EMERGENCY

STATUTE TO BE ENFORCED UPON DISPOSITION OF THIS MOTION

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

TULSA WOMEN'S REPRODUCTIVE CLINIC, LLC, on behalf of itself, its staff, and its patients, Plaintiff/Appellant, v. MIKE HUNTER, in his official capacity as Attorney General of Oklahoma, STEVE KUNZWEILER, in his official capacity as District Attorney for Tulsa County, LYLE KELSEY, in his official capacity as Executive Director of the Oklahoma State Board of Medical Licensure and Supervision, and TOM BATES, in his official capacity as Oklahoma Interim Commissioner of Health, Defendants/Appellees.	)	#118292 No. _____

APPELLANT'S EMERGENCY MOTION FOR A TEMPORARY INJUNCTION PENDING APPEAL TO PRESERVE THE *STATUS QUO*

Pursuant to 12 Okla. Stat. § 990.4(C), Appellant Tulsa Women's Clinic seeks an emergency temporary injunction barring enforcement of Oklahoma House Bill 1721, in order to preserve the *status quo* pending appeal. H.B. 1721 bans the standard of care for abortion performed after approximately 14 weeks of pregnancy, months before viability. If allowed to take effect, H.B. 1721 will immediately eliminate access to abortion in Oklahoma after this point in pregnancy, causing grave harm to women throughout the state.

The United States Supreme Court has already held, repeatedly, that such a ban on the most common method of abortion is unconstitutional. *See Gonzales v. Carhart*, 550 U.S. 124, 164-65 (2007); *Stenberg v. Carhart*, 530 U.S. 914, 938-45 (2000). The District Court's decision to the contrary is an extreme outlier. In fact, *the District Court is the only court in the country* to have considered a law like H.B. 1721 and found it constitutional. Every one of the *ten* other state and federal courts to consider a similar law has blocked it from taking effect, either through preliminary or permanent injunctions, based on the Supreme Court's clear precedent and the tremendous burden such laws would have on women and their ability to access abortion.

Appellees ("the State") have defended this ban by claiming that they should be permitted to mandate that the medical profession use "alternatives" to the standard of care for abortion. Unsurprisingly, every other court to consider this identical argument on similar facts has rejected it. Courts have resoundingly rejected this argument because each of the State's purported alternatives would expose women to additional, unnecessary risks with no corresponding medical benefit. These alternatives would also amount to experimental treatment on women in many cases and are not practically feasible or available for every patient.

There are only two providers of abortion after 14 weeks in Oklahoma, Tulsa Women's Clinic and Trust Women Oklahoma City. Both will cease providing abortion services after this point if the ban takes effect. The District Court's decision thus significantly imperils access to

abortion for Oklahoma women, and Tulsa Women's Clinic and its patients respectfully request a temporary injunction preserving access pending appeal.

I. Procedural History and Factual Background

On October 2, 2015, Tulsa Women's Clinic challenged H.B. 1721 ("the ban") (attached as Exhibit A) and House Bill 1409 ("the mandatory delay law"), which were scheduled to take effect on November 1, 2015, under the Oklahoma Constitution. The ban prohibits performing the procedure that is the standard of care for abortion after approximately 14 weeks, the dilation and evacuation (D&E) procedure. *See* H.B. 1721. A physician who violates the ban is subject to civil liability, fines, and criminal liability, including a prison sentence of up to two years. *Id.* The mandatory delay law amends existing Oklahoma restrictions on abortion by extending from 24 to 72 hours the time that a woman must delay her abortion procedure after receiving certain state-mandated information. 63 O.S. § 1-738.2. A physician who violates the mandatory delay law is subject to civil liability, criminal liability, and disciplinary action by state medical boards. 63 O.S. § 63-1-738.3e-3g, 63-1-738.5. Tulsa Women's Clinic sought a temporary injunction of both laws from the District Court. The State opposed.

