No. 21-50792

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WHOLE WOMAN'S HEALTH, on behalf of itself, its staff, physicians, nurses, and patients; ALAMO CITY SURGERY CENTER, P.L.L.C., on behalf of itself, its staff, physicians, nurses, and patients, d/b/a ALAMO WOMEN'S REPRODUCTIVE SERVICES; BROOKSIDE WOMEN'S MEDICAL CENTER, P.A., on behalf of itself, its staff, physicians, nurses, and patients, d/b/a BROOKSIDE WOMEN'S HEALTH CENTER AND AUSTIN WOMEN'S HEALTH CENTER; HOUSTON WOMEN'S CLINIC, on behalf of itself, its staff, physicians, nurses, and patients; HOUSTON WOMEN'S REPRODUCTIVE SERVICES, on behalf of itself, its staff, physicians, nurses, and patients; PLANNED PARENTHOOD CENTER FOR CHOICE, on behalf of itself, its staff, physicians, nurses, and patients; PLANNED PARENTHOOD OF GREATER TEXAS SURGICAL HEALTH SERVICES, on behalf of itself, its staff, physicians, nurses, and patients; PLANNED PARENTHOOD SOUTH TEXAS SURGICAL CENTER, on behalf of itself, its staff, physicians, nurses, and patients; SOUTHWESTERN WOMEN'S SURGERY CENTER, on behalf of itself, its staff, physicians, nurses, and patients; WHOLE WOMEN'S HEALTH ALLIANCE, on behalf of itself, its staff, physicians, nurses, and patients; ALLISON GILBERT, M.D., on behalf of herself and her patients; BHAVIK KUMAR, M.D., on behalf of himself and his patients; THE AFIYA CENTER, on behalf of itself and its staff; FRONTERA FUND, on behalf of itself and its staff; FUND TEXAS CHOICE, on behalf of itself and its staff; JANE'S DUE PROCESS, on behalf of itself and its staff; LILITH FUND, INCORPORATED, on behalf of itself and its staff; NORTH TEXAS EQUAL ACCESS FUND, on behalf of itself and its staff; REVEREND ERIKA FORBES; REVEREND DANIEL KANTER; MARVA SADLER,

Plaintiffs - Appellees,

v.

JUDGE 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, and on behalf of a class of all Texas court 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; KEN PAXTON, in his official capacity as Attorney General of Texas,

Defendants - Appellants.

On Appeal from the United States District Court for the Western District of Texas, Austin Division
No. 1:21-cv-00616-RP

PLAINTIFFS-APPELLEES' REPLY IN SUPPORT OF EMERGENCY MOTION TO EXPEDITE APPEAL

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INTRODUCTION

Defendants-Appellants do not deny that if this Court does not review the merits of this appeal on an emergency expedited basis, the State of Texas's blatantly unconstitutional abortion ban will halt nearly all abortions across the State starting in less than a week, on Wednesday, September 1. Thousands of pregnant Texans will lose their constitutional right to abortion immediately, forcing them to continue carrying pregnancies against their will and/or try to muster the resources to seek health care out of the State. This is not a harm "of Plaintiffs' own making." Opp. 1. It is due to the Texas Legislature's defiance of the rule of law. Plaintiffs implore the Court to expedite this appeal on an emergency basis.

ARGUMENT

There is unquestionably "good cause" for the Court to schedule the appeal for briefing on an emergency basis and resolve the appeal on the papers before Wednesday, September 1. *See* 5th Cir. R. 27.5; *see also* 5th Cir. R. 35. As Plaintiffs discussed in their motion, a decision on this timeframe is necessary to prevent the grave and irreparable harm that will immediately ensue if S.B. 8 is permitted to take effect as scheduled.

