October 25 - ROUGH DRAFT OF AMICUS BRIEF

No. 21A85 (21-588)

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, PETITIONER

v.

TEXAS, ET AL., RESPONDENT

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

BRIEF OF WILLIAM R, SCHLECHT AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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No. 21A85 (21-588)

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, APPLICANT

v.

TEXAS, ET AL., RESPONDENT

ON APPLICATION TO VACATE THE STAY PENDING APPEAL ISSUED BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF WILLIAM R. SCHLECHT AS AMICUS CURIAE IN SUPPORT OF APPLICANT

INTERESTS OF *AMICUS CURIAE*

Amicus provides legal guidance to Planned Parenthood entities and is particularly supportive of the interests of Planned Parenthood Great Plains ("PPGP"). Amicus, however, does not represent PPGP in this case. PPGP has provided reproductive health care to women since 1935. Services now include the provision of abortion services beyond six weeks after conception in Arkansas, Kansas, Missouri, and Oklahoma. Oklahoma is adjacent to Texas. Since the Texas legislature enacted Texas Senate Bill 8, PPGP facilities in Oklahoma have experienced a significant increase in the provision of abortion services provided to women who have been able to leave Texas. Moreover, other states served by PPGP have declared their intention to copy TX SB 8 and effect a bar on most abortions in those states. If the States served by PPGP follow Texas, more than 15 million women of childbearing age would face abortion restrictions that have been ruled unconstitutional by the Supreme Court in Roe v. Wade, 410 U.S. 113 (1973) and Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992). Moreover , the legislative intent behind SB 8 is contrary to the abortion rights protections established by the

Constitution as determined by the Supreme Court in Doe v. Bolton, 410 U.S. 113 (1973) and Hill v. Colorado, 530 U.S. 703 (2000). This brief concentrates on the State Action Doctrine and is intended to expand on related arguments of the Department of Justice in previous filings.

SUMMARY OF ARGUMENT

Texas designed its law to take advantage of the State Action Doctrine. It is well understood that the Constitution restrains only state actors. In general, private parties cannot violate the Constitution.

In doing so, Texas ignores two exceptions to the State Action Doctrine. The State Enablement Exception and the Public Functions Exception. By enacting Texas SB 8, the Texas legislature creates a private right of action that can only be actualized with the assistance of Texas courts and judicial officials. Moreover abortion regulation and enforcement has traditionally and exclusively been a state function. Delegating abortion regulation and enforcement to private parties is in effect created thousands of private attorneys general.

ARGUMENT

A. State Enablement Exception to State Action Doctrine

The State of Texas, its legislature, its courts, enable a private party to effectively enforce the extreme abortion restrictions specified in SB 8 with precision.

A private right of action is when a private individual or entity, as opposed to the state, government or public body, has the legal right to assert legal rights under the law. The right is typically justified when a person suffers damages or when the government does not have the bandwidth to right a wrong. Neither is present here. The plaintiff is not required to prove that they were personally damaged. That would be exceedingly difficult in the context of another person, a woman, who has already exercised her Constitutionally protected right to abort a fetus that has attached to her uterus. At six weeks the fetus is about the size of a grain of rice.[1] It is shaped like a very small tadpole and weighs about five millimeters from head to tail.[2]. Depending on its type, a tadpole may be one inch to four inches in length. Of course these comparisons have no relevance to the complexities of a human fetus or the religion of some some who view the fetus as a person at the time of conception regardless of its complete dependence on the woman's body.[3]

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[1] https://www.healthline.com/health/pregnancy/pregnancy-symptoms-week-6#your-baby

[2] https://raisingchildren.net.au/pregnancy/week-by-week/first-trimester/6-weeks

