FILED
21-0262
8/5/2021 1:46 PM
tex-56028420
SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

# No. 21-0262

IN THE
SUPREME COURT OF TEXAS

DON ZIMMERMAN,
*Petitioner,*

v.

CITY OF AUSTIN AND SPENCER CRONK, IN HIS OFFICIAL CAPACITY AS CITY MANAGER OF THE CITY OF AUSTIN,
*Respondents.*

On Review from the
Eighth Court of Appeals at El Paso, Texas
No. 08-20-00039-CV

BRIEF OF AMICI CURIAE
**TEXAS RIGHT TO LIFE; GRASSROOTS AMERICA – WE THE PEOPLE; TRUE TEXAS PROJECT; TEXAS VALUES; RIGHT TO LIFE OF EAST TEXAS; WEST TEXAS FOR LIFE; WEST TEXANS FOR LIFE; STUDENTS FOR LIFE OF AMERICA; STUDENTS FOR LIFE ACTION; RIO GRANDE VALLEY PROLIFE APOSTOLATE; HUMAN DEFENSE INITIATIVE; CANOPY GLOBAL FOUNDATION; PROJECT DESTINY LUBBOCK; RAIDERS DEFENDING LIFE AT TEXAS TECH; TEXAS FAMILY DEFENSE COMMITTEE; U.S. PASTOR COUNCIL; TEXAS EAGLE FORUM; CONSERVATIVE REPUBLICANS OF TEXAS; TEXAS YOUNG REPUBLICAN FEDERATION; YOUNG CONSERVATIVES OF TEXAS AT TEXAS TECH; TEA PARTY PATRIOTS OF EASTLAND COUNTY; SOUTHERN BAPTISTS OF TEXAS CONVENTION; CHRIST FELLOWSHIP CHURCH OF BIG SPRING, TEXAS; ASSEMBLY OF YAHWEH (7TH DAY) OF CISCO, TEXAS; MOUNTAIN TOP CHURCH OF CISCO, TEXAS; MARK LEE DICKSON; DR. KARYSSE TRANDEM**
IN SUPPORT OF PETITION FOR REVIEW

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Amici Curiae submit this brief in support of Don Zimmerman's petition for review. Amici urge this Court to grant review and hold that the court of appeals erred in concluding that Texas's pre-*Roe v. Wade*[1] criminal abortion statutes are "void" and a "nullity" based on the United States Supreme Court's ruling in *Roe*. Federal courts cannot "void" or "nullify" a duly enacted state statute—they only can decline to enforce it or enjoin its enforcement when resolving cases or controversies. Despite pervasive and mistaken rhetoric that courts "strike down" legislation, *Roe* did not nullify the Texas abortion statutes or render them "void." Those statutes are still on the books and enforceable in any situation that falls outside the scope of *Roe*'s purported constitutional protections. The Court should clear up the "writ-of-erasure fallacy"[2] perpetuated by the court of appeals' opinion and hold that a statute declared unconstitutional by a federal or Texas court is not rendered "void," but subsists in the law books exactly as before the declaration—remaining capable of being enforced in circumstances that will not result in a violation of anyone's constitutional rights.

[1] 410 U.S. 113 (1973).

[2] *See* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933 (2018).

## INTEREST OF AMICI CURIAE

Amici Curiae are Texas nonprofit organizations comprised of members who have a profound interest in protecting the sanctity of human life. Amici's members include thousands of Texans across the state, including within the City of Austin. Amici share a common interest in safeguarding the constitutional and God-given right to life of every Texan, both born and unborn. This case implicates Amici's interests and raises important issues of public concern because the court of appeals' decision flouts the mandates of the Texas Constitution by permitting the City of Austin's illegal use of taxpayer funds to support an industry that profits from the deaths of unborn children.

No fee was paid or promised in association with the preparation of this brief, and none involved in its preparation have any pecuniary interest in the outcome of this case.

Amici include the organizations described in the Appendix attached hereto.

## ARGUMENT

### I. Texas's pre-*Roe* abortion statutes continue to exist as the law of Texas; they were never rendered "void" or "struck down" by any court

A fundamental misunderstanding persists throughout the judiciary and legal profession regarding the power of judicial review. Often, a judicially disapproved law is described as having been "struck down" or rendered "void." But judges cannot cancel or revoke a duly enacted statute; they have no "writ of erasure" to formally

revoke or "strike down" legislation. *See* Mitchell, *supra*, at 933. The power of judicial review is more limited: it permits a court to decline to enforce a statute, or enjoin its enforcement by others, when resolving cases or controversies. *Id.* But the judicially disapproved statute continues to exist as a law unless and until it is repealed by the legislature that enacted it, even if a past judicial decision was unwilling to fully enforce it. *Id.*

### A. The Framers expressly debated and then rejected the creation of a "Council of Revision" that would vest judges with a veto-like power to "strike down" or formally revoke legislation

The Framers of the Constitution repeatedly debated whether the judiciary should have a power of revision over legislative enactments. And, after lengthy, much-heated discourse, they overwhelmingly rejected the idea. Instead, the Framers gave judges the power to resolve cases or controversies between litigants, which allows a court to decline to enforce a statute or enjoin the executive from enforcing it when deciding a particular case—but does *not* empower the court to revoke or veto the statute itself. The statute remains on the law books, subject to enforcement should a future court have a different view of what the Constitution requires. Mitchell, *supra*, at 956.

