No. 23-0994

IN THE SUPREME COURT OF TEXAS

IN RE STATE OF TEXAS; ATTORNEY GENERAL OF TEXAS; KEN PAXTON, in his official capacity as Provisional 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

AMICUS CURIAE BRIEF ON BEHALF OF WOMEN'S AND CHILDREN'S ADVOCACY PROJECT, EQUAL MEANS EQUAL AND ELIZABETH CADY STANTON TRUST

Respectfully submitted,

JASON C.N. SMITH
State Bar No. 00784999
LAW OFFICES OF JASON SMITH
612 Eighth Avenue
Fort Worth, Texas 76104
(817) 334-0880, telephone
(817) 334-0898, facsimile
Email: jasons@letsgotocourt.com
Service Email: courtfiling@letsgotocourt.com

WENDY J. MURPHY
New England Law | Boston
154 Stuart Street
Boston, MA
BBO# 550455
(617) 422-7410
Email: wmurphy@nesl.edu
Admitted Pro Hac Vice

Attorneys for Amici
Women's and Children's Advocacy Project,
Equal Means Equal, and
Elizabeth Cady Stanton Trust

TABLE OF CONTENTS

TABLE OF AUTHORITES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Three national women's rights charitable organizations submit an amicus brief in this matter because it raises profoundly important issues of constitutional magnitude that will affect the rights of all women in Texas. Amici ask the Court to consider claims and arguments not raised below by either party and that afford Ms. Cox and all women in Texas better legal protections than the claims and arguments now pending before the Court.

Relators and Respondents oppose this motion.

AMICI

Amici have a significant interest in this matter because they are all established charitable organizations with demonstrated histories of advocating for legal equality and equal treatment of women under all laws. They have a legitimate concern that the strongest possible legal claims and arguments are not being advanced on behalf of Ms. Cox and all women in Texas.

WOMEN'S AND CHILDREN'S ADVOCACY PROJECT

The Women's and Children's Advocacy Project (WCAP) is a public interest law project of the Center for Law and Social Responsibility at New England Law | Boston. The WCAP engages in direct litigation and submits amicus briefs in state and federal court on behalf of the rights and interests of women and children.

WCAP's director was lead counsel in the first federal lawsuit to validate the ERA, which was filed in Massachusetts federal court in January 2020.

EQUAL MEANS EQUAL

Equal Means Equal (EME) is a project of the Heroica Foundation, a 501(c)(3) charitable organization that Advocates for sex/gender equality and the fully equal treatment of women. Through the use of grassroots activism, social media, and documentary filmmaking, EME has actively led or participated in hundreds of events to support the ERA and sex/gender equality. In 2016, EME produced and released the film Equal Means Equal. In 2018, EME testified before the Illinois legislature in support of that state's successful ratification of the 1972 Equal Rights Amendment. EME has many members and supporters in Texas.

ELIZABETH CADY STANTON TRUST

The Elizabeth Cady Stanton Trust Elizabeth Cady Stanton Trust ("ECST") is a national 501(c)(3) organization whose mission includes education and advocacy for women's constitutional equality and rights. ECST is widely known as a leader in the women's rights movement. It is named for famed women's rights activist Elizabeth Cady Stanton, who authored the historic Declaration of Sentiments in 1848, which was presented at the well-known Women's Rights Convention at Seneca Falls, New York. The Declaration of Sentiments was the first effort by

women in the United States to establish their constitutional equality. Its primary sentiment reads: "All men and women are created equal." The Declaration of Sentiments was styled after the Declaration of Independence and was meant as a protest against the exclusion of women as fully equal persons under the United States Constitution. ECST was founded by Stanton's great-great granddaughter in 1999 and has been working toward the establishment of women's equality ever since. ECST has performed its mission throughout the United States, including in Texas.

