

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

OKLAHOMA COALITION FOR )  
REPRODUCTIVE JUSTICE, on behalf of )  
itself and its members; )  
and )  
NOVA HEALTH SYSTEMS, D/B/A )  
REPRODUCTIVE SERVICES, on behalf )  
of itself, its staff, and its patients, )  
)  
)  
Plaintiffs/Appellees, )  
vs. )

TERRY CLINE, in his official capacity )  
as Oklahoma Commissioner of Health; )  
and )  
LYLE KELSEY, in his official capacity )  
as Executive Director of the Oklahoma )  
State Board of Medical Licensure and )  
Supervision; )  
and )  
CATHERINE V. TAYLOR, in her official )  
capacity as the President of the Oklahoma )  
State Board of Osteopathic Examiners, )  
)  
)  
Defendants/Appellants. )

FILED  
SUPREME COURT  
STATE OF OKLAHOMA  
JUN -7 2012  
MICHAEL S. RICHIE  
CLERK OF  
THE APPELLATE COURTS

#110765

No. \_\_\_\_\_

PETITION IN ERROR

XXX PETITION IN ERROR  
\_\_\_\_ AMENDED OR SUPPLEMENTAL PETITION  
\_\_\_\_ CROSS PETITION  
\_\_\_\_ COUNTER-PETITION  
\_\_\_\_ DATE FIRST PETITION IN ERROR FILED: \_\_\_\_\_

I. TRIAL COURT HISTORY

COURT/TRIBUNAL: Oklahoma County District Court  
COUNTY: Oklahoma  
CASE NO.: CV-2011-1722  
JUDGE: Donald Worthington  
NATURE OF CASE: Declaratory and Injunctive Relief

**NAME OF PARTY OR PARTIES FILING THIS PETITION IN ERROR:**

Terry Cline, in his official capacity as Oklahoma Commissioner of Health; and  
Lyle Kelsey, in his official capacity as Executive Director of the Oklahoma State  
Board of Medical Licensure and Supervision; and  
Catherine V. Taylor, in her official capacity as the President of the Oklahoma  
State Board of Osteopathic Examiners

**THE APPEAL IS BROUGHT FROM:**

- Judgment, Decree or Final order of District Court.
- Appeal from order granting summary judgment or motion to dismiss where motion filed after October 1, 1993 (Accelerated procedure under Rule 1.36).
- Appeal from Revocation of Driver's License (Rule 1.21(b)).
- Final Order of Other Tribunal.  
(Specify Corporation Commission, Insurance Department, Tax Commission, Court of Tax Review, Banking Board or Banking Commissioner, etc. \_\_\_\_\_)
- Interlocutory Order Appealable by Right.
- Other \_\_\_\_\_

**II. TIMELINESS OF APPEAL**

1. Date judgment, decree or order appealed was filed: May 11, 2012.
2. *If decision was taken under advisement*, date judgment, decree or order was mailed to parties: \_\_\_\_\_
3. Does the judgment or order on appeal dispose of *all* claims by and against *all* parties?  Yes  No.  
If not, did district court direct entry of judgment in accordance with 12 O.S. Supp.1995 § 994?  Yes  No.  
When was this done? \_\_\_\_\_
4. If the judgment or order is not a final disposition, is it appealable because it is an Interlocutory Order Appealable by Right?  Yes  No.
5. If none of the above applies, what is the *specific* statutory basis for determining the judgment or order is appealable? \_\_\_\_\_
6. Were any post-trial motions filed?  Yes  No.
7. This Petition is filed by:  Delivery to Clerk, or  
 Mailing to Clerk by U.S. Certified Mail, Return Receipt Requested, on \_\_\_\_\_  
(Date)

**III. RELATED OR PRIOR APPEALS**

List all prior appeals involving same parties or same trial court proceeding: \_\_\_\_\_

List all related appeals involving same issues: \_\_\_\_\_

**IV. SETTLEMENT CONFERENCE**

Is appellant willing to participate in an attempted settlement of the appeal by predecisional conference under Rule 1.250? \_\_\_\_\_ Yes XX No

**V. RECORD ON APPEAL**

- \_\_\_\_\_ A Transcript will be ordered.
- \_\_\_\_\_ No Transcript will be ordered because no record was made and/or no transcript will be necessary for this appeal
- \_\_\_\_\_ A Narrative Statement will be filed
- XX Record is concurrently filed as required by Rule 1.34 (Driver's License Appeals, etc.) or Rule 1.36 (Summary judgments and motions to dismiss granted).