On October 28, 2015, the District Court (the Honorable Judge Patricia Parrish) entered a temporary injunction of the ban. The court held that Tulsa Women's Clinic was likely to succeed on its claim that the ban violated the Oklahoma Constitution because the "U.S. Supreme Court has previously balanced the competing interests at stake here—namely, the State's asserted interests in protecting potential life and the ethics of the medical profession, and a woman's liberty interest in terminating a pre-viable pregnancy—and found that a [similar ban] was unconstitutional," and because the State's proposed "alternatives" are not "reasonable" and would "likely be unavailable in Oklahoma." October 28, 2015 Order at 5-6 (citing *Gonzales*, 550 U.S. at 147, 164-65; *Stenberg*, 530 U.S. at 945-46) (attached as Exhibit B-I).The parties then engaged in discovery and ultimately filed Motions for Summary

Judgment on July 13, 2018.[1] On July 12, 2019, the District Court (the Honorable Judge Cindy Truong) ruled from the bench that the ban is constitutional without stating any reasoning. On September 16, 2019, Tulsa Women's Clinic sought to maintain the injunction against the ban before the District Court, and the State opposed. The District Court denied Tulsa Women's Motion from the bench. *See* Transcript of September 6, 2019 Hearing (attached as Exhibit B-2). The parties stipulated to a stay of enforcement pending this Court's decision on the instant motion. September 19, 2019 Order at 2 (attached as Exhibit B-3).

Tulsa Women's Clinic provides reproductive health services, including abortion, in Tulsa, Oklahoma. Aff. of Brandie Haddan in Supp. Pl.'s Mot. Summ. J. ("Haddan Aff.") ¶ 1 (attached as Exhibit C). The clinic is one of four abortion providers in the State, and one of only two that offers abortions after the first trimester.[2] *Id.* ¶¶ 3, 37. Since 1974, the clinic has sought to provide care to underserved women, and many of its patients are women of color and/or low income. *Id.* ¶ 1. Were the ban to take effect, Tulsa Women's Clinic would immediately stop performing abortions after 14 weeks. *Id.* ¶ 36. Trust Women, the only other provider of abortions after 14 weeks LMP in Oklahoma, has also represented to Appellant's Counsel that it will immediately cease performing abortions after this point in pregnancy if the ban takes effect. *See also* Aff. of Colleen P. McNicholas, D.O., M.S.C.I., F.A.C.O.G., in Supp. Pl.'s Mot. Summ. J. ("McNicholas Aff.") ¶ 15 (attached as Exhibit D).

Legal abortion is one of the safest and most common medical procedures performed in the United States. Aff. of Amy Whitaker, M.D. in Supp. Pl.'s Mot. Summ. J. ("Whitaker Aff.") ¶ 9 (attached as Exhibit E). Abortion is typically performed on an outpatient basis in an office

---

[1] The District Court (the Honorable Judge Patricia Parrish) court denied a temporary injunction of the mandatory delay law, and ultimately granted summary judgment to the State on that law. Tulsa Women's Clinic does not seek emergency temporary relief from the mandatory delay law, although it appeals the grant of summary judgment to this Court.

[2] Pregnancy is measured by medical professionals based on the number of weeks elapsing since a woman's last menstrual period ("LMP"). A normal pregnancy lasts approximately 40 weeks.

or clinic setting, with an extremely low rate of complications. McNicholas Aff. ¶ 5; Whitaker Aff. ¶¶ 10-11. Most studies report complications in less than 1% of procedures. Whitaker Aff. ¶ 10. Although abortion is safe throughout both the first and second trimesters,[3] the risk of complications as well as the overall cost of the procedure increases as pregnancy progresses. McNicholas Aff. ¶ 23; Haddan Aff. ¶¶ 8, 27-28.

