EMERGENCY
CHALLENGED STATUTES TO BE ENFORCED ON NOVEMBER 1, 2021

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

OKLAHOMA CALL FOR REPRODUCTIVE JUSTICE, on behalf of itself and its members; TULSA WOMEN'S REPRODUCTIVE CLINIC, LLC, on behalf of itself, its physicians, its staff, and its patients; ALAN BRAID, M.D., on behalf of himself and his patients; COMPREHENSIVE HEALTH OF PLANNED PARENTHOOD GREAT PLAINS, INC., on behalf of itself, its physicians, its staff, and its patients; and PLANNED PARENTHOOD OF ARKANSAS & EASTERN OKLAHOMA, on behalf of itself, its physicians, its staff, and its patients,

Plaintiffs/Appellants,

v.

JOHN O'CONNOR, in his official capacity as Attorney General for the State of Oklahoma; DAVID PRATER, in his official capacity as District Attorney for Oklahoma County; STEVE KUNZWEILER, in his official capacity as District Attorney for Tulsa County; LYLE KELSEY, in his official capacity as Executive Director of the Oklahoma State Board of Medical Licensure and Supervision; KATIE TEMPLETON, in her official capacity as President of the Oklahoma State Board of Osteopathic Examiners; LANCE FRYE, in his official capacity as the Commissioner of the Oklahoma State Board of Health; and JUSTIN WILSON, in his official capacity as the President of the Oklahoma State Board of Pharmacy; as well as their employees, agents, and successors,

Defendants/Appellees.

Case No. #119918

PLAINTIFFS-APPELLANTS' EMERGENCY MOTION FOR A TEMPORARY INJUNCTION PENDING APPEAL TO PRESERVE THE STATUS QUO

I. INTRODUCTION

Pursuant to 12 Okla. Stat. § 990.4(C), Plaintiffs-Appellants Oklahoma Call for Reproductive Justice, Tulsa Women's Reproductive Clinic, LLC, Alan Braid, M.D., Comprehensive Health of Planned Parenthood Great Plains, Inc., and Planned Parenthood of Arkansas & Eastern Oklahoma seek an emergency temporary injunction barring enforcement of H.B. 1904, S.B. 778, and S.B. 779, enacted by the Oklahoma Legislature in 2021 (collectively, the "Challenged Laws," attached as Exhibits C-E to the Verified Petition). If allowed to take effect on November 1, the Challenged Laws will decimate abortion access in Oklahoma. Oklahomans will face tremendous delays and costs in accessing abortion, and many will be entirely prevented from obtaining care in the state. Many patients will also be unable to access medication abortion, which is preferred by many and medically safer for some.

The Challenged Laws unconstitutionally violate the Due Process Clause of the Oklahoma Constitution, Article II, § 7, under directly applicable precedent of this Court and the U.S. Supreme Court. H.B. 1904 (the "OB/GYN Requirement") will drastically reduce abortion access by arbitrarily prohibiting highly trained, board-certified family medicine doctors from providing abortions. S.B.778 and S.B. 779 (together, the "Medication Abortion Restrictions") set forth labyrinthine schemes of disparate restrictions that—aside from being *applied* to circumstances involving medication abortion—have nothing in common other than restricting abortion access. The schemes include elements that have already been struck down by this Court and, in some cases, the U.S. Supreme Court.[1] The Medication Abortion

[1] *Okla. Coal. for Reprod. Just. v. Cline* ("*Cline IV*"), 2019 OK 33, ¶ 43, 441 P.3d 1145, 1160-61 (permanently enjoining law mandating outdated protocol for providing medication abortion); *Burns v. Cline* ("*Cline III*"), 2016 OK 121, ¶ 19, 387 P.3d 348, 354 (permanently enjoining bill including an admitting-privileges requirement); *Cline v. Okla. Coal. for Reprod. Justice* ("*Cline I*"), 2012 OK 102, ¶ 3, 292 P.3d 27, 27-28 (permanently enjoining law restricting access to medication abortion); *Nova*

Restrictions also violate the Oklahoma Constitution's single subject rule, Art. V, § 57, under the precedent of this Court.

