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 AMERICAN CENTER FOR LAW AND JUSTICE, AMERICANS UNITED FOR LIFE, AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS AND GYNECOLOGISTS, SUSAN B. ANTHONY LIST, CHARLOTTE LOZIER INSTITUTE, NATIONAL RIGHT TO LIFE COMMITTEE, FAMILY RESEARCH COUNCIL, CATHOLIC VOTE.ORG EDUCATION FUND, UNIVERSITY FACULTY FOR LIFE, HUMAN COALITION, AND AMERICAN VALUES AS AMICI CURIAE SUPPORTING PETITIONER

JAY ALAN SEKULOW
Ga. Bar No. 634900
LAURA B. HERNANDEZ
Va. Bar No. 29853
AMERICAN CENTER FOR LAW AND JUSTICE
201 Maryland Avenue NE
Washington, DC 20002
Tel: (202) 546-8890
sekulow@aclj.org

HEATHER GEBELIN HACKER
State Bar No. 24103325
ANDREW B. STEPHENS
State Bar No. 24079396
HACKER STEPHENS LLP
108 Wild Basin Rd. South
Suite 250
Austin, Texas 78746
Tel: (512) 399-3022
heather@hackerstephens.com

Counsel for Amici Curiae

Table of Contents

Index of Authorities

Cases:

Statutes:

Other Authorities:

Interest of Amici Curiae

The American Center for Law and Justice (ACLJ) is a national, nonprofit organization dedicated to the defense of constitutional liberties secured by law.[1] ACLJ attorneys often appear before state and federal courts, addressing a variety of issues as counsel either for a party, *e.g., Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for amicus, *e.g., June Medical Services v. Russo*, 140 S. Ct. 1101 (2020). This case is of particular interest to the ACLJ because it opposes taxpayer subsidization of the abortion industry and any organization that promotes abortion.

Since its founding in 1971, Americans United for Life (AUL) has represented parties or filed amicus briefs in dozens of cases involving federal and state public funding for elective abortion, including *Harris v. McRae*, 448 U.S. 297 (1980), in which AUL successfully defended the federal Hyde Amendment from a constitutional challenge. AUL's work for 50 years in the Congress, state legislatures, and the courts has influenced a range of bioethical issues in American law, including assisted suicide and life-sustaining care for persons with disabilities.

American Association of Pro-Life Obstetricians and Gynecologists (AAPLOG) is a nonprofit professional medical organization with over 6,000 obstetrician-gynecologist members and associates. Since 1973, AAPLOG has strived to ensure that pregnant women receive the highest quality medical care and are fully informed of the effects of abortion, including the potential long-term consequences abortion has on women's health. AAPLOG offers both healthcare providers and the

[1] No party has paid a fee in connection with this brief. *See* Tex. R. App. P. 11(c).

public a better understanding of abortion-related health risks, such as depression, substance abuse, suicide, subsequent preterm birth, and placenta previa. AAPLOG educates the public truthfully about human development and the monumental advancements made in this field over the last several years. AAPLOG exists to encourage and equip its members and medical practitioners to provide an evidence-based rationale for defending the lives of both the pregnant mother and her unborn child.

Susan B. Anthony List (SBA List) is a pro-life advocacy organization dedicated to reducing and ultimately eliminating abortion by electing national leaders and advocating for laws that save lives, with a special calling to promote pro-life women leaders. SBA List combines politics with policy, investing heavily in voter education to ensure that pro-life Americans know where their lawmakers stand on protecting the unborn, and in issue advocacy, advancing pro-life laws through direct lobbying and grassroots campaigns.

Charlotte Lozier Institute (CLI) is the education and research arm of SBA List. CLI is named after a 19th century feminist physician who, like Susan B. Anthony, championed women's rights without sacrificing either equal opportunity or the lives of the unborn. CLI studies and writes about federal and state policies—including those related to abortion—and their impact on women's health and on child and family well-being.

National Right to Life (NRTL), founded in 1968, is the nation's oldest and largest pro-life organization. NRTL is the federation of 50 state right-to-life affiliates and more than 3,000 local chapters. Through education and legislation, NRTL is

working to restore legal protection to the most defenseless members of our society who are threatened by abortion, infanticide, assisted suicide and euthanasia.

Family Research Council (FRC) is a nonprofit research and educational organization that seeks to advance faith, family, and freedom in public policy from a biblical worldview. FRC recognizes and respects the inherent dignity of every human life from conception until death, and believes that the life of every human being is an intrinsic good, not something whose value is conditional upon its usefulness to others or to the state.

