APP. NO. 26A325

In the Supreme Court of the United States

M.W.,

Applicant,

v.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, N.G., AND O.A.,

Respondents.

To the Honorable Elena Kagan,
Associate Justice of the Supreme Court of the United States
and Circuit Justice for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF EMERGENCY APPLICATION FOR STAY PENDING PETITION FOR CERTIORARI

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INTRODUCTION

The Commissioning Parties' response only confirms the need for relief.

They say the Court lacks jurisdiction because denial of a writ petition is not final. Not so—California makes a writ petition the exclusive means to review personal jurisdiction. And in any case, this Court can still grant a stay pending further review.

On the merits, the Commissioning Parties offer nothing that diminishes the importance of setting due process limits on personal jurisdiction by consent. They do not try to defend the reasoning of the lose-lose dilemma posed by the trial court: that M.W. consented to its jurisdiction by attaching 147 pages to her jurisdictional objections and by purportedly resisting service. Instead, they offer other grounds for a general appearance that were never argued or adopted below. But most of the actions they cite occurred *after* the trial court's finding, and *all* of them are statutorily foreclosed from showing a general appearance. Cal. Code Civ. Proc. §§ 418.10–11. In short, they offer no reason the Court should not grant review and summarily reverse.

Nor can the Commissioning Parties escape this Court's scrutiny through their successful post-Application efforts to remove Baby G. from Texas—to the contrary, those actions amplify the need for review. While M.W. is pleased they proffered physician testimony that they would consent to life-saving care, the Texas court's order demanding that care may soon have no effect with their move to California. And since the Texas court vacated its only order that required notice to M.W., she has now lost all access to or information about Baby G., leaving her no way to ensure care occurs.

This Court can redress the California judgment's irreparable harm to M.W.'s right to "participat[e] in decisions regarding [Baby G.'s] health" by staying or reversing it. *Mirabelli* v. *Bonta*, 607 U.S. 492, 497 (2026). That relief is modest, appropriate, and essential: it will restore the birth presumption of Texas law, Tex. Fam. Code § 160.201(a)(1), let the dispute be decided by a court with jurisdiction over all parties, and give effect to the order for life-saving care. The Court should grant it.

ARGUMENT

I. The decision below is final and this Court has jurisdiction.

The Commissioning Parties seek to prevent this Court's review by arguing that the California Court of Appeal's summary denial of M.W.'s writ application is not final and that personal jurisdiction is subject to ongoing review in state court. This is both incorrect and immaterial. It is incorrect because California makes M.W.'s writ petition her sole and exclusive means to review personal jurisdiction, giving her no further review of that issue in state court. And it is immaterial because even if personal jurisdiction could still be reviewed in state court, this Court would have authority to grant a stay while other appellate process continues.

The denial of M.W.'s writ applications by the California courts is final as to personal jurisdiction because "later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 481 (1975). The California Supreme Court has left no doubt on this point: because state law provides a "method of obtaining appellate review" of personal jurisdiction decisions, "the availability of the interlocutory appellate remedy would, accordingly, *preclude review of the order upon appeal from a judgment entered after trial on the merits*." *McCorkle* v. *City of L.A.*, 70 Cal. 2d 252, 257 (1969) (emphasis added). Thus, "a defendant in a civil case may only challenge by extraordinary writ a trial court order refusing to quash service, and may not raise the issue on appeal of the final judgment." *People* v. *Mena*, 54 Cal. 4th 146, 156 (2012) (citing *McCorkle*, 70 Cal. 2d at 257); accord *State Farm Gen. Ins. Co.* v. *JT's Frames, Inc.*, 181 Cal. App. 4th 429, 442 (2010).

That principle is built into the plain language of the statute. If a defendant "petitions for a writ of mandate pursuant to subdivision (c)," she "is not deemed to have generally appeared *until the proceedings on the writ petition have finally concluded*." Cal. Code Civ. Proc. § 418.10(e)(2) (emphasis added). The writ proceedings finally concluded when the California Supreme Court denied review on August 26,[1] and at that moment, M.W. had no further recourse in state court.