Defendants-Appellees (the "State") have provided *no evidence* to contest the harms of these laws as described in the affidavits of Plaintiffs-Appellants and their experts. Rather, the State simply rehashes previously made allegations that abortion is unsafe and must be restricted to serve an interest in health and safety. But this Court has already rejected the junk science the State relies on, given the immense evidence that abortion is safe. The State's intent is clear—to limit and prohibit abortion access in any conceivable way. These laws should be temporarily enjoined to preserve the status quo and protect the rights of Oklahomans.

II. Background

A. Procedural History

On September 2, 2021, Plaintiffs-Appellants filed this case in the District Court, challenging five laws, all scheduled to take effect November 1, along with a motion for temporary injunctive relief. The State filed an opposition on September 24, and Plaintiffs-Appellants filed a reply on September 29. The District Court held a hearing on Plaintiffs' motion on October 4. From the bench, the District Court granted the motion in part—enjoining the two abortion bans but declining to enjoin the OB/GYN Requirement and the Medication Abortion Restrictions.

B. Abortion Is Safe and Common

Abortion is one of the safest forms of medical care in the United States. Affidavit of

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Health Sys. v. Pruitt, 2012 OK 103, 292 P.3d 28 (permanently enjoining mandatory ultrasound law); *see also June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2133 (2020) (plurality); *id.* at 2139-41 (Roberts, C.J., concurring) (striking down admitting privileges requirement); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2310-18 (2016) (striking down admitting privileges requirement and ambulatory surgical center requirement).

Ushma Upadhyay, M.P.H, Ph.D. ("Upadhyay Aff.")[2] ¶¶ 19-26. Serious complications occur in fewer than one percent of abortions. *Id.* ¶ 20. One in four American women will obtain an abortion in their lifetime. *Id.* ¶ 36. This Court has recognized the "widespread consensus" that medication abortion is one of the safest medication regimens in medicine today. *Cline IV,* 2019 OK 33, ¶¶ 34, 38, 441 P.3d at 1158-59; *see also* Upadhyay Aff. ¶¶ 19-26. This Court in *Cline IV* rejected the opinions of witnesses proffered by the State—opinions largely identical to those offered by the State here. 2019 OK 33, ¶¶ 28-38, 441 P.3d at 1155-59 & nn.32-34 (crediting the testimony of Appellants' experts, including about Dr. Upadhyay's research, over that of Dr. Donna Harrison, upon whose opinions the State has again sought to rely).

There are generally two methods of abortion—medication and procedural. Upadhyay Aff. ¶¶ 11-13. Medication abortion involves a regimen of two prescription oral medications, and is comparable in safety to common medications such as antibiotics, Advil, and Tylenol. *Id.* ¶¶ 12, 28. This regimen is overwhelmingly preferred by Oklahomans. Affidavit of Joshua Yap, M.D., M.P.H. ("Yap Aff.") ¶ 54; Affidavit of Alan Braid, M.D. ("Braid Aff.") ¶¶ 19-20. As evidence of medication abortion's safety has accumulated over time, the medical community and the FDA have moved away from previous restrictions on its provision, as this Court has recognized. Upadhyay Aff. ¶ 29; *see also Cline IV*, 2019 OK 33, ¶ 38, 441 P.3d at 1155 (noting the FDA now recommends lower dosages, longer availability, and removal of in-person follow-up requirements, reflecting evidence-based medical practice). Evidence of medication abortion's safety and efficacy continues to mount and now supports providing medication abortion for patients through 77 days LMP. Upadhyay Aff. ¶¶ 29-31; Yap Aff. ¶ 52. Procedural abortion is a straightforward procedure that involves gently dilating the cervix

[2] Plaintiffs-Appellants' Affidavits are attached to their Memorandum and Reply filed below.

and removing the uterine contents. Braid Aff. ¶ 17; Yap Aff. ¶ 51.

Both procedural and medication abortion are similar or identical to care provided to manage a patient's miscarriage—care that is regularly provided by non-OB/GYNs. Yap Aff. ¶ 45; Affidavit of Joey Banks, M.D. ("Banks Aff.") ¶¶ 23-24. A wide range of clinicians provide abortions in the United States, including family medicine doctors and some advanced practice clinicians. Banks Aff. ¶ 16; Upadhyay Aff. ¶¶ 14, 23-25.

