IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

OKLAHOMA CALL FOR REPRODUCTIVE JUSTICE, *on behalf of itself and its members, et al.*

Plaintiffs/Appellants,

v.

JOHN M. O'CONNOR, *in his official capacity as* OKLAHOMA ATTORNEY GENERAL, *et al.*

Defendants/Appellees.

No: 119,918

DEFENDANTS/APPELLEES' RESPONSE BRIEF

MITHUN MANSINGHANI, OBA NO. 32453
Solicitor General
ZACH WEST, OBA NO. 30768
Assistant Solicitor General

OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA
313 N.E. 21st Street
Oklahoma City, OK 73105
Direct: (405) 521-3921
zach.west@oag.ok.gov

Counsel for Defendants/Appellees

Statutes

Statutes

Other Authorities

Cases

Cases

INTRODUCT'ION

The district court declined to enjoin three new Oklahoma laws regulating abortion: HB 1904, which requires abortions to be performed by OBGYNs, and SB 778 and 779, which regulate the increasingly important subject of medication abortion. Plaintiffs appeal the court's denial. But despite their hyperbolic claims of impending "catastrophic" harm, Plaintiffs' lawsuit invokes only baseless claims under the Oklahoma Constitution. Federal courts, of course, have long interpreted the U.S. Constitution to provide a right to abortion—although that interpretation is being re-considered by the U.S. Supreme Court.[1] No court anywhere, however, has determined that the Oklahoma Constitution by itself protects abortion. Nor would any such determination hold water, as it would conflict with the text, history, and purpose of our State's governing document. Thus, given that an injunction "is an extraordinary remedy"[2] to be exercised "only in cases reasonably free from doubt,"[3] and that courts must "indulge every possible presumption that an act of the Legislature was constitutional,"[4] Plaintiffs are not entitled to an injunction on their claims that the Oklahoma Constitution's due process clause protects a right to an abortion.

To be sure, although this Court has applied federal abortion law in state law cases, it has "never made such a determination [that abortion is protected] under the Oklahoma Constitution."[5] And to continue to apply federal abortion jurisprudence in the absence of federal claims would conflict with the U.S. Supreme Court's most recent abortion-related decision. A little over a month ago the Supreme Court expressly stated that federal abortion jurisprudence needs

---

[1] *See* Amy Howe, *Majority of court appears poised to roll back abortion rights*, SCOTUSblog (Dec. 1, 2021) (discussing *Dobbs v. Jackson Women's Health Organization*, No. 19-1392).
[2] *Dowell v. Pletcher*, 2013 OK 50, ¶ 6.
[3] *Loewen Group Acq. v. Matthews*, 2000 OK CIV APP 109, ¶ 12 (citation omitted).
[4] *Lafalier v. Lead-Impacted Cmtys. Relocation Assis. Trust*, 2010 OK 48, ¶ 15; *Adwon v. Okla. Retail Grocers Ass'n*, 1951 OK 43, ¶ 11.
[5] *OCRJ v. Cline*, 2019 OK 33, ¶ 17

to be "properly asserted" in state court for it to apply.[6] Here, Plaintiffs have asserted no federal claims at all, thus this Court should decline to give credence to their lawsuit and injunction request.

Plaintiffs' single-subject arguments don't change that calculus. To avoid single subject issues, the Legislature overwhelmingly passed nine *separate* abortion-related laws this past term, and the Legislature even split its regulation of medication abortion into two separate bills (SB 778 and 779). To find a single subject violation in these circumstances would not only be incommensurate with reality, but it would wrongly accept Plaintiffs' internally incoherent argument that the Legislature passed too many and not enough abortion laws at the same time.

Finally, even if this Court analyzes this case through the prism of un-asserted federal law, it should not reverse the district court by enjoining HB 1904, SB 778, and SB 779. In attacking these laws, Plaintiffs are strong on rhetoric but weak on everything else. In short, they ignore, gloss over, or mislead on key reasons why these three laws are permissible under current federal jurisprudence, and they in essence ask this Court to rely on sheer speculation to find an undue burden—speculation that they will never have to back up if an injunction is issued before the laws even take effect. On top of that, they simultaneously abandon contentions they levied below, while they invent new arguments that they didn't make below, such as the novel, speculative, and unquantified claim that "many" women "will be entirely prevented" from abortions in Oklahoma because of these laws. The district court's decision to deny an injunction should be affirmed.

STATEMENT OF THE ISSUES

1. Whether this Court should issue an extraordinary injunction for three Oklahoma laws regulating abortion (HB 1904, SB 778, and SB 779) when Plaintiffs only brought their due process claims under the Oklahoma Constitution, which does not protect a right to abortion.

[6] *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 530 n.1 (Dec. 10, 2021).

2. Whether this Court should issue an extraordinary injunction of two Oklahoma laws (SB 778 and SB 779) regulating medication abortion on single-subject grounds, when Plaintiffs have provided no evidence of logrolling, inadequate notification, or anything remotely similar.
3. Whether, in the alternative, it is likely that federal jurisprudence would be interpreted to prohibit three commonsense abortion regulations that contain provisions that have been upheld in federal courts across the country, and where Plaintiffs rely on speculation about the alleged harms those laws will supposedly inflict.

SUMMARY OF THE RECORD[7]

OBGYNs and Abortion: For over 40 years, and like most other states, Oklahoma has statutorily limited the performance of abortions to licensed physicians only.[8] Moreover, the U.S. Supreme Court has repeatedly approved such "physician-only" laws. Most forcefully, in 1997 the Supreme Court summarily rejected a challenge to Montana's "physician-only" law and re-emphasized that "our prior cases left ***no doubt*** that, to ensure the safety of the abortion procedure, the States may mandate that only physicians perform abortions," even if "an objective assessment might suggest that those same tasks could be performed by others."[9]

Among physicians, OBGYNs are undoubtedly the ones who can best ensure the safety of the abortion procedure for the mother. OBGYNs are the physicians who perform the most abortions by far: in Oklahoma and nationwide nearly three-quarters of all abortions are performed

[7] Rule 1.11(e)(1) states that citations to the record "shall identify the number of the document in the record, and the page number within the document. Example: ROA, Doc. 1, p.5." With the current record, however, such citations are nearly impossible. Document No. 4 in this record, for example, spans over 250 pages and contains separate sub-documents and exhibits. Thus, for ease and clarity, Defendants will cite the broader document number and pin-cite to the overall ROA number that encompasses the entire record, like so: ROA 138, Doc. 3 (Pls' TI Memo).
[8] *See* 63 O.S.2011 § 1-731(A) (enacted 1978); Guttmacher Institute, *Overview of Abortion Laws*, (Sept. 1, 2021), https://www.guttmacher.org/state-policy/explore/overview-abortion-laws.
[9] *Mazurek v. Armstrong*, 520 U.S. 968, 973-75 (1997) (emphasis added) (citation omitted).

by OBGYNs.[10] OBGYNs are also the physicians who have the most specialized training and skills applicable to the performance of abortions.[11] In particular, and unlike family medicine practitioners, most if not all OBGYNs would learn to perform dilation and curettage (D&C) and dilation and evacuation (D&E) procedures during their residency, because they are considered core competencies.[12] These procedures are very similar to performing an abortion.[13] Because of the four years of "extensive training," "intense instruction and clinical surgical practice" that OBGYNs undergo during their residency, OBGYNs are "intimately familiar with a woman's reproductive anatomy and are well equipped to handle complications that may result from an early obstetric complication, and thus are the most qualified physicians to perform abortion procedures."[14] One of Plaintiffs' own witnesses admitted below that becoming a board-certified OBGYN entails much effort and training,[15] and another admitted that the majority of OBGYN residency programs offer routine abortion training,[16] unlike any other specialty. Moreover, the board-certification process also tests an OBGYN's "knowledge of surgical complications that may affect his patients."[17] And scientific studies have found an association between board certification and positive clinical outcomes.[18]

---

[10] *See Jackson Women's Health Org. v. Currier*, 320 F. Supp. 3d 828, 839 (S.D. Miss. 2018) (finding that "as many as 75% of all abortions in the United States are performed by ob-gyn specialists"). In Oklahoma, it would appear that in 2020 nearly 65 percent of abortions in Oklahoma were performed by OBGYNs. *See Abortion Surveillance in Oklahoma*, Dep't of Health, at 25 Table 21 (Amended Aug. 23, 2021), https://oklahoma.gov/content/dam/ok/en/health/health2/aem-documents/data-and-statistics/center-for-health-statistics/2020%20AbortionReport.pdf. In 2018 and 2019, according to earlier versions of this report, that number was around 73 percent.