**VI. JUDGMENT, DECREE OR ORDER APPEALED – EXHIBIT “A”**

Attach as Exhibit "A" to the Petition in Error a certified copy of the judgment, decree or order from which the appeal is taken. If a post-trial motion extending appeal time under Rule 1.22 was filed, a certified copy of the order disposing of the motion must be attached also.

**VII. SUMMARY OF CASE – EXHIBIT “B”**

Attach as Exhibit "B" a brief summary of the case *not to exceed one 8 1/2" x 11" double spaced page.*

### **VIII. ISSUES TO BE RAISED ON APPEAL – EXHIBIT “C”**

Attach as Exhibit "C" the issues proposed to be raised. Include each point of law alleged as error. Avoid general statements such as "Judgment not supported by law."

**IX. NAME OF COUNSEL OR PARTY, IF PRO SE**

**ATTORNEY FOR APPELLANT**

Patrick R. Wyrick  
OBA No. 21874  
Solicitor General  
Oklahoma Attorney General's Office  
313 NE 21st Street  
Oklahoma City, Oklahoma 73105  
Telephone: (405) 522-4393  
Facsimile: (405) 522-0669  
Email: patrick.wyrick@oag.ok.gov

**ATTORNEYS FOR APPELLEE**

Anne E. Zachritz  
OBA No. 15608  
Andrews Davis: A Professional Corporation  
Attorneys and Counselors at Law  
100 N. Broadway, St. 3300  
Oklahoma City, Oklahoma 73102-8812  
Telephone: (405) 272-9241  
Facsimile: (405) 235-8786  
Email: aezachritz@andrewsdavis.com

Martha M. Hardwick  
OBA No. 3847  
Hardwick Law Office  
P.O. Box 35975  
Tulsa, Oklahoma 74153-0975  
Telephone: (918) 749-3313  
Facsimile: (918) 742-1819  
Email: mh@hardwicklawoffice.com

Michelle Movahed\*  
New York Bar Registration No. 4552063  
Illinois Bar No. 62918636  
David Brown\*  
New York Bar Registration No. 4863544  
Center for Reproductive Rights  
120 Wall St., 14th Floor  
New York, NY 10005-3904  
Telephone: (917) 637-3600  
Facsimile: (917) 637-3666  
Email: mmovahed@reprorights.org  
dbrown@reprorights.org

\* Admitted to practice by order dated Oct. 7,  
2011

DATE: June 7, 2012

**E. Scott Pruitt**  
**Attorney General of Oklahoma**

Verified by: \_\_\_\_\_

  
Patrick R. Wyrick, OBA #21874  
Solicitor General  
Oklahoma Attorney General  
313 NE 21st Street  
Oklahoma City, OK 73105  
(405) 522-4448  
(405) 522-0669  
patrick.wyrick@oag.ok.gov

**X. CERTIFICATE OF MAILING TO ALL PARTIES AND  
COURT CLERK**

I hereby certify that a true and correct copy of the Petition in Error was emailed this 7<sup>th</sup> day of June, 2012, to the following:

**ATTORNEYS FOR APPELLEE**

Anne E. Zachritz  
OBA No. 15608  
Andrews Davis: A Professional Corporation  
Attorneys and Counselors at Law  
100 N. Broadway, St. 3300  
Oklahoma City, Oklahoma 73102-8812  
Telephone: (405) 272-9241  
Facsimile: (405) 235-8786  
Email: aezachritz@andrewsdavis.com

Martha M. Hardwick  
OBA No. 3847  
Hardwick Law Office  
P.O. Box 35975  
Tulsa, Oklahoma 74153-0975  
Telephone: (918) 749-3313  
Facsimile: (918) 742-1819  
Email: mh@hardwicklawoffice.com

Michelle Movahed\*  
New York Bar Registration No. 4552063  
Illinois Bar No. 62918636  
David Brown\*  
New York Bar Registration No. 4863544  
Center for Reproductive Rights  
120 Wall St., 14th Floor  
New York, NY 10005-3904  
Telephone: (917) 637-3600  
Facsimile: (917) 637-3666

Email: [mmovahed@reprorights.org](mailto:mmovahed@reprorights.org)  
[dbrown@reprorights.org](mailto:dbrown@reprorights.org)

\* *Admitted to practice by order dated Oct. 7, 2011*

I further certify that a copy of the Petition in Error was mailed to, or filed in, the Office of the Court Clerk in Oklahoma County on this 7<sup>th</sup> day of June, 2012.



