

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*.

UNITED STATES OF AMERICA, *Petitioner*,

v.

STATE OF TEXAS, ET AL. *Respondents*.

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

**BRIEF OF LOCAL GOVERNMENTS AS *AMICI*
CURIAE IN SUPPORT OF PETITIONERS**

ANNE L. MORGAN
City Attorney
MEGHAN L. RILEY
City of Austin Law Department
P.O. Box 1546
Austin, TX 78767
Counsel for the City of Austin

ERIN BERNSTEIN
GINA ELLIOTT
Bradley Bernstein Sands LLP
3911 Harrison St., Suite 100
Oakland, CA 94611
Counsel for Amici Curiae

JONATHAN B. MILLER
Counsel of Record
MARISSA ROY
ELSA HAAG
Public Rights Project
4096 Piedmont Ave. #149
Oakland, California 94611
T: (646) 831-6113
jon@publicrightsproject.org
Counsel for Amici Curiae

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STATEMENT OF INTEREST

Texas has long disagreed with the Constitution’s and this Court’s protection of the right to a pre-viability abortion.¹ But disagreement has now turned to flagrantly unconstitutional disregard. Texas has created a novel scheme to circumvent constitutional review in an effort to completely ban abortion in the state. Texas Senate Bill 8 (hereinafter “SB 8”) prohibits a doctor from performing an abortion after a “fetal heartbeat” is detected (generally measured at six weeks of pregnancy) and creates additional liability for any person who aids and abets the performance or inducement of an abortion after such time. Although such a law directly contradicts *Roe v. Wade*’s guarantee of abortion access before viability, Texas seeks to evade constitutional review by deputizing individuals, rather than state actors, to bring litigation to enforce SB 8’s provisions. Texas’s gambit is to maintain sovereign immunity from challenges to SB 8 in federal court by disclaiming any role in enforcement. As a result of this run-around, abortion is almost entirely banned in Texas in direct contravention of *Roe*, with devastating impact for people seeking abortion care as well as anyone or any entity supporting them in seeking such care.

¹ All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *Amici* or *Amici*’s counsel made a monetary contribution to the preparation or submission of this brief. A list of all *Amici* is available at Appendix A.

Amici are local governments, both within and outside of Texas, that support the constitutional right to choose to abort a pregnancy. As traditional guarantors of public health and safety, *Amici* administer public health systems that depend on access to requisite care, including abortion care. When abortion is effectively banned and pregnant people cannot locally access the care they need in certain states, *Amici* bear a host of heightened health and economic costs. Abortion bans exacerbate health disparities by forcing people to continue pregnancies without the means or resources to safely do so. These bans also overburden health systems. Patients are unable to access care in a timely manner, which can worsen outcomes. Clinics become overwhelmed with individuals traveling to access care. Providers are squeezed to serve community members as well as those who have been denied their rights elsewhere.

In addition to the harms attendant with banning abortion, *Amici* face unique harms stemming from SB 8's private enforcement structure. Local governments within Texas, such as *Amici* City of Austin, City of Houston, and Travis County, face exposure to lawsuits for a range of ordinary municipal activities that could aid and abet an abortion. Local governments outside of Texas could face the same exposure if SB 8 escapes review and becomes a model for other states to emulate.

SUMMARY OF ARGUMENT

Unsuccessful in its attempts to combat the right to an abortion by imposing unduly burdensome regulations on providers, Texas has turned to a new strategy to ban abortion almost entirely while evading judicial review. Recognizing that the state and its officers are vulnerable to challenge if they enforce an unconstitutional ban on abortion, Texas has used SB 8 to deputize private individuals with the power to seek an injunction and monetary relief against those who perform abortions, aid and abet the performance of such abortions, or merely intend to do so. As Petitioners discuss at greater length, SB 8 merits substantive review because its unconstitutional provisions will be enforced by state judicial officers. SB 8 is highly dependent on the coercive power of the state; the notion that public officials are not involved in its enforcement is illusory, cannot withstand scrutiny, and does not square with this Court's precedent. Similarly, the United States has proper authority to challenge SB 8 and seek judicial review of the Texas law.

Without such review, many will suffer grave and irreversible harm. First and foremost, pregnant persons in Texas have and will continue to suffer irreparable harm as their constitutionally protected access to abortion is effectively cut off. These harms extend beyond the mere curtailment of access to care and can have extensive personal, professional, financial, and family impacts. Physicians and reproductive health clinics will also suffer irreparable harm as they are unable to deliver care and are

exposed to costly litigation. Beyond those directly targeted by SB 8, the terms of the statute's aiding and abetting liability provisions are so vague and their scope so broad that a wide range of individuals and entities, including local governments like *Amici*, will be exposed to litigation for routine and innocuous activities. This exposure is further exacerbated by SB 8's removal of procedural protections against frivolous litigation.

Local governments like *Amici* face a range of harms if SB 8's constitutional violations are not reviewed and redressed. Local governments within Texas may face litigation for routine municipal services that keep clinics running, such as sanitation and utilities, or municipal services that a person could use in the course of accessing abortion care, from public transportation to library services. Even if local governments in Texas have strong defenses to such litigation, SB 8 forces them to bear the costs of their defense by foreclosing an award of attorney's fees. Local governments outside of Texas will suffer increased strain on their health systems as they accommodate an influx of pregnant people from Texas seeking access to health care the Constitution guarantees them. All local governments stand to suffer if pregnant people cannot access abortion and experience attendant economic or health consequences, which ripple to affect entire communities. And all local governments are threatened if SB 8 becomes a model for disregarding constitutional rights. To prevent all of these harms, *Amici* urge the Court to allow review of SB 8.

