IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

OKLAHOMA CALL FOR REPRODUCTIVE JUSTICE, on behalf of itself and its members, *et al.*, Plaintiffs/Appellants, v. JOHN O'CONNOR, in his official capacity as Attorney General for the State of Oklahoma, *et al.*, Defendants/Appellees.	FILED SUPREME COURT STATE OF OKLAHOMA DEC - 8 2021 Case No. 119918 JOHN D. HADDEN CLERK

PLAINTIFFS-APPELLANTS' BRIEF

Appeal from the District Court of Oklahoma County, State of Oklahoma
Case No. CV-2021-2072
The Honorable Cindy Truong
The Honorable Nikki Kirkpatrick
District Court Interlocutory Order: Temporary Injunction

DECEMBER 8, 2021

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I. PRELIMINARY STATEMENT

This case concerns the Oklahoma Legislature's latest campaign to prevent Oklahomans, especially those without means, from accessing abortions—its most draconian yet. In its 2021 session, the Oklahoma Legislature enacted three laws that are the subject of this appeal—H.B. 1904 (the "OB/GYN Requirement"), S.B. 778, and S.B. 779 (the "Medication Abortion Restrictions") (collectively, the "Challenged Laws"). At the same time, the Legislature enacted two outright bans on abortion—a ban on all abortions and a ban on abortions after approximately six weeks of pregnancy as measured from a person's last menstrual period ("LMP"). The District Court enjoined the bans but declined to enjoin the Challenged Laws.

Extensive record evidence demonstrates that the Challenged Laws, if permitted to go into effect, will severely reduce abortion services and delay access to time-sensitive care in Oklahoma. The cascading delays and other hurdles imposed by the Challenged Laws will push patients into later and more complex procedures, prevent many patients from receiving a medication abortion, and prevent many from being able to access abortion in the state. Uncontested record evidence shows that these laws were enacted with the express purpose of accomplishing these outcomes.

Defendants-Appellees (the "State") have asserted a supposed interest in patient health and safety, but the words of legislators show this to be pretext. These laws are designed to restrict abortion, not to protect patients. The overwhelming medical consensus is that the requirements imposed by the Challenged Laws are medically unnecessary—mandatory ultrasounds days in advance, multiple trips to a provider, board-certification in obstetrics and gynecology, and admitting privileges, among others—do nothing to increase the safety of a procedure already demonstrated to be highly safe and effective.

The Challenged Laws throw asunder the substantive due process rights of pregnant people. The State would have this Court hold that the Legislature may radically intrude on Oklahomans' liberty and bodily autonomy by forcing them to remain pregnant and give birth. This is not and cannot be so.

In enacting the Medication Abortion Restrictions, the Legislature also ignored this Court's repeated admonitions that such sprawling omnibus bills violate the single subject rule of the Oklahoma Constitution.

To protect the constitutional rights of Oklahomans pending a decision on the merits, Plaintiffs-Appellants respectfully request that this Court reverse the District Court's denial of a temporary injunction as to the Challenged Laws.

II. SUMMARY OF THE RECORD

A. Procedural History

On September 2, 2021, Plaintiffs-Appellants filed this lawsuit in the District Court challenging H.B. 2241, H.B. 1102, H.B. 1904, S.B. 778, and S.B. 779 under the Oklahoma Constitution and seeking a temporary injunction ("TI"), given the laws' effective date of November 1. ROA, pp. 1-117 (Petition); ROA, pp. 118-124 (TI Mot.); ROA, pp. 125-276 (Mem. ISO TI Mot.). After the TI motion was fully briefed, the District Court held a hearing on October 4. From the bench, the District Court granted the motion in part and denied it in part—enjoining the two abortion bans (H.B. 1102 and H.B. 2241) but declining to enjoin the OB/GYN Requirement (H.B. 1904) and the Medication Abortion Restrictions (S.B. 778 and S.B. 779). ROA, pp. 580-583 (TI Order).

On October 13, Plaintiffs-Appellants filed an Emergency Motion for a TI Pending Appeal, to which the State responded on October 20; a Motion to Retain Jurisdiction; and a Motion for a Fast-Track Appeal in this Court. This Court granted the Motion to Retain and

denied the Motion for a Fast-Track Appeal on October 15. In an Order dated October 25, this Court continued the District Court's TI barring enforcement of the bans and granted Plaintiffs-Appellants' Emergency Motion for a TI, temporarily enjoining the Challenged Laws.

B. The Record Shows That Abortion is Safe and Effective

Abortion is one of the safest forms of medical care in the United States and is routinely performed by licensed clinicians across different medical specialties. ROA, pp. 210-260, (Aff. of Ushma Upadhyay, M.P.H., Ph.D.) ("Upadhyay Aff.") ¶¶ 19-26. There are generally two methods of abortion—medication and procedural. *Id.* ¶¶ 11-13. Medication abortion involves taking two prescription oral medications. *Id.* ¶ 12. Procedural abortion is an outpatient procedure that involves the use of instruments or medications to gently open the cervix and remove the contents of the uterus. *Id.* ¶ 13. Both methods are exceedingly safe and effective, with serious complications occurring in fewer than one percent of abortions. *Id.* ¶ 19. Physicians from a wide range of specialties safely provide both methods of abortion care in the United States, including family medicine doctors, obstetrician/gynecologists ("OB/GYNs"), and others. *Id.* ¶¶ 14, 23-25; ROA, pp. 261-76 (Aff. of Joey Banks, M.D.) ("Banks Aff.") ¶¶ 16, 23-24; ROA, pp. 188-209 (Aff. of Joshua Yap, M.D., M.P.H.) ("Yap Aff.") ¶¶ 42-43.

While both methods of abortion are safe and effective, Oklahomans who are eligible for both overwhelmingly prefer medication abortion. Yap Aff. ¶ 54; ROA, pp. 163-187 (Aff. of Alan Braid, M.D.) ("Braid Aff.") ¶¶ 19-20. Medication abortion is comparable in safety to many commonly prescribed medications, such as antibiotics, as well as over-the-counter medications like Advil and Tylenol. Upadhyay Aff. ¶¶ 12, 28. This Court has recognized the "widespread consensus" that medication abortion is one of the safest medication regimens in medicine today. *Okla. Coal. for Reprod. Just. v. Cline* ("*Cline IV*"), 2019 OK 33, ¶ 38, 441

P.3d 1145, 1159; *see also* Upadhyay Aff. ¶¶ 19-26. In reaching that conclusion, this Court rejected the opinions of the State's witnesses suggesting that medication abortion is unsafe—opinions largely rehashed by the State here. *Cline IV*, 2019 OK 33, ¶¶ 28-38, 441 P.3d at 1155-60 & nn.42, 44 (crediting the testimony of the plaintiffs' experts, including testimony relying on the research of Dr. Ushma Upadhyay, Plaintiffs-Appellants' expert here, over that of Dr. Donna Harrison, the State's expert). As evidence of medication abortion's safety and effectiveness has mounted over decades, the medical community and the FDA have altered their recommendations to expand access to the regimen, Upadhyay Aff. ¶ 29, as this Court has acknowledged. *Cline IV*, 2019 OK 33, ¶ 28, 441 P.3d at 1155 (noting that the FDA now recommends lower dosages, longer availability, and removal of in-person follow-up requirements, reflecting evidence-based medical practice). Evidence-based medicine now supports providing medication abortion to patients through 77 days LMP. Upadhyay Aff. ¶ 29; Yap Aff. ¶ 52.

