IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

OKLAHOMA CALL FOR REPRODUCTIVE JUSTICE, *et al.*

Petitioners,

v.

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

Respondents.

No: 120,543

ANSWER TO PETITIONERS' BRIEF IN CHIEF

Submitted by:

Zach West, OBA No. 30768
Solicitor General
OKLAHOMA OFFICE OF THE ATTORNEY GENERAL
313 N.E. 21st Street
Oklahoma City, OK 73105
Phone: (405) 521-3921
zach.west@oag.ok.gov

Audrey A. Weaver, OBA No. 33258
Assistant Solicitor General
OKLAHOMA OFFICE OF THE ATTORNEY GENERAL
313 N.E. 21st Street
Oklahoma City, OK 73105
Phone: (405) 521-3921
audrey.weaver@oag.ok.gov

COUNSEL FOR RESPONDENTS

September 21, 2022

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Oklahoma City, OK 73105
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INTRODUCTION

On July 12, 2022, soon after the U.S. Supreme Court overruled *Roe v. Wade* and held that the issue of abortion should return to the people, Respondents explained to this Court in detail, in the emergency response, why the Oklahoma Constitution cannot be read to encompass an implicit right to kill an unborn child. Oklahomans and their elected representatives, Respondents pointed out, have stood firmly against the practice of abortion throughout the history of our State, and nothing in our Constitution's text or this Court's precedent endorses a fundamental and inherent right to kill a whole, separate, unique, and living human being in the womb.

Petitioners' brief-in-chief repeats many of the arguments from their emergency brief, which Respondents refuted (and the Court rejected). Rather than confront Respondents' best textual, precedential, and historical points, Petitioners overlook or rush past them. For example, Petitioners ignore Respondents' explanation of why Petitioners' primary precedent, *In re Mental Health of K.K.B.*, 1980 OK 7, 609 P.2d 747, is inapplicable here.[1] The minimal additions Petitioners do provide fail to refute Respondents' authorities, nor advance Petitioners' underlying claim. They falsely claim, for instance, that the Muscogee (Creek) tribe permitted abortion. Petitioners likewise highlight one-sided "facts" that have no relevance to whether our Constitution protects abortion. Petitioners also raise several legal issues that are now, post-*Roe*, within the exclusive province of the Court of Criminal Appeals.

Respondents will not repeat all the unrebutted arguments and authorities covered in the emergency response. Rather, Respondents will refute new arguments Petitioners have raised, as well as provide further support for propositions in Respondents' original brief. In the end, Petitioners have not moved the needle, and this Court should deny relief and dismiss the case.

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[1] To recap: *K.K.B.* didn't interpret any particular constitutional provision, it didn't say the founders' views can be discarded, it was a "limited" decision that has been cited once by this Court in 42 years (in a footnote), and it cited now-defunct *Roe* for its holding. Emerg. Resp. at 17-20.

I. THIS CASE IS SIMPLE: OUR CONSTITUTION DOES NOT CONTAIN A FUNDAMENTAL RIGHT TO KILL A WHOLE, SEPARATE, UNIQUE, AND LIVING HUMAN BEING.

Petitioners repeatedly embrace a classic red herring: they claim it is "critical[]" that the unborn are not "persons" under the Oklahoma Constitution. *See, e.g.*, Petitioners' Brief ("Pet. Br.") at 19-20, 22-23. This misses the point. Even if they were correct that the unborn are sub-humans unworthy of the term "person," Petitioners still would not prevail—not even close. As Respondents have emphasized: This Court "does ***not*** actually need to decide whether the Oklahoma Constitution protects the unborn within the scope of 'inherent … life'" to deny relief. Emergency Response ("Emerg. Resp.") at 24. Petitioners never acknowledge this point.

The key question here is not fetal personhood, but whether the Oklahoma Constitution protects abortion as a right. And on that score, as was the case in *Dobbs v. Jackson Women's Health*, Petitioners offer not one scintilla of evidence showing that Oklahoma's founders, Indian tribes, or anyone remotely connected to either, viewed abortion as a right of any sort, much less a fundamental or "inherent" one. *See, e.g.*, 142 S. Ct. 2228, 2254 (2022) ("[Respondents] have found no support for the existence of an abortion right that predates the latter part of the 20th century—no state constitutional provision, no statute, no judicial decision, no learned treatise.").

This case should begin and end on this point alone: There is no express abortion right in Oklahoma's Constitution, and there is zero historical evidence that our Constitution implicitly contains a fundamental right to kill a whole, separate, unique, and living human being in the womb. It is Petitioners' burden to show that Oklahoma's abortion prohibitions "clearly, palpably, and plainly" conflict with the Constitution, Pet. Br. at 12 (quoting *Lafalier v. Lead-Impacted Cmtys. Relocation Assistance Tr.*, 2010 OK 48, ¶ 15, 237 P.3d 181, 188), and they have not done so.

The historical record instead confirms a deeply rooted and enduring Oklahoma tradition of protecting unborn life and criminalizing abortion. *See, e.g.*, Emerg. Resp. at 2-7, 11-16, 20-24. Petitioners' attempt to push back against this overwhelming record relies on overwrought rhetoric

and flat-out falsehood rather than substance. Petitioners fail to establish any deeply rooted history, or expansive understanding of natural law, encompassing the right to kill a human child.

a. Oklahomans have prohibited abortion throughout pregnancy since 1890, and courts have acknowledged and enforced that prohibition numerous times.

Petitioners spill quite a bit of ink on the supposedly (but not really) divergent abortion views of Indian tribes, and in trying to make something of "quick child" distinctions and varying penalties. None of this erases the fact that performing an abortion was a crime at **every** stage of pregnancy, as currently found at 21 O.S. § 861, tracing all the way back to Oklahoma Territory law from 1890. *See* Okla. (Terr.) Stat. § 2187 (1890), *recodified at* Okla. (Terr.) Stat. § 2177 (1893), *recodified at* Okla. (Terr.) Stat. § 2268 (1903), *recodified at* Okla. Comp. Laws § 2370 (1909), *recodified at* Okla. Rev. Laws § 2436 (1910), *recodified at* Okla. Comp. Stat. Ann. § 1859 (1921), *recodified at* O.S. § 1834 (1931), *recodified at* 21 O.S. § 861 (1937); *see also* Resp. App. K. Thus, nearly two decades before and for over five decades after Oklahoma adopted its constitution in 1907, abortion was criminalized throughout pregnancy, except to save the mother's life. This remarkable consistency continues to this day and was only interrupted by the U.S. Supreme Court imposing the "egregiously wrong," "exceptionally weak," and "damaging" *Roe* decision. *Dobbs*, 142 S. Ct. at 2243.

Prior to *Roe*, moreover, courts repeatedly analyzed and enforced Oklahoma's prohibitions on procuring or administering abortion.[2] Respondents already cited one example where the Court of Criminal Appeals (OCCA) upheld an abortion conviction. *See* Emerg. Resp. at 2, 11 (citing *Greenwood v. State*, 1909 OK CR 156, 105 P. 371). Other abortion cases involving Section 861 or

[2] To the contrary, Respondents have been unable to find any reported prosecutions under Section 862 of Title 21, which prohibited mothers from soliciting an abortion. *Cf. Wilson v. State*, 1927 OK CR 42, 252 P. 1106, 1108 ("It is generally held that the woman upon whom an abortion is performed is not an accomplice, but rather is a victim."). Unsurprisingly then, whereas Section 861 was elevated when *Roe* was overturned, Section 862 was repealed. *See* S.B. 918, Ch. 308, §§ 1, 18 O.S.L. (2021), *as amended by* S.B. 1555, Ch. 133, O.S.L. (2022); Cert. of Attorney General John O'Connor (June 24, 2022).

its direct statutory predecessors (hereinafter referred to jointly as "Section 861") can readily be found, as well. *See, e.g.*, *Adams v. State*, 1933 OK CR 38, 21 P.2d 1075 (upholding conviction under Section 861); *Cahill v. State*, 1947 OK CR 27, 178 P.2d 657 (reversing conviction under Section 861 due to insufficient evidence).[3]