The historical record reflecting these facts cannot be disputed. During the British colonization of the Americas, the supreme laws of England trumped conflicting inferior colonial law. *See* Justin W. Aimonetti, *Colonial Virginia: The*

*Intellectual Incubator of Judicial Review*, 106 Va. L. Rev. 765, 767 (May 2020). An English "Board of Trade" was responsible for reviewing laws passed by colonial assemblies and "disallowing" those "repugnant to the laws of England." *Id.* at 766-67. In the aftermath of independence, with no Board of Trade to check the limits of lawmaking authority, the new states experimented with "unrestrained democracy," producing laws that "frequently represented the selfish desires of interested majorities." *Id.* at 796.

It was in this historical setting and political culture that James Madison, the "Father of the Constitution," was raised in colonial Virginia. *Id.* at 794. Involved in revising Virginia's laws after its independence, Madison's real-life experience with British imperial oversight profoundly influenced his "view of government and his proposed constitutional solution to the problem of unrestrained state legislatures." *Id.* at 794, 798.

Early in the Constitutional Convention, Madison argued that Britain's imperial oversight "would not have been inconvenient; if the supreme power of negativing had been faithful to the American interest." *Id.* at 805. But many delegates disliked the idea of incorporating "a pillar of British imperial rule into the structure of the new Federal Constitution." *Id.* Some suggested a more qualified federal negative power, in which "the Constitution defined the cases in which the negative ought to be exercised." *Id.* (citation omitted). Madison was unimpressed,

convinced that the "*un*qualified negative's utility [was] sufficiently displayed in the British System." *Id.* (emphasis added) (citation omitted).

Accordingly, Madison (and other delegates in agreement) called for a "Council of Revision," comprised of both the executive and the federal judiciary. Mitchell, *supra*, at 955 (citation omitted). The proposed Council would hold power to permanently veto legislation passed by Congress. *Id.* at 955; *see Collins v. Mnuchin*, 938 F.3d 553, 610 (5th Cir. 2019) (en banc) (Oldham & Ho, JJ., concurring in part and dissenting in part) (citing Mitchell, *supra*, at 954) (recounting events at the Constitutional Convention, including Madison's proposed Council of Revision that would give the federal judiciary the power to veto legislation and render it "void," without any legal effect), *aff'd in part*, *rev'd in part*, *vacated in part sub nom. Collins v. Yellen*, 141 S. Ct. 1761 (2021).

The powers of the proposed Council of Revision "differ from the power of judicial review." Mitchell, *supra*, at 956. The Council would have been empowered "to *permanently* block legislation from taking effect, and its disapproval of a proposed law . . . [would be] final and irreversible." *Id.* In contrast, judicial review allows a court "to decline to enforce a statute and enjoin the executive from enforcing it." *Id.* But such review cannot "revoke or veto the statute itself, which remains on the books, and it cannot prevent future courts from enforcing the statute if they have a different view of what the Constitution requires." *Id.*

The Framers supporting the proposed Council of Revision fought hard at the Constitutional Convention for a formal judicial veto over federal legislation. *See id.* at 956-58. The proposed Council was first debated on June 4, 1787. *Id.* at 957. After deliberation, it was defeated by a vote of eight to three. *Id*.[3] It again was raised on July 21, 1787. *Id.* at 958. James Wilson acknowledged that the Convention already had rejected the judicial veto power, but "was so confirmed by reflection in the opinion of its utility, that he thought it incumbent on him to make another effort." *Id.* (citation omitted). After further deliberation, again, it was defeated (with four states opposed, three in favor, and two divided). *Id.* On August 15, 1787, Madison made yet another (and final) effort to revive the proposed grant of judicial veto power over federal legislation. *Id.* This time he moved to give the Supreme Court a veto power separate and independent from the President's veto, with each subject to legislative override. *Id.* at 958-59. Once again, the Convention rejected the motion (by a vote of eight to three). *Id.* at 959. Finally, the judicial veto debate came to an end, with Madison "greatly disappointed" by the Convention's unwillingness to support it. *Id.* (citation omitted).

[3] Only 12 states participated by sending delegates to the Convention. Rhode Island did not participate, and New Hampshire delegates did not participate until July 1787. https://www.thoughtco.com/constitustional-convention-105426 (last visited July 15, 2021).

Other delegates proposed granting the federal judiciary a veto-like power over *state* laws. *Id.* Another proposal included language in the supremacy clause that would have empowered the Supreme Court to render state laws "void" when they conflict with the judiciary's interpretation of the Constitution. *Id.* at 960.

