No. 23-0994

In The Supreme Court of Texas

IN RE STATE 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

RESPONSE TO PETITION FOR WRIT OF MANDAMUS AND EMERGENCY MOTION FOR TEMPORARY RELIEF

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STATEMENT OF THE CASE

Nature of the underlying proceeding:	Plaintiffs sued Defendants (Relators) as the entities who enforce Texas's abortion bans for declaratory and injunctive relief. Plaintiffs seek a statutory interpretation of Texas's medical exception to its abortion bans, codified at Tex. Health & Safety Code §§ 170A.001, 170A.002, 171.002, and, in the alternative, a ruling as to the constitutionality of Texas's abortion bans as applied to Plaintiffs. MR.2–53.
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
Respondent:	The Honorable Maya Guerra Gamble, 200th Judicial District Court, Travis County
Real Parties in Interest:	Kate Cox Justin Cox Damla Karsan, M.D. on behalf of herself, her staff, nurses, pharmacists, agents, and patients
Challenged Action:	Relators petition for mandamus relief from a Temporary Restraining Order that Respondent issued on December 7, 2023, "to preserve Plaintiffs' legal right to obtain, provide, aid, or abet the abortion Ms. Cox is currently seeking." MR.206.

STATEMENT OF JURISDICTION

Relators ("the State") were obligated to "first" present their Petition to the Third Court of Appeals absent "a compelling reason not to do so." Tex. R. App. 52.3(e). The State lacks a "compelling reason" to bypass the Third Court of Appeals given that the temporary restraining order ("TRO") narrowly applies to prevent the State from enforcing Texas's abortion bans against Real Parties in Interest Kate Cox, Justin Cox, and Damla Karsan, M.D., on behalf of herself, her staff, nurses, pharmacists, agents, and patients (collectively, "Plaintiffs") in connection with Ms. Cox's current nonviable pregnancy, and does not enjoin the State, writ large, from enforcing Texas's abortion bans as applied to other pregnancies. *See Sears v. Bayoud*, 786 S.W.2d 248, 249 (Tex. 1990) (providing that direct petitions to the Supreme Court are entertained where the matter involved is of "statewide application.")

Notwithstanding the above, Plaintiffs do not dispute that the "imminence" of the threat to Ms. Cox's health and fertility may place this case within the "narrow class of cases in which resort to the court of appeals is excused" if a writ of mandamus from this Court will allow Ms. Cox to receive the life-saving abortion care she desperately requires. *Bird v. Rothstein*, 930 S.W.2d 586, 587 (Tex. 1996) (Orig. Proceeding).

ISSUE PRESENTED

Whether the District Court abused its discretion in granting a TRO to protect Plaintiffs' rights to obtain, provide, aid, or abet an abortion that Ms. Cox's medical providers have determined is necessary to protect her life, health, and fertility.

To the Honorable Supreme Court of Texas:

The State's mandamus petition is stunning in its disregard for Ms. Cox's life, fertility, and the rule of law. First, the State claims that it alone has the power to value Ms. Cox's current nonviable pregnancy more highly than Ms. Cox's own life and life of the future children she and her husband hope to have, regardless of Ms. Cox's wishes for her family and the good faith advice of her medical team. Next, the State claims both that urgent relief from this Court is necessary to halt the District Court's TRO, but also that the TRO *means nothing either way*. Plaintiffs agree that urgent action from this Court is necessary—specifically, to remind the Attorney General that he does not exist outside the systems of laws of which he is an officer, and that he must follow court orders just like the citizens he purports to serve. Plaintiffs respectfully request that this Court deny the writ and instruct the Attorney General to comply with binding orders from a Texas court.

STATEMENT OF FACTS

I. Ms. Cox's Life and Future Fertility.

At detailed in the verified petition, Ms. Cox's life and future fertility currently hang in the balance. Today, Ms. Cox is 20 weeks and 3 days pregnant and facing a panoply of serious medical conditions in her current pregnancy impacting the life of her fetus, her own life, and her future fertility. Specifically, she is dealing with all of the following *simultaneously*: 1) her fetus has been diagnosed with full Trisomy 18,

and after multiple screening tests, a diagnostic amniocentesis, and repeat weekly ultrasounds over the last two months, her physicians have informed her that her pregnancy is likely to end in a stillbirth or at best, her baby will live for only minutes, hours, or days; 2) during this pregnancy, Ms. Cox is at increased risk for gestational hypertension, gestational diabetes due to increased glucose tests in this and prior pregnancy, fetal macrosomia, cesarean delivery, post-operative infections, and anesthesia complications; 3) in the last month, she has been to four emergency rooms for concerning pregnancy symptoms including severe cramping and diarrhea, leaking of fluid, and elevated vital signs, with the most recent emergency room visit occurring in the days between filing the petition and received a TRO hearing ; and 4) continuing her current nonviable pregnancy to term will make it more difficult and dangerous for her to have children in the future. Verified Pet. ¶¶ 1-23; Hr'g, *Cox v. State of Texas*, No. D-1-GN-23-008611 (Travis Cty. Dist. Ct. Dec. 7, 2023) ("12/7 Hr'g").

