ORIGINAL

1054504089

2023 OK 24

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

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, its staff, and its patients,	)	
Petitioners,	)	
v.	)	Case No. 120,543
GENTNER DRUMMOND, in his official capacity as Attorney General for the State of Oklahoma; VICKI BEHENNA, in her 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; BRET S. LANGERMAN, in his official capacity as President of the Oklahoma State Board of Osteopathic Examiners; KEITH REED, in his official capacity as the Commissioner of the Oklahoma State Board of Health,	)	FOR OFFICIAL PUBLICATION
Respondents.	)	

APPLICATION TO ASSUME ORIGINAL JURISDICTION FOR DECLARATORY AND INJUNCTIVE RELIEF AND/OR A WRIT OF PROHIBITION

¶0 The Petitioners filed an application to assume original jurisdiction seeking declaratory relief and to enjoin enforcement of two laws which criminalize abortion. They assert the laws are unconstitutional and the Oklahoma Constitution protects a woman's right to terminate a pregnancy. We hold there is a limited right to terminate a pregnancy that is protected by the Oklahoma Constitution. We assume original jurisdiction, grant declaratory relief in part and deny injunctive relief and writ of prohibition.

ORIGINAL JURISDICTION ASSUMED; DECLARATORY RELIEF GRANTED IN PART; INJUNCTIVE RELIEF AND WRIT OF PROHIBITION DENIED

Kelley Bodell, Barnum & Clinton, Norman, Oklahoma for Petitioners

Linda Cecilia Goldstein, Meghan Ann Agostinelli, Dechert LLP, New York, New York for Petitioners Oklahoma Call for Reproductive Justice, Tulsa Women's Reproductive Clinic, LLC, and Alan Braid, M.D.

Jerome A. Hoffman and Rachel Maura Rosenberg, Dechert LLP, Philadelphia, Pennsylvania for Petitioners Oklahoma Call for Reproductive Justice, Tulsa Women's Reproductive Clinic, LLC, and Alan Braid, M.D.

Jonathan S. Tam, Dechert LLP, San Francisco, California for Petitioners Oklahoma Call for Reproductive Justice, Tulsa Women's Reproductive Clinic, LLC, and Alan Braid, M.D.

Rabbia Claire Muqaddam, Center for Reproductive Rights, New York, New York for Petitioners Oklahoma Call for Reproductive Justice, Tulsa Women's Reproductive Clinic, LLC, and Alan Braid, M.D.

Diana Olga Salgado, Planned Parenthood Federation of America, Washington, D.C. for Petitioners Comprehensive Health of Planned Parenthood Great Plains, Inc. and Planned Parenthood of Arkansas & Eastern Oklahoma

Camila Vega, Planned Parenthood Federation of America, New York, New York for Petitioners Comprehensive Health of Planned Parenthood Great Plains, Inc. and Planned Parenthood of Arkansas & Eastern Oklahoma

Zach West, Solicitor General, and Audrey A. Weaver, Assistant Solicitor General, Office of Attorney General, State of Oklahoma, Oklahoma City, Oklahoma for Respondents

PER CURIAM:

¶1 The Petitioners consist of healthcare providers, Tulsa Women's Reproductive Clinic, LLC, Alan Braid, M.D., Comprehensive Health of Planned Parenthood Great Plains, Inc., Planned Parenthood of Arkansas & Eastern Oklahoma and an advocacy group, the Oklahoma Call for Reproductive Justice. The Respondents consist of the Attorney General of the State of Oklahoma, the district attorneys of Oklahoma and Tulsa counties, and the heads of various Oklahoma medical agencies.[1] The Petitioners filed this original proceeding asking this Court to assume original jurisdiction and grant declaratory relief concerning the constitutionality of two statutes, 21 O.S. 2021, § 861[2] and 63 O.S. Supp. 2022, § 1-

[1] The names of the Attorney General of Oklahoma, District Attorney of Oklahoma County and President of the Oklahoma State Board of Osteopathic Examiners have been updated to reflect the current persons serving in those positions. 12 O.S. 2021, § 2025 (D).

