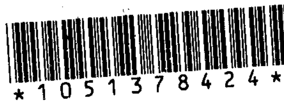

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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

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

Plaintiffs/Appellants,

v.

JOHN O'CONNOR, in his official capacity as Attorney General for the State of Oklahoma, *et al.*,

Defendants/Appellees.

Case No. 119918

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PLAINTIFFS-APPELLANTS' REPLY BRIEF

Appeal from the District Court of Oklahoma County, State of Oklahoma
Case No. CV-2021-2072
The Honorable Cindy Truong
The Honorable Brent C. Dishman
District Court Interlocutory Order: Temporary Injunction

FEBRUARY 7, 2022

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The Challenged Laws will decimate abortion access in Oklahoma. At a minimum, they will impose the same types of barriers to abortion access that this Court has already determined violate the Oklahoma Constitution, if not far exceed them. The State does not meaningfully deny this. Nor has the State seriously countered that the Medication Abortion Restrictions violate the single subject rule or that all of the Challenged Laws were enacted with the express purpose of reducing access to abortion.

Plaintiffs have made an extensive and largely unrebutted evidentiary presentation on the provision of abortion care in Oklahoma and the harms that the Challenged Laws will cause based on providers' experience and extensive, reliable medical literature. Although the State invokes a purported interest in health and safety, it relies on hyperbole or surmise, not actual evidence that abortion is unsafe or that the Challenged Laws will advance the health and safety of Oklahomans.

For these reasons, the Challenged Laws should be temporarily enjoined to protect the rights of Oklahomans and maintain the status quo pending a decision on the merits.

I. THE STATE DOES NOT COUNTER PLAINTIFFS' ROBUST EVIDENCE.

A. The OB/GYN Requirement Has No Medical Justification.

Contrary to the State's assertions, Jan. 14, 2022 Defendants/Appellees' Response Brief ("State's Br.") at 3-5, Plaintiffs have offered substantial, reliable evidence that abortion care falls within several specialties, including family medicine, and that family medicine doctors routinely provide abortion care as safely and effectively as OB/GYNs. ROA, pp. 561-66 (Rebuttal Aff. of Joey Banks, M.D.) ("Banks Rebuttal Aff.") ¶¶ 3-5, 7; ROA, pp. 261-76 (Aff. of Joey Banks, M.D.) ("Banks Aff.") ¶¶ 22-26; ROA, pp. 188-209 (Decl. of Joshua Yap, M.D., M.P.H.) ("Yap Decl.") ¶¶ 44-45. Like many other medical competencies, training and clinical experience dictate qualification to provide abortion services. Banks Aff. ¶¶ 14-24; Yap Decl.

¶¶ 39-40. Family medicine physicians, in particular, can train to provide a wide array of procedures comparable to and riskier than abortion, including obstetrical care, which is far riskier.[1] Banks Aff. ¶¶ 14-24; Yap Decl. ¶¶ 39-40.

OB/GYN residency and board certification do *not* ensure "specialized training and skills applicable to the performance of abortions," as the State incorrectly contends.[2] *See* State's Br. at 3-4. The testimony the State offers in support of this proposition is unreliable, based on clear ignorance of abortion training, and contrary to the weight of the evidence. Banks Rebuttal Aff. ¶¶ 2-3; ROA, pp. 567-78 (Rebuttal Aff. of Ushma Upadhyay, M.P.H., Ph.D.) ("Upadhyay Rebuttal Aff.") ¶ 3. Only one of the State's witnesses opines on this issue.[3] Even she offers no concrete medical benefits to prohibiting trained family medicine doctors from providing abortions, simply stating generally that "complications can and do occur" and thus patients should have the "most qualified provider available." Skop Decl. ¶ 19. The State never asserts that any of the trained family medicine physicians who currently perform abortions in Oklahoma are unqualified to do so.[4] Skop Decl. ¶ 19. Indeed, the State has never identified

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[1] In 2020, the Oklahoma Maternal Mortality Review Committee issued its inaugural report. It found that Oklahoma is the fourth-worst state in the nation for maternal mortality. Oklahoma Maternal Mortality Review Committee, *Maternal Mortality in Oklahoma 2004-2018* (2020), https://oklahoma.gov/content/dam/ok/en/health/health2/aem-documents/family-health/maternal-and-child-health/maternal-mortality/annual-mmrc-report.pdf.

[2] Indeed, the so-called "recent sordid history" of medication abortion invoked by the State, State's Br. at 7, refers to a physician who, according to the State's own database, specialized in OB/GYN. Oklahoma Board of Medical Licensure & Supervision, Licensee Database, N. B. Patel, https://www.okmedicalboard.org/licensee/MD/14640 (accessed on Jan. 21, 2022).

[3] Dr. Danley opines only that certain procedures are part of the "core competencies" required for OB/GYN training. *See* Danley Aff. ¶¶ 5-6.

[4] In *Little Rock Fam. Plan. Servs. v. Rutledge*, the district court rejected similar opinions, although there they were introduced through Dr. Harrison. 398 F. Supp. 3d 330, 408 (E.D. Ark. 2019), *rev'd on other grounds* 984 F.3d 682, 690 (8th Cir. 2021). Notably, here, the State has offered Dr. Harrison as a witness, but has not introduced opinions from her about the OB/GYN Requirement.

any problems caused by the family medicine doctors that have provided safe and effective abortion care in Oklahoma and other states for decades.

The State tries to downplay the effect of the OB/GYN requirement while in the same breath agreeing that its data show that at least 35% of abortions in Oklahoma have been safely performed by non-OB/GYNs without issue. State's Br. at 4 n.10. According to the author of the OB/GYN Requirement, that number is even greater—"[o]ver half of [abortions]" performed in Oklahoma from 2012-2020 "were [provided] by non-board certified OBGYNs."[5]

Many OB/GYNs—as many as 49% according to a recent study the State itself cites, State's Br. at 4—*do not receive* routine training in abortion care. Banks Aff. ¶ 17; Upadhyay Aff. ¶¶ 23-25. Nor are OB/GYNs necessarily better suited to manage complications; physicians of many specialties, including family medicine doctors, are trained to manage complications and refer if necessary. Banks Aff. ¶ 25; Upadhyay Aff. ¶ 25. The OB/GYN requirement is thus not remotely akin to "restricting brain surgery to brain surgeons," State's Br. at 20, but more like barring family medicine doctors from performing colonoscopies because they are not gastroenterologists or from prescribing blood pressure medication because they are not cardiologists. It is simply arbitrary.

