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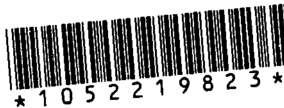

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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

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

Petitioners,

v.

THE STATE OF OKLAHOMA, *et al.*,

Defendants/Appellees.

Case No. PR-120376

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PETITIONERS' BRIEF IN CHIEF

JUNE 20, 2022

J. Blake Patton, OK Bar # 30673
WALDING & PATTON PLLC
518 Colcord Drive, Suite 100
Oklahoma City, OK 73102

Attorney for Petitioners

Jennifer Sandman*
Sarah Mac Dougall*
PLANNED PARENTHOOD FEDERATION OF AMERICA
123 William St., 9th Floor
New York, NY 10038
Phone: (212) 261-4584
jennifer.sandman@ppfa.org
sarah.macdougall@ppfa.org

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

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

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

*Out-of-state Registered Attorneys

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123 William St., 9th Floor
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jennifer.sandman@ppfa.org
sarah.macdougall@ppfa.org

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Fax: (917) 637-3666
rmuqaddam@reprorights.org
mmehdizadeh@reprorights.org
ccoquillette@reprorights.org

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*Out-of-state Registered Attorneys

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I. PRELIMINARY STATEMENT

For weeks, Oklahoma House Bill 4327 ("H.B. 4327") and Senate Bill 1503 ("S.B. 1503," together with H.B. 4327, the "Acts") have nullified the rights of Oklahomans seeking abortion, abortion providers, and those who support abortion access. The Oklahoma Legislature has achieved this result by attempting to design the Acts to evade challenge, including by disavowing traditional enforcement mechanisms in favor of empowering the public at large to file frivolous and harassing lawsuits against any person suspected of being involved with an abortion. Although a person sued under the Acts can assert their unconstitutionality defensively, the Acts purport to strip the state courts of authority to grant any declaratory or injunctive relief that would prevent the filing of future lawsuits—including those about the very same conduct. The Acts are thus a direct attack on the supremacy of the Oklahoma Constitution and the authority of this Court and must be declared unconstitutional. Respondents must also be forbidden from continuing to implement them in any way to preserve Oklahoma's system of government and the rights of Petitioners and the Oklahomans they represent.

II. SUMMARY OF THE RECORD

A. Procedural History

On April 28, 2022, the Oklahoma Legislature passed S.B. 1503 with an immediate effective date. The same day, Petitioners filed this original jurisdiction proceeding and sought emergency temporary injunctive relief barring implementation of S.B. 1503 in order to continue seeing patients that were scheduled throughout that week. On May 3, the Court denied Petitioners' request for emergency relief. That same day, Governor Stitt signed S.B. 1503 into law, and it took effect. Petitioners cancelled the appointments of all patients past the earliest stages of pregnancy. On May 6, Petitioners requested reconsideration of the Court's order

denying their motion for emergency temporary injunctive relief or, in the alternative, a temporary writ of prohibition. On May 11, this Court held that Petitioners' motion for reconsideration would not be considered but that their application for relief on the merits remains pending. On May 19, the Court granted Petitioners' motion for supplemental briefing and set a briefing schedule.

Also on May 19, 2022, the Oklahoma Legislature passed H.B. 4327 with an immediate effective date. The Governor signed H.B. 4327 on May 25, 2022, and it took effect. Since that time, abortion has been entirely prohibited in Oklahoma. On May 26, Petitioners filed a supplemental original jurisdiction proceeding against H.B. 4327, a supplemental motion for emergency temporary relief, and a motion to consolidate briefing on both S.B. 1503 and H.B. 4327. The Court ordered that the Respondents could file a written response to the supplemental motion for emergency temporary relief by June 1, 2022. On June 1, the Oklahoma Attorney General filed a response and objection; Respondents Rick Warren and Don Newberry also filed responses, and Respondents Lisa Hannah, Melody Harper, Patti Barger, and Kimberly Berry filed a motion to dismiss. Petitioners filed a response to that motion to dismiss on June 14. None of the other 71 Oklahoma court clerks have responded.

B. Petitioners

Dr. Alan Braid is a board-certified OB/GYN who owns Tulsa Women's Reproductive Clinic, LLC ("Tulsa Women's") and provides abortions there. Affidavit of Alan Braid, M.D. (attached as Exhibit 3 to Petitioners' Appendix) ("Braid Aff.") ¶ 1. Tulsa Women's, Comprehensive Health of Planned Parenthood Great Plains, Inc., and Planned Parenthood of Arkansas & Eastern Oklahoma are licensed Oklahoma abortion facilities that provide medication and procedural abortion (together with Dr. Braid, the "Clinic Petitioners"). *Id.*; Affidavit of Emily Wales (attached as Exhibit 4 to Petitioners' Appendix) ("Wales Aff.") ¶¶ 2-

3. Collectively, the Clinic Petitioners provide the majority of abortions in Oklahoma. Braid Aff. ¶ 12; Wales Aff. ¶ 8.

Clinic Petitioners are committed to providing high-quality reproductive healthcare to their patients and believe that access to abortion is essential for the health and well-being of Oklahomans and their families. Braid Aff. ¶¶ 9, 11, 23-24; Wales Aff. ¶ 21. However, with the passage of the Acts and the looming threat of civil litigation, Clinic Petitioners have been forced to stop providing abortions in Oklahoma and have had to turn away distraught patients seeking care at their facilities. Supplemental Affidavit of Emily Wales (attached as Exhibit 7 to Petitioners' Second Supplemental Appendix) ("Wales Suppl. Aff.") ¶¶ 2-3; Supplemental Affidavit of Andrea Gallegos (attached as Exhibit 9 to Petitioners' Second Supplemental Appendix) ("Gallegos Suppl. Aff.") ¶¶ 6-11. Clinic Petitioners have long faced hostility and harassment, and the Clinic Petitioners themselves are regularly the target of protesters. Braid Aff. ¶¶ 25-28; Wales Aff. ¶¶ 20-21. Given this history, Clinic Petitioners credibly fear being sued by vigilantes under the Act, despite the fact that abortion care is constitutionally protected.

Oklahoma Call for Reproductive Justice ("OCRJ") is a 501(c)(4) nonprofit founded in 2010 to advance reproductive justice and protect access to reproductive healthcare, including abortion, in Oklahoma. Affidavit of Priya Desai (attached as Exhibit 2 to Petitioners' Appendix) ("OCRJ Aff.") ¶ 1. OCRJ advances its mission to promote reproductive justice in Oklahoma in several ways, including by lobbying against bills that restrict abortion and other reproductive healthcare, and supporting the few Oklahoma bills that help pregnant people. *Id.* ¶ 6. OCRJ also provides education and information in the community and communicates directly with Oklahomans, including by publishing a zine, *How to Get an Abortion in Oklahoma*. *Id.* ¶ 7.

C. Respondents

The State of Oklahoma is obliged to uphold the Oklahoma Constitution. "The rule of law requires" that the "Constitution of this State" be upheld "regardless of what is popular or politically expedient." *Prescott v. Okla. Capitol Pres. Comm'n*, 2015 OK 54, ¶ 17 n.53, 373 P.3d 1032, 1051 n.53. The remaining 77 Respondents are all Oklahoma state court clerks who are each responsible for filing and docketing cases presented to them. Okla. Stat. Ann. tit. 12, § 29(A). This Court exercises "general superintending control over all inferior courts," including state court clerks. Okla. Const. art. VII, § 4. Court clerks in Oklahoma have both ministerial and discretionary duties. *Speight v. Presley*, 2008 OK 99, ¶ 14, 203 P.3d 173, 177. In particular, Oklahoma clerks are empowered by statute to "refuse to file any document presented for filing if the clerk believes that the document constitutes sham legal process . . . ." Okla. Stat. Ann. tit. 12, § 29. If a clerk exercises their discretion and refuses to file a document, the would-be filer can petition the district court for a writ of mandamus to compel the clerk to file the document. *Id.* State court clerks are subject to extraordinary writs in the exercise of both their ministerial and discretionary duties, including with respect to sham legal process. *See infra* at 28-29.

D. The Challenged Laws

1. H.B. 4327

H.B. 4327 prohibits abortions entirely in Oklahoma. The only exceptions are for abortions "necessary to save the life of a pregnant woman in a medical emergency" or if the "pregnancy is the result of rape, sexual assault, or incest," but only if such a crime has "been reported to law enforcement." H.B. 4327 § 2.

