No. 21A_____

IN THE

# Supreme Court of the United States

WHOLE WOMAN'S HEALTH; ALAMO CITY SURGERY CENTER, P.L.L.C. D/B/A ALAMO WOMEN'S REPRODUCTIVE SERVICES; BROOKSIDE WOMEN'S MEDICAL CENTER, P.A. D/B/A BROOKSIDE WOMEN'S HEALTH CENTER AND AUSTIN WOMEN'S HEALTH CENTER; HOUSTON WOMEN'S CLINIC; HOUSTON WOMEN'S REPRODUCTIVE SERVICES; PLANNED PARENTHOOD CENTER FOR CHOICE; PLANNED PARENTHOOD OF GREATER TEXAS SURGICAL HEALTH SERVICES; PLANNED PARENTHOOD SOUTH TEXAS SURGICAL CENTER; SOUTHWESTERN WOMEN'S SURGERY CENTER; WHOLE WOMEN'S HEALTH ALLIANCE; ALLISON GILBERT, M.D.; BHAVIK KUMAR, M.D.; THE AFIYA CENTER; FRONTERA FUND; FUND TEXAS CHOICE; JANE'S DUE PROCESS; LILITH FUND, INCORPORATED; NORTH TEXAS EQUAL ACCESS FUND; REVEREND ERIKA FORBES; REVEREND DANIEL KANTER; MARVA SADLER,

*Applicants*,

*v.*

JUDGE AUSTIN REEVE JACKSON; PENNY CLARKSTON; MARK LEE DICKSON; STEPHEN BRINT CARLTON; KATHERINE A. THOMAS; CECILE ERWIN YOUNG; ALLISON VORDENBAUMEN BENZ; KEN PAXTON,

*Respondents.*

## EMERGENCY APPLICATION TO JUSTICE ALITO FOR WRIT OF INJUNCTION AND, IN THE ALTERNATIVE, TO VACATE STAYS OF DISTRICT COURT PROCEEDINGS

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TO THE HONORABLE SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE OF THE SUPREME COURT AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT:

Nearly fifty years ago, this Court held that Texas could not ban abortion prior to viability. *Roe v. Wade*, 410 U.S. 113 (1973). Yet, absent intervention from this Court, in less than two days, on Wednesday, September 1, Texas will do precisely that. This new Texas law will ban abortion starting at six weeks of pregnancy, which is indisputably prior to viability and before many people even know they are pregnant. Senate Bill 8, 87th Leg., Reg. Sess. (Tex. 2021) ("S.B. 8" or the "Act"). As such, it unquestionably contravenes this Court's precedent, including *Roe*, which the State of Texas concedes is binding. Indeed, as an amicus in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392 (pet. for cert. granted May 17, 2021), Texas asked this Court to *overrule* its precedent in order to uphold the fifteen-week abortion ban at issue in that case. *See, e.g.*, Br. for the States of Texas, et al. as Amici Curiae in Supp. of Pet'rs, *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, 2021 WL 3374343 (U.S. July 29, 2021).

Despite this Court's precedent, and the clear harm that will occur in less than two days, the U.S. Court of Appeals for the Fifth Circuit entered an indefinite administrative stay of all district-court proceedings in Applicants' challenge to S.B. 8; vacated the preliminary-injunction hearing that had been scheduled for August 30; denied Applicants' motion to expedite Respondents' interlocutory appeal; and denied an injunction pending appeal. Absent relief from this Court, the court of appeals' orders will prevent the district court from ruling on Applicants' request for emergency injunctive relief in a meaningful timeframe, allowing Texas to ban abortion beginning

at six weeks of pregnancy before this Court considers the question presented in *Jackson Women's Health Organization*.

If permitted to take effect, S.B. 8 would immediately and catastrophically reduce abortion access in Texas, barring care for at least 85% of Texas abortion patients (those who are six weeks pregnant or greater) and likely forcing many abortion clinics ultimately to close. Patients who can scrape together resources will be forced to attempt to leave the state to obtain an abortion, and many will be delayed until later in pregnancy. The remaining Texans who need an abortion will be forced to remain pregnant against their will or to attempt to end their pregnancies without medical supervision.

This obvious and immediate harm is precisely S.B. 8's intent. In an attempt to insulate this patently unconstitutional law from federal judicial review prior to enforcement, the Texas Legislature barred government officials—such as local prosecutors and the health department—from directly enforcing S.B. 8's terms. Instead, the Act deputizes private citizens to enforce the law, allowing "[a]ny person" who is not a government official to bring a civil lawsuit against anyone who provides an abortion in violation of the Act, "aids or abets" such an abortion, or merely intends to do so. S.B. 8 § 3 (adding Tex. Health & Safety Code § 171.208). These civil suits are permitted regardless of whether the person suing has any connection to the abortion, and a successful S.B. 8 claimant is entitled to at least $10,000 in "statutory damages" per abortion, plus mandated injunctions preventing the person sued from providing or assisting future abortions, and costs and attorney's fees. *Ibid.*

At bottom, the question in this case is whether—by outsourcing to private individuals the authority to enforce an unconstitutional prohibition—Texas can adopt a law that allows it to "do precisely that which the [Constitution] forbids." *Terry v. Adams*, 345 U.S. 461, 469–70 (1953) (striking down a Texas law attempting to insulate white-only political primaries from federal court review). The answer to that question must be no. This Court should grant relief to block Texas's flagrant defiance of this Court's clearly established constitutional precedent. In so doing, it should make clear that the Fifth Circuit's extraordinary decision to administratively stay all proceedings in the district court just days before that court was set to rule on Applicants' fully briefed preliminary injunction motion was an abuse of discretion, as was its decision to deny an injunction pending appeal and Applicants' request to expedite that appeal. Accordingly, Applicants ask that the Court issue an injunction preventing enforcement of S.B. 8 pending appeal and disposition of a petition for certiorari to this Court.

In the alternative, Applicants urge the Court to provide other relief to ensure that the district court may rule on their pending motions for a temporary restraining order/preliminary injunction and class certification before an irreparable deprivation of constitutional rights occurs. Specifically, Applicants request that the Court (1) vacate the Fifth Circuit's administrative stay of the district-court proceedings as to Respondent Mark Lee Dickson, who is not a government official, has never claimed sovereign immunity, and has no right to an immediate interlocutory appeal from an order denying sovereign immunity, and (2) vacate the district court's stay of its own

proceedings as to the remaining Respondents, who are all government officials with specific authority to enforce compliance with S.B. 8, because the district court incorrectly concluded that the notice of appeal necessarily divested it of jurisdiction to issue an order maintaining the status quo and preventing irreparable harm. In lieu of this course, the Court could vacate the district-court order denying the motions to dismiss and remand this case to the Fifth Circuit with instructions to dismiss the appeal from that order as moot. Finally, if the Court needs additional time to consider this Application, it should enter appropriate interim relief.

While the relief requested will maintain the status quo ante and protect the constitutional rights of countless Texans, Respondents will suffer no harm from an injunction pending appeal or vacatur of the stays. One of the Respondents is a private individual sued by Applicants based on his threats to enforce S.B. 8 against them. He has no colorable claim to sovereign immunity or other ground for interlocutory appeal. The remaining Respondents are a county clerk and a state judge sued in their official capacities and on behalf of putative defendant classes of similarly situated clerks and judges, who are integral to S.B. 8's private enforcement scheme, as well as state agency officials who have authority to enforce collateral penalties against Applicants for violating S.B. 8. The district court properly rejected their assertions of sovereign immunity. In any event, given that Applicants' motions for class certification and preliminary injunction require no further briefing from Respondents in the district court, delaying their opportunity to seek appellate review by mere days while the district court considers those motions would impose no burden on them.