ARGUMENT

I. THE CONSTITUTION DOES NOT PERMIT TEXAS TO EVADE JUDICIAL REVIEW BY DEPUTIZING INDIVIDUAL ENFORCEMENT

As set out in depth in the record before the district courts, as well as in a variety of *amicus curiae* briefs submitted to this Court, SB 8 infringes on the constitutionally protected right to seek pre-viability abortion care, in contravention of *Roe v. Wade*. 410 U.S. 113 (1973). In fact, SB 8 essentially eliminates access to abortion care for the vast majority of people in Texas.² The legislative purpose in crafting SB 8 to prohibit public enforcement—but empower all would-be private litigants—is clear: Texas sought to make the law effectively self-executing while circumventing judicial review. To date, with the exception of a few days following the issuance of a district court injunction in *United States v. Texas*, Texas has succeeded on both counts. This tactic, if allowed to continue, would subject local governments like *Amici* to substantial burden and risk based on an unconstitutional law. The Constitution cannot countenance (and this Court should not tolerate) such an outcome.

² See Neelam Bohra, *Texas Law Banning Abortion as Early as Six Weeks Goes into Effect as the U.S. Supreme Court Takes No Action*, Tex. Tribune (Aug. 31, 2021), <https://www.texastribune.org/2021/08/31/texas-abortion-law-supreme-court/>.

Federal courts may hear civil lawsuits brought by individuals against a state when a state official seeks to enforce a state statute that violates the U.S. Constitution. See *Ex parte Young*, 209 U.S. 123, 159–60 (1908). In such cases, “the legislative enactment . . . is void because unconstitutional” and thus the official enforcing the state law “comes into conflict with the superior authority of th[e] Constitution” and is stripped of sovereign immunity from federal suit. *Id.* *Ex parte Young* is an integral component of our constitutional order because it enables pre-enforcement suits to challenge unconstitutional laws before they affect individuals, businesses, and governments.³

To evade *Ex parte Young*, Texas deputized *private* individuals with the power to bring civil actions under SB 8 and prohibited *public* officers of state and local governments from doing so. This design, in the estimation of the Legislature, would prevent pre-enforcement constitutional challenge to SB 8 because only private individuals rather than state officers could file lawsuits under SB 8.⁴ Likewise, SB 8 seeks

³ See, e.g., *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (explaining that *Ex parte Young* “has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States”) (internal quotation omitted).

⁴ The author of SB 8 has explained it more starkly. In filings before the Fifth Circuit, Intervenor Defendants-Appellants, represented by Jonathan Mitchell, boldly asserted that state

to preclude constitutional review in Texas state courts by expressly preserving sovereign immunity for the state, political subdivisions, and officers from legal or equitable action that “challenges the validity of any provision or application of this chapter, on constitutional grounds or otherwise.” Tex. Health & Safety Code § 171.211(b).

But the reliance on privately filed lawsuits does not insulate SB 8 from judicial review. Enforcement of SB 8 ultimately requires the coercive power of a different facet of the Texas government: its courts. *See, e.g., Shelley v. Kraemer*, 334 U.S. 1, 14-19 (1948) (explaining that action of state courts and judicial officers constitutes action of the state). State judicial officers are critical to the administration of SB 8. Such officers effectuate the statute’s entire enforcement scheme by docketing cases, overseeing proceedings, acting to assign liability, awarding damages, and granting (or withholding) attorney’s fees permitted (or disallowed) by SB 8, among other duties. *See Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 622-24 (1991) (finding state action in a private litigant’s exercise of peremptory challenges in jury selection and noting that “a private party could not exercise its peremptory challenges absent the overt, significant assistance of the court”).

legislatures have the ability to curtail judicial review of their laws. Intervenor’s C.A. Reply Br. at 3. (“By prohibiting state officials from enforcing the statute, and by authorizing the citizenry to enforce the law through private civil-enforcement actions, *Texas has boxed out the judiciary from entertaining pre-enforcement challenges.*”) (emphasis added).

Without the exercise of enforcement authority by state courts and their officers, SB 8 would have no impact on constitutional rights of individuals and would not create liability exposure for those supporting the exercise of such rights, including local governments. Accordingly, Texas's façade of no state action cannot withstand meaningful inquiry or review when held against this Court's precedents. The deliberate use of the state's power to threaten actors, both public and private, must be subject to judicial review.

Likewise, the United States is a proper party to pursue its action. This Court has repeatedly recognized the federal government's authority to sue in federal court to vindicate the public interest. *See, e.g., In re Debs*, 158 U.S. 564 (1895). While the United States does not have unfettered authority to enforce Constitutional protections against states and localities, several factors weigh in favor here. Among them, SB 8 essentially eliminates access to abortion in Texas for most people, the law is designed to evade a pre-enforcement challenge, and there is a considerable impact on interstate commerce (given how many individuals must seek care out of state). Thus, it is in the public interest to allow pre-enforcement review.

**II. IF LEFT UNTOUCHED BY THIS COURT,
STATE COURT ENFORCEMENT OF SB 8
WILL CAUSE LOCAL GOVERNMENTS
HARM THROUGH EXPOSURE TO
LAWSUITS FOR AIDING AND ABETTING
ABORTION CARE**

If federal courts lack jurisdiction to review and redress the constitutional violations caused by state enforcement of SB 8, local governments in Texas will face extensive exposure to litigation. In enacting SB 8, Texas lawmakers cast a wide net, seeking to hold individuals and entities liable for broad swaths of conduct relating to the provision of abortion care. The law's provisions outline liability not just for those directly involved in providing abortion care, but also for those who aid and abet such care. That means anyone from a bus driver to a librarian could be liable under SB 8. The vagueness of the aiding-and-abetting provisions is likely the source of yet another constitutional infirmity in these cases.

These extraordinarily unrestrained provisions invite litigation that implicates a wide range of routine municipal services potentially used in the course of obtaining an abortion or that support the operation of an abortion clinic, such as the water, utility, and sanitation services without which a clinic could not function. Even land use decisions could be implicated. Although local governments in Texas will have strong defenses against litigation, such protections will not prevent suits from being filed. Nor will SB 8 allow local governments to recover their costs when they ultimately defeat such suits—after

potentially expending considerable time and expense (including travel to a far-off venue)—since SB 8 only provides for a fee award for individuals who initiate an action. Litigation already has been threatened in the record before this Court. This broad exposure has already bred uncertainty among local governments in Texas that threatens to chill the provision of routine and innocuous municipal services.⁵

A. SB 8’s Creation of Unfettered Aiding and Abetting Liability Likely Violates the Constitution

SB 8 establishes a new category of civil aiding-and-abetting liability in order to discourage support for those seeking constitutionally protected care. Yet in doing so, the statute’s language is impermissibly vague. That is, the text establishing aiding and abetting liability fails to define boundaries between everyday municipal services and more direct assistance of those seeking care.

