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Supreme Court of the State of Oklahoma

OKLAHOMA CALL FOR REPRODUCTIVE JUSTICE, ET AL.,
PETITIONERS,

v.

JOHN O'CONNOR, ET AL.,
RESPONDENTS.

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ORIGINAL JURISDICTION PROCEEDING

**BRIEF OF GATEWAY WOMEN'S RESOURCE CENTER, INC. AS
AMICUS CURIAE IN SUPPORT OF RESPONDENTS**

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INTRODUCTION

Oklahoma's Constitution is silent about abortion. Thus, like the United States Constitution, it is neutral on this contentious issue. And “[b]ecause the Constitution is neutral on the issue of abortion, this Court also must be scrupulously neutral.” *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2305 (2022) (Kavanaugh, J., concurring). The People of Oklahoma have spoken through their representatives. Petitioners' demand to impose their moral and business view—that unborn life has *no* value—on the People should be rejected.

The United States Supreme Court tried to impose a judicial vision of abortion-on-demand for nearly 50 years, to disastrous results. It struggled to identify the constitutional basis of such a right, veering from privacy in *Roe v. Wade*, 410 U.S. 113, 154 (1973), to autonomy and mysteries of life in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992). It could not decide the parameters of such a right, careening from trimesters in *Roe* to viability in *Casey*. It could not identify why viability mattered but in purely “circular” fashion. *Dobbs*, 142 S. Ct. at 2311 (Roberts, C.J., concurring in judgment). It could not provide a workable standard to adjudicate any right to abortion, eventually recognizing that its “undue burden” test “is inherently standardless.” *Id.* at 2272 (majority opinion) (cleaned up). It adopted an abortion right that put the United States in the dubious company of a handful of countries hostile to basic human rights, “among them China and North Korea.” *Id.* at 2312 (Roberts, C.J.). Its invented abortion right distorted vast swaths of the law, including “[s]tatutory interpretation, the rules of civil procedure, the standards for appellate review of legislative factfinding, and the First Amendment.” *Memphis Ctr. for Reprod. Health v. Slatery*, 14 F.4th 409, 451 (6th Cir. 2021) (Thapar, J., concurring in judgment in part and dissenting in part). And its constitutional rule precipitated the deaths of more than 63 million unborn children in America.

Now, several abortionists whose business interests are at stake want this Court to make all these mistakes and more. They want this Court to take sides on one of the most contentious questions of our time: whether an unborn child deserves legal protection. And they want this Court to categorically hold that unborn life has no value. Not at viability (when the child can

indisputably feel pain). Not in the second trimester. Not in the delivery room. They claim that, as a matter of law, unborn life deserves *no* legal protection.

Unsurprisingly, that extraordinary ideological view has never prevailed in our legislative process. Abortionists can continue pressing that view in the court of public opinion; their business model all but demands it. But this Court should not countenance abortionists' strained effort to invoke a constitutional provision that guarantees life and liberty to take away the ability of the People to protect unborn life. The Oklahoma Constitution does not impose Petitioners' moral perspective on all Oklahomans. The Court too should be neutral.

Fortunately, upholding Oklahoma's laws would not require the Court to decide when life begins. After surveying medical evidence, the legislature determined that unborn life is worthy of legal protection. This legislative determination is consistent with the scientific evidence now available. "[B]y common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb." *Gonzales v. Carhart*, 550 U.S. 124, 147 (2007). At five weeks' gestation (just three weeks after conception), the unborn child's heart starts beating. By six weeks, brain waves are detectable. By seven weeks, the child can move and starts to develop sensory receptors. By ten weeks, multiple organs begin to function, and the child has the neural circuitry for spinal reflex, an early response to pain. By twelve weeks, the child can open and close fingers and sense stimulation from the outside world, and has assumed the human form. Medical interventions after fifteen weeks (other than abortion) use analgesia to prevent suffering. At this point, abortionists must rip the child "piece by piece" from the womb. *Gonzales*, 550 U.S. at 136.

