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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. ________

In the Supreme Court of Texas

In re State of Texas; Attorney General of Texas; Ken Paxton, in his official capacity as Attorney General of Texas; Texas Medical Board; and Stephen Brint Carlton, in his official capacity as Executive Director of the Texas Medical Board,

Relators.

On Petition for Writ of Mandamus
from the 200th Judicial District Court, Travis County

PETITION FOR WRIT OF MANDAMUS

Ken Paxton
Attorney General of Texas

Brent Webster
First Assistant Attorney General

Grant Dorfman
Deputy First Assistant Attorney General

Ralph Molina
Deputy Attorney General for Legal Strategy

Ryan Walters
Chief, Special Litigation Division

Johnathan Stone
Special Counsel
Texas State Bar No. 24071779
Johnathan.Stone@oag.texas.gov

Amy Snow Hilton
Special Counsel
Texas Bar No. 24097834
Amy.Hilton@oag.texas.gov

Amy Pletscher
Assistant Attorney General
Texas State Bar No. 24113663
Amy.Pletscher@oag.texas.gov

Office of the Attorney General
Special Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Telephone: (512) 936-2613
Facsimile: (512) 320-0667

Identity of Parties and Counsel

Relators:
State of Texas
Attorney General of Texas
Ken Paxton, in his official capacity as Attorney General of Texas
Texas Medical Board
Stephen Brint Carlton, in his official capacity as Executive Director of the Texas Medical Board

Appellate and Trial Counsel for Relators:
Ken Paxton
Brent Webster
Ralph Molina
Ryan Walters
Johnathan Stone
Amy Snow Hilton
Amy Pletscher
Office of the Attorney General
Special Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Telephone: (512) 463-4139
Facsimile: (512) 320-0667
Johnathan.Stone@oag.texas.gov
Amy.Hilton@oag.texas.gov
Amy.Pletscher@oag.texas.gov

Respondent:
The Honorable Maya Guerra Gamble, 200th Judicial District Court, Travis County

Real Parties in Interest:
Kate Cox
Justin Cox
Damla Karsan, M.D.

Appellate and Trial Counsel for Real Parties in Interest:

Austin Kaplan
Kaplan Law Firm, PLLC
3901 S Lamar Blvd., Suite 260
Austin, TX 78704
(512) 843-5572
akaplan@kaplanlawatx.com

Molly Duane
Marc Hearron
Nicolas Kabat
Astrid Ackerman

Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038
(917) 637-3631
mduane@reprorights.org
mhearron@reprorights.org
nkabat@reprorights.org
aackerman@reprorights.org

Jamie A. Levitt
J. Alexander Lawrence
Claire N. Abrahamson

Morrison & Foerster LLP
250 W. 55th Street
New York, NY 10019
(212) 468-8000
jlevitt@mofo.com
alawrence@mofo.com
cabrahamson@mofo.com

Aditya V. Kamdar
2100 L Street NW
Suite 900
Washington, D.C. 20037
(202) 877-1500
akamdar@mofo.com

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"App." refers to the appendix to this petition. "MR." refers to the mandamus record.

Statement of the Case

Nature of the underlying proceeding:	Plaintiffs filed suit seeking declaratory and injunctive relief that Texas's abortion statutes cannot be enforced. MR.52–53.
Relators:	State of Texas Attorney General of Texas Ken Paxton Texas Medical Board Stephen Brint Carlton
Respondent:	The Honorable Maya Guerra Gamble, 200th Judicial District Court, Travis County
Real Parties in Interest:	Kate Cox Justin Cox Damla Karsan, M.D.
Respondent's challenged actions:	Respondent issued a temporary restraining order enjoining Relators from enforcing Texas's post-*Roe* abortion laws "against Plaintiffs and their staff, nurses, pharmacists, agents, and patients, as applied to Ms. Cox's current pregnancy." MR.206.

