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

OKLAHOMA ATTORNEY GENERAL'S RESPONSE AND OBJECTION TO PETITIONERS' SUPPLEMENTAL EMERGENCY MOTION FOR AN IMMEDIATE TERMPORARY RESTRAINING ORDER, ETC.

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June 1, 2022

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INTRODUCTION

This is the *third* time Petitioners have moved this Court to issue emergency injunctive relief barring "the State of Oklahoma" and all Oklahoma district court clerks from performing their non-adversarial statutory duty of docketing petitions filed pursuant to a state law. The first two times, and after an oral argument, this Court rightly declined to issue an emergency injunction. It should do so again here, especially since Petitioners admit that the "Acts" challenged—Senate Bill 1503 (S.B. 1503) originally, and now House Bill 4327 (H.B. 4327)[1]—are nearly identical. *See, e.g.*, Suppl. Emerg. Mot. at 5 ("H.B. 4327, like S.B. 1503, expressly precludes the state or any political subdivision, as well as officers or employees of a state or local government entity in Oklahoma, from enforcing the bans.").

Like their first two emergency motions, Petitioners' third motion makes an unprecedented demand that would undermine Oklahoma's judicial system and run afoul of precedent. As the U.S. Supreme Court recently recognized in a challenge to a similar Texas law, states enjoy sovereign immunity, and to enjoin state court clerks from their duties like this "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). State judges and clerks, moreover, "do not enforce state laws as executive officials might; instead, they work to resolve disputes between parties." *Id.* Thus, no case or controversy exists between litigants challenging enforcement of a statute and clerks, who "serve to file cases as they arrive, not to participate as adversaries in those disputes." *Id.*

As such, pursuant to 74 O.S. § 18b(A)(3), and without waiving any defenses or arguments available to any Respondent, the Attorney General respectfully asks this Court to deny Petitioners' third attempt at emergency relief. In law, unlike life, the third time should not be a charm.

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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.

BACKGROUND

Less than six months ago, on December 10, 2021, the U.S. Supreme Court held that Texas judges and clerks were improperly included in a lawsuit challenging the Texas Heartbeat Act. *See Jackson,* 142 S. Ct. at 529-539. As is now well-known, that act created a private enforcement mechanism for protecting the unborn, and it did "not allow state officials to bring criminal prosecutions or civil enforcement actions." *Id.* at 530. Relying on *Alden v. Maine*, 527 U.S. 706 (1999), and *Ex parte Young*, 209 U.S. 123 (1908), the U.S. Supreme Court reiterated that state courts and their "machinery" are "immune from suit under the terms of the Eleventh Amendment and the doctrine of sovereign immunity." *Jackson*, 142 S. Ct. at 532. Enjoining courts and clerks, therefore, "would be a violation of the whole scheme of our Government." *Id.* (quoting *Ex parte Young*, 209 U.S. at 163). And that wasn't "the only problem confronting the petitioners' court-and-clerk theory," as the petitioners also lacked a "case or controversy." *Id.* This all added up to a clean dismissal of the court clerks. *Id.* at 539. At present, the Texas law is still in effect. *See, e.g., Whole Woman's Health v. Jackson*, 642 S.W.3d 569, 583 (Tex. 2022) (concluding, in response to a certified question from Fifth Circuit, that the act "prohibits any indirect-enforcement method"); *Whole Woman's Health v. Jackson*, 31 F.4th 1004 (5th Cir. April 26, 2022) (remanding, after receiving the answer to its certified question, the Texas Heartbeat Act lawsuit to district court "with instructions to dismiss all challenges to the private enforcement provisions of the statute").[2]

On April 28, 2022, by an overwhelming and bipartisan vote, the Oklahoma Legislature passed S.B. 1503—the Oklahoma Heartbeat Act. This Act contains a nearly identical private enforcement mechanism as the Texas law, declaring that it "shall be enforced exclusively through

