No. _____

In the Court of Appeals for the First Judicial District Houston, Texas

In re Ken Paxton; Texas Medical Board; Stephen Brint Carlton; Texas Board of Nursing; Katherine A. Thomas; Texas Health and Human Services Commission; Cecile Erwin Young; Texas Board of Pharmacy; Tim Tucker,

Relators.

On Petition for Writ of Mandamus
to the 269th Judicial District Court, Harris County

PETITION FOR WRIT OF MANDAMUS

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Texas Board of Pharmacy
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The Honorable Christine Weems, 269th Judicial District Court, Harris County

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Alamo City Surgery Center PLLC d/b/a Alamo Women's Reproductive Services, on behalf of itself, its staff, physicians, nurses, pharmacists, and patients

Brookside Women's Medical Center PA d/b/a Brookside Women's Health Center and Austin Women's Health Center, on behalf of itself, its staff, physicians, nurses, pharmacists, and patients

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Record References

"App." refers to the appendix to this petition. "MR." refers to the mandamus record.

Statement of the Case

Nature of the underlying proceeding:	Plaintiffs filed suit seeking declaratory and injunctive relief that criminal abortion statutes that were the subject of *Roe v. Wade*, 410 U.S. 113 (1973), Tex. Civ. Stat. art. 4512.1 *et seq.*, are no longer part of the law of Texas and cannot be used to prosecute performing unlawful abortions. MR.25-29.
Respondent:	The Honorable Christine Weems 269th District Court, Harris County
Respondent's challenged actions:	Respondent issued a temporary restraining order enjoining Relators and the other defendants from enforcing Texas's preexisting criminal prohibitions on abortion, Tex. Civ. Stat. art. 4512.1 *et seq.*, "against Plaintiffs or their physicians, nurses, pharmacists, or other staff." MR.81.

Statement of Jurisdiction

The Court has jurisdiction under Texas Government Code section 22.221(b)(1).

Issues Presented

Texas Revised Civil Statutes articles 4512.1-4 and 4512.6, which were recodified in 1974, provide that it is a criminal offense to gives a pregnant woman any substance or commits any act to cause an abortion, art. 4512.1, knowingly "furnish[] the means for procuring an abortion," art. 4512.2, or "attempt to produce abortion," art. 4512.3, unless it is done "by medical advice for the purpose of saving the life of the

mother," art. 4512.6. The United States Supreme Court declared these criminal prohibitions unconstitutional in *Roe v. Wade*, which erroneously concluded that the Fourteenth Amendment's due process clause—or some other combination of constitutional provisions—creates a right to abortion. For 49 years, Texas could not enforce its criminal prohibitions on abortion, but no legislative enactment ever repealed these provisions. And after a federal court guessed that the provisions were no longer in force, the Legislature twice enacted laws finding that not to be so. The first issue presented is:

1. Whether Texas's criminal prohibitions on abortion have been repealed, expressly or impliedly, by being moved from the Penal Code to the Civil Statutes, treated as unenforceable under *Roe v. Wade* and its progeny, or in any other way.

The Due Process Clause of the United States Constitution prohibits deprivations of liberty without fair notice of the conduct that is punishable. Plaintiffs (or their staff) have not been criminally prosecuted, and they know that the Attorney General considers the State's preexisting criminal prohibitions on abortion to remain in force. The second issue presented is:

2. Whether the Due Process Clause prevents Texas from enforcing its criminal prohibitions on abortion after informing Plaintiffs that those prohibitions are still the law and will be enforced against those who violate them after June 24, 2022.

The other issues presented are:

3. Whether Plaintiffs have standing to challenge criminal or civil enforcement against their employees.
4. Whether the UDJA waives sovereign immunity.
5. Whether Plaintiffs have alleged viable *ultra vires* claims against the individual Relators.
6. Whether the federal court's judgment in *Roe v. Wade* is binding on Relators, who were not parties to that case.

Introduction

The trial court entered a temporary restraining order preventing Relators from enforcing Texas's criminal prohibitions on abortion, which apply to any abortion unless it is necessary to save the life of the mother. Plaintiffs are abortion clinics who wish to immediately violate these criminal prohibitions by performing elective abortions in the coming days and weeks. They argue that Texas's preexisting criminal provisions were impliedly repealed sometime between 1973 and today and that enforcement of those provisions would deprive them of fair notice (and thus due process). Both of those theories are untenable. Statutes are not repealed by non-use, and Plaintiffs cannot overcome the strong presumption against implied repeal by pointing to non-substantive recodifications, a nonbinding 1974 opinion letter from the attorney general, or a federal court's incorrect *Erie* guess.

As to due process, Plaintiffs are now well aware that their actions will be treated as criminal. They cannot claim a lack of fair notice if their employees proceed to criminally perform abortions, even under cover of a temporary restraining order.

This Court should issue an emergency stay and mandamus relief. Should Plaintiffs' employees commit abortions while the TRO is in place, nothing will prevent them being prosecuted for those crimes once the TRO erroneously prohibiting enforcement is vacated—and it will be. But criminal prosecution will not restore the lives of unborn children lost in the interim. That irreparable loss necessitates this Court's immediate action. Relators therefore respectfully request that this Court issue mandamus relief by Tuesday, July 5, 2022—seven days from this filing—and issue a temporary stay of the TRO in the meantime.

