No. 23-0629

IN THE SUPREME COURT OF TEXAS

STATE OF TEXAS; ATTORNEY GENERAL OF TEXAS; ANGELA COLMENARO, in her official capacity as Provisional Attorney General of Texas; TEXAS MEDICAL BOARD; and STEPHEN BRINT CARLTON, in his official capacity as Executive Director of the Texas Medical Board,

Appellants,

v.

AMANDA ZURAWSKI; LAUREN MILLER; LAUREN HALL; ANNA ZARGARIAN; ASHLEY BRANDT; 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,

Appellees.

On Direct Appeal from the
353rd Judicial District Court of Travis County, Texas

PETITION IN INTERVENTION, OR IN THE ALTERNATIVE, MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE WOMEN'S AND CHILDREN'S ADVOCACY PROJECT, EQUAL MEANS EQUAL AND ELIZABETH CADY STANTON TRUST

Respectfully submitted,

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Women's and Children's Advocacy Project,
Equal Means Equal, and
Elizabeth Cady Stanton Trust

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INTRODUCTION

Petitioners are national women's rights charitable organizations. They seek to intervene in this matter because it raises profoundly important issues of constitutional magnitude that will affect the rights of all women in Texas. Petitioners seek to participate for the limited purpose of enabling this Court to consider claims and arguments not raised below by either party and that afford women in Texas better legal protections than the claims and arguments now pending before the Court. In the event intervention is denied, Petitioners respectfully request that this Court accept this petition as an amicus brief or grant leave to file a brief as Amicus Curiae.

Both Appellants and Appellees oppose Petitioner's Request for Intervention.

PETITIONERS/AMICUS

Petitioners listed below have a significant interest in this matter because they are all established charitable organizations with demonstrated histories of advocating for legal equality and equal treatment of women under all laws. They have a legitimate concern that the strongest possible legal claims and arguments are not being advanced on behalf of women in Texas.

WOMEN'S AND CHILDREN'S ADVOCACY PROJECT

The Women's and Children's Advocacy Project (WCAP) is a public interest law project of the Center for Law and Social Responsibility at New England Law | Boston. The WCAP engages in direct litigation and submits amicus briefs in state

and federal court on behalf of the rights and interests of women and children. WCAP's director was lead counsel in the first federal lawsuit to validate the ERA, which was filed in Massachusetts federal court in January 2020.

EQUAL MEANS EQUAL

Equal Means Equal (EME) is a project of the Heroica Foundation, a 501(c)(3) charitable organization that Advocates for sex/gender equality and the fully equal treatment of women. Through the use of grassroots activism, social media, and documentary filmmaking, EME has actively led or participated in hundreds of events to support the ERA and sex/gender equality. In 2016, EME produced and released the film Equal Means Equal. In 2018, EME testified before the Illinois legislature in support of that state's successful ratification of the 1972 Equal Rights Amendment. EME has many members and supporters in Texas.

ELIZABETH CADY STANTON TRUST

The Elizabeth Cady Stanton Trust Elizabeth Cady Stanton Trust ("ECST") is a national 501(c)(3) organization whose mission includes education and advocacy for women's constitutional equality and rights. ECST is widely known as a leader in the women's rights movement. It is named for famed women's rights activist Elizabeth Cady Stanton, who authored the historic Declaration of Sentiments in 1848, which was presented at the well-known Women's Rights Convention at

Seneca Falls, New York. The Declaration of Sentiments was the first effort by women in the United States to establish their constitutional equality. Its primary sentiment reads: "All men and women are created equal." The Declaration of Sentiments was styled after the Declaration of Independence and was meant as a protest against the exclusion of women as fully equal persons under the United States Constitution. ECST was founded by Stanton's great-great granddaughter in 1999 and has been working toward the establishment of women's equality ever since. ECST has performed its mission throughout the United States, including in Texas, and has many supporters in Texas.

