ABORTION AND BIRTH CONTROL – CONSTITUTIONAL LAW: CONSTITUTIONALITY OF NORTH DAKOTA'S LEGISLATIVE BAN ON ABORTIONS BEFORE VIABILITY

MKB Mgmt. Corp. v. Burdick, No. 1:13-cv-071, 2014 U.S. Dist. LEXIS 60152 (D.N.D. Apr. 16, 2014)

ABSTRACT

In *MKB Mgmt. Corp. v. Burdick*, the United States District Court for the District of North Dakota, Southwestern Division, held that House Bill 1486 ("H.B. 1486"), a bill passed by the North Dakota Legislature in the 63rd Assembly, is unconstitutional. The question before the court was whether the North Dakota Legislature could ban the performance of abortions before viability of the fetus, beginning approximately at a gestation time of six weeks, based on the presence of a fetal heartbeat. The court stated that when the Supreme Court has upheld a woman's right to have an abortion before viability in *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, a district court cannot go against that precedent and is obligated to uphold it. The court found that the North Dakota Legislative Assembly's adoption of H.B. 1486 is unconstitutional and violates a woman's due process right to choose to terminate a pregnancy because it goes against the Supreme Court precedents of allowing abortion pre-viability. This ruling is not new nationally, but seeks to establish the federal precedent specifically in North Dakota. In the past year, two other federal courts in Arkansas and Alabama have struck down similar laws finding them to be unconstitutional as well.

I. FACTS

During the 63rd Legislative Assembly, the North Dakota Legislature passed H.B. 1456,[1] which was codified in North Dakota Century Code section 14-02.1-05.1.[2] On April 16, 2014, the United States District Court for the District of North Dakota, Southwestern Division held that North Dakota could not "prohibit abortions beginning at six weeks gestation and before the fetus is viable."[3] The plaintiff in the case was MKB Management Corporation, also known as the Red River Women's Clinic ("the Clinic") in Fargo, North Dakota, and Dr. Kathryn Eggleston, the medical director of the Clinic.[4] The defendants ("Burdick") were various North Dakota officials named in the suit in their official capacity, the Cass County State's Attorney, the Attorney General, and the thirteen members of the North Dakota Board of Medical Examiners.[5]

The Clinic challenged H.B. 1456 on the grounds that the statute was unconstitutional because it banned abortion prior to viability contrary to forty years of Supreme Court precedent.[6] The Clinic argued that the statute

1. H.B. 1456, 63d Leg. Assemb., Reg. Sess. (N.D. 2013).
2. N. D. CENT. CODE § 14-02.1-05.1 (2013).
3. MKB Mgmt. Corp. v. Burdick, No. 1:13-cv-071, 2014 U.S. Dist. LEXIS 60152, at *2-3 (D.N.D. Apr. 16, 2014).
4. *Id*. at *3.
5. *Id*. at *3-4.
6. *Id*. at *4.

was unconstitutional for two reasons. First, the bill is an "abridgement of the right to abortion protected under the Fourteenth Amendment . . . ."[7] Second, the statute restrained doctors by criminally penalizing them for performing an abortion if a heartbeat had been detected with a Class C felony charge.[8] Further, a doctor's failure to try to detect a heartbeat before performing an abortion was punishable by the North Dakota Board of Medical Examiners with suspension or revocation of the doctor's license to practice medicine.[9]

Burdick took the position that H.B. 1456 would not prohibit all abortions. Under the statute, abortion could be performed up until a heartbeat was detected.[10] Burdick claimed that H.B. 1456 was constitutional because it protected the state's interest in the health of its children and mothers and that because viability begins at the moment of conception, this was not a pre-viability issue.[11]

As a non-fiscal legislative bill, H.B. 1456 was scheduled to be effective August 1, 2013, but a July 2013 preliminary injunction from the District Court of North Dakota enjoined the implementation of the law until this case could be ruled upon.[12] Ultimately, the case was decided on summary judgment.[13]

II. LEGAL BACKGROUND

In *Roe v. Wade*, Justice Blackmun stated:

> One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.[14]

The role of the court in these controversial cases is to follow their obligation to uphold the legal precedent.[15]

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7. *Id*. at *6.
8. *Id.*
9. *Id*. at *6-7.
10. *Id*. at *9.
11. *Id*.
12. *Id.* at *5.
13. *Id.* at *7-8.
14. Roe v. Wade, 410 U.S. 113, 116 (1973).
15. *MKB Mgmt. Corp*., 2014 U.S. Dist. LEXIS 60152, at *46.