“Vague laws offend several important values.” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). “Vague laws may trap the innocent” if they do not provide a person with reasonable intelligence

⁵ SB 8 permits a huge range of parties to sue and be sued in a private enforcement action. While Texas courts generally follow Article III requirements for standing, the Legislature can confer standing based on specific statutory provisions. *See, e.g., Williams v. Lara*, 52 S.W.3d 171, 178 (Tex. 2001). SB 8 potentially expands standing to any individual who cares to enforce the abortion restrictions against any actor whose actions relate, however remotely, to an abortion.

sufficient notice of what conduct is prohibited so that person may act accordingly. *Id.* As this Court has recognized, this may be especially true when aiding and abetting liability suffers from such defects. Without clear definitions and limiting principles, aiding and abetting provisions can be abused to sweep a range of activities that is “very wide indeed.” *Baggett v. Bullitt*, 377 U.S. 360, 371 (1964).

When several states mandated government employees swear as a condition of employment that they had never aided or abetted a member of the Communist party, *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278, 285 (1961), or a “subversive person,” *Baggett*, 377 U.S. at 367, the Court decried the “very absurdity of these possibilities.” *Cramp*, 368 U.S. at 286. Because those mandates failed to sufficiently define or limit the definition of aiding and abetting, they could ensnare a limitless range of individuals simply undertaking ordinary activities or seeking to do their jobs—the lawyer who once provided counsel to a client who happened to be a member of the Communist Party, a journalist advocating for First Amendment rights including those of Communist Party members, or a professor who participated in an “international convention[] of mathematicians” and exchanged ideas with scholars from Communist countries. *Baggett*, 377 U.S. at 369–70; *Cramp*, 368 U.S. at 286. The possibilities were so broad that even a scienter requirement could not save these laws from their vagueness. *Baggett*, 377 U.S. at 369 (holding that an oath requirement was unconstitutionally vague even accepting that “knowledge is to be read into every provision”).

SB 8's ill-defined aiding and abetting language is just as expansive as the laws this Court struck as impermissibly vague in *Baggett* and *Cramp*. As in *Baggett* and *Cramp*, SB 8 imposes unfettered civil aiding and abetting liability: sweeping in anyone who “knowingly engages in conduct that aids or abets the performance or inducement of a [prohibited] abortion” or “intends to engage in [such] conduct.” Tex. Health & Safety Code § 171.208 (a)(2) & (3). This language, in attaching liability not only to actions *actually* taken in support of people seeking abortions but also to inchoate or otherwise undefined acts to be taken *in the future*, sweeps within its mantle even the most attenuated or hypothetical conduct.

Given this breadth of indirect liability, a wide range of ordinary municipal actions could provide fodder for state court litigation against a public entity. Such actions could range from providing access to information about abortion through crime victim services, at a public library, or on a public health website to operating bus transportation located near an abortion-providing clinic. And although Texas provides one example of aiding and abetting—providing monetary support to a pregnant person seeking a prohibited abortion—the legislation is not textually limited to that single act. *Id.* § 171.208(a)(2) (“*including* paying for or reimbursing the costs of an abortion through insurance or otherwise”) (emphasis added). Further, as the Texas Supreme Court has “never expressly recognized a distinct [civil] aiding and abetting cause of action,” *First United Pentecostal Church v. Parker*, 514 S.W.3d 214, 225 (Tex. 2017), those seeking clarity on what conduct SB 8 prohibits

under its aiding and abetting provisions will find no universal or even analogous state court precedent from which to draw guidance.⁶

SB 8 also renders any scienter consideration meaningless by requiring only that a person knowingly engage in the conduct that eventually aids or abets a prohibited abortion, not that they *know the connection* between their conduct and the prohibited abortion. Tex. Health & Safety Code § 171.208(a). Thus, a person or entity offering transportation used by a pregnant person need only know that they are providing transportation, not that the person is seeking transportation to obtain a prohibited abortion or at what stage of pregnancy. Such a limitless definition of aiding and abetting prevents a person of ordinary intelligence from ascertaining what actions violate SB 8 and the lack of scienter threatens to expose people, organizations, or other entities who may have no idea the future effects of ordinary actions to strict liability for at least \$10,000 in damages, attorney's fees of the plaintiff, and the costs and expense of defending against such claims. The vagueness of the aiding and abetting provisions of SB

⁶ The instances where Texas Supreme Court has considered civil aiding and abetting liability have been within the context of applying statutory schemes distinct from SB 8. *See, e.g., Eberle v. Adams*, 73 S.W.3d 322 (Tex. App. 2001) (deriving from the family code); *Juhl v. Airington*, 936 S.W.2d 640 (Tex. 1996) (regarding a breach of fiduciary duty). Scholars have posited that there may be as many as five different tests courts in Texas have used for civil aiding and abetting liability. Nelson S. Ebaugh, *The Liability: Why You Should Understand the Five Tests of Civil Aiding and Abetting in Texas*, 78 Tex. B.J. 362 (2015).

8, as well as its lack of a scienter requirement, render it constitutionally infirm.⁷

B. Local Governments in Texas Engage in a Wide Variety of Activities that Risk Exposure to Litigation Via the Aiding and Abetting Provisions of SB 8

Local governments in Texas provide a range of services to their residents. A very select few of these services are directly tailored to aid those seeking abortions—such as the City of Austin’s funding of logistical support services such as transportation, lodging, and childcare for people seeking abortions.⁸ Such programs already have been put under threat of litigation in the record before the Court.⁹ However, services need not be directed at abortion to create aiding and abetting exposure. Local governments

⁷ In the criminal context, this Court has held that a person cannot be convicted for aiding and abetting a person who is performing an innocent act. *Shuttlesworth v. City of Birmingham, Ala.*, 373 U.S. 262, 265–66 (1963). In *Shuttlesworth*, the Court reversed convictions of Black religious ministers who were charged with inciting and aiding students in a protest to assert violations of their civil rights. *Id.* The aiding and abetting provisions of SB 8 are similarly indefensible.