Statement of Jurisdiction

The Court has jurisdiction under Texas Government Code section 22.002(a) and article V, section 3(a) of the Texas Constitution. Relators have "compelling reason" for seeking a writ of mandamus from this Court without first going to the Third Court of Appeals. Tex. R. App. P. 52.3(e). Plaintiffs have indicated their intent to perform and procure an abortion while the TRO is in place. MR.51; MR.206–207. Because Plaintiffs evidently believe (incorrectly) that the TRO immunizes them from civil or criminal enforcement actions, see MR.51, each hour it remains in place is an hour that Plaintiffs believe themselves free to perform and procure an elective abortion. Nothing can restore the unborn child's life that will be lost as a result. Post hoc enforcement is no substitute, so time is of the essence. Relators therefore have compelling reason for seeking a writ of mandamus from this Court.

Issue Presented

Whether the district court abused its discretion in issuing the temporary restraining order prohibiting the enforcement of Texas abortion statutes.

To the Honorable Supreme Court of Texas:

The trial court entered a temporary restraining order allowing Plaintiffs to perform and procure an abortion of a single child even though Plaintiffs failed to plead and prove that they satisfy the requirements for a medical-emergency exception. By applying language not found in Texas law, the trial court's order represents an expansion of the statutory exceptions to Texas's abortion prohibitions. Because the life of an unborn child is at stake, this Court should require a faithful application of Texas statutes prior to determining that an abortion is permitted.

This Court should issue an emergency stay and mandamus relief. Should the abortion occur while the TRO is in place, nothing will prevent enforcement of Texas's civil and criminal penalties once the TRO erroneously prohibiting enforcement is vacated. But enforcement of Texas's laws will not restore the unborn child's life lost in the interim. That irreparable loss necessitates this Court's immediate action. Relators therefore respectfully request that this Court issue mandamus relief.

Statement of Facts

I. Background

Plaintiffs challenge Texas's Human Life Protection Act, Tex. Health & Safety Code ch. 170A; pre-*Roe* statutes, Tex. Rev. Civ. Stat. arts. 4512.1-.6; Senate Bill 8, Tex. Health & Safety Code §§ 171.201-.212; and the Texas Medical Board's authority to discipline physicians for violating a statute relating to the practice of medicine, Tex. Occ. Code §§ 165.001, 164.052(a)(5), 164.053(a), 164.055. The most relevant statute, the HLPA, prohibits most abortions but creates an exception when

> in the exercise of reasonable medical judgment, the pregnant female on whom the abortion is performed, induced, or attempted has a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that places the female at risk of death or poses a serious risk of substantial impairment of a major bodily function unless the abortion is performed or induced.

Tex. Health & Safety Code § 170A.002(b); *see also id.* § 171.002(3); Tex. Rev. Civ. Stat. 4512.6. Neither the HLPA, Senate Bill 8, nor the pre-*Roe* laws contain an exception to their general prohibition on abortion for unborn children with fatal conditions who are unlikely to survive long after birth.

II. Procedural History

A. In order to obtain a desired abortion, Plaintiffs Kate and Justin Cox filed suit on behalf of themselves and Plaintiff Dr. Karsan filed suit on behalf of herself and her staff, nurses, pharmacists, agents, and patients. MR.4, 8, 11. They sought declaratory and injunctive relief against the Attorney General, the Texas Medical Board, the Executive Director of the Texas Medical Board, and the State of Texas. MR.52–53. According to the petition, Ms. Cox learned that her child was diagnosed with the life limiting condition of Trisomy 18. MR.3. As a result of that diagnosis, Ms. Cox wants to abort her unborn child. MR.8 (Pet. at para 21). The petition does not identify what life-threatening physical condition Ms. Cox has been diagnosed with or how, absent an abortion, that condition creates a risk to her life or serious risk of substantial impairment of a major bodily function. *See* Tex. Health & Safety Code §170A.002(b). Instead, Plaintiffs have alleged only that the plaintiff physician, Dr. Karsan, "*believes in good faith*" that "abortion is medically recommended." MR.37 (emphasis added).