Indeed, several such cases interpreted aspects of Section 861, acknowledged the severity of the crime, or recognized the humanity of the unborn. In *Chandler v. State*, for instance, the OCCA upheld a conviction under Section 861 for a man's attempt to perform an abortion. *See* 1910 OK CR 1, 105 P. 375, *overruled on other grounds by Reddell v. State*, 1975 OK CR 229, 543 P.2d 574. In that opinion, the OCCA emphasized that the crime "was not a misdemeanor, but a felony," it interpreted the word "administer," and it noted the crime had been committed a month after statehood, *see id.* at 378, making it particularly useful for gauging the founding generation's view on abortion. Nearly 20 years later, the OCCA again interpreted Section 861 and upheld the conviction of a physician who had "performed some act to bring about an abortion" of an "unborn child," *Wilson v. State*, 1927 OK CR 42, 252 P. 1106, 1107. The "medical practitioner who performs abortions," the OCCA opined, "is a menace to society." *Id.*

In other words, Section 861 wasn't just a paper tiger, enshrined in text but ignored in practice. Courts and litigants had numerous opportunities to interact with the statute, and "nary a whisper of a constitutional tension" was raised, "much less a conflict." Emerg. Resp. at 10. No reference can be found to an argument that killing an unborn child was so deeply rooted in our nation or state's history that it was an "inherent" or "natural" right.

No such argument can be found in other pre-*Roe* abortion cases, either. In *Copus v. State*,

[3] This doesn't include, moreover, prosecutions and convictions that never made their way into appellate opinions. *See* Paul Benjamin Linton, *Abortion Convictions Before Roe*, 36 ISSUES IN LAW & MEDICINE 77, 78 (Spring 2021) ("Inclusion of such information would increase the numbers of criminal convictions, perhaps significantly.").

the OCCA upheld a dentist's manslaughter conviction under Oklahoma's now-repealed "quick child" prohibition, while observing that a "life had been destroyed" in the womb. 1924 OK CR 91, 224 P. 364, 364. And in *Davis v. State*, the OCCA upheld the murder conviction of a "professional criminal abortionist, of the most reprehensible type," after the physician's illegal practice was discovered because a mother under his care died. 1925 OK CR 61, 234 P. 787, 790.[4] In so doing, the OCCA repeatedly referred to abortion as "criminal." *Id.* Eight years later, the OCCA upheld a murder conviction of another "professional criminal abortionist" following the death of a mother. *Thacker v. State*, 1933 OK CR 119, 26 P.2d 770, 775. The State's theory there was that performance of abortion was a "disgrace" in the medical community, and the court added in apparent agreement that the defendant was "not entitled to be considered a reputable physician" because of his performance of abortion. *Id.*[5]

Last but not least, in *Bowlan v. Lunsford* this Court unanimously held, in a case seeking civil damages, "that the anti-abortion statutes in Oklahoma were enacted and designed for the protection of the unborn child and, through[] it[,] society." 1936 OK 158, ¶ 11, 54 P.2d 666, 668. "It is the rule in all jurisdictions," this Court added, "that the interruption of pregnancy has always been regarded as highly offensive to good morals and injurious to society." *Id.* at ¶ 8. This Oklahoma history, of course, dovetails precisely with the historical findings of the U.S. Supreme Court in *Dobbs. See, e.g.*, 142 S. Ct. at 2254.

b. Legislative silence in criminal laws pre-dating statehood do not establish that abortion was permitted, much less considered a fundamental right.

Rather than identify a single historical source enshrining a right to kill an unborn child, Petitioners make negative inferences from legislative silence in pre-statehood tribal and territory

[4] The doctor had assured the mother that the abortion "would not be dangerous." *Id.* at 787. She then died of blood poisoning, and he was convicted of her murder.

[5] *See also Smith v. State,* 1946 OK CR 115, 175 P.2d 348, 365 (upholding manslaughter conviction for non-physician who "brazenly" operated "abortion mill" where a mother died).

law. In particular, they claim the existence of pre-statehood criminal laws prohibiting abortion of a *quick* child mean that the laws "permit[ed] abortion up until 'quickening[.]'" Pet. Br. at 19. Petitioners present no evidence to support the negative inference. Nor do they acknowledge the U.S. Supreme Court refuted this type of "quickening" point in *Dobbs*. *See* 142 S. Ct. at 2249-2255.

In *Dobbs*, the U.S. Solicitor General "suggest[ed] that history supports an abortion right because of the common law's failure to criminalize abortion before quickening." *Id.* at 2236. But this was wrong. Not only did many "authorities assert[] that even a pre-quickening abortion was 'unlawful'" under the common law, but also the "fact that many States in the late 18th and early 19th century did not criminalize pre-quickening abortions does *not* meant that anyone thought the States lacked the authority to do so." *Id.* (emphasis added). In other words, "it does not follow" from statutory silence "that abortion was *permissible* at common law—much less that abortion was a legal *right*." *Id.* at 2250 (emphasis in original). No one in that time, the Court observed, "endorsed the practice" of abortion, even though authorities "differed on the severity of punishment for abortions committed at different points in pregnancy." *Id.* at 2251 ("[W]e are aware of no common-law case or authority, and the parties have not pointed to any, that remotely suggests a positive right to procure an abortion at any stage of pregnancy.").

In addition, *Dobbs* pointed out that the quickening distinction potentially developed because of the "difficulty of proving that a pre-quickening fetus was alive" based on the limited scientific methods available. *Id.* "As one court put it in 1872: '[U]ntil the period of quickening there is no evidence of life; and whatever may be said of the feotus, the law has fixed upon this period of gestation as the time when the child is endowed with life' because 'foetal movements are the first clearly marked and well defined evidences of life.'" *Id.* at 2251-52 (quoting *Evans v. People*, 49 N.Y. 86, 90 (N.Y. 1872)). Put simply, "quickening" was embraced not because killing a pre-quick child was permissible, but rather because, as an evidentiary matter, it was impossible at

the time to prove the unborn child was ever alive. This changed, of course, with scientific advancements. The quickening rule "was abandoned in the 19th century" because it was "neither in accordance with the result of medical experience, nor with the principles of the common law." *Id.* at 2252. Indeed, the *Dobbs* dissent did not dispute "the fact that abortion was illegal at common law at least after quickening; that the 19th century saw a trend toward criminalization of pre-quickening abortions; that by 1868, a supermajority of States (at least 26 of 37) had enacted statutes criminalizing abortion at all stages of pregnancy; [and] that by the late 1950s at least 46 States prohibited abortion 'however and whenever performed' ...." *Id.* at 2260.

Thus, when Oklahoma became a State, although there was a "quick child" abortion law on the books, and although an Indian tribe or two had included a quickening distinction, the primary abortion law that had been in place for several decades was a total abortion ban, throughout pregnancy. *See supra* Section I(a). At no point did anyone even remotely suggest abortion was permissible, a right, a fundamental right, or an inherent right.

c. Petitioners' claims about Indian tribes are wildly mistaken.

Petitioners next turn to tribal laws, straining to refute Respondents' undeniably true contention that "[p]rior to Oklahoma's statehood, the laws of various Indian Nations in Indian Territory criminalized killing an unborn child." Emerg. Resp. at 2 (citing Cherokee and Choctaw laws). Here again, however, Petitioners base these arguments directly on fetal personhood, rather than on the existence of a clear and plain fundamental *right* to abortion. Petitioners also fail to recognize that even if they could establish Indian tribes in the late 1800s viewed abortion as a right, that fact cannot, as a matter of law, overcome the unbroken and deeply rooted history underlying Oklahoma's Constitution. Regardless, Indian tribes did not permit abortion or consider it a right. Rather than refute the proposition that historic tribal laws criminalized killing the unborn, Petitioners *bolster* it by conceding that the Osage also prohibited abortion throughout pregnancy.

Pet. Br. at 19 n.25 (citing Treaties and Laws of the Osage Nation, art. IV, §§ 30–32).