STATEMENT OF THE CASE

Kate Cox filed a lawsuit on December 5, 2023 in Travis County District Court seeking a declaratory judgment and injunctive relief. Ms. Cox is a pregnant woman in need of urgent abortion care because she recently learned that her fetus has life threatening medical problems, and that if she does not have an abortion her own life and health are at risk, including that she may be unable to have children. Verified Pet.¶¶ 1-23, 36, 131, 136-37. App. A. Ms. Cox's doctors are unwilling to perform an abortion because while recently enacted laws in Texas (hereafter "abortion restrictions") appear to permit abortions in the circumstances presented by her case, Texas state officials disagree and have threatened prosecution if an abortion is performed. Resp. Br. pp. 7-8.

Ms. Cox's claims below include her *Third Claim for Relief* which asserts "Rights for Pregnant People and Supporters of Abortion" under Tex. Const. art. 1, §

3. Verified Pet. P. 45. This claim alleges that the abortion restrictions violate the Texas Constitution because they deny Ms. Cox and all women equal treatment under the law, Verified Pet., ¶¶ 143-50; 182-92.

Ms. Cox's *Fourth Claim for Relief* asserts rights of "Equality Based on Sex for Pregnant People" under Tex. Const. art. 1, § 3a. This claim alleges that "Texas abortion bans deny pregnant women equality because of sex…" and "are based on gender stereotypes", thus "constitute "discrimination because of sex." Verified Pet., ¶¶195-96.

On December 7, 2023, the lower court granted Ms. Cox an injunction and allowed her to receive an abortion. MR 203-07. Relators then filed a Writ of Mandamus with this Court, which stayed the lower court's order. Resp. Br. p.8.

Ms. Cox correctly argued below that the abortion restrictions violate the Texas Constitution's guarantee of sex equality and prohibition against sex discrimination, but incorrectly argued that the constitutionality of the restrictions should be reviewed under a meager "rational relationship" standard. Verified Pet. ¶¶189, 198. Because Ms. Cox asserts a less protective standard than that which is required under the Texas Constitution and the United States Constitution, Amici urge this Court to disregard Ms. Cox's view, and apply strict scrutiny as this affords Ms. Cox and all women in Texas maximum legal protection for all their rights.

ISSUES PRESENTED

1. Whether The United States Constitution And The Texas Constitution Require Strict Judicial Scrutiny?

2. Whether The Abortion Restrictions Fail Strict Scrutiny?

TO THE HONORABLE SUPREME COURT OF TEXAS:

SUMMARY OF ARGUMENT

The United States Constitution and the Texas Constitution require strict judicial scrutiny when courts review claims involving sex-based inequality and sex discrimination.

The abortion restrictions fail strict scrutiny under the United States Constitution and the Texas Constitution.

STANDARD OF REVIEW

Respondents adequately set forth the general standard of review for mandamus petitions, including that Relators must establish that the lower court's decision was a "clear and prejudicial error of law." Resp. Br. p. 9. But they nowhere set forth the standard of review this Court must apply when it analyzes the constitutionality of the abortion restrictions. As argued at length herein, the proper standard is strict scrutiny.

ARGUMENT

I. STRICT JUDICIAL SCRUTINY IS REQUIRED UNDER THE UNITED STATES CONSTITUTION AND UNDER THE TEXAS CONSTITUTION

Art. I, § 3 of the Texas Constitution grants people in Texas "equal rights." This constitutional provision is directly analogous to the federal Equal Protection clause,

which grants people "Equal Protection of the laws." U.S. Const. amend. XIV, § 1. A similar provision, Art. I, § 3a, prohibits the state from "deny[ing] or abridg[ing rights] because of sex." § 3a is directly analogous to the federal ERA, which states, "Equality of rights under the law … shall not be denied or abridged … on account of sex." U.S. Const. amend. XXVIII.

