No. 21A24

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 WOMAN'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.

APPLICANTS' REPLY IN SUPPORT OF EMERGENCY APPLICATION TO JUSTICE ALITO

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ARGUMENT

Notably absent from the responses is any defense of the constitutionality of Texas Senate Bill 8, 87th Leg., Reg. Sess. (2021) ("S.B. 8" or the "Act"). S.B. 8 unquestionably contravenes this Court's precedent and will cause clear harm beginning at midnight tonight, with abortions after six weeks banned throughout Texas—something that has never been allowed to occur in any other state of the nation in the decades since *Roe*. The urgency of the harm and the obvious violation of this Court's precedents calls out for this Court's relief.

A. Applicants Need Not Violate the Law Before Bringing Suit.

At bottom, Respondents argue that federal courts are powerless to prevent a patently unconstitutional state law from taking effect. They maintain that the only way for Applicants to challenge S.B. 8's constitutionality is to violate the law; get sued in state court by any number of claimants, no matter how large; and raise constitutional defenses. State Resp'ts' Opp'n 12. That is plainly incorrect.

In *Ex parte Young*, this Court crafted an exception to sovereign immunity precisely to avoid this outcome. The Court explained that "harass[ment]" of individuals "with a multiplicity of suits or litigation generally in an endeavor to enforce penalties under an unconstitutional enactment" would itself "be an injury," the prevention of which "ought to be within the jurisdiction of a court of equity." *Ex parte Young*, 209 U.S. 123, 160 (1908). It went on to declare, emphatically, that "[i]f the question of unconstitutionality, with reference . . . to the Federal Constitution, be first raised in a Federal court, that court . . . has the right to decide it, to the exclusion of all other courts." *Id.* More recent cases applying *Ex parte Young* have underscored

the vital interest that this exception to sovereign immunity serves in our federal system. *See Va. Office for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 253, 255 (2011) (explaining that *Ex parte Young*'s legal fiction is necessary to "permit the federal courts to vindicate federal rights" (citation omitted)); *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" (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102 (1984); *Milliken v. Bradley*, 433 U.S. 267 (1977))).

Accordingly, as this Court's precedents make clear, and as Applicants detailed in their opening brief, an "enforcement action is not a prerequisite to challenging" S.B. 8. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014); Emergency Appl. to Justice Alito for Writ of Inj. ("Emergency Appl.") 19–20. Nor are Applicants required to subject themselves to the irreparable harm of being forced to defend potentially innumerable lawsuits across the state of Texas, incurring substantial legal defense costs while also risking the imposition of ruinous monetary damages if ultimately unsuccessful. *See Perez v. Ledesma,* 401 U.S. 82, 85 (1971); *id.* at 117–18 (Brennan, J., concurring in part and dissenting in part); *cf. MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 134 (2007) ("The rule that a plaintiff must destroy a large building, bet the farm, or (as here) risk treble damages and the loss of 80 percent of its business before seeking a declaration of its actively contested legal rights finds no support in Article III.").

Respondents' disregard of this body of law is especially striking because their filings below recognize that the overwhelming risks of providing abortions under S.B. 8 mean that, in practice, without this Court's interventions banned abortions will cease in Texas in a manner of hours. App.242 (Respondent Dickson stating that "I continue to believe that the Plaintiffs will comply with Senate Bill S.B. 8 and obviate the need for private civil-enforcement lawsuits. Indeed, no rational abortion provider or fund (in my view) would subject itself to the risk of civil liability under S.B. 8").

