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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The Honorable Christine Weems, 269th Judicial District Court, Harris County

Real Parties in Interest:

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Whole Woman's Health Alliance, on behalf of itself, its staff, physicians, nurses, pharmacists, and patients
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

Houston Women's Clinic, on behalf of itself, its staff, physicians, nurses, pharmacists, and patients

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"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

Certificate of Compliance

Microsoft Word reports that this document contains 6,850 words, excluding exempted text.

/s/ Natalie D. Thompson
Natalie D. Thompson

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

RELATORS' APPENDIX

Tab A: Temporary Restraining Order (June 28, 2022)

2022-38397 / Court: 269

CAUSE NO. _____

WHOLE WOMAN'S HEALTH, on behalf of itself, its staff, physicians, nurses, pharmacists, and patients; WHOLE WOMAN'S HEALTH ALLIANCE, on behalf of itself, its staff, physicians, nurses, pharmacists, and patients; 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; HOUSTON WOMEN'S CLINIC, on behalf of itself, its staff, physicians, nurses, pharmacists, and patients; HOUSTON WOMEN'S REPRODUCTIVE SERVICES, on behalf of itself, its staff, physicians, nurses, pharmacists, and patients; and SOUTHWESTERN WOMEN'S SURGERY CENTER, on behalf of itself, its staff, physicians, nurses, pharmacists, and patients, Plaintiffs, V. KEN PAXTON, in his official capacity as Attorney General of Texas; TEXAS MEDICAL BOARD; STEPHEN BRINT CARLTON, in his official capacity as Executive Director of the Texas Medical Board; TEXAS BOARD OF NURSING; KATHERINE A. THOMAS, in her official capacity as Executive Director of the Texas Board of Nursing; TEXAS HEALTH AND SERVICES COMMISSION; CECILE ERWIN YOUNG, in her official capacity as Executive Commissioner of the Texas Health and Human Services Commission; TEXAS BOARD OF PHARMACY; TIM TUCKER in his official capacity as Executive Director of the Texas Board of Pharmacy; JOSÉ GARZA in his capacity as District Attorney for Travis County, TX; JOE GONZALES, in his official capacity as	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS _____ JUDICIAL DISTRICT

District Attorney for Bexar County, TX; KIM OGG, in her official capacity as District Attorney for Harris County, TX; JOHN CREUZOT, in his official capacity as District Attorney for Dallas County, TX; SHARON WILSON, in her official capacity as District Attorney for Tarrant County, TX; RICARDO RODRIGUEZ, JR., in his official capacity as District Attorney for Hidalgo County, TX; and GREG WILSON, in his official capacity as District Attorney for Collin County, TX;

Defendants.

TEMPORARY RESTRAINING ORDER AND
ORDER SETTING HEARING ON MOTION FOR TEMPORARY INJUNCTION

On the 28th day of June, 2022, the Court considered Plaintiffs Whole Women's Health, Whole Women's Health Alliance, Alamo City Surgery Center PLLC d/b/a Alamo Women's Reproductive Services, Women's Medical Center PA d/b/a Brookside Women's Health Center and Austin Women's Health Center, Houston Women's Clinic, Houston Women's Reproductive Services, and Southwestern Women's Surgery Center's ("Plaintiffs") *Application for Temporary Restraining Order and Temporary Injunctive Relief* ("Application") seeking to restrain Defendants Ken Paxton, Texas Medical Board, Stephen Brint Carlton, Texas Board of Nursing, Katherine A. Thomas, Texas Health and Services Commission, Cecile Erwin Young, Texas Board of Pharmacy, Tim Tucker, Joe Gonzales, José Garza, Kim Ogg, John Creuzot, Sharon Wilson, Ricardo Rodriguez Jr., and Greg Wilson ("Defendants"), their agents, servants, employees, attorneys, and all persons in active concert and participation with Defendants from enforcing 1925 TEX. PENAL CODE ARTS. 1191–1194, 1196 (VERNON'S TEX. CIV. STATES CIVIL STATUTES ARTS. 4512.1–4512.4, 4512.6) (the "Pre-*Roe* Ban") against Plaintiffs, their physicians, nurses, pharmacists, and other staff. After consideration of the Application and the evidence attached thereto, and pursuant to Texas Rule of Civil Procedure 680, the Court hereby finds:

FINDINGS

The Court finds that Texas's Pre-*Roe* Ban is repealed and may not be enforced consistent with the due process guaranteed by the Texas constitution. The Court further finds that the threat of enforcement of Texas's Pre-*Roe* Ban creates a probable, irreparable, and imminent injury for which Plaintiffs and their physicians, nurses, pharmacists, other staff, and patients throughout Texas have no adequate remedy at law if Plaintiffs, their physicians, nurses, pharmacists, and/or other staff are subjected to criminal liability or disciplinary action under the Pre-*Roe* Ban in the interim before House Bill 1280, 87th Leg., Reg. Sess. (Tex. 2021) (the "Trigger Ban"), goes into effect. Money damages are insufficient to remedy the injuries that will result if the Defendants are not enjoined from instituting criminal or disciplinary investigations or actions, against Plaintiffs, their physicians, nurses, pharmacists, and other staff under the Pre-*Roe* Ban. Conversely, the Defendants will not be harmed if the Court restrains them and anyone in active concert and participation with them from enforcing the Pre-*Roe* Ban against Plaintiffs, their physicians, nurses, and other staff.

