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

PETITION FOR REVIEW

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

(additional counsel listed on inside)

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

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

Identity Of Parties And Counsel

Petitioners	Counsel for Petitioner
• Mark Lee Dickson • Right to Life East Texas	Jonathan F. Mitchell Mitchell Law PLLC 111 Congress Avenue, Suite 400 Austin, Texas 78701 Thomas Brejcha Martin Whittaker Thomas More Society 309 West Washington Street, Suite 1250 Chicago, Illinois 60606 H. Dustin Fillmore III Charles W. Fillmore The Fillmore Law Firm, LLP 201 Main Street, Suite 801 Fort Worth, Texas 76102 D. Bryan Hughes Law Office of D. Bryan Hughes 110 North College Avenue, Suite 207 Tyler, Texas 75702-7221

Respondents	Counsel for Respondents
• The Afiya Center • Texas Equal Access Fund	Jennifer R. Ecklund Elizabeth G. Myers John P. Atkins Thompson Coburn LLP 1919 McKinney Avenue, Suite 100 Dallas, Texas 75201

Table Of Contents

Index Of Authorities

Cases

Statutes

Rules

Other Authorities

Statement Of The Case

Nature of the Case:	Defendants Mark Lee Dickson and Right to Life East Texas have been encouraging cities throughout Texas to enact ordinances that outlaw abortion within city limits and declare abortion to be "an act of murder with malice aforethought." An early version of the ordinance, which seven cities enacted, also prohibited abortion-assistance organizations such as The Afiya Center and the Texas Equal Access Fund from operating within city limits and declared them to be "criminal organizations." Plaintiffs The Afiya Center and the Texas Equal Access Fund have sued Mr. Dickson and Right to Life East Texas, alleging that Mr. Dickson and Right to Life East Texas defamed them by promoting an ordinance that describes abortion as "murder" and describes their activities as "criminal." (App. 83–103; App. 104–124). The defendants moved to dismiss under the Texas Citizens Participation Act. The district court denied the TCPA motion to dismiss, and the defendants are appealing this decision.
Trial Court:	The Honorable Tonya Parker, 116th Judicial District Court, Dallas County, Texas
Trial Court Disposition:	The district court denied Mr. Dickson and Right to Life East Texas's motion to dismiss under the Texas Citizens Participation Act.

Parties in the Court of Appeals:	Appellants: Mark Lee Dickson and Right to Life East Texas Appellees: The Afiya Center and Texas Equal Access Fund
Court of Appeals:	Fifth Court of Appeals at Dallas, Texas (Osborne, Pedersen, and Nowell, JJ.)
Court of Appeals Disposition:	The court of appeals, in a unanimous opinion authored by Pedersen, J., affirmed the trial court's denial of the TCPA motion. *See Dickson v. The Afiya Center*, 2021 WL 3412177 (Tex. App.—Dallas 2021) (App. 139–173). After Mr. Dickson and Right to Life East Texas moved for rehearing, the panel withdrew its original opinion and issued a new opinion. *See Dickson v. The Afiya Center*, --- S.W.3d ----, 2021 WL 4771538 (Tex. App.—Dallas 2021) (App. 3–36). The court of appeals denied en banc reconsideration, over a dissent from Justice Schenck. *See Dickson v. The Afiya Center*, --- S.W.3d ----, 2021 WL 4947193 (Tex. App.—Dallas 2021) (App. 38–55). No additional motions for rehearing or en banc reconsideration are pending.

Statement Of Jurisdiction

This Court has jurisdiction under section 22.001(a) of the Texas Government Code because the appeal presents a question of law that is important to the jurisprudence of the state.

Statement Of Issues

The state of Texas has never repealed its pre–*Roe v. Wade* statutes that outlaw abortion unless the mother's life is endangered by the pregnancy. These statutes remain codified at articles 4512.1 through 4512.6 of the Revised Civil Statutes, and they impose criminal liability on anyone who "furnishes the means for procuring an abortion knowing the purpose intended." West's Texas Civil Statutes, article 4512.2 (1974) (App. 82).

The law of Texas also defines the crime of murder to include the intentional or knowing killing of an unborn child. *See* Tex. Penal Code § 19.02(b)(1) (App. 184); Tex. Penal Code § 1.07. The murder statute exempts only "lawful medical procedures" and the dispensation or administration of drugs "in accordance with law," (App. 187), which makes abortion an act of murder when performed in violation of a city ordinance that outlaws abortion within city boundaries.

Defendants Mark Lee Dickson and Right to Life East Texas have been persuading cities throughout Texas to enact ordinances that outlaw abortion within city limits and declare abortion to be "an act of murder." Several of these ordinances also declared entities that aid or abet abortions to be "criminal organizations," consistent with the extant statutes of Texas that continue to define abortion as a criminal act. The Afiya Center and the Texas Equal Access Fund claim that Mr. Dickson and Right to Life East Texas defamed them (and conspired to defame them) by advocating for the enactment of these ordinances, and Mr. Dickson and Right to Life East Texas moved to dismiss these claims under the Texas Citizens Participation Act. The district court denied the TCPA motion to dismiss, and the Dallas Court of Appeals affirmed. The issues presented are:

1. Did the plaintiffs produce "clear and specific evidence" that Mr. Dickson or Right to Life East Texas published a "false statement of fact" concerning The Afiya Center and the Texas Equal Access Fund?

2. Did the plaintiffs produce "clear and specific evidence" that defendants Mark Lee Dickson or Right to Life East Texas acted with "actual malice" or "negligence" in publishing the disputed statements?

3. Have the defendants established that their statements are entitled to the defense of truth or, in the alternative, that their statements are constitutionally protected statements of opinion or rhetorical hyperbole?

4. Did the plaintiffs produce "clear and specific evidence" of a conspiracy between Right to Life East Texas and any other person or entity?

5. Did the plaintiffs produce "clear and specific evidence" that Right to Life East Texas can be held legally responsible for statements that were published only by Mr. Dickson?

In the Supreme Court of Texas

Mark Lee Dickson and Right to Life East Texas,

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Fifth Court of Appeals, Dallas, Texas
No. 05-20-00988-cv

PETITION FOR REVIEW

To The Honorable Supreme Court Of Texas:

This petition presents a square conflict of authority between Dallas and Amarillo Courts of Appeals. The Dallas Court of Appeals allowed petitioners Mark Lee Dickson and Right to Life East Texas to be sued for defamation over their efforts to enact local ordinances that outlaw abortion within city limits, declare abortion to be an act of "murder," and describe abortion-assistance organizations as "criminal." App. 3–37. The Amarillo Court of Appeals found the exact same statements to be constitutionally protected speech, and ordered the plaintiff in that case to pay Mr. Dickson and Right to Life East Texas's costs and attorneys' fees. App. 174–83. The Court should

grant the petition to resolve this division of authority. *See* Tex. R. App. P. 56.1(a)(2).

Statement Of Facts

Petitioner Mark Lee Dickson has been encouraging cities in Texas to enact ordinances that outlaw abortion within city limits. To date, at least 38 cities in Texas have enacted local abortion bans in response to Mr. Dickson's efforts. The first city to do so was Waskom, which adopted its ordinance on June 19, 2019. App. 66–72. Each of these ordinances describes abortion as "an act of murder." App. 68.

An early version of the ordinance not only outlawed abortion but also prohibited abortion providers and abortion-assistance organizations from "operating" within city limits. The original Waskom ordinance, for example, banned all organizations that "perform abortions" or "assist others in obtaining abortions" from:

> (a) Offering services of any type within the City . . .
>
> (b) Renting office space or purchasing real property within the City . . . [or]
>
> (c) Establishing a physical presence of any sort within the City . . .

App. 69. The ordinance also listed abortion-assistance groups that had been banned from the city and described them as "prohibited criminal organizations." App. 68. Seven cities, including Waskom, enacted local abortion bans that included these provisions. But each of those cities repealed their ordinances in response to a separate lawsuit, and enacted a replacement ordi-

nance that retains the ban on abortion but omits the provisions that described abortion-assistance groups as "criminal" and banned them from operating in the city. App. 73–79.

On June 11, 2020, The Afiya Center and the Texas Equal Access Fund sued Mr. Dickson and Right to Life East Texas, alleging that the defendants defamed them through each of the following acts:

(1) Mr. Dickson's drafting and advocating for the passage of the original ordinance, which banned The Afiya Center and the Texas Equal Access Fund from operating within city limits and described them as "criminal organizations."[1]

(2) Mr. Dickson's posting the following statement on Facebook on July 2, 2019:

> "Abortion is Freedom" in the same way that a wife killing her husband would be freedom—Abortion is Murder. The Lilith Fund and NARAL Pro-Choice Texas are advocates for abortion, and since abortion is the murder of innocent life, this makes these organizations advocates for the murder of those innocent lives. This is why the Lilith Fund and NARAL Pro-Choice Texas are listed as criminal organizations in Waskom, Texas. They exist to help pregnant Mothers murder their babies.[2]

(3) Right to Life East Texas's posting a similar statement from Mr. Dickson on Facebook that reads as follows:

> As I have said before, abortion is freedom in the same way that a wife killing her husband is freedom. Abortion is murder. The thought that you can end the life of another innocent human

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1. App. 87 ("Dickson's statements and advocacy in favor of the original ordinance remain defamatory"); App. 107 (same).

2. App. 93–94; App. 114.

being and not expect to struggle afterwards is a lie. In closing, despite what these groups may think, what happened in Waskom was not a publicity stunt. The Lilith Fund was in error when they said on a July 2nd Facebook post, "Abortion is still legal in Waskom, every city in Texas, and in all 50 states." We said what we meant and we meant what we said. Abortion is illegal in Waskom, Texas. In the coming weeks more cities in Texas will be taking the same steps that the City of Waskom took to outlaw abortion in their cities and become sanctuary cities for the unborn. If NARAL Pro-Choice Texas and the Lilith Fund want to spend more money on billboards in those cities we welcome them to do so. After all, the more money they spend on billboards the less money they can spend on funding the murder of innocent unborn children.[3]

(4) Mr. Dickson's posting the following statement on Facebook on November 26, 2019:

Nothing is unconstitutional about this ordinance. Even the listing of abortion providers as examples of criminal organizations is not unconstitutional. We can legally do that. This is an ordinance that says murdering unborn children is outlawed, so it makes sense to name examples of organizations that are involved in murdering unborn children. That is what we are talking about here: The murder of unborn children. Also, when you point out how the abortion restrictions in 2013 cost the State of Texas over a million dollars, you should also point out how many baby murdering facilities closed because of those restrictions. We went from over 40 baby murdering facilities in the State of Texas to less than 20 baby murdering facilities in the State of Texas in just a few years. Even with the win for abortion advocates with Whole Woman's Health v. Hellerstedt, how many baby murdering facilities have opened back up? Not very many at all. So thank you for reminding us all that when

3. App. 97; App. 118.

we stand against the murder of innocent children, we really do save a lot of lives.[4]

(5) Mr. Dickson's posting the following statement on Facebook on June 11, 2019, and Right to Life East Texas's re-posting of this statement on Facebook:

> Congratulations Waskom, Texas for becoming the first city in Texas to become a "Sanctuary City for the Unborn" by resolution and the first city in the Nation to become a "Sanctuary City for the Unborn" by ordinance. Although I did have my disagreements with the final version, the fact remains that abortion is now OUTLAWED in Waskom, Texas! . . . . All organizations that perform abortions and assist others in obtaining abortions (including Planned Parenthood and any of its affiliates, Jane's Due Process, The Afiya Center, The Lilith Fund for Reproductive Equality, NARAL Pro-Choice Texas, National Latina Institute for Reproductive Health, Whole Woman's Heath and Woman's Health Alliance, Texas Equal Access Fund, and others like them) are now declared to be criminal organizations in Waskom, Texas. This is history in the making and a great victory for life![5]

(6) Mr. Dickson's utterance of the following statement during an interview with CNN:

> The idea is this: in a city that has outlawed abortion, in those cities if an abortion happens, then later on when Roe v. Wade is overturned, those penalties can come crashing down on their heads.[6]

The defendants moved to dismiss under the Texas Citizens Participation Act. The district court denied the motion. App. 1. The Fifth Court of Ap-

4. App. 94–95; App. 115.
5. App. 95; App. 116.
6. App. 96; App. 117.

peals affirmed, holding that the plaintiffs had produced "clear and specific evidence" that: (1) the allegedly defamatory utterances were statements of fact rather than opinion;[7] (2) the defendants' statements were false;[8] (3) the defendants acted negligently and the plaintiffs were not "limited-purpose public figures";[9] and (4) Mr. Dickson and Right to Life East Texas conspired to defame the plaintiffs.[10] The court of appeals also held that the defendants had failed to establish a truth defense[11] and failed to show that their statements were constitutionally protected opinion or rhetorical hyperbole.[12]

The defendants moved for rehearing and flagged four errors in the original panel opinion. App. 132–136. Two of these errors concerned the panel's description of the amended ordinances and the resolution of the plaintiffs' lawsuit against the cities. App. 134. The panel corrected those mistakes in its subsequent opinion. *Compare* App. 141 (original panel opinion) *with* App. 5–6 (corrected opinion).

The panel, however, refused to amend its opinion in response to the two remaining errors. Both the original and amended opinions incorrectly state that the Texas Penal Code categorically exempts abortion from the definition of murder. App. 32 (referring to "the clear language of penal code section

7. App. 12–14.
8. App. 15–20.
9. App. 20–28.
10. App. 28–29.
11. App. 31–33.
12. App. 33–36.

19.06 excepting abortion from the definition of murder."); App. 168 (same). But section 19.06 of the Penal Code does not exempt abortion from the definition of murder; it exempts "lawful medical procedures" and "the dispensation of a drug in accordance with law." Tex. Penal Code §§ 19.06(2), (4) (App. 187). Unlawful abortions are acts of murder under the Penal Code,[13] and the court of appeals erred in stating that abortion is *per se* excluded from the definition of murder.

The panel opinion also repeatedly and falsely states that Mr. Dickson and Right to Life East Texas have called The Afiya Center and the Texas Equal Access Fund "murderers" and accused them of committing or assisting "murder." App. 13, 15, 20, 27, 33, 34, 36. Neither Mr. Dickson nor Right to Life East Texas has ever called The Afiya Center or the Texas Equal Access Fund "murderers," and they have never accused them of committing murder or aiding or abetting murder. Mr. Dickson's statements describe *abortion* as murder, and none of those statements mention or refer to The Afiya Center or the Texas Equal Access Fund. Yet the court of appeals refused to correct its misrepresentations of Mr. Dickson's statements, even after the defendants brought this to the panel's attention. App. 135–36.

13. *See* Texas Penal Code § 1.07 ("'Individual' means a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth."); Texas Penal Code § 19.02(b)(1) (defining "murder" to include any act that "intentionally or knowingly causes the death of an individual").

After the panel denied rehearing, Mr. Dickson and Right to Life East Texas moved for en banc reconsideration. The court of appeals denied the motion over a vigorous dissent from Justice Schenck,[14] who declared that the defendants' statements "clearly amount to opinion or rhetorical hyperbole" protected by the First Amendment. App. 44.

Summary Of Argument

The court of appeals' opinion directly conflicts with the Seventh Court of Appeals' ruling in *Dickson v. Lilith Fund for Reproductive Equity*, 2021 WL 3930728 (Tex. App.—Amarillo 2021, no pet. h.) (App. 174–83). *Lilith Fund* holds that the allegedly defamatory statements uttered by Mr. Dickson and Right to Life East Texas are constitutionally protected statements of opinion, and it ordered the plaintiff to pay Mr. Dickson and Right to Life East Texas's costs and attorneys' fees under the TCPA. *See id.* at *6–*7 (App. 181–83). *Lilith Fund* also considered and rejected the Fifth Court of Appeals' conclusion that Mr. Dickson and Right to Life East Texas are not entitled to a TCPA dismissal. *See id.* at *6 (App. 182–83). The Court should grant the petition for review to resolve this conflict of authority—a conflict that concerns the *exact same statements* uttered by the same defendants in this case.

The Court should also grant review because the court of appeals' opinion is an affront to the First Amendment. Calling abortion "murder" is constitutionally protected speech, yet the court of appeals is allowing Mr. Dickson

14. App. 38–55.

and Right to Life East Texas to be sued for those constitutionally protected utterances. In addition, the plaintiffs have failed to produce *any* evidence—let alone "clear and specific evidence"—of a false statement of fact concerning The Afiya Center or the Texas Equal Access Fund. And the plaintiffs have no evidence that Mr. Dickson or Right to Life East Texas acted with negligence or actual malice in publishing the statements for which they have been sued. This is an abusive lawsuit that seeks to chill constitutionally protected speech, and it should be promptly dismissed under the TCPA.

Argument

I. The Court Should Grant Review Because The Court Of Appeals' Opinion Conflicts With The Seventh Court Of Appeals' Ruling In Dickson v. Lilith Fund

The Fifth Court of Appeals issued its initial ruling on August 4, 2021, which held that The Afiya Center and the Texas Equal Access Fund had presented "clear and specific evidence" of defamation sufficient to withstand a TCPA motion to dismiss. On September 2, 2021, the Seventh Court of Appeals reached the opposite conclusion, holding that the statements for which Mr. Dickson and Right to Life East Texas have been sued are non-actionable statements of opinion. *See Dickson v. Lilith Fund for Reproductive Equity*, 2021 WL 3930728, *6–*7 (Tex. App.—Amarillo 2021, no pet. h.); App. 181–83. *Lilith Fund* considered and rejected the court of appeals' ruling that Mr. Dickson and Right to Life East Texas are not entitled to a TCPA dismissal.

App. 182–83. And it ordered the plaintiff to pay Mr. Dickson and Right to Life East Texas's costs and attorneys' fees. App. 183.

The ruling of the court of appeals and the ruling of *Lilith Fund* are impossible to reconcile. Both cases involve the exact same statements uttered by the same defendants. Yet the Amarillo Court of Appeals found that these statements were constitutionally protected under the TCPA, while the Dallas Court of Appeals rejected this view and allowed the plaintiffs' defamation lawsuit to proceed. The Court should grant the petition for review to resolve this direct conflict between the courts of appeals. *See* Tex. R. App. P. 56.1(a)(2).

II. The Court Should Grant Review To Correct The Court Of Appeals' Misstatements Of Law And Misrepresentations Of Mr. Dickson's Statements

The court also should grant review to correct the two errors that the panel refused to fix in response to the motion for rehearing. The first of these errors appears on page 30 of the slip opinion, where the court of appeals incorrectly states that that the Texas Penal Code categorically exempts abortion from the definition of murder:

> To reach the legal conclusions he does, Dickson ignores or rejects out of hand: the clear language of penal code section 19.06 excepting abortion from the definition of murder . . . .

App. 32. Section 19.06 of the Penal Code does not exempt "abortion" from the definition of murder; it exempts "lawful medical procedures" and "the dispensation of a drug in accordance with law":

> This chapter does not apply to the death of an unborn child if the conduct charged is:
>
> (1) conduct committed by the mother of the unborn child;
>
> (2) a lawful medical procedure performed by a physician or other licensed health care provider with the requisite consent, if the death of the unborn child was the intended result of the procedure;
>
> (3) a lawful medical procedure performed by a physician or other licensed health care provider with the requisite consent as part of an assisted reproduction as defined by Section 160.102, Family Code; or
>
> (4) the dispensation of a drug in accordance with law or administration of a drug prescribed in accordance with law.

Tex. Penal Code §§ 19.06 (App. 187). An abortion must be "lawful" before it can be excluded from the definition of murder—and an unlawful abortion is an act of murder because the murder statute: (1) prohibits acts that "intentionally or knowingly causes the death of an individual";[15] and (2) defines "individual" to include "a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth."[16] So it is simply false to state, as the court of appeals does, that "abortion" is *per se* excluded from the definition of murder.

It is especially important that the Court correct this misstatement now that SB 8 has taken effect, which outlaws abortion after a fetal heartbeat is

15. Texas Penal Code § 19.02(b)(1).
16. Texas Penal Code § 1.07.

detectable. *See* Senate Bill 8, 87th Leg., § 3, codified at Tex. Health & Safety Code §§ 171.201–.212; *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494 (2021). By removing any legal status for post-heartbeat abortions, SB 8 has made these abortions acts of murder under section 19.02(b)(1) of the Penal Code,[17] and anyone who knowingly performs or assists a post-heartbeat abortion has committed murder and is guilty of murder. The court of appeals' opinion, however, says that *all* abortions are excluded from the statutory definition of murder, which misleads readers into thinking that abortions performed in violation of SB 8 (or any other provision of Texas law) are not criminal acts of murder—even though the Penal Code unambiguously states that they are.

The second uncorrected error is more serious, because it misrepresents the factual record. The court of appeals' opinion repeatedly (and falsely) claims that Mr. Dickson and Right to Life East Texas have called The Afiya Center and the Texas Equal Access Fund "murderers" and accused them of committing or assisting "murder." Statements of this sort appear on page 11 of the slip opinion (referring to "the statements at issue—that TAC and TEAF are criminal organizations and that they commit murder");[18] page 13

17. *See* Tex. Penal Code § 19.02(b)(1) ("A person commits an offense if he . . . intentionally or knowingly causes the death of an individual"); *see also* Tex. Penal Code § 1.07 ("'Individual' means a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth.").
18. App. 13.

(referring to "appellants' statements calling TAC and TEAF criminals and asserting that they are committing murder");[19] page 18 ("[A]ppellees have offered clear and specific evidence—and a cogent legal argument—making a prima facie case that they have not committed a crime generally, or murder specifically");[20] page 25 ("[A]ppellants knew or should have known that appellees were not criminals or murderers under Texas law.");[21] page 31 ("[H]e has been sued for publishing statements that call TAC and TEAF criminal organizations that commit murder.");[22] page 32 (referring to "statements accusing TAC and TEAF of aiding and abetting murder");[23] and page 34 (referring to "appellants' statements calling TAC and TEAF criminals and murderers").[24]

Mr. Dickson and Right to Life East Texas have never called The Afiya Center or the Texas Equal Access Fund "murderers," and they have never accused them of committing murder or aiding or abetting murder. Their statements describe *abortion* as murder, and none of those statements mention or refer to The Afiya Center or the Texas Equal Access Fund in any way. App. 41–42 n.4 (quoting the purportedly defamatory statements); App. 66–72 (text of original Waskom ordinance). The court of appeals' entire analysis

19. App. 15.
20. App. 20.
21. App. 27.
22. App. 33.
23. App. 34.
24. App. 36.

rests on a false assertion that Mr. Dickson and Right to Life East Texas called the plaintiffs "murderers" and accused them of committing "murder."

III. The Court Should Grant Review Because The Court Of Appeals' Ruling Subjects Constitutionally Protected Speech To A Defamation Lawsuit

Finally, the Court should grant review because the ruling below threatens and deters constitutionally protected speech. Statements that call abortion "murder" are quintessential examples of rhetorical hyperbole protected by the First Amendment, and subjecting someone to lawsuits for these statements is an affront to the Constitution. In addition, there is nothing even remotely approaching a false statement of fact in any of the statements for which Mr. Dickson and Right to Life East Texas have been sued. And even if there were, the plaintiffs have presented *no* evidence—let alone "clear and specific evidence"—that Mr. Dickson or Right to Life East Texas acted with actual malice or negligence in publishing the statements.

The plaintiffs have sued Mr. Dickson and Right to Life East Texas for calling abortion "murder"—and the court of appeals is *allowing* those claims to proceed. Here are each of the allegedly defamatory statements that use the word "murder":

(1) Mr. Dickson's posting of the following statement on Facebook on July 2, 2019:

> "Abortion is Freedom" in the same way that a wife killing her husband would be freedom—Abortion is Murder. The Lilith Fund and NARAL Pro-Choice Texas are advocates for abortion, and since abortion is the murder of innocent life, this makes

these organizations advocates for the murder of those innocent lives. This is why the Lilith Fund and NARAL Pro-Choice Texas are listed as criminal organizations in Waskom, Texas. They exist to help pregnant Mothers murder their babies.[25]

(2) Right to Life East Texas's posting of a similar statement from Mr. Dickson on Facebook that reads as follows:

As I have said before, abortion is freedom in the same way that a wife killing her husband is freedom. Abortion is murder. The thought that you can end the life of another innocent human being and not expect to struggle afterwards is a lie. In closing, despite what these groups may think, what happened in Waskom was not a publicity stunt. The Lilith Fund was in error when they said on a July 2nd Facebook post, "Abortion is still legal in Waskom, every city in Texas, and in all 50 states." We said what we meant and we meant what we said. Abortion is illegal in Waskom, Texas. In the coming weeks more cities in Texas will be taking the same steps that the City of Waskom took to outlaw abortion in their cities and become sanctuary cities for the unborn. If NARAL Pro-Choice Texas and the Lilith Fund want to spend more money on billboards in those cities we welcome them to do so. After all, the more money they spend on billboards the less money they can spend on funding the murder of innocent unborn children.[26]

(3) Mr. Dickson's posting of the following statement on Facebook on November 26, 2019:

Nothing is unconstitutional about this ordinance. Even the listing of abortion providers as examples of criminal organizations is not unconstitutional. We can legally do that. This is an ordinance that says murdering unborn children is outlawed, so it makes sense to name examples of organizations that are involved in murdering unborn children. That is what we are talk-

25. CR 23–24; CR 51.

26. CR 27; CR 55.

> ing about here: The murder of unborn children. Also, when you point out how the abortion restrictions in 2013 cost the State of Texas over a million dollars, you should also point out how many baby murdering facilities closed because of those restrictions. We went from over 40 baby murdering facilities in the State of Texas to less than 20 baby murdering facilities in the State of Texas in just a few years. Even with the win for abortion advocates with Whole Woman's Health v. Hellerstedt, how many baby murdering facilities have opened back up? Not very many at all. So thank you for reminding us all that when we stand against the murder of innocent children, we really do save a lot of lives.[27]

This is defamation? Note that The Afiya Center and the Texas Equal Access Fund are not even mentioned in these statements. So the defamation claims regarding the word "murder" flunk the most basic requirement of defamation law: That the alleged defamatory statements be "concerning the plaintiffs." *In re Lipsky*, 460 S.W.3d 579, 593 (Tex. 2015) (orig. proceeding); 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.").

There are also no "false statements of fact" in these utterances, because the statements make clear that the accusations of "murder" refer exclusively to the killing of *unborn* humans—and it is undeniably true that the plaintiffs are complicit in abortion. The plaintiffs resent the characterization of abortion as "murder," but it is not defamatory to call abortionists "murderers," and it is not defamatory to describe abortion-assistance organizations as ac-

27. CR 24–25; CR 52.

complices to "murder." *See* 1 Rodney A. Smolla, *Law of Defamation* § 4:13 (2d ed. 2005). It *would* be defamatory to accuse The Afiya Center or the Texas Equal Access Fund of murdering human beings *after* they have been born, but no reasonable person could interpret the defendants' statements that way.

Finally, statements or suggestions that abortion is "murder" are constitutionally protected as "rhetorical hyperbole." *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) (observing that the First Amendment protects "'rhetorical hyperbole,' which has traditionally added much to the discourse of our Nation."). Calling abortion providers "murderers" is a textbook example of constitutionally protected rhetorical hyperbole—even when the statements are made in a jurisdiction that has repealed its criminal prohibitions on abortion. *See* 1 Rodney A. Smolla, *Law of Defamation* § 4:13 (2d ed. 2005) ("[A] doctor who performs lawful abortions may be faced with the specter of protesters marching in front of his or her clinic with signs declaring that the doctor is a 'murderer.' The word 'murderer' in this context, again, is obviously not intended to be taken in its literal sense, but rather as an expression of the protesters' view that abortion is tantamount to murder."). Any statements that accuse the plaintiffs of aiding and abetting "murder" are likewise protected by the First Amendment, so long as the context makes clear that the accusations refer only to the plaintiffs' involvement in abortion and nothing more.

* * *

Mr. Dickson and Right to Life East Texas have a constitutional right to advocate for the enactment of ordinances that outlaw abortion and criminalize the behavior of abortion-assistance organizations such as The Afiya Center and the Texas Equal Access Fund. They also have a constitutional right to advocate for the enforcement of existing criminal statutes against abortion-assistance organizations—no matter how offensive those ideas may seem to the plaintiffs and others who engage in abortion-promoting activities. If the plaintiffs are disturbed by the fact that cities in Texas are outlawing abortion and declaring their activities "criminal," then their remedies are to lobby the city council to amend or repeal the ordinance, seek preemptive legislation from the state or federal governments, or file a lawsuit to have the ordinances declared unconstitutional. It is not to sue the people who advocated for the passage of these ordinances. The use of defamation lawsuits to deter speech that truthfully relates the contents of a dormant but unrepealed criminal statute is intolerable. The plaintiffs' lawsuit chills constitutionally protected speech and advocacy, and it seeks to intimidate those working to outlaw abortion and promote the enforcement of the state's pre-*Roe* criminal abortion statutes. The TCPA was enacted precisely to prevent lawsuits of this sort.

Conclusion

The petition for review should be granted.

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 December 4, 2021, this document was served through the electronic filing manager upon:

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)
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 4,497 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: December 4, 2021

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

APPENDIX TO PETITION FOR REVIEW

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

(additional counsel listed on inside)

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

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

CAUSE NOs. DC-20-08104, DC-20-08113

The Afiya Center, Plaintiff, v. Mark Lee Dickson, and Right to Life East Texas, Defendants.	§ § § § § § § § § § §	IN THE DISTRICT COURT DALLAS COUNTY, TEXAS 116th JUDICIAL DISTRICT

Texas Equal Access Fund Plaintiff, v. Mark Lee Dickson, and Right to Life East Texas, Defendants.	§ § § § § § § § § § §	IN THE DISTRICT COURT DALLAS COUNTY, TEXAS 116th JUDICIAL DISTRICT

ORDER DENYING DEFENDANTS' SECOND AMENDED MOTION TO DISMISS UNDER THE TEXAS CITIZENS PARTICIPATION ACT

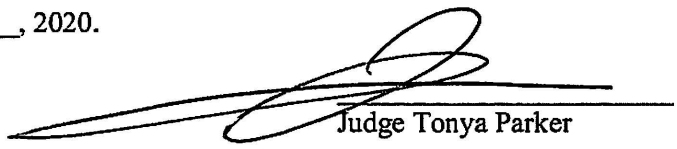
After hearing Defendants' Second Amended Motion to Dismiss Under the Texas Citizens Participation Act (the "Motion") on November 2, 2020, and upon consideration of the arguments of counsel, and the evidence and briefing submitted by the parties, the Court is of the opinion that the Motion should be denied on all grounds.

THEREFORE, the Court orders as follows:

Defendants' Second Amended Motion to Dismiss Under the Texas Citizens Participation Act in Cause Nos. DC-20-08104 and DC-20-08113 is **DENIED**.

IT IS SO ORDERED.

Dated: November 3, 2020.



Judge Tonya Parker

Affirm and Opinion Filed September 8, 2021

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-20-00988-CV

MARK LEE DICKSON AND RIGHT TO LIFE EAST TEXAS, Appellants
V.
THE AFIYA CENTER AND TEXAS EQUAL ACCESS FUND, Appellees

On Appeal from the 116th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-20-08104

OPINION ON REHEARING

Before Justices Osborne, Pedersen, III, and Nowell
Opinion by Justice Pedersen, III

We deny appellants' August 17, 2021 Motion for Rehearing. On our own motion, we withdraw our August 4, 2021 memorandum opinion and vacate our judgment of that date. We amend one sentence in our original opinion describing the Waskom Ordinance to be certain that it complies faithfully with the record. In all other respects our opinion remains the same. This is now the opinion of the Court.

Appellants Mark Lee Dickson and Right to Life East Texas appeal the trial court's order denying their Second Amended Motion to Dismiss under the Texas Citizens' Participation Act (the Motion to Dismiss). The Motion to Dismiss sought dismissal of all defamation and conspiracy claims brought by appellees, The Afiya

Center (TAC) and Texas Equal Access Fund (TEAF). Appellants raise five issues in this Court, contending: appellees failed to produce clear and specific evidence that appellants published a false statement of fact concerning appellees or that appellants acted with actual malice in publishing the statements at issue; appellants established affirmative defenses or constitutional protection of the statements at issue; and appellees failed to produce clear and specific evidence of a conspiracy between appellants or that Right to Life East Texas (RLET) can be held legally responsible for statements published by Dickson. We affirm the trial court's order.

BACKGROUND

Dickson acknowledges in his brief that he "has been encouraging cities throughout Texas to enact ordinances that outlaw abortion within their city limits." Dickson likewise acknowledges his success in this endeavor, identifying seventeen cities that had passed such ordinances at the time of his briefing. The roots of this lawsuit lie in the first such ordinance, which was enacted by the City of Waskom.

The Waskom Ordinance

The original Waskom Ordinance begins with a series of "Findings." For our purposes, the key finding states:

> WHEREAS, a surgical or chemical abortion is the purposeful and intentional ending of a human life, and is murder "with malice aforethought" since the baby in the womb has its own DNA, and at certain points in pregnancy has its own heartbeat and its own brainwaves . . .

The ordinance proceeds to a series of four "Declarations," which assert:

App. 4

1. We declare Waskom, Texas to be a Sanctuary City for the Unborn.

2. Abortion at all times and at all stages of pregnancy is declared to be an act of murder with malice aforethought, subject only to the affirmative defenses described in Section C.3.

3. Organizations that perform abortions and assist others in obtaining abortions are declared to be criminal organizations. These organizations include, but are not limited to:

(a) Planned Parenthood and any of its affiliates;

(b) Jane's Due Process;

(c) The Afiya Center;

(d) The Lilith Fund for Reproductive Equality;

(e) NARAL Pro-Choice Texas;

(f) National Latina Institute for Reproductive Health;

(g) Whole Woman's Health and Whole Woman's Health Alliance;

(h) Texas Equal Access Fund.

4. The Supreme Court's rulings and opinions in *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), *Stenberg v. Carhart*, 530 U.S. 914 (2000), *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), and any other rulings or opinions from the Supreme Court that purport to establish or enforce a "constitutional right" to abort a pre-born child, are declared to be unconstitutional usurpations of judicial power, which violate both the Tenth Amendment and the Republican Form of Government Clause, and are declared to be null and void in the City of Waskom.

The ordinance goes on to declare abortion and aiding and abetting abortion to be "unlawful acts." In resolution of an earlier lawsuit, the ordinance was amended to remove the list of "criminal organizations," although the ordinance continued to assert that it was an offense to aid and abet an abortion by engaging in conduct such

as "[k]nowingly providing transportation to or from an abortion provider" or "[p]roviding money with the knowledge that it will be used to pay for an abortion or the costs associated with procuring an abortion."

The Statements at Issue

Following enactment of the Waskom Ordinance, and during the following months, Dickson made a number of statements on television and on Facebook related to the ordinance he drafted and supported. Along with the ordinance language quoted above, which declared TAC and TEAF to be criminal organizations, appellees referenced five such statements in their petitions—four Facebook posts on Dickson's and RLET's pages and one statement to CNN—and submitted additional Facebook posts during the Motion to Dismiss proceeding.

By way of example, Dickson posted the following statement on Facebook on June 11, 2019:

> Congratulations Waskom, Texas for becoming the first city in Texas to become a "Sanctuary City for the Unborn" by resolution and the first city in the Nation to become a "Sanctuary City for the Unborn" by ordinance. Although I did have my disagreements with the final version, the fact remains that abortion is now OUTLAWED in Waskom, Texas! … All organizations that perform abortions and assist others in obtaining abortions (including Planned Parenthood and any of its affiliates, Jane's Due Process, The Afiya Center, The Lilith Fund for Reproductive Equality, NARAL Pro-Choice Texas, National Latina Institute for Reproductive Health, Whole Woman's Heath and Woman's Health Alliance, Texas Equal Access Fund, and others like them) are now declared to be criminal organizations in Waskom, Texas. This is history in the making and a great victory for life!

He posted the following on November 26, 2019:

> This is an ordinance that says murdering unborn children is outlawed, so it makes sense to name examples of organizations that are involved in murdering unborn children. That is what we are talking about here: The murder of unborn children.

And RLET posted this Dickson-authored statement on its Facebook page:

> [A]bortion is freedom in the same way that a wife killing her husband is freedom. Abortion is murder. . . . Abortion is illegal in Waskom, Texas.

Appellees sued Dickson and RLET, asserting that the statements defamed them by calling them criminal organizations and murderers.

The Motion to Dismiss

Appellants timely filed their Motion to Dismiss in response to appellees defamation claim. In that motion, appellants invoked application of the Texas Citizens' Participation Act (the TCPA) on the bases of their right of free speech, right to petition, and right of association.[1] They charged that TAC and TEAF could not establish by clear and specific evidence (a) that appellants had made a false statement of fact, or (b) that appellants had acted with malice or negligence in making the statements at issue, or (c) that appellees had suffered damages as a result of the statements at issue. However, appellants argued further that—even if TAC and TEAF could establish those elements of their claims by clear and specific evidence—the trial court should still dismiss the claims because the statements were true or substantially true or were constitutionally protected opinion or rhetorical

[1] The appellees' original petitions, later consolidated by agreement, were both filed on June 11, 2020. Accordingly, this case is governed by the amended version of the TCPA that became effective September 1, 2019. Act of May 17, 2019, 86th Leg., R.S., ch. 378, § 11, 2019 Tex. Sess. Law Serv. 684, 687.

hyperbole, and appellants were thus entitled to judgment as a matter of law. Appellants sought recovery of their costs and attorney's fees. In support of their Motion to Dismiss, appellants submitted copies of what they identify as the Texas abortion statutes; a copy of the amended Waskom Ordinance; and the Affidavit of Mark Lee Dickson.