STATEMENT OF THE CASE

Appellees filed their lawsuit on March 6, 2023, on behalf of the rights and interests of Appellees and all women in Texas in a constitutional challenge to abortion restrictions enacted by the Texas Legislature in 2021 (hereafter "2021 abortion restrictions"). Am. Pet., pg. 109, ¶ 467 ("Texas abortion bans deny women equality because of sex." [..] "Texas abortion bans are based on stereotypes, thus constitute "discrimination because of sex."); and pg. 3, ¶ 1 (Texas abortion restrictions harm "women."). Appellees filed an amended complaint on May 22, 2023, adding parties and seeking a Temporary Restraining Order (TRO).

The lower court held a hearing on the TRO in July and issued a ruling in favor of Appellees on August 4, 2023, granting a TRO on the grounds that the 2021

abortion restrictions, inter alia, deny women "equal rights," in violation of Art. I, § 3 of the Texas Constitution, and discriminate against women based on sex, in violation of Art. I, § 3a of the Texas Constitution. Appellants immediately sought review from this Court. On August 25, 2023, this Court noted probable jurisdiction and agreed to decide the merits.

ISSUES PRESENTED

1. Whether Women's Rights Organizations Should Be Allowed To Intervene Where They Share Privity And Identity of Interest With the Plaintiffs, But Their Interests Are Not Represented, And Where the Vitality Of The Federal Equal Rights Amendment Is At Stake?

2. Whether The Federal Constitution Affords Women Better Legal Protections Than The Texas Constitution?

3. Whether 2021 Abortion Restrictions Fail Strict Scrutiny?

TO THE HONORABLE SUPREME COURT OF TEXAS:

SUMMARY OF ARGUMENT

Women's rights organizations should be allowed to intervene because they share privity and identity of interest with Appellees, but their interests are not represented, and the vitality of the federal Equal Rights Amendment is at stake.

The United States Constitution affords women better legal protections than the Texas Constitution for all rights, including abortion rights, because it requires more rigorous judicial review standards.

Alternatively, the abortion restrictions in question fail to survive strict scrutiny under the Texas ERA.

ARGUMENT

I. INTERVENTION IS APPROPRIATE UNDER THE VIRTUAL REPRESENTATION DOCTRINE

Pursuant to the virtual-representation doctrine set forth in *In re Lumbermens Mut. Cas. Co*., 184 S.W.3d 718 (Tex. 2006), Petitioners respectfully seek to intervene in this matter for the limited purpose of advancing important claims and arguments not raised by the parties. *Lumbermens* allows intervention on appeal in the first instance when Intervenors (1) will be bound by the judgment; (2) are in privity of interest; and (3) share an identity of interest with a named party to the judgment. *Id.* at 722 ("Under [the virtual representation] doctrine, a litigant is deemed to be a party if it will be bound by the judgment, its privity of interest appears from the record,

and there is an identity of interest between the litigant and a named party to the judgment."). Petitioners satisfy *Lumbermans* because they represent the interests of women and women will be bound by the Court's judgment. In addition, Petitioners enjoy privity and shared identity of interest with Appellees because Petitioners seek to assert claims under the federal Equal Rights Amendment (hereafter "ERA"), U.S. Const. Amend. XXVIII, and the Equal Protection clause of the Fourteenth Amendment (hereafter "Equal Protection clause"), U.S. Const. Amend. XIV, § 1, and Appellees assert analogous claims under the Texas Constitution. See Am. Pet., pg. 109, ¶ 467 ("Texas abortion bans deny women equality because of sex" and constitute "discrimination because of sex.")

