No. 21A85

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Applicant,

v.

STATE OF TEXAS, ET AL.,
Respondents.

On Application to Vacate Stay of Preliminary Injunction Issued by the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF APPLICANT

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
DAVID H. GANS
MIRIAM BECKER-COHEN
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

* Counsel of Record

October 19, 2021

No. 21A85

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Applicant,

v.

STATE OF TEXAS, ET AL.,
Respondents.

On Application to Vacate Stay of Preliminary Injunction Issued by the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF APPLICANT

Constitutional Accountability Center (CAC) respectfully moves under Supreme Court Rule 37.2(b) for leave to file the attached brief as *amicus curiae* in support of Applicant United States of America.

Applicant took no position on the filing of this brief. Respondent State of Texas consented so long as the brief was filed prior to noon on October 19, 2021. As of the time of this filing, Respondents Erick Graham, Jeff Tuley, and Mistie Sharp have not responded to undersigned counsel's inquiry as to whether they consent.

CAC is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with

legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees.

CAC has a strong interest in ensuring that the Fourteenth Amendment is interpreted as robustly as its text and history require. CAC has repeatedly filed briefs in this Court explaining that the right to a previability abortion is protected from state infringement by the Fourteenth Amendment. *See, e.g.*, Br. of CAC as *Amicus Curiae* in Support of Respondents, *Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (U.S. Sept. 20, 2021); Br. of CAC as *Amicus Curiae* in Support of Petitioners, *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020) (No. 18-1323).

CAC has also filed numerous briefs on the history of the enforcement of rights secured by the Fourteenth Amendment, *e.g.*, Br. of CAC as *Amicus Curiae* in Support of Petitioner, *Cox v. Wilson*, No. 20-1002 (U.S. Feb. 25, 2021), and on the interplay between the Fourteenth Amendment and the supremacy of federal law, *e.g.*, Br. of CAC as *Amicus Curiae* in Support of Respondent, *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019) (No. 17-1174).

Permitting the filing of the proposed brief would offer an important perspective to this Court: that Texas's argument to the court below that the United States' suit cannot proceed without an express statutory cause of action cannot be squared with this Court's precedent, *see In re Debs*, 158 U.S. 564 (1895), and core constitutional principles, including the separation of powers and federalism. As *amicus* explains in its proposed brief, under even the narrowest construction of *Debs*, the United States has a right to sue here because SB8 imposes a substantial burden on interstate commerce, creates a crisis for the United

States and the rule of law, and has resulted in a scenario in which it is exceedingly difficult, if not impossible, for private individuals to enforce their own Fourteenth Amendment rights. Moreover, given the unique statutory design of SB8 and its effects on the fundamental right to abortion, recognizing the United States' right to sue here would vindicate the constitutional principles of separation of powers and federalism—principles that SB8 has undermined.

For the foregoing reasons, CAC respectfully requests that it be allowed to file the attached brief as *amicus curiae*.

Respectfully submitted,

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
DAVID H. GANS
MIRIAM BECKER-COHEN
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

October 19, 2021

* Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES – cont'd

Page(s)

Statutes and Constitutional Provisions

TABLE OF AUTHORITIES – cont'd

Page(s)

INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC has a strong interest in enforcement of the Fourteenth Amendment and in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Over the past five decades, this Court has repeatedly recognized that the right to a pre-viability abortion is protected from state infringement by the Fourteenth Amendment. Yet in a brazen and unprecedented attack on the supremacy of federal law and the constitutional rights of its people, Texas enacted Senate Bill 8, banning abortion once a "fetal heartbeat" can be detected—well before a fetus reaches viability or most people even know that they are pregnant. *See* Senate Bill No. 8, 87th Leg., Ch. 62 Reg. Sess. (Tex. 2021) (to be codified at Tex. Health & Safety Code §§ 171.203(b), 171.204(a)) [hereinafter SB8].