## DECISIONS BELOW

The Fifth Circuit's order denying Applicants' emergency motion for an injunction pending appeal and emergency motion to vacate the stays of the district court's proceedings, App.1–2, is unreported. The Fifth Circuit's order granting an administrative stay of the district court proceedings and denying Applicants' emergency motion to expedite the appeal, App.4–5, is unreported. The district court's order granting in part and denying in part the motion to stay, App.6–7, is unreported. The district court's order denying the motions to dismiss, App.8–58, is available at 2021 WL 3821062.

## JURISDICTION

The district court denied Respondents' motions to dismiss on August 25, 2021. Respondents filed a notice of appeal the same day. *See P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). Respondents' appeal is pending in the Fifth Circuit. This Court's jurisdiction is invoked under 28 U.S.C. §§ 1651, 1254.

## STATEMENT

### A. Senate Bill 8

S.B. 8 provides that "a physician may not knowingly perform or induce an abortion . . . if the physician detect[s] a fetal heartbeat," a term that the Act defines to include even embryonic cardiac activity that appears at approximately six weeks in pregnancy. S.B. 8 § 3 (adding Tex. Health & Safety Code § 171.204(a)–(b));[1]

[1] Hereinafter, citations to S.B. 8 § 3 are to the newly added provisions of the Texas Health & Safety Code.

App.10. The Act also makes it unlawful for any person to "aid[] or abet[]" an abortion prohibited by the law, including by helping to pay for a prohibited abortion, or even merely to intend to provide or assist with a prohibited abortion. S.B. 8 § 171.208(a)(2), (b)(1); App.10. Six weeks is so early in pregnancy that many patients do not yet realize they are pregnant, App.91, 157, and it is indisputably prior to viability, App.90–91, a point in pregnancy at which the State may not prohibit a patient from deciding whether to end her pregnancy, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992); *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2120 (2020) (plurality opinion); *id.* at 2135 (Roberts, C.J., concurring). If permitted to take effect, S.B. 8 would immediately and irreparably decimate abortion access in Texas, barring care for at least 85% of Texas abortion patients (those who are six weeks pregnant or greater) and likely forcing many abortion clinics to ultimately close. App.89, 105, 115–16, 124–24, 131, 148, 155, 158, 172, 178. Patients who can scrape together resources will be forced out of state to obtain abortion care, by one estimate increasing the average one-way drive to a health center by 20 times, from 12 miles to 248—almost 500 miles round trip.[2]

In this respect, S.B. 8 is like other unconstitutional laws that states have enacted in recent years to ban abortion before viability. Every single federal appellate

[2] Elizabeth Nash et al., *Impact of Texas' Abortion Ban: A 20-Fold Increase in Driving Distance to Get an Abortion*, Guttmacher Inst. (Aug. 4, 2021), https://www.guttmacher.org/article/2021/08/impact-texas-abortion-ban-20-fold-increase-driving-distance-get-abortion.

court to consider a law prohibiting abortion before viability, with or without exceptions, has struck it down as a violation of the Fourteenth Amendment.[3]

But S.B. 8 differs from those bans in that it bars executive-branch officials—such as local prosecutors or the health department—from enforcing it directly. S.B. 8 §§ 171.207(a), 171.208(a). Instead, S.B. 8 may be enforced only by state courts via civil-enforcement actions that "[a]ny person" can bring against anyone alleged to have violated the ban by performing or assisting with a prohibited abortion, or by intending to do so. *Id.* § 171.208(a). When a "violation" of the ban occurs, S.B. 8 requires state courts to issue an injunction to prevent further prohibited abortions from being performed, aided, or abetted. *Id.* § 171.208(b)(1). In addition, courts are required to award the person who initiated the enforcement action a minimum (there is no statutory maximum) of $10,000 per abortion, payable by the person who violated the Act. *Id.* § 171.208(b)(2).

At every turn, S.B. 8 attempts to replace normal civil-litigation rules and clearly established federal constitutional rules with distorted versions designed to maximize the abusive and harassing nature of the lawsuits and to make them impossible to fairly defend against. For example, S.B. 8 provides that persons sued under the Act could be forced into any of Texas's 254 counties to defend themselves,

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[3] *See, e.g.*, *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 773 (8th Cir. 2015); *McCormack v. Herzog*, 788 F.3d 1017, 1029 (9th Cir. 2015); *Edwards v. Beck*, 786 F.3d 1113, 1117 (8th Cir. 2015) (per curiam); *Isaacson v. Horne*, 716 F.3d 1213, 1217 (9th Cir. 2013); *Women's Med. Pro. Corp. v. Voinovich*, 130 F.3d 187, 201 (6th Cir. 1997); *Jane L. v. Bangerter*, 102 F.3d 1112, 1114, 1117–18 (10th Cir. 1996); *Sojourner T v. Edwards*, 974 F.2d 27, 29, 31 (5th Cir. 1992); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1368–69, 1373 & n.8 (9th Cir. 1992).

and it prohibits transfer of the cases to any other venue without the parties' joint agreement. *Id.* § 171.210(b). S.B. 8 also states that a person sued under the Act may not point to the fact that the claimant already lost an S.B. 8 lawsuit against someone else on equally applicable grounds or that a court order permitted an abortion provider's conduct at the time when it occurred, if that court order was later overruled. *Id.* § 171.208(e)(3)–(5). And S.B. 8 imposes a draconian fee-shifting provision providing that, if an abortion provider or other person challenges S.B. 8 seeking declaratory or injunctive relief against its enforcement, that person and all of their lawyers can be held jointly and severally liable for the opposing party's attorney's fees and costs if any of these claims are dismissed for any reason. S.B. 8 § 4 (adding Tex. Civ. Prac. & Rem. Code § 30.022(a)–(b)).

As former Texas judges and legal scholars have observed, S.B. 8 "weaponizes the judicial system by exempting the newly created cause of action from the normal guardrails that protect Texans from abusive lawsuits and provide all litigants a fair and efficient process in our state courts."[4] As a result, even if abortion providers and others sued in S.B. 8 lawsuits ultimately prevailed in them—as they should in every case if only they could mount a fair defense—the threat of unlimited lawsuits against them will prevent them from continuing to provide constitutionally protected health care.

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[4] Letter from Texas attorneys to Dade Phelan, Speaker of the Tex. House of Representatives (Apr. 28, 2021), *available at* https://npr.brightspotcdn.com/d5/51/a2eac3664529a017ade7826f3a69/attorney-letter-in-opposition-to-hb-1515-sb-8-april-28-2021-1.pdf.

### B. The District Court Proceedings

On July 13, 2021, Applicants, who are plaintiffs in the district court, filed this case to challenge the Act's constitutionality. They named as defendants those officials whom the Texas Legislature made responsible for compelling compliance with S.B. 8: a state judge (Judge Austin Reeve Jackson) and a court clerk (Penny Clarkston), each on behalf of a putative defendant class of judges and clerks, respectively, who will be conscripted into enforcing S.B. 8 through actions in the courts where they serve. App.17. Applicants further named as a defendant Mark Lee Dickson, a private party whom Plaintiffs reasonably expect to file suit against those who violate the Act. App.18. Additionally, Applicants sued certain State licensing officials and the Attorney General of Texas (the "State Agency Respondents") because, although these officials cannot directly enforce the Act's ban on providing, aiding, or abetting abortions, they are authorized and required to bring administrative and civil-enforcement actions under other laws that are triggered by violations of S.B. 8. App.17–18; S.B. 8 § 171.207(a); *see also, e.g.*, Tex. Occ. Code § 164.055(a) (requiring the Texas Medical Board to "take an appropriate disciplinary action against a physician who violates . . . Chapter 171, Health and Safety Code").

