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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.

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SUPREME COURT
STATE OF OKLAHOMA

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CLERK

Case No. PR-120,543

**PETITIONERS' RESPONSE TO AMICI CURIAE BRIEFS OF (1) PROFESSOR
CARTER SNEAD, ET AL. AND (2) THE AMERICAN CENTER FOR LAW & JUSTICE,
ET AL.**

Blake Patton, Oklahoma Bar No. 30673
WALDING & PATTON PLLC
518 Colcord Drive, Suite 100
Oklahoma City, OK 73102

Attorney for Petitioners

Diana Salgado*
PLANNED PARENTHOOD
FEDERATION OF AMERICA
1110 Vermont Ave., NW, Suite 300
Washington, DC 20005

Camila Vega*
PLANNED PARENTHOOD
FEDERATION OF AMERICA
123 Williams St., 9th Floor
New York, NY 10038

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

* Out-of-state Registered Attorney
† Out-Of-State Registration Pending

Linda C. Goldstein*
Jenna C. Newmark*
Meghan Agostinelli†
Samantha DeRuvo*
DECHERT LLP
Three Bryant Park
1095 Avenue of the Americas
New York, NY 10036

Jerome Hoffman*
Rachel Rosenberg*
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104-2808

Jonathan Tam*
DECHERT LLP
One Bush Street, Suite 1600
San Francisco, CA 94104-4446

Rabia Muqaddam*
CENTER FOR REPRODUCTIVE RIGHTS
199 Water Street, 22nd Floor
New York, NY 10038

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

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Blake Patton, Oklahoma Bar No. 30673
WALDING & PATTON PLLC
518 Colcord Drive, Suite 100
Oklahoma City, OK 73102

Attorney for Petitioners

Diana Salgado*
PLANNED PARENTHOOD
FEDERATION OF AMERICA
1110 Vermont Ave., NW, Suite 300
Washington, DC 20005

Camila Vega*
PLANNED PARENTHOOD
FEDERATION OF AMERICA
123 Williams St., 9th Floor
New York, NY 10038

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

* Out-of-state Registered Attorney
‡ Out-Of-State Registration Pending

Linda C. Goldstein*
Jenna C. Newmark*
Meghan Agostinelli‡
Samantha DeRuvo*
DECHERT LLP
Three Bryant Park
1095 Avenue of the Americas
New York, NY 10036

Jerome Hoffman*
Rachel Rosenberg*
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104-2808

Jonathan Tam*
DECHERT LLP
One Bush Street, Suite 1600
San Francisco, CA 94104-4446

Rabia Muqaddam*
CENTER FOR REPRODUCTIVE RIGHTS
199 Water Street, 22nd Floor
New York, NY 10038

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

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I. INTRODUCTION

Amici Carter Snead and the American Center for Law & Justice invite this Court to shirk its role of interpreting the Oklahoma Constitution by advancing what amounts to an “abortion exception” to judicial review. *See* Brief of Professor Carter Snead, *et al.* as Amici Curiae In Opposition to Petitioners (“Snead Br.”) at 1-2, 5, 7-8; Brief of the American Center for Law & Justice and 41 Members of the Oklahoma Senate and House of Representatives as Amici Curiae in Support of Respondents (“ACLJ Br.”) at 4-7. Few arguments could be more profoundly wrong, for “when the constitutionality of a statute is put at issue,” it is precisely the “function” of this Court to determine “the validity or invalidity of the statute.” *Torres v. Seaboard Foods, LLC*, 2016 OK 20, ¶ 17, 373 P.3d 1057, 1067, as corrected (Mar. 4, 2016) (internal citation omitted). Professor Snead’s further contention that legal “personhood” begins at conception, founded on his theory of bioethics, is contradicted by the text of the Oklahoma Constitution, by contemporary statements, and by Oklahoma law.