[2] Petitioners point to the Idaho Supreme Court's apparent stay of a similar law, but they cite no reasoning from that court, and the situation is complicated, to say the least. *See* Audrey Dutton, *Update: Idaho attorney general disputes false claim that he 'cut a deal' with Planned Parenthood in abortion lawsuit*, IDAHO CAPITAL SUN (April 13, 2022), https://idahocapitalsun.com/briefs/idaho-attorney-general-refutes-false-claim-that-he-cut-a-deal-with-planned-parenthood-in-abortion-lawsuit//.

a private civil action" and that "[n]o direct or indirect enforcement of this act may be taken or threatened by the state, a political subdivision, a district attorney, or an executive or administrative officer or employee of this state or a political subdivision ...." 63 O.S. § 1-745.38. Well before Governor Stitt signed the law, Petitioners filed this original jurisdiction suit against the State of Oklahoma and its 77 county court clerks, as well as an emergency motion seeking to enjoin those clerks from performing their ministerial duties. On May 3, 2022, after a referee argument, this Court denied the emergency motion and the Governor signed the Act into law. Three days later, Petitioners filed a motion to reconsider, which this Court denied on May 11.

On May 25, 2022, the Governor signed H.B. 4327, a law that was also enacted by an overwhelming and bipartisan majority of the Legislature. As Petitioners acknowledge, H.B. 4327 is nearly identical to the Oklahoma Heartbeat Act in terms of how it operates. *See, e.g.*, Mot. to Consol. at ¶ 7 (describing the two laws as "heavily overlapping"); Suppl. Emerg. Mot. at 5. The main difference, of course, being that H.B. 4327 prohibits abortion throughout pregnancy, whereas S.B. 1503 applies once a heartbeat is detectable early in a pregnancy.

The day after H.B. 4327 was signed, Petitioners filed six supplemental motions and briefs in this case, including yet another motion for emergency injunctive relief. This third motion *again* seeks reconsideration of this Court's *two* denials of emergency injunctive relief enjoining S.B. 1503, *see* Suppl. Emerg. Mot. at 1 n.1,[3] and further seeks an emergency injunction of H.B. 4327. Specifically, Petitioners insist upon "injunctive relief barring any implementation of H.B. 4327 in any way, including by enjoining the [77] state court clerks from docketing H.B. 4327 lawsuits." *Id.* at 15. In short, Petitioners are attempting the same maneuver the plaintiffs attempted in Texas. But *Jackson* applies equally here, and thus the emergency motion should be denied.

[3] Reconsideration of this Court's denial of emergency relief as to S.B. 1503 would be improper for the same reasons already articulated by this Court in its May 11, 2022 order.

ARGUMENT

It is a "well settled rule that the mere allegation of the invalidity of a statute is not sufficient to warrant the application to its operation of the remedy of injunction." *Starner v. Okla. City*, 1951 OK 253, ¶ 6, 236 P.2d 479, 481. Rather, a "proper case" must be presented for constitutionality to be determined. *City of Shawnee v. Taylor*, 1943 OK 11, ¶ 4, 132 P.2d 950, 952. Moreover, when a party is seeking "preventive relief," a "court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding." *California v. Texas*, 141 S. Ct. 2104, 2115 (2021) (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923)); *see also Jackson*, 141 S. Ct. 2494, 2495 (2021) (denying preliminary injunctive relief for the Texas Heartbeat Act).

Petitioners here have not brought a proper case. They seek an injunction under a statute that doesn't apply, the Respondents they have sued are clearly entitled to sovereign immunity, they have failed to present an actual controversy to this Court, and the Oklahoma Constitution does not protect a right to an abortion. So they are not entitled to any relief, emergency or otherwise.