H.B. 4327 creates liability for "[p]erform[ing] or induc[ing] an abortion in violation of" the total ban. *Id.* § 5(A)(1), as well as for "[k]nowingly engag[ing] in conduct that aids or

abets" performance or inducement of such an abortion. *Id.* § 5(A)(2). Although H.B. 4327 does not define aiding or abetting, it provides that "paying for or reimbursing the costs of an abortion" is prohibited. *Id.* H.B. 4327's aiding-and-abetting liability applies "regardless of whether the person knew or should have known that the abortion would be performed or induced in violation of" the law. *Id.* Even if someone does not actually perform a prohibited abortion or aid and abet a prohibited abortion, the bill provides that they can still be sued if they merely *intend* to do so. *Id.* § 5(A)(3).

2. S.B. 1503

S.B. 1503 prohibits a physician from providing an abortion after "detect[ing] a fetal heartbeat" or if the physician "failed to perform a test to detect a fetal heartbeat." *Id.* § 4(A). S.B. 1503 defines "fetal heartbeat" as "cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac." S.B. 1503 § 2(1). In a typically developing pregnancy, ultrasound can generally detect cardiac activity beginning at approximately 6 weeks LMP.[1] No embryo is viable at 6 weeks LMP or at any other point when cardiac activity can first be detected by ultrasound. By prohibiting abortion after approximately 6 weeks LMP, S.B. 1503 bans abortion roughly four months before viability.

S.B. 1503 contains no exception for pregnancies that result from rape or incest. *Id.* § 5(A). The only exception is for a medical emergency. *Id.* Section 5 of S.B. 1503 imposes

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[1] The cells that produce the early cardiac activity described in S.B. 1503, however, have not yet formed a "heart." The term "heartbeat" in S.B. 1503 more accurately refers to electrical impulses present before full development of the cardiovascular system. Similarly, a developing pregnancy is properly referred to as an "embryo" until approximately 10 weeks LMP, when it becomes a "fetus." So, despite S.B. 1503's use of the phrase "fetal heartbeat," it forbids abortion even when electrical impulses are detected in an embryo. *See* S.B. 1503 §§ 2-4. Because neither "fetal" nor "heartbeat" is accurate medical terminology at this stage of pregnancy, Petitioners refer to the prohibition against providing an abortion after the detection of a "fetal heartbeat" as a "6-week ban."

additional reporting requirements on abortions performed because of a medical emergency. *Id.* § 5(B)-(C).

Like H.B. 4327, S.B. 1503 creates liability for "[p]erform[ing] or induc[ing] an abortion in violation of" the 6-week ban. S.B. 1503 § 9(A)(1). It also similarly creates liability for aiding and abetting an abortion that violates the act, regardless of whether a person knew or should have known that an abortion would be performed, but does not define what constitutes aiding or abetting. *Id.* § 9(A)(2).

3. Enforcement Under H.B. 4327 and S.B. 1503

H.B. 4327 and S.B. 1503 are enforced via nearly identical systems of civil lawsuits skewed against defendants that depart from the norms of Oklahoma civil procedure. H.B. 4327 and S.B. 1503 expressly preclude the State or any political subdivision, as well as officers or employees of a state or local government entity in Oklahoma, from directly enforcing the abortion ban. Instead, the Acts create a private, civil enforcement mechanism: "[a]ny person, other than the state, its political subdivisions, and any officer or employee of a state or local governmental entity in this state, may bring a civil action against any person" who performs a prohibited abortion, aids or abets a prohibited abortion, or intends to engage in these activities. H.B. 4327 § 5(A); S.B. 1503 § 9(A). Besides government officials, the only people not permitted to initiate an enforcement action under H.B. 4327 and S.B. 1503 are those "who impregnated a woman seeking an abortion through an act of rape, sexual assault, incest," or certain other crimes. H.B. 4327 § 5(K)(4); S.B. 1503 § 9(K)(4). The Acts do not permit suits against abortion patients, H.B. 4327 § 5(K)(1); S.B. 1503 § 9(K)(1), but they provide a ready tool for abusive and manipulative partners or family members to try to block a patient's abortion decision. Under both Acts, if such individuals know about a patient's plan to obtain

an abortion, they could sue the patient's abortion provider, or anyone else who "intends" to assist with that abortion, to try to prevent the patient from accessing care. H.B. 4327 § 5(A)(3); S.B. 1503 § 9(A)(3).

The Acts impose mandatory draconian penalties and provide extreme incentives for abortion opponents or windfall seekers to file suit. Where a claimant under either Act prevails, "the court *shall* award": (1) "[i]njunctive relief sufficient to prevent" future violations or conduct that aids or abets violations; (2) "[s]tatutory damages" to the claimant "in an amount of *not less than* Ten Thousand Dollars ($10,000) for each abortion" that was provided or aided and abetted; (3) "[n]ominal and compensatory damages" if the claimant "suffered harm . . . including but not limited to loss of consortium and emotional distress"; and (4) the claimant's "costs and attorney fees." H.B. 4327 § 5(B); S.B. 1503 § 9(B) (emphases added). The Acts impose no cap on the "statutory damages," and provide no room for discretion of judges or juries in determining what amount of damages to award.

H.B. 4327 and S.B. 1503's rules for their enforcement proceedings sharply diverge from those normally-applicable rules governing civil litigation in Oklahoma.

- ***Statewide venue***: The Acts allow claimants to file enforcement lawsuits in their home counties and then veto transfer to a more appropriate venue. As a result, abortion providers and alleged aiders and abettors could be forced to defend themselves in multiple, simultaneous enforcement proceedings in far-flung courts across the state. H.B. 4327 § 7; S.B. 1503 § 11.
- ***Draconian fee-shifting in favor of claimants***: Anyone who brings a claim under either Act and prevails is entitled to recover costs and attorney's fees. H.B. 4327 § 5(B)(4); S.B. 1503 § 9(B)(4). Defendants who prevail in suits brought under the Acts, however,

cannot be awarded costs or attorney's fees—no matter how many times they are sued or the number of courts in which they must defend themselves, irrespective of whether the claims against them on their face make out a violation of either Act, and irrespective of the fact that every H.B. 4327 and S.B. 1503 claim is barred by binding precedent. Additionally, S.B. 1503 provides that plaintiffs who are challenging abortion restrictions and seeking declaratory and injunctive relief can be forced to pay defendants' attorney's fees unless they prevail on *each and every* claim covered by S.B. 1503's fee-shifting provision. S.B. 1503 § 13(A)-(B). If the Court dismisses a claim, regardless of the reason (including because it granted relief based on other claims and did not need to reach that claim), the party defending the abortion restriction is deemed to have "prevail[ed]." *Id.* § 13(B). Under S.B. 1503, that "prevailing party" could then seek fees not only against the plaintiffs, but also against their attorneys. *Id.* § 13(A).

- ***Elimination of defenses***: The Acts purport to bar people who are sued from raising seven defenses, including that they believed the law was unconstitutional or that the patient consented to the abortion. H.B. 4327 § 5(E); S.B. 1503 § 13(E). The Acts also state that people who are sued may not rely on non-mutual issue or claim preclusion or rely as a defense on any other "state or federal court decision that is not binding on the court in which the action" was brought. H.B. 4327 § 5(E); S.B. 1503 § 9(E). Further, the Acts purport to eliminate for those sued under the Acts the protections of the Oklahoma Religious Freedom Restoration Act and the Oklahoma Citizens Participation Act. H.B. 4327 § 5(J); S.B. 1503 § 9(J).
- ***Overriding federal precedent***: The Acts also purport to override binding federal law when applied in state-court enforcement proceedings. For example, the Acts direct

Oklahoma judges to ignore judgments and injunctions issued by federal courts, by telling Oklahoma courts to refuse to apply non-mutual collateral estoppel based on such judgments, and by mandating that they ignore whether a federal injunction expressly permitted the activity at issue in a proceeding under the Acts. H.B. 4327 § 5(E)(4)-(5); S.B. 1503 § 9(E)(4)-(5).

