No. 21-588

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

V.

STATE OF TEXAS ET AL.,

Respondents.

On Writ of Certiorari Before Judgment to the United States Court of Appeals for the Fifth Circuit

BRIEF OF LEGAL SCHOLARS LEAH LITMAN, ERWIN CHEMERINSKY, MICHAEL C. DORF, BARRY FRIEDMAN, AND FRED O. SMITH AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Sonya D. Winner
Counsel of Record
Covington & Burling LLP
Salesforce Tower
415 Mission Street, Suite 5400
San Francisco, CA 94105-2533
(415) 591-6000
swinner@cov.com

Julia F. Post
Elizabeth A. Saxe
Kate Thompson
Amanda A. Humphreville
Kendra N. Mells
Megan C. Keenan
Covington & Burling LLP
One CityCenter
850 Tenth St. NW
Washington, DC 20001
(202) 662-6000
jpost@cov.com

Counsel for Amici Curiae

October 27, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are constitutional law scholars who teach and write in the fields of constitutional law and federal courts. They share an interest in promoting the appropriate role of the federal courts in maintaining the supremacy of federal law, and in preserving our federal constitutional system and the rule of law.

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), all parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, this Court is asked to consider whether the United States may seek relief in federal court to protect constitutional rights in the face of state subterfuge designed to undercut those rights. Texas's efforts to evade judicial review of Senate Bill 8 ("S.B. 8") are central to the jurisdictional questions in this case. S.B. 8—which bans abortions once a heartbeat is detected, weeks before fetal viability—is plainly unconstitutional under *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southern Pennsylvania v. Casey*, 505 U.S. 833 (1992). No one seriously argues otherwise. The "unprecedented" design of S.B. 8 is intended to unleash the full coercive authority of the State to effectuate Texas's unconstitutional policy while insulating the State's policy from judicial review. *See Whole Woman's Health* v. *Jackson*, 141 S. Ct. 2494, 2496 (2021) (Roberts, C.J., dissenting) (characterizing the delegation of authority "to insulate the State from responsibility for implementing and enforcing the regulatory regime" as "unprecedented").

The drafters of S.B. 8 made no secret of the fact that they developed the law's enforcement scheme for the specific purpose of frustrating judicial review. *See, e.g.*, Michael S. Schmidt, *Behind the Texas Abortion Law, a Persevering Conservative Lawyer*, N.Y. Times (Sept. 15, 2021), https://nyti.ms/3lqCBc6. Intervenors acknowledge this purpose approvingly: "[T]hat is what Texas has done in enacting Senate Bill 8. By prohibiting state officials from enforcing the statute, and by authorizing the citizenry to enforce the

law through private civil-enforcement actions, Texas has *boxed out the judiciary* from entertaining pre-enforcement challenges . . . ." Reply Br. in Support of Intervenors' Emergency Motion to Stay Preliminary Injunction Pending Appeal at 3, *United States v. Texas*, No. 21-50949 (5th Cir. filed Oct. 14, 2021) (emphasis added). Multiple features of the law underscore this design. S.B. 8 limits the ability of defendants to argue that they believe S.B. 8 to be unconstitutional or that its enforcement would violate the constitutional rights of third parties. Tex. Health & Safety Code § 171.208(e)(2), (7); *id.* § 171.209(a). Additionally, it is no defense under S.B. 8 if a person violates its terms while it is judicially enjoined should that injunction later be overturned. *Id.* § 171.208(e)(3).

Insulating state laws from meaningful judicial review flouts the bedrock principle that there must be some mechanism for challenging unconstitutional state action in order to ensure the supremacy of federal law and the rule of law in general. As this Court explained more than two centuries ago: "It is emphatically the province and duty of the judicial department to say what the law is. . . . So if a law be in opposition to the constitution . . . the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty." *Marbury v. Madison*, 5 U.S. 137, 177–78 (1803). By attacking well-established constitutional rights through a scheme designed to evade judicial review, S.B. 8 represents a challenge to the rule of law, our system of constitutional government, and the Constitution's Supremacy Clause.

Texas's scheme represents an exceptional circumstance that provides the federal government with the authority to bring suit. And Texas is the proper defendant in this suit, particularly because Texas does not enjoy immunity from suits brought by the United States. Under S.B. 8, litigants are expressly empowered to take up the State's enforcement mantle, and state judicial personnel facilitate, enforce, and otherwise enable these litigants' attacks. As the district court correctly noted, "the State has its prints all over the statute." *United States v. Texas*, No. 21-cv-796, 2021 WL 4593319, at *30 (W.D. Tex. Oct. 6, 2021). This Court should not countenance Texas's efforts to shield itself from accountability for its transparent attack on constitutional rights.

