No. 21A-_____

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, APPLICANT

v.

STATE OF TEXAS

APPLICATION TO VACATE STAY OF PRELIMINARY INJUNCTION ISSUED BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PARTIES TO THE PROCEEDING

Applicant, the United States of America, was the plaintiff-appellee below.

Respondents were the defendant-appellant and intervenor defendants-appellants below. They are the State of Texas (the defendant-appellant) and Erick Graham, Jeff Tuley, and Mistie Sharp (the intervenor defendants-appellants).

Oscar Stilley was an intervenor defendant in the district court, but did not appeal.

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On October 14, 2021, the United States Court of Appeals for the Fifth Circuit stayed a preliminary injunction barring enforcement of Texas Senate Bill 8 (S.B. 8). Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, the Acting Solicitor General, on behalf of the United States of America, respectfully applies for an order vacating the stay.

For half a century, this Court has held that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992) (plurality opinion); accord Roe v. Wade, 410 U.S. 113, 163-164 (1973). S.B. 8 defies those precedents by banning abortion long before viability -- indeed, before many women even realize they are pregnant. Texas is not the first State

to question Roe and Casey. But rather than forthrightly defending its law and asking this Court to revisit its decisions, Texas took matters into its own hands by crafting an "unprecedented" structure to thwart judicial review. Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2496 (2021) (Roberts, C.J., dissenting).

To avoid pre-enforcement suits against state officials, Texas "delegated enforcement" of the law "to the populace at large" in a system of private bounties. Whole Woman's Health, 141 S. Ct. at 2496 (Roberts, C.J., dissenting). And to frustrate constitutional defenses in those private suits, Texas designed them to be so procedurally lopsided -- and to threaten such crushing liability -- that they deter the provision of banned abortions altogether. Thus far, S.B. 8 has worked exactly as intended: Except for the few days the preliminary injunction was in place, S.B. 8's in terrorem effect has made abortion effectively unavailable in Texas after roughly six weeks of pregnancy. Texas has, in short, successfully nullified this Court's decisions within its borders.

All of this is essentially undisputed. The Fifth Circuit did not deny any of it. Texas itself has not seriously tried to reconcile S.B. 8's ban with this Court's precedents -- indeed, it said not a word about the law's constitutionality in the Fifth Circuit. The intervenors, for their part, boast that "Texas has boxed out the judiciary" and assert that States "have every

prerogative to adopt interpretations of the Constitution that differ from the Supreme Court's." Intervenors C.A. Reply Br. 3-4.

The question now is whether Texas's nullification of this Court's precedents should be allowed to continue while the courts consider the United States' suit. As the district court recognized, it should not: The United States is likely to succeed on the merits because S.B. 8 is clearly unconstitutional and because the United States has authority to seek equitable relief to protect its sovereign interests -- including its interest in the supremacy of federal law and the availability of the mechanisms for judicial review that Congress and this Court have long deemed essential to protect constitutional rights. Allowing S.B. 8 to remain in force would irreparably harm those interests and perpetuate the ongoing irreparable injury to the thousands of Texas women who are being denied their constitutional rights. Texas, in contrast, would suffer no cognizable injury from a preliminary injunction barring enforcement of a plainly unconstitutional law.

Again, the Fifth Circuit disputed none of this. Instead, the divided panel's one-paragraph order stayed the preliminary injunction solely for "the reasons stated in" two decisions addressing a prior challenge to S.B. 8, Whole Woman's Health v. Jackson, 13 F.4th 434 (5th Cir. 2021), and Whole Woman's Health, 141 S. Ct. at 2495. App., infra, 1a. But those reasons do not apply to this very different suit. Sovereign immunity forced the

private plaintiffs in Whole Woman's Health to sue individual state officers, and this Court and the Fifth Circuit questioned whether those officers were proper defendants. This suit does not raise those questions because it was brought against the State of Texas itself, and the State has no immunity from suits by the United States. The Fifth Circuit ignored that distinction, which refutes the court's only justification for the stay.

Because the United States has made all showings required for a preliminary injunction -- and because the Fifth Circuit's unjustified stay enables Texas's ongoing nullification of this Court's precedents and its citizens' constitutional rights -- the Court should vacate the stay. In addition, given the importance and urgency of the issues, the Court may construe this application as a petition for a writ of certiorari before judgment, grant the petition, and set this case for briefing and argument this Term. Cf. Nken v. Mukasey, 555 U.S. 1042 (2008).

STATEMENT

A. Texas's Enactment of S.B. 8

1. S.B. 8 provides that "a physician may not knowingly perform or induce an abortion on a pregnant woman" after cardiac activity is detected in the embryo. Tex. Health & Safety Code §§ 171.203(b), 171.204(a).[1] Cardiac activity begins at roughly

[1] All references in this application to the Texas Code and Rules of Procedure are to the versions in effect as of September 1, 2021.

six weeks of pregnancy, as measured from a woman's last menstrual period -- that is, just two weeks after a woman's first missed period, and roughly four months before viability. See App., infra, 3a-4a, 6a-7a. S.B. 8 contains no exception for pregnancies resulting from rape or incest. And it provides only a limited exception for "medical emergenc[ies] * * * that prevent[] compliance with" the law. Tex. Health & Safety Code § 171.205(a).

Because this Court has long held that a State may not prohibit any woman from choosing to terminate a pregnancy before viability, federal courts have uniformly enjoined similar "heartbeat laws" in traditional suits against the state officials charged with enforcing them. See, e.g., Jackson Women's Health Org. v. Dobbs, 951 F.3d 246, 248 (5th Cir. 2020) (per curiam). Seeking to avoid that result, Texas designed S.B. 8 to thwart judicial review. The law provides that it "shall be enforced exclusively through * * * private civil actions" rather than by the State's executive branch. Tex. Health & Safety Code § 171.207(a). Those suits may be brought against anyone who performs or aids, or intends to perform or aid, a prohibited abortion. Id. § 171.208(a). And they may be brought by "[a]ny person" other than a state or local official -- the plaintiff need not have any connection to the abortion, or even reside in Texas. Ibid.

