ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

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SUPREME COURT
STATE OF OKLAHOMA
JUL - 1 2022
JOHN D. HADDEN
CLERK

OKLAHOMA CALL FOR REPRODUCTIVE JUSTICE, on behalf of itself and its members; TULSA WOMEN'S REPRODUCTIVE CLINIC, LLC, on behalf of itself, its physicians, its staff, and its patients; ALAN BRAID, M.D., on behalf of himself and his patients; COMPREHENSIVE HEALTH OF PLANNED PARENTHOOD GREAT PLAINS, INC., on behalf of itself, its physicians, its staff, and its patients; and PLANNED PARENTHOOD OF ARKANSAS & EASTERN OKLAHOMA, on behalf of itself, its physicians, its staff and its patients,

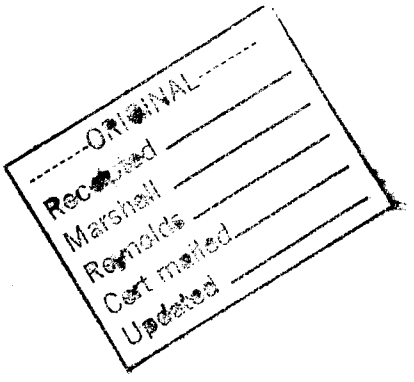
Petitioners,

v.

JOHN O'CONNOR, in his official capacity as Attorney General for the State of Oklahoma; DAVID PRATER, in his official capacity as District Attorney for Oklahoma County; STEVE KUNZWEILER, in his official capacity as District Attorney for Tulsa County; LYLE KELSEY, in his official capacity as Executive Director of the Oklahoma State Board of Medical Licensure and Supervision; KATIE TEMPLETON, in her official capacity as President of the Oklahoma State Board of Osteopathic Examiners; and KEITH REED, in his official capacity as the Commissioner of the Oklahoma State Board of Health,

Respondents.

CASE NO. #120543



BRIEF IN SUPPORT OF PETITIONERS' APPLICATION TO ASSUME ORIGINAL JURISDICTION AND PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

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I. INTRODUCTION

Oklahoma's criminal ban on performing abortions was enacted in 1910 and codified at 21 Okla. Stat. Ann. § 861 (the "1910 Ban"). Once *Roe v. Wade*, 410 U.S. 113 (1973), was decided, Oklahoma courts declared the 1910 Ban unconstitutional under the U.S. Constitution. It has not since been enforced. For nearly 50 years, abortion has been essential to women's ability to participate more fully in the economic and social life of Oklahoma and the nation. But over the last year, anticipating that the Supreme Court would overturn *Roe*, the Legislature resurrected the 1910 Ban through Senate Bill 918, amended by Senate Bill 1555 (the "Trigger Ban"), which enabled the State to enforce the 1910 Ban upon a certification by the Attorney General that *Roe* and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) were overruled. Senate Bill 612 (the "2022 Ban") is an overlapping criminal abortion ban enacted by the Legislature and scheduled to go into effect on August 27, 2022.

The Attorney General issued the certification contemplated by the Trigger Ban on June 24, 2022, as soon as the Supreme Court overruled *Roe* and *Casey* in *Dobbs v. Jackson Women's Health Org.* ("*Dobbs*"), 597 U.S. __, 2022 WL 2276808 (2022). The Attorney General's certification warned that the 1910 Ban had become "immediately enforceable" and that the Attorney General would "begin enforcement efforts immediately." The 1910 and 2022 Bans eliminate abortion care under nearly all circumstances, with devastating effects for Oklahomans. The urgent question for the Court here and in other pending cases challenging overlapping abortion bans,[1] is whether the Oklahoma Constitution's broad protection for individual liberty bars the State from running roughshod over the rights of pregnant

[1] *See Oklahoma Call for Reproductive Justice, et al., v. O'Connor, et al.*, Case No. PR-120376; *Oklahoma Call for Reproductive Justice, et al., v. O'Connor, et al.*, Case No. 119918; *Tulsa Women's Reproductive Clinic, et al. v. Hunter, et al.*, Case No. SD-118,292.

Oklahomans. It does. Oklahoma's Constitution does not countenance laws that destroy the "right of an individual to make decisions about her life," that deny "the dignity and autonomy of the individual," or that force submission to state action that is "intrusive in nature and an invasion of the body." *In re K.K.B.*, 1980 OK 7, 609 P.2d 747, 749, 752. The 1910 and 2022 Bans violate this fundamental liberty interest.

