ORIGINAL

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SUPREME COURT
STATE OF OKLAHOMA

OCT 20 2021

JOHN D. HADDEN
CLERK

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

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

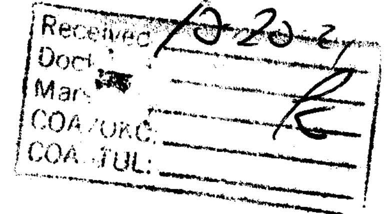
Plaintiffs/Appellants,

v.

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

Defendants/Appellees.

No: 119,918



RESPONSE TO PLAINTIFFS' EMERGENCY MOTION

Plaintiffs have moved this Court for an extraordinary emergency injunction of three Oklahoma laws regulating abortion (HB 1904, SB 778, and SB 779), after the district court declined to enjoin these laws. In doing so, Plaintiffs spend most of their emergency brief simply repeating the same mistaken arguments that they unsuccessfully made to the district court several weeks ago, such as the misleading claim that "elements" of SB 778 and SB 779 have been enjoined previously. Emerg. Mot. at 1. These arguments were refuted, in detail, in Defendants' 25-page response below, *see* Defs' Resp. (Sept. 24, 2021), and Defendants will not duplicate that brief in full here. Indeed, given the "emergency" nature of Plaintiffs' motion, it would stand to reason that this Court could just review the briefs below and rule on the emergency issue.

Nevertheless, Defendants will herein respond to Plaintiffs' most mistaken points in the emergency brief, such as Plaintiffs' insistence that "directly applicable precedent" precludes the OBGYN law (HB 1904), Emerg. Mot. at 1, when U.S. Supreme Court, federal circuit, and federal district court precedent point in the opposite direction. *See, e.g., Jackson Women's Health Org. v. Currier*, 320 F. Supp. 3d 828, 837-40 (S.D. Miss. 2018) (upholding OBGYN law because it "provides some benefit to women's health" and Plaintiffs' "speculation" did not establish a

substantial obstacle). Defendants will also address points Plaintiffs raise here that they *didn't* below, such as the novel, speculative, and unquantified claim that "many" women "will be entirely prevented" from abortions in Oklahoma because of these particular laws. Emerg. Mot. at 1. Similarly, Defendants will address claims Plaintiffs raised in their reply below (and again here) that Defendants have not yet responded to in writing. For instance, Plaintiffs have repeatedly criticized one of Defendants' experts but have entirely failed to flag that the primary judicial opinions they cite for this criticism have been stayed on appeal, vacated, or are not majority opinions. *See, e.g.*, Emerg. Mot. at 11 n.8 (citing *Whole Woman's Health All. v. Rokita*, 2021 WL 3508211 (S.D. Ind. Aug. 10, 2021), but neglecting to mention that the Seventh Circuit stayed that decision because of "strong grounds for concluding that Indiana is likely to prevail," 13 F.4th 595, 598 (7th Cir. 2021)). Underhanded tactics like this should not serve as a basis for emergency relief.

In the end, this Court should deny an injunction for three basic reasons. *First*, Plaintiffs have yet again intentionally brought their due process claims solely under the Oklahoma Constitution, which does not protect abortion. *See* Defs' Resp. at 8-11 (Sept. 24, 2021). Although this Court has countenanced similar efforts in the past, it should end that practice here. *Second*, even if federal abortion jurisprudence is applied, Plaintiffs have not provided anything more than rank and irrelevant speculation, along with misleading comparisons, to argue that the three challenged laws pose a substantial obstacle to abortion. *See* Defs' Resp. at 11-20. *Third*, Plaintiffs have provided no evidence of logrolling, inadequate notification, or anything remotely similar for their single-subject claims; rather, Plaintiffs have harshly criticized the Legislature for passing too many abortion laws, and then turned around and claimed the Legislature should have passed even more abortion laws to avoid single subject issues. *See* Defs' Resp. at 20-24. For these reasons and more, Plaintiffs are not likely to succeed on the merits. Plaintiffs' motion should be denied.

BACKGROUND

This spring, by overwhelming super-majorities, the Oklahoma Legislature enacted nine different laws relating to abortion. The three attacked in Plaintiffs' motion here were all passed on a bipartisan basis: **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. Each of these laws was authored by a woman in the Oklahoma Legislature—two by Senator Julie Daniels and one by Representative Cynthia Roe.