For all of these reasons, the preeminent national professional association of OB/GYNs, the American College of Obstetricians and Gynecologists ("ACOG"), publicly opposes OB/GYN requirements for abortion care because they are "medically unnecessary," as "clinicians in many medical specialties can provide safe abortion services." Banks Aff. ¶ 18; *see also* Yap Decl. ¶¶ 42-45.

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[5] Jamison Keefover, *Abortion Laws Blocked By Okla. Supreme Court Days Before Going Into Effect*, News Channel 8 Tulsa ABC (Oct. 26, 2021), https://ktul.com/news/local/abortion-laws-blocked-by-oklahoma-supreme-court-days-before-going-into-effect.

B. Medication Abortion is Safe, Effective, and Preferred by Oklahomans Due to Its Many Benefits.

This Court has recognized the "widespread consensus" that medication abortion is one of the safest medication regimens in medicine today. *Okla. Coal. For Reprod. Just. v. Cline* ("*Cline IV*"), 2019 OK 33, ¶ 38, 441 P.3d 1145, 1159; *see also* Upadhyay Aff. ¶¶ 19-26. In reaching this conclusion, this Court rejected the opinions proffered by the State's witnesses suggesting that medication abortion is unsafe—opinions largely rehashed by the State here. *Cline IV*, 2019 OK 33, ¶¶ 28-38, 441 P.3d at 1155-60 & nn.42, 44 (crediting the testimony of the plaintiffs' experts, including testimony relying on the research of Dr. Ushma Upadhyay, Plaintiffs' expert here, over that of Dr. Donna Harrison, the State's expert). The State's contention that medication abortion "exposes women to a risk of serious harm," State's Br. at 5-7, is contrary to this overwhelming medical consensus. The State does not and cannot dispute that extensive literature on the safety of medication abortion shows that serious complications occur in fewer than one percent of all abortions. Upadhyay Aff. ¶¶ 12, 19.

There is nothing "facile" about Plaintiffs' assertion that medication abortion has a similar risk profile to common and over-the-counter medications. State's Br. at 5. Decades of research shows this to be the case, and this conclusion was reported by the National Academies of Sciences, Engineering, and Medicine (the "National Academies") in their consensus report on abortion care in the United States. Upadhyay Aff. ¶ 28; Upadhyay Rebuttal Aff. ¶ 5. Any medical intervention carries some risk, but for medication abortion, that risk is minimal. Upadhyay Aff. ¶ 28; Upadhyay Rebuttal Aff. ¶ 2. The State misleadingly cites data that show slightly higher risks for medication abortion than for first trimester procedural abortions, State's Br. at 7, but as Dr. Upadhyay states in the same paper cited by the State and in her affidavit, this is not indicative of a lack of safety, and both levels of risk remain extremely low.

Harrison Decl., ROA 435, Ex. 3, Attachment J, at p. 182 (Dr. Upadhyay' seminal 2015 study); Upadhyay Rebuttal Aff. ¶ 7 & n.20. The risk of serious complications still falls *under 1%.* Upadhyay Aff. ¶¶ 19-21. The State also misleadingly suggests that the research on abortion safety is weakened by low follow-up rates, State's Br. at 7, but this ignores that one of the strengths of Dr. Upadhyay's methodology is that it has no loss to follow-up and still confirms the low rates of complication reported across other studies. Harrison Decl., ROA 434, Doc. 4, Attachment J, at p. 182.[6]

For lack of other evidence, the State curiously cites the U.S. Food and Drug Administration ("FDA") as supporting these distortions, State's Br. at 5, but the FDA has repeatedly determined that medication abortion is extremely safe and liberalized its regulation of the regimen, Upadhyay Aff. ¶ 29, as this Court has acknowledged. *Cline IV*, 2019 OK 33, ¶ 28, 441 P.3d at 1155 (noting that the FDA now recommends lower dosages, longer availability, and elimination of in-person follow-up requirements, reflecting evidence-based medical practice). Less than two months ago, the FDA permanently removed its requirement that all patients make an in-person visit to receive the first medication in the regimen, mifepristone.[7] Because of medication abortion's many advantages, Oklahomans increasingly prefer it. ROA, pp. 164-185, Aff. of Alan Braid, M.D. ("Braid Aff.") ¶¶ 65; Yap Decl. ¶ 53.

Ultimately, the State has offered no argument or evidence to suggest that any of the medication abortion restrictions in question will actually make medication abortion safer—it

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[6] The State also suggests that abortion "in general" causes mental health harms, State's Br. at 7, but this assertion has been repeatedly and soundly rejected by the American Psychological Association and other authoritative groups of mental health professionals. Upadhyay Rebuttal Aff. ¶ 12.

[7] FDA, Questions and Answers on Mifeprex, https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/questions-and-answers-mifeprex (accessed Jan. 21, 2022).

only exaggerates the risks of medication abortion without tying those risks in any way to the proposed restrictions.[8]

As in *Cline IV*, the State conjures extreme "risks of infection, failed termination necessitating surgical intervention, and clinically significant hemorrhaging and the need for blood transfusion," relying on Dr. Harrison. 2019 OK 33, ¶ 29, 441 P.3d at 1155-56; *see* State's Br. at 5-7. And, as this Court did in *Cline IV* and other courts have done,[9] this Court should reject Dr. Harrison's opinions, and Dr. Skop's largely overlapping opinions, as unreliable. *See id.*; Upadhyay Rebuttal Aff. ¶¶ 13-14.

Dr. Skop's and Dr. Harrison's opinions directed at the supposed benefits of an additional visit for an ultrasound and testing 72 hours in advance of an abortion, *see* State's Br. at 26, ignore that patients *do* undergo an ultrasound before an abortion. Braid Aff. ¶¶ 70-75; Yap Decl. ¶¶ 58-64. There is no medical reason to require an ultrasound days in advance.

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[8] The State also baselessly asserts that the Challenged Laws would prevent bad actors from providing care, but as the Supreme Court said in response to this same argument, "there is no reason to believe that an extra layer of regulation would have affected that behavior." *Whole Woman's Health v. Hellerstedt*,136 S. Ct. 2292, 2313-14 (2016). The State provides no basis to think that the Challenged Laws would be any different.

