No. ____

In The
Supreme Court of the United States

WHOLE WOMAN'S HEALTH, ET AL.,
Petitioners,
v.
AUSTIN REEVE JACKSON, JUDGE, ET AL.,
Respondents.

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

MOTION TO EXPEDITE CONSIDERATION OF THE PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT AND TO EXPEDITE CONSIDERATION OF THIS MOTION

Pursuant to Supreme Court Rule 21, petitioners move for expedited consideration of their petition for a writ of certiorari before judgment to the United States Court of Appeals for the Fifth Circuit. That petition raises the important question whether a state can insulate an unconstitutional state-law prohibition from federal challenges—and thereby effectively deprive individuals of their constitutional rights—by delegating to the general public the authority to enforce the prohibition. The petition urges the Court to grant certiorari before judgment under Supreme Court Rule 11 because of the urgency of the harm to residents of Texas and neighboring States, because the court of appeals has already made clear that it will not provide relief, and because the law at issue is patently unconstitutional.

Given the pressing need for prompt resolution of the question presented, Petitioners respectfully request that the Court direct Respondents to file an

opposition to the petition by October 12, 2021, which would enable this Court to consider the petition at its conference on October 29, 2021. Petitioners also move for this Court to order Respondents to file any opposition to this motion by Tuesday, September 28, 2021. Petitioners further request that if the petition is granted, a briefing schedule be set that would allow for oral argument during the Court's December sitting.

BACKGROUND

The State of Texas adopted a law banning abortion at approximately six weeks of pregnancy—indisputably months before viability, and before many people even realize they are pregnant. Senate Bill 8, 87th Leg., Reg. Sess. (Tex. 2021) ("S.B. 8" or the "Act"). In a deliberate effort to shield this unconstitutional law from a pre-enforcement challenge in federal court, the State barred executive-branch officials—such as local prosecutors or the health department—from enforcing it directly, S.B. 8 § 3 (adding Tex. Health & Safety Code §§ 171.207(a), 171.208(a)), and instead delegated enforcement to the general public via private civil actions.

S.B. 8 authorizes "[a]ny person" to bring a civil-enforcement action in state court against anyone alleged to have (1) provided an abortion that violates the ban, (2) engaged in conduct that "aids or abets" an abortion that violates the ban (regardless of whether they knew or had any reason to know that the abortion they assisted was unlawful under S.B. 8), or (3) intended to do any of those things. S.B. 8 § 3 (adding Tex. Health & Safety Code § 171.208(a), (e)(1)). The law does not require

that the claimant have any connection to the person sued or be injured by the abortion in any way. *Ibid.*

When an S.B. 8 claimant demonstrates a "violation" of the Act, the state court is required to issue an injunction to prevent further prohibited abortions from being performed, aided, or abetted. S.B. 8 § 3 (adding Tex. Health & Safety Code § 171.208(b)(1)). In addition, the court must award the person who initiated the enforcement action a minimum bounty (there is no statutory maximum) of $10,000 per abortion, plus costs and attorney's fees, payable by the person sued. S.B. 8 § 3 (adding Tex. Health & Safety Code § 171.208(b)(2)–(3)).

Petitioners filed this pre-enforcement challenge on July 13 seeking to block S.B. 8 in advance of its September 1 effective date. Petitioners named as putative defendant classes the government officials integral to S.B. 8's private-enforcement mechanism: (1) the clerks of the courts in which S.B. 8 enforcement actions are brought, represented by Respondent Penny Clarkston, and (2) the judges of those courts, represented by Respondent Judge Austin Reeve Jackson. Pet. App. 3a–4a, 15a. Petitioners also sued Respondent Ken Paxton, alleging that, as the Attorney General of Texas and Texas's chief law-enforcement officer, he is a proper defendant in a challenge to this state law. Petitioners acknowledged, however, that this argument with respect to Attorney General Paxton is currently foreclosed by Fifth Circuit precedent. D.Ct. Dkt. 1 at 20 n.5; D.Ct. Dkt. 19 at 21 n.4. Additionally, Petitioners sued Attorney General Paxton and certain state licensing officials on the ground that they can enforce S.B. 8 indirectly through other laws that are triggered

by violations of S.B. 8. Pet. App. 11a–12a, 15a–16a. Petitioners also named as a defendant Respondent Mark Lee Dickson, a private party authorized to enforce S.B. 8 who has credibly threatened to sue Petitioners who violate the Act. Pet. App. 16a.