C. Plaintiffs-Appellants

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. ROA, pp. 153-162 (Aff. of Priya Desai) ("OCRJ Aff.") ¶ 1. Dr. Alan Braid is a board-certified OB/GYN who owns Tulsa Women's Reproductive Clinic ("Tulsa Women's") and provides abortion care there. Braid Aff. ¶ 1. Tulsa Women's, Comprehensive Health of Planned Parenthood Great Plains, Inc. ("CHPPGP"), and Planned Parenthood of Arkansas & Eastern Oklahoma ("PPAEO") (collectively, the "Provider Plaintiffs") are licensed Oklahoma abortion facilities that provide medication and procedural abortion. Yap Aff. ¶¶ 6-7.

Half of the physicians who regularly provide abortion care at Tulsa Women's are board-certified family medicine doctors and three are board-certified OB/GYNs. Braid Aff. ¶ 13. PPAEO employs one physician to provide all its abortion care; he works full time and is board-certified in family medicine. Yap Aff. ¶¶ 2, 21, 82; ROA, pp. 555-60 (Rebuttal Aff. of Joshua Yap, M.D., M.P.H.) ("Yap Rebuttal Aff.") ¶ 5. CHPPGP currently contracts with six part-time physicians who each provide care only a few days per month—around half are board-certified in family medicine, and the others are board-certified OB/GYNs. Yap Aff. ¶¶ 19, 41, 82; Yap Rebuttal Aff. ¶ 5.

D. The Record Shows that Abortion is Essential but Challenging to Access

One in four American women will obtain an abortion in their lifetime. Upadhyay Aff. ¶ 36. Approximately 5,000 patients a year obtain abortions in Oklahoma. Braid Aff. ¶ 14. Access to abortion is essential for the health and well-being of pregnant people and their families. Upadhyay Aff. ¶¶ 36-49; Braid Aff. ¶ 22; OCRJ Aff. ¶ 20; Yap Aff. ¶ 79. The Provider Plaintiffs collectively provide a majority of abortion services in the state. Braid Aff. ¶¶ 13-14; Yap Aff. ¶ 3.

There is no typical abortion patient—people choose abortion for myriad and often complex personal reasons, including familial, medical, and financial concerns. Yap Aff. ¶ 8; Braid Aff. ¶ 24. Most people who access abortion care are living in poverty. Upadhyay Aff. ¶ 37. Data from the Oklahoma State Department of Health show that, when asked their reason for seeking abortion care, patients most frequently report that having a child would interfere with their education or career, or that they cannot afford to have a child.[1]

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[1] *See* Okla. State Dep't Health, *Abortion Surveillance in Okla., 2002-2020* (May 2020), https://oklahoma.gov/content/dam/ok/en/health/health2/aem-documents/data-and-statistics/center-for-health-statistics/2020%20AbortionReport.pdf ("OK Abortion Report 2020"), 24 tbl.17.

As this Court has recognized, logistical barriers that subject patients to increased travel or costs impose a host of burdensome challenges on Oklahomans seeking abortion care. *Cline IV*, 2019 OK 33, ¶ 34, 441 P.3d at 1158; Yap Aff. ¶¶ 14-15, 60, 80; Braid Aff. ¶¶ 23, 35, 41; Upadhyay Aff. ¶¶ 38-39. Oklahoma is a rural state that lacks meaningful public transportation, and many patients must already travel significant distances to access care. Yap Aff. ¶ 60; Upadhyay Aff. ¶ 39. "Traveling from rural areas might require a long journey or a two night stay away from home to access care, which increases costs for low-income patients, childcare, and time off from work." *Cline IV*, 2019 OK 33, ¶ 34, 441 P.3d at 1158; *see also* Yap Aff. ¶¶ 10, 14, 60; Braid Aff. ¶ 72; Upadhyay Aff. ¶ 39. Some patients must also navigate threats to their safety due to intimate partner violence. Yap Aff. ¶ 80. It is undisputed that all these barriers disproportionately affect poor and low-income people who make up the majority of Oklahomans seeking abortions, Yap Aff. ¶ 10; Braid Aff. ¶¶ 23-24, 71; Upadhyay Aff. ¶¶ 37, 39, 44, as well as Black and Indigenous Oklahomans and other people of color, Yap Aff. ¶¶ 11-13, 80; OCJR Aff. ¶ 6. Research shows that even small increases in logistical obstacles prevent people from receiving care at all. Upadhyay Aff. ¶¶ 38-39; Braid Aff. ¶¶ 71-76.

Abortion is time-sensitive and becomes more complex and expensive as pregnancy advances. Upadhyay Aff. ¶¶ 38-41; Braid Aff. ¶¶ 39, 72-76, 91, 98; Yap Aff. ¶¶ 16, 64-65. Delays in access can exacerbate pregnancy-related medical conditions and can cause some patients, including sexual assault survivors, tremendous stress. Upadhyay Aff. ¶ 41; Braid Aff. ¶¶ 39-40. Delays can prevent people from being able to access medication abortion at all, "even when that is the best option for them due to fear of surgical instruments, anesthesia or sedation, being victims of sexual assault or having certain medical or anatomical conditions." *Cline IV*, 2019 OK 33, ¶ 34, 441 P.3d at 1158; Braid Aff. ¶¶ 65-66; Yap Aff. ¶ 53; *see also Cline IV*,

2019 OK 33, ¶ 31, 441 P.3d at 1156 (noting that many Oklahomans prefer medication abortion "for privacy reasons" or "because it feels natural"); Braid Aff. ¶ 65.

There already is a serious shortage of abortion providers in Oklahoma due to stigma and harassment—the Provider Plaintiffs have struggled to hire physicians for years, and most physicians who provide abortion care travel into Oklahoma only a few days per month. Yap Aff. ¶¶ 22-28; Braid Aff. ¶¶ 52-56, 90, 96; Banks Aff. ¶¶ 27-29.

The severe obstacles created by the Challenged Laws will exacerbate these existing barriers to accessing abortion. Upadhyay Aff. ¶¶ 38-40; Braid Aff. ¶¶ 67-96, 98; Yap Aff. ¶¶ 15-16, 46, 48, 55-62, 64-65, 76, 80, 82. Restricting the pool of available physicians creates appointment shortages and backlogs. Braid Aff. ¶¶ 49-50, 68, 89-91; Yap Aff. ¶¶ 15-16, 46, 48, 55, 73-76. Imposing logistical barriers on patients, such as forcing patients to travel potentially long distances twice, will also cause significant delays. Upadhyay Aff. ¶¶ 38-40; Braid Aff. ¶¶ 70-77; Yap Aff. ¶¶ 58-65. These delays will prevent many patients from accessing medication abortion. Braid Aff. ¶¶ 75-77; Yap Aff. ¶¶ 15-16. Ultimately these appointment shortages and delays will push many patients beyond the point where abortion care is available in Oklahoma at all, forcing some to carry unwanted pregnancies to term. Braid Aff. ¶¶ 74, 98; Yap Aff. ¶¶ 16, 65, 79-80.

