IN THE DISTRICT COURT IN AND FOR OKLAHOMA COUNTY
STATE OF OKLAHOMA

(1) OKLAHOMA COALITION FOR REPRODUCTIVE JUSTICE, on behalf of itself and its members, and (2) NOVA HEALTH SYSTEMS, D/B/A REPRODUCTIVE SERVICES, on behalf of itself, its staff, and its patients, Plaintiffs,	)	FILED IN DISTRICT COURT OKLAHOMA COUNTY SEP - 8 2016 RICK WARREN COURT CLERK 40
v.	)	Case No. CV-2014-1886
(3) TERRY L. CLINE, in his official capacity as Oklahoma Commissioner of Health, and (4) LYLE KELSEY, in his official capacity as Executive Director of the Oklahoma State Board of Medical Licensure and Supervision, Defendants.	)	

DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT

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As a matter of fact and law, the Oklahoma Supreme Court has already held that House Bill 2684 ("H.B. 2684")[1] is a law that "is reasonably and substantially connected to protecting women."[2] This holding alone resolves most, if not all, of Plaintiffs' claims. The Supreme Court's conclusion that H.B. 2684 reasonably and substantially advances the State's legitimate interest in protecting the health of women is well-supported by medical science. As compared to Plaintiffs' methods for administering medication abortions, the science shows that the regimen required by H.B. 2684 is more effective and lowers the risks for infection, hemorrhaging, hospitalization, surgery, and death. Meanwhile, H.B. 2684 does not prevent women from accessing abortion. For the following reasons and based on the following undisputed facts, Defendants respectfully move for summary judgment on all of Plaintiffs' claims.

STATEMENT OF UNDISPUTED FACTS

1. During the first trimester of pregnancy, women in the United States may generally obtain an abortion by two different methods. First, women can receive a surgical abortion, which in the first trimester involves a five to ten minute procedure that uses suction or vacuum aspiration to evacuate the uterus. That method can be used up to 14 weeks of pregnancy.

2. Second, women can receive a medication abortion. The FDA approved the prescription of mifepristone to induce abortions in 2000. Mifepristone's final printed label approved by the FDA in 2000 prescribed that the drug be used according to a particular regimen (the "original FDA regimen"). Under this regimen, administration of mifepristone for the termination of pregnancy requires three office visits by the patient. During the first office visit, the patient is given 600 mg of mifepristone orally. Two days later, the patient returns to the office and the physician examines the patient to determine if her pregnancy has ended and, if not, the patient is

[1] 2014 Okla. Sess. Laws Serv. Ch. 121 (Attached as Exhibit A).
[2] *Okla. Coal. for Reproductive Justice v. Cline*, 2016 OK 17, ¶¶ 31-32 ("*Cline III*").

given 400 μg (0.4 mg) of misoprostol orally. Two weeks later, the patient returns to the office for a third visit to verify the procedure was successful. The original FDA regimen permits mifepristone through administered through forty-nine days (7 weeks) of pregnancy.[3]

3. Plaintiffs operate an abortion clinic in Tulsa, Oklahoma providing both surgical and medication abortions through 17 weeks of pregnancy. The medication abortion protocols that Plaintiffs use on patients ("Plaintiffs' regimen") deviates from the original FDA regimen in several respects. First, the patient is given 200 mg of mifepristone rather than 600 mg. Second, rather than being administered 400 μg of misoprostol orally as called for in the original FDA regimen, the Plaintiffs' patients are given double that dose (800 μg) administered vaginally or buccally, the majority of which receive vaginal administration. Third, rather than returning to the office a second time 48 hours after mifepristone administration to determine if the pregnancy has ended before being given misoprostol, Plaintiffs instruct patients to self-administer misoprostol either 6-10 hours after the mifepristone (for vaginal insertion) or 24 hours after the mifepristone (for buccal consumption). Fourth, Plaintiffs perform medication abortions up to 9 weeks of pregnancy, as opposed to the 7 week limit provided for in the original FDA regimen.[4]

4. Since FDA approval of mifepristone, at least 14 women have died after receiving a medication abortion. Of those women, eight deaths were attributed to severe bacterial infections following medication abortion. All eight of those deaths followed use of mifepristone and misoprostol according to Plaintiffs' regimens: seven from vaginal use, and one from buccal use. There have been no reports of women dying in the U.S. from bacterial infection after use of

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[3] *Cline v. Okla. Coal. for Reproductive Justice*, 2013 OK 93, ¶ 9, 313 P.3d 253, 257-58. ("*Cline II*"); *see also* Exhibit B, Harrison Decl., ¶ 8.

