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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

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 RELATORS' EMERGENCY MOTION FOR TEMPORARY RELIEF

TO THE HONORABLE SUPREME COURT OF TEXAS:

In seeking an emergency stay of the district court's temporary restraining order (TRO), Relators ask this Court to upend multiple norms and precedents under Texas law. Their motion should be denied.

Relators' principal argument for such extraordinary relief is to allow Texans to be criminally prosecuted for violating antiquated statutes (1) that, if given effect, would invalidate a slew of later-enacted statutes expressly permitting and regulating abortion; (2) that, for this reason, have been held by the Fifth Circuit to have been repealed; and (3) that

even the Texas statewide prosecutors' association believes "cannot be reconciled" with later enacted laws and thus are causing "confusion."[1]

Setting aside the lack of merit to their argument, Relators have no authority to initiate criminal prosecutions. The district attorney ("DA") defendants in this case are the parties with prosecutorial authority, while the Attorney General's power is (as Relators admit) limited to assisting the DAs if they so request. Because Relators cannot initiate criminal prosecution, they are not aggrieved by the TRO to the extent it prohibits such prosecution. Relators have wholly failed to show they have standing to request a stay of the TRO's bar against criminal prosecution.

Relators' motion also defies the Texas Rules of Appellate Procedure. Relators misuse Rule 52.10(b) by seeking to alter, rather than preserve, the status quo. Here, it has been the status quo for five decades that the statutes at issue cannot be enforced against Real Parties in Interest ("Plaintiffs"). Preserving the status quo requires denying Relators' motion, not granting it. Moreover, although the court of appeals normally must be afforded an opportunity to grant relief before a litigant seeks this

[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/.

Court's intervention, *see* Tex. R. App. P. 52.3(e), Relators rushed to this Court on an "emergency" basis, frustrated by the normal process that applies to all other litigants and cases. Relators filed a nearly identical stay motion in the First Court of Appeals, which ordered a response by Tuesday, July 5—only one business day after Relators' requested deadline for the Court of Appeals' action and one week before the temporary injunction hearing scheduled for July 12. MR.82, MR.86, MR.167. Relators have shown no compelling reason for refusing to allow the First Court to consider their stay motion in the first instance under the usual practice.

Relators' requests also seek to usurp the authority of the Texas Legislature and subvert the power of Texas courts. Just last year, the Legislature determined that its 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*. In their Petition, however, the Attorney General suggests he has the power to unilaterally put all Texans on "notice" that, months before that criminal ban takes effect, providing an abortion in Texas is a felony immediately. Pet. 8. But as this Court held

last month, the Attorney General has no authority to issue such interpretations that could bind the public. *See In re Abbott*, No. 22-0229, 2022 WL 1510326, at *2 (Tex. May 13, 2022).

Indeed, Relators go so far as to threaten criminal prosecution (again, an authority they lack) for actions Texans take *in reliance on a court order* if it is later overruled, Pet. 16–17—threatening to severely undermine the power of Texas district and intermediate appellate courts in circumstances far beyond this case.

BACKGROUND

Before *Roe v. Wade*, 410 U.S. 113, 166 (1973), abortion was prohibited and criminalized in Texas under Penal Code Articles 1191–1194 and 1196, which were enacted in 1925. Articles 1191-95 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, 1196 (1925).

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, 63rd Leg., R.S., 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.

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 II.B.

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 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.

On June 24, 2022, the U.S. Supreme Court issued its opinion in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 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 prosecution 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]

Based on the threat of enforcement of the Pre-*Roe* Ban—which carries severe penalties including at least two years' imprisonment—against their officers and employees, Plaintiffs (abortion clinics across the state) ceased providing abortions on June 24, approximately two months (or more) before Texas' post-*Roe* abortion ban takes effect.

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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.