The Court further finds that granting this request preserves the status quo preceding this controversy and follows precedent from the Supreme Court of Texas. *See In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004); *In re Greg Abbott*, No. 21-0720, 2021 Tex. LEXIS 1195 (Tex. Aug. 26, 2021) (holding that the primary consideration for temporary emergency relief is preserving the status quo).

The Texas Attorney General's Office and Defendants José Garza, Joe Gonzales, Kim Ogg, John Creuzot, Sharon Wilson, Ricardo Rodriguez, Jr., and Greg Wilson were provided notice of the cause of action, the Application, and the hearing conducted. It clearly appears from the papers filed by Plaintiffs that they are entitled to a temporary restraining order without notice

to the remaining Defendants. Unless Defendants are immediately restrained, Plaintiffs, their physicians, nurses, pharmacists, and other staff face an imminent threat of criminal liability and disciplinary action under the Pre-*Roe* Ban before notice can be given and a hearing is had on Plaintiffs' Application for a Temporary Injunction and will suffer irreparable harm. Imminent judicial intervention is necessary to preserve Plaintiffs' patients' legal right to obtain, and Plaintiffs' and their physicians' legal right to provide, abortions in Texas until the Trigger Ban is in effect.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

A. A Temporary Restraining Order is entered enjoining Defendants, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them, from enforcing the Pre-*Roe* Ban against Plaintiffs or their physicians, nurses, pharmacists, or other staff.

B. Defendants shall provide notice of this Temporary Restraining Order to their officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with them.

C. This matter is scheduled for a temporary injunction hearing on the 12th day of July, 2022, at 3:30PM.

D. Plaintiffs' bond is set at $100.00. A law firm check is sufficient to post the bond. Upon the filing of the bond required herein, the Clerk of this Court shall issue a Temporary Restraining Order in conformity with the law and the terms of this Order Granting Plaintiffs' Application for Temporary Restraining Order.

E. All parties may be served with notice of this Temporary Restraining Order and of the hearing on the request for Temporary Injunction in any manner provided under Rule 21a of the Texas Rules of Civil Procedure.

F. This temporary restraining order shall expire on July 12, 2022, at 5:00 p.m.

SIGNED this ___ day of _____, 2022, at _____ a.m./p.m.

Signed:
6/28/2022
10:44 AM

JUDGE PRESIDING

Prepared By:

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*Pro hac vice applications forthcoming

TAB B: TEXAS CIVIL STATUTES ARTICLES 4512.1-.6

VERNON'S CIVIL STATUTES

TITLE 71. HEALTH—PUBLIC

CHAPTER 6-1/2. ABORTION

Art. 4512.1. ABORTION. If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By "abortion" is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.

Acts 1925, 39th Leg., R.S., S.B. 7, eff. September 1, 1925. Transferred by Acts 1973, 63rd Leg., R.S., Ch. 399 (S.B. 34), eff. January 1, 1974.

Art. 4512.2. FURNISHING THE MEANS. Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.

Acts 1925, 39th Leg., R.S., S.B. 7, eff. September 1, 1925. Transferred by Acts 1973, 63rd Leg., R.S., Ch. 399 (S.B. 34), eff. January 1, 1974.

Art. 4512.3. ATTEMPT AT ABORTION. If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.

Acts 1925, 39th Leg., R.S., S.B. 7, eff. September 1, 1925. Transferred by Acts 1973, 63rd Leg., R.S., Ch. 399 (S.B. 34), eff. January 1, 1974.

Art. 4512.4. MURDER IN PRODUCING ABORTION. If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.

Acts 1925, 39th Leg., R.S., S.B. 7, eff. September 1, 1925. Transferred by Acts 1973, 63rd Leg., R.S., Ch. 399 (S.B. 34), eff. January 1, 1974.

Art. 4512.5. DESTROYING UNBORN CHILD. Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years.

Acts 1925, 39th Leg., R.S., S.B. 7, eff. September 1, 1925. Transferred by Acts 1973, 63rd Leg., R.S., Ch. 399 (S.B. 34), eff. January 1, 1974.

Art. 4512.6. BY MEDICAL ADVICE. Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.

Acts 1925, 39th Leg., R.S., S.B. 7, eff. September 1, 1925. Transferred by Acts 1973, 63rd Leg., R.S., Ch. 399 (S.B. 34), eff. January 1, 1974.

Tab C: House Bill 1280 (2021)

House Bill No. 1280

AN ACT

relating to prohibition of abortion; providing a civil penalty; creating a criminal offense.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. This Act may be cited as the Human Life Protection Act of 2021.

SECTION 2. Subtitle H, Title 2, Health and Safety Code, is amended by adding Chapter 170A to read as follows:

CHAPTER 170A. PERFORMANCE OF ABORTION

Sec. 170A.001. DEFINITIONS. In this chapter:

(1) "Abortion" has the meaning assigned by Section 245.002.

(2) "Fertilization" means the point in time when a male human sperm penetrates the zona pellucida of a female human ovum.

(3) "Pregnant" means the female human reproductive condition of having a living unborn child within the female's body during the entire embryonic and fetal stages of the unborn child's development from fertilization until birth.

(4) "Reasonable medical judgment" means a medical judgment made by a reasonably prudent physician, knowledgeable about a case and the treatment possibilities for the medical conditions involved.

(5) "Unborn child" means an individual living member of the homo sapiens species from fertilization until birth, including the entire embryonic and fetal stages of development.

Sec. 170A.002. PROHIBITED ABORTION; EXCEPTIONS. (a) A person may not knowingly perform, induce, or attempt an abortion.

