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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 21-0262

In the Supreme Court of Texas

DON ZIMMERMAN,
Petitioner,

v.

CITY OF AUSTIN AND SPENCER KRONK, IN HIS OFFICIAL CAPACITY AS CITY MANAGER OF THE CITY OF AUSTIN,
Respondents.

On Petition for Review
from the Eighth Court of Appeals, El Paso
No. 08-20-00039-cv

BRIEF FOR AMERICA FIRST LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING PETITIONER

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Issues Presented

America First Legal Foundation adopts the "Issues Presented" set forth in the Petition for Review.

Interest of Amicus Curiae

America First Legal Foundation ("AFL") is a national, nonprofit organization. AFL works to promote the rule of law in the United States, prevent executive overreach, to ensure due process and equal protection for all Americans, and to encourage the diffusion of knowledge and understanding of the law and individual rights guaranteed under the Constitution and laws of the United States.

AFL has a substantial interest in this case. The City of Austin has relied upon a misguided and unjustified theory of judicial supremacy that suggests that court decisions operate as a super-legislature to erase state statutes. In so doing, it continues a long and tragic tradition of courts distorting the law, particularly in abortion cases. AFL is committed to promoting and protecting American principles of the rule of law and separation of powers. Among these is AFL's conviction that the judiciary is a coequal branch of government with the legislature and that its obligation is to apply the law, not pursue its own policy preferences. This is the fundamental issue raised by the Petition for Review in this case, and that is why AFL files this brief.

Source of Fee

America First Legal Foundation is paying all fees incurred in preparing this brief.

Statement of Facts

America First Legal Foundation incorporates the "Statement of Facts" in the Petition for Review.

Summary of Argument

The Court of Appeals decided this case with a perfunctory analysis that missed key legal issues. It entirely ignored the relevant provision of the Texas Constitution. It ignored the issue of severability. And it ignored this Court's pronouncement about the meaning of a judicial determination of unconstitutionality: a law declared unconstitutional in one case is not necessarily unconstitutional in different circumstances. The law itself is not erased from the law books, as the Court of Appeals seemed to think.

The Texas Supreme Court should grant review to correct these serious oversights in the Court of Appeals' legal analysis. These are not just errors in need of correction in this case (though they surely are that), but also matters of broader importance to the way that courts approach

abortion cases generally. In short, this is a case of significance to the jurisprudence of the state of Texas. Tex. Gov't Code § 22.001(a).

For too long, abortion jurisprudence in America has been a field where different rules apply. The U.S. Supreme Court's abortion jurisprudence is full of frustrated dissents calling out majority opinions for taking shortcuts around the normal steps of legal analysis. This kind of analytical sloppiness undercuts confidence in the courts—and this in an area of law where moral commitments are at their strongest and disagreements at their most intense. The Texas Supreme Court is not responsible for the errors of the federal courts. But it does have the ability to make clear that—at least in Texas courts—abortion cases require the same attention to detail, the same analytical care and precision, that is required and expected of a fair and impartial judiciary sworn to uphold the law.

I. The Judiciary Lacks the Power to Erase Statutes

The Court of Appeals *was* clear on one issue, but on that issue, it was wrong. This provides an additional basis for granting review. The Court of Appeals may not have known what to do with the state constitution. But it was confident that *Roe v. Wade*, 410 U.S. 113

(1973)had rendered earlier state statutes a "nullity." *Zimmerman v. City of Austin*, 620 S.W.3d 473, 486 (Tex. App. 2021). This fundamentally misunderstands the nature of judicial decisions. As this Court has stated, "[w]hen 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." *Pidgeon v. Turner*, 538 S.W.3d 73, 88 n. 21 (Tex. 2017).

In other words, courts possess no writ of erasure by which they can make enacted laws disappear. *See* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933 (2018). They decide cases; they do not make laws. In Texas, this is embodied in the constitution's prohibition on advisory opinions. Texas Const. art. II, § 1. *See also Valley Baptist Med. Ctr. v. Gonzalez*, 33 S.W.3d 821, 822 (Tex. 2000) ("Under article II, section 1 of the Texas Constitution, courts have no jurisdiction to issue advisory opinions."); *Cadena Comercial USA Corp. v. Texas Alcoholic Beverage Comm'n*, 518 S.W.3d 318, 338 (Tex. 2017) ("Advisory opinions are prohibited because they purport to bind future parties based on a "hypothetical injury," rather than "actual or imminent harm."). It is also embodied in this Court's repeated admonitions against inserting

itself into the legislative process. *McIntyre v. Ramirez*, 109 S.W.3d 741, 748 (Tex. 2003) ("Our role . . . is not to second-guess the policy choices that inform our statutes"); *Cadena Comercial*, 518 S.W.3d at 336–37 ("Our role as a court is limited to determining legislative intent through the words the Legislature selected.").

