IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

OKLAHOMA CALL FOR REPRODUCTIVE JUSTICE, *et al.*

Petitioners,

v.

THE STATE OF OKLAHOMA, *et al.*

Respondents.

No: 120,376

ATTORNEY GENERAL'S BRIEF IN RESPONSE TO PETITIONERS' APPLICATION FOR ORIGINAL JURISDICTION AND PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF AND/OR A WRIT OF PROHIBITION

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 THE OKLAHOMA ATTORNEY GENERAL

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INTRODUCTION

Petitioners' Application for Original Jurisdiction and Petition for Declaratory and Injunctive Relief and/or Writ of Prohibition ("Application") seeks an unprecedented and extraordinary remedy that would: (1) prohibit "the State of Oklahoma" from enforcing a law its officials cannot enforce, and (2) prohibit 77 district court clerks from performing their statutory duty of docketing petitions. The targets of Petitioners' constitutional challenge, S.B. 1503 and H.B. 4327,[1] create civil liability for abortion once a heartbeat is detectable and throughout pregnancy, respectively. But unlike Oklahoma's enforceable criminal abortion laws, laws which Petitioners challenge in yet another original jurisdiction action,[2] S.B. 1503 and H.B. 4327 (hereinafter "Civil Enforcement Laws") contain a purely private and civil enforcement mechanism.

Consequently, even before reaching the merits issues occupying almost the entirety of Petitioners' brief, their Application must fail. For reasons already briefed—reasons that have largely gone unrebutted by Petitioners—the doctrine of sovereign immunity clearly bars this suit in its entirety against both the "State of Oklahoma" and all 77 district court clerks. To hold otherwise, the U.S. Supreme Court recently instructed, "would be a violation of the whole scheme of our Government." *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 532 (2021) (citation omitted).

Furthermore, Petitioners utterly fail to establish a justiciable controversy or entitlement to their requested writ. And even if Petitioners could somehow overcome these insurmountable hurdles, they cannot establish that the Civil Enforcement Laws violate the Oklahoma Constitution, especially now that the U.S. Supreme Court has overruled *Roe v. Wade* and held that States may prohibit abortion. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). For these reasons and more, this Court should dismiss Petitioners' Application.

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[1] S.B. 1503 is codified at 63 O.S. §§ 1-745.31 through 1-745.44. H.B. 4327 is codified at 63 O.S. §§ 1-745.51 through 1-745.60.
[2] *OCRJ v. O'Connor*, No. 120,543.

SUMMARY OF THE RECORD

The Attorney General summarized the background of this case in early June, in the midst of this Court denying emergency relief to Petitioners multiple times, and he now incorporates that summary to avoid repetition. *See* Okla. Att'y Gen. Resp. to Pets' Suppl. Emerg. Mot. (hereinafter "OAG Resp.") at 2-3 (Jun. 1, 2022). Since then, the environment has only grown more favorable for the constitutionality of the Civil Enforcement Laws. In *Dobbs*, the U.S. Supreme Court overruled *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). In that landmark decision, the U.S. Supreme Court explained that no right to abortion "is implicitly protected by any constitutional provision," that the right to abortion is not "rooted in our Nation's history and tradition" or the common law, that abortion is not "an essential component of what we have described as 'ordered liberty,'" and that abortion is not "part of a broader entrenched right" of privacy or autonomy. *Dobbs*, 142 S. Ct. at 2242, 2244, 2257. With the U.S. Supreme Court's thorough dismantling of an alleged right to an abortion, this Court should now disregard Petitioners' outdated descriptions of abortion as a "constitutionally-protected" right. *See, e.g.*, Br. at 3, 10-11, 18; *see also id.* at 12 (highlighting this Court's previous reliance on *Roe* and *Casey*, "which guarantee a right to abortion").