When the State imposes restrictions that deny people access to abortions, it intrudes on their bodily autonomy and their ability to direct their own lives. OCRJ ¶ 20; Upadhyay Aff. ¶¶ 42-49. Denial of care also imposes substantial medical risk, as carrying to term is far riskier than abortion. Upadhyay Aff. ¶ 43; Braid Aff. ¶¶ 21-22; Banks Aff. ¶ 23. Further, research shows that people denied access to abortion experience worse psychological and physical

health outcomes than people who were able to access care. Upadhyay Aff. ¶¶ 42-49. These people are more likely to experience poverty and physical violence, as are their families. *Id.*

E. The Challenged Laws

1. The OB/GYN Requirement

The OB/GYN Requirement arbitrarily prohibits licensed physicians from providing abortions unless they are "board-certified in obstetrics and gynecology." H.B. 1904 § 1 (amending 63 O.S. § 1-731(A)). Providing an abortion in violation of the OB/GYN Requirement is a felony, punishable by one to three years in prison. *Id.* If permitted to take effect, the OB/GYN Requirement will dramatically restrict abortion access in Oklahoma overnight—of the four health centers in Oklahoma that provide abortion care, one will have no eligible physicians and three others will lose around half their physicians. Braid Aff. ¶ 49; Yap Rebuttal Aff. ¶¶ 4-5; ROA, pp. 561-66 (Rebuttal Aff. of Joey Banks, M.D.) ("Banks Rebuttal Aff.") ¶ 5 & n.3[2]; Yap Aff. ¶¶ 46, 48, 82. The State's own data show that thirty-five percent of abortions performed in Oklahoma in 2020 were performed by physicians who would be prohibited from performing abortions under the OB/GYN Requirement. Resp. to Emerg. Mot. at 8 n.5. And, according to the author of the OB/GYN Requirement, "[o]ver half of [abortions]" performed in Oklahoma from 2012-2020 "were [provided] by non-board certified OBGYNs."[3] Thus, the OB/GYN Requirement will impose tremendous delays and insurmountable barriers to abortion access, as the remaining providers cannot possibly take on

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[2] The only non-Plaintiff abortion provider in Oklahoma, Trust Women, will lose four of its eight physicians. Sabrina Tavernise, *With Abortion Largely Banned in Texas an Oklahoma Clinic is Inundated*, N.Y. Times (Sept. 26, 2021), https://www.nytimes.com/2021/09/26/us/oklahoma-abortion.html.

[3] Jamison Keefover, *Abortion Laws Blocked By Okla. Supreme Court Days Before Going Into Effect*, News Channel 8 Tulsa ABC (Oct. 26, 2021), https://ktul.com/news/local/abortion-laws-blocked-by-oklahoma-supreme-court-days-before-going-into-effect ("*Abortion Laws Blocked*, News Channel 8").

more than double their existing patient load. This will result in many Oklahomans being entirely unable to access abortion in the state. *See supra* Part II(D). Further, the struggles the Provider Plaintiffs already face in hiring new doctors will worsen should the pool of possible providers become limited to board-certified OB/GYNs. Contrary to the State's speculation, ROA, pp. 277-528 (Resp. to TI Mot.) at 14-16, it is not feasible to quickly substitute enough new board-certified OB/GYN physicians working enough days per month to maintain current patient loads. Braid Aff. ¶ 52; Yap Rebuttal Aff. ¶¶ 2-5.

The preeminent national professional association of OB/GYNs, the American College of Obstetricians and Gynecologists, publicly opposes OB/GYN restrictions because they are "medically unnecessary," as "clinicians in many medical specialties can provide safe abortion services," and are "designed to reduce access to abortion." Banks Aff. ¶ 18; *see also* Yap Aff. ¶¶ 42-45. Training and clinical experience, not specialty, determine competency to provide abortion care. Banks Aff. ¶¶ 14-20; *see also* Yap Aff. ¶¶ 39-40. The record evidence shows that abortion is well within the core competencies of family medicine physicians, many of whom have safely provided abortion care in Oklahoma for years. *See infra* Part III(C)(1)(i). Family medicine doctors frequently provide care far more complex than abortion, such as labor and delivery, and routinely prescribe far riskier medications, such as opiates. Banks Aff. ¶¶ 23-24. Family medicine physicians can and do provide miscarriage care, which generally involves medications and procedures identical to those used for abortion care. *Id.*; Yap Aff. ¶ 45.

2. The Medication Abortion Restrictions

S.B. 778 and S.B. 779 are sprawling bills, each containing myriad unrelated provisions restricting medication abortion, and each imposing severe penalties for even minor infractions. These bills will dramatically restrict access to medication abortion by forcing patients to jump

through medically unnecessary hoops, restricting the availability of abortion providers, threatening to publicly out abortion patients and their physicians, and the physicians, agencies, or services who refer them for care, and potentially chilling medication abortion manufacturers from distributing the medications in Oklahoma at all.

For example, S.B. 778 includes: (i) a requirement that patients have an ultrasound at least 72 hours before a medication abortion, forcing patients to make an additional, medically unnecessary visit to a provider (even though a less burdensome ultrasound requirement has already been held unconstitutional by this Court, *see infra* Part III(C)(1)(ii)), S.B. 778 §§ 6(A)-(C), (E)(1), 8(A), (B)(6); Upadhyay Aff. ¶ 33; and (ii) a mandate that providers file reports to be designated as "public records," which must include demographic information about patients, abortion providers, and referring physicians and agencies, S.B. 778 §§ 8(B), (H).[4]

S.B. 779 similarly includes myriad unrelated provisions, applying to different entities and involving different sanctions. For example, it includes (i) a limitation on providing medication abortion beyond 70 days or 10 weeks LMP, S.B. 779 § 7(10)(b); Yap Aff. ¶¶ 55, 64; (ii) a requirement that doctors have hospital admitting privileges or contract with a physician who does, whose information must be publicized to all local hospitals (even though similar requirements have been held unconstitutional by this Court and the United States Supreme Court, *see infra* Part III(C)(1)(ii)), S.B. 779 §§ 7(11), 8, which threatens to shut down the provision of medication abortion at the Provider Plaintiffs' clinics, Yap Aff. ¶ 76; Braid Aff. ¶¶ 88-91; and (iii) record keeping and reporting obligations, resulting in the publication

[4] S.B. 778 also imposes (iii) an interstate bar on mailing abortion medication, *id.* § 3; and (iv) a bar on medication abortion on school, university, or state grounds, *id.* § 5.

of provider, staff, and patient information, S.B. 779§§ 9(A)(7).[5] S.B. 779 also delegates enforcement authority to four different state agencies: two physician licensing boards; the pharmacy board, which must promulgate rules to certify physicians who provide abortion-inducing drugs and manufacturers and distributors of abortion-inducing drugs, *id.* §§ 4(A), 5(A), (C); and the board of health, *id.* § 8(2)(d).

Noncompliance with just one provision of S.B. 778 or S.B. 779 results in an inability to provide medication abortion, *e.g.*, *id.* § 12(A)(2), which harms patients, *see supra* Part II(D).[6] The delays in care stemming from the 72-hour ultrasound requirement alone will deprive some Oklahomans of the ability to obtain a medication abortion at all. Braid Aff. ¶ 75; Yap Aff. ¶ 64; Upadhyay Aff. ¶ 33. The admitting privileges requirement alone will likely disqualify most of the Provider Plaintiffs' physicians. Braid Aff. ¶¶ 88-89; Yap Aff. ¶¶ 73-76, 82. Both bills also threaten the safety and confidentiality of patients, physicians, and staff—harms the State does not meaningfully contest or address. Braid Aff. ¶¶ 80, 89, 94; Yap Aff. ¶ 75. The 10-week restriction will bar anyone from obtaining medication abortion between 10 and 11 weeks LMP for no medically justifiable reason. Yap Aff. ¶¶ 55, 64.

III. ARGUMENTS AND AUTHORITIES

A. Standard of Review

This Court may reverse a district court's denial of a temporary injunction where the lower court "abused its discretion or the decision is clearly against the weight of the evidence."

