Nos. 21-463 & 21-588

In the Supreme Court of the United States

WHOLE WOMAN'S HEALTH, ET AL., PETITIONERS

v.

AUSTIN REEVE JACKSON, JUDGE, DISTRICT COURT OF TEXAS, 114TH DISTRICT, ET AL.

UNITED STATES, PETITIONER

v.

TEXAS, ET AL.

ON WRITS OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR RESPONDENTS JACKSON, CARLTON, THOMAS, YOUNG, BENZ, PAXTON, AND THE STATE OF TEXAS

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REPLY BRIEF

Notwithstanding petitioners' incendiary rhetoric, nothing has been nullified. Nor has Texas delegated its authority to enforce state proscriptive law to private parties. Texas has created a private tort cause of action that is enforceable in state court and appealable through the Texas court system—subject to the ultimate review of this Court on issues of federal law.

This Court has recognized for centuries that "[s]tate courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law"—an obligation they are presumed to exercise in good faith. *Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976) (citing *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 341-44 (1816)). Texas courts are no different. Nor is the right to terminate a pregnancy before viability as defined in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

At no time has the Court recognized a right to what petitioners really seek here—to turn a lower federal court into an appellate tribunal over a State's judiciary. The Court should not deviate from this long history to create special rules just because this case implicates abortion.

ARGUMENT

I. Whole Woman's Health Cannot Establish Jurisdiction.

The nature of the WWH petitioners' constitutional grievances does not permit federal courts to disregard the limits of their own jurisdiction. "Constitutional judgments . . . are justified only out of the necessity of adjudicating rights in particular cases between the litigants brought before the Court." *Broadrick v. Oklahoma*, 413

U.S. 601, 610-11 (1973); *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Petitioners point to three alleged injuries: a general fear of private litigation, a specific fear of the fee-shifting provision of SB 8, and the potential for indirect enforcement of SB 8 through other regulatory regimes.

The first injury is insufficient because it is neither traceable to nor redressable by the named defendants; the other two are foreclosed by state law. The WWH petitioners cannot avoid this conclusion by naming the Attorney General—who cannot enforce SB 8—and asserting that a suit against him must be proper because *some* state official must be amenable to suit. Such a theory fails to establish standing. It also runs afoul of sovereign immunity because the *Ex parte Young* remedy is not available against an official who cannot or will not enforce the law against a plaintiff. 209 U.S. 123, 157 (1908). To do so would be an improper "attempt[] to make the state a party." *Id.*

A. Fear of private lawsuits does not create standing to sue executive officials or judges.

The WWH petitioners primarily attempt to establish jurisdiction by focusing on the possibility of *private* lawsuits from unidentified third parties. This is insufficient to establish standing or overcome sovereign immunity against the *state* respondents who, as all appear to recognize, cannot bring an SB 8 lawsuit.

1. Respondents do not dispute that, under certain circumstances, a litigant does not need to violate an allegedly unconstitutional statute to seek review of its constitutionality. *I.N.S. v. Chadha*, 462 U.S. 919, 930 (1983). But that litigant may only bring such an action against a government actor "[w]here threatened action by government is concerned." *Susan B. Anthony List v. Driehaus*,

573 U.S. 149, 158 (2014) (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007)). Even if *some* private person were to sue petitioners, no *state* official could bring such a suit. And jurisdiction is a defendant-specific, claim-specific inquiry. *Town of Chester v. Laroe Ests., Inc*, 137 S. Ct. 1645, 1650 (2017).

And injury-in-fact is not the WWH petitioners' only problem: any potential future litigation cannot be "traced to 'allegedly unlawful *conduct' of the defendant*." *Collins v. Yellen*, 141 S. Ct. 1761, 1779 (2021) (emphasis added) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). That "the provision of law that is challenged" creates a condition that might lead to a constitutional violation is not enough. *Id.* Here, the WWH petitioners insist (at 14) that it is the existence of SB 8's cause of action—not any conduct by defendants—that "has coerced compliance with the statute." But courts enjoin people—not provisions. *California v. Texas*, 141 S. Ct. 2104, 2116 (2021). And this injury is neither caused nor redressable by the named respondents.

2. Under many circumstances, government officials can enforce laws by initiating civil suits. *See Terrace v. Thompson*, 263 U.S. 197, 211-12 (1923). Petitioners do not appear to dispute that state executive officials are expressly prohibited from bringing SB 8 lawsuits. Tex. Health & Safety Code § 171.207(a); *see* WWH Br. 6. As a result, they are doing nothing to threaten petitioners with SB 8 lawsuits. And prohibiting them from doing something they cannot do in the first place would do nothing to alleviate the alleged injury. *See Phelps v. McDonald*, 99 U.S. 298, 308 (1878) (courts may compel those actions a party could voluntarily take).

To the contrary, petitioners bemoan (*e.g.*, at 6, 8, 31), that the Texas Legislature created a private tort cause

of action through SB 8. But they cannot name state legislators as defendants. *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). And they do not claim a federal court can order a state legislature to enact or repeal legislation. *Cf. New York v. United States*, 505 U.S. 144, 188 (1992) (cannot enact); *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476-77 (2018) (cannot repeal).

3. The WWH petitioners also insist that this injury can be redressed by court personnel, including Judge Jackson. But this Court distinguishes between an "enforcement action of a *private party*" and "enforcement action of . . . the government." *MedImmune*, 549 U.S. at 130. The filing of a lawsuit for damages—including statutory damages—is the former and traceable to the private plaintiff—not the court called upon to hear the suit.

a. Petitioners' alleged injury is not traceable to a judge who might hear an SB 8 action. A private litigant who initiates a lawsuit "may be appropriately characterized as [a] 'state actor[]'" only under limited circumstances defined by this Court. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939-40 (1982). And a "long li[n]e of cases" has concluded "state action" exists "only after a final judgment or otherwise dispositive order" from the state court. *Henry v. First Nat'l Bank of Clarksdale*, 444 F.2d 1300, 1309 (5th Cir. 1971); *see also* Tex. Br. 67 (collecting cases). "[P]articipation by a private party in litigation, without more, does *not* constitute state action." *Slotnick v. Garfinkle*, 632 F.2d 163, 166 (1st Cir. 1980) (emphasis added).

