

No. 21-1039

IN THE
SUPREME COURT OF TEXAS

MARK LEE DICKSON AND RIGHT TO LIFE EAST TEXAS,
Petitioners,

v.

THE AFIYA CENTER AND TEXAS EQUAL ACCESS FUND,
Respondents.

On Petition for Review from the
Fifth Court of Appeals at Dallas, Texas
No. 05-20-00988-CV

BRIEF OF AMICI CURIAE
**TEXAS RIGHT TO LIFE; REPUBLICAN PARTY OF TEXAS;
GRASSROOTS AMERICA – WE THE PEOPLE; TRUE TEXAS PROJECT; TEXAS
EAGLE FORUM; THE TEXAS YOUNG REPUBLICAN FEDERATION; HOUSTON
YOUNG REPUBLICANS; TEXAS PASTOR COUNCIL; THE SOUTHERN BAPTISTS OF
TEXAS CONVENTION; HUMAN COALITION ACTION; STUDENTS FOR LIFE OF
AMERICA; TEXAS HOME SCHOOL COALITION; CONCERNED WOMEN FOR
AMERICA; TEXAS VALUES**
IN SUPPORT OF PETITION FOR REVIEW

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INTEREST OF AMICI CURIAE¹

Texas Right to Life is a nonprofit organization devoted to stopping attacks on innocent human life including elective abortion in Texas. Texas Right to Life utilizes three related entities—a 501(c)(3) organization, a 501(c)(4) organization, and political action committee—all of which engage in educating citizens that each abortion murders a human being. Texas Right to Life’s 501(c)(4) organization routinely advocates for passage of laws that protect preborn children, and Texas Right to Life’s political action committee oppose candidates for elective office who do not share their view of stopping abortion. Just like Mr. Dickson, Texas Right to Life has recently been sued numerous times in state court—including by The Afiya Center, the Texas Equal Access Fund, and the Lilith Fund for Reproductive Equity—for expressing their constitutionally protected speech that certain abortions in Texas are unlawful after enactment of the Texas Heartbeat Act.

Texas Right to Life has been joined in this brief by other organizations who are also concerned about their First Amendment speech in furtherance of their unique missions being chilled.

The Republican Party of Texas (“RPT”) is the state political organization of the Republican Party in the State of Texas. The RPT represents the interests of

¹ No person or entity other than Amici, its members, or counsel have authored or paid in whole or in part for the preparation of this brief.

Republican citizens in the state of Texas, including those of the unborn, and supports the God-given freedom of those citizens to engage in public discourse and debate, especially in the protection of unborn children.

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

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

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

Houston Young Republicans is an organization for 18-40 year old liberty minded conservative Republicans. They stand on the scientific foundation that a new life begins at fertilization and therefore abortion is murder and ending a human life.

Beyond that, Houston Young Republicans has a strong belief in the classical liberal ideal of freedom of speech for all people.

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

The Southern Baptists of Texas Convention (“SBTC”) 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.

Human Coalition Action, a Texas 501(c)(4) corporation, is a public policy advocacy organization advocating for preborn children and their pregnant mothers by advancing pro-life policies, informing voters about pro-life candidates and supporting pro-life legal arguments in the courts. Human Coalition Action advocates for rescuing children, serving families, and ending abortion by reaching abortion-determined women with life-affirming messages and tangible, individualized services. Human Coalition Action aims to create a culture of collaboration; provide policy expertise; and generate momentum from the grassroots to the government to solidify victory over abortion.

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. SFLA relies on its First Amendment freedoms to effectively pursue these goals. 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.

Texas Home School Coalition (“THSC”), is a nonprofit organization committed to preserving the fundamental rights of parents to raise their children without unwarranted and unnecessary government interference. Recognizing the attendant and equally important right and interest of children in maintaining relationships with their natural parents, THSC provides to its members, in addition to educational opportunities and resources, legislative advocacy and legal support. THSC was instrumental in affirming the rights of parents to homeschool in Texas *Educ. Agency v. Leeper*, 893 S.W.2d 432 (Tex. 1994). Since that time, THSC has become increasingly involved in the defense of these precious fundamental rights. As a part of that goal, THSC assists families in obtaining legal representation in

cases threatening their fundamental liberty interests. THSC further pursues this mission by providing legislative education, insight, and advocacy regarding the preservation of family integrity.

