



ORIGINAL

**EMERGENCY
CHALLENGED STATUTE IMMEDIATELY EFFECTIVE UPON IMMINENT
SIGNATURE BY GOVERNOR**

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

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

Petitioners,

v.

THE STATE OF OKLAHOMA; NICHOLE COOPER in her official capacity as court clerk of Adair County; TAMMI MILLER in her official capacity as court clerk of Alfalfa County; ANGELA NUTTALL in her official capacity as court clerk of Atoka County; TAMMIE PATZKOWSKY in her official capacity as court clerk of Beaver County; DONNA HOWELL in her official capacity as court clerk of Beckham County; CHRISTY MATLI in her official capacity as court clerk of Blaine County; DONNA ALEXANDER in her official capacity as court clerk of Bryan County; PATTI BARGER in her official capacity as court clerk of Caddo County; MARIE HIRST in her official capacity as court clerk of Canadian County; RENEE BRYANT in her official capacity as court clerk of Carter County; LESA ROUSEY-DANIELS in her official capacity as court clerk of Cherokee County; LAURA SUMNER in her official capacity as court clerk of Choctaw County; METZI BROWN in her official capacity as court clerk of Cimarron County; MARILYN WILLIAMS in her official capacity as court clerk of Cleveland County; LaDONNA FLOWERS in her official capacity as court clerk of Coal County; ROBERT MORALES in his official capacity as court clerk of Comanche County; TERRY KELLEY in her official capacity as court clerk of Cotton County; DEBORAH MASON in her official capacity as

**FILED
SUPREME COURT
STATE OF OKLAHOMA**

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**JOHN D. HADDEN
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CASE NO. **#120376**

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APRIL FRAUENBERGER in her official capacity as court clerk of Nowata County; SHERRI FOREMAN in her official capacity as court clerk of Okfuskee County; RICK WARREN in his official capacity as court clerk of Oklahoma County; CHARLY CRINER in her official capacity as court clerk of Okmulgee County; JENNIFER BURD in her official capacity as court clerk of Osage County; CASSIE KEY in her official capacity as court clerk of Ottawa County; ILA POTTS in her official capacity as court clerk of Pawnee County; LORI ALLEN in her official capacity as court clerk of Payne County; PAM SMITH in her official capacity as court clerk of Pittsburg County; KAREN DUNNIGAN in her official capacity as court clerk of Pontotoc County; VALERIE UELTZEN in her official capacity as court clerk of Pottawatomie County; TINA FREEMAN in her official capacity as court clerk of Pushmataha County; JAN BAILEY in her official capacity as court clerk of Roger Mills County; CATHI EDWARDS in her official capacity as court clerk of Rogers County; KIMBERLY DAVIS in her official capacity as court clerk of Seminole County; GINA COX in her official capacity as court clerk of Sequoyah County; MELODY HARPER in her official capacity as court clerk of Stephens County; M. RENEE ELLIS in her official capacity as court clerk of Texas County; KEVIN STEVENS in his official capacity as court clerk of Tillman County; DON NEWBERRY in his official capacity as court clerk of Tulsa County; JIM HIGHT in his official capacity as court clerk of Wagoner County; JILL SPITZER in her official capacity as court clerk of Washington County; LYNDA VERMILLION in her official capacity as court clerk of Washita County; STACI DAVEY in her official capacity as court clerk of Woods County; TAMMY ROBERTS in her official capacity as court clerk of Woodward County,

Respondents.

