

ORIGINAL



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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA OCT - 4 2022

JOHN D. HADDEN
CLERK

Case No. PR-120543

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

Received:	
Docketed:	10-4-22
Marshaled:	
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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, 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, KATIE TEMPLETON, in her 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.

BRIEF OF AMICI CURIAE PROFESSOR CARTER SNEAD, THE ROMAN CATHOLIC ARCHDIOCESE OF OKLAHOMA CITY, AND DIOCESE OF TULSA IN OPPOSITION TO PETITIONERS' APPLICATION FOR DECLARATORY AND INJUNCTIVE RELIEF AND/OR WRIT OF PROHIBITION AND IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Carter Snead is Professor of Law, Concurrent Professor of Political Science, and Director of the de Nicola Center for Ethics and Culture at the University of Notre Dame. Professor Snead is one of the world's leading experts on public bioethics—the governance of science, medicine, and biotechnology in the name of ethical goods. His teaching and research include the legal, ethical, social, cultural, and policy issues concerning abortion. His book *What It Means to be Human: The Case for the Body in Public Bioethics* (Harvard University Press 2020) was recently listed in *The New York Times* as one of “Ten Books to Understand the Abortion Debate in the U.S.” Professor Snead is the former General Counsel to the President's Council on Bioethics (a White House advisory committee) and an elected fellow of The Hastings Center, the oldest independent, nonpartisan private bioethics think tank and institute in the world. As part of their ministry, *amici* the Roman Catholic Archdiocese of Oklahoma City and Diocese of Tulsa are committed to promoting the intrinsic equal dignity of every human being, born and unborn, from conception to natural death, and, in particular, caring for mothers, babies, and families in need, regardless of their faith tradition. Collectively, they consist of nearly 200 parishes and missions, serving all 77 counties in Oklahoma.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners are asking this Court to ignore the text of the Oklahoma Constitution as well as the unbroken history of legal protection for unborn children and the criminal prohibition of abortion, both before and after its ratification (from 1890 until the now-overturned U.S. Supreme Court decision in *Roe v. Wade* in 1973).¹ They thus invite this Court simply to *invent*

¹ We agree with Respondent's analysis, set forth in its Answer to Petitioners' Brief in Chief, that there is no defensible historical or textual analysis of the Oklahoma Constitution that yields an unwritten right to abortion. There is therefore no need to recapitulate that analysis here.

a new state constitutional right to abortion based on nothing more than Petitioners' own preferred normative arguments concerning this perennially vexed domain. This request, of course, flies in the face of this Court's longstanding method of evaluating substantive due process claims, which focuses on "history, legal traditions, and practices."² But even more deeply, as this Brief will show, Petitioners' normative arguments (on which their constitutional claims depend) fail on their own merits. First, their analysis of the competing goods at stake in this context is woefully inadequate—failing to take into account even the most basic elements of the vital conflict at the heart of the abortion debate as it has long been framed by pro-choice and pro-life advocates alike. Second, their arguments are rooted in controversial premises about human identity and flourishing that the Oklahoma Constitution does not require.

ARGUMENT

I. Petitioners' Framing of the Abortion Issue Fatally Undermines Their Constitutional Argument

The debate over abortion in this country (and others) has generally involved an analysis of the competing goods at stake.³ On the one side, there is the unborn child, whose interests primarily consist of being protected from the lethal private violence of abortion. On the other is the pregnant woman whose interests include being free from the bodily, psychic, and economic burdens of an unwanted pregnancy and the obligations of parenting once the child is born. Arguments in favor of abortion rights rest on the proposition that because these burdens are so significant and uniquely affect the pregnant woman, she alone should have the authority to terminate or continue the pregnancy. Arguments for restricting or prohibiting

² Answer to Pet. Br. in Chief at 13.

³ For an extended discussion of the legal, policy, and philosophical debate over abortion, see O. Carter Snead, *What It Means to be Human* 106–85 (2020). The arguments that follow draw heavily upon this work.

abortion rest on the proposition that absent narrow and compelling justifications (such as threats to the life of the mother), it is unjust to intentionally take the life of the child *in utero*, who though immature, small, and profoundly dependent, is indisputably an individual, living member of the species *homo sapiens*, separate and distinct from her mother.⁴ By way of response, those arguing for abortion rights sometimes make the case that the unborn child, though a human being in the biological sense, does not merit legal protection because she is not a “person” in the moral sense.⁵ Proponents of this point of view argue that only those human beings that meet preferred criteria (such as the capacity for conceptual thought) should enjoy the protections of the law against intentional killing of innocents. Advocates for legal protection of the unborn child respond that such line-drawing constitutes radical discrimination against the weak and vulnerable based on standards that are specifically designed by the strong to withhold the protection of the law for their own benefit. Moreover, they object that when applied neutrally, the criteria for “personhood” often exclude from the moral and legal community not just the unborn, but newborns, children, the cognitively disabled, and the elderly, which reveals such criteria to be ethically monstrous. They argue that all human beings possess intrinsic, equal, and matchless worth, regardless of age, size, state of dependency, or others’ perceptions. This ethical, political, and legal argument for and against abortion has continued for many decades, made by thoughtful philosophers, legal scholars, and others of good will. The form of this argument is well understood and a fixture of American public bioethics.

