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

Brief of *Amici Curiae* American College of Obstetricians and Gynecologists and Society for Maternal-Fetal Medicine in Opposition to Petition and Emergency Motion for Relief

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

Amici curiae are leading medical societies representing tens of thousands of physicians and other clinicians who serve patients, like Ms. Cox, in Texas and nationwide. *Amici* file this brief on an emergency basis because Ms. Cox faces a current, emergent threat to her life, health, and future fertility, and to the wellbeing of her family. *Amici* also file this brief because the Attorney General of Texas's threats of enforcement of criminal and civil penalties against physicians and hospitals that owe a foundational ethical obligation to patients to provide basic, essential reproductive health care are endangering the provision of medical care in Texas and the health and wellbeing of Texans. We respectfully request that this Court vacate the administrative stay and deny Relators' efforts to prevent the provision of essential medical care.

The **American College of Obstetricians and Gynecologists (ACOG)** is the nation's leading group of physicians providing evidence-based obstetric and gynecologic care. With more than 60,000 members, ACOG maintains the highest standards of clinical practice and continuing education of its members; strongly advocates for equitable, exceptional, and respectful care for all women and people in need of obstetric and gynecologic care; promotes patient education; and increases

[1] Pursuant to Rule 11(c) of the Texas Rules of Appellate Procedure, *Amici* confirm that no person or entity other than *Amici* made a monetary contribution to the preparation or filing of this brief.

awareness among its members and the public of critical issues facing patients and their families and communities. ACOG has appeared as *amicus curiae* in courts throughout the country. ACOG's briefs and medical practice guidelines have been cited by numerous authorities, including the U.S. Supreme Court, which recognize ACOG as a leading provider of authoritative scientific data regarding childbirth and abortion.[2]

Because ensuring access to the full spectrum of essential reproductive health care is critical to ACOG's mission and the health of our communities, ACOG opposes political and ideological interference into the practice of medicine and encourages approaches to policy issues that steer clear of such interference. ACOG's Statement of Policy on Legislative Interference acknowledges that while the "[g]overnment serves a valuable role in the protection of public health and safety and the provision of essential health services," "[l]aws and regulations that veer from these functions and unduly interfere with patient-physician relationships are not

[2] *See, e.g.*, *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2131-32 (2020); *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 613 (2016); *Stenberg v. Carhart*, 530 U.S. 914, 932-36 (2000) (quoting ACOG brief extensively and referring to ACOG as among the "significant medical authority" supporting the comparative safety of the abortion procedure at issue); *Hodgson v. Minnesota*, 497 U.S. 417, 454 n.38 (1990) (citing ACOG in assessing disputed parental notification requirement); *Simopoulos v. Virginia*, 462 U.S. 506, 517 (1983) (citing ACOG in discussing "accepted medical standards" for the provision of obstetric-gynecologic services, including abortions); *see also Gonzales v. Carhart*, 550 U.S. 124, 170-71, 175-78, 180 (2007) (Ginsburg, J., dissenting) (referring to ACOG as "experts" and repeatedly citing ACOG's brief and congressional submissions regarding abortion procedure).

appropriate."[3]

The **Society for Maternal-Fetal Medicine (SMFM)** is the medical professional society for maternal-fetal medicine subspecialists, who are obstetricians with additional training in high-risk pregnancies. SMFM was founded in 1977, and it represents more than 6,500 members caring for high-risk pregnant people. SMFM provides education, promotes research, and engages in advocacy to advance optimal and equitable perinatal outcomes for all people who desire and experience pregnancy. SMFM and its members are dedicated to ensuring that all medically appropriate treatment options are available for individuals experiencing high-risk pregnancies.

These organizations together represent tens of thousands of medical practitioners in Texas and across the country, with deep expertise in both medical research and the treatment of patients in real-world settings. Ensuring robust access to evidence-based health care and promoting health care policy that improves patient health are central to *Amici's* missions. *Amici curiae* believe that all patients are entitled to prompt, complete, and unbiased health care that is medically and scientifically sound.

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[3] Am. Coll. of Obstetricians & Gynecologists, *Legislative Interference with Patient Care, Medical Decisions, and the Patient-Physician Relationship*, ACOG, https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2019/legislative-interference-with-patient-care-medical-decisions-and-the-patient-physician-relationship (last amended 2021).