ARGUMENT

I. The United States Has Standing to Challenge S.B. 8.

A. Texas's Transparent Scheme to Evade Judicial Review of S.B. 8 Represents an Exceptional Circumstance That the United States Has Standing to Challenge.

As this Court explained in *In re Debs*, 158 U.S. 564 (1895): "Every government intrusted 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." 158 U.S. at 584; *see also id.* ("The obligations which [the government] is under to promote the interest of all and to prevent the wrongdoing of one,

resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court.").

While there is debate about how broadly *Debs* should be interpreted, at minimum it allows the United States to challenge decisions affecting interstate commerce in emergency or exceptional circumstances. In *United States v. City of Jackson*, 318 F.2d 1 (5th Cir. 1963), the Fifth Circuit held that the United States may seek an injunction "[w]hen the action of a State violative of the Fourteenth Amendment conflicts with the Commerce Clause and casts more than a shadow on the Supremacy Clause." 318 F.2d at 14; *see also Fla. E. Coast Ry. Co. v. United States*, 348 F.2d 682, 685 (5th Cir. 1965) (finding the United States possessed standing under *Debs*), *aff'd*, 384 U.S. 238 (1966); *cf. Sanitary Dist. of Chicago v. United States*, 266 U.S. 405, 425–26 (1925) ("[The United States] has standing in this suit . . . to remove obstruction to interstate and foreign commerce. . . . [I]n matters where the national importance is imminent and direct even where Congress has been silent the States may not act at all . . . without the consent of the United States."). Other courts have reached similar conclusions. *See, e.g.*, *United States v. Brand Jewelers, Inc.*, 318 F. Supp. 1293, 1293, 1296–99 (S.D.N.Y. 1970) (collecting cases and concluding that, under *Debs*, "the United States has 'standing' . . . to seek injunctive and other civil remedies for an allegedly 'long-standing and systematic practice'" of violating constitutional rights); *United States v. City of Montgomery*, 201 F. Supp. 590, 594 (M.D. Ala. 1962) (citing *Debs* for its holding that "the United States has a legal right to

maintain an action [for an injunction] to relieve burdens on interstate commerce").

That test is satisfied here. S.B. 8's burden on interstate commerce was well articulated by the district court. *Texas*, 2021 WL 4593319, at *17–18, *23–24. Texas's neighbors are bearing the brunt of that burden, leading to severe overcrowding of health care facilities that offer the abortion care that no longer is available in Texas. *See, e.g.*, Paul J. Weber, *Texas Abortion Law Strains Clinics: "Exactly What We Feared,"* NBCDFW (Sept. 15, 2021), https://bit.ly/3aSxH1r (discussing impacts in Oklahoma); Sabrina Tavernise, *With Abortion Largely Banned in Texas, an Oklahoma Clinic is Inundated*, N.Y. Times (Sept. 26, 2021), https://nyti.ms/3pdOIeM (same); Robert Nott, *New Mexico Abortion Clinics See Influx from Texas*, Santa Fe New Mexican (Sept. 18, 2021), https://bit.ly/3pmpyKS (discussing impacts in New Mexico as being "not sustainable" and "a public health crisis"). This overcrowding is contributing to an emergency of care and, for some, will mean an irreversible violation of their ability to access necessary health services.

But the exceptional circumstances here go well beyond the specific subject matter of this statute. S.B. 8's very design—which is intended to nullify rights guaranteed under the Constitution while insulating this denial of rights from meaningful judicial review—is an exceptional circumstance that supports the federal government's standing to challenge the law. S.B. 8's *in terrorem* enforcement scheme works by using the threat of litigation and back-breaking personal damages—while expressly limiting a constitutional defense—to chill

constitutionally protected conduct. Denying standing to the United States would sanction end-runs by states around constitutional rights.

