ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

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

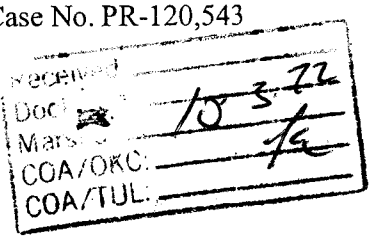
Petitioners,

v.

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

Respondents.

Case No. PR-120,543



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I. INTRODUCTION

Respondents have chosen to wrap themselves in the mantle of *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), in order to justify compelling Oklahomans to carry unwanted pregnancies to term, violating their fundamental rights and imposing profound health and economic consequences upon them and their existing families. But *Dobbs* has no place in assessing the constitutionality of the 1910 and 2022 Bans because, as the "primary guardian[]" of the "civil liberties and civil rights" promised to Oklahomans in the Oklahoma Constitution, this Court "present[s] the most legitimate forum for judicial expansion of these guarantees."[1] Yvonne Kauger, *Reflections on Federalism: Protections Afforded by State Constitutions*, 27 Gonzaga L. Rev. 1, 2 (1991-92). Respondents invite this Court to abandon its role as the primary guardian of civil liberties and instead abet their own efforts to run roughshod over the fundamental rights of pregnant Oklahomans. What is worse, they do so by disrespecting this Court's own precedents, such as *In re K.K.B.*, 1980 OK 7, 609 P.2d 747, ignoring the records of Oklahoma's Constitutional Convention, erasing from the state's legal history any tribal laws that do not fit Respondents' false narrative, exaggerating the legal consequences of striking the Bans down, and understating the devastating impact of letting them stand. This Court should reject the invitation.

First, Respondents seek to stop the clock in 1907 and deny fundamental rights of personal liberty and bodily autonomy to pregnant persons because those rights had not yet achieved legal recognition at that time. That argument requires this Court to disavow *In re K.K.B.*, which expressly extended the liberty right of bodily autonomy to psychiatric patients

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[1] Capitalized terms not defined here are defined in Petitioners' Corrected Brief in Chief ("Pets.' Br."). The Answer to Petitioners' Brief in Chief is cited as "Ans. Br." Respondents' Appendix is cited as "Resps.' App." Petitioners' Supplemental Appendix is cited as "Pets.' Supp. App."

notwithstanding the lack of prior legal recognition for that right, and to embrace *Washington v. Glucksberg*, 521 U.S. 702 (1997), a decision that the United States Supreme Court had itself (prior to *Dobbs*) limited. Because this case implicates an "inherent right" to personal liberty guaranteed by art. II, § 2 that is not expressly found in the United States Constitution, Respondents' invocation of federal precedent is unavailing.

Critically, Respondents' argument ignores the stated intent of the delegates of the Oklahoma Constitutional Convention to draft a "progressive" document that would evolve to reflect the "wisdom and experience" of future generations. That intent would be frustrated if the delegates' antediluvian views about the role of women in society could frustrate pregnant persons' full participation in Oklahoma's economic life today. As the Kansas Supreme Court held in words that are just as applicable to the Oklahoma Constitution:

> True equality of opportunity in the full range of human endeavor is a Kansas constitutional value, and it cannot be met if the ability to seize and maximize opportunity is tethered to prejudices from two centuries ago.

Hodes & Nauser, MDs, P.A. v. Schmidt, 309 Kan. 610, 659, 440 P.3d 461, 491 (2019). Respondents' effort to distinguish the natural right of "liberty" guaranteed by the Kansas Constitution from the natural right of "liberty" guaranteed by the Oklahoma Constitution is a shell game; and their criticism of the Kansas Supreme Court's methodology in *Hodes* depends upon a patent misreading of a single sentence from the works of John Locke. *See* Sections II.A.1–3, below.

Second, the fundamental right of pregnant persons to bodily autonomy is subject to strict scrutiny review. Respondents' efforts to subject the Bans to rational basis review by drawing analogies to cases sanctioning cockfighting bans or bans on specific forms of medical treatment are all off the mark for one important reason: the Bans deprive pregnant persons of *any* control over their own bodies, and offer them *no* alternative if they do not wish to remain

pregnant and endure childbirth. Respondents' asserted fears that recognition of pregnant persons' liberty rights would require legalizing abortion up until birth—or infanticide afterwards—are refuted by existing Oklahoma legislation that prohibits abortion after 22 weeks LMP, and the fact that the provider Petitioners have never offered abortion services in Oklahoma beyond that point. *See* Sections II.A.4–5, below.

Third, Respondents' assertions that this Court cannot consider Petitioners' arguments that the conflicting 1910 and 2022 Bans are both vague, and that the 2022 Ban implicitly repeals the 1910 Ban, are based on an egregious partial quotation from *Ex Parte Meek*, 1933 OK 473, 165 Okla. 80, 25 P.2d 54. This Court has indeed considered vagueness and implicit repeal challenges to criminal statutes when asserted in civil cases. Respondents fail to explain how the conflicting provisions of the 1910 and 2022 Bans can be reconciled with each other, apart from their own *ipse dixit*. *See* Section II.B, below.

Finally, Respondents' affidavits do not refute the unassailable facts that pregnancy and childbirth are risky, life-altering events and that they can have profound, irrevocable impacts on the health and economic well-being of pregnant persons and their families. Instead, they focus on the alleged risks of abortion. Their spurious claims about abortion's risks are irrelevant to the constitutional issue before this Court because Respondents do not even pretend that the Bans were enacted in order to protect pregnant persons' health. In any event, all of Respondents' opinions about the safety of abortion are thoroughly debunked by the Rebuttal Affidavit of Ushma Upadhyay, Ph.D., M.P.H. ("Upadhyay Rebuttal Aff.") (Pets.' Supp. App. Ex. 5), and the other affidavits in Petitioners' Supplemental Appendix. *See* Section II.C, below.

As explained in greater detail below, the Bans should be declared unconstitutional.

II. ARGUMENT

A. The 1910 and 2022 Bans Violate the Inherent Liberty Rights of Pregnant Oklahomans

1. This Court Has Already Rejected Respondents' Cramped View that the Recognition of Fundamental Constitutional Rights Must Be Frozen as of 1907

Respondents contend that "before a court can recognize an unenumerated right, a plaintiff must establish that the right is 'objectively, deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" Ans. Br. 14 (quoting *Glucksberg*, 521 U.S. at 702-03, 721). The personal liberty right of bodily autonomy is, in fact, "deeply rooted in this Nation's history" and "implicit in the concept of ordered liberty," as Respondents themselves acknowledge: "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." Ans. Br. 16 (citing *Union Pac. Ry. v. Botsford*, 141 U.S. 250, 251 (1891)). Petitioners seek recognition that this inherent and fundamental liberty right extends to pregnant persons who do not wish to continue a pregnancy to term.

