Nos. 21-463, 21-588

IN THE

Supreme Court of the United States

WHOLE WOMAN'S HEALTH, ET AL.,
Petitioners,
v.
AUSTIN REEVE JACKSON, JUDGE,
DISTRICT COURT OF TEXAS, 114TH DISTRICT, ET AL.,
Respondents.

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

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

BRIEF OF 128 CURRENT AND FORMER PROSECUTORS AND LAW ENFORCEMENT LEADERS, AND FORMER STATE ATTORNEYS GENERAL, FEDERAL AND STATE COURT JUDGES, U.S. ATTORNEYS, AND U.S. DEPARTMENT OF JUSTICE OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

MIRIAM KRINSKY
ROSEMARY NIDIRY
ELIZABETH KOMAR
DAVID WEISS
ESTELA DIMAS
FAIR AND JUST PROSECUTION,
A PROJECT OF THE
TIDES CENTER
1012 Torney Avenue
San Francisco, CA 94129

JOHN P. MASTANDO III
Counsel of Record
LAUREN BERNSTEIN
MELISSA RUTMAN
TANIA C. MATSUOKA
FRANK T. UNGERER
LAUREN R. WANDS
WEIL, GOTSHAL &
MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000
john.mastando@weil.com

Counsel for Amicus Curiae

October 27, 2021

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are nearly 130 current and former prosecutors and law enforcement leaders, and former state attorneys general, federal and state court judges, U.S. Attorneys, and U.S. Department of Justice officials, who are all committed to protecting the integrity of the justice system, upholding the Constitution and rule of law, and promoting safer and healthier communities.

Amici have decades of experience in safeguarding the integrity of the American criminal justice and legal systems. They are united in their conviction that a core tenet of the pursuit of justice is the furtherance of fair and equitable policies and practices that comport with Supreme Court precedent and protect the well-being and safety of communities. Drawing on their collective experiences, *amici* recognize that trust in the rule of law and the justice system is the foundation for keeping communities safe.

While *amici* may not all agree on the issue of abortion, they have come together here based on their deeply held concerns over the dangerous and brazen disrespect for decades of settled legal precedent resulting from the implementation of Senate Bill 8, 87th Leg., Reg. Sess. (Tex. 2021) ("S.B. 8"). They are united in their view that this Court should step in to

---

[1] Pursuant to S. Ct. Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part and no person or entity other than amici or their counsel made a monetary contribution to its preparation or submission. All parties, including the Intervenors in the *United States v. Texas*, have provided their blanket consent to the filing of amicus briefs in support of either or neither party in this case. A full list of *amici curiae* is appended to this brief.

immediately halt Texas's effort to flagrantly disregard this Court's nearly five-decade-long pronouncement regarding Constitutional rights. Any other course of action would have profound consequences, inviting other States to evade binding federal law, simply by outsourcing enforcement to private citizens for cash bounties. And allowing S.B. 8 to remain in effect—even as the merits of these cases are litigated—will erode trust in the rule of law and send the message that each State is effectively a law unto itself and can eviscerate any constitutional safeguard its legislature dislikes.

Protections for individual rights guaranteed by the U.S. Constitution and recognized by this Court should not be converted to little more than advisory opinions and Americans' fundamental rights should not be beholden to the whims of State legislatures. Communities will suffer if the rule of law is no longer a binding and stable anchor that citizens can trust and rely on to protect them. This potential chaos will harm us all and— regardless of one's view in relation to the propriety of abortions—*amici* fear both the short-term and long-term consequences of sanctioning S.B. 8's deeply concerning attempt to ignore and erode settled law.

SUMMARY OF ARGUMENT

S.B. 8 is perhaps the most blatant attempt to subvert federal authority since the Jim Crow era. The law is nakedly designed to override this Court's existing precedents by deputizing private citizens as bounty hunters tasked with enforcing laws the State could not enforce itself and then disclaiming responsibility before the courts.

Nonetheless, the Fifth Circuit stayed a preliminary injunction barring enforcement of this scheme in *United States v. Texas*, No. 21-50949, 2021 WL 4786458, at *1 (5th Cir. Oct. 14, 2021). And in *Whole Woman's Health v. Jackson*, 13 F.4th 434, 441-45 (5th Cir. 2021), the Fifth Circuit made clear that, in its view, federal courts are powerless to preemptively block the implementation of the privately enforced state law prohibitions created by S.B. 8. See also *Whole Woman's Health v. Jackson*, No. 21-50792, 2021 WL 3919252, at *1 (5th Cir. Aug. 29, 2021) (denying emergency motions for an injunction pending appeal and to vacate an administrative stay of the district court proceedings). Taken together, the Fifth Circuit's decisions allow a deeply troubling vigilante system to remain in effect indefinitely and send a powerful signal to state governments and communities across the nation that constitutional protections and the precedent of this Court are meaningless. Equally concerning, the Fifth Circuit's decisions are not limited to any specific right, thereby potentially inviting a litany of abuses and copycat legislation in other realms.