B. Plaintiffs sought a temporary restraining order allowing Plaintiffs to procure, conduct, and assist in procuring an abortion and enjoining Relators from bringing an action to enforce Texas's abortion laws. MR.51–52. Defendants opposed the TRO, pointing out that the allegations did not suffice under the statute and that the court did not have jurisdiction. MR.70–72. The Court granted the TRO. MR.203–207.

Summary of the Argument

The district court's granting of the TRO expands Texas's narrow statutory exceptions to its abortion prohibitions such that the exceptions swallow the rule. Further, the district court's order renders meaningless the statutory requirement that "*reasonable medical judgment*" counsel the necessity of an abortion to save the mother's life or avoid "a serious risk of substantial impairment of a major bodily function." Tex. Health & Safety Code § 170A.002(b). Contrary to the strict requirements of the statute, the Court granted the TRO on the feeble basis that the plaintiff-physician "believe[d] in good faith" that an abortion is "recommended." MR.37. The district court's circumvention of the basic requirements of the statute opens the floodgates to pregnant mothers procuring an abortion through a doctor who need only "believe[] in good faith" that an abortion is "recommended," and not necessary to avert a risk of death or impairment of a major bodily function. MR.37. Nor does the district court's order preserve the status quo: by entering an order allowing the abortion to go forward, the court in effect conferred final adjudication through a TRO. Lastly, the district court erred in failing to determine whether it had jurisdiction over Plaintiffs' lawsuit before ordering relief.

Relators and the people of Texas will be irreparably harmed by the TRO. Although Plaintiffs and their agents can later be prosecuted for violations of law committed under cover of a TRO, post hoc enforcement cannot restore the life of an unborn child lost in the interim. The Court should immediately stay the TRO and grant the petition for mandamus.

Standard of Review

Mandamus relief is available where the lower court's error "constitute[s] a clear abuse of discretion" and the relator lacks "an adequate remedy by appeal." *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding). There is no remedy on appeal from a temporary restraining order. *See In re Office of Attorney Gen.*, 257 S.W.3d 695, 698 (Tex. 2008) (orig. proceeding) (per curiam).

Argument

I. The Trial Court Abused Its Discretion by Granting Final Relief Through a Temporary Restraining Order.

The purpose of a TRO is to "preserve the status quo pending a ruling on the motion for a temporary injunction." *Fernandez v. Pimental*, 360 S.W.3d 643, 646 (Tex. App.—El Paso 2012, no pet.). Temporary injunctive relief is intended to be just that—temporary—and "may not be used to obtain an advance ruling on the merits." *Iranian Muslim Org. v. City of San Antonio*, 615 S.W.2d 202, 208 (Tex. 1981). The temporary restraining order at issue here authorizes Dr. Karsan to perform an abortion on Ms. Cox. That is not temporary relief, nor does it preserve the status quo. This Court has held that a trial court errs when it makes a "final" adjudication by granting a TRO. *In re Newton*, 146 S.W.3d 648, 652 (Tex. 2008) (orig.

proceeding). An abortion ends a life; it is an action that cannot be undone. No other relief could be more final.

II. The Trial Court Abused Its Discretion in Concluding that Ms. Cox's Condition Meets the Medical-Emergency Exception.

By Plaintiffs' own pleadings, they are not entitled to the relief they seek. Plaintiffs' allegations fall far short of demonstrating that Ms. Cox is entitled to any medical exception to Texas's statutory prohibitions on abortion.

A. *First*, Texas law does not permit abortions solely because the unborn child is unlikely to have sustained life outside the womb. There is no textual argument that fatal fetal conditions or fetal conditions incompatible with life are included within the medical-emergency exceptions, which focus only on the woman's life. *E.g.*, Tex. Health & Safety Code § 170A.002(b) (concerning life of the mother). The Legislature knows how to draft such exemptions. *See, e.g.*, *id.* §§ 171.0122(d)(3) (referring to unborn children who have an "irreversible medical condition or abnormality"), 171.046(c) (referring to unborn children who have a "severe fetal abnormality"). It did not do so here.

