AMICUS CURIAE LETTER BRIEF OF
NUMEROUS STATE SENATORS AND STATE REPRESENTATIVES

July 14, 2022

Via E-Filing
Supreme Court of Texas
Supreme Court Building
201 W 14th St., Room 104
Austin, Texas 78711

Re: *In re Ken Paxton*, et al., No. 22-0527

TO THE HONORABLE SUPREME COURT OF TEXAS:

The members of the Texas Legislature named in Exhibit A (*amicus curiae*) submit this *amicus curiae* letter brief in support of Relators' Petition for Writ of Mandamus. *Amicus Curiae* are members of the Texas Senate and Texas House of Representatives who are interested in ensuring that this Court enforces the clear and unequivocal commands of the Texas legislature.

I. The District Court Defied The State Legislature By Claiming That Texas's Pre–*Roe v. Wade* Abortion Statutes Have Been "Repealed"

The Texas legislature has repeatedly and emphatically affirmed the continued existence of the state's pre–*Roe v. Wade* abortion statutes, and it has amended the Code Construction Act to prohibit **any** abortion statute from being construed to repeal those statutes by implication. When the legislature enacted the Texas Heartbeat Act last year (S.B. 8), it included a provision in section 2 that read as follows:

> The legislature finds that the State of Texas ***has never repealed, either expressly or by implication***, the state statutes enacted before the ruling in *Roe v. Wade*, 410 U.S. 113 (1973), that prohibit and criminalize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.

S.B. 8, 87th Leg. R.S. § 2 (2021) (emphasis added). When the legislature passed the Trigger Ban later that year (H.B. 1280), it included an ***identical*** provision in section 4 of the Act reaffirming the continued existence of the state's pre-*Roe* criminal abortion ban. *See* H.B. 1280, 87th Leg. R.S. § 4 (2021). So the legislature has ***twice*** declared that it has never repealed the state's pre-*Roe* abortion statutes, and that those statutes continue to exist as the law of Texas even though they have not been enforced since *Roe v. Wade*, 410 U.S. 113 (1973).

For good measure,[1] the Texas Heartbeat Act amended the Code Construction Act to prohibit ***any*** abortion statute from being construed to impliedly repeal the state's pre-*Roe* abortion law. Section 311.036(a) of the Texas Government Code now reads:

> A statute that regulates or prohibits abortion ***may not be construed to repeal any other statute that regulates or prohibits abortion***, either wholly or partly, ***unless the repealing statute explicitly states that it is repealing the other statute***.

Tex. Gov't Code § 311.036(a) (emphasis added). The abortion providers do not even mention section 311.036(a) in their brief, apparently in the hope that this Court will ignore this provision as they and the district court have done.

So the legislature has overruled *McCorvey v. Hill*, 385 F.3d 846, 849 (5th Cir. 2004), on ***three*** separate occasions: once in section 2 of the Texas Heartbeat Act (S.B. 8), again in section 4 of the Trigger Ban (H.B. 1280), and finally in section 5 of the Heartbeat Act, which added section 311.036(a) to the Code Construction Act. For a court to nonetheless hold that the pre-*Roe* laws were "repealed"—and to do so in the teeth of these statutory provisions—is defiance of the legislature and its enactments.

II. *McCorvey v. Hill* Has Not Only Been Overruled, It Was Demonstrably Wrong From The Outset

[1] The legislature not only placed express language in both the Heartbeat Act and the Trigger Ban declaring that the pre-*Roe* statutes were never impliedly repealed, for good measure, the legislature added section 311.036(a) to the Code Construction Act to clarify that statutes regulating or prohibiting abortion may not be construed to repeal any other statute regulating or prohibiting abortion. *See e.g.*, *Cowan v. Hardeman*, 26 Tex. 217, 224 (Tex. 1862) (finding no implied repeal where a condition "was introduced, out of abundant caution, to guard against the implication that such repeal was intended.").