[11] *See* ROA 317-18, Doc. 4 (Dr. Ingrid Skop Aff. ¶¶ 19-21) (testimony of a longtime OBGYN); ROA 330, Doc. 4 (Dr. Tabitha Danley Aff. ¶¶ 5-6) (testimony of a longtime Oklahoma family medicine practitioner).

[12] *See* ROA 317-18, Doc. 4 (Dr. Skop Aff. ¶¶ 19-21); ROA 330, Doc. 4 (Dr. Danley Aff. ¶¶ 5-6).

[13] *See* ROA 317-18, Doc. 4 (Dr. Skop Aff. ¶¶ 19-21); ROA 330, Doc. 4 (Dr. Danley Aff. ¶¶ 5-6).

[14] *See* ROA 317-18, Doc. 4 (Dr. Skop Aff. ¶¶ 19-21); *see also Currier*, 320 F. Supp. 3d at 837.

[15] *See* ROA 199, Doc. 3 (Dr. Yap Aff. ¶ 47).

[16] ROA 266-267, Doc. 3 (Dr. Banks Aff. ¶ 17).

[17] ROA 318, Doc. 4 (Dr. Skop Aff. ¶ 21); *see also Currier*, 320 F. Supp. 3d at 837.

[18] ROA 318, Doc. 4 (Dr. Skop Aff. ¶ 21 & n.33).

As a result, two nearby states have enacted laws restricting the performance of abortions to eligible or certified OBGYNs. Both have survived legal challenges. In Mississippi, a federal district court found that a 2012 OBGYN law "provides some benefit to women's health in that it ensures that physicians performing abortions in Mississippi abortion clinics are specialists in women's healthcare who are trained to perform abortions or their equivalents."[19] In so finding, the court expressly "reject[ed] the opinions of Plaintiffs' experts who"—exactly like Plaintiffs assert here—"testified that the ob-gyn requirement provides no benefit to Mississippi women seeking abortions."[20] The court also found that the plaintiffs had not established that the law was burdensome enough to create a substantial obstacle to a woman's right to seek abortion, in part because the plaintiffs engaged in "pure speculation."[21] In Arkansas, a federal district court's decision enjoining Arkansas' law was vacated by the Eighth Circuit after the challengers admitted on appeal they could indeed comply with the law.[22]

Medication Abortion: Plaintiffs admit that the use of medication abortion is on the rise in Oklahoma.[23] This is of particular interest to the Oklahoma Legislature, in part because medication abortion exposes women to a risk of serious harm, to say nothing of the unborn child.[24] Contrary to Plaintiffs' facile suggestion that medication abortion is as safe as "over-the-counter medications like Advil and Tylenol," Pls' Br. at 3, the U.S. Food & Drug Administration-approved label for medication abortion warns that "[a]bout 85% of patients report at least one adverse reaction following administration of MIFEPREX and misoprostol, and many can be expected to report

---

[19] *Currier*, 320 F. Supp. 3d at 837.
[20] *Id.*
[21] *Id.* at 838-840.
[22] *Little Rock Fam. Plan. Servs. v. Rutledge*, 984 F.3d 682, 690-92 (8th Cir. 2021).
[23] *See, e.g.*, ROA 169, Doc. 3 (Dr. Braid Aff., ¶¶ 19-20) & ROA 201, Doc. 3 (Dr. Yap Affidavit, ¶54) (admitting that over 80% of abortions at Plaintiffs' clinics are now medication abortions).
[24] *See, e.g.*, See ROA 319-20, Doc. 4 (Dr. Skop Aff. ¶¶ 26-28); ROA 334-36, 338-42, Doc. 4 (Dr. Donna Harrison Aff. ¶¶ 7-12, 18-32.

more than one such reaction."[25] These reactions frequently include fever and vomiting and can also include hemorrhage, infections, and pelvic inflammatory disease[26]—not just minor side effects. The FDA also admits serious and sometimes fatal infections and bleeding occur after medication abortion; the FDA claims these happen rarely, but it nevertheless has issued a black box warning stating, "WARNING: SERIOUS AND SOMETIMES FATAL INFECTIONS OR BLEEDING."[27] Most tellingly, the FDA has for many years instituted a Risk Evaluation and Mitigation Strategy (REMS) because of "the risk of serious complications."[28] "[O]nly a few medications" with "serious safety concerns" require a REMS.[29] Even in the recent and highly touted "full review" and revision of the mifepristone REMS Program that the FDA conducted, the FDA did not purport to retract any of these statements or details.[30] Per the FDA's limited data, by 2019 over 4,000 U.S. women had experienced adverse events after medication abortion, including at least 24 deaths, 1,042 hospitalizations, 599 blood transfusions, and 412 infections.[31]

As Drs. Donna Harrison and Ingrid Skop explained in their affidavits below, medication abortion complications are relatively common.[32] Moreover, as these doctors observe, the FDA's documentation of adverse events is likely to be understating complications due to widespread inadequacies in reporting: Healthcare providers are not all required to report complications, for example, follow-up is poor, and women have at times been encouraged not to report the source

---

[25] ROA 335, Doc. 4 (Dr. Harrison Aff. ¶ 10) (quoting FDA Mifeprex Medication Guide).
[26] *Id.*; *see also* SB 778 § 6(E)(3) (listing risks related to medication abortion, "including, but not limited to, hemorrhaging, failure to remove all tissue of the unborn child which may require an additional procedure, sepsis, sterility, and possible continuation of pregnancy").
[27] ROA 335-36, Doc. 4 (Dr. Harrison Aff. ¶ 11) (quoting Attach. B, FDA Mifeprex Med. Guide).
[28] ROA 335-36, Doc. 4 (Dr. Harrison Aff. ¶ 11) & ROA 375-77, Doc. 4 (Attach. D, FDA Rablon Warning).
[29] ROA 335-36, Doc. 4 (Dr. Harrison Aff. ¶ 11 (quoting Attach. E, FDA REMS document).
[30] *See* FDA, *Mifeprex (mifepristone) Information* (Dec. 16, 2021), https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/mifeprex-mifepristone-information.
[31] ROA 336, Doc. 4 (Dr. Harrison Aff. ¶ 12).
[32] ROA 314-15, 319-20, Doc. 4 (Dr. Skop Aff. ¶¶ 12, 26); ROA 340-42, Doc. 4 (Dr. Harrison Aff. ¶¶ 27-31).

of complications.[33] Indeed, one of Plaintiffs' own medical witnesses has elsewhere written that "complication rates are underestimated by low follow-up rates" and "[p]ublished complication rates are considered incomplete ...."[34]

In addition, evidence shows that medication abortion is substantially riskier than first-trimester surgical abortion. One of Plaintiffs' own witnesses has published a study finding that medication abortion is nearly six "times as likely to result in a complication."[35] And abortion in general is associated with an increased risk of mental health issues.[36] As the *en banc* Eighth Circuit once explained, "[n]umerous studies published in peer-reviewed medical journals ... demonstrate a statistically significant correlation between abortion and suicide."[37]

Medication abortion also has a recent sordid history in Oklahoma. Specifically, long-time Oklahoma City abortionist Naresh Patel was convicted in 2014 of several felonies and stripped of his license after falsely telling women they were pregnant in order to sell them the medication abortion. This scheme, by which Patel lied to his patients so he could make money selling abortion pills, began to come to light in 2011 when evidence surfaced indicating that he had performed an unnecessary abortion on a woman who then died from cervical cancer.[38]

* * *

This spring, by overwhelming super-majorities, the Oklahoma Legislature enacted nine different laws relating in some way to abortion.[39] The three challenged here on appeal were passed