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[5] S.B. 779 also includes (iv) licensing of national manufacturers and distributors, which may chill such entities from supplying providers in Oklahoma, *id.* §§ 5(A)-(B), 6; (v) an enforcement scheme with heavy fines, *id.* § 12; and (vi) a system for making and receiving complaints, resulting in the publication of the names of the physicians certified under the Act, *id.* § 13(D).

[6] Both S.B. 778 and 779 also include provisions relating to the unsupported theory of medication abortion "reversal." On October 4, based on the agreement of the parties in a separate case, these provisions were added to an existing injunction barring required counseling on this theory.

Dowell v. Pletcher, 2013 OK 50, ¶ 5, 304 P.3d 457, 460 (citation omitted). This Court "will consider all the evidence on appeal to determine" whether the District Court abused its discretion. *Id.* (footnote omitted).

B. The Applicable Legal Standard

"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. Emps. Ass'n v. Okla. Mil. Dep't*, 2014 OK 48, ¶ 15, 330 P.3d 497, 504 (citation omitted). "A temporary injunction protects a court's ability to render a meaningful decision on [the] merits of the controversy." *Edwards v. Bd. of Cty. Comm'rs of Canadian Cty.*, 2015 OK 58, ¶ 10, 378 P.3d 54, 58 (citation omitted).

Courts consider the following factors in determining whether to issue a temporary injunction: (1) the applicant's likelihood of success on the merits; (2) irreparable harm to the party seeking relief if injunctive relief is denied; (3) whether the applicant's threatened injury outweighs that of the opposing party; and (4) whether the injunction is in the public interest. *Dowell*, 2013 OK 50, ¶ 7, 304 P.3d at 460 (citation omitted).

C. Plaintiffs-Appellants Are Likely to Succeed on the Merits

1. The Challenged Laws Likely Violate the Oklahoma Constitution's Due Process Clause

The Oklahoma Constitution states "[n]o person shall be deprived of life, liberty, or property, without due process of law." Okla. Const. art. II, § 7. This Court has repeatedly interpreted this guarantee to protect a person's ability to access abortion care prior to viability, consistent with the federal constitution and Supreme Court precedent. *Cline IV*, 2019 OK 33 ¶¶ 16, 25, 43, 441 P.3d at 1151, 1153-54, 1160-61 (citations omitted); *Burns v. Cline* ("*Cline III*"), 2016 OK 121, ¶ 8, 387 P.3d 348, 351-52. At a minimum, Oklahoma courts apply the

undue burden standard used by federal courts to determine the constitutionality of a state law that interferes with the right to abortion. *Cline IV*, 2019 OK ¶ 20, 441 P.3d at 1152. Plaintiffs-Appellants are likely to succeed in demonstrating that the Challenged Laws create an undue burden on abortion access because they have "the effect of placing a substantial obstacle in the path of a woman's choice" to have an abortion. *Id.* ¶ 20, 441 P.3d at 1152 (footnote omitted). This Court has previously held that laws that impose the same effects on abortion access as the Challenged Laws here constitute substantial obstacles.

The State agrees that a law creates an unconstitutional undue burden if it imposes a "substantial obstacle." The State quibbles that Chief Justice Roberts's concurrence in *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103 (2020), has displaced the balancing approach to the undue burden analysis articulated in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), wherein the benefits of a law are weighed against the law's burdens. Under the Chief Justice's preferred approach, courts perform a threshold examination of whether a law is "reasonably related to legitimate state interest" and, if it is, whether its effects would constitute a substantial obstacle to abortion access. *June Med. Servs.*, 140 S. Ct. at 2135, 2138 (quotations and citations omitted) (Roberts, C.J. Concurring). This Court need not parse which of these opinions governs[7] because the parties agree that no matter the articulation of the test,

[7] The U.S. Court of Appeals for the Tenth Circuit has not opined as to which, if any, of the opinions issued in *June Medical* are controlling. Other federal circuit courts applying the "narrowest grounds" rule articulated in *Marks v. United States*, 430 U.S. 188 (1977), have come to different conclusions. *Compare Whole Woman's Health v. Paxton*, 10 F.4th 430, 440-42 (5th Cir. 2021); *EMW Women's Surgical Ctr. v. Friedlander*, 978 F.3d 418, 437 (6th Cir. 2020); *Hopkins v. Jegley*, 968 F.3d 912, 915 (8th Cir. 2020), *with Planned Parenthood of Ind. & Ky. v. Box*, 991 F.3d 740, 748 (7th Cir. 2021). Should this Court choose to decide this issue, it should conclude that the *Whole Woman's Health* majority opinion remains controlling precedent. As the Seventh Circuit has held, the State's position that the Chief Justice's opinion is controlling would "give one Justice the ability to write obiter dicta that would sweep away constitutional precedents protecting individual rights by adopting broad reasoning that would confine the individual right most narrowly, yet without a majority having actually voted to overrule an earlier precedential opinion." *Box*, 991 F.3d at 750.

a law that imposes a substantial obstacle cannot stand. Further, any change in how the State's interests are evaluated would not affect this Court's prior holdings as to what kinds of effects constitute a substantial obstacle.[8] This Court's prior holdings as to the range of barriers constituting substantial obstacles thus remain undisturbed. *See, e.g.*, *Cline IV*, 2019 OK 33, ¶ 39, 441 P.3d at 1159. Contrary to the State's assertions, this Court has never held that only those laws that force abortion clinics to close create substantial obstacles to abortion access. *Compare* Resp. to Emerg. Mot. at 9 *with Cline IV*, 2019 OK 33, ¶ 39, 441 P.3d at 1159 (striking down law as undue burden even though it would not cause "an alleged [clinic] closings").

a. The OB/GYN Requirement

As this Court previously held, the State may not enact provider qualifications that would "cause[] a significant reduction in abortion providers, creating an onerous burden to women of child-bearing age." *Cline III*, 2016 OK 121 ¶¶ 13, 19, 387 P.3d at 353-54. But that is precisely what the OB/GYN Requirement does. It will disqualify around half of Plaintiff-Appellants' physicians from providing abortions, as well as around half of the remaining non-party abortion providers in the state, and therefore impose a substantial obstacle. *See supra* Part II(E)(1). This Court has faced this scenario before and concluded that an abortion restriction that would halve abortion services in the State imposes a substantial obstacle to

[8] Indeed, the Chief Justice's concurrence emphasizes that courts are bound by prior decisions on what constitutes a substantial obstacle. *Id.* at 2133-34 (Roberts, C.J., Concurring) (affirming that the Court had to follow the determination in *Whole Woman's Health* regarding whether an identical admitting privileges requirement posed a substantial obstacle based on identical facts). He stressed that "principles of stare decisis" required the Court to reach the same result in *June Medical* that it had reached in *Whole Woman's Health*. *Id.* at 2133-34, 2139 ("[t]he question today however is not whether *Whole Woman's Health* was right or wrong, but whether to adhere to it in deciding the present case."). Here, the Challenged Laws create the same type of effects on abortion access as laws that this Court has previously held impose a substantial obstacle.

abortion access. *Cline III*, 2016 OK 121, ¶ 17, 387 P.3d at 353 (holding that a reduction from two to one clinics constitutes a substantial obstacle).

The severe reduction in abortion services that would result from the OB/GYN Requirement will cause dramatic delays in care, which will prevent many patients from accessing medication abortion, push patients into more complex and expensive procedures, and prevent many patients from accessing abortion care in Oklahoma altogether.[9] *See supra* Part II(E)(1). The State has provided no evidence to the contrary. The Provider Plaintiffs cannot replace so many of their current physicians, much less do so quickly, and the existing OB/GYNs cannot double their current patient load. *See id.* The OB/GYN Requirement will thus impose a substantial obstacle for the same reasons as the law struck in *Cline III*. 2016 OK 121, ¶ 19, 387 P.3d at 354.