⁸ Stacy Fernandez, *Texas Told Cities They Couldn’t Fund Abortion Providers. So Austin is Funding Abortion Access Instead*, *The Tex. Tribune*, (Sept. 12, 2019) <https://www.texastribune.org/2019/09/11/austin-texas-passes-abortion-access-funding-going-around-senate-bill-2/>.

⁹ Decl. of Erick Graham ¶ 9, *United States v. Texas*, Case No. 1:21-cv-00796-RP (W.D. Tex.), Dkt. No. 28-1 (“I also intend to sue the city of Austin, which has been using taxpayer money to subsidize the provision of post-heartbeat abortions.”).

throughout Texas provide basic services accessible to the general public that might benefit individuals seeking abortions or assist clinics providing such care.

Municipal health care services may be particularly vulnerable to targeting under SB 8's aiding and abetting provisions. Many local governments in Texas offer health services that support people in accessing reproductive care. For example, the City of El Paso's Community Care Center provides family planning services and pregnancy testing.¹⁰ The cities of Austin, Dallas, El Paso, Fort Worth, and Houston all additionally provide support to pregnant and parenting youth, and Dallas, Fort Worth, and Houston provide reproductive health care in school-based health centers.¹¹ While none of these cities provides abortions directly, their public health workers could be in the position of answering a patient's questions about pregnancy options and about where to access abortion care.¹²

¹⁰ City of El Paso, *CommUnity Care Center*, Public Health, City of El Paso (2020), <https://www.elpasotexas.gov/public-health/services/community-care-center/>.

¹¹ Nat'l Inst. for Reprod. Health, *Comprehensive Scorecard*, NIRH (2019), https://localrepro.nirhealth.org/wp-content/uploads/2019/10/2019-NIRH-Comprehensive_full.png.

¹² *Amici* acknowledge that SB 8 specifically carves out "any speech or conduct protected by the First Amendment of the United States Constitution," Tex. Health & Safety Code § 171.208(g), but as explained further in Part II.C, *infra*, such a defense does not limit the harm of potential litigation, given the incentive structures set up in the private enforcement scheme.

Municipally provided human services could also be particularly vulnerable to litigation under SB 8. Several local governments offer social services to victims of rape and assault, which could include providing counseling or information about abortion. *Amicus* City of Austin, for example, has trained and certified City employees to provide counseling and social work services through a 24-hour crisis hotline. This Division, under the Austin Police Department, is staffed by trained social workers to respond to calls related to rape and assault.¹³ Police departments in other cities, such as El Paso and San Antonio, similarly provide crisis support, information, and referrals to meet the needs of rape, assault, and domestic violence survivors.¹⁴ If in the course of this assistance and counseling, victims ask for information about reproductive care, social workers may provide information or referrals to a clinic that provides abortions. Such programs could thus be exposed to litigation under SB 8.

¹³ *Victim Services*, City of Austin, <https://www.austintexas.gov/departments/victim-services> (last visited Oct. 27, 2021).

¹⁴ The San Antonio Police Department Crisis Response Team is made up of police officers and caseworkers that provide victims' services, violence prevention, crisis intervention counseling, case management, child and family counseling, support groups, and information and referrals. San Antonio Police Dep't., *Victim's Advocacy*, City of San Antonio, <https://www.sanantonio.gov/SAPD/Victims-Advocacy> (last visited Oct. 27, 2021). The El Paso Police Department Victims Services Response Team provides assistance to victims, including with "referrals to appropriate agencies to ensure that victim's needs are met." El Paso Police Dep't., *VSRT: Victim Services Response Team 1*, City of El Paso, <https://www.elpasotexas.gov/assets/Documents/CoEP/Police/Victim-Services/About-VSRT-English.pdf> (last visited Oct. 27, 2021).

Even services that have no direct nexus with health care could be implicated. Local governments in Texas that provide public transportation, for example, may be exposed to suit under SB 8. In many localities, a person seeking abortion care could take public transportation to or from an abortion-providing clinic, including public transportation provided by local governments at airports. In 2019, Texans took more than 274 million trips on public transportation, including municipal buses, rural “dial-a-ride” systems, and light rail systems.¹⁵ One of the most common reasons that Texans took public transportation was to access health care, accounting for 26% of trips in rural transit districts and 18% of trips in urban transit districts.¹⁶ Riders disproportionately had lower incomes,¹⁷ mirroring national data suggesting that as many as 20% of low-income Americans lack access to a vehicle.¹⁸ As the vast majority of people seeking an

¹⁵ Jessica Donald & Shannon Halbrook, *Public Transit in Texas: Vital Systems Under Pressure*, Texas Comptroller: Fiscal Notes, (Apr. 2021) <https://comptroller.texas.gov/economy/fiscal-notes/2021/apr/transit.php>.

¹⁶ Tex. Dep’t of Transp., *Texas Transportation Plan 2050* at 44, <https://ftp.txdot.gov/pub/txdot/tpp/2050/ttp-2050.pdf> (describing a 2017 ridership survey).

¹⁷ Donald & Halbrook, *supra*, note 15.

¹⁸ Caroline Cournoyer, *More Poorer Residents are Driving Cars, Presenting New Issues for Transit Agencies*, *Governing* (Apr. 6, 2018), <https://www.governing.com/archive/gov-car-ownership-poverty.html>.

abortion—up to 75%—are poor or low income,¹⁹ many may rely on public transportation to access care.

What is true of broader healthcare access via public transportation in Texas is also true of abortion care as a subset of such access. Indeed, of the dwindling number of abortion providers in Texas, many maintain proximity to public transportation to facilitate broader access to care. In McAllen, Texas, for example, the only abortion provider (Whole Woman's Health) is less than a half-block from a city-operated bus line and within the range of the city's paratransit service.²⁰ Similarly, Planned Parenthood's El Paso Health Center is two blocks away from a city-operated bus line and within the city's range for curb-to-curb paratransit service.²¹ With the enactment of SB 8, the public transportation providers of El Paso and McAllen could be sued for aiding and abetting

¹⁹ Jenna Jerman et al., *Barriers to Abortion Care and Their Consequences for Patients Traveling for Services: Qualitative Findings from Two States*, Guttmacher Inst. (June 2017), <https://www.guttmacher.org/journals/psrh/2017/04/barriers-abortion-care-and-their-consequences-patients-traveling-services#6a>.