S.B. 8's enforcement scheme, if countenanced here, could be used in a variety of contexts to alter fundamentally the landscape of constitutional rights well beyond reproductive rights. By delegating enforcement authority to citizens through a private cause of action, states could ban the sale of firearms, the expression of particular viewpoints, or worship by certain faiths. States could, for example, enact laws that authorize private citizens to sue when a neighbor possesses a disassembled gun in his home, side-stepping this Court's ruling in *District of Columbia v. Heller*, 545 U.S. 570 (2008), or pass laws to circumvent this Court's ruling in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), by permitting private citizens to sue to limit in-person religious gatherings. The unprecedented enforcement scheme in S.B. 8 presents an exceptional circumstance that readily supports the federal government's standing to challenge the law in order "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) (quoting *Ex Parte Young*, 209 U.S. 123, 160 (1908)).

B. Texas's Scheme Represents an Unprecedented Attack on the Supremacy Clause and the Framers' Constitutional Design.

The United States' standing in this case is confirmed by the basic structure of the Constitution

and its reliance on judicial review to resolve challenges to the constitutionality of state laws.

Judicial review—with final review in this Court—was the solution to one of the great challenges faced by the Constitutional Convention: how to assure that state laws were consistent with federal authority, in particular the Constitution. Barry Friedman, The Will of The People 23–25, 33–36 (Farrar Strauss & Giroux 2009) [hereinafter Friedman, Will of the People]; Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review 73 (2004) ("[T]he Framers clearly opted for judicial review as a device to control state law."). In the lead-up to ratification, James Iredell, Edmund Randolph, and others "express[ed] disgust as state legislatures regularly enacted laws that were seen as violating fundamental rights." Friedman, Will of the People, *supra*, at 24. James Madison similarly understood that one of the "Vices" that brought the delegates to Philadelphia was the "[f]ailure of the States to comply with the Constitutional requisition." *Id*. at 34 (citing James Madison, "Vices of the Political System of the United States," in Letters and Other Writings of James Madison, Fourth President of the United States Vol. I 320 (Philadelphia, J. B. Lipincott & Co. 1865)). Madison accordingly proposed that "the National Legislature . . . be impowered . . . to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union." *Id*. But this "negative" was rejected in favor of another solution: judicial review. Challenges to state legislation would be brought to court, and the courts of the nation would favor the Constitution.

This solution is embodied in the Supremacy Clause, which provides: "This Constitution, and the laws of the United States . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. Const. art. VI, cl. 2. Central to the constitutional design was the understanding that this Court would resolve the constitutionality of state enactments. While the delegates to the Convention were unable to agree on whether to direct all litigation regarding state laws to federal courts, even opponents of a strong federal judiciary approved "the right of appeal to the supreme national tribunal" as "sufficient to secure the national rights & uniformity of Judgments." H. Fallon, Jr., et al., Hart and Wechsler's The Federal Courts and the Federal System 7 (7th ed. 2015) (quoting Records of the Federal Convention of 1787 Vol. 1 124 (Max Farrand ed., Yale Univ. Press rev. ed. 1966) (statement of John Rutledge)).

The United States' power to bring this suit is consistent with the Framers' expectation that the Executive would play an important role in ensuring faithful adherence to the constitutional framework, including upholding the supremacy of federal law. The Constitution directs the Executive to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. This obligation exists independent of any cause of action created—or not created—by Congress; the Executive cannot abandon protection of constitutional rights simply because Congress is silent. As the Fifth Circuit explained in *City of Jackson*:

> The Constitution cannot mean to give individuals standing to attack state action inconsistent with their constitutional rights but to deny to the United States standing when States jeopardize the constitutional rights of the Nation. Or that the United States may sue to enforce a statute but not sue to preserve the fundamental law on which that statute is based. Or that the United States may sue to protect a proprietary right but may not sue to protect much more important governmental rights, the existence and protection of which are necessary for the preservation of our Government under the Constitution.

318 F.2d at 15–16; *see also Debs*, 158 U.S. at 600 (emphasizing that the Court's holding rested on such "broader ground" derived from constitutional principles and not on a statutory enactment). Other circuits have agreed that the United States may bring suit independent of statutory authorization. *See, e.g.*, *Babcock v. United States*, 9 F.2d 905, 906 (7th Cir. 1925) (quoting *Debs* and finding grant of injunction sought by the United States was proper because the government has standing to prevent "wrongdoing" that injures "the general welfare"); *Robbins v. United States*, 284 F. 39, 46 (8th Cir. 1922) (citing *Debs* in holding that "[the government's] national policy is involved of protecting the public in traveling within the park, and in such a case, injunction is the proper remedy").

