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SUPREME COURT OF TEXAS
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No. 23-0629

In the Supreme Court of Texas

STATE OF TEXAS; KEN PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF TEXAS; TEXAS MEDICAL BOARD; AND STEPHEN BRINT CARLTON, IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE TEXAS MEDICAL BOARD,

Defendants-Appellants,

v.

AMANDA ZURAWSKI; LAUREN MILLER; LAUREN HALL; ANNA ZARGARIAN; ASHLEY BRANDT; KYLIE BEATON; JESSICA BERNARDO; SAMANTHA CASIANO; AUSTIN DENNARD, D.O.; TAYLOR EDWARDS; KIERSTEN HOGAN; LAUREN VAN VLEET; ELIZABETH WELLER; DAMLA KARSAN, M.D., ON BEHALF OF HERSELF AND HER PATIENTS; AND JUDY LEVISON, M.D., M.P.H., ON BEHALF OF HERSELF AND HER PATIENTS,

Plaintiffs-Appellees.

On Direct Appeal from the 353rd Judicial District Court, Travis County,
Trial Court Number: D-1-GN-23-000963

BRIEF OF AMICI CURIAE STATE CONSTITUTIONAL LAW PROFESSORS AND SCHOLARS IN SUPPORT OF PLAINTIFFS-APPELLEES

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TO THE HONORABLE SUPREME COURT OF TEXAS:

INTERESTS OF AMICI

Amici curiae are a group of preeminent law professors and legal scholars with expertise in the history, development, and interpretation of state constitutions. *Amici* have researched, published, and taught courses on state constitutional law and have made significant contributions to scholarship in this field. This case involves a constitutional challenge to two Texas abortion bans, codified in Tex. Health & Safety Code §§ 170A.001, 170A.002, 171.002, as applied to patients for whom abortion is necessary to preserve their life or health. *Amici* are well suited to opine on whether the application of these abortion bans violates the Texas Constitution, which codifies the right to life in Article I, Sections 19 and enhances that right in Article I, Section 29.

Individual *amici* are as follows:[1]

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[1] *Amici curiae* have no personal or financial stake in this case other than academic interest. Counsel for *amici curiae* has underwritten all incurred costs. Counsel Henneman Rau Kirklin & Smith LLP has incurred any filing fees.

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INTRODUCTION

"Life is surely the most basic right of all." *Henderson v. State*, 962 S.W.2d 544, 561 (Tex. Crim. App. 1997) (en banc). The Texas Constitution grants an affirmative right to life from birth until death and prohibits the state from enacting legislation interfering with that right. Tex. Const. art. I, §§ 19, 29. Because that right has not been given significant attention by scholars or jurists, especially compared to liberty and property rights, *amici* submit this brief to assist the Court in evaluating some of the critical issues raised by the present appeal. In particular, we focus on the meaning and scope of the right to life guaranteed by the Texas Constitution and its proper application to a pregnant person suffering life- or health-threatening medical complications.

We begin by reviewing the plain text of key provisions of the Texas Constitution and evaluating the historical and philosophical context in which they were drafted, followed by an analysis of case law interpreting other fundamental rights—all of which indicate that the Texas Constitution confers an affirmative right to life that is not about mere survival, but rather encompasses an individual's right to health, safety, and wellbeing. We also review several recent decisions of state supreme courts in Oklahoma and North Dakota, which are informative because they interpreted constitutional provisions analogous to those in the Texas Constitution and held there is a constitutional right to an abortion where necessary to preserve

one's life and health. We respectfully submit that this Court should take a similar approach, clarifying that a pregnant person's right to life includes the right to life- and health-preserving abortion care.

I The Texas Bill of Rights Guarantees a Fundamental Right to Life

Article I, Sections 19 and 29 of the Texas Bill of Rights guarantee the right to life in the Texas Constitution. Section 19 provides that "[n]o 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. This guarantee first appeared in the Texas charters in 1845 and has appeared in each version of the Texas Constitution since then. Tex. Const., art. I, § 16 (1845); Tex. Const., art. I, § 16 (1861); Tex. Const., art. I, § 16 (1866); Tex. Const., art. I, § 16 (1869); Tex. Const., art. I, § 19 (1876). It is written as an "affirmative grant of rights" conferred "directly on the people" of Texas. *See* James C. Harrington, *The Texas Bill of Rights and Civil Liberties*, 17 Tex. Tech. L. Rev. 1487, 1505, 1525 (1986); *see also* Arvel (Rod) Ponton III, *Sources of Liberty in the Texas Bill of Rights*, 20 St. Mary's L.J. 93, 94, 114 (1988) (noting the Texas Bill of Rights "defin[es] the natural rights of the citizens of Texas and expressing the broad liberties enjoyed by its citizens.")

