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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. _____

In the Supreme Court of Texas

In re Ken Paxton; Texas Medical Board; Stephen Brint Carlton; Texas Board of Nursing; Katherine A. Thomas; Texas Health and Human Services Commission; Cecile Erwin Young; Texas Board of Pharmacy; Tim Tucker,

Relators.

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

RELATORS' EMERGENCY MOTION FOR TEMPORARY RELIEF

To the Honorable Supreme Court of Texas:

On June 24, the United States Supreme Court overruled its decision in *Roe v. Wade*, 410 U.S. 113 (1973), which had declared a constitutional right to abortion. *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, 2022 WL 2276808, at *7 (U.S. June 24, 2022). While the consequences of that ruling will be significant, one specific result is that the laws declared unconstitutional in *Roe* can again be enforced. Consequently, Texas's criminal prohibitions may be enforced against any person in Texas who unlawfully commits or attempts an abortion unless it is necessary to save the life of the mother.

Plaintiffs—a group of abortion clinics—disagree with this assessment of Texas law. But they cannot dispute that the Texas Legislature has never expressly repealed the pre-*Roe* abortion laws. Instead, they rely largely on decisions of publishers and an *Erie* guess by the Fifth Circuit to claim that the laws have been impliedly repealed.

But precedent and the Texas Legislature have confirmed they were not. The district court abused its discretion not only in allowing Plaintiffs to bring claims based on injuries to others, but in concluding that the pre-*Roe* laws had been repealed. Relators filed a petition for writ of mandamus in the First Court of Appeals to challenge the temporary restraining order, but the First Court issued an order that does not request Plaintiffs respond until the day before the TRO expires. The TRO has, therefore, been constructively denied.

Accordingly, Relators are seeking mandamus relief from this Court and respectfully request emergency temporary relief from under Texas Rule of Appellate Procedure 52.10. This Court should grant an immediate stay of the temporary restraining order pending the Court's consideration of the petition for writ of mandamus. Because the trial court's order threatens Texas's effort to protect unborn children, **Relators request an order granting temporary relief as soon as possible, but in any event, no later than Tuesday, July 5.**

BACKGROUND

In 1970, Jane Roe and others filed a constitutional challenge to Texas's laws that criminalized the performance of most abortions. *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970) (challenging Texas Penal Code articles 1191, 1192, 1193, 1194, & 1196). A three-judge panel declared the laws unconstitutional but did not enter injunctive relief. *Id.* at 1224. That decision was affirmed by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973), which recognized a right to abortion in the United States Constitution, *id.* at 164.

On June 24, 2022, the Supreme Court overturned its decision in *Roe*. *See Dobbs v. Jackson Women's Health Org.*, No. 19-1392, 2022 WL 2276808 (U.S. June 24, 2022). The Texas Attorney General issued an advisory that the laws at issue in *Roe* (which are now located in Tex. Civ. Stat. arts. 4512.1-.4, 4512.6) were immediately enforceable. MR.35.[1]

Plaintiffs, a group of abortion clinics, filed suit purportedly on behalf of themselves, their staff, physicians, nurses, pharmacists, and patients. MR.7-8. They asserted that the pre-*Roe* laws had been impliedly repealed, claimed that enforcing them would violate due process, and sought declaratory and injunctive relief. MR.25-29. They sued several district attorneys with the authority to prosecute, the Attorney General (who can assist in prosecution), and several state agencies and their heads who can impose administrative penalties if the regulated person or entity commits certain infractions. MR.8-11.

The district court granted a TRO on June 28 and set a temporary injunction hearing for July 12. MR.79-81. Relators filed a petition for mandamus with the First Court of Appeals, as well as a motion for temporary relief. MR.87-175. Relators requested temporary relief by July 1 and mandamus relief by July 5. MR.87-175. Today, the First Court of Appeals issued an order requesting a response to the motion for temporary relief from the real parties in interest by July 5 and a response to the

[1] "MR" refers to the mandamus record filed contemporaneously with this motion.

mandamus petition by July 11. MR.86. By setting the deadline the day before the TRO is set to expire, this order operates as a constructive denial of the mandamus petition.

Relators now seek mandamus relief from this Court, and in this motion seek to immediately stay the district court's order pending this Court's disposition of the petition for writ of mandamus.

ARGUMENT

In conjunction with a petition for writ of mandamus, relators "may file a motion to stay any underlying proceedings or for any other temporary relief pending the court's action on the petition." Tex. R. App. P. 52.10; *see In re Alamo Defenders Descendants Ass'n*, 619 S.W.3d 363, 366–67 (Tex. App.—El Paso 2021, orig. proceeding). A stay is warranted when the Court reaches "the tentative opinion that relator is entitled to the relief sought," and "the facts show 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).