[9] The opinions about the safety of medication abortion expressed by Dr. Harrison and regurgitated in Dr. Skop's affidavit have been repeatedly rejected as non-credible. *See, e.g.*, *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 Dr. Upadhyay's 2015 study 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"); *id.* ("Dr. Harrison has never personally provided medication abortions and, in fact, no longer practices medicine, having instead chosen to dedicate her career to pro-life research. She also has not published any research on these issues in more than fifteen years."), *stay granted pending appeal Whole Woman's Health All. v. Rokita*, 13 F.4th 595, 597 (7th Cir. 2021) (not commenting on Dr. Harrison's opinions); *Planned Parenthood Ark. & E. Okla. v. Jegley*, 4:15-cv-00784, 2018 WL 3029104, at*42 (E.D. Ark. 2018) ("Dr. Harrison's statements regarding the incidence of complications from medication abortions must be rejected."); *MKB Mgmt. Corp. v. Burdick*, 855 N.W.2d 31, 68 (N.D. 2014) ("Dr. Harrison's opinions lack scientific support, tend to be based on unsubstantiated concerns, and are generally at odds with solid medical evidence. To the extent she referenced published studies during her testimony, Dr. Harrison tended to present the results in an exaggerated or distorted manner.").

Upadhyay Aff. ¶ 33; Upadhyay Rebuttal Aff. ¶¶ 13-14. Dr. Skop's and Dr. Harrison's opinions that the Medication Abortion Restrictions' reporting requirements are necessary seem inexplicably to assume that complications are not currently reported. Harrison Decl. ¶ 17. They are—*extensively*. ROA, pp. 549-54, Rebuttal Aff. of Alan, Braid, M.D. ("Braid Rebuttal Aff.") ¶ 4; Braid Aff. ¶¶ 78-81; ROA, pp. 555-60 (Rebuttal Decl. of Joshua Yap, M.D., M.P.H.) ("Yap Rebuttal Decl.") ¶ 8. Finally, the State offers no evidence, nor could it, that admitting privileges are relevant to the provision of pills to patients. Upadhyay Aff. ¶ 34; Braid Aff. ¶¶ 84-85; Yap Decl. ¶¶ 67-68. If patients need follow-up medical care after a medication abortion, this would occur after they have left a health facility. Braid Aff. ¶ 86; Yap Decl. ¶ 69

C. Reduced Access to Abortion Causes Tremendous Harm to Oklahomans.

Many people need to access abortions—one in four women in the United States will obtain an abortion in their lifetime, and approximately 5,000 patients per year obtain abortions in Oklahoma. Upadhyay Aff. ¶ 36; Braid Aff. ¶ 14. Most of these are provided by Plaintiffs. Braid Aff. ¶¶ 13-14; Yap Decl. ¶ 3. There is no typical abortion patient, although most people who access abortion care are living in poverty. Upadhyay Aff. ¶ 37. Data from the Oklahoma State Department of Health show that, when asked their reason for seeking abortion care, patients most frequently report that having a child would interfere with their education or career, or that they cannot afford to have a child.[10] Consequently, access to abortion is essential for the health and well-being of pregnant Oklahomans and their families. Upadhyay Aff. ¶¶ 36-49; Braid Aff. ¶ 22; ROA, pp. 153-162, Aff. of Priya Desai ("OCRJ Aff.") ¶ 20; Yap Decl. ¶ 79. The State does not refute any of these facts.

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[10] *See* Okla. State Dep't Health, *Abortion Surveillance in Okla., 2002-2020* (May 2020), https://oklahoma.gov/content/dam/ok/en/health/health2/aem-documents/data-and-statistics/center-for-health-statistics/2020%20AbortionReport.pdf, 24 tbl.17.

The State provides no evidence to refute the record evidence that abortion care is time-sensitive, and that the delays that will result from the Challenged Laws will harm Oklahomans' health, cause them tremendous stress, prevent many from accessing medication abortion even if it is the better option for them, and ultimately push many patients beyond the point where abortion care is available in Oklahoma at all, forcing some to carry unwanted pregnancies to term. *See* Dec. 8, 2021 Plaintiffs/Appellants' Brief ("Appellants' Br.") at 6-7. Nor does the State refute that the severe obstacles created by the Challenged Laws will heighten existing barriers to accessing abortion. *Id.*; Upadhyay Aff. ¶¶ 38-40; Braid Aff. ¶¶ 67-96, 98; Yap Decl. ¶¶ 15-16, 46, 48, 55-62, 64-65, 76, 80, 82.

Today, there is a serious shortage of abortion providers in Oklahoma. Yap Decl. ¶¶ 22-28; Braid Aff. ¶¶ 52-56, 90, 96; Banks Aff. ¶¶ 27-29. Contrary to the State's unsupported assertion, Plaintiffs' challenges in finding new providers do not stem from physicians' "aversion" to providing abortion, State's Br. at 23, but rather from the fear of anti-abortion protesters who routinely harass providers and patients. *See* Appellants' Br. at 7; Yap Decl. ¶¶ 22-28; Braid Aff. ¶¶ 52-56, 90, 96; Banks Aff. ¶¶ 27-29.

When the State imposes restrictions that deny people access to abortions, it intrudes on their bodily autonomy and their ability to direct their own lives. OCRJ ¶ 20; Upadhyay Aff. ¶¶ 42-49. Denial of care also imposes substantial medical risk, as carrying a pregnancy to term is far riskier than abortion. Upadhyay Aff. ¶ 43; Braid Aff. ¶¶ 21-22; Banks Aff. ¶ 23. Further, research shows that people denied access to abortion experience worse psychological and physical health outcomes than people who were able to access care. Upadhyay Aff. ¶¶ 42-49. They are also more likely to experience poverty and physical violence, as are their families. *Id.*

These consequences are not based in "sheer speculation." State's Br. at 2. They are predictable outcomes, detailed in sworn testimony based on experience and reliable medical literature in the record. *See* Appellants' Br. at 7.

II. The Challenged Laws Likely Violate the Oklahoma Constitution's Due Process Clause.

A. The State Does Not Address the Rights of Pregnant Oklahomans and This Court's Precedents Regarding Private Healthcare Decisions.

The State's refusal to grapple with the harm to Oklahomans when they are unable to access abortion leads it to a fatal doctrinal error. Oklahoma's Constitution evidences a strong intent to protect individual, private decisions, including those around healthcare. *See* Appellants' Br. at 21-23 (citing *In re K.K.B.*, 1980 OK 7, 609 P.2d 747, 749, 752) (the "Oklahoma Constitution's due process protection encompasses the fundamental right to make intimate and personal decisions 'about one's own health,'" which is rooted in "respect for the dignity and autonomy of the individual."). Under this Court's precedent, Oklahomans' rights to make decisions regarding their own health are protected more strongly under the Oklahoma Constitution than under the federal Constitution. *See* Appellants' Br. at 21-23. The decision to continue or to end a pregnancy is indisputably critical to this fundamental right. The State notably fails to respond to this precedent—cited by Plaintiffs, *compare id. with* State's Br. at 9-11—and thus has failed to actually counter Plaintiffs' arguments that the right to abortion is protected more strongly under the Oklahoma Constitution than under the federal constitution.