In early September, 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 applied federal law to the Plaintiffs' claims and declined to enjoin HB 1904, SB 778, and SB 779.[1] For the following reasons, this Court should decline to enjoin the laws pending appeal.

ARGUMENT

"Injunction is an extraordinary remedy and relief by this means should not be granted lightly." *Dowell v. Pletcher*, 2013 OK 50, ¶ 6. 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.

Dowell, 2013 OK 50, ¶ 7. "[A] heavy burden is cast on those challenging a legislative enactment to show its unconstitutionality." *Thomas v. Henry*, 2011 OK 53, ¶ 8. As such, any constitutional analysis

[1] The court enjoined the other two laws—a bill barring abortions after a fetal heartbeat and a bill revoking the licenses of abortionists—which Defendants had argued should stand under Oklahoma's Constitution but were likely to be found unconstitutional under federal jurisprudence.

should proceed "with great caution," as courts should "indulge every possible presumption that an act of the Legislature was constitutional." *Lafalier v. Lead-Impacted Cmtys. Relocation Assis. Trust*, 2010 OK 48, ¶ 15; *Adwon v. Okla. Retail Grocers Ass'n*, 1951 OK 43, ¶ 11. In other words, "[i]f there is any doubt as to the Legislature's power to act ... the doubt should be resolved in favor of the validity of the action taken by the Legislature." *Draper v. State*, 1980 OK 117, ¶ 10. On the merits, a law will be deemed unconstitutional only if it "is clearly, palpably, and plainly inconsistent with the Constitution." *Lafalier*, 2010 OK 48, ¶ 15.

I. The challenged laws are not likely to be found clearly, palpably, and plainly inconsistent with a State Constitution that protects an "inherent right to life" rather than abortion.

Article 2, Section 2 of our State Constitution establishes that "[a]ll persons have the inherent ***right to life***." Article 2, Section 7's due process clause, in turn, states that "[n]o person shall be deprived of ***life***, liberty, or property, without due process of law." These constitutional texts, like any other, "must be ... given a practical interpretation so that the manifest purpose of the framers and the people who adopted it may be carried out." *Fent v. Fallin*, 2014 OK 105, ¶ 17.

It was never the manifest purpose of our State's Framers to create a right to abortion. Nor have Oklahomans in the years since ever voted to establish a right to kill a whole, separate, unique, and living unborn human being. *See* 63 O.S. § 1-738.3(A)(2)(d). Quite the opposite: As Defendants detailed in our brief below and in a separate case still pending before this Court, Oklahomans have always and repeatedly emphasized, in a number of contexts, the precise opposite: that the unborn have an inviolable dignity that is protected under Oklahoma law. *See* Defs' Resp. at 8-11 (Sept. 24, 2021); Defs' Resp., *Tulsa Women's Repr. Clinic v. O'Connor*, No. 118,292, at 5-9 (Dec. 10, 2019) (decision pending). All the historical and statutory evidence indicates that the people of Oklahoma have protected unborn human life—not abortion—under our State Constitution.

This Court has not held otherwise. Plaintiffs claim in their emergency motion that this "Court has repeatedly recognized that the Due Process Clause of the Oklahoma Constitution, Art. II, § 7, protects a person's ability to choose to terminate a pregnancy prior to viability in line with the U.S. Constitution." Emerg. Mot. at 10. But, in its most recent discussion on point, this Court instead stated that it has "never made such a determination [that abortion is protected] under the Oklahoma Constitution, and we need not do so now." *OCRJ v. Cline*, 2019 OK 33, ¶ 17.

What is true is that this Court has repeatedly applied federal law in state lawsuits, citing, among other things, the U.S. Constitution's Supremacy Clause. *See Cline*, 2019 OK 33, ¶¶ 16-20. With all respect, such an approach (applying federal law to non-federal claims) is not required by the Supremacy Clause, federal law, or any U.S. Supreme Court case law that Defendants are aware of. Nor is it required by Oklahoma law. To the contrary, this Court has elsewhere held—citing U.S. Supreme Court precedent—that "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 constitutions are similarly or identically phrased." *Fair Sch. Fin. Council of Oklahoma, Inc. v. State*, 1987 OK 114, ¶ 53 n.46 (citing *Cooper v. State of California*, 386 U.S. 58, 62 (1967), and *Oregon v. Hass*, 420 U.S. 714, 719 (1975)). Even the 2019 *Cline* decision held only that this Court is bound to "comply with federal constitutional law on issues of federal law." *Id.* ¶ 17. But when Plaintiffs make an intentional decision—like they have here—to bring only state law claims, <u>there are no issues of federal law present</u>, something a federal district court expressly found in the other abortion case pending before this Court when it denied removal. *See* Defs' Resp., *Tulsa Women's Reproductive Clinic v. O'Connor*, No. 118,292, at 8-9 (Dec. 10, 2019) (citing *NOVA Health Systems v. Pruitt*, No. 5:15-cv-1209, Doc. 11 (W.D. Okla. Jan. 12, 2016)). Plaintiffs have made an intentional and strategic choice and should be held to that choice.

