IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

OKLAHOMA CALL FOR REPRODUCTIVE JUSTICE, on behalf of itself and its members, *et al.*,

Petitioners,

v.

JOHN O'CONNOR, in his official capacity as Attorney General for the State of Oklahoma, *et al.*,

Respondents.

Case No. PR-120,543

PETITIONERS' CORRECTED BRIEF IN CHIEF

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September 2, 2022

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TABLE OF CONTENTS AND AUTHORITIES*

* This Corrected Brief in Chief fixes errors in the formatting of the Table of Contents and Authorities. Other than the date, no changes have been made to the body of Petitioners' Brief in Chief filed on September 1, 2022.

I. INTRODUCTION

For nearly 50 years, abortion has been essential to pregnant Oklahomans' ability to participate more equally in the economic and social life of the state and the nation. *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), guaranteed a federal right to abortion until the U.S. Supreme Court overruled them on June 24, 2022, in *Dobbs v. Jackson Women's Health Org.* ("*Dobbs*"), 142 S. Ct. 2228 (2022). Immediately after *Dobbs*, the Oklahoma Attorney General issued a certification pursuant to Senate Bill 1555 ("S.B. 1555" or the "Trigger Ban") that resurrected Oklahoma's century-old criminal ban on performing abortions, enacted in 1910 and codified at 21 Okla. Stat. Ann. § 861 (the "1910 Ban"). Two months before *Dobbs*, anticipating that the Supreme Court would overturn *Roe*, the Legislature enacted Senate Bill 612 (the "2022 Ban"), an overlapping statute also banning abortion that went into effect on August 25, 2022.

The 1910 and 2022 Bans prohibit abortion in Oklahoma under nearly all circumstances, subjecting Oklahomans to immense stress, significant medical risk, and gross personal indignity for months. The urgent question for the Court here, and in the other pending cases challenging overlapping abortion bans,[1] is whether the Oklahoma Constitution's independent protection for individual liberty bars the State from running roughshod over the rights of pregnant 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

[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. In its Order of August 9, 2022, this Court acknowledged Petitioners' notice of these related cases.

2022 Bans violate this fundamental liberty interest, relegating pregnant Oklahomans to second-class citizenship.

The prohibitions in the 1910 and 2022 Bans are also inconsistent with each other and with the overlapping prohibitions of two civil enforcement bans that were hastily enacted in 2022. As a result, they are too vague to provide legally sufficient notice of prohibited conduct and threaten arbitrary enforcement in violation of the Oklahoma Constitution's substantive due process guarantee. Further, in the unlikely event 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, became effective. This means that, at a bare minimum, the 1910 Ban should be declared unenforceable.

Given the gross constitutional violations wrought by the 1910 and 2022 Bans, Petitioners respectfully request that the Court 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. SUMMARY OF THE RECORD

A. Petitioners Seek to Protect Access to Abortions for Oklahomans

Each Petitioner is committed to preserving abortion access in Oklahoma. Dr. Alan Braid is a board-certified OB/GYN who has offered abortion services since 1978 and now owns Tulsa Women's Reproductive Clinic ("Tulsa Women's"). Braid Aff. ¶¶ 1-2.[2] Dr. Braid

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

took ownership of the clinic in 2018 when the previous owner retired to ensure that it continued to provide Oklahomans with high quality abortion care. *Id.* ¶ 2. Until May 3, 2022, when S.B. 1503 (a ban on abortions after approximately 6 weeks of pregnancy as dated from a patient's last menstrual period ("LMP"), enforced through private civil lawsuits) went into effect, Dr. Braid and Tulsa Women's provided medication abortion up through 10 weeks, 0 days LMP and procedural abortion up through 18 weeks LMP. *Id* ¶ 1.

Comprehensive Health of Planned Parenthood Great Plains ("CHPPGP") operates one health center in Oklahoma, located in Oklahoma City. Wales Aff. ¶ 2.[3] CHPPGP provides a wide variety of sexual and reproductive healthcare at its Oklahoma City location, including, until recently, abortions. *Id.* Until April 2022, several weeks before S.B. 1503 went into effect, CHPPGP's Oklahoma City location provided medication abortion up through 11 weeks, 0 days LMP, as well as procedural abortion up through 21 weeks 6 days LMP. *Id.* ¶ 8.

Planned Parenthood of Arkansas and Eastern Oklahoma ("PPAEO") operates one health center in Oklahoma, located in Tulsa. *Id.* ¶ 2. PPAEO provides a wide variety of sexual and reproductive healthcare at its Tulsa location, including, until recently, abortions. *Id.* Until April 2022, several weeks before S.B. 1503 went into effect, PPAEO's Tulsa location provided medication abortion up through 11 weeks 0 days LMP, as well as procedural abortion up through 17 weeks 6 days LMP. *Id.* ¶ 8.

Oklahoma Call for Reproductive Justice ("OCRJ") is a 501(c)(4) nonprofit that advances reproductive justice and protects access to reproductive healthcare, including abortion, in Oklahoma. OCRJ Aff. ¶ 1.[4] OCRJ's members are diverse in their party affiliation,

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

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

economic background, and lived experience, but all believe that pregnant Oklahomans are endowed with the liberty to make decisions about their own bodies and health in line with their own values and aspirations for their lives. *Id.* ¶ 3.

B. The Challenged Laws and Other Restrictions on Abortion

The 1910 Ban was enacted shortly after Oklahoma became a state but before women had the right to vote for legislative representatives. The statute imposes a mandatory minimum sentence of two years imprisonment upon individuals who perform abortions in Oklahoma at any point during a 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 . . . shall be guilty of a felony punishable by imprisonment in the State Penitentiary for not less than two (2) years nor more than five (5) years.