Forcing a person to give birth against their will is a violation of their dignity and bodily autonomy, which irrevocably alters their life. OCRJ Aff. ¶ 20; Braid Aff. ¶ 22; Yap Decl. ¶ 79; Upadhyay Aff. ¶¶ 42-49. This intrusion on a person's liberty is fundamentally inconsistent with Oklahomans' intent to "zealously guard[] their right to privacy" in their State constitution. *Alva State Bank & Tr. Co. v. Dayton*, 1988 OK 44, 755 P.2d 635, 638 (Kauger, J., concurring)

(footnote omitted). Under Oklahoma's Constitution, the liberty of the individual—*the Oklahoman who is pregnant and seeks an abortion*—must be protected. Okla. Const. Art. II, § 7. Despite the State's cherry-picked history, it is clear that the purpose of the Oklahoma Constitution's bill of rights was to protect individual liberty. For example, the President pro tempore of the Oklahoma Constitutional Convention reported that the "reason for inserting a bill of rights into the constitution" was chiefly "to protect the individual in the enjoyment of his life, his liberty and his property." *Alva State Bank & Tr. Co. v. Dayton*, 1988 OK 44, 755 P.2d 635, 638 (Kauger, J., concurring) (citation omitted).

The State has instead argued that, in the absence of a federal right to abortion, the Oklahoma Constitution permits the State to ban abortion entirely. ROA, pp. 277-528 (Resp. to TI Mot.) at 8-11; State's Br. at 9-10. But forcing Oklahomans to remain pregnant and give birth against their will cannot be squared with the Oklahoma Constitution's guarantee of individual liberty. *See In re K.K.B.*, 1980 OK 7, 609 P.2d at 749, 752 (holding that forced medication is inconsistent with "the right of an individual to make decisions about her life" arising "out of respect for the dignity and autonomy of the individual" and that because a "patient will be the one to suffer the consequences[,] she must have the power to make the decision" about her healthcare); *see also* Appellants' Br. at 21-23.

The State does not contest that Oklahoma courts apply strict scrutiny when fundamental rights are at stake. *In re Guardianship of S.M.*, 2007 OK CIV APP 110, ¶ 14, 172 P.3d 244, 247; Appellants' Br. at 22. As discussed *infra*, the Challenged Laws are unlikely to survive the undue burden standard, and so, by definition, they also likely fail strict scrutiny. The Challenged Laws will severely restrict access to abortion—an outcome the State does not meaningfully contest, perhaps because that was the Legislature's clear objective in enacting

them. *See infra* at Part II(E); Part III(C)(4). The State has made no showing that the Challenged Laws are narrowly tailored to achieve a compelling interest, nor could it.

B. The Challenged Laws Are Unconstitutional Under the Undue Burden Standard.

This Court has repeatedly protected a person's ability to access abortion care prior to viability, consistent with the federal constitution and U.S. Supreme Court precedent, *Cline IV*, 2019 OK 33 ¶¶ 16, 25, 43, 441 P.3d at 1151, 1153-54, 1160-61 (citations omitted); *Burns v. Cline* ("*Cline III*"), 2016 OK 121, ¶ 8, 387 P.3d 348, 351-52. The State offers no reason for this Court to deviate from this longstanding precedent other than its disagreement.[11] *See* State's Br. at 18-19. At a minimum, this Court has applied the federal undue burden standard, and Plaintiffs are likely to succeed under that standard given the tremendous burdens the Challenged Laws' will impose. *Cline IV*, 2019 OK ¶ 20, 441 P.3d at 1152.

The State weakly argues that Chief Justice Roberts' concurrence in *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103 (2020), has displaced the balancing approach to the undue burden analysis articulated in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), wherein the benefits of a law are weighed against its burdens.[12] State's Br. at 17-19.

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[11] The State makes a convoluted argument regarding *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 530 n.1 (2021), attempting to use a footnote stating the uncontroversial proposition that "federal constitutional defenses always stand fully available when properly asserted" as support for their suggestion that Plaintiffs are unable to avail themselves of relevant federal precedent when asserting state law claims. This is clearly untrue. As this Court has stated, the Supremacy Clause and the Oklahoma Constitution "mandate[] this Court comply with federal constitutional law on issues of federal law," and thus, at a minimum, federal precedent construing the U.S. Constitution outlines the floor of constitutional rights. *Cline IV*, 2019 OK ¶ 17, 441 P.3d at 1151.

[12] Under the Chief Justice's preferred approach, courts perform a threshold examination of whether a law is "reasonably related to legitimate state interest" and, if it is, whether its effects would constitute a substantial obstacle to abortion access. *June Med. Servs.*, 140 S. Ct. at 2135, 2138 (quotations and citations omitted) (Roberts, C.J. concurring).

This argument is beside the point because the State agrees that a law creates an unconstitutional undue burden if it imposes a "substantial obstacle." State's Br. at 18. Therefore, this Court need not parse which of these opinions governs[13] because the parties agree that no matter the articulation of the undue burden test, a law that imposes a substantial obstacle cannot stand. Further, any change in how the State's interests are evaluated would not disturb this Court's prior holdings as to the range of barriers and the kinds of effects that constitute a substantial obstacle. *See, e.g., Cline IV*, 2019 OK 33, ¶ 39, 441 P.3d at 1159.

The State inaccurately suggests that *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103 (2020), nullifies this Court's decisions applying the undue burden standard entirely, State's Br. at 18, but that is not how stare decisis works. In fact, the Chief Justice's concurrence emphasizes that courts are bound by prior decisions on what constitutes a substantial obstacle. *Id.* at 2133-34 (Roberts, C.J., concurring) (affirming that the Court had to follow the determination in *Whole Woman's Health* regarding whether an identical admitting privileges requirement posed a substantial obstacle based on identical facts). He stressed that "principles of stare decisis" required the Court to reach the same result in *June Medical* that it had reached in *Whole Woman's Health. Id.* at 2133-34, 2139 ("[t]he question today however is not whether *Whole Woman's Health* was right or wrong, but whether to adhere to it . . . .").