[2] 21 O.S. 2021, § 861:

> Every person who administers to any woman, or who 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 intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life shall be guilty of a felony punishable by imprisonment in the State Penitentiary for not less than two (2) years nor more than five (5) years.

731.4[3], which criminalize performance of certain abortions. They request this Court either issue an injunction preventing the enforcement of these statutes or, alternatively, issue a writ of prohibition preventing the Respondents from enforcing these statutes. The Petitioners allege the two statutes violate inherent rights and substantive due process rights guaranteed by sections 2[4] and 7[5] of article II of the

[3] 63 O.S. Supp. 2022, § 1-731.4:

> A. As used in this section:
>
> 1. The terms "abortion" and "unborn child" shall have the same meaning as provided by Section 1-730 of Title 63 of the Oklahoma Statutes; and
>
> 2. "Medical emergency" means a condition which cannot be remedied by delivery of the child 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.
>
> B. 1. Notwithstanding any other provision of law, a person shall not purposely perform or attempt to perform an abortion except to save the life of a pregnant woman in a medical emergency.
>
> 2. A person convicted of performing or attempting to perform an abortion shall be guilty of a felony punishable by a fine not to exceed One Hundred Thousand Dollars ($100,000.00), or by confinement in the custody of the Department of Corrections for a term not to exceed ten (10) years, or by such fine and imprisonment.
>
> 3. This section does not:
>
> a. authorize the charging or conviction of a woman with any criminal offense in the death of her own unborn child, or
>
> b. prohibit the sale, use, prescription or administration of a contraceptive measure, drug or chemical if the contraceptive measure, drug or chemical is administered before the time when a pregnancy could be determined through conventional medical testing and if the contraceptive measure, drug or chemical is sold, used, prescribed or administered in accordance with manufacturer instructions.
>
> 4. It is an affirmative defense to prosecution under this section if a licensed physician provides medical treatment to a pregnant woman which results in the accidental or unintentional injury or death to the unborn child.

[4] Okla. Const. art. 2, § 2:

> All persons have the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry.

[5] Okla. Const. art. 2, § 7:

Oklahoma Constitution. The gravamen of their argument is, following the recent decision of the United States Supreme Court in *Dobbs v. Jackson Women's Health Org.,* 142 S. Ct. 2228 (2022), wherein the Court held there was no constitutional right to an abortion in the United States Constitution, that the Oklahoma Constitution provides an independent right to terminate a pregnancy and that right is unaffected by the *Dobbs* opinion. In addition, the Petitioners allege the statutes are unconstitutionally vague and that § 861 was repealed by implication by § 1-731.4.

¶2 This Court has discretion in determining whether to assume jurisdiction over a controversy in which both this Court and the district courts have concurrent jurisdiction. *Edmondson v. Pearce,* 2004 OK 23, ¶10, 91 P.3d 605, 613. Two themes run through most cases where original jurisdiction has been assumed: 1) the matter concerns the public interest, i.e., the case is *publici juris* in nature; and 2) there must be some urgency or pressing need for an early decision. *Id.* ¶11, 91 P.3d at 613. Here there is no question whether the matter is *publici juris* in nature, dealing as it does with laws that affect the right of a woman to terminate a pregnancy. We also believe there is a pressing need to rule on this matter as soon as possible due to the many challenges to laws which affect abortion following the recent *Dobbs* opinion and their effects on the people of this state. The Oklahoma Constitution

No person shall be deprived of life, liberty, or property, without due process of law.

gives the Supreme Court the authority to determine jurisdiction and such determination is final. Okla. Const. art. 7, § 4.[6] Original jurisdiction is assumed.[7]

---

[6] One dissent implies that there is concurrent jurisdiction between this Court and the Court of Criminal Appeals in deciding the constitutionality of the two criminal statutes at issue in this matter, arguing a potential conflict would arise if a later challenge is presented to the Court of Criminal Appeals. The Oklahoma Constitution makes abundantly clear that in any jurisdictional conflict, the Supreme Court's determination of jurisdiction is final. Okla. Const. art. 7, § 4.