Second, Plaintiffs allege Ms. Cox had elevated glucose levels in October, similar to what she experienced in a prior pregnancy. MR.6. But there are no allegations that elevated glucose levels in October are a life-threatening physical condition, nor that they place her at risk of substantial impairment of a major bodily function. Indeed, Ms. Cox reported elevated glucose levels in a prior pregnancy for which she did *not* seek an abortion, presumably because that child did not have the same diagnoses. MR.6. Ms. Cox's decision to seek an abortion during this pregnancy based on

elevated glucose levels when she did not similarly seek one in the past strongly suggests no true medical emergency exists.

Third, Ms. Cox asserts she has experienced intermittent cramping, diarrhea, and mild fluid leaking. MR.6–7. According to Ms. Cox, each time she was examined for these complaints by emergency-room physicians, she was sent home. MR.7. There are no allegations that these symptoms were life-threatening physical conditions, that they are currently happening, or that they place Ms. Cox at risk of death or substantial impairment of a major bodily function.

And *fourth*, Ms. Cox claims an elevated risk of uterine rupture if she delivers the baby vaginally because she has had two prior C-sections. MR.7. She therefore believes a C-section is the safer option if the baby survives to term. MR.7. But while Ms. Cox alleges "that a C-section at full term would make subsequent pregnancies higher risk," MR.7, Plaintiffs plead no facts suggesting that a subsequent pregnancy would place Ms. Cox "at risk of death" or result in a "serious risk of substantial impairment of a major bodily function." *Compare* MR.7*, with* Tex. Health & Safety Code § 170A.002(b).

Consequently, none of these allegations demonstrate that Ms. Cox falls within the medical-emergency exception, contrary to the trial court's TRO.

B. Further, to fall within the medical exception, the physician performing the abortion must use "reasonable medical judgment" when determining that the necessary life-threatening physical condition exists. Tex. Health & Safety Code § 170A.002(b). Here, Plaintiffs have alleged only that the physician, Dr. Karsan, "*believes in good faith*" that "abortion is medically recommended." MR.37 (emphasis

added). This "good faith belief" is a subjective standard not sufficient under the law. By Plaintiffs' own pleadings, their allegations are insufficient to place them within the scope of any exception to Texas's abortion laws. Having pled themselves outside the terms of the statute, Plaintiffs have not demonstrated a probable right to the relief they seek, necessary for the issuance of a TRO.

III. The Trial Court Abused Its Discretion in Granting a Temporary Restraining Order Before Determining Jurisdiction.

A court that lacks subject-matter jurisdiction cannot enter injunctive relief "even temporarily." *In re Abbott*, 601 S.W.3d 802, 805 (Tex. 2020) (orig. proceeding) (per curiam). The district court erred in entering a temporary restraining order before determining whether it had jurisdiction. Although Defendants filed a Plea to the Jurisdiction, MR.69–201, the district court refused to consider it before issuing its ruling. But significant issues of standing and sovereign immunity should have limited the relief the trial court ordered.

A. Standing is a "constitutional prerequisite to suit." *Heckman v. Williamson County*, 369 S.W.3d 137, 150 (Tex. 2012), and the burden is on the plaintiff to "demonstrate standing for each claim," *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 14 (Tex. 2011). Plaintiffs failed to establish standing for many of their claims. For example, Plaintiffs lack standing to challenge the constitutionality of S.B.8 by suing the Attorney General and the Executive Director because they lack statutory authority to enforce it. *See Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 539 (2021); *Whole Woman's Health v. Jackson*, 642 S.W.3d 569 (Tex. 2022). And Plaintiffs lack standing to challenge the constitutionality of S.B.8 against the State of Texas because