The 1910 Ban has only one narrow exception for abortions "necessary to preserve [the patient's] life[.]" *Id.* Following the Supreme Court's decision in *Roe*, the 1910 Ban was found unconstitutional by state and federal courts in Oklahoma.[5] The Trigger Ban, signed by the Governor on April 29, 2022, was designed to ban abortion when "the Attorney General certifie[d] that . . . [t]he United States Supreme Court . . . overruled in whole or in part *Roe* . . . and . . . *Casey*." S.B. 1555 provided that when the Attorney General so certified, the State of Oklahoma could enforce the 1910 Ban "or enact a similar statute prohibiting abortion throughout pregnancy." S.B. 1555. Attorney General O'Connor issued the certification on June 24, 2022, the same day *Dobbs* was decided.

The 2022 Ban was enacted earlier this year and took effect on August 25, 2022. Like

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[5] *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).

the 1910 Ban, the 2022 Ban makes providing any abortion a felony, but one bearing different criminal penalties: no mandatory two-year minimum sentence; up to ten years in prison; and/or a fine of up to $100,000. S.B. 612 § 1(B)(2). The law also has a broader exception for an abortion necessary to "save the life of a pregnant woman in a medical emergency," which it defines as "a condition which cannot be remedied by delivery of the child in which an abortion is necessary to preserve the life of a pregnant woman whose life is endangered by a physical disorder, physical illness or physical injury including a life-endangering physical condition caused by or arising from the pregnancy itself." S.B. 612 § 1(A)(2).

Even while *Roe* protected a legal right to abortion across the country, the Oklahoma Legislature sought to obstruct its exercise. Since 2008, the Legislature enacted over 20 bills that imposed a maze of requirements on abortion access, including two abortion bans enacted in 2021, which are currently enjoined.[6] *See* October 25, 2021 Order Granting Emergency Temporary Injunction, No. IN-119918. In 2022, the Legislature enacted S.B. 1503, which prohibits physicians from providing an abortion after "detect[ing] a fetal heartbeat" or if the physician "failed to perform a test to detect a fetal heartbeat." S.B. 1503 § 4(A). In a typically developing pregnancy, ultrasound can generally detect cardiac activity beginning at approximately 6 weeks LMP. House Bill 4327 ("H.B. 4327") prohibits performing an abortion at any stage of a pregnancy. H.B. 4327 § 2. Both statutes expressly preclude the State or any of its political subdivisions, as well as officers or employees of a state or local government entity in Oklahoma, from directly enforcing them. S.B. 1503 § 9(A); H.B. 4327 § 4. Instead, both statutes create a private, civil enforcement mechanism by which any person not affiliated with state or local government "may bring a civil action against any person" who performs a

[6] *See* H.B. 1102, H.B. 2441, H.B. 1904, S.B. 778, S.B. 779.

prohibited abortion, aids or abets a prohibited abortion, or intends to engage in these activities. S.B. 1503 § 9(A); H.B. 4327 § 4. Petitioners' challenge to the constitutionality of S.B. 1503 and H.B. 4327 (the "Vigilante Bans") is pending before this Court in *Oklahoma Call for Reproductive Justice, et al., v. O'Connor, et al.*, Case No. PR-120376.

As of the filing of this Brief, the 1910 Ban and the 2022 Ban and the Vigilante Bans are all in effect and have resulted in a complete cessation of abortion services in Oklahoma.

C. Harm to Petitioners and Their Patients

If allowed to remain in effect, the two bans challenged in this Petition will continue to devastate Petitioners and pregnant Oklahomans who seek abortion care. Abortion is, and has always been, critical to people's abilities to chart their own course in life, to protect their health and their families, and to take advantage of all that society has to offer. *See* Braid Aff. ¶ 5. Before *Roe v. Wade*, pregnant people unable to access legal abortion often lost autonomy, had to sacrifice their careers and other aspirations, and were subjected to serious health risks—underscoring how gravely liberty is compromised when the State forces pregnant people to remain pregnant and give birth. *Id.* Indeed, the unrebutted record shows that women who are able to receive an abortion in accordance with their wishes are much more likely than women who are denied a wanted abortion to set short and longer-term aspirational plans relating to children, finances, education, and relationships. *See* Upadhyay Aff. ¶ 18.[7]

Denial of abortion access imposes substantial medical risk, as carrying a pregnancy to term is far riskier than any method of abortion. *See* Braid Aff. ¶¶ 18-19. In the short term, women giving birth after being denied an abortion are at risk of experiencing more potentially life-threatening complications than those who obtain an abortion. *Id.* Even for someone who

[7] Affidavit of Ushma Upadhyay, Ph.D., M.P.H. (attached as Exhibit 4 to Petitioners' Appendix) ("Upadhyay Aff.").

is otherwise healthy and has an uncomplicated pregnancy, being forced to carry that pregnancy to term and give birth poses serious medical risks with both short- and long-term consequences for the patient's physical health and mental and emotional well-being. *See* Upadhyay Aff. ¶ 6. For someone with a medical condition caused or exacerbated by pregnancy, these risks are increased. *See id.* ¶ 25; Braid Aff. ¶ 19.

The medical risks of forcing people to carry their pregnancies to term are particularly pronounced for Black and Indigenous Oklahomans, because of the significantly higher rates of maternal mortality in those communities. *See* OCRJ Aff. ¶¶ 10-11. Oklahoma "persistently ranks among the states with the worst rates" of maternal deaths in the United States, and maternal deaths in Oklahoma have "increased in recent years."[8] Specifically, Black women in Oklahoma are currently over one-and-a-half times more likely to die of complications related to birth or pregnancy than white women. From 2004 to 2018, Black women in Oklahoma were two-and-a-half times more likely to die of complications related to birth or pregnancy than white women, a statistic the Oklahoma Maternal Mortality Review Committee called an "alarming disparity."[9] Indigenous women in Oklahoma have also faced increased rates of maternal mortality over the years and at times were more than one-and-a-half times more likely to die than white women during the same time period.[10] Moreover, "[f]or every woman who dies, about 70 experience potentially fatal complications" related to birth or pregnancy,

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[8] Okla. State Dep't of Health, Okla. Maternal Mortality Rev. Comm., Oklahoma Maternal Health, Morbidity and Mortality: Annual Report 2021, at 5, 26 (2021), *available at* https://oklahoma.gov/content/dam/ok/en/health/health2/aem-documents/family-health/maternal-and-child-health/maternal-mortality/maternal-morbidity-mortality-annual-report-2021.pdf.