Texas has thus "delegated enforcement of [S.B. 8's] prohibition to the populace at large" to "insulate the State from

responsibility for implementing and enforcing the regulatory regime." Whole Woman's Health, 141 S. Ct. at 2496 (Roberts, C.J, dissenting). The evident purpose of that "unprecedented" scheme, ibid., is to avoid pre-enforcement suits against state officers under 42 U.S.C. 1983 and Ex parte Young, 209 U.S. 123 (1908).

In theory, providers could perform prohibited abortions and then assert S.B. 8's unconstitutionality as a defense in the resulting enforcement actions. But that avenue of review is not even theoretically available to pregnant women -- whose rights S.B. 8 directly violates -- because they cannot be sued under the law. Tex. Health & Safety Code § 171.206(b)(1). And Texas crafted S.B. 8 to ensure that the threat of crippling liability would deter providers from taking their chances in court.

If an enforcement suit succeeds, S.B. 8 requires the court to award a bounty of "not less than" $10,000 in statutory damages for each abortion, plus costs, attorney's fees, and mandatory injunctive relief. Tex. Health & Safety Code § 171.208(b). The law raises the specter of retroactive liability by purporting to bar defendants from asserting reliance on precedent that was later "overruled." Id. § 171.208(e)(3). Its special venue rules encourage forum-shopping and suits in inconvenient locations. Id. § 171.210. And even if a provider defeats a suit on constitutional grounds, S.B. 8 limits the relief that success affords by barring "non-mutual issue preclusion or non-mutual claim preclusion." Id.

§ 171.208(e)(5). That means that even if a provider repeatedly prevails, she can be sued again and again by other plaintiffs -- even for the same abortion.

2. S.B. 8's architects have candidly acknowledged that the law was designed to deter constitutionally protected abortions while evading judicial review. App., infra, 51a. One of S.B. 8's principal proponents in the Texas Senate lauded the statute's "elegant use of the judicial system" and explained that its structure was intended to avoid the fate of other "heartbeat" bills that federal courts have held unconstitutional. Id. at 51a & n.34 (citations omitted); see C.A. App. 107, 111. And an attorney who helped draft the law described it as an effort to "counter the judiciary's constitutional pronouncements" on abortion. App., infra, 51a n.34 (citation omitted); see C.A. App. 116.

B. S.B. 8's Impact

S.B. 8 took effect on September 1, 2021. As the district court found, it virtually eliminated access to abortion in Texas after six weeks of pregnancy. App., infra, 77a. Indeed, the court observed that Texas could cite -- and the record revealed -- "only one case" of a post-cardiac-activity abortion being performed "in post-S.B. 8 Texas." Id. at 86a. And by banning abortions after roughly six weeks of pregnancy, S.B. 8 has blocked the vast majority of all abortions that would otherwise have been performed in the State. See id. at 85a (citing providers' statements that

S.B. 8 prohibits between 80% and 95% of all abortions previously provided in Texas).

Texans with sufficient means have traveled hundreds of miles to obtain abortions in other States -- often making multiple trips to comply with those States' abortion laws. App, infra, 94a; see id. at 87a-97a. As the district court found, the influx of patients from Texas has overwhelmed providers in Oklahoma, Kansas, Colorado, New Mexico, and as far away as Nevada. See id. at 91a-97a. Clinics in Oklahoma, for example, have been "forced to delay patients' abortions" for weeks "because of the volume of appointments needed." Id. at 91a (citation omitted); see id. at 91a n.72; see also id. at 97a. "And with the overlapping state regulation regimes, a delayed abortion can mean the difference between a medication abortion" and "a procedural abortion, if a patient is able to obtain an abortion at all." Id. at 94a; see id. at 94a n.79.

In addition, many Texans seeking abortions cannot travel to other States "for any number of reasons," including financial constraints; childcare, job, and school responsibilities; and "dangerous family situations." App., infra, 88a; see id. at 87a n.64, 88a n.66. As the district court found, women who cannot leave the State are being forced to "make a decision" about whether to have an abortion "before they are truly ready to do so." Id. at 84a (citation omitted). And if they do not learn they are

pregnant until after six weeks, women who cannot travel "are being forced to carry their pregnancy to term against their will or to seek ways to end their pregnancies on their own." Id. at 88a (citation omitted); see id. at 93a n.76.

C. The Whole Woman's Health Litigation

Before S.B. 8 took effect, abortion providers and patient advocates sued several state officials and an individual who had expressed an intent to bring S.B. 8 suits. The district court denied the state defendants' motion to dismiss. Whole Woman's Health v. Jackson, No. 21-cv-616, 2021 WL 3821062 (W.D. Tex. Aug. 25, 2021). After the defendants appealed, the Fifth Circuit stayed the district court's proceedings and rejected the plaintiffs' request for an injunction pending appeal. Whole Woman's Health v. Jackson, No. 21-5079, 2021 WL 3919252 (Aug. 29, 2021) (per curiam). The Fifth Circuit later explained that, in its view, the claims against state officials were barred by Texas's "Eleventh Amendment immunity." Whole Woman's Health v. Jackson, 13 F.4th 434, 438 (2021) (per curiam). The court acknowledged that state officials may be sued under Ex parte Young's exception to sovereign immunity, but it found that exception inapplicable because it concluded that the executive defendants had no role in enforcing S.B. 8 and that state judges and clerks are not proper defendants under Ex parte Young. Id. at 441-445.

