No. 21A85

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

Applicant,

v.

STATE OF TEXAS ET AL.,

Respondents.

ON EMERGENCY APPLICATION TO VACATE STAY OF PRELIMINARY INJUNCTION ISSUED BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR MASSACHUSETTS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, THE DISTRICT OF COLUMBIA, HAWAI'I, ILLINOIS, MAINE, MARYLAND, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, VIRGINIA, WASHINGTON, WISCONSIN, AND THE ATTORNEY GENERAL OF NORTH CAROLINA AS AMICI CURIAE IN SUPPORT OF THE UNITED STATES' APPLICATION TO VACATE STAY OF PRELIMINARY INUNCTION

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INTERESTS OF AMICI CURIAE

In direct contravention of nearly a half century of binding precedent, Texas has banned most pre-viability abortions within its borders. Senate Bill 8, 87th Leg., Reg. Sess. (Tex. 2021) ("S.B. 8"). Texas has paired its ban with a sweeping prohibition on "aiding or abetting" any abortion that violates S.B. 8—regardless of whether a person knows that a particular abortion would violate the law. Tex. Health & Safety Code § 171.208(a)(2). And Texas has sought to evade federal court review of this plainly unconstitutional law by purporting to vest enforcement authority in private individuals rather than state officials, offering people with no connection whatsoever to any particular abortion a $10,000 minimum bounty per abortion. *Id.* § 171.208(b)(2).

Massachusetts, California, Colorado, Connecticut, Delaware, the District of Columbia, Hawai‘i, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, Wisconsin, and North Carolina Attorney General Joshua H. Stein are committed to ensuring the safety of our residents who must seek medical care in Texas while present as students, workers, or visitors. We also have an interest in safeguarding the ability of clinicians in our States to provide abortion services in other states when they are licensed and otherwise qualified to do so. And we have a further concrete interest in ensuring that all of the States abide by their obligation not to prohibit access to constitutionally protected abortion care, because any

substantial reduction in the availability of abortion services in one state causes people to seek services in other States, potentially burdening those States' health care systems and limiting access to care for residents there.

Indeed, such cross-border harms are already occurring as a result of S.B. 8.[1] In New Mexico, for example, an influx of patients from Texas has already strained provider resources and made it more difficult for New Mexico residents to receive timely care.[2] Similar impacts are affecting other Amici States as well, including California,[3] Colorado,[4] Illinois,[5] and Nevada.[6]

Amici States are also committed to ensuring that residents of our States who assist individuals in obtaining abortion care in Texas do not face the threat of liability

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[1] *See* Shefali Luthra, *After the Texas Abortion Ban, Clinics in Nearby States Brace for Demand*, The Guardian (Sept. 2, 2021), https://tinyurl.com/phnjfbbu; Janet Shamlin, *After Texas' New Abortion Law, Some Clinics in Nearby States Can Barely Keep Up With Demand*, CBS News (Sept. 21, 2021), https://tinyurl.com/wh48kc8h.

[2] *See* Jolie McCullough and Neelam Bohra, *As Texans Fill Up Abortion Clinics in Other States, Low-Income People Get Left Behind*, Texas Tribune (Sept. 3, 2021), https://tinyurl.com/ud8c3u8 ("At a clinic in Albuquerque, New Mexico, an abortion provider said that on Tuesday, the day before the law's enactment, every patient who had made an appointment online was from [Texas]. By Thursday, all of New Mexico's abortion clinics were reportedly booked up for weeks, and a Dallas center had dispatched dozens of employees to help the much less populated state's overtaxed system."); Robert Nott, *New Mexico Abortion Clinics See Influx From Texas*, Santa Fe New Mexican (Sept. 18, 2021), https://tinyurl.com/c3ubk9w5.

[3] *See* Soumya Karlamangla, *What the Texas Abortion Law Means for California,* New York Times (Sept. 9, 2021), https://tinyurl.com/7d38umu3; Sarah Mosqueda, *Area Director of Planned Parenthood Says Texas Abortion Law Impacts California*, L.A. Times (Sept. 13, 2021), https://tinyurl.com/2wbf4xdm.

[4] *See* Melissa Henry, *Colorado Abortion Clinics Seeing More Texas Women Since New Law Passes*, KKTV News (Sept. 16, 2021), https://tinyurl.com/8e2b3p99.

