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No. 23-0629

In the

Supreme Court
of
Texas

STATE OF TEXAS; KEN PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF TEXAS; TEXAS MEDICAL BOARD; and STEPHEN BRINT CARLTON, IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE TEXAS MEDICAL BOARD,
Appellants,

v.

AMANDA ZURAWSKI; LAUREN MILLER; LAUREN HALL; ANNA ZARGARIAN; ASHLEY BRANDT; KYLIE BEATON; JESSICA BERNARDO; SAMANTHA CASIANO; AUSTIN DENNARD, D.O.; TAYLOR EDWARDS; KIERSTEN HOGAN; LAUREN VAN VLEET; ELIZABETH WELLER; DAMLA KARSAN, M.D., ON BEHALF OF HERSELF AND HER PATIENTS; and JUDY LEVISON, M.D., M.P.H., ON BEHALF OF HERSELF AND HER PATIENTS,
Appellees.

ON DIRECT APPEAL FROM THE 353RD JUDICIAL DISTRICT COURT, TRAVIS COUNTY

BRIEF FOR *AMICI CURIAE* HISTORIANS WITH EXPERTISE IN THE HISTORY OF ABORTION MEDICINE, LAW, AND REGULATION IN SUPPORT OF APPELLEES

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TO THE HONORABLE SUPREME COURT OF TEXAS:

The history and traditions of this Country—including and in particular in Texas—establish that pregnant women have a right, under the Texas Constitution, to life and health exceptions to abortion bans. This right is fundamental both as a matter of legal principle and medical practice.

Prior to S.B.8 and the Trigger Ban, Texas law ***always*** recognized a life-preserving exception to the criminalization of abortion. The decision as to when an abortion was medically appropriate to preserve the life of a pregnant patient was left to the medical expertise and discretion of the patient's physician, without reference or restriction to a bright-line rule establishing when the patient's life was considered endangered. Texas was not an outlier in this regard: the national consensus throughout the nineteenth and twentieth centuries was to recognize a patient's fundamental right to life-preserving treatment—including abortion—by permitting life-preserving exceptions to abortion bans.

Within this legal and statutory framework, throughout the history of abortion bans, medical professionals in the United States, including Texas, performed medically necessary abortions to sustain the health

and life of their patients. That the laws did not specifically delineate conditions or instances in which the life-preserving exception applied allowed physicians to adapt to the ever-changing medical landscape, including the onset of new diseases, development of diagnostic tools, and evolving medical understanding of conditions that may affect pregnant patients. The ability of physicians to rely on their medical judgment to perform necessary and appropriate abortions is well-documented in the contemporaneous medical literature. Physicians did not limit their medical intervention solely to instances in which their patients were faced with imminent or certain death, but rather exercised medical intervention in a range of circumstances in which the physical and mental health of their patients was placed into jeopardy and could be remedied or alleviated by abortion.

Evidence of physicians' ability and discretion to perform medically indicated abortions in Texas, even under then-existing abortion bans, is not limited to medical texts. As pre-*Roe* case law demonstrates, the courts consistently recognized the need to shield patients and medical professionals from criminal liability in order to fulfill the purpose of the exemption, as did the abortion laws themselves.

* * * *

In sum, Texas's history and tradition—including longstanding legislative history, medical guidance, and enforcement practices—support a deeply rooted constitutional right to abortion to preserve the life and health of the pregnant person. The failure of S.B.8 and the Trigger Ban to protect access to health- and life-preserving abortions is thus entirely inconsistent with the legal and medical norms observed by the State of Texas even prior to *Roe*.

ARGUMENT

I. THE RIGHT TO AN ABORTION TO PRESERVE LIFE AND HEALTH IS DEEPLY ROOTED IN LEGAL TRADITION.

The legal tradition of expansively criminalizing and prosecuting abortion in the United States is not a relic of common law. Even William Blackstone's teachings indicate that life "begins in contemplation of law as soon as an infant is able to stir in his mother's womb," also described as quickening. 1 St. George Tucker, Blackstone's Commentaries 129 (William Young Birch & Abraham Small eds. 1803); *see* Alfred Swaine Taylor et al., A MANUAL OF MEDICAL JURISPRUDENCE 421 (Phila., H.C. Lea, 6th ed. 1866). And only the pregnant woman herself could know if she had "quickened." *See id.* at 426. Following the dictates of common

law, early American law permitted abortion before the fetus "stir[red]." James Wilson, NATURAL RIGHTS OF INDIVIDUALS (1790), reprinted in 2 The Works of James Wilson 316 (James DeWitt Andrews ed., Chi., Callaghan & Co. 1896) ("In the contemplation of law, life begins when the infant is first able to stir in the womb.").

Most scholars have concluded that, at least until the mid-1800s, abortion in most states was not a crime until the point of "quickening" (*i.e.*, when fetal motion could be felt by the pregnant person). *See* James C. Mohr, *Abortion in America: The Origins and Evolution of National Policy* at 3 (1979) ("The common law did not formally recognize the existence of a fetus in criminal cases until it had quickened."); *see also Com. v. Bangs*, 9 Mass. 387, 388 (1812); *State v. Cooper*, 22 N.J.L. 52, 58 (N.J. Sup. Ct. 1849) (holding that abortion is an indictable offense only if the pregnant person is "quick with child"). That is, only late abortions could be prosecuted, and "there is some disagreement as to whether or not even late abortions were ever prosecuted." Kristin Luker, ABORTION AND THE POLITICS OF MOTHERHOOD 26, 14 (Univ. Cal. Press. 1985). Professor Aaron Tang has concluded that this was indeed the case in Texas, where "the law that existed before 1907 was the settled common

law understanding that women had the right to obtain an abortion before quickening. *See* Aaron Tang, *The Originalist Case for an Abortion Middle Ground*, at 44-45 (Sept. 13, 2021), *available at* https://ssrn.com/abstract=3921358.