Over the dissent of four Justices, this Court declined to grant an injunction or vacate the stay. Whole Woman's Health, 141 S. Ct. 2495. The Court explained that the private plaintiffs had "raised serious questions regarding the constitutionality of the Texas law," but it determined that they had not "carried their burden" as to "complex and novel antecedent procedural questions" resulting from the law's unprecedented design -- principally, whether the individual officials named in the lawsuit were proper defendants under Ex parte Young. Ibid.; see ibid. (noting that the sole private defendant had filed an affidavit disclaiming any present intent to enforce S.B. 8). The Court emphasized that its decision "in no way limit[ed] other procedurally proper challenges to the Texas law, including in Texas state courts." Id. at 2496. The plaintiffs in Whole Woman's Health have filed a petition for a writ of certiorari before judgment. Whole Woman's Health v. Jackson, No. 21-463 (filed Sept. 23, 2021).[2]

[2] To the government's knowledge, fourteen challenges to S.B. 8 have been filed in Texas courts. Although those cases were filed in August and early September, they were stayed pending a motion to transfer them to the State's multidistrict litigation court, which was recently granted. See Order, In re Texas Heartbeat Act Litigation, No. 21-782 (Tex. Multidistrict Litigation Panel Oct. 14, 2021). In addition, three individuals have filed S.B. 8 suits against a doctor who announced that he had performed a single prohibited abortion. See Stilley v. Braid, No. 2021CI19940 (Bexar County, 438th Judicial District); Gomez v. Braid, No. 2021CI19920 (Bexar County, 224th Judicial District); Texas Heartbeat Project v. Braid, No. 21-2276-C (Smith County, 241st Judicial District).

D. Proceedings Below

1. On September 9, 2021, the United States brought this suit against the State of Texas. On October 6, the district court granted the United States' motion for a preliminary injunction against S.B. 8's enforcement. App., infra, 2a-114a. The court explained that the United States has authority to bring this suit, id. at 25a-57a; that S.B. 8 plainly violates the Fourteenth Amendment and the doctrines of preemption and intergovernmental immunity, id. at 72a-105a; that a preliminary injunction was necessary to prevent irreparable harm, id. at 105a-108a; and that the balance of equities and the public interest favored an injunction, id. at 108a-109a. The preliminary injunction forbids "the State of Texas, including its officers, officials, agents, employees, and any other persons or entities acting on its behalf, * * * from enforcing [S.B. 8], including accepting or docketing, maintaining, hearing, resolving, awarding damages in, enforcing judgments in, enforcing any administrative penalties in, and administering any lawsuit brought pursuant to" the law. Id. at 110a. The district court declined to stay the injunction pending appeal. Id. at 113a.

2. Texas and the intervenor defendants-appellants (three individuals who seek to bring S.B. 8 enforcement suits) appealed and moved for a stay pending appeal. App., infra, 1a, 16a. On October 8 -- two days after the district court's order -- the Fifth

Circuit granted an administrative stay. Order 1. On October 14, a divided panel stayed the preliminary injunction pending an expedited appeal. App., infra, 1a. Although this suit is brought by the United States (rather than private plaintiffs) against the State of Texas (rather than individual state officials), the panel majority's single-sentence explanation for its decision simply invoked "the reasons stated in Whole Woman's Health v. Jackson, 13 F.4th 434 (5th Cir. 2021), and Whole Woman's Health v. Jackson, 141 S. Ct. 2494 (2021)." Ibid. Judge Stewart dissented. Ibid.

ARGUMENT

The United States respectfully requests that this Court vacate the Fifth Circuit's stay of the district court's preliminary injunction. "The well-established principles" that guide the determination whether "to stay a judgment entered below are equally applicable when considering an application to vacate a stay." Certain Named & Unnamed Non-Citizen Children & Their Parents v. Texas, 448 U.S. 1327, 1330 (1980) (Powell, J., in chambers); see Coleman v. Paccar Inc., 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers). In considering such an application, this Court has thus looked to the traditional "four-factor test" for a stay. Alabama Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2488 (2021) (per curiam). That test requires a court to consider: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be

irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." Nken v. Holder, 556 U.S. 418, 426 (2009) (citation omitted). Each of those factors strongly supports vacating the stay in this case.

I. The United States Is Likely To Succeed On The Merits

S.B. 8 is plainly unconstitutional under this Court's precedents. Texas has not seriously argued otherwise. Instead, the State has focused on purported procedural obstacles to judicial review. But this suit by the United States does not present the procedural questions at issue in the private plaintiffs' suit in Whole Woman's Health. And Texas's insistence that no party can bring a suit challenging S.B. 8 amounts to an assertion that the federal courts are powerless to halt the State's ongoing nullification of federal law. That proposition is as breathtaking as it is dangerous. S.B. 8 is "unprecedented," Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2496 (2021) (Roberts, C.J., dissenting), but other States are already regarding it as a model. App., infra, 112a. And if Texas is right, States are free to use similar schemes to nullify other precedents or suspend other constitutional rights. Our constitutional system does not permit States to so easily thwart the supremacy of federal law.

A. S.B. 8 Is Unconstitutional

The district court correctly held that the United States is likely to prevail on the merits of its two claims that S.B. 8 violates the Constitution.

1. In seeking a stay in the Fifth Circuit, Texas did not try to argue that S.B. 8 comports with this Court's precedents on abortion. With good reason: This Court has long recognized that the Constitution protects a pregnant woman's right "to have an abortion before viability and to obtain it without undue interference from the State," which until viability lacks "interests * * * strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992). Because S.B. 8 bans abortion several months before viability, it is unconstitutional without recourse to the undue-burden standard. Ibid.; see id. at 878-879 (plurality opinion); see also, e.g., Jackson Women's Health Org. v. Dobbs, 951 F.3d 246, 248 (5th Cir. 2020) (per curiam).

Even if the undue-burden test applied, S.B. 8 would fail it. By exposing abortion providers to crippling liability and thwarting pre-enforcement review, the law aims to deter them from providing constitutionally protected abortion care. See pp. 5-7, supra. And that is exactly what S.B. 8 has done. The resulting

near-total unavailability of abortion in Texas after six weeks of pregnancy -- before many women even realize they are pregnant -- is an undue burden by any measure. See Casey, 505 U.S. at 878 (plurality opinion).