Women seek abortion for a variety of familial, socio-economic, health, and safety reasons, including that they do not want to become mothers or they already have children and having another child would make it more difficult to care for their existing families. Haddan Aff. ¶ 5; McNicholas Aff. ¶ 18; Whitaker Aff. ¶ 20. Some women seek abortion because they are in an unstable or abusive relationship. Haddan Aff. ¶ 5; McNicholas Aff. ¶¶ 21, 24-25. Others have medical conditions that make pregnancy and childbirth particularly risky to their health or have received a diagnosis of a grave or lethal fetal anomaly. Whitaker Aff. ¶ 20; Haddan Aff. ¶ 5; McNicholas Aff. ¶¶ 25.

The vast majority of abortions take place during the first trimester and involve a combination of medications or a simple procedure using gentle suction. Whitaker Aff. ¶¶ 12-14. Beginning at approximately 14 weeks LMP, abortion is typically accomplished by the D&E procedure, which is the standard of care for abortion in the second trimester. *Id.* ¶ 15; McNicholas Aff. ¶ 5. To perform a D&E, the physician first dilates (or opens) the patient's cervix using medication or dilators, and, second, removes the pregnancy. Whitaker Aff. ¶ 15. A D&E abortion can be performed in an outpatient setting in 20 minutes or less. *Id.* ¶¶ 18, 35.

The only safe alternative to D&E in the second trimester is induction abortion, which requires the use of medication to induce full labor and delivery of a non-viable fetus. *Id.* ¶ 35.

---

[3] The first trimester is typically understood to conclude at approximately 13 weeks LMP. The second trimester begins at approximately 14 weeks LMP and concludes at approximately 26-27 weeks LMP. In Oklahoma, abortion providers do not perform abortions beyond 21 weeks, 6 days LMP. 63 O.S. § 1-745.5. D&E procedures performed in Oklahoma only occur between approximately 14 weeks and 21 weeks, 6 days. *See id.*; McNicholas Aff. ¶ 5; Whitaker Aff. ¶ 15.

Induction abortion must be performed in a hospital and can take days to complete. *Id.* For most women, the process of undergoing labor and delivery of a non-viable fetus is distressing and painful both physically and emotionally. *Id.* Induction abortion is uncommon nationally and unavailable in Oklahoma public hospitals except in extremely limited circumstances. 63 O.S. § 1-741.1(A). Risks include hemorrhage, uncontrolled blood pressure, sepsis, or seizure in the case of severe preeclampsia. Whitaker Aff. ¶ 35. In those instances, a D&E is then the only available option to quickly and safely complete the abortion procedure. *Id.*

The State asserts that, instead of following the standard of care, providers should comply with the ban by performing a separate procedure on women to cause the demise of the fetus before they begin a D&E. Specifically, the State proposes three "alternatives" to cause fetal demise before the D&E procedure: injection of digoxin through the woman's abdomen or vagina via spinal needle; injection of potassium chloride (KCl) through the woman's abdomen, also via spinal needle; and transecting the umbilical cord and then waiting—while a woman remains dilated and sedated—until cessation of fetal heart tones.[4] Defendants' Motion for Summary Judgment at 11 (attached as Exhibit F). To be clear, none of these methods are currently used in Oklahoma, and they would not be practically feasible for all patients after 14 weeks of pregnancy.

Major medical groups have concluded, and all medical experts in this case agree, that causing fetal demise before a D&E *is not medically indicated or necessary*. McNicholas Aff. ¶¶ 5-8; Whitaker Aff. ¶¶ 22-23; Transcript of the Deposition of Michael Valley, M.D. ("Valley Tr.") 56:24-57:3 (attached as Exhibit G). Accordingly, the State proposes that providers subject women to additional procedures that are not medically warranted as a pre-condition for obtaining an abortion.

---

[4] The State has referred to umbilical cord transection throughout the case, although its expert Dr. Valley stated that he was not offering an opinion on this proposed method. Valley Tr. 124:14-23.