C. Plaintiffs-Appellants

Oklahoma Call for Reproductive Justice ("OCRJ") is a 501(c)(4) nonprofit that advances reproductive justice and protects access to reproductive healthcare, including abortion, in Oklahoma. Affidavit of Priya Desai ("OCRJ Aff.") ¶ 1. Dr. Alan Braid is a board-certified OB/GYN who owns Tulsa Women's Reproductive Clinic ("Tulsa Women's") and provides abortion care there. Braid Aff. ¶ 1. Tulsa Women's, Comprehensive Health of Planned Parenthood Great Plains, Inc. ("CHPPGP"), and Planned Parenthood of Arkansas & Eastern Oklahoma ("PPAEO") (collectively, the "Provider Plaintiffs") are licensed Oklahoma abortion facilities that provide medication and procedural abortion. *Id.* ¶ 8; Yap Aff. ¶ 7.

Three of the physicians who typically provide abortion care at Tulsa Women's are board-certified family medicine doctors and three are board-certified OB/GYNs. Braid Aff. ¶ 12. PPAEO's Tulsa health center employs one physician to provide all its abortion care, who works full time and is board-certified in family medicine. Yap Aff. ¶ 2. CHPPGP's Oklahoma City health center currently contracts with six part-time physicians who each provide care only a few days per month—half are board-certified in family medicine, and half are board-certified OB/GYNs. Yap Aff. ¶¶ 19, 41, 82; Yap Rebuttal Aff. ¶ 5.

D. The Harms to Oklahomans from Barriers to Abortion Access

As this Court has recognized, Oklahomans already face a host of challenges in seeking abortion care. *Cline IV*, 2019 OK 33, ¶ 34, 441 P.3d at 1158; Yap Aff. ¶¶ 14-15, 60, 80; Braid Aff. ¶¶ 23, 35, 41; Upadhyay Aff. ¶¶ 38-39. Many patients must travel significant distances to access care. Yap Aff. ¶ 60; Upadhyay Aff. ¶ 39. "Traveling from rural areas might require a long journey or a two night stay away from home to access care, which increases costs for low-income patients, childcare, and time off from work." *Cline IV*, 2019 OK 33, ¶ 34, 441 P.3d at 1158; *see also* Yap Aff. ¶¶ 10, 14, 60; Braid Aff. ¶ 72; Upadhyay Aff. ¶ 39. Some patients must navigate threats to their safety due to intimate partner violence. Yap Aff. ¶ 80. These barriers disproportionately affect low-income people, who make up the majority of patients who seek abortions, Yap Aff. ¶ 10; Braid Aff. ¶¶ 23-24, 71; Upadhyay Aff. ¶¶ 37, 39, 44, as well as Black and Indigenous Oklahomans. Yap Aff. ¶¶ 11-13, 80; OCJR Aff. ¶ 6.

Additionally, there is a shortage of abortion providers in Oklahoma due to stigma, harassment, and the extremely restrictive legislative environment. The Provider Plaintiffs have struggled to hire physicians for years and have been forced to contract with physicians who travel into Oklahoma to provide abortions only a few days per month. Yap Aff. ¶¶ 22-28; Braid Aff. ¶¶ 52-56, 90, 96; Banks Aff. ¶¶ 27-29.

Even small increases in logistical obstacles have dramatic effects on the ability to access care. Upadhyay Aff. ¶¶ 38-39; Braid Aff. ¶¶ 70-76; Yap Aff. ¶ 16. The severe obstacles created by the Challenged Laws—restricting the pool of physicians, creating appointment backlogs, and forcing patients to travel to a health center twice—worsen existing barriers and will push abortion out of reach for many. Upadhyay Aff. ¶¶ 38-40; Braid Aff. ¶¶ 68, 70-76, 91, 98; Yap Aff. ¶¶ 15-16, 33, 63-65.

Abortion is a time-sensitive medical service that becomes more complex and expensive

as pregnancy advances. Upadhyay Aff. ¶¶ 38-40; Braid Aff. ¶¶ 39, 70-76, 91, 98; Yap Aff. ¶¶ 16, 64-65. Delays in access can exacerbate medical conditions and can cause some patients, including sexual assault survivors, tremendous stress. Upadhyay Aff. ¶ 41; Braid Aff. ¶ 40.