**PETITIONERS' EMERGENCY MOTION FOR AN IMMEDIATE TEMPORARY
RESTRAINING ORDER AND/OR TEMPORARY INJUNCTION TO PRESERVE
THE STATUS QUO PENDING DECISION ON APPLICATION FOR ORIGINAL
JURISDICTION AND PETITION FOR DECLARATORY AND INJUNCTIVE
RELIEF AND/OR A WRIT OF PROHIBITION**

Pursuant to Okla. Stat. Ann. tit. 12, § 990.4(C), Petitioners Oklahoma Call for Reproductive Justice, Tulsa Women’s Reproductive Clinic, LLC, Alan Braid, M.D., Comprehensive Health of Planned Parenthood Great Plains, Inc., and Planned Parenthood of Arkansas & Eastern Oklahoma seek emergency temporary injunctive relief barring implementation of Oklahoma Senate Bill 1503 (“S.B. 1503” or “the Act”), enacted by the Oklahoma Legislature in 2022 (attached as Ex. 1 in Petitioners’ Appendix). The Act passed through the Legislature on April 28, 2022 and is effective immediately upon the Governor’s signature, which is expected imminently.¹ For this reason, and because Petitioners have patients scheduled for abortions throughout the week, Petitioners request immediate entry of a temporary restraining order pending a determination on the motion for a temporary injunction or a temporary injunction. S.B. 1503 is repugnant to the Oklahoma Constitution and the rule of law itself. S.B. 1503 is a patently unconstitutional abortion ban at approximately 6 weeks of pregnancy—months before viability and before many people know they are pregnant. It is enforced by the public at large via grossly unequal civil lawsuits, which are procedurally stacked against any abortion provider or person who supports a patient in accessing abortion.

In order to shield itself from constitutional review, the Act instructs the state courts, in deciding cases brought under S.B. 1503, to ignore basic Oklahoma constitutional and civil law principles, such as the right to access the courts, and the applicability of binding precedent, both in evaluating the plaintiffs’ claims and the defendants’ defenses. Indeed, S.B. 1503 attempts to bar the state courts from granting *any declaratory or injunctive remedy* against the State and all subdivisions, employees, and officers of the state, as well as all would-be private enforcers. S.B. 1503 is thus even more radical than Texas S.B. 8—the Legislature’s clear

¹ Even if the Governor takes no action, the law becomes effective 5 days following transmittal to his office. Okla. Const. art. VI, § 11.

model—because it is not only designed to foreclose federal pre-enforcement review like S.B. 8, but it also attempts to upend the Oklahoma Constitution’s supremacy over the laws of the state and prevent Oklahomans from vindicating many of their rights in state court entirely.

If S.B. 1503 is allowed to take effect, it will destroy abortion access in Oklahoma at an already fraught time for access in the region. The history of Texas S.B. 8²—which, for more than seven months, has nullified the rights of thousands of Texans—shows the devastating effects that will occur here. Given the threats to abortion access across the region, such effects will be magnified. Many Oklahomans who seek abortions will have nowhere to turn.

There is no doubt here about this Court’s authority and duty under the Oklahoma Constitution to prevent the grave harms threatened by S.B. 1503, consistent with its obligation to “invalidat[e] as unconstitutional” statutes that are “clearly, palpably and plainly inconsistent with the Constitution.” *Lafalier v. Lead-Impacted Cmty. Relocation Assistance Tr.*, 2010 OK 48, ¶ 15, 237 P.3d 181, 188. Petitioners therefore respectfully request that this Court enter a temporary restraining order pending a determination on a temporary injunction or a temporary injunction sufficient to prevent Respondents from implementing S.B. 1503 in any way, including by docketing lawsuits.

I. BACKGROUND

A. Clinic Petitioners Provide Abortions to Thousands of Patients Each Year.

Dr. Alan Braid is a board-certified OB/GYN who owns Tulsa Women’s Reproductive

² In *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522 (2021), the Supreme Court held that certain state actors, including Texas clerks, could not be sued in federal court to block Texas S.B. 8. But even putting aside the differences between Texas and Oklahoma law regarding the role of clerks, *see* Petitioners’ Brief in Support at 10 & n.4, the Supreme Court’s analysis has no bearing here, where neither Eleventh Amendment immunity nor Article III standing are at issue. *See Nichols v. Dep’t of Corr.*, 1981 OK 83, 631 P.2d 746, 749; Okla. Const. art. VII, § 1. The Idaho Supreme Court recently temporarily blocked Idaho’s S.B. 8-style ban. *See* Order, No. 49615-2022 (Idaho Sup Ct. Apr. 8, 2022).

