No. 22-0527

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 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

RESPONSE TO PETITION FOR WRIT OF MANDAMUS

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IDENTITY OF PARTIES AND COUNSEL

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	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, physician, nurses, 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
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Respondent:	269th Judicial District Court, Harris County, Texas, Hon. Cory Sepolio presiding
Other Defendants:	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

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

STATEMENT OF THE CASE

Nature of the Case	Plaintiffs filed suit seeking declaratory and injunctive relief that Texas's criminal abortion statutes 1925 TEX. PENAL CODE arts. 1191–1194, 1196, have been repealed and may not be enforced consistent with the due process guaranteed by the Texas Constitution, or are otherwise unenforceable against Plaintiffs. APP.1-35.
Respondent	269th Judicial District Court of Harris County, Judge Cory Sepolio presiding
Respondent's Challenged Action	The District Court entered a Temporary Restraining Order enjoining Relators and the other Defendants from enforcing 1925 TEX. PENAL CODE arts. 1191–1194, 1196. MR.81.
Court of Appeals	First Court of Appeals, Houston
Proceedings in the Court of Appeals:	On June 28, 2022, Relators filed a petition for writ of mandamus and emergency motion for stay in the First Court of Appeals No. 01-22-00480-CV seeking an immediate stay of the TRO and mandamus relief. The First Court ordered the Plaintiffs 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. MR.86.

STATEMENT OF JURISDICTION

The Court's jurisdiction arises under Texas Government Code § 22.002. In their Statement of Jurisdiction, Relators argued that the First Court of Appeals constructively denied the mandamus petition by setting the response deadline at 5 p.m. on July 11, the day before the TRO is set to expire, because the petition would be moot by the time it is fully considered. That argument would apply equally to this Court, which set the same response deadline. Since Relators' filing, however, a district-attorney defendant agreed to extend the TRO, and Plaintiffs have accordingly asked the district court to extend the TRO against him. *See* Tex. R. Civ. P. 680 (TRO may be extended beyond 14 days if "the party against whom the order is directed consents that it may be extended for a longer period."). The mandamus petitions in this Court and the Court of Appeals are therefore not constructively denied and will not be mooted.

ISSUE PRESENTED

Whether the district court clearly abused its discretion in granting a TRO against Relators precluding their enforcement of Texas's pre-*Roe* statutes banning abortion.

INTRODUCTION

Relators' petition for a writ of mandamus should be denied. The district court acted well within its discretion in granting a TRO blocking enforcement of the 1925 statutes that banned abortion in Texas.

Texas's Pre-*Roe* Ban cannot be reconciled with a slew of later-enacted statutes that expressly permit and regulate abortion and enable the granting of licenses to facilities that provide abortion. For this very reason, the Fifth Circuit has held that the Pre-*Roe* Ban has been repealed at least by implication. Even the Texas statewide prosecutors' association believes "cannot be reconciled" with later enacted laws and thus is causing widespread "confusion."[1] These statutes also cannot be enforced consistent with due process: if prosecutors cannot tell whether the Pre-*Roe* Ban is in force, a person of ordinary intelligence cannot be deemed to know either.

Relators rely principally on legislative dicta from 2021 purporting to interpret and override decades of legislative enactments that impliedly repealed the Pre-*Roe* Ban. Pet. for Writ of Mandamus ("Mandamus Pet.)

[1] "Interim Update: Abortion-Related Crimes after *Dobbs*," Texas District and County Attorneys Association (June 24, 2022), *available* at https://www.tdcaa.com/legislative/dobbs-abortion-related-crimes/.

2-3, 12-13 (Tex. June 29, 2022). But it is well established that "one session of the Legislature [does not] have the power to construe the Acts or to declare the intent of a past session." *Pruett v. Harris Cnty. Bail Bond Bd.*, 249 S.W.3d 447, 454 (Tex. 2008) (quoting *Rowan Oil Co. v. Texas Emp. Comm'n*, 263 S.W.2d 140, 144 (Tex. 1953)). Indeed, the very enactment on which Relators rely undermines their argument: the Legislature determined that a criminal ban on abortion would not take effect until 30 days after the U.S. Supreme Court issues its judgment in a decision overruling *Roe v. Wade*. The district court's TRO blocking premature enforcement of an abortion ban is consistent with the Legislature's enactment; Relators' position would subvert the Legislature's authority.

The district court also acted well within its discretion in determining that Plaintiffs would be irreparably harmed absent injunctive relief. Plaintiffs are suffering irreparable harm to their vested property rights in operating their businesses due to explicit threats to enforce the Pre-*Roe* Ban.

Indeed, in their zest to destroy Petitioners' vested property rights, Relators go so far as to threaten criminal prosecution (an authority they

lack) for actions Texans take *in reliance on a court order* if it is later overruled. Mandamus Pet. 16-17. Relators' theory that temporary restraining orders and injunctions do not protect against prosecution, but merely delay it, threatens to severely undermine the power of Texas district and intermediate appellate courts in circumstances far beyond this case—unless this Court quickly quashes Relators' intimidation campaign.

STATEMENT OF FACTS

A. The Pre-*Roe* Ban

Before *Roe*, abortion was prohibited and criminalized in Texas under Texas Penal Code Articles 1191-94, and 1196, which were enacted in 1925. Articles 1191-94 and 1196 (together, "the Pre-*Roe* Ban") made it a crime to provide an abortion except in cases of life-endangerment. TEX. PENAL CODE arts. 1191-94, 1196.

In 1973, the Supreme Court affirmed the federal district court's judgment that Texas's Pre-*Roe* Ban was unconstitutional, holding that "the Texas abortion statutes, as a unit, must fall." *Roe*, 410 U.S. at 166. Shortly after *Roe* was decided, on May 24, 1973, the Texas Legislature enacted a new Penal Code that removed the Pre-*Roe* Ban. *See* Act of May 24, 1973, S.B. 34, 63rd Leg., Reg. Sess., ch. 399, § 5(a). Although the Pre-

Roe Ban imposed only criminal (not civil) liability, the statutes were initially transferred to Chapter 6-1/2 of Title 71 of the Civil Statutes. 1973 Tex. Gen. Laws 995 (codified at TEX. REV. CIV. STAT. arts. 4512.1–4512.4, 4512.6 (West 1974)). But since at least 1984, the Texas Civil Statutes also have not contained the text of the Pre-*Roe* Ban. Indeed, the Texas Legislature's website, which makes Texas statutes available, did not contain *any* reference to the Pre-*Roe* Ban.

B. Abortion Laws in Texas Since *Roe*

In the decades since *Roe*, the Texas Legislature enacted a comprehensive scheme of laws expressly permitting and regulating abortion and licensing facilities for the provision of legal abortions. For example, Texas law defines how patients can give informed consent for a legal abortion, TEX. HEALTH & SAFETY CODE §§ 171.011–171.018, permits and regulates the provision of medication abortion, *id*. §§ 171.061–171.066, and regulates which abortion procedures may be used, *id*. §§ 171.151–171.153.

Texas's comprehensive legislative scheme allowing and regulating abortion led the Fifth Circuit to conclude: "[t]he Texas statutes that criminalized abortion (former Penal Code Articles 1191, 1192, 1193, 1194 and

1196) and were at issue in *Roe* have . . . been repealed by implication" because abortion regulations passed thereafter could not be "harmonized with provisions that purport to criminalize abortion." *McCorvey v. Hill*, 385 F.3d 846, 849 (5th Cir. 2004); *see infra* Part I.B.2.

In 2021, the Legislature enacted House Bill 1280, 87th Leg., Reg. Sess. (Tex. 2021) (the "Trigger Ban"), which, among other things, criminalizes virtually all abortions with narrow medical exceptions if *Roe* is overturned. The Trigger Ban, now codified at TEX. HEALTH & SAFETY CODE §§ 170A.001 – 170A.007, is subject to a complicated delayed enforcement scheme providing that its operative provisions "take[] effect, to the extent permitted," 30 days after the "issuance" of any U.S. Supreme Court "judgment" in a decision overruling *Roe*. Paradoxically, the 2021 Texas Legislature included a legislative finding in H.B. 1280 and another bill regulating abortion, Texas Senate Bill 8, 87th Leg., Reg. Sess. (Tex. 2021) ("S.B. 8"), that Texas's Pre-*Roe* Ban was "never repealed, either expressly or by implication." H.B. 1280 § 4; S.B. 8 §§ 2, 5.

C. Threats to Enforce the Pre-*Roe* Ban on the Provision of Abortion Care Following *Dobbs*

On June 24, 2022, the U.S. Supreme Court issued its opinion in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, ___ U.S. ___, __ S. Ct. __, 2022 WL 2276808 (June 24, 2022), overruling *Roe*.

That same day, within hours of the release of the *Dobbs* opinion, Relator Ken Paxton, Attorney General of Texas, issued an "Advisory on Texas Law Upon Reversal of *Roe v. Wade*" (the "Advisory"). MR.34-35. Mr. Paxton acknowledged that the Texas Legislature delayed the effectiveness of the Trigger Ban, a comprehensive legislative enactment to prohibit abortions until months after the release of the opinion in *Dobbs* at which point abortion will be "clearly illegal in Texas." MR.34. Yet Mr. Paxton also raised the specter that Texas district attorneys might "pursue criminal prosecutions based on violations" of the Pre-*Roe* Ban starting on June 24, 2022. MR.35.

Shortly after Mr. Paxton's Advisory was released, the Pre-*Roe* Ban appeared without notice on the Texas Legislature's website, but with a cautionary note that the Pre-*Roe* Ban was "held to have been impliedly

repealed in *McCorvey v. Hill*, 385 F.3d 846 (5th Cir. 2004)" prior to the passage of S.B. 8 and the Trigger Ban.[2]

In briefing on their mandamus petitions here and in the First Court of Appeals, Relators directly threatened Plaintiffs with imminent prosecution—even for performing abortions in reliance on a court order—stating that "[s]hould Plaintiffs' employees commit abortions while the TRO is in place, nothing will prevent them from being prosecuted for those crimes once the TRO erroneously prohibiting enforcement is vacated." Mandamus Pet. 1; MR.102. Defendant Sharen Wilson, Tarrant County District Attorney, also threatened criminal enforcement of the Pre-*Roe* Ban.[3]

Legal abortion is one of the safest medical procedures in the United States. The risk of death associated with carrying a pregnancy to term

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[2] VERNON'S TEX. CIV. STATS. ch. 6-1/2 (June 24, 2022), *available at* https://statutes.capitol.texas.gov/Docs/SDocs/VERNON'SCIVILSTATUTES.pdf.

[3] The following statement was posted to the Tarrant County District Attorney's Twitter account on June 24, 2022:

> We do not choose which laws we follow. My oath and that of everyone in my office is to preserve, protect and defend the Constitution and the laws of the United States and Texas. Prosecutors

is approximately 14 times higher than that associated with abortion, and every pregnancy-related complication is more common among those giving birth than among those having abortions. Plaintiffs have offered abortion care and reproductive services to patients in Texas for decades. Plaintiffs strongly believe that the provision of abortion care to patients in Texas is a medical and social necessity. Plaintiffs wish to continue providing early abortions to patients in Texas in compliance with law. APP.24.

Plaintiffs were already complying with Senate Bill 8, enacted in 2021, which prohibits abortions beginning at approximately six week's pregnancy, before many patients know they are pregnant. But based on the threat of enforcement of the Pre-*Roe* Ban, Plaintiffs ceased providing

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> do not make the law – we follow it. We followed *Roe v. Wade* when it was the law and we will follow Texas state law now.
>
> Every case presented to the Tarrant County Criminal District Attorney's Office will be reviewed. If the facts warrant prosecution, then the case will be presented to a Grand Jury for consideration.

@TarrantCountyDA, Twitter (June 24, 2022), https://twitter.com/TarrantCountyDA/status/1540448808756301824/photo/1.

abortions altogether on June 24, approximately two months (or more) before Texas' post-*Roe* abortion ban takes effect. Plaintiffs are actively suffering harm to their businesses; many of them have already been forced to lay off staff months before the abortion ban takes effect.

Were Plaintiffs to offer pre-six-week abortion services in Texas while the legality of doing so remains uncertain, they would risk severe and irreparable criminal, civil, and disciplinary action including at least two years' imprisonment, substantial per-violation fines, and permanent loss of licenses or other authorizations that permit them to provide healthcare to patients in Texas and in which they have vested property rights. Their physicians, nurses, and pharmacists on which they rely to run their businesses risk similar consequences. Thus, Plaintiffs are effectively precluded from testing the constitutionality of such actions in defense to a criminal prosecution, as to do so would force them to endure irreparable injury for which there is no adequate remedy at law.

Plaintiffs accordingly face immediate harm, for which they have no adequate remedy at law, if they provide early abortions that they reasonably believe to be legal, unless the district court grants declaratory relief

confirming the unenforceability of the Pre-*Roe* Ban and injunctive relief preventing unlawful enforcement of the Pre-*Roe* Ban against them.

D. Proceedings Below and in This Court

On June 27, 2022, Plaintiffs filed a Petition for Declaratory Judgment and Application for Temporary Restraining Order and Temporary Injunction in Harris County. APP.1-35. On June 28, 2022, the 281st Civil District Court of Harris County granted the Temporary Restraining Order ("TRO"),and scheduled a temporary-injunction hearing for July 12. MR.79-82.

On June 28, Relators filed a petition for writ of mandamus and emergency motion for stay in the First District Court of Appeals. MR.87. The next day, June 29, the court of appeals ordered a response to stay motion by 5 p.m. on July 5, and a response to the petition by 5 p.m. on July 11. Supp.MR.141-45.

That same day, June 29, without allowing the court of appeals to consider their motion, Relators filed a nearly identical petition and emergency stay motion with this Court. On July 1, the Court stayed the TRO as to Relators only.

On July 8, Plaintiffs moved for an agreed extension of the TRO against Defendant John Creuzot, and to vacate the temporary-injunction hearing set for July 12. Mot. to Extend TRO at 2, No. 2022-38397 (269th Dist. Ct. July 8, 2022).

SUMMARY OF ARGUMENT

Plaintiffs have standing because (1) Plaintiffs face an impending threat of criminal prosecution and discipline, including clinic license revocation, if their physicians provide abortions that violate state law at their clinics, and (2) that threat of the enforcement against Plaintiffs' employees, owners, physicians, and other staff means that Plaintiffs cannot operate their businesses in which they have vested property rights.

Sovereign immunity does not shield Relators' actions from judicial review because (1) Plaintiffs' claims involve a facial constitutional challenge to the validity of the Pre-*Roe* Ban on due process grounds, and thus fall directly within the scope of claims permitted under Texas' Uniform

Declaratory Judgment Act, Texas Civil Practice and Remedies Code § 37.001, *et seq*. ("UDJA"), and (2) to the extent that Plaintiffs' claims challenging the validity of the Pre-*Roe* Ban involve questions of statutory interpretation, they nonetheless constitute a challenge to the validity of the Pre-*Roe* Ban that is subject to the implied waiver of sovereign immunity under the UDJA.