I. 12 O.S. § 990.4(C) DOES NOT AUTHORIZE A TEMPORARY INJUNCTION HERE.

As a preliminary matter, Petitioners base their emergency demand for a temporary injunction entirely on 12 O.S. § 990.4(C). *See* Suppl. Emerg. Mot. at 1, 8.[4] But that statutory subsection doesn't apply here. Section 990.4(C) only authorizes a "trial or appellate court" to act "during the pendency **of the appeal**" or "while any posttrial motions are pending." (emphasis added). Petitioners conveniently removed the phrase "of the appeal" in their emergency motion, *see* Suppl. Emerg. Mot. at 8 (claiming an injunction is allowed "'... during the pendency' of **litigation**" (emphasis added)), but it is that very phrase that removes Section 990.4(C) from their reach. Simply put, this is not an appeal, it is not posttrial, and it is this Court's original jurisdiction

[4] Petitioners mention in passing that this Court "could" grant a writ of prohibition. Suppl. Emerg. Mot. at 1 n.1. This falls far short of actually requesting the writ or explaining why it is deserved.

that is being invoked, not its appellate jurisdiction. By its plain text, Section 990.4(C) is inapplicable. And none of the cases Petitioners cite to say this Court is somehow obliged to act here involve an injunction under Section 990.4(C). *See* Suppl. Emerg. Mot. at 8-9 & n.5.

Even if Section 990.4(C) or some other statute allowed for temporary injunctions during original jurisdiction actions, that general guidance would not trump H.B. 4327's specific (and later-in-time) instruction that "no court of this state shall have jurisdiction to consider any action, claim, or counterclaim that seeks declaratory or injunctive relief against the state, a political subdivision, or any officer or employee of this state or a political subdivision in relation to this act." 63 O.S. § 1-745.58(D). Nor do Petitioners' generic invocations of this Court's duty to uphold the Oklahoma Constitution mean a proper case and controversy against non-immune Respondents exists here.

II. RESPONDENTS ARE ALL ENTITLED TO SOVEREIGN IMMUNITY.

Petitioners devote remarkably little of their emergency motion to a critical issue in this lawsuit: sovereign immunity. Indeed, Petitioners only briefly mention the doctrine in a single footnote. *See* Suppl. Emerg. Mot. at 2 n.2. Similarly, despite the U.S. Supreme Court rejecting an almost identical argument to the one Petitioners present here, they cite to the highly instructive *Jackson* opinion just one time, in that same footnote. *Id.* This is not nearly enough to overcome the obvious conclusion that all Respondents are entitled to sovereign immunity.

a. Sovereign immunity extends beyond the Eleventh Amendment.

Petitioners claim that *Jackson* "has no bearing here," in part because Eleventh Amendment immunity is not at issue. *Id.*[5] This fundamentally misunderstands *Jackson* and the doctrine of sovereign immunity. In *Jackson*, the U.S. Supreme Court held that the doctrine of sovereign immunity barred the petitioners' suit against court clerks, among others. 142 S. Ct. at 532. The

[5] The Eleventh Amendment holds that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Supreme Court did not rely solely on the Eleventh Amendment for this conclusion; rather, it explained that "States are immune from suit under the terms of the Eleventh Amendment *and* the doctrine of sovereign immunity." *Jackson*, 142 S. Ct. at 532 (emphasis added). For this proposition, *Jackson* relied on a critical case: *Alden*, 527 U.S. 706.

In *Alden*, the U.S. Supreme Court observed that the phrase "Eleventh Amendment immunity" is an oft-used "misnomer," because "the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Id.* at 713. "[A]s the Constitution's structure, its history, and the authoritative interpretations by this Court make clear," *Alden* explained, "the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today." *Id.*; *see also id.* at 727 ("[T]he Court has upheld States' assertions of sovereign immunity in various contexts falling outside the literal text of the Eleventh Amendment."). As such, *Alden* held definitively that "[i]n light of history, practice, precedent, and the structure of the Constitution ... States retain immunity from private suit **in their own courts**." *Id.* at 754 (emphasis added); *see also id.* at 745.

