

CAUSE NO. _____

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

_____ 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' ORIGINAL VERIFIED PETITION FOR DECLARATORY JUDGMENT AND APPLICATION FOR TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION

Plaintiffs file this Original 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

¹Ex. 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

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. Plaintiffs urgently request that this Court issue declaratory and injunctive relief, which would allow them to continue providing abortion care to patients in Texas to the extent permitted by Texas law without fear of devastating criminal and civil liability and the loss of their medical 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

A. PLAINTIFFS

12. 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.

13. 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.

14. 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.

15. 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.

16. 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.

17. 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.

18. 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.

B. DEFENDANTS

19. 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.

20. 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). TMB may be served with process at 333 Guadalupe Street, Tower 3, Suite 610, Austin, Texas 78701.

21. 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.

22. 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). TBN may be served with process at 333 Guadalupe Street, Suite 3-460, Austin, Texas 78701-3944.

23. 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.

24. 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.

25. 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.

26. 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. TEX. OCC. CODE §§ 566.001-.002, 566.101. TBP may be served with process at 333 Guadalupe, Suite 500, Austin, TX 78701-3944.

27. 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.

28. 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.

29. 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.

30. 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.

31. 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.

32. 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.

33. 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.

34. 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

35. 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.

36. 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.

37. 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.

38. Finally, the 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).

39. 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.

40. 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

I. HISTORY OF ABORTION LAWS IN TEXAS

41. 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*.

42. 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.

43. 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

44. 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

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/>.

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 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.

45. 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.

46. 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

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 . . .”).

Texas’s intricate regulatory scheme for abortion and by the Trigger Ban itself, somehow had never been repealed.

47. 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[ie]d 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

II. THE PRE-*ROE* ABORTION BAN

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

48. 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

49. 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).

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”).

50. Initially, the Pre-*Roe* Ban and Article 1195—a statute that was not challenged in *Roe* and is not an abortion ban¹¹—were transferred from the Texas Penal Code to the Texas Civil 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. STATS. arts. 4512.1-.4, -.6 (West 1974)).

51. 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.”

52. 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

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”).

¹² The Pre-*Roe* ban was published in Volume 4 of the 1974 West’s Texas Statutes and Codes, which currently appears on Texas Legislature’s Historical Texas Statutes site stamped “SUPERSEDED”. See TEX. 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.

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).

53. 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 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

54. 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

55. 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.

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.”).

¹⁵ See Ex. C, Vernon’s Texas Civil Statutes at 181 (dated Jan. 1, 2022).

¹⁶ See *id.*

¹⁷ VERNON’S TEX. CIV. STATS. ch. 6-1/2 (June 24, 2022), available at <https://statutes.capitol.texas.gov/Docs/SDocs/VERNON'SCIVILSTATUTES.pdf>.

56. 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 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

57. 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

58. 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.

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.”).

59. 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.

60. 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* 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.

61. 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

62. 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

63. 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

¹⁹ Ex. B, Hill Letter at 1728.

“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 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).”).

64. 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.

65. 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.

66. 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).

²⁰ TDCAA Bulletin (emphasis in original).

67. 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 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.

68. 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).

69. 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*.

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

70. 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.

71. “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).

72. 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.

73. 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).

74. 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.

75. 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.

76. 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.

77. 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

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

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

78. 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

79. 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.

80. 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.

81. Plaintiff health-care providers 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 and wish to continue providing lawful abortions to patients in Texas.

82. Threatened enforcement of the Pre-*Roe* Ban, however, subjects Plaintiffs to an untenable choice. If Plaintiffs cease providing abortions for fear of liability under the Pre-*Roe*

²² *Id.*

Ban, they will be forced to turn away patients in urgent need of care in the months immediately following the *Dobbs* decision during which, as detailed above, abortion care remains legal in Texas.

83. 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 and loss of licenses or other authorizations that permit them to provide healthcare to patients in Texas.

84. Plaintiffs accordingly face an immediate threat of liability 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' patients' legal right to obtain, and Plaintiffs' legal right to provide, abortions in Texas 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

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

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

87. 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.

88. 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.

89. 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.

90. 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

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

92. 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).

93. 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.

94. 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

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

96. 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.

97. 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.

98. 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.

99. 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.

100. 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.

101. 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

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

103. 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.

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

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

106. The threatened injury to Plaintiffs 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*.

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

108. 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 June 27, 2022

Respectfully submitted,

/s/ Melissa Hayward

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*Pro hac vice applications forthcoming

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

Sworn to and subscribed before me, the undersigned, this 26th day of June 2022.



Notary Public, State of Texas
Commission Expires on October 28, 2022

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