The prohibitions in the 1910 and 2022 Bans are also inconsistent with each other and with the overlapping prohibitions of two civil enforcement bans enacted in 2022. They are too vague to provide notice of prohibited conduct, in violation of the Oklahoma Constitution's substantive due process guarantee. Further, if the 2022 Ban is held to be consistent with the Oklahoma Constitution, its enactment effectively repealed the 1910 Ban. By providing "that the State of Oklahoma may enforce Section 861 of Title 21 of the Oklahoma Statutes *or* enact a similar statute prohibiting abortion throughout pregnancy" in the Trigger Ban, the Oklahoma Legislature expressed its intent that the 1910 Ban would *not* be enforced if a similar statute prohibiting abortion throughout pregnancy, such as the 2022 Ban, were enacted.

Given the urgent circumstances for Oklahomans posed by the blatant constitutional violations wrought by the 1910 and 2022 Bans, Petitioners respectfully request that the Court consider their Application and Petition on an expedited basis, assume original jurisdiction, declare the 1910 and 2022 Bans unconstitutional, and grant declaratory and injunctive relief or a writ of prohibition sufficient to prevent Respondents from enforcing them in any way.

II. BACKGROUND: THE CHALLENGED LAWS

The 1910 Ban is a complete ban on abortion. It prohibits individuals from providing abortions at any point during pregnancy:

> Every person who administers to any woman, or who prescribes for any woman, or advises or procures any woman to take any medicine, drug or substance, or uses or

> employs any instrument, or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, shall be guilty of a felony.

Okla. Stat. tit. 21 § 861. Anyone convicted of violating the 1910 Ban is "punishable by imprisonment in the State Penitentiary for not less than two (2) years nor more than five (5) years." *Id.* The only exception is for abortions "necessary to preserve [the patient's] life[.]" *Id.*

The 1910 Ban was declared unconstitutional under *Roe* in 1973.[2] Since then, it has not been enforced. Over the last year, the Oklahoma Legislature has passed increasingly radical and conflicting restrictions on abortion. In 2021, the State enacted two abortion bans (H.B. 2441 and H.B. 1102), both of which have been enjoined and are currently before this Court.[3] The State also enacted the first iteration of the Trigger Ban (S.B. 918), amended in 2022 (S.B. 1555), which permits the Attorney General to revive the 1910 Ban upon the overturning of *Roe*. Then, the Legislature passed the 2022 Ban, effective on August 27, 2022, which makes providing any abortion a felony, though it has different penalties and exceptions from the 1910 Ban: physicians who provide abortions face up to 10 years in prison and/or a fine of up to $100,000; and abortions are permitted in the case of certain "medical emergenc[ies]."

After the 2022 Ban, the Legislature enacted two civil enforcement bans: one banning abortion after around 6 weeks of pregnancy (S.B. 1503); and one prohibiting abortion at any gestational stage (H.B. 4327).[4] These civil bans are the subject of an original action before this Court,[5] but they remain in effect. As a result, all abortion care in Oklahoma has ceased.

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2 *See Jobe v. State*, 509 P.2d 481, 482 (Okla. Crim. App. 1973); *Henrie v. Derryberry*, 358 F. Supp 719, 721 (N.D. Okla. 1973).

3 *Oklahoma Call for Reproductive Justice, et al., v. O'Connor, et al.*, October 25, 2021 Order Granting Temporary Emergency Injunction, No. IN-119918.

4 S.B. 1503's only exception is for medical emergency. *Id.* § 5(A). H.B. 4327's only exceptions are for pregnancies that result from rape, sexual assault or incest and where "necessary to save the life of a pregnant woman in a medical emergency." *Id.* §§ 2(1)-2(2).

5 *Oklahoma Call for Reproductive Justice v. O'Connor*, No. 120376.

III. THE COURT SHOULD ASSUME ORIGINAL JURISDICTION.

Where as here this Court and the district courts have concurrent jurisdiction under Article VII of the Oklahoma Constitution, this Court has discretion to assume original jurisdiction. *Edmondson v. Pearce*, 2004 OK 23, ¶ 10, 91 P.3d 605, 613. Jurisdiction "may be assumed (1) in matters of public interest where there is (2) an element of urgency or a pressing need for an early decision." *Fent v. Contingency Rev. Bd.*, 2007 OK 27, ¶ 11, 163 P.3d 512, 521. This Court has repeatedly held that ruling on the constitutionality of legislation subject to imminent enforcement presents the rare circumstance in which assuming original jurisdiction is warranted. *E.g.*, *Campbell v. White*, 1993 OK 89, 856 P.2d 255, 258-59; *Johnson v. Walters*, 1991 OK 107, 819 P.2d 694, 699. There is a "general public need for a speedy determination of [a] constitutional question." *Keating v. Johnson*, 1996 OK 61, 918 P.2d 51, 56.