This Court has never relied upon historical practice to limit the recognition of fundamental rights for classes of persons not previously understood to have enjoyed them.[2] To the contrary, in *In re K.K.B.*, this Court held that "the freedom to decide about one's own

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[2] Although this Court has sometimes referred to historical practices in recognizing substantive due process rights, such historical support was not a *sine qua non* for any of those decisions. *See Matter of Adoption of Darren Todd H.*, 1980 OK 119, ¶ 18, 615 P.2d 287, 290 (noting that "the right of a parent to the care, custody, companionship and management of his or her child is a fundamental right" that has been repeatedly recognized, but not that it needed to have been repeatedly recognized in order to be considered a fundamental right); *In re Herbst*, 1998 OK 100, ¶ 10, 971 P.2d 395, 397-98 (same); *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (same); *Davis. v. Davis*, 1985 OK 85, 17 n.33, 708 P.2d 1102, 1109 n.33 (same); *Delk v. Markel Am. Ins. Co.*, 2003 OK 88, ¶ 17 n.45, 81 P.3d 629, 639 n.45 (finding that "the right of parents to the care, custody, companionship and management of their child is a fundamental right," but making no reference to any historical practices related to this right).

health" belongs to psychiatric patients notwithstanding the lack of historical recognition for that right:

> The public's long dormant interest in the human rights of mental patients has been aroused by vocal former patients, activists and concerned professionals. *It is time to recognize* liberty includes the freedom to decide about one's own health.

609 P.2d at 749 (emphasis added). Even though the "human rights" of psychiatric patients were "long dormant," this Court did not hesitate to recognize them as "the law in the State of Oklahoma" in 1980. *Id.*

Respondents quibble that *In re K.K.B.* "didn't interpret any particular constitutional provision," Ans. Br. 1 n.1, but *In re K.K.B.* based its holding on the plaintiff's "liberty" interest, protected by both Okla. Const. art. II, §§ 2 and 7 and by the Fourteenth Amendment to the United States Constitution. 609 P.2d at 749. And Respondents' observation that *In re K.K.B.* "cited now-defunct *Roe* for its holding," Ans. Br. 1 n.1, cannot imply that *In re K.K.B.*'s reasoning has been superseded by *Dobbs*, for the footnote citing *Roe* also cites three state court decisions. *See In re K.K.B.*, 609 P.2d at 750 n.11 (citing *In re Quinlan*, 355 A.2d 647 (N.J. 1976); *Sup't of Belchertown v. Saikewicz*, 370 N.E.2d 417 (Mass. 1977); *In re Young*, 48 U.S.L.W. 2338 (Cal. Super. Ct. Sept. 11, 1979)). These state court decisions all relied, either entirely or in part, upon their respective states' constitutions and laws.[3] The only inference to be drawn from *In re K.K.B.*'s footnote 11 is that this Court was relying upon the constitutional guarantees of liberty found in *both* the U.S. and the Oklahoma Constitutions. Those same rights to bodily autonomy and determining the course of one's medical treatment protected under *In*

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[3] *See Saikewicz*, 370 N.E.2d at 739-40 ("There is implicit recognition in the law of the Commonwealth, as elsewhere, that a person has a strong interest in being free from nonconsensual invasion of his bodily integrity."); *In re Young* 48 U.S.L.W. at 2338 (holding that there is a "[f]undamental, privacy-based right to refuse medication, protected by the California Constitution"); *In re Quinlan*, 355 A.2d at 40 ("Nor is such right of privacy forgotten in the New Jersey Constitution.") (citing N.J. Const. art. I, § 1).

re K.K.B. should be extended to pregnant persons who do not wish to carry their pregnancies to term.

Respondents' reliance on *Glucksberg* is also misplaced. *In re K.K.B.* was decided before *Glucksberg*, and this Court thus had no need to address the case in its opinion. Since *Glucksberg* was issued in 1997, however, this Court has cited the case only twice. In neither instance was the case invoked to limit the scope of a fundamental right based on historical practice.[4] And before its precedent-shattering decision in *Dobbs*, the United States Supreme Court itself rejected *Glucksberg*'s reliance upon "specific historical practices" to exclude classes of persons from enjoying fundamental liberty interests:

> *Loving* did not ask about a 'right to interracial marriage'; *Turner* did not ask about a 'right of inmates to marry'; and *Zablocki* did not ask about a 'right of fathers with unpaid child support duties to marry. Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right.
>
> That principle applies here. If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.

Obergefell v. Hodges, 576 U.S. 644, 671 (2015) (citations omitted). Justice Kennedy's reasoning in *Obergefell* is persuasive here as well.

This Court should not decide this case by asking whether pregnant persons could legally obtain an abortion in the Oklahoma or Indian Territories, but by asking whether pregnant persons enjoy the fundamental liberty right to bodily autonomy guaranteed by the Oklahoma Constitution. This question must be answered "yes," independent of the United

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[4] *In re Baby Girl L.*, 2002 OK 9, ¶ 15, 51 P.3d 544, 551, cited by Respondents, held that prospective adoptive parents could not reasonably expect that they would have a constitutional right to permanent custody of the proposed adoptee because "[r]easonableness of the expectation is based, *in part*, upon our history, legal traditions and practices" (emphasis added). And in *Hunsucker v. Felin*, 2017 OK 100, 408 P.3d 599, 626, *Glucksberg* was cited in a concurring opinion for the unremarkable proposition that "substantive due process is typically invoked to protect unenumerated 'fundamental' rights," a point on which there is no dispute.

States Supreme Court's decision in *Dobbs*, for while "the same due process protections guaranteed by the 14th amendment are also guaranteed by art. II, § 2," Ans. Br. 15, the inherent liberty rights guaranteed by art. II, § 2 of the Oklahoma Constitution are not limited to those guaranteed by the Fourteenth Amendment. *See* Pets.' Br. 14.

2. Respondents' Reliance on "Historical Evidence" Ignores Critical Historical Context

Although they insist that "historical evidence" should govern this case, Ans. Br. 2, Respondents quote nothing from the proceedings of the Oklahoma Constitutional Convention.[5] This silence speaks volumes. Respondents cannot refute the historical record that the framers of the Oklahoma Constitution were charged with assuring "the fullest personal liberty"[6] to Oklahomans, that they considered both the people of Oklahoma and their government to be "progressive,"[7] and that they intended that the Oklahoma Constitution would evolve to reflect the "wisdom and experience"[8] of future generations. In other words, there is zero "historical evidence" that the framers of the Oklahoma Constitution intended to confine Oklahomans' fundamental rights to those rights that had achieved legal recognition in 1907.

Without such historical or textual evidence, Respondents' historical argument amounts to saying that this Court cannot hold that abortion bans violate pregnant persons' rights of bodily autonomy in 2022 because the Territory of Oklahoma enacted one such ban in 1890 and

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5 Instead, Respondents point to "an aspiring poet [who] wrote that in 'Oklahoma's Alphabet,' the letter 'U is for the unborn, they her future will see." Ans. Br. 30. Plainly, "the unborn" is poetic license for "all future generations," and not a reference to the fetuses *in utero* when the poem was published in 1899.

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

7 *Proceedings of the Constitutional Convention of the Proposed State of Oklahoma Held at Guthrie, Oklahoma* (Muskogee Printing Co. 1907) ("*Proceedings*") at 10 ("[b]ut time impairs Constitutions as it impairs all things, but if they be not amended and repaired to meet changed conditions, new questions and the ever-altering conditions of an enterprising and progressive people, there is an end to good government") (statement of J.F. King); *id.* at 11 (referring to Oklahoma's "enterprising and progressive" government).

8 *Id.* at 11 ("[E]ach generation in the future as in the past should crystalize in the Constitution its wisdom and experience.").

the Oklahoma legislature followed suit in 1910. The fallacy of Respondents' position is best illustrated by a simple historical analogy.

