No. 23-0629

In the Supreme Court of Texas

State of Texas, *et al.*, Defendants–Appellants,

vs.

Amanda Zurawski, *et al.*, Plaintiffs–Appellees

On Direct Appeal from the 353rd Judicial District Court of Travis County, Texas
Cause No. D-1-GN-23-000968

Brief *Amicus Curiae* On Behalf of Members of the Texas State Legislature in Support of Defendants–Appellants

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Statement of the Interest of the *Amici*

Amici curiae are Members of the Texas State Legislature. As legislators, *amici* have a vital interest in the outcome of this litigation, which directly challenges their constitutional authority to establish public policy for the State of Texas and to protect the lives of unborn children in accordance with that policy. The regulation of abortion is a sensitive issue which, like most such issues, should be decided by the legislature, where the voice of the people may be heard and where compromise and accommodation of divergent viewpoints are possible.

Having failed in the political process, abortion advocates have turned to the courts in an effort to subvert the democratic will. That effort should be resisted. "Judicial power is most forcefully asserted when a court refrains from arrogating to itself decisions properly entrusted to the other branches of government or to the people." *Doe v. Dep't of Social Services*, 487 N.W.2d 16, 186 (Mich. 1992) (Levin, J., concurring).

The decision as to whether, and under what circumstances, abortion should be allowed is one for the legislature, not the judiciary, to make. Accordingly, the temporary injunction issued by the district court should be vacated.[*]

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[*] Attorney fees for the preparation of this brief were paid by Texas Alliance for Life Trust Fund.

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Statement of the Case

Amici curiae adopt the defendants-appellants' Statement of the Case.

Statement of the Issues Presented for Review

Whether the due course of law guarantee of the Texas Constitution, art. I, § 19, confers a right to abortion.

Whether the prohibition of abortion denies or abridges equality under the law because of sex in violation of art. I, § 3a, of the Texas Constitution.

Whether the prohibition of abortion violates the equal rights guarantee of the Texas Constitution, art. I, § 3.

Summary of Argument

The district court held that, under article I, §§ 3, 3a and 19, of the Texas Constitution, a physician must be allowed to perform an abortion upon a pregnant woman whenever the physician determines "in [his or her] good faith judgment" that the woman has a "physical emergent medical condition." "Temporary Injunction Order" at 2.[1] The court enjoined defendants from enforcing the pre-*Roe* abortion statutes, Tex. Rev. Civ. Stat. Ann. articles 4512.1–4512.4, 4512.6 (West 1976), the "Human Life Protection Act," Tex. Health & Safety Code, § 170A.001 *et seq*. (West Supp. 2022), and the "Texas Heartbeat Act," Tex. Health & Safety Code, § 171.201 *et seq*. (West Supp. 2022), to the extent that they do not permit such abortions. In so ruling, the district court erred.

First, the due course of law guarantee, art. I, § 19, does not confer a right to abortion. Such a right cannot be derived from the text of § 19, the intent of the framers who drafted it and the people who approved it, the historical context in which it was written, the legal traditions of the State, and the judicial precedents interpreting it. Under the applicable rational basis standard of review, the

[1] Such a condition includes, "at a minimum," "a physical medical condition or complication of pregnancy that poses a risk of infection, or otherwise makes continuing the pregnancy unsafe for the pregnant [woman]," "a physical medical condition that is exacerbated by pregnancy, cannot be effectively treated during pregnancy, or requires recurrent invasive intervention," and/or "a fetal condition where the fetus is unlikely to survive the pregnancy and sustain life after birth." *Id*.

prohibition of abortion is reasonably related to multiple, legitimate state interests.

Second, the prohibition of abortion does not deny or abridge equality under the law because of sex in violation of art. I, § 3a. A prohibition of abortion can directly affect only women because only women are capable of becoming pregnant. A classification based upon a physical characteristic unique to one sex, and which is not a pretext designed to favor one sex over another, does not violate art. I, § 3a, so long as it is reasonably related to one or more legitimate state interests. The prohibition of abortion meets that standard.

Third, the prohibition of abortion does not violate the equal rights guarantee of art. I, § 3. Article I, § 3, has been construed consistently with the Supreme Court's interpretation of the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court, however, has held that the Equal Protection Clause does not protect a right to abortion. *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228, 2245–46 (2022). Accordingly, there is no corresponding right to abortion under art. I, § 3, of the Texas Constitution. Entirely apart from the foregoing, plaintiffs' argument fails. The prohibition of abortion neither infringes upon a fundamental right nor burdens a suspect class. Thus, the applicable standard of review under art. I, § 3, is rational basis. Once again, the prohibition of abortion meets that standard.