[5] *See* Becky Willeke, *Texas Abortion Ban Has Patients Calling Illinois Clinics,* Fox 2 Now St. Louis, (Sept. 1, 2021), https://tinyurl.com/tpkr66a3; Safia Samee Ali, "*We've Been Preparing for a Post-Roe World": Ripples from Texas Abortion Law Spread to Illinois Safe Haven*, NBC News (Sept. 19, 2021), https://tinyurl.com/4dr5mm4d.

[6] *See* Humberto Sanchez, *More Texans Could Seek Abortions in Nevada Following New Texas Six-Week Ban,* Nevada Independent (Sept. 2, 2021), https://tinyurl.com/njjz69bf.

under S.B. 8's vague and expansive "aiding or abetting" provisions. Countless individuals and organizations in our States could be targeted under S.B. 8, including family and friends who provide support to people terminating their pregnancies prior to viability in Texas; academics and clinicians affiliated with institutions in our States who perform research used to support abortion access in Texas; people in our States who donate or provide in-kind support to abortion funds and other abortion advocacy groups in Texas; students who reside in our States but attend schools in Texas and volunteer as clinic escorts or in other capacities that support abortion access; nonprofit organizations headquartered in our States that are engaged in abortion advocacy in Texas; attorneys who reside in our States who work on abortion access in Texas; and many others. Amici States have a significant interest in protecting our residents from the specter of vexatious and costly litigation filed against them solely for their support of others' exercise of a constitutionally protected right.

SUMMARY OF THE ARGUMENT

Nearly half a century ago, this Court first recognized the constitutional right to terminate a pregnancy before viability. *Roe v. Wade*, 410 U.S. 113, 163 (1973). The Court has repeatedly affirmed *Roe*, including in the face of attempts by state legislatures to undermine or altogether eliminate their residents' ability to exercise this constitutional right. *See, e.g.*, *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2120 (2020) (plurality opinion); *id.* at 2135 (Roberts, C.J., concurring); *Whole*

Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016); *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) ("Before viability, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy.") (internal quotation and citation omitted); *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) (constitutional right to terminate a pregnancy before viability); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992).

S.B. 8 represents a new and dangerous frontier in the quest by some state legislatures to restrict or eliminate abortion access in violation of this Court's precedent. In open disregard of such precedent, S.B. 8 not only imposes an across-the-board ban on almost all abortions in Texas, but also attempts to thwart judicial review and insulate the State from accountability for its unconstitutional ban by purporting to create only a private enforcement scheme.

Such an unprecedented attack on the rule of law must be rejected. Despite Texas's claim that S.B. 8 is permissible as a mere "regulation" of abortion, this Court's precedents make clear that S.B. 8's ban on nearly all pre-viability abortions is *per se* unconstitutional under the Fourteenth Amendment. And Texas cannot evade compliance with binding precedent simply by delegating to private individuals the task of enforcing a patently unconstitutional law. This Court has not hesitated to recognize state action for Fourteenth Amendment purposes when faced with similar "evasive schemes" for trampling constitutional rights under color of state law, *Cooper v. Aaron*, 358 U.S. 1, 16-17 (1958), including where—as here—a State enlists its

courts to deprive people of their constitutional rights, *see, e.g., Shelley v. Kraemer*, 334 U.S. 1, 14-19 (1948). The district court's grant of preliminary injunctive relief was thus warranted to redress the serious threat that S.B. 8 poses to our constitutional order.

Preliminary relief was and is also necessary to halt the irreparable harms S.B. 8 is inflicting on countless people in Texas. Today, virtually no one can obtain an abortion in Texas. Most patients now must travel out of state, which makes abortion for many people too difficult, too time-intensive, and too costly. Consequently, many will now be forced to carry unwanted pregnancies to term, resulting in negative health and socioeconomic consequences for both them and their children. And the harms caused by S.B. 8 are rippling well beyond Texas into other States, as people are forced to seek care elsewhere, in many places overwhelming capacity and threatening our own residents' access to care.

Amici States urge the Court to uphold the rule of law by vacating the Fifth Circuit's stay of the district court's preliminary injunction.

ARGUMENT

I. The Court Must Not Permit Texas to Flout Precedent With Its Unconstitutional Abortion Ban.

By enacting a law that plainly violates the Constitution while purporting to shield itself from judicial review, Texas has inflicted a serious injury on the rule of law. In these extraordinary circumstances threatening the very supremacy of the Constitution, the district court below appropriately granted the United States

temporary equitable relief to restore the status quo and stave off further irreparable harms caused by Texas's disregard of this Court's constitutional rulings. This Court, too, should act and vacate the stay entered by the Fifth Circuit below to ensure that the Court's own precedents and the rule of law are not so notoriously abused.

