

No. 21-1039

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**In the Supreme Court of Texas**

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MARK LEE DICKSON AND RIGHT TO LIFE EAST TEXAS,

*Petitioners,*

v.

THE AFIYA CENTER AND TEXAS EQUAL ACCESS FUND,

*Respondents.*

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

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**PETITIONERS' REPLY**

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## **PETITIONERS' REPLY**

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TO THE HONORABLE SUPREME COURT OF TEXAS:

The respondents agree that the petition presents a conflict of authority between the Dallas and Amarillo Courts of Appeals. *See* Response at 12. Yet they insist that the Court should deny the petition and grant review only in the Amarillo case, which is the subject of a separate petition that was filed on December 22, 2021. *See The Lilith Fund for Reproductive Equity v. Dickson*, No. 21-0978, petition available at <https://bit.ly/3GFWqEi>. The respondents' stance is untenable. Each petition is equally worthy of this Court's review, and the Court should grant both petitions and consolidate the cases for merits briefing and argument.

## REPLY TO RESPONDENTS' STATEMENT OF FACTS

The respondents' statement of facts includes several false and misleading statements. First, the respondents mischaracterize the ordinance by claiming that "it cannot be enforced by any government official" until *Roe* and *Casey* are overruled. Response at 5–6. The ordinance limits only *public* enforcement by government officials—and it remains enforceable through private-citizen suits until the Supreme Court overrules *Roe* and *Casey*. See Pet'rs' App. 69–70. So the ordinance *can* be enforced by government officials—so long as those government officials are involved in the private civil-enforcement lawsuits or enforcing a judgment obtained in those proceedings. The respondents are equally wrong to say that the ordinance "purports" to outlaw abortion within city limits. Response at 5. The ordinance *does* outlaw abortion and abortion-enabling acts; it simply limits the means by which the abortion ban may be enforced.<sup>1</sup>

The respondents also fail to provide the full context of the allegedly defamatory statements that they quote. See Response at 6–7. Some of the quoted statements never even mention The Afiya Center or the Texas Equal Access Fund, yet the respondents falsely imply that these statements were referring to *all* organizations listed in the original ordinance. The quote from Mr. Dickson that appears underneath the first bulletpoint on page 6 refers

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1. In this respect the ordinance resembles the Texas Heartbeat Act, which bans conventional public enforcement while allowing enforcement only through private civil lawsuits. See Tex. Health & Safety Code § 171.207(a).

only to abortion *providers*, not to abortion-assistance organizations such as The Afiya Center or the Texas Equal Access Fund. *Compare* Response at 6 *with* CR 24–25 (full quote); CR 52 (same). And the quote on the top of page 7 refers only to the Lilith Fund and NARAL Pro-Choice Texas. CR 998 (“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.”). The respondents, however, replaced “The Lilith Fund and NARAL Pro-Choice Texas” with “[The listed organizations]” and “[the organizations],” which misleads the Court by implying that Mr. Dickson was referring to all organizations listed in the ordinance.

### **THE COURT SHOULD GRANT THE PETITION FOR REVIEW**

The respondents acknowledge the conflict of authority between the Dallas and Amarillo Courts of Appeals, yet they argue that the Court should grant review only in the Amarillo case and deny review here. The respondents’ only argument for denial is that the Fifth Court of Appeals’ ruling (in their view) was correct, while the Seventh Court of Appeals erred. But the Court should not resolve which court was correct at this stage of the litigation. The decision to grant or deny a petition for review turns on whether the issues in the case are worthy of this Court’s review, not the correctness of the decision below. *See* Tex. R. App. P. 56.1(a)(1)–(6). And it is especially in-

appropriate for the respondents to ask this Court to pre-judge the issues in the Amarillo case—which they concede that this Court should review<sup>2</sup>—by denying review in this case on the supposed ground that the Seventh Court of Appeals erred. The parties have not submitted briefs on the merits in either case, and the Court is in no position to decide which ruling is correct until it receives briefing and holds oral argument on that question.

The respondents spend much of their brief attacking the Seventh Court of Appeals’ decision—which is not the subject of this petition. *See* Response at 9–15. And to the extent that the Seventh Court of Appeals’ analysis departs from the opinion below, that only strengthens the petitioners’ argument for review. *See* Tex. R. App. P. 56.1(a)(2).