To uphold the Act would not require this Court to consider the implications of these scientific facts; the People have already done so through their elected representatives. Accepting the abortionists' theory, on the other hand, would require this Court to "impose on the [P]eople a particular theory about when the rights of personhood begin." *Dobbs*, 142 S. Ct. at 2261. It would require this Court to substitute a moral and philosophical belief that unborn life *never* has any value for the legislature's scientific judgment that abortion ends "the life of an

‘unborn human being.’” *Id.* at 2258. In other words, the abortionists want this Court to hold that the Oklahoma Constitution “requires the State[] to regard a fetus as lacking even the most basic human right—to live”—even one minute before birth. *Id.* at 2261. That extraordinary demand seeks relief far beyond this Court’s judicial power to say what the law is: “It is solely the prerogative of the Legislature to fashion . . . policy and the courts may not substitute their judgment for that of the Legislature.” *Oklahoma Water Res. Bd. v. Texas Cnty. Irr. & Water Res. Ass’n, Inc.*, 1984 OK 96, 711 P.2d 38, 41 n.2 (citing Okla. Const. art. IV, § 1).

The Court should reject Petitioners’ radical reinterpretation of the Oklahoma Constitution. As with many controversial issues, abortion is not decided by the Constitution. “The permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.” *Dobbs*, 142 S. Ct. at 2243 (cleaned up). The People’s representatives “can do what [this Court] can’t: listen to the community, create fact-specific rules with appropriate exceptions, gather more evidence, and update their laws if things don’t work properly.” *Slatery*, 14 F.4th at 462 (Thapar, J.). The People, not judges, get to decide how to protect unborn life.

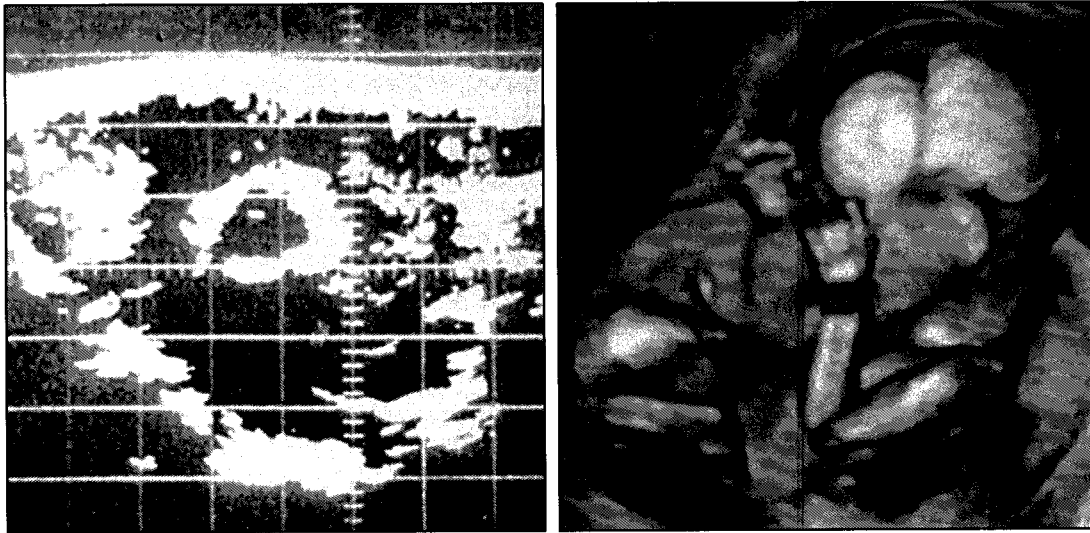
I. The People’s decision to protect unborn life reflects scientific fact.

Scientific knowledge both underscores the legitimacy of the legislature’s decisions here and undermines any argument for a novel constitutional right to abortion. Medical advancements have produced scientific evidence that makes clear today what the U.S. Supreme Court in *Roe* could not understand: the human fetus is a living being from the moment of conception and can move, smile, and feel pain in the womb.

When the Court decided *Roe* in 1973, scientific knowledge about fetal development was limited, with fetology only recognized as a new field of science that same year. Indeed, the Court had been told that “in early pregnancy” “embryonic development has scarcely begun.” Brief for Appellant 20, *Roe*, 1971 WL 128054. Thus, “[a]s to the question ‘when life begins,’ the *Roe* majority maintained that ‘at that point in the development of man’s knowledge,’ it was ‘not in a position to speculate.’” *Slatery*, 14 F.4th at 450 (Thapar, J.). The

Court relied on “the well-known facts of fetal development” to conclude that a previability “fetus, at most, represents only the potentiality of life.” *Roe*, 410 U.S. at 156, 162.