Applicants filed a motion for summary judgment on all claims the same day they filed their lawsuit, roughly seven weeks before the Act's effective date. They supported their motion with 19 declarations, App.86–238, including declarations from every abortion provider plaintiff, App. 86–188. The providers testified that it would be impossible for them to continue to perform abortions after six weeks if S.B. 8 takes effect, in light of the extraordinary financial penalties and injunctions that S.B.

8 requires state-court judges to impose for any violation; the risk to their professional licenses; and the severe costs and burdens of defending themselves in S.B. 8 enforcement actions across the state of Texas even if they might ultimately prevail. App.94–95, 112, 115–16, 124, 131–32, 149, 158, 166, 172–73, 179, 185.

Applicants effected service quickly and, three days after filing suit and moving for summary judgment, they moved to certify the defendant classes of clerks and judges under Federal Rule of Civil Procedure 23(b)(1)(A). The district court subsequently entered a scheduling order that would have ensured full briefing by August 13.

All Respondents filed a motion to stay the district court proceedings beyond resolution of the motions to dismiss, which the district court judge denied. App.8–9. Respondents then filed their Rule 12(b)(1) motions to dismiss. The State Agency Respondents and state judge argued that they were entitled to sovereign immunity. App.22, 40. The county clerk claimed sovereign immunity solely by "adopting the arguments of her co-Defendants without further elaboration." App.40.

All government official Respondents, along with Respondent Dickson, also argued that Applicants lacked Article III standing to bring their claims, although their rationales diverged. In particular, Dickson contended that Applicants lacked standing as to him because he had not credibly threatened to bring an S.B. 8 enforcement action against them, and Dickson submitted declarations in which he attempted to distance himself from previous threats against Applicants, while acknowledging that he has personal knowledge of "countless" individuals prepared to

sue Plaintiffs for any perceived violation as soon as S.B. 8 takes effect. App.53–54, 242–43. The government officials argued in the aggregate that Plaintiffs lacked standing because they failed to plead an actual case or controversy, an imminent injury-in-fact, traceability, or redressability and that prudential standing requirements were not met. App.27.

### C. The Fifth Circuit's Mandamus Order

On August 7, before Applicants even had an opportunity to respond to the motions to dismiss, Respondents Clarkston (the court clerk) and Dickson (the private individual) filed a petition for a writ of mandamus asking the court of appeals to "direct the district court to immediately dismiss the claims brought against Judge Jackson and Ms. Clarkston," on the ground that these officials were entitled to sovereign immunity. *In re: Penny Clarkston*, No. 21-50708, Pet. for Writ of Mandamus (5th Cir. Doc. No. 515969448) ("Mandamus Pet.") at 24. Notably, Judge Jackson and the other State Agency Respondents did not join the petition. Respondents Clarkston and Dickson also sought a stay of the district-court proceedings as to *all* Respondents, and argued that, if Applicants "need relief before September 1[,] they should move for a preliminary injunction rather than forcing the case to final judgment within seven weeks." *Id.* at 5. Given the delay caused by Respondents' writ of mandamus request, Plaintiffs immediately filed a motion for a temporary restraining order and preliminary injunction against all Respondents, D. Ct. ECF No. 53, mirroring their previously filed motion for summary judgment.

The district court judge subsequently submitted a letter to the Fifth Circuit panel in the mandamus action. He assured the court of appeals that he would rule on

Respondents' jurisdictional defenses before resolving the merits of the case. App.239–40. In light of Applicants' filing of a preliminary injunction request, the judge also told the Fifth Circuit that, absent further guidance from the court of appeals, he would enter a new briefing schedule. That briefing schedule called first for completion of briefing on the motions to dismiss, concurrent with briefing on the preliminary-injunction request, and it provided for completion of class-certification briefing by late August. He indicated he would hold a hearing on the preliminary-injunction motion on August 30. The district court judge then entered a briefing schedule consistent with what he had laid out in his letter to the Fifth Circuit.

On August 13, 2021, the court of appeals denied the mandamus petition, stating:

> We conclude that the essence of what petitioners request is that this court alter the schedule established by the district court for briefing. We interpret the district court's statement to be that an order on the motion to dismiss will be issued no later than any order as to summary judgment. We do not find in petitioners' arguments a basis to grant the extraordinary relief of a writ of mandamus simply to direct the timing of briefing.

App.59.

### D. Further Proceedings

On remand, Respondent Clarkston subpoenaed eleven of the Applicants and their staff members to testify at the preliminary-injunction hearing, D. Ct. ECF No. 72, which in turn led the district court to convert the proceeding to an evidentiary hearing. Applicants made clear that they believed the case could be resolved without an evidentiary hearing.

On August 25, 2021, the district court denied Respondents' motions to dismiss in a consolidated order. App.8. In a detailed opinion, the district court rejected Respondents' arguments concerning sovereign immunity, standing, and other Article III issues. App.21–57. At that time, briefing on Applicants' motion for a preliminary injunction was complete, and Respondents had responded to Applicants' motion for defendant class certification. D. Ct. ECF No. 72, at 4–6.

Respondents appealed the denial of the motion to dismiss the same day it was decided, and simultaneously filed a motion in the district court asking it to stay the proceedings and vacate the preliminary-injunction hearing. Before the district court ruled on that motion, all Respondents also filed on August 27 an emergency motion in the Fifth Circuit to stay district-court proceedings pending appeal. 5th Cir. Doc. No. 515997262. Shortly thereafter, the district court granted a stay of the proceedings as to Respondents Jackson and Clarkston and the State Agency Respondents, based on their argument that the interlocutory appeal on sovereign immunity divested the court of jurisdiction, but it denied a stay as to Respondent Dickson and ordered the preliminary injunction hearing to proceed as scheduled with respect to the claims against the latter. App.6–7.

Later in the day, Plaintiffs filed an opposition to the Fifth Circuit motion to stay, combined with a motion to dismiss Respondent Dickson's appeal. 5th Cir. Doc. No. 515998618. Plaintiffs also filed an emergency motion to expedite the appeal. 5th Cir. Doc. No. 515997650.

That evening, the court of appeals entered a temporary administrative stay of all district court proceedings, including the preliminary-injunction hearing. App.5. Although Respondent Dickson had asked the court by letter to permit him to respond by 12 p.m. on Sunday, the Fifth Circuit denied Applicants' motion to expedite the appeal and directed Respondent Dickson to file a combined response to Applicants' motion to dismiss his appeal and reply to Applicants' opposition to his emergency stay motion by 9 a.m. on August 31, the day after the preliminary injunction hearing was scheduled to take place and the day before S.B. 8 takes effect. App.5.

On August 29, 2021, Applicants filed emergency motions with the Fifth Circuit asking that the court of appeals (1) issue an injunction pending appeal; (2) vacate its administrative stay of the district-court proceedings as to Respondent Dickson; (3) vacate the district court's own stay of its proceedings as to the government official Respondents; and (4) in the alternative to vacatur of the stays, vacate the underlying district court order denying the motions to dismiss. Later that day, the Fifth Circuit denied all of Applicants' motions without explanation. App.2.

