No. 21-1039

In the Supreme Court of Texas

MARK LEE DICKSON AND RIGHT TO LIFE EAST TEXAS,

Petitioners,

v.

THE AFIYA CENTER AND TEXAS EQUAL ACCESS FUND,

Respondents.

On Petition for Review from the
Fifth Court of Appeals, Dallas, Texas
No. 05-20-00988-cv

PETITIONERS' REPLY BRIEF ON THE MERITS

THOMAS BREJCHA
Illinois Bar No. 0288446
MARTIN WHITTAKER
Texas Bar No. 24095097
Thomas More Society
309 West Washington Street, Suite 1250
Chicago, Illinois 60606
(312) 782-1680 (phone)
(312) 782-1887 (fax)
info@thomasmoresociety.org

JONATHAN F. MITCHELL
Texas Bar No. 24075463
Mitchell Law PLLC
111 Congress Avenue, Suite 400
Austin, Texas 78701
(512) 686-3940 (phone)
(512) 686-3941 (fax)
jonathan@mitchell.law

(additional counsel listed on inside)

Counsel for Petitioners

H. Dustin Fillmore III
Texas Bar No. 06996010
Charles W. Fillmore
Texas Bar No. 00785861
The Fillmore Law Firm, LLP
1200 Summit Avenue, Suite 860
Fort Worth, Texas 76102
(817) 332-2351 (phone)
(817) 870-1859 (fax)
dusty@fillmorefirm.com
chad@fillmorefirm.com

D. Bryan Hughes
Texas Bar No. 00793995
Law Office of D. Bryan Hughes
110 North College Avenue, Suite 207
Tyler, Texas 75702-7221
(903) 581-1776 (phone)
bryan@hughesfirm.com

Additional Counsel for Petitioners

Table Of Contents

Index Of Authorities

Cases

Statutes

Constitutional Provisions

Rules

Other Authorities

In the Supreme Court of Texas

Mark Lee Dickson and Right to Life East Texas,

Petitioners,

v.

The Afiya Center and Texas Equal Access Fund,

Respondents.

On Petition for Review from the
Fifth Court of Appeals, Dallas, Texas
No. 05-20-00988-cv

PETITIONERS' REPLY BRIEF ON THE MERITS

To The Honorable Supreme Court Of Texas:

There are two crucial points on which the petitioners and the respondents agree. First, the parties agree that The Afiya Center and the Texas Equal Access Fund help pay for abortions. *See* Resp. Br. at 2 (acknowledging that the respondents "provide financial assistance to Texans in need of an abortion."). So there is no dispute that the respondents are engaged in the conduct described in article 4512.2 of the Revised Civil Statutes, which imposes criminal liability on anyone who "furnishes the means for procuring an abortion knowing the purpose intended." Pet. Br. App. at 82.

Second, the respondents acknowledge that article 4512.2 has not been repealed[1]—even though they insist that the statute no longer has legal effect after *Roe v. Wade*, 410 U.S. 113 (1973). So the parties agree on this much: (1) Article 4512.2 has not been repealed; and (2) The respondents are engaged in conduct that article 4512.2 defines as a crime.

The parties, however, dispute whether it is defamatory to describe the respondents as "criminal." Mr. Dickson insists that it is entirely truthful to describe the respondents as "criminal" organizations because: (1) Article 4512.2 defines the act of paying for another person's abortion as a crime; (2) *Roe* did not "strike down" or formally revoke article 4512.2, which continues to exist as the law of Texas; and (3) The present-day reluctance of district attorneys to prosecute abortion funds under article 4512.2 does not change the fact that the law of Texas continues to define the behavior of abortion funds as a crime. Mr. Dickson wants to call attention to the fact that The Afiya Center and the Texas Equal Access Fund are violating an unrepealed criminal statute, and urge district attorneys to begin enforcing article 4512.2 against Texas abortion funds and their employees, volunteers, and donors. These statements are 100% truthful, and Mr. Dickson's efforts to revive the enforcement of an extant but currently under-enforced criminal statute is constitutionally protected speech and advocacy.

---

1. *See* Resp. Br. at 30 (acknowledging that the "legislature has not acted to 'repeal'" the state's pre–*Roe v. Wade* abortion statutes, including article 4512.2).

The respondents, by contrast, claim that *Roe v. Wade* formally revoked article 4512.2 in an act akin to an executive veto. *See* Resp. Br. at 8–9; *see also id.* at 9 ("[U]nconstitutional statutes are not laws, and are void *ab initio*."). The respondents' argument rests on a fallacious and demonstrably mistaken understanding of judicial review. Courts do not have the ability or the authority to "strike down" statutes,[2] and they do not wield a preclearance power over legislation. The judicial power extends *only* to resolving "cases" or "controversies" between named litigants. When the Supreme Court opines that a statute is unconstitutional, it does not veto or erase the statute or render it "void." All that a court can do is decline to enforce the statute in the particular case or controversy before it, or issue an injunction that restrains particular individuals from *enforcing* the statute while the court's injunction remains in effect. *See Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 535 (2021) ("[N]o court may . . . purport to enjoin challenged 'laws themselves'" (citation omitted)); *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021) ("[F]ederal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves."); *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) ("If a case for preventive relief be presented, the court enjoins, in effect, not the execution of the statute, but the acts of the official,

2. *See Pidgeon v. Turner*, 538 S.W.3d 73, 88 n.21 (Tex. 2017) ("[N]either the Supreme Court in *Obergefell* nor the Fifth Circuit in *De Leon* 'struck down' any Texas law. When a court declares a law unconstitutional, the law remains in place unless and until the body that enacted it repeals it.").

the statute notwithstanding.").[3] But the judicially disapproved statute continues to exist as law, and it remains available for future courts to use if they have a different view of what the Constitution means. *See Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1870) (overruling *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870), and enforcing the Legal Tender Act of 1862, without requiring reenactment of the Act after *Hepburn* had declared it unconstitutional). So the law of Texas continues to define abortion (and acts that aid and abet abortions) as crimes, even if the federal judiciary (at this moment) is unwilling to fully enforce those statutes when deciding Article III cases or controversies.