[9] Okla. State Dep't of Health, Okla. Maternal Mortality Rev. Comm., Maternal Mortality in Oklahoma 2004-2018, at 4 (2020), *available at* https://oklahoma.gov/content/dam/ok/en/health/health2/aem-documents/family-health/maternal-and-child-health/maternal-mortality/annual-mmrc-report.pdf.

[10] *Id.*

according to data from the Oklahoma State Department of Health.[11]

When people are denied wanted abortions, they also are exposed to long-lasting economic hardship. *See* Myers Aff. ¶¶ 4-5.[12] Research shows that women who were denied an abortion and went on to give birth experienced an increase in household poverty lasting at least four years relative to those who received an abortion. *Id.* ¶ 9. Years after being denied a wanted abortion, women forced to carry a pregnancy to term were more likely to lack the money needed for living essentials such as food, housing, and transportation. *Id.* ¶ 10. Being denied an abortion lowered a woman's credit score, increased a woman's amount of debt, and increased the number of her negative public financial records, such as bankruptcies and evictions. *Id.* ¶ 11.

The financial well-being and development of existing children is also negatively impacted when their mothers are denied a wanted abortion. "The children women already have at the time they seek abortions show worse child development when their mother is denied an abortion compared to the existing children of women who receive one." *Id.* ¶ 12. In addition, forced pregnancy adds to the anguish of patients and their families who receive fetal diagnoses that are incompatible with sustained life after birth—forcing patients to carry doomed pregnancies for months and suffer the physical and emotional pains and medical risks of labor and delivery, knowing all the while that their child will not survive. Women who are unable to access abortion can be at increased risk of continued violence from intimate partners. *See* Upadhyay Aff. ¶ 20.

Given the economic and other hardships most Oklahomans seeking abortions face,

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[11] Kassie McClung, *Most of Oklahoma's Maternal Deaths Preventable, State Review Finds*, The Frontier (Aug. 10, 2020), *available at* https://www.readfrontier.org/stories/mostof-oklahomas-maternal-deaths-preventable-state-review-finds/.

[12] Affidavit of Caitlin Myers, Ph.D. (attached as Exhibit 5 to Petitioners' Appendix) ("Myers Aff.").

many of them cannot travel to access reproductive care. Braid Aff. ¶ 17; Wales Aff. ¶ 18. About 75% of all abortion patients nationally, and most from Oklahoma, are poor or low-income. *See* Upadhyay Aff. ¶ 11. Those who cannot travel may try to self-induce an abortion, and many are forced to carry their pregnancies to term. Braid Aff. ¶ 17; Wales Aff. ¶ 18.

For those able to raise the necessary funds, the 1910 and 2022 Bans force them to travel long distances to access abortion care. Those who attempt to travel out of state to access care must arrange and pay for transportation, childcare, and time off work. *See* Upadhyay Aff. ¶ 26. Because the majority of abortion patients are poor or have low incomes, these financial and other costs may require them to forgo other basic needs for themselves and their families. *See id.* Even those able to raise the necessary funds will be delayed in obtaining an abortion. *See* Myers Aff. ¶ 9. While abortion is very safe at all stages of a pregnancy, the complexity (and generally the cost) increases as pregnancy advances. *See* Upadhyay Aff. ¶¶ 24-25.

D. Procedural History

On July 1, 2022, Petitioners filed an original action in this Court challenging the 1910 Ban and the 2022 Ban's constitutionality under Oklahoma state law. Petitioners also filed an emergency motion for a temporary restraining order seeking to enjoin the enforcement of both bans, and the State responded on July 12, 2022. The Court has not yet ruled on that pending motion. Petitioners now file this Brief in Chief pursuant to the Court's August 1, 2022 Order.

III. ARGUMENT

A. The Court Should Assume Original Jurisdiction Over this Critically Important Case

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. As discussed above in Section II.C., 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. Oklahomans who seek an abortion but are unable to travel out of state will have little choice but to continue their pregnancies against their will, exposing them (and their families) to long-lasting negative economic and social effects. The lives of those denied the ability to have an abortion, and the lives of their families, will be irrevocably altered by 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.

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

Resurrection and enactment of the 1910 and 2022 Bans nullify the fundamental rights of pregnant Oklahomans, subjecting them to grave risk, indignity, and bodily intrusion and exposing their providers to criminal and civil penalties. Although *Dobbs* could not locate the rights of pregnant persons to seek an abortion in the U.S. Constitution, that right is independently protected under the Oklahoma Bill of Rights through Article II, § 2, which protects "inherent rights," and Article II, § 7, which guarantees due process.

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 that the U.S. Supreme Court had recognized for nearly 50 years. *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 language of the Oklahoma Constitution's protection for the "inherent" right to liberty is more expansive than the U.S. Constitution's, and the historical record confirms that the differences are purposeful; (2) this Court already recognizes a right to healthcare decision-making that properly encompasses the decision to terminate a pregnancy; and (3) courts in states with constitutions that protect the same "inherent" or "inalienable" right to liberty as the Oklahoma Constitution have concluded that this language protects a right to

abortion. Oklahomans' right to abortion is therefore a fundamental right under the Oklahoma Constitution, subject to strict scrutiny, which the 1910 and 2022 Bans cannot sustain.

The Court has a judicial mandate 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, 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.