## ARGUMENT

### I. ISSUANCE OF AN INJUNCTION IS NECESSARY TO MAINTAIN CLEARLY ESTABLISHED LEGAL RIGHTS AND TO PREVENT IRREPARABLE HARM

The Circuit Justices of this Court have authority to issue injunctions under the All Writs Act, 28 U.S.C. § 1651(a), when applicants' claims "are likely to prevail," the denial of injunctive relief "would lead to irreparable injury," and "granting relief would not harm the public interest." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 65–66 (2020) (per curiam) (granting emergency injunctive relief to prevent

likely constitutional violations from state law); *see also Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regul. Comm'n.*, 479 U.S. 1312, 1312 (1986) (Scalia, J., in chambers) (injunctive relief under All Writs Act appropriate where the legal rights at issue are "indisputably clear," the circumstances are "critical and exigent," and injunctive relief is "necessary or appropriate in aid of the Court's jurisdiction" (citations and alterations omitted)).

An application for an injunction may be granted without serving "as an expression of the Court's views on the merits," *Little Sisters of the Poor Home for the Aged v. Sebelius*, 571 U.S. 1171, 1171 (2014) (mem.), to prevent enforcement of a potentially unconstitutional statute. The Court has thus granted emergency injunctions pending appeal when there is a "fair prospect" of reversal and a likelihood of "irreparable harm . . . from the denial of equitable relief." *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers); *see also, e.g.*, *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2807 (2014) (granting injunction enjoining enforcement of challenged provisions of the Affordable Care Act "pending final disposition of appellate review"); *Roman Cath. Diocese*, 141 S. Ct. at 66 (granting injunction enjoining enforcement of executive order limiting attendance at religious services).

Applicants satisfy the standard for an emergency injunction. First, this appeal presents an indisputably clear case for relief. The court of appeals has blocked the district court from taking prompt action to enjoin enforcement of a law that violates nearly fifty years of this Court's precedent, and it has refused to expedite consideration of the pending appeal—leaving the rights of Texas women to obtain a

legal abortion in jeopardy for months or more. In so doing, the court of appeals will be the first in the nation to allow a pre-viability abortion ban to take effect—and it will do so while the question whether all pre-viability prohibitions on elective abortions are unconstitutional is currently pending before this Court in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392. This Court's intervention is needed to protect this Court's ability to meaningfully decide that question.

Second, Applicants' request is both extraordinarily time-sensitive and solely within this Court's power to redress. In just two days, on Wednesday, September 1, pregnant Texans will be prohibited from exercising fundamental rights consistently protected by this Court. Yet, due to an unusual procedural posture below and the Fifth Circuit's refusal either to safeguard Texans' constitutional rights itself or to permit the district court to rule on Applicants' fully briefed preliminary-injunction motion, this Court's injunctive powers under the All Writs Act are the last resort.

Third, the balance of equities weighs heavily in favor of maintaining the status quo by enjoining S.B. 8, because irreparable harm will flow from the deprivation of fundamental freedoms protected by the Constitution. In contrast, Respondents will face no harm from maintaining the status quo while their appeal proceeds. Granting an injunction would simply mean that abortion will be legal in Texas as it has been since *Roe v. Wade* was decided nearly fifty years ago, subject to all of Texas's pre-existing abortion regulations other than S.B. 8's outright six-week ban. This Court's longstanding precedent and the public interest cannot be served by allowing enforcement of a constitutionally foreclosed statute.

Fourth and finally, injunctive relief is appropriate in aid of the Court's jurisdiction. Given the short duration of pregnancy and the typical length of appellate proceedings, the Court will lose the opportunity to provide meaningful relief to Texas residents seeking abortion care on September 1 if it does not enter an injunction now.

### A. This Court's Precedent Indisputably Precludes Enforcement of S.B. 8

There is no dispute that S.B. 8 is facially unconstitutional under this Court's precedent. S.B. 8 bans abortion in Texas if there is detectable cardiac activity, S.B. 8 § 171.204; *see id.* § 171.201(1), which occurs early in pregnancy and months prior to viability, *see supra* pp. 5–7. An unbroken line of this Court's precedents through the last Term establishes that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion." *Casey*, 505 U.S. at 846; *see also June Med. Servs., L.L.C.*, 140 S. Ct. at 2154 (Alito, J., dissenting) ("Unless *Casey* is reexamined . . . the test it adopted should remain the governing standard."); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2343 (2016), *as revised* (June 27, 2016) (Alito, J., dissenting) ("Under our cases, petitioners must show that the [statutory] requirements impose an 'undue burden' on women seeking abortions."). Here, the bill's proponents do not even deny that it runs afoul of this Court's precedent. To the contrary, Texas has acknowledged that pre-viability bans cannot survive this Court's established precedents. Brief for the States of Texas, et al. as Amici Curiae in Support of Petitioners, at 31–33, Dobbs v. Jackson Women's Health Org., No. 19-1392, 2021 WL 3374343, at *31–33 (U.S. July 29, 2021) (arguing that

the Supreme Court should overturn its precedent in order to uphold pre-viability abortion bans).

This Court has recently granted injunctions where it has determined there would otherwise be constitutional harm. Last Term, the Court granted an emergency injunction to prevent constitutional injury from the restrictions on religious gatherings imposed by New York's COVID-19 executive orders. *Roman Cath. Diocese*, 141 S. Ct. at 65–67. In that case, this Court granted an "emergency application" for "immediate relief" to prevent a state order curtailing in-person religious gatherings from going into effect. *Id.* at 65–66. Recognizing that "[s]temming the spread of COVID–19 is unquestionably a compelling interest," *id.* at 67, the Court nonetheless enjoined the executive order, finding it "a drastic measure" that risked interference with constitutional rights, *id.* at 68. This Court granted similar injunctions with respect to challenged provisions of the Affordable Care Act. *See Wheaton Coll.*, 134 S. Ct. at 2807 (granting application enjoining enforcement of challenged provisions of the Affordable Care Act to certain non-profits with religious affiliation pending appellate review on the merits); *Little Sisters of the Poor Home for the Aged*, 571 U.S. at 1171 (same).

The Court also has granted injunctions to prevent violation of federal law. In *Lucas*, Justice Kennedy considered whether to enjoin a Georgia Board of Education election that was about to proceed without preclearance from the Attorney General pursuant to Section 5 of the Voting Rights Act. 486 U.S. at 1302. A panel of the court of appeals had "declined to issue the injunction prayed for by the applicants,"

notwithstanding the lack of preclearance, and the applicants moved this Court for emergency relief. *Id.* at 1304. Observing that the case presented "substantial[] . . . federal questions" and that the lower court's decision to allow the election to go forward was "problematic under our precedents," Justice Kennedy "concluded that four Members of the Court would likely vote to note probable jurisdiction" and issued an injunction. *Id.* at 1304–05.

Similarly, in *Hollingsworth v. Perry*, 558 U.S. 183 (2010), this Court acted on a request to enjoin live streaming of proceedings over California's Proposition 8 banning same-sex marriages. The district court had amended a rule prohibiting video-streaming of the trial to allow for live broadcast without providing an appropriate public notice and comment period as required by federal law, *id.* at 192–93, but the Ninth Circuit failed to redress the potential violation due to procedural and technical hurdles, *see id.* at 188–89. Noting the significance of the issue and the potential violation of federal law, this Court intervened and granted a stay of the district court's order. *Id.* at 199.

