The Post-*Roe* Era: Standards of Care or Standards of Statute?

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Zurawski v. Texas is believed to be the first case women have sued for being denied an abortion since 1973. Since the Supreme Court overruled Roe v. Wade in June 2022, abortion access has been left to each individual state. After the Dobbs decision overturned Roe, Texas imposed a nearly complete abortion ban after six weeks of pregnancy. While the Texas law gives exceptions to its abortion ban, "Emergent Medical Condition Exception," plaintiffs in Zurawski v. Texas claim the exceptions are too vague, making physicians wary about their liability in providing abortions, and putting patient lives at risk.

The case includes several plaintiffs who were denied abortions in Texas—all experiencing complications with desired pregnancies. While their situations vary, they all have the same thing in common: they were denied abortions in Texas that should have fallen under an emergency medical exception but ambiguity surrounding the Texas exceptions put the plaintiffs—and other fetuses—at risk.

The plaintiffs also include physicians. These physician plaintiffs fear losing their medical licenses, receiving hefty fines, and earning up to 99 years in prison for providing abortion services. Consequently, doctors are turning patients away and preventing patients from receiving the standard of care, or the degree of care a prudent and reasonable physician would provide in the same situation. The fear and uncertainty regarding the scope of the life and health exceptions in the Texas law have put patient lives and physician livelihood in danger. Such criminalization of a physician's medical judgment is prohibiting adequate abortion care for fear of criminal and professional consequences, essentially coercing physicians away from the standard of care physicians should be providing.

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I. INTRODUCTION

The pending case of *Zurawski v. Texas*[1] stands as a landmark contention in the ongoing discourse surrounding reproductive rights in Texas. The plaintiffs—a group of Texas women, supported by two obstetrician-gynecologists, who were denied access to abortion services during their own medical emergencies—have brought suit to challenge the state's stringent abortion laws.[2] The defendants, representing Texas, uphold the laws enacted under the Trigger Ban and Senate Bill 8 (S.B. 8), two similar pieces of legislation which effectively criminalized abortion after six weeks of pregnancy, when fetal heart activity becomes detectable.[3] Many women are not even aware they are pregnant at the six-week mark, which makes S.B. 8 a cleverly disguised near-total ban on abortions.[4] The crux of the lawsuit lies in seeking clarity and expansion on the exceptions to this ban, particularly in medical emergencies, and clarifying the standards of care that doctors in Texas should be giving to pregnant people.[5]

The "standard of care" is not a medical term, but a legal one.[6] Much like the "reasonable person" standard, the standard of care is the care that "reasonably prudent similar healthcare providers are doing under similar circumstances."[7] Meeting the standard of care does not equate to the optimal care a physician can provide, but rather is a range of care—from the bare minimum of acceptable care in a given situation on one end to the ultimate care possible at the other end.[8] It is the failure to adhere to the

1. Plaintiffs' Original Petition for Declaratory Judgment & Application for Permanent Injunction, Zurawski v. Texas, No. D-1-GN-23-000968 (Dist. Ct. Travis Cnty. filed Mar. 6, 2023), https://reproductiverights.org/wp-content/uploads/2023/03/Zurawski-v-State-of-Texas-Complaint.pdf [hereinafter Plaintiffs' Original Petition].

2. *Id.* at 4–23; *Texas Abortion Ban Emergency Exceptions Case: Zurawski v. State of Texas*, CTR. FOR REPROD. RTS., https://reproductiverights.org/case/zurawski-v-texas-abortion-emergency-exceptions/zurawski-v-texas/ (last visited Mar. 12, 2024). There were initially five patient plaintiffs and two physician plaintiffs, for a total of seven plaintiffs. Eight more plaintiffs joined the lawsuit in May. *Id.* As of November 14, 2023, an additional seven plaintiffs joined the suits, bringing the total number of plaintiffs to 22. *Id.* Plaintiffs' First Amended Verified Petition for Declaratory Judgment & Application for Temporary and Permanent Injunction at 2–3, *Zurawski*, No. D-1-GN-23-000968, https://reproductiverights.org/wp-content/uploads/2023/05/2023.05.22-Zurawski-v.-Texas-1st-Am.-Ver.-Pet.-FINAL.pdf [hereinafter Plaintiffs' Amended Petition].

