

No. _____

**In the Supreme Court
of 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

KEN PAXTON
Attorney General of Texas

JUDD E. STONE II
Solicitor General

BRENT WEBSTER
First Assistant Attorney General

NATALIE D. THOMPSON
Assistant Solicitor General
State Bar No. 24088529
Natalie.Thompson@oag.texas.gov

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

BETH KLUSMANN
Assistant Solicitor General

Counsel for Relators

IDENTITY OF PARTIES AND COUNSEL

Relators:

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 Human 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

Appellate and Trial Counsel for Relators:

Ken Paxton

Brent Webster

Judd E. Stone II

Beth Klusmann

Natalie D. Thompson (lead counsel)

Charles K. Eldred

Office of the Attorney General

P.O. Box 12548 (MC 059)

Austin, Texas 78711-2548

Natalie.Thompson@oag.texas.gov

Respondent:

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

Real Parties in Interest:

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, pharma-
cists, and patients

Houston Women’s Reproductive Services, on behalf of itself, its staff, physicians,
nurses, pharmacists, and patients

Southwestern Women’s Surgery Center, on behalf of itself, its staff, physicians,
nurses, pharmacists, and patients

Appellate and Trial Counsel for Real Parties in Interest:

Melissa Hayward
John P. Lewis, Jr.
Hayward PLLC
10501 North Central Expressway,
Suite 106
Dallas, TX 75231
jplewis@haywardfirm.com
mhayward@haywardfirm.com

Marc Hearron
Center for Reproductive Rights
1634 Eye St., NW, Suite 600
Washington, DC 20006
mhearron@reprorights.org

Astrid Ackerman
Nicolas Kabat
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038
aackerman@reprorights.org
nkabat@reprorights.org

Jamie A. Levitt
J. Alexander Lawrence
Claire Abrahamson
Carleigh E. Zeman
Morrison & Foerster LLP
250 W. 55th Street
New York, NY 10019
jlevitt@mofocom
alawrence@mofocom
cabrahamson@mofocom
czeman@mofocom

Julia Kaye
American Civil Liberties Union
Foundation
125 Broad Street, 18th Floor
New York, NY 10004
jkaye@aclu.org

David Donatti
Adriana Pinon
ACLU Foundation of Texas, Inc.
5225 Katy Freeway, Suite 350
Houston, TX 7700
ddonatti@aclutx.org
apinon@aclutx.org

Other Defendants:

Jose Garza, in his official capacity as District Attorney for Travis County

Joe Gonzales, in his official capacity as District Attorney for Bexar County

Kim Ogg, in his official capacity as District Attorney for Harris County

John Creuzot, in his official capacity as District Attorney for Dallas County

Sharon Wilson, in his official capacity as District Attorney for Tarrant County

Ricardo Rodriguez, Jr., in his official capacity as District Attorney for Hidalgo
County

Greg Wilson, in his official capacity as District Attorney for Collin County

TABLE OF CONTENTS

	Page
IDENTITY OF PARTIES AND COUNSEL	i
RECORD REFERENCES	vii
STATEMENT OF THE CASE	viii
ISSUES PRESENTED	xi
Introduction.....	1
STATEMENT OF FACTS	2
I. Texas Abortion Laws.....	2
II. Procedural History	3
Summary of the Argument.....	4
Standard of Review	5
ARGUMENT.....	5
I. The Trial Court Abused Its Discretion by Granting a Temporary Restraining Order Without Jurisdiction.	5
A. Plaintiffs lack standing.....	5
B. Sovereign immunity bars Plaintiffs’ claims.....	7
II. Plaintiffs Cannot Establish a Probable Right to Relief on the Merits.....	8
A. Roe did not erase Texas statutes criminalizing abortion.	9
B. The abortion providers’ due process claim fails.	13
C. The declaratory judgment from Roe v. Wade is not binding on Relators.	15
III. Plaintiffs Did Not Establish the Irreparable Harm Necessary for Temporary Injunctive Relief.....	15
IV. Relators Have No Adequate Appellate Remedy.....	17
PRAYER	17
MANDAMUS CERTIFICATION	18
CERTIFICATE OF SERVICE	18
CERTIFICATE OF COMPLIANCE	18