Petitioners' own summary of the record includes various mischaracterizations and unsupported, one-sided, or contested factual averments. *See, e.g.*, Br. at 5 n.1 (claiming, sans citation, that "electrical impulses" in the "cardiovascular system" of an unborn child are not a "heartbeat"); *id.* at 7 (claiming the Civil Enforcement Laws "provide no room for discretion of judges" after recognizing the statutory language provides a floor on damages, not a cap). One particularly egregious example can be found on Page 10, where Petitioners assert that people who need "management for an ectopic pregnancy[] are being significantly harmed because of the confusion caused by the Acts." But H.B. 4327 expressly states that an "act is not an abortion if

the act is performed with the purpose to ... remove an ectopic pregnancy." 63 O.S. § 1-745.51(1)(c). What is confusing about that?

Even when Petitioners support allegations with citations, those sources are self-serving and on issues the Attorney General has vigorously contested in other cases. *See, e.g.,* Br. at 10-11 (relying on affidavits containing hearsay and speculation); *id.* at 11 (claiming that the "State forces a person to give birth," which "subjects them to medical risk"). In pending filings before this Court, for example, Oklahoma offers experts such as Dr. Martha Shuping, who has counseled over 1,000 women with abortion-related mental health issues and has testified based on scientific studies that abortion has no mental health benefits and can lead to an increased risk of suicide and substance abuse. *See* Resp. of Defs./Appellees, Dec. 10, 2019, at 3-11, *Tulsa Women's Repro. Clinic v. Hunter*, No. 118,292; *see also Planned Parenthood v. Rounds*, 686 F.3d 889, 905 (8th Cir. 2012) (*en banc*) ("[A] multitude of studies published in peer-reviewed medical journals ... found an increased risk of suicide for women who had received abortions compared to women who gave birth, miscarried, or never became pregnant.").

In any event, few of the alleged facts submitted by Petitioners, if any, are material to the underlying legal dispute at issue. Indeed, none of the alleged facts do anything to remove the immunity that protects all Respondents from a lawsuit like this. This Court should deny the Application and dismiss the lawsuit.[3]

LEGAL STANDARD

A petitioner challenging a legislative act bears a heavy burden, as "every presumption is to be indulged in favor of the constitutionality of a statute." *Fent v. Okla. Capitol Imp. Auth.*, 1999 OK

[3] The Attorney General is appearing pursuant to 74 O.S. § 18b(A)(3), which permits him to, among other things, "take and assume control of the prosecution or defense of the state's interest therein." Here, to the extent that any Respondent has not appeared, the Attorney General assumes control of the case on behalf of that Respondent and asserts the arguments herein.

64, ¶ 3, 984 P.2d 200, 204. Indeed, a "legislative act ... will be upheld by this Court unless it is clearly, palpably and plainly inconsistent with the Constitution." *Hill v. Am. Med. Response*, 2018 OK 57, ¶ 8, 423 P.3d 1119, 1124.

To obtain a writ of prohibition, a petitioner must establish: "1) a court, officer, or person has or is about to exercise judicial or quasi-judicial power; 2) the exercise of said power is unauthorized by law; and 3) the exercise of that power will result in injury for which there is no other adequate remedy." *Maree v. Neuwirth*, 2016 OK 62, ¶ 6, 374 P.3d 750, 752 (citation omitted). Even if a petitioner can meet these elements, the writ will lie only in "cases of manifest necessity." *Bd. of Comm'rs of Carter Cty. v. Worten*, 1927 OK 445, ¶ 7, 261 P. 553, 554.

ARGUMENT

I. RESPONDENTS ARE ENTITLED TO SOVEREIGN IMMUNITY AND PETITIONERS HAVE FAILED TO ESTABLISH A JUSTICIABLE CONTROVERSY.

Petitioners devote nearly their entire brief to their underlying constitutional claims against the Civil Enforcement Laws. But this approach puts the cart before the horse. Attacking the merits is futile if Petitioners lack a proper case for judicial review. *See City of Shawnee v. Taylor*, 1943 OK 11, ¶ 4 132 P.2d 950, 952. Here, the Attorney General has already detailed why Petitioners' Application does not present a proper case for judicial review, and he incorporates those same arguments here. *See generally* OAG Resp. In short, as explained by the U.S. Supreme Court in the *Jackson* case, the doctrine of sovereign immunity bars this suit in its entirety against both the State of Oklahoma and all 77 district court clerks. *See id.* at 5-10 (citing *Jackson*, 142 S. Ct. 522). In addition, there is no justiciable controversy that can be resolved by any writ from this Court because Respondents do not enforce the Civil Enforcement Laws. *Id.* at 10-14. Simply put, this case should end right here.