When interpreting the Texas Constitution, courts "give effect to its plain language," "presume the language of the Constitution was carefully selected," and

"interpret words as they are generally understood." *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 148 (Tex. 1995). By its plain terms, Section 19 grants an affirmative right to life because it provides that "*no citizen . . . shall be deprived of life* . . . ." Tex. Const. art. I, § 19 (emphasis added). A comparison to the text of other constitutions' provisions is illustrative. For example, the Due Process Clause of the Fourteenth Amendment provides that "*no State shall* . . . deprive any person of life, liberty, or property . . . ." U.S. Const. Amend. XIV, § 1 (emphasis added). The language of the Fourteenth Amendment is an explicit restriction on state power, whereas the language of Section 19 is focused on the rights of the Texas citizenry—which strongly suggests that it grants an affirmative right to individual citizens. Such a reading is consistent with this Court's recognition that the "Texas due course of law guarantee . . . has independent vitality, separate and distinct from the due process clause of the Fourteenth Amendment to the U.S. Constitution." *In re J.W.T.*, 872 S.W.2d 189, 197 (Tex. 1994).

Section 19's text prohibiting deprivation of life, liberty, and property, except "by due course of law," does not negate or modify the Texas Constitution's grant of an affirmative right to life. Indeed, the "due course of law" provision preserves the state's obligation to ensure that the general powers of government do not deprive state citizens of their right to life. This is made explicit in Section 29, which provides: "To guard against transgressions of the high powers herein delegated, we

declare that every thing in this 'Bill of Rights' [which includes the provisions of Section 19] is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions, shall be void." Tex. Const. art. I, § 29. Section 29 "defines the scope and application of the Texas Bill of Rights," *Satterfield v. Crown Cork & Seal Co.*, 268 S.W.3d 190, 204 (Tex. App. 2008) (emphasis added), "to the effect that certain rights are inalienable, that man is not capable of divesting himself or his posterity of them even by consent." Tex. Const. art I, § 29 interp. commentary (Vernon 2022).

Identical language appeared in the Texas Constitution of 1845 and each subsequent iteration, and there is no counterpart in the federal constitution. *See* Harrington, 17 Tex. Tech. L. Rev. at 1502-03 (further noting Section 29's "uniqueness and potential"). Texas courts have explained that Section 29 must be read as an "express limitation on state power *beyond* that set forth in each of the individual rights guaranteed in the Texas Bill of Rights." *Satterfield*, 268 S.W.3d at 205 (emphasis added). Moreover, "[i]f it is to have meaning, the language of Section 29 can only be intended to *strengthen*—not limit—the other provisions of the Bill of Rights." *Id.* (emphasis added).

Sections 19 and 29 are properly read, therefore, as interlocking provisions that enhance one another. *See* Robert F. Williams, *Enhanced State Constitutional Rights: Interpreting Two or More Provisions Together*, 2021 Wis. L.R. 1001 (2021)

(exploring cases in which state courts interpreted two or more constitutional provisions "conjointly" or "harmoniously" with each other); *see also* Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 Colum. L. Rev. 1855, 1897 (2023) ("Within state declarations of rights, abundant provisions . . . may work together to enhance a right.") (collecting cases). In this respect, Section 29 imposes an "express limitation on the police power" of the state that "plainly prohibits the enactment of legislation" that would destroy the "rights, guaranties, privileges, and restraints excepted from the powers of government by the Bill of Rights." *Travelers' Ins. Co. v. Marshall*, 76 S.W.2d 1007, 1011 (1934) (striking down law that impaired constitutionally protected right to contract); *see also* Harrington, 17 Tex. Tech. L. Rev. at 1502 ("The Texas Supreme Court has held that section 29 is an express limitation of the state's police power" and a "flat prohibition on any infringement on article I rights.").

Taken together, these sections operate to guarantee certain inviolate, fundamental rights, including the right to life—rights that cannot be interfered with by statute. Scholars have observed that "the framers [of the Texas Constitution] intended to provide stronger guarantees of individual rights than provided for in the Constitution of the United States, by guaranteeing these rights in *mandatory, positive* language." Ponton, 20 St. Mary's L.J. at 99 (emphasis added); *see also* Harrington, 17 Tex. Tech. L. Rev. at 1500-03 (comparing the language and structure of the U.S.

Bill of Rights with that of the Texas Constitution). The Texas Court of Criminal Appeals recognized that fundamental rights include at least: "Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject to such restraints as the government may justly prescribe for the general good of the whole." *Ex parte Brown*, 42 S.W. 554, 555 (1897) (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823)). The court went on to discuss the importance of striking down laws that would interfere with these constitutional guarantees:

> These are inalienable and indefeasible rights, which no man, or set of men, by even the largest majority, can take from the citizen. They are absolute and inherent in the people, and all free governments must recognize and respect them. Therefore it is incumbent upon the courts to give the constitutional provisions which guaranty them a liberal construction, and to hold inoperative and void all statutes which attempt to destroy or interfere with them.

Id. at 556.

That Sections 19 and 29 protect an affirmative right to life is underscored by the philosophical principles underpinning the Texas Constitution, as discussed in further detail in Section II below.