The abortion providers rely heavily on the Fifth Circuit's conclusory and ill-reasoned opinion in *McCorvey v. Hill*, 385 F.3d 846 (5th Cir. 2004), which held that the Texas legislature had repealed its pre-*Roe* statutes by enacting post-*Roe* legislation that regulates the abortion procedure. The legislature overruled this decision three times when it enacted the Texas Heartbeat Act and the Trigger Ban, as explained above. But even if *McCorvey* had not been overruled by the legislature, its interpretation of state law is not binding on the state judiciary and it may not be followed unless this court, in its independent judgment, finds *McCorvey*'s reasoning persuasive. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 58 n.11 (1997) (holding that a federal circuit court's interpretations of state law do not bind the state judiciary). *McCorvey*'s implied-repeal holding is demonstrably wrong, and it ignores and contradicts the binding pronouncements from the Supreme Court of the United States and the Supreme Court of Texas that disfavor repeals by implication.[2]

McCorvey never so much as mentions the repeated holdings from the Supreme Court of the United States (and this Court) that strongly disfavor implied repeals. *See, e.g., Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367, 381 (1996) ("The rarity with which we have discovered implied repeals is due to the relatively stringent standard for such findings, namely, that there be an 'irreconcilable conflict' between the two federal statutes at issue.").[3] In *National Ass'n of Home Builders v.*

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[2] Not only are repeals by implication disfavored, there is a presumption against them. *See Diruzzo v. State*, 581 S.W.3d 788, 799 n.13 (Tex. Crim. App. 2019) ("[T]he presumption against implied repeal is grounded in judicial respect for the ultimate authority of the legislature to make laws." (citation omitted)); *Jones v. Sharyland Indep. Sch. Dist.*, 239 S.W.2d 216, 218-19 (Tex. Civ. App.—San Antonio 1951, no writ) ("The courts will not presume that the legislature intended a repeal by implication." (citation omitted)); *Hankins v. Connally*, 206 S.W.2d 89, 92 (Tex. Civ. App.—Waco 1947, writ ref'd n.r.e.) ("The rule in Texas is that 'the repeal of statutes by implication is never favored or presumed. When a new statute is passed dealing with the subject covered by an old law, if there is no express repeal, the presumption is that in enacting a new law the Legislature intended the old statute to remain in operation.'" (citing *State v. Humble Oil & Refining Co.*, 187 S.W.2d 93, 100 (Tex. Civ. App.—Waco 1947, no writ)). *See also In re Garza*, 28 Tex. Ct. App. 381, 384, 13 S.W. 779, 781 (1890) (explaining that it is "a well known rule, founded on solid reasons, such repeals are not favored; and the principle of implied repeal ought to be applied with extreme caution." (citation omitted)).

[3] *See also Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) ("When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at 'liberty to pick and choose among congressional enactments' and must instead strive '"to give effect to both."' *Morton v. Mancari*, 417 U.S. 535, 551 (1974). A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing '"a clearly expressed congressional intention"' that such a result should follow. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995). The intention must be '"clear and manifest."'

Defenders of Wildlife, 551 U.S. 644 (2007), for example, the Supreme Court held that:

> We will not infer a statutory repeal unless the later statute expressly contradict[s] the original act or unless such a construction is absolutely necessary . . . in order that [the] words [of the later statute] shall have any meaning at all.

Id. at 662. This Court has been equally emphatic in holding that implied repeals are not to be found so long as it remains *possible* to harmonize the competing statutes:

> [S]tatutory repeals by implication are not favored. *Gordon v. Lake*, 163 Tex. 392, 394, 356 S.W.2d 138, 139 (1962). A legislative enactment covering a subject dealt with by an older law, but not repealing that law, *should be harmonized whenever possible with its predecessor in such a manner as to give effect to both*.