INDEX OF AUTHORITIES

	Page(s)
Cases	
<i>In re Abbott</i> , 601 S.W.3d 802 (Tex. 2020) (orig. proceeding) (per curiam).....	5, 6
<i>In re Abbott</i> , No. 22-0229, 2022 WL 1510326 (Tex. May 13, 2022).....	11
<i>Acker v. Texas Water Comm’n</i> , 790 S.W.2d 299 (Tex. 1990)	11
<i>Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.</i> , 766 F.2d 715 (2d Cir. 1985)	16
<i>Andrade v. NAACP of Austin</i> , 345 S.W.3d 1 (Tex. 2011)	5
<i>City of El Paso v. Heinrich</i> , 284 S.W.3d 366 (Tex. 2009)	9
<i>City of Longview v. Head</i> , 33 S.W.3d 47 (Tex. App.—Tyler 2000).....	16
<i>Cole v. State</i> , 170 S.W. 1036 (Tex. 1914).....	11, 13
<i>County of Dallas v. Wiland</i> , 216 S.W.3d 344 (Tex. 2007).....	14
<i>Crain v. State</i> , 153 S.W. 155 (1913)	14
<i>Diruzzo v. State</i> , 581 S.W.3d 788 (Tex. Crim. App. 2019)	11

<i>Edgar v. MITE Corp.</i> , 457 U.S. 624 (1982) (Stevens, J., concurring in part and concurring in the judgment).....	16
<i>Fleming Foods of Tex., Inc. v. Rylander</i> , 6 S.W.3d 278 (Tex. 1999).....	9, 10
<i>Heckman v. Williamson County</i> , 369 S.W.3d 137 (Tex. 2012)	5
<i>Holmes v. Morales</i> , 924 S.W.2d 920 (Tex. 1996)	11
<i>Hous. Belt & Terminal Ry. Co. v. City of Houston</i> , 487 S.W.3d 154 (Tex. 2016)	7
<i>J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Intern., Inc.</i> , 534 U.S. 124 (2001)	11
<i>Kenneth D. Eichner, P.C. v. Dominguez</i> , 623 S.W.3d 358 (Tex. 2021).....	15
<i>Klumb v. Houston Mun. Employees Pension Sys.</i> , 458 S.W.3d 1 (Tex. 2015).....	8
<i>Kowalski v. Tesmer</i> , 543 U.S. 125 (2004)	6
<i>Lehman v. Howard</i> , 133 S.W.2d 800 (Tex. App.—Waco 1939, no writ)	15
<i>Massachusetts v. Mellon</i> , 262 U.S. 447 (1923)	12
<i>McCorvey v. Hill</i> , 385 F.3d 846 (5th Cir. 2005)	12
<i>McLane Co., Inc. v. Tex. Alcoholic Beverage Comm’n</i> , 514 S.W.3d 871 (Tex. App.—Austin 2017, pet. denied)	7
<i>Meyers v. JDC/Firethorne, Ltd.</i> , 548 S.W.3d 477 (Tex. 2018).....	6