Petitioners’ normative framing of the abortion debate, by contrast, bears no

⁴ See *id.*; see also App. to Resp. Answer (collecting authorities).

⁵ Still others, such as philosopher Judith Jarvis Thomson, argue that even assuming the full personhood of the unborn child, there is no duty to carry him or her to term, despite the parent-child relationship. For an analysis and critique of this argument, see Snead, *supra* note 3.

resemblance to this well-established account of the competing goods at stake. Presented with the Petitioners' arguments as the only window into the ethical, legal, and policy debate over abortion, one could be forgiven for not understanding why there is a dispute at all. It only mentions one side of the calculus of important goods—the physical, psychic, and financial burdens on the mother of unwanted pregnancy and parenthood—and entirely ignores the interests of the innocent, unborn human being whose life is intentionally terminated by the abortion.⁶

This defective conceptual framing dooms Petitioners' constitutional arguments because they turn entirely on the proposition that Sections 2 and 7 of Article II of the Oklahoma Constitution, taken together, protect an inherent "liberty interest" in abortion that ensures that women can "chart their own course in life," "protect their health and their families," and "take advantage of all that society has to offer."⁷ Access to abortion *must* be guaranteed by the Oklahoma Constitution as an inherent right because it maximizes chances for women "to set short and longer-term aspirational plans relating to children, finances, education, and relationships."⁸ However, as important as these goods obviously are, Petitioners never explain why they are sufficient to justify the intentional taking of an innocent human life in the womb. It is impossible to judge the scope of any asserted liberty interest without a meaningful assessment of the object, nature, and *consequences* of the choice under consideration. Even if one grants a robust right to liberty and self-determination, a state may reasonably impose limits where the exercise of such freedom causes *harm* to another. The Plaintiffs do not attempt to

⁶ The closest Petitioners come to even recognizing that there are competing goods at stake is when they refer in conclusory fashion to Oklahoma's interest in "potential life." Pet. Br. in Chief at 23.

⁷ *Id.* at 6.

⁸ *Id.* In support of this proposition, Petitioners rely on contested factual assertions regarding the deleterious effects of pregnancy on health, and those of parenthood on economic and social well-being. Respondents' expert declarations (found in the Appendix to Respondents' Answer) offer decisive rebuttals to the Petitioners' empirical assertions on these matters.

explain why abortion is a justified harm. They appear to simply assume without explanation that it is not meaningfully harmful in the first instance.⁹ As such, they beg the fundamental question at issue and assume the very thing they mean to prove, namely, that the scope of the asserted inherent right to liberty extends to abortion.

Having failed to explain as a conceptual matter *why* the liberty they espouse justifies a right to kill what is indisputably (as a matter of biological classification)¹⁰ a living individual member of the species *homo sapiens* in the womb, they by extension fail to establish *as a legal matter* that the Oklahoma Constitution guarantees an unwritten right to abortion that likewise requires the state political branches of government to (i) set the value of the interests of the unborn child at nil, and (ii) categorically privilege the interests of her mother by comparison.

II. Petitioners' Argument Depends on a Radical Conception of Human Identity and Flourishing Without Basis in the Oklahoma Constitution

Petitioners are not merely asking this Court to embed in the Oklahoma Constitution (and thus impose on the people of the state) a normative view of abortion that flattens and ignores the complexity of the competing goods at issue. They are also asking this Court to write into the Constitution the radical and deeply flawed ideology of what it means to be and flourish as a human being in which their normative view is rooted. Consider again how

⁹ Arguments by several amici supporting Petitioners suffer from the same infirmity in that they simply discuss the important health and economic interests of women seeking abortions without explaining how such interests stand in relation to the interest of the unborn child of avoiding the lethal consequences of abortion, or the interests of the state in protecting unborn life, preserving the integrity of the medical profession, or promoting respect for life more generally. The ethical arguments made in the amicus brief of the American College of Obstetricians and Gynecologists, et al., are especially problematic in this way. They appeal to the ethical principles of “beneficence/non-maleficence,” and “patient autonomy” without sufficiently addressing the harm of abortion to the unborn child. It is impossible to assess their arguments without such a discussion. Br. of American College of Obstetricians and Gynecologists et al. at 6–7. They and other amici supporting Petitioners thus likewise fail to explain the novel proposition that the Oklahoma Constitution prevents the state’s political branches from weighing these competing goods and legislating accordingly.

