The petition for a writ of certiorari is **GRANTED**. Without need of further briefing, the executive order is struck in its entirety and costs awarded to petitioner.

Supreme Court of the United States

No. 21-06

In re. Executive Order 13998: Safer Terminations Of Pregnancies

[January 14, 2022]

PER CURIAM.

I. INTRODUCTION

Some cases are hard, requiring the balancing of a myriad of factors and complicated statutory interpretation of ambiguous text. This is not one of them. *See* *In re B.385: the Death Penalty Abolition Reaffirmation Act*, No. 20-16, 101 M.S.Ct. 120 (2020) ("This is not a complicated case.").

On December 28, 2021, President Adith issued Executive Order No. 13998, entitled Safer Terminations of Pregnancies. The order states that its purpose is to "improve [the] safety of terminations of pregnancies by ensuring that the casualty rates of terminations of pregnancies are reduced" from the current standard of "every abortion lead[ing] to at last one death." As a vehicle to enact these improvements, the President remarkably chose the Occupational Safety and Health Administration (hereafter OSHA).

The order directs the Secretary of Health and Human Services to promulgate a rule reading that "no medical procedures involving terminations of pregnancies may be carried out unless the procedure can guarantee beyond reasonable doubt the safety of the life of the unborn child before and after the

procedure" and that violators will be punished consistent with the OSHA act and other laws.

A lawsuit was filed, challenging the order under two theories. First, that the order is beyond the scope of the OSHA's powers because the unborn are not "employees" and second, that even if it was not beyond the scope, that the order violates this court's jurisprudence on abortion by unduly restricting access to abortions. As the order falls grossly outside the scope of OSHA, we have no need to consider the restrictions the order would place on abortions.

II. OSHA

The purpose of OSHA, as stated by statute, is to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions and preserve our human resources…" 29 US § 651(b). The purpose statement further explains how OSHA can achieve these goals by listing thirteen guidelines for how OSHA can act. The connecting theme of these guidelines is that OSHA can protect employees from health risks in the workplace. An employee is defined by the act as "an employee of an employer who is employed in a business of his employer which affects commerce." 29 US § 652.

While the government stated in oral argument that a purpose of the bill was to prevent employees from having to perform abortions against their will, the text of the order says no such thing. By its own terms, it states that the goal is to "reduce the casualty rates of terminations of pregnancies" and requires not that the safety of any employee be protected, but instead the "safety of the life of the unborn child."

It *should* go without saying, though apparently it does not, that the unborn–whatever one thinks of the status of any rights they may or may not have or whether or not they are a living being–are not employees of any business by the definition of employee in the statute or any other possible definition known to this court.

As the purpose of OSHA is to protect employees, and the unborn are blatantly not employees, any further analysis would

be self indulgent on our part. The order falls far outside the scope of OSHA's authority.

III. CONCLUSION

Because we reach this conclusion on statutory grounds, we need not explore the constitutional question. However, it is clear that, despite the administration's assertions to the contrary, this order is intended as an end around to avoid this court's jurisprudence. While we do not comment on that jurisprudence today, this type of cynical and transparent effort is odious to the Constitution, and the administration's frankly insulting claims that this was not their intent are unacceptable. Therefore, we take the unusual step of *sua sponte* imposing sanctions in the form of awarding costs to the petitioner.

The order is struck in its entirety and costs are awarded to the petitioner. **IT IS SO ORDERED.**

CHEATEM, J., concurring, with whom **JJEAGLEHAWK, J.**, joins in fully but especially as to the first clause of the third sentence of the seventh paragraph, and with whom **IBNEY** and **DOBS, JJ.**, join except as to the first clause of the third sentence of the seventh paragraph.

Today the Court rightly rejects the President's effort to shoehorn in to the Occupational Safety and Health Act his opposition to abortion.

I write separately because today's decision highlights the need for this Court to clarify whether the right to an abortion qualifies as a constitutionally-guaranteed right. Though our judiciary, and this Court, has developed a robust jurisprudence on the matter, much of the question remains unclear. We first announced the right to an abortion, then spent decades curtailing it, and since 2016 have schizophrenically cycled between various standards, none of which are compatible with each other.