INTRODUCTION

Amici file this brief to reinforce the *urgent* need for this Court to vacate its administrative stay and deny Relators' petition for mandamus and motion for temporary relief. Kate Cox, facing a devasting pregnancy diagnosis, must be permitted to obtain the abortion that she has decided, in consultation with her physician, is in the best interests of herself and her family given the risks her pregnancy is posing to her life, health, and future fertility. The Attorney General's efforts to interfere with the provision of needed medical care—including by opposing the relief sought in the trial court, threatening multiple hospitals with criminal and civil penalties while court-ordered relief remained in effect, and by seeking mandamus relief without satisfying the standard for such review—clearly demonstrate the reasons *amici* oppose political interference in the practice of medicine.

As *amici* and others stated in greater length in their brief filed recently in *State of Texas v. Zurawski*, No. 23-0629, Texas clinicians, like Dr. Karsan, must be permitted to provide abortions to pregnant patients, like Ms. Cox, in medically complex cases to protect them from negative health outcomes.[4] As explained in that

[4] *See* Br. of *Amici Curiae* ACOG, AMA, and Other Medical Organizations, *State of Texas v. Zurawski*, No. 23-0629 (Tex. Sup. Ct. Nov. 21, 2023) (hereinafter "*Zurwaski Amicus* Brief").

brief, every day that the Texas abortion bans ("the Bans")[5] remain in effect, they are preventing the provision of medically necessary care to state residents. The inability of clinicians in Texas to provide essential reproductive health care, starkly presented in this case, will increase existing disparities in health outcomes for Texas residents, exacerbate the shortage of qualified health care providers and worsen the maternal mortality rate in Texas, which is already at crisis levels. This is harming countless Texans who are pregnant or might one day become pregnant—whether or not they ever seek abortions or experience a serious obstetrical complication.[6]

In the midst of this deepening crisis, Ms. Cox, her husband and her clinician have come to the Texas courts to seek leave for basic, essential reproductive health care. This Court should ensure the decisions like the one faced by Ms. Cox and her family are able to be made by the people with expertise in the medical complexities and those facing the risks and bearing the consequences.

ARGUMENT

I. Ms. Cox Faces Specific Risks to Her Health, Life, and Future Fertility If Forced to Continue Her Pregnancy.

Ms. Cox, facing a pregnancy that will not result in sustained life because of a tragic fetal condition, should not be compelled to endure the continued health risks

[5] Both *Zurawski* and this matter arise under (1) the historical ban at issue in *Roe v. Wade*, 410 U.S. 113 (1973) (Tex. Rev. Civ. Stats. Ann. arts. 4512.1–6; 1925 Tex. Penal Code arts. 1191–96) (the "pre-*Roe* Ban"); (2) Tex. Health & Safety Code §§ 170A.001–.007 (the "Trigger Ban"); and (3) Tex. Health & Safety Code §§ 171.201–.212 ("S.B. 8") (collectively the "Bans").
[6] *Zurwaski Amicus* Brief, *supra* note 4, at 26-37.

posed by her pregnancy and the risk to future fertility should she be forced to carry her pregnancy to term.

Ms. Cox's fetus has been diagnosed with full Trisomy 18, and her physicians have informed her that her pregnancy is likely to end in a stillbirth or death shortly after birth. Edwards syndrome (Trisomy 18) is a chromosomal disorder caused by the presence of an extra chromosome 18 that leads to significant impairments in fetal development of the limbs, heart, and brain.[7] It occurs in approximately 1 in 2,500 diagnosed pregnancies. This serious medical condition can be expected to result in pregnancy loss, stillbirth or infant mortality within the first year of birth.[8] Infants that are born typically die within 10-15 days due to severe lung, heart, and other defects, often of cardiac arrest or respiratory failure.[9] Those that survive beyond this time (only 5-10% of live births[10]) face substantial impairments, including heart impairments, intellectual disabilities, spinal problems, among others.[11]

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[7] MedlinePlus, *Trisomy 18*, Nat'l Libr. of Med., https://medlineplus.gov/download/genetics/condition/trisomy-18.pdf (last updated Feb. 16, 2021).