Respondents also point to several lawsuits challenging limited aspects of S.B. 8 in Texas courts, suggesting that Plaintiffs could seek relief in state court as well. State Resp'ts' Opp'n 12. These lawsuits do not obviate the need for this Court to grant the emergency relief requested by Applicants. The court presiding over these cases temporarily restrained Texas Right to Life, its Legislative Director John Seago, and individuals working in concert with them from instituting private enforcement actions under S.B. 8, but the benefit of the order is limited to the petitioners in those cases (two individuals and one organization who are not parties to these proceedings and do not provide abortions), and it binds only the aforementioned defendants, who represent a small subset of those who may sue under S.B. 8. *See* TRO, *Van Stean v. State*, No. D-1-GN-21-004179 (Travis Cnty., Tex., 98th Jud. D., Aug. 31, 2021); TRO, *Tuegel v. State*, No. D-1-GN-21-004316 (Travis Cnty., Tex., 261st Jud. D., Aug. 31, 2021); TRO, *The Bridge Collective v. State*, No. D-1-GN-21-004303 (Travis Cnty., Tex., 126th Jud. D., Aug. 31, 2021). Although the plaintiffs in those cases have also sued state officials, the TROs do not apply to them, and S.B. 8 purports to erect a

statutory bar to suits against state officials in state court. S.B. 8 § 171.211. In fact, Texas Right to Life has already posted a statement on its website declaring that the TROs issued today will not deter the organization from suing Applicants and others to enforce S.B. 8: "This ruling by a Travis County judge does not change Texas Right to Life's plans. Texas Right to Life is still legally authorized to sue others who violate [S.B. 8], including abortionists."[1]

The relief that Applicants seek from the governmental Respondents in this case is therefore vital to preventing S.B. 8 from causing a widespread deprivation of federal constitutional rights and other irreparable harm.

B. Applicants Have Article III Standing

Respondents contend that Applicants lack Article III standing to challenge S.B. 8 as against them. To the contrary, each Respondent contributes to the injury that Applicants suffer under S.B. 8, and relief from this Court would redress that injury.

First, Respondents claim that judges and clerks do not have a sufficiently personal stake in the outcome of this case to give rise to an Article III "case or controversy." But the decisions on which they rely, none of which are by this Court, were decided as a matter of "[p]rudential standing," *Bauer v. Texas*, 341 F.3d 352, 358 (5th Cir. 2003); *see also id.* at 357, and do not analyze whether the plaintiffs in those cases meet the three-part inquiry for Article III standing. Under those prudential-standing decisions, judges "ordinarily" cannot be sued if there is an official in another branch of government tasked with enforcing the statute. *In re Justs. of Sup. Ct. of P.R.*, 695 F.2d 17, 21–22 (1st Cir. 1982). So "a court should not enjoin

judges from applying statutes when complete relief can be afforded by enjoining all other parties with the authority to seek relief under the statute," *id.* at 23 (citing *Gen. Motors Corp. v. Buha*, 623 F.2d 455, 463 (6th Cir. 1980); *United Steelworkers of Am. V. Bishop*, 598 F.2d 408, 413 (9th Cir. 1979); *Lamb Enters. Inc. v. Kiroff*, 549 F.2d 1052, 1060 (6th Cir. 1977)), which "ordinarily" occurs by suing "the enforcement official authorized to bring suit under the statute," *id.* at 21.

But with S.B. 8, the Texas Legislature's intent was to make it so that there was no government official authorized to bring suit directly under the statute. So here, even under the court of appeals' decisions on which Respondents rely, there is a "relief-related basis for including the judges in [the] law suit," and it is "necessary to enjoin a judge to ensure full relief to the parties." *Id.* at 23. This accords with this Court's recognition "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"—exactly the situation here. *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (emphasis added) (citations omitted).