CatholicVote.org Education Fund ("CatholicVote") is a nonpartisan voter education program devoted to building a Culture of Life. It seeks to serve our country by supporting educational activities that promote an authentic understanding of ordered liberty and the common good. Given its educational mission and its focus on the dignity of the human person, CatholicVote is deeply concerned about the use of public funds to pay for the destruction of human life.

University Faculty for Life (UFL), founded in 1989, comprises more than 400 faculty members from 80 colleges and universities in the United States. UFL encourages scholarly research on bioethical and social-science issues and seeks to ensure that public policy on abortion is grounded on current and reliable scientific, medical, philosophical, and other scholarly information.

Human Coalition, a Texas nonprofit 501(c)(3) corporation formed in 2009 that is committed to rescuing children, serving families, and ending abortion by reaching abortion-determined women with a specially crafted, objectively measured, life-affirming message and tangible, individualized services. In addition to providing

life-affirming marketing approaches for several dozen affiliated nonprofit pregnancy centers in 14 states across the country and running a contact center for women considering abortion, Human Coalition also operates its own specialized women's care clinics in four major cities across the country (Atlanta, Georgia; Raleigh, North Carolina; Pittsburgh, Pennsylvania; and Dallas, Texas), with plans to expand beyond those locations to many of the largest U.S. cities. Through its contact center, care clinics, church and marketing outreach, and continuum of care program, Human Coalition continually tests and optimizes its practices and messaging so that it listens to and serves the abortion-determined community with greater effectiveness.

American Values is a non-profit organization committed to uniting the American people around the vision of our Founding Fathers. Centuries ago, our Founders boldly proclaimed to the world a distinctly American faith in democracy; a faith rooted in the self-evident truths that "all men are created equal and endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness." American Values is deeply committed to defending life, traditional marriage and equipping our children with the values necessary to stand against liberal education and cultural forces.

Summary of the Argument

This Court should grant review and hold that Zimmerman may sue to enforce Texas's abortion statutes against the City of Austin. The court of appeals erred in ruling that *Roe v. Wade* rendered Texas's abortion statutes void as to all applications. Two years after *Roe*, the Supreme Court made clear in *Connecticut v. Menillo* that criminal abortion prohibitions are not facially unconstitutional, and they may continue to be enforced in situations that do not violate the right to abortion established in *Roe*. Under *Menillo*, Texas's abortion statutes remain enforceable against the City of Austin's proposed funding for entities providing support to women seeking abortions, because it is undisputed that the enforcement of those statutes against these expenditures of taxpayer money will not violate anyone's constitutional rights.

Both *Menillo* and this Court's decision in *Pidgeon v. Turner* comport with the increasing consensus among the courts that the judiciary does not have the authority to erase or nullify a statute. As the Supreme Court has recently reemphasized, limits on judicial review are essential to the separation of powers. The lower court's holding that Texas's abortion statutes are void as if never enacted usurps the legislature's exclusive power to enact and repeal laws. Review is warranted to clarify that this Court's decision in *Pidgeon* represents Texas law on the scope of judicial review.

ARGUMENT

Review should be granted to reverse the lower court's erroneous conclusion that *Roe v. Wade,* 410 U.S. 113 (1973), rendered Texas's abortion statutes[2] unenforceable in all applications. *Zimmerman v. City of Austin*, 620 S.W.3d 473, 484 (Tex. App.—El Paso 2021, pet. filed). *Roe* never held that Texas's abortion statutes were "facially" unconstitutional, and any suggestion to the contrary was dispelled two years later in *Connecticut v. Menillo*, 423 U.S. 9 (1975) (per curiam). Texas's abortion statutes remain enforceable outside of contexts where enforcement would violate the right to abortion articulated in *Roe*. Correcting the court of appeals's error removes the basis for its conclusion that Petitioner cannot enforce the statutes against the City of Austin's proposed funding of entities providing logistical support to women seeking abortion. This Court should therefore grant review and reverse.

I. Under *Connecticut v. Menillo*, Texas's Abortion Statutes Are Enforceable to the Extent They Do Not Impose an Undue Burden on the *Roe* Right to Abortion.

The Supreme Court's decision in *Connecticut v. Menillo* eliminates any contention that *Roe* "facially invalidated" the Texas's abortion statutes. Below, the City pointed to language in *Roe* saying that "the Texas abortion statutes, as a unit, must fall,"[3] but this passage does not mean that the statutes have been formally revoked or erased from the law books. It also does not render the statutes a "nullity," as the court of appeals claimed. Indeed, as then-Justice Rehnquist's dissent pointed

[2] West's Texas Civil Statutes art. 4512.1 –.6 (1974).