Ms. Cox filed no claims under the United States Constitution and asked the court below to apply only a "rational relationship" standard of review when assessing the constitutionality of the abortion restrictions under the Texas Constitution, even though this Court long ago held that the Texas Constitution requires strict scrutiny. *In the Interest of McLean*, 725 S.W. 2d, 696, 698 (1987) ("Our reading of the [Texas] Equal Rights Amendment elevates sex to a suspect classification… [and must be] afforded maximum constitutional protection").[1] This Court explained that strict scrutiny under the Texas Constitution requires the state to prove that the abortion restrictions are narrowly tailored to serve a compelling state interest, and that it has used the least restrictive means to do so. *McLean,* at 698., ("strict scrutiny "does not yield except to compelling state interests" and will tolerate discrimination, "only when the proponent of the discrimination can prove that there is no other manner to protect the state's compelling interest." quoting *Mercer v.*

[1] Curiously, Ms. Cox asserted a claim under Art. I, § 3a, yet nowhere cited *In the Interest of McLean*, 725 S.W. 2d, 696 (1987) in her pleadings despite its seminal nature as the leading case on women's legal status under the Texas Constitution, and entitlement to strict scrutiny under § 3a.

Board of Trust, North Forest Independent School District, 538 S.W.2d 201 (Tex. Civ. App.--Houston [14th Dist.] 1976, writ ref'd n.r.e.)).

Despite this Court's holding in *McLean* that strict scrutiny is required under the Texas Constitution, Ms. Cox asked that only a rational relationship standard of review be applied. Amici urge this Court to disregard Ms. Cox view and heed the requirements of the federal ERA[2] and the Equal Protection clause[3] because both require this Court to apply a judicial review standard more rigorous than "rational relationship."

---

[2] While there is some controversy about the ERA's current validity, many government officials agree the ERA is valid and is currently the Twenty-Eighth Amendment to the United States Constitution. See e.g., H.J. Res.25, January 31, 2023 (dozens of congresspeople submit "Joint Resolution" declaring the ERA "valid").

[3] Although the Supreme Court in *Dobbs v. Jackson,* 597 U.S. ___ (2022) noted that abortion restrictions are not subject to Equal Protection claims because abortion is not a "sex-based" concern given that "only one sex can undergo" pregnancy, 597 U.S. ___ (slip op. at 10-11 (2022), this aspect of *Dobbs* is mere dictum and may be disregarded as *Dobbs* was decided solely under the Due Process clause; there was no Equal Protection claim. Moreover, the *Dobbs* Court relied on *Geduldig v. Aiello*, 417 U.S. 484 (1974) to support its claim that pregnancy is not sex-based, and scholars have long dismissed *Geduldig* as not intellectually sound, and inconsistent with established precedent under the Equal Protection clause. Liss, S., The Constitutionality of Pregnancy Discrimination: The Lingering Effects of *Geduldig* and Suggestions For Forcing Its Reversal, 23 *N.Y.U. Review of Law and Social Change*, pp. 59-103 (1997). Among the many serious criticisms, *Geduldig* barely addressed Equal Protection, dismissing the claim in a footnote, without discussion, on the theory that not all women can get pregnant, *Geduldig* at 496–97. This reasoning was subsequently rejected by the Supreme Court in a case alleging a sex-based Equal Protection claim. See *Wengler v. Druggists Mutual Insurance Co.,* 446 U.S. 142 (1980) (Male plaintiffs allowed to assert Equal Protection claim based on sex even though "not all men" were subjected to the sex discrimination alleged by the male plaintiffs). Regardless, courts have recognized the validity of an Equal Protection argument in the context of pregnancy and reproduction notwithstanding *Geduldig*. See e.g., *Jane L. v. Bangerter*, 61 F.3d 1505, 1516 n.11 (10th Cir. 1995).