It was not until the mid-1800s when abortion bans were adopted on a more wide-scale basis. This criminalization of abortion was the product of a targeted strategy led by the American Medical Association ("AMA") under the direction of Dr. Horatio Storer. Leslie J. Reagan, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES 1867-1973 11-12 (1997); Simone M. Caron, *Who Chooses? American Reproductive History since 1830*, at 21-22 (2008); James C. Mohr, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTIONS OF NATIONAL POLICY, 1800-1900, 147-49 (New York: Oxford Univ. Press, 1978); *Dobbs v. Jackson Whole Women's Health Org., et al.*, No. 19-1392, Brief for Amici Curiae American Historical Association and Organization of American Historians in Support of Respondents, at 18-24 (Sept. 20, 2021). But even these new laws typically possessed one uniform characteristic: an exception to protect the life and health of the pregnant person.

A. Texas Has A Longstanding History And Tradition Of An Exception That Was Understood To Protect The Life And Health Of The Pregnant Person.

When Texas was admitted to the Union in 1845, the legal rights and protections of the common law were crystallized in its original Constitution. Petrs. Br.47. Thus, at that time, prior to the existence of any abortion ban, abortion practices in Texas were governed by common law which, as previously discussed, permitted abortions until quickening (*i.e.*, when the pregnant woman felt fetal movement).

Texas first criminalized abortion in 1856 with the enactment of Texas Penal Code articles 531 to 536. These provisions, however, expressly permitted life-saving abortions. Specifically, Article 536 assured that "[n]othing in [the abortion ban of Chapter VII] shall be deemed to apply" to "abortion[s]" "procured by medical advice" to save the pregnant person's "life." Tex Penal Code art. 536 (1857). Article 536 neither narrowed the term "life" nor limited a physician's discretion to make that determination.

In the century thereafter, Texas state law continued to consistently permit abortions "by medical advice." *See* Tex. Penal Code arts. 536–41 (1879); Tex. Penal Code arts. 641–46 (1895); Tex. Penal Code arts. 1071–

76 (1911); Tex. Penal Code arts. 1191–96 (1925). Like Texas's original 1856 ban, the exception for life-saving abortions in these successive laws shared three key features: (1) they did not define the term "life," (2) they did not restrict or specifically enumerate the circumstances in which pregnancy could threaten a pregnant person's life or put the pregnant person's life at stake, and (3) they did not limit a physician's discretion to determine when an abortion was appropriate to save the pregnant person's life. In recognition of these unambiguous provisions, in 1927, the Texas Court of Criminal Appeals held that a physician has "a [statutory] right to produce an abortion by [medicine and an operation] if his acts were directed towards saving the [pregnant person's] life." *Ex parte Vick*, 292 S.W. 889, 890 (Tex. Crim. App. 1927).

Accordingly, even the earliest Texas laws permitted abortions to save the life of a pregnant person—in the exercise of a physician's subjective judgment.

B. More Broadly, Abortion Bans Have Almost Universally Included Subjective Exceptions That Permit Physicians' Discretion To Determine When Abortion Is Medically Necessary.

The practice of providing exceptions to criminal laws for life-preserving abortions is not unique to Texas. Indeed, it is a well-rooted

practice in the United States, and penal abortion codes and statutes across the fifty states have long included exceptions to protect the life and health of the pregnant person.

As detailed in their recent respective Supreme Court opinions addressing post-*Dobbs* abortion bans like S.B.8, North Dakota and Oklahoma's abortion bans have *always* included such exceptions. The North Dakota Supreme Court held that there was a longstanding legal tradition permitting abortions for the life and health of the mother, observing that under the earliest penal code, abortions were criminalized "but explicitly provided an abortion was not a criminal act if the treatment was done to preserve the life of the woman." *Wrigley v. Romanick*, 988 N.W.2d 231, 240 (N.D. 2023). In fact, North Dakota's "legislature enacted and reaffirmed laws which always provided an exception to preserve the life of the woman up and until 2007," when the legislature enacted the trigger law at issue. *Id.* at 241. And in Oklahoma, the state supreme court concluded that "[a]s much as [the state statute] had always outlawed abortion it also always acknowledged a limited exception." *Okla. Call for Reproductive Justice v. Drummond*, 526 P.3d 1123, 1130 (Okla. 2023).

Far from outliers, these two states reflect the norm of the 19th century. In fact, "[b]y 1900[,] only six states did not include a 'therapeutic exception' in their abortion laws" allowing for legal abortions "on the advice of a physician to preserve the life of the mother . . . ." Luker, *supra*, at 32-33. Defendants appear to concede as much. Defs.Br.36.[3] In *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the United States Supreme Court included appendices purporting to list, chronologically, statutes criminalizing abortion in states and territories beginning in the 19th century. Of the statutes the Court listed, the vast majority had exceptions for the life of the pregnant person, with varying language that suggests a broad reading of life. As set out in the *Dobbs* appendices:

- New York (1828) ("unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians necessary for such purpose");
- Ohio (1834) ("unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose");

[3] Brief for Appellants ("Defs. Br.") dated Sept. 25, 2023.