[4] Petition ¶ 38; Exhibit C, Eldridge Aff. ¶¶ 1, 7, 15.

these drugs pursuant to the original FDA regimen. Indeed, the original FDA regimen has a long history of safe clinical use in Europe and China without any reported deaths due to infection.[5]

5. In 2014, the Legislature passed H.B. 2684, citing the facts in the paragraph above in its legislative findings and allowing physicians to induce abortions using mifepristone and misoprostol only in accordance with the original FDA regimen.[6]

6. In addition to the increased death tolls associated with Plaintiffs' regimen, scientific data and medical studies show other differences in the health outcomes of women between the first trimester abortion protocols mandated by H.B. 2684—the original FDA regimen and surgical abortion—and the Plaintiffs' regimens. First, the risk of infection associated with Plaintiffs' vaginal regimen is greater than with the original FDA regimen. Patients who are administered misoprostol vaginally have rates of infection more than six times those who are administered the same drug orally. Indeed, after numerous instances of infections at their clinic, Planned Parenthood announced in 2006 that it would stop prescribing misoprostol using Plaintiffs' vaginal method and, as a result of the change, it rates of infection after medication abortion dropped by 73%. This is consistent with scientific models that have shown how both vaginal and buccal use of misoprostol lead to greater susceptibility to bacterial infection.[7]

7. Second, Plaintiffs' regimens allows for medication abortion for up to 63 days of pregnancy (9 weeks), whereas the original FDA regimen limits use to 49 days of pregnancy (7 weeks). But after 49 days of pregnancy, the risks of infection, failed abortion necessitating surgical intervention, and clinically significant hemorrhaging and the need for blood transfusion

[5] Exhibit A, H.B. 2684 § 1(A)(13); Exhibit B, Harrison Decl., ¶ 16.
[6] *See* Exhibit A.
[7] Exhibit B, Harrison Decl., ¶¶ 18-19.

increases.[8] The legislature acknowledged a similar fact in one of its legislative findings in H.B. 2684, noting that "the risk of complications increases with advancing gestational age."[9]

8. Third, under H.B. 2684, after 49 days of pregnancy, Plaintiffs would be required to perform surgical abortions instead of the medication abortions performed under Plaintiffs' regimen. As the Legislature has found, "[a]bortion-inducing drugs are associated with an increased risk of complications relative to surgical abortion."[10] Specifically, the rate of adverse events after medication abortions is about four times higher than after surgical abortions. The rate of hemorrhaging is nearly eight times higher for medication abortions as compared to surgical abortions. The rate of hospital admissions for medication abortion is fourteen times higher than with surgical abortions (with a 150% in the need for emergency treatment). The rates of failed abortion are almost four times higher with medication abortion than surgical abortion. And the risk of death from infections is about ten times greater for medication abortion than for surgical abortion. As admitted by the American College of Obstetricians and Gynecologists (ACOG), "[c]ompared to surgical abortion, medical abortion takes longer to complete, requires more active patient participation, and is associated with higher reported rates of bleeding and cramping," as well as lower success rates.[11]

9. Fourth, under the original FDA regimen, patients must return to their doctor 48 hours after taking mifepristone and only after examination to ensure that the abortion is not complete is the patient given misoprostol. One in twenty women will not need misoprostol at all because their abortion is completed by that time, eliminating the negative symptoms and increased risks of hemorrhaging and infection posed by misoprostol. However, Plaintiffs' regimen requires

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[8] Exhibit B, Harrison Decl., ¶¶ 11-14.
[9] Exhibit A, H.B. 2684 § 1(A)(13).
[10] Exhibit A, H.B. 2684 § 1(A)(13).
[11] Exhibit B, Harrison Decl., ¶¶ 43-48.

misoprostol use in all medication abortions, exposing some women to the risks of misoprostol that could have been avoided if the original FDA regimen was followed. Moreover, Plaintiffs regimen requires double the dose of misoprostol, even though misoprostol is the drug most associated with the infections that follow medication abortions.[12]

10. Fifth, Plaintiffs' regimen directs patients to self-administer the misoprostol between 6 to 24 hours after the mifepristone, instead of 48 hours in-clinic administration as provided for in the original FDA regimen. But use of misoprostol less than 24 hours after mifepristone leads to a significantly increased failure rate—nearly one in three will fail to abort—and even use at 24 hours leads to a lower abortion success rate. These half-completed abortions then require surgical intervention. Thus, Plaintiffs' self-administration regimen presents risks that their patients will use misoprostol at the wrong time, and even if used as directed by Plaintiffs, that regimen still presents greater danger than the original FDA regimen. Not only does in-clinic administration guarantee the correct timing of the drug administration, it also allows for better monitoring of bleeding, vital signs, and pain by trained physicians during the most difficult time of the abortion, than if the patient were to experience all these things at home or at work.[13]

11. It is also true that, prior to 49 days of pregnancy, the efficacy rates of Plaintiffs' regimen and the original FDA regimen are substantially same. Nevertheless, the safety and health outcomes between the two regimens differ, as noted above.[14]

12. Plaintiffs challenged the constitutionality of H.B. 2684 in 2014. Addressing cross-motions for summary judgment, this Court in 2015 granted summary judgment in favor of Plaintiffs on one of their four claims, holding that H.B. 2684 is an impermissible special law. In 2016, the Oklahoma Supreme Court reversed this Court's ruling, holding that H.B. 2864 was not

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[12] Exhibit B, Harrison Decl., ¶¶ 21-24.
[13] Exhibit B, Harrison Decl., ¶¶ 25-36.
[14] Exhibit B, Harrison Decl., ¶ 9.

