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Oklahoma Supreme Court Strikes Down Two Anti-abortion Statutes

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In a 6-3 decision, the Oklahoma Supreme Court held that two recently passed anti-abortion statutes are in violation of the state's Constitution. However, the highly restrictive 1910 statute remains in place.

The justices used their ruling earlier this year in another abortion case as precedent to set aside two statutes passed in the recent session. In the earlier ruling, in a 5-4 decision, the justices declared that there is a "constitutional right" to abortion in the Oklahoma State Constitution. This no doubt would have surprised the writers of the state's Constitution, just as the *Roe v. Wade* ruling of 1973 would have amazed James Madison and George Washington.

Yet, that is what the Oklahoma Supreme Court (OCS) ruled in March, arguing that Oklahoma's statute — passed in the wake of the U.S. Supreme Court's overturning of *Roe* with the *Dobbs* decision — which stipulated that a woman could obtain an abortion in Oklahoma only if a medical emergency arose that threatened the woman's life, was too narrow. The majority of the OCS justices said that the option to obtain an abortion should not be restricted to just a medical emergency, but should be left up to a physician to decide if a continued pregnancy might lead to a situation in which a mother's life is in danger.

Tony Lauinger, the state chairman of Oklahomans for Life, commented on that decision, "The worst of it is, in determining whether an abortion is 'necessary to preserve the life of the mother,' the Court has created a subjective standard which is virtually as broad as the health exception in *Doe v. Bolton* and which allows the abortionist to be as arbitrary as he wants in justifying an abortion."

Lauinger's point is well taken. The person who is in the business of ending the life of unborn children would be the person deciding whether a continued pregnancy *might*, sometime in the future, lead to a life-threatening emergency. One can readily see just how large a loophole that could be.

Building on that decision, the OCS has now struck down two more statutes passed by the Oklahoma Legislature this session. In a case brought by a group calling itself the Oklahoma Call for Reproductive Justice, and others including Planned Parenthood of Arkansas and Eastern Oklahoma, the Court assumed original jurisdiction in a suit challenging SB 1503 and HB 4327.

SB 1503 was an effort to clarify at what point in the stage of pregnancy that an abortion would become illegal under the 1910 statute. It prohibited abortion after detection of a fetal heartbeat, except in the case of a medical emergency. HB 4327 was a total ban on all abortions unless the "abortion is necessary to save the life of a pregnant woman in a medical emergency," or the "pregnancy is the result of rape, sexual assault, or incest that has been reported to law enforcement." The statute defined "medical

emergency" as a condition 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."

While this language seems like a reasonable attempt by the Oklahoma Legislature to make a law (which is, after all, the province of the legislative branch of government) to define exactly what is meant by "medical emergency," the OCS declared both statutes unconstitutional, citing its own decision reached earlier this year as precedent. OCS even declared that SB 1503 "provides even more extreme language" than the law it struck down just a few months earlier. Concerning HB 4327, the Court not only struck down the language concerning what constitutes a "medical emergency," it struck down the whole statute — despite its inclusion of a "severability" clause.

The majority explained its ignoring of the severability clause — which means that even if a part of a statute is declared unconstitutional, the remainder of the bill will still stand. "In this case, if the Court were to sever the language allowing for medical abortions only in case of a medical emergency in HB 4327, the Court would create an even more restrictive statute like SB 1503, which was in further violation of the Oklahoma Constitution. If the Court were to sever the prohibition on abortion altogether, there would be no meaning to the rest of the bill because there would be nothing to civilly enforce. In order to attempt to salvage the rest of HB 4327, this Court would have to re-write the entire statute, which is not our purview."

What the Court is referencing is HB 4327, which banned abortions from the moment of fertilization (defined as the moment when the male sperm unites with the female egg), except for medical emergencies or in reported cases of rape and incest. In addition, this statute (modeled after a Texas statute) would have allowed citizens to file civil suits against those performing illegal abortions. The Court declared that since they were striking down the rest of the law, there was nothing to "civilly enforce." Thus the "severability clause" was irrelevant.

Unfortunately, one justice who dissented in March switched sides in these two cases. Justice Richard Darby concurred, writing, "If the Court was starting on square one on this subject, I would dissent. But this issue is determined by stare decisis. I maintain my position that I expressed in my dissent in *Oklahoma Call for Reproductive Justice v. Drummond* [the March case]."

Justice John Kane, however, rejected the assertion that *stare decisis* was relevant in this case, and continued to dissent. "Were I to conclude that this case is exclusively resolved by the doctrine of stare decisis, I would dissent for the reasons given in my dissent [in the March case]. However, while this case [and the previous case] both deal with abortion, they present different legal and factual issues."

Justice Dustin Rowe, in a separate dissent, expressed his concern that "the majority has expanded that right [to abortion] beyond what the Court recognized [in the previous case]." Rowe added, "The issues presented in this matter are political questions, which are better resolved by the people via our democratic process."

Oklahoma Governor Kevin Stitt, who appointed all three dissenters to the bench, agreed with Rowe. "The Court has once more over-involved itself in the state's democratic process." State Senator Julie Daniels (R-Bartlesville), an author of the two bills, charged the Court with "Acting as self-appointed legislators" who have "unleashed another attack on Oklahoma's unborn children. The Court also thumbed its nose at the Legislature and showed their contempt for the separation of powers."

Fortunately for those who value the life of the unborn, the 1910 statute, which criminalized almost all

abortions in the state, remains in effect. The 1910 law said, “Every person who administers to any woman, or 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 the intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, shall be guilty of a felony. The punishment provided for violation of the statute is imprisonment in the State Penitentiary for not less than two (2) years nor more than five (5) years.”

As good as this statute is, those seeking to provide more protection for the lives of unborn children in the Sooner State, could look to add even stiffer punishments than just two to five years in prison. And, considering the rise of the use of the mail-order abortifacients, the Legislature could criminalize the delivery of such drugs to any person seeking to end their pregnancy by abortion.