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. Prior to September 2021, approximately 5,000 patients a year obtained abortions in Oklahoma. Braid Aff. ¶ 12. Collectively, the Clinic Petitioners provide the majority of abortions in Oklahoma. *Id.*; Wales Aff. ¶ 8.

Oklahoma is a very hostile environment for abortion providers. Braid Aff. ¶¶ 25-28; Wales Aff. ¶¶ 20-21. Doctors at the Clinic Petitioners’ facilities experience personal harassment, and the Clinic Petitioners themselves are regularly the target of protesters. Braid Aff. ¶ 26; Wales Aff. ¶ 21. Abortion providers, including the Clinic Petitioners, have repeatedly had to challenge in court bans and restrictions on abortion passed by the Oklahoma Legislature. Braid Aff. ¶ 23; Wales Aff. ¶ 29. Just last legislative session, Oklahoma passed five abortion restrictions, including a total ban and a 6-week ban, which remain enjoined by this Court. *See infra* at 9. Despite the hostile climate, the Clinic Petitioners are committed to ensuring that patients can access abortions because that access is essential for the health and well-being of Oklahomans and their families. Braid Aff. ¶¶ 9, 11, 23-24; Wales Aff. ¶ 22.

B. OCRJ Advocates for Access to this Essential Care and Provides Information and Support to Oklahomans Seeking Abortions.

Oklahoma Call for Reproductive Justice (“OCRJ”) is a 501(c)(4) nonprofit that advances reproductive justice and protects access to reproductive healthcare, including abortion, in Oklahoma. Affidavit of Priya Desai (attached as Exhibit 2 to Petitioners’

Appendix) (“OCRJ Aff.”) ¶ 1. OCRJ advances its mission in several ways. OCRJ lobbies for or against bills in the legislature and speaks to the media about legislation. *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*, which is updated regularly and provides information to Oklahomans who need to navigate the many overlapping laws restricting abortion in the state. *Id.* ¶ 7.

C. S.B. 1503 Prohibits Abortion After 6 Weeks in Oklahoma.

S.B. 1503 prohibits abortion in Oklahoma beginning at approximately 6 weeks of pregnancy, as dated from a person’s last menstrual period (LMP)—an early point in pregnancy, roughly four months before viability, and before many patients realize they are pregnant.³ Specifically, S.B. 1503 prohibits a physician from “knowingly perform[ing] or induc[ing] an abortion on a pregnant woman if the physician detected a fetal heartbeat . . . or failed to perform a test to detect a fetal heartbeat.” S.B. 1503 § 4(A). A “heartbeat” is an inaccurate term for the early electrical activity that precedes the development of a heart in an embryo, and such activity is generally detectable by ultrasound around 6 weeks LMP. *Braid Aff.* ¶ 5; *Wales Aff.* ¶ 5.

D. S.B. 1503 Was Designed to Subvert Oklahoma’s Unique Judicial Processes through a Private, Civil Enforcement Scheme.

In a cynical effort to shield its 6-week ban from review, S.B. 1503 expressly precludes the state or any political subdivision, as well as officers or employees of a state or local government entity in Oklahoma, from enforcing the 6-week ban. S.B. 1503 § 9(A). Instead, S.B. 1503 creates a private, civil cause of action: “[a]ny person, other than an officer or

³ Viability is generally understood as the point when a fetus, if born at that point in pregnancy, has a reasonable likelihood of sustained life after birth, with or without artificial support. *Roe v. Wade*, 410 U.S. 113, 160 (1973). Viability is an individual medical determination, but it generally does not occur until approximately 23-24 weeks LMP. *Braid Aff.* ¶ 6.

employee of a state or local governmental entity in this state, may bring a civil action against any person” who (1) performs a prohibited abortion, (2) aids or abets a prohibited abortion, or intends to engage in these activities. *Id.*

S.B. 1503 provides extreme incentives for abortion opponents or windfall seekers to file suit. Where an S.B. 1503 claimant prevails, “the court *shall* award”: (1) “injunctive relief sufficient to prevent” future violations or conduct that aids or abets violations; (2) “statutory 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) “nominal 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’s fees.” S.B. 1503 § 9(B) (emphasis added). S.B. 1503 imposes no cap on the “statutory damages” and provides no room for discretion (or standards to guide the discretion) of judges or juries in determining what amount of damages to award. *Id.*

These private, civil actions are exempted from the generally-applicable rules governing civil litigation in this state in several ways.