There is a more serious problem with the respondents' argument. The respondents seem to think that *Roe* established a constitutional right for individuals and entities to pay for other people's abortions, and that they can therefore assert *Roe* as a defense if they are prosecuted for their violations of article 4512.2. But *Roe* does not protect the respondents from prosecution for

---

3. *See also Jacobson v. Florida Secretary of State*, 974 F.3d 1236, 1255 (11th Cir. 2020) ("[F]ederal courts have no authority to erase a duly enacted law from the statute books. . . . Our power is more limited: we may enjoin executive officials from taking steps to enforce a statute." (citations and internal quotation marks omitted)); Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 Stan. L. Rev. 1209, 1221 (2010) ("Judicial review is not the review of statutes at large; judicial review is constitutional review of governmental action."); David L. Shapiro, *State Courts and Federal Declaratory Judgments*, 74 Nw. U. L. Rev. 759, 767 (1979) ("No matter what language is used in a judicial opinion, a federal court cannot repeal a duly enacted statute of any legislative authority.").

their violations of the State's abortion laws. There is no constitutional right to pay for another's abortion, and there is no constitutional right to receive financial assistance from others when obtaining an abortion. *See Harris v. McRae*, 448 U.S. 297, 325 (1980). It will not impose an "undue burden" on abortion patients if an abortion fund (as opposed to an abortion provider) is prosecuted for violating the state's abortion statutes. Indeed, the respondents would not even have standing to assert the third-party rights of abortion patients, because the Supreme Court has never held that abortion funds (as opposed to abortion providers) have third-party standing to assert the rights of abortion patients. *See June Medical Services LLC v. Russo*, 140 S. Ct. 2103 (2020). The state's pre-*Roe* abortion statutes are severable in each of their applications,[4] and they may be enforced against The Afiya Center or the Texas Equal Access Fund without contradicting anything in the Supreme Court's present-day abortion jurisprudence.[5]

Finally, even if the respondents could somehow show that it is "false" to describe their conduct as criminal, they cannot establish a *defamation* case unless they show that Mr. Dickson acted with actual malice (or, at the very least, with negligence) in reaching a contrary conclusion. The respondents

---

4. *See* Tex. Gov't Code § 311.032(c); *Connecticut v. Menillo*, 423 U.S. 9, 9–10 (1975).

5. When this brief was filed, the Supreme Court had not announced its ruling in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392. So our brief will proceed on the assumption that *Roe* continues to exist as a Supreme Court precedent.

have nothing that remotely approaches "clear and specific evidence" that Mr. Dickson acted with actual malice or negligence, and Mr. Dickson's sworn affidavits conclusively refute any possibility of negligent or malicious behavior.

I. The Respondents Are Violating The State's Criminal Abortion Statutes By Paying For Abortions

The respondents admit that they pay for other people's abortions. *See* Resp. Br. at 2. That violates article 4512.2 of the Revised Civil Statutes, which imposes criminal liability on anyone who "furnishes the means for procuring an abortion knowing the purpose intended." Pet. Br. App. at 82.[6] So the respondents are engaged in conduct that the law of Texas defines as criminal—even though they not currently being prosecuted for this.[7]

---

6. The respondents are also violating sections 1.07 and 19.02(b)(1) the Texas Penal Code, which define murder to include the intentional killing of "a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth." Tex. Penal Code § 1.07; Tex. Penal Code 19.02(b)(1). To be sure, the murder statute exempts "*lawful* medical procedures" and the dispensation or administration of drugs "*in accordance with law*." Tex. Penal Code § 19.06(2), (4) (emphasis added). But the law of Texas continues to define abortion as a crime unless the mother's life is in danger, *see* West's Texas Civil Statutes, article 4512.1 (1974) (Pet. Br. App. at 82), and it continues to prohibit abortions unless they are performed in ambulatory surgical centers by physicians with hospital-admitting privileges. *See* Tex. Health & Safety Code § 245.010(a) (ambulatory surgical centers); Tex. Health & Safety Code § 171.0031(a)(1) (admitting privileges).

7. The respondents note that they "have never been arrested for, investigated for, or convicted of any crime." Resp. Br. at 2. But they are still *committing* crimes by violating article 4512.2, even though they have not

The respondents deny that they are violating the criminal laws of Texas, but none of their arguments hold water.

A. *Roe* Did Not "Strike Down" Or Formally Revoke The State's Criminal Abortion Statutes

The respondents' lead argument is that article 4512.2 no longer exists as a "law" because it was formally revoked by *Roe v. Wade*, 410 U.S. 113 (1973). *See* Resp. Br. at 8–9; *see also id.* at 9 ("[U]nconstitutional statutes are not laws."). The respondents are wrong. The federal courts have no ability or authority to "strike down" a statute or render it "void." *See Pidgeon v. Turner*, 538 S.W.3d 73, 88 n.21 (Tex. 2017) ("When a court declares a law unconstitutional, the law remains in place unless and until the body that enacted it repeals it");[8] *Texas v. United States*, 945 F.3d 355, 396 (5th Cir. 2019) ("The

---

yet been arrested, investigated, or convicted—and Mr. Dickson is calling attention to this in an effort to encourage prosecutors throughout the state to resume enforcement of these unrepealed criminal laws. It is not "defamation" to call someone a "criminal" when that person is flouting an unrepealed statute with impunity because prosecutors are either unaware of the statute's existence or unwilling to enforce it.