ARGUMENT

I.

THE DUE COURSE OF LAW GUARANTEE OF THE TEXAS CONSTITUTION DOES NOT CONFER A RIGHT TO ABORTION.

Plaintiffs argued below, and the district court agreed, that the due course of law guarantee of the Texas Constitution (art. I, § 19) confers a right to abortion, at least in certain vague and broadly defined circumstances.[2] That determination was clearly erroneous.

Article I, § 19, provides: "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." Tex. Const. art. I, § 19 (West 2018).

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[2] Plaintiffs sought a temporary injunction enjoining defendants from enforcing the pre-*Roe* abortion statutes, Tex. Rev. Civ. Stat. Ann. articles 4512.1–4512.4, 4512.6 (West 1976), the "Human Life Protection Act," Tex. Health & Safety Code § 170A.001 *et seq*. (West Supp. 2022). and the "Texas Heartbeat Act," *id*., § 171.201 *et seq*., "in any manner that would prevent pregnant Texans with emergent medical conditions from receiving abortion care" during the pendency of the litigation. "Temporary Injunction Order" at 1 (summarizing plaintiffs' application). The district court held that under article I, §§ 3, 3a and/or 19, of the Texas Constitution, a physician must be allowed to perform an abortion upon a pregnant woman whenever the physician determines, "in [his or her] good faith judgment and in consultation with the pregnant [woman]," that she has "a physical emergent medical condition." *Id*. at 2. The court found that a "physical emergent medical condition" includes, "*at a minimum*: a physical medical condition or complication of pregnancy that poses a risk of infection, or otherwise makes continuing the pregnancy unsafe for the pregnant [woman]; a physical medical condition that is exacerbated by pregnancy, cannot be effectively treated during pregnancy, or requires recurrent invasive intervention; and/or a fetal condition where the fetus is unlikely to survive the pregnancy and sustain life after birth." *Id*. (emphasis added). The actual terms of the temporary injunction, however, did not restrict the scope of the injunction to physical conditions, even as loosely defined by the district court. *See* "Temporary Injunction Order" at 5-6, ¶¶ A, B & C.

Relying principally on § 19, this Court has recognized a state constitutional right of privacy in the nondisclosure of personal matters. *TSEU v. Texas Dep't of Mental Health & Mental Retardation*, 746 S.W.2d 203 (Tex. 1987) (forbidding mandatory polygraph testing of public employees). Whether the privacy right extends to conduct, however, is doubtful,[3] and, in any event, could not possibly extend to a right to abortion.[4]

In evaluating state constitutional claims, this Court has looked to the text of the constitution itself; the intent of the framers who drafted it and the people who

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[3] *See City of Sherman v. Henry*, 928 S.W.2d 464 (Tex. 1996) (state right of privacy does not extend to adultery); *Ex parte Morales*, 212 S.W.3d 483, 487, 494–98 (Tex. App.–Austin, 2006, *pet. dism'd*) (penal statute prohibiting sexual relations between an educator and a student, even a consenting adult student, does not violate any state or federal right of privacy); *Toledo v. State*, 519 S.W.3d 273, 283–84 (Tex. App.–Houston [1st Dist.] 2017, *pet. ref'd)* (same); *Berkovsky v. State*, 209 S.W.3d 252, 253–54 (Tex. App.–Waco 2006, *pet. ref'd*) (same); *Lawrence v. St*ate, 41 S.W.3d 349, 359–62 (Tex. App.–Houston [14th Dist] 2001, *pet. ref'd*) (*en banc*) (no state right of privacy to engage in homosexual sodomy), *reversed on other grounds*, 539 U.S. 558 (2003). Apart from privacy based claims, this Court has recognized fundamental "substantive due process" rights under art I, § 19, only on rare occasion, and never in the absence of a longstanding tradition of protecting the right being asserted. *See Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977) (right to own property); *Spann v. City of Dallas*, 235 S.W. 513, 515 (Tex. 1921) (right to use property). For the reasons set forth in the text, *infr*a, there is no tradition protecting a right to abortion in Texas law.