Digoxin, which is a medication used to treat certain heart conditions in adults, requires administration 24 to 48 hours prior to the actual abortion procedure to cause fetal demise. Whitaker Aff. ¶ 24; McNicholas Aff. ¶ 11. For procedures that would otherwise involve only one day of care, requiring a digoxin injection means requiring women to undergo a two-day procedure, by adding another visit 24-48 hours in advance. McNicholas Aff. ¶ 11. Digoxin is administered using an 18- , 20- , or 22-gauge spinal needle inserted through the woman's abdomen or vagina into the fetus or amniotic fluid. Whitaker Aff. ¶ 24. The procedure can cause physical and emotional discomfort for women and may require the use of localized pain management. *Id.*; McNicholas Aff. ¶ 10; Valley Tr. 185:3-23, 198:3-14. All medical experts in this case agree that attempting to administer an injection of digoxin can be much more complicated for an obese patient and may be impossible based on a woman's uterine anatomy or other factors. Whitaker Aff. ¶ 27; McNicholas Aff. ¶ 11; Valley Tr. 103:3-104:12.

There is significant evidence regarding the risks of digoxin injection at all gestational ages, which include vomiting, nausea, infection, ruptured membranes, extramural delivery (i.e. delivery outside a medical setting), and hospital admission. McNicholas Aff. ¶ 10; Whitaker Aff. ¶ 27; Valley Tr. 197:9-11. Some of these outcomes can lead to more serious complications, including sepsis and hemorrhage, as well as significant emotional distress for the patient. Whitaker Aff. ¶ 27; McNicholas Aff. ¶ 10. Because there is almost no medical evidence examining the safety or efficacy of digoxin in patients less than 18 weeks LMP, administration of digoxin to patients prior to 18 weeks LMP would subject those patients to an experimental procedure. McNicholas Aff. ¶ 10; Whitaker Aff. ¶ 29.

All experts in this case also agree that digoxin used at any gestational age is not 100% effective at causing fetal demise, McNicholas Aff. ¶ 11; Whitaker Aff. ¶ 30; Valley Tr. 123:5-11, 186:15-25; failure rates of 10-15% have been reported and vary depending on the dosage, method of administration, gestational age, and other factors. McNicholas Aff. ¶ 11. If a digoxin injection is unsuccessful in causing fetal demise, a physician would have to administer a second dose to avoid criminal prosecution, accompanied by yet another 24-48-hour delay. *Id.* No data

exists regarding the risks or potential effectiveness of subjecting patients to multiple doses of digoxin. *Id.*; Whitaker Aff. ¶ 30.

Inducing fetal demise through an injection of KCl requires insertion of a needle through the patient's abdomen into the uterus and administration of the drug into the fetal heart. McNicholas Aff. ¶ 12; Whitaker Aff. ¶ 32. It is an exceptionally difficult procedure, especially at early gestational ages, and requires specialized training and extensive practice. McNicholas Aff. ¶ 12; Whitaker Aff. ¶ 32. As confirmed by the medical experts in this case, KCl injections are almost exclusively performed by maternal fetal medicine physicians, sub-specialists in the field of obstetrics and gynecology who have completed a special post-residency fellowship, in hospital settings using ultrasound guidance. McNicholas Aff. ¶ 12; Whitaker Aff. ¶ 32; Valley Tr. 107:9-25, 111:2-16, 221:12-17. Administration of KCl is associated with significant risk for the woman, including potential cardiac arrest if the drug accidentally enters her bloodstream. McNicholas Aff. ¶ 12; Whitaker Aff. ¶ 32; Valley Tr. 220:2-7, 233:1-234:11. The risks and efficacy of KCl injections outside of the hospital setting are unstudied and unknown. Deposition Transcript of Amy Whitaker, M.D. 97:7-99:13 (attached as Exhibit H).

Umbilical cord transection requires the physician to cut the umbilical cord in the middle of a D&E procedure after dilation (opening of the cervix) and wait for cessation of fetal cardiac activity before removing the pregnancy. Whitaker Aff. ¶ 33; McNicholas Aff. ¶ 13. The physician first ruptures the amniotic sac and uses suction to remove the amniotic fluid, after which it becomes harder to visualize the umbilical cord. Whitaker Aff. ¶ 33. Prior to approximately 18 weeks LMP, the umbilical cord is quite small and difficult to distinguish from other fetal parts, making visualization even more challenging. *Id.*; McNicholas Aff. ¶ 13. Even with ultrasound guidance, it may be impossible to visualize and locate the cord at the outset of every D&E procedure. Whitaker Aff. ¶ 33. The State's expert, Dr. Valley, does not offer any opinion on the reasonableness, safety, or efficacy of umbilical cord transection, but admitted at his deposition that the procedure is rare. Valley Tr. 124:14-23.