Strict scrutiny is mandatory under the federal ERA and is far more demanding and protective than rational relationship. *Frontiero v. Richardson*, 411 U.S. at 692. Likewise, the Equal Protection clause requires "exacting scrutiny," *U.S. v. Virginia*, 518 U.S. 515, 533 (1996), which, while less rigorous than strict scrutiny, is more rigorous than rational relationship. Indeed, rational relationship is the weakest possible standard in the hierarchy of judicial review standards; women have not been subjected to anything so meager under the federal Constitution since 1976 when the Supreme Court decided *Craig v. Boren*, 429 U.S. 190 (1976), in which it adopted the "intermediate scrutiny" standard, overturning the lesser "rational basis" standard it had adopted a few years earlier in *Reed v. Reed*, 404 U.S. 71 (1971), *Boren*, 429 U.S. at 197. Ms. Cox's reliance on a judicial review standard that was rejected by the Supreme Court as constitutionally inadequate more than forty-five years ago is curious and dangerous as Ms. Cox is suing the state not only on behalf of herself, but also on behalf of all women. In a case like this where the rights of all women are at stake, it is incomprehensible that Ms. Cox failed even to *ask* the court to apply the most rigorous and protective judicial review standard possible.

The inadequacy of the rational relationship test becomes clearer when Ms. Cox's *Claims for Relief* are examined, which set forth her position as to the constituent components of the rational relationship test. Ms. Cox asserts that the rational relationship requires the state to prove that the abortion restrictions serve

either a "compelling" *or* an "important" state interest. Verified Pet. ¶¶178, 188. This odd use of the disjunctive invites the Court to choose between "important" and "compelling." The federal ERA is preferable because "strict scrutiny" affords the Court no choice – the compelling state interest standard is mandatory. Chemerinsky, E., *Constitutional Law: Principles and Policies*, (Aspen Law and Business, 1997) at 529. The Equal Protection clause similarly affords women better legal protection because its "exacting scrutiny" standard requires "exceedingly persuasive justification," *U.S. v. Virginia*, 518 U.S. at 533, which, while less demanding than a "compelling state interest", is more demanding than an "important" one.

Ms. Cox also argued below that the rational relationship test requires only that the abortion restrictions be "sufficiently tailored" to serve the state's interest. Verified Pet. ¶¶178, 188). Again, Ms. Cox asked the court to apply a meager sufficiently tailored test even though strict scrutiny requires "narrow" tailoring. *Frontiero*, 411 U.S. at 692. Sufficiently tailored is also less rigorous than the "substantially related" test, which is required under the "exacting scrutiny" standard of the Equal Protection clause. *U.S. v. Virginia*, 518 U.S. at 524. *But see*, *Americans for Prosperity Foundation v. Bonta*, 594 U.S. ___ (2021) (the more demanding standard of "narrow tailoring" is now mandatory under "exacting scrutiny.").

Finally, under the federal ERA, the abortion restrictions must also satisfy the "least restrictive means" test because this is a required element of strict scrutiny.

Chemerinsky, E., at 529. The "least restrictive means" test prohibits overbroad restrictions that cause unnecessary encroachments on individual rights. As discussed further in the following section, this is an important feature of strict scrutiny because it prohibits overbroad restrictions, yet Ms. Cox never asked the court below to apply the least restrictive means test.

II. THE ABORTION RESTRICTIONS FAIL STRICT SCRUTINY

Before undertaking to apply strict scrutiny in this case, this Court should acknowledge that Texas has a compelling state interest in protecting women's rights to life and health, including the right to procreate. Indeed, the Supreme Court has held that the right to procreate is a basic civil right - fundamental to the very existence and survival of the human race. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). This alone compels the Court to reject a judicial review standard less rigorous than strict scrutiny.

Because the state has a compelling interest in protecting women's rights to life and health, including the ability to procreate, it is significantly limited in its ability to encroach on these rights, regardless of the nature of any competing interest. When, as here, such encroachments are also discriminatory based on sex because they treat women differently or have a disparate impact on women's lives, they simply cannot survive constitutional muster unless they are "narrowly tailored" to serve a compelling interest, *and* "there is no other manner" to protect it. *Id*.

The state makes no assertion here that it has a compelling interest in protecting unborn life. To the contrary, it argued below only that it has a "legitimate interest" in the preservation of prenatal life "at all stages of development." Def. Opp. To TRO, P. 42. The state suggests by this language that its interest remains the same throughout gestation, which cannot be sustained as the United States Supreme Court has long recognized that the state's interest changes during the course of a pregnancy and "grows" as the woman's pregnancy reaches full-term, becoming compelling only when the fetus becomes viable. *Roe v. Wade*, 410 U.S. 113, 162-63 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992).[4] In fact, it was a Texas abortion law that the Supreme Court analyzed in *Roe* when it said a state has no compelling interest in an embryo or fetus, prior to viability. *Roe*, *supra*. In any event, since the state concedes it has no compelling state interest at any stage of fetal development, it cannot satisfy strict scrutiny.

