶ 12, 161 P.3d 303, 310 (quoting *Fent v. Okla. Capitol Improvement Auth.*, 1999 OK 64, 984 P.2d 200). Every presumption must be indulged in favor of finding a statute constitutional. *Ibid.* If two interpretations are possible, this Court is bound to give the interpretation that

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“[S]ubsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.” *Casey*, 505 U.S., at 879, overruled by *Dobbs*, 142 S. Ct. 2228.

3

“Under our precedents, rational-basis review is the appropriate standard for such challenges. As we have explained, procuring an abortion is not a fundamental constitutional right because such a right has no basis in the Constitution’s text or in our Nation’s history.” *Dobbs*, 142 S. Ct., at 2283.

renders it constitutional. *Ibid.*

¶10 Regarding article 2, section 2 of the Constitution specifically, this Court has stated that courts may not annul a statute “as being in violation of substantive due process unless it is clearly irrelevant to the policy the Legislature may adopt or is arbitrary, unreasonable or discriminatory.” *Edmondson v. Pearce*, 2004 OK 23, ¶35, 91 P.3d 605, 624, as corrected (July 28, 2004) (quoting *Jack Lincoln Shops, Inc. v. State Dry Cleaners’ Bd.*, 1943 OK 28, 135 P.2d 332,333; *see also Fair Sch. Fin. Council of Okla., Inc. v. State*, 1987 OK 114, ¶62, 746 P.2d 1135, 1150 (stating that we review the constitutionality of a statute to determine if the Legislature acted within its power, and “the act will be declared constitutional unless it can be clearly demonstrated that the Legislature acted arbitrarily and capriciously.”). But instead of following this Court’s standard, which would require the Court to uphold the statute unless it is arbitrary, unreasonable, or discriminatory, the majority chooses to apply a much stricter standard.

¶11 The majority does not simply adopt the higher standard the United States Supreme Court previously applied to abortion—the Court goes a step further and applies strict scrutiny to the statute. The majority cites to a bar discipline case wherein we applied strict scrutiny to a regulation that limited an attorney’s *federal* first amendment right to speech. *See* Maj. Op. ¶11; *see also State ex rel. Okla. Bar*

Ass'n v. Porter, 1988 OK 114, ¶¶ 19, 24, 766 P.2d 958, 966-68.⁴ Yet the majority offers no explanation for the application of a higher standard of review than previously applied under federal law or Oklahoma law.

¶12 This is not the first time this Court has been asked to address the constitutionality of a statute under article 2, section 2 of the Oklahoma Constitution. In *Edmondson v. Pearce*, we said: “The inherent right to ‘life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own labor’ guaranteed to the people by Sec. 2, Art. 2, of the state constitution, is subject to reasonable regulation in the exercise of the police power.” 2004 OK 23, ¶ 35, 91 P.3d, at 624 (quoting *Jack Lincoln Shops, Inc. v. State Dry Cleaners’ Bd.*, 1943 OK 28, 135 P.2d 332, 333, Second Syllabus). We noted that “the rights guaranteed in OKLA.CONST. art. 2, § 2 are qualified. They are not absolute.” *Edmondson*, 2004 OK 23, ¶ 34, 91 P.3d, at 624. We further explained that it “is well settled that the legislature may, in the proper exercise of the police power, define and declare what is to be deemed injurious to public health, morals, safety and general welfare. And, the legislature is primarily

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“[T]he First Amendment is clearly offended by such a restriction on the free exchange of information pertinent to the functioning of government embodied by this prohibition of attorney criticism. Thus, utilization of disciplinary rules to sanction the speech here in question is a significant impairment of First Amendment rights. Where, as here, a prohibition is directed at speech itself, and the speech is ultimately related to the process of self government, the state may prevail only upon showing a subordinating interest which is compelling.” *State ex rel. Okla. Bar Ass’n v. Porter*, 1988 OK 114, ¶ 24, 766 P.2d 958, 967.

the judge of whether certain facts or conditions justify regulation of a particular business for the public welfare.” *Edmondson*, 2004 OK 23, ¶ 34, 91 P.3d, at 623 (quoting *One Chicago Coin’s Play Boy Marble Bd. v. State*, 1949 OK 251, ¶ 11, 212 P.2d 129, 132). We have repeatedly stated that:

In the legislative department of the government is vested the power of enacting all laws. To that department is intrusted the determination of what laws shall be enacted, and what laws shall not be enacted. It must in the first instance determine whether a proposed measure is valid or invalid, and in doing so it will not be presumed that the members of that department, whether they be the electors at the polls, or the members of the Legislature, will enact or attempt to enact legislative measures that they know are violative of the state Constitution or of the federal Constitution, but that they will act from patriotic motives and endeavor to adopt such laws only as will best serve the public good, keeping in mind the limitation upon their powers fixed by the Constitution of the state and the federal Constitution as the supreme law of the land. When such department has acted upon a proposed measure and adopted same, it thereby becomes clothed with the presumption that it is a valid enactment and with its validity the executive and judicial departments have nothing to do, until it becomes the duty of these respective departments to participate in the construction or enforcement of such statute. The duty of determining what law shall be enacted and what law shall not be enacted rests neither upon the executive nor the judicial department.