On June 27, Plaintiffs filed a Petition for Declaratory Judgment and Application for TRO and Temporary Injunction in Harris County. On June 28, the 281st District Court granted the TRO, finding that (1) Texas's Pre-*Roe* Ban was repealed and "may not be enforced consistent with the due process guaranteed by the Texas constitution"; (2) "the threat of enforcement of Texas's Pre-*Roe* Ban creates a probable, irreparable, and imminent injury for which Plaintiffs and their physicians, nurses, pharmacists, other staff, and patients throughout Texas have no adequate remedy at law if . . . subjected to criminal liability or disciplinary action under the Pre-*Roe* Ban"; (3) "Defendants will not be harmed if the Court restrains them and anyone in active concert and participation with them from enforcing the Pre-*Roe* Ban"; and (4) "granting this request preserves the status quo preceding this controversy." MR.80.

The district court thus temporarily 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." MR.81. The district court also scheduled a hearing on Plaintiffs'

Application for a Temporary Injunction Hearing for July 12, 2022. MR.81.

On June 28, 2022, Relators filed a Petition for Writ of Mandamus and moved for a stay of the TRO in the First District Court of Appeals. The next day, June 29, the Court of Appeals ordered a response to the stay motion by June 5 and response to the mandamus petition by July 11. That same day, without allowing the Court of Appeals to consider their motion, Relators petitioned this Court for a writ of mandamus and moved on an "emergency" basis for temporary relief.

ARGUMENT

Relators are not entitled to a stay. The defendant district attorneys declined to join Relators' petition or stay motion, and thus Relators have no appellate standing to move for a stay of the TRO against those defendants. A stay would upend the status quo of five decades, not preserve it. And Relators have not shown that they would be prejudiced in the absence of temporary relief when the comprehensive abortion ban the Legislature just enacted deliberately included a delayed effective date.

Nor have Relators shown entitlement to mandamus relief. This Court's decisions establish that the district court has jurisdiction in this

case and that Relators lack sovereign immunity here. And the district court did not abuse its discretion when it preserved the status quo through a TRO, and preliminarily determined that the Pre-*Roe* Ban has been supplanted by and cannot be harmonized with subsequent statutory enactments—just as a unanimous Fifth Circuit panel held in an opinion by Judge Edith Jones. Moreover, this Court should reject the Petition because it is premised on a novel theory that would preclude Texans from *ever* relying on temporary relief entered by a district or intermediate appellate court. Relators' request for emergency relief should be denied.

I. Relators Are Not Entitled to Emergency Temporary Relief.

A. Relators have no standing to seek relief from the TRO's bar against criminal enforcement.

Relators are seeking "an immediate stay of the temporary restraining order" in its entirety. Mot. 2. But the TRO applies not only to the Relators but also to other defendants—district attorneys—who have sought neither mandamus nor a stay.

Relators have no standing to ask that the TRO against those other parties be stayed. "Generally, when one party appeals from a judgment, a reversal as to that party will not justify a reversal as to other nonappealing parties." *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 446

(Tex. 1989). "[A]n appealing party may not complain of errors that do not injuriously affect it or that merely affect the rights of others." *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 843 (Tex. 2000).

Here, none of the Relators can initiate criminal prosecution for a purported violation of the Pre-*Roe* Ban. At most, Relator Paxton can "provide assistance in the prosecution" of a criminal offense "[a]t the request of a district attorney." TEX. GOV'T CODE § 402.028(a); *accord* Mot. 3. The district attorneys, however, have not asked for relief from the TRO to permit such prosecution. Relators therefore are not aggrieved by the TRO's application to district attorneys, and they lack standing to seek a stay of that part of the TRO.

B. Relators seek to alter the status quo, not preserve it.

Where this Court has yet to consider the merits of a mandamus petition, the Court's role in issuing temporary relief under Rule 52.10(b) of the Texas Rules of Appellate Procedure is to preserve the status quo pending consideration of the petition. *In re State*, No. 21-0873, 65 TEX. SUP. CT. J. 48, at *1 (Tex. Oct. 14, 2021) (per curiam). The status quo is the "last, actual, peaceable, non-contested status" preceding the pending

controversy. *Id.*; *see also Transp. Co. v. Robertson Transps., Inc.*, 261 S.W.2d 549, 553–54 (1953).