[13] The U.S. Court of Appeals for the Tenth Circuit has not opined as to which, if any, of the opinions issued in *June Medical* are controlling. Other federal circuit courts applying the "narrowest grounds" rule articulated in *Marks v. United States*, 430 U.S. 188 (1977), have come to different conclusions. *Compare Whole Woman's Health v. Paxton*, 10 F.4th 430, 440-42 (5th Cir. 2021); *EMW Women's Surgical Ctr. v. Friedlander*, 978 F.3d 418, 437 (6th Cir. 2020); *Hopkins v. Jegley*, 968 F.3d 912, 915 (8th Cir. 2020), *with Planned Parenthood of Ind. & Ky. v. Box*, 991 F.3d 740, 748 (7th Cir. 2021). Should this Court choose to decide this issue, it should conclude that the *Whole Woman's Health* majority opinion remains controlling precedent. As the Seventh Circuit has held, the State's position that the Chief Justice's opinion is controlling would "give one Justice the ability to write obiter dicta that would sweep away constitutional precedents protecting individual rights by adopting broad reasoning that would confine the individual right most narrowly, yet without a majority having actually voted to overrule an earlier precedential opinion." *Box*, 991 F.3d at 750.

Similarly, here, the Challenged Laws create the same range of barriers to abortion access as laws that this Court has previously held impose a substantial obstacle. The State attempts to shield its laws by asserting that it is "undeniably significant" that "no clinics will close." State's Br. at 22. However, this Court has held that it is not only those laws that force abortion clinics to close, which create substantial obstacles to abortion access. *Cline IV*, 2019 OK 33, ¶ 39, 441 P.3d at 1159. In fact, this Court struck down a law under an undue burden analysis even though it would not cause "alleged [clinic] closings."[14] *Id.*

a. The OB/GYN Requirement

With the OB/GYN requirement, the State[15] is again enacting provider qualifications that would "cause[] a significant reduction in abortion providers, creating an onerous burden to women of child-bearing age" in violation of applicable precedent. *Cline III*, 2016 OK 121 ¶¶ 13, 19, 387 P.3d at 353-54. The OB/GYN Requirement will disqualify around half of Plaintiffs' physicians from providing abortions, and around half of the remaining abortion providers in Oklahoma. Braid Aff. ¶ 49; Yap Rebuttal Decl. ¶¶ 4-5; Banks Rebuttal Aff. ¶¶ 5 & n.3, 16; Yap Decl. ¶¶ 46, 48, 82. To put providers who collectively perform around half of

[14] In any event, one out of the four clinics will be entirely unable to provide abortion services. Yap Decl. ¶ 21; Yap Rebuttal Decl. ¶ 5.

[15] The State has asserted that *Mazurek v. Armstrong*, 520 U.S. 968 (1997) shows that the OB/GYN Requirement is constitutional, State Br. at 20, but that case does not permit the State to baselessly exclude certain qualified, licensed physicians from providing abortion care. This became evident when the U.S. Supreme Court struck down two admitting privileges requirements because they were medically unsupported and imposed a substantial obstacle. *See June Med. Servs.*, 140 S. Ct. at 2140 (Roberts, C.J., concurring). In *Mazurek*, the Supreme Court held that a Montana law restricting the provision of abortion to physicians did not have an improper purpose. 520 U.S. at 972-74. The Court also noted that the district court did not find sufficient evidence of an unconstitutional effect, although that ruling was not before the Supreme Court. *Id.* at 972. Here, the record contains extensive evidence that the OB/GYN Requirement has both the purpose, *see infra* Part IV, and effect of imposing a substantial obstacle, *see supra* Part II(B)(a).

[16] The only non-Plaintiff 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*

all abortions in Oklahoma out of practice overnight will dramatically restrict abortion access in the state. Braid Aff. ¶ 49; Yap Rebuttal Decl. ¶¶ 4-5; Banks Rebuttal Aff. ¶ 5 & n.3[17]; Yap Decl. ¶¶ 46, 48, 82. This Court has addressed this very scenario before and concluded that a restriction which would halve abortion services in the State imposes a substantial obstacle to abortion access. *Cline III*, 2016 OK 121, ¶ 17, 387 P.3d at 353 (holding that a reduction from two to one clinics constitutes a substantial obstacle). The State asks this Court, State's Br. at 19-24, to disregard its own precedent, Plaintiffs' sworn testimony, and basic logic that if over half of abortion services are shut down in the state overnight, the impact will be extreme. *See supra* at Part I(A).

Contrary to the State's speculation that the dramatic effects of the OB/GYN Requirement will be easy to offset, State's Br. at 23, the *only* record evidence is that the OB/GYN physicians performing abortions in Oklahoma will be unable to double their current patient loads, and Plaintiffs will not be able to immediately hire enough board-certified OB/GYNs to make up the difference. Braid Aff. ¶ 49; Yap Rebuttal Decl. ¶¶ 4-5; Banks Rebuttal Aff. ¶ 5 & n.3; Yap Decl. ¶¶ 46, 48, 82. The severe reduction in abortion services that would result from the OB/GYN Requirement will cause dramatic delays in care, which will prevent many patients from accessing medication abortion, push patients into more complex and expensive procedures, and prevent many patients from accessing abortion care in Oklahoma altogether. Upadhyay Aff. ¶¶ 38-41; Braid Aff. ¶¶ 39, 67-96, 98; Yap Decl. ¶¶ 15-16, 46, 48, 55-62, 64-65, 76, 80, 82. The State has provided no evidence to the contrary.

Inundated, N.Y. Times (Sept. 26, 2021), https://www.nytimes.com/2021/09/26/us/oklahoma-abortion.html.

[17] The State repeatedly asserts that there are five providers in Oklahoma. As the State is presumably also able to determine, there was a fifth clinic in the state that was never a plaintiff in this case, but it has ceased operating.