²⁰ *System Maps: Bus Routes*, Metro McAllen, Tex., <https://mcallen.net/metro/riding/maps.aspx> (last visited Oct. 27, 2021); *ADA Paratransit Services*, Metro McAllen, Tex., <https://mcallen.net/metro/services/ada.aspx> (last visited Oct. 27, 2021).

²¹ *Planned Parenthood - El Paso Health Center to Yandell \Langtry, El Paso, TX*, GoogleMaps, <https://goo.gl/maps/YWoQ37fv9xYfV5Bq9> (last visited Oct. 27, 2021); *About the LIFT*, Sun Metro, <https://sunmetro.net/lift/about-the-lift/> (last visited Oct. 27, 2021).

abortions, merely by facilitating transit to those facilities.

Municipal information services, such as those provided by public libraries, could also place public entities within the ambit of SB 8's aiding and abetting provisions. Libraries across Texas provide internet access, computers, and support programs to help visitors use computers. Reference librarians and other public library staff are available to help answer visitor questions and assist them in accessing external services. For example, the Austin Public Library provides free wireless internet and public computers at all of its locations and provides drop-in computer help labs.²² Similarly, the San Antonio Public Library's LEARN@sapl program offers free technology and skills support for adults and can help individuals apply for social services "or tackle other important tasks."²³ These free information services are particularly vital to the millions of Texans without access to broadband, who are disproportionately low income and people of color.²⁴

²² *Computers and WiFi*, Austin Pub. Library, <https://library.austintexas.gov/computers-and-wifi> (last visited Oct. 27, 2021).

²³ *Learn@SAPL*, San Antonio Pub. Library, <https://guides.mysapl.org/learn> (last updated July 2, 2021 4:28 PM).

²⁴ Juan Pablo Garnham, *Millions of Texans Still Don't Have Broadband Access. Some Lawmakers are Trying to Change That*, Tex. Trib., (Mar. 8, 2021), <https://www.texastribune.org/2021/03/08/internet-broadband-texas/>.

The catchment of aiding and abetting liability could extend well beyond the areas highlighted above and include other, ordinary municipal services that incidentally touch upon abortion services. Local governments provide police protection²⁵ and fire safety to reproductive health clinics that perform abortions; they remove trash and other waste; and they enforce parking and other motor vehicle requirements on the streets and areas surrounding the facilities. Local governments clear debris from roadways, operate water and sewage systems, and provide many other daily services upon which facilities rely in order to operate. Local governments also regularly make land use decisions that affect property utilization. They know that they provide services that are instrumental to the operation of reproductive health clinics. Accordingly, it is at least conceivable that individuals could seek to stop these services from being offered—as a means of undercutting the operation of particular clinics that provide abortion—by suing the local governments themselves.

Such broad exposure of municipal services to litigation under SB 8 causes local governments in Texas significant harm. When local governments are exposed to needless litigation, it risks “governmental paralysis . . . which hamper[s] government functions.” *Nettles v. GTECH Corp.*, 606 S.W.3d 726, 743 (Tex. 2020) (citations and internal quotations omitted)

²⁵ Depending on safety considerations at a particular clinic, local police departments often have a close working relationship with clinic staff and security teams.

(Boyd, J., concurring in part and dissenting in part.). Protecting local governments from frivolous litigation ensures that taxpayer dollars are spent “for their intended purposes,” not on needless court battles. *Hillman v. Nueces Cty.*, 579 S.W.3d 354, 361 (Tex. 2019) (internal quotation marks omitted). If local governments in Texas are sued under SB 8, however, they will have to bear the costs of litigation with no possibility of recovery, even with strong defenses. This exposure and cost could impact delivery of municipal services, not just to facilities providing abortion but to other residents.

C. Even Strong Legal Defenses Do Not Cure the Harm of Frivolous Litigation Brought Under SB 8

Amici are confident that local governments in Texas have strong defenses against liability under SB 8. As political subdivisions of the state, municipalities retain governmental immunity from suits for money damages unless immunity is expressly waived or the state legislature expressly consents to a lawsuit.²⁶ *Wasson Interests, Ltd. v. City of Jacksonville*, 489

²⁶ The Texas Supreme Court has repeatedly held that it is the role of the legislature, not the courts, to waive immunity. *City of Dallas v. Albert*, 354 S.W.3d 368, 373 (Tex. 2011). To waive governmental immunity in Texas, “a statute must use ‘clear and unambiguous language’ expressing that intent,” *Hillman v. Nueces Cty.*, 579 S.W.3d 354, 360 (Tex. 2019) (quoting *Tooke v. City of Mexia*, 197 S.W.3d 325, 328–29 (Tex. 2006)), such that the legislature’s intended waiver is “beyond doubt,” *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697 (Tex. 2003). Any ambiguity as to a statute’s intent must be resolved in favor of retaining immunity. See *Hillman*, 579 S.W.3d at 360.

S.W.3d 427, 429–30 (Tex. 2016). SB 8 does not waive local governments’ general sovereign immunity from civil suit. However, even if this defense will ultimately protect local governments against liability, it does not prevent individuals from filing frivolous lawsuits against local governments, nor does it allow local governments to recover the costs of their defense.