Rather than contend with this legal reality, or address most of the arguments presented in the Attorney General's earlier response, Petitioners essentially ignore it. Instead of working to

establish that they can properly maintain a suit against Respondents here, Petitioners insist that this Court should not "allow[]" duly enacted legislation "to stand" and should "prevent Respondents from *implementing* the Acts in any way . . . ." Br. at 27, 30 (emphasis added). But Petitioners fail to identify a single authority supporting a power to prohibit the sovereign "State of Oklahoma" at-large from doing anything. *See State ex rel. Williamson v. Superior Court of Seminole Cnty.*, 1958 OK 52, ¶ 6, 323 P.2d 979, 981 ("It is fundamental that the State cannot be sued in any manner, or upon any liability, constitutional, statutory, or contractual, unless there is express consent thereto.").

The cases cited by Petitioners only accentuate this fatal flaw: Petitioners claim that this "Court has entered such relief against the State before," but each of Petitioners' authorities named the State of Oklahoma *through* a state official, board, commission, or subdivision responsible for enforcing the law, unlike here. *See* Br. at 29-30. Take *IRAP v. State*, for example: there, the plaintiffs sued the State *through* the ABLE Commission and Governor Stitt in his official capacity. 2020 OK 5, 457 P.3d 1050. Moreover, the defendants in that case had *some* role in enforcing the regulation, unlike the laws at issue here, and immunity was never even mentioned in that case, making it quite the unworthy vehicle to overcome decades upon decades of clear legal precedent confirming the State's immunity. *See United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) ("The effect of the omission was not there raised in briefs or argument nor discussed in the opinion of the Court. Therefore, the case is not a binding precedent on this point."); *Okla. Educ. Assn v. State ex rel. Okla. Legislature*, 2007 OK 30, ¶ 13, 158 P.3d 1058, 1064 ("This Court is not bound by its exercise of jurisdiction in *Nigh* because the OEA's standing passed without mention in that case.").

Nor do Petitioners identify a single authority that supports their insinuation that, regardless of procedural niceties, this Court can just strike laws from the books whenever it finds them particularly egregious. *See* Br. at 29-30. To the contrary, this Court has made clear that "[n]o matter

how sympathetic we might be to a party, we are without authority to rewrite a statute merely because the legislation does not comport with our conception of prudent public policy." *See Burrell v. Burrell*, 2007 OK 47, ¶ 17, 192 P.3d 286, 291; *see also Lang v. Erlanger Tubular Corp.*, 2009 OK 17, ¶ 8, 206 P.3d 589, 591 ("It is the duty of courts to give effect to legislative acts, not to amend, repeal or circumvent them.").

What's more, although Petitioners attempt to argue that clerks can be sued, they fail to cite relevant authority for the proposition that this Court can suspend or supersede the district court clerks' ***core statutory obligation***—filing and docketing cases. *Compare* Br. at 28-30, *with* OAG Resp. at 7-10. Rather, their case law is all readily distinguishable. One of Petitioners' cited authorities, for instance, involved a statute that purported to impose additional duties on the district court clerk that invaded another branch of government. *See, e.g., Fent v. State ex rel. Dep't of Human Servs.*, 2010 OK 2, ¶¶ 2, 24 n.7, 236 P.3d 61, 64, 70 n.7 (statute improperly forced district court clerks to act as "a tax collector for the executive branch of government," violating the separation of powers). Even further afield, another authority involved this Court ordering a clerk, through a writ, to *accept* a filing that he wrongly declined to file. *See Cotner v. Golden*, 2006 OK 25, ¶ 5, 136 P.3d 630, 632 ("A clerk of a District Court is required to file together and carefully preserve in the clerk's office, **all papers delivered to the clerk for that purpose** except for sham legal process." (emphasis added)). This supports *Respondents* here, not Petitioners, who seek a judicial decree ordering court clerks to violate their statutory duty rather than obey it. Finally, Petitioners cite a case where this Court *declined* to order anything of a court clerk. *See Barzellone v. Presley*, 2005 OK 86, 126 P.3d 588 (affirming summary judgment in favor of the Oklahoma County Court Clerk). Moreover, none of these cases discussed immunity, meaning there precedential value as to the issue of immunity is non-existent. *See L. A. Tucker Truck Lines*, 344 U.S. at 38; *Okla. Educ. Assn*, 2007 OK 30, ¶ 13, 158 P.3d at 1064.