Relators' motion, if granted, would upend the status quo, not preserve it. The last, actual, peaceable, non-contested status before the controversy was that the Pre-*Roe* Ban could not be enforced. Relators admitted at the TRO hearing in the district court that "abortion was legal" in Texas before the U.S. Supreme Court's decision in *Dobbs* this past Friday. TRO Hearing Tr. 52:3–4. The controversy arose when Relator Paxton tweeted that "[a]bortion is now illegal in Texas,"[3] and issued his advisory on Friday stating that "abortion providers could be criminally liable for providing abortions starting today." MR.35. Because the "central question of the suit" is whether the provision of abortion in Texas can now be prosecuted or otherwise punished through disciplinary actions, the parties' position *before* such enforcement was threatened "is the last peaceable uncontested status between these parties that must be preserved by the temporary injunction." *In re Newton*, 146 S.W.3d 648, 651–52 (Tex. 2004) (quoting *City of Arlington v. City of Ft. Worth*, 873 S.W.2d

[3] Ken Paxton (@KenPaxtonTX), TWITTER (June 24, 2022, 10:21 AM ET), https://twitter.com/KenPaxtonTX/status/1540339215581470723.

765, 769 (Tex. App.–Fort Worth 1994)). This alone requires denial of Relators' emergency motion.

C. Relators cannot establish that they will suffer prejudice without an emergency stay of the TRO.

Relators also have not shown they will suffer prejudice if the Court does not grant them the extraordinary relief of a stay. Mr. Paxton's only role with respect to the Pre-*Roe* Ban, and thus his sole interest in this case, is in assisting district attorneys who ask for his assistance. *See* TEX. GOV'T CODE § 402.028(a); *accord* Mot. 3. Mr. Paxton has not shown how he would be prejudiced by being unable to assist district attorneys *who do not seek this Court's intervention* during the TRO's duration. His asserted public interest in protecting embryonic and fetal life cannot support a finding that Relator himself will suffer prejudice, particularly given the extremely limited role the Legislature gave him vis-à-vis the Pre-*Roe* Ban.[4] Nor have any of the other Relators shown any prejudice

[4] In contrast, the Legislature gave the Attorney General a larger role with respect to the Trigger Ban: the ability to sue violators of the Trigger Ban for civil penalties. *See* TEX. HEALTH & SAFETY CODE § 170A.005. But all agree the Trigger Ban has not taken effect and is not encompassed within the TRO.

from a TRO that preserves the status quo by temporarily preventing disciplinary proceedings over "violations" of 100-year-old statutes that the Texas Legislature has impliedly repealed.

II. Relators Have Not Shown They Will Be Entitled to 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 that the lower court clearly abused its discretion and 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).

Relators fall far short of meeting this heavy burden. 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 did not abuse its discretion in concluding 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 just establish "threatened injury" that is "certainly impending." *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. Hadjdik*, 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 at the clinic that violate state law. Plaintiffs are licensed and regulated by Relator Texas Health and Human Services Commission (HHSC) and its Executive Commissioner, Relator Cecile Erwin Young. MR.9–10. 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; Mot. 3 (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, Real Parties in Interest 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.[5]

[5] 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 & Sprits 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, 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).

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. 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. App.–Fort Worth 1987) (hospital asserting privacy rights on behalf of blood donors); *see also Illinois Cent. R. 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 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, and they could not. The causation element is satisfied because each Defendant has some role in enforcement of the Pre-*Roe* Ban. *See* Pet. ¶¶ 19–34; Mot. 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 Uniform Declaratory Judgments Act, Texas Civil Practice and Remedies Code § 37.001, et seq. ("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. *Texas Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 622 (Tex. 2011).

Plaintiffs seek a declaratory judgment that the Pre-*Roe* Ban is invalid because, *inter alia*, it cannot be enforced consistent with the constitutional right of due process. MR.15–18, MR.27–28; *infra* Part II.D. 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 Anding v. City of Austin*, No. 03-18-00307-CV, 2020 WL 2048255, at *4 (Tex. 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); *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).

