No. 21A-_____

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, APPLICANT

v.

STATE OF TEXAS

APPLICATION TO VACATE STAY OF PRELIMINARY INJUNCTION ISSUED BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIAN H. FLETCHER
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

PARTIES TO THE PROCEEDING

Applicant, the United States of America, was the plaintiff-appellee below.

Respondents were the defendant-appellant and intervenor defendants-appellants below. They are the State of Texas (the defendant-appellant) and Erick Graham, Jeff Tuley, and Mistie Sharp (the intervenor defendants-appellants).

Oscar Stilley was an intervenor defendant in the district court, but did not appeal.

IN THE SUPREME COURT OF THE UNITED STATES

_____

No. 21A-_____

UNITED STATES OF AMERICA, APPLICANT

v.

STATE OF TEXAS

_____

APPLICATION TO VACATE STAY OF PRELIMINARY INJUNCTION ISSUED BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

_____

On October 14, 2021, the United States Court of Appeals for the Fifth Circuit stayed a preliminary injunction barring enforcement of Texas Senate Bill 8 (S.B. 8). Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, the Acting Solicitor General, on behalf of the United States of America, respectfully applies for an order vacating the stay.

For half a century, this Court has held that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992) (plurality opinion); accord Roe v. Wade, 410 U.S. 113, 163-164 (1973). S.B. 8 defies those precedents by banning abortion long before viability -- indeed, before many women even realize they are pregnant. Texas is not the first State

to question Roe and Casey. But rather than forthrightly defending its law and asking this Court to revisit its decisions, Texas took matters into its own hands by crafting an "unprecedented" structure to thwart judicial review. Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2496 (2021) (Roberts, C.J., dissenting).

To avoid pre-enforcement suits against state officials, Texas "delegated enforcement" of the law "to the populace at large" in a system of private bounties. Whole Woman's Health, 141 S. Ct. at 2496 (Roberts, C.J., dissenting). And to frustrate constitutional defenses in those private suits, Texas designed them to be so procedurally lopsided -- and to threaten such crushing liability -- that they deter the provision of banned abortions altogether. Thus far, S.B. 8 has worked exactly as intended: Except for the few days the preliminary injunction was in place, S.B. 8's in terrorem effect has made abortion effectively unavailable in Texas after roughly six weeks of pregnancy. Texas has, in short, successfully nullified this Court's decisions within its borders.

All of this is essentially undisputed. The Fifth Circuit did not deny any of it. Texas itself has not seriously tried to reconcile S.B. 8's ban with this Court's precedents -- indeed, it said not a word about the law's constitutionality in the Fifth Circuit. The intervenors, for their part, boast that "Texas has boxed out the judiciary" and assert that States "have every

prerogative to adopt interpretations of the Constitution that differ from the Supreme Court's." Intervenors C.A. Reply Br. 3-4.

The question now is whether Texas's nullification of this Court's precedents should be allowed to continue while the courts consider the United States' suit. As the district court recognized, it should not: The United States is likely to succeed on the merits because S.B. 8 is clearly unconstitutional and because the United States has authority to seek equitable relief to protect its sovereign interests -- including its interest in the supremacy of federal law and the availability of the mechanisms for judicial review that Congress and this Court have long deemed essential to protect constitutional rights. Allowing S.B. 8 to remain in force would irreparably harm those interests and perpetuate the ongoing irreparable injury to the thousands of Texas women who are being denied their constitutional rights. Texas, in contrast, would suffer no cognizable injury from a preliminary injunction barring enforcement of a plainly unconstitutional law.

Again, the Fifth Circuit disputed none of this. Instead, the divided panel's one-paragraph order stayed the preliminary injunction solely for "the reasons stated in" two decisions addressing a prior challenge to S.B. 8, Whole Woman's Health v. Jackson, 13 F.4th 434 (5th Cir. 2021), and Whole Woman's Health, 141 S. Ct. at 2495. App., infra, 1a. But those reasons do not apply to this very different suit. Sovereign immunity forced the

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.