Like *Jackson*, this Court has expressly embraced *Alden*, quoting as authoritative its propositions that "Eleventh Amendment Immunity" is a "misnomer, that "sovereign immunity of the States neither derives from nor is limited by, the terms of the Eleventh Amendment," and that "the States' immunity from suit is a fundamental aspect of ... sovereignty." *Freeman v. State ex rel. Dep't of Hum. Servs.*, 2006 OK 71, ¶ 4, 145 P.3d 1078, 1079. Thus, Petitioners' suggestion that *Jackson*'s holding can be disregarded here is wrong. The same underlying sovereign immunity discussed in *Jackson* applies to the State of Oklahoma, in federal *and* state courts.

b. The State of Oklahoma is immune, as it has not consented to this suit.

In *Alden*, the U.S. Supreme Court pointed out two limits on the sovereign immunity of states, limits that would apply in state and federal court. "The first of these limits is that sovereign

immunity bars suits only in the absence of consent." *Id.* at 755. "The second important limit ... is that it bars suits against States but not lesser entities." *Id.* at 756. Petitioners have first sued the "State of Oklahoma," which is by definition not a "lesser entit[y]." Thus, the only relevant initial question is whether Oklahoma has consented to Petitioners' suit. *See Henry v. Okla. Tpk. Auth.*, 1970 OK 232, ¶ 15, 478 P.2d 898, 901 ("This state has long been committed to the rule, without a single exception, that the State is immune from suits without its waiver or consent."); *Barrios v. Haskell Cty. Pub. Facilities Auth.*, 2018 OK 90, ¶ 7, 432 P.3d 233, 236-37 ("We have long recognized that the Legislature has the final say in defining the scope of the State's sovereign immunity ....").

The answer to that question is easy: the State of Oklahoma has not consented to this suit. Broadly, Oklahoma has "adopt[ed] the doctrine of sovereign immunity." 51 O.S. § 152.1. And that immunity is not limited to cases of tort. *See Freeman*, 2006 OK 71, ¶ 9, 145 P.3d 1078, 1080. Moreover, Petitioners here openly *admit* that H.B. 4327 expressly invokes "sovereign immunity for the State, its subdivisions, and all its officers and employees." Suppl. Emerg. Mot. at 8. If sovereign immunity means anything at all, at a bare minimum the State of Oklahoma should be dismissed from this lawsuit due to an admitted lack of consent on its part.

c. All 77 Oklahoma district court clerks are immune from suit.

Petitioners have also sued all 77 district court clerks in Oklahoma to enjoin them from docketing H.B. 4327 lawsuits. For the same reasons discussed above, Oklahoma has not consented for these clerks to be sued. Moreover, in performing their relevant statutory and ministerial duties, court clerks act as "both a county officer and an officer or 'arm' of the court." *Speight v. Presley*, 2008 OK 99, ¶ 14, 203 P.3d 173, 177 (citing *Petuskey v. Cannon*, 1987 OK 74, 742 P.2d 1117). And the "traditional exception" to sovereign immunity, *Jackson* held, "does not normally permit federal courts to issue injunctions against state-court judges or clerks" who "work to resolve disputes between parties" rather than "enforce state laws as executive officials might." *Jackson*, 142 S. Ct.

at 532; *see also Trackwell v. U.S. Gov't*, 472 F.3d 1242, 1247 (10th Cir. 2007) ("[W]hen a court clerk assists a court or a judge in the discharge of judicial functions, the clerk is considered the functional equivalent of the judge and enjoys derivative immunity."). In a resounding rejection of the relief requested here, the U.S. Supreme Court emphasized that "an injunction against a state court or its machinery would be a violation of the whole scheme of our Government." *Jackson*, 142 S. Ct. at 532 (quoting *Ex parte Young*, 209 U.S. at 163) (internal marks omitted).

The U.S. Supreme Court's rationale in *Jackson* logically applies whether a suit is filed in federal court or state court, as the forum of a suit does not change the essential nature of the court clerk function. Court clerks are court clerks, and they operate as an extension of the court and the state in performing the ministerial duty of accepting petitions. Moreover, by citing *Alden* in reaching its conclusion—a precedent relied upon by this Court in determining the scope of sovereign immunity—the U.S. Supreme Court sent a straightforward signal that its rationale is not limited to federal courts. *Jackson,* in sum, points directly toward immunity for clerks here.

d. Oklahoma's "sham legal process" exception does not withdraw immunity.