Appellees rightly argue that the 2021 abortion restrictions should be challenged under constitutional provisions that (1) prohibit sex discrimination and (2) guarantee women equal rights under the law, but they fail women by: (1) Arguing such claims only under the Texas Constitution and asking for only "rational relationship" review, Am.Pet. pg. 109, ¶¶ 461–62, 469, and 470, even though the federal Constitution requires review under standards more rigorous than "rational relationship," thus affords women better legal protections; (2) Not asking the Court to apply strict scrutiny review under the Texas Constitution's Equal Rights

provision,[1] despite the fact that strict scrutiny is required under the analogous federal Equal Rights Amendment ("ERA"), and Texas courts are bound by the United States Constitution, *Small v. State*, 977 S.W. 2d 771, 776 (Tex. App. – Fort Worth 1998, no pet.); *Altria Group, Inc. v. Good*, 555 U.S. 70 (2008) ("…state laws that conflict with federal law are without effect"); (3) Not asking the Court to apply at least "exacting scrutiny" under the Texas Constitution's anti-sex discrimination provision, despite the fact that exacting scrutiny is required under the Equal Protection clause of the Fourteenth Amendment.

Petitioners seek to rectify these weaknesses by advancing claims and arguments that afford women better legal protections than the claims and arguments currently pending before the Court.

Intervention will not delay or needlessly complicate this case because the claims and arguments Petitioners seek to assert require the same type of legal analysis the parties have already addressed under the Texas Constitution. The only difference is that the claims Petitioners seek to assert utilize more rigorous standards.

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[1] Appellees appear to have changed their argument on appeal in terms of the standard of scrutiny they request. In their appellate brief Appellees cite two decisions from North Dakota and Oklahoma for the proposition that strict scrutiny should apply here. (App. Br. 58) Yet they nowhere mentioned or argued strict scrutiny below, and despite their appellate brief's mention of the phrase strict scrutiny, they nowhere analyze how strict scrutiny applies to the abortion restrictions in controversy here, beyond declaring that the state has "no interest, much less a compelling one, in protecting potential life in these circumstances." (App. Br. 55). This does not rise to the level of appellate argument. More importantly, because Appellees did not ask for strict scrutiny below, this Court may decline to address strict scrutiny on the grounds that Appellees waived their right to argue it.

Where intervention will not delay or complicate the case, it should be granted. *Lumbermans*, 184 S.W.3d at 728.

Petitioners urge this Court to grant intervention to ensure that it may consider the best possible claims and arguments on behalf of women -- the class of people whose rights are at stake. As other courts have recognized, women's groups, such as Petitioners here, should be granted intervention standing where the vitality of a women's constitutional equality is at stake. See *Idaho v. Freeman*, 625 F. 2d. 886 (9th Cir. 1980) (woman's group has standing to intervene where the "vitality" of the federal Equal Rights Amendment is at stake). Denying intervention will deprive this Court of arguments that should *at least be considered* before a decision affecting half the population in Texas is rendered.

This Court is poised to adopt judicial review standards under the Texas Constitution that will affect not only abortion rights, but all laws and policies that affect women in Texas. The constitutional standards in controversy are broadly applicable to all aspects of women's lives. This Court should consider *all* arguments that afford women the best possible legal protections.

II. THE FEDERAL CONSTITUTION AFFORDS WOMEN BETTER LEGAL PROTECTIONS THAN THE TEXAS CONSTITUTION

Appellees assert a claim under Art. I, § 3 of the Texas Constitution, which grants people in Texas "equal rights." Am. Pet. pg. 108. This state constitutional

provision is directly analogous to the federal Equal Protection clause, which grants people "Equal Protection of the laws." U.S. Const. amend. XIV, § 1. Appellees also assert a claim under Art. I, § 3a, which prohibits the state from "deny[ing] or abridg[ing rights] because of sex." Am.Pet. pg. 109. This state constitutional provision is directly analogous to the federal ERA, which states, "Equality of rights under the law … shall not be denied or abridged … on account of sex." U.S. Const. amend. XXVIII.

Under §§ 3 and 3a Appellees asked the court below to apply only a "rational relationship" standard of review when assessing the 2021 abortion restrictions for constitutionality. Am.Pet. pg. 109, ¶¶ 461–62, 469, and 470.

Petitioners seek to add claims under the ERA[2] and the Equal Protection clause[3] because both require this Court to apply a judicial review standard more rigorous than "rational relationship."