<i>In re Office of Attorney Gen.</i> , 257 S.W.3d 695 (Tex. 2008) (per curiam)	5, 17
<i>Ohio v. Yellen</i> , 539 F. Supp. 3d 802 (S.D. Ohio 2021)	16
<i>Operation Rescue-Nat'l v. Planned Parenthood of Houston & Se. Texas, Inc.</i> , 975 S.W.2d 546 (Tex. 1998)	16
<i>Pidgeon v. Turner</i> , 538 S.W.3d 73 (Tex. 2017)	9
<i>Planned Parenthood of Greater Ohio v. Hodges</i> , 917 F.3d 908 (6th Cir. 2019)	14
<i>Planned Parenthood of Southeastern Pennsylvania v. Casey</i> , 505 U.S. 833 (1992)	3
<i>Priester v. JP Morgan Chase Bank, N.A.</i> , 927 F.3d 912 (5th Cir. 2019)	12
<i>Roe. Dobbs v. Jackson Women's Health Org.</i> , No. 19-1392, 2022 WL 2276808 (June 24, 2022)	3, 14, 15
<i>Roe v. Wade</i> , 314 F. Supp. 1217 (N.D. Tex. 1970)	2, 15
<i>Roe v. Wade</i> , 410 U.S. 113 (1973)	<i>passim</i>
<i>Sterling v. San Antonio Police Dep't</i> , 94 S.W.3d 790 (Tex. App.—San Antonio 2002)	16
<i>Taylor v. Sturgell</i> , 553 U.S. 880 (2008)	15
<i>Tex. Dep't of State Health Services v. Crown Distrib. LLC</i> , No. 21-1045, 2022 WL 2283170 (Tex. June 24, 2022) (Young, J., concurring)	14

<i>Tex. Dep't of Transp. v. Sefzik</i> , 355 S.W.3d 618 (Tex. 2011).....	7
<i>Tex. Parks & Wildlife Dep't v. Sawyer Tr.</i> , 354 S.W.3d 384 (Tex. 2011)	7
<i>Tex. Workers' Comp. Comm'n v. Garcia</i> , 893 S.W.2d 504 (Tex. 1995).....	5
<i>Texas Dep't of Transp. v. Sunset Transp., Inc.</i> , 357 S.W.3d 691 (Tex. App.—Austin 2011, no pet.).....	8
<i>Town of Shady Shores v. Swanson</i> , 590 S.W.3d 544 (Tex. 2019).....	7
<i>United States v. United Mine Workers of Am.</i> , 330 U.S. 258 (1947).....	16
<i>Vista Healthcare, Inc. v. Tex. Mut. Ins. Co.</i> , 324 S.W.3d 264 (Tex. App.—Austin 2010, pet. denied)	13
<i>Walker v. Packer</i> , 827 S.W.2d 833 (Tex. 1992) (orig. proceeding).....	5
<i>Whole Woman's Health v. Jackson</i> , 141 S. Ct. 2494 (2021) (per curiam)	9
Statutes:	
Tex. Civ. Prac. & Rem. Code § 71.021(b).....	6
Tex. Civ. Prac. & Rem. Code § 37.006(b)	7
Tex. Civ. Stat. art. 4512.1.....	<i>passim</i>
Tex. Civ. Stat. art. 4512.2	xvi
Tex. Civ. Stat. art. 4512.3.....	xvi
Tex. Civ. Stat. art. 4512.6.....	xvi, 3, 13
Tex. Fam. Code ch. 33	2

Tex. Gov’t Code § 311.036(a) 3, 12

Tex. Gov’t Code § 323.007(a)9

Tex. Health & Safety Code ch. 170A.....3

Tex. Health & Safety Code ch. 171.....2

Tex. Health & Safety Code ch. 2452

Tex. Health & Safety Code § 170A.002 14

Texas Government Code § 22.221(b)(1)..... xvi

Other Authorities

25 Tex. Admin. Code § 139.60(c)6

Act of May 13, 2021, 87th Leg., R.S., ch. 62, § 2, 2021 Tex. Sess. Law
 Serv. 1252

Act of May 24, 1973, 63d Leg., R.S., ch. 399, 1973 Tex. Gen. Laws 8832

Act of May 25, 2021, 87th Leg., R.S., ch. 800, § 4, 2021 Tex. Sess.
 Law Serv. 1887 2, 3

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of
 Legal Texts* (2012) 13

Tex. R. App. P. 52.3(e) xvi

Tex. R. Civ. P. 42.....6

RECORD REFERENCES

“App.” refers to the appendix to this petition. “MR.” refers to the mandamus record.

