No. 23-0629

IN THE
SUPREME COURT OF TEXAS

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,
Appellants,

v.

AMANDA ZURAWSKI; LAUREN MILLER; LAUREN HALL; ANNA ZARGARIAN; ASHLEY BRANDT; KYLIE BEATON; JESSICA BERNARDO; SAMANTHA CASIANO; AUSTIN DENNARD, D.O.; TAYLOR EDWARDS; KIERSTEN HOGAN; LAUREN VAN VLEET; ELIZABETH WELLER; DAMLA KARSAN, M.D., ON BEHALF OF HERSELF AND HER PATIENTS; AND JUDY LEVISON, M.D., M.P.H., ON BEHALF OF HERSELF AND HER PATIENTS,
Appellees.

BRIEF OF CURRENT AND FORMER LOCAL ELECTED OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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STATEMENT OF INTEREST

Amici are current and former local elected officials in Texas.[1] We represent communities across the state with diverse populations, economic circumstances, and local interests. As members of government closest to the people, we share a common commitment to the health and welfare of our constituents. To that end, all our residents need access to and trust in the delivery of healthcare. This case, fundamentally, is about access to healthcare when it is needed.

We care deeply about the issues raised in this litigation. Our cities and counties offer emergency response and public health services. However, we are impeded from effectively addressing the needs of our communities when there is a lack of clarity regarding state laws. The grave and consequential issues raised in this case are matters of dignity and equality for all Texans. In no other circumstances do people facing significant health risks—like the Plaintiff patients—confront the denial of clear care. Inability to pay, health history, and more are irrelevant. But pregnant people—and only pregnant people—can be denied life-altering care. We believe that established Texas law requires more.

We write here to offer our strong support for Plaintiffs and to push to ensure that their claims are adjudicated by Texas courts. The clarity that Plaintiffs seek in

[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amici* or *amici*'s counsel made a monetary contribution to the preparation or submission of this brief. A list of all *amici* is available at Appendix A.

the law is not a luxury. It is a life-or-death necessity. Such clarity is imperative for our ability to be responsive to our constituents, and relevant to our delivery of services and community supports. We urge this Court to treat the issues presented with the urgency and empathy that they deserve.

SUMMARY OF ARGUMENT

This Court should uphold the lower court's injunction. *First*, Plaintiffs' claims are justiciable and are not barred by sovereign immunity. As current and former local elected officials in Texas, our governments have benefited directly from the protections sovereign immunity allows. Nevertheless, we strongly believe the doctrine should not prohibit residents from seeking clarity about the rights afforded to them under state law, especially here when individual health is at stake. Plaintiffs have asserted claims that are covered by the Uniform Declaratory Judgment Act ("UDJA"), as they have sought a declaration of their rights under the state constitution. With respect to Counts 3-6 in the complaint, Plaintiffs assert that the application of Texas's abortion bans would violate a variety of rights. This type of determination of rights is clearly inside the scope of the UDJA waiver. In addition, Plaintiffs' *ultra vires* claims are permissible. Plaintiff patients have been denied care—and Plaintiff providers are under the threat of enforcement—because of the non-discretionary duties of the named individual Defendants. In so doing, Plaintiffs

seek to ensure that the named individual Defendants follow the law as it currently exists—not change state policy.

Second, the lower court properly issued an injunction. Plaintiffs are likely to succeed on the merits. Protection of the pregnant person's life under the Texas Constitution requires that the statutory bans be interpreted to provide robust protection to health-saving care for pregnant persons. The issuance of a preliminary injunction also is in the public interest. Among other things, the significant public health impacts and racial disparities that come with the denial of case make clear that an injunction should be issued. The public interest demands access to care where there are emergencies, and pregnant people should not be excluded from care that would be provided in all other health circumstances (*i.e.*, no other patients are told they need to get worse before receiving care). Plaintiffs, both patients and providers alike, have suffered irreparable harm from the denial of care, and the harm is ongoing given the scope of complications suffered by pregnant persons throughout Texas. For these reasons, and the reasons provided by Plaintiffs, the order of the lower court should be affirmed.

