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
to the 200th Judicial District Court, Travis County

RELATORS' EMERGENCY MOTION FOR TEMPORARY RELIEF

TO THE HONORABLE SUPREME COURT OF TEXAS:

"The judiciary is called upon to serve in black robes, not white coats. And it must be vigilant to stay in its lane and remember its role." *Texas Health Huguley, Inc. v. Jones*, 637 S.W.3d 202, 214 (Tex. App.—Fort Worth 2021, no pet.) (citing *Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53, 65 (Tex. 2016)).

Texas law prohibits elective abortions. A medical exception exists to Texas' general prohibition on abortion when a *physician*, in their "reasonable medical judgment," concludes that a pregnant female "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)(2).

Today, a Travis County District Court Judge abused her discretion when she issued a temporary restraining order ("TRO") rendering a final, unappealable decision that permits a Dallas resident to obtain an abortion in Houston. MR.203-07. The district judge effectively rendered a medical decision on behalf of Plaintiff Kate Cox without the benefit of any evidence beyond the verified Petition and a declaration from Texas's medical expert stating that Ms. Cox *did not* meet the necessary requirements in the medical exception. The district court abused its discretion by concluding that Ms. Cox qualified for the medical exception even though Ms. Cox failed to allege that she "has a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that places [her] 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)(2). The court further abused its discretion by ruling that the plaintiff-physician's *subjective* good-faith belief was sufficient to qualify for the medical exception when the law expressly requires that physicians have an *objective* reasonable belief that the patient qualifies for the medical exception. *Id.*

Relators are prejudiced by the trial court's ruling and will suffer irreparable harm—the permanent loss of human life—if Plaintiffs are permitted to obtain an unlawful abortion before an evidentiary hearing can be held.

This TRO ruling at issue is the first of its kind. But it won't be the last. As Joanna Grossman, a law professor at Southern Methodist University's Dedman School of Law, observed:

> This case provides a good template (for other women) in both the idea but also the documents. If this TRO stands, we have a model for what can work. Then, that's easy to scale up to give it to lawyers in different counties… Unless he [Paxton] files a writ and the Texas Supreme Court says something broad that would be make this not work again, [] I expect we would see all kinds of lawsuits like this.

Eleanor Klibanoff and Neelam Bohra, *Judge says Texas woman may abort fetus with lethal abnormality*, Tex. Trib. (Dec. 7, 2023), available online from https://www.texastribune.org/2023/12/07/texas-emergency-abortion-lawsuit/.

For all the foregoing reasons, Relators respectfully request emergency temporary relief under Texas Rule of Appellate Procedure 52.10 in the form of a stay of the TRO pending the Court's consideration of Relators' petition for writ of mandamus. Because of the nature of this suit, Relators request relief as soon as possible, but no later than **December 8, 2023**.

BACKGROUND

A. Plaintiffs' lawsuit largely concerns the abortion prohibition and exception found in Texas's Human Life Protection Act (HLPA). Tex. Health & Safety Code ch. 170A. Although generally prohibiting abortion, *id.* § 170A.002(a), the HLPA permits an abortion 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.

Id. § 170A.002(b)(2). The HLPA does not contain an exception based on fatal fetal anomalies or for unborn children who are unlikely to have sustained life outside the

womb. Other Texas abortion laws challenged by Plaintiffs are similar. *Id.* §§ 171.201-.212; Tex. Rev. Civ. Stat. arts. 4512.1-.6.

B. Plaintiffs claim that "Kate Cox needs an abortion, and she needs it now," MR.2, yet fail to allege facts which indicate that that Ms. Cox is currently suffering from *any* diagnosed life-threatening medical condition, let alone one that subjects her to a serious risk of substantial impairment of a major bodily function or death unless an abortion is performed. MR.36 (admitting that she does not have a life-threatening condition but contending that she might develop one at some point in the future). To the contrary, Plaintiffs pled facts merely illustrate that Ms. Cox's baby was diagnosed with a life limiting condition—Trisomy 18—and that, as a result, Ms. Cox does not desire to continue the pregnancy. MR.6-7. Knowing that fetal anomalies are not covered by Texas abortion laws, however, Plaintiffs claim that Ms. Cox qualifies for an abortion under the emergency medical exception based on intermittent symptoms she experienced and the mere possibility that she could have complications at some point during her pregnancy. But Relators presented a declaration from Ingrid Skop, M.D., an expert cited by both parties, that concluded that the facts, as alleged by Ms. Cox, do *not* show that she qualifies for the medical exception. MR.117-119.

C. On December 7, 2023, a TRO hearing was held remotely in the 200th Judicial District Court of Travis County. At the outset of the hearing, the trial court declined to hear Relators' jurisdictional arguments and considered only Plaintiffs' TRO Application. After brief argument from both parties, the court issued a ruling from the bench, granting Plaintiffs' request for a TRO, signing the proposed TRO,

and preventing Defendants from taking any enforcement actions for 14 days. Plaintiffs' counsel indicated after the ruling that they will likely seek a stay of the district court proceedings after the abortion is performed and there will be no need for a temporary injunction hearing.

Relators now seek mandamus relief from this Court and a stay of the TRO pending this Court's disposition of the petition for writ of mandamus.

Summary of the Argument

In conjunction with a petition for writ of mandamus, a relator "may file a motion to stay any underlying proceedings or for any other temporary relief pending the court's action on the petition." Tex. R. App. P. 52.10(a); *see In re Alamo Defs. Descendants Ass'n*, 619 S.W.3d 363, 366-67 (Tex. App.—El Paso 2021, orig. proceeding). A stay is warranted when the Court reaches "the tentative opinion that relator is entitled to the relief sought" and "the facts show that relator will be prejudiced in the absence of such relief." *Republican Party of Tex. v. Dietz*, 924 S.W.2d 932, 932-33 (Tex. 1996) (per curiam).