Petitioners do make the eye-popping claim that the Muscogee Creek "permit[ed] abortion throughout a pregnancy," Pet. Br. at 19 & n.22, but their sole source for this assertion—the Creek Constitution—says *nothing* about abortion being permitted. The claim is based entirely on (supposed) statutory silence. But "[t]he absence of evidence is not evidence," *Thompson v. Sullivan*, 987 F.2d 1482, 1491 (10th Cir. 1993), much less evidence of "permitting abortion." In any event, the Creek Constitution *wasn't* silent about abortion: rather, as the phrasing and context of the criminal "infanticide" provision that Petitioners acknowledge make plain, it was addressing abortion. *Compare* Constitution and Laws of the Muskogee (Creek) Nation, § 180 (Oct. 15, 1892) ("It shall be unlawful for any woman to use medicine calculated to cause infanticide; and any woman who may be found guilty … shall receive fifty lashes on the bare back."), *with* 21 O.S. § 861 ("Every person who administers to any woman … any medicine … shall be guilty ….").[6] Prominent historian Angie Debo confirmed this fact twice in her work on Creek history, tracing the prohibition back to at least 1861. *See* Resp. App. A at 125, 181 ("By 1861 the Creeks had a fairly complete criminal code. … Women who used drugs to cause abortion were to receive fifty lashes."); *see also United States v. Adair*, 913 F. Supp. 1503, 1511 (E.D. Okla. 1995) (describing Debo as "a well-respected Five Civilized Tribes historian"). Petitioners' Creek claim is false.[7]

To this day, tribes in Oklahoma and elsewhere have not embraced abortion. *See, e.g.*, Cecily Hilleary, *Native Americans Bristle at Suggestions They Offer Abortions on Tribal Land*, VOICE OF AMERICA (June 30, 2022) ("'Any time there's a call for tribes to do something that is not originating in their

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[6] *See also Patterson v. State*, 1882 WL 9282, at *5 (Tex. App. 1882) (using "abortion" and "infanticide" interchangeably), *overruled on other grounds by Van Dusen v. State*, 30 S.W. 1073 (Tex. Crim. 1895).

[7] Petitioners similarly claim that the Choctaw "permit[ed] abortion up until 'quickening'" because their abortion prohibition only applied to a "quick child." Pet. Br. at 19 & n.23. Yet again, the absence of evidence is not evidence of permission or practice—and this is especially so in relation to the "quick child" distinction. *See supra* Section I(a)-(b).

own thought processes, it very much just reeks of further colonization,' said Leeds. ... 'And a lot of tribal spiritual traditions hold life as sacred from beginning to the end.'");[8] Carson Walker, *Tribal Leader Ousted Over Abortion Clinic*, WASH. POST (June 30, 2006) (reporting that a Sioux tribe in South Dakota: (1) impeached its president for proposing an abortion clinic on tribal land and (2) voted to ban abortion on the land because "under Lakota values, abortion is wrong and life is sacred").[9] In 2010, the Supreme Court of the Navajo Nation—one of the largest tribes in the country—held that "the unborn child[] occupies a space in Navajo culture that can best be described as holy or sacred .... The child is ... alive at conception, and develops perfectly in the care of the mother." *EXC v. Kayenta Dist. Ct.*, No. SC-CV-07-10, 2010 WL 3701050, *188 (Navajo Sept. 15, 2010).

While Petitioners claim significance in the Cherokee, Osage, and Oklahoma Territory "two-tier" systems wherein abortion was allegedly treated "as a much lesser offense" pre-quickening, Pet. Br. at 19 & n.25, even a "much lesser offense" is still a crime, and not indicative of a right. The fact that wrongful killing, for instance, has different gradations does not mean that an inference can be drawn that, say, manslaughter could be declared a fundamental right because it wasn't treated as harshly as murder. Legislatures may analyze circumstances, determine levels of culpability, weigh competing interests, and draw lines. That they have historically treated abortion somewhat separately and differently from murder does not prove they didn't believe in the humanity of the unborn, or that they thought abortion was not a big deal; rather, it tends to show what the U.S. Supreme Court has repeatedly emphasized: abortion is a "unique act." *Dobbs*, 142 S. Ct. at 2258 (favorably quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1993)).[10]

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[8] Available at https://www.voanews.com/a/native-americans-bristle-at-suggestions-they-offer-abortions-on-tribal-land-/6639480.html.

[9] Available at https://www.washingtonpost.com/wp-dyn/content/article/2006/06/30/AR2006063000700.html.

[10] Petitioners also fail to explain why this two-tier system even matters given that Petitioners have not asked this Court to craft any sort of tiered framework for abortion like *Roe* and *Casey* did. Rather, Petitioners have argued that abortion throughout pregnancy is a fundamental right.

Given all of this, this Court should take with a grain of salt Petitioners' claim that *Dobbs* applied a "surprisingly flawed historical methodology" by not including the Five Tribes when asserting that "the Territories that would become the last 13 states . . . criminalized abortion at all stages of pregnancy.'" Pet. Br. at 19 (quoting *Dobbs,* 142 S. Ct. at 2253). Petitioners don't dispute that the Oklahoma Territory criminalized abortion at all stages of pregnancy, and *Dobbs* was naturally collecting the territories that became States with the same name. Moreover, Petitioners admit that the Cherokee and Osage *did* criminalize abortion throughout pregnancy, and as shown, the Creek did so as well. Petitioners' quibble over the Supreme Court's omission of a single tribe (the Choctaw) criminalizing abortion after quickening. This trifle does nothing to show the Oklahoma Constitution protects a right to abortion.

d. North Dakota dicta does not create a right to abortion in Oklahoma.

Petitioners also claim that this Court "must take into account the fact that at the time of its enactment, the 1910 Ban was considered to be only a 'minor offense.'" Pet. Br. at 20-21. Yet again, a minor offense is **still a criminal offense**, and not a right. In any event, Petitioners reach this conclusion by pointing out that: (1) Oklahoma's abortion laws, including Section 861, "were evidently taken from the Dakota laws." *Lovejoy v. State*, 1921 OK CR 20, 194 P. 1087, 1090; (2) "[W]hen one state adopts a statute from another state, it also adopts the construction which has been given to it by the courts of that state prior to its adoption." *Id.*; and (3) The North Dakota Supreme Court in 1900 called North Dakota's abortion prohibition a "minor offense" because its elements do "not include an attack upon human life, nor does it include any attempt to destroy any living foetus." *State v. Belyea*, 83 N.W. 1, 3, 4 (N.D. 1900).

There are multiple problems with this logic. *First,* even assuming *Lovejoy*'s instruction is still valid, it says the second state "adopts the construction" of the statute, not dicta describing the statute. And painting a statute as "minor" is a description, not a construction. *Second*, neither *Lovejoy*

nor any other decision in this state ever adopted the "minor offense" language from North Dakota, despite plenty of opportunities. Instead, *Lovejoy* (for instance) repeatedly refers to a violation of Section 861 as a felony. And cases like *Bowlan* emphasize that "highly offensive" abortion is prohibited "for the protection of the unborn child" and "society." *Bowlan*, 1936 OK 158 at ¶ 11, 54 P.2d at 668. *Third,* in stating that the law does "not include an attack upon human life," the North Dakota Supreme Court was merely pointing out that North Dakota's law, like Section 861, does not include killing the unborn child among its core elements. The violation occurs beforehand, when the medicine is administered "with *intent* thereby to procure" the abortion in the future. *See Belyea*, 83 N.W. at 3 (it is not "necessary to complete such offense that death either to a pregnant woman or to her **child** should transpire" (emphasis added)). For these reasons and more, Petitioners' reliance on North Dakota dicta is meritless.

e. Petitioners' newfound personhood statute supports Respondents, as do numerous other Oklahoma statute and cases.

Bizarrely, Petitioners rely on a longstanding statute that provides a "child conceived, but not born, is to be deemed an existing person so far as may be necessary for its interest in the event of its subsequent birth." 15 O.S. § 15. In claiming that this statute holds "that an 'unborn child' was not deemed to be an 'existing person' until its 'subsequent birth,'" Pet. Br. at 19-20, Petitioners get the law entirely backward. The statue plainly requires the unborn child to be viewed as person *prior to* birth if doing so is necessary for its interests *after* birth. (The very title of the statute is "**Unborn Child to be Deemed Existing Person**.") This Court has long interpreted it that way. *See Herndon v. St. Louis & S.F.R.*, 1912 OK 99, ¶ 16, 128 P. 727, 730 ("[T]here can be no doubt but that the child R. B. Herndon, unborn at the time of his father's death, but later born alive, is to be considered under our laws as an existing person at the time of his father's death ....").