[8] Joan K. Morris & George M. Savva, *The Risk of Fetal Loss Following a Prenatal Diagnosis of Trisomy 13 or Trisomy 18*, 146A Am. J Med. Genetics 827, 828 (2008), https://onlinelibrary.wiley.com/doi/abs/10.1002/ajmg.a.32220.

[9] Dunja Niedrist et al., *Survival with Trisomy 18—Data from Switzerland*, 140A Am. J. Med. Genetics 952, 954 (2006), https://onlinelibrary.wiley.com/doi/epdf/10.1002/ajmg.a.31172.

[10] Sonja A. Rasmussen et al., *Population-Based Analyses of Mortality in Trisomy 13 and Trisomy 18*, 111 Pediatrics 777 (2003), https://publications.aap.org/pediatrics/article-abstract/111/4/777/63087/Population-Based-Analyses-of-Mortality-in-Trisomy.

[11] MedlinePlus, *Trisomy 18*, *supra* note 8; *see also* Cleveland Clinic, *Edwards Syndrome (Trisomy 18)*, https://my.clevelandclinic.org/health/diseases/22172-edwards-syndrome (last reviewed Dec. 13, 2021).

In addition to this devastating diagnosis, Ms. Cox is facing additional risk factors. In the last month, she has visited multiple emergency rooms because of symptoms associated with obstetrical complications, including cramping, diarrhea, leaking of fluid and elevated vital signs. Remaining pregnant is also putting her at an increased risk for gestational hypertension, gestational diabetes due to increased glucose tests in this and prior pregnancy, placenta accreta spectrum, injury to bladder, urinary tract and bowel, cesarean delivery, hysterectomy, several blood loss, fetal macrosomia, post-operative infections, and anesthesia complications, among other conditions.[12]

If Ms. Cox is forced to carry her pregnancy to term, her risk factors again intensify. She will have to undergo a third cesarean surgery (C-section) in order to deliver. Each C-section—which is major abdominal surgery—carries progressively increased risks and will make it more dangerous for her to have children in the

[12] Robert M. Silver et al., *Maternal Morbidity Associated With Multiple Repeat Cesarean Deliveries*, 107 Obstetrics & Gynecology 1226, 1228 (2006), https://journals.lww.com/greenjournal/abstract/2006/06000/maternal_morbidity_associated_with_multiple_repeat.4.aspx; Resp. to Pet. for Writ of Mandamus and Emergency Mot. for Temporary Relief at 2; Mandamus Record ("MR") at 6-7.

future.[13] Given that approximately 70% of pregnancies involving a trisomy 18 diagnosis that proceed past 12 weeks gestational age will not result in a live birth, these risks become unacceptable for most patients in a similar position as Ms. Cox.

II. Clinicians Must Be Able to Provide Abortions Where Indicated for Pregnant Patients like Ms. Cox Experiencing Health- or Life-Threatening Medical Conditions.

Abortion is an essential component of reproductive health care. Indeed, one quarter of all women of reproductive age in the United States will have an abortion in their lifetime.[14] For patients facing serious risks during pregnancy, abortion must be available as a possible treatment, as set forth in greater detail in *amici*'s brief in the *Zurawski* case.[15]

Because of the complexities inherent in providing care to pregnant patients, including in emergency situations, clinicians must be permitted to use their medical

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[13] Aaron B. Caughey et al., Safe Prevention of the Primary Cesarean Delivery, 210 Am. J. Obstetricians & Gynecologists 179 (2014), https://www.acog.org/clinical/clinical-guidance/obstetric-care-consensus/articles/2014/03/safe-prevention-of-the-primary-cesarean-delivery (discussing, collecting complications); Am. College of Obstetricians & Gynecologists, *Cesarean Birth: Frequently Asked Questions*, ACOG, https://www.acog.org/womens-health/faqs/cesarean-birth (last updated May 2022); Nicole E. Marshall et al., *Impact of Multiple Cesarean Deliveries on Maternal Morbidity: A Systematic Review*, Am. J. Obstetrics & Gynecology (Sept. 2011), https://www.sciencedirect.com/science/article/abs/pii/S0002937811007630; *see also* Resp. to Pet. For Writ of Mandamus and Emergency Mot. for Temporary Relief at 10.

