

**In the Supreme Court of Texas**

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*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.*

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

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**REPLY IN SUPPORT OF  
PETITION FOR WRIT OF MANDAMUS**

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## **TO THE HONORABLE SUPREME COURT OF TEXAS:**

The life of an unborn child is at stake. Plaintiffs did not plead at the trial court—or in Response to the Petition for Writ of Mandamus—that a medical emergency existed before the Coxes’ child was diagnosed with trisomy 18. Rather, several of the conditions identified by Plaintiffs have either been present in a prior pregnancy (elevated glucose) or will be present in future, desired pregnancies (risk from C-section). If they are not life-threatening then, they are not life-threatening now. This Court should not allow the trial court to effectively except from Texas’s abortion prohibitions the diagnosis of a fetal abnormality. This Court should issue an emergency stay and mandamus relief to preserve the status quo—and the Coxes’ child’s life.

### **ARGUMENT**

#### **I. The Trial Court Abused Its Discretion because Plaintiffs Failed to Plead Facts Supporting the Medical-Emergency Exception.**

Plaintiffs do not adduce any evidence or plead any facts demonstrating that Ms. Cox’s symptoms—elevated glucose, diarrhea, cramping, or prior C-sections—are life-threatening unless an abortion is performed. Plaintiffs’ verified petition stops short of even Dr. Karsan stating that an abortion is necessary to save Ms. Cox’s life or a major bodily function; she says only that she believes it to be “recommended.” *See* MR.37. Conspicuously missing in Plaintiffs’ 52-page petition are any facts explaining that a physician exercising reasonable medical judgment would conclude the medical-emergency exception has been met. *See generally* MR.2–67. The trial court

abused its discretion by allowing this minimal evidence to permit the ending of an unborn life.

A. In their Response to the Petition for Writ of Mandamus, Plaintiffs claim that the Coxes' unborn child's condition is "obviously and inextricably intertwined" with Ms. Cox's condition, but they do not explain how. Resp. at 9–10. And Plaintiffs' verified petition, on which the district court issued the TRO, does not make this claim *at all*. See MR.2–67.

Instead, the record shows the following: On November 17, 2023, "Ms. Cox went to the emergency room due to severe cramping and diarrhea." MR.6. With no other signs "of maternal or fetal distress, Ms. Cox was sent home." *Id.* About a week later, Ms. Cox went to the emergency room for "cramping" and "leaking amniotic fluid." M.R.6. Following "additional testing" at another hospital, Ms. Cox was sent home. M.R. 6–7. Plaintiffs do not plead that Ms. Cox was not stable, was improperly discharged, or should have received an abortion at one of these emergency rooms as treatment for an emergency medical condition.

Three days after her second emergency room visit, Ms. Cox's child was diagnosed with trisomy 18. MR.7. After hearing that her child might not survive to birth or long afterwards, Ms. Cox inquired about getting an abortion. *Id.* There is no indication in the pleadings that Ms. Cox had previously asked about the possibility of abortion due to concerns about her life and/or health when (1) her glucose was elevated (as in a prior pregnancy) in October, MR.6, and (2) she knew the birth of her child would likely be by C-section, MR.4, 7.

Plaintiffs' verified petition does not allege that, following the trisomy 18 diagnosis, Ms. Cox's physicians believed her to be suffering a life-threatening physical condition that placed her at risk of death or serious risk of substantial impairment of a major bodily function. *Compare* MR.7 and Resp., with Tex. Health & Safety Code § 170A.002(b)(2). It does not allege that any of Ms. Cox's healthcare providers advised her that abortion was necessary—or even recommended. Nor does it allege that Ms. Cox's healthcare providers were confused about the application of the law to her circumstance. *See, e.g.*, MR.6–8.

Indeed, in Plaintiffs' verified petition, it appears that no physician who has actually treated Ms. Cox has recommended abortion. *See* MR.2–67. Only Dr. Karsan, a co-plaintiff, MR.9, who has “reviewed [Ms. Cox's] medical records” “believes” abortion is “recommended.” MR.37. But the legal standard is “reasonable medical judgment” and a “life-threatening physical condition” that places Ms. Cox at risk of death or serious risk of substantial impairment of a major bodily function unless an abortion is performed. Tex. Health & Safety Code § 170A.002(b).

**B.** Plaintiffs have also failed to explain why *these* risks require the abortion of *this* child. While Plaintiffs contend “all her physicians have explained” that because she has delivered two children via C-section, “*any* subsequent deliveries come with significant risks,” Resp. at 2 (emphasis added), Plaintiffs' verified petition does not include any allegations that Ms. Cox wanted or needed an abortion due to this risk before her unborn child was diagnosed with trisomy 18. Instead, Plaintiffs allege Ms. Cox hopes to deliver more children after this pregnancy, even though that will include the same risks associated with a third C-section. MR.3.