[3] 410 U.S. at 166.

out, the majority opinion conceded that the Texas could continue outlawing abortion after fetal viability, which is incompatible with a ruling that renders the statutes unconstitutional or unenforceable in all their applications. *Roe,* 410 U.S. at 177-78 (Rehnquist, J., dissenting).

Two years after *Roe*, the Court made abundantly clear that *Roe* should not be read as nullifying all applications of the Texas abortion statutes. *Menillo*, 423 U.S. at 10. In *Menillo*, the Connecticut Supreme Court overturned the defendant's conviction for performing an abortion without a medical license, reasoning that *Roe's* holding had effectively invalidated Connecticut's abortion statute, even as applied to abortions performed by non-physicians. *State v. Menillo*, 362 A.2d 962, 963 (Conn. 1975). The court held that because Texas's statutes were (in its view) held unconstitutional "in toto," Connecticut's abortion statutes were also "null and void." *Id.*

In a per curiam opinion, the Supreme Court rejected that reasoning:

> That the Texas statutes fell as a unit meant only that they could not be enforced . . . in contravention of a woman's right to a clinical abortion by medically competent personnel. We did not hold the Texas statutes unenforceable against a nonphysician abortionist, for the case did not present the issue. . . . As far as this Court and the Federal Constitution are concerned, Connecticut's statute remains fully effective against performance of abortions by non-physicians.

423 U.S. at 10. Thus, by clear implication, where enforcement of Texas and other states' abortion statutes do not place an undue burden[4] on a woman's right to

[4] *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992) (plurality op.).

abortion, they remain enforceable. *Menillo* thus directly repudiates the court of appeals's conclusion that *Roe* must be understood as "invalidating" the Texas abortion statutes in all their applications. *Zimmerman*, 620 S.W.3d at 484.

Further, *Roe* did not consider the issue of whether the statutes could constitutionally be applied to a municipal program that funds abortion related services. But under the Supreme Court's abortion-funding cases, they clearly can. It is well established that both state and federal governments are free to discourage abortion, including through allocation of taxpayer dollars. States may make "value judgment[s] favoring childbirth over abortion, and [] implement that judgment by the allocation of public funds." *Maher v. Roe*, 432 U.S. 464, 474, 479 (1977) (upholding state regulation denying payments for non-therapeutic abortions to Medicaid recipients); *see also Harris v. McRae*, 448 U.S. 297, 326 (1980) (holding that a "State that participates in the Medicaid program is not obligated under Title XIX to continue to fund those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment").

The Texas Legislature chose to prohibit taxpayer subsidization of abortion providers and their affiliates. Tex. Gov't Code § 2272.003. Although this provision does not directly forbid the City of Austin's program, the preexisting abortion statutes do. The City of Austin's proposed allocation of taxpayer funds to abortion-assistance organizations indisputably qualifies as "furnishing the means for procuring an abortion knowing the purpose intended," and it is flatly prohibited by state law. West's Texas Civil Statutes, art. 4512.2 (1974). *Roe* does not require a different conclusion because *Roe* did not address the issue.

Although *Menillo* did not expressly say so, its holding reflects the long-standing principle that in deciding the constitutionality of statutes, courts must "'never [] formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *United States v. Raines*, 362 U.S. 17, 21 (1960) (quoting *Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration*, 113 U.S. 33, 39 (1885)). *Roe* cannot be interpreted to prevent Texas from enforcing its abortion statutes in situations that do not implicate the constitutional right to abortion established in *Roe*—and it certainly cannot be interpreted in this manner after the Supreme Court's ruling in *Menillo*. The lower court's ruling that Texas's abortion statutes are unenforceable in all applications is indefensible and should be reversed.

II. *Menillo* Accords with the Growing Consensus that Judicial Review Excludes the Power to "Strike Down" or Revoke Statutes.

Menillo, unlike *Roe,* has the additional merit of aligning with corollary principles of judicial review derived from the separation of powers. In the context of a constitutional challenge, judicial review "amounts to little more than the negative power to disregard an unconstitutional enactment. . . . [T]he court enjoins, in effect, not the execution of the statute, but the acts of the official." *Massachusetts v. Mellon*, 262 U. S. 447, 488 (1923). The Supreme Court has repeatedly agreed with *Mellon*'s description of the judicial power. In the context of a severability analysis during this term, the Court stated:

> In general, "when confronting a constitutional flaw in a statute, we try to limit the solution to the problem" by disregarding the "problematic portions while leaving the remainder intact." This approach derives from

> the Judiciary's "negative power to disregard an unconstitutional enactment" in resolving a legal dispute. In a case that presents a conflict between the Constitution and a statute, we give "full effect" to the Constitution and to whatever portions of the statute are "not repugnant" to the Constitution, effectively severing the unconstitutional portion of the statute. This principle explains our "normal rule that partial, rather than facial, invalidation is the required course."