[14] Guttmacher Inst., *Induced Abortion in the United States* (Sept. 2019), https://www.guttmacher.org/fact-sheet/induced-abortion-united-states. The National Academies of Sciences has found that restrictions on abortion harm patients' health and well-being, making care less safe. *See* Nat. Acads. of Scis., Eng'g, and Med., *The Safety and Quality of Abortion Care in the United States*, Nat'l Acads. Press 10 (2018), https://www.ncbi.nlm.nih.gov/books/NBK507236/pdf/Bookshelf_NBK507236.pdf.

[15] *Zurwaski Amicus* Brief, *supra* note 4, at 8-19.

judgment—honed through years or decades of medical education, training, and experience—to provide evidence-based care that is consistent with clinical guidance and responsive to their patients' individualized needs, including abortions. Clinicians must be permitted to provide that care, without delay or threat of criminal or civil prosecution, to patients who need it to preserve their life, health and/or future fertility. Being able to provide quality medical care that is informed by the patient's needs and the physician's medical judgment is especially present here where there is a diagnosis of a lethal fetal anomaly or other high-risk condition.

The law is a blunt instrument, and patients and clinicians face complex and nuanced situations like that experienced by Ms. Cox daily. In this case, the informed judgment of Dr. Karsan and the decision of Ms. Cox and her family should not be interfered with by politicians lacking medical expertise, especially given the potential cost to Ms. Cox's life, health, and fertility.

III. Granting the Requested Relief Will Only Deepen the Health Care Crisis Facing Texans after *Dobbs.*

This case clearly demonstrates the risks for Texas clinicians trying to provide care under the Bans, which will deepen the maternal and reproductive health crisis facing Texans. A trained, expert physician has explained the risks posed by continuing her pregnancy to Ms. Cox, and Ms. Cox and her physician have concluded that an abortion is necessary to address the risks. Ms. Cox, her husband,

and her physician, recognizing the very real threat of criminal and civil penalties, have sought judicial confirmation that the abortion is permitted (a course of action the Attorney General's office endorsed for patients who needed care[16]). In response, after the trial court entered a temporary restraining order, Attorney General Paxton threatened civil and criminal prosecution in letters to hospitals that might have provided that care.[17] Unless this Court intervenes, this case will reinforce the concerns of Texas clinicians, and further chill the provision of medically necessary care to pregnant Texans.

Clinicians trying to provide evidence-based, ethical care to patients who are suffering from medical complications and need abortions are already being chilled by the possible criminal, civil, and professional penalties that they might face. They fear that they may be indicted by a state official who disagrees with the exercise of their judgment; that they would bear the burden of retaining counsel and defending against the indictment; and that they would risk loss of their medical license, livelihood, and reputation—and even face life in prison—if a jury decides they were incorrect in their medical judgment. Even if they are not prosecuted, they could face disciplinary action from state officials, and risk losing their license and livelihoods

[16] *See* MR at 13-14.
[17] Texas Attorney General (@TXAG), X (Dec. 7, 2023, 2:49 P.M.), https://twitter.com/TXAG/status/1732849903154450622 (releasing a letter to The Methodist Hospital, The Women's Hospital of Texas, and Texas Children's Hospital from Ken Paxton, Attorney General of Texas, re: *Cox v. State of Texas*).

if their decision to provide care is second-guessed or replaced by the judgment of state officials with no training or expertise.

Facing these risks, clinicians and hospitals across Texas and other states where abortion has been banned are being forced to rely on "expectant management."[18] When caring for a patient suffering from a medical condition, clinicians are forced to ignore their judgment and—directly contrary to their training and clinical guidance—withhold treatment until a patient's condition deteriorates before providing the clinically indicated termination of pregnancy. The results are devastating: a recent study found that "expectant management of obstetrical complications in the periviable period was associated with significant maternal

