



**ORIGINAL**

FILED  
SUPREME COURT  
STATE OF OKLAHOMA

JUL 12 2016

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CLERK OF  
THE APPELLATE COURTS

**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. )

No. SD-114807

Received:	7/12/16
Docketed:	
Marshal:	
COA/OKC:	
COA/TUL:	

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

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**MOTION FOR LEAVE TO PROVIDE BRIEFING**

Appellant Larry A. Burns, D.O., makes this Second motion to this Court for an Order granting the parties leave to submit briefs in this case. Dr. Burns' first motion for additional briefing was filed on March 17, 2016 and is still pending.

1. This appeal is governed by Oklahoma Supreme Court Rule 1.36, which specifies an accelerated procedure for appeals from summary judgments and does not permit briefs on appeal unless authorized by the Court. Okla. Sup. Ct. R. 1.36(g).

2. Dr. Burns respectfully requests the opportunity to submit a brief to address new authority issued by the United States Supreme Court in *Whole Woman's Health v. Hellerstedt*, No. 15-274, 2016 WL 3461560 (U.S. June 27, 2016). The legal standard set by the U.S. Supreme Court in *Whole Woman's Health* provides the floor of protection guaranteed to Dr. Burns' patients under the Due Process Clause of the Oklahoma Constitution and requires judgment in favor of Dr. Burns and his patients under the Sixth Claim for Relief in the (Amended) Complaint.

3. This Court has made clear that the Oklahoma Constitution protects due process rights *at least* to the same extent as the Federal Constitution. *Okla. Coal. for Reprod. Justice v. Cline*, 2012 OK 102, 292 P.3d 27 (per curiam); *Nova Health Sys. v. Pruitt*, 2012 OK 103, 292 P.3d 28 (per curiam); *Starkey v. Okla. Dep't of Corrs.*, 2013 OK 43, ¶ 45, 305 P.3d 1004, 1021 ("The United States Constitution provides a floor of constitutional rights—state constitutions provide the ceiling." (internal quotation marks and citation omitted)); *Messenger v. Messenger*, 1992 OK 27, 827 P.2d 865 ("Although the state and federal due process clauses are similarly, or identically, worded and have a coextensive definitional range, we are free, as a matter of state law, to afford protection to state-created rights that is more extensive than that which flows from the federal constitution."). As argued in Dr. Burns' Response to the State's

Motion for Summary Judgment, the strong protection for the fundamental right to abortion encompassed in the Due Process Clause of the Oklahoma Constitution, Art. II, § 7, calls for this Court to evaluate restrictions on the right to abortion under strict scrutiny. *See* Pl.’s Resp. Mem. of Law in Opp’n to Defs.’ Cross Mot. for Summ. J. at 15–18.

4. However, the U.S. Supreme Court’s decision in *Whole Woman’s Health* makes clear that, even under the federal standard, an admitting privileges requirement like the one at issue in this case imposes an undue burden on access to abortion. In its recent decision, the U.S. Supreme Court struck down a virtually identical admitting privileges requirement, holding it unconstitutional in all its applications. *See Whole Woman’s Health*, 2016 WL 3461560, at \*6. The Court explained that while a state has a legitimate interest in ensuring that abortion is performed under safe conditions, an abortion restriction must actually “further” that interest to survive constitutional scrutiny. *See id.* at \*15 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (plurality opinion)). Applying that standard, the Court held that the Texas admitting privileges requirement failed to serve any valid state interest because nothing in the record established that it would advance women’s health. *Id.* at \*18; *see also id.* at \*19–20. The State has presented no medical evidence in this case that differs in kind from the evidence that the State of Texas presented in *Whole Woman’s Health*.

5. Moreover, the Supreme Court made clear that for an abortion restriction to be constitutional, its benefits must outweigh its burdens. *See Whole Woman’s Health* at \* 16–17. The burdens of the Oklahoma requirement are comparable to the burdens of the Texas requirement struck down in *Whole Woman’s Health*. Enforcement of the admitting privileges requirement in Oklahoma would force the closure of one of only two licensed facilities in the state—causing the number of medical facilities providing abortions in the state to drop in

half—and lead to increased driving distances, a reduction in the availability of abortion services in Oklahoma, and a delay or total obstruction of access to services. *See id.* at \* 19 (crediting evidence that Texas admitting privileges requirement led to closure of about half of the clinics in the state); *see also* Pl.’s Resp. Mem. of Law in Opp’n to Defs.’ Cross Mot. for Summ. J. at 21–22. “Taken together” the burdens that the clinic’s shut down would bring about, “when viewed in light of the virtual absence of any health benefit,” would impose an undue burden on Oklahoma women that cannot stand in light of the U.S. Supreme Court’s clear precedent. *See id.* at \*20.

6. As in this Court’s prior cases addressing restrictions on access to abortion, this Court is bound to strike down the restriction at issue in light of a United State Supreme Court decision finding a similar law unconstitutional under the Federal Constitution. *Cline*, 2012 OK 102, ¶ 1, 292 P.3d 27, 27.

7. Additional briefing would provide the parties an opportunity to fully address the U.S. Supreme Court’s recent precedent and its dispositive impact on the instant case.

Dated: July ~~12~~ 2016

Respectfully submitted,



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J. Blake Patton, OBA No. 30673  
Walding & Patton  
518 Colcord Drive, Suite 100  
Oklahoma City, OK 73102-2202  
Telephone: (405) 605-4440

Martha M. Hardwick, OBA No. 3847  
P. O. Box 307  
Pauls Valley, Oklahoma 73075  
Telephone: (918) 749-3313

Ilene Jaroslaw\*  
New York Bar No. 2241131  
Genevieve Scott\*  
New York Bar No. 4922811  
CENTER FOR REPRODUCTIVE RIGHTS  
199 Water Street, 22<sup>nd</sup> Floor  
New York, NY 10038  
Telephone: (917) 637-3697  
Fax: (917) 637-3666  
*\*Admitted to Practice by Order dated Oct. 2,  
2014*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 12<sup>th</sup> day of July, 2016, a copy of the foregoing was served via hand delivery, on the following:

Sarah A. Greenwalt  
Assistant Solicitor General  
Office of the Oklahoma Attorney General  
313 NE 21<sup>st</sup> Street  
Oklahoma City, OK 73105

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end, positioned above a solid horizontal line.

J. Blake Patton, Esq.