

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 19-5005

JANE DOE, minor child who is unborn, by and
through her father and next friend, John Doe,

Plaintiff-Appellant

v.

MIKE HUNTER, in his official capacity as Oklahoma
Attorney General; KEVIN STITT, in his official capacity
as Oklahoma Governor; WILLIAM P. BARR, in his official
capacity as U.S. Attorney General; U.S. DEPARTMENT
OF JUSTICE; UNITED STATES OF AMERICA,

Defendants – Appellees

On Appeal from the United States District Court
for the Northern District of Oklahoma
District Court No. 4:18-cv-00408-JED-FHM
District Judge: The Honorable John E. Dowdell

Before: TYMKOVICH, *Chief Judge*, KELLY and HARTZ, *Circuit Judges*

Decided: December, 6, 2019

ORDER AND JUDGMENT

Timothy M. Tymkovich, Chief Judge

*** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G).* The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Jane Doe, an unborn child of less than 22 weeks' gestational age acting through her father, sought to challenge the exceptions for legal abortions in the fetal-homicide laws of the United States and Oklahoma.¹ The district court dismissed for lack of Article III standing. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

A. *Legal Background*

¹ The parties have not informed the court of when or whether Doe was born; the governments do not know her status, and Doe's father has remained silent on the matter. We do not consider the case moot, however, because due to the short period of human gestation, cases involving abortion fall within the exception for matters capable of repetition yet evading review. *See Roe v. Wade*, 410 U.S. 113, 125 (1973).

In *Roe v. Wade*, 419 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Supreme Court concluded that before a fetus is viable, a pregnant woman has a due process right to choose to have an abortion without undue interference of the state.

After *Roe* and *Casey* were issued, both the United States and Oklahoma enacted statutes that criminalize the killing of an unborn child. *See* 18 U.S.C. § 1841(a) (providing that conduct that violates listed federal criminal provisions "and thereby causes the death of, or bodily injury . . . to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense under this section"); Okla. Stat. tit. 21, § 691 (defining homicide as "the killing of one human being by another" and defining "human being" to include an "unborn child"). In compliance with *Roe* and *Casey*, both statutes explicitly except legal abortions, performed with the consent of the mother, from the conduct that is criminalized. *See* 18 U.S.C. § 1841(c); Okla. Stat. tit. 21, § 691(C)(1). Doe seeks to challenge these statutory exceptions (the Exceptions).

B. Doe's Claims

Doe alleges that the Exceptions: (1) violate her Fifth and Fourteenth Amendment rights to equal protection based on differential treatment of born and unborn human beings and among unborn human beings; (2) violate her Fifth and Fourteenth Amendment rights to substantive due process, by depriving her of the right to life; (3) violate her Fifth and Fourteenth Amendment rights to substantive due process, by depriving her of the rights to liberty and bodily integrity; and (4)

violate 42 U.S.C. § 1983 by depriving her of the rights to equal protection, life, bodily integrity, and to be free from discrimination.² As relief, she requests: (1) a permanent injunction prohibiting the defendants "from enforcing or preserving the . . . Exceptions or taking other similar discriminatory action against [Doe] or other minor children who are unborn"; (2) a declaratory judgment that the Exceptions "are unconstitutional and unenforceable in all of their applications and on their face"; (3) a declaratory judgment "that [Doe] and minor children who are unborn have the right to a guarantee of equal protection, substantive due process, and life under the Fourteenth and Fifth Amendments to the United States Constitution and shall not be deprived of these rights"; and (4) any other relief the court deems proper. Aplt. App. at 24.

C. Principles of Article III Standing

"[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Standing has three elements: (1) an injury in fact, (2) that "fairly can be traced to the challenged action of the defendant, and has not resulted from the independent action of some third party not before the court," and (3) that is likely to be redressed by a favorable decision. *Ne. Fla. Chapter of Associated Gen.*

² The § 1983 claim relies on the same constitutional provisions as the other claims. For convenience, we consider the claims as substantive due process and equal protection claims, without separately discussing § 1983. -----

Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 663-64 (1993) (internal quotation marks omitted).