TAC and TEAF filed their Joint Opposition to Defendants' Second Amended Motion to Dismiss Under The Texas Citizens Participation Act, attaching the following evidence: a copy of the original version of the Waskom Ordinance; copies of each of the published statements relied on in the petitions; the Affidavit of Marsha Jones, co-founder and Executive Director of TAC; the Affidavit of Kamyon Conner, Executive Director of TEAF; and the Declaration of Jennifer Rudenick Ecklund, attorney for TAC and TEAF.

Appellants filed a Reply Brief, which attached a supplemental affidavit from Dickson.[2] The trial court heard the Motion to Dismiss and denied it "on all grounds." This interlocutory appeal followed.

THE TCPA

The purpose of the TCPA is "to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate

[2] The reply also attached affidavits from appellants' counsel, Jonathan Mitchell, and a law professor, Michael Stokes Paulsen. Those affidavits were stricken by the trial court in their entirety, and appellants have not complained of their exclusion in this Court.

in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury." TEX. CIV. PRAC. & REM. CODE ANN. § 27.002. The act itself instructs us to construe its provisions liberally "to effectuate its purpose and intent fully." *Id.* § 27.011(b). Litigants invoke the protection of the TCPA through a motion to dismiss, *id.* § 27.003, and we review a trial court's ruling on such a motion de novo, *Vaughn-Riley v. Patterson*, No. 05-20-00236-CV, 2020 WL 7053651, at *2 (Tex. App.—Dallas Dec. 2, 2020, no pet.) (mem. op.).

The TCPA provides a three-step process for determining whether a case should be dismissed. *See generally Youngkin v. Hines*, 546 S.W.3d 675, 679–80 (Tex. 2018). At the outset, the movant must demonstrate that the TCPA applies to the legal action brought against it. CIV. PRAC. & REM. § 27.005(b). If the movant meets that burden, then the party bringing the legal action must establish by clear and specific evidence a prima facie case for each essential element of the claim in question. *Id.* § 27.005(c). If the party bringing the action satisfies that requirement, the action will still be dismissed if the movant "establishes an affirmative defense or other grounds on which the moving party is entitled to judgment as a matter of law." *Id.* § 27.005(d).[3]

[3] Prior to the 2019 amendments to the TCPA, the third step provided for dismissal "if the moving party establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim."

Step 1: Applicability of the Act

The TCPA applies to a legal action that is based on or is in response to the movant's exercise of the right of free speech, the right to petition, or the right of association. *Id.* § 27.005(b)(1). In both the trial court and this Court, the parties agree that TAC's and TEAF's claims for defamation and conspiracy to defame fall within the TCPA's concept of free speech. Accordingly, we need not address this first step further. *See Dallas Morning News, Inc. v. Hall*, 579 S.W.3d 370, 377 (Tex. 2019); *Caracio v. Doe*, No. 05-19-00150-CV, 2020 WL 38827, at *5 (Tex. App.—Dallas Jan. 3, 2020, no pet.) (mem. op.).

Step 2: Clear and Specific Evidence of a Prima Facie Case For the Essential Elements of the Legal Action

Appellants contend that TAC and TEAF have failed to come forward with clear and specific evidence of a prima facie case for the essential elements of their claims for defamation and conspiracy to defame. In this second step, the statute directs us to consider "the pleadings, evidence a court could consider under Rule 166a, Texas Rules of Civil Procedure, and supporting and opposing affidavits stating the facts on which the liability or defense is based." CIV. PRAC. & REM. § 27.006. We consider the pleadings and evidence in the light most favorable to the nonmovant. *Dyer v. Medoc Health Servs., LLC*, 573 S.W.3d 418, 424 (Tex. App.—Dallas 2019, pet. denied); *see also Locke Lord LLP v. Retractable Techs., Inc.*, No. 05-20-00884-CV, 2021 WL 1540652, at *2 (Tex. App.—Dallas Apr. 20, 2021, no

pet. h.) (mem. op.). As the supreme court has stated, in a TCPA proceeding "we assume [the] truth" of the nonmovant's evidence. *Rosenthal*, 529 S.W.3d at 440 n.9.

Appellees' Defamation Claim

The elements of the tort of defamation include "(1) the publication of a false statement of fact to a third party, (2) that was defamatory concerning the plaintiff, (3) with the requisite degree of fault, and (4) damages, in some cases." *In re Lipsky*, 460 S.W.3d 579, 593 (Tex. 2015) (orig. proceeding) (citing *WFAA–TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex.1998)). In this Court, appellants have challenged appellees' proof on the elements of a false statement of fact and the requisite degree of fault.[4]

Generally, clear and specific evidence means that the plaintiff 'must provide enough detail to show the factual basis for its claim.'" *D Magazine Partners, L.P. v. Rosenthal*, 529 S.W.3d 429, 434 (Tex. 2017) (quoting *Lipsky*, 460 S.W.3d at 591). The "clear and specific evidence" standard does not impose a heightened evidentiary burden or reject the use of circumstantial evidence when determining the nonmovant's prima-facie-case burden. *Andrews County v. Sierra Club*, 463 S.W.3d 867 (Tex. 2015). In a defamation case implicating the TCPA, "pleadings and

[4] Appellants do not challenge appellees' evidence as to whether the statements at issue were defamatory, i.e., whether they tended "to injure [appellees'] reputation, to expose [them] to public hatred, contempt, ridicule, or financial injury, or to impeach [their] integrity, honesty, or virtue." *Backes v. Misko*, 486 S.W.3d 7, 24 (Tex. App.—Dallas 2015, pet. denied). Accusing someone of a crime is defamatory per se under Texas common law. *Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d 614, 638 (Tex. 2018). Such an accusation is "so obviously harmful that general damages, such as mental anguish and loss of reputation, are presumed." *Id.* (citing *Lipsky*, 460 S.W.3d at 596). Thus, appellants do not challenge evidence of the element of damages either.

evidence that establishes the facts of when, where, and what was said, the defamatory nature of the statements, and how they damaged the plaintiff should be sufficient to resist a TCPA motion to dismiss." *Lipsky*, 460 S.W.3d at 591. We do not scrutinize individual statements; instead, we examine the larger context of the purportedly defamatory conduct by the movant. *See, e.g.*, *Bentley v. Bunton*, 94 S.W.3d 561, 581 (Tex. 2002) (considering series of statements during "Bunton's efforts over many months to prove Bentley corrupt").

(1) Evidence that Appellants' Statements Were Statements of Fact

Again, TAC and TEAF limit their defamation claim to assertions that they are criminal organizations and that their conduct in assisting a woman terminating her pregnancy literally amounts to murder.[5] To determine whether such assertions were statements of fact, we focus on the statements' verifiability and the context in which they were made. *Id.* at 583. An actionable statement must assert an objectively verifiable fact, not merely an opinion. *Campbell v. Clark*, 471 S.W.3d 615, 625 (Tex. App.—Dallas 2015, no pet.). However, "[m]erely expressing a defamatory statement in the form of an 'opinion' does not shield it from tort liability because opinions often imply facts." *Backes v. Misko*, 486 S.W.3d 7, 24 (Tex. App.—Dallas 2015, pet. denied); *see also, e.g.*, *Bentley*, 94 S.W.3d at 583 ("If a speaker says, 'In my

[5] In their letter to appellants seeking retraction, appellees stressed: "We are not asking you to change your political views or cease advocating for them. All we ask is that you . . . retract[] any allegations that these organizations or their agents have broken or are breaking any laws." Throughout this lawsuit, appellees have similarly limited their action to charges that they have committed crimes; they specifically except from any complaint appellants' opinions concerning abortion.

opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth."). Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. *Bentley*, 94 S.W.3d at 583. Determining whether a statement is actionable fact or non-actionable opinion is a question of law. *Scripps NP Operating, LLC v. Carter*, 573 S.W.3d 781, 795 (Tex. 2019).

We ask, then, whether the statements at issue—that TAC and TEAF are criminal organizations and that they commit murder—are verifiable. Can we determine as a matter of fact whether the conduct with which a party has been charged is criminal or is murder? Stated differently, can we verify the status of the law as to a particular offense at the time of a particular statement? We conclude that we can, because our state's criminal law is gathered and written in the Texas Penal Code. And while it is true that a municipal ordinance may also identify conduct that constitutes an offense, *see* TEX. PENAL CODE ANN. § 1.03(a), the Texas Constitution provides that no such ordinance "shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State." TEX. CONST. art. XI, § 5; *City of Richardson v. Responsible Dog Owners of Tex.*, 794 S.W.2d 17, 19 (Tex. 1990).

Appellees' evidence included the statements alleged to be defamatory and identified when they were made and how they were published; appellants do not

dispute those fundamental facts. We conclude that the gist of these statements, i.e., that appellees are criminal organizations and that their conduct amounts to murder, can be verified by reference to the Texas Penal Code. Indeed, among the objectives of that code are "by definition and grading of offenses to give fair warning of what is prohibited and of the consequences of violation," and "to safeguard conduct that is without guilt from condemnation as criminal." PENAL § 1.02(2), (4).

We also look to the context in which the statements were made. Dickson purports to pronounce the salutary effect of the Waskom Ordinance on the status of the criminal law involving abortion in Texas; he describes it as "history in the making." He expresses confidence that "[i]n the coming weeks more cities in Texas will be taking the same steps that the City of Waskom took to outlaw abortion in their cities and become sanctuary cities for the unborn." As he describes the effect of this first ordinance, and the effect he anticipates passage of similar ordinances throughout the state will have, he is purporting to inform the public of a change in the criminal law. Dickson claims to have made significant efforts to determine the status of the law, and—based on those efforts—he made statements declaring appellees to be criminal organizations and murderers. We conclude he made those declarations, and continues to make them, as statements of fact. *See generally Bentley*, 94 S.W.3d at 585 ("The clear import of Bunton's statements on 'Q&A' was that Bentley was corrupt as a matter of verifiable fact, as Bunton continued to assert at trial.").

(2) Evidence that Appellants' Statements Were False.

Appellees' burden on this element was to produce clear and specific evidence that appellants' statements calling TAC and TEAF criminals and asserting that they are committing murder when they provide assistance to a woman seeking to terminate a pregnancy are false. The issue of falsity is generally a question of fact. *Bentley*, 94 S.W.3d at 587 (if evidence is disputed, falsity must be determined by finder of fact). In this case, however—where the gist of the defamation issue turns on the status of the criminal law concerning abortion—much of our analysis must be guided by that law.

We construe a series of allegedly defamatory statements as a whole, in light of the surrounding circumstances, and based upon how a person of ordinary intelligence would perceive them. *See Lipsky*, 460 S.W.3d at 594 ("While some of the statements may, in isolation, not be actionable, . . . the gist of his statements were that Range was responsible for contaminating his well water and the Railroad Commission was unduly influenced to rule otherwise."). We have concluded that a statement concerning the status of the criminal law is verifiable by reference to the penal code, whether directly or indirectly by comparing a local ordinance to that code. Accordingly, to adjudge appellees' evidence of falsity, we look first to the penal code to discern whether the conduct alleged by appellants could reasonably be declared criminal.

The penal code does not define the term "criminal" or its root word, "crime." As a general principle of statutory construction, when a term is not defined by statute it bears its common, ordinary meaning, which we typically determine by looking to dictionary definitions. *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 838 (Tex. 2018). Merriam-Webster defines a "crime" as "an illegal act for which someone can be punished by the government." *Crime*, MERRIAM-WEBSTER.COM DICTIONARY, www.merriam-webster.com/dictionary/crime (last visited July __, 2021). Appellees' evidence includes a copy of the original Waskom Ordinance, which ordinance provides:

> Neither the City of Waskom, nor any of its officers or employees, nor any district or county attorney, nor any executive or administrative officer or employee of any state or local governmental entity, shall take any steps to enforce this ordinance against a person or entity that commits an unlawful act described in Section C, unless and until the Supreme Court overrules *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and permits states and municipalities to once again enforce abortion prohibitions.

Thus, although the ordinance purports to outlaw abortion and any conduct that assists in the procurement of an abortion, it states on its face that no arm of the government can take any steps to enforce those prohibitions "unless and until" the Supreme Court's opinions securing a right to abortion are overruled. Thus, the ordinance itself serves as evidence that assisting women in terminating a pregnancy is not "an illegal act for which someone can be punished by the government," i.e., that such assistance is not a crime.

The statements at issue, submitted by appellees as evidence below, repeatedly declare that abortion is murder. The ordinance asserts: "Abortion at all times and at all stages of pregnancy is declared to be an act of murder with malice aforethought." Appellees argue that the definition of murder in the Texas Penal Code establishes that this is false. The code states that a person commits the offense of murder "if he: (1) intentionally or knowingly causes the death of an individual." PENAL § 19.02(b)(1). And the code defines the term "individual" to mean "a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth." *Id.* § 1.07(a)(26). However, appellees correctly point out that the code makes a specific exception to the chapter on criminal homicide, stating:

> This chapter does not apply to the death of an unborn child if the conduct charged is:
>
> (1) conduct committed by the mother of the unborn child; [or]
>
> (2) a lawful medical procedure performed by a physician or other licensed health care provider with the requisite consent, if the death of the unborn child was the intended result of the procedure.

Id. § 19.06. Thus, the Texas Legislature has created a specific exception to the definition of murder for an abortion performed lawfully.

Section 19.06 became the law in Texas after our statutes outlawing abortion were declared unconstitutional by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973). Shortly after *Roe* was decided, the Texas Attorney General was asked to explain the status of Texas law concerning abortion and, after addressing *Roe* and its effect, he stated: "Therefore, there presently are no effective

statutes of the State of Texas against abortion, per se." Tex. Att'y Gen. Op. No. H-369, 3 (1974). When appellants made their statements decades later, *Roe v. Wade* and its progeny continued to be binding law in Texas. *See, e.g.*, *Ex parte Twedell*, 158 Tex. 214, 228 (1958) (Texas Supreme Court is "duty bound to follow the Supreme Court of the United States" when construing U.S. Constitution); *see also Ex parte Evans*, 537 S.W.3d 109, 111 (Tex. Crim. App. 2017) ("The ultimate authority on federal constitutional law is the U.S. Supreme Court.").[6]

If further clarification of the status of Texas criminal law regarding abortion were necessary, it was recently supplied by the Presiding Judge of the Texas Court of Criminal Appeals, who stated in unambiguous terms: "A mother choosing to abort her unborn child is not a crime under Texas law." *State v. Hunter*, No. PD-0861-20, 2021 WL 2449991, at *1 (Tex. Crim. App. June 16, 2021) (concurring in denial of review). The defendant in *Hunter* was charged, *inter alia*, with solicitation to commit capital murder based on text messages sent to his girlfriend requesting that she obtain

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[6] The Waskom Ordinance recites:

> *Roe v. Wade*, 410 U.S. 113 (1973), is a lawless and illegitimate act of judicial usurpation, which violates the Tenth Amendment by trampling the reserved powers of the States, and denies the people of each State a Republican Form of Government by imposing abortion policy through judicial decree[.]

Appellants cite no legal authority for the proposition that a city may, by adopting an ordinance, declare a United States Supreme Court opinion "lawless and illegitimate" and thereby ignore its pronouncements.

an abortion. *State v. Hunter*, 606 S.W.3d 836, 837 (Tex. App.—Austin 2020, pet. refused). The trial court granted a defense motion to quash and dismiss the solicitation count of the indictment, and the court of appeals affirmed that order. *Id.* Presiding Judge Keller explained her reason for denying the State's petition for review, writing:

> My reason to refuse review is simple: The State's indictment does not charge a crime under the laws of the State of Texas, the Court of Appeals's resolution was correct, and the correct resolution *is so obvious* that we need not grant review. A mother choosing to abort her unborn child is not a crime under Texas law, so the defendant cannot be guilty of the offense of solicitation for soliciting such a crime.

Hunter, 2021 WL 2449991, at *1 (emphasis added). And as to the specific question of the charge of murder, she stated, "[T]he entire homicide chapter of the Penal Code, including the provision proscribing the offense of murder, 'does not apply' to the mother ending the unborn child's life." *Id.*

The Motion to Dismiss contends that the Waskom Ordinance negates section 19.06 of the penal code by declaring abortion to be unlawful within that city. However, neither the Waskom Ordinance, nor any other edict by local government, may conflict with this legislative exception. TEX. CONST. art. XI, § 5. And regardless of appellants' stated belief that *Roe* was incorrectly decided, our attorney general in 1974, and our highest criminal court today, have acknowledged that abortion is not a crime under Texas law.

Our task in this opinion, however, is not to rule on the viability of the Waskom Ordinance. In this preliminary proceeding under the TCPA we must limit our ruling

to whether the parties carried their respective burdens under that statute. We conclude that appellees have offered clear and specific evidence—and a cogent legal argument—making a prima facie case that they have not committed a crime generally, or murder specifically, while engaging in any conduct condemned by appellants. Accordingly appellees have carried their step-two burden as to the element of falsity.

We overrule appellants' first issue.

(3) Evidence that Appellants Acted With the Requisite Mental State

In their second issue, appellants argue that TAC and TEAF failed to produce clear and specific evidence sufficient to provide a prima facie case that appellants made the statements at issue with actual malice. If the person allegedly defamed is a private individual, he must establish the defamatory statements were made negligently; a public figure or official must prove actual malice. *Lipsky*, 460 S.W.3d at 593. "'Actual malice' in this context means that the statement was made with knowledge of its falsity or with reckless disregard for its truth." *Id.*

Appellants contend that appellees are "limited-purpose public figures," and thus, that appellees must establish appellants made their statements with actual malice as opposed to negligence. We apply a three-part test to determine whether a party qualifies as a limited-purpose public figure:

> (1) the controversy at issue must be 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;

> (2) the plaintiff must have more than a trivial or tangential role in the controversy; and
>
> (3) the alleged defamation must be germane to the plaintiff's participation in the controversy.

Neely v. Wilson, 418 S.W.3d 52, 70 (Tex. 2013). Whether a party is a limited-purpose public figure is a question of law for the court. *Id.* The "controversy at issue" in this case concerns the Waskom Ordinance and its ability to outlaw abortion within the city of Waskom. While we cannot adjudge how large a group of people are "discussing it," appellees' evidence includes Facebook posts, which are followed by many comments from the public. Moreover, appellees' evidence indicates that they have been contacted by a number of people who have heard about—and been confused by—the ordinance and appellants' statements concerning its effect. We also agree with appellants that people other than these parties are likely to feel the impact of its resolution, given that the Waskom Ordinance applies to all the city's residents and that Dickson's efforts have motivated a number of other cities to adopt similar ordinances. Thus the evidence satisfies the first factor of the *Neely* test.

However, the second and third factors of the test address the role of TAC and TEAF in this controversy. The evidence establishes that TAC and TEAF are solely targets of the ordinance, otherwise playing no role in creating the subject controversy. The Supreme Court has explained that "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979). "[T]he

allegedly defamatory statement cannot be what brought the plaintiff into the public sphere." *Neely*, 418 S.W.3d at 71. In this case, it was precisely the allegedly defamatory statements—beginning with the ordinance's declaration that TAC and TEAF were criminal organizations—that brought appellees into any public controversy involving the Waskom Ordinance. As the Connor and Jones affidavits state:

> It was not until Defendants began shopping around a draft ordinance in the summer of 2019 that [appellees] even realized that the Defendants and others were alleging [their] mission and operations were in violation of criminal law. Until that time, neither [appellees] nor [their] agents made any public statements or engaged in any debate about the question of whether [appellees were] currently violating any criminal law.

We conclude that these appellees were drawn involuntarily into the controversy spawned by the Waskom Ordinance and that they are not limited purpose public figures. *See Neely*, 418 S.W.3d at 71 ("[N]either the United States Supreme Court nor this Court has found circumstances in which a person involuntarily became a limited-purpose public figure.").

Accordingly, to meet their step-two burden on the element of appellants' mental state, appellees need only have offered clear and specific evidence of a prima facie case that appellants made the statements at issue negligently. To carry that burden, TAC and TEAF had to show that appellants knew or should have known that their statements calling appellees criminal organizations and murderers were

false. *See id.* at 72. They could make this showing of appellants' state of mind through circumstantial evidence. *Bentley*, 94 S.W.3d at 591.

Dickson's affidavits assert his belief that abortion remains a crime in Texas. He asserts that he consulted a lawyer, carefully researched "case law and legal scholarship," and concluded that (a) the Waskom Ordinance successfully rendered abortion unlawful, and thus a criminal offense in that city, and (b) because the Texas Legislature never repealed the abortion statutes declared unconstitutional by the Supreme Court in *Roe*, "the law of Texas continues to define abortion as a criminal offense."[7]

We begin the inquiry—as we did the inquiry into falsity—with the Waskom Ordinance itself. And we look again to the ordinance's directive that the government may not enforce its provisions "unless and until the Supreme Court overrules *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and permits states and municipalities to once again enforce abortion prohibitions." Just as this provision of the ordinance directly evidences the fact that abortion is not currently a crime, it provides circumstantial evidence that Dickson knew when he

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[7] TAC and TEAF have argued that the Texas Legislature impliedly repealed the abortion statutes by regulating the process of abortion in Texas. In supplemental briefing, appellants point out that the legislature recently included the following statement in a statute that will become effective September 1, 2021:

> 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 § 2. In this opinion, we do not rely upon, and express no opinion concerning, the question of repeal by implication.

drafted the ordinance that abortion was not currently a crime. Likewise, Dickson's statement to CNN about the Waskom Ordinance implies that he knew that abortion was not currently a crime. He told CNN that "[t]he idea is this: in a city that has outlawed abortion, in those cities if an abortion happens, then later on when *Roe v. Wade* is overturned, those penalties can come crashing down on their heads." The statement may be ambiguous about what happens now, but it is clear that Dickson understood the penalties would only "come crashing down" *after* the status of the law changes. We conclude that the ordinance Dickson drafted, and his statements about it, evidence—at a minimum—a serious question in his mind as to whether abortion was currently a crime in Texas.

After *Roe* declared Texas's abortion statutes unconstitutional, the Texas Legislature transferred those laws to articles 4512.1 through 4512.6 of the Revised Civil Statutes. Appellants' second legal theory posits that unconstitutional but unrepealed criminal statutes continue to identify criminal conduct in Texas. This theory relies heavily upon a law review article, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933 (2018), authored by Jonathan Mitchell, who is serving as one of appellants' attorneys of record in this Court. Dickson's affidavit states that, although the article does not address the status of Texas's unconstitutional abortion statutes, it explains that "the Supreme Court lacks any power to formally revoke or 'strike down' statutes that it declares unconstitutional, and that those statutes continue to exist as laws until they are repealed by the legislature that enacted them." Dickson

states that this article "further confirmed [his] belief that abortion remains a 'criminal' offense under Texas law, despite the Court's ruling in *Roe v. Wade*."

Appellants' Texas legal authority for this conclusion is limited to a single footnote in a Texas Supreme Court case on an unrelated issue. In *Pidgeon v. Turner*, 538 S.W.3d 73, 75 (Tex. 2017), taxpayers sought an injunction to prohibit the city of Houston from providing employee benefits to same-sex spouses of city employees who had been legally married in other states. The trial court granted the injunction, but while the case was pending on appeal, the United States Supreme Court decided *Obergefell v. Hodges*, and held that states may not exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples. 576 U.S. 644, 675–76 (2015). The *Pidgeon* court of appeals reversed the temporary injunction. 538 S.W.3d at 76. The Texas Supreme Court vacated the injunction and remanded the case to the trial court. It concluded that *Obergefell* did not require states to provide the same publicly funded benefits to all married persons, and the parties should have the opportunity to develop that issue, and others, at trial. *Id.* at 86–87. In the course of that discussion, the court dropped this footnote:

> We note that neither 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, even though the government may no longer constitutionally enforce it. Thus, the Texas and Houston DOMAs remain in place as they were before *Obergefell* and *De Leon*, which is why Pidgeon is able to bring this claim.

Id. at 88 n.21.

App. 25

Our colleagues on the El Paso court of appeals have rejected reliance on the *Pidgeon* footnote in another context. In *Zimmerman v. City of Austin*, 620 S.W.3d 473, 476 (Tex. App.—El Paso 2021, pet. filed), Zimmerman challenged the city's allocation of $150,000 for "abortion access logistical support services." He alleged that the City's proposed expenditures were *ultra vires* because they violate the state's abortion laws, which made it a crime to assist a woman in procuring an abortion. *Id.* at 477. He argued that—because the Texas Legislature never repealed the statutes—"they remained in effect for any application outside of that addressed in *Roe v. Wade*." *Id.* at 477–78. He contended that the City's proposed expenditures "would in effect assist women in obtaining an abortion in conflict with these unrepealed statutes." *Id.* at 478.

The El Paso court identified four "problems" with relying on the *Pidgeon* footnote. We summarize them briefly:

> (1) The opinion in *Pidgeon* focused on two facts—*Obergefell* did not directly address the constitutionality of any laws in Texas, and the trial court had not yet had the opportunity to examine the scope and extent of *Obergefell*'s holding as it applied to the Texas laws at issue. *Roe*, in contrast, was fully litigated up to the United States Supreme Court, which specifically declared the Texas abortion statutes unconstitutional.
>
> (2) The rationale expressed by the *Pidgeon* footnote, i.e., that an unconstitutional statute "remains in place unless and until the body that enacted it repeals it," does not necessarily mean the Texas abortion statutes still have any enforceable effect. Even if the court does no more than declare that the courts will not enforce an unconstitutional law, no court would have a basis to enforce the Texas abortion statutes.

> (3) The *Pidgeon* footnote has not been validated by subsequent opinions from the Texas Supreme Court. Instead, the Court has more recently treated statutes that have been declared unconstitutional as null and void and has stated that an offense created by an unconstitutional statute "is not a crime." *See, e.g.*, *Ex parte E.H.*, 602 S.W.3d 486, 494 (Tex. 2020) (recognizing that an "unconstitutional law is void, and is no law," and that an offense created by an unconstitutional statute "is not a crime").
>
> (4) The Court of Criminal Appeals recognized over a century ago, when a legislative act is declared to be unconstitutional, the act is "absolutely null and void," and has "no binding authority, no validity [and] no existence." *See Ex parte Bockhorn*, 62 Tex. Crim. 651, 138 S.W. 706, 707 (Tex. Crim. App. 1911) (pronouncing that an unconstitutional law should be viewed as "lifeless," as "if it had never been enacted," given that it was "fatally smitten by the Constitution at its birth).

Id. at 484–85. The court concluded that the unconstitutional abortion statutes could not serve as a basis for Zimmerman to challenge the City's budget allocation. *Id.* at 486.

Likewise, we conclude that the *Pidgeon* footnote cannot defeat appellee's evidence and legal argument showing that appellants knew or should have known that appellees were not criminals or murderers under Texas law. To the extent that later cases have not implicitly overruled the footnote, we conclude that it represents no more than an interesting metaphysical theory of where and how unrepealed and unconstitutional statutes exist. The footnote does not support a legal argument that unrepealed and unconstitutional statutes can be enforced in any fashion. To the extent those statutes continue to exist, it is not as part of the criminal law of the State of Texas. A violation of such a statute is not a crime.

We conclude that anyone making a serious investigation into the status of Texas criminal law would learn that the overwhelming body of that law confirms that a mother's termination of a pregnancy is not a crime and is certainly not murder.[8] Thus, we conclude that TAC and TEAF have carried their TCPA step-two burden to make a prima facie case that appellants knew or should have known that their statements declaring appellees criminal organizations and accusing them of murder were false. We overrule appellants' second issue.

Appellees' Conspiracy Claim

Appellees also pleaded a claim against both appellants alleging that they conspired to defame appellees. In their fourth issue, appellants contend that appellees failed to produce clear and specific evidence of a conspiracy between them.

A civil conspiracy involves a combination of two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996) (orig. proceeding). "[A] defendant's liability for conspiracy depends on participation in some underlying tort for which the plaintiff seeks to hold at least one of the named defendants liable." *Id.*

[8] While discussing the higher standard of actual malice, our supreme court stated: "A failure to investigate fully is not evidence of actual malice; a purposeful avoidance of the truth is." *Bentley*, 94 S.W.3d at 596. A failure to investigate fully is evidence of negligence.

Thus, appellees' conspiracy claim depends on appellants' participation in the alleged defamation.

In a TCPA appeal, we do not analyze a trial court's refusal to dismiss a plaintiff's cause of action for conspiracy separately from its refusal to dismiss the plaintiff's underlying cause of action. *See Minett v. Snowden*, No. 05-18-00003-CV, 2018 WL 2929339, at *11 (Tex. App.—Dallas June 12, 2018, pet. denied) (mem. op.). Therefore, because we have determined that the trial court properly refused to dismiss appellants' defamation claim, we conclude that it did not err by refusing to dismiss the conspiracy to defame claim as well. *See id.*

We overrule appellant's fourth issue.

Derivative Liability of RLET

In their fifth issue, appellants argue that appellees have failed to produce clear and specific evidence establishing that RLET should be legally responsible for statements published only by Dickson. Appellants acknowledge that two of the statements identified by appellees' petition that were authored by Dickson were posted by RLET on its Facebook page. They contend that all other statements at issue were published only by Dickson.

Appellees, however, have pleaded that RLET is liable directly—not derivatively through respondeat superior—for Dickson's statements. Regardless, to the extent that such derivative liability is or becomes an issue in this case, it is not an issue for the TCPA. A motion to dismiss under the TCPA must be directed at a

"legal action." CIV. PRAC. & REM. § 27.003. That term is defined to mean "a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal, declaratory, or equitable relief." *Id.* § 27.001(6). The common law doctrine of respondeat superior is not the equivalent of these requests for relief: it is instead a recognition that "liability for one person's fault may be imputed to another who is himself entirely without fault solely because of the relationship between them." *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 540 (Tex. 2002). Because it is not a separate legal action, we do not address it separately from the underlying cause of action for defamation in a TCPA motion to dismiss. *Jones v. Pozner*, No. 03-18-00603-CV, 2019 WL 5700903, at *1 n.2 (Tex. App.—Austin Nov. 5, 2019, pet. denied) (mem. op.).

We overrule appellants' fifth issue.

Step 3: Proof of Defense as a Matter of Law

In their third issue, appellants contend that—even if appellees have produced clear and specific evidence of the essential elements of their defamation claim—appellants are entitled to judgment based on their defensive theories. Appellants' burden in the proceeding below was to establish such a defense or ground as a matter of law. CIV. PRAC. & REM. § 27.005(d). We consider all the evidence in determining whether appellants established a defensive ground. *D Magazine Partners, L.P. v. Rosenthal*, 475 S.W.3d 470, 480–81, 488 (Tex. App.—Dallas 2015), aff'd in part, rev'd in part, 529 S.W.3d 429 (Tex. 2017).

Truth or Substantial Truth

Both common law and statute provide that truth and substantial truth are defenses to defamation. *Neely*, 418 S.W.3d at 62 (citing CIV. PRAC. & REM. § 73.005, *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 115 (Tex. 2000)). Appellants contend that all statements for which they have been sued are true or, at the very least, substantially true.

Appellants' evidence of this defense is Dickson's affidavit testimony. There he states that he believes the Texas abortion statutes continue to impose criminal liability on anyone who "furnishes the means for procuring an abortion knowing the purpose intended," citing article 4512.2. He also testifies that he believes an ordinance that outlaws abortion within its city limits successfully eliminates the legal status of abortion in that city. And as to the pronouncements of the United States Supreme Court, Dickson states:

> I understand that the Court's decision in *Roe v. Wade* means that the federal judiciary is unlikely to sustain criminal convictions obtained under the Texas abortion statutes for as long as the Court adheres to the notion that abortion is a constitutional right. I also understand that *Roe* makes it unlikely that any prosecutor in Texas will attempt to bring criminal charges against abortion providers for their violations of state law because the courts are unlikely to uphold those convictions until *Roe* is overruled. But none of that changes the fact that the law of Texas continues to define abortion as a criminal offense. I believed (and continue to believe) that it is truthful to call abortion a "crime" under state law even if abortion providers are not currently being prosecuted for their criminal acts. I believed (and continue to believe) that a person or organization that breaks a criminal statute is a "criminal"—regardless of whether they are ultimately prosecuted and punished for their unlawful conduct.

App. 31

Finally, Dickson asserts that he did not act negligently (or with reckless disregard, as actual malice requires) in making the statements at issue because he "carefully researched the law and consulted with legal counsel" before publishing them.

A TCPA movant cannot carry his step-three burden with self-serving and conclusory affidavits. *Camp v. Patterson*, No. 03-16-00733-CV, 2017 WL 3378904, at *10 (Tex. App.—Austin Aug. 3, 2017, no pet.) (mem. op.). "Imagining that something may be true is not the same as belief." *Bentley*, 94 S.W.3d at 596.

To reach the legal conclusions he does, Dickson ignores or rejects out of hand: the clear language of penal code section 19.06 excepting abortion from the definition of murder; article XI, section 5 of the Texas Constitution, which prohibits a local government provision from conflicting with the penal code; opinions of the Texas Attorney General, the Texas Supreme Court, and the Texas Court of Criminal Appeals, which acknowledge that once declared unconstitutional, a statute has no legal effect; and the pronouncements of the United States Supreme Court that declare a constitutional right of a woman to terminate a pregnancy. He relies instead upon a law review article and a strained interpretation of a single footnote that subsequent cases may have implicitly overruled. *See In re Lester*, 602 S.W.3d 469, 483 (Tex. 2020) (J. Blacklock dissenting) ("[T]he Court overrules *sub silentio* its prior, correct statement—just three years ago—regarding judicial declarations of the unconstitutionality of statutes . . . After today, that statement from *Pidgeon* hangs

from a thread (though it remains correct). Under today's decision, statutes declared unconstitutional by courts no longer exist.").

The gist of appellants' statements is that TAC and TEAF are criminal organizations whose conduct amounts to murder. We concluded above that appellees' evidence and legal argument have made a prima facie case that those statements are not true. We have considered appellants' evidence and legal argument in rebuttal to appellees' proof. We conclude that appellants have failed to establish they are entitled to judgment as a matter of law on the defense of truth or substantial truth.

Constitutionally Protected Opinion

Appellants' argument here is straightforward: Dickson argues he has the right to believe that the Supreme Court was wrong in *Roe v. Wade* when it concluded there was a right to abortion in the Constitution. We agree that Dickson has a right to his opinion. But he has not been sued on the basis of that opinion; he has been sued for publishing statements that call TAC and TEAF criminal organizations that commit murder. If those statements are proven at trial to be defamatory, his personal opinions about *Roe v. Wade* will not provide him, or RLET, a defense. Simply put, while Dickson has the right to his opinions, he does not have the right to defame someone who disagrees with those opinions. TAC and TEAF have raised fact issues in support of their defamation claim. Appellants have not established that they are entitled to judgment as a matter of law on the basis of any constitutionally protected opinion.

Rhetorical Hyperbole

Finally, appellants argue that they are entitled to judgment as a matter of law because their statements were merely rhetorical hyperbole. We have called the concept of rhetorical hyperbole "extravagant exaggeration [that is] employed for rhetorical effect." *Backes*, 486 S.W.3d at 26. Such a statement is not actionable as defamation. *Id.* But to qualify as rhetorical hyperbole so as to be protected from a defamation claim, a statement must be understood by the ordinary reader as an overstatement, a rhetorical flourish, that is not intended to be taken literally. *See, e.g.*, *Greenbelt Co-op. Pub. Ass'n v. Bresler*, 398 U.S. 6, 14 (1970) ("even the most careless reader" would recognize that calling a proposal "blackmail" was rhetorical hyperbole used by those who considered the negotiating position extremely unreasonable; the record contained no evidence that anyone thought proposal maker had been charged with a crime); *Marble Ridge Capital LP v. Neiman Marcus Group, Inc.*, 611 S.W.3d 113, 125 (Tex. App.—Dallas 2020, pet. dism'd) (statement concerning "theft of assets" did not qualify as rhetorical hyperbole because reasonable persons would understand the phrase to mean that "entities with a rightful claim to the assets were being harmed by the designations and transactions about which [the party] complained").

Appellants contend that their statements accusing TAC and TEAF of aiding and abetting murder or criminal acts qualify as protected rhetorical hyperbole "so long as the context makes clear that the accusations refer only to plaintiffs'

involvement in abortion and nothing more." They support this contention with citations to two sources in which the speakers did not mean either (a) their allegations that abortion is murder literally or (b) that an activist who identified on his website a doctor who performed abortions was legally responsible for the doctor's murder. *See Horsley v. Rivera*, 292 F.3d 695, 702 (11th Cir. 2002) (when doctor who performed abortions was murdered, television host's calling anti-abortionist an "accomplice to murder" was rhetorical hyperbole; no reasonable viewer would conclude host was literally contending that activist could be charged with murder); *see also* 1 Rodney A. Smolla, *Law of Defamation* § 4:13 (2d ed. 2005) (protesters at abortion clinic with signs declaring doctor a murderer "obviously" do not intend charge to be taken literally). These sources do not stand for the proposition that one can use defamatory language and be protected so long as the language refers to abortion in some manner. Instead, they instruct that—to avoid liability for defamation on the basis of rhetorical hyperbole—the speaker must show that a reasonable person would not understand that he meant the statement literally.