Thus, here, since they have no likelihood of success in showing that the Oklahoma Constitution's due process clause protects a right to abortion, their motion should be denied. Plaintiffs claim that their patients face great harm from these laws, but they haven't done what would seem obvious if that harm were actually true—file federal claims, pursuant to the federal Constitution. Under the State Constitution alone, mere rational basis review would apply. 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. *Gladstone v. Bartlesville Indep. Sch. Dist. No. 30 (I-30)*, 2003 OK 30, ¶ 12. Because that undoubtedly true here in regard to all three laws, this Court should deny Plaintiffs' motion for a temporary injunction.

II. The challenged laws are likely to be upheld even if federal jurisprudence is applied because Plaintiffs have not demonstrated a substantial obstacle.

If this Court applies current federal jurisprudence, the three challenged laws should be upheld because Plaintiffs have not demonstrated a likelihood of success on the merits.

a. Chief Justice Roberts' *June Medical* opinion controls the analysis.

In their emergency motion, 10-11 & n.8, Plaintiffs do not really dispute that the controlling explanation of federal abortion jurisprudence is now found in Chief Justice Roberts's concurring opinion in *June Medical Services v. Russo*, 140 S. Ct. 2103 (2020).[2] Under this opinion, the Chief Justice made clear that federal law neither requires nor permits application of a "grand balancing test" for abortion regulations, whereby abortion laws are upheld only if their benefits outweigh the burdens. *Id.* at 2135-36. To the contrary, "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.

[2] *See Whole Woman's Health v. Paxton,* 10 F.4th 430, 446 (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). *But see Planned Parenthood of Ind. & Ky. v. Box*, 991 F.3d 740 (7th Cir. 2021).

Id. at 2136 (quoting *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007)). The role for the courts under *Casey*, the Chief held, is solely to determine whether the laws puts in place a "substantial obstacle" to abortion in a "large fraction" of relevant cases. *Id.* at 2135-38; *Casey*, 505 U.S. at 877, 895 (containing "large fraction" language).[3] If a law poses no substantial obstacle, it is constitutional regardless of the magnitude of benefits it provides, so long as it has a rational basis. *Id.* at 2138.[4]

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 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 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' reliance on *Cline*, after the Supreme Court has spoken otherwise in *June Medical*, is tenuous at best. Moreover, Plaintiffs spend a significant amount of their brief attacking Defendants' experts and evidence, even though the controlling test, as stated in *June Medical*, is almost wholly concerned with whether they have demonstrated a substantial obstacle or not, and not with the benefits of the laws.

Like *June Medical* and *Gonzales*, this Court has long held that Oklahoma "has wide latitude in regulating abortion" and the mere "fact that a regulation increases the cost or decreases the availability of an abortion is insufficient to invalidate the regulation." *Davis v. Fieker*, 1997 OK 156,

[3] *See also id.* at *63 (Kavanaugh, J., dissenting) ("Today, five Members of the Court reject the *Whole Woman's Health* cost-benefit standard.").

[4] Notably, at one point Plaintiffs claim that "[e]ven small increases in obstacles have dramatic effects on the ability to access care." Emerg. Mot. at 5. Such a holding would eviscerate the substantial obstacle test, obviously, as it would essentially make any obstacle a substantial obstacle.

¶¶ 30, 34 (citing *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)). Justices have also emphasized that "speculation" will not suffice to strike down an abortion regulation. *Id.* (Kauger, J., joined by Opala, J., concurring).

b. The OBGYN requirement would likely be upheld under federal case law.