an unconstitutional delegation of legislative power, nor was it an impressible special law, and remanded this case back to this Court for adjudication of the remaining two claims. Specifically, the Supreme Court held that H.B. 2684 "is reasonably and substantially connected to protecting women" since "the Legislature has taken great pains to incorporate 16 legislative findings documenting the danger off-label use of these medications have for women when used as abortion-inducing drugs."[15] The Court also held that it will not construe H.B. 2684 to "allow[] the FDA to change Oklahoma abortion laws by changing a [Final Printed Label]" and, as such, "H.B. 2684 is unaltered by any future FDA actions."[16]

13. After the Supreme Court's decision, the FDA took such an action, changing the Final Printed Label to contain a new regimen (the "new FDA regimen"). The new FDA regimen describes a protocol that involves 200 mg of mifepristone ingested orally, 800 μg of misoprostol ingested buccally at least 24 hours after the mifepristone, and a follow-up visit seven to fourteen days after mifepristone administration. The regimens used by Plaintiffs in administering medication abortions do not always, or even most of the time, comply with the new FDA label.[17]

ARGUMENT AND AUTHORITIES

Any constitutional analysis proceeds "with great caution" and starts with "a presumption that every statute is constitutional."[18] Thus, courts "indulge every possible presumption that an act of the Legislature was constitutional."[19] "If there is any doubt as to the Legislature's power to act in any given situation, the doubt should be resolved in favor of the validity of the action taken by the Legislature."[20] In other words, a law must be upheld unless "its unconstitutionality

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[15] *Cline III*, 2016 OK 17, ¶¶ 31-32.
[16] *Id.* at ¶¶ 16, 33.
[17] *Compare supra* ¶ 3 *with* ¶ 13.
[18] *Lafalier v. Lead-Impacted Cmtys. Relocation Assis. Trust*, 2010 OK 48, ¶ 15, 237 P.3d 181, 188-89.
[19] *Adwon v. Okla. Retail Grocers Ass'n*, 1951 OK 43, ¶ 11, 228 P.2d 376, 379.
[20] *Draper v. State*, 1980 OK 117, ¶ 10, 621 P.2d 1142, 1146.

is shown beyond a reasonable doubt."[21] A law will be deemed unconstitutional only if it "is clearly, palpably, and plainly inconsistent with the Constitution."[22] Accordingly, Plaintiff bears a "heavy burden" in "challenging a legislative enactment to show its unconstitutionality."[23]

Summary judgment is proper when the evidentiary material shows that "there is no substantial controversy as to any material fact."[24] When the material facts are undisputed, summary judgment should only be denied "if under the evidence, reasonable men could reach a different conclusion[]" as to those facts.[25] Here, the undisputed facts, combined with the heavy burden faced by Plaintiffs and the Supreme Court's binding decision on the merits in this case, demonstrate that Defendants are entitled to summary judgment.

I. Plaintiffs' unlawful delegation claim has been definitively rejected by the Supreme Court.

Plaintiffs' first claim for relief is that H.B. 2684 impermissibly delegates legislative authority to the FDA in violation of in Oklahoma Constitution. The Oklahoma Supreme Court squarely held that H.B. 2684 does not violate this constitutional requirement.[26] Specifically, the Supreme Court stated that it must "construe H.B. 2684 as not allowing the FDA's decisions to change Oklahoma law," and as such, it interpreted the statute to not "allow[] the FDA to change Oklahoma abortion laws by changing a FPL."[27] In other words, the Court held that "H.B. 2684 is unaltered by any future FDA actions."[28] Thus, because H.B. 2684 "does not allow the FDA any authority," the Supreme Court held that it "is not unconstitutional as an improper delegation

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[21] *Schmitt v. Hunt*, 1960 OK 257, ¶ 6, 359 P.2d 198, 200.
[22] *Lafalier*, 2010 OK 48, ¶ 15, 237 P.3d at 188; *see also Zeier v. Zimmer, Inc.*, 2006 OK 98, ¶ 12, 152 P.3d 861, 866.
[23] *Fent v. Oklahoma Capitol Imp. Auth.*, 1999 OK 64, ¶ 3, 984 P.2d 200, 204.
[24] Okla. Stat. tit. 12, ch. 2, app., R. 13(a).
[25] *F.D.I.C. v. Moss*, 1991 OK 116, ¶ 27, 831 P.2d 613; *see also Brown v. Okla. St. Bank & Trust Co. of Vinita*, 1993 OK 117, ¶ 7, 860 P.2d 230.
[26] *Cline III*, 2016 OK 17, ¶¶ 1, 21, 33.
[27] *Id.*at ¶ 16.
[28] *Id.* at ¶ 33.

of legislative authority."[29] Since the Supreme Court definitively resolved the nondelegation claim, this Court is bound to grant summary judgment on this claim. Because H.B. 2684 is not affected by subsequent FDA actions, the FDA's changes to the label are of no relevance.

