No. _____

IN THE

Supreme Court of Texas

IN RE PLANNED PARENTHOOD OF GREATER TEXAS SURGICAL HEALTH SERVICES, ON BEHALF OF ITSELF, ITS STAFF, PHYSICIANS, AND PATIENTS; PLANNED PARENTHOOD SOUTH TEXAS SURGICAL CENTER, ON BEHALF OF ITSELF, ITS STAFF, PHYSICIANS, AND PATIENTS; PLANNED PARENTHOOD CENTER FOR CHOICE, ON BEHALF OF ITSELF, ITS STAFF, PHYSICIANS, AND PATIENTS; BHAVIK KUMAR, M.D., ON BEHALF OF HIMSELF AND HIS PATIENTS,

Relators.

On Petition for Writ of Mandamus
to the Multi-District Litigation Panel
Case No. 21-0782

PETITION FOR WRIT OF MANDAMUS

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Multi-District Litigation Panel

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Verification was served on Real Parties in Interest by e-mail in accordance with the Texas Rules of Civil and Appellate Procedure on this the 29th day of September, 2021, as follows:

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RECORD REFERENCES

"App." refers to the appendix to this petition. "MR" refers to the mandamus record.

STATEMENT OF THE CASE

Nature of the Case	Plaintiffs sued Texas Right to Life, John Seago, and Does 1–100, seeking declaratory and injunctive relief against Texas Senate Bill 8, 87th Leg., Reg. Sess. (Tex. 2021), which bans abortion at approximately six weeks in pregnancy. Defendants Texas Right to Life and Seago filed a motion with the Multi-District Litigation Panel to transfer this case, along with several other unrelated cases, to a multi-district litigation judge for all pretrial proceedings. The Panel entered an unsigned order indefinitely staying all trial-court proceedings in this case and the unrelated cases, despite ongoing briefing and an October 13 hearing on dispositive motions filed by both sides in this case, and a September 30 hearing on Defendants' motion to seal under Texas Rule of Civil Procedure 76a.
Respondent	Multi-District Litigation Panel
Respondent's Challenged Action	The Multi-District Litigation Panel entered an unsigned, indefinite stay of all proceedings in the district court. App.002; MR.1046.

STATEMENT OF JURISDICTION

The Court has original jurisdiction over this petition under Texas Government Code § 74.163(a)(4) and Texas Rule of Judicial Administration 13.9(a).

ISSUE PRESENTED

Whether the Multi-District Litigation Panel erred by indefinitely staying all trial-court proceedings in a constitutional challenge that involves pure legal issues, where widespread irreparable harm is occurring in the absence of final judgment; where the stay will bar scheduled hearings on summary judgment and the continued sealing of information that should be made public; and the underlying motion to transfer is meritless and clearly intended for the purpose of delay and forum-shopping.

TO THE HONORABLE SUPREME COURT OF TEXAS:

On September 1, 2021, Texas Senate Bill 8, 87th Leg., Reg. Sess. (Tex. 2021) ("S.B. 8" or "the Act"), took effect, banning abortion at approximately six weeks of pregnancy. The law purports to immunize all state officials from suit and forbids executive-branch officials from directly enforcing it. Instead, in an effort to evade judicial review, S.B. 8 deputizes millions of private citizens to enforce its terms. As a result, abortion access in Texas has been decimated, and preliminary-injunctive relief against any finite number of individual enforcers is insufficient to restore such access and to fully prevent other constitutional harms. A swift hearing on S.B. 8's ultimate constitutionality is thus critically important.

On September 23, 2021, despite this urgency and demonstrated harm to thousands of pregnant Texans, the Texas Multi-District Litigation ("MDL") Panel entered an unsigned, indefinite stay of all state-court affirmative challenges to S.B. 8. App.002. The order, which contains no reasoning, places a roadblock in front of fourteen cases pending in the District Court of Travis County. Thirteen of those cases are now proceeding in lockstep; share the same counsel, defendants, and claims;

and are subject to a pending motion to consolidate, App.388–98, that Defendants seeking MDL transfer have opposed, despite their stated interest in coordination and efficiency. The fourteenth case was brought by Relators, and is the sole subject of this Petition for Writ of Mandamus. Relators' case involves different counsel and plaintiffs, distinct claims, and largely non-overlapping defendants. *See* App.101.[1]

A grant of the pending motion to consolidate—now precluded by the MDL Panel's stay order—would leave one consolidated matter by plaintiffs in unrelated cases, and Relators' case. Relators are aware of no instance in which the Panel has transferred such a small number of cases, both in a single county, to an MDL pretrial court—much less granted an indefinite stay pending resolution of a transfer motion, despite grievous public harm.