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[2] While there is some controversy about the ERA's current validity, many government officials agree the ERA is valid and is currently the Twenty-Eighth Amendment to the United States Constitution. See e.g., H.J. Res.25, January 31, 2023 (dozens of congresspeople submit "Joint Resolution" declaring the ERA "valid").

[3] Although the Supreme Court in *Dobbs v. Jackson,* 597 U.S. ___ (2022) noted that abortion restrictions are not subject to Equal Protection claims because abortion is not a "sex-based" concern given that "only one sex can undergo" pregnancy, 597 U.S. ___ (slip op. at 10-11 (2022), this aspect of *Dobbs* is mere dictum and may be disregarded as *Dobbs* was decided solely under the Due Process clause; there was no Equal Protection claim. Moreover, the *Dobbs* Court relied on *Geduldig v. Aiello*, 417 U.S. 484 (1974) to support its claim that pregnancy is not sex-based, and scholars have long dismissed *Geduldig* as not intellectually sound, and inconsistent with established precedent under the Equal Protection clause. Liss, S., The Constitutionality of Pregnancy Discrimination: The Lingering Effects of *Geduldig* and Suggestions For Forcing Its Reversal, 23 *N.Y.U. Review of Law and Social Change*, pp. 59-103 (1997). Among the many

Under the ERA, "strict scrutiny" review is required, which is far more demanding than "rational relationship." *Frontiero v. Richardson*, 411 U.S. 677, 692 (1973) (Powell, J., concurring). Likewise, the Equal Protection clause requires "exacting scrutiny," *U.S. v. Virginia*, 518 U.S. 515, 533 (1996), which, while less rigorous than "strict scrutiny," is more rigorous than "rational relationship." Indeed, "rational relationship" is the weakest possible standard in the hierarchy of judicial review standards; women have not been subjected to anything so meager under the federal Constitution since 1976 when the Supreme Court decided *Craig v. Boren*, 429 U.S. 190 (1976), in which it adopted the "intermediate scrutiny" standard, overturning the lesser "rational basis" standard it had adopted a few years earlier in *Reed v. Reed*, 404 U.S. 71 (1971), *Boren*, 429 U.S. at 197. Appellees' reliance on a judicial review standard that was rejected by the Supreme Court as constitutionally inadequate more than forty-five years ago is curious, at best. Indeed, given that Equal Protection jurisprudence has, for decades, offered judicial review standards more rigorous than rational relationship, it is confounding that Appellees - who purport to

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serious criticisms, *Geduldig* barely addressed Equal Protection, dismissing the claim in a footnote, without discussion, on the theory that not all women can get pregnant, *Geduldig* at 496–97. This reasoning was subsequently rejected by the Supreme Court in a case alleging a sex-based Equal Protection claim. See *Wengler v. Druggists Mutual Insurance Co.,* 446 U.S. 142 (1980) (Male plaintiffs allowed to assert Equal Protection claim based on sex even though "not all men" were subjected to the sex discrimination alleged by the male plaintiffs). Regardless, courts have recognized the validity of an Equal Protection argument in the context of pregnancy and reproduction notwithstanding *Geduldig*. See e.g., *Jane L. v. Bangerter*, 61 F.3d 1505, 1516 n.11 (10th Cir. 1995).

represent the interests of women in a case where the judicial review standard is critical to its success in this case - failed to *at least ask* the court below to apply the most rigorous and protective judicial review standard possible.

The inadequacy of the "rational relationship" test becomes even clearer when Appellees' Claims for Relief are examined, which set forth the test's requirements. Appellees assert that Appellants must prove the 2021 abortion restrictions serve either a "compelling" *or* an "important" state interest. Am. Pet. pg. 108, ¶.46; pg. 110, ¶¶469–70. Appellees' curious use of the disjunctive invites this Court to choose between the "important" state interest test and the more demanding "compelling" state interest test. Petitioners seek to add a claim under the ERA because "strict scrutiny" mandates use of the preferable "compelling" state interest test. Chemerinsky, E., *Constitutional Law: Principles and Policies*, (Aspen Law and Business, 1997) at 529. Petitioners also seek to add an Equal Protection clause claim because its "exacting scrutiny" standard requires an "exceedingly persuasive justification," *U.S. v. Virginia*, 518 U.S. 515, 533 (1996), which, while less demanding than "compelling," is more demanding than "important."