In its first session, the Oklahoma legislature enacted a law prohibiting interracial marriage. *See* Okla. Laws 1907-08 at 556. While Respondents rightly condemn this law as "evil" because "African Americans were treated as less than fully human," *see* Ans. Br. 15 n.12, the more important doctrinal point is that this law deprived African Americans who wished to marry non-African Americans of the fundamental right to marry. *See Loving v. Virginia*, 388 U.S. 1 (1967). But in Respondents' view, the right of African Americans to marry the person of their choice is not "historically grounded" because Oklahoma's miscegenation statute was enacted at the same time as the Oklahoma Constitution. Ans. Br. 15.

This Court should reject Respondents' circular reasoning, just as the Kansas Supreme Court did in *Hodes*. In *Hodes*, the Kansas Supreme Court was confronted with the very same argument made by Respondents here—that "Territorial and early state statutes" banning abortion precluded the court from concluding that the Kansas Constitution's guarantee of natural rights included a right to reproductive choice. *Hodes*, 309 Kan. at 660, 440 P.3d at 491. The Kansas Supreme Court rejected that argument because the "paternalistic attitude" towards women prevalent in the 19th century, which did not give women the same autonomy over their bodies and lives as men, should not retain a chokehold over the rights of pregnant persons in the 21st century:

> In essence, the history of women's rights contemporaneous to the [Kansas Constitutional] Convention reflects a paternalistic attitude and—despite what the Constitution said—a practical lack of recognition that women, as individuals distinct from men, possessed natural rights. We no longer live in a world of separate spheres for men and women. True equality of opportunity in the full range of human endeavor is a Kansas constitutional value, and it cannot be met if the ability to seize and maximize opportunity is tethered to prejudices from two centuries ago. Therefore, rather than rely on historical prejudices in

> our analysis, *we look to natural rights and apply them equally to protect all individuals*.

Hodes, 309 Kan. at 659–60, 440 P.3d at 491 (emphasis added).

More recently, a trial court in Indiana applied similar reasoning to reject the same invocation of territorial law to preclude legal recognition of pregnant women's rights to bodily autonomy:

> The Court acknowledges that abortion was not lawful at the time the Indiana Constitution was ratified. However, this does not foreclose the language of Article I, § 1[9] from being interpreted at this point as protecting bodily autonomy, including a qualified right by women not to carry a pregnancy to term. The significant, then-existing deficits of those who wrote our Constitution—particularly as they pertain to the liberty of women and people of color—are readily apparent. . . . Our analysis here cannot disregard this reality, particularly when considering questions of bodily autonomy.

Planned Parenthood Northwest v. Members of the Licensing Board of Indiana, No. 53C06-2208-PL-001756, ¶ aa (Ind. Cir. Ct. Sept. 22, 2022) (Pets.' Supp. App. Ex. 1).

The historical record confirms that the framers of the Oklahoma Constitution shared the same "paternalistic attitudes" towards women as the delegates to the Kansas and Indiana Constitutional Conventions, for they did not view women as full citizens with equal rights to participate in Oklahoma's political and economic life. The original Oklahoma Constitution itself embodied those prejudices. Full electoral suffrage was only for men. *See* Okla. Const. of 1907, art. III, § 1 ("[t]he qualified electors of the State shall be male citizens of the United States, male citizens of the State, and male persons of Indian descent native of the United States, who are over the age of twenty-one years"). Women could vote only in school board

[9] Article I, § 1 of the Indiana Constitution is a "natural rights" provision similar to Article II, § 2 of the Oklahoma Constitution: "WE DECLARE, that all people are created equal; that they are endowed by their CREATOR with certain inalienable right; that among these are life, liberty and the pursuit of happiness. . . ."

elections. *Id.*, art. III, § 3 ("all female citizens of this State, possessing like qualifications of male electors, shall be qualified to vote at school district elections or meetings").

Speeches by the leaders of the Convention confirm their view that the proper place for women was in the home. The Convention's Chair, William Murray (later elected as the first Speaker of Oklahoma's House of Representatives), said as much in his first speech to the Convention, when he proclaimed that the "schoolboy of today is the citizen of tomorrow" while "the school girl of today is the mother of tomorrow." *Proceedings* at 17. In urging his fellow delegates to reject full suffrage for women, Charles Haskell (the majority floor leader, later elected as Oklahoma's first Governor) asked his all-male fellow delegates to picture themselves "coming home 'to find a candidate for county commissioner has taken so much of your wife's time that it hadn't really occurred to her that supper was a part of every day life.'" Irvin Hurst, *The 46th Star, A History of Oklahoma's Constitutional Convention and Early Statehood* (Semco Color Press 1957) at 14 (quoting C.N. Haskell).

Other statutes from the era confirm that contemporaneous Oklahoma lawmakers did not consider women to be endowed with the same natural rights as men, and certainly not with the same personal liberty right of bodily autonomy that men enjoyed. For example, under the law of the Oklahoma Territory, a man could not be charged with rape for any act of sexual intercourse with his wife, regardless of her lack of consent or his use of force. Gen. Stats. Terr. Okla., Ch. 25, art. XXVI, § 1. The criminal law that prohibited employers from compelling children under the age of fourteen to work more than ten hours a day applied the same restriction to the employment of all women. *Id.*, Ch. 25, art. LVIII, § 10. And, as a matter of civil law, wives were required "to conform" to their husbands' "mode of living": "[t]he

husband is the head of the family. He may choose any reasonable place or mode of living and the wife must conform thereto." *Id.*, Ch. 40, § 2.

Any review of this historical record requires this Court to acknowledge that, like the framers of the Kansas and Indiana constitutions, the framers of the Oklahoma Constitution did not consider women to be equal participants in the body politic or to have the same personal liberty right of bodily autonomy as men. Relying upon their antiquated prejudices about the role of women in society to limit the scope of fundamental rights today would do a grave disservice to Oklahoma's citizens.

Finally, this Court also has a separate reason, unique to Oklahoma's history, to reject Respondents' reliance on Oklahoma Territory law to gauge the framers' intent with respect to pregnant persons' fundamental rights. When the United States Congress enacted a law to admit Oklahoma "into the Union on an equal footing with the original states," the very name of that law required *both* the "people of Oklahoma and of the Indian Territory to form a constitution and State government." Enabling Act of 1906, Pub.L. 59–234, H.R. 12707, 34 Stat. 267, enacted June 16, 1906. Notwithstanding Respondents' self-serving characterization of the law of Oklahoma Territory as the "primary abortion law," Ans. Br. 7, the many varied abortion laws of the Indian Territory are just as much a part of Oklahoma's historical legal landscape as the laws of Oklahoma Territory.[10] *See* Pets.' Br. 19. In an effort to gloss over these variations, Respondents mischaracterize historical tribal laws[11] and denigrate some of them as

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[10] For example, it is undisputed that the laws of the Choctaw did not prohibit abortion until *after* quickening. Constitution and Laws of the Choctaw Nation (1894), Criminal Offenses, Sec. III(1).

[11] Respondents contend that the statutory prohibition of "infanticide" in the laws of the Muskogee Creek Nation was really "addressing abortion," Ans. Br. 8, but the contemporaneous edition of Black's Law Dictionary makes it plain that "infanticide," which occurs after birth, was a different crime from "abortion," which occurs before. *See* Black's Law Dictionary (1st Ed., 1891) (defining "Infanticide" as "[t]he murder or killing of an infant soon after its birth. The fact of the birth distinguishes this act from 'feticide' or 'procuring an abortion,' which terms

the views of "an Indian tribe or two." Ans. Br. 7. But the wide variation in pre-statehood law on abortion precludes assigning dispositive weight to the law of the Oklahoma Territory in any legal analysis.