The stay in Relators' case is particularly inappropriate because the stay disrupts ongoing briefing on dispositive motions by both sides that turn on pure questions of law and that can be resolved quickly without need for discovery. By blocking the trial court's consideration of these

[1] Relators are Planned Parenthood of Greater Texas Surgical Health Services, Planned Parenthood of South Texas Surgical Center, Planned Parenthood Center for Choice, and Dr. Bhavik Kumar.

motions, including Relators' motion for summary judgment set for an October 13 hearing, the Panel's stay will further prolong S.B. 8's insulation from constitutional review and, in turn, exacerbate the ongoing crisis for pregnant Texans. The stay also freezes in place a provisional sealing order in Relators' case, barring a September 30 hearing on the continued sealing of a portion of the trial court's temporary-injunction order.

The MDL motion on which the stay is based is a brazen attempt by the Real Parties in Interest Texas Right to Life ("TRTL") and Jon Seago to delay an ultimate ruling on the unconstitutional law challenged by Relators. And so far, this abuse of the MDL process is working. The Court's intervention is urgently needed to vacate the stay and clarify that MDL transfer of Relators' case under these circumstances would be an abuse of discretion as a matter of law.

STATEMENT OF FACTS

A. Senate Bill 8 and Its Recent Impact on Texans

1. S.B. 8 bans abortion at approximately six weeks of pregnancy, before many people even know they are pregnant. App.329, 332.

2. In an attempt to evade pre-enforcement judicial review, the Legislature crafted S.B. 8 so that it does not rely on direct enforcement

by executive officials or local prosecutors. S.B. 8 § 3 (codified at Tex. Health & Safety Code § 171.208(a)). Instead, the Act gives any other person the right to sue abortion providers who perform abortions at or after six weeks of pregnancy and to sue anyone else who assists with such an abortion, *id.*—from a nurse or ultrasound technician to a family member who helps pay for an abortion.

3. S.B. 8's substantive prohibitions and enforcement mechanism are flatly unconstitutional under the Texas Constitution. App.287–310.

4. The Act took effect on September 1, 2021, threatening abortion providers and others who assist them with an unlimited number of abusive lawsuits in Texas courts if these individuals continue to perform or assist abortions now prohibited by the Act. S.B. 8 § 12. Due to the threat of harassing litigation, Relators—who are Texas abortion providers—are complying with S.B. 8's prohibitions. To their knowledge, all other abortion providers in Texas are complying as well.[2]

5. S.B. 8 has decimated abortion access starting at six weeks of pregnancy, setting off a statewide crisis with national impact. App.320,

[2] Relators are aware that a physician unaffiliated with them provided a single abortion in violation of S.B. 8. Alan Braid, *I Violated Texas's Abortion Ban. Here's Why*, Washington Post (Sept. 18, 2021), https://www.washingtonpost.com/opinions/2021/09/18/texas-abortion-provider-alan-braid/.

323–24, 325, 336–37, 351, 356–57, 364–65, 367. Thousands of Texans are now unable to exercise their rights in contravention of the Texas Constitution.

6. Texans with the means to do so are traveling hundreds of miles to neighboring states for care. App.324, 336, 347–49, 357–58, 367. And because clinics in neighboring states cannot accommodate the surge of Texas patients, some Texans are being forced to travel nearly a thousand miles or more, each way, to other states. App.382–85; *see also* App.123–24. Many patients, including victims of rape, incest, and domestic violence, can make these journeys only at great personal expense and hardship. *See, e.g.*, App.325, 336–39, 358, 367.