Statement of Facts

I. Texas Abortion Laws

A. In 1970, Jane Roe and others filed a constitutional challenge to Texas's laws that criminalized the performance of most abortions. *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970) (challenging Texas Penal Code articles 1191, 1192, 1193, 1194, & 1196). Those laws set the punishment for that crime at 2-5 years and also made anyone who furnished the means of the abortion guilty as an accomplice. *Id.* at 1219 n.2. There was an exception, however, for abortions to save the mother's life. *Id.* The only defendant in the suit was the Dallas District Attorney. *Id.* at 1219.

A three-judge panel declared the laws unconstitutional but did not enter injunctive relief. *Id.* at 1224. That decision was affirmed by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973), which recognized a right to abortion in the United States Constitution, *id.* at 164.

B. Also in 1973, the Texas Legislature enacted a new penal code. Act of May 24, 1973, 63d Leg., R.S., ch. 399, 1973 Tex. Gen. Laws 883. As discussed in more detail herein, *see infra* 14-15, section 5 of the Act specifically provided for the transfer of articles of the former penal code that were "not repealed" into the Texas civil statutes. The table showing the "Disposition of Unrepealed Articles" accompanying the Act shows that the abortion laws at issue in *Roe* were transferred to articles 4512.1-.6 of the Texas Civil Statutes. 1973 Tex. Gen. Laws at 996e.

In the light of *Roe*'s mandate that States permit elective abortion, Texas also enacted numerous laws to regulate the performance of those abortions, including informed-consent statutes, health-and-safety regulations, parental-notice provisions,

and more. *See* Tex. Fam. Code ch. 33; Tex. Health & Safety Code chs. 171, 245. At no point, however, did Texas explicitly repeal the laws that were at issue in *Roe*. Just last year, the Texas Legislature twice confirmed that the statutes that prohibited abortion prior to *Roe* had never been repealed, either expressly or by implication. Act of May 25, 2021, 87th Leg., R.S., ch. 800, § 4, 2021 Tex. Sess. Law Serv. 1887 ("HB 1280"); Act of May 13, 2021, 87th Leg., R.S., ch. 62, § 2, 2021 Tex. Sess. Law Serv. 125 ("SB 8"). The Legislature also added to the Code Construction Act a statute providing that the enactment of a statute regulating or prohibiting abortion may not be construed to repeal any other statute regulating or prohibiting abortion, absent an explicit statement to do so. Tex. Gov't Code § 311.036(a).

C. In 2021, the Texas Legislature passed the Human Life Protection Act of 2021, (which Plaintiffs refer to as the Trigger Ban), that makes it a criminal and civil violation to perform most abortions. HB 1280, § 2 (enacting Tex. Health & Safety Code ch. 170A). But the provisions of the Act do not take effect until 30 days after a Supreme Court judgment overruling *Roe*, as modified by *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). HB 1280, § 3.

On June 24, 2022, the Supreme Court overturned its decision in *Roe*. *See Dobbs v. Jackson Women's Health Org.*, No. 19-1392, 2022 WL 2276808 (June 24, 2022). The Texas Attorney General issued an advisory that Texas's Human Life Protection Act would take effect 30 days after the Supreme Court's judgment, but that the laws at issue in *Roe* (Tex. Civ. Stat. arts. 4512.1-.4, 4512.6) were immediately enforceable. MR.35.

II. Procedural History

Plaintiffs are a group of abortion clinics. MR.7-8. They filed suit purportedly on behalf of themselves, their staff, physicians, nurses, pharmacists, and patients. MR.7-8. They asserted that the pre-*Roe* laws had been impliedly repealed and that enforcing them would violate due process. MR.25-29. Consequently, they sought declaratory and injunctive relief. MR.25-29. They sued several district attorneys with the authority to prosecute, the Attorney General (who can assist in prosecution), and several state agencies and their heads who can impose administrative penalties if the regulated person or entity commits certain infractions. MR.8-11.

The district court granted a temporary restraining order. MR.79-81.

Summary of the Argument

Mandamus relief is appropriate because Plaintiffs' lawsuit suffers from multiple jurisdiction defects and their claims are untenable on the merits. Plaintiffs are abortion clinics; they lack standing to obtain an injunction prohibiting criminal enforcement or other disciplinary measures against their employees. Texas law does not provide them with third-party standing to sue on behalf of employee doctors, nurses, pharmacists, or other staff. Sovereign immunity also bars their claims against the State agencies because the UDJA's limited waiver of sovereign immunity does not extend to disputes about statutory construction.

And Plaintiffs' claims fail on the merits. Texas's preexisting criminal prohibitions on abortion remain in force—a federal court declaratory judgment like *Roe v. Wade* cannot erase a duly enacted statute from Texas law. And Plaintiffs have not identified any legislative enactment expressly repealing these criminal prohibitions.

So Plaintiffs rely primarily on a theory of implied repeal. But that theory cannot surmount the strong presumption against implied repeal. Plaintiffs' argument appears to based on (1) decisions by a publisher, (2) an *Erie* guess by the Fifth Circuit, and (3) the existence of more than one law criminalizing abortion.

Relators—and the people of Texas, who they represent—will be irreparably harmed by the trial court's TRO. Although Plaintiffs and their employees can still be prosecuted for crimes commit under cover of a temporary restraining order, such prosecutions will do nothing to restore the lives of unborn children lost in the interim. The Court should immediately stay and temporary restraining order and ultimately grant the petition for mandamus.