Urgency is paramount here. The 1910 and 2022 Bans deprive Oklahomans of the constitutionally protected right to make their own healthcare decisions, intruding on their agency and bodily autonomy. Oklahomans forced to give birth are exposed to serious medical risks posed by carrying a pregnancy to term, which exposes patients to far more serious and potentially life-threatening complications than any method of abortion. Braid Aff. ¶¶ 18, 19.[6] Oklahoma "ranks among the states with the worst rates" of maternal deaths in the United States. OCRJ Aff. ¶ 10.[7] Those rates are even higher among Black and Indigenous Oklahomans. *Id.* ¶ 11.

Without access to abortion care, those with means must travel out of state to receive care. But, given that most people seeking abortions are poor or low-income, that is not an

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6 Affidavit of Alan Braid, M.D. (attached as Exhibit 1 to Petitioners' Appendix) ("Braid Aff.").

7 Affidavit of Priya Desai (attached as Exhibit 2 to Petitioners' Appendix) ("OCRJ Aff.").

option for many. Braid Aff. ¶ 17; Wales Aff. ¶ 18.[8] Some people denied care will attempt to self-manage their own abortions without medical supervision. Many Oklahomans will have no choice but to continue their pregnancies against their will, exposing them (and their families) to long-lasting negative effects. The lives of those denied the ability to have an abortion will be irrevocably altered as a result of the 1910 and 2022 Bans.

Here, a "speedy determination" is critical because the 1910 and 2022 Bans (1) prevent access to abortion, obliterating Oklahomans' rights to individual liberty and personal autonomy and dignity, in violation of the Oklahoma Constitution; and (2) have immediate and long-term catastrophic effects on patients, providers, and people who support abortion patients. *See Hunsucker v. Fallin*, 2017 OK 100, ¶ 7, 408 P.3d 599, 603. The Court should assume original jurisdiction to address these unconstitutional laws in the first instance. To delay consideration risks sanctioning the 1910 and 2022 Bans' gross invasion of personal liberty and inflicting irreversible grave harms.

A. The 1910 and 2022 Bans Violate Oklahomans' Inherent Liberty Rights.

The 1910 and 2022 Bans have nullified the fundamental rights of pregnant Oklahomans, subjecting them to grave risk, indignity, and bodily intrusion and their providers to criminal and civil penalties. Although *Dobbs* holds that the U.S. Constitution does not protect the rights of pregnant persons to seek an abortion, that right is independently protected under the Oklahoma Bill of Rights, Okla. Const. art. II, § 2, and its guarantee of due process, Okla. Const. art. II, § 7. The Court has a judicial duty to "invalidat[e]" the 1910 and 2022 Bans because they are "clearly, palpably, and plainly inconsistent with the Constitution." *Lafalier v. Lead-Impacted Communities Relocation Assistance Trust*, 2010 OK 48, ¶ 15, 237 P.3d 181,

[8] Affidavit of Emily Wales (attached as Exhibit 3 to Petitioners' Appendix) ("Wales Aff.").

188. As the final arbiter of the meaning of the Oklahoma Constitution, this Court has a "solemn yet urgent duty to act" to protect Oklahomans' constitutional rights. *Beason v. I. E. Miller Servs., Inc.*, 2019 OK 28, ¶ 15, 441 P.3d 1107, 1113.

Until now, this Court has not "need[ed]" to make a "determination" about whether a person's right to terminate a pregnancy is protected "under the Oklahoma Constitution" because it has relied on the protections of federal law. *Okla. Coal. for Reprod. Just. v. Cline,* 2019 OK 33, ¶ 17, 441 P.3d 1145, 1151. Since *Dobbs* has overruled *Roe* and *Casey*, which had located this right in the U.S. Constitution, this Court must now determine whether the Oklahoma Constitution itself protects a pregnant person's rights to bodily integrity and personal autonomy, including the fundamental choice of whether and when to bear a child. The answer must be yes for at least three reasons: (1) the Oklahoma Constitution's protection for individual liberty is more expansive than the U.S. Constitution's; (2) this Court already recognizes a right to healthcare decision-making that encompasses the decision to terminate a pregnancy; and (3) courts in states with constitutions that protect the same "inherent" or "inalienable" right to liberty have concluded that this language protects a right to abortion. For these reasons, Oklahomans' right to abortion is a fundamental right under the Oklahoma Constitution, subject to strict scrutiny, which the 1910 and 2022 Bans cannot sustain.