7. Many other pregnant Texans are unable to travel out of state for care, and will be forced either to attempt to access abortions outside the medical system, or to carry those pregnancies to term and face the risks—medical and financial—associated with childbirth. App.325–26, 336–37, 351–52, 357–58, 367.[3]

[3] *See also, e.g.*, Abby Vesoulis, *How Texas' Abortion Ban Will Lead to More At-Home Abortions*, Time (Sept. 21, 2021), https://time.com/6099921/texas-self-managed-abortions/ (visits to online resource for accessing abortion pills went from 500 to 25,000 daily after S.B. 8 took effect).

8. S.B. 8 is also harming clinic staff and physicians. Not only are they forced to turn away patients desperate for the safe care that staff are trained to provide, App.325, 340–41, 358–60, staff are facing increased threats and harassment, App.326, 360, 366.

B. The State-Court Litigation Challenging S.B. 8

9. Because of S.B. 8's "unprecedented" statutory scheme, *Whole Woman's Health v. Jackson*, No. 21A24, 2021 WL 3910722, at *1 (U.S. Sept. 1, 2021) (Roberts, C.J., dissenting), Relators and other abortion providers and advocates throughout Texas have been stymied in obtaining judicial review of this patently unconstitutional law.

10. TRTL and John Seago are Defendants in the case brought by Relators, and are among those who have credibly threatened to sue the Relators for any S.B. 8 violation. TRTL stated, for example, that "after the Texas Heartbeat Act takes effect, we're going to sue the abortionists ourselves."[4] TRTL also launched a "whistleblower" website to gather information for its own enforcement actions and to recruit additional enforcers. App. 146–58.

[4] MR.1337.

11. On September 2, 2021, Relators filed their petition against TRTL and Seago in the District Court of Travis County, where one of the Relators provides abortion services and where Seago resides. App.107, 109.

12. Thirteen other individuals and organizations (the "Non-Relator Plaintiffs") also filed lawsuits in the District Court of Travis County to challenge a portion of S.B. 8. These plaintiffs are all represented by the same counsel, and share no overlapping counsel with Relators. The claims of Relators and Non-Relator Plaintiffs are distinct. Most importantly, Relators challenge S.B. 8's abortion ban directly as a violation of the Texas Constitution and the Non-Relator Plaintiffs do not, instead focusing on the constitutionality of S.B. 8's enforcement mechanism. Moreover, although TRTL and Seago are defendants in each case, the Non-Relator Plaintiffs have also sued a range of executive officials and legislators, whereas Relators have not.

13. Relators obtained a temporary restraining order against TRTL and Seago and sought a temporary injunction. Relators acknowledged that preliminary relief would not permit them to restore abortion services banned by S.B. 8 given the remaining threat of

litigation from other private enforcers. App.216. They instead demonstrated why preliminary relief would alleviate the risk of frivolous and harassing litigation by TRTL and Seago despite Relators' compliance with S.B. 8's unconstitutional ban. App.106, 119–20, 125, 321–22, 326, 355–56, 359–60. As Relators explained, TRTL and Seago had made clear they would sue Relators if they perceived a violation of the Act, App.143, thus exposing Relators to abusive litigation designed to discourage the exercise of constitutional rights even if Relators in fact prevailed at trial. App.216, 273–74.

14. One day before Relators' temporary-injunction hearing, on September 12, TRTL and Seago filed an opposed motion with the MDL Panel to transfer all pending cases that challenge S.B. 8 to an MDL pre-trial judge, and to stay all trial-court proceedings. App.64.

15. The Non-Relator Plaintiffs subsequently filed a motion to consolidate their cases in the District Court for Travis County, which TRTL opposed and which remains pending. App.389–98. This motion was a formality: Although the Non-Relator Plaintiffs' thirteen cases (the "Non-Relator Cases") are technically filed in separate Travis County district courts, Travis County uses a central docketing system. *See* Travis

County Local Rules 1.2–1.3 (concerning central docket). Only two Travis County District Judges have heard motions in the Non-Relator Cases, and the cases have already been functionally consolidated through the use of joint filings and hearings. *See* MR.1477–84.