---

[33] ROA 313-16, Doc. 4 (Dr. Skop Aff. ¶ 10, 13-14); ROA 336-37, Doc. 4 (Dr. Harrison Aff. ¶¶ 13-17).
[34] ROA 344, Doc. 4 (Dr. Harrison Aff. ¶ 40) (quoting Attach. J, Dr. Upadhyay research article).
[35] ROA 434, Doc. 4 (Attach. J, Dr. Upadhyay at 181).
[36] *See, e.g.*, ROA 316-17, 320, Doc. 4 (Dr. Skop Aff. ¶¶ 15, 27).
[37] *Planned Parenthood v. Rounds*, 686 F.3d 889, 898 (8th Cir. 2012) (en banc).
[38] Nolan Clay, *Oklahoma City abortion doctor agrees to give up medical license, pay fine*, THE OKLAHOMAN (Oct. 23, 2015), https://www.oklahoman.com/article/5455604/oklahoma-city-abortion-doctor-agrees-to-give-up-medical-license-pay-fine.
[39] *See* Ashley Ellis, *Stitt holds ceremonial bill signing for 9 anti-abortion laws*, KTUL (Sept. 10, 2021), https://ktul.com/news/local/gov-stitt-signs-9-anti-abortion-bills-into-law.

on a bipartisan basis: again, **HB 1904** requires abortionists to be board certified in obstetrics and gynecology; **SB 778** creates a unified protocol regulating the provision of medication abortion; and **SB 779** creates a certification program for regulating medication abortion.[40] Each of these three laws was authored by a woman in the Oklahoma Legislature.

In early September of last year, Plaintiffs challenged these laws and two others in Oklahoma County, bringing claims solely pursuant to the Oklahoma Constitution. Plaintiffs did not bring any federal claims. Plaintiffs then moved for a temporary injunction. After briefing and a hearing, the district court declined to enjoin HB 1904, SB 778, and SB 779, even as it enjoined the two other laws.[41] For the following reasons, this Court should decline to reverse.

ARGUMENT

As discussed above, an "[i]njunction is an extraordinary remedy and relief by this means should not be granted lightly."[42] To obtain a preliminary injunction, a plaintiff must establish by clear and convincing evidence that

> four factors weigh in his favor: 1) the likelihood of success on the merits; 2) irreparable harm to the party seeking injunction relief if the injunction is denied; 3) his threatened injury outweighs the injury the opposing party will suffer under the injunction; and 4) the injunction is in the public interest.[43]

"[A] heavy burden is cast on those challenging a legislative enactment to show its unconstitutionality."[44] As such, any constitutional analysis should proceed "with great caution," as courts should "indulge every possible presumption that an act of the Legislature was

---

[40] *See* ROA 472-509, Doc. 4 (Compilation of Oklahoma House and Senate Vote Tallies).
[41] Although they have not appealed this latter aspect of the district court's preliminary ruling, Defendants maintain those laws are valid under Oklahoma's Constitution and federal jurisprudence is irrelevant because Plaintiffs did not bring federal claims.
[42] *Dowell v. Pletcher*, 2013 OK 50, ¶ 6.
[43] *Dowell*, 2013 OK 50, ¶ 7.
[44] *Thomas v. Henry*, 2011 OK 53, ¶ 8.

constitutional."[45] In other words, "[i]f there is any doubt as to the Legislature's power to act in any given situation, the doubt should be resolved in favor of the validity of the action taken by the Legislature."[46] On the merits, a law will be deemed unconstitutional only if it "is clearly, palpably, and plainly inconsistent with the Constitution."[47] Courts "do[] not consider the 'propriety, desirability or wisdom' in a statute"; rather, their function "is limited to a determination of whether legislative provision is valid and nothing further."[48]

I. The Oklahoma Constitution's guarantee of a right to life does not protect a right to end an innocent human life through abortion.

Plaintiffs contend that the challenged laws violate the due process clause in Article II, Section 7 of the Oklahoma Constitution. That claim must fail because the Oklahoma Constitution does not protect abortion as fundamental right. Oklahoma's founders never intended nor created a right to abortion, nor have Oklahoma's people ever voted to create such a right. Rather, the people of Oklahoma have *always* emphasized the opposite: that the unborn have dignity that is protected under Oklahoma law. Plaintiffs' efforts to the contrary threaten to undermine the people of Oklahoma's right to determine the contents of their own Constitution.

To be more precise, the text of Article 2, Section 2 of our Constitution establishes that "[a]ll persons have the inherent **right to life**." And as quoted in Plaintiffs' own brief on appeal, Pls' Br. at 12, the due process clause in Article 2, Section 7 states that "[n]o person shall be deprived of **life**, liberty, or property, without due process of law." This text "must be ... given a practical interpretation so that the manifest purpose of the framers and the people who adopted it may be

[45] *Lafalier v. Lead-Impacted Cmtys. Relocation Assis. Trust*, 2010 OK 48, ¶ 15; *Adwon v. Okla. Retail Grocers Ass'n*, 1951 OK 43, ¶ 11.
[46] *Draper v. State*, 1980 OK 117, ¶ 10.
[47] *Lafalier v. Lead-Impacted Cmtys. Relocation Assistance Trust*, 2010 OK 48, ¶ 15.
[48] *Burns v. Cline*, 2016 OK 99, ¶ 3 (citation omitted).

carried out."[49] Here, it was never the "manifest purpose" of the people of Oklahoma or its constitutional framers to enshrine a fundamental right to kill a whole, separate, unique, and living human being.[50] The history of abortion laws in Oklahoma demonstrates the opposite. Prior to statehood, the laws of the Indian Nations in the Indian Territory criminalized the killing of an unborn child.[51] Similarly, the Oklahoma Territory legislature also criminalized abortion.[52] No historical sources indicate that any notions of a right to privacy or right to make healthcare decisions our Constitution encompass a right to abortion. Rather, historical and statutory evidence indicates that the people of Oklahoma protected unborn human life—not abortion—under our State Constitution.[53] After adoption of the State Constitution, Oklahoma repeatedly retained and re-codified these prohibitions.[54]

Even after *Roe v. Wade*, the people of Oklahoma never repealed these laws. Rather, they have continually chosen to recognize the rights of an unborn child to life and liberty. In addition to the laws against abortion, Oklahoma homicide law include the killing of an unborn child, Oklahoma's wrongful death statute expressly allows recovery for an unborn child, pregnant women cannot be executed, and there is a statutory presumption against withdrawal of life-sustaining care for pregnant women.[55] In short, all the historical and statutory evidence indicates that the people of Oklahoma have never intended to protect abortion.

---

[49] *Fent v. Fallin,* 2014 OK 105, ¶ 17; *accord EOG Res, Mktg., Inc. v. Okla. State Bd. of Equalization,* 2008 OK 95, ¶ 16.

[50] *See* 63 O.S.Supp.2015 § 1-738.3(A)(2)(d).

[51] *See, e.g.,* Constitution and Laws of the Cherokee Nation (1892), Crimes and Misdemeanors, Ch. IV, art. 2, § 275; art. 10, § 303; Const. and Laws of the Choctaw Nation, Criminal Offenses § 3(1).

[52] Okla. (Terr.) Stat. §§ 2187, 2188 (1890).

[53] *See* Defs' Resp., *Tulsa Women's Repr. Clinic v. O'Connor,* No. 118,292, at 5-9 (Dec. 10, 2019) (decision pending).

[54] *See* 21 O.S.2011 §§ 861-62.

[55] *See* 12 O.S.2011 § 1053(F)(1); 21 O.S.2011 § 691(B), 22 O.S.2011 § 1011; 30 O.S.2011 § 119(A)(3); 63 O.S.2011 § 3101.4; *see also Pino v. United States,* 2008 OK 26, ¶ 23.

Nevertheless, Plaintiffs claim that "this Court has repeatedly interpreted this [due process] guarantee to protect a person's ability to access abortion care prior to viability." Pls' Br. at 12. This is misleading. As mentioned above, in this Court's most recent opinion on the subject the Court expressly stated that it has "never made such a determination."[56] Certainly, this Court has applied federal law in state lawsuits.[57] But it has not actually decided the critical issue of whether the Oklahoma Constitution itself creates a right to abortion. This Court thus can and should deny the injunction on the grounds that Plaintiffs are unlikely to prove—and have barely tried to prove—that the Oklahoma Constitution protects a right to abortion. *See* Rowe, J., dissenting (Oct. 25, 2021) ("Appellants have failed to demonstrate a likelihood of success on the merits. The Appellants never asserted federal constitutional claims ....").