II. The Supreme Court has rejected Plaintiffs' special law claim.

Plaintiffs claim that H.B. 2684 is an impermissible special law under Article V, § 59 of the Oklahoma Constitution. But the Supreme Court unambiguously rejected this claim as well,[30] and the Plaintiffs cannot now ask this Court to overturn the Supreme Court's ruling. The Supreme Court first found that "the Legislature made 16 factual findings, including that . . . fourteen women had died after off-label use of abortion-inducing drugs."[31] The Supreme Court also found that "eight fatal bacterial infections have been reported in the United States where the women were administered Mifeprex and misoprostol for a medication abortion and did not follow the FPL, but followed an off-label protocol."[32]

With this in view, the Supreme Court held that, although H.B. 2684 is a special law, it is a permissible special law not prohibited by Article V, § 59. The Court held a general law is not applicable because "[t]he factual findings, specifically the deaths and hospitalizations caused by off-label use of Mifeprex and misoprostol and the dangers of methotrexate, establish the basis for their legislative restrictions by special law."[33] Similarly, the law is permissible because it "is reasonably and substantially connected to protecting women" since "the Legislature has taken great pains to incorporate 16 legislative findings documenting the danger off-label use of these medications have for women when used as abortion-inducing drugs" and "[t]he documented

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[29] *Id.* at ¶ 21.
[30] *Id.* at ¶¶ 1, 32, 33.
[31] *Id.* at ¶ 4.
[32] *Id.* at ¶ 10.
[33] *Id.* at ¶ 29.

cases of death and injury are not disputed by the Plaintiffs."[34] And to the extent that the "evidence is mixed" on safety, the Court held that it "must defer to the Legislature" because "it is not the place of this Court to question legislative wisdom."[35]

The Supreme Court definitively resolved Plaintiffs' special law claim. When the Supreme Court issues a ruling on a claim, "the trial court is thereafter without authority to review the record, opinion, or judgment of [the Supreme Court] for the purpose of determining the correctness of [the] decision or to enter a judgment contrary to such decision."[36] And "when a mandate is issued it is the duty of the trial court to comply therewith."[37]

The Supreme Court's ruling was based on the Legislature's painstaking documentation of the deaths following use of abortion drugs that deviated from the label at the time of H.B. 2684's enactment. Those facts have not changed simply because the FDA has now changed its label—a reality which, as the Supreme Court held, has no effect in Oklahoma law.[38] Indeed, despite the fact that the Oklahoma Supreme Court specifically contemplated the possibility that the FDA might "chang[e] a FPL of currently approved drugs,"[39] the Supreme Court remanded to this Court "for a determination of H.B. 2684's validity under *other* constitutional provisions."[40] To allow the change in FDA label to affect the Supreme Court's ruling, or to defer to the FDA's factual determinations, would be to impermissibly delegate fact-finding authority to the FDA and allow the FDA's determinations to override the Supreme Court's. This is especially the case because, as the Supreme Court held and as Plaintiffs have

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[34] *Id.* at ¶¶ 31-32.
[35] *Id.*(citing *EOG Res. Mktg., Inc. v. Okla. State Bd. of Equalization*, 2008 OK 95, ¶ 20, 196 P.3d 511, 521).
[36] *Welch v. Welch*, 1936 OK 311, 58 P.2d 896, 899 (*Randol v. Harbour Longmire Co.*, 1927 OK 304, ¶ 8, 259 P. 548, 549).
[37] *Hurst v. Brown*, 1954 OK 25, 266 P.2d 438, 440.
[38] *Cline III*, 2016 OK 17, ¶ 16.
[39] *Id.*at ¶¶ 16, 33.
[40] *Id.* at ¶ 34 (emphasis added).

pressed over and over again, the FDA's label contains "marketing restrictions" and does not purport to dictate the "practice of medicine."[41] This change in marketing restrictions cannot be sufficient to overturn the Supreme Court's factual findings and legal holdings in this case. Accordingly, this Court need not reconsider Plaintiffs' special law claim and the Court should grant summary judgment in Defendants' favor.

III. H.B. 2684 does not violate Plaintiffs' due process rights under the Oklahoma Constitution.

Plaintiffs claim that H.B. 2684 is unconstitutional because the Oklahoma Constitution protects the right to an abortion under Article II, §§ 2 and 7. But the Oklahoma Supreme Court has never recognized such a right and the purpose and intent of the framers and the people was never to recognize that right. Another judge of this Court has already held that the Oklahoma Constitution does not protect the right to an abortion. In light of the fact that it is highly unlikely that a right to abortion under the Oklahoma Constitution even exists, it cannot be said H.B. 2684 "clearly, palpably, and plainly" violates that supposed right. Rather than accepting Plaintiff's invitation to rashly create a new right to abortion unsupported by the Oklahoma Constitution's text and inconsistent with the State's history, traditions, and laws, this Court must undertake constitutional analysis "with great caution,"[42] and recognize that "[r]estrictions and limitations upon legislative power are to be construed strictly."[43] A strict construction of Oklahoma's Constitution requires rejection of Plaintiff's claims against H.B. 2684.

