Nos. 21-463 & 21-588

In the Supreme Court of the United States

WHOLE WOMAN'S HEALTH, ET AL., *Petitioners,*
v.
AUSTIN REEVE JACKSON, IN HIS OFFICIAL CAPACITY AS JUDGE OF THE 114TH DISTRICT COURT, ET AL., *Respondents*

UNITED STATES OF AMERICA, *Petitioner,*
v.
STATE OF TEXAS, ET AL., *Respondents*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF 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 PETITIONERS

MAURA HEALEY,
Attorney General of Massachusetts
ELIZABETH N. DEWAR
State Solicitor
ABIGAIL B. TAYLOR
Chief, Civil Rights Division
AMANDA HAINSWORTH*
Assistant Attorney General
One Ashburton Place
Boston, MA 02108
(617) 963-2618
amanda.hainsworth@mass.gov
**Counsel of Record*

(Additional counsel are listed on signature pages.)

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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).

Amici States 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.[1] We also have an interest in safeguarding the ability of clinicians in our States to provide abortion services

[1] No party authored this brief in whole or in part, and no one other than *Amici* States made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

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, 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.[2] 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.[3] Similar impacts are affecting other

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[2] *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.

[3] *See* Jolie McCullough & 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.

Amici States, including California,[4] Colorado,[5] Illinois,[6] and Nevada.[7]

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 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;

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[4] *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.

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

[6] *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.

[7] *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.

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); *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 open disregard of this Court's binding 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, S.B. 8's ban on nearly all pre-viability abortions plainly violates the Fourteenth Amendment under this Court's longstanding precedent.

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 Court has likewise repeatedly acknowledged that the doctrine of sovereign immunity does not bar private suits against state officials, including judicial officials, for equitable and declaratory relief to stop states from violating the Constitution. *Ex Parte Young*, 209 U.S. 123, 159-60 (1908); *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) ("[F]ederal

injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights."). The district court below therefore correctly held that both the United States and the provider petitioners could seek equitable relief to redress S.B. 8's violation of the Fourteenth Amendment and the serious threat the law poses to our constitutional order.

Such relief is necessary to halt the harms S.B. 8 is inflicting on countless people in Texas. Today, abortion is completely unavailable in Texas for many people who do not even yet know they are pregnant. These 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 delay care or 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 affirming the district court's rulings below and allowing the cases to proceed.

ARGUMENT

I. The Court Should Confirm That Texas Cannot Flout Precedent and Evade Review 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, sovereign immunity does not bar the provider petitioners' case against state judicial officials, and the United States has appropriately sought equitable relief to restore the very supremacy of our Constitution. S.B. 8's purported private-enforcement mechanism cannot defeat "'the fundamental and paramount law of the nation'" that this Court's "interpretation of the Fourteenth Amendment . . . is the supreme law of the land." *Cooper*, 358 U.S. at 18 (quoting *Marbury v. Madison*, 1 Cranch. 137, 177 (1803)).

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

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.

Overtly violating that precedent, S.B. 8 imposes 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 a provider who performs a prohibited abortion faces liability of at least $10,000. Tex. Health & Safety Code § 171.208(b)(2). 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, almost all Texas abortion providers have ceased providing any abortion care after six weeks of pregnancy. *See infra* Part II, at 17-18.

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. That 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. S.B. 8 does more than impose an undue burden on pre-viability abortions; rather, it outright prohibits them.

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 17-23. And Texas's incorporation of a so-called "undue burden" affirmative defense is no remedy, as it is plainly inconsistent with *Casey*; 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 enacts 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 after six weeks 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. In doing so, Texas has argued that the provider petitioners' claims for declaratory and injunctive relief against state executive and judicial officials are barred by sovereign immunity, that the United States lacks the authority to obtain equitable relief to enforce the Constitution against Texas itself, and that, indeed, there is no state action here at all for Fourteenth Amendment purposes. *See, e.g.*, Tex. Opp. to U.S. App. to Vacate Stay, at 29 (U.S. No. 21A85 Oct. 21, 2021) ("there is no 'state action' to be found in the mere filing of a private civil action in state court"

(quotation omitted)). Meanwhile, abortion providers—to comply with Texas's own law—have almost entirely stopped providing abortions in Texas after six weeks of pregnancy. This Court should not acquiesce in Texas's attempt to evade judicial review through state action with a veneer of private action so sheer that private actions need not even be filed.

