

No. 21-463

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.

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

**BRIEF OF AMICI CURIAE – PROFESSORS
ADAM LAMPARELLO, CHARLES E.
MACLEAN, AND BRIAN OWSLEY IN
SUPPORT OF PETITIONERS**

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INTEREST OF AMICI CURIAE

Amici Curiae Adam Lamparello, Charles E. MacLean, and Brian Owsley are assistant or associate professors and write in the areas of constitutional law, criminal law, and criminal procedure. The professors have an interest in the fair and equitable development of the law in this area.¹

Professor Lamparello is an Assistant Professor of Public Law at Georgia College and State University, and teaches and writes in the areas of constitutional and criminal law, with a particular focus on the Fourteenth Amendment. Additionally, Professor Lamparello has written over seventy law review articles, authored several textbooks, and drafted ten amicus briefs in cases pending before the Court, including in *Whole Woman's Health v. Hellerstedt*, *Riley v. California*, and *Hall v. Florida*.

Professor MacLean serves as an Associate Professor at the Metropolitan State University in St. Paul, Minnesota, and teaches and writes in the areas of ethics and constitutional law, particularly related to the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments. Professor MacLean supports a rational and predictable reproductive freedom approach that honors a woman's right to choose and fuels a rebirth of the Court's institutional legitimacy.

¹ Counsel for Petitioner and Respondent have provided blanket consent to the filing of amicus briefs. Pursuant to this Court's

Professor Owsley, former Harlan Fisk Stone Scholar and former federal magistrate judge for the Southern District of Texas, teaches Constitutional Law, Torts, and other courses at the University of North Texas-Dallas College of Law, and is interested as amicus in the Court's institutional legitimacy.

Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

If a private enforcement scheme is sufficient to eviscerate abortion rights, judicial review – and fundamental constitutional rights – will eventually be buried in the “graveyard of the forgotten past.” *In re Gault*, 387 U.S. 1, 24 (1967).

Texas is up to its old tricks again. Indeed, “[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried,” Texas Senate Bill 8 (“SB8”), which bans all abortions after six weeks, stalks the Court’s abortion jurisprudence yet again with a law that is flagrantly unconstitutional. *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

Simply put, SB8 is analogous to a movie sequel that is equally, if not more, deplorable than the original. In the first – and unsuccessful – installment, Texas attempted to significantly reduce, if not eliminate, abortion access by requiring abortion providers to obtain hospital admitting privileges. *See Whole Women’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). Fortunately, the Court recognized that this requirement was merely a pretense to eliminate access to abortions, as complications from abortion procedures are extremely rare and far less frequent than complications resulting from, for example, tooth extractions, tonsillectomies, and colonoscopies – none of which were subject to an admitting privileges requirement. *See id.*; *see also June Medical Services v. Russo*, 140 S. Ct. 2103 (2020) (invalidating a similar

law in Louisiana). For this and other reasons, the Court invalidated the law and, in so doing, implicitly recognized that its purpose was not to protect women but, in the words of former Governor Rick Perry, “to make abortion, at any stage, a thing of the past.” Press Release, Governor Rick Perry, Tex., Governor Perry Announces Initiative to Protect Life (Dec. 11, 2012), <http://perma.cc/CWN2-KLDD>.

Unfortunately, Texas’s desire to outlaw abortions at any cost and through whatever means necessary has once again reared its ugly head. Undeterred by the Court’s decision in *Hellerstedt*, Texas now seeks to circumvent this Court’s abortion jurisprudence with an “uncommonly silly law” that dispenses with any pretense whatsoever. *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting). Specifically, SB8 categorically bans all abortions after six weeks and its drafters, almost certainly aware of SB8’s unconstitutionality, seek to evade judicial review by deputizing private citizens to enforce its provisions. In so doing, SB8 – and the State of Texas – thumbs its nose at this Court, its well-settled precedent, and the judiciary’s exclusive power to “say what the law is.” *Marbury v. Madison*, 5 U.S. 137 (1 Cranch) (1803); *see also Roe v. Wade*, 410 U.S. 113 (1973) (holding that the liberties protected under the Fourteenth Amendment’s Due Process Clause encompass the right to terminate a pregnancy before viability); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (holding that states may not unduly burden a woman’s ability to access abortion services).

Accordingly, the Court should quickly – and unanimously – grant Petitioner’s request for relief. SB8 is obviously unconstitutional as a frontal assault on *Roe v. Wade* and the fetal viability threshold. Given SB8’s obvious unconstitutionality, denying Petitioners relief would severely harm women throughout Texas *and* significantly undermine the Court’s institutional legitimacy.