Even if Plaintiffs' claims were seeking a declaration of rights under the Pre-*Roe* Ban not subject to the UDJA's sovereign immunity waiver, the same claims are properly brought against the Relator state officials under the *ultra vires* doctrine because (1) Relators seek to enforce the Pre-*Roe* Ban, a long-repealed statute that the Relator state officials therefore have no authority to enforce, (2) Relators' threatened enforcement of the Pre *Roe* Ban does not comport with the Texas Constitution's guarantee of due process, and (3) the declaratory judgment in *Roe* voiding the Pre-*Roe* Ban remains in effect and binding on any state officials who are successors-in-interest to the government parties in *Roe*, including the Relator state officials. Relators conceded at the TRO hearing that attempting to enforce a repealed statute would be *ultra vires*.

The District Court did not abuse its discretion in finding that Plaintiffs established a probable right to relief on the merits. The Texas Legislature repealed the Pre-*Roe* Ban by removing it from the statute books and by passing a comprehensive scheme of laws regulating the same conduct that cannot be reconciled with the Pre-*Roe* Ban. Enforcing the Pre-*Roe* Ban would violate due process because a person of ordinary intelligence cannot tell whether early abortions are currently prohibited in Texas when even Texas prosecutors do not know. Additionally, the final declaratory judgment issued in *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970) has not been set aside.

The District Court did not clearly abuse its discretion in finding that Plaintiffs established the irreparable harm necessary for temporary injunctive relief. The District Court has jurisdiction to enjoin enforcement of the Pre-*Roe* Ban because its enforcement would violate due process and cause irreparable injury to Plaintiffs' vested property rights through devastating criminal and civil liability, the premature closing of otherwise legal businesses, substantial per-violation fines, and the loss of medical and facility licenses. The District Court also has jurisdiction to enjoin enforcement of the Pre-*Roe* Ban because the Ban is enforced

through noncriminal means that are subject to a civil court's equity powers. Finally, Plaintiffs face a real and imminent threat of prosecution, as Relators have explicitly threatened enforcement actions against Plaintiffs for any abortions performed that would violate the Pre-*Roe* Ban.

Accordingly, Relators' Petition should be denied.

ARGUMENT

I. THE DISTRICT COURT DID NOT CLEARLY ABUSE ITS DISCRETION IN GRANTING A TRO PRECLUDING ENFORCEMENT OF THE PRE-*ROE* BAN.

Relators fall far short of meeting their heavy burden on mandamus. Mandamus is an "extraordinary" remedy, which does "not issue[] as a matter of right, but at the Court's discretion." *In re Allstate Indem. Co.*, 622 S.W.3d 870, 883 (Tex. 2021) (orig. proceeding) (quoting *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 138 (Tex. 2004) (orig. proceeding)). Mandamus is only appropriate where the relator satisfies the "heavy" burden of establishing a "clear abuse of discretion" and that there is no adequate remedy by way of appeal. *See In re Columbia Med. Ctr. of Las Colinas*, 290 S.W.3d 204, 207 (Tex. 2009) (orig. proceeding); *In re CSX Corp.*, 124 S.W.3d 149, 151 (Tex. 2003) (orig. proceeding).

A lower court abuses its discretion only when "'it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial

error of law' or if it clearly fails to correctly analyze or apply the law." *In re Ford Motor Co.*, 165 S.W.3d 315, 317 (Tex. 2005) (orig. proceeding) (quoting *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992)). Here, Relators do not and cannot show that the TRO was a clear abuse of discretion.

A. The District Court Properly Concluded It Has Jurisdiction

1. Plaintiffs have standing.

Texas's standing doctrine parallels the test for Article III standing. *In re Abbott*, 601 S.W.3d 802, 807 (Tex. 2020). Standing requires Plaintiffs to allege (1) "personal injury" that is (2) "fairly traceable to the defendant's allegedly unlawful conduct" and (3) "likely to be redressed by the requested relief." *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 154 (Tex. 2012) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

Showing "injury in fact" requires a plaintiff to allege "an invasion of a legally protected interest which is (a) concrete and particularized," and (b) "'actual or imminent, not conjectural or hypothetical.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (quoting *Allen*, 468 U.S. at 756; *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). In a pre-enforcement challenge to a criminal law, a plaintiff must only establish "threatened injury" that is "certainly impending." *In re Abbott*, 601 S.W.3d at

812 (quoting *Whitmore*, 495 U.S. at 158). Additionally, injury to a plaintiff's property interest in operating their business readily suffices for standing. *Pike v. Texas EMC Mgmt., LLC*, 610 S.W.3d 763, 775 (Tex. 2020) (holding corporations may establish standing where there is "injury to the property of a corporation, or the impairment or destruction of its business" (quoting *Wingate v. Hajdik*, 795 S.W.2d 717, 719 (Tex. 1990))).

As an initial matter, Plaintiffs themselves face an impending threat of discipline, including clinic license revocation, if their physicians provide abortions that violate state law at their clinics. Plaintiffs are licensed and regulated by Relator Texas Health and Human Services Commission (HHSC) and its Executive Commissioner, Relator Cecile Erwin Young. APP.9. HHSC may take disciplinary or civil action against any licensed facility that fails to ensure physicians working in the facility comply with the Medical Practice Act or its rules. *See* 25 TEX. ADMIN. CODE § 139.60(c); *see also id*. § 135.4(f), (l); TEX. HEALTH & SAFETY CODE §§ 243.014–.015, 245.015, 245.017; MR.168 (acknowledging that the relevant state agency "can impose administrative penalties if the regulated . . . entity commits certain infractions"). The Medical Practice Act, in

turn, provides that a physician "commits a prohibited practice if" the physician "commits unprofessional or dishonorable conduct," TEX. OCC. CODE § 164.052(a)(5), including "commit[ing] an act that violates any state . . . law if the act is connected with the physician's practice of medicine," § 164.053(a)(1).

Moreover, Plaintiffs are injured because the threat of the Pre-*Roe* Ban's enforcement against individuals—Plaintiffs' employees, owners, physicians, and other staff—means that Plaintiffs cannot operate. Indeed, the threat of enforcement against these individuals led Plaintiffs to cease providing abortion care until the TRO issued. That is more than enough to confer standing on Plaintiffs, without needing to show third-party standing. See *Pike*, 610 S.W.3d at 775.[4]

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[4] Where injury to the plaintiff is established, it is of no moment if that harm flows from the threat of government action against a third-party. See Wright, Miller, & Cooper, 13A FED. PRAC. & PROC. JURIS. § 3531.5 (3d ed.) ("Designation of a proper public official as defendant does not require that the official's acts be aimed directly at the plaintiff."); *Wine & Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36, 45-46 (1st Cir. 2005) (franchisor of independently owned Class A liquor retailors had standing to challenge statute that prohibited Class A liquor retailers from engaging in business activities typical of a franchise relationship, even though the franchisor plaintiff did not have a Class A liquor license and was not subject to any enforcement action or penalty under the statute's terms); *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445,

Indeed, there is nothing novel about an employer bringing a declaratory judgment action on behalf of their employees when their interests are closely aligned. Courts in Texas and federal courts regularly permit employers to bring actions on behalf of their employees or patients. *See, e.g.*, *In re UPS Ground Freight, Inc.*, 629 S.W.3d 441, 450–51 (Tex. Ct. App.–Tyler 2020) (UPS "may assert rights to privacy on behalf of its employees"); *Tarrant Cnty. Hosp. Dist. v. Hughes*, 734 S.W. 675, 677 (Tex. Ct. App.–Fort Worth 1987) (hospital asserting privacy rights on behalf of blood donors); *see also Illinois Cent. Ry. Co. v. Fordice*, 30 F. Supp. 2d 945, 951 (S.D. Miss. 1997) (holding that employer had standing to bring action on behalf of employees because the employer had shown by competent proof that its employees' rights would be implicated by the challenged law).

Doing so ensures complete relief: because Plaintiffs' ability to continue to operate their clinics is inextricably interwoven with their employees' interests not to be prosecuted for performing abortions at those

456 (5th Cir. 2017) (individual Medicaid beneficiaries and recipients of care from Planned Parenthood had standing to sue state officials who terminated Planned Parenthood's Medicaid provider agreement, even though their injury was caused indirectly).

clinics, Plaintiffs defend their employees' interests on their behalf to ensure that the relief sought will redress this dispute. *Lujan*, 504 U.S. at 560–61. Moreover, this action does not require participation of individual employees as their interests are interwoven with the Plaintiffs'. *Hunter v. Branch Banking & Tr. Co.*, No. 3:12-cv-2437-D, 2013 WL 4052411, at *7 (N.D. Tex. Aug. 12, 2013) ("requests for declaratory or injunctive relief rarely require individual determinations").

Relators do not contest that the other two standing elements are met, nor could they. The causation element is satisfied because each Defendant has some role in enforcement of the Pre-*Roe* Ban. *See* APP.7-11; Mandamus Pet. 3 (describing Defendants' enforcement roles); *Bronson v. Swensen*, 500 F.3d 1099, 1110 (10th Cir. 2007) ("the causation element of standing requires the named defendants to possess authority to enforce the complained-of provision"). And a declaration that the Pre-*Roe* Ban could not be enforced would plainly protect Plaintiffs against Defendants' continued enforcement threats.

2. Sovereign Immunity Does Not Shield Relators' Actions from Judicial Review.

(i) The UDJA's waiver of sovereign immunity applies.

The district court did not abuse its discretion in concluding it had jurisdiction over the claims against the Relators pursuant to the Texas UDJA. The UDJA provides that "[a] person . . . whose rights, status, or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder." TEX. CIV. PRAC. & REM. CODE § 37.004(a). Where, as here, parties seek a "declaratory judgment action that challenges the validity of a statute," the UDJA waives sovereign immunity in suits against the state and its political divisions. *Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 622 (Tex. 2011).

Relators attempt to narrowly circumscribe a court's jurisdiction under these circumstances to "constitutional challenges to ordinances and statutes," and further allege that Plaintiffs' challenge to the validity of the Pre-*Roe* Ban on constitutional due process grounds is a "bare statutory construction claim" to which the UDJA's waiver of sovereign immun-

ity does not apply. Mandamus Pet. 7 (quoting *McLane Co. v. Tex. Alcoholic Bev. Comm'n*, 514 S.W.3d 871, 875 (Tex. Ct. App. – Austin 2017)). This mischaracterizes both Plaintiffs' allegations and the applicable law.

First, Plaintiffs' claims involve a constitutional challenge to the validity of Pre-*Roe* Ban. Plaintiffs seek a declaratory judgment that the Pre-*Roe* Ban is invalid because, *inter alia*, it cannot be enforced consistent with the constitutional right to due process. APP.15-18, 29-30. A challenge to the validity of a statute on constitutional due process grounds falls directly within the scope of claims permitted under the UDJA and so Relators do not have immunity from Plaintiffs' claims. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 n.6 (Tex. 2009) (noting that UDJA waives sovereign immunity for claims challenging the validity of a statute or ordinance because it requires service on the attorney general in suits where a statute or ordinance is alleged to be unconstitutional); *Anding v. City of Austin*, No. 03-18-00307-CV, 2020 WL 2048255, at *4 (Tex. Ct. App. – Austin Apr. 29, 2020) (holding that a claim that an ordinance was unconstitutionally vague and invited arbitrary and discriminatory enforcement was subject to the UDJA's sovereign immunity waiver).

Second, Relators' argument that the UDJA's immunity waiver does not extend to a suit challenging the validity of a statute based on grounds other than unconstitutionality is also wrong. This Court has rejected the argument that the UDJA sovereign immunity waiver applies only "to suits involving constitutional invalidation and not to those involving statutory interpretation," reasoning that the "the language in the [UDJA] does not make that distinction." *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 634-35; *see also Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 n.6 (Tex. 1995) ("The [UDJA] expressly provides that persons may challenge ordinances or statutes, and that governmental entities must be joined or notified. . . The Act thus contemplates that governmental entities may be—indeed, must be—joined in suits to construe their legislative pronouncements."). At a minimum, where, as here, Plaintiffs are "challenging a statute's validity" based on "an alleged conflict between . . . statutes," the UDJA waives sovereign immunity. *McLane*, 514 S.W.3d at 876 n.2; *see also City of Dallas v. Texas EZPAWN, L.P.*, No. 05-12-01269-CV, 2013 WL 1320513, at *3 (Tex. App.—Dallas Apr. 1, 2013).

(ii) The same claims can be brought under the *ultra vires* Doctrine.

Regardless, Plaintiffs' claims are properly brought against the Relator state officials in their official capacity under the *ultra vires* doctrine. *Sefzik*, 355 S.W.3d at 621 ("[W]hen the plaintiff seeks a declaration of his or her rights under a statute or other law," "the state agency remains immune," but "[v]ery likely, the same claim could be brought against the appropriate state official under the *ultra vires* exception."). Pursuant to the *ultra vires* doctrine, "claims may be brought against a state official for nondiscretionary acts unauthorized by law." *Id.* "Such lawsuits are not against the state and thus are not barred by sovereign immunity." *Id.*

An officer acts without legal authority if he "exceeds the bounds of his granted authority or if his acts conflict with the law itself." *Hous. Belt & Terminal Ry. Co. v. City of Hous.*, 487 S.W.3d 154, 158 (Tex. 2016). Plaintiffs' pleadings adequately allege that Relators' threatened enforcement of the Pre-*Roe* Ban would exceed their authority and be *ultra vires* acts for three reasons. *First*, as detailed below, Plaintiffs allege that enforcement of the Pre-*Roe* Ban would be *ultra vires* because the Pre-*Roe*

Ban has been repealed. Counsel for Relators conceded at the TRO hearing that enforcing a repealed law would be *ultra vires*: "And as far as an agency which took away a license under a law that doesn't exist, I think I'd have to agree that'd be *ultra vires*. Or a DA to prosecute someone under a law that doesn't exist, I think I would have to agree that's *ultra vires*." Supp.MR.41.

Second, Plaintiffs allege that Relators' threatened enforcement of the Pre-*Roe* Ban would be *ultra vires* because it does not comport with the Texas Constitution's guarantee of due process. APP.28-29; *see Sefzik*, 355 S.W.3d at 621 (suits to require state officials to comply with constitutional provisions are not prohibited by sovereign immunity). And *third*, Plaintiffs allege it is *ultra vires* for the Relators to enforce the Pre-*Roe* Ban because those statutes are subject to a final declaratory judgment that they are invalid and unenforceable. APP.28-29.

Each of these allegations fits well within the *ultra vires* doctrine because each alleges that enforcement of the Pre-*Roe* Ban would be unauthorized by law.

B. The District Court Did Not Clearly Abuse Its Discretion in Concluding that Plaintiffs Established a Probable Right to Relief on the Merits.

1. The Pre-*Roe* Ban Has Been Repealed Expressly or by Implication.

The Pre-*Roe* Ban has been repealed either expressly or by implication. Relators argue that *Roe* did not erase Texas statutes criminalizing abortion—but the Texas Legislature did. Indeed, for decades, the text of the Pre-*Roe* Ban has been entirely absent from Texas's statutes. The Legislature removed the abortion ban from the Penal Code in 1973 (*see* Act of May 24, 1973, S.B. 34, 63rd Leg., Reg. Sess., ch. 399, § 5(a)), and it has not been included in that Code since. Although the statutes were initially transferred to Chapter 6-1/2 of Title 71 of the Civil Statutes. 1973 Tex. Gen. Laws 995 (codified at TEX. REV. CIV. STAT. arts. 4512.1–4512.4, 4512.6 (West 1974)), beginning in 1984, Articles 4512.1 to 4512.4 and 4512.6 in the Civil Statutes also did not include the text of the statutes that Relators would have enforced today.