- Indiana (1835) (“unless the same shall have been necessary to preserve the life of such woman”);
- Maine (1840) (“unless the same shall have been done as necessary to preserve the life of the mother”);
- Alabama (1841) (“unless the same shall be necessary to preserve her life, or shall have been advised by a respectable physician to be necessary for that purpose”);
- Michigan (1846) (“unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose”);
- Virginia (1848) (“unless the same shall have been done to preserve the life of such woman”);
- New Hampshire (1849) (“unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose”);
- California (1850) (“no physician shall be affected by the last clause of this section, who, in the discharge of his professional duties, deems it necessary to produce the miscarriage of any woman in order to save her life”);
- Iowa (1858) (“unless the same shall be necessary to preserve the life of such woman”);
- Wisconsin (1858) (“unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose”);
- Kansas (1859) (“unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by a physician to be necessary for that purpose”);

- Connecticut (1860) ("unless the same shall have been necessary to preserve the life of such woman, or of her unborn child");
- Rhode Island (1861) ("unless the same is necessary to preserve her life");
- Nevada (1861) ("provided, that no physician shall be affected by the last clause of this section, who, in the discharge of his professional duties, deems it necessary to produce the miscarriage of any woman in order to save her life");
- West Virginia (1863) (excluding "where such act is done in good faith, with the intention of saving the life of such woman or child");
- Oregon (1864) ("unless the same shall be necessary to preserve the life of such mother");
- Maryland (1868) (excluding an abortion where "no other method will secure the safety of the mother");
- Florida (1868) ("unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose");
- Minnesota (1873) ("unless the same shall have been necessary to preserve her life, or the life of such child");
- Georgia (1876) ("unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose");
- North Carolina (1881) ("unless the same shall have been necessary to preserve the life of such mother");
- Tennessee (1883) ("unless the same shall have been done with a view to preserve the life of the mother");

- South Carolina (1883) ("unless the same shall have been necessary to preserve her life, . . . in whole or in part therefrom");
- Kentucky (1910) ("unless such miscarriage is necessary to preserve her life");
- Mississippi (1952) ("unless the same were done as necessary for the preservation of the mother's life");
- Hawaii (1850) ("where means of causing abortion are used for the purpose of saving the life of the woman, the surgeon or other person using such means is lawfully justified");
- Washington (1854) ("unless the same shall have been necessary to preserve the life of such mother");
- Idaho (1864) (excluding a physician "who in the discharge of his professional duties, deems it necessary to produce the miscarriage of any woman in order to save her life");
- Montana (1864) (excluding a physician "who in the discharge of his professional duties deems it necessary to produce the miscarriage of any woman in order to save her life");
- Arizona (1865) (excluding a physician "who in the discharge of his professional duties, deems it necessary to produce the miscarriage of any woman in order to save her life");
- Wyoming (1869) ("unless it appear that such miscarriage was procured or attempted by, or under advice of a physician or surgeon, with intent to save the life of such woman, or to prevent serious and permanent bodily injury to her");

- Utah (1876) (“unless the same is necessary to preserve her life”);
- North Dakota (1877) (“unless the same is necessary to preserve her life”);
- South Dakota (1877) (“unless the same is necessary to preserve her life”);
- Oklahoma (1890) (“unless the same is necessary to preserve her life”);
- Alaska (1899) (“unless the same shall be necessary to preserve the life of such mother”); and
- New Mexico (1919) (excluding “when two physicians licensed to practice in the State of New Mexico, in consultation, deem it necessary to preserve the life of the woman, or to prevent serious and permanent bodily injury”).

142 S. Ct. at 2285-300 (App’x A, B). This collection of statutes cited by *Dobbs*, however, is not itself comprehensive. For example, in *Dobbs*, the Court cited the Texas statute from 1854, but not the version enacted just two years later that included the exception for the life of the pregnant person. Therefore, there are at least 38 states—and potentially more—that provided such exceptions in their early abortion bans.

The consistency of the protections afforded in these laws is telling. As in Texas, “no laws defined precisely when a woman’s ‘life’ was at stake,” nor did they “specify the confidence level needed” regarding the risk to a woman’s life. Luker, *supra*, at 32-33. And, as in Texas, many of

these early statutes recognized and deferred to the medical judgment of a physician for when an abortion was necessary to preserve the life of the pregnant person. By 1900, even statutes that sought to impose additional prerequisites to performing health-saving abortions still universally acknowledged abortions "undertaken by or on the advice of a physician to preserve the life of the mother . . . ." *Id.* at 33. Ten statutes specified that the physician must consult with another physician before performing an abortion and two statutes specified that regular physicians must decide when to perform an abortion, but "[n]o mechanism was set up for reviewing 'medical judgment . . . .'" *Id.* And two statutes specified that "a doctor's 'bona fide' intent to save the life of a woman was sufficient to justify abortion." *Id.* These laws therefore afforded "physicians almost unlimited discretion in deciding" whether the exception was met. *Id.* For example, as early as 1828, New York excluded criminal penalties when an abortion was necessary, as "advised by two physicians." N.Y. Rev. Stat., pt. 4, ch. 1, tit. 2, § 9. A physician did not need to determine whether a threat was a "serious" risk of death or immediate, and physicians could conclude that "life" included health and fetal indications because they would impact the quality of the

pregnant person's daily life. *See* Luker, *supra*, at 33-34. Historians believe this ambiguity was intentional. *Id.*