State ex rel. York v. Turpen, 1984 OK 26, 681 P.2d 763, 766 (quoting *Threadgill v. Cross*, 1910 OK 165, ¶ 19, 109 P. 558, 562).

III. ANALYSIS OF THE STATUTES

¶13 The majority applies strict scrutiny and finds no compelling interest, but fails

to discuss *any* interest of the State. To be clear, the State's interest is in protecting the life of the unborn child.

¶14 The definition of when an exception is allowed is a policy choice for the people of the state of Oklahoma, not a decision we should be dictating from above. "The duty of determining what law shall be enacted and what law shall not be enacted rests neither upon the executive nor the judicial department." *Threadgill*, 1910 OK 165, ¶ 19, 109 P. 558, 562. The people of Oklahoma have the option to change this legislative language, and perhaps should do so, in order to help provide further guidance and clarity to medical professionals for when medical emergency abortions are allowed—but that is not the role of this Court.

III. ELECTIVE ABORTION IN OKLAHOMA

¶15 Finally, the opinion notes in multiple places that the Court "makes no ruling on whether the Oklahoma Constitution provides a right to an elective termination of a pregnancy. *See* Maj. Op. ¶¶ 10, 13. Yet, following *Dobbs*, it is clear that Oklahoma has not historically recognized a right to an elective abortion. *See* 21 O.S.2011, § 861. Further, it is inexplicable to me how the majority finds section 861 constitutional because "it allows for a termination of a pregnancy in order to preserve the life of the pregnant woman," but somehow asserts that it does not make a "ruling on whether an elective abortion is constitutional" when elective abortions are

prohibited under the same section. *See* Maj. Op. ¶ 13.

¶16 I cannot join in the majority opinion because I do not believe the statute is unconstitutional under the rational basis test. Our decision is whether both statutes are constitutional as written—and they are. For the above reasons, I dissent.

ORIGINAL



2023 OK 24

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

OKLAHOMA CALL FOR REPRODUCTIVE)
JUSTICE, on behalf of itself and its members;)
TULSA WOMEN'S REPRODUCTIVE CLINIC,)
LLC, on behalf of itself, its physicians, its staff, and)
its patients; ALAN BRAID, M.D., on behalf of)
himself and his patients; COMPREHENSIVE)
HEALTH OF PLANNED PARENTHOOD GREAT)
PLAINS, INC., on behalf of itself, its physicians, its)
staff, and its patients; and PLANNED)
PARENTHOOD OF ARKANSAS & EASTERN)
OKLAHOMA, on behalf of itself, its physicians, its)
staff, and its patients,)
Petitioners,)
v.) Case No. 120,543

FILED
SUPREME COURT
STATE OF OKLAHOMA

MAR 21 2023

JOHN D. HADDEN
CLERK

GENTNER DRUMMOND, in his official capacity as)
Attorney General for the State of Oklahoma; VICKI)
BEHENNA, in her official capacity as District Attorney)
for Oklahoma County; STEVE KUNZWEILER, in)
his official capacity as District Attorney for Tulsa)
County; LYLE KELSEY, in his official capacity as)
Executive Director of the Oklahoma State Board of)
Medical Licensure and Supervision; BRET S.)
LANGERMAN, in his official capacity as President)
of the Oklahoma State Board of Osteopathic)
Examiners; KEITH REED, in his official capacity as)
the Commissioner of the Oklahoma State Board of)
Health,)
Respondents.)

FOR OFFICIAL
PUBLICATION

Rec'd (date)	3-21-23
Posted	PR
Mailed	PR
Distrib	PR
Publish	<input checked="" type="checkbox"/> yes <input type="checkbox"/> no

KUEHN, J., with whom ROWE, V.C.J., joins, DISSENTING:

¶1 Petitioners claim the Oklahoma Constitution protects a woman's right to terminate her pregnancy. Petitioners, Respondents, and this Court all agree that the plain language of our Constitution does not. The question is

why this Court chooses to find that protection is implied by some other existing language. Instead of creating language, the Court should use the most powerful tool in the judicial toolbox, judicial restraint. We are asked to decide whether this protection currently exists in the language of the Oklahoma Constitution, yes or no. With that determination our judicial role ends, and judicial restraint should begin.