The Commissioning Parties rely on *Kowis* v. *Howard*, 3 Cal.4th 888, 897 (1992), and its progeny, which stand for the undisputed point that a summary denial is not a ruling on the merits. Resp.18. That misses the point—section 1257(a) requires a final judgment, not a reasoned one. And the remaining decisions they cite are no further aid. Their only published decision, *In re Marriage of Obrecht*, 245 Cal. App. 4th 1, 4–5 (2016), reviewed a default judgment entered while the writ petition was pending—the one situation the California Supreme Court has reserved for a proper appeal on personal jurisdiction, *McCorkle*, 70 Cal. 2d at 258. And the other unpublished decisions are non-precedential. This Court thus has jurisdiction under 28 U.S.C. 1257(a) and authority to issue a stay under 28 U.S.C. 2101(f).

In any event, even if the Court were to credit the Commissioning Parties' position, it would not deprive this Court of authority to grant the stay that M.W. requested and was denied in each court below. Indeed, that's just what this Court did just last term. *Malliotakis* v. *Williams*, 146 S. Ct. 809, 809 (2026). "[E]ven if a state judgment is technically subject to further review in state proceedings, it may nevertheless be reviewable by this Court under § 1257." *T.M.* v. *Univ. of Md. Med. Sys. Corp.*, 146 S. Ct. 1739, 1753 (2026). For example, in *National Socialist Party of America* v. *Skokie*, 432 U.S. 43, 44 (1977) (per curiam), "[w]ithout providing any reasoning, both the State's intermediate appellate court and supreme court denied applications for a stay pending appeal" before the appellants' "constitutional rights would be violated," *Malliotakis*, 146 S. Ct. at 810–11 (Alito, J., concurring).

[1] The Application's List of All Proceedings inadvertently misstated the dates of the three Court of Appeal writ denials. The correct sequence is B355938 (denied July 27, 2026), B356109 (denied July 31, 2026), and B356235 (denied Aug. 7, 2026).

What happened here is similar but even worse. Not only have the California appellate courts summarily denied stays, they did not even docket M.W.'s appeal on the merits until she had filed her application in this Court—nearly three months after she appealed and long after the violation of her constitutional rights was complete. See *N.G.* v. *M.W.*, B357160 (Cal. Ct. App., docketed Sept. 10, 2026). So even if M.W. could obtain review of personal jurisdiction on that appeal, the California courts' denial of a stay while she was stripped of her rights in the Texas proceedings was "effectively a final determination on the merits" under 28 U.S.C. 1257(a), and likewise subject to stay under 28 U.S.C. 1651. *Malliotakis*, 146 S. Ct. at 811 (Alito, J., concurring). This Court has jurisdiction.

II. M.W. is likely to prevail on a question that warrants review.

Nothing in the Commissioning Parties' response diminishes the certworthiness of M.W.'s Application. They do not dispute that the due process limits of personal jurisdiction by consent present an important question that warrants this Court's attention. This Court raised but did not resolve that question in *Mallory* v. *Norfolk Southern Railway Company*, and it did so with four separate opinions on behalf of all the current Justices. 600 U.S. 122, 135–36 (2023). The *Mallory* dissent itself shows there is "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari." *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010). Plus, this Court raised the question again in *Fuld* v. *Palestine Liberation Org.*, 606 U.S. 1 (2025), and left it again unanswered. And this case furnishes an excellent opportunity to give that answer, since there is neither a factual basis to find that M.W. consented to the jurisdiction of the California courts nor a risk the case would be resolved on other grounds.

The Commissioning Parties attempt to portray the issue in this case as narrow and unworthy of the Court's review. Resp.21. Not so. The facts here probe the heart of the dispute in *Mallory*. Giving states unlimited discretion to find "implied consent" to jurisdiction, as the lower courts here have done, would allow them to "defeat the Due Process Clause by adopting a law at odds with the Due Process Clause." *Mallory*, 600 U.S. at 168 (Barrett, J., dissenting). This case tests whether there are in fact any constitutional boundaries on implied consent: is consent so malleable that a state court may find it even though a litigant complies with all state procedures to challenge jurisdiction and makes no manifestation of assent?