Standard of Review

Mandamus relief is available where the lower court's error "constitute[s] a clear abuse of discretion" and the relator lacks "an adequate remedy by appeal." *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding); *see also In re Turner*, 591 S.W.3d 121, 124 (Tex. 2019) (orig. proceeding). A court abuses its discretion if it misinterprets or misapplies the law. *See In re Dawson*, 550 S.W.3d 625, 628 (Tex. 2018) (orig. proceeding) (per curiam). There is no remedy on appeal from a temporary restraining order because such orders are not appealable. *See In re Office of Attorney Gen.*, 257 S.W.3d 695, 698 (Tex. 2008) (per curiam).

ARGUMENT

I. The Court of Appeals Abused Its Discretion by Granting a Temporary Restraining Order Without Jurisdiction.

A court that lacks subject-matter jurisdiction cannot enter injunctive relief "even temporarily." *In re Abbott*, 601 S.W.3d 802, 805 (Tex. 2020) (orig. proceeding) (per curiam). The trial court erred in entering a temporary restraining order—a form of temporary injunctive relief—in a case where plaintiffs lack standing and on claims barred by sovereign immunity.

A. Plaintiffs lack standing.

1. Standing is a "constitutional prerequisite to suit," *Heckman v. Williamson County*, 369 S.W.3d 137, 150 (Tex. 2012), and the burden is on the plaintiff to "demonstrate standing for each claim he seeks to press and for each form of relief that is sought," *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 14 (Tex. 2011) (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008)). The standing requirement in Texas "derives from the Texas Constitution's separation of powers among the departments of government, which denies the judiciary authority to decide issues in the abstract, and from the Open Courts provision, which provides court access only to a 'person for an injury done him.'" *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304 (Tex. 2008) (quoting Tex. Const. art. I, § 13). Thus, to demonstrate standing under Texas law, a plaintiff must be *personally* aggrieved, and his alleged injury must be concrete and particularized, actual or imminent, not hypothetical. *Id.* at 304-05. If a plaintiff lacks an actual or threatened injury, he is not "personally aggrieved,"

has no personal stake in the litigation, and lacks standing. *M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 707-08 (Tex. 2001).

Under this standard, Plaintiffs (all of which are abortion clinics) lack standing because they lack a threatened injury. The pre-*Roe* laws state that "person[s]" who administer medicine or use "violence" to procure an abortion are to be confined in a penitentiary. Tex. Civ. Stat. art. 4512.1. Abortion clinics cannot be imprisoned, and Plaintiffs offer no explanation why they, as abortion clinics, fear criminal prosecution. At most, Plaintiffs point to a regulatory requirement that they must ensure their doctors comply with the Medical Practice Act. 25 Tex. Admin. Code § 139.60(c). But Plaintiffs point to no evidence that their doctors intend to violate the Medical Practice Act, so any injury to the Plaintiff clinics is not certainly impending. *See In re Abbott*, 601 S.W.3d 802, 812 (Tex. 2020) (orig. proceeding) (holding a "threatened injury must be certainly impending to constitute an injury in fact").

2. It is perhaps for this reason that Plaintiffs have purported to bring suit on behalf of a variety of other people. MR.7-8. But under Texas law, injuries to others—who are not plaintiffs—typically do not suffice to create standing. As the Supreme Court has stated, "the standing inquiry begins with determining whether the plaintiff has personally been injured, that is, 'he must plead facts demonstrating that he, himself (rather than a third party or the public at large), suffered the injury.'" *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 485 (Tex. 2018) (quoting *Heckman*, 369 S.W.3d at 155); *accord Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (noting that to have standing in a typical lawsuit, a litigant must assert his own rights, not those of a third party). When challenging the constitutionality of a statute a plaintiff must (1)

"suffer some actual or threatened restriction under that statute," and (2) "contend that the statute unconstitutionally restricts the plaintiff's rights, not somebody else's." *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 518 (Tex. 1995); *see also Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 626 (Tex. 1996) (stating "the plaintiff must contend that the statute unconstitutionally restricts the plaintiff's own rights"). The few instances in Texas law in which someone is permitted to sue for another's injuries are supported by statute or rule. *E.g.*, Tex. Fam. Code § 151.001(a)(7) (parents); Tex. Civ. Prac. & Rem. Code § 71.021(b) (estates); Tex. Bus. Org. Code § 20.002(c)(1) (shareholders); Tex. R. Civ. P. 42 (class actions).

As a result, Plaintiffs cannot base their standing on potential injuries to their staff, physicians, nurses, or pharmacists. The potential injuries identified in the petition belong to those individuals—not to the Plaintiff clinics. Consequently, Plaintiffs lack standing to bring those claims. *See Garcia*, 893 S.W.2d at 518.

Plaintiffs' attempt to represent their patients' interests is twice flawed. First, neither the pre-*Roe* statutes nor the regulatory laws cited by Plaintiffs purport to impose any criminal, civil, or administrative penalty on the woman receiving an abortion. Thus, Plaintiffs' patients face no injury related to the claims Plaintiffs have brought.[1] Second, even if Plaintiffs' patients might suffer some injury by the enforcement of the pre-*Roe* statutes, Plaintiffs cannot bring suit on their behalf for the reasons stated above—it is not Plaintiffs' injury.

[1] Plaintiffs have not asserted any right to abortion on behalf of their patients.