A. The Oklahoma Constitution Does Not Confer A Right To Kill An Unborn Child.

Plaintiff's due process claim is based solely on its argument that the Oklahoma Constitution confers a right on women and their physicians to kill unborn children—and that,

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[41] *Id.* at ¶ 9; *see also Cline v. Okla. Coal. for Reproductive Justice*, 2013 OK 93, ¶ 20.
[42] *Lafalier*, 2010 OK 48, ¶ 15, 237 P.3d at 188-89.
[43] *Draper*, 1980 OK 117, ¶ 10, 621 P.2d at 1146.

concomitantly, those children have absolutely no rights to life and liberty. But the Oklahoma Supreme Court has never recognized a right to abortion, the people of Oklahoma have never intended such a right, and this Court should not take it upon itself to establish that physicians have a right to extinguish unborn life *and* that children in the womb have no rights at all.

"A constitutional provision must be construed considering its purpose and given a practical interpretation so that the manifest purpose of the framers and the people who adopted it may be carried out."[44] Because it was not, nor ever has been, the "manifest purpose" of the people of Oklahoma or the framers of its Constitution to enshrine the right to kill an unborn child, Plaintiffs' due process claim against H.B. 2684 must fail.

The history of abortion laws in Oklahoma makes this clear. Prior to statehood, the laws of the Native peoples that occupied the lands of Oklahoma criminalized the killing of an unborn child.[45] Similarly, the territorial legislature also criminalized abortion.[46] After adoption of the Constitution, the people of Oklahoma continued to retain and recodify these same prohibitions on the taking of fetal life.[47] Even after the Supreme Court's ruling in *Roe v. Wade*, 410 U.S. 113 (1973), the people of Oklahoma have refused to repeal these laws, evincing a recognition that while some rights to abortion are protected under federal law, they are emphatically *not* protected under the Oklahoma Constitution.

Quite contrary to the right to an abortion, the people of Oklahoma have instead continually chosen to recognize the rights of an unborn child to life and liberty. In addition to

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[44] *Fent v. Fallin*, 2014 OK 105, ¶ 17; 345 P.3d 1113, 1117; *accord EOG Res. Mktg., Inc.*, 2008 OK 95, ¶ 16; 196 P.3d at 520.

[45] *See, e.g.*, Compiled Laws of the Cherokee Nation, Chap. V, Art. 2, § 10; Art. 10, § 36; Constitution and Laws of the Choctaw Nation, Criminal Offenses § 3(1); Criminal Laws of Creek Nation, *reproduced in* Ohland Morton, The Government of the Creek Indians, 8 Chronicles of Oklahoma 54 (Mar. 1930); Constitution and Laws of the Muskogee Nation, Crimes, Chap. VI, § 180.

[46] Okla. (Terr.) Stat. §§ 2187, 2188 (1890).

[47] *See* 21 O.S.2011 §§ 861-62.

the laws against abortion, the crime of homicide includes the killing of an unborn child, Oklahoma's wrongful death statute expressly allows recovery for the death of an unborn child, pregnant women cannot be executed, there is a statutory presumption against withdrawal of life-sustaining care for pregnant women, and guardians are statutorily prohibited from consenting to a ward's non-emergency abortion absent specific authorization by the court.[48]

In short, all evidence indicates that it was and always has been the intent of the people of Oklahoma and its Constitution's framers that the Constitution (including its Due Process Clause) protects the rights of the unborn and does *not* protect the right to kill the same. There is no evidence to the contrary, and thus Plaintiffs cannot show that it was the "manifest purpose" of Oklahomans to deny rights to the unborn and protect the right to abortion.[49] Not surprisingly, the Oklahoma Supreme Court has never found a right to abortion in the State Constitution, but has instead expressly avoided finding such a right.[50] In fact, another judge of this Court has already held that the State Constitution does not protect the right to an abortion.[51]

Unable to show that the intent of the framers and the people support its view, Plaintiffs have previously attempted to argue that because the U.S. Supreme Court has interpreted the *federal* constitution to protect some rights to an abortion, so must the state constitution. Plaintiff's position leads to the untenable result that the meaning and interpretation of the Oklahoma Constitution is essentially delegated to the U.S. Supreme Court, unaccountable to the people of Oklahoma. Rather, the Oklahoma Supreme Court has previously refused to

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[48] *See* 12 O.S.2011 § 1053(F)(1); 21 O.S.2011 § 691(B), 22 O.S.2011 § 1011; 30 O.S.2011 § 119(A)(3); 63 O.S.2011, § 3101.4; *see also Pino v. United States*, 2008 OK 26, ¶ 23, 183 P.3d 1001.
[49] *Fent*, 2014 OK 105, ¶ 17; 345 P.3d at 1117.
[50] *See In Re Initiative Petition 349, State Question No. 642*, 1992 OK 122, ¶ 35 n.29, 838 P.2d 1, 12.
[51] *See* Exhibit D, *Burns v. Cline*, No. CV-14-1896, Mem. Order at 10 (Okla. Cnty. Dist. Ct. Feb. 11, 2016).