8. The respondents attempt to undermine the petitioners' reliance on *Pidgeon* by invoking *In re Lester*, 602 S.W.3d 469 (Tex. 2020), and *Ex parte E.H.*, 602 S.W.3d 486 (Tex. 2020). But those decisions are irrelevant to the petitioners' truth defense because each of those decisions post-dates the allegedly defamatory statements, and truth is assessed at the time an allegedly defamatory statement is made. *Compare* Resp. Br. at 26 ("Notably, this Court's decision in *In re Lester* dispensed with the idea that the *Pidgeon* footnote means that laws declared unconstitutional by the United States Supreme Court remain valid, enforceable, or capable of imposing criminal liability."), *with Burbage v. Burbage*, 447 S.W.3d 249, 255 (Tex. 2014) (a jury is to "determine if each statement was sub-

federal courts have no authority to erase a duly enacted law from the statute books, [but can only] decline to enforce a statute in a particular case or controversy." (citation and internal quotation marks omitted)), *rev'd on other grounds*, *California v. Texas*, 141 S. Ct. 2104 (2021); *Pool v. City of Houston*, 978 F.3d 307, 309 (5th Cir. 2020) ("It is often said that courts 'strike down' laws when ruling them unconstitutional. That's not quite right." (citation omitted)). When a court declares a statute unconstitutional, it continues to exist as a law until it is repealed by the legislature that enacted it. A court's power extends *only* to the resolution of cases or controversies between named litigants—and no further. *See* U.S. Const. art. III.

In the course of resolving a case or controversy, a court may decline to *enforce* a statute that it believes to be unconstitutional when deciding that particular case. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). A court might also issue an injunction that prevents the named defendants from *enforcing* a statute. *See Ex parte Young*, 209 U.S. 123 (1908); *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021) ("[F]ederal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves."). But a Court has no authority to change the content of Texas law.

---

stantially true at the time it was made."). In all events, the respondents are wrong to say that *Lester* "dispensed" with *Pidgeon*'s analysis, as the opinion in *Lester* does not acknowledge *Pidgeon*, let alone "dispense" with it.

And the law of Texas continues to define abortion as a crime,[9] even though the federal judiciary (at this point in time) is unwilling to uphold criminal convictions obtained under those statutes. So the pre-*Roe* statutes continue to exist and continue to define abortion—as well as acts that aid or abet abortion—as a criminal offense. The Supreme Court's opinions about the constitutionality of those statutes concern only whether the federal judiciary is *currently willing to enforce* those criminal prohibitions in cases or controversies that fall within its jurisdiction.

The situation is no different from a President who refuses to enforce a criminal statute that he believes to be unconstitutional. In 2002, the Bush Administration opined that the federal anti-torture statute[10] violated the Commander-in-Chief clause as applied to wartime interrogations of enemy combatants, and it refused to enforce the anti-torture statute in those situations.[11] That did not "strike down" the statute or render it "void," and it did not change the fact that Congress had defined torture as a federal crime. It would not be defamation to call interrogators "criminals" if they violated the anti-torture statute, even though they were never criminally prosecuted and even though they relied on DOJ opinions pronouncing the statute unconsti-

9. Unless the mother's life is in danger. *See* West's Texas Civil Statutes, article 4512.6 (1974) (Pet. Br. App. at 82).

10. 18 U.S.C. §§ 2340-2340A.

11. *See* Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002).

tutional. Statutes continue to exist as laws, even when the President (or the Supreme Court) declines to enforce them for constitutional reasons. The constitutional pronouncements of the executive branch or the Supreme Court concern only whether those particular institutions will *enforce* the criminal statutory prohibition—and their non-enforcement policies are temporary and last only for as long as the executive or the judiciary chooses to adhere to the constitutional views of its predecessors. *See, e.g.*, Executive Order 13,491 (January 22, 2009) (requiring U.S. interrogators to comply with the federal anti-torture statute and revoking the Bush Administration's constitutional objections to those laws); *Dobbs v. Jackson Women's Health Organization*, 141 S. Ct. 2619 (2021) (granting certiorari to reconsider *Roe v. Wade*, 410 U.S. 113 (1973)); *Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1870) (overruling *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870), and enforcing the Legal Tender Act of 1862, without requiring reenactment of the Act after *Hepburn* had declared it unconstitutional). They do not terminate the existence of the statute or eliminate the underlying criminal prohibitions.

The Afiya Center and the Texas Equal Access Fund are violating 4512.2 by "furnishing the means for procuring an abortion knowing the purpose intended." The law of Texas defines this conduct as a crime—and it remains a crime regardless of whether the current Supreme Court is willing to enforce the statute or uphold criminal convictions obtained under the state's pre-*Roe* abortion laws. It is entirely truthful to describe The Afiya Center and the

Texas Equal Access Fund as "criminal" organizations on account of their admitted violations of article 4512.2.

B. *Roe* Does Not Shield The Afiya Center Or The Texas Equal Access Fund From Criminal Prosecution For Their Violations Of Article 4512.2

There is a more serious problem with the respondents' reliance on *Roe v. Wade*: Nothing in *Roe* confers any constitutional protection on the activities of abortion funds such as The Afiya Center or the Texas Equal Access Fund. There is no constitutional right to pay for another person's abortion, and the abortion right recognized in *Roe* is implicated only when a state imposes an "undue burden" on women seeking abortions. *See Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 874 (1992) (plurality opinion) ("Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause."). And abortion funds (unlike abortion providers) do not have standing to assert the third-party rights of women seeking abortions. The Afiya Center and the Texas Equal Access Fund can be prosecuted under article 4512.2 *now*, without encountering any obstacles from *Roe* or the supposed constitutional right to abortion. The State's failure to bring criminal charges against these organizations is solely a matter of prosecutorial grace.