A. SOCIAL HISTORY OF A WOMAN'S RIGHT TO CHOOSE

Abortion is not a modern issue. The original Hippocratic Oath, developed during Hippocrates's life sometime between 460–377 BCE in Greece, specified how medical professionals should handle abortions.[16] One translation reads: "I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect. Similarly, I will not give to a woman an abortive remedy."[17] On the other hand, Plato and Aristotle commended abortion prior to viability.[18] But the Pythagoreans believed embryos were animate from the moment of conception, and abortion thus destroyed a living being.[19]

In the United States, the colonies adopted the common law approach to abortions, which allowed abortions to be a decision between a woman and her doctor before quickening.[20] Such laws made abortion legal in the United States until 1821, when Connecticut made termination of a pregnancy after "quickening" a crime.[21] One of the first modern abortion procedures occurred in Edinburgh Scotland in the 1860s.[22] James Young Simpson, a gynecologist, wrote about a "dry cupping" procedure.[23] This is the adumbrated vacuum aspiration procedure that is commonly used today to perform legal abortions early in a pregnancy.[24]

After the common law treatment of terminating pregnancy, abortion laws were replaced with religious based treatment, mirroring the Pythagorean beliefs.[25] This continued into the twentieth century. In 1968, Pope Paul VI published the "Humane Vitae."[26] He stated: "We are obliged once more to declare that the direct interruption of the generative process already begun and, above all, all direct abortion, even for therapeutic reasons, are to be absolutely excluded as lawful means of regulating the

16. *Roe*, 410 U.S. at 130-31.

17. *Id*. at 131 (quoting L. EDELSTEIN, THE HIPPOCRATIC OATH 3 (1943)).

18. *Id*.

19. *Id*.

20. Christine Vestal, *Americans and Abortion: An Overview*, PEWRESEARCH (Sept. 29, 2008), http://www.pewforum.org/2008/09/29/americans-and-abortion-an-overview/.

21. Jill Lepore, *Birthright*, THE NEW YORKER (Nov. 14, 2011), http://www newyorker.com/magazine/2011/11/14/birthright-2?currentPage=all.

22. *Birth Control*, ENCYCLOPEDIA BRITANNICA, http://www.britannica.com/EBchecked/topic/66704/birth-control.

23. *Id*.

24. *Id*.

25. Roe v. Wade, 410 U.S. 113, 132 (1973).

26. Pope Paul VI, Encyclical Letter, Humane Vitae (July 25, 1968), *available* at http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en html.

number of children."[27] Remarkably though, in 1972, sixty-eight percent of Republicans and fifty-nine percent of Democrats were in agreement that the decision to have an abortion should be between a woman and her doctor only.[28] Allegedly, Justice Blackmun even had a clipping of that poll in his *Roe v. Wade* case file.[29]

Today, approximately 210 million pregnancies occur globally each year.[30] Of those 210 million pregnancies, eighty million are reported to be unintended and thirty-three million of those were due to reliance on traditional contraceptive methods that are arguably ineffective.[31] Out of all the pregnancies that occur in the world, an estimated one in five end in induced abortions.[32] In 2008, an estimated 43.8 million induced abortions were performed.[33] That is a decrease from the 45.6 million induced abortions performed globally in 1995.[34]

Of abortions performed in 2008, approximately twenty-two million were performed safely and 21.6 million were performed unsafely. Unsafe induced abortions increased from forty-four percent in 1995 to forty-nine percent in 2008.[35] This increase in unsafe abortions may be due to the population increase of women ages fifteen to forty-four.[36] It may also be due to increased legislation restricting access to safe abortions.[37]