In recognizing the public importance of these issues, this Court has granted certiorari before judgment in both cases. In *Whole Woman's Health v. Jackson*, the Court will review whether the State can insulate from federal court oversight a law that prohibits the exercise of a constitutional right by delegating to the public the authority to enforce that prohibition through civil actions. Brief for Petitioner at i, No. 21-463, 2021 WL 4928617 (Oct. 22, 2021). And in *United States v. Texas*, this Court will determine whether the United States may bring suit in federal court against the State and other parties to obtain injunctive or declaratory relief and prevent S.B. 8's enforcement.

No. 21A85 (21-588), 2021 WL 4928618, at 1 (Oct. 22, 2021).

If left in place, S.B. 8's unabashed disregard for the rule of law will have a corrosive impact on the ability of law enforcement to protect the communities they serve. S.B. 8 creates a new form of vigilante justice, encouraging private citizens to target their fellow neighbors in exchange for a cash payout and creating an incentive (and tacit state license) to intrude into the intimate affairs of others. The resulting fear and distrust this structure fuels will further weaken the integrity of the rule of law and the critical role of criminal justice stakeholders in promoting safer communities.

For all these reasons, this deeply disturbing enactment simply cannot—and should not—be allowed to stand. The erosion of trust and damage S.B. 8 has created, and will continue to create, should be of great concern to all who value a system of laws and who seek to promote the well-being of our communities.

ARGUMENT

I. S.B. 8's Provisions and Unprecedented Enforcement Mechanism Undermine Trust In The American Justice System

A. S.B. 8 Is A Blatant Evasion Of Federal Authority

Texas does not seriously dispute that the abortion ban enacted by S.B. 8 runs afoul of this Court's long-standing precedent, which recognizes the constitutional right to terminate a pregnancy before viability. *Planned Parenthood v. Casey*, 505 U.S. 833, 871 (1992); *Roe v. Wade*, 410 U.S. 113, 164–65 (1973). Yet, the drafters of S.B. 8 have brazenly proceeded ahead

with this effort, while also outsourcing the law's enforcement to private citizens in an effort to circumvent not only this Court's binding precedent and interpretation of Constitutional rights, but also judicial review. This shameful legislative scheme directly undermines public trust in the rule of law. The Court cannot permit Texas to "insulate [itself] from responsibility," *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2496 (2021) (Roberts, C.J., dissenting) and elude binding precedent in this manner.

State legislatures do not have the power to supersede federal constitutional rights—whether through a citizen enforcement mechanism or any other mechanism. Federal law is the "supreme Law of the Land" notwithstanding "anything in the Constitution or laws of any State." U.S. Const. art. VI., cl. 2; *Marbury v. Madison*, 5. U.S. 137, 178–80 (1803). It is thus a foundational principle that "the federal judiciary is supreme in the exposition of the law of the Constitution," and "state legislators or state executive or judicial officers" cannot nullify federal rights through "evasive schemes" designed to foreclose judicial review. *Cooper v. Aaron*, 358 U.S. 1, 16–18 (1958); see also *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971) (where a state policy "operates to hinder vindication of federal constitutional guarantees," it "must give way"). As a result, this Court has consistently struck down efforts by states to circumvent constitutional rights. See, e.g., *Am. Tradition P'ship, Inc. v. Bullock*, 567 U.S. 516, 516–17 (2012) (holding Montana law limiting political speech was unconstitutional in light of *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010)); *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971) (holding North Carolina anti-busing law unconstitutional); *Lombard v. Louisiana*, 373 U.S. 267, 273

(1963) (holding that Louisiana could not enforce racial segregation in violation of the Fourteenth Amendment by issuing "an official command"); *Terry v. Adams*, 345 U.S. 461, 469–70 (1953) (finding Texas law permitting an electoral process managed by a private volunteer organization in order to exclude Black people from voting because of their race violated the Fifteenth Amendment).

These bedrock principles dictate the result here. That the Texas legislature attempted to shield the State from responsibility by crafting a private right of action makes no difference but instead simply highlights that the State's goal is to circumvent and disregard this Court's binding precedents.

B. Implementing An Abortion Ban In Direct Contravention of Settled Precedent Threatens The Integrity Of The Rule Of Law

1. States Will No Longer Be Obligated To Adhere To Supreme Court Precedent

Because Supreme Court rulings are the law of the land, no court may do anything short of applying binding Supreme Court precedent. The Court of Appeals was obligated to do so in the cases before it. See *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) ("Courts of Appeals should . . . leav[e] to this Court the prerogative of overruling its own decisions."); *State Oil v. Khan*, 522 U.S. 3, 20 (1997) (same). This is true even where the Court of Appeals may believe that "changes in judicial doctrine [have] significantly undermined" the precedent at issue. *U.S. v. Hatter*, 532 U.S. 557, 567 (2001); see also *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) ("Our

decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.") (quoting *Hohn v. U.S.*, 524 U.S. 236, 252–53 (1998)).