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE JUSTICIABLE BECAUSE THEY FALL WITHIN THE UDJA WAIVER AND ARE PROPERLY FRAMED AS *ULTRA VIRES*

Amici recognize the crucial protections sovereign immunity provides for governmental entities. As current and former elected leaders, we know that such limits on litigation are necessary to ensure the functioning of local governments. Nevertheless, we do not believe such a protection applies here under established precedent of this Court. As explained below, all of the claims asserted by Plaintiffs are appropriate for adjudication. For the claims asserted against governmental entities, the UDJA waiver clearly applies. For the claims asserted against individually named defendants, the claims are appropriately styled as *ultra vires*.

A. The UDJA Waives Sovereign Immunity for Claims Seeking a Determination of Rights Under State Law

The text of the UDJA itself, this Court's own precedent, and the logical flow of civil litigation support Plaintiffs' waiver arguments. The UDJA provides: "[a] person …whose rights, status, or other legal relations are affected by a statute … may have determined *any question of construction or validity arising under the ... statute* … and obtain a declaration of rights, status, or other legal relations thereunder." Tex. Civ. Prac. & Rem. Code § 37.004 (emphasis added). This Court has made clear that when the text is unambiguous, the words themselves control the analysis. *TIC Energy & Chem., Inc. v. Martin*, 498 S.W.3d 68, 74 (Tex. 2016) ("Our

objective is to ascertain and give effect to the Legislature's intent as expressed in the statute's language."). The statute provides for "any question of construction or validity arising under the … statute" at issue in the litigation. "Any" means "one or some indiscriminately of whatever kind." *Any*, Merriam-Webster.com (2023); *see also TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011) ("Undefined terms in a statute are typically given their ordinary meaning."). The term "any" in the statute is unqualified and thus is not limited to constitutional claims.

Despite the clarity of the statute's text, this Court's jurisprudence on whether the UDJA waives sovereign immunity for statutory interpretation claims has been inconsistent. At times, and as Defendants note, this Court has said that the UDJA only waives immunity for a challenge of the "validity of a statute." *Texas Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 622 (Tex. 2011). But in other decisions, this Court has looked more closely at the text and found that statutory interpretation is permissible. For example, in *Texas Lottery Commission*, this Court specifically rejected such a narrow construction of the UDJA:

> Next, the Commission asserts that the DJA does not waive immunity because it applies only to suits involving constitutional invalidation and not to those involving statutory interpretation. But the language in the DJA does not make that distinction. In *Leeper*, the issue was whether a mandatory school attendance private school exemption statute applied to children taught at home. While the plaintiffs also claimed that enforcement of the statute violated their constitutional rights, the Court

> did not reach the constitutional issue. Rather, the DJA discussion was in the context of a statutory clarification.

Texas Lottery Comm'n v. First State Bank of DeQueen, 325 S.W.3d 628, 634–35 (Tex. 2010) (internal citations omitted).

Texas Lottery Commission is more consistent with the text and meaning of the UDJA. In addition, it comports with the typical flow of civil litigation. There is not always a clear distinction between cases that require constitutional analysis and those limited to statutory interpretation, especially at the outset of litigation. In fact, it is the obligation of courts in Texas to avoid constitutional issues wherever possible. Under the canon of constitutional avoidance, courts should, "if possible, interpret a statute in a manner that avoids constitutional infirmity." *Paxton v. Longoria*, 646 S.W.3d 532, 539 (Tex. 2022) (citing *Quick v. City of Austin*, 7 S.W.3d 109, 115 (Tex. 1998)). A UDJA waiver limited only to constitutional claims runs headlong into another crucial limitation on judicial review. *In re Ginsberg*, 630 S.W.3d 1, 10 (Tex. 2018) ("[A]s a rule, courts decide constitutional questions only when the issue cannot be resolved on non-constitutional grounds.") (citing *In re B.L.D.*, 113 S.W.3d 340, 349 (Tex. 2003)). Thus, reading the plain text of the UDJA and the canon of constitutional avoidance in harmony undercuts Defendants' assertions that statutory claims are inadequate for waiver.