Until June 24, 2022, the Texas Legislature's website, which posts the text of Texas statutes, did not contain any reference to the pre-*Roe* statutes—not even a disclosure that the statutes existed but were held unconstitutional. The only statute in Chapter 6-1/2 that was referenced

in any way was article 4512.5, the single provision not at issue in *Roe* and not an abortion ban. MR.54. This is in stark contrast with other Texas statutes that have been declared unconstitutional, the text of which has nevertheless remained in the statute books. *See, e.g.*, TEX. PENAL CODE § 21.06.

Meanwhile, successive Texas Legislatures enacted a comprehensive set of statutes permitting and regulating abortion. Those later enactments are incompatible with, and therefore clearly supplant, the Pre-*Roe* Ban. That is precisely what the Fifth Circuit concluded in 2004 in a unanimous decision authored by Judge Edith Jones, which held that Texas's pre-*Roe* statutes banning abortion "have, at least, been repealed by implication." *McCorvey*, 385 F.3d at 849.

Citing this Court's leading decision on the standard for implied repeal, the Fifth Circuit explained that the Texas Legislature has enacted a comprehensive scheme "regulat[ing] the practices and procedures of abortion clinics." *Id*. (citing *Gordon v. Lake*, 356 S.W.2d 138, 139 (Tex. 1962)). "These regulatory provisions cannot be harmonized with provisions that purport to criminalize abortion. There is no way to enforce both

sets of laws; the current regulations are intended to form a comprehensive scheme—not an addendum to the criminal statutes struck down in *Roe*." *Id*.; *accord Weeks v. Connick*, 733 F. Supp. 1036, 1038 (E.D. La. 1990) ("[I]t is clearly inconsistent to provide in one statute that abortions are permissible if set guidelines are followed and in another provide that abortions are criminally prohibited."). For that reason, the Fifth Circuit rejected a motion to reopen the final judgment in *Roe* for new evidence, explaining that doing so would be pointless because "[s]uits regarding the constitutionality of statutes become moot once the statute is repealed," as Texas's Pre-*Roe* Ban is. *McCorvey*, 385 F.3d at 849.[5]

The Fifth Circuit's decision in *McCorvey* was correct. "Where a later enactment is intended to embrace all the law upon the subject with which it deals, it repeals all former laws relating to the same subject . . . ." *Gordon*, 356 S.W.2d at 139.

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[5] Judge Jones wrote this on behalf of a unanimous panel, while also penning a concurrence in which she expressed hope that the U.S. Supreme Court would revisit *Roe*. *See id*. at 850–53 (Jones, J., concurring). As she correctly explained in her concurrence, reopening the district court's judgment in *Roe* could not "turn back Texas's legislative clock to reinstate the laws, no longer effective, that formerly criminalized abortion." *Id*. at 850 (Jones, J., concurring).

That is the case here. Over the course of multiple decades, Texas Legislatures enacted a comprehensive scheme to grant licenses to abortion facilities and ambulatory surgical centers specifically for the purpose of allowing those facilities to legally provide abortion and to regulate such provision. *See, e.g.*, TEX. HEALTH & SAFETY CODE ch. 245 (Texas Abortion Facility Reporting and Licensing Act). Indeed, Texas law allows abortions to be performed without an abortion-facility license or ambulatory surgical center license at hospitals and at physician offices that are not used substantially for the purpose of performing abortions. TEX. HEALTH & SAFETY CODE § 245.004(a). Texas law defines how patients can give informed consent for a legal abortion and contains exceptions to the informed consent requirements. *Id.* §§ 171.011–171.018. Texas law permits and extensively regulates the provision of medication abortion. *Id.* §§ 171.061–171.066. Texas law also permits abortion before cardiac activity is detectable, *see id.* § 171.204, prohibits it with criminal liability starting at 20 weeks post-fertilization, *id.* §§ 171.041–171.048, and regulates which procedures may be used, *id.* §§ 171.151–171.154 (prohibiting D&E abortions but expressly allowing suction abortions).

This comprehensive regulatory scheme expressly licensing, allowing, and regulating the provision of abortion is repugnant to and cannot be reconciled with the pre-*Roe* statutes' near-total ban on abortion. As the Fifth Circuit concluded, "[t]here is no way to enforce both sets of laws." *McCorvey*, 385 F.3d at 849. If ever there were circumstances warranting a finding of implied repeal, it is here.

Relators' arguments, if accepted, would eviscerate numerous Texas statutes and the implied-repeal doctrine itself, effectively overruling *Gordon*, 356 S.W.2d at 139. There is no textually supported way to uphold both the Pre-*Roe* Ban and the decades of inconsistent, later-enacted abortion statutes. Relators hardly make any effort to try to reconcile Texas's later-enacted laws permitting abortion with the Pre-*Roe* Ban. At most, Relators try to harmonize the provisions with the facile suggestion that the Pre-*Roe* Ban does not criminalize abortion "[w]hen necessary to save the life of the mother," "so Texas's other regulations of abortion have effect" in those narrow circumstances. Mandamus Pet. 13. But many of Texas's regulations of abortion expressly *do not apply* in cases of life endangerment. *See, e.g.,* TEX. HEALTH & SAFETY CODE §§ 171.002(3), 171.0124, 171.046, 171.205. Thus, giving effect to the Pre-*Roe* Ban's

abortion prohibition that applies *except* for life endangerment would be completely incompatible with later-enacted Texas statutory regulations that only apply to the very abortions prohibited by the Pre-*Roe* Ban.

Relators' central response is that the 2021 Texas Legislature construed and overrode those decades of legislative enactments via legislative findings included in two bills. Mandamus Pet. 2-3, 12-13. But it is well established that "one session of the Legislature [does not] have the power to construe the Acts or to declare the intent of a past session." *Pruett*, 249 S.W.3d at 454 (quoting *Rowan Oil Co.*, 263 S.W.2d at 144); *cf. Ervin v. State*, 991 S.W.2d 804, 816 (Tex. Crim. App. 1999) (stating "we ... give little weight to ... subsequent enactments in interpreting the prior law"); *see also, e.g., Ex parte Schroeter*, 958 S.W.2d 811, 813 (Tex. Crim. App. 1997) ("[A] legislative construction of an act of another legislature is uniformly held to be entitled to little weight."*); Fed. Crude Oil Co. v. Yount-Lee Oil Co.*, 52 S.W.2d 56, 63 (1932) ("[T]he expression of an opinion by one Legislature in construing the act of a former Legislature is not conclusive upon the courts as it is their province to arrive at the intention of the particular legislature which enacted each of these laws.".

Further, conspicuously absent from those legislative findings was any citation to the supposedly not-repealed statutes in the Texas code: that is because the statutes were not there.

If the 2021 Legislature wanted abortion to be banned after *Dobbs*, the way to accomplish that was not through legislative dicta but through a new enactment—and, indeed, that is exactly what the Trigger Ban is. The Trigger Ban provides that a near-total abortion ban will take effect approximately two months or more after the *Dobbs* decision. The Trigger Ban itself supplants the Pre-*Roe* Ban, establishing an entirely distinct and irreconcilable range of penalties for performing an abortion. While the Pre-*Roe* Ban provided that any person who causes an abortion "shall be confined in the penitentiary not less than two nor more than five years," 1925 TEX. PENAL CODE art. 1191, the Trigger Ban states that a person who provides an abortion is subject to "imprisonment . . . for any term of not more than 99 years or less than 5 years." TEX. HEALTH & SAFETY CODE § 170A.004. As the TDCAA concluded in its advisory to

Texas prosecutors, the Trigger Ban's "new provisions cannot be reconciled with those older—but more specifically-tailored—pre-*Roe* crimes which also carry much lower punishments.[6]

2. Enforcement of the Pre-*Roe* Ban Would Be Inconsistent with Due Process.

"No citizen of this State shall be deprived of life, liberty, property, privileges, or immunities, or in any manner disfranchised, except by the due course of the law of the land." TEX. CONST. art. I, § 19. Laws offend this constitutional right by, *inter alia*, "allowing arbitrary and discriminatory enforcement, [or] by failing to provide fair warning." *May v. State*, 765 S.W.2d 438, 439 (Tex. Crim. App. 1989) (en banc). "[A] law that imposes criminal liability must be sufficiently clear (1) to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and (2) to establish determinate guidelines for law enforcement." *State v. Doyal*, 589 S.W.3d 136, 146 (Tex. Crim. App. 2019); *see also Lambert v. California*, 355 U.S. 225, 228 (1957) ("Engrained in our concept of due process is the requirement of notice.").

[6] TDCAA Advisory, *supra* n.1.

As the district court found in its order issuing a TRO, enforcing the Pre-*Roe* Ban would violate these standards because a person of ordinary intelligence cannot tell whether or not early abortions are currently prohibited in Texas. At some point during the day on Friday, June 24, after being absent from the statute books for decades, the pre-*Roe* statutes banning abortion suddenly reappeared on the Texas Legislature's website without notice. Although the text of the statutes reappeared, they are preceded by notes that demonstrate significant confusion over whether the statutes have been repealed. Far from giving a person of ordinary intelligence fair notice of whether anything is prohibited, the public is essentially notified that the answer is unknown and unknowable.

Relators assert that the Attorney General's June 24 Advisory put the public on notice that providing abortions can lead to criminal liability immediately. Mandamus Pet. 1, 8, 14. But the Attorney General has no such authority. "[I]t is well-settled that an Attorney General opinion interpreting the law cannot alter the pre-existing legal obligations of state agencies or private citizens." *In re Abbott*, 2022 WL 1510326, at *2. Attorney General opinions do not "*create* or *change* legal obligations." *Id.*

at n.2. Moreover, even Mr. Paxton implicitly acknowledged in his advisory that the effect of the Pre-*Roe* Ban is uncertain, describing abortion as "clearly illegal" in Texas only once the Trigger Ban takes effect. MR.34. The Advisory further states that "some prosecutors *may choose* to immediately pursue criminal prosecutions" and that "abortion providers *could be* criminally liable for providing abortions starting today." (emphasis added). Mr. Paxton's use of non-committal language in the Advisory to hedge the issue of enforceability of the Pre-*Roe* Ban reflects that even he is not certain of the ban's legal status. MR.35.

The confusion is so deep that Texas district attorneys are uncertain of the legality of abortion in Texas. The TDCAA's June 24 advisory to prosecutors stated that the Legislature's "legislative dicta" that the Pre-*Roe* Ban has not been repealed has "mudd[ied] the waters" and made the "confusion" "worse, not better," because the "new provisions [of the Trigger Ban] cannot be reconciled with" those of the antiquated Pre-*Roe* Ban.[7] A person of ordinary intelligence cannot be responsible for deciphering what is prohibited when district attorneys cannot do so.

[7] TDCAA Advisory, *supra* n.1.

This widespread uncertainty invites a serious risk of arbitrary and discriminatory enforcement against abortion providers across Texas. Some prosecutors might (correctly) understand the Pre-*Roe* Ban as repealed by implication under *McCorvey* and in irreconcilable conflict with Texas's regulatory scheme for abortion and with the Trigger Ban; others might follow the incorrect and improper guidance set forth by Relator Paxton in his June 24 advisory. Due process does not permit enforcement of a criminal law subject to such uncertainty.

3. The Pre-*Roe* Ban Remains Subject to a Final Declaratory Judgment of Unenforceability.

In *Roe*, the Northern District of Texas issued a final judgment, including a declaratory judgment, that the Pre-*Roe* Ban was facially invalid and unconstitutional. *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970). That final judgment was affirmed by the U.S. Supreme Court, *Roe*, 410 U.S. at 166, and remains in place today. The Supreme Court's *Dobbs* decision overruled *Roe* as a rule of decision in pending and future cases. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 273 (1994); *Bradley v. Richmond Sch. Bd.*, 416 U.S. 696, 711 (1974). But *Dobbs* did not have the effect of automatically vacating the district court's final judgment in *Roe* under Rule 60(b) of the Federal Rules of Civil Procedure.

Relators argue that *Roe*'s declaratory judgment never bound anybody save the Dallas County District Attorney. MR.123–24. But that cannot be squared with *Roe* itself. The district court in *Roe* stopped short of issuing an injunction, "assum[ing] that state courts and prosecutors will" follow it statewide. *Roe,* 314 F. Supp. at 1224 (quoting *Dobrowski v. Pfister,* 380 U.S. 479, 484-485 (1965). The question of injunctive relief was then presented to the U.S. Supreme Court in *Roe*, and the Supreme Court found it "unnecessary to decide whether the District Court erred in withholding injunctive relief, for we assume the Texas prosecutorial authorities will give full credence to this decision that the present criminal abortion statutes of that State are unconstitutional." *Roe,* 410 U.S. at 166. Indeed, Relators admit that the judgment extended beyond the parties in that case. *See* Mandamus Pet. xi ("For 49 years, Texas could not enforce its criminal prohibitions on abortion."); MR.118 ("It was accurate to describe these provisions as not 'enforceable' in 1974.").

Now that *Roe* is overruled as a rule of decision, the way to ban abortion is through a new legislative enactment—i.e., the Trigger Ban.

C. The District Court Did Not Clearly Abuse Its Discretion in Finding that Plaintiffs Would Suffer Irreparable Harm Absent Temporary Injunctive Relief.

A court sitting in equity may enjoin the enforcement of a criminal statute when: (1) the statute at issue is unconstitutionally applied by a rule, policy, or other noncriminal means subject to a civil court's equity powers and irreparable injury to property or personal rights is threatened; or (2) the enforcement of an unconstitutional statute threatens irreparable injury to property rights. *State v. Morales*, 869 S.W.2d 941, 942 (Tex. 1994); *State v. Logue*, 376 S.W.2d 567, 569 (Tex. 1964). Both circumstances exist here.

1. Plaintiffs Face a Real and Imminent Threat of Prosecution.

The district court did not clearly abuse its discretion in granting an injunction because Relators have explicitly threatened enforcement actions against Plaintiffs for any abortions performed that would violate the Pre-*Roe* Ban. *Contra Morales*, 869 S.W.2d at 943 (injunction improper where the controversy was a "hypothetical one"). Within hours of the U.S. Supreme Court's decision in *Dobbs*, Mr. Paxton invited district attorneys to begin initiating criminal prosecution immediately. MR.34–35.

Defendant Sharen Wilson, Tarrant County District Attorney, also threatened criminal enforcement of the Pre-*Roe* ban.[8] Indeed, Relators have gone so far as to threaten Plaintiffs with imminent prosecution for performing abortions in reliance on a court order enjoining such prosecution. *See* MR.137-38; *infra* Part I.C.

2. The Threat of Prosecution Is Causing Irreparable Injury to Plaintiffs' Vested Property Rights.

The threat of the Pre-*Roe* Ban's enforcement is causing irreparable injury to Plaintiffs' vested property rights in multiple ways.