Concerned Women for America is the largest public policy organization for women in the Nation. For the last 43 years we have supported the fundamental rights of the unborn for life and care and members have spoken in multiple venues to influence public policy makers as they implement our laws. We stand in support of the First Amendment rights of pro-life advocates at every level of policy engagement.

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

SUMMARY OF ARGUMENT

TO THE HONORABLE SUPREME COURT OF TEXAS:

Amici Curiae submit this brief in support of the petition for review filed by Mark Lee Dickson and Right to Life East Texas. The Court should grant the petition for three simple reasons: 1) Given the current context of abortion law in Texas, a split in this state's courts of appeals on an issue as fundamental as First Amendment rights must be immediately resolved; 2) The Texas Citizens Participation Act is the only tool available to protect in practice the exercise of First Amendment rights by non-governmental actors; and 3) The Fifth Court of Appeals' opinion will lead to damaging results shutting down public-policy debate.

ARGUMENT

The freedom to encourage policy change and express one's viewpoint under the protection of the First Amendment cannot be dependent upon which area of the state a Texas citizen resides. Here, various abortion advocates sued Petitioners in two different counties with allegations stemming from Petitioner's exact same statements. However, the respective courts resulted in vastly different outcomes; the Seventh Court of Appeals dismissed the defamation and conspiracy claims while the Fifth Court of Appeals will allow the lawsuits to proceed. Amici urge this Court to resolve this split. Further, Amici respectfully urge that the Fifth Court of Appeals' position leads to absurd results chilling both speech and participation in public policy, in violation of the Texas and United States Constitutions.

I. A split in the court of appeals on an issue as fundamental as First Amendment rights in the abortion context is sure to wreak havoc, stifle speech, and inundate the courts

With the enactment of the Texas Heartbeat Act,² the impending decision of the United States Supreme Court in *Dobbs v. Jackson Women's Health Organization*,³ and the pro-life movement's success in local communities passing Sanctuary City for the Unborn ordinances, Texas is currently a hot spot for abortion politics. As a result, national mainstream news and abortion-funding organizations

² Tex. Health & Safety Code §§ 171.201 – 171.212.

³ *Dobbs v. Jackson Women's Health Org.*, 141 S. Ct. 2619 (2021).

have a renewed zest for attempting to ensure Texas babies are killed through unopposed abortion.

The pro-life side is winning and therefore drawing the full ire of the abortion industry. The abortion industry failed to prevent the Texas Legislature and 38 Texas cities⁴ from protecting the unborn. And they continue to fail at blocking these life-saving measures in the courts. As a result, the abortion industry is instead turning their attention to silencing private individuals and advocacy organizations, resulting in a series of private “heckler’s lawsuits.” Texas Right to Life is no stranger to these lawsuits, having been sued 14 times on similar facts.⁵

The Petitioners here have litigated these claims in two different jurisdictions—the Seventh and Fifth Courts of Appeals.⁶ Each of these instances is predicated on informing the public about abortion law in Texas or what the law *should* be. In fact, Respondents threatened Texas Right to Life in their original petition simply because of the organization’s past association and professional collaboration with Mr. Dickson. This insinuation that Texas Right to Life “coordinated” with allegedly defamatory behavior is further evidence of Respondents’ failure to recognize public-policy discourse protected by the First

⁴ *Sanctuary Cities for the Unborn*, Texas Right to Life, <https://texasrighttolife.com/sanctuary-cities-for-the-unborn> (last visited Jan. 18, 2022).

⁵ *Van Stean v. Texas Right to Life*, No. 03-21-00650-CV (Tex. App.—Austin 2021).

⁶ *Dickson v. Lilith Fund for Reproductive Equity*, 2021 WL 3930728 (Tex. App.—Amarillo 2021); *Dickson v. The Afya Center*, --- S.W.3d ----, 2021 WL 4771538 (Tex. App.—Dallas 2021).

Amendment.⁷ These lawsuits confuse the public on the legality of abortions within the State of Texas and deter individuals and organizations from free expression and political advocacy. The choice for pro-lifers is to be quiet or risk exposure to hundreds of thousands of dollars in expensive lawsuits.

Thirty-eight Texas cities have enacted a Sanctuary City for the Unborn ordinance. These cities fall within the jurisdiction of six different courts of appeals. Each of these cities includes advocates who support the measures and have spoken publicly in their support. With a split of authority already, it is reasonable to see the writing on the wall: more lawsuits and more splits within the courts of appeal are forthcoming. This Court should act now to resolve this conflict and prevent more disjunctive judicial opinions.