- **Statewide venue:** S.B. 1503 allows 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. S.B. 1503 § 11(A)(4); *id.* § 11(B).
- **Draconian fee-shifting in favor of S.B. 1503 claimants:** Anyone who brings an S.B. 1503 claim and prevails is entitled to recover costs and attorney’s fees. S.B. 1503 § 9(B)(4). S.B. 1503 defendants, however, cannot be awarded costs or attorney’s fees if they prevail, 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 an S.B. 1503 violation, and irrespective of the fact that every S.B. 1503 claim is barred by binding precedent. *Id.* § 9(I). Moreover, S.B. 1503 provides that plaintiffs seeking declaratory and injunctive relief against *any abortion restriction whatsoever* can be forced to pay the “prevailing” party’s attorney’s fees for each claim on which they do not succeed, as can their attorneys and corresponding law firms. *Id.* § 13(B). The clear purpose of this provision is to impose coercive penalties on abortion providers and their attorneys simply for seeking to vindicate providers’ constitutional rights and the rights of their patients in court.

- **Elimination of defenses:** S.B. 1503 purports to bar people who are sued under the Act from raising seven defenses, including that they believed the law was unconstitutional or that the patient consented to the abortion. *Id.* § 9(E). S.B. 1503 also states 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. *Id.* The clear import of these provisions is to cast a pall on constitutionally protected activity, to force abortion providers and others who assist them to defend themselves over and over again, and to hamstring that defense. Further, S.B. 1503 § 9(J) purports to eliminate for those sued under it the protections of the Oklahoma Religious Freedom Restoration Act and the Oklahoma Citizens Participation Act. *Id.* § 9(J).
- **Overriding federal precedent:** S.B. 1503 also purports to override binding federal law when applied in state court enforcement proceedings. As one example, S.B. 1503 directs 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 S.B. 1503 proceeding. *Id.* §§ 9(E)(4), (5).

- **Threat of retroactive liability:** S.B. 1503 also threatens retroactive liability. It expressly states 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 Act. *Id.* § 9(E)(3) (emphasis added). S.B. 1503 further eliminates as a defense to its punitive attorney’s fee provision the fact that “[t]he court in the underlying action held that any provisions of this section are invalid, unconstitutional, or preempted by federal law, notwithstanding the doctrines of issue or claim preclusion.” *Id.* § 13(D)(3).
- **Stripping the jurisdiction of the state courts:** Beyond these enforcement proceedings, S.B. 1503 also attempts to rework the balance of power in Oklahoma’s three branches of government and to shield its provisions from scrutiny by this and other state courts. S.B. 1503 purports to prohibit Oklahoma courts from considering any “action, claim, or counterclaim that seeks declaratory or injunctive relief to prevent” enforcement of the Act. *Id.* § 12(D). Not only would this provision eliminate any opportunity to seek pre-enforcement review of S.B. 1503 as permitted by the Oklahoma Uniform Declaratory Judgment Act, it would also bar counterclaims for declaratory or injunctive relief in an S.B. 1503 suit itself. S.B. 1503 also purports to foreclose judicial review by invoking unlimited sovereign immunity for the State, its subdivisions, and all its officers and employees.