HB 1904 simply requires abortionists to be board-certified OBGYNs. It is undisputed that OBGYNs as a whole perform the most abortions in the U.S. and Oklahoma,[5] they have the most specialized skills and training applicable to abortion, 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. *See* Defs' Br. at 2-4 (Sept. 24, 2021) (collecting evidence). Thus, saying there "is no medical basis" for this law, Emerg. Mot. at 7, is a bit akin to saying there is no medical basis for restricting heart surgery to heart surgeons. It is a completely rational regulation. *Cf. Currier*, 320 F. Supp. 3d at 837 ("The Court therefore rejects the opinions of Plaintiffs' experts who testified that the ob-gyn requirement provides no benefit to Mississippi women seeking abortions.").

That said, Plaintiffs have claimed that "directly applicable precedent" precludes the OBGYN law (HB 1904). Emerg. Mot. at 1. Nearly the opposite is true. As explained below, Defs' Resp. at 2-4 (Sept. 24, 2021), a federal district court upheld a Mississippi OBGYN law in a thorough, well-reasoned opinion, *Currier*, 320 F. Supp. 3d 828, and the Eighth Circuit just this year vacated a lower court injunction of an OBGYN law in Arkansas, *Little Rock Fam. Plan. Servs. v. Rutledge*, 984 F.3d 682, 690-92 (8th Cir. 2021). Thus, in each state where one has been enacted, an

[5] 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.

OBGYN law is currently 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 duly-enacted law. Moreover, the U.S. Supreme Court has emphatically and for decades approved of state laws limiting abortions to physicians, emphasizing 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." *Mazurek v. Armstrong*, 520 U.S. 968, 973-75 (1997) (emphasis added). If States can limit abortion to physicians, then surely they can limit abortion to the most qualified group of physicians, "even if an objective assessment might suggest that those same tasks could be performed by others." *Id.*[6] At the very least, based on this case law, Plaintiffs are unlikely to succeed on this point.

This is also evident in Plaintiffs' failure to show that the OBGYN requirement will likely impose a "substantial obstacle" for a large fraction of Oklahoma women. *See* Defs' Resp. at 13-16. To begin, unlike other laws that have been invalidated, no clinics will close in Oklahoma if the law goes into effect. *See June Medical*, 140 S. Ct. at 2140 (Roberts, C.J.) (noting that, in *Hellerstedt*, 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"). Oklahoma will still have five licensed clinics,[7] which is more than much of the last decade. Plaintiffs do claim that existing clinics will lose roughly half of their physicians. Emerg. Mot. at 7. But merely counting the heads of doctors tells us little about how many abortions each doctor performs, especially when some are part-time. *See Currier*, 320 F. Supp. 3d at 839 ("[T]the question is whether the law creates a

[6] Thus, Plaintiffs' insistence that abortion is "well within the broad scope of practice of family medicine physicians" is irrelevant even if true, Emerg. Mot. at 8, much as it would be irrelevant to claim that abortion is within the scope of practice of nurses to attack a "physicians-only" law.

[7] Plaintiffs continue to insist that there are only four clinics in the State, without explanation, despite there being five clinics currently licensed.

burden on women seeking abortions, not the doctors or clinics providing them."). On that critical issue, Plaintiffs give no specifics. The last three years' numbers actually suggest that somewhere between 65 and 73 percent of Oklahoma abortions are currently performed by OBGYNs. *See supra* n.5. 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. *See Currier*, 320 F. Supp. 3d at 839 ("the Court is not convinced that [the clinic] cannot hire board-certified or board-[]eligible ob-gyns"); *Rutledge*, 984 F.3d at 690 (vacating an injunction because clinic admitted on appeal it had "hired a board-certified OBGYN").

Plaintiffs claim providers are hard to come by in Oklahoma. But Plaintiffs attribute this to ambiguous and unquantifiable non-State actions like "stigma," and to an "extremely restrictive legislative environment." Emerg. Mot. at 5. In other words, Plaintiffs blame this shortage in part on physicians having trouble with the morality of abortion or not wanting to comply with existing Oklahoma laws that are not even challenged here. A physician's aversion to obeying existing state laws cannot possibly be used as a cudgel to strike down newly enacted laws. Critically, Plaintiffs do not detail in their emergency brief what actual efforts, if any, they have made or could make to secure more board-certified OBGYNs. One of Plaintiffs' witnesses admitted in a reply affidavit below, however, that even in the month since this lawsuit was filed Planned Parenthood has hired ***three*** new OBGYNs to work in Oklahoma. Pls' Reply, Ex. B, at ¶ 4 (Sept. 29, 2021).