[7] The Respondents admit that the Petitioners' have properly presented to this Court the question of whether there exists a right to an abortion under the Oklahoma Constitution. However, they challenge this Court's jurisdiction to address the Petitioners' arguments concerning unconstitutional vagueness of the two challenged criminal statutes and implied repeal of 21 O.S. § 861. They assert the interpretation of these issues is within the sole authority of the Oklahoma Court of Criminal Appeals (OCCA).

The Respondents rely upon our precedent wherein we have found deference to the decisions of the Oklahoma Court of Criminal Appeals in matters relating to its construction of criminal statutes and whether they violate the Oklahoma Constitution. In *Ikard* v. *Russell,* a relator was charged with nepotism under a statute that defined the term as well as provided criminal misdemeanor punishment and forfeit of office for a violation of the statute. 1912 OK 425, 124 P. 1092. The relator filed a writ of prohibition in this Court challenging the district court's jurisdiction based upon a previous decision of this Court. We denied the writ and noted since our previous decision the OCCA had handed down a decision on point which was contrary in its conclusion to our earlier opinion. We determined "[i]t is settled policy of the Supreme Court to follow the construction given to criminal statutes by the Criminal Court of Appeals, since the enforcement of such statutes must be in accordance with such construction." *Id.* ¶1, 124 P. at 1093. The wisdom behind this policy was to avoid a situation where the OCCA would adhere to its construction while this Court adhered to its previous construction, thus allowing an important class of criminal offenses to go unpunished. *Id.* ¶3, 124 P. at 1093.

In *Ex parte Meek*, 1933 OK 473,¶9, 25 P.2d 54, 55, this Court held:

> This court is the supreme judicial court of the state of Oklahoma in all civil matters, passing by as not material to this discussion the relative rank of the state Senate when it is sitting as a court of impeachment. Our construction of legislation as being constitutional or otherwise judged by our own Constitution is supreme and final. It is possible that in the execution of the law complained of, or a similar law, i. e., one that is civil in its general purposes as distinguished from one that is criminal, but which might carry provisions making nonobservance or a violation of its provisions a crime and specifying the punishment therefor, that the construction of the portions thereof relating to the crime and its punishment by the Criminal Court of Appeals might differ from the construction of the law as generally construed by this court from a civil standpoint. But if we hold an act generally to be repugnant to our Constitution, such a construction would be paramount and the law of the state of Oklahoma, even though it might be in conflict with the construction of the Criminal Court of Appeals.

Here, the matter before us is not a criminal case. The challenges to vagueness and repeal by implication are specifically related to the two statutes challenged in this matter. The Respondents have cited no opinion of the OCCA deciding whether 21 O.S. § 861 or 63 O.S. § 1-731.4 are unconstitutionally vague or that 21 O.S. § 861 has been repealed by implication. Further, Respondents note that the Petitioners have properly raised in this Court the question of the constitutionality of these statutes concerning a right to an abortion. That issue addresses the constitutionality of 21 O.S. § 861 and 63 O.S. § 1-731.4. It is unclear how they would believe one constitutional challenge should be brought to this Court yet another challenge, on the same statutes, should be brought to the OCCA in the same controversy. If we were to agree, we would potentially end up with the very situation that we avoided in *Russell.*

I. ANALYSIS

A. The Oklahoma Constitution protects a limited right to an abortion

¶3 The Petitioners claim the two statutes, which outlaw most abortions, restrict a woman's right to have control over her own body and to make decisions concerning reproduction in violation of the Oklahoma Constitution. Therefore, we must first determine whether the Oklahoma Constitution provides a right, or at least some right, to terminate a pregnancy and if so what is the appropriate standard for determining when a state regulation violates that right.

¶4 The Petitioners assert a woman's right to terminate a pregnancy is protected by article II, section 7 of the Oklahoma Constitution (the state due process section), and article II, section 2 of the Oklahoma Constitution (inherent rights). Article II, section 7 of the Oklahoma Constitution provides:

> No person shall be deprived of life, liberty, or property, without due process of law.

