IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

OKLAHOMA CALL FOR REPRODUCTIVE JUSTICE, *et al.*,	)	
Petitioners,	)	
v.	)	CASE NO. PR-120543
	)	(Writ of Prohibition)
JOHN O'CONNOR, in his official capacity as OKLAHOMA ATTORNEY GENERAL, *et al.*,	)	
Respondents.	)	

BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE AND FORTY-ONE (41) MEMBERS OF THE OKLHOMA SENATE AND HOUSE OF REPRESENTATIVES, *AMICI CURIAE*, IN SUPPORT OF RESPONDENTS

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Dated: October 3, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Other

INTEREST OF *AMICI CURIAE*

The American Center for Law & Justice ("ACLJ"), *amicus curiae*, is an organization dedicated to the defense of constitutional liberties secured by law, including the defense of the sanctity of human life. Counsel for the ACLJ have presented expert testimony before State and federal legislative bodies, and have presented oral argument, represented parties, and submitted *amicus curiae* briefs before the Supreme Court of the United States and numerous State and federal courts in cases involving a variety of issues, including those dealing with abortion and constitutional law. *See, e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); *June Medical Servs. v. Russo*, 140 S. Ct. 2103 (2020); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997); *Whitmer v. Linderman*, No. 164256 (Mich. Sup. Ct. 2022). The ACLJ submits this brief on behalf of itself and more than 127,000 of its supporters (including more than 2,200 in Oklahoma) who promote the sanctity of life and have an interest in the provisions of the Oklahoma Constitution being followed.

The ACLJ's important decades-long role in precedential cases involving abortion is perhaps best illustrated by the *Dobbs* Court's citation of and reliance upon two cases argued by the ACLJ at the United States Supreme Court: *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), and *Hill v. Colorado*, 530 U.S. 703 (2000). The *Dobbs* majority cited *Bray* in support of its pivotal finding that the "goal of preventing abortion" does not constitute "'invidiously discriminatory animus' against women," *Dobbs*, 142 S. Ct. at 2246 (quoting *Bray*, 506 U.S. at 273–74), and *Hill*, as just one of a host of cases demonstrating how the

Court's abortion jurisprudence led to the distortion of numerous background legal principles in other areas of the law, including those involving the First Amendment. *Id.* at 2276.

Members of the Oklahoma House of Representatives joining this brief are Majority Floor Leader Jon Echols, and Representatives Sherrie Conley, Tom Gann, Brad Boles, Marilyn Stark, Dick Lowe, Jim Olsen, Mark Lepak, Anthony Moore, Danny Williams, Jim Grego, Sheila Dills, Robert Manger, Chris Sneed, Rusty Cornwell, Mark Lawson, Kevin McDugle, Todd Russ, Tammy Townley, Lonnie Sims, Terry O'Donnell, Avery Frix, Brian Hill, Jeff Boatman, Denise Crosswhite Hader, Mark Vancuren, Rhonda Baker, Ross Ford, Ty Burns, Stan May, Cynthia Roe, and Mark McBride.

Members of the Oklahoma Senate joining this brief are Senators David Bullard, Brent Howard, George Burns, Micheal Bergstrom, Warren Hamilton, Roland Pederson, Dave Rader, Jake Merrick, and Nathan Dahm.

These Forty-One (41) Members of the Oklahoma Legislature, many of whom were sponsors of S.B. 612, are elected representatives of their constituents. They hold the offices vested by the Oklahoma Constitution with the legislative power. As such, they have a direct interest in the outcome of this case.

INTRODUCTION

By challenging Okla. Stat. tit. 21, § 861 (the 1910 law) and S.B. 612 (the 2022 law), Petitioners are asking this Court to create a new abortion right in the Oklahoma Constitution. As recently as 2019, this Court explained that it has never found an abortion right within the Oklahoma Constitution (either before or after *Roe v. Wade*, 410 U.S. 113 (1973)). *Okla. Coalition for Reprod. Justice v. Cline*, 2019 OK 33, ¶ 17, 441 P.3d 1145, 1151; *id.* at ¶¶ 16-43, 441 P.3d at 1151-61 (explaining that the then-existing abortion right was derived from the

federal constitution); *see also Bowland v. Lunsford*, 1936 OK 158, ¶ 11, 54 P.2d 666, 668 (holding that the Oklahoma anti-abortion statutes "were enacted and designed for the protection of the unborn child and through it society").