"[W]e assess standing as of the time a suit is filed." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 426 (2013). "Standing is not dispensed in gross. Rather, a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) (citation, brackets, and internal quotation marks omitted). It is Doe's burden to establish her standing. *See Lujan*, 504 U.S. at 561.

This case was decided at the Fed. R. Civ. P. 12 motion-to-dismiss stage. "[A]t the pleading stage, the plaintiff must clearly allege facts demonstrating each element [of standing]." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (ellipsis and internal quotation marks omitted). "[B]oth the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *United States v. Supreme Court of N.M.*, 839 F.3d 888, 899 (10th Cir. 2016) (internal quotation marks omitted).

D. The District Court's Ruling

The district court held that Doe failed to show any of the requirements of standing. It first held that Doe had "not alleged any facts supporting the conclusion that the threat of injury to [her] is both real and immediate, not conjectural or hypothetical." Aplt. App. at 95 (internal quotation marks omitted). Noting that the complaint used the term "could"—that Doe *could* be subjected to an abortion—the district court stated that "the Complaint is conspicuously silent as to the actual

intent of [Doe's] mother to seek an abortion. Nowhere does the Complaint allege that [Doe's] mother is seeking to or is likely to terminate her pregnancy." *Id.* Accordingly, the court concluded that Doe's alleged injuries were hypothetical and dependent upon the choices made by her mother, an independent actor who was not before the court.

The district court further stated that even if it were to assume an injury in fact, Doe could not establish traceability or redressability. It pointed out that the federal exception itself does not authorize abortions. Instead, it is Supreme Court precedent that protects a woman's right to choose to abort a non-viable fetus." [Doe's] asserted injury is not fairly traceable to [§ 1841(c)], and the injunctive and declaratory relief she seeks concerning [§ 1841(c)] would not prevent her mother from legally obtaining an abortion under *Roe* and *Casey*." Aplt. App. at 96. Further, Oklahoma also is bound by *Roe* and *Casey*, and whatever its fetal-homicide provisions, they would be unenforceable as to legal abortions.

Doe had argued that her situation should be analogized to pre-enforcement standing, whereby a plaintiff need not expose herself to liability by violating an allegedly unconstitutional law before challenging it in court. The district court rejected this theory, stating that "there is no threatened action by the state or federal government in this case, and [Doe] is not exposed to liability under the challenged statutory provisions. The reasoning behind pre-enforcement standing does not apply to [Doe's] claims." *Id.* at 97.

II. DISCUSSION

Our review of a plaintiff's Article III standing is de novo. *See Benham v. Ozark Materials River Rock, LLC*, 885 F.3d 1267, 1272 (10th Cir.), *cert. denied*, 139 S. Ct. 174 (2018). Doe has failed to show an injury in fact or traceability for her substantive due process claims, and she has failed to show traceability for her equal protection claims. Accordingly, we affirm the district court's dismissal for lack of Article III standing without needing to consider redressability.

A. *Injury in Fact*

To establish injury in fact, Doe must show she suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotation marks omitted). "For an injury to be 'particularized,' it must affect the plaintiff in a personal and individual way." *Spokeo, Inc.*, 136 S. Ct. at 1548 (internal quotation marks omitted). "A concrete injury must be *de facto*; that is, it must actually exist. When we have used the adjective 'concrete,' we have meant to convey the usual meaning of the term—real, and not abstract." *Id.* (citation and internal quotation marks omitted). And while "imminence" is a "somewhat elastic concept," "it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." *Lujan*, 504 U.S. at 564 n.2 (internal quotation marks omitted).

Allegations of possible future injury do not establish an injury in fact. *See Clapper*, 568 U.S. at 409; *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990).

"[S]tanding is affected by the nature of the relief sought." *Baca v. Colo. Dep't of State*, 935 F.3d 887, 909 (10th Cir. 2019), *petition for cert. filed* (U.S. Oct. 16, 2019) (No. 19-518). Doe seeks injunctive relief rather than damages. "To obtain prospective relief, a plaintiff must show a credible threat of future harm." *Id.* at 910; *see also Tandy v. City of Wichita*, 380 F.3d 1277, 1283 (10th Cir. 2004) (stating that when a plaintiff seeks prospective relief, he or she "must be suffering a continuing injury or be under a real and immediate threat of being injured in the future").