Given that it is absolutely in the interests of the unborn to *have* a birth and to be *alive* afterward, this statute conflicts with the concept of abortion as a right. This is not surprising, given

that it was originally enacted alongside criminal abortion prohibitions.

Section 15 is not an abortion regulation, of course. Instead, the Legislature placed it in the Title regulating "Contracts." This is not unusual. Throughout Oklahoma history Oklahomans have "continually enacted laws to maximize protections for the unborn" in many areas of law in criminal law, tort law, health care law, property law, and guardianship law, etc. For instance, as Respondents have already pointed out, Oklahoma's wrongful death statute allows recovery "for the death of an unborn person," 12 O.S. § 1053(F)(1), and the phrase "human being" in homicide law "includes an unborn child." 21 O.S. § 691(B)-(C); *see also Hughes v. State*, 1994 OK CR 3, ¶ 11, 868 P.2d 730, 732 ("[A]n offspring of human parents cannot reasonably be considered to be other than a human being ... first within, and then ... outside, the womb." (citation omitted)).

There is more. For example, "current Oklahoma law clearly protects unborn children from not only homicide but also from assault and battery." *State v. Green*, 2020 OK CR 18, ¶ 13, 474 P.3d 886, 891. And one longstanding law prevents a woman convicted of a capital offense from being executed while she is pregnant. 22 O.S. § 1011; *see also* 22 O.S. § 1010. In tort law, a common law action for (nonlethal) prenatal injuries may be brought on behalf of an unborn child without regard to the stage of pregnancy. *Evans v. Olson*, 1976 OK 64, ¶¶ 7–9, 550 P.2d 924, 927. And in a medical malpractice case, this Court held that a physician had no duty to disclose to the mother information about abortion as an alternative treatment post-viability. *Spencer by and through Spencer v. Seikel*, 1987 OK 75, ¶¶ 16–17, 742 P.2d, 1126, 1130.

Under Oklahoma's health care laws, in the absence of specific authorization from the patient, life-sustaining treatment and/or artificially administered nutrition and/or hydration may not be withheld or withdrawn from a pregnant woman pursuant to an advance directive. 63 O.S. §§ 3101.4 & 3101.8(C). In property law, echoing Section 15, children conceived before but born after the death of a parent who dies without a will "are considered as living at the death of their

parents" for inheritance. 84 O.S. § 228. And if a person fails to provide in his will for a child born after the will is executed, the child receives a share in the estate equal in value to what he would have received if the testator had died intestate. *Id.* § 131; *see also id.* § 173.

Circling back to criminal law, the OCCA has repeatedly held that a fetus is covered by child neglect statutes. *See State v. Allen*, 2021 OK CR 14, 492 P.3d 27; *Green*, 2020 OK CR 18, 474 P.3d 886 (interpreting 21 O.S. § 843.5(C)). "A child several weeks away from birth," that court wrote, "is every bit as vulnerable to and in need of protection from neglect and its potential harm as a child one minute after birth." *Green*, 2020 OK CR 18 at ¶ 12. "To interpret Section 843.5(C) to deny that protection to the unborn child in this case is to thwart the clear trajectory that Oklahoma law has been on for at least the past quarter century, which is to protect children, born and unborn, from potential harm because they cannot protect themselves." *Id.*

II. KILLING AN UNBORN CHILD IS NOT A NATURAL OR INHERENT RIGHT THAT WOULD PREVENT THE STATE FROM EXERCISING ITS POLICE POWER.

Petitioners claim a right to abortion can be found under the Oklahoma Constitution's "inherent right" (Art. II, § 2) and "due process" (Art. II, § 7) provisions, although they mostly focus on the former. In doing so, Petitioners simultaneously (and contradictorily) argue that "nothing in this Court's jurisprudence requires it to confine its understanding of 'inherent liberty' to the rights recognized in 1907," Pet. Br. at 20, and that the right to kill an unborn child "'come[s] from the very elementary laws of nature' and thus fall[s] within" the English tradition of "natural" or "Lockean" rights enshrined in our State Constitution. *Id.* at 13. Neither proposition is correct.

a. Recognizing an inherent or fundamental right requires a historical basis.

The "objective of construing the Oklahoma Constitution is to give effect to the framers' intent, as well as the people adopting it." *IRAP* v. *State*, 2020 OK 5, ¶ 12, 457 P.3d 1050, 1055; *see also* Emerg. Resp. at 13-15 (collecting cases). For substantive due process, "history, legal traditions and practices" guide the analysis of fundamental rights. *In re Baby Girl L.*, 2002 OK 9, ¶ 15, 51

P.3d 544, 551. *In re Baby Girl L.*, *Glucksberg*, and *Dobbs* all confirm that before a court can recognize an unenumerated right, a plaintiff must establish that the right is "objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 703 & 721 (1997) (internal marks omitted). Petitioners ignore these citations entirely. Also absent from Petitioners' brief is any explanation of the framework this Court uses to analyze "inherent right[s]" claims under Article II, Section 2.[11] That framework, unsurprisingly, also requires historical evidence to be taken into account.

A recent explanation of the approach this Court takes to "inherent" rights can be found in *Edmondson v. Pearce*, 2004 OK 23, ¶¶ 34-35, 91 P.3d 605, 623–24, *as corrected* (July 28, 2004), and it sharply contrasts with Petitioners' demands here. There, this Court emphasized that the inherent rights named in Art. II, § 2 "are qualified" and "not absolute," nor were they ever "intended to be viewed as protecting a right to do whatever one chooses or has the power to do." *Id.* at ¶ 34 (citing *One Chi. Coin's Play Boy Marble Bd. v. State*, 1949 OK 251, 212 P.2d 129). They do not generally trump the State's "proper exercise of the police power," which is the power to "define and declare what is to be deemed injurious to public health, morals, safety and general welfare." *Id.* This Court then reiterated—regarding both inherent rights *and* substantive due process rights—that "every possible presumption is to be indulged in favor of the correctness" of the State's use of its police power, and that the Court should only annul the legislative act when it is "arbitrary, unreasonable or discriminatory." *Id.* at ¶ 35 (citation omitted). In short, inherent rights are "subject to reasonable regulation in the exercise of the police power." *Id.* (citation omitted).

In applying this standard of review, this Court emphasized the importance of historical practice: "enactments of this type [prohibiting cockfighting]," this Court stated, "have **long been**

[11] As Respondents already explained, it is unclear whether their primary case (*In re K.K.B.*) involves the Oklahoma Constitution at all, and it certainly doesn't cite Art. II, § 2.

recognized to fall within the scope of a legitimate exercise of the police power." *Id.* at ¶ 36; *see also id.* at ¶ 32 (observing that "criminal statutes prohibiting cruelty to animals or instigating fights between animals have been part of Oklahoma law since at least the early 20th Century"). The Court's "bottom line," then, was this: "[U]nder our form of government, a person's right to do as he or she chooses must yield to the reasonable laws of society." *Id.*

This Court, in short, has recognized the importance of a historical basis for substantive due process rights *and* for inherent rights. And it has recognized that due process and inherent rights analyses are functionally the same. *See E. Okla. Bldg. & Constr. Trades Council v. Pitts*, 2003 OK 113, ¶¶ 7–8, 82 P.3d 1008, 1011–12 (holding that the "same due process protections guaranteed by the 14th amendment are also guaranteed by Art. 2, § 2" and that "the same analysis applies to the due process protections generally"). Putting all that together tells us that: (1) fundamental rights under the Oklahoma Constitution must be historically grounded, and (2) if a right is not protected by the due process clause it also isn't likely to be protected by the inherent rights clause. Petitioners' claim that "nothing in this Court's jurisprudence requires it to confine its understanding of 'inherent liberty' to the rights recognized in 1907," put bluntly, is nonsense.[12]