(b) The prohibition under Subsection (a) does not apply if:

(1) the person performing, inducing, or attempting the abortion is a licensed physician;

(2) in the exercise of reasonable medical judgment, the pregnant female on whom the abortion is performed, induced, or attempted has a life-threatening

physical condition aggravated by, caused by, or arising from a pregnancy that places the female at risk of death or poses a serious risk of substantial impairment of a major bodily function unless the abortion is performed or induced; and

(3) the person performs, induces, or attempts the abortion in a manner that, in the exercise of reasonable medical judgment, provides the best opportunity for the unborn child to survive unless, in the reasonable medical judgment, that manner would create:

(A) a greater risk of the pregnant female's death; or

(B) a serious risk of substantial impairment of a major bodily function of the pregnant female.

(c) A physician may not take an action authorized under Subsection (b) if, at the time the abortion was performed, induced, or attempted, the person knew the risk of death or a substantial impairment of a major bodily function described by Subsection (b)(2) arose from a claim or diagnosis that the female would engage in conduct that might result in the female's death or in substantial impairment of a major bodily function.

(d) Medical treatment provided to the pregnant female by a licensed physician that results in the accidental or unintentional injury or death of the unborn child does not constitute a violation of this section.

Sec. 170A.003. CONSTRUCTION OF CHAPTER. This chapter may not be construed to authorize the imposition of criminal, civil, or administrative liability or penalties on a pregnant female on whom an abortion is performed, induced, or attempted.

Sec. 170A.004. CRIMINAL OFFENSE. (a) A person who violates Section 170A.002 commits an offense.

(b) An offense under this section is a felony of the second degree, except that the offense is a felony of the first degree if an unborn child dies as a result of the offense.

Sec. 170A.005. CIVIL PENALTY. A person who violates Section 170A.002 is subject to a civil penalty of not less than $100,000 for each violation. The attorney

general shall file an action to recover a civil penalty assessed under this section and may recover attorney's fees and costs incurred in bringing the action.

Sec. 170A.006. CIVIL REMEDIES UNAFFECTED. The fact that conduct is subject to a civil or criminal penalty under this chapter does not abolish or impair any remedy for the conduct that is available in a civil suit.

Sec. 170A.007. DISCIPLINARY ACTION. In addition to any other penalty that may be imposed under this chapter, the appropriate licensing authority shall revoke the license, permit, registration, certificate, or other authority of a physician or other health care professional who performs, induces, or attempts an abortion in violation of Section 170A.002.

SECTION 3. Section 2 of this Act takes effect, to the extent permitted, on the 30th day after:

(1) the issuance of a United States Supreme Court judgment in a decision overruling, wholly or partly, *Roe v. Wade*, 410 U.S. 113 (1973), as modified by *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), thereby allowing the states of the United States to prohibit abortion;

(2) the issuance of any other United States Supreme Court judgment in a decision that recognizes, wholly or partly, the authority of the states to prohibit abortion; or

(3) adoption of an amendment to the United States Constitution that, wholly or partly, restores to the states the authority to prohibit abortion.

SECTION 4. The legislature finds that the State of Texas never repealed, either expressly or by implication, the state statutes enacted before the ruling in *Roe v. Wade*, 410 U.S. 113 (1973), that prohibit and criminalize abortion unless the mother's life is in danger.

SECTION 5. The provisions of this Act are hereby declared severable, and if any provision of this Act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this Act.

SECTION 6. This Act takes effect September 1, 2021.

_____ _____

President of the Senate Speaker of the House

I certify that H.B. No. 1280 was passed by the House on May 6, 2021, by the following vote: Yeas 81, Nays 61, 2 present, not voting.

_____

Chief Clerk of the House

I certify that H.B. No. 1280 was passed by the Senate on May 25, 2021, by the following vote: Yeas 19, Nays 12.

_____

Secretary of the Senate

APPROVED: _____

Date

_____

Governor

TAB D: SENATE BILL 8 (2021)

Senate Bill No. 8

AN ACT

relating to abortion, including abortions after detection of an unborn child's heartbeat; authorizing a private civil right of action.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. This Act shall be known as the Texas Heartbeat Act.

SECTION 2. The legislature finds that the State of Texas never repealed, either expressly or by implication, the state statutes enacted before the ruling in *Roe v. Wade*, 410 U.S. 113 (1973), that prohibit and criminalize abortion unless the mother's life is in danger.

SECTION 3. Chapter 171, Health and Safety Code, is amended by adding Subchapter H to read as follows:

SUBCHAPTER H. DETECTION OF FETAL HEARTBEAT

Sec. 171.201. DEFINITIONS. In this subchapter:

(1) "Fetal heartbeat" means cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac.

(2) "Gestational age" means the amount of time that has elapsed from the first day of a woman's last menstrual period.

(3) "Gestational sac" means the structure comprising the extraembryonic membranes that envelop the unborn child and that is typically visible by ultrasound after the fourth week of pregnancy.

(4) "Physician" means an individual licensed to practice medicine in this state, including a medical doctor and a doctor of osteopathic medicine.

(5) "Pregnancy" means the human female reproductive condition that:

(A) begins with fertilization;

(B) occurs when the woman is carrying the developing human offspring; and

(C) is calculated from the first day of the woman's last menstrual period.

(6) "Standard medical practice" means the degree of skill, care, and diligence that an obstetrician of ordinary judgment, learning, and skill would employ in like circumstances.