When a court declares a particular statute unconstitutional, it is simply saying that in the case before it, the statute is inconsistent with the Constitution. What it does then is refuse to enforce the statute to produce an unconstitutional result in that case. But the statute remains on the books. Where prior precedents do not forbid its application, it must be applied.

It is true that *Roe* said that it was unconstitutional for the Texas statute to prohibit a doctor from providing an abortion. But that tells us nothing about whether the same statute can prohibit a city from funding abortions. To claim otherwise implies that courts function beyond the cases before them and wield a veto-like power to formally revoke legislation.

Unfortunately, the Court of Appeals in this case has muddied the waters, suggesting contrary to this court's holding in *Pidgeon* that a

single holding stating the magic word "unconstitutional" can render a statute a "nullity." This Court should grant review to correct this serious confusion about the function of a decision of unconstitutionality.

II. The Severability Statute Functions as a Backstop to the Writ-of-Erasure Analysis

This case should also be granted to clarify the judiciary's obligation to enforce statutory severability requirements. The recognition of the writ-of-erasure fallacy could potentially raise questions about severability's significance or relevance. This case provides an opportunity to clarify this issue, also important not only to this case but also more broadly to this state's constitutional jurisprudence.

Here is the potential point of confusion: when a court is circumspect about the writ-of-erasure fallacy, it would hardly seem to need to resort to severability analysis. A court would simply refuse to apply an unconstitutional statute; the statute would be simply *displaced* by the higher authority of the Constitution. *See Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1485 (2018) (Thomas, J., concurring); Kevin Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738, 769 (2010). Severability doctrine was, after all, unknown in the early republic and only invented in the mid-19th century. *See* Mark L. Movsesian,

Severability in Statutes and Contracts, 30 GA. L. REV. 41, 66–73 (1995); Walsh, 755–77. This fact has prompted U.S. Supreme Court Justices Thomas and Gorsuch to suggest rethinking severability doctrine. *See Murphy*, 138 S. Ct. at 1485 (Thomas, J., concurring); *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2219–20 (2020) (Thomas, J., concurring in part and dissenting in part); *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2365–66 (2020) (Gorsuch, J., concurring in part and dissenting in part). But this is about severability as a judge-made and judge-applied doctrine. This case presents something a bit different from what they have written about—a *statutory* severability requirement.

Even if the courts were to avoid resorting to severability doctrine, as Justices Thomas and Gorsuch have argued they should in light of writ-of-erasure principles, courts still must consider statutory commands on severability. Texas law requires courts to regard statutes as presumptively severable. Tex. Gov't Code § 311.032(c). When combined with a proper perspective on judicial power, statutory severability requirements operate as a kind of backstop against judicial overreach. When a court finds that a particular statute in a particular case was unconstitutional, the legislature has made it crystal clear that any

components or applications of that statute *not* at issue in the case remain good law.

In the present case, Tex. Gov't Code § 311.032(c) applies; the statutes prohibiting facilitation of abortion have multiple, severable components and applications. Not all of these statutory applications were held unconstitutional in *Roe*, as the Supreme Court has made abundantly clear. *See Connecticut v. Menillo*, 423 U.S. 9, 9–10 (1975) (allowing Connecticut to enforce its pre-*Roe* criminal abortion statutes against non-physician abortions, and rejecting the Connecticut Supreme Court's argument that *Roe* had rendered those statutes "null and void, and thus incapable of constitutional application even to someone not medically qualified to perform an abortion").

This shows that the Court of Appeals was wrong on two points. First, contra the Court of Appeals, the declaration of unconstitutionality does not repeal or revoke the statute. The statute was passed by the legislature and remains in Texas's statute books. Second, as the Court of Appeals failed to note, the statute is severable in each of its applications, so at least *some* aspects of the statute remain constitutional and fully enforceable. Either of these propositions could provide a starting point

for serious judicial analysis of the Texas statutes in question. The Court of Appeals' decision reflects neither of these propositions. It is up to the Supreme Court of Texas to correct this erroneous decision—and in the process, to reassert the rule of law in even the most controversial cases, and to clarify the meaning of the judicial power.

III. The Court of Appeals Followed an Unfortunate and Unlawful Trend of Courts Ignoring the Law in Abortion Cases

When the Court of Appeals skipped steps in its analysis, it fed into the long and sorry history of American courts abandoning careful and rigorous legal analysis in the abortion context. This is not only problematic in this case; it has broader implications for the reputation of Texas's courts.