Despite all of this, Plaintiffs assert that "many Oklahomans" will be "entirely prevented from obtaining care in the state." Emerg. Mot. at 7. Not only is this unsubstantiated, but it is a claim ("many Oklahomans") Plaintiffs did not make below. Below, Plaintiffs merely said "many

providers" would be excluded, Pls' Br. at 1 (Sept. 2, 2021) (emphasis added), and that Oklahoma's Fetal Heartbeat Bill (enjoined by the court) would "prevent many people from being able to obtain abortion in Oklahoma," Pl's Br. at 8. 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." *Id.* at 9 (emphasis added). "Some" is not the same as "many." Plaintiffs have ratcheted up their rhetoric on appeal, but the actual 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 simply not enough to prevent a law from taking effect. Plaintiffs are not entitled to have courts relieve them of the challenge of complying with valid laws. *See* Defs' Resp. at 13-16. If Plaintiffs truly believe the OBGYN regulation will "dramatically constrict abortion access in Oklahoma overnight," Emerg. Mot. at 7, then perhaps they should have spent more time over the past five months preparing for this known scenario by searching for doctors rather than pursuing a legal challenge against a law that has survived legal challenges in every other state where it has been enacted.

c. The medication abortion law would likely be upheld under federal case law.

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. *See* Defs' Resp. at 4-6. Plaintiffs barely even try to articulate or quantify how these two laws create a substantial obstacle to abortion. *See* Emerg. Mot. at 11-12. Instead, they haphazardly alternate between claiming that precedent precludes aspects of the laws and attacking any insinuation that abortion may not be the safest medical procedure on earth. Both of these lines of argument are misleading.

Plaintiffs' reliance on precedent is wildly 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. *OCRJ v. Cline,* 2012 OK 102.[8] SB 778 and 779 do nothing of the sort. And, even aside from utilizing a now-defunct legal standard, the 2019 *Cline* decision enjoined an Oklahoma law that would have prevented physicians from using the 2016 FDA regimen for medication abortion. *Cline,* 2019 OK 33, ¶¶ 42-43. Here, it's the reverse: one of Plaintiffs' complaints is that SB 778 and 779 follow *too closely* to the current FDA regimen because the laws don't approve of medication abortions after 10 weeks LMP. *See* Defs' Resp. at 17. And Plaintiffs attack Dr. Harrison, even though a substantial portion of her testimony simply quotes FDA warnings and restrictions concerning medication abortion that Plaintiffs neglect to mention. *Compare* Emerg. Mot. at 3 (claiming that medication abortion is as safe as Advil and Tylenol), *with* Defs' Resp. at 4-6 (FDA: medication abortion is one of "only a few medications" with "serious [enough] safety concerns" to require a Risk Evaluation and Mitigation Strategy (REMS)).

Plaintiffs then insinuate that anything dictating the "usage" of medication abortion, the "timing" of care, and the number of "doctor's office visits" is automatically unconstitutional. Emerg. Mot. at 12. In a similar vein, Plaintiffs claim that the State may not "prevent patients from accessing medication abortion." Emerg. Mot. at 11. 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 "usage" 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. *See Mazurek*, 520 U.S. 968.

Plaintiffs also claim that the ultrasound requirement in SB 778 and admitting privileges requirement in SB 779 "in some ways *exceed* the burdens imposed by laws this Court has already

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[8] *See also Cline v. OCRJ*, 2013 OK 93 (explaining that the "plain language" of HB 1970 prohibited the "use of misoprostol in conjunction with mifepristone" laid out in the FDA protocol).

held to be unconstitutional." Emerg. Mot. at 12. This is not an accurate portrayal of either requirement. As Defendants pointed out in more detail below, Defs' Resp. at 18-19, both the ultrasound and the admitting privileges requirements are ***narrower*** than the requirements that have been struck down, and similar to requirements that have been upheld. The new admitting privileges requirement, for example, 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." Neither *Hellerstedt, June Medical,* nor this Court's 2016 decision in *Cline* enjoined an admitting privileges law with that alternative. *See, e.g., Cline*, 2016 OK 121, ¶ 24. To the contrary: *Hellerstedt* and *June Medical* both expressly 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. *See June Medical,* 140 S. Ct. at 2139 (Roberts, C.J.). And this Court in *Cline* expressly noted that the plaintiff "maintains an agreement with a physician who has such an affiliation." *Cline*, 2016 OK 121, ¶ 15. In other words, the Legislature adopted the modest, broader approach that preceded *Hellerstedt* and *June Medical* and that past litigation in this Court showed could be complied with.