The Fifth Circuit's decisions rejecting challenges to S.B. 8 effectively negate this principle, however, by enabling any individual State to disregard this Court's precedents within its borders. Abiding by the Fifth Circuit's endorsement of S.B. 8's approach will suggest to state legislatures that they have carte blanche to erode any federal rights of their choosing, despite settled recognition of those rights under this Court's precedent. As this Court explained not long after our Nation's founding, "[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." *United States v. Peters*, 9 U.S. 115, 136 (1809); see also *Terry*, 345 U.S. at 463–64, 469 (holding that electoral primaries which were "purposefully designed to exclude" Black people from voting were a "flagrant abuse of [election] processes to defeat the purposes of" the Constitution); *Reitman v. Mulkey,* 387 U.S. 369, 380–81 (1967) (a law providing a private right to racially discriminate in the housing market was unconstitutional because it would "significantly encourage and involve the State in private discriminations.").

2. Allowing S.B. 8 To Remain In Effect Will Erode Trust In The Rule Of Law And Adversely Impact Law Enforcement

Prosecutors and law enforcement officials rely on the rule of law to perform their jobs. When the

integrity of the rule of law—and people's belief in its even-handed enforcement—is undermined, it becomes more difficult for law enforcement officials and criminal justice leaders to maintain community trust and protect public safety. See, e.g., Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation and Engagement*, 20 Psych., Pub. Pol'y & L. 78, 78–79 (2013); Building Community Trust: Key Principles and Promising Practices in Community Prosecution and Engagement, Fair and Just Prosecution ("Trust between the community and the prosecutor's office is essential to maintain the office's legitimacy and credibility").[2] When individuals have less confidence in legal authorities and view the police, the courts, and the law as illegitimate, they are less likely to report crimes, cooperate as witnesses, and accept police and judicial system authority. See Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 Ohio St. J. Crim. L. 231, 263 (2008). Unfair, discriminatory, and arbitrary practices by government officials erode essential community confidence and trust in law enforcement and our justice system. See Andrew Goldsmith, *Police Reform and the Problem of Trust*, 9 Theoretical Criminology 443, 456 (2005); Thomas C. O'Brien & Tom R. Tyler, *Rebuilding Trust Between Police & Communities Through Procedural Justice & Reconciliation*, 5 Behav. Sci. & Pol'y 35, 35 (2019).

S.B. 8 will create untold damage to these critical bonds of trust, while also encouraging future legislation that would exacerbate these concerns. Indeed,

---

[2] https://www.fairandjustprosecution.org/staging/wp-content/uploads/2018/03/FJP_Brief_CommunityProsecution.pdf.

S.B. 8 has already motivated copycat abortion restrictions across the country. Thus far, at least fourteen states have announced plans to draft restrictions modeled after S.B. 8.[3] In Arkansas, for example, state legislator Jason Rapert has vowed to introduce an S.B. 8-like bill in an upcoming special legislative session. See Rebecca Cohen, *GOP Lawmakers in Florida and Arkansas Considering Own Versions of Texas' Restrictive Anti-Abortion Law*, Business Insider, (Sept. 2, 2021), https://www.businessinsider.com/florida-will-consider-own-version-of-texas-anti-abortion-law 2021-9.

Crucially, the key features of S.B. 8 that the Fifth Circuit has allowed to remain in place are structural and not limited to any particular subject matter. As such, states potentially could empower private bounty hunters to use civil suits to enforce not merely a ban that disrupts decades of precedent regarding abortion, but also any enactment at odds with settled federal law.[4] "Today, it is abortion providers and those who

---

[3] The states include: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Mississippi, Missouri, North Dakota, South Dakota, Oklahoma, South Carolina, and West Virginia. See, e.g., Oren Oppenheim, *Which States' Lawmakers Have Said They Might Copy Texas' Abortion Law*, ABC News (Sept. 3, 2021), https://abcnews.go.com/Politics/states-lawmakers-copy-texas-abortion-law/story?id=79818701; Devan Cole & Ariane de Vogue, *Restrict Abortion Bill Introduced in Florida Mirrors Controversial Texas Law*, CNN (Sept. 22, 2021), https://www.cnn.com/2021/09/22/politics/florida-abortion-law-six-weeks/index.html.

[4] As National Right to Life General Counsel Jim Bopp recognized, "You can flat guarantee you're going to see a lot more civil remedies" inspired by S.B. 8 "attached to other forms of law." See Alice Miranda Ollstein & Josh Gerstein, *Texas Abortion Ban Spawns Look-Alike Laws But Could be Short-Lived*, POLITICO,

assist them who are targeted. Tomorrow, it might be gun buyers who face private, civil liability for firearm purchases. Same sex-couples could be sued by neighbors for trying to obtain a marriage license. States could give citizens a right to sue any newspaper that criticized the incumbent government. Unpopular political groups could be barred from gather under threat of vigilante lawsuits. The possibilities are limitless." Appellant Emergency Br. at 26–27, *Whole Woman's Health v. Jackson*, No. 21-463, 2021 WL 4928617 (Oct. 22, 2021). Indeed, following S.B. 8, Illinois legislators introduced a bill (H.B. 4156) that would grant "any person" a cause of action against manufacturers, importers, or dealers for gun-related injuries or deaths.[5] Similar legislation can be envisioned regarding campaign finance,[6] gender identity,[7]

(Sept. 2, 2021), https://www.politico.com/news/2021/09/02/texas-abortion-law-private-right-to-sue-509244.

