

Cause No. _____

Joel Enge,

Plaintiff,

v.

**The Lilith Fund for Reproductive
Equity; Texas Equal Access Fund;
and The Afiya Center,**

Defendants

IN THE DISTRICT COURT

SMITH COUNTY, TEXAS

____ JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION

The state of Texas has never repealed its pre-*Roe v. Wade* statutes that outlaw abortion unless the mother's life is in danger. After the Supreme Court announced its judgment in *Roe v. Wade*, 410 U.S. 113 (1973), the Texas legislature did not repeal its criminal prohibitions on abortion. Instead, the legislature recodified and transferred those laws to articles 4512.1 through 4512.6 of the Revised Civil Statutes. *See* West's Texas Civil Statutes, articles 4512.1 – 4512.6 (1974) (attached as Exhibit 1). So the law of Texas continues to define abortion as a criminal offense—even though the current federal judiciary is unlikely to uphold convictions obtained under those statutes until *Roe v. Wade* is overruled. The same goes for conduct that aids and abets an abortion. The law of Texas continues to define this conduct as criminal, despite the fact that prosecutors are unlikely to indict people who engage in this conduct on account of *Roe v. Wade*. *See* West's Texas Civil Statutes, article 4512.2 (1974) (attached as Exhibit 1); Texas Penal Code § 7.02.

Plaintiff Joel Enge wants to publish statements that abortion remains a criminal offense under Texas law because Texas has never repealed its pre-*Roe v. Wade* abortion statutes. He also wants to name the specific organizations that aid and abet abortions

in Texas and describe them as engaging in conduct that remains “criminal” under the law of Texas. Finally, Mr. Enge intends to publicly state that the Texas pre-*Roe* abortion statutes are severable in each of their discrete applications, and that they remain fully enforceable in situations that will not impose an “undue burden” on any woman seeking an abortion.

Each of the three defendants in this case is an organization that helps women in Texas obtain abortions. And each of these organizations has filed a defamation lawsuit against a pro-life activist named Mark Lee Dickson, alleging that he defamed them by describing the defendants and their actions as “criminal.” *See* Exhibits 2–4. Mr. Enge wishes to state that the defendants (and other organizations that help women obtain abortions) are engaging in conduct that the law of Texas continues to define as criminal, but he cannot publish these statements without risking a defamation lawsuit given the defendants’ actions against Mr. Dickson. Mr. Enge therefore seeks a declaratory judgment from this Court that the statements that he wishes to publish concerning the defendants and their violations of the Texas abortion statutes are truthful and non-defamatory.

DISCOVERY CONTROL PLAN

1. The plaintiff intends to conduct discovery under Level 3 of the rules set forth in Rule 190 of the Texas Rules of Civil Procedure.

PARTIES

2. Plaintiff Joel Enge resides in Smith County.

3. Defendant The Lilith Fund for Reproductive Equity is a Texas nonprofit which aids and abets abortion. It may be served with civil process by serving Emily M. Bivona, 2727 Allen Parkway, Suite 1700, Houston, Texas, 77019-2125.

4. Defendant Texas Equal Access Fund is a Texas nonprofit which aids and abets abortion. Its mailing address is Post Office Box 227336, Dallas, Texas, 75222.

5. Defendant The Afiya Center is a Texas nonprofit which aids and abets abortion. It may be served with civil process by serving Marsha Jones at 4907 Spring Avenue, Suite 209, Dallas, Texas 75210.

JURISDICTION AND VENUE

6. The Court has subject-matter jurisdiction under article V, section 8 of the Texas Constitution. Mr. Enge seeks relief that can be granted by courts of law or equity.

7. The Court has personal jurisdiction over each of the defendants.

8. Venue is proper because the statements that Mr. Enge wishes to publish concerning the defendants will take place in Smith County, and the statements that he has refrained from publishing on account of the defendants' lawsuit against Mr. Dickson would have occurred in Smith County. *See* Tex. Civ. Prac. & Rem. Code § 15.002(a)(1) (allowing venue in the county in which all or a substantial part of the events or omissions giving rise to the claim occurred).

THE TEXAS ABORTION STATUTES

9. After the Supreme Court announced its ruling in *Roe v. Wade*, 410 U.S. 113 (1973), the Texas legislature did not repeal its statutes that criminalize elective abortion.

10. Instead, the legislature recodified and transferred those statutes to articles 4512.1 through 4512.6 of the Revised Civil Statutes. *See* Act of June 14, 1973, ch. 399, §§ 5–6, 1973 Tex. Acts 883, 995–96; *see also id.* 996a, 996e (including the Texas abortion laws in the table indicating the “Disposition of Unrepealed Articles of the Texas Penal Code of 1925 and Vernon’s Penal Code.”).¹ The legislature has never repealed these statutes, and they remain on the books as the law of Texas.

1. The text of the Act of June 14, 1973, is available at https://lrl.texas.gov/LASDOCS/63R/SB34/SB34_63R.pdf#page=1 (last visited on July 15, 2020).

11. The law of Texas therefore continues to define abortion as a criminal offense except when necessary to save the life of the mother—just as it did before *Roe v. Wade*, 410 U.S. 113 (1973). *See* West’s Texas Civil Statutes, article 4512.1 (1974).

12. In addition, the law of Texas continues to prohibit any act that “furnishes the means for procuring an abortion knowing the purpose intended.” *See* West’s Texas Civil Statutes, article 4512.2 (1974).