Indeed, the Texas legislature designed SB 8’s attorney’s fees award to provide mandatory fees to a prevailing plaintiff, Tex. Civ. Prac. & Remedies Code § 30.22, but no recovery of fees for a defendant wrongfully and even frivolously sued, Tex. Health & Safety Code § 171.208(i). SB 8 also allows plaintiffs to sue defendants in the county where the plaintiff lives—even if that venue has no connection to the conduct or defendant—requiring the defendant to expend travel costs unless plaintiff consents to a transfer of venue. *Id.* § 171.210. A plaintiff need not even have a connection to the alleged aiding and abetting as SB 8 confers statutory standing that supersedes the general requirement of injury. *See Williams v. Lara*, 52 S.W.3d 171, 178-79 (Tex. 2011) (recognizing that statutes can create exception to the general rule requiring particularized injury to demonstrate standing). Even if local governments in Texas win *every lawsuit* brought against them under SB 8, they will still bear the repeated costs of defending those suits, including the potential costs of defending suits in any of Texas’s 254 counties.

III. SB 8'S RESTRICTIONS ON ABORTION WITHIN TEXAS WILL HARM LOCAL GOVERNMENTS OUTSIDE TEXAS

Although the Texas legislature did not purport to extend SB 8's reach to local governments outside of Texas,²⁷ local governments outside of the state certainly feel the impacts of this law. Local governments outside Texas, including *Amici*, recognize and carry an increased responsibility to provide constitutionally guaranteed access to abortion care not only to their own residents but also to Texans denied those rights. Indeed, some municipalities, such as *Amici* City of Portland, Oregon, have set aside their own funds to help pregnant people access out-of-state abortion care.²⁸ Nonetheless, these increased

²⁷ SB 8 does not appear to extend its aiding and abetting provisions extraterritorially. Neither local governments nor individuals can be sued for aiding and abetting abortions *outside* of Texas. Section 171.208 defines the scope of the aiding and abetting by creating secondary liability “if the abortion is performed or induced in violation of this subchapter[.]” Tex. Health & Safety Code § 171.208. Said violation arises if an abortion is performed after a “fetal heartbeat” is detected—the determination of which the Legislature mandated for physicians in Texas. *Id.* §§ 171.203-171.204. Any interpretation that SB 8 covers aiding and abetting of abortions performed outside of Texas's borders would create additional constitutional infirmities, given the direct regulation of interstate commerce, among other things. *See, e.g., South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2090 (2018).

²⁸ Sarah Cline, *Portland Scraps Texas Boycott, Allocates Abortion Funds*, U.S. News (Sept. 15, 2021), <https://www.usnews.com/news/health-news/articles/2021-09-15/portland-scraps-texas-boycott-allocates-abortion-funds>.

responsibilities to care for Texans seeking abortion care introduce additional burdens on municipal resources already strained by many other public health crises, including a nearly two-year global pandemic. Local governments across the nation face further stresses if SB 8's enforcement scheme is insulated from constitutional review and adopted by other states.

**A. Local Governments Outside Texas Face
Strains on Their Limited Resources
Because of SB 8**

SB 8's ban of abortion creates a domino effect: as providers outside of Texas bear the costs of caring for Texans who need abortion care, their own resources become more strained and less able to provide constitutionally protected care to others (including residents within their own communities). Recent studies show that abortion bans increase financial pressure on neighboring states that absorb out-of-state patients seeking abortion care. More than 276,000 people crossed state lines to obtain an abortion between 2012 and 2017.²⁹ These numbers have increased dramatically since 2017 as more states have enacted stringent abortion restrictions.³⁰ Texans increasingly have been forced to seek abortion care out of state. In March 2020, when Texas Governor Greg

²⁹ Christina Cassidy, *Women Seek Abortions Out of State Amid Restrictions*, AP News (Sept. 8, 2019), <https://apnews.com/article/in-state-wire-abortion-or-state-wire-il-state-wire-mo-state-wire-4ced42150e3348328296e28559c2143b>.

³⁰ *Id.*

Abbott signed an executive order banning abortions for nearly a month due to the ongoing pandemic, abortion clinics in Colorado, Kansas, Nevada, and New Mexico saw a marked increase of patients from Texas.³¹

Because SB 8 has now forced pregnant people to travel out of state to seek abortions, there is a substantially increased burden on providers in neighboring states. In Oklahoma City and Tulsa, for example, there has been a 646% increase in patients from Texas compared to the first six months of 2021.³² Additionally, clinics in Colorado, Kansas, Nevada, and New Mexico have all seen a sharp increase in patients from Texas.³³ As more Texans

³¹ See, e.g., Shannon Najmabadi, *Colorado Abortion Providers are Preparing For an Influx of Patients From Texas*, The Colo. Sun (Sept. 3, 2021), <https://coloradosun.com/2021/09/03/colorado-abortion-patients-texas-ban/> (“Abortion providers in Colorado saw the difference when Texas banned abortions at the start of the pandemic. More calls from Texas area codes. More Texas license plates. More stories about 16-hour drives.”); Rebecca Tong, *Texas’ New Anti-Family Abortion Law is Already Hurting Women’s Health Care in Kansas*, The Kan. City Star (Sept. 9, 2021), <https://www.kansascity.com/opinion/readers-opinion/guest-commentary/article254076098.html> (“From March to May of 2020, our Wichita clinic saw more than 200 patients from Texas — nearly a tenfold increase in the total number of Texans who came to the entire state of Kansas during 2019.”).

³² Decl. of Joshua Yap, M.D. M.P.H. ¶¶ 14-16, *United States v. Texas*, No. 1:21-cv-796-RP (W.D. Tex.) (Dkt. No. 6-11).

³³ Jaleesa Irizarry, *A Denver Planned Parenthood Has Seen a 520% Increase in Patients from Texas*, 9 News (Oct. 5, 2021), <https://www.9news.com/article/news/local/denver-planned-parenthood-increase-in-patients-from-texas/73-db2062d2-b179->

seek abortions out of state, resident patients in those clinics—many of whom might be seeking non-abortion care, such as testing for sexually transmitted diseases, cancer screenings, or family planning—are displaced.

This harms not only the patients forced to seek care further away or even out of state themselves,³⁴ but also damages local public health systems by forcing local governments to cope with broader consequences of delayed care. There is a strong connection between abortion access and physical and socioeconomic well-being for both the pregnant person seeking an abortion as well as their wider community. Children who are born as a result of the denial of abortion care are more likely to live in a household without access to basic necessities.³⁵ Additionally, the stress of navigating reproductive and abortion care may itself worsen the health of a pregnant person and the health

4cb5-bcbd-64059b86a984; Susan Dunlap *How the Texas Abortion Ban is Affecting New Mexico Abortion Providers and Funds, Almost 4 Weeks In*, NM Pol. Rep. (Sept. 27, 2021), <https://nmpoliticalreport.com/2021/09/27/how-the-texas-abortion-ban-is-affecting-new-mexico-abortion-providers-and-funds-almost-four-weeks-in/>.