3. Plaintiffs' Original Petition, *supra* note 1, at 2. The Trigger Ban, a law passed in 2021, bans all abortions in the state effective 30 days after *Roe v. Wade* was overturned, with exceptions only for life-threatening medical emergencies. Plaintiffs' Amended Petition, *supra* note 2, at 61–62. S.B. 8, a law also passed in 2021, effectively bans all abortions after six weeks of pregnancy, before many individuals even realize they are pregnant. Laura Blockman, Note, *"A Solemn Mockery": Why Texas's Senate Bill 8 Cannot Be Legitimized Through Comparisons to Qui Tam and Environmental Protection Statutes*, 77 U. MIA. L. REV. 786, 794–95 (2023).

4. Blockman, *supra* note 3.

5. Plaintiffs' Original Petition, *supra* note 1, at 3–4, 85.

6. Donna Vanderpool, *The Standard of Care*, 18 INNOVATIONS IN CLINICAL NEUROSCIENCE 50–51 (2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8667701/pdf/icns_18_7-9_50.pdf.

7. *Id.*

8. *Id.*

standard of care that gives rise to a medical malpractice claim from a patient.[9]

The threat of criminal legal action under S.B. 8 undermines physicians' professional autonomy and ability to provide ideal care based on their expert medical judgment.[10] This coerced deviation from standards of care can result in suboptimal patient health outcomes and create an alarming professional dilemma for healthcare providers.[11] Other courts analyzing the conduct of physicians in other medical contexts have overturned criminal sanctions against physicians that had acted in good faith.[12] The *Zurawski* court should decide the same here, by clarifying the language of the medical exception and providing protection to physicians acting within the standard of care. Physicians acting to provide necessary health care to their patients should be shielded from the heavy-handed criminal consequences Texas laws impose. This would provide a safeguard to physicians when exercising their medical judgments when treating patients with such emergent pregnancy conditions, without fear of convictions and steep fines or loss of their licenses and livelihood based on the state's subjective interpretation of vague legislation.

II. BACKGROUND

A. Case Description

The legal challenge, spearheaded by the Center for Reproductive Rights, was officially filed on behalf of a group of women who experienced medical emergencies during their pregnancies and were denied abortion services under Texas law.[13] The lawsuit explicitly targets the punitive measures levied against physicians who knowingly attempt or perform abortions post-detection of fetal cardiac activity, as stipulated by the Trigger Ban and S.B. 8.[14] Despite an Emergent Medical Condition Exception ("EMCE")[15] that allows physicians to perform an abortion when "the

9. *Id.*

10. Sonia M. Suter, *Alito is Wrong: We Can Assess the Impact of Dobbs, and It Is Bad for Women's Health*, 53 SETON HALL L. REV. 1477, 1491 (2023).

11. Elizabeth Kukura, *Pregnancy Risk and Coerced Interventions After Dobbs*, 76 SMU L. REV. 105, 117–18 (2023).

12. *See* Ruan v. United States, 142 S. Ct. 2370, 2375 (2022).

13. CTR. FOR REPROD. RTS., *supra* note 2. Some of these women had to travel out of state to receive an abortion, at great risk to their own lives. *Id.* One was forced to develop sepsis over several days before the Texas hospital would give her an abortion, which permanently altered her fertility for later pregnancies. *Id.* Another woman was forced to carry to term and deliver a baby doctors told her would have no chance of surviving—the baby died within hours of being born. *Id.*

14. *Id.*

15. The Emergent Medical Condition Exception ("ECME") is a term for the exception to Texas's abortion bans, including the exception to the Trigger Ban and the "medical emergency" exception to

patient has a physical condition posing a risk of death or a serious risk to the patient's health," the lawsuit argues that the scope of this exception remains unclear, leading to injustices and denial of critical healthcare services.[16]