(7) "Unborn child" means a human fetus or embryo in any stage of gestation from fertilization until birth.

Sec. 171.202. LEGISLATIVE FINDINGS. The legislature finds, according to contemporary medical research, that:

(1) fetal heartbeat has become a key medical predictor that an unborn child will reach live birth;

(2) cardiac activity begins at a biologically identifiable moment in time, normally when the fetal heart is formed in the gestational sac;

(3) Texas has compelling interests from the outset of a woman's pregnancy in protecting the health of the woman and the life of the unborn child; and

(4) to make an informed choice about whether to continue her pregnancy, the pregnant woman has a compelling interest in knowing the likelihood of her unborn child surviving to full-term birth based on the presence of cardiac activity.

Sec. 171.203. DETERMINATION OF PRESENCE OF FETAL HEARTBEAT REQUIRED; RECORD. (a) For the purposes of determining the presence of a fetal heartbeat under this section, "standard medical practice" includes employing the appropriate means of detecting the heartbeat based on the estimated gestational age of the unborn child and the condition of the woman and her pregnancy.

(b) Except as provided by Section 171.205, a physician may not knowingly perform or induce an abortion on a pregnant woman unless the physician has determined, in accordance with this section, whether the woman's unborn child has a detectable fetal heartbeat.

(c) In making a determination under Subsection (b), the physician must use a test that is:

(1) consistent with the physician's good faith and reasonable understanding of standard medical practice; and

(2) appropriate for the estimated gestational age of the unborn child and the condition of the pregnant woman and her pregnancy.

(d) A physician making a determination under Subsection (b) shall record in the pregnant woman's medical record:

(1) the estimated gestational age of the unborn child;

(2) the method used to estimate the gestational age; and

(3) the test used for detecting a fetal heartbeat, including the date, time, and results of the test.

Sec. 171.204. PROHIBITED ABORTION OF UNBORN CHILD WITH DETECTABLE FETAL HEARTBEAT; EFFECT. (a) Except as provided by Section 171.205, a physician may not knowingly perform or induce an abortion on a pregnant woman if the physician detected a fetal heartbeat for the unborn child as required by Section 171.203 or failed to perform a test to detect a fetal heartbeat.

(b) A physician does not violate this section if the physician performed a test for a fetal heartbeat as required by Section 171.203 and did not detect a fetal heartbeat.

(c) This section does not affect:

(1) the provisions of this chapter that restrict or regulate an abortion by a particular method or during a particular stage of pregnancy; or

(2) any other provision of state law that regulates or prohibits abortion.

Sec. 171.205. EXCEPTION FOR MEDICAL EMERGENCY; RECORDS. (a) Sections 171.203 and 171.204 do not apply if a physician believes a medical emergency exists that prevents compliance with this subchapter.

(b) A physician who performs or induces an abortion under circumstances described by Subsection (a) shall make written notations in the pregnant woman's medical record of:

(1) the physician's belief that a medical emergency necessitated the abortion; and

(2) the medical condition of the pregnant woman that prevented compliance with this subchapter.

(c) A physician performing or inducing an abortion under this section shall maintain in the physician's practice records a copy of the notations made under Subsection (b).

Sec. 171.206. CONSTRUCTION OF SUBCHAPTER. (a) This subchapter does not create or recognize a right to abortion before a fetal heartbeat is detected.

(b) This subchapter may not be construed to:

(1) authorize the initiation of a cause of action against or the prosecution of a woman on whom an abortion is performed or induced or attempted to be performed or induced in violation of this subchapter;

(2) wholly or partly repeal, either expressly or by implication, any other statute that regulates or prohibits abortion, including Chapter 6-1/2, Title 71, Revised Statutes; or

(3) restrict a political subdivision from regulating or prohibiting abortion in a manner that is at least as stringent as the laws of this state.

Sec. 171.207. LIMITATIONS ON PUBLIC ENFORCEMENT. (a) Notwithstanding Section 171.005 or any other law, the requirements of this subchapter shall be enforced exclusively through the private civil actions described in Section 171.208. No enforcement of this subchapter, and no enforcement of Chapters 19 and 22, Penal Code, in response to violations of this subchapter, may be taken or threatened by this state, a political subdivision, a district or county attorney, or an executive or administrative officer or employee of this state or a political subdivision against any person, except as provided in Section 171.208.

(b) Subsection (a) may not be construed to:

(1) legalize the conduct prohibited by this subchapter or by Chapter 6-1/2, Title 71, Revised Statutes;

(2) limit in any way or affect the availability of a remedy established by Section 171.208; or

(3) limit the enforceability of any other laws that regulate or prohibit abortion.

Sec. 171.208. CIVIL LIABILITY FOR VIOLATION OR AIDING OR

ABETTING VIOLATION. (a) Any person, other than an officer or employee of a state or local governmental entity in this state, may bring a civil action against any person who:

(1) performs or induces an abortion in violation of this subchapter;

(2) knowingly engages in conduct that aids or abets the performance or inducement of an abortion, including paying for or reimbursing the costs of an abortion through insurance or otherwise, if the abortion is performed or induced in violation of this subchapter, regardless of whether the person knew or should have known that the abortion would be performed or induced in violation of this subchapter; or

(3) intends to engage in the conduct described by Subdivision (1) or (2).