[4] There is authority supporting the proposition that "the Texas Constitution's due course of law provision [art. I, § 19] does not afford greater protection than the federal due process clause." *Toledo v. State*, 519 S.W.3d at 283–84 (citing cases). If so, plaintiffs' argument based on art. I, § 19, is foreclosed by the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228 (2022), overruling *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and holding that the Due Process Clause of the Fourteenth Amendment does not confer a right to abortion. *See Dobbs*, 142 S.Ct. at 2244–61 (due process analysis), 2284 (overruling *Roe* and *Casey*).

approved it; the historical context in which it was written; the legal traditions of the State; and the judicial precedents interpreting the particular provision in question and similar provisions in the federal constitution. *City of Sherman v. Henry*, 928 S.W.2d 464, 472 (Tex. 1996).

Article I, § 19, does not expressly confer a right to abortion. Nor can such a right fairly be implied. Abortion has long been a serious criminal offense in Texas. In 1854, less than ten years after being admitted to the Union and more than twenty years before the present constitution was adopted, Texas enacted its first abortion statute. The statute prohibited anyone from "unlawfully and maliciously" using any drug or device "with the intent to procure the miscarriage of any woman being with child." Tex. Gen. Laws, ch. XLIX, § 1 (1854). This statute was superseded by an Act of August 28, 1856, as amended by an Act of February 12, 1858, *codified at* Tex. Gen. Stat. Digest, ch. VII, arts. 531–536, p. 524 (Oldham & White 1859), *recodified at* Tex. Penal Code arts 641–46 (1895), Texas Penal Code arts. 1071–76 (1911), Texas Penal Code arts. 1191–96 (1925), *carried forward as* Tex. Penal Code Ann. arts. 1191–1196 (West 1961), *recodified at* Tex. Rev. Civ. Stat. Ann. arts. 4512.1–4512.6 (West 1976). Under these statutes, which punished a completed abortion as a felony and an attempted abortion as a misdemeanor, an abortion could be procured or attempted only "by

medical advice for the purpose of saving the life of the mother." *Id*. The abortion statutes remained essentially unchanged until they were struck down by the Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973), *overruled*, *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228 (2022). They have not been repealed.[5]

For decades before *Roe* was decided, the Texas Court of Criminal Appeals regularly affirmed convictions for abortion and attempted abortion without any hint that either the prosecutions or convictions violated the Texas Constitution. *See* Paul Benjamin Linton, *Abortion Convictions Before Roe*, 36 Issues in Law & Medicine 77, 105–06 (Spring 2021) (listing twenty-eight Texas cases decided between 1894 and 1971). Less than fifteen months before *Roe v. Wade* was decided, the Texas Court of Criminal Appeals affirmed a physician's conviction for performing an illegal abortion, rejecting both privacy and vagueness challenges. *Thompson v. Stat*e, 493 S.W.2d 913 (Tex. Crim. App. 1971), *vacated*

[5] Although the United States Court of Appeals for the Fifth Circuit has held that the pre-*Roe* statutes were repealed by implication by the enactment of post-*Roe* laws regulating abortion, *see McCorvey v. Hill*, 385 F.3d 846 (5th Cir. 2004), the court's repeal-by-implication analysis is both superficial (for example, the court cites, *inter alia*, an *administrative regulation* in support of its holding, even though a statute cannot be repealed by implication by a regulation) and unpersuasive. *See* David M. Smolin, *The Status of Existing Abortion Prohibitions in a Legal World without Roe: Applying the Doctrine of Implied Repeal to Abortion*, 11 St. Louis. U. Pub. L. Rev. 385 (1992) (analyzing repeal-by-implication doctrine). In any event, a federal court's interpretation of state law is not binding upon a state court.

and remanded, 410 U.S. 950 (1973), *on remand*, 493 S.W.2d 793 (Tex. Crim. App. 1973).

Quoting art. I, § 19, the court said that "[t]he State of Texas is committed to preserving the lives of its citizens so that no citizen 'shall be deprived of life, . . . except by the due course of the law of the land.'" [6] 493 S.W.2d at 918. The court determined that the Texas abortion statutes were "designed to protect fetal life," and held that this purpose "justifies prohibiting termination of the life of the fetus or embryo except for the purpose of saving the life of the mother." *Id*. In light of the decision in *Thompson*, art. I, § 19, could not plausibly be construed to confer a "liberty" interest in ending a life that is specifically protected by § 19.

