

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 at Dallas, Texas
No. 05-20-00988-CV

BRIEF OF AMICI CURIAE
**TEXAS RIGHT TO LIFE; REPUBLICAN PARTY OF TEXAS;
GRASSROOTS AMERICA – WE THE PEOPLE; TRUE TEXAS PROJECT; TEXAS
EAGLE FORUM; THE TEXAS YOUNG REPUBLICAN FEDERATION; HOUSTON
YOUNG REPUBLICANS; TEXAS PASTOR COUNCIL; THE SOUTHERN BAPTISTS OF
TEXAS CONVENTION; HUMAN COALITION ACTION; STUDENTS FOR LIFE OF
AMERICA; TEXAS HOME SCHOOL COALITION; TEXAS VALUES
IN SUPPORT OF PETITIONERS’ BRIEF ON THE MERITS**

EMILY COOK

State Bar No. 24092613

ecook@texasrighttolife.com

TEXAS RIGHT TO LIFE

4500 Bissonnet Street, Suite 305

Bellaire, Texas 77401

713.782.5433

713.952.2041 (fax)

Counsel for all Amici Curiae

KRISTINA DENAPOLIS WEST

State Bar No. 24062697

kristina@amlawteam.com

3400 William D. Tate Ave.

Grapevine, TX 76051

972.444.8777

817.912.3605 (fax)

Counsel for Amicus Curiae

Texas Right to Life

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INTEREST OF AMICI CURIAE¹

Texas Right to Life is a nonprofit organization devoted to stopping attacks on innocent human life including elective abortion in Texas. Texas Right to Life utilizes related entities which engage in educating citizens that each abortion murders a human being. Texas Right to Life's 501(c)(4) organization routinely advocates for passage of laws that protect preborn children, and Texas Right to Life's political action committee oppose candidates for elective office who do not share their view of stopping abortion. Just like Mr. Dickson, Texas Right to Life has recently been sued numerous times in state court—including by The Afiya Center, the Texas Equal Access Fund, and the Lilith Fund for Reproductive Equity—for expressing their constitutionally protected speech that certain abortions in Texas are unlawful after enactment of the Texas Heartbeat Act.

Texas Right to Life has been joined in this brief by other organizations who are also concerned about their First Amendment speech in furtherance of their unique missions being chilled.

The Republican Party of Texas ("RPT") is the state political organization of the Republican Party in the State of Texas. The RPT represents the interests of Republican citizens in the state of Texas, including those of the unborn, and supports

¹ No person or entity other than Amici, its members, or counsel have authored or paid in whole or in part for the preparation of this brief.

the God-given freedom of those citizens to engage in public discourse and debate, especially in the protection of unborn children.

Grassroots America – We the People is a non-partisan public policy and citizen-action organization with a constitutional conservative focus. Grassroots America – We the People’s mission is to preserve and advance the cause of Liberty—for the born and unborn—as established in the Declaration of Independence, the U.S. Constitution, and the Bill of Rights.

True Texas Project exists to educate and motivate citizen engagement in all levels of government.

Texas Eagle Forum is rooted and grounded in biblical principles and values. They support the family as the core beginning of all government and they fight for Life—from conception to the grave.

The Texas Young Republican Federation is the premiere Republican organization in Texas representing 2000 members and 40 local chapters. The Texas Young Republicans have a strong belief in limited government focus on protecting the rights of people including the fundamental right to life.

Houston Young Republicans is an organization for 18-40 year old liberty minded conservative Republicans. They stand on the scientific foundation that a new life begins at fertilization and therefore abortion is murder and ending a human life.

Beyond that, Houston Young Republicans has a strong belief in the classical liberal ideal of freedom of speech for all people.

Texas Pastor Council is a pastor-led ministry engaging in cultural, social, moral and governing issues from a Biblically-grounded perspective. Texas Pastor Council strongly supports the sanctity of human life and opposes any type of taxpayer subsidies for abortions or abortion-assistance organizations.

The Southern Baptists of Texas Convention (“SBTC”) is a statewide fellowship of 2,682 churches committed to reaching Texas with the good news of Jesus Christ. The SBTC has confessionally affirmed that all human life, born and unborn, is precious and holy.