16. On September 13, the district court held a hearing on the Relators' temporary-injunction motion. Despite being subpoenaed, Real Party in Interest Seago refused to testify, App.218, 225–26, 230–31, and TRTL and Seago instead stipulated to (1) an agreed order for a temporary injunction based on the verified petition and other exhibits offered at the hearing, App.189–91, and (2) inclusion of an exhibit to the temporary-injunction order, App.234, 254. That exhibit identifies individuals who TRTL and Seago named as acting in concert with them to enforce S.B. 8, and individuals whom Seago identified, based on his personal knowledge, as preparing to sue Relators under S.B. 8.

17. The court temporarily sealed the exhibit, App.253, thus preventing public access, and forbade the Relators' counsel from disclosing the list's contents even to their clients in the case, App.234.

18. In the course of entering the agreed temporary injunction, the trial court found that Relators had a "probable right" to relief on their claims. App.190.

19. Defendants subsequently filed a motion to seal the temporary-injunction order's exhibit until Relators' case is fully resolved. App.161–68. A group of individuals moved to intervene to unseal that exhibit. App.175. The hearing on the motion is set for September 30. *See* App.191. Relators had planned to file an opposition to the sealing motion as it pertains to the temporary-injunction order's exhibit.[5]

20. In the meantime, the parties in Relators' case have also filed dispositive motions, each taking the position that claims between them could be resolved on one or more of those motions without aid of any discovery. TRTL filed a Plea to the Jurisdiction, MR.1689–94, and a Texas Citizens Participation Act ("TCPA") Motion to Dismiss ("TCPA Mot."), MR.1725–35. Plaintiffs filed a motion for summary judgment. App.270–310. Plaintiffs argue that, as a matter of law, S.B. 8 is facially unconstitutional under the Texas Constitution because it violates the

[5] Relators did not oppose the portion of the motion requesting sealing for Defendant Seago's home address, which Relators and others included in their original petitions as required by Tex. R. Civ. P. 79.

rights of Plaintiffs and their patients to privacy, due process, open courts, equal protection, and free speech; confers on uninjured persons the right to sue Plaintiffs in Texas courts; unlawfully delegates executive authority to private parties; and is unconstitutionally retroactive. App.288–310.

21. The responses to the motion for summary judgment and the TCPA motion to dismiss are due on October 6. *See* Tex. Civ. Prac. & Rem. Code § 27.003(e); Tex. R. Civ. P. 166a(c). All three motions are set for an October 13 hearing. MR.2093, 2097.

22. Although Relators and their counsel are not involved in the Non-Relator cases, it is their understanding that those cases do not involve sealing of the identities of individuals with whom TRTL and Seago are in active concert or participation and that no party in those cases has moved for summary judgment. *See* MR.1015–20. .

23. On Thursday, September 23, the MDL Panel granted a stay of all trial-court proceedings. App.002; MR.1046. The Panel provided no reasoning, or a date by which it will decide the motion to transfer. Although the letter accompanying the order was signed by a clerk, the order itself was not signed and did not indicate which members concurred

in it, thus violating Texas Rule of Judicial Administration 13.3(m). App.002.

24. In recent history, the Panel takes on average several months to decide a transfer motion—ranging from approximately one month to more than eleven months. *See, e.g.*, *In re Winter Storm URI Litig.*, No. 21-0313 (Tex. J.P.M.L., filed Apr. 7, 2021) (two months); *In re Ahern Rentals, Inc. "Trade Secret" Litig.*, No. 20-0592 (Tex. J.P.M.L., filed July 31, 2020) (one month); *In re Wendland Well Cases Litig.*, No. 20-0286 (Tex. J.P.M.L., filed Apr. 9, 2020) (more than 11 months).[6]

25. Given the emergent circumstances and widespread irreparable harm that S.B. 8 is causing, Relators filed an emergency request to the MDL Panel asking that the Panel lift the stay and allow district-court proceedings to move forward. App.044–58. Relators asked the Panel for a decision by Monday, September 27. App.045. The Panel has not acted on Relators' motion.

[6] The dockets for MDL proceedings are publicly available at https://www.txcourts.gov/about-texas-courts/multi-district-litigation-panel/available-multidistrict-litigation-cases/, and the facts stated above are based on a review of such cases from 2017 through the present.

SUMMARY OF ARGUMENT

The Panel's unexplained stay order constitutes a clear abuse of discretion and should be vacated.

