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Lawsuit about more than prescribing drugs for 'off-label' use

Last spring, the North Dakota legislature passed a law requiring abortionists using abortion-inducing drugs to stick to the protocol approved by the federal Food and Drug Administration. The law is reasonable. Fourteen women have died using the drug, 10 of which probably occurred because of "off-label" use.

Not surprisingly, the Red River Women's Clinic in Fargo has sued the state to prevent the law from going into effect. To hear them tell it, the suit is merely about having the right to prescribe the kind of "off-label" use permitted for other drugs. The claim conveniently ignores that using abortion-inducing drugs, which involves a series of medications working against a woman's body to kill and expel an unborn child, is hardly like other drugs.

There is, however, much more to the lawsuit than seeking unfettered discretion when using abortion drugs. The clinic can claim that the law is unfair, burdensome or unnecessary as much as it wants. Those are policy questions that the clinic should have brought up at the legislative hearings.

To succeed at stopping the law in court, however, the clinic cannot rely on just a list of alleged problems with the law. It needs to have a legal basis for its claims.

Here is where this case becomes about more than abortion drugs. The clinic, represented by the Center for Reproductive Rights, claims that the North Dakota state constitution grants a right to an abortion that, in turn, protects its right to use the abortion drug without restriction. If a court agrees with the clinic's legal arguments, the ramifications could extend well beyond the use of abortion drugs.

For a long time, abortion advocates based their legal arguments on the right to an abortion "found" in the U.S. Constitution in *Roe v. Wade* and its companion cases. The original applications of those cases were so broad that supporters of abortion did not need to look elsewhere. In more recent years, the Supreme Court has limited the "right" to an abortion under the U.S. Constitution, though still falling short from eliminating it altogether.

In response, abortion rights supporters began to look at state constitutions. Several state courts, especially in those states with a "right to privacy" in their constitutions, have found a right to abortion that is equal to or greater than the right under the U.S. Constitution. Some states, like North Dakota, do not have a privacy clause in their constitutions, but that has not stopped abortion activists from looking for abortion rights in every nook and cranny of state constitutional law. The Center for Reproductive Rights is using the abortion drug case to do just that in North Dakota.

The center claims that the "liberty clause" of the state constitution provides a right to abortion that is "greater" than the right under the federal constitution.

That clause states: "All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty;

acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family, property and the state, and for lawful hunting, recreational and other lawful purposes, which shall not be infringed.”

The courts will have to determine whether this clause really grants a right to an abortion in North Dakota, but for now all North Dakotans should know what is at stake if the court buys this argument.

If there exists a “right to abortion” under the state constitution, much more than the ability to regulate abortion drugs would be in jeopardy. Eventually, practically all of our laws protecting unborn life and women considering abortions would be struck down.

The legal challenge against the abortion drug limits is really an attack on the many reasonable and successful laws North Dakotans have enacted through the years: parental consent requirements, the ban on partial-birth abortion, waiting periods, informed consent requirements, physician-only restrictions, the ban on state funding for abortion, the universal state policy of favoring childbirth over abortion, the prohibition on abortion insurance coverage and more.

North Dakota could by court action go from being one of the most pro-life states to being one of the most pro-abortion. Moreover, if the “liberty clause” covers a right to abortion, it would probably also cover a number of other “rights.” We already know from other states that if a state constitution is interpreted to protect abortion it can also be interpreted to protect a right to contraceptives — even for minors — and a right to assisted suicide.

Make no mistake about it, there is much more at stake in this lawsuit than whether abortion drugs can be used “off-label.” Let’s pray that the courts reject this broad, expansive and dangerous argument.

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