Only in the late 1970s did the use of ultrasound machines expand. Unlike the prototypes in limited use in 1973, routine ultrasounds can now provide high-quality three-dimensional images in real time that reveal the fetus to be much more developed than the Court in *Roe* could have known. Reflecting these advances in medical knowledge, ultrasound imagery available at the time of *Roe* looked much different from the imagery available today. Below are fifteen-week ultrasounds around 1973 and today:¹



Now we know that “[f]rom fertilization, an embryo (and later, fetus) is alive and possesses its unique DNA.”² The fusion of the oocyte and the sperm create the zygote “in less than a single second.”³ In a “biological sense,” “the embryo or fetus is whole, separate, unique and living” from conception. *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 736

¹ Stuart Campbell, *A Short History of Sonography in Obstetrics and Gynaecology*, 5 FVV-ObGyn 217 (2013); Kristen J. Gough, *Second Trimester Ultrasound Pictures* (Dec. 5, 2019), <https://perma.cc/J2NV-GT6M>.

² *Slatery*, 14 F.4th at 450 (Thapar, J.) (citing Enrica Bianchi, et al., *Juno Is the Egg Izumo Receptor and Is Essential for Mammalian Fertilization*, 508 *Nature* 483, 483 (2014)).

³ Am. Coll. of Pediatricians, *When Human Life Begins* (Mar. 2017), <https://perma.cc/Z9W5-UN9T>; see also Ulyana Vjugina & Janice P. Evans, *New Insights into the Molecular Basis of Mammalian Sperm-Egg Membrane Interactions*, 13 *Frontiers Bioscience* 462, 462–76 (2008); Maureen L. Condic, *When Does Human Life Begin? A Scientific Perspective* 5 (2008).

(8th Cir. 2008) (en banc). “Of course, that new life is not yet mature—growth and development are necessary before that life can survive independently—but it is nonetheless human life.” *Hamilton v. Scott*, 97 So. 3d 728, 746–47 (Ala. 2012) (Parker, J., concurring).

During the fifth week, “[t]he cardiovascular system is the first major system to function in the embryo,” with the heart and vascular system appearing in the middle of the week.⁴ By the end of the fifth week, “blood is circulating and the heart begins to beat on the 21st or 22nd day” after conception; by six weeks, “[t]he embryonic heartbeat can be detected.”⁵ After detection of a fetal heartbeat—and absent an abortion—the overwhelming majority of unborn children will now survive to birth.⁶ Also during the sixth week, the child’s nervous system is developing, with the brain already “patterned” at this early stage.⁷ The earliest neurons are generated in the region of the brain responsible for thinking, memory, and other higher functions.⁸ And the child’s face is developing, with cheeks, chin, and jaw starting to form.

At seven weeks, cutaneous sensory receptors, which permit prenatal pain perception, begin to develop.⁹ The unborn child also starts to move.¹⁰ During the seventh week, “the growth of the head exceeds that of other regions” largely because of “the rapid development of the brain” and facial features.¹¹ At eight weeks, essential organs and systems have started to form, including the child’s kidneys, liver, and lungs.¹² At nine weeks, the child’s ears, eyes,

⁴ Keith L. Moore et al., *The Developing Human E-Book: Clinically Oriented Embryology* 8945 (Kindle ed. 2020).

⁵ *Id.* at 2662, 2755.

⁶ Joe Leigh Simpson, *Low Fetal Loss Rates After Ultrasound Proved-Viability in First Trimester*, 258 J. Am. Med. Ass’n 2555, 2555–57 (1987).

⁷ Thomas W. Sadler, *Langman’s Medical Embryology* 72 (14th ed. 2019); see generally *id.* at 59–95.

⁸ See, e.g., Irina Bystron et al., *Tangential Networks of Precocious Neurons and Early Axonal Outgrowth in the Embryonic Human Forebrain*, 25 J. Neuroscience 2781, 2788 (2005).

⁹ Kanwaljeet S. Anand & Paul R. Hickey, *Special Article, Pain and Its Effects in the Human Neonate and Fetus*, 317 New Eng. J. Med. 1321, 1322 (1987).

¹⁰ Alessandra Pionetelli, *Development of Normal Fetal Movements: The First 25 Weeks of Gestation* 98, 110 (2010).

¹¹ Keith L. Moore et al., *The Developing Human: Clinically Oriented Embryology* 65–84.e1 (11th ed. 2020).