In this case, RLET published Dickson's assertion on Facebook: "We said what we meant and we meant what we said. Abortion is illegal in Waskom, Texas." And in a June 14 Facebook post, Dickson posed the key question and then answered it himself:

> Is abortion literally murder?
>
> Yes. The fact that 'abortion is literally murder' is why so many people want to outlaw abortion within the city limits of their cities. If you want

App. 35

> to see your city pass an enforceable ordinance outlawing abortion be sure to sign the online petition.

We conclude that a reasonable person reading appellants' statements calling TAC and TEAF criminals and murderers could believe that appellants intended the statements literally. When we consider all the evidence before the trial court, we conclude appellants failed to establish as a matter of law that the statements at issue were merely rhetorical hyperbole.

Appellants have failed to carry their third-step burden to prove they are entitled to judgment as a matter of law on any of their defensive theories. We overrule their third issue.

CONCLUSION

We affirm the trial court's order.

/Bill Pedersen, III//
BILL PEDERSEN, III
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

MARK LEE DICKSON AND RIGHT TO LIFE EAST TEXAS, Appellants

No. 05-20-00988-CV V.

THE AFIYA CENTER AND TEXAS EQUAL ACCESS FUND, Appellees

On Appeal from the 116th Judicial District Court, Dallas County, Texas Trial Court Cause No. DC-20-08104. Opinion delivered by Justice Pedersen, III. Justices Osborne and Nowell participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee The Afiya Center and Texas Equal Access Fund recover their costs of this appeal from appellant Mark Lee Dickson and Right to Life East Texas.

Judgment entered this 8th day of September, 2021.

DISSENT and Opinion Filed October 25, 2021

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-20-00988-CV

MARK LEE DICKSON AND RIGHT TO LIFE EAST TEXAS, Appellants
V.
THE AFIYA CENTER AND TEXAS EQUAL ACCESS FUND, Appellees

On Appeal from the 116th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-20-08104

DISSENTING OPINION FROM DENIAL OF *EN BANC* RECONSIDERATION

Opinion by Justice Schenck

The Constitution forbids all three branches of government from suppressing or proscribing speech, particularly speech on matters of public concern and debate. The state and the state courts may not deploy tort law to achieve that purpose without violating our own constitution and the First and Fourteenth Amendments of the federal Constitution. Because the plaintiffs' claims in this case seek to suppress and punish speech any reasonable observer would see as a criticism of past judicial decision-making, I believe it is especially perilous to overlook the obvious implications this suit has to the First Amendment and the judiciary alike. The

legislature has directed us to be on the watch for such efforts and to bring them to a prompt halt with reimbursement of the interim costs. I would follow that direction.

I.

When does life begin for purpose of its recognition under the states' police powers and protections—conception, viability, birth, or some other time? Is the federal Constitution properly read to include a right to privacy that forecloses the states' plenary power to answer those questions in the rough and tumble political process associated with the legislative process? And, in answering that second question in *Roe v. Wade*, did the United States Supreme Court remove the answers Texas gave to the first question both from its law books and its permitted public discourse?

All but the last of these questions have intensely divided public and legal opinion alike for four decades. It will likely come as a surprise to many, then, that by framing the last question as one of fact actionable (and suppressible and punishable) under state tort law, these first two questions are set to be answered in a civil jury trial in a Dallas County district courtroom.

Until recently, perhaps, no one would seriously doubt that citizens had the absolute right to differ with their government, and not only to think their own

thoughts about when life begins,[1] but to speak them aloud in the form of disagreeing with judicial pronouncements—even ones venerated by what would be the other side of a political debate—such as the controversial holding in *Roe*. Nevertheless, this lawsuit unavoidably seeks to penalize[2] a statement premised on the opinion that life begins at some point prior to the moment that *Roe* and its progeny permit the state's interest in protecting the potential for life to control.[3] Our panel opinion turns aside the Texas Citizen's Participation Act's ("TCPA") appeal seeking recognition and protection of the free speech implications this case presents.

As detailed below, I disagree with the panel's holding. Accordingly, I dissent from the Court's denial of appellants' request for *en banc* reconsideration.

II.

This appeal originated from the trial court's denial of appellants Mark Lee Dickson ("Dickson") and Right to Life East Texas's ("RLET") Motion to Dismiss appellees' defamation and conspiracy to defame claims under the TCPA. Dickson is opposed to abortion and has encouraged cities throughout Texas to enact

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[1] Justice Blackmun's majority opinion in *Roe* appeared to concede that no one—not even the United States Supreme Court (or presumably a jury)—could answer the question of when life begins as a matter of fact. "When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." 410 U.S. 113, 159 (1973).

[2] The plaintiffs' petition in this case seeks "punitive damages in an amount of more than $300,000[]." Pet. at 20. The jury will presumably be instructed that it "may in its discretion award [an amount] as a penalty or by way of punishment." *See* TEX. PATTERN JURY CHARGE 115.38.

[3] As noted, the *Roe* majority declined to answer the question of when life begins, preferring to rest its holding on the weighing of the right to privacy it recognized against the state's compelling interest in the potential for life, with state power preserved after "viability." 410 U.S. at 165–66. Whether that factual and legal analysis is correct has been a matter of sharp public debate since.

ordinances that outlaw abortions within their city limits. The City of Waskom enacted such an ordinance. Following the Waskom's enactment of the ordinance, Dickson and RLET made various comments about abortion and the Waskom's enactment of an ordinance declaring abortion illegal within the city's limits.[4]

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[4] The complained of statements are as follows:

(1) Dickson's drafting and advocating for the passage of the original ordinance, which banned appellees from operating within city limits and declared them to be "criminal organizations."

(2) Dickson's posting of the following statement on Facebook on July 2, 2019.

> "Abortion is Freedom" in the same way that a wife killing her husband would be freedom—Abortion is Murder. The Lilith Fund and NARAL Pro-Choice Texas are advocates for abortion, and since abortion is the murder of innocent life, this makes these organizations advocates for the murder of those innocent lives. This is why the Lilith Fund and NARAL Pro-Choice Texas are listed as criminal organizations in Waskom, Texas. They exist to help pregnant Mothers murder their babies.

(3) RLET's posting of a similar statement from Dickson on Facebook that reads as follows:

> As I have said before, abortion is freedom in the same way that a wife killing her husband is freedom. Abortion is murder. The thought that you can end the life of another innocent human being and not expect to struggle afterwards is a lie. In closing, despite what these groups may think, what happened in Waskom was not a publicity stunt. The Lilith Fund was in error when they said on a July 2nd Facebook post, "Abortion is still legal in Waskom, every city in Texas, and in all 50 states." We said what we meant, and we meant what we said. Abortion is illegal in Waskom, Texas. In the coming weeks more cities in Texas will be taking the same steps that the City of Waskom took to outlaw abortion in their cities and become sanctuary cities for the unborn. If NARAL Pro-Choice Texas and the Lilith Fund want to spend more money on billboards in those cities we welcome them to do so. After all, the more money they spend on billboards the less money they can spend on funding the murder of innocent unborn children.

(4) Dickson's posting of the following statement on Facebook on November 26, 2019:

> Nothing is unconstitutional about this ordinance. Even the listing of abortion providers as examples of criminal organizations is not unconstitutional. We can legally do that. This is an ordinance that says murdering unborn children is outlawed, so it makes sense to name examples of organizations that are involved in murdering unborn children. That is what we are talking about here: The murder of unborn children. Also, when you point out how the abortion restrictions in 2013 cost the State of Texas over a million dollars, you should also point out how many baby murdering facilities closed because of those restrictions. We went from over 40 baby murdering facilities in the State of Texas to less than 20 baby murdering facilities in the State of Texas in just a few years. Even with the win for abortion advocates

Given this context of an ongoing and heated national debate over *Roe* and a controversial local ordinance related to that debate, one would assume that our common law would not attempt to regulate speech about either the validity of the ordinance or the Supreme Court decision it confronts, or to "penalize" either viewpoint in that debate, but would instead assiduously constrain its reach to avoid those constitutional thickets. *Greenbelt Coop. Publ'g Ass'n, Inc. v. Bresler*, 398 U.S. 6, 13 (1970) ("This case involves newspaper reports of public meetings of the citizens of a community concerned with matters of local governmental interest and importance. The very subject matter of the news reports, therefore, is one of particular First Amendment concern.").

> with Whole Woman's Health v. Hellerstedt, how many baby murdering facilities have opened back up? Not very many at all. So thank you for reminding us all that when we stand against the murder of innocent children, we really do save a lot of lives.

(5) Dickson's posting of the following statement on Facebook on June 11, 2019, shortly after Waskom adopted the sanctuary-cities ordinance, and RLET's re-posting of this statement on Facebook:

> Congratulations Waskom, Texas for becoming the first city in Texas to become a "Sanctuary City for the Unborn" by resolution and the first city in the Nation to become a "Sanctuary City for the Unborn" by ordinance. Although I did have my disagreements with the final version, the fact remains that abortion is now OUTLAWED in Waskom, Texas! . . . . All organizations that perform abortions and assist others in obtaining abortions (including Planned Parenthood and any of its affiliates, Jane's Due Process, The Afiya Center, The Lilith Fund for Reproductive Equality, NARAL Pro-Choice Texas, National Latina Institute for Reproductive Health, Whole Woman's Heath and Woman's Health Alliance, Texas Equal Access Fund, and others like them) are now declared to be criminal organizations in Waskom, Texas. This is history in the making and a great victory for life!

(6) Mr. Dickson's utterance of the following statement during an interview with CNN:

> The idea is this: in a city that has outlawed abortion, in those cities if an abortion happens, then later on when Roe v. Wade is overturned, those penalties can come crashing down on their heads.

As detailed below, I do not believe our law does or should reach these statements or attempt to subject them to the penalties sought below for uttering them. Further, had the legislature not already directed us to so declare and promptly, I believe the federal and state constitutions would compel us to act on our own account.

III.

I. THE TCPA AND COMMON LAW DEFAMATION

Our panel does an excellent job of identifying the statements at issue and considering their potential for a favorable verdict if the statements may be treated as questions of fact. So far as it goes, I agree with the panel's treatment of the issues; but the first and most immediate problem is fairly pedestrian: does the common law[5] recognize a viable claim here?

Our sister court in Amarillo has examined the very controversy presented in this case and has determined that the speech involved here falls within the TCPA and that the plaintiffs cannot make out the prima facie case that the statute would require to permit the case to proceed. *See Dickson v. Lilith Fund for Reprod. Equity*, No. 07-21-00005-CV, 2021 WL 3930728 (Tex. App.—Amarillo Sept. 2, 2021, no pet. h.) (mem. op.). I agree in full with my colleagues' analysis there and will

[5] The legislature has codified this law in Chapter 73 of the Civil Practice & Remedies Code.

address it primarily in relation to my broader concern that a contrary reading would implicate the First Amendment.

A. *The Defamation Standard Should Not Be Applied or Expanded to Function as a Restraint on Protected Political Speech*

Dickson's statements decrying appellees' promotion of abortion procedures as "murder" and their activities as "criminal" clearly amount to opinion or rhetorical hyperbole,[6] as our colleagues in Amarillo have explained. *Lilith*, 2021 WL 3930728, at *6; *see also Scripps NP Operating, LLC v. Carter*, 573 S.W.3d 781, 795 (Tex. 2019); *Backes v. Misko*, 486 S.W.3d 7, 26 (Tex. App.—Dallas 2015, pet. denied). Whether an utterance is an opinion or rhetorical hyperbole turns not on what the speaker intended but what a reasonable person would believe and presents as a question of law for the court to decide. *Carr v. Brasher*, 776 S.W.2d 567, 570 (Tex. 1989). It is of no moment whether one parses the issues as part of the plaintiffs' case or as an affirmative defense. TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(d); *Baumgart v. Archer*, 581 S.W.3d 819, 825 (Tex. App.—Houston [1st Dist.] 2019, pet. denied).

[6] Rhetorical hyperbole is extravagant exaggeration that is employed for rhetorical effect. A person of ordinary intelligence would perceive appellants' words as nothing more than rhetorical hyperbole. To the extent appellants' comments express their views that abortion should be considered murder, that is their opinion on the morality and legality of abortion. Under the entire context of the conversation being had, appellants' accusations are rhetorical hyperbole or opinions on a hotly debated topic of public concern and is protected speech under the Constitution.

The panel, however, treats both statements as actionable statements of fact for which the defendants must stand trial and face potential punishment, notwithstanding the potential chilling effect either might have on their or others' speech. In doing so, the panel, unintentionally I suspect, embraces a reading of our defamation law that would extend it to opinion and rhetorical hyperbole, and constitutional infirmity, as detailed below.

1. Courts and Juries Are Not Equipped to Decide Political Disagreements

As we ponder the reach of our state tort law, we should recall that Dickson is hardly alone in expressing himself in forceful or hyperbolic ways about public matters[7] like the municipal ordinance at issue here. Suppose, just by way of example, someone was to take to an international medium viewable from any part of the state to declare that Texas Governor Greg Abbott is "a psychopathic murderer."[8] While the Governor as a public figure would be required to show heightened scienter as to falsity, regardless of the venue, rural or urban, the underlying defamation claim would be the same. That court would thus face the same question we have here: would a reasonably intelligent listener understand this

[7] Examples abound. Recently, Press Secretary Jen Psaki accused South Carolina Governor Henry McMaster of "literally killing people" by not welcoming the federal government sending its workers or volunteers door-to-door to engage its citizens relative to the COVID-19 vaccine. An Oklahoma school board member said kids could "commit murder" by not wearing masks in school. Would listeners understand these statements in their context as part of a public debate, albeit a heated one? *See also Nat'l Rifle Ass'n v. Dayton Newspapers, Inc.*, 555 F. Supp. 1299 (S.D. Ohio 1983) (statement that National Rifle Association "happily encourages . . . murders and robberies" was protected opinion).

[8] https://www.youtube.com/watch?v=3l263xKfLV8

statement to be one of fact or political hyperbole or relating to an ongoing debate over challenging public health policy questions? A question of "fact" in Dallas is a question of fact in Cut and Shoot as well. Are we to have rural and urban juries with varying views on the issue of abortion deciding whether speech concerning same is actionable, potentially coming to different conclusions?

Given the propensity any merits judgment in this case would have to foment, rather than resolve, civil conflict and to politicize the judiciary, I would favor a reading of our defamation law that would avoid the constitutional conflict that would stem from reading any of these statements as "factual" as opposed to political hyperbole. This would leave the political debate on the floors of the legislative bodies and in the town squares where the remedy of further speech is freely available, permitting the judiciary to play a more sober role only where unprotected and provably false, genuine factual assertions are involved. *Cf. Fam. Planning Spec. v. Powers,* 46 Cal. Rptr. 2d 667 (Cal. Ct. App. 1995) (suit brought by doctors identified by name in pamphlet and said incorrectly to employ a gruesome form of late-term, partial breech extraction).

As a contrary reading increases the prospect for lawsuits on a myriad of topics already boiling amongst a polarized nation over which the Constitution assures the various points of view a voice free from judicial suppression, short of imminent threats of violence or incitement of riots, I would not construe such statements as potentially actionable under our defamation law. Our reading of the substantive law

to the contrary insufficiently considers the chilling effect such litigation (or threats of it) would have on protected political speech.[9]

2. What Will Our Jury Be Answering Here, If Not Questions of Opinion and Permissible Political Viewpoints?

Obviously, the political and jurisprudential debates over *Griswold*'s recognition of a right to privacy and *Roe*'s application of it to abortion are not questions state courts are capable of resolving. In my view, however, further injecting the judiciary into that debate[10] is inappropriate and inadvisable—particularly in a state that has chosen partisan election of its appellate judiciary. And, yet, by attacking statements challenging *Roe*'s validity (and defending an ordinance doing the same) as false statements of fact, this seems unavoidably to be the path this case has set for us.

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[9] I take judicial notice that the internet provides a national and indeed international medium for the dissemination of political rhetoric. Venue in defamation cases can arise as readily in Massachusetts as in Alabama, and the expense of defending a tort claim in remote forums may be enormous. *Internet Sols. v. Marshall,* 39 So. 3d 1201 (Fla. 2010). The notion that juries (and judges) in these states might deploy their laws to punish and suppress locally unpopular political views is hardly fanciful, and precisely why the federal Constitution (as well as those of the states) protects the debate from the cudgel of litigation and the attendant threat and expense it entails. While the Supreme Court has recognized these concerns are real, they are not embodied in due process, personal jurisdiction protection. Instead, "the potential chill on protected First Amendment activity stemming from libel and defamation actions is [supposed to be] already taken into account in the constitutional limitations on the substantive law governing such suits." *Calder v. Jones,* 465 U.S. 783, 791 (1984). I believe that consideration operates in both directions, and that state libel and defamation standards should strive to avoid constitutional conflict. *Cf. City of Fort Worth v. Rylie,* 602 S.W.3d 459 (Tex. 2020). Whether the law here is developed by courts or by statutes, we should read it with an eye toward the Constitution and our role under it.

[10] Of course, critics charge the recognition of an extra-textual right to privacy in *Griswold v. Connecticut*, 381 U.S. 479 (1965), (and *Roe*'s application of it) as having the same effect of politicizing judicial review. *Roe*, 410 U.S. at 152 ("The Constitution does not explicitly mention any right of privacy"); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1002 (1992) (Scalia, J., dissenting). As state judges have no say in that debate, I merely note it here and suggest that further digging is what people in holes should not do.

Dickson's statements are no doubt pointed and offensive to his targets. Believing as he does that life begins at conception, he decries their advocacy of abortion services as "murder." And, urging that Texas statutes criminalizing the procedure remain unrepealed, if unenforceable, and that the act of performing any abortion is a "crime," he thus decries the enterprise as a "criminal organization."

To be actionable, however, these statements must be both factual and incorrect. Again, the statement's intended effect on the listener is not part of the analysis. *See Carr*, 776 S.W.2d at 570. Unless our jury is to answer when life begins or opine on the jurisprudential correctness of *Roe*, how are these statements to be weighed as "factual" matters at all, rather than matters of opinion or rhetorical hyperbole (leaving aside their political or protected nature for the moment)? I believe that any reasonable observer would view them as opinion and rhetoric *and* that the TCPA requires justices on appeal to make that judgment if the statute is to have its intended effect.

But what of the statement that the plaintiffs are "criminal organizations" presumably involved in a crime? Is not the accusation of criminal conduct a statement of fact and defamatory? That may be, but what then is the factual "crime" that Dickson ascribes to the plaintiffs? If one wishes to engage in the debate over whether the Texas statutes regarding murder remain extant but dormant, how is that a factual, rather than legal inquiry? Why or how would a jury ever be empowered

to give a helpful answer to that question? How would a jury be instructed to answer that question?[11]

Ignoring the antecedent logical problem of what crime an observer would ascribe from Dickson's statements, the answer to the factual component of that question (if there is one) is obvious: the "crime" is "murder." Dickson helps us with that as he says as much directly. That position, obviously, is grounded in his opinion that life begins at conception—a view even the majority in *Roe* saw as incapable of being proven in a court of law. 410 U.S. at 159; *Benton,* 94 S.W.3d at 580. The constitution protects Dickson's right to state his opinion that life begins at conception and, as a result, that abortion is murder.

To suggest that the statement that "abortion is murder" is protected as a statement of opinion or rhetoric but that it is a "crime" is not protected strains comprehension. To be sure, jurors could be exposed to the esoteric legal debate over the authority of federal courts to strike down (rather than declare unenforceable) state laws. But, ignoring that this is not a "factual" matter at all, even the effort to put this issue and speech on trial risks the appearance of the judiciary quashing dissent and opposition to its own work product. Citizens have the right to disagree with Supreme Court holdings. Having the state judiciary adjudicate and declare the speech to be unlawful and punishable risks the resulting trial resembling a seditious

[11] Would a juror believing life begins at birth be empowered to award actual and punitive damages on the basis of that understanding? And, regardless of how a jury arrives at a favorable verdict, how would it be perceived by those wishing to express a view on this hotly debated topic other than as a judicial threat?

libel case—one brought to punish unlawful speech critical of and seeking to alter their government. This form of libel, of course, was the one form thought to directly be prohibited by the First Amendment from the outset. *New York Times Co. v. Sullivan,* 376 U.S. 254, 295 (1964) (Douglas, J., concurring) ("[S]ince the adoption of the Fourteenth Amendment a State has no more power than the Federal Government to use a civil libel law or any other law to impose damages for merely discussing public affairs and criticizing public officials.").

Because the challenged statements in this case are opinion and rhetoric, they should not be actionable at common law. *Lilith*, 2021 WL 3930728 at *3.

B. *The TCPA Requires Us to Consider the Free Speech Concerns This Case Presents*

The TCPA is found in a chapter of our civil practice and remedies code titled "Actions Involving the Exercise of Certain Constitutional Rights." *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001–27.011. I believe we are obliged under that statute to consider and make a judgment (quickly) about whether the case may go forward. As our supreme court has said: "The TCPA's purpose is to identify and summarily dispose of lawsuits designed only to chill First Amendment rights, not to dismiss meritorious lawsuits." *In re Lipksy*, 460 S.W.3d 579, 589 (Tex. 2015) (orig. proceeding). Necessarily implied in that binary formulation is the notion that the former cannot be the latter: speech likely to be understood as political debate and

protected as such *is protected* by the federal and state constitutions and *is not* the makings of a meritorious lawsuit.

I understand that this has the effect of depriving the plaintiffs of the potential fruits of a jury's assessment, but this is precisely what the TCPA and the Constitution command of us, lest the prospect of juries and the costs of litigation be deployed as a tool of suppression of protected speech with the judiciary facilitating the suppression. As the broad language of the TCPA has compelled us to struggle with and recognize seemingly incompressible applications of its scope, finding it to apply here but not to cover the speech at issue leaves the act with no center.

II. EVEN COMMON LAW SPEECH RESTRAINTS RAISE CONSTITUTIONAL IMPLICATIONS THAT WE CANNOT AVOID.

Appellants urge that continuation of this lawsuit would impinge on their constitutional right to free speech. I agree. As noted, I believe that this concern informs the reach of the substantive defamation law and is embraced by the TCPA. But, even if the TCPA did not already direct us to consider that question, I believe we would be compelled to do so directly given the constitutionally protected speech interests at stake here.

I assume that no one would contend that the speech at issue in this case could be foreclosed by an injunction, as the Supreme Court has already so held. *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 760, 775 (1994) (signs displayed in front of doctor's home decrying him as a "baby killer" protected). The

question, then, is whether our tort law can be read to permit a claim for actual and punitive damages after the fact in light of its effect on protected speech.

Both the United States Constitution and the Texas Constitution protect freedom of expression. The First Amendment applies to the states through the Fourteenth Amendment. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 n.1 (1996). The Supreme Court has made clear that state "judicial action is to be regarded as action o[f] the State for the purposes of the Fourteenth Amendment" as a general matter. *Shelley v. Kraemer*, 334 U.S. 1, 15 (1948). Thus, actions within state courts, including and especially those targeted at protected speech, constitute state action subject to First and Fourteenth Amendment scrutiny. *Fla. Star v. B.J.F.*, 491 U.S. 524, 541 (1989); *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110 (11th Cir. 1992).

Even in its present interlocutory posture, this case mirrors the question posed in *New York Times Co. v. Sullivan:*

> Although this is a civil lawsuit between private parties, the [Texas] courts have applied a state rule of law which [defendants] claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that the law has been applied in a civil action, and that it is common law only, though supplemented by statute. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.

376 U.S. at 283.

The constitutional safeguard afforded by the First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social

changes desired by the people. *Id.* at 269. Even if the state's defamation law purported to reach to and proscribe rhetoric or purported to leave its recognition to a jury,[12] the judiciary cannot be used to constrain speech on a matter of public concern by subjecting the speaker to liability for civil damages. *Greenbelt*, 398 U.S. at 13–14; *Bentley v. Bunton*, 94 S.W.3d 561, 581 (Tex. 2002) (Constitution protects rhetorical hyperbole made in debate over public matters). It makes no difference if the speech is critical or offensive to its listener. Popular speech needs no protecting, and there is no right to not hear critical or offensive speech. *See Boos v. Barry*, 485 U.S. 312, 322 (1988) ("As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.").

Speech consisting of rhetoric on matters of public concern and likely to be so understood in the perception of a reasonable person is protected under the Constitution. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990); *Bentley*, 94 S.W.3d at 579; *see also* 1 Rodney A. Smolla, *Law of Defamation* § 4:13 (2d ed. 2005) ("[A] doctor who performs abortions may be faced with the specter of protesters marching in front of his or her clinic with signs declaring that the doctor

[12] "[I]n cases raising First Amendment issues . . . an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (quoting *Sullivan,* 376 U.S. at 284–85).

is a 'murderer.' The word 'murder' in this context, again, is obviously not intended to be taken in its literal sense, but rather as an expression of the protesters' view that abortion is tantamount to murder.").

This protection should extend to relief not only from an adverse final judgment, but from the chilling effect of the costs of litigation prior to judgment and the interim threat of punitive damages. Treating the question as one of fact for a jury is contrary to controlling law and our obligation to make an independent appellate determination of the claims' impact on protected speech. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984); *Bentley*, 94 S.W.3d at 590. It also subjects protected speech to the chilling effects of the massive interim costs. *Cf. Christiansburg Garment Co. v. Equal Empl. Opp. Comm'n*, 434 U.S. 412, 421 (1978).[13] For that reason, even if we were not directed by the legislature to do so in the TCPA, I would recognize the need to bring this case to an end directly in view of our own constitutional guarantee of free speech and as part of the judiciary's obligation to provide for the efficient administration of justice. TEX. CONST. art. V, § 31 & art. I, § 8.

[13] If the prospect of shifting litigation costs in failed litigation are nevertheless sufficient to chill future potential meritorious litigation, the actual expense of defending meritless litigation is just as likely to chill future protected speech. The TCPA, of course, recognizes this serious concern and provides a direct remedy in the form of fee recoupment.

CONCLUSION

This lawsuit seeks to chill constitutionally protected speech and advocacy. The speech involved in this case is the quintessential example of what the TCPA was enacted to protect. Juries and judges are no more able to answer the questions involved here than the body politic has been over these past decades. Any judgment entered on the merits in this case can only chill the public debate and breed resentment toward the courts.

Accordingly, I would reverse the trial court's denial of the motion to dismiss without delay and remand with instructions to award appropriate attorney's fees to the defendants. Because the panel decision directly conflicts with the holding of another court of appeals, impinges on a fundamental right, and injects the judiciary into an intractable political debate, I would grant the motion for *en banc* reconsideration.

/David J. Schenck/
DAVID J. SCHENCK
JUSTICE

200988HD.P05

CIVIL PRACTICE AND REMEDIES CODE

TITLE 2. TRIAL, JUDGMENT, AND APPEAL

SUBTITLE B. TRIAL MATTERS

CHAPTER 27. ACTIONS INVOLVING THE EXERCISE OF CERTAIN CONSTITUTIONAL RIGHTS

Sec. 27.001. DEFINITIONS. In this chapter:

(1) "Communication" includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.

(2) "Exercise of the right of association" means to join together to collectively express, promote, pursue, or defend common interests relating to a governmental proceeding or a matter of public concern.

(3) "Exercise of the right of free speech" means a communication made in connection with a matter of public concern.

(4) "Exercise of the right to petition" means any of the following:

(A) a communication in or pertaining to:

(i) a judicial proceeding;

(ii) an official proceeding, other than a judicial proceeding, to administer the law;

(iii) an executive or other proceeding before a department of the state or federal government or a subdivision of the state or federal government;

(iv) a legislative proceeding, including a proceeding of a legislative committee;

(v) a proceeding before an entity that requires by rule that public notice be given before proceedings of that entity;

(vi) a proceeding in or before a managing board of an educational or eleemosynary institution supported directly or indirectly from public revenue;

(vii) a proceeding of the governing body of any political subdivision of this state;

(viii) a report of or debate and statements made in a

proceeding described by Subparagraph (iii), (iv), (v), (vi), or (vii); or

(ix) a public meeting dealing with a public purpose, including statements and discussions at the meeting or other matters of public concern occurring at the meeting;

(B) a communication in connection with an issue under consideration or review by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(C) a communication that is reasonably likely to encourage consideration or review of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(D) a communication reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding; and

(E) any other communication that falls within the protection of the right to petition government under the Constitution of the United States or the constitution of this state.

(5) "Governmental proceeding" means a proceeding, other than a judicial proceeding, by an officer, official, or body of this state or a political subdivision of this state, including a board or commission, or by an officer, official, or body of the federal government.

(6) "Legal action" means a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal, declaratory, or equitable relief. The term does not include:

(A) a procedural action taken or motion made in an action that does not amend or add a claim for legal, equitable, or declaratory relief;

(B) alternative dispute resolution proceedings; or

(C) post-judgment enforcement actions.

(7) "Matter of public concern" means a statement or activity regarding:

(A) a public official, public figure, or other person who has drawn substantial public attention due to the person's official acts, fame, notoriety, or celebrity;

(B) a matter of political, social, or other interest to the community; or

(C) a subject of concern to the public.

(8) "Official proceeding" means any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant.

(9) "Public servant" means a person elected, selected, appointed, employed, or otherwise designated as one of the following, even if the person has not yet qualified for office or assumed the person's duties:

(A) an officer, employee, or agent of government;

(B) a juror;

(C) an arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy;

(D) an attorney or notary public when participating in the performance of a governmental function; or

(E) a person who is performing a governmental function under a claim of right but is not legally qualified to do so.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.
Amended by:
Acts 2019, 86th Leg., R.S., Ch. 378 (H.B. 2730), Sec. 1, eff. September 1, 2019.

Sec. 27.002. PURPOSE. The purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Sec. 27.003. MOTION TO DISMISS. (a) If a legal action is based on or is in response to a party's exercise of the right of free speech, right to petition, or right of association or arises from any act of that party in furtherance of the party's communication or conduct described by Section 27.010(b), that party may file a motion to dismiss the legal

action. A party under this section does not include a government entity, agency, or an official or employee acting in an official capacity.

(b) A motion to dismiss a legal action under this section must be filed not later than the 60th day after the date of service of the legal action. The parties, upon mutual agreement, may extend the time to file a motion under this section or the court may extend the time to file a motion under this section on a showing of good cause.

(c) Except as provided by Section 27.006(b), on the filing of a motion under this section, all discovery in the legal action is suspended until the court has ruled on the motion to dismiss.

(d) The moving party shall provide written notice of the date and time of the hearing under Section 27.004 not later than 21 days before the date of the hearing unless otherwise provided by agreement of the parties or an order of the court.

(e) A party responding to the motion to dismiss shall file the response, if any, not later than seven days before the date of the hearing on the motion to dismiss unless otherwise provided by an agreement of the parties or an order of the court.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.
Amended by:

Acts 2019, 86th Leg., R.S., Ch. 378 (H.B. 2730), Sec. 2, eff. September 1, 2019.

Sec. 27.004. HEARING. (a) A hearing on a motion under Section 27.003 must be set not later than the 60th day after the date of service of the motion unless the docket conditions of the court require a later hearing, upon a showing of good cause, or by agreement of the parties, but in no event shall the hearing occur more than 90 days after service of the motion under Section 27.003, except as provided by Subsection (c).

(b) In the event that the court cannot hold a hearing in the time required by Subsection (a), the court may take judicial notice that the court's docket conditions required a hearing at a later date, but in no event shall the hearing occur more than 90 days after service of the motion under Section 27.003, except as provided by Subsection (c).

(c) If the court allows discovery under Section 27.006(b), the court may extend the hearing date to allow discovery under that

subsection, but in no event shall the hearing occur more than 120 days after the service of the motion under Section 27.003.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.
Amended by:
Acts 2013, 83rd Leg., R.S., Ch. 1042 (H.B. 2935), Sec. 1, eff. June 14, 2013.

Sec. 27.005. RULING. (a) The court must rule on a motion under Section 27.003 not later than the 30th day following the date the hearing on the motion concludes.

(b) Except as provided by Subsection (c), on the motion of a party under Section 27.003, a court shall dismiss a legal action against the moving party if the moving party demonstrates that the legal action is based on or is in response to:

(1) the party's exercise of:

(A) the right of free speech;

(B) the right to petition; or

(C) the right of association; or

(2) the act of a party described by Section 27.010(b).

(c) The court may not dismiss a legal action under this section if the party bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question.

(d) Notwithstanding the provisions of Subsection (c), the court shall dismiss a legal action against the moving party if the moving party establishes an affirmative defense or other grounds on which the moving party is entitled to judgment as a matter of law.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.
Amended by:
Acts 2013, 83rd Leg., R.S., Ch. 1042 (H.B. 2935), Sec. 2, eff. June 14, 2013.
Acts 2019, 86th Leg., R.S., Ch. 378 (H.B. 2730), Sec. 3, eff. September 1, 2019.

Sec. 27.006. PROOF. (a) In determining whether a legal action is subject to or should be dismissed under this chapter, the court shall consider the pleadings, evidence a court could consider under Rule 166a, Texas Rules of Civil Procedure, and supporting and opposing affidavits stating the facts on which the liability or defense is based.

(b) On a motion by a party or on the court's own motion and on a showing of good cause, the court may allow specified and limited discovery relevant to the motion.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.
Amended by:

Acts 2019, 86th Leg., R.S., Ch. 378 (H.B. 2730), Sec. 4, eff. September 1, 2019.

Acts 2019, 86th Leg., R.S., Ch. 378 (H.B. 2730), Sec. 5, eff. September 1, 2019.

Sec. 27.007. ADDITIONAL FINDINGS. (a) If the court awards sanctions under Section 27.009(b), the court shall issue findings regarding whether the legal action was brought to deter or prevent the moving party from exercising constitutional rights and is brought for an improper purpose, including to harass or to cause unnecessary delay or to increase the cost of litigation.

(b) The court must issue findings under Subsection (a) not later than the 30th day after the date a request under that subsection is made.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.
Amended by:

Acts 2019, 86th Leg., R.S., Ch. 378 (H.B. 2730), Sec. 6, eff. September 1, 2019.

Sec. 27.0075. EFFECT OF RULING. Neither the court's ruling on the motion nor the fact that it made such a ruling shall be admissible in evidence at any later stage of the case, and no burden of proof or degree of proof otherwise applicable shall be affected by the ruling.

Added by Acts 2019, 86th Leg., R.S., Ch. 378 (H.B. 2730), Sec. 7, eff.

September 1, 2019.

Sec. 27.008. APPEAL. (a) If a court does not rule on a motion to dismiss under Section 27.003 in the time prescribed by Section 27.005, the motion is considered to have been denied by operation of law and the moving party may appeal.

(b) An appellate court shall expedite an appeal or other writ, whether interlocutory or not, from a trial court order on a motion to dismiss a legal action under Section 27.003 or from a trial court's failure to rule on that motion in the time prescribed by Section 27.005.

(c) Repealed by Acts 2013, 83rd Leg., R.S., Ch. 1042, Sec. 5, eff. June 14, 2013.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Amended by:

Acts 2013, 83rd Leg., R.S., Ch. 1042 (H.B. 2935), Sec. 5, eff. June 14, 2013.

Sec. 27.009. DAMAGES AND COSTS. (a) Except as provided by Subsection (c), if the court orders dismissal of a legal action under this chapter, the court:

(1) shall award to the moving party court costs and reasonable attorney's fees incurred in defending against the legal action; and

(2) may award to the moving party sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.

(b) If the court finds that a motion to dismiss filed under this chapter is frivolous or solely intended to delay, the court may award court costs and reasonable attorney's fees to the responding party.

(c) If the court orders dismissal of a compulsory counterclaim under this chapter, the court may award to the moving party reasonable attorney's fees incurred in defending against the counterclaim if the court finds that the counterclaim is frivolous or solely intended for delay.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff.

June 17, 2011.
Amended by:
Acts 2019, 86th Leg., R.S., Ch. 378 (H.B. 2730), Sec. 8, eff. September 1, 2019.

Sec. 27.010. EXEMPTIONS. (a) This chapter does not apply to:

(1) an enforcement action that is brought in the name of this state or a political subdivision of this state by the attorney general, a district attorney, a criminal district attorney, or a county attorney;

(2) a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer;

(3) a legal action seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action;

(4) a legal action brought under the Insurance Code or arising out of an insurance contract;

(5) a legal action arising from an officer-director, employee-employer, or independent contractor relationship that:

(A) seeks recovery for misappropriation of trade secrets or corporate opportunities; or

(B) seeks to enforce a non-disparagement agreement or a covenant not to compete;

(6) a legal action filed under Title 1, 2, 4, or 5, Family Code, or an application for a protective order under Subchapter A, Chapter 7B, Code of Criminal Procedure;

(7) a legal action brought under Chapter 17, Business & Commerce Code, other than an action governed by Section 17.49(a) of that chapter;

(8) a legal action in which a moving party raises a defense pursuant to Section 160.010, Occupations Code, Section 161.033, Health and Safety Code, or the Health Care Quality Improvement Act of 1986 (42 U.S.C. 11101 et seq.);

(9) an eviction suit brought under Chapter 24, Property Code;

(10) a disciplinary action or disciplinary proceeding brought under Chapter 81, Government Code, or the Texas Rules of Disciplinary

Procedure;

(11) a legal action brought under Chapter 554, Government Code; or

(12) a legal action based on a common law fraud claim.