1. The State's Pre-*Roe* Abortion Statutes Are Severable In Each Of Their Applications

The respondents claim that *Roe* prevents the State from enforcing its criminal abortion statutes in *any* situation,[12] but that is false. Every provision and every discrete application of the state's abortion statutes is severable from each other. *See* Tex. Gov't Code § 311.032(c) ("In a statute that does not contain a provision for severability or nonseverability, if any provision of the statute or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the statute that can be given effect without the invalid provision or application, and to this end the provisions of the statute are severable."); *Virginia v. Hicks*, 539 U.S. 113, 121 (2003) ("Severab[ility] is of course a matter of state law." (citation omitted)). And the Supreme Court has allowed states to continue enforcing their pre-*Roe* criminal abortion bans against non-physician abortions and other situations that fall outside the protections of *Roe*. *See Connecticut v. Menillo*, 423 U.S. 9, 9–10 (1975) (allowing Connecticut to enforce its pre-*Roe* criminal abortion statutes against non-physician abortions, and rejecting the Connecticut Supreme Court's holding that *Roe* had rendered those statutes "null and void, and thus incapable of constitutional application even to someone not medically qualified to perform an abortion"). *Menillo* also specifically rejected the notion that *Roe* had rendered Texas's pre-*Roe* abortion statutes "void" or facially unconstitutional:

---

12. Resp. Br. at 9 (describing article 4512.2 and the state's pre-*Roe* abortion statutes as "void *ab initio*").

> Jane Roe had sought to have an abortion "performed by a competent, licensed physician, under safe, clinical conditions," and *our opinion recognized only her right to an abortion under those circumstances*. That the Texas statutes fell as a unit meant only that they could not be enforced, with or without Art. 1196, in contravention of a woman's right to a clinical abortion by medically competent personnel. *We did not hold the Texas statutes unenforceable against a nonphysician abortionist, for the case did not present the issue*.

Id. at 10 (emphasis added) (citation and some internal quotation marks omitted). State supreme courts have likewise held that their pre-*Roe* abortion statutes are severable and remain enforceable against non-physician abortions, post-viability abortions, and other situations that will not impose an "undue burden" on abortion patients. *See May v. State*, 492 S.W.2d 888, 889 (Ark. 1973); *People v. Bricker*, 208 N.W.2d 172, 175–76 (Mich. 1973); *State v. Norflett*, 337 A.2d 609, 615 (N.J. 1975) ("[T]o the extent that it authorizes the criminal prosecution of laymen for performing abortions, N.J.S.A. 2A:87-1 survives *Roe*"); *id.* ("*Roe* and *Doe* do not preclude the enforcement of criminal abortion statutes against laymen.").

The Texas abortion statutes are severable in the same manner, and they remain enforceable in situations that will not violate the Constitution or impose an "undue burden" on abortion patients. And Texas may enforce its criminal abortion statutes against the respondents and other abortion funds without violating *any* constitutional pronouncement from the Supreme Court.

2. Prosecuting The Afiya Center Or The Texas Equal Access Fund Will Not Impose An "Undue Burden" On Abortion Patients Or Violate The Respondents' Constitutional Rights

Under *Roe* and *Casey*, a state cannot enforce its abortion laws in a manner that imposes an "undue burden" on women seeking abortions. But a State remains free to enforce abortion statutes in situations that will not impose an undue burden or violate anyone's constitutional rights. The State can prosecute the respondents now for their violations of article 4512.2, and for their complicity in violating sections 1.07 and 19.02(b)(1) the Texas Penal Code.

Prosecuting The Afiya Center or the Texas Equal Access Fund will not impose an "undue burden" on women seeking abortions. There is no constitutional right to receive financial assistance from others when obtaining an abortion, and the prosecution of Texas abortion funds will merely remove financial subsidies from abortion patients, rather than place a "substantial obstacle" in their path. *See Casey*, 505 U.S. at 877 ("undue burden" exists only if a "substantial obstacle" is placed in the path of a women seeking abortions); *Harris v. McRae*, 448 U.S. 297, 325 (1980) (no constitutional right to receive financial subsidies for an abortion).

There is also no constitutional right to pay for another person's abortion. The right recognized in *Roe* concerns only the right of women to *obtain* abortions; there is no constitutional right to perform abortions, nor is there any constitutional right to assist others in obtaining abortions. *See Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 912 (6th Cir. 2019) (en banc)

(denying the existence of any constitutional right to perform abortions). So The Afiya Center and the Texas Equal Access Fund would have no constitutional rights of their own to assert if they were prosecuted for violating article 4512.2.

3. The Respondents Lack Third-Party Standing To Assert The Rights Of Abortion Patients

The respondents also lack standing to assert the constitutional rights of abortion patients as a defense to criminal prosecution. *See Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) ("A party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" (citation omitted)); *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 16 (Tex. 2011) ("[A] plaintiff [must] 'assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)); *Texas Workers' Compensation Commission v. Garcia*, 893 S.W.2d 504, 518 (Tex. 1995) ("[T]he plaintiff must contend that the statute unconstitutionally restricts the *plaintiff's* rights, not somebody else's."). The Supreme Court allows abortion *providers* to assert the third-party rights of abortion patients. *See Singleton v. Wulff*, 428 U.S. 106, 113–18 (1976) (plurality opinion); *June Medical Services LLC v. Russo*, 140 S. Ct. 2103, 2118–20 (2020) (plurality opinion); *id.* at 2139 (Roberts, C.J., concurring). But the Court has never allowed abortion funds to assert the constitutional rights of abortion patients, and the provision of financial support is not analogous to a doctor–patient

relationship. So even if the respondents could somehow demonstrate that the enforcement of article 4512.2 would impose an "undue burden" on abortion patients, they would not be permitted to assert those rights as a defense to criminal prosecution.

4. Any Immunity From Prosecution That Abortion Providers Enjoy On Account Of *Roe* Does Not Protect Abortion Funds From Accomplice Liability

Of course, abortion *providers* who violate the state's pre-*Roe* abortion statutes cannot be prosecuted unless and until the Supreme Court overrules *Roe*—and any provider can invoke *Roe* as a defense if it is prosecuted for performing pre-viability abortions. *See Menillo*, 423 U.S. at 10 ("Jane Roe had sought to have an abortion 'performed by a competent, licensed physician, under safe, clinical conditions,' and our opinion recognized only her right to an abortion under those circumstances." (citation omitted)). But this does not shield abortion funds and abortion-assistance organizations from accomplice liability, even when the abortion provider is immune from prosecution under *Roe*. The accomplice-liability statute makes this unmistakably clear:

> In a prosecution in which an actor's criminal responsibility is based on the conduct of another, the actor may be convicted on proof of commission of the offense and that he was a party to its commission, and it is no defense:
>
> (1) that the actor belongs to a class of persons that by definition of the offense is legally incapable of committing the offense in an individual capacity; or
>
> (2) that the person for whose conduct the actor is criminally responsible has been acquitted, has not been prosecuted or con-

> victed, has been convicted of a different offense or of a different type or class of offense, or is immune from prosecution.