The state's claim of only a "legitimate" state interest is in accord with this Court's ruling in *McLean*, where it held that the state has only a "legitimate" or "significant interest" in the welfare of an already born child, *McLean,* at 698. If the state has only a legitimate or significant interest in the well-being of an already born

[4] Although in *Dobbs* the Supreme Court overturned the aspect of *Roe v. Wade*, 410 U.S. 113 (1973) that gave women a due process right to abortion under the federal Constitution, it did not overturn its prior rulings on the nature of the state's interest in the unborn, and how it changes during a woman's pregnancy, and only becomes compelling after viability.

child, it cannot possibly have a stronger "compelling" interest in the well-being of children not yet viable, much less born.

Even if the state's interest could be seen as compelling, the abortion restrictions are not narrowly tailored to serve the state's interest. As this Court said in *McLean*, a law is narrowly tailored only if it is "keyed" to the state's interest without needlessly discriminating against a competing compelling state interest. *Id*.

Here, the state has not crafted its abortion restrictions to satisfy narrow tailoring because the abortion restrictions forbid abortion after six weeks of gestation unless the pregnant woman's life is at stake, or a woman faces a "serious risk of substantial impairment of a major bodily function." Tex. Health & Safety Code §§ 170A. 002(b)(2), 171.002(3), 171.205(a). This language is hardly "tailored" to serve the state's interest, much less is it narrowly tailored, because it subordinates the state's well-settled compelling interest in preserving the life and health of a pregnant woman to its less than compelling interest in preserving a nonviable embryo, or a more developed fetus that has no chance at health or life. A narrowly tailored statute would at least prioritize a pregnant woman's health over an embryo, or a nonviable fetus that has no future chance at health or life.

The importance of narrow tailoring and ensuring that a state has used the least restrictive means to accomplish its goal cannot be overstated. Tailoring restrictive language as narrowly as possible recognizes the dangers of sex discriminatory laws

and prevents bigoted lawmaking. As was observed by this Court in *McLean*, a case involving sex discriminatory laws related to childbirth and parental rights, "A father … should not be required to meet a higher burden of proof solely because he is male." Indeed, and neither should a woman be required to risk her life or health, solely because she is female.

To the extent this Court questions whether the abortion restrictions are subject to heightened scrutiny at all under the federal Equal Protection clause, or the Texas Constitution's analogue, Art. I, § 3, under the theory that the *Dobbs* Court said there was no Equal Protection issue because abortion restrictions are not sex-based as only women can get pregnant, *Dobbs v. Jackson,* 597 U.S. ___ (2022) (slip op. at 10-11) (*accord*, *Bell v. Low Income Women of Tex.,* 95 S.W. 3d 253, 260 (Tex.2002)), this Court should disregard *Dobbs* as its mention of Equal Protection jurisprudence was mere dictum. This Court should instead be guided by *Michael M. v. Superior Court*, 450 U.S. 464 (1981), where the Supreme Court applied the Equal Protection clause to a challenged law that was discriminatory based on sex because of pregnancy, reasoning that the Equal Protection clause was applicable even though the sexes were not "similarly situated." *Id*., at 468-69. As with the challenged restrictions at issue in *Michael M.*, Texas' abortion restrictions must be subjected to Equal Protection and Equal Rights analyses, even though the sexes are not similarly situated, as they clearly discriminate based on sex by imposing health and life risks

solely on women (and people who can get pregnant who may not identify as women). Indeed, this Court embraced a sex discrimination claim by a man in *McLean* even though the legal challenge there was rooted in the fact that only women can get pregnant.