The WWH petitioners appear finally to acknowledge that they cannot hold Judge Jackson liable for how he may apply *Casey*. Instead, the mere possibility that he could allow a SB 8 suit to "advance" to an unspecified point, they insist (at 41), raises "the specter of default

judgments" and "chill[s] their constitutionally protected activity." But even a default judgment cannot exist until one litigant seeks it. And standing cannot be based on "the independent action of some third party not before the court." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

b. The WWH petitioners have also not identified anything Judge Jackson can be ordered not to do that would remedy their fear of future private lawsuits. He cannot stop a suit from being filed, and ordinary procedural rules require defendants to respond—often without any involvement from the court. The only way to avoid those is to enjoin the law itself, which the court cannot do, *see Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021) (*Jackson II*), or enjoin the would-be litigants. As no such litigation is "actual or imminent," the WWH petitioners seek only this Court's advice on how a state trial court should resolve it—a remedy the Court cannot provide. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). The WWH petitioners' two counterarguments lack merit.

First, the WWH petitioners argue (at 31-33) that *Ex parte Young* "expressly allows an injunction against 'commencing suits,'" or to "'stay proceedings'" in state court. But *Ex parte Young* involved an anti-suit injunction *after* enforcement had already begun—not the docketing or resolution of a new pleading. *See* Tex. Br. 43-46. Moreover, the injunction was aimed at the parties, specifically at a government executive official enforcing a complained-of law, not the court or its personnel. *Ex parte Young*, 209 U.S. at 162-63; *see also Mitchum v. Foster*, 407 U.S. 225, 242 (1972). Indeed, even in 1908, it was well established that anti-suit injunctions are "directed only to the parties," not the court. 2 JOSEPH

STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 166 § 875 (1836). That understanding has persisted even in the rare circumstances where this Court has held that a federal court may enjoin state-court proceedings. *Younger v. Harris*, 401 U.S. 37 (1971) (addressing injunction to a district attorney).

Second, the WWH petitioners contend (at 22-23) that section 1983 contemplates suits against state judges under very narrow circumstances. Leaving aside that those circumstances do not apply here, "Article III also imposes limitations on the availability of injunctive relief against a judge." *Pulliam v. Allen*, 466 U.S. 522, 538 n.18 (1984). Those limitations doom a bid to enjoin Texas's courts.

Initially, as the State respondents have explained (at 22-23), a judge is not adverse to the litigants in his courtroom merely because his adjudicatory role may require him to consider the constitutionality of a relevant statute. This Court has blessed section 1983 suits against judges performing non-adjudicatory functions such as initiating attorney discipline (*see* Tex. Br. 24-25; Tex. Br. in Opp'n 22-23), but WWH petitioners can find no support for their contention that Judge Jackson is adverse to them because he *may* someday be called upon to adjudicate an SB 8 lawsuit.

Moreover, before a federal court may issue a declaratory judgment that a state-court judge had a "practice" of entering orders that "violat[e]" federal rights, *Pulliam*, 466 U.S. at 526, the WWH petitioners must still show such an unlawful order is "imminent," *Clapper*, 568 U.S. at 409. It is entirely speculative that Judge Jackson (or any other state judge) will misapply *Casey* in adjudicating SB 8. Indeed, if SB 8 is as "patently unconstitutional" as the WWH petitioners insist (at 1, 5-6), state

judges will (and must) quickly dismiss such suits. And the pre-judgment conduct of litigation is not attributable to the judge presiding over the case (or the clerk who docketed it), so any "chilling effect" is not traceable to them. *See supra* I.A.1.

B. Any risk of fee-shifting under section 4 of SB 8 is entirely speculative.

Also insufficient to establish standing is the WWH petitioners' related argument (at 36) that they are injured because executive officials could seek attorney's fees as "prevailing parties" under section 4 of SB 8, which created Texas Civil Practice and Remedies Code section 30.022. Because this specific request to challenge section 4 is outside the question presented, the Court should not consider it. But even if it did, the theory would fail because the WWH petitioners have not plausibly alleged actual or imminent injury arising from the fee-shifting provision.

To establish standing, a future "injury must be *certainly impending*." *Clapper*, 568 U.S. at 409. "'[A]llegations of *possible* future injury' are not sufficient." *Id.* As to suits brought under SB 8, a nonsensical allegation of future injury—that an official may seek a fees award in a suit he cannot (or does not) bring—is plainly insufficient as an "imminent" injury. *Id.* As to defending abortion regulations in other cases (like this one), standing still runs up against the imminence requirement. The WWH petitioners and other abortion proponents may have a habit of challenging Texas abortion regulations, but the mere possibility of future fee-shifting in such cases does not suffice. *Id.* at 409. And standing in *this* case cannot be based on a possible request for attorneys' fees *here*. *See In re TMT Procurement Corp.*, 764 F.3d 512, 525 (5th Cir. 2014) (per curiam); *cf. Lynch v.*

Donnelly, 465 U.S. 668, 684-85 (1984) (a litigant cannot prove its case based on "the very act of commencing [its] lawsuit").

The district court thought the possibility of fee-shifting "chill[s]" the WWH petitioners' exercise of their First Amendment right to petition, and that "chill" qualified as an injury-in-fact. WWH.ROA.1506; *see* WWH.ROA.756. That theory of injury-in-fact requires the plaintiff to show (1) an "intention to engage in a course of conduct arguably affected with a constitutional interest," (2) his intended future conduct is "arguably . . . proscribed by [the policy in question]," and (3) "the threat of future enforcement of the [challenged policies] is substantial." *Susan B. Anthony List*, 573 U.S. at 161-64. Petitioners do not satisfy that standard.