(b) If a claimant prevails in an action brought under this section, the court shall award:

(1) injunctive relief sufficient to prevent the defendant from violating this subchapter or engaging in acts that aid or abet violations of this subchapter;

(2) statutory damages in an amount of not less than $10,000 for each abortion that the defendant performed or induced in violation of this subchapter, and for each abortion performed or induced in violation of this subchapter that the defendant aided or abetted; and

(3) costs and attorney's fees.

(c) Notwithstanding Subsection (b), a court may not award relief under this section in response to a violation of Subsection (a)(1) or (2) if the defendant demonstrates that the defendant previously paid the full amount of statutory damages under Subsection (b)(2) in a previous action for that particular abortion performed or induced in violation of this subchapter, or for the particular conduct that aided or abetted an abortion performed or induced in violation of this subchapter.

(d) Notwithstanding Chapter 16, Civil Practice and Remedies Code, or any other law, a person may bring an action under this section not later than the fourth anniversary of the date the cause of action accrues.

(e) Notwithstanding any other law, the following are not a defense to an action

brought under this section:

(1) ignorance or mistake of law;

(2) a defendant's belief that the requirements of this subchapter are unconstitutional or were unconstitutional;

(3) a defendant's reliance on any court decision that has been overruled on appeal or by a subsequent court, even if that court decision had not been overruled when the defendant engaged in conduct that violates this subchapter;

(4) a defendant's reliance on any state or federal court decision that is not binding on the court in which the action has been brought;

(5) non-mutual issue preclusion or non-mutual claim preclusion;

(6) the consent of the unborn child's mother to the abortion; or

(7) any claim that the enforcement of this subchapter or the imposition of civil liability against the defendant will violate the constitutional rights of third parties, except as provided by Section 171.209.

(f) It is an affirmative defense if:

(1) a person sued under Subsection (a)(2) reasonably believed, after conducting a reasonable investigation, that the physician performing or inducing the abortion had complied or would comply with this subchapter; or

(2) a person sued under Subsection (a)(3) reasonably believed, after conducting a reasonable investigation, that the physician performing or inducing the abortion will comply with this subchapter.

(f-1) The defendant has the burden of proving an affirmative defense under Subsection (f)(1) or (2) by a preponderance of the evidence.

(g) This section may not be construed to impose liability on any speech or conduct protected by the First Amendment of the United States Constitution, as made applicable to the states through the United States Supreme Court's interpretation of the Fourteenth Amendment of the United States Constitution, or by Section 8, Article I, Texas Constitution.

(h) Notwithstanding any other law, this state, a state official, or a district or county attorney may not intervene in an action brought under this section. This

subsection does not prohibit a person described by this subsection from filing an amicus curiae brief in the action.

(i) Notwithstanding any other law, a court may not award costs or attorney's fees under the Texas Rules of Civil Procedure or any other rule adopted by the supreme court under Section 22.004, Government Code, to a defendant in an action brought under this section.

(j) Notwithstanding any other law, a civil action under this section may not be brought by a person who impregnated the abortion patient through an act of rape, sexual assault, incest, or any other act prohibited by Sections 22.011, 22.021, or 25.02, Penal Code.

Sec. 171.209. CIVIL LIABILITY: UNDUE BURDEN DEFENSE LIMITATIONS. (a) A defendant against whom an action is brought under Section 171.208 does not have standing to assert the rights of women seeking an abortion as a defense to liability under that section unless:

(1) the United States Supreme Court holds that the courts of this state must confer standing on that defendant to assert the third-party rights of women seeking an abortion in state court as a matter of federal constitutional law; or

(2) the defendant has standing to assert the rights of women seeking an abortion under the tests for third-party standing established by the United States Supreme Court.

(b) A defendant in an action brought under Section 171.208 may assert an affirmative defense to liability under this section if:

(1) the defendant has standing to assert the third-party rights of a woman or group of women seeking an abortion in accordance with Subsection (a); and

(2) the defendant demonstrates that the relief sought by the claimant will impose an undue burden on that woman or that group of women seeking an abortion.

(c) A court may not find an undue burden under Subsection (b) unless the defendant introduces evidence proving that:

(1) an award of relief will prevent a woman or a group of women from

obtaining an abortion; or

(2) an award of relief will place a substantial obstacle in the path of a woman or a group of women who are seeking an abortion.

(d) A defendant may not establish an undue burden under this section by:

(1) merely demonstrating that an award of relief will prevent women from obtaining support or assistance, financial or otherwise, from others in their effort to obtain an abortion; or

(2) arguing or attempting to demonstrate that an award of relief against other defendants or other potential defendants will impose an undue burden on women seeking an abortion.

(e) The affirmative defense under Subsection (b) is not available if the United States Supreme Court overrules *Roe v. Wade*, 410 U.S. 113 (1973) or *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), regardless of whether the conduct on which the cause of action is based under Section 171.208 occurred before the Supreme Court overruled either of those decisions.

(f) Nothing in this section shall in any way limit or preclude a defendant from asserting the defendant's personal constitutional rights as a defense to liability under Section 171.208, and a court may not award relief under Section 171.208 if the conduct for which the defendant has been sued was an exercise of state or federal constitutional rights that personally belong to the defendant.

Sec. 171.210. CIVIL LIABILITY: VENUE. (a) Notwithstanding any other law, including Section 15.002, Civil Practice and Remedies Code, a civil action brought under Section 171.208 shall be brought in:

(1) the county in which all or a substantial part of the events or omissions giving rise to the claim occurred;

(2) the county of residence for any one of the natural person defendants at the time the cause of action accrued;

(3) the county of the principal office in this state of any one of the defendants that is not a natural person; or

(4) the county of residence for the claimant if the claimant is a natural

person residing in this state.