¶2 It is not the job of this Court to create a right where none exists. Nor is it the Court's job to make policy decisions. The Legislature, through legislation, and the People, through their elected representatives and through referendum, have that responsibility. This is not a novel concept in Oklahoma jurisprudence. And the United States Supreme Court clearly recognized that whether a state protects the right to terminate a pregnancy should be decided by the people of that State.¹ Ultimately, the people of Oklahoma are the ones to decide this issue. This Court can only determine what law currently exists.

¶3 The Majority first looks at Article II, section 7 of our Constitution, which provides, "No person shall be deprived of life, liberty, or property, without due process of law." Recently the United States Supreme Court determined that this language in the federal Constitution does not include a woman's right to terminate her pregnancy. *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 2284 (2022). Previously, of course, the Court had found

¹ *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 2243, 2247, 2257, 2259, 2265, 2277, 2279, 2284 (2022).

the same language did protect that right. Thus, the Court needed to explain its reasoning. It concluded that, in order to find a fundamental right within the liberty interest of the Due Process Clause – a right which is not included in the specific text – one must determine whether the right is deeply rooted in our Nation’s history and tradition. *Id.* at 2246. The Court then explored the general history of termination of pregnancy at common law and in state and federal statutes, and determined that the right to terminate a pregnancy was not deeply rooted in colonial times or, after its founding, the United States. *Id.* at 2253-54.

¶4 The Majority uses this same analysis to find that the Oklahoma Constitution provides a limited protection for termination of a pregnancy to preserve a woman’s life. I believe this is misguided. We need not engage in this analysis to decide the question before us. The *Dobbs* Court directed, “[t]he Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.” *Id.* at 2284.

¶5 To interpret the Oklahoma Constitution, we need not use a federal analysis or test. That is, we begin our analysis with a clean slate. We begin with looking at the language of the Constitution itself. Only if it is ambiguous do we look elsewhere. I agree with the Majority that since before statehood Oklahoma has, *by statute*, exempted from criminal prosecution a termination

of pregnancy which is necessary to preserve the mother's life. This humane exception has consistently been included in most Oklahoma statutes regulating abortion, from the territorial code through the most recent legislative session. But the framers of the Oklahoma Constitution did not include it. And the Legislature and people of Oklahoma have had over a century to preserve this exception as a Constitutional right. They have not done so. There simply is no language in our due process clause which includes any right to terminate a pregnancy.

¶16 The Majority also suggests that Article II, section 2 of the Oklahoma Constitution may preserve a right to abort. That provision begins, "All persons have the inherent right to life...." The Majority first says this clause "can be viewed as" protecting a termination of pregnancy to preserve a woman's life. And, immediately thereafter, the Majority holds that the Oklahoma Constitution "creates an inherent right of a pregnant woman to terminate a pregnancy when necessary to preserve her life." But the Majority provides no legal explanation for this statement. Is it based on the statutory analysis justifying the inclusion of this right under the due process clause? Or is the Majority suggesting that, because we all have a right to life, anything which threatens that right may give rise to a constitutional protection or, conversely, prohibition? And, under some rare and terrible circumstances, people's rights to life may conflict. How do we balance that? I believe the general language in Article II, section 2 is not enough, and certainly not

without more explanation, to bear the weight of this specific constitutional protection.

¶7 Because the Oklahoma Constitution does not explicitly protect termination of pregnancy, the Legislature has the authority to regulate it, to ban it, and to criminalize its procurement. And the Legislature has done so, almost since statehood. I would find that 21 O.S.2021, § 861 was constitutional, but was superseded by 63 O.S. 2022, § 1-731.4; I would also find Section 1-731.4 constitutional. The Legislature – not this Court – can also enact exceptions to that ban. Section 861 includes such an exception, to preserve the life of the mother. In 2022 the Legislature enacted Section 1-731.4, which prohibits termination of pregnancy except to save the life of a woman “in a medical emergency.” And, as a matter of policy, the Legislature defined what that means. Even if I agreed with the Majority that the Oklahoma Constitution provides a limited right to termination of pregnancy to preserve the life of the mother, I could not agree with the Majority’s attempt to define that phrase. Again, that task belongs to either the people or their legislative representatives.

¶8 All who practice medicine face difficult, important, life decisions for their patients every day. When a mother must make the horrific decision to choose between her own life and that of her child, her medical team is present to provide her medical expertise. Each situation will be different, and this Court is in no better position to define what constitutes an “emergency”

than the people (through their elected representatives) are. The exception is limited to emergencies, because under current Oklahoma law, abortion is illegal except in an emergency. This exception protects what is perhaps the most difficult choice a mother will ever have to make.

¶9 The Oklahoma Constitution does not include a right to abortion. The people, or their elected representatives, may include this limited protection in the Constitution. I do not believe it is this Court's place to do so, absent some ambiguity in the current language that simply isn't there.