¹² See Sadler, *supra* note 7, at 72–95.

teeth, and external genitalia are forming.¹³ At ten weeks, vital organs begin to function, and the child's hair and nails begin to form.¹⁴ By this point, the neural circuitry has formed for spinal reflex, or “nociception,” which is the fetus's early response to pain.¹⁵ Starting around ten weeks, the earliest connections between neurons constituting the subcortical-frontal pathways—the circuitry that is involved in pain perception—are established.¹⁶

Only during the late 1980s and early 1990s did any of the initial scientific evidence for prenatal pain begin to emerge. Today, the “evidence for the subconscious incorporation of pain into neurological development and plasticity is incontrovertible.”¹⁷ Every modern review of prenatal pain consistently issues the same interpretation of the data: by ten to twelve weeks, a fetus develops neural circuitry able to detect and respond to pain.¹⁸ Even more sophisticated reactions occur as the unborn child develops further.¹⁹ And new developments have provided more evidence strengthening this conclusion.²⁰

As early as ten or eleven weeks, the fetus shows awareness of his or her environment.²¹ The fetus also begins to perform “breathing movements” that “increase progressively” as he

¹³ See Sadler, *supra* note 7, at 72–95.

¹⁴ See *id.* at 106–127; Moore et al., *supra* note 11, at 65–84.e1; Johns Hopkins Med., *The First Trimester*, <https://perma.cc/8N6H-M6CN>.

¹⁵ See, e.g., Int'l Ass'n for the Study of Pain, *IASP Terminology*, <https://perma.cc/5PV5-5T9H>.

¹⁶ Lana Vasung et al., *Development of Axonal Pathways in the Human Fetal Fronto-Limbic Brain: Histochemical Characterization and Diffusion Tensor Imaging*, 217 *J. Anatomy* 400, 400–03 (2010).

¹⁷ Curtis L. Lowery et al., *Neurodevelopmental Changes of Fetal Pain*, 31 *Seminars Perinatology* 275, 275 (2007).

¹⁸ See, e.g., Carlo V. Bellieni & Giuseppe Buonocore, *Is Fetal Pain a Real Evidence?*, 25 *J. Maternal-Fetal & Neonatal Med.* 1203, 1203–08 (2012); Richard Rokyta, *Fetal Pain*, 29 *Neuroendocrinology Letters* 807, 807–14 (2008).

¹⁹ See Royal Coll. of Obstetricians & Gynaecologists, *Fetal Awareness: Review of Research and Recommendations for Practice* 5, 7 (Mar. 2010), <https://perma.cc/4V84-TEMC>; Susan J. Lee et al., *Fetal Pain: A Systematic Multidisciplinary Review of the Evidence*, 294 *J. Am. Med. Ass'n* 947, 948–49 (2005).

²⁰ See Lisandra Stein Bernardes et al., *Acute Pain Facial Expressions in 23-Week Fetus, Ultrasound Obstetrics & Gynecology* (June 2021), <https://perma.cc/V8BU-PZK4>.

²¹ Umberto Castiello et al., *Wired to Be Social: The Ontogeny of Human Interaction*, 5 *PLOS One*, Oct. 2017, e13199, at 1, 9.

or she develops in the womb.²² At eleven weeks, the unborn child's diaphragm is developing.²³ The child has hands and feet, ears, open nasal passages on the tip of the nose, and a tongue.²⁴ "[A]n unborn child visibly takes on the human form in all relevant aspects by 12 weeks' gestation." *Slatery*, 14 F.4th at 450 (Thapar, J.) (cleaned up). The child can open and close fingers, starts to make sucking motions, and senses stimulation.²⁵

Moreover, by twelve weeks, the parts of the central nervous system leading from peripheral nerves to the brain are sufficiently connected to permit the peripheral pain receptors to detect painful stimuli.²⁶ Thus, the unborn "baby develops sensitivity to external stimuli and to pain much earlier than was believed" when *Roe* and *Casey* were decided. *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 774 (8th Cir. 2015) (cleaned up). By fifteen weeks, "the fetus is extremely sensitive to painful stimuli," and physicians (other than those performing abortions) take this fact "into account when performing invasive medical procedures on the fetus."²⁷ Even more neural circuitry for pain detection and transmission develops between sixteen and twenty weeks, including spinothalamic fibers, which are responsible for the transmission of pain from the periphery to the thalamus.²⁸ By eighteen weeks, painful stimuli will cause the baby *in utero* to exhibit stress-induced hormonal responses.²⁹ The fetus reacts to such stimuli with "hormonal stress responses," with rising hormone levels "independent of those of the mother."³⁰

²² Pionetelli, *supra* note 10, at 40.

²³ *Id.* at 31.

²⁴ Moore et al., *supra* note 11, 1–9.e1; Prachi Jain & Manu Rathee, *Embryology, Tongue* (last updated Aug. 11, 2020), <https://perma.cc/FCP4-7788>.