Assuming that *Ex parte Young could* apply to an internal court rule like fee-shifting, SB 8's fee-shifting provision does not "arguably . . . proscribe[]" the WWH petitioners from filing lawsuits to challenge Texas abortion regulations. *Id.* at 162; *see also Laird v. Tatum*, 408 U.S. 1, 11 (1972). Having to bear the costs of a lawsuit is not a prohibition on filing it. *Cf. Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, Inc.*, 814 F.2d 358, 373 (7th Cir. 1987). Moreover, there is no plausible "threat of enforcement," *Susan B. Anthony List*, 573 U.S. at 161-64, because executive officials cannot seek fees as prevailing parties in litigation they cannot bring, and any fee-shifting for their defense of Texas regulations depends on a chain of contingencies. *See Clapper*, 568 U.S. at 410-11.

C. "Indirect enforcement" does not create standing or avoid sovereign immunity.

The WWH petitioners' reliance on the threat of "indirect enforcement" fails for a simple reason: such enforcement is forbidden by state law.

1. As State respondents have explained (at 2, 18-20) Texas government officials are prohibited by law from enforcing SB 8 either directly *or indirectly*. The WWH petitioners suggest (at 34) that respondents are wrong in their interpretation of Texas law, and the executive officials really *do* have authority to indirectly enforce SB 8 through general disciplinary proceedings. Leaving aside that any lack of clarity on this point is a reason SB 8 should be interpreted by state courts before reaching this tribunal, the Fifth Circuit correctly explained that the WWH petitioners' reading "ignores the statute's plain language." *Whole Woman's Health v. Jackson*, 13 F.4th 434, 442 (5th Cir. 2021) (per curiam) (*Jackson I*).[1]

But even if the Texas Attorney General is wrong about Texas law, the WWH petitioners cannot show they face an "imminent," or "certainly impending," threat of indirect enforcement. *Clapper*, 568 U.S. at 409. "[T]he mere existence of enforcement power does not create a justiciable controversy under Article III with enforcement officials." *In re Justices of Sup. Ct. of P.R.*, 695 F.2d 17, 24 (1st Cir. 1982) (Breyer, J.); *see also Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) ("[a]llegations of possible future injury" are not enough to demonstrate standing). Rather, because the "threatened injury must be *certainly impending*," *Clapper*, 568 U.S. at 409, they must show some threat that the named defendants will use that power. *Susan B. Anthony List*, 573 U.S. at 158. In the light of respondents' express representations that they do not think they even *can* enforce SB 8, any assertion that they *will* is purely speculative. *See*

[1] Indeed, the United States' premise (*e.g.*, at 16) is that the WWH petitioners are unable to obtain pre-enforcement constitutional review in federal court because SB 8 is not enforced by government officials.

WWH.ROA.71. And even if the WWH petitioners have standing based on their indirect enforcement theory, that would at most allow them to challenge the constitutionality of indirect enforcement proceedings. *See Lewis v. Casey*, 518 U.S. 343, 357 (1996).

2. The executive officials cannot be sued under *Ex parte Young* for much the same reasons. *Ex parte Young* permits an injunction against enforcement of state law only when directed at the officials who enforce that law. 209 U.S. at 159. And "[t]he doctrine is limited to that precise situation." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011). Since these executive officers cannot "indirectly enforce" SB 8, they have immunity from any request to enjoin them from indirectly enforcing SB 8.

D. The Attorney General—who does not enforce SB 8—cannot be an appropriate defendant.

Finally, the WWH petitioners insist (at 36) that they must be allowed to sue the Attorney General "if no other state official is an appropriate defendant." That argument gives the game away: the WWH petitioners are not seeking to enjoin "the acts of the official, the statute notwithstanding," as this Court's precedent requires. *Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923). Instead, they are "making [the Attorney General] a party as a representative of the state, and thereby attempting to make the state a party"—exactly what *Ex parte Young* forbids, 209 U.S. at 157—and to "enjoin" the statute itself, which is an impossibility, *see Nken v. Holder*, 556 U.S. 418, 428 (2009).

But more fundamentally, the problem with the WWH petitioners' proposed revolution in federal litigation is that it treats the requirement of "cases and controversies" as a nuisance that may be dispensed with when it

becomes an obstacle to "correcting constitutional errors." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 489 (1982). That "philosophy has no place in our constitutional scheme," *id.*, and is "inimical to the Constitution's democratic character," *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 133 (2011).

II. The United States Failed to Establish Jurisdiction.

The United States also cannot establish a case or controversy with either the only defendant it has sued directly—the State of Texas—or the individuals it seeks to sue indirectly. Its amorphous theory of sovereign harm is not cognizable. And there is no evidence its federal programs are facing imminent harm.

A. The United States is not legally adverse to Texas.

The United States' claim fails at the outset because under *Muskrat v. United States*, 219 U.S. 346, 361-62 (1911), a request to determine the constitutionality of laws by itself is not a justiciable controversy. *See* Tex. Br. 30-34. The United States makes three attempts to avoid *Muskrat*'s holding. None has merit.

First, the United States claims (at 25) to seek "an injunction prohibiting S.B. 8's enforcement," "not an advisory opinion." U.S. Br. 25. But the *Muskrat* plaintiffs also asked "to restrain the enforcement of [challenged] legislation." 219 U.S. at 349. Because parties almost never admit that they seek an advisory opinion, courts look behind labels: under *Muskrat*, enacting the law and defending its constitutionality are not enough to make a sovereign legally "adverse" to a plaintiff. *Id.* at 361.

Second, the United States characterizes (at 25) the challenged laws in *Muskrat* as "allocat[ing] private rights" and SB 8 as "implement[ing] Texas's preferred public policy." But *all* laws implement the sovereign's preferred public policy: the laws at issue in *Muskrat* implicated Indian policy and assimilation as well as private rights. *See Muskrat*, 219 U.S. at 348-50. In any event, SB 8 does affect private rights, as it concerns the liability of one individual to another regarding a tort action. *See Crowell v. Benson*, 285 U.S. 22, 51 (1932). And, by definition, the court's judgment in such a suit will necessarily determine private rights. *Judgment*, BLACK'S LAW DICTIONARY (11th ed. 2019).