First, Plaintiffs have vested property rights in operating their businesses. This Court has recognized a "vested property right in making a living, subject only to valid and subsisting regulatory statutes," and held that equitable relief is available where plaintiffs are "being prevented from performing their business otherwise lawful but for the statute in question." *Smith v. Decker*, 312 S.W.2d 632, 634 (Tex. 1958). Equitable relief is available where the plaintiff's business would be "effectually destroyed" by a law prohibiting the central function of the business. *City of Austin v. Austin City Cemetery Ass'n*, 28 S.W. 528, 529-30 (Tex. 1894).

[8] *See supra* n.3.

That is the case here. Plaintiffs and their medical staff have offered abortion care and reproductive services to patients in Texas for decades under licenses granted by Relators. APP.25-26. Continued operation of their businesses would be clearly lawful today absent the Pre-*Roe* Ban. If Plaintiffs are unable to continue providing abortions due to threatened enforcement of the Pre-*Roe* Ban, they will be forced to permanently change their operational models or shutter their businesses altogether, months before Texas's Trigger Ban takes effect. *Id.*

Second, Plaintiffs have vested property rights in their facility licenses. The improper revocation of a valid license or permit harms a vested property interest. *See St. Jude Healthcare, Ltd. v. Tex. Health & Human Servs. Comm'n*, No. 01-20- 00076-CV, 2021 WL 5904337, at *14 (Tex. Ct. App.—Houston Dec. 14, 2021) (citing *House of Tobacco, Inc. v. Calvert*, 394 S.W.2d 654, 657 (Tex. 1965) (vested interest in an existing permit that was improperly revoked)). Here, Plaintiffs all operate under abortion-facility licenses or ambulatory surgical center licenses granted by the Health and Human Services Commission under Chapter 243 or 245 of the Health and Safety Code. APP.6-7. If the Plaintiffs that are licensed as abortion facilities are unable to provide abortions due to the

threat of enforcement of the Pre- *Roe* Ban, they will be forced to surrender their facility licenses. 25 TEX. ADMIN. CODE § 139.24(e). Additionally, violations of the Pre-*Roe* Ban provides grounds for the revocation of Plaintiffs' facility licenses. TEX. HEALTH & SAFETY CODE §§ 243.011, 245.012; 25 TEX. ADMIN. CODE §§ 135.4(l), 139.60(c).[9]

Third, Plaintiffs rely on licensed physicians, nurses, and pharmacists to conduct their businesses, APP.26-27, and those individuals all have vested property rights in their own occupational licenses. Enforcement of the Pre-*Roe* Ban against those individuals could be grounds for revocation of their licenses. *See* TEX. OCC. CODE §§ 164.053(a)(1), (b), 164.052(a)(5), 301.453(a); 22 TEX. ADMIN. CODE §§ 217.11(1)(A), 217.12(1)(A), 281.7(a), 287.1(b); TEX. HEALTH & SAFETY CODE §§ 565.001(a), 565.002. The ongoing threat of criminal prosecution and license revocation against Plaintiffs' physicians, nurses, and pharmacists is causing irreparable harm by precluding them from performing their

[9] To the extent Relators may argue that Plaintiffs lack a vested property right in their facility licenses because the Pre-*Roe* Ban makes the provision of abortion unlawful, that only confirms that the subsequently enacted statutes expressly allowing and licensing facilities to perform abortions are irreconcilable with, and therefore impliedly repealed, the Pre-*Roe* Ban. *See McCorvey*, 385 F.3d at 849.

professions, for which they are licensed. The threat to Plaintiffs' employees' licenses is interwoven with the irreparable harm to Plaintiffs' vested property rights in operating their businesses.

Relators' reliance on two decisions from lower courts is misplaced. *See* Mandamus Pet. 16 (citing *City of Longview v. Head*, 33 S.W.3d 47, 53 (Tex. Ct. App.—Tyler 2000); *Sterling v. San Antonio Police Dep't*, 94 S.W.3d 790, 795 (Tex. Ct. App.—San Antonio 2002)). Both cases confirm that equitable relief is available under the circumstances described above and present here. *City of Longview*, 33 S.W.3d at 52; *Sterling*, 94 S.W.3d at 794. That the Courts of Appeals did not find for the plaintiffs in those cases is insignificant.[10] In both matters, only the plaintiff business owner faced criminal prosecution under the challenged law: no one else integral to the operation of their business was at risk. Here, by contrast, the

[10] Indeed, both cases are distinguishable. In *Sterling*, the Fourth Court of Appeals relied on the Seventh Court's holding that the plaintiff could have "no property right in 'gambling paraphernalia.'" 94 S.W.3d at 794–95 (citing *Roberts v. Gossett*, 88 S.W.2d 507, 509 (Tex. Ct. App.—Amarillo 1935)). In *City of Longview*, the Twelfth Court of Appeals held that the district court did not have jurisdiction over the action because of the plaintiff's "deficient pleadings," including improperly requesting a declaratory judgment in order to "resolve [a] factual dispute," effectively seeking "merely advisory" relief from the trial court by failing to seek a valid injunction, and failing to sue the district or county attorney. 33 S.W.3d at 53–54.

Plaintiffs themselves are not the only ones at risk; the Pre-*Roe* Ban could also be enforced against physicians and other medical professionals without whom Plaintiffs' abortion clinics cannot operate.

Where, as here, enforcement of an unconstitutional or void criminal statute against others would result in a plaintiff's business being effectively destroyed, Texas courts have long held that equitable relief against such enforcement is warranted. *See Austin City Cemetery Ass'n*, 28 S.W. at 529–30; *Robinson v. Jefferson Cnty.*, 37 S.W.3d 503, 508–09 (Tex. Ct. App.—Texarkana 2001) (collecting cases). For this reason, it is of no moment that the owner of a Plaintiff clinic could raise a due process or *ultra vires* defense if prosecuted for aiding and abetting a prohibited abortion. Absent relief that protects the physicians, nurses, pharmacists, and other staff essential to Plaintiffs' businesses, any such remedy at law would be meaningless.

Additionally, the threat of enforcement of the Pre-*Roe* Ban effectively precludes Plaintiffs from testing the ban's constitutionality in defense to a criminal prosecution. *See City of Laredo v. Laredo Merchants Ass'n*, 550 S.W.3d 586, 592 n.28 (Tex. 2018). In *Laredo*, this Court determined that jurisdiction was proper "where the ordinance . . . imposes a

substantial per-violation fine that effectively precludes small local businesses from testing the ban's constitutionality in defense to a criminal prosecution." *Id*. The same is true here. The provision of legal abortion care comprises the overwhelming majority of Plaintiffs' business; thus, if Plaintiffs engage in abortion services while the legality of abortions in Texas remains unclear, the cumulative risk of penalties is immense. If they continue to perform abortions, they and their staff would risk devastating criminal liability (including up to 5 years imprisonment *per* prohibited abortion), substantial fines and penalties, and the permanent loss of their medical and facility licenses. Those risks are so great as to wholly deter testing the Pre-*Roe* Ban through criminal prosecution.

For these reasons, only an injunction against enforcement of the Pre-*Roe* Ban can afford adequate relief to preclude irreparable harm to Plaintiffs' vested property rights. The district court thus has jurisdiction to enjoin both criminal and civil enforcement of the Pre-*Roe* Ban.

3. The Pre-*Roe* Ban Would Be Unconstitutionally Enforced Through Noncriminal Means That Are Subject to the District Court's Equity Powers

The district court has jurisdiction to enjoin enforcement of the Pre-*Roe* Ban for the additional reason that the Pre-*Roe* Ban is enforced

through "noncriminal means subject to a civil court's equity powers and irreparable injury to property or personal rights is threatened." *Morales*, 869 S.W.2d at 942.

Although the Pre-*Roe* Ban is a criminal statute, it is enforced not only through criminal prosecution but also through noncriminal means. Specifically, the Pre-*Roe* Ban can be enforced through civil disciplinary actions against Plaintiffs by Relator Health and Human Services Commission, up to and including facility license revocation. *See* TEX. HEALTH & SAFETY CODE §§ 243.011, 245.012; 25 TEX. ADMIN. CODE §§ 135.4(l), 139.60(c). Relators Texas Medical Board, Texas Board of Nursing, and Texas Board of Pharmacy can also enforce the Pre-*Roe* Ban civilly through disciplinary actions against physicians, nurses, and pharmacists. *See* TEX. OCC. CODE §§ 164.053(a)(1), (b), 164.052(a)(5), 301.453(a); 22 TEX. ADMIN. CODE §§ 217.11(1)(A), 217.12(1)(A), 281.7(a), 287.1(b); TEX. HEALTH & SAFETY CODE §§ 565.001(a), 565.002. As discussed above, these disciplinary actions would harm the vested rights of Plaintiffs and their physicians, nurses, and pharmacists.

Accordingly, this prong of the *Morales* standard also supports the district court's jurisdiction to enjoin enforcement of the Pre-*Roe* Ban, at least as to the Relators.

4. Relators' Threat that Individuals Will Be Prosecuted for Relying on the TRO Is Compounding the Irreparable Harm to Plaintiffs.

Finally, in a transparent attempt to nullify the TRO through intimidation if not on the merits, Relators argue that "nothing will prevent" Plaintiffs' employees from being prosecuted for abortions they performed "while the TRO is in place," if the order is later overturned. Mandamus Pet. 1; *accord id.* at 12, 23-24. Relators support this incendiary theory with the flimsiest of citations: a 40-year-old single-Justice concurrence about federal court jurisdiction and a Second Circuit opinion in which the relevant activity happened *before* the lawsuit was ever filed. *See* Mandamus Pet. 16 (citing *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)).[11] Nevertheless, if not quickly quashed by the courts, Relators' theory that litigants cannot rely on a court order granting preliminary relief will infect the judicial system, with far-reaching consequences far beyond the circumstances of this case.

Relators' theory is not about abortion: it is about the very nature of judicial relief. *See* Mandamus Pet. 16. It is axiomatic that "the purpose of a TRO is to preserve the status quo." *In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004) (citations omitted). Yet if Relators' theory were correct, it would be foolish for any Texan to ever maintain the status quo in reliance on a TRO or temporary injunction, rather than preemptively conforming their behavior to avoid retroactive civil or criminal liability. In Relators' telling, a temporary injunction provides no assurance of protection from the penalties lying in wait if an appellate court later disagrees with the district court. Texas courts' orders are not so hollow.

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[11] Relators' third and final citation, *United States v. United Mine Workers of America*, Mandamus Pet. 16, states in dicta only the non-controversial point that a party is bound to follow a court order until it is reversed. 330 U.S. 258, 293-94 (1947). Far from supporting Relators' attempt to render trial court orders meaningless, *United Mine Workers* reinforces that a lower court's "orders are to be respected." *Id.* at 294.

Nor do Relators' meager citations support their position. In *American Postal Workers Union*, the Second Circuit considered whether a postal worker union leader could be fired for action *pre-dating* the lawsuit: writing a letter to an important customer criticizing the defendant U.S. Postal Service. 766 F.2d at 718. The Court held that, for a variety of reasons, the plaintiffs had not established that the employee's potential firing "pending the outcome of the grievance and arbitration process, would have a chilling effect on" postal union members' first amendment rights sufficient to constitute irreparable harm. 766 F.2d at 722. Significantly, the Court explained that any "theoretical chilling" effect would arise from the threat that the union leader might ultimately be fired based on the letter he wrote *prior to the litigation*—and while a preliminary injunction could delay any such discharge, it would not necessarily prevent it. *American Postal Workers Union* provides no support for Relators' theory that temporary relief is meaningless to protect activity undertaken *while the court's order was in effect*.

Edgar v. MITE Corp. is a 1982 case that questioned, but did not resolve, whether a *federal court* has authority to issue a preliminary injunction that fully protects a litigant from state-court criminal or civil

liability. 457 U.S. at 630; *see also id.* at 647-48, 649, 653 (Stevens, J., concurring); *accord Clarke v. United States*, 915 F.2d 699, 701–02 (D.C. Cir. 1990) (describing the question in *Edgar* as "whether a later-vacated *federal* injunction would protect the plaintiff from a *state* prosecution" notwithstanding "federalism concerns."). The single-justice concurrence on which Relators rely repeatedly states that "the question is whether *federal judges* possess the power to grant such immunity." *Id.* at 648 (emphasis added) (Stevens, J., concurring); *accord id.* at 649 (Stevens, J., concurring) ("More fundamentally, federal judges have no power to grant such blanket dispensation" from a state statute). The concurrence concluded that "[f]ederal courts are courts of limited jurisdiction . . . There simply is no constitutional or statutory authority that permits a *federal judge* to grant dispensation from a valid state law." *Id.* at 653 (emphasis added) (Stevens, J., concurring). In the four decades since that single concurrence, countless litigants have continued to rely on preliminary relief. It does not legitimize the Relators' intimidation campaign.

Indeed, Relators' theory would fly in the face of numerous decisions confirming what common sense and justice demand: that a "judgment[]

later reversed or found erroneous" is nonetheless "a defense to a . . . prosecution for acts committed while the judgment was in effect." *Clarke*, 915 F.2d at 701–02 (collecting cases); *see also, e.g.*, *United States v. Mancuso*, 139 F.2d 90, 92 (3d Cir. 1943) (draftee who did not report for duty because a district court had enjoined enforcement of his induction order could not be prosecuted for failing to appear, despite the injunction's having been issued erroneously) ("If the litigant does something, or fails to do something, while under the protection of a court order he should not, therefore, be subject to criminal penalties for that act or omission."); *United States v. Moore*, 586 F.2d 1029, 1033 (4th Cir. 1978) ("Of course, one ought not to be punished if one reasonably relies upon a judicial decision later held to have been erroneous."); *Broward Coalition of Condominiums, Homeowners Ass'ns & Community Orgs. Inc. v. Browning*, No. 4:08cv445–SPM/WCS, 2008 WL 4791004, at *14 n.10 (N.D. Fla. Oct. 29, 2008) ("Defendants also argue that even if Plaintiffs speak under the protection of an injunction, they will not be immunized from future prosecution for that speech. . . . But Defendants do not cite a single case in which an individual acting under the protection of a preliminary injunction was

later prosecuted or fined by the enjoined party following the dissolution of the injunction." (citations omitted)).

The mandamus petition is premised on numerous power grabs, including claiming criminal prosecutorial authority Relators do not have to enforce a repealed statute that defies decades of legislative enactments based on "notice" provided by an Attorney General interpretation. Relators' threats of retroactive penalties are even more extreme. In addition to vacating the petition, this Honorable Court should clarify that Texas litigants can reasonably rely on the TROs and injunctions they secure to maintain the status quo.

CONCLUSION & PRAYER

For the foregoing reasons, Relators' petition for a writ of mandamus should be denied.

Respectfully submitted,

/s/ Marc Hearron

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July 11, 2022

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/ *Marc Hearron*
Marc Hearron

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been electronically filed and served by e-mail this 11th day of July, 2022, to the following counsel of record:

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Judd E. Stone II
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Counsel for Relators

/s/ *Marc Hearron*
Marc Hearron

CERTIFICATE OF COMPLIANCE

I certify that this document was prepared with Microsoft Word using Century Schoolbook 14 point font. It contains 10,076 words, excluding the portions of the Response exempted by Rule 9.4(i)(1).