1. Defendants' assertion that Plaintiffs "waited" to file this suit, Opp. 2, is flatly wrong. Plaintiffs moved as swiftly as possible to file this litigation—which involves 21 Plaintiffs, 8 Defendants, and numerous constitutional claims—only

weeks after S.B. 8 was signed into law. Plaintiffs moved for summary judgment, supported by 19 declarations, the day they filed their complaint. Just three days later, Plaintiffs filed a motion to certify two defendant classes. Plaintiffs' complaint included all the factual assertions necessary to establish subject-matter jurisdiction, standing, and the absence of sovereign immunity; that is all that was required of Plaintiffs at the pleading stage. Defendants try to fault Plaintiffs for not responding to Defendants' jurisdictional arguments until August 11, *see* Opp. 4, but that is when Plaintiffs' responses to the motions to dismiss were due, and it was only six days after the last motion to dismiss was filed on August 5.

Plaintiffs have acted diligently throughout this litigation, whereas Defendants have delayed at every turn. Defendants opposed a status conference to set a briefing schedule until at least August 9. *See* D. Ct. ECF No. 34. Two of the Defendants filed a meritless petition for mandamus that resulted in a temporary stay of summary judgment briefing, *see In re Clarkston*, No. 21-50708 (5th Cir.), and forced Plaintiffs to file (at Defendants' insistence) a motion for temporary restraining order and preliminary injunction. Defendants' delay tactics are at least partially responsible for this emergency, and they should not be rewarded—particularly in contrast to thousands of pregnant Texans who, through no fault of their own, will lose constitutionally protected access to abortion in mere days.

2. Defendants' central argument in response to the motion to expedite is that their jurisdictional arguments are correct. To the contrary, the district court properly rejected all of their assertions in a well-reasoned opinion. But the validity of their arguments (or lack thereof) is beside the point when deciding whether to expedite the appeal.

What is more relevant for purposes of this motion is the fact that the parties have already extensively briefed sovereign immunity in the papers that Defendants included in the appendix of exhibits to their emergency motion to stay. Presenting those arguments in briefs before this Court will not be a significant hurdle, and Defendants have not articulated how they would be prejudiced by expediting this appeal. *See* Opp. 4 (stating only in conclusory fashion that expedition "would self-evidently prejudice" them). If Defendants' arguments are so "obviously" correct as they assert, Opp. 2, Defendants should be able to quickly present them to this Court.

In any event, Defendants' arguments are incorrect. Defendant Dickson, a private citizen, has no sovereign immunity, and this Court thus lacks jurisdiction over his appeal. And the district court correctly concluded that all of Plaintiffs' claims against the government officials fall well within the *Ex parte Young* exception to sovereign immunity. That exception involves a "straightforward inquiry" that asks whether the complaint names state officials in their official capacity, alleges an ongoing violation of federal law, and seeks prospective relief. *Green Valley Special*

Util. Dist. v. City of Schertz, 969 F.3d 460, 471 (5th Cir. 2020) (en banc). "On its face," a claim for relief satisfies *Ex parte Young* where it "requests relief prospectively requiring [state officials] to refrain from taking future actions to enforce" an allegedly unlawful state law. *Id.* at 472. Here, as will be explained fully in Plaintiffs' answering brief, Plaintiffs have sued the state officials connected to enforcement of S.B. 8; they allege that enforcing S.B. 8 would be an ongoing violation of the Federal Constitution; and Plaintiffs seek solely prospective equitable relief. On their face, Plaintiffs' claims satisfy *Ex parte Young*. Indeed, Defendant Clarkston's purported claim to sovereign immunity is so dubious that she never even articulated it on her own behalf in the district court.

3. Defendants claim that expedited briefing is not warranted because Plaintiffs supposedly have not shown immediate, irreparable harm. That argument is absurd. Just days from now, if S.B. 8 takes effect, patients will be banned from getting an abortion after six weeks of pregnancy throughout the state of Texas, forcing thousands of Texans in the first month alone to remain pregnant against their will or to try to travel to other states to access basic health care that it has been their constitutional right to obtain for generations. *See* Tex. Health & Hum. Servs., *2020 Selected Characteristics of Induced Terminations of Pregnancy YTD – 05/2021* (May 15, 2021), *available at* https://www.hhs.texas.gov/about-hhs/records-

statistics/data-statistics/itop-statistics (recording 53,573 abortions performed in Texas for Texas residents in 2020).