The ultrasound requirement deserves a quick mention as well, to point out that Plaintiffs have admitted that they already perform ultrasounds prior to abortions. *See* Defs' Resp. at 18-19. Thus, their complaint is solely about having to perform ultrasounds 72 hours in advance, claiming this forces patients "to make an additional, medically unnecessary trip to a provider ... a requirement far more burdensome than the ultrasound provision invalidated in [2012]." Emerg. Mot. at 12. But the "fact that a regulation increases the cost or decreases the availability of an abortion is insufficient to invalidate the regulation." *Davis*, 1997 OK 15, ¶ 30 (citing *Casey*, 505 U.S. at 874). Moreover, in *Casey* itself the U.S. Supreme Court upheld a waiting period despite the

requirement of "at least two visits to the doctor." *Casey*, 505 U.S. at 885-86. Plaintiffs claim that these laws conflict with precedent, but it is their own arguments that precedent forecloses.

Plaintiffs also repeatedly claim that because of the new reporting requirements patient 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)). In addition, Plaintiffs ignore SB 778 and 779's robust severability clauses. *See* SB 778 § 14; SB 779 § 16. These mean that if this Court eventually finds a provision unconstitutional, it should sever that provision, not enjoin the entire law.

Shifting from the law to the evidence, Plaintiffs' repeated arguments concerning the safety of abortion aren't particularly significant here, even if Defendants' counter-evidence is ignored. This Court, after *June Medical*, is supposed to focus on substantial obstacles, not on benefits, and Plaintiffs have barely tried to articulate the substantial obstacle found in SB 778 and SB 779. That said, Plaintiffs' continued attacks on Dr. Harrison are worth mentioning, if only because of how lacking in candor they are. In their reply below, Plaintiffs cited three cases to claim that Dr. Harrison has been "repeatedly rejected as non-credible." Pl's Reply at 9 n.4 (Sept. 29, 2021). Yet Plaintiffs omitted critical information on each of those decisions. The first, mentioned above, was an Indiana federal district court decision that Plaintiffs failed to note has been stayed by the Seventh Circuit on appeal because "Indiana is likely to prevail on the contested issues." *Rokita*, 13 F.4th at 598. The second was a federal district court's TRO in Arkansas, *Planned Parenthood Arkansas & E. Okla. v. Jegley*, 2018 WL 3029104 (E.D. Ark. June 18, 2018), which (Plaintiffs did not mention) became a preliminary injunction that was vacated by the Eighth Circuit.[9] The third

[9] *See Planned Parenthood Arkansas & E. Oklahoma v. Jegley*, 2018 WL 3816925, at *1 (E.D. Ark. July

was a North Dakota Supreme Court decision where Plaintiffs failed to note that the opinion they were quoting was that of a justice—not the *per curiam* court—who disagreed with the outcome. *MKB Mgmt. Corp. v. Burdick*, 2014 ND 197, ¶¶ 62, 107 (Kapsner, J.).[10] In other words, none of the decisions Plaintiffs cited are currently valid or controlling in any court, much less this one, and all of the laws Dr. Harrison supported are apparently in effect.[11]

Two final points should be made here. First, Plaintiffs argue that non-compliance with the new laws "will impose tremendous harm on patients" because it will result in an immediate inability to provide medication abortion. Emerg. Mot. at 9. But that is just saying their patients will be harmed if they choose not to follow the law. That cannot possibly be a reason itself to hold the law unconstitutional, unless they can somehow show that compliance is impossible (which they have not done). Second, Plaintiffs claim that because of the well-publicized situation in Texas regarding that state's unique abortion law, Oklahoma laws will have a "catastrophic effect on Oklahomans." Emerg. Mot. at 6-7 n.3. This make no sense—how does what Texas is doing have any bearing on whether Oklahoma laws are constitutional? It doesn't.

III. The medication abortion regulations are not single-subject violations.

Plaintiffs admit that the two foundational purposes of the single subject rule are to make sure legislators are "adequately notified" and to "prevent logrolling." Emeg. Mot. at 13. Plaintiffs then proceed to make zero arguments that legislators here were inadequately notified or logrolled

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2, 2018), *vacated*, 2018 WL 9944527 (E.D. Ark. Nov. 9, 2018), *and appeal dismissed sub nom. Planned Parenthood of Arkansas & E. Oklahoma v. Jegley*, 2018 WL 9944528 (8th Cir. Nov. 9, 2018).