According to the World Health Organization, "[w]here abortions are highly restricted, abortions are usually unsafe and carry high risk, especially among poor women; causing serious consequences for the women and a major financial and service burden on the families and on national health systems."[38] Also, "[i]t is estimated that approximately 5 million women are hospitalized each year and 47,000 women die due to complication of unsafe abortion."[39] The report continues: "[w]omen all over the world are likely

27. *Id.*
28. Leepore, *supra* note 22.
29. *Id*.
30. *Safe and Unsafe Induced Abortion, Global and Regional Levels in 2008, and trends during 1995 – 2008*, WORLD HEALTH ORGANIZATION 1 (2012), http://apps.who.int/iris/bitstream/10665/75174/1/WHO_RHR_12.02_eng.pdf?ua=1.
31. *Id*.
32. *Id*. at 2.
33. *Id*.
34. *Id*. at 3.
35. *Id.* at 2.
36. *Id.*
37. *Id.*
38. *Id*. at 4.
39. *Id*.

to resort to an unsafe abortion when faced with an unplanned pregnancy and provisions for safe abortions are restricted, unavailable or inaccessible."[40]

B. LEGAL HISTORY OF A WOMAN'S RIGHT TO CHOOSE

Two prominent cases that Supreme Court abortion precedent rests on are *Roe v. Wade*[41] and *Planned Parenthood v. Casey*.[42] In *Roe v. Wade*, a single pregnant woman challenged the constitutionality of the Texas Code of Criminal Procedure abortion law[43] that made it a crime to "procure an abortion" or attempt one, with an exception only for procedures related to saving the mother's life.[44] Ms. Roe wanted an abortion "performed by a competent, licensed physician, under safe, clinical conditions" in the jurisdiction where she resided.[45] Because she had no life-threatening complications, an abortion was not available to her in Texas.[46] Ms. Roe claimed that the Texas statutes were "unconstitutionally vague" and "abridged her right to personal privacy."[47] She believed she had a right to terminate her pregnancy under the Fourteenth Amendment's Due Process Clause.[48]

The United States Constitution does not explicitly grant its citizens a right to privacy, but case law dating back as far as 1891 has recognized that right and granted it protections.[49] In *Roe*, the Court stated the right to privacy, "whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[50] The *Roe* Court, led by Justice Blackmun, concluded: "the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation."[51]

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40. *Id*.
41. 410 U.S. 113 (1973).
42. 505 U.S. 833 (1992).
43. *Roe*, 410 U.S. at 116.
44. *Id.* at 118-19.
45. *Id*. at 120.
46. *Id*.
47. *Id*.
48. *Id*.
49. *Id.* at 152.
50. *Id.* at 153.
51. *Id.* at 154.

Texas argued that the state had a compelling interest in protecting the life of its citizens, and life begins at conception.[52] The Court in *Roe* rejected this argument in favor of the viability standard, which is the point when a fetus can live outside the womb without artificial aid; viability occurs at twenty-four to twenty-eight weeks gestation.[53] The Court found that at approximately the end of the first trimester the state has a compelling interest in protecting the life of its pregnant women.[54] Before this "compelling point," the doctor and patient can decide, without interference from the state, that the pregnancy should be terminated.[55]

The opinion in *Roe* also dealt with the issue of legal standing in regards to pregnant women. Generally, a controversy must be present during the appellate process to have adequate standing.[56] However, with a pregnancy, which lasts approximately 266 days, it would be impossible for women to bring forth their pregnancy related constitutional issues.[57] Justice Blackmun, the author of the *Roe* opinion, deemed Ms. Roe had standing when he wrote: "Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be 'capable of repetition, yet evading review.'"[58] This statement established standing in the appellate courts for pregnant women, even after the initial pregnancy has ended.