Delays can also prevent people from being able to access medication abortion entirely, "even when that is the best option for them due to fear of surgical instruments, anesthesia or sedation, being victims of sexual assault or having certain medical or anatomical conditions." *Cline IV*, 2019 OK 33, ¶ 34, 441 P.3d at 1158; Braid Aff. ¶¶ 65-66; Yap Aff. ¶ 53. As this Court has noted, many patients have a medication abortion "for privacy reasons" or "because it feels natural." *Cline IV*, 2019 OK 33, ¶ 31, 441 P.3d at 1156; Yap Aff. ¶ 53; Braid Aff. ¶¶ 19-20.

Ultimately, delays in accessing care can push some patients beyond the point where abortion is available in Oklahoma, forcing people to carry unwanted pregnancies to term. Braid Aff. ¶¶ 70 n.16, 74, 98; Yap Aff. ¶¶ 16, 63, 65. When the State forces a person to give birth, it intrudes on their bodily autonomy and ability to direct their own lives. OCRJ ¶ 20; Upadhyay Aff. ¶¶ 42-49. Denial of care also imposes substantial medical risk, as carrying to term is far riskier than abortion. Upadhyay Aff. ¶ 43. Braid Aff. ¶¶ 21-22; Banks Aff. ¶ 23. People denied access to abortion and their families experience worse psychological, physical, and financial outcomes than people able to access care. Upadhyay Aff. ¶¶ 42-49.

A. The Effects of the Challenged Laws[3]

1. The OB/GYN Requirement

In addition to banning abortion entirely, the Oklahoma Legislature seeks to prohibit

[3] Oklahoma has followed on the heels of Texas in attempting to radically ban and restrict abortion this year. Since Texas S.B. 8 went into effect, Texas patients have streamed into Oklahoma seeking care. Given this present reality, should the Challenged Laws go into effect, they will have a catastrophic

physicians from providing abortions unless they are board-certified in obstetrics and gynecology. H.B. 1904 § 1 (amending 63 O.S. § 1-731(A)). Providing an abortion in violation of the OB/GYN Requirement is a felony, punishable by one to three years in prison. *Id.* If permitted to take effect, the OB/GYN Requirement will dramatically constrict abortion access in Oklahoma overnight—of the four health centers in Oklahoma providing abortion care, one will have no eligible physicians and three others will lose half their physicians. Braid Aff. ¶ 49; Yap Rebuttal Aff. ¶¶ 4-5; Banks Rebuttal Aff. ¶¶ 5 & n.3; Yap Aff. ¶¶ 46, 48, 82.[4] This will impose tremendous delays and barriers to abortion access, as the remaining providers cannot possibly take on more than double their existing patient load. Further, the struggles Provider Plaintiffs face in hiring doctors will worsen should the pool of possible providers become limited to board-certified OB/GYNs. Braid Aff. ¶ 52; Yap Rebuttal Aff. ¶¶ 2-3. The OB/GYN Requirement will result in many Oklahomans being entirely unable to exercise their constitutional right to a pre-viability abortion.[5] *See supra* Part II(D).

There is no medical basis for the OB/GYN Requirement. Indeed, the American College of Obstetricians and Gynecologists has stated that such requirements are "medically unnecessary" and "designed to reduce access to abortion," as "clinicians in many medical

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effect on Oklahomans. *See United States v. Texas*, No. 1:21-CV-796-RP, 2021 WL 4593319, at *43-*46 (W.D. Tex. Oct. 6, 2021), *appeal filed*, No. 21-50949 (Oct. 7, 2021), *temporary administrative stay granted* (Oct. 8, 2021) (crediting evidence on how the "inundation of Texas patients overburdens abortion services in other states, many of which are already stretched to the breaking," having a "stunning" impact on "Oklahoma clinics," which will worsen should "laws recently enacted in Oklahoma . . . take effect, further burden[ing] the region's abortion care resources").

[4] The only other abortion provider in Oklahoma, Trust Women, will lose four of its eight physicians. Sabrina Tavernise, *With Abortion Largely Banned in Texas an Oklahoma Clinic is Inundated*, N.Y. Times (Sept. 26, 2021), https://www.nytimes.com/2021/09/26/us/oklahoma-abortion.html.