A stay is warranted here because Relators satisfy the two elements of the *Dietz* test. Should the Court decline to intervene by granting the relief Relators seek, a life will be lost without a faithful application of Texas abortion laws designed to protect unborn life. That action is final, unappealable, and cannot be undone. Further, the absence of a stay pending further consideration will essentially render Texas' abortion laws moot, as it will create a readily available landscape where any woman seeking an elective abortion can simply obtain the permanent relief they desire with a TRO.

The Texas Legislature did not intend for courts to become revolving doors of permission slips to obtain abortions. The Court should make clear that it will require application of the statutory language in any situation when an unborn life is at stake.

Argument

I. Relators Are Entitled to Mandamus Relief.

Mandamus relief is available when the court's error "constitute[s] a clear abuse of discretion" and relators lack "an adequate remedy by appeal." *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding). Each of those requirements is satisfied here.

A. The trial court abused its discretion by failing to preserve the status quo and misapplying the medical-emergency exceptions.

1. The TRO does not preserve the status quo of the parties.

This Court has held that "[t]he purpose of a TRO is to preserve the status quo," which it has defined as, "the last, actual, peaceable, non-contested status which preceded the pending controversy." *In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004). By its nature, 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) (emphasis added); *see also Pub. Util. Comm'n v. Water Servs., Inc.,* 709 S.W.2d 765, 767 (Tex. App.—Austin 1986, no writ) ("The ... recognition that a temporary injunction hearing is not the same as a hearing on the merits echoes throughout our jurisprudence.").

What Plaintiffs have requested—and received here—is not temporary relief, nor does it fulfill the purpose of a TRO by preserving the status quo. Performance of an abortion on Ms. Cox constitutes the ending of a life— an action that cannot be undone; there is no other relief which could possibly be more final or unappealable. Rather, the status quo here—in accordance with this Court's definition above—is prior to Dr. Karsan subjectively determining that Ms. Cox qualified for the medical exception. MR. 11. That is the "last, actual, peaceable, non-contested status" and *that* is the status that must be preserved here pending a final determination on the merits.

2. The trial court failed to apply the language of the medical-emergency exceptions to the facts pleaded by Plaintiffs.

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.

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. *See* MR.36.

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); *see also* Rebecca Klahr, et al., *Maternal Morbidity with Repeated*

Cesarean Deliveries, Am J Perinatol (Oct 2023), available online from https://pubmed.ncbi.nlm.nih.gov/34583410/ (showing C-section complication rates of up to 4% for women with two prior C-sections without a placenta previa diagnoses and concluding that "maternal morbidity increases with increase [C-sections] but the absolute risks remain low.").

As Dr. Skop concluded, none of these allegations show that Ms. Cox falls within the medical-emergency exception, contrary to the trial court's TRO. MR.117-119.

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.

C. Relators are likely to obtain mandamus relief because there is no adequate appellate remedy. This Court has held that TROs are "generally not appealable," and that because there is otherwise no "adequate appellate remedy," a mandamus is warranted. *Newton*, 146 S.W.3d at 652-53. There could not be a more final,

irreversible, unappealable set of facts than termination of a life, warranting immediate, mandamus relief.

For these reasons, Relators are likely to prevail on their request for mandamus relief. The first *Dietz* element is satisfied.

II. Relators Will Be Prejudiced Absent a Stay.

For similar reasons, Relators satisfy the second *Dietz* element because they will be "prejudiced in the absence" of a stay. 924 S.W.2d at 932-33. Texas abortion laws are designed to protect unborn children from abortion—no matter how long or short their lives may be. Plaintiffs' lawsuit seeks to dilute that protection by (1) creating an exception for fatal fetal anomalies, and (2) lowering the standard to show that the medical-emergency exception applies. As noted above, this creates a template for future plaintiffs to follow to obtain abortions that may not be in accordance with Texas law. The Court should end that practice now and require the faithful application of statutory language before an unborn life is ended.

Prayer

The Court should grant this motion and issue an order staying the trial court's temporary restraining order of December 7, 2023, pending resolution of Relators' petition for a writ of mandamus.

Respectfully Submitted.

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

/s/ Johnathan Stone
JOHNATHAN STONE
Special Counsel
Texas State Bar No. 24071779
Johnathan.Stone@oag.texas.gov

AMY SNOW HILTON
Special Counsel
Texas State 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

Attorneys for Relators

CERTIFICATE OF CONFERENCE

In accordance with Texas Rule of Appellate Procedure 52.10(a), I certify that on December 7, 2023, Relators' counsel contacted Molly Duane, counsel for the real parties in interest, and notified them that this motion for temporary relief would be filed. Ms. Duane indicated that she is opposed to this motion.

/s/ Johnathan Stone
JOHNATHAN STONE
Special Counsel

CERTIFICATE OF SERVICE

On December 7, 2023, this document was served electronically on Molly Duane, lead counsel for the real parties in interest, via electronic service.

/s/ Johnathan Stone
JOHNATHAN STONE
Special Counsel

CERTIFICATE OF COMPLIANCE

Microsoft Word reports that this document contains 2493 words, excluding exempted text.

/s/ Johnathan Stone
JOHNATHAN STONE
Special Counsel

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tamera.martinez@oag.texas.gov
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Filing Description: 20231207_Cox Mandamus final
Status as of 12/8/2023 12:24 AM CST

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: 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: 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

Associated Case Party: Ken Paxton

Name	BarNumber	Email	TimestampSubmitted	Status

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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

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
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

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: StephenBrintCarlton

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

Associated Case Party: Maya Guerra Gamble

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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