/s/ *Marc Hearron*
Marc Hearron

Automated Certificate of eService

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No. 22-0527

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 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

APPENDIX
TO RESPONSE TO PETITION FOR WRIT OF MANDAMUS

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Exhibit 1

7/6/2022 7:29 PM
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Envelope No. 66081341
By: Joshua Herrington
Filed: 7/6/2022 7:29 PM

CAUSE NO. 2022-38397

WHOLE WOMAN'S HEALTH, on behalf of itself, its staff, physicians, nurses, pharmacists, and patients; WHOLE WOMAN'S HEALTH ALLIANCE, on behalf of itself, its staff, physicians, nurses, pharmacists, and patients; ALAMO CITY SURGERY CENTER PLLC d/b/a ALAMO WOMEN'S REPRODUCTIVE SERVICES, on behalf of itself, its staff, physicians, nurses, pharmacists, and patients; BROOKSIDE WOMEN'S MEDICAL CENTER PA d/b/a BROOKSIDE WOMEN'S HEALTH CENTER AND AUSTIN WOMEN'S HEALTH CENTER, on behalf of itself, its staff, physicians, nurses, pharmacists, and patients; HOUSTON WOMEN'S CLINIC, on behalf of itself, its staff, physicians, nurses, pharmacists, and patients; HOUSTON WOMEN'S REPRODUCTIVE SERVICES, on behalf of itself, its staff, physicians, nurses, pharmacists, and patients; and SOUTHWESTERN WOMEN'S SURGERY CENTER, on behalf of itself, its staff, physicians, nurses, pharmacists, and patients,

Plaintiffs,

V.

KEN PAXTON, in his official capacity as Attorney General of Texas; TEXAS MEDICAL BOARD; STEPHEN BRINT CARLTON, in his official capacity as Executive Director of the Texas Medical Board; TEXAS BOARD OF NURSING; KATHERINE A. THOMAS, in her official capacity as Executive Director of the Texas Board of Nursing; TEXAS HEALTH AND SERVICES COMMISSION; CECILE ERWIN YOUNG, in her official capacity as Executive Commissioner of the Texas Health and Human Services Commission; TEXAS BOARD OF PHARMACY; TIM TUCKER in his official capacity as Executive Director of the Texas Board of Pharmacy; JOSÉ GARZA in his capacity as District Attorney for Travis County, TX; JOE GONZALES, in his official capacity as

IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

269th JUDICIAL DISTRICT

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

Defendants.

PLAINTIFFS' AMENDED VERIFIED PETITION FOR DECLARATORY JUDGMENT AND APPLICATION FOR TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION

Plaintiffs file this Amended Verified Petition for Declaratory Judgment and Application for Temporary Restraining Order and Temporary Injunction. The immediate threat of enforcement of 1925 TEX. PENAL CODE arts. 1191–1194, 1196 (the "Pre-*Roe* Ban") is causing irreparable injury to Plaintiffs and their physicians, nurses, pharmacists, other staff, and patients, and Plaintiffs respectfully urge the Court to rule with all deliberate speed on the requested relief.

INTRODUCTION

1. On June 24, 2022, the U.S. Supreme Court issued an opinion in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, ___ U.S. ___, __ S. Ct. __, 2022 WL 2276808 (June 24, 2022), that departed from nearly fifty years of unbroken precedent and overruled *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). *Dobbs*, 2022 WL 2276808, at *7 ("We hold that *Roe* and *Casey* must be overruled."). The Supreme Court's decision will cause profound harm to patients across Texas: in just a few months, virtually all abortion in Texas will be banned.

2. From 1973 until 2021, Texas patients generally had access to safe abortion care despite the Texas Legislature's frequent and increasingly hostile attempts to enact laws curtailing

a patient's ability to end a pregnancy. But last year, the Texas Legislature enacted two measures that threaten abortion providers with severe criminal and civil liability for providing essential reproductive health care: (i) Texas Senate Bill 8, 87th Leg., 3d Called Sess. (Tex. 2021) ("S.B. 8"), which bans abortions in Texas beginning at approximately six weeks in pregnancy and provides for a civil enforcement scheme with civil penalties of at least $10,000 per statutory violation, and (ii) Texas House Bill 1280 §§ 2-3, 87th Leg., Reg. Sess. (Tex. 2021) ("H.B. 1280" or "Trigger Ban"), a near-total ban on abortion with severe criminal and civil penalties that "take[s] effect, to the extent permitted," 30 days after the "issuance" of any U.S. Supreme Court "judgment" in a decision overruling *Roe*. At the same time, the Texas Legislature embedded in S.B. 8 and in the Trigger Ban legislative findings claiming that Texas's long-repealed Pre-*Roe* Ban criminalizing abortion remains good law.

3. On June 24, 2022, within hours of the release of the *Dobbs* opinion, Defendant Ken Paxton, Attorney General of Texas, issued an "Advisory on Texas Law Upon Reversal of *Roe v. Wade*" (the "Advisory").[1] Mr. Paxton acknowledges that the Trigger Ban is not enforceable until 30 days after the U.S. Supreme Court issues its judgment in *Dobbs*, which will occur "only after the window for the litigants to file a motion for rehearing has closed," and which could occur "in about a month, or longer if the Court considers a motion for rehearing."[2] Thirty days after issuance of the judgment, Mr. Paxton asserted, abortion will "be clearly illegal in Texas."[3]

4. Toward the end of the Advisory, however, Mr. Paxton asserts that prosecutors may nonetheless "choose to immediately pursue criminal prosecutions based on violations of Texas

[1] Ex. A, Ken Paxton, *Advisory on Texas Law Upon Reversal of* Roe v. Wade (June 24, 2022), https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/Post-Roe%20Advisory.pdf.
[2] *Id.* ("A judgment can issue in about a month, or longer if the Court considers a motion for rehearing. So while it is clear that the [Trigger Ban] *will* take effect, we cannot calculate exactly *when* until the Court issues its judgment.").
[3] *Id.*

abortion prohibitions predating *Roe* that were never repealed by the Texas Legislature."[4]

5. Shortly after Mr. Paxton's Advisory was released on June 24, 2022, the Pre-*Roe* Ban—which was expressly declared unconstitutional in *Roe* and has been absent from Texas's civil statutes for decades—was added back into Vernon's Texas Civil Statutes, available on the Texas Legislature's website, but with a cautionary note that the Pre-*Roe* Ban was "held to have been impliedly repealed in *McCorvey v. Hill*, 385 F.3d 846 (5th Cir. 2004)" prior to the passage of S.B. 8 and the Trigger Ban.[5]

6. Mr. Paxton's and the Texas Legislature's attempts to greenlight the immediate prosecution of abortion providers based on violations of the Pre-*Roe* Ban must not stand. As a threshold matter, the Pre-*Roe* Ban was repealed as of the *Roe* decision in 1973. It was found nowhere in Texas's criminal or civil statutes for nearly four decades, and even now it appears in Vernon's Texas Civil Statutes with the proviso that, according to the Fifth Circuit, these antiquated statutes were long ago repealed by implication. Moreover, the Pre-*Roe* Ban cannot be harmonized with the Trigger Ban, which contains only legislative dicta that the Pre-*Roe* Ban remains in effect while establishing an entirely different and irreconcilable range of penalties for the same offense. For all these reasons, the Pre-*Roe* ban cannot be enforced consistent with due process. Further, even if the Pre-*Roe* Ban had not been repealed, it is void under a declaratory judgment in *Roe* that remains in place unless and until there are further, specific actions taken by Defendants and the U.S. District Court for the Northern District of Texas under Federal Rule of Civil Procedure 60(b).[6]

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[4] *Id.*
[5] VERNON'S TEX. CIV. STATS. ch. 6-1/2 (June 24, 2022), *available at* https://statutes.capitol.texas.gov/Docs/SDocs/VERNON'SCIVILSTATUTES.pdf
[6] *See Roe v. Wade*, 314 F. Supp. 1217, 1225 (N.D. Tex. 1970) ("It is therefore ordered, adjudged and decreed that: (1) the complaint of John and Mary Doe be dismissed; (2) the Texas Abortion Laws are declared void on their face for unconstitutional overbreadth and for vagueness; (3) plaintiffs' application for injunction be dismissed."); *Roe*, 410 U.S. at 166-167 ("The judgment of the District Court as to intervenor Hallford is reversed, and Dr. Hallford's complaint in intervention is dismissed. In all other respects, the judgment of the District Court is affirmed.")

7. Nonetheless, if abortion providers and patients are not given assurance that they will not be held criminally liable under the Pre-*Roe* Ban, the specter of criminal enforcement and disciplinary actions resulting from this repealed law will inevitably and irreparably chill the provision of abortions in the vital last weeks in which safe abortion care remains available and lawful in Texas.

8. Plaintiffs currently provide abortion care and reproductive health services to patients in Texas and wish to continue providing these safe and essential services to the extent permissible under current Texas law until the operative provisions in the Trigger Ban prohibiting abortion are in effect. Plaintiffs therefore request a declaratory judgment that the Pre-*Roe* Ban has been repealed and may not be enforced.

9. Defendants are state agencies and officials who are duty bound to carry out Texas's criminal laws and administrative regulations. Plaintiffs therefore also request injunctive relief preventing the Defendants from enforcing the Pre-*Roe* Ban or instituting any disciplinary actions in connection with alleged violations of the Pre-*Roe* Ban against Plaintiffs in accordance with Plaintiffs' requested declaratory relief.

10. Absent intervention from this Court, Plaintiffs face an imminent risk that the Pre-*Roe* Ban will unlawfully be enforced against them. Under the weight of this threat, they have stopped providing abortions, some have laid off staff, and they are at serious risk of business closure without an injunction. Plaintiffs urgently request that this Court issue declaratory and injunctive relief, which would allow them to continue operating their businesses of providing abortion care to patients in Texas to the extent permitted by Texas law, without fear of devastating criminal and civil liability and fines, the premature closing of their businesses, and the loss of their medical and facility licenses.

DISCOVERY CONTROL PLAN

11. Plaintiff requests that this case be conducted as a Level 3 case for the purposes of discovery in accordance with Texas Rule of Civil Procedure 190.4. In addition, pursuant to Texas Rule of Civil Procedure 47(c)(5), Plaintiffs state that they seek non-monetary relief only.

PARTIES

B. PLAINTIFFS

12. Plaintiffs are Texas-licensed businesses providing reproductive health services, predominantly abortion care. Plaintiffs rely on licensed physicians, nurses, and pharmacists to conduct their operations. Abortion facility and ambulatory surgical center licenses issued by Defendant Texas Health and Human Services Commission are critical to Plaintiffs' operations.

13. Plaintiff Whole Woman's Health operates licensed abortion facilities in Fort Worth (Tarrant County), McAllen (Hidalgo County), and McKinney (Collin County). Whole Woman's Health provides a range of reproductive health services, including medication and procedural abortions. Whole Woman's Health sues on behalf of itself and its physicians, nurses, pharmacists, other staff, and patients.

14. Plaintiff Whole Woman's Health Alliance is a Texas not-for-profit corporation. It operates a licensed abortion facility in Austin (Travis County) that provides both medication and procedural abortions. Whole Woman's Health Alliance sues on behalf of itself and its physicians, nurses, pharmacists, other staff, and patients.

15. Plaintiff Alamo City Surgery Center PLLC d/b/a Alamo Women's Reproductive Services ("Alamo") operates a licensed ambulatory surgical center in San Antonio (Bexar County). Alamo provides a range of reproductive health services, including medication and procedural abortions. Alamo sues on behalf of itself and its physicians, nurses, pharmacists, other staff, and patients.

16. Plaintiff Brookside Women's Medical Center PA d/b/a Brookside Women's Health Center and Austin Women's Health Center ("Austin Women's") operates a licensed abortion facility in Austin (Travis County). Austin Women's provides a range of reproductive health services, including medication and procedural abortions. Austin Women's sues on behalf of itself and its physicians, nurses, pharmacists, other staff, and patients.

17. Plaintiff Houston Women's Clinic provides medication and procedural abortions and contraceptive care at its licensed abortion facility in Houston (Harris County). Houston Women's Clinic sues on behalf of itself and its physician, nurses, pharmacists, other staff, and patients.

18. Plaintiff Houston Women's Reproductive Services ("HWRS") operates a licensed abortion facility in Houston (Harris County). HWRS provides medication abortion services. HWRS sues on behalf of itself and its physicians, nurses, pharmacists, other staff, and patients.

19. Plaintiff Southwestern Women's Surgery Center ("Southwestern") operates a licensed ambulatory surgical center in Dallas (Dallas County). Southwestern provides a range of reproductive health services, including medication and procedural abortions. Southwestern sues on behalf of itself and its physicians, nurses, pharmacists, other staff, and patients.

C. DEFENDANTS

20. Defendant Ken Paxton is the Attorney General of Texas. He is empowered to assist county and district attorneys in the prosecution of criminal offenses. TEX. GOVT. CODE § 574.004. He is sued in his official capacity and may be served with process at 300 West 15th Street, Austin, Texas 78701.

21. Defendant Texas Medical Board ("TMB") is the state agency mandated to regulate the practice of medicine by licensed doctors in Texas. TMB may impose discipline on a doctor

who violates any state law "connected with the physician's practice of medicine" because such violation constitutes per se "unprofessional or dishonorable conduct." TEX. OCC. CODE. § 164.053(a)(1); *id*. § 164.052(a)(5); *see also id.* § 164.053(b) (making clear that "[p]roof of the commission of the act while in the practice of medicine ... is sufficient" for discipline). Discipline may include fines, civil penalties, injunctions against continuing violations, or suspension or revocation of a doctor's license. TEX. OCC. CODE §§ 164.001, 165.001, 165.003, 165.051, 165.101. TMB may be served with process at 333 Guadalupe Street, Tower 3, Suite 610, Austin, Texas 78701.

22. Defendant Stephen Brint Carlton is the Executive Director of the TMB and in that capacity serves as the chief executive and administrative officer of TMB. TEX. OCC. CODE § 152.051. Mr. Carlton is sued in his official capacity and may be served with process at 333 Guadalupe Street, Tower 3, Suite 610, Austin, Texas 78701.

23. Defendant Texas Board of Nursing ("TBN") is the state agency mandated to regulate the practice of nursing by licensed nurses in Texas. TBN is authorized to take disciplinary, administrative, and civil action against licensed nurses who violate the Nursing Practice Act or its rules. *Id.* §§ 301.452(b)(1), 301.501, 301.553. Under TBN's rules, a nurse must "conform to . . . all federal, state, or local laws, rules or regulations affecting the nurse's current area of nursing practice." 22 TEX. ADMIN. CODE § 217.11(1)(A). A nurse's "repeated[] fail[ure] . . . to perform" nursing duties "in conformity with th[is] standard[]" constitutes a per se "[u]nsafe [p]ractice" for which discipline may be imposed. *Id.* § 217.12(1)(A). Discipline may include fines, civil penalties, injunctions against continuing violations, and suspension or revocation of a nurse's license. TEX. OCC. CODE §§ 301.502. TBN may be served with process at 333 Guadalupe Street, Suite 3-460, Austin, Texas 78701-3944.

24. Defendant Katherine A. Thomas is the Executive Director of the TBN. Ms. Thomas performs duties as required by the Nursing Practice Act and as designated by TBN. TEX. OCC. CODE. § 301.101. Ms. Thomas is sued in her official capacity and may be served with process at 333 Guadalupe Street, Suite 3-460, Austin, Texas 78701-3944.