II. ARGUMENT

A. LEGAL STANDARD

Oklahoma law provides that this Court can “grant an injunction during the pendency” of litigation “as it considers proper for the security of the rights of the parties.” Okla. Stat. Ann.

tit. 12, § 990.4(C). When considering a motion for a temporary injunction, this Court considers: (a) the likelihood of success on appeal; (b) the threat of irreparable harm if relief is not granted; (c) the potential harm to the opposing party; and (d) any risk of harm to the public interest. Okla. Sup. Ct. R. 1.15(c)(2); *Dowell v. Pletcher*, 2013 OK 50, ¶ 7, 304 P.3d 457, 460. “The purpose of a temporary injunction is to preserve the status quo and prevent . . . the doing of an act whereby the rights of the moving party may be materially invaded, injured or endangered.” *Okla. Pub. Emps. Ass’n v. Okla. Mil. Dep’t*, 2014 OK 48, ¶ 15, 330 P.3d 497, 504.

B. Petitioners Are Likely to Succeed on the Merits.

This Court has an obligation to “invalidat[e] as unconstitutional” statutes that are “clearly, palpably and plainly inconsistent with the Constitution.” *Lafalier*, 2010 OK 48, ¶ 15, 237 P.3d at 188. Indeed, in such circumstances, this Court has the “solemn yet urgent duty to act” to protect constitutional rights. *Beason v. I. E. Miller Servs., Inc.*, 2019 OK 28, ¶ 15, 441 P.3d 1107, 1113. This Court has never shirked this obligation.⁴

1. The 6-Week Ban Is a Clearly Unconstitutional Pre-Viability Ban.

This Court has repeatedly interpreted the Oklahoma Constitution’s due process clause to protect a person’s ability to access abortion care prior to viability, consistent with the federal constitution and Supreme Court precedent.⁵ Okla. Const. art. II, § 7; *Okla. Coal. for Reprod.*

⁴ See, e.g., *Inst. for Responsible Alcohol Pol’y v. State ex rel. Alcoholic Beverage L. Enf’t Comm’n*, 2020 OK 5, ¶ 12, 457 P.3d 1050, 1055 (declaring a law unconstitutional in suit brought against the State and the Governor); *Fent v. Contingency Review Bd.*, 2007 OK 27, ¶¶ 29, 31, 163 P.3d 512, 526 (granting declaratory relief in suit against state agency, Governor, and Oklahoma Speaker of the House and President Pro Tempore of the Senate); *Okla. Ass’n of Mun. Att’ys v. State*, 1978 OK 59, 577 P.2d 1310, 1312 (assuming original jurisdiction in suit against State and Attorney General); see also *Fent v. State ex rel. Dep’t of Hum. Servs.*, 2010 OK 2, ¶ 1, 236 P.3d 61, 63 (assessing constitutionality of statute 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, 632 (granting writ of mandamus to compel court clerk to file *in forma pauperis* affidavit).

⁵ As Plaintiffs in *Oklahoma Call for Reproductive Justice*, No. IN-119918, and *Tulsa Women’s Reproductive Clinic v. Hunter*, No. SD-118292, articulated in their appellate briefing, Oklahoma’s

Just. v. Cline, 2019 OK 33 ¶¶ 16, 25, 43, 441 P.3d 1145, 1151, 1153-54, 1160-61.⁶ Under this precedent, S.B. 1503’s ban on abortion at 6 weeks is indisputably an unconstitutional previability abortion ban, as the State recently conceded. Oct. 4, 2021 Temporary Injunction Hearing Transcript, *Oklahoma Call for Reproductive Justice, et al., v. O’Connor, et al.*, Tr. 15:13-21 (filed with this Court on appeal on March 4, 2022, No. IN-119918); October 25, 2021 Order Granting Emergency Temporary Injunction, No. IN-119918.

2. S.B. 1503’s Enforcement Mechanism Offends Numerous Guarantees of the Oklahoma Constitution.

• **S.B. 1503 violates Article II, § 6 of the Oklahoma Constitution.**

The Oklahoma Constitution guarantees that “[a]ccess to the courts must be available to all comers through simple and direct means[,] and the right must be administered in favor of justice rather than being bound by technicalities.” *Wall v. Marouk*, 2013 OK 36, ¶ 23, 302 P.3d 775, 786. Likewise, “legislation cannot be used to deny access to court.” *Rollings v. Thermodyne Indus., Inc.*, 1996 OK 6, 910 P.2d 1030, 1033. Yet S.B. 1503 purports to do precisely that by blocking litigants from bringing claims to seek declaratory or injunctive relief against a law which the State itself has acknowledged to be an unconstitutional abortion ban.