Petitioners are left with pointing to Oklahoma's "sham" exception again. Br. at 28-29. But the Attorney General already refuted that contention, *see* OAG Resp. at 8-9, and Petitioners don't bother to interact with that refutation. Petitioners merely assert that state court clerks "have the ability to accept for filing or reject lawsuits, and their participation undergirds the enforcement of the Acts." Br. at 28. But as the Attorney General has pointed out, this "ability" is strictly limited by a statute that itself says that clerks are immune, the Civil Enforcement Laws say that clerks are immune, and a document filed under those laws would in no way qualify as a "sham." OAG Resp. at 8. So the sham angle doesn't help Petitioners at all. That clerks may be "subject to extraordinary writs" in certain circumstances, Br. at 28, doesn't make this case one of those circumstances.

In the end, it is again telling that in their brief discussion of court clerks, Petitioners never interact with the U.S. Supreme Court's decision in *Jackson*—Petitioners cite the *Jackson* majority just once, in a late footnote. *See* Br. at 28 n.8. But that case, unlike the ones relied on by Petitioners, is directly on point. And there, again, the U.S. Supreme Court *emphatically* denied that court clerks could be sued over a law like Oklahoma's here. *See Jackson*, 142 S. Ct. at 532 (enjoining court clerks over a law like Oklahoma's "would be a violation of the whole scheme of our Government" (citation omitted)).

II. THE CIVIL ENFORCEMENT LAWS ARE CONSTITUTIONAL.

Sovereign immunity is an impassable obstacle for Petitioners here, and this case should be dismissed accordingly. Nevertheless, the Attorney General will address several of Petitioners' merits arguments. Those fail as well. In short, the Civil Enforcement Laws are constitutional.

a. Our Constitution does not include a right to terminate an unborn child.

Per *Dobbs*, the United States Constitution does not guarantee a right to abortion. On July 1, 2022, Petitioners filed yet another application for original jurisdiction with this Court, this time challenging two Oklahoma criminal laws that became enforceable after the *Dobbs* decision. *See*

OCRJ v. O'Connor, No. 120,543. There, the Petitioners raised the same legal argument for their constitutional challenge as here—that the unspoken words of the Oklahoma Constitution somehow protect the right to end the life of an unborn child. Petitioners also filed an emergency motion for an injunction in that case. In response, the Attorney General explained in thorough detail why there is no fundamental right in the Oklahoma Constitution to kill a whole, separate, unique, and living human being in the womb. Resp. and Obj. to Pets' Emerg. Mot., *OCRJ v. O'Connor*, No. 120,543 (Jul. 12, 2022). The Attorney General will not belabor that argument in full here. In short, the U.S. Supreme Court has held that the issue of abortion should be returned to the "people and their elected representatives," *Dobbs*, 142 S. Ct. at 2259, 2279, and since before statehood into the present, Oklahoma and her elected representatives have always condemned abortion. Thus, the critical legal assumption underlying Petitioners' challenge to the Civil Enforcement Laws—that they were obstructing the exercise of fundamental constitutional rights—is gone.

b. The procedural limits in the Civil Enforcement Laws are constitutional.