25. Defendant Texas Health and Human Services Commission ("HHSC") is the state agency mandated to license and regulate abortion facilities and ambulatory surgical centers ("ASCs") operated by Plaintiffs. TEX. HEALTH & SAFETY CODE §§ 243.011, 245.012. HHSC's regulations provide that it may take disciplinary or civil action against any licensed facility that fails to ensure physicians working in the facility comply with the Medical Practice Act or its rules. *See* 25 TEX. ADMIN. CODE § 139.60(c), (l); TEX. HEALTH & SAFETY CODE §§ 243.014-.015, 245.015, 245.017; *see also* 25 TEX. ADMIN. CODE § 135.4(l) (requiring abortion-providing ASCs to comply with rules for abortion facilities). HHSC may deny, suspend, or revoke a license and assess civil and administrative financial penalties against a licensed abortion facility or ASC for violating its rules. TEX. HEALTH & SAFETY CODE §§ 243.014-.015, 245.015, 245.017. The HHSC may be served with process at 4900 N. Lamar Blvd., Austin, Texas 78751.

26. Defendant Cecile Erwin Young is the Executive Commissioner of the HHSC. She is sued in her official capacity and may be served with process at 4900 N. Lamar Blvd., Austin, Texas 78751.

27. The Texas Board of Pharmacy ("TBP") is the state agency mandated to license and regulate Texas pharmacists and pharmacies. TBP is authorized to take disciplinary, administrative, and civil action against licensed pharmacists and pharmacies who have violated the Texas Pharmacy Act or its rules, including for "unprofessional" conduct or "gross immorality." *Id.* §§ 565.001(a), 565.002. TBP defines "unprofessional conduct" to include "engaging in behavior

or committing an act that fails to conform with the standards of the pharmacy profession, including, but not limited to, criminal activity." 22 TEX. ADMIN. CODE § 281.7(a). "[G]ross immorality" includes broadly defined types of misconduct that are "willful" and "flagrant." *Id.* § 287.1(b). The Board of Pharmacy may assess a civil or administrative financial penalty for any violation of the Pharmacy Act or its rules, and may suspend or revoke a pharmacist's license. TEX. OCC. CODE. §§ 565.061, 566.001-.002, 566.051, 566.101. TBP may be served with process at 333 Guadalupe, Suite 500, Austin, TX 78701-3944.

28. Defendant Tim Tucker is the Executive Director of the TBP. He is sued in his official capacity and may be served with process at 333 Guadalupe, Suite 500, Austin, TX 78701-3944.

29. Defendant José Garza is the District Attorney of Travis County, Texas. He is empowered to prosecute alleged criminal violations in Travis County. He is sued in his official capacity and may be served with process at 416 West 11th Street, Austin, Texas 78701.

30. Defendant Joe D. Gonzales is the District Attorney of Bexar County, Texas. He is empowered to prosecute alleged criminal violations in Bexar County. He is sued in his official capacity and may be served with process at 101 West Nueva Street, San Antonio, Texas 78205.

31. Defendant Kim Ogg is the District Attorney of Harris County, Texas. She is empowered to prosecute alleged criminal violations in Harris County. She is sued in her official capacity and may be served with process at 500 Jefferson Street Suite #600, Houston, Texas 77002.

32. Defendant John Creuzot is the District Attorney of Dallas County, Texas. He is empowered to prosecute alleged criminal violations in Dallas County. He is sued in his official capacity and may be served with process at 133 N. Riverfront Boulevard, LB 19, Dallas, Texas 75207.

33. Defendant Sharon Wilson is the District Attorney of Tarrant County, Texas. She is empowered to prosecute alleged criminal violations in Tarrant County. She is sued in her official capacity and may be served with process at 401 West Belknap Street, Fort Worth, Texas 76196.

34. Defendant Ricardo Rodriguez, Jr. is the District Attorney of Hidalgo County, Texas. He is empowered to prosecute alleged criminal violations in Hidalgo County. He is sued in his official capacity and may be served with process at 100 East Cano Street, Edinburg, Texas 78539.

35. Defendant Greg Willis is the District Attorney of Collin County, Texas. He is empowered to prosecute alleged criminal violations in Collin County. He is sued in his official capacity and may be served with process at 2100 Bloomdale Road, Suite 100, McKinney, Texas 75071.

JURISDICTION AND VENUE

36. This action is brought pursuant to Texas Rules of Civil Procedure 680 to 693, Texas Civil Practice and Remedies Code Chapter 65, and the common law of Texas, to obtain declaratory and injunctive relief against Defendants.

37. This Court has jurisdiction over this matter, pursuant to the Texas Uniform Declaratory Judgments Act, Texas Civil Practice and Remedies Code § 37.001, *et seq.* ("UDJA"), Sections 24.007 and 24.0008 of the Texas Government Code, and TEX CONST. art. 5, § 8.

38. Further, 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.

39. This Court also has jurisdiction over the Defendants sued in their official capacity because the Ultra Vires Doctrine permits claims brought against state officials for nondiscretionary acts unauthorized by law. *See* TEX. CIV. PRAC. & REM. CODE §§ 37.003, 37.004, 37.006; *Tex.*

Lottery Comm 'n v. First State Bank of DeQueen, 325 S.W.3d 628, 634-635 (Tex. 2010); *Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 621-22 (Tex. 2011).

40. Finally, this Court has jurisdiction to enjoin the Pre-*Roe* Ban because (a) these statutes cannot be constitutionally applied and are otherwise void, and (b) the threat of their enforcement against Plaintiffs and their employees and officers is causing irreparable injury to Plaintiffs' vested property rights in operating their businesses, as well as Plaintiffs' vested property rights in their facility licenses and Plaintiffs' physicians, nurses, and pharmacists' vested property rights in their medical licenses, nursing licenses, and pharmacy licenses, for which they have no adequate remedy at law. *See, e.g.*, *State v. Morales*, 869 S.W.2d 941, 942, 945 (Tex. 1994); *State v. Logue*, 376 S.W.2d 567, 569 (Tex. 1964); *Smith v. Decker*, 158 Tex. 416, 420, 312 S.W.2d 632, 634 (1958); *City of Austin v. Austin City Cemetery Ass'n*, 28 S.W. 528, 529-530 (Tex. 1894).

41. Venue is proper in Harris County because Defendant Kim Ogg resides or has her principal place of business in Harris County. TEX. CIV. PRAC. & REM. CODE § 15.002(1). Venue is proper with respect to the non-resident Defendants because all claims against these Defendants arise out of the same transaction and occurrence as the claims against the resident Defendant. TEX. CIV. PRAC. & REM. CODE § 15.005.

42. Plaintiffs' request for prospective relief is specifically authorized as a request for a declaratory judgment under the UDJA. An action for a declaratory judgment is neither legal nor equitable but is sui generis—that is, of its own kind. *Tex. Liquor Control Bd. v. Canyon Creek Land Corp.*, 456 S.W.2d 891, 895 (Tex. 1970). Without such declaratory judgment, Plaintiffs have no meaningful remedy for their state-law claims in accordance with Texas Constitution article I, § 13.

FACTUAL ALLEGATIONS

II. HISTORY OF ABORTION LAWS IN TEXAS

43. Prior to *Roe*, abortion was prohibited and criminalized in Texas under Texas Penal Code Articles 1191-94, and 1196, enacted in 1925. Articles 1191-95 and 1196, together referred to herein as "the Pre-*Roe* Ban," provided that any person who performed an abortion or assisted a pregnant woman in obtaining an abortion could be imprisoned for up to ten years and held liable for civil penalties unless the abortion was "procured or attempted by medical advice for the purpose of saving the life of the mother." TEX. PENAL CODE arts. 1191-94, 1196. Texas's Pre-*Roe* Ban later became the subject of a constitutional challenge in *Roe*.

44. In *Roe*, the Supreme Court affirmed on appeal the district court's declaratory judgment that the Pre-*Roe* Ban was unconstitutional, holding that "the Texas abortion statutes, as a unit, must fall." *Roe*, 410 U.S. at 166. No Defendant has moved for relief from that final judgment.

45. The Texas Legislature subsequently, however, enacted a series of laws regulating abortion access in the state, permitting first and second trimester abortions while imposing parental notification and mandatory delay laws, taxpayer dollar restrictions, and other draconian limitations on the provision of care.[7]

46. The Texas Legislature's efforts to limit abortion access took on particular fervor in 2021. In May 2021, the legislature passed S.B. 8, which bans abortions at approximately six weeks in pregnancy and provides for a civil enforcement scheme that allows private citizens to sue individuals who provide, aid or abet, or intend to provide or aid and abet a prohibited abortion, for at least $10,000 per prohibited abortion. S.B. 8 § 3. Paradoxically, while permitting and regulating

[7] *See* Kevin Reynolds, *How Today's Near-Total Abortion Ban in Texas Was 20 Years in the Making*, TEX. TRIBUNE (Nov. 1, 2021), *available at* https://www.texastribune.org/2021/11/01/Texas-abortion-restrictions-timeline/.

the provision of abortion care, the 2021 Texas Legislature included a legislative finding in S.B. 8 that Texas's Pre-*Roe* Ban criminalizing abortion unless the pregnant person's life is in danger—the very statutes held unconstitutional by the United States Supreme Court in *Roe*—were "never repealed, either expressly or by implication" and remain "enforceable." S.B. 8 §§ 2, 5. S.B. 8 took effect on September 1, 2021.

47. Also in 2021, the Texas House introduced House Bill 1280, 87th Leg., Reg. Sess. (Tex. 2021), the Trigger Ban, which seeks to, among other things, criminalize virtually all abortions with narrow medical exceptions in the event that *Roe* is overturned in whole or in part. The Trigger Ban passed and was signed into law on June 16, 2021. The Trigger Ban, now codified at Tex. Health & Safety Code §§ 170A.001 – 170A.007, is subject to a complicated delayed enactment as set forth in Section 3 of the act and discussed below.

48. The Legislature deliberately chose *not* to make the Trigger Ban immediately effective or effective upon the certification of a state official, as other states had done.[8] Rather than establishing through its new law that abortion would be immediately banned in Texas, the Legislature merely included the same legislative finding in the Trigger Ban as in S.B. 8, which claims that Texas's criminal statutes from more than half a century ago, superseded both by Texas's intricate regulatory scheme for abortion and by the Trigger Ban itself, somehow had never been repealed.

[8] *See, e.g.*, ARK. CODE §§ 5-61-301 to -304 (effective "on and after certification of the Attorney General"); Ky. Rev. Stat. § 311.772 ("effectively immediately" upon Supreme Court "decision"); LA. REV. STAT. § 40:1061 (same); MISS. CODE § 41-41-45 (effective "ten days following the date of publication by the Attorney General of Mississippi that the Attorney General has determined" that *Roe* is overruled); MO. REV. STAT. § 188.017 (effective upon, *inter alia*, an opinion by the Attorney General); S.B. 918, 58th Leg. 1st Reg. Sess. (Okla. 2021) (effective "on and after certification of the Attorney General . . . ."); S.D. CODIFIED LAWS § 22-17-5.1 (effective "on the date that the states are recognized by the United States Supreme Court to have the authority to prohibit abortion at all stages of pregnancy"); UTAH CODE § 76-7a-201 (effective "on the date that the legislative general counsel certifies to the Legislative Management Committee . . . .").

49. The Texas District and County Attorneys Association ("TDCAA"), a non-profit organization that provides guidance to district and county offices and includes on its Board of Directors Defendant Greg Willis, District Attorney of Collin County,[9] acknowledged in a legislative update released on June 24, 2022 regarding "Abortion-Related Crimes After Dobbs" that this "legislative dicta" in S.B.8 and the Trigger Ban has "mudd[ied] the waters" and made the "confusion" as to whether the Pre-*Roe* Ban is enforceable "worse, not better" because the Trigger Ban's "new provisions cannot be reconciled with those older—but more specifically-tailored—pre-*Roe* crimes which also carry much lower punishments."[10]

III. THE PRE-ROE ABORTION BAN

A. The Pre-Roe Ban Is Repealed Expressly or by Implication

50. Legislative and judicial treatment of the Pre-*Roe* Ban in Texas over the past five decades since *Roe* confirms that the Pre-*Roe* Ban was repealed expressly or by implication, has no legal effect, and may not be enforced against Plaintiffs.

(i) The Pre-Roe Ban Was Absent from Texas Statutes from 1984 Until the Dobbs Opinion

51. The Pre-*Roe* Ban remained in the Texas Penal Code for only a brief period following the release of the *Roe* decision on January 22, 1973. Shortly thereafter, on May 24, 1973, the Texas Legislature enacted a new Penal Code that removed the Pre-*Roe* Ban. *See* Act of May 24, 1973, 63rd Leg., R.S., ch. 399, § 5(a).

52. Initially, the Pre-*Roe* Ban and Article 1195—a statute that was not challenged in *Roe* and is not an abortion ban[11]—were transferred from the Texas Penal Code to the Texas Civil

[9] "About TDCAA," TDCAA, *available at* https://www.tdcaa.com/about/.
[10] "Interim Update: Abortion-Related Crimes after *Dobbs*," TDCAA (June 24, 2022), *available* at https://www.tdcaa.com/legislative/dobbs-abortion-related-crimes/ (hereinafter the "TDCAA Bulletin").
[11] Article 1195 provides that a person may be criminally liable for "destroy[ing] . . . the life in a child in a state of being born . . . "." 1925 Tex. Crim. Sta. 1195. Article 1195 requires that the pregnant person be in the act of giving birth and is, therefore, not an abortion ban that was challenged in *Roe*. *See also* Ex. B, Letter from John L. Hill, Texas Attorney General, to Ted Butler, Bexar County District Attorney (Aug. 13, 1974) ("Hill Letter").

Code, where they were recodified as Articles 4512.1–4512.6 of the Texas Civil Statutes. 1973 Tex. Gen. Laws 995 (codified at TEX. REV. CIV. STAT. arts. 4512.1-.4, -.6 (West 1974)).

53. The Pre-*Roe* Ban appears printed in the 1974 version of Vernon's Texas Civil Statutes,[12] but even then it had no legal effect and was understood to have been repealed when the new Penal Code was enacted in 1973. For instance, an August 13, 1974, letter from the Texas Attorney General John L. Hill to the Bexar County District Attorney addressing "what Articles of the present Penal Code, relating to abortion, are now valid and enforceable" following *Roe*, explained that "[t]he 1973 Penal Code contains no specific prohibition on abortion."[13] Mr. Hill's letter states that only "Article 1195, presently Art. 4512.5, V.T.C.S. [Vernon's Texas Civil Statutes], is left unaffected" and was "not repealed by the 1973 Penal Code" and adds that this provision "is not, in truth, an abortion statute." The letter concludes with Mr. Hill affirmatively stating that "there presently are no effective statutes of the State of Texas against abortion, per se."

54. In 1984, this technicality leaving the Pre-*Roe* Ban on Texas's civil statutes was corrected when the Texas Legislature enacted a new Civil Code that removed the text of Articles 4512.1–4512.4 and 4512.6 and marked them "Unconstitutional."[14] The 1984 version of the Civil Code thus included only Article 4512.5 (previously Article 1195 in the Texas Penal Code).