That is true even though the statute purports to provide an "undue burden" defense. Tex. Health & Safety Code § 171.209(b); see Whole Woman's Health v. Jackson, 13 F.4th 434, 444 (5th Cir. 2021) (per curiam). That defense is a distorted shadow of the undue-burden standard mandated by this Court's precedents. Most obviously, it directly contradicts this Court's instruction that the undue-burden standard examines the cumulative real-world consequences of the challenged law. See, e.g., Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2312-2318 (2016); Casey, 505 U.S. at 895; but see Texas Health & Safety Code § 171.209(b)(2) and (d)(2). And it is now indisputable that the theoretical availability of S.B. 8's "undue burden" defense has not actually prevented the law from achieving near-total deterrence of covered abortions. That result is manifestly an undue burden. And imposing that burden was the very purpose of S.B. 8 and its unprecedented scheme to thwart the traditional judicial mechanisms for ensuring the supremacy of federal law.

2. S.B. 8 also violates the doctrines of conflict preemption and intergovernmental immunity because it impairs the ability of federal agencies, contractors, and employees to carry

out their duties in a manner consistent with the Constitution and federal law. See, e.g., Arizona v. United States, 567 U.S. 387, 399 (2012) (conflict preemption); Trump v. Vance, 140 S. Ct. 2412, 2425 (2020) (intergovernmental immunity).

For example, the Bureau of Prisons must protect the rights of pregnant inmates by "arrang[ing] for an abortion to take place" if an inmate requests one. 28 C.F.R. 551.23(c). Other federal agencies have responsibilities that are also directly affected by S.B. 8. See App., infra, 26a-27a (discussing the United States Marshals Service, the Department of Defense, the Department of Health and Human Services, the Department of Labor, and the Office of Personnel Management). By imposing liability on anyone who aids or abets an abortion -- including in the case of a pregnancy resulting from rape or incest -- S.B. 8 threatens suits against federal employees and contractors for carrying out their duties under federal law. Id. at 26a; see id. at 101a-105a (rejecting the State's contrary arguments). It is thus preempted and contrary to principles of intergovernmental immunity, which apply even if a "federal function is carried out by a private contractor." Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 181 (1988); see, e.g., United States v. California, 921 F.3d 865, 882 n.7 (9th Cir. 2019), cert. denied, 141 S. Ct. 124 (2020).

Texas has not denied that S.B. 8 suits against federal employees and contractors would violate intergovernmental

immunity. Instead, it has suggested that its courts might construe S.B. 8 not to apply to those federal actors. C.A. Stay Mot. 5. But S.B. 8's text contains no such exception. And even if state courts might construe it not to apply to the federal government or its contractors, S.B. 8 would still pose an obstacle to the federal government's operations: Because the law has essentially eliminated abortion in Texas after six weeks of pregnancy, federal employees and contractors who are required to facilitate abortion care cannot do so within the State. App., infra, 28a.

B. The Procedural Obstacles Identified In Whole Woman's Health Are Absent Here

The panel majority granted a stay solely "for the reasons stated in" the decisions of the Fifth Circuit and this Court in Whole Woman's Health, the private challenge to S.B. 8. App., infra, 1a. Those reasons have no application to this suit by the United States.

In Whole Woman's Health, the Fifth Circuit concluded that Texas executive officials, judges, and clerks were immune from suit under the Eleventh Amendment. 13 F.4th at 441-445. The court acknowledged that, under Ex parte Young, 209 U.S. 123 (1908), sovereign immunity does not prevent a court from ordering a state officer "not to enforce a state law that violates federal law." Id. at 442. But the Fifth Circuit concluded that Ex parte Young did not apply because the defendant executive officials did not enforce the law, and because the state judges and clerks were not subject to suit under Ex parte Young. Id. at 443. The court also determined that Section 1983 did

not authorize an injunction against state judges in these circumstances. Id. at 443-444.

This Court's decision rested on similar concerns about a suit against individual state officials. The Court explained that it was "unclear whether the named defendants in th[e] lawsuit can or will seek to enforce" S.B. 8, which created questions under Ex parte Young and Article III. 141 S. Ct. at 2495 (citing Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013)). And the Court added that it was uncertain whether Ex parte Young authorizes "an injunction against state judges asked to decide a lawsuit" under S.B. 8. Ibid.

The concerns raised in Whole Woman's Health are wholly inapplicable in this suit by the United States against Texas itself. "In ratifying the Constitution, the States consented to suits brought by * * * the Federal Government." Alden v. Maine, 527 U.S. 706, 755 (1999). The district court thus correctly held that Texas's sovereign immunity poses no bar to this suit. Indeed, even Texas "d[id] not contend otherwise." App., infra, 59a. And because the United States can sue the State directly, this case likewise poses no question about which particular Texas officials would be proper defendants under Ex parte Young or Article III. Id. at 63a & n.40.

In short, the "reasons stated in Whole Woman's Health," App., infra, 1a, have no bearing on the validity of the preliminary injunction entered here. And the Fifth Circuit majority failed to

identify any other reasons justifying its stay of the injunction. That by itself provides sufficient reason to vacate the stay.

C. The District Court Properly Enjoined Enforcement of S.B. 8

Texas has argued that the United States lacks authority to bring this suit and that the scope of the preliminary injunction is improper. The Fifth Circuit did not rely on those contentions, and the district court correctly rejected them.

1. The United States Has Authority To Maintain This Suit

The United States has challenged S.B. 8 to vindicate two distinct sovereign interests. First, to the extent S.B. 8 interferes with the federal government's own activities, it is preempted and violates the doctrine of intergovernmental immunity. Second, S.B. 8 is an affront to the United States' sovereign interests in maintaining the supremacy of federal law and ensuring that the traditional mechanisms of judicial review endorsed by Congress and this Court remain available to challenge unconstitutional state laws. The United States has authority to seek equitable relief to vindicate both interests.

a. Courts have long recognized that even absent an express statutory cause of action, the United States may sue in equity to enjoin state statutes that interfere with the federal government's activities. See, e.g., Arizona, supra (preemption); California, 921 F.3d at 876-879 (intergovernmental immunity). The United

States' preemption and intergovernmental immunity claim falls squarely within that category.

b. The government also has authority to challenge S.B. 8 because the law's violation of the Fourteenth Amendment and the Supremacy Clause injures the United States' sovereign interests. In re Debs, 158 U.S. 564 (1895), is the canonical precedent recognizing that the federal government may, in appropriate circumstances, bring a suit in equity to vindicate such interests of the national government under the Constitution.