Until recently, the U.S. Constitution's Due Process Clause of the Fourteenth Amendment had been the basis for a national right to terminate a woman's pregnancy before viability of the fetus.[8] A woman's federal constitutional right to

[8] Our state due process section is nearly identical to the Due Process Clause found in the Fourteenth Amendment of the U.S. Constitution, which provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

terminate her pregnancy was found to exist by the U.S. Supreme Court in 1973. In *Roe v. Wade*, 410 U.S. 113, 153 (1973) the Court held that a right of privacy founded in the Fourteenth Amendment's concept of personal liberty was broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The Court further determined that a right of personal privacy, which included the termination decision, was not unqualified and that it must be considered against important state interests in regulation. *Id.* at 154. It held that where certain fundamental rights are involved, regulations limiting such rights are only justified by a compelling state interest which must be narrowly drawn to express only the legitimate state interests at stake. *Id.* at 154-55. It held the compelling point for the state corresponded with the viability of the fetus. *Id.* at 163.

¶5 Nineteen years later, the U.S. Supreme Court revised its decision in *Roe.* In *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 860, 878 (1992), the Court retained the central holding in *Roe*, i.e., "that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions." *Id.* at 860. However, it found that *Roe's* prohibition of state abortion regulation in the first trimester was unwarranted. *Id.* at 875-76. It created an "undue burden" standard to determine whether a state regulation placed an unconstitutional burden on a woman's right to terminate a pregnancy prior to the viability of the fetus. The Court

defined the undue burden test several ways in the opinion but it can best be summarized as "a statute which, while furthering the interest in potential life or some other valid state interest" is "invalid" and creates an "undue burden" if "its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Id.* 876-78. It held that such "undue burden" was an "unconstitutional burden." *Id.* at 877. The Court found that a state may enact regulations, as it can with any other medical procedure, to further the health or safety of a woman seeking an abortion. *Id.* at 878. However, "unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion [pre-viability] impose an undue burden on the right." *Id.* at 878. The Court then reaffirmed *Roe's* holding that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion **except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother**." *Id.* at 879 (quoting *Roe* at 164-65) (emphasis added).

¶6 On June 24, 2022, the U.S. Supreme Court overruled *Roe* and *Casey*. *Dobbs v. Jackson Women's Health Org.,* 142 S. Ct. 2228, 2284 (2022). After forty-nine years of respecting a woman's right to terminate a pregnancy under the federal Due Process Clause, the U.S. Supreme Court held the federal Constitution does not grant that right. The Court found that in order for a fundamental right to be

recognized as a component of the liberty protected in the Due Process Clause such right must be deeply rooted in our Nation's history and tradition. *Id.* at 2246, 2260. It determined that was not the case based upon the fact that prior to the *Roe* decision "abortion had long been a *crime* in every single State." *Id.* at 2248. The Court explained, there was no "fundamental constitutional right to an abortion because such right had no basis in the Constitution's text or in our Nation's history." *Dobbs,* at 2283. Therefore, it determined the appropriate standard of review is a rational-basis review when state abortion regulations undergo federal constitutional challenges. *Id.* It held "[t]he Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* abrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives." *Id.* at 2284. *Dobbs* took the issue of abortion out of the U.S. Constitution and placed it squarely with the states.

¶7 Since *Roe*, this Court has followed the U.S. Supreme Court's interpretation of the federal Due Process Clause when deciding issues related to abortion. It was unnecessary for this Court to determine whether there existed an independent right to terminate a pregnancy under the Oklahoma Constitution. Although we have refrained from finding a right to terminate a pregnancy in the Oklahoma Constitution, we have never ruled such right did not exist. *See Oklahoma Coalition for Reproductive Justice v. Cline,* 2019 OK 33, ¶17, 441 P.3d at 1151. If

we adopted the *Dobbs* analysis we would have to find a right to terminate a pregnancy was deeply rooted in Oklahoma's history and tradition. *Dobbs* relied upon various state statutes that criminalized abortion to help determine whether abortion rights were deeply rooted in this nation. Even during the Oklahoma Territory there were laws outlawing certain terminations of pregnancy. *See* Okla. (Terr.) Stat. §§ 2187, 2188 (1890). Soon after statehood and the adoption of the Oklahoma Constitution these laws persisted and were recodified several times. For many years these laws have been codified in Sections 861 and 862 of title 21 of the Oklahoma Statutes. Section 862 has since been repealed but § 861 still exists. *See* 2021 Okla. Sess. Laws ch. 308, § 1, S.B. 918. Section 861 provides:

> Every person who administers to any woman, or who 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 intent thereby to procure the miscarriage of such woman, **unless the same is necessary to preserve her life** shall be guilty of a felony punishable by imprisonment in the State Penitentiary for not less than two (2) years nor more than five (5) years. (emphasis added).