A. The Court of Appeals Skipped Steps in This Case

The Texas legislature prohibited municipal funding for abortion. Tex. Gov't Code §§ 2272.001–.005. The City of Austin sought to end-run around the legislature's prohibition by funding groups that help people get abortions. The City ignored the Texas Constitution's prohibition on ordinances inconsistent with laws passed by the legislature. Tex. Const. Art. XI, § 5. The legislature had indeed passed a law prohibiting conduct

that "furnishes the means for procuring an abortion knowing the purpose intended." Article 4512.2 of the Revised Civil Statutes.

Oddly, the Court of Appeals did not bother to interpret the relevant provision of the Texas Constitution, Art. XI, § 5. Yet—equally oddly—the Court of Appeals was confident that the City's budget allocation to support abortion was protected by the Supreme Court's abortion cases, starting with *Roe v. Wade*, 410 U.S. 113 (1973). That conclusion does not follow without some account of the Texas Constitution, which the Court of Appeals does not provide. In other words, the Court of Appeals skipped a key analytical step to reach its conclusion. That by itself is good reason for this Court to grant the petition to review the case.

Public faith in the courts depends on careful and fair adjudication. Particularly on a controversial subject like abortion, clear and thorough analysis of the law is essential. When it comes to abortion cases—in particular—there is a long and sorry history of courts skipping steps or bending rules to get to preferred policy conclusions. Texas's courts should not become part of this history. The Supreme Court of Texas has the authority and responsibility to see that the civil courts of Texas follow the law. It should do so in this case.

B. There Has Been a Long History of Courts Making Up, Bending, or Ignoring the Law in Abortion Cases

According to Justice Scalia, the Supreme Court's "inclination" has been "to bend the rules when any effort to limit abortion, or even to speak in opposition to abortion, is at issue." *Stenberg v. Carhart*, 530 U.S. 914, 954 (2000) (Scalia, J., dissenting); *see also* Kaytlin L. Roholt, *Give Me Your Tired, Your Poor, Your Pregnant: The Jurisprudence of Abortion Exceptionalism in* Garza v. Hargan, 5 TEX. A&M L. REV. 505, 506 (2018) ("The Supreme Court has come to ignore—and even nullify—longstanding precedent and legal doctrines in the name of preserving and expanding the abortion right.").

In *Roe* itself, the Court started by breezing past issues of standing and mootness. *See* Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159, 160. It then proceeded to a famously undisciplined survey of historical and medical literature, cherry-picked to reach the conclusion that abortion was an unenumerated liberty right. *See* CLARKE D. FORSYTHE, ABUSE OF DISCRETION: THE INSIDE STORY OF ROE V. WADE (2013) (surveying the omissions and defects in the Court's empirical analysis); Robert M. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORDHAM L.

REV. 807 (1973) (surveying the historical errors of the *Roe* Court and of the sources upon which the Court relied). The ends-focused analysis was criticized not only for being wrong on ethics and medicine but cavalier as to legal standards. "Even among those who purport to agree with the outcome, few support the opinion." Linda R. Hirshman, *Bronte, Bloom, and Bork: An Essay on the Moral Education of Judges*, 137 U. PA. L. REV. 177, 202 (1988).

Critics of the opinion who were hardly pro-life advocates complained immediately that the opinion in *Roe* "lacks even colorable support in the constitutional text, history, or any other appropriate source of constitutional doctrine." John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 943 (1973). Others complained about its analytical confusion. *See, e.g.,* Michael J. Perry, *Abortion, The Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689, 733 (1976); Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1434 (1995) (describing the opinion in *Roe* as "unreasoned," "sophomoric," and an "embarrassing performance[]"). Even someone as sympathetic to *Roe* as Justice Ruth Bader Ginsburg recognized that the

decision was poorly structured and aggressively activist. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185 (1992) (criticizing the *Roe* Court's decision "to fashion a regime blanketing the subject, a set of rules that displaced virtually every state law then in force"); Alisha Haridasani Gupta, *Why Ruth Bader Ginsburg Wasn't All That Fond of Roe v. Wade*, N.Y. TIMES (Sept. 21, 2020), https://www.nytimes.com/2020/09/21/us/ruth-bader-ginsburg-roe-v-wade.html ("She didn't like how [*Roe*] was structured.").

When the Court revised its abortion analysis in *Casey*, it was again long on policy and short on law. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 965 (1992) (Rehnquist, C.J., concurring in part and dissenting in part). As Justice Scalia later described it, the *Casey* opinion offered nothing more than a "vote by nine lawyers" on abortion policy: "not on the question whether the text of the Constitution has anything to say about this subject (it obviously does not); nor even on the question (also appropriate for lawyers) whether the legal traditions of the American people would have sustained such a limitation upon abortion (they obviously would); but upon the pure policy question whether this limitation upon abortion is 'undue'—i.e., goes too far." *Stenberg v.*

Carhart, 530 U.S. 914, 955 (2000) (Scalia, J., dissenting). This undue burden standard was sui generis, fabricated "out of whole cloth" specifically for the abortion context. *Casey*, 505 U.S. at 964 (Rehnquist, C.J., concurring in judgment in part and dissenting in part).