Let us start at the beginning. In *Roe v. Wade*, 410 U.S. 113 (1973) we announced a right to an abortion, justifying it on the

grounds that the ability to get an abortion fell within the bounds of the right to privacy. Immediately thereafter, we began curtailing that same right. In *Harris v. McRae*, 448 U.S. 297 (1980), we upheld a federal law barring federal funding for abortions except where the mother's life was endangered. The next year, in *H.L. v. Matheson*, 450 U.S. 398 (1981), we upheld a statute requiring that doctors notify the parents of a minor child seeking an abortion before performing the abortion. In *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) and *Rust v. Sullivan*, 500 U.S. 173 (1991) we affirmed the constitutionality of denying government funding to facilities that provide abortions.

In *Planned Parenthood of Southwestern Pennsylvania v. Casey*, 505 U.S. 833 (1992), we overturned *Roe*'s regime entirely and substituted a new test: that a woman has a "right . . . to choose to have an abortion before viability . . . without undue interference by the state" *but* the State may "restrict abortions after fetal viability." *Id*. at 846. Subsequent decisions continued the trend of restricting the right to an abortion recognized in *Roe*. For example, in *Gonzales v. Carhart*, 127 S.Ct. 1610 (2007) we upheld against challenge a federal prohibition on "partial birth" abortions.

More recently, in *Whole Woman's Health v. Hellerstadt*, 136 S.Ct. 2292 (2016), we modified *Casey* to require that, when considering a constitutional challenge to a statute that restricts abortion, courts "consider the burdens a law imposes on abortion access"–as required by *Casey–and* "the benefits those laws confer." *Id*. at 2309.

That same year in *In re Midwestern Public Law B005.2 - Midwest Equal Rights Act*, No. 16-15, 100 M.S.Ct. 122 (2016), we struck down a restriction on abortion. The law in question legally defined "person" to include fetuses–which the Court presumed extended to prohibit abortions. Notably, however, we subjected the restriction to rational basis review, finding that "[t]here is little, if any legitimate justification a government can have to interfere with" a person's ability to get an abortion.

The ruling only muddied the already less-than-clear waters on the question of the constitutionality of abortion restrictions.

For example, *Midwest Equal Rights Act* focused substantially, and sexistly, on "Mothers [sic] and their role as childbearers." Then, trotting out a silly parade of horribles on par with that put forth by noted shithead Antonin Scalia in *Lawrence v. Texas*, the Court concluded that if abortion were restricted "women would be mere vessels, a crude means to an end, held captive by their own biology." This reasoning only calls into question the standard under which the case was decided. If the case were decided under Substantive Due Process, as presumably required by *Casey*, then none of this focus on sex distinctions would be relevant.

So the case must have been at least in part decided on Equal Protection Clause grounds–in which case its reasoning conflicts with the weight of our precedent. The Court's line of reasoning in *Midwest Equal Rights Act* relies on the very same sex stereotyping we found in *Misogynists United v. United States*, No. 21-05 (Jan. 8, 2022), to be impermissible! *Id.* at 8 ("Just as an employer cannot rely on sex stereotyping in employment decisions, the Government cannot itself engage in sex stereotyping, whether on its own or as justification for other sex discrimination."). After all, not all women are capable of giving birth, just as not all men are *in*capable of giving birth. *See id.* at 20-23 (Cheatem, J., concurring) (exploding the concept of "sex").

Our decision in *In re State of Sacagawea Executive Order 007*, No. 16-19, 100 M.S.Ct. 123 (2017) only made matters worse. In a three-paragraph *per curiam* order, we held that *all* "[o]utright bans on abortive procedures create an undue burden on a person's right to receive an abortion prior to fetal viability." Though a quarter-century had passed since the enunciation of the decision in *Casey*, the Court never considered any advancements of medical science–which may have by then, or may at some point in the future, reduce the point of "fetal viability" to zero. Nor did the Court apply the standard required in *Hellerstadt*–i.e., whether the benefits of such prohibitions outweigh their burdens.