The Civil Enforcement Laws do not strip any petitioner of their right to access courts. *See* OAG Resp. 12-14. Contrary to Petitioners' overheated rhetoric, the Civil Enforcement Laws expressly preserve a defendant's right to "assert[] the defendant's *personal* constitutional rights as a defense to liability . . . ." 63 O.S. §§ 1-745.40(C), 1-745.56(C) (emphasis added). Unlike the authorities cited by Petitioners, the Civil Enforcement Laws do not require a person to clear any additional, let alone burdensome, procedural hurdles before reaching the courthouse steps. *See* Br. at 15-16 (citing *Zeier v. Zimmer, Inc.*, 2006 OK 98, 152 P.3d 861, *Wall v. Marouk*, 2013 OK 36, 302 P.3d 775, and *John v. Saint Francis Hosp., Inc.*, 2017 OK 81, 405 P.3d 681, *as amended* (Oct. 25, 2017)). Each of these cases involved a law purporting to require an expert affidavit to survive dismissal for specific subsets of tort claims. In contrast to laws imposing additional pleading burdens

contravening Oklahoma's notice-pleading standards, the Civil Enforcement Laws properly limit only particular avenues of interlocutory or declaratory relief. *See Jaworsky v. Frolich*, 1992 OK 157, ¶ 16, 850 P.2d 1052, 1056; *Lafalier v. Lead-Impacted Communities Relocation Assistance Tr.*, 2010 OK 48, ¶¶ 18-20, 237 P.3d 181, 189-90. And Petitioners themselves have admitted that the ability to receive such relief is something "permitted" by the Legislature. Br. at 9. To state the obvious again: what the Legislature permits, it can take away.

For similar reasons, the inclusion of remedial or procedural limitations in the Civil Enforcement Laws does not render them unconstitutional special laws. *Contra id.* at 17-18. As explained by the authorities cited by Petitioners, "[a] special law confers some right or imposes some duty on some but not all of the class of those who stand upon the same footing and same relation to the subject of the law." *Wall v. Marouk*, 2013 OK 36, ¶ 5, 302 P.3d 775, 779. The civil remedy limitation in the Civil Enforcement Laws applies equally and uniformly to all classes of persons without distinction. It does not "place[] an out of the ordinary enhanced burden on ... subgroups to access the courts" by imposing different pleading burdens or procedural requirements on different litigants who may invoke the law. *Id.* at ¶ 6.

Concerning the Civil Enforcement Laws' venue provisions, this Court has long recognized the Legislature's authority to define where venue, a matter of procedure and convenience, *originally* lies. *See, e.g., Gentges v. State Election Bd.*, 2018 OK 39, ¶ 12, 419 P.3d 224, 228 (upholding a venue statute that defined original venue); *Chapman v. Parr*, 1974 OK 46, ¶ 34, 521 P.2d 799, 803–04 ("This Court should not extend the venue statutes beyond those limitations intended by the legislature, nor, should this Court effectively overrule legislative intent manifest in the specific divorce venue statute by judicial fiat."); *see also, e.g.,* 10 O.S. §§ 7502-1.2, 7700-605; 10A O.S. § 1-4-101; 18 O.S. § 471; 36 O.S. § 4902; 43 O.S. § 103; 47 O.S. § 173; 75 O.S. § 318. At the end of the day, as the U.S. Supreme Court has emphasized, "those seeking to challenge the

constitutionality of state laws are not always able to pick and choose the timing and preferred forum for their arguments." *Jackson*, 142 S. Ct. at 537.

Moreover, even if Petitioners could establish that any of these procedural provisions were unconstitutional, the Civil Enforcement Laws' robust severability provisions would require this Court to severe those and only those provisions. *See* 63 O.S. §§ 1-745.44, 1-745.59; *see also Englebrecht v. Day*, 1949 OK 154, ¶ 39, 208 P.2d 538, 544 ("'The unconstitutionality of a portion of an act of the Legislature does not defeat or affect the validity of the remaining provisions, unless it is evident that the Legislature would not have enacted the valid provisions with the invalid provisions removed, if with the invalid provisions removed the rest of the act is fully operative at a law.") (citation omitted). Accordingly, Petitioners' facial challenge to the Civil Enforcement Laws still fails on the merits.[4]

c. The Civil Enforcement Laws do not contravene the separation of powers.