Third, the United States takes issue (at 25 n.5) with *Muskrat*'s statement that courts lack jurisdiction to "settle the doubtful character of the legislation in question," claiming it refers to a previous hesitancy to issue declaratory judgments, even though the *Muskrat* plaintiffs sought to restrain enforcement of the laws. 219 U.S. at 349, 361-62. But respondents' argument follows from the reasoning and holding of *Muskrat*, not just that particular quote.

Moreover, this Court has continued to cite *Muskrat*'s jurisdictional holdings—even after any doubts about declaratory judgments had been resolved. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998); *Flast v. Cohen*, 392 U.S. 83, 96 (1968). For good reason: *Muskrat*'s larger principle—that Article III requires adverse legal interests, not mere abstract disagreement about the constitutionality of a law—is still applicable. *Hollingsworth v. Perry*, 570 U.S. 693, 707 (2013).

For example, in *Texas v. Interstate Commerce Commission*, 258 U.S. 158 (1922), Texas sued two federal agencies because it thought portions of a federal statute

were unconstitutional. *Id.* at 159. It sought "a declaration" of unconstitutionality, "an annulment" of past agency actions, and "an injunction restraining" enforcement. *Id.* at 159-60. The Court dismissed for lack of jurisdiction, holding that the "abstract question of" constitutionality "[o]bviously" "does not present a case or controversy." *Id.* at 162. Only when a statute's enforcement will prejudice a party' rights can its validity "be called in question by a suitor and determined by an exertion of the judicial power." *Id.* (citing *Muskrat*, 219 U.S. at 361).

The same problems apply here: standing on its own, a sovereign-versus-sovereign suit does not permit a court to settle the constitutionality of a challenged law, and the people most affected by the suit (future SB 8 plaintiffs) are not parties here, other than the few individual intervenors.

B. The United States cannot use a suit against Texas as a proxy to sue those whom it cannot sue directly.

The United States plays a game of bait and switch in its effort to enjoin (1) countless, unidentified, would-be private plaintiffs, and (2) the entire state judiciary, including local officials who enforce court judgments. U.S. Br. 31-40. The United States could not have sued these individuals directly, Tex. Br. 17-30, and it does not contend otherwise, *see* U.S. Br. 33. Nevertheless, when pressed about how it can establish jurisdiction to sue Texas, the United States points (at 31) to the actions of these unknown individuals. And when pressed about how it could establish jurisdiction to sue the unknown individuals, it points back to Texas on the theory that the State and the unknown individuals are in "concert" under Rule 65(d)(2)(C). U.S. Br. 34, 40.

The biggest flaw in the United States' position is that traceability and redressability turn on "the defendant's actual action," *Clapper*, 568 U.S. at 414 n.5—not individuals who "were not parties to the suit" and who may or may not be bound by a judgment. *Lujan*, 504 U.S. at 568. That these third parties might be affected by "an incidental legal determination" is not dispositive because the judgment is not "binding upon" them. *Id.* at 569. Put another way, the United States must "satisfy[] the traceability and redressability requirements of standing against a defendant," not "nonparties 'who are in active concert' with a defendant." *Jacobson v. Florida Sec'y of State*, 974 F.3d 1236, 1255 (11th Cir. 2020) (quoting Fed. R. Civ. P. 65(d)(2)(C)).[2] It cannot do so based merely on the "presence of a disagreement," over the constitutionality of SB 8—"however sharp and acrimonious it may be." *Hollingsworth*, 570 U.S. at 704.

C. The United States has no injury-in-fact to support a Fourteenth Amendment claim.

The United States hopes its sovereign status will sweep aside these limits Article III places on other litigants, but the United States' standing "depends upon the same general principles which would authorize a private citizen to apply to a court of justice." *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 285 (1888). "[T]he government must show that, like the private individual, it has such an interest in the relief sought as entitles it to move in the matter." *Id.*

1. The United States lacks standing when it (1) has "no pecuniary interest in the remedy sought," (2) is under "no obligation to the party who will be benefited to

[2] The United States' assertion that the State and private parties are acting in concert is also wrong. *Infra* III.A.1.

sustain an action for his use," and (3) has no "obligation" "to the public or to any individual." *United States v. Am. Bell Tel. Co.*, 128 U.S. 315, 367 (1888). The United States does not assert any "pecuniary" or "proprietary" interests, U.S. Br. 15, nor does it claim to be under any "obligation . . . to sustain an action for" the abortion providers or their patients who would benefit from any relief issued in this case. *Am. Bell*, 128 U.S. at 367.

The United States also does not have "any obligation . . . to the public or to any individual" to sue to enforce *Casey*. *Id. Casey* creates a negative right to be free from government restrictions, not a positive right to have the United States ensure that abortions occur: "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation." *Harris v. McRae*, 448 U.S. 297, 316 (1980); *see also Casey*, 505 U.S. at 872 (plurality op.). Thus, even if Texas had unconstitutionally burdened the right to abortion, the United States would not have standing because it has no duty to remove those burdens.

Moreover, the Constitution gives Congress, not the executive branch, "power to enforce" the Fourteenth Amendment "by appropriate legislation." U.S. CONST. amend. XIV, § 5. Congress has provided various methods for enforcing Fourteenth Amendment rights, most notably section 1983. But it has not given the Executive any duty to enforce *Casey*, for example, by adopting the Vice President's proposed preclearance regime. *Cf.* 52 U.S.C. § 10304.[3] Whether Congress can create such an

[3] Alice Miranda Ollstein, *How Kamala Harris Would Protect Abortion Rights*, POLITICO (May 28, 2019), https://www.politico.com/story/2019/05/28/how-sen-kamala-harris-would-protect-abortion-rights-1476696.

enforcement role for the Executive is unclear, *see generally Shelby County v. Holder*, 570 U.S. 529 (2013), but what is clear is that Congress has not done so.

2. The United States nevertheless claims (at 16) that its "sovereign interest in ensuring that a State cannot nullify" *Casey* gives it standing. That runs into three problems: (1) the United States has no such interest, (2) that interest is not implicated here, and (3) it cites no cases holding a "sovereign interest" suffices for standing.