1. The Oklahoma Constitution Provides More Robust Protection of an Individual's Liberty Rights than the U.S. Constitution.

On its face, the Oklahoma Constitution protects individual rights to a greater degree than the U.S. Constitution. The Oklahoma Constitution provides that "[a]ll 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. By contrast, the U.S. Constitution nowhere refers to such "inherent" rights.

State constitutional protections of "unenumerated individual-liberty-rights guarantees," such as those in Okla. Const. art. II, § 2, spring from the venerable English tradition of "natural" or "Lockean" rights.[9] Members of Oklahoma's Constitutional Convention embraced this history of "natural" rights when they chose to include the Bill of Rights in the Oklahoma Constitution: in the words of the convention's President Pro Tempore, "[t]he object of the Bill of Rights is to protect the individual in the enjoyment of his life, his liberty and his property. They usually declare that all men are possessed of certain equal and inalienable rights, among which are life, liberty and the pursuit of happiness."[10] One of the earliest decisions of this Court recognized that "'natural rights'" are a "broader and more comprehensive term than the term 'political rights,'" and that they include "those rights which are necessarily inherent, rights which are innate, and which come from the very elementary laws of nature, such as life, liberty, the pursuit of happiness, and self-preservation." *Byers v. Sun Sav. Bank*, 1914 OK 78, 139 P. 948, 949.

The Oklahoma Constitution's guarantee of an "inherent right" to "liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry" precedes, and is a foundation for, the substantive due process rights guaranteed under Okla. Const. art. II, § 7, which provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law." Okla. Const. art. II, § 7. This Court has repeatedly recognized that the liberty interest protected by Art. II, § 7 of the Oklahoma Constitution may be broader than the liberty interest protected by the Fourteenth Amendment to the U.S. Constitution. *See Oklahoma Corr. Pro. Ass'n, Inc. v. Jackson*, 2012 OK 53, 280 P.3d 959, 964; *Daffin v. State ex rel. Oklahoma*

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[9] *See* Steven G. Calabresi & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 Texas L. Rev. 1299, 1304-05 (2015).

[10] *Proceedings of the Constitutional Convention of the Proposed State of Oklahoma Held at Guthrie, Oklahoma* (Muskogee Printing Co. 1907) ("*Proceedings*") at 8 (statement of J.F. King).

Dep't of Mines, 2011 OK 22.

When a person is forced to remain pregnant or give birth against their will, she is subjected to a violation of her most basic rights. The State coopts her body as a human incubator and forces her to experience the pains and risk of pregnancy. It subjects her to the ultimate indignity of losing control over her own body, facing unwanted physical and mental risk, and being unable to pursue plans for her own life. *See supra* at 4. The robust protections contained in Okla. Const. art. II, §§ 2 and 7 forbid the state to override a person's most fundamental choices in this way.

2. This Court Has Already Held that the Right to Make Decisions About One's Own Health Is a Protected Liberty Interest.

This Court has already held that Oklahoma's due process guarantee encompasses the fundamental right to make intimate and personal decisions "about one's own health." *In re K.K.B.*, 1980 OK 7, 609 P.2d 747, 749, 752. In *In re K.K.B.*, this Court concluded that the "law recognizes the right of an individual to make decisions about her life out of respect for the dignity and autonomy of the individual," and held that a legally competent but mentally ill adult has a constitutional right to refuse psychotropic treatments that "are intrusive in nature and an invasion of the body." *Id.* The Court further recognized that such individuals "must have the power to make the decision" whether to obtain medical treatment because it is they who will ultimately bear the consequences of that decision. *Id.*; *see also Scott v. Bradford*, 1979 OK 165, 606 P.2d 554, 557.

So too with the decision whether to continue a pregnancy. The continuation of an unwanted pregnancy to term poses far greater risks to a woman's health and well-being than any abortion. That is particularly true for women of color in Oklahoma, who face some of the highest maternal mortality rates in the nation. OCRJ Aff. ¶ 10. Forcing women to run those

risks against their will is a gross infringement of their constitutionally protected "dignity and autonomy." *In re K.K.B.*, 1980 OK 7, 609 P.2d at 752. It is the prerogative of every pregnant person to determine whether and when to have children.