Texas's abortion laws, particularly the Trigger Ban and S.B. 8, significantly impede access to necessary abortion care, especially during medical emergencies.[17] By introducing punitive measures against healthcare providers who perform or try to perform abortions after six weeks of pregnancy, the laws have created an atmosphere of fear and uncertainty among physicians.[18] Even where the health or life of the pregnant person is at imminent risk, providers often err on the side of caution, opting to withhold abortion care due to potential legal repercussions.[19] This withholding of care has led to an alarming decrease in access to abortion services within the state.[20] The ambiguity surrounding the EMCE further exacerbates the problem, as the lack of clear guidelines leaves providers unsure of the scenarios under which they can legally perform an abortion.[21]

S.B. 8. Plaintiffs' Original Petition, *supra* note 1, at 2. The ECME provisions allows physicians to provide abortions for the following conditions:

> conditions that can lead to dangerous bleeding or hemorrhage, including placental conditions; dangerous forms of hypertension; conditions that can lead to dangerous infection, including premature rupture of membranes; other medical conditions that can become emergent during pregnancy, either because being pregnant causes or exacerbates a chronic condition or increases other health risks, or because treatment for the chronic condition is unsafe while pregnant (with the exception of conditions whose emergent nature stems from the risk of self-harm, which are statutorily excluded); and certain fetal conditions or diagnoses that can increase the risks to a pregnant person's health such that, when combined with the patient's other comorbidities, a patient's medical provider may determine that the patient has an emergent condition necessitating abortion.

Id. at 50–51.

16. Plaintiffs' Original Petition, *supra* note 1, at 3–4, 50, 85.

17. *Id.* at 4–23; CTR. FOR REPROD. RTS., *supra* note 2.

18. Plaintiffs' Original Petition, *supra* note 1, at 2, 19–23; Maya Manian, *The Ripple Effects of Dobbs on Health Care Beyond Wanted Abortion*, 76 SMU L. REV. 77, 87–88 (2023).

19. Plaintiffs' Original Petition, *supra* note 1, at 2, 19–23; Manian, *supra* note 18; Suter, *supra* note 10, at 1501–03.

20. Suter, *supra* note 10, at 1503–04 ("Research shows that patients whose conditions required abortions after Texas imposed Senate Bill 8 (SB8), which effectively bans abortions at six weeks, had to wait, on average, nine days until their complications posed 'an immediate threat to maternal health.' The result was that many suffered hemorrhaging and sepsis. The authors of the study calculated that for patients in Texas presenting at less than twenty-two weeks' gestation with medical indications for delivery suffered higher rates of "serious maternal morbidity" (57 percent) compared to that of patients who terminated their pregnancies in states without abortions bans (33 percent). Thus, even if patients do not ultimately die as a result of delayed care—although some surely will—they may still suffer serious health effects." (internal footnotes omitted)).

21. Plaintiffs' Original Petition, *supra* note 1, at 2, 19–23.

> Texas law provides scant guidance for what the rest of the language in the Emergent Medical Condition Exception means. Nowhere in the code does Texas law define any of the following distinctions: "risk" versus "serious risk"; "insubstantial impairment" versus "substantial impairment"; "minor bodily function" versus "major bodily function."
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> Nor does Texas law define what it means to have "a serious risk of a substantial impairment" or "a substantial impairment of a major bodily function." None of this terminology has

Many women are left without an essential healthcare service during a crisis, intensifying their physical and emotional distress.[22] The impact of these laws extends beyond the individuals directly affected, sending a chilling effect through the medical community and undermining patient trust in the healthcare system.[23] The plaintiffs in *Zurawski* serve as stark evidence of the real-world impact of these restrictive legislative measures on access to abortion health care.[24]

The medical emergencies involved in this lawsuit range from cases of ectopic pregnancies to severe heart conditions—complications that significantly threaten the life or health of the pregnant individual.[25] Yet because of the ambiguous wording of the exceptions in Texas's abortion laws, healthcare providers hesitated to perform abortions, fearing potential legal repercussions. This fear of legal consequences delayed or denied access to necessary abortion care for these women, exacerbating their health risks.