On August 25, the district court denied Respondents' motions to dismiss, concluding that petitioners have standing to bring their claims and that the claims against the government-official Respondents fit within the exception to sovereign immunity recognized in *Ex parte Young*, 209 U.S. 123 (1908). Pet. App. 1a–68a. Respondents appealed the same day. Respondents moved for a stay of proceedings, arguing that an appeal of a denial of sovereign immunity divests the district court of jurisdiction to resolve claims subject to the immunity defense. On August 27, the district court stayed the case as to the government officials but denied the stay motion as to respondent Dickson, who—as a private defendant—had not asserted sovereign immunity. Pet. App. 73a–75a. The court thus ordered the hearing on Petitioners' fully briefed motion for a preliminary injunction, which had been previously scheduled for August 30, to proceed as to Respondent Dickson.

On August 27, the Fifth Circuit entered a temporary administrative stay of all district-court proceedings, including the preliminary-injunction hearing, and also denied Petitioners' emergency motion to expedite the appeal. Pet. App. 79a. On August 29, the court of appeals denied Petitioners' emergency motions for an injunction pending appeal and to vacate the stays of the district-court proceedings or, in the alternative, to vacate the district court's denial of the motions to dismiss and remand. Pet. App. 82a.

On August 30, Petitioners submitted an emergency application to Justice Alito seeking, among other things, an injunction to preserve the status quo and prevent the irreparable harm that would ensue once S.B. 8 took effect. The Court denied the application on September 1, stating that petitioners had "raised serious questions regarding the constitutionality of S.B. 8," but that injunctive relief was not warranted at that time because of "complex and novel antecedent procedural questions." *Whole Women's Health v. Jackson*, No. 21A24, slip op. at 1 (Sept. 1, 2021).

S.B. 8 took effect on September 1. Although S.B. 8 unabashedly defies this Court's precedents, abortion providers—faced with the threat of unlimited lawsuits from the general populace and the prospect of ruinous liability if they violate the ban—have been forced to comply. As a result, abortion access across Texas has been decimated. Texans with means must now travel hundreds of miles each way to other States during a pandemic, just to exercise a clearly established federal right. The surge of Texans seeking out-of-state appointments for this time-sensitive medical care is causing backlogs in those States, delaying abortions by weeks for Texans and non-Texans alike. Many Texans, however, lack the financial means to travel out of state or are unable to secure childcare or the necessary time off work to do so. These individuals must carry pregnancies to term and go through labor and delivery against their will or seek ways to induce an abortion without medical assistance, as reports now suggest many more Texans are doing.

The court of appeals maintained its administrative stay of the district-court proceedings until September 10, when it issued a published opinion denying

Petitioners' motion to dismiss Dickson's appeal and granting Dickson's motion to stay the district-court proceedings. Although the court also ordered that the appeal be expedited, Pet. App. 105a, briefing will not even begin until mid-October, and no argument will be heard before December.

In its opinion, the Fifth Circuit explained that it previously denied Petitioners' emergency motion for an injunction pending appeal because Petitioners' claims against Texas clerks and judges are "specious" and "absurd." Pet. App. 86a, 96a, 97a. The court declared that none of the state officials are "amenable to suit under *Ex parte Young*, 209 U.S. 123 (1908)," and that the jurisdictional issues in Dickson's appeal are "inextricably intertwined" with those in the state officials' appeal. Pet. App. 86a, 104a.