The exclusively civil nature of the remedy created in the Civil Enforcement Laws does not implicate, let alone violate, the separation of powers. *Contra* Br. at 18-20, 27-28. In short, the Civil Enforcement Laws do not involve the exercise of any executive or police power. The Civil Enforcement Laws don't, for example, purport to "vest a quasi-judicial power in an *administrative (executive) agency* to exercise adjudicative authority or render decisions in individual proceedings." *Young v. Station 27, Inc.*, 2017 OK 68, ¶ 19, 404 P.3d 829, 838 (emphasis added). Nor do the Civil Enforcement Laws purport to exercise any legislative or rulemaking power. *See Nat'l Bank of Tulsa Bldg. v. Goldsmith*, 1951 OK 5, ¶ 17, 226 P.2d 916, 921 ("[T]he Legislature has no power to delegate legislative authority to any individual."). Finally, the Civil Enforcement Laws do not purport to

[4] It is also worth noting that, contrary to Petitioners' hyperbole, in nearly three months since the passage of S.B. 1503 Petitioners do not report that any lawsuit has been filed under the Civil Enforcement Laws. *Contra* Br. at 16 (claiming that a "person could be sued a hundred times or more for providing one prohibited abortion").

delegate any judicial power, nor deprive the district courts of jurisdiction to adjudicate claims arising thereunder. *See Young*, 2017 OK 68 at ¶ 19 n.43, 404 P.3d at 839 n.43. They are, very simply, *civil laws*, with mechanisms of action that are not dissimilar from other statutes that allow private citizens to sue. *See Jackson*, 142 S. Ct. at 535 ("But somewhat analogous complaints could be levied against private attorneys general acts, statutes allowing for private rights of action, tort law, federal antitrust law, and even the Civil Rights Act of 1964. In some sense all of these laws 'delegate' the enforcement of public policy to private parties and reward those who bring suits with 'bount[ies]' like exemplary or statutory damages and attorney's fees.").

d. The Civil Enforcement Laws do not violate free speech, void-for-vagueness, or ex post facto doctrines.

Petitioners' void-for-vagueness, ex post facto, and free speech arguments rely on strict legal standards inapplicable to the Civil Enforcement Laws. The void-for-vagueness doctrine, for example, generally "requires that a *penal statute* define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (emphasis added). Here, the Civil Enforcement Laws are not penal statutes nor criminal laws, and therefore they are not subject to the same rigorous standard. *See id.* at 358, n.8.

Courts have similarly demanded more clarity in, or subjected to stricter scrutiny, laws that regulate constitutionally protected conduct, especially in the First Amendment context. *Id.* at 359. Yet here, again, abortion is not a constitutional right, and the performance of the same is now illegal in Oklahoma as a matter of separate criminal provisions. *See supra* Section II(a). Petitioners can no longer predicate their arguments on a constitutionally protected right to abortion, which severely undermines their attempt to argue any form of strict scrutiny applies here.

Moreover, Petitioners snub the traditional rules underlying constitutional adjudication. For example, this Court cannot declare a statute unconstitutional if one possible interpretation would

render it constitutional or avoid constitutional doubt. *Fent v. Oklahoma Capitol Imp. Auth.*, 1999 OK 64, ¶ 3, 984 P.2d 200, 204. Similarly, "a person to whom a statute may be constitutionally applied will not be heard to challenge that statute on the ground that it may be conceivably applied unconstitutionally to others, in situations not before the court." *Matter of Schrader*, 1983 OK 19, ¶7, 660 P.2d 135, 137. "[C]ourts are not roving commissions assigned to pass judgment on the Nation's laws," and *personal* constitutional rights "may not be asserted vicariously." *Id.* Here, Petitioners provide only hypothetical situations of feigned confusion over the meaning or effect of the Civil Enforcement Laws which are not before this Court. In any event, even if Petitioners could clear these many hurdles the Civil Enforcement Laws still pass muster.

i. The Civil Enforcement Laws do not improperly burden speech.

The Civil Enforcement Laws explain that they "shall not be construed to impose liability on any speech or conduct protected by the First Amendment … or by Section 3 or 22 of Article II of the Oklahoma Constitution." 63 O.S. §§ 1-745.39(G), 1-745.55(G). Petitioners insist that this unambiguous language cannot save the statutes from invalidation, but the single case they cite for this stands for very nearly the *opposite* proposition. Here is the Fifth Circuit quote in full, with the language Petitioners omitted in brackets:

> Of course, such a provision cannot substantively operate to save an otherwise invalid statute, since it is a mere restatement of well-settled constitutional restrictions on the construction of statutory enactments. [However, it is a **valuable indication** of Congress' concern for the preservation of First Amendment rights in the specific context of the statute in question. **Thus, it serves to validate a construction of the statute which avoids its application to protected expression**.]