C. The United States Has the Authority to Proceed Against Texas.

The history and principles underlying this Court's decision in *Ex Parte Young*, 209 U.S. 123 (1908), further make clear why the United States must be able here to exercise its power to challenge an unconstitutional state law. *Ex Parte Young* involved a dispute much like the present one, in which a state adopted legislation that violated constitutional rights and purposely wrapped it in a scheme to avoid judicial review. Barry Friedman, The Story of *Ex Parte Young*: Once Controversial, Now Canon, in Federal Courts Stories 260–62 (Vicki Jackson & Judith Resnick eds., 2010) [hereinafter Friedman, *Ex Parte Young*]. As Texas did in S.B. 8, the Minnesota legislation "gave no particular state officer authority to enforce the [law]," and "to fend off litigation," imposed harsh penalties. Friedman, *Ex Parte Young*, *supra*, at 261. And like Texas argues now, the Minnesota attorney general claimed that the lawsuit could not proceed because it was "merely to test the constitutionality of a State statute, in the enforcement of which those officers will act only by formal judicial proceedings in the Courts of the State." Brief for Petitioner, *Ex Parte Young*, 209 U.S. 123, 1907 LW 18905, at *57 (quoting *Fitts v. McGhee*, 172 U.S. 156, 530 (1899)).

In holding that the suit in equity was appropriate, this Court was dismissive of a state law drafted "in terms [that] prohibited the company from seeking judicial construction of laws which deeply affect its rights." *Ex Parte Young*, 209 U.S. at 147. The Court answered the question before it—whether a case involving a violation of the constitution could be

challenged in a federal court of equity—with an emphatic yes:

> To await proceedings . . . in a state court, grounded upon a disobedience of the act, and then, if necessary, obtain a review in this court by writ of error to the highest state court, would place the [entity] in peril of large loss and its agents in great risk of fines . . . if it should be finally determined that the act was valid. This risk the [entity] ought not to be required to take.

Id. at 165.

What was true for Minnesota in *Ex Parte Young* is true for Texas today. Texas has enacted a "flagrantly unconstitutional" law that is designed to avoid pre-enforcement judicial review—and indeed any judicial review—by imposing steep penalties on citizens who choose to exercise their constitutional rights. *Whole Woman's Health*, 141 S. Ct. at 2498 (Sotomayor, J., dissenting). But Texas's efforts at evasion do not alter the bedrock role of the Executive, designated by the Framers, to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, nor do they alter the fundamental principle that interested parties may "go[] into a Federal court of equity, in a case involving a violation of the Federal Constitution." *Ex Parte Young*, 209 U.S. at 149.

Furthermore, as the district court correctly recognized, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), does not bar the United States from bringing such a suit in equity.

Texas, 2021 WL 4593319, at *20. In *Grupo*, this Court held that a federal court cannot enjoin a foreign litigant from transferring assets "in which no lien or equitable interest is claimed" because that remedy was "previously unknown to equity jurisprudence." *Grupo*, 527 U.S. at 310, 332–33. *Grupo* thus limits courts to the general forms of relief that were available at the time of ratification, but it does not require that the relief have the *same exact contours* as that awarded during the ratification period. Just as the Seventh "Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common-law jurisdictions," *Galloway v. United States*, 319 U.S. 372, 392 (1943), so, *a fortiori*, the judge-made rule of *Grupo Mexicano*—which requires that completely novel remedies be authorized by Congress—does not treat every new application of a *long-established* remedy as requiring new authority. *See Galloway*, 319 U.S. at 390 (explaining that the Framers "did not bind the federal courts to the exact procedural incidents or details of . . . the common law" at the time of adoption).

The United States is a proper party to bring this suit, and Texas cannot by subterfuge strip the federal courts—and particularly this Court—of the ability to review S.B. 8 and enjoin it if appropriate.

II. Texas is a Proper Defendant.

S.B. 8 was drafted to permit private parties to enforce the law in hopes of obscuring obvious state action. Even if the State's only role is to provide the

coercive power necessary for a private party to enforce the state policy embodied in the statute, Texas is a proper defendant.