This law has changed very little since the days of the Oklahoma Territory. In 1973, the Court of Criminal Appeals of Oklahoma declared that because of the decision in *Roe* both sections are "unconstitutional as being violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution." *Jobe v. State*, 1973 OK CR 51, ¶4, 509 P.2d 481, 482. However, enforcement of § 861 was revived by

law when *Dobbs* overruled *Roe* and *Casey*. *See* 2021 Okla. Sess. Laws ch. 308, § 18, S.B. 918, as amended by, 2022 Okla. Sess. Laws ch. 133, § 1, S.B. 1555.

¶8 In its finding that the various state laws did not support a history or tradition of a national right to an abortion, *Dobbs* focused on the criminal element of such statutes. However, that is only half the story in Oklahoma. As much as § 861 had always outlawed abortion it also always acknowledged a limited exception. The law in Oklahoma has long recognized a woman's right to obtain an abortion in order to preserve her life ("unless the same is necessary to preserve her life"). Our history and tradition have therefore recognized a right to an abortion when it was necessary to preserve the life of the pregnant woman. This right can be viewed as protected by the Oklahoma due process section. It can also be viewed as a right protected under the inherent rights provided in article II, section 2 of the Oklahoma Constitution. This section provides:

> All persons have the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry.[9]

It creates an "inherent right to life" as well as "liberty" and stands as the basis for protecting a pregnant woman's right to terminate a pregnancy in order to preserve her life.

[9] The U.S. Constitution does not contain a section identical to art. 2, § 2, Okla. Const.

¶9 We hold that the Oklahoma Constitution creates an inherent right of a pregnant woman to terminate a pregnancy when necessary to preserve her life. We would define this inherent right to mean: a woman has an inherent right to choose to terminate her pregnancy if at any point in the pregnancy, the woman's physician has determined to a reasonable degree of medical certainty or probability that the continuation of the pregnancy will endanger the woman's life due to the pregnancy itself or due to a medical condition that the woman is either currently suffering from or likely to suffer from during the pregnancy. Absolute certainty is not required, however, mere possibility or speculation is insufficient.

¶10 We make no ruling on whether the Oklahoma Constitution provides a right to an elective termination of a pregnancy, i.e., one made outside of preserving the life of the pregnant woman as we have defined herein.

¶11 We must also determine what standard should be applied when reviewing challenges to state laws affecting the inherent right to preserve the life of the pregnant woman. *Dobbs* held there was no right to an abortion under the **federal Constitution** and therefore the applicable standard to apply would be the highly deferential rational-basis test when state abortion laws were challenged under **federal law**. **Here**, we are concerned with an inherent right to terminate a pregnancy to preserve the woman's life which is protected under the **Oklahoma Constitution**. Regulations that significantly impair an inherent right must survive strict scrutiny.

See State ex rel. Oklahoma Bar Ass'n v. Porter, 1988 OK 114, ¶¶24-25, 766 P.2d 958, 967-68. The state may prevail only upon showing its subordinating interest is compelling and such interest must be narrowly tailored to avoid unnecessary abridgement of the right. *Id.* ¶24, 766 P.2d at 967-68. In *Porter* we held:

> A mere showing of state interest is insufficient; the interest must be paramount, of vital importance, and the burden is on the government to show its existence. Further it is not enough to show a rational relationship between the means chosen and the end sought to be accomplished. The advance of the subordinating interest must outweigh the loss of protected rights and the government must employ means closely drawn to avoid unnecessary abridgement. If the state has open to it a less drastic method of satisfying its legitimate interest it may not validly choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.