CISPES v. FBI, 770 F.2d 468, 474 (5th Cir. 1985) (brackets and emphasis added). Based on Petitioners' own cited authority, then, the plain text of the Civil Enforcement Laws provides a "valuable indication" of the Legislature's "concern for the preservation of" free speech rights, and a "construction of the statute[s] which avoids [their] application to protected expression" is

validated by that plain text. *Id.* The Civil Enforcement Laws can be interpreted consistently with the Oklahoma Constitution, so Petitioners' free speech challenge must fail.

That Oklahoma's speech protections may be greater than those provided in the U.S. Constitution, in light of differing constitutional language, does nothing to undermine this. Br. at 22 (citing *In re Initiative Petition No. 366,* 2002 OK 21, ¶ 7, 46 P.3d 123, 126 & *Gaylord Ent. Co. v. Thompson*, 1998 OK 30, ¶ 13 n.23, 958 P.2d 128, 138 n.23). As just mentioned, the Civil Enforcement Laws both expressly state that they "shall not be construed to impose liability on any speech or conduct protected by . . . Section 3 or 22 of Article II of the Oklahoma Constitution." Moreover, this Court has also held Oklahoma's speech protection is "not absolute" and "clearly does not extend" to categories such as "incitement to imminent lawless activity." *Edmondson v. Pearce*, 2004 OK 23, ¶ 61 & n.40, 91 P.3d 605, 633-34 & n.40. Indeed, this Court takes a "common sense, reasonable interpretation and application of the plain meaning" of statutory language, and that this approach rendered "without merit" a party's argument that the act in question in *Pearce*—which prohibited encouragement of a cockfight—prohibited "all speech" and "editorial advocacy." *Id. Pearce* also emphasized that "even if there may be … a chilling effect 'to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face.'" *Id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). This cuts to the heart of Petitioners' argument, which focuses on a chilling effect and asks for facial invalidity.

Put differently, to the extent the aiding and abetting contemplated in the Civil Enforcement Laws could reach speech, it still does not seriously implicate, let alone infringe upon, free speech concerns. Courts have long held that the cloak of the First Amendment "lends no protection to speech which urges the listeners to commit violations of current law." *United States v. Kelley*, 769 F.2d 215, 217 (4th Cir. 1985) (citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969)); *see also*

Gerhart v. State, 2015 OK CR 12, ¶ 7, 360 P.3d 1194, 1196–97. Just as criminal laws can prohibit conduct that aids and abets unlawful criminal activity, so too can civil laws prohibit conduct that aids and abets unlawful civil activity. *See, e.g.*, 18 U.S.C. § 2; 21 O.S. § 172; 22 O.S. § 432; 68 O.S. § 4209; and 10A O.S. § 1-4-904; 25 O.S. § 1601; 59 O.S. § 509; 71 O.S. § 1-509; *Keel v. Hainline*, 1958 OK 201, ¶ 9, 331 P.2d 397, 400 (affirming judgment in a civil case where the jury was correctly instructed on "the responsibility of those defendants who may have aided, abetted, encouraged, procured, promoted or instigated the act which caused the injury").

Finally, Petitioners' claim that the existence of a fee-shifting provision somehow operates as content- and viewpoint-based discrimination is unsupported, even by the cases cited by Petitioners. *See* Br. at 24. For example, Petitioners cite a concurrence in *Gerhart v. State*, 2015 OK CR 12, 360 P.3d 1194, but that case had nothing to do with fee-shifting; rather, it involved alleged blackmail to a state senator. Petitioners want this Court to blaze a new trail with no compass.

ii. The Civil Enforcement Laws are not unconstitutionally vague.