[5] See H.B. 4156 § 15; see also Nic Flosi, *'Protecting Heartbeats Act': Illinois Gun Bill Inspired by Texas Abortion Law*¸ FOX 32 Chicago, (Sept. 28, 2021), https://www.fox32chicago.com/news/protecting-heartbeats-act-illinois-gun-bill-inspired-by-texas-abortion-law. Missouri also recently passed a law allowing certain citizens to sue law enforcement who help enforce federal gun regulations. See Jack Karp, *How Privately Enforced Laws Aim to Duck Court Review*, Law360 (Sept. 30, 2021), https://www.law360.com/pulse/articles/1426166/how-privately-enforced-laws-aim-to-duck-court-review. Revisions to the law, modelled after S.B. 8, could extend this cause of action to all Missouri citizens.

[6] See Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, Colum. L. Rev. 1384, 1416 n. 138 (2000) (advocating for the private enforcement of 42 U.S.C. § 14141).

[7] Tennessee House Bill 1233 ("H.B. 1233") permits "a private right of action" against schools who fail to provide "reasonable accommodations" for an individual who refuses to share a

religious liberty, particular categories of free speech,[8] and in other contexts. This Court must "look[] behind the law and ferret[] out the trickery"[9] of S.B. 8 to prevent the flood of derivative legislation that would delegitimize settled precedent and undermine community trust in the justice system.

II. S.B. 8 Creates A Vigilante System That Will Erode Trust In, And Circumvent The Role And Obligations Of, Law Enforcement

S.B. 8 deputizes ordinary citizens to police and prosecute virtually anyone involved in providing or aiding women who obtain abortions, or anyone who intends to do so. In effect, Texas has outsourced enforcement of the law and prosecutorial roles to private individuals to act under color of state law—and has done so in a way that deprives women of their constitutional rights.

The justice system is intended to be a shield through which victims can obtain redress for harms, not a sword that arms unaffiliated private citizens to go after their neighbors for personal gain. S.B. 8 turns

---

bathroom with a fellow transgender student. See H.B. 1233 § 4; Yue Stella Yu, *'Bathroom Bill' Allowing Students, Teachers to Reject Shared Restrooms with Transgender Peers Clears Senate*, Tennessean (Apr. 21, 2021), https://www.tennessean.com/story/news/politics/2021/04/21/tennessee-bathroom-bill-clears-state-senate-expected-pass-house/7283372002/.

[8] S.B. 8 already contemplates lawsuits against women's magazines that advertise abortion clinics. Similar causes of action could be created against firearms magazines that advertise gun stores or political newspapers that advertise forums for unpopular political opinions.

[9] Thurgood Marshall: His Speeches, Writing, Arguments, Opinions, and Reminiscences (Mark V. Tushnet ed. 2001).

the justice system on its head, incentivizing these "deputized" citizens to use overzealous, intrusive, and abusive measures (e.g., spying, stalking, hacking). These tactics create the potential for unchecked vigilantism and will necessarily undermine public safety.

Unlike actual prosecutors and law enforcement officials, these private actors are not guided by the rule of law or any of the policies, practical limitations or ethical obligations that might otherwise temper government actions. As a result, communities may lose faith in the laws designed to protect their safety and those charged with upholding the rule of law. These concerns are exacerbated by several ill-conceived elements and consequences of the new law.

First, S.B. 8's drafters bestowed "deputized" private citizens with state-backed support to enforce the law. This creates a tangible risk that communities will believe that these actors somehow represent the interests of the state, which may further undermine trust in law enforcement and state actors. And there are no restrictions or guidelines on who can bring a lawsuit under S.B. 8. Any individual, regardless of their underlying motives, criminal history, and connection to the abortion or patient, is empowered to fulfill personal vendettas, seek revenge against fellow citizens, or simply seek pecuniary gain under the guise of enforcing the law. Indeed, the state's major anti-abortion lobby group, Texas Right to Life, already helped empower anti-abortion activists to enforce the law by creating a website that invited "whistleblowers" to report violations of S.B. 8.[10] On the site,

[10] The website has since been shut down for violating hosting provider's terms of service forbidding collection of personal data. *See* Janelle Bludau, *'We Will Not Be Silenced' GoDaddy Takes*

informants could anonymously share information about perceived violations, and individuals seeking to become plaintiffs could receive support and instructions on how to bring a lawsuit.[11] And the first two individuals who have filed suit under S.B. 8 are two attorneys who have either been disbarred or otherwise disciplined for their conduct, one for dishonesty resulting in a criminal tax evasion conviction, and the other for harassment.[12] Neither individual has any personal connection to the patient or personal interest in their health status. *Id*.

S.B. 8 supplants the gatekeeping functions of elected prosecutors, who exercise discretion when determining whether to bring cases. The law's

---

Down Pro-Life Abortion Tip Website, They Vow To Return, KHOU (Sept. 4, 2021).