[5] A handful of states have enacted OB/GYN requirements, but none had record evidence demonstrating anywhere near the effect on abortion access that the OB/GYN Requirement will have in Oklahoma. *See Jackson Women's Health v. Currier*, 320 F. Supp. 3d 828, 838 (S.D. Miss. 2018); *Little Rock Fam. Plan. Servs. v. Rutledge*, 984 F.3d 682, 690 (8th Cir. 2021).

specialties can provide safe abortion services." Banks Aff. ¶ 18; *see also* Yap Aff. ¶¶ 42-45. Training and experience, not specialty, determine competency to provide abortion care. Banks Aff. ¶¶ 14-20; *see also* Yap Aff. ¶¶ 39-40. Abortion is well within the broad scope of practice of family medicine physicians, who frequently provide care far more complex than abortion and routinely prescribe far riskier medications, such as opiates. Banks Aff. ¶¶ 23-24. Family medicine physicians have provided safe and high-quality abortion care in Oklahoma for years. Braid Aff. ¶ 45; Banks Aff. ¶ 6. Moreover, family medicine physicians can and do provide miscarriage care, which generally involves medications and procedures that are similar or identical to the ones used for abortion care. Banks Aff. ¶¶ 23-24; Yap Aff. ¶ 45.

2. S.B. 778 & S.B. 779 ("Medication Abortion Restrictions")

S.B. 778 includes myriad unrelated provisions that have nothing in common other than restricting abortion access. For example, S.B. 778 includes: a requirement that patients have an ultrasound at least 72 hours before a medication abortion, forcing patients to make an additional, medically unnecessary visit to a provider (even though a less burdensome ultrasound requirement was already held unconstitutional by this Court, *see infra* Part IV(A)(1)), S.B. 778 §§ 6(A)-(C), (E)(1), 8(A), (B)(6); *see* Upadhyay Aff. ¶ 33; a mandate that providers file reports designated as "public records," which must include identifying demographic information about patients, abortion providers, and referring physicians and agencies, S.B. 778 §§ 8(B), (H); an interstate bar on mailing medication abortion, *id.* § 3; and a bar on providing medication abortion on school, university, or state grounds, *id.* § 5.

S.B. 779 similarly includes myriad unrelated provisions, applying to different entities and involving different sanctions. For example, it includes: a limitation on providing medication abortion beyond 70 days or 10 weeks LMP, *id.* § 7(10)(b); Yap Aff. ¶¶ 55, 64; a requirement that doctors have hospital admitting privileges or contract with a physician with

admitting privileges whose information must be publicized to all local hospitals annually (even though similar requirements have been held unconstitutional by this Court and the United States Supreme Court, *see infra* Part IV(A)(1)), S.B. 779 §§ 7(11), 8, which threatens to shut down the provision of medication abortion at the Provider Plaintiffs' clinics, Yap Decl ¶ 76; Braid Aff. ¶¶ 88-91; a licensing requirement for manufacturers and distributors, which may chill them from supplying providers, S.B. 779 §§ 5(A)-(B), 6(2); record keeping and reporting obligations, requiring publication of provider, staff, and patient information, *id.* §§ 9(A)(7), 13(D); an enforcement scheme with heavy fines, *id.* § 12; and a system for making and receiving complaints, *id.* § 13. S.B. 779 also delegates authority to four different state agencies: two physician licensing boards; the pharmacy board, which must promulgate rules to certify physicians who provide abortion-inducing drugs and manufacturers and distributors of abortion-inducing drugs, *id.* §§ 4(A), 5(A), (C); and the board of health, *id.* § 8(2)(d).

Noncompliance with just one provision of S.B. 778 or 779 results in an immediate inability to provide medication abortion, *e.g.*, *id.* § 12(A)(2), which will impose tremendous harm on patients, *see supra* Parts II(A), (D), (E)(4). Compliance, on the other hand, will subject patients to medically unjustified requirements that substantially reduce the availability of medication abortion and threaten the security and confidentiality of providers, referring providers, and patients.[6] *See supra* Part II(D).

III. LEGAL STANDARD

Oklahoma law provides that this Court can "grant an injunction during the pendency

[6] S.B. 778 and 779 also include provisions relating to the unsupported theory of medication abortion "reversal." On October 4, based on the agreement of the parties in a separate case, these provisions were added to an existing injunction preventing enforcement of these requirements. Agreed Order, *Tulsa Women's Reprod. Clinic v. Hunter*, No. CV-2019-2176 (Okla. Dist. Ct. Oct. 4, 2021).

of the appeal . . . as it considers proper for the security of the rights of the parties." 12 Okla. Stat. § 990.4(C). When considering a motion for a temporary injunction, this Court considers: (a) the likelihood of success on appeal; (b) the threat of irreparable harm if relief is not granted; (c) the potential harm to the opposing party; and (d) any risk of harm to the public interest. Okla. Sup. Ct. R. 1.15(c)(2); *Dowell v. Pletcher*, 2013 OK 50, ¶ 7, 304 P.3d 457, 460.