Not one of these proposals made it into the final Constitution. *Id.* Instead:

> In the final Constitution, the judiciary was given only the power to decide cases and controversies—to resolve legal disputes between parties and order remedies to redress injuries. Thus, when a court concludes that a statute is unconstitutional, it is not "striking down" or "voiding" or "invalidating" the law. It is merely holding that the law may not be applied to the parties in the dispute. The Constitution does not empower courts to delete sections of state and federal codes.

*Collins*, 938 F.3d at 611 (Oldham & Ho, JJ., concurring in part and dissenting in part); *see also* Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. Rev. 738, 756 (2010) (the Framers did not conceive of judicial review as the power to "strike down" legislation).

* * *

Given these clear and incontestable historical facts, there can be no mistake that the Framers understood the scope of judicial review differed markedly from a Council of Revision's veto power. Indeed, they exhaustively debated and then rejected the proposed grant of judicial veto power over legislation, not once, not twice, but *three times*. *See United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1991 (2021) (Gorsuch, J., concurring in part and dissenting in part) (recognizing "the

framers' *explicit rejection* of allowing this Court to serve as a council of revision free to amend legislation" (emphasis added)); *Collins*, 938 F.3d at 611 (Oldham & Ho, JJ., concurring in part and dissenting in part) ("The Founders expressly considered the possibility of a judicial veto, and they rejected it multiple times during the Constitutional Convention.")

As a result, federal courts do not have the power to formally revoke a statute or render it void. Accordingly, contrary to the court of appeals' opinion, the Supreme Court in *Roe* did not erase, nullify, or render void the Texas pre-*Ro*e abortion statutes. Those statutes are still on the books and enforceable in every application that falls outside the scope of *Roe*'s constitutional protections. *See* PFR at 9-13.

### B. The improper perpetuation of the writ-of-erasure fallacy stems from a flawed premise

The rhetoric of the writ-of-erasure fallacy—"the fallacy that equates judicial review with a veto-like power to 'strike down' legislation"—has been perpetuated since the Constitutional Convention. Mitchell, *supra*, at 933, 964-68. Some of the delegates supporting the judicial veto later asserted that judicial review would empower the courts to declare statutes "void" and "not law." *Id.* at 961-62. Perhaps their lack of success in promoting a Council of Revision led them to describe judicial review to include the statutory veto-like power they had hoped to instill in the judiciary. *Id.* at 963. Regardless of the reasons, unfortunately, this language and

rhetoric "found its way into the ratification debates, The Federalist, and eventually the [opinion in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)]." *Id.*

The improper perpetuation of the writ-of-erasure rhetoric can be largely traced to the Supreme Court's language in *Marbury* declaring an unconstitutional statute "entirely void," "invalid," and "not law." Mitchell, *supra*, at 964 (quoting *Marbury*, 5 U.S. at 177-78, 180); *Collins*, 938 F.3d at 611 (Oldham & Ho, JJ., concurring in part and dissenting in part) (The history of the Framers' rejection of a judicial veto "has been obscured by rhetoric that Chief Justice Marshall used in [*Marbury*] to explain judicial review."). And "[s]ubsequent cases have compounded the confusion." *Collins*, 938 F.3d at 611 (Oldham & Ho, JJ., concurring in part and dissenting in part); *United States v. Stroke*, No. 14-CR-45S, 2019 WL 1960207, at *14 (W.D.N.Y. May 2, 2019) ("From the Supreme Court down to trial judges across the country, courts frequently misunderstand [that injunctions against unconstitutional statutes do not nullify the political process that enacted the statute] and write of injunctions that 'strike down' a statute."). But this uncritical reliance on *Marbury*'s language is utterly misplaced—that was not even the fate of the statutory provision found unconstitutional in that case. Mitchell, *supra*, at 964-65.

In *Marbury*, the Supreme Court concluded that section 13 of the 1789 Judiciary Act unconstitutionally expanded the Court's original jurisdiction beyond the scope of Article III, Section 2, of the U.S. Constitution. *Id.* at 965 (citing

*Marbury*, 5 U.S. at 173-77, 180). Accordingly, the Court "declared section 13 'repugnant to the Constitution' and 'void' for that reason." *Id.*

Despite these declarations, section 13 continued to exist as a federal statute: Congress did not repeal it after the decision, and litigants continued using it to seek relief in cases within the Supreme Court's jurisdiction. *Id.* at 965 & n.133. Further, post-*Marbury* litigants were free to ask the Court to overrule *Marbury* and, in fact, did so in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), where the Court repudiated much of *Marbury*'s constitutional analysis. *Id*. at 965 & n.134. The Court's imprecise declarations that a statute declared unconstitutional is "void" and "not law" are inaccurate.

> [I]t is indisputable that courts do not have the power to erase duly enacted statutes. Instead, they may decline to enforce them or enjoin their future enforcement to resolve cases and controversies.