In *Planned Parenthood v. Casey*, the petitioners, abortion clinics and doctors in Pennsylvania, sued the State[59] over the Pennsylvania Abortion Control Act of 1982.[60] *Casey* created the undue burden standard for states to follow when passing laws limiting abortion. "An undue burden exists, and therefore a provision of law is invalid, 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."[61]

The opinion in *Casey* gave a four-part summary to explain the standard. First, the Court created the standard to protect the rights set out in *Roe* and simultaneously accommodate the state's interests in protecting

52. *Id.* at 159.
53. *Id.* at 160.
54. *Id.* at 162-63
55. *Id.* at 163.
56. *Id*. at 125.
57. *Id.*
58. *Id.* (quoting S. Pac. Terminal Co., v. ICC, 219 U.S. 498, 515 (1911)).
59. Planned Parenthood v. Casey, 505 U.S. 833 (1992).
60. 18 PA. CONS. STAT. §§ 3203-3220 (1990).
61. *Casey*, 505 U.S. at 878.

potential life.[62] Second, the rigid trimester framework of *Roe* was rejected to promote the state's interest in potential life.[63] This point in *Casey* allowed states to pass laws limiting a woman's choices on abortion.[64] Third, the state could enact laws that protect the health and safety of women seeking abortions, but unnecessary laws with the purpose or effect of "presenting a substantial obstacle" would impose an undue burden on her rights.[65] Fourth, *Casey* explicitly stated that the undue burden standard would not disturb the holding of *Roe*, and in fact, reaffirmed it: "Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."[66]

In more recent case law, federal courts heard two cases very similar to the North Dakota challenge: *Edwards v. Beck*[67] in Arkansas and *Isaacson v. Horne*[68] in Arizona. In *Edwards v. Beck*,[69] the plaintiffs ("Edwards") were two doctors that provided abortion procedures at clinics in Little Rock, Arkansas. Edwards sued the members of the Arkansas State Medical Board ("Beck"), in their official capacities. Edwards claimed that the Act[70] was unconstitutional because it banned abortion prior to fetal viability.[71] Beck challenged the Act based on its three provisions: "a heartbeat testing requirement; a disclosure requirement; and a ban on abortions when a fetal heartbeat is detected and the fetus has reached twelve weeks' gestation."[72] The Act also provided penalties if a doctor performed an abortion after a heartbeat had been detected and without one of the above exceptions, the doctor could face revocation of his medical license after a determination by the Board.[73] The evidence submitted in *Edwards* was a doctor's affidavit stating that a heartbeat can be shown at twelve weeks and statistics showing

62. *Id.*

63. *Id.*

64. For example, for minors in North Dakota, the law requires a delay of at least twenty-four hours between when a patient receives mandated information and when an abortion is performed. *See* N. D. CENT. CODE § 14-02.1-03 (2011).

65. *Casey*, 505 U.S. at 878.

66. *Id.* at 879.

67. No. 4:13CV00224 SWW, 2014 U.S. Dist. LEXIS 33399 (E.D. Ark. Mar. 14, 2014).

68. 716 F.3d 1213 (9th Cir. 2013).

69. *Edwards*, 2014 US Dist. LEXIS 33399, at *3.

70. S.B. 134, 89th Leg. Assemb., Reg. Sess (Ark. 2013) (codified at ARK. CODE ANN. §§ 20-16-1301 to 1307 (2013)).

71. *Edwards*, 2014 US Dist. LEXIS 33399, at *8.

72. *Id.* at *5.

73. *Id.* at *8.

that only twenty percent of abortions in Arkansas are performed at or after twelve weeks.[74]

On analysis of the twelve week heartbeat ban, the court looked to Supreme Court precedent and stated: "The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician."[75] The court in *Edwards* held, as a matter of law, that because a fetus at twelve weeks cannot survive outside of the womb, the twelve-week abortion ban in Arkansas prohibited pre-viability abortions and infringed upon "a woman's Fourteenth Amendment right to elect to terminate a pregnancy before viability."[76]

In *Isaacson v. Horne*, [77] the plaintiffs ("Isaacson") were three obstetrician-gynecologists that practiced in Arizona. Isaacson sued various state and local government officials ("Horne") in their official capacities.[78] Isaacson challenged the constitutionality of Arizona H.B. 2036, which the governor signed in April 2012.[79] The Act, passed by the Arizona Legislature, banned abortion after twenty weeks gestation, a time before the fetus is viable.[80] Based on controlling precedent, the court held that this act was unconstitutional.[81] The court in *Isaacson* relied on precedent from *Roe*, *Casey*, and *Gonzales*.[82] Horne argued that precedent from those cases was simply dicta, not controlling.[83] The court in *Isaacson* disagreed with Horne.[84]