II. The Texas Citizens Participation Act is the only tool for non-governmental defendants

Government officials—including legislators—enjoy immunity and thus, early dismissal from abusive lawsuits aimed at their engagement in public discourse. For others, however, the Texas Citizens Participation Act⁸ (“TCPA”) is the only tool available for private defendants to financially curb abuse of the threat and onslaught of litigation. The TCPA provides, “If a legal action is based on or is in response to a

⁷ Plaintiff’s Original Petition at 6, *Texas Equal Access Fund v. Dickson*, No. DC-20-08113 (filed June 11, 2020) (claiming that one of Texas Right to Life’s employees testifying in favor of Mr. Dickson’s ordinance “further show[ed] the coordination between Dickson and Texas Right to Life”).

⁸ Tex. Civ. Prac. & Rem. Code §§ 27.001 – 27.011.

party's exercise of the right of free speech, right to petition, or right of association or arises from any act of that party in furtherance of the party's communication or conduct described by Section 27.010(b), that party may file a motion to dismiss the legal action."⁹ In the landmark decision of *New York Times v. Sullivan*, the United States Supreme Court noted the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open."¹⁰ The TCPA is the tool by which individuals, such as Mr. Dickson, can exercise their First Amendment rights free from legal duress.

Abortion is quite possibly the most hotly contested public issue since its legalization in 1973. Litigation between pro-life and abortion advocates has established clear lines for protected First Amendment speech, and other states have previously grappled with similar lawsuits. In *Horsley v. Rivera*,¹¹ an abortion doctor was murdered. Because the plaintiff, a pro-life advocate, had listed the murdered doctor's name on a website listing abortionists, the television personality Geraldo Rivera accused the pro-life advocate of being "an accomplice to murder" during an interview. The pro-life advocate then filed a defamation action against Rivera, but the Eleventh Circuit found that Rivera's statement was a protected expression of opinion and that "it is clear...that the [parties] were engaged in an emotional debate

⁹ Tex. Civ. Prac. & Rem. Code § 27.003.

¹⁰ *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

¹¹ *Horsley v. Rivera*, 292 F.3d 695, 697 (11th Cir. 2002).

concerning emotionally charged issues of significant public concern.” *Horsley v. Rivera*, 292 F.3d 695, 702 (11th Cir. 2002). Had *Horsley* been litigated in Texas state court, the TCPA would have been an appropriate vehicle for the defendant.

In Illinois, we note two cases involving pro-life organizations that characterized abortion as murder or the killing of children in their advocacy efforts. In *Stericycle*,¹² a pro-life group alleged that Stericycle, a biowaste business, helped to kill children by disposing of aborted babies in area abortion clinics. In *Van Duyn*, the executive director of an abortion clinic that offered first trimester abortions sued a pro-life advocate for defamation for publishing communications describing the executive director’s work as “killing children,” and the executive director as a “killer.”¹³ Both of these cases resulted in court opinions that describe such expressions within the abortion debate as being constitutionally protected speech.

As Texas is steadily making its way to becoming a safe haven for unborn babies, private lawsuits under unconstitutional theories are increasingly becoming the tactic of preference for those on the losing side of the abortion debate. After all, such lawsuits are an effective way to silence their adversaries. For example, without making them a prime target for Respondents by naming them here, pro-life activists, organizations and pastors in major metropolitan areas such as Dallas County believe

¹² *Stericycle, Inc. et al. v. Created Equal PAC, et al.*, No. 16-CH-522 (Ill.—D. Lake County, Sep. 29, 2016).

¹³ *Van Duyn v. Smith*, 173 Ill. App. 3d 523 (3rd Dist. 1988).

no differently about the reality of abortion and the proper policy response than those activists, organizations, and pastors in rural East Texas. Whether these pro-life advocates can exercise their rights to assemble, to petition their government and to speak on matters of public policy, without the threat of being judicially “canceled” should not rely on their geographic area. The TPCA is the only shield these defendants have. The Texas Supreme Court must weigh in immediately to prevent further chilling of First Amendment rights of citizens across the state.