(ii) The same claims can be brought under the ultra vires doctrine

Regardless, Plaintiffs' claims are properly brought against the Relators 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.* 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). "Such lawsuits are not against the state and thus are not barred by sovereign immunity." *Sefzik*, 355 S.W.3d at 621.

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. *See infra* Part II.B. 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." TRO Hearing Tr. 40:4–8. *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. *See infra* Part II.D; *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. *See infra* Part II.C.

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 trial court did not abuse its discretion in finding that the Pre-*Roe* Ban has been repealed.

The Pre-*Roe* Ban has been repealed either expressly or by implication. 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, 63rd Leg., R.S., ch. 399, § 5(a), and it has not been included in that Code since. 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 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 seek to have enforced today:

CHAPTER SIX ½. ABORTION

Art.
4512.1 to 4512.4. Unconstitutional.
4512.5. Destroying Unborn Child.
4512.6. Unconstitutional.
4512.7. Right Not to Perform Abortions.

This Chapter 6½, consisting of articles 4512.1 to 4512.6, was transferred from Vernon's Ann.P.C., Title 15, Chapter 9 (articles 1191 to 1196) by authority of § 5 of Acts 1973, 63rd Leg., p. 995, ch. 399, enacting the new Texas Penal Code.

Arts. 4512.1 to 4512.4. Unconstitutional

The United States Supreme Court in Roe v. Wade (1973) 93 S.Ct. 705, 410 U.S. 113, 35 L.Ed.2d 147, held that arts. 4512.1 to 4512.4 and 4512.6 violated the due process clause of the Fourteenth Amendment protecting right to privacy against state action.

Art. 4512.5. Destroying Unborn Child

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

[1925 P.C.]

Art. 4512.6. Unconstitutional

See note under arts. 4512.1 to 4512.4.

Vernon's Tex. Civ. Stat. arts. 4512.1–4512.6 (1984).

Until last Friday, the Texas Legislature's website, which posts the text of Texas statutes, did not contain any reference at all 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:

CHAPTER 6-1/2. ABORTION

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

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.

Relators point to the Legislature's legislative dicta in two enactments in 2021 purporting to "find" that the pre-*Roe* statutes had not been repealed. Mot. 7. But 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.

Meanwhile, successive Texas Legislatures were filling that void with a comprehensive set of statutes permitting but regulating abortion, which 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 v. Hill*, 385 F.3d 846, 849 (5th Cir. 2004).

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.[6]

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[6] 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

The Fifth Circuit's unanimous 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.

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 that 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.* §§

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).

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. 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. Pet. 13. But many of

Texas's regulations of abortion expressly *do not apply* in cases of life endangerment. *See* TEX. HEALTH & SAFETY CODE §§ 171.002(3), 171.0124, 171.046, 171.205. So 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.

If the Legislature wants abortion to be banned after *Dobbs*, the way to accomplish that is through a new enactment—and that is exactly what the Trigger Ban is. Indeed, the Trigger Ban itself supplants the Pre-*Roe* Ban. The Trigger Ban determines when a near-total abortion ban will take effect, and that is approximately two months or longer after the *Dobbs* decision. The Trigger Ban also establishes an entirely different 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."[7]

C. The federal court's final judgment that the Pre-*Roe* Ban is unenforceable has not been set aside.

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. Sch. Bd. of City of Richmond*, 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

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

issuing an injunction, "assum[ing] that state courts and prosecutors will" follow it statewide. *Roe,* 314 F. Supp. at 1224 (quoting *Dombrowski v. Pfister,* 380 U.S. 479, 484 (1965). The question of injunctive relief was 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* 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.

D. The district court did not abuse its discretion in finding that the Pre-*Roe* Ban may not be enforced consistent 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.").

As the district court found in the TRO order, enforcing the Pre-*Roe* Ban would violate these standards because a person of ordinary intelligence reading the Civil Statutes 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.