What this Court should not do is continue to apply federal law to lawsuits brought strictly and intentionally under Oklahoma law alone. This approach is not required by the Supremacy Clause, federal law, or any U.S. Supreme Court case law. The United States and Oklahoma constitutions are separate and unique documents promulgated by distinct sovereigns at divergent times and by different framers. Although the U.S. Constitution is supreme, the Oklahoma Constitution does not automatically mirror the U.S. Constitution in every respect. As this Court has held, citing U.S. Supreme Court precedent, "State courts are free to consider the merits of a constitutional challenge under their own constitutional provisions, and they are free to do so independently of United States Supreme Court opinions, even when the state and federal

---

[56] *See, e.g., OCRJ v. Cline*, 2019 OK 33, ¶ 17.

[57] Even in these cases, the Court states only that the "Oklahoma Constitution requires compliance with federal constitutional law ***on issues of federal law***." *In Re Initiative Petition 349, State Question No. 642*, 1992 OK 122, ¶ 12 (emphasis added); *see also Burns v. Cline*, 2016 OK 121, ¶ 6; *OCRJ v. Cline*, 2012 OK 102, ¶ 2. By refusing to bring a federal claim, however, Plaintiffs have not raised an "issue of federal law."

constitutions are similarly or identically phrased."[58] As such, where the U.S. Supreme Court has held that the federal Constitution protects a right—such as abortion—this does not mean that right is protected equivalently, or at all, by the Oklahoma Constitution.[59] Similarly, if the U.S. Constitution fails to protect a right sufficiently—such as the right to life—the Oklahoma Constitution may protect that right to a greater degree.

Undoubtedly, the U.S. Constitution "provides a floor of constitutional rights [and] state constitutions provide the ceiling,"[60] but this still requires a party seeking that federal floor to do the bare minimum of actually bringing a claim under federal law. This was very recently emphasized by the U.S. Supreme Court in *Whole Woman's Health v. Jackson.* There, in response to the dissenters' accusation that the Texas abortion law in question subverts and nullifies the U.S. Constitution, the Supreme Court emphasized that "whatever a state statute may or may not say, applicable federal constitutional defenses always stand fully available **when properly asserted**."[61] The U.S. Supreme Court cited the federal Constitution's Supremacy Clause for this proposition, which is the same clause this Court has cited when applying federal law that has *not* been properly asserted.[62] That is, the U.S. Supreme Court's latest exegesis of the federal Supremacy Clause on this point appears to conflict with the views enunciated by this Court in the past, so this Court is bound to reconsider its prior rulings applying federal law even when no federal claim is brought.

---

[58] *Fair Sch. Fin. Council of Okla. v. State*, 1987 OK 114, ¶ 53 n.46; *see also Turner v. City of Lawton*, 1986 OK 51, ¶ 10 ("The Oklahoma Constitution does not merely project a mirror image of the federal constitution.").

[59] This Court noted recently that "[d]ue process protections encompassed within the Okla. Const. art. II, § 7 are ***generally*** coextensive with those of its federal counterpart." *OCRJ v. Cline*, 2019 OK 33, ¶ 24 (emphasis added). Generally, of course, does not mean "always."

[60] *Starkey v. Okla. Dep't of Corr.*, 2013 OK 43, ¶¶ 45-46 (citation omitted).

[61] *Whole Woman's Health v. Jackson*, 142 S. Ct. at 530 n.1 (emphasis added). Defendants cannot conceive of a coherent reason why this principle would apply to constitutional defenses but not to constitutional challenges.

[62] *See, e.g., OCRJ v. Cline*, 2019 OK 33, ¶ 16.

This Court should hold that if Plaintiffs want to rely on federal law, they must properly assert it by bringing a federal claim under a federal statute or constitutional provision rather than, as here, bringing only state law claims.[63] Plaintiffs have made an intentional and strategic choice to bring state law claims, and they should be held to that choice. And because nothing in the Oklahoma Constitution protects abortion as a fundamental right, this Court should evaluate Plaintiffs' Article II, Section 7 claims under rational basis only.[64] This is "a highly deferential standard" that requires upholding a law so long as "there is any reasonably conceivable state of facts that could provide a rational basis" for the Legislature's action.[65] Since that is undoubtedly true here for all three laws, this Court should deny Plaintiffs' demand for a temporary injunction.

II. SB 778 and SB 779 are not single subject violations.

After claiming that the Legislature needs to stop passing so many laws on abortion, Pls' Br. at 1, Plaintiffs then make the contradictory claim that Oklahoma has not passed *enough* bills on abortion. Rather, they argue, the Legislature has—in a legislative session where the Legislature overwhelmingly passed nine different abortion-related bills on a bipartisan basis—somehow "logroll[ed]" legislators in violation of Oklahoma's single subject rule by enacting SB 778 and SB 779. Pls' Br. at 26. As a legal matter, the claim that SB 778 and SB 779 are each a single subject violation is dubious; as a factual matter, it is utterly implausible.

Article 5, § 57 of the Oklahoma Constitution says "[e]very act of the Legislature shall embrace but one subject, which shall be clearly expressed in its title." The single subject rule was meant as a shield against the corruption of the democratic process by sneaking in "matters foreign

---

[63] This would also enable Defendants to exercise their right to remove such cases to federal court, which relieves a state court of the burden of adjudicating a federal dispute. In the past, Defendants' attempt at removing an abortion case such as this was rejected by a federal court because the "petition alleges no claims under the United States Constitution" and "does not refer to any federal laws." *Nova Health Systems v. Pruitt*, No. 5:15-cv-1209, Doc. 11 (W.D.O.K. Jan. 12, 2016).

[64] *See Cherokee Nation v. Nomura*, 2007 OK 40, ¶ 18, 160 P.3d 967, 974.

[65] *Gladstone v. Bartlesville Indep. Sch. Dist. No. 30 (I-30)*, 2003 OK 30, ¶ 12, 66 P.3d 442, 448.

to the main objects" or by packaging two unrelated laws to pass "when neither measure [alone] could command ... a majority."[66] Put simply: no "logrolling."[67] But the single subject rule is "not to be exactingly enforced, or in such a technical manner as to cripple legislation" and it is "sufficient if [the contents of the bill are] referable and cognate to the subject expressed."[68] Moreover, "[e]verything which is necessary to make a complete enactment, or to result as a complement of the thought therein contained" is authorized.[69] The provisions of a single bill need only be "germane, relative, and cognate to a readily apparent common theme and purpose."[70] If any matter is not germane to the subject of the act, then it may be declared void, but "only as to so much of the laws as may not be expressed in the title."[71] In other words, if matters *unrelated* to the subject of the act have been snuck in, they may be severed, but the rest remains valid law.

Named the "Oklahoma Abortion-Inducing Drug Risk Protocol Act," SB 778 creates a unified protocol for dealing with abortion-inducing drugs and their risks. SB 779, in turn, is named "the Oklahoma Abortion-Inducing Drug Certification Program" and creates a thorough regulatory program for identifying and certifying abortion-inducing drugs and setting the standards, requirements, and penalties for using (or misusing) those drugs in Oklahoma. Thus, the "single subject" for either Act could be considered medication abortion, although SB 778 deals more with doctors providing medication abortion, and SB 779 deals also with manufacturers and distributers of medication abortion. Even if the subject of each bill is defined as "medication abortion," though, the *Cline* cases are distinguishable given that this Court in those cases only

---

[66] *In re Cnty. Comm'rs of Cntys. Comprising Seventh Judicial Dist.*, 1908 OK 207, ¶¶ 4–5.
[67] *Nova Health Sys. v. Edmondson*, 2010 OK 21, ¶ 1.
[68] *In re Cnty. Comm'rs*, 1908 OK 207, ¶ 5.
[69] *Id.*
[70] *Fent v. State ex rel. Okla. Capitol Improvement Auth.*, 2009 OK 15, ¶ 16.
[71] OKLA. CONST. art. 5, § 57; *see also* 75 O.S.2011 § 11a(1).

found that abortion generically was not a single subject.[72] It said nothing about whether a particular subset or aspect of abortion—here, medication abortion—would qualify as a single subject.