As to Ms. Cox's future fertility, all her physicians have explained that because she has two young children already, each delivered via cesarean surgery ("C-section"), any subsequent deliveries come with significant risks. If Ms. Cox is induced or attempts to deliver vaginally, she is at high risk for uterine rupture, which is why major medical organizations like the American College of Obstetricians and Gynecologists ("ACOG") recommend against induction for patients who

have had recent and repeat C-sections. Verified Pet. ¶¶ 18, 132; *see also Vaginal Birth After Cesarean Delivery: Frequently Asked Questions*, ACOG, https://www.acog.org/womens-health/faqs/vaginal-birth-after-cesarean-delivery. Ms. Cox's only other option for delivery is a third C-section, and her physicians, as well as major medical organizations, have cautioned that with each repeat C-section—a major abdominal surgery—the risks of serious complications including placenta problems like placenta previa, blood transfusion, uterine rupture, damage to the bladder, infection, and hysterectomy, all increase. Verified Pet. ¶¶ 18, 133; *see also Cesarean Birth: Frequently Asked Questions*, ACOG, https://www.acog.org/womens-health/faqs/cesarean-birth; Nicole E. Marshall, et al., *Impact of Multiple Cesarean Deliveries on Maternal Morbidity: A Systematic Review*, 2011 Am. J. of Obstetrics & Gynecology, Sept. 205(3): 262.e1-8, https://www.ajog.org/article/S0002-9378(11)00763-0/fulltext.

These conditions put her 1) at risk "of death" where the imminence of death cannot be known *or* 2) at "serious risk of substantial impairment of her reproductive functions. Tex. Health & Safety Code §§ 170A.002(a); 171.002(3).

Ms. Cox is aware of the current risks to her life and future fertility and desperately wants to have more children. Her physicians have advised her that the safest option for her health and future fertility is to terminate her current nonviable pregnancy, and given her ongoing

health concerns, such abortion care is urgently needed. Verified Pet. ¶¶ 19, 21, 36, 131, 136-37.

Currently, Ms. Cox, her family, and her physicians, are anxiously awaiting a ruling from the Court regarding how her critical healthcare in Texas may legally proceed.

II. Texas's Abortion Bans.

This Court is familiar with the laws at issue and their severe penalties of life in prison, loss of medical license, and hundreds of thousands of dollars in fines, which are identical to those in *Zurawski,* Case No. 23-0629. Briefly, and as discussed in the State's mandamus petition, the District Court here deferred to Ms. Cox's physicians' judgment that the medical exceptions to Texas's abortion bans apply in Ms. Cox's situation.

The prohibitions in S.B. 8, Texas Health & Safety Code §§ 171.201–12, "do not apply if a physician believes a medical emergency exists." Tex. Health & Safety Code § 171.205(a). The definition of "medical emergency" that applies to S.B. 8 is located in a separate long-standing section of the Texas code and defines the term as: "a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that, as certified by a physician, places the woman in danger of death or a serious risk of substantial impairment of a major bodily function unless the abortion is performed." Tex. Health & Safety Code § 171.002(3).

After stating that "[a] person may not knowingly perform, induce, or attempt an abortion," the Trigger Ban, Texas Health & Safety Code §§ 170A.001–07, states that the prohibition "does not apply if…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.

To the extent the pre-*Roe* ban has not been repealed by implication, it allows an abortion "by medical advice for the purpose of saving the life of the mother." Tex. Rev. Civ. Stats. arts. 4512.1–6; 1925 Tex. Penal Code arts. 1191–96.

III. Procedural History.

On November 28, 2023, at oral argument before the Court in *Zurawski*, the State's attorney conceded that, for a patient-plaintiff who is currently pregnant and receives a fatal fetal diagnosis, "bringing a lawsuit in that specific circumstance [of a fetal diagnosis] to challenge whether or not the statute encompasses that [diagnosis and accompanying health conditions]" against "either the attorney general or the executive director of TMB" would suffice for standing purposes. Arg., *Zurawski*, at 12:24–13:28. Defendants similarly stated "I think if the doctor had any specific circumstance in front of them, they could perhaps

bring that lawsuit." *Id.* at 13:55–14:03. The State conceded the patient and the doctor could sue the Attorney General or the Texas Medical Board and its Executive Director, under either an *ultra vires* theory or the Uniform Declaratory Judgment Act. *Id.* at 11:30–50, 13:07–14:04. Finally, the State agreed that if a "fatal fetal anomaly" were "accompanied by evidence of a serious risk of substantial impairment of a major bodily function of the mother," then it would "fall[] within the [medical] exception." *Id.* at 9:30–9:54.