In any event, the reasoning in those decisions applies only to judges, not clerks. The courts of appeals are in agreement that court clerks can be sued over the constitutionality of a statute that they apply, including when performing a ministerial duty like docketing proceedings. For example, the Eleventh Circuit held that a court clerk was an appropriate defendant in a challenge to the constitutionality of a post-judgment garnishment statute because of clerks' responsibility to "docket[] the garnishment affidavit" and "issu[e] the summons of garnishment." *Strickland v.*

Alexander, 772 F.3d 876, 885 (11th Cir. 2014); *see also id.* at 879–81; *Kitchen v. Herbert*, 755 F.3d 1193, 1201-02 (10th Cir. 2014) (concluding that plaintiffs had standing to challenge prohibition on same-sex marriage by suing the clerk who denied the marriage licenses by performing their duty under state law); *Finberg v. Sullivan*, 634 F.2d 50, 53-54 (3d Cir. 1980) (en banc) (holding that court clerk and sheriff were proper defendants in challenge to post-judgment garnishment procedures because the performance of their duties is the immediate cause of the plaintiff's injury); *accord McNeil v. Cmty. Probation Servs., LLC*, 945 F.3d 991, 994-96 (6th Cir. 2019) (holding that a sheriff can be sued in an action for an injunction in challenge to state bail statute because sheriffs detain individuals who cannot pay the bail set by the judge); *cf. Const. Party of Pa. v. Aichele*, 757 F.3d 347, 367 (3d Cir. 2014) (finding standing to sue state officials responsible for administering election code where, otherwise, "[b]y the impossible logic of the Commonwealth, the Aspiring Parties will never have a prospective remedy for their injury, because there will never be standing, because there will never be causation, because the third parties who might challenge their nomination papers are always unknown[.]").

Under the three-prong Article III analysis, Applicants' standing is clear, as the district court concluded. Applicants have an injury in fact from the risk of enforcement actions and ruinous liability. Clerks and judges are officials who will contribute to that harm by exercising their state-law duties to compel individuals into S.B. 8 enforcement proceedings and issue S.B. 8's mandatory penalties. *Cf. Shelley v. Kraemer*, 334 U.S. 1, 14 (1948) ("A State acts by its legislative, its executive, or its

judicial authorities. It can act in no other way."). And an injunction precluding Texas judges and clerks from taking these actions with respect to S.B. 8 enforcement proceedings would redress Applicants' injury. And unlike the plaintiffs in *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 489 (1982), who were uninjured but argued that they should be permitted to sue because no one else would, the district court correctly held that Applicants have shown why the injury, causation, and redressability elements of standing are plainly met. Once the three standing criteria are met, as they are here, "a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Susan B. Anthony List*, 573 U.S. at 167 (cleaned up).

As to the State Agency Respondents, their argument is premised on the notion that the district court's decision "is an incorrect reading of Texas law" about whether they have indirect enforcement authority, State Resp'ts' Opp'n 11, and they ask this Court to interpret that state law in a manner at odds with its text. App.25–26. But the State Agency Respondents never made this argument below, and even now it is premised on a declaration from the Attorney General's *chief of staff,* who has no authority to speak for State Agency Respondents, much less the authority to bind them going forward. And as the district court explained, state law *requires* state agencies to enforce in certain circumstances, *see* App.22–24, a point to which Respondents have no answer.

C. The Claims Here Are Well Within *Ex Parte Young*

As the district court held, the government official Respondents are not entitled to sovereign immunity. App. 22–27, 40–42. Nothing Respondents say before this Court undermines that correct conclusion.

Respondents claim that the "act of docketing or hearing a case" cannot remove a clerk or judge's entitlement to sovereign immunity because "not every SB 8 enforcement suit violates the Constitution." State Resp'ts' Opp'n 15. That is incorrect. As Plaintiffs have demonstrated, and as the district court agreed, their claims are based not only on the constitutional harm that will occur if they lose in S.B. 8 state-court proceedings, but also by being targeted with *any* of these abusive, one-sided lawsuits that strip them of all the normal protections afforded to other civil litigants. Emergency Appl. 7–8,19–20; D. Ct. ECF No. 19 at 28–31. Moreover, even on its own terms, government official Respondents' argument fails. The only conceivable example they can muster is the possibility that someone will sue an abortion provider for offering a post-viability abortion unprotected by the Fourteenth Amendment. But as the officials themselves concede, Texas already bans abortion later in pregnancy, *see* Tex. Health & Safety Code § 171.044, and Plaintiffs comply with that law. This Court should reject this "invitation to pave the way for legislatures to immunize their statutes from facial review." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2319 (2016), *as revised* (June 27, 2016) (rejecting similar argument in the context of severability).