[3] Other religions disagree. Religious people may follow the example of the Old Testament parable of a pregnant woman killed by villains. The parable teaches that prior to it being "fully formed," the fetus is not a person that would subject the villains to a murder charge. Exodus 21:22-23 (Saptuagent translation). Discussed in The Septuagint Translation Has the Right Interpretation of Exodus 21:22-23: https://tmcdaniel.palmerseminary.edu/LXX_EXO_%2021_22-23.pdf. Of particular note, in a unanimous decision on September 7, 2021, the Supreme Court of Justice of the Nation, the highest court in Mexico, a predominantly Catholic nation, legalized abortions under circumstances similar to Roe. Discussed in Mexico's Top Court Top Court Decriminalizes Abortion in 'Watershed Event. https://www.reuters.com/world/americas/mexico-supreme-court-rules-criminalizing-abortion-is-unconstitutional-2021-09-07/. The Court annulled several provisions of a law from Coahuila — a state on the Texas border — that had made abortion a criminal act. In a second case that same week, the Court ruled that the protection of "life from conception" was unconstitutional, doubling down on its decision that abortion was not a crime. Discussed in Mexico's Supreme Court Rules Right to Life From Conception Is Unconstitutional: https://www.usnews.com/news/world/articles/2021-09-09/mexicos-supreme-court-rules-right-to-life-from-conception-is-unconstitutional

In Shelley v. Kraemer, 334 U.S. 1 (1948), a unanimous Supreme Court held that courts cannot enforce provisions in a contract that could not have been promulgated by a legislature.[4] The provisions at issue were contained in privately agreed deed restrictions. Land subject to those restrictions could only be "occupied" by Whites. *Id*. at 5. Private agreements to exclude persons of a designated race or color from the use or occupancy of real estate for residential purposes is not, in and of itself, violative of the Fourteenth Amendment; but a state court's enforcement of those restrictions doe violate the equal protection clause of the Fourteenth Amendment for state courts to enforce them.

> State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands.

Id. at [20].

Likewise, the effect of judicial enforcement of SB 8 is denial of abortion rights protected by the right of privacy found in Roe v Wade to be embraced by the Constitution as implied from related rights therein specified. Enforcement also denies women equal protection of the laws under the Equal Protection Clause of the Fourteenth Amendment. Only women get pregnant. Abortion restrictions only apply to women because they are women. Rights related to the right of privacy are also contained in the Bill of Rights of the Texas State Constitution. See, e.g., Article 1 Sec. 9 (restricts searches and seizures). Texas also has an Equal Protection Clause. Art.1, Sec. 3a. (EQUALITY UNDER THE LAW. Equality under the law shall not be denied or abridged

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[4] https://supreme.justia.com/cases/federal/us/334/1/#14

because of sex, race, color, creed, or national origin. This amendment is self-operative.) (Added Nov. 7, 1972.)

Intrusion of the State and the minimal involvement of the private parties in this case are more pronounced here than in the case of Shelley. In this case, the State's role begins at the outset and ends at the endpoint. The Texas legislature created the abortion restriction regimen out of whole cloth. The legislature makes it easy for a private to pursue litigation and to win an award for doing so. Any person in the United States can file a claim based on the legislation, not based on damages suffered by the person. Little effort is required of plaintiff. At this time, plaintiff does not have to appear in court in person and an out of court affidavit is permissible. Plaintiff has little risk of monetary loss.[5] SB 8 requires a defendant to pay a prevailing plaintiff's legal fees. A prevailing defendant cannot recover their legal fees.

Winning is easy. SB 8 does not make noncompliance criminal. As a consequence, the defendant would not, in general, have a Fifth Amendment right not to testify. Medical records are readily discoverable because they are not considered admissions against interest. HIPPA provides little comfort to a woman whose medical records about her abortion are required to be disclosed. Perhaps under seal. Perhaps not.

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[5] The Supreme Court of Texas issued its Forty-Third Emergency Order continuing "the authority of **all courts, without a participant's consent** to require or allow remote hearings, consider sworn statements made out of court or sworn testimony given remotely, conduct proceedings away from the court." (emphasis added). Forty-Third Emergency Order of the Supreme Court of Texas Regarding the COVID-19 State of Disaster Order (Misc. Docket No. 21-9119) entered September 21, 2021: https://www.txcourts.gov/media/1452887/219119.pdf

These excerpts from Shelley are dispositive of this case:

> These cases present for our consideration questions relating to the validity of court enforcement of private agreements, generally described as restrictive covenants, which have as their purpose the exclusion of persons of designated race or color from the ownership or occupancy of real property." *Id.* at 4.
> …
> The short of the matter is that, from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference includes action of state courts and state judicial officials. … [I]t has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government. *Id*. at 18.
> …
> The fact that state courts stand ready to enforce restrictive covenants excluding non-White persons from the ownership or occupancy of property covered by them does not prevent the enforcement of covenants excluding colored persons from constituting a denial of equal protection of the laws, since the rights created by § 1 of the Fourteenth Amendment are guaranteed to the individual. *Id.* at 21-22
> …
> The difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing. *Id.* at 19.
> …
> We hold that, in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws, and that, therefore, the action of the state courts cannot stand. … The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals. … The task of determining whether the action of a State offends constitutional provisions is one which may not be undertaken lightly. Where, however, it is clear that the action of the State violates the terms of the fundamental charter, it is the obligation of this Court so to declare." *Id.* at 23-24.
> …
> These cases present for our consideration questions relating to the validity of court enforcement of private agreements, generally described as restrictive covenants, which have as their purpose the exclusion of persons of designated race or color from the ownership or occupancy of real property." *Id.* at 4.

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have as their purpose the exclusion of persons of designated race or color from the ownership or occupancy of real property. *Id.* at 4.

These cases present for our consideration questions relating to the validity of court enforcement of private agreements …. [They] raise the question of the validity not of the private agreements as such, but of the judicial enforcement of those agreements." *Id.* at 9.

It is likewise clear that restrictions on the right of occupancy of the sort sought to be created by the private agreements in these cases could not be squared with the requirements of the Fourteenth Amendment if imposed by state statute or local ordinance. We do not understand respondents to urge the contrary. *Id.* at 11.

Here, the particular patterns of discrimination and the areas in which the restrictions are to operate are determined, in the first instance, by the terms of agreements among private individuals. Participation of the State consists in the enforcement of the restrictions so defined. The crucial issue with which we are here confronted is whether this distinction removes these cases from the operation of the prohibitory provisions of the Fourteenth Amendment.
…
These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements. *Id.* at 13-14.
…
These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. *Id.* at 19.

In contrast to Shelley, judicial action is essential to in order to carry out the legislature's abortion restriction regimen. Private parties created the deed restrictions in Shelley. Judicial action was only necessary if the restrictions were challenged.

B. Public Functions Exception to State Action Doctrine

Abortion regulation has traditionally and exclusively the domain of the State. SB 8 delegates to private parties an abortion regulation in the form of a private right of action. The effect is to allow anyone in America to be a private state attorney general.

The Public Functions Exception to the State of Action Doctrine clearly applies. See Brentwood Academy v. Tennessee Secondary School Athletic Association, 531 U.S. 288 (1971)pp. The Tennessee Secondary School Athletic Association accredits and regulates high school sports programs. Litigation ensued between the Brentwood Academy and the state accrediting agency. The Academy's argument was that the Athletic Association was taking on a public function and acting in a public capacity. The Court ruled in favor of the Academy finding state action. The conclusion relied on the fact that *most* of the schools regulated at the high school level are public schools The Court distinguishes National Collegiate Athletic Association v. Tarkanian, 488 U.S. 178 (1988). At the college level, there's much more of a split between public and private schools. The Court therefore concluded that the NCAA does not perform a public function when it regulates college sports and is not subject to Constitutional constraints.

CONCLUSION

Private parties perform a public function when they avail themselves of the new rights created by SB 8. Governmental officials, including the Texas legislature and judges, enable those parties to do so. And, without the law and without the courts, it would be impossible for a private party to do so.

State action is rampant throughout the process. The State of Texas bears responsibility for violating Constitutionally protected privacy rights ensured by current law. The State of Texas also violates the equal protection of women guaranteed by the equal protection provisions of the Fourteenth Amendment and Article 1, Sec. 3a of the Constitution of the State of Texas.

Respectfully submitted,

Date: October 27, 2021 /s/ William R. Schlecht

CERTIFICATE OF COMPLIANCE

The undersigned is a member of the Bar of the United States Supreme Court.

The principal parties in this case have filed blanket consents to the filing of amicus briefs.

I certify that this brief complies with the requirements of Supreme Court Rules 33.1, 34 and 37.

The brief contains 1001 words (excluding exempted items) and the brief's type size and typeface are in compliance with the pertinent requirements.

Date: October 27, 2021 /s/ William R. Schlecht