

No. 21A85

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

**On Emergency Application to Vacate Stay of
Preliminary Injunction Issued by the
U.S. Court of Appeals for the Fifth Circuit**

**MOTION FOR LEAVE TO FILE BRIEF OF
AMICI CURIAE AND BRIEF OF 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 APPLICANT**

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October 19, 2021

Nearly 120 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 (“proposed *amici*”) respectfully move under Supreme Court Rule 37.2(b) for leave to file a brief as *amici curiae* in support of Applicant, the U.S. Department of Justice. The U.S. has not taken a position on the filing of this *amicus* brief. Respondent Texas has conditionally consented presuming the brief is filed by the earlier of 48 hours after the United States files its motion or 48 hours before Respondent’s response is due. Respondent intervenors conditionally consented presuming the brief is filed 48 hours before their response is due. The U.S. filed on October 18, 2021 and Respondent’s response is due on October 21, 2021 at 12pm. Given the expedited briefing schedule and the extensive coordination necessary amongst the large number of *amici* who wanted to participate in this case, this brief may be filed slightly outside the timeframe required for Respondents’ consent. Therefore, proposed *amici* file this motion seeking leave to file the *amicus* brief appended to this motion.

This case, and the pending application by the United States to vacate the stay of the preliminary injunction issued by the Fifth Circuit, presents issues of national significance of particular importance to proposed *amici* who, as past and present leaders in the state and federal criminal justice and judicial arenas, are deeply committed to upholding the laws of their communities as well as the individual rights and protections afforded under the U.S. Constitution. Proposed *amici* believe that if Senate Bill 8, 87th Leg., Reg. Sess. (Tex. 2021) (“S.B. 8”) is permitted to remain in effect, including while this litigation is pending, it will erode trust in the rule of law and adversely impact the

interests of public safety that proposed *amici* seek to advance. This result will also create a deeply concerning roadmap by which states may evade Supreme Court precedent, Constitutional protections, and federal law by bestowing on private citizens authority traditionally reserved for law enforcement, namely the execution of the law. Proposed *amici* are concerned that allowing this vigilante structure of privately enforced state and local law to be implemented for even a short period of time would erode trust in the justice system and destabilize faith in the rule of law.

For the foregoing reasons, proposed *amici* request the opportunity to add their voice to this important case and respectfully urge this Court to grant this motion for leave to file the appended *amicus* brief.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*¹

Amici curiae are 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 in this case 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 immediately halt Texas’s effort to flagrantly disregard

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. The United States takes no position on the filing of *amicus curiae* briefs. Respondents Texas and intervenors conditionally consent to *amicus curiae* briefs filed by the earlier of 48 hours after the United States files its motion or 48 hours before their response are due. A full list of *amici curiae* is appended to this brief.

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 this case 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.

The Fifth Circuit’s decision allowing this scheme to remain in place sends a powerful signal to state governments and communities across the nation that constitutional protections and the precedent of this

Court are meaningless. And this decision is hard to view as limited to any specific right, thereby potentially inviting a litany of abuses and copycat legislation in other realms.

The Fifth Circuit's willingness to green light an 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 remain in place for a single day longer. 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. The Fifth Circuit's Decision Undermines 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. The Fifth Circuit’s Decision 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 here. 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, 252–253 (1998)).

The Fifth Circuit’s decision effectively negates this principle, however, by enabling any individual State to disregard this Court’s precedents within its borders. Pursuant to the Fifth Circuit’s approach, state legislatures may believe 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 v. Adams*, 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 (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, 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

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

³ The states include: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Mississippi, Missouri, North Dakota,

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 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. 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, (Sep. 2, 2021), <https://www.politico.com/news/2021/09/02/texas-abortion-law-private-right-to-sue-509244>. 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.⁴ Similar

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 See H.B. 4156 Sec. 15; see also Nic Flosi, *‘Protecting Heartbeats Act’: Illinois Gun Bill Inspired by Texas Abortion Law*,

legislation can be envisioned regarding campaign finance,⁵ gender identity,⁶ religious liberty, particular categories of free speech,⁷ and in other contexts.⁸ This

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.

⁵ 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).

⁶ 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 bathroom with a fellow transgender student. See H.B. 1233 Sec. 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/>.

⁷ 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.

⁸ “Today, it is abortion providers and those who assist them who are targeted. Tomorrow, it might be the gun buyer who faces 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 gathering under threat of vigilante lawsuits. The possibilities are limitless.” Appellant Emergency Br. at 26–27.

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 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

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

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, 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

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 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>.

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 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

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. Dis. Ct., Bexar Cty.), available at https://bustingthefeds.com/wp-content/uploads/2021/09/1_ComplaintVBraid.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>.

by the individual defendant. See S.B. 8, sec. 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 at greatest risk for such harassment and surveillance, and most impacted by hopelessness and fear.¹⁴

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>.

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 situation.” 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.

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 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*, No. 1:21-CV-796-RP, 2021 WL 4593319 at 81 n.54 (W.D. Tex. Oct. 2021) (the “Pitman Order”). Clinics have also received “threatening calls, emails, and social media posts.” *Id.* at 82 n.56; see also Linton Decl. at ¶ 40, *United States v. Texas*, No. 1:21-CV-796-RP (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. at ¶ 44, *United States v. Texas*, No. 1:21-CV-796-RP (W.D. Tex. Oct. 6, 2021), ECF. No. 8-2 (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 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."); Pitman Order 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*,

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).

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 vacate the Fifth Circuit's stay of the preliminary injunction of Texas Senate Bill 8.

Respectfully submitted,

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APPENDIX

**APPENDIX: LIST OF *AMICI*—
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