Moreover, the OB/GYN restriction provides no medical benefits, *Whole Woman's Health*, 136 S. Ct. at 2300, 2309-10, nor is it "reasonably related to a legitimate state interest," *June Med. Servs.*, 140 S. Ct. at 2135, 2138 (Roberts, C.J., concurring) (quotations and citations omitted). There is simply *no* medical justification for preventing family medicine physicians from providing abortions.[10] Training and clinical experience, not specialty, determine

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[9] While a handful of states have enacted OB/GYN requirements, none had anywhere near the effect on abortion access that the OB/GYN Requirement will have in Oklahoma. The State cherry-picks language from *Jackson Women's Health Org. v. Currier*, *see* ROA, pp. 277-528 (Resp. to TI Mot.) at 4, ignoring the ultimate conclusion of the court that "the ob-gyn requirement produces no benefit to Mississippi women as compared to prior law," which required only substantial relevant training. 320 F. Supp. 3d 828, 838 (S.D. Miss. 2018) (footnote omitted). In *Jackson Women's*, there were no doctors who would be disqualified by the new law—here, over half of the doctors in the state would be. In Arkansas, where the law required board-certification *or* board-eligibility, plaintiffs dismissed an appeal as moot when they came into compliance. *Little Rock Fam. Plan. Servs. v. Rutledge*, 984 F.3d 682, 691 (8th Cir. 2021).

[10] The State has offered only its unsupported speculation that OB/GYNs are the doctors "who can best ensure the safety of the abortion procedure." ROA, pp. 277-528 (Resp. to TI Mot.) at 3. Only one of the State's witnesses actually opines on this issue, and even she offers no concrete medical benefits to

competency to provide abortion care. Banks Aff. ¶¶ 14-20; *see also* Yap Aff. ¶¶ 39-40. For this reason, the American College of Obstetricians and Gynecologists opposes such restrictions. *See supra* Part II(E)(1). Indeed, Family medicine doctors frequently provide care far more complex than abortion, such as labor and delivery, and routinely prescribe far riskier medications, such as opiates. Banks Aff. ¶¶ 23-24. Moreover, family medicine physicians can and do provide miscarriage care, which generally involves medications and procedures that are *identical* to the ones used for abortion care. *Id.* ¶¶ 23-24; Yap Aff. ¶ 45. Because clinicians of many specialties safely and effectively provide abortion services, including the family medicine physicians providing care at the Provider Plaintiffs' clinics, the OB/GYN Requirement is not remotely akin to "restricting heart surgery to heart surgeons," as the State has asserted. *See* Resp. to Emerg. Mot. at 8.

b. Medication Abortion Restrictions

It is also well-established in Oklahoma that the State may not impose irrelevant and burdensome restrictions on medication abortion. This Court has previously recognized Oklahomans have protectable interests in having the choice to obtain a medication abortion: "many choose it for privacy reasons; because it feels natural; because of past trauma; . . . because it is specifically medically indicated," because of "fear of surgical instruments, anesthesia or sedation, being victims of sexual assault or having certain medical or anatomical conditions." *Cline IV*, 2019 OK 33 ¶¶ 31, 34, 441 P.3d at 1156-58. This Court has held that

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prohibiting trained family medicine doctors from providing abortions, rather stating that "complications can and do occur" and therefore patients should have the "most qualified provider available." ROA, pp. 310-27 (Decl. of Ingrid Skop, M.D.) ("Skop Decl.") ¶ 19. But, the suggestion that OB/GYNs are necessarily "the most qualified providers" is based on ignorance of abortion training and the scientific literature, as described in the record evidence. Banks Rebuttal Aff. ¶¶ 2-3; ROA, pp. 567-78 (Rebuttal Aff. of Ushma Upadhyay, M.P.H., Ph.D.) ("Upadhyay Rebuttal Aff.") ¶ 3.

preventing patients from accessing medication abortion imposes a substantial obstacle. *Okla. Coal. for Reprod. Just. v. Cline*, 2012 OK 102, 292 P.3d 27.

As in *Cline IV*, the Medication Abortion Restrictions here will prevent doctors from utilizing their "evidence-based" practice based on "good and consistent scientific evidence," regardless of whether it matches the specific FDA label, in ways that burden patients in the "timing" available for medication abortion and the number of visits they must make to a provider, resulting in delays and outright inability to access medication abortion. *Cline IV*, 2019 OK 33, ¶¶ 9, 28-31, 40-41, 441 P.3d at 1150, 1155-60. This Court has already found such obstacles to be substantial. While the Medication Abortion Restrictions include hundreds of provisions, those posing the greatest obstacles (many of which have already been deemed to be substantial by this Court), are summarized below.

First, S.B. 778 requires patients to make an additional trip to a health center for an ultrasound at least 72 hours before obtaining a medication abortion. S.B. 778 §§ 6(A)-(C), (E)(1), 8(A), (B)(6). This Court has already held that requiring an ultrasound *one hour* prior to an abortion, which does not require an additional trip to a health care center, is "facially unconstitutional pursuant to *Casey*." *Nova Health Sys. v. Pruitt*, 2012 OK 103, ¶ 3, 292 P.3d 28. Moreover, in *Cline IV*, this Court struck down medication abortion restrictions requiring people to make medically unnecessary visits to health centers, as S.B. 778 requires. *Cline IV*, 2019 OK 33, ¶¶ 28, 43, 441 P.3d at 1155, 1160-61. The record demonstrates that requiring stand-alone ultrasound appointments would create substantial logistical barriers and appointment backlogs, further restricting access. Yap Aff. ¶¶ 58-65; Braid Aff. ¶¶ 70-77.

Second, S.B. 779 requires physicians to have admitting privileges at a nearby hospital, or to execute a written contract with a physician who does. S.B. 779 §§ 7(11), 8. Record

evidence demonstrates that it will be difficult, if not impossible, for most of Provider Plaintiffs' physicians to satisfy this requirement. Yap Aff. ¶¶ 73-76; Braid Aff. ¶¶ 88-91. In *Cline III*, this Court held that admitting privileges requirements that result in reduced abortion access are unconstitutional. *Cline III*, 2016 OK 121, ¶ 19, 387 P.3d at 354. Contrary to the State's assertion, this admitting privileges requirement is not more "modest" than that challenged in *Cline III* because it allows providers to contract with an associated physician. *See* Resp. to Emerg. Mot. at 13. This is because S.B. 779 includes a publicity requirement that mandates that the Department of Health annually send an associated physician contract to *every* hospital in the county, publicly outing those physicians as associating with abortion providers. S.B. 779 § 8(2)(d)(l). As one of the Provider Plaintiffs' physicians noted, "this requirement appears designed to harass both physicians who agree to be associated with abortion providers and the hospitals that are willing to give such associated physicians admitting privileges." Yap Aff. ¶ 75.

Third, S.B. 778 requires reporting of detailed information about individual medication abortion patients to the Department of Health, which must then designate these individual records as public records. S.B. 778 § 8(B), (H). Although the State currently publishes mandated reporting on abortions in an aggregated format, it has never deemed individual patient records public. O.S.A. 63 § 1-738j(D). The designated public records must include, among other things: the patient's age; race; county of residence; number of prior pregnancies; number of prior live births; number of previous abortions; gestational age; preexisting medical conditions "which would complicate . . . pregnancy"; the patient's reason for seeking care; the date of administration of the first medication; the date of any follow-up examination; any "specific complications"; follow-up treatment, if any; and the amount billed for follow-up

treatment. S.B. 778 § 8 (B)(1)-(11). Even if the published data omit the patients' names, this information is so detailed that there are likely people for whom its disclosure would *uniquely* identify them.