Id. ¶25, 766 P.2d at 968.

B. The Constitutionality of the Two Statutes

¶12 Both § 861 and § 1-731.4 are statutes which criminalize the performance of certain abortions. As mentioned, § 861 provides a narrow exception if it is necessary to "preserve" the life of the woman. However, the scheme in § 1-731.4 is much more invasive to a woman's right to terminate a pregnancy in order to preserve her life. Section 1-731.4 (A) (2) first defines a "medical emergency" as:

> [A] condition which cannot be remedied by delivery of the child 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.

Next, it provides in paragraph (B)(1):

> Notwithstanding any other provision of law, a person shall not purposely perform or attempt to perform an abortion except to save the life of a pregnant woman in a medical emergency.

The language, "except to save the life of a pregnant woman in a medical emergency" is much different from "preserve her life" found in § 861. It restricts the performance of an abortion to only a pregnant woman who is "in a medical emergency" which includes that her life "is endangered." We read this section of law to require a woman to be in actual and present danger in order for her to obtain a medically necessary abortion. We know of no other law that requires one to wait until there is an actual medical emergency in order to receive treatment when the harmful condition is known or probable to occur in the future. Requiring one to wait until there is a medical emergency would further endanger the life of the pregnant woman and does not serve a compelling state interest. We hold this section of law, 63 O.S. Supp. 2022, 1-731.4, cannot meet the test of strict scrutiny and is therefore void and unenforceable. Having found the statute to be void and unenforceable, there is no need to address Petitioners' other constitutional challenge, i.e., the statute is unconstitutionally vague.

¶13 The Petitioners also allege § 861: 1) violates rights protected under the Oklahoma Constitution; 2) is unconstitutionally vague, due to conflicts with its

language and other enacted statutes, including § 1-731.4; and 3) was repealed by implication. For the above mentioned reasons, we do not find § 861 violates the Oklahoma Constitution as it allows the termination of a pregnancy in order to preserve the life of the pregnant woman. Again, we make no ruling on whether an elective abortion is constitutional. Nor do we find the language in § 861 itself is unconstitutionally vague. This opinion clarifies what it means to preserve the life of the pregnant woman. The Oklahoma Court of Criminal Appeals has addressed what constitutes unconstitutional vagueness:

> Due process requires that a criminal statute give fair warning of the conduct which it prohibits. Specifically, the Supreme Court of the United States has held that: "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."

Hughes v. State, 1994 OK CR 3, ¶20, 868 P.2d 730, 735 (quoting *United States v. Harriss,* 347 U.S. 612, 617 (1954)). The Petitioners' arguments largely rely on alleged conflicts between the language in § 861 and § 1-731.4 which they believe create unconstitutional vagueness in violation of due process. However, having determined § 1-731.4 to be void and unenforceable there is no potential conflict with § 861. Further, Petitioners allege § 861 is in conflict with two so-called civil

"vigilante" enforcement Acts.[10] Neither Act is part of the challenge before us today. The two Acts are currently before this Court in another matter, *Oklahoma Call for Reproductive Justice v. State of Oklahoma,* Case No. 120, 376. We do not find that § 861 fails to unambiguously specify the activity proscribed and the penalties available upon conviction and therefore it is not unconstitutionally vague. *See United States v. Batchelder,* 442 U.S. 114, 123 (1979).

¶14 The Petitioners additionally assert that § 861 was repealed by implication by a later enacted law. Since *Jobe*, § 861 had been found to be unconstitutional only because of the United States Supreme Court decision in *Roe.* In 2021, S.B. 918 was enacted and consisted of many repealer sections. The Act had a conditional effective date that provided the entire Act would become effective when the Oklahoma Attorney General certifies that *Roe* and *Casey* had been overruled by the United States Supreme Court. The following year, S.B. 1555 (2022) amended the conditional effective date section of S.B. 918. It also repealed all but one of S.B. 918 repealer sections. The amended effective date now provides that section 1 of S.B. 918 would become effective when the attorney general certifies that *Roe* and *Casey* had been overruled by the Supreme Court "such that the State of Oklahoma may enforce Section 861 of Title 21 of the Oklahoma Statutes or enact a