In addition to enacting comprehensive regulations of abortion, Texas has recognized the rights of unborn children in a variety of contexts outside of abortion, including criminal law, tort law, health care law, property law, family law and guardianship law. Apart from the abortion statutes that have been challenged in this case, the killing or injury of an unborn child, other than in an abortion, may be prosecuted as a homicide or an assault. Tex. Penal Code Ann.

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[6] Article I, § 19, secures rights to "citizens," not "persons," but the constitutional protections afforded by § 19 have been extended to persons who are not, in a strict sense, "citizens." *See Ismail v. Ismail*, 702 S.W.2d 216, 220 n. 2 (Tex. App.–Houston [1st Dist.] 1985, *writ ref'd n.r.e.*) (due course of law guarantee protects nonresident aliens); *Pintor v. Martinez*, 202 S.W.2d 333, 335 (Tex. Civ. App.–Austin 1947, *writ ref'd, n.r.e.*) (due process guarantee protects resident aliens).

§ 1.07(26) (West 2021) (defining "individual" to include "an unborn child at every stage of gestation from fertilization until birth"); §§ 19.06 (West 2011) (exceptions to scope of homicide offenses), 22.12 (exceptions to scope of assaultive offenses).[7]

In tort law, a common law action for (nonlethal) prenatal injuries may be brought without regard to stage of pregnancy when the injuries were inflicted. *Yandell v. Delgado*, 471 S.W.2d 569 (Tex. 1971). *See also Brown v. Shwarts*, 968 S.W.2d 331, 334 (Tex. 1998). And a statutory cause of action for wrongful death may be brought on behalf of an unborn child without regard to the stage of pregnancy when the injuries causing death were inflicted. Tex. Civ. Prac. & Rem. Code Ann. § 71.001(4) (West 2008). And Texas does not recognize wrongful life causes of action. *Nelson v. Krusen*, 678 S.W.2d 918, 924–25 (Tex. 1984).

Under the State's health care statutes, an advance directive may not direct the withholding or withdrawal of life-sustaining treatment from a pregnant patient. Tex. Health & Safety Code Ann. § 166.049 (West 2017). DNR orders are subject

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[7] The Court of Criminal Appeals has rejected every challenge to the constitutionality of what is known as "The Prenatal Protection Act." *See Lawrence v. State*, 240 S.W.3d 912, 917–18 (Tex. Crim. App. 2007) ("the Legislature is free to protect the lives of those whom it considers to be human beings"); *Flores v. State*, 245 S.W.3d 432, 436–38 (Tex. Crim. App. 2008); *Estrada v. State*, 313 S.W.3d 274, 30–10 (Tex. Crim. App. 2010). *See also Eguia v. State*, 288 S.W.3d 1, 11–13 (Tex. App.–Houston [1st Dist.] 2008, *no pet.*) (rejecting state and federal constitutional challenges to the Act)*; Kiss v. State*, 316 S.W.3d 665, 667–69 (Tex. App.–Dallas 2009, *pet. ref'd*) (same)..

to the same limitation. *Id*. § 166.098. And a medical power of attorney may not authorize an abortion. *Id*. § 166.152(f)(4).

In property law, a child *en ventre sa mere* (in the mother's womb) is included among those children in being at the time of the decedent's death. *James v. James*, 164 S.W. 47, 47 (Tex. Civ. App.–San Antonio 1914, *writ dismissed w.o.j.*). *See also* Tex. Estates Code Ann. § 255.051 *et seq*. (West 2020). A child conceived before but born after the death of a decedent may recover damages for the death of his father. *Nelson v. Galveston, H. & S.A. Ry. Co*., 14 S.W. 1021, 1022–23 (Tex. 1890). The rule against perpetuities, which limits the time within which an interest in a trust must vest, allows a period of gestation to be added to a "life in being" at the time the interest is created. Tex. Prop. Code Ann. §§ 112.036(c)(1)(B), (c)(2) (West 2014).

In family law, a suit to terminate parental rights may be commenced before birth. Tex. Fam. Code Ann. § 161.102 (West 2014). And a guardian *ad litem* may be appointed to represent the interest of an unborn child in any proceeding if the court determines that representation of the child's interest otherwise would be inadequate. Tex. Prop. Code Ann. § 115.014(a) (West 2014). A guardian *ad litem* may also be appointed to represent an unborn child in probate proceedings. Tex. Estates Code Ann. §§ 53.104(a)(3), 1054.007(a)(4) (West 2020).

