

MAR 17 2016

MICHAEL S. RICHIE
CLERK

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

(1) LARRY A. BURNS, D.O., on behalf of)
himself and his patients,)

Plaintiff/Appellant,)

vs.)

(2) TERRY L. CLINE, in his official capacity)
as Oklahoma Commissioner of Health,)

(3) CARL B. PETTIGREW, D.O., in his official)
capacity as President of the Oklahoma State)
Board of Osteopathic Examiners, and)

(4) GREG MASHBURN, in his official)
capacity as District Attorney for Cleveland,)
Garvin, and McClain Counties,)

Defendants/Appellees.)

#114807

No. _____

Appeal from District Court of Oklahoma County
Case No. CV-2014-1896
The Honorable Don Andrews

**MOTION OF APPELLANT LARRY A. BURNS, D.O., THAT APPEAL BE
RETAINED FOR DISPOSITION BY SUPREME COURT**

Pursuant to Okla. Sup. Ct. R. 1.24, Appellant Larry A. Burns, D.O., hereby moves that this appeal be retained for disposition by the Supreme Court. The issues raised in this appeal “concern matters which will affect public policy” and “any decision is likely to have widespread impact.” Okla. Sup. Ct. R 1.24(c)(3). Senate Bill 1848 (2014 Okla. Sess. Laws Ch. 370) (“S.B. 1848” or “the Act”) offends the rights of all Oklahoma citizens by violating the Oklahoma Constitution, depriving Dr. Burns’s patients of their fundamental due process right to abortion, targeting physicians who provide abortion and their patients for discriminatory treatment, and depriving women throughout Oklahoma of access to safe medical care. If enforced, the Act will force the closure of one of only two clinics in the state, which serves nearly half of women who seek an abortion in Oklahoma. The remaining facility would not be able to meet the statewide demand for abortion services, and women will be forced to travel hundreds of miles to reach the only remaining provider. Women will likely face delays in obtaining abortions, increasing their risk of complications, needlessly forcing some women to undergo more invasive and complex procedures, including surgical rather than medication abortion, and preventing some women from exercising their constitutional rights entirely. Some may turn to illegal and unregulated medical care to end their pregnancies, including various means of self-induced abortion. This Court has granted motions to retain where, as here, constitutional rights are at stake and the case will have widespread impact. *See Farrimond v. State ex rel. Fisher*, 2000 OK 52, ¶ 6; *Thomas v. Henry*, 2011 OK 53, ¶ 2.

S.B. 1848 prohibits the performance of an abortion unless a physician with admitting privileges at a general hospital within thirty miles of the facility is present at the facility. It is just one in a long series of comprehensive and progressively more onerous restrictions providers have been forced to challenge to continue providing health care and avert systematic

legislative efforts to dismantle abortion access in the state. The Oklahoma State Medical Association publicly opposed S.B. 1848. Rather than serving women’s health, the statute threatens the health of women throughout the State.

The District Court made grave errors of constitutional law, denying Dr. Burns’s motion for summary judgment on his single-subject and delegation challenges, and granting summary judgment to the State on all claims. The District Court departed from this Court’s case law, failing to strike down an unconstitutional multiple-subject law. S.B. 1848 directs the Department of Health to adopt medical standards related to abortion—including standards for equipment, training, screening, follow-up care, and reporting—while also separately requiring abortion providers to have admitting privileges. A legislator in favor of one aspect of the bill, such as some medical standards overseen by the Department of Health, would not necessarily approve of all medical standards and the admitting privileges provision—a unilateral decision by individual hospitals, without any standards for such determinations. Okla. Const. art. V, § 57; *Nova Health Sys. v. Edmondson*, 2010 OK 21, ¶ 1; *Fent v. State ex rel. Okla. Capital Improvement Auth.*, 2009 OK 15, ¶ 23; *In re Initiative Petition 382*, 2006 OK 45, ¶¶ 14–15.

The law also unconstitutionally delegates legislative authority to hospital boards without standards to guide the exercise of such authority nor a mechanism to challenge determinations, and adopts as state law the future rules and bylaws of public and private hospitals. Okla. Const. art. IV, § 1; art. V, § 1; *Okla. City v. State ex rel. Dep’t of Labor*, 1995 OK 107. Hospitals can and do deny physicians admitting privileges for reasons unrelated to their qualifications. The District Court, relying on an inapplicable statute, erred in finding that S.B. 1848 sets forth standards. Moreover, the District Court relied on federal delegation doctrine, disregarding the greater protection against standardless delegation provided by the

Oklahoma Constitution. As in *In re Initiative Petition No. 366*, 2002 OK 21, ¶¶ 17–18, the omission of any standards impermissibly leaves “the fundamental policy-making function to the unbridled discretion” of unelected hospital boards without meaningful review. Likewise, without a mechanism for review, S.B. 1848 deprives Dr. Burns of his due process right to pursue his chosen profession. Okla. Const. art. IV, II, § 7.

S.B. 1848 further violates the fundamental rights of Dr. Burns’s patients to access abortion. Okla. Const. art. II, § 7. The District Court misapplied the undue burden standard, conflating its purpose and effects prongs, and denied a trial on the undue burden claim, even though numerous courts around the country have held trials to assess the benefits and impact of admitting privileges laws on women. *See, e.g., Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 916 (7th Cir. 2015) (holding admitting privileges law imposed an undue burden following an evidentiary hearing); *Whole Woman’s Health v. Lakey*, 46 F. Supp. 3d 673 (W.D. Tex. 2014) (same), *aff’d in part, vacated in part, rev’d in part sub nom. Whole Woman’s Health v. Cole*, 790 F.3d 563 (5th Cir. 2015) *modified*, 790 F.3d 598 (5th Cir. 2015), *and cert. granted*, 136 S. Ct. 499 (2015). Moreover, the law subjects abortion providers to regulatory burdens not imposed on similar outpatient facilities and is thereby unconstitutional as a special law and equal protection violation. Okla. Const. art. V, § 59; *Reynolds v. Porter*, 1988 OK 88; Okla. Const., art. II, § 7. The District Court denied a trial on these claims, ignoring the existence of disputed material facts about whether the law advances the State’s asserted interest in women’s health or undermines it.

For the foregoing reasons, Dr. Burns respectfully requests that this Court retain the instant case to address S.B. 1848’s constitutional infirmities and widespread impact on women throughout Oklahoma. Okla. Sup. Ct. R. 1.24(c)(3).

Dated: March 17, 2016

Respectfully submitted,



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**Admitted to Practice by Order dated Oct. 2,
2014*

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 17th of March, 2016, of a copy of the foregoing was served via hand delivery, on the following:

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