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 Human Services Commission; Cecile Erwin Young; Texas Board of Pharmacy; Tim Tucker,

Relators.

On Petition for Writ of Mandamus
to the 269th Judicial District Court, Harris County

REPLY IN SUPPORT OF RELATORS' EMERGENCY MOTION FOR TEMPORARY RELIEF

To the Honorable Supreme Court of Texas:

Plaintiffs say *Relators* are seeking to change the status quo. That is quite the claim. Performing elective abortions has been a crime in Texas since (at least) 1854. Act of Feb. 9, 1854, 5th Leg., R.S., ch. 49, § 1, 1854 Tex. Gen. Laws 58. It was a crime in 1973, when the United States Supreme Court erroneously found a right to elective abortion somewhere in the penumbras of the Constitution. *See Roe v. Wade*, 410 U.S. 113, 153 (1973). And it was a crime on June 24, 2022, when that Court finally corrected its error. *See Dobbs v. Jackson Women's Health Org.*, No. 19-1392, 2022 WL 2276808, at *38 (U.S. June 24, 2022). That is "the last, actual, peaceable, non-contested status which preceded the pending controversy." *In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004).

To grant a stay, this Court need only reach "the tentative opinion that relator is entitled to the relief sought," and find "that relator will be prejudiced in the absence of such relief." *Republican Party of Tex. v. Dietz*, 924 S.W.2d 932, 932-33 (Tex. 1996) (per curiam). That standard is easily met. Plaintiffs come nowhere close to overcoming the presumption against implied repeal, and unborn children will lose their lives in the absence of relief. This irreparable harm far outweighs Plaintiffs' asserted injury of being unable to prolong the *Roe v. Wade* regime a bit longer. That is particularly so given that "the harm inherent in prosecution for a criminal offense" or civil enforcement is not irreparable harm as a matter of law. *Sterling v. San Antonio Police Dep't*, 94 S.W.3d 790, 795 (Tex. App.—San Antonio 2002, no pet.).

I. Plaintiffs cannot overcome the strong presumption against implied repeals. "Laws are enacted with a view to their permanence, and it is to be supposed that a purpose on the part of the lawmaking body to abrogate them will be given unequivocal expression." *Cole v. State*, 170 S.W. 1036, 1037 (Tex. 1914). Accepting the reality of the *Roe v. Wade* regime, the Legislature enacted various regulations to govern the performance of abortions, but that is hardly an "unequivocal expression" of intent to repeal preexisting criminal prohibitions. Plaintiffs would require the Legislature to have forsworn all health and safety regulation in order to preserve Texas's criminal statutes. It was not required to do so.

Nor was the Legislature unable to enact additional civil and criminal penalties for unlawful abortions, as it did in the Human Life Protection Act of 2021. Act of May 25, 2021, 87th Leg., R.S., ch. 800, 2021 Tex. Sess. Law Serv. 1887. In that same Act, the Legislature enacted a provision stating Texas's preexisting criminal

prohibitions had *not* been repealed. *Id.* § 4. So that Act cannot supply the "unequivocal expression" of intent that is necessary to effect a repeal by implication under this Court's precedent. *Cole*, 170 S.W. at 1037.

The declaratory judgment in *Roe v. Wade* is no barrier to enforcement by Relators or any other public official not a party to that case. Texas has been unable to enforce its criminal law since 1973, but that was because the *stare decisis* effect of *Roe v. Wade* meant no enforcement action would be successful, and thus enforcement would be a waste of public resources. Far from supporting Plaintiffs' theory that Relators are bound by a declaratory judgment in a case to which they were not parties, the Supreme Court recognized that reality when it "assume[d] the Texas prosecutorial authorities w[ould] give full credence to this decision that the present criminal abortion statutes of that State are unconstitutional." *Roe*, 410 U.S. at 166. But, as that Court has now explained, those criminal abortion statutes are *not* unconstitutional—there is no reason Relators cannot enforce them again. *Dobbs*, 2022 WL 2276808, at *38. The Dallas County District Attorney might need to move for relief from the judgment in *Roe v. Wade*, but Relators and other prosecutors do not.

II. As to prejudice, the TRO causes the State to "suffer[] the irreparable harm of denying the public interest in the enforcement of its laws." *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013). As explained above, the status quo ante is that performing elective abortions is criminal. The *Roe v. Wade* regime cannot seriously be called "non-contested." In the Legislature and in the courts, Texas has contested that regime time and again. *See, e.g.*, *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 530 (2021); *Whole Woman's Health*

v. Hellerstedt, 136 S. Ct. 2292, 2309 (2016); *Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott*, 748 F.3d 583, 605 (5th Cir. 2014); *Women's Med. Ctr. of Nw. Houston v. Bell*, 248 F.3d 411 (5th Cir. 2001); Conditional Cross-Petition for a Writ of Certiorari Before Judgment, *Carlton et al. v. Whole Woman's Health et al.*, No. 21-583 (U.S. Oct. 21, 2021).

More fundamentally, Relators seek a stay (and eventual mandamus relief) not so they can take enforcement action for its own sake. To the contrary, the interest Relators assert is in protecting unborn children. Plaintiffs intend to immediately perform elective abortions under cover of the TRO—and may have done so already. *See* MR.16. Even if Plaintiffs were correct that the TRO immunizes their conduct from future enforcement (though they are not), Relators' interest in protecting unborn children far outweighs Plaintiffs' interest in maintaining pre-*Dobbs* business as usual while this Court adjudicates the petition for a writ of mandamus.

The Attorney General is empowered to defend Texas law against constitutional challenges. Tex. Gov't Code § 402.010. That vitiates Plaintiffs' argument (at 2) that Relators lack "standing to request a stay of the TRO's bar against criminal prosecution." Moreover, it is true that the Attorney General participates in criminal prosecutions only to assist local prosecutors and the other Relators' enforcement authority is civil, not criminal, but that is a reason the TRO cannot stand, not a reason to deny a stay. Plaintiffs obtained an overbroad TRO, *see* MR.81; they cannot complain when Relators seek relief from it. And an injunction preventing enforcement threatens the State's interest in protecting unborn children even though some of the enjoined enforcement actions would be taken by the defendants who have not yet

appeared in this case. The injury Relators ask this Court to prevent is loss of life, not loss of the opportunity to prosecute or discipline its perpetrators after the fact.

Prayer

The Court should stay the trial court's temporary restraining order pending resolution of Relators' petition for a writ of mandamus.

Respectfully submitted.

Ken Paxton
Attorney General of Texas

Brent Webster
First Assistant Attorney General

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

Judd E. Stone II
Solicitor General

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

Beth Klusmann
Assistant Solicitor General

Counsel for Relators

Certificate of Service

On July 1, 2022, this document was served on Marc Hearron and Melissa Hayward, counsel for Real Parties In Interest, via Mhearron@reprorights.org and mhayward@haywardfirm.com.

/s/ Natalie D. Thompson
Natalie D. Thompson

Certificate of Compliance

Microsoft Word reports that this document contains 1,103 words, excluding exempted text.

/s/ Natalie D. Thompson
Natalie D. Thompson