Enforcement of Texas's abortion restrictions traditionally has been a state function. *See* Tex. Health & Safety Code § 171.005 (providing that S.B. 8 is the sole exception to State enforcement). Although the State purports to disclaim its authority to enforce S.B. 8 in light of the private cause of action, in reality the State has deputized bounty hunters to carry out its traditional enforcement authority. The private bounty hunters, however, cannot perform their role without the enforcement machinery of the state. Thus, Texas has made its state judicial system available to enable those bounty hunters to do the State's bidding. And Texas has supplied its coercive authority in a manner that explicitly *limits* affected parties from asserting the statute is unconstitutional. *Id.* § 171.208(e)(2), (7); *id.* § 171.209(a) (denying defendants sued under S.B. 8 "standing to assert the rights of women seeking an abortion as a defense"). Thus, the State makes its courts available to private parties to implement a state policy of preventing the exercise of constitutional rights, while restricting those courts from exercising their obligation to respect the Constitution in their judgments. In short, Texas has provided the apparatus that chills the exercise of constitutional rights.

In *Shelley v. Kraemer*, 334 U.S. 1 (1948), this Court held that where private actors' enforcement of a law can be "secured only by judicial enforcement by state courts," judicial enforcement of private agreements amounts to state action. 334 U.S. at 13, 18; *see also*

id. at 20 ("We hold that, in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws, and that, therefore, the action of the state courts cannot stand."). *Shelley* concerned racially-restrictive covenants—a classic attempt to circumvent the enforcement of constitutional rights through purported privatization of the conduct that infringed those rights. Still, in *Shelley*, this Court had "no doubt" that "enforcement by state courts" of racially-restrictive covenants amounted to "state action . . . in the full and complete sense of the phrase," because, "but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint." *Id.* at 18–19. This Court recognized that the State had not "merely abstained from action, leaving private individuals free to impose such discriminations as they see fit." *Id.* at 19. Rather, the State had "made available to such individuals the full coercive power of government to deny to petitioners" their rights under the Constitution. *Id.*

Shelley definitively defeats the State's effort to disclaim legal accountability over S.B. 8. Regardless of whether the bounty hunters to whom the State purports to delegate enforcement authority are viewed as state actors—and the district court was correct in holding that they are—it cannot be disputed that instrumentalities of the State, including its judiciary, play a central and necessary role in enforcing the law. This alone is sufficient to make the State a proper defendant.

It is far from novel to enjoin state courts and judges in such circumstances. In fact, this essential check on government authority pre-dates the Founding, and has persisted ever since. *See Pulliam v. Allen*, 466 U.S. 522 (1984) (reciting history and collecting cases); *Mireles v. Waco*, 502 U.S. 9, 9, 10 n.1 (1991) (stating that while a judge is generally immune from a suit for money damages, a "judge is not absolutely immune from . . . a suit for prospective injunctive relief"); *United States v. Texas*, 356 F. Supp. 469, 473 (E.D. Tex. 1972) (permanently enjoining the state court from further proceedings), *aff'd*, 495 F.2d 1250 (5th Cir. 1974); *United States v. Washington*, 459 F. Supp. 1020, 1034 (W.D. Wash. 1978) (enjoining the state court from enforcing its temporary injunction and from interfering with the federal court's judgment), *aff'd*, 645 F.2d 749 (9th Cir. 1981); *see also In re BankAmerica Corp. Sec. Litig.*, 263 F.3d 795 (8th Cir. 2001), *cert. denied sub nom. Desmond v. BankAmerica Corp.*, 535 U.S. 970 (2002). Accordingly, neither judicial immunity nor a purported absence of state action supports Texas's attempt to evade legal accountability for S.B. 8.

CONCLUSION

Texas intentionally designed S.B. 8 to attack the federal constitutional rights of its own citizens while insulating the scheme from judicial review. The United States is an appropriate plaintiff to protect those rights; to deny the United States standing to challenge Texas's scheme would go against more than a century of Supreme Court precedent and frustrate the Framers' constitutional design. And Texas unequivocally is the proper defendant. If the State's

subterfuge is permitted here, constitutional rights of all stripes—the right to speak freely, to bear arms, to worship—are subject to intimidation and denial.

Respectfully submitted,

Sonya D. Winner
Counsel of Record
Covington & Burling LLP
Salesforce Tower
415 Mission Street
Suite 5400
San Francisco, CA 94105
(415) 591-6000
swinner@cov.com

Julia F. Post
Elizabeth A. Saxe
Kate Thompson
Amanda A. Humphreville
Kendra N. Mells
Megan C. Keenan
Covington & Burling LLP
One CityCenter
850 Tenth St. NW
Washington, DC 20001
(202) 662-6000
jpost@cov.com

October 27, 2021

Counsel for Amici Curiae