



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

**MEMORANDUM ORDER**

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

Appellate case number: 01-22-00480-CV

Trial court case number: 2022-38397

Trial court: 269th District Court of Harris County

The plaintiffs in the underlying suit, who are the real parties in interest in this original proceeding, are entities that operate licensed abortion facilities and ambulatory surgical centers in Texas and that provide a range of reproductive health care services, including medication and procedural abortions. They sued two sets of defendants: (1) state actors and agencies and (2) district attorneys for the counties in which the plaintiffs operate. The state actors and agencies are empowered to assist in the prosecution of criminal offenses and to regulate and license the practice of medicine, the practice of nursing, abortion facilities and ambulatory surgical centers, and pharmacists and pharmacies. The district attorneys are empowered to prosecute alleged criminal violations in their counties.

In 2021, the Texas Legislature enacted H.B. 1280, a statute that banned most abortions at every stage of development “from fertilization until birth, including the entire embryonic and fetal states of development.” *See* Act of May 25, 2021, 87th Leg., R.S., ch. 800, § 2 (codified at TEXAS HEALTH & SAFETY CODE §§170A.001–.007). This law included a narrow exception to permit a physician to perform, induce, or attempt an abortion when pregnancy threatens a mother’s life or “poses a serious risk of substantial impairment of a major bodily function.” *Id.* And it provided for criminal penalties up to life imprisonment and civil penalties no less than \$100,000 for each violation. *Id.* However, the law was not immediately effective. *See* Act of May 25, 2021, 87th Leg., R.S., ch. 800, § 3.

Instead, the Legislature provided that the prohibition on provision of abortion health care services would be effective

To the extent permitted, on the 30th day after:

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

....

*Id.*

On June 24, 2022, the Supreme Court of the United States handed up its opinion in *Dobbs v. Jackson Women’s Health Organization*, overruling *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392, 2022 WL 2276808, at \*7 (U.S. June 24, 2022).

That same day, on June 24, 2022, Attorney General Ken Paxton issued an “Advisory on Texas Law Upon Reversal of *Roe v. Wade*,” asserting that criminal prosecution could proceed based on pre-*Roe* abortion bans immediately and prior to the effective date of the 2021 statute. Among these pre-*Roe* bans, and at issue in this original proceeding, is a law enacted in 1925 prohibiting abortion at every stage of development of the embryo or fetus, providing civil and criminal penalties, and including a narrow exception for “abortion procured or attempted by medical advice for the purpose of saving the life of the mother.” See Acts 1925, 39th Leg., R.S., S.B.7 (transferred by Acts 1973, 63d Leg., R.S., ch. 399 (S.B. 34)).

In the underlying case, the plaintiffs sought declaratory and injunctive relief because the attorney general’s advisory had a chilling effect on their ability to provide legal abortion care, which the plaintiffs allege is “one of the safest medical procedures in the United States.”

On June 28, 2022, the trial court issued a temporary restraining order as to both the state actors and agencies and the district attorneys. The TRO enjoined

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

The trial court set the matter for hearing on a temporary injunction on July 12, 2022 at 3:30 p.m.

On June 29, 2022, the state actors and agencies simultaneously filed petitions for writ of mandamus in this Court and in the Supreme Court of Texas. These original proceedings were each accompanied by a request for emergency relief that sought a stay of the trial court's TRO as to all defendants.

We ordered the real parties in interest to file a response to the Emergency Motion for Temporary Relief by 5 p.m., Tuesday, July 5, 2022, which they did. We further ordered the real parties in interest to file a response to the petition for writ of mandamus by 5 p.m., Monday, July 11, 2022.

Meanwhile, on June 30, 2022, the real parties in interest filed a response to the emergency motion in the Supreme Court of Texas, and the relators filed a reply in that court the following day. On July 1, 2022, the Supreme Court of Texas granted the relators' emergency motion in part, refusing to permit district attorneys to commence prosecution under pre-*Roe* abortion bans:

1. Relators' emergency motion for temporary relief, filed June 29, 2022, is granted in part. The temporary restraining order, dated June 28, 2022, in Cause No. 2022-38397, styled *Whole Woman's Health, et al. v. Ken Paxton, et al.*, in the 269th District Court of Harris County, Texas, is stayed as to Relators only pending further order of this Court.
2. The parties are directed to submit briefing . . . regarding whether the 269th District Court of Harris County, Texas, has jurisdiction to enjoin the enforcement of a criminal statute. *See State v. Morales*, 869 S.W.3d 941 (Tex. 1994).
- . . . .
4. This order does not preclude further proceedings in the court of appeals and district court, including proceedings to address the

jurisdictional issue described in paragraph 2 above. The Court is confident that those courts will proceed expeditiously.

5. The petition for writ of mandamus remains pending before this Court.

The motion for emergency relief filed in this Court remains pending. We deny the motion in part. Specifically, we deny the relators' emergency motion for temporary relief to the extent that the motion seeks to stay the operation of the trial court's temporary restraining order as to the district attorney defendants who are not relators in this original proceeding. Thus, consistent with the Supreme Court of Texas, we do not permit district attorneys to commence prosecution under pre-*Roe* abortion bans. We carry the remainder of the relators' motion for temporary relief with the case.

It is so **ORDERED**.

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

Date: July 6, 2022