Nor would such a holding make sense, as medication abortion is a particularized procedure and topic on which to legislate. Rather than contest this point head on, Plaintiffs retort that "[a]dding the word 'medication' does not change the outcome." Pls' Br. at 24. But that is a caricature of Defendants' position, which is certainly *not* that the Legislature randomly sprinkled the word "medication" throughout the bills. To the contrary, Defendants' point is that SB 778 and SB 778 each deal with medication abortion or abortion-inducing drugs throughout. Plaintiffs purport to dispute this, claiming that the laws contain "unrelated provisions that are largely unrelated to the safe provision of medication abortion," Pls' Br. at 23, but they fail to back this rhetoric up with examples that don't involve medication abortion. *See, e.g.,* Pls' Br. at 10 ("S.B. 779 similarly includes myriad unrelated provisions … [f]or example, it includes: a limitation on providing medication abortion beyond 70 days." (emphasis added)); *id.* at n.4 ("S.B. 778 also imposes (iii) an interstate bar on mailing abortion medication … and (iv) a bar on medication abortion on school, university, or state grounds."). Moreover, on the very first page of their emergency brief on appeal, Plaintiffs admitted that SB 778 and 779's restrictions can all be "*applied* to circumstances involving medication abortion." Pls' Emerg. Mot. at 1 (Oct. 13, 2021). They made similar admissions below, stating that SB 778 and SB 779 prescribe "unnecessary restrictions on medication abortion."[73] Plaintiffs' real complaint, then, isn't so much that this is a single-subject violation, but that SB 778 and 779 are "unnecessary." That is a policy decision, not a judicial one.

Nevertheless, Plaintiffs claim that "S.B. 778 includes 14 new sections of law with over 100 subsections" and "S.B. 779 is comprised of over 16 new sections of law with nearly 200

[72] *Cline*, 2016 OK 99, ¶ 18.
[73] ROA 145, Doc. 3 (Pls' TI Memo) (emphasis added); *see also* ROA 159, Doc. 3 (Desai Aff. ¶ 15) (admitting that SB 778 "solely" applies to "doctors providing medication abortion").

subsections." Pls' Br. at 25. But a single-subject violation cannot just be found by counting provisions in a bill. One must rather show that the provisions are not "germane, relative, and cognate to a readily apparent common theme and purpose,"[74] or that logrolling occurred. That has not been done here.

Plaintiffs also contend that the bills are single subject violations because they "delegate authority to multiple agencies for different purposes." Pls' Br. at 25. That alone means little. Virtually all criminal laws, after all, implicitly or explicitly delegate authority to various agencies—police, courts, district attorneys, jails, prisons, etc. And virtually every regulation of physicians necessarily implicates at least two agencies, since physicians are licensed by two separate boards.[75]

As a comparative matter, SB 778 and SB 779 have no more subjects than previous laws this Court has upheld. For example, this Court upheld a law with the theme of discouraging illegal immigration, finding all provisions (with one exception) a single subject even though the various provisions included: (1) making it a felony to transport, conceal, harbor or shelter illegal aliens; (2) regulating the creation of identification documents; (3) requiring jailers to make reasonable efforts to identify the citizenship status of those charged with a felony or DUI; (4) requiring public employers to verify federal employment status of new employees by using a Status Verification System; and (5) limiting the eligibility of students not lawfully within the country for post-secondary benefits of scholarships and other aid, among many other provisions.[76] And in another

---

[74] *Fent v. State ex rel. Okla. Capitol Improvement Auth.*, 2009 OK 15, ¶ 16.

[75] To be sure, this Court has stated in passing that an abortion law that was a single subject violation delegated authority to three different state agencies. *Cline,* 2016 OK 99, ¶ 13. But this was an alternative holding that was arguably dicta. Moreover, in support for this proposition, this Court cited only to *Fent v. Oklahoma Capitol,* where the Court invalidated a law that involved "three separate bond issues and three separate entities with three separate purposes." *Fent v. Oklahoma Capitol,* 2009 OK 15, ¶ 23. This indicates that there is no standalone prohibition on multiple delegations, but rather that delegation is simply a factor in the single-subject analysis. The laws in *Oklahoma Capitol* and *Cline*, in other words, were not invalid just because of multiple delegations, but in part because the delegations were for completely unrelated purposes.

[76] *Thomas v. Henry,* 2011 OK 53, ¶¶ 30–31.

case, the Court upheld a law under the central purpose of preventing cruelty to birds, which contained different provisions that criminalized (1) instigating cockfighting; (2) hosting cockfighting; (3) watching cockfighting; and (4) keeping birds to cockfight, as well as penalties.[77]

It also must be observed that Plaintiffs have presented no basis to believe logrolling actually happened here. Protecting against that harm is one of the primary purposes of the single subject rule.[78] Yet nothing in Plaintiffs' pleadings, brief, declarations, or briefs on appeal indicates that anyone in the Legislature that voted for this bill was opposed to any portion of it. All evidence is to the contrary. The most prominent basic fact here is that the Legislature **split** its medication abortion regulation into two **separate** bills and kept those bills separate from the other seven abortion-related bills it passed overwhelmingly and on a bipartisan basis. To require chopping up bills on the same single subject even more than that is not mandated by Oklahoma's Constitution.[79]

III. If federal law is applied, the three challenged laws would likely be upheld.

If Plaintiffs had brought federal claims, the three challenged laws would still likely be upheld, as the district court found, because Plaintiffs have not shown that they will place a substantial obstacle to abortion in a large fraction of cases. Thus, an injunction should not issue.

A. Chief Justice Roberts' *June Medical* concurrence controls, for now.

The U.S. Supreme Court is currently deciding whether to overturn *Roe v. Wade* and *Planned Parenthood v. Casey*, with a decision expected by the end of June.[80] And 25 states, including Oklahoma, have urged the Court to do so. But setting that unknown aside, the Supreme Court's

---

[77] *Edmondson v. Pearce*, 2004 OK 23, ¶¶ 45–46.
[78] *Nova Health*, 2010 OK 21, ¶ 1.
[79] It also shouldn't be overlooked that a good portion of the length of SB 778 and SB 779 comes from definition sections, as well as from SB 779's unifying amendments to other laws. See SB 778 § 2 (containing 13 definitions); SB 779 §§ 17-19 (unifying amendments). Neither of these presents single subject issues. And both SB 778 and 779 have robust severability provisions, so if a provision is found to be unrelated, it should be severed.
[80] *See Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (U.S.).

most recent guidance on the standard to be applied in properly asserted abortion cases is found in Chief Justice Roberts's concurring opinion in *June Medical Services v. Russo*, 140 S. Ct. 2103 (2020).[81] Under this opinion, the Chief Justice made clear that federal law neither requires nor permits application of a "grand balancing test" for abortion regulations.[82] He stressed that judges have neither the legal power nor the practical ability to weigh the competing interests in abortion cases and conduct an ad hoc analysis in which abortion laws are upheld only if their benefits outweigh the burdens they impose.[83] To the contrary, he wrote—using similar language to what this Court emphasized in *Fieker*—that "the 'traditional rule' that 'state and federal legislatures [have] wide discretion to pass legislation in areas where there is medical and scientific uncertainty'" is still valid.[84] The role for the courts under *Casey* "is solely to determine whether the laws puts in place a 'substantial obstacle' to abortion in a 'large fraction' of relevant cases."[85] If a law poses no substantial obstacle, the Chief Justice confirmed that such a law is constitutional regardless of the magnitude of benefits, so long as it has a rational basis.[86]

This creates problems for Plaintiffs, right off the bat. Plaintiffs rely heavily on this Court's 2019 decision in *Cline*, but this Court employed in *Cline* the very standard that the Chief Justice's controlling opinion in *June Medical* later rejected. *Compare Cline*, 2019 OK 33, ¶¶ 26, 39 ("The asserted benefits are weighed against the burdens as presented by the evidence before the trial

---

[81] As Plaintiffs acknowledge, Pls' Br. at 13 & n.7, three federal circuits have found that Chief Justice Roberts' concurrence controls, whereas only one has found otherwise. *Compare Whole Woman's Health v. Paxton*, 10 F.4th 430 (5th Cir. 2021) (*en banc*) ("Under the *Marks* rule, the Chief Justice's concurrence is *June Medical*'s controlling opinion."); *Hopkins v. Jegley*, 968 F.3d 912, 915 (8th Cir. 2020) (similar); *EMW Women's Surgical Ctr. v. Friedlander*, 978 F.3d 418, 437 (6th Cir. 2020) (similar), *with Planned Parenthood of Ind. & Ky. v. Box*, 991 F.3d 740 (7th Cir. 2021).