1. Substantive Due Process Claims

Doe's substantive due process claims allege that she is being deprived of her rights to life, liberty, and bodily integrity. But as the district court pointed out, the complaint does not establish that Doe's mother ever sought an abortion or even had any intention of doing so. The complaint uses the terms "could" and "can" to describe the harm to life and liberty that Doe allegedly faces. These allegations do not establish a concrete, particularized injury that is actual, imminent, or certainly impending. *See Clapper*, 568 U.S. at 410 (holding that allegations that the government could intercept plaintiffs' communications were speculative and insufficient to establish injury in fact); 15 *Moore's Federal Practice*, § 101.40[4][b][i] (Matthew Bender 3d Ed.) (recognizing that "[s]tanding may also be denied on the ground that the injury is only hypothetical in the sense that the plaintiff *could* have been injured, but was not").

Rather, this case appears more analogous to *Diamond v. Charles*, 476 U.S. 54, 66-67 (1986), in which the Supreme Court held that "Article III requires more than a desire to vindicate value interests. It requires an injury in fact that distinguishes a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem." (citation and internal quotation marks omitted). "Diamond's claim of conscientious objection to abortion [did] not provide a judicially cognizable interest." *Id.* at 67.

Doe argues that a "substantial risk" of injury is sufficient, *see Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) ("An allegation of future injury may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." (internal quotation marks omitted)), and she asserts that the fact that her mother could seek an abortion at any time establishes such a "substantial risk" to her life and liberty. Like Doe's other allegations, this argument requires hypothesizing about what Doe's mother "could" do. But hypotheticals do not establish that Doe is subject to any risk, much less a substantial risk, that her mother will seek an abortion. Accordingly, this argument similarly falls short of establishing an injury in fact.

Doe also renews her analogy to pre-enforcement standing. The Supreme Court has noted that "[o]ne recurring issue in [its] cases is determining when the threatened enforcement of a law creates an Article III injury. When an individual is subject to such a threat, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law." *Id.*

Instead, we have permitted pre-enforcement review under circumstances that render the threatened enforcement sufficiently imminent. Specifically, we have held that a plaintiff satisfies the injury-in-fact requirement where he alleges an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.

Id. at 159 (internal quotation marks omitted). "[A] 'credible' threat of prosecution [is] one that arises from an objectively justified fear of real consequences." *Bronson v. Swensen*, 500 F.3d 1099, 1107 (10th Cir. 2007) (internal quotation marks omitted).

As Doe argues, pre-enforcement standing recognizes that a plaintiff should not have to incur a grave injury before seeking vindication of a legal interpretation. See *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 134 (2007) ("The rule that a plaintiff must destroy a large building, bet the farm, or (as here) risk treble damages and the loss of 80 percent of its business before seeking a declaration of its actively contested legal rights finds no support in Article III."). But Doe is not being faced with a choice or being asked to "bet the farm" on anything; she simply is trying to assert the Exceptions are unconstitutional. There is no reason why the traditional requirements for showing injury in fact are not adequate for these circumstances. Moreover, for the same reason she fails to show injury in fact as to her due process claims, Doe fails to satisfy the "credible threat" aspect of pre-enforcement standing.

2. Equal Protection Claims

In contrast, for equal protection claims, the injury is the denial of equal treatment. *See Ne. Fla. Chapter*, 508 U.S. at 666; *Citizen Ctr. v. Gessler*, 770 F.3d 900, 913 (10th Cir. 2014); *Petrella v. Brownback*, 697 F.3d 1285, 1294 (10th Cir. 2012); *Am. Civil Liberties Union of N.M. v. Santillanes*, 546 F.3d 1313, 1319 (10th Cir. 2008). In light of this precedent, Doe's averments that she is being discriminated against and denied the same protections as born human beings and other unborn human beings sufficiently allege an injury in fact.