Human Coalition Action, a Texas 501(c)(4) corporation, is a public policy advocacy organization advocating for preborn children and their pregnant mothers by advancing pro-life policies, informing voters about pro-life candidates and supporting pro-life legal arguments in the courts. Human Coalition Action advocates for rescuing children, serving families, and ending abortion by reaching abortion-determined women with life-affirming messages and tangible, individualized services. Human Coalition Action aims to create a culture of collaboration; provide policy expertise; and generate momentum from the grassroots to the government to solidify victory over abortion.

Students for Life of America (“SFLA”) is the nation’s largest pro-life youth organization that uniquely represents the generation most targeted for abortion. SFLA, a 501(c)(3) charity, exists to recruit, train, and mobilize the Pro-Life Generation to abolish abortion and provide policy, legal, and community support for women and their children, born and preborn. SFLA relies on its First Amendment freedoms to effectively pursue these goals. A legal prejudice in favor of abortion prevents women from having access to all the information about how abortion harms women and preborn children and what services and support can be made available to them. SFLA thus works to overcome the bias in favor of abortion in critical social institutions, including the courts.

Texas Home School Coalition (“THSC”), is a nonprofit organization committed to preserving the fundamental rights of parents to raise their children without unwarranted and unnecessary government interference. Recognizing the attendant and equally important right and interest of children in maintaining relationships with their natural parents, THSC provides to its members, in addition to educational opportunities and resources, legislative advocacy and legal support. THSC was instrumental in affirming the rights of parents to homeschool in *Texas Educ. Agency v. Leeper*, 893 S.W.2d 432 (Tex. 1994). Since that time, THSC has become increasingly involved in the defense of these precious fundamental rights. As a part of that goal, THSC assists families in obtaining legal representation in

cases threatening their fundamental liberty interests. THSC further pursues this mission by providing legislative education, insight, and advocacy regarding the preservation of family integrity.

Texas Values is a Judeo-Christian nonprofit organization that promotes research and education to encourage, strengthen, and protect American families, including pro-life policies.

SUMMARY OF ARGUMENT

TO THE HONORABLE SUPREME COURT OF TEXAS:

Amici Curiae submit this brief in support of the brief on the merits filed by Petitioners Mark Lee Dickson and Right to Life East Texas on April 11, 2022. The Court should grant Petitioners' request for four reasons: 1) Respondents, The Afiya Center and Texas Equal Access Fund, are now engaging in abusive litigation tactics aimed towards private citizens to thwart laws they do not support; 2) If Respondents are allowed to prevail, similar *heckler's lawsuits* will chill the speech of private citizens speaking on controversial, unpopular, and divisive topics; 3) Mr. Dickson's speech is constitutionally protected; and 4) Respondents' claims must be rejected to avoid a constitutional conflict, correctly utilizing the Texas Citizens Participation Act.

ARGUMENT

I. Respondents are now engaging in abusive litigation tactics against private citizens to thwart laws they do not like

Respondents have a problem: The State of Texas, from local cities passing Sanctuary Cities for the Unborn ordinances to the Texas Legislature passing the Texas Heartbeat Act,² is increasingly becoming a safe haven for pregnant mothers and unborn children. As the mission of Respondents' organizations is to assist pregnant women in procuring abortions that kill the children in their mothers' wombs,³ such progress in eliminating abortion in Texas clearly threatens Respondents' existence. Thus, Respondents' desire to fight such laws is expected.

However, the pro-abortion side is losing. Their attempts failed during the legislative session, and continue to fail as Texas state and federal courts refuse to enjoin these life-saving laws, such as the Texas Heartbeat Act. Respondents have now turned to a different tactic, using unconventional methods with a new motto: If we can't stop the laws, let's punish anyone who *speaks* about the laws of Texas.

The pro-abortion industry's new tactic started in June 2020 when Respondents sued pro-life advocate and pastor Mark Dickson after speaking about his sincere

² Tex. Health & Safety Code §§ 171.201–171.212.