²⁵ Pionetelli, *supra* note 10, at 50, 61–62; Slobodan Sekulic et al., *Appearance of Fetal Pain Could Be Associated with Maturation of the Mesodiencephalic Structures*, 9 J. Pain Rsch. 1031, 1034–35 (2016).

²⁶ Sekulic et al., *supra* note 25, at 1034–35.

²⁷ Sekulic et al., *supra* note 25, at 1036.

²⁸ Ritu Gupta et al., *Fetal Surgery and Anesthetic Implications*, 8 Continuing Educ. Anesthesia, Critical Care & Pain 71, 74 (2008).

²⁹ Stuart W. G. Derbyshire, *Can Fetuses Feel Pain?*, 332 Brit. Med. J. 909, 910 (2006).

³⁰ Rachel Gitau et al., *Fetal Hypothalamic-Pituitary-Adrenal Stress Responses to Invasive Procedures are Independent of Maternal Responses*, 86 J. Clinical Endocrinology & Metabolism 104, 104 (2001).

These recent discoveries have led scientists to conclude that “the human fetus can feel pain when it undergoes surgical interventions and direct analgesia must be provided to it.”³¹ For this reason, anesthesiologists commonly recommend pain relievers for the fetus during potentially painful procedures.³² As one group of scholars explains, “the fetus is extremely sensitive to painful stimuli,” and “[i]t is necessary to apply adequate analgesia to prevent the suffering of the fetus.”³³ Thus, in other medical practices at this stage, physicians recognize the need to protect the unborn child in the womb and prioritize the child’s health.³⁴ By contrast, abortionists use no analgesia as they “dismember the fetus” “limb from limb” until the fetus “bleeds to death.” *Stenberg v. Carhart*, 530 U.S. 914, 958–59 (2000) (Kennedy, J., dissenting).

Also at fifteen weeks, unborn children kick their legs, move their arms, and start curling their toes. Between seventeen and eighteen weeks, the unborn child’s fingers and toes each develop their own unique prints.³⁵ By eighteen weeks, the child can hear his or her mother’s voice.³⁶ The nervous system is also developing for all five senses. At twenty weeks, the sex-specific reproductive organs have developed enough to permit identification of the child’s sex by ultrasound.³⁷ “[F]acial expressions begin to appear consistently,” including emotions.³⁸

At twenty-one weeks, the physical and neurological development of the unborn child is sufficiently mature that, in some cases, the child can survive childbirth.³⁹ At this stage of

³¹ Carlo V. Bellieni, *Analgesia for Fetal Pain During Prenatal Surgery: 10 Years of Progress*, 89 *Pediatrics Rsch.* 1612, 1612 (2021).

³² Sekulic et al., *supra* note 25, at 1036.

³³ *Id.*; accord Carlo V. Bellieni et al., *Use of Fetal Analgesia During Prenatal Surgery*, 26 *J. Maternal-Fetal Neonatal Med.* 90, 94 (2013).

³⁴ See, e.g., Ryan M. Antiel et al., *Weighing the Social and Ethical Considerations of Maternal-Fetal Surgery*, 140 *Pediatrics*, Dec. 2017, e20170608, at 1, 3–4.

³⁵ Johns Hopkins Med., *The Second Trimester*, <https://perma.cc/M7WA-6PC5>.

³⁶ *Id.*; see also Cleveland Clinic, *Fetal Development: Stages of Growth* (last updated Apr. 16, 2020), <https://perma.cc/YG92-KRH4>.

³⁷ See, e.g., Kavita Narang et al., *Developmental Genetics of the Female Reproductive Tract, in Human Reproductive and Prenatal Genetics* 129, 132, 135 (Peter C. K. Leung & Jie Qiao eds., 2019).

³⁸ Pionetelli, *supra* note 10, at 80.

³⁹ See Kaashif A. Ahmad et al., *Two-Year Neurodevelopmental Outcome of an Infant Born at*

development, the child can also swallow and experience different tastes. Between 23% and 60% of infants born at twenty-two weeks who receive active treatment survive.⁴⁰ And the true figures could be much higher, for “[a] policy that limits treatment for infants born at 24 weeks’ gestation will lead to [comparatively] low survival rates.”⁴¹ Yet Petitioners would treat unborn life, regardless of all this proven development, as meaningless, and their theory assigns the child’s life no value even in the remaining weeks of development until (at least) birth.

II. Barring the People from protecting unborn life would be a radical departure from the judicial role under the Oklahoma Constitution.