In Debs, the government sought an injunction against the Pullman rail strike. This Court explained that "[e]very government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other." Id. at 584. The Court emphasized that "it is not the province of the government to interfere in any mere matter of private controversy between individuals." Id. at 586. But it explained that "whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted 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, then the mere fact that the government has no

pecuniary interest in the controversy is not sufficient to exclude it from the courts." Ibid.

In recognizing the United States' authority to sue in Debs, this Court noted the United States' proprietary interest in the mail carried by railroads, but expressly declined to "place [its] decision upon th[at] ground alone." 158 U.S. at 584. Nor did the Court rely solely upon the government's statutory authority over rail commerce. Rather, Debs reflects the "general rule that the United States may sue to protect its interests." Wyandotte Transp. Co. v. United States, 389 U.S. 191, 201 (1967). And this Court has recognized the government's authority -- even without an express statutory cause of action -- to seek equitable relief against threats to various sovereign interests. In addition to allowing challenges to state laws that conflict with federal law or otherwise hinder the federal government's activities (as discussed above), the Court has allowed federal suits to protect the public from fraudulent patents, United States v. American Bell Tel. Co., 128 U.S. 315 (1888); protect Indian tribes, Heckman v. United States, 224 U.S. 413, 438-439 (1912); and carry out the Nation's treaty obligations, Sanitary Dist. of Chicago v. United States, 266 U.S. 405, 426 (1925).[3]

[3] Texas has suggested (C.A. Reply Br. 4) that Sanitary District and Heckman "rested on statutory causes of action." That is incorrect. In Sanitary District, the Court explained that "[t]he Attorney General by virtue of his office may bring this proceeding and no statute is necessary to authorize the suit."

Here, too, the United States is suing to vindicate its distinct sovereign interests. Texas designed S.B. 8 to violate the Constitution, as interpreted by this Court, and to thwart judicial review -- both by forswearing enforcement by the State's executive officials, in an effort to avoid pre-enforcement review, and by designing S.B. 8 suits to frustrate post-enforcement review. The United States does not claim, and the district court did not recognize, authority to sue whenever a State enacts an unconstitutional law. App., infra, 49a-50a. If a state law is subject to judicial review through ordinary channels, there is no danger of constitutional nullification. But nullification is exactly what Texas intended and accomplished here. The United States has a sovereign interest in ensuring the supremacy of federal law by preventing a State from suspending a constitutional right within its borders.

The particular means by which Texas has accomplished that result also implicates the United States' sovereign interest in ensuring the effectiveness of the mechanisms for vindicating federal rights provided by Congress and recognized by this Court. In enacting Section 1983, Congress created "a uniquely federal remedy against incursions upon rights secured by the Constitution and laws of the Nation." Felder v. Casey, 487 U.S. 131, 139 (1988)

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266 U.S. at 426. And in Heckman, the Court merely noted the United States' statutory authority to sue in addition to its authority to sue in equity. See 224 U.S. at 439, 442.

(citation and ellipsis omitted). Section 1983 "interpose[s] the federal courts between the States and the people, as guardians of the people's federal rights." Mitchum v. Foster, 407 U.S. 225, 242 (1972). And by specifically authorizing a "suit in equity," 42 U.S.C. 1983, Congress sought to ensure that individuals "threatened" with a "deprivation of constitutional rights" would have "immediate access to the federal courts notwithstanding any provision of state law to the contrary." Patsy v. Board of Regents, 457 U.S. 496, 504 (1982) (citation omitted). S.B. 8 was designed to frustrate "[t]he 'general rule' * * * that plaintiffs may bring constitutional claims under § 1983" rather than being forced to assert their rights in state court. Knick v. Township of Scott, 139 S. Ct. 2162, 2172 (2019) (citation omitted); see id. at 2172-2173.

This Court has likewise recognized that the equitable cause of action recognized in Ex parte Young is "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105 (1984) (citation omitted); accord Virginia Office for Protection and Advocacy v. Stewart, 563 U.S. 247, 254 (2011). Like Section 1983, Ex parte Young's cause of action ensures that individuals are "not * * * required to take" the risk of violating an unconstitutional

statute and "await[ing] proceedings" in state court. Ex parte Young, 209 U.S. at 165.

Texas has suggested that it has not frustrated judicial review because defendants in S.B. 8 suits could raise the statute's unconstitutionality as a defense. But that is no help for the women whose rights S.B. 8 most directly violates, because they cannot be defendants in S.B. 8 suits. And Texas designed S.B. 8 to ensure that such constitutional defenses will be infrequent (because S.B. 8 has so thoroughly chilled providers that few enforcement proceedings will be brought) and ineffective (because S.B. 8 limits the consequences of a successful constitutional defense to the particular plaintiff at issue).[4]

Indeed, S.B. 8's entire structure for its private enforcement suits manifests overt hostility to a defense based on this Court's decisions recognizing a constitutional right to abortion. See pp. 5-7, supra. Far from an effective means of judicial review, therefore, S.B. 8 suits are themselves an improper attempt to undermine federal rights: "States retain substantial leeway to establish the contours of their judicial systems," but "they lack authority to nullify a federal right or cause of action they

[4] For the same reason, S.B. 8 bears no resemblance to prior state laws that have conferred limited private rights of action on parties with a direct connection to a prohibited abortion. See, e.g., Nova Health Sys. v. Gandy, 416 F.3d 1149, 1152 (10th Cir. 2005) (describing an Oklahoma statute making abortion providers liable for certain medical costs resulting from an abortion performed on a minor without parental consent).

believe is inconsistent with their local policies." Haywood v. Drown, 556 U.S. 729, 736 (2009).