But even if Defendants are technically correct on the statutory interpretation point, it is functionally irrelevant. Plaintiffs are asserting constitutional claims as well. For example, in their Complaint, Plaintiffs assert a claim under the right to life as protected by Article I, § 19 of the Texas Constitution. Compl. ¶ 305. Their claim is that if the abortion bans do, in fact, prohibit "the provision of abortion to pregnant people to treat emergent medical conditions," then these laws violate fundamental rights protected by the state constitution. *Id.* ¶ 306. Plaintiffs assert three similar claims under separate rights guaranteed by the Texas Constitution. These are all constitutional claims. If Plaintiffs prevail on these claims, the statutes are invalid as applied in these circumstances. It is, of course, possible that this Court will decide emergency care is protected by the statutes, or that the constitutional rights do not conflict with the statutes, but that *ultimate* determination does not mean there are no constitutional claims asserted at the *outset* of the litigation. *See Texas Educ. Agency v. Leeper*, 893 S.W.2d 432, 433 (Tex. 1994) (construing statutory exemption to mandatory school attendance to include home-schooled children).

Defendants offer two additional arguments under the UDJA, but neither has merit. First, they argue waiver does not apply because Plaintiffs do not seek to invalidate the statutes as a whole. The UDJA does not require a facial challenge to be utilized. To suggest otherwise would demand judicial overreach in the review of statutes. Second, Defendants argue that claims must be viable to satisfy jurisdictional

requirements of sovereign immunity. As a matter of logic, the merits of a claim are to be assessed once threshold jurisdictional issues are resolved. The ultimate merit of the claims asserted are to be determined once subject matter is established. Additionally, this Court's ruling in *Patel v. Texas Department of Licensing & Regulation*, is squarely on point. 469 S.W.3d 69 (Tex. 2015). In that case, a similar argued was advanced and rejected:

> The State argues that because the trial court granted summary judgment to the State on the merits, the Threaders did not prove a valid claim, rendering their pleadings insufficient to give the trial court jurisdiction. The State relies on *Andrade v. NAACP of Austin*, in which we held that the Secretary of State was immune from suit because the constitutional claims against her were non-viable. But, our conclusion there simply followed a line of decisions in which we held that claims were not viable due to basic pleading defects. *Andrade* stands for the unremarkable principle that claims against state officials—like all claims—must be properly pleaded in order to be maintained, not that such claims must be viable on their merits to negate immunity. Because the Threaders' pleadings presented a viable claim, they were sufficient.

469 S.W.3d at 77 (internal citations omitted). Defendants' assertions should be disposed here.

B. *Ultra Vires* Claims Challenging Named Officials' Actions as Beyond Their Legal Authority Are Not Barred by Sovereign Immunity

Ultra vires suits cannot be used to control a government entity. Instead, they attempt to reassert the control of the state when state officials act outside the scope of their legal authority. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex.

2009). Plaintiffs' claims fall within the scope of *ultra vires* because direct and indirect actions of the state have denied them access to and ability to practice lawful health care including that "a physician may perform an abortion [...] in a medical emergency." Tex. Health & Safety Code § 171.0124. Defendants have refused to provide clarity about what their statutory authority is, despite repeated requests from physicians and lawmakers, and have threatened to "strictly enforce" Texas abortion bans, chilling the medical-emergency provision of lawful abortion care. In a pre-enforcement posture, but having already suffered harm caused by Defendants, Plaintiffs are seeking prospective injunctive relief to "require state officials to comply with statutory or constitutional provisions." *Heinrich*, 284 S.W.3d at 372.

1. Plaintiffs have alleged valid *ultra vires* claims to enjoin future actions by official-capacity Defendants

This Court's precedent makes clear that the *ultra vires* doctrine permits prospective injunctive relief against government actors whose future actions violate statutory or constitutional provisions. *Heinrich*, 284 S.W.3d at 368–69. In *Patel*, for example, the plaintiffs sought prospective injunctive relief against future agency disciplinary sanctions, because they believed that the state had unlawfully subjected them to threat of enforcement. 469 S.W.3d at 79. This Court held that the *ultra vires* exception creates an avenue for pre-enforcement declaratory judgment that would address a plaintiff's injury. *Id*. Like the plaintiffs in *Patel*, who feared the closure of their business as well as significant fines by the state for regulatory overreach,

Plaintiffs here are seeking prospective injunctive relief to stop future enforcement and disciplinary actions that would be ruinous of their professional practice. *Id.* at 78 (Plaintiffs in *Patel* "were subject to a real threat of likely civil and criminal proceedings, as well as administrative proceedings that could result in penalties and sanctions.").