As shown above, the legislature’s judgment that unborn life deserves legal protection is amply supported by scientific fact. The question, then, is whether anything in the Oklahoma Constitution forbids this conclusion and *mandates* that the State permit the unlimited taking of unborn life. It does not. The abortionists’ theory hinges on a 40-year-old decision finding a “right of a legally competent person involuntarily committed to a medical facility . . . to refuse to consent to the administration of certain anti-psychotic drugs.” *In re K.K.B.*, 1980 OK 7, 609 P.2d 747, 748. *K.K.B.* did not cite a single constitutional provision. Presumably because the case’s holding had nothing to do with a right to abortion, Petitioners selectively quote this sentence from the decision’s conclusion: “If the law recognizes the right of an individual to make decisions about her life out of respect for the dignity and autonomy of the individual, that interest is no less significant when the individual is mentally or physically ill.” *Id.* at 752. From that, Petitioners extract an “autonomy and bodily integrity” right not “to continue a pregnancy.” Br. 8–9. This extraordinary reading contradicts text and history, as Respondents show.

Petitioners’ reading also contradicts *Dobbs*, the common law, Oklahoma’s and most

21 Weeks’ 4 Days’ Gestation, 140 *Pediatrics*, Dec. 2017, e20170103, at 1–2, <https://perma.cc/D9UR-KH DU>.

⁴⁰ Matthew A. Rysavy et al., *Between-Hospital Variation in Treatment and Outcomes in Extremely Preterm Infants*, 372 *New Eng. J. Med.* 1801, 1804 (2015); Katrin Mehler et al., *Survival Among Infants Born at 22 or 23 Weeks’ Gestation Following Active Prenatal and Postnatal Care*, 170 *J. Am. Med. Ass’n Pediatrics* 671, 675 (2016).

⁴¹ John D. Lantos & William Meadow, *Variation in the Treatment of Infants Born at the Borderline of Viability*, 123 *Pediatrics* 1588, 1589 (2009).

States' laws for centuries, and the laws of 117 countries. *Slatery*, 14 F.4th at 449 (Thapar, J.). Petitioners' theory depends on their claim that *only* the "pregnant person" "will ultimately bear the consequences" of an abortion—and the corollary, unstated claim that an unborn child has no value. Br. 8. *Amici* ACOG et al. make the incredible claim that "[t]here is no rational or legitimate basis" to regulate, for instance, an abortionist piercing the skull of a healthy 39-week-old little girl and suctioning her brains out. Br. 5. That monstrous position is rightly rejected by nearly every part of civilized society. Even *Roe* recognized that "[t]he pregnant woman cannot be isolated in her privacy" and abortion "is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation." 410 U.S. at 159. *Dobbs* confirmed the point, calling abortion "critically different": unlike *personal* autonomy rights, "[a]bortion destroys" "what the law" "regards as the life of an unborn human being." 142 S. Ct. at 2258, 2260 (cleaned up); *id.* at 2277, 2280. *Roe* and *Casey* at least permitted protection of post-viability life. Though that was an arbitrary line with no constitutional basis, *id.* at 2311 (Roberts, C.J.), Petitioners' theory would not allow the People to protect life even then. As shown, science cannot account for the Petitioners' view. Science teaches that the fetus is a unique human from the moment of conception. Thus, adopting the Petitioners' proposed limitless right to elective abortion would be a sheer imposition of their personal preferences on the People. But "the wisdom of choices made within the Legislature's law-making sphere are not [this Court's] concern." *Head v. McCracken*, 2004 OK 84, ¶ 13, 102 P.3d 670, 680; *see Yocum v. Greenbriar Nursing Home*, 2005 OK 27, ¶ 10, 130 P.3d 213, 219 (Courts "cannot trump a law's validity by employment of some extra-constitutional standards.").

CONCLUSION

Imposing Petitioners' desired rule—subjecting to strict scrutiny every abortion regulation until birth—would not only be a grievous departure from the judiciary's role in our system of government and "produc[e] a make-it-up-as-you-go abortion jurisprudence" (*Slatery*, 14 F.4th at 438 (Thapar, J.)), it would also end the lives of countless unborn children. This Court should grant judgment for Respondents.

Respectfully submitted,



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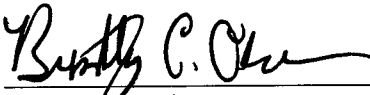
OCTOBER 3, 2022

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished via first-class mail, on this 3rd day of October 2022, to:

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