A right to abortion cannot be found in the text or structure of the Texas Constitution. There is no evidence that either the framers or ratifiers of the Texas Constitution intended the Bill of Rights to limit the Legislature's authority to prohibit abortion. *See* Seth Shepard McKay, Debates in the Texas Constitutional Convention of the State of Texas of 1875, 234–42 (debate on the Bill of Rights in Committee of the Whole), 290–95 (debate on the Bill of Rights in Convention) (1930); Journal of the Constitutional Convention of the State of Texas of 1875, 337–39, 346–57, 434–36. Such an intent would have been remarkable in light of the contemporaneous prohibition of abortion except to save the life of the mother. *See City of Sherman v. Henry*, 928 S.W.2d 464, 473 (Tex. 1996) (rejecting asserted privacy interest to engage in adultery where adultery was a crime from before the time when the 1876 Constitution was adopted until 1973).

To paraphrase what this Court said in *City of Sherman*, "[w]hile the constitution's framers may have been willing to die for the right of free expression, . . . there is no indication that they were willing to make any sacrifice for the right to [have an abortion]." *Id*. Moreover, "the fact that constitutional guarantees continue to evolve over time does not mean that we are allowed to create new guarantees that are not present in either the text or the intent of the constitution." *Id*. *See also Jones v. Ross*, 173 S.W.2d 1022, 1024 (Tex. 1943)

(noting that it is "the settled law of this State that the provisions of our State Constitution mean what they meant when they were promulgated and adopted, and their meaning is not different at any subsequent time. Constitutional provisions must be construed in light of conditions existing at the time of [their] adoption"). There is no basis for the argument that abortion is protected as a "fundamental right" under the Texas Constitution. Abortion, like adultery, is "not a right implicit in the concept of liberty in Texas or deeply rooted in this state's history and tradition." *City of Sherman*, 928 S.W.2d at 473.

Apart from fundamental rights, a statute does not violate the due course of law guarantee of art. I, § 19, if it is reasonably related to a legitimate governmental purpose. This Court has recognized that the State has a "legitimate governmental purpose to favor childbirth over abortion." *Bell v. Low Income Women of Texas*, 95 S.W.3d 253, 263 (Tex. 2002). The legitimacy of that interest extends to the State's abortion statutes, which were "designed to protect fetal life," a purpose the Texas Court of Criminal Appeals held "justifies prohibiting termination of the life of the fetus or embryo except for the purpose of saving the life of the mother." *Thompson v. State*, 493 S.W.2d. 913, 918 (Tex. Crim. App. 1971).[8]

[8] *Amici* note that both the "Texas Heartbeat Act" and the "Human Life Protection Act" allow abortions to be performed for serious physical health reasons, as well as to avert the death of the pregnant woman.

In overruling *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Supreme Court held that statutes "regulating or prohibiting abortion" are subject to "rational-basis review . . . ." *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228, 2246, 2283-84 (2022). The statute "must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests." *Id*. at 2284. The regulation of abortion is rationally related to multiple, legitimate state interests, including "respect for and preservation of prenatal life at all stages of development . . . ; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability." *Id*. (citation omitted). Those interests provide a rational basis for the prohibition of abortion. *Id*. The abortion statutes challenged in this case are rationally related to the same interests. Accordingly, they do not violate the due course of law guarantee (art. I, § 19) of the Texas Constitution.

II.

THE PROHIBITION OF ABORTION DOES NOT DENY OR ABRIDGE EQUALITY UNDER THE LAW BECAUSE OF SEX.

Plaintiffs also argued below, and the district court agreed, that the

prohibition of abortion denies or abridges equality under the law because of sex, in violation of art. I, § 3a, of the Texas Constitution. *See* n. 1, *supra*. This was error.

Article I, § 3a, provides, in relevant part: "Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin." Tex. Const. art. I, § 3a (West 2018). The prohibition of abortion does not deny or abridge equality of law because of sex.

This Court follows a three-step process for evaluating claims brought under art. I, § 3a. First, the court decides whether equality under the law has been denied. Second, if equality under the law has been denied, then § 3a requires the court to determine whether equality has been denied *because* of a person's membership in a class protected by the amendment. Third, if the court concludes that equality has been denied because of a person's membership in a protected class, then the challenged statute, ordinance or policy cannot stand unless it is narrowly tailored to serve a compelling governmental interest. *Bell v. Low-Income Women of Texas*, 95 S.W.3d 253, 257 (Tex. 2002).