*Collins*, 938 F.3d at 61 (Oldham & Ho, JJ., concurring in part and dissenting in part). "If the Constitution were amended or if new judges were appointed, the statute could become fully enforceable again." Mitchell, *supra*, at 966.

### C. The existence of writ-of-erasure rhetoric does not make it accurate, and many judges and scholars recognize its fallacy

The pervasive writ-of-erasure rhetoric is unfortunate. But its mere existence does not make it accurate. The absence of any grant of such power in the Constitution, and the Constitution's explicit separation-of-powers mandate, controls whether such power exists in the judiciary. It does not.

Despite all the rhetoric, many judges and scholars recognize that no federal court—not even the Supreme Court—can "nullify" or render "void" state legislation.[4] Indeed, this Court recently (and correctly) acknowledged that a

[4] *See*, *e.g.*, *Steffel v. Thompson*, 415 U.S. 452, 469 (1974) ("Of course, a favorable declaratory judgment . . . cannot make even an unconstitutional statute disappear." (cleaned up)); *Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) (The power of the judiciary "to review and annul acts of Congress" is "little more than the negative power to disregard an unconstitutional enactment. . . . [T]he court enjoins, in effect, not the execution of the statute, but the acts of the official, *the statute notwithstanding*." (emphasis added)); *Pool v. City of Houston*, 978 F.3d 307, 309 (5th Cir. 2020) ("It is often said that courts 'strike down' laws when ruling them unconstitutional. That's not quite right. Courts hold laws unenforceable; they do not erase them." (cleaned up)); *Jacobson v. Florida Secretary of State*, 974 F.3d 1236, 1255 (11th Cir. 2020) ("The district court's decision rests on the flawed notion that by declaring the ballot statute unconstitutional, it eliminated the legal effect of the statute in all contexts. But federal courts have no authority to erase duly enacted law from the statute books. Our power is more limited: we may enjoin executive officials from taking steps to enforce a statute. And we can exercise that power only when the officials who enforce the challenged statute are properly made parties to a suit." (cleaned up)); *Planned Parenthood of Greater Texas Surgical Health Servs. v. City of Lubbock, Texas*, No. 5:21-CV-114-H, 2021 WL 2385110, at *3, 11 (N.D. Tex. June 1, 2021) ("[E]ven though this Court can rule that a law is unconstitutional when presiding over an actual case or controversy, it can only hold laws unenforceable; it cannot erase them." (cleaned up)); *Cunningham v. Matrix Fin. Servs., LLC*, No. 4:19-cv-896, 2021 WL 1226618, at *5 n.7 (E.D. Tex. Mar. 31, 2021) ("While severability shorthand typically speaks in terms of 'striking down' or 'invalidating' acts of Congress, this characterization is inexact. In reality, courts hold laws unenforceable; they do not erase them." (cleaned up)); *Stroke*, 2019 WL 1960207, at *14-15 ("Injunctions issued against [unconstitutional] statutes do not nullify the political process that enacted the statute and do not function like a red pen crossing out text from statutory compilations. . . . What courts should say when issuing [such] an injunction . . . is that, as a matter of equity, they are forbidding an executive from enforcing a duly enacted statute."); *see also Borden v. United States*, 141 S. Ct. 1817, 1835 (2021) (Thomas, J., concurring) ("Courts have no authority to strike down statutory text." (cleaned up)); *Seila Law LLC v. Consumer Fin. Protection Bureau*, 140 S. Ct. 2183, 2219 (2020) (Thomas, J., concurring) (In the context of a constitutional challenge, the judicial power of the United States in the Supreme Court and the lower federal courts "amounts to little more than the negative power to disregard an unconstitutional enactment."); *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1585-86 (2020) (Thomas, J., concurring) ("There is good evidence that courts in the early Republic understood judicial review to consist simply of a refusal to give a statute effect as operative law in resolving a case once that statute was determined to be unconstitutional." (cleaned up)); *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1486 (2018) (Thomas, J., concurring) ("And courts do not have the power to 'excise' or 'strike down' statutes."); *Nat'l Collegiate Athletic Assoc. v. Governor of N.J.*, 939 F.3d 597, 611-12 (3rd Cir. 2019) (Porter, J., dissenting) ("The majority thus commits the 'writ-of-

judicially disapproved statute remains in place "unless and until" repealed by the body that enacted it. *Pidgeon v. Turner*, 538 S.W.3d 73, 88 n.21 (Tex. 2017).