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 expressly 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. This divergence was deeply intentional. The leaders of the Oklahoma Constitutional Convention of 1906, who also had leadership roles in the previous year's Sequoyah Constitutional Convention, sought to copy the best provisions of existing state constitutions.[13] They revered William Jennings Bryan, who, when he was specifically invited to address the members of the Oklahoma Constitutional Convention, exhorted them to "profit by the wisdom and the mistakes of those who have prepared former constitutions" to draft "the

[13] *See* Danny M. Adkison & Lisa McNair Palmer, THE OKLAHOMA STATE CONSTITUTION: A REFERENCE GUIDE (Greenwood Press 2001) at 8 (noting that "[t]he Committee that drafted the Sequoyah Constitution [of 1905] relied not only on the U.S. Constitution, but got copies of all existing state constitutions, from which they freely copied"). As a result, the "constitutions of the forty-five states that comprised the Union before Oklahoma's statehood" were one of the three principal sources of the Oklahoma Constitution. OKLAHOMA POLITICS AND POLICIES: GOVERNING THE SOONER STATE, Ch. 5, The Oklahoma Constitution (University of Nebraska Press 1991) at 67. The other two were "the Progressive Movement" and the U.S. Constitution. *Id.*

best constitution ever written."[14] Later, he congratulated Oklahoma for succeeding in adopting "the best constitution in the United States."[15]

The framers of the Oklahoma Constitution did not invent its broad protection for "inherent liberty" out of whole cloth. Rather, state constitutional protections of "unenumerated individual-liberty-rights guarantees," such as those in Article II, § 2 of the Oklahoma Constitution, spring from the venerable English tradition of "natural" or "Lockean" rights, enshrined in the Declaration of Independence's invocation of the "inalienable" rights of "life, liberty, and the pursuit of happiness."[16] 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."[17] One of the earliest decisions of this Court recognized that such "'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 decisions whether and when to bear a child "come from the very elementary laws of nature" and thus fall within this category.

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[14] *Proceedings of the Constitutional Convention of the Proposed State of Oklahoma Held at Guthrie, Oklahoma* (Muskogee Printing Co. 1907) ("*Proceedings*") at 389 (letter of W.J. Bryan).

[15] Speech of the Honorable William J. Bryan before the Legislature of the State of Oklahoma on December 21st, A.D. 1907, *New State Tribune*, Dec. 26, 1907 at 4.

[16] *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).

[17] *Proceedings* at 8 (statement of J.F. King) (emphasis added).

The Oklahoma Constitution's guarantee of an "inherent right" to "liberty, the pursuit of happiness, and the enjoyment of the gains of [one's] own industry" precedes, and is a foundation for, the substantive due process rights guaranteed under Article, II § 7 of the Oklahoma Constitution, which provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law." This Court has repeatedly recognized that the liberty interest protected by Article II, § 7 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 Dep't of Mines*, 2011 OK 22.

When individuals are forced to remain pregnant or to give birth against their will, they are subjected to a violation of their fundamental liberty and autonomy. The State coopts their bodies and forces them to experience the pains and risks of pregnancy. It subjects them to the ultimate indignity of losing control over their own bodies, facing unwanted physical and mental risk, and being unable to pursue plans for their own lives. *See supra*, Section II.C. The robust protections contained in Article 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 the ability to make intimate, personal decisions "about one's own health" is a constitutionally protected right. In *In re K.K.B.*, 1980 OK 7, 609 P.2d 747, 749, 752, 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." 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 person'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 individuals 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 the Fourteenth Amendment to the U.S. Constitution was adopted, Oklahoma's 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."[18] Indeed, the drafters of Oklahoma's 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."[19] Like the recognition of the rights of psychiatric patients, society's interest in the liberty of pregnant persons 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

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

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

liberty is broad enough to encompass pregnant persons' 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 do not expressly refer to abortion.[20] The detailed constitutional analysis conducted by the Kansas Supreme Court in *Hodes v. Schmidt* is particularly instructive. The Kansas Constitution, like Oklahoma's, purposefully 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." Kan. Const., § 1. In 2019, the Kansas Supreme Court held that this provision guarantees the fundamental right to abortion, and struck down a ban on the safest type of abortion procedure commonly used during the second trimester that would have severely restricted access to abortion during that stage of pregnancy. *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

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[20] *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); *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).

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 itself recognized in *In re K.K.B. See In re K.K.B.*, 609 P.2d at 747, 749, 752. *Hodes* 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.

In other states with comparable "inherent rights" provisions in their state constitutions, the state supreme courts that have ruled on the question have all held that the provisions establish a constitutional right to abortion.[21] 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,

[21] In *M.K.B. Mgmt. Corp. v. Burdick*, 2014 ND 197, ¶ 1, 855 N.W.2d 31, 31, the North Dakota Supreme Court was unable to reach a majority decision on whether abortion is a fundamental right under that state's constitution. Because the North Dakota Constitution requires its Supreme Court to reach a decision by a majority vote, *M.K.B. Mgmt.* has no precedential effect. *Id.*; N.D. Const. art. VI, § 4.

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 the "decision concerning whether to carry a child to full term or to abort") (citation omitted).

The Oklahoma Constitution's protection for unenumerated "inherent rights," Okla. Const. art. II, § 2, is broader than the U.S. Constitution's Fourteenth Amendment protections. *See* Section III.B.1, *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 consider a sister state's persuasive analysis, as it has done in the past. *See, e.g.*, *Ramsey v. Leeper*, 31 P.2d 852 (Okla. 1933); *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 pregnant persons' decisions to end their pregnancy.

4. *Dobbs* Has No Bearing on this Court's Interpretation of the Natural Rights Guaranteed by the Oklahoma Constitution

Because Okla. Const. art. II, § 2 has no counterpart in the U.S. Constitution, it necessarily follows that *Dobbs*'s cramped analysis cannot constrain this Court's interpretation of that provision. Indeed, *Dobbs* is completely silent about "inherent rights," "inalienable rights," "natural rights," and the guarantees of such rights in many state constitutions and the Declaration of Independence.