¹⁰ See, e.g., Brief of Biologists as Amici Curiae in Support of Neither Party, *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022) (No. 19-1392).

Petitioners describe the human context in which the question of abortion arises.

Petitioners' argument rests on the premise that the fundamental unit of human reality is the individual, defined by her will and capacity to choose, and whose flourishing consists in pursuing the projects of the will (*e.g.*, to “set short and longer-term aspirational plans relating to children, finances, education, and relationships”)¹¹, even when it requires the use of violence against the weakest and most vulnerable members of one's own family. This normative framework dissolves the parent-child relationship, atomizes and isolates mother and child, and reconfigures their relationship as a zero-sum vital clash of interests between strangers—a person and nonperson (who is only barely mentioned).

This narrative of conflict bears little relation to the lived reality of human procreation and pregnancy, in which the *dramatis personae* include a woman and her biological offspring literally joined in body, one inside the other and utterly dependent on the other, the two lives integrated and intertwined to a degree found in no other human relationship. They are, biologically speaking, mother and child. They are not host and parasite, homeowner and intruder, or violinist and unwilling conjoined kidney donor (to borrow a famous analogy from philosopher Judith Jarvis Thomson)¹². This is not a dispute over private property. Moreover, there is no mere “unplugging” to undo this relationship; modern methods of abortion involve the direct killing and removal of the fetus through highly invasive and violent means. Petitioners' narrative of this conflict is simplistic, alien, and forgetful of lived embodied reality.

Petitioners offer no serious discussion of the meaning of pregnancy's singular bodily integration and intertwining of mother and child. There is no exploration of the significance

¹¹ Pet. Br. in Chief at 6.

¹² See Snead, *supra* note 3 at 126–31 (discussing Judith Jarvis Thomson, A Defense of Abortion, *in* Rights and Wrongs of Abortion: A Philosophy and Public Affairs Reader 3, 4–5 (Marshall Cohen, Thomas Nagel & Thomas Scanlon eds., 1974)).

of the bonds of kinship. There is no reflection on the fact that every new human life comes into being already embedded in a relationship with mother, father, and family. They do not consider that the womb is the first place of belonging for every child who has ever lived. There is no wrestling with the complexity and risks of dividing the world of living human organisms into “persons” who bear rights and “nonpersons” who live at the sufferance of others, according to their interests and desires.

Their argument does not grapple with the alternative possibility that we are not merely solitary and isolated individuals seeking to impose our wills on the world and one another. That we are perhaps better understood as vulnerable, mutually dependent, embodied beings in time who exist in a web of relationships that bring with them both unchosen obligations and unearned privileges regarding one another’s care and concern. In these human networks of uncalculated giving and graceful receiving that are required to protect and promote the flourishing of a community of embodied beings, the vulnerability and dependence of a woman facing an unplanned pregnancy constitutes a summons for aid that must be answered by all of us who are able to render it. By contrast, the Petitioners’ argument presupposes only a world of strife in which atomized strangers are isolated in their vulnerability, with only the “freedom” to resort to force against others to protect their interests. It is a world without unchosen obligations that inhere in particular natural or communal relationships. It is a world in which parents and children are strangers to one another, owe nothing to each other, and are not entitled to mutual love, care, concern, and protection.

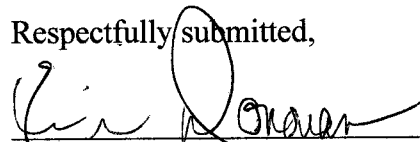
Petitioners, of course, are free to embrace any account of human flourishing they wish and make the case for it in the public square before the political branches of the state government. But they are wrong to ask this Court to embed their radically individualistic

anthropology in the state Constitution as the necessary but implicit normative foundation for a novel right to abortion that finds no support in its text, history, or tradition. They are wrong to ask this Court to strip from the people of Oklahoma the freedom and authority to debate the *full* array of human goods and various conceptions of human flourishing implicated by the abortion issue and legislate accordingly.

CONCLUSION

For the foregoing reasons, this Court should reject Petitioners' invitation to graft on to the Oklahoma Constitution a novel right to abortion that is not only unwarranted as a matter of its text, history, and tradition, but also unjustified by Petitioners' extratextual and ahistorical appeal to deficient, unbalanced normative arguments, rooted in radical premises about who we are and what we owe to one another as human beings. The question of abortion is a matter for the people of Oklahoma to resolve through the deliberative democratic processes of the political branches, as they have done in the challenged laws in this case.

Respectfully submitted,



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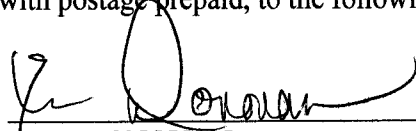
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was mailed on the 30th day of September, 2022, by depositing it in the U.S. Mail, with postage prepaid, to the following:



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