(b) Notwithstanding Subsections (a)(2), (7), and (12), this chapter applies to:

(1) a legal action against a person arising from any act of that person, whether public or private, related to the gathering, receiving, posting, or processing of information for communication to the public, whether or not the information is actually communicated to the public, for the creation, dissemination, exhibition, or advertisement or other similar promotion of a dramatic, literary, musical, political, journalistic, or otherwise artistic work, including audio-visual work regardless of the means of distribution, a motion picture, a television or radio program, or an article published in a newspaper, website, magazine, or other platform, no matter the method or extent of distribution; and

(2) a legal action against a person related to the communication, gathering, receiving, posting, or processing of consumer opinions or commentary, evaluations of consumer complaints, or reviews or ratings of businesses.

(c) This chapter applies to a legal action against a victim or alleged victim of family violence or dating violence as defined in Chapter 71, Family Code, or an offense under Chapter 20, 20A, 21, or 22, Penal Code, based on or in response to a public or private communication.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Amended by:

Acts 2013, 83rd Leg., R.S., Ch. 1042 (H.B. 2935), Sec. 3, eff. June 14, 2013.

Acts 2019, 86th Leg., R.S., Ch. 378 (H.B. 2730), Sec. 9, eff. September 1, 2019.

Acts 2021, 87th Leg., R.S., Ch. 915 (H.B. 3607), Sec. 3.001, eff. September 1, 2021.

Sec. 27.011. CONSTRUCTION. (a) This chapter does not abrogate or lessen any other defense, remedy, immunity, or privilege available under

other constitutional, statutory, case, or common law or rule provisions.

(b) This chapter shall be construed liberally to effectuate its purpose and intent fully.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

ORDINANCE OUTLAWING ABORTION WITHIN THE CITY OF WASKOM, DECLARING WASKOM A SANCTUARY CITY FOR THE UNBORN, MAKING VARIOUS PROVISIONS AND FINDINGS RELATED THERETO, PROVIDING FOR SEVERABILITY, REPEALING CONFLICTING ORDINANCES, AND ESTABLISHING AN EFFECTIVE DATE.

WHEREAS, the City Alderman of the City of Waskom hereby finds that the United States Constitution has established the right of self-governance for local municipalities;

WHEREAS, a surgical or chemical abortion is the purposeful and intentional ending of a human life, and is murder "with malice aforethought" since the baby in the womb has its own DNA, and at certain points in pregnancy has its own heartbeat and its own brainwaves;

WHEREAS, these babies are the most innocent among us and deserve equal protection under the law as any other member of our American posterity as defined by the United States Constitution;

WHEREAS, the Supreme Court erred in Roe v. Wade, 410 U.S. 113 (1973), when it said that pregnant women have a constitutional right to abort their pre-born children, as there is no language anywhere in the Constitution that even remotely suggests that abortion is a constitutional right;

WHEREAS, constitutional scholars have excoriated Roe v. Wade, 410 U.S. 113 (1973), for its lack of reasoning and its decision to concoct a constitutional right to abortion that has no textual foundation in the Constitution or any source of law, *see* John Hart Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920, 947 (1973) ("Roe v. Wade . . . is *not* constitutional law and gives almost no sense of an obligation to try to be."); Richard A. Epstein, Substantive Due Process By Any Other Name: The Abortion Cases, 1973 Sup. Ct. Rev. 159, 182 ("It is simple fiat and power that gives [Roe v. Wade] its legal effect."); Mark Tushnet, Red, White, and Blue: A Critical Analysis of Constitutional Law 54 (1988) ("We might think of Justice Blackmun's opinion in *Roe* as an innovation akin to Joyce's or Mailer's. It is the totally unreasoned judicial opinion.");

WHEREAS, Roe v. Wade, 410 U.S. 113 (1973), is a lawless and illegitimate act of judicial usurpation, which violates the Tenth Amendment by trampling the reserved powers of the States, and denies the people of each State a Republican Form of Government by imposing abortion policy through judicial decree;

WHEREAS, the recent changes of membership on the Supreme Court indicate that the pro-abortion justices have lost their majority;

WHEREAS, to protect the health and welfare of all residents within the City of Waskom, including the unborn, the City Council has found it necessary to outlaw human abortion within the city limits.

NOW, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF WASKOM, TEXAS, THAT:

A. DEFINITIONS

1. "Abortion" means the death of a child as the result of purposeful action taken before or during the birth of the child with the intent to cause the death of the child. This includes, but is not limited to:

(a) Chemical abortions caused by the morning-after pill, mifepristone (also known as RU-486), and the Plan B pill.

(b) Surgical abortions at any stage of pregnancy.

(c) Saline abortions at any stage of pregnancy.

(d) Self-induced abortions at any stage of pregnancy.

The term "abortion" does NOT include accidental miscarriage.

2. "Child" means a natural person from the moment of conception until 18 years of age.

3. "Pre-born child" means a natural person from the moment of conception who has not yet left the womb.

4. "Abortionist" means any person, medically trained or otherwise, who causes the death of the child in the womb. This includes, but is not limited to:

(a) Obstetricians/gynecologists and other medical professionals who perform abortions of any kind for any reason.

(b) Any other medical doctor who performs abortions of any kind for any reason.

(c) Any nurse practitioner who performs abortions of any kind for any reason.

(d) Any personnel from Planned Parenthood or other pro-abortion organizations who perform abortions of any kind for any reason.

(e) Any remote personnel who instruct abortive women to perform self-abortions at home via internet connection.

(f) Any pharmacist or pharmaceutical worker who sells chemical or herbal abortifacients.

5. "City" shall mean the city of Waskom, Texas.

B. DECLARATIONS

1. We declare Waskom, Texas to be a Sanctuary City for the Unborn.

2. Abortion at all times and at all stages of pregnancy is declared to be an act of murder with malice aforethought, subject only to the affirmative defenses described in Section C.3.

3. Organizations that perform abortions and assist others in obtaining abortions are declared to be criminal organizations. These organizations include, but are not limited to:

(a) Planned Parenthood and any of its affiliates;

(b) Jane's Due Process;

(c) The Afiya Center;

(d) The Lilith Fund for Reproductive Equality;

(e) NARAL Pro-Choice Texas;

(f) National Latina Institute for Reproductive Health;

(g) Whole Woman's Health and Whole Woman's Health Alliance;

(h) Texas Equal Access Fund;

4. The Supreme Court's rulings and opinions in Roe v. Wade, 410 U.S. 113 (1973), Planned Parenthood v. Casey, 505 U.S. 833 (1992), Stenberg v. Carhart, 530 U.S. 914 (2000), Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016), and any other rulings or opinions from the Supreme Court that purport to establish or enforce a "constitutional right" to abort a pre-born child, are declared to be unconstitutional usurpations of judicial power, which violate both the Tenth Amendment the Republican Form of Government Clause, and are declared to be null and void in the City of Waskom.

C. UNLAWFUL ACTS

1. ABORTION — It shall be unlawful for any person to procure or perform an abortion of any type and at any stage of pregnancy in the City of Waskom, Texas.

2. AIDING OR ABETTING AN ABORTION — It shall be unlawful for any person to knowingly aid or abet an abortion that occurs in the City of Waskom, Texas. This includes, but is not limited to, the following acts:

(a) Knowingly providing transportation to or from an abortion provider;

(b) Giving instructions over the telephone, the internet, or any other medium of communication regarding self-administered abortion;

(c) Providing money with the knowledge that it will be used to pay for an abortion or the costs associated with procuring an abortion;

(d) Coercing a pregnant mother to have an abortion against her will.

3. AFFIRMATIVE DEFENSES — It shall be an affirmative defense to the unlawful acts described in Sections C.1 and C.2 if the abortion was:

(a) In response to a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that, as certified by a physician, places the woman in danger of death or a serious risk of substantial impairment of a major bodily function unless an abortion is performed.

(b) In response to a pregnancy caused by an act of rape, sexual assault, or incest that was reported to law enforcement;

The defendant shall have the burden of proving these affirmative defenses by a preponderance of the evidence.

4. CAUSING AN ABORTION BY AN ACT OF RAPE, SEXUAL ASSAULT, OR INCEST — It shall be unlawful for any person to cause an abortion by an act of rape, sexual assault, or incest that impregnates the victim against her will and causes her to abort the pre-born child.

5. PROHIBITED CRIMINAL ORGANIZATIONS — It shall be unlawful for a criminal organization described in Section B.3 to operate within the City of Waskom, Texas. This includes, but is not limited to:

(a) Offering services of any type within the City of Waskom, Texas;

(b) Renting office space or purchasing real property within the City of Waskom, Texas;

(c) Establishing a physical presence of any sort within the City of Waskom, Texas;

D. PUBLIC ENFORCEMENT

1. Neither the City of Waskom, nor any of its officers or employees, nor any district or county attorney, nor any executive or administrative officer or employee of any state or local governmental entity, shall take any steps to enforce this ordinance against a person or entity that commits an unlawful act described in Section C, unless and until the Supreme Court overrules Roe v. Wade, 410 U.S. 113 (1973), and Planned Parenthood v. Casey, 505 U.S. 833 (1992), and permits states and municipalities to once again enforce abortion prohibitions.

2. If (and only if) the Supreme Court overrules Roe v. Wade, 410 U.S. 113 (1973), and Planned Parenthood v. Casey, 505 U.S. 833 (1992), a person who commits an unlawful act described in Section C shall be subject to the maximum penalty permitted under Texas law for the violation of a municipal ordinance governing public health, and each violation shall constitute a separate offense.

Provided, that no punishment shall be imposed upon the mother of the pre-born child that has been aborted.

3. If (and only if) the Supreme Court overrules Roe v. Wade, 410 U.S. 113 (1973), and Planned Parenthood v. Casey, 505 U.S. 833 (1992), a corporation or entity that commits an unlawful act described in Section C shall be subject to the maximum penalty permitted under Texas law for the violation of a municipal ordinance governing public health, and each violation shall constitute a separate offense.

E. PRIVATE ENFORCEMENT

1. A person or entity that commits an unlawful act described in Section C.1 or C.2, other than the mother of the pre-born child that has been aborted, shall be liable in tort to any surviving relative of the aborted pre-born child, including the child's mother, father, grandparents, siblings or half-siblings, aunts, uncles, or cousins. The person or entity that committed the unlawful act shall be liable to each surviving relative of the aborted pre-born child for:

(a) Compensatory damages, including damages for emotional distress;

(b) Punitive damages; and

(c) Costs and attorneys' fees.

There is no statute of limitations for this private right of action.

2. Any private citizen may bring a qui tam relator action against a person or entity that commits or plans to commit an unlawful act described in Section C, and may be awarded:

(a) Injunctive relief;

(b) Statutory damages of not less than two thousand dollars ($2,000.00) for each violation, and not more than the maximum penalty permitted under Texas law for the violation of a municipal ordinance governing public health; and

(c) Costs and attorneys' fees;

Provided, that no damages or liability for costs and attorneys' fees may be awarded or assessed against the mother of the pre-born child that has been aborted. There is no statute of limitations for this qui tam relator action.

3. No qui tam relator action described in Section E.2 may be brought by the City of Waskom, by any of its officers or employees, by any district or county attorney, or by any executive or administrative officer or employee of any state or local governmental entity.

F. SEVERABILITY

1. Mindful of Leavitt v. Jane L., 518 U.S. 137 (1996), in which in the context of determining the severability of a state statute regulating abortion the United States Supreme Court held that an explicit statement of legislative intent is controlling, it is the intent of the City Council that every provision, section, subsection, sentence, clause, phrase, or word in this ordinance, and every application of the provisions in this ordinance, are severable from each other. If any application of any provision in this ordinance to any person, group of persons, or circumstances is found by a court to be invalid or unconstitutional, then the remaining applications of that provision to all other persons and circumstances shall be severed and may not be affected. All constitutionally valid applications of this ordinance shall be severed from any applications that a court finds to be invalid, leaving the valid applications in force, because it is the City Council's intent and priority that the valid applications be allowed to stand alone. Even if a reviewing court finds a provision of this ordinance to impose an undue burden in a large or substantial fraction of relevant cases, the applications that do not present an undue burden shall be severed from the remaining provisions and shall remain in force, and shall be treated as if the City Council had enacted an ordinance limited to the persons, group of persons, or circumstances for which the statute's application does not present an undue burden. The City Council further declares that it would have passed this ordinance, and each provision, section, subsection, sentence, clause, phrase, or word, and all constitutional applications of this ordinance, irrespective of the fact that any provision, section, subsection, sentence, clause, phrase, or word, or applications of this ordinance, were to be declared unconstitutional or to represent an undue burden.

2. If any provision of this ordinance is found by any court to be unconstitutionally vague, then the applications of that provision that do not present constitutional vagueness problems shall be severed and remain in force, consistent with the declarations of the City Council's intent in Section F.1

3. No court may decline to enforce the severability requirements in Sections F.1 and F.2 on the ground that severance would "rewrite" the ordinance or involve the court in legislative activity. A court that declines to enforce or enjoins a city official from enforcing a subset of an ordinance's applications is never "rewriting" an ordinance, as the ordinance continues to say exactly what it said before. A judicial injunction or declaration of unconstitutionality is nothing more than a non-enforcement edict that can always be vacated by later courts if they have a different understanding of what the Constitution requires; it is not a formal amendment of the language in a statute or ordinance. A judicial injunction or declaration of unconstitutionality no more "rewrites" an ordinance than a decision by the executive not to enforce a duly enacted ordinance in a limited and defined set of circumstances.

4. If any federal or state court ignores or declines to enforce the requirements of Sections F.1, F.2, or F.3, or holds a provision of this ordinance invalid

on its face after failing to enforce the severability requirements of Sections F.1 and F.2, for any reason whatsoever, then the Mayor shall hold delegated authority to issue a saving construction of the ordinance that avoids the constitutional problems or other problems identified by the federal or state court, while enforcing the provisions of the ordinance to the maximum possible extent. The saving construction issued by the Mayor shall carry the same force of law as an ordinance; it shall represent the authoritative construction of the ordinance in both federal and state judicial proceedings; and it shall remain in effect until the court ruling that declares invalid or enjoins the enforcement of the original provision in the ordinance is overruled, vacated, or reversed.

5. The Mayor must issue the saving construction described in Section F.4 within 20 days after a judicial ruling that declares invalid or enjoins the enforcement of a provision of this ordinance after failing to enforce the severability requirements of Sections F.1 and F.2. If the Mayor fails to issue the saving construction required by Section F.4 within 20 days after a judicial ruling that declares invalid or enjoins the enforcement of a provision of this ordinance after failing to enforce the severability requirements of Sections F.1 or F.2, or if the Mayor's saving construction fails to enforce the provisions of the ordinance to the maximum possible extent permitted by the Constitution or other superseding legal requirements, as construed by the federal or state judiciaries, then any person may petition for a writ of mandamus requiring the Mayor to issue the saving construction described in Section F.4.

G. EFFECTIVE DATE

This ordinance shall go into immediate effect upon majority vote within the Waskom, Texas City Council meeting.

ORDINANCE NO. 342

ORDINANCE OUTLAWING ABORTION WITHIN THE CITY OF WASKOM, DECLARING WASKOM A SANCTUARY CITY FOR THE UNBORN, MAKING VARIOUS PROVISIONS AND FINDINGS RELATED THERETO, PROVIDING FOR SEVERABILITY, REPEALING CONFLICTING ORDINANCES, AND ESTABLISHING AN EFFECTIVE DATE.

WHEREAS, the City Alderman of the City of Waskom hereby finds that the United States Constitution has established the right of self-governance for local municipalities;

WHEREAS, a surgical or chemical abortion is the purposeful and intentional ending of a human life, and is murder "with malice aforethought" since the baby in the womb has its own DNA, and at certain points in pregnancy has its own heartbeat and its own brainwaves;

WHEREAS, these babies are the most innocent among us and deserve equal protection under the law as any other member of our American posterity as defined by the United States Constitution;

WHEREAS, the Supreme Court erred in Roe v. Wade, 410 U.S. 113 (1973), when it said that pregnant women have a constitutional right to abort their unborn children, as there is no language anywhere in the Constitution that even remotely suggests that abortion is a constitutional right;

WHEREAS, constitutional scholars have excoriated Roe v. Wade, 410 U.S. 113 (1973), for its lack of reasoning and its decision to concoct a constitutional right to abortion that has no textual foundation in the Constitution or any source of law, *see* John Hart Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920, 947 (1973) ("Roe v. Wade . . . is *not* constitutional law and gives almost no sense of an obligation to try to be."); Richard A. Epstein, Substantive Due Process By Any Other Name: The Abortion Cases, 1973 Sup. Ct. Rev. 159, 182 ("It is simple fiat and power that gives [Roe v. Wade] its legal effect."); Mark Tushnet, Red, White, and Blue: A Critical Analysis of Constitutional Law 54 (1988) ("We might think of Justice Blackmun's opinion in *Roe* as an innovation akin to Joyce's or Mailer's. It is the totally unreasoned judicial opinion.");

WHEREAS, Roe v. Wade, 410 U.S. 113 (1973), is a lawless and illegitimate act of judicial usurpation, which violates the Tenth Amendment by trampling the reserved powers of the States, and denies the people of each State a Republican Form of Government by imposing abortion policy through judicial decree;

WHEREAS, the recent changes of membership on the Supreme Court indicate that the pro-abortion justices have lost their majority;

WHEREAS, to protect the health and welfare of all residents within the City of Waskom, including the unborn and pregnant women, the City Council has found it necessary to outlaw human abortion within the city limits.

NOW, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF WASKOM, TEXAS, THAT:

A. DEFINITIONS

1. "Abortion" means the act of using or prescribing an instrument, a drug, a medicine, or any other substance, device, or means with the intent to cause the death of an unborn child of a woman known to be pregnant. The term does not include birth control devices or oral contraceptives. An act is not an abortion if the act is done with the intent to:

(a) save the life or preserve the health of an unborn child;

(b) remove a dead, unborn child whose death was caused by accidental miscarriage; or

(c) remove an ectopic pregnancy.

2. "Child" means a natural person from the moment of conception until 18 years of age.

3. "Unborn child" means a natural person from the moment of conception who has not yet left the womb.

4. "Abortionist" means any person, medically trained or otherwise, who causes the death of the child in the womb. The term does not apply to any pharmacist or pharmaceutical worker who sells birth control devices or oral contraceptives. The term includes, but is not limited to:

(a) Obstetricians/gynecologists and other medical professionals who perform abortions of any kind.

(b) Any other medical professional who performs abortions of any kind.

(c) Any personnel from Planned Parenthood or other pro-abortion organizations who perform abortions of any kind.

(d) Any remote personnel who instruct abortive women to perform self-abortions at home.

5. "City" shall mean the city of Waskom, Texas.

B. DECLARATIONS

1. We declare Waskom, Texas to be a Sanctuary City for the Unborn.

2. Abortion at all times and at all stages of pregnancy is declared to be an act of murder with malice aforethought, subject only to the affirmative defenses described in Section C.3.

3. The Supreme Court's rulings and opinions in Roe v. Wade, 410 U.S. 113 (1973), Planned Parenthood v. Casey, 505 U.S. 833 (1992), Stenberg v. Carhart, 530 U.S. 914 (2000), Whole Woman's Health v. Hellerstedt, 136 S. Ct.

2292 (2016), and any other rulings or opinions from the Supreme Court that purport to establish or enforce a "constitutional right" to abort a unborn child, are declared to be unconstitutional usurpations of judicial power, which violate both the Tenth Amendment the Republican Form of Government Clause, and are declared to be null and void in the City of Waskom.

C. UNLAWFUL ACTS

1. ABORTION — It shall be unlawful for any person to procure or perform an abortion of any type and at any stage of pregnancy in the City of Waskom, Texas.

2. AIDING OR ABETTING AN ABORTION — It shall be unlawful for any person to knowingly aid or abet an abortion that occurs in the City of Waskom, Texas. This section does not prohibit referring a patient to have an abortion which takes place outside of the city limits of Waskom, TX. This includes, but is not limited to, the following acts:

(a) Knowingly providing transportation to or from an abortion provider;

(b) Giving instructions over the telephone, the internet, or any other medium of communication regarding self-administered abortion;

(c) Providing money with the knowledge that it will be used to pay for an abortion or the costs associated with procuring an abortion;

(d) Coercing a pregnant mother to have an abortion against her will.

3. AFFIRMATIVE DEFENSE — It shall be an affirmative defense to the unlawful acts described in Sections C.1 and C.2 if the abortion was in response to a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that, as certified by a physician, places the woman in danger of death or a serious risk of substantial impairment of a major bodily function unless an abortion is performed. The defendant shall have the burden of proving this affirmative defense by a preponderance of the evidence.

4. No provision of Section C may be construed to prohibit any action which occurs outside of the jurisdiction of the City.

5. No provision of Section C may be construed to prohibit any conduct protected by the First Amendment of the U.S. Constitution, as made applicable to state and local governments through the Supreme Court's interpretation of the Fourteenth Amendment.

D. PUBLIC ENFORCEMENT

1. Neither the City of Waskom, nor any of its officers or employees, nor any district or county attorney, nor any executive or administrative officer or employee of any state or local governmental entity, shall take any steps to enforce this ordinance

against a person or entity that commits an unlawful act described in Section C, unless and until the Supreme Court overrules Roe v. Wade, 410 U.S. 113 (1973), and Planned Parenthood v. Casey, 505 U.S. 833 (1992), and permits states and municipalities to once again enforce abortion prohibitions.

2. If the Supreme Court overrules Roe v. Wade, 410 U.S. 113 (1973), and Planned Parenthood v. Casey, 505 U.S. 833 (1992), a person who commits an unlawful act described in Section C shall be subject to the maximum penalty permitted under Texas law for the violation of a municipal ordinance governing public health, and each violation shall constitute a separate offense.

Provided, that no punishment shall be imposed upon the mother of the unborn child that has been aborted.

3. If the Supreme Court overrules Roe v. Wade, 410 U.S. 113 (1973), and Planned Parenthood v. Casey, 505 U.S. 833 (1992), a corporation or entity that commits an unlawful act described in Section C shall be subject to the maximum penalty permitted under Texas law for the violation of a municipal ordinance governing public health, and each violation shall constitute a separate offense.

E. PRIVATE ENFORCEMENT

1. A person or entity that commits an unlawful act described in Section C.1 or C.2, other than the mother of the unborn child that has been aborted, shall be liable in tort to any surviving relative of the aborted unborn child, including the child's mother, father, grandparents, siblings or half-siblings, aunts, uncles, or cousins. The person or entity that committed the unlawful act shall be liable to each surviving relative of the aborted unborn child for:

(a) Compensatory damages, including damages for emotional distress;

(b) Punitive damages; and

(c) Costs and attorneys' fees.

There is no statute of limitations for this private right of action.

2. Any private citizen may bring a qui tam relator action against a person or entity that commits or plans to commit an unlawful act described in Section C, and may be awarded:

(a) Injunctive relief;

(b) Statutory damages of not less than two thousand dollars ($2,000.00) for each violation, and not more than the maximum penalty permitted under Texas law for the violation of a municipal ordinance governing public health; and

(c) Costs and attorneys' fees;

Provided, that no damages or liability for costs and attorneys' fees may be awarded or assessed against the mother of the unborn child that has been aborted. There is no statute of limitations for this qui tam relator action.

3. No qui tam relator action described in Section E.2 may be brought by the City of Waskom, by any of its officers or employees, by any district or county attorney, or by any executive or administrative officer or employee of any state or local governmental entity.

4. Private enforcement described in Section E.1 and E.2 may be brought against a person or entity that commits an unlawful act described in Section C upon the effective date of the ordinance, regardless of whether the Supreme Court overrules Roe v. Wade, 410 U.S. 113 (1973), Planned Parenthood v. Casey, 505 U.S. 833 (1992), or permits states and municipalities to once again enforce abortion prohibitions.

F. SEVERABILITY

1. Mindful of Leavitt v. Jane L., 518 U.S. 137 (1996), in which in the context of determining the severability of a state statute regulating abortion the United States Supreme Court held that an explicit statement of legislative intent is controlling, it is the intent of the City Council that every provision, section, subsection, sentence, clause, phrase, or word in this ordinance, and every application of the provisions in this ordinance, are severable from each other. If any application of any provision in this ordinance to any person, group of persons, or circumstances is found by a court to be invalid or unconstitutional, then the remaining applications of that provision to all other persons and circumstances shall be severed and may not be affected. All constitutionally valid applications of this ordinance shall be severed from any applications that a court finds to be invalid, leaving the valid applications in force, because it is the City Council's intent and priority that the valid applications be allowed to stand alone. Even if a reviewing court finds a provision of this ordinance to impose an undue burden in a large or substantial fraction of relevant cases, the applications that do not present an undue burden shall be severed from the remaining provisions and shall remain in force, and shall be treated as if the City Council had enacted an ordinance limited to the persons, group of persons, or circumstances for which the statute's application does not present an undue burden. The City Council further declares that it would have passed this ordinance, and each provision, section, subsection, sentence, clause, phrase, or word, and all constitutional applications of this ordinance, irrespective of the fact that any provision, section, subsection, sentence, clause, phrase, or word, or applications of this ordinance, were to be declared unconstitutional or to represent an undue burden.

2. If any provision of this ordinance is found by any court to be unconstitutionally vague, then the applications of that provision that do not present

constitutional vagueness problems shall be severed and remain in force, consistent with the declarations of the City Council's intent in Section F.1

3. No court may decline to enforce the severability requirements in Sections F.1 and F.2 on the ground that severance would "rewrite" the ordinance or involve the court in legislative activity. A court that declines to enforce or enjoins a city official from enforcing a subset of an ordinance's applications is never "rewriting" an ordinance, as the ordinance continues to say exactly what it said before. A judicial injunction or declaration of unconstitutionality is nothing more than a non-enforcement edict that can always be vacated by later courts if they have a different understanding of what the Constitution requires; it is not a formal amendment of the language in a statute or ordinance. A judicial injunction or declaration of unconstitutionality no more "rewrites" an ordinance than a decision by the executive not to enforce a duly enacted ordinance in a limited and defined set of circumstances.

4. If any federal or state court ignores or declines to enforce the requirements of Sections F.1, F.2, or F.3, or holds a provision of this ordinance invalid on its face after failing to enforce the severability requirements of Sections F.1 and F.2, for any reason whatsoever, then the Mayor shall hold delegated authority to issue a saving construction of the ordinance that avoids the constitutional problems or other problems identified by the federal or state court, while enforcing the provisions of the ordinance to the maximum possible extent. The saving construction issued by the Mayor shall carry the same force of law as an ordinance; it shall represent the authoritative construction of the ordinance in both federal and state judicial proceedings; and it shall remain in effect until the court ruling that declares invalid or enjoins the enforcement of the original provision in the ordinance is overruled, vacated, or reversed.

5. The Mayor must issue the saving construction described in Section F.4 within 20 days after a judicial ruling that declares invalid or enjoins the enforcement of a provision of this ordinance after failing to enforce the severability requirements of Sections F.1 and F.2. If the Mayor fails to issue the saving construction required by Section F.4 within 20 days after a judicial ruling that declares invalid or enjoins the enforcement of a provision of this ordinance after failing to enforce the severability requirements of Sections F.1 or F.2, or if the Mayor's saving construction fails to enforce the provisions of the ordinance to the maximum possible extent permitted by the Constitution or other superseding legal requirements, as construed by the federal or state judiciaries, then any person may petition for a writ of mandamus requiring the Mayor to issue the saving construction described in Section F.4.

G. REPEAL OF PREVIOUS SANCTUARY CITIES ORDINANCE

This ordinance shall supersede and repeal Ordinance No.336 as adopted on June 11,2019 by the City of Waskom, Texas.

H. EFFECTIVE DATE

This ordinance shall go into immediate effect upon majority vote within the Waskom, Texas City Council meeting.

PASSED, ADOPTED, SIGNED and APPROVED,

CITY SEAL Jesse Moore Jesse Moore, Mayor

ATTEST: Tammy Lofton Tammy Lofton, City Secretary

FURTHER ATTESTED BY "WE THE PEOPLE", THE CITIZENS and WITNESSES TO THIS PROCLAMATION, THIS DAY OF MARCH 10, THE YEAR OF OUR LORD 2020.

WITNESS:

WITNESS:

West's Texas Statutes and Codes

Volume 4 SUPERSEDED

REVISED CIVIL STATUTES

Articles 2461 to 5561

ST. PAUL, MINN.
WEST PUBLISHING CO.

deformity or injury, by any system or method, or to effect cures thereof.

2. Who shall diagnose, treat or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method, or to effect cures thereof and charge therefor, directly or indirectly, money or other compensation; provided, however, that the provisions of this Article shall be construed with and in view of Article 740, Penal Code of Texas [1] and Article 4504, Revised Civil Statutes of Texas as contained in this Act.

[1925 P.C.; Acts 1949, 51st Leg., p. 160, ch. 94, § 20(b); Acts 1953, 53rd Leg., p. 1029, ch. 426, § 11.]

[1] See, now, article 4504a.

Art. 4510b. Unlawfully Practicing Medicine; Penalty

Any person practicing medicine in this State in violation of the preceding Articles of this Chapter shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than Fifty Dollars ($50), nor more than Five Hundred Dollars ($500), and by imprisonment in the county jail for not more than thirty (30) days. Each day of such violation shall be a separate offense.

[1925 P.C.; Acts 1939, 46th Leg., p. 352, § 10.]

Art. 4511. Definitions

The terms, "physician," and "surgeon," as used in this law, shall be construed as synonymous, and the terms, "practitioners," "practitioners of medicine," and, "practice of medicine," as used in this law, shall be construed to refer to and include physicians and surgeons.

[Acts 1925, S.B. 84.]

Art. 4512. Malpractice Cause for Revoking License

Any physician or person who is engaged in the practice of medicine, surgery, osteopathy, or who belongs to any other school of medicine, whether they used the medicines in their practice or not, who shall be guilty of any fraudulent or dishonorable conduct, or of any malpractice, or shall, by any untrue or fraudulent statement or representations made as such physician or person to a patient or other person being treated by such physician or person, procure and withhold, or cause to be withheld, from another any money, negotiable note, or thing of value, may be suspended in his right to practice medicine or his license may be revoked by the district court of the county in which such physician or person resides, or of the county where such conduct or malpractice or false representations occurred, in the manner and form provided for revoking or suspending license of attorneys at law in this State.

[Acts 1925, S.B. 84.]

CHAPTER SIX ½. ABORTION

Article
4512.1 Abortion.
4512.2 Furnishing the Means.
4512.3 Attempt at Abortion.
4512.4 Murder in Producing Abortion.
4512.5 Destroying Unborn Child.
4512.6 By Medical Advice.

Art. 4512.1 Abortion

If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By "abortion" is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.

[1925 P.C.]

Art. 4512.2 Furnishing the Means

Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.

[1925 P.C.]

Art. 4512.3 Attempt at Abortion

If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.

[1925 P.C.]

Art. 4512.4 Murder in Producing Abortion

If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.

[1925 P.C.]

Art. 4512.5 Destroying Unborn Child

Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years.

[1925 P.C.]

Art. 4512.6 By Medical Advice

Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.

[1925 P.C.]

CAUSE NO. DC-20-08104

The Afiya Center,	§	IN THE DISTRICT COURT
	§	
Plaintiff,	§	
	§	
v.	§	116TH JUDICIAL DISTRICT
	§	
Mark Lee Dickson, and	§	
Right to Life East Texas,	§	
	§	
Defendants.	§	DALLAS COUNTY, TEXAS

PLAINTIFF'S ORIGINAL PETITION

A "criminal" is a person who breaks the law, not a person with whom you disagree politically. In Texas, calling a person or a business who has committed no crimes "criminal" is *per se* defamation. There is no level of commitment to a particular political outcome and no amount of fervent belief in any one particular political position that relieves a person of his duty to avoid defaming others. Simply put, there are rules that apply to everyone in Texas and one of them is you cannot falsely accuse your political enemies of crimes.

Defendants Mark Lee Dickson ("Dickson") and Right to Life East Texas ("RLET") have been breaking that rule with impunity for months by lying about Plaintiff the Afiya Center ("TAC" or "Plaintiff") and other pro-choice organizations. Defendants' lies about TAC and the other organizations are as simple as they are appalling. They have repeatedly stated that TAC and the other organizations are literal criminals when Defendants know that is not true. Worse still, Defendants have encouraged others, including members of local government in cities throughout the state, to also lie about TAC and other organizations.

When Defendants made these false statements and encouraged others to do so, Defendants knew that TAC and the other organizations had committed no crimes. Abortion is not a crime in Texas. Abortion is not murder under Texas law. Providing information about abortion is not

illegal under Texas law and is, in fact, protected activity and speech. Providing financial assistance to a private citizen is not illegal under Texas law. And none of those things are or ever have been murder under Texas law. Yet, Defendants continue to publicly say that TAC and other similar organizations are literally "criminal organizations" who are assisting with murder "with malice aforethought."

As described in detail below, Defendants' statements were made before and during efforts to get various city councils to pass an ordinance that enshrines the lies into the municipal books; they were made at city council meetings, but also online, to news media, or on social media. They were also often made after enactment of various ordinances, in order to confuse the public about the legal effects of those ordinances and to defame TAC and similar organizations. The available facts disclose that this campaign has been strategic and thorough, and that its principle aim has been to (1) defame TAC and other reproductive justice advocates and (2) confuse the public about the state of the law in support of this defamatory purpose. This conduct continues to the present day, and the defamation is ongoing. Because Defendants refuse to stop lying and refuse to correct the false record they have created, TAC asks this Court to find the statements are false and defamatory, require Dickson and RLET to set the record straight, and award such damages as are necessary to compensate TAC for the injuries caused by Defendants' lies.

I.
RELIEF SOUGHT AND DISCOVERY LEVEL

1. Plaintiff seeks monetary relief over $200,000.00 but not more than $1,000,000.00 and intend to conduct discovery under Level Three pursuant to Texas Rule of Civil Procedure 190.4.

II.
PARTIES

2. Plaintiff the Afiya Center is a Texas nonprofit which may be served with process through the undersigned counsel.

3. Defendant Mark Lee Dickson is a resident and citizen of Texas, and on information and belief may be served with process at 1233 E. George Richey Rd., Longview, TX 75604-7622.

4. Defendant Right to Life East Texas is a Texas nonprofit organization, and may be served with process through its director, Mark Lee Dickson, at 1233 E. George Richey Rd., Longview, TX 75604-7622.

III.
JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction because no other court has exclusive jurisdiction of the subject matter of these causes and the amount in controversy is within the jurisdictional limits of this Court.

6. Venue is proper in Dallas County, Texas, pursuant to § 15.017 of the Texas Civil Practice and Remedies Code because Plaintiff resided in Dallas County at the time of accrual of the cause of action.

IV.
FACTS

7. Plaintiff TAC was established in order to help address the disparate impact of HIV on black women and girls in Texas. TAC is the only reproductive justice organization in North Texas founded and directed by black women, and it provides education and support for black women to redress the effects of reproductive oppression, and works to reduce the stigma and hardship associated with living with HIV. It also provides discursive spaces for black women, and other women of color, to discuss issues related to black feminism and reproductive justice.

8. In addition to this work, TAC advocates for abortion rights and funds programs to educate the public about how to change the harmful reproductive health policies—including abortion policies—in Texas. TAC also provides support to certain people seeking abortion services. Because of this part of its broad work, TAC has been targeted, along with other reproductive justice organizations, by Dickson and RLET's defamatory campaign, described below.

A. Defendants' Campaign and Lies.

9. Defendants, led by Mark Lee Dickson, have been attempting to persuade various cities and local governments to enact a patently unconstitutional ordinance purporting to ban abortion and designating as "criminal" organizations like Planned Parenthood (which provides abortion procedures) and Plaintiff TAC (which does not). The proposed ordinance, which has now been passed in several localities (with some variations), not only violates almost fifty years of settled Supreme Court precedent in *Roe v. Wade*, *Planned Parenthood v. Casey*, and *Whole Women's Health v. Hellerstedt* and their progeny, it also (as originally enacted by many of the jurisdictions) operates as an unconstitutional bill of attainder, since (as originally enacted) it declared certain groups, including TAC, to be "criminal" or "unlawful" without any judicial

process. Although many cities have now amended their versions to strike Dickson's specific list of political enemies from their code of ordinances, Dickson's statements and advocacy in favor of the original ordinance remain defamatory and evidence an ongoing and concerted effort to perpetuate their lies about TAC.

10. Dickson's campaign has been going on for months, and the records of the City Council meetings he has attended show that his campaign has been coordinated, not only with Defendant RLET (of which he is the director) but also with other organizations, like Texas Right to Life. The campaign shows the breadth and scope of Dickson's lies, and the endorsement and ratification of them—even the participation in dissemination of that them —by RLET.

11. Dickson goes from city to city (cities Dickson does not live in and has no personal connection with), often accompanied by people associated with Texas Right to Life, to spread his lies and pursue his unconstitutional ordinance. His usual practice is to stir up fear that an abortion facility could open within the city limits unless the ordinance is passed when there is no reason to believe that is likely to happen. He typically brings with him stuffed animals, as well as dolls allegedly depicting twelve-week old fetuses.