A. S.B. 8 is *per se* unconstitutional.

S.B. 8 is an across-the-board ban on constitutionally protected abortions in Texas. While the law provides that violations of this ban are to be enforced through private lawsuits rather than government enforcement proceedings, abortion providers are nonetheless obliged to comply with the ban, whether or not they are sued. And in the event of private litigation under the law, a provider who performs a prohibited abortion faces liability of at least $10,000. Unsurprisingly, S.B. 8 achieved its intended result the moment it went into effect, even before any actual private litigation was filed. Indeed, the record is clear that, as a result of S.B. 8, most patients cannot obtain a pre-viability abortion in Texas. *See infra* Part II, at 16.

S.B. 8 is *per se* unconstitutional under nearly a half century of precedent. *See Casey*, 505 U.S. at 846; *Roe*, 410 U.S. at 163. This Court has repeatedly affirmed and reaffirmed *Roe*'s "essential holding" that the States may not prohibit abortion prior to viability. *Casey*, 505 U.S. at 846; *see Gonzales*, 550 U.S. at 146; *Stenberg*, 530 U.S. at 921; *see also June Med. Servs.*, 140 S. Ct. at 2120 (plurality opinion); *Whole Woman's Health*, 136 S. Ct. at 2300.

Texas's attempt to recast S.B. 8 as a mere constitutional "regulation" of abortion, requiring pregnant people to obtain abortions at the very outset of pregnancy, is unavailing, as the district court found. *See* Order Granting Mot. for Prelim. Inj. ("Dist. Ct. Op."), *United States v. Texas*, No. 21-cv-796, ECF No. 68, at 73-77 (W.D. Tex. Oct. 6, 2021). S.B. 8 itself clearly states that pre-viability abortions are "prohibited," Tex. Health & Safety Code § 171.204, and this Court's precedents are clear that the "State's interests are not strong enough to support a *prohibition* of abortion" prior to viability. *Casey*, 505 U.S. at 846 (emphasis added). In other words, State laws that prohibit abortions prior to viability—as S.B. 8 clearly does—are *per se* unconstitutional without application of the undue burden test. The undue burden test applies only to regulations that are alleged to have the effect of imposing a substantial obstacle on a person's ability to obtain an abortion—like, for example, requirements that abortions be performed only at certain types of facilities or only by doctors with certain credentials, *see, e.g.*, *Whole Woman's Health*, 136 S. Ct. at 2310-18, or not be performed using certain common pre-viability abortion procedures, *Stenberg*, 530 U.S. at 939. While these regulations were unconstitutional because they had the effect of imposing an undue burden, none of these laws outright prohibited pre-viability abortions as S.B. 8 clearly does.

Even if S.B. 8's ban on pre-viability abortions could somehow be credibly cast as an abortion regulation to which *Casey*'s undue burden test would apply, the law would fail that test. As the district court found, S.B. 8 imposes tremendous burdens

on patients seeking care—far greater than those imposed by many laws this Court has struck down. Dist. Ct. Op. 77-86; *see infra*, Part II, at 16-22. And Texas's incorporation of a so-called "undue burden" affirmative defense is no remedy, as it is plainly inconsistent with *Casey*'s standard; for example, S.B. 8 precludes courts from considering S.B. 8's impact on other patients' abortion access. *Compare* Tex. Health & Safety Code § 171.209(d)(2), *with Whole Woman's Health*, 136 S. Ct. at 2313 (describing how the undue burden balancing test must take into account statewide impacts). And, as the district court noted, "it is implausible that this obscure and somewhat unclear provision in the law will be sufficient to convince providers to provide abortions in the face of all the obstacles" S.B. 8 creates, and, therefore, "the affirmative defense—despite its name—does nothing to lessen the undue burden imposed by S.B. 8." Dist. Ct. Op. 98.

Neither S.B. 8's private enforcement scheme nor its plainly inadequate "undue burden" defense changes the fact that the law permits precisely what the Fourteenth Amendment forbids: a ban on abortions in Texas before viability. Indeed, the architects of S.B. 8 have admitted as much. Dist. Ct. Op. 50. And, as discussed further below, *infra* Part II, S.B. 8 has succeeded in eliminating nearly all pre-viability abortions without even a single "private" case under S.B. 8 proceeding through litigation.