It is not surprising that this Court has never construed the Oklahoma Constitution to contain an abortion right since Oklahoma has consistently prohibited abortion. Before Oklahoma became a State, abortion was outlawed in the Oklahoma Territory in 1890, except to save the life of the mother. Okla. (Terr.) Stat. § 2187; *see also id.* § 2188. In 1907, Oklahoma became a State, adopted its Constitution, and soon thereafter enacted the 1910 law, which outlawed abortion except to preserve the life of the mother. Okla. Stat. tit. 21, § 861. Although the 1910 law was not enforced during the years *Roe* was in place, it was never repealed, and is effective post-*Dobbs* as are other anti-abortion laws, including S.B. 612, Ch. 11, O.S.L. 2022.[1]

Abortion implicates many significant interests—including those of the unborn child who may be killed, the child's parents, the government, and the public—and it also "presents a profound moral issue on which Americans hold sharply conflicting views." *Dobbs*, 142 S. Ct. at 2240. The basic premise of Petitioners' lawsuit, however, is that the Oklahoma Constitution gives one group of human beings (pregnant women) a "right" to have other separate, unique, living human beings (unborn children) intentionally killed, and neither the public nor the legislative branch of government has much, if any, say in the matter.

The question of when and whether the law should authorize, or at least excuse, the intentional killing of a living human being is *never* a primarily *private* question. To the

[1] In *Wilson v. State*, 1927 OK CR 42, 252 P. 1106, a conviction for violation of the pre-*Roe* anti-abortion law was affirmed without mention of a constitutional right to abortion. Moreover, the Oklahoma Public Health Code states that "[n]othing in this act shall be construed as creating or recognizing a right to abortion." Okla. Stat. tit. 63, § 1-729.6.

contrary, both the public and the government clearly have *compelling* interests at stake whenever human life is being taken, regardless of whether the circumstance entails abortion, capital punishment, murder, the use of lethal force by individuals asserting defense of self or others, deaths caused in military operations, suicide, or euthanasia. The fact that a particular killing impacts the individuals involved in a more direct way than it impacts the general public does *not* render legislatures powerless to carefully weigh the competing interests at stake and set policies that reflect the values of the public.

More generally, State legislatures have ample room to regulate conduct where one's exercise of a purported right directly harms others. The policy arguments raised by Petitioners should be presented *to the proper audience*: the legislature, and the public at large. The amendment to the State Constitution proposed by Petitioners needs to occur, if it occurs at all, *through the constitutional amendment process*, not through the amendment-by-litigation strategy that this lawsuit represents. *See, e.g.,* Okla. Const. art. V, §§ 1-3 & art. XXIV, §§ 1-3. This Court should reject Petitioners' request to effectively destroy the rightful authority of the public and the Legislature to weigh the various significant interests at play and determine abortion policy.

ARGUMENT

I. Petitioners' position is contrary to the separation of powers ensured by the Oklahoma Constitution.

By effectively asking this Court to strip the Oklahoma Legislature (and ultimately the public) of its authority to make abortion policy, this lawsuit raises significant separation of powers concerns that extend well beyond the issue of abortion. *See Sojourner T v. Edwards*, 974 F.2d 27, 31-32 (5th Cir. 1992) (Garza, J., concurring specially) ("In essence, *Casey* is not about abortion; it is about power."); *see also State ex rel. York v. Turpen*, 1984 OK 26, ¶ 7,

681 P.2d 763, 766 ("The legislature represents the will of the people in a degree no less conclusive than a constitutional convention, in all matters neither expressly, nor by clear implication, prohibited by the basic law of the state or nation.").

Every judge-made or judge-expanded right shifts power away from the political branches, thereby diminishing the right of the people to exercise their voting power to decide or influence important policy questions. Courts "'should be extremely reluctant to breathe still further substantive content" into constitutional provisions "so as to strike down legislation adopted by a State or city to promote its welfare. Whenever the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority.'" *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (citation omitted).