II Historically, The Right to Life Has Always Meant More Than a Right of Mere Survival

The right to life guaranteed by the Texas Constitution is based on the historic idea that all individuals have certain innate, fundamental rights that are not granted by government, but that government must protect. While the Texas Constitution

provides an *affirmative* right distinct from federal protections, both state and federal framers' understanding of the scope of "life" was largely influenced by the same legal and philosophical authorities tracing back to the thirteenth century, reflecting the belief that the right to life is a natural right inherent in all people by virtue of their being human. An analysis of key historical materials demonstrates that life was considered "the most basic right" and meant "more than mere biological existence"—"it also encompasse[d] physical integrity, 'health and indolency of body,'[2] and even a minimum quality of life." Sheldon Gelman, "*Life" and "Liberty": Their Original Meaning, Historical Antecedents, and Current Significance in the Debate over Abortion Rights*, 78 Minn. L. Rev. 585, 588 (1994) (quoting John Locke, *A Letter Concerning Toleration* 26 (James H. Tully ed., Hackett Publishing Co. 1983) (William Popple trans., 1st ed. 1689)). Applied to pregnant people, the affirmative right to life in the Texas Constitution means, at a minimum, that the state cannot force individuals to experience harm to their bodies or to delay treatment in the face of known bodily risks and ongoing harms.

A. Magna Carta

The concept of a "right to life" originates from Magna Carta, a charter of rights agreed to by King John of England in 1215 that was understood by the framers

[2] "Indolency" in this context refers to "freedom from pain; a state of rest or ease, in which neither pain nor pleasure is felt." *See Indolence*, Oxford English Dictionary (2d ed. 1989).

to convey that a government should be constitutional, that the "law of the land" should apply to everyone, and that certain rights and liberties were so fundamental that their violation was an abuse of governmental authority. The right to life was borne out of Clause 39 of Magna Carta, which states: "No freeman is to be taken or imprisoned or disseised of his free tenement or of his liberties or free customs, or outlawed or exiled *or in any way ruined*, nor will we go against such a man or send against him save by lawful judgement of his peers or by the law of the land." Magna Carta, 39 (1215) (emphasis added).

Magna Carta was among the "[s]pecific instruments that exerted the greatest direct influence" on the framing of nineteenth-century state constitutions, including the Texas Bill of Rights. *See* J.E. Ericson, *Origins of the Texas Bill of Rights*, 62 Sw. Hist. Q. 457, 466 (1958); *see also id.* at 464 ("The due course of law clause, of course, may be traced ultimately to the famous Section 39 of Magna Charta (1215).") In the subsequent centuries, the right to life recognized by Magna Carta was characterized as an expansive right by the authoritative jurists Edward Coke (1552-1634) and William Blackstone (1723-1780), and moral theorists such as John Locke (1632-1704) and Francis Hutcheson (1694-1746), with whom the drafters of the federal and state constitutions, including Texas, were deeply familiar.[3]

[3] *See, e.g.*, Ponton, 20 St. Mary's L.J. at 95-96 (1988) ("The eighteenth-century theories of natural rights, as set forth by Montaigne, Montesquieu, Hobbes, Thomas Paine, and others, found flower

B. English Jurists

Blackstone's *Commentaries on the Laws of England* was the most influential and widely read law book in America in the late eighteenth century and is considered the most prominent legal influence on the framers. *See* Gelman, 78 Minn. L. Rev. at 648, 650. According to Blackstone, the principal aim of society is "to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature," including "the right of personal security." 1 William Blackstone, Commentaries *120, *125. Blackstone interpreted the right to personal security as encompassing "a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation." *Id.* at *125. According to Blackstone, "limbs" included "those members which may be useful . . . [to a person] in fight" and which "enable [him] to protect himself from external injuries in a state of nature." *Id.* at *126. To the extent not covered by "limbs," Blackstone understood "body" to include "the rest . . . [of someone's] person or body." *Id.* at *130. Together, the rights to limbs, body, health, and reputation comprise essential components of the right to life, as the loss of any one of them could be said to

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in the writings of the revolutionaries of the United States and France in the late eighteenth century. These were adopted and affirmed in the Bill of Rights of the state of Texas. . . . This is a reflection and expansion upon the natural rights written so elegantly in the Declaration of Independence of the United States, which included many of the rights written in the Magna Charta. Early state constitutions, to which the drafters of the Texas Constitution of 1836 looked, spoke of the inherent rights of the citizens of their states and of their natural inalienable rights."); *see also* Ericson, 62 S.W. Hist. Q. at 466 (noting the Texas framers were influenced "principally [by] Anglo-American sources").

"destroy" a person in accordance with the language of Magna Carta. *See* Gelman, 78 Minn. L. Rev. at 650.