- ***Threat of retroactive liability***: The Acts also threaten potential defendants with retroactive liability, expressly stating that defendants may not rely on court decisions that are later overruled, "even if that court decision had not been overruled when the defendant engaged in conduct" barred by the Acts. H.B. 4327 § 5(E)(3); S.B. 1503 § 9(E)(3).
- ***Stripping jurisdiction of the state courts***: Beyond these enforcement proceedings, the Acts also attempt to rework the balance of power in Oklahoma's three branches of government and to shield the Acts' provisions from scrutiny by this and other state courts. The Acts purport to prohibit Oklahoma courts from considering any "action, claim, or counterclaim that seeks declaratory or injunctive relief" to prevent enforcement of H.B. 4327 or S.B. 1503. H.B. 4327 § 8(D); S.B. 1503 § 12(D). Not only would this provision eliminate any opportunity to seek pre-enforcement review of the Acts as permitted by the Oklahoma Uniform Declaratory Judgment Act, but it also would bar counterclaims for declaratory or injunctive relief in an enforcement action under the Acts themselves. The Acts also purport to foreclose judicial review by invoking unlimited sovereign immunity for the State, its subdivisions, and all its officers and employees. H.B. 4327 § 8(A); S.B. 1503 § 12(A).

E. Harm to Petitioners and their Patients

H.B. 4237 and S.B. 1503 inflict irreparable harm on providers, advocates, and patients who are denied their constitutional right to access abortion. Before H.B. 4237 was signed into law, S.B. 1503 was already inflicting tremendous damage on Petitioners and their patients by banning abortions after approximately 6 weeks LMP. Petitioners were forced to cancel existing appointments and had stopped scheduling patients altogether due to S.B. 1503. Affidavit of Andrea Gallegos (attached as Exhibit 5 to Petitioners' First Supplemental Appendix) ("Gallegos Aff.") ¶ 4; Wales Aff. ¶ 9. Patients turned away during this time included minors and survivors of rape and abuse. Gallegos Aff. ¶¶ 7, 9-10. Under S.B. 1503, patients were distraught and desperate that they could not obtain an abortion. *Id.* ¶¶ 5-10. H.B. 4237 then halted *all* abortions in the state, no matter how early in pregnancy, with very narrow exceptions.

For those able to scrape together the necessary funds, the Acts are forcing desperate patients to travel out of state to attempt to access abortions. Oklahomans who are able to do so are traveling potentially hundreds of miles, at great financial and emotional cost to themselves and their families. Gallegos Suppl. Aff. ¶ 14; Affidavit of Gabriela Cano (attached as Exhibit 8 to Petitioners' Second Supplemental Appendix) ("Cano Aff.") ¶¶ 8-10 (describing hardships experienced by Oklahomans having to go out of state due to S.B. 1503); Wales Suppl. Aff. ¶ 7 (collecting patient accounts of hardships endured after being denied abortions in Texas and traveling to Oklahoma to obtain care). Because of these barriers, those who are able to reach healthcare in other states are being pushed into later, more complex, and more expensive abortions. Braid Aff. ¶ 10; Wales Suppl. Aff. ¶ 9; Gallegos Suppl. Aff. ¶ 14. Even people who need other reproductive healthcare services, such as management for an ectopic pregnancy, are being significantly harmed because of the confusion caused by the Acts. Affidavit of Christina Bourne, M.D. (attached as Exhibit 10 to Petitioners' Third Supplemental Appendix) ¶¶ 6-10.

Many Oklahomans will not be able to travel out of state, given that most Oklahomans who seek abortions are living in poverty, due to such factors as inadequate access to contraceptive care and income inequity. Wales Aff. ¶¶ 10, 24. Some of those who are unable to travel may attempt to self-manage their own abortions without medical supervision, and many Oklahomans will have no choice but to continue their pregnancies against their will. Braid Aff. ¶ 20; Wales Aff. ¶ 7.

When the State forces a person to give birth, it intrudes on their bodily autonomy and ability to direct their own lives, OCRJ Aff. ¶ 16; Cano Aff. ¶¶ 4-5, 11; and subjects them to medical risk, Braid Aff. ¶¶ 18-20; Wales Aff. ¶ 23. Oklahomans of color and low-income populations are bearing an outsized share of the Acts' burdens. Cano Aff. ¶¶ 3, 11; Wales Aff. ¶¶ 10-11, 24; Moreover, Black and Indigenous Oklahomans disproportionately suffer the gravest consequences of forced pregnancy in light of the significantly higher rates of maternal mortality in their communities. OCRJ Aff. ¶ 5. Every day that the Acts remain in effect, providers are forced to turn away Oklahomans in need of constitutionally-protected and time-sensitive abortions. Wales Suppl. Aff. ¶ 13; Gallegos Suppl. Aff. ¶¶ 9-10. Patients will continue to be irreparably injured unless this Court intervenes. Further, the Clinic Petitioners have faced the threat of unequal civil lawsuits, and OCRJ has been unable to provide its community education for people seeking abortions. Wales Suppl. Aff. ¶ 2; OCRJ Aff. ¶ 12.

III. ARGUMENTS AND AUTHORITIES

A. H.B. 4327 and S.B. 1503 Violate the Oklahoma Constitution.

1. H.B. 4327's and S.B. 1503's Prohibitions on Abortion Violate the Oklahoma Constitution's Protection for Individual Rights.

Under the Oklahoma Constitution, "[n]o person shall be deprived of life, liberty, or property, without due process of law." Okla. Const. art. II, § 7. And, "[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. The Oklahoma Constitution on its face protects individual rights to a greater degree than the federal Constitution. It has independent protection for "natural rights" or "inherent rights," which are "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, 41 Okla. 728, 139 P. 948, 949; Okla. Const. art. II, § 2. This guarantee of inherent rights exists in addition to substantive due process rights guaranteed under Okla. Const. art. II, § 7.

This Court has repeatedly struck down abortion restrictions and bans by relying on *Roe v. Wade* and *Planned Parenthood v. Casey*, which guarantee a right to abortion under the federal Constitution, and it has never "need[ed]" to make a "determination" about whether a person's right to terminate a pregnancy is protected "under the Oklahoma Constitution." *Okla. Coal. for Reprod. Just. v. Cline* ("*Cline IV*"), 2019 OK 33, ¶ 17, 441 P.3d 1145, 1151; *Burns v. Cline* ("*Cline III*"), 2016 OK 121, ¶ 8, 387 P.3d 348, 351-52. Under this precedent, H.B. 4327 and S.B. 1503 are clearly unconstitutional because they outright prohibit previability abortions. *Planned Parenthood of Se. Pa v. Casey*, 505 U.S. 833, 846, 870-71 (1992); *Roe v. Wade*, 410 U.S. 113, 154 (1973).

But with the federal precedent guaranteeing the right to abortion under its gravest threat in decades, the time has come to make that determination and to answer in the affirmative. In preparation for the release of a decision in *Dobbs v. Jackson Women's Health Organization*, in 2021 and 2022, the Oklahoma Legislature enacted numerous overlapping abortion bans and substantially expanded the scope of its "trigger ban," which bans abortion should *Roe* be

overturned "in whole or in part." Oklahoma Senate Bill 1555. In short, the Court must soon determine whether the guarantee of individual liberty under the Oklahoma Constitution protects the fundamental right to choose whether and when to have children.

There can be no doubt of the answer. A person's decision about whether to have an abortion implicates the most personal considerations and values, which must be protected under the Oklahoma Constitution's guarantees of both inherent rights and substantive due process. OCRJ Aff. ¶ 15. Forced birth intrudes on a person's bodily autonomy, subjecting them to irrevocable short- and long-term emotional and physical consequences. Cano Aff. ¶¶ 4-5, 11; OCRJ Aff. ¶ 16; Wales Suppl. Aff. ¶ 12. Further, the government denies them the ability to direct their own lives and take full advantage of social and economic opportunity. *See id.*

This intrusion on a person's liberty is fundamentally inconsistent with Oklahomans' intent to "zealously guard[] their right to privacy" in their state Constitution. *Alva State Bank & Tr. Co. v. Dayton*, 1988 OK 44, 755 P.2d 635, 638 (Kauger, J., specially concurring). Under that Constitution, the liberty of the *individual* must be protected—here, Oklahomans who are pregnant and seek an abortion.[2] Okla. Const. art. II, § 7. For generations, access to abortion has facilitated advancement and equality, and it remains essential to the ability of people to chart their own course in life.