---

PATRICK R. WYRICK

RECEIVED

IN THE DISTRICT COURT OF OKLAHOMA COUNTY MAY 15 2012  
STATE OF OKLAHOMA

ATTORNEY GENERAL

OKLAHOMA COALITION FOR )  
REPRODUCTIVE JUSTICE, on behalf )  
of itself and its members; and )  
NOVA HEALTH SYSTEMS, D/B/A )  
REPRODUCTIVE SERVICES, on behalf )  
of itself, its staff, and its patients )

Case No. CV-2011-1722

Judge Donald L. Worthington

Plaintiffs, )

v. )

FILED IN THE DISTRICT COURT  
OKLAHOMA COUNTY, OKLA.

MAY 11 2012

TERRY L. CLINE, in his official capacity )  
as Oklahoma Commissioner of Health; )  
LYLE KELSEY, in his official capacity as )  
Executive Director of the Oklahoma State )  
Board of Medical Licensure and )  
Supervision; and )  
CATHERINE C. TAYLOR, in her official )  
capacity as the President of the Oklahoma )  
State Board of Osteopathic Examiners, )

PATRICIA PRESLEY, COURT CLERK  
by \_\_\_\_\_  
DEPUTY

Defendants. )

**FINDINGS OF FACT**

1. In the year 2000 the United States Food and Drug Administration (FDA) approved the abortion inducing drug RU-486 (also known as Mifeprex and Mifepristone) for marketing in the United States subject to a regimen of use described in the FDA final printed labeling (FPL) that accompanied the approval of the drug.
2. On May 11, 2011, Governor Mary Fallin signed into law Oklahoma House Bill 1970 (The Act) amending Section 1, Chapter 48, O.S.L. 2010 (codified as 63 O.S. Supp. 2010, § 1-729a) to become effective November 1, 2011 relating to the drug RU-486 or "any other abortion-inducing drug, medicine or other substance" prescribed or dispensed with the intent of terminating the clinically diagnosable pregnancy of a woman.
3. Plaintiffs on October 5, 2011 filed this case in this court seeking declaratory judgment that The Act violates the Oklahoma Constitution and seeking an injunction prohibiting enforcement of The Act.



4. On December 2, 2011, the Honorable Daniel L. Owens, a judge of this court entered an Order Granting Injunction temporarily enjoining the enforcement of The Act.
5. The Act provides a ban on medication abortion in the State of Oklahoma except as provided and in the manner and regimen set forth in the RU-486 FPL and it explicitly prohibits the "off label" use of RU-486 or any abortion drug or medication.
6. Good medical practice and the best interests of the patient often includes drug use that is not displayed in the FPL of that drug and requires physicians use legally available drugs according to their best knowledge and judgment.
7. Since the RU-486 FPL was issued by the FDA in 2000, a regimen different from that set forth in the FPL has been used in a great majority of cases of medication abortions in the United States demonstrated by scientific research to be safer and more effective than the regimen provided in the RU-486 FPL.

### **CONCLUSIONS OF LAW**

1. The due process clause of the United States Constitution protects the right to bodily integrity as a fundamental right. *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Planned Parenthood v. Casey* 505 U.S. 833 (1992).
2. Rights that are protected as fundamental by the United States Constitution are protected as fundamental rights by the Oklahoma Constitution to at least the same extent, *Eastern Oklahoma Building and Construction Trades Council v. Pitts*, 2003 OK 113, 82 P.3d 1008; *Messenger v. Messenger*, 1992 OK 27, 827 P.2d 865 (Okla 1992).
3. The due process clause of the United States Constitution protects the right to terminate a pregnancy as a fundamental right, *Roe V. Wade*, 410 U.S. 113 (1973).
4. The due process clause of the Oklahoma Constitution protects the right to terminate a pregnancy as a fundamental right. *Article II § 7, Oklahoma Constitution*; *Roe v. Wade*, ante; *Eastern Oklahoma Building and Construction Trades Council v. Pitts*, ante; *Messenger v Messenger*, ante.
5. A state regulation that has the effect of placing a substantial obstacle in the path of a woman seeking an abortion creates an "undue burden" on her ability to make that decision. *Planned Parenthood v. Casey*, ante; *Jane L. V. Bangerter*, 102 F.3d 1112 (10<sup>th</sup> Cir. 1995); *Davis v. Fieker*, 1997, OK 156, 952 P.2d 505.
6. A law violates the undue burden standard if its purpose is to impose a substantial obstacle in the path of women seeking a previable abortion. *Planned Parenthood v. Casey*, ante; *Jane L. V Bangerter*, ante
7. The Act's restriction of the use of the drug RU-486 or "any other abortion inducing drug, medicine or other substance" in the manner and to the regimen set forth in the medication FPL when used for abortion is so completely at odds with the standard that governs the practice of medicine that it can serve no purpose other than to prevent women from