The reporting of this patient-specific information threatens patient privacy. *Cf. Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 900-01 (holding reporting provision did not impose an undue burden where the identity of each patient would remain entirely confidential). Indeed, in a recent case in Montana, concerning medication abortion reporting requirements virtually identical to S.B. 778, the court enjoined the requirements because, as here, the state did "not adequately rebut Plaintiffs showing that this data indicates that certain demographic categories of women obtaining abortions contain very few numbers, which makes obvious the risk of identification through the additional data the law requires." *Planned Parenthood of Mont. v. Montana*, DV 21-00999, (Mont. 13th Jud. Dist. Oct. 7, 2021) at 30. The threat of public exposure is particularly dire for patients with abusive partners or family members. *See* Braid Aff. ¶¶ 80, 94.

S.B. 778 also requires reporting the name of the abortion-providing physician as well as the "referring physician, agency or service," and deems such information a "public record." S.B. 778 § 8(B)(1), (3), (H). Similarly, S.B. 779 requires reporting "a list of staff attending patients including licensing numbers and evidence of other qualifications." S.B. 779 § 9 (A)(7). It is undisputed that these requirements are likely to lead to the harassment of physicians and a chilling effect for those who refer patients for abortions, including for reasons related to serious maternal or fetal health conditions. *See supra* Part II(E)(2).

Fourth, S.B. 779 limits medication abortion to 70 days LMP, even though evidence-based practice supports its use through 77 days. S.B. 779 § 7(10)(b). This Court has already

held that barring medication abortion after a certain time period without medical justification constitutes a burden "of timing," giving patients "less time to discover the pregnancy, and to decide whether to terminate." *Cline IV*, 2019 OK 33, ¶ 31, 441 P.3d at 1156-57.

In short, the Medication Abortion Restrictions combine previously stricken restrictions on medication abortion access—requiring women seeking a medication abortion to make two trips to a health center to obtain a mandatory ultrasound, arbitrarily reducing the number of physicians who may prescribe medication abortion (through admitting privileges requirements), and restricting the time period when medication abortion is available (with the 70-day limitation)—with numerous other provisions that compromise the safety and confidentiality of people who seek abortion care, the doctors who provide that care, the clinic staff who attend to patients during that care, and anyone (including social services agencies) who refers for that care, regardless of the reason for the referral.

Not only do these restrictions create substantial obstacles, but the record also shows that they are unrelated to any purported interest in patient health. *See supra* Part II(E)(2). Indeed, the State has not offered *any* rationale for compromising the confidentiality of patients or those who assist them. The Medication Abortion Restrictions simply provide no benefits, *Whole Woman's Health*, 136 S. Ct. at 2300, 2309-10, nor are they "reasonably related to a legitimate state interest," *June Med. Servs.*, 140 S. Ct. at 2135, 2138 (quotations and citations omitted) (Roberts, C.J., concurring).

Virtually any of these requirements standing on its own is unconstitutional; together, under this Court's precedent, each of the Challenged Laws is unquestionably so.

2. The Oklahoma Constitution Protects the Right to Abortion and the Challenged Laws Likely Fail Under Strict Scrutiny

Forcing a person to give birth against their will is a violation of their dignity and bodily autonomy, which irrevocably alters their life. OCRJ Aff. ¶ 20; Braid Aff. ¶ 22; Yap Aff. ¶ 79; Upadhyay Aff. ¶¶ 42-49. This intrusion on a person's liberty is fundamentally inconsistent with Oklahomans' intent to "zealously guard[] their right to privacy" in their State constitution.[11] *Alva State Bank & Tr. Co. v. Dayton*, 1988 OK 44, 755 P.2d 635, 638 (Kauger, J., concurring) (footnote omitted). Under that Constitution, regardless of the views of those in power, the liberty of the *individual* must be protected—here, Oklahomans who are pregnant and seek an abortion.[12] Okla. Const. Art. II, § 7.

The Oklahoma Constitution's due process protection encompasses the fundamental right to make intimate and personal decisions "about one's own 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

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[11] Plaintiffs-Appellants focused on the undue burden standard in their briefing below, but expressly reserved their argument that strict scrutiny is the applicable standard. ROA, pp. 125-276 (Mem. ISO TI Mot.) at 13 n.6. The argument is also briefed in an appeal currently pending before this Court in a separate case. *See* Pl.-Appellant's Br. at 15-17, *Tulsa Women's Reprod. Clinic, LLC v. Hunter*, Case No. 118292 (Okla. Nov. 25, 2019).

[12] Notably, in its arguments regarding how the Oklahoma Constitution protects the right to life, ROA, pp. 277-528 (Resp. to TI Mot.) at 8-11, the State completely ignores the right to life and liberty of *the person who is pregnant*.

ultimately bear the consequences of that decision. *Id.* So too with the decision whether to continue a pregnancy.

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.

As discussed *supra*, the Challenged Laws are unlikely to survive the undue burden standard, and so, by definition, they also likely fail strict scrutiny. The Challenged Laws will severely restrict access to abortions—an outcome the State has failed to contest, perhaps because that was the Legislature's objective in enacting them. *See supra* Part II(E); *infra* Part III(C)(4). To survive strict scrutiny, the laws would have to be narrowly tailored to achieve a compelling interest. The State has made no such showing here, nor could it. *Id.*

The State has argued in this case that, in the absence of a federal right to abortion, the Oklahoma Constitution permits the State to ban abortion *entirely*. ROA, pp. 277-528 (Resp. to TI Mot.) at 8-11. The legislature has already attempted to do this by passing a law that will immediately criminalize abortions should the United States Supreme Court reverse *Roe v. Wade*. S.B. 918. But forcing Oklahomans to remain pregnant against their will and preventing them from accessing safe and effective medical care cannot be squared with the Oklahoma Constitution's guarantee of individual liberty. *In re K.K.B.*, 1980 OK 7, 609 P.2d at 749, 752.

This is because denying access to an abortion infringes on a person's control over their own lives, aspirations, and ability to care for their existing family and subjects them to significant increased health risk. *See id.* (holding that forced medication is inconsistent with "the right of an individual to make decisions about her life" arising "out of respect for the dignity and autonomy of the individual" and that because a "patient will be the one to suffer the consequences[,] she must have the power to make the decision" about her healthcare).

As thousands of Americans from across the county, including fifty 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., Neo Philosophy Inc. d/b/a We Testify as *Amicus Curiae* In Supp. of Resp't Jackson Women's Health Org., *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, at 3 (S. Ct. Sept. 17, 2021).

3. The Medication Abortion Restrictions Likely Violate the Single Subject Rule

The Medication Abortion Restrictions likely violate Oklahoma's single subject rule because they each contain numerous unrelated provisions that are largely unrelated to the safe provision of medication abortion. Under the Oklahoma Constitution, "[e]very act of the Legislature shall embrace but one subject, which shall be clearly expressed in its title." Okla. Const. art. V, § 57. The single subject rule has two essential purposes, neither of which a law can offend: (1) "to ensure legislators . . . are adequately notified of the potential effect of the legislation" and (2) "to prevent 'logrolling.'" *Cline III*, 2016 OK 121, ¶ 21, 387 P.3d at 354

(footnote omitted). This Court will consider "whether it appears that either the proposal is misleading or provisions in the proposal are so unrelated that many of those voting on the law would be faced with an unpalatable all-or-nothing choice." *Id.* ¶ 27, 387 P.3d at 355-56 (quotation and footnote omitted).