STATEMENT OF THE CASE

Nature of the underlying proceeding: Plaintiffs filed suit seeking declaratory and injunctive relief that Texas’s criminal abortion statutes, which 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 unlawful abortions or be enforced through civil proceedings. 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. The trial court set a temporary injunction hearing for July 12, 2022. MR.81.

Court of Appeals: First Court of Appeals, Houston

Proceedings in the Court of Appeals: Relators filed a petition for writ of mandamus and emergency motion for stay in the First Court of Appeals. No. 01-22-00480-CV. The motion sought an immediate stay of the TRO, and Relators requested mandamus relief by July 5, 2022—seven days from the date of filing. The next day, the First Court ordered the real parties in interest to respond to the emergency motion by 5 p.m., Tuesday, July 5, 2022, and to the petition by 5 p.m., Monday, July 11, 2022.

Because that order constructively denies Relators’ petition and, independently, provides compelling reason for seeking relief in this Court, Relators now file this petition for writ of mandamus and emergency motion for an immediate stay.

STATEMENT OF JURISDICTION

The Court has jurisdiction under Texas Government Code section 22.221(b)(1). Relators first presented their petition for writ of mandamus to the First Court of Appeals, MR.88-127, but that Court has constructively denied relief by setting the deadline for real parties in interest to respond at 5 p.m. the night before the temporary injunction hearing—at which time the TRO will expire on its own terms, MR.86. Relators’ petition will be moot by the time the First Court of Appeals receives full briefing and considers their petition. That court also constructively denied Relators’ emergency motion for a stay pending resolution of their mandamus petition, MR.166-75, by setting the response deadline for 5 p.m. on July 5. Relators respectfully consider this a constructive denial of relief, for which reason they now seek a writ of mandamus from this Court.

And even if the Court of Appeals has not constructively denied relief, Relators have “compelling reason” for seeking a writ of mandamus from this Court without awaiting that court’s ruling. Tex. R. App. P. 52.3(e). Plaintiffs have stated their intent to immediately perform elective abortions while the TRO is in place. MR.6. To be sure, the then-existence of a TRO will not prevent Plaintiffs and their employees from facing prosecution or civil enforcement for violations they commit after that TRO is vacated. But Plaintiffs evidently believe (incorrectly) that the TRO immunizes criminal actions, *see* MR.6, so every day it remains in place is a day that Plaintiffs believe themselves free to perform elective abortions with impunity. And nothing will restore the unborn children’s lives that are being lost as a result. Post hoc enforcement is no substitute, so time is of the essence. It is apparent from the timeline

set by the Court of Appeals that it will not grant mandamus relief vacating the TRO until the day that TRO would expire on its own terms. Such relief is no relief at all. Relators therefore have compelling reason for seeking a writ of mandamus from this Court.

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 give a pregnant woman any substance or commit 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 and the Due Course of Law Clause of the Texas Constitution prohibit deprivations of liberty without fair notice of the conduct that is punishable. Plaintiffs are aware of Texas's criminal prohibitions on enforcement and know that the Attorney General considers these provisions 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 as of 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's implied waiver sovereign immunity extends to a claim alleging a statute has been repealed.
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 elective abortion. Plaintiffs are abortion clinics who wish to immediately violate these criminal prohibitions. They argue that the criminal provisions at issue in *Roe* were impliedly repealed sometime after 1973, and that enforcement would deprive them of fair notice (and thus due process). Plaintiffs' 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. And Plaintiffs are now aware their actions will be treated as criminal. They cannot claim a lack of fair notice if their employees criminally perform abortions, even under cover of a TRO.