[10] The two Acts are H.B. 4327 (2022 Okla. Sess. Laws ch. 321) and S.B. 1503 (2022 Okla. Sess. Laws ch. 190), which both provide certain bans on abortion and each are exclusively enforced in a private civil action.

similar statute prohibiting abortion throughout pregnancy . . . ." On June 24, 2022, the attorney general made the required certification and stated "the State of Oklahoma may enforce Section 861 of Title 21 of the Oklahoma Statutes or enact a similar statute prohibiting abortion throughout pregnancy." The Petitioners assert that the conjunction "or" in S.B. 1555 meant that any other later enacted law to criminalize abortion, i.e., 63 O.S. Supp. 2022, § 1-731.4, would repeal § 861 by implication. Section 1-731.4 became effective in August of 2022 (S.B. 612, 2022 Okla. Sess. Laws ch. 11) and therefore was enacted after § 861. Repeals by implication are not favored and all statutory provisions must be given effect if possible. *City of Sand Springs v. Dept. of Public Welfare,* 1980 OK 36, ¶28, 608 P.2d 1139, 1151. Nothing short of irreconcilable conflict between statutes accomplishes a repeal by implication. *Sesow v. Swearingen*, 1976 OK 97, ¶4, 552 P.2d 705, 706. Where such a conflict exists, the later modifies the earlier, even where both sections were enacted into the same official codification. *Ex parte Burns*, 1949 OK CR 11, 202 P.2d 433. Where statutes conflict in part, the one last passed, which is the later declaration of the Legislature, should prevail, superseding and modifying the former statute only to the extent of such conflict. *Consumers Co-op Ass'n. v. Titus*, 1949 OK 86, ¶7, 205 P.2d 1162, 1163.

¶15 The legislative intent behind S.B. 1555's conditional effective date language is not clear. The use of the conjunction "or" could mean there is a choice

as to whether to provide enforcement pursuant to § 861 or another later enacted statute. S.B. 612 which enacted § 1-731.4 makes no mention of § 861 nor does it contain any repealer sections or any type of conditional language. If the Legislature had intended to conditionally repeal § 861, it could have easily done so in that bill. A repeal by implication compares the language of two statutes to determine if there is an irreconcilable conflict. Here, however, we find § 1-731.4 to be void and unenforceable and therefore we do not find it poses a conflict or in any way repealed § 861 by implication.

II. CONCLUSION

¶16 We hold the Oklahoma Constitution under the provisions of article II sections 2 and 7 protects the right of a woman to terminate her pregnancy in order to preserve her life. Having determined the Oklahoma Constitution protects the right of a woman to terminate her pregnancy in order to preserve her life, we hold that 63 O.S. Supp. 2022, § 1-731.4 does not pass strict scrutiny review and is void and unenforceable. We hold, 21 O.S. 2021, § 861 does not violate this protection as it allows a woman to terminate her pregnancy, as defined herein, in order to preserve her life. Therefore we grant Petitioner declaratory relief as to 63 O.S. Supp. 2022, § 1-731.4 but deny declaratory relief as to 21 O.S. 2021, § 861. Having found § 1-731.4 is unconstitutional and therefore unenforceable, it is unnecessary to address the Petitioners' request for injunctive relief and/or writ of prohibition. Petitioners

request for injunctive relief and/or a writ of prohibition is denied. *See Hunsucker v. Fallin,* 2017 OK 100, ¶37, 408 P.3d 599, 612.

ORIGINAL JURISDICTION ASSUMED; DECLARATORY RELIEF GRANTED IN PART; INJUNCTIVE RELIEF AND WRIT OF PROHIBITION DENIED

KAUGER (by separate writing), WINCHESTER, EDMONDSON, COMBS (by separate writing) and GURICH, JJ. - CONCUR

KANE, C.J. (by separate writing), ROWE, V.C.J. (by separate writing), DARBY (by separate writing) and KUEHN, JJ. (by separate writing) – DISSENT