[10] Justice Kapsner was joined solely by a "surrogate judge" sitting by designation.

[11] To be sure, this Court in the 2019 *Cline* decision did not, for the most part, agree with Dr. Harrison's opinions. But neither did this Court purport to "discredit" her. Rather, it simply noted where it disagreed based on other evidence. On the flip side, in a similar case as *Cline*, Dr. Harrison was cited favorably by the Fifth Circuit. *See Planned Parenthood of Greater Texas v. Abbott*, 748 F.3d 583, 602 (5th Cir. 2014).

by SB 778 and 779. They made none below, either. That is, Plaintiffs argue that the Legislature—in a session where it separated abortion regulations into nine different bills on a bipartisan basis—still somehow violated Oklahoma's single subject rule. As a legal matter, the claim that SB 778 and SB 779 are single subject violations is dubious; as a factual matter, it is implausible. *See Fent v. State ex rel. Okla. Capitol Improvement Auth.*, 2009 OK 15, ¶ 16 (provisions of a single bill need only be "germane, relative, and cognate to a readily apparent common theme and purpose").

These arguments were well-covered in Defendants' brief below. *See* Defs' Br. at 20-24. Defendants add a couple of additional thoughts here. For starters, Plaintiffs still do not directly oppose Defendants' point that medication abortion is obviously a single subject that can be legislated on, even if abortion more generally is not. *See* Defs' Resp. at 22. Rather than contest this point, Plaintiffs simply state that "[a]dding the word 'medication' does not change the outcome." Emerg. Mot. at 13. But that is a deflection, and a caricature of Defendants' position, which is certainly *not* that the Legislature just sprinkled the word "medication" throughout the bills. Moreover, even when Plaintiffs attempt to show that there are supposedly "unrelated provisions," their examples still plainly involve medication abortion. *See, e.g.,* Emerg. Mot. at 8 ("S.B. 779 similarly includes myriad unrelated provisions ... [f]or example, it includes: a limitation on providing <u>medication</u> abortion beyond 70 days." (emphasis added)) And on the very first page of their motion, Plaintiffs openly admit that SB 778 and 779's restrictions can all be "*applied* to circumstances involving medication abortion." Emerg. Mot. at 1. With that admitted, there really isn't an argument to be made that this is a single-subject violation.

Nevertheless, soldiering on, 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 subsections." Emerg. Mot. at 12. But a single-subject violation cannot just be found by counting provisions in a bill. One must actually show that the provisions are unrelated or that

logrolling occurred. That has not been done here.

Finally, like below, Plaintiffs contend that the bills are single subject violations simply because they "delegate authority to multiple agencies." Mot. at 18. This is incorrect. To be sure, one of the *Cline* decisions 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 dicta, 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 to be taken into account. The laws in *Oklahoma Capitol* and *Cline*, in other words, were not invalid just because of multiple delegations, but because the delegations were for unrelated purposes, which isn't the case here. In any event, Plaintiffs' overbroad reading of *Cline* would threaten numerous valid statues. Virtually all criminal laws, after all, implicitly or explicitly delegate authority to a number of agencies—police, courts, district attorneys, jails, prisons, etc.

IV. These laws should not be enjoined because of an alleged improper purpose.

Defendants addressed this argument succinctly below, and little needs to be added. Defs' Resp. at 24-25. Even assuming Plaintiffs are quoting legislators accurately, the challenged laws are *not* "so at odds with controlling precedent" to evince an improper purpose. And, as the U.S. Supreme Court has held, "[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." *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.").

V. The equitable factors counsel in favor of Defendants, as well.

For reasons stated below, the equitable factors also counsel in Defendants' favor. Defs' Br. at 25. One point, though: Plaintiffs claim that the "State does not dispute, that abortion access in Oklahoma will be significantly reduced overnight by the Challenged Laws." Emerg. Mot. at 15. Defendants do dispute this; or, at least, Defendants do not believe Plaintiffs have firmly demonstrated that any such reduction will occur. *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, as well as those offered in the brief below, 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. A temporary stay therefore is not warranted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 20th day of October 2021, a true and correct copy of the above RESPONSE was transmitted, postage prepaid to the following:

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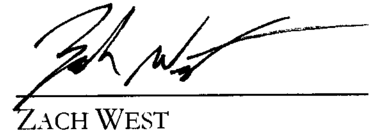

ZACH WEST