The *Isaacson* court recognized the Supreme Court's finding that the viability standard is medically determinable—which makes it a flexible point—and for that reason must be "a matter for the judgment of the responsible attending physician."[85] Because both Isaacson and Horne agreed that a fetus was not viable at twenty weeks, the court found that the Arizona law banned pre-viability abortions and was thusly unconstitutional.[86]

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74. *Id.* at *13.
75. *Id.* at *11 (quoting Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 64-65 (1976)).
76. *Id.* at *14.
77. 716 F.3d 1213 (9th Cir. 2013).
78. *Id.* at 1218.
79. *Id.* at 1217-18.
80. *Id.*
81. *Id.* at 1231.
82. *Id.* at 1222.
83. *Id.* at 1222-23.
84. *Id.* at 1223.
85. *Id.* at 1225 (quoting Colautti v. Franklin, 439 U.S. 379, 396 (1979)).
86. *Id.* at 1231.

III. COURT'S ANALYSIS

The issue before the court in *MKB Mgmt. Corp. v. Burdick* was whether the North Dakota Legislature could prohibit abortion after a heartbeat has been detected—approximately six week's gestation—and at a point before the fetus is viable.[87] The court held that the statute was unconstitutional[88] and granted the Clinic's motion for summary judgment. The court considered the medical opinions of the Clinic and Burdick on viability and then analyzed the alleged due process violation.

A. AT WHAT POINT ARE WE VIABLE

The Clinic brought this motion on the basis that H.B. 1456[89] was unconstitutional and it violated the due process rights of the Clinic's patients.[90] Burdick claimed that the statute was constitutional because it was not intended to ban all abortions, reasoning the bill still allowed pre-viability abortions and the State has an interest in protecting future lives.[91] To support their positions, both parties submitted affidavits of medical professionals to the court, which the court analyzed at length.

The Clinic presented an affidavit from Dr. Kathryn Eggleston, M.D., who has been the medical director of the Red River Women's Clinic since 2008, a family medicine physician, and reproductive health care provider for over fourteen years.[92] Dr. Eggleston's affidavit explained the complex medical issues present in the case.[93] She stated that the Clinic performs abortions one day each week for forty-five to fifty weeks a year.[94] These procedures typically involve fetuses from approximately five weeks after a woman's last menstrual period ("LMP")[95] to sixteen weeks after LMP.[96]

The Clinic rarely performs abortions before five weeks for two main reasons. First, before five weeks LMP, the pregnancy is so small that the location of the pregnancy is very hard to determine by ultrasound or vaginal ultrasound.[97] This makes performing an abortion unsafe.[98] Second, most

87. MKB Mgmt. Corp. v. Burdick, No. 1:13-cv-071, 2014 U.S. Dist. LEXIS 60152, at *3 (D.N.D. Apr. 16, 2014).
88. *Id*. at *43.
89. H.B. 1456, 63d Leg. Assemb., Reg. Sess. (N.D. 2013).
90. *MKB Mgmt. Corp.,* 2014 U.S. Dist. LEXIS 60152, at *3.
91. *Id.* at *9.
92. *Id*. at *10-11.
93. *Id*. at *10-14.
94. *Id*. at *12.
95. *Id*.
95. "LMP" refers to the first day of the woman's last menstrual period.
96. *MKB Mgmt. Corp.*, 2014 U.S. Dist. LEXIS 60152, at *12.
97. *Id*.

women do not know they are pregnant before six weeks LMP, making them unaware of the option of having an abortion.[99]

Before performing abortions, the Clinic uses ultrasound to confirm intrauterine pregnancy and the gestational age of the fetus.[100] This is a protocol necessary for performing safe abortions.[101] According to Dr. Eggleston's affidavit, the ultrasound also confirms fetal cardiac activity, which is usually present by six weeks LMP and sometimes a few days sooner.[102] According to the North Dakota Department of Health's Induced Termination of Pregnancy Reports, in the past three years, the Clinic has performed ninety-one percent of abortion procedures after six weeks LMP.[103]