B. Texas's private enforcement mechanism does not shield such brazen disrespect for the Constitution from judicial review.

Texas seeks to avoid judicial review of S.B. 8's *per se* unconstitutional ban on almost all pre-viability abortions by cloaking its ban with a private enforcement mechanism. And so far, Texas has largely succeeded in its gambit: after staying district court proceedings in a challenge to S.B.8 brought by private litigants, *see Whole Woman's Health v. Jackson*, 13 F.4th 434 (5th Cir. 2021), the Fifth Circuit has now stayed the district court's injunction in the present case; the Texas Multidistrict Litigation Panel has stayed all cases in state court challenging S.B. 8[7]; and abortion providers—to comply with the law—have almost entirely stopped providing abortions in Texas. This Court should not acquiesce in Texas's attempt to evade judicial review by purporting to delegate direct enforcement authority solely to private individuals.

The fact remains that S.B. 8's private enforcement regime hinges upon the coercive power of the State, which acts through "'its legislative, its executive, or its judicial authorities'" and "'in no other way.'" *Shelley*, 334 U.S. at 14 (quoting *Ex Parte Virginia*, 100 U.S. 339, 347 (1880)). Specifically, to effectuate S.B. 8's across-the-board ban on constitutionally protected activity, Texas has created a coercive structure within its state court system: delegating enforcement power to private individuals, tilting the scales in their favor through a range of procedural provisions, and requiring state courts to award them specific forms of monetary and injunctive

[7] *See* Order of Multidistrict Litigation Panel, *In re Texas Heartbeat Act Litigation*, No. 21-0782 (Sept. 23, 2021), https://tinyurl.com/yrsp597s (granting stay of "[a]ll trial court proceedings").

relief if they prove a violation of S.B. 8's unconstitutional ban. *See* Dist. Ct. Op. 9-10. Texas has thereby eliminated the vast majority of pre-viability abortion care in Texas even without a flood of private S.B. 8 suits, because "the abortion services that would result in civil actions have been coerced out of existence." Dist. Ct. Op. 86 n.63.

In these circumstances, Texas's choice to effect its unconstitutional policy through the mechanism of heavily incentivized private litigation, instead of directly through state government enforcement proceedings, does not eliminate state action for Fourteenth Amendment purposes. *See Shelley*, 334 U.S. at 14-19; *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 622-24 (1991) (finding state action in a private litigant's exercise of peremptory challenges in jury selection and noting that "a private party could not exercise its peremptory challenges absent the overt, significant assistance of the court"). Rather, Texas's chosen enforcement scheme necessarily requires the exercise of "power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of state law.'" *Hall v. Garson*, 430 F.2d 430, 439 (5th Cir. 1970) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)) (finding state action where Texas law permitted landlords to enter their tenants' residences and seize property). This "is state action taken 'under color of' state law." *Id.*

Shelley is particularly instructive. In *Shelley*, this Court held that a state court's judicial enforcement of a private contract written to exclude people of color from ownership of real property violated the Fourteenth Amendment. 334 U.S. at

18-20. The Court made clear that "the action of the States to which the [Fourteenth] Amendment has referenc[e] includes action of state courts and state judicial officials." *Id.* at 18. Indeed, the Court noted, "it has never been suggested that state court action is immunized from the operation of [the Fourteenth Amendment] simply because the act is that of the judicial branch of the state government." *Id.* Accordingly, even though the litigation was between private parties and involved discrimination defined by a private agreement, the judicial enforcement by state courts of the discriminatory agreement was itself the act that deprived the purchasers of their constitutional rights. *Id.* at 19. Put differently, "the Amendment [is not] ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement." *Id.* at 20. Rather, "[s]tate action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands." *Id.*

The same obligation exists here, where the deprivation of Fourteenth Amendment rights is as clear as it was in *Shelley*, and where that constitutional deprivation stems even more directly from state action. Unlike in *Shelley*, which involved a court's enforcement of a racially discriminatory private agreement, here it is Texas's own legislature that has directed Texas courts to enforce a state-created

ban on constitutionally protected activity—including by prescribing a unique set of procedural rules specifically designed to effect this ban and mandating the award of specific monetary and injunctive relief in cases where a pre-viability abortion in violation of the law has occurred.