This Court should issue an emergency stay and mandamus relief. Should Plaintiffs' employees commit abortions while the TRO is in place, nothing will prevent prosecution once the TRO erroneously prohibiting enforcement is vacated. But prosecuting abortionists will not restore the unborn children's lives lost in the interim. That irreparable loss necessitates this Court's immediate action. Relators therefore respectfully request that this Court immediately stay the TRO and, absent a stay, issue mandamus relief by Wednesday, July 6.

STATEMENT OF FACTS

I. Texas Abortion Laws

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

A three-judge panel declared the laws unconstitutional. *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 constitutional right to abortion, *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. Section 5 of the Act specifically provided for the transfer of the former penal code's articles that were "not repealed" into the Texas civil statutes.

In light of *Roe*'s mandate that States permit elective abortion, Texas later enacted numerous laws regulating those abortions, including informed-consent statutes, health-and-safety regulations, and parental-notice provisions. *See* Tex. Fam. Code ch. 33; Tex. Health & Safety Code chs. 171, 245. Texas, however, never repealed the laws at issue in *Roe*. Just last year, the Texas Legislature twice confirmed that the statutes at issue in *Roe* had never been repealed, either expressly or impliedly. 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 statutes regulating or prohibiting abortion may not be construed to repeal any other statutes regulating or prohibiting abortion, absent an explicit statement to do so. Tex. Gov’t Code § 311.036(a).

C. In 2021, the Legislature passed the Human Life Protection Act of 2021, (which Plaintiffs dub the Trigger Ban); it makes performing most abortions a criminal and civil violation. HB 1280, § 2 (enacting Tex. Health & Safety Code ch. 170A). But the Act does 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 *Roe*. *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 abortion clinics. MR.7-8. They filed suit on behalf of themselves, their staff, physicians, nurses, pharmacists, and patients. MR.7-8. They assert the pre-*Roe* laws have been impliedly repealed and that enforcing them violates due process. MR.25-29. They sought declaratory and injunctive relief against district attorneys with the authority to prosecute, the Attorney General (who can assist in prosecution), and state agencies and their heads who can impose administrative penalties on regulated professionals and entities. MR.8-11, 25-29.

The district court granted a TRO. MR.79-81. The First Court of Appeals constructively denied mandamus relief. MR.86; *see supra* ix-x.

SUMMARY OF THE ARGUMENT

Plaintiffs' lawsuit suffers from multiple jurisdiction defects and their claims are untenable on the merits. Plaintiffs lack standing to obtain an injunction prohibiting criminal enforcement or other disciplinary measures against their employees. Sovereign immunity also bars their claims. The UDJA's waiver of sovereign immunity does not extend to disputes about statutory construction and Plaintiffs have not alleged viable ultra vires claims.

And Plaintiffs' claims fail on the merits. Texas's preexisting criminal prohibitions on abortion remain in force. A federal court declaratory judgment cannot erase a duly enacted statute from Texas law, and Plaintiffs have not identified any legislative enactment expressly repealing these statutes. Plaintiffs cannot surmount the strong presumption against implied repeal based on decisions by a publisher, an *Erie* guess by the Fifth Circuit, or the existence of more than one law criminalizing abortion.

Relators and the people of Texas will be irreparably harmed by the TRO. Although Plaintiffs and their employees can later be prosecuted for crimes committed under cover of a TRO, post hoc enforcement cannot restore the lives of unborn children lost in the interim. The Court should immediately stay the TRO and 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). There is no remedy on appeal from a temporary restraining order. See *In re Office of Attorney Gen.*, 257 S.W.3d 695, 698 (Tex. 2008) (per curiam).

ARGUMENT

I. The Trial Court 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 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," *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 14 (Tex. 2011). When challenging a statute, the 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). Abortion clinics cannot be imprisoned, and Plaintiffs offer no explanation why clinics fear criminal prosecution. Tex. Civ. Stat. art. 4512.1. At most, Plaintiffs point to a regulatory requirement

that they ensure their doctors comply with the Medical Practice Act. 25 Tex. Admin. Code § 139.60(c). But any hypothetical discipline on that basis is not certainly impending. *See In re Abbott*, 601 S.W.3d 802, 812 (Tex. 2020).

