No. 21-50792

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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,

Plaintiffs - Appellees,

v.

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

Defendants - Appellants.

On Appeal from the U.S. District Court, Western District of Texas (Austin)
No. 1:21-cv-00616-RP

PLAINTIFFS-APPELLEES' EMERGENCY MOTION TO VACATE STAYS OF THE DISTRICT COURT PROCEEDINGS OR ALTERNATIVE RELIEF

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs-Appellees	**Counsel**
Whole Woman's Health Alamo City Surgery Center PLLC d/b/a Alamo Women's Reproductive Services Brookside Women's Medical Center PA 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 The Afiya Center Frontera Fund Fund Texas Choice Jane's Due Process	Center for Reproductive Rights ● Marc Hearron ● Molly Duane ● Kirby Tyrrell ● Melanie Fontes ● Nicolas Kabat Morrison & Foerster LLP ● Jamie A. Levitt ● J. Alexander Lawrence Planned Parenthood Federation of America ● Julie Murray ● Richard Muniz Johns & Hebert PLLC ● Christen Mason Hebert American Civil Liberties Union Foundation ● Julia Kaye ● Brigitte Amiri ● Chelsea Tejada

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Defendants-Appellants	**Counsel**
Penny Clarkston, Clerk for the District Court of Smith County Mark Lee Dickson Austin Reeve Jackson, Judge of the 114th District Court Stephen Brint Carlton, Executive Director of the Texas Medical Board Katherine A. Thomas, Executive Director of the Texas Nursing Board Cecile Erwin Young, Executive Commissioner of the Texas Health and Human Services Commission Allison Vordenbaumen Benz, Executive Director of the Texas Board of Pharmacy Ken Paxton, Attorney General of Texas	Hacker Stephens LLP ● Andrew B. Stephens ● Heather Gebelin Hacker Mitchell Law PLLC ● Jonathan F. Mitchell Office of the Texas Attorney General ● Judd E. Stone ● Beth Klusman ● Natalie D. Thompson ● Benjamin S. Walton ● Christopher D. Hilson ● Halie Daniels The McGuire Firm, PC ● M. Shane McGuire

/s/ Marc Hearron
Marc Hearron

INTRODUCTION AND NATURE OF EMERGENCY

In less than four days, Texas Senate Bill 8, 87th Leg., Reg. Sess. (Tex. 2021) ("S.B. 8" or the "Act") will ban abortion starting at six weeks of pregnancy, immediately imposing widespread and catastrophic harm to pregnant Texans and Plaintiffs in this case. As this Court has held—and as nearly five decades of Supreme Court precedent make clear—a six-week ban on abortion is constitutionally "doom[ed]" because it violates patients' substantive-due-process right to abortion. *Jackson Women's Health Org. v. Dobbs*, 951 F.3d 246, 248 (5th Cir. 2020) (per curiam).

Despite this clear law and impending effective date, this Court has now stayed all district-court proceedings to challenge S.B. 8 and denied Plaintiffs' motion to expedite this interlocutory appeal. If left in place, this Court's order will indefinitely prevent the district court from ruling on Plaintiffs' request for emergency injunctive relief, thus disregarding 50 years of Supreme Court precedent and decimating abortion access in Texas. And the order will do all of this in the course of a baseless, interlocutory appeal brought by Defendant Mark Lee Dickson, a private individual who claims only that Plaintiffs lack standing against him, and seven Government Official Defendants who have no meritorious claim to sovereign immunity, as the district court held.

Given the urgent need for relief, Plaintiffs-Appellees respectfully request that the Court do the following on or before 10:00 pm on Sunday, August 29, 2021:

(1) The Court should vacate the administrative stay of the district-court proceedings, *see* Order (5th Cir. Doc. No. 515998773) (per curiam), and the district court's stay of proceedings as to the Government Official Defendants, *see* App. 056–058, so that the district court may rule on Plaintiffs' pending motions for a temporary restraining order/preliminary injunction ("TRO/PI Mot.") and class certification. *See* D. Ct. ECF Nos. 32, 53.

(2) In the alternative, the Court should vacate without opinion the district court order denying Defendants' motions to dismiss, dismiss this appeal as moot, and issue the mandate forthwith for the purpose of consideration of the pending motions for preliminary injunction and class certification. Even if the district court's jurisdiction has been divested, that jurisdiction would unquestionably be restored by vacatur of the underlying order on which this appeal rests.