³ *About*, Texas Equal Access Fund, <https://teafund.org/about/> (last visited May 14, 2022). *See also* Respondents' Brief On The Merits, *Dickson v. The Afiya Center*, No. 21-1039, Jones Aff. ¶ 4; Conner Aff. ¶ 5 (Tex.–May 2, 2022) (describing the act of providing financial assistance to individuals seeking abortions).

belief that abortion is murder.⁴ This trend was continued in August of 2021 when the abortion industry sued Texas Right to Life fourteen times, complaining that Texas Right to Life was educating citizens about the new Texas Heartbeat Act.⁵ The pro-abortion advocates' latest round of baseless attacks have been aimed at anyone who has criticized their mission—providing support and funding for mothers to kill their unborn children—such as pro-life state representative Briscoe Cain,⁶ private citizens Sadie Weldon and Ashley Maxwell,⁷ and other nonprofit organizations such as the Thomas More Society and America First Legal.⁸

Respondents' playbook is clear: If they cannot win in the legislative branch, whether in city halls or in the state capitol; if they cannot stop the executive branch from signing pro-life laws; and if they cannot compel the judiciary to block enforcement of such pro-life policies, then they will haul private citizens and private

⁴ Plaintiff's Original Petition, *Texas Equal Access Fund v. Dickson*, No. DC-20-08113 (filed June 11, 2020).

⁵ Texas Right to Life has been sued fourteen times by the abortion industry, namely plaintiffs Allison Van Stean, Michelle Tuegel, The Bridge Collective, Jane Doe, Monica Faulkner, Lilith Fund for Reproductive Equity, Dr. Ghazaleh Moayed, The North Texas Equal Access Fund, The Afiya Center, Fund Texas Choice, Clinic Access Support Network, Planned Parenthood, The West Fund, and Frontera Fund. *See Van Stean v. Texas Right to Life*, No. 03-21-00650-CV (Tex. App.—Austin 2021).

⁶ Complaint, *Wendy Davis, et al. v. Mistie Sharp, et al.*, No. 22-cv-373 (filed April 19, 2022).

⁷ Plaintiff's Original Petition, *The Lilith Fund for Reproductive Equity v. Weldon*, No. 22-03-032 (filed March 15, 2022); Plaintiff's Original Petition, *North Texas Equal Access Fund v. Maxwell*, No. 22-2100-431 (filed March 15, 2022).

⁸ Complaint for Declaratory and Injunctive Relief, *The North Texas Equal Access Fund and Lilith Fund for Reproductive Equity v. Thomas More Society*, No. 1:22-cv-1399 (filed March 16, 2022); Complaint for Declaratory and Injunctive Relief, *The North Texas Equal Access Fund and Lilith Fund for Reproductive Equity v. America First Legal Foundation*, No. 1:22-cv-00728 (filed March 16, 2022).

organizations into expensive lawsuits simply for voicing their support of pro-life policies or their belief that killing another human being is murder.

II. If allowed to prevail, Respondents’ heckler’s lawsuits will chill the speech of private citizens speaking on controversial, unpopular, and divisive topics

Our Constitution recognizes and protects free speech, especially on matters of public concern and debate.⁹ In *New York Times v. Sullivan*, the United States Supreme Court noted the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open.”¹⁰ There has been no greater, more divisive topic in the American public square than abortion. For the past forty years, feelings and opinions about the availability and procurement of abortion in America has split churches, raised up and cast down politicians, and impacted commerce. The issue of abortion is so incredibly divisive that even the most closely-held institution in American governance—the United States Supreme Court—saw the most significant breach of trust and security through a leak of the initial draft opinion of *Dobbs v. Jackson Women’s Health Organization*.¹¹ Certainly, divisiveness will always be present in our country in matters of public interest. Here, however, we see Respondents vehemently seeking to stifle conflicting voices

⁹ U.S. Const. amend. 1.

¹⁰ *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

¹¹ *Dobbs v. Jackson Women’s Health Org.*, 141 S. Ct. 2619 (2021); *How rare is a Supreme Court breach? Very rare*, Politico, <https://www.politico.com/news/2022/05/02/supreme-court-draft-opinion-00029475> (last visited May 3, 2022).

regarding abortion, distorting the First Amendment, and asking this Court to become an “ad-hoc nullification machine.”¹² Stifling differing viewpoints, however irreconcilable, is never the solution to public division.

Everyday Texans already pause before voicing their opinion on important political issues. Fear of being “canceled,” “doxed,” and sued in this increasingly hostile culture of unpopular opinions is very real. In the aftermath of the Texas Heartbeat Act taking effect, Texas Right to Life’s legislative director, Dr. John Seago, personally experienced such cowardly attacks: Dr. Seago’s church was threatened by virtue of his leadership presence, his wife received threatening messages complete with their home address and her personal cell phone, and numerous threats, including two bomb threats, were mailed in to his office. Counsel for Amici Curiae additionally experienced similar attacks: her home address began circulating around social media, prompting a police presence at both her home and private law office. In the face of these very real physical threats, an ordinary citizen may calculate that the cost of an expensive defamation claim—on top of grave physical threats—is simply too high. Many will avoid speaking publicly about what they believe abortion law should be, petitioning their government to initiate a change, and encouraging their friends and neighbors to do the same.