Contemporaneously with this motion, Petitioners have filed a petition for a writ of certiorari before judgment to the United States Court of Appeals for the Fifth Circuit. They ask this Court to determine whether a State can insulate from federal-court review a law that prohibits the exercise of a constitutional right by delegating to the general public the authority to enforce that prohibition through civil actions.

ARGUMENT

For the same reasons that Petitioners have filed a petition seeking certiorari before judgment, they request expedited consideration of that petition. Texas intentionally outsourced enforcement of S.B. 8's blatantly unconstitutional six-week abortion ban "to the populace at large" as a ploy to "insulate the State from responsibility" for enacting a law that violates a clearly established federal right. No.

21A24, slip op. at 2 (Roberts, C.J., dissenting). Resolution of the question "whether a state can avoid responsibility for its laws in such a manner," *ibid.*, is of the utmost public importance and should not be delayed.

Every day that the Court does not confirm that prospective injunctive relief is available to block S.B. 8's private enforcement mechanism is a day that Texas has succeeded in defying this Court's clearly established precedent and stripped Texans of a federal constitutional right. As a result, those with the means to do so are being forced to travel hundreds of miles out of State to exercise that federal right. Indeed, because abortion clinics in neighboring States cannot accommodate the surge of Texas patients, many Texans are being forced to travel nearly a thousand miles or more, each way, to other States. *See United States v. Texas*, No. 21-cv-00796 (W.D. Tex., Sept. 15, 2021), Dkt. 8-6, Decl. of Rebecca Tong ¶¶ 12–13, 21–22, 28. Many patients, including victims of rape, incest, and domestic violence, can make these journeys only at great personal expense and hardship. *See, e.g.*, *id.* Dkt. 8-9, Decl. of Joshua Yap ¶ 19 (describing Texas woman who drove through the night to Oklahoma for a morning appointment and then drove back the same day), ¶ 22 (describing "Texas minor who had been raped by a family member" and endured "a 7- to 8-hour drive" each way to Oklahoma); *id.* Dkt. 8-7, Decl. of Vicki Cowart ¶ 10 (describing Texas woman facing violence at the hands of her abusive husband and attempting to "scrape together funds" by "selling personal items" to afford an "out-of-state trip"), ¶ 12 (describing Texas woman who "drove alone out and back to her appointment [in New Mexico]—over 1000 miles round trip—because she didn't have paid time off work

and couldn't afford to miss the hours"); *id.* Dkt. 8-8, Decl. of Anna Rupani ¶ 26 (describing Texas woman who "piled her children into her car and drove over 15 hours overnight" to Kansas "rather than struggle to patch together the money needed for air-fare and childcare").

Still more pregnant Texans are simply unable to travel out of State for care, and in most cases "will be forced to carry those pregnancies to term and face the risks—medical and financial—attendant with childbirth." *Id.* Dkt. 8-4, Decl. of Amy Hagstrom Miller ¶ 32. Others will attempt to take matters into their own hands. *Id.* Dkt. 8-5, Decl. of Melaney A. Linton ¶ 34 (describing a patient who reported taking an "abortion tea" she found on the internet); Abby Vesoulis, *How Texas' Abortion Ban Will Lead to More At-Home Abortions*, Time (Sept. 21, 2021) (visits to online resource for accessing abortion pills went from 500 to 25,000 daily), https://time.com/6099921/texas-self-managed-abortions/.