The sovereign immunity of Oklahoma court clerks is not diminished because an Oklahoma clerk "may refuse to file any document presented for filing if the clerk believes that the document constitutes sham legal process, as defined by Section 1533 of Title 21." 12 O.S. § 29. To start, this "sham legal process" statute expressly declares that court clerks are "immune from liability for such action in any civil suit" even *if* they "improperly file[] or refuse[] to file a document provided for in subsection B of this section [*i.e.*, the "sham" document subsection]." 12 O.S. § 29(D) (emphasis added). If that wasn't enough, H.B. 4327 itself declares that "[n]othwithstanding any other law … each officer and employee of this state or a political subdivision has official immunity" and "no provision of state law may be construed to waive or abrogate [that] immunity"

unless is specifically references H.B. 4327. 63 O.S. § 1-745.58(A)-(B). It is crystal clear that clerks are immune under Oklahoma law.

In addition, a filing under H.B. 4327 would not qualify as a "sham." Oklahoma law defines "[s]ham legal process," among other things, as the use "of an instrument that is not lawfully issued," such as a spurious "summons, subpoena, judgment, arrest warrant, search warrant, or other order of a court." 21 O.S. § 1533(H)(1). Nothing about H.B. 4327 involves filing fraudulent or fake documents. To use this narrow exception to justify the requested relief would require finding a legal absurdity: that the Legislature created a private civil enforcement process that, if utilized, would likely qualify as a state felony. *See* 21 O.S. 1553(C) (making it a felony to falsely assert "authority of law not provided for by federal or state law in connection with any sham legal process"). This Court "harmonizes [statutory] provisions to avoid an absurd result," *Hogg v. Okla. Cnty. Juv. Bureau*, 2012 OK 107, ¶ 14, 292 P.3d 29, 35, not the other way around.[6]

e. Petitioners have provided this Court with no logical limits to their theory.

In *Jackson*, the U.S. Supreme Court found it "troubling" that "the petitioners have not offered any meaningful limiting principles for their theory." 142 S. Ct. at 532. The same goes for Petitioners here. If court clerks can be enjoined, then what would prevent "clerks from hearing and docketing disputes between private parties under *other* state laws?" *Id.* Such questions abound:

> Under the petitioners' theory, would clerks have to assemble a blacklist of banned claims subject to immediate dismissal? What kind of inquiry would a state court have to apply to satisfy due process before dismissing those suits? How notorious would the alleged constitutional defects of a claim have to be before a state-court clerk would risk legal jeopardy merely for filing it? Would States have to hire independent legal counsel for their clerks—and would those advisers be the next target of suits seeking injunctive relief?

[6] To be sure, *Jackson* stated that the "petitioners have pointed to nothing in Texas law that permits clerks to pass on the substance of the filings they docket—let alone refuse a party's complaint based on an assessment of the merits." 142 S. Ct. at 532. But at that point in the opinion, the U.S. Supreme Court had finished its immunity analysis and was discussing *additional* reasons why clerks could not be sued—including a lack of adversarial posture and a remedy. *See id.* at 532.

Id. at 533; *see also Coleman v. Farnsworth*, 90 F. App'x 313, 317 (10th Cir. 2004) (unpublished) ("To hold otherwise would have a chilling effect on the judicial duties and actions of the clerk, who would be readily subject to suit in the course of performing his or her duties....").

Even more troubling, Petitioners' rationale would logically extend to the county judges themselves. *See Jackson*, 142 S. Ct. at 534 ("[N]othing in any of our [dissenting] colleagues' cases supports their novel suggestion that we should allow a pre-enforcement action for injunctive relief against state-court clerks, all while simultaneously holding the judges they serve immune."); *Speight*, 2008 OK 99, ¶ 14, 203 P.3d 173, 177 ("The district court clerk is 'judicial personnel' and is an arm of the court whose duties are ministerial ...."). If court clerks can be enjoined, then so can judges. Neither should be permitted, however, as both are entitled to sovereign immunity.