"The purpose of a temporary injunction is to preserve the status quo and prevent . . . the doing of an act whereby the rights of the moving party may be materially invaded, injured or endangered." *Okla. Pub. Emps. Ass'n v. Okla. Mil. Dep't*, 2014 OK 48, ¶ 15, 330 P.3d 497, 504. This Court can "consider all evidence on appeal." *Edwards v. Bd. of Cty. Comm'rs of Canadian Cty.*, 2015 OK 58, ¶ 11, 378 P.3d 54, 58-59 (citations omitted).

IV. LEGAL ARGUMENT

A. Plaintiffs-Appellants Are Likely to Succeed on the Merits.

1. The Challenged Laws Likely Violate the Right to Abortion.

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. *Cline IV*, 2019 OK 33, ¶¶ 16, 25, 43, 441 P.3d at 1151, 1153-54, 1160-61 (citations omitted); *Cline III*, 2016 OK 121, ¶ 8, 387 P.3d at 351-52. At a minimum, Oklahoma Courts apply the undue burden standard used by federal courts to determine the constitutionality of a state law that interferes with the right to abortion.[7] *Id.* Under that test, the State may not enact laws that have the "purpose or effect" of placing a

[7] In this motion, Plaintiffs-Appellants focus on the federal standard. But, Plaintiffs-Appellants expressly reserve and do not waive their argument that the Oklahoma Constitution has independent protections for individual liberty, privacy, and health, encompassing the right to abortion. *See* Appellants' Brief, *Tulsa Women's Reprod. Clinic v. Hunter*, No. 118,292, at 16-17 (Okla. Sup. Ct. Nov. 25, 2019).

"substantial obstacle" in the path of patients seeking an abortion.[8] *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992).

The OB/GYN Requirement: It is well settled that the State may not enact provider qualifications that have "*no effect* on the quality of care the patient receives," but would, as here, "cause[] a significant reduction in abortion providers, creating an onerous burden to women of child-bearing age." *Cline III*, 2016 OK 121, ¶¶ 13, 19, 387 P.3d at 353-54; *see also June Med. Servs.*, 140 S. Ct. at 2132 (plurality); *id.* at 2134 (Roberts, C.J., concurring); *Whole Woman's Health*, 136 S. Ct. at 2300, 2310-18. The OB/GYN Requirement imposes an undue burden for the same reasons as the admitting privileges requirements invalidated in *Cline III*, *Whole Woman's Health*, and *June Medical Services*. *See supra* Parts II(D), (E)(3).

The Medication Abortion Restrictions: It also is well-established in Oklahoma that the State may not impose medically irrelevant restrictions on medication abortion or prevent patients from accessing medication abortion. In 2012, this Court struck down H.B. 1970, which barred off-label uses of medication abortion and effectively prevented patients from receiving

[8] The only evidence supplied by the State in the District Court purported to show that the Challenged Laws improve patient safety. The State has not provided *any evidence* to contest that the purpose and effect of the Challenged Laws is to impose a substantial obstacle. But, under Defendants' preferred articulation of the undue burden standard, *see* Defs.' TI Resp. at 12-13 (citing Chief Justice Roberts' concurring opinion in *June Medical Services*), the Challenged Laws are unconstitutional if they impose a substantial obstacle, regardless of the State's asserted interest. In any event, the evidence that the State introduced as to its purported interest in safety is a sham given the robust medical consensus that abortion by medication or procedure is extremely safe. As this Court and other courts have done, the Court should reject the opinions of the State's witness, Dr. Harrison—as well as Dr. Skop's largely overlapping opinions. *See, e.g.*, *Cline IV*, 2019 OK 33, ¶ 29, 441 P.3d at 1155-56; *Whole Woman's Health All. v. Rokita*, No. 118CV01904SEBMJD, 2021 WL 3508211, at *7 (S.D. Ind. Aug. 10, 2021) (concluding as to Dr. Harrison's opinion that the seminal research on abortion safety is unreliable that "[i]t remains unclear, however, on what basis Dr. Harrison reached this conclusion; Dr. Harrison did not cite any personal experiences or research that supported it, nor did she direct the Court to medical literature supporting that view"); Upadhyay Rebuttal Aff. ¶¶ 13-14. The State offers no credible evidence that the OB/GYN Requirement or the dizzying array of provisions in the Medication Abortion Restrictions actually further an interest in safety. For a fulsome discussion of the State's witnesses and citations to additional cases rejecting the State's evidence, *see* Plaintiffs-Appellants' Reply at 8-10.