Tex. Penal Code § 7.03. So an abortion fund can be criminally prosecuted under article 4512.1 or article 4512.2, based on the rules of accomplice liability in sections 7.02 and 7.03 of the Texas Penal Code, regardless of whether *Roe* shields the abortion provider from prosecution or conviction.

C. Article 4512.2 Has Not Been Repealed By Implication

The respondents have claimed throughout this litigation that article 4512.2 has been repealed by implication.[13] But they do not present that argument in their briefing to this Court, and for good reason: The Texas Heartbeat Act emphatically reaffirms the continued existence of article 4512.2 and the state's pre–*Roe* criminal abortion statutes, and it repudiates any suggestion that these statutes were "repealed" by post-*Roe* statutes that regulate the abortion procedure:

> The legislature finds that the State of Texas never repealed, either expressly or by implication, the state statutes enacted before the ruling in *Roe v. Wade*, 410 U.S. 113 (1973), that prohibit and criminalize abortion unless the mother's life is in danger.

Senate Bill 8, 87th Leg., § 2, available at https://bit.ly/3F6n9Kk. The "trigger ban" enacted after SB 8 contains identical language reaffirming the continued existence and enforceability of the state's pre-*Roe* abortion laws. *See*

13. *See* Appellees' Br., *Dickson v. Afiya Center*, No. 05-20-00988-CV at 24 ("Texas's anti-abortion statutes were also repealed by implication because Texas adopted laws regulating the provision of abortion services."), available at https://bit.ly/3Lz55u9.

House Bill 1280, 87th Leg., § 4, available at https://bit.ly/3y5jATa. Article 4512.2 has not been repealed.[14]

* * *

It is entirely truthful to describe the respondents as "criminal" organizations because: (1) The respondents are indisputably engaged in conduct that article 4512.2 defines as a crime; and (2) *Roe v. Wade* does not protect the respondents from criminal prosecution for their violations of article 4512.2. The respondents are not currently being prosecuted for these violations, but they could be, regardless of whether the Supreme Court overrules *Roe* in *Dobbs*. And it is irrelevant whether the respondents will ultimately be prosecuted or convicted for their crimes. What matters is what the law of Texas

14. Even if this Court could somehow find that article 4512.2 has been repealed by implication, the respondents are *still* committing criminal acts by aiding and abetting abortions performed in violation of the State's admitting-privileges and ambulatory-surgical-center requirements. *See* Tex. Health & Safety Code § 245.010(a) (ambulatory surgical centers); Tex. Health & Safety Code § 171.0031(a)(1) (admitting privileges). Those statutes have never been repealed, and the respondents are violating sections 1.07 and 19.02 of the Texas Penal Code whenever they pay for abortions performed outside an ambulatory surgical center or by a doctor who lacks hospital-admitting privileges. The injunction in *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582 (2016), protects only the abortion providers who sued and affects only the state officials who were named as defendants. It does not prevent district attorneys from prosecuting The Afiya Center or the Texas Equal Access Fund, who were not parties to *Hellerstedt*. And there was no finding in *Hellerstedt* that the prosecution of abortion funds that aid and abet violations of H.B. 2 would impose an "undue burden" on abortion patients. So the respondents are violating the criminal laws of Texas coming and going.

says. The law of Texas says that paying for another person's abortion is a crime—and there is no constitutional obstacle to enforcing this criminal prohibition against the respondents and other Texas abortion funds. The petitioners' statements are truthful, and they have every right under the First Amendment to call attention to the respondents' violations of these unrepealed statutes and urge prosecutors to start enforcing these statutes again.

II. Even If The Petitioners' Statements Are False, The TCPA Motion Must Be Granted Because The Respondents Failed To Produce "Clear And Specific Evidence" Of Actual Malice

There is a separate and independent reason why the respondents cannot establish a prima facie case of defamation: The Afiya Center and the Texas Equal Access Fund are "limited-purpose public figures," so they must produce clear and specific evidence that the petitioners acted with "actual malice," *i.e.*, with actual knowledge that the disputed statements were false or with reckless disregard toward the truth. *See WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998) ("[P]ublic figures . . . must prove that the defendant published a defamatory falsehood with actual malice, that is, with 'knowledge that it was false or with reckless disregard of whether it was false or not.'" (quoting *New York Times v. Sullivan*, 376 U.S. 254, 279–80 (1964)). The respondents come nowhere close to making this required showing—and they certainly do not have evidence that is "'unambiguous,' 'sure,' or 'free from doubt.'" *In re Lipsky*, 460 S.W.3d 579, 590 (Tex. 2015) (orig. proceed-

ing) ("The words 'clear' and 'specific' in the context of [the TCPA] have been interpreted respectively to mean, for the former, '"unambiguous," "sure," or "free from doubt"' and, for the latter, '"explicit" or "relating to a particular named thing."'"). And even if they had, Mr. Dickson's affidavit conclusively refutes any possibility of actual malice or negligence.