A court must proceed with great caution where, as here, a purported fundamental liberty that greatly restricts legislative authority is claimed to exist, "lest it open itself to the accusation that, in the name of identifying constitutional principles to which the people have consented in framing their Constitution, the Court has done nothing more than impose its own controversial choices of value upon the people." *Thornburgh v. ACOG*, 476 U.S. 747, 790 (1986) (White, J., dissenting); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) ("By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore 'exercise the utmost care whenever we are asked to break new ground in this field,' . . . lest the [law] be subtly transformed into the policy preferences of the members of this Court."). The United States Supreme Court's admonishment (in a case that did not involve abortion) applies here:

> The respondents in this case insist that a difficult question of public policy must be taken from the reach of the voters, and thus removed from the realm of public

> discussion, dialogue, and debate in an election campaign. . . . [This] is inconsistent with the underlying premises of a responsible, functioning democracy. It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds.

Schuette v. Coalition to Defend Affirmative Action, 572 U.S. 291, 312-13 (2014) (plurality).

A central theme of the *Dobbs* decision—also applicable here—was the significant harm that *Roe*, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and their progeny had done to federalism, the separation of powers, and the public's voting rights, which are concerns that go well beyond the issue of abortion policy. The Court acknowledged that *Roe* "represented the 'exercise of raw judicial power'" and "abruptly ended" the State legislatures' process of reviewing and modifying abortion laws. *Dobbs*, 142 S. Ct. at 2241. Whereas *Roe* improperly took legislative authority away, the Court recognized in *Dobbs* that it "has neither *the authority* nor the expertise to adjudicate" disputes over the pros and cons of abortion-related policies. *Id.* at 2277 (emphasis added).

The *Dobbs* Court noted that its decision restored abortion policymaking authority *to the State legislatures*:

> [T]he people of the various States may evaluate those interests differently. In some States, voters may believe that the abortion right should be even more extensive than the right that *Roe* and *Casey* recognized. Voters in other States may wish to impose tight restrictions based on their belief that abortion destroys an "unborn human being." . . . Our Nation's historical understanding of ordered liberty does not prevent *the people's elected representatives* from deciding how abortion should be regulated. . . .
>
> [T]he authority to regulate abortion must be returned *to the people and their elected representatives*.

Id. at 2257, 2279 (majority opinion) (emphasis added).

Prior to *Dobbs*, numerous opinions of individual Supreme Court Justices and other courts and judges raised similar concerns about the improper usurpation of legislative

authority.[2] It would be a significant defeat for the separation of powers and the rule of law if, shortly after the State legislatures had their authority to determine abortion policy rightly restored to them after a half-century, State courts usurped that authority. This Court should reject Petitioners' request to do so.

II. The court-created right that Petitioners seek would improperly short-circuit the democratic process.

Roe's evisceration of the public's right to influence abortion policy through their elected officials "sparked a national controversy that has embittered our political culture for a half century." *Dobbs*, 142 S. Ct. at 2241. *Dobbs* emphasized the disruptive impact that *Roe*'s improper short-circuiting of the democratic process had across the country:

> [W]ielding nothing but "raw judicial power," . . . the [*Roe*] Court usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people. *Casey* described itself as calling both sides of the national controversy to resolve their debate, but in doing so, *Casey* necessarily declared a winning side. Those on the losing side—those who sought to advance the State's interest in fetal life—could no longer seek to persuade their elected representatives to adopt policies consistent with their views. The Court short-circuited the democratic process by closing it to the large number of Americans who dissented in any respect from *Roe*. . . .
>
> [*Casey*] claimed the authority to impose a permanent settlement of the issue of a constitutional abortion right simply by saying that the matter was closed. . . . That unprecedented claim exceeded the power vested in us by the Constitution. As Alexander Hamilton famously put it, the Constitution gives the judiciary "neither Force nor Will." The Federalist No. 78. . . . Whatever influence the Court may have on public attitudes must stem from the strength of our opinions, not an attempt to exercise "raw judicial power."

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[2] *See, e.g., Casey*, 505 U.S. at 979, 989-90 (Scalia, J., concurring in part and dissenting in part) ("The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting. . . . [T]he joint opinion's verbal shell game will conceal raw judicial policy choices concerning what is 'appropriate' abortion legislation."); *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 774-76 (8th Cir. 2015) (citation omitted) (abortion policymaking "is better left to the states. . . . 'To substitute its own preference to that of the legislature in this area is not the proper role of a court.'").