S.B.8 is not enforced by the State. It is "enforced exclusively through the private civil actions" of private citizens. Tex. Health & Safety Code § 171.207(a). And Plaintiffs have not sued anyone who could bring a criminal prosecution under the pre-*Roe* laws. *See State v. Stephens*, 663 S.W.3d 45, 47, 52 (Tex. Crim. App. 2021). At a minimum, the trial court erred in purporting to enjoin Defendants from enforcing S.B. 8 and the pre-*Roe* laws. Moreover, Plaintiff Dr. Karsan purports to bring suit on behalf of a variety of other people. MR.11. But under Texas law, injuries to others typically do not suffice. The plaintiff "must plead facts demonstrating that he, himself (rather than a third party or the public at large), suffered the injury." *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 485 (Tex. 2018); *accord Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004). The few instances in Texas law in which someone is permitted to sue for another's injuries are supported by statute or rule. None of those situations exist here. Dr. Karsan cannot assert the rights of her patients or her coworkers and cannot obtain relief on behalf of third parties.

B. Plaintiffs fail to establish a waiver of sovereign immunity. *See, e.g.*, *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 550 (Tex. 2019).

1. Plaintiffs obtained their TRO not on the basis of the constitutional invalidity of Texas law, but on statutory-interpretation grounds. MR.204–206. But "there is no general right to sue a state agency for a declaration of rights." *Tex. Parks & Wildlife Dep't v. Sawyer Tr.*, 354 S.W.3d 384, 388 (Tex. 2011). The UDJA supplies only an implied waiver for *validity* challenges to ordinances or statutes. *Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 621–22 (Tex. 2011); *see* Tex. Civ. Prac. & Rem. Code § 37.006(b). And even then, the claim cannot be facially invalid. *Abbott v. Mex.*

Am. Legis. Caucus, Tex. House of Representatives, 647 S.W.3d 681, 698 (Tex. 2022). The TRO does not purport to find any Texas law invalid, so it is unclear on what jurisdictional grounds the court acted.

2. Plaintiffs' ultra vires claims fare no better. The ultra vires exception applies to claims that a government official acted without lawful authority or failed to perform a purely ministerial act. *Hous. Belt & Terminal Ry. Co. v. City of Houston*, 487 S.W.3d 154, 161 (Tex. 2016). But "merely asserting legal conclusions or labeling a defendant's actions as 'ultra vires,' 'illegal,' or 'unconstitutional' does not suffice to plead an ultra vires claim—what matters is whether the facts alleged constitute actions beyond the governmental actor's statutory authority, properly construed." *Tex. Dep't of Transp. v. Sunset Transp., Inc.*, 357 S.W.3d 691, 702 (Tex. App.—Austin 2011, no pet.); *see also Klumb v. Houston Mun. Employees Pension Sys.*, 458 S.W.3d 1, 13 (Tex. 2015). As shown above, were Defendants to enforce the abortion prohibitions, it would not be ultra vires because Plaintiffs have not demonstrated that they fall within the medical-emergency exceptions. Jurisdiction, again, is lacking.

IV. Relators Have No Adequate Appellate Remedy.

Relators are entitled to mandamus relief because they lack an adequate remedy from the district court's order: they cannot appeal the grant of a temporary restraining order. *In re Office of Attorney General,* 257 S.W.3d 695. Future criminal and civil proceedings cannot restore the life that is lost if Plaintiffs or their agents proceed to perform and procure an abortion in violation of Texas law. Relators therefore request mandamus relief.

PRAYER

The Court should grant this petition and issue a writ of mandamus directing the trial court to vacate its temporary restraining order of December 7, 2023.

Dated December 7, 2023

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

RALPH MOLINA
Deputy Attorney General for Legal Strategy

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

RYAN WALTERS
Chief, Special Litigation Division

/s/ Amy S. Hilton
AMY S. HILTON
Special Counsel
State Bar No. 24097834
Amy.Hilton@oag.texas.gov

Counsel for Relators

Mandamus Certification

Pursuant to Texas Rule of Appellate Procedure 52.3(j), I certify that I have reviewed this petition and that every factual statement in the petition is supported by competent evidence included in the appendix or record. Pursuant to Rule 52.3(k)(1)(A), I certify that every document contained in the appendix is a true and correct copy.