[82] *June Medical*, 140 S. Ct. 2103, 2135 (Roberts, C.J.).

[83] *Id.* at 2135-36.

[84] *Id.* at 2136 (quoting *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007)).

[85] *Id.* at 2135-2138; *Casey*, 505 U.S. at 877, 895 (containing "large fraction" language); *see also id.* at *63 (Kavanaugh, J., dissenting) ("Today, five Members of the Court reject the *Whole Woman's Health* cost-benefit standard.").

[86] *June Medical*, 140 S. Ct. at 2138 (Roberts, C.J.).

court."), *with June Medical*, 140 S. Ct at 2136 (Roberts, C.J.) ("Nothing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts."). Given that this Court has stated that "[w]here the United States Supreme Court has spoken, this Court is bound by its pronouncements," *Cline*, 2019 OK 33, ¶ 16, Plaintiffs' abundant reliance on *Cline*, after the Supreme Court has spoken otherwise in *June Medical*, is tenuous at best. And Plaintiffs' claim that this change of law is somehow irrelevant, Pls' Br. at 14, is simply untrue.

Plaintiffs are correct, or course, that Chief Justice Roberts emphasized the importance of stare decisis in *June Medical*. But that cuts against Plaintiffs here. In *June Medical*, the Chief Justice stated that stare decisis required him to affirm the enjoining of Louisiana's law only because it was "nearly identical to the Texas law stuck down four years ago," and like cases must be treated alike.[87] Thus, Plaintiffs' arguments on this point would hold water if the Oklahoma Legislature had passed laws identical or nearly identical to those the U.S. Supreme Court struck down previously. But that logic would not apply to laws that this Court has attempted to analyze under federal standards previously. In this latter scenario, if the federal standards change or are clarified in a way contrary to this Court's prior efforts, this Court—under its own logic—would be bound to correct course by the Supremacy Clause. This Court could not claim that stare decisis required it, in interpreting federal law, to abide by decisions utilizing a now-discarded federal standard. In any event, as will be shown, and contrary to Plaintiffs' misleading characterizations, the challenged laws have *not* been enjoined or ruled on in the past, by this Court or by the U.S. Supreme Court.

B. The OBGYN requirement in HB 1904 is likely to be upheld.

Most prominently, Plaintiffs make no claim whatsoever—nor can they—that law simply requiring abortions to be performed by board-certified OBGYNs (HB 1904) has been enjoined previously by this Court or the U.S. Supreme Court. Rather, the law's logic is supported by decades

[87] *Id.* at 2133.

of U.S. Supreme Court precedent, and the two other States that have enacted similar laws are currently enforcing them, with legal challenges to those laws having been ultimately unsuccessful.

Plaintiffs ignore the unbroken line of U.S. Supreme Court cases going back decades indicating that there is "**no doubt**" that states can restrict the performance of abortions to physicians alone, "even if an objective assessment might suggest that those same tasks could be performed by others."[88] Plaintiffs make the same basic assertions here, claiming that family medicine physicians can perform abortions as well as board-certified OBGYNs. Pls' Br. at 9. But if there is "no doubt" that States can make their own assessment and restrict abortion to physicians, then it seems likely—if not certain—that they can also insist that abortions be performed by the very specialists who perform most abortions in Oklahoma are most qualified to perform abortions as a group because they have the most specialized skills and training applicable to abortion. Indeed, as discussed above, the majority of OBGYN residency programs offer routine abortion training (unlike other specialties), and studies have found an association between board certification and positive clinical outcomes, generally speaking. This type of law, then, is this akin to restricting brain surgery to brain surgeons or heart surgery to heart surgeons. Such an action may be debatable as a policy matter, but it is not arbitrary or without medical justification.[89]

In addition to the logically relevant U.S. Supreme Court precedent, there is also the fact that the two other states to enact OBGYN laws have seen those laws survive federal law challenges. As explained above, a federal district court upheld a Mississippi OBGYN law in a thorough, well-reasoned opinion, and the Eighth Circuit just this year vacated a lower court

---

[88] *Mazurek*, 520 U.S. at 973 (quoting *Casey*, 505 U.S. at 885). This language was repeated by Chief Justice Roberts in his controlling *June Medical* concurrence. *See June Medical*, 140 S. Ct. at 2137.

[89] ROA 318, Doc. 4 (Dr. Skop Aff. ¶ 21); *see also Currier*, 320 F. Supp. 3d at 837 ("Defendants have shown that the ob-gyn requirement provides some benefit to women's health in that it ensures that physicians performing abortions in Mississippi abortion clinics are specialists in women's healthcare who are trained to perform abortions or their equivalents").

injunction of an OBGYN-only law in Arkansas.[90] Plaintiffs' passing attempt to distinguish these cases is remarkable in its flimsiness. Primarily, Plaintiffs claim that such laws elsewhere haven't "had anywhere near the effect on abortion access that the OB/GYN Requirement will have in Oklahoma." Pls' Br at 15 n.9. But the reason we know that Mississippi's law hasn't had any such effect **is because it was allowed to take effect**. Here in Oklahoma, we have Plaintiffs' rank and unquantified speculation **prior to** the law being enforced; in Mississippi and Arkansas, we have actual facts from after-the-fact. Plaintiffs are essentially asking this Court to value their dire predictions and extreme speculation ("catastrophic" etc.) over the on-the-ground experiences in other states—experiences that have led to federal courts permitting the laws.

Pre-enforcement injunctions are disfavored for this very reason: they allow plaintiffs to nullify laws without having to test or prove their speculative theories in reality. That is, if this Court enjoins the OBGYN law, Plaintiffs may never actually have to hit the pavement and figure out if they can staff up or not, or whether their existing staff will be unable to meet abortion demands. Rather, speculation will continue apace. If an injunction is denied, however, as-applied and after-the-fact challenges will always be available to Plaintiffs if they can produce solid evidence and if their legal claims are valid.

Plaintiffs also claim that Defendants "cherry-pick" language from the *Currier* decision in Mississippi and ignore the supposedly "ultimate conclusion" of the court. Pls' Br. at 15 n.9. But what was the ultimate result? The Mississippi law was *not* enjoined, despite plaintiffs there making nearly identical arguments as plaintiffs here. *See, e.g., Currier*, 320 F. Supp. 3d at 840-41 ("[T]he Court cannot agree factually that Plaintiffs have established a substantial obstacle to a woman's right to seek an abortion. ... Plaintiffs' summary-judgment/permanent-injunction motion is therefore denied."). Thus, in each state where one has been enacted, an OBGYN law is currently

[90] *Currier*, 320 F. Supp. 3d 828; *Little Rock Fam. Plan. Servs.*, 984 F.3d 682, 690-92 (8th Cir. 2021).

in effect, yet Plaintiffs want this Court to take the extraordinary step of singling out Oklahoma as the only state that cannot enforce such a law.

Plaintiffs have failed to show that the OBGYN requirement will likely impose a "substantial obstacle" for a large fraction of Oklahoma women. To begin, unlike other various other laws that have been invalidated by the U.S. Supreme Court, no clinics will close in Oklahoma if the law goes into effect. Oklahoma will still have five licensed clinics,[91] which is more than much of the last decade. Plaintiffs retort that "this Court has never held that only those laws that force abortion clinics to close create substantial obstacles to abortion access." Pls' Br. at 14. Defendants never claimed otherwise. But it is blatantly obvious, from the most recent U.S. Supreme Court decisions, that clinic closures play a critical role in the high court's calculus, and particularly in Chief Justice Roberts' controlling opinion.[92] The undisputed fact that no clinics will close may not carry the day for Defendants all by itself, but it is undeniably significant.