A stay is warranted here because Relators easily satisfy the two elements of the *Dietz* test. Relators are entitled to the relief sought in their mandamus petition: the district court lacked jurisdiction, the pre-*Roe* laws have never been repealed, and Plaintiffs failed to prove a due-process violation. Further, the temporary restraining order is not appealable and will remain in effect, leaving Texas unable to protect unborn life, as the United States Supreme Court has permitted it to do. *Dobbs*, 2022 WL 2276808, at *42. Accordingly, the Court should grant an immediate stay pending its consideration of the petition for writ of mandamus.

I. Relators Are Entitled to Mandamus Relief.

Mandamus relief is available when the trial court's error "constitute[s] a clear abuse of discretion" and the relator lacks "an adequate remedy by appeal." *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992). This order meets that standard for at least three reasons.

A. The district court lacked jurisdiction because Plaintiffs (all abortion clinics) will not be prosecuted under the pre-*Roe* statutes and cannot rely on potential injuries to others to satisfy the injury-in-fact requirement. Standing is a "constitutional prerequisite to suit," *Heckman v. Williamson County*, 369 S.W.3d 137, 150 (Tex. 2012), and the burden is on the plaintiff to "demonstrate standing for each claim he seeks to press and for each form of relief that is sought," *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 14 (Tex. 2011) (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008)). To demonstrate standing under Texas law, a plaintiff must be *personally* aggrieved, and his alleged injury must be concrete and particularized, actual or imminent, not hypothetical. *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304-05 (Tex. 2008). If a plaintiff lacks an actual or threatened injury, he is not "personally aggrieved," has no personal stake in the litigation, and lacks standing. *M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 707-08 (Tex. 2001).

The criminal prohibitions in the pre-*Roe* laws do not injure the Plaintiff clinics. The pre-*Roe* laws state that "person[s]" who administer medicine or use "violence" to procure an abortion are to be confined in a penitentiary. Tex. Civ. Stat. art. 4512.1. Abortion clinics cannot be imprisoned, and Plaintiffs offer no explanation why they, as abortion clinics, fear criminal prosecution. At most, Plaintiffs point to a regulatory

requirement that they must ensure their doctors comply with the Medical Practice Act. 25 Tex. Admin. Code § 139.60(c). But Plaintiffs put on no evidence that their doctors intend to violate the Medical Practice Act, so any injury to the Plaintiff clinics is not certainly impending. *See In re Abbott*, 601 S.W.3d 802, 812 (Tex. 2020) (orig. proceeding) (holding a "threatened injury must be certainly impending to constitute an injury in fact").

Plaintiffs' attempt to bring suit "on behalf of" others fares no better. MR.7-8. "[T]he standing inquiry begins with determining whether the plaintiff has personally been injured, that is, 'he must plead facts demonstrating that he, himself (rather than a third party or the public at large), suffered the injury.'" *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 485 (Tex. 2018) (quoting *Heckman*, 369 S.W.3d at 155). When challenging the constitutionality of a statute a plaintiff must (1) "suffer some actual or threatened restriction under that statute," and (2) "contend that the statute unconstitutionally restricts the plaintiff's rights, not somebody else's." *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 518 (Tex. 1995).

As a result, Plaintiffs cannot base their standing on potential injuries to their staff, physicians, nurses, or pharmacists. The potential injuries identified in the petition belong to those individuals—not to the Plaintiff clinics. And Plaintiffs have not even articulated a potential injury to the patients they purport to represent. Consequently, Plaintiffs lack standing to bring those claims, *see Garcia*, 893 S.W.2d at 518, and the district court abused its discretion in exercising jurisdiction.

B. In addition to lacking jurisdiction, the district court abused its discretion in concluding that the pre-*Roe* statutes had been repealed. MR.80. As this Court has

explained, "[w]hen a court declares a law unconstitutional, the law remains in place unless and until the body that enacted it repeals it, even though the government may no longer constitutionally enforce it." *Pidgeon v. Turner*, 538 S.W.3d 73, 88 n.21 (Tex. 2017). The Texas Legislature has never repealed the pre-*Roe* laws.