Nor is this Court bound to apply the surprisingly flawed historical methodology applied by *Dobbs*. For starters, *Dobbs* misstates Oklahoma law when it asserts that all of "the Territories that would become the last 13 states . . . criminalized abortion at all stages of pregnancy." 142 S. Ct. at 2253. In fact, the laws of the Five Tribes and the Oklahoma Territory, which together became the state of Oklahoma, ranged from permitting abortion throughout a pregnancy,[22] to permitting abortion up until "quickening"[23] (*i.e.*, when a fetus began to perceptibly move in the uterus[24]), to a two-tiered system that treated post-quickening abortions as manslaughter or a "high misdemeanor," but treated pre-quickening abortions as a much lesser offense.[25] Critically, *none* of these pre-statehood laws treated an unborn embryo or fetus as a "person" endowed with "natural rights." Indeed, a statute enacted by the Territory of Oklahoma in 1890 and then by the State of Oklahoma in 1910 provided the exact opposite—

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[22] Before statehood, the Muskogee Creek Nation did not prohibit abortion at *any* stage of a pregnancy, although the tribe did enact a criminal law against infanticide. *See* Constitution and Laws of the Muskogee Nation, Criminal Laws Approved Oct. 12, 1867, Sec. 6. Appendix B of *Dobbs*, which purports to set forth the pre-statehood law of the territory that later became the State of Oklahoma, fails to refer to this law or to the laws of any of the other Indian territories. *See Dobbs*, 142 S. Ct. at 2999 (quoting a law enacted by Oklahoma Territory).

[23] The Choctaw Nation deemed procedures committed "with the intent to destroy" a "quick child" to be manslaughter, but did not criminalize abortions performed before quickening. Constitution and Laws of the Choctaw Nation (1894), Criminal Offenses, Sec. III(1).

[24] "Quickening" is not defined in the statutes; the common law definition is "[t]he first motion of the foetus in the womb felt by the mother, occurring usually about the middle of the term of pregnancy. *See Com. v. Barker*, 9 Mete." Black's Law Dictionary, 11th ed.

[25] In 1890, Oklahoma Territory enacted a statute deeming the administration of drugs or the performance of procedures upon "any woman pregnant with a quick child . . . with intent thereby to destroy such child," to be first degree manslaughter "in the case the death of the child or of the mother is thereby produced." Gen. Stats. Terr. Okla, Ch. 25, art. 17, § 16 (1890). Such procedures performed before quickening were not considered to be manslaughter, but a separate statutory provision provided for much lower criminal penalties when the same procedures were performed "with intent thereby to procure the miscarriage of such woman." *Id.*, Ch. 25, art. 29, § 1. The two-tier framework enacted by the Osage Nation treated abortions of a "quick child" as a "high misdemeanor" and others as a misdemeanor. Treaties and Laws of the Osage Nation, art. IV, §§ 30-32. The Cherokee Nation also enacted a two-tier framework: one statute deemed the administration of drugs to, or performance of an operation upon, "any pregnant woman, for the purpose of destroying the child" to be second degree manslaughter if "the life of the child or mother is destroyed," Const. and Laws of the Cherokee Nation, Art. II, § 10; another deemed the same procedures performed "with intent to produce abortion or miscarriage" to be a simple felony, subject to much lower prison terms, even if an "abortion or miscarriage" was the result, *id.* Art. X, § 36. These two statutes, which impose very different penalties for "destroying the child" and producing an "abortion or miscarriage" can be reconciled only if the former is confined to post-quickening procedures.

that an "unborn child" was not deemed to be an "existing person" until its "subsequent birth":

> **Unborn child.** A child conceived, but not born, is to be deemed an existing person so far as may be necessary for its interests *in the event of its subsequent birth.*[26]

Members of Oklahoma's Constitutional Convention would have believed that natural rights were enjoyed only after birth. Contemporaneous evidence in an editorial supporting ratification of the then-proposed Constitution and its Bill of Rights noted that "the constitution does not profess to grant individual liberty, but simply presents it as a rightful heritage of every man *born into the world.*" Niblack, Leslie, *The Guthrie Daily Leader,* Aug. 6, 1907 at 4 (emphasis added).

More importantly, nothing in this Court's jurisprudence requires it to confine its understanding of "inherent liberty" to the rights recognized in 1907, an era when Oklahoma law also prohibited "[t]he marriage of any person of African descent, as defined by the Constitution of this state, to any person not of African descent, or the marriage of any person not of African descent to any person of African descent," Okla. Laws 1907-08 at 556, and required railway companies to "provide separate coaches or compartments, as hereinafter provided, for the accommodation of the white and negro races," Okla. Laws 1907-08 at 201. The liberty rights of pregnant persons may not have been recognized by everyone when the 1910 Ban was enacted, but that is not a principled basis to deny their recognition today, just as this Court recognized the rights of the mentally ill 40 years ago in *In re K.K.B.*, 1980 O.K. 7.

Finally, should this Court undertake the kind of historical analysis contemplated by *Dobbs*, it must take into account the fact that at the time of its enactment, the 1910 Ban was considered to be only a "minor offense." Shortly after statehood, the Oklahoma legislature

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[26] Gen. Stats. Terr. Okla, Ch. 64, § 3 (1890) (emphasis added); Session Laws of 1910-11 of Oklahoma, Chapter 74, art. I § 4260. The statute remains in effect to this day. *See* Okla. Stat. tit. 15 § 15.

adopted a two-tiered system for regulating abortion, based upon "the Dakota laws."[27] Session Laws of 1910-11 of Oklahoma, Chapter 100, Art. 17 § 7696, provided that destruction of a "quick child" is first degree manslaughter, punishable by a minimum of four years in the state penitentiary.[28] This provision did not apply to abortions performed before quickening. *Lovejoy,* 194 P. at 1089 (holding that § 7696, later codified as § 2323, "may only be committed upon a woman pregnant with a quick child"). The 1910 Ban originally provided a maximum sentence of up to one or three years (depending on where the time was served) for seeking to procure a "miscarriage."[29] The North Dakota Supreme Court considered the statute to be only a "minor offense" because its elements do "not include an attack upon human life, nor does it include any attempt to destroy any living fetus." *State v. Belyea*, 9 N.D. 353, 83 N.W. 1, 3, 4 (1900). The Oklahoma legislators who enacted the 1910 Ban are presumed to have been aware of this decision. *Lovejoy*, 194 P. at 1090 (holding, specifically with respect to *Belyea* and the 1910 Ban, that "when one state adopts a statute from another state, it also adopts the construction which has been given to it by the courts of that state prior to its adoption").