This historical focus is borne out in this Court's case law discussing various fundamental rights. For example, this Court has "repeatedly recognized that the right of a parent to the care, custody, companionship and management of his or her child is a fundamental right protected by the federal and state constitutions." *Matter of Adoption of Darren Todd H.*, 1980 OK 119, ¶ 18, 615 P.2d 287, 290 (citing cases); *see also In re Herbst*, 1998 OK 100, ¶ 10, 971 P.2d 395, 397–98 (same); *Delk v. Markel Am. Ins. Co.*, 2003 OK 88, ¶ 17 n. 45, 81 P.3d 629, 639 n. 45 (same). This right is

[12] Petitioners complain that 1907-era views should not control because Oklahoma then prohibited interracial marriage and segregated railcars. Pet. Br. at 20. Segregation existed and was evil, certainly, but why does that mean the founders' views on abortion or other issues should be discarded? Saying that because African Americans were treated as less than fully human in 1907 the unborn should be treated as less than fully human in 2022 is a complete non-sequitur.

firmly rooted in the history and traditions of the American people, *see Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("[t]he liberty interest . . . of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court" (citing, among other cases, *Meyer v. Nebraska*, 262 U.S. 390 (1923))), and, ultimately, English common law. *See Davis. v. Davis*, 1985 OK 85, ¶ 17 n. 33, 708 P.2d 1102, 1109 n. 33 ("[t]he parental interest in the custody of a child rests on the common law"). As the U.S. Supreme Court has observed, "[t]his primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

In a similar vein, this Court has recognized a right to "corporal [bodily] integrity," *Blocker v. Martin*, 1994 OK 17, ¶ 4, 868 P.2d 1316, 1316 ("[a] person's corporal integrity is protected from *inappropriate state-compelled deliberate intrusions* to secure withdrawal of vital fluids for evidence purposes"), which includes the right to refuse unwanted medical treatment, *see In re Mental Health of K.K.B.*, 1980 OK 7, 609 P.2d. 747. This too has deep roots. *See Union Pac. Ry. v. Botsford*, 141 U.S. 250, 251 (1891) ("[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law").

The same cannot be said about an asserted right to abortion, either with respect to the Nation generally, *see Dobbs* 142 S. Ct. at 2248–56, or to Oklahoma. The right to bodily integrity—and the corollary right to decline medical treatment—is a *negative* right. It is not an *affirmative* right to insist on a particular form of treatment or drug that is illegal. *See Carnohan v. United States*, 616 F.2d 1120, 1122 (9th Cir. 1980) (patient did not have a right "to obtain laetrile [for cancer treatment] free of the lawful exercise of government police power"); *Rutherford v. United States*, 616 F.2d 455, 457 (10th Cir. 1980) (same); *Raich v. Gonzales*, 500 F.3d 850, 866 (9th Cir. 2007) ("federal law does not recognize a fundamental right to use medical marijuana ... to alleviate excruciating

pain and human suffering"); *Mitchell v. Clayton*, 995 F.2d 772, 775 (7th Cir. 1993) ("a patient does not have a constitutional right to obtain a particular type of treatment").

b. Petitioners have not shown that Oklahoma's inclusion of "inherent" rights protects more than the U.S. Constitution, much less that it covers abortion.

Petitioners declare the Oklahoma founders' decision to add the word "inherent" to our Constitution "was deeply intentional[,]" but they fail to cite a single citation in support. Pet. Br. at 12. Instead, they point to the generic fact that William Jennings Bryan and the early "Progressive Movement" "sought to copy the best provisions of existing state constitutions[,]" and revered the Oklahoma Constitution as the "best constitution ever written." *Id.* at 12-13. This tells us nothing about how in particular our Constitution differs from others. Nor is it plausible that Bryan, or anyone during that era, would have considered abortion a right.

Although Oklahoma courts have long recognized their "independent interpretation of Oklahoma constitutional provisions is not circumscribed by United States Supreme Court interpretations," they have likewise recognized that through Article I, § 1 of the Oklahoma Constitution, "the Framers of our Constitution expressed a preference for a harmonious construction of the Oklahoma Constitution with the Constitution of the United States where possible." *Gomez v. State*, 2007 OK CR 33, ¶ 15, 168 P.3d 1139, 1145.

Moreover, Petitioners' theory still largely ignores the overlapping and consistent national and local understanding of natural, Lockean rights at the time of our Nation's and our State's founding. *See* Emerg. Resp. at 15. Petitioners do finally admit that Oklahoma's protection of "inherent" rights stems from the English tradition of natural or Lockean rights and the Declaration of Independence's invocation of "inalienable" rights. *See* Pet. Br. at 13. But they never refute Respondents' arguments showing that such rights have also been recognized in the U.S. Constitution (through, e.g., the Ninth Amendment) and in U.S. Supreme Court jurisprudence (through, e.g., substantive due process).

c. There is no right to kill an unborn child in the natural law tradition.

More important still, Petitioners cite nothing to establish that any historical understanding of natural or Lockean rights—nationally or locally—encompassed the right to kill an unborn child. *Contra* Pet. Br. at 12-14. And for good reason: such evidence doesn't exist. *See, e.g.*, *Dobbs*, 142 S. Ct. at 2254 ("[Respondents] have found no support for the existence of an abortion right that predates the latter part of the 20th century—no state constitutional provision, no statute, no judicial decision, no learned treatise.").[13]

To the contrary, prominent historic progenitors of natural rights—including John Locke himself—were quite clear on their beliefs on abortion. Locke, for example, explained that even "men ignorant of words, or untaught by the laws and customs of their country" know "Not to procure Abortion." Resp. App. B at 84; *see also* Resp. App. C at 193-194, 219-221, 281. Perhaps most powerfully, the eminent William Blackstone said:

> 1. Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion or other wise, killeth it in her womb; or if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child; this though not murder, was by the antient law homicide or manslaughter.
>
> An infant *in ventresa mere*, or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to it's use, and to take afterwards by such limitation, as if it were then actually born. And in this point the civil law agrees with ours.

Resp. App. D at 129-130. Indeed, Blackstone observed that a state constitution vesting the "power of destroying [life] at pleasure, without the direction of laws, . . . is in the highest degree tyrannical

[13] Petitioners attempt to distinguish *Dobbs*' supposedly "cramped" opinion because it was silent about "inherent rights, inalienable rights, natural rights, and the guarantees of such rights." Pet. Br. at 18. But unlike *Roe*, *Dobbs* was a thorough and lengthy opinion that responds to numerous arguments. Moreover, the fact *Dobbs* did not comment on inherent rights cuts *against* Petitioners, as it shows that the parties, majority, and dissenters did not deem the topic worthy of discussion.

. . . ." *Id.* at 133. And as the U.S. Supreme Court explained in *Dobbs*, the focus of commentators like Blackstone on quickening did *not* mean that they believe abortion was a right beforehand.

d. Petitioners' attempt at natural law reasoning is unsupported and unworkable.

Having no support in the historic understanding of natural rights, Petitioners nonetheless argue that "[w]hen individuals are forced to remain pregnant or to give birth against their will, they are subjected to a violation of their fundamental liberty and autonomy." Pet. Br. at 14. Once again, Petitioners cite nothing for this rhetorical blast, either in recent case law or history. It's pure linguistics: trying to make something as commonplace and natural as pregnancy and childbirth sound as horrible as possible.

In any event, Petitioners' new "forced birth" mantra proves too much, as it has no logical end point. If it is a violation of natural rights to be "forced" to remain pregnant, then strict scrutiny would apply all the way up to the very moment of birth—and potentially beyond. A fully formed baby in the womb just hours away from being born would be just as vulnerable as a six-week-old whose heartbeat just started. Oklahoma is in no way required to accept this view.

e. This Court should not follow *Hodes* and other pre-*Dobbs* misinterpretations.

Finding no support for an inherent right to abortion in the text, history, structure, or tradition of Oklahoma's Constitution, Petitioners again urge this Court to "follow *other* state supreme courts' interpretation" of *other* state constitutions. Pet. Br. at 16 (emphasis added). Petitioners rely primarily on a pre-*Dobbs* decision from the Kansas Supreme Court, *Hodes & Nauser v. Schmidt*, 440 P.3d 461 (Kan. 2019). This Court should reject Petitioners' appeal to *Hodes*.