Blackstone's definition of "personal security" was based in part on Sir Edward Coke's seventeenth century commentary on Clause 39 of Magna Carta. *See* 1 William Blackstone, Commentaries *129 ("'*Nullus liber homo,* says the great charter, *aliquo modo destruatur, nisi per legale judicium parium suorum aut per legem terrae*.' Which words, *'aliquo modo destruatur,'* according to Sir Edward Coke, include a prohibition not only of *killing,* and *maiming,* but also of *torturing* (to which our laws are strangers) and of every oppression by colour of an illegal authority. And it is enacted by the statute 5 Edw. III. c. 9. that no man shall be forejudged of life or limb, contrary to the great charter and the law of the land: and again, by statute 28 Ed. III. c. 3. that no man shall be put to death, without being brought to answer by due process of law.").[4] As one scholar put it, this concept of "personal security" is Blackstone's version of Magna Carta's "freedom from destruction" and the Lockean-Hutchesonian "right of life," each of which was well known to the state and federal framers. Gelman, 78 Minn. L. Rev. at 650-51.

C. Moral Theorists

The framers, including of the Texas Bill of Rights, had an understanding of the right to life that was also significantly influenced by the writings of Locke and

[4] *See also* Edward Coke, 2 *Institutes of the Laws of England* 50 (W. Clarke and Sons, 1809).

Hutcheson.[5] Specifically, these philosophers developed the idea that the "right to life" originated from the "social contract," a more fundamental and profound source than Magna Carta itself.

According to Locke, the right to life is an expansive concept which includes the inherent right to health, limb, and "indolency of body," *i.e.*, freedom from pain. In the *Second Treatise on Government*, Locke portrayed government as a means of securing life, liberty, and property, warranting rebellion whenever government fails to secure these rights. *See* John Locke, *Second Treatise on Government* ¶¶ 6, 149. As part of this theory, Locke explained that humans have inherent rights as part of the "state of nature," foremost being the right to life. *Id.* ¶ 6. Beginning from the concept that "[e]very one . . . is bound to preserve himself, and not to quit his station willfully," Locke concluded that "the preservation of life" encompasses the right to

[5] *See, e.g.*, James A. Gardener, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 82 U. Pitt. L. Rev. 189, 193 (1990) ("[T]he United States government derives its legitimacy, in the Lockean sense, from the consent of the governed."); *id.* at 197-198, 207-08; Robert Paul Wolff, *About Philosophy* 123, 127, 129 (1976) ("We call it our Constitution, but what the Founding Fathers actually wrote was the first operative social contract . . . [with] John Locke [thus being] the spiritual father of our Constitution."); Steven G. Calabresi, James Lindgren, Hannah M. Begley, Kathryn L. Dore, & Sarah E. Agudo, *Individual Rights Under State Constitutions in 2018: What Rights Are Deeply Rooted in A Modern-Day Consensus of the States?*, 94 Notre Dame L. Rev. 49, 125 (2018) ("Thirty-nine of the states--representing 78% of the states . . . include Lockean rights clauses in their state constitutions that refer to a contractarian understanding of fundamental rights that exist in a natural law form, prior to the creation of the state. These states have essentially 'declared as a matter of positive state constitutional law' that there exist certain unenumerated natural, inalienable, inviolable, or inherent basic rights.") (citing Tex. Const. art. I, § 3); *id.* at 127 ("In 1868, when the Fourteenth Amendment was ratified, twenty-seven out of thirty-seven state constitutions . . . had Lockean rights clauses in their state constitutions.") (citing Tex. Const. of 1866, art. I, §§ 2, 21).

protect one's "liberty, health, limb, [and] goods." *Id.* Locke also wrote that the magistrate's power was limited to preserving a person's "civil interest," which he described as "life, liberty, health, and indolency of body; and the possession of outward things." John Locke, *A Letter Concerning Toleration* 6 (James H. Tully ed., 1983) (William Popple trans. 1689).

Similarly, Hutcheson posited the notion that the right to life is a significant and robust right based on his own theory of consent to be governed. In Hutcheson's view, the first natural right is the "right to life, and to that perfection of body which nature has given." 1 Frances Hutcheson, *A System of Moral Philosophy* 293 (1st ed. 1755). Hutcheson explained that the right is "intimate" to individuals by "our immediate sense of moral evil in all cruelty occasioning unnecessary pain, or abatement of happiness to any of our fellows." *Id.* Additionally, Hutcheson described an "inalienable" right "over our lives and limbs." Morton White, *The Philosophy of American Revolution* 204 (1978).

The works outlined above make clear that the right to life meant not just existence, but a full and unimpeded life. Hutcheson's treatment of this right, like Locke's, demonstrates that the right to life is the most fundamental and innate of all rights, and transcends government authority.