12. Dickson's first target for the ordinance was Waskom, Texas. The official minutes of the Board of Aldermen for June 11, 2019 reflect that Mark Lee Dickson, "representing Right of Life of East Texas" proposed and advocated for the ordinance, claiming that the city "was at risk with an abortion clinic moving in[.]" Another speaker, Rusty Thomas, apparently asked the board to "make a stand" and "pass the ordinance outlawing abortion." Alderman James King moved to adopt the ordinance, and the motion was seconded by Alderman Russell Allbritton. The Board adopted the ordinance on a 5-0 vote.

13. On July 23, 2019, Dickson spoke to the City Council of Gilmer, Texas. The Council Minutes reflect that Dickson was representing Right to Life East Texas (his attendance is recorded as "Mark Lee Dickson, Right to Life East Texas"). But it wasn't until September 24, 2019, when Dickson again visited the Gilmer City Council (again representing Right to Life East Texas according to the minutes), that Gilmer adopted the ordinance by 4 votes to 1. The minutes reflect that at this meeting Dickson was accompanied by Katherine "Pilcher" (it appears that this is a misspelling of "Pitcher") and John Seago of Texas Right to Life.

14. On September 9, 2019, Dickson attended the meeting of the City Council of Naples, Texas, again apparently accompanied by Katherine Pitcher. Pitcher testified in favor of adoption of Dickson's ordinance, further showing the coordination between Dickson and Texas Right to Life. Dickson, misidentified in the minutes as "Mark Lee Dickerson" advocated for the ordinance as well. The City Council adopted the ordinance with one opposing vote.

15. The City of Joaquin passed the ordinance on September 17, 2019, though the City Council minutes reflect little about this decision. More informative are the minutes from the City Council for the City of Tenaha on September 23, 2019. Dickson was in attendance at that meeting and claimed that, due to a new fetal heartbeat bill passed by Louisiana, Tenaha was at risk of an abortion clinic opening if it did not pass his ordinance. Tenaha passed the ordinance.

16. Dickson then moved on to the City of Gary, Texas, attending the October 17, 2019 Gary City Council meeting. The City Council voted to table his proposed ordinance. Dickson returned to the Gilmer City Council on January 16, 2020 and made another presentation, after which the Gary City Council adopted Dickson's ordinance.

17. "A citizen" presented Dickson's ordinance to the Big Spring City Council on November 12, 2019. "Several citizens" spoke in favor of the resolution. The minutes do not name

these speakers. On December 10, 2019, Dickson's ordinance was again entertained, and "many citizens spoke in favor and against" the ordinance. Finally, on January 14, 2020, "many citizens" again spoke in favor and against the ordinance. The Big Spring City Council then passed the ordinance, though they modified it by substituting the word "unlawful" in for "criminal organizations" when describing (and listing) organizations like TAC. The ordinance was adopted three votes to two.

18. Dickson was at the November 14 and November 18, 2019 meetings of the City Council for the City of Westbrook, Texas, and presented his ordinance, persuading Westbrook to adopt it.

19. On November 21, 2019 Dickson (described as "President, East Texas Chapter Right to Life") and Katherine Pitcher (described as "Legislative Associate, Texas Right to Life") spoke to the City Council for the City of Rusk, Texas, advocating for the ordinance. The Council tabled the ordinance for later discussion. On January 9, 2020, the City of Rusk took up the ordinance again. Speaking then were Defendant Dickson (described as "Director, Right to Life, East Texas Chapter"), Katherine Pitcher ("Legal and Legislative Dept[.], Texas Right to Life"), and Jackson Melton ("Legal and Legislative Dept[.], Texas Right to Life") among others. After an executive session, the City Council approved the ordinance three votes to two.

20. The prior paragraphs are just a summary of Dickson's initial campaign, and the list is not exhaustive. In addition to the above, the City Council of Colorado City, Texas adopted the ordinance after meetings on December 10, 2019 and January 14, 2020, in which a representative of Texas Right to Life named Rebecca Parma told the council that the ordinance could outlaw abortion constitutionally, that persons who broke the law between enactment and the date *Roe* was overturned could be held retroactively criminally liable, and that the ordinance "was supplied by

Texas National Right to Life." Dickson presented the ordinance to the City Council for Wells, Texas on February 10, 2020, and persuaded them to adopt it. Dickson also presented the ordinance to the Whiteface, Texas City Council on March 12, 2020, and persuaded them to pass it three votes to two. The Omaha City, Texas, City Council was persuaded to pass the ordinance on September 9, 2019, but repealed it in favor of a nonbinding resolution on October 14, 2019.

21. In the proposed ordinance itself, and in connection with the above-summarized campaign, Defendants have repeatedly exceeded the bounds of protected political speech. Both in the ordinance itself—which was drafted at Defendant Dickson's behest—and in Defendants' arguments in support of that ordinance, Defendants have repeatedly claimed that the named organizations, including TAC, are "criminal organizations," due to their support for abortion, which Defendants characterize as the literal crime of murder.

22. For instance, the text of the ordinances originally adopted in Waskom, Big Spring, Colorado City, Joaquin, and other cities and counties in Texas, includes an express declaration that "[o]rganizations that perform abortions and assist others in obtaining abortions are declared to be criminal [or unlawful] organizations. These organizations include, but are not limited to: … The Afiya Center…." A copy of the original Waskom is attached to this Petition as Exhibit A as an example of this language.

23. This alleged criminality is not merely hypothetical or a comment on the moral character of TAC or other similar organizations. Dickson, in concert with RLET, instead accuses TAC, and other organizations, of literal murder and of aiding and abetting literal murder in the very text of the proposed and passed ordinances.

24. The text of the ordinance itself shows that this use of the term "murder" is not merely a rhetorical device. The text of the Waskom ordinance, for instance, begins with a series of recitations indicating that abortion is the criminal act of murder:

> WHEREAS, a surgical or chemical abortion is the purposeful and intentional ending of a human life, and is murder "with malice aforethought" since the baby in the womb has its own DNA, and at certain points in pregnancy has its own heartbeat and its own brainwaves[…]

25. This is a recitation—one of the assumed facts intended to justify the ordinance. So this statement is not even defensible as a statement of the intended effect of the ordinance. It is also not true, both for the simple reason that (1) abortion is legal in Texas, as it is everywhere in the United States (within legal parameters, as with any medical procedure), because laws criminalizing abortion are unconstitutional and (2) because abortion has *never* been murder in Texas. Indeed, even before its anti-abortion law was declared unconstitutional almost fifty years ago, Texas law provided that abortion or assistance with an abortion was a separate offense from murder, punishable by a maximum of five years in prison (or ten if the abortion was done without the consent of the patient). *See* TEX. REV. CIV. STAT. ANN. ART. 4512.1 (recodified version of Texas's unconstitutional prohibition on abortion). The ordinance uses the phrase "malice aforethought,"[1] specifically invoking a historical legal standard associated with the crime of murder, even though Texas law specifically exempts a person who obtains or performs an abortion from the murder law. Tex. Pen. Code. Ann. § 19.06. Moreover, present Texas law authorizes and regulates abortion as a medical procedure, which is incompatible with the position that abortion

[1] The accusation by Dickson, enshrined in text drafted at Dickson's and RLET's behest and advocated for, is that abortion is murder "with malice aforethought"—a term taken from criminal law and clearly intended to refer to murder as a specific crime, and not as a moral concept. Although Texas law no longer uses this term, "malice aforethought" is a term commonly associated with the crime of murder, and lends the ordinance a veneer of legitimacy that is likely (and intended) to confuse people about what the law is and whether Defendants' political enemies are criminals.

is "murder" or in any way illegal under Texas law. *See* TEX. HEALTH & SAFETY CODE ANN. § 245.001, *et seq.*

26. But the ordinance goes further than merely stating a legal falsehood. Instead it states a legal falsehood and then accuses TAC, and other organizations, of committing or abetting this fictional crime. As proposed by Dickson and originally adopted by numerous Texas jurisdictions, the ordinance not only *recites* that abortion is murder, it then *declares* that abortion is murder in Section B.2., then in the immediately following subsection declares that TAC, and other organizations, are "criminal organizations" because they "perform abortions" or "assist others in obtaining abortions." *See* Ex. A, p. 3. There is no way to read these provisions together except as an assertion that TAC and the other named organizations are being accused, by Dickson and (on his recommendation) by a legislative body and without any judicial findings or action, of committing or abetting murder.

27. Dickson has admitted that the ordinances were drafted at his behest with the assistance of an unnamed "legal expert" who allegedly clerked for Justice Antonin Scalia. The relevant text of these ordinances is Dickson's responsibility, and RLET has, in its support for this ordinance, ratified its text. Dickson and RLET are responsible for the statements of alleged fact the ordinance contains, including the recitals, and including the specific list of Dickson's political enemies he has encouraged various cities to declare as "criminal," even if many of these cities have since thought better of keeping this list in their ordinance books.

28. To summarize, Defendants' positive assertion, in the text of the very ordinance they had drafted and have sought to have enacted, is not that TAC or the other named organizations have abetted murder in some figurative or rhetorical sense, but that TAC has abetted actual, criminal murders. Because this accusation of criminality is false, it is *per se* defamatory under

Texas law. In drafting this ordinance, and in advocating for its passage, Defendants have defamed Plaintiff.

29. Ultimately, defamation is the purpose of the ordinance; Dickson's campaign is designed to confuse people about the legal status of abortion *and* abortion advocacy, and paint abortion rights organizations like TAC as criminals. This is revealed by Dickson's own statements. For example, in Dickson's November 26, 2019 Facebook statement, set out below, in which he tries to defend his unconstitutional proscription list, Dickson gives the game away—implicitly admitting that his ordinance is not intended to actually survive legal scrutiny (by referencing previously unsuccessful attempts to restrict abortion in Texas), while implying that the chilling effect of these ordinances on abortion rights groups will ultimately have been worth it. *See infra*, ¶ 32 ("Also, when you point out how the abortion restrictions in 2013 cost the State of Texas over a million dollars, you should also point out how many baby murdering facilities closed because of those restrictions. We went from over 40 baby murdering facilities in the State of Texas to less than 20 baby murdering facilities in the State of Texas in just a few years. Even with the win for abortion advocates with Whole Woman's Health v. Hellerstedt, how many baby murdering facilities have opened back up? Not very many at all.")

B. <u>Dickson's Other Lies.</u>

30. In his own personal statements, Dickson has made even clearer that he is talking about literal, criminal murder and not speaking in moral terms when he accuses the organizations originally named in the ordinance of criminality. Dickson said in a July 2, 2019 Facebook post responding to two billboards put up in Waskom, Texas by the Lilith Fund and NARAL Pro-Choice Texas, that:

> "Abortion is Freedom" in the same way that a wife killing her husband would be freedom - Abortion is Murder. The Lilith Fund

> and NARAL Pro-Choice Texas are advocates for abortion, and since abortion is the murder of innocent life, this makes these organizations advocates for the murder of those innocent lives. This is why the Lilith Fund and NARAL Pro-Choice Texas are listed as criminal organizations in Waskom, Texas. They exist to help pregnant Mothers murder their babies.

31. Of course, TAC was listed as a criminal organization in Waskom as well. The necessary implication of this statement is that what is said here about the Lilith Fund and NARAL Pro-Choice Texas is also true of TAC. That is, TAC is a criminal organization that abets murder because it "advocates for abortion." This statement was made after the Waskom enactment of the ordinance—it was not a statement made to persuade Waskom to adopt it or to persuade others to support its adoption. And the statement equates abortion with the murder of an adult person, then continues by indicating that this is the justification for these organizations being designated as "criminal organizations" in the ordinance Dickson himself had drafted and persuaded Waskom to pass. Defendant Dickson's meaning cannot be mistaken: TAC and similar organizations are presently abetting the crime of murder, and are presently committing crimes in the City of Waskom, his status as the primary advocate for these ordinances and his statements arguing that the ordinance passes legal muster, and has the actual effect of rendering abortion illegal, are very likely to confuse reasonable people into believing that his characterization of TAC as an organization that commits criminal acts is accurate.

32. Speaking about another version of his ordinance enacted in Big Spring, Texas, Dickson said in a November 26, 2019 Facebook post that:

> Nothing is unconstitutional about this ordinance. Even the listing of abortion providers as examples of criminal organizations is not unconstitutional. We can legally do that. This is an ordinance that says murdering unborn children is outlawed, so it makes sense to name examples of organizations that are involved in murdering unborn children. That is what we are talking about here: The murder of unborn children. Also, when you point out how the abortion

> restrictions in 2013 cost the State of Texas over a million dollars, you should also point out how many baby murdering facilities closed because of those restrictions. We went from over 40 baby murdering facilities in the State of Texas to less than 20 baby murdering facilities in the State of Texas in just a few years. Even with the win for abortion advocates with Whole Woman's Health v. Hellerstedt, how many baby murdering facilities have opened back up? Not very many at all. So thank you for reminding us all that when we stand against the murder of innocent children, we really do save a lot of lives.

33. Again, these statements are not merely philosophical statements that "abortion is murder" in some moral sense. In light of the ordinance Dickson has advocated, these social media posts argue that TAC and other similar organizations are *literally* assisting in criminal murder by advocating for abortion rights and educating women about those rights.

34. Further demonstrating that defamation—including confusion about whether abortion rights organizations are presently committing crimes—is the purpose of this entire quixotic ordinance campaign is the statement Dickson made immediately after Waskom, Texas, became the first city to pass his ordinance:

> Congratulations Waskom, Texas for becoming the first city in Texas to become a "Sanctuary City for the Unborn" by resolution and the first city in the Nation to become a "Sanctuary City for the Unborn" by ordinance. Although I did have my disagreements with the final version, the fact remains that abortion is now OUTLAWED in Waskom, Texas! … All organizations that perform abortions and assist others in obtaining abortions (including Planned Parenthood and any of its affiliates, Jane's Due Process, The Afiya Center, The Lilith Fund for Reproductive Equality, NARAL Pro-Choice Texas, National Latina Institute for Reproductive Health, Whole Woman's Heath and Woman's Health Alliance, Texas Equal Access Fund, and others like them) are now declared to be criminal organizations in Waskom, Texas. This is history in the making and a great victory for life!

35. Again, the point here is that Dickson wants people to believe that these ordinances *really do* criminalize abortion, assisting women to obtain abortions, and advocacy and education

in support of abortion rights. Since this statement was made *after* the ordinance was adopted, its intent was not to persuade Waskom to adopt the ordinance, but to persuade people that the ordinance actually does make abortion illegal. Indeed, Dickson specifically claims, in present-tense language, that Waskom has "OUTLAWED" abortion. That way, Dickson has an excuse to falsely claim that his political opponents are committing crimes by opposing his anti-choice agenda, which Dickson then proceeds to do, using his *own ordinance* as cover for that statement.

36. Similarly, Dickson claimed in an interview with CNN, published in a January 25, 2020 article, that "[t]he idea is this: in a city that has outlawed abortion, in those cities if an abortion happens, then later on when Roe v. Wade is overturned, those penalties can come crashing down on their heads." Dickson wants people to genuinely believe that providing abortion services, or assisting others to do so, is *presently* a crime, and that present abortions or assistance therewith—undertaken while *Roe* is still the governing law—will be subject to future penalties if the Supreme Court's view of the constitution changes. Dickson and RLET *know* that abortion is legal, that advocacy for abortion rights is legal, that assisting people in obtaining legal abortions is legal, and yet Dickson is genuinely trying to persuade people that organizations like TAC are currently violating the law by providing assistance to people who are seeking abortion services. This is defamation.

37. Dickson repeatedly claims that these ordinances actually outlaw abortion even though his own ordinance shows that he knows this to be false. As Dickson knows, his conning of the city councils of various municipalities to unconstitutionally enshrine his proscription list in city ordinances does not alter the legality of TAC's actions, or those of any of the other named organizations. Since these organizations have not committed—and are not committing—criminal acts (whether murder or any other crime), his characterization of them is false and defamatory.

C. Conspiracy with Right to Life East Texas.

38. Dickson is the director of RLET. Its resources have been leveraged in support of Dickson's campaign, and RLET supports and advocates for the passage of variants of Dickson's ordinance with defamatory language similar to that that described above.

39. RLET has endorsed not only the statements enshrined in the ordinance (including the Waskom and Big Spring ordinances) but also the statements Dickson has made outside of the four corners of these ordinances. RLET posted on Facebook a statement signed by Dickson substantially repeating his July 2, 2019 Facebook post:

> As I have said before, abortion is freedom in the same way that a wife killing her husband is freedom. Abortion is murder. The thought that you can end the life of another innocent human being and not expect to struggle afterwards is a lie. In closing, despite what these groups may think, what happened in Waskom was not a publicity stunt. The Lilith Fund was in error when they said on a July 2nd Facebook post, "Abortion is still legal in Waskom, every city in Texas, and in all 50 states." We said what we meant and we meant what we said. Abortion is illegal in Waskom, Texas. In the coming weeks more cities in Texas will be taking the same steps that the City of Waskom took to outlaw abortion in their cities and become sanctuary cities for the unborn. If NARAL Pro-Choice Texas and the Lilith Fund ant to spend more money on billboards in those cities we welcome them to do so. After all, the more money they spend on billboards the less money they can spend on funding the murder of innocent unborn children.

40. RLET also reposted Dickson's June 11, 2019 Facebook post, set out above, in which Dickson attempts to persuade people that the adoption of his ordinance *actually means* that the organizations named in his ordinance, including TAC, are literally criminal organizations, because the ordinance *he designed* asserts that.

41. RLET's support for this defamatory campaign, and endorsement and publication of Dickson's statements, show that RLET has aided and strengthened Dickson's defamation of TAC and the other organizations named in Dickson's unconstitutional ordinance.

D. Falsity of the Statements.

42. It is, of course, false that TAC, or any of the other named organizations, have abetted murder, committed crimes, or are criminal organizations in any sense. Abortion is not illegal anywhere in the United States. Nor is it illegal anywhere in the United States to advocate for abortion rights or assist people in obtaining a legal abortion. Legal abortion is not a crime and is not classified as murder, anywhere in the United States (indeed, as noted above, even before *Roe*, abortion was not classified as murder in Texas). Dickson's declarations to the contrary were not true when he was shopping his unconstitutional ordinance around, and they are not any more true now that some cities have been defrauded into passing it.

43. The text of the proposed ordinance as enacted *itself* demonstrates that Defendants know that their statements are false. As the Waskom ordinance shows, but as is replicated in all the jurisdictions that have passed variations of Dickson's ordinance, the efficacy of the penalties the ordinance purports to exact are forestalled until a hypothetical future in which *Roe* and *Casey* and their progeny are all overturned:

> Neither the City of Waskom, nor any of its officers or employees, nor any district or county attorney, nor any executive or administrative officer or employee of any state or local government entity, shall take any steps to enforce this ordinance against a person or entity that commits an unlawful act described in Section C, unless and until the Supreme Court overrules Roe v. Wade, 410 U.S. 113 (1973), and Planned Parenthood v. Casey, 505 U.S. 833 (1992), and permits states and municipalities to once again enforce abortion prohibitions.

44. Defendants know that they cannot argue that criminal penalties can issue from the ordinances they have proposed for enactment, because they know that laws forbidding abortion are unconstitutional. Defendants instead hope that their law will at some point *become* constitutional, an implicit recognition that it does not pass constitutional muster presently.

Consequently, Defendants *know* that providing legal abortions, advocating for abortion rights, and assisting people in obtaining legal abortions is legal (even in Waskom, and Big Spring, and the other places Defendants have persuaded to adopt their ineffectual ordinance). After all, "[a]n unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby County*, 118 U.S. 425, 442, 6 S. Ct. 1121, 1125, 30 L. Ed. 178 (1886). Although this principle does not literally unwrite or physically remove the laws that have been written when they are struck down as unconstitutional in every case, it does render unconstitutional criminal laws ineffectual such that an offense created by an unconstitutional law is "not a crime." *Ex parte Siebold*, 100 U.S. 371, 376, 25 L. Ed. 717 (1879); *see also Hiett v. United States*, 415 F.2d 664, 666 (5th Cir. 1969) ("It is well settled that if the statute under which appellant has been convicted is unconstitutional, he has not in the contemplation of the law engaged in criminal activity; for an unconstitutional statute in the criminal area is to be considered no statute at all."); *Karenev v. State*, 281 S.W.3d 428, 437 (Tex. Crim. App. 2009); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 760, 115 S. Ct. 1745, 1752, 131 L. Ed. 2d 820 (1995) (Scalia, J. writing in concurrence "a law repugnant to the Constitution is void, and is as no law[.]")

45. There is thus no legal sense in which TAC has committed *any* crime, and yet Dickson and Defendants have repeatedly characterized it as guilty of abetting the literal crime of murder. This misrepresentation—both of TAC's actions themselves *and* of the legal status of same—is defamatory *per se* under Texas law. There is a categorical difference between accusing someone of immorality, and accusing someone of criminality. People can disagree on the morality of actions, as people discussing the abortion issue certainly do, but whether an action is criminal

is not a philosophical matter. In advocating for these ordinances, Defendants repeatedly crossed this line, both before and after enactment.

46. To be perfectly clear, TAC is not arguing it has been defamed because Defendants believe or argue that abortion is murder in some moral sense; instead, TAC has been defamed because Defendants have falsely accused it of assisting in the commission of the specific crime of murder. TAC has not been defamed because Defendants hope one day to make abortion a crime, but because Defendants *presently state* that TAC is, at this moment, breaking the law. These statements are baseless and provably false, and Defendants knew these statements were false when they were uttered as their own statements and the text of the ordinance itself demonstrates. In Texas, this is enough, on its own, to support a claim of defamation, even in the absence of damages.

47. In addition, TAC has suffered damages to its reputation as a result of Defendants' lies. Although this action seeks compensatory damages, its primary purpose is to set the record straight: TAC abides by the law. It is not a "criminal organization" engaging in activities that have been "outlawed." It has not once abetted "murder." Dickson's dishonorable campaign of lies transgresses the boundaries of political debate, and TAC asks this Court to put a stop to it.

V.
CAUSES OF ACTION

Count 1: Defamation, against Defendants Dickson and RLET.

48. Dickson's statements, both in the ordinance he had drafted, and in his arguments in support thereof, can only be reasonably read as accusing Plaintiff of the literal crime of murder, of abetting the literal crime of murder, or of committing other presently criminal acts.

49. Dickson is the director of Defendant RLET, and regularly makes statements on its behalf. Some of Dickson's defamatory statements have been made specifically via Defendant RLET's outlets, including its Facebook page.

50. Defendant RLET publicized both the ordinance itself (which it has materially supported) and certain of Dickson's defamatory statements (as described above).

51. A reasonable person could be deceived, on the basis of Dickson's and RLET's statements, into believing that TAC has committed the criminal acts Dickson has accused them of.

52. Dickson and RLET actually knew that their statements regarding TAC's alleged criminality were false at the time they had the ordinance drafted, advocated for its passage, and made the described statements.

53. Even if Dickson and RLET did not actually know that their statements regarding TAC were false, they reasonably should have known their statements were false at the time they made them.

54. These statements are assertions of fact that are provably false.

55. False allegations of criminal acts are *per se* defamatory under Texas law, entitling TAC to damages.

56. Additionally, these statements have caused TAC significant reputational harm in an amount to be determined at trial.

Count 2: <u>Conspiracy to Commit Defamation, against Defendant Right to Life East Texas.</u>

57. Defendant Right to Life East Texas is directed by Defendant Dickson, and to the extent his statements are not directly attributable to RLET, RLET has taken actions to strengthen, enhance, and publicize Dickson's defamatory statements. As described above, this includes (1) publicizing Dickson's defamatory statements on RLET's own Facebook page, and (2) financially and materially supporting Dickson's campaign to pass ordinances drafted at Dickson's behest that contain defamatory statements.

58. RLET intends, by its support of Dickson's campaign and statements, to further Dickson's defamatory goal of persuading people that TAC has committed and is committing criminal acts. RLET and Dickson combined together and conspired to further this defamatory goal. To be clear, RLET and Dickson, to the extent they are treated as separate individuals, had the same defamatory goal in mind.

59. RLET's support to Dickson enhanced his defamatory ordinance campaign and brought wider publicity to his defamatory statements, causing reputation damages in an amount to be determined at trial.

VI.
CONDITIONS PRECEDENT

60. All conditions precedent to TAC's claims for relief have been performed or have occurred.

VII.
REQUEST FOR DISCLOSURE

61. Pursuant to Texas Rule of Civil Procedure 194, TAC requests that the Defendants disclose, within fifty (50) days of the service of this request, all of the information or material described in Rule 194.2 (a)-(l).

VIII.
REQUEST FOR RELIEF

For the reasons set forth above, Plaintiff requests the following:

(A) Compensatory damages in the amount of more than $100,000 plus pre and post-judgment interest on all sums at the maximum rate allowed by law;

(B) Punitive damages in the amount of more than $300,0000;

(C) Injunctive relief requiring Defendants to delete all present defamatory content from their websites, social media, and any other presently-extant physical or electronic media;

(D) All costs of court;

(E) Any and all costs and reasonable attorneys' fees incurred in any and all related appeals and collateral actions (if any); and

(F) Such other relief to which this Court deems Plaintiff justly entitled.

Respectfully submitted,

By: */s/ Jennifer R. Ecklund*

Jennifer R. Ecklund
Texas Bar No. 24045626
jecklund@thompsoncoburn.com

Elizabeth G. Myers
Texas Bar No. 24047767
emyers@thompsoncoburn.com

John P. Atkins
Texas Bar No. 24097326
jatkins@thompsoncoburn.com

THOMPSON COBURN LLP
1919 McKinney Avenue, Suite 100
Dallas, Texas 75201
Telephone: 972/629-7100
Facsimile: 972/629-7171

ATTORNEYS FOR PLAINTIFF

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FELICIA PITRE
DISTRICT CLERK
DALLAS CO., TEXAS
JAVIER HERNANDEZ DEPUTY

DC-20-08113

CAUSE NO. _____

Texas Equal Access Fund,	§	IN THE DISTRICT COURT
	§	
Plaintiff,	§	160TH
	§	
v.	§	____ JUDICIAL DISTRICT
	§	
Mark Lee Dickson, and	§	
Right to Life East Texas,	§	
	§	
Defendants.	§	DALLAS COUNTY, TEXAS

PLAINTIFF'S ORIGINAL PETITION

A "criminal" is a person who breaks the law, not a person with whom you disagree politically. In Texas, calling a person or a business who has committed no crimes "criminal" is *per se* defamation. There is no level of commitment to a particular political outcome and no amount of fervent belief in any one particular political position that relieves a person of his duty to avoid defaming others. Simply put, there are rules that apply to everyone in Texas and one of them is you cannot falsely accuse your political enemies of crimes.

Defendants Mark Lee Dickson ("Dickson") and Right to Life East Texas ("RLET") have been breaking that rule with impunity for months by lying about Plaintiff Texas Equal Access Fund ("TEA Fund" or "Plaintiff") and other pro-choice organizations. Defendants' lies about TEA Fund and the other organizations are as simple as they are appalling. They have repeatedly stated that TEA Fund and the other organizations are literal criminals when Defendants know that is not true. Worse still, Defendants have encouraged others, including members of local government in cities throughout the state, to also lie about TEA Fund and other organizations.

When Defendants made these false statements and encouraged others to do so, Defendants knew that TEA Fund and the other organizations had committed no crimes. Abortion is not a crime in Texas. Abortion is not murder under Texas law. Providing information about abortion

is not illegal under Texas law and is, in fact, protected activity and speech. Providing financial assistance to a private citizen is not illegal under Texas law. And none of those things are or ever have been murder under Texas law. Yet, Defendants continue to publicly say that TEA Fund and other similar organizations are literally "criminal organizations" who are assisting with murder "with malice aforethought."

As described in detail below, Defendants' statements were made before and during efforts to get various city councils to pass an ordinance that enshrines the lies into the municipal books; they were made at city council meetings, but also online, to news media, or on social media. They were also often made after enactment of various ordinances, in order to confuse the public about the legal effects of those ordinances and to defame TEA Fund and similar organizations. The available facts disclose that this campaign has been strategic and thorough, and that its principle aim has been to (1) defame TEA Fund and other reproductive justice advocates and (2) confuse the public about the state of the law in support of this defamatory purpose. This conduct continues to the present day, and the defamation is ongoing. Because Defendants refuse to stop lying and refuse to correct the false record they have created, TEA Fund asks this Court to find the statements are false and defamatory, require Dickson and RLET to set the record straight, and award such damages as are necessary to compensate TEA Fund for the injuries caused by Defendants' lies.

I.
RELIEF SOUGHT AND DISCOVERY LEVEL

1. Plaintiff seeks monetary relief over $200,000.00 but not more than $1,000,000.00 and intend to conduct discovery under Level Three pursuant to Texas Rule of Civil Procedure 190.4.

II.
PARTIES

2. Plaintiff Texas Equal Access Fund is a Texas nonprofit which may be served with process through the undersigned counsel.

3. Defendant Mark Lee Dickson is a resident and citizen of Texas, and on information and belief may be served with process at 1233 E. George Richey Rd., Longview, TX 75604-7622.

4. Defendant Right to Life East Texas is a Texas nonprofit organization, and may be served with process through its director, Mark Lee Dickson, at 1233 E. George Richey Rd., Longview, TX 75604-7622.

III.
JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction because no other court has exclusive jurisdiction of the subject matter of these causes and the amount in controversy is within the jurisdictional limits of this Court.

6. Venue is proper in Dallas County, Texas, pursuant to § 15.017 of the Texas Civil Practice and Remedies Code because Plaintiff resided in Dallas County at the time of accrual of the cause of action.

IV.
FACTS

7. Plaintiff TEA Fund provides financial assistance to people who need help paying for an abortion in northern Texas. All of TEA Fund's resources come from private donations.

A. Defendants' Campaign and Lies.

8. Defendants, led by Mark Lee Dickson, have been attempting to persuade various cities and local governments to enact a patently unconstitutional ordinance purporting to ban abortion and designating as "criminal" organizations like Planned Parenthood (which provides abortion procedures) and Plaintiff TEA Fund (which advocates for abortion rights and assists people in obtaining legal abortions by providing information about legal abortions and by providing funding to private citizens, but does not provide abortion procedures). The proposed ordinance, which has now been passed in several localities (with some variations), not only violates almost fifty years of settled Supreme Court precedent in *Roe v. Wade*, *Planned Parenthood v. Casey*, and *Whole Women's Health v. Hellerstedt* and their progeny, it also (as originally enacted by many of the jurisdictions) operates as an unconstitutional bill of attainder, since (as originally enacted) it declared certain groups, including TEA Fund, to be "criminal" or "unlawful" without any judicial process. Although many cities have now amended their versions to strike Dickson's specific list of political enemies from their code of ordinances, Dickson's statements and advocacy in favor of the original ordinance remain defamatory and evidence an ongoing and concerted effort to perpetuate their lies about TEA Fund.

9. Dickson's campaign has been going on for months, and the records of the City Council meetings he has attended show that his campaign has been coordinated, not only with Defendant RLET (of which he is the director) but also with other organizations, like Texas Right

to Life. The campaign shows the breadth and scope of Dickson's lies, and the endorsement and ratification of them—even the participation in dissemination of that them —by RLET.

10. Dickson goes from city to city (cities Dickson does not live in and has no personal connection with), often accompanied by people associated with Texas Right to Life, to spread his lies and pursue his unconstitutional ordinance. His usual practice is to stir up fear that an abortion facility could open within the city limits unless the ordinance is passed when there is no reason to believe that is likely to happen. He typically brings with him stuffed animals, as well as dolls allegedly depicting twelve-week old fetuses.

11. Dickson's first target for the ordinance was Waskom, Texas. The official minutes of the Board of Aldermen for June 11, 2019 reflect that Mark Lee Dickson, "representing Right of Life of East Texas" proposed and advocated for the ordinance, claiming that the city "was at risk with an abortion clinic moving in[.]" Another speaker, Rusty Thomas, apparently asked the board to "make a stand" and "pass the ordinance outlawing abortion." Alderman James King moved to adopt the ordinance, and the motion was seconded by Alderman Russell Allbritton. The Board adopted the ordinance on a 5-0 vote.

12. On July 23, 2019, Dickson spoke to the City Council of Gilmer, Texas. The Council Minutes reflect that Dickson was representing Right to Life East Texas (his attendance is recorded as "Mark Lee Dickson, Right to Life East Texas"). But it wasn't until September 24, 2019, when Dickson again visited the Gilmer City Council (again representing Right to Life East Texas according to the minutes), that Gilmer adopted the ordinance by 4 votes to 1. The minutes reflect that at this meeting Dickson was accompanied by Katherine "Pilcher" (it appears that this is a misspelling of "Pitcher") and John Seago of Texas Right to Life.

13. On September 9, 2019, Dickson attended the meeting of the City Council of Naples, Texas, again apparently accompanied by Katherine Pitcher. Pitcher testified in favor of adoption of Dickson's ordinance, further showing the coordination between Dickson and Texas Right to Life. Dickson, misidentified in the minutes as "Mark Lee Dickerson" advocated for the ordinance as well. The City Council adopted the ordinance with one opposing vote.

14. The City of Joaquin passed the ordinance on September 17, 2019, though the City Council minutes reflect little about this decision. More informative are the minutes from the City Council for the City of Tenaha on September 23, 2019. Dickson was in attendance at that meeting and claimed that, due to a new fetal heartbeat bill passed by Louisiana, Tenaha was at risk of an abortion clinic opening if it did not pass his ordinance. Tenaha passed the ordinance.

15. Dickson then moved on to the City of Gary, Texas, attending the October 17, 2019 Gary City Council meeting. The City Council voted to table his proposed ordinance. Dickson returned to the Gilmer City Council on January 16, 2020 and made another presentation, after which the Gary City Council adopted Dickson's ordinance.

16. "A citizen" presented Dickson's ordinance to the Big Spring City Council on November 12, 2019. "Several citizens" spoke in favor of the resolution. The minutes do not name these speakers. On December 10, 2019, Dickson's ordinance was again entertained, and "many citizens spoke in favor and against" the ordinance. Finally, on January 14, 2020, "many citizens" again spoke in favor and against the ordinance. The Big Spring City Council then passed the ordinance, though they modified it by substituting the word "unlawful" in for "criminal organizations" when describing (and listing) organizations like TEA Fund. The ordinance was adopted three votes to two.

17. Dickson was at the November 14 and November 18, 2019 meetings of the City Council for the City of Westbrook, Texas, and presented his ordinance, persuading Westbrook to adopt it.

18. On November 21, 2019 Dickson (described as "President, East Texas Chapter Right to Life") and Katherine Pitcher (described as "Legislative Associate, Texas Right to Life") spoke to the City Council for the City of Rusk, Texas, advocating for the ordinance. The Council tabled the ordinance for later discussion. On January 9, 2020, the City of Rusk took up the ordinance again. Speaking then were Defendant Dickson (described as "Director, Right to Life, East Texas Chapter"), Katherine Pitcher ("Legal and Legislative Dept[.], Texas Right to Life"), and Jackson Melton ("Legal and Legislative Dept[.], Texas Right to Life") among others. After an executive session, the City Council approved the ordinance three votes to two.

19. The prior paragraphs are just a summary of Dickson's initial campaign, and the list is not exhaustive. In addition to the above, the City Council of Colorado City, Texas adopted the ordinance after meetings on December 10, 2019 and January 14, 2020, in which a representative of Texas Right to Life named Rebecca Parma told the council that the ordinance could outlaw abortion constitutionally, that persons who broke the law between enactment and the date *Roe* was overturned could be held retroactively criminally liable, and that the ordinance "was supplied by Texas National Right to Life." Dickson presented the ordinance to the City Council for Wells, Texas on February 10, 2020, and persuaded them to adopt it. Dickson also presented the ordinance to the Whiteface, Texas City Council on March 12, 2020, and persuaded them to pass it three votes to two. The Omaha City, Texas, City Council was persuaded to pass the ordinance on September 9, 2019, but repealed it in favor of a nonbinding resolution on October 14, 2019.

20. In the proposed ordinance itself, and in connection with the above-summarized campaign, Defendants have repeatedly exceeded the bounds of protected political speech. Both in the ordinance itself—which was drafted at Defendant Dickson's behest—and in Defendants' arguments in support of that ordinance, Defendants have repeatedly claimed that the named organizations, including TEA Fund, are "criminal organizations," due to their support for abortion, which Defendants characterize as the literal crime of murder.

21. For instance, the text of the ordinances originally adopted in Waskom, Big Spring, Colorado City, Joaquin, and other cities and counties in Texas, includes an express declaration that "[o]rganizations that perform abortions and assist others in obtaining abortions are declared to be criminal [or unlawful] organizations. These organizations include, but are not limited to: … Texas Equal Access Fund…." A copy of the original Waskom ordinance is attached to this Petition as Exhibit A as an example of this language.

22. This alleged criminality is not merely hypothetical or a comment on the moral character of TEA Fund or other similar organizations. Dickson, in concert with RLET, instead accuses TEA Fund, and other organizations, of literal murder and of aiding and abetting literal murder in the very text of the proposed and passed ordinances.