As in *In re K.K.B*, this Court is not confined to considering whether the right in question was traditionally recognized when the framers ratified the Oklahoma Constitution. When the Oklahoma Constitution was adopted in 1907, about 40 years after adoption of the Fourteenth Amendment to the U.S. Constitution, its framers acknowledged that "in a government enterprising and progressive like ours, each generation in the future as in the past should crystalize in the Constitution its wisdom and experience."[11] Indeed, the drafters of the Bill of Rights were charged with "mak[ing] assurance doubly certain that no clause restricting the fullest personal liberty of citizens consistent with justice may creep in."[12] Like the recognition of the rights of psychiatric patients, society's interest in women's liberty was "long dormant." *K.K.B.* at 609 P.2d at 749. But that is no impediment to recognizing a right to abortion now, because the Oklahoma Constitution's concept of inherent liberty is broad enough to encompass pregnant persons' fundamental interests in autonomy and bodily integrity, just as it protects those fundamental interests for psychiatric patients. *See id.*

3. This Court Should Follow Other State Supreme Courts' Interpretation of Similar State Constitutional Guarantees.

Independent of the federal decisions in *Roe* and *Casey*, many state supreme courts have already recognized a right to abortion in their own state constitutions even though, like the Oklahoma Constitution, those constitutions did not expressly refer to abortion.[13] The detailed

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[11] *Proceedings* at 11 (statement of J.F. King).

[12] "To Study Bill of Rights Provisions," *The Daily Oklahoman*, Jan. 6, 1907 at 4.

[13] *See Valley Hosp. Ass'n v. Mat-Su Coalition*, 948 P.2d 963, 969 (Alaska 1997); *Committee to Defend Reprod. Rights v. Myers*, 29 Cal.3d 252, 262, 274, 625 P.2d 779 (1981); *In re T.W.*, 551 So.2d 1186, 1193 (Fla. 1989);

constitutional analysis recently conducted by the Kansas Supreme Court is particularly instructive. The Kansas Constitution, like Oklahoma's, guarantees the inherent natural rights of liberty and the pursuit of happiness: "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." Kansas Const., § 1. In 2019, the Kansas Supreme Court held that this constitutional provision guarantees the fundamental right to abortion, and struck down a ban on a common second-trimester abortion procedure. *Hodes,* 440 P.3d at 480. The decision turned on an analysis of the Kansas constitution's guarantee of "inalienable natural rights." The court drew a distinction between a "natural right" as "[a] right that is conceived as part of natural law" and civil "rights created by government or society," *id.* at 472 (citation omitted), just as this Court did in *Byers*. It went on to conclude that the "equal and inalienable natural rights" to which the Kansas Constitution refers are broader than the U.S. Constitution's due process protections. *Hodes*, 440 P.3d at 479-80.

The *Hodes* court examined the debates on the drafting of the Kansas Constitution and concluded that the wording of Section 1 was deliberate and "intended to be 'broad enough for all to stand upon' and that it not be 'any narrow, contracted conception' of rights but 'a fair and independent view of the rights of man, aside from the restrictions of law and civil government of any character.'" *Id.* at 474 (citation omitted)). Those rights include a "right to personal autonomy, which includes the ability to control one's own body, to assert bodily integrity, and to exercise self-determination," *id.* at 480-82—constitutional rights that this Court has already recognized in *In re K.K.B. See In re K.K.B.*, 609 P.2d at 747, 749, 752. *Hodes*

Hodes & Nauser, MDs, P.A. v. Schmidt, 309 Kan. 610, 639, 440 P.3d 461, 480 (2019); *Moe v. Secretary of Administration & Finance*, 383 Mass. 629, 649, 417 .E.2d 387 (1981); *Women v. Gomez*, 542 N.W.2d 17, 31 (Minn. 1995); *Pro-Choice Mississippi v. Fordice*, 716 So.2d 645, 653 (Miss. 1998); *Armstrong v. State*, 296 Mont. 361, 376, 989 P.2d 364 (1999); *Right to Choose v. Byrne*, 91 N.J. 287, 450 A.2d 925., 935 (1982); *Planned Parenthood v. Sundquist*, 38 S.W.3d 1, 11, 15 (Tenn. 2000), *superseded by amendment*, Tenn. Const. art. I § 36 (2014); *State v. Koome*, 84 Wash. 2d 901, 904, 530 P.2d 260 (1975).

further recognized that the ability to control one's body "enables decision-making about issues that affect one's physical health, family formation, and family life," 440 P.3d at 484, and therefore that the Kansas Constitution's guarantee of an "inalienable" right to liberty "protects the right to decide whether to continue a pregnancy," *id.* at 486.