Texas intentionally crafted SB8 to make it as difficult as possible for individuals and abortion providers to sue to protect their rights in court. As a result, Texans seeking to terminate their pregnancies must

---

[1] Applicant took no position on the filing of this brief. Respondent State of Texas consented. As of the time of this filing, Respondents Erick Graham, Jeff Tuley, and Mistie Sharp have not responded to undersigned counsel's inquiry as to whether they consent. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

undertake often-daunting trips to neighboring states' clinics in the midst of a pandemic, and those clinics have grown so overwhelmed that they are now struggling to meet demand. It is under these unique circumstances that the United States has stepped in to defend itself and its people who have been harmed by this flagrantly unconstitutional law.

It undoubtedly has the power to do so. In a long line of cases—including, perhaps most prominently, *In re Debs*, 158 U.S. 564 (1895)—this Court has recognized the right of the federal government to sue in federal court to vindicate the public interest even where Congress has not passed a law explicitly authorizing the specific type of action pursued.

Several courts of appeals have recognized the "broad" language of the *Debs* decision, *e.g.*, *United States v. City of Jackson*, 318 F.2d 1, 14 (5th Cir. 1963), yet under even its narrowest construction, the United States has a right to sue here because SB8 imposes a substantial burden on interstate commerce, creates a crisis for the rule of law in this country, and has resulted in a scenario in which it is exceedingly difficult, if not impossible, for private individuals to enforce their own Fourteenth Amendment rights. Moreover, given the unique statutory design of SB8 and its effects on the fundamental right to abortion, recognizing the United States' right to sue here would vindicate the constitutional principles of separation of powers and federalism—principles that SB8 has undermined.

ARGUMENT

I. Since the Early Days of the Republic, This Court Has Recognized the Right of the United States to Sue Even in the Absence of Statutory Authorization.

This Court has long recognized the right of the United States to sue in federal court even in the absence of a statute authorizing it do so. Two principles have animated this doctrine's development: the deep-seated rule that "equitable relief . . . is traditionally available to enforce federal law," *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 329 (2015), and the related concept, dating back to English common law, that "where there is a legal right, there is also a legal remedy," *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (quoting 3 William Blackstone, *Commentaries on the Laws of England* 23 (1768)). To ensure that the United States as a sovereign nation can fulfill its duty to protect the supremacy of federal law and the constitutional rights of its people, this Court has repeatedly recognized the authority of the executive to sue where Congress has not otherwise barred such an action.

In the early days of the Republic, "[l]acking a guiding body of statutes, the judiciary faced the task of defining the rights of the United States, as a sovereign and representative entity, in a system of law that made few explicit provisions for government interests and actions." Note, *Protecting the Public Interest: Nonstatutory Suits by the United States*, 89 Yale L.J. 118, 120 (1979) [hereinafter *Protecting Public Interest*]. Early statutes did not explicitly authorize the United States to sue in tort or contract, yet this Court recognized the incongruity of recognizing the right to own property or to enter into a contract without permitting enforcement of those rights in a court of law. *See, e.g.*,

Dugan v. United States, 16 U.S. 172, 181 (1818); *United States v. Tingey*, 30 U.S. 115, 122 (1831).

In these early cases, this Court relied primarily on analogies between the United States and a private plaintiff seeking to vindicate a proprietary interest in court. *See, e.g.*, *Cotton v. United States*, 52 U.S. 229, 231 (1850); *Dugan*, 16 U.S. at 181. But in the wake of the Civil War and the creation of the federal Department of Justice, this Court promptly recognized the flaws in such analogies—that, in fact, the federal government's right to bring lawsuits not authorized by statute was broader than that of private parties in light of its sovereign duty to protect its citizens and the public interest, *see Protecting Public Interest*, *supra*, at 121-22; *United States v. City of Philadelphia*, 644 F.2d 187, 215 (3d Cir. 1980) (Gibbons, J., dissenting from denial of rehearing) ("The analogy to private litigants is in fact imperfect, for as the Court recognized, . . . the Executive has a duty to the public, which no private litigant suing to enforce his property interests has.").