III. PETITIONERS' LAWSUIT DOES NOT PRESENT AN ADVERSARIAL CONTROVERSY.

An additional problem for the petitioners in *Jackson* was the absence of a "case or controversy," since "[c]lerks serve to file cases as they arrive," rather than "participate as adversaries in those disputes." 142 S. Ct. at 532. Petitioners dismiss this because Article III is not at issue here. *See* Suppl. Emerg. Mot. at 2 n.2. But Petitioners cannot hand wave this problem away. Though Article III of the federal Constitution is not at issue here, Petitioners ignore the fact that Oklahoma courts generally require a "case or controversy," rather than "merely a request for an advisory opinion." *Cloudi Mornings, LLC. v. City of Broken Arrow*, 2019 OK 75, ¶ 1, 454 P.3d 753, 755. And a case or controversy requires parties that are antagonistic, *see Tulsa Indus. Auth. v. City of Tulsa,* 2011 OK 57, ¶ 13, 270 P.3d 113, 120 ("[W]hen only non-antagonistic demands are presented, there is no 'controversy' ...."), which is not the case with litigants and court clerks, or litigants and the "State of Oklahoma" here, for that matter.

Put differently, Petitioners need to identify some actual or imminent conflict between themselves and a person empowered to enforce the law in question. *See, e.g., Diamond v. Charles*,

476 U.S. 54, 64 (1986) ("The conflict between state officials empowered to enforce a law and private parties subject to prosecution under that law is a classic 'case' or 'controversy'"); *Ex parte Young*, 209 U.S. at 157 (an "officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party"). They have not done so. The "State of Oklahoma" is not a person that could be enjoined in the first place, nor is the State or any state official empowered to enforce H.B. 4327. *See J.W. v. Indep. Sch. Dist. No. 10 of Dewey Cty.*, 2021 OK CIV APP 34, ¶ 38, 500 P.3d 649, 659 ("Like a private corporation, a governmental entity can only act through its agents and employees."). As the U.S. Supreme Court held in *Jackson*, a proper conflict doesn't exist with state court clerks, either. Petitioners have not and cannot establish that any Respondent takes part in the enforcement of H.B. 4327.

To the contrary, H.B. 4327 unequivocally states that it "shall be enforced exclusively through the private civil action" and that "[n]o direct or indirect enforcement of this act may be taken or threatened by the state, a political subdivision, a district attorney, or an executive or administrative officer or employee of this state ...." 63 O.S. § 1-745.54. If that language weren't plain enough on its own, the law goes further, clarifying that the state and its officers also cannot act in concert or participation with any plaintiff, attempt to establish an agency or fiduciary relationship with a plaintiff, attempt to control or influence a plaintiff, or even intervene in any private action. 63 O.S. § 1-745.55(H). To enjoin or restrain "the State of Oklahoma" or the 77 district court clerks here would therefore be wholly improper.

As noted above, *Jackson* did state that the "petitioners [in Texas] have pointed to nothing in Texas law that permits clerks to pass on the substance of the filings they docket—let alone refuse a party's complaint based on an assessment of the merits." *Jackson*, 142 S. Ct. at 532. And here, Petitioners have pointed to the ability of Oklahoma clerks to reject a "sham" document. But

as the Attorney General has already pointed out, this is an extremely narrow process that doesn't involve assessing the "merits" of any complaint or passing "on the substance" of the filings. Rather, it merely empowers court clerks to prevent the use of court process in perpetration of fraud. It does not create an adversarial relationship for purposes of H.B. 4327.