2. Plaintiffs purport to bring suit on behalf of a variety of other people. MR.7-8. But under Texas law, injuries to others typically do not suffice. The plaintiff “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); accord *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004). 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. Civ. Prac. & Rem. Code § 71.021(b) (estates); Tex. R. Civ. P. 42 (class actions). As a result, Plaintiffs cannot base their standing on potential injuries to their employees.

3. In federal court, 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 v. Tesmer*, 543 U.S. 125, 129 (2004) (citations omitted). But this Court has never recognized general third-party standing of this sort. It should not do so here.

But even if the Court were to apply federal third-party standing doctrine here, Plaintiffs would still lack standing. A “close relationship” here would permit all employers to bring suit on behalf of their employees. Moreover, there is no identified hindrance to Plaintiffs’ employees bringing suit on their own behalf.

B. Sovereign immunity bars Plaintiffs' claims.

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. "[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). The UDJA supplies only an implied waiver 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). 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.

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 Houston*, 487

S.W.3d 154, 161 (Tex. 2016). But “merely 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.); *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 criminal prohibitions on abortion are no longer part of Texas law and on a purported due process violation premised on alleged lack of notice. MR.18, 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. And as explained below, Plaintiffs have ample notice that violations of Texas’ preexisting law will be considered criminal and enforced accordingly. *See infra* Part II.B. Finally, it is not *ultra vires* for public officials like Relators to disregard a now-overruled declaratory judgment that does not bind him or her, as is the case with the *Roe* judgment. *See infra* Part II.C.

II. Plaintiffs Cannot Establish a Probable Right to Relief on the Merits.

Plaintiffs do not have a probable right to relief on the merits. 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 them because Plaintiffs have notice of the laws and what they require.

Accordingly, Plaintiffs' request for declaratory relief cannot succeed. 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* did not erase Texas statutes criminalizing abortion.

1. *Roe* effectively prevented enforcement of Texas's criminal prohibitions for nearly five decades. But 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). "When a court declares a law unconstitutional, the law remains in place unless and until the body that enacted it repeals it, even though the government may no longer constitutionally enforce it." *Pidgeon v. Turner*, 538 S.W.3d 73, 88 n.21 (Tex. 2017).

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

Plaintiffs 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. 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)), and did not

“alter the sense, meaning, or effect of [any] statute,” *id.* (quoting § 323.007(b)). The 1974 statute recodifying the Penal Code expressly lists the provisions of Vernon’s Texas Penal Code that *were* repealed. *See* Act of May 25, 1973, 63rd Leg., R.S., ch. 399, § 3, 1973 Tex. Gen. Laws 883, 991-95. Absent from that list are Texas Penal Code articles 1191–1194 or 1196. *Id.* It also specifically “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 . . . without reenactment and without altering the meaning or effect of the unrepealed articles.” *Id.* § 5(a), 1973 Tex. Gen. Laws at 995, *see also* 1973 Tex. Gen. Laws at 996a–996g. The preexisting criminal statutes were transferred without alteration.

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 note into Texas law, and commentary from the publishers of Vernon’s does not change Texas law.¹

¹ That these provisions were not repealed is apparent by contrast to other provisions that are marked as “Repealed by” a particular statutory enactment.

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). 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) (there must be “an irreconcilable conflict”). 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). Plaintiffs offer two sources in support of their implied-repeal argument. 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 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. Any criminal conviction would have been vacated as inconsistent with the purported

constitutional right to abortion, so it was accurate to say the statutes were not “enforceable.” *Cf. Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923).