This Court has already enshrined in its precedent the broad scope of individual rights in the Oklahoma Constitution. The Oklahoma Constitution's due process protections encompass the fundamental right to make intimate and personal decisions "about one's own

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[2] As he has done repeatedly, the Attorney General argues that the Oklahoma Constitution protects a fetus's right to life and so the State may prohibit abortion entirely. June 1, 2022 Oklahoma Attorney General's Response and Objection to Petitioners' Supplemental Emergency Motion for an Immediate Temporary Restraining Order, Etc. at 14-15. In so stating, while completely ignoring the right to life and liberty of *the person who is pregnant*, the Attorney General makes clear that he thinks the State is entitled to choose to protect the rights of a fetus over the rights of pregnant Oklahomans.

health." *In re K.K.B.*, 1980 OK 7, 609 P.2d 747, 749, 752; *see also Scott v. Bradford*, 1979 OK 165, 606 P.2d 554, 557 ("It is the prerogative of every patient to chart his own course and determine which direction he will take."). In *In re K.K.B.*, this Court concluded that the "law recognizes the right of an individual to make decisions about her life out of respect for the dignity and autonomy of the individual." 1980 OK 7, 609 P.2d at 752. The Court further recognized that the people "must have the power to make the decision" whether to obtain treatment because it is they who will ultimately bear the consequences of that decision. *Id.* So too with the decision whether to continue a pregnancy. As thousands of Americans from across the county, including many Oklahomans, recently attested in amicus curiae briefing before the United States Supreme Court, the constitutionally guaranteed right to access abortion services prior to viability allows people "to define themselves as autonomous individuals who have control over their bodies and reproductive lives" and "to ensure access to education, to ensure the ability to escape abusive relationships, to break the cycle of unintended teenage pregnancy, and to fully participate in their careers." Br. of Advocates for Youth, Inc. and Neo Philanthropy, Inc. d/b/a We Testify as *Amici Curiae* In Support of Respondents, *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, at 3 (U.S. Sept. 17, 2021).

Oklahoma courts apply strict scrutiny when fundamental rights are at stake. *In re Guardianship of S.M.*, 2007 OK CIV APP 110, ¶ 14, 172 P.3d 244, 247. "In pursuing a substantial or compelling state interest, it is fundamental that a state cannot choose a means to reach its goal which unnecessarily burdens or restricts a constitutionally protected activity." *Matter of Adoption of Blevins*, 1984 OK CIV APP 41, 695 P.2d 556, 560 (citation omitted). Where a law "impinges upon the exercise of a fundamental constitutional right or liberty," the state must employ the "least restrictive" means to further its interests. *Id.* Accordingly,

infringement on the fundamental right to abortion is subject to strict scrutiny review, and a total prohibition on exercising this right is clearly unconstitutional.

2. The Civil Enforcement Scheme in H.B. 4327 and S.B. 1503 Violate Numerous Oklahoma Constitutional Guarantees.

H.B. 4327 and S.B. 1503 are also unconstitutional for the independent reason that their cynical and unique enforcement mechanisms violate numerous guarantees of the Oklahoma Constitution.

a. Open Courts

The Oklahoma Constitution protects the rights of all Oklahomans to access the courts and seek a "speedy and certain remedy for every wrong and for every injury to person, property, or reputation." Okla. Const. art. II, § 6. In recognition of this right, the Court has repeatedly struck down statutes which impose "court access hurdles" based on the legislature's intent to deter litigants from filing certain categories of disfavored claims. *See, e.g.*, *John v. Saint Francis Hosp., Inc.*, 2017 OK 81, ¶¶ 16-18, 405 P.3d 681, 687-88; *Wall v. Marouk*, 2013 OK 36, ¶¶ 19-25, 302 P.3d 775, 784-88; *Zeier v. Zimmer*, 2006 OK 98, ¶ 18, 152 P.3d 861, 868. Specifically, statutes which prevent a group of litigants from bringing a claim by subjecting them to uniquely onerous procedures before they can have their claims heard by the court unconstitutionally burden this right. *Wall*, 2013 OK 36, ¶ 23, 302 P.3d at 786.

H.B. 4327 and S.B. 1503 create uniquely burdensome procedures designed to prevent litigants from accessing the courts to vindicate their constitutional rights. The Acts prevent abortion providers and supporters not only from seeking pre-enforcement declaratory and injunctive relief but also from bringing a counterclaim for declaratory and injunctive relief to prevent further enforcement of the Acts, H.B. 4327 § 8, S.B. 1503 § 12(D), and provide that those sued under the Acts cannot rely on non-mutual issue or claim preclusion. H.B. 4327

§ 5(E); S.B. 1503 § 9(E). Thus, even if a defendant raised the unconstitutionality of the Acts in a particular lawsuit, the court presiding over that lawsuit would have no ability whatsoever to prevent any other lawsuits brought by other H.B. 4327 and S.B. 1503 claimants, even lawsuits involving *the exact same conduct*. A person could be sued a hundred times or more for providing one prohibited abortion. And, given the Acts' unique venue provisions which allow claimants to file in their home counties and then veto transfer to a more appropriate venue, H.B. 4327 § 7; S.B. 1503 §§ 11(A)(4), (B), defendants sued under the Acts could be hailed into far-flung courts across the state.

In addition to imposing burdensome procedures on abortion providers and supporters, the Acts deny Petitioners their right to access the courts by imposing exorbitant penalties and costs on anyone who chooses to challenge them. *See Union Indem. Co. v. Saling*, 1933 OK 481, 166 Okla. 133, 26 P.2d 217, 222, *disapproved of on other grounds by Taylor v. Langley*, 1941 OK 67, 188 Okla. 646, 112 P.2d 411 (noting that a law can be unconstitutional "when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate [parties] from resorting to the courts to test the validity of the legislation"). For example, defendants sued under the Acts are not entitled to attorney's fees and costs if they prevail in a lawsuit brought under the Acts—no matter how many times they are sued or the number of courts in which they must defend themselves, irrespective of whether the claims against them on their face make out a violation of the Acts, and irrespective of the fact that every claim under the Acts is barred by binding precedent. H.B. 4327 § 5(I); S.B. 1503 § 9(I). The Acts thus purport to foreclose Petitioners from seeking meaningful relief to block enforcement of the Acts defensively and would subject any person who tries to seek such relief to potentially limitless civil liability.

b. Special Law under Section 46

H.B. 4327 and S.B. 1503 violate Article V, § 46 of the Oklahoma Constitution's categorical prohibition on certain types of special laws. As this Court has held, several of the categories enumerated in Article V, § 46 distill to prohibit special laws "regulating the practice of judicial proceedings before the courts or any other tribunal." *Wall*, 2013 OK 36, ¶ 6, 302 P.3d at 779. Thus, the legislature cannot pass laws which create preference and establish inequality among a subclass of litigants. *Wall*, 2013 OK 36, ¶¶ 4-6, 302 P.3d at 779; *John*, 2017 OK 81, ¶ 22, 405 P.3d at 689 (noting that "the Legislature is absolutely and unequivocally prohibited from acting" to pass a special law related to the enumerated subjects in § 46 (citation omitted)); *Zeier v. Zimmer*, 2006 OK 98, ¶ 18, 152 P.3d at 868 (§ 46 "mandate[es] uniformity of procedure").

H.B. 4327 and S.B. 1503 are just such laws. Like the law declared to be an impermissible special law in *Wall*, the Acts create a "new subclass" of civil litigants, "plac[ing] an out of the ordinary enhanced burden" on this subclass with respect to their ability to "access the courts." 2013 OK 36, ¶ 6, 302 P.3d at 779. The Acts' shared civil enforcement scheme singles out abortion providers and those who "aid and abet" banned abortions and subjects them to a particularly burdensome procedure not faced by any other civil litigant, by rewriting rules regarding venue, fees, collateral estoppel, and retroactive enforcement, among others, for these cases and these cases alone, *see supra* Part II.D.3. As § 46 clearly states, statutes which seek to regulate judicial proceedings in this way are unconstitutional.

c. Special Law under Section 59

S.B. 1503 and H.B. 4327 further violate the Oklahoma Constitution's proscription that the legislature may not enact a special law "where a general law can be made applicable." Okla. Const. art. V, § 59. The test for whether a statute is unconstitutional under § 59 is three-

pronged. *Reynolds v. Porter*, 1988 OK 88, 760 P.2d 816, 822. A law which fails under the first prong of the test, and then under either the second or third prong, is unconstitutional. *Id.*

The first prong of the *Reynolds* test asks whether a law "single[s] out less than an entire class of similarly affected persons or things for different treatment." *Id.* The Acts here do just that by singling out defendants in enforcement proceedings brought under the Acts and subjecting them to different procedural rules than those which are applied in other civil cases.