5. The 1910 and 2022 Bans Fail Strict Scrutiny Review

When fundamental rights are at stake, as they are here, Oklahoma courts apply strict scrutiny review. *Matter of Adoption of Blevins*, 1984 OK CIV APP 41, 695 P.2d 556, 560. "In

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27 "The particular [abortion] statutes were evidently taken from the Dakota laws." *Lovejoy v. State*, 18 Okla. Crim. 335, 194 P. 1087, 1090 (Ok. Crim. Ct. App. 1921).

28 The full text of § 7696 reads: "Every person who administers to any woman pregnant with a quick child, or who prescribes for such woman, or advises or procures any such woman to take any medicine, drug, or substance whatever, or who uses or employs any instrument or other means with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, is guilty in case the death of the child or of the mother, of manslaughter in the first degree."

29 *See* Session Laws of 1910-11 of Oklahoma, Chapter 100, Art. 29 § 7794: "Every person who administers to any pregnant woman, or who prescribes for any such woman, or advises or procures for any such 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, is punishable by imprisonment in the State penitentiary not exceeding three years, or in a county jail not exceeding one year."

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." *Id.* In other words, when a law infringes upon a fundamental constitutional right, the state must employ the "least restrictive" means to further its interest. *Id.* It is therefore the State's burden to show that the statute (1) furthers a compelling state interest; and (2) is narrowly tailored to achieve this interest. *See, e.g.*, *Johnson v. California*, 543 U.S. 499, 505, 125 S. Ct. 1141, 1146, 160 L. Ed. 2d 949 (2005).

The 1910 and 2022 Bans cannot possibly meet this high standard. In seeking to defend unlawful abortion restrictions, the State pretends that Article II, § 2's protection of a right to life for all "persons" includes the "unborn." This argument has no textual basis. The word "person" appears over 50 times in the Oklahoma Constitution's Bill of Rights, and over 150 times in its other articles. Not one of these references could sensibly be thought to encompass unborn embryos or fetuses. Indeed, the Oklahoma law providing that an unborn fetus is not deemed to be a person until *after* its birth, discussed above, is still in effect. *See* Okla. Stat. tit. 15 § 15. But even taking the State's view that the term "persons" includes the unborn at face value, this view not only imposes on all Oklahomans the state's narrow view of when life begins but also enforces outdated gender stereotypes by, among other things, endorsing the conscription of women into "the home and the rearing of the family." *Stanton v. Stanton*, 421 U.S. 7, 14, 95 S. Ct 1373, 43 L. Ed. 2d 688 (1975). And it enshrines into law the State's discriminatory disapproval of women who do not wish to be parents, or to have additional children, despite the proven risks of forced pregnancy to their physical and mental health, financial stability, and long-term well-being, *see supra* Section II.C. Even if a purported interest in denying abortion access to protect all embryos and fetuses is legitimate—which it

is not—it is hardly compelling because it intrinsically values potential life over the existing lives of born Oklahoma citizens.

Even if the challenged laws can legitimately further an interest in potential life, they cannot do so by overriding the choices of pregnant Oklahomans, for that is not the least restrictive means of furthering such an interest. Indeed, there are obvious alternatives to the bans, which makes clear that the 1910 and 2022 Bans are not truly concerned with fetal life. For example, if Oklahoma's paramount goal were truly to protect fetal life, it could take many steps to address the overwhelming obstacles to healthy pregnancy and successful parenting in Oklahoma, including providing access to affordable childcare and preventative healthcare. The State could also support programs that offer comprehensive sex education and options for contraception to prevent unwanted pregnancies. These means are far less restrictive than the bans at issue—not to mention more likely to achieve the state's purported goal.

Rather than pursue less restrictive alternatives, the State has chosen to force people to carry pregnancies to term. The 1910 and 2022 Bans prohibit abortion at all stages of a pregnancy and contain only narrow (and conflicting) exceptions to preserve the life of the pregnant person. A total ban on abortion is therefore the *most* restrictive method of regulation, and one that would not survive even rational basis review, much less strict scrutiny. Because the bans are neither supported by a compelling state interest, nor narrowly tailored to further any purported interest, they violate Oklahomans' fundamental rights to bodily integrity and personal autonomy as guaranteed by this State's constitution.

C. The 1910 and 2022 Bans Are Unconstitutionally Vague

"The due process clause of the Oklahoma Constitution requires statutory prohibitions to be clearly defined." *In re Initiative Petition No. 366*, 2002 OK 21, ¶ 13, 46 P.3d 123, 128

(citing Okla. Const. art. II, § 7). "Vague laws offend several important values." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). First, vague statutes deny a "'person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that [the person] may act accordingly,'" and thus may "'trap the innocent' by failing to provide fair warning." *In re Initiative Petition No. 366*, 2002 OK at ¶ 14, 46 P.3d at 128 (quoting *Grayned*, 408 U.S. at 108-09). Second, "[b]y failing to provide explicit standards, vague laws delegate basic policy matters to judges and juries for ad hoc resolution resulting in discriminatory enforcement." *Id.* Third (and most importantly), is when statutory ambiguity "threatens to inhibit the exercise of constitutionally protected rights." *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 499 (1982); *In re Initiative Petition No. 366*, 2002 OK at ¶ 14, 46 P.3d at 128. The overlapping abortion bans enacted by the Oklahoma Legislature trample all of these values.[30]

Inconsistent mens rea provisions. The 2022 Ban criminalizes "purposely" performing or attempting to perform an abortion. S.B. 612 § 1(B)(1). Although "purposely" is not generally defined in the Oklahoma criminal code, a currently enjoined provision of the existing abortion code provides that a person acts "purposely" when:

> a. if the element involves the nature of his or her conduct or a result thereof, it is his or her conscious objective to engage in conduct of that nature or to cause such a result, and b. if the element involves the attendant circumstances, he or she is aware of the existence of such circumstances or he or she believes or hopes that they exist.