First, aggregating alleged private injuries does not transform them into a sovereign injury. A sovereign plaintiff asserting "nothing more than a collectivity of private suits" has "[n]o sovereign or quasi-sovereign interests" at stake. *Pennsylvania v. New Jersey*, 426 U.S. 660, 666 (1976) (per curiam).

Second, SB 8 does not "nullify" *Casey*. Nullification was the theory that a State could "declare a federal law unconstitutional and therefore void." *Nullification Doctrine*, BLACK'S LAW DICTIONARY (11th ed. 2019). Far from declaring *Casey* void, SB 8 incorporates its "undue burden" test, unless and until this Court "overrules *Roe v. Wade* or *Planned Parenthood v. Casey*." Tex. Health & Safety Code § 171.209(b)(2), (e) (citations omitted).

Third, none the United States' authority holds that Article III standing can be based on this kind of "sovereign interest." The United States primarily relies (at 14-15) on *Debs*. But the United States ignores that it had standing in *Debs* based on an "obligation [that] existed on the part of the United States to the public," *Am. Bell*, 128 U.S. at 367. Specifically, the United States had the "dut[y] of a government to remove obstructions from the

highways under its control." *In re Debs*, 158 U.S. 564, 586 (1895).[4] No such duty exists here.

3. The United States also claims a sovereign injury from "judicial review" being "thwart[ed]." U.S. Br. 18. But judicial review cannot have been thwarted: SB 8 is implemented exclusively through litigation. It cannot therefore be implemented at all without an opportunity for judicial review of its constitutionality. Tex. Br. 54-57. Moreover, this alleged interest is dependent on this Court's ultimate rejection of the WWH petitioners' theory of standing. Though the Court certainly *should* reject that theory, the United States' view creates a here-today-gone-tomorrow theory of standing that is inconsistent with the notion that standing must be determined as of the time a complaint is filed. *Lujan*, 504 U.S. at 569.

Most fundamentally, this Court has expressly rejected the view that standing must exist just because a sovereign feels the need to "step[] in to represent the interests of particular citizens who, for whatever reason, cannot represent themselves." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 600 (1982). If Congress wished, it could—subject to the limitations of Article III—provide different remedies that afford the Attorney General an interest to vindicate. But it has not done so. If the United States' alleged injuries flow from the absence of its preferred version of judicial review, then those wounds "were self-inflicted, resulting from decisions by [its] legislature[]." *Pennsylvania*, 426 U.S. at 664. "No [sovereign] can be heard to complain about damage inflicted by its own hand." *Id.* And the concern that "no one would have standing" to challenge a law

[4] The same is true for *United States v. Minnesota*, 270 U.S. 181, 194 (1926), which the United States acknowledges turns on the existence of federal "obligations." U.S. Br. 26.

"is not a reason to find standing." *Clapper*, 568 U.S. at 420.

D. The United States faces no injury for its preemption and intergovernmental-immunity claims.

The United States is wrong to contend (at 30) that it has standing because the district court "found" that federal employees and contractors face civil liability under SB 8. As Texas has explained (at 39-41 & n.12, 60), this was legal error because under background principles of Texas law, SB 8 does not apply to the federal government, its employees, or its contractors. *See* US.ROA.817. To the extent it supposedly found otherwise, the district court did so by ignoring these principles of Texas substantive law. *See* US.ROA.1761-63 (omitting any reference to Texas's cited authority). That violated the district court's duties to follow state-court precedent interpreting state law and to interpret law so as to avoid constitutional infirmities. *See, e.g.*, *Winters v. New York*, 333 U.S. 507, 514 (1948); *Osterberg v. Peca*, 12 S.W.3d 31, 51 (Tex. 2000); *accord Clark v. Martinez*, 543 U.S. 371, 381-82 (2005).

In addition to these legal errors, any factual finding was clearly erroneous because it was based on conjecture that SB 8 could affect federal programs—not evidence that it would. There is no evidence that the federal programs would be required to facilitate post-heartbeat abortions, that someone was likely to sue a federal defendant under SB 8, or that such a suit would ultimately result in liability. Tex. Br. 39-41; US.ROA.1761-63. Speculation about the actions of third parties not before the court cannot support Article III standing. *See Clapper*, 568 U.S. at 413.

Finally, the United States argues (at 30) that the abortion providers' choices to stop offering certain abortions "interfer[es] with the government's activities in Texas." Leaving aside that this is the providers' choice, the United States' own brief demonstrates why any supposed finding regarding its injury was clearly erroneous: the only support the United States can muster (at 30) in support of its theory is an online guidance document not presented to the district court. Such extra-record evidence cannot meet the United States' burden to establish a certainly impending injury to support standing for its federal programs.

III. The United States Cannot Proceed in Equity.

Assuming it can establish standing, the United States lacks a cause of action. No statutory or constitutional cause of action exists. Because an equitable cause of action against a judge or clerk not to even consider an entire class of state-law torts bears no resemblance to a traditional claim of equity, such an innovation can only come from Congress. Because Congress has not authorized such a claim, injunctive relief was improper.

A. The United States has no equitable cause of action.

The United States does not seriously dispute that an injunction against a judge—as opposed to a party—not to hear a class of suit would have been completely foreign to the courts of equity in 1789. Tex. Br. 42-47. The Judiciary Act of 1789 thus did not vest the federal courts with such an equitable cause of action. *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 333 (1999). To avoid the consequence of that conclusion—namely that the United States will have to take its request for a new cause of action to Congress—the United

States tries (at 26-27) to raise the level of generality by asserting that a request for "an injunction against enforcement of an unconstitutional statute" "falls squarely within the history and tradition of courts of equity."

Such a high level of generality is irreconcilable with *Grupo Mexicano*. There, the plaintiff was a creditor who secured an injunction to prevent its debtor from dissipating assets. 527 U.S. at 312. Traditionally, a "creditor's bill" allowed a creditor "to discover the debtor's assets, to reach equitable interests not subject to execution at law, and to set aside fraudulent conveyances." *Id.* at 319. That was not enough: looking deeper into the relief sought, the Court discovered that a creditor's bill was subject to a "well-established general rule that a judgment establishing the debt was necessary before a court of equity would interfere with the debtor's use of his property." *Id.* at 321. That relatively minor difference was enough to make a preliminary injunction for a prejudgment creditor a "substantial expansion of past practice" that must be left "to Congress." *Id.* at 329.