Life- and health-preserving abortions continued to be regularly practiced and legally recognized into the 20th century even before the Supreme Court expanded the right to abortion in *Roe v. Wade*. By the 1950s, exceptions to criminal abortion laws for the life of the pregnant person were considered "typical of the law in thirty-one American states." Herbert L. Packer & Ralph J. Gampell, *Therapeutic Abortion: A Problem in Law and Medicine*, 11 STAN. L. REV. 417, 418 (1959). For instance, in Illinois, the 1867 abortion statute exempted "any person who procures or attempts to produce the miscarriage of any pregnant woman for *bona fide* medical or surgical purposes." Reagan, *supra*, at 61. "The Illinois Supreme Court did not rule on the indications for therapeutic abortion until the 1970s," but throughout that time, it was readily acknowledged that "[p]hysicians could legitimately, according to the law and medical ethics, perform therapeutic abortions in order to save the life of the pregnant woman." *Id.*

States' broad adoption of life- and health-saving exceptions that they were not considered radical or even controversial. To the contrary,

they were commonplace in abortion bans. It is therefore unsurprising that Texas patients have similarly held the right—since even before Texas's statehood—procure an abortion deemed medically necessary or appropriate by a physician in the exercise of the physician's discretion. Indeed, the history of this ability of Texas women to seek the protection of their life through life- and health-preserving abortions is co-extensive with and even longer than the history of abortion criminalization itself. S.B.8 and the Trigger Ban—and the chilling effect caused by their enactment—deprive Texans of this longstanding right. In doing so, the bans are antithetical to the history and tradition of exceptions to criminal abortion laws.

II. THE RIGHT TO AN ABORTION TO PRESERVE LIFE AND HEALTH IS DEEPLY ROOTED IN MEDICAL TRADITION.

The legal tradition of providing exceptions to abortion laws to protect the life and health of the pregnant person, in the exercise of a physician's judgment and discretion, does not stand in a vacuum. Such a legal tradition exists for good reason: the medical field has long recognized the significant health risks attendant to pregnancy and supported intervention when medically necessary. For instance, a medical treatise from as early as 1810 shows that abortion was

prescribed as the treatment for disease that would otherwise result in the death of the pregnant person. Joseph Brevitt, A TREATISE ON THE PRIMARY DISEASES OF INFANTS 101 (Hunter & Robinson, 1810) (recommending abortion to treat dropsy (fluid retention in the abdominal cavity) where "death indicates the necessity").

The laws that were passed in the mid-1800s in response to the AMA's push for criminalization of abortion reflect this consensus. While the AMA at this time advocated for restrictive abortion laws, they, at minimum, sought to maintain protections for medically necessary abortions. The purpose and, ultimately, the effect of the AMA's campaign with respect to abortions, was to place the determination of the propriety and necessity of an abortion within the sole purview of the medical profession. Luker, *supra*, at 35. As a result, individual physicians had broad discretion to determine what constituted a necessary reason for abortion—determinations that were made on a case-by-case, "good faith" basis. *Id*. at 35-36 ("[T]he very success of the medical profession in claiming exclusive responsibility for abortion meant that if a reasonably plausible medical indication for abortion could be presented to a

sympathetic physician, neither the medical society nor any other authority was likely to intervene.”).

Consistent with medical practice from the 19th century until *Roe*, therapeutic abortions—that is, “a medical procedure for the termination of pregnancy openly performed in the regular course of his practice by a licensed medical practitioner[,]” Packer, *supra*, at 418—were not reserved for near-death scenarios. The medical profession advocated for and routinely practiced medically necessary abortions in a broader range of circumstances. Never has the medical field, including the medical community in the State of Texas, required that a pregnant person wait for death to be imminent—as the Petitioners have been required here under the restrictions of S.B.8 and the Trigger Ban—before seeking necessary interventions.

A. Physicians Had Wide Discretion To Determine When An Abortion Was Medically Necessary.

As described above, the therapeutic exceptions recognized by most state abortion laws provided physicians with “almost unlimited discretion in deciding when an abortion was necessary.” Luker, *supra*, at 33. Nineteenth century medical journals, gynecology textbooks, and even anti-abortionist textbooks indicate that the definition of “saving the

life" of a pregnant person was deliberately vague, such that "[t]he word *life* may mean physical life in the narrow sense of the word (life or death), or it may mean the social, emotional, and intellectual life of a woman in the broad sense (style of life)." *Id.* at 34 (emphasis added). Thus, the meaning of "saving the life" of a pregnant person was not necessarily limited to saving the person only from imminent death; the meaning may have encompassed "protecting the process and quality of [the person's] daily life." *Id.* Put differently, physicians "were not limiting themselves to the preservation of *life* but were considering the preservation of *health*, broadly defined, as well." *Id.* at 47 (emphasis added). As Professor Frederick J. Taussig observed in 1936, "it is fortunate . . . that the law in most civilized countries permits therapeutic abortion on the basis not alone of immediate threat to the life, but also of serious danger to the health of the mother." Frederick J. Taussig, ABORTION, SPONTANEOUS AND INDUCED: MEDICAL AND SOCIAL ASPECTS, at 279 (1936). The practice of discretionary therapeutic abortions was even endorsed by those most strongly opposed to abortion during the AMA campaign for abortion bans in the mid-1800s. For example, Dr. T. Gaillard Thomas, an obstetrician-gynecologist and a staunch anti-abortionist, believed that if pregnancy

would "destroy the life or intellect, or permanently ruin the health of the mother," abortion was appropriate. Luker, *supra*, at 34.

In the absence of a mechanism set forth by abortion laws to determine when an abortion should be performed, physicians relied on their expertise and that of their colleagues, as well as the accepted practice within the medical community, to determine whether an abortion in a specific case was medically necessary. *See id*. at 35-36. A physician might confer with colleagues so that they agreed on the indication for the proposed abortion, and if a physician "flagrantly applied a set of abortion criteria not shared by the majority of their colleagues," the medical community would exclude the physician. *Id*. at 35. By the end of the 19th century, abortion had become a medical issue that doctors wanted to exercise control over, and "physicians made almost all 'official' decisions on abortion." *Id.* at 40.