The State cites *Jackson Women's Health v. Currier*, 320 F. Supp. 3d 828 (S.D. Miss. 2018), State's Br. at 21, but that case does not support the constitutionality of Oklahoma's OB/GYN requirement—quite the opposite. In *Jackson Women's Health*, the challenged Mississippi law altered an existing law to allow only board-certified or board-eligible OB/GYNs to provide abortions. *Id.* at 837. The pre-existing law required that physicians associated with an abortion facility must have either "completed a residency in family medicine, with strong rotation through OB/GYN," "completed a residency in obstetrics and gynecology," or had "at least one year of postgraduate training in a training facility with an approved residency program and an additional year of obstetrics/gynecology residency." *Id.* Notably, under that pre-existing law, all of Plaintiffs' physicians (who are family medicine doctors and OB/GYNs) would have been qualified. The District Court then found the challenged "ob-gyn requirement produces no benefit to Mississippi women as compared to prior law,"[18] which already required substantial relevant training. *Id.* at 838. In short, the only law the court found to have any benefit was a law that would have permitted all of Plaintiffs' doctors to provide care. As to the effect of Mississippi law, there were no doctors who would be immediately disqualified by the new law—here, over half of the doctors in the state would be.[19] *See id.*

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[18] Since the *Jackson Women's Health* plaintiffs made their evidentiary presentation, the literature has also expanded, and this research is included in Plaintiffs' experts' testimony. For example, in 2018, the National Academies published their consensus report concluding that abortion is one of the safest procedures performed in the nation and that a host of clinicians can safely provide abortion care. Upadhyay Aff. ¶ 19; Upadhyay Rebuttal Aff. ¶ 5. In 2020, ACOG published an updated opinion opposing OB/GYN restrictions. *See supra* at 3.

[19] Nor does *Little Rock Fam. Plan. Servs. v. Rutledge*, 984 F.3d 682, 690 (8th Cir. 2021), support the State's position. In *Little Rock Family Planning*, the district court concluded at the preliminary injunction stage on a similar record that "[t]raining in OBGYN does not entail training in all aspects of abortion care; instead, the record evidence is that practitioners must specifically seek out this training. Further, there is no record evidence that OBGYN board certification requires demonstrated skill in

In addition, as detailed above, the OB/GYN restriction provides no medical benefits, *Whole Woman's Health*, 136 S. Ct. at 2300, 2309-10, nor is it "reasonably related to a legitimate state interest," *June Med. Servs.*, 140 S. Ct. at 2135, 2138 (Roberts, C.J., concurring) (quotations and citations omitted). There is simply no medical justification for preventing family medicine physicians from providing abortions—as described *supra* Part I(A), training and clinical experience, not specialty, determine competency to provide abortion care. Banks Aff. ¶¶ 14-20; see also Yap Decl. ¶¶ 39-40.

b. Medication Abortion Restrictions

It is well-established in Oklahoma that the State may not impose irrelevant and burdensome restrictions on medication abortion. The State's primary response to this precedent is that it disagrees with this Court's rulings, which the State claims have been entirely abrogated by *June Medical v. Russo. See* State's Br. at 18, 24-28. But this Court has repeatedly recognized that Oklahomans have important, protectable interests in having the choice to obtain a medication abortion and are significantly harmed by restrictions on access to the regimen. *See* Appellants' Brief at 16-17.

As in *Cline IV*, the medication abortion restrictions will prevent doctors from using "evidence-based" practice based on "good and consistent scientific evidence" regardless of whether it matches the specific FDA label. *Cline IV*, 2019 OK 33, ¶¶ 9, 28-31, 40-41, 441 P.3d at 1150, 1155-60; *Cline I*, 2012 OK 102, ¶ 3, 292 P.3d at 27-28. Here, the Medication Abortion Restrictions will similarly burden patients by increasing the number of visits they must make

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providing abortion care or requires specific continuing education or competence in abortion care." *Little Rock Fam. Plan. Servs. v. Rutledge*, 398 F. Supp. 3d 330, 408 (E.D. Ark. 2019). There is no decision on the merits in that case because plaintiffs' claims were mooted when they were able to come into compliance. *Little Rock Fam. Plan. Servs. v. Rutledge*, 984 F.3d 682, 690 (8th Cir. 2021). Plaintiffs were able to come into compliance by hiring *one* new physician. *See id.*

to a provider, which will result in delays, and by narrowing the "timing" available for a medication abortion, which will outright prevent patients from accessing medication abortions. *Id.* But the Medication Abortion Restrictions impose even greater burdens than those at issue in *Cline IV*—those posing the greatest obstacles (many of which have already been deemed to be substantial by this Court), are summarized below.

i. Two-Visit Requirement: S.B. 778 forces patients to make an additional, medically unnecessary trip to a health center for an ultrasound at least 72 hours before obtaining a medication abortion. S.B. 778 §§ 6(A)-(C), (E)(1), 8(A), (B)(6). This Court struck down barriers far less onerous under *Casey* in *Nova Health Systems v. Pruitt*, which, while requiring additional information to be provided during an ultrasound, only required the ultrasound to be performed *one hour* prior to an abortion. 2012 OK 103, ¶ 3, 292 P.3d 28. The State suggests that *Casey* means that all abortion restrictions that require two visits are automatically constitutional regardless of the individual burdens at issue, but the *Casey* court upheld Pennsylvania's two-visit requirement precisely because it did not impose a substantial obstacle.[20] *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 886 (1992). Indeed, the U.S. Supreme Court has explicitly noted that "other jurisdictions" might find "similar restrictions" unconstitutional. *Planned Parenthood of Se. Pa. v. Casey*, 510 U.S. 1309, 1313 (1994). This Court did just that in *Cline IV*, when it determined that Oklahoma's 2014 medication abortion restrictions requiring medically unnecessary visits to health centers imposed a substantial obstacle. *Cline IV*, 2019 OK 33, ¶¶ 28, 43, 441 P.3d at 1155, 1160-

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[20] It is notable that at the time of the *Casey* decision, Pennsylvania had *81 clinics* providing abortion services; today in Oklahoma, there are four. https://www.guttmacher.org/sites/default/files/pdfs/tables/3026398t5.pdf.