⊟ TITLE 71. HEALTH--PUBLIC
⊞ CHAPTER 1. HEALTH BOARDS AND LAWS
⊞ CHAPTER 4A. SANITATION AND HEALTH PROTECTION
⊟ CHAPTER 6-1/2. ABORTION
Art. 4512.5. DESTROYING UNBORN CHILD
⊟ TITLE 83. LABOR
⊞ CHAPTER 12. RESTRICTIONS ON LABOR

As of June 23, 2022

⊟ TITLE 71. HEALTH--PUBLIC
⊞ CHAPTER 1. HEALTH BOARDS AND LAWS
⊞ CHAPTER 4A. SANITATION AND HEALTH PROTECTION
⊟ CHAPTER 6-1/2. ABORTION
Art. 4512.1. ABORTION
Art. 4512.2. FURNISHING THE MEANS
Art. 4512.3. ATTEMPT AT ABORTION
Art. 4512.4. MURDER IN PRODUCING ABORTION
Art. 4512.5. DESTROYING UNBORN CHILD
Art. 4512.6. BY MEDICAL ADVICE
⊟ TITLE 83. LABOR
⊞ CHAPTER 12. RESTRICTIONS ON LABOR

As of June 24, 2022

And yet, although the text of the statutes reappeared, they are preceded by notes that demonstrate significant confusion over whether the statutes have been repealed:

CHAPTER 6-1/2. ABORTION

The following article was held to have been impliedly repealed in McCorvey v. Hill, 385 F.3d 846 (5th Cir. 2004).

In Section 2, Chapter 62 (S.B. 8), and Section 4, Chapter 800 (H.B. 1280), Acts of the 87th Legislature, Regular Session, 2021, the legislature finds that the state statutes enacted before the ruling in Roe v. Wade, 410 U.S. 113 (1973), that prohibit and criminalize abortion unless the mother's life is in danger, have not been repealed by the legislature, either expressly or by implication.

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

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. 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. AG 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 confusion is so deep that even Texas district attorneys do not know whether or not abortion is legal in Texas before the Trigger Ban's effective date. 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.[8]

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.

III. Relators' Petition Seeks to Subvert the Power of Texas Courts.

Relators' due process violations do not stop with Mr. Paxton's June 24 advisory. Wholly apart from any issue of abortion, the Petition itself is an attack on Texas courts and the rule of law.

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

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

TRO is in place," if mandamus is granted. Pet. 1; MR.102, MR.124–25 (arguing that "the temporary injunction would not be a defense to prosecution" for abortions committed while it was in effect). Were this premise correct, no Texan could *ever* rely on a TRO or temporary injunction to maintain the status quo: preemptively conforming their behavior would be the *only* way to avoid the risk of ruinous liability if the court order is later overruled. That is not, and cannot be, the law.

Relators support their incendiary theory with the flimsiest of citations: a 40-year-old, single-Justice concurrence about *federal court* jurisdiction,[9] and a Second Circuit opinion in which the relevant activity happened *before* the lawsuit was ever filed.[10] *Compare* Pet. 23, *with, e.g.*, *Clarke v. United States*, 915 F.2d 699, 701–02 (D.C. Cir. 1990); *United States v. Mancuso*, 139 F.2d 90, 92 (3d Cir. 1943) ("If the litigant does something, or fails to do something, while under the protection of a court

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[9] *Edgar v. MITE Corp.*, 457 U.S. 624, 648, 649, 653 (1982) (Stevens, J., concurring in part and concurring in judgment) ("[T]he question is whether federal judges possess the power to grant such immunity.").

[10] *Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, 766 F.2d 715, 718–19, 721–22 (2d Cir. 1985) (discussing "theoretical chilling" effect if union leader is fired based on letter he wrote prior to the litigation).

order he should not, therefore, be subject to criminal penalties for that act or omission."). Nevertheless, if not quickly quashed by this Court, Relators' theory that litigants cannot rely on a court order granting preliminary relief will infect Texas's judicial system, with far-reaching consequences well beyond the circumstances of this case.

CONCLUSION & PRAYER

For the foregoing reasons, Relators' emergency motion for temporary relief should be denied.

Respectfully submitted,

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June 30, 2022

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I certify that this document was prepared with Microsoft Word using Century Schoolbook 14-point font. It contains 5,380 words, excluding the portions of the Response exempted by Rule 9.4(i)(1).

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