Okla. Stat. Ann. tit. 63, § 1-737.8 (enjoined in Case No. 118,292). The 1910 Ban criminalizes conduct performed "with intent thereby to procure the miscarriage of [a] woman," Okla. Stat. Ann. tit. 21, § 861, and is therefore a special intent statute because it "include[s] the words 'intent to' followed by a statement of a **further** intended action or consequence," *Fairchild v.*

[30] Petitioners have filed a chart setting forth key provisions of the 1910, 2022, and Vigilante Bans. Petitioners' App'x Exhibit 8.

State, 1999 OK CR 49, ¶ 32, 998 P.2d 611, 619, *as corrected on denial of reh'g* (May 11, 2000) (emphasis in original). And both statutes conflict with the Vigilante Bans, which impose penalties for actions performed "knowingly." Okla. Stat. Ann. tit. 63, § 1-745.52; Okla. Stat. Ann. tit. 21, § 861. The Oklahoma criminal code defines "knowingly" as a lesser level of intent, requiring "only a knowledge that the facts exist which bring the act or omission within the provisions of" the code; it does "not require any knowledge of the unlawfulness of such act or omission." Okla. Stat. Ann. tit. 21, § 96. Under these conflicting bans, it is unclear whether one may be subject to sanction for merely having knowledge of facts constituting a violation, for "purposely" causing an illegal abortion or miscarriage, or for specially intending one.

Inconsistent emergency exceptions. The 2022 Ban permits abortion only when necessary to preserve a person's "life in a medical emergency," defined as "a condition which cannot be remedied by delivery of the child in which an abortion is necessary to preserve the life of a pregnant woman whose life is endangered by a physical disorder, physical illness or physical injury including a life-endangering physical condition caused by or arising from the pregnancy itself." S.B. 612 § 1(A)(2). H.B. 4327 includes a similar "medical emergency" exception with a similar definition. Okla. Stat. Ann. tit. 63, § 1-745.51-52. S.B. 1503 contains an exception for medical emergencies but does not define medical emergency at all. The 1910 Ban, however, permits abortion only to preserve the "life" of the pregnant person. Okla. Stat. Ann. tit. 21, § 861. Under these definitions, physicians cannot know when they are permitted to end a pregnancy; in a "medical emergency" that merely "endangers" the life of the patient, must they wait until the patient's "life" is in immediate jeopardy? Braid Aff. ¶ 14; Wales Aff.

¶ 12. For patients, the consequences can be extreme, and even deadly.[31] As Petitioners have attested, this confusion has a chilling effect that hampers physicians in providing care to pregnant people, which only risks delaying and denying care to those people who need it most.[32] Braid Aff. ¶¶ 16-19; Wales Aff. ¶ 12; Upadhyay Aff. ¶ 25. For patients with underlying health conditions exacerbated by pregnancy that may not result in an immediate medical emergency but that are nonetheless harmful, any delay in or denial of medical care can be particularly dangerous, Braid Aff. ¶¶ 18-19, Upadhyay Aff. ¶ 25, especially for Oklahoma's Black and Indigenous communities as well as other people of color. OCRJ Aff. ¶¶ 10-11.

Inconsistent non-emergency exceptions. Some of the bans carve out more exceptions not available in the other bans. H.B. 4327 explicitly exempts care for an "ectopic pregnancy" and allows abortion for pregnancies resulting from "rape, sexual assault, or incest that has been reported to law enforcement." Okla. Stat. Ann. tit. 63, § 1-745.51-52. None of the other bans expressly carves out such circumstances. The confusion generated by this inconsistency has already impacted Oklahomans. One patient nearly died because of her physician's confusion and fear around treating her ectopic pregnancy. Case No. 120,376 Third Supp. App'x, Bourne Aff. ¶¶ 6-12. And survivors of rape and abuse have also suffered from the inconsistency in exempting their cases. Case No. 120,376, First Supp. App'x, Gallegos Aff. ¶ 7.

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[31] As one court has held, vagueness in this context is particularly dangerous because "a determination of whether a medical emergency or necessity exists . . . is fraught with uncertainty and susceptible to being subsequently disputed by others." *Women's Med. Pro. Corp. v. Voinovich*, 130 F.3d 187, 205 (6th Cir. 1997), *abrogated on other grounds by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). And, for this reason, it is particularly important that that scienter requirements be clear. *Id.* at 205.

[32] Whitney Arey, et al., "A Preview of the Dangerous Future of Abortion Bans—Texas Senate Bill 8," 387 New England Journal of Medicine 388-90 (2022), https://www.nejm.org/doi/full/10.1056/NEJMp2207423?query=TOC&cid=NEJM%20eToc,%20June%2023,%202022%20DM1181466_NEJM_Non_Subscriber&bid=1036921651 (explaining that "[p]atients with pregnancy complications or preexisting medical conditions that may be exacerbated by pregnancy are being forced to delay an abortion until their conditions become life-threatening . . . [and in] multiple cases, the treating clinicians—believing, on the basis of their own or their hospital's interpretation of the law, that they could not provide early intervention—sent patients home, only to see them return with signs of sepsis").