A. The Respondents Are Limited-Purpose Public Figures And Must Produce "Clear And Specific Evidence" Of Actual Malice Rather Than Mere Negligence

The "controversy" in this case is whether the law of Texas defines abortion as a crime, and whether abortion funds such as The Afiya Center and the Texas Equal Access Fund can be prosecuted for aiding or abetting abortions. The respondents admitted in their district-court briefing that this is how the relevant "controversy" should be defined. CR 954 ("Plaintiffs' claims and Defendants' defamatory statements only involve the more narrow question of whether abortion *is currently* legal.").[15] The respondents easily qualify as "limited purpose public figures" under this framing of the controversy, for the reasons in the petitioners' opening brief. *See* Pet. Br. at 32–36;

15. The respondents suggest that the "relevant controversy" should be defined as "the campaign for the 'Sanctuary City for the Unborn' ordinances" rather than the current legality of their behavior, *see* Resp. Br. at 30, but they waived this argument by failing to present it to the district court, and they do not develop the argument in their brief. *See Riyad Bank v. Al Gailani*, 61 S.W.3d 353, 356 (Tex. 2001) ("[Respondents] waived this argument because they did not present it to the trial court.").

see also McLemore, 978 S.W.2d at 571 (describing the three-part test for "limited purpose public figure").

The respondents do not deny that this controversy is "public both in the sense that people are discussing it and people other than the immediate participants in the controversy are likely to feel the impact of its resolution." *McLemore*, 978 S.W.2d at 571. Instead, they complain that this is not "a major controversy" because the petitioners cited only "five authors who espouse the theory that Petitioners have adopted." Resp. Br. at 30. But the test for whether someone qualifies as a limited-purpose public figure does not turn on whether the relevant controversy is "major." It requires only that: (1) "people are discussing" the controversy; and (2) "people other than the immediate participants in the controversy are likely to feel the impact of its resolution." *McLemore*, 978 S.W.2d at 571. The respondents do not deny that these requirements have been met.

Nor do the respondents deny that they have "more than a trivial or tangential role in the controversy."[16] They complain that they were not "aware" that anyone thought they were committing crimes until the enactment of Mr. Dickson's ordinance,[17] but that is irrelevant to their role in the controversy. And the respondents are *publicly* involved in abortion assistance, as their websites boast about their complicity in abortion and solicit funds for their

16. *McLemore*, 978 S.W.2d at 571.

17. *See* Resp. Br. at 31.

efforts.[18] The respondents' violations of article 4512.2 were open for all to see long before Mr. Dickson crafted his ordinance.

Finally, the accusations of criminality are undoubtedly "germane" to the respondents' participation in the controversy. The respondents complain that Mr. Dickson thrust them into this controversy by accusing them of criminal behavior,[19] but that has no bearing on the germaneness inquiry. The respondents chose to engage in the conduct described in article 4512.2, and Mr. Dickson has (truthfully) pointed out that this conduct remains a crime under the extant laws of Texas.

So the respondents are "limited-purpose public figures," and they must produce "clear and specific evidence" of actual malice rather than mere negligence.

B. The Respondents Failed To Produce "Unambiguous" Evidence That Mr. Dickson Knew That The Allegedly Defamatory Statements Were False

This Court defines "clear and specific evidence" as follows:

> The words "clear" and "specific" in the context of [the TCPA] have been interpreted respectively to mean, for the former, "'unambiguous,' 'sure,' or 'free from doubt'" and, for the latter, "'explicit' or 'relating to a particular named thing.'"

Lipsky, 460 S.W.3d at 590. And a "prima facie case" requires "evidence sufficient as a matter of law to establish a given fact if it is not rebutted or con-

---

18. *See* https://www.theafiyaccnter.org; http://www.tcafund.org (last visited May 17, 2022).

19. *See* Resp. Br. at 32.

tradicted." *Id.* at 590. So the respondents must produce evidence sufficient to establish as a matter of law that Mr. Dickson acted with actual malice, and that evidence must be "unambiguous, sure, or free from doubt," as well as "explicit or relating to a particular named thing." *Id.*

Mr. Dickson's sworn affidavit states that he believed (and continues to believe) that it is truthful to describe the respondents as "criminal" because Texas has never repealed its criminal abortion statutes, and it is undisputed that the respondents are violating article 4512.2 by "furnish[ing] the means for procuring an abortion knowing the purpose intended." *See* Affidavit of Mark Lee Dickson at ¶¶ 11–19 (Pet. Br. App. 190–193). Mr. Dickson also believed (and continues to believe) that it is truthful and legally accurate for the ordinances to declare abortion to be an act of "murder." *See id.* at ¶ 20 (Pet. Br. App. 193). Mr. Dickson knows that the Texas Penal Code defines murder to include the intentional killing of an unborn child. *See id.* at ¶ 13 (Pet. Br. App. 190–191); Tex. Penal Code § 1.07; *id.* at § 19.02(b)(1). Mr. Dickson also sincerely believes that the statutory exceptions for "lawful medical procedures" and the dispensation or administration of drugs "in accordance with law" are inapplicable when a local ordinance has outlawed abortion under city law, and when Texas has never repealed its statutes that criminalize abortion statewide. *See* Affidavit of Mark Lee Dickson at ¶¶ 13, 20 (Pet. Br. App. 190–191, 193).

The respondents have failed to produce "clear and specific" evidence that Mr. Dickson is lying in his affidavit. Their claim that Dickson "knew

there was a vast wealth of authority that contradicted his statements"[20] is patently false and unsupported by citation of evidence. And their claim that Mr. Dickson acted with "ill will and intent to harm the Respondents" is irrelevant to the actual-malice inquiry, which asks whether a defendants subjectively *knew* his statements to be false or acted with reckless disregard of the truth.

C. The Respondents Failed To Produce "Unambiguous" Evidence That Mr. Dickson Acted With Negligence Or Reckless Disregard For The Truth

Mr. Dickson's affidavit denies that he acted with "negligence" or "reckless disregard" toward the truth, and it explains how he "carefully researched the law" and "consulted with legal counsel and other legal experts before publishing the ordinance and the other statements." Affidavit of Mark Lee Dickson at ¶ 8 (Pet. Br. App. 189). His affidavit recites the steps he took to ensure the truthfulness of the ordinance and the statements that he and Right to Life East Texas made. *See id.* at ¶¶ 11–22 (Pet. Br. App. 190–194). Specifically, Mr. Dickson relied on lectures from Bradley Pierce, a licensed attorney in Texas, this Court's decision in *Pidgeon v. Turner*, 538 S.W.3d 73 (Tex. 2017), and a law-review article entitled *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933 (2018). *See id.* at ¶¶ 11–16 (Pet. Br. App. 190–192). The respondents do not deny any of these factual claims in Mr. Dickson's affidavit, and they do not contend that Mr. Dickson is lying when he describes the research that

20. Resp. Br. 34.

he conducted. The respondents may disagree with the legal conclusions that Mr. Dickson reached, but they have no "clear and specific evidence" that he acted with negligence or reckless disregard in concluding that abortion funds are violating the criminal laws of Texas.