it. *Cline I*, 2012 OK 102, ¶ 3, 292 P.3d at 27-28.[9] In 2019, this Court struck down H.B. 2684, which prohibited providers from using a safer and more effective evidence-based protocol for medication abortion. *Cline IV*, 2019 OK 33, ¶ 9, 441 P.3d at 1150.

Since 2019, it has only become clearer that medication abortion is exceedingly safe and that restrictions like H.B. 1970 and H.B. 2284 have no medical basis. *See supra* Part II(A). Yet, the Medication Abortion Restrictions in some ways *exceed* the burdens imposed by the laws this Court has already held to be unconstitutional. First, the Medication Abortion Restrictions mirror H.B. 1907 and H.B. 2264 in dictating the "usage" of medication abortion, the "timing" of care, and the number of "doctor's office visits." *See Cline IV*, 2019 OK 33, ¶¶ 28-31, 441 P.3d at 1155-58. Second, the Medication Abortion Restrictions reenact significantly burdensome requirements that this Court has already struck down as medically unjustified with respect to *all* abortions (both medication and procedural), including a mandatory ultrasound at least 72 hours prior to an abortion, forcing patients to make an additional, medically unnecessary trip to a provider (S.B. 778)—a requirement far more burdensome than the ultrasound provision invalidated in *Nova Health Sys.*, 2012 OK 103, ¶ 1, 292 P.3d 28; and an admitting privileges requirement threatening to reduce the number of providers (S.B. 779), similar to that struck down in *Cline III*, 2016 OK 121, ¶ 17, 387 P.3d at 353.

2. The Medication Abortion Restrictions Likely Violate the Single Subject Rule.

S.B. 778 includes 14 new sections of law with over 100 subsections. S.B. 779 is comprised of over 16 new sections of law with nearly 200 subsections. Because the provisions

[9] This decision remains intact and binding after the U.S. Supreme Court dismissed a petition for certiorari. *Cline v. Okla. Coal. for Reprod. Just.*, 2013 OK 93, ¶ 1, 313 P.3d 253, 255.

in each of the Medication Abortion Restrictions are not "germane, relative, and cognate to a readily apparent common theme or purpose," they violate the Oklahoma Constitution's single subject rule. *Hunsucker v. Fallin*, 2017 OK 100, ¶ 31, 408 P.3d 599, 610 (footnote omitted). The single subject rule has two purposes, neither of which a statute can offend: (1) to ensure legislators "are adequately notified of the potential effect of the legislation" and (2) "to prevent 'logrolling.'" *See Cline III*, 2016 OK 121, ¶ 21, 387 P.3d at 354.

In striking down bills with fewer unrelated requirements than those in S.B. 778 and S.B. 779, this Court has made clear that a law cannot survive constitutional scrutiny simply "because each sub-part relates in some way to abortion." *Id.* ¶ 26, 387 P.3d at 355; *see also Burns v. Cline* ("*Cline II*"), 2016 OK 99, ¶¶ 17-18, 382 P.3d 1048, 1053. Adding the word "medication" does not change the outcome. Like the laws in *Cline II* and *Cline III*, S.B. 778 and S.B. 779 span numerous "unrelated provisions subjecting abortion providers to added regulation." *Id.*; *Cline II*, 2016 OK 99, ¶ 18, 382 P.3d at 1053. Indeed, the Medication Abortion Restrictions include many of the *same* unrelated topics as those invalidated in *Cline III* and *Cline II*—along with many more. *See supra* Parts II(E)(4)-(5); *Cline III*, 2016 OK 121, ¶¶ 23-25, 28, 387 P.3d at 354-56 (invalidating law spanning, among other things: physician training, "medical screening and evaluation," "abortion procedure and post-procedure follow-up care," "record keeping and reporting requirements," and "hospital admitting privileges," as well as "significant penalties for simple violations"); *Cline II*, 2016 OK 99, ¶¶ 14-16, 382 P.3d at 1051-53.