First, the order flies in the face of accepted standards for a stay. S.B. 8 is causing widespread, irreparable harm that cannot be prevented by the Relators' temporary injunction. The stay will exacerbate that harm by disrupting ongoing briefing of Relators' motion for summary judgment, scheduled to be heard on October 13, and by effectively cancelling a September 30 hearing on the propriety of sealing a portion of the trial court's temporary-injunction order. In addition, the trial court has now found that Relators have a probable right to relief on their claims, relief that is blocked by the Panel's stay order.

Second, TRTL and Seago are not likely to succeed on their MDL transfer motion. Indeed, a grant of the motion—which is nothing more than a brazen attempt to forum-shop and delay—would constitute an abuse of discretion as a matter of law. The Non-Relator cases share a single set of counsel, the same set of defendants, and were proceeding in lockstep even before Non-Relators' counsel filed a formal (and notably opposed) consolidation motion. Relators' case is not related to the Non-

Relators' cases, including because counsel are entirely separate, the claims are distinct, and nearly all of the Defendants named in the Non-Relators' Cases are not named in the Relators' action. This Court's mandamus authority is necessary to correct the Panel's error because Relators have no adequate appellate remedy for the harm that error is causing. Even if this Court reviews the underlying case on appeal—or is called upon to review a future MDL transfer order—it cannot possibly correct the constitutional and other harm caused by the stay.

ARGUMENT

To obtain mandamus relief, a relator must show the tribunal abused its discretion and the relator has no adequate appellate remedy. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004, writ conditionally granted) (orig. proceeding); *Walker v. Packer*, 827 S.W.2d 833, 839–40 (Tex. 1992, pet. denied) (orig. proceeding). "The test for abuse of discretion is 'whether the court acted without reference to any guiding rules and principles' or, stated another way, whether its decision was arbitrary or unreasonable." *City of San Benito v. Rio Grande Valley Gas Co.*, 109 S.W.3d 750, 757 (Tex. 2003) (quoting *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 242 (Tex. 1985)).

I. The Panel Plainly Abused Its Discretion in Granting an Indefinite Stay

A. The stay will interfere with pending dispositive and sealing motions and exacerbate immense harms.

The Relators moved for summary judgment on all of their claims, App.270–310, and a hearing on that motion has already been noticed for October 13, MR.2093. On that same day, the district court will hear Defendants' Plea to the Jurisdiction, along with their TCPA Motion. MR.2097. The parties have already filed opening briefs on these motions, and the motions all involve interrelated issues of law. Accordingly, there could be a final adjudication of Relators' claims against Defendants in a matter of weeks, which would then be subject to review on appeal. A stay of the trial-court proceedings is a manifest injustice to Relators because it will unnecessarily delay such resolution, thus undermining rather than furthering "the just and efficient conduct of the case[]." Tex. R. Jud. Admin. 13.3(a)(2).

Although the Relators now have a temporary injunction against TRTL and its collaborators, that injunction does not provide sufficient relief to actually restore abortion provision for Texans. *See, e.g.*, App.376–77. For this reason, Relators need a final declaration of S.B. 8's unconstitutionality at the earliest possible time, and the trial court

already determined that Relators have a "probable right" to that relief. App.190.

A stay of the trial-court proceedings will also violate the public's right to a prompt determination on the propriety of sealing the exhibit to the temporary-injunction order in this case. Currently, the hearing on Defendants' motion to seal is set for September 30. If the stay is not lifted, the district court's provisional sealing decision will effectively become indefinite.

It is imperative—both to protect Relators' rights to review the exhibit (currently classified as attorneys'-eyes only) as well as to protect the public's right of access—that the September 30 hearing go forward. Under Rule 76a, "[a] hearing, open to the public, on a motion to seal court records shall be held in open court *as soon as practicable*, but not less than fourteen days after the motion is filed and notice is posted." Tex. R. Civ. P. 76a(4) (emphasis added). This deadline serves to protect the "strong presumption that all court records are open to the public," *True & Sewell, P.C. v. Arkoma Basin Res., Inc.*, No. 05-99-00692-cv, 1999 WL 970924, at *1 (Tex. App.—Dallas Oct. 26, 1999), and that the movant has carried its "heavy burden[]" of proof necessary "to secure a[] [sealing]

order," *Toyota Motor Sales, U.S.A., Inc. v. Reavis*, No. 05-19-00284-cv, 2021 WL 389094, at *3 (Tex. App.—Dallas Feb. 4, 2021) (quotation marks omitted).