Here, by contrast, the United States defines the level of generality at such a level that nearly *any* legal wrong would have been remediable at equity. Its assertion that a constitutional right can always be vindicated by injunction omits several features relevant to equity including that (1) this is suit by a sovereign, (2) against another sovereign, (3) to prevent litigation by third parties, (4) against other third parties, (5) for an injunction that would run against judicial officials themselves—not the litigants. As previously explained (at 43-45), those features were entirely absent from historical cases

including *Ex parte Young*. And under *Grupo Mexicano*, creating such a new cause of action must be left to Congress.[5]

B. Texas is not undermining any congressional enforcement scheme.

1. Congress's carefully reticulated remedial scheme for the enforcement of constitutional rights does not provide for the cause of action the United States seeks. Congress has provided a general civil cause of action for private individuals, 42 U.S.C. § 1983, albeit not against States, *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66 (1989). Similarly, Congress provided the Attorney General with specific causes of action to protect certain federal rights, including one related to abortion. Tex. Br. 53. Congress has also determined the limited circumstances in which the Attorney General may sue purely because private individuals "are unable, in [the Attorney General's] judgment, to initiate and maintain appropriate legal proceedings." 42 U.S.C. §§ 2000b(a), 2000c-6(a); *see* Tex. Br. 54. None applies to the Fourteenth Amendment generally or abortion in particular.

Unable to deny that Congress has said when the United States may sue to vindicate private rights, the United States insists (at 24 n.4) that the statutes are limited to "different circumstances." That is respondents' point. Fully aware that individuals may be unable to sue themselves, Congress provided that United States can sue in "circumstances" that do not exist here. Permitting

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[5] The United States continues to rely (at 15) on cases involving traditional causes of action vindicable by the sovereign. As Texas has already explained (at 47-51), these cases do not help the United States here.

the United States' suit would render Congress's statutory limits superfluous.

2. The United States insists (at 23-24) that Congress nonetheless meant to allow it to seek pre-enforcement review in lower federal courts for all constitutional claims. Neither text nor legislative history support that principle. *United States v. City of Philadelphia*, 644 F.2d 187, 195 (3d Cir. 1980) (discussing "three express refusals of modern Congresses to grant the Executive general injunctive powers in this field").

Respondents do not dispute that section 1983 was generally designed to provide a forum to vindicate federal rights, but "no legislation pursues its purposes at all costs . . . [I]t frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam). When Congress imposes "limitations on recovery," courts "must respect" them, especially when as in this case "Congress appeared well aware of the limited nature of the cause of action it established." *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 460-61 (2012).

IV. Neither Injunctive nor Declaratory Relief Is Permissible.

Perhaps recognizing the weakness of its claims for injunctive relief, the United States advocates (at 42-46) for the first time in this litigation that declaratory relief should issue. Neither relief is permissible. The United States' request for an injunction based on the theory that anyone who *could* become involved in an SB 8 suit acts in active concert with the State of Texas is an impermissible attempt to enjoin a law. *Jackson II*, 141 S. Ct. at 2495. Its belated request for declaratory relief is not properly before the Court in this interlocutory appeal of a

preliminary injunction. Regardless, the district court could not have issued a declaration for the same reasons it could not have issued an injunction: lack of Article III jurisdiction and an inability to bind private parties.

A. Suing Texas does not permit the district court to enjoin private individuals, judges, and local officials.

Conceding it cannot obtain an injunction of state executive officials, U.S. Br. 40, the United States has chosen instead to seek an injunction of everyone else in the State, leaving it up to Texas to figure out how to comply. For suits against the United States, the Department of Justice (per then-AAG Scalia) has insisted that failing to specify "what individual has personal responsibility (presumably under pain of contempt) for compliance" would be "either unfair to the individual who may be responsible or else destructive of the enforceability of the decree." H.R. Rep. 94-1656, *28, 1976 U.S.C.C.A.N. 6121, 6147. Congress agreed. 5 U.S.C. § 702; Tex. Br. 32. But no one the United States has identified is properly subject to injunction.[6]

1. The district court erred in enjoining Texas's judicial officials.

The United States cannot enjoin judicial officials simply by suing the State. It admits (at 37) that its request to enjoin judges and clerks is "unusual" but insists

[6] The cases cited by the United States (at 31-32 n.7) for the proposition that it is permissible simply to enjoin a State are distinguishable because (among other reasons) how a State would comply was clearer and they fell within the original jurisdiction of this Court, *see, e.g.*, *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), or involved traditional claims of title, *United States v. Texas*, 340 U.S. 900 (1950).

that it is permissible because lower courts have occasionally enjoined courts and such relief is necessary. Both contentions are wrong.

First, assuming these cases were correctly decided, none of them supports broadly enjoining a State's judiciary from docketing, hearing, and adjudicating a class of tort claims without statutory authorization. *See In re BankAmerica Corp. Sec. Litig.*, 263 F.3d 795, 801 (8th Cir. 2001) (concerning express congressional authorization to enjoin certain state-court proceedings); *Blackard v. Memphis Area Med. Ctr. for Women, Inc.*, 262 F.3d 568, 576 (6th Cir. 2001) (concluding the Administrative Director of Courts acted in concert with courts); *WXYZ, Inc. v. Hand*, 658 F.2d 420, 421 (6th Cir. 1981) (enjoining a single judge who was violating constitutional rights).

As for court personnel, the United States points (at 39) to only two cases enjoining clerks carrying out *post-judgment* garnishment. *Strickland v. Alexander*, 772 F.3d 876 (11th Cir. 2014); *Finberg v. Sullivan*, 634 F.2d 50 (3d Cir. 1980) (en banc). Yet it insists (at 39) that SB 8 is so unconstitutional that no court would fail to strike it down. If that is the case, there can be no reason to think that a judgment will be entered—making its only authority supporting the "unusual" remedy of enjoining all judicial personnel entirely inapposite.