Also on November 28, Ms. Cox received the final diagnostic results from an amniocentesis confirming prior concerns regarding the health of her pregnancy. On November 30, she reached out to plaintiffs' counsel in *Zurawski*. Verified Pet. ¶ 22. On December 5, 2023, one week after the State made these representations before this Court, and two business days after Ms. Cox contacted counsel, Ms. Cox, her husband, and her physician Dr. Karsan brought the very suit the State conceded was allowed. Faced with a fatal fetal diagnosis and a risk of death or substantial impairment of a major bodily function, Plaintiffs filed a verified petition for declaratory judgment and application for a TRO and permanent injunction. Later that day, Ms. Cox made her latest trip to the emergency room. 12/7 Hr'g.

On December 6, 2023, hours before the TRO hearing, the State filed a plea to the jurisdiction ("PTJ") and response to Plaintiffs' TRO application that parroted almost verbatim their arguments in this Court

in *Zurawski*. MR.69–201. Plaintiffs have not yet had time to submit opposition briefing.

The TRO hearing was at 9 am CT on December 7, 2023. Having considered the Parties' papers and argument, the District Court issued a TRO later that day. MR.203–07. The TRO contained findings, including, "consistent with Dr. Karsan's good faith belief and medical recommendation, that Ms. Cox has a life-threatening physical condition aggravated by, caused by, or arising from her current pregnancy that places her at risk of death or poses a serious risk of substantial impairment of her reproductive functions if a D&E abortion is not performed." MR.205. "Ms. Cox's circumstances thus fall within the medical exception to Texas's abortion bans and laws. Texas law therefore permits Dr. Karsan to perform, induce, or attempt an abortion for Ms. Cox, and permits Mr. Cox to assist Ms. Cox in obtaining that abortion." *Id.* The TRO enjoined the State from enforcing Texas's abortion bans and laws against Plaintiffs and related entities, as applied to Ms. Cox's current pregnancy. MR.206.

Hours later, Defendant Attorney General Paxton published and posted online a letter addressed to three hospitals where he believes Ms. Cox might receive an abortion in accordance with the TRO. App'x.1. The letter threatened criminal, civil, and disciplinary action against the hospitals, warning them against relying on what he called the

"purported" TRO. *Id.* Within hours, Plaintiffs alerted both this Court and the District Court to the Attorney General's threats. App'x.2.

The night of December 7, 2023, the State filed this emergency motion for temporary relief and petition for writ of mandamus.

SUMMARY OF ARGUMENT

The District Court did not abuse its discretion in granting temporary relief to Ms. Cox and her co-Plaintiffs. That relief will not prevent the parties from litigating the merits, but will prevent life-altering consequences for Ms. Cox, including loss of her ability to have future children. Further, there was no error in the District Court's refusal to consider the State's PTJ. The State conceded just last week before this Court that Plaintiffs bringing exactly this case would have standing and sovereign immunity would be waived. Finally, this Court must reject the State's extreme threat of retroactive enforcement and disregard for the rule of law.

STANDARD OF REVIEW

A stay of temporary relief pending the court's action on a petition for mandamus under Tex. R. App. P. 52.10(a) is only warranted where (1) the Court reaches "the tentative opinion that relator is entitled to the relief sought" and (2) "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).

Mandamus relief is only available to correct a "clear abuse of discretion" by the trial court and when there is no "adequate remedy by appeal". *Walker v. Packer,* 827 S.W.2d 833, 840 (Tex. 1992). "A trial court's determination of a factual issue is entitled to deference in a mandamus proceeding and should not be set aside unless it is clear from the record that only one decision could have been reached." *In re Kuntz*, 124 S.W.3d 179, 181 (Tex. 2003). Relators, however, do not establish that the trial court "reache[d] a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law," such that this Court must issue mandamus relief setting aside the TRO. *Walker*, 827 S.W.2d at 839.

ARGUMENT

I. The District Court Did Not Abuse its Discretion and Correctly Applied the Language of the Medical Exceptions.

The State's primary argument—that Ms. Cox cannot possibly be eligible for an abortion under the medical exception to Texas's abortion bans—misrepresents both the verified facts regarding her serious health condition, including her future fertility, and the underlying law.