In other words, Texas "is *responsible* for" the unconstitutional ban at issue here, and Texas has "provide[d] significant encouragement, either overt or covert" to effect that ban—encouragement that has indeed been so clear and so strong that it has effectively eliminated pre-viability abortion care across Texas. *See Brentwood Acad. v. Tenn. Secondary Sch. Athl. Ass'n*, 531 U.S. 288, 295-96 (2001) (identifying considerations for discerning state action) (emphasis in original) (internal quotations and citations omitted). That Texas has endowed private parties who have no connection whatsoever to any particular abortion with a right of action to enforce S.B. 8's unconstitutional ban also confirms its aim to achieve an unconstitutional governmental policy—banning abortion—rather than to vindicate a private injury or right. *See Evans v. Newton*, 382 U.S. 296, 299 (1966) ("Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action.").

Permitting Texas to evade federal review of a plainly unconstitutional law through such an enforcement scheme—state action with a veneer of private action so sheer that *private actions need not even be filed*—could have significant implications

for the Fourteenth Amendment and for the rule of law in our Republic. In our country's history, state policymakers have not infrequently adopted laws that have targeted politically unpopular groups—such as anti-miscegenation laws, segregation laws, anti-Asian laws, and anti-LGBTQ laws—and many of these laws have been struck down as unconstitutional.[8] Yet some state officials have attempted to avoid adherence to precedent with which they disagree. Some state legislatures enacted laws specifically designed to evade compliance with *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1952), for example, and to perpetuate racial segregation in places of public accommodation more broadly. *See, e.g.*, *Bush v. Orleans Parish Sch. Bd.*, 188 F. Supp. 916, 921-29 (E.D. La. 1960), *aff'd*, *Orleans Parish Sch. Bd. v. Bush*, 365 U.S. 569 (1961); *Bush v. Orleans Parish Sch. Bd.*, 191 F. Supp. 871, 873-75 (E.D. La. 1961), *aff'd*, *Louisiana v. United States*, 367 U.S. 908 (1961). These statutes ranged from enactments that openly defied *Brown*, *see, e.g.*, *Bush*, 188 F. Supp. at 923-38, to practices that relied on private individuals to perpetuate the legacy of racial segregation, such as leasing public spaces to private individuals who continued to engage in racially discriminatory conduct, *see, e.g., Derrington v. Plummer*, 240 F.2d 922, 925-26 (5th Cir. 1956) (holding that the Fourteenth Amendment prohibits racially discriminatory conduct through the instrumentality of a lessee); *see also Turner v. City of Memphis*, 369 U.S. 350, 353 (1962) (same); *Hamm v. Va. State Bd.*

[8] *See, e.g.*, *Romer v. Evans*, 517 U.S. 620 (1996); *Loving v. Virginia*, 388 U.S. 1 (1967); *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1953); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

of Elections, 230 F. Supp. 156, 157-58 (E.D. Va. 1964) ("[N]o State can directly dictate or casually promote a distinction in the treatment of persons solely on the basis of their color. To be within the condemnation, the governmental action need not effectuate segregation of facilities directly."), *aff'd*, *Tancil v. Woolls*, 379 U.S. 19 (1964).

In each of these cases, federal courts concluded that the Fourteenth Amendment applied, "whatever the agency of the State taking the action," *Cooper*, 358 U.S. at 17 (citing, *inter alia*, *Shelley*, 334 U.S. at 1), or "whatever the guise in which it is taken," *id.* (citing *Derrington v. Plummer*, 240 F.2d at 922, and *Dep't of Conservation and Dev. v. Tate*, 231 F.2d 615 (4th Cir. 1956)). In other words, constitutional rights "can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.'" *Id.* at 17 (quoting *Smith v. Texas*, 311 U.S. 128, 132 (1940)).

So too here, this Court should not permit Texas to "nullif[y] indirectly" the constitutional rights recognized in *Roe* and *Casey* through the "evasive scheme" that it has created in S.B. 8. *Id*. Consider, for example, if a state legislature had required segregation of schools in defiance of *Brown*, instead of banning pre-viability abortions in defiance of *Roe* and *Casey*, and vested private litigants with the exclusive authority to enforce the statute against any Black child who sought to attend a segregated white school in accordance with the Fourteenth Amendment. This Court certainly

would not have hesitated to conclude that a state could not, consistent with the Fourteenth Amendment, segregate its schools via a law to be enforced by private actors. The same must be true here. As this Court long ago explained, "[i]f the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery; and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals." *United States v. Peters*, 9 U.S. 115, 136 (1809).