Further, action or inaction by legislative bodies in the wake of judicial constitutionality rulings are telling as to the viability of disapproved statutes. For example, in 2018, the Massachusetts legislature repealed the Commonwealth's criminal statute prohibiting abortion. *See* Josh Blackman, *The Irrepressible Myth of Cooper v. Aaron*, 107 Geo. L.J. 1135, 1200 (2019). "Why? It was concerned that if *Roe* was overturned the criminal statute *would once against become enforceable*. That is, the state law was never 'struck down' but was merely unenforceable for several decades."[5] *Id.* (emphasis added). Nothing in the actual text of a statute changes as a consequence of judicial action—it stays exactly the same and persists as law "that can spring back into effect if the constitutional barrier to its enforcement is removed." Walsh, *supra*, at 747; *see also Close v. Sotheby's*, 909 F.3d 1204, 1210 n.1 (9th Cir. 2018) (Although "we are aware that, as far back as *Marbury*, there is language suggesting that an unconstitutional or preempted law is "void" and must be treated as "though it be not law[,] . . . [s]uch sweeping pronouncements may overstate the actual effect of judicial review and the Supremacy Clause. . . .

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erasure fallacy,' or the mistaken 'assumption that a judicial pronouncement of unconstitutionality has canceled or blotted out a duly enacted statute.'" (quoting Mitchell, *supra*, at 937)).

[5] Although Massachusetts's criminal abortion statute was not at issue in *Roe*, as a practical matter, state officials would not seek to enforce it so long as *Roe* remains in effect. Blackman, *supra*, at 1200.

Preempted laws are constitutionally unenforceable, but they are not snipped from the statute books. . . . If, for example, Congress removed the preemption provision from the Copyright Act, the preempted portions of the [California Resale Royalty Act ("CRRA")] *would automatically revive*; the CRRA ***would not have to be reenacted*** *to become effective*." (emphasis added)).

### D. The Texas cases cited by the court of appeals do not apply—the issue here is whether the *Supreme Court*'s opinion in *Roe* rendered the Texas abortion statutes "void"

In *Pidgeon*, this Court noted that neither the Supreme Court in *Obergefell v. Hodges*, 576 U.S. 644 (2015), nor the Fifth Circuit in *De Leon v. Abbott*, 791 F.3d 619 (5th Cir. 2015), "struck down" any Texas law:

> When a court declares a law unconstitutional, the law remains in place unless and until the body that enacted it repeals it, even though the government may no longer constitutionally enforce it.

*Pidgeon*, 538 S.W.3d at 88 n.21. Attempting to sidestep this correct statement of the law, the court of appeals notes that *Obergefell* "did not directly address the constitutionality of any laws in Texas." *Zimmerman v. City of Austin*, 620 S.W.3d 473, 484 (Tex. App.—El Paso 2021, pet. filed). If the court is suggesting the Texas statute involved in *Pidgeon* would no longer exist if *Obergefell* ***had*** involved that statute, the court misreads *Pidgeon*. This Court's statement in *Pidgeon* expressly considers the status of a law *after* being declared unconstitutional, and correctly

concludes "the law remains in place unless and until the body that enacted it repeals it." 538 S.W.3d at 88 n.21.

The court of appeals also relies on this Court's post-*Pidgeon* opinions in *Ex parte E.H.*, 602 S.W.3d 486 (Tex. 2020) and *In re Lester*, 602 S.W.3d 469 (Tex. 2020), and the Texas Court of Criminal Appeals' opinion in *Ex parte Bockhorn*, 138 S.W. 706 (Tex. Crim. App. 1911), and other cases from that court addressing the status of Texas laws after being judicially declared unconstitutional. *See Zimmerman*, 620 S.W.3d at 485. The court concludes that under these cases such laws are "void," "no law," and have "no validity and no existence." *Id.* (citations omitted). The court's reliance is misplaced.

First, these cases are inapplicable. At issue here is whether the *U.S. Supreme Court*'s unconstitutionality determination in *Roe* rendered the Texas pre-*Roe* abortion statutes "void." As discussed, it did not. Accordingly, as a matter of law, the Texas abortion statutes may be enforced to the extent they prohibit conduct falling outside the scope of *Roe*'s constitutional protections. *See* PFR at 9-13.

Moreover, nothing in the *Texas* Constitution grants the Texas judiciary power to void state statutes. Like the U.S. Constitution, the Texas Constitution divides the state government into three distinct departments (legislative, executive, and judicial) and grants the judiciary "the power . . . to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for

decision." *Morrow v. Corbin*, 62 S.W.2d 641, 644 (Tex. 1933); *see* Tex. Const. art. 5, § 1. The Texas Constitution also mandates that no one in "one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted." Tex. Const. art. 2, § 1. No other constitutional provision "expressly permit[s]" the judiciary to encroach upon the legislative branch by "voiding" laws passed by the legislature.

## II. It is undisputed that blocking the City of Austin's funding of abortion-assistance organizations will not impose an "undue burden" on any woman seeking an abortion

The Supreme Court has made clear there is no constitutional requirement to affirmatively *help* abortion-minded mothers procure an abortion. In *Harris v. McRae*, 448 U.S. 297 (1980), the Court considered whether the congressionally enacted *Hyde Amendment*—preventing federal funds from financing abortion procedures—violated a woman's right to seek an abortion under *Roe*. The Court held it did not:

> [R]egardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in [*Roe*], it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. . . . [A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category.