D. Federal and State Framers

The influence of Magna Carta, English jurists, and moral theorists on the federal and state constitutions, including that of Texas, is well recognized. Magna Carta was the basis for English common law, and thereby had tremendous influence on American law. *See, e.g.*, Ericson, 62 Sw. Hist. Q. at 466 (Texas framers were influenced by "principally Anglo-American" sources, "beginning with Magna Charta and the English Bill of Rights and ending with the existing state constitutions of the period of the 1870's"); Ponton, 20 St. Mary's L.J. at 99 ("[T]he core of the Bill of Rights of the Constitution of the Republic of Texas would be the rights guaranteed by English common law, first espoused in the Magna Carta, and the Bill of Rights of the United States.").

The Magna Carta signified the people's reassertion of rights against oppressive government power, and fully captured the early American distrust of concentrated political power. In part because of this tradition, most of the early state constitutions, including those in Texas,[6] contained declarations of rights intended to guarantee individual citizens a list of protections and immunities from state government. *See, e.g.*, John Cornyn, *The Roots of the Texas Constitution: Settlement*

[6] *See* Ericson, 62 Sw. Hist. Q. at 458 ("The Texan of the 1830's has been characterized as a militant individualist, who resented encroachments on personal rights . . . He was thus imbued with the ideas and ideals of Jacksonian democracy. Generally , then, the constitutions of the 1830's in Texas were built upon a framework of traditional Anglo-American ideas modified by the advanced thinking of the Jacksonian period and further modified by the traditions of Spanish law and custom.").

to Statehood, 26 Tex. Tech. L. Rev. 1089, 1128 (1995) ("Characteristic of all such declarations during this period was the invocation of natural law doctrine and the expressed conviction that governments were compacts between the government and the governed, founded upon the governed's consent."). State declarations of rights incorporated numerous guarantees that were understood at the time of their ratification to descend from rights protected by Magna Carta, including protection from loss of life, liberty, or property without due process of law.[7]

This influence is particularly evident in the Texas Constitution's "law of the land" language in Article I Section 19, which is the same language used in Clause 39 of Magna Carta. Additionally, the Texas Constitution specifically references a "social compact," suggesting a direct reference to the fundamental beliefs of the moral theorists Locke and Hutcheson. Tex. Const. art. 1, § 3 ("All freemen, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public

[7] *See e.g.*, Md. Const. Declaration of Rights, art. XXI (1776) (stating "no free man ought to be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land"); Va. Const. Declaration of Rights, § 8 (1776) (stating "that no man be deprived of his liberty except by the law of the land or the judgment of his peers"); N.C. Const. Declaration of Rights, art. XII (1776) (stating "no freeman ought to be taken, imprisoned, or disseized of his freehold liberties or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the law of the land"); S.C. Const., art. XLI (1778) (stating "[t]hat no freeman of this State be taken or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, exiled or in any manner destroyed or deprived of his life, liberty, or property, but by the judgment of his peers or by the law of the land").

services."); *see also* Tex. Const. art. 1, § 2 ("All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit.").[8] This Court has accordingly observed that the framers of the Texas Constitution "shared the belief that a constitution was a compact between the government and its citizens." *Republican Party of Texas v. Dietz*, 940 S.W.2d 86, 91 n.6 (Tex. 1997).

For the reasons set forth herein, we respectfully submit that the Texas Constitution not only confers an affirmative right to life, but that right is an innate and robust right consistent with the philosophical principles promoted by Locke and the other influential theorists and jurists discussed above.

III The Constitutional Right to Life Encompasses a Person's Right to Protect Their Health, Safety, and Wellbeing

Texas courts recognize that the state has an interest in preserving life. *See generally T.L. v. Cook Children's Med. Ctr.*, 607 S.W.3d 9, 89–90 (Tex. App. 2020)

[8] *See also* Thomas M. Cooley, *A Treatise on the Constitutional Limitations which Rest upon the Legislative Power of the States of the American Union,* *35-39 (2d ed. 1871) ("In considering State constitutions we must not commit the mistake of supposing that, because individual rights are guarded and protected by them, they must also be considered as owing their origin to them. These instruments measure the powers of the rulers, but they do not measure the rights of the governed. What is a constitution, and what are its objects? It is easier to tell what it is not than what it is. It is not the beginning of a community, nor the origin of private rights; it is not the fountain of law, nor the incipient state of government; it is not the cause, but consequence, of personal and political freedom; it grants no rights to the people, but is the creature of their power, the instrument of their convenience. Designed for their protection in the enjoyment of the rights and powers which they possessed before the constitution was made, it is but the framework of the political government, and necessarily based upon the preexisting condition of laws, rights, habits, and modes of thought.").

("*CCMC*"). The relative paucity of case law interpreting the right to life, as compared to some of the other fundamental rights protected in the Texas constitution—like the right to liberty and property—may be no more than a reflection of the fact that "[t]he fundamental interest in one's own life need not be elaborated upon." *CCMC*, 607 S.W.3d at 36 (quoting *Tenn. v. Garner*, 471 U.S. 1, 9 (1985)). Although Texas courts have not expressly interpreted the meaning and scope of the "right to life" provided by Section 19 and enhanced by Section 29, several lines of cases interpreting other fundamental rights are informative. Specifically, cases from Texas and the United States Supreme Court on the protection of fundamental rights in matters of medical treatment and bodily autonomy demonstrates that the right to life encompasses a person's health, safety, and wellbeing. In addition, Texas jurisprudence on the fundamental right to property is illustrative because it indicates that the rights enshrined in Sections 19 and 29 are to be interpreted expansively. Taken together, these cases support the conclusion that patients are deprived of their fundamental right to life under Texas law when the government intervenes to deny life- and health-preserving medical care.

