No. 21A85

In the Supreme Court of the United States

UNITED STATES,

Applicant,

v.

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 ADMINISTRATIVE LAW, CONSTITUTIONAL LAW, AND CIVIL PROCEDURE SCHOLARS AS AMICI CURIAE IN SUPPORT OF THE APPLICATION TO VACATE STAY OF PRELIMINARY INJUNCTION

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October 19, 2021

Professors Jon D. Michaels and David L. Noll (collectively, *Amici*) respectfully move for leave to file the accompanying brief as *amici curiae* in support of the application for a stay without 10 days' advance notice to the parties of *Amici*'s intent to file as ordinarily required by Sup. Ct. R. 37.2(a).

In light of the compressed briefing schedule set by the Court, it was not feasible to provide 10 days' notice to the parties. Applicant takes no position on this filing. Respondents have consented to this filing on the condition it is filed before noon on October 19, 2021. *Amici*, who urgently desire to be heard on the application, request that this Court grant the motion.

Amici are scholars of administrative law, constitutional law, and civil procedure. They possess substantial expertise in the governing principles that have traditionally constrained private enforcement schemes.

One of the primary arguments advanced in favor of Texas Senate Bill 8 ("S.B. 8") is that its enforcement scheme—which was designed to shield it from judicial review—is "entirely commonplace." *See, e.g.*, Intervenor-Appellants' Opening Br. at 11, *United States v. Texas* (5th Cir. No. 21-50949) (hereinafter "Intervenor-Appellants' 5th Cir. Opening Br." and "5th Cir.," respectively). *Amici* offer their expertise to explain why this statement is wrong, and why constitutional, statutory, and historical precedent confirm that S.B. 8's enforcement scheme is uniquely dangerous to the rule of law. Regardless of the status of abortion as a constitutional right, the procedural

mechanisms through which S.B. 8 is enforced pose grave risks to due process, the separation of powers, and other hallmarks of our constitutional scheme.

While *Amici* acknowledge that this Court "strongly discourage[s]" *amicus* briefing "in connection with emergency applications," *Amici* seek leave to file because this Court's disposition of the United States's application has immediate and ongoing consequences for the adjudication of S.B. 8 and laws like it. The circumstances of this case are unique and urgent. S.B. 8 is designed to frustrate judicial review and allowing it to continue in effect threatens serious harm to the rule of law. And already, *Amici* have begun to witness the introduction of copycat laws in other jurisdictions, which are explicitly designed around the same unprecedented and dangerous enforcement scheme deployed by S.B. 8. Receiving *Amici*'s brief will neither undermine the Court's policies nor delay expedited consideration of the matter.

For the reasons stated above, *Amici* urge the Court to grant their motion for leave to file.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*[1]

Jon D. Michaels is a Professor of Law at UCLA School of Law. He teaches and writes in the areas of administrative law, constitutional law, regulation, and bureaucracy. He is the author of, among other things, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC (2017). David L. Noll is the Associate Dean for Faculty Research and Development and a Professor of Law at Rutgers Law School. He teaches and writes in the areas of legislation, regulation, civil procedure, and complex litigation, and is a co-author of LEGISLATION AND THE REGULATORY STATE (2d ed. 2017).

Professors Michaels and Noll (collectively, *Amici*) have closely followed the recent wave of state laws enforced through private rights of action, of which Texas Senate Bill 8 ("S.B. 8") is an extreme example, and the lawsuits that have been filed under the law since its enactment.

Amici have no direct financial interest in the parties or the outcome of this case. They do share a common interest in providing crucial legal and historical context for S.B. 8's enforcement scheme, and respectfully submit this brief to (1) highlight the unprecedented nature of that scheme; and (2) explain

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[1] Applicant takes no position on this filing and Respondents have consented to the filing of this brief on the condition it is submitted before noon on October 19, 2021. No counsel for a party authored this brief in whole or in part, and no person other than *Amici* or their counsel made a monetary contribution to fund its preparation or submission.

the grave threat that S.B. 8 poses to constitutional governance and the rule of law.

INTRODUCTION AND SUMMARY OF ARGUMENT[2]

S.B. 8's private enforcement scheme is not "entirely commonplace," as its defenders contend. *See* Intervenor-Appellants' Opening Br. at 11, *United States v. Texas* (5th Cir. No. 21-50949) (hereinafter "Intervenor-Appellants' 5th Cir. Opening Br.," and "5th Cir.," respectively). It departs radically from the models it purports to draw upon in "unprecedented" ways that brazenly elevate vigilantism over the rule of law. *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2496 (2021), at *2 (Roberts, C.J., dissenting). For that reason, S.B. 8 should be immediately enjoined.