3. The Decision of the Kansas Supreme Court Offers Persuasive Guidance to this Court

This Court can, and should, look to the Kansas Supreme Court's decision in *Hodes* for guidance in its own analysis. Respondents' criticisms of *Hodes* are unfounded.[12]

First, Respondents assert that *Hodes* relied upon "state-specific case law and legislative history." Ans. Br. 20. Petitioners have proffered Oklahoma-specific case law—including *In re K.K.B.*—and legislative history that supports recognition of the bodily autonomy of pregnant persons as a natural right under the Oklahoma Constitution. *See* Pets.' Br. 12–16, 19–21. The Kansas Supreme Court relied heavily upon "historical prejudices" against women in Kansas in reaching its conclusion, *Hodes*, 309 Kan. at 659–60, 440 P.3d at 491, and the historical record unequivocally shows that Oklahoma's legislators and constitutional convention delegates harbored the same kinds of stereotypes about women's roles as their counterparts in Kansas. *See* pages 9–11, above.

Second, Respondents contend that "textual differences" between the Oklahoma Constitution and the "broader constitutional provisions relied upon in Kansas and other states," should lead this Court to a different conclusion from *Hodes*. Ans. Br. 22. But any semantic differences are not material here. Section 1 of the Kansas Constitution Bill of Rights states:

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denote the destruction of a *fetus* in the womb."). Historian Angie Debo, who described the Muskogee statute as a prohibition of "us[ing] drugs to cause abortion," Resps.' App. A, did not note the legal distinction.

[12] Earlier this year, Kansas voters resoundingly rejected an effort to override the *Hodes* decision by defeating a proposed amendment to the Kansas Constitution that would have nullified the right to abortion. *See* Barbara Hoberock, *Kansas abortion vote gives hope to Oklahoma reproductive rights supporters*, TULSA WORLD, Aug. 3, 2022, https://tulsaworld.com/news/state-and-regional/govt-and-politics/kansas-abortion-vote-gives-hope-to-oklahoma-reproductive-rights-supporters/article_b1f9ec38-1364-11ed-a295-4bdfb1adcfb6.html.

"All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." Respondents characterize this as a "non-exhaustive" list of natural rights because it includes the phrase "among which" after "inalienable natural rights." Article II, § 2 of the Oklahoma Constitution does not use the words "among which": "All persons have the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry." Whether a reference to natural rights is "non-exhaustive" or "exhaustive" (to use Respondents' terms) is a distinction without a difference, for both constitutions guarantee "liberty and the pursuit of happiness," which is the textual source for the Kansas Supreme Court's ruling. *Hodes*, 309 Kan. at 645, 440 P.3d at 486. This Court may look to other courts that have found the right to abortion encompassed in the natural right to liberty, regardless of whether the text of the guarantee is "exhaustive" or "non-exhaustive." *See* Pets.' Br. 17-18.

Third, Respondents contend that *Hodes*'s "methodology is just wrong" because, in their view, the Kansas Supreme Court cherry-picked statements from John Locke and William Blackstone. Ans. Br. 20-21. But it is Respondents who are guilty of cherry-picking. *Hodes* correctly observed that both Locke and Blackstone recognize bodily autonomy as a fundamental natural right. As for Locke, the court noted that he "observed that 'every Man has a Property in his own Person.'" *Hodes*, 309 Kan. at 640, 440 P.3d at 480 (quoting Locke, Two Treatises of Government, Bk. II, § 27). For Blackstone, the court cited his identification of "the private rights to life, liberty, and property as the three 'absolute' rights—so called because they 'appertain[ed] and belong[ed] to particular men, merely as individuals,'" and not as "'members of society.'" *Id.* (quoting 1 Blackstone, Commentaries on the Laws of England 123).

Respondents look to a law review article for the proposition that "*Hodes* failed to acknowledge specific statements from these jurists and philosophers condemning abortion," Ans. Br. 21 (citing Skyler Reese Croy & Alexander Lemke, *An Unnatural Reading: The Revisionist History of Abortion in* Hodes v. Schmidt, 32 U. Fla. J. L. & Pub. Pol'y 71, 82–86 (2021)), as well as an Iowa decision citing the same article, *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, 975 N.W.2d 710, 740 (Iowa 2022), *reh'g denied* (July 5, 2022). But that law review article (relying upon the same materials provided in Respondents' Appendix) misreads those statements. Specifically, Locke did *not* say that "men ignorant of words" know "[n]ot to procure [a]bortion," as Respondents contend. Ans. Br. 18. In fact, the cited statement, drawn from Locke's epistemological study, the "Essay concerning Human Understanding," says the opposite.

The full and somewhat convoluted sentence appears in the following footnote.[13] Locke's point was that it could *not* be proven that sins (including adultery) or virtues (including charity) were innate "common notions and practical principles." Indeed, this sentence appears in a chapter titled "No Innate Practical Principles." More germane is Locke's statement, made in one of his treatises on government, that "[e]very man is born with a double right: *first,* a *right of freedom to his person,* which no other man has a power over, but the free disposal of it lies in himself," confirming that he considered men to be endowed with a natural right of

[13] "When it shall be made out that men ignorant of words, or untaught by the laws and customs of their country, know that it is part of the worship of God, not to kill another man; not to know more women than one; not to procure an abortion; not to expose their children, not to take from another what is his, though we want it ourselves, but on the contrary, relieve and supply his wants; and whenever we have done the contrary we ought to repent, be sorry, and resolve to do no more;—when I say, all men shall be proved actually to know and allow all these and a thousand other rules, all of which come under these two general words made use of above, viz., *virtutes et peccata*, virtues and sins, there will be more reason for admitting these and the like, for common notions and practical principles." Resps.' App. Ex. B at 84.

bodily autonomy only *after* their birth. Two Treatises of Government, Book II, § 190 (emphasis in original).

As for Blackstone, his observation that "Life . . . begins in contemplation of law as soon as an infant is able to stir in the mother's womb," Ans. Br. 18 (quoting Resps.' App. D at 129), is fully consistent with the common law rule that criminalized abortion only after quickening. It does not suggest that England ever banned all abortions at all stages of pregnancy, as the 1910 and 2022 Bans do in Oklahoma. In short, none of the statements submitted by Respondents suggest that *Hodes* had a mistaken understanding of Lockean natural rights.

Finally, no matter how many times *Hodes* cited *Roe* or *Casey*, *see* Ans. Br. 20, the case was decided under the Kansas Constitution, independent and apart from the federal Constitution, under Kansas's "inalienable natural rights" clause, Kan. Const., § 1. *See Hodes*, 309 Kan. at 669, 440 P.3d at 480. *Dobbs* has no impact on that decision and should have no impact on this Court's analysis of the rights protected by the Oklahoma Constitution.

Respondents also identify three courts—in Iowa, Idaho, and North Dakota—that declined, after *Dobbs* was decided, to find that their state constitution's guarantee of unenumerated natural rights encompassed the right to abortion.[14] Ans. Br. 23. The Iowa decision relied upon the same misleading law review article as Respondents;[15] the trial courts in Idaho and North Dakota reserved any definitive ruling on the constitutional issue until after

[14] Respondents also note that a trial court in Mississippi has declined to adhere to *Pro-Choice Mississippi v. Fordice*, 716 So.2d 645 (Miss. 1998). Ans. Br. 22. *Pro-Choice Mississippi v. Fordice* nonetheless remains the Mississippi Supreme Court's last word on the subject of abortion rights under that state's constitution.