obtaining abortions and to punish and discriminate against those women who do. *Planned Parenthood v. Casey, ante.*

8. No material fact is in dispute in this case and Plaintiffs are entitled to judgment as a matter of law.

**ORDER**

The Motions for Summary Judgment of Plaintiffs and of Defendants come on this date for decision. The court heard argument of the attorneys on April 27, 2012, has reviewed and considered that argument, and the authority and material submitted by the parties, has found the facts as set forth herein and has reached the conclusions of law above noted.

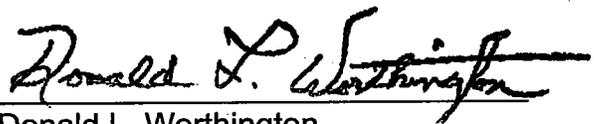
It is therefore ordered that the Motion for Summary Judgment of Plaintiffs is sustained and the Motion for Summary Judgment of Defendants is overruled.

It is further ordered that Plaintiffs are granted judgment that Oklahoma House Bill 1970, 2011 Session Laws 1276 is an unconstitutional law in violation of the fundamental rights of women to privacy and bodily integrity guaranteed by Article II, § 7 of the Constitution of the State of Oklahoma.

It is further ordered that the Temporary Injunction issued by this court on December 2, 2011 is converted into a Permanent Injunction without bond and Defendants, their employees, agents and successors in office are restrained and prohibited from enforcing the said Oklahoma House Bill 1970, 2011 Sessions Law 1276.

The clerk is directed to send a copy of this order to the attorneys for the parties.

Dated this 11th day of May, 2012.



Donald L. Worthington  
Judge of the District Court

I, PATRICIA PRESLEY, Court Clerk for Oklahoma County, Okla., hereby certify that the foregoing is a true, correct and complete copy of the instrument herewith set out as appears of record in the District Court Clerk's Office of Oklahoma County, Okla., this 11<sup>th</sup> day of May, 2012.

PATRICIA PRESLEY, Court Clerk  
By Kathy White Deputy

## SUMMARY OF CASE – EXHIBIT B

The trial court in this case held that the Oklahoma Constitution contains a fundamental right never before recognized by *any* Oklahoma Court: the right to an abortion. The trial court did so based on its erroneous belief that the Oklahoma Constitution must be read in lockstep with the federal constitution, and did so despite the overwhelming and undisputed historical evidence establishing that the drafters of Oklahoma’s Constitution did not intend it to contain a right to an abortion. Indeed, Oklahoma has always *criminalized* abortion. The trial court then took the additional step of (seemingly) finding that this new fundamental right was unduly burdened by an Oklahoma law that requires that medication abortions be performed according to the federal Food and Drug Administration-approved protocol, and struck down that Oklahoma law as unconstitutional.

The law at issue is Oklahoma House Bill 1970, 2011 Okla. Sess. Laws Ch. 216, § 1. House Bill 1970 requires that abortion-inducing drugs be used according to the protocol described on their FDA-approved drug label. The case came before the trial court on cross-motions for summary judgment involving only state constitutional claims. Evidence was introduced to the trial court showing that no women had ever died from serious infection after using abortion-inducing drugs according to the FDA-approved protocol, but that a significant number of otherwise healthy young women had died from serious infection after using a non-approved protocol. The trial court nonetheless found that it was undisputed that the non-approved protocols were “safer and more effective” than the FDA-approved protocol, and concluded that House Bill 1970 “serves[s] no purpose other than to prevent women from obtaining abortions.” The trial court thus—in error—sustained Appellees’ Motion for Summary Judgment, and denied Appellants’ (“the State’s”) Motion for Summary Judgment.