Historically, private enforcement schemes have been tailored to promote fair and efficient enforcement where public enforcement may not be adequate. Accordingly, such schemes have respected defendants' due process rights and courts' authority to engage in fair and impartial judicial review. And, where they have authorized the recovery of monetary damages, that authorization has been limited; generally only injured parties could seek recovery, and only from those who injured them.

S.B. 8 tosses aside any such limitations in favor of a rigged private bounty system insulated from judicial

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[2] *Amici* adopt the facts and procedural history set forth in the application.

review. The law's provisions work together to systematically deprive defendants of their basic due process rights. Under S.B. 8, defendants are subject to suit from *any* person in *any* judicial district in Texas without the possibility of transfer (S.B. 8 § 171.208(b)); even if defendants prevail, they are barred from asserting claim or issue preclusion to prevent others from bringing the exact same suit based on the exact same conduct (*id.* §171.208(e)(5)), And regardless whether such lawsuits are brought in bad faith, S.B. 8 purports to bar defendants from obtaining attorney's fees to defray the overwhelming costs of such repeat litigation (*id.* § 171.208(i)).

S.B. 8 not only infringes on individual liberty, it also undercuts bedrock principles of just governance. Subverting the roles of the executive and judiciary in overseeing enforcement of the statute, S.B. 8 is fundamentally at odds with the careful system of checks and balances enshrined in our state and federal frameworks. The provenance of the scheme is no mystery. It is the product of its drafters' single-minded focus on ensuring S.B. 8's underlying substantive regulations evade judicial review. *United States v. Texas*, 2021 WL 4593319, at **49-51 (W.D. Tex. Oct. 6, 2021) ("Dist. Ct. Op.").

S.B. 8's structural defects are not specific to the issue of abortion. *Amici* would have the same concerns if an S.B. 8-like enforcement scheme permitted private citizens to sue to enforce restrictions on private firearms ownership, corporations' campaign finance contributions, or COVID prevention regulations. Indeed,

commentators have already suggested that S.B. 8 supplies a "ready blueprint" for similar legislation enacted by partisan lawmakers to target "[u]npopular political groups . . . from gathering under threat of vigilante lawsuits."[3]

The District Court properly recognized the unique harms that S.B. 8's enforcement scheme creates. *See* Dist. Ct. Op. at **38-42 (describing harassment faced by abortion providers and *in terrorem* effect of S.B. 8). In contrast, the Fifth Circuit's sparse order ignored them entirely. This Court should allow the District Court's preliminary injunction to remain in effect as the litigation proceeds.

ARGUMENT

Federal and state law supply myriad examples of statutes that create private rights of action through which securities, antitrust, consumer, environmental, and other laws are enforced—often in parallel with public enforcement actions. *See* Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 662-66 (2013) (describing various advantages of private enforcement); Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285, 289-90 (2016) (discussing advantages of "legal regimes in which public and private agents may seek

[3] *See, e.g.*, Julia Kaye & Marc Hearron, *Even people who oppose abortion should fear Texas's new ban*, WASH. POST, July 19, 2021, *available at* https://www.washingtonpost.com/outlook/2021/07/19/texas-sb8-abortion-lawsuits.

overlapping remedies for the same conduct on substantially similar theories").

While the decisions whether and how to implement private enforcement schemes are generally entrusted to legislatures in the first instance, *see, e.g.*, *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 269-71 (1975) (attorneys' fees for statutory causes of action deemed "policy matter that Congress has reserved for itself"), legislatures do not have a blank check. Private enforcement schemes have traditionally been constrained by (1) compliance with due process; (2) opportunity for judicial review; and (3) fidelity to the separation of powers. S.B. 8's constitutionally dubious design flies in the face of these principles, underscoring the need for this Court to reinstate the District Court's preliminary injunction judicial review while proceeds.