[15] *Planned Parenthood of the Heartland, Inc.*, 975 N.W.2d at 740 n.19.

a full submission on the merits.[16] Moreover, in recent weeks, a court in Indiana held that a right to abortion is protected by the Indiana constitution's guarantee of an inherent right to liberty. *Planned Parenthood Northwest*, No. 53C06-2208-PL-001756 (Ind. Cir. Ct. Sept. 22, 2022) (Pets.' Supp. App. Ex. 1).[17] And a court in Ohio relied upon the Ohio constitution's guarantee of an "inherent right" to liberty, among other provisions, to hold that the Ohio constitution protected "a fundamental right to abortion." *See Pre-term Cleveland v. Yost*, Decision and Entry, Case No. A2203203 (Ohio Ct. of Common Pleas Sept. 14, 2022) at 11, 14–15 (Pets.' Supp. App. Ex. 3). Oklahoma's avowedly "progressive" Constitution and this Court's own jurisprudence in *In re K.K.B.* are more in line with these decisions than with those denying pregnant persons the personal liberty right of bodily autonomy.

4. Rational Basis Review Is Not Applicable Here, and Even If It Were, the 1910 and 2022 Bans Would Fail

Respondents acknowledge the many decisions of this Court recognizing that the "right of a parent to the care, custody, companionship and management" of a child is a fundamental right, entitled to strict scrutiny review, only to contend that a pregnant Oklahoman's decision not to become a parent (or not to have another child) should not be afforded the same level of protection. *See* Ans. Br. 15 (citing *Matter of Adoption of Darren Todd H.*, 1980 OK 119, ¶ 18, 65 P.2d 287, 290; *Blocker v. Martin*, 1994 OK 17, ¶ 4, 868 P.2d 1316). Instead, they urge this

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[16] *Access Indep. Health Serv. Inc v. Wrigley*, No. 08-2022-CV-1608 at 3-4 (N.D. S. Cent. Dist. Ct. Aug. 25, 2022) ("[T]he underlying issue before the Court has no questions of facts; the determination of the substantial probability of succeeding on the merits would essentially have the Court determine the final validity of the parties' claims [regarding the right to abortion]. As such, the Court makes no findings towards the substantial probability of succeeding on the merits prong and instead, reserves such analysis for the proper time, on a motion for summary judgment or trial."); *Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky v. Idaho*, No. 49615, 49817, 49899 at 7 (Idaho Sup. Ct. Aug. 12, 2022) ("In short, given the legal history of abortion in Idaho, we cannot simply infer such a right [to abortion] exists absent *Roe* without breaking new legal ground, which should only occur after the matter is finally submitted on the merits.")

[17] In Michigan, a court held that a fundamental right to abortion exists in the state constitution's equal protection and due process clauses. *See* Order and Opinion, *Planned Parenthood of Michigan v. Attorney General of the State of Michigan*, Case No. 22-000044-MM (Mich. Ct. of Claims Sept. 8, 2022) (Pets.' Supp. App. Ex. 2).

Court to follow *Edmondson v. Pearce*, which applied "rational basis" review in upholding a statute that prohibited cockfighting. *See* Ans. Br. 14-16; *Edmondson v. Pearce*, 2004 OK 23, ¶ 67 n.42, 91 P.3d 605, 636 n.42. But the ability to determine whether one will carry a pregnancy to term—unlike the ability to "earn a living by fighting birds or breeding them for fighting"—is a fundamental right under the Oklahoma Constitution, subject to strict scrutiny, which the 1910 and 2022 Bans cannot possibly meet. *Id.* ¶ 67 n.42, 636 n. 42. *See also* Pet. Br. 11–14, 21–23; *Matter of Adoption of Blevins*, 1984 OK CIV App 41, 695 P.2d 556, 560.

Respondents' effort to draw an analogy between the total abortion Bans and bans on certain kinds of medical treatment is also unavailing. *See* Ans. Br. at 16. The analogy fails because unlike the patients in those cases, who could pursue other forms of safe and effective treatment, pregnant persons who do not wish to carry a pregnancy to term and give birth, with all of their attendant risks, have no alternative. Specifically, Respondents cite *Carnohan v. United States*, 616 F.2d 1120 (9th Cir. 1980) and *Rutherford v. United States*, 616 F.2d 455 (10th Cir. 1980), which declined to recognize a fundamental right to obtain and use a non-FDA-approved cancer treatment, laetrile. *See* Resps.' Br. at 16. Yet the right that both *Rutherford* and *Carnohan* declined to recognize was the patient's right to "select[]...a *particular* treatment" that had not been approved as safe and effective by the FDA, *Rutherford*, 616 F.2d at 457 (emphasis added), *accord Carnohan*, 616 F.2d at 1122, where "conventional" and "legitimate" alternative treatment options are available. *United States v. Rutherford*, 442 U.S. 544, 556, 99 S. Ct. 2470, 2477, 61 L. Ed. 2d 68 (1979). Indeed, *Rutherford* expressly stated "the decision by the patient whether to have a treatment or not *is* a protected right." *Rutherford*, 616 F.2d at 457 (emphasis added).

Respondents' reliance on *Mitchell v. Clayton*, 995 F.2d 772 (7th Cir. 1993), fails for the same reason. In *Mitchell*, the court declined to recognize a patient's fundamental right to receive treatment from unlicensed acupuncturists. *Id.* at 775. Acknowledging that "the constitutional right of privacy included a patient's right to obtain acupuncture treatment" generally, the court held that patients did not have a fundamental right to a particular acupuncturist. *Id.* at 774 (citing *Maguire v. Thompson*, 957 F.2d 374, 377-78 (7th Cir.), *cert. denied*, 506 U.S. 822, 113 S. Ct. 73, 121 L.Ed.2d 38 (1992)). Unlike the laws at issue in *Rutherford*, *Carnohan*, and *Mitchell*, the 1910 and 2022 Bans prohibit abortion in Oklahoma under nearly all circumstances with no alternative options—depriving these cases of any pertinence here.[18]

But even if the Court were to apply rational basis review, the Bans cannot stand because they do not constitute a legitimate exercise of the State's police power. *See* Pet. Br. 21–23. In *Edmondson,* this Court upheld the prohibition on cockfighting on the ground that the legislature may regulate "certain business . . . for the public good." 2004 OK 23, ¶ 35, 91 P.3d at 624. This Court further noted that the cockfighting ban applied equally to all citizens and therefore did not "unconstitutionally discriminate." *Id.* The same cannot be said for the 1910 and 2022 Bans, which do not involve the regulation of an economic activity and do not apply equally to all citizens; rather, they seek to deny only *pregnant* Oklahomans their rights to personal autonomy and bodily integrity with respect to a life-altering medical decision. Moreover, the State's alleged interest in protecting the unborn is undermined by the fact that

[18] *Raich v. Gonzales*, 500 F.3d 850 (9th Cir. 2007), in which the Ninth Circuit declined to recognize a fundamental right to use medical marijuana, fails to advance Respondents' position because it was decided in the context of a federal law of general applicability, the Controlled Substances Act, § 101 *et seq.*, 21 U.S.C. § 801 *et seq.*, that prohibited the very conduct that plaintiffs sought to protect. Here, by contrast, the Bans are directed only against medical providers who provide abortion services to pregnant patients.