Despite this Court's precedent squarely foreclosing a six-week abortion ban, Respondents argued below that the only way abortion providers and those who provide practical and financial assistance to abortion patients can challenge this flagrantly unconstitutional law is by violating it, subjecting themselves to what one Respondent acknowledged were "ruinous" penalties that no "rational" abortion provider would risk, App.242; and then, once they are haled into court to defend themselves in enforcement proceedings, raise federal constitutional claims as

affirmative defenses, *see, e.g.*, App.27, 37, 53–54; D. Ct. ECF No. 49 at 9. But as this Court has explained, an "enforcement action is not a prerequisite to challenging the law." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014); *see also MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007) (that plaintiffs have not yet "violate[d] the law . . . does not eliminate Article III jurisdiction"); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) ("It is not necessary that the plaintiff first expose himself to actual arrest or prosecution to be entitled to challenge the statute that he claims deters the exercise of his constitutional rights." (cleaned up)); *Doe v. Bolton*, 410 U.S. 179, 188 (1973) ("The physician-appellants . . . should not be required to await and undergo a criminal prosecution as the sole means of seeking relief."). Moreover, being forced to defend potentially numerous lawsuits, filed anywhere in the state, itself constitutes irreparable harm; indeed, even if Applicants ultimately prevail in those lawsuits, they will never recover the time and resources required to defend them, and the threat of those lawsuits will chill Plaintiffs' constitutionally protected conduct immediately if S.B. 8 takes effect. *See Perez v. Ledesma*, 401 U.S. 82, 85 (1971); *id.* at 117–18 (Brennan, J., concurring in part and dissenting in part); *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

Furthermore, notwithstanding the government-official Respondents' assertions of sovereign immunity, this challenge falls squarely within the *Ex parte Young*, 209 U.S. 123 (1908), doctrine, which involves a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*,

535 U.S. 635, 645 (2002) (citation omitted). Here, Applicants allege that enforcing S.B. 8 would be an ongoing violation of federal law, and they seek solely prospective equitable relief blocking such enforcement. App.38, 51. Applicants have also named as defendants the Attorney General of Texas, who is the State's chief law-enforcement officer, as well as the government officials most immediately connected to S.B. 8's private-enforcement mechanism: (1) a putative defendant class of clerks, who will docket S.B. 8 petitions for enforcement and issue summonses compelling those sued to appear on pain of default judgment, and (2) a putative defendant class of judges, who will oversee enforcement actions and issue S.B. 8's mandatory penalties. Additionally, Applicants named state agency heads who retain authority to enforce other state laws against Applicants premised on violations of S.B. 8. Applicants have also named Respondent Dickson, a private individual who has threatened enforcement actions under S.B. 8 and as to whom no conceivable sovereign immunity defense applies.

Further, as the district court aptly concluded, App.27–33, 42–51, 53–57, Applicants readily satisfy the requirements for standing. First, Applicants have an imminent injury because, as in *Susan B. Anthony List*, the challenged statute allows "[a]ny person" to "file a complaint" "alleging a violation" of the statute, meaning that "there is a real risk of complaints from, for example, political opponents." 573 U.S. at 152, 164; *see* S.B. 8 § 171.208(a). Second, the Respondents will each contribute to Applicants' harm by (1) initiating S.B. 8's direct enforcement actions (private Respondent Dickson), (2) opening the enforcement actions in the dockets and issuing

the summonses that compel people sued under S.B. 8 to respond (clerks), (3) issuing the penalties mandated by S.B. 8 (judges), or (4) indirectly enforcing S.B. 8 through other laws governing the state licenses or professional practice of Applicants and their staff (agency heads). App.17–18, 23–24, 27–30, 44–47, 53–61. And third, equitable relief would redress Plaintiffs' harm by blocking S.B. 8's enforcement.

Accordingly, the district court correctly held that neither Article III jurisdiction nor sovereign immunity bars declaratory and injunctive relief to prevent enforcement of a law that is in clear violation of this Court's precedent.

### B. Exigent Circumstances Warrant Immediate and Extraordinary Relief

Notwithstanding the clear conflict between S.B. 8 and Supreme Court precedent, and the lack of merit to any of Respondents' immunity or standing arguments, the proceedings below have left Applicants no avenue other than to seek the Circuit Justice's urgent intervention. In short, recent events in the district court and the Fifth Circuit have ground Applicants' efforts to obtain relief to a halt, and without an emergency injunction it is likely that a six-week ban clearly foreclosed by precedent will take effect on Wednesday, September 1 to the irreparable harm of the recognized constitutional rights of Texans.

Applicants brought this case nearly seven weeks ago, seeking a declaration "that S.B. 8 is unconstitutional and invalid" and that the Respondents may not burden the constitutional rights of Applicants and their patients. D. Ct. ECF No. 19, at 49. As discussed, Applicants also moved for a preliminary injunction to maintain the status quo among the parties prior to the entry of final judgment. D. Ct. ECF No. 53. The parties completed briefing on the preliminary injunction, and the district

court set a hearing on the motion for August 30—two days before the law was set to take effect. But after the district court denied Respondents' motions to dismiss, Defendants immediately appealed to the Fifth Circuit. On Respondents' motion, the district court entered a stay pending appeal as to the proceedings against Judge Jackson, Ms. Clarkston, and the State Agency Respondents but denied the stay as to Dickson. App.6–7. The Fifth Circuit then entered a blanket administrative stay—of indefinite duration—for all district-court proceedings, including the preliminary-injunction hearing, and denied Applicants' motion to expedite the appeal. App.4–5. Subsequently, the Fifth Circuit denied without explanation Applicants' motion to vacate the stays and issue an injunction pending appeal. App.1–2. Accordingly, Applicants have been functionally deprived of an opportunity to obtain an injunction of S.B. 8 prior to its effective date.

The substantive result is unacceptable: absent an injunction, Applicants and thousands of other Texans will be stripped of their fundamental constitutional rights on Wednesday without ever receiving a decision on their fully briefed request for a preliminary injunction. Unlike emergency motions before this Court seeking "judicial intervention that has been withheld by lower courts," *Ohio Citizens for Responsible Energy, Inc.*, 479 U.S. at 1312, Applicants here have not even had their full day in court and yet will be irreparably deprived of their recognized constitutional rights without this Court's intervention.

### C. Absent an Emergency Injunction, Applicants Will Face Irreparable Harm

Without an injunction, a ban on abortion months before viability will take effect across Texas on September 1 in flagrant violation of longstanding precedent. *See Casey*, 505 U.S. at 879 ("[A] State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."). "The loss of [constitutional] freedoms . . . unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (threatened violation of First Amendment rights); 11A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane Federal Practice & Procedure § 2948.1 (3d ed. 2013) ("When an alleged deprivation of a constitutional right is involved, . . . most courts hold that no further showing of irreparable injury is necessary."). This Court has recognized as much when considering emergency injunctive relief. *Roman Cath. Diocese*, 141 S. Ct. at 67 (violations of constitutional protections for "even minimal periods of time" will cause irreparable harm (citing *Elrod*, 427 U.S. at 373)). Here, the Fifth Circuit has left Applicants and Texans in limbo. There is no telling when the Fifth Circuit will decide Applicants' motion to dismiss Respondent Dickson's improper interlocutory appeal, much less resolve the other Respondents' collateral-order appeal on sovereign immunity. But beginning in less than two days, Texans will be without most access to time-sensitive abortion care for months or longer as the appellate process runs its course. Moreover, Respondents have not identified any cognizable harm to the public interest that would occur if the status quo of lawful pre-viability abortion in Texas were preserved pending judicial resolution of Applicants' challenge. Given the constitutional questions at play, the

equities weigh strongly in favor of granting an injunction to maintain the status quo in this case. *See Lucas*, 486 U.S. at 1304.