In 1973, the Texas Legislature enacted a new penal code. Act of May 24, 1973, 63d Leg., R.S., ch. 399, 1973 Tex. Gen. Laws 883. Section 5 of that Act specifically provided for the transfer of articles of the former penal code that were "not repealed" into the Texas civil statutes. The table showing the "Disposition of Unrepealed Articles" accompanying the Act shows that the abortion laws at issue in *Roe* were transferred to articles 4512.1-.6 of the Texas Civil Statutes. 1973 Tex. Gen. Laws at 996e. Since then, the Texas Legislature twice confirmed that the statutes that prohibited abortion prior to *Roe* had never been repealed, either expressly or by implication. Act of May 25, 2021, 87th Leg., R.S., ch. 800, § 4, 2021 Tex. Sess. Law Serv. 1887 ("HB 1280"); Act of May 13, 2021, 87th Leg., R.S., ch. 62, § 2, 2021 Tex. Sess. Law Serv. 125 ("SB 8").

It is no answer to say that the Fifth Circuit concluded that the laws had been implied repealed merely because Texas enacted laws to regulate the performance of abortions following *Roe*. *McCorvey v. Hill*, 385 F.3d 846, 849 (5th Cir. 2005). Federal courts' *Erie* guesses are not definitive statements of Texas law. *See R.R. Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 499 (1941). And under Texas law, "[r]epeals by implication are never favored." *Cole v. State*, 170 S.W. 1036, 1037 (Tex. 1914). Whenever "the later act is silent as to the older law, the presumption is that its continued operation was intended, unless they present a contradiction so positive that

the purpose to repeal is manifest." *Id.* Enforcement of Texas's preexisting criminal prohibitions had been impossible for many years; the Texas Legislature cannot be said to have "repealed" those prohibitions by enacting additional regulations that *could* be enforced under the *Roe v. Wade* regime. Doing so is hardly an expression of intent to repeal the then-unenforceable criminal statutes.

C. Finally, Plaintiffs' due-process claim fails. Plaintiffs are on notice of the State's position that the pre-*Roe* laws remain in effect, as they admit in their petition. MR.4-5, 35. And because no one has threatened to prosecute them for conduct that took place prior to June 24, Plaintiffs' liberty has not been put in jeopardy through any criminal prosecution, and they can conform their conduct to the requirements of the law going forward. *Cf. County of Dallas v. Wiland*, 216 S.W.3d 344, 354 (Tex. 2007) ("In general, . . . the remedy for a denial of due process is due process.").

Plaintiffs have no constitutional right to perform abortions, so there is no due-process violation there.[2] *See Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 912 (6th Cir. 2019) ("The Supreme Court has never identified a freestanding right to perform abortions."); *see also Tex. Dep't of State Health Servs. v. Crown Distrib. LLC*, No. 21-1045, 2022 WL 2283170, at *25 (Tex. June 24, 2022) (Young, J., concurring) (explaining that "our distinct Texas constitutional tradition seems to provide some evidence that the judiciary exists to protect rights that are textually

[2] Plaintiffs have not asserted a substantive-due-process right to abortion on behalf of their patients.

expressed, but not to discover new ones in the due-course clause itself."). There is no due-process violation, and the district court abused its discretion in finding one.

II. Relators Will Be Prejudiced Absent a Stay.

Relators satisfy the second *Dietz* element because they will be "prejudiced in the absence" of a stay. 924 S.W.2d at 932-33. "As a sovereign entity, the State has an intrinsic right to enact, interpret, and enforce its own laws." *State v. Naylor*, 466 S.W.3d 783, 790 (Tex. 2015). "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 411 (5th Cir. 2020).

Moreover, as confirmed by the United States Supreme Court, States have a legitimate interest in protecting unborn life. *Dobbs*, 2022 WL 2276808, at *42. Texas's pre-*Roe* laws further that interest by protecting unborn children from the moment of conception. The district court's temporary restraining order prohibits Texas from acting to protect that life—the harms suffered will be immeasurable and irreversible. Post-hoc enforcement from criminal conduct cannot restore the unborn children's lives lost in the meantime. This Court should immediately stay the TRO that Plaintiffs (incorrectly) believe immunizes their violations of Texas law, *see* MR.6.

Prayer

The Court should grant this motion and immediately issue an order staying the effect of the trial court's temporary restraining order pending resolution of Relators' petition for a writ of mandamus.

Respectfully submitted.

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Certificate of Conference

In accordance with Texas Rule of Appellate Procedure 52.10(a), I certify that on June 29, 2022, Relators' counsel contacted Marc Hearron, counsel for the Real Parties in Interest, by email to notify them that this motion would be filed. Mr. Hearron indicated that the Real Parties in Interest are opposed.

/s/ Natalie D. Thompson
Natalie D. Thompson

Certificate of Service

On June 29, 2022, this document was served on Marc Hearron and Melissa Hayward, counsel for Real Parties In Interest, via Mhearron@reprorights.org and mhayward@haywardfirm.com.

/s/ Natalie D. Thompson
Natalie D. Thompson

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