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 relief if they prove a violation of S.B. 8's unconstitutional ban. *See* Dist. Ct. Op. 9-10. Texas has thereby effectively eliminated pre-viability abortion care after six weeks of pregnancy 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

constitutional 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 "is state action taken 'under color of' state law" because it 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). Similarly, S.B. 8's private enforcement mechanism does not permit Texas to avoid injunctive relief against its state officials under 42 U.S.C. § 1983 on the basis of sovereign immunity. *See Sup. Ct. of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 736-37 (1980) (holding that the Eleventh Amendment did not bar a suit against the Virginia Supreme Court and its members for declaratory and injunctive relief). Indeed, it is hard to imagine a more appropriate use of *Ex Parte Young* than the circumstances here: where a state has openly defied almost 50 years of this Court's precedent.

Shelley is particularly instructive. In *Shelley*, the 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. This

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.* And 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. The Court recognized that "the Amendment [was not] ineffective simply because the particular pattern of discrimination, which the State ha[d] 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 constitutional 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 state 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 been so clear and so strong that it has indeed effectively eliminated the banned conduct across Texas. *See Brentwood Acad. v. Tenn. Secondary Sch. Athl. Ass'n*, 531 U.S. 288, 295-96 (2001) (emphasis in original; internal quotations and citations omitted) (identifying considerations for discerning state action). 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 the law's 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 a scheme could have significant implications for constitutional rights and for the rule of law in our Republic. In our

country's history, state policymakers and officials have sometimes attempted to avoid adherence to precedent with which they disagree. Some state legislatures, for example, openly defied *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1952), by enacting laws that mandated continued racial segregation in schools and 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). Other state actors engaged in 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. 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).

These stratagems to defy the Court and the Constitution ultimately failed, in part because courts recognized that "the prohibitions of the

Fourteenth Amendment extend to all action of the State denying equal protection of the laws[,] 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*, 240 F.2d at 922, and *Dep't of Conservation & 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. *See Cooper*, 358 U.S. at 17. 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 whites-only 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. And, 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. Texas's Unconstitutional Ban Is Inflicting Grave Harms on People Across Texas and Straining Healthcare Systems in Neighboring States.

S.B. 8's prohibition on pre-viability abortions in Texas not only flagrantly disregards this Court's precedent in derogation of the rule of law, but also is harming people across Texas this very day, with mounting harms cascading beyond Texas's borders.

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 the District

Court found, as a result of S.B. 8, 80-95% of previously provided abortion services are now unlawful and unavailable in Texas. *Id.* at 76, 84. Because many people do not know that they are pregnant until after S.B. 8's ban applies (approximately two weeks after a missed menstrual period), because even those who do know may not be able to schedule an abortion before the ban precludes it, and because travelling out-of-state to obtain care is impossible for many pregnant Texans, 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 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.[8] 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.[9] Physical violence is a further risk, when carrying an unwanted pregnancy

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[8] *See* Jenna Jerman et al., *Barriers to Abortion Care and Their Consequences For Patients Traveling for Services: Qualitative Findings from Two States*, 49 Perspectives on Sexual & Reproductive Health (June 2017), https://tinyurl.com/bnrte5ts.

[9] 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.

to term results in a person remaining in contact with a violent partner.[10] 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.[11]

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 and invite them to bring S.B. 8 lawsuits.[12] And it is this real specter of litigation,

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[10] *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.

[11] *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.

[12] 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 repeatedly under S.B. 8 and is also the subject of a complaint

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 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

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to the Texas Medical Board based on his performance of one pre-viability abortion in violation of S.B. 8 on September 6, 2021. *See* 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); Complaint, *Texas Heartbeat Project v. Braid*, No. 21-2276-C (Smith Cty. 7th Dist. Ct. Sept. 22, 2021); Letter from Cheryl Sullenger, Senior Vice President, Occupation Rescue, to Texas Medical Board (Sept. 20, 2021), https://tinyurl.com/sd5ejux6. Meanwhile, the Texas Multidistrict Litigation Panel has stayed all cases in state court challenging S.B. 8. *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").

designed to *encourage* litigation against providers in Texas, while also eliminating a basic safeguard against unfounded suits. The law 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 is also causing repercussions beyond Texas's borders, as Texas conceded below. Def. Mem. in Opp., *United States v. Texas*, 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.[13] And patients traveling from Texas have accounted for close to a third of the total abortion patients in New Mexico since September 1. Dist. Ct. Op. 95.

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. Dist. Ct. Op. 90. It has thus adversely affected the ability of residents of those States—including residents of some of the *Amici* States—to receive care. *Id.* at 94-96. And providers anticipate the situation only worsening. *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

[13] *See* McCullough & Bohra, *supra* note 3.

support to Texas patients.[14] 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 or provides childcare, regardless whether that supportive person even knows that the abortion will violate S.B. 8—a fact that, as S.B. 8 contemplates, may not even be knowable at the time of the assistance, because any such violation depends on the precise timing of the procedure. Tex. Health & Safety Code § 171.208(a)(2) (providing for liability "regardless of whether the person knew or should have known that the abortion would be performed or induced in violation of this subchapter"). And, by threatening such sweeping liability for one's family and friends, the law cruelly isolates patients when support is most needed.