### D. Injunctive Relief Is Proper as to All Respondents

Finally, to the degree that this Court might look to 42 U.S.C. § 1983 in considering whether to use its authority under the All Writs Act to enter an injunction pending appeal, Section 1983 expressly permits injunctive relief "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity" where "a declaratory decree was violated or declaratory relief was unavailable." 42 U.S.C. § 1983. This limitation does not preclude injunctive relief against either Respondent Clarkston (the county clerk) or Jackson (the state-court judge).

*First*, Clarkston is not a "judicial officer" subject to this limitation. Although Section 1983 does not define "judicial officer," the term is common in the U.S. Code, and its use in those statutes consistently refers to judges and other jurists—not all court employees, such as clerks. *See, e.g.*, 18 U.S.C. § 3156(a)(1); 18 U.S.C. § 3172(1); 28 U.S.C. §§ 480, 482; 5 U.S.C. App. 4 § 103(c); 5 U.S.C. App. 4 § 109(8), (10). Federal Rules use "judicial officer" in the same way. *See, e.g.*, Fed. R. Crim. P. 1(b)(4)(10); 18 U.S.C. § 3041; Fed. R. Bankr. P. 9001(3), (4). Congress knew how to make the amendment to Section 1983 applicable to individuals who were not judges: it could have used "court employee" or "judicial employee" as it had done before. But Congress chose not to do so. This Court likewise has not treated "judicial officer" as synonymous with clerks or other courthouse staff. *See Osterneck v. Ernst & Whinney*, 489 U.S.

169, 179 (1989) (a late-filed notice of appeal can be deemed timely if the party "has received specific assurance by a judicial officer").

Moreover, Congress added Section 1983's limitation on injunctive relief against "judicial officers" for the narrow purpose of modifying this Court's decision in *Pulliam v. Allen*. S. Rep. No. 104-366, at 36–37 (1996). In *Pulliam*, this Court used "judicial officer" and "judge" interchangeably. *See, e.g.*, 466 U.S. 522, 537 (1984). Accordingly, the Senate Report explained that the amendment to Section 1983 limiting the availability of injunctive relief would modify *Pulliam*'s effect as to "judges." S. Rep. No. 104-366, at 37.

*Second*, injunctive relief—even if confined to the scope of what is available under Section 1983—is warranted here as to Respondent Jackson as well, because declaratory relief has become "unavailable." 42 U.S.C. § 1983. "Unavailable" means the "status or condition of not being available." *See* Black's Law Dictionary 1768 (10th ed. 2014); *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 407 (2011) (providing that courts look to the ordinary meaning of a term left undefined by statute). In turn, "the ordinary meaning of the word 'available' is 'capable of use for the accomplishment of a purpose,' and that which 'is accessible or may be obtained." *Ross v. Blake*, 578 U.S. 1174, 1858 (2016) (quoting Webster's Third New International Dictionary 150 (1993)). Here, where all proceedings in the district court, including those against Respondent Jackson, have been stayed indefinitely while Respondents' appeal of the motion to dismiss proceeds, it is plain that

declaratory relief against Respondent Jackson is not capable of "be[ing] obtained." *Ross*, 578 U.S. at 1858.

### E. An Injunction Is Appropriate in Aid of the Court's Jurisdiction

Under the circumstances of this case, entry of an injunction is appropriate in aid of the Court's jurisdiction. *See* 28 U.S.C. § 1651(a). Absent an immediate injunction, the Court would be powerless to safeguard the constitutional rights of Texas residents impacted by S.B. 8 when it takes effect less than two days from now. By the time this Court had the opportunity to review the court of appeals' judgment, individuals seeking abortion care on September 1 would no longer be eligible for such care. *See Roe*, 410 U.S. at 125 ("[W]hen, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete."). Although the case would not technically be moot, the Court's ability to provide meaningful relief to those seeking abortions in the interim would be lost. *See generally Nken v. Holder*, 556 U.S. 418, 421 (2009) ("It takes time to decide a case on appeal. . . . [A]nd if a court takes the time it needs, the court's decision may in some cases come too late for the party seeking review.").

## II. In the Alternative, Vacatur of the Lower Courts' Stays Is Warranted So That the District Court Can Rule on a Motion for Preliminary Relief Adequate to Maintain the Status Quo

In the alternative, this Court should vacate the stays below and remand for the district court to consider the pending motions for a temporary restraining order, preliminary injunction, and class certification, none of which require any further briefing by Respondents. D. Ct. ECF No. 60.

The full Court or Circuit Justice has jurisdiction to vacate a stay by a court of appeals, including one characterized as an "administrative stay." *Off. of Pers. Mgmt. v. Am. Fed'n of Gov't Emps.*, 473 U.S. 1301, 1306 (1985) (Burger, C.J., in chambers). That authority exists "regardless of the finality of the judgment below." *W. Airlines, Inc. v. Int'l Brotherhood of Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers). The full Court or Circuit Justice also has jurisdiction to vacate a stay entered by a district court. *See Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2320 (2021) (per curiam) (directly vacating a district court's stay of judgment pending appeal).

This Court may vacate a stay of the court of appeals if the lower court "clearly and demonstrably erred in its application of accepted standards." *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 134 S. Ct. 506, 506 (2013) (Scalia, J., concurring) (quotation marks and citation omitted); *see also Coleman v. Paccar Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers) (holding that Court may vacate a stay where "the rights of the parties . . . may be seriously and irreparably injured by the stay"; "the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay"; and the case "could and very likely would be reviewed here upon final disposition in the court of appeals").

### A. The Stays Will Seriously and Irreparably Harm the Rights of Applicants and Pregnant Texans

As discussed *supra*, the stays will cause immediate and irreparable harm to Applicants and patients by precluding the district court from issuing effective relief

to block enforcement of Texas's unconstitutional abortion ban. In just two days, approximately 85–90% of Texans who seek abortions, *see* App.89, 105, 115–16, 124, 131, 148, 155, 172, 178, and every Texan who seeks an abortion after six weeks' pregnancy, will be stripped of a constitutional right long recognized by this Court. This itself is irreparable harm. *See supra* Part I.C.

Further, the serious and irreparable deprivation of constitutional rights will continue indefinitely unless this Court lifts the stays, because the district court's proceedings are stayed until the Fifth Circuit: (1) at a minimum, decides whether to dismiss Respondent Dickson's appeal and deny him a stay; and (2) resolves the government officials' appeal, which it refused to expedite and which could last for months or longer).

### B. In Refusing to Lift the Stays, the Fifth Circuit Erred in Its Application of Accepted Standards

1. The Fifth Circuit's refusal to lift the stays of proceedings against the government official Respondents misapplied the governing legal standards.

Although the filing of a notice of appeal generally "divests the district court of its control over those aspects of the case involved in the appeal," *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (per curiam), "it is well-settled that a court retains the power to grant injunctive relief to a party to preserve the status quo during the pendency of an appeal, even to this Court," *Haw. Hous. Auth. v. Midkiff*, 463 U.S. 1323, 1324 (1983) (Rehnquist, J., in chambers) (citing *Newton v. Consol. Gas Co.*, 258 U.S. 165, 177 (1932); *Merrimack River Sav. Bank v. Clay Ctr.*, 219 U.S. 527, 531–35 (1911); Fed. R. Civ. P. 62). Here, the status quo is that S.B. 8 has not taken

effect; Texans are permitted to exercise their constitutionally protected right to abortion as required by this Court's precedents. The Fifth Circuit should have lifted the stays to allow the district court to issue an order maintaining that status quo during the pendency of the appeal.