I. S.B. 8's Design Deprives Defendants of Due Process.

1. Despite their discretion to establish private enforcement schemes, legislatures may not create private rights of action stripped of any procedural safeguards typically afforded litigants. This Court has long recognized that "[a] fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955); *see also Fuentes v. Shevin*, 407 U.S. 67, 93, 96 (1972) (state replevin statute that allowed creditor to repossess goods with minimal judicial safeguards violated due process); *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 122-23 (1928) (delegation of

enforcement power to private citizens subject to due process requirements). In *Christianburg Garment Co. v. EEOC*, this Court highlighted the dangers of tilting the playing field too drastically against a defendant and in favor of a plaintiff:

> A fair adversary process presupposes both a vigorous prosecution and a vigorous defense. It cannot be lightly assumed that in enacting [a statute], Congress intended to distort that process by giving the private plaintiff substantial incentives to sue, while foreclosing to the defendant the possibility of recovering his expenses in resisting even a groundless action unless he can show that it was brought in bad faith.

434 U.S. 412, 419 (1978).

But that is exactly what Texas did here—and deliberately so. *Cf.* Dist. Ct. Op. at **4-5, 22. As the District Court, the United States and others have explained, the provisions of S.B. 8 are heavily stacked in favor of plaintiffs, in such a way as to deprive defendants of any incentives to litigate even entirely meritorious cases to their conclusion. *See* Dist. Ct. Op. at *9-10; U.S. Br. at 6-7. It grants plaintiffs their choice of venue regardless of how inconvenient it is to the defendant. S.B. 8 § 171.210(b). It denies defendants the right to raise well-recognized affirmative defenses, including barring non-mutual issue preclusion or non-mutual claim preclusion. *Id.* § 171.208(e)(5). It threatens defendants with attorneys' fees and costs while ensuring that

defendants cannot seek fees from plaintiffs. *Id.* § 171.208(i). All told, the risks to a defendant of litigating a claim brought under S.B. 8 are so severe that regardless of the merits of a lawsuit, few defendants will be willing or able to litigate to judgment.

S.B. 8 is, in this important regard, entirely out of step with extant private enforcement schemes designed to ensure, not thwart, due process. As just one example, legislatures have always recognized (if not supplemented) courts' authority to police bad faith, vexatious, and frivolous filings in actions brought by private-enforcer plaintiffs. *See, e.g.*, 15 U.S.C. § 15(a)(1) (subordinating the amount of a private litigant's recovery under the Sherman Act to the court's *a priori* analysis of "whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith."); 42 U.S.C. § 2000e-5(k) (deputizing courts to police bad-faith filings under Title VII by placing within their discretion the award of attorneys' fees). The same holds true in the environmental context, which has some of the more expansive private enforcement schemes. *See, e.g.*, Fla. Stat. Ann. § 403.412(f) (prevailing party in suit under Florida Environmental Protection Act may receive attorneys' fees, which "shall be discretionary with the court"); La. Stat. Ann. § 30:2026(A)(3) (same); *see also* Susan George, William J. Snape, III & Rina Rodriguez, *The Public in Action: Using State Citizen*

Suit Statutes to Protect Biodiversity, 6 U. BALT. J. ENVT'L. L. 1, 30-36 (1997) (summarizing cost provisions in state environmental citizen suit statutes) (hereinafter "George, Snape, III & Rodriguez").

Many private enforcement schemes also empower the executive to control the direction of a private cause of action through rulemaking, case-screening, pre-suit filing requirements, alternative dispute resolution requirements, or even the option to take it over in its entirety. *See, e.g.*, *Christianburg Garment Co.*, 434 at 413-14 (discussing pre-suit conciliation process and ability of EEOC to take over litigant's employment discrimination case). These protections bespeak legislative care and fidelity to due process.

2. S.B. 8's procedural ills are especially worrisome because potential defendants cannot obtain legal clarity pre- or even post-suit. Typically, a person facing imminent lawsuits could proactively ask a court to address such suits' merits through a declaratory judgment action. But S.B. 8 forecloses pre-enforcement review by deputizing "any person," but not the State of Texas, to enforce its provisions. This structure ensures that a potential target of the law has no way of knowing who might sue them, thereby cutting off any avenue for declaratory relief. It has long been accepted that providing pre-enforcement relief, through for example a declaratory judgment action, ensures potential defendants are ably protected. *See, e.g.*, *Abbott Labs. v. Gardner*, 387 U.S. 136, 153 (1967). And, because of the statute's limits on the use of preclusion defenses, even if a

defendant defeats an action against it, the threat of suit by other plaintiffs remains.