United States v. Arthrex, Inc., 141 S. Ct. 1970, 1986 (2021) (citations omitted); *see also Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2211 (2020) (quoting *Mellon*, 262 U. S. at 488) ("The Court's only instrument, however, is a blunt one. We have 'the negative power to disregard an unconstitutional enactment.'").

As the Court noted recently, the judiciary's "negative power" does not include the power to repeal the law or declare it a complete nullity:

> The term "invalidate" is a common judicial shorthand when the Court holds that a particular provision is unlawful and therefore may not be enforced against a plaintiff. To be clear, however, when it "invalidates" a law as unconstitutional, the Court of course does not formally repeal the law from the U. S. Code or the Statutes at Large.

Barr v. Am. Ass'n of Political Consultants, 140 S. Ct. 2335, 2351 n.8 (2020) (plurality op.)*; see also Seila Law*, 140 S. Ct. at 2220 (Thomas, J., concurring in part and dissenting in part) ("The Federal Judiciary does not have the power to excise, erase, alter, or otherwise strike down a statute."); *cf. Collins v. Yellen*, 141 S. Ct. 1761, 1788 (2021) (stating that the Constitution displaced[5] "any conflicting statutory provision").

---

[5] *Collins*'s use of the term "displace" presumably reflects acceptance of the "displacement approach" to judicial review in which "the reviewing court does nothing to the inferior law except refuse to recognize it as enforceable law in resolving the

A growing number of lower federal courts, including the Third, Fifth, Ninth, Tenth, and Eleventh Circuits, also recognize that a judicial decision holding a statute unconstitutional does not purge the statute from the books. For example, in *Pool v. City of Houston*, the Fifth Circuit stated: "It is often said that courts "strike down" laws when ruling them unconstitutional. That's not quite right. Courts hold laws unenforceable; they do not erase them. Many laws that are plainly unconstitutional remain on the statute books." 978 F.3d 307, 309 (5th Cir. 2020) (citing Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 936 (2018)); *see also Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1255 (11th Cir. 2020) (quoting Mitchell, *supra*, at 936) (declaring a law unconstitutional does not eliminate "the legal effect of the statute in all contexts . . . '[F]ederal courts have no authority to erase a duly enacted law from the statute books'"); *Winsness v. Yocom*, 433 F.3d 727, 728 (10th Cir. 2006) (McConnell, J.) ("There is no procedure in American law for courts or other agencies of government—other than the legislature itself—to purge from the statute books, laws that conflict with the Constitution as interpreted by the courts."); *Hartnett v. Pa. State Educ. Ass'n*, 963 F.3d 301, 309 (3d Cir. 2020) (stating that "unconstitutional laws remain on the books"); *cf. Close v. Sotheby's, Inc.*, 909 F.3d 1204, 1209-10 (9th Cir. 2018) (rejecting plaintiffs' argument that a state law

---

particular case before it." Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U.L. Rev. 738, 755-56 (2010); *see also Johnson v. United States*, 576 U.S. 591, 615 (2015) (Thomas, J., concurring) (early courts "understood judicial review to consist 'of a refusal to give a statute effect as operative law in resolving a case'") (quoting Walsh, *supra,* at 756).

preempted by federal law becomes "nonexistent" because "[t]he state law continues to exist until the legislature that enacted it repeals it").

The federal district court for the Eastern District of Texas has also adopted this correct understanding of the judicial power. *E.g. Cunningham v. Matrix Fin. Servs.*, No. 4:19-cv-896, 2021 WL 1226618, at *5 n.7 (E.D. Tex. Mar. 31, 2021) ("While severability shorthand typically speaks in terms of 'striking down' or 'invalidating' acts of Congress, this characterization is inexact. In reality, '[c]ourts hold laws unenforceable; they do not erase them.'") (citations omitted); *see also United States v. Stroke*, No. 14-CR-45S, 2019 WL 1960207, at *14 (W.D.N.Y. Sept. 25, 2018) (a court's ruling against a statute "do[es] not function like a red pen crossing out text from statutory compilations").