That question matters far beyond the specific procedural posture of this case. If the Due Process Clause gives state courts untrammeled authority to find that a litigant has consented to their jurisdiction, it would obliterate due process restraints on state power over out-of-state defendants. Any State could offer the Hobson's choice the California courts allowed here: a defendant unlawfully haled in from out of state can either (a) decline to appear and accept a default judgment; or (b) choose to appear to dispute jurisdiction and find her contest construed as consent. As the amici brief of Florida, Alaska, and 11 other States highlights, rejecting that rule matters not just for individual rights, but also for state sovereignty—and especially for complex, multi-jurisdictional surrogacy disputes. State.Br.7–13. This case is a fully appropriate vehicle to reject the lawless dilemma posed by an unbounded view of consent.

Nor do the Commissioning Parties fare any better in attempting to defend the trial court's sua sponte ruling as correct. They do not attempt to justify the trial court's reasoning that the volume of M.W.'s attachments to her objection to jurisdiction somehow converted that objection to consent. App.A.63–65. They do not and cannot defend the trial court's upside-down conclusion that M.W. consented to the jurisdiction of the California courts by resisting service of process. *Ibid.* And of course they don't try to rationalize the trial court's later statement that M.W. had sought "a denial of the ex parte relief on the merits," App.J.12, because it is flatly incorrect: her brief sought relief related only to jurisdiction and an inconvenient forum, App.E.6–11, and her initial appearance pointedly refused to reach the merits, App.L.10.

Instead, they ask the Court not to disturb the trial court's consent finding based on grounds that neither they, the trial court, nor any other court stated at any time below: that M.W. consented to jurisdiction by arguing other matters unrelated to personal jurisdiction. See Resp.20. There is a good reason this argument was never raised below—it is legally meritless and it rests almost entirely on conduct that post-dates the finding of consent.

Most important, this attempt to rehabilitate the trial court's consent finding fails as a matter of law. The Commissioning Parties argue that various aspects of M.W.'s participation in the ex parte proceedings suggest consent to jurisdiction, but they never mention California's statute that states the opposite: "[a]n appearance at a hearing at which ex parte relief is sought … *is not a general appearance*." Cal. Code Civ. Proc. § 418.11 (emphasis added); cf. *Factor Health Mgmt.* v. *Superior Court*, 132 Cal. App. 4th 246, 250–51 (2005) (finding general appearance in ex parte proceedings only where requested relief went beyond that requested ex parte). This Court need not decide any state law question to see that finding consent contrary to this statute violates the Due Process Clause's demands. Indeed, while a litigant might be penalized for "fail[ing] to follow specific procedural rules" to preserve a personal jurisdiction defense, *Mallory*, 600 U.S. at 147–48 (Jackson, J., concurring), no view of due process can impose the punishment of waiver even when a litigant carefully adheres to and relies on those same rules. To suggest otherwise is not fair notice, but Kafka.

Though the Court need go no further to reject the Commissioning Parties' new appellate defense of the trial court's ruling, their argument founders on the facts as well. They blur the weakness of their purported examples of consent to jurisdiction by omitting nearly all relevant chronology. See Resp.7–10, 20–21. Almost all the examples they cite occurred *after* the trial court had already found M.W. made a general appearance and had directed the parties to proceed to the merits:

- The Commissioning Parties say M.W. made a general appearance through testimony and argument on whether she had independent counsel. Resp.7–8. But that didn't happen until June 15, App.J, three days after the trial court found a general appearance, App.A.63–65.

- They insist M.W.'s counsel effected a general appearance by arguing about their intentions for life-saving care. Resp.9 (citing App.A.67:9–10). But this was after the trial court had already found a general appearance, refused M.W.'s request to further brief the issue, and directed her to proceed to the merits. App.A.63–65.

- They argue M.W. made a general appearance by questioning N.G. about her intentions for Baby G. Resp.8–9 (citing App.A.91:22–101:14). But again, this did not occur until after the trial court found a general appearance. App.A.63–65.

- They claim M.W.'s counsel appeared on the merits by offering to submit a brief on the parentage statute. Resp.9 (citing App.A.76:13–16). But he made no such offer until *after* the trial court had found a general appearance. App.A.63–65. Before that finding, her attorneys refused the Court's instruction to brief the merits because "this Court lacks jurisdiction," urging it "should not rule on these contested questions in an emergency proceeding where [M.W.] has not been served." App.E.11.