Even if this Court concludes that federal and state Equal Protection laws are inapt, it must recognize, as it has in the past, that the Texas ERA affords women broader legal protections because "the [Texas] Equal Rights Amendment is more extensive and provides more specific protection than both the United States and Texas due process and equal protection guarantees." *McLean* at 698; *accord*, *State v. Morales*, 826 S.W. 2d 201, 204 (Tex. App. -- Austin 1992), *rev'd on other grounds*, 869 S.W.2d 941 (1994). "More extensive" means, inter alia, that individuals may assert "disparate impact" claims, even when such claims are not available under Equal Protection jurisprudence, *see Arlington Heights v. Metropolitan Housing Corp.,* 429 U.S. 252 (1977). Disparate impact claims are "more extensive" because, unlike Equal Protection laws that address only intentional discrimination, they also cover unintentional discrimination that causes disproportionate harm to an identified class of people. *See e.g., EEOC v. Sambo's of Georgia, Inc.,* 530 F. Supp. 86, 92 (N.D. Ga. 1981). The more extensive scope of Texas' Equal Rights provision thus compels this Court to apply the Texas ERA regardless of *Dobbs* and regardless of

whether the abortion restrictions raise an Equal Protection issue, because it is beyond cavil that the restrictions have a disparate impact on women.

Texas voters in passing the Texas ERA chose to provide broad protections to women from being targeted by law because of their sex. Discrimination against women in enacting legislation that limits their abortion choices when their lives, health or right to procreate is threatened by a pregnancy violates the Texas ERA.

Moreover, the statutes are not narrowly tailored to protect the interests articulated by the State of Texas as required by the Texas ERA.

Accordingly, Ms. Cox's right to have an abortion in order to protect her right to procreate in the future is protected by the Texas ERA.

CONCLUSION AND PRAYER FOR RELIEF

Sex equality — the most fundamental of rights for all women — is at stake in this litigation and is not adequately being protected by either party. Amici seek to participate in this case for the limited purpose of advancing the strongest possible arguments on behalf of Ms. Cox and all women all women in Texas.

In light of the Supreme Court's unprecedented and devastating decision in *Dobbs v. Jackson*, which determined that pregnant women no longer enjoy federal Due Process protections for their reproductive rights, it is not asking too much that this Court welcome any and all arguments on behalf of women. When our nation's highest court rescinds constitutional protections and undermines fundamental rights

for half the population, state courts must open their courtroom doors to all claims and all arguments that might afford women an alternative means of protecting their rights.

Amici respectfully request that this Court adopt and apply the most rigorous judicial review standards under the Texas Constitution and the United States Constitution. Women deserve and are entitled to fully equal treatment under all laws.

Amici pray that the Court should deny the Texas Attorney General's Petition for Writ of Mandamus and allow Ms. Cox to proceed to get the abortion that will preserve her life, health and ability to procreate in the future.

Respectfully submitted,

/s/ Wendy J. Murphy
Wendy J. Murphy
New England Law | Boston
154 Stuart Street
Boston, MA 02116
BBO# 550455
(617) 422-7410
Email: wmurphy@nesl.edu
Admitted Pro Hac Vice

JASON C.N. SMITH
State Bar No. 00784999
LAW OFFICES OF JASON SMITH
612 Eighth Avenue
Fort Worth, Texas 76104
(817) 334-0880, telephone
(817) 334-0898, facsimile
Email: jasons@letsgotocourt.com
Service Email: courtfiling@letsgotocourt.com
ATTORNEYS FOR AMICI

CERTIFICATE OF COMPLIANCE

This pleading complies with the type volume limitations of Tex.R.App.P. 9.4(i)(2) because it contains 2,959 words, excluding the parts exempted by Tex.R.App.P. 9.4(i)(1).

/s/ JASON C.N. SMITH
JASON C.N. SMITH

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of December, 2023, a true and correct copy of the foregoing document has been sent via eservice, to all counsel of record, pursuant to the Texas Rules of Appellate Procedure.

/s/ JASON C.N. SMITH
JASON C.N. SMITH