B. Traceability

"To satisfy the traceability requirement, the defendant's conduct must have caused the injury." *Benham*, 885 F.3d at 1273 (citing *Lujan*, 504 U.S. at 560). The plaintiff must show that "the injury fairly can be traced to the challenged action of the defendant, and has not resulted from the independent action of some third party not before the court." *Ne. Fla. Chapter*, 508 U.S. at 663 (internal quotation marks omitted). "Although the traceability of a plaintiff's harm to the defendant's actions need not rise to the level of proximate causation, Article III does require proof of a substantial likelihood that the defendant's conduct caused plaintiff's injury in fact." *Habecker v. Town of Estes Park*, 518 F.3d 1217, 1225 (10th Cir. 2008) (internal quotation marks omitted).

1. Substantive Due Process Claims

While Doe ostensibly challenges the Exceptions as a violation of her substantive due process rights, it is inescapable that any injuries to life, liberty, or bodily integrity she may suffer flow not from the Exceptions, but from *Roe* and

Casey. Accordingly, Doe has failed to establish that her alleged substantive due process injuries are traceable to the Exceptions.

2. Equal Protection Claims

Finally, Doe argues that the statutes themselves discriminate and deny equal treatment. Again, however, it is apparent that Doe's real quarrel is with *Roe* and *Casey*. If any equal protection injury exists, it does not come from the United States and Oklahoma enacting the Exceptions, but rather from *Roe* and *Casey*. Doe therefore has failed to establish any injury is sufficiently traceable to the defendants to provide standing to challenge the Exceptions.

CONCLUSION

The district court's judgment is affirmed.

Entered for the Court

Timothy M. Tymkovich
Chief Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
OKLAHOMA**

JANE DOE, a minor child who is unborn,
by and through her father and next friend,
John Doe,

CIVIL ACTION

Plaintiff

v.

1. MIKE HUNTER, in his official capacity as
Oklahoma Attorney General; 2. MARY
FALLIN, in her official capacity as Oklahoma
Governor; 3. MATTHEW G. WHITAKER, in
his official capacity as Acting U.S. Attorney
General; 4. U.S. DEPARTMENT OF JUSTICE;
and 5. THE UNITED STATES OF AMERICA,

NO. 18-cv-408-JED-FHM

Defendants.

OPINION AND ORDER

DOWDELL, J.

NOVEMBER 30, 2018

The Complaint (Doc. 2) in this case was brought by Jane Doe, an unborn child, by and through her father and next friend, John Doe.¹ Plaintiff asserts constitutional claims challenging specific state and federal laws that, she argues, "sanction and protect the killing of one class of innocent human beings." (Doc. 2 at ¶ 1). Specifically, she challenges what she calls the "Primary Exceptions"—provisions in Oklahoma's fetal homicide laws and the federal Unborn Victims of Violence Act

¹ Plaintiff has submitted a separate Motion to File and Proceed Anonymously (Doc. 4). Because the Court ultimately finds that Plaintiff lacks standing to bring her claims, this separate motion is rendered moot.

(UVVA) that make exceptions for legally obtained abortions. *See Okla. Stat. tit. 21, §§ 652(D), 691(C); 18 U.S.C. § 1841(c).* She seeks both injunctive and declaratory relief against Defendants Mike Hunter and Mary Fallin ("the Oklahoma Defendants"), as well as Matthew G. Whitaker², the U.S. Department of Justice, and the United States of America ("the Federal Defendants"). The Court now has for its consideration the Oklahoma Defendants' Motion to Dismiss (Doc. 8) and the Federal Defendants' Motion to Dismiss (Doc. 15). Both sets of defendants assert that Plaintiff has failed to establish standing to bring her claims.

I. Legal Standards

"Article III . . . gives the federal courts jurisdiction over only 'cases and controversies,' and the doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process." *Whitmore v. Arkansas*, 495 U.S. 149, 154-55 (1990). The Supreme Court has outlined three elements that constitute "the irreducible constitutional minimum of standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In order to have standing, a plaintiff must show "(1) [she] has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly

² The Court is aware that Jefferson B. Sessions, III, is no longer the U.S. Attorney General. Pursuant to Fed. R. Civ. P. 25(d), when a public officer who is a party in an official capacity ceases to hold office, the officer's successor shall be substituted as a party. The new Acting U.S. Attorney General, Matthew G. Whitaker, is hereby substituted in place of Mr. Sessions. The Court Clerk shall note such substitution on the docket.

traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc., 528 U.S. 167, 180 (2000). Importantly, "[t]he party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561.