III. If The Court Rejects The Truth Defense And The Mens Rea Defense, Then It Should Hold That The Allegedly Defamatory Utterances Are Constitutionally Protected Statements Of Opinion Or Rhetorical Hyperbole

If (and only if) this Court concludes that the respondents produced "clear and specific evidence" to establish falsity and actual malice, then the Court should order dismissal under the TCPA because the defendants' statements should be regarded as constitutionally protected statements of opinion or rhetorical hyperbole.[21]

A. Statements That Call Abortion Funds "Criminal" Are Constitutionally Protected Statements Of Opinion

The respondents claim that it is factually false to describe their violations of article 4512.2 as "criminal" because (in their view) abortion is a constitutional right and article 4512.2 is unconstitutional. But whether abortion is a

21. Defendants in civil litigation are allowed to assert inconsistent defenses. *See* Tex. R. Civ. P. 48 ("A party may also state as many separate claims or defenses as he has regardless of consistency").The respondents' refusal to acknowledge this reflects ignorance of the most basic rules of civil practice. *See, e.g.*, Resp. Br. at 22 ("To later reverse course and insist that it is just non-literal opinion or hyperbole to loudly denominate Respondents 'criminal organizations' who are 'complicit in murder' is rank hypocrisy.").

constitutional right is a matter of opinion—and the correctness of *Roe* is likewise a matter of opinion and not fact. *See Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 551 (2021) (Sotomayor, J., concurring in part and dissenting in part) ("'The Supreme Court's *interpretations* of the Constitution are not the Constitution itself—they are, after all, called *opinions*.'" (quoting Reply Brief for Intervenors in No. 21-50949 (CA5), p.4.)).

The respondents claim that Mr. Dickson "clearly intended" to express a statement of fact. Resp. Br. at 38. But whether these statements qualify as opinion or fact turns on a reasonable person's perception of the statements, not the speaker's intent. *See Bentley v. Bunton*, 94 S.W.3d 561, 579 (Tex. 2002) ("[T]he meaning of a publication, and thus whether it is false and defamatory, depends on a reasonable person's perception of the entirety of a publication . . . . This is also true in determining whether a publication is an actionable statement of fact or a constitutionally protected expression of opinion." (citation and internal quotation marks omitted)). Mr. Dickson is entitled to opine that article 4512.2 is constitutional and should be fully enforced against the respondents, and that the respondents should therefore be regarded as "criminals" (and prosecuted as "criminals") for their admitted violations of article 4512.2. A reasonable speaker would interpret these accusations of criminality as conveying a belief that paying for abortion is not a constitutional right—and that is (at the very least) a constitutionally protected statement of opinion.

B. Statements That Call Abortion Funds "Criminal" Are Constitutionally Protected Statements Of Rhetorical Hyperbole

Describing abortion as "murder" and calling abortion funds "criminal" is quintessential rhetorical hyperbole, even in a state where abortion is legal. *See* 1 Rodney A. Smolla, *Law of Defamation* § 4:13 (2d ed. 2005). The respondents once again claim that Mr. Dickson "intended" to communicate facts rather than hyperbole,[22] but that is irrelevant because the test turns on the perception of a reasonable listener. *See Bentley*, 94 S.W.3d at 579. Mr. Dickson of course intended to convey a factual message that the respondents are violating the state's criminal abortion laws—and those statements are entirely truthful because article 4512.2 has not been repealed and there is no constitutional right to pay for another person's abortion. But if the Court disagrees and finds those statements factually false, then it should nonetheless hold that calling abortion funds "criminal" is constitutionally protected hyperbole. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990); *Horsley v. Rivera*, 292 F.3d 695 (11th Cir. 2002).

IV. The Respondents Have Failed To Produce "Clear And Specific Evidence" Of A Conspiracy

The respondents have no evidence—let alone "clear and specific evidence"—of a conspiracy between Mr. Dickson and Right to Life East Texas. That Dickson posted statements on Right to Life East Texas's Facebook page

22. Resp. Br. at 40.

is not evidence of an agreement between them to commit defamation. Nor have the respondents produced "clear and specific evidence" that would make Right to Life East Texas legally responsible for statements that were published by Mr. Dickson alone.

V. The False And Misleading Statements In The Respondents' Brief

We conclude by addressing the falsehoods and misrepresentations that appear in the respondents' brief. A court cannot evaluate the parties' legal contentions unless it has an accurate presentation of the record, and it must be able to trust counsel's representations without having to check every primary source to confirm that counsel has described it in a truthful and non-misleading fashion. There are several places where the respondents' brief falls short of the candid advocacy that this Court is entitled to.

First. Mr. Dickson has never, ever stated that The Afiya Center or the Texas Equal Access Fund have committed "murder." Mr. Dickson has called *abortion* "murder."[23] But he has never uttered any statement that mentions The Afiya Center or the Texas Equal Access Fund and accuses those organizations of committing "murder" or being complicit in "murder." Calling abortion "murder" is constitutionally protected speech, and statements that describe the *act* of abortion as "murder" do not defame because they are not statements "of and concerning" The Afiya Center or the Texas Equal Access Fund—or anyone else involved in abortion. *See Lipsky*, 460 S.W.3d at 593;

23. CR 1108 ("Is abortion literally murder? Yes.").

Richard A. Epstein, Torts § 18.5 (1999) ("The 'of and concerning' requirement in the law of defamation . . . allow[s] only those persons singled out by the defamatory statement to sue for their losses."). Yet the respondents' brief repeatedly and falsely says that Mr. Dickson uttered statements accusing *them* of murder. *See* Resp. Br. at 3 ("Dickson . . . defended the truthfulness of his statements, saying that because TAC and TEAF assist others in obtaining abortions, they are 'criminal organizations' that are committing the crime of murder in Texas."); *id.* at 10 ("Petitioners[] . . . say [TAC and TEAF] are literally 'complicit in murder.'"); *id.* at 22 (claiming that Mr. Dickson "loudly denominate[d] Respondents "criminal organizations" who are "complicit in murder"); *id.* at 42 (referring to petitioners' "statements calling TAC and TEAF criminals and murderers"); *id.* at 50 ("Dickson directly accused Respondents of committing the crime of murder").