Conduct that occurred *after* the trial court's unconstitutional finding of consent cannot establish that consent occurred *before* it. And after the trial court made that illegal finding, nothing required M.W. to refuse to participate in further proceedings. To the contrary, California law immunized her defense of the ex parte proceedings from operating as consent to jurisdiction. Cal. Code Civ. Proc. § 418.11. As California statutes provide, a nonresident must be able to contest a court's power over her without surrendering to it. Cal. Code Civ. Proc. §§ 418.10(c), (e)(2).

Finally, the only examples that the Commissioning Parties cite of conduct *before* the trial court's finding were addressed in the Application (at 17–19) and do not suggest consent. They cite the fact that M.W. moved to dismiss for forum non conveniens, Resp.10; App.E.6–11, but California law expressly says that is not a general appearance, Cal. Code Civ. Proc. § 418.10(d). They cite M.W.'s counsel's general description of the nature of the dispute at the first hearing, Resp.7; App.L.14, but M.W.'s counsel expressly offered those remarks as "back story," arguing that "the contract provides for Alaska as the forum for all disputes," App.L.11–12, and that "the Court has to resolve the service issue before it can address anything on the merits," App.A.15. Finally, the Commissioning Parties cite the fact that M.W.'s jurisdictional objections attached the surrogacy contract, her Alaska complaint, and various correspondence, Resp.10, but they do not explain how providing background and mentioning her lawsuit in Alaska and her contractual right to litigate there could possibly establish consent to be sued in California, App.E.

This failure to marshal any adequate defense of the trial court's order makes this case an excellent candidate not just for a stay but for certiorari and summary reversal. The Commissioning Parties do not even address M.W.'s request for that relief. Reversing will both resolve an unsettled federal question by setting the outer bounds of consent and restore to M.W. her ability to participate in litigation and remain informed about the child she carried, birthed, and continues to fight to protect. That relief would not require the Court to referee a messy parentage dispute on the emergency docket or to wade into a constitutional challenge to surrogacy agreements. Instead, it would cleanly decide an important jurisdictional question with a clear right answer and place the parties where they ought to have been from the outset: litigating contested claims in a proper forum that has jurisdiction over all of them. Due process demands no less.

III. The equities favor a stay.

Developments since the filing of the Application reinforce the appropriateness of a stay. The ongoing harm is concrete: the only court order requiring Baby G.'s care is tied to a Texas proceeding, but he is about to leave Texas, and the California judgment has barred M.W. from that proceeding, without a means to enforce that order. The chief irreparable harm that the Application asserts (at 21) is to M.W.'s rights concerning Baby G.'s "care, custody, and management," *Santosky* v. *Kramer*, 455 U.S. 745, 753 (1982), including "the right not to be shut out of participation in decisions regarding" his health, *Mirabelli*, 607 U.S. at 497. And as amicus briefing recognizes, courts cannot terminate those rights established by "'having given birth'" except as due process permits. See AUL.Br.10–11 (quoting *Tuan Anh Nguyen* v. *INS*, 533 U.S. 53, 62 (2001)); AAPLOG.Br.7. A stay will redress the harm to those rights by allowing M.W. to move to reopen the Texas parentage proceedings and remain apprised of and involved in his care—particularly as additional life-saving surgeries are yet to come.

That harm to M.W.'s access to Baby G.'s care is even more severe now than when she filed the Application. After this Court called for a response, the guardian ad litem in the Texas trial court, joined by the Commissioning Parties, immediately moved to allow Baby G. to be removed from the hospital and from the State of Texas. As the Commissioning Parties acknowledge, that motion responded to this Application, Resp.2, which explains why they rushed to schedule it for hearing before their response was due in this Court. M.W. objected based on this pending Application, but the Texas trial court went ahead and set a hearing the next day. And though the guardian's motion acknowledged Baby G. was doing well, the Texas court granted immediate transfer because his physician testified it was in his long-term medical interest to be transferred to California where the Commissioning Parties reside. The Texas court then vacated its prior order and reaffirmed parentage per the California judgment, taking away the last sliver of access M.W. had to Baby G. or the Texas proceedings.