¹² *Hill v. Coronado*, 530 U.S. 703, 741 (2000) (Scalia, J., dissenting).

Petitioners are unashamedly pro-life advocates. If Petitioners’ statements are actionable, then statements made in support of other controversial subjects may equally open up liability, wedging the door ajar to public policy change by activist courts through tort law. Following this, a myriad of controversial or unpopular topics would be eliminated as contrary opinion from the public square. It is not simply final judgments against citizens which harm an individual’s First Amendment rights, but rather the “chilling effect of the costs of litigation prior to judgment...”¹³

III. Mr. Dickson’s speech is constitutionally protected

Respondents seek to define any speech casting their work in a negative light as defamation. Unfortunately for Respondents, all negative commentary is not defamatory, nor can all negative commentary be stopped.

A. The pre-*Roe* statutes have never been repealed

The laws of Texas recognize that an unborn child is an individual who may be the victim of murder.¹⁴ Additionally, the laws of Texas impose criminal liability upon anyone who “furnishes the means for procuring an abortion knowing the purpose intended.”¹⁵ While *Roe v. Wade*¹⁶ does prohibit criminal enforcement of

¹³ *Dickson v. The Afiya Center*, No. 05-20-00988-CV, 2021 WL 4947193, at *7 (Tex. App.—Dallas Oct. 25, 2021, pet. filed) (mem. op.) (Schenck, J., dissenting from denial of en banc consideration).

¹⁴ See Tex. Penal Code §§ 19.01–19.02 (defining homicide and murder specifically); Tex. Penal Code § 1.07(a)(26) (defining “individual” to include “an unborn child at every stage of gestation from fertilization until birth”).

¹⁵ See West’s Texas Civil Statutes, articles 4512.1–4512.6 (1974).

¹⁶ *Roe v. Wade*, 410 U.S. 113 (1973).

violations of these laws, they are still statutes in the State of Texas. The action is still illegal, regardless of whether the chances of prosecution are great or small. Enforcement ability and the presence of a statute are related points, but they are not mutually exclusive. Thus, Mr. Dickson’s statements that Respondents were engaged in activity deemed a criminal offense by the Texas Legislature through aiding and abetting women procuring abortions is true under the laws of the State of Texas; Respondents simply have escaped prosecution for that particular activity. “The Supreme Court’s pronouncements may limit a state’s ability to enforce its abortion statutes, but they do not cancel or change the statutes themselves, which continue to exist as the law of the state until they are repealed by the legislature that enacted them.”¹⁷

B. Characterizing and calling abortion “murder” is protected First Amendment speech

Such commentary is true, and is also protected opinion derived from scientific facts, ethical concerns, and faith-based beliefs. At the moment of conception, an unborn baby has DNA separate from her mother. By just twenty-one days after conception, an unborn baby’s heart begins to beat. In a study conducted by Gallup, forty-seven percent of the American public identified as pro-life,¹⁸ believing, as supported by the amazing process of fetal development, that an unborn child is a

¹⁷ Petitioners’ Brief on the Merits, *Dickson v. The Afya Center*, No. 21-1039, at 6-7 (Tex.–Apr 11, 2022)

¹⁸ *Abortion*, Gallup, <https://news.gallup.com/poll/1576/abortion.aspx> (last visited May 3, 2022).

human being whose right to life is protected by the United States Constitution. Abortion intentionally and violently ends the life of an innocent, living human being. It is for these reasons that the pro-life community believes the intentional killing of a child through abortion is murder.¹⁹

Pro-abortion activists often appeal to science to reinforce the validity of their arguments, yet science supports the pro-life perspective that a fetus is a living human. In a study conducted by Steven Andrew Jacobs, ninety-six percent of biologists held the biological view that human life begins at fertilization.²⁰ Scientific progress in the last several decades has also served to boost the validity of the pro-life perspective held by Mr. Dickson. New technological advances have made it easier to apprehend the humanity and moral status of a growing child. Ultrasounds, for example, have made it possible for a mother to see her growing child and hear the child's heartbeat.²¹ Pro-abortion supporters should agree with this scientific evidence, yet they choose to deliberately disregard the humanity of a fetus by denying her the moral status of 'personhood.'