Second. The respondents attempt to establish "actual malice" by claiming that Mr. Dickson "knew there was a vast wealth of authority that contradicted his statements." Resp. Br. at 34. This statement is unsupported by any citation of evidence, and it is patently false. *See* Affidavit of Mark Lee Dickson (Pet. Br. App. 188–199); Supplemental Affidavit of Mark Lee Dickson (Pet. Br. App. 200–206). There is nothing in the record to show that Mr. Dickson was subjectively aware of authority that contradicted his views, and the respondents never cited such evidence at any stage of these proceedings. Litigants are not permitted to make up facts and put them in an appellate brief.

Conclusion

The petition for review should be granted, and the judgment of the court of appeals should be reversed.

Respectfully submitted.

/s/ Jonathan F. Mitchell

Thomas Brejcha
Illinois Bar No. 0288446
Martin Whittaker
Texas Bar No. 24095097
Thomas More Society
309 West Washington Street, Suite 1250
Chicago, Illinois 60606
(312) 782-1680 (phone)
(312) 782-1887 (fax)
info@thomasmoresociety.org

Jonathan F. Mitchell
Texas Bar No. 24075463
Mitchell Law PLLC
111 Congress Avenue, Suite 400
Austin, Texas 78701
(512) 686-3940 (phone)
(512) 686-3941 (fax)
jonathan@mitchell.law

H. Dustin Fillmore III
Texas Bar No. 06996010
Charles W. Fillmore
Texas Bar No. 00785861
The Fillmore Law Firm, LLP
201 Main Street, Suite 801
Fort Worth, Texas 76102
(817) 332-2351 (phone)
(817) 870-1859 (fax)
dusty@fillmorefirm.com
chad@fillmorefirm.com

D. Bryan Hughes
Texas Bar No. 00793995
Law Office of D. Bryan Hughes
110 North College Avenue, Suite 207
Tyler, Texas 75702-7221
(903) 581-1776 (phone)
bryan@hughesfirm.com

Counsel for Petitioners

Certificate Of Service

I certify that on May 17, 2022, this document was served through the electronic filing manager upon:

Douglas S. Lang
Jennifer R. Ecklund
Elizabeth G. Myers
John P. Atkins
Thompson Coburn LLP
1919 McKinney Avenue, Suite 100
Dallas, Texas 75201
(972) 629-7100 (phone)
(972) 629-7171 (fax)
dlang@thompsoncoburn.com
jecklund@thompsoncoburn.com
emyers@thompsoncoburn.com
jatkins@thompsoncoburn.com

Counsel for Respondents

/s/ Jonathan F. Mitchell
Jonathan F. Mitchell
Counsel for Petitioners

Certificate Of Compliance

I certify that this document contains 7,472 words, excluding the portions described in Texas Rule of Appellate Procedure 9.4(i)(1), according to Microsoft Word for Mac version 16.41.

/s/ Jonathan F. Mitchell
Jonathan F. Mitchell
Counsel for Petitioners

Dated: May 17, 2022

Automated Certificate of eService

This automated certificate of service was created by the efiling system.
The filer served this document via email generated by the efiling system
on the date and to the persons listed below:

Jonathan Mitchell on behalf of Jonathan Mitchell
Bar No. 24075463
jonathan@mitchell.law
Envelope ID: 64602158
Status as of 5/18/2022 7:15 AM CST

Associated Case Party: MarkLeeDickson

Name	BarNumber	Email	TimestampSubmitted	Status
Jonathan F.Mitchell		jonathan@mitchell.law	5/17/2022 8:07:00 PM	SENT
Charles W.Fillmore		chad@fillmorefirm.com	5/17/2022 8:07:00 PM	SENT
H. Dustin Fillmore		dusty@fillmorefirm.com	5/17/2022 8:07:00 PM	SENT
Bryan Hughes		bryan@hughesfirm.com	5/17/2022 8:07:00 PM	SENT
Thomas Brejcha		tbrejcha@thomasmoresociety.org	5/17/2022 8:07:00 PM	SENT
Martin Whittaker		privatrecht@gmail.com	5/17/2022 8:07:00 PM	SENT

Associated Case Party: The Afiya Center

Name	BarNumber	Email	TimestampSubmitted	Status
Linda Carranza		lcarranza@thompsoncoburn.com	5/17/2022 8:07:00 PM	SENT
Douglas S.Lang		dlang@thompsoncoburn.com	5/17/2022 8:07:00 PM	SENT
John Atkins	24097326	jatkins@thompsoncoburn.com	5/17/2022 8:07:00 PM	SENT
Jennifer Ecklund	24045626	jecklund@thompsoncoburn.com	5/17/2022 8:07:00 PM	SENT
Elizabeth Myers	24047767	emyers@thompsoncoburn.com	5/17/2022 8:07:00 PM	SENT
Laurie DeBardeleben		ldebardeleben@thompsoncoburn.com	5/17/2022 8:07:00 PM	SENT
Roxanna Lock		rlock@thompsoncoburn.com	5/17/2022 8:07:00 PM	SENT

Associated Case Party: Texas Right to Life

Name	BarNumber	Email	TimestampSubmitted	Status
Emily Cook		ecook@texasrighttolife.com	5/17/2022 8:07:00 PM	SENT