An *ultra vires* suit can guide future action by making clear the contours of an official's authority. *Hall v. McRaven*, 508 S.W.3d 232, 241 (Tex. 2017). In addition, the past conduct giving rise to an *ultra vires* claim can be both action and inaction. In *Sefzik*, for example, the plaintiff brought suit requesting that the court declare he was required a hearing when his application for permission to post an advertising sign was denied by the State Department of Transportation. 355 S.W.3d at 620. This Court held that the *ultra vires* exception allowed the plaintiff to bring suit to clarify his rights, even though the conduct at issue was a failure to act. *Id*. at 623. Similarly, in *Phillips v. McNeill*, this Court determined that an *ultra vires* suit could require state officials to provide a contested-case hearing. 635 S.W.3d 620, 629 (Tex. 2021). By contrast in *Hall*, a supposed misinterpretation of federal privacy law—a law outside the core of the University of Texas Chancellor's authority—did not give rise to a valid *ultra vires* claim because that federal privacy law did not "suppl[y] the parameters of [his] authority." 508 S.W.3d. at 242.

Here, Plaintiffs are challenging Defendants' actions (and inactions) to date, which chill physicians from performing medically necessary abortions, and are requesting a declaration of their statutory rights. Defendants have refused to provide clarity about what their statutory authority is, despite repeated requests from physicians and lawmakers. 4.RR.1199–1200; CR.598–99. Moreover, Attorney General Paxton threatened to "strictly enforce" the bans, even though a physician cannot violate the ban if they acted in good-faith reliance on the medical exception. *See* Tex. Health & Safety Code § 170A.002. These actions and failures to act are enough, as the lack of clarity and the aggressive enforcement posture have precluded the delivery of protected care. The requested prospective relief goes to the core of Defendants' enforcement authority: they are authorized to bring civil lawsuits and revoke medical licenses, among other things. *See Houston Belt & Terminal Ry. Co. v. City of Houston*, 487 S.W.3d 154, 158 (Tex. 2016) ("[A] government officer with some discretion to interpret and apply a law may nonetheless act 'without legal authority,' and thus *ultra vires*, if he exceeds the bounds of his granted authority or if his acts conflict with the law itself.").

2. Pre-enforcement *ultra vires* claims are permissible

Defendants' chief complaint boils down to this: pre-enforcement review is not available under Texas law. This cannot be so. The U.S. Supreme Court's decision about S.B. 8 was premised, at least in part, on the availability of pre-enforcement

litigation to challenge abortion bans under state law. *Whole Woman's Health v. Jackson*, 595 U.S. 30, 48–49 (2021) ("[E]veryone acknowledges that other pre-enforcement challenges may be possible in state court as well."). But more broadly, this does not follow logically. An *ultra vires* claim by its nature is prospective, even when the complained-of conduct occurred previously. *Sefzik*, 355 S.W.3d at 621 ("Our precedent made clear that 'suits to require state officials to comply with statutory or constitutional provisions are not prohibited by sovereign immunity.' ") (quoting *Heinrich*, 284 S.W.3d at 372). A pre-enforcement suit seeks the same type of relief—a forward-looking injunction to ensure that any action taken by the official-capacity defendants complies with state law—as in all the prior suits approved by this Court.

Principles from pre-enforcement challenges under *Ex parte Young*, 209 U.S. 123 (1908), support the adjudication of Plaintiffs' *ultra vires* claims under state law. Generally speaking, the "doctrine of sovereign immunity prohibit[s] federal courts from exercising jurisdiction over claims against the states, but a narrow exception permits them to hear claims for prospective relief against state officials who have some connection with the enforcement of a state law that is alleged to violate federal law." *Whole Woman's Health v. Jackson*, 642 S.W.3d 569, 573 n.5 (Tex. 2022). In other words, such suits seek to ensure conformity with federal laws, albeit a conflicting statute or the U.S. Constitution. *See Virginia Off. for Prot. & Advoc. v.*

Stewart, 563 U.S. 247, 255 (2011) ([*Ex parte Young*] "rests on the premise—less delicately called a 'fiction,'—that when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes." (internal citation omitted)). Such a formulation echoes *Heinrich* where this Court noted that "*ultra vires* suits do not attempt to exert control over the state—they attempt to reassert the control of the state." 284 S.W.3d at 372. In fact, this Court cited *Ex parte Young* in *Heinrich* concluding that "a claimant who successfully proves an *ultra vires* claim is entitled to prospective injunctive relief, as measured from the date of the injunction." *Id.* at 374; *see also Schraer v. Texas Health & Hum. Servs. Comm'n*, No. 13-12-00702-CV, 2014 WL 586036, at *4-*5 (Tex. App. Feb. 13, 2014).