13. Texas law also prohibits conduct that aids or abets a criminal act, *see* Texas Penal Code § 7.02, and the law of Texas continues to define abortion as a criminal offense unless the mother’s life is in danger. *See* West’s Texas Civil Statutes, articles 4512.1, 4512.6 (1974).

14. The Supreme Court’s judgment in *Roe v. Wade* did not cancel or formally revoke the Texas abortion statutes, and the judiciary has no power to erase a statute that it believes to be unconstitutional. *See Pidgeon v. Turner*, 538 S.W.3d 73, 88 n.21 (Tex. 2017) (“[N]either the Supreme Court in *Obergefell* nor the Fifth Circuit in *De Leon* ‘struck down’ any Texas law. When a court declares a law unconstitutional, the law remains in place unless and until the body that enacted it repeals it [T]he Texas and Houston DOMAs remain in place as they were before *Obergefell* and *De Leon*, which is why Pidgeon is able to bring this claim.”); *see also Texas v. United States*, 945 F.3d 355, 396 (5th Cir. 2019) (“The federal courts have no authority to erase a duly enacted law from the statute books, [but can only] decline to enforce a statute in a particular case or controversy.” (citation and internal quotation marks omitted)); *see also Hart and Wechsler’s The Federal Courts and The Federal System* 181 (Richard H. Fallon, Jr., et al. eds., 7th ed. 2015) (“[A] federal court has no authority to excise a law from a state’s statute book.”); David L. Shapiro, *State Courts and Federal Declaratory Judgments*, 74 Nw. U. L. Rev. 759, 767 (1979) (“No matter what language is used in a judicial opinion, a federal court cannot repeal a duly enacted statute of any legislative authority.”).

15. The Supreme Court’s pronouncements may limit the State’s ability to *enforce* its abortion statutes against those who violate them, but they do not veto or erase the statutes themselves, which continue to exist as the law of Texas until they are repealed by the legislature that enacted them. The State’s temporary inability to prosecute or punish those who violate its abortion statutes on account of *Roe* does not change the fact that abortion is still defined as a criminal offense under Texas law.

16. In addition, neither *Roe v. Wade*, 410 U.S. 113 (1973), nor any subsequent abortion pronouncement of the Supreme Court prevents Texas from enforcing its pre-*Roe* abortion statutes in at least *some* situations. Every discrete application of articles 4512.1 through 4512.6 is severable from each other. *See* Tex. Gov’t Code § 311.032(c) (“In a statute that does not contain a provision for severability or non-severability, if any provision of the statute or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the statute that can be given effect without the invalid provision or application, and to this end the provisions of the statute are severable.”); *see also* *Leavitt v. Jane L.*, 518 U.S. 137, 138 (1996) (per curiam) (“Severability is of course a matter of state law.”); *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924) (holding that a state court’s “decision as to the severability of a provision is conclusive upon this Court.”). So any applications of the state’s pre-*Roe* abortion statutes that contradict the Supreme Court’s abortion edicts are severable from the applications that do not, and the constitutional applications of these statutes remain fully enforceable. The State of Texas may, for example, continue to enforce its pre-*Roe* abortion statutes against non-physicians who perform abortions. *See, e.g.,* *May v. State*, 492 S.W.2d 888, 889 (Ark. 1973), cert. denied, 414 U.S. 1024; *People v. Bricker*, 208 N.W.2d 172, 175–76 (Mich. 1973); *State v. Norflett*, 337 A.2d 609, 615 (N.J. 1975) (“[T]o the extent that it authorizes the criminal prosecution of laymen for performing abortions, N.J.S.A. 2A:87-1 survives *Roe*”); *id.* (“*Roe* and *Doe* do not preclude the enforcement of criminal abortion statutes against

laymen.”). Texas may also enforce its pre-*Roe* abortion statutes against post-viability abortions, and in other situations that will not impose an “undue burden” on women seeking abortions.

CLAIM FOR DECLARATORY RELIEF

17. Mr. Enge respectfully asks for a declaratory judgment that: (a) the State of Texas has never repealed its pre-*Roe v. Wade* statutes that criminalize abortion; (b) every discrete application of articles 4512.1 through 4512.6 of the Revised Civil Statutes, and every discrete application of section 7.02 of the Texas Penal Code, is severable from each other under section 311.032(c) of the Texas Government Code; and (c) that any accusations of “criminal” activity directed at the defendants for their actions that aid and abet abortions performed in Texas are therefore truthful and non-defamatory.

18. Mr. Enge brings his claim for relief under the Uniform Declaratory Judgment Act. *See* Tex. Civ. Prac. & Rem. Code § 37.003(a).

19. Mr. Enge brings his claim exclusively under state law and expressly disclaims any federal cause of action or any reliance on federal law that would trigger subject-matter jurisdiction under 28 U.S.C. § 1331.

DEMAND FOR JUDGMENT

Mr. Enge demands the following relief:

- a. a declaratory judgment that:
 - (i) the State of Texas has never repealed its pre-*Roe v. Wade* statutes that criminalize abortion unless the mother’s life is in danger;
 - (ii) each discrete application of articles 4512.1 through 4512.6 of the Revised Civil Statutes, and each discrete application of section 7.02 of the Texas Penal Code, is severable from the remaining applications of those statutes under section 311.032(c) of the Texas Government Code; and

(iii) it is therefore truthful (and non-defamatory) to describe organizations that aid and abet elective abortions in Texas as engaged in “criminal” behavior;

- b. an award of costs and attorneys’ fees;
- c. all other relief that the Court may deem just, proper, or equitable.

Respectfully submitted.

/s/ Jonathan F. Mitchell

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* *pro hac vice* applications
forthcoming

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