First, the State repeatedly complains that "Texas law does not permit abortions *solely* because the unborn child is unlikely to have sustained life outside the womb," Pet. at 7 (emphasis added), but Plaintiffs do not contend otherwise. Rather, Plaintiffs' position is that the medical exception must be read to encompass certain fetal conditions when, as Ms. Cox's condition shows, it is impossible to separate the

medical condition of the patient from the medical condition of the fetus—they are quite obviously and inexorably intertwined. The State said as much to this Court just last week, conceding that a patient who is currently pregnant and receives a fatal fetal diagnosis would have standing to bring a lawsuit to challenge whether Texas's abortion bans encompass that diagnosis and accompanying health conditions. The State similarly stated that if a doctor was facing specific circumstance, they could similarly bring suit. Arg., *Zurawski*, at 12:24–14:03.

Ms. Cox is a living human being experiencing multiple health complications from her pregnancy simultaneously. Pregnancy is not a health neutral physical state, it has real costs as well as benefits, and physicians must be able to treat the full patient in front of them. The State speaks of each of Ms. Cox's conditions as though they exist in a vacuum, but this does not comport with the reality of human health nor the way that physicians are trained to practice medicine.

Second, for the first time, the State has provided an interpretation of the medical exceptions in their mandamus petition. Yet that interpretation writes half of the language of the exceptions out of the statutes. This rewrite does not comport with any plain text reading of the laws. The State complains that, contrary to the judgment of Ms. Cox's medical team, the Attorney General and a physician who has never treated Ms. Cox "believe" she is not "currently suffering from *any* diagnosed life-threatening medical condition," Pet. at 4. Putting aside

the propriety of the State second-guessing good faith medical judgment, the State ignores entirely that the statute *also* protects patients like Ms. Cox from "serious risk of substantial impairment of a major bodily function." Tex. Health & Safety Code §§ 170A.002(a); 171.002(3). Surely all parties would agree that reproductive functions, which are critical to the creation of new human life, are "major." Tex. Labor Code § 21.002(11-a) ("[M]ajor bodily function, includ[es], but [is] not limited to, functions of the immune system, normal cell growth, and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.").

Third, the State repeats to this Court the arguments already addressed during the *Zurawski* hearing last week, regarding the appropriate standard that applies to physician judgment under Texas's abortion bans. Plaintiffs will not repeat their argument here at length but note that the statutes, while requiring the clarification provided by the District Court in *Zurawski*, repeatedly point to physicians' subjective good faith. S.B. 8 appears to use good faith language—"if a physician *believes* a medical emergency exists," Tex. Health & Safety Code § 171.205(a)—while the Trigger Ban both says "reasonable medical judgment" applies to the exception, and that violations of the law must be "knowing," meaning that a physician only violates the law if they know their reliance on the exception is unreasonable—that is effectively the same as good faith judgment, Tex. Health & Safety Code §§ 170A.001(4),

170A.002(a). The District Court here, like the District Court in *Zurawski*, did no more than clarify that Texas law means what it says.

Finally, it is clear that the State's arguments in this case prove the plaintiffs' core claim in *Zurawski*. Namely, the problem with an objective reasonable judgment standard in the context of abortion bans is that the State can *and will* always find an expert to disagree with a particular physician's judgment and say that the physician's reliance on the exception was unreasonable. Texas law prohibits individuals who are not licensed as physicians by the state of Texas, as well as corporations, from practicing medicine in this state. *See* Tex. Occ. Code §§ 151.002(a)(12); 152.002(a)(13); 155.001; 164.052(a)(17). By attempting to categorize the degree of risk to Ms. Cox's health and future fertility that is tolerable under the abortion bans, however, the state appears to be doing just that. *See* Mandamus Pet. at 8-9 (arguing that a 4% complication rate after two prior C-sections and an overall increase in maternal morbidity with repeat C-sections is not "serious").

II. The District Court's TRO Properly Preserved the Status Quo.

By issuing the TRO, the District Court preserved the status quo, which this Court 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). The Parties do not dispute that Texas's abortion bans contain a medical exception. Nor do the Parties dispute that, should a pregnant person's circumstances meet the requirements of

the medical exception such that she could receive an abortion, the State could not bring a valid enforcement action against her physician or anyone who aided or abetted her.

That is the *precise* situation presented by this case. The District Court, having considered Plaintiffs' verified petition and the State's response, found that, consistent with Dr. Karsan's diagnosis and the serious risks posed by Ms. Cox's conditions, Ms. Cox's circumstances "fall within the medical exception to Texas's abortion bans and laws." MR.205. The status quo allows for the abortion sought, and the District Court's injunction temporarily prevents the State from enforcing criminal or civil penalties against Dr. Karsan, Mr. Cox, and others, as applied to Ms. Cox's current pregnancy.