III. The Fifth Court of Appeals’ opinion leads to absurd results in all areas of public policy debate

Upholding the Fifth Court of Appeals’ decision would have drastic and long-lasting repercussions in the Texas court system, as it would open the door to litigation based solely on the protected expression of public policy opinions. If Respondents can hold Mr. Dickson liable for defamation because he opines on Facebook that intentionally stopping a preborn child’s heartbeat is murder, then the reverse can also be true: pro-abortion advocates can be held liable for their opinions.¹⁴ Under Respondents’ arguments and reasoning, pro-life activists could equally hold Respondents liable for defamation. Such a case would be equally as damaging to First Amendment rights as the instant case.

¹⁴ *Lilith Fund*, Twitter, <https://twitter.com/lilithfund/status/1346961550834221057> (last visited Feb 1, 2022); *NARAL*, Twitter, <https://twitter.com/naral/status/1348630761881165826> (last visited Feb 1, 2022).

Mr. Dickson may encourage the pro-life community to fight the “crime” of abortion, just as Respondents may encourage abortionists to promote the “right” to abort unborn children. Advocating for killing innocent human beings in their mothers’ wombs is deeply offensive to Amici. However, the ability to advocate for and promote policy change is constitutionally protected activity.¹⁵ It is the very nature of free speech and public policy in the United States. The winner of the abortion debate is to be decided by the public at large through petition, through legislation, and through judicial review of such policies. The debate should not be silenced through chilling defamation lawsuits.

The reasoning adopted by Respondents is a slippery slope that could be applied to any current issue. In 2020, pastors across the nation decried the lockdown of churches at the onset of the COVID-19 pandemic. Would Texas pastors be haled into court for expressing their rights to freely assemble and worship under the First Amendment, or for criticizing those government officials who instituted such lockdown policies? In Dallas, where some of the state’s most vocal Christian,

¹⁵ Equating abortion to murder is certainly not a new claim nor a claim exclusively attributable to Mr. Dickson. For example, Justice Scalia, in his notable dissent in *Madsen v. Women’s Health Center Inc.*, 512 U.S. 753 (1994), describes a videotape of a protest in front of an abortion clinic in 1993 that includes a myriad of signs and speech, both for and against abortion, including signs and shouts such as “Abortion: God Calls it Murder,” “Choose Life,” and even “You are responsible for the deaths of children... You are a murderer. Shame on You.” *Id.* at 784-789. Following this description of the protest, Justice Scalia then proceeds to describe these activities as “a great many forms of expression...includ[ing]...speeches, communication of familiar political messages, handbilling, persuasive speech directed at opposing groups on the issue of abortion, efforts to persuade individuals not to have abortions...” *Id.* at 790. As illustrated in the case at hand, similar messaging persists almost thirty years later.

conservative pastors serve, they would. In Amarillo, they likely would not. As a pastor himself, Mr. Dickson's ability to advocate against abortion based on his sincerely held religious belief that abortion takes an innocent life is taken away by the Fifth Court of Appeals' ruling. This Court has an obligation to fully protect the rights granted to Texas citizens and undo the chaos the Fifth Court of Appeals has initiated.

The ability to engage in a public policy debate and take sides on any issue cannot hinge on which court of appeals a citizen's residency falls under. If taken to the Fifth Court of Appeals' conclusion, public debate will be silenced by a race to the courthouse and deep pockets. Texas citizens like Mr. Dickson will be unable to express their personal beliefs on public policy issues unless they are in a "safe space" that shares the same views. Citizens who care deeply about Second Amendment rights, police reform, COVID-19 policies, social justice, climate change, or traditional marriage must think twice about telling others what they believe, and they certainly must carefully consider the repercussions of petitioning their elected officials to enact policy measures. In a culture where citizens are increasingly being "canceled" in mainstream America, the Fifth Court of Appeals has created an avenue for citizens to be judicially silenced as well. This Court must weigh in.

CONCLUSION AND PRAYER

Amici urge this Court to grant review and hold that the Fifth Court of Appeals erred in affirming the 116th Judicial District Court's denial of Mr. Dickson and Right to Life East Texas's motion to dismiss under the Texas Citizens Participation Act.

Respectfully Submitted,

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I hereby certify that on February 7, 2022, 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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CERTIFICATE OF COMPLIANCE

Microsoft Word 2016 reports that this brief contains 3186 words, excluding the portions described in Texas Rule of Appellate Procedure 9.4(i)(1).

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Dated: February 7, 2022

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