Attempting to locate and transect the umbilical cord within a patient's uterus—while the cervix is dilated and the patient sedated—significantly extends and complicates the D&E procedure. Whitaker Aff. ¶ 34; McNicholas Aff. ¶ 13. It exposes her to increased risks, including placental disruption and hemorrhage, perforation, infection, and other complications. Whitaker Aff. ¶ 34; McNicholas Aff. ¶ 13. Extended exposure to anesthesia also increases risk to the woman's health. Whitaker Aff. ¶ 34. In the event of a medical complication where demise could not be accomplished by transecting the cord, a physician would be unable to complete the D&E procedure. McNicholas Aff. ¶ 13. The physician would have to attempt to cause demise through digoxin injection with its attendant delay and additional risk. *Id.* ¶ 11; Whitaker Aff. ¶ 34. There is almost no medical literature addressing the safety and efficacy of umbilical cord transection as a method of inducing fetal demise prior to D&E. Whitaker Aff. ¶ 33.

In short, the medical evidence shows that all of the methods of fetal demise proposed by the State impose unnecessary risks on women without any corresponding benefit, may be experimental, especially for abortion prior to 18 weeks LMP, and cannot be successfully and safely performed in every case. McNicholas Aff. ¶¶ 9-14.

II. Standard for Temporary Injunction

This Court has the authority to preserve the *status quo* and prevent irreparable injury by entering a temporary injunction while it considers the merits of this appeal. Oklahoma law provides: "[i]f a temporary or permanent injunction is denied or dissolved, the trial or appellate court, in its discretion, may restore or grant an injunction during the pendency of the appeal . . . upon such terms as to bond or otherwise as it considers proper for the security of the rights of the parties." 12 Okla. Stat. § 990.4(C). When considering a motion for a stay or a temporary injunction, this Court considers: (a) a likelihood of success on appeal; (b) the threat of irreparable harm if relief is not granted; (c) 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 perpetuation of a wrong or the doing of an act whereby the rights of the moving party may be materially invaded, injured or endangered." *Okla. Pub. Employees Ass'n v. Okla. Military Dep't*, 2014 OK 48, ¶ 15, 330 P.3d 497, 504 (citation omitted). "Matters involving the granting or denial of injunctive relief are of equitable concern," and this Court can "consider all evidence on appeal." *Edwards v. Bd. of Cty. Comm'rs of Canadian Cty.*, 2015 OK 58, ¶ 11, 378 P.3d 54, 58 (internal citations omitted).

III. Argument

A. Likelihood of Success on the Merits

Tulsa Women's Clinic is likely to succeed before this Court in demonstrating that the ban is unconstitutional because it violates the Oklahoma Constitution's Due Process Clause. Okla. Const. Art. II, § 7.

The U.S. Supreme Court has already held that it is unconstitutional to ban D&E. This Court has repeatedly made clear that, at a minimum, Oklahoma Courts apply the federal standard in determining the constitutionality of state restrictions on abortion. *Burns v. Cline*, 2016 OK 121, ¶ 8, 387 P.3d 348, 351. Under the federal standard, a law restricting abortion is unconstitutional if it imposes an undue burden on the right, meaning that the burdens on women outweigh any benefits. *See id.* at ¶ 9, 352 (citing *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292, 2311 (2016)). And, where the Supreme Court has already "spoken"—weighed the benefits and burdens imposed by a particular restriction—this Court is "bound by its pronouncements." *Id.* at ¶¶ 5, 18, 351-353 (holding that admitting privileges requirement imposed an undue burden because the State's argument that it advanced women's health was "considered and rejected" by Supreme Court based on "national scientific evidence").