That an abortion prohibition can directly affect only women does not mean that equality under the law has been denied *because* of a woman's sex. As this Court observed in rejecting a challenge to the public policy of not paying for any abortions for which federal reimbursement was not available under the Hyde

Amendment, "[t]he classification here is not so much directed at women as a class as it is abortion as a medical treatment, which, because it involves a potential life, has no parallel as a treatment method." *Low-Income Women of Texas*. 95 S.W.3d at 258 (citing *Harris v. McRae*, 448 U.S. 297, 325 (1980) ("[a]bortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life")). For that reason, the court was unable to say that the classification was, by its own terms, "because of sex." *Id*.

The court also determined that the funding restrictions could not be characterized as "a pretext designed to prefer males over females in the provision of health care. . . ." *Id*.[9] ". . . we do not believe [that] the discouragement of

[9] *But see New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841 (N.M. 1998) (*contra*). In applying "heightened scrutiny" to the abortion funding restriction challenged in that case, the New Mexico Supreme Court failed to recognize that the regulation in question did not use "the unique ability of women to become pregnant and bear children," *id*. at 855, as a pretext to discriminate against them in *other* respects, *e.g.*, "imposing restrictions on [their] ability to work and participate in public life." *Id*. at 854. With the exception of the New Mexico Supreme Court's decision in *New Mexico Right to Choose*, every other state reviewing court to have considered the issue has recognized that laws that differentiate between the sexes are permissible and do not violate the state equal rights guarantee if they are based upon the unique physical characteristics of a particular sex. The cases have upheld rape statutes, *State v. Rivera*, 612 P.2d 526, 530–31 (Haw. 1980), *State v. Fletcher*, 341 So.2d 340, 348 (La. 1976), *Brooks v. State*, 330 A.2d 670, 672–73 (Md. Ct. Sp. App. 1975), *State v. Craig*, 545 P.2d 649, 652–53 (Mont. 1976), *Finley v. State*, 527 S.W.2d 553, 555–56 (Tex. Crim. App. 1975); statutory rape statutes, *People v. Salinas*, 551 P.2d 703, 706 (Colo. 1976), *State v. Bell*, 377 So.2d 303 (La. 1979); an aggravated incest statute, *People v. Boyer*, 349 N.E.2d 50 (Ill. 1976); statutes governing the means of establishing maternity and paternity, *Commonwealth v. MacKenzie*, 334 N.E.2d 613, 614–16 (Mass. 1975), *A v. X, Y & Z*, 641 P.2d 1222, 1224–26 (Wyo. 1982); statutes restricting public funding of abortion, *Fischer v. Dep't of Public Welfare*, 502 A.2d 114, 124–26 (Pa. 1986); statutes and rules barring female nudity in bars, *Dydyn v. Dep't of Liquor Control*, 531 A.2d 170, 175 (Conn. App. Ct. 1987); *MJR's Fare of Dallas, Inc. v. City of Dallas*, 792 S.W.2d 569, 575

abortion through funding restrictions can, by itself, be considered purposeful discrimination against women as a class. . . . The biological truism that abortions can only be performed on women does not necessarily mean that governmental action restricting abortion funding discriminates on the basis of gender." *Id*. at 263.[10] Rather, "those restrictions implement a legitimate governmental purpose to favor childbirth over abortion." *Id*.

So, too, the Texas statutes prohibiting abortion that have been challenged in this case cannot be said to discriminate against women "because of sex" in violation of art. I, § 3a. It would be more appropriate to view the prohibitions as ones "directed at . . . abortion as a medical treatment. . . ." In light of the State's indisputable interest in protecting unborn human life, the prohibition of abortion

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(Tex. App.–Dallas 1990, *writ denied*); and ordinances prohibiting public exposure of female breasts, *State v. Lilley*, 204 A.3d 198, 205–08 (N.H. 2019), *City of Seattle v. Buchanan*, 584 P.2d 918, 919–22 (Wash. 1978). *See also City of Albuquerque v. Sachs*, 92 P.3d 24 (N.M. Ct. App. 2004) (rejecting challenge to ordinance banning public exposure of female breasts).