The second prong of the *Reynolds* test considers whether a matter is "reasonably susceptible of general treatment," such that a special law would not be required. *Id.*; *Orthopedic Hosp. of Okla. v. Okla. State Dep't of Health*, 2005 OK CIV APP 43, ¶ 13, 118 P.3d 216, 222. There is no reason that abortion providers and supporters should not be allowed to rely on the same procedures and protections available to civil litigants in all other matters—indeed, Petitioners here have challenged abortion restrictions in Oklahoma state courts according to the general rules applicable to litigants in Oklahoma courts for many decades. The final prong of the *Reynolds* test asks courts to consider whether a law is "reasonably and substantially related" to a valid legislative objective. *Reynolds*, 760 P.2d at 822. But depriving Oklahomans of their constitutional rights is hardly a valid legislative objective, so the Acts fail the final prong as well. *See United States v. Raines*, 362 U.S. 17, 27 (1960) ("[T]here is the highest public interest in" preserving "constitutional guarantees, including those that bear the most directly on private rights."). Because the Acts violate each element of the *Reynolds* test, they are unconstitutional special laws under § 59.

d. Unlawful Delegation of Police Power

In a transparent attempt to avoid judicial review of its unconstitutional abortion bans, the State has disavowed all enforcement authority, handing it instead to private citizen-bounty

hunters. But this attempted end run is itself unconstitutional, because "Oklahoma's fundamental law interdicts legislative intrusion upon the functions assigned by the constitution to the executive." *Fent v. Contingency Rev. Bd.*, 2007 OK 27, ¶ 12, 163 P.3d 512, 521 (citing Okla. Const. art. IV, § 1). "Legislative power is mainly confined to making law, while the executive department is invested primarily with the function of executing the law." *Id.*

Based on this fundamental division, "the Legislature of a state may not part with any of its right to exercise the police power." *Nat'l Bank of Tulsa Bldg. v. Goldsmith*, 1951 OK 5, 204 Okla. 45, 49, 226 P.2d 916, 921. That is, because "the state's police power is inalienable," *Tenneco Oil Co. v. El Paso Nat. Gas Co.*, 1984 OK 52, 687 P.2d 1049, 1059 n.14, the State cannot "redelegate to any one the ultimate right to determine when, to what extent, and under what circumstances the police power may properly be exercised in any given case," *Nat'l Bank of Tulsa Bldg.*, 226 P.2d at 921 (quoting 11 Am. Jur. Const. Law § 254). Included in this separation necessarily is a line between "(1) public rights which arise between the government and others . . . , and (2) private rights which involve the liability of one individual to another under the law[.]" *Young v. Station 27, Inc.*, 2017 OK 68, 404 P.3d 829, 839.

By adopting S.B. 1503 and H.B. 4237, the Oklahoma Legislature improperly delegated executive branch police power to private parties—thereby attempting to turn public rights into "private rights" involving "the liability of one individual to another under the law." *Young*, 404 P.3d at 839. Among other things, the Acts provide no meaningful review of a private party's decision to enforce the Acts' prohibitions, expressly forbidding, for example, the Attorney General and any other state official from intervening in an S.B. 1503 or H.B. 4327 suit. Nor do the Acts turn over enforcement to individuals uniquely qualified to apply its terms. Quite

the contrary: "Any person," no matter how untrained in law and medicine, may bring an enforcement claim, H.B. 4327 § 5(A); S.B. 1503 § 9(A), so long as they are *not* a government official and did not "impregnate[] a woman seeking an abortion through an act of rape, sexual assault, [or] incest," S.B. 1503 § 9(K)(4); H.B. 4327 § 5(K)(4).

Enforcers also have a broad charge; they can sue repeatedly over *any* abortion, *anywhere* in the state of Oklahoma, and place at issue sensitive, private medical decisions to which they have no connection. Moreover, enforcers are permitted—indeed, encouraged by cash bounties that are uncapped and quasi-criminal in nature—to rely on their own pecuniary and ideological interests when deciding whom to target. *Cf. TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207 (2021) (emphasizing that "[p]rivate plaintiffs are not accountable to the people and are not charged with pursuing the public interest in enforcing a defendant's general compliance with regulatory law"). And—last but certainly not least—the Acts' delegation of authority to private parties is standardless, guided only by the transparent goal of violating patients' clearly established constitutional rights and obstructing abortion services.[3] *See supra* Part II.D.3; *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2498–99 (Sotomayor, J., dissenting). S.B. 1503 and H.B. 4237 are thus a private "delegation running riot." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring).

[3] Other high courts would agree. The Texas Supreme Court applies a searching eight-part test to delegations of enforcement for public rights to private parties. *See Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 469, 472 (Tex. 1997), *as supplemented on denial of reh'g* (Oct. 9, 1997). In analyzing challenges to Texas S.B. 8's virtually identical private enforcement mechanism on separation of powers, a multi-district litigation court appointed by the Texas Supreme Court held that S.B. 8 made "no pretense of satisfying" this test. *Van Stean, et al. v. Texas Right to Life*, Cause No. D-1-GN-21-004179, Order Declaring Certain Civil Procedures Unconstitutional and Issuing Declaratory Judgment (Travis County, Dec. 9, 2021) (internal quotation marks omitted).

e. Vagueness

As this Court has recognized, due process demands that "[l]aws . . . afford '[a] person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that [the person] may act accordingly.'" *In re Initiative Petition No. 366*, 2002 OK 21, ¶ 13, 46 P.3d 123, 128 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 107 (1972)). Laws are unconstitutionally vague where they "fail[] to provide explicit standards," leaving governed parties with an impermissibly vague understanding of how to abide by the law. *Id.* ¶ 14.

The Acts deprive abortion providers, and those who may be subject to suit for aiding and abetting a banned abortion like OCRJ, of the notice necessary to determine when they are violating the law and may be liable for their conduct. The Acts state that Petitioners cannot avoid liability by relying on binding U.S. Supreme Court precedent or any other court decision in place at the time of their conduct if that decision is later overruled. H.B. 4327 § 5(E)(4)-(5); S.B. 1503 § 9(E)(4)-(5). The Acts impose aiding-and-abetting liability "regardless of whether the person knew *or should have known* that the abortion would be performed or induced in violation" of the ban—thus blatantly denying those who may be sued under the Acts of any notice of whether their conduct is prohibited.[4] S.B. 1503 § 9(A)(2); H.B. 4327 § 5(A)(2) (emphasis added).[5] Further, Petitioners could be subject to unlimited fines, and the Acts give no guidance to a court presiding over enforcement cases under the Acts as to how to determine the amount to award other than setting a minimum. H.B. 4327 § 5(B); S.B. 1503 § 9(B).

Due process does not permit such uncertainty, particularly where—as here—it will

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[4] Other than explicitly including financial support, aiding and abetting is undefined. Oklahoma courts have interpreted liability for "aiding and abetting" broadly to include "slight participation." *See, e.g.*, *Spears v. State*, 1995 OK CR 36, 900 P.2d 431, 438. Applying that standard here, people who provide limited information on how to access care may be at risk of being sued.

[5] Because the Acts also restrain speech, *see infra* at 22-24, this court should be particularly searching when evaluating the Acts' clarity. *In re Initiative Petition No. 366*, 2002 OK 21, ¶ 14, 46 P.3d at 128.

"cause[] citizens to avoid lawful conduct," here, providing abortions, "for fear of entering the forbidden zone." *In re Initiative Petition No. 366*, 2002 OK 21, ¶ 14, 46 P.3d at 128; *see also Grayned*, 408 U.S. at 109.

f. Ex Post Facto

Article II, § 15 of the Oklahoma Constitution provides "[n]o . . . ex post facto law . . . shall ever be passed." An ex post facto law is one that "retrospectively changes the legal consequences or relations of such fact or deed." *Starkey v. Okla. Dep't of Corr.*, 2013 OK 43, ¶ 37, 305 P.3d 1004, 1018. "In every case of doubt the doubt must be resolved against the retrospective effect." *Id.* ¶ 27 (citing *Good v. Keel*, 1911 OK 264, ¶ 4, 116 P. 777, 777; *Barnhill v. Multiple Injury Tr. Fund*, 2001 OK 114, 37 P.3d 890).