The respondents also have no answer to the falsehoods that appear in the Fifth Court of Appeals’ opinion. The court of appeals incorrectly stated that the Texas Penal Code categorically exempts abortion from the definition of murder,<sup>3</sup> and it refused to correct this misstatement when the petitioners moved for rehearing.<sup>4</sup> The respondents do not defend this mischaracterization of state law; their only response is that the petitioners “do not explain how this is relevant to the case before this Court or to Petitioners’ TCPA mo-

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2. *See* <https://bit.ly/3GFWqEi> (petition for review in *The Lilith Fund for Reproductive Equity v. Dickson*, No. 21-0978).
  3. Pet’rs’ App. 32 (referring to “the clear language of penal code section 19.06 excepting abortion from the definition of murder.”); Pet’rs’ App. 168 (same).
  4. Pet’rs’ App. 134–35 (motion for rehearing).



tion.” Response at 15. But the relevance is obvious. The respondents have sued our clients for calling abortion “murder,”<sup>5</sup> and our clients are defending themselves by observing that: (1) The Texas Penal Code includes abortion within the definition of murder,<sup>6</sup> unless the abortion qualifies as a “lawful medical procedure performed by a physician or other licensed health care provider with the requisite consent”<sup>7</sup> or “the dispensation of a drug in accordance with law or administration of a drug prescribed in accordance with law”;<sup>8</sup> (2) It is truthful to call abortion “murder” in a city that has outlawed abortion by city ordinance, because abortion does not qualify as “lawful” in those cities; (3) It is truthful to call abortion “murder” in a state (such as Texas) that has never repealed its pre-*Roe v. Wade* statutes that outlaw and criminalize abortion;<sup>9</sup> and (4) The plaintiffs cannot produce “clear and specific evidence” that Mr. Dickson acted with actual malice or negligence when he researched the law of Texas and relied on the definition of “murder” that

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5. Pet’rs’ App. 93–94 (allegedly defamatory statement that calls abortion “murder”); *id.* at 94–95 (same); *id.* at 97 (same); *id.* at 66 (provision in original Waskom ordinance that calls abortion “murder”); *id.* at 68 (same).

6. *See* Texas Penal Code § 19.02(b)(1); Texas Penal Code § 1.07.

7. Tex. Penal Code § 19.06(2).

8. Tex. Penal Code § 19.06(4).

9. Senate Bill 8, 87th Leg., § 2 (2021) (“[T]he 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.”).

appears in the Texas Penal Code.<sup>10</sup> The court of appeals, however, dismissed all of this by falsely claiming that abortion is categorically exempt from the statutory definition of murder. *See* Pet’rs’ App. 168 (“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”).

The respondents also do not deny that Mr. Dickson and Right to Life East Texas have never called them “murderers”—and they do not deny that Mr. Dickson and Right to Life East Texas have never accused them of committing or assisting “murder.” Nor do the respondents defend the court of appeals for falsely (and repeatedly) accusing the petitioners of calling The Afiya Center and the Texas Equal Access Fund “murderers” and claiming that these organizations commit “murder.” Pet’rs’ App. at 13, 15, 20, 27, 33, 34, 36. Instead, the respondents misrepresent the petitioners’ argument by saying:

It is also baffling that Petitioners argue they did not really call Respondents “criminals” or “murderers.”

Response at 16. The petitioners, however, are *not* denying that they called the respondents “criminal organizations.” The ordinance includes The Afiya Center and the Texas Equal Access Fund on the list of “prohibited criminal organizations,”<sup>11</sup> and Mr. Dickson’s social-media statements point out that

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10. CR 323–324 (¶ 13); CR 326 (¶ 20).

11. Pet’rs’ App. 68, 69.

the respondents (and others) were described as “criminal organizations” in the Waskom ordinance.<sup>12</sup> The petitioners are denying only that they called the respondents “murderers” or accused them of committing “murder”—despite the court of appeals’ repeated accusations to the contrary. The respondents do not dispute this claim, and they do not identify any statement in which the petitioners called them “murderers” or accused them of committing “murder.” The court of appeals misrepresented the factual record.