To make out a pre-enforcement challenge under *Ex parte Young*, a plaintiff must demonstrate a sufficient connection between the named official-capacity defendant and their enforcement of the state laws at issue in the litigation. "The required 'connection' is not 'merely the general duty to see that the laws of the state are implemented,' but 'the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty.' " *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014) (quoting *Okpalobi v. Foster*, 244 F.3d 405, 416 (5th Cir. 2001)); *see also Texas Democratic Party v. Abbott*, 978 F.3d 168, 179 (5th Cir. 2020). Such a review demands "a provision-by-provision analysis, *i.e.*, the official

must have the requisite connection to the enforcement of the particular statutory provision that is the subject of the litigation." *Id.* (citing *In re Abbott*, 956 F.3d 696, 707 (5th Cir. 2020), *cert. granted, judgment vacated sub nom. Planned Parenthood Ctr. for Choice v. Abbott*, 141 S. Ct. 1261 (2021)). Utilizing this standard, Plaintiffs have asserted claims sufficient to meet the requirements of *Ex parte Young* for both of the named official-capacity defendants.

Attorney General Ken Paxton: The Attorney General has specific enforcement authority under the Trigger Ban, which is not disputed by the Defendants. Any person who violates the Trigger Ban "is subject to a civil penalty of not less than $100,000 for each violation," and "[t]he attorney general shall file an action to recover a civil penalty assessed under this section and may recover attorney's fees and costs incurred in bringing the action." Tex. Health & Safety Code § 170A.005. AG Paxton has made it clear that he intends to enforce this civil component of the Trigger Ban, among other laws relating to abortion. For example, AG Paxton published an "advisory" that "[his] office" is authorized to pursue financial penalties under the Trigger Ban and promised to "strictly enforce this law." Tex. Att'y Gen., Advisory on Texas Law Upon Reversal of *Roe v. Wade* (June 24, 2022) (App'x.A). In addition, the Attorney General has specified authority to enforce the Texas Medical Practice Act and seek a civil penalty of $1,000 for each violation. Tex. Occ. Code § 165.101. The TMPA prohibits "unprofessional or

dishonorable conduct likely to deceive or defraud the public" and arises whenever a physician engaged in "an act that violates any state or federal law if the act is connected with the physician's practice of medicine." *Id.* § 164.053. Accordingly, AG Paxton has "the requisite connection to the enforcement of the particular statutory provision that is the subject of the litigation." *Texas Democratic Party*, 978 F.3d at 179.

Executive Director Carlton: The Executive Director of the Texas Medical Board (TMB) is authorized to take disciplinary action in his capacity as the chief executive and administrative officer against a medical provider who violates Chapter 171 or Section 170A.002 of Texas Health and Safety Code or any state law. Tex. Occ. Code §§ 152.051, 165.001, 164.053(a)(1). Section 170A.002 mandates that the TMB take disciplinary action against a medical provider who "intentionally or knowingly perform[ed] an abortion on a woman who is pregnant with a viable unborn child during the third trimester of the pregnancy." Tex. Health & Safety Code § 170A.002(b). Thus, Executive Director Carlton is assigned to enforce the challenged law and his office is required by law to take action.