Plaintiffs do claim that existing clinics will lose roughly half of their physicians. Pls' Br. at 14. But several clinics have not even brought suit. And regardless, merely counting the heads of doctors tells us little about how many abortions each doctor performs, especially when some are part-time.[93] On that critical issue, Plaintiffs gave no specifics to the district court, again raising the question of how the district court could have abused its discretion in declining to enjoin the law. Only now do Plaintiffs latch on to the State's data that Defendants have identified. But that data doesn't help Plaintiffs. Rather, it shows that in the last three years somewhere between 65 and 73

---

[91] Plaintiffs continue to insist that there are only four clinics in the State, without explanation, despite there being five clinics currently licensed. *See* Pls' Br. at 8.

[92] *See June Medical*, 140 S. Ct. at 2140 (Roberts, C.J.) (observing that, in *Hellerstedt*, where the Supreme Court enjoined a Texas law, eight Texas "abortion clinics closed in the months prior to the law's effective date. Another 11 clinics closed on the day the law took effect."); *see also Currier*, 320 F. Supp. 3d at 835, 840 (upholding OBGYN requirement that "did not result in any closures").

[93] *See Currier*, 320 F. Supp. 3d at 839 ("[T]the question is whether the law creates a burden on women seeking abortions, not the doctors or clinics providing them.").

percent of Oklahoma abortions have been performed by OBGYNs. That is to say, it demonstrates far more definitively than anything Plaintiffs have offered that substantially *less* than half of Oklahoma abortions would be affected—at most. And to hold that the remaining 1/3 to 1/4 of abortions qualify as a "large fraction" or "substantial obstacle" would require, among other things, this Court to unrealistically pretend that clinics won't hire more doctors to fill the gaps, have their current doctors work more, or mitigate in any way. Nothing in the law, after all, bars Plaintiffs—which includes the nation's largest abortion provider, Planned Parenthood—from hiring as many OBGYNs as they want. When presented with these same types of contentions from Mississippi's clinic, the federal court there concluded that he was "not convinced that [the clinic] cannot hire board-certified or board-[]eligible ob-gyns."[94]

Plaintiffs do claim providers are hard to come by in Oklahoma. But Plaintiffs attribute this to ambiguous and unquantifiable non-State actions like "stigma" and "harassment." Pls' Br. at 7. In other words, Plaintiffs blame this shortage in part on physicians having trouble with the morality of abortion. A physician's aversion to be complicit in Plaintiffs' practices cannot possibly be used as a cudgel to strike down duly-enacted laws. In any event, Plaintiffs do not detail what efforts, if any, they have made or could make to secure more board-certified OBGYNs. One of Plaintiffs' witnesses admitted below that, even in the single month between when the lawsuit was filed and the reply brief, Planned Parenthood hired ***three*** new OBGYNs to work in Oklahoma.[95] This alone severely undermines Plaintiffs' claim that "it is not feasible to quickly substitute enough new board-certified OB/GYN physicians." Pls' Br. at 9.

Despite all of this, Plaintiffs assert that "many Oklahomans" will be "entirely unable to access abortion in the state." Pls' Br. at 9. Not only is this unsubstantiated, but it is a claim ("many

---

[94] *Currier*, 320 F. Supp. 3d at 839; *see also Rutledge*, 984 F.3d at 690 (vacating an injunction because clinic admitted on appeal it had "hired a board-certified OBGYN").
[95] ROA 557, Doc. 6 (Ex. B, Dr. Yap Decl. ¶ 4).

Oklahomans") Plaintiffs did not make below. Below, Plaintiffs merely said "many providers" would be excluded, ROA 130, Doc. 3 (Pls' TI Memo), (emphasis added), and that Oklahoma's Fetal Heartbeat Bill (enjoined by the court, and not appealed here) would "prevent many people from being able to obtain abortion in Oklahoma," ROA 137, Doc. 3 (Pls' TI Memo). For the OBGYN law, however, Plaintiffs merely stated that would likely prevent "at least some people from being able to obtain an abortion in Oklahoma at all." ROA 138, Doc. 3 (Pls' TI Memo) (emphasis added). "Some" is not the same as "many," and this Court has long echoed the U.S. Supreme Court in holding that the "fact that a regulation . . . decreases the availability of an abortion is insufficient to invalidate the regulation."[96] Plaintiffs have ratcheted up their rhetoric on appeal, but the evidence of a substantial obstacle is still lacking. In sum, rather than showing a likelihood of a substantial obstacle, Plaintiffs have put forth a substantial amount of unquantified speculation, and speculation is not enough to prevent a law from taking effect.

C. The medication abortion laws are likely to be upheld.

The use of medication abortion is on the rise in Oklahoma, and dramatically so, which led the Legislature to pass two new laws on the subject—SB 778 and SB 779. Plaintiffs barely even try to articulate or quantify how these two laws create a substantial obstacle to abortion. Instead, they haphazardly alternate between claiming that precedent precludes aspects of the laws and attacking any insinuation that abortion may not be 100% safe.

Plaintiffs' reliance on precedent is misplaced. Plaintiffs cite this Court's 2012 *Cline* decision, for instance, but that case involved what the Court construed as a total ban on medication abortion.[97] SB 778 and 779 do nothing of the sort. And, even aside from questions about the decision's reliance on a defunct federal standard, the 2019 *Cline* decision enjoined an Oklahoma

[96] *Davis*, 1997 OK 15, ¶ 30 (citing *Casey*, 505 U.S. at 874).
[97] *OCRJ v. Cline*, 2012 OK 102; *see also Cline v. OCRJ*, 2013 OK 93 (explaining that HB 1970 prohibited the "use of misoprostol in conjunction with mifepristone").

law that would have prevented physicians from using the 2016 FDA regimen for medication abortion.[98] Here, it's the reverse: Plaintiffs complain that SB 778 and 779 follow *too closely* to the FDA regimen because the laws don't approve of medication abortions after 10 weeks LMP.[99]

Below and on appeal, Plaintiffs have insinuated that anything dictating or influencing the usage of medication abortion, the timing of care, and the number of doctor's office visits is automatically unconstitutional under this Court's precedents. Pls' Br. at 17; Emerg. Mot. at 12. This overbroad reading of this Court's precedent is *not* required by any federal abortion case, and, if accepted, would lead to enjoining nearly all of Oklahoma's abortion laws. Oklahoma's physician-only law (63 O.S. § 1-731(A)), for example, enacted in 1978, plainly regulates the use of medication abortion and even prevents patients from accessing medication abortion, in that they can't obtain it from a non-physician. But such laws have been repeatedly upheld by the U.S. Supreme Court.[100] And, again, the Supreme Court and this Court have emphasized that the "fact that a regulation increases the cost or decreases the availability of an abortion is insufficient to invalidate the regulation."[101] In a similar vein, it is quite incredible that Plaintiffs continue to claim that the challenged medication abortion laws are unconstitutional because they would require women to make "two trips to a health center," Pls' Br. at 20, when in *Casey* itself the U.S. Supreme Court upheld a waiting period despite the requirement of "at least two visits to the doctor."[102] Plaintiffs wrongly claim that SB 778 and SB 779 conflict with precedent, in other words, when it is their own arguments that precedent squarely forecloses.

Plaintiffs have also claimed that certain provisions of SB 778 and SB 779 "in some ways *exceed* the burdens imposed by those laws this Court has already held to be unconstitutional."

---

[98] *Cline*, 2019 OK 33, ¶¶ 42-43.
[99] Pls' Br. at 11.
[100] *See Mazurek*, 520 U.S. 968.
[101] *Davis*, 1997 OK 15, ¶ 30 (citing *Casey*, 505 U.S. at 874).
[102] *Casey*, 505 U.S. at 885-86.

Emeg. Mot. at 12. In particular, Plaintiffs cite the ultrasound requirement in SB 778 and the admitting privileges requirement in SB 779. On both fronts, Plaintiffs are mistaken.