Article II, § 6 of the Oklahoma Constitution further guarantees a “speedy and certain remedy for every wrong and for every injury to person, property, or reputation.” Okla. Const. art. II, § 6. While the state legislature may define the scope of an appropriate remedy, “the Legislature cannot completely cut off an existing or vested right.” *Lafalier*, 2010 OK 48, ¶ 20, 237 P.3d at 190. By eliminating any opportunity to seek pre-enforcement review of S.B. 1503

due process guarantee encompasses the fundamental right to make intimate and personal decisions “about one’s own health,” see *In re K.K.B.*, 1980 OK 7, 609 P.2d 747, 749, 752, which includes the ability to make one’s own decisions about whether and when to have children.

⁶ See Aplnt’s Brief, *Oklahoma Call for Reproductive Justice*, No. IN-119918 (Dec. 8, 2021) at 21-23.

as permitted by the Oklahoma Uniform Declaratory Judgment Act, barring counterclaims for declaratory or injunctive relief in an S.B. 1503 suit, S.B. 1503 § 12(D), and invoking total sovereign immunity for the State, including all its employees, S.B. 1503 § 12(A), S.B. 1503 effectively denies Petitioners any remedy at all to vindicate their rights.

Further, the extreme penalties imposed by S.B. 1503 coupled with the fee-shifting provisions serve to stifle any defense of those sued under the Act. As a result, S.B. 1503 penalizes use of Oklahoma courts for the redress of grievances in violation of the Oklahoma Constitution. *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 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”).

- **S.B. 1503 is an unconstitutional delegation of the State’s police power.**

Having tried and failed to ban abortion at 6 weeks under its own authority, the State now invites private citizens to step into its shoes and enforce its unconstitutional abortion ban. However, “the state’s police power is inalienable” and cannot be delegated to private individuals in this way. *Tenneco Oil Co. v. El Paso Nat. Gas Co.*, 1984 OK 52, 687 P.2d 1049, 1059 n.14; *see also National Bank of Tulsa Bldg. v. Goldsmith*, 1951 OK 5, 204 Okla. 45, 226 P.2d 916, 921 (“the Legislature of a state may not part with any of its right to exercise the police power”). Specifically, 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.” *Id.* at 921 (quoting 11 Am. Jur. Const. Law § 254). Allowing

private citizens to determine when, how, and against whom the State’s abortion ban will be exercised is similarly an unconstitutional delegation of the State’s general police power.

- **S.B. 1503 is an unconstitutional “special law” prohibited by Article V, §§ 46 and 59.**

Under Article V, § 46 of the Oklahoma Constitution, special laws are categorically prohibited on a series of topics. *Wall*, 2013 OK 36, ¶ 4, 302 P.3d at 779. As this Court has held, several of those categories distill to prohibit special laws “regulating the practice of judicial proceedings before the courts or any other tribunal.” *Id.* ¶ 6, 302 P.3d at 779. This is precisely what S.B. 1503 does. Like the law declared to be an impermissible special law in *Wall*, S.B. 1503 creates 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.” *Id.* The civil enforcement scheme of S.B. 1503 singles out abortion providers and those who “aid and abet” provision of abortion and subjects those groups to a unique and particularly burdensome procedure bearing no resemblance to the litigation procedure facing any other civil litigant.⁷