[11] Texas Right to Life wants "to use [the site and others] to help connect pro-life citizens with pro-life attorneys who are interested in helping enforce" S.B. 8. *Texas Right to Life Group On Law Restricting Abortion*, WBUR (Sept. 2, 2021) (interviewing Rebecca Parma, senior legislative associate at Texas Right to Life), https://www.wbur.org/hereandnow/2021/09/02/texas-right-to-life-abortion-law.

[12] The first individual to bring suit in Texas, Oscar Stilley, is, in his words, "a disbarred and disgraced former Arkansas lawyer" who is currently "in the custody of the United States Department of Justice-Federal Bureau of Prisons" serving 15 years for tax evasion and conspiracy. See Compl., *Stilley v. Braid*, No. 2021-I-19940 (Tex. Dist. Ct., Bexar Cty. Sept. 20, 2021), available at https://bustingthefeds.com/wp-content/uploads/2021/09/1_Complaint VBraid.pdf. The second individual, Felipe N. Gomez, is an Illinois attorney currently suspended from the state's bar over accusation of sending harassing and threatening emails. See Melissa Heelan, *7th Cir. Affirms Disbarment Over Harassing Email Allegations*, Bloomberg Law (Nov. 6, 2020), https://news.bloomberglaw.com/us-law-week/7th-cir-affirms-disbarment-over-harassing-email-allegations.

sweeping scope does not exempt abortions resulting from rape, incest, and sexual abuse. Instead, S.B. 8 allows vigilante private citizens to pursue such cases unbound by ethics, prosecutorial discretion, and basic humanity. By twisting legal enforcement mechanisms to displace prosecutors and law enforcement, S.B. 8 eviscerates trust in the legal system necessary for prosecutors and law enforcement to ensure the health and safety of their communities.

Second, S.B. 8 encourages these lawsuits by design. The law offers up a bounty of *at least* $10,000 per violation to any citizen who brings a successful lawsuit against an abortion provider or assister, to be paid out by the individual defendant. See S.B. 8 §171.208(b)(2). Through the promise of financial payout, Texas has in effect subsidized and incentivized a community of private actors to stalk, harass, surveil, and report on their fellow citizens.[13] Not only will this sow distrust within communities, but state-sanctioned vigilantism will also undermine citizens' confidence in law enforcement's ability to enforce laws aimed at protecting their privacy and security. And it is the most vulnerable women—those who lack the means to sufficiently protect themselves—who will be

[13] Florida Governor Ron DeSantis has even publicly challenged the financial incentives under S.B. 8. As a representative for the Governor stated on his behalf, "Governor DeSantis doesn't want to turn private citizens against each other." See Kadia Goba, *Florida Gov. Ron DeSantis Has Issues With Incentivizing Abortion Lawsuits*, Buzzfeed (Sept. 11, 2021), https://www.buzzfeednews.com/article/kadiagoba/florida-desantis-abortion-ban-republican.

at greatest risk for such harassment and surveillance, and most impacted by hopelessness and fear.[14]

Third, deputized citizens preparing a lawsuit under S.B. 8 are incentivized to intrude on the personal freedoms of others in overzealous efforts to engage in "fact-gathering" for a prize. These efforts involve intrusion into a woman's most intimate affairs, including her menstrual cycle, relationships, and choices about a possible pregnancy. While law enforcement officers are required to comply with the Fourth Amendment in carrying out investigations, vigilantes, as ordinary citizens, are not so bound. In the weeks after S.B. 8 went into effect, there have been alarming reports of harassment and dangerous behavior by anti-abortion activists. Clinic staff and physicians have faced increased threats and harassment. One abortion provider in Texas explained that their staff has endured "protestors trespassing; conducting illegal drone surveillance; blocking roads, driveways, and entrances; yelling at staff and patients; using illegal sound amplification; video recording

[14] The law further invites vigilante interference in the patient-physician relationship, and "could normalize vigilante interference in the patient-physician relationship in other complex, controversial medical or ethical situations." Texas Medical Assoc., TMA Statement: Enough is Enough (Sept. 3, 2021). Moreover, it places particular strain on the ability of incarcerated women, who are unable to travel out of state, to receive access to reproductive health care and as a result are treated more adversely than women behind bars in other states. *Amici* are well aware that prosecutors and criminal justice stakeholders bear responsibility for keeping a watchful eye over the health and confinement conditions for those behind bars in Texas—whether awaiting resolution of criminal cases or serving time in state prison—and are deeply troubled by this inequitable consequence of S.B. 8 that adversely impacts women incarcerated in Texas, even as litigation over the law continues.

staff, staff vehicles, and license plates, as well as surreptitiously recording inside the health center; trying to follow staff home; and more." *United States v. Texas*, 21-CV-796, 2021 WL 4593319, at *81 n.54 (W.D. Tex. Oct. 6, 2021) (the "Pitman Order"). Clinics have also received "threatening calls, emails, and social media posts." *Id*. at 82 n.56; see also Linton Decl., *United States v. Texas*, 21-CV-796 (W.D. Tex. Oct. 6, 2021) ECF. No. 8-5 ¶ 40 (physician received messages calling him a murderer and saying that he should be killed); Gilbert Decl., *United States v. Texas*, 21-CV-796 (W.D. Tex. Oct. 6, 2021), ECF. No. 8-2 ¶ 44 (describing threats, including caller threatening to "tie up staff in chains and torture them").