The women named as patient-plaintiffs represent diverse socio-economic backgrounds but are united by their shared experiences of being denied access to abortions in the face of medical emergencies.[26] Their stories clarify the real-life consequences of the current legal uncertainties surrounding the Texas abortion laws, putting a human face to the theoretical legal debates surrounding reproductive rights. Despite the immense personal and health risks involved, these women have bravely come forward to challenge what they perceive as an unjust system, hoping to effect change for themselves and others in similar situations.[27]

B. Legal Background

The bedrock of the current legal landscape on abortion emanates from the Supreme Court's decision to overturn *Roe v. Wade*[28] in 2022, a

> standardized meaning in the medical profession, leaving physicians to guess at how to translate it into clinical practice. The lack of clarity is preventing medical professionals from providing the care that their patients need.

Id. at 47.

22. Suter, *supra* note 10, at 1503–05; Plaintiffs' Original Petition, *supra* note 1, at 59–67 (stating the effects of abortion bans are not unique to Texas but gives harrowing accounts of women similarly affected across the country); CTR. FOR REPROD. RTS., *supra* note 2 (giving stories of the plaintiffs' physical and emotional struggles).

23. Suter, *supra* note 10, at 1509–14 (discussing health impacts when there is a lack of trust in the physician patient relationship). Patient feelings of abandonment and feeling overwhelmed. *Id.* at 1512. "Diminished trust may also affect patient compliance with medical recommendations." *Id.* at 1514.

24. Plaintiffs' Amended Petition, *supra* note 2, at 5–45.

25. *Id.*

26. *See* CTR. FOR REPROD. RTS., *supra* note 2; *see also* Plaintiffs' Original Petition, *supra* note 1, at 10–11, 113, 118; Plaintiffs' Amended Petition, *supra* note 2, at 16, 21, 30–31.

27. Plaintiffs' Amended Petition, *supra* note 2, at 5–45.

28. *See generally* Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

landmark ruling recognizing the constitutional right to abortion. The Court's decision to reverse this precedent left abortion rights mainly to the discretion of individual states, paving the way for an array of state-level restrictions on abortion access.[29]

Like many other conservative states, Texas has capitalized on this newfound autonomy to implement stringent restrictions on abortion access.[30] The Texas state constitution does not explicitly guarantee the right to an abortion, and the legislature has passed many laws restricting access to abortion services.[31] These laws have created a hostile environment for abortion providers and have placed considerable burdens on individuals seeking abortion care.[32]

Two of the most significant pieces of legislation are the "Trigger Ban" and Senate Bill 8 (S.B. 8). The Trigger Ban, a law passed in 2021, bans all abortions in the state effective 30 days after *Roe v. Wade* was overturned, with exceptions only for life-threatening medical emergencies.[33] The Trigger Ban imposes both civil and criminal penalties.[34] Trigger Ban violators are "subject to a civil penalty of not less than $100,000 for each violation," as well as paying attorney's fees and costs incurred.[35] Additionally, the Texas Medical Board "shall revoke" the license of the health care professional that "performs, induces, or attempts an abortion" that is in violation of the Trigger Ban.[36] As for the criminal penalties, a person can also be charged with a first- or second-degree felony for violating the Trigger Ban; first-degree felonies carry imprisonment for life or a term between 5 and 99 years, second-degree felonies carry a term between 2 and 20 years.[37]

The second piece of legislation is S.B. 8, a law also passed in 2021, which prohibits abortion care when the embryo or fetus has a detectable heartbeat.[38] This effectively bans all abortions after six weeks of pregnancy, when fetal cardiac activity becomes detectable, which is well

29. *Dobbs*, 142 S. Ct. at 2283–84.

30. Blockman, *supra* note 3, at 789–90.

31. Lillie Graham, Note, *Texas, We Have a Problem: The Unraveling of the Constitutional Right to an Abortion, Chaos in Texas State Abortion Law, and Senate Bill 8*, 47 T. MARSHALL L. REV. 1, 2 (2022) ("In an effort to return the decision to the states and in turn reject its adopted role of 'super-legislature,' the Supreme Court has created a monster. Like the three-headed hound of Hades, 'Cerberus,' Texas now has three abortion statutes operating simultaneously and in direct conflict with one another: (1) the above-mentioned S.B. 8, (2) House Bill 1280 'Human Life Protection Act of 2021' ('Trigger Law'), and (3) Texas's resurrected 1925 Penal Code pertaining to abortion ('Pre-*Roe* Statutes')." (footnotes omitted)).