Second, such an extraordinary remedy—which seeks to set the lower federal courts as hybrid appellate bodies over state tribunals—is not necessary to avert constitutional crisis. The United States concedes (at 38-39), as it must, that Texas courts could hear SB 8 suits and would properly apply this Court's precedents and the Constitution. The United States is thus left to argue (at 39) that it is too risky for abortion providers to defend themselves in court. But, again, the United States cites no

precedent—and respondents are aware of none—that guarantees a federal forum if the state forum seems difficult.

The United States' efforts to enjoin untold numbers of private plaintiffs or local officials fare no better.

2. Private citizens do not become the State's agents by filing lawsuits.

a. In lieu of substantive argument, the United States repeatedly asserts (at 33-37) that Texas has "delegated" enforcement of SB 8 to private individuals, such that filing a private cause of action transforms them into state actors who can be enjoined in a suit against Texas. But creating a cause of action is hardly groundbreaking legal innovation. Like all States, Texas has allowed numerous private causes of action, from deceptive trade practices, Tex. Bus. & Com. Code § 17.50; to employment discrimination, Tex. Lab. Code § 21.254; to tort claims against the government, Tex. Civ. Prac. & Rem. Code § 101.021. But courts have uniformly rejected the argument that merely filing a lawsuit under one of these statutes makes one a state actor. Tex. Br. 67; *see also J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 150 (1994) (O'Connor, J., concurring) (explaining that "not all that occurs in the courtroom is state action").

Unable to point to any cases holding to the contrary, the United States asks the Court to create a good-for-one-case only theory of delegated power. This Court should decline the invitation. Delegation and "[a]gency require[] more than mere authorization to assert a particular interest." *Hollingsworth*, 570 U.S. at 713. In particular, "[a]n essential element of agency is the principal's right to control the agent's actions." *Id.* (quoting RESTATEMENT (THIRD) OF AGENCY § 1.01, Comment *f* (2005)).

SB 8 does not delegate authority to enforce proscriptive law to SB 8 plaintiffs. It creates a private tort cause of action. Tex. Health & Safety Code § 171.208(a). Such citizens "answer to no one; they decide for themselves, with no review, what arguments to make and how to make them" without Texas's direction, control, or supervision. *Hollingsworth*, 570 U.S. at 713; *see Delegation*, BLACK'S LAW DICTIONARY (11th ed. 2019). They are not represented by the Attorney General at any stage as they would have to be if Texas considered their suits "actions in which the state is interested." Tex. Gov't Code § 402.021. Texas cannot strip them of the right to pursue an SB 8 claim for poor performance, and Texas lacks "the right to control the conduct of" SB 8 plaintiffs. RESTATEMENT (SECOND) OF AGENCY § 14 (1958). Indeed, the Texas Legislature has gone so far as to expressly prohibit the Attorney General from intervening. Tex. Health & Safety Code § 171.208(h). Under such circumstances, SB 8 plaintiffs "are plainly not agents of the State"—even when they have an interest in defending the constitutionality of state law. *Hollingsworth*, 570 U.S. at 713.

The United States' delegation theory would have significant consequences. The False Claims Act, unlike SB 8, assigns a portion of the sovereign's interest to private plaintiffs. *See* 31 U.S.C. § 3730. But this Court has never held that "*qui tam* suits violate Article II, in particular the Appointments Clause of § 2 and the 'take Care' Clause of § 3." *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 778 n.8 (2000) (noting the question remains open).

The United States counters that SB 8 plaintiffs "do not sue to redress any personal injury or to vindicate any private rights." U.S. Br. 34. If that were true, they would face jurisdictional hurdles in state court. Though earlier

precedent suggested otherwise, *Spence v. Fenchler*, 180 S.W. 597, 603 (Tex. 1915), the Texas Supreme Court has now "adopted the constitutional standing test employed by the federal courts." *Tex. Bd. of Chiropractic Exam'rs v. Tex. Med. Ass'n*, 616 S.W.3d 558, 567 n.59 (Tex. 2021). Thus, like the United States, any putative SB 8 plaintiff would have to show a "concrete and particularized" "injury in fact." *Heckman v. Williamson County*, 369 S.W.3d 137, 154 (Tex. 2012) (quoting *Lujan*, 504 U.S. at 560-61). Whether SB 8 plaintiffs can show a justiciable injury is, however, a different question from whether they are state actors.

b. The United States' own authority (at 34) shows that private SB 8 claimants are *not* agents of the State who can be enjoined under Federal Rule of Civil Procedure 65(d)(2)(C). As Texas explained (at 68), even "a non-party with notice" is entitled to an opportunity to be heard on the question of agency before being named in an injunction. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 112 (1969). They have not, and the United States does not claim otherwise.

Even if the United States could ignore the procedural requirements of Rule 65—and the Due Process Clause—private SB 8 plaintiffs do not fall within the scope of the rule. To be agents of Texas, there must be "an express or implied legal relationship," often called "privity," in which the non-party is accountable to Texas. *Texas v. Dep't of Labor*, 929 F.3d 205, 211 (5th Cir. 2019). As discussed above, no such relationship exists. Similarly, to constitute aiding or abetting under Rule 65(d)(2)(C), the act "must be taken for the benefit of, or to assist, a party subject to the decree." *Goya Foods, Inc. v. Wallack Mgmt. Co.*, 290 F.3d 63, 75 (1st Cir. 2002). Unlike in the

qui tam context, Texas does *not* benefit from SB 8 suits: the damages go entirely to the private plaintiffs.