That is all the more true here where the stays will have the effect of upending the status quo, contravening the very purpose of a stay: to "preserv[e] rights during the pendency of an appeal . . . [and] ensur[e] that appellate courts can responsibly fulfill their role in the judicial process." *Nken*, 556 U.S. at 427 (citation omitted). Far from "suspend[ing] judicial alteration of the status quo," *Ohio Citizens for Responsible Energy, Inc.*, 479 U.S. at 1312, the Fifth Circuit's stay deprives the district court of its inherent authority to prevent the irreparable injuries that will certainly befall Texans starting this Wednesday.

Moreover, the Fifth Circuit erred in its rigid application of the divestiture doctrine. As this Court has explained, "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction." *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 17 (2017) (citations omitted); *see* U.S. Const. art. III, § 1. The divestiture doctrine "is a judge made rule originally devised in the context of civil appeals to avoid confusion or waste of time resulting from having the same issues before two courts at the same time." *United States v. Claiborne*, 727 F.2d 842, 850 (9th Cir. 1984). "[B]ecause the judge-made divestiture rule isn't based on a statute, it's not a hard-and-fast jurisdictional rule." *United States v. Rodriguez-Rosado*, 909 F.3d 472, 477 (1st Cir. 2018) (citing *Kontrick v. Ryan*, 540 U.S. 443, 452–53 (2004); *Claiborne*, 727

F.2d at 850); *accord United States v. Rodgers*, 101 F.3d 247, 251 (2d Cir. 1996); *United States v. Leppo*, 634 F.2d 101, 104 (3d Cir. 1980). The rule's guiding principle has always been efficiency; it was never intended to be used as an end-run to allow a clearly unconstitutional law to take effect indefinitely and cause severe and irreparable harm in the process. *See* 16A Charles Alan Wright, Arthur R. Miller, & Catherine T. Struve, Federal Practice & Procedure § 3949.1 (5th ed.) (providing that the rule is a "judge-made doctrine designed to implement a commonsensical division of labor between the district court and the court of appeals" and should be implemented "to guard against the risk that a litigant might manipulate the doctrine for purposes of delay").

The district court could have granted a preliminary injunction after ruling on Respondents' jurisdictional arguments in the same order. Indeed, the Fifth Circuit recognized in its order denying mandamus in this case that the district court need only rule on the motions to dismiss before resolving a motion for summary judgment. App.59; *see United States v. United Mine Workers of Am.*, 330 U.S. 258, 290 (1947) (holding that district court "unquestionably had the power to issue a restraining order for the purpose of preserving existing conditions pending a decision upon its own jurisdiction"). It would be a perverse application of the divestiture rule if Respondents could defeat any meaningful relief from a preliminary injunction by appealing a ruling that completely rejected all their jurisdictional arguments.

In any event, regardless of what the court of appeals should have done, this Court plainly has the authority to allow the district court to regain control over the case, consider the pending temporary-restraining-order/preliminary-injunction and

class-certification motions, and enter any appropriate orders to preserve the status quo. Doing so would preserve all parties' ability to raise their jurisdictional arguments on appeal, as whichever side does not prevail in the preliminary-injunction proceedings could appeal from that decision. By contrast, preventing the district court from acting on the fully briefed motions would defer a ruling on an issue of *preliminary* relief for potentially months or longer until after the Fifth Circuit decides the pending appeal.

2. The Fifth Circuit demonstrably erred in staying proceedings against the private individual Respondent, Mark Lee Dickson. Dickson did not, and could not, demonstrate the traditional standard for a stay. *Nken*, 556 U.S. at 425–26 (citation omitted). In particular, Dickson did not identify any harm to himself absent a stay of the district court proceedings.

Dickson also failed to show he was likely to succeed on his appeal, for which the court of appeals plainly lacks jurisdiction. Dickson is a private citizen who appealed from an interlocutory order denying his motion to dismiss for lack of Article III standing. He has never asserted that he is entitled to sovereign immunity. *Cf. P.R. Aqueduct & Sewer Auth.*, 506 U.S. at 139 (holding that denial of motion to dismiss based on Eleventh Amendment immunity is immediately appealable under collateral-order doctrine). Accordingly, the district court's denial of his motion to dismiss is precisely the kind of garden-variety interlocutory order that is not "immediately appealable under [28 U.S.C.] § 1292(a)(1)." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981).

Nor can Dickson rely on "'pendent party' appellate jurisdiction," which this Court has foreclosed. *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 51 (1995). And pendent appellate jurisdiction is unavailable to him because his Article III standing arguments—the sole basis of his motion to dismiss—are wholly distinct from the sovereign-immunity issues on review. *See ibid.* (rejecting pendent appellate jurisdiction where non-appealable order was not "inextricably intertwined" with immediately appealable order and where "review of the former decision was [not] necessary to ensure meaningful review of the latter"). In any event, Dickson lacks standing to appeal because he cannot show any personal injury from the denial of sovereign immunity to the government-official Respondents. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (holding that a "particularized [injury] . . . must affect the plaintiff in a personal and individual way" (internal quotation marks and citation omitted)); *Hollingsworth*, 570 U.S. at 715 (holding that petitioners had failed to "demonstrate standing to appeal the judgment" below).

Accordingly, the Fifth Circuit stay of the district-court proceedings as to Respondent Dickson, and its refusal to lift the district court's own stay as to the government-official Respondents, were clearly erroneous.

### C. The Court Would Likely Grant Review of Judgment in This Case

Vacatur of the stays that have halted district-court proceedings is also appropriate because this Court could, and very likely would, review a decision from a direct appeal of the district court's grant or denial of the preliminary injunction or from the appeal currently pending in the Fifth Circuit.

This case will present the question whether a state may ban abortion at six weeks of pregnancy, roughly four months before viability. That question is not open to dispute under this Court's existing precedent. Because the statute at issue is in such clear contravention of this Court's decisions, this Court would and should intervene if the lower courts allow its enforcement. And further demonstrating the worthiness of this Court's review is the fact that this Court has already granted review on the question whether all pre-viability prohibitions on elective abortions are unconstitutional in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 2021 WL 1951792 (U.S. May 17, 2021).

This case will also present the question whether a state can evade federal court review of a state law that is in clear contravention of this Court's precedents by creating a scheme of private enforcement in the state's courts. Under this Court's decisions, federal courts have clear authority to prospectively enjoin violations of federal rights that occur in a state's judicial system. *See Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (The Court "long ago recognized that federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights."); *see also Mireles v. Waco*, 502 U.S. 9, 10 n.1 (1991) (per curiam); *Pulliam*, 466 U.S. at 536–43. The Fifth Circuit, however, is improperly constraining district courts' authority to remedy clear ongoing violations of federal rights under Section 1983 and *Ex parte Young*. For instance, the Fifth Circuit has held that state officials cannot be sued in their official capacity under Section 1983 for injunctive relief, notwithstanding this Court's clear

statement that "a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989); *see Freedom from Rel. Found. v. Mack*, 4 F.4th 306, 312–13 (5th Cir. 2021); *Green Valley Special Util. Dist. v. City of Schertz, Tex.*, 969 F.3d 460, 475 (5th Cir. 2020) (en banc). And the Fifth Circuit's *Ex parte Young* jurisprudence incorrectly requires federal court litigants to demonstrate that the state attorney general satisfies a heightened standard of connection to the challenged state statute as a condition of suing him as the state's chief law enforcement officer for prospective relief from unconstitutional applications of state law. *See Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014) (quoting *Okpalobi v. Foster*, 244 F.3d 405, 416 (5th Cir. 2001) (en banc) (plurality opinion)). This heightened standard is inconsistent with *Ex parte Young*, itself, *see* 209 U.S. at 160–61, as well as subsequent decisions by this Court, *see Verizon Md., Inc.*, 535 U.S. at 645, and the Fifth Circuit's approach undermines the purpose of *Ex parte Young*'s legal fiction: to "permit the federal courts to vindicate federal rights." *Va. Off. for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 254–55 (2011) (citations omitted); *accord Green v. Mansour*, 474 U.S. 64, 68 (1985) ("Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law.").