BACKGROUND

A. Senate Bill 8

S.B. 8 bans abortion in Texas at approximately six weeks of pregnancy, roughly four months before the viability line established by the Supreme Court. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 870 (1992); *Jackson Women's Health Org.*, 951 F.3d at 248 (holding Mississippi's six-week abortion ban

unconstitutional). In that respect, S.B. 8 is like other unconstitutional laws that states have enacted in recent years to ban abortions at gestational ages before viability—all of which have been blocked by federal courts when challenged. *See Planned Parenthood S. Atl. v. Wilson*, No. 3:21-00508-MGL, 2021 WL 672406, at *2 (D.S.C. Feb. 29, 2021) (collecting cases), *appeal filed*, No. 21-1369 (4th Cir. Apr. 5, 2021).

But S.B. 8 differs from those other bans in that it bars executive branch officials—such as local prosecutors or the health department—from enforcing it directly. S.B. 8, § 3 (adding Tex. Health & Safety Code §§ 171.207(a), 171.208(a)).[1] Instead, S.B. 8 may be directly enforced only by state courts via civil enforcement actions that "any person" can initiate against anyone alleged to have (1) provided an abortion that violates the ban, (2) engaged in conduct that "aids or abets" an abortion that violates the ban, or (3) intended to do any of those things. *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).

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

Further, 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."[2] S.B. 8 imposes a patently discriminatory enforcement scheme, thus inviting harassing, costly lawsuits as a penalty for providing or facilitating access to safe abortion in Texas.[3]

B. Procedural History

On July 13, 2021, Plaintiffs—who include abortion clinics, doctors, health-center staff, clergy, and funds and practical support networks that assist abortion patients—filed this case challenging the Act's constitutionality. App. 002–03. They raised claims on their own behalf and on behalf of staff and abortion patients, arguing that S.B. 8's ban on previability abortion violates the Fourteenth Amendment and

[2] 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.

[3] *Compare* Tex. Health & Safety Code § 171.210(a)(4) (permitting suit in the claimant's county of residence if "the claimant is a natural person residing in" Texas); *id.* § 171.210(b) (providing that S.B. 8 "action may not be transferred to a different venue without the written consent of all parties"), *with* Tex. Civ. Prac. & Rem. Code § 15.002(a) (generally limiting venue to where the events giving rise to a claim took place or where the defendant resides); *id.* § 15.002(b) (generally permitting Texas state courts to transfer venue "[f]or the convenience of the parties and witnesses and in the interest of justice").

that its rigged enforcement scheme and attorney-fee provision violate the First Amendment, due process, and equal protection.

Plaintiffs sued the government officials responsible for compelling compliance with S.B. 8: (1) Texas clerks who exert their official power to open S.B. 8 enforcement actions in the docket and issue citations compelling those sued to respond under threat of default judgment; (2) the judges who force those sued under S.B. 8 to comply with the statute through mandated injunctions and other penalties; and (3) certain State licensing officials and the Attorney General of Texas (the "State Agency Defendants") who, although not able to directly enforce the Act's ban, are authorized and required to bring administrative and civil enforcement actions under other laws for violations of S.B. 8, including actions for civil penalties and attorney's fees. App. 016–021. In addition, Plaintiffs sued a private party, Mark Lee Dickson, whom Plaintiffs reasonably expect to file suit against purported violators based on his history of threats and other targeting of Plaintiffs. App. 047–49.

After filing the case, Plaintiffs immediately moved for summary judgment because their claims, which turn solely on questions of law, do not require discovery or other fact development. *See* App. 003. They submitted a declaration from each Plaintiff to demonstrate their Article III standing and support their showing of irreparable harm if S.B. 8 takes effect. App. 171–342. Three days later, on July 16, 2021, Plaintiffs moved for class certification. App. 003. Rather than requesting an

extension of time to respond to the motions, Defendants moved to completely stay briefing on the summary-judgment and class-certification motions. App. 003.