What is more, this Court itself has recognized that the judiciary lacks the power to erase unconstitutional statutes from the books. In *Pidgeon v. Turner*, 538 S.W.3d 73 n.20 (Tex. 2017), the Court explained that "[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." The court of appeals refused to follow *Pidgeon* because it believed that subsequent decisions cast doubt on *Pidgeon's* continuing validity. *Zimmerman*, 620 S.W.3d at 485. The lower court's confusion is somewhat understandable. *See Ex Parte E.H.*, 602 S.W.3d 486, 494 (Tex. 2020) (quoting *Ex parte Siebold*, 100 U.S. 371, 376 (1879) (recognizing that the "Supreme Court explained long ago [that] an 'unconstitutional law is void, and is no law'"); *id.* at 502 (Blacklock, J., dissenting) (noting the majority's departure from *Pidgeon*); *see also In re Lester*, 602 S.W.3d 469, 475 (Tex.

2020) (stating that an "unconstitutional statute is legally void from its inception"); *id.* at 483 (Blacklock, J., dissenting) ("[T]he Court overrules sub silentio its prior, correct statement [in Pidgeon] regarding judicial declarations of the unconstitutionality of statutes.")

Confusion aside, the court of appeals's conclusion is incorrect because the weight of recent federal authority supports *Pidgeon*. This case provides the perfect vehicle for the Court to eliminate any existing confusion on this point and clarify that Texas agrees with the Supreme Court of the United States and a growing number of lower courts in recognizing that judicial review does not encompass the power to strike down or nullify statutes.

PRAYER

The Court should grant the petition for review.

Respectfully submitted.

/s/ Heather Gebelin Hacker

JAY ALAN SEKULOW
GA Bar No. 634900
LAURA B. HERNANDEZ
VA Bar No. 29853
AMERICAN CENTER FOR LAW AND JUSTICE
201 Maryland Avenue NE
Washington, DC 20002
Tel: (202) 546-8890
sekulow@aclj.org

HEATHER GEBELIN HACKER
State Bar No. 24103325
ANDREW B. STEPHENS
State Bar No. 24079396
HACKER STEPHENS LLP
108 Wild Basin Rd. South
Suite 250
Austin, Texas 78746
Tel: (512) 399-3022
Heather@hackerstephens.com

Counsel for Amici Curiae

Certificate of Service

I hereby certify that on July 16, 2021, this document was served electronically on:

Jonathan F. Mitchell
Mitchell Law PLLC
111 Congress Avenue
Suite 400
Austin, Texas 78701
jonathan@mitchell.law

Thomas Brejcha
Martin Whittaker
Thomas More Society
309 W. Washington Street
Suite 1250
Chicago, Illinois 60606
info@thomasmoresociety.org

H. Dustin Fillmore III
Charles W. Fillmore
The Fillmore Law Firm, LLP
1200 Summit Ave.
Suite 860
Fort Worth, Texas 76102
dusty@fillmorefirm.com
chad@fillmorefirm.com

Counsel for Petitioners

Hannah M. Vahl
Assistant City Attorney
City of Austin Law Department
Post Office Box 1546
Austin, Texas 78767-1546
hannah.vahl@austintexas.gov

Counsel for Respondents

`

/s/ Heather Gebelin Hacker
Heather Gebelin Hacker

Certificate of Compliance

Microsoft Word reports that this brief contains 3276 words, excluding the portions of the brief exempted by Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ Heather Gebelin Hacker
HEATHER GEBELIN HACKER

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below:

Heather Hacker on behalf of Heather Hacker
Bar No. 24103325
heather@hackerstephens.com
Envelope ID: 55427022
Status as of 7/16/2021 1:10 PM CST

Associated Case Party: Texas Public Policy Foundation

Name	BarNumber	Email	TimestampSubmitted	Status
Yvonne Simental		ysimental@texaspolicy.com	7/16/2021 1:05:56 PM	SENT
Robert Henneke		rhenneke@texaspolicy.com	7/16/2021 1:05:56 PM	SENT
Munera Al-Fuhaid		mal-fuhaid@texaspolicy.com	7/16/2021 1:05:56 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Jonathan F.Mitchell		jonathan@mitchell.law	7/16/2021 1:05:56 PM	SENT
Charles W.Fillmore		chad@fillmorefirm.com	7/16/2021 1:05:56 PM	SENT
H. Dustin Fillmore		dusty@fillmorefirm.com	7/16/2021 1:05:56 PM	SENT
Hannah Vahl		hannah.vahl@austintexas.gov	7/16/2021 1:05:56 PM	SENT