A contrary result could have profound consequences. Amici States recognize that state legislatures across the country have strongly held policy preferences in areas as diverse as gun rights, freedom of religion, marriage equality, and voting rights that may at times be in tension with, or even conflict with, constitutional principles. We likewise recognize the vital role that judicial review plays in resolving these tensions. But, where longstanding precedent clearly and unambiguously forecloses a particular policy as unconstitutional, a State cannot be permitted to disregard that precedent by passing an unconstitutional law and shielding it from federal judicial review.

II. Emergency Relief Is Essential to Stanch the Irreparable Harms Being Inflicted by Texas's Unconstitutional Ban.

S.B. 8's prohibition on nearly all pre-viability abortions in Texas not only flagrantly disregards this Court's precedent in derogation of the rule of law, but also

inflicts grave harms on people across Texas this very day, with mounting harms cascading beyond Texas's borders. Immediate relief is essential to stop these harms and serve the public interest. *See W. Airlines, Inc. v. Int'l Broth. of Teamsters*, 480 U.S. 1301, 1309 (1987) (O'Connor, J., in chambers) (granting stay of court of appeals' order where "[t]o assume that [it] would do no more than preserve the 'status quo,' in the face of this upheaval, would be to blink at reality").

The irreparable harms inflicted by S.B. 8 are manifest across Texas and are increasingly evident in our own States. Abortion is a safe and common medical procedure. Dist. Ct. Op. 4. As a result of S.B. 8, abortion providers in Texas have almost entirely stopped providing abortions as of midnight on September 1, 2021. *Id.* at 76. Indeed 80-95% of previously provided abortion services are now unlawful and unavailable in Texas. *Id.* at 76, 84. Because the vast majority of people do not know that they are pregnant until after S.B. 8's six-week ban (approximately two weeks after a missed menstrual period), and because many pregnant Texans who want an abortion will not be able to travel out-of-state to obtain that care, the effect of S.B. 8 is to deprive a large percentage of people who seek abortions in Texas of their constitutionally protected right to choose to terminate a pregnancy. *Id.* at 86 n.64, 87.

S.B. 8 will lead to negative health and socioeconomic consequences for the large percentage of people who are forced to delay or forgo an abortion. Delaying abortion

can make access to abortion too costly and too logistically difficult for many patients.[9] And forcing a patient to carry an unwanted pregnancy to term creates a greatly heightened risk of death, in part due to the dangerous risks of postpartum hemorrhage and eclampsia.[10] Physical violence is a further risk, when carrying an unwanted pregnancy to term results in a person remaining in contact with a violent partner.[11] Lack of access to abortion also results in poorer socioeconomic outcomes, including lower rates of full-time employment and increased reliance on publicly funded safety-net programs.[12] And lack of access to abortion may cause people to attempt self-induction, which can result in severe long-term medical consequences.[13]

S.B. 8 has already had significant impacts on clinics in Texas, which may ultimately be forced to close entirely—inflicting yet more harm. Dist. Ct. Op. 82 & n.57. S.B. 8 proponents have threatened to sue abortion providers and others who violate S.B. 8, going so far as setting up a "whistleblower" website to encourage people to submit anonymous "tips" that abortions have been performed in violation of S.B. 8

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[9] *See* Rachel K. Jones and Jenna Jerman, *Time to Appointment and Delays in Accessing Care Among U.S. Abortion Patients*, Guttmacher Institute Report 13-14 (Aug. 2016), https://tinyurl.com/8tzdzu2j.

[10] Caitlin Gerdts, et al., *Side Effects, Physical Health Consequences, and Mortality Associated with Abortion and Birth after an Unwanted Pregnancy*, Women's Health Issues 26-1, 57-58 (2016), https://tinyurl.com/56e3pb9d; *see also* Dist. Ct. Op. 5 n.6.

[11] *See* Sarah C.M. Roberts, et al., *Risk of violence from the man involved in the pregnancy after receiving or being denied an abortion*, BMC Medicine (2014), https://tinyurl.com/36jm874n.