The Supreme Court indeed has already examined, repeatedly, the very issue raised by Tulsa Women's Clinic's challenge to the ban—namely, whether it is constitutionally permissible to outlaw the most common method of second-trimester abortion. In every case it has faced this issue, the U.S. Supreme Court has ruled that such a ban imposes an undue burden

on a woman's constitutional right to abortion. *See Gonzales*, 550 U.S. at 165; *Stenberg*, 530 U.S. at 945-46; *see also Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 76-79 (1976).

In *Danforth*, the Court struck down a Missouri law banning the most common method of second-trimester abortion at that time, saline amniocentesis. 428 U.S. at 76-79. The Court based its decision in large part on its finding that the proposed alternatives to saline amniocentesis were not commonly used or generally available, noting that the state had offered no evidence that any of the proposed alternatives were actually available. *Id.* at 77. Thus, as a "practical matter," the ban forced "a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed." *Id.* at 79.

In *Stenberg*, the Supreme Court struck down a Nebraska law because it found that its broad sweep would ban D&E. The state law at issue purported to ban a different, rarely-used procedure, dilation and extraction (D&X). 530 U.S. at 945-46. But the Court found that the law actually banned both D&X *and* D&E. *Id.* Because the Court recognized that D&E was the most common method of second-trimester abortion, it concluded that the law imposed an undue burden. *Id.* In keeping with the logic of *Danforth*, the Court held that a State "may promote but not endanger a woman's health when it regulates the methods of abortion." *Id.* at 931. Nebraska's law was struck down because it impermissibly forced women to undergo "riskier methods of abortion" than that prohibited. *Id.*

In *Gonzales*, the Supreme Court upheld a different law—a federal ban on D&X—based on its conclusion that the law allowed the "prototypical" D&E procedure. 550 U.S. at 153, 164, 166-67. The *Gonzales* Court both distinguished and affirmed *Stenberg*, explaining that the Nebraska statute at issue in *Stenberg* imposed an undue burden because it banned both D&X and D&E. *Id.* at 151-53. By contrast, the federal ban was constitutional because it reached *only* D&X, while allowing access to D&E, the most common and generally accepted method of second-trimester abortion. *Id.* at 165-66.

Based on this clear precedent from the U.S. Supreme Court, every court that has reviewed the constitutionality of a D&E ban like Oklahoma's (based on largely identical evidence) has permanently or preliminarily enjoined the ban as imposing an undue burden on a woman's constitutional right to access pre-viability abortion. *See, e.g.*, *W. Ala. Women's Ctr. v. Williamson*, 900 F.3d 1310, 1329-30 (11th Cir. 2018) (affirming district court's decision after a trial permanently enjoining Alabama D&E ban), *cert. denied sub nom. Harris v. W. Ala. Women's Ctr.*, 139 S. Ct. 2606 (2019); *Bernard v. Individual Members of Ind. Med. Licensing Bd.*, No. 1:19-CV-01660-SEB-DML, 2019 WL 2717620, at *1, *24 (S.D. Ind. June 28, 2019) (preliminarily enjoining a D&E ban); *Whole Woman's Health v. Paxton*, 280 F. Supp. 3d 938, 944-45 (W.D. Tex. 2017) (permanently enjoining a D&E ban based on *Gonzales* and *Stenberg* after trial on the merits), *appeal stayed*, No. 17-51060 (5th Cir. Mar. 13, 2019); *Hopkins v. Jegley*, 267 F. Supp. 3d 1024, 1069 (E.D. Ark. 2017) (preliminarily enjoining a D&E ban), *appeal docketed*, No. 17-2879 (8th Cir. Aug. 28, 2017); *EMW Women's Surgical Ctr., P.S.C. v. Meier*, 373 F. Supp. 3d 807, 825-26 (W.D. Ky. 2019) (permanently enjoining a D&E ban after trial on the merits), *appeal docketed*, No. 19-5516 (6th Cir. May 15, 2019); *Planned Parenthood Sw. Ohio Region v. Yost*, 375 F. Supp. 3d 848, 872 (S.D. Ohio 2019) (preliminary injunction of a D&E ban); *Hodes & Nauser, MDs, P.A. v. Schmidt*, 368 P.3d 667, 676-77 (Kan. Ct. App. 2016) (affirming temporary injunction against D&E ban, relying on *Stenberg* and *Gonzales*), *aff'd*, 440 P.3d 461 (Kan. 2019). Most recently, the U.S. Supreme Court denied certiorari on an appeal from the opinion of the Eleventh Circuit affirming a permanent injunction against Alabama's D&E ban. *Harris v. W. Ala. Women's Ctr.*, 139 S. Ct. 2606 (2019) (*denying certiorari*).