First, Petitioners' retreat to *Hodes* stumbles out of the gate because the proper interpretation of Oklahoma law "must necessarily depend upon the provisions of our own Constitution and not upon that of any other state or the federal government." *Wentz v. Thomas*, 1932 OK 636, ¶ 18, 15 P.2d 65, 68. "This Court is the final interpreter of Oklahoma's laws,

including the Oklahoma Constitution." *IRAP*, 2020 OK 5, ¶ 11, 457 P.3d 1050, 1055 (citing *Monson v. State ex rel. Okla. Corp. Comm'n*, 1983 OK 115, 673 P.2d 839). And this Court has emphasized that it is "bound to follow the Oklahoma Constitution, and [. . .] cannot circumvent it because of private notions of justice or because of personal inclinations." *Id.* (citations omitted). To be sure, decisions of other high courts interpreting other state constitutions drafted and ratified under different circumstances may count as "persuasive" authority, but they do not bind this Court or require manufacturing a right to abortion under the Oklahoma Constitution when there is no basis whatsoever for doing so.

Second, the Kansas Supreme Court's decision materially relied upon state-specific case law and legislative history that do not apply here. That court relied on statements of particular constitutional delegates in Kansas, for instance. *See Hodes*, 440 P.3d at 476. It also relied upon Kansas case law and legislative history. *Id.* at 491. Further, a major part of the Kansas Supreme Court's reason for disregarding early statutes criminalizing abortion related to a phenomenon unique to Kansas history, namely, that those statutes were enacted by an allegedly "bogus legislature" elected by Missouri voters who took to the polls in the Kansas Territory. *Id.* at 486–89. None of these factors are relevant in Oklahoma, which has its own constitutional history, legislative history, and case law continuously protecting unborn life to the greatest extent possible.

Third, while the Kansas Supreme Court attempted to distinguish its decision in *Hodes* from the federal constitutional analysis, it nevertheless referenced the framework and holdings of the deeply flawed (and now overturned) *Roe* and *Casey* decisions more than *ten* times each. *Hodes*, 440 P.3d at 461–500. This Court now has the benefit of the U.S. Supreme Court's thorough legal and historical analysis in *Dobbs*, and it should conduct a similar historical analysis.

Fourth, as Respondents stated in our emergency brief, *Hodes'* methodology is just wrong. *See Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, 975 N.W.2d 710, 740 n.19 (Iowa

2022), *reh'g denied* (Jul. 5, 2022) (critiquing the historical analysis in *Hodes*); Skylar Reese Croy & Alexander Lemke, *An Unnatural Reading: The Revisionist History of Abortion in* Hodes v. Schmidt, 32 U. Fla. J.L. & Pub. Pol'y 71, 82–86 (2021) ("*Hodes* relied on some of the most influential jurists and philosophers in legal history to support its reasoning, including John Locke, Edward Coke, and William Blackstone. ... *Hodes* failed to acknowledge specific statements from these jurists and philosophers condemning abortion."). In addition to giving "little weight" to the existence of longstanding Kansas laws outlawing abortion, *Hodes*, 440 P.3d at 489; *see also id.* at 518 (Stegall, J., dissenting), *Hodes* runs into some of the issues already highlighted in the emergency response: It held, for instance, that right to "control one's own body" and "family formation" protects the "right to decide whether to continue a pregnancy," *id.* at 466; but this ignores that once there is a pregnancy, there are *two* human lives at stake, and a "family" has already been formed. And again, why, under *Hodes'* logic, does the unborn child not have a right to live and control her own body?

Fifth, there are textual differences between the Oklahoma Constitution and broader constitutional provisions relied upon in Kansas and other states. Our Constitution specifically identifies those "inherent rights" to which persons are entitled: "All persons have the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry." OKLA. CONST. art. II, § 2 (emphasis added). Conversely, the Kansas Constitution generally introduces the concept of "natural rights" and then provides a non-exhaustive list of things "among" those rights. Kan. Const. Bill of Rts. § 1 (emphasis added). The Kansas Supreme Court emphasized that very textual point in *Hodes*, 440 P.3d at 473, and it did not mention Oklahoma when discussing constitutional provisions similar to the one in Kansas, but instead listed states with non-exhaustive lists like Ohio and Massachusetts. *See id.* at 484–85.

Turning elsewhere, Petitioners claim that "states with comparable 'inherent rights' provisions in their state constitutions, the state supreme courts that have ruled on the question

have all held that the provisions establish a constitutional right to abortion." Pet. Br. at 17. This is misleading, at best. The Iowa, Idaho, and North Dakota constitutions protect a broader *non*-exhaustive list of "inalienable rights," IOWA CONST. art. I, § 1; IDAHO CONST. art. I, § 1; N.D. CONST. art. I, § 1, and their Supreme Courts have all declined to enshrine abortion as a fundamental right. *See Planned Parenthood Great Nw. v. State*, No. 49615, 2022 WL 3335696, at *6 (Idaho Aug. 12, 2022) (declining to infer for injunctive purposes that an abortion right exists under Idaho's Constitution given "the legal history of abortion [criminalization] in Idaho"); *Reynolds*, 975 N.W.2d at 716 (holding that "the Iowa Constitution is not the source of a fundamental right to an abortion necessitating a strict scrutiny standard of review for regulations affecting that right");[14] Pet. Br. at 17 n.21 (admitting that *MKB Mgmt. Corp. v. Burdick*, 855 N.W.2d 31, 31 (N.D. 2014) did not declare abortion a fundamental right under North Dakota's Constitution).[15]

Next, Petitioners again cite the Mississippi Supreme Court's decision in *Pro-Choice Mississippi v. Fordice*, 716 So. 2d 645, 654 (Miss. 1998). But Petitioners ignore Respondents' rebuttal pointing out that *Fordice* relied heavily on *Roe* and has already been rejected by a lower Mississippi court. Emerg. Resp. at 20. The citation to that decision is now available. *See Jackson Women's Health Org. v. Dobbs*, No. 25CH1:22-cv-00739 (Chancery Ct. Hinds Cnty., Miss. First Jud. Dist. July 5, 2022) (holding that abortion is illegal in Mississippi). Rather than appeal, the sole clinic in Mississippi shut down and voluntarily dismissed its case. *See* Wicker Perlis, *Jackson Women's Health Organization legal saga comes to an end with case dismissed,* CLARION LEDGER (Aug. 3, 2022).[16]

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[14] *See also id.* at 740 ("Textually [and] . . . [h]istorically, there is no support for abortion as a fundamental constitutional right in Iowa . . . abortion became a crime in our state on March 15, 1858—just six months after the effective date of the Iowa Constitution ....").

[15] Petitioners' claims about case law around the country are also weakened by constitutional amendments that people in various states have enacted rejecting any theory of an implied right to abortion. ALA. CONST., § 36.06; LA. CONST. ANN. art. I, § 20.1; R.I. CONST. art. I, § 2; TENN. CONST. art. I, § 36; W. VA. CONST. art. VI, § 57; ARK. CONST. amend. LXVIII, §§ 1-2.

[16] Available at https://www.clarionledger.com/story/news/2022/08/03/case-dismissed-final-abortion-clinic-lawsuit-mississippi/10230660002/. Similarly, Petitioners Braid and Tulsa

Since *Dobbs*, various courts have also upheld laws protecting the unborn. *See Rutledge v. Little Rock Fam. Plan. Servs.*, 142 S. Ct. 2894 (2022) (lifting injunction of Arkansas law prohibiting discriminatory abortions and abortions after 18 weeks); *SisterSong Women of Color Reprod. Just. Collective v. Gov. of Georgia*, 40 F.4th 1320 (11th Cir. 2022) (lifting injunction of Georgia's heartbeat law); *State v. Planned Parenthood of Sw. & Cent. Fla.*, 342 So. 3d 863 (Fla. Dist. Ct. App. 2022) (concluding that 15-week limit was likely constitutional); *Robinson v. Marshall*, No. 2:19CV365-MHT, 2022 WL 2314402 (M.D. Ala. June 24, 2022) (lifting injunction of Alabama law prohibiting abortions); *June Med. Servs., LLC v. Landry*, 2022-01198, 2022 WL 3335698 (La. Aug. 11, 2022) (lifting injunction of Louisiana law prohibiting abortion). *Dobbs* has revolutionized the jurisprudential landscape in this area, and reliance on pre-*Dobbs* case law is a shaky proposition.