By barring potential defendants from seeking pre-enforcement clarity, and then systematically stripping those defendants of basic procedural protections traditionally afforded in civil litigation, S.B. 8 is legislation *in terrorem*: it controls private behavior through the specter of private enforcement in tribunals that fail to accord defendant-litigants reasonable due process rights.

II. S.B. 8 Intentionally Subverts the Judicial Process.

1. The same features of S.B. 8 that deprive individuals of due process preclude the judiciary from exercising its proper authority. By limiting pre-enforcement review and by barring non-mutual issue preclusion or claim preclusion, S.B. 8 seeks to deny the judiciary the opportunity to state whether the substantive rules are constitutional; and as discussed in Part I, *supra*, by tilting the playing field once a suit commences, it ensures that courts are likely to reach the merits in few if any cases.

This was by design. *See* Dist. Ct. Opp. at **49-51; *see also* Intervenor-Appellants' 5th Cir. Reply Br. 3-4 (boasting that "Texas has boxed out the judiciary" while asserting that States "have every prerogative to adopt interpretations of the Constitution that differ from the Supreme Court's."). The Texas legislature thus transgresses the "emphatic[] . . . duty of the judicial department to say what the law is." *Marbury v. Madison*, 5. U.S. 137, 177 (1803). By intentionally

blocking judicial review, S.B. 8 arrogates to the Texas legislature the question of the Texas legislature's own authority to regulate abortion—or for that matter, any other fundamental right this Court has recognized. That is contrary to constitutional design.

The suite of provisions governing the course of proceedings under S.B. 8—including the foreclosure of certain defenses, attorneys' fees, and *res judicata* and collateral estoppel—interferes with the judiciary in other ways as well. For instance, S.B. 8 threatens to saddle courts with a torrent of claims brought by individuals with a passing interest, if any, in the conduct at issue, while preventing courts from sanctioning frivolous or bad faith litigation, applying claim or issue preclusion, or transferring claims to a more proper venue. S.B. 8 §§ 171.208(b), (d), (e), (i); *id.* § 171.210(b).

III. S.B. 8's Complete Delegation of Enforcement Authority Undermines the Separation of Powers and Invites Private Abuse.

Amici are unaware of any private enforcement scheme, state or federal, enlisting individuals to enforce state regulatory goals in the same manner as S.B. 8. S.B. 8 not only permits uninjured private parties to sue, but it dangles the carrots of a monetary bounty, attorney's fees, and costs (to successful litigants) to encourage them to do so, while explicitly disclaiming any role in enforcement by the state. Separate and apart from the due process issues described above, *see* Part II, *supra*, this complete delegation of enforcement authority raises separation

of powers concerns and threatens abuse by private parties.

1. Private enforcement schemes typically restrict causes of action to certain classes of individuals (*e.g.*, investors, consumers, competitors) or to individuals who have suffered an injury or loss. In those states that have not incorporated Article III's injury-in-fact requirement, courts, "out of respect for the legislature, or out of a sense of their own limitations, . . . customarily decline to rule on questions of law absent something like a case or controversy." *See* Christopher S. Elmendorf, *State Courts, Citizen Suits, and the Enforcement of Federal Environmental Law by Non-Article III Plaintiffs*, 110 YALE L.J. 1003, 1006 (2001. And, even states that have extended private enforcement claims more broadly to so-called "citizen suits" have generally limited such schemes by restricting who may be sued (*e.g.*, state authorities) or the remedies available. *See, e.g.*, George, Snape, III & Rodriguez at 30-36 (summarizing state environmental citizen suit statutes which largely are limited to injunctive and declaratory relief).

The principle that the judiciary decides controversies between interested litigants derives from separation of powers principles and limits the exercise of judicial power in its proper domain. *See, e.g., Allen v. Wright*, 468 U.S. 737, 750 (1984) (observing that standing relates to the "prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government" (quoting *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1178-79 (D.C. Cir. 1982) (Bork, J., concurring))). And principles like

standing ensure that the complainant is properly positioned to be a zealous and well-informed plaintiff, as well as provide a key safeguard against vexatious litigation brought solely for political purposes. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring) ("[The injury requirement] is not a mere formality. It preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed stake in the outcome, and that 'the legal questions presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.'")