II. ARGUMENT

A. The Oklahoma Supreme Court Has the Authority to Interpret the Oklahoma Constitution and to Invalidate Statutes that Conflict with It

Amici’s concern that this Court would “strip” the Oklahoma Legislature of its legislative authority by recognizing pregnant persons’ rights to liberty and bodily autonomy, *see* ACLJ Br. at 4-7, Snead Br. at 8, overlooks this Court’s “solemn yet urgent duty” to interpret the Oklahoma Constitution and invalidate laws that are inconsistent with it. *Beason v. I. E. Miller Servs., Inc.*, 2019 OK 28, ¶ 15, 441 P.3d 1107, 1113 (internal citation and quotations omitted); *accord Lafalier v. Lead-Impacted Communities Relocation Assistance Trust*, 2010 OK 48, ¶ 15, 237 P.3d 181, 188; *Torres v. Seaboard Foods, LLC*, 2016 OK 20, ¶ 26, 373 P.3d 1057, 1071, as corrected (Mar. 4, 2016) (“One well-known principle is that a legislature’s

authority to create or abolish a right or benefit does not mean that the legislature has the authority to create an unconstitutional condition related to that right or benefit.”).

Amici erroneously suggest that the U.S. Supreme Court’s statement in *Dobbs v. Jackson Women’s Health Organization*, 213 L. Ed. 2d 545, 142 S. Ct. 2228, 2279 (2022), that “the authority to regulate abortion must be returned to the people and their elected representatives,” somehow deprives this Court of its “solemn yet urgent duty” to interpret the Oklahoma Constitution. *See* ACLJ Br. at 6, Snead Br. at 8. But *Dobbs* cannot draw bounds on this Court’s authority. This Court has long recognized that its interpretation of the Oklahoma Constitution is not constrained by the United States Supreme Court’s interpretation of the U.S. Constitution. Rather, “the protections of the Federal Constitution [act] as a floor rather than a ceiling...State constitutions are free to do much more.” Yvonne Kauger, *Oklahoma, Reflections on Federalism: Protections Afforded by State Constitutions*, 27 Gonz. L. Rev. 1, 2, 7 (1992) (“*Reflections on Federalism*”). For this reason, “and because state courts perform over 95% of the litigation in this country, state courts must assume their role as the first line of defense against interference with constitutional guarantees.” *Id.* at 2 (1992).¹ Because Oklahoma’s Constitution does not permit laws that destroy the “right of the 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,” *see* Pet. Br. at 1 (citing *In re K.K.B.*, 1980 OK 7, 609 P.2d 747, 749, 752),² it is this Court’s prerogative to invalidate the 1910 and 2022 Bans.

¹ *See also* U.S. Courts, Federal Judicial Caseload Statistics 2017, available at <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2017> (292,000 civil cases filed in federal court in 2017); *cf.* Richard Y. Schauffler, et al., *Examining the Work of State Courts: An Overview of 2015 State Court Caseloads* 4 (2016) (15 million civil cases filed in state court in 2015).

² Amici mischaracterize this Court’s decisions in *Okla. Coalition for Reprod. Justice v. Cline*, 2019 OK 33, ¶ 17, 441 P.3d 1145, 1151; *id.* ¶¶ 16-43, 441 P.3d at 1151-61 and *Bowlan v. Lunsford*, 1936 OK 158, ¶ 17,

Amici’s contention that the act of judicial review of the 1910 and 2022 Bans would somehow “short-circuit the democratic process,” *see* ACLJ Br. at 7-8, Snead Br. at 8, similarly misstates the role of this Court under the Oklahoma Constitution. This court cannot avoid the obligation to interpret the Oklahoma Constitution merely because the 1910 and 2022 Bans were approved by the Oklahoma Legislature. Rather, the Oklahoma Constitution itself provides a democratic check on this Court’s Constitutional rulings, in the form of its liberal amendment process. *See* Okla. Const. art. XXIV; *Reflections on Federalism*, 27 Gonz. L. Rev. at 13 (noting that “[c]onstitutional review is legitimized by the power and final responsibility of state citizens to amend their constitutions”).³ Indeed, after the Kansas Supreme Court held in *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 440 P.3d 461 (2019) that the Kansas Constitution’s Lockean guarantee of “inalienable” liberty protected the right to abortion, there was an effort—albeit an unsuccessful one—to amend the Kansas Constitution to eliminate that right. *See* Pet. Reply at 12, n.12.