## ISSUES TO BE RAISED ON APPEAL - EXHIBIT C

1. Appellees attached almost two-hundred pages of evidence to their Motion for Summary Judgment, including declarations from multiple medical experts and fact witnesses. Did the trial court err in denying the State's Motion to Bifurcate Proceedings, or Alternatively, Motion for Discovery Pursuant to 12 O.S. 2056(F), and in giving the State only seven days from the date of that denial in which to respond—without the benefit of discovery—to Appellees' Motion for Summary Judgment?
2. The State introduced undisputed evidence showing that no women had ever died from serious infection after using abortion-inducing drugs according to the FDA-approved protocol, but that a significant number of otherwise healthy young women had died from serious infection after using a non-approved protocol. The State also introduced significant evidence disputing Appellees' claim that non-approved protocols were otherwise "safer and more effective" than the FDA-approved protocol. Did the trial court err in finding that it was undisputed that the non-approved protocols were "safer and more effective" than the FDA-approved protocol?
3. The State introduced undisputed historical evidence establishing that the drafters of Oklahoma's Constitution did not intend it to protect abortion, whether such protection came in the form of a "right to bodily integrity" or otherwise. Did the trial court err in nonetheless finding that the Oklahoma Constitution "protects the right bodily integrity" and "protects the right to terminate a pregnancy" as "fundamental" rights?
4. The trial court concluded that *Eastern Oklahoma Building and Construction Trades Council v. Pitts*, 2003 OK 113, 82 P.3d 1008, and *Messenger v. Messenger*, 1992 OK 27, 827 P.2d 865, were controlling authority with regard to the question of whether Oklahoma's due process clause contained the same abortion protections that federal courts have found to be protected by the federal due process clause. Did the trial court err in that conclusion, when in *In Re Initiative Petition 349, State Question No. 642*, 1992 OK 122, 838 P2d 1, the Oklahoma Supreme Court specifically declined to decide whether Oklahoma's due process clause contained an abortion right?
5. Federal courts have found that the federal constitution contains numerous unenumerated "fundamental" rights. The trial court concluded that Oklahoma's Constitution protects *all* fundamental rights found in the federal constitution at least to the extent those rights are protected by federal law. Did the trial court err in that conclusion?
6. Having found that Oklahoma's Constitution contained a fundamental right to bodily integrity and a fundamental right to an abortion, the trial court applied the federal "undue burden" test to determine whether those rights had been violated. Did the trial court err when it concluded (without ever explicitly saying so) that House Bill 1970 placed an undue burden on those rights?

7. The United States Supreme Court has held that before viability, a state “may not prohibit any woman from making the ultimate decision to terminate her pregnancy.” *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833, 879 (1992) (plurality opinion). But the Supreme has also held that “the State has legitimate interests from the outset of the pregnancy in protecting the health of the women.” *Id.* at 846. As the Court later explained “*Casey*, in short, struck a balance” between those two interests. *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007). Did the trial court err in failing to balance the State’s interest in protecting the health of women against the right of those women to obtain a pre-viability abortion, particularly where House Bill 1970 does not prohibit any woman from obtaining an abortion?
8. House Bill 1970 does not ban medication abortions, nor any other type of abortion. Rather, it simply requires that medication abortions be performed pursuant to the FDA-approved protocol. Did the trial court err when it found that House Bill 1970 “can serve no purpose other than to prevent women from obtaining abortions and to punish and discriminate against those who do so”?
9. The FDA is the federal agency responsible for ensuring that drugs are safe. In carrying out that responsibility, the FDA approves a drug label for each drug it approves for use, and that drug label describes the FDA-approved protocol for use of the drug. Did the trial court err in finding that requiring that the FDA-approved protocol be used was “completely at odds with the standards that govern the practice of medicine”?
10. While the trial court relied solely on Appellees’ claim that House Bill 1970 violated Oklahoma’s due process clause, Appellees raised a host of other state constitutional claims, including claims that House Bill 1970: (1) denies equal protection of the law; (2) unlawfully delegates power to the federal government; (3) is unconstitutionally vague; (4) violates the prohibition against special laws; and (5) impermissibly compels speech. The State cross-motivated for summary judgment on all of these claims. Did the trial court err in failing to grant the State summary judgment on each of these claims?
11. House Bill 1970 contains a severability clause. The State argued that to the extent any particular provision of House Bill 1970 was found unconstitutional, the trial court should sever that provision while preserving the rest. Did the trial court err in striking down House Bill 1970 in its entirety? And in doing so without analyzing the severability of the offending provisions?