III. THIS COURT DOES NOT HAVE JURISDICTION OVER PETITIONERS' REMAINING INTERPRETIVE CHALLENGES TO OKLAHOMA CRIMINAL LAW.

The OCCA is vested with exclusive appellate jurisdiction in criminal cases. *Hinkle v. Kenny*, 1936 OK 582, ¶ 9, 62 P.2d 621, 622; OKLA. CONST. art. VII, § 2-4. This Court has long recognized it is bound to "follow the decisions of the Criminal Court of Appeals in matters relating to criminal law and to the construction of the criminal statutes of this state, even upon constitutional questions." *Hinkle*, 1936 OK 582 at ¶ 10; *see also State v. Russell*, 1912 OK 425, ¶ 1, 124 P. 1092, 1093 (similar). An opinion of the Court of Criminal Appeals interpreting a criminal law "is not only final, but practically exclusive[,]" except to the extent "it may be incidentally involved in civil actions to recover penalties or remove certain officers under the enforcing act . . . ." *Ex parte Meek*, 1933 OK 473, ¶ 9, 25 P.2d 54, 55. This deference developed from this Court's recognition that

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Women's Reproductive Clinic appear to have given up standing to bring the present challenge. *See* Brenna Rose, *Tulsa abortion clinic closing, moving to Illinois*, KTUL (July 13, 2022), available at https://ktul.com/news/local/only-on-8-tulsa-abortion-clinic-closing-moving-to-illinois ("The Tulsa Women's Clinic will officially close its doors Thursday, as staff prepares to move the facility to Carbondale, Ill. .... The clinic is owned by Dr. Alan Braid ....").

the court of enforcement should be the one concerned with interpretation, as well from a desire to avoid unnecessary conflicts. *See id.* at ¶ 11; *see also Walters v. Okla. Ethics Comm'n*, 1987 OK 103, ¶¶ 6-7, 746 P.2d 172, 182 (Opala, J., concurring).

This Court recognizes that the OCCA's exclusive criminal appellate jurisdiction subsumes within it "the power and authority to exercise such jurisdiction in questions pertaining to the criminal statutes of this state as would make effectual the purpose of our Legislature in creating such a court." *Hinkle*, 1936 OK 582 at ¶ 9, 62 P.2d at 622 (declining to grant mandamus to interpret a criminal statute contrary to the decisions of the OCCA). Consistent with the same, the OCCA has concluded "[i]t is the **exclusive** province of the Oklahoma Court of Criminal Appeals, the court of last resort for criminal matters in this state, OKLA. CONST. art. VII, § 4, to construe state criminal statutes." *State v. Tolle*, 1997 OK CR 52, ¶ 5, 945 P.2d 503, 504–05 (emphasis added).

This Court adheres to this rule even when a criminal law is challenged because it "violated the Constitution of the state of Oklahoma." *Ex parte Meek*, 1933 OK 473 at ¶ 8. Additionally, this Court has affirmed that the Legislature's adoption of the Uniform Declaratory Judgments Act was not intended to enlarge the jurisdiction of civil courts over criminal statutes that would encroach upon the exclusive jurisdiction of the OCCA. *See Anderson v. Trimble*, 1974 OK 2, ¶ 15, 519 P.2d 1352, 1355. This Court only exercises jurisdiction over matters involving interpretation of criminal law in rare and exigent circumstances, for example where a criminal statute infringes on an independent vested constitutional right. *See id.* at ¶¶ 14-15. Here, the question properly presented to this Court is whether the Oklahoma Constitution protects some unenumerated civil right to kill an unborn child—which it does not. As such, Petitioners' remaining constitutional challenges to Oklahoma's criminal abortion laws present purely interpretive questions that rest within the sole authority of the OCCA. This Court should therefore decline to assume original jurisdiction over these questions.

IV. THE CHALLENGED CRIMINAL LAWS ARE NOT UNCONSTITUTIONALLY VAGUE.

In the event this Court decides to analyze Petitioners' void-for-vagueness challenge, binding OCCA precedent supports only one result: upholding the challenged laws. A law is unconstitutionally vague only if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *State v. Green*, 2020 OK CR 18, ¶ 15, 474 P.3d 886, 892 (citation omitted); *see also United States v. Williams*, 553 U.S. 285, 304 (2008). Under this high standard, courts only invalidate statutes that require "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." *Williams*, 553 U.S. at 306. "A heavy burden is cast on those challenging a legislative enactment to show its unconstitutionality and every presumption is to be indulged in favor of the constitutionality of a statute." *Fent v. Oklahoma Capitol Imp. Auth.*, 1999 OK 64, ¶ 3, 984 P.2d 200, 204; *see also Leftwich v. State*, 2015 OK CR 5, ¶ 15, 350 P.3d 149, 155 ("We presume that a statute enacted by the legislature is constitutional."). Petitioners cannot overcome that burden here.

Petitioners first complain about purported inconsistencies between Oklahoma's two criminal abortion laws.[17] *See* Pet. Br. at 24-27. There is nothing unconstitutionally vague about inconsistent or overlapping criminal provisions. As the OCCA has explained, "there simply is no rule of statutory construction requiring that a particular pattern of criminal conduct shall only be addressed by one particular criminal provision." *State v. Haworth*, 2012 OK CR 12, ¶ 12, 283 P.3d 311, 315–16; *see also* 21 O.S. § 11 ("But an act or omission which is made punishable in different

[17] Petitioners also complain about inconsistencies between the criminal laws at issue in this lawsuit and the civil laws challenged in the separate lawsuit *OCRJ v. O'Connor*, No. 120,376. *See* Pet. Br. at 25-27. This Court should disregard Petitioners' complaints about laws not before the Court, particularly in light of this Court's order denying Petitioners' motion to consolidate. Moreover, Petitioners cite no authority whatsoever to support their insinuation that differences between criminal and civil laws can somehow render a criminal law unconstitutionally vague.

ways by different provisions of this title may be punished under any of such provisions . . . ."); *Newman v. State*, 2020 OK CR 14, ¶ 21, 466 P.3d 574, 583.

In *Haworth*, the OCCA explained that "it is within the Legislature's authority to write laws so that a particular course of conduct might be prosecutable under more than one provision." *Haworth*, 2012 OK CR 12 at ¶ 18. When overlapping criminal provisions arguably cover a defendant's conduct, broad prosecutorial discretion "as to whether, when, and how to prosecute crime" allows for the choice among alternative provisions and ranges of punishment. *Id.* at ¶ 13. Although overlapping criminal provisions may "create uncertainty as to which crime may be charged and therefore what penalties may be imposed, . . . [s]o long as overlapping criminal provisions clearly define the conduct prohibited and the punishment authorized, the notice requirements of the Due Process Clause are satisfied." *Id.* at ¶ 15 (quoting *United States v. Batchelder*, 442 U.S. 114, 123 (1979)).

Petitioners' vagueness challenge rests entirely on the existence of overlapping, and allegedly inconsistent, criminal provisions prohibiting abortion. *See* Pet. Br. at 24-27. Petitioners do not complain that either provision independently fails to define the conduct prohibited. To the contrary, Petitioners themselves explain with detail the differences in language, even defining unambiguous terms. *See, e.g., id.* at 24-25 (explaining the common understanding of the words "purposely" and "knowingly."). Only by pointing to purported divergence between the language of the two criminal provisions, and inapposite civil laws, do Petitioners attempt to establish unconstitutional vagueness.[18] Because overlapping criminal provisions, even ones that cover the

[18] Nor is Petitioners' complaint with the inconsistencies between the life exceptions aided by pointing to conceivable marginal factual scenarios or close calls. *Cf.* Pet. Br. at 25-26. Because "[c]lose cases can be imagined under virtually any statute[,]" *Williams*, 553 U.S. at 306, "[t]he Constitution does not impose '[i]mpossible standards of specificity' upon legislatures." *United States v. Welch*, 327 F.3d 1081, 1094 (10th Cir. 2003) (citation omitted).

same conduct but diverge on criminal elements, definitions, or punishments, do not render a criminal provision unconstitutionally vague, Petitioners cannot succeed as a matter of law.