B. Professor Snead’s Bioethical Framework Conflicts with Myriad Religious Traditions and Oklahoma Law, including the 1910 and 2022 Bans

The normative framework set forth by Professor Snead, the Roman Catholic Archdiocese of Oklahoma City, and the Diocese of Tulsa—that legal personhood begins at conception—“fail[s] to respect the diversity of religious views regarding when and how life begins and the moral implications of terminating a pregnancy.” Brief of Rev. Barbara Prose,

54 P.2d 666, 668 by suggesting that this Court has reached the question of whether the Oklahoma Constitution protects the right to an abortion and has “never found” such a right. ACLJ Br. at 2. In fact, *Cline* held that this Court did not need to determine whether there is a right to abortion under the Oklahoma Constitution, because it has relied on U.S. Supreme Court precedent recognizing the right under federal law. Likewise, 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.

³ Oklahoma Supreme Court Justices are also democratically accountable directly to Oklahomans. Okla. Const. art. VII-B, § 2.

et al. as Amici Curiae in Support of Petitioners at 2. Indeed, even within the Catholic faith, there are and have been divergent views regarding the “nature and timing of the beginning of life.” *See id.* at 3-4. Far from acknowledging this diversity of beliefs, amici purport to impose a single view of when life begins on all pregnant Oklahomans, destroying their rights to make decisions about their pregnancies according to their own faith and beliefs.

Amici’s argument that an unborn embryo or fetus is “indisputably...a living individual” in biological and ideological terms also ignores the fact that Oklahoma *law* has never treated an unborn embryo or fetus as a legal “person” endowed with “natural rights.” *See* Pet. Br. at 19-20. Indeed, it has provided the exact opposite. *See* Okla. Stat. tit. 15 § 15 (providing that an unborn fetus is not deemed to be a person entitled to rights under law until after its birth). John Locke, the philosophical father of the “natural rights” guarantees embodied in the Oklahoma Constitution, believed that such rights belonged to persons who had been “born.” Pets.’ Reply Br. at 14 (quoting Locke, *Two Treatises of Government*, Bk. II, § 190).⁴ Nor do amici address the text of the Oklahoma Constitution, which includes over 50 references to the word “person” in its Bill of Rights, and over 150 references in other articles, none of which could be reasonably interpreted to encompass unborn embryos or fetuses. *See* Pet. Br. at 22. Indeed, even 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.

Amici’s radical argument is not even consistent with the 1910 and 2022 Bans that they purport to support. To the extent amici take the position that abortion is *never* permissible, *see*

⁴ Contemporaneous accounts of the Oklahoma Constitutional Convention suggest that the Framers shared that view. *See* Pets.’ Br. at 7, n.5 (quoting “To Study Bill of Rights Provisions,” *The Daily Oklahoman*, Jan. 6, 1907, at 4).

Snead at 1, 7, they directly conflict with both the 1910 Ban and the 2022 Ban, which each permit abortion under different (and conflicting) emergency exceptions.⁵ Amici do not address—much less resolve—this discrepancy, confirming that their philosophical position cannot serve to justify the Bans under the Oklahoma Constitution.

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 13, 2022

Respectfully Submitted,



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

Attorney for Petitioners

⁵ See Okla. Stat. Ann. tit 21, § 861 (permitting abortion to preserve the “life” of the pregnant person); S.B. 612 § 1(A)(2) (permitting 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.”).