The State attempts to portray the TRO as providing permanent relief to the parties, but that is false. The State's argument that an abortion "cannot be undone" and is "unappealable" unabashedly ignores Ms. Cox's risk of death or infertility, which also "cannot be undone," and the very real Texan family whose trauma is at the center of this case. Mot. at 7. As the State claims and publicly threatens, should Ms. Cox receive her necessary abortion from Dr. Karsan, after the TRO expires, Dr. Karsan and those who aided or abetted the abortion may still be subject to a criminal or civil enforcement action brought by Relators. App'x.1. Indeed, the purpose of the pending *Zurawski* case is to settle confusion regarding the medical exception and when enforcement would

otherwise be allowed. Because the temporary injunction entered in *Zurawski* remains stayed pending this Court's resolution of the appeal, the threat of enforcement to physicians around the state remains very real as Attorney General Paxton's position in this case has made perfectly clear. *Id.* Were Plaintiffs to proceed with Ms. Cox's abortion in Texas, the proceedings below would thus not be moot, and Plaintiffs who, again, desperately want more children, would still have every incentive to pursue more permanent relief in this matter.

III. The District Court Did Not Abuse its Discretion by Declining to Decide the State's Eleventh Hour PTJ Before Entering a TRO.

Late in the evening on the day before the TRO hearing, the State filed a 131-page PTJ, with over thirty pages of standing and sovereign immunity arguments. The district court did not abuse its discretion in declining to address those arguments, identical to those pending before this Court in *Zurawski*, during the emergency TRO hearing at 9 A.M. the next day. In any event, Relators' ill-timed standing and sovereign immunity objections are meritless. The State already conceded before this Court last week in *Zurawski* that the standing and sovereign immunity arguments they made to this Court in *Zurawski* would not apply in a situation like Ms. Cox's. As Plaintiffs indicated to the District Court, the lower courts should await guidance from this Court on those issues and address them later after full briefing.

First, the State already conceded to this Court that at least one of the plaintiffs in this case has standing. Standing requires (1) injury that is (2) fairly traceable to Defendants' challenged conduct and (3) likely to be redressed by a favorable decision. *Heckman v. Williamson County*, 369 S.W.3d 137, 154 (Tex. 2012). Only one plaintiff needs standing for the Court to have jurisdiction. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52, n.2 (2006). As discussed above, the State at oral argument before this Court stated that a plaintiff currently pregnant with ongoing complications and/or a physician with a specific patient who status under the medical exception was unclear, could come to court to seek the relief requested in *Zurawski*. Arg., *Zurawski*, at 12:24–13:28.

Ms. Cox is currently pregnant and unable to get access to an abortion she believes she is entitled to under Texas law because of Defendants' credible enforcement threats against physicians such as Dr. Karsan. And Attorney General Paxton has explicitly threatened enforcement against Physician-Plaintiff Karsan for providing emergency abortion care. App'x.1. It is beyond dispute that a Plaintiff in this case has standing, and the State's about-face on its standing arguments should be rejected.

Second, the State's claim that Physician-Plaintiff Karsan may not seek relief for her patients or staff is equally inapt. Pet. 8. Because Dr. Karsan satisfies the injury, traceability, and redressability

requirements, *see* briefing in *Zurawski*, that ends the standing inquiry. This Court has never imposed additional prudential limitations on standing, and it should not do so for the first time here in an emergency posture. The Attorney General himself has now issued direct threats against Dr. Karsan, the hospitals where she has privileges, and the staff of those hospitals under all of the abortion bans, drawing a straight line from his authority to enforce those laws to the coercive effect it is having on physicians and the medical community in Texas. App'x.1 Further, this Court explicitly stated in *Whole Woman's Health v. Jackson* that the Texas Medical Board and its executive director have "broad authority" to enforce abortion restrictions, which include the pre-Roe ban and Trigger Ban. 642 S.W.3d 569, 576 (Tex. 2022). Enforcement of both the pre-*Roe* Ban and S.B. 8 are traceable to Defendant State of Texas, as both district or county attorney and private individuals enforcing either ban necessarily exercise the State's power in doing so. *See id.* at 642 S.W.3d at 574–75; *Esteves v. Brock*, 106 F.3d 674, 678 (5th Cir. 1997). Notably, in a case currently pending before this Court on jurisdictional matters, a multi-jurisdictional court already concluded that S.B. 8 is an unconstitutional delegation of state authority to private parties. *See* Op., *Van Stean v. Tex. Rt. to Life*, No. D-1-GN-21-004179, at 43 (Tex. J.P.M.L. Dec. 9, 2021), *appeal pending*, No. 23-0468 (Tex. June 21, 2023).