Moreover, the presumption of openness is at its apex with respect to court decisions like the temporary-injunction order, of which the attached exhibit is a part. *See* Tex. R. Civ. P. 76a(1) ("No court order or opinion issued in the adjudication of a case may be sealed."); App.164 (Defendants' own statement that "the temporary injunction attaches (as Exhibit A) a list of individuals who are bound under the temporary injunction"); *HouseCanary, Inc. v. Title Source, Inc.*, 622 S.W.3d 254, 263–64 (Tex. 2021) (describing the "public's right of access to judicial proceedings" as "a fundamental element of the rule of law" (quotation marks and citation omitted)).

If left in place, the stay will effectively preclude the September 30 hearing and permit the continued sealing of the order's exhibit without any showing that Defendants have carried their heavy burden to restrict public access. And Defendants are unlikely to be able to do so. In support of their motion to seal, Defendants provided a declaration from Seago, describing threatening communications he has received. App.172–73.

While this testimony might justify sealing of his home address, which Relators do not oppose, the declaration does not establish that the *other individuals* acting in concert with TRTL have received or will receive similar threats, and does not suggest that the communications to which Seago points resulted from Seago's role in Relators' case. To the contrary, Seago has been actively publicizing his role with respect to S.B. 8, as well as his intention to vigorously enforce it against providers.[7] Threats of violence have no place in a civilized society and in some circumstances may provide a basis for sealing. However, Defendants have provided no support for their assertion that Relators' lawsuit is responsible for the threats against Seago, that it will cause the individuals named in the exhibit to be similarly targeted, or that those individuals identified as people prepared to enforce S.B. 8 in open court proceedings have any expectation of privacy in their names anyway.

[7] *See, e.g.*, Emma Green, *What Texas Abortion Foes Want Next*, The Atlantic (Sept. 2, 2021), https://www.theatlantic.com/politics/archive/2021/09/texas-abortion-ban-supreme-court/619953/; Tierney Sneed, *Texas's 6-Week Abortion Ban Lets Private Citizens Sue in an Unprecedented Legal Approach*, CNN News (Sept. 1, 2021), https://www.cnn.com/2021/08/31/politics/texas-six-week-abortion-ban-supreme-court-explainer/index.html; Neelam Bohra, *Texas Abortion Law That Bans Procedure As Early As Six Weeks Set to Go Into Effect After Court Cancels Hearing, Denies Motions*, Tex. Tribune (Aug. 29, 2021), https://www.texastribune.org/2021/08/29/texas-abortion-law-5th-circuit-court.

Under these circumstances, indefinitely delaying briefing and resolution of the sealing motion constitutes an abuse of discretion.

B. Defendants are not likely to succeed on their MDL transfer motion.

The Panel's stay order was an abuse of discretion because Defendants are unlikely to succeed on their transfer motion and cannot claim prejudice without a stay. A stay is proper only when a court reaches "the tentative opinion that relator is entitled to the relief sought," *Republican Party of Tex. v. Dietz*, 924 S.W.2d 932, 932–33 (Tex. 1996) (orig. proceeding) (per curiam) (quoting Tex. R. App. P. 121), and "the facts show that relator will be prejudiced" without relief, *id.*

Defendants' transfer motion fails to establish that the cases challenging S.B. 8 meet even the minimum "threshold" for an MDL transfer: whether the cases "involv[e] common questions of fact." *In re Deepwater Horizon Incident Litig.*, 387 S.W.3d 127, 128 (Tex. J.P.M.L. 2011); Tex. R. Jud. Admin. 13.1(b); *id.* 13.3(*l*). Indeed, cases in which the Panel has granted transfer typically involve fact-intensive mass torts, disasters, or products-liability claims—not facial challenges to a statute's constitutionality. *See, e.g.*, *In re Winter Storm URI Litig.*, No. 21-0313 (Tex. J.P.M.L., mot. to transfer granted June 10, 2021); *In re Wendland*