In addition to the scientific certainty that an unborn child is an individual distinct from her mother, Mr. Dickson's Judeo-Christian faith also compels him to

¹⁹ 18 U.S. Code § 1111; Tex. Penal Code §§ 19.01–19.02 (1994).

²⁰ Steven Andrew Jacobs, *The Scientific Consensus on When a Human's Life Begins*, 36 *Issues in Law & Medicine* 221, 230 (2021).

²¹ *Science Is Giving the Pro-life Movement a Boost*, The Atlantic, <https://www.theatlantic.com/politics/archive/2018/01/pro-life-pro-science/549308/> (last visited May 14, 2022).

believe abortion is morally wrong. Mr. Dickson’s vocation as a Christian pastor places on him a responsibility and platform to teach the doctrines of his faith, including abortion opposition. When Mr. Dickson is teaching or attempting to convince others that abortion is wrong, both morally and legally, he is engaging in protected speech and protected religious activity. To allow Respondents’ lawsuit to proceed would place Mr. Dickson’s well-established rights under three clauses of the First Amendment—the free exercise clause, the freedom of speech clause, and the right to petition our government—squarely on the chopping block.

C. Such commentary is also considered constitutionally protected rhetorical hyperbole

Even if the hearer is not a legal scholar who understands *The Writ-of-Erasure Fallacy*,²² Mr. Dickson’s speech is constitutionally protected under the rhetorical hyperbole doctrine.

There is possibly no greater breadth of caselaw regarding the protection of rhetorical hyperbole than in the abortion context. One example is *Madsen v. Women’s Health Center*.²³ Justice Scalia, in his notable dissent in *Madsen*, describes a videotape of a protest in front of an abortion clinic in 1993 that includes a myriad of signs and speech, both for and against abortion, including signs and shouts such as “Abortion: God Calls it Murder,” “Choose Life,” and even “You are responsible

²² See Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933 (2018).

²³ *Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753 (1994).

for the deaths of children...You are a murderer. Shame on You.”²⁴ Following this description of the protest, Justice Scalia then proceeds to describe these activities as “a great many forms of expression...includ[ing]...speeches, communication of familiar political messages, handbilling, persuasive speech directed at opposing groups on the issue of abortion, efforts to persuade individuals not to have abortions...”²⁵ As illustrated in the case at hand, similar messaging persists almost thirty years later.

In Illinois, courts considered two cases that dealt with the advocacy of pro-life organizations in characterizing abortion as murder or the killing of children. In *Stericycle*,²⁶ a pro-life group alleged that Stericycle, a biowaste business, helped to kill children by disposing of aborted babies in area abortion clinics. Another case involved a pro-life advocate and the executive director of an abortion clinic offering first trimester abortions. The executive director sued the pro-life advocate for defamation for publishing communications equating the executive director’s work to “prenatal killing,” and describing her as a “killer.”²⁷ There also the court held that such expressions within the abortion debate are constitutionally protected.

²⁴ *Id.* at 784-789.

²⁵ *Id.* at 790.

²⁶ *Stericycle, Inc. et al. v. Created Equal PAC, et al.*, No. 16-CH-522 (Ill.—D. Lake County, Sep. 29, 2016).

²⁷ *Van Duyn v. Smith*, 173 Ill. App. 3d 523, 527 (3rd Dist. 1988) (“We believe defendant’s statement that plaintiff is involved in “killing” can be commonly understood as meaning that plaintiff has terminated a life of something or someone that was previously living....Since the Supreme Court decision of *Roe v. Wade* (1973)...wherein a woman’s right to have an abortion was determined to be constitutionally protected, one of the primary issues has been, and still is, whether

Flipping the script, a pro-abortion advocate's statement that a pro-life advocate was an accomplice to murder was rhetorical hyperbole and not actionable in *Horsley v. Rivera*.²⁸ In *Horsley*, the pro-life advocate had included a murdered doctor's name on an online list of abortionists. The website listing prompted television personality Geraldo Rivera to label the pro-life advocate "an accomplice to murder" during an interview. In the defamation suit that followed, the Eleventh Circuit ruled in favor of Geraldo Rivera, finding that his statement was a protected expression of opinion and that "it is clear...that [the parties] were engaged in an emotional debate concerning emotionally charged issues of significant public concern."²⁹