Respondents do not dispute that the unborn are not "persons" within the meaning of art. II, §§ 2 and 7, and thus do not enjoy the full scope of "inherent rights" enjoyed by pregnant persons. *See* Pets.' Br. 20. This implicit concession eliminates any textual basis for Respondents' contention that the rights to autonomy and bodily integrity of the pregnant person must give way to the State's asserted interest in potential life at all points in pregnancy.

5. Respondents Exaggerate the Implications of Holding the Bans to Be Unconstitutional

Respondents exaggerate the implications of holding the Bans to be unconstitutional, contending that a right to reproductive choice would necessarily entail abortions "up to the very moment of birth—and potentially beyond." Ans. Br. 19. The record presents no evidence that this specter has any prospect of coming to pass in Oklahoma. Respondents do not mention that Okla. Stat. Ann. tit. 63 § 1-745.5, which prohibits abortion after 20 weeks "postfertilization age" (22 weeks LMP) remains on the books. None of the provider Petitioners performed abortions beyond that point in pregnancy,[19] and none intend to do so if the 1910 and 2022 Bans are held to be unconstitutional.[20] And Respondents' absurd speculation that abortion access might somehow provide legal grounds for infanticide is refuted by this country's experience in the nearly fifty years after *Roe*, in which that never happened, as well as by the experience of many other countries around the world where abortion is legal.

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[19] Tulsa Women's provided medication abortion up through 10 weeks, 0 days LMP and procedural abortion up through 18 weeks LMP; CHPPGP provided medication abortion up through 11 weeks, 0 days LMP, as well as procedural abortion up through 21 weeks 6 days LMP; and PPAEO location provided medication abortion up through 11 weeks 0 days LMP, as well as procedural abortion up through 17 weeks 6 days LMP. Braid Aff. ¶ 1; Wales Aff. ¶ 8.

[20] In a footnote, Respondents assert that "Petitioners Braid and Tulsa Women's Reproductive Clinic appear to have given up standing to bring the present challenge" because Tulsa Women's Reproductive Clinic LLC and Dr. Braid closed the Tulsa facility. Ans. Br. at 22–23 n.15. This is false. Dr. Braid was forced to close his Tulsa clinic by the very abortion bans being challenged; he hopes to be able to resume providing services in Oklahoma should the Bans and the Vigilante Bans be held unenforceable. *See* Braid Rebuttal Aff. ¶¶ 3, 4 (Pets.' Supp. App. Ex. 4).

The Oklahoma legislature is fully capable of distinguishing between different stages of pregnancy without outright banning abortion for the entire period of pregnancy, as the 1910 and 2022 Bans do.[21] Section 1-745-5's prohibition of abortion after 22 weeks LMP is one example; the statute for "procuring destruction of unborn child," applicable to persons who performed an abortion on a woman "pregnant with quick child," which remained on the books until June 24, 2022, was another. Okla. Stat. Ann. tit. 21 § 714, repealed by Laws 2021, c. 308, § 1, eff. June 24, 2022. There is no need for concern that recognition of a right to reproductive choice would logically require that the choice be available for the full duration of a pregnancy, which was not the case under 50 years of *Roe*.

In short, Respondents' parade of horribles has no factual basis. It cannot justify depriving pregnant Oklahomans of their rights to determine whether and when they will bear a child.

B. The Conflicting 1910 and 2022 Bans Are Unenforceably Vague

1. This Court Has Jurisdiction to Hear Petitioners' Vagueness and Implied Repeal Arguments

Respondents' argument that this Court has no jurisdiction to interpret a statute with criminal penalties in a civil case such as this is a sham. As stated in *Ex parte Meek* (adjacent to the language cherry-picked in Respondents' brief): "[The Oklahoma Supreme Court] is not prohibited from ruling on any vagueness challenge to a criminal statute, especially one in the

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[21] Contrary to Respondents' assertion that Oklahoma courts have sought to protect unborn life "without regard to the stage of a pregnancy," Ans. Br. 12, the cases they cite from outside of the abortion context did not do so before viability. *See Hughes v. State,* 868 P.2d 730, 732, 1994 OK CR 3, 1111 (superseded by statute) ("We think that the better rule is that infliction of prenatal injuries resulting in the death of a viable fetus, before or after it is born, is homicide."); *Evans v. Olson*, 1976 OK 64, 550 P.2d 924, 928 ("Having here recognized a common-law negligence action to a surviving child suffering a prenatal injury, it must follow that a wrongful death action may be maintained for a viable fetus which is stillborn."); *State v. Green*, 2020 OK CR 18, ¶ 19, 474 P.3d 886, 893 ("In sum, we hold that just as a viable fetus may be the victim of a homicide or an assault with a dangerous weapon, so too may he or she be a victim of child neglect under the facts presented by this case."); *State v. Allen*, 2021 OK CR 14, ¶ 7, publication ordered, 2021 OK CR 13, ¶ 7, 487 P.3d 837 (same).

context of a civil case . . . . [I]f we hold an act generally to be repugnant to our Constitution, such a construction would be paramount and the law of the state of Oklahoma, even though it might be in conflict with the construction of the Criminal Court of Appeals." 1933 OK 473, 165 Okla. 80, 25 P.2d 54 at 55.

The Court of Criminal Appeals indeed has "exclusive appellate jurisdiction in criminal cases." Okla. Const. art. VII, § 4. But this is not a criminal case; it is a civil case raising a constitutional challenge. All of the cases cited by Respondents in support of their jurisdictional challenge arose out of criminal prosecutions, *Hinkle v. Kenny*, 1936 OK 582, 178 Okla. 210, 62 P.2d 621, 622; *State v. Russell*, 1912 OK 425, 33 Okla. 141, 124 P. 1092, 1093, *State v. Tolle*, 1997 OK CR 52, 945 P.2d 503, 504–05, or potential prosecutions, *Walters v. Oklahoma Ethics Comm'n*, 1987 OK 103, 746 P.2d 172, 180. And, in the context of criminal prosecutions, the "constitutionality or validity of a penal enactment that is to serve as a foundation for the prosecution ordinarily presents an issue which lies within the exclusive cognizance of the court in which the criminal charge is lodged." *Walters v. Oklahoma Ethics Comm'n*, 1987 OK 103, 746 P.2d 172, 180. While this Court has a practice of deferring to statutory constructions articulated by the Court of Criminal Appeals in criminal cases, *Ex parte Meek*, 1933 OK 473, 165 Okla. 80, 25 P.2d 54, 55, that practice does not deprive this Court of jurisdiction over civil cases properly brought before it.

Nor is this case a civil proceeding to enjoin a presently threatened or ongoing prosecution. Even if it were, this Court could hear this case because one of the clear circumstances in which it is "appropriate for a civil court in an equity proceeding to enjoin prosecution or enforcement under a criminal statute" is where the "statute or ordinance is void or unconstitutional," "rights would be destroyed" if "a criminal proceeding is allowed to

proceed," and "irreparable injury would be inflicted without an injunction." *Edmondson v. Pearce*, 2004 OK ¶ 14, 91 P.3d 605, 614; *Anderson v. Trimble*, 1974 OK 2, 519 P.2d 1352, 1355. Each of those elements is met here.