[18] Anjali Nambiar et al., *Maternal Morbidity and Fetal Outcomes Among Pregnant Women at 22 Weeks' Gestation or Less with Complications in 2 Texas Hospitals After Legislation on Abortion*, 227 Am. J. of Obstetrics & Gynecology 648, 649 (July 2022), https://www.ajog.org/action/showPdf?pii=S0002-9378%2822%2900536-1; *see, e.g.*, Daniel Grossman et al., *Care Post-Roe: Documenting Cases of Poor-Quality Care Since the Dobbs Decision*, Advancing New Standards in Reprod. Health (2023), https://sites.utexas.edu/txpep/files/2023/05/ANSIRH-Care-Post-Roe-Report-Embargoed-until-15-May-23.pdf; *see also* Am. Coll. of Obstetricians & Gynecologists, *Early Pregnancy Loss* (Aug. 29, 2018), https://www.acog.org/clinical/clinical-guidance/practice-bulletin/articles/2018/11/early-pregnancy-loss (discussing "expectant management" as an option for treatment of early pregnancy loss and warning that "[b]ecause of a lack of safety studies of expectant management in the second trimester and concerns about hemorrhage, expectant management generally should be limited to gestations within the first trimester").

morbidity."[19] The pervasive "climate of fear"[20] among the Texas medical community is certain to be made worse by this case and the State's actions in opposing the abortion Ms. Cox needs. Perhaps that's the point of the State's conduct. But *amici* fear that the result will put their Texas patients at increased risk of preventable negative health outcomes, including impairment to their health or loss of fertility and even life.

If this Court fails to vacate the administrative stay and declines to deny the relief sought by Relators, a Texas mother seeking to preserve her life, health, and fertility amidst a tragic pregnancy diagnosis will be forced to continue her

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[19] Nambiar et al., *supra* note 18, at 649. Moreover, state-mandated "[e]xpectant management resulted in 57% of patients having a serious maternal morbidity compared with 33% who elected immediate pregnancy interruption under similar clinical circumstances reported in states without such legislation." *Id.* The study also documented a significant increase in maternal morbidity among patients with preterm labor who would have been promptly offered induction abortions before the law but, due to fear regarding the law, were not offered such treatment until their physicians determined that an emergent condition posed "an immediate threat to maternal life." *Id.* The study followed patients with premature preterm rupture of the membranes and pregnancy tissue prolapsed into the vagina. Among these patients, 43% experienced maternal morbidity such as infection or hemorrhage; 32% required intensive care admission, dilation and curettage, or readmission; and one patient required a hysterectomy. *Id*.

[20] Whitney Arey et al., *A Preview of the Dangerous Future of Abortion Bans—Texas Senate Bill 8*, 387 N. Eng. J. Med. 388, 389 (2022), https://www.nejm.org/doi/pdf/10.1056/NEJMp2207423?articleTools=true. A recent national survey conducted by the Kaiser Family Foundation found that "68% of OB-GYNs said that the *Dobbs* "ruling has worsened their ability to manage pregnancy-related emergencies." *See* Brittni Frederiksen et al., *A National Survey of OBGYNs' Experiences After Dobbs*, Kaiser Fam. Found. 3 (June 21, 2023), https://files.kff.org/attachment/Report-A-National-Survey-of-OBGYNs-Experiences-After-Dobbs.pdf. Almost 40% of OB-GYNs feel constrained in "their ability to provide care for miscarriages and other pregnancy-related medical emergencies since the Dobbs decision." And over half of clinicians (55%) practicing in states like Texas where abortion is banned say their ability to practice within the standard of care has been hindered. *Id.*

pregnancy, and clinicians in Texas will be prevented from fulfilling their core professional purpose: to provide necessary, quality care to those in need.

CONCLUSION

For all the reasons stated above, the Court should lift the administrative stay and deny the Petition for Review and Emergency Motion for Temporary Relief without delay.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this petition complies with the typeface requirements of TEX. R. APP. P. 9.4(e), because it has been printed in a conventional typeface no smaller than 14-point except for footnotes, which are no smaller than 12-point. This document also complies with the word-count limitations of TEX. R. APP. P. 9.4(i), because it contains less than 15,000 words, excluding any parts exempted by TEX. R. APP. P. 9.4(i)(1).

/s/ Clark Richards
Clark Richards

CERTIFICATE OF SERVICE

On December 11, 2023, I electronically filed this Amicus Brief with the Clerk of Court using the eFile.TXCourts.gov electronic filing system, which will send notification of the filing to all parties of record.

/s/ Clark Richards
Clark Richards