It seems now that only relief from this Court can restore it. The Texas Supreme Court declined to stay the order authorizing transfer. Supp.App.I. And unless that court declines to affirm the trial court's grant of full faith and credit to the California judgment, see *In re M.W.*, 26-1054 (Tex., response requested by Sept. 25, 2026), the Texas courts will likely lose jurisdiction once Baby G. and his parents leave the state, Tex. Fam. Code § 152.202(a)(2), if they have not left already. That will change only if this Court grants relief from the unlawful California judgment that makes the Commissioning Parties his parents.

Nor do the new statements by the Commissioning Parties regarding life-saving care alter the balance. As the Application explained (at 24), if they are in fact committed to life-saving care, that just means they are unharmed by M.W.'s continued involvement to obtain judicial assurance of the same. And while M.W. is heartened by the testimony of Baby G.'s physician that the Commissioning Parties have committed to that care, the uncertainty regarding those commitments was of great enough concern that the Texas trial court has kept in effect its order requiring that Baby G. receive life-saving care. See Supp.App.B.[2] Yet that order too will likely become unenforceable when Baby G. and his parents move out of state. Tex. Fam. Code § 152.202(a)(2). This Court should grant relief from the California judgment to give continued legal effect to that order for life-saving care.

Even the Commissioning Parties' response shows there is good reason still for M.W. to insist on an enforceable judicial demand for life-saving care. Over and over, they discuss the option of palliative care for Baby G., highlighting the risks of giving him life-saving surgery. Resp.5, 12, 23. They opposed being forced to choose life-saving care up to the day before he was born, and they chose it only after it was required by court order, App.H.4–10, an order they challenged immediately after his birth, App.N.1–3. Since this dispute began with their demand that M.W. abort Baby G. per the terms of a contract—a decision that N.G. has re-affirmed under oath she does not regret—M.W. is amply justified in declining to take their word for it. App.G.75–76, 158.

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[2] The Commissioning Parties moved to file this order and much of their response under seal, chiding M.W. for having spoken to the media about her situation. Resp.13. But the same day they filed their response, they authorized TMZ to publish photos of Baby G. after his surgery, using his legal name, and gave media statements regarding this Application. See *McKenna West Surrogacy Scandal: Couple Shares First Photos of Newborn*, TMZ.com (Sept. 18, 2026), https://www.tmz.com/2026/09/18/mckenna-west-photos-of-newborn-baby/. In any event, Texas court orders can never be sealed, see Texas Rule of Civil Procedure 76a, and the Commissioning Parties themselves filed the order they attempt to seal here on the public docket of the Supreme Court of Texas, see *In re M.W.*, 26-1054 (filing dated Sept. 16, 2026).

All that's left, then, is the Commissioning Parties' claim that granting a stay would "upend the status quo" and "endanger the child instead of safeguarding him" by putting his healthcare in doubt. Resp.25. In fact, the opposite is true. If the California judgment remains in place, the Texas order for life-saving care will likely be unenforceable upon departure from the state. Tex. Fam. Code § 152.202(a)(2). But if it is stayed or reversed, the life-saving care order will remain in effect, and M.W.'s access and right to advocate for Baby G. will be restored. There will be no threat to Baby G. while parentage is litigated in a proper forum—as the Commissioning Parties acknowledge, the guardian ad litem has advocated for life-saving care for Baby G. and would continue to do so as any dispute proceeds.

The risk of disturbing the status quo is not a reason to leave in place a judgment that offends the fundamentals of due process. This Court has granted stays before that switched an award of parentage. *V.L.* v. *E.L.*, No. 15A522 (Dec. 14, 2015). Here, relief will simply restore the presumption that Texas law attaches to birth and leave the parties free to litigate in a court with jurisdiction over them all. If there were ever a time to reopen that question, it is now, little more than a month after Baby G.'s birth, to aid the medical fight for his life. The Court should grant relief.

CONCLUSION

This Court should stay the judgment or grant certiorari and summary reversal.

Dated: September 21, 2026

Respectfully submitted,

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