Then in *In re Dixie Bill 177 (The Dismemberment Abortion Ban Act)*, No. 18-02, 101 M.S.Ct. 106 (2018), we struck down as unconstitutional a statute which "banned" all abortions "after

the 18 week point no matter the circumstances." Unsurprisingly, the poorly-drafted law–which explicitly justified itself on religious grounds–did not fare well: it "ban[ned] abortion even if the procedure [was] necessary for the life of the mother"; the state did not attempt to provide any non-religious justification for the statute; the state's counsel failed to consider any of the Court's decisions subsequent to *Casey*; and, crucially, the state's counsel did not ask us to overturn any of our precedent. We therefore mechanically did apply our precedent–as we then saw it–finding the law unconstitutional. The problem was that even as we criticized the state's counsel for failing to consider our precedent, we similarly failed to recognize the requirement in *Hellerstadt* that we perform a balancing test, taking into account the benefits of the legislation along with the burdens it imposes.

One might think we had simply overruled *Hellerstadt*–but only two years later, we exacerbated the confusion rife in this area of the law when we again employed the *Hellerstadt* approach in *June Medical Services v. Russo*, 140 S.Ct. 2103 (2020).

The discerning reader might reasonably suffer whiplash from the speed at which this Court has changed tests, or forgotten and remembered constitutional requirements (for which I disclaim any liability). Our abortion jurisprudence is quickly coming to resemble our incomprehensible Establishment Clause jurisprudence, under which the state may fund textbooks for parochial schools, but not maps, creating the unsolveable problem of the constitutionality of altases, which are both books and maps.

Is there, indeed, a constitutionally-guaranteed right to an abortion? And, if so, what are its contours? These questions find no satisfactory answers in our jurisprudence.

DOBS and **IBNEY, JJ.**, concurring in judgment in part and dissenting in part,

I. INTRODUCTION

I must first concur with the majority in their declaration that this case is an easy one. Indeed, this case is not legally

complex. The President erroneously sought to change abortion law by exercising clear executive overreach through the use of Executive Order No. 13998. Order 13998 directed the Occupational Safety and Health Administration to issue a regulation of healthcare professionals to lower the casualty rate of abortive procedures by ensuring that no employee under OSHA could participate in such a procedure "unless the procedure can guarantee beyond a reasonable doubt the safety of the life of the unborn child before and after the procedure."

The majority is further accurate in their assessment that such a regulation oversteps the already tenuous bounds of OSHA jurisdiction. OSHA is dubiously empowered to protect only employees employed by an employer in a business which affects commerce. While serious questions remain about the constitutionality of OSHA's broad-reaching power under the commerce clause, this is not that case. Indeed, we must go no further than recognizing that the unborn are not employees and therefore cannot possibly be under the jurisdiction of OSHA, their contribution to interstate commerce withstanding.

II. THE SAFETY OF DEATH

Where I must depart from the majority is in their dismissal of the material question before us. Executive agencies such as OSHA now recognize life, and indeed personhood, as beginning at conception as per Executive Order 13994. This places OSHA in the precarious position of asking "Can the termination of life ever be safe?" It is not for this court to ponder that question today, but rather to recognize the gravity of the situation in healthcare settings around the nation which are now forced to grapple with the supposed "safety" of the death of millions of unborn children. It is for this reason that I reject the majority's label of the order as "cynical." While this order falls outside the scope of OSHA's authority, it is a reasonable attempt to reconcile the disparate protection of the laws given to born and unborn persons. However, there is little need to examine this question further as no action has been brought before the court on these grounds.

I furthermore object to the *sua sponte* granting of costs to the petitioner. The court finds itself in a similar position as the

Executive in its overreach of authority. Sanctions ought to be reserved for deviant, frivolous, and dubious suits. Today, the court takes the peculiar action of not only awarding costs, but doing so unprompted for the reason of claiming personal insult by the administration. Such a punitive, grudging measure seemingly declares a side in the political debate being waged over the President's orders. Our role is not to play passionate political pundits, rather just and dispassionate jurists.

I concur in the judgment that this order is outside the bounds of OSHA's power and should therefore be struck but respectfully dissent from the awarding of costs to the petitioner.