The Medication Abortion Restrictions also impermissibly delegate authority to multiple agencies for separate criminal and civil enforcement. *See Cline II*, 2016 OK 99, ¶¶ 10, 13, 382 P.3d at 1051-52; *see supra* Parts II(E)(4)-(5). By logrolling these numerous unrelated

subjects into two expansive bills and delegating authority to multiple state agencies, the Medication Abortion Restrictions present precisely the "constitutionally prohibited all-or-nothing choice" the single subject rule was designed to prevent. *Id.* ¶ 18, 382 P.3d at 1053. As a result, S.B. 778 and 779 must be enjoined in their entirety. *See Cline III*, 2016 OK 121, ¶¶ 29, 387 P.3d at 356; *Cline II* 2016 OK 99, ¶ 19, 382 P.3d at 1053.

3. The Challenged Laws Were Enacted with an Improper Purpose.

The Challenged Laws were enacted for the improper purpose of significantly reducing abortion access. *Casey*, 505 U.S. at 878. A court may find improper purpose where the intent to impose a substantial obstacle was "the predominant factor motivating the legislature's decision." *Jane L. v. Bangerter*, 102 F.3d 1112, 1116 (10th Cir. 1996) (internal citations and quotation marks omitted). A court must look at the totality of the circumstances, including the "legislative or administrative history," *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267-68 (1977), and the potential effect of the challenged law, *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993).

The effect of the Challenged Laws and the candid legislative history show that their purpose is to systematically dismantle abortion access in Oklahoma. The primary sponsor of the OB/GYN Requirement affirmed that it was intended to reduce access to abortions.[10] Similarly, a co-author of S.B. 778 and S.B. 779 made clear in debate that they did not even know if any physicians were consulted in the drafting process, but did know that the restrictions were supported by anti-abortion organizations.[11] Further, that the Challenged Laws are so at odds with controlling precedent, *see supra* at Part IV(A)(1)-(2), "evinces an intent to prevent

[10] House Session, 58th Leg., 1st Reg. Sess., Day 18, Statement of Cynthia Roe.

[11] House Session, 58th Leg., 1st Reg. Sess., Day 45, 65, Statements of Rep. Mark Lepak.

a woman from exercising her right to choose an abortion."[12] *Jane L.*, 102 F.3d at 1117.

B. Oklahomans Seeking Abortion Care Will Suffer Irreparable Harm.

The Challenged Laws' threats to constitutional rights constitute *per se* irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976). If allowed to go into effect, the Challenged Laws will delay Oklahomans in accessing care and force some to carry unwanted pregnancies to term against their will, also clear irreparable harm.

C. Lack of Injury to the Opposing Party

The State would suffer little harm if a temporary injunction were granted; a temporary injunction would preserve the status quo while this Court reviews the District Court's decision. The State has not alleged any non-speculative harm to it from the laws remaining blocked for the additional time needed for this Court to fairly consider Plaintiffs-Appellants' appeal.

D. No Risk of Harm to the Public Interest

It is well-settled that enforcement of an unconstitutional law is contrary to the public interest. *See, e.g.*, *Entm't Merchants Ass'n*, No. CIV-06-675-C, 2006 WL 2927884 at *3 (citation omitted); *Am. Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999). Plaintiffs-Appellants have shown, and the State does not dispute, that abortion access in Oklahoma will be significantly reduced overnight by the Challenged Laws. Further, where, as here, an appeal raises important issues of state policy, the public interest is "best served by preserving the status quo." *Edwards*, 2015 OK 58, ¶ 35, 378 P.3d at 64.

V. CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants respectfully request that this Court issue a temporary injunction pending resolution of their appeal of the Order below.

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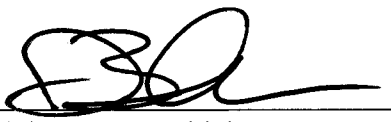
[12] The District Court did enjoin two outright bans on abortion. Oklahoma can have no legitimate interest in enacting the Challenged Laws when it simultaneously bans abortion outright.

Dated: October 13, 2021

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I, Blake Patton, hereby certify that on this 13th day of October, 2021, a true and correct copy of the foregoing Motion was delivered to the following:

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