Third, by the State's own arguments in *Zurawski*, sovereign immunity is no bar to Ms. Cox's case. At oral argument last week, the

State admitted that a patient-plaintiff in circumstances identical to Ms. Cox's "would sue either the Attorney General or the Executive Director of TMB, perhaps under an *ultra vires* theory." Oral Arg. at 13:07–35. Likewise, the State conceded that "I think if a doctor had a specific circumstance in front of them, they could perhaps bring that lawsuit." *Id.* at 13:36–14:04. That would be a lawsuit "under the UDJA" that names "either the TMB or the Attorney General." *Id.* at 11:30–50. In other words, the State fails to distinguish this case from the hypothetical one they just described to this Court as justiciable in *Zurawski*. Instead, the State argues that the TRO is based "on statutory-interpretation grounds," Pet. at 8, even though waiver of immunity turns on the parties' claims, not the relief granted by the trial court, *Patel v. Texas Dep't of Licensing & Reg.*, 469 S.W.3d 69, 75–76 (Tex. 2015). And Plaintiffs, here, bring both statutory construction and constitutional challenges to the State's abortion laws. Verified Pet. ¶¶ 163–222. It is settled that sovereign immunity does not prohibit suits challenging a statute's constitutionality, and the existence of a credible threat of enforcement is sufficient for ultra vires purposes when seeking only equitable relief. *See Patel*, 469 S.W.3d at 75–77 ("[S]overeign immunity does not prohibit suits brought to require state officials to comply with statutory or *constitutional* provisions.") (emphasis added); *Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 621 (Tex. 2011); *City of El Paso v. Heinrich*, 284 S.W.3d 366, 376 (Tex. 2009).

IV. The Attorney General's Threat of Retroactive Prosecution Is Compounding the Irreparable Harm.

Finally, in a transparent attempt to nullify the TRO through intimidation, if not on the merits, the State argues that "nothing will prevent" Physician-Plaintiff Karsan, Ms. Cox's husband, or "their agents" from prosecution "for violations of law committed under cover of a TRO." Pet. 1–4. The Attorney General repeated this meritless theory in the threatening letter he delivered yesterday to the hospitals where he believes Ms. Cox will receive an abortion. App'x.1.

The State offers no legal support for its incendiary claims that Plaintiffs cannot rely on a TRO, and its threats fly in the face of numerous decisions confirming what common sense and justice demand: that a "judgment[] later reversed or found erroneous" is nonetheless "a defense to a ... prosecution for acts committed while the judgment was in effect." *Clarke*, 915 F.2d at 701–02 (collecting cases). Nevertheless, if not quickly quashed, the State's theory that litigants cannot rely on a court order granting preliminary relief will wreak havoc in the judicial system, with far-reaching consequences beyond this case.

The State's threat is not about abortion: it is about the very nature of judicial relief. It is axiomatic that "the purpose of a TRO is to preserve the status quo." *In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004) (citations omitted). Yet if the State's theory were correct, it would be foolish for any Texan to ever maintain the status quo in reliance on a TRO or temporary

injunction, rather than preemptively conforming their behavior to avoid retroactive liability. In the State's telling, a court order provides no assurance of protection from the penalties lying in wait if an appellate court later disagrees with the lower court—meaning that the Attorney General, and not the courts of this state, determine what the law means. But the orders of Texas's courts are not so hollow.

PRAYER

In addition to denying the petition and request for emergency relief, this Court should clarify that Texas litigants can reasonably rely on TROs and injunctions they secure to maintain status quo.

Respectfully submitted,

/s/ *Molly Duane*

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CERTIFICATE OF COMPLIANCE

According to Microsoft Word, this brief contains 4,451 words, excluding the portions exempted by Rule 9.4.

/s/ Molly Duane
Molly Duane

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing brief has been served on counsel of record for Relators through electronic service on December 8, 2023.

/s/ Molly Duane
Molly Duane

No. 23-0994

In The Supreme Court of Texas

IN RE STATE 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

APPENDIX

Tab

1. Attorney General Paxton Letter, dated December 7, 2023..... 1
2. Plaintiffs' Notice of Supplemental Authorities, State of Texas v. Zurawski, No. 23-0629 (Dec. 7, 2023) (exhibits omitted)..... 2

Tab 1

Attorney General Paxton Letter, dated
December 7, 2023

KEN PAXTON
ATTORNEY GENERAL OF TEXAS

Recipients:

The Methodist Hospital
c/o Mike Cantu, Chief Legal Officer
6565 Fannin St.
Houston, TX 77030
Ramon.Cantu@houstonmethodist.org

The Women's Hospital of Texas
c/o Jeanna Bamburg, CEO
7600 Fannin St.
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Jeanna.Bamburg@hcahealthcare.com

Texas Childrens Hospital
c/o Lance Lightfoot, Chief Legal Officer
6621 Fannin St.
Houston, TX 77030
LLightfoot@texaschildrens.org

December 7, 2023

Via email

Re: *Cox v. St. of Tex.*, Cause No. D-1-GN-23-008611, pending in the 200th Judicial District Court, Travis County, Texas.