Appellees further argue that the Texas Constitution's "rational relationship" test requires only that the 2021 abortion restrictions be "sufficiently tailored" to

serve the state's interest. Am. Pet. pg. 108, ¶461; pg. 110, ¶¶469–70).[4] Again, Appellees ask this Court to apply the weaker "sufficiently tailored" test even though the ERA's "strict scrutiny" standard requires application of the more demanding "narrow" tailoring test. *Frontiero*, 411 U.S. at 692 (Powell, J., concurring). "Sufficiently tailored" is also less rigorous than the "substantially related" test, which is required under the "exacting scrutiny" standard of the Equal Protection clause. *Virginia*, 518 U.S. at 524. *But see*, *Americans for Prosperity Foundation v. Bonta*, 594 U.S. ___ (2021) (the more demanding standard of "narrow tailoring" is now mandatory under "exacting scrutiny.").

Finally, under the ERA, the 2021 abortion restrictions must also satisfy the "least restrictive means" test because this is a required element of "strict scrutiny." Chemerinsky, E., at 529. The "least restrictive means" test prohibits overbroad restrictions that cause unnecessary encroachments on individual rights. This is an important feature of "strict scrutiny," yet Appellees nowhere ask this Court to apply the "least restrictive means" test.

[4] Once again, Appellees assert a different standard for "tailoring" in their brief before this Court, compared to the lesser standard it argued below. Before the lower court, Appellees asked only for "sufficient" tailoring, while in its brief before this Court, they state that "narrow" tailoring or "reasonable" tailoring must be applied, however, they then summarily conclude without discussion or analysis that the restrictions fail both standards. (App. Br. 56-57). Petitioners seek to intervene because Appellees' summary conclusion that the 2021 abortion restrictions fail both tests does not rise to the level of appellate argument, and even if it does, this Court could hold that Appellees' failure to argue the "narrow" tailoring standard below amounts to a waiver of their right to argue it on appeal.

Because Appellees ask this Court to apply weaker judicial review standards than those available to women under the ERA and the Equal Protection clause, the Court should allow Petitioners to intervene so these claims can be filed and considered by the Court.

III. THE 2021 ABORTION RESTRICTIONS FAIL STRICT SCRUTINY

As set forth above, the federal Equal Rights Amendment requires this Court to apply strict scrutiny review to determine the constitutionality of the 2021 abortion restrictions. Such scrutiny requires the state to prove that the restrictions are narrowly tailored to serve a "compelling state interest, and that the state has used the least restrictive means to do so. Chemerinsky, *supra*.

Strict scrutiny is also required under the Texas Equal Rights Amendment, Article I, § 3a of the Texas Constitution, *In the Interest of McLean*, 725 S.W. 2d, 696, 698 (1987) ("Our reading of the Equal Rights Amendment elevates sex to a suspect classification… [and must be] afforded maximum constitutional protection").[5] As with the federal Equal Rights Amendment, strict scrutiny under § 3a requires the state to prove that the 2021 abortion restrictions are narrowly tailored to serve a compelling state interest, and that it has used the least restrictive means to

[5] Curiously, Appellees assert claims under Art. I, § 3a, yet nowhere cite *In the Interest of McLean*, 725 S.W. 2d, 696 (1987) despite its seminal nature as the leading case on women's status and entitlement to strict scrutiny under § 3a.

do so. *Id*., ("strict scrutiny "does not yield except to compelling state interests" and will tolerate discrimination, "only when the proponent of the discrimination can prove that there is no other manner to protect the state's compelling interest." quoting *Mercer v. Board of Trust, North Forest Independent School District*, 538 S.W.2d 201 (Tex. Civ. App.--Houston [14th Dist.] 1976, writ ref'd n.r.e.)).