Texas courts have recognized that medical patients have a constitutionally protected interest when it comes to life-or-death decisions about their health. Under a well-established doctrine of federal constitutional law, which has been applied in Texas, a terminally ill patient has the right to refuse or cease the use of life-sustaining

medical treatment, thereby voluntarily causing their own death. In such circumstances, the "interest a terminally ill patient has in individual *autonomy* may overcome a state's interest in preserving her life." *CCMC*, 607 S.W.3d at 79 (discussing *Cruzan by Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990), *Vacco v. Quill*, 521 U.S. 793 (1997) and *Wash. v. Glucksberg*, 521 U.S. 702 (1997)) (emphasis added). While the state has an interest in preserving life, the individual's liberty interest in refusing medical treatment is grounded in the notions of "physical freedom and self-determination." *Cruzan*, 497 U.S. at 267 (O'Connor, J. concurring).

In contrast, the case before the Texas court in *CCMC* did not involve *voluntary* refusal of medical treatment. There, a terminally ill patient—through her mother as surrogate decisionmaker—wished to continue receiving life-sustaining treatment contrary to the opinion of her physician. CCMC, a medical center, argued that the withdrawal of life-sustaining medical care would "passively result in a natural death"—as in the *Cruzan* line of cases—such that it did not implicate the patient's right to life. *CCMC*, 607 S.W.3d at 79. The court disagreed, finding that "vested fundamental rights were at stake" because the proposed withdrawal of life-sustaining medical care was involuntary. *Id.* at 80. Unlike voluntary refusal of medical treatment, "[t]here is simply no constitutional equivalent for involuntarily depriving a terminally ill patient of her life against her wishes." *Id.* at 79.

Similarly, courts have long held that involuntary "state incursions into the body" implicate fundamental, constitutionally protected interests. *Cruzan*, 497 U.S. at 287 (O'Connor, J. concurring). For example, in upholding a twentieth-century compulsory vaccination law on the ground that Massachusetts could validly require vaccinations under its police power to protect the public health from smallpox, the U.S. Supreme Court clarified that anyone for whom the vaccination would pose a serious impairment of health *would be excepted* from the statute's application: "It is easy, for instance, to suppose the case of an adult who is embraced by the mere words of the act, but yet to subject whom to vaccination in a particular condition of his health or body, would be cruel and inhuman in the last degree. We are not to be understood as holding that . . . the judiciary would not be competent to interfere and protect the health and life of the individual concerned." *Jacobson v. Commonwealth of Mass.*, 197 U.S. 11, 38-39 (1905); *see also Booth v. Bd. of Educ. of Fort Worth Indep. School Dist.*, 70 S.W.2d 350, 353 (Tex. Civ. App. 1934). In other words, the state may not require that a citizen impair his or her health, *even if* the individual's right to good health and medical care infringes upon some legitimate state interest.

In other contexts, courts have observed the "right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891). This principle has been applied to protect an

individual's bodily autonomy against involuntary intrusion. *See, e.g.*, *Rochin v. Cal.*, 342 U.S. 165, 172 (1952) ("Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents . . . is bound to offend even hardened sensibilities."); *Winston v. Lee*, 470 U.S. 753, 759 (1985) ("A compelled surgical intrusion into an individual's body for evidence . . . implicates expectations of privacy and security of such magnitude that the intrusion may be 'unreasonable' even if likely to produce evidence of a crime."). Similar considerations protect individuals from involuntary confinement, including for unwanted medical treatment. *See, e.g.*, *Parham v. J.R.*, 442 U.S. 584, 600 (1979) (individuals have "a substantial liberty interest in not being confined unnecessarily for medical treatment").

Given the principles articulated in the above cases, it would be contradictory to hold that a patient may *involuntarily be denied* life- or health-preserving medical treatment when suffering complications from pregnancy. Appellants argue that the Texas abortion laws includes an exception for life-threatening medical complications (Br. at 3–4.), but this argument ignores the fact that confusion generated by the laws, coupled with palpable risks of criminal prosecution and financial penalties, have made it virtually impossible to apply that exception in practice. The devastating consequences to the plaintiffs' health in this case are a direct result of being denied medically necessary care because of the abortion bans

at issue in this case and the state's announcements surrounding them, which have had a chilling effect on physicians. (Opp. at 13, 30.) That the state action at issue is the forced withholding of medical care, rather than imposing it, does not change the fact that the patient's fundamental rights are at stake.