Defendants' challenge the threat of enforcement against Plaintiffs—an argument that sounds in standing. Specifically, they assert: "Plaintiffs have not alleged or introduced evidence that Defendant Officials can—*let alone intend to*—enforce the prohibitions and medical exceptions in any manner that is not in

accordance with their statutory authority." Defs. Br. at 25 (emphasis added). However, *ultra vires* suits are not limited to statutory authority. *Sefzik*, 355 S.W.3d at 621. And Plaintiff providers face at least as daunting a threat of enforcement as Lorie Smith did in *303 Creative LLC v. Elenis*, 600 U.S. 570, 580 (2023) (Smith was required to show " 'a credible threat' existed that Colorado would, in fact, seek to compel speech from her that she did not wish to produce.") (citation omitted). The same factual predicates averred in that case are present here. Just as Smith asserted that "the First Amendment's Free Speech Clause protects her from being compelled to speak what she does not believe," *303 Creative*, 600 U.S. at 580, the Plaintiff providers here assert that Texas law protects their ability to provide life-saving care. Because on standing "Texas law and federal law are parallel," *Texas Propane Gas Ass'n v. City of Houston*, 622 S.W.3d 791, 800 (Tex. 2021), *reh'g denied* (June 11, 2021), Plaintiffs have shown enough on threat of enforcement to satisfy the requirements of these claims.

II. THE DISTRICT COURT'S INJUNCTION SHOULD BE AFFIRMED

The lower court correctly concluded that Plaintiffs are entitled to a preliminary injunction. Plaintiffs are likely to succeed on the merits, the remaining factors support the issuance of an injunction, and there is clear evidence of irreparable harm. *Amici* fully support Plaintiffs' arguments on the merits.

A. Plaintiffs Are Likely to Succeed on the Merits

The Texas Constitution states: "no citizen of this State shall be deprived of life[.]" Tex. Const. art. I, § 19. Texas courts have repeatedly held that this right to life includes protection from bodily harm, including in medical settings. *See* Plaintiffs' Br. 39-40. Moreover, the right to life has been interpreted by other state supreme courts to encompass a right to abortion in medically necessary situations or when a pregnant person's life is in danger. Oklahoma's Supreme Court, for example, applying an analogous constitutional provision to a similar abortion ban, concluded that the Oklahoma constitution "creates an inherent right of a pregnant woman to terminate a pregnancy when necessary to preserve" their life. *Oklahoma Call for Reprod. Just. v. Drummond*, 526 P.3d 1123, 1130 (Okla. 2023). In North Dakota, the supreme court emphasized that "the plain language of its Constitution" established a pregnant person's right "to preserve her life or health," which "includes providing an abortion when necessary to prevent severe, life altering damage." *Wrigley v. Romanick*, 988 N.W.2d 231, 240–43 (N.D. 2023). And in Indiana, the "inalienable" right to "protect one's own life" extends "beyond just protecting against imminent death, and it includes protecting against 'great bodily harm'" or "a serious health risk." *Members of Med. Licensing Bd. of Ind. v. Planned Parenthood*, 211 N.E.3d 957, 976 (Ind. 2023).

Given the analysis of other state supreme courts and this Court's precedent, the lower court correctly interpreted Texas law to allow physicians to exercise their good-faith medical judgment to provide an abortion to preserve a patient's life and health, and to do so without requiring a patient's condition to be imminently life-threatening. Further, the abortion bans must be interpreted in coherence with the Texas Constitution's right to life, as the care being sought concerns life-saving measures. *See, e.g.*, *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 148–49 (Tex. 1995) ("[T]he State has no power to commit acts contrary to the guarantees found in the Bill of Rights.") (citations omitted).

B. Issuance of a Preliminary Injunction Is in the Public Interest

Under Texas law, a preliminary injunction is merited when, among other things, a court finds that the public interest weighs in favor of the injured party. *Int'l Paper Co. v. Harris County*, 445 S.W.3d 379, 395 (Tex. App. 2013) (citing *Hot Rod Hill Motor Park v. Triolo,* 276 S.W.3d 565, 568 (Tex. App. 2008)). Plaintiffs have demonstrated that, without relief, the public interest will suffer significantly.

The present lack of clarity regarding the law's medical exception exacerbates disparities in reproductive health access and heightens the risk for death during pregnancy complications, particularly for people of color. Nationally, people of color have less access to contraception, worse birthing outcomes, and higher

maternal mortality.[2] When they seek abortions, they tend to seek them later into pregnancy, due to health, cost, and other access barriers. Race is among the strongest predictors of outcomes in reproductive health, because people of color have less access to healthcare, experience worse outcomes, and experience discrimination in obtaining treatment.[3] For example, Black women are about three times more likely than White women to die from childbirth or other pregnancy-related complications.[4] These disparities are also true in Texas.