- **S.B. 1503 is unconstitutionally vague.**

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

⁷ Even if S.B. 1503 did not fall within the categorical prohibition on certain special laws regarding judicial processes, it is also an impermissible special law under Article V, § 59, because it fails the *Reynolds* test. *Reynolds v. Porter*, 1988 OK 88, 760 P.2d 816, 822. If a law is special under the first prong of this test, and it fails either the second or third prong, it is unconstitutional. *Id.* at 822. The first prong asks whether a law “single[s] out less than an entire class of similarly affected persons or things for different treatment,” which S.B. 1503 clearly does in subjecting S.B. 1503 defendants to such unequal proceedings. *Id.* S.B. 1503 also fails both prong 2 and 3. As to prong 2, civil litigation regarding abortion is “reasonably susceptible of general treatment”—the normal operation of the Oklahoma state courts, in which litigation has taken place regarding abortion restrictions for many decades. *Orthopedic Hosp. of Okla. v. Okla. State Dep’t of Health*, 2005 OK CIV APP 43, ¶ 13, 118 P.3d 216, 222. As to prong 3, S.B. 1503 is not “reasonably and substantially related” to a valid legislative objective, because it is designed to shield an otherwise unconstitutional ban from review. *Reynolds*, 760 P.2d at 822.

123, 128 (citing *Grayned v. City of Rockford*, 408 U.S. 104, 107 (1972)). S.B. 1503, however, “fail[s] to provide explicit standards,” leaving governed parties with an impermissibly vague understanding of how to conform their conduct to the law. *Id.* ¶ 14, 46 P.3d at 128. And, S.B. 1503’s enforcement provisions also invite precisely the kind of “arbitrary and discriminatory enforcement” that the vagueness doctrine guards against. *Grayned*, 408 U.S. at 108.⁸ S.B. 1503 deprives abortion providers of the notice necessary to determine when they are violating the law and may be liable for providing an abortion. They cannot rely on binding Supreme Court precedent or any other court decision in place at the time of their conduct if that decision is later overruled. S.B. 1503 also fails to adequately inform those who assist with abortions of when they may be liable for aiding and abetting, as “[a]ids and abets” is undefined.⁹ S.B. 1503 purports to impose aiding-and-abetting liability regardless of whether a person knew that an abortion would violate the Act. Indeed, information critical to whether an abortion is prohibited—whether a physician detects a “heartbeat”—is likely to arise after alleged aiding-and-abetting (such as helping a patient get to a clinic), and thus be unknowable in some cases.

- **S.B. 1503’s retroactivity provision imposes an unlawful ex post facto law.**

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

⁸ Because S.B. 1503 also restrains speech, *see infra* at 13, this court should be particularly searching when evaluating the clarity of S.B. 1503’s terms. *In re Initiative Petition No. 366*, 2002 OK 21, ¶ 14, 46 P.3d at 128. S.B. 1503 “causes citizens to avoid lawful conduct for fear of entering the forbidden zone,” for example, when people avoid sharing information with patients seeking abortion because they are afraid of being sued. *Id.*

⁹ While there is no universal statutory definition, Oklahoma courts have interpreted liability for “aiding and abetting” broadly. *See e.g., Spears v. State*, 1995 OK CR 36, 900 P.2d 431, 438 (Okla. Cr.) (“[M]ere presence or acquiescence, without participation, does not constitute a crime, [but] only slight participation is needed to change a person’s status from mere spectator into an aider and abettor”). Applying the same standard here, people who provide information on how to access care or funding for an abortion may be considered “aiders and abettors” based on their “slight participation.”

consequences or relations of such fact or deed.” *Starkey v. Okla. Dep’t of Corr.*, 2013 OK 43, ¶ 37, 305 P.3d 1004, 1018. S.B. 1503 purports to impose liability on any person who violates its terms, even if the person is acting under the pendency of an injunction if that injunction is ever removed. This unfairly holds enforcement of S.B. 1503 over the heads of Petitioners even when they are in good faith relying on an injunction of this Court. Thus, the law’s operation will “retrospectively change[]” the legal consequences of providing abortion care if an injunction is ever removed, violating this State’s prohibition on ex post facto laws. Further, Providers cannot rely on binding Supreme Court precedent or any court decision in place at the time of the abortion if the decision is later overruled, violating “[e]lementary considerations of fairness.” *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994).