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

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

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

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

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

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

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

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

*Out-Of-State Attorney Applications Granted
‡ Out-Of-State Attorney Application
Forthcoming

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 13th day of October, 2022 a true and correct copy of the foregoing was served via email to the following:

Zach West
Solicitor General
Audrey A. Weaver
Assistant Solicitor General
Office of the Oklahoma Attorney General
313 N.E. 21st Street
Oklahoma City, OK 73105
Zach.west@oag.ok.gov
Audrey.weaver@oag.ok.gov

Attorneys for Respondents

The undersigned further certifies that on this 13th day of October, 2022, a true and correct copy of the foregoing was served via U.S. mail to the following:

Teresa S. Collett
University of St. Thomas School of Law
MSL 400, 1000 LaSalle Ave
Minneapolis, MN 55403

*Attorney for Amicus Curiae, the
Prolife Center at the University
of St. Thomas*

John Paul Jordan
The Jordan Law Firm
PO Box 850342
Yukon, OK 73085

*Attorney for Amicus Curiae, the Oklahoma
Faith Leaders*

Wyatt Mcguire
J. Blake Johnson
Overman Legal Group LLC
809 NW 36th Street
Oklahoma City, OK 73118

Lucas Fortier
Wilmer Cutler Pickering Hale and Dorr
LLP
60 State Street
Boston, MA 02109

Kimberly Parker
Wilmer Cutler Pickering Hale and Dorr
LLP
1875 Pennsylvania Ave, NW
Washington, DC 20006

Molly Meegan
American College of Obstetricians and
Gynecologists
409 12th St. SW
Washington, DC 20024

*Attorneys for Amicus Curiae,
American College of Obstetricians
and Gynecologists, the American
Medical Association, and the Society
for Maternal-Fetal Medicine*

Brently C. Olsson
Cheek Law Firm, P.L.L.C
311 North Harvey Avenue,
Oklahoma City, OK 73102

Christopher E. Mills
Spero Law LLC
557 East Bay St.
Charleston, SC 29413

*Attorneys for Amicus Curiae, Gateway
Women's Resource Center, Inc.*

Jay Alan Sekulow
Stuart J. Roth
Olivia F. Summers
Jordan Sekulow
Benjamin P. Sisney
American Center For Law & Justice
201 Maryland Ave., NE
Washington, DC 20002

Edward L. White, III
Erik M. Zimmerman
American Center For Law & Justice
3001 Plymouth Road, Suite 203
Ann Arbor, MI 48105

*Attorneys for Amicus Curiae, the
American Center for Law & Justice*

Erin Donovan
Erin Donovan and Associates
1616 South Main Street
Tulsa, OK 74119

*Attorney for Amicus Curiae, Professor Carter
Snead, the Roman Catholic Archdiocese of
Oklahoma City, and Diocese of Tulsa*

Steven Lewis
Steven Lewis, PLLC
3233 E. Memorial Rd., Ste 105
Edmond, OK 73013

*Attorney for Amicus Curiae, Oklahoma
Business Leaders*

Eugene M Gelernter
Patterson Belknap Webb & Tyler, LLP
1133 Avenue of the Americas
New York, NY 10036

*Attorney for Amicus Curiae, Rev. Barbara
Prose and Oklahoma Faith Leaders*

Charles E. Wetsel
Teague & Wetsel, PLLC
1741 West 33rd Street, Suite 120
Edmond, OK 73013

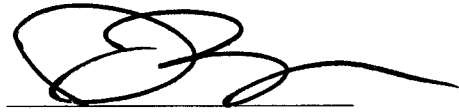
*Attorney for Amicus Curiae, Frederick
Douglass Foundation and National
Hispanic Christian Leadership
Conference*

Jay W. Barnett
Barnett Legal, PLLC
3404 NW 135th Street
Oklahoma City, OK 73120

*Attorney for Amicus Curiae, Oklahoma
Physicians*

Leah R. Bruno
Dentons US LLP
233 S. Wacker Drive, Suite 5900
Chicago, IL 60606

*Attorney for Amicus Curiae, Erika Lucas and
Vest Her, Inc.*



J. BLAKE PATTON