The first cases to recognize this broader non-statutory right to sue were *United States v. San Jacinto Tin* and *United States v. American Bell Telephone*. In *San Jacinto*, the Attorney General filed suit to revoke a fraudulently obtained land patent. 125 U.S. 274 (1888). In upholding the right of the United States to sue even in the absence of an authorizing statute, the Court initially focused on the government's asserted proprietary interest in the action because revocation of the patent would have resulted in reversion of the land to the government. *Id.* at 286. But the Court also acknowledged a presumption in favor of executive authority to sue in the absence of a congressional prohibition, *id.* at 284, and noted that the United States might claim standing to sue to enforce an "obligation to the general public," *id.* at 286.

This Court seized on that reasoning in *American Bell*, explicitly upholding the right of the United States to sue to effectuate a statutory scheme, even in the absence of an express cause of action. 128 U.S. 315, 367-68 (1888). *American Bell* also involved a fraudulently obtained patent, but this time, the United States could claim neither a pecuniary loss nor a proprietary interest in the subject of the patent. *See id.* at 350-51, 366-68. Even so, this Court upheld the right of the United States to sue. It held that "the right of the United States to interfere in the present case is its obligation to protect the public from the monopoly of the patent which was procured by fraud," *id.* at 367—to "take care that the laws be faithfully executed," U.S. Const. art. II, § 3.

On the heels of *San Jacinto* and *American Bell* came this Court's decision in *Debs*. *Debs* arose out of an injunction obtained by the Attorney General against the leaders of the Pullman rail strike of 1894. 158 U.S. at 565-67. Those leaders argued that the federal government lacked the authority to seek the injunction in the first place, *id.* at 570-73, but this Court disagreed.

In explaining its decision, this Court acknowledged that there were multiple possible grounds for it, some narrower than others. For example, the Court could have rested its holding on the government's proprietary interest in ending the strike, or its right to sue to effectuate the guarantees of the Sherman Anti-Trust Act. *See id.* at 584, 600.

But this Court unanimously chose to go further. Citing *San Jacinto* and *American Bell*, this Court found it "obvious from these decisions" that the United States could sue in cases that "affect the public at large, and are in respect of matters which by the constitution are intrusted to the care of the nation, and

concerning which the nation owes the duty to all the citizens of securing to them their common rights." *Id.* at 586. Thus, the courts should not "prevent [the United States] from taking measures therein to fully discharge those constitutional duties." *Id.*

Alongside this sweeping language, this Court also emphasized three special aspects of the Pullman strike that made suit by the United States appropriate. First, the Court discussed the government's special duties with respect to enforcement of the Commerce Clause, the constitutional provision implicated by the strike. *See id.* at 586. Second, it emphasized the disastrous and immediate effects of the strike. *Id.* at 592. Third, this Court found that the strike "affect[ed] the people at large" in the exercise of common rights, *id.* at 593, meaning no individual might have standing in his or her own right to challenge it, and the Attorney General thus had a special duty to step in on behalf of the public, *see id.* at 587; *accord Protecting Public Interest*, *supra*, at 143 & n.31.

II. This Court Can Recognize the United States' Right to Sue in This Case Without Adopting a Broad or Novel Reading of *Debs*.

Since *Debs* was decided, this Court has repeatedly recognized the right of the United States to sue in the absence of explicit statutory authorization. *See, e.g.*, *Arizona v. United States*, 567 U.S. 387 (2012); *Sanitary Dist. of Chi. v. United States*, 266 U.S. 405 (1925); *Heckman v. United States*, 224 U.S. 413 (1912). Still, in a handful of cases, some courts of appeals have interpreted *Debs* as limited to cases presenting at least some of the special circumstances of the Pullman strike, *e.g.*, *United States v. Solomon*, 563 F.2d 1121, 1129 (4th Cir. 1977).

This Court need not resolve those debates in this case because the same special circumstances that existed in *Debs* exist here. Just as in *Debs*, the federal government here has demonstrated that SB8 substantially burdens interstate commerce, creates a crisis requiring immediate intervention, and has made it exceedingly difficult for individual Texans harmed by SB8 to vindicate their own rights in court.