Dr. Christie Iverson, M.D., an obstetrician and gynecologist in North Dakota for over fifteen years, also submitted an affidavit on behalf of the Clinic for the court's consideration.[104] Dr. Iverson agreed with Dr. Eggleston that by five weeks LMP, most women do not know they are pregnant, and this statute would create a very narrow window of opportunity that would be burdensome to women in North Dakota.[105] Dr. Iverson explained that an egg is fertilized at two weeks LMP, with the pregnancy actually beginning when the fertilized egg is implanted into the uterine lining at three weeks LMP.[106] A woman will miss her period at about four weeks LMP.[107] If a woman has irregular periods, which is common, she may not notice a missed period until around six weeks LMP.[108] The language of H.B. 1456 would make abortions illegal after a detectable heartbeat, which, according to Dr. Eggleston, is around six weeks LMP[109], a time when many women would not even know that they are pregnant. At five weeks LMP, the heart development of the embryo is just beginning; the tissues that will become the heart are just forming tubes that will fuse together to create the embryonic heart that will pump blood through the embryo.[110] At five weeks, LMP the embryo is only one

98. *Id*.
99. *Id*.
100. *Id*.
101. *Id*.
102. *Id.*
103. *Id.* at *20.
104. *Id.* at *15.
105. *Id.* at *16-18.
106. *Id.* at *18.
107. *Id.* at *17.
108. *Id.* at *18.
109. *Id.* at *12.
110. *Id.* at *16-17.

millimeter in diameter.[111] Dr. Eggleston stated that a fetus would not be viable, according to the definition in North Dakota Century Code,[112] until twenty-four weeks LMP.[113] Dr. Iverson agreed that viability, based on the same definition, is not possible until twenty-four weeks LMP and then only with a reasonable chance of survival with lifesaving medical intervention.[114] Dr. Iverson stated "[n]o pregnancy is viable at 6 weeks LMP, nor for several months thereafter."[115]

Burdick also submitted a medical doctor's affidavit for support of denying the motion. Dr. Jerry Obritsch, M.D.,[116] took the position that "viability occurs at the point of conception."[117] He claimed that since during in vitro fertilization (IVF) embryos can survive in test tubes for two to six days, they were viable.[118] Dr. Obritsch offered that since the first "test tube baby"[119] was not created until 1978, the *Roe* Court did not have the information available to make an informed ruling including IVF in 1972.[120] Dr. Obritsch stated: "it is my opinion, to a reasonable degree of medical certainty, an unborn child is viable or viability occurs, as medically defined as well as legally defined, from the time of conception."[121]

As further support of his opinion that viability at any point other than the moment of conception is "no longer a medically valid basis,"[122] Dr. Obritsch's affidavit listed the development stages of "medically recognized attributes that exist in an unborn child [to] demonstrate the framework of viability . . . ."[123] At conception, unique DNA, including hair and eye color and facial features are present.[124] Three weeks after conception, the heart beats, possibly with a different blood type than that of the mother.[125] Six weeks after conception, the fetus possesses detectable brain waves.[126] Eight

111. *Id.* at *17.
112. N. D. CENT. CODE § 14-02.1-02(14) (2013).
113. *MKB Mgmt. Corp.*, 2014 U.S. Dist. LEXIS 60152, at *13.
114. *Id.* at *17.
115. *Id.*
116. A medical doctor who specializes in obstetrics and gynecology in Bismarck, North Dakota.
117. *MKB Mgmt. Corp.*, 2014 U.S. Dist. LEXIS 60152, at *20.
118. *Id.*
119. *Id.* at *23.
120. *Id.* In fact, the Roe Court did specifically mention "implantation of embryos, artificial insemination, and even artificial wombs." *See* Roe v. Wade, 410 U.S. 113, 161 (1973).
121. *MKB Mgmt. Corp.*, 2014 U.S. Dist. LEXIS 60152, at *23.
122. *Id.* at *25.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*

weeks after conception, the fetus can experience pain. After eight weeks, all major organs are in place.[127]