At the outset it should be emphasized that the state has a compelling interest in protecting the lives and health of women in Texas. This significantly limits the state's ability to enact laws that encroach on women's lives and health, regardless of the nature of any competing interest. But when such encroachments are also discriminatory based on sex because they treat women differently or have a disparate impact on women, they cannot survive constitutional muster unless they are "narrowly tailored" to serve a compelling interest, *and* "there is no other manner" to protect it. *Id*.

In this case, the state's assertion that it has a compelling interest in protecting unborn life that has gestated for only six weeks cannot be sustained as the United States Supreme Court has long recognized that the state's interest changes during the course of a pregnancy and "grows" as the woman's pregnancy reaches full-term, becoming compelling only when the fetus becomes viable. *Roe v. Wade*, 410 U.S.

113, 162-63 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992).[6] In fact, it was a Texas abortion law that the Supreme Court analyzed in *Roe* when it said a state has no compelling interest in an embryo or fetus, prior to viability. *Roe*, *supra*.

Furthermore, this Court held in *McLean* that the state has only a "legitimate" or "significant interest" in the welfare of an already born child, *McLean at 698*. If the state has only a legitimate or significant interest in the well-being of an already born child, it cannot possibly have a stronger "compelling" interest in the well-being of children not yet viable, much less born.

Even if the state's interest could be seen as compelling, the 2021 abortion restrictions are not narrowly tailored to serve the state's interest. As this Court held in *McLean*, a law is narrowly tailored only if it is "keyed" to the state's interest without needlessly discriminating against a competing compelling state interest. *Id*.

Here the state has not crafted its 2021 abortion restrictions to satisfy narrow tailoring because the restrictions forbid abortion after six weeks of gestation unless the pregnant woman's life is at stake, or a woman faces a "serious risk of substantial impairment of a major bodily function." Tex. Health & Safety Code §§ 170A.

[6] Although in *Dobbs* the Supreme Court overturned the aspect of *Roe v. Wade*, 410 U.S. 113 (1973) that gave women a due process right to abortion under the federal Constitution, it did not overturn its prior rulings on the nature of the state's interest in the unborn, and how it changes during a woman's pregnancy, and only becomes compelling after viability.

002(b)(2), 171.002(3), 171.205(a) (App'x.D). This language is hardly "tailored" to serve the state's interest, much less is it narrowly tailored, because it subordinates the state's well-settled compelling interest in preserving the health of a pregnant woman to its less than compelling interest in preserving a nonviable embryo, or a more developed fetus that has no chance at health or life. A narrowly tailored statute would at least prioritize a pregnant woman's existing health over an embryo, or a nonviable fetus that has no future chance at health or life.

The importance of narrow tailoring and ensuring that a state has used the least restrictive means to accomplish its goal cannot be overstated. Tailoring statutory language as narrowly as possible recognizes the dangers of sex discriminatory laws and prevents bigoted lawmaking. As was observed by this Court in *McLean*, a case involving sex discriminatory laws related to childbirth and parental rights, "A father … should not be required to meet a higher burden of proof solely because he is male." Indeed, and neither should a woman be required to risk her life or health, solely because she is female.

To the extent this Court questions whether the 2021 abortion restrictions are subject to heightened scrutiny at all under the federal Equal Protection clause, or the Texas Constitution's analogue, Art. I, § 3, under the theory that the *Dobbs* Court said that there was no need to engage an Equal Protection clause analysis because abortion restrictions are not sex-based as only women can get pregnant, *Dobbs v.*

Jackson, 597 U.S. ___ (2022) (slip op. at 10-11), this Court should disregard *Dobbs* as its mention of Equal Protection jurisprudence was mere dictum, and be guided instead by *Michael M. v. Superior Court*, 450 U.S. 464 (1981), where the Supreme Court applied the Equal Protection clause to a challenged law that was discriminatory based on sex because of pregnancy. The Court reasoned that Equal Protection clause was applicable even though the sexes were not "similarly situated." *Id*., at 468-69. Under *Michael M.*, the 2021 abortion restrictions should be subjected to Equal Protection analysis, even though the sexes are not similarly situated, as they clearly discriminate based on sex by imposing health and life risks solely on women (and people who can get pregnant who may not identify as women).