61. S.B. 778's two-visit requirement imposes a substantial obstacle for the same reason here. *See* Appellants' Br. at 17.

ii. Admitting Privileges: S.B. 779 requires physicians to have admitting privileges at a nearby hospital, or to execute a written contract with a physician who does. S.B. 779 §§ 7(11), 8. As this Court and the U.S. Supreme Court have held, whether an abortion provider has admitting privileges is utterly irrelevant to the safe management of any complications arising from an abortion, but such a requirement will unconstitutionally restrict access by imposing tremendous obstacles to care. *Cline III*, 2016 OK 121, ¶ 17-19, 387 P.3d at 353-354. The State does not dispute that it will be difficult, if not impossible, for most of Plaintiffs' physicians to satisfy this requirement. Yap Decl. ¶¶ 73-76; Braid Aff. ¶¶ 88-91. This admitting privileges requirement is not more "modest" than the one challenged in *Cline III* because it gives providers the option to contract with an associated physician. State's Br. at 27. This is because S.B. 779 includes a publicity requirement that directs the Department of Health to annually send associated physician contracts to every hospital in the county, publicly outing those physicians as associating with abortion providers. S.B. 779 § 8(2)(d)(l). Plaintiffs attest without contradiction that the possibility of finding a doctor willing to publicly become an associated physician is remote. Braid Aff. ¶¶ 88-89; Yap Decl. ¶¶ 73-76, 82. The State provides no evidence to refute that this publicity provision effectively nullifies the associated physician option. State's Br. at 27.

iii. Publicly Exposing Patient & Provider Records: S.B. 778 threatens patient privacy by requiring reporting of detailed information about individual medication abortion patients to the Department of Health, which must then designate these individual records as public records. S.B. 778 § 8(B), (H). The State cites language purportedly protecting patient

information, but it fails to explain the ways in which S.B. 778 deviates from existing law. Although the State currently publishes mandated reporting on abortions in an aggregated format, it has never before deemed individual patient records public. O.S.A. 63 § 1-738j(D). It is undisputed that the designated public records are so detailed, *see* Appellants' Br. at 19, that there are likely people for whom their disclosure would *uniquely* identify them. In a recent case in Montana concerning reporting requirements virtually identical to S.B. 778, the court enjoined the requirements because, as here, the state did "not adequately rebut Plaintiffs showing that this data indicates that certain demographic categories of women obtaining abortions contain very few numbers, which makes obvious the risk of identification through the additional data the law requires." *Planned Parenthood of Mont. v. Montana*, DV 21-00999, (Mont. 13th Jud. Dist. Oct. 7, 2021) at 30; *cf. Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 900-01 (holding reporting provision did not impose an undue burden where the identity of each patient would remain entirely confidential). The threat of public exposure is particularly and unacceptably dire for patients with abusive partners or family members. Braid Aff. ¶¶ 80, 94.

S.B. 778 also requires reporting the name of the abortion-providing physician as well as the "referring physician, agency or service," and deems such information a "public record." S.B. 778 § 8(B)(1), (3), (H). Similarly, S.B. 779 requires reporting "a list of staff attending patients including licensing numbers and evidence of other qualifications." S.B. 779 § 9(A)(7). It is undisputed that these requirements are likely to lead to the harassment of physicians and a chilling effect for those who refer patients for abortions, including for reasons related to serious maternal or fetal health conditions. Braid Aff. ¶¶ 88-89; Yap Decl. ¶¶ 73-76,

82. The State has failed to provide any rationale for compromising the confidentiality of patients or the providers who care for them. *See* Appellants' Br. at 19.

iv. Restricting Medication Abortion to 70 days: S.B. 779 entirely prohibits abortion patients from obtaining medication abortion after 70 days as dated from a person's last menstrual period even though evidence-based practice supports its use through 77 days. S.B. 779 § 7(10)(b). This Court has already held that barring medication abortion after a certain time period without medical justification constitutes a burden "of timing," giving patients "less time to discover the pregnancy, and to decide whether to terminate," constituting an unconstitutional obstacle. *Cline IV*, 2019 OK 33, ¶¶ 28 31, 441 P.3d at 1155-58.

In sum, the State's rhetoric cannot diminish the undue burden that the Medication Abortion Restrictions impose on abortion access.

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

The Medication Abortion Restrictions likely violate Oklahoma's single subject rule because they each contain numerous unrelated provisions. Appellants' Br. at 23-26. The State's arguments to contrary do not hold water. *See* State's Br. at 13-17.

Plaintiffs are not arguing that the State has passed too many laws on abortion and not "enough bills on abortion." State's Br. at 13. Regardless of how many bills the State has enacted, each bill must comply with the single subject rule. Under that rule, each individual bill must "embrace but one subject." Okla. Const. art. V, § 57. The key question is whether the components of the bill are sufficiently interrelated. In answering this question, the Court must consider "whether it appears that either the proposal is misleading or provisions in the proposal are so unrelated that many of those voting on the law would be faced with an unpalatable all-or-nothing choice." *Cline III*, 2016 ¶ 27, 387 P.3d at 355-56 (quotation and footnote omitted).

Contrary to the State's contention, *see* State's Br. at 15, the question of whether the provisions of the Medication Abortion Restrictions are sufficiently interrelated as the single subject rule requires is not answered by the fact that the legislature *has applied* these restrictions to medication abortion. *See Cline III*, 2016 OK ¶ 27, 387 P.3d at 355-56. In striking down omnibus abortion bills far less labyrinthine than S.B. 778 and S.B. 779,[21] this Court has made clear that a law is not sufficiently interrelated "because each sub-part relates in some way to abortion." *Cline III*, 2016 OK 121, ¶ 26, 387 P.3d at 355.[22] Rather, this Court has repeatedly struck down laws where the State attempted to employ this sort of "comprehensive" theory. *Cline II*, 2016 OK 99, ¶ 15, 382 P.3d at 1052 ("Whether or not legislation is comprehensive ***is not*** the determinative factor for constitutional challenge under art. 5, 57." (emphasis in original)).

Here the State uses "medication abortion" in an identical fashion. But, the State's attempt to use "medication abortion" as "some rational connection" between the various components of the Medication Abortion restrictions is insufficient to demonstrate that the bills comply with the single subject rule. *Cline III*, 2016 OK 121, ¶ 27, 387 P.3d at 355. A "common connection or theme is not sufficient to satisfy the single subject rule where the legislation is potentially misleading or leaves the Legislature with an all-or-nothing choice." *Id.* ¶ 17, 382 P.3d at 1053.

The State's assertion that this Court has upheld other laws with a similar number of provisions, *see* State's Br. at 16, is also irrelevant to whether the bills' provisions are actually

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[21] *Nova Health Sys. v. Edmondson*, 2010 OK 21, ¶ 1, 233 P.3d at 381-82; *Burns v. Cline* ("*Cline II*"), 2016 OK 99, ¶ 10, 382 P.3d 1048, 1051; *Cline III*, 2016 OK 121, ¶ 25, 28, 387 P.3d at 355-56.

[22] So too have lower courts. *Okla. Coal. for Reprod. Just. v. State Bd. of Pharm.*, No. CV-2013-1640, 2014 WL 585353, at *1 (Okla. Dist. Jan. 29, 2014); *Davis v. Edmondson*, No. CJ-2009-9154, 2010 WL 1734636 (Okla. Dist. Mar. 02, 2010).