Appellants assert that Appellees take the position that the Texas Constitution confers a right to an abortion (Br. at 32.), but that argument mischaracterizes the fundamental question at issue in this matter. This case is not about a right to an abortion, it is about a pregnant person's right to life. Appellants have also argued that the state interest in preserving life requires protection of the unborn child, thereby justifying abortion bans. (*Id.*) Even if so, it does not follow that the state may require an individual to put their life and health at risk to protect that interest. The Court need not reach that question, however, because the issue here is a narrower one: With respect to each pregnancy at issue in this case, "it was medically certain they would not result in children with sustained life." (Opp. at 17). Texas courts have recognized that "the state's interest in preserving life is greatest when life *can* be preserved and then weakens as the prognosis dims." *HCA, Inc. v. Miller ex rel. Miller*, 36 S.W.3d 187, 194 (Tex. App. 2000), *aff'd*, 118 S.W.3d 758 (Tex. 2003) (citing *Cruzan*, 497 U.S. at 270-71) (emphasis in original); *see also Torres v. Tex. Child.'s Hosp.*, 611 S.W.3d 155 at 161 (no interest in preserving life where prognosis is irreversible brain death). Under the facts of this case, the prognosis was

that the pregnancies would not result in children with sustained life, while the lives and health of the pregnant patients could be preserved. Under such circumstances, there is no competing state interest to consider.

There are certain circumstances in which "privileges that are ordinarily viewed as 'fundamental rights' may lose that character." *Henderson v. State*, 962 S.W.2d 544, 561 (Tex. Crim. App. 1997). For example, "[w]hen a person intentionally or knowingly kills another, or anticipates that a human life would be taken during criminal activity with co-conspirators and a human life is taken, then that person forfeits any expectation that his or her own life will be held sacrosanct." *Id.* (internal citations omitted). Under such circumstances, "life no longer occupies the status of a fundamental right for persons who have been convicted under the current capital murder scheme." *Id.* Similarly, "freedom from confinement has been recognized as a fundamental right," which carries more weight before conviction of a crime—when the defendant is presumed innocent—as opposed to after, when the deprivation of liberty may be more justified. *Id.* The principles underpinning these cases, of course, are inapplicable in the context of this case, where it is beyond dispute that patients suffering life- or health-threatening medical conditions have not forfeited any fundamental right.

Finally, Texas courts' interpretation of the scope of the "fundamental right to property" is informative for interpreting other fundamental rights. The right to

property, "[l]ike every other fundamental liberty," "is a right to which the police power is subordinate." *Spann v. City of Dallas*, 111 Tex. 350, 356 (1921). It is recognized as "fundamental, natural, inherent, inalienable, not derived from the legislature and as preexisting even constitutions," the protection of which is "one of the most important purposes of government." *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977). Importantly, the right to property extends beyond mere ownership or possession of a thing—it requires the "unrestricted right of use, enjoyment, and disposal" of property. *Spann*, 111 Tex. at 355. Moreover, "[a]nything which destroys any of these elements of property, to that extent destroys the property itself. The substantial value of property lies in its use. If the right of use [is] denied, the value of the property is annihilated and ownership is rendered a barren right." *Id.* Applying the same logic to the fundamental right to life, it cannot be that the right is limited to mere biological existence. The right must include, at a minimum, protection against great bodily harm and life-impairing risks to one's health.

IV Sister State Courts Have Held that Their Constitutions Protect the Right to an Abortion to Preserve Life and Health

Several states have recently interpreted provisions in their state constitutions similar to Article I, Sections 19 and 29 as establishing an affirmative right to life that encompasses the right to obtain an abortion where necessary to preserve and protect the life or health of the pregnant person. For example, Oklahoma and North Dakota

have invalidated statutes that placed unconstitutional bans on a pregnant patient's right to obtain an abortion under such circumstances. Oklahoma and North Dakota, like Texas, have state constitutions that affirmatively protect the right to life. Oklahoma's constitutional "right to life" is found in Article II, Sections 2 and 7 of its state constitution: The Oklahoma Constitution declares that "[n]o person shall be deprived of life, liberty, or property, without due process of law" Okla. Const. art. II, § 7, and that "[a]ll persons have the inherent right to life." Okla. Const. art. II, § 2. North Dakota's state constitution provides that "[a]ll individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life." N.D. Const. art. I, § 1. Although the language of these constitutions is different from Article I, Sections 19 and 29, all three recognize an inalienable or inherent right to life and were drafted with the intent of providing more affirmative protections than those in the federal constitution. *See supra* Section II. The reasoning in these cases can equally be applied to the right to life protected by the Texas Constitution.