Government official Defendants also contend that the instant lawsuit would require the federal courts to "commandeer the entire Texas judiciary," effectively

doing what sovereign immunity prohibits. State Resp'ts' Opp'n 16. But Plaintiffs and pregnant Texans are not barred from seeking relief in federal court simply because the Texas Legislature has decided to give *too many* people the authority to violate their constitutional rights. Petitioners are simply asking for an injunction forbidding a government official from enforcing a state law in a manner contrary to federal constitutional right. If relief as to an individual judge is appropriate, as it unquestionably is under this Court's precedent and as confirmed by the district court, App. 27–51, then the use of a Rule 23 class action as a mechanism to effect that relief in an efficient way makes no difference with respect to sovereign immunity. *See* 28 U.S.C. § 2072. Moreover, clerks could comply with an injunction by for instance, requiring filers to aver whether their petition is brought under S.B. 8, or they could also seek guidance from legal authorities. *See Campaign for S. Equal v. Bryant*, 197 F. Supp. 3d 905, 909 (S.D. Miss. 2016) (discussing how clerks obtained guidance from state attorney general as to how to implement injunction). This is not a jurisdictional hurdle.

Finally, the state agency respondents contend that they are entitled to sovereign immunity based on a belated claim that they "lack state law authority to enforce S.B. 8, whether directly or indirectly." State Resp'ts' Opp'n 17. As discussed above, however, this self-serving and belated statement from the Attorney General's chief of staff is not binding on the State, and does not in any event disclaim the state officials' authority to seek attorneys' fees from Plaintiffs. Nor does it wrestle with each of the applications to which Plaintiffs and the district court pointed as to the

state agency Respondents clear enforcement authority, App.22–24, including a mandatory obligation to investigate or enforce in some circumstances, Tex. Occ. Code §§ 160.052–.053; 22 Tex. Admin. Code § 176.2(a)(3), § 176.8(b).

D. Applicants Will Be Irreparably Harmed

1. An Injunction Pending Appeal Will Redress Applicants' Irreparable Harm

Respondents' suggestion that Applicants have unlawfully sought relief against "non-parties" is wrong. Dickson Opp'n 2, 24–29. As specified in their Rule 20.3 statement, applicants have sought an injunction pending appeal against all Respondents, including two putative classes of Texas judges and clerks. This Court has authority to grant such relief.

Respondents have already made all of their arguments in the district court in opposition to the motion for class certification; only Applicants' reply brief is left to be filed. Thus, it is undisputed that—should this Court vacate the stay of proceedings in the district court—that court could promptly certify the classes at the same time that it rules on Applicants' fully briefed preliminary-injunction motion, or it could provisionally certify the classes as part of a ruling granting the preliminary injunction. There is no reason why this Court's broad equitable authority under the All Writs Act would not allow for the same relief. As this Court explained in *United States v. New York Telephone Company*:

> [U]nless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it . . . . The Court has consistently applied the Act flexibly in conformity with these principles

> . . . . The power conferred by the Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice.