This result is not only directed by binding precedent, but common sense. To accept Petitioners' argument would result in an absurdity: a due process violation every time a criminal law covered the same underlying conduct or subject matter as another criminal law. Such a result would be repugnant to the separation of powers, as it would improperly invade into the prosecutorial discretion of the executive branch, as well as the legislative prerogative to grant that discretion through complimentary criminal laws. *See Haworth* 2012 OK CR 12 at ¶ 18 ("[I]t is not the province of this Court to eliminate discretion that the Legislature apparently intended."). Moreover, it would be "folly," as "[t]he legal consequences of a single set of facts are so often debatable—such as whether a killing was done with premeditation (which is murder) or was committed in a heat of passion (which is manslaughter)." *Id.*

Such a result would further exploit the Constitution to contravene well-established principles of statutory construction—including the doctrine of repeal by implication. Before a court can conclude the Legislature repealed a criminal enactment by implication, rendering the law unenforceable, it "must first conclude, not just that they overlap in their application, but that they are hopelessly repugnant to one another in some respect." *Id.* at ¶ 17; *see also* 75 O.S. § 12; *McLean v. State*, 1952 OK CR 48, 244 P.2d 335, 338 (two acts must "be inconsistent, incompatible and conflicting"). A criminal defendant cannot meet this high standard, and avoid prosecution, merely by a showing two statues will produce different results or penalties based on the same facts. *See Haworth*, 2012 OK CR 12 at ¶¶ 17-18; *Hunt v. State*, 1979 OK CR 108, ¶ 9, 601 P.2d 464, 468.

Here, Petitioners claim that S.B. 612 repealed Section 861 by implication. But these two laws are not at all "hopelessly repugnant" to each other. Rather, they are quite similar—they both

contain a life exception, for example—although they differ in penalties. Thus, Section 861 should not be found to be repealed by implication.

V. RESPONSE TO PETITIONERS' SUMMARY OF THE RECORD: PETITIONERS' ONE-SIDED "FACTS" ARE IRRELEVANT AND OPPOSED HERE.

Petitioners harp incessantly on various alleged harms and effects of Oklahoma's criminal abortion laws, which they claim are "unrebutted." Pet. Br. at 6. To start, no amount of alleged harm, outrage, disapproval, or annoyance by those who wish to violate a law can beget a constitutional right or circumvent the established legal framework for evaluating constitutional rights. Whether Oklahoma's Constitution protects a right to abortion is a legal issue, not a factual one; Petitioners' hyperbolic factual narrative and evidentiary materials are simply irrelevant. Since our Constitution does not protect a right to kill an unborn child, the challenged laws are only subject to rational-basis review, at most. *See* Emerg. Resp. at 24-25. And under rational-basis review, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993); *see also Maages Auditorium v. Prince George's Cnty., Md.*, 4 F. Supp. 3d 752, 776 (D. Md. 2014) ("[W]hen undertaking rational basis review, the party defending the constitutionality of the action need not introduce evidence ..."); *Birchansky v. Clabaugh*, 955 F.3d 751, 757 (8th Cir. 2020) ("supporting empirical evidence is unnecessary").

But even if Petitioners' alleged evidence was somehow relevant to the legal question here, it *is* opposed.[19] Respondents present four affidavits here: three from other pending abortion cases in Oklahoma, and one created for this litigation. *First,* Dr. Martha Shuping has testified that studies show abortion has no mental health benefits and can lead to an increased risk of suicide and substance abuse. *See generally* Resp. App. E. She also has testified that several of the data sets relied

[19] Petitioners' evidence is also self-serving and rife with evidentiary deficiencies that would be the subject of pre-trial motions and objections under any ordinary trial proceeding.

up on by Petitioners' affiants to claim that women denied abortions suffer more are "highly questionable" because of low participation, non-random selection, and methodological flaws. *Id.* at ¶ 28. *Second*, Dr. Donna Harrison has testified that medication abortion carries significant risks, including—as the FDA label states—"serious and sometimes fatal infections or bleeding." Resp. App. F at ¶ 11. As a result, the FDA subjects medication abortion to a "Risk Evaluation and Mitigation Strategy" (REMS) that is reserved for "only a few medications" "with serious safety concerns." *Id. Third*, Dr. Ingrid Skop has testified that abortion complication rates are higher than typically reported, and that the oft-repeated canard that legal abortion is fourteen times safer than childbirth is incorrect. *See generally* Resp. App. G. *Fourth,* Dr. George Mulcaire-Jones testifies that the dangers of abortion are extensive, and that claims of abortion's safety are based on flawed and incomplete data. *See generally* Resp. App. H.

Respondents also attach the underlying documents where the one-time medical director and the administrator for Petitioner Tulsa Women's Reproductive Clinic admitted that abortion terminates the life of a whole, separate, unique, and living human being, that their typical D&E abortion procedure involves the living dismemberment of those humans, and that childbirth is safe. *See* Resp. App. I at 185-86; Resp. App. J at 110-11, 135, 148-150.

With their typically over-the-top rhetoric, Petitioners contend that Oklahoma's abortion bans relegate "pregnant Oklahomans to second-class citizenship" because they will lose the ability to participate "more equally in the economic and social life of the State" Pet. Br. at 1-2. Aside from being obviously untrue, this ignores the undeniable fact that with abortion allowed, countless unborn Oklahoma girls will *completely* lose their ability to participate in the economic and social life of the State because they will be dead. Petitioners, in other words, bemoan "[h]ow gravely liberty is compromised when the State forces pregnant people to remain pregnant and give birth," *id.* at

6, without acknowledging how gravely liberty is compromised when the State allows doctors to kill the most vulnerable human beings among us before they can even be born.

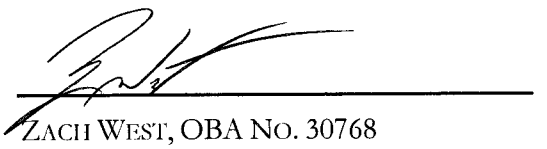
Petitioners also claim that "[o]ne patient nearly died because of her physician's confusion and fear around treating her ectopic pregnancy." Pet. Br. at 26. Yet, the evidence cited describes nothing more than the discovery of an ectopic pregnancy, which was promptly treated. Although an ectopic pregnancy can be life-threatening, the facts fail to support even an inference that this woman "nearly died" or that the situation was attributable to Oklahoma law, which excludes removal of ectopic pregnancies from the definition of abortion. 63 O.S. § 1-730.

Finally, Petitioners' complaints about maternal mortality in Oklahoma omit one obvious issue: All the statistics they cite arose in an era when *Roe* was the "law of the land." If abortion is the panacea that it is claimed to be, then why hasn't it helped women in Oklahoma?

CONCLUSION

In 1899, an aspiring poet wrote that in "Oklahoma's Alphabet," the letter "U is for the unborn, they her future will see." Emerg. Resp. at 22. In the decades that followed, Oklahoma's commitment to the protection of the unborn endured. For the past 50 years, however, an egregiously wrong expansion of the U.S. Constitution has thwarted that commitment, and countless unborn children have not been able to see a future in Oklahoma because of abortion. With *Roe v. Wade* overturned, that era is over, and the right to protect the life of the unborn has again returned to the people. This Court should reject Petitioners' invitation to commit the same egregious error as *Roe*: conjuring out of thin air a constitutional right to kill an unborn child.

Respectfully submitted,



ZACH WEST, OBA NO. 30768
Solicitor General
AUDREY WEAVER, OBA NO. 33258
Assistant Solicitor General
OKLAHOMA OFFICE OF THE
ATTORNEY GENERAL
313 N.E. 21st Street
Oklahoma City, OK 73105
Phone: (405) 521-3921
Zach.west@oag.ok.gov
Audrey.weaver@oag.ok.gov

Counsel for the Oklahoma Attorney General

CERTIFICATE OF SERVICE

This is to certify that on the 21st day of September, 2022, a true and correct copy of the above instrument was transmitted, postage prepaid to the following:

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

Counsel for Petitioners

ZACH WEST