55. For nearly forty years, until the *Dobbs* opinion was released on June 24, 2022, Vernon's Texas Civil Statutes, as made available on the Texas Legislature's website, did not

[12] The Pre-*Roe* ban was published in Volume 4 of the 1974 West's Texas Statues and Codes, which currently appears on Texas Legislature's Historical Texas Statutes site stamped "SUPERSEDED". *See* TEX. REV. CIV. STAT. (West 1984), *available at* https://www.sll.texas.gov/library-resources/collections/historical-texas-statutes/bookreader/1974-4/#page/1/mode/2up.

[13] Ex. B, Hill Letter at 1723.

[14] *See* TEX. CIV. STAT. arts. 4512.1-.4, -.6 (West 1984), *available at* https://www.sll.texas.gov/library-resources/collections/historical-texas-statutes/bookreader/1984-3/#page/402/mode/2up (stating "Arts. 4512.1 to 4512.4. Unconstitutional" and "Art. 4512.6. Unconstitutional.").").

contain *any* reference to the Pre-*Roe* Ban.[15] Within Title 71 of Vernon's Texas Civil Statutes, there was a Chapter 6-1/2 titled "Abortion," but the only listed provision was Article 4512.5, the statute that was not challenged in *Roe*.[16]

56. On June 24, 2022, without notice, the Texas Legislature's website replaced this copy of Vernon's Texas Civil Statutes with a new version that includes the text of the Pre-*Roe* Ban, but notes that the relevant statutes were "held to have been impliedly repealed in *McCorvey v. Hill*, 385 F.3d 846 (5th Cir. 2004)" prior to the legislative findings in S.B. 8 and the Trigger Ban regarding the Pre-*Roe* Ban.[17]

57. The Texas Legislature's removal of the Pre-*Roe* Ban from the Texas Penal Code when it enacted a new Penal Code in 1973 by legislative enactment demonstrates that the Pre-*Roe* Ban, which was a criminal statute, was repealed. *See Gordon v. Lake*, 163 Tex. 392, 394 (Tex. 1962) ("[A] later enactment is intended to embrace all the law upon the subject with which it deals, it repeals all former laws relating to the same subject."). The complete absence of the Pre-*Roe* Ban from *any* Texas statutes for the past four decades further confirms that the Pre-*Roe* Ban is long repealed and has no legal effect, notwithstanding the Supreme Court's reversal of its longstanding abortion jurisprudence.

58. Moreover, a law that was not found anywhere in the Texas Code for decades prior to June 24, 2022, when it was added to Vernon's Civil Statutes with a note that simultaneously states it was long ago repealed by implication, does not provide the notice that due process requires. *Lambert v. California*, 355 U.S. 225, 228 (1957) ("Engrained in our concept of due process is the requirement of notice."). The law as currently present in Vernon's Texas Statutes would subject

[15] *See* Ex. C, Vernon's Texas Civil Statutes at 181 (dated Jan. 1, 2022).
[16] *See id.*
[17] VERNON'S TEX. CIV. STAT. ch. 6-1/2 (June 24, 2022), *available at* https://statutes.capitol.texas.gov/Docs/SDocs/VERNON'SCIVILSTATUTES.pdf.

Plaintiffs to arbitrary and discriminatory enforcement because some prosecutors might understand the law as repealed by implication under *McCorvey* and in conflict with both Texas's regulatory scheme for abortion and with the Trigger Ban, whereas others might understand the Legislature's "dicta" purporting to resuscitate the Pre-*Roe* Ban to be persuasive. *See, e.g.*, TDCAA Bulletin (describing areas of "confusion" that Texas prosecutors will need to reconcile in determining if the Pre-*Roe* Ban is enforceable).[18]

59. A law that causes such prosecutorial confusion, and thereby invites arbitrary enforcement of its severe penalties, is inconsistent with the due process guaranteed by the Texas constitution. *See* TEX CONST. art. I, § 19 ("No citizen of this State shall be deprived of life, liberty, property, privileges, or immunities, or in any manner disfranchised, except by the due course of the law of the land.").

(ii) The Fifth Circuit Has Held that the Pre-Roe Ban Was Repealed by Implication

60. The Fifth Circuit Court of Appeals has also confirmed that Texas's Pre-*Roe* Ban was repealed by implication because of the irreconcilable conflict between Texas's regulation of abortion and the Pre-*Roe* Ban.

61. As referenced in the current version of Vernon's Texas Statutes, in *McCorvey v. Hill*, 385 F.3d 846 (5th Cir. 2004), the court dismissed an appeal by the original plaintiff in *Roe* who had moved to have the district court revisit the Supreme Court's decision in *Roe* on mootness grounds.

62. The court concluded in that decision: "[t]he Texas statutes that criminalized abortion (former Penal Code Articles 1191, 1192, 1193, 1194 and 1196) and were at issue in *Roe*

[18] TDCAA Bulletin ("Despite the optimism of HB 1280 supporters noted above that '[t]he bill would clear up confusion about whether the state's pre-Roe statutes are still valid,' it arguably makes the confusion worse, not better.").

have . . . been repealed by implication" because abortion regulations passed thereafter "cannot be harmonized with provisions that purport to criminalize abortion. There is no way to enforce both sets of laws; the current regulations are intended to form a comprehensive scheme—not an addendum to the criminal statutes struck down in *Roe*." *Id*. at 849.

63. In other words, in enacting a comprehensive regulatory scheme addressing the provision of abortions, Texas repealed the Pre-*Roe* Ban, not only literally as described above, but by implication.

(iii) The Trigger Ban and Pre-Roe Ban Are Incompatible

64. If Texas's comprehensive regulation of abortion over the past half-century did not repeal and replace the voided Pre-*Roe* Ban, the enforcement authority enacted as the Trigger Ban has done so. Indeed, as acknowledged in 1974 by the then-Texas Attorney General, "any newly enacted statute to replace those declared unconstitutional" in *Roe* would thereafter govern under what circumstances an abortion is lawfully performed.[19]

65. The Trigger Ban prohibits and regulates the same conduct at issue in the Pre-*Roe* Ban and treats them differently. For example, the mandatory penalties set out in the two bans are in irreconcilable conflict. While the Pre-*Roe* Ban provides that any person who causes an abortion "shall be confined in the penitentiary *not less than two nor more than five years*," 1925 TEX. PENAL CODE art. 1191 (emphasis added), the Trigger Ban provides that a person who causes an abortion is guilty of a first-degree felony and subject to "imprisonment . . . for any term of *not more than 99 years or less than 5 years*." TEX. PENAL CODE § 12.32 (emphasis added); *see* TEX. HEALTH & SAFETY CODE § 170A.004; *see infra* ¶ 72; *see also* TDCAA Bulletin, (stating that the Trigger Ban "cannot be reconciled with those older—but more specifically-tailored—pre-*Roe* crimes which

[19] Ex. B, Hill Letter at 1728.

also carry much lower punishments (for example, a maximum of five years' imprisonment for abortion under former Article 1191 [or 4512.1], versus a potential life sentence under §170A.002).").

66. As the TDCAA Bulletin states, "[b]ecause HB 1280 did not explicitly repeal the old statutes struck down by *Roe*, it . . . created a situation in which those old crimes will co-exist with the bill's new felony abortion crime under [the Trigger Ban], *even though that new crime irreconcilably conflicts with those old crimes in many situations*."[20]

B. The Declaratory Judgment in Roe Holding the Pre-Roe Ban Unconstitutional Remains in Effect Unless Reopened and Vacated by the Issuing Court.

67. In *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970), the Northern District of Texas issued a final judgment including a declaratory judgment that the Pre-*Roe* Ban was void as unconstitutional, which was upheld by the United States Supreme Court on appeal. *See Roe*, 410 U.S. at 166.

68. Setting aside that the Pre-*Roe* Ban was repealed by implication, the declaratory judgment in *Roe* that the Pre-*Roe* Ban is unconstitutional remains in effect unless and until the judgment is reopened and vacated pursuant to Federal Rule of Civil Procedure 60(b). *See* FED. R. CIV. P. 60(b).

69. Rule 60(b) provides the procedural mechanism to reopen and vacate a judgment and sets forth the rare circumstances under which relief from a final judgment—including a declaratory judgment—may be granted. Pursuant to Rule 60(b)(5), a party to a judgment or its successor-in-interest must file a motion with the issuing court for relief "from a final judgment, order or proceeding." FED. R. CIV. P 60(b); WRIGHT & MILLER, 11 FED. PRACTICE & PROCEDURE § 2851 (noting that Rule 60 "prescribes the practice in proceedings to obtain relief" from

[20] TDCAA Bulletin (emphasis in original).

judgment). A judgment is only set aside under Rule 60(b) if the moving party establishes that one of the six criteria set forth in Rule 60(b) applies and justifies vacating the judgment.

70. Thus, in addition to having been impliedly repealed, the Pre-*Roe* Ban remains void as unconstitutional unless the court that issued the final declaratory judgment—the U.S. District Court for the Northern District of Texas—reopens the case upon motion and vacates the judgment based on one of the rationales set forth in Rule 60(b).

71. On information and belief, a successor-in-interest to the defendant in *Roe* has not moved in the Northern District of Texas to reopen the final judgment in *Roe*. The declaratory judgment in *Roe* that the Pre-*Roe* Ban is void and unconstitutional remains in effect and further prevents the Defendants from enforcing the Pre-*Roe* Ban in the immediate aftermath of *Dobbs*.

IV. ABORTION CARE REMAINS LAWFUL IN TEXAS UNTIL THE EFFECTIVE DATE OF THE TRIGGER BAN

72. Section 2 of the Trigger Ban makes it a criminal offense to "knowingly perform, induce, or attempt an abortion" and provides for severe criminal and civil penalties. TEX. HEALTH & SAFETY CODE § 170A.002.

73. "Abortion" is defined as "the act of using or prescribing an instrument, a drug, a medicine, or any other substance, device, or means with the intent to cause the death of an unborn child of a woman known to be pregnant," excluding "birth control devices [and] oral contraceptives" and efforts to "save the life or preserve the health of an unborn child," remove a fetus following a miscarriage, or "remove an ectopic pregnancy." TEX. HEALTH & SAFETY CODE § 245.002(1). The Trigger Ban defines an "unborn child" as "an individual . . . from fertilization until birth." *Id.* § 170A.001(5).

74. Pursuant to Section 2 of the Trigger Ban, any individual who performs or attempts an abortion commits an "offense." TEX. HEALTH & SAFETY CODE § 170A.004. The "offense"

constitutes a second-degree felony unless "an unborn child dies as a result of the offense[,]" in which case it is a first-degree felony. *Id.* First-degree felonies are punishable by "imprisonment in the Texas Department of Criminal Justice for life or for any term of not more than 99 years or less than 5 years" and a fine not to exceed $10,000. TEX. PENAL CODE § 12.32. Second-degree felonies are punishable by "imprisonment in the Texas Department of Criminal Justice for any term of not more than 20 years or less than 2 years" and a fine not to exceed $10,000. *Id.* § 12.33.

75. Section 3 of the Trigger Ban details a delayed effectiveness scheme applicable to Section 2 of the Act. H.B. 1280 § 3. Section 3 provides that the operative provisions of Section 2 shall not take effect until the thirtieth day after the date of one of three triggering events:

> (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.

H.B. 1280 § 3 (emphasis added).

76. The text of subsections 1 and 2 of Section 3, therefore, does ***not*** provide that Section 2 becomes effective 30 days after announcement of a U.S. Supreme Court decision overruling *Roe*; instead, Section 2 takes effect 30 days after the issuance of the U.S. Supreme Court's judgment in such a decision. H.B. 1280 § 3.

77. The Supreme Court Rules provide, among other things, the procedure by which the U.S Supreme Court announces its decision, enters its judgment on the docket, and then subsequently issues that judgment to the lower court. Pursuant to the U.S. Supreme Court Rules, a judgment is not *issued* to the lower court until at least 25 days after the entry of judgment.

U.S. S. CT. R. 45. 3; *see also* U.S. S. CT. R. 45.2. Section 3(1) of the Trigger Ban must, therefore, be read to start its 30-day clock only upon issuance of a certified copy of the opinion to the clerk of the lower court as provided under Supreme Court Rule 45.3.

78. On June 24, 2022, the U.S. Supreme Court released its opinion in *Dobbs* declaring that the "Constitution does not confer a right to abortion" and that "*Roe* and *Casey* must be overruled." *Dobbs*, 2022 WL 2276808, at *38. The *Dobbs* judgment was entered on the docket and the slip opinion issued by the Clerk on June 24, 2022. Because *Dobbs* is a Supreme Court case originating in federal court, Supreme Court Rule 45.3 controls the issuance of its judgment. As such, the Trigger Ban will be triggered no earlier than July 19, 2022, when the 25-day period to petition for rehearing expires. Section 2 of the Trigger Ban will not take effect until 30 days after *that* date (or a later date if the judgment issues thereafter), and the provision of abortion care in Texas will remain lawful until that point.