32. CTR. FOR REPROD. RTS., *supra* note 2.

33. TEX. HEALTH & SAFETY CODE ANN. § 170A.001 (West 2023). § 170A.002. Plaintiffs' Amended Petition, *supra* note 2, at 61–62.

34. Plaintiffs' Amended Petition, *supra* note 2, at 62.

35. § 170A.005.

36. § 170A.007.

37. § 170A.004; TEX. PENAL CODE ANN. § 12.32 (West 2023); § 12.33.

38. TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–204.

before many individuals even realize they are pregnant.[39] This law adds additional civil penalties, deputizing private citizens to sue anyone who aids, abets, or performs an abortion, creating a bounty system that further deters providers from offering abortion services.[40] This bounty-hunting enforcement mechanism allows anyone to bring a civil action against an S.B. 8 violator for statutory damages of "not less than $10,000 for each abortion that the defendant performed or induced."[41]

The combined impact of the Trigger Ban and S.B. 8 has devastated abortion access in Texas. These laws have effectively outlawed nearly all abortions in the state and have forced many clinics to close their doors.[42] The few remaining providers operate under a haze of legal uncertainty, often turning away patients out of fear of legal retribution.[43] The result is a state where access to abortion is severely limited, and individuals seeking this critical healthcare service are often left with no options and having to shoulder the burden of finding those limited options themselves.[44] *Zurawski* has brought these issues into sharp focus, highlighting the dire need for legal clarity and reform.

III. COURT'S DECISION

The decision by Travis County District Court Judge Jessica Mangrum in *Zurawski* marked a significant juncture in this legal saga.[45] Judge Mangrum's ruling interpreted the EMCE to provide some reprieve to abortion providers, letting them continue offering time-sensitive care without fear of legal retribution.[46] Her decision effectively served as a

39. Blockman, *supra* note 3, at 794–95.

40. *Id.* at 797.

41. *Id.* at 792 (quoting S.B. 8, § 171.208(b)(1)–(3)); TEX. HEALTH & SAFETY CODE ANN. §§ 171.207–211.

42. Suter, *supra* note 10, at 1514–15 (detailing physicians leaving states due to the burden of incompatible obligations).

43. Plaintiffs' Amended Petition, *supra* note 2, at 2; Suter, *supra* note 10, at 1510–11 ("As the *New York Times* reported six months after *Dobbs* was decided, very few exceptions have been granted with respect to the new abortion bans, even if the situation could conceivably apply to one of the exceptions. One provider explained that even if you have exceptions for maternal life, '[w]hen you get into the nitty-gritty details of it, you actually don't.' The *Times* investigation found that '[d]octors and hospitals are turning away patients' who need abortion care, 'saying that ambiguous law and the threat of criminal penalties make them unwilling to test the rules.'" (footnotes omitted)).

44. Courtney C. Baker, Emma Smith, Mitchell D. Creinin, Ghazaleh Moayedi & Melissa J. Chen, *Texas Senate Bill 8 and Abortion Experiences in Patients with Fetal Diagnoses*, 141 OBSTETRICS & GYNECOLOGY 602, 604 (2023), https://pubmed.ncbi.nlm.nih.gov/36735418.

45. Temporary Injunction Order at 5, Zurawski v. Texas, No. D-1-GN-23-000968 (Dist. Ct. Travis Cnty. filed Mar. 6, 2023), https://reproductiverights.org/wp-content/uploads/2023/08/Zurawski-v-Texas_TI.pdf [hereinafter Temporary Injunction Order].