Well Cases Litig., No. 20-0286 (Tex. J.P.M.L., mot. to transfer granted Apr. 7, 2021); *In re Waymon L. Boyd Litig.*, No. 21-0022 (Tex. J.P.M.L., mot. to transfer granted Mar. 26, 2021). By contrast, "[w]here only common ultimate issues are presented, transfer is improper." *In re Pers. Inj. Litig. Against Great Lakes Dredge & Dock Co.*, 283 S.W.3d 547, 548 (Tex. J.P.M.L. 2007) (citation omitted).

Here, the pending lawsuits seek to invalidate all or a portion of S.B. 8 on its face, but that object of the litigation—even if shared in part by the Relators' and Non-Relators' cases—is not a common question of fact. It is instead a common goal. *See In re Ad Valorem Tax Litig.*, 216 S.W.3d 83, 85–86 (Tex. J.P.M.L. 2006) (holding that "Rule 13 does not purport to strive for uniformity of *law*" (emphases in original)). Where the proposed related cases do not present common questions of fact, the MDL Panel "lack[s] authority" to assign them to a pretrial court. *In re Deepwater Horizon Incident Litig.*, 387 S.W.3d at 128.

Further, Defendants cannot credibly claim prejudice absent a stay. Although Defendants have argued that a stay will "serve the interests of judicial economy and consistency by avoiding duplicative or conflicting judicial rulings while the panel considers [their] motion," App.076, they

have remarkably *opposed* consolidation of the Non-Relator Plaintiffs' cases, which would serve that same asserted interest. Defendants' inconsistency makes clear that the request for a stay is in actuality little more than an attempt to delay this case indefinitely in furtherance of their ultimate goal of forum-shopping through an MDL transfer.

In contrast to this lack of prejudice to Respondents, the facts of this case show that a stay is exacerbating acute, irreparable, and widespread harm to patients and abortion providers. *See supra* Statement of Facts ¶¶ 3–8.

II. Relators Have No Adequate Appellate Remedy

Relators are entitled to mandamus relief because they lack an appellate remedy from the Panel's stay order. The order is not appealable, and Rule 13.9(a) of the Rules of Judicial Administration provides that review of a Panel order may be had in this Court only in an original proceeding. App.012–13; *see In re Off. of Att'y Gen.*, 257 S.W.3d 695, 698 (Tex. 2008, writ conditionally granted) (orig. proceeding) (holding no remedy by appeal where temporary restraining order was not appealable).

Moreover, as discussed above, Relators and their patients will continue to suffer injuries from an indefinite stay that prolongs this case. And there is good reason to believe those harms will continue for a significant period of time, given the Panel's recent practice of taking on average *several months* to decide motions to transfer. *See supra* Statement of Facts ¶ 24. Keeping a stay of this kind in place to block Relators' claims against Defendants, when those claims could well be finally resolved in just a few weeks from now, is not only unprecedented but a manifest miscarriage of justice.

CONCLUSION & PRAYER

This Court should grant the petition, direct the MDL Panel to vacate its stay of the trial-court proceedings in Relators' case, and clarify that an MDL transfer of Relators' case would be improper.

Dated: September 29, 2021

By: */s/ Austin Kaplan*
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** Application for pro hac vice admission forthcoming*

MANDAMUS CERTIFICATION

Pursuant to Texas Rule of Appellate Procedure 52.3(j), I certify that I have reviewed this petition and that every factual statement in the petition is supported by competent evidence included in the appendix or record. Pursuant to Rule 52.3(k)(1)(A), I certify that every document contained in the appendix is a true and correct copy.

/s/ Austin Kaplan
Austin Kaplan

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been electronically filed and served by e-mail this 29th day of September, 2021, to the following counsel of record:

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/s/ Austin Kaplan
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CERTIFICATE OF COMPLIANCE

I certify that this document complies with Rule 9.4 of the Texas Rules of Appellate Procedure and that the portions of the motion required by Rule 9.4(i)(1) do not exceed 4,500 words.

/s/ Austin Kaplan
Austin Kaplan