The injury-in-fact requirement "helps to ensure that the plaintiff has a 'personal stake in the outcome of the controversy.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 134 S. Ct. 2334, 2341 (2014) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). To meet this requirement, a plaintiff "must show that [she] has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983) (internal quotation marks omitted). "Abstract injury is not enough." *Id.* at 101. If a plaintiff alleges future injury, such threatened injury must be "certainly impending," or there must at least be a "substantial risk" that the harm will occur. *Driehaus*, 134 S. Ct. at 2341 (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013)). "Plaintiffs cannot rely on speculation about 'the unfettered choices made by independent actors not before the court.'" *Clapper*, 468 U.S. at 414 n.5 (quoting *Lujan*, 504 U.S. at 562).

II. Discussion

The Complaint asserts that Plaintiff is "under an ever-present and imminent threat of a violent loss of her right to life and right to bodily integrity." (Doc. 2 at ¶

1). However, she has not alleged any facts supporting the conclusion that the threat of injury to Plaintiff is "both real and immediate, not conjectural or hypothetical." *See Lyons*, 461 U.S. at 102 (internal quotations marks omitted). The Complaint states that Plaintiff "could be subjected at any moment to the deprivation of her right to life by any doctor hired by her mother," that her "life could be taken through abortion for any reason, at any time, until she reaches 22 weeks gestation," and that she "could also be killed through abortion in multiple locations around the nation up until she reaches 40 weeks gestation." (Doc. 2 at ¶¶ 17, 18, 19) (emphasis added). Yet, the Complaint is conspicuously silent as to the actual intent of Plaintiff's mother to seek an abortion. Nowhere does the Complaint allege that Plaintiff's mother is seeking to or is likely to terminate her pregnancy. As such, Plaintiff's alleged injury is merely hypothetical and wholly dependent upon "the unfettered choices made by [an independent actor] not before the court." *See Lujan*, 504 U.S. at 562. Such a hypothetical injury does not give Plaintiff standing to sue. Even were the Court to assume an injury-in-fact, Plaintiff cannot show that her asserted injury is fairly traceable to the Primary Exceptions, nor can she show that her asserted injury is redressable through the relief she seeks.

First of all, it bears noting that the federal UVVA is not a general homicide provision; instead, it describes the federal offense of causing the "death of, or bodily injury . . . to, a child, who is in utero" during the commission of one of approximately 60 federal crimes. 18 U.S.C. § 1841(a)(1). Although the UVVA contains an exception for abortions and for women, generally, in respect to their own unborn children,

these exceptions themselves do not authorize abortions. *See* § 1841(c)(1), (3). Instead, under binding U.S. Supreme Court precedent, the U.S. Constitution "offers basic protection to the woman's right to choose." *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) (citing *Roe v. Wade*, 410 U.S. 113, 153 (1973), *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)).³ Plaintiff's asserted injury is not fairly traceable to the UVVA, and the injunctive and declaratory relief she seeks concerning the UVVA would not prevent her mother from legally obtaining an abortion under *Roe* and *Casey*.

Similarly, Plaintiff cannot fairly trace her alleged injury to the exceptions in Oklahoma's fetal homicide laws. The Oklahoma Defendants are bound by *Roe* and *Casey* to permit abortions in certain circumstances. Regardless of the Primary Exceptions, the state's fetal homicide laws are unenforceable as to legal abortions. Although Plaintiff argues that the Oklahoma Defendants "must be responsible for their own laws," (Doc. 16 at 4), the U.S. Constitution is the "the supreme law of the land," and Supreme Court precedent interpreting the Constitution must be followed by the states. U.S. Const. art. VI, cl. 2; *see also Martin v. Hunter's Lessee*, 14 U.S. 304 (1816), *Cohens v. Virginia*, 19 U.S. 264 (1821).