It is not just clinic staff and physicians who may be dragged into court and captured in this net—any collateral party can be sued for "aiding and abetting" an abortion, or even intending to do so, in violation of S.B. 8. Vigilantes could conceivably target rideshare drivers and phone operators who connect women with a clinic. And potential plaintiffs are well-equipped to engage in long-term retrospective evidence collection, as there is a four-year statute of limitations for violations of S.B. 8.[15] Those who have received or facilitated an abortion could be subject to extended harassment and fear of prosecution for years to come. A law which promotes and incentivizes such harassment and threatening behavior necessarily undermines public safety and erodes the ability of law enforcement to protect our communities.

Fourth, vigilantes may divert law enforcement resources and attention from dealing with serious and

[15] Florida's proposed legislation (H.B. 167) grants a six-year statute of limitations to bring suit. *See* H.B. 167 § 390.027(4).

pressing public safety issues, causing further harm to communities. Texas police and fire departments have already spent time fielding calls from protestors seeking to report violations at abortion clinics and/or attempting to slow down the clinic's work, and about a protestor blocking a clinic driveway. See Tierney Sneed, *How Texas' 6-Week Abortion Ban Will Make Accessing The Procedure Nearly Impossible for Some*, CNN (Sept. 2, 2021); Pitman Order at 82 n.56 ("threats have continued despite [clinics'] public statements that [they] would be and now are in compliance with S.B. 8 . . . Since September 1, the threats have only gotten worse."); *id.* at 81 n.54 ("[a]bortion providers deal with relentless harassment from abortion opponents, including as they come into work each day, which has increased since S.B. 8 took effect."); Adam Edelman, *'Insidious,' 'Draconian,' 'Cruel': New Texas Abortion Law Empowers Vigilantism, Experts Say*, NBC News (July 24, 2021) (as one state policy analyst from the Guttmacher Institute indicated, S.B. 8 "literally provides a financial incentive for the kind of harassment and vigilantism we've seen grow [against clinics] decade after decade."); see also *NAF Releases 2019 Violence & Disruption Statistics*, National Abortion Federation (July 30, 2020) (discussing how from 2018 to 2019 clinic invasions more than doubled, hate mail and harassing calls increased 125%, and death threats or threats of harm rose from 57 to 92).

Amici urge this Court to take action and put an end to the deeply concerning and problematic consequences of this ill-conceived legislation that allows decades of established legal precedent to be cast aside. Failing to protect the individual rights guaranteed by the U.S. Constitution and recognized by this Court would have dire consequences, inviting other States to defy binding federal law and endanger public trust.

The safety of *amici's* communities will suffer if S.B. 8's deeply concerning attempt to evade settled law continues to be sanctioned.

CONCLUSION

For the foregoing reasons, the Court should hold in *United States v. Texas* that the United States is permitted to bring suit in federal court and obtain injunctive and declaratory relief against the State, state court judges, state court clerks, other state officials, and all private parties to prohibit S.B. 8 from being enforced. The Court should also hold in *Whole Woman's Health v. Jackson*, that a State cannot 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.

Respectfully submitted.

MIRIAM KRINSKY
ROSEMARY NIDIRY
ELIZABETH KOMAR
DAVID WEISS
ESTELA DIMAS
FAIR AND JUST PROSECUTION, A PROJECT OF THE TIDES CENTER
1012 Torney Avenue
San Francisco, CA 94129

JOHN P. MASTANDO III
Counsel of Record
LAUREN BERNSTEIN
MELISSA RUTMAN
TANIA C. MATSUOKA
FRANK T. UNGERER
LAUREN R. WANDS
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000
john.mastando@weil.com

October 27, 2021

APPENDIX

APPENDIX: LIST OF 128 *AMICI*— CURRENT AND FORMER PROSECUTORS AND LAW ENFORCEMENT LEADERS, AND FORMER STATE ATTORNEYS GENERAL, FEDERAL AND STATE COURT JUDGES, U.S. ATTORNEYS, AND U.S. DEPARTMENT OF JUSTICE OFFICIALS

Roy L. Austin
Former Deputy Assistant Attorney General,
Civil Rights Division, U.S. Department of Justice
Former Deputy Assistant to President Obama
for the Office of Urban Affairs, Justice and
Opportunity (White House Domestic Policy Council)

Diana Becton
District Attorney, Contra Costa County, California

Wesley Bell
Prosecuting Attorney, St. Louis County, Missouri

Buta Biberaj
Commonwealth's Attorney, Loudoun County,
Virginia

Shay Bilchik
Former Administrator, Office of Juvenile Justice and
Delinquency Prevention, U.S. Department of Justice
Former Chief Assistant State Attorney, Miami-Dade
County, Florida

Sherry Boston
District Attorney, DeKalb County, Georgia

Chesa Boudin
District Attorney, City and County of San Francisco, California

RaShall M. Brackney, Ph.D.
Police Chief, Charlottesville Police Department, Virginia

Joseph Brann
Former Chief, Hayward Police Department, California Former Director, Office of Community Oriented Policing Services, U.S. Department of Justice