Following a status conference on August 4, 2021, the district court entered a scheduling order directing concurrent briefing of Defendants' forthcoming motions to dismiss and Plaintiffs' pending motions for summary judgment and class certification, to be completed by August 13. App. 092–93. The order expressly stated: "To the extent Defendants believe that the record must be developed through factual discovery before a ruling may be issued on these motions, the Court will consider these arguments in Defendants' responses to the motions." *Id.*

In early August, Defendants filed a series of motions to dismiss for lack of subject-matter jurisdiction. App. 003. The Government Official Defendants claimed they were entitled to sovereign immunity and argued that the district court also lacked Article III jurisdiction. App. 016, 021, 024, 028, 034, 036. Defendant Dickson acknowledged that Plaintiffs had alleged a credible threat that he would sue them, but argued that those allegations were not supported by the evidence, including two declarations he submitted. App. 047–48; *id.* 344–352.

On August 7, 2021, Defendants Clarkston and Dickson filed a petition for a writ of mandamus primarily asking this Court to direct the district court to rule on their motions to dismiss before requiring them to respond to the summary-judgment motion. App. 054. The district judge submitted a response to the mandamus petition,

stating that the court intended to rule on Defendants' jurisdictional contentions before resolving the merits of the case. App. 054. On August 13, 2021, this Court denied Defendants' 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. 054.

In the meantime, at Defendants' invitation, Plaintiffs moved for a preliminary injunction to maintain the status quo among the parties prior to entry of final judgment. App. 003. The district court set a preliminary-injunction hearing for August 30, 2021, and allowed each side to present evidence and legal arguments. App. 059–63. The district court also amended the briefing schedule for Plaintiffs' motions for class certification and summary judgment, directing that briefing of the former be completed by August 27, 2021, and briefing of the latter be completed by September 17, 2021. App. 064–65.

On August 25, 2021, the district court denied Defendants' motions to dismiss. App. 002. The district court carefully considered, and ultimately rejected, Defendants' arguments concerning sovereign immunity, standing, and other Article III issues.

Later that day, all Defendants filed a notice of appeal and subsequently moved in the district court to stay further proceedings and vacate the preliminary-injunction hearing, arguing that the appeal from the denial of the motions to dismiss had divested the district court of jurisdiction. The district court granted that request in part, staying the proceedings pending appeal as to the Government Official Defendants. App. 56–58. The court denied a stay as to Defendant Dickson, and ordered the preliminary injunction hearing to proceed as scheduled with respect to the claims against him. App. 56–58. The district court also directed that briefing on Plaintiffs' motion for summary judgment against Dickson be completed by September 7, 2021. App. 444.

On August 27, 2021, Defendants filed an Opposed Emergency Motion to Stay Proceedings Pending Appeal (5th Cir. Doc. No. 515997262). That same day, Plaintiffs filed a Combined Motion to Dismiss Defendant-Appellant Mark Lee Dickson's Appeal and Opposition to Emergency Motion to Stay (5th Cir. Doc. No. 515998618). Plaintiffs also filed an Opposed Emergency Motion to Expedite Appeal (5th Cir. Doc. No. 515997650).

On August 27, 2021, the Court entered an administrative stay of the district-court proceedings, including the preliminary injunction hearing. Order (5th Cir. Doc. No. 515998773). It denied Plaintiffs' motion to expedite the appeal without explanation and directed Defendant Dickson to file a combined response to

Plaintiffs' motion to dismiss his appeal and reply to Plaintiffs' opposition to his emergency stay motion by 9 a.m. on Tuesday, the day after the preliminary injunction hearing had been scheduled to take place and only fifteen hours before S.B. 8 is scheduled to take effect. *Id.*

ARGUMENT

I. The Court Should Vacate the Stays of the District-Court Proceedings Entered by This Court and the District Court.

The Court should lift its temporary administrative stay and the stay issued by the district court so that the district court can consider the pending, fully briefed preliminary-injunction motion.

The filing of a notice of appeal "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). But the district court retains jurisdiction to issue orders "to maintain the status quo of the parties pending the appeal." *Coastal Corp. v. Tex. E. Corp.*, 869 F.2d 817, 819 (5th Cir. 1989); *see also, e.g.*, *Nat. Res. Def. Council, Inc. v. Sw. Marine Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001) ("The district court retains jurisdiction during the pendency of an appeal to act to preserve the status quo." (citing *Newton v. Consolidated Gas Co.*, 258 U.S. 165, 177 (1922)); *Kidder, Peabody & Co. v. Maxus Energy Corp.*, 925 F.2d 556, 565 (2d Cir. 1991) (holding that district court was permitted to enjoin state-court proceedings after appeal was filed from declaratory judgment that the claims were

invalid); Fed. R. Civ. P. 62(d) (authorizing district court to grant an injunction pending interlocutory appeal).