These harms already inflicted by S.B. 8 on patients in Texas, in *Amici* States, and elsewhere threaten to multiply. Nineteen States have already enacted ninety-seven restrictions on abortion—including twelve partial or total bans—in just a six-month period.[15] While lower courts have generally, as they must, applied this Court's precedent to enjoin these bans, success for Texas in avoiding

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[14] *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).

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

judicial review through S.B. 8's procedural ploy would embolden some states to enact "copycat" laws, which could quickly lead to bans in effect in many states.[16] If access to safe and legal abortion is severely restricted or banned in states or entire regions across the country, many patients will be forced to travel even farther to receive care, untenably straining health care systems in states like ours that continue to provide abortion access, and leaving the many patients without resources to travel simply unable to receive the care that they need, to the grave detriment of their health.[17]

In view of the harms inflicted by S.B. 8 on people and on the rule of law, the Court should "not sanction one more day" of Texas's "unprecedented and aggressive scheme to deprive its citizens of a

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[16] 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); *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).

[17] *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.").

significant and well-established constitutional right." Dist. Ct. Op. 112.

CONCLUSION

The Court should affirm the district court's rulings below; vacate the stays pending appeal entered by the Fifth Circuit; and remand both cases for further proceedings.

Respectfully submitted,

MAURA HEALEY,
Attorney General of Massachusetts
ELIZABETH N. DEWAR
State Solicitor
ABIGAIL B. TAYLOR
Chief, Civil Rights Division
AMANDA HAINSWORTH*
Assistant Attorney General
One Ashburton Place
Boston, MA 02108
(617) 963-2618
amanda.hainsworth@mass.gov
**Counsel of Record*

October 27, 2021

ROB BONTA
Attorney General of California
1300 I Street
Sacramento, CA 95814

PHILIP J. WEISER
Attorney General of Colorado
1300 Broadway
10th Floor
Denver, CO 80203

WILLIAM TONG
Attorney General of Connecticut
55 Elm Street
Hartford, CT 06106

KATHLEEN JENNINGS
Attorney General of Delaware
820 North French Street
Wilmington, DE 19801

KARL A. RACINE
Attorney General for the District of Columbia
400 6th Street NW
Washington, D.C. 20001

CLARE E. CONNORS
Attorney General of Hawai‘i
425 Queen Street
Honolulu, HI 96813

KWAME RAOUL
Attorney General of Illinois
100 West Randolph Street
Chicago, IL 60601

AARON M. FREY
Attorney General of Maine
6 State House Station
Augusta, ME 04333

BRIAN E. FROSH
Attorney General of Maryland
200 Saint Paul Place
Baltimore, MD 21202

DANA NESSEL
Attorney General of Michigan
P.O. Box 30212
Lansing, MI 48909

KEITH ELLISON
Attorney General of Minnesota
102 State Capitol
75 Rev. Dr. Martin Luther King Jr. Boulevard
St. Paul, MN 55155

AARON D. FORD
Attorney General of Nevada
100 North Carson Street
Carson City, NV 89701

ANDREW J. BRUCK
Acting Attorney General of New Jersey
Richard J. Hughes Justice Complex
25 Market Street
Trenton, NJ 08625

HECTOR BALDERAS
Attorney General of New Mexico
408 Galisteo Street
Santa Fe, NM 87501

LETITIA JAMES
Attorney General of New York
28 Liberty Street
New York, NY 10005

JOSHUA H. STEIN
Attorney General of North Carolina
114 W. Edenton Street
Raleigh, NC 27603

ELLEN F. ROSENBLUM
Attorney General of Oregon
1162 Court Street N.E.
Salem, OR 97301

JOSH SHAPIRO
Attorney General of Pennsylvania
16th Floor, Strawberry Square
Harrisburg, PA 17120

PETER F. NERONHA
Attorney General of Rhode Island
150 South Main Street
Providence, RI 02903

THOMAS J. DONOVAN, JR.
Attorney General of Vermont
109 State Street
Montpelier, VT 05609

MARK R. HERRING
Attorney General of Virginia
202 North 9th Street
Richmond, VA 23219

ROBERT W. FERGUSON
Attorney General of Washington
P.O. Box 40100
Olympia, WA 98504

JOSHUA L. KAUL
Attorney General of Wisconsin
17 W. Main St.
Madison, WI 53703