Texas has thus effectively suspended a federal constitutional right by thwarting the mechanisms of judicial review long recognized by Congress and this Court -- and by depriving the direct rightsholders (pregnant women) of any effective means of judicial review. Just as the United States could sue in Debs to eliminate a grave threat to its sovereign interest in the free flow of interstate commerce, it may sue here to eliminate S.B. 8's grave threat to the supremacy of federal law and the traditional mechanisms of judicial review.

The consequences of Texas's actions, moreover, are not confined to its own borders. Pervasive interference with access to abortion in one State affects "the availability of abortion-related services in the national market" by forcing women to travel to clinics in other States, burdening "the availability of abortion services" in neighboring jurisdictions. United States v. Bird, 124 F.3d 667, 678, 681 (5th Cir. 1997), cert. denied, 523 U.S. 1006 (1998). The district court found that S.B. 8 has had exactly that effect. For example, the court credited a declaration from a provider at two clinics in Oklahoma who stated that "since S.B. 8 took effect, we have seen an overall staggering 646% increase of Texan patients per day compared to the first six months of the year," with patients from Texas "taking up at least 50% (and on

some days nearly 75%) of the appointments we have available at our Oklahoma health centers." App., infra, 92a (quoting C.A. App. 199); see generally id. at 93a-97a (describing effects on clinics in Kansas, Colorado, New Mexico, and Nevada).

c. The United States' authority to bring suit to protect the sovereign interests threatened by S.B. 8 is well-grounded in equity. As this Court has explained, "[t]he ability to sue to enjoin unconstitutional actions by state * * * officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 327 (2015). "'[S]uits to enjoin official conduct that conflicts with the federal Constitution are common,'" and "a cause of action routinely exists for such claims" -- not because it is implied "under the Constitution itself," but "as 'the creation of courts of equity.'" D.C. Ass'n of Chartered Public Sch. v. District of Columbia, 930 F.3d 487, 493 (D.C. Cir. 2019) (citations omitted). Indeed, in the last decade alone, the United States has brought numerous suits for equitable relief against States and localities to protect its sovereign interests, notwithstanding the absence of express statutory authority.[5]

[5] See, e.g., Arizona, supra; United States v. State Water Res. Control Bd., 988 F.3d 1194 (9th Cir. 2021); United States v. Washington, 971 F.3d 856 (9th Cir. 2020), as amended, 994 F.3d 994 (9th Cir. 2020), petition for cert. pending, No. 21-404 (filed Sept. 8, 2021); United States v. California, 921 F.3d 865, 876

Texas has asserted (e.g., C.A. Reply Br. 4) that the government's suit is inconsistent with Grupo Mexicano de Desarrollo S. A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999). But Grupo Mexicano simply stands for the proposition that the equity jurisdiction of the federal courts does not authorize them to grant "a remedy" that was "historically unavailable from a court of equity." Id. at 333. Unlike the novel form of preliminary relief sought in Grupo Mexicano, the remedy the United States seeks here -- an injunction against enforcement of an unconstitutional statute -- falls squarely within the history and tradition of courts of equity. See Armstrong, 575 U.S. at 327.

Texas has also invoked lower-court decisions holding that the mere fact that a State has violated its citizens' Fourteenth Amendment rights does not authorize the United States to sue for an injunction. See, e.g., United States v. City of Philadelphia, 644 F.2d 187 (3d Cir. 1980); United States v. Mattson, 600 F.2d 1295 (9th Cir. 1979); United States v. Solomon, 563 F.2d 1121 (4th Cir. 1977). But again, this suit does not simply seek to enforce such rights; rather, it seeks to protect a distinct interest of the United States in preventing a State from nullifying federal law and evading Congress's direction in Section 1983, and this

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(9th Cir. 2019), cert. denied, 141 S. Ct. 124 (2020); United States v. Board of Cnty. Comm'rs, 843 F.3d 1208 (10th Cir. 2016), cert. denied, 138 S. Ct. 84 (2017); United States v. South Carolina, 720 F.3d 518, 524 (4th Cir. 2013); United States v. Alabama, 691 F.3d 1269, 1279 (11th Cir. 2012), cert. denied, 569 U.S. 968 (2013); United States v. City of Arcata, 629 F.3d 986, 988 (9th Cir. 2010).

Court's recognition in Ex parte Young, that injured individuals should be able to vindicate their federal constitutional rights in federal court. Texas's attempt to evade those traditional mechanisms of judicial review distinctly undermines the constitutional structure and distinctly harms the United States' sovereign interests. The district court's decision in this case was expressly limited to these "exceptional" circumstances. App., infra, 111a; see id. at 49a-50a. And because City of Philadelphia, Mattson, and Solomon involved no effort to frustrate other mechanisms for judicial review, the district court's reasoning in this case would not have authorized the suits in those cases.

For much the same reason, there is no merit to Texas's prior assertion (e.g., C.A. Stay Mot. 11-13) that Congress has displaced the United States' equitable cause of action by enacting Section 1983 and other express statutory mechanisms for vindicating constitutional rights. Whatever the force of that argument in other contexts, it is no help to Texas here. After all, the whole point of S.B. 8's unprecedented enforcement scheme is to thwart the express cause of action Congress provided in Section 1983. See Intervenors C.A. Reply Br. 3-4. In bringing this suit, the United States thus seeks to vindicate, not circumvent, Congress's judgment that state laws that prohibit the exercise of federal constitutional rights should be subject to suits for injunctive relief in federal court.

d. Finally, Texas has invoked Muskrat v. United States, 219 U.S. 346 (1911), to assert that there is no justiciable controversy here. Muskrat concerned a statute authorizing four individuals to sue the United States "to determine the validity" of an earlier statute broadening the class of Native Americans entitled to participate in an allotment of property. Id. at 350. This Court explained that the suit authorized by the statute amounted to an impermissible request for an advisory opinion, because the Court's judgment would have been "no more than an expression of opinion upon the validity of the acts in question." Id. at 362.