In addition, this Court is likely to grant certiorari review of the Fifth Circuit's appellate decision or a decision on appeal from a preliminary injunction order because such decisions will present questions of national importance. *See* Sup. Ct. R. 10(c); *see, e.g.*, *June Med. Servs. L.L.C. v. Gee*, 140 S. Ct. 35 (2019) (mem.); *N.Y. State Rifle*

*& Pistol Ass'n v. N.Y.C.*, 139 S. Ct. 939 (2019) (mem.). The drastic consequences of S.B. 8 for public health, women's health, and the constitutional right to a pre-viability abortion plainly present issues of national importance warranting this Court's review. Likewise, Texas's open defiance of this Court's precedent—and its transparent attempt to evade federal review—call out for this Court to protect its authority. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

## III. In the Alternative, Vacatur of the District Court's Order Denying the Motions to Dismiss Is Proper to Permit That Court to Rule on Applicants' Request for Injunctive Relief and Class Certification in the First Instance

As a final alternative, should the Court find that it is appropriate for the district court to rule on any injunctive relief in the first instance, but that the judge-made divestiture-of-jurisdiction removes that authority here, this Court should vacate the district court's order denying Respondents' motions to dismiss and remand to the Fifth Circuit with instructions to dismiss the appeal as moot.

In so doing, this Court could automatically return jurisdiction to the district court, which could then decide Respondents' motions to dismiss simultaneously with Applicants' pending requests for preliminary injunctive relief and class certification. Should the district court determine that the requirements for a preliminary injunction are satisfied, it would then be able to grant such relief against the appropriate defendants or classes of defendants, preventing devastating and irreparable harm to Applicants and to Texans seeking abortion. On the other hand, Respondents would suffer no prejudice: they have already completed all briefing on Applicants' preliminary-injunction and class-certification motions, and, should the

district court issue a new order provisionally or ultimately denying the motions to dismiss while also issuing preliminary injunctive relief and/or class certification, Respondents' ability to seek appellate review of their sovereign immunity defenses would be delayed only by a matter of days.

Consequently, if the Court does not either grant relief directly, *see supra* Part I, or lift the stays and permit the district court to rule on Applicants' motions for class certification and a temporary restraining order or preliminary injunction, *see supra* Part II, it should restore the district court's authority to prevent a flagrantly unconstitutional law from taking effect in less than two days by: vacating the district court's order denying Respondents' motions to dismiss; dismissing the appeal as moot; remanding the case to the district court for further proceedings; and issuing the mandate forthwith. *See* 28 U.S.C. § 2106 ("[A]ny . . . court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and . . . require such further proceedings to be had as may be just under the circumstances."); *GuideOne Specialty Mut. Ins. Co. v. Missionary Church of Disciples of Jesus Christ*, 687 F.3d 676, 682 n.3 (5th Cir. 2012) ("Once jurisdiction attaches, Courts of Appeals have broad authority to dispose of district court judgments as they see fit.").

## CONCLUSION

This Court has continually recognized the importance of enjoining enforcement of drastic state restrictions on access to pre-viability abortion, pending later review. *See Whole Woman's Health*, 136 S. Ct. at 2303; *June Med. Servs. L.L.C.*, 139 S. Ct.

at 663. For the foregoing reasons, the Court should do the same here and enjoin enforcement of S.B. 8 or, at a minimum, vacate the stays entered by the Fifth Circuit and the district court so that the district court may again exercise its control over this case and consider the propriety of Applicants' pending motions for class certification and a temporary restraining order or preliminary injunction.

Respectfully submitted.


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August 30, 2021

## RULE 20.3(a) STATEMENT

Relief is sought against Austin Reeve Jackson, in his official capacity as Judge of the 114th District Court, and on behalf of a class of all Texas judges similarly situated; Penny Clarkston, in her official capacity as Clerk for the District Court of Smith County, Texas, and on behalf of a class of all Texas clerks similarly situated; Mark Lee Dickson; Stephen Brint Carlton, in his official capacity as Executive Director of the Texas Medical Board; Katherine A. Thomas, in her official capacity as Executive Director of the Texas Board of Nursing; Cecile Erwin Young, in her official capacity as Executive Commissioner of the Texas Health and Human Services Commission; Allison Vordenbaumen Benz, in her official capacity as Executive Director of the Texas Board of Pharmacy; and Ken Paxton, in his official capacity as Attorney General of Texas.

## CORPORATE DISCLOSURE STATEMENT

Plaintiff Whole Woman's Health is the doing business name of a consortium of limited liability companies held by a holding company, the Booyah Group, which includes Whole Woman's Health of McAllen, LLC and Whole Woman's Health of Fort Worth, LLC d/b/a Whole Woman's Health of Fort Worth and Whole Woman's Health of North Texas. Whole Woman's Health has no parent corporation, and no publicly held corporation holds 10% or more of its shares.

Plaintiff Whole Woman's Health Alliance is a Texas non-profit corporation. It has no parent corporation, and no publicly held corporation holds 10% or more of its shares.

Plaintiff Planned Parenthood Center for Choice has no parent corporation, and no publicly held corporation holds 10% or more of its shares.

Plaintiff Planned Parenthood of Greater Texas Surgical Health Services discloses that its parent corporation is Planned Parenthood of Greater Texas, and no publicly held corporation holds 10% or more of Planned Parenthood of Greater Texas Surgical Health Services' or Planned Parenthood of Greater Texas's shares.

Plaintiff Planned Parenthood South Texas Surgical Center discloses that Planned Parenthood South Texas is its sole member , and further discloses that no publicly held corporation holds 10% or more of either Planned Parenthood South Texas Surgical Center's or Planned Parenthood South Texas's shares.

Plaintiff Southwestern Women's Surgery Center, has no parent corporation, and no publicly held corporation holds 10% or more of its shares.

Plaintiff Alamo City Surgery Center PLLC d/b/a Alamo Women's Reproductive Services, has no parent corporation, and no publicly held corporation holds 10% or more of its shares.

Plaintiff Houston Women's Reproductive Services, has no parent corporation, and no publicly held corporation holds 10% or more of its shares.

Plaintiff Brookside Women's Medical Center PA d/b/a Brookside Women's Health Center and Austin Women's Health Center has no parent corporation, and no publicly held corporation holds 10% or more of its shares.

Plaintiff Houston Women's Clinic has no parent corporation, and no publicly held corporation holds 10% or more of its shares.

Plaintiff The Afiya Center is a Texas non-profit corporation. It has no parent corporation, and no publicly held corporation holds 10% or more of its shares.

Plaintiff Frontera Fund is a Texas non-profit corporation. It has no parent corporation, and no publicly held corporation holds 10% or more of its shares.

Plaintiff Fund Texas Choice is a Texas non-profit corporation. It has no parent corporation, and no publicly held corporation holds 10% or more of its shares.

Plaintiff Jane's Due Process is a Texas non-profit corporation. It has no parent corporation, and no publicly held corporation holds 10% or more of its shares.

Plaintiff Lilith Fund for Reproductive Equity is a Texas non-profit corporation. It has no parent corporation, and no publicly held corporation holds 10% or more of its shares.

Plaintiff North Texas Equal Access Fund is a Texas non-profit corporation. It has no parent corporation, and no publicly held corporation holds 10% or more of its shares.

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