Inconsistent definitions of abortion. Adding to the confusion, the bans apply at different points in pregnancy. The 2022 Ban applies starting at "conception," which is medically understood to include implantation of a fertilized egg (embryo) in the uterine wall. S.B. 612 § 1(A)(1); Okla. Stat. Ann. tit. 63, § 1-730. But H.B. 4327 prohibits abortion from "fertilization." Okla. Stat. Ann. tit. 63, § 1-745.51 (1), (4); Okla. Stat. Ann. tit. 63, § 1-745.52. S.B. 1503 prohibits abortion once fetal cardiac activity is detected. These inconsistent points at which abortion is banned prevent anyone from understanding what may be prohibited as to embryos at different stages. For example, "fertilized" embryos include embryos used for the purposes of in vitro fertilization ("IVF"). This definition has caused "pani[c]" among assisted reproduction professionals and patients because they cannot reasonably determine whether the use of embryos in IVF falls within the ambit of abortion bans.[33]

Inconsistent criminal penalties. Under the 2022 Ban, "[a] person convicted of performing or attempting to perform an abortion shall be guilty of a felony punishable by a fine not to exceed One Hundred Thousand Dollars ($100,000.00), or by confinement in the custody of the Department of Corrections for a term not to exceed ten (10) years, or by such fine and imprisonment." S.B. 612 § 1(B)(2). The 1910 Ban provides that a person convicted is "guilty of a felony punishable by imprisonment in the State Penitentiary for not less than two (2) years nor more than five (5) years." Okla. Stat. Ann. tit. 21, § 861. Either a one-year or a ten-year sentence would be illegal under the 1910 ban, but both are permitted by the 2022 Ban.

The Attorney General effectively conceded the conflicting nature of the 1910 Ban and the 2022 Ban when, on August 31, 2022, he issued "guidance" to law enforcement authorities

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[33] Dana Branham, *Could Oklahoma's abortion ban restrict IVF? Here's what experts say, and why patients are 'panicking'*, The Oklahoman (May 31, 2022), https://www.oklahoman.com/story/news/2022/06/01/what-does-oklahomas-ban-abortion-fertilization-mean-ivf-fertility/9942829002/.

on when prosecutions should be initiated.[34] The Guidance does not begin to cure the conflicting statutory standards in the bans; in some instances, it compounds them. For example, the Guidance calls for prosecution of those who "intentionally" perform an abortion, a word that does not appear in the 2022 Ban, which the Attorney General calls the "better vehicle for prosecution." Guidance at 1 n.1. And the Guidance has even less relevance to the Vigilante Bans, which purport to be unenforceable by state actors, and which themselves have a chilling effect on physicians' conduct.[35]

As the U.S. Supreme Court has held, a statute is vague when it imposes liability based on an incriminating fact that is "indetermina[te]," demanding "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." *United States v. Williams*, 553 U.S. 285, 306 (2008). Here, the bans impose criminal penalties based on *at least 5 elements* that are indeterminate because of conflicting provisions in other laws. As a result, the bans fail to provide "fair warning" about what is prohibited and threaten "discriminatory enforcement." *In re Initiative Petition No. 366*, 2002 OK at ¶ 14, 46 P.3d at 128. Further, the vagueness created by the 2022 and 1910 Bans, and the conflicts between both bans and the Vigilante Bans, inhibit the provision of reproductive care generally, including in the riskiest, most dangerous circumstances for pregnant people, in violation of Oklahomans' constitutional rights. *Vill. Of Hoffman Ests.*, 455 U.S. 489 at 499. For these reasons, the 2022 and 1910 Bans are unconstitutionally vague and must be invalidated.

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[34] *See* Memorandum from Okla. Att'y Gen. to All Okla. Law Enf't Agencies, Guidance for Oklahoma law enforcement following Dobbs v. Jackson Women's Health Org. (Aug. 31, 2022) ("Guidance").

[35] The Attorney General is not the only one unable to reconcile the bans' myriad contradictions. A media investigation "contacted all 42 lead sponsors and cosponsors of the five statutes" and found that none could "answer basic questions about enforcement." 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.

D. The 2022 Ban Repeals the 1910 Ban by Implication

Should this Court reject Petitioners' claims that the 1910 and 2022 Bans violate Oklahomans' inherent liberty rights and are unconstitutionally vague, this Court should hold that 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 most recent of Oklahoma's criminal abortion bans, implying that it was intended to supersede all prior bans. This intent is confirmed by the Trigger 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 once a similar statute prohibiting abortion throughout pregnancy, such as the 2022 Ban, became effective.[36] 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 earlier bans. *City of Sand Springs v. Dep't of Public Welfare*, 1980 OK 36, 608 P.2d 1139, 1151.

[36] At a June 24, 2022 press conference, the Attorney General stated that the 2022 Ban would replace the 1910 Ban when the former became 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. The Guidance, which now asserts that both bans currently are enforceable, is a reversal of this position.

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

"As the independent department of government charged with the responsibility of protecting the constitution," this Court has the "solemn yet urgent duty to act when a statute is clearly, palpably and plainly inconsistent with the constitution"—as here. *Beason v. I. E. Miller Servs., Inc.*, 2019 OK 28, ¶ 15, 441 P.3d 1107, 1113 (internal citation and quotation marks omitted). In exercising this duty, this Court has the power to "issue, hear and determine writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition and such other remedial writs as may be provided by law." Okla. Const. art. VII, § 4.

Because the 1910 and 2022 Bans violate the Oklahoma Constitution, this Court should declare them void and of no effect. *See 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 (declaring a law unconstitutional in suit brought against the State and the Governor); *Fent v. State ex rel. Dep't of Hum. Servs.*, 2010 OK 2, ¶ 25, 236 P.3d 61, 70 (declaring a law unconstitutional in suit brought against state officials). It is also within the discretion of this Court to grant a writ of prohibition to prevent Respondents from exercising power "unauthorized by law" that "will result in injury for which there is no other adequate remedy." *Maree v. Neuwirth*, 2016 OK 62, ¶ 6, 374 P.3d 750, 752. The Court could also enter an injunction to the same effect. *See Petition of Univ. Hosps. Auth.*, 1997 OK 162, ¶ 25, 953 P.2d 314, 321; *Wells v. Childers*, 1945 OK 365, 196 Okla. 353, 358, 165 P.2d 371, 376.

V. CONCLUSION

For these reasons, Petitioners respectfully request that the Court assume original jurisdiction, declare Section 861 and S.B. 612 unconstitutional, and grant declaratory and injunctive relief and/or a writ of prohibition to prevent Respondents from enforcing them.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 2nd day of September, 2022 a true and correct copy of the foregoing was served via hand delivery to the following:

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