IV. H.B. 4327's Removal of Authority To Issue Injunctions is Valid.

Petitioners heap special opprobrium on H.B. 4327's provisions "blocking litigants from bringing claims to seek declaratory or injunctive relief." Suppl. Emerg. Mot. at 10. Among other things, they argue that these provisions violate Article II, Section 6 of the Oklahoma Constitution, which states that the "courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation." Petitioners are mistaken in this argument, in multiple ways.

To begin, Petitioners' attacks on these provisions in H.B. 4327 do not solve their immunity problem. Nothing in the cited language prohibiting "declaratory or injunctive relief," 63 O.S. § 1-745.58(D) & (E), consents to the removal of sovereign immunity for the State of Oklahoma or its court clerks. Quite the opposite: these provisions reinforce sovereign immunity, in that they clearly state that "no court of this state shall have jurisdiction" to enjoin state officials "in relation to this act," nor shall they prevent the "filing [of] a civil action under this act." *Id.*

Furthermore, these provisions do *not* deny Petitioners access to court or "foreclose state court review." Suppl. Emerg. Mot. at 2, 9-10. Rather, H.B. 4327 makes clear that "[n]othing in this section or act shall be construed to prevent a litigant from asserting the invalidity or unconstitutionality of any provision or application of this act as a defense to any action, claim, or counterclaim brought against that litigant." 63 O.S. § 1-745.58(F). Elsewhere, H.B. 4327 declares that a defendant "may assert an affirmative defense to liability under this section if ... the imposition of civil liability on the defendant will result in an undue burden on a woman or group

of women seeking an abortion," that a "court shall not award relief under Section 5 of this act if the conduct for which the defendant has been sued was an exercise of state or federal constitutional rights," and that "[n]othing in this section or this act shall limit or preclude a defendant from asserting the unconstitutionality of any provision of this act as a defense to liability." 63 O.S. § 1-745.56(A), (C), & (D). Petitioners neglect to mention these provisions when claiming that H.B. 4327 "effectively denies Petitioners a meaningful remedy entirely." Suppl. Emerg. Mot. at 10. Nor do Petitioners cite any case holding that merely removing the possibility of declaratory and injunctive relief violates their constitutional rights.

Petitioners' real complaint, beneath the hyperbole, is with the Legislature's power to remove the remedies that Petitioners prefer. But, as even Petitioners are forced to admit, the "state legislature may define the scope of an appropriate remedy." Suppl. Emerg. Mot. at 10; *cf. St. Paul Fire & Marine Ins. Co. v. Getty Oil Co.*, 1989 OK 139, ¶ 16, 782 P.2d 915, 919 ("Art. 2, § 6 does not promise a remedy to every complainant. ... [S]ome slings and arrows must remain in the realm of outrageous fortune until legislatively brought into the courtroom."). Even more on point, Petitioners acknowledge that a state court's authority to issue injunctions and declaratory judgments comes from Oklahoma statutes. Specifically, in addition to Petitioners' misplaced appeal for injunctive relief to Section 990.4(C)—a statute enacted by the Legislature—they also complain that H.B. 4327 eliminates "any opportunity to seek pre-enforcement review **as permitted by the Oklahoma Uniform Declaratory Judgment Act**." Suppl. Emerg. Mot. at 10 (emphasis added). Surely what the Oklahoma Legislature "permit[s]," it can also take away.

This Court has acknowledged similar principles in the context of a writ of mandamus. In *Martin v. Harrah Independent School District*, for example, this Court held that "[a]though the power to issue a writ of mandamus by appellate courts under Art. 7 § 4 of the Oklahoma Constitution is constitutional, we have never determined the right to the writ to be a constitutional remedy." 1975