46. *Id.* at 2–6; CTR. FOR REPROD. RTS., *supra* note 2 ("A Texas district judge on August 4 issued an injunction blocking Texas's abortion bans as they apply to dangerous pregnancy complications, clarifying that doctors can use their own medical judgment to determine when to provide abortion care in emergency situations. The ruling also denied the state's request to throw out the case, and it found S.B. 8—Texas's citizen-enforced abortion ban—unconstitutional. The judge recognized in her ruling

temporary injunction against the enforcement of the Trigger Ban and S.B. 8, safeguarding healthcare providers from the punitive measures outlined in these laws.[47]

Even so, this brief window of relief was eclipsed when the defendants immediately appealed Judge Mangrum's decision.[48] The appeal led to the effective blockage of the temporary injunction, reinstating the legal threats against healthcare providers.[49] This turn of events underlines the volatile and uncertain legal landscape these providers must navigate, compounding their challenges and intensifying worries over the accessibility of abortion services.

The implications of these rulings and future appeals extend beyond the boundaries of Texas. S.B. 8, with its unique enforcement mechanism, has been used as a blueprint for similar legislation in other states.[50] The fluctuating legal status following Judge Mangrum's ruling and the subsequent appeal highlights the potential for inconsistent interpretations and applications of these laws, sowing further confusion. The appeal's success in blocking the temporary injunction could embolden other courts, further constraining access to abortion services nationwide. These developments underscore the pressing need for clear, unambiguous legislation and judicial guidance on this critical matter.

IV. COMMENTARY

The case introduces troubling conflicts of interest by financially incentivizing private citizens to sue abortion providers or anyone aiding or abetting an abortion.[51] Physicians cannot provide optimum care to their patients when they must weigh every decision against possible sanctions, like hefty fines, the loss of their medical license, and even up to 99 years in prison.[52] This unprecedented bounty system undermines trust in the healthcare system, fostering a climate of fear and suspicion and eroding patient-provider relationships.[53]

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that the women who brought this case should have been given abortions. The state immediately appealed the ruling, blocking it from taking effect.").

47. Temporary Injunction Order, *supra* note 45, at 2–6; CTR. FOR REPROD. RTS., *supra* note 2.

48. CTR. FOR REPROD. RTS., *supra* note 2.

49. *See id.*

50. *Memo: Twelve States and Counting Poised to Copy Texas' Abortion Ban*, REPROD. FREEDOM FOR ALL (Oct. 20, 2021), https://reproductivefreedomforall.org/news/twelve-states-and-counting-poised-to-copy-texas-abortion-ban/; Alison Durkee, *Idaho Enacts Law Copying Texas' Abortion Ban—And These States Might Be Next*, FORBES (Mar. 23, 2022, 4:22 PM), https://www.forbes.com/sites/alisondurkee/2022/03/23/idaho-enacts-law-copying-texas-abortion-ban—-and-these-states-might-be-next/?sh=2086faa25c05; Graham, *supra* note 31, at 32 ("On the opposite spectrum, the seeming success of S.B. 8's construction has already spun off many copycat bills in Alabama, Arizona, Arkansas, Florida, Missouri, Ohio, and Oklahoma.").

51. Blockman, *supra* note 3, at 797–98.

52. Plaintiffs' Original Petition, *supra* note 1, at 2.

53. Suter, *supra* note 10, at 1509–14.

Zurawski's effects ripple through the broader healthcare system, potentially leading to increased demand on already strained resources.[54] The case's decision could clash with the Emergency Medical Treatment and Labor Act ("EMTALA"), a federal law which mandates hospitals to provide care to anyone needing emergency healthcare treatment regardless of citizenship, legal status, or ability to pay.[55] EMTALA requires emergency departments receiving federal funding provide stabilizing care, including abortion care if necessary, to stabilize a pregnant patient.[56] There has already been a debate within two federal district courts[57] regarding the conflict between the standards of care given under abortion bans and EMTALA—however the lawsuits provide no additional guidance as the two districts reached opposite conclusions.[58] The confusion surrounding the application and enforcement of S.B. 8 may place these institutions in a precarious position, caught between conflicting legal obligations, where one law requires physicians to provide services that are prohibited by statute, and another law criminalizes the very conduct used to save lives.