Once the abortion decision became a question of "medical judgment," the "semantic ambiguity built into the phrase 'to save the life of the mother,'" permitted physicians to perform a wide range of abortions in good faith. *Id*. at 36. Historic published materials authored by physicians performing therapeutic abortions, demonstrate that these

physicians believed such abortions to be necessary in the exercise of their medical judgment, and that these abortions were performed under a broader definition of the term *life*, not solely in life-or-death situations. *Id.* at 34.

A 1930 survey of 62 practicing physicians in the southern United States is instructive. *Id.* at 47. Specifically, 22 physicians surveyed said they approved abortions "for health reasons, life not involved," and 21 physicians approved abortions "for dominant hereditary taint in both parents." *Id.* By contrast, only one physician did not approve of abortions even to save the life of the pregnant woman. *Id.* First-hand accounts of physicians revealed the same latitude in their medical practice. In 1946, a doctor described in a prestigious obstetrical journal the abortions performed at the hospital where he practiced:

> It must be admitted that, while the majority of these therapeutic abortions were done to *preserve the mother's health*, to *prolong her life*, and to *prevent serious and permanent injury*, under the direction of at least two practitioners of medicine, the life of the mother was not always threatened imminently.

Id. at 46-47 (emphasis in original). And as demonstrated by a study published in 1961 by the Department of Obstetrics and Gynecology at the

University of Pennsylvania School of Medicine, the medical judgment of individual physicians regarding their patient's need for an abortion was widely supported: "[f]rom 1956 [to] 1959, 45 applications requesting the termination of pregnancy were reviewed. Forty-two were approved by committee action . . . ." Stanley H. Boulas, et al., *Therapeutic Abortions*, 19 OBSTETRICS & GYNECOLOGY 222, 226 (1962). Consistent with the medical consensus that these "openly performed" hospital abortions were appropriate and medically indicated, "prosecutors (who vigorously pursued underground practitioners and criminal abortion cases at the time) did not investigate hospital abortions." Leslie J. Reagan, DANGEROUS PREGNANCIES ch. 4, 143 (1st ed. 2012).

In sum, the medical community has long recognized that physicians must be able to perform abortions that they determine, in the exercise of their discretion and medical judgment, to be appropriate to protect the health of a pregnant person.

B. Physicians Have Long Recognized The Need For And Practiced Abortions To Address Certain Medical Conditions.

Abortion "indications," or conditions warranting therapeutic abortions, have been historically "categorized as medical, psychiatric and

fetal." Packer, *supra*, at 419. "Medical indications are diseases whose course is thought to be worsened by pregnancy, such as . . . tuberculosis, some forms of cancer, and diabetes." *Id.* They also included circulatory system diseases, including rheumatic heart disease, hypertension, cardiac hypertrophy, subacute bacterial endocarditis, respiratory, kidney disease, uterine non-cancerous growths, such as uterine fibroid myoma, pregnancy-related diseases, especially kidney ailments and toxemia, asthma, multiple sclerosis, pernicious anemia, lupus erythematosus, and epilepsy.[4] Severe hepatitis and ulcerative colitis could also be indicators for therapeutic abortion. *See* Korns, *supra*, at 333-34. Next, "[f]etal indications relate to the possibility that the child will be still-born or defective." Packer, *supra*, at 419. They include congenital conditions such as Rh incompatibility; congenital conditions such as Tay-Sachs disease; diseases or conditions occurring during pregnancy like rubella (German measles) in the first three months of pregnancy, which has a comparatively high likelihood of resulting in birth defects; and

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[4] As one physician observed, "diseases of the cardiovascular system far outweigh any other possible indications for therapeutic abortion." H.M. Korns, *Therapeutic Abortion from the Point of View of the Internist*, 137 JAMA 333, 333 (1943).

"therapeutic X-ray irradiation of the pelvic area during undiagnosed early pregnancy, which is likely to result in malformations of the child's central nervous system." *Id.* Finally, psychiatric indications "r[a]n the entire gamut of mental and emotional disorders," *id.* at 420, including schizophrenia, manic-depressive disorder, and psychoneuroses, Mary Steichen Calderone, ABORTION IN THE UNITED STATES; A CONFERENCE SPONSORED BY THE PLANNED PARENTHOOD FEDERATION OF AMERICA, INC. AT ARDEN HOUSE AND THE NEW YORK ACADEMY OF MEDICINE 79 (New York: Hoeber-Harper, 1958). Acceptable indications also included "'neurasthenia' (an all-purpose diagnosis for complaints from 'high-strung' women) and many other complaints that would compromise the woman's life in the broader sense of the word." Luker, *supra*, at 34.

Since abortion bans were first introduced in Texas in the mid-1800s, even their fiercest proponents have recognized the need for therapeutic abortions in a wide range of circumstances. Dr. Storer, a gynecologist and leader of the AMA campaign to criminalize abortion during this time, "subscribed to a broad view of what 'saving the life' of a woman entailed[,]" and included health and fetal indications in his list of acceptable indications for abortion:

> There are other instances that might be cited, cases of dangerous organic disease, as cancer of the womb, in which, however improbable it might seem, pregnancy does occasionally occur; *cases of insanity, of epilepsy, or of other mental lesion, where there is fear of transmitting the malady* to a line of offspring; cases of general ill health, where there is perhaps a chance of the patient becoming an invalid for life [emphasis added].

Id.