³ Plaintiff claims that she "has brought suit directly under the Fifth Amendment, separate and apart from the UVVA." (Doc. 17 at 2). However, the Complaint alleges no unconstitutional act on the part of the Federal Defendants apart from the Primary Exceptions in the UVVA. (*See, e.g.*, Doc. 2 at ¶¶ 2-5). -----

In her response to the Federal Defendants' dismissal motion, Plaintiff argues that her situation should be analogized to pre-enforcement standing. (Doc. 17 at 7-8). In *MedImmune, Inc. v. Genentech, Inc.*, one of the cases cited by Plaintiff, the Supreme Court recognized that "where threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced." 549 U.S. 118, 128-129 (2007) (emphasis in original). The circumstances described in *MedImmune* are simply not relevant here; there is no threatened action by the state or federal government in this case, and Plaintiff is not exposed to liability under the challenged statutory provisions. The reasoning behind pre-enforcement standing does not apply to Plaintiff's claims.

Plaintiff also argues that the Court should be "generous" in considering her standing. (See Doc. 17 at 8-9). The Court declines Plaintiff's invitation to loosen the constitutional standing requirements for her case. As stated above, federal courts have limited jurisdiction, and this Court may not overlook the well-established requirements for a "case and controversy" in order to hear a case out of "fairness." For the foregoing reasons, the Oklahoma Defendants' Motion to Dismiss (Doc. 8) and the Federal Defendants' Motion to Dismiss (Doc. 15) are hereby **granted**. Plaintiff's Motion for Permanent Injunction (Doc. 6) is **denied**, and her Motion to File and Proceed Anonymously (Doc. 4) is **moot**. Plaintiff's claims are **dismissed without prejudice**. A separate judgment will be entered forthwith.

ORDERED this 30th day of November, 2018.

/s/

JOHN E. DOWDELL
UNITED STATES DISTRICT JUDGE

**FILED
February 24, 2020**

Christopher M. Wolpert
Clerk of Court

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

No. 19-5005

JANE DOE, minor child who is unborn, by and
through her father and next friend, John Doe,
Plaintiff-Appellant

v.

MIKE HUNTER, in his official capacity as
Oklahoma Attorney General, et al.,
Defendants - Appellees.

On Appeal from the United States District Court
for the Northern District of Oklahoma
District Court No. 4:18-cv-00408-JED-FHM

ORDER

Before **TYMKOVICH**, Chief Judge, **KELLY** and **HARTZ**, Circuit Judges.

Appellant's petition for panel rehearing is denied.

Entered for the Court

s/ Christopher M. Wolpert

CHRISTOPHER M. WOLPERT, Clerk

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
OFFICE OF THE CLERK**
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157

Christopher M. Wolpert
Clerk of Court

March 03, 2020

Jane K. Castro
Chief Deputy Clerk

Mr. Mark C. McCartt
United States District Court for the Northern District of Oklahoma
333 West 4th Street, Room 411
Tulsa, OK 74103

RE: 19-5005, Doe v. Hunter, et al

Dist/Ag docket: 4:18-CV-00408-JED-FHM

Dear Clerk:

Pursuant to Federal Rule of Appellate Procedure 41, the Tenth Circuit's mandate in the above-referenced appeal issued today. The court's December 6, 2019 judgment takes effect this date.

Please contact this office if you have questions.

Sincerely,

s/ Christopher M. Wolpert

Christopher M. Wolpert
Clerk of the Court

cc: Kristine L. Brown
Mithun Mansinghani
Cathryn Dawn McClanahan
Daniel Clarence Nunley
Zachary Paul West

CMW/djd

18 U.S.C. § 1841**Protection of Unborn Children**

(a)(1) Whoever engages in conduct that violates any of the provisions of law listed in subsection (b) and thereby causes the death of, or bodily injury (as defined in section 1365) to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense under this section.

(2)(A) Except as otherwise provided in this paragraph, the punishment for that separate offense is the same as the punishment provided under Federal law for that conduct had that injury or death occurred to the unborn child's mother.

(C) If the person engaging in the conduct thereby intentionally kills or attempts to kill the unborn child, that person shall instead of being punished under subparagraph (A), be punished as provided under sections 1111, 1112, and 1113 of this title for intentionally killing or attempting to kill a human being.