Finally, the statements that describe The Afiya Center and the Texas Equal Access Fund as “criminal organizations” are not even remotely defamatory. The state of Texas has never repealed its pre-*Roe v. Wade* statutes that outlaw abortion unless the mother’s life is in danger, and the law of Texas continues to define abortion as a criminal offense. Article 4512.1 of the Revised Civil Statutes provides:

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.

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12. Pet’rs’ App. 94 (“This is why the Lilith Fund and NARAL Pro-Choice Texas are listed as criminal organizations in Waskom, Texas.”); *id.* (“[T]he listing of abortion providers as examples of criminal organizations is not unconstitutional.”); *id.* at 95 (“The Afiya Center, . . . Texas Equal Access Fund, and others like them . . . are now declared to be criminal organizations in Waskom, Texas.”).

West’s Texas Civil Statutes, article 4512.1 (1974) (Pet’rs’ App. 82).<sup>13</sup> And article 4512.2 of the Revised Civil Statutes imposes 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) (Pet’rs’ App. 82) (“Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.”).

It is undisputed that The Afiya Center and the Texas Equal Access Fund are violating article 4512.2 by “furnish[ing] the means for procuring an abortion knowing the purpose intended.” The plaintiffs admit to this in their petitions. *See* Pet’rs’ App. 86 (¶ 8) (“[The Afiya Center] also provides support to certain people seeking abortion services.”); *see also* Pet’rs’ App. 107 (¶ 7). So it is entirely truthful for an ordinance to declare the plaintiffs “criminal organizations” based on their admitted violations of article 4512.2. It is equally truthful to publish statements that declare or insinuate that the respondents are engaged in “criminal” activity—so long as the context of those statements makes clear that the accusation of criminal conduct is derived from the respondents’ complicity in abortion.

The respondents claim that it is defamatory to call their behavior “criminal” because article 4512.2 was “struck down by the Supreme Court in *Roe v. Wade*.” Response at 19. But the Supreme Court does not “strike down” stat-

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13. Article 4512.6 of the Revised Civil Statutes establishes an exception for abortions needed to save the life of the mother. *See* West’s Texas Civil Statutes, article 4512.6 (1974) (Pet’rs’ App. 82).

utes, and a judicially disapproved statute continues to exist as law until it is repealed by the legislature that enacted it. The Court made this abundantly clear in *Pidgeon v. Turner*, 538 S.W.3d 73 (Tex. 2017):

[N]either the Supreme Court in *Obergefell* nor the Fifth Circuit in *De Leon* ‘struck down’ any Texas law. When a court declares a law unconstitutional, the law remains in place unless and until the body that enacted it repeals it . . . . [T]he 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. *Roe* may temporarily limit the ability the ability of state officials to punish those who violate the state’s abortion laws, but it does not revoke or repeal the underlying statutes, and it does not change the fact that abortion remains a criminal offense under Texas law.

More importantly, *Roe* does not protect The Afiya Center or the Texas Equal Access Fund from criminal prosecution for their violations of article 4512, because there is no constitutional right to pay for another person’s abortion, and abortion funds lack third-party standing to assert the rights of abortion patients as a defense to criminal prosecution.<sup>14</sup> The pre-*Roe* abortion statutes are severable in each of their discrete applications,<sup>15</sup> and they can be

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14. See *Singleton v. Wulff*, 428 U.S. 106, 117 (1976) (plurality opinion) (allowing *physicians* to assert third-party rights of their patients seeking abortions on account of the “patent” “closeness of the relationship”); *June Medical Services LLC v. Russo*, 140 S. Ct. 2103, 2118 (2020) (plurality opinion) (“We have long permitted abortion *providers* to invoke the rights of their actual or potential patients in challenges to abortion-related regulations.” (emphasis added)).

15. See Tex. Gov’t Code § 311.032(c) (“In a statute that does not contain a provision for severability or nonseverability, if any provision of the stat-

enforced against abortion funds because no “undue burden” is imposed on women seeking abortions if outside sources of funding are restricted. *See Harris v. McRae*, 448 U.S. 297, 325 (1980).

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ute or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the statute that can be given effect without the invalid provision or application, and to this end the provisions of the statute are severable.”).

## CONCLUSION

The petition for review should be granted. If the Court decides to order merits briefing or oral argument, it should consolidate the petition with No. 21-0978 and have the cases briefed and argued together.

Respectfully submitted.

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