Yet another example faced by a court in the northeast was *Greenbelt v. Bresler*, in which a small newspaper used the term "blackmail" to describe a real estate developer's negotiations with city officials. The Court found this language to

or not there is an actual killing of a human life as the result of an abortion. Pro-life activists certainly maintain that abortion is a killing; however, pro-choice activists believe the contrary....Regardless of which position may ultimately be considered correct, at the present we find that the average reasonable reader of the 'Wanted' poster would not believe as an actual fact that plaintiff has been involved in killing, as that word is commonly understood by our society. In fact, we believe that the average reader would quickly realize that the central theme of the 'Wanted' poster is that abortion is a killing, to which plaintiff plays a part, and should be a crime in the opinion of those siding with the pro-life movement." *Id.* at 537-38.

²⁸ *Horsley v. Rivera*, 292 F.3d 695, 697 (11th Cir. 2002).

²⁹ *Id.* at 697.

be mere rhetorical hyperbole, reversing the lower court's finding of libel.³⁰ Justice Stewart delivered the opinion of the Court:

It is simply impossible to believe that a reader who reached the word 'blackmail' in either article would not have understood exactly what was meant: it was [real estate developer] Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable. Indeed, the record is completely devoid of evidence that anyone in the city of Greenbelt or anywhere else thought Bresler had been charged with a crime.³¹

The principle of rhetorical hyperbole employed in *Greenbelt* may be employed here. A reasonable person would engage in a natural reading of Mr. Dickson's social media statements and reach the logical conclusion that said statements signify a personal belief about the nature of abortion. In his *Law of Defamation*, Rodney A. Smolla opined on the element of rhetorical hyperbole in reference to *Greenbelt*:

Almost any word, no matter how emotionally charged or pejorative, can in a given context be merely a hyperbolic figure of speech, not a literal misstatement of fact injurious to reputation. A President accused of being a "murderer" because of his steadfast prosecution of an unpopular war is not being accused literally of a common-law crime, rather, he is being accused of misconduct in a political sense, a sense that ranges into the realm of opinion.

³⁰ *Greenbelt Co-op. Pub. Ass'n v. Bresler*, 398 U.S. 6 (1970). See also *Bentley v. Bunton*, 94 S.W.3d 561, 581 (Tex. 2002) (finding that even an "excited reference to [an individual] as a 'criminal' might be taken to be rhetorical hyperbole").

³¹ *Greenbelt*, 398 U.S. at 14.

Similarly, 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.³²

Murder is a negative and harsh word, but to describe the violent act of abortion as murder is not defamation.

IV. Respondents’ claims must be rejected to avoid a constitutional conflict, and the Texas Citizens Participation Act is the correct tool

The Texas Citizens Participation Act (“TCPA”) encourages and safeguards the constitutional right of persons to participate in government to the maximum extent permitted by the law.³³ The TCPA is the proper tool to address Petitioners’ and Respondents’ dispute, as its very purpose is “to identify and summarily dispose of lawsuits designed only to chill First Amendment rights....”³⁴ The TCPA defines the exercise of the right of free speech to be “communication made in connection with a matter of public concern.”³⁵ “Matter of public concern” includes issues related to health or safety, government, and a service in the marketplace.³⁶

No one can argue with a straight face that abortion is *not* a matter of public concern. As mentioned before, there is no one topic in the last forty years as divisive

³² 1 Rodney A. Smolla, Law of Defamation § 4:13 (2d ed. 2005). *See also Dickson*, 2021 WL 4947193, at *7 (Schenck, J., dissenting).

³³ Tex. Civ. Prac. & Rem. Code § 27.002.

³⁴ *Dickson*, 2021 WL 4947193, at *6 (Schenck, J., dissenting) (citing *In re Lipsky*, 460 S.W.3d 579, 589 (Tex. 2015)).

³⁵ Tex. Civ. Prac. & Rem. Code § 27.001(3).

³⁶ Tex. Civ. Prac. & Rem. Code § 27.001(7).

in American culture as the topic of abortion-on-demand has been. Abortion is a health and safety issue, as evidenced by repeated reports of women maimed through botched abortions and the grotesque market for selling and buying the remains of aborted children. Abortion is a governmental issue, from city councils to the United States Supreme Court. Abortion is, regrettably, also a service in the marketplace: the average second trimester abortion costs roughly in excess of \$1,000.00, and a new industry has recently emerged on the scene shipping illegal abortion-inducing drugs across state lines.