(b) The provisions referred to in subsection (a) are the following:

(1) Sections 36, 37, 43, 111, 112, 113, 114, 115, 229, 242, 245, 247, 248, 351, 831, 844(d), (f), (h)(1), and (i), 924(j), 930, 1111, 1112, 1113, 1114, 1116, 1118, 1119, 1120, 1121, 1153(a), 1201(a), 1203, 1365(a), 1501, 1503, 1505, 1512, 1513, 1751, 1864, 1951, 1952 (a)(1)(B), (a)(2)(B), and (a)(3)(B), 1958, 1959, 1992, 2113, 2114, 2116, 2118, 2119, 2191, 2231, 2241(a), 2245, 2261, 2261A, 2280, 2281, 2332, 2332a, 2332b, 2340A, and 2441 of this title.

- (2) Section 408(e) of the Controlled Substances Act of 1970 (21 U.S.C. 848(e)).
- (3) Section 202 of the Atomic Energy Act of 1954 (42 U.S.C. 2283).

(c) Nothing in this section shall be construed to permit the prosecution—

- (1) of any person for conduct relating to an abortion for which the consent of the pregnant woman, or a person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law;
- (2) of any person for any medical treatment of the pregnant woman or her unborn child; or
- (3) of any woman with respect to her unborn child.

(d) As used in this section, the term “unborn child” means a child in utero, and the term “child in utero” or “child, who is in utero” means a member of the species homo sapiens, at any stage of development, who is carried in the womb.

21 OK Stat § 21-652**Shooting or discharging firearm with intent to kill - Use of vehicle to facilitate discharge of weapon in conscious disregard of safety of others - Assault and battery with deadly weapon, etc.**

A. Every person who intentionally and wrongfully shoots another with or discharges any kind of firearm, with intent to kill any person, including an unborn child as defined in Section 1-730 of Title 63 of the Oklahoma Statutes, shall upon conviction be guilty of a felony punishable by imprisonment in the State Penitentiary not exceeding life.

B. Every person who uses any vehicle to facilitate the intentional discharge of any kind of firearm, crossbow or other weapon in conscious disregard for the safety of any other person or persons, including an unborn child as defined in Section 1-730 of Title 63 of the Oklahoma Statutes, shall upon conviction be guilty of a felony punishable by imprisonment in the custody of the Department of Corrections for a term not less than two (2) years nor exceeding life.

C. Any person who commits any assault and battery upon another, including an unborn child as defined in Section 1-730 of Title 63 of the Oklahoma Statutes, by means of any deadly weapon, or by such other means or force as is likely to produce death, or in any manner attempts to kill another, including an unborn child as defined in Section 1-730 of Title 63 of the Oklahoma Statutes, or in resisting the execution of any legal process, shall upon conviction be guilty of a felony punishable by imprisonment in the State Penitentiary not exceeding life.

D. The provisions of this section shall not apply to:

1. Acts which cause the death of an unborn child if those acts were committed during a legal abortion to which the pregnant woman consented; or
2. Acts which are committed pursuant to usual and customary standards of medical practice during diagnostic testing or therapeutic treatment.

E. Under no circumstances shall the mother of the unborn child be prosecuted for causing the death of the unborn child unless the mother has committed a crime that caused the death of the unborn child.

21 OK Stat § 21-691

Homicide defined.

- A. Homicide is the killing of one human being by another.
- B. As used in this section, "human being" includes an unborn child, as defined in Section 1-730 of Title 63 of the Oklahoma Statutes.
- C. Homicide shall not include:
 - 1. Acts which cause the death of an unborn child if those acts were committed during a legal abortion to which the pregnant woman consented; or
 - 2. Acts which are committed pursuant to the usual and customary standards of medical practice during diagnostic testing or therapeutic treatment.
- D. Under no circumstances shall the mother of the unborn child be prosecuted for causing the death of the unborn child unless the mother has committed a crime that caused the death of the unborn child.

63 OK Stat § 63-1-730

Definitions.

- 4. "Unborn child" means the unborn offspring of human beings from the moment of conception, through pregnancy, and until live birth including the human conceptus, zygote, morula, blastocyst, embryo and fetus;