As early as 1879, the medical literature is replete with discussion of the use of abortions where medically indicated to preserve a pregnant person's life. In one instance, an abortion was performed where the patient suffered from severe, pregnancy-related side effects and other health conditions, including uncontrollable nausea and vomiting, such that the doctor was concerned she would die without an abortion. M.H. Jordan, M.D., *A Case of Artificial Abortion for Relief of Uncontrollable Nausea and Vomiting, with Remarks*, 10 S. MED. RECORD 275-78 (1880). The doctor concluded that "[i]n all cases where nature fails to bring about abortion, and the patient's life is in jeopardy, if the obstetrician does not [complete an abortion], he has not given his patient the benefit of all the resources of his vast art." *Id*. at 278.

While exceptions for medically necessary abortions have remained throughout the history of abortion bans, when abortions are medically necessary has shifted over time. Accepted indications for therapeutic abortions have evolved, oftentimes in response to the incidence of certain diseases and available treatment at the time. For example, around 1910, tuberculosis became a leading indication for abortion. *See* Reagan, WHEN ABORTION WAS A CRIME, *supra*, ch. 2. Between 1890 and 1950, physicians "frequently assumed that abortions to preserve the health of the woman (including her mental health) were acceptable, as were abortions in cases of rape or incest or when there was a likelihood of what would later be called 'fetal deformity.'" Luker, *supra*, at 46.

Similarly, in the 1960s, a rise of birth defects due to rubella or German measles led to a corresponding approval of abortions if a pregnant person contracted rubella. Because the disease carried a 50% risk of severe fetal deformity, "[m]edical textbooks taught physicians that maternal rubella was an accepted indication for abortion, [and] many hospitals permitted and provided 'therapeutic' abortions for this reason[.]" Reagan, DANGEROUS PREGNANCIES, *supra*, at 109. In fact, "[a] prospective study of more than three hundred cases of maternal rubella

in New York City found that nearly two-thirds of the women later had therapeutic abortions." *Id.* Physicians therefore considered abortions for rubella to be not only an acceptable practice, but also medically appropriate:

> State investigators uncovered not only the practice of providing therapeutic abortion for rubella but also the strength of the medical feeling that doing so was medically correct and morally upstanding. Even as he was coming under investigation, one specialist told investigators that he and his hospital planned to continue to provide abortions for rubella while they sought legal changes. 'He hated to be a test case,' the investigators recorded, 'but felt that good medical practice called for abortions in cases of the type at hand.

Id. at 148-49. Given the heightened risk of birth defects, a "stricter application of therapeutic abortions" permitted an abortion if a pregnant person expressed suicidal ideations in response to the fears of birth defects from rubella. *Id.* "[A]s one district attorney told investigators, if there was any evidence of a woman's 'suicidal tendencies,' it would seem to make an abortion legal." *Id.* at 151.

Indeed, the discretion provided to medical professionals to determine when abortions are medically indicated was a concept that was fully endorsed well-prior to *Roe*. "In the late 1950s, a number of leading

physicians and attorneys called for reform of the state abortion laws . . . that would clarify the law, protect doctors, and narrowly expand the legal practice of (therapeutic) abortion." *Id.* at 142.[5]

Thus, as history makes clear, from the mid-1800s through *Roe*, physicians—irrespective of their views on abortion—recognized that therapeutic abortions were advisable under a broad range of possible conditions. These physicians routinely practiced such abortions when they deemed it, in their medical judgments, appropriate for the life and health of the pregnant person.

C. The History And Tradition Of Life- And Health-Preserving Abortions Is Clearly Established In Texas.

In Texas, therapeutic abortions have been performed ever since the institution of abortion bans, as evidenced by numerous publications in

[5] While physicians widely recognized that abortion was medically indicated for a range of health circumstances, in practice, abortion access reflected systemic inequities. Specifically, in this time period, "[r]acial and economic discrimination limited access . . . to therapeutic abortions. Reagan, WHEN ABORTION WAS A CRIME, *supra*, at 204-08. "Physicians performed the overwhelming majority of therapeutic abortions for private-paying white patients." *Id.* at 205. Public health officials noted that "the disparity . . . between ethnic groups has been widening over the years" and believed it a "medical responsibility . . . to equalize the opportunities for therapeutic abortion." *Id.*

Journals of the Texas Medical Association discussing their use where medically indicated:

- In 1885, Dr. J.A. Boyd performed an abortion on an 18-year-old patient where the non-viable fetus remained in her uterus for eight weeks and had made her gravely ill, but once the abortion had been provided, the patient healed quickly and remained in good health. J.A. Boyd, *A Case of Abortion, with Treatment*, 1 TEX. MED. J. 8, 8-9 (1885).

- In 1891, J. F. Y. Paine, a Professor of Obstetrics and Gynecology at the University of Texas, cited a laundry list of experts who "declare[d] in most unequivocal terms" that the "artificial interruption of pregnancy" is "indicated and justifiable in all cases" of severe albuminuria (excessive albumin in the urine, which is often a sign of kidney disease). J. F. Y. Paine, *Some Practical Observations on the Management of Albuminuria in Pregnancy*, 7 DANIEL'S TEXAS MED. J. 45, 47 (1891).

- In 1896, Dr. F. S. Love, characterized delaying treatment for ectopic pregnancy as "tamper[ing] with life" and "an injustice to . . . our patients . . . ." F. S. Love, *Ectopic Gestation with Report of Cases*, 11(8) TEX. MED. J. 421, 426 (1896).

- In 1897, the Texas Medical Journal published correspondence from Dr. W. J. Matthews who advised swift abortion in the case of a nonviable fetus, as "the safest course to pursue is to empty the uterus at once[,]" rather than forcing the pregnant person to await her body's attempt to expel the fetus without assistance. W. J. Matthews, *The Proper Treatment of Abortion:*

Reply to Dr. Smith's Criticisms, 12(10) TEX. MED. J. 550, 552 (1897).