The United States offers a strained analogy to *Ex parte Young*, arguing that state officers stripped of their immunity can be enjoined like private citizens. U.S. Br. 35 (citing *Ex parte Young*, 209 U.S. at 159-60). But that does not mean that private citizens can be enjoined as arms of the State. Indeed, even "unconstitutional conduct by a state officer may be 'state action' for purposes of the Fourteenth Amendment yet not attributable to the State for purposes of the Eleventh." *Fla. Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 685 (1982) (plurality op.). Private conduct that would be unconstitutional had it been performed by a state actor certainly cannot be attributed to the State or enjoined by suing the State.[7]

3. The injunction cannot bind local government officials.

The United States' attempt to assert that local sheriffs, constables, and county officials, are either agents of the State or acting "in active concert or participation" with the State fail for similar reasons. U.S. Br. 40 (citing Fed. R. Civ. P. 65(d)(2)(B), (C)). Again, the United States cites nothing for this sweeping proposition that a litigant could avoid being sued by suing any local official who *might* be called upon to enforce an adverse judgment.

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[7] The United States' effort to limit its sweeping request is ineffective and irrelevant. First, there is no difference between enjoining "the universe of *potential* S.B. 8 plaintiffs" and enjoining those unidentified individuals who will someday "actually attempt to bring an S.B. 8 action." U.S. Br. 36-37. Second, regardless of their aggregate number, those individuals are not before the Court, are not "the State," and are not acting in concert with the State.

B. An award of declaratory relief is not before the Court and is unavailable regardless.

1. None of these problems with the United States' claims are cured by its belated request for declaratory relief. As an initial matter, no request for declaratory relief is properly before the Court. The district court granted, the United States' request to "temporarily or preliminarily enjoin enforcement of S.B. 8" without ruling on any request for declaratory relief. U.S.ROA.367, 1844-48. As the United States did not cross appeal regarding any putative denial of declaratory relief (assuming it was appealable), such a request is not currently at issue. 28 U.S.C. § 1292(a); *accord El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473, 479 (1999); *Gill v. Whitford*, 138 S. Ct. 1916, 1931 (2018) (noting the Court lacks jurisdiction to draw advisory conclusions).

2. Regardless, the district court would have lacked jurisdiction to grant declaratory relief. The Declaratory Judgment Act applies only when there is "a case of actual controversy within [a court's] jurisdiction." 28 U.S.C. § 2201(a). And this Court has confirmed that the Act does not "impliedly repeal[] or modif[y]" the jurisdictional limits set by Congress on district courts. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 672 (1950); *see also Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. 2011). Thus, the jurisdictional flaws identified by respondents in this case also prevent a court from issuing declaratory relief. *See Earnest v. Lowentritt*, 690 F.2d 1198, 1203 (5th Cir. 1982) (holding the Act "does not provide an independent cause of action for determination of the constitutionality of a statute").

3. The remainder of the United States' argument fails for the same reasons described above: private

individuals who are not parties cannot be bound by a judgment against the State.

A declaratory judgment against a State binds its residents only if a public right is at issue. 18A Charles Alan Wright, et al., *Federal Practice and Procedure* § 4458.1 (3d ed. 2017). For example, in *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958), this Court held that Washington's unsuccessful effort to force Tacoma to comply with state law when seeking a license from the Federal Power Commission, *id.* at 328, bound its citizens to the adverse ruling in subsequent proceedings, *id.* at 340-41. The United States' other citations similarly concern public rights. *See Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 692 n.32 (1979) (concerning a treaty); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 107 (1938) (interstate compact).

Here, however, no such public rights are at stake. Indeed, this Court has already held that a judgment against a sovereign concerning the constitutionality of a law impacting only private parties would not bind those parties. *See Muskrat*, 219 U.S. at 362. Thus, any declaratory judgment against Texas would not bind future SB 8 plaintiffs.

It is, perhaps, for this reason that the United States declines to fully embrace the prospect of declaratory relief, urging the Court (at 45-46) to provide injunctive relief instead.

V. SB 8 Is Constitutional.

In addition to the reasons discussed above, the United States has not proven a likelihood of success on the merits, which is another reason injunctive relief is impermissible. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

A. To support its Fourteenth Amendment claim, the United States looks (*e.g.*, at 16, 44) only to the portion of SB 8 that it thinks acts as a "ban" on previability abortion. Like federal law, however, Texas law looks at all portions of SB 8 in context. *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 838 (Tex. 2018). Because a bare statutory command does not injure anyone without an enforcement mechanism, *California*, 141 S. Ct. at 2114, SB'8s purported ban on post-heartbeat abortions has to be read in context of its enforcement mechanism—namely, a private tort action subject to an undue-burden defense. Tex. Health & Safety Code § 171.209(b). Creating the potential for liability for abortions that are *unprotected* by this Court's precedent is not a ban on post-heartbeat abortions that *are* protected.

The United States counters (at 5-6) by pointing to news articles purporting to quote a single state senator about the purpose behind SB 8. Such commentary does not change the law. Indeed, this Court does not "assume unconstitutional legislative intent" based on individual legislators' statements, *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam), even when those remarks appear in the legislative record, *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980). Isolated comments by a bill's sponsor to members of the media certainly do not alter the constitutional status of a bill voted on by numerous other legislators. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021).

Given the undue-burden defense built into SB 8, Tex. Health & Safety Code § 171.209(b), the only intent that can be derived is to create potential liability for abortions other than those that this Court's precedent requires Texas to permit. Such a limitation on abortion is not an

undue burden under *Casey*, 505 U.S. at 877 (plurality op.). Tex. Br. 57-59.

B. The United States makes minimal effort to defend its preemption and intergovernmental-immunity claims, simply pointing (at 29) to what the district court stated. But as explained in respondents' brief, SB 8 does not prohibit federal agencies, employees, and contractors from carrying out any abortion-related obligation (should any arise). Tex. Br. 59-62. The possibility that an individual might bring an unsuccessful lawsuit under SB 8 against the United States or its agents does not mean SB 8 is unconstitutional. And even if a violation were shown, the remedy would be limited to those federal programs. *See Lewis*, 518 U.S. at 357. The United States cannot bootstrap an alleged injury to a *de minimis* subset of the beneficiaries of federal programs into an injunction on behalf of all abortion providers in Texas.

CONCLUSION

In *Whole Woman's Health v. Jackson*, this Court should reverse the district court's order denying the motions to dismiss.

In *United States v. Texas*, this Court should vacate the district court's preliminary injunction and reverse the district court's order denying the State's motion to dismiss.

Respectfully submitted.

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