*Harris*, 448 U.S. at 316.

Here, the City of Austin's ordinance is even one step further removed from the abortion procedure itself. The City is not trying to pay directly for abortions with taxpayer dollars, but rather ancillary costs a mother might incur. If the state may constitutionally prohibit the use of public funds to pay for an abortion procedure, it also may constitutionally prohibit the use of such funds to pay for fuel, hotel rooms, and childcare to further an abortion procedure.

## III. The City of Austin's expenditures will violate the Texas Heartbeat Act when it takes effect

After September 1, 2021, taxpayers in Austin will be funding unlawful abortions, because the City's abortion-access budget provision contains no language restricting expenditures to abortions that do not violate the Texas Heartbeat Act (the "Act"). Senate Bill 8, 87th Leg. (eff. Sept. 1, 2021) (to be codified at Health & Safety Code § 171.201, *et seq*.) ("Senate Bill 8"). The Act prohibits an individual or organization from knowingly aiding or abetting an abortion that occurs after fetal heartbeat. *Id.* at § 3, Secs. 171.204, 171.208(a)(2).

To avoid liability, the Act effectively places an affirmative requirement on anyone who aids or abets an abortion to be certain the abortion does not violate the Act. Senate Bill 8 at § 3, Sec. 171.208(a)(2). Thus, the City of Austin cannot blindly assume its taxpayer funds flagged for abortion assistance will assist only pregnant women within the gestational parameters allowed by the Act. To be liable under the Act, one must only "knowingly engage in *conduct*" that aids or abet an abortion, and

regardless of whether the actor knew or should have known the abortion would violate the Act, the actor is liable if that particular abortion turns out to be illegal due to the presence of a fetal heartbeat. *Id.* at § 3, Sec. 171.208(a)(2) (emphasis added). The City's professed public purpose for the budget allocation is to assist women in obtaining abortions, but the City has not put any safeguards in place to ensure taxpayer dollars are not spent on abortions of babies with a detectable heartbeat. In every instance where an unlawful abortion occurs, the City is liable under the Act.

## CONCLUSION AND PRAYER

Amici Curiae urge this Court to grant review and hold that the court of appeals erred in failing to recognize that Texas's pre-*Roe* abortion statutes are not "void," but are enforceable in their applications that fall outside the scope of *Roe*'s constitutional protections, including the conduct in this case.

Respectfully submitted,

*/s/ Emily Cook*
Emily Cook


*Counsel for all Amici Curiae*

*/s/ LaDawn H. Nandrasy*
LaDawn H. Nandrasy


*Counsel for Amicus Curiae*
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## CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2021, a true and correct copy of this Brief of Amici Curiae was served via electronic service through eFile.TXCourts.gov on counsel of record, listed below:

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*/s/ LaDawn H. Nandrasy*
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## CERTIFICATE OF COMPLIANCE

Based on a word count run in Microsoft Word 2016, this brief contains 4,465 words, excluding the portions of the brief exempt from the word count under Texas Rule of Appellate Procedure 9.4(i)(1).

*/s/ LaDawn H. Nandrasy*
LaDawn H. Nandrasy

# Appendix

## Individual Statements of Interest of Amici Curiae

**Texas Right to Life**

Founded in 1973, Texas Right to Life is the largest Texas Christian non-profit organization dedicated to legally, peacefully, and prayerfully protecting the God-given Right to Life of innocent human beings from fertilization to natural death. TRTL is stridently opposed to abortion and therefore opposes the use of tax dollars to pay for the counseling, promotion, referral, and performance of abortions.

**Grassroots America – We the People**

Grassroots America – We the People is a non-partisan public policy and citizen-action organization with a constitutional conservative focus. Grassroots America – We the People's mission is to preserve and advance the cause of Liberty – for the born and unborn – as established in the Declaration of Independence, the U.S. Constitution, and the Bill of Rights.

**True Texas Project**

True Texas Project exists to educate and motivate citizen engagement in all levels of government.

**Texas Values**

Texas Values is a Judeo-Christian nonprofit organization that promotes research and education to encourage, strengthen, and protect American families, including pro-life policies.

**Right to Life of East Texas**

Based in Longview but reaching out across the state of Texas and beyond, Right to Life of East Texas has been fighting for all human life from the point of conception until the point of natural death since our formation in 1976. We exist to educate, equip, and encourage others with the information and resources they need to do their part to bring an end to the Texas abortion holocaust.

**West Texas for Life**

West Texas for Life's mission is to see the State of Texas abolish all abortion. West Texas for Life has been pointing out for years that abortion is already illegal in Texas, and this case gets to the heart of that point.

**West Texans for Life**

West Texans for Life is a nonprofit organization committed to doing everything it can through educational and legal means to put an end to abortion in our country. West Texans for Life is adamantly opposed to taxpayer money being used to enable individuals to obtain abortions.