- **S.B. 1503’s Aiding and Abetting Liability Is a Free Speech Violation.**

The Oklahoma Constitution is highly protective of free speech. Okla. Const. art. II, § 22. This Court has consistently stated that the protections afforded by the Oklahoma Constitution 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. Above all else, the First Amendment forbids content-based speech restrictions—“restrict[ing] expression because of its message, its ideas, its subject matter, or its content.” *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). There is a “recognized need in a free, self-governing society for dissemination of information of fundamental importance to the people.” *Gaylord Ent. Co.*, 1998 OK 30, ¶ 13, 958 P.2d at 138. S.B. 1503’s broad prohibition on activity that aids and abets abortion burdens OCRJ’s speech. S.B. 1503’s threat of civil suits, draconian penalties, and fee-shifting provisions invades OCRJ’s protected sharing of information to facilitate Oklahomans in accessing

abortion services and community education about abortion. S.B. 1503 further restricts speech by assigning “joint and several” liability to those who challenge abortion restrictions but do not prevail on every claim. S.B. 1503’s fee-shifting provisions are thus viewpoint- and content-based restrictions on abortion-related activity and have the effect of chilling those who might litigate against abortion restrictions.¹⁰

- **S.B. 1503 will result in 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. v. Dayton*, 1988 OK 44, 755 P.2d 635, 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 Holmes v. Nightingale*, 2007 OK 15, ¶ 28, 158 P.3d 1039, 1046. S.B. 1503 violates this right because it puts at issue in litigation patients’ private medical decisions and records, exposing such information to plaintiffs, attorneys, judges, and juries, among others, regardless of the patient’s interests or consent. This harm to patient privacy is particularly acute for patients who become pregnant through sexual assault or incest.

C. Oklahomans Seeking Abortions and Providers of Abortion, as Well as Their Supporters, Will Suffer Irreparable Harm.

S.B. 1503’s threats to constitutional rights constitute *per se* irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976). S.B. 1503 would gravely restrict access to abortion in

¹⁰ Although S.B. 1503 contains a provision stating that it “shall not be construed to impose liability on any speech or conduct protected by the First Amendment,” 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).

Oklahoma. Delays caused by the 6-week ban will push many patients beyond the point they can get an abortion in Oklahoma, forcing those with the means to travel potentially hundreds of miles, and others to self-manage an abortion or carry unwanted pregnancies to term. Braid Aff. ¶¶ 18, 20-21; 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. Denial of care also imposes medical risk. Braid Aff. ¶¶ 18-20; Wales Aff. ¶ 23. And, S.B. 1503 will subject Petitioners to a grave risk of suit under its unlawful enforcement scheme. Braid Aff. ¶¶ 8, 25.

D. Lack of Injury to the Opposing Party

Respondents would suffer little harm if a temporary injunction were granted; a temporary injunction would merely preserve the status quo. Where a case involves important issues of state policy, the public interest is “best served by preserving the status quo.” *Edwards v. Bd. of Cty. Comm’rs of Canadian Cty.*, 2015 OK 58, ¶ 35, 378 P.3d 54, 64.

E. No Risk of Harm to the Public Interest

It is well-settled that enforcement of an unconstitutional law is contrary to the public interest. *See, e.g., Ent. Merchants Ass’n v. Henry*, No. CIV-06-675-C, 2006 WL 2927884, at *3 (W.D. Okla. Oct. 11, 2006); *ACLU v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999).

III. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court enter an immediate temporary restraining order pending a determination on the motion for a temporary injunction or a temporary injunction pending resolution of this litigation on the merits. Specifically, Petitioners respectfully request injunctive relief barring any implementation of S.B. 1503 in any way, including by enjoining the state court clerks from docketing S.B. 1503 lawsuits, and including as to any future suits for conduct that occurred during the pendency of this injunction.

Dated: April 28, 2022

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A handwritten signature in black ink, consisting of a large, rounded loop followed by a smaller loop and a short, upward-sloping stroke.

J. BLAKE PATTON