(b) If a civil action is brought under Section 171.208 in any one of the venues described by Subsection (a), the action may not be transferred to a different venue without the written consent of all parties.

Sec. 171.211. SOVEREIGN, GOVERNMENTAL, AND OFFICIAL IMMUNITY PRESERVED. (a) This section prevails over any conflicting law, including:

(1) the Uniform Declaratory Judgments Act; and

(2) Chapter 37, Civil Practice and Remedies Code.

(b) This state has sovereign immunity, a political subdivision has governmental immunity, and each officer and employee of this state or a political subdivision has official immunity in any action, claim, or counterclaim or any type of legal or equitable action that challenges the validity of any provision or application of this chapter, on constitutional grounds or otherwise.

(c) A provision of state law may not be construed to waive or abrogate an immunity described by Subsection (b) unless it expressly waives immunity under this section.

Sec. 171.212. SEVERABILITY. (a) Mindful of *Leavitt v. Jane L.*, 518 U.S. 137 (1996), in which in the context of determining the severability of a state statute regulating abortion the United States Supreme Court held that an explicit statement of legislative intent is controlling, it is the intent of the legislature that every provision, section, subsection, sentence, clause, phrase, or word in this chapter, and every application of the provisions in this chapter, are severable from each other.

(b) If any application of any provision in this chapter to any person, group of persons, or circumstances is found by a court to be invalid or unconstitutional, the remaining applications of that provision to all other persons and circumstances shall be severed and may not be affected. All constitutionally valid applications of this chapter shall be severed from any applications that a court finds to be invalid, leaving the valid applications in force, because it is the legislature's intent and priority that the valid applications be allowed to stand alone. Even if a reviewing court finds a

provision of this chapter to impose an undue burden in a large or substantial fraction of relevant cases, the applications that do not present an undue burden shall be severed from the remaining applications and shall remain in force, and shall be treated as if the legislature had enacted a statute limited to the persons, group of persons, or circumstances for which the statute's application does not present an undue burden.

(b-1) If any court declares or finds a provision of this chapter facially unconstitutional, when discrete applications of that provision can be enforced against a person, group of persons, or circumstances without violating the United States Constitution and Texas Constitution, those applications shall be severed from all remaining applications of the provision, and the provision shall be interpreted as if the legislature had enacted a provision limited to the persons, group of persons, or circumstances for which the provision's application will not violate the United States Constitution and Texas Constitution.

(c) The legislature further declares that it would have enacted this chapter, and each provision, section, subsection, sentence, clause, phrase, or word, and all constitutional applications of this chapter, irrespective of the fact that any provision, section, subsection, sentence, clause, phrase, or word, or applications of this chapter, were to be declared unconstitutional or to represent an undue burden.

(d) If any provision of this chapter is found by any court to be unconstitutionally vague, then the applications of that provision that do not present constitutional vagueness problems shall be severed and remain in force.

(e) No court may decline to enforce the severability requirements of Subsections (a), (b), (b-1), (c), and (d) on the ground that severance would rewrite the statute or involve the court in legislative or lawmaking activity. A court that declines to enforce or enjoins a state official from enforcing a statutory provision does not rewrite a statute, as the statute continues to contain the same words as before the court's decision. A judicial injunction or declaration of unconstitutionality:

(1) is nothing more than an edict prohibiting enforcement that may subsequently be vacated by a later court if that court has a different understanding

of the requirements of the Texas Constitution or United States Constitution;

(2) is not a formal amendment of the language in a statute; and

(3) no more rewrites a statute than a decision by the executive not to enforce a duly enacted statute in a limited and defined set of circumstances.

SECTION 4. Chapter 30, Civil Practice and Remedies Code, is amended by adding Section 30.022 to read as follows:

Sec. 30.022. AWARD OF ATTORNEY'S FEES IN ACTIONS CHALLENGING ABORTION LAWS. (a) Notwithstanding any other law, any person, including an entity, attorney, or law firm, who seeks declaratory or injunctive relief to prevent this state, a political subdivision, any governmental entity or public official in this state, or any person in this state from enforcing any statute, ordinance, rule, regulation, or any other type of law that regulates or restricts abortion or that limits taxpayer funding for individuals or entities that perform or promote abortions, in any state or federal court, or that represents any litigant seeking such relief in any state or federal court, is jointly and severally liable to pay the costs and attorney's fees of the prevailing party.

(b) For purposes of this section, a party is considered a prevailing party if a state or federal court:

(1) dismisses any claim or cause of action brought against the party that seeks the declaratory or injunctive relief described by Subsection (a), regardless of the reason for the dismissal; or

(2) enters judgment in the party's favor on any such claim or cause of action.

(c) Regardless of whether a prevailing party sought to recover costs or attorney's fees in the underlying action, a prevailing party under this section may bring a civil action to recover costs and attorney's fees against a person, including an entity, attorney, or law firm, that sought declaratory or injunctive relief described by Subsection (a) not later than the third anniversary of the date on which, as applicable:

(1) the dismissal or judgment described by Subsection (b) becomes final on the conclusion of appellate review; or

(2) the time for seeking appellate review expires.

(d) It is not a defense to an action brought under Subsection (c) that:

(1) a prevailing party under this section failed to seek recovery of costs or attorney's fees in the underlying action;

(2) the court in the underlying action declined to recognize or enforce the requirements of this section; or

(3) the court in the underlying action held that any provisions of this section are invalid, unconstitutional, or preempted by federal law, notwithstanding the doctrines of issue or claim preclusion.