To Whom It May Concern:

It has come to our attention that Damla Karsan, M.D., a physician holding privileges at your hospital, intends to perform a dilation and evacuation abortion on Ms. Katelynn "Kate" Cox. Today, an activist Travis County Judge signed a Temporary Restraining Order ("TRO") purporting to enjoin the Attorney General's Office (the "OAG") and the Texas Medical Board ("TMB") from enforcing some of the state's abortion laws against Dr. Karsan if she performs an abortion on Ms. Cox. We feel it is important for you to understand the potential long-term implications if you permit such an abortion to occur at your facility.

First, the TRO will not insulate you, or anyone else, from civil and criminal liability for violating Texas' abortion laws, including first degree felony prosecutions, Tex. Health & Safety Code § 170A.004, and

civil penalties of not less than $100,000 for each violation, Tex. Health & Safety Code §§ 170A.005, 171.207-211. And, while the TRO purports to *temporarily* enjoin actions brought by the OAG and TMB against Dr. Karsan and her staff, it does not enjoin actions brought by private citizens. Tex. Health & Safety Code § 171.207; *Whole Woman's Health v. Jackson*, 590 U.S. 30, 44 (2021). Nor does it prohibit a district or county attorney from enforcing Texas' pre-*Roe* abortion laws against you, Dr. Karsan, or anyone else. We remind you that the TRO will expire long before the statute of limitations for violating Texas' abortion laws expires.

Second, it is the hospitals—not the courts—that have the training, responsibility, and discretion to "determine, in accordance with state law and with the advice of the medical staff, which categories of practitioners are eligible candidates for appointment to the medical staff." 25 Tex. Admin. Code § 133.41(f)(4)(F) (2021). Your hospital may be liable for negligently credentialing the physician and failing to exercise appropriate professional judgment, among other potential regulatory and civil violations, if you permit Dr. Karsan to perform an unlawful abortion. *Garland Cmty. Hosp. v. Rose*, 156 S.W.3d 541, 546 (Tex. 2004).

Third, it appears that Dr. Karsan failed to follow your hospital's procedures for determining whether Ms. Cox qualifies for the medical exception to Texas' abortion laws. It appears she has not sought a second opinion from a colleague at your hospital to determine whether they agree with her that Ms. Cox qualifies for the medical exception. Nothing in the TRO compels you to waive your hospital's long-standing policies for determining whether a patient, including Ms. Cox, qualifies for the medical exception to Texas' abortion laws.

Fourth, the TRO and the allegations in this lawsuit, on their face, fail to establish that Ms. Cox qualifies for the medical exception to Texas' abortion laws. To fall within the medical exception, the physician must determine "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) (emphasis added). The TRO states that Dr. Karsan "*believes in good faith*" that "abortion is medically recommended" for Ms. Cox. But that is not the legal standard—reasonable medical judgment and a life-threatening physical condition are. The TRO is further deficient because it fails to identify what "life-threatening" medical condition that Ms. Cox purportedly *has* that is aggravated by, caused by, or arising from a pregnancy, nor does it state with specificity how this unidentified condition places Ms. Cox at risk of death or poses a serious risk of substantial impairment of a major bodily function unless the abortion is performed or induced. The *temporary* ruling fails to show that Dr. Karsan meets all of the elements necessary to fall within an exception to Texas' abortion laws. Judge Guerra Gamble is not medically qualified to make this determination and it should not be relied upon. A TRO is no substitute for medical judgment.

Thank you for your prompt attention to this matter.

Sincerely,

Ken Paxton

Tab 2

Plaintiffs' Notice of Supplemental Authorities, State of Texas v. Zurawski, No. 23-0629 (Dec. 7, 2023) (exhibits omitted)

CENTER *for* REPRODUCTIVE RIGHTS

NEW YORK
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December 7, 2023

Mr. Blake Hawthorne
Clerk of the Texas Supreme Court
P.O. Box 12248
Austin, Texas 78711

Re: Case No. 23-0629; *State of Texas et al. v. Zurawski et al.* – Appellees' Notice of Supplemental Authorities

Dear Mr. Hawthorne:

We write to inform the Court of recent filings in a case, *Cox et al. v. State of Texas et al.*, Cause No. D-1-GN-23-008611 (Travis Cnty. Dist. Ct.), that involve issues relevant to the case before this Court. *Cox* is a case filed two days ago by a pregnant plaintiff undergoing a medical crisis, as well as her husband and her physician, against the State of Texas, the Attorney General, and the Texas Medical Board and its Executive Director. As set forth in the verified petition, Ms. Cox received a diagnosis of full trisomy 18, and her physicians confirmed that her pregnancy may not reach term, and even if it does, the baby is likely to be stillborn or to live at most minutes, hours, or days. Ms. Cox is at high risk if she continues the pregnancy due to underlying health conditions and her prior two C-sections, and a third C-section would make it less likely she would be able to have children in the future.

