



Jennifer R. Ecklund

March 24, 2022

U.S. Mail, Overnight Delivery Email

The Hon. Representative Briscoe Cain
P.O. Box 2910
Austin, TX 78768-2910
Briscoe.Cain@house.texas.gov

Re: Your March 18, 2022 letters to The North Texas Equal Access Fund, Lilith Fund for Reproductive Equity, The Afiya Center, Frontera Fund, The West Fund, Clinic Access Support Network, and Fund Texas Choice.

Representative Cain,

We received your March 18, 2022 “Cease and Desist” letters concerning our clients The North Texas Equal Access Fund, Lilith Fund for Reproductive Equity, The Afiya Center, Frontera Fund, The West Fund, Clinic Access Support Network, and Fund Texas Choice. Our clients informed us that you sent copies of these letters directly to them. As you know, Rule 4.02 of the Texas Disciplinary Rules of Professional Conduct specifically prohibits contact with represented persons or organizations. Your letter to us confirms your knowledge that our clients are “represented organizations.” Accordingly, please stop communicating with our clients immediately, and direct all future correspondence to me.

It is not clear in what capacity you sent the letters and then posted them to your social media accounts. The letters were sent under your State Representative letterhead, but you have not identified whether they were sent in your capacity as a Texas State Representative, as an attorney representing a client, or as an individual. At your earliest convenience, but no later than 5:00 p.m. on Tuesday, March 29, 2022, please confirm to us in writing whether the letters are an act you have taken as a public official, as an attorney representing a client (and if so, whom), or as a private citizen.

Your letters falsely accuse our clients of engaging in criminal acts by funding abortions in any situation in which the mother’s life is not in danger. This accusation, which you have made public by publishing the letters on social media, is objectively false, and has been for almost 50 years.

The statutory scheme to which you refer in your letter was struck down “as a unit” by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113, 166 (1973). The “unit” referred to is described in *Roe* as former Articles 1191-94 and 96 of the Texas Penal Code of the day. *Id.* at 117 and 117 n. 1. The specific statutory section your letters cite is Article 4512.2 of the Texas Civil

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Statutes (1974), which is the recodified Texas Penal Code Article 1192. That is one of the statutes that the United States Supreme Court expressly struck down in *Roe*.

Laws that are repugnant to the Constitution are void and of no effect, and do not create crimes or criminal liability, as the United States and Texas Supreme Courts have repeatedly explained. *Ex parte Siebold*, 100 U.S. 371, 376-77 (1879) ("An unconstitutional law is void, and is as no law. An offence created by it is not a crime."); *Ex Parte E.H.*, 602 S.W.3d 486, 494 (Tex. 2020) (an unconstitutional statute is "as a matter of law...void from its inception...as if it had never been' and 'is to be considered no statute at all.'"); *In re Lester*, 602 S.W.3d 469, 473 (Tex. 2020).¹ Therefore, when you say that "[y]ou and your organization are violating this criminal statutory provision" or "your organization is committing criminal acts..." you are making statements that are legally indefensible and factually false.

Your unfounded criminal accusations are also defamatory. It is *per se* defamation to falsely accuse someone of criminal acts in Texas. You publicized these letters on social media and issued a press release in which you call our clients "criminal organizations." Therefore, the false and defamatory statements have been published to a potentially unlimited number of third parties. Your decision to publish these statements on social media demonstrates that the defamatory effect of your words is intentional. Therefore, it is imperative that you immediately retract and/or clarify your defamatory statements.

Specifically, please immediately make a public statement through all of the same channels in which you published the letters and/or called our clients "criminal organizations" that states:

- (1) You fully and unequivocally retract your claim that our clients have committed or are committing any crimes; and
- (2) You have no reason to believe that our clients have committed any crimes.

If you do not issue this retraction, our clients will have no choice but to explore all legal options. Those options include seeking (1) injunctive relief requiring you to retract and clarify your defamatory statements; (2) damages to compensate our clients for any injury to their

¹ In *Lester* the court considered whether a person was "actually innocent" when, at the time he committed the allegedly criminal act, the underlying statute had already been ruled unconstitutional. The Court explained:

Here, as a matter of historical fact, Lester's conduct was not a crime at the time it was committed because the Court of Criminal Appeals had already declared the online-solicitation statute unconstitutional. Lester is therefore actually innocent in the same way that someone taking a stroll in the park is actually innocent of the crime of walking on a sidewalk. No such crime exists.

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reputations you have caused; (3) expenses and attorneys' fees for litigation you have forced upon them; and (4) punitive damages given the apparently intentional nature of this defamation.

Please contact me with any questions you may have or to connect me with your own legal counsel. Please forward to me any retractions or corrections that you make so that our clients can evaluate their legal options and avoid unnecessary litigation.

Very truly yours,

Thompson Coburn LLP



By

Jennifer R. Ecklund
Partner

cc: Elizabeth Myers
Mackenzie Wallace
John Atkins