- In 1898, Dr. Arthur E. Spohn characterized abortion for severe hyperemesis gravidarum and preeclampsia as a "necessity" and scolded other physicians for "delay[ing] too long in emptying the uterus" in those cases. Arthur Spohn, *Some Perils of Child-Bearing and Their Prevention*, 13(11) TEX. MED. J. 545, 547 (1898) (opining that for preterm premature rupture of membranes and bleeding, physicians should "empty[] the uterus" sooner rather than wait until "the case becomes desperate").

A 1900 piece published by Dr. J.A. Winfrey in the *Texas Medical Journal* (and read at a Central Texas Medical Association meeting in Waco) summarizes the expansive array of conditions under which physicians might find an abortion appropriate. When noting that "[i]nduced abortion becomes a crime when done for purposes other than to save the life or reason of the mother," Dr. Winfrey cited a number of "indications for interrupting the natural course of pregnancy in the early months." J. A. Winfrey, *Abortion; Spontaneous and Induced*, 15(9) TEXAS MED. J. 472, 474 (1900). Among these, Dr. Winfrey included "mechanical obstruction, as deformity of pelvis and tumors," "nervous diseases, not amenable to treatment, as puerperal mania, chorea and neuralgia," "organic diseases of the heart, aggravated by the puerperal state[,]" and

"pernicious vomiting of pregnancy" that were unresponsive to medication and presented real "danger [] from exhaustion." *Id.* at 474-75. Serious vomiting during pregnancy was also addressed in an 1885 article in the *Daniel's Texas Medical Journal*, where Dr. Scott spoke of a similar experience: "This was the third case I have had within eighteen months in which a similar condition of affairs existed, and when I produced an abortion the patients were saved. I felt that I was treading ground that I had gone over before." *Induced Abortion to Relieve Vomiting in Pregnancy*, 1 DANIEL'S TEXAS MED. J. 74, 77 (1885).

As previously discussed, as medicine advanced in the early 20th century, indications for therapeutic abortions broadened to include an array of physical health conditions. Texas was no exception. In 1936, the *Texas Medical Journal* published articles by physicians recommending or discussing their experience in performing therapeutic abortions for the treatment of various critical illnesses of the patient:

- Dr. Titus H. Harris described an abortion provided for a patient with vomiting who was also recovering from brain tumor surgery, and Dr. Harris explained that "it was felt that continued vomiting would *possibly* promote hemorrhage in a recently operated brain tumor . . . which *might have been* fatal." Titus Harris, *Modern Indications for Therapeutic Abortion from the Neurologic*

Standpoint, 31 TEX. STATE J. MED. 555 (1936) (emphasis added).

- Similarly, Dr. Reddick described the classification of cardiac conditions in pregnant women and concluded that patients with "undue fatigue, palpitation, dyspnea, or chest pain" during "[o]rdinary physical activity," "should have therapeutic abortion[s]" if they did not improve by the second trimester. *See* W.G. Reddick, *Cardiac Indications of Therapeutic Abortion*, 1 TEX. STATE J. MED. 558–60 (1936) (Texas). If the same symptoms were experienced "at rest" and the patient was "unable to carry on any physical activity without discomfort," the patient should "have the pregnancy terminated" once detected. *Id*. at 558.

- Dr. Will S. Horn noted that pulmonary disorders, specifically tuberculosis, may justify the termination of a pregnancy. W.S. Horn, *Modern Indications for Therapeutic Abortion in Pulmonary Complications*, 1 Tex. State J. Med. 563 (1936) (Texas).

- Dr. Joe Kopecky, based on his professional experience and knowledge, recommended that therapeutic abortions be conducted in circumstances where the patient suffers from nephritis (*i.e.*, permanently damaged kidneys). Joe Kopecky, *Modern Indications for Therapeutic Abortion in Nephritic Complications*, 1 Tex. State J. Med. 560-62 (1936) (Texas) ("When definite signs of chronic nephritis appear during the early stages of pregnancy, we know that the kidneys will find the task harder and harder as pregnancy goes on. The possibility that the imposed burden will prove superior to the capacity of the kidneys long before term, or before a viable child could be

> obtained, must be considered; the patient's life should not be needlessly risked for what is quite likely to result in failure.").

The foregoing history and tradition in Texas are essential to analyzing the current restrictions of S.B.8 and the Trigger Ban. Since the late 1800s, doctors in the State of Texas have relied on their sound medical judgment to determine when an abortion is necessary to protect the health of the pregnant person. And "[d]etermining when an abortion was necessary – and thus legal – was left to the medical profession." Reagan, WHEN ABORTION WAS A CRIME, *supra*, at 61.[6] As Dr. Robert Hall summarized in 1965:

> Today *the life of the mother* is almost never jeopardized by pregnancy, but *the mental and physical health of the mother and the proper development of the fetus* are not infrequently so jeopardized. Abortion is legally sanctioned by most states only if the former threat exists; yet abortion is medically approved and performed when the latter threats exist. The laws should be clarified to permit the indications for abortion

[6] Indeed, further demonstrating that medically necessary abortions were accepted as part of medical training and care, the 1928 Texas State Board of Medical Examiners exam for prospective physicians included a question "Discuss the conditions which justify a therapeutic abortion." *Miscellaneous: June Examinations, State Board of Medical Examiners*, 23 TEX. STATE J. MED. 291 (1927).

> which accepted medical practice has already legitimized.