As Justice Schenck pointed out in his dissenting opinion in *Dickson v. The Afiya Center*, "...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."³⁷ Criticism of past judicial-decision making, such as *Roe v. Wade*³⁸ and its progeny, is protected speech whether a listener agrees or disagrees with the criticism. Our First Amendment rights do not rise and fall based on the subjective view of a listener.

Whatever side of the debate one falls in, the TCPA protects their ability to openly submit their opinions to anyone who will listen. The TCPA protects Petitioners, and it protects Respondents. Therefore, Mr. Dickson and Right to Life of East Texas should prevail, and Respondents' suit should be dismissed.

³⁷ *Dickson*, 2021 WL 4947193, at *1 (Schenck, J., dissenting).

³⁸ *Roe*, 410 U.S.

CONCLUSION AND PRAYER

Justice Schenck’s dissent in *Dickson v. The Afiya Center* illustrates well the constitutional conflict Respondents’ lawsuit, if allowed to proceed, will levy on the judiciary.³⁹ Allowing Respondents’ claims to proceed requires an expansion of tort law, a rejection of the rhetorical hyperbole doctrine, and most significantly, a suppression of free discourse on matters of public concern. The First Amendment grants citizens the “absolute right to differ with their government.”⁴⁰ Amici urge this Court to grant Petitioners’ request for review and hold that the Fifth Court of Appeals erred in affirming the 116th Judicial District Court’s denial of Mr. Dickson and Right to Life East Texas’s motion to dismiss under the Texas Citizens Participation Act.

Respectfully Submitted,

/s/ Emily Cook
Emily Cook
State Bar No. 24092613
ecook@texasrighttolife.com
TEXAS RIGHT TO LIFE
4500 Bissonnet Street, Suite 305
Bellaire, Texas 77401
713.782.5433
713.952.2041 (fax)
Counsel for all Amici Curiae

³⁹ *Dickson*, 2021 WL 4947193 (Schenck, J., dissenting).

⁴⁰ *Id.* at 1.

/s/ Kristina Denapolis West

Kristina Denapolis West

State Bar No. 24062697

kristina@amlawteam.com

3400 William D. Tate Ave.

Grapevine, TX 76051

972.444.8777

817.912.3605 (fax)

Counsel for Amicus Curiae

Texas Right to Life

CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2022, a true and correct copy of this Brief of Amici Curiae was served was served via electronic service through eFile.TXCourts.gov on counsel of record, listed below:

Jonathan F. Mitchell
jonathan@mitchell.law
MITCHELL LAW PLLC
111 Congress Ave., Suite 400
Austin, Texas 78701

Thomas Brejcha
tbrejcha@thomasmoresociety.org
Martin Whittaker
THOMAS MORE SOCIETY
309 West Washington St., Suite 1250
Chicago, Illinois 60606

H. Dustin Fillmore III
dusty@fillmorefirm.com
Charles W. Fillmore
chad@fillmorefirm.com
THE FILLMORE LAW FIRM, LLP
1200 Summit Avenue, Suite 860
Fort Worth, Texas 76102

D. Bryan Hughes
bryan@hughesfirm.com
LAW OFFICE OF D. BRYAN HUGHES
110 North College Avenue, Suite 207
Tyler, Texas 75702-7221

Counsel for Petitioners

Jennifer R. Ecklund
jecklund@thompsoncoburn.com
Elizabeth G. Myers
emyers@thompsoncoburn.com
John P. Atkins
jatkins@thompsoncoburn.com
THOMPSON COBURN LLP
1919 McKinney Avenue, Suite 100
Dallas, Texas 75201

Counsel for Respondents

/s/ Emily Cook
Emily Cook, Attorney
Counsel for all Amici Curiae

CERTIFICATE OF COMPLIANCE

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/s/ Emily Cook

Emily Cook, Attorney

Counsel for all Amici Curiae

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mwillborg@texasrighttolife.com
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Associated Case Party: The Afiya Center

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|---------------------|-----------|----------------------------------|----------------------|--------|
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| Jennifer Ecklund | 24045626 | jecklund@thompsoncoburn.com | 5/16/2022 4:51:29 PM | SENT |
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| Laurie DeBardeleben | | ldebardeleben@thompsoncoburn.com | 5/16/2022 4:51:29 PM | SENT |
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| Linda Carranza | | lcarranza@thompsoncoburn.com | 5/16/2022 4:51:29 PM | SENT |
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Associated Case Party: Texas Right to Life

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