"speculate" concerning a state constitutional right to abortion, meaning it cannot be that the state constitution contains such a right merely because the federal constitution does.[52]

Instead, "[t]he Oklahoma Constitution does not merely project a mirror image of the federal constitution."[53] While it is true that, with respect to the rights of an individual, "[t]he United States Constitution provides a floor of constitutional rights [and] state constitutions provide the ceiling," it does not follow from that proposition that the state constitution always contains the same protections as the federal constitution.[54] Rather, those cases stand for the uncontroversial proposition that individuals in Oklahoma enjoy the rights granted by both the federal and state constitutions. Thus, the Oklahoma Supreme Court has held that when a citizen seeks to vindicate her *federal* constitutional rights, she must bring claims under the *federal* constitution.[55] Plaintiffs, however, have failed to bring any federal claims in this suit. All indications of the people's intent demonstrate that, even though the federal constitution has lesser protections, the Oklahoma Constitution was intended to protect the life of the unborn.

Notably, when a state district court first attempted to recognize a state constitutional right to abortion in invalidating a state law, the Oklahoma Supreme Court chose to affirm the judgement *not* by agreeing that such a state constitutional right exists, but instead by applying *federal* law.[56] That case involved only state law claims and was ruled upon below on state law issues, but the Oklahoma Supreme Court went out of its way to invoke *federal* law, noting that the matter was "controlled" by federal precedent, that the Oklahoma Supreme Court was "not free to impose its own view of the law" (as it would be under the state constitution), and that the

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[52] *In Re Initiative Petition 349*, 1992 OK 122, ¶ 35 n.29, 838 P.2d at 12.
[53] *Turner v. City of Lawton*, 1986 OK 51, ¶ 10, 733 P.2d 375, 379.
[54] *Starkey v. Okla. Dep't of Corrs.*, 2013 OK 43, ¶ 45, 305 P .3d 1004, 1021.
[55] *Daffin v. State*, 2011 OK 22, ¶ 16, 251 P.3d 741, 747 ("It is only when state law provides less protection that the question *must* be determined by federal law." (emphasis added)); *accord Turner*, 1986 OK 51, ¶ 10, 733 P.2d at 379.
[56] *Okla. Coal. for Reproductive Justice v. Cline*, 2012 OK 102, ¶¶ 1-3, 292 P.3d 27, 27-28.

U.S. Supreme Court's decision "remains binding on this court" (as it could only be with respect to federal, not state, law).[57] In other words, the Oklahoma Supreme Court has made clear that when Oklahoma citizens seek to vindicate their right to abortion, they should seek to do so under federal constitutional law, not the Oklahoma Constitution.

This Court and the Oklahoma Constitution receive their legitimacy solely from the democratic choices and purposes of the people of Oklahoma. Throughout history, it has always been the manifest purpose of the people to recognize the right to life of the unborn. If Plaintiffs seek to add a new right to the Constitution, they may do so through the referendum process—not by asking this Court to invent one out of whole cloth. This Court should reject Plaintiff's invitation to issue Oklahoma's *Roe v. Wade*, which would simultaneously deny the right to life clearly demonstrated by our history and recognize instead a right to abortion never intended by the framers or the people. If Plaintiffs seek to vindicate their alleged right to kill unborn children, they should seek to do so under federal law.

Because Plaintiffs have brought only state law claims and no right to abortion exists under the State Constitution, their substantive due process claim must be evaluated under the rational basis standard. Under this standard, H.B. 2684 does not violate the Oklahoma Constitution's due process protections unless it is an "arbitrary and unreasonable action by the state."[58] This only requires "a rational-basis standard of review" of legislation, which is "a highly deferential standard" that requires courts to uphold the challenged statute "so long as there is any reasonably conceivable state of facts that could provide a rational basis" for the law.[59]

H.B. 2684 meets this standard because, as discussed in Part II above and pursuant the binding decision of the Supreme Court in this case, "H.B. 2684 is reasonably and substantially

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[57] *Id.*
[58] *City of Edmond v. Wakefield*, 1975 OK 96, 537 P.2d 1211, 1213.
[59] *Gladstone v. Bartlesville Indep. Sch. Dist. No. 30*, 2003 OK 30, ¶¶ 12, 20, 66 P.3d 442, 448, 451.

connected to protecting women."[60] And again, the change in the FDA's label does nothing to erase the fact of those women's deaths—the fact upon which the Supreme Court based its decision. Accordingly, summary judgment must be granted to Defendants on this claim.

