

No. 21-588

**In the Supreme Court
of the United States**

UNITED STATES, PETITIONER

v.

TEXAS, ET AL., RESPONDENTS

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

**BRIEF OF *AMICUS CURIAE* DAVID BOYLE
IN SUPPORT OF PETITIONER**

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AMICUS CURIAE STATEMENT OF INTEREST

The present *amicus curiae*, David Boyle (hereinafter, “Amicus”),¹ has noted Texas’ intriguing Senate Bill 8 (2021) (“S.B. 8”), with its “bounty hunter” approach to discouraging abortion; and writes to support Petitioner United States in its quest to question S.B. 8 through a federal lawsuit.

Indeed, Amicus wonders: if S.B. 8 is supposed to be some kind of fair law, why is Texas trying to isolate it from federal review?

Amicus is no expert about civil procedure—and even experts may differ—but thinks that the U.S. has a reasonable chance to be correct about its right to sue. (Even if the Court decides the U.S. hasn’t a right to sue, the instant brief may have some useful ideas about the (lack of) merits of S.B. 8, for general consideration.)

Amicus has filed various briefs with the Court re abortion issues (“available on request”), and updates that tradition here. In particular, he filed a brief on the side of Mississippi in 19-1392, *Dobbs v. Jackson Women’s Health Organization*; this gives him a perspective that complements the many “pro-choice”-leaning amicae/i supporting Petitioner, and shows that diverse sorts of people, not just “liberal Democrat law professors”, think that the federal government may have a right to be heard in court about S.B. 8. —It is not “pro-life” to promulgate

¹ No party or its counsel wrote or helped write this brief, or gave money for the brief, *see* S. Ct. R. 37. Blanket permission to write briefs is filed with the Court by Petitioner and Respondent Texas. Intervenor-Respondents sent Amicus a letter of consent to his brief.

laws that could make the pro-life movement look like fools.

SUMMARY OF ARGUMENT

The “crowdsourced surveillance state” S.B. 8 sets up, ironically defies the Texas tradition of independence, by making Texans vulnerable to lawsuits from people elsewhere (and in their own state), for exercising their current constitutional legal (as opposed to moral) rights to abortion.

Too, S.B. 8’s creation of a “turkey shoot” or “lottery” atmosphere where a mob of people can cash in on prosecution of abortion-seekers, resembles the “let’s kill all the lawyers” attitude of Shakespeare’s Jack Cade, and also resembles violent game shows out of dystopian fiction.

Finally, with *Dobbs* coming up for argument in December, the Court has a reasonable alternative, under Mississippi law, for regulating abortion, rather than the surreally-abusive Texas law S.B. 8, which may deserve tossing onto the ash heap of history.

ARGUMENT

I. S.B. 8 ENCOURAGES ALMOST EVERYONE, INCLUDING OUTSIDERS, TO “MESS WITH TEXANS” AND SPY ON TEXANS CHOOSING ABORTION—AND SEEKS TO SHIELD THE “MESS” FROM FEDERAL COURT REVIEW

Texas may have good intentions, leveraging *Young* (*Ex parte Young*, 209 U.S. 123 (1908)) to protect Texas’ *young* (the unborn) from abortion.

That is, the clever mechanics of S.B. 8 may seemingly, supposedly allow federal jurisdiction to be avoided, if there are just private causes of action for those suing someone-involved-with-abortion for their \$10,000 prize. —However, two wrongs may not make a right. Texas may be pursuing an honorable goal through dishonorable means, sadly. (Not that Texas would be *intentionally* dishonorable, of course.)

After all, S.B. 8 sets up a “snitch state” whereby virtually anyone, even Aunt Ida in Idaho, can get \$10,000 in a lawsuit if he/she somehow gets tipped off that somebody, even a babysitter taking care of children so that the mother can go get an abortion, was involved in an abortion. A plaintiff may not need any reason beyond wanting the money.

So, minding other people’s business can be profitable; or, if it’s a sin to interfere with other people’s intimate lives, the wages of sin are pretty good (\$10,000). No wonder there are Texans happy to gather gossip and/or anonymous tips about what abortion patients are doing.

Cf. “The Eyes of Texas are upon you,/All the livelong day./The Eyes of Texas are upon you,/You cannot get away.” (University of Texas—Austin school song, *id.*) Orwell’s Big Brother would be proud, having spawned many Texan Little Brothers willing to pass around hot tips about prospective (or completed) abortions.

And it’s odd that this happened in Texas. Texas has, in legend or fact, a reputation for independence—the *Lone Star State*. There is even a state slogan, “Don’t Mess with Texas”.