In evaluating Texas abortion laws, this Court should recognize that forcing pregnant people to carry dangerous and life-threatening pregnancies to term will exacerbate existing racial disparities that already and profoundly affect lives. According to Texas' Maternal Mortality and Morbidity Review Committee and the Department of State Health Services, among the documented pregnancy-related deaths in Texas, a staggering 90% were preventable.[5] The maternal mortality ratio

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[2] Latoya Hill, Samantha Artiga, and Usha Ranji, *Racial Disparities in Maternal and Infant Health: Current Status and Efforts to Address Them*, KFF (Nov. 2022), https://www.kff.org/racial-equity-and-health-policy/issue-brief/racial-disparities-in-maternal-and-infant-health-current-status-and-efforts-to-address-them/.

[3] Cristina Novoa & Jamila Taylor, *Exploring African Americans' High Maternal and Infant Death Rates*, Ctr. Am. Progress (Feb. 1, 2018), https://www.americanprogress.org/article/exploring-african-americans-high-maternal-infant-death-rates/.

[4] Kelsey Butler, *U.S. Maternal Mortality Rate Among Black Women Is Nearly Triple That Of White, Hispanic Peers*, Bloomberg Law (Feb. 23, 2023), https://www.bloomberg.com/news/articles/2022-02-23/u-s-black-maternal-mortality-rate-triple-that-of-white-hispanic-women-in-2020.

[5] Texas Health and Human Services, *Texas Maternal Mortality and Morbidity Review Committee and Department of State Health Services Joint Biennial Report 2022*, p.8 (2022).

for Texas is higher than the national average—20.2 maternal deaths per 100,000 live births (in 2017, the latest year with available data), compared to the national average of 17.4 deaths per 100,000 live births (in 2018, the closest year for which data is available).[6] The Texas Maternal Mortality and Morbidity Report also finds significant demographic and geographic disparities in maternal mortality and morbidity, particularly among non-Hispanic Black women, who are twice as likely as white women and four times as likely as Hispanic women to die from pregnancy-related causes. Placed in this context, clarifying the standard for when a pregnant person may receive life-saving care advances the public interest.

C. Plaintiffs Have Suffered Irreparable Harm

Under Texas law, an injunction will be granted when plaintiffs demonstrate irreparable harm. Among other things, irreparable injury is defined as an injury for which compensation cannot be made, or for which compensation cannot be measured by any certain pecuniary standard. *See, e.g.*, *Tri-Star Petroleum Co. v. Tipperary Corp.*, 101 S.W.3d 583, 591 (Tex. App. 2003) (citation omitted). Plaintiff patients in this case have suffered irreparable harm due to the physical and emotional impact of being forced to carry a pregnancy despite suffering from a medical emergency putting their lives in danger. Plaintiff providers have suffered harm as a result of the threat of enforcement and their inability to deliver medically indicated

[6] *Id*. at 10.

care, among other challenges. If the standard for when medical professionals are able to provide emergency care to patients is not clarified—and the injunction is not reinstated—the harm will remain ongoing. *See also* Plaintiffs' Br. 56-59.

The need for reinstatement of the injunction is especially true in chronically under-served areas. In Texas, 3 million people live in areas defined by the U.S. Census as "rural," more than the population of 18 other states.[7] In rural areas, where access to care is already strained, the chill caused by the bans has resulted in more rural patients being forced to travel long distances to other states to seek care, or for those without the ability to travel, being forced to carry out unviable and dangerous pregnancies in areas with already-limited care options.

[7] Michael Ratcliffe, *Defining Urban and Rural at the U.S. Census Bureau: A Look at Demographic Trends*, United States Census Bureau (May 26, 2022), https://demographics.texas.gov/Resources/Presentations/DDUC/2022/2022_05_26_DefiningUrbanandRuralattheUSCensusBureauALookat.pdf.

PRAYER

For all of the foregoing reasons and for the reasons provided by Plaintiffs, the temporary injunction and denial of the plea to the jurisdiction should be affirmed.

Respectfully submitted,

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Dated: November 22, 2023

Appendix A—List of *Amici Curiae*

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A true and correct copy of the foregoing brief has been served on all counsel of record through electronic service on November 22, 2023.

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