B. H.B. 2684 does not impose an undue burden on the federal right to an abortion.

Even assuming that federal law applies to this case—despite the fact that Plaintiffs failed to raise any federal claims—H.B. 2684 does not violate the right to obtain an abortion. Under federal law "[t]he State has legitimate interests from the outset of the pregnancy in protecting the health of the woman."[61] Because "not all regulations [of abortion] must be deemed unwarranted" and "[n]ot all burdens on the right to decide whether to terminate a pregnancy will be undue," a reviewing court must carefully consider the specific facts of the case and must do so mindful of the state's legitimate interest in protecting the health and safety of its citizens, rather than invalidating a law simply because it regulates or limits the practice of abortion.[62]

Thus, "not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right."[63] In other words, "when a law serves a valid purpose" merely because it "has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it."[64] Rather, a law should be invalidated under the U.S. Constitution "[o]nly where state regulation imposes an undue burden on a woman's ability to make [the] decision" to have any abortion.[65] A regulation poses an undue burden if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of

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[60] *Cline III*, 2016 OK 17, ¶¶ 31-32.
[61] *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992).
[62] *Id.* at 876; *see also Gonzales v. Carhart*, 550 U.S. 124, 166 (2007) (rejecting a "zero-tolerance policy" on abortion regulations).
[63] *Casey*, 505 U.S. at 873.
[64] *Id.* at 874.
[65] *Id.*

a nonviable fetus."[66] Those challenging the facial validity of an abortion regulation have the burden of showing that the law "the Act would be unconstitutional in a large fraction of relevant cases."[67] Nonetheless, because "it is clear the State has a significant role to play in regulating the medical profession[,] . . . [w]here [the State] has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession . . . ."[68]

Applying that standard to H.B. 2684, is it clear that H.B. 2684 does not create an undue burden on the right to an abortion on a large fraction of women seeking medication abortions. All women who could obtain an abortion under current law can also obtain an abortion under H.B. 2684. Nor does H.B. 2684 prohibit any type of abortion. There is no evidence in the record, beyond bald speculation, that proves even a single woman will not be able to receive an abortion if H.B. 2684 is enforced. It merely requires that abortion-inducing drugs be administered in the originally-approved method—a requirement that is certainly less burdensome than the absolute ban of a type of abortion that was upheld in *Gonzales.*

Moreover, the methods of performing the abortion procedures that H.B. 2684 promotes are *more safe* than the methods being prohibited. As detailed in the Statement of Undisputed Facts above, more women have died using Plaintiffs' regimens than the regimen required by H.B. 2684. Plaintiffs' primary regimen poses a greater risk of infection. When used after 7 weeks of pregnancy—as called for by Plaintiffs' regimen—medical abortion has heightened risks of clinically significant bleeding. In contrast, H.B. 2684 would require use of suction abortion after 7 weeks, which has lower risks, including substantially lower risks of hemorrhaging, hospital admission, unsuccessful abortion, and death. In addition, Plaintiffs' regimen increases the

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[66] *Id.* at 877.
[67] *Gonzalez,* 550 U.S. at 167-68.
[68] *Gonzales*, 550 U.S. at 157-58.

chances that women will take misoprostol needlessly and decreases the efficacy of the procedure. Thus, H.B. 2684 is justified by numerous medical reasons, and "[p]hysicians are not entitled to ignore regulations that direct them to use reasonable alternative procedures."[69] H.B. 2684 unquestionably advances the legitimate state interests in protecting maternal health and such paramount state interests outweigh any incidental burdens imposed and are not "undue."

To the extent that this Court believes that "both sides have medical support for their position," U.S. Supreme Court precedent mandates that H.B. 2684 be upheld.[70] Even if there is "medical disagreement whether the Act's prohibition would ever impose significant health risks" and "medical uncertainty persists," *Gonzales* requires this Court to uphold the Act because the legislature has "wide discretion to pass legislation in areas where there is medical and scientific uncertainty."[71] This is because "[c]onsiderations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends."[72] The Oklahoma Supreme Court reaffirmed this idea in this very case, holding that when "the evidence is mixed, we must defer to the Legislature."[73] Thus, unless the Court is absolutely *certain* that the original FDA regimen is significantly less safe than Plaintiffs' methods and *certain* that the Legislature was acting completely irrationally, H.B. 2684 must be upheld. Because the great weight of the evidence proves the legitimacy of this regulation, it is undoubtedly constitutional under the standards of *Casey*.

The U.S. Supreme Court's recent decision in *Whole Woman's Health v. Hellerstedt* provides a useful contrast to this case.[74] In reviewing Texas's law pertaining to abortion clinic admitting

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[69] *Id.* at 163-67.
[70] *Id.* at 161-64.
[71] *Id.* at 163.
[72] *Id.* at 166-67.
[73] *Cline III*, 2016 OK 17, ¶ 32.
[74] 136 S. Ct. 2292 (2016).

privileges and ambulatory surgical center requirements, the Supreme Court explicitly applied the standard from its decision in *Casey*.[75] The Court noted that the Texas statute "does not set forth any legislative findings" and that the challenged requirements "brought about no [] health-related benefits," and thus the new laws did nothing to "advance[] Texas' legitimate interest in protecting women's health."[76] Meanwhile, the effect of the Texas law was to shut down half of the State's abortion clinics, making abortion very hard to access for nearly half a million Texans.[77] Thus, the Court invalidated these provisions because they "provide[d] few, if any, health benefits for women, pose[d] a substantial obstacle to women seeking abortions, and constitute[d] an 'undue burden' on their constitutional right to do so."[78]