Even if this Court concludes that federal and state Equal Protection laws are inapt, it should hold, as it has in the past, that the Texas Equal Rights Amendment, Art. I, § 3a, affords women broader legal protections than either the federal or state Equal Protection laws: "the [Texas] Equal Rights Amendment is more extensive and provides more specific protection than both the United States and Texas due process and equal protection guarantees." *McLean* at 698; *accord*, *State v. Morales*, 826 S.W. 2d 201, 204 (Tex. App. -- Austin 1992), *rev'd on other grounds*, 869 S.W.2d 941 (1994).

"More extensive" legal protections include that individuals may assert "disparate impact" claims, even when such claims are not available under Equal

Protection jurisprudence, *see Arlington Heights v. Metropolitan Housing Corp.,* 429 U.S. 252 (1977). Disparate impact claims are "more extensive" because, unlike Equal Protection laws that address only intentional discrimination, they also cover unintentional discrimination that causes disproportionate harm to an identified class of people. *See e.g., EEOC v. Sambo's of Georgia, Inc.,* 530 F. Supp. 86, 92 (N.D. Ga. 1981). The more extensive scope of Texas' Equal Rights provision compels this Court to apply § 3a, regardless of *Dobbs* and regardless of whether the 2021 abortion restrictions raise an Equal Protection issue, because it is beyond cavil that the restrictions have a disparate impact on women.

CONCLUSION AND PRAYER FOR RELIEF

Sex equality — the most fundamental of rights for all women — is at stake in this litigation and is not adequately being protected by either party. Petitioners seek to participate in this case for the limited purpose of ensuring that women's rights receive the strongest possible advocacy in a matter of profound importance to all women in Texas.

In light of the Supreme Court's unprecedented and devastating decision in *Dobbs v. Jackson*, 597 U.S. ___ (2022), which determined that pregnant women no longer enjoy federal Due Process protections for their reproductive rights, it is not asking too much that this Court welcome any and all arguments on behalf of women. When our nation's highest court rescinds constitutional protections and undermines

fundamental rights for half the population, state courts must open their courtroom doors to all claims and all arguments that might afford women an alternative means of protecting their rights.

Petitioners respectfully request that this Court allow them to intervene, invite them to file all possible claims and arguments under state and federal law, and afford all parties an opportunity to submit responsive briefs. Denying Petitioners' request could lead this Court to adopt legal standards under the Texas Constitution that enable the second-class treatment of women under all laws, not just abortion laws, not because women fought for equal treatment and lost, but because they were denied the opportunity to fight at all.

In the alternative, Petitioners respectfully request that this Court treat this filing as an Amicus Curiae brief.

Respectfully submitted,

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ATTORNEYS FOR PETITIONERS/AMICUS

CERTIFICATE OF COMPLIANCE

This pleading complies with the type volume limitations of Tex.R.App.P. 9.4(i)(2) because it contains 3,712 words, excluding the parts exempted by Tex.R.App.P. 9.4(i)(1).

/s/ JASON C.N. SMITH
JASON C.N. SMITH

CERTIFICATE OF CONFERENCE

Counsel for Intervenors/Amici, Jason C.N. Smith held a conference on October 31, 2023 with Lanora Pettit, counsel for Appellant. Appellant opposed this motion. Therefore, this motion is submitted to the Court for determination.

Counsel for Intervenors/Amici, Jason C.N. Smith held a conference on November 1, 2023 with Austin Kaplan, counsel for Appellee. Appellee opposed this motion. Therefore, this motion is submitted to the Court for determination.

/s/ JASON C.N. SMITH
JASON C.N. SMITH

CERTIFICATE OF SERVICE

I hereby certify that on the 9th 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/ JASON C.N. SMITH
JASON C.N. SMITH