Here, the status quo when the appeal was filed is that S.B. 8 has not taken effect, Texans are able to access safe and constitutionally protected abortions as they have been for decades, and Defendants have been held to not have sovereign immunity. The district court has jurisdiction to issue an order maintaining that status quo during the pendency of the appeal. The stays should be lifted to give the district court an opportunity to issue such an order.

But even if the district court is currently divested of jurisdiction, this Court can and should restore control to the district court. The divestiture-of-jurisdiction rule is flexible, not rigid. The rule "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); *see also Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 17 (2017) ("Only Congress may determine a lower federal court's subject-matter jurisdiction." (citation omitted)); U.S. Const. art. III, § 1. The divestiture rule's "application is guided by concerns of efficiency and is not automatic." *United States v. Rodgers*, 101 F.3d 247, 251 (2d Cir. 1996); *United*

States v. Leppo, 634 F.2d 101, 104 (3d Cir. 1980) (rejecting a "ritualistic application of the divestiture rule"); 16A Wright & Miller, Fed. Prac. & Proc. Juris. § 3949.1 (5th ed.) (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.").

Here, the Court should allow the district court to regain control over the case so that the district court can consider the pending preliminary-injunction and class-certification motions. (The former motion has been fully briefed; the latter has been briefed through Defendants' response; and no Defendant was subpoenaed for the preliminary-injunction hearing.) Rigidly applying the divestiture-of-jurisdiction rule here would indefinitely delay consideration of an issue of utmost importance to Texans. This flexible, non-mandatory rule must bend here to prevent profound irreparable harm to thousands of Texans who will otherwise be stripped of their fundamental constitutional rights on Wednesday. The rule's guiding principle has always been efficiency; it was never intended to be used as an end-run to allow a blatantly unconstitutional law to take effect indefinitely and cause severe harm to patients caught in the crosshairs.

Applying the divestiture rule mechanically here would be antithetical to an efficient administration of justice. In a matter of days, whichever side does not

prevail in the preliminary-injunction proceedings could appeal from that decision, *see* 28 U.S.C. § 1292(a)(1), so that all the issues, including sovereign immunity, are before this Court at once. By contrast, refusing to allow the district court to act now on the fully briefed motions would defer a ruling on an issue of *preliminary* relief for potentially months or longer until after the pending appeal is decided.

Indeed, the district court could have granted a preliminary injunction that ruled provisionally on Defendants' jurisdictional arguments without fully deciding their motions to dismiss. As this Court explained when rejecting the mandamus petition filed by two of the Defendants, the district court need only issue "an order on the motion to dismiss . . . no later than any order as to summary judgment." App. 054; *see also* Jurisdiction to Determine Jurisdiction, 20 Fed. Prac. & Proc. Deskbook § 17 (2d ed.) ("Before it has determined whether it has jurisdiction of an action, a federal court may issue various orders, such as temporary restraining orders or preliminary injunctions."). It would be a perverse application of the divestiture rule if Defendants could defeat any meaningful relief from a preliminary injunction by appealing a ruling that completely rejected all their jurisdictional arguments.

Allowing the district court to resolve the pending motions would not defeat the purpose of sovereign immunity—which is to shield states from the "burden[s]" of litigation. *Texas v. Caremark, Inc.*, 584 F.3d 655, 658 (5th Cir. 2009). There is no additional burden required of the Government Official Defendants here: they have

already filed their briefs responding to the preliminary-injunction and class-certification motions (pursuant to a briefing schedule to which the Government Official Defendants consented, *see* D. Ct. ECF No. 58). No defense witnesses have been subpoenaed for the preliminary-injunction hearing, and Plaintiffs have made clear they did not believe an evidentiary hearing (or indeed, any hearing) is necessary.