Dr. Obritsch argued that defining viability as the moment of conception would bring consistency to the legal system, because that moment cannot be changed by medical advances and is not a fluid point in time.[128] Dr. Obritsch stated "[v]iablity at conception is based on medical science and fact and is in alignment with natural law."[129] Dr. Obritsch iterated his position—that viability begins at conception—was based on his opinion and a reasonable degree of medical certainty.[130]

B. DUE PROCESS VIOLATION

Based on the fundamental holdings in *Roe v. Wade* and *Planned Parenthood v. Casey*, institutional integrity, and the doctrine of stare decisis, Judge Hovland[131] found H.B. 1456 unconstitutional.[132]

Roe v. Wade held that a woman has a constitutional right to terminate her pregnancy before viability under the Due Process Clause of Fourteenth Amendment.[133] According to *Roe* and *Casey*, viability is "the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman."[134] *Planned Parenthood v. Casey* took the holding of *Roe* a step further. *Casey* held that a woman has the right to terminate her pregnancy before viability and that such aright extends to obtaining the abortion without undue interference from the state.[135] In *Roe*, the Court had set a trimester analysis for when a woman could legally obtain an abortion.[136] *Casey* dropped the trimester analysis and adopted an "undue burden standard."[137] The undue burden standard states that the statute is facially unconstitutional if it creates "a substantial obstacle to a woman's

127. *Id.* at *26.
128. *Id.* at *25.
129. *Id.*
130. *Id.* at *26.
131. Judge of the United State District Court, District of North Dakota since 2009, nominated by President George W. Bush in 2002, received his J.D. from University of North Dakota School of Law in 1979.
132. *MKB Mgmt. Corp.*, 2014 U.S. Dist. LEXIS 60152, at *43.
133. *Id.* at *28.
134. *Id.*
135. *Id.*
136. *Id.* at *29.
137. *Id.*

choice" to obtain an abortion.[138] *Casey* specifically asked the Supreme Court if "a law designed to further the State's interest in fetal life, but which imposed an undue burden on a woman's decision before fetal viability, could be constitutional."[139] The holding in *Casey* answered this question with a resounding no[140] and held that a "state may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."[141]

More recently, Arkansas wrestled with a law similar to H.B. 1456.[142] Arkansas passed a statute that banned abortions after a fetal heartbeat had been detected and after twelve weeks LMP[143]—a ban on abortion that is six weeks later than North Dakota's bill. The federal district court of Arkansas ruled an abortion law is facially unconstitutional if in "a large fraction of the cases in which the law is relevant the law will operate as a substantial obstacle to a woman's choice to undergo an abortion."[144] This language is almost verbatim the holding in *Casey*. In Arizona, the Ninth Circuit Court of Appeals held that a law prohibiting abortions after twenty weeks LMP was unconstitutional.[145] The case in Arizona was appealed to the United States Supreme Court where it was denied certiorari in 2014.[146]

On Burdick's position that viability occurs at conception, the court empathically answered, "the position that viability occurs at the moment of conception is one this Court is obligated to reject under binding precedent of the United States Supreme Court."[147] Judge Hovland's opinion repeatedly mentions the definition of viability established by the Supreme Court and his duty to uphold that precedent. Regardless of the advances in medical science that both make abortions safer later in pregnancy and make viability occur earlier due to the same medical advances, "the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician."[148] Because of medical advances, a state cannot "fix viability at a specific point" during a pregnancy.[149] Judge Hovland continued: "[V]iability . . . established in

138. *Id.* (quoting Planned Parenthood v. Casey, 505 U.S. 833, 845 (1992)).
139. *Id.*
140. *Id.*
141. *Id.* at *30-31.
142. *Id.*
143. *Id.* at *33-34.
144. *Id.* at *34.
145. *Id.* at *36.
146. *Id.* (citing Horne v. Isaacson, 134 S. Ct. 905 (2014)).
147. *Id.* at *39.
148. *Id.* at *38 (quoting Colautti v. Franklin, 439 U.S. 379, 396 (1979)).
149. *Id.*

