
SUPREME COURT OF TEXAS UPDATE
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I. SCOPE OF THIS PAPER

This paper surveys cases that were decided by the Supreme Court of Texas from April 1, 2021, through May 31, 2022. Petitions granted but not yet decided are also included.

The summaries do not constitute the Court's official descriptions or statements. Readers are encouraged to review the Court's official opinions for specifics regarding each case. The Court appreciates suggestions and corrections, which may be sent via email to kelly.canavan@txcourts.gov.

II. DECIDED CASES

A. ADMINISTRATIVE LAW

1. Enforcement

- a) *Whole Woman's Health v. Jackson*, 642 S.W.3d 569 (Mar. 11, 2022) [22-0033]

This case answered a certified question from the United States Court of Appeals for the Fifth Circuit asking whether Texas law authorizes certain state officials to directly or indirectly enforce the state's abortion-restriction requirements.

The Texas Legislature passed Senate Bill 8 (labeled the "Texas Heartbeat Act") in 2021. Section 3 of the Act added a new subchapter H to chapter 171 of the Texas Health and Safety Code, which prohibits physicians from knowingly "perform[ing]" or "induc[ing]" an abortion unless they first perform an "appropriate" test and do not detect a "fetal heartbeat." The plaintiffs provide and fund abortions and support women who obtain them in Texas. They filed suit in federal court requesting a declaration that the Act unconstitutionally restricts their rights

and an injunction prohibiting the defendants from enforcing its requirements. The defendants include the executive directors and commissioners of various state agencies.

These state-agency executives moved to dismiss the lawsuit, asserting jurisdictional challenges, including that they are immune from the plaintiffs' federal suit because Texas law does not grant them any authority to enforce the Act's requirements. The federal district court disagreed and denied their dismissal motions. The United States Supreme Court also disagreed, affirmed the denial of the state-agency executives' dismissal motions, and remanded the case to the Fifth Circuit. At the state-agency executives' request, the Fifth Circuit then certified the following question to the Court:

Whether Texas law authorizes the Attorney General, [the] Texas Medical Board, the Texas Board of Nursing, the Texas Board of Pharmacy, or the Texas Health and Human Services Commission, directly or indirectly, to take disciplinary or adverse action of any sort against individuals or entities that violate the Texas Heartbeat Act, given the enforcement authority granted by various provisions of the Texas Occupations Code, the Texas Administrative Code, and the Texas Health and Safety Code and given the restrictions on public enforcement in sections 171.005, 171.207, and 171.208(a) of the Texas Health and Safety Code.

The Court concluded that Texas law does not authorize the state-agency

executives to enforce the Act's requirements, either directly or indirectly. First, it determined that the statute's language unambiguously confirms that the state-agency executives cannot directly bring a civil action under that section to enforce the Act's requirements. The statute unequivocally provides that the Act's testing and no-heartbeat requirements may be enforced by a private civil action under section 171.208, and that no state official may bring or participate as a party in any such action.

The Court then concluded that the state-agency executives also cannot *indirectly* enforce the Act's requirements through "administrative and public civil enforcement actions" against Texas physicians, nurses, pharmacists, and other professional licensees. Those laws grant the state agencies broad authority to enforce other state laws through the professional-disciplinary process unless other laws provide otherwise, and the Heartbeat Act expressly provides otherwise. The Court reached this conclusion for three reasons. First is the Act's emphatic, unambiguous, and repeated provisions declaring that the civil action section 171.208 provides is the "exclusive" method for enforcing the Act's requirements.

Next, the Court considered the savings clause in section 171.207(b), which states that section 171.207(a) "may not be construed to . . . limit the enforceability of any other laws that regulate or prohibit abortion." The plaintiffs contended that the laws that authorize agencies to take disciplinary actions against licensees who perform "criminal abortions" are laws that

"regulate or prohibit abortion." The Court disagreed, reasoning that laws that "regulate or prohibit abortion" must do more than relate to or have an impact on abortions but must be specifically directed at abortions and must substantively control, forbid, preclude, or hinder them.

Finally, the Court considered the plaintiff's argument regarding the Act's statement that "[n]o enforcement of this subchapter, and no enforcement of Chapters 19 and 22, Penal Code, in response to violations of this subchapter, may be taken or threatened by" any government actor. The plaintiffs argued that to read the Act as broadly prohibiting all indirect enforcement actions would render this clause mere surplusage. The Court first stated that the clause is not surplusage because it confirms that although the Act is a civil statute, prosecutors cannot pursue criminal charges based on an abortion that violates the Act's requirements. But even if the clause were surplusage, such a redundancy would not alter the clear terms of the exclusive-enforcement provisions. The clause cannot be given the full effect the plaintiffs propose without rendering other language in the Act superfluous. The Court determined that to stay truest to all of the Act's language, it must conclude that the legislature included the clause not to prohibit indirect enforcement that would be permitted in the clause's absence but to emphasize and make it unmistakably clear that by prohibiting all enforcement methods other than a section 171.208 civil action, even criminal prosecutions. The Court therefore answered the Fifth Circuit's certified question No.

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