SECTION 5. Subchapter C, Chapter 311, Government Code, is amended by adding Section 311.036 to read as follows:

Sec. 311.036. CONSTRUCTION OF ABORTION STATUTES. (a) 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.

(b) A statute may not be construed to restrict a political subdivision from regulating or prohibiting abortion in a manner that is at least as stringent as the laws of this state unless the statute explicitly states that political subdivisions are prohibited from regulating or prohibiting abortion in the manner described by the statute.

(c) Every statute that regulates or prohibits abortion is severable in each of its applications to every person and circumstance. If any statute that regulates or prohibits abortion is found by any court to be unconstitutional, either on its face or as applied, then all applications of that statute that do not violate the United States Constitution and Texas Constitution shall be severed from the unconstitutional applications and shall remain enforceable, notwithstanding any other law, and the statute shall be interpreted as if containing language limiting the statute's application to the persons, group of persons, or circumstances for which the statute's application will not violate the United States Constitution and Texas Constitution.

SECTION 6. Section 171.005, Health and Safety Code, is amended to read as

follows:

Sec. 171.005. COMMISSION [~~DEPARTMENT~~] TO ENFORCE; EXCEPTION. The commission [~~department~~] shall enforce this chapter except for Subchapter H, which shall be enforced exclusively through the private civil enforcement actions described by Section 171.208 and may not be enforced by the commission.

SECTION 7. Subchapter A, Chapter 171, Health and Safety Code, is amended by adding Section 171.008 to read as follows:

Sec. 171.008. REQUIRED DOCUMENTATION. (a) If an abortion is performed or induced on a pregnant woman because of a medical emergency, the physician who performs or induces the abortion shall execute a written document that certifies the abortion is necessary due to a medical emergency and specifies the woman's medical condition requiring the abortion.

(b) A physician shall:

(1) place the document described by Subsection (a) in the pregnant woman's medical record; and

(2) maintain a copy of the document described by Subsection (a) in the physician's practice records.

(c) A physician who performs or induces an abortion on a pregnant woman shall:

(1) if the abortion is performed or induced to preserve the health of the pregnant woman, execute a written document that:

(A) specifies the medical condition the abortion is asserted to address; and

(B) provides the medical rationale for the physician's conclusion that the abortion is necessary to address the medical condition; or

(2) for an abortion other than an abortion described by Subdivision (1), specify in a written document that maternal health is not a purpose of the abortion.

(d) The physician shall maintain a copy of a document described by Subsection (c) in the physician's practice records.

SECTION 8. Section 171.012(a), Health and Safety Code, is amended to read

as follows:

(a) Consent to an abortion is voluntary and informed only if:

(1) the physician who is to perform or induce the abortion informs the pregnant woman on whom the abortion is to be performed or induced of:

(A) the physician's name;

(B) the particular medical risks associated with the particular abortion procedure to be employed, including, when medically accurate:

(i) the risks of infection and hemorrhage;

(ii) the potential danger to a subsequent pregnancy and of infertility; and

(iii) the possibility of increased risk of breast cancer following an induced abortion and the natural protective effect of a completed pregnancy in avoiding breast cancer;

(C) the probable gestational age of the unborn child at the time the abortion is to be performed or induced; and

(D) the medical risks associated with carrying the child to term;

(2) the physician who is to perform or induce the abortion or the physician's agent informs the pregnant woman that:

(A) medical assistance benefits may be available for prenatal care, childbirth, and neonatal care;

(B) the father is liable for assistance in the support of the child without regard to whether the father has offered to pay for the abortion; and

(C) public and private agencies provide pregnancy prevention counseling and medical referrals for obtaining pregnancy prevention medications or devices, including emergency contraception for victims of rape or incest;

(3) the physician who is to perform or induce the abortion or the physician's agent:

(A) provides the pregnant woman with the printed materials described by Section 171.014; and

(B) informs the pregnant woman that those materials:

(i) have been provided by the commission [~~Department of State Health Services~~];

(ii) are accessible on an Internet website sponsored by the commission [~~department~~];

(iii) describe the unborn child and list agencies that offer alternatives to abortion; and

(iv) include a list of agencies that offer sonogram services at no cost to the pregnant woman;

(4) before any sedative or anesthesia is administered to the pregnant woman and at least 24 hours before the abortion or at least two hours before the abortion if the pregnant woman waives this requirement by certifying that she currently lives 100 miles or more from the nearest abortion provider that is a facility licensed under Chapter 245 or a facility that performs more than 50 abortions in any 12-month period:

(A) the physician who is to perform or induce the abortion or an agent of the physician who is also a sonographer certified by a national registry of medical sonographers performs a sonogram on the pregnant woman on whom the abortion is to be performed or induced;

(B) the physician who is to perform or induce the abortion displays the sonogram images in a quality consistent with current medical practice in a manner that the pregnant woman may view them;

(C) the physician who is to perform or induce the abortion provides, in a manner understandable to a layperson, a verbal explanation of the results of the sonogram images, including a medical description of the dimensions of the embryo or fetus, the presence of cardiac activity, and the presence of external members and internal organs; and

(D) the physician who is to perform or induce the abortion or an agent of the physician who is also a sonographer certified by a national registry of medical sonographers makes audible the heart auscultation for the pregnant woman to hear, if present, in a quality consistent with current medical practice and provides,

in a manner understandable to a layperson, a simultaneous verbal explanation of the heart auscultation;

(5) before receiving a sonogram under Subdivision (4)(A) and before the abortion is performed or induced and before any sedative or anesthesia is administered, the pregnant woman completes and certifies with her signature an election form that states as follows:

"ABORTION AND SONOGRAM ELECTION

(1) THE INFORMATION AND PRINTED MATERIALS DESCRIBED BY SECTIONS 171.012(a)(1)-(3), TEXAS HEALTH AND SAFETY CODE, HAVE BEEN PROVIDED AND EXPLAINED TO ME.