Further, this Court has held that the State cannot ban the "acceptable standard of care," subjecting abortion patients to "sub-standard practices" and medical professionals to potential liability for failing to provide the standard of care. *Oklahoma Coal. for Reprod. Justice v. Cline [Cline IV]*, 2019 OK 33, ¶ 42, 441 P.3d 1145, 1160; *Oklahoma Coal. for Reprod. Justice v. Cline [Cline III]*, 2016 OK 17, ¶ 2, 368 P.3d 1278, 1289. In this case, just as in *Cline III*, "those

who do not practice medicine have determined to insert themselves between physicians and their patients, with the insistence they know what is best when it comes to the standard of care." *Id.*

Here, the medical evidence shows that the D&E procedure performed without an additional demise procedure is the standard of care for abortion after approximately 14 weeks LMP. Whitaker Aff. ¶¶ 18, 25; McNicholas Aff. ¶¶ 15-16. It is the most common method of second-trimester abortion. Whitaker Aff. ¶¶ 23-27; McNicholas Aff. ¶¶ 7-8; Valley Tr. 57:1-58:18.

As for the State's proposed alternatives, the record evidence demonstrates: (1) fetal demise procedures do not generate any medical benefit for patients, Whitaker Aff. ¶¶ 18, 25; McNicholas Aff. ¶¶ 15-16; Valley Tr. 57:1-58:18; (2) all of these procedures carry risks for patients not associated with the D&E procedure, Whitaker Aff. ¶¶ 27, 32-33; McNicholas Aff. ¶¶ 10, 12-13; Valley Tr. 197:9-11, 220:2-7, 233:1-234:11; (3) in many cases, these procedures would be experimental, McNicholas Aff. ¶ 10; Whitaker Aff. ¶¶ 28-29; and (4) there is no way to reliably ensure demise in every case using the State's proposed methods, which are largely unavailable in Oklahoma and uncommon generally, McNicholas Aff. ¶¶ 10-13, Whitaker Aff. ¶¶ 22-35; Valley Tr. 103:3-16, 107:9-25, 111:2-16, 123:5-11, 124:14-23, 186:15-25, 221:12-17.

Accordingly, all of these alternatives are infeasible for Oklahoma providers, and the ban will eliminate women's access to abortion after 14 weeks LMP. Tulsa Women's Clinic has, therefore, demonstrated a likelihood of success on the merits of its claim that the ban violates the Due Process rights of its patients under the Oklahoma Constitution.

B. Irreparable Harm

If the ban were to take effect, abortion access in Oklahoma will be significantly constricted overnight. No abortion services will be available after 14 weeks. Accordingly, women who have made the decision to end a pregnancy after this point will be unable to obtain this medical care and exercise their fundamental right to access abortion in Oklahoma. Loss of

constitutional freedoms, even temporarily, constitutes *per se* irreparable harm. *See generally* 11A Charles Alan Wright, et al., Fed. Prac. & Proc. § 2948.1 (3d ed. West 2014); *accord Entm't Merchants Ass'n v. Henry*, No. CIV-06-675-C, 2006 WL 2927884 at *2 (W.D. Okla. Oct. 11, 2006).