Indeed, this Court has already held that a six-week ban on abortion is "doom[ed]" under binding Supreme Court precedent because it violates a person's federal constitutional right to abortion. *Jackson Women's Health Org. v. Dobbs*, 951 F.3d 246, 248 (5th Cir. 2020) (per curiam) (striking similar ban because "cardiac activity can be detected well before the fetus is viable" and that alone "dooms the law"). Every other federal court evaluating a previability abortion ban has agreed and blocked such laws. This Court should not be the first to turn its back on the harms caused by such a ban.

Defendants' suggestion that harm will not be immediate, or that it could be addressed by state-court judges on a case-by-case basis in S.B. 8 enforcement proceedings, ignores Plaintiffs' claims and is at odds with unrefuted evidence. Plaintiffs have submitted nineteen declarations regarding the impact of S.B. 8 on them, their staff, and their patients, including evidence demonstrating that they will be forced to stop providing abortion after six weeks of pregnancy immediately on September 1 if S.B. 8 takes effect. As Defendant Dickson has stated, no "rational" person would violate S.B. 8 in light of its "ruinous civil liability." Decl. of Mark Lee Dickson ¶¶ 5, 7, D. Ct. ECF No. 50-1.

Moreover, as the district court recognized, S.B. 8 "bucks" the normal courthouse rules, for example, by "limit[ing] the defenses available to defendants and subject[ing] them to a fee-shifting regime skewed in favor of claimants." Order Denying MTDs 4–6, D. Ct. ECF No. 82. In these ways, S.B. 8 is designed to prevent abortion providers and others who are sued from mounting a fair defense in individual cases. Moreover, even if those sued under S.B. 8 prevail, it cannot possibly repair the damage done by these suits. The cost of litigation alone would be ruinous and therefore coerce Plaintiffs' compliance. *See* Order Denying MTDs 8–10. In addition, as the district court held, Section 4 of S.B. 8, the draconian fee-shifting provision, will "immediately chill" Plaintiffs' First Amendment right to petition the courts to vindicate their constitutional rights. App. 397.

For these same reasons, Defendants' suggestion that Plaintiffs cannot show irreparable harm without proving that lawsuits *will* be filed in a particular county, or in front of a particular judge, misses the mark. The credible—indeed, overwhelming—threat of enforcement is enough to chill Plaintiffs' constitutional rights *now*, and that threat comes from every judge and clerk in Texas courts that have authority over S.B. 8 claims.

Defendants' opposition likewise ignores clear harm from the State Agency Defendants. As the district court held, the State Agency Defendants' "enforcement authority under the existing Texas laws [governing Plaintiffs' and their staff's

licenses] may be triggered by a violation of S.B. 8," noting in particular that S.B. 8 violations would trigger certain mandatory agency enforcement actions. App. 391. The court found further that the State Agency Defendants have shown a credible threat of enforcement triggering irreparable harm through their longstanding "enforce[ment] [of] anti-abortion laws through health officials and actual use of disciplinary proceedings against medical professionals who violate laws," like S.B. 8, "that trigger such discipline. App. 393–94. Defendants simply ignore these conclusions, and the demonstrated harm that will flow from them to Plaintiffs and their staff, whose licenses are at stake.

* * *

For these and the reasons explained in Plaintiffs-Appellees' motion, this Court should expedite the appeal to prevent manifest harm and violation of constitutional rights that otherwise will occur on September 1.

Dated: August 27, 2021

Respectfully submitted,

/s/ Marc Hearron

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CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2021, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. Service will be accomplished by the CM/ECF system and by email to counsel for Defendants-Appellees.

/s/ Marc Hearron
Marc Hearron

CERTIFICATE OF COMPLIANCE

This reply complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 21(d) because it contains 1541 words, excluding the parts exempted by Rule 32(f); and (2) the typeface and type style requirements of Rule 32(a)(5) and Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word (the program used for the word count).

/s/ Marc Hearron
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