Respondents offer no support for their suggestion that only intrusions on what they term "independent vested constitutional rights" allow this Court to exercise jurisdiction over civil matters involving interpretation of criminal statutes. *See* Ans. Br. 24. To the contrary, in civil cases this Court has passed upon both criminal statutes alleged to be vague, *Edmondson*, 2004 OK ¶ 55, 91 P.3d 605 at 632; *In re Initiative Petition No. 366*, 2002 OK 21, ¶ 6, 46 P.3d 123, 126; and criminal statutes alleged to be repealed by implication, *Perrine v. State*, 1919 OK 22, 72 Okla. 18, 178 P. 97. The dichotomy is clear—it is the general province of the Court of Criminal Appeals to interpret penal laws in the context of the criminal cases that come before it; and it is within the general province of this Court to hear constitutional challenges to criminal statutes in civil cases such as this.

2. Respondents Cannot and Have Not Clarified the Conflicts Between the 1910 Ban, the 2022 Ban and the Vigilante Bans

Aside from mischaracterizing Petitioners' arguments and the Bans, Respondents never explain how "[a] person of ordinary intelligence" could have "a reasonable opportunity to know what is prohibited" by the overlapping abortions bans now in effect. *In re Initiative Petition No. 366*, 2002 OK ¶ 13, 46 P.3d at 128 (internal citation and quotation marks omitted).

Contrary to Respondents' distortions, Petitioners are not arguing that "inconsistent and overlapping criminal provisions" are never permissible. *See* Ans. Br. 25. Some inconsistent and overlapping criminal provisions may pose no vagueness issues, such as the statutes at issue in *State v. Haworth*, where the same conduct was punishable by two different statutes. 2012 OK CR 12, ¶ 4, 283 P.3d 311, 313. There, the criminalized conduct itself—homicide in the

commission of a traffic misdemeanor—was not vaguely defined. *Id.* The distinction here is that inconsistencies between the overlapping abortion bans have made the *criminalized conduct itself* vague. *Cf. Edmondson*, 2004 OK ¶ 50, 91 P.3d at 630 (no vagueness where statute clearly defined key terms imposing liability).

This Court has held that overlapping criminal provisions are constitutional "'[s]o long as [they] clearly define the conduct prohibited and the punishment authorized, the notice requirements of the Due Process Clause are satisfied.'" *Haworth*, 2012 OK CR ¶ 15, 283 P.3d at 317 (quoting *United States v. Batchelder*, 442 U.S. 114, 123 (1979)). But, as the U.S. Supreme Court explained in *United States v. Williams*, there is an important difference between statutes that penalize a defendant based on an incriminating fact that may be difficult to determine versus vague laws, which impose liability based on incriminating facts that are themselves "'indetermina[te].'" 553 U.S. 285, 306 (2008).

Here, the Bans fail to "unambiguously specify the activity proscribed and the penalties available upon conviction." *Batchelder*, 442 U.S. at 123. The overlapping and inconsistent nature of the Bans does not on its own render them vague—they are vague because their inconsistencies result in key components of culpability being insufficiently defined, including such fundamental questions as what constitutes an illegal abortion or a medical emergency. *See* Pets.' Br. 24-27. It is thus exactly what Respondents downplay as "diverg[ences] on criminal elements, definitions, or punishments," *see* Ans. Br. 27, that make the Bans vague. Further, while a scienter requirement can mitigate vagueness, *United States v. Welch*, 327 F.3d 1081, 1096 (10th Cir. 2003), four distinct and inconsistent scienter requirements clearly cannot. *See* Pets.' Br. 24–25. These ill-defined elements of culpability are made all the worse by the incompatible ranges of potential penalties. *Id.* at 27–28.

Respondents try to write off this imprecision by saying that the very real circumstances Petitioners have identified as confusing are simply the permissible "close cases" described in *Williams*. But this dodge misreads *Williams*—there, the permissible "close cases" referred to the difficulty a prosecutor may experience proving what is a clear objective element of the crime—not from "close cases" about *what constitutes a crime* under the statute. 535 U.S. at 305-06. Nowhere in their response do Respondents actually grapple with the terms of the Bans.

Further, Respondents erroneously suggest that this Court may not consider the impact of the different terms in the civil Vigilante Bans that are also in effect. As articulated by this Court in a case cited by Respondents, in "attempting to sort out the interplay between statutes . . . this Court may look to each part of the statute in question, to other statutes on the same or related subjects, to the evils and mischiefs to be remedied by these provisions, and to the natural or absurd consequences of any particular interpretation." *Haworth*, 2012 OK CR ¶ 12, 283 P.3d at 315.

Similarly, Respondents argue that the 2022 Ban cannot have impliedly repealed the 1910 Ban because the two statutes simply "produce different results or penalties based on the same facts." *See* State's Br. 26-27. But, as Petitioners have described, the 1910 and 2022 Bans have opposing scienter requirements, definitions, and penalties, rendering them "inconsistent, incompatible, and conflicting" such that they may not stand together. *McLean v. State*, 95 Okla. Crim. 271, 274, 244 P.2d 335, 338 (1952). That the statutes are irreconcilable is underscored by the fact that together the statutes create unconstitutional vagueness—thus, they are not merely different ways of criminalizing similar facts. *Cf. Haworth*, 2012 OK CR ¶ 12, 283 P.3d at 315 (finding that two statutes criminalizing similar conduct in similar ways could coexist where the overlapping nature was not otherwise unconstitutionally vague or otherwise

impermissible). Further supporting Petitioners' argument, the Trigger Ban enacted by the Oklahoma legislature manifests legislative intent for the 2022 Ban to replace the 1910 Ban. *See* Pets.' Br. 29.

C. Respondents Have Not Presented Any Credible Evidence that Can Refute Petitioners' Evidence of Harm Resulting from the 1910 and 2022 Bans

Respondents understate the impact of continuing an unwanted pregnancy to term on pregnant persons and their families, claiming that Petitioners are merely "trying to make something as commonplace and natural as pregnancy and childbirth sound as horrible as possible." Ans. Br. 19. The unfortunate reality, which Respondents want this Court to ignore, is that while a wanted pregnancy may be one of life's greatest joys, that is not true for all pregnancies. Respondents have provided no evidence whatsoever to refute Petitioners' ample evidence supporting the well-known facts that pregnancy and childbirth are life-altering events that can sometimes result in irreversible health conditions, including death.[22] Contrary to Respondents' assertion that such evidence is "irrelevant," Ans. Br. 28, in fact it is critical to understanding why the Bans must be held unconstitutional. The Court cannot determine whether Oklahomans' inherent liberty rights have been abridged without taking stock of why these rights are implicated in the first place.

In re K.K.B. provides just one example of this common sense principle. There, the Court considered evidence of the "many toxic and severe primary and side effects accompanying the use of psychotropic drugs."[23] 1980 OK n.3, 609 P.2d 748 n.3. There would

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[22] Respondents quibble that there are unidentified "evidentiary deficiencies," Ans. Br. at 28 n.19, but Petitioners' evidence, similar to that considered by the Court in *In re K.K.B.*, clearly would be admissible under the Oklahoma Rules.

[23] Respondents' gesture to a medical director's personal beliefs in an unrelated D&E case have no relevance here; and, in any event, that same medical director made clear that, despite her personal beliefs, it did not affect how she felt about providing abortions. Resps.' App. I 136:10-14.

be nothing controversial about the Court considering analogous evidence here. Respondents instead try to erase pregnant Oklahomans from the equation, and to distract the Court with inflammatory rhetoric about the supposed "liberty interests" of the "unborn." Ans. Br. 29-30. But Respondents do not and cannot contend that unborn fetuses are "persons" endowed with liberty interests. Respondents cannot place the hypothetical interests of future citizens above the actual interests of its current ones, and the Bans would therefore not survive even rational basis review, much less the strict scrutiny to which they are entitled. Pet. Br. 21-23.