2. A limited exception to the personal stake requirement applies in *qui tam* actions, where a private litigant "steps into the shoes of the government" and acts as its assignee in litigation. In *qui tam* actions brought under the federal False Claims Act, 31 U.S.C. §§ 3729-33 (hereinafter "FCA"), a private party called a relator brings an action as an assignee on the federal government's behalf. *See Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 773 (2000) ("The FCA can reasonably be regarded as effecting a partial assignment of the government's damages claim."); *see also* 31 U.S.C. § 3930 (FCA claims brought "for the person and for the United States Government," and must be "brought in the name of the Government"). Because the relator is asserting the government's injury, "the United States' injury in fact suffices to confer standing on [FCA plaintiffs]" that were not personally harmed by the

challenged conduct. *U.S. ex rel. Stevens*, 529 U.S. at 774. Texas statutes are structured similarly. *See, e.g.*, Tex. H.R. Code 36.101(a) (permitting a plaintiff under the Texas Medicaid Fraud Prevention Act to "bring a civil action . . . for the person and for the state," while requiring that the action "be brought in the name of the person and of the state").

Senator Bryan Hughes, who sponsored S.B. 8 in the Texas Senate, contends that the purpose of S.B. 8 was to mimic *qui tam* statutes.[4] However, *qui tam* statutes share a key unifying principle that is conspicuously disregarded in S.B. 8: when a relator asserts a claim that is the government's, the government plays an important, ongoing, and ultimately supervisory role when it comes to the shepherding of *qui tam* litigation. Under the federal FCA, the government has the right to intervene and assume primary responsibility for the litigation of the action. 31 U.S.C. § 3730(b)(2). That responsibility is capacious—it includes deciding whether to take over the fraud suit (sidelining the relator), to partner with the relator, to settle with the defendant, or to dismiss the suit outright. 31 U.S.C. § 3730(c)(2). Again, Texas ordinarily imposes similar constraints on private plaintiffs. Under the Texas Medicaid Fraud Prevention Act, the Texas government must receive

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[4] *See* Jenna Greene, *Column: Crafty lawyering on Texas abortion bill withstood SCOTUS challenge*, REUTERS, September 5, 2021, *available at* https://www.reuters.com/legal/government/crafty-lawyering-texas-abortion-bill-withstood-scotus-challenge-greene-2021-09-05.

notice before the case is brought (Tex. H.R. Code 36.101(a)), is permitted to intervene (Tex. H.R. Code 36.101(c)), and should it choose to, assume "primary responsibility for prosecuting the action" without being "bound by an act of the person bringing the action" (Tex. H.R. Code 36.107(a)).

3. Traditional separation of powers principles caution against the delegation of executive enforcement authority from elected officials to private citizens with a tenuous connection, if any, to the offending conduct underlying the suit. Injury-in-fact requirements and the government's role in *qui tam* actions comport with this doctrine.

These limits on the delegation of executive authority make sense. Politically and legally accountable, fiscally minded, and resource-constrained public officials are generally in the best position to ensure fair, uniform and nondiscriminatory enforcement of laws and regulations. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (noting that enforcement decisions involve "balancing of a number of factors . . . peculiarly within [an agency's] expertise").[5] The executive self-governs the exercise of its enforcement discretion by, among other things, defining enforcement priorities and developing internal guidelines, approvals and review processes. *See, e.g.*, Dep't. of Justice, JUSTICE MANUAL (setting forth Department of Justice policies governing public enforcement); Nat'l Assoc. of

[5] *See also* Tara L. Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 800 (2009).

Attorneys General, STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES, at 91-99, 105-11 (4th ed. 2018) (discussing role of Attorneys General to conduct litigation). And executive enforcement decisions are subject to legislative oversight, *see, e.g.*, *Heckler*, 470 U.S. at 832-33 (discussing legislative oversight of enforcement decisions), as well as judicial review when Congress or the agency have promulgated binding enforcement standards, *see, e.g.*, *Edison Elec. Inst. v. EPA*, 996 F.2d 326, 333 (D.C. Cir. 1993) (permitting judicial review of EPA enforcement policy that derived from the agency's interpretation of "substantive requirements of the [relevant] law").

In contrast, courts have consistently recognized that the incentives of private citizens are often misaligned with the public's objectives. *See Assoc. of Am. Railroads v. U.S. Dep't. of Transp.*, 721 F.3d 666, 677 (D.C. Cir. 2013) (*Amtrak I*) ("Skewed incentives are precisely the danger forestalled by restricting delegations to government instrumentalities."); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 164 (2014) (discussing risks where "universe of potential complainants is not restricted to state officials who are constrained by explicit guidelines or ethical obligations"). Nor are the enforcement decisions of private actors nearly as politically or legally accountable. *Cf.* Jon D. Michaels, *Deputizing Homeland Security*, 88 TEX. L. REV. 1435, 1457-66 (2010) (describing potential dangers of delegation of investigatory authority to private actors).