For their vagueness argument, Petitioners present nothing more than feigned (and speculative) ignorance over the meaning of ordinary and plain terms, such as aiding and abetting. Br. at 21, 23. Petitioners fail to cite any authority for their proposition that a person of ordinary intelligence would be unable to discern what aiding and abetting liability is without a statutory definition. Rather, aiding and abetting is a concept that courts have handled for a long time. *See, e.g., Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949) ("In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed."). Petitioners' real complaint is with the policy of the statutes, not the aiding and abetting provisions. *See Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 177 (1994)

("The issue, however, is not whether imposing private civil liability on aiders and abettors is good policy but whether aiding and abetting is covered by the statute.").[5]

iii. The Civil Enforcement Laws are not ex post facto violations.

As Petitioners acknowledge, an ex post facto law is "[a] law passed *after* the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed." *Starkey v. Okla. Dep't of Corr.*, 2013 OK 43, ¶ 37, 305 P.3d 1004, 1018 (emphasis added) (quoting Black's Law Dictionary 662 (4th ed. 1968)); Br. at 22. Nothing in the language cited by Petitioners, nor the Civil Enforcement Laws more broadly, purports to make conduct illegal that occurred before the laws themselves were passed.

Petitioners rest their ex post facto argument on a provision of the Civil Enforcement Laws that clarifies it is not a defense for a party that is sued to rely on "any court decision that has been overruled on appeal or by a subsequent court, even if that court decision had not been overruled" when the party engaged in conduct that violates the act. Br. at 22 (quoting 63 O.S. §§ 1-745.39(E)(3), 1-745.55(E)(3)). But this says nothing about retroactivity; rather, it only covers actions that took place after the laws were enacted on May 3 and May 25, 2022, respectively. The *reasonable* construction of this provision is that if a defendant violates the statutes *after* they are enacted (say, on June 1) they cannot rely on the protections of cases like *Roe v. Wade* and its progeny if those are eventually overturned (which they were, on June 24). Because a constitutionally sound interpretation is readily apparent that does not implicate the ex post facto clause, there is no issue.

[5] In the alternative, Petitioners argue that the aiding and abetting prohibitions "serve no legitimate, much less important, governmental purpose." Br. at 23 n.7. But this again goes to Petitioners' mistaken view that abortion is a right rather than a criminal action. *See Dobbs*, 142 S. Ct. at 2283-84 ("States may regulate abortion for legitimate reasons .... These legitimate interests include respect for and preservation of prenatal life at all stages of development ....").

e. The Civil Enforcement Laws do not involve improper disclosure of confidential medical records.

Petitioners' final merits argument is a complaint in search of a legal harm. To begin, under no conceivable interpretation could Article II, Section 30 of our Constitution, which protects against unreasonable *government* searches and seizures, be construed as shielding relevant underlying facts from civil liability, judicial scrutiny, or even disclosure through discovery. *See* Br. at 24-25. The fact that an abortion has occurred is certainly not the type of confidential, personal, or medical information entitled to protection against government disclosure, let alone by any constitutional provision. *See Leiser v. Moore*, 903 F.3d 1137, 1144 (10th Cir. 2018). But even if it were, the Civil Enforcement Laws do not involve any government disclosure. *See* Br. at 25 (admitting "government officials are prohibited from directly enforcing the Acts"). Moreover, and perhaps more importantly, nothing in the plain text of the Civil Enforcement Laws contradicts or overrides other applicable statutory protections that apply to individual patient medical records, regardless of whether the government is involved or just private individuals. The authorities cited by Petitioners, largely involving discovery disputes, don't suggest otherwise. *Id.* at 24-25.

CONCLUSION

For these many reasons, this Court should dismiss or otherwise deny Petitioners' Application for Original Jurisdiction and Petition for Declaratory and Injunctive Relief and/or a Writ of Prohibition. Respondents are clearly immune from suit and Petitioners cannot assert any justiciable controversy because Respondents have no role in enforcing the Civil Enforcement Laws. Even if they could surpass these threshold burdens, Petitioners likewise cannot establish the Civil Enforcement Laws are clearly, palpably, and plainly inconsistent with the Oklahoma Constitution. To the contrary, the Civil Enforcement Laws are constitutional—under the Oklahoma and the United States Constitutions.

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 19th day of July, 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