To be constitutional under the single subject rule, a statute's various provisions must all be "germane, relative, and cognate to a common theme or purpose." *Hunsucker v. Fallin*, 2017 OK 100, ¶ 31, 408 P.3d 599, 610 (footnote omitted); *Cline III*, 2016 OK 121, ¶ 27, 387 P.3d at 355. A statute will not satisfy this test merely because one can "articulate some rational connection between similar or related provisions." *Id.* ¶ 27, 387 P.3d at 355 (footnote omitted).

In striking down abortion bills with fewer unrelated provisions than S.B. 778 and S.B. 779,[13] this Court has made clear that a law is not sufficiently interrelated "because each sub-part relates in some way to abortion." *Cline III*, 2016 OK 121, ¶ 26, 387 P.3d at 355.[14] Adding the word "medication" does not change the outcome. Rather, this Court has consistently seen through attempts to characterize omnibus abortion bills as encompassing one common theme or purpose, and struck down laws that, like S.B. 778 and S.B. 779, contain numerous "unrelated provisions subjecting abortion providers to added regulation." *Id.* ¶ 23, 387 P.3d at 354.[15]

In *Cline III*, this Court invalidated a statute that was "comprised of twelve unrelated provisions subjecting abortion providers to added regulation." 2016 OK 121, ¶¶ 20-30, 387

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[13] *Nova Health Sys. v. Edmondson*, 2010 OK 21, ¶ 1, 233 P.3d at 381-82; *Burns v. Cline* ("*Cline II*"), 2016 OK 99, ¶ 10, 382 P.3d 1048, 1051; *Cline III*, 2016 OK 121, ¶ 25, 28, 387 P.3d at 355-56.

[14] So too have lower courts. *Okla. Coal. for Reprod. Just. v. State Bd. of Pharm.*, No. CV-2013-1640, 2014 WL 585353, at *1 (Okla. Dist. Jan. 29, 2014); *Davis v. Edmondson*, No. CJ-2009-9154, 2010 WL 1734636 (Okla. Dist. Mar. 02, 2010).

[15] *Id.* (rejecting argument that the legislation "has one common theme and purpose, 'the establishment of standards for abortion procedures performed at abortion facilities'") (footnote omitted); *Cline II*, 2016 OK ¶ 7, 382 P.3d at 1051 (rejecting argument that "all sections . . . relate[d] to protecting the reproductive health of women"); *Nova Health Sys.*, 2010 OK 21, ¶ 1, 233 P.3d 380, 381-82.

P.3d at 354-56. Like the statute in *Cline III*, S.B. 778 and S.B. 779 span numerous "unrelated provisions subjecting abortion providers to added regulation." *Id.* S.B. 778 includes 14 new sections of law with over 100 subsections covering numerous unrelated components, including reporting requirements and mandatory ultrasounds for medication abortion patients. S.B. 779 is comprised of over 16 new sections of law with nearly 200 subsections applying myriad unrelated provisions to multiple different entities (physicians, pharmaceutical manufacturers, and distributors), and amending three different statutes. Both bills include significant criminal and civil penalties and create private rights of action. *See supra* Part II(E)(2).

Indeed, S.B. 778 and 779 span some of the *same* subjects already found to be unrelated for single subject purposes by this Court. Like the law invalidated in *Cline III*, the provisions of S.B. 779 span provider qualifications, "medical screening and evaluation," "abortion procedure and post-procedure follow-up care, "record keeping and reporting requirements" and "hospital admitting privileges." *Cline III*, 2016 OK 121, ¶¶ 25, 28, 387 P.3d at 355-56; *see supra* Part II(E)(2). S.B. 778 includes these same subjects apart from admitting privileges. *Id.*

The Medication Abortion Restrictions also impermissibly delegate authority to multiple agencies for different purposes. In *Cline II*, the Oklahoma Supreme Court struck down a statute that, among other things, set forth both civil and criminal penalties for a violation of any existing regulation relating to abortion. 2016 OK 99, ¶¶ 9, 13, 382 P.3d at 1051-52 (footnote omitted). The Court found that the law violated the single subject rule by including "directives to different state entities for different purposes" as it imposed civil, criminal, and licensure penalties, delegating "authority to three different state agencies." *Id.* ¶¶ 9, 13, 382 P.3d at 1052 (footnote omitted). The same is true here, especially given that the bills impose "significant penalties for simple violations." *Cline III*, 2016 OK 121, ¶ 23, 387 P.3d at 354.

Whether an omnibus bill has broad legislative support does not alleviate concerns about "logrolling" or whether legislators were "adequately notified." To the contrary, the single subject rule is a procedural safeguard intended to ensure that "[e]ach subject brought into the deliberation of the legislative department is to be considered and voted on singly, without having associated with it any other measure to give it strength." *Fent v. State ex rel. Okla. Capitol Improvement Auth.*, 2009 OK 15, ¶ 15, 214 P.3d 799, 804-05 (quotation and citation omitted). When the terms of a bill violate the single subject rule, the law must be enjoined in full. *See Cline III*, 2016 OK 121, ¶ 29, 387 P.3d at 356; *Cline II*, 2016 OK 99, ¶ 19, 382 P.3d at 1053; *Nova Health Sys.*, 2010 OK 21, ¶ 1, 233 P.3d at 381-82.

The sprawling nature of these bills presented legislators with an "all-or-nothing choice" and risked "misleading" them about the impact of the legislation's individual provisions. *See Cline III,* 2016 OK 121, ¶ 27, 387 P.3d at 355-56 (quotation and citations omitted). For example, a legislator may have supported a bar on mailing abortion-inducing drugs but opposed (or failed to consider, amid the over 100 subsections) the 72-hour ultrasound requirement or the provision designating patient reports as "public records." *Compare* S.B. 778 § 3 *with id.* §§ 6(A)-(C), (E)(1), 8(A), (B)(6)*; id.* §§ 8(B), (H).

Because each of the Medication Abortion Restrictions logrolls numerous unrelated subjects together and delegates authority to multiple state agencies, they likely violate the single subject rule and should be enjoined. *Cline III*, 2016 OK 121, ¶ 29, 382 P.3d at 356.

4. The Challenged Laws Were Enacted with an Improper Purpose

A law also imposes an "undue burden" on the right to abortion if its "purpose . . . is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Casey,* 505 U.S. at 878. "Legislative purpose to accomplish a constitutionally forbidden result may be found when that purpose was the predominant factor motivating the

legislature's decision." *Jane L. v. Bangerter*, 102 F.3d 1112, 1116 (10th Cir. 1996) (internal citations and quotation marks omitted). To evaluate whether the legislature was predominantly motivated by an improper purpose, a court must look at the totality of the circumstances, including "[t]he historical background" of the challenged action and its "legislative or administrative history." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267-68 (1977); *see also Jane L.*, 102 F.3d at 1116-17. Such an inquiry also requires an examination of the potential effect of the challenged requirement, because "the effect of a law in its real operation is strong evidence of its object." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993).

Ordinarily, it is difficult to find evidence that the legislature intended to enact a constitutionally forbidden provision. But here, the evidence comes directly from the mouths of the legislators who sponsored the Challenged Laws, who openly declared that these bills were intended to restrict abortion access in Oklahoma. Indeed, the sponsor of the OB/GYN Requirement,[16] Representative Cynthia Roe, has stated that this was her "sole intent":

> "I was very clear from the get-go that my *sole intent* was to reduce the number of abortions…In the research that I had done, between 2012 and 2020, there were over 96,000 abortions reported in the state of Oklahoma. Over half of those that I had found from my research were done by non-board certified OBGYNs. In my mind, if we cut that number in half, then we've at least done part of our jobs."

