

No. 21-463 & 21-588

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

WHOLE WOMEN'S HEALTH, ET AL.,
Petitioners,

v.

AUSTIN REEVE JACKSON, ET AL.,
Respondents.

UNITED STATES OF AMERICA,
Petitioner,

v.

STATE OF TEXAS, ET AL.,
Respondents.

*On Writs of Certiorari to the
United States Court of Appeals for the Fifth Circuit*

**BRIEF OF AMICUS CURIAE
LIFE LEGAL DEFENSE FOUNDATION
IN SUPPORT OF RESPONDENTS**

CATHERINE W. SHORT

Counsel of Record

ALEXANDRA SNYDER

ALLISON K. ARANDA

Life Legal Defense Foundation

PO Box 2105

Napa, CA 94558

(707) 224-6675

kshort@lldf.org

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF CONTENTSi

TABLE OF AUTHORITIES ii

INTEREST OF AMICI.....1

ARGUMENT2

 I. CIVIL ENFORCEMENT MECHANISMS
 ARE APPROPRIATE IN THE FACE OF
 PROSECUTORS ABDICATING THEIR
 RESPONSIBILITY TO ENFORCE THE LAW. ..2

CONCLUSION.....5

TABLE OF AUTHORITIES

OTHER AUTHORITIES

<http://files.suffolkdistrictattorney.com/The-Rachael-Rollins-Policy-Memo.pdf> (last visited Oct. 27, 2021).....2

<https://da.lacounty.gov/sites/default/files/pdf/SPECIAL-DIRECTIVE-20-07.pdf> (last visited October 27, 2021).....2

<https://oag.ca.gov/sites/default/files/Joint-Statement-from-Elected-Prosecutors-on-Abortion-Laws-10-14-20.pdf> (last visited October 27, 2021).....2

John Donne, “No Man Is an Island.”..... 4

John E. Foster, Charges to Be Declined: Legal Challenges and Policy Debates Surrounding Non-Prosecution Initiatives in Massachusetts, 60 B.C. L. Rev. 2511 (2019).3

INTEREST OF AMICI¹

Amicus Life Legal Defense Foundation is a California non-profit 501(c)(3) public interest legal and educational organization that works to assist and support those who advocate in defense of life. Its missions is to give innocent and helpless human beings of any age, particularly unborn children, a trained and committed defense against the threat of death, and to support their advocates in the nation's courtrooms. Life Legal Defense Foundation believes life begins at the moment of conception and does not end until natural death. We litigate cases to protect human life, from preborn babies targeted by a billion-dollar abortion industry to the elderly, disabled, and medically vulnerable denied life-sustaining care.

Life Legal Defense Foundation sees in the present case an opportunity for this Court to right a 47-year-old wrong: the stripping from states of their authority to protect the lives of innocent human beings within their borders.

¹ This brief was wholly authored by counsel for amicus Life Legal Defense Foundation. No party or counsel for any party made any financial contribution toward the preparation or submission of the brief. Counsel of record for the parties have filed blanket consent to the filing of amicus briefs.

ARGUMENT

I. CIVIL ENFORCEMENT MECHANISMS ARE APPROPRIATE IN THE FACE OF PROSECUTORS ABDICATING THEIR RESPONSIBILITY TO ENFORCE THE LAW.

In May 2021, the Texas Legislature enacted S.B.8, the Texas Heartbeat Act. Several months prior to the enactment, the district attorneys of Dallas, Bexar, Nueces, and Fort Bend Counties, along with attorneys general and prosecutors from many other states, publicly pledged that they would not enforce laws restricting abortion. See <https://oag.ca.gov/sites/default/files/Joint-Statement-from-Elected-Prosecutors-on-Abortion-Laws-10-14-20.pdf> (last visited October 27, 2021).

Prosecutors across the country have made similar declarations with regard to other crimes.²

² See, e.g., <http://files.suffolkdistrictattorney.com/The-Rachael-Rollins-Policy-Memo.pdf> (last visited Oct. 27, 2021) at C-3 (“When the item taken is recovered and returned, the individual appears to have substance use issues, mental health issues, and/ or the item is taken out of necessity (e.g. food, diapers, childcare-related items, etc.) due to a lack of employment or resources, the policy is for the ADA to presumptively decline the charge(s)”); <https://da.lacounty.gov/sites/default/files/pdf/SPECIAL-DIRECTIVE-20-07.pdf> (last visited October 27, 2021) (issuing a non-exhaustive list of misdemeanors to be “declined or dismissed” including public intoxication, drug possession, loitering to commit prostitution, and minors in possession of alcohol);

Rather than exercising prosecutorial discretion on a case-by-case basis, these prosecutors publicly declare that they will not prosecute entire categories of conduct made criminal by the legislature and governor.

These pre-emptive exercises of prosecutorial “discretion” raise separation of powers questions,³ and have led to conflicts with the judiciary where judges attempt to rein in prosecutors.⁴

In light of this trend of prosecutors deciding which crimes to prosecute according to their own political leanings, and the declared intentions of four Texas district attorneys to ignore laws restricting abortion, the Texas Legislature’s decision to provide for civil remedies for violations of S.B.8 shows great foresight. Without such provision, the wrongful conduct defined by S.B.8 would continue unabated in at least three of the ten most populous counties in Texas. The lawlessness of these individual prosecutors would trump the

https://cdn.muckrock.com/outbound_composer_attachments/Lucasgl/62919/Philadelphia-DA-Larry-Krasner-s-Memo.pdf (last visited October 27, 2021) (non-prosecution of marijuana and prostitution offenses).

³ See, e.g., John E. Foster, Charges to Be Declined: Legal Challenges and Policy Debates Surrounding Non-Prosecution Initiatives in Massachusetts, 60 B.C. L. Rev. 2511 (2019).

⁴ <https://www.npr.org/2021/02/09/965673109/judge-blocks-l-a-district-attorneys-reforms> (last visited October 27, 2021); <https://www.washingtonpost.com/dc-md-va/2020/08/28/arlington-prosecutor-goes-va-supreme-court-against-judges-who-challenge-her-new-policies/> (last visited October 27, 2021).

rights of all Texans with regard to enforcement of criminal prohibitions enacted by their duly-elected legislature.

Having wisely chosen to provide for civil remedies for violations of SB8 to ensure some type of enforcement, the Legislature was faced with the question of who should be able to bring the civil action. In the case of a past abortion, the aggrieved party is dead. The “injury” of any other person, even a relative who attempted to prevent the abortion, pales in comparison to this harm. And for many abortion victims, there will be no relative interested in redressing the harm.

Thus the Legislature’s solution of allowing standing in any other person makes sense. In the words of John Donne:

No man is an island entire of itself;
every man is a piece of the continent,
a part of the main; if a clod be washed
away by the sea, Europe is the less, as
well as if a promontory were, as well
as any manner of thy friends or of
thine own were; *any man's death
diminishes me, because I am involved
in mankind.* And therefore never send
to know for whom the bell tolls; it tolls
for thee.⁵

⁵ John Donne, “No Man Is an Island.” (Emphasis added).

CONCLUSION

The Fifth Circuit's decisions should be affirmed.

Respectfully submitted,

CATHERINE W. SHORT
Counsel of Record
ALEXANDRA SNYDER
ALLISON K. ARANDA
Life Legal Defense Foundation
PO Box 2105
Napa, CA 94558
Tel.: (707) 224-6675
Fax: (707-224-6676
kshort@lldf.org

Counsel for Amicus Curiae

October 27, 2021