Here, a person sued under the Acts cannot defend themselves against liability based on "any court decision that has been overruled on appeal or by a subsequent court, even if that court decision had not been overruled" when they engaged in the activity alleged to violate the Acts. H.B. 4327 § 5(E)(3); S.B. 1503 § 9(E)(3). The Acts thus subject providers and supporters to liability for conduct that was lawful when it was performed. This limitation on defenses is unconstitutionally retroactive and should be invalidated.

g. Freedom of Speech

This Court has consistently recognized that the Oklahoma Constitution's protections for free speech, Okla. Const. art. II, § 22, are greater than the protections guaranteed by the federal Constitution, *see In re Initiative Petition No. 366*, 2002 OK 21, ¶ 7, 46 P.3d at 126; *Gaylord Ent. Co. v. Thompson*, 1998 OK 30, ¶ 13 n.23, 958 P.2d 128, 138 n.23. This protection, above all, forbids content-based speech restrictions—"restrict[ing] expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chi. v. Mosley*, 408 U.S.

92, 95 (1972). Here, the Acts' threat of civil suits, draconian penalties, and fee-shifting provisions invades Petitioners' protected sharing of information to facilitate Oklahomans in accessing abortion services and community education about abortion.[6]

First, the Acts' broad prohibitions on aiding and abetting an abortion chill protected speech and expressive activities by Petitioners. Petitioners regularly counsel patients, clients, and community members about abortion services, assist them with scheduling health center appointments for abortion services, and refer patients where necessary to other abortion providers and to patient-support services. OCRJ Aff. ¶¶ 7, 12; Gallegos Aff. ¶ 12; Cano Aff. ¶¶ 8-9. The Acts do not define "aiding or abetting" an abortion and include no specific intent requirement. Given this breadth—and the fact that this prohibition could be enforced by *anyone*, the Acts have chilled Petitioners' speech.

The Acts' chilling effect on speech by Plaintiffs and their staff is subject to strict scrutiny, *Arganbright v. State*, 2014 OK CR 5, ¶ 20, 328 P.3d 1212, 1217. Defendants thus bear the burden of proving the law "promote[s] a compelling interest" and is "the least restrictive means to further the articulated interest." *Id.* (quoting *Sable Comm'n of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)). The Acts' prohibition on aiding or abetting cannot possibly survive this scrutiny: indeed, the State has identified *no* specific justification for its prohibition on aiding and abetting through speech or expressive conduct, let alone a compelling one.[7]

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[6] Although the Acts each contain a provision stating that it "shall not be construed to impose liability on any speech or conduct protected by the First Amendment," H.B. 4327 § 5(G); S.B. 1503 § 9(G), "such a provision cannot substantively operate to save an otherwise invalid statute," *CISPES (Comm. in Solidarity with the People of El Sal.) v. F.B.I.*, 770 F.2d 468, 474 (5th Cir. 1985).

[7] Thus, even if the Acts' aiding or abetting and intent prohibitions were viewed as regulating conduct that only incidentally burdens speech, they would still be unconstitutional because they serve no legitimate, much less important, governmental purpose.

Second, the Acts' fee-shifting provisions in enforcement proceedings operate as a content- and viewpoint-based regulation, which "[t]he First Amendment forbids." *Gerhart v. State*, 2015 OK CR 12, ¶ 4, 360 P.3d 1194, 1202. This is especially true when, as here the "message—or the messenger—are unpopular or controversial. *Id.* (citing *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010) ("Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints.")). Under the Acts' fee-shifting provisions, only litigants motivated to block the enforcement of laws that "regulate[] or restrict[] abortion" are punished for their advocacy in litigation. S.B. 1503 § 13(A)-(B); H.B. 4327 § 5(B)(4)-(I). In contrast, the Acts do not impose a penalty on litigants whose goal is to uphold such laws. Moreover, the Acts uniquely make abortion providers' attorneys jointly and severally liable for fees in the circumstance where they directly target the Acts as unconstitutional. *Id.* This improper viewpoint discrimination means that the Acts are subject to strict scrutiny, *Oklahoma Corr. Pro. Ass'n, Inc. v. Jackson*, 2012 OK 53, ¶ 6 n.11, 280 P.3d 959, 963 n.11 (collecting cases), and presumptively invalid, *see, e.g.*, *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Respondents cannot justify the Acts' fee-shifting provisions, which are an unconstitutional attempt to insulate an unconstitutional law from challenge. *See, e.g.*, *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001).

h. Unreasonable Access to Patient Medical Records

"Oklahomans have zealously guarded their right to privacy and their protection against unreasonable searches or seizures." *Alva State Bank & Tr. Co.*, 1988 OK 44, 755 P.2d at 638 (Kauger, J., specially concurring). "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches or seizures shall not be violated." Okla.

Const. art. II, § 30. This is particularly true of personal medical records, which are subject to special protections and privileges. Okla. Stat. Ann. tit. 76, § 19; Okla. Stat. Ann. tit. 12, § 2503(D)(3); *see also Holmes v. Nightingale*, 2007 OK 15, ¶ 28, 158 P.3d 1039, 1046 (applying limitations to discovery of medical records, even when placed at issue by a litigant).

The Acts violate these protections by granting a right to any person to place patients' pregnancy and personal abortion decisions at issue in public litigation, irrespective of patients' wishes or consent to treatment. S.B. 1503 further encourages this intrusion by requiring a physician who performs an abortion to "record in the pregnant woman's medical record" information to demonstrate compliance with the Acts. *Id.* at § 3(D). Because government officials are prohibited from directly enforcing the Acts, a clear purpose of collecting such information is to supply vigilantes with evidence to use in litigation.

The Acts' invasion of privacy is particularly acute for patients who become pregnant from sexual assault or incest. Because a claimant cannot prevail if they caused the pregnancy by committing rape, incest, or a similar crime, the Acts put the onus on the third-party patient and their doctor to demonstrate why that exclusion applies.

B. This Court should Exercise Original Jurisdiction to Rule on the Constitutionality of H.B. 4327 and S.B. 1503.

Pursuant to Article VII of the Oklahoma Constitution, this Court has discretion to assume original jurisdiction in several contexts. *Edmondson v. Pearce*, 2004 OK 23, ¶ 10, 91 P.3d 605, 613. First, 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*, 2007 OK 27, ¶ 11, 163 P.3d at 521. Second, the Court's original jurisdiction may be invoked "upon the circumstances of [the] dispute as being one between two powers of State government, each imbued with constitutionally vested authority." *Ethics Comm'n of State of Okla. v. Cullison*,

1993 OK 37, 850 P.2d 1069, 1072. Third, the Court may assume original jurisdiction based on its "general superintending control over all inferior courts and all Agencies, Commissions and Boards created by law" pursuant to Okla. Const. art. VII, § 4. *Sparks v. State Election Bd.*, 1964 OK 114, 392 P.2d 711, 715. Here, all three grounds are implicated.

1. H.B. 4327 and S.B. 1503's Private Enforcement is a Matter of Great Public Importance and Urgency.

This Court has repeatedly found that deciding the constitutionality of legislation presents a circumstance in which the Court will exercise its discretion to assume original jurisdiction. *See, e.g., Campbell v. White*, 1993 OK 89, 856 P.2d 255, 258-59 (assuming original jurisdiction and granting relief against statute that violated the single subject rule); *Johnson v. Walters*, 1991 OK 107, 819 P.2d 694, 699 (same). The Court has described its basis for assuming original jurisdiction to rule on the constitutionality of legislative acts as a "general public need for a speedy determination of [a] constitutional question." *Keating v. Johnson*, 1996 OK 61, 918 P.2d 51, 56.

This case presents such an urgent question of great public importance because (1) S.B. 1503 eviscerates, and H.B. 4327 eliminates, access to safe and legal abortion in Oklahoma, and each does so in a manner that violates numerous provisions of the Oklahoma Constitution; (2) the Acts became effective immediately upon the Governor's signature and implement a novel private enforcement scheme that will have devastating effects on patients, providers, and people who support abortion patients; and (3) the Acts purport to curb the State's authority to implement and oversee the enforcement of its own laws and this Court's ability to review their constitutionality. *See Hunsucker v. Fallin*, 2017 OK 100, ¶ 7, 408 P.3d 599, 603 (assuming original jurisdiction where controversy was "*publici juris* due to the negative consequences attendant to enforcing *alleged* unconstitutional provisions").