[16] The State has asserted that *Mazurek v. Armstrong*, 520 U.S. 968 (1997) shows that the OB/GYN Requirement is constitutional, but that case does not support the State's view that it may baselessly exclude certain qualified, licensed physicians from providing abortion care. In *Mazurek*, the Supreme Court held that a Montana law restricting the provision of abortion to physicians only did not have an improper purpose. *Id.* at 972-74. The Court found that the record there did not contain evidence of an improper purpose, *id.*, nor did it reflect sufficient evidence of an unconstitutional effect, *id.* at 972. Here, the record contains extensive evidence that the OB/GYN Requirement has both the purpose, *see infra* Part III(C)(4), and effect of imposing a substantial obstacle, *see supra* Part III(C)(1).

(*Abortion Laws Blocked*, News Channel 8) (emphasis added).[17] In legislative hearings, Representative Roe acknowledged that the "[b]ill is about reducing the number of abortions done in this state." H.R., 58th Leg., 1st Reg. Sess., Day 18 (Okla. Mar. 2, 2021). *See also id.* (noting that "[b]etween 2012 and 2019 there were over 96,000 abortions performed in this state and that's 96,000+ too many"). Representative Roe further laid the bill's improper purpose bare by stating that it was "an effort to limit the types of doctors that can perform this procedure" and thus reduce access to abortions. *Id.*

When asked whether she "consider[ed] the lack of OBGYNs across the state as an issue for [abortion] access," Representative Roe dismissed that concern and again acknowledged her intent to make it more difficult for patients to access abortion: "if someone is willing to go through that gruesome procedure, they should be willing to travel to have it done." *Id.* Similarly, Senator Shane Jett, also a co-sponsor of the OB/GYN Requirement, reiterated Representative Roe's sentiment, remarking that "House Bill 1904 will reduce the number of babies who are killed in the womb." Senate Chamber Session, 58th Leg. (Okla. Apr. 20, 2021).

The legislative history of the Medication Abortion Restrictions similarly demonstrates that these bills were enacted with the improper purpose of impeding abortion access. During debate on S.B. 778, when its primary sponsor was asked whether he sought to "put[] these [restrictions] in place for the safety of a woman or is there some other intent that you're trying

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[17] *See also* Press Release, OK Senate, Abortion Restriction Bill Sent to Governor (Apr. 20, 2021), https://oksenate.gov/press-releases/abortion-restriction-bill-sent-governor?back=/press-releases/2021-04%3Fpage%3D2 ("During her debate, [Senator] Garvin shared with her fellow members that since 2012 around 100,000 abortions have been conducted in Oklahoma--a number she hopes will decrease significantly with this legislation."); Rep. Cindy Roe, Facebook (Mar. 2, 2021), https://www.facebook.com/permalink.php?story_fbid=846626372849606&id=138803500298567 (sharing post by the Oklahoma House Republicans, stating, "There are over 500,000 abortions performed in the United States every year. Thanks to the Oklahoma House passage of HB 1904, the number in Oklahoma could be less next year.").

to, to do," this same representative responded that "[i]t is no secret that I'm opposed to abortion." H.R., 58th Leg., 1st Reg. Sess., Day 45 (Okla. Apr. 21, 2021).

Although the outright bans challenged in this case are not presently before the Court because even the State has acknowledged they are unconstitutional under *Roe* and *Casey*, the Legislature's contemporaneous enactment of statutes that were clearly intended as "vehicle[s] by which to challenge *Roe*" is yet another indication that the Challenged Laws have the improper purpose of imposing a substantial obstacle. *Jane L.*, 102 F.3d at 1116-17; *see also* Hicham Raache, *58th Legislature Adjourns, Oklahoma Republicans Tout Tax Cuts in Fiscal Year '22 Budget, Education Investment, Abortion Restriction*, NBC 4 KFOR (May 27, 2021) ("Senate Republicans [have also] said [that] with the conservative shift in the U.S. Supreme Court, some of these bills are meant to challenge national abortion laws.").

In sum, the effect of the Challenged Laws, when viewed with the candid legislative history, shows that their purpose is to impermissibly decimate abortion access in Oklahoma.

D. Oklahomans Seeking Abortion Care Will Suffer Irreparable Harm.

The Challenged Laws' threats to constitutional rights constitute *per se* irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976). As stated above, each of the Challenged Laws would create a substantial obstacle to abortion access in this state. *See supra* Part III(C)(1). This threatens to occur at an already fraught time for abortion access in the region.[18]

[18] Oklahoma has followed Texas in attempting to radically ban and restrict abortion this year. Since Texas S.B. 8 went into effect, Texas patients have streamed into Oklahoma seeking care. Given this present reality, should the Challenged Laws go into effect, the burdens they will impose on access to abortion will be catastrophic for Oklahomans. *See United States v. Texas*, 2021 WL 4593319, at *43-*46 (W.D. Tex. Oct. 6, 2021), *stayed on other grounds by* No. 21-50949, 2021 WL 4786458 (5th Cir. Oct. 14, 2021), *cert. granted on other grounds by* 142 S. Ct. 14 (2021) (argued Nov. 1, 2021) (crediting evidence on how the "inundation of Texas patients" has had a "stunning" impact on "Oklahoma clinics," which will worsen should "laws recently enacted in Oklahoma . . . take effect, further burden[ing] the region's abortion care resources").

Severely restricting Oklahomans' access to abortion was the explicitly stated goal of the legislators who proposed the laws, *see supra* Part III(C)(4), which the State has not denied.

Further, because the Medication Abortion Restrictions violate the single subject rule, they have failed to afford the public "a clear picture of how their elected officials have voted on a particular issue" and "adequate[] noti[ce] of the potential effect of legislation." *Hunsucker*, 2017 OK 100, ¶ 31, 408 P.3d at 610. The Medication Abortion Restrictions are independently void for failing this constitutional safeguard. *See supra* Part III(C)(3).

E. Lack of Injury to the Opposing Party

The State has identified no concrete harm, nor could it, that would result if the status quo were maintained pending final resolution of Plaintiffs-Appellants' claims. The evidentiary record amply demonstrates that abortion, including medication abortion, is safe and the State has failed to meaningfully rebut the harms demonstrated by Plaintiffs-Appellants. A temporary injunction would preserve the status quo while the merits are adjudicated.

F. No Risk of Harm to the Public Interest

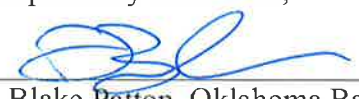
It is well-settled that enforcement of an unconstitutional law is contrary to the public interest. *See, e.g., Entm't Merchants Ass'n*, No. CIV-06-675-C, 2006 WL 2927884 at *3 (citation omitted); *see also Am. Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999). Plaintiffs-Appellants have shown, and the State does not dispute, that abortion access in Oklahoma will be significantly reduced overnight by the Challenged Laws. Further, where, as here, an appeal raises important issues of state policy, the public interest is "best served by preserving the status quo." *Edwards*, 2015 OK 58, ¶ 35, 378 P.3d at 64.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants respectfully request that this Court reverse the District Court's denial of a temporary injunction as to the Challenged Laws.

Dated: December 8, 2021

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I, Blake Patton, hereby certify that on this 8th day of December, 2021, a true and correct copy of the foregoing was delivered to the following:

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