The interstate commerce effects of SB8 are well-documented by the government. *See* App. 36a-37a, 48a. SB8 authorizes lawsuits by people *anywhere* in the country to enforce its unconstitutional terms. *See* Tex. Health & Safety Code § 171.208(a). Meanwhile, Texas residents are flooding clinics in neighboring states because of SB8's restrictions, causing a ripple effect that makes abortion more difficult to access even outside of Texas. *See, e.g.*, App. 87a-97a.

As for the emergency nature of the situation, SB8 poses at least as urgent a crisis for the United States and its people as the Pullman strike did in *Debs*. As described above, the impact of SB8 has been immediate and devastating for Texans in need of abortions.

The unprecedented and lawless nature of SB8 also creates a second urgency requiring intervention by the federal government and equitable relief. Here, Texas has avowedly and unapologetically disregarded this Court's precedent, *see Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). In so doing, the State has not only violated the Fourteenth Amendment, but it also has violated the most basic tenet of the Supremacy Clause: that the federal Constitution is "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. Texas's open defiance of federal law and its effort to subvert judicial review threatens this fundamental precept and serves as a blueprint

for other states to undermine constitutional rights and avoid accountability.

Finally, as in *Debs*, SB8 presents a scenario where individuals face significant barriers to their own suits for equitable relief. Here, Texas has crafted a statute with a private enforcement scheme that, it has argued, renders Section 1983 lawsuits improper and the exception to Eleventh Amendment sovereign immunity under *Ex parte Young*, 209 U.S. 123 (1908), unavailable. The United States is uniquely positioned to vindicate the rights of its people under these circumstances. *See United States v. Texas*, 143 U.S. 621, 642-46 (1892).

III. The Rationales Counseling Against Recognizing a Public Right of Action Do Not Apply Here.

A. This Case Does Not Raise Separation of Powers Concerns.

Because the Constitution delegates the lawmaking power to Congress, some lower courts have expressed a hesitancy to extend a cause of action to the executive branch where Congress has not done so itself. *See, e.g.*, *Solomon*, 563 F.2d at 1128-29; *Philadelphia*, 644 F.2d at 199-201. In this case, however, it is Texas, not the federal courts or the executive branch, that has usurped Congress's power by crafting a statute that attempts to prevent individuals from vindicating their constitutional rights pursuant to the express cause of action in Section 1983.

Congress enacted Section 1983 in the wake of the Civil War to "throw[] open the doors of the United States courts to those whose rights under the Constitution are denied or impaired." Cong. Globe, 42d Cong., 1st Sess. App. 376 (1871) (Rep. Lowe). For the past fifty years, Section 1983 has been the chief vehicle through which private parties have sought injunctive

relief to prevent enforcement of state laws that infringe on their constitutional right to abortion. Yet as described above, Texas specifically designed SB8 to evade judicial review pursuant to Section 1983, effectively rendering that statute a dead letter in the abortion context.

By stepping in on behalf of the American people to defend their constitutional rights, the executive branch here seeks to restore the congressional scheme disrupted by Texas.

B. This Case Does Not Raise Federalism Concerns.

Under the Supremacy Clause, the Constitution reigns as "the supreme Law of the Land." U.S. Const. art. VI, cl. 2; *see McCulloch v. Maryland*, 17 U.S. 316, 326-27 (1819). Texas has flagrantly disregarded this principle, intentionally crafting a state law that deprives Texans of their long-established Fourteenth Amendment rights and is designed to evade traditional forms of judicial review.

To be sure, under our constitutional structure, states are charged with ensuring the health and well-being of their citizens. For this reason, state abortion regulations are permissible when they do not have the "purpose or effect of presenting a substantial obstacle to a woman seeking an abortion," *Casey*, 505 U.S. at 878.

But Texas has asserted no historic state interest in regulating the health of its citizens to defend its enactment of SB8. Nor could it: SB8 is an outright *ban* on most constitutionally protected abortions with no health and safety justification whatsoever. Under such circumstances, permitting the federal government to intervene in defense of that right and the supremacy of federal law helps preserve the

Constitution's delicate balance between state and federal power.

CONCLUSION

For the foregoing reasons, the United States' request to lift the stay should be granted.

Respectfully submitted,

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
DAVID H. GANS
MIRIAM BECKER-COHEN
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

October 19, 2021 * Counsel of Record