Other states with comparable "inherent rights" provisions in their constitutions have also held that they establish a constitutional right to abortion. Mississippi's constitution protects unenumerated rights "retained by, and inherent in, the people." Miss. Const. Art. 3, § 32. In *Pro-Choice Mississippi,* Mississippi's Supreme Court held that this provision protected "autonomous bodily integrity" and thus "an implicit right to have an abortion." 716 So. 2d at 653. New Jersey's Constitution states that "[a]ll persons...have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness." N.J. Const. Art. I, § 1. In *Right to Choose*, New Jersey's Supreme Court held that this provision protects a "woman's right to choose whether to carry a pregnancy to full-term or to undergo an abortion." 450 A.2d at 933. *See also Committee to Defend Reprod. Rights*, 625 P.2d at 803 (California's Constitution's "inalienable" liberty right protects a woman's "decision concerning whether to carry a child to full term or to abort") (citation omitted).

The Oklahoma Constitution's protection for certain unenumerated "inherent rights," Okla. Const. art. II, § 2, is broader than the U.S. Constitution's Fourteenth Amendment protections. *See* Section III.A.3, *supra*. The similarities between Kansas's guarantee of liberty as an "inalienable right" and Oklahoma's guarantee of liberty as an "inherent right," as well as this Court's longstanding recognition of a right to autonomy and bodily integrity with respect to medical decisions in *In re K.K.B.*, counsel this Court to follow a sister state's persuasive

analysis, as it often does. *See, e.g.*, *Ramsey v. Leeper*, 31 P.2d 852 (Okla. 1933); *see also In re Initiative Petition No. 364, State Question No. 673*, 1996 OK 129, 930 P.2d 186; *Application of Baptist Gen. Convention*, 1945 OK 93, 156 P.2d 1018, 1019. This Court should hold that the Oklahoma Constitution protects a pregnant person's decision to end a pregnancy.

4. The 1910 and 2022 Bans Fail Strict Scrutiny Review.

Oklahoma courts apply strict scrutiny when fundamental rights are at stake. *In re Guardianship of S.M.*, 2007 OK CIV APP 110, ¶ 14, 172 P.3d 244, 247. "In pursuing a substantial or compelling state interest, it is fundamental that a state cannot choose a means to reach its goal which unnecessarily burdens or restricts a constitutionally protected activity." *Matter of Adoption of Blevins*, 1984 OK CIV APP 41, 695 P.2d 556, 560 (citation omitted). Where a law infringes upon a fundamental constitutional right, the state must employ the "least restrictive" means to further its interests. *Id.* An outright ban plainly "impinges upon the exercise of a fundamental constitutional right or liberty," and necessarily fails the strict scrutiny test. *Cf. Hodes*, 440 P.3d at 495, 497 (applying strict scrutiny to strike down a far less restrictive statute that banned only some abortion procedures).

In seeking to defend unlawful abortion restrictions, the State has invoked Art. II, § 2's protection of a right to life for all "persons," asserting that the term "persons" includes the unborn. This argument has no textual basis. The word "person" appears over fifty times in the Bill of Rights,[14] and over 150 times in the Constitution's other articles.[15] Not one of these references could sensibly be thought to encompass the unborn.[16] Contemporaneous references

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[14] *See, e.g.*, Okla. Const. art. II, §§ 6, 8, 11, 12A, 16-19, 21-22, 25, 29, 30.

[15] *See, e.g.*, Okla. Const. art. III, § 4; *id.* art. V, §§ 18, 44; *id.* art. VI, §§ 3, 4; *id.* art. VII, § 4; *id.* art. VIII, § 4; *id.* art. IX, § 15; *id.* art. IX, § 24.

[16] Acknowledging that the Constitution does not recognize fetuses as "persons," several legislators tried to enact a resolution to put a question to the votes on the November Ballot as to whether fetuses should be treated as "persons" under the Oklahoma Constitution. The resolution did not make it out of committee. 2022 SJR 37.

to the Bill of Rights reflect that its guarantees were believed to apply only to persons already born. As stated in an editorial supporting ratification of the then-proposed Constitution and its Bill of Rights, "the constitution does not profess to grant individual liberty, but simply presents it as a rightful heritage of every man *born into the world*."[17] Even if the State can legitimately further an interest in potential life, it cannot do so by overriding the choices of pregnant Oklahomans—that would be the most, not the least, restrictive means of furthering such an interest. Other means of encouraging people to carry pregnancies to term—such as providing access to affordable childcare and preventive healthcare—would be far less restrictive.