(2) I UNDERSTAND THE NATURE AND CONSEQUENCES OF AN ABORTION.

(3) TEXAS LAW REQUIRES THAT I RECEIVE A SONOGRAM PRIOR TO RECEIVING AN ABORTION.

(4) I UNDERSTAND THAT I HAVE THE OPTION TO VIEW THE SONOGRAM IMAGES.

(5) I UNDERSTAND THAT I HAVE THE OPTION TO HEAR THE HEARTBEAT.

(6) I UNDERSTAND THAT I AM REQUIRED BY LAW TO HEAR AN EXPLANATION OF THE SONOGRAM IMAGES UNLESS I CERTIFY IN WRITING TO ONE OF THE FOLLOWING:

___ I AM PREGNANT AS A RESULT OF A SEXUAL ASSAULT, INCEST, OR OTHER VIOLATION OF THE TEXAS PENAL CODE THAT HAS BEEN REPORTED TO LAW ENFORCEMENT AUTHORITIES OR THAT HAS NOT BEEN REPORTED BECAUSE I REASONABLY BELIEVE THAT DOING SO WOULD PUT ME AT RISK OF RETALIATION RESULTING IN SERIOUS BODILY INJURY.

___ I AM A MINOR AND OBTAINING AN ABORTION IN ACCORDANCE WITH JUDICIAL BYPASS PROCEDURES UNDER CHAPTER 33, TEXAS FAMILY CODE.

___ MY UNBORN CHILD [~~FETUS~~] HAS AN IRREVERSIBLE MEDICAL CONDITION OR ABNORMALITY, AS IDENTIFIED BY RELIABLE DIAGNOSTIC PROCEDURES AND DOCUMENTED IN MY MEDICAL FILE.

(7) I AM MAKING THIS ELECTION OF MY OWN FREE WILL AND WITHOUT COERCION.

(8) FOR A WOMAN WHO LIVES 100 MILES OR MORE FROM THE NEAREST ABORTION PROVIDER THAT IS A FACILITY LICENSED UNDER CHAPTER 245, TEXAS HEALTH AND SAFETY CODE, OR A FACILITY THAT PERFORMS MORE THAN 50 ABORTIONS IN ANY 12-MONTH PERIOD ONLY:

I CERTIFY THAT, BECAUSE I CURRENTLY LIVE 100 MILES OR MORE FROM THE NEAREST ABORTION PROVIDER THAT IS A FACILITY LICENSED UNDER CHAPTER 245 OR A FACILITY THAT PERFORMS MORE THAN 50 ABORTIONS IN ANY 12-MONTH PERIOD, I WAIVE THE REQUIREMENT TO WAIT 24 HOURS AFTER THE SONOGRAM IS PERFORMED BEFORE RECEIVING THE ABORTION PROCEDURE. MY PLACE OF RESIDENCE IS:_____.

_____ _____

SIGNATURE DATE";

(6) before the abortion is performed or induced, the physician who is to perform or induce the abortion receives a copy of the signed, written certification required by Subdivision (5); and

(7) the pregnant woman is provided the name of each person who provides or explains the information required under this subsection.

SECTION 9. Section 245.011(c), Health and Safety Code, is amended to read as follows:

(c) The report must include:

(1) whether the abortion facility at which the abortion is performed is licensed under this chapter;

(2) the patient's year of birth, race, marital status, and state and county of residence;

(3) the type of abortion procedure;

(4) the date the abortion was performed;

(5) whether the patient survived the abortion, and if the patient did not survive, the cause of death;

(6) the probable post-fertilization age of the unborn child based on the best medical judgment of the attending physician at the time of the procedure;

(7) the date, if known, of the patient's last menstrual cycle;

(8) the number of previous live births of the patient; [~~and~~]

(9) the number of previous induced abortions of the patient;

(10) whether the abortion was performed or induced because of a medical emergency and any medical condition of the pregnant woman that required the abortion; and

(11) the information required under Sections 171.008(a) and (c).

SECTION 10. Every provision in this Act and every application of the provision in this Act are severable from each other. If any provision or application of any provision in this Act to any person, group of persons, or circumstance is held by a court to be invalid, the invalidity does not affect the other provisions or applications of this Act.

SECTION 11. The change in law made by this Act applies only to an abortion performed or induced on or after the effective date of this Act.

SECTION 12. This Act takes effect September 1, 2021.

President of the Senate Speaker of the House

I hereby certify that S.B. No. 8 passed the Senate on March 30, 2021, by the following vote: Yeas 19, Nays 12; and that the Senate concurred in House amendments on May 13, 2021, by the following vote: Yeas 18, Nays 12.

Secretary of the Senate

I hereby certify that S.B. No. 8 passed the House, with amendments, on May 6, 2021, by the following vote: Yeas 83, Nays 64, one present not voting.

Chief Clerk of the House

Approved:

Date

Governor