³⁴ Sabrina Tavernise, *With Abortion Largely Banned in Texas, and Oklahoma Clinic is Inundated*, N.Y. Times (Sept. 26, 2021), <https://www.nytimes.com/2021/09/26/us/oklahoma-abortion.html>.

³⁵ Diane Greene Foster, et al., *Comparison of Health, Development, Maternal Bonding, and Poverty among Children Born after Denial of Abortion vs after Pregnancies Subsequent to an Abortion*, 172 J. Am. Med. Ass'n Pediatrics (2018), <https://jamanetwork.com/journals/jamapediatrics/fullarticle/>.

of the child.³⁶ SB 8 has created a ripple effect that is increasing the burden on residents and municipalities of several states as patients travel further away to seek health services as well as abortion care.³⁷ This in turn impacts local governments, like *Amici*, which provide health care services and develop public health initiatives to provide for the continued health, safety, and general welfare of residents.

**B. If SB 8 Stands, Local Governments
Outside Texas Will Face Litigation
Exposure from Copycat Laws Covering
Abortion and Other Subject Areas**

The drafters of SB 8 have provided a pathway for other states to circumvent *Roe v. Wade* and infringe on rights guaranteed by the Constitution or enshrined in other laws. After this Court declined to prevent SB 8 from taking effect on September 1, Mississippi state Senator McDaniel said: “[M]ost conservative states in the South will look at this inaction by the court and will see that as perhaps a chance to move on that

³⁶ Anusha Ravi, *Limiting Abortion Access Contributes to Poor Maternal Health Outcomes*, Ctr. for Am. Progress (June 13, 2018), <https://www.americanprogress.org/issues/women/reports/2018/06/13/451891/limiting-abortion-access-contributes-poor-maternal-health-outcomes/>.

³⁷ Iris Samuels, *New Texas Abortion Law Pushes Women to Out-Of-State Clinics*, AP News (Sept. 2, 2021), <https://apnews.com/article/abortion-lifestyle-health-travel-texas-fbc505c3db4a08af51ba409a91ea161c>.

issue.”³⁸ Already, lawmakers in Arizona, Arkansas, Florida, Idaho, Indiana, Mississippi, Missouri, Ohio, Oklahoma, South Carolina, and South Dakota have either introduced anti-abortion bills that mimic SB 8’s enforcement structure or seriously entertained introducing such legislation.³⁹ For example, in Florida, a state representative introduced HB 167, a bill that prohibits an abortion after a “fetal heartbeat” is detected. Just like SB 8, the proposed Florida bill is “enforced exclusively through [] private civil enforcement actions.”⁴⁰ The bill thus mimics SB 8’s model for evading constitutional review, despite the same constitutional infirmities.

³⁸ Ariana Garcia, *Here Are the States Making Their Own Version of Texas’ Controversial Abortion Ban*, Hous. Chron. (Oct. 6, 2021), <https://www.chron.com/politics/article/Texas-abortion-ban-Ron-DeSantis-SB-8-Mississippi-16513003.php>.

³⁹ 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>; Sarah Fentem, *Missouri Republicans Plan To Introduce Abortion Restrictions Modeled on Texas Law*, St. Louis Public Radio (Sept. 3, 2021), <https://news.stlpublicradio.org/health-science-environment/2021-09-03/missouri-abortion-restrictions-modeled-on-texas-law>; Elyssa Spitzer & Nora Ellmann, *State Abortion Legislation in 2021*, Ctr. for Am. Progress (Sept. 21, 2021), <https://www.americanprogress.org/issues/women/reports/2021/09/21/503999/state-abortion-legislation-2021/>.

⁴⁰ Fla. House of Representatives, HB-167 Bill Text, https://www.myfloridahouse.gov/Sections/Documents/loadaddoc.aspx?FileName=_h0167_.docx&DocumentType=Bill&BillNumber=0167&Session=2022 (last visited Oct. 27, 2021).

Should these “copycat” bills replicate SB 8’s aiding and abetting liability provisions, municipalities across those states will also likely face similar baseless suits. Just as SB 8 did in Texas, local governments in states with similar laws would also be left to defend themselves against suits based on offering health care counseling, providing transportation, or supporting access to general information. Without this Court’s intervention, SB 8’s model will proliferate, allowing states to avoid constitutional accountability and exposing local governments beyond Texas to potential litigation for performing routine and innocuous municipal services. Local governments across the country continue to have important public health and safety duties. SB 8 and bills relying on the same theories would instead work to disrupt public entities from providing basic resources, support, and care to their communities.

CONCLUSION

For these reasons, the Court should grant Petitioners’ requested relief.

Respectfully submitted,

ANNE L. MORGAN

City Attorney

MEGHAN L. RILEY

City of Austin Law

Department

P.O. Box 1546

Austin, Texas 78767

*Counsel for the City of
Austin, Texas*

ERIN BERNSTEIN

GINA ELLIOTT

Bradley Bernstein

Sands LLP

3911 Harrison Street,

Suite 100

Oakland, California 94611

Counsel for Amici Curiae

JONATHAN B. MILLER

Counsel of Record

MARISSA ROY

ELSA HAAG

Public Rights Project

4096 Piedmont Ave., #149

Oakland, California 94611

T: (646) 831-6113

jon@publicrightsproject.org

Counsel for Amici Curiae

Dated: October 27, 2021

ADDITIONAL COUNSEL

YIBIN SHEN
City Attorney
2263 Santa Clara Avenue
Room 280
Alameda, CA 94501
*Attorney for the City of
Alameda, California*

ESTEBAN A.
AGUILAR, JR.
City Attorney
One Civic Plaza N.W.
Fourth Floor, Room 4072
Albuquerque, NM 87102
*Attorney for the City of
Albuquerque, New Mexico*