[12] *See* Diana Greene Foster, et al., *Socioeconomic Outcomes of Women Who Receive and Women Who are Denied Wanted Abortions in the United States*, Am. J. Pub. Health 108, no. 3, at pp. 407-413 (2018), https://tinyurl.com/yeawzmpf.

[13] Daniel Grossman et al., *Self-Induction of Abortion Among Women in the United States*, 18(36) Reprod. Health Matters 136, 143 (2010), https://tinyurl.com/5atnu3f (discussing medical risks associated with self-induced abortion).

and invite people to be plaintiffs in S.B. 8 proceedings.[14] And it is this real specter of litigation, including the costs and time necessary to defend against such suits, that has resulted in compliance with S.B. 8 despite its facial unconstitutionality. *Id.* at 80-82. Indeed, S.B. 8 has already caused providers and staff to be "plagued by fear and uncertainty," "seriously concerned that even providing abortions in compliance with S.B. 8 will draw lawsuits from anti-abortion vigilantes or others seeking financial gain under S.B. 8's bounty hunting scheme." *Id.* at 80. Clinics report struggling to hire and retain staff who are uncertain about the future of abortion in Texas. *Id.* at 81 n.55, 82 n.57. Clinic staffing shortages caused by S.B. 8, in turn, are already untenably straining the limited remaining staff resources available to assist patients who are still eligible for care under S.B. 8. *Id.* at 80 & n.53.

That providers opted to comply with this unconstitutional law, rather than risk potentially ruinous litigation costs, is not surprising given that S.B. 8's enforcement mechanism was intentionally designed to *encourage* litigation against providers in Texas, while also eliminating a basic safeguard against unfounded suits. The law

[14] Texas Right to Life, prolifewhistleblower.com (last visited Sept. 3, 2021) (website statistics as of September 3, 2021 indicated that it had been shared over 40,000 times); Meryl Kornfield, *A Website for 'Whistleblowers' to Expose Texas Abortion Providers was Taken Down—Again*, Washington Post (Sept. 6, 2021), https://tinyurl.com/37crxb34 (noting that the website had been subsequently de-platformed by GoDaddy and Epik, but that Texas Right to Life intends to get the website "back up soon to continue collecting anonymous tips"); *see also* Dist. Ct. Op. 82 n.56. At least one provider has been sued twice under S.B. 8 and is also the subject of a complaint to the Texas Medical Board based on his performance of a pre-viability abortion in violation of S.B. 8 on September 6, 2021. Complaint, *Gomez v. Braid*, No. 2021CI19920 (Bexar Cty. 224th Dist. Ct. Sept. 20, 2021); Complaint, *Stilley v. Braid*, No. 2021CI19940 (Bexar Cty. 224th Dist. Ct. Sept. 20, 2021); Letter from Cheryl Sullenger, Senior Vice President, Occupation Rescue, to Texas Medical Board (Sept. 20, 2021), https://tinyurl.com/sd5ejux6.

includes a bounty of "not less than $10,000 per abortion," Tex. Health & Safety Code § 171.208(b)(2), combined with one-sided attorney's fees provisions that award attorney's fees and costs to any plaintiff who prevails, *id.* § 171.208(b)(3), while statutorily *barring* providers from recovering their attorney's fees and costs even if they prevail, *id.* § 171.208(i) (bar on fee awards to defendants is "[n]otwithstanding any other law"). Together, these provisions create powerful financial incentives to sue under S.B. 8, with seemingly zero downside to filing harassing, vexatious, or frivolous litigation.

S.B. 8 has also already had impacts outside of Texas's borders, as Texas conceded below. Def. Mem. in Opp., No. 21-cv-796, ECF No. 43, at 29 (W.D. Tex. Sept. 29, 2021) (noting that S.B, 8 is "stimulating" interstate travel and citing evidence that such travel is burdening the healthcare systems of other States). Clinics in nearby States, including Amici States, have already experienced a significant spike in the percentage of patients travelling from Texas for abortion care, with clinics in Colorado, Kansas, Nevada, New Mexico, and Oklahoma reporting substantial increases in the number of Texans obtaining abortion care. Dist. Ct. Op. 90-96. In New Mexico, for example, all abortion clinics were reportedly booked for weeks just one day after S.B. 8 went into effect,[15] and Texans have accounted for close to a third of the total abortion patients in New Mexico since September 1, Dist. Ct. Op. 95.

[15] *See* McCullough and Bohra, *supra* note 2.