Plaintiffs' Response also emphasizes the threat to Ms. Cox's "future fertility." Resp. at 1. Assuming that "future fertility" constitutes a "major bodily function" under the statute, Plaintiffs plead no facts linking Ms. Cox's physical condition related to the birth of *this child* to the loss of fertility. Instead, it appears she will face the same risks regarding the birth of any future child. At best, Plaintiffs plead that C-sections "are associated with significantly higher mortality and morbidity than abortion." MR.36. Assuming that is true, that would make abortion the rule and delivery the exception for any woman facing a C-section. That is simply not the law.

In the end, Plaintiffs do not identify the life-threatening condition that Ms. Cox purportedly has. They do not identify it in their verified petition, and they do not identify it in their Response to this Court. Such a condition is required by statute. Tex. Health & Safety Code § 170A.002(b). And, consistent with the position the State took in oral argument in *Zurawski*, a fatal fetal condition does not meet the medical exception. Rather, the only question is whether Ms. Cox's condition meets the exception, regardless of how long the child is expected to live. And Plaintiffs have not presented any evidence—or even pled—that a physician exercising "reasonable medical judgment" would consider Ms. Cox's conditions, such as elevated glucose or prior C-sections, to be life-threatening unless an abortion is performed. At most, Dr. Karsan claims she "recommends" abortion. MR.37. That is not enough. The trial court abused its discretion by issuing a TRO that concludes this pleading and evidence suffices to demonstrate that the medical-emergency exception has been met and an unborn child may be aborted.

## II. The TRO Ignores Basic Jurisdictional Flaws.

Plaintiffs appear to argue that because the State filed a Plea to the Jurisdiction one day after receiving notice of the lawsuit and TRO hearing, the district court need not to have considered it. Resp. at 14. Regardless of timing, a trial court may not issue a TRO with obvious jurisdictional defects.

A. While certain aspects of standing were discussed at oral argument in *Zurawski*, other basic flaws should have limited the relief the trial court granted.

*First*, the TRO purports to enjoin the Attorney General, the Executive Director of the Texas Medical Board, the Texas Medical Board, and the State of Texas from enforcing S.B. 8. MR.206. But this Court has already held that the State may not enforce S.B. 8 directly or indirectly. *Whole Woman’s Health v. Jackson*, 642 S.W.3d 569, 583 (Tex. 2022).

*Second*, Plaintiffs have not sued anyone who can enforce the criminal provisions of the Human Life Protection Act or pre-*Roe* laws. Suing “the State” does not include all of its district and county attorneys. *See State v. Volkswagen*, --S.W.3d--, 2022 WL 17072342, at \*4 (Tex. Nov. 18, 2022) (“Our cases acknowledge the separateness of a government entity and its constituent government actors.”).

*Third*, Plaintiffs may sue only to assert their own injuries, not the injuries of others—in this case, other staff at the hospital where Dr. Karsan intends to perform the abortion. *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 485 (Tex. 2018) (quoting *Heckman v. Williamson County*, 369 S.W.3d 137, 155 (Tex. 2012)). Thus, under existing precedent, the TRO is overly broad to the extent it attempts to enjoin enforcement of S.B. 8 and criminal laws, as well as enforcement against a non-party.



**B.** Plaintiffs’ non-constitutional claims on which the trial court granted the TRO arise under the ultra vires doctrine, as the UDJA does not purport to authorize injunctive relief and waives immunity only for validity challenges. *See, e.g., Texas Dep’t of Transp. v. Sefzik*, 355 S.W.3d 618, 621 (Tex. 2011) (per curiam). But Plaintiffs have not identified any state official who has exceeded his legal authority under any of the challenged statutes. To avoid sovereign immunity through an ultra vires claim, Plaintiffs must plead and prove that an official acted without legal authority. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). As shown above, because Ms. Cox does not fall within the medical-emergency exceptions, it would not be ultra vires for a state official to enforce Texas abortion laws in this circumstance, and the claim remains barred by immunity.

\* \* \*

Under Plaintiffs’ theory, they are entitled to final relief under this TRO—to abort an unborn child and to prevent any state official or entity from ever questioning in the future whether that abortion was lawful. Resp. at 18-19. While the State asserts that the TRO prohibits enforcement only for the duration of the TRO, Plaintiffs’ position only goes to show why this Court’s review is essential and why trial courts must be held to apply the language of the statutory exceptions. The trial court failed to do that here, entering an overbroad injunction that is inconsistent with statutes and precedent. The Court should grant the petition for mandamus.

## 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 9, 2023

Respectfully submitted.

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## CERTIFICATE OF SERVICE

On December 9, 2023, this document was served on Molly Duane, lead counsel for Real Parties in Interest via [mduane@reproright.org](mailto:mduane@reproright.org) and Austin Kaplan via [AKaplan@kaplanlawatx.com](mailto:AKaplan@kaplanlawatx.com).

*/s/ Amy S. Hilton*  
**AMY S. HILTON**

## CERTIFICATE OF COMPLIANCE

Microsoft Word reports that this document contains 1,655 words, excluding exempted text.

*/s/ Amy S. Hilton*  
**AMY S. HILTON**