JAMES L. SHEA
City Solicitor
100 N. Holliday Street
Suite 101
Baltimore, MD 21146
*Attorney for the City of
Baltimore, Maryland*

JAMES R. BENJAMIN, JR.
County Attorney
400 Washington Avenue
Towson, MD 21204
*Attorney for Baltimore
County, Maryland*

SANDRA M. LLANES
Interim City Attorney
P.O. Box 791
Boulder, CO 80306
*Attorney for the City of
Boulder, Colorado*

CELIA MEZA
Corporation Counsel
City of Chicago
Department of Law
2 N. LaSalle Street
Suite 580
Chicago, IL 60602
*Attorney for the City of
Chicago, Illinois*

ANDREW W. GARTH
City Solicitor
801 Plum Street, Room 214
Cincinnati, OH 45202
*Attorney for the City of
Cincinnati, Ohio*

JESSICA M. SCHELLER
Chief; Advice, Business &
Complex Litigation
Division
Civil Actions Bureau
Cook County State's
Attorney
500 Richard J. Daley
Center Place
5th Floor
Chicago, IL 60602
*Attorney for Cook County,
Illinois*

BARBARA J. DOSECK
City Attorney
101 W. Third Street
P.O. Box 22
Dayton, OH 45401
*Attorney for the City of
Dayton, Ohio*

KRISTIN M. BRONSON
City Attorney
1437 Bannock Street
Room 353
Denver, CO 80202
*Attorney for the City and
County of Denver, Colorado*

RODNEY POL, JR.
City Attorney
401 Broadway, Suite 101
Gary, IN 46402
*Attorney for the City of
Gary, Indiana*

ARTURO G. MICHEL
City Attorney
900 Bagby, 4th Floor
Houston, TX 77002
*Attorney for the City of
Houston, Texas*

HOWARD PHILLIP
SCHNEIDERMAN
Senior Deputy Prosecuting
Attorney
Second & Seneca Building
1191 2nd Avenue
Suite 1700
Seattle, WA 98104-2388
*Attorney for King County,
Washington*

MICHAEL N. FEUER
City Attorney
200 N. Main Street
8th Floor
Los Angeles, CA 90012
*Attorney for the City of
Los Angeles, California*

RODRIGO A.
CASTRO-SILVA
County Counsel
500 W. Temple Street
Los Angeles, CA 90012
*Attorney for the County of
Los Angeles, California*

MICHAEL HAAS City Attorney 210 Martin Luther King Jr. Blvd., Room 401 Madison, WI 53703 <i>Attorney for the City of Madison, Wisconsin</i>	BARBARA J. PARKER City Attorney One Frank H. Ogawa Plaza 6th Floor Oakland, CA 94612 <i>Attorney for the City of Oakland, California</i>
BRIAN E. WASHINGTON County Counsel 3501 Civic Center Drive Suite 275 San Rafael, CA 94903 <i>Attorney for the County of Marin, California</i>	DIANA P. CORTES City Solicitor 1515 Arch Street 17th Floor Philadelphia, PA 19102 <i>Attorney for the City of Philadelphia, Pennsylvania</i>
MARGARET C. DAUN Corporation Counsel 901 N. 9th Street, Room 303 Milwaukee, WI 53233 <i>Attorney for Milwaukee County, Wisconsin</i>	ROBERT TAYLOR City Attorney 1221 SW Fourth Avenue Room 430 Portland, OR 97204 <i>Attorney for the City of Portland, Oregon</i>
ROBERT E. SINNOTT Sr. Asst. County Attorney 501 SE Hawthorne Blvd. Suite 500 Portland, OR 97214 <i>Attorney for Multnomah County, Oregon</i>	LYNDSEY M. OLSON City Attorney 400 City Hall & Court House 15 West Kellogg Boulevard Saint Paul, MN 55102 <i>Attorney for the City of Saint Paul, Minnesota</i>
GEORGIA M. PESTANA Corporation Counsel 100 Church Street New York, NY 10007 <i>Attorney for the City of New York, New York</i>	

DENNIS J. HERRERA
City Attorney
City Hall Room 234
One Dr. Carlton B. Goodlett
Place
San Francisco, CA 94102
*Attorney for the City and
County of San Francisco,
California*

JAMES R. WILLIAMS
County Counsel
70 W. Hedding Street
East Wing, 9th Floor
San José, CA 95110
*Attorney for County of
Santa Clara, California*

JOSEPH LAWRENCE
Interim City Attorney
1685 Main St., Rm. 310
Santa Monica, CA 90401
*Attorney for City of Santa
Monica, California*

PETER S. HOLMES
City Attorney
701 Fifth Avenue
Suite 2050
Seattle, WA 98104-7097
*Attorney for the City of
Seattle, Washington*

DELIA GARZA
County Attorney
P.O. Box 1748
Austin, TX 78767
*Attorney for Travis County,
Texas*

LAUREN LANGER
City Attorney
Best Best & Krieger LLP
1230 Rosecrans Avenue
Suite 110
Manhattan Beach, CA
90266
*Attorney for City of West
Hollywood, California*

APPENDIX

APPENDIX A

LIST OF AMICI CURIAE

City of Austin, Texas
City of Alameda, California
City of Albuquerque, New Mexico
City of Baltimore, Maryland
Baltimore County, Maryland
City of Boulder, Colorado
City of Chicago, Illinois
City of Cincinnati, Ohio
Cook County, Illinois
City of Dayton, Ohio
City and County of Denver, Colorado
City of Gary, Indiana
City of Houston, Texas
King County, Washington
City of Los Angeles, California
Los Angeles County, California
City of Madison, Wisconsin
Marin County, California
Milwaukee County, Wisconsin
Multnomah County, Oregon
City of New York, New York
City of Oakland, California

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City of Philadelphia, Pennsylvania

City of Portland, Oregon

City of Saint Paul, Minnesota

City and County of San Francisco, California

County of Santa Clara, California

City of Santa Monica, California

City of Seattle, Washington

Travis County, Texas

City of West Hollywood, California