Id. at 2265, 2278 (citations omitted).

Petitioners similarly ask this Court to exceed its constitutional authority and exercise raw judicial power by creating a constitutional abortion right. When courts improperly constitutionalize important matters of legislative policy, thereby making the judiciary the ultimate policy-making body, they exceed their authority and jeopardize their legitimacy. Asking a court to purport to "objectively assign weight to . . . [the] imponderable values" implicated by abortion would facilitate "judicial arbitrariness," destroy predictability, and would require the court "to act as legislators, not judges, and would result in nothing other than an 'unanalyzed exercise of judicial will' in the guise of a 'neutral utilitarian calculus.'" *June Med. Servs.*, 140 S. Ct. at 2135-36 (Roberts, C.J., concurring) (citation omitted). This Court should decline Petitioners' invitation to superimpose its own value judgments upon the Oklahoma Constitution.

III. The Oklahoma Legislature and the public have the power to decide that unborn human beings, like human beings that have already been born, are worthy of legal protection and basic dignity.

Throughout history, there has been a recurring debate over the controversial position that the extent to which a living human being should be entitled to legal protection and basic dignity is dependent upon his or her medical conditions, expected quality of life, potential to contribute to society, etc. *See, e.g., Glucksberg*, 521 U.S. at 729. It is well established, however, that "a State may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life." *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 282 (1990); *Glucksberg*, 521 U.S. at 729 ("[The State] . . . insists that all persons' lives, from beginning to end, regardless of physical or mental condition, are under the full protection of the law."). For instance, a State

legislature has substantial leeway to ensure that the lives of human beings that have a disability or terminal condition are no less valued than the lives of others. *Glucksberg*, 521 U.S. at 731-32. The task of weighing the "unquestionably important and legitimate" interests at play when the lives of these individuals are at risk is a quintessentially legislative task. *Id.* at 735. The State has, and may pursue through legislation, "a legitimate and substantial interest in preserving and promoting fetal life." *Gonzales*, 550 U.S. at 145; *see also Dobbs*, 142 S. Ct. at 2284 (citations omitted) (the State's "legitimate interests include respect for and preservation of prenatal life at all stages of development, . . . the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability").

By contrast, a court-created abortion "right" wrongfully enshrines the court's own subjective theory of life—including the point at which living human beings become entitled to basic dignity and legal protection—into constitutional law. As the *Dobbs* Court noted:

> The dissent . . . would impose on the people a particular theory about when the rights of personhood begin. According to the dissent, the Constitution requires the States to regard a fetus as lacking even the most basic human right—to live—at least until an arbitrary point in a pregnancy has passed. Nothing in the Constitution or in our Nation's legal traditions authorizes the Court to adopt that "theory of life."

Id. at 2261.

More generally, the State clearly has significant interests at stake when *one* person makes medical decisions that may harm *another* person; this includes decisions that parents make concerning a child. *Cruzan*, 497 U.S. at 287 n.12 (emphasis added) ("[T]he choice made by a competent person to refuse medical treatment, and the choice made *for an incompetent person by someone else* to refuse medical treatment, are so obviously different that the State is

warranted in establishing rigorous procedures for the latter class of cases which do not apply to the former class."); *Thornburgh*, 476 U.S. at 792 n.2 (White, J., dissenting) ("[P]arents have a fundamental liberty to make decisions with respect to the upbringing of their children. But no one would suggest that this fundamental liberty extends to assaults committed upon children by their parents."). The type of abortion "right" asserted here is fundamentally different from the kind of freedoms that are actually protected by the federal and State constitutions because "[a]bortion is a unique act" that entails the intentional killing of living human beings. *Dobbs*, 142 S. Ct. at 2243, 2258, 2277.

CONCLUSION

Whether, and the extent to which, abortion should be permitted in Oklahoma is a policy question reserved for the Legislature and the people. Amici, including forty-one (41) members of the Oklahoma Senate and House, respectfully urge this Court to reject Petitioners' claims.

Respectfully submitted,

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Dated: October 3, 2022

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2022, a true and correct copy of the above document was sent by United States Mail, first-class postage prepaid, to each of the following:

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