[10] *See Geduldig v Aiello*, 417 U.S. 484, 496 n. 20 (1974) ("[n]ormal pregnancy is an objectively identifiable physical condition with unique characteristics"). *See also Jane L. v. Bangerter*, 794 F. Supp. 1537, 1549 (D. Utah. 1992) ("[a]bortion statutes are examples of cases in which the sexes are not biologically similarly situated" because only women are capable of becoming pregnant and having abortions). In *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228 (2022), the Supreme Court, citing, *inter alia*, *Geduldig*, held that "a State's regulation of abortion is not a sex-based classification and is thus not subject to the 'heightened scrutiny' that applies to such classifications." *Id*. at 2245. *See also Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky v. State of Idaho*, 522 P.3d 1132, 1197-1200 (Idaho 2023) (for purposes of state equal protection analysis, statutes prohibiting abortion are not subject to the higher scrutiny that applies to sex-based classifications).

cannot be regarded as a pretext to discriminate against women in favor of men. For purposes of the state equal rights amendment, therefore, abortion prohibitions are subject to rational basis review. *Id*. at 264. For the reasons previously stated, those prohibitions are reasonably related to multiple legitimate state interests.

III.

THE PROHIBITION OF ABORTION DOES NOT VIOLATE THE EQUAL RIGHTS GUARANTEE OF THE TEXAS CONSTITUTION.

Petitioners argued further, and the district court agreed, that the prohibition of abortion violates the equal rights guarantee of the Texas Constitution (art. I, § 3). *See* n. 1, *supra*. That determination was in error.

Article I, § 3, provides: "All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive public emoluments, or privileges, but in consideration of public services." Tex. Const. art. I, § 3 (West 2018). Although § 3 does not use the words "equal protection," this Court has "typically referred to the guarantee of equal rights afforded by article I, section 3 by that term," *Bell v. Low-Income Women of Texas*, 95 S.W.3d 253, 257 n. 4 (Tex. 2002 (citing cases), and has repeatedly held that "the federal analytical approach applies to equal protection challenges under [§ 3 of] the Texas Constitution." *Id*. at 266 (citing *Rose v. Doctors Hospital*, 801 S.W.2d 841, 846

(Tex. 1990) ("Texas cases echo federal standards when determining whether a statute violates equal protection"), and *Richards v. League of United Latin American Citizens*, 868 S.W.2d 306, 310–11 (Tex. 1993)). *See also Abbott v. Anti-Defamation League Austin, Southwest & Texoma Regions*, 610 S.W.3d 911, 923 n. 14 (2020) (same) (quoting *Bell*).

Given this equivalency of interpretation, this Court could derive a right to abortion from art. I, § 3, of the Texas Constitution *only* if there were a corresponding right to abortion under the Equal Protection Clause of the Fourteenth Amendment. In *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228 (2022), however, the Supreme Court held that the Equal Protection Clause does *not* protect a right to abortion. *Id*. at 2245–46. Accordingly, there is no right to abortion under art. I, § 3, of the Texas Constitution, either.

Entirely apart from the foregoing analysis, plaintiffs' equal protection argument fails. This Court has held that "[w]hen the classification created by a state statute does not infringe upon fundamental rights or does not burden an inherently suspect class, equal protection requires only that the statutory classification be rationally related to a legitimate state interest." *Rose v. Doctors Hospital*, 801 S.W.2d at 846. For the reasons set forth in the preceding arguments, the statutes challenged in this case neither infringe upon a fundamental right (*see*

Argument I, *supra*) nor burden a suspect class (*see* Argument II, *supra*). Thus, the applicable standard of review is rational basis. The prohibition of abortion is rationally related to multiple legitimate state interests, including most particularly, "respect for and preservation of prenatal life at all stages of development." *Dobbs*, 142 S.Ct. at 2284. That is sufficient to sustain their constitutionality under art. I, § 3, of the Texas Constitution.[11]

[11] With respect to all issues not discussed herein, *amici curiae* adopt the brief of the defendants-appellants.

Prayer

For the foregoing reasons, *amici curiae*, Members of the Texas State Legislature, respectfully pray that this Honorable Court reverse the district court's order denying defendants-appellants' plea to the jurisdiction and render judgment dismissing this case. In the alternative, this Court should vacate the district court's order granting a temporary injunction and remand for further proceedings.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing instrument was forwarded to all counsel of record by electronic filing in accordance with the Texas Rules of Appellate Procedure on November 6, 2023.

/s/Christopher Maska
Christopher Maska

Certificate of Compliance

I hereby certify that, according to the word processing software used to generate this document (Word Perfect), this document contains 4,962 words, excluding exempted text.

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