United States Court of Appeals
For the Eighth Circuit

No. 19-2690

Little Rock Family Planning Services, et al.

Plaintiffs - Appellees

v.

Leslie Rutledge, in her official capacity as Attorney General of the State of Arkansas, et al.

Defendants - Appellants

Justin Buckley Dyer, Ph. D.; State of Missouri; State of Alabama; State of Alaska; State of Georgia; State of Idaho; State of Indiana; Commonwealth of Kentucky; State of Louisiana; State of Nebraska; State of Ohio; State of Oklahoma; State of South Carolina; State of South Dakota; State of Tennessee; State of Texas; State of Utah; State of West Virginia

Amici on Behalf of Appellants

Society for Maternal- Fetal Medicine; American College of Obstetricians and Gynecologists; Constitutional Law Scholars; State of California; State of Colorado; State of Connecticut; State of Delaware; State of Hawaii; State of Illinois; State of Maine; State of Maryland; State of Massachusetts; State of Minnesota; State of Nevada; State of New Mexico; State of New York; State of Oregon; State of Pennsylvania; State of Rhode Island; State of Vermont; State of Virginia; State of Washington; District of Columbia; Reproductive Justice Organizations

Amici on Behalf of Appellees

Appeal from United States District Court
for the Eastern District of Arkansas - Little Rock

Submitted: September 23, 2020
Filed: January 5, 2021

Before LOKEN, SHEPHERD, and ERICKSON, Circuit Judges.

LOKEN, Circuit Judge.

Little Rock Family Planning Services and Dr. Thomas Tvedten (collectively, "LRFP") brought this 42 U.S.C. § 1983 action challenging the constitutionality of three Arkansas statutes enacted in 2019 that relate to abortions: (1) Act 493, codified at Ark. Code Ann. § 20-16-2004, bans providers from performing an abortion when the "probable age" of the fetus is "determined to be greater than eighteen weeks' gestation," with exceptions for a "medical emergency" or a pregnancy that results from rape or incest. (2) Act 619, codified at Ark. Code Ann. § 20-16-2103, prohibits a provider from intentionally performing an abortion with knowledge that the pregnant woman is seeking the abortion "solely on the basis" of a test indicating Down syndrome or any other reason to believe that the fetus has Down syndrome, with exceptions if the abortion is necessary to save the woman's life or to preserve her health or if the pregnancy is the result of rape or incest. (3) Act 700, codified at Ark. Code Ann. § 20-16-606, provides that a person who performs an abortion must be a licensed physician "board-certified or board-eligible in obstetrics and gynecology" (OBGYN). A provider who violates these statutes commits a Class D felony and is subject to suspension or revocation of his or her medical licence. Defendants are the Attorney General of Arkansas and numerous other officials acting in their official capacities.

Following an evidentiary hearing at which eight witnesses testified, the district court issued a 186-page Preliminary Injunction order preliminarily enjoining Defendants "from enforcing Act 493 of 2019, Act 619 of 2019, and Act 700 of 2019." The court applied our traditional four-part test for the grant of preliminary injunctions in Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 113 (8th Cir. 1981) (en banc), as modified when the moving party seeks to enjoin a state statute by Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 725, 732 (8th Cir. 2008) (en banc). Defendants appeal.[1] With the appeal pending, LRFP moved to dismiss as moot Defendants' appeal of the injunction against enforcing Act 700, explaining that Plaintiffs now comply with the statute's OBGYN requirement. After careful, de novo review, we affirm the order preliminarily enjoining enforcement of Act 493 and Act 619. We dismiss as moot the appeal of that part of the order that preliminarily enjoined enforcement of Act 700 (the OBGYN requirement) and remand with instructions to vacate that part of the Preliminary Injunction order and its supporting findings and conclusions.

---

[1]Defendants' Notice of Appeal also included an order of the district court judge to whom this case was initially assigned consolidating the case with Planned Parenthood of Ark. & E. Okla. v. Jegley, Case No. 4:15-cv-00784-KGB, then pending before the judge who issued the Preliminary Injunction order. Defendants did not include this order in their statement of the issues presented for review or the argument sections of their brief, as Fed. R. App. P. 28(a)(5) and (8) require. Therefore, we do not consider this issue, and we deny LRFP's time-wasting motion to dismiss that part of the appeal. We also reject as totally without merit Defendants' disrespectful argument that we direct the case be reassigned because the judge who issued the Preliminary Injunction order "has a long history of unlawfully enjoining Arkansas laws." In these motion wars, counsel of record for both sides lost sight of their duties to serve as officers of the court as well as vigorous advocates for their clients.

I. Acts 493 and 619, The Pre-Viability Abortion Bans.

As the district court recognized, the law governing the constitutionality of two of the three statutes at issue -- Act 493 and Act 619 -- though obviously subject to change in the future, is well established in this Circuit today:

> Before viability, a State "may not prohibit any woman from making the ultimate decision to terminate her pregnancy." It also may not impose upon the right an undue burden, which exists if a regulation's "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." On the other hand, "[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose."

MKB Mgmt. Corp. v. Stenehjem, 795 F.3d 768, 772 (8th Cir. 2015), cert. denied, 136 S. Ct. 981 (2016), quoting Gonzales v. Carhart, 550 U.S. 124, 146 (2007), in turn quoting Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 879, 878, and 877 (1992). The Supreme Court has defined viability as "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." Casey, 505 U.S. at 870. "Before viability," the Court declared, "the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure." Id. at 846. "The woman's right to terminate her pregnancy before viability . . . . is a rule of law and a component of liberty we cannot renounce." Id. at 871 (citation omitted).

The Supreme Court has repeatedly stated that its pre-viability rule is categorical: "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." Casey, 505 U.S. at 879; see Gonzales, 550 U.S. at 146; cf. June Med. Servs. L.L.C., v. Russo, 140 S. Ct. 2103, 2135 (2020) (Roberts, C.J., concurring).[2] We have applied the rule categorically, even while recognizing "that viability varies among pregnancies and that improvements in medical technology will both push later in pregnancy the point at which abortion is safer than childbirth and advance earlier in gestation the point of fetal viability." Edwards v. Beck, 786 F.3d 1113, 1117 (8th Cir. 2015) (citations omitted) (invalidating an Arkansas statute banning abortions after twelve weeks' gestation because the Act "prohibits women from making the ultimate decision to terminate a pregnancy at a point before viability").

A. Act 493, The 18-Week Ban. Act 493 provides that a person "shall not intentionally or knowingly perform, induce, or attempt to perform or induce an abortion of an unborn human being if the probable gestation age of the unborn human being is determined to be greater than eighteen (18) weeks' gestation." Ark. Code Ann. § 20-16-2004(b). The district court preliminarily enjoined enforcement of this statute based on uncontroverted medical testimony that "no fetus is viable at 18 weeks," and that "[i]t is commonly accepted in the field of OBGYN that a normally developing fetus will not attain viability until at least 24 weeks." This testimony has strong support in governing case law. See MKB Mgmt., 795 F.3d at 774 ("[t]oday, viability generally occurs at 24 weeks"); accord Casey, 505 U.S. at 860.

[2]Chief Justice Roberts's concurring opinion is controlling. Hopkins v. Jegley, 968 F.3d 912, 915 (8th Cir. 2020), citing Marks v. United States, 430 U.S. 188, 193 (1977), and Gregg v. Georgia, 428 U.S. 158, 169 n.15 (1976).

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.