79. Defendant Paxton's Advisory confirms that the Trigger Ban is not in effect until thirty days after the *Dobbs* judgment is issued, which may take place "in about a month, or longer if the [United States Supreme Court] considers a motion for rehearing."[21]

V. IMPACT OF THREATS TO ENFORCE THE PRE-*ROE* BAN ON THE PROVISION OF ABORTION CARE FOLLOWING *DOBBS*

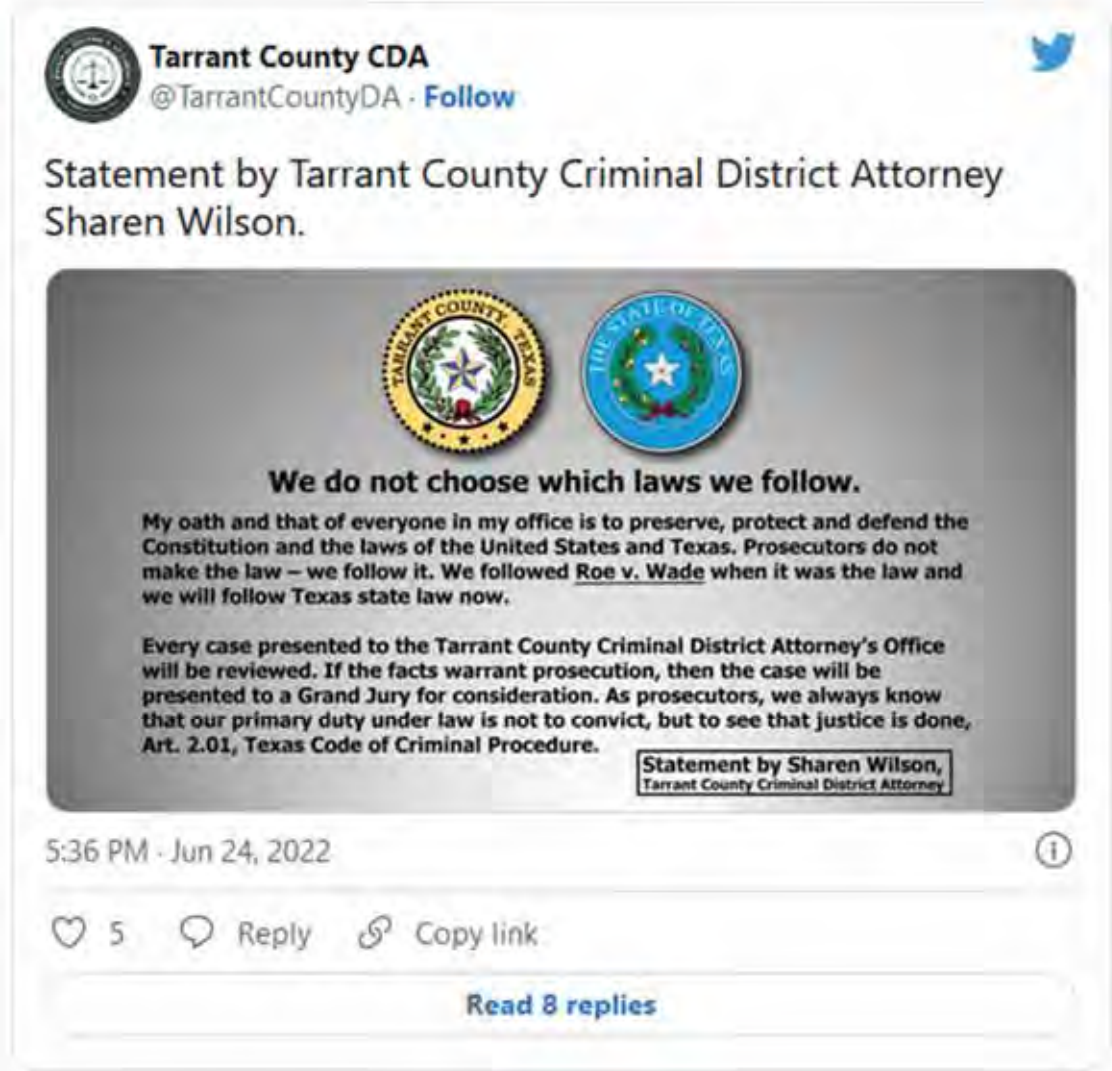
80. Despite acknowledging that the Texas Legislature enacted a comprehensive legislative act that delays any criminal prosecution of abortion providers until months after the release of the opinion in *Dobbs*—*i.e.*, until the point at which abortion is "clearly illegal in Texas"—Mr. Paxton also raised the specter that Defendants might "pursue criminal prosecution based on violations" of the Pre-*Roe* Ban starting on June 24, 2022.[22]

[21] Ex. A, Ken Paxton, *Advisory on Texas Law Upon Reversal of* Roe v. Wade (June 24, 2022).
[22] *Id.*

81. Legal abortion is one of the safest medical procedures in the United States. A woman's risk of death associated with carrying a pregnancy to term is approximately 14 times higher than that associated with abortion, and every pregnancy-related complication is more common among women giving birth than among those having abortions.

82. Notwithstanding the numerous bases on which the Pre-*Roe* Ban is unenforceable, *see supra* ¶¶ 48-69, Defendant Paxton's invitation to the Defendant District Attorneys to begin initiating criminal prosecutions immediately means that Plaintiffs currently risk criminal liability—or at least criminal prosecution and its attendant financial, personal, and reputational costs—for providing safe abortion care, even though the Trigger Ban will not take effect for approximately two months or longer. Furthermore, in briefing on a mandamus petition to the First Court of Appeals, Defendants directly threatened Plaintiffs with imminent prosecution—even for performing abortions in reliance on a court order—stating that "[s]hould Plaintiffs' employees commit abortions while the TRO is in place, nothing will prevent them from being prosecuted for those crimes once the TRO erroneously prohibiting enforcement is vacated." (Pet. for Writ of Mandamus at 1, No. 01-22-00480-CV (Tex. App. June 28, 2022).)

83. Defendant Sharen Wilson also threatened criminal enforcement of the Pre-*Roe* Ban. The following statement was posted to the Tarrant County District Attorneys' Twitter Account (https://twitter.com/TarrantCountyDA) on June 24, 2022:



84. But the harm to Plaintiffs goes well beyond the explicit threat of criminal liability. Plaintiff health-care providers have offered abortion care and reproductive services to patients in Texas for decades, and providing abortion services is central to Plaintiffs' operational models. As a result, if Plaintiffs are unable to provide abortions, they will be forced to surrender their abortion-facility licenses and permanently change their operational models or shutter their businesses altogether. Absent the requested relief, Defendants' threats of enforcement of the Pre-*Roe* Ban will force Plaintiffs to close their businesses prematurely, months before the Trigger Ban takes effect. Plaintiffs have "a vested property right…in performing their business [which would be] otherwise

lawful but for the statute in question," and have no adequate remedy at law for Defendants' threatened enforcement of the Pre-*Roe* Ban. *Smith*, 158 Tex. at 420.

85. Unlawful enforcement of the Pre-*Roe* Ban also threatens Plaintiffs' facility licenses and the licenses of the agents they rely on for their operations. So-called violations of the Pre-*Roe* Ban could provide grounds for the revocation of critical facility and ambulatory surgical center licenses held by Plaintiffs and licenses held by physicians, nurses, and pharmacists working on behalf of Plaintiffs. *See* TEX. OCC. CODE. §§ 164.053(a)(1), 164.052(a)(5), 164.053(b); 22 TEX. ADMIN. CODE §§ 217.11(1)(A), 217.12(1)(A), 139.60(c), 135.4(l), 281.7(a), 287.1(b); TEX. HEALTH & SAFETY CODE §§ 243.011, 245.012, 243.014-.015, 245.015, 245.017, 565.001(a), 565.002. So-called violations of the Pre-*Roe* Ban could also result in the imposition of heavy administrative fines and civil penalties on Plaintiffs and their agents. *See* TEX. OCC. CODE. §§ 165.001–.003, 165.101–.103, 301.501–.502, 301.553, 566.001–.003, 566.101–103; TEX. HEALTH & SAFETY CODE §§ 243.014–.015; TEX. ADMIN. CODE §§ 135.24, 139.33. The Pre-*Roe* Ban further subjects Plaintiffs to the threat of fines of up to $1,000 per violation, in addition to criminal liability and imprisonment. *See* 1925 TEX. PENAL CODE art. 1193. Additionally, a licensed abortion facility must surrender its facility license when the licensed abortion facility ceases operations, 25 TEX. ADMIN CODE § 139.24(e), which will likely occur absent the requested relief.

86. Threatened enforcement of the Pre-*Roe* Ban, therefore, subjects Plaintiffs to an untenable choice. If Plaintiffs cease providing abortions for fear of liability under the Pre-*Roe* Ban, they will be forced to turn away patients and permanently shut down their otherwise legal, licensed businesses despite the fact that, as detailed above, abortion care remains legal in Texas.

87. If Plaintiffs, instead, offer abortion services in Texas while the legality of doing so remains uncertain under Texas's patchwork of abortion laws and the Pre-*Roe* Ban, they risk severe

and irreparable criminal, civil, and disciplinary action including at least two years' imprisonment, substantial per-violation fines, and permanent loss of licenses or other authorizations that permit them to provide healthcare to patients in Texas and in which they have vested property rights. Their physicians, nurses, and pharmacists on which they rely to run their businesses risk similar consequences. Thus, Plaintiffs are effectively precluded from testing the constitutionality in defense to a criminal prosecution as to do so would force them to endure irreparable injury for which there is no adequate remedy at law.

88. Plaintiffs accordingly face immediate harm for which they have no adequate remedy at law for the provision of early abortions that they reasonably believe to be legal, unless this Court grants (i) declaratory relief that provides guidance regarding the status of the Pre-*Roe* Ban, and (ii) an injunction preventing unlawful enforcement of the Pre-*Roe* Ban against them. Imminent judicial intervention is necessary to preserve Plaintiffs' vested property rights in the operation of their businesses and maintenance of their various facility licenses and their agents' professional licenses, and freedom from the threat of criminal fines and imprisonment until Section 2 of the Trigger Ban takes effect thirty days after the *Dobbs* opinion is issued on or after July 19, 2021.

CLAIM I: DECLARATORY JUDGMENT

89. The allegations in paragraphs 1 through 84 above are incorporated as if fully set forth herein.

90. Plaintiff hereby petitions the Court pursuant to the UDJA.

91. Section 37.002 of the UDJA provides that it is remedial and its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and it is to be liberally construed and administered.

92. Under Section 37.003 of the UDJA, a court of proper jurisdiction has the power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. The declaration may be either affirmative or negative in form and effect and the declaration has the force and effect of a final judgment or decree.

93. Legislative findings contained within Section 2 of S.B. 8 and Section 4 of the Trigger Ban state that, with or without the Trigger Ban, Defendants may enforce the Pre-*Roe* Ban, 1925 TEX. PENAL CODE arts. 1191–1194, 1196, against Plaintiffs. But the Pre-*Roe* Ban has been repealed, does not provide adequate notice, and is in irreconcilable conflict with the Trigger Ban, and for all of those reasons is not enforceable. Moreover, the Pre-*Roe* Ban is unenforceable under a final declaratory judgment that has not been vacated. Plaintiffs seek a declaratory judgment of the Court that the Pre-*Roe* Bans are repealed and that Defendants may not enforce the Pre-*Roe* Ban consistent with the due process clause.

94. Plaintiffs further affirmatively plead and allege that they have sued the Defendant state agencies and officials in their official capacities, and that they challenge the validity of the Pre-*Roe* Ban. Therefore, the state agencies and officials are necessary parties to this suit and governmental immunity does not apply.

CLAIM II: ULTRA VIRES

95. The allegations in paragraphs 1 through 84 above are incorporated as if fully set forth herein.

96. A state office may not act without legal authority. *See, e.g., City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009).

97. The legislative acts S.B. 8 and H.B. 1280 state that the Defendant state officials may enforce the Pre-*Roe* Ban, 925 TEX. PENAL CODE arts. 1191–1194, 1196. But the Pre-*Roe* Ban has been repealed, does not provide adequate notice, and is in irreconcilable conflict with the

Trigger Ban, and for all of those reasons is not enforceable. Moreover, the Pre-*Roe* ban is unenforceable under a final declaratory judgment that has not been vacated. Plaintiffs seek a declaratory judgment of the Court that any enforcement of the Pre-*Roe* Ban by Defendants is therefore *ultra vires* and not authorized by law consistent with the due process clause.

98. Plaintiffs further affirmatively plead and allege that they have sued the Defendant state officials in their official capacities under the *ultra vires* doctrine, and that they seek prospective relief other than the recovery of monetary damages. Therefore, governmental immunity does not apply.

CLAIM III: DUE PROCESS

99. The allegations in paragraphs 1 through 84 above are incorporated as if fully set forth herein.

100. Under the Texas Constitution, "[n]o citizen of this State shall be deprived of life, liberty, property, privileges, or immunities, or in any manner disfranchised, except by the due course of the law of the land." TEX. CONST. art. I, § 19.

101. The Pre-*Roe* Ban imposes criminal penalties on persons who provide an abortion, or furnish the means for procuring an abortion, or attempt to do these things.

102. Enforcement of the Pre-*Roe* Ban would be inconsistent with the due process guaranteed by the Texas constitution. Fundamental uncertainty around the Pre-*Roe* Ban's status authorizes or encourages arbitrary and discriminatory enforcement and fails to provide fair warning of whether its prohibitions exist so that ordinary people may conform their conduct accordingly.

103. The Pre-*Roe* Ban unlawfully empowers arbitrary and discriminatory enforcement because, (i) it does not provide sufficient notice as to whether its provisions are currently operable and enforceable, (ii) it provides no guidance to prosecutors regarding reconciling the Pre-*Roe* Ban

with inconsistencies in other Texas abortion laws including the Trigger Ban, and (iii) for both of these reasons, by the admission of the State's own prosecutorial association, is causing "confusion" among prosecutors as to whether and how to attempt to enforce it.

104. The Pre-*Roe* Ban also thereby fails to adequately inform regulated parties and those charged with the law's enforcement of whether engaging in the described conduct is prohibited and/or leads to penalties.

105. Due process does not permit such uncertainty, particularly where, as here, the challenged law threatens parties with serious criminal penalties and conflicting interpretations as to the status of the law by courts and government officials provide no guidance to parties as to the legality of their conduct.

CLAIM IV: APPLICATION FOR TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION

106. The allegations in paragraphs 1 through 84 above are incorporated as if fully set forth herein.

107. Pursuant to Texas common law and Texas Civil Practice and Remedies Code Section 65.011 (1, 5), Plaintiffs are entitled to injunctive relief against Defendants because Defendants' threatened immediate enforcement of the Pre-*Roe* Ban is causing imminent, irreparable injury to Plaintiffs.

108. Plaintiffs are likely to prevail on the merits of this case and receive the requested declaratory judgment, as well as equitable relief.

109. Plaintiffs also have no adequate remedy at law for Defendants' threatened actions. Specifically, money damages are insufficient to redress the threatened injury to Plaintiffs.

110. The threatened injury to Plaintiffs' vested property rights and liberty far outweighs any possible damages to Defendants. Indeed, Defendants are not harmed in any sense by

maintenance of the status quo— the availability of very early abortions in Texas—for period of time consistent with the Texas Legislature's deliberate decision to delay the Trigger Ban's effective date until 30 days after issuance of a U.S. Supreme Court judgment overruling *Roe*.

111. Accordingly, Plaintiff requests that this Court issue a temporary restraining order pursuant to Texas Rule of Civil Procedure 680.

112. Plaintiffs are willing to post a bond for any temporary injunction if ordered to do so by the Court, but request that the bond be minimal because Defendants are acting in a governmental capacity, have no pecuniary interest in the suit, and no monetary damages can be shown. TEX. R. CIV. P. 684.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff asks this Court:

a. To enter a judgment against Defendants declaring that the Pre-*Roe* Ban has been repealed expressly or by implication, and may not be enforced consistent with the due process guaranteed by the Texas constitution, or is otherwise unenforceable against Plaintiffs;

b. To issue temporary injunctive relief as soon as possible that restrains Defendants, their agents, servants, employees, attorneys, and any persons in active concert or participation with Defendants, from enforcing the Pre-*Roe* Ban or instituting disciplinary actions related to alleged violations of the Pre-*Roe* Ban;

c. To retain jurisdiction after judgment for the purposes of issuing further appropriate injunctive relief if the Court's declaratory judgment is violated; and

d. To grant such other and further relief as the Court deems just and proper.

Dated July 6, 2022

Respectfully submitted,

/s/ Melissa Hayward
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*Pro hac vice applications submitted

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF BRAZOS §

Before me, the undersigned notary public, on this day personally appeared Allison Gilbert, M.D., who declares and states that that she is authorized to make this affidavit, that she has read Plaintiffs' Original Verified Petition, Application for Temporary Restraining Order, Temporary Injunctive Relief against Defendants ("Petition") and knows the contents thereof; and, unless otherwise stated, that the factual statements contained in the Petition are based upon her personal knowledge, or obtained from others with personal knowledge or from documents, and are, to the best of her knowledge, true and correct.

Allison Gilbert

State of Texas
County of Brazoria

Sworn to and subscribed before me, the undersigned, this 6th day of July 2022.

Notary Public, State of Texas
Commission Expires on July 22, 2024

This notarial act is an online notarization via two-way webcam and audiovisual technology.

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