23. The text of the ordinance itself shows that this use of the term "murder" is not merely a rhetorical device. The text of the Waskom ordinance, for instance, begins with a series of recitations indicating that abortion is the criminal act of murder:

> WHEREAS, a surgical or chemical abortion is the purposeful and intentional ending of a human life, and is murder "with malice aforethought" since the baby in the womb has its own DNA, and at certain points in pregnancy has its own heartbeat and its own brainwaves[…]

24. This is a recitation—one of the assumed facts intended to justify the ordinance. So this statement is not even defensible as a statement of the intended effect of the ordinance. It is also not true, both for the simple reason that (1) abortion is legal in Texas, as it is everywhere in the United States (within legal parameters, as with any medical procedure), because laws criminalizing abortion are unconstitutional and (2) because abortion has *never* been murder in Texas. Indeed, even before its anti-abortion law was declared unconstitutional almost fifty years ago, Texas law provided that abortion or assistance with an abortion was a separate offense from murder, punishable by a maximum of five years in prison (or ten if the abortion was done without the consent of the patient). *See* TEX. REV. CIV. STAT. ANN. ART. 4512.1 (recodified version of Texas's unconstitutional prohibition on abortion). The ordinance uses the phrase "malice aforethought,"[1] specifically invoking a historical legal standard associated with the crime of murder, even though Texas law specifically exempts a person who obtains or performs an abortion from the murder law. Tex. Pen. Code. Ann. § 19.06. Moreover, present Texas law authorizes and regulates abortion as a medical procedure, which is incompatible with the position that abortion is "murder" or in any way illegal under Texas law. *See* TEX. HEALTH & SAFETY CODE ANN. § 245.001, *et seq.*

25. But the ordinance goes further than merely stating a legal falsehood. Instead it states a legal falsehood and then accuses TEA Fund, and other organizations, of committing or abetting this fictional crime. As proposed by Dickson and originally adopted by numerous Texas jurisdictions, the ordinance not only *recites* that abortion is murder, it then *declares* that abortion

[1] The accusation by Dickson, enshrined in text drafted at Dickson's and RLET's behest and advocated for, is that abortion is murder "with malice aforethought"—a term taken from criminal law and clearly intended to refer to murder as a specific crime, and not as a moral concept. Although Texas law no longer uses this term, "malice aforethought" is a term commonly associated with the crime of murder, and lends the ordinance a veneer of legitimacy that is likely (and intended) to confuse people about what the law is and whether Defendants' political enemies are criminals.

is murder in Section B.2., then in the immediately following subsection declares that TEA Fund, and other organizations, are "criminal organizations" because they "perform abortions" or "assist others in obtaining abortions." *See* Ex. A, p. 3. There is no way to read these provisions together except as an assertion that TEA Fund and the other named organizations are being accused, by Dickson and (on his recommendation) by a legislative body and without any judicial findings or action, of committing or abetting murder.

26. Dickson has admitted that the ordinances were drafted at his behest with the assistance of an unnamed "legal expert" who allegedly clerked for Justice Antonin Scalia. The relevant text of these ordinances is Dickson's responsibility, and RLET has, in its support for this ordinance, ratified its text. Dickson and RLET are responsible for the statements of alleged fact the ordinance contains, including the recitals, and including the specific list of Dickson's political enemies he has encouraged various cities to declare as "criminal," even if many of these cities have since thought better of keeping this list in their ordinance books.

27. To summarize, Defendants' positive assertion, in the text of the very ordinance they had drafted and have sought to have enacted, is not that TEA Fund or the other named organizations have abetted murder in some figurative or rhetorical sense, but that TEA Fund has abetted actual, criminal murders. Because this accusation of criminality is false, it is *per se* defamatory under Texas law. In drafting this ordinance, and in advocating for its passage, Defendants have defamed Plaintiff.

28. Ultimately, defamation is the purpose of the ordinance; Dickson's campaign is designed to confuse people about the legal status of abortion *and* abortion advocacy, and paint abortion rights organizations like TEA Fund as criminals. This is revealed by Dickson's own statements. For example, in Dickson's November 26, 2019 Facebook statement, set out below, in

which he tries to defend his unconstitutional proscription list, Dickson gives the game away—implicitly admitting that his ordinance is not intended to actually survive legal scrutiny (by referencing previously unsuccessful attempts to restrict abortion in Texas), while implying that the chilling effect of these ordinances on abortion rights groups will ultimately have been worth it. *See infra*, ¶ 31 ("Also, when you point out how the abortion restrictions in 2013 cost the State of Texas over a million dollars, you should also point out how many baby murdering facilities closed because of those restrictions. We went from over 40 baby murdering facilities in the State of Texas to less than 20 baby murdering facilities in the State of Texas in just a few years. Even with the win for abortion advocates with Whole Woman's Health v. Hellerstedt, how many baby murdering facilities have opened back up? Not very many at all.")

B. <u>Dickson's Other Lies.</u>

29. In his own personal statements, Dickson has made even clearer that he is talking about literal, criminal murder and not speaking in moral terms when he accuses the organizations originally named in the ordinance of criminality. Dickson said in a July 2, 2019 Facebook post responding to two billboards put up in Waskom, Texas by the Lilith Fund and NARAL Pro-Choice Texas, that:

> "Abortion is Freedom" in the same way that a wife killing her husband would be freedom - Abortion is Murder. The Lilith Fund and NARAL Pro-Choice Texas are advocates for abortion, and since abortion is the murder of innocent life, this makes these organizations advocates for the murder of those innocent lives. This is why the Lilith Fund and NARAL Pro-Choice Texas are listed as criminal organizations in Waskom, Texas. They exist to help pregnant Mothers murder their babies.

30. Of course, TEA Fund was listed as a criminal organization in Waskom as well. The necessary implication of this statement is that what is said here about the Lilith Fund and NARAL Pro-Choice Texas is also true of TEA Fund. That is, TEA Fund is a criminal organization that

abets murder because it "advocates for abortion." This statement was made after the Waskom enactment of the ordinance—it was not a statement made to persuade Waskom to adopt it or to persuade others to support its adoption. And the statement equates abortion with the murder of an adult person, then continues by indicating that this is the justification for these organizations being designated as "criminal organizations" in the ordinance Dickson himself had drafted and persuaded Waskom to pass. Defendant Dickson's meaning cannot be mistaken: TEA Fund and similar organizations are presently abetting the crime of murder, and are presently committing crimes in the City of Waskom, his status as the primary advocate for these ordinances and his statements arguing that the ordinance passes legal muster, and has the actual effect of rendering abortion illegal, are very likely to confuse reasonable people into believing that his characterization of TEA Fund as an organization that commits criminal acts is accurate.

31. Speaking about another version of his ordinance enacted in Big Spring, Texas, Dickson said in a November 26, 2019 Facebook post that:

> Nothing is unconstitutional about this ordinance. Even the listing of abortion providers as examples of criminal organizations is not unconstitutional. We can legally do that. This is an ordinance that says murdering unborn children is outlawed, so it makes sense to name examples of organizations that are involved in murdering unborn children. That is what we are talking about here: The murder of unborn children. Also, when you point out how the abortion restrictions in 2013 cost the State of Texas over a million dollars, you should also point out how many baby murdering facilities closed because of those restrictions. We went from over 40 baby murdering facilities in the State of Texas to less than 20 baby murdering facilities in the State of Texas in just a few years. Even with the win for abortion advocates with Whole Woman's Health v. Hellerstedt, how many baby murdering facilities have opened back up? Not very many at all. So thank you for reminding us all that when we stand against the murder of innocent children, we really do save a lot of lives.

32. Again, these statements are not merely philosophical statements that "abortion is murder" in some moral sense. In light of the ordinance Dickson has advocated, these social media posts argue that TEA Fund and other similar organizations are *literally* assisting in criminal murder by advocating for abortion rights and educating women about those rights.

33. Further demonstrating that defamation—including confusion about whether abortion rights organizations are presently committing crimes—is the purpose of this entire quixotic ordinance campaign is the statement Dickson made immediately after Waskom, Texas, became the first city to pass his ordinance:

> Congratulations Waskom, Texas for becoming the first city in Texas to become a "Sanctuary City for the Unborn" by resolution and the first city in the Nation to become a "Sanctuary City for the Unborn" by ordinance. Although I did have my disagreements with the final version, the fact remains that abortion is now OUTLAWED in Waskom, Texas! … All organizations that perform abortions and assist others in obtaining abortions (including Planned Parenthood and any of its affiliates, Jane's Due Process, The Afiya Center, The Lilith Fund for Reproductive Equality, NARAL Pro-Choice Texas, National Latina Institute for Reproductive Health, Whole Woman's Heath and Woman's Health Alliance, Texas Equal Access Fund, and others like them) are now declared to be criminal organizations in Waskom, Texas. This is history in the making and a great victory for life!

34. Again, the point here is that Dickson wants people to believe that these ordinances *really do* criminalize abortion, assisting women to obtain abortions, and advocacy and education in support of abortion rights. Since this statement was made *after* the ordinance was adopted, its intent was not to persuade Waskom to adopt the ordinance, but to persuade people that the ordinance actually does make abortion illegal. Indeed, Dickson specifically claims, in present-tense language, that Waskom has "OUTLAWED" abortion. That way, Dickson has an excuse to falsely claim that his political opponents are committing crimes by opposing his anti-choice agenda, which Dickson then proceeds to do, using his *own ordinance* as cover for that statement.

35. Similarly, Dickson claimed in an interview with CNN, published in a January 25, 2020 article, that "[t]he idea is this: in a city that has outlawed abortion, in those cities if an abortion happens, then later on when Roe v. Wade is overturned, those penalties can come crashing down on their heads." Dickson wants people to genuinely believe that providing abortion services, or assisting others to do so, is *presently* a crime, and that present abortions or assistance therewith—undertaken while *Roe* is still the governing law—will be subject to future penalties if the Supreme Court's view of the constitution changes. Dickson and RLET *know* that abortion is legal, that advocacy for abortion rights is legal, that assisting people in obtaining legal abortions is legal, and yet Dickson is genuinely trying to persuade people that organizations like TEA Fund are currently violating the law by providing assistance to people who are seeking abortion services. This is defamation.

36. Dickson repeatedly claims that these ordinances actually outlaw abortion even though his own ordinance shows that he knows this to be false. As Dickson knows, his conning of the city councils of various municipalities to unconstitutionally enshrine his proscription list in city ordinances does not alter the legality of TEA Fund's actions, or those of any of the other named organizations. Since these organizations have not committed—and are not committing—criminal acts (whether murder or any other crime), his characterization of them is false and defamatory.

C. Conspiracy with Right to Life East Texas.

37. Dickson is the director of RLET. Its resources have been leveraged in support of Dickson's campaign, and RLET supports and advocates for the passage of variants of Dickson's ordinance with defamatory language similar to that that described above.

38. RLET has endorsed not only the statements enshrined in the ordinance (including the Waskom and Big Spring ordinances) but also the statements Dickson has made outside of the four corners of these ordinances. RLET posted on Facebook a statement signed by Dickson substantially repeating his July 2, 2019 Facebook post:

> As I have said before, abortion is freedom in the same way that a wife killing her husband is freedom. Abortion is murder. The thought that you can end the life of another innocent human being and not expect to struggle afterwards is a lie. In closing, despite what these groups may think, what happened in Waskom was not a publicity stunt. The Lilith Fund was in error when they said on a July 2nd Facebook post, "Abortion is still legal in Waskom, every city in Texas, and in all 50 states." We said what we meant and we meant what we said. Abortion is illegal in Waskom, Texas. In the coming weeks more cities in Texas will be taking the same steps that the City of Waskom took to outlaw abortion in their cities and become sanctuary cities for the unborn. If NARAL Pro-Choice Texas and the Lilith Fund want to spend more money on billboards in those cities we welcome them to do so. After all, the more money they spend on billboards the less money they can spend on funding the murder of innocent unborn children.

39. RLET also reposted Dickson's June 11, 2019 Facebook post, set out above, in which Dickson attempts to persuade people that the adoption of his ordinance *actually means* that the organizations named in his ordinance, including TEA Fund, are literally criminal organizations, because the ordinance *he designed* asserts that.

40. RLET's support for this defamatory campaign, and endorsement and publication of Dickson's statements, show that RLET has aided and strengthened Dickson's defamation of TEA Fund and the other organizations named in Dickson's unconstitutional ordinance.

D. Falsity of the Statements.

41. It is, of course, false that TEA Fund, or any of the other named organizations, have abetted murder, committed crimes, or are criminal organizations in any sense. Abortion is not illegal anywhere in the United States. Nor is it illegal anywhere in the United States to advocate for abortion rights or assist people in obtaining a legal abortion. Legal abortion is not a crime and is not classified as murder, anywhere in the United States (indeed, as noted above, even before *Roe*, abortion was not classified as murder in Texas). Dickson's declarations to the contrary were not true when he was shopping his unconstitutional ordinance around, and they are not any more true now that some cities have been defrauded into passing it.

42. The text of the proposed ordinance as enacted *itself* demonstrates that Defendants know that their statements are false. As the Waskom ordinance shows, but as is replicated in all the jurisdictions that have passed variations of Dickson's ordinance, the efficacy of the penalties the ordinance purports to exact are forestalled until a hypothetical future in which *Roe* and *Casey* and their progeny are all overturned:

> Neither the City of Waskom, nor any of its officers or employees, nor any district or county attorney, nor any executive or administrative officer or employee of any state or local government entity, shall take any steps to enforce this ordinance against a person or entity that commits an unlawful act described in Section C, unless and until the Supreme Court overrules Roe v. Wade, 410 U.S. 113 (1973), and Planned Parenthood v. Casey, 505 U.S. 833 (1992), and permits states and municipalities to once again enforce abortion prohibitions.

43. Defendants know that they cannot argue that criminal penalties can issue from the ordinances they have proposed for enactment, because they know that laws forbidding abortion are unconstitutional. Defendants instead hope that their law will at some point *become* constitutional, an implicit recognition that it does not pass constitutional muster presently.

Consequently, Defendants *know* that providing legal abortions, advocating for abortion rights, and assisting people in obtaining legal abortions is legal (even in Waskom, and Big Spring, and the other places Defendants have persuaded to adopt their ineffectual ordinance). After all, "[a]n unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby County*, 118 U.S. 425, 442, 6 S. Ct. 1121, 1125, 30 L. Ed. 178 (1886). Although this principle does not literally unwrite or physically remove the laws that have been written when they are struck down as unconstitutional in every case, it does render unconstitutional criminal laws ineffectual such that an offense created by an unconstitutional law is "not a crime." *Ex parte Siebold*, 100 U.S. 371, 376, 25 L. Ed. 717 (1879); *see also Hiett v. United States*, 415 F.2d 664, 666 (5th Cir. 1969) ("It is well settled that if the statute under which appellant has been convicted is unconstitutional, he has not in the contemplation of the law engaged in criminal activity; for an unconstitutional statute in the criminal area is to be considered no statute at all."); *Karenev v. State*, 281 S.W.3d 428, 437 (Tex. Crim. App. 2009); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 760, 115 S. Ct. 1745, 1752, 131 L. Ed. 2d 820 (1995) (Scalia, J. writing in concurrence "a law repugnant to the Constitution is void, and is as no law[.]")

44. There is thus no legal sense in which TEA Fund has committed *any* crime, and yet Dickson and Defendants have repeatedly characterized it as guilty of abetting the literal crime of murder. This misrepresentation—both of TEA Fund's actions themselves *and* of the legal status of same—is defamatory *per se* under Texas law. There is a categorical difference between accusing someone of immorality, and accusing someone of criminality. People can disagree on the morality of actions, as people discussing the abortion issue certainly do, but whether an action is criminal

is not a philosophical matter. In advocating for these ordinances, Defendants repeatedly crossed this line, both before and after enactment.

45. To be perfectly clear, TEA Fund is not arguing it has been defamed because Defendants believe or argue that abortion is murder in some moral sense; instead, TEA Fund has been defamed because Defendants have falsely accused it of assisting in the commission of the specific crime of murder. TEA Fund has not been defamed because Defendants hope one day to make abortion a crime, but because Defendants *presently state* that TEA Fund is, at this moment, breaking the law. These statements are baseless and provably false, and Defendants knew these statements were false when they were uttered as their own statements and the text of the ordinance itself demonstrates. In Texas, this is enough, on its own, to support a claim of defamation, even in the absence of damages.

46. In addition, TEA Fund has suffered damages to its reputation as a result of Defendants' lies. Although this action seeks compensatory damages, its primary purpose is to set the record straight: TEA Fund abides by the law. It is not a "criminal organization" engaging in activities that have been "outlawed." It has not once abetted "murder." Dickson's dishonorable campaign of lies transgresses the boundaries of political debate, and TEA Fund asks this Court to put a stop to it.

V.
CAUSES OF ACTION

Count 1: Defamation, against Defendants Dickson and RLET.

47. Dickson's statements, both in the ordinance he had drafted, and in his arguments in support thereof, can only be reasonably read as accusing Plaintiff of the literal crime of murder, of abetting the literal crime of murder, or of committing other presently criminal acts.

48. Dickson is the director of Defendant RLET, and regularly makes statements on its behalf. Some of Dickson's defamatory statements have been made specifically via Defendant RLET's outlets, including its Facebook page.

49. Defendant RLET publicized both the ordinance itself (which it has materially supported) and certain of Dickson's defamatory statements (as described above).

50. A reasonable person could be deceived, on the basis of Dickson's and RLET's statements, into believing that TEA Fund has committed the criminal acts Dickson has accused them of.

51. Dickson and RLET actually knew that their statements regarding TEA Fund's alleged criminality were false at the time they had the ordinance drafted, advocated for its passage, and made the described statements.

52. These statements are assertions of fact that are provably false.

53. False allegations of criminal acts are *per se* defamatory under Texas law, entitling TEA Fund to damages.

54. Additionally, these statements have caused TEA Fund significant reputational harm in an amount to be determined at trial.

Count 2: **Conspiracy to Commit Defamation, against Defendant Right to Life East Texas.**

55. Defendant Right to Life East Texas is directed by Defendant Dickson, and to the extent his statements are not directly attributable to RLET, RLET has taken actions to strengthen, enhance, and publicize Dickson's defamatory statements. As described above, this includes (1) publicizing Dickson's defamatory statements on RLET's own Facebook page, and (2) financially and materially supporting Dickson's campaign to pass ordinances drafted at Dickson's behest that contain defamatory statements.

56. RLET intends, by its support of Dickson's campaign and statements, to further Dickson's defamatory goal of persuading people that TEA Fund has committed and is committing criminal acts. RLET and Dickson combined together and conspired to further this defamatory goal. To be clear, RLET and Dickson, to the extent they are treated as separate individuals, had the same defamatory goal in mind.

57. RLET's support to Dickson enhanced his defamatory ordinance campaign and brought wider publicity to his defamatory statements, causing reputation damages in an amount to be determined at trial.

VI.
CONDITIONS PRECEDENT

58. All conditions precedent to TEA Fund's claims for relief have been performed or have occurred.

VII.
REQUEST FOR DISCLOSURE

59. Pursuant to Texas Rule of Civil Procedure 194, TEA Fund requests that the Defendants disclose, within fifty (50) days of the service of this request, all of the information or material described in Rule 194.2 (a)-(l).

VIII.
REQUEST FOR RELIEF

For the reasons set forth above, Plaintiff requests the following:

(A) Compensatory damages in the amount of more than $100,000 plus pre and post-judgment interest on all sums at the maximum rate allowed by law;

(B) Punitive damages in the amount of more than $300,0000;

(C) Injunctive relief requiring Defendants to delete all present defamatory content from their websites, social media, and any other presently-extant physical or electronic media;

(D) All costs of court;

(E) Any and all costs and reasonable attorneys' fees incurred in any and all related appeals and collateral actions (if any); and

(F) Such other relief to which this Court deems Plaintiff justly entitled.

Respectfully submitted,

By: */s/ Jennifer R. Ecklund*

Jennifer R. Ecklund
Texas Bar No. 24045626
jecklund@thompsoncoburn.com

Elizabeth G. Myers
Texas Bar No. 24047767
emyers@thompsoncoburn.com

John P. Atkins
Texas Bar No. 24097326
jatkins@thompsoncoburn.com

THOMPSON COBURN LLP
1919 McKinney Avenue, Suite 100
Dallas, Texas 75201
Telephone: 972/629-7100
Facsimile: 972/629-7171

ATTORNEYS FOR PLAINTIFF

ORDINANCE OUTLAWING ABORTION WITHIN THE CITY OF WASKOM, DECLARING WASKOM A SANCTUARY CITY FOR THE UNBORN, MAKING VARIOUS PROVISIONS AND FINDINGS RELATED THERETO, PROVIDING FOR SEVERABILITY, REPEALING CONFLICTING ORDINANCES, AND ESTABLISHING AN EFFECTIVE DATE.

WHEREAS, the City Alderman of the City of Waskom hereby finds that the United States Constitution has established the right of self-governance for local municipalities;

WHEREAS, a surgical or chemical abortion is the purposeful and intentional ending of a human life, and is murder "with malice aforethought" since the baby in the womb has its own DNA, and at certain points in pregnancy has its own heartbeat and its own brainwaves;

WHEREAS, these babies are the most innocent among us and deserve equal protection under the law as any other member of our American posterity as defined by the United States Constitution;

WHEREAS, the Supreme Court erred in Roe v. Wade, 410 U.S. 113 (1973), when it said that pregnant women have a constitutional right to abort their pre-born children, as there is no language anywhere in the Constitution that even remotely suggests that abortion is a constitutional right;

WHEREAS, constitutional scholars have excoriated Roe v. Wade, 410 U.S. 113 (1973), for its lack of reasoning and its decision to concoct a constitutional right to abortion that has no textual foundation in the Constitution or any source of law, *see* John Hart Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920, 947 (1973) ("Roe v. Wade . . . is *not* constitutional law and gives almost no sense of an obligation to try to be."); Richard A. Epstein, Substantive Due Process By Any Other Name: The Abortion Cases, 1973 Sup. Ct. Rev. 159, 182 ("It is simple fiat and power that gives [Roe v. Wade] its legal effect."); Mark Tushnet, Red, White, and Blue: A Critical Analysis of Constitutional Law 54 (1988) ("We might think of Justice Blackmun's opinion in *Roe* as an innovation akin to Joyce's or Mailer's. It is the totally unreasoned judicial opinion.");

WHEREAS, Roe v. Wade, 410 U.S. 113 (1973), is a lawless and illegitimate act of judicial usurpation, which violates the Tenth Amendment by trampling the reserved powers of the States, and denies the people of each State a Republican Form of Government by imposing abortion policy through judicial decree;

WHEREAS, the recent changes of membership on the Supreme Court indicate that the pro-abortion justices have lost their majority;

WHEREAS, to protect the health and welfare of all residents within the City of Waskom, including the unborn, the City Council has found it necessary to outlaw human abortion within the city limits.

NOW, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF WASKOM, TEXAS, THAT:

A. DEFINITIONS

1. "Abortion" means the death of a child as the result of purposeful action taken before or during the birth of the child with the intent to cause the death of the child. This includes, but is not limited to:

(a) Chemical abortions caused by the morning-after pill, mifepristone (also known as RU-486), and the Plan B pill.

(b) Surgical abortions at any stage of pregnancy.

(c) Saline abortions at any stage of pregnancy.

(d) Self-induced abortions at any stage of pregnancy.

The term "abortion" does NOT include accidental miscarriage.

2. "Child" means a natural person from the moment of conception until 18 years of age.

3. "Pre-born child" means a natural person from the moment of conception who has not yet left the womb.

4. "Abortionist" means any person, medically trained or otherwise, who causes the death of the child in the womb. This includes, but is not limited to:

(a) Obstetricians/gynecologists and other medical professionals who perform abortions of any kind for any reason.

(b) Any other medical doctor who performs abortions of any kind for any reason.

(c) Any nurse practitioner who performs abortions of any kind for any reason.

(d) Any personnel from Planned Parenthood or other pro-abortion organizations who perform abortions of any kind for any reason.

(e) Any remote personnel who instruct abortive women to perform self-abortions at home via internet connection.

(f) Any pharmacist or pharmaceutical worker who sells chemical or herbal abortifacients.

5. "City" shall mean the city of Waskom, Texas.

B. DECLARATIONS

1. We declare Waskom, Texas to be a Sanctuary City for the Unborn.

2. Abortion at all times and at all stages of pregnancy is declared to be an act of murder with malice aforethought, subject only to the affirmative defenses described in Section C.3.

3. Organizations that perform abortions and assist others in obtaining abortions are declared to be criminal organizations. These organizations include, but are not limited to:

(a) Planned Parenthood and any of its affiliates;

(b) Jane's Due Process;

(c) The Afiya Center;

(d) The Lilith Fund for Reproductive Equality;

(e) NARAL Pro-Choice Texas;

(f) National Latina Institute for Reproductive Health;

(g) Whole Woman's Health and Whole Woman's Health Alliance;

(h) Texas Equal Access Fund;

4. The Supreme Court's rulings and opinions in Roe v. Wade, 410 U.S. 113 (1973), Planned Parenthood v. Casey, 505 U.S. 833 (1992), Stenberg v. Carhart, 530 U.S. 914 (2000), Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016), and any other rulings or opinions from the Supreme Court that purport to establish or enforce a "constitutional right" to abort a pre-born child, are declared to be unconstitutional usurpations of judicial power, which violate both the Tenth Amendment the Republican Form of Government Clause, and are declared to be null and void in the City of Waskom.

C. UNLAWFUL ACTS

1. ABORTION — It shall be unlawful for any person to procure or perform an abortion of any type and at any stage of pregnancy in the City of Waskom, Texas.

2. AIDING OR ABETTING AN ABORTION — It shall be unlawful for any person to knowingly aid or abet an abortion that occurs in the City of Waskom, Texas. This includes, but is not limited to, the following acts:

(a) Knowingly providing transportation to or from an abortion provider;

(b) Giving instructions over the telephone, the internet, or any other medium of communication regarding self-administered abortion;

(c) Providing money with the knowledge that it will be used to pay for an abortion or the costs associated with procuring an abortion;

(d) Coercing a pregnant mother to have an abortion against her will.

3. AFFIRMATIVE DEFENSES — It shall be an affirmative defense to the unlawful acts described in Sections C.1 and C.2 if the abortion was:

(a) In response to a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that, as certified by a physician, places the woman in danger of death or a serious risk of substantial impairment of a major bodily function unless an abortion is performed.

(b) In response to a pregnancy caused by an act of rape, sexual assault, or incest that was reported to law enforcement;

The defendant shall have the burden of proving these affirmative defenses by a preponderance of the evidence.

4. CAUSING AN ABORTION BY AN ACT OF RAPE, SEXUAL ASSAULT, OR INCEST — It shall be unlawful for any person to cause an abortion by an act of rape, sexual assault, or incest that impregnates the victim against her will and causes her to abort the pre-born child.

5. PROHIBITED CRIMINAL ORGANIZATIONS — It shall be unlawful for a criminal organization described in Section B.3 to operate within the City of Waskom, Texas. This includes, but is not limited to:

(a) Offering services of any type within the City of Waskom, Texas;

(b) Renting office space or purchasing real property within the City of Waskom, Texas;

(c) Establishing a physical presence of any sort within the City of Waskom, Texas;

D. PUBLIC ENFORCEMENT

1. Neither the City of Waskom, nor any of its officers or employees, nor any district or county attorney, nor any executive or administrative officer or employee of any state or local governmental entity, shall take any steps to enforce this ordinance against a person or entity that commits an unlawful act described in Section C, unless and until the Supreme Court overrules Roe v. Wade, 410 U.S. 113 (1973), and Planned Parenthood v. Casey, 505 U.S. 833 (1992), and permits states and municipalities to once again enforce abortion prohibitions.

2. If (and only if) the Supreme Court overrules Roe v. Wade, 410 U.S. 113 (1973), and Planned Parenthood v. Casey, 505 U.S. 833 (1992), a person who commits an unlawful act described in Section C shall be subject to the maximum penalty permitted under Texas law for the violation of a municipal ordinance governing public health, and each violation shall constitute a separate offense.

Provided, that no punishment shall be imposed upon the mother of the pre-born child that has been aborted.

3. If (and only if) the Supreme Court overrules Roe v. Wade, 410 U.S. 113 (1973), and Planned Parenthood v. Casey, 505 U.S. 833 (1992), a corporation or entity that commits an unlawful act described in Section C shall be subject to the maximum penalty permitted under Texas law for the violation of a municipal ordinance governing public health, and each violation shall constitute a separate offense.

E. PRIVATE ENFORCEMENT

1. A person or entity that commits an unlawful act described in Section C.1 or C.2, other than the mother of the pre-born child that has been aborted, shall be liable in tort to any surviving relative of the aborted pre-born child, including the child's mother, father, grandparents, siblings or half-siblings, aunts, uncles, or cousins. The person or entity that committed the unlawful act shall be liable to each surviving relative of the aborted pre-born child for:

(a) Compensatory damages, including damages for emotional distress;

(b) Punitive damages; and

(c) Costs and attorneys' fees.

There is no statute of limitations for this private right of action.

2. Any private citizen may bring a qui tam relator action against a person or entity that commits or plans to commit an unlawful act described in Section C, and may be awarded:

(a) Injunctive relief;

(b) Statutory damages of not less than two thousand dollars ($2,000.00) for each violation, and not more than the maximum penalty permitted under Texas law for the violation of a municipal ordinance governing public health; and

(c) Costs and attorneys' fees;

Provided, that no damages or liability for costs and attorneys' fees may be awarded or assessed against the mother of the pre-born child that has been aborted. There is no statute of limitations for this qui tam relator action.

3. No qui tam relator action described in Section E.2 may be brought by the City of Waskom, by any of its officers or employees, by any district or county attorney, or by any executive or administrative officer or employee of any state or local governmental entity.

F. SEVERABILITY

1. Mindful of Leavitt v. Jane L., 518 U.S. 137 (1996), in which in the context of determining the severability of a state statute regulating abortion the United States Supreme Court held that an explicit statement of legislative intent is controlling, it is the intent of the City Council that every provision, section, subsection, sentence, clause, phrase, or word in this ordinance, and every application of the provisions in this ordinance, are severable from each other. If any application of any provision in this ordinance to any person, group of persons, or circumstances is found by a court to be invalid or unconstitutional, then the remaining applications of that provision to all other persons and circumstances shall be severed and may not be affected. All constitutionally valid applications of this ordinance shall be severed from any applications that a court finds to be invalid, leaving the valid applications in force, because it is the City Council's intent and priority that the valid applications be allowed to stand alone. Even if a reviewing court finds a provision of this ordinance to impose an undue burden in a large or substantial fraction of relevant cases, the applications that do not present an undue burden shall be severed from the remaining provisions and shall remain in force, and shall be treated as if the City Council had enacted an ordinance limited to the persons, group of persons, or circumstances for which the statute's application does not present an undue burden. The City Council further declares that it would have passed this ordinance, and each provision, section, subsection, sentence, clause, phrase, or word, and all constitutional applications of this ordinance, irrespective of the fact that any provision, section, subsection, sentence, clause, phrase, or word, or applications of this ordinance, were to be declared unconstitutional or to represent an undue burden.

2. If any provision of this ordinance is found by any court to be unconstitutionally vague, then the applications of that provision that do not present constitutional vagueness problems shall be severed and remain in force, consistent with the declarations of the City Council's intent in Section F.1

3. No court may decline to enforce the severability requirements in Sections F.1 and F.2 on the ground that severance would "rewrite" the ordinance or involve the court in legislative activity. A court that declines to enforce or enjoins a city official from enforcing a subset of an ordinance's applications is never "rewriting" an ordinance, as the ordinance continues to say exactly what it said before. A judicial injunction or declaration of unconstitutionality is nothing more than a non-enforcement edict that can always be vacated by later courts if they have a different understanding of what the Constitution requires; it is not a formal amendment of the language in a statute or ordinance. A judicial injunction or declaration of unconstitutionality no more "rewrites" an ordinance than a decision by the executive not to enforce a duly enacted ordinance in a limited and defined set of circumstances.

4. If any federal or state court ignores or declines to enforce the requirements of Sections F.1, F.2, or F.3, or holds a provision of this ordinance invalid

on its face after failing to enforce the severability requirements of Sections F.1 and F.2, for any reason whatsoever, then the Mayor shall hold delegated authority to issue a saving construction of the ordinance that avoids the constitutional problems or other problems identified by the federal or state court, while enforcing the provisions of the ordinance to the maximum possible extent. The saving construction issued by the Mayor shall carry the same force of law as an ordinance; it shall represent the authoritative construction of the ordinance in both federal and state judicial proceedings; and it shall remain in effect until the court ruling that declares invalid or enjoins the enforcement of the original provision in the ordinance is overruled, vacated, or reversed.

5. The Mayor must issue the saving construction described in Section F.4 within 20 days after a judicial ruling that declares invalid or enjoins the enforcement of a provision of this ordinance after failing to enforce the severability requirements of Sections F.1 and F.2. If the Mayor fails to issue the saving construction required by Section F.4 within 20 days after a judicial ruling that declares invalid or enjoins the enforcement of a provision of this ordinance after failing to enforce the severability requirements of Sections F.1 or F.2, or if the Mayor's saving construction fails to enforce the provisions of the ordinance to the maximum possible extent permitted by the Constitution or other superseding legal requirements, as construed by the federal or state judiciaries, then any person may petition for a writ of mandamus requiring the Mayor to issue the saving construction described in Section F.4.

G. EFFECTIVE DATE

This ordinance shall go into immediate effect upon majority vote within the Waskom, Texas City Council meeting.

No. 05-20-00988-CV

In the Court of Appeals for the Fifth Appellate District at Dallas, Texas

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Mark Lee Dickson and Right to Life East Texas,

Defendants-Appellants,

v.

The Afiya Center and Texas Equal Access Fund,

Plaintiffs-Appellees.

On Appeal from the 116th Judicial District Court, Dallas County
Case No. DC-20-08104

APPELLANTS' MOTION FOR REHEARING

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

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 inside)

Counsel for Appellants

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

Additional Counsel for Appellants

Appellants Mark Lee Dickson and Right to Life East Texas move for rehearing, as the opinion issued on August 4, 2021, contains some errors that we respectfully bring to the Court's attention.

On page 3 of its opinion, the Court states that the amendment to the original Waskom ordinance "did not remove the 'declaration' that any organization that performed or assisted in obtaining abortions is a 'criminal organization.'" That is not correct, as the amended ordinance omits the previous provision that had declared abortion-assistance organizations to be "criminal." CR 709–715. The appellants respectfully recommend that the Court correct this statement.

On page 3 of the opinion, the Court also states that the original Waskom ordinance was amended in a "settlement" of an earlier lawsuit. But there was no settlement in the lawsuit that was filed against Waskom (and other cities) over the text of the original ordinance. Instead, the cities unilaterally amended their ordinances in response to the lawsuit, and the plaintiffs unilaterally dismissed their lawsuit in response to the amendments. This outcome was not negotiated between the parties, and no "settlement" of this lawsuit ever occurred. The appellants respectfully recommend that the Court change "In settlement of an earlier lawsuit" to "In response to an earlier lawsuit."

On page 30 of the opinion, the Court refers to "the clear language of penal code section 19.06 excepting abortion from the definition of murder." But section 19.06 of the Texas Penal Code does not exempt abortion from the definition of murder; it exempts "lawful medical procedures" and "the dis-

pensation of a drug in accordance with law." Tex. Penal Code §§ 19.06(2), (4). Unlawful abortions are acts of murder under Texas law, and the appellants respectfully recommend that the Court clarify this statement.

Finally, the Court's opinion repeatedly states that Mr. Dickson and Right to Life East Texas have called The Afiya Center and the Texas Equal Access Fund "murderers" or have accused them of committing or assisting "murder." Statements of this sort appear on page 11 (referring to "the statements at issue—that TAC and TEAF are criminal organizations and that they commit murder"), page 13 (referring to "appellants' statements calling TAC and TEAF criminals and asserting that they are committing murder"), page 18 ("[A]ppellees have offered clear and specific evidence—and a cogent legal argument—making a prima facie case that they have not committed a crime generally, or murder specifically"), page 25 ("[A]ppellants knew or should have known that appellees were not criminals or murderers under Texas law."), page 31 ("[H]e has been sued for publishing statements that call TAC and TEAF criminal organizations that commit murder."), page 32 (referring to "statements accusing TAC and TEAF of aiding and abetting murder"), and page 34 (referring to "appellants' statements calling TAC and TEAF criminals and murderers").

Neither Mr. Dickson nor Right to Life East Texas has ever called The Afiya Center or the Texas Equal Access Fund "murderers," and they have never accused them of committing murder or aiding or abetting murder. Mr. Dickson's statements describe *abortion* as murder, but none of those state-

ments mention or refer to The Afiya Center or the Texas Equal Access Fund in any way. The appellants respectfully recommend that the Court modify the statements described in the previous paragraph by removing any claim that Mr. Dickson or Right to Life East Texas has called the plaintiffs "murderers" or has accused them of committing or participating in murder.

We have attached the opinion of August 4, 2021, as an exhibit to this motion.

Respectfully submitted.

/s/ Jonathan F. Mitchell

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

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

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

Counsel for Appellants

Certificate Of Service

I certify that on August 17, 2021, this document was served through the electronic filing manager upon:

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)
jecklund@thompsoncoburn.com
emyers@thompsoncoburn.com
jatkins@thompsoncoburn.com

Counsel for Plaintiffs-Appellees

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

Certificate Of Compliance

This brief contains 589 words, excluding the portions exempted by Tex. R. App. P. 9.4(i)(1), according to Microsoft Word for Mac version 16.52.