But S.B. 8 precisely allows anyone anywhere, practically, even Aunt Ida in Idaho, to mess with Texans, i.e., to make money off of preventing their abortion after c. 6 weeks. And to make money without having been really injured either. (How is Aunt Ida up in the Gem State really damaged by Tina Texan’s abortion, hundreds of miles southeast?)

(And didn’t the Court admonish Texas, after last year’s presidential election, for trying to “mess with” other States’ election procedures, and not having standing for a lawsuit?)

Thus, S.B. 8 may be considered a hallucinatory bad joke of sorts; an abortion of a law, so to speak. And the Court may wish to stop S.B. 8 from messing with Texans any further.

II. “LET’S KILL ALL THE LAWYERS”; OR, JACK CADE, *SQUID GAME*, AND S.B. 8: LAWLESS MAYHEM DISGUISED AS LAW

The bizarreness of S.B. 8 even sounds Shakespearean depths. When English rebel Jack Cade’s lieutenant Dick the Butcher snarls, “The first thing we do, let’s kill all the lawyers”, WILLIAM SHAKESPEARE, HENRY VI, PART 2, act 4, sc. 2, this reminds Amicus of S.B. 8 and its “crowdsourced” dispersal of litigants, ostensibly without much involvement by Texas’ state legal apparatus (“lawyers”): again, a device apparently engineered to foil federal-court challenges.

See Wikipedia, *Jack Cade laws*, https://en.wikipedia.org/wiki/Jack_Cade_laws (as of GMT 17:33, May 24, 2021) (last viewed October 27, 2021): “A Jack Cade law is a statute or regulation that has the effect of weakening the rule of law [or] hindering

access to justice[.] The term has been used in relation to laws that abolished the reimbursement of lawsuit costs by at-fault persons to their innocent victims[.]” *Id.* (citation omitted)

S.B. 8’s tortuous denial of costs and attorney’s fees *only to defendants*, thus meets the definition of “Jack Cade laws” *supra*. This is no badge of honor.

One may also compare S.B. 8 to the television series *Squid Game* (Netflix 2021). This fictional show, *see id.*, involves low-income South Koreans trapped in a terrible game where people are abused and even kill each other, or are killed by guards, in order to win a cash prize.

Re S.B. 8: maybe the law saves some fetuses from being killed in Texas, true; but many abortions are just outsourced from Texas to other States. And as for other deaths: what if someone dies from a “back-alley abortion” due to S.B. 8? And what about all the other chaos and misery caused? Shades of the January 6, 2021 riot at the U.S. Capitol.

The invitation to sue people involved with abortion in Texas—who often may be low-income people who can’t afford to get out-of-state abortions—for an easy 10-grand prize seems like a sick, even predatory or misogynistic, game, rather than the more principled alternatives in other States, as discussed *infra*.

III. S.B. 8 IS FAR LESS REASONABLE THAN MISSISSIPPI’S GESTATIONAL AGE ACT

Indeed, S.B. 8, considering not only its c. 6-week abortion ban, but also the “evading federal review” issues mentioned *supra*, may be much less

reasonable than Mississippi's Gestational Age Act (H.B. 1510, Miss. Gen. Laws 2018, ch. 393 (codified at Miss. Code Ann. 41-41-191)), which allows nicely memorable demarcations re abortion access, i.e., 15 weeks (exactly in between 10 and 20 weeks), and crucially, *over 100 days* (105 days) to decide about abortion, as opposed to S.B. 8's 42 days (6 weeks). If the Court were to fall for S.B. 8, the Justices might seem like lupine, politicized thugs, since a more rational alternative awaits in Mississippi.

(There is still the question of whether Mississippi women/children will get money/support/welfare equivalent to that available in France/Ireland/etc., European countries restricting abortion after the first trimester. Maybe remand to a lower court can help resolve that issue.)

* * *

"Those who believe absurdities, will commit atrocities." (Voltaire) S.B. 8 is rife with absurdities, and it is an atrocity. And Amicus says this as no friend of abortion: he wishes abortion didn't happen at all, ideally. Texas can lower abortion rates by attacking rape, poverty, etc.

Thus, offering women/doctors "qualified immunity" (immunity for 105 days post-gestation) from prosecution for abortion, Mississippi-style, may seem more measured than S.B. 8's free-for-all, which is so bad that it actually dishonors real bounty hunters; since bounty hunters may risk their lives trying to hunt bad people, while an S.B. 8 plaintiff may make \$10,000 just for suing an abortion patient's babysitter.

Again, if S.B. 8 is such a fair law, why is Texas trying to isolate it from federal review?

CONCLUSION

The Court should consider allowing the U.S. to sue over S.B. 8; and should overturn S.B. 8 in any case. Amicus humbly thanks the Court for its time and consideration.

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Respectfully submitted,

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