3. The United States Supreme Court has created an exception to the general article III requirement that a litigant must assert his own injury: litigants may assert the rights of third parties when (1) the litigant has "a close relationship" with the third party; and (2) some "hindrance" affects the third party's ability to protect her own interests. *Kowalski*, 543 U.S. at 130 (citations omitted). But unlike its federal counterpart, the Texas Supreme Court has never recognized a general third-party standing doctrine that parties may (attempt to) apply to any given situation. And doing so here would be contrary to the Texas Supreme Court's repeated statements that standing requires an injury to the plaintiff—not to someone else. *See supra* 6-7.

Regardless, even if the Court were to apply the federal third-party standing doctrine here, Plaintiffs would still lack standing. They do not have a close relationship with their staff, physicians, nurses, and pharmacists that would suffice to establish standing. Holding otherwise would open up third-party standing far beyond anything the Texas Supreme Court has recognized and permit all employers to bring suit on behalf of their employees. Moreover, there is no identified hindrance to Plaintiffs' staff, physicians, nurses, and pharmacists bringing suit on their own behalf. Individuals frequently challenge Texas laws. *E.g.*, *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 74 (Tex. 2015); *Gant v. Abbott*, 574 S.W.3d 625 (Tex. App.—Austin 2019, no pet.). There is no reason to presume they cannot do so here.

The same holds for Plaintiffs' patients (who, again, have no identified injury). Under the Supreme Court's decision in *Kowalski*, a future attorney-client relationship was insufficient to establish the necessary close relationship for third-party standing. 543 U.S. at 131. The same holds true for any future clinic-patient

relationship. *See Doe v. Bolton*, 410 U.S. 179, 189 (1973) (noting that corporations are "another step removed" from patients when it comes to standing). Moreover, women are perfectly capable of bringing their own lawsuit to challenge any abortion regulation. *See, e.g., Leavitt v. Jane L.,* 518 U.S. 137 (1996) (per curiam); *Hodgson v. Minnesota*, 497 U.S. 417 (1990). And the potential mootness of any such claim is not a hindrance under the capable-of-repetition-yet-evading-review doctrine. *Tex. A & M Univ.-Kingsville v. Yarbrough*, 347 S.W.3d 289, 290 (Tex. 2011). Women face no hindrance to bringing their own legal claims, so the federal third-party standing doctrine, even if it were applicable in Texas courts, cannot save Plaintiffs' claims.

B. Sovereign immunity bars Plaintiffs' claims.

"Sovereign immunity implicates a court's subject matter jurisdiction." *EBS Sols., Inc. v. Hegar*, 601 S.W.3d 744, 749 (Tex. 2020). It is Plaintiffs' burden to establish a viable waiver of Defendants' sovereign immunity. *See Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 550 (Tex. 2019). Plaintiffs cannot meet that burden.

1. Plaintiffs contend "this Court has jurisdiction over Plaintiff's request for declaratory and injunctive relief against Defendants sued in their official capacity because the UDJA waives sovereign and governmental immunity for challenges to the validity of statutes." MR.12. That misapprehends Texas law. The UDJA does not enlarge the courts' jurisdiction beyond an implied, limited waiver of immunity for *constitutional* challenges to ordinances or statutes. *Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 621-22 (Tex. 2011); *see* Tex. Civ. Prac. & Rem. Code § 37.006(b). Plaintiffs primarily do not challenge the constitutional validity of Texas's criminal prohibitions on abortion. Instead, they ask the courts to opine on the meaning of those

provisions. The UDJA's limited waiver of sovereign immunity does not extend to a "bare statutory construction claim" like that. *McLane Co., Inc. v. Tex. Alcoholic Beverage Comm'n*, 514 S.W.3d 871, 876 (Tex. App.—Austin 2017, pet. denied); *see Sefzik*, 355 S.W.3d at 622.

"[T]here is no general right to sue a state agency for a declaration of rights." *Tex. Parks & Wildlife Dep't v. Sawyer Tr.*, 354 S.W.3d 384, 388 (Tex. 2011). And the UDJA's limited waiver of sovereign immunity only applies to "the relevant governmental entities," not state officials. *Sefzik*, 355 S.W.3d at 621-22 & n.3; *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994); *Gant v. Abbott*, 574 S.W.3d 625, 633–34 (Tex. App.—Austin 2019, no pet.). The UDJA does not waive sovereign immunity.

2. Plaintiffs' ultra vires claims fare no better. The ultra vires exception applies to claims that a government official acted without lawful authority or failed to perform a purely ministerial act. *Hous. Belt & Terminal Ry. Co. v. City of Hou*ston, 487 S.W.3d 154, 161 (Tex. 2016). But to establish the Court's subject-matter jurisdiction, the plaintiff must do more than invoke the exception. "[M]erely asserting legal conclusions or labeling a defendant's actions as 'ultra vires,' 'illegal,' or 'unconstitutional' does not suffice to plead an ultra vires claim—what matters is whether the facts alleged constitute actions beyond the governmental actor's statutory authority, properly construed." *Texas Dep't of Transp. v. Sunset Transp., Inc.*, 357 S.W.3d 691, 702 (Tex. App.—Austin 2011, no pet.) (emphasis in original); *see also Creedmoor-Maha Water Supply Corp. v. TCEQ*, 307 S.W.3d 505, 515-16 (Tex. App.—Austin 2010, no pet.) (noting that "if the claimant is attempting to restrain a state officer's

conduct on the grounds that it is unconstitutional, it must allege facts that actually constitute a constitutional violation" to fall within the ultra vires exception); *see also Klumb v. Houston Mun. Employees Pension Sys.*, 458 S.W.3d 1, 13 (Tex. 2015).