This shaky footing for physicians is further compounded by the use of criminal law to enforce intricate regulatory frameworks. Healthcare professionals have long grappled with regulatory offenses entailing intricate rules and exceptions hinging on nuanced questions of intent and medical judgment.[59] Consequently, when a law criminalizes a physician's errors in interpreting regulations or relying on clinical expertise, it can deter activities that benefit society, making the law inherently unjust. These offenses can carry life-altering consequences for individuals who make errors, often instilling fear in doctors and discouraging them from exercising their medical judgment in patient care.[60] Such an example can be found in physician's dispensing of controlled substances, where enforcement efforts in an attempt to crack down on "pill mills" created a "chilling effect" on physicians—leaving patients with legitimate medical needs with compromised access to care.[61] This is the same chilling effect

54. *See* Manian, *supra* note 18, at 89.

55. Suter, *supra* note 10, at 1506–09.

56. Manian, *supra* note 18, at 89.

57. *See* United States v. Idaho, 623 F. Supp. 3d 1096, 1101 (D. Idaho Aug. 24, 2022); *see also* Texas v. Becerra, 623 F. Supp. 3d 696, 703–04 (N.D. Tex. Aug. 23, 2022).

58. Manian, *supra* note 18, at 89. "Two federal district courts in Idaho and Texas issued conflicting decisions on whether [Emergency Medical Treatment and Labor Act ("EMTALA")] preempts state abortion bans that have a chilling effect on medical care. This leaves physicians even more uncertain about how to provide medical care for their patients." *Id.* (footnotes omitted).

59. *See* Ruan v. United States, 142 S. Ct. 2370, 2377 (2022).

60. *See id.* at 2376. One doctor was sentenced to over twenty years in prison and to pay millions of dollars in restitution, and the other doctor sentenced to twenty-five years in prison. *Id.*

61. *See* Michael C. Barnes, Taylor J. Kelly & Christopher M. Piemonte, *Demanding Better: A Case for Increased Funding and Involvement of State Medical Boards in Response to America's Drug Abuse Crisis*, 106 J. MED. REGUL. 3, 6–21, 8 (2020) (discussing how the investigation and prosecution of prescribing physicians "has compromised access to treatment for individuals with legitimate medical

the physicians in Texas are facing under the current abortion laws, causing them to fall below the standards of care that other reasonable physicians would adhere to under federal law.

The issues of utilizing criminal law for enforcement of regulations against physicians is exemplified in the recent *Ruan v. United States* case.[62] In *Ruan*, the Supreme Court addressed the prosecution of doctors for allegedly prescribing controlled substances, such as opioids, in a manner inconsistent with the Controlled Substances Act ("CSA").[63] The CSA allowed registered doctors acting in the usual course of their professional practice to dispense controlled substances through authorized prescriptions only for legitimate medicinal purposes.[64] The case had intense debate about whether a physician's intent in acting under the CSA should be considered.[65] The Supreme Court acknowledged that "the regulatory language defining an authorized prescription is, we have said, 'ambiguous,' written in 'generalit[ies],' susceptible to more precise definition and open to varying constructions,"[66] much like the language in the *Zurawski* case.[67] The Supreme Court in *Ruan* ultimately determined that the Government must prove the doctor acted knowingly or intentionally in an unauthorized manner.[68] Though the statute in *Ruan* had a general scienter provision—"knowingly or intentionally"—the Supreme Court states that there is a presumption of scienter in criminal statutes that are "s*ilent* on the required mental state."[69] A doctor exercising their medical judgment and providing the standard of care to best help their patient, does not have the requisite criminal intent. Therefore, Texas physicians should be shielded from criminal prosecution when utilizing the ECME in good faith.

For Texas healthcare providers, and even other states looking to implement similar legislation,[70] the *Zurawski* case can offer much-needed clarity regarding when they can provide abortion healthcare without the looming threat of criminal prosecution. This clarification could also serve as a crucial safeguard for doctors who act in good faith and within the bounds of their professional judgment, particularly in the realm of abortion healthcare. It ensures that these practitioners cannot be convicted based on

needs. Enforcement efforts have created a chilling effect on prescribers . . . who are decreasing and altogether ceasing their prescribing out of fear of investigation and prosecution.")