/s/ Amy S. Hilton
Amy S. Hilton

Certificate of Service

On December 7, 2023, this document was served on Molly Duane, lead counsel for Real Parties in Interest via mduane@reproright.org and Austin Kaplan via AKaplan@kaplanlawatx.com.

/s/ Amy S. Hilton
Amy S. Hilton

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Amy S. Hilton

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Bar No. 24097834
tamera.martinez@oag.texas.gov
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Associated Case Party: StephenBrintCarlton

Name	BarNumber	Email	TimestampSubmitted	Status
Amy Hilton	24097834	Amy.Hilton@oag.texas.gov	12/7/2023 11:45:32 PM	SENT
Johnathan Stone	24071779	Johnathan.Stone@oag.texas.gov	12/7/2023 11:45:32 PM	SENT
Amy Pletscher	24113663	amy.pletscher@oag.texas.gov	12/7/2023 11:45:32 PM	SENT

Associated Case Party: Kate Cox

Name	BarNumber	Email	TimestampSubmitted	Status
Austin Kaplan	24072176	akaplan@kaplanlawatx.com	12/7/2023 11:45:32 PM	SENT
Molly Duane		mduane@reprorights.org	12/7/2023 11:45:32 PM	SENT

Associated Case Party: Justin Cox

Name	BarNumber	Email	TimestampSubmitted	Status
Austin Kaplan	24072176	akaplan@kaplanlawatx.com	12/7/2023 11:45:32 PM	SENT
Molly Duane		mduane@reprorights.org	12/7/2023 11:45:32 PM	SENT

Associated Case Party: Damla Karsan

Name	BarNumber	Email	TimestampSubmitted	Status
Austin Kaplan	24072176	akaplan@kaplanlawatx.com	12/7/2023 11:45:32 PM	SENT
Molly Duane		mduane@reprorights.org	12/7/2023 11:45:32 PM	SENT

Associated Case Party: Maya Guerra Gamble

Name	BarNumber	Email	TimestampSubmitted	Status

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Associated Case Party: Maya Guerra Gamble

Name	BarNumber	Email	TimestampSubmitted	Status
Maya Guerra Gamble		shannon.matusek-steele@traviscountytx.gov	12/7/2023 11:45:32 PM	SENT

Associated Case Party: State of Texas

Name	BarNumber	Email	TimestampSubmitted	Status
Amy Hilton	24097834	Amy.Hilton@oag.texas.gov	12/7/2023 11:45:32 PM	SENT
Johnathan Stone	24071779	Johnathan.Stone@oag.texas.gov	12/7/2023 11:45:32 PM	SENT
Amy Pletscher	24113663	amy.pletscher@oag.texas.gov	12/7/2023 11:45:32 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Tamera Martinez		tamera.martinez@oag.texas.gov	12/7/2023 11:45:32 PM	SENT

Associated Case Party: Ken Paxton

Name	BarNumber	Email	TimestampSubmitted	Status
Amy Pletscher	24113663	amy.pletscher@oag.texas.gov	12/7/2023 11:45:32 PM	SENT
Johnathan Stone	24071779	Johnathan.Stone@oag.texas.gov	12/7/2023 11:45:32 PM	SENT
Amy Hilton	24097834	Amy.Hilton@oag.texas.gov	12/7/2023 11:45:32 PM	SENT

Associated Case Party: Texas Medical Board

Name	BarNumber	Email	TimestampSubmitted	Status
Amy Hilton	24097834	Amy.Hilton@oag.texas.gov	12/7/2023 11:45:32 PM	SENT

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Johnathan Stone	24071779	Johnathan.Stone@oag.texas.gov	12/7/2023 11:45:32 PM	SENT
Amy Pletscher	24113663	amy.pletscher@oag.texas.gov	12/7/2023 11:45:32 PM	SENT