Earlier today, the 459th District Court in Travis County entered a Temporary Restraining Order in *Cox* restraining the defendants from enforcing Texas's abortion bans with respect to Ms. Cox's case. A copy of the Temporary Restraining Order is attached.

In that case, the defendants filed a Plea to the Jurisdiction challenging the *Cox* plaintiffs' standing, asserting sovereign immunity, and claiming that Ms. Cox is not sufficiently "near death" to qualify for an abortion or for her claim to be "ripe." That plea is also attached.

Notwithstanding arguments that the Defendants made in oral argument last week in *Zurawski*, the same defendants in *Cox* are making inconsistent arguments:

1. Standing. Last week in *Zurawski*, the Defendants conceded that "for example," a patient-plaintiff who is currently pregnant and receives a fatal fetal diagnosis, "bringing a lawsuit in that specific circumstance [of a fetal diagnosis] to challenge whether or not the statute encompasses that [diagnosis and accompanying health conditions]" against "either the attorney general or the executive director of TMB" would suffice for standing purposes. Oral Arg., *State of Texas v. Zurawski*, at 12:24–13:28. Defendants similarly stated that "I think if the doctor had any specific circumstance in front of them, they could perhaps bring that lawsuit." *Id.* at 13:55–14:03. Despite those representations, in *Cox*, the defendants challenge Ms. Cox's standing on grounds that she is not at "imminent" loss of her life or fertility, the risk that she "*might* experience complications while delivering her child to term is insufficiently concrete," and her emergency amounts to "generalized grievances indistinguishable from every other pregnant Texan." *Cox* PTJ 12–14. The defendants similarly challenge the standing of her physician, Dr. Karsan (who is also a plaintiff in *Zurawski*). *Id.* 14–24.

2. Sovereign Immunity. At oral argument in *Zurawski*, Defendants said that a patient-plaintiff in circumstances identical to Ms. Cox's "would sue either the Attorney General or the Executive Director of TMB, perhaps under an *ultra vires* theory." Oral Arg. at 13:07–35. Likewise, the State Defendants stated that "I think if a doctor had a specific circumstance in front of them, they could perhaps bring that lawsuit." *Id.* at 13:36–14:04. That would be a lawsuit "under the UDJA" that names "either the TMB or the Attorney General." *Id.* at 11:30–50. Notwithstanding what they just told this Court, in *Cox*, the Defendants continue to assert complete sovereign immunity against suit under either the UDJA or an *ultra vires* theory. *Cox* PTJ 27–43.

3. Scope of Medical Exceptions. Before this Court in *Zurawski*, Defendants agreed that if a "fatal fetal anomaly" was "accompanied by evidence of a serious risk of substantial impairment of a major bodily function of the mother," then it would "fall[] within the exception." Oral Arg. 9:40. In *Cox*, however, the State Defendants have asserted that the medical exceptions require "imminent" risk of death, and that threats to future fertility and other health risks do not suffice under the medical exceptions. *Cox* PTJ 5–7, 12–14.

Defendants' position in *Cox* thus contradicts the position they took before this Court regarding standing, sovereign immunity, and under what circumstances a pregnant patient can obtain an abortion in Texas.

Hours after the District Court entered the Temporary Restraining Order, Defendant Attorney General Ken Paxton published and posted to X (Twitter) a letter addressed to three hospitals where he believes Ms. Cox might receive an abortion in accordance with the Temporary Restraining Order. Defendant Paxton's letter states: "Today, an activist Travis County Judge signed a Temporary Restraining Order ('TRO') *purporting* to enjoin" himself and the Texas Medical Board (emphasis added). The letter threatened those hospitals with "first degree felony prosecutions" and private actions by citizens under S.B. 8, notwithstanding the text of the Temporary Restraining Order. The letter also threatened disciplinary action against the hospitals for employing a physician willing to perform an abortion for a patient in a medical crisis. Finally, the letter claims that the medical exceptions require that Ms. Cox have a current "life-threatening physical condition," and warns the hospitals against "rel[ying] upon" the Temporary Restraining Order. Defendants later emailed a copy of the letter to Plaintiffs' counsel "to make sure that y[']all received a copy." A copy of Defendant Paxton's letter is attached.

Sincerely,

/s/ Molly Duane

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* Admitted *pro hac vice*

Encl.: Temporary Restraining Order, *Cox v. Texas* (Exhibit A)
Defendants' Plea to the Jurisdiction and Response to Plaintiffs' Application for a Temporary Restraining Order, *Cox v. Texas* (Exhibit B)
Attorney General Paxton Letter, dated December 7, 2023 (Exhibit C)

Certificate of Service

A true and correct copy of the foregoing has been served on counsel of record for Defendants-Appellants via electronic service on this 7th day of December, 2023.

/s/Molly Duane
Molly Duane