The same has been true in other neighboring States. An Oklahoma clinic, for example, has reported a "dramatic increase" in patient volume since S.B. 8 went into effect, and has been forced to delay patient appointments to try to meet this increased demand. *Id.* at 90. Another Oklahoma abortion provider has reported more than six times as many patients from Texas *per day* since S.B. 8 went into effect compared to the first six months of the year. *Id.* at 91. And in Kansas, at least half of one clinic's patients have been from Texas in the weeks since S.B. 8 went into effect. *Id.* at 92. The influx of patients from Texas has strained providers "to the point of breaking" in neighboring States that are not equipped to handle a higher volume of patients, *id.* at 90, and has adversely affected the ability of residents of those States to receive care. *Id.* at 94-96. Providers anticipate the situation only worsening over the coming weeks. *See id.* at 91 n.75.

Because many people who seek an abortion rely on others in obtaining access to such care, S.B. 8 also threatens to harm countless people who provide that support to Texas patients.[16] S.B. 8's broad and undefined "aiding or abetting" provision threatens to create at least $10,000 liability for anyone who so much as gives a patient a ride, regardless whether that supportive person even knows that it will violate S.B. 8 depending on the precise timing of the abortion procedure. Tex. Health & Safety

[16] *See* Kari White, et al., Tex. Pol'y Evaluation Project, Research Brief, *Texas Senate Bill 8: Medical and Legal Implications* 2 (July 2021), https://tinyurl.com/4pc5rzhs (noting that 43% of Texans who sought an abortion in Texas in 2018 had someone drive them to their abortion and 57% had a friend, family member, or partner help them pay).

Code §§ 171.208(a)(2), (b)(2). And, by threatening sweeping liability, the law cruelly isolates patients when assistance is most needed.

The public interest thus weighs heavily in favor of granting relief. Unless this Court vacates the stay of the district court's preliminary injunction, S.B. 8 will continue to wreak havoc for patients in Texas and elsewhere. Moreover, Texas has inflicted these harms at a time when nineteen States have already enacted ninety-seven restrictions on abortion—including twelve partial or total bans—in just a six-month period.[17] While lower courts have generally, as they must, applied this Court's precedent to enjoin these bans, success for Texas in avoiding such an injunction through S.B. 8's procedural ploy would embolden some states to enact "copycat" laws,[18] which could quickly lead to successful bans in many states.[19] If access to safe and legal abortion is severely restricted or banned in states across the country, vast regions may be devoid of abortion providers, forcing some patients to travel even further to receive care, untenably straining health care systems in states like ours that continue to provide abortion access, and leaving the many patients without

[17] Emma Batha, *U.S. States Making 2021 Moves on Abortion Rights and Access*, Thomson Reuters Found. News (Sept. 1, 2021), https://tinyurl.com/rsk3r4mt.

[18] Meryl Kornfield, et al., *Texas Created a Blueprint for Abortion Restrictions. Republican-Controlled States May Follow Suit*, Washington Post (Sept. 3, 2021), https://tinyurl.com/4wh4y577 (noting that a quarter of States are likely to introduce legislation that mirrors S.B. 8).

[19] *See, e.g.*, House Bill 167, 2022 Reg. Sess. (Fla. 2021) (pending highly similar legislation introduced on September 22, 2021, after S.B. 8 was permitted to go into effect).

resources to travel simply unable to receive the care that they need, to the grave detriment of their health.[20]

In view of the irreparable harms inflicted by S.B. 8, the Court should "not sanction one more day" of Texas's "unprecedented and aggressive scheme to deprive its citizens of a significant and well-established constitutional right." Dist. Ct. Op. 112.

CONCLUSION

The Court should vacate the Fifth Circuit's stay of the district court's order enjoining S.B. 8's enforcement.

[20] *See, e.g.,* Rachel Benson Gold, *Lessons from Before Roe: Will Past Be Prologue?,* The Guttmacher Institute Report on Public Policy 10 (March 2003), https://tinyurl.com/yw7r2kev ("The year before the Supreme Court's decision in *Roe v. Wade*, just over 100,000 women left their own state to obtain a legal abortion in New York City. According to an analysis by The Alan Guttmacher Institute, an estimated 50,000 women traveled more than 500 miles to obtain a legal abortion in New York City; nearly 7,000 women traveled more than 1,000 miles, and some 250 traveled more than 2,000 miles, from places as far as Arizona, Idaho and Nevada.").

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