Robert E. Hall, M.D., *Therapeutic abortion, sterilization, and contraception*, AM. J. OST. & GYNC. 520, 522 (1965) (emphasis in original). Now, decades later, the illusory exceptions carved out by S.B.8 and the Trigger Ban fail to "permit" what "medical practice has already legitimized." *Id.* Instead, the statutes prevent doctors from relying on good faith judgment to treat patients who face threats to their life and health, offering only the assurance of severe criminal and civil penalties instead of practical clarity. And so physicians who seek to provide their patients with fundamental healthcare to which the patient is entitled are forced to abandon their ethical and Hippocratic obligations to their patients. As the District Court concluded and legal and medical history makes clear, "emergent" medical conditions should not only apply to imminent emergencies that risk the life of the pregnant person, but also to those that may become life-threatening to the pregnant person or fetus if the pregnancy is permitted to continue.

III. PROSECUTORIAL TRENDS FOR ABORTIONS DO NOT SUPPORT A HISTORY OF PROSECUTION FOR HEALTH-PRESERVING ABORTIONS.

The extensive history and tradition of health-preserving abortions in Texas is further illuminated by prosecutorial and conviction trends. Because Texas has *always* permitted physicians to perform abortions that they deem necessary to protect the life of the pregnant person, and the medical community has agreed there is a wide range of conditions that can fall into that category, there is little evidence of the enforcement of these criminal laws when such a medically-necessary abortion was performed.

Prior to *Roe*'s recognition of a broad right to abortion, even where there are convictions under Texas's abortion laws, there is not a single Court of Criminal Appeals of Texas decision involving a conviction for an abortion that was performed to preserve the life of the pregnant person. Rather, the Court of Criminal Appeals of Texas had insulated criminal defendants from liability in such circumstances. In *Veevers v. State*, 354 S.W.2d 161, 163 (Tex. Crim. App. 1962), an abortion provider was charged after performing an abortion on a 19-year-old patient who needed medical care. On appeal, the provider argued that the

government failed to allege that the abortion was "unlawful." *Id.* at 166. The Court of Criminal Appeals explained that "under some circumstances an abortion may be legally performed[,]" and an abortion that was "procured or attempted by medical advice" would be "an affirmative defense available in [a] proper case to an accused." *Id.* at 168-69; *see also* Winfrey, *supra*, at 474 (explaining that "[i]nduced abortion becomes a crime when done for purposes other than to save the life or reason of the mother.").

In *Ex parte Vick*, 292 S.W. 889, 890 (Tex. Crim. App. 1927), the Court of Criminal Appeals applied this affirmative defense, concluding that it undermined the requisite mens rea for abortion crimes. In *Vick*, an 18-year-old patient died after receiving an abortion from a physician, and the physician was subsequently charged with murder by abortion. *Id.* In reversing the trial court's denial of bail, the court explained that the state failed to prove that the physician acted with the required malice aforethought because the physician "had a right to produce an abortion by the means mentioned if his acts were directed towards saving the life of the mother of the child." *Id.* The court explained that the evidence established that the physician regularly attended to the patient, gave her

medicine, and performed an operation which resulted in an abortion, and such evidence could not establish that he performed the abortion with malice aforethought. *Id.*

Further, a review of appeals of all Texas criminal convictions related to abortions reveals a holistic emphasis on the protection of the life and health of the pregnant person. In these appeals, the Court of Criminal Appeals focused on the harm and injuries the criminal defendants caused to the pregnant person by performing abortions often in unsafe conditions outside of formal medical settings. *See Tritt v. State*, 379 S.W.2d 919, 921 (Tex. Crim. App. 1964), *overruled on other grounds by Heath v. State*, 817 S.W.2d 335 (Tex. Crim. App. 1991) (defendant charged with abortion after pregnant person required operation on perforated uterus and intestine caused during abortion); *Fletcher v. State*, 362 S.W.2d 845, 846–47 (Tex. Crim. App. 1962) (defendant charged with abortion after pregnant person required surgery due to infection following abortion); *Romero v. State*, 308 S.W.2d 49, 50 (Tex. Crim. App. 1957) (same); *Veevers v. State*, 354 S.W.2d 161, 163 (Tex. Crim. App. 1962) (same); *Crossett v. State*, 235 S.W. 599, 600 (Tex. Crim. App. 1921) (defendant charged with abortion after pregnant person died during

surgery following abortion); *Reum v. State*, 90 S.W. 1109, 1110 (Tex. Crim. App. 1905) (defendant charged with abortion after pregnant person was hospitalized with septic shock following abortion); *King v. State*, 34 S.W. 282, 283 (Tex. Crim. App. 1896) (defendant charged with abortion nearly killing pregnant person during abortion). Such a focus on protecting women from unsafe abortion methods is irreconcilable with the current laws that deprive women of abortions that ensure their safety.

At bottom, Texas courts historically declined to hold individuals criminally responsible for performing or receiving medically necessary abortions. These cases further solidify the strong history and tradition of affording pregnant women and physicians in Texas the freedom to seek or perform abortions when appropriate to preserve their health.

PRAYER

The temporary injunction and denial of the plea to the jurisdiction should be affirmed.

Dated: November 22, 2023

Respectfully submitted,

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Certificate of Compliance

I further certify that this brief complies with the type-volume limitation in Texas Rule of Appellate Procedure 9.4(i) because, according to Microsoft Word, it contains 8,075 words, excluding exempted parts.

/s/ Lindsey Cohan
Lindsey Cohan

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I certify that on November 22, 2023, a true and correct copy of the foregoing brief has been served on counsel of record for all parties through electronic service.

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