Aisha Braveboy
State's Attorney, Prince George's County, Maryland

Bobbe J. Bridge
Former Justice, Supreme Court, Washington

Jim Bueermann
Former President, National Police Foundation
Former Chief, Redlands Police Department, California

John Choi
County Attorney, Ramsey County (St. Paul), Minnesota

Jerry L. Clayton
Sheriff, Washtenaw County (Ann Arbor), Michigan

Dave Clegg
District Attorney, Ulster County, New York

Laura Conover
County Attorney, Pima County (Tucson), Arizona

Michael W. Cotter
Former U.S. Attorney, District of Montana

Brendan Cox
Former Chief, Albany Police Department, New York

John Creuzot
District Attorney, Dallas County, Texas

Deirdre M. Daly
Former U.S. Attorney, District of Connecticut

Satana Deberry
District Attorney, Durham County, North Carolina

Parisa Dehghani-Tafti
Commonwealth's Attorney, Arlington County and the City of Falls Church, Virginia

Brandon del Pozo
Former Chief, Burlington Police Department, Vermont

Steve Descano
Commonwealth's Attorney, Fairfax County, Virginia

Lloyd Doggett
U.S. Representative, 35th District, Texas
Former Justice, Supreme Court, Texas

Michael Dougherty
District Attorney, 20th Judicial District (Boulder), Colorado

Mark Dupree
District Attorney, Wyandotte County (Kansas City), Kansas

Jenny Durkan
Mayor, City of Seattle
Former U.S. Attorney, Western District of Washington

Matt Ellis
District Attorney, Wasco County, Oregon

Zachary Fardon
Former U.S. Attorney, Northern District of Illinois

John Farmer
Former Attorney General, New Jersey
Former Assistant U.S. Attorney, New Jersey

John P. Flannery
Former Assistant U.S. Attorney, Southern District of New York
Former Special Counsel, House and Senate Judiciary Committees

Lisa Foster
Former Director, Office for Access to Justice, U.S. Department of Justice
Former Judge, Superior Court, California

Kimberly M. Foxx
State's Attorney, Cook County (Chicago), Illinois

William Royal Furgeson Jr.
Former Judge, U.S. District Court, Western District of Texas

Gil Garcetti
Former District Attorney, Los Angeles County, California

Kimberly Gardner
Circuit Attorney, City of St. Louis, Missouri

Stan Garnett
Former District Attorney, 20th Judicial District (Boulder), Colorado

Delia Garza
County Attorney, Travis County, Texas

José Garza
District Attorney, Travis County (Austin), Texas

George Gascón
District Attorney, Los Angeles County, California
Former District Attorney, City and County of San Francisco, California
Former Chief, San Francisco Police Department, California
Former Chief, Mesa Police Department, Arizona

Sarah F. George
State's Attorney, Chittenden County (Burlington), Vermont

Nancy Gertner
Former Senior Judge, U.S. District Court, District of Massachusetts

Deborah R. Gilg
Former U.S. Attorney, District of Nebraska

Sim Gill
District Attorney, Salt Lake County, Utah

Joe Gonzales
District Attorney, Bexar County (San Antonio), Texas

Deborah Gonzalez
District Attorney, Western Judicial Circuit (Athens), Georgia

Eric Gonzalez
District Attorney, Kings County (Brooklyn), New York

Mark Gonzalez
District Attorney, Nueces County (Corpus Christi), Texas

Emily Jane Goodman
Former Justice, Supreme Court, New York

Christian Gossett
District Attorney, Winnebago County, Wisconsin

Barry Grissom
Former U.S. Attorney, District of Kansas

Joseph R. Grodin
Former Associate Justice, Supreme Court, California

Deborah Hankinson
Former Justice, Supreme Court, Texas

Andrea Harrington
District Attorney, Berkshire County, Massachusetts

Scott Harshbarger
Former Attorney General, Massachusetts
Former District Attorney, Middlesex County, Massachusetts

David J. Hickton
Former U.S. Attorney, Western District of Pennsylvania

Jim Hingeley
Commonwealth's Attorney, Albemarle County, Virginia

John Hummel
District Attorney, Deschutes County, Oregon

Natasha Irving
District Attorney, 6th Prosecutorial District, Maine

Shalena Cook Jones
District Attorney, Chatham County (Savannah), Georgia

Melinda Katz
District Attorney, Queens County, New York

Steven Kirkland
Former Civil Judicial District Court Judge, Harris County, Texas

Zach Klein
City Attorney, Columbus, Ohio

Justin F. Kollar
Former Prosecuting Attorney, County of Kaua'i, Hawaii

Lawrence S. Krasner
District Attorney, Philadelphia, Pennsylvania

William Lansdowne
Former Chief, San Diego Police Department, California
Former Chief, San Jose Police Department, California Former Chief, Richmond Police Department, California

Timothy K. Lewis
Former Judge, U.S. Court of Appeals, Third Circuit
Former Judge, U.S. District Court, Western District of Pennsylvania

Rebecca Like
Acting Prosecuting Attorney, County of Kaua'i, Hawaii

Robert L. Listenbee
Former Administrator, Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice

Rory Little
Former Associate Deputy Attorney General, U.S. Department of Justice

Karen Loeffler
Former U.S. Attorney, District of Alaska

Patricia A. Madrid
Former Attorney General, New Mexico

Kenneth Magidson
Former U.S. Attorney, Southern District of Texas

A. Howard Matz
Former Judge, U.S. District Court, Central District of California

Beth McCann
District Attorney, 2nd Judicial District (Denver), Colorado

Mary McCord
Former Acting Assistant Attorney General and Principal Deputy Assistant Attorney General for National Security, U.S. Department of Justice
Former Criminal Division Chief, U.S. Attorney's Office for the District of Columbia

F. Scott McCown
Retired State District Judge, Travis County, Texas

Karen McDonald
Prosecuting Attorney, Oakland County, Michigan

Barbara McQuade
Former U.S. Attorney, Eastern District of Michigan

Ryan Mears
Prosecuting Attorney, Marion County (Indianapolis), Indiana

Christian D. Menefee
County Attorney, Harris County, Texas

Brian Middleton
District Attorney, Fort Bend County, Texas

Stephanie Morales
Commonwealth's Attorney, Portsmouth, Virginia

Marilyn Mosby
State's Attorney, Baltimore City, Maryland

Michol O'Connor
Former Justice, Court of Appeals, First Judicial District, Texas
Former Assistant U.S. Attorney, Southern District of Texas

Jerome O'Neill
Former U.S. Attorney, District of Vermont
Former Assistant U.S. Attorney, District of Vermont

David Ogden
Former Deputy Attorney General, U.S. Department of Justice
Former Assistant Attorney General for the Civil Division, U.S. Department of Justice

Jody Owens
District Attorney, Hinds County, Mississippi

Alonzo Payne
District Attorney, 12th Judicial District, Colorado

Joseph Platania
Commonwealth's Attorney, City of Charlottesville, Virginia

Richard Pocker
Former U.S. Attorney, District of Nevada

Abdul D. Pridgen
Chief, San Leandro Police Department, California
Former Chief, Seaside Police Department, California

Ira Reiner
Former District Attorney, Los Angeles County, California
Former City Attorney, Los Angeles, California

Carole Rendon
Former U.S. Attorney, Northern District of Ohio
First Assistant U.S. Attorney, Northern District of Ohio

Eric Rinehart
State's Attorney, Lake County, Illinois

Mimi Rocah
District Attorney, Westchester County, New York

Rachael Rollins
District Attorney, Suffolk County (Boston), Massachusetts

Jeff Rosen
District Attorney, Santa Clara County, California

Stephen Rosenthal
Former Attorney General, Virginia

Marian Ryan
District Attorney, Middlesex County, Massachusetts

Sarah R. Saldaña
Former U.S. Attorney, Northern District of Texas
Former Director, U.S. Immigration and Customs Enforcement

Dan Satterberg
Prosecuting Attorney, King County (Seattle), Washington

Eli Savit
Prosecuting Attorney, Washtenaw County (Ann Arbor), Michigan

Shira A. Scheindlin
Former Judge, U.S. District Court, Southern District of New York

Mike Schmidt
District Attorney, Multnomah County (Portland), Oregon

Harry L. Shorstein
Former State Attorney, 4th Judicial Circuit (Jacksonville), Florida

Carol Siemon
Prosecuting Attorney, Ingham County (Lansing), Michigan

Norm Stamper
Former Chief, Seattle Police Department, Washington

Darrel Stephens
Former Executive Director, Major City Chiefs Association
Former Chief, Charlotte-Mecklenburg Police Department, North Carolina

Jack Stollsteimer
District Attorney, Delaware County, Pennsylvania

David Sullivan
District Attorney, Northwestern District, Massachusetts

Edward J. Tarver
Former U.S. Attorney, Southern District of Georgia

Shannon Taylor
Commonwealth's Attorney, Henrico County, Virginia

Carolyn Engel Temin
Former Judge, First Judicial District, Pennsylvania

Anne Tompkins
Former U.S. Attorney, Western District of North Carolina

Raúl Torrez
District Attorney, Bernalillo County (Albuquerque), New Mexico

Anthony F. Troy
Former Attorney General, Virginia

Gregory Underwood
Commonwealth's Attorney, City of Norfolk, Virginia

Matthew Van Houten
District Attorney, Tompkins County, New York

Cyrus R. Vance
District Attorney, New York County (Manhattan), New York

John W. Vaudreuil
Former U.S. Attorney, Western District of Wisconsin
Former Assistant U.S. Attorney, Western District of Wisconsin

John Walsh
Former U.S. Attorney, District of Colorado
Former Chair, Attorney General's Advisory Committee on U.S. Attorneys

T. John Ward
Former Judge, U.S. District Court, Eastern District of Texas

Andrew Warren
State Attorney, 13th Judicial Circuit (Tampa), Florida

Seth P. Waxman
Former Solicitor General, U.S. Department of Justice

Jared Williams
District Attorney, Augusta, Georgia

Monique H. Worrell
State Attorney, 9th Judicial Circuit (Orlando), Florida