B. The 1910 and 2022 Bans Are Unconstitutionally Vague.

The 1910 and 2022 Bans also are unconstitutionally vague. Due process demands that "[l]aws ... afford '[a] person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that [the person] may act accordingly.'" *In re Initiative Petition No. 366*, 2002 OK 21, ¶ 13, 46 P.3d 123, 128 (citation omitted). Laws are unconstitutionally vague where they "fail[] to provide explicit standards," leaving governed parties with an impermissibly vague understanding of how to abide by the law. *Id.* ¶ 14.

Oklahoma has three overlapping and inconsistent abortion bans in effect, soon to be four when the 2022 Ban goes into effect.[18] Currently, the 1910 Ban is in effect—its only exception is for an abortion to "preserve" a person's "life." H.B. 4327, another total ban in effect, has an exception for rape and incest. S.B. 1503 is a 6-week ban and has an exception only for a medical emergency. Given this inconsistency, Petitioners do not understand which circumstances might fall within these laws' exceptions. Braid Aff. ¶ 14; Wales Aff. ¶ 12.

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[17] Niblack, Leslie, *The Guthrie Daily Leader*, Aug. 6, 1907 at 4 (emphasis added).

[18] Two other statutes enacted in 2021 (H.B. 2441 and H.B. 1102), although currently enjoined, would also be inconsistent if they were permitted to take effect.

Neither can the legislators who enacted these bills. A media outlet contacted the statutes' sponsors, asking them "what will happen in the state if *Roe* is overturned as expected," and found that "[t]he few [legislators] who responded couldn't answer basic questions about enforcement."[19]

The overlapping nature of these bans deprives Petitioners of the notice needed to know if they are violating the law. Due process does not permit such uncertainty, particularly where—as here—it will "cause[] citizens to avoid lawful conduct," especially with respect to the bans' inconsistent exceptions, "for fear of entering the forbidden zone." *In re Initiative Petition No. 366*, 2002 OK 21, ¶ 14, 46 P.3d at 128; *see also Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). With the passage of three conflicting bans in the 2022 legislative session and the revival of the 1910 Ban, these challenged laws present an unprecedented level of vagueness and should all be invalidated.

C. The 2022 Ban Repeals the 1910 Ban by Implication.

Repeal by implication occurs when there are "two legislative enactments relating to the same subject, where the later statute purports to revise the entire subject-matter and contains additional provisions for carrying into effect the same objects" even though the later statute does not "explicitly repeal" the earlier one. *Application of Jackson*, 1937 OK 226, 66 P.2d 1101; *Taylor v. State*, 640 P.2d 554, 556 (Okla. Crim. App. 1982) (holding that the newer statute prevailed based on legislative history).

The 2022 Ban is the latest and most draconian of Oklahoma's criminal abortion bans, implying that it was intended to supersede all prior bans. This intent is confirmed by the Trigger

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[19] Einbinder *et al., Oklahoma lawmakers passed 5 contradictory abortion bans. No one knows which laws will be enforced*, Business Insider (June 24, 2022), *available at* https://www.businessinsider.com/ oklahoma-abortion-ban-sponsors-dont-know-what-law-might-be-post-roe-2022-5.

Ban, which provides "that the State of Oklahoma may enforce Section 861 of Title 21 of the Oklahoma Statutes *or* enact a similar statute prohibiting abortion throughout pregnancy." S.B. 1555 § 1 (emphasis added). By using the word "or," the Oklahoma Legislature expressed its intent that the 1910 Ban would not be enforced if a similar statute prohibiting abortion throughout pregnancy, such as the 2022 Ban, were enacted.[20] The 2022 Ban "is so broad in scope, clear and explicit that its terms demonstrate it was intended to cover the whole subject matter, displacing the prior enactment" of all earlier bans. *City of Sand Springs v. Dep't of Public Welfare*, 1980 OK 36, 608 P.2d at 1151.