This case is entirely different. The United States seeks not an advisory opinion but an injunction barring enforcement of S.B. 8. And both the United States and Texas have genuine, adverse stakes in this controversy. As discussed above, S.B. 8 injures the United States' sovereign interests: Among other things, the statute nullifies federal law and frustrates Congress's enactment of Section 1983 for the enforcement of federal constitutional rights. And while Texas has attempted to delegate its enforcement powers to the citizenry at large, S.B. 8 plaintiffs do not seek to vindicate private rights through the courts; indeed, they need have no connection to the abortion at issue. Rather, S.B. 8 suits address an alleged public harm -- the provision of constitutionally

protected abortions that are inconsistent with Texas's preferred public policy.

2. The Relief Ordered By The District Court Was Proper

The district court properly enjoined "the State of Texas, including its officers, officials, agents, employees, and any other persons or entities acting on its behalf" from "maintaining, hearing, resolving, awarding damages in, enforcing judgments in, enforcing any administrative penalties in, and administering any lawsuit brought pursuant to" S.B. 8. App., infra, 110a.

a. S.B. 8 is a statute enacted by the Texas legislature, signed by the Texas governor, and enforceable in Texas courts. If Texas had not enacted S.B. 8, no private plaintiff could maintain the cause of action that it creates. And no plaintiff could maintain an S.B. 8 cause of action or recover the statutory damages it authorizes without action by the Texas courts. It is, in short, plain that Texas is responsible for the constitutional violations caused by S.B. 8. It should be equally plain that where, as here, the State's sovereign immunity does not apply, Texas can be enjoined to prevent those violations.

Everything after that is just a question of how best to craft the injunction -- that is, which state actors should be covered by an injunction against the State, and what specific conduct the injunction should prohibit or require. Those remedial questions should not distract from the core point: It was proper for the

district court to enjoin the State to halt its ongoing constitutional violations. And having chosen a supremely unusual means of enforcing its unconstitutional law, Texas should bear the obligation to identify an alternative form of injunctive relief if it is dissatisfied with the particular mechanism adopted by the district court.

Texas has steadfastly refused to propose such an alternative. That refusal gives the game away. Texas's objection is, at bottom, not to the particular structure of the district court's preliminary injunction, but to any injunction that would halt S.B. 8's ongoing nullification of the Constitution as interpreted by this Court. Indeed, that is why the State structured its statute in this unique manner to begin with. The implications of Texas's position are startling: If, as Texas insists, courts cannot enjoin the State itself, or individual state officers, or private parties who actually bring S.B. 8 suits, then a State could effectively nullify any constitutional decision of this Court with which it disagreed by enacting a sufficiently punitive statutory scheme and delegating its enforcement to the public at large.

A State might, for example, ban the possession of handguns in the home, contra District of Columbia v. Heller, 554 U.S. 570 (2008), or prohibit independent corporate campaign advertising, contra Citizens United v. FEC, 558 U.S. 310 (2010), and deputize its citizens to seek large bounties for each firearm or

advertisement. Those statutes, too, would violate the Constitution as interpreted by this Court. But under Texas's theory, they could be enforced without prior judicial review, chilling the protected activity -- and the effect of any successful constitutional defense in an enforcement proceeding could be limited to that proceeding alone. The district court correctly determined that the State's ingenuity does not permit it to nullify constitutional rights in that manner.

b. In any event, each aspect of the district court's injunction was an appropriate response to S.B. 8's unprecedented enforcement scheme.

First, the district court properly specified that the injunction against the State prevents state judges and court clerks from accepting or deciding S.B. 8 suits. This Court has held that "judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity." Pulliam v. Allen, 466 U.S. 522, 541-542 (1984). And although Section 1983 permits injunctions against judicial officers only in specific circumstances, see Whole Woman's Health, 13 F.4th at 444, this suit by the United States is not based on Section 1983.

To be sure, injunctions that run to state judges are unusual. But that is because other forms of relief are typically more appropriate -- most obviously, a plaintiff can ordinarily secure an injunction binding "the enforcement official authorized to

bring suit under the statute." In re Justices of the Supreme Court of Puerto Rico, 695 F.2d 17, 21 (1st Cir. 1982) (Breyer, J.); see Ex parte Young, 209 U.S. at 163. Here, Texas has deliberately sought to thwart that ordinary remedy. Especially where other remedies are not available, injunctions that bind state judicial officials have long been permitted. The Anti-Injunction Act, for example, expressly contemplates that federal courts may "grant an injunction to stay proceedings in a State court." 28 U.S.C. 2283. And the Act's limits on those injunctions do not apply where, as here, the suit is brought by the United States. See Leiter Minerals, Inc. v. United States, 352 U.S. 220, 226 (1957).

Second, the district court properly barred state executive officials from "enforcing judgments in" S.B. 8 suits. App., infra, 110a. While S.B. 8 relies on private citizens to bring enforcement actions, state executive officials (including "sheriff[s]," "constable[s]," and "county clerk[s]") may enforce the resulting state-court judgments. Tex. R. Civ. P. 622; Tex. Prop. Code Ann. § 52.004. And although the Fifth Circuit concluded in Whole Woman's Health that other state executive officials do not enforce S.B. 8, that suit did not involve the officials who would enforce the judgments in S.B. 8 suits. See 13 F.4th at 439 n.2, 443-444.

Third, the district court correctly determined that an injunction against Texas could bind private plaintiffs who maintain S.B. 8 suits, because by filing suit those individuals

both "act on behalf of the State" and "act in active concert with the State." App., infra, 110a; see id. at 67a-72a. Under Federal Rule of Civil Procedure 65, an injunction binds not only the parties, but also their "officers, agents, servants, employees, and attorneys" and "other persons who are in active concert or participation with" them. Fed. R. Civ. P. 65(d)(2)(B) and (C). Here, the court stated that it "need not craft an injunction that runs to the future actions of private individuals per se." App., infra, 110a. But the court explained that "those private individuals' actions are proscribed to the extent their attempts to bring a civil action under [S.B. 8] would necessitate state action that [the injunction] prohibited." Ibid.