OK 154, ¶ 14, 543 P.2d 1370, 1374. Instead, "its relief and the power of the district court to issue the writ are of a **statutory** nature." *Id.* (citing 12 O.S. § 1451) (emphasis added). "Statutory," of course, means the Legislature sets its parameters. *Cf.* OKLA. CONST. art. V, § 36 ("The authority of the Legislature shall extend to all rightful subjects of legislation, and any specific grant of authority in this Constitution, upon any subject whatsoever, shall not work a restriction, limitation, or exclusion of such authority upon the same or any other subject or subjects whatsoever."); *see also* 12 O.S. §§ 1381-1398, 1451-1462, 1651-1657. In short, injunctions and declaratory judgment actions are statutory rather than constitutional creations, thus the Legislature can eliminate them. *Cf. Jaworsky v. Frolich*, 1992 OK 157, ¶ 16, 850 P.2d 1052, 1056 ("The legislature controls the creation and termination of causes of action, including abolishing existing causes of action, unless restricted by the constitution."); *Lafalier*, 2010 OK 48, ¶ 20, 237 P.3d 181, 190 (similar).

In the end, H.B. 4327 does not strip Petitioners of the ability to vindicate their constitutional rights; rather, it merely removes one avenue of relief. As the U.S. Supreme Court emphasized in *Jackson*, "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. To this day, many federal constitutional rights are as a practical matter asserted typically as defenses to state-law claims ...." *Id.* at 537-38. That is what H.B. 4237 requires, and nothing more.[7]

V. THE OKLAHOMA CONSTITUTION DOESN'T PROTECT A RIGHT TO ABORTION.

Finally, as the Attorney General has explained more thoroughly in other cases pending before this Court, the Oklahoma Constitution does not protect abortion as fundamental right. *See* Defs' Resp., *OCRJ v. O'Connor*, No. 119,918, at 9-13 (Jan. 14, 2022) (decision pending); Defs' Resp., *Tulsa Women's Repr. Clinic v. O'Connor*, No. 118,292, at 5-9 (Dec. 10, 2019) (decision pending).

Nevertheless, Petitioners bring their claims here solely pursuant to the Oklahoma

[7] It should also be noted that H.B. 4327 has robust severability provisions. *See* 63 O.S. 1-745.59.

Constitution, arguing that this Court has "repeatedly interpreted the Oklahoma Constitution's due process clause to protect a person's ability to access abortion care prior to viability." Suppl. Emerg. Mot. at 9. And this is once again misleading, since this Court has expressly stated that it has "never made such a determination." *OCRJ v. Cline*, 2019 OK 33, ¶ 17, 441 P.3d 1145, 1151. Rather, this Court has applied federal law in state lawsuits, stating that the "Oklahoma Constitution requires compliance with federal constitutional law on issues of federal law." *In Re Initiative Petition 349, State Question No. 642*, 1992 OK 122, ¶ 12, 838 P.2d 1, 7; *see also Burns v. Cline*, 2016 OK 121, ¶ 6, 387 P.3d 348, 351; *OCRJ v. Cline*, 2012 OK 102, ¶ 2, 292 P.3d 27. The Attorney General herein renews his contention that Petitioners have not raised an "issue of federal law."

Without repeating previous arguments in full, the Attorney General simply draws this Court's attention back to *Jackson*. There, in response to the dissenters' accusation that the analogous Texas law subverted the U.S. Constitution, the U.S. Supreme Court emphasized: "whatever a state statute may or may not say, applicable federal constitutional defenses always stand fully available **when properly asserted**." 142 S. Ct. at 530 n.1 (emphasis added). Petitioners haven't even *attempted* to assert federal law here. Instead, Petitioners only bring claims under the Oklahoma Constitution, which does not protect a right to an abortion.

CONCLUSION

In *Jackson*, the U.S. Supreme Court held that a sovereign state and its court clerks are immune from suit, that clerks lack adversarial positioning in regard to litigants, and that a party must "properly assert" federal rights to rely upon them. Here, Petitioners have not properly asserted any federal rights, and they seek improper, nonjusticiable relief. Thus, Petitioners' emergency motion should be denied. To hold otherwise would be to do something that has never been done in the history of our State: enjoin the State at large and all county clerks—and by extension, county courts—from performing their statutory duties.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 1st day of June, 2022, a true and correct copy of the above instrument was transmitted, postage prepaid to the following:

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