Not only have the Supreme Court's abortion cases been notorious instances of policy-driven jurisprudence that disregards the law. They have also been willing to do violence to standard matters of legal analysis in the process. In *Stenberg*, the Court interpreted the statute in such a way as to depart not only from its clear text but even from their standard practices in interpreting an ambiguous statute. This prompted Justice Scalia's remark that the Court tends to "bend the rules" when faced with "any effort to limit abortion." *Stenberg*, 530 U.S. at 954 (Scalia, J., dissenting).

In *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), the Court again departed from normal law. First, the Court ignored the fact that the petitioners were apparently relitigating an earlier case which they had lost. *See id*. at 2331-50 (Alito, J., dissenting). Second, it refused to engage in the normal severability analysis that could have saved parts of the challenged law. *See id*. at 2350-53. Third, the Court continued a

longstanding tendency of being particularly liberal with third-party standing in the abortion context. *See id*. at 2323 (Thomas, J., dissenting).

These are just the most obvious examples of the Court's willingness to stretch the law to protect abortion. *See also, e.g., Hellerstedt*, 136 S. Ct. at 2321 (Thomas, J., dissenting) (referring to "the Court's habit of applying different rules to different constitutional rights — especially the putative right to abortion"); *Hill v. Colorado*, 530 U.S. 703, 742 (2000) (Scalia, J., dissenting) ("Because, like the rest of our abortion jurisprudence, today's decision is in stark contradiction of the constitutional principles we apply in all other contexts, I dissent."); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting) ("This Court's abortion decisions have already worked a major distortion in the Court's constitutional jurisprudence."); *id*. ("Today's decision ... makes it painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion.").

In this case, the Court of Appeals skipped an essential piece of the analysis in order to quickly reach its decision to stay out of the way of

pro-abortion city policies. It appears to be just the latest judicial innovation to protect pro-abortion policies.

The petitioner's argument is straightforward. The Texas Constitution prohibits municipalities from enacting policies contrary to a law passed by the legislature; a law passed by the legislature prohibits facilitating abortions; the City of Austin's policy facilitates abortions; the city's policy is contrary to the Texas Constitution. The Court of Appeals disagreed but did not explain why. Its opinion does not address the Texas Constitution at all, even though it is the Texas Constitution that is central to the petitioner's argument. The only thing that the Court of Appeals is clear about is that the City of Austin's pro-abortion policy should go into effect. How it reaches this legal conclusion is unclear.

C. The Texas Supreme Court Can Ensure That Texas Courts Do a Better Job, Deciding Abortion Cases According to the Law

America's abortion jurisprudence is a mess. But this case is not asking the Texas Supreme Court to fix the problems created by the U.S. Supreme Court.[1] This case presents a much more modest issue—but one

[1] A thorough fix would require reversing *Roe* and the atextual right to abortion. Better still would be recognizing the actual Fourteenth Amendment protections for unborn children. *See* Michael Stokes Paulsen, *The Plausibility of Personhood*, 74 OHIO ST. L.J. 13 (2013); Joshua J. Craddock, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?*, 40 HARV. J. L. & PUB.

nonetheless of great importance to the jurisprudence of the state. Tex. Gov't Code § 22.001(a). The issue is whether normal legal analysis is to go by the wayside in abortion cases. This case is an opportunity to explain that, in Texas at the very least, abortion cases deserve the same kind of conscientious attention to law and legal analysis as every other case. And this is important regardless of one's substantive views on *Roe* and *Casey*. It is essential that people be able to trust the courts to apply the law fairly and evenhandedly. When courts make it up as they go along, bend the rules, or skip steps in analysis, the courts do not live up to their promise and trust in the judiciary is undermined.

This Court should grant the petition for review to ensure that at least in Texas courts, legal analysis is conducted properly. Even—especially—when the issue is controversial, as it always is in abortion cases, the courts must be vigilant to follow and apply the law clearly and accurately.

POL'Y 539 (2017); John Finnis, *Born and Unborn: Answering Objections to Constitutional Personhood*, FIRST THINGS (Apr. 9, 2021), https://www.firstthings.com/web-exclusives/2021/04/born-and-unborn-answering-objections-to-constitutional-personhood.

Conclusion

The petition for review should be granted.

Respectfully submitted.

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Certificate of Compliance

This brief contains 3,472 words, excluding the portions exempted by Tex. R. App. P. 9.4(i)(1) according to Microsoft Word.

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