Ultrasound: Section 6 of SB 778 requires an ultrasound, at least 72 hours in advance of an abortion, to confirm the gestational age of the child. Plaintiffs point out that in 2012 this Court enjoined a mandatory ultrasound requirement, Pls' Br. at 17 (citing *Nova Health Sys. v. Pruitt*, 2012 OK 103, ¶ 3), but they neglect to mention that the 2012 law was much broader than SB 778. That law required physicians to perform an ultrasound, explain to the woman what the ultrasound was depicting, *and* display the images so that the woman could view them, among other things. Numerous states have passed a variety of ultrasound laws, and very few of them have been enjoined; the only ones that have were similar to Oklahoma's old law.[103] In any event, this is a moot point because Plaintiffs admit that they already perform ultrasounds prior to abortions.[104] Thus, their complaint is not actually the requirement itself, but the timing: they object to having to perform the ultrasounds 72 hours in advance, claiming this forces patients "to make an additional, medically unnecessary visit to a provider." Pls' Br. at 10. But Oklahoma's 72-hour reflection period after informed consent has been in effect for six years,[105] so the ultrasound addition would not necessarily add an extra trip, because a significant number of women receive informed consent in person. Regardless, and again, a second trip does not make a law unconstitutional, as *Casey* made perfectly clear.[106]

Admitting privileges: Section 8 of SB 779 requires abortionists to either maintain nearby hospital admitting privileges ***OR*** "enter into a written agreement with an associated physician in the county or contiguous county where the abortion-inducing drug was provided." Below,

---

[103] *See* Guttmacher Institute, *State Laws & Policies: Requirements for Ultrasound,* (Sept. 1, 2021), https://www.guttmacher.org/state-policy/explore/requirements-ultrasound.
[104] ROA 177, Doc. 3 (Braid Aff. ¶ 61); ROA 220, Doc. 3 (Upadhyay Aff. ¶ 33).
[105] *See* 63 O.S. § 1-746.2.
[106] *Casey*, 505 U.S. at 886; *Davis*, 1997 OK 15, ¶ 30 (citing *Casey*, 505 U.S. at 874).

Plaintiffs claimed that this requirement has "been held unconstitutional by both the U.S. and the Oklahoma Supreme Courts." ROA 140, Doc. 3 (Pls' TI Memo at 11). That was incorrect. *Hellerstedt* and *June Medical* both dealt with state laws where the states had affirmatively removed a similar alternative written-agreement option from their admitting privilege laws, exposing them to challenge.[107] In other words, with SB 779, the Oklahoma Legislature adopted the modest, broader approach that preceded, and wasn't challenged in, *Hellerstedt* and *June Medical.* Moreover, this Court's decision in 2016 dealt with an admitting privileges law without an alternative, as well, expressly nothing that the plaintiff "maintains an agreement with a physician who has such an affiliation."[108] Seemingly acknowledging this, in their most recent brief Plaintiffs are careful to claim only that "similar" laws "have been held unconstitutional by this Court and the United States Supreme Court." Pls' Br. at 10. But while similarities exist, the differences between the laws are literally the differences between permissible laws and laws that have been found unconstitutional.

Plaintiffs now base their claim on the argument "that the Department of Health annually send an associated physician contract to every hospital in the county." Pls' Br. at 18. Plaintiffs do not say whether such a requirement has been upheld elsewhere, they do not explain whether any court has ever enjoined it, nor do they even bother to mention that such a provision would obviously be severable under the robust severability clauses, *see* SB 778 § 14, SB 779 § 16, leaving the rest of the admitting privileges requirements intact. This scattershot, drive-by approach is simply not sufficient to clearly show unconstitutionality.

Plaintiffs sporadically blast other provisions too. None of these attacks hold water. Most significantly, Plaintiffs repeatedly claim that because of the new reporting requirements patient

---

[107] *See June Medical*, 140 S. Ct. at 2139 (Roberts, C.J.,) ("The new [Texas] law, adopted in 2013, eliminated the option of having a transfer agreement ... Likewise, Louisiana law previously required abortion providers to have either admitting privileges or a transfer agreement.").
[108] *Cline*, 2016 OK 121, ¶ 15, 24.

information will be made public, even though this is expressly forbidden by both acts in no uncertain terms. *See, e.g.*, SB 778 § 8(C) ("Reports required under this subsection shall not contain ... information or identifiers that would make it possible to identify, ***in any manner or under any circumstances***, a woman who has obtained or seeks to obtain a chemical abortion." (emphasis added)). Plaintiffs also claim that the required "licensing of national manufacturers and distributors ... may chill such entities from supplying providers." Pls' Br. at 11, n.5. But Plaintiffs do not have standing to represent manufacturer and distributer interests, and even if they did Plaintiffs' speculation does not come close to the standard needed to show a substantial obstacle.

D. The laws should not be enjoined because of an allegedly improper purpose.

Plaintiffs also claim that the challenged laws are all unconstitutional under federal law because of various comments by Oklahoma legislators supposedly showing that their purpose was to limit abortions. As the U.S. Supreme Court has explained, in an opinion released after the non-binding Tenth Circuit case Plaintiffs rely on, "[w]e see no reason to give greater weight to the views of two Senators than to the collective votes of both Houses, which are memorialized in the unambiguous statutory text."[109] Moreover, as has already been demonstrated, the OBGYN requirement and medication abortions laws are not "so clearly at odds with controlling precedent," nor have they been "repeatedly condemned by the Court" such that any intent other than that found in the text itself can be discerned.[110] The Legislature can walk and chew gum at the same time; it can challenge a legal regime while passing laws that operate within that regime.

---

[109] *Barnhart v. Sigmon Coal*, 534 U.S. 438, 457 (2002); *see also Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1552 (8th Cir. 1996) ("Furthermore, an isolated statement by an individual legislator is not a sufficient basis from which to infer the intent of that entire legislative body.").

[110] ROA 148 (Pls' Memo at 19).

IV. Plaintiffs' alleged harms are merely repetitive of their incorrect legal theories.

Plaintiffs claim that a deprivation of fundamental constitutional rights is *per se* irreparable harm. Pls' Br. at 29-30. If that is so, then Plaintiffs should have sued under the federal Constitution. As it stands, they sued under the Oklahoma Constitution, which doesn't protect abortion as a fundamental constitutional right. In other words, Plaintiffs' alleged harm relies mainly on their allegation that the laws violates their rights under the Oklahoma Constitution. Because they are wrong on the merits, as described above, they are also wrong in stating a resulting harm will occur.

V. Equity and the public interest disfavor enjoining the challenged laws.

Plaintiffs claim that Defendants will not be harmed. This is false. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."[111] Allowing an aggrieved litigant to enjoin duly enacted state laws makes the courts an agent to reverse the democratic process. Enjoining these laws will harm the Legislature's ability to represent Oklahomans and undermine Oklahoma sovereignty and the rule of law. Moreover, by removing commonsense safety regulations, enjoining the laws here will harm women like those abused and deceived by Naresh Patel. And, of course, every single successful abortion itself destroys the life of an unborn human being—the ultimate harm.

One final point: Plaintiffs claim that the "State does not dispute, that abortion access in Oklahoma will be significantly reduced overnight by the Challenged Laws." Pls' Br. at 15. Defendants do dispute this (and other items Plaintiffs claim are undisputed); at least, Defendants do not believe Plaintiffs have firmly demonstrated that any such reduction will occur.[112]

---

[111] *Maryland v. King*, 133 S.Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345 (1977) (Rehnquist, J., in chambers)).

[112] *Cf Currier*, 320 F. Supp. 3d at 832 ("Yet since the [OBGYN] law was enacted, the number of abortions Plaintiffs perform has increased by 17%.").

CONCLUSION

For all these reasons, the district court's decision not to enjoin HB 1904, SB 778, and SB 779 was correct and Plaintiffs are not likely to succeed on the merits of those claims.

Respectfully submitted,

MITHUN MANSINGHANI, OBA NO. 32453
Solicitor General
ZACH WEST, OBA NO. 30768
Assistant Solicitor General

OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA
313 N.E. 21st Street
Oklahoma City, OK 73105
Direct: (405) 521-3921
zach.west@oag.ok.gov

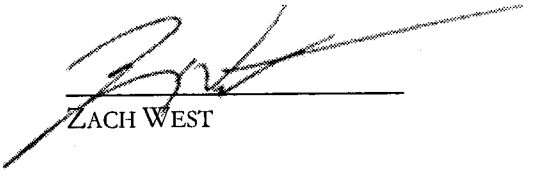
Counsel for Defendants/Appellees

CERTIFICATE OF SERVICE

This is to certify that on the 14th day of January 2022, a true and correct copy of the above RESPONSE was transmitted, postage prepaid to the following:

J. BLAKE PATTON
WALDING & PATTON PLLC
518 Colcord Drive, Suite 100
Oklahoma City, OK 73102

Counsel for Plaintiffs/Appellants



ZACH WEST