62. *See Ruan*, 142 S. Ct. at 2375.
63. *Id.* at 2374–75.
64. *Id.* at 2375.
65. *Id.* at 2376.
66. *Id.* at 2377 (quoting Gonzales v. Oregon, 546 U. S. 243, 258 (2006)).
67. Plaintiffs' Original Petition, *supra* note 1, at 47.
68. *Ruan*, 142 S. Ct. at 2382.
69. *Id.* at 2377 (quoting Elonis v. United States, 575 U.S. 723, 736 (2015)).
70. *See* REPROD. FREEDOM FOR ALL, *supra* note 50; Durkee, *supra* note 50; Graham, *supra* note 31, at 32 ("On the opposite spectrum, the seeming success of S.B. 8's construction has already spun off many copycat bills in Alabama, Arizona, Arkansas, Florida, Missouri, Ohio, and Oklahoma.").

the government's subjective interpretation of relevant regulations or simply because the government disagrees with their medical decisions that are based on their professional judgment and medical standards of care. Given the indispensable role doctors and healthcare providers play in our society, we must enable them to exercise their best judgment in aiding those in need, free from the fear of punishment for honest mistakes. Criminal law should be wielded judiciously, especially when overseeing those who provide essential public services, to prevent them from being deterred from applying their knowledgeable judgment and innovative approaches to assisting those in need.

Ultimately, the aforementioned issues arise from the ECME's ambiguous language that Texas has time and time again refused to clarify.[71] It is time that the courts clarify the exception and shield physician's acting in good faith under the exception, so that physicians may easily interpret and apply those exceptions to their patients' circumstances—preventing other pregnant individuals from suffering similar agonizing experiences as those of the *Zurawski* plaintiffs. "Texas's abortion bans can and should be read to ensure that physicians have wide discretion to determine the appropriate course of treatment, including abortion care, for their patients who present with emergent medical conditions—without being second guessed by the Attorney General, the Texas Medical Board, a prosecutor, or a jury."[72]

V. CONCLUSION

Zurawski, currently in legal limbo, is at a critical juncture. The Supreme Court of Texas is scheduled to hear oral arguments, an event that will no doubt further shape the future of abortion law in the state.[73] Its resolution will provide much-needed clarity on interpreting and applying the medical emergencies exception in Texas's abortion laws.[74] This case could redefine the boundaries of reproductive rights in the state by either upholding the stringent restrictions in place or expanding access to abortions in situations of medical crises.[75] As the first significant legal challenge to the state's abortion laws since the reversal of *Roe v. Wade*, this case serves as a litmus test for the future direction of reproductive rights

71. Plaintiffs' Original Petition, *supra* note 1, at 47, 52–56.

72. *Id.* at 47.

73. Joanna L. Grossman, *Do No Harm: Texas Court Rules in Favor of Women Harmed by Abortion Ban's Inadequate Protection for Medical Emergencies*, JUSTIA: VERDICT (Aug. 15, 2023), https://verdict.justia.com/2023/08/15/do-no-harm-texas-court-rules-in-favor-of-women-harmed-by-abortion-bans-inadequate-protection-for-medical-emergencies (explaining the trial is set for March 2024).

74. Plaintiffs' Original Petition, *supra* note 1, at 43–45, 68–70.

75. *Id.* at 85.

across the U.S.[76] Its outcome will influence legislative and judicial attitudes toward abortion—setting a precedent for similar cases and legislation nationwide.[77] This case underscores the urgent need for clear, consistent, and compassionate legal guidelines for physicians providing pivotal healthcare services.

76. CTR. FOR REPROD. RTS., *supra* note 2.

77. *See* REPROD. FREEDOM FOR ALL, *supra* note 50 (listing twelve states to copy Senate Bill 8 in Texas, allowing third-party suits against abortion providers and facilitators; provides links to introduced bills); *see also* Durkee, *supra* note 50; Graham, *supra* note 31, at 32.