Plaintiffs' ultra vires claims are based on the theory that Texas's preexisting criminal prohibitions on abortion are no longer part of Texas law and on a purported due process violation. MR.25-28. Plaintiffs are wrong to say that these provisions are no longer the law of Texas, as explained below. *See infra* Part II.A. Nor do Plaintiffs do not allege facts that could constitute a violation of due process. As explained below, Plaintiffs have ample notice that violations of Texas' preexisting law will be considered criminal and enforced accordingly—criminal or civil enforcement based on their actions between June 24 and whenever the TRO is vacated would not violate due process. *See infra* Part II.B. Finally, it is not *ultra vires* for a public official like Relators to disregard a declaratory judgment that does not bind him or her, and the *Roe* judgment does not bind Relators. *See infra* Part II.C.

II. The Abortion Providers Cannot Establish a Probable Right to Relief on the Merits.

The district court further abused its discretion by concluding that Plaintiffs had established a probable right to relief on the merits. They have not. Plaintiffs generally assert that (1) the pre-*Roe* laws have been repealed and cannot be enforced, and (2) enforcement of the pre-*Roe* laws would violate due process. They have proven neither claim. Instead, as found by the Texas Legislature, the pre-*Roe* laws have never been repealed. HB 1280, § 4; SB 8, § 2. And there is no due-process violation in enforcing the pre-*Roe* laws because Plaintiffs have notice of the laws and what they

require. Accordingly, Plaintiffs' request for declaratory relief must be denied. And because they cannot prove that the defendants' actions are "without legal authority," *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009), their ultra vires claim must also fail.

A. *Roe v. Wade* did not erase Texas statutes criminalizing abortion.

1. In *Roe v. Wade*, 410 U.S. 113 (1973), the United States Supreme Court affirmed a federal court's judgment declaring Texas's criminal prohibitions on abortion unconstitutional. That effectively prevented enforcement of those prohibitions for nearly five decades. But the federal courts have no ability to "strike down" or revoke a statute. *See Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021) (per curiam) ("[F]ederal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves."); *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." (citation omitted)). To the contrary, "[n]either the judiciary nor the executive branch has the power to invalidate lawful enactments." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 337 (2012). As the Texas Supreme Court has explained, "[w]hen 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 v. Turner*, 538 S.W.3d 73, 88 n.21 (Tex. 2017).

2. To prevail on their theory that Texas's preexisting criminal prohibitions are no longer the law of Texas, the abortion providers must establish that the Texas Legislature repealed those provisions sometime between 1973 and today. It did not.

Plaintiffs first suggest that the Legislature expressly repealed Texas's criminal abortion statutes. MR.15. That is wrong. There is no statute stating that the preexisting criminal prohibitions are "repealed," "amended," or otherwise removed from Texas law.

Instead, Plaintiffs point to a 1973 recodification project, MR.16, but that recodification made no substantive changes. Rather, it was aimed at making "the statutes more accessible, understandable, and usable." *Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278, 283 (Tex. 1999) (quoting Tex. Gov't Code § 323.007(a)). The Texas Legislative Council, which was tasked with drafting the new code, was not permitted to "alter the sense, meaning, or effect of [any] statute.'" *Id.* (quoting § 323.007(b)). As part of that revision process, the Legislature enacted Senate Bill 34 during the Sixty-Third Legislative Session. *See* Act of May 25, 1973, 63rd Leg., R.S., ch. 399, 1973 Tex. Gen. Laws 883.

Senate Bill 34 expressly lists the provisions of Vernon's Texas Penal Code that *were* repealed. *Id.* at § 3, 1973 Tex. Gen. Laws at 991–995. Noticeably absent from that list are Texas Penal Code articles 1191–1194 or 1196. *Id.* at § 3, 1973 Tex. Gen. Laws 883, 994. Senate Bill 34 also specifically provided for the disposition of *unrepealed* articles. *Id.* § 5, 1973 Tex. Gen. Laws at 995. It "provide[d] for the transfer of articles of the Penal code of Texas, 1925, which are not repealed by this Act to the civil statutes or other appropriate places within the framework of Texas statute law, without reenactment and without altering the meaning or effect of the unrepealed articles." *Id.* § 5(a), 1973 Tex. Gen. Laws at 995. To carry out that purpose, the Legislature instructed the Legislative Council to "prepare and submit . . . an appendix

listing the unrepealed articles of the Penal Code of Texas, 1925, as amended, and prescribing for each unrepealed title, chapter or articles a new official citation." *Id.* § 5(b), 1973 Tex. Gen. Laws at 996. Finally, "[n]othing in [Section 5] or done under its authority alters the meaning or effect of any statute of this state." Pursuant to that authority, a disposition table was compiled cross referencing the former Penal Code article numbers with the new article numbers. *Id.* at 1973 Tex. Gen. Laws at 996a–996g. In that table, articles 1191-96 of the Texas Penal Code were transferred to articles 4512.1-.6 of the Civil Statutes of Texas. Accordingly, the preexisting criminal statutes were transferred to the Civil Statutes of Texas and such transfer did not alter the meaning or effect of those statutes.

Plaintiffs next claim that the Texas Legislature "enacted a new Civil Code that removed the text of Articles 4512.1–4512.4 and 4512.6." MR.16-17. It did not. To be sure, the 1984 edition of Vernon's Texas Civil Statutes Annotated omits the text of Articles 4512.1-.4 and 4512.6 and includes an editorial note:

> The United States Supreme Court in Roe v. Wade (1973) 93 S. Ct. 705, 410 U.S. 113, 35 L. Ed. 147, held that arts. 4512.1 to 4512.4 and 4512.6 violated the due process clause of the Fourteenth Amendment protecting right to privacy against state action.