The Court should assume original jurisdiction to address these patently unconstitutional laws, which have been in force and harming Oklahomans for weeks. Patients who were able to travel across state lines to access abortion have shared harrowing stories of driving all night with their children to try to get to a health center; being unable to pay their bills because of the expenses of traveling out of state; and jeopardizing much-needed jobs by missing work. Wales Suppl. Aff. ¶ 7 (quoting patient stories). Clinics in other states have been stretched to the limits of their capacity. Cano Aff. ¶ 9; Gallegos Suppl. Aff. ¶ 13. Other patients are unable to travel to access care and will be forced to end their pregnancies without medical supervision or carry their pregnancies to term against their will. Wales Suppl. Aff. ¶ 10, Gallegos Suppl. Aff. ¶ 14. Whether the Acts will be allowed to stand is an urgent question, and the answer will have cascading effects throughout the state, region, and nation.

2. H.B. 4327 and S.B. 1503 Create Irreconcilable Conflict Between Branches of Government.

The Court has also assumed original jurisdiction where a case presents a conflict "between two powers of State government, each imbued with constitutionally vested authority," particularly when such "an 'intolerable conflict' exists with a co-ordinate branch of state government amounting to governmental gridlock." *Ethics Comm'n*, 1993 OK 37, 850 P.2d at 1072-73. The Acts create such a conflict by purporting to delegate the executive's traditional enforcement authority entirely to private parties. H.B. 4327 §§ 4, 5; S.B. 1503 §§ 8, 9. In addition, the Acts provide that "no court of this state shall have jurisdiction to consider any action, claim, or counterclaim that seeks declaratory or injunctive relief" to prevent the state or any of its political subdivisions, officers, or employees, or any other person from enforcing the Acts or from filing a civil action under the Acts. H.B. 4327 § 8; S.B. 1503 § 12(D). The Acts thus purport to insulate themselves from judicial review in either the pre-

enforcement or defensive posture by stripping from any court in the state, including this Court, jurisdiction to grant declaratory or injunctive relief. For these reasons, the Acts create irreconcilable conflict between branches of Oklahoma government and present a constitutional crisis, justifying this Court's intervention.

3. The Court has Constitutional Authority to Assume Original Jurisdiction and Grant Relief Against State Court Clerks, Who Are Essential to the Private Enforcement Scheme's Functioning.

This Court has previously assumed original jurisdiction pursuant to its superintending authority and granted relief, including extraordinary writs, against state court clerks. *See, e.g.*, *Fent v. State ex rel. Dep't of Hum. Servs.*, 2010 OK 2, ¶ 1, 236 P.3d 61, 63 (assessing constitutionality of law requiring portion of fees paid to clerks to be deposited to the accounts of certain non-judicial programs); *Cotner v. Golden*, 2006 OK 25, ¶¶ 1-2, 136 P.3d 630, 631-32 (granting writ of mandamus to compel court clerk to file *in forma pauperis* affidavit). The state court clerks are responsible for filing and docketing cases presented to them. Okla. Stat. Ann. tit. 12, § 29. Clerks "may refuse to file any document presented for filing if the clerk believes that the document constitutes sham legal process." *Id.*; *Dowell v. Pletcher*, 2013 OK 39, ¶ 6, 304 P.3d 735, 736. State court clerks, therefore, have the ability to accept for filing or reject lawsuits, and their participation undergirds the enforcement of the Acts.[8]

Under the sham legal process statute, the clerk is immune from liability for damages or other civil liability for improperly filing or refusing to file a document, although they are subject to extraordinary writs. Okla. Stat. Ann. tit. 12, § 29. If a clerk exercises their discretion and refuses to file a document, the would-be filer can petition the district court for a writ of

[8] The Oklahoma state court clerks thus play a different role than the Texas clerks, which the United States Supreme Court concluded had no discretion to "pass on the substance of the filings they docket—let alone refuse a party's complaint based on an assessment of its merits." *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 532 (2021).

mandamus to compel the clerk to file the document. *Id.*; *cf. Cotner*, 2006 OK 25, ¶¶ 1–2, 136 P.3d at 632. Even in the context of an injury arising from a state court clerk's ministerial duties, however, this Court "has jurisdiction to provide declaratory relief so as to afford a party a means to vindicate a judicially cognizable interest," especially in "a matter of *publici juris*, warranting consideration by this Court." *Barzellone v. Presley*, 2005 OK 86, ¶ 10 n.16, 126 P.3d 588, 592 n.16 (assuming original jurisdiction in constitutional challenge to jury fee that state court clerks were required to collect). Given the significance and urgency of the constitutional questions presented here, the Court should assume original jurisdiction and grant relief pursuant to its superintending control over state court clerks.

C. This Court should Grant Declaratory, Injunctive Relief And/Or a Writ of Prohibition.

This Court is "*required* to apply the Oklahoma Constitution with absolute fidelity." *Beason v. I. E. Miller Servs., Inc.*, 2019 OK 28, ¶ 15, 441 P.3d 1107, 1113 (emphasis in original). It has a "solemn yet urgent duty to act when a statute is clearly, palpably and plainly inconsistent with the constitution—as here." *Id.* (internal citation and quotation marks omitted). The Court can issue at least three forms of relief that each independently would allow Petitioners to restart providing abortion services.

1. Declaration of Unconstitutionality

The Court should declare that H.B. 4327 and S.B. 1503 are unconstitutional because they violate numerous provisions of the Oklahoma Constitution. *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. The Court has entered such relief against the State and state actors before, particularly where a statute was contrary to the Oklahoma Constitution. *Id.* (declaring a law unconstitutional in suit brought against the State and the Governor); *Fent*, 2007 OK 27, ¶¶ 29,

31, 163 P.3d at 526 (granting declaratory relief in suit against state agency, Governor, and Oklahoma Speaker of the House and President Pro Tempore of the Senate); *Ethics Comm'n*, 1993 OK 37, 850 P.2d at 1072 (granting declaratory relief in part in suit against Oklahoma President Pro Tempore and Speaker of the House as representatives of the Oklahoma Legislature). The Court has specifically entered declaratory relief against state court clerks where clerks were acting pursuant to an unconstitutional statute. *Fent*, 2010 OK 2, ¶ 26, 236 P.3d at 70. A declaration of unconstitutionality would likely prevent prospective plaintiffs from filing harassing and frivolous lawsuits against Petitioners.

2. Injunction or Writ of Prohibition Barring Docketing of Lawsuits

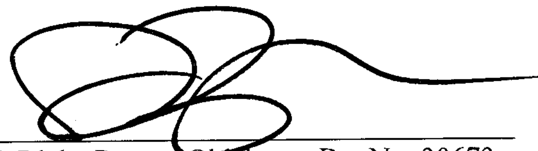
It is also within the discretion of this Court to grant a writ of prohibition to prevent Oklahoma and the state court clerks from exercising judicial power "unauthorized by law" that "will result in injury for which there is no other adequate remedy," such as docketing lawsuits under the Acts. *Maree 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. As H.B. 4327 and S.B. 1503 are blatantly unconstitutional, it is within the authority of this court to restrain state actors from facilitating the filing of lawsuits brought under these laws.

IV. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court issue declaratory and injunctive relief and/or a writ of prohibition to prevent Respondents from implementing the Acts in any way, including by prohibiting the state court clerks from docketing lawsuits under the Acts, and including as to any future suits for conduct that occurred during the pendency of any relief.

