

ONE HUNDRED SEVENTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

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September 7, 2021

The Honorable Merrick Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Garland:

We write to ask you to use the full power of the Department of Justice to defend a woman's constitutional right to choose an abortion, a right now under assault by Texas Senate Bill 8 ("SB 8"). Because the Department cannot permit the second largest state in the Nation to deprive women of their constitutional rights by outsourcing the enforcement of SB 8 to private individuals, we urge you to take legal action up to and including the criminal prosecution of would-be vigilantes attempting to use the private right of action established by that blatantly unconstitutional law.

As you know, SB 8 effectively bans abortion after six weeks of pregnancy, well before many women know that they are pregnant. This ban is a clear violation of a woman's right to choose an abortion prior to fetal viability established nearly fifty years ago under *Roe v. Wade*.¹ SB 8 also creates a private right of action that allows an individual to sue not only reproductive healthcare providers that violate this statutory ban, but *any* individual who "aids or abets the performance or inducement of an abortion" in violation of the ban—all while specifically prohibiting state officials from enforcing the statute.²

This private right of action is the law's most insidious feature. It represents an effort by the State of Texas to evade judicial scrutiny long enough for a clearly unconstitutional law to take effect. Indeed, in an unsigned "shadow docket" ruling issued late Wednesday, the Supreme Court refused even to hold a hearing on the issues presented by this private right of action. Instead, over the dissent of four justices, including Chief Justice Roberts, the Court denied an application for emergency injunctive relief, specifically citing the plaintiffs' failure to carry their burden on the "complex and novel antecedent procedural questions" presented by SB 8.³

¹ 410 U.S. 113 (1973).

² Tex. Health & Safety Code Ann. § 171.208 (2021).

³ *Whole Woman's Health v. Jackson*, 594 U.S. ___ (2021) (denying application for injunctive relief).

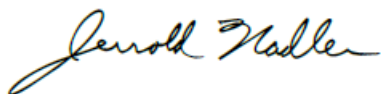
By accepting the State of Texas’s legal gambit, the Court thrust the citizens of Texas into a regime that is as unsettling as it is unconstitutional. SB 8 awards a bounty—a minimum of \$10,000 and legal fees—to any individual who successfully brings a suit under the law. In Texas, women may now be reluctant to confide the fact of a complicated pregnancy in once-trusted neighbors, coworkers, and family members, any of whom might simply want a payday under SB 8. This perverse system has not only a chilling effect on a deeply private decision-making process that is essential to a woman’s personal autonomy, but is also just plain chilling. And our fears are hardly theoretical. Anti-abortion groups in Texas have already begun setting up anonymous tip lines to allow individuals to report on their fellow citizens.⁴ Other states are preparing to enact similarly dangerous laws.⁵

As Justice Sotomayor wrote in her dissent to the Court’s ruling, “[i]t cannot be the case that a State can evade federal judicial scrutiny by outsourcing the enforcement of unconstitutional laws to its citizenry.”⁶ Similarly, the Department of Justice cannot permit private individuals seeking to deprive women of the constitutional right to choose an abortion to escape scrutiny under existing federal law simply because they attempt to do so under the color of state law. Indeed, the Department is fully empowered to prosecute any individual who attempts, “under color of any law,” to deprive a United States citizen of “any rights, privileges, or immunities secured or protected by the Constitution.”⁷

We were encouraged by your recent statement that the Department “is deeply concerned about Texas SB 8” and that it is “evaluating all options to protect the constitutional rights of women, including access to an abortion.”⁸ Two generations of women have come to rely on the right to choose an abortion. That choice is deeply private and should not in any way be intruded upon by *any* third party, let alone a vigilante seeking a payday from the state.

We urge you to act to protect the right to choose without delay.

Sincerely,



Jerrold Nadler
Chairman



Zoe Lofgren
Member of Congress

⁴ Alice Miranda Ollstein, *Supreme Court allows Texas’ 6-week abortion ban to take effect*, POLITICO, Sept. 1, 2021.

⁵ Oren Oppenheim, *Which States’ Lawmakers Say They Might Copy Texas’ Abortion Law*, ABC NEWS, Sept. 3, 2021.

⁶ *Whole Woman’s Health v. Jackson*, 594 U.S. ___ (2021) (Sotomayor, J. dissenting) at 4.

⁷ 18 U.S.C. § 242. *See also* 42 U.S.C. § 1983.

⁸ Rebecca Shabad, *‘Unconstitutional chaos’: Biden vows ‘whole-of-government’ response after Texas abortion decision*, NBC NEWS, Sept. 2, 2021.



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Member of Congress



Steve Cohen
Member of Congress



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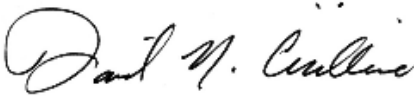
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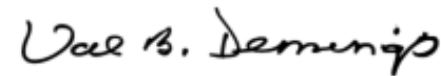
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