**Students for Life of America**

Students for Life of America ("SFLA") is the nation's largest pro-life youth organization that uniquely represents the generation most targeted for abortion. SFLA, a 501(c)(3) charity, exists to recruit, train, and mobilize the Pro-Life Generation to abolish abortion and provide policy, legal, and community support for women and their children, born and preborn. Headquartered in Fredericksburg, VA,

SFLA has more than 1,250 student groups with thousands of members on middle, high school, college, university, medical, and law school campuses in all 50 states, with nearly 100 groups in Texas. The organization was founded in 1977 as a student-run organization, and in 2005 was launched as a full-time operation that now has a nationwide network of staff and volunteers, including more than 127,000 pro-life advocates trained by SFLA.

SFLA and its members are uniquely harmed as the generation most targeted for abortion. A legal prejudice in favor of abortion prevents women from having access to all the information about how abortion harms women and preborn children and what services and support can be made available to them. SFLA thus works to overcome the bias in favor of abortion in critical social institutions, including the courts. As an organization made up primarily of women, many who are working mothers, the mission to build up each generation of women to succeed at home and at work is undermined by misogynist presuppositions—including statements in court findings—that abortion contributes to women's prosperity.

**Students for Life Action**

Students for Life Action trains and mobilizes this generation of pro-life leaders to impact public policy and influence key elections in order to restrict & abolish abortion in America. It opposes the city of Austin's efforts to give taxpayer

money to abortion-assistance organizations and supports the full enforcement of Texas's abortion laws.

**Rio Grande Valley Prolife Apostolate**

The Rio Grande Valley Prolife Apostolate is an organization committed to loving God's creation in the womb by protecting and saving the unborn, and by respecting all Life from womb to tomb. The Rio Grande Valley Prolife Apostolate strongly supports the enforcement of Texas's abortion statutes, which clearly and unequivocally prohibit conduct that "furnishes the means for procuring an abortion knowing the purpose intended."

**Human Defense Initiative**

Human Defense Initiative is a digital-based, millennial-led pro-life news publication and advocacy platform. Its mission is to save lives as well as change minds and hearts through spreading the truth about abortion and offering life-affirming support. Human Defense Initiative supports the full enforcement of all anti-abortion laws, including the laws of Texas, and opposes the city of Austin's unlawful use of taxpayer money to subsidize abortions.

**Canopy Global Foundation**

Canopy Global Foundation provides a varied canopy of services to support the health of the individual and family, relieve the suffering of the most vulnerable, and promote cooperation and peace among all people. It treats women seeking abortion and survivors of abortion cross-culturally and internationally in

community, clinic, and hospital settings. Canopy Global Foundation strongly supports the right to life and opposes the city of Austin's efforts to promote abortion with taxpayer money.

**Project Destiny Lubbock**

Project Destiny Lubbock was established in 2021 for the purpose of enacting the ordinance that outlawed abortion in the city of Lubbock. Project Destiny had many volunteer coordinators overseeing various aspects of the campaign and deployed a large number of volunteers that are passionate about defending the defenseless. Project Destiny's focus is on protecting life – both the lives of innocent babies in their mothers' wombs and the lives of precious girls and women struggling with an unplanned pregnancy.

**Raiders Defending Life at Texas Tech**

Raiders Defending Life at Texas Tech is a student-led organization seeking to build a Culture of Life at Texas Tech University and in the Lubbock community. It is non-partisan and non-sectarian, united on a single viewpoint: that all innocent human life is valuable and must be protected from fertilization to natural death. Through education, volunteerism, and activism, Raiders Defending Life works to ensure that the students, faculty, and staff of Texas Tech University understand and protect the human right to life from discrimination, regardless of development, dependency, or ability. Raiders Defending Life was actively involved in working to

enact the Sanctuary Cities for the Unborn Ordinance that outlaws abortion in Lubbock, Texas.

**Texas Family Defense Committee**

This group formed to support and defend the traditional family (father, mother and their children) as the essential building block for this nation, believing that no other structure so aptly fulfills individual wants and needs, or so perfectly and selflessly nurtures the next generation. They oppose abortion, and all activities supporting it, because abortion steals the future while crippling the present. They believe Texas laws against "furnishing the means to procuring an abortion knowing the purpose intended" have not been repealed or voided and should be enforced to prevent this wanton destruction.

**U.S. Pastor Council**

The U.S. Pastor Council is a pastor-led ministry engaging in cultural, social, moral and governing issues from a Biblically-grounded perspective. The U.S. Pastor Council strongly supports the sanctity of human life and opposes any type of taxpayer subsidies for abortions or abortion-assistance organizations.

**Texas Eagle Forum**

Texas Eagle Forum is rooted and grounded in biblical principles and values. We support the family as the core beginning of all government and we fight for Life – from conception to the grave.

**Conservative Republicans of Texas**

Conservative Republicans of Texas strongly supports the right to life from conception until natural death. It opposes taxpayer funding of abortion and pro-abortion organizations, and it supports the enforcement of the state's abortion laws, which unequivocally prohibit conduct that "furnishes the means for procuring an abortion knowing the purpose intended."