The contrast between H.B. 2684 and the provisions invalidated in *Hellerstedt* could not be more apparent. H.B. 2684 has already been found to be "reasonably and substantially connected to protecting women"[79]—a conclusion justified by numerous scientific facts and explicit legislative findings—and it does not prevent any women from accessing abortion, much less hundreds of thousands. In fact, the same law challenged in *Hellerstedt*, H.B. 2, also contained a regulation of medication abortion similar to H.B. 2684, but that provision was *upheld* by the Fifth Circuit, and that holding was not questioned or disturbed by the U.S. Supreme Court.[80]

Indeed, the only two federal appeals courts that have addressed a final decision on the merits with respect to laws similar to H.B. 2684 have upheld statutes requiring that medication abortions be performed according to the original approved regimen. For example, the Sixth Circuit upheld an Ohio law that prohibited prescribing abortion-inducing drugs "unless the

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[75] *Id.* at 2300, 2309.
[76] *Id.* at 2310-11.
[77] *Id.* at 2312-13.
[78] *Id.* at 2318.
[79] *Cline III*, 2016 OK 17, ¶32.
[80] *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583 (5th Cir. 2014).

distribution mirrored certain protocols and gestational time limits identified by the FDA when mifepristone was first approved in 2000."[81] The Sixth Circuit agreed with the district court that "[t]here is no evidence that the Act would impose an undue burden on a woman's ability to make the decision to have an abortion."[82] In so holding, the Sixth Circuit rejected the notion that "the right to choose abortion encompasses the right to choose a particular abortion method" and noted that, despite the law having been in effect for several years, the plaintiff was not able to produce a single woman who was unable to obtain an abortion because of the regulation.[83] The court also rejected plaintiff's argument that the increased cost of medication abortion due to the law ($150) posed an undue burden because the price of surgical abortion remained the same and, in light of the strict regulations upheld in *Casey*, there was no "evidence suggesting that the added cost of a medical abortion would unduly burden the right to choose abortion for a large fraction of affected women."[84]

Similarly, the Fifth Circuit upheld against constitutional attack a Texas law that "mandates that the administration of abortion-inducing drugs comply with the protocol authorized by the Food and Drug Administration (FDA)."[85] In that case, the plaintiff, Planned Parenthood, conceded that the law was constitutional as it relates to abortions prior to 49 days of pregnancy.[86] For abortions after 49 days of pregnancy, the Fifth Circuit upheld the law because of the availability of the safer, more effective surgical alternative and rejected the plaintiff's claims to the contrary, noting that—as is the case here—the plaintiff's claims were mere "bald[] assert[ions]," "hypothesis," and "speculation" unsupported by "any evidence of

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[81] *Planned Parenthood SW. Ohio Region v. DeWine*, 696 F.3d 490, 493 (6th Cir. 2012).
[82] *Id.* at 514 (internal marks omitted).
[83] *Id.* at 515-16.
[84] *Id.* at 516-18.
[85] *Abbott*, 748 F.3d at 587.
[86] *Id.* at 601.

scientific studies or research."[87] Just as the Fifth and Sixth Circuits have upheld the constitutionality of similar laws, this Court should uphold the constitutionality of H.B. 2684.[88]

IV. H.B. 2684 does not violate state constitutional equal protection provisions.

Finally, Plaintiffs claim that H.B. 2684 violates Plaintiffs' equal protection rights under Article II, § 7 of the Oklahoma Constitution. As Judge Andrews has already held,[89] because abortionists and their patients are not a suspect class, and because the Oklahoma Constitution does not contain a fundamental right to abortion, rational basis review applies to Plaintiffs' equal protection claim.[90] Under rational basis review, the Court asks only "whether the statute is rationally related to a legitimate government interest."[91] Because the Supreme Court has already held that "H.B. 2684 is reasonably and substantially connected to protecting women" due to the deaths of women using Plaintiffs' protocols,[92] Plaintiffs equal protection claim is easily resolved. Again, the FDA's change in label does nothing to change the facts upon which the Supreme Court based its holding—namely, that women have died using Plaintiffs' preferred protocol. Summary judgment is thus appropriate for Defendants on this final claim.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant summary judgment in favor of Defendants on all of Plaintiffs' claims.

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[87] *Id.* at 604.

[88] The State is aware of one other law similar to H.B. 2684 that has been challenged in federal court, but decisions about that law have only been rendered at the preliminary injunction stage, without the benefit of a fully-developed factual record and final adjudication on the merits. *See Planned Parenthood Arizona, Inc. v. Humble*, 753 F.3d 905 (9th Cir. 2014).

[89] *See* Exhibit D, *Burns v. Cline*, No. CV-14-1896, Mem. Order at 10 (Okla. Cnty. Dist. Ct. Feb. 11, 2016).

[90] *St. Paul Fire & Marines Ins. Co. v. Getty Oil Co.*, 1989 OK 139, ¶ 24, 782 P.2d 915, 921.

[91] *St. Paul*, 1989 OK 139, ¶ 24, 782 P.2d at 921.

[92] *Cline III*, 2016 OK 17, ¶¶ 31-32.

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CERTIFICATE OF MAILING

This is to certify that on this 8th day of September 2016, a true and correct copy of the foregoing instrument was mailed, postage prepaid to the following:

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