Dated: June 20, 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

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

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

Jennifer Sandman*
Sarah Mac Dougall*
PLANNED PARENTHOOD FEDERATION OF AMERICA
123 William St., 9th Floor
New York, NY 10038
Phone: (212) 261-4584
jennifer.sandman@ppfa.org
sarah.macdougall@ppfa.org

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

*Out-Of-State Registered Attorneys

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 20th day of June, 2022 a true and correct copy of the foregoing was served via hand delivery or Certified U.S. Mail to the following:

State of Oklahoma
Through Office of the Attorney General
Zach West
Acting Solicitor General
Audrey A. Weaver
Assistant Solicitor General
313 N.E. 21st Street
Oklahoma City, OK 73105

Nichole Cooper
Court Clerk of Adair County
PO Box 426
Stilwell, OK 74960

Tammi Miller
Court Clerk of Alfalfa County
300 S. Grand Avenue
Cherokee, OK 73728

Angela Nuttall
Court Clerk of Atoka County
200 E. Court St.
Atoka, OK 74525

Tammie Patzkowsky
Court Clerk of Beaver County
PO Box 237
Beaver, OK 73932

Donna Howell
Court Clerk of Beckham County
PO Box 520
Sayre, OK 73662

Christy Matli
Court Clerk of Blaine County
212 N. Weigel St.
Watonga, OK 73772

Donna Alexander
Court Clerk of Bryan County
402 W. Evergreen St.
Durant, OK 74701

Charles L. Sifers
Assistant District Attorney
Sixth Prosecutorial District
201 N. 4th St
Chickasha, OK 73018
Counsel for Respondents Lisa Hannah, Melody Harper, Patti Barger, and Kimberly Berry, Court Clerks of Grady, Stephens, Caddo, and Jefferson Counties, respectively

Marie Hirst
Court Clerk of Canadian County
PO Box 730
El Reno, OK 73036

Renee Bryant
Court Clerk of Carter County
20 B St. SW, Suite 203
Ardmore, OK 73401

Lesa Rousey-Daniels
Court Clerk of Cherokee County
213 W. Delaware St.
Tahlequah, OK 74464

Laura Sumner
Court Clerk of Choctaw County
300 E. Jefferson St.
Hugo, OK 74743

Metzi L. Brown
Court Clerk of Cimarron County
PO Box 788
Boise City, OK 73933

Marilyn Williams
Court Clerk of Cleveland County
200 S. Peters Ave.
Norman, OK 73069

LaDonna Flowers
Court Clerk of Coal County
4 N. Main St., Ste 9
Coalgate, OK 74538

Robert Morales
Court Clerk of Comanche County
315 SW 5th St
Lawton, OK 73501

Terry Kelley
Court Clerk of Cotton County
301 N. Broadway
Walters, OK 73572

Deborah Mason
Court Clerk of Craig County
210 W. Delaware, Suite 201
Vinita, OK 74301

Amanda Vanorsdol
Court Clerk of Creek County
222 E. Dewey Ave., Suite 201
Sapulpa, OK 74066

Staci Hunter
Court Clerk of Custer County
PO Box D
Arapaho, OK 73620

Caroline Weaver
Court Clerk of Delaware County
PO Box 407
Jay, OK 74346

Rachelle Rogers
Court Clerk of Dewey County
PO Box 278
Taloga, OK 73667

Sally Wayland
Court Clerk of Ellis County
PO Box 217
Arnett, OK 73832

Janelle M. Sharp
Court Clerk of Garfield County
114 W. Broadway Ave.
Enid, OK 73701

Laura Lee
Court Clerk of Garvin County
PO Box 239
Pauls Valley, OK 73075

Deana Kilian
Court Clerk of Grant County
PO Box 9
Medford, OK 73759

Jeanna Scott
Court Clerk of Greer County
PO Box 216
Mangum, OK 73554

Stacy Macias
Court Clerk of Harmon County
114 W. Hollis St.
Hollis, OK 73550

Susan Breon
Court Clerk of Harper County
PO Box 347
Buffalo, OK 73834

Tina Oaks
Court Clerk of Haskell County
202 E. Main St., Suite 9
Stigler, OK 74462

Ashley Sanford
Court Clerk of Hughes County
PO Box 32
Holdenville, OK 74848

Tina Swailes
Court Clerk of Jackson County
PO Box 616
Altus, OK 73521

Cassandra Slover
Court Clerk of Johnston County
403 West Main, Suite 201
Tishomingo, OK 73460

Marilee Thornton
Court Clerk of Kay County
PO Box 428
Newkirk, OK 74647

Lisa Markus
Court Clerk of Kingfisher County
PO Box 328
Kingfisher, OK 73750

Kay Richards
Court Clerk of Kiowa County
PO Box 854
Hobart, OK 73651

Melinda Brinlee
Court Clerk of Latimer County
109 N. Central Street
Wilburton, OK 74568

Melba Hall
Court Clerk of Le Flore County
PO Box 688
Poteau, OK 74953

Cindy Kirby
Court Clerk of Lincoln County
PO Box 307
Chandler, OK 74834

Cheryl Smith
Court Clerk of Logan County
201 Courthouse
301 E. Harrison Street
Guthrie, OK 73044

Wendy Holland
Court Clerk of Love County
405 W Main St
Marietta, OK 73448

Shauna Hoffman
Court Clerk of Major County
500 E. Broadway St.
Fairview, OK 73737

Wanda Pearce
Court Clerk of Marshall County
PO Box 58
Madill, OK 73446

Jenifer Clinton
Court Clerk of Mayes County
1 Court Place, Suite 200
Pryor, OK 74361

Kristel Gray
Court Clerk of McClain County
121 N. 2nd Street, Ste. 231
Purcell, OK 73080

Kathy Gray
Court Clerk of McCurtain County
PO Box 1378
Idabel, OK 74745

Lisa Rodebush
Court Clerk of McIntosh County
PO Box 426
Eufaula, OK 74432

Jodi Jennings
Court Clerk of Murray County
1001 W Wyandotte Ave
Sulphur, OK 73086

Robyn Boswell
Court Clerk of Muskogee County
PO Box 1350
Muskogee, OK 74402

Hillary Vorndran
Court Clerk of Noble County
300 Courthouse Dr, #14
Perry, OK 73077

April Frauenberger
Court Clerk of Nowata County
229 N. Maple Street
Nowata, OK 74048

Sherri Foreman
Court Clerk of Okfuskee County
PO Box 30
Okemah, OK 74859

Rick Warren
Court Clerk of Oklahoma County
320 Robert S. Kerr
409 County Office Bldg.
OKC, OK 73102

Charly Criner
Court Clerk of Okmulgee County
314 W. 7th Street, Suite 305
Okmulgee, OK 74447

Jennifer Burd
Court Clerk of Osage County
600 Grandview Ave, Rm. 304
Pawhuska, OK 74056

Cassie Key
Court Clerk of Ottawa County
102 E. Central Ave., Suite 203
Miami, OK 74354

Ila Potts
Court Clerk of Pawnee County
500 Harrison Street, #300
Pawnee, OK 74058

Lori Allen
Court Clerk of Payne County
606 S. Husband Street, Suite 206
Stillwater, OK 74074

Pam Smith
Court Clerk of Pittsburg County
PO Box 460
McAlester, OK 74501

Karen Dunnigan
Court Clerk of Pontotoc County
120 W. 13th St
Ada, OK 74820

Valerie Ueltzen
Court Clerk of Pottawatomie County
325 N. Broadway Ave
Shawnee, OK 74801

Tina Freeman
Court Clerk of Pushmataha County
203 S.W. 3rd St.
Antlers, OK 74523

Jan Bailey
Court Clerk of Roger Mills County
PO Box 409
Cheyenne, OK 73628

Cathi Edwards
Court Clerk of Rogers County
200 S. Lynn Riggs Blvd.
Claremore, OK 74017

Kimberly Davis
Court Clerk of Seminole County
PO Box 130
Wewoka, OK 74884

Gina Cox
Court Clerk of Sequoyah County
120 E. Chickasaw St., Suite 205
Sallisaw, OK 74955

M. Renee Ellis
Court Clerk of Texas County
PO Box 1081
Guymon, OK 73942

Kevin Stevens
Court Clerk of Tillman County
PO Box 116
Frederick, OK 73542

Mike Shouse
Assistant District Attorney | Civil Division
Tulsa County District Attorney's Office
218 W. 6th St, Suite 935
Tulsa, OK 74119
Counsel for Respondent Don Newberry, Court Clerk of Tulsa County

Jim Hight
Court Clerk of Wagoner County
PO Box 249
Wagoner, OK 74467

Jill Spitzer
Court Clerk of Washington County
420 S. Johnstone Ave.
Bartlesville, OK 74003

Lynda Vermillion
Court Clerk of Washita County
PO Box 397
Cordell, OK 73632

Staci Davey
Court Clerk of Woods County
407 Government St., Ste. 30
Alva, OK 73717

Tammy Roberts
Court Clerk of Woodward County
1600 Main St
Woodward, OK 73801

/s/ J. Blake Patton