Acker v. Texas Water Commission, 790 S.W.2d 299, 301 (Tex. 1990).[4]

McCorvey did not attempt to explain how this demanding standard had been met. Its entire analysis of the implied-repeal question consisted of two conclusory sentences:

> These regulatory provisions cannot be harmonized with provisions that purport to criminalize abortion. There is no way to enforce both sets of

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Morton, supra, at 551, 94 S. Ct. 2474. And in approaching a claimed conflict, we come armed with the 'stron[g] presum[ption]' that repeals by implication are 'disfavored' and that 'Congress will specifically address' preexisting law when it wishes to suspend its normal operations in a later statute. *United States v. Fausto*, 484 U.S. 439, 452, 453 (1988)."); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984) ("[W]here two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective" (internal quotation marks omitted)).

[4] *See also Twin City Fire Insurance Co. v. Cortez*, 576 S.W.2d 786, 789 (Tex. 1978) ("Repeal of laws by implication is not favored. . . . Thus, when there is *no clear repugnance* between the provisions of old and new statutes, the duty of this court is to reconcile them and to construe both statutes so as to give effect to each." (emphasis added)); *Standard v. Sadler*, 383 S.W.2d 391, 395 (Tex. 1964) ("'In the absence of an express repeal by statute, where there is no positive repugnance between the provisions of the old and the new statutes, the old and new statutes will each be construed so as to give effect, if possible, to both statutes.'" (quoting *Wintermann v. McDonald*, 102 S.W.2d 167, 171 (Tex. 1937)).

> laws; the current regulations are intended to form a comprehensive scheme—not an addendum to the criminal statutes struck down in *Roe*.

McCorvey, 385 F.3d at 849. Each of these statements is untrue. It is *easy* to harmonize post-*Roe* abortion regulations with pre-*Roe* criminal prohibitions; many behaviors (such as tax evasion) are subject to both regulatory and criminal penalties. And a legislature's decision to regulate abortion in response to a Supreme Court ruling that thwarts the enforcement of its criminal abortion laws does not evince a desire to repeal the existing criminal prohibitions. The post-*Roe* abortion statutes were enacted to salvage *some* semblance of abortion regulation while the Supreme Court adheres to the view that abortion is a constitutional right. They were not enacted to ratify the Supreme Court's abortion pronouncements or repeal the regime the Supreme Court was blocking the State from enforcing.

It is also untenable to suggest the State's post-*Roe* abortion regulations meet the standard for implied repeal this Court established in *Acker*, which requires a statute to be "harmonized *whenever possible* with its predecessor in such a manner as to give effect to both." *Acker*, 790 S.W.2d at 301 (emphasis added). It is certainly "possible" to harmonize a criminal prohibition on abortion with the post-*Roe* enactments that regulate the procedure. The latter serve as a stopgap effort to limit abortion in a manner consistent with the current pronouncements of the Supreme Court, while the criminal prohibitions are left to be enforced as soon as the Supreme Court overrules *Roe v. Wade* and allows the states to resume enforcement of their criminal abortion laws. That is at least a *possible* harmonization of the statutes, and that is all that is needed to defeat a claim of implied repeal.

CONCLUSION

The legislature could not possibly have been clearer when it enacted the Texas Heartbeat Act and the Trigger Ban: the Texas pre-*Roe* statutes have never been repealed and remain the law of the state, and abortion statutes may not be construed to repeal earlier statutes by implication. *See* Tex. Gov't Code § 311.036(a). The courts of this state must follow the legislature's enactments rather than their own beliefs about what state abortion policy should be. The district court's disregard of these statutes cannot be tolerated, and neither can the abortion providers' refusal to acknowledge section 311.036(a) in their brief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

[5] Due to time to constraints the legislators listed herein is not to be construed as representative of the total number of legislators who would have signed on as *amici curia*.

Microsoft word reports that this document contains 2271 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1).

CERTIFICATE OF SERVICE

On July 13, 2022, this document was served on Marc Hearron and Melissa Hayward, counsel for Real Parties In Interest, via Mhearron@reprorights.org and mhayward@haywardfirm.com.