Roe and affirmed in *Casey* . . . cannot be overturned by this Court based on a single affidavit of a physician who has opined that viability occurs at the point of conception."[150] Also, "[i]t is clear and undisputed that, until *Roe v. Wade* and *Planned Parenthood v. Casey* are overturned by the United States Supreme Court, all lower courts are bound to follow that precedent under the rule of *stare decisis*."[151]

IV. IMPACT AND EFFECTS OF APPLICATION

The statute, proposed by H.B. 1456, at issue in this case would effectively ban abortions after a heartbeat is detected. According to the affidavits of Drs. Eggleston and Iverson, a heartbeat is detected about five to six weeks into a pregnancy—a time when many women do not know they are pregnant.[152] In North Dakota, the only facility that performs abortions is in Fargo, and it only does those procedures one day each week.[153] In application, H.B. 1456 would limit abortions in North Dakota to one day in a woman's fifth week of pregnancy, a time when many women would not even know they are pregnant yet.

Roe v. Wade established a woman's right to choose to terminate her pregnancy. *Planned Parenthood v. Casey* reaffirmed that right and added that a woman should be free to choose to terminate without undue interference. Because of the limited window of time in which a woman could have an abortion and the Clinic's location, this statute placed an undue burden on women in North Dakota. House Bill 1456 would have eliminated a woman's right to choose to terminate her pregnancy by limiting her choice to one day on which she may or may not know she is pregnant.

This case and H.B. 1456 also invite us to consider the responsibility that a state legislature has in enacting laws that they know will go against established federal precedent. By enacting H.B. 1456, the Legislature, with a House vote of sixty-three to twenty-eight (three absent) and a Senate vote of twenty-six to seventeen (four absent),[154] doomed thousands of North Dakota taxpayer dollars to litigation of a law that is blatantly unconstitutional. Not only did this statute cost thousands of dollars[155] to

150. *Id.* at *42.
151. *Id.* at *43.
152. *Id.* at *4.
153. *Id.* at *12.
154. H.B. 1456, 63d Leg. Assemb., Reg. Sess. (N.D. 2013).
155. "The legal wrangling over HB 1456 has cost taxpayers $154,749—through the date of Hovland's April 17 ruling, according to data obtained from Stenehjem's office." Rob Port, *Legal*

appeal to the federal district court, but also after this ruling, granting the plaintiff's summary judgment motion, the defendants have appealed this case to the Eighth Circuit Court of Appeals,[156] which will cost even more for the State.

V. CONCLUSION

In *MKB Mgmt. Corp. v. Burdick*, the United States Federal District Court for the District of North Dakota held that H.B. 1456—a statute enacted by the Sixty-Third Legislative Assembly—was facially unconstitutional.[157] The court's holding was based on forty years of Supreme Court precedent finding abortion allowable pre-viability and that viability is not determined at conception. The holding in *MKB Mgmt. Corp.* affirms precedent for North Dakota, follows the recent cases in Arkansas and Arizona where the courts struck down similar abortion bans as unconstitutional, and ruled in a way unlikely to be overturned by the Supreme Court, if the appeals go that far, as evidenced by the denial of certiorari on the Ninth Circuit appeal.[158]

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battles over anti-abortion laws costs ND taxpayers nearly $300,000, WATCHDOG (Apr. 22, 2014), http://watchdog.org/140072/abortion/.

156. MKB Mgmt. Corp. v. Burdick, No. 1:13-cv-071, 2014 U.S. Dist. LEXIS 60152, at *3 (D.N.D. Apr. 16, 2014), *appeal docketed*, No. 14-2128 (8th Cir. April 14, 2014).

157. MKB Mgmt. Corp. v. Burdick, No. 1:13-cv-071, 2014 U.S. Dist. LEXIS 60152, at *43 (D.N.D. Apr. 16, 2014).

158. Edwards v. Beck, No. 4:13CV00224 SWW, 2014 US Dist. LEXIS 33399 (E.D. Ark. Mar. 14, 2014); Isaacson v. Horne, 716 F.3d 1213 (9th Cir. 2013).

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