Second, Plaintiffs point to *McCorvey v. Hill*, 385 F.3d 846 (5th Cir. 2005), in which the Fifth Circuit guessed that Texas’s preexisting criminal prohibitions had been repealed. *See id.* at 849. The court noted “regulatory provisions” governing abortion and concluded “[t]hese regulatory provisions cannot be harmonized with provisions that purport to criminalize abortion.” *Id.* 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; “*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 provisions designed specifically to reject it. *E.g.* Tex. Gov’t Code § 311.036(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.”). So even if *McCorvey* had been correct—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 implied repeal. Enforcement was impossible for many years; the Texas Legislature cannot be said to have “repealed” its criminal law 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. That is the case here. When necessary to save the life of the mother, abortion is not criminal, Tex. Civ. Stat. art. 4512.6, so Texas’s other regulations of abortion have effect even though most abortions are criminal. Because both the preexisting criminal prohibitions and the later-enacted regulations have some effect, “total repugnance” is lacking. *Cole*, 170 S.W. at 1037.

* * *

At bottom, Plaintiffs’ theory is that Texas’s preexisting criminal prohibitions have been ignored, so they must have been repealed. But “[t]he bright-line rule” is that “[a] statute is *not* repealed by nonuse or desuetude.” Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 336 (2012) (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 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.

Due process prohibits deprivations of liberty interests without 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). Plaintiffs’ liberty has not been put in jeopardy for pre-June 24 conduct, and, now that Texas law can again be enforced, Plaintiffs can conform their conduct to 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.”); *Crain v. State*, 153 S.W. 155, 156 (1913) (“all persons are presumed to know what the law prohibits one from doing”). Plaintiffs do not lack fair notice. MR.18.

To the extent Plaintiffs’ 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; *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 912 (6th Cir. 2019); *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 also assert that the existence of the trigger law suggests that the Legislature understood the pre-*Roe* laws had been repealed. 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 Relators.

Plaintiffs finally contend that the preexisting criminal provisions cannot be enforced until the *Roe v. Wade* declaratory judgment is vacated. MR.20-21. Relators were not parties to *Roe*, 314 F. Supp. at 1219, and “a judgment *in personam* is binding only on the parties thereto and their privies.” *Lehman v. Howard*, 133 S.W.2d 800, 801 (Tex. App.—Waco 1939, no writ); cf. *Kenneth D. Eichner, P.C. v. Dominguez*, 623 S.W.3d 358, 362 (Tex. 2021). No exception to that blackletter rule applies here. See *Taylor v. Sturgell*, 553 U.S. 880, 892–895 (2008). *Roe* was not a class action or other “representative” case, and there was no tie between the Dallas District Attorney and any Relator akin to a successor-in-interest or a fiduciary relationship. *Id.* at 894–895. 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 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 discipline such as revocation of employees’ medical licenses. See MR.5-9. 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 and their employees will be able to raise their claims in defense if criminal or civil enforcement is necessary.

B. And a court cannot issue an injunction that does not alleviate the plaintiff’s harm. *See 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 where 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. That is because a TRO *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 TRO will not be a defense. *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). Plaintiffs cannot show

that enforcement will be avoided through the TRO, and a court cannot issue an injunction that does not remedy the alleged harm.

IV. Relators Have No Adequate Appellate Remedy.

Relators lack an adequate remedy from the district court's order: they cannot appeal the grant of a temporary restraining order. *In re Office of Attorney Gen.*, 257 S.W.3d at 698. 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 of the TRO, and, absent a stay, mandamus relief by July 6, 2022.

P R A Y E R

The Court should grant the petition and issue a writ of mandamus.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

JUDD E. STONE II
Solicitor General

BRENT WEBSTER
First Assistant Attorney General

/s/ Natalie D. Thompson
NATALIE D. THOMPSON
Assistant Solicitor General
State Bar No. 24088529
Natalie.Thompson@oag.texas.gov

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

BETH KLUSMANN
Assistant Solicitor General

Counsel for Relators

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 29, 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 4,493 words, excluding exempted text.