**Texas Young Republican Federation**

Texas Young Republican Federation is the premiere Republican organization in Texas representing 2000 members and 40 local chapters. We have a strong belief in limited government focus on protecting the rights of people including the fundamental right to life.

**Young Conservatives of Texas at Texas Tech**

The Young Conservatives of Texas (YCT) at Texas Tech University, founded in 1980, has long stood for the rights of the unborn. Last Spring, we campaigned for the Sanctuary Cities Ordinance to prevent abortions in Lubbock, Texas. We strongly oppose the use of any tax dollars that incentivizes abortions in the state of Texas.

**Tea Party Patriots of Eastland County**

Tea Party Patriots of Eastland County has held since their inception in 2009 that life, including the unborn, is precious. They believe that every individual from conception is unique and endowed by their Creator with rights to life, liberty, and the pursuit of happiness. They also support the enforcement of the State's abortion

laws, including the state-law prohibition on "furnishing the means for procuring an abortion knowing the purpose intended," which has never been repealed and continues to exist as the law of Texas.

**Southern Baptists of Texas Convention**

The Southern Baptists of Texas Convention is a statewide fellowship of 2,682 churches committed to reaching Texas with the good news of Jesus Christ. The SBTC has confessionally affirmed that all human life, born and unborn, is precious and holy.

**Christ Fellowship Church of Big Spring, Texas**

At Christ Fellowship Church of Big Spring, Texas, we believe that all human life, from conception to natural death, bears the image of God and, therefore, ought to be protected. We believe that the intentional taking of innocent human life is murder, that it is condemned by God and ought to be outlawed. We support meaningful efforts to abolish the modern-day holocaust of abortion.

**Assembly of Yahweh (7th Day) of Cisco, Texas**

The Assembly of Yahweh holds as a point of doctrine that life begins at conception, and that taking innocent life, certainly including preborn babies, violates Yahweh's moral code. They believe abortion injures individuals, families, the congregation, and the community. They are aware that the laws of Texas continue to define abortion as a criminal offense, even though, due to the Court's interpretation in *Roe v. Wade*, those laws are not currently enforced. They believe

the same is true for conduct that aids and abets an abortion, and find conduct by the City of Austin in funding ancillary support to abortive women to be not only reprehensible but also illegal.

**Mountain Top Church of Cisco, Texas**

Mountain Top Church is all about helping un-churched people become a unified community of growing, multiplying Christ followers. They've seen the pain inflicted by abortion and seek to bring healing, but believe the better course is recognizing that life begins at conception, a unique, special gift from a perfect and loving God. Members strive to protect and value that gift of life, and thus they support Texas statutes—still a valid part of our legal code—against aiding and abetting abortion, which snatches away the promise of that young life.

**Mark Lee Dickson**

Mark Lee Dickson is a Director with Right To Life of East Texas, the founder of the Sanctuary Cities for the Unborn Initiative, and a pastor with SovereignLOVE Church. Mr. Dickson is currently being sued by three "abortion funds" in the State of Texas—the Lilith Fund, the Texas Equal Access Fund, and The Afiya Center—over statements that he has made pointing out that the law of Texas still defines abortion as a criminal offense and that abortion funds are therefore complicit in criminal activity. Mr. Dickson also believes that no government entity should be

involved in any partnerships with any organization that commits abortions in the State of Texas.

**Dr. Karysse Trandem**

Dr. Karysse Trandem is founder and chief executive officer of Canopy Global Foundation, an organization that treats women seeking abortion and survivors of abortion cross-culturally and internationally in community, clinic, and hospital settings. Canopy Global Foundation strongly supports the right to life and opposes the city of Austin's efforts to promote abortion with taxpayer money.

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|---|---|---|---|---|
| Yvonne Simental | | [redacted] | 8/5/2021 1:46:10 PM | SENT |
| Robert Henneke | | | 8/5/2021 1:46:10 PM | SENT |
| Munera Al-Fuhaid | | | 8/5/2021 1:46:10 PM | SENT |

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|---|---|---|---|---|
| Carol Smith | | [redacted] | 8/5/2021 1:46:10 PM | SENT |
| Ruth Blackwelder | | | 8/5/2021 1:46:10 PM | SENT |
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| Charles W.Fillmore | | | 8/5/2021 1:46:10 PM | SENT |
| H. Dustin Fillmore | | | 8/5/2021 1:46:10 PM | SENT |
| Tomas Brejcha | | | 8/5/2021 1:46:10 PM | SENT |

Associated Case Party: Texas Right to Life

| Name | BarNumber | Email | TimestampSubmitted | Status |
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| LaDawn HNandrasy | | [redacted] | 8/5/2021 1:46:10 PM | SENT |
| Emily Cook | | | 8/5/2021 1:46:10 PM | SENT |