The reduction in availability of important health services causes irreparable harm as this Court recognized in *Cline IV*. 2019 OK 33, ¶ 31, 441 P.3d at 1156 The reduction in services if the ban takes effect will be at least as great as it was in that case, supporting the grant of temporary relief here. *Id.*; *see also Edwards*, 2015 OK at ¶ 29, 378 P.3d at 63 (holding that "interruption of juvenile services and programs throughout the county could not be" compensated via monetary damages and constituted irreparable harm).

C. Lack of Injury to the Opposing Party

The State would suffer little harm if a temporary injunction were granted; indeed, a temporary injunction would preserve the *status quo* while this Court reviews the District Court's decision. This law has been blocked since 2015. The State has not alleged any non-speculative harm to it from the law remaining blocked for the additional time needed for this Court to consider this case.

D. 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.*, *Entm't Merchants Ass'n,* No. CIV-06-675-C, 2006 WL 2927884 at *3; *Am. Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999). Tulsa Women's Clinic has amply demonstrated, and the State does not reasonably dispute, that abortion access in Oklahoma will be immediately reduced upon implementation of the ban.

Where an appeal raises two competing views of public policy, "tied directly to the merits of the underlying suit, . . . the public interest is best served by preserving the *status quo*." *Edwards*, 2015 OK at ¶ 35, 378 P.3d at 64. The *status quo* deserves special weight here, given that so many courts around the country each have come to the opposite conclusion of the District Court on the constitutionality of laws identical to the ban.

IV. Conclusion

Tulsa Women's Clinic respectfully requests a temporary injunction pending resolution of its appeal because it has shown that the ban is likely unconstitutional based on controlling Supreme Court precedent and the uncontroverted facts in the record below. The ban, if implemented even temporarily, will irrevocably alter the lives of Oklahoma women in need of abortion care after approximately 14 weeks LMP. This harm greatly outweighs any interest of the State in immediate enforcement. A temporary injunction is therefore warranted.

Respectfully submitted this 2nd day of October, 2019,

J. Blake Patton
Oklahoma Bar Registration No. 30673
WALDING & PATTON PLLC
518 Colcord Drive, Suite 100
Oklahoma City, OK 73102-2202
Phone: (405) 605-4440
Fax: N/A
Email: bpatton@waldingpatton.com

Autumn Katz*
New York Bar Registration No. 4394151
Rabia Muqaddam*
New York Bar Registration No. 5319413
CENTER FOR REPRODUCTIVE RIGHTS
199 Water Street, 22nd Floor
New York, NY 10038
Phone: (917) 637-3645
Email:akatz@reprorights.org
rmuqaddam@reprorights.org

**Admitted to Practice by Order*

ATTORNEYS FOR PLAINTIFF/APPELANT

APPELLANT'S CERTIFICATE OF COMPLIANCE WITH SUPREME COURT RULE 1.15(c)(1)

Pursuant to Sup. Ct. R. 1.15(c)(1), counsel for Appellant Tulsa Women's Clinic certifies that they are requesting this Court to act within less than a week on the application for temporary injunctive relief because the Bill at issue, H.B. 1721, is unconstitutional and threatens to cause Tulsa Women's Clinic and its patients irreparable injury. The State has stipulated that enforcement of H.B. 1721 will not take place until a ruling by this Court on this Emergency Motion. Without an injunction from this Court, the ruling of the District Court dissolving the injunction will go into effect.

J BLAKE PATTON

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of October, 2019, a true and correct copy of the foregoing was sent via first class U.S. mail, postage pre-paid, and emailed to the following:

Mithun Mansinghani
Solicitor General
Zach West
Assistant Solicitor General
Devan A. Pederson
Assistant Attorney General
Office of the Oklahoma Attorney General
313 N.E. 21st Street
Oklahoma City, Oklahoma 73105
Email: mithun.mansinghani@oag.ok.gov
zach.west@oag.ok.gov
devan.pederson@oag.ok.gov

/s/J. Blake Patton
J BLAKE PATTON