IV. DECLARATORY AND INJUNCTIVE RELIEF AND/OR A WRIT OF PROHIBITION IS WARRANTED

Because the Bans violate multiple Oklahoma Constitutional guarantees, this Court should grant immediate declaratory and injunctive relief to prevent Respondents from enforcing the 1910 and 2022 Bans in any way. *See, e.g.*, *Inst. for Responsible Alcohol Pol'y v. State ex rel. Alcoholic Beverage L. Enf't Comm'n*, 2020 OK 5, ¶ 12, 457 P.3d 1050, 1055; *Fent v. Contingency Rev. Bd.*, 2007 OK 27, ¶¶ 29, 31, 163 P.3d 512, 526; *Oklahoma Ass'n of Mun. Att'ys v. State*, 1978 OK 59, 577 P.2d 1310, 1312.

V. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court consider their application and petition on an expedited basis, assume original jurisdiction, declare Section 861 and S.B. 612 unconstitutional, and grant declaratory and injunctive relief sufficient to prevent Respondents from enforcing them in any way.

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[20] At a June 24, 2022 press conference, the Attorney General agreed that the 2022 Ban would supersede the 1910 Ban when it becomes effective in August, 2022. *See Governor Kevin Stitt and AG O'Connor Celebrate Oklahoma Becoming a Pro-Life State* YouTube (June 24, 2022), https://www.youtube.com/watch?v=M-CECcfWWTc.

Dated: July 1, 2022

Respectfully Submitted,

J. Blake Patton, Oklahoma Bar No. 30673
WALDING & PATTON PLLC
518 Colcord Drive, Suite 100
Oklahoma City, OK 73102
Phone: (405) 605-4440
Fax: N/A
bpatton@waldingpatton.com

Attorney for Petitioners

Linda C. Goldstein*
Jenna C. Newmark*
Meghan Agostinelli*
Samantha DeRuvo*
DECHERT LLP
Three Bryant Park
1095 Avenue of the Americas
New York, NY 10036
Phone: (212) 649-8723
Fax: (212) 314-0064
linda.goldstein@dechert.com
jenna.newmark@dechert.com
meghan.agostinelli@dechert.com
samantha.deruvo@dechert.com

Jerome Hoffman*
Rachel Rosenberg*
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104-2808
Phone: (215) 994-2496
Fax: (215) 665-2496
jerome.hoffman@dechert.com
rachel.rosenberg@dechert.com

Jonathan Tam*
DECHERT LLP
One Bush Street, Suite 1600
San Francisco, CA 94104-4446
T: (415) 262-4518
F: (415) 262-4555
jonathan.tam@dechert.com

Rabia Muqaddam*
CENTER FOR REPRODUCTIVE RIGHTS
199 Water Street
22nd Floor
New York, NY 10038
Phone: (917) 637-3645
Fax: (917) 637-3666
rmuqaddam@reprorights.org

Attorneys for Petitioners Oklahoma Call for Reproductive Justice, Tulsa Women's Reproductive Clinic, L.L.C, and Alan Braid, M.D.

Diana Salgado*
PLANNED PARENTHOOD FEDERATION OF AMERICA
1110 Vermont Avenue, NW, Suite 300
Washington, DC 20005
202-973-4830
diana.salgado@ppfa.org

Camila Vega*
PLANNED PARENTHOOD FEDERATION OF AMERICA
123 Williams St., 9th Floor
New York, NY 10038
(212) 261-4548
camila.vega@ppfa.org

Attorneys for Petitioners Comprehensive Health of Planned Parenthood Great Plains, Inc. and Planned Parenthood of Arkansas & Eastern Oklahoma

*Out-Of-State Attorney Applications Filed/Forthcoming

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 1st day of July, 2022 a true and correct copy of the foregoing was served via hand delivery to the following:

John O'Connor
Oklahoma Attorney General

Office of the Oklahoma Attorney General
313 NE 21st Street
Oklahoma City, OK 73105

Steve Kunzweiler
Tulsa County District Attorney

Tulsa County Court House
500 South Denver Avenue, Suite 900
Tulsa, OK 74103

Katie Templeton
President

Oklahoma State Board of Osteopathic Examiners
4848 N. Lincoln Boulevard, Suite 100
Oklahoma City, OK 73105

David Prater
Oklahoma County District Attorney

Oklahoma County Courthouse
320 Robert S. Kerr Avenue, #505
Oklahoma City, OK 73102

Lyle Kelsey
Executive Director

Oklahoma Board of Medical Licensure & Supervision
101 NE 51st Street
Oklahoma City, OK 73105

Keith Reed
Commissioner

Oklahoma State Department of Health
1000 NE 10th Street
Oklahoma City, OK 73117

J. BLAKE PATTON