On its own terms, that does no more than recognize the impact of *Roe v. Wade* on enforcement of Texas law. And in any event, *the Legislature* did not enact this

editorial note into Texas law or repeal the relevant provisions; commentary from the publishers of Vernon's does not change Texas law.[2]

3. Plaintiffs also contend the preexisting criminal prohibitions have been impliedly repealed, but they cannot make such a showing. "Repeals by implication are never favored." *Cole v. State*, 170 S.W. 1036, 1037 (Tex. 1914). To impliedly repeal a preexisting statute, there must be "total repugnance" between the new statute and the old; "the antagonism must be absolute—so pronounced that both [statutes] cannot stand." *Id.*; *see also J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Intern., Inc.*, 534 U.S. 124, 142 (2001) ("The rarity with which [the Court has] discovered implied repeals is due to the relatively stringent standard for such findings, namely, that there be an irreconcilable conflict between the two federal statutes at issue."). That stringent standard is not met here.

"A legislative enactment covering a subject dealt with by an older law, but not repealing that law, should be harmonized whenever possible with its predecessor in such a manner as to give effect to both." *Acker v. Texas Water Comm'n*, 790 S.W.2d 299, 301 (Tex. 1990); *see also Diruzzo v. State*, 581 S.W.3d 788, 799 n. 13 (Tex. Crim. App. 2019) ("Texas does not favor general repealers in the absence of strong repugnance between new and existing statutes. If possible the statutes are construed to give effect to both."). The Legislature codified this rule of statutory construction in the Texas Government Code. Under the Government Code, the Court must

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[2] That these provisions were not repealed is apparent by contrast to other provisions, some appearing on the same page, that are marked as "Repealed by" particular statutory enactments.

determine that the statutes are wholly irreconcilable to support a finding that a new statute impliedly repealed an older statute. *See* Tex. Gov't Code § 311.025 ("[I]f statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in the date of enactment prevails.").

Plaintiffs offer two sources in support of their implied-repeal argument. None overcomes the presumption against it. First, the abortion providers point to an opinion letter issued by the Attorney General in 1974. But "an Attorney General opinion . . . cannot alter" the law. *In re Abbott*, No. 22-0229, 2022 WL 1510326, at *2 (Tex. May 13, 2022). And even as a matter of interpretation, such opinions are "not controlling on the courts." *Holmes v. Morales*, 924 S.W.2d 920, 924 (Tex. 1996). The 1974 opinion letter cannot impliedly repeal Texas's preexisting criminal prohibitions on abortion.

Even on its own terms, the 1974 opinion letter does not help Plaintiffs. The opinion letter addressed a specific question: Which provisions of "the present Penal Code, relating to abortion, are now valid and enforceable" after *Roe v. Wade*? MR.37. It was accurate to describe these provisions as not "enforceable" in 1974, as any criminal conviction would have been vacated as inconsistent with the purported constitutional right to abortion. *Cf. Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) (explaining that when enforcement of a state statute would be inconsistent with the Constitution, "the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding").

Second, Plaintiffs point to *McCorvey v. Hill*, 385 F.3d 846 (5th Cir. 2005), in which the Fifth Circuit offered an *Erie* guess that Texas's preexisting criminal

prohibitions had been repealed. *See id.* at 849. The court noted the existence of "regulatory provisions" governing, for example, "the practices and procedures of abortion clinics," and concluded "[t]hese regulatory provisions cannot be harmonized with provisions that purport to criminalize abortion." *McCorvey*, 385 F.3d at 849. That decision is neither binding nor persuasive as a matter of Texas law.

Federal courts' *Erie* guesses, of course, are not definitive statements of Texas law. *See R.R. Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 499 (1941) (on a question of state law, a federal court's decision "cannot escape being a forecast rather than a determination"). As the Fifth Circuit has explained, "Erie guesses are just that—guesses. Hopefully we get them right, but sometimes we get them wrong." *Priester v. JP Morgan Chase Bank, N.A.*, 927 F.3d 912, 912 (5th Cir. 2019). And this Court cannot now follow *McCorvey*'s *Erie* guess because the Legislature has enacted a provision designed specifically to reject it. *See* Tex. Gov't Code § 311.036(a) (2021) ("A statute that regulates or prohibits abortion may not be construed to repeal any other statute that regulates or prohibits abortion, either wholly or partly, unless the repealing statute explicitly states that it is repealing the other statute."). So even if *McCorvey* had been correct in its prediction of Texas law in 2005—though it was not—today it is contrary to Texas law to treat subsequent abortion regulations as impliedly repealing the preexisting criminal prohibitions.

And *McCorvey*'s *Erie* guess is unpersuasive in any event. The Fifth Circuit did not recognize, much less address, Texas's strong presumption against repeals by implication. *See supra* 16-18. Whenever "the later act is silent as to the older law, the presumption is that its continued operation was intended, unless they present a

contradiction so positive that the purpose to repeal is manifest." *Cole*, 170 S.W. at 1037. By 2005, enforcement of Texas's preexisting criminal prohibitions had been impossible for many years; the Texas Legislature cannot be said to have "repealed" those prohibitions by enacting additional regulations that *could* be enforced under the *Roe v. Wade* regime. Doing so is hardly an expression of intent to repeal the then-unenforceable criminal statutes.