To be sure, the public’s opinion of the Court results, at least in part, from the perception that some decisions reflect the Court’s current ideological composition. When the justices’ votes conveniently and consistently align with their policy preferences – and constitutional meaning changes based on whether a majority of the justices is liberal or conservative – the perception is that politics, not law, and party affiliation, not principle, motivate the Court’s decisions. Of course, although the justices continually emphasize that their decisions are never motivated by policy preferences, the fact remains that *perception* matters more than *reality*. Indeed, it *is* reality.

Any decision that denies Petitioners the ability to seek relief in federal court would re-enforce this perception. It would suggest that constitutional meaning can – and does – change simply because the political and ideological predilections of the justices change. It would suggest that constitutional rights can be tossed in the proverbial garbage simply because there are more conservatives on the Court in 2021 than there were in 1973 or 1992. That is the point – and the problem. This case provides the Court with a golden

opportunity to disabuse the public of that notion and reaffirm that the United States is a country of laws, not men.

ARGUMENT**DENYING THE PETITIONERS
RELIEF WOULD DAMAGE THE
COURT'S INSTITUTIONAL
LEGITIMACY**

The Texas law has put the Supremacy Clause and the institutional legitimacy of the federal courts on the line. The Court must intervene swiftly and clearly to ensure that Petitioners can seek redress in federal court from a blatantly unconstitutional law. This is necessary for three reasons.

First, SB8's categorical ban on abortions after six weeks unquestionably violates the Court's precedents. *See Roe* 410 U.S. 113; *Casey*, 505 U.S. 833. Furthermore, the Court has repeatedly held that a "State cannot delegate . . . a veto power [over the right to obtain an abortion] which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy." *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 69 (1976) (internal quotation marks omitted); *see also Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2499 (2021) (Sotomayor, J., dissenting) ("It cannot be the case that a State can evade federal judicial scrutiny by outsourcing the enforcement of unconstitutional laws to its citizenry"). In so holding, the Court emphasized that "since the State cannot regulate or proscribe abortion during the first stage . . . the State cannot delegate authority to any particular person . . . to prevent abortion during that same period." *Whole Woman's Health*, 141 S. Ct. at 2497

(Breyer, J., dissenting) (quoting *Planned Parenthood of Central Mo.*, 428 U.S. at 69). Yet, that is precisely what Texas is attempting to do here. Put differently, even though the law at issue in *Hellerstedt* could be characterized as a wolf in sheep’s clothing, “this wolf [SB8] comes as a wolf.” *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting) (brackets added).

In response, the Court should grant Petitioners relief. As Justice Sotomayor recognized, SB8 was “enacted in disregard of the Court’s precedents,” and the Court “should not be so content to ignore its constitutional obligations to protect not only the rights of women, but also the sanctity of its precedents and of the rule of law.” *Whole Woman’s Health*, 141 S. Ct. at 2499 (Sotomayor, J., dissenting). Justice Sotomayor is right.

Indeed, if Texas – and other states – can avoid judicial review of unconstitutional abortion bans, abortion will, as a practical matter, be outlawed in many states. And *Roe v. Wade* and *Planned Parenthood v. Casey*, which were decided nearly a half-century and thirty years ago, respectively, will be effectively overruled. Put simply, denying Petitioners relief would require the Court to ignore its well-settled precedents, thus demonstrating that *stare decisis* is a doctrine of convenience rather than conviction. That is a recipe for damaging the Court’s legitimacy because it will reinforce the belief that the Court’s decisions depend more on the current ideological predilections of the

justices rather than principled – and objective – legal analysis.

Second, SB8's drafters – obviously aware that a six-week abortion ban is unconstitutional – devised a ridiculous scheme that strives to evade constitutional review by giving *any* private citizen enforcement power and that treats this Court and its precedents with utter disdain. Under Texas's scheme, an ex-boyfriend, estranged family member, or *complete* stranger could sue an abortion provider for offering abortion services after six weeks – and collect at least \$10,000 for doing so.

If the Court refuses to intervene, it will countenance legislative end-arounds that place constitutional rights in the rear-view mirror and prioritize politics over principle. Again, this a recipe for damaging the Court's institutional legitimacy. The Court should acknowledge the obvious: SB8 is unquestionably unconstitutional and nothing, not even the most invidious legislative subterfuge, can rescue it from invalidation.

Third, if the Court refuses to grant Petitioners relief, it will give other states the green light to enact similar duplicitous schemes that strive to erode other fundamental constitutional protections. For example, if the Court countenances Texas's tactic of re-assigning to private persons the acts Texas itself cannot constitutionally pursue, virtually any recognized constitutional right, if politically unpopular, could be eviscerated by simply deputizing private bounty hunters. As a result, constitutional

rights would be worth the equivalent of Monopoly money.

The founders, the Constitution, the rule of law, and citizens, deserve better. Granting Petitioner's requested relief is what the Constitution requires, and what justice demands.

CONCLUSION

For the foregoing reasons, the Court should grant Petitioners' requested relief.

Respectfully submitted,

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