II. The Balance Of Equities Favors Vacating The Stay

The court of appeals did not address the balance of harms to the parties or whether the public interest favored staying the district court's injunction. See App., infra, 1a. To the contrary, it relied exclusively on the Whole Woman's Health decisions, which in turn relied solely on procedural issues related to the private plaintiffs' "likelihood of success" on the merits. 13 F.4th at 441; see 141 S. Ct. at 2495-2496. But the balance of the equities strongly supports vacating the stay and restoring "the status quo ante -- before the law went into effect -- so that the courts may consider whether a state can avoid responsibility

for its laws" in the manner Texas has attempted here. Whole Woman's Health, 141 S. Ct. at 2496 (Roberts, C.J., dissenting).

1. To begin, Texas is poorly positioned to assert irreparable injury from an injunction against the enforcement of S.B. 8. Throughout this case (and all other S.B. 8 litigation), the State has labored to distance itself from the law. If Texas is to believed, the State has no responsibility for S.B. 8 or its operation. And because Texas disclaims accountability for S.B. 8, it likewise has no basis for complaint if the law's enforcement is preliminarily enjoined.

Even more fundamentally, a State suffers no cognizable injury -- much less irreparable harm -- from an injunction against enforcement of a plainly unconstitutional statute. Put simply, there is "no harm" from the "nonenforcement of invalid legislation." United States v. Alabama, 691 F.3d 1269, 1301 (11th Cir. 2012), cert. denied, 569 U.S. 968 (2013).

2. By contrast, the Fifth Circuit's stay gravely injures the United States and the public interest. See Nken, 556 U.S. at 435 (recognizing that these interests "merge" in a case involving the federal government). Both the United States and the public have a manifest interest in "preventing a violation of the Supremacy Clause." United States v. California, 921 F.3d 865, 893 (9th Cir. 2019), cert. denied, 141 S. Ct. 124 (2020). And the stay prolongs not only S.B. 8's affront to the supremacy of federal

law, but also its disruption of judicial review through the channels this Court and Congress have identified as essential for the vindication of federal constitutional rights. Vacating the stay would serve the United States' overriding sovereign interest and the public interest in ensuring that all States honor the federal Constitution and the controlling precedent of this Court -- and that they do not seek to insulate unconstitutional laws from the framework of judicial review established by Section 1983 and Ex parte Young.

S.B. 8's practical consequences likewise overwhelmingly favor a preliminary injunction. The district court's findings document those consequences in detail. App., infra, 75a-98a & nn.44-87. Women with sufficient means are being forced to travel to other States to obtain pre-viability abortion care -- causing chaos and backlogs at clinics in other States, and delaying abortions by weeks. Id. at 87a-97a. Women who lack the ability to leave the State are forced to "make a decision" about whether to have an abortion "before they are truly ready to do so"; to carry unwanted pregnancies to term; or to "seek to terminate their pregnancies outside the medical system," "with potentially devastating consequences." Id. at 84a, 93a n.76, 106a (citations omitted). And "[i]f the law remains in effect for an extended period," providers in Texas may be forced to "shutter [their] doors" altogether and may be unable to reopen even if S.B. 8 is ultimately

struck down. Id. at 108a; see id. at 8a. These consequences confirm the district court's determination that the balance of equities strongly favors a preliminary injunction.

III. The Court May Treat This Application As A Petition For A Writ Of Certiorari Before Judgment

For the foregoing reasons, this Court should vacate the Fifth Circuit's stay, put a stop to Texas's ongoing nullification of the Court's precedents, and restore the status quo while this litigation proceeds. In addition, the Court may construe this application as a petition for a writ of certiorari before judgment, grant the petition, and set the case for briefing and argument this Term. Cf. Nken v. Mukasey, 555 U.S. 1042 (2008) (treating a stay application as a petition for a writ of certiorari before judgment).[6]

A petition for a writ of certiorari before judgment under 28 U.S.C. 2101(e) is an extraordinary remedy, but the issues presented by Texas's extraordinary law are "of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court."

[6] See, e.g., Purcell v. Gonzalez, 549 U.S. 1, 2 (2006) (per curiam) (same); see also High Plains Harvest Church v. Polis, 141 S. Ct. 527 (2020) (same for an application for an injunction); Trump v. Mazars USA, LLP, 140 S. Ct. 660 (2019) (treating an application as a petition for a writ of certiorari). A petition for a writ of certiorari before judgment "may be initiated by any party, aggrieved or not by the district court decree." Stephen M. Shapiro et al., Supreme Court Practice § 2.2, at 2-12 (11th ed. 2019).

Sup. Ct. R. 11. The fundamental question presented in this case is whether States may nullify disfavored constitutional rights by purporting to disclaim their own enforcement authority and delegating enforcement of unconstitutional laws to private bounty hunters. S.B. 8's use of that scheme has already allowed Texas to nullify this Court's precedents for six weeks. That state of affairs should not be allowed to persist -- or spread to other States or other rights -- without this Court's review.

Absent certiorari before judgment, however, this Court likely could not hear the case this Term: The Fifth Circuit will not hear oral argument in this case and in Whole Woman's Health until early December, see C.A. Order (Oct. 15, 2021), and there is no guarantee when it will rule. The private plaintiffs in Whole Woman's Health have already sought certiorari before judgment. Whole Woman's Health v. Jackson, No. 21-463 (filed Sept. 23, 2021). And certiorari before judgment would allow this Court to "promptly" consider the constitutionality of S.B. 8's abortion ban and the propriety of its novel procedural scheme "after full briefing and oral argument." Whole Woman's Health, 141 S. Ct. at 2496 (Roberts, C.J., dissenting).

CONCLUSION

The stay of the district court's preliminary injunction should be vacated and the injunction restored pending disposition of the appeal in the Fifth Circuit and, if that court reverses the

injunction, pending the filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court. In addition, the Court may construe this application as a petition for a writ of certiorari before judgment, grant the petition, and set the case for briefing and argument this Term.

Respectfully submitted.

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