4. S.B. 8 reassigns the executive's responsibility to faithfully execute the laws to private citizens ill-

equipped to do so. Indeed, S.B. 8 requires private citizens to decide *all* aspects of enforcement, among them whether to sue; where to sue; whom to sue; what claims to bring; what remedies to pursue; what litigation strategy to pursue in light of other regulatory and enforcement priorities; and whether and under what terms to settle. The law provides no mechanism for plaintiffs or courts to coordinate enforcement decisions or duplicative actions, and as discussed above, blocks courts from giving *res judicata* effect to claims and issues litigated to their conclusion in prior suits. *See* Part II, *supra*.

This Court has heavily criticized far less extensive efforts to bypass executive authority. *See, e.g.*, *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207 (2021) ("A regime where Congress could freely authorize *unharmed* plaintiffs to sue defendants who violate federal law not only would violate Article III but also would infringe on the Executive Branch's Article II authority."); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) ("[T]o permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3.").[6]

[6] Like the federal executive branch, the Texas Governor and Attorney General—both duly elected public officials—are constitutionally entrusted to faithfully execute the laws of the

In its scope and effect, S.B. 8's design invites the very danger the D.C. Circuit sought to avoid in *Assoc. of Am. Railroads v. U.S. Dep't of Transp.* (*Amtrak III*): that the "delegation of coercive power to private parties can raise . . . due process concerns," in significant part because unlike "disinterested" governmental bodies, private parties are motivated to pursue their own "naked self-interest." 821 F.3d 19, 29-31 (D.C. Cir. 2016).

* * *

In pursuit of protecting a policy goal from constitutional scrutiny, the State of Texas created a noxious broth of procedural extremes. Nowhere does the State of Texas argue that S.B. 8's design is necessary to achieve any legitimate policy goals such as the regulation of medicine. S.B. 8 represents a troubling willingness to cast aside the constitutional principles of due process and separation of powers, and an embracement of vigilantism at the expense of the rule of law.[7]

If countenanced, S.B. 8 is sure to be repeated elsewhere. Already, legislation copying S.B. 8's

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State. *Compare* U.S. Const., art. II, § 3 (providing that the Executive Branch "shall take care that the laws [are] faithfully executed"), *with* Tex. Const. art. IV, § 10 ("[The Governor] shall cause the laws to be faithfully executed."), *and id.* § 22 ("The Attorney General shall represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party").

[7] *See, e.g.*, Jon D. Michaels & David L. Noll, *We Are Becoming a Nation of Vigilantes*, N.Y. TIMES, Sept. 4, 2021, *available at* https://www.nytimes.com/2021/09/04/opinion/texas-abortion-law.html.

enforcement scheme verbatim has been introduced in other jurisdictions.[8] And it is not difficult to imagine legislatures of varying political stripes creating private enforcement schemes to strip individuals of the ability to defend their federally protected rights. For example, as the United States notes, laws could be enacted to bar gun owners from availing themselves of their rights under *Heller v. District of Columbia*; to prevent corporations from bundling donations for political candidates, despite this Court's decision in *Citizens United v. FEC*; and to fine persons of faith and faith-based institutions for availing themselves of various regulatory exemptions recognized as constitutional imperatives in *Fulton v. City of Philadelphia et al.*, 141 S. Ct. 1868 (2021) and *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63 (2020). In light of these far-reaching and time-sensitive implications, it is critical that the Court grant the United States's application and reinstate the District Court's injunction pending judicial review of S.B. 8.

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[8] *See, e.g.*, Adela Suliman, *Florida Republican introduces 'copycat' bill to ban most abortions, echoing Texas law*, WASH. POST, Sept. 23, 2021, *available at* https://www.washingtonpost.com/nation/2021/09/23/florida-texas-abortion; Oren Oppenheim, *Which states' lawmakers have said they might copy Texas' abortion law*, ABC NEWS, Sep. 3, 2021, https://abcnews.go.com/Politics/states-lawmakers-copy-texas-abortion-law/story?id=79818701.

CONCLUSION

For the foregoing reasons, the Court should grant the United States's application to vacate the stay of preliminary injunction issued by the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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