"germane, relative, and cognate to a readily apparent common theme or purpose." *Hunsucker v. Fallin*, 2017 OK 100, ¶ 31, 408 P.3d 599, 610. In fact, the Medication Abortion Restrictions include many of the *same topics* found to be unrelated to each other by this Court in *Cline II* and *Cline III*—along with many more. *See* Appellants' Br. at 24-25. The statements of legislators show that the only intent behind the Medication Abortion Restrictions is to make medication abortion difficult to access, and that is the only common thread through their many provisions. *See infra* Part IV; Appellants' Br. at 26-29.

The State admits that multiple delegations can violate the single subject rule when they are directed at different purposes. State's Br. at 16. In *Cline II*, the Oklahoma Supreme Court struck down a statute that, among other things, set forth both civil and criminal penalties for a violation of any existing regulation relating to abortion. 2016 OK 99, ¶¶ 9, 13, 382 P.3d at 1051-52 (footnote omitted). The Court held that the law violated the single subject rule by including "directives to different state entities for different purposes" as it imposed civil, criminal, and licensure penalties, delegating "authority to three different state agencies." *Id.* ¶¶ 9, 13, 382 P.3d at 1052 (footnote omitted). The same is true here, especially given that the bills impose "significant penalties for simple violations." *Cline III*, 2016 OK 121, ¶ 23, 387 P.3d at 354.

The State next argues that there was broad support for these bills, State's Br. at 17, but whether an omnibus bill has broad legislative support does not alleviate concerns about "logrolling" or whether legislators were "adequately notified," *Fent v. State ex rel. Okla. Capitol Improvement Auth.*, 2009 OK 15, ¶ 14, 214 P.3d 799, 804-05. To the contrary, the single subject rule is a procedural safeguard intended to ensure that "[e]ach subject brought into the deliberation of the legislative department is to be considered and voted on singly,

without having associated with it any other measure to give it strength." *Id.* ¶ 15, 804-05 (quotation and citation omitted).

When the terms of a bill violate the single subject rule, the law must be enjoined in full. *See Cline III*, 2016 OK 121, ¶ 29, 387 P.3d at 356; *Cline II*, 2016 OK 99, ¶ 19, 382 P.3d at 1053; *Nova Health Sys.*, 2010 OK 21, ¶ 1, 233 P.3d at 381-82. The State makes a half-hearted attempt to argue that any offending provisions are severable, although they cite no authority to support their view that this Court should serve in such a legislative role. State's Br. at 14. To the contrary, this Court has held, "severance is not an option" where each bill "encompasses so many different subjects."[23] *Douglas v. Cox Ret. Properties, Inc.*, 2013 OK 37, ¶ 11, 302 P.3d 789, 793.

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

Under longstanding precedent, an abortion restriction cannot be enacted with the purpose of placing a substantial obstacle in front of patients seeking abortion—and such a purpose may be divined from legislative history like that cited in Appellants' Brief. *See* Appellants' Br. at 26-29. Unable to contest that showing, the State asks this Court to ignore it, relying upon two inapposite cases. State's Br. at 28. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 457 (2002), held that legislative history cannot be used to modify unambiguous statutory language, not that it cannot be used as evidence of legislative intent. In *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1552 (8th Cir. 1996), the Eighth Circuit held that the views of a single isolated senator in the Minnesota legislature were insufficient to prove legislative purpose. Here, there

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[23] Even if severance was available, it would be impermissible judicial legislating to "pick[] and choos[e] which provisions relate to" medication abortion "and which do not." *Id.* A court must refrain from "'rewrit[ing] state law to conform it to constitutional requirements' even as [it] strive[s] to salvage it." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) (quoting *Virginia v. American Booksellers Assn., Inc.*, 484 U.S. 383, 397 (1988)).

is extensive evidence that restricting abortion access was the clear goal of the legislature in enacting the Challenged Laws. *See* Appellants' Br. at 26-29; *see also* Hicham Raache, *58th Legislature Adjourns, Oklahoma Republicans Tout Tax Cuts in Fiscal Year '22 Budget, Education Investment, Abortion Restriction*, NBC 4 KFOR (May 27, 2021) ("Senate Republicans [have also] said [that] with the conservative shift in the U.S. Supreme Court, some of these bills are meant to challenge national abortion laws.").

V. The Equities Favor Oklahomans Seeking Abortion Care.

The State's argument that Oklahomans are not harmed is based only on their view that Plaintiffs are unlikely to succeed on the merits. *See* State's Br. at 29. But, as stated above, and as detailed in extensive testimony, each of the Challenged Laws violates the substantive due process rights of Oklahomans. *See supra* Part III(C)(1). This harm is threatened at an already fraught time for abortion access in the region.[24] Severely restricting Oklahomans' access to abortion was the explicitly stated goal of the legislators who proposed the laws, *see supra* Part III(C)(4); Appellants' Br. at 26-29, which the State has never denied. Further, because the Medication Abortion Restrictions violate the single subject rule, they have failed to afford the public "a clear picture of how their elected officials have voted on a particular issue" and "adequate[] noti[ce] of the potential effect of legislation." *Hunsucker*, 2017 OK 100, ¶ 31, 408 P.3d at 610. The Medication Abortion Restrictions are independently void for failing this constitutional safeguard. *See supra* Part III(C)(3). These threats to constitutional rights constitute *per se* irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976).

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[24] Oklahoma has followed 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, the burdens they will impose on access to abortion will be catastrophic for Oklahomans. *See supra* at 13 n.16.

The State has identified no concrete harm, nor could it, that would result if the status quo were maintained pending final resolution of Plaintiffs' claims. Appellants' Br. at 30. Indeed, the evidentiary record amply demonstrates that abortion, including medication abortion, is safe, and the State has failed to meaningfully rebut the harms demonstrated by Plaintiffs. *See* Appellants' Br. at 29-30. A temporary injunction would simply preserve the status quo while the merits are adjudicated.

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; *see also Am. Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999). Where, as here, an appeal raises important issues of state policy, the public interest is "best served by preserving the status quo." *Edwards v. Bd. of Cnty. Comm'rs of Canadian Cnty*, 2015 OK 58, ¶ 35, 378 P.3d at 64.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court reverse the District Court's denial of a temporary injunction as to the Challenged Laws.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Blake Patton, hereby certify that on this 7th day of February, 2022, a true and correct copy of the foregoing was delivered to the following:

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