At a minimum, even if this Court believed the sovereign immunity issue is necessarily intertwined with a preliminary injunction with respect to the Government Official Defendants (though it is not), the Court should lift the stays to allow the district court to rule on (1) the class-certification motion and (2) the proceedings against Dickson. Those aspects of the case are not at issue in the appeal, and thus the district court retains jurisdiction over them. *See Griggs*, 459 U.S. at 58. This appeal is from the denial of the Government Official Defendants' sovereign-immunity assertions; that is the only ground for an immediate appeal here. The class-certification motion will not itself impose any burden or obligation on the Government Official Defendants; it will decide only whether any relief ultimately granted will apply class-wide. Moreover, Defendant Dickson is a private citizen who has no claim to sovereign immunity. The denial of his motion to dismiss is an interlocutory order that is not immediately appealable. *Thomas ex rel. D.M.T. v. Sch. Bd. St. Martin Par.*, 756 F.3d 380, 383 (5th Cir. 2014). As the district court

held, it is precisely the kind of improper appeal that does not divest the district court of jurisdiction. *See BancPass, Inc. v. Hwy. Toll Admin., L.L.C.*, 863 F.3d 391, 399–400 (5th Cir. 2017).

II. In the Alternative, The Court Should Vacate The District Court's Order, Dismiss the Appeal as Moot, and Remand for Consideration of the Pending Motions Necessary to Prevent Irreparable Harm.

Alternatively, this Court should vacate the district court's order denying Defendants' motions to dismiss, which would moot this appeal. That, in turn, would necessitate dismissal of the appeal, which would automatically return jurisdiction to the district court.

This Court's order denying mandamus indicated that it would be appropriate for the district court to issue an order on the motions to dismiss "no later than any order as to summary judgment." App. 054. Accordingly, the district court had the authority (as expressly approved by this Court) to reserve its ruling on the motions to dismiss until it ruled on Plaintiffs' motions for class certification and preliminary injunction, provided it did so before entering an order as to summary judgment. To the extent that the district court's decision to issue an earlier ruling on the motions to dismiss—just days before the scheduled preliminary injunction hearing—inadvertently divested it of jurisdiction to consider Plaintiffs' request for preliminary injunctive relief, that can be remedied through vacatur. Otherwise, as discussed, this mechanical operation of the divestiture rule will result in manifest injustice to

Plaintiffs and abortion patients throughout Texas, who will be denied the ability to access time-sensitive and constitutionally protected abortion care beginning on September 1.

Vacating the district court's order on the motions to dismiss would enable the district court to decide those motions simultaneously with Plaintiffs' requests for class certification and preliminary injunctive relief. 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 from occurring to individuals seeking abortion care. Defendants would suffer no prejudice because their ability to seek appellate review would be delayed only by a matter of days, and in the meantime they will carry no burden of litigation remotely comparable to that protected against by sovereign immunity.

Consequently, if the Court does not lift the stays and permit the district court to rule on Plaintiffs' motions for class certification and preliminary injunction, it should vacate the district court's order denying Defendants' motions to dismiss; dismiss the appeal as moot; remand the case to the district court for further proceedings; and issue 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 AND PRAYER FOR RELIEF

For the foregoing reasons, the Court should vacate the administrative stay of the district-court proceedings as to all Defendants and the district court's stay as to proceedings for the Government Official Defendants for the purpose of permitting the district court to rule on the pending motions for a TRO, preliminary injunction, and class certification; or in the alternative, vacate the district court order granting the motions to dismiss, dismiss the appeal as moot, and issue the mandate forthwith.

Dated: August 29, 2021

Respectfully submitted,

/s/ Marc Hearron

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CERTIFICATE OF CONFERENCE

On August 29, 2021, Marc Hearron, counsel for Plaintiffs, contacted counsel for all Defendants by e-mail about this motion, who state that they oppose.

/s/ Marc Hearron
Marc Hearron

CERTIFICATE OF COMPLIANCE WITH RULE 27.3

I certify the following in compliance with Fifth Circuit Rule 27.3:

- Before filing this motion, counsel for Plaintiffs-Appellees contacted the clerk's office and opposing counsel to advise them of their intent to file this motion.
- The facts stated herein supporting emergency consideration of this motion are true and complete.
- The Court's review of this motion is requested as soon as possible and no later than Sunday, August 29, 2021, at 10:00 pm.
- True and correct copies of relevant orders and other documents are attached in the Appendix to this motion, filed separately.
- This motion is being served at the same time it is being filed.

/s/ Marc Hearron
Marc Hearron

CERTIFICATE OF SERVICE

I hereby certify that on August 29, 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 emergency motion complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 21(d) because it contains 3772 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
Marc Hearron