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

Dated: August 17, 2021

Affirm and Opinion Filed August 4, 2021

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-20-00988-CV

MARK LEE DICKSON AND RIGHT TO LIFE EAST TEXAS, Appellants
V.
THE AFIYA CENTER AND TEXAS EQUAL ACCESS FUND, Appellees

On Appeal from the 116th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-20-08104

MEMORANDUM OPINION

Before Justices Osborne, Pedersen, III, and Nowell
Opinion by Justice Pedersen, III

Appellants Mark Lee Dickson and Right to Life East Texas appeal the trial court's order denying their Second Amended Motion to Dismiss under the Texas Citizens' Participation Act (the Motion to Dismiss). The Motion to Dismiss sought dismissal of all defamation and conspiracy claims brought by appellees, The Afiya Center (TAC) and Texas Equal Access Fund (TEAF). Appellants raise five issues in this Court, contending: appellees failed to produce clear and specific evidence that appellants published a false statement of fact concerning appellees or that appellants acted with actual malice in publishing the statements at issue; appellants established affirmative defenses or constitutional protection of the statements at issue; and

appellees failed to produce clear and specific evidence of a conspiracy between appellants or that Right to Life East Texas (RLET) can be held legally responsible for statements published by Dickson. We affirm the trial court's order.

BACKGROUND

Dickson acknowledges in his brief that he "has been encouraging cities throughout Texas to enact ordinances that outlaw abortion within their city limits." Dickson likewise acknowledges his success in this endeavor, identifying seventeen cities that had passed such ordinances at the time of his briefing. The roots of this lawsuit lie in the first such ordinance, which was enacted by the City of Waskom.

The Waskom Ordinance

The original Waskom Ordinance begins with a series of "Findings." For our purposes, the key finding states:

> WHEREAS, a surgical or chemical abortion is the purposeful and intentional ending of a human life, and is murder "with malice aforethought" since the baby in the womb has its own DNA, and at certain points in pregnancy has its own heartbeat and its own brainwaves . . .

The ordinance proceeds to a series of four "Declarations," which assert:

> 1. We declare Waskom, Texas to be a Sanctuary City for the Unborn.
>
> 2. Abortion at all times and at all stages of pregnancy is declared to be an act of murder with malice aforethought, subject only to the affirmative defenses described in Section C.3.
>
> 3. Organizations that perform abortions and assist others in obtaining abortions are declared to be criminal organizations. These organizations include, but are not limited to:

(a) Planned Parenthood and any of its affiliates;

(b) Jane's Due Process;

(c) The Afiya Center;

(d) The Lilith Fund for Reproductive Equality;

(e) NARAL Pro-Choice Texas;

(f) National Latina Institute for Reproductive Health;

(g) Whole Woman's Health and Whole Woman's Health Alliance;

(h) Texas Equal Access Fund.

4. The Supreme Court's rulings and opinions in *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), *Stenberg v. Carhart*, 530 U.S. 914 (2000), *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), and any other rulings or opinions from the Supreme Court that purport to establish or enforce a "constitutional right" to abort a pre-born child, are declared to be unconstitutional usurpations of judicial power, which violate both the Tenth Amendment and the Republican Form of Government Clause, and are declared to be null and void in the City of Waskom.

The ordinance goes on to declare abortion and aiding and abetting abortion to be "unlawful acts." In settlement of an earlier lawsuit, the ordinance was amended to remove the list of "criminal organizations," although the amendment did not remove the "declaration" that any organization that performed or assisted in obtaining abortions is a "criminal organization."

The Statements at Issue

Following enactment of the Waskom Ordinance, and during the following months, Dickson made a number of statements on television and on Facebook related to the ordinance he drafted and supported. Along with the ordinance language quoted above, which declared TAC and TEAF to be criminal organizations, appellees referenced five such statements in their petitions—four Facebook posts on Dickson's and RLET's pages and one statement to CNN—and submitted additional Facebook posts during the Motion to Dismiss proceeding.

By way of example, Dickson posted the following statement on Facebook on June 11, 2019:

> Congratulations Waskom, Texas for becoming the first city in Texas to become a "Sanctuary City for the Unborn" by resolution and the first city in the Nation to become a "Sanctuary City for the Unborn" by ordinance. Although I did have my disagreements with the final version, the fact remains that abortion is now OUTLAWED in Waskom, Texas! … All organizations that perform abortions and assist others in obtaining abortions (including Planned Parenthood and any of its affiliates, Jane's Due Process, The Afiya Center, The Lilith Fund for Reproductive Equality, NARAL Pro-Choice Texas, National Latina Institute for Reproductive Health, Whole Woman's Heath and Woman's Health Alliance, Texas Equal Access Fund, and others like them) are now declared to be criminal organizations in Waskom, Texas. This is history in the making and a great victory for life!

He posted the following on November 26, 2019:

> This is an ordinance that says murdering unborn children is outlawed, so it makes sense to name examples of organizations that are involved in murdering unborn children. That is what we are talking about here: The murder of unborn children.

And RLET posted this Dickson-authored statement on its Facebook page: App. 142

> [A]bortion is freedom in the same way that a wife killing her husband is freedom. Abortion is murder. . . . Abortion is illegal in Waskom, Texas.

Appellees sued Dickson and RLET, asserting that the statements defamed them by calling them criminal organizations and murderers.

The Motion to Dismiss

Appellants timely filed their Motion to Dismiss in response to appellees defamation claim. In that motion, appellants invoked application of the Texas Citizens' Participation Act (the TCPA) on the bases of their right of free speech, right to petition, and right of association.[1] They charged that TAC and TEAF could not establish by clear and specific evidence (a) that appellants had made a false statement of fact, or (b) that appellants had acted with malice or negligence in making the statements at issue, or (c) that appellees had suffered damages as a result of the statements at issue. However, appellants argued further that—even if TAC and TEAF could establish those elements of their claims by clear and specific evidence—the trial court should still dismiss the claims because the statements were true or substantially true or were constitutionally protected opinion or rhetorical hyperbole, and appellants were thus entitled to judgment as a matter of law. Appellants sought recovery of their costs and attorney's fees. In support of their Motion to Dismiss, appellants submitted copies of what they identify as the Texas

[1] The appellees' original petitions, later consolidated by agreement, were both filed on June 11, 2020. Accordingly, this case is governed by the amended version of the TCPA that became effective September 1, 2019. Act of May 17, 2019, 86th Leg., R.S., ch. 378, § 11, 2019 Tex. Sess. Law Serv. 684, 687.

abortion statutes; a copy of the amended Waskom Ordinance; and the Affidavit of Mark Lee Dickson.

TAC and TEAF filed their Joint Opposition to Defendants' Second Amended Motion to Dismiss Under The Texas Citizens Participation Act, attaching the following evidence: a copy of the original version of the Waskom Ordinance; copies of each of the published statements relied on in the petitions; the Affidavit of Marsha Jones, co-founder and Executive Director of TAC; the Affidavit of Kamyon Conner, Executive Director of TEAF; and the Declaration of Jennifer Rudenick Ecklund, attorney for TAC and TEAF.

Appellants filed a Reply Brief, which attached a supplemental affidavit from Dickson.[2] The trial court heard the Motion to Dismiss and denied it "on all grounds." This interlocutory appeal followed.

THE TCPA

The purpose of the TCPA is "to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury." TEX. CIV. PRAC. & REM. CODE ANN. § 27.002. The act itself instructs us to construe

[2] The reply also attached affidavits from appellants' counsel, Jonathan Mitchell, and a law professor, Michael Stokes Paulsen. Those affidavits were stricken by the trial court in their entirety, and appellants have not complained of their exclusion in this Court.

its provisions liberally "to effectuate its purpose and intent fully." *Id.* § 27.011(b). Litigants invoke the protection of the TCPA through a motion to dismiss, *id.* § 27.003, and we review a trial court's ruling on such a motion de novo, *Vaughn-Riley v. Patterson*, No. 05-20-00236-CV, 2020 WL 7053651, at *2 (Tex. App.—Dallas Dec. 2, 2020, no pet.) (mem. op.).

The TCPA provides a three-step process for determining whether a case should be dismissed. *See generally Youngkin v. Hines*, 546 S.W.3d 675, 679–80 (Tex. 2018). At the outset, the movant must demonstrate that the TCPA applies to the legal action brought against it. CIV. PRAC. & REM. § 27.005(b). If the movant meets that burden, then the party bringing the legal action must establish by clear and specific evidence a prima facie case for each essential element of the claim in question. *Id.* § 27.005(c). If the party bringing the action satisfies that requirement, the action will still be dismissed if the movant "establishes an affirmative defense or other grounds on which the moving party is entitled to judgment as a matter of law." *Id.* § 27.005(d).[3]

[3] Prior to the 2019 amendments to the TCPA, the third step provided for dismissal "if the moving party establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim."

Step 1: Applicability of the Act

The TCPA applies to a legal action that is based on or is in response to the movant's exercise of the right of free speech, the right to petition, or the right of association. *Id.* § 27.005(b)(1). In both the trial court and this Court, the parties agree that TAC's and TEAF's claims for defamation and conspiracy to defame fall within the TCPA's concept of free speech. Accordingly, we need not address this first step further. *See Dallas Morning News, Inc. v. Hall*, 579 S.W.3d 370, 377 (Tex. 2019); *Caracio v. Doe*, No. 05-19-00150-CV, 2020 WL 38827, at *5 (Tex. App.—Dallas Jan. 3, 2020, no pet.) (mem. op.).

Step 2: Clear and Specific Evidence of a Prima Facie Case For the Essential Elements of the Legal Action

Appellants contend that TAC and TEAF have failed to come forward with clear and specific evidence of a prima facie case for the essential elements of their claims for defamation and conspiracy to defame. In this second step, the statute directs us to consider "the pleadings, evidence a court could consider under Rule 166a, Texas Rules of Civil Procedure, and supporting and opposing affidavits stating the facts on which the liability or defense is based." CIV. PRAC. & REM. § 27.006. We consider the pleadings and evidence in the light most favorable to the nonmovant. *Dyer v. Medoc Health Servs., LLC*, 573 S.W.3d 418, 424 (Tex. App.—Dallas 2019, pet. denied); *see also Locke Lord LLP v. Retractable Techs., Inc.*, No. 05-20-00884-CV, 2021 WL 1540652, at *2 (Tex. App.—Dallas Apr. 20, 2021, no

pet.) (mem. op.). As the supreme court has stated, in a TCPA proceeding "we assume [the] truth" of the nonmovant's evidence. *D Magazine Partners, L.P. v. Rosenthal*, 529 S.W.3d 429, 440 n.9 (Tex. 2017).

Appellees' Defamation Claim

The elements of the tort of defamation include "(1) the publication of a false statement of fact to a third party, (2) that was defamatory concerning the plaintiff, (3) with the requisite degree of fault, and (4) damages, in some cases." *In re Lipsky*, 460 S.W.3d 579, 593 (Tex. 2015) (orig. proceeding) (citing *WFAA–TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex.1998)). In this Court, appellants have challenged appellees' proof on the elements of a false statement of fact and the requisite degree of fault.[4]

Generally, clear and specific evidence means that the plaintiff 'must provide enough detail to show the factual basis for its claim.'" *Rosenthal*, 529 S.W.3d at 434 (quoting *Lipsky*, 460 S.W.3d at 591). The "clear and specific evidence" standard does not impose a heightened evidentiary burden or reject the use of circumstantial evidence when determining the nonmovant's prima-facie-case burden. *Andrews County v. Sierra Club*, 463 S.W.3d 867 (Tex. 2015). In a defamation case

[4] Appellants do not challenge appellees' evidence as to whether the statements at issue were defamatory, i.e., whether they tended "to injure [appellees'] reputation, to expose [them] to public hatred, contempt, ridicule, or financial injury, or to impeach [their] integrity, honesty, or virtue." *Backes v. Misko*, 486 S.W.3d 7, 24 (Tex. App.—Dallas 2015, pet. denied). Accusing someone of a crime is defamatory per se under Texas common law. *Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d 614, 638 (Tex. 2018). Such an accusation is "so obviously harmful that general damages, such as mental anguish and loss of reputation, are presumed." *Id.* (citing *Lipsky*, 460 S.W.3d at 596). Thus, appellants do not challenge evidence of the element of damages either.

implicating the TCPA, "pleadings and evidence that establishes the facts of when, where, and what was said, the defamatory nature of the statements, and how they damaged the plaintiff should be sufficient to resist a TCPA motion to dismiss." *Lipsky*, 460 S.W.3d at 591. We do not scrutinize individual statements; instead, we examine the larger context of the purportedly defamatory conduct by the movant. *See, e.g.*, *Bentley v. Bunton*, 94 S.W.3d 561, 581 (Tex. 2002) (considering series of statements during "Bunton's efforts over many months to prove Bentley corrupt").

(1) Evidence that Appellants' Statements Were Statements of Fact

Again, TAC and TEAF limit their defamation claim to assertions that they are criminal organizations and that their conduct in assisting a woman terminating her pregnancy literally amounts to murder.[5] To determine whether such assertions were statements of fact, we focus on the statements' verifiability and the context in which they were made. *Id.* at 583. An actionable statement must assert an objectively verifiable fact, not merely an opinion. *Campbell v. Clark*, 471 S.W.3d 615, 625 (Tex. App.—Dallas 2015, no pet.). However, "[m]erely expressing a defamatory statement in the form of an 'opinion' does not shield it from tort liability because opinions often imply facts." *Backes v. Misko*, 486 S.W.3d 7, 24 (Tex. App.—Dallas 2015, pet. denied); *see also, e.g.*, *Bentley*, 94 S.W.3d at 583 ("If a speaker says, 'In my

[5] In their letter to appellants seeking retraction, appellees stressed: "We are not asking you to change your political views or cease advocating for them. All we ask is that you . . . retract[] any allegations that these organizations or their agents have broken or are breaking any laws." Throughout this lawsuit, appellees have similarly limited their action to charges that they have committed crimes; appellees have not made any complaint implicating appellants' opinions concerning abortion.

opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth."). Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. *Bentley*, 94 S.W.3d at 583. Determining whether a statement is actionable fact or non-actionable opinion is a question of law. *Scripps NP Operating, LLC v. Carter*, 573 S.W.3d 781, 795 (Tex. 2019).

We ask, then, whether the statements at issue—that TAC and TEAF are criminal organizations and that they commit murder—are verifiable. Can we determine as a matter of fact whether the conduct with which a party has been charged is criminal or is murder? Stated differently, can we verify the status of the law as to a particular offense at the time of a particular statement? We conclude that we can, because our state's criminal law is gathered and written in the Texas Penal Code. And while it is true that a municipal ordinance may also identify conduct that constitutes an offense, *see* TEX. PENAL CODE ANN. § 1.03(a), the Texas Constitution provides that no such ordinance "shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State." TEX. CONST. art. XI, § 5; *City of Richardson v. Responsible Dog Owners of Tex.*, 794 S.W.2d 17, 19 (Tex. 1990).

Appellees' evidence included the statements alleged to be defamatory and identified when they were made and how they were published; appellants do not

dispute those fundamental facts. We conclude that the gist of these statements, i.e., that appellees are criminal organizations and that their conduct amounts to murder, can be verified by reference to the Texas Penal Code. Indeed, among the objectives of that code are "by definition and grading of offenses to give fair warning of what is prohibited and of the consequences of violation," and "to safeguard conduct that is without guilt from condemnation as criminal." PENAL § 1.02(2), (4).

We also look to the context in which the statements were made. Dickson purports to pronounce the salutary effect of the Waskom Ordinance on the status of the criminal law involving abortion in Texas; he describes it as "history in the making." He expresses confidence that "[i]n the coming weeks more cities in Texas will be taking the same steps that the City of Waskom took to outlaw abortion in their cities and become sanctuary cities for the unborn." As he describes the effect of this first ordinance, and the effect he anticipates passage of similar ordinances throughout the state will have, he is purporting to inform the public of a change in the criminal law. Dickson claims to have made significant efforts to determine the status of the law, and—based on those efforts—he made statements declaring appellees to be criminal organizations and murderers. We conclude he made those declarations, and continues to make them, as statements of fact. *See generally Bentley*, 94 S.W.3d at 585 ("The clear import of Bunton's statements on 'Q&A' was that Bentley was corrupt as a matter of verifiable fact, as Bunton continued to assert at trial.").

(2) Evidence that Appellants' Statements Were False.

Appellees' burden on this element was to produce clear and specific evidence that appellants' statements calling TAC and TEAF criminals and asserting that they are committing murder when they provide assistance to a woman seeking to terminate a pregnancy are false. The issue of falsity is generally a question of fact. *Bentley*, 94 S.W.3d at 587 (if evidence is disputed, falsity must be determined by finder of fact). In this case, however—where the gist of the defamation issue turns on the status of the criminal law concerning abortion—much of our analysis must be guided by that law.

We construe a series of allegedly defamatory statements as a whole, in light of the surrounding circumstances, and based upon how a person of ordinary intelligence would perceive them. *See Lipsky*, 460 S.W.3d at 594 ("While some of the statements may, in isolation, not be actionable, . . . the gist of his statements were that Range was responsible for contaminating his well water and the Railroad Commission was unduly influenced to rule otherwise."). We have concluded that a statement concerning the status of the criminal law is verifiable by reference to the penal code, whether directly or indirectly by comparing a local ordinance to that code. Accordingly, to adjudge appellees' evidence of falsity, we look first to the penal code to discern whether the conduct alleged by appellants could reasonably be declared criminal.

The penal code does not define the term "criminal" or its root word, "crime." As a general principle of statutory construction, when a term is not defined by statute it bears its common, ordinary meaning, which we typically determine by looking to dictionary definitions. *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 838 (Tex. 2018). Merriam-Webster defines a "crime" as "an illegal act for which someone can be punished by the government." *Crime*, MERRIAM-WEBSTER.COM DICTIONARY, www.merriam-webster.com/dictionary/crime (last visited Aug. 2, 2021). Appellees' evidence includes a copy of the original Waskom Ordinance, which provides:

> Neither the City of Waskom, nor any of its officers or employees, nor any district or county attorney, nor any executive or administrative officer or employee of any state or local governmental entity, shall take any steps to enforce this ordinance against a person or entity that commits an unlawful act described in Section C, unless and until the Supreme Court overrules *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and permits states and municipalities to once again enforce abortion prohibitions.

Thus, although the ordinance purports to outlaw abortion and any conduct that assists in the procurement of an abortion, it states on its face that no arm of the government can take any steps to enforce those prohibitions "unless and until" the Supreme Court's opinions securing a right to abortion are overruled. Thus, the ordinance itself serves as evidence that assisting women in terminating a pregnancy is not "an illegal act for which someone can be punished by the government," i.e., that such assistance is not a crime.

App. 152

The statements at issue, submitted by appellees as evidence below, repeatedly declare that abortion is murder. The ordinance asserts: "Abortion at all times and at all stages of pregnancy is declared to be an act of murder with malice aforethought." Appellees argue that the definition of murder in the Texas Penal Code establishes that this is false. The code states that a person commits the offense of murder "if he: (1) intentionally or knowingly causes the death of an individual." PENAL § 19.02(b)(1). And the code defines the term "individual" to mean "a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth." *Id.* § 1.07(a)(26). However, appellees correctly point out that the code makes a specific exception to the chapter on criminal homicide, stating:

> This chapter does not apply to the death of an unborn child if the conduct charged is:
>
> (1) conduct committed by the mother of the unborn child; [or]
>
> (2) a lawful medical procedure performed by a physician or other licensed health care provider with the requisite consent, if the death of the unborn child was the intended result of the procedure.

Id. § 19.06. Thus, the Texas Legislature has created a specific exception to the definition of murder for an abortion performed lawfully.

Section 19.06 became the law in Texas after our statutes outlawing abortion were declared unconstitutional by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973). Shortly after *Roe* was decided, the Texas Attorney General was asked to explain the status of Texas law concerning abortion and, after addressing *Roe* and its effect, he stated: "Therefore, there presently are no effective

statutes of the State of Texas against abortion, per se." Tex. Att'y Gen. Op. No. H-369, 3 (1974). When appellants made their statements decades later, *Roe v. Wade* and its progeny continued to be binding law in Texas. *See, e.g.*, *Ex parte Twedell*, 158 Tex. 214, 228 (1958) (Texas Supreme Court is "duty bound to follow the Supreme Court of the United States" when construing U.S. Constitution); *see also Ex parte Evans*, 537 S.W.3d 109, 111 (Tex. Crim. App. 2017) ("The ultimate authority on federal constitutional law is the U.S. Supreme Court.").[6]

If further clarification of the status of Texas criminal law regarding abortion were necessary, it was recently supplied by the Presiding Judge of the Texas Court of Criminal Appeals, who stated in unambiguous terms: "A mother choosing to abort her unborn child is not a crime under Texas law." *State v. Hunter*, No. PD-0861-20, 2021 WL 2449991, at *1 (Tex. Crim. App. June 16, 2021) (concurring in denial of review). The defendant in *Hunter* was charged, *inter alia*, with solicitation to commit capital murder based on text messages sent to his girlfriend requesting that she obtain

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[6] The Waskom Ordinance recites:

> *Roe v. Wade*, 410 U.S. 113 (1973), is a lawless and illegitimate act of judicial usurpation, which violates the Tenth Amendment by trampling the reserved powers of the States, and denies the people of each State a Republican Form of Government by imposing abortion policy through judicial decree[.]

Appellants cite no legal authority for the proposition that a city may, by adopting an ordinance, declare a United States Supreme Court opinion "lawless and illegitimate" and thereby ignore its pronouncements.

an abortion. *State v. Hunter*, 606 S.W.3d 836, 837 (Tex. App.—Austin 2020, pet. refused). The trial court granted a defense motion to quash and to dismiss the solicitation count of the indictment, and the court of appeals affirmed that order. *Id.* Presiding Judge Keller explained her reason for denying the State's petition for review, writing:

> My reason to refuse review is simple: The State's indictment does not charge a crime under the laws of the State of Texas, the Court of Appeals's resolution was correct, and the correct resolution *is so obvious* that we need not grant review. A mother choosing to abort her unborn child is not a crime under Texas law, so the defendant cannot be guilty of the offense of solicitation for soliciting such a crime.

Hunter, 2021 WL 2449991, at *1 (emphasis added). And as to the specific question of the charge of murder, she stated, "[T]he entire homicide chapter of the Penal Code, including the provision proscribing the offense of murder, 'does not apply' to the mother ending the unborn child's life." *Id.*

The Motion to Dismiss contends that the Waskom Ordinance negates section 19.06 of the penal code by declaring abortion to be unlawful within that city. However, neither the Waskom Ordinance, nor any other edict by local government, may conflict with this legislative exception. TEX. CONST. art. XI, § 5. And regardless of appellants' stated belief that *Roe* was incorrectly decided, our attorney general in 1974, and our highest criminal court today, have acknowledged that abortion is not a crime under Texas law.

Our task in this opinion, however, is not to rule on the viability of the Waskom Ordinance. In this preliminary proceeding under the TCPA we must limit our ruling

to whether the parties carried their respective burdens under that statute. We conclude that appellees have offered clear and specific evidence—and a cogent legal argument—making a prima facie case that they have not committed a crime generally, or murder specifically, while engaging in any conduct condemned by appellants. Accordingly appellees have carried their step-two burden as to the element of falsity.

We overrule appellants' first issue.

(3) Evidence that Appellants Acted With the Requisite Mental State

In their second issue, appellants argue that TAC and TEAF failed to produce clear and specific evidence sufficient to provide a prima facie case that appellants made the statements at issue with actual malice. If the person allegedly defamed is a private individual, he must establish the defamatory statements were made negligently; a public figure or official must prove actual malice. *Lipsky*, 460 S.W.3d at 593. "'Actual malice' in this context means that the statement was made with knowledge of its falsity or with reckless disregard for its truth." *Id.*

Appellants contend that appellees are "limited-purpose public figures," and thus, that appellees must establish appellants made their statements with actual malice as opposed to negligence. We apply a three-part test to determine whether a party qualifies as a limited-purpose public figure:

> (1) the controversy at issue must be 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;

(2) the plaintiff must have more than a trivial or tangential role in the controversy; and

(3) the alleged defamation must be germane to the plaintiff's participation in the controversy.

Neely v. Wilson, 418 S.W.3d 52, 70 (Tex. 2013). Whether a party is a limited-purpose public figure is a question of law for the court. *Id.* The "controversy at issue" in this case concerns the Waskom Ordinance and its ability to outlaw abortion within the city of Waskom. While we cannot adjudge how large a group of people are "discussing it," appellees' evidence includes Facebook posts, which are followed by many comments from the public. Moreover, appellees' evidence indicates that they have been contacted by a number of people who have heard about—and been confused by—the ordinance and appellants' statements concerning its effect. We also agree with appellants that people other than these parties are likely to feel the impact of its resolution, given that the Waskom Ordinance applies to all the city's residents and that Dickson's efforts have motivated a number of other cities to adopt similar ordinances. Thus the evidence satisfies the first factor of the *Neely* test.

However, the second and third factors of the test address the role of TAC and TEAF in this controversy. The evidence establishes that TAC and TEAF are solely targets of the ordinance, otherwise playing no role in creating the subject controversy. The Supreme Court has explained that "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979). "[T]he

allegedly defamatory statement cannot be what brought the plaintiff into the public sphere." *Neely*, 418 S.W.3d at 71. In this case, it was precisely the allegedly defamatory statements—beginning with the ordinance's declaration that TAC and TEAF were criminal organizations—that brought appellees into any public controversy involving the Waskom Ordinance. As the Connor and Jones affidavits state:

> It was not until Defendants began shopping around a draft ordinance in the summer of 2019 that [appellees] even realized that the Defendants and others were alleging [their] mission and operations were in violation of criminal law. Until that time, neither [appellees] nor [their] agents made any public statements or engaged in any debate about the question of whether [appellees were] currently violating any criminal law.

We conclude that these appellees were drawn involuntarily into the controversy spawned by the Waskom Ordinance and that they are not limited purpose public figures. *See Neely*, 418 S.W.3d at 71 ("[N]either the United States Supreme Court nor this Court has found circumstances in which a person involuntarily became a limited-purpose public figure.").

Accordingly, to meet their step-two burden on the element of appellants' mental state, appellees need only have offered clear and specific evidence of a prima facie case that appellants made the statements at issue negligently. To carry that burden, TAC and TEAF had to show that appellants knew or should have known that their statements calling appellees criminal organizations and murderers were

false. *See id.* at 72. They could make this showing of appellants' state of mind through circumstantial evidence. *Bentley*, 94 S.W.3d at 591.

Dickson's affidavits assert his belief that abortion remains a crime in Texas. He asserts that he consulted a lawyer, carefully researched "case law and legal scholarship," and concluded that (a) the Waskom Ordinance successfully rendered abortion unlawful, and thus a criminal offense in that city, and (b) because the Texas Legislature never repealed the abortion statutes declared unconstitutional by the Supreme Court in *Roe*, "the law of Texas continues to define abortion as a criminal offense."[7]

We begin the inquiry—as we did the inquiry into falsity—with the Waskom Ordinance itself. And we look again to the ordinance's directive that the government may not enforce its provisions "unless and until the Supreme Court overrules *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and permits states and municipalities to once again enforce abortion prohibitions." Just as this provision of the ordinance directly evidences the fact that abortion is not currently a crime, it provides circumstantial evidence that Dickson knew when he

[7] TAC and TEAF have argued that the Texas Legislature impliedly repealed the abortion statutes by regulating the process of abortion in Texas. In supplemental briefing, appellants point out that the legislature recently included the following statement in a statute that will become effective September 1, 2021:

> 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 § 2. In this opinion, we do not rely upon, and express no opinion concerning, the question of repeal by implication.

drafted the ordinance that abortion was not currently a crime. Likewise, Dickson's statement to CNN about the Waskom Ordinance implies that he knew that abortion was not currently a crime. He told CNN that "[t]he idea is this: in a city that has outlawed abortion, in those cities if an abortion happens, then later on when *Roe v. Wade* is overturned, those penalties can come crashing down on their heads." The statement may be ambiguous about what happens now, but it is clear that Dickson understood the penalties would only "come crashing down" *after* the status of the law changes. We conclude that the ordinance Dickson drafted, and his statements about it, evidence—at a minimum—a serious question in his mind as to whether abortion was currently a crime in Texas.

After *Roe* declared Texas's abortion statutes unconstitutional, the Texas Legislature transferred those laws to articles 4512.1 through 4512.6 of the Revised Civil Statutes. Appellants' second legal theory posits that unconstitutional-but-unrepealed criminal statutes continue to identify criminal conduct in Texas. This theory relies heavily upon a law review article, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933 (2018), authored by Jonathan Mitchell, who is serving as one of appellants' attorneys of record in this Court. Dickson's affidavit states that, although the article does not address the status of Texas's unconstitutional abortion statutes, it explains that "the Supreme Court lacks any power to formally revoke or 'strike down' statutes that it declares unconstitutional, and that those statutes continue to exist as laws until they are repealed by the legislature that enacted them." Dickson

states that this article "further confirmed [his] belief that abortion remains a 'criminal' offense under Texas law, despite the Court's ruling in *Roe v. Wade*."

Appellants' Texas legal authority for this conclusion is limited to a single footnote in a Texas Supreme Court case on an unrelated issue. In *Pidgeon v. Turner*, 538 S.W.3d 73, 75 (Tex. 2017), taxpayers sought an injunction to prohibit the city of Houston from providing employee benefits to same-sex spouses of city employees who had been legally married in other states. The trial court granted the injunction, but while the case was pending on appeal, the United States Supreme Court decided *Obergefell v. Hodges* and held that states may not exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples. 576 U.S. 644, 675–76 (2015). The *Pidgeon* court of appeals reversed the temporary injunction. 538 S.W.3d at 76. The Texas Supreme Court vacated the injunction and remanded the case to the trial court. It concluded that *Obergefell* did not require states to provide the same publicly funded benefits to all married persons, and the parties should have the opportunity to develop that issue, and others, at trial. *Id.* at 86–87. In the course of that discussion, the court dropped this footnote:

> We note that neither 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, even though the government may no longer constitutionally enforce it. Thus, the Texas and Houston DOMAs remain in place as they were before *Obergefell* and *De Leon*, which is why Pidgeon is able to bring this claim.

Id. at 88 n. 21.

App. 161

Our colleagues on the El Paso court of appeals have rejected reliance on the *Pidgeon* footnote in another context. In *Zimmerman v. City of Austin*, 620 S.W.3d 473, 476 (Tex. App.—El Paso 2021, pet. filed), Zimmerman challenged the city's allocation of $150,000 for "abortion access logistical support services." He alleged that the City's proposed expenditures were *ultra vires* because they violate the state's abortion laws, which made it a crime to assist a woman in procuring an abortion. *Id.* at 477. He argued that—because the Texas Legislature never repealed the statutes—"they remained in effect for any application outside of that addressed in *Roe v. Wade*." *Id.* at 477–78. He contended that the City's proposed expenditures "would in effect assist women in obtaining an abortion in conflict with these unrepealed statutes." *Id.* at 478.

The El Paso court identified four "problems" with relying on the *Pidgeon* footnote. We summarize them briefly:

> (1) The opinion in *Pidgeon* focused on two facts—*Obergefell* did not directly address the constitutionality of any laws in Texas, and the trial court had not yet had the opportunity to examine the scope and extent of *Obergefell*'s holding as it applied to the Texas laws at issue. *Roe*, in contrast, was fully litigated up to the United States Supreme Court, which specifically declared the Texas abortion statutes unconstitutional.
>
> (2) The rationale expressed by the *Pidgeon* footnote, i.e., that an unconstitutional statute "remains in place unless and until the body that enacted it repeals it," does not necessarily mean the Texas abortion statutes still have any enforceable effect. Even if the court does no more than declare that the courts will not enforce an unconstitutional law, no court would have a basis to enforce the Texas abortion statutes.

> (3) The *Pidgeon* footnote has not been validated by subsequent opinions from the Texas Supreme Court. Instead, the Court has more recently treated statutes that have been declared unconstitutional as null and void and has stated that an offense created by an unconstitutional statute "is not a crime." *See, e.g.*, *Ex parte E.H.*, 602 S.W.3d 486, 494 (Tex. 2020) (recognizing that an "unconstitutional law is void, and is no law," and that an offense created by an unconstitutional statute "is not a crime").
>
> (4) The Court of Criminal Appeals recognized over a century ago, when a legislative act is declared to be unconstitutional, the act is "absolutely null and void," and has "no binding authority, no validity [and] no existence." *See Ex parte Bockhorn*, 62 Tex. Crim. 651, 138 S.W. 706, 707 (Tex. Crim. App. 1911) (pronouncing that an unconstitutional law should be viewed as "lifeless," as "if it had never been enacted," given that it was "fatally smitten by the Constitution at its birth").

Id. at 484–85. The court concluded that the unconstitutional abortion statutes could not serve as a basis for Zimmerman to challenge the City's budget allocation. *Id.* at 486.

Likewise, we conclude that the *Pidgeon* footnote cannot defeat appellee's evidence and legal argument showing that appellants knew or should have known that appellees were not criminals or murderers under Texas law. To the extent that later cases have not implicitly overruled the footnote, we conclude that it represents no more than an interesting metaphysical theory of where and how unrepealed and unconstitutional statutes exist. The footnote does not support a legal argument that unrepealed and unconstitutional statutes can be enforced in any fashion. To the extent those statutes continue to exist, it is not as part of the criminal law of the State of Texas. A violation of such a statute is not a crime.

We conclude that anyone making a serious investigation into the status of Texas criminal law would learn that the overwhelming body of that law confirms that a mother's termination of a pregnancy is not a crime and is certainly not murder.[8] Thus, we conclude that TAC and TEAF have carried their TCPA step-two burden to make a prima facie case that appellants knew or should have known that their statements declaring appellees criminal organizations and accusing them of murder were false. We overrule appellants' second issue.

Appellees' Conspiracy Claim

Appellees also pleaded a claim against both appellants alleging that they conspired to defame appellees. In their fourth issue, appellants contend that appellees failed to produce clear and specific evidence of a conspiracy between them.

A civil conspiracy involves a combination of two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996) (orig. proceeding). "[A] defendant's liability for conspiracy depends on participation in some underlying tort for which the plaintiff seeks to hold at least one of the named defendants liable." *Id.*

[8] While discussing the higher standard of actual malice, our supreme court stated: "A failure to investigate fully is not evidence of actual malice; a purposeful avoidance of the truth is." *Bentley*, 94 S.W.3d at 596. A failure to investigate fully is evidence of negligence.

Thus, appellees' conspiracy claim depends on appellants' participation in the alleged defamation.

In a TCPA appeal, we do not analyze a trial court's refusal to dismiss a plaintiff's cause of action for conspiracy separately from its refusal to dismiss the plaintiff's underlying cause of action. *See Minett v. Snowden*, No. 05-18-00003-CV, 2018 WL 2929339, at *11 (Tex. App.—Dallas June 12, 2018, pet. denied) (mem. op.). Therefore, because we have determined that the trial court properly refused to dismiss appellants' defamation claim, we conclude that it did not err by refusing to dismiss the conspiracy to defame claim as well. *See id.*

We overrule appellant's fourth issue.

Derivative Liability of RLET

In their fifth issue, appellants argue that appellees have failed to produce clear and specific evidence establishing that RLET should be legally responsible for statements published only by Dickson. Appellants acknowledge that two of the statements identified by appellees' petition that were authored by Dickson were posted by RLET on its Facebook page. They contend that all other statements at issue were published only by Dickson.

Appellees, however, have pleaded that RLET is liable directly—not derivatively through respondeat superior—for Dickson's statements. Regardless, to the extent that such derivative liability is or becomes an issue in this case, it is not an issue for the TCPA. A motion to dismiss under the TCPA must be directed at a

"legal action." CIV. PRAC. & REM. § 27.003. That term is defined to mean "a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal, declaratory, or equitable relief." *Id.* § 27.001(6). The common law doctrine of respondeat superior is not the equivalent of these requests for relief: it is instead a recognition that "liability for one person's fault may be imputed to another who is himself entirely without fault solely because of the relationship between them." *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 540 (Tex. 2002). Because it is not a separate legal action, we do not address it separately from the underlying cause of action for defamation in a TCPA motion to dismiss. *Jones v. Pozner*, No. 03-18-00603-CV, 2019 WL 5700903, at *1 n.2 (Tex. App.—Austin Nov. 5, 2019, pet. denied) (mem. op.).

We overrule appellants' fifth issue.

Step 3: Proof of Defense as a Matter of Law

In their third issue, appellants contend that—even if appellees have produced clear and specific evidence of the essential elements of their defamation claim—appellants are entitled to judgment based on their defensive theories. Appellants' burden in the proceeding below was to establish such a defense or ground as a matter of law. CIV. PRAC. & REM. § 27.005(d). We consider all the evidence in determining whether appellants established a defensive ground. *D Magazine Partners, L.P. v. Rosenthal*, 475 S.W.3d 470, 480–81, 488 (Tex. App.—Dallas 2015), aff'd in part, rev'd in part, 529 S.W.3d 429 (Tex. 2017).

Truth or Substantial Truth

Both common law and statute provide that truth and substantial truth are defenses to defamation. *Neely*, 418 S.W.3d at 62 (citing CIV. PRAC. & REM. § 73.005, *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 115 (Tex. 2000)). Appellants contend that all statements for which they have been sued are true or, at the very least, substantially true.