These harms are spilling over to residents of other States. Patients from Texas now take up about two-thirds of appointments at one of the few abortion clinics in Oklahoma, and about half of the appointments at one of the few Kansas clinics. *United States v. Texas*, Dkt. 8-6, Tong Decl. ¶¶ 11, 20. As a result, the Oklahoma clinic is having to schedule appointments three weeks out, a significant delay for a time-sensitive medical procedure. *Id.* ¶ 13. Inevitably, this means first-trimester abortion patients across multiple States are now being delayed until later in pregnancy to obtain abortion care, with no end to these delays in sight. Even a herculean effort to increase capacity in other States could not accommodate the influx

of patients attempting to escape Texas's extreme abortion ban. *Id.* Dkt. 8-7, Cowart Decl. ¶ 18 (55,966 abortions in Texas in 2019, compared to 2,735 in New Mexico in 2019 and 10,368 in Colorado in 2020); *ibid.* Dkt. 8-6, Tong Decl. ¶¶ 32–33 (describing difficulties in hiring physicians and staff to meet increased demand).

The law is also harming clinic staff and physicians. Not only are they forced to turn away patients desperate for care, *id.* Dkt. 8-5, Linton Decl. ¶ 40, but they are facing increased threats and harassment, *id.* ¶ 37 (physician received messages calling him a murderer and saying that he should be killed); *id.* Dkt. 8-2, Gilbert Decl. ¶ 44 (describing threats, including caller threatening to "tie up staff in chains and torture them"); *see also* Pls.' Mot. Summ. J., Declaration of Melaney A. Linton ¶ 32, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Tex. Right to Life*, No. D-1-GN-21-004632 (Tex. Dist. Ct., Travis Cnty. Sept. 20, 2021) (describing a protestor who set up a camera to record patients' license plates and another who blocked a health center driveway with his vehicle, requiring police response); *id.* Decl. of Polin Barraza ¶ 15 (describing caller who "demanded the last name of a [staff] representative so that they could sue her").

All of this is happening because of a clearly unconstitutional law. There is no argument under existing precedent that a ban on abortion at six weeks is constitutional, and that is true regardless of how it is enforced. Only this Court's immediate intervention will ensure that Texans' federal constitutional rights are protected from this brazen effort to subvert a constitutional right.

Moreover, Texas is not the only state that may use this private-enforcement scheme to strip its residents of clearly established federal constitutional rights. The drafters of S.B. 8 are being credited for their success in circumventing the Constitution. *See* Michael S. Schmidt, *Behind the Texas Abortion Law, a Persevering Conservative Lawyer*, N.Y. Times (Sept. 12, 2021), https://www.nytimes.com/2021/09/12/us/politics/texasabortion-lawyer-jonathan-mitchell.html. Already, legislation modeled on S.B. 8 has been introduced in Florida, and other States are considering it. H.B. 167, 2022 Sess. (Fla. 2021); Ewan Palmer, *Florida and 5 other GOP-Led States Consider Texas-Style Curbs on Abortion*, Newsweek (Sept. 3, 2021) (noting that lawmakers in Arkansas, Florida, Indiana, North Dakota, Mississippi, and South Dakota are considering parallel laws), https://www.newsweek.com/republican-states-texas-style-restrictive-curbs-legislation-abortion-florida-1625876. Nor is there any reason to think that this scheme will be limited to abortion bans. It could just as easily be used by other States and municipalities with respect to other rights they disfavor.

The gravity of the circumstances and the paramount importance of the question presented warrant this Court's urgent intervention.

For these reasons, Petitioners move the Court to adopt a certiorari briefing schedule that would require Respondents to file a response by October 12, 2021. That deadline provides Respondents nearly three weeks to file a brief in opposition; in contrast, Petitioners now submit their petition less than two weeks after issuance of the Fifth Circuit's opinion granting the motion to stay and one day after the Fifth

Circuit made clear it would not even take up the full appeal until December. The proposed schedule would allow the Court to consider the petition at its October 29 conference. Through this motion, petitioners waive the 14-day period provided by this Court's Rule 15.5 between the filing of a brief in opposition and the distribution of the petition to the Court. And to facilitate expedition, petitioners also request that this Court direct respondents to file any response to this motion by Tuesday, September 28. Petitioners further request that if the petition is granted, a briefing schedule be set that would allow for oral argument during the Court's December sitting.

September 23, 2021

Respectfully submitted,

/s/ Marc Hearron

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