Instead of providing any evidence to counter the harms Petitioners have shown, Respondents try to cast doubt on the safety of abortion—efforts this Court has already rejected. *See Oklahoma Call for Reproductive Justice v. Cline*, 2019 OK 33 ¶¶ 31, 38, 441 P.3d 1145, 1157, 1159 (finding that there are "little to no significant health-related problems" associated with FDA-approved protocol for medication abortion and that "there is no established link between medical termination and fatal infection"). The question is not whether pregnancy is generally safe, or whether abortion—which is less risky than childbirth, Upadhyay Rebuttal Aff. ¶ 14—carries some risks. The proper question is whether the State of Oklahoma can force its citizens to carry a pregnancy to term against their will, thereby taking on risks to which they have not consented. Respondents' bogus assertions about abortion's safety are a sideshow because Respondents do not contend that the Bans were enacted in order to protect the health of pregnant persons. To the contrary, Respondents highlight this Court's decision in *Bowlan v. Lunsford*, 1936 OK 158, 54 P.2d 666, 668, which held that it was "false or at least not supported" to claim that the 1910 Ban "was designed to protect the woman."[24]

[24] In *Bowlan*, this Court affirmed the dismissal of a claim for damages suffered by the plaintiff from an illegal abortion on the ground of *in pari delicto*. The case did not raise a constitutional challenge to the 1910 Ban. Respondents' reliance on this Court's statement that the 1910 Ban was designed "for the protection of the unborn

Apart from being irrelevant, Respondents' affidavits are unreliable.

First, they are wildly out of step with mainstream medical literature and the positions of numerous credible national and other medical organizations, *including the Oklahoma State Medical Association*. *See* Brief of Amici Curiae American College of Obstetricians and Gynecologists, *et al.*, 3, 5–6, 8–10; *see also* Upadhyay Rebuttal Aff. ¶¶ 5–10. The evidence overwhelmingly makes clear that legal abortions in the United States "are safe and effective."[25] Both the National Academies of Sciences, Engineering and Medicine and the American Psychological Association have rebutted assertions that abortion causes mental health problems.[26] Accepting Respondents' affiants' claims at face value would require this Court to conclude that these preeminent groups are charlatans, and that some of the most lauded academic studies on abortion are unreliable. Skop Aff. ¶¶ 11-13; Mulcaire-Jones Aff. ¶¶ 24-32; Ans. Br. 28-29. Instead, it is Respondents' affiants' testimony on these very topics that has been held to be unreliable in numerous court proceedings.[27]

Second, they rely upon outdated and international data that is not relevant to the current practices regarding the provision of abortion in the United States (and Oklahoma). Skop Aff.

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child" thus has no bearing on whether that asserted purpose can withstand judicial scrutiny. Ans. Br. 5 (quoting *Bowlan*, 1936 OK ¶ 11, 54 P.2d at 668).

25 NAS, Safety and Quality of Abortion Care at 77.

26 NAS, Safety and Quality of Abortion Care at153; American Psychological Association Task Force on Mental Health and Abortion (2008). Report of the APA Task Force on Mental Health and Abortion, at 92.

27 *See, e.g.*, *MKB Mgmt. Corp. v. Burdick*, 855 N.W.2d 31, 68 (N.D. 2014) ("Dr. Harrison's opinions lack scientific support, tend to be based on unsubstantiated concerns, and are generally at odds with solid medical evidence."); *Planned Parenthood Ark. & E. Okla. v. Jegley*, No. 4:15-cv-00784, 2018 WL 3029104, at *42 (E.D. Ark. June 18, 2018) (noting the opinion Dr. Harrison offered "appears inaccurate and incomplete"); *Little Rock Fam. Plan. Servs.*, 397 F. Supp. 3d 1213, 1268, 1300, 1323 (noting that Dr. Harrison "cite[d] no source material or scientific studies" in support of an assertion in her declaration); *Planned Parenthood of Sw. & Central Fla. v. Florida*, No. 2022 CA 912 (Fla. Circuit Ct. July 5, 2022), Order ¶ 68 ("Overall, Dr. Skop has no experience in performing abortions; admitted that her testimony on the risks of certain abortion complications was inaccurate and overstated, or based on data from decades ago; admitted that her views on abortion safety are out of step with mainstream medical organizations; and provided no credible scientific basis for her disagreement with recognized high-level medical organizations in the United States.").

¶ 15; Mulcaire-Jones Aff. ¶ 41; Harrison Aff. ¶¶ 19-20; *see* Upadhyay Rebuttal Aff. ¶ 11. Nor do these foreign studies support the affiants' conclusions. For example, the authors of the Finnish study relied upon by Dr. Mulcaire-Jones concluded that "[the] [r]ate of serious, 'real' complications is rare . . . ."[28]

Third, all but one of Respondents' affidavits, as well as the relied-upon deposition testimony, are repurposed from other cases and say little about the issues before this Court.[29] Dr. Harrison's affidavit takes issue solely with the safety of medication abortion, which she suggests could be partially alleviated by increased contact with physicians—an outcome that is impossible under Oklahoma's current statutory scheme. Harrison Aff. ¶¶ 34-38. Dr. Shuping's and Dr. Skop's affidavits are similarly focused primarily on the importance of having appropriate guardrails around medication abortion. *See* Shuping Aff. ¶ 2; *id.* ¶ 86; Skop Aff. ¶ 36. None of Respondents' affidavits seriously dispute that pregnancy is a risky endeavor, and none of them say anything about the health impacts of a total abortion ban.

Finally, Respondents' claim that Oklahoma's dismal maternal mortality rates are somehow proof that abortion is not safe is completely backwards. *See* Mulcaire-Jones Aff. ¶ 44; Ans. Br. 30. General maternal mortality statistics taken from a time when abortion was legal and accessible in Oklahoma say *nothing* about abortion safety, but only emphasize the risks of childbirth. Upadhyay Rebuttal Aff. ¶ 18. If any inference can be made, it is that there will be more maternal deaths as more people are forced to carry pregnancies to term against

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[28] Upadhyay Rebuttal Aff. ¶ 12 (quoting Maarit Niinimaki, *et al.*, *Reply* to *Letter to the Editor* Regarding *Immediate Complications after Medical Compared with Surgical Termination of Pregnancy* by Mary Fjerstad, *et al.*, 115(3) Obstetrics & Gynecology 660 (2010)).

[29] In an abundance of caution, Petitioners are submitting the expert affidavits that were submitted in these other lawsuits to refute the three repurposed affidavits. *See* Pets.' Supp. App. Exs. 6-9.

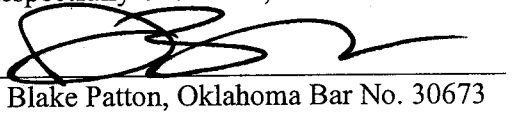
their will, highlighting the crippling confusion and public health harms that will continue if the Bans are allowed to stand.

III. CONCLUSION

For the foregoing 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 sufficient to prevent Respondents from enforcing them in any way.

Dated: October 3, 2022

Respectfully Submitted,



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