Moreover, there is no repeal by implications so long as the "later statute reasonably admits of a construction which will allow effect to the older law and still leave an ample field for its own operation." *Cole*, 170 S.W. at 1037; *see also Standard v. Sadler*, 383 S.W.2d 391, 396 (Tex. 1964) (holding that a statute only impliedly repeals an older statute when there is "positive repugnance" or "clear repugnancy" between them). That is the case here. For example, *McCorvey* pointed to Texas Family Code section 33.002's requirements for an abortion on a minor. *McCorvey*, 385 F.3d at 849. That provision would impose requirements on a physician performing an abortion necessary to save the life of a pregnant minor, which would not be criminal under Texas's preexisting law. *See* Tex. Civ. Stat. art. 4512.6 (criminal prohibitions do not apply "to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother"). Because both the preexisting criminal prohibitions and the later-enacted regulations have some effect, "total repugnance" is lacking. *Cole*, 170 S.W. at 1037. The same is true of other regulations of abortion.

* * *

At bottom, Plaintiffs' point is that Texas's preexisting criminal prohibitions have been ignored—by the Legislature, by the publishers of Vernon's, by the

attorney general in 1974, or by the Fifth Circuit—so they must have been repealed. But "[t]he bright-line rule" is that "[a] statute is *not* repealed by nonuse or desuetude." Scalia & Garner, *supra*, at 336 (emphasis added). Instead, "a statute has effect until it is repealed" by the body that enacted it. *Id.* That body was the Texas Legislature, and, far from repealing the preexisting criminal prohibitions on abortion, the Legislature has twice stated that as a matter of Texas law these prohibitions have *not* been repealed. *See* HB 1280, § 4; SB 8, § 2. The criminal prohibitions on abortion that the Supreme Court held unconstitutional in *Roe v. Wade* remain in force. Plaintiffs violate them at their peril.

B. The abortion providers' due process claim fails.

Plaintiffs object that they did not receive notice that the pre-*Roe* laws remain in force. MR.18. But they are on notice of that legal position now, as they admit in their petition. MR.4-5, 35. And because no one has threatened to prosecute them for conduct that took place prior to June 24, that is all that is required for due-process purposes. The Fourteenth Amendment protects against deprivations of liberty interests without due process of law, which includes fair notice of "what conduct may be punished." *Vista Healthcare, Inc. v. Tex. Mut. Ins. Co.*, 324 S.W.3d 264, 273 (Tex. App.—Austin 2010, pet. denied). But plaintiffs' liberty has not been put in jeopardy through any criminal prosecution, and they can conform their conduct to the requirements of the law going forward. *Cf. County of Dallas v. Wiland*, 216 S.W.3d 344, 354 (Tex. 2007) ("In general, . . . the remedy for a denial of due process is due process.").

And to the extent their claim is based on a deprivation of the ability to perform abortions between June 24 and the effective date of the newly enacted trigger law,

see MR.6, 24, that claim fails—there is no constitutional right to obtain an abortion, much less to perform abortions. *See Dobbs*, 2022 WL 2276808, at *7 ("The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision."); *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 912 (6th Cir. 2019) ("The Supreme Court has never identified a freestanding right to perform abortions."); *see also Tex. Dep't of State Health Services v. Crown Distrib. LLC*, No. 21-1045, 2022 WL 2283170, at *25 (Tex. June 24, 2022) (Young, J., concurring) (explaining that "our distinct Texas constitutional tradition seems to provide some evidence that the judiciary exists to protect rights that are textually expressed, but not to discover new ones in the due-course clause itself.").

Plaintiffs' argument for lack of notice lacks merit in any event. The Fifth Circuit's holding in *McCorvey*, 385 F.3d at 849, that the pre-*Roe* laws had been repealed by implication, was only an (incorrect) *Erie* guess. *See supra* 17-19. Since then, the Texas Legislature has affirmed that the pre-*Roe* laws were never repealed, either expressly or by implication. HB 1280, § 4; SB 8, § 2. Plaintiffs cannot claim to have been unaware of that finding by the Legislature: HB 1280 was signed by the Governor over one year ago, and SB 8 even before that. *See Crain v. State*, 153 S.W. 155, 156 (1913) (stating that "all persons are presumed to know what the law prohibits one from doing").

Plaintiffs also assert that the existence of the trigger law suggests that the Legislature understood the pre-*Roe* laws had been repealed otherwise the two would be in conflict. But addressing any conflict is premature. Both laws prohibit abortion, so there is no question as to what conduct is prohibited. *Compare* Tex. Civ. Stat. art.

4512.1, *with* Tex. Health & Safety Code § 170A.002. The only conflict Plaintiffs have raised is the length of criminal punishment, MR.19-20, and that is a matter to be taken up at sentencing if and when a prosecution under either statute occurs. Given that the Legislature found that the pre-*Roe* laws had never been repealed in the same bill that enacted the trigger law (HB 1280), the Court must presume that the Legislature intended both sets of laws to apply and to give prosecutors a choice once the trigger law takes effect.