434 U.S. 159, 173–74 (1977) (cleaned up). Here, where the only non-parties against whom Applicants seek relief are properly before the district court on a motion for class certification, the Court clearly has authority to "achieve the ends of justice" by preventing S.B. 8 enforcement actions to go forward in Texas state courts starting in just hours. *Id.*

But even if this Court were to grant the injunction only as to the individually named Applicants—who include the state's chief law enforcement officer—that would still provide essential relief. Even when not binding, "the persuasive force" of this Court's "opinion and judgment" may have a "deterrent effect," including by "lead[ing] . . . courts . . . to reconsider their respective responsibilities toward the statute." *Steffel v. Thompson*, 415 U.S. 452, 470 (1974). Indeed, in *Roe v. Wade*, this Court assumed that state officials "will give full credence to this decision that the present criminal abortion statutes of that State are unconstitutional." 410 U.S. 113, 166 (1973). While that decision pertained to a declaratory judgment, it is beyond dispute that, as a practical matter, an injunction pending appeal issued by this Court against the Attorney General and the other named defendants could send a strong signal as to the unconstitutionality of this six-week abortion ban and thus allay at least some Applicants' fears about proceeding with lawful abortions in Texas tomorrow.

Multiple Applicants have confirmed that there are patients who have complied with Texas's mandatory twenty-four hour waiting period and could be seen tomorrow morning if S.B. 8 is enjoined. One Applicant has patients waiting at the clinic ready to be seen. Though that Applicant is planning to provide abortions until 11:59 PM, it is likely that they will need to turn away patients at 12:00 AM. Another Applicant has a minor patient who obtained a judicial bypass for her procedure but was not able to be seen today. And because she is close to the legal limit for accessing abortion in Texas, if she does not obtain care in the next day or two, she will be barred from accessing her right to abortion in Texas.

2. S.B. 8's Purported "Undue Burden" Affirmative Defense Is Meaningless

Respondent Dickson's argument that S.B. 8's purported "undue burden" affirmative defense is sufficient to mitigate Applicants' harms, *see* Dickson Opp'n 30–31, is so unavailing that it appears nowhere in the government Respondents' brief. Respondent Dickson refers to a section of S.B. 8 candidly entitled "Undue Burden Defense *Limitations*," S.B. 8 § 171.209 (emphasis added), which distorts this Court's undue burden test beyond recognition. Indeed, no Respondent has ever even tried to refute Applicants' explanations in the courts below of how this "limit[ed]" defense conflicts with this Court's precedent—and that Texas permits people sued in S.B. 8 enforcement actions to raise a distorted version of this Court's precedent as an affirmative defense does not make this any less of an unconstitutional ban. A criminal ban on abortion is still a ban even if physicians can theoretically choose to keep performing abortions and raise a constitutional defense at their criminal trial. *See,*

e.g., *Roe*, 410 U.S. 113. The existence of this defense does not in any way mitigate the need for this Court's intervention.

3. This Is Not an Emergency of Applicants' Making

Respondents' assertion that Applicants "waited" to file this suit, State Resp'ts' Opp'n 1, is flatly wrong. Applicants moved as swiftly as possible to file this litigation, which involves twenty-one Plaintiffs, eight Defendants, and numerous constitutional claims. On July 13, Applicants filed their complaint and simultaneously moved for summary judgment, supported by nineteen declarations. Just three days later, Applicants filed a motion to certify two defendant classes. Applicants' 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 Applicants. And they met all deadlines required of them under the district court's briefing schedule without delay. Moreover, Respondents' delay has contributed to this emergency. For example, two of the Respondents filed a meritless petition for mandamus that resulted in a temporary stay of summary judgment briefing, *see* Pet. for Writ of Mandamus, *In re Clarkston*, No. 21-50708 (5th Cir. Aug. 7, 2021), ultimately forcing Applicants to file (at Respondents' insistence) a motion for temporary restraining order and preliminary injunction.

Through no fault of their own, thousands of pregnant Texans will lose constitutionally protected access to abortion in mere hours unless this Court acts. Applicants and their patients urgently need relief.

E. Injunctive Relief Is Available

Even assuming this Court looks to Section 1983 with respect to its authority to enter Applicants' requested relief, Section 1983 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.