In 2023, the Oklahoma Supreme Court stated unambiguously that these constitutional provisions create "an inherent right of a pregnant woman to terminate a pregnancy when necessary to preserve her life." *Okla. Call for Reprod. Just. v. Drummond*, 2023 OK 24, ¶ 9, 526 P.3d 1123, 1130. At issue was a statute that criminalized performing certain abortions but provided an exception allowing an

abortion "to save the life of a pregnant woman in a medical emergency." *Id.* at 1131 (quoting Section 1-731.4 (B)(1)). The statute defined "medical emergency" as "[a] condition which cannot be remedied by delivery of the child in which an abortion is necessary to preserve the life of a pregnant woman whose life is endangered by a physical disorder, physical illness or physical injury including a life-endangering physical condition caused by or arising from the pregnancy itself." *Id.* (quoting Section 1-731.4 (A) (2)). The court interpreted this language as requiring a woman to be in "actual and present danger" before she could legally obtain a medically necessary abortion. *Id*. The court wrote: "We know of no other law that requires one to wait until there is an actual medical emergency in order to receive treatment when the harmful condition is known or probable to occur in the future. Requiring one to wait until there is a medical emergency would further endanger the life of the pregnant woman and does not serve a compelling state interest." *Id.*

The *Drummond* court held that the requirement to wait until there was a medical emergency violated the fundamental right to life granted by the state constitution. Instead, protecting the woman's right to life required allowing an abortion where there is a "probability that the continuation of the pregnancy will endanger the woman's life due to the pregnancy itself or due to a medical condition that the woman is either currently suffering from or likely to suffer from during the pregnancy." *Id.* at 1130. Importantly, the court did not hold that this protection is

without limits. While "[a]bsolute certainty is not required" for a physician to determine that an abortion is medically necessary, the court made it clear that "mere possibility or speculation is insufficient" to trigger the protections afforded by the Oklahoma constitution's right to life in this context. *Id.*

The Oklahoma Supreme Court subsequently struck down two other abortion-related statutes on similar grounds. *See Okla. Call for Reprod. Just. v. State*, 2023 OK 60, 531 P.3d 117 (2023). Both statutes prohibited abortions after certain cutoff points and provided a civil enforcement mechanism similar to the one in Texas. The first statute operated as a complete abortion ban unless the "abortion is necessary to save the life of a pregnant woman in a medical emergency" or the "pregnancy is the result of rape, sexual assault, or incest that has been reported to law enforcement." H.B. 4327, § 2. The definition of "medical emergency" was the same as the one found unconstitutional in *Drummonds*, making it unconstitutional here as well. The other statute prohibited "abortion after detection of a fetal heartbeat except in case of medical emergency." S.B. 1503 at ¶ 5. It did not define "medical emergency" at all, instead limiting the exception to situations where "a physician believes a medical emergency exists that prevents compliance of this act." S.B. 1503, § 5(A). The court held this was "even more extreme" than the statute it had previously held unconstitutional in *Drummond* and struck it down on the same ground. 531 P.3d at 122.

The North Dakota Supreme Court has also recognized that the fundamental right to life protects a pregnant person's "right to seek an abortion to preserve her life or health." *Wrigley v. Romanick*, 2023 ND 50, ¶ 31, 988 N.W.2d 231, 243. In this case, the North Dakota Supreme Court struck down as unconstitutional a statute making abortion a felony except for cases where an affirmative defense applied—including where "the abortion was necessary in professional judgment and was intended to prevent the death of the pregnant female." *Id.* at 235. The statute defined "professional judgment" to mean "a medical judgment that would be made by a reasonably prudent physician who is knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved." *Id.* The court held that this language was unconstitutionally restrictive of the woman's right to life, including because it prevented a woman from obtaining an abortion to "preserve her health." *Id.* at 242.

The district court in this case similarly (and correctly) found the enforcement of Texas's abortion bans, "as applied to a pregnant person with an emergent medical condition for whom an abortion would prevent or alleviate a risk of death or risk of their health (including their fertility)," to be in violation of the Texas Constitution, including Section 19. *See* Temporary Injunction Order, No. D-1-GN-23-000968 at 3. The court found that physical medical conditions falling within the scope of the exception to the abortion bans must include, at a minimum: "a physical medical

condition or complication of pregnancy that poses a risk of infection, or otherwise makes continuing a pregnancy unsafe for the pregnant person; 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.* at 2. Implicit in this list of circumstances is a finding that, as in the Oklahoma and North Dakota cases, it is an unconstitutional deprivation of the right to life to require a pregnant woman to wait until she is at imminent risk of death or severe bodily harm before she can obtain an abortion. The fundamental right to life must encompass the right to obtain a life- and health-preserving medical care.

CONCLUSION

Based on the foregoing, we respectfully ask this Court to rule in favor of Plaintiffs-Appellees.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

According to Microsoft Word, this pleading contains 7,390 words, excluding the portions exempted by Tex. R. App. P. 9.4(i)(1).

/s/ Matthew B. Henneman
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I hereby certify that on the 21st day of November, 2023, a true and correct copy of the foregoing document has been sent via eservice, to all counsel of record, pursuant to the Texas Rules of Appellate Procedure.

/s/ Matthew B. Henneman
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