C. The declaratory judgment from *Roe v. Wade* is not binding on anyone but the Dallas County District Attorney.

Plaintiffs finally contend that the preexisting criminal provisions cannot be enforced until the *Roe v. Wade* declaratory judgment is vacated. MR.20-21. But "a judgment *in personam* is binding only on the parties thereto and their privies." *Lehman v. Howard*, 133 S.W.2d 800, 801 (Tex. Civ. App.—Waco 1939, no writ); *cf. Kenneth D. Eichner, P.C. v. Dominguez*, 623 S.W.3d 358, 362 (Tex. 2021) (recognizing that a judgment is not binding on a non-party who sought to intervene after judgment). The only defendant in *Roe* was the Dallas County District Attorney. *Roe*, 314 F. Supp. at 1219. It is axiomatic that a judgment cannot bind those—such as the attorney general—who were not parties to a case. *See Hansberry v. Lee*, 311 U.S. 32, 41 (1940) (citing *Pennoyer v. Neff*, 95 U.S. 714 (1878)). None of the exceptions to that blackletter rule apply here. *See Taylor v. Sturgell*, 553 U.S. 880, 892–895 (2008). Most particularly, *Roe* was not a class action or other "representative" case, and there was no tie between the Dallas District Attorney and another defendant akin to a successor-in-interest or a fiduciary relationship. *Id.* at 894–895; *Lehman*, 133 S.W.2d at 801

("By a privy is meant one whose rights are derived from or through a party to the judgment"). To the extent the *Roe* declaratory judgment has any binding force after *Dobbs*, it does not extend to Relators or any other non-party to that case.

III. Plaintiffs Did Not Establish the Irreparable Harm Necessary for Temporary Injunctive Relief.

A. A temporary restraining order, like a temporary injunction, can issue only where it is both necessary and sufficient to remedy an otherwise-irreparable harm. Plaintiffs showed neither. Plaintiffs contend they fear prosecution as abortion providers or disciplinary action such as revocation of their employees' medical licenses. *See* MR.5-6, 8-9. But "the harm inherent in prosecution for a criminal offense does not constitute irreparable harm." *Sterling v. San Antonio Police Dep't*, 94 S.W.3d 790, 795 (Tex. App.—San Antonio 2002). "The opportunity to assert the constitutionality of a penal provision as a defense to a criminal prosecution is an adequate remedy at law." *City of Longview v. Head*, 33 S.W.3d 47, 53 (Tex. App.—Tyler 2000). The same is true of civil disciplinary actions, which include a hearing and the other requirements of due process. Plaintiffs (or, more likely, their employees) will be able to raise their claims in defense if criminal or civil enforcement is necessary.

B. And even if the possibility of criminal prosecution sufficed, a court cannot issue an injunction that does not alleviate the plaintiff's harm. *See, e.g.*, *Ohio v. Yellen*, 539 F. Supp. 3d 802, 821-22 (S.D. Ohio 2021); *cf. Operation Rescue-Nat'l v. Planned Parenthood of Houston & Se. Texas, Inc.*, 975 S.W.2d 546, 568 (Tex. 1998). Even if criminal enforcement is temporarily prohibited, Plaintiffs may still be prosecuted for crimes committed in the interim—the injunction, after all, does not void

the statute. *See supra* 13. So Plaintiffs cannot show that their alleged injury—prosecution for criminal abortions or revocation of their licenses—will be avoided through issuance of a temporary restraining order.

A temporary restraining order does just that: it temporarily restrains the defendant from acting. But it ceases to be binding if "it is reversed by orderly and proper proceedings," *United States v. United Mine Workers of Am.*, 330 U.S. 258, 293 (1947), as this one should be. In that event, the temporary injunction would not be a defense to prosecution. *See Edgar v. MITE Corp.*, 457 U.S. 624, 649 (1982) (Stevens, J., concurring in part and concurring in the judgment); *Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, 766 F.2d 715, 722 (2d Cir. 1985) (explaining, in a First Amendment claim, that "since the theoretical chilling of protected speech and union activities stems not from the interim discharge, but from the threat of permanent discharge, which is not vitiated by an interim injunction," a temporary injunction could not issue).

IV. Relators Have No Adequate Appellate Remedy.

Relators are entitled to mandamus relief because they lack an adequate remedy from the district court's order: they cannot appeal the grant of a temporary restraining order. *See In re Office of Attorney Gen.*, 257 S.W.3d 695, 698 (Tex. 2008) (per curiam). When the ordinary appellate process cannot afford timely relief, mandamus is proper. *See In re Woodfill*, 470 S.W.3d 473, 480-81 (Tex. 2015) (per curiam). And because future criminal prosecutions cannot restore the lives lost if Plaintiffs or their employees proceed to perform abortions in violation of Texas law, an immediate stay of the temporary restraining order pending disposition of the petition is proper.

Relators therefore request an immediate stay and mandamus relief within seven days, by July 5, 2022.

Prayer

The Court should immediately stay the temporary restraining order, grant this petition, and issue a writ of mandamus directing the district court to vacate the temporary restraining order entered on June 28, 2022. Relators respectfully request mandamus relief by no later than Tuesday, July 5, 2022.

Respectfully submitted.

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Mandamus Certification

Pursuant to Texas Rule of Appellate Procedure 52.3(j), I certify that I have reviewed this petition and that every factual statement in the petition is supported by competent evidence included in the appendix or record. Pursuant to Rule 52.3(k)(1)(A), I certify that every document contained in the appendix is a true and correct copy.

/s/ Natalie D. Thompson
Natalie D. Thompson

Certificate of Service

On June 28, 2022, this document was served on Marc Hearron and Melissa Hayward, counsel for Real Parties In Interest, via Mhearron@reprorights.org and mhayward@haywardfirm.com.

/s/ Natalie D. Thompson
Natalie D. Thompson

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