Appellants' evidence of this defense is Dickson's affidavit testimony. There he states that he believes the Texas abortion statutes continue to impose criminal liability on anyone who "furnishes the means for procuring an abortion knowing the purpose intended," citing article 4512.2. He also testifies that he believes an ordinance that outlaws abortion within its city limits successfully eliminates the legal status of abortion in that city. And as to the pronouncements of the United States Supreme Court, Dickson states:

> I understand that the Court's decision in *Roe v. Wade* means that the federal judiciary is unlikely to sustain criminal convictions obtained under the Texas abortion statutes for as long as the Court adheres to the notion that abortion is a constitutional right. I also understand that *Roe* makes it unlikely that any prosecutor in Texas will attempt to bring criminal charges against abortion providers for their violations of state law because the courts are unlikely to uphold those convictions until *Roe* is overruled. But none of that changes the fact that the law of Texas continues to define abortion as a criminal offense. I believed (and continue to believe) that it is truthful to call abortion a "crime" under state law even if abortion providers are not currently being prosecuted for their criminal acts. I believed (and continue to believe) that a person or organization that breaks a criminal statute is a "criminal"—regardless of whether they are ultimately prosecuted and punished for their unlawful conduct.

App. 167

Finally, Dickson asserts that he did not act negligently (or with reckless disregard, as actual malice requires) in making the statements at issue because he "carefully researched the law and consulted with legal counsel" before publishing them.

A TCPA movant cannot carry his step-three burden with self-serving and conclusory affidavits. *Camp v. Patterson*, No. 03-16-00733-CV, 2017 WL 3378904, at *10 (Tex. App.—Austin Aug. 3, 2017, no pet.) (mem. op.). "Imagining that something may be true is not the same as belief." *Bentley*, 94 S.W.3d at 596.

To reach the legal conclusions he does, Dickson ignores or rejects out of hand: the clear language of penal code section 19.06 excepting abortion from the definition of murder; article XI, section 5 of the Texas Constitution, which prohibits a local government provision from conflicting with the penal code; opinions of the Texas Attorney General, the Texas Supreme Court, and the Texas Court of Criminal Appeals, which acknowledge that once declared unconstitutional, a statute has no legal effect; and the pronouncements of the United States Supreme Court that declare a constitutional right of a woman to terminate a pregnancy. He relies instead upon a law review article and a strained interpretation of a single footnote that subsequent cases may have implicitly overruled. *See In re Lester*, 602 S.W.3d 469, 483 (Tex. 2020) (J. Blacklock dissenting) ("[T]he Court overrules *sub silentio* its prior, correct statement—just three years ago—regarding judicial declarations of the unconstitutionality of statutes . . . After today, that statement from *Pidgeon* hangs

from a thread (though it remains correct). Under today's decision, statutes declared unconstitutional by courts no longer exist.").

The gist of appellants' statements is that TAC and TEAF are criminal organizations whose conduct amounts to murder. We concluded above that appellees' evidence and legal argument have made a prima facie case that those statements are not true. We have considered appellants' evidence and legal argument in rebuttal to appellees' proof. We conclude that appellants have failed to establish they are entitled to judgment as a matter of law on the defense of truth or substantial truth.

Constitutionally Protected Opinion

Appellants' argument here is straightforward: Dickson argues he has the right to believe that the Supreme Court was wrong in *Roe v. Wade* when it concluded there was a right to abortion in the Constitution. We agree that Dickson has a right to his opinion. But he has not been sued on the basis of that opinion; he has been sued for publishing statements that call TAC and TEAF criminal organizations that commit murder. If those statements are proven at trial to be defamatory, his personal opinions about *Roe v. Wade* will not provide him, or RLET, a defense. Simply put, while Dickson has the right to his opinions, he does not have the right to defame someone who disagrees with those opinions. TAC and TEAF have raised fact issues in support of their defamation claim. Appellants have not established that they are entitled to judgment as a matter of law on the basis of any constitutionally protected opinion.

Rhetorical Hyperbole

Finally, appellants argue that they are entitled to judgment as a matter of law because their statements were merely rhetorical hyperbole. We have called the concept of rhetorical hyperbole "extravagant exaggeration [that is] employed for rhetorical effect." *Backes*, 486 S.W.3d at 26. Such a statement is not actionable as defamation. *Id.* But to qualify as rhetorical hyperbole so as to be protected from a defamation claim, a statement must be understood by the ordinary reader as an overstatement, a rhetorical flourish, that is not intended to be taken literally. *See, e.g.*, *Greenbelt Co-op. Pub. Ass'n v. Bresler*, 398 U.S. 6, 14 (1970) ("even the most careless reader" would recognize that calling a proposal "blackmail" was rhetorical hyperbole used by those who considered the negotiating position extremely unreasonable; the record contained no evidence that anyone thought proposal maker had been charged with a crime); *Marble Ridge Capital LP v. Neiman Marcus Group, Inc.*, 611 S.W.3d 113, 125 (Tex. App.—Dallas 2020, pet. dism'd) (statement concerning "theft of assets" did not qualify as rhetorical hyperbole because reasonable persons would understand the phrase to mean that "entities with a rightful claim to the assets were being harmed by the designations and transactions about which [the party] complained").

Appellants contend that their statements accusing TAC and TEAF of aiding and abetting murder or criminal acts qualify as protected rhetorical hyperbole "so long as the context makes clear that the accusations refer only to plaintiffs'

involvement in abortion and nothing more." They support this contention with citations to two sources in which the speakers did not mean either (a) their allegations that abortion is murder literally or (b) that an activist who identified on his website a doctor who performed abortions was legally responsible for the doctor's murder. *See Horsley v. Rivera*, 292 F.3d 695, 702 (11th Cir. 2002) (when doctor who performed abortions was murdered, television host's calling anti-abortionist an "accomplice to murder" was rhetorical hyperbole; no reasonable viewer would conclude host was literally contending that activist could be charged with murder); *see also* 1 Rodney A. Smolla, *Law of Defamation* § 4:13 (2d ed. 2005) (protesters at abortion clinic with signs declaring doctor a murderer "obviously" do not intend charge to be taken literally). These sources do not stand for the proposition that one can use defamatory language and be protected so long as the language refers to abortion in some manner. Instead, they instruct that—to avoid liability for defamation on the basis of rhetorical hyperbole—the speaker must show that a reasonable person would not understand that he meant the statement literally.

In this case, RLET published Dickson's assertion on Facebook: "We said what we meant and we meant what we said. Abortion is illegal in Waskom, Texas." And in a June 14 Facebook post, Dickson posed the key question and then answered it himself:

> Is abortion literally murder?
>
> Yes. The fact that 'abortion is literally murder' is why so many people want to outlaw abortion within the city limits of their cities. If you want

App. 171

> to see your city pass an enforceable ordinance outlawing abortion be sure to sign the online petition.

We conclude that a reasonable person reading appellants' statements calling TAC and TEAF criminals and murderers could believe that appellants intended the statements literally. When we consider all the evidence before the trial court, we conclude appellants failed to establish as a matter of law that the statements at issue were merely rhetorical hyperbole.

Appellants have failed to carry their third-step burden to prove they are entitled to judgment as a matter of law on any of their defensive theories. We overrule their third issue.

CONCLUSION

We affirm the trial court's order.

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/Bill Pedersen, III//
BILL PEDERSEN, III
JUSTICE

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

MARK LEE DICKSON AND RIGHT TO LIFE EAST TEXAS, Appellants

No. 05-20-00988-CV V.

THE AFIYA CENTER AND TEXAS EQUAL ACCESS FUND, Appellees

On Appeal from the 116th Judicial District Court, Dallas County, Texas Trial Court Cause No. DC-20-08104. Opinion delivered by Justice Pedersen, III. Justices Osborne and Nowell participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee The Afiya Center and Texas Equal Access Fund recover their costs of this appeal from appellant Mark Lee Dickson and Right To Life East Texas.

Judgment entered this 4th day of August, 2021.

2021 WL 3930728
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.

Court of Appeals of Texas, Amarillo.

Mark Lee DICKSON and Right to Life East Texas, Appellants
v.
LILITH FUND FOR REPRODUCTIVE EQUITY, Appellee

No. 07-21-00005-CV
|
September 2, 2021
|
Rehearing Denied Oct. 7, 2021

On Appeal from the 53rd District Court, Travis County, Texas, Trial Court No. D-1-GN-20-003113, Honorable Amy Clark Meachum, Presiding

Attorneys and Law Firms

H. Dustin Fillmore III, Jonathan F. Mitchell, D. Bryan Hughes, Charles W. Fillmore, for Appellants.

Elizabeth G. Myers, John P. Atkins, Jennifer R. Ecklund, for Appellee.

Before QUINN, C.J., and PARKER and DOSS, JJ.

MEMORANDUM OPINION

Brian Quinn, Chief Justice

***1** "Abortion is Freedom," so said Lilith. " 'Abortion is Freedom' in the same way that a wife killing her husband would be freedom – Abortion is Murder," so said Dickson.

"Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) . . . and any other rulings or opinions from the Supreme Court that purport to establish or enforce a 'constitutional right' to abort a pre-born child, are declared to be unconstitutional usurpations of judicial power," so said the City of Waskom. And, a municipal ordinance purporting to criminalize abortion, which ordinance the litigants concede the municipality lacked authority to enact. These circumstances underlie the defamation suit from which this appeal arose. But, does the debate surrounding them depict defamation or protected opinion? That is the dispositive question before us.

In 2019, the City of Waskom, in Harrison County, Texas, enacted a municipal ordinance decrying *Roe* and outlawing abortion in all but a few forms. Other rural cities followed suit. Under the ordinance, entities participating or facilitating abortions were also designated to be criminal organizations. Mark Lee Dickson, an outspoken advocate for the ordinance, accused the Lilith Fund for Reproductive Equity of being a criminal organization and committing murder under that ordinance because it helped others obtain abortions permissible within the scope of *Roe*. Lilith returned volley by purchasing a billboard in Waskom declaring "Abortion is Freedom." Dickson then referred to the billboard in describing Lilith (and NARAL Pro-Choice Texas) as "advocates for the murder of those innocent lives."

Lilith sued Dickson and the entity he represented, Right to Life East Texas, for defamation and conspiracy. Would a person of reasonable intelligence and learning, and who uses care and prudence in evaluating circumstances believe Dickson is alleging Lilith committed a criminal act? The answer to that question controls the disposition of this appeal. We answer "no" because the accusation is an "opinion masquerading as fact" under the entire context of the conversation being had.

The appeal comes to us as another mole to show its head in the field laid by the Texas Citizens Participation Act (TCPA).[1] TEX. CIV. PRAC. & REM. CODE ANN. § 27.001 *et seq.* (West & Supp. 2020). The trial court denied, through silence, the motion of Dickson and Right to Life East Texas (East TX) to dismiss the defamation and conspiracy suit. In denying their TCPA motion, the trial court allegedly erred. We agree, reverse, and remand.[2]

[1] *See* *Western Mktg. v. AEG Petroleum, LLC*, 616 S.W.3d 903, 909 (Tex. App.—Amarillo 2021, pet. filed) (describing an interlocutory appeal involving the TCPA as mimicking "a game of 'whack-a-mole'; as soon as the court disposes of one, another pops up. And each leads down the tortuous winding TCPA mole-hole").

[2] Because this appeal was transferred from the Third Court of Appeals, we are obligated to apply its precedent when available in the event of a conflict between the precedents of that court and this Court. *See* TEX. R. APP. P. 41.3.

***2** We do not belabor disposition of the appeal by dissertation on the standard of review applicable in TCPA appeals. Others have expounded upon it at sufficient length. *See, e.g., Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 891 (Tex. 2018) (discussing same); *Zilkha-Shohamy v. Corazza*, No. 03-20-00380-CV, 2021 WL 3009034, 2021 Tex. App. LEXIS 5698 (Tex. App.—Austin July 16, 2021, no pet. h.) (mem. op.) (same); *Casey v. Stevens*, 601 S.W.3d 919, 922–24 (Tex. App.—Amarillo 2020, no pet.) (doing same).

Furthermore, all parties agree that the TCPA applies. The debate concerns two areas, though. One involves whether Lilith established a prima facie case for each element of its claims through clear and specific evidence. TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c) (stating that a court may not dismiss a legal action if the party bringing it "establishes by clear and specific evidence a prima facie case for each essential element of the claim in question"). The other concerns whether Dickson established an affirmative defense or other ground entitling him to dismissal as a matter of law. *Id.* § 27.005(d) (obligating the trial court to dismiss the action "if the moving party establishes an affirmative defense or other grounds on which the moving party is entitled to judgment as a matter of law"). Irrespective of whether approached as an element of defamation or a defense to it, the result is the same. On the record before us, we conclude as a matter of law that Dickson's comments were inactionable opinion as discussed below.

We begin our journey through the mole field by addressing argument pertaining to the elements of defamation. Dickson contends that Lilith failed to establish a prima facie case on each one. The elements of the claim consist of 1) the publication of a false statement of fact to a third party, 2) that was defamatory and concerned the plaintiff, and 3) was made with the requisite degree of fault. *Dallas Morning News, Inc. v. Hall*, 579 S.W.3d 370, 377 (Tex. 2019); *Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d 614, 623 (Tex. 2018). Such a statement of fact must be more than false, abusive, unpleasant, or objectionable; it must be defamatory. *Rehak Creative Servs. v. Witt*, 404 S.W.3d 716, 728 (Tex. App.—Houston [14th Dist.] 2013, pet. denied). It must be of the ilk that tends to injure one's reputation and "expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation or to publish the natural defects of anyone and thereby expose the person to public hatred, ridicule, or financial injury." TEX. CIV. PRAC. & REM. CODE ANN. § 73.001 (West 2017); *Rehak Creative Servs.*, 404 S.W.3d at 728. And, whether the statement can be viewed as such involves an objective, not subjective, assessment. *Id.* In other words, we look at it through the eyes of an ordinary prudent person with ordinary intelligence

and assess how that person would perceive it when viewing its entire context. *Carr v. Brasher*, 776 S.W.2d 567, 570 (Tex. 1989) (stating that the allegedly libelous statement must be construed as a whole, in light of surrounding circumstances based upon how a person of ordinary intelligence would perceive the entire statement); *Freiheit v. Stubbings*, No. 03-12-00243-CV, 2014 WL 7463242 at *——, 2014 Tex. App. LEXIS 13889 at *5 (Tex. App.—Austin Dec. 31, 2014, no pet.) (mem. op.) (quoting *Carr*, 776 S.W.2d at 570). Such a person is neither "omniscient" nor a "dullard." *See Rehak Creative Servs.*, 404 S.W.3d at 728. An ordinary prudent person is one who uses care and prudence when evaluating circumstances and one who has reasonable intelligence and learning. *Id.* And, unless the words in play are ambiguous, our assessment of their potential for defaming implicates a question of law, *id.* at 728–29, which frees us from deferring to the trial court's interpretation. *Gulf Chem. & Metallurgical Corp. v. Hegar*, 460 S.W.3d 743, 747–48 (Tex. App.—Austin 2015, no pet.) (stating that the reviewing court does not defer to the trial court on questions of law); *see also Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d at 624 (stating that if the court determines the language of the statement is ambiguous then a jury should decide the statement's meaning).

***3** We reemphasize that the obligatory viewpoint is that of the ordinary prudent person considering the entire context of the words. That context generally includes more than the words themselves. A myriad of circumstances, including such things like "accompanying statements, headlines, pictures, and the general tenor and reputation of the source itself" help define that context. *City of Keller v. Wilson*, 168 S.W.3d 802, 811 (Tex. 2005); *Rehak Creative Servs.*, 404 S.W.3d at 729.

Another matter bears mentioning before we turn to our analysis. It concerns certain forms of words or phrases which, again from their context, are opinions or rhetorical hyperbole. Neither may be actionable. *See Scripps NP Operating, LLC v. Carter*, 573 S.W.3d 781, 795 (Tex. 2019) (discussing when opinion may be non-actionable); *Backes v. Misko*, 486 S.W.3d 7, 26 (Tex. App.—Dallas 2015, no pet.) (observing that rhetorical hyperbole is inactionable). The former fall within two categories. The first category encompasses statements which are not verifiable as false. *Scripps NP Operating, LLC*, 573 S.W.3d at 795; *Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d at 639. The second encompasses statements which may be verifiable as false but their entire context nevertheless reveals them to be merely opinions masquerading as fact. *Scripps NP Operating, LLC*, 573 S.W.3d at 795; *Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d at 639. As said in *Dallas Morning News*, "statements that cannot be verified, as well as statements that cannot be understood to convey a verifiable fact [given their entire context], are opinions." *Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d at 639. And, whether the utterances at issue fall within either category also entails a question of law. *Id.*

As for rhetorical hyperbole, such often are characterized as extravagant exaggerations utilized for rhetorical effect, *Campbell v. Clark*, 471 S.W.3d 615, 626–27 (Tex.

App.—Dallas 2015, no pet.); *ABC, Inc. v. Gill*, 6 S.W.3d 19, 30 (Tex. App.—San Antonio 1999, pet. denied), or vigorous epithets. *Greenbelt Coop. Pub. Ass'n v. Bresler*, 398 U.S. 6, 14, 90 S. Ct. 1537, 26 L. Ed. 2d 6 (1970). Indeed, a sister court recently described such speech statements that an "ordinary reader" would view as an overstatement or rhetorical flourish and unintended to be taken literally. *Dickson v. Afiya Ctr.*, No. 05-20-00988-CV, 2021 WL 3412177 at *13, 2021 Tex. App. LEXIS 6261 at *37 (Tex. App.—Dallas Aug. 4, 2021, no pet. h.) (mem. op.). We read that court's reference to an "ordinary reader" as meaning the reasonable person to which we previously alluded; after all, it is the eyes of that person through which we peer in gauging whether statements are defamatory. And, as with opinions, whether an utterance is rhetorical hyperbole, given its context, is a question of law. *See id.* at *11.

We now turn to our analysis of the statements underlying Lilith's suit. They were uttered over a period of time and generally related to the aforementioned ordinance and in response to Lilith's own advocacy. For instance, Dickson congratulated Waskom for being the first to become a sanctuary city, proclaimed that abortion was "outlawed" there, and noted that organizations which perform or assist with obtaining abortions were "criminal organizations." The litany of organizations identified in his message included Lilith. Two other statements by Dickson were:

> "Abortion is Freedom" in the same way that a wife killing her husband would be freedom - Abortion is Murder. The Lilith Fund and NARAL Pro-Choice Texas are advocates for abortion, and since abortion is the murder of innocent life, this makes these organizations advocates for the murder of those innocent lives. This is why the Lilith Fund and NARAL Pro-Choice Texas are listed as criminal organizations in Waskom, Texas. They exist to help pregnant Mothers murder their babies.
>
> ***4** [and]
>
> Nothing is unconstitutional about this ordinance. Even the listing of abortion providers as examples of criminal organizations is not unconstitutional. We can legally do that. This is an ordinance that says murdering unborn children is outlawed, so it makes sense to name examples of organizations that are involved in murdering unborn children. That is what we are talking about here: The murder of unborn children. Also, when you point out how the abortion restrictions in 2013 cost the State of Texas over a million dollars, you should also point out how many baby murdering facilities closed because of those restrictions. We went from over 40 baby murdering facilities in the State of Texas to less than 20 baby murdering facilities in the State of Texas in just a few years. Even with the win for abortion advocates with *Whole Woman's Health v. Hellerstedt*, how many baby murdering facilities have opened back up? Not very many at all. So thank you for reminding us all that when we stand against the murder of innocent children, we really do save a lot of lives.

All of the foregoing statements pertain to the campaigns of Dickson and East TX to end abortion and pursue the reversal of *Roe v. Wade*. No one can reasonably deny that both topics have been the stuff of ever-increasing discussion and attention even before 1973. Nor can one reasonably deny that abortion and the Supreme Court's decisions on the issue trigger emotional, intellectual, moral, and religious debate.[3] They have and will continue to do so.[4] They have and will continue to influence elections and legislation. One within the legal standard of neither a dullard nor omniscient but, rather, of reasonable intelligence and learning who utilizes care and prudence in evaluating circumstances would know that to be an accurate assessment of the debate's effect.

3 *See* Frank Pavone, *Democrats Exalt Their Woman, Pope Francis Exalts His: Column*, USA TODAY, Sept. 4, 2016, https://www.usatoday.com/story/opinion/2016/09/04/mother-teresa-clinton-abortion-francis-democratic-platform-hyde-amendment-beautification-column/89729254 (describing Mother Teresa's stance on abortion as expressed during a National Prayer Breakfast).

4 Treva B. Lindsey, *A Concise History of the US Abortion Debate*, THE CONVERSATION, June 10, 2019.

Similarly, those involved on both sides of the debate have utilized colorful rhetorical devices to garner attention to the issues. On the "pro-choice" side, for example, Lilith refers to abortion as being "freedom." On the "pro-life" side, medical personnel have been called "murderers."[5] The same is true of mothers undergoing an abortion.[6] No doubt, many uttering these words believe in their accuracy, advocate for others to believe it, and have the ability to rationally explain the basis of their belief. Yet, as Lilith implicitly acknowledged, a reasonable person would understand the label to be a non-defamatory opinion or hyperbole given its context.[7]

5 *See, e.g.*, Alexa N. D'Angelo, Supporters, Opponents Rally at Planned Parenthood Sites in Arizona, U.S., THE REPUBLIC, Aug. 22, 2018, https://www.azcentral.com/story/news/local/phoenix/2015/08/22/supporters-opponents-rally-planned-parenthood-sites-arizona-us/32203591/; Diana Pearl, *Free Speech Outside the Abortion Clinic*, THE ATLANTIC, Mar. 19, 2015, https://www.theatlantic.com/health/archive/2015/03/free-speech-outside-the-abortion-clinic/388162/; Michael Sheridan, *Rep. Randy Neugebaurer: I Yelled 'Baby Killer' During Rep. Bart Stupak's Speech*, NY DAILY NEWS, Mar. 22, 2010, https://www.nydailynews.com/news/politics/rep-randy-neugebauer-yelled-baby-k

iller-rep-bart-stupak-speech-article-1.173917.

6 *See* Frank Pavone, *Democrats Exalt Their Woman, Pope Francis Exalts His: Column*, USA TODAY, Sept. 4, 2016, https://www.usatoday.com/story/opinion/2016/09/04/mother-teresa-clinton-abortion-francis-democratic-platform-hyde-amendment-beautification-column/89729254 (reiterating Mother Teresa's statement that "[T]he greatest destroyer of peace today is abortion, because it is a war against the child, a direct killing of the innocent child, murder by the mother herself. And if we accept that a mother can kill even her own child, how can we tell other people not to kill one another?").

7 Lilith wrote in its appellee's brief that "[g]enerally calling abortion 'murder' alone is not defamatory."

***5** Another item of context involves the ordinance itself. Its constitutionality is not before us. Nevertheless, the municipal edict frames Dickson's comments. Several observations warrant mention. First, Dickson represented to this Court through his attorney that 1) "because Waskom is a city, it doesn't have the power to create crimes under city law"; 2) "[t]hat is only something the state legislature can do"; and 3) "Waskom doesn't have the authority to make something a crime."[8]

8 Because Dickson conceded that Waskom lacked the authority to criminalize abortion, he was actually referring to the Texas statute implicated in *Roe*. Yet, the latter was not a part of the context underlying his comments. He never mentioned the statute in them, only the Waskom ordinance.

Moreover, the Waskom city council described *Roe* as "a lawless and illegitimate act of judicial usurpation, which violates the Tenth Amendment by trampling the reserved powers of the States and denies the people of each State a Republican Form of Government by imposing abortion policy through judicial decree." Nevertheless, enforcement of the alleged criminal aspect of the ordinance was expressly conditioned upon the rescission of *Roe*. The pertinent language consisted of the city council saying that 1) "no punishment shall be imposed upon the mother of the pre-born child that has been aborted" and 2) "[i]f (and only if) the Supreme Court overrules *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), and *Planned Parenthood v. Casey*, 505

U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992), a corporation or entity that commits an unlawful act described in Section C shall be subject to the maximum penalty permitted under Texas law for the violation of a municipal ordinance governing public health, and each violation shall constitute a separate offense." Conditioning the imposition of any criminal penalty on the rescission of the very Supreme Court precedent the body attacked is novel. Without the risk of punishment being levied, it is unclear if anyone possesses standing to challenge the constitutionality of the ordinance's penal effect before a court for final adjudication. At the same time, it arguably permits individuals to refer to the corporations in terms suggesting illegal conduct. As noted above, the constitutionality of the ordinance is not being challenged on appeal.

Third, while Texans are not presumed to agree with the law, they are presumed to know it. *See S. C. v. Tex. Dep't of Family & Protective Servs.*, No. 03-19-00965-CV, 2020 WL 6750561 at *——, 2020 Tex. App. LEXIS 9122 at *6 (Tex. App.—Austin Nov. 18, 2020, no pet.) (mem. op.) (quoting *E.H. Stafford Mfg. Co. v. Wichita Sch. Supply Co.*, 118 Tex. 650, 655, 23 S.W.2d 695, 697 (1930)). The proverbial reasonable person alluded to earlier would presumably have that knowledge as well. And, an aspect of that knowledge consists of the United States Constitution prescribing that it is "the supreme Law of the Land." U.S. CONST. art. VI, cl. 2. Another aspect consists of the dictate that the United States Supreme Court is the arbiter of what the Constitution says. *See* *Marbury v. Madison*, 5 U.S. 1 Cranch 137, 2 L. Ed. 60 (1803). One cannot escape nor ignore the effect of those legal principles; so, a reasonable person would or should know that a municipality cannot itself reverse Supreme Court precedent such as *Roe* and punish that which it allowed. Waskom acknowledged as much by expressly conditioning the punitive effect of its ordinance on the vitiation of *Roe.*

Again, all the foregoing depicts the context of Dickson's words when pursuing his campaign to end abortion and inspire the eventual nullification of *Roe.* And, that context leads us to conclude that a reasonable person of ordinary learning would deem his accusation about Lilith being a criminal entity engaged in criminal acts as opinion masquerading as a statement of fact uttered in the course of advocating for a change in law. His words differ little from language that even Lilith admits is inactionable, that is, language which likens individuals who facilitate abortion as murderers. Nor does his allusion to the Waskom ordinance as basis for his accusation change our view. The ordinance itself describes abortion as murder, just as many protesters have done over the decades.

***6** Simply put, Dickson's comments were made within the context of a political, ethical, moral, and legal stage built in part by the Waskom city council. He expounded about how Waskom "got it right" in purporting to outlaw abortion while also castigating *Roe* and the court rendering the decision. He urged others to believe that those facilitating abortion were criminals much in the same way that others liken those who perform

abortions to murderers. Members on both sides of the debate no doubt believe their positions to be true. Members on both sides offer argument rationalizing their respective positions. And, no doubt, some may well believe Dickson when saying that Lilith is a criminal organization because Waskom enacted an ordinance purporting to nullify Supreme Court precedent. Yet, the legal standard by which we must abide is the "reasonable person." He or she " 'does not represent the lowest common denominator, but reasonable intelligence and learning. He or she can tell the difference between satire and sincerity.' " *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 157 (Tex. 2004) (quoting *Patrick v. Superior Court*, 22 Cal. App. 4th 814, 821, 27 Cal. Rptr. 2d 883, 887 (1994)). And, "the question [becomes] not whether some actual readers [or listeners] were [misled], as they inevitably will be, but whether the hypothetical reasonable reader could be." *Id.* Putting aside subjective beliefs, we focus on the single objective inquiry of whether the utterance can be reasonably understood as stating actual fact. *See id.* (involving satire). Even if what Dickson uttered could be characterized as statements of fact and even if some readers were to believe them, the context surrounding those utterances would lead a reasonable person of ordinary learning with a penchant for reasonable investigation to see them as opinion masquerading as fact or rhetorical hyperbole masquerading as fact.

Moreover, their entire context is the circumstance which causes us to disagree with the recent conclusions of our sister court in *Dickson v. Afiya Center*. The panel writing that opinion deemed statements uttered by Dickson (mirroring those said here) to be statements of fact rather than opinion. It so concluded because it found them to be verifiable. *Dickson v. Afiya Ctr.*, 2021 WL 3412177, at *——, 2021 Tex. App. LEXIS 6261, at *11–13. And, they were verifiable because they purported to represent the status of the criminal law in Texas while existing penal provisions could verify their accuracy or inaccuracy. *Id.* Yet, as mentioned earlier, non-actionable opinion may take two forms, according to our Supreme Court in *Dallas Morning News*. One encompasses statements of fact subject to verification. That is the category upon which the *Afiya Center* court relied. It said nothing of the second category, that being comments appearing to be statements of fact subject to verification but by their entire context are nothing other than opinion masquerading as fact. That is the category in which we conclude that Dickson's comments fall, as a matter of law.

Admittedly, we agree with the *Afiya Center* panel when it says that simply interjecting the word "abortion" into the discussion does not *ipso facto* make the statements inactionable opinion. Falsely accusing one of "robbing a bank to fund an abortion protest" most likely would not insulate the defamation about robbing a bank merely because the word "abortion" were interjected into the passage. That is not what we have here, though. As explained earlier, Dickson's words were part of the abortion debate itself, as was the municipal enactment to which he referred and which supported his viewpoint. That context is what the *Afiya Center* did not address, and that context is an

indisputable part of the entire canvas upon which he left his words.

The same is no less true of the panel's conclusion regarding rhetorical hyperbole. It found that his words were not such because a reasonable person could believe that Dickson "intended the statements literally." *Id.* at *39. A person outside an abortion clinic yelling that those inside are "murderers" no doubt believes and wants others to believe that terminating a fetus' viability is intentionally killing a human life, i.e., murder. If what some person speaking the words believed and intended alone were the test then he or she would be engaging in defamation under the *Afiya Center* analysis. Yet, the focus is not on what the speaker intended but what a reasonable person would believe, given the context involved. The *Afiya Center* panel does not consider the entire context of Dickson's words but only whether he intended them to be taken literally. That is an inaccurate focus. Again, the context of words is all important.

Being opinion, the comments uttered by Dickson and upon which Lilith based its suit are inactionable. They being inactionable, East TX's purported conspiracy to engage in publishing them is equally inactionable. Consequently, the trial court erred in failing to dismiss Lilith's suit under the TCPA.

***7** Thus, we reverse the trial court's *sub silentio* decision denying dismissal and render judgment dismissing the claims of defamation and conspiracy averred by the Lilith Fund for Reproductive Equity against Mark Lee Dickson and Right to Life East Texas. We also remand the cause to the trial court with directions to 1) award Dickson and Right to Life East Texas court costs and reasonable attorney's fees per § 27.009(a)(1) of the Texas Civil Practice and Remedies Code and 2) determine sanctions, if any, per § 27.009(a)(2) of the same.

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PENAL CODE

TITLE 5. OFFENSES AGAINST THE PERSON

CHAPTER 19. CRIMINAL HOMICIDE

Sec. 19.01. TYPES OF CRIMINAL HOMICIDE. (a) A person commits criminal homicide if he intentionally, knowingly, recklessly, or with criminal negligence causes the death of an individual.

(b) Criminal homicide is murder, capital murder, manslaughter, or criminally negligent homicide.

Acts 1973, 63rd Leg., p. 883, ch. 399, Sec. 1, eff. Jan. 1, 1974. Amended by Acts 1973, 63rd Leg., p. 1123, ch. 426, art. 2, Sec. 1, eff. Jan. 1, 1974; Acts 1993, 73rd Leg., ch. 900, Sec. 1.01, eff. Sept. 1, 1994.

Sec. 19.02. MURDER. (a) In this section:

(1) "Adequate cause" means cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection.

(2) "Sudden passion" means passion directly caused by and arising out of provocation by the individual killed or another acting with the person killed which passion arises at the time of the offense and is not solely the result of former provocation.

(b) A person commits an offense if he:

(1) intentionally or knowingly causes the death of an individual;

(2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or

(3) commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

(c) Except as provided by Subsection (d), an offense under this

section is a felony of the first degree.

(d) At the punishment stage of a trial, the defendant may raise the issue as to whether he caused the death under the immediate influence of sudden passion arising from an adequate cause. If the defendant proves the issue in the affirmative by a preponderance of the evidence, the offense is a felony of the second degree.

Acts 1973, 63rd Leg., p. 883, ch. 399, Sec. 1, eff. Jan. 1, 1974. Amended by Acts 1973, 63rd Leg., p. 1123, ch. 426, art. 2, Sec. 1, eff. Jan. 1, 1974; Acts 1993, 73rd Leg., ch. 900, Sec. 1.01, eff. Sept. 1, 1994.

Sec. 19.03. CAPITAL MURDER. (a) A person commits an offense if the person commits murder as defined under Section 19.02(b)(1) and:

(1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;

(2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, arson, obstruction or retaliation, or terroristic threat under Section 22.07(a)(1), (3), (4), (5), or (6);

(3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;

(4) the person commits the murder while escaping or attempting to escape from a penal institution;

(5) the person, while incarcerated in a penal institution, murders another:

(A) who is employed in the operation of the penal institution; or

(B) with the intent to establish, maintain, or participate in a combination or in the profits of a combination;

(6) the person:

(A) while incarcerated for an offense under this section or Section 19.02, murders another; or

(B) while serving a sentence of life imprisonment or a term of 99 years for an offense under Section 20.04, 22.021, or 29.03, murders another;

(7) the person murders more than one person:

(A) during the same criminal transaction; or

(B) during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct;

(8) the person murders an individual under 10 years of age;

(9) the person murders an individual 10 years of age or older but younger than 15 years of age; or

(10) the person murders another person in retaliation for or on account of the service or status of the other person as a judge or justice of the supreme court, the court of criminal appeals, a court of appeals, a district court, a criminal district court, a constitutional county court, a statutory county court, a justice court, or a municipal court.

(b) An offense under this section is a capital felony.

(c) If the jury or, when authorized by law, the judge does not find beyond a reasonable doubt that the defendant is guilty of an offense under this section, he may be convicted of murder or of any other lesser included offense.

Added by Acts 1973, 63rd Leg., p. 1123, ch. 426, art. 2, Sec. 1, eff. Jan. 1, 1974. Amended by Acts 1983, 68th Leg., p. 5317, ch. 977, Sec. 6, eff. Sept. 1, 1983; Acts 1985, 69th Leg., ch. 44, Sec. 1, eff. Sept. 1, 1985; Acts 1991, 72nd Leg., ch. 652, Sec. 13, eff. Sept. 1, 1991; Acts 1993, 73rd Leg., ch. 715, Sec. 1, eff. Sept. 1, 1993; Acts 1993, 73rd Leg., ch. 887, Sec. 1, eff. Sept. 1, 1993; Acts 1993, 73rd Leg., ch. 900, Sec. 1.01, eff. Sept. 1, 1994; Acts 2003, 78th Leg., ch. 388, Sec. 1, eff. Sept. 1, 2003.

Amended by:

Acts 2005, 79th Leg., Ch. 428 (S.B. 1791), Sec. 1, eff. September 1, 2005.

Acts 2011, 82nd Leg., R.S., Ch. 1209 (S.B. 377), Sec. 1, eff. September 1, 2011.

Acts 2019, 86th Leg., R.S., Ch. 1214 (S.B. 719), Sec. 2, eff. September 1, 2019.

Sec. 19.04. MANSLAUGHTER. (a) A person commits an offense if he recklessly causes the death of an individual.

(b) An offense under this section is a felony of the second degree.

Acts 1973, 63rd Leg., p. 883, ch. 399, Sec. 1, eff. Jan. 1, 1974. Renumbered from Penal Code Sec. 19.04 by Acts 1973, 63rd Leg., p. 1123, ch. 426, art. 2, Sec. 1, eff. Jan. 1, 1974. Amended by Acts 1987, 70th Leg., ch. 307, Sec. 1, eff. Sept. 1, 1987. Renumbered from Penal Code Sec. 19.05 and amended by Acts 1993, 73rd Leg., ch. 900, Sec. 1.01, eff. Sept. 1, 1994.

Sec. 19.05. CRIMINALLY NEGLIGENT HOMICIDE. (a) A person commits an offense if he causes the death of an individual by criminal negligence.

(b) An offense under this section is a state jail felony.

Acts 1973, 63rd Leg., p. 883, ch. 399, Sec. 1, eff. Jan. 1, 1974. Renumbered from Penal Code Sec. 19.06 by Acts 1973, 63rd Leg., p. 1123, ch. 426, art. 2, Sec. 1, eff. Jan. 1, 1974. Renumbered from Penal Code Sec. 19.07 and amended by Acts 1993, 73rd Leg., ch. 900, Sec. 1.01, eff. Sept. 1, 1994.

Sec. 19.06. APPLICABILITY TO CERTAIN CONDUCT. This chapter does not apply to the death of an unborn child if the conduct charged is:

(1) conduct committed by the mother of the unborn child;

(2) a lawful medical procedure performed by a physician or other licensed health care provider with the requisite consent, if the death of the unborn child was the intended result of the procedure;

(3) a lawful medical procedure performed by a physician or other licensed health care provider with the requisite consent as part of an assisted reproduction as defined by Section 160.102, Family Code; or

(4) the dispensation of a drug in accordance with law or administration of a drug prescribed in accordance with law.

Added by Acts 2003, 78th Leg., ch. 822, Sec. 2.02, eff. Sept. 1, 2003.

Certificate of Service

I certify that on November 21, 2021, this document was served through the electronic filing manager upon:

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)
jecklund@thompsoncoburn.com
emyers@thompsoncoburn.com
jatkins@thompsoncoburn.com

Counsel for Respondents

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