/s/ Natalie D. Thompson
NATALIE D. THOMPSON

No. _____

In the Supreme Court of 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
1. Temporary Restraining Order (June 28, 2022).....	A
2. Court of Appeals Order (June 29, 2022).....	B
3. Texas Civil Statutes articles 4512.1-.6.....	C
4. House Bill 1280 (2021)	D
5. Senate Bill 8 (2021).....	E

**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,

IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

_____ JUDICIAL DISTRICT

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

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 Cruzot, 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:

/s/ Melissa Hayward

Melissa Hayward
(Texas Bar No. 24044908)
John P. Lewis, Jr.
(Texas Bar No. 12294400)
Hayward PLLC
10501 North Central Expressway, Suite 106
Dallas, TX 75231
jplewis@haywardfirm.com
mhayward@haywardfirm.com

Attorney for Plaintiffs

Marc Hearron
(Texas Bar No. 24050739)
Center for Reproductive Rights
1634 Eye St., NW, Suite 600
Washington, DC 20006 (202) 524-5539
mhearron@reprorights.org

Astrid Ackerman*
Nicolas Kabat*
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038
(917) 637-3631
aackerman@reprorights.org
nkabat@reprorights.org

Jamie A. Levitt*
J. Alexander Lawrence*
Claire N. Abrahamson*
Carleigh E. Zeman*
Morrison & Foerster LLP
250 W. 55th Street
New York, NY 10019
(212) 468-8000
jlevitt@mofocom
alawrence@mofocom
cabrahamson@mofocom
czeman@mofocom

*Attorneys for Whole Woman's Health, Whole
Woman's Health Alliance, Southwestern*

Julia Kaye*
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2633
jkaye@aclu.org

David Donatti (Texas Bar No. 24097612)
Adriana Pinon (Texas Bar No. 24089768)
ACLU Foundation of Texas, Inc.
5225 Katy Freeway, Suite 350
Houston, TX 7700
Tel. (713) 942-8146 Fax: (713) 942-8966
ddonatti@aclutx.org
apinon@aclutx.org

Attorneys for Houston Women's Clinic

Women's Surgery Center, Brookside Women's Medical Center PA d/b/a Brookside Women's Health Center and Austin Women's Health Center, Alamo City Surgery Center PLLC d/b/a Alamo Women's Reproductive Services, Houston Women's Reproductive Services

*Pro hac vice applications forthcoming

**TAB B: COURT OF APPEALS ORDER
(JUNE 29, 2022)**



**COURT OF APPEALS FOR THE
FIRST DISTRICT OF TEXAS AT HOUSTON**

MEMORANDUM ORDER

Appellate case name: In re Ken Paxton, in his official capacity as Attorney General of Texas,
et al.

Appellate case number: 01-22-00480-CV

Trial court case number: 2022-38397

Trial court: 269th District Court of Harris County

The Court requests that the real-parties-in-interest file a response to relators' Emergency Motion for Temporary Relief by 5 p.m., Tuesday, July 5, 2022.

The Court further requests that the real-parties-in-interest file a response to relators' Petition for Writ of Mandamus by 5 p.m., Monday, July 11, 2022.

It is so **ORDERED**.

Judge's signature: /s/ Peter Kelly
Acting individually

Date: June 29, 2022

TAB C: 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 D: 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 E: 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

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below:

Maria Mendoza-Williamson on behalf of Natalie Thompson
Bar No. 24088529
maria.williamson@oag.texas.gov
Envelope ID: 65905593
Status as of 6/29/2022 4:54 PM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Marc Hearron	24050739	MHearron@reprorights.org	6/29/2022 4:46:21 PM	SENT
Melissa Hayward	24044908	MHayward@HaywardFirm.com	6/29/2022 4:46:21 PM	SENT
Natalie Thompson	24088529	natalie.thompson@oag.texas.gov	6/29/2022 4:46:21 PM	SENT