1. Declaratory relief is currently unavailable at this stage of the litigation, and Respondents have not made any showing otherwise. Applicants initially moved for summary judgment on the same day they filed their complaint (as expressly permitted under Rule 56) because there was sufficient time for entry of a declaratory judgment before September 1. After Respondents successfully delayed resolution of that motion, Applicants moved for a preliminary injunction at certain Respondents' insistence. *See* Pet. for Writ of Mandamus, 4, 5, 11, 20, *In re Clarkston*, No. 21-50708 (5th Cir. Aug. 7, 2021). Having successfully delayed a ruling on a declaratory judgment past S.B. 8's effective date, Respondents should not be heard to argue that declaratory relief is still available.

Respondents suggest that "unavailable" must mean never available and that "[t]emporary unavailability is not enough." State Resp'ts' Opp'n 20. But "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) (citations omitted). Consistent with that ordinary meaning, something can be unavailable for a time and then later available. For example, the President can fill certain vacancies while the Senate is "unavailable" due to a recess,

even though Congress will be available again. *See N.L.R.B. v. Noel Canning*, 573 U.S. 513, 530-33, 552 (2014). Similarly, the Federal Rules of Evidence use "unavailability" to encompass "then-existing" temporary conditions. Fed. R. Evid. 804(a)(4).

2. A court clerk is not a "judicial officer" as Congress used that term in Section 1983. As Applicants explained—and Respondents nowhere refute—"judicial officer" is used throughout the U.S. Code and the Federal Rules to refer to judges and other jurists. There is no reason to think Congress intended a different meaning in Section 1983. To the contrary, the Senate Judiciary Committee Report accompanying the amendment to Section 1983 that added the "judicial officer" limitation explicitly states that "judicial officers" means "justices, judges, and magistrates." Senate Rep. 104-366, at 37; *see id.* (Section 1938 permits injunctive relief against "a State judge" if declaratory relief is unavailable or the "State judge violated a declaratory decree").

Respondents argue that clerks are judicial officers because they hold elected office, work in the state court system, and act on behalf of or at the direction of judges. But those facts, even if accurate, mean only that clerks are officeholders who act on behalf of or at the direction of judicial officers; it does not make clerks themselves judicial officers, as Congress used that term. Respondents also rely on decisions holding that in certain circumstances, clerks are entitled to the same immunity as judicial officers when acting at their direction, but that likewise does not make clerks judicial officers themselves.

F. This Court Can Grant the Requested Relief

This Court can and should vacate the stays entered by the court of appeals and the district court. Respondents do not dispute that federal courts retain jurisdiction

to enter appropriate orders to preserve the status quo. *Coleman v. Paccar Inc.*, 424 U.S. 1301 (1976) (Rehnquist, J., in chambers); *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"). Respondents contend only that Federal Rule of Civil Procedure 62(d) applies to appeals of decisions relating to injunctions. State Resp'ts' Opp'n 35–36. Regardless, Rule 62 does not purport to displace the district court's equitable powers.

Governmental Respondents also claim that recognizing an exception to the judge-made divestiture rule and allowing the district court to decide the pending preliminary-injunction motion would result in them losing their "dignitary interests." State Resp'ts' Opp'n 36. But as they also recognize, and as the Fifth Circuit's mandamus order made clear, App.59–61, the district court could have decided their motions to dismiss at the same time as the preliminary-injunction request without offending their sovereign interests. And Respondents rightly do not claim any dignitary harm from the district court deciding motions for which Respondents have already submitted their opposition briefs.

CONCLUSION

The Court should 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. Should it need further time to consider this request, it should enter an administrative stay of the underlying district court and Fifth Circuit stays, thus unquestionably restoring the district court's jurisdiction to prevent imminent harm.

Respectfully submitted.

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August 31, 2021

CERTIFICATE OF SERVICE

I, Marc Hearron, a member of the bar of this Court, certify that on this 31st day of August, 2021, I caused all parties requiring service in this matter to be served with a copy of the foregoing by email and mail to the individuals listed below:

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