No. 21-588

In the Supreme Court of the United States

UNITED STATES, PETITIONER

v.

TEXAS, ET AL.,

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR INTERVENOR-RESPONDENTS

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QUESTION PRESENTED

May the United States bring suit in federal court and obtain injunctive or declaratory relief against the State, state court judges, state court clerks, other state officials, or all private parties to prohibit S.B. 8 from being enforced?

PARTIES TO THE PROCEEDING

Petitioner United States of America was the plaintiff-appellee in the court of appeals.

Respondent the State of Texas was the defendant-appellants in the court of appeals.

Intervenor-Respondents Erick Graham, Jeff Tuley, and Mistie Sharp were intervenor defendants-appellants in the court of appeals.

A corporate disclosure statement is not required because Mr. Graham, Mr. Tuley, and Ms. Sharp are not corporations. *See* Sup. Ct. R. 29.6.

STATEMENT OF RELATED CASES

Counsel is aware of no directly related proceedings arising from the same trial-court case as this case other than those proceedings appealed here.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Rules

Other Authorities

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While the United States complains about the supposed constitutional infirmities in SB 8, its own lawsuit violates the constitutional separation of powers. The Fourteenth Amendment empowers Congress to "enforce" its requirements "by appropriate legislation,"[1] and that means it is up to Congress to decide whether and to what extent lawsuits should be authorized against those who violate the Fourteenth Amendment. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014) ("[A] court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied"). Congress has, for example, enacted a

1. U.S. Const. amend. XIV, § 5.

statute that authorizes individuals to sue state officials (but not state governments)[2] that violate their constitutional rights. *See* 42 U.S.C. § 1983. But Congress has never authorized the United States to sue a state whenever it violates the constitutional rights of its citizens, or whenever it violates constitutional rights in a manner that cannot be redressed under 42 U.S.C. § 1983. The notion that the executive may unilaterally fix the "gaps" that it perceives in section 1983 by suing states that violate the Fourteenth Amendment is incompatible with the Amendment's decision to vest the enforcement authority in Congress—and any flaws that may exist in a congressionally created remedial scheme must be fixed by Congress, not by unilateral executive action. *See United States v. City of Philadelphia*, 644 F.2d 187, 200 (3d Cir. 1980) (refusing to recognize an implied right of action for the federal government to sue over Fourteenth Amendment violations because "[s]ection 5 of the fourteenth amendment confers on Congress, not on the Executive or the Judiciary, the 'power to enforce, by appropriate legislation, the provisions of this article.'"). The President must execute the laws in accordance with the enforcement procedures established in the law; he does not get to create new mechanisms for enforcing federal legal obligations. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587–88 (1952).

The United States' lawsuit is also plagued by the same problems that confront the abortion providers' law-

2. *Will v. Michigan Dep't of Police*, 491 U.S. 58, 71 (1989) (a state is not a "person" under 42 U.S.C. § 1983).

suit in *Whole Woman's Health v. Jackson*, No. 21-463. A federal court cannot "enjoin" SB 8 itself; it can enjoin only the "individuals tasked with enforcing laws." *Whole Woman's Health*, 141 S. Ct. 2494, 2495 (2021) (citing *California v. Texas*, 141 S. Ct. 2104, 2115–16 (2021)). But the State of Texas does not "enforce" SB 8; it merely allows its judiciary to adjudicate private civil lawsuits brought under the statute. That is not a ground on which an Article III case or controversy can exist between the United States and Texas. *See Muskrat v. United States*, 219 U.S. 346 (1911); *Hope Clinic v. Ryan*, 249 F.3d 603, 605 (7th Cir. 2001) (en banc) ("*Muskrat* . . . held that Article III does not permit the federal judiciary to determine the constitutionality of a statute providing for private litigation, when the federal government (or its agents) are the only adverse parties to the suit.").

The federal judiciary is also powerless to enjoin or prevent a state court from *hearing* a lawsuit. *See Ex parte Young*, 209 U.S. 123, 163 (1908) ("[T]he right to enjoin an individual, even though a state official, from commencing suits . . . does not include the power to restrain a court from acting in any case brought before it, either of a civil or criminal nature . . . . [A]n injunction against a state court would be a violation of the whole scheme of our Government."). That remains true regardless of whether an individual is suing a state-court judge under 42 U.S.C. § 1983, or whether the United States is suing the state (or its judiciary) as an entity. Federal courts must presume that state judges will respect fed-

erally protected rights when deciding cases,[3] and injunctive or declaratory relief that bars the state judiciary from even *hearing* a lawsuit is incompatible with that presumption. More importantly, an injunction may be used only to restrain *unlawful* behavior, and a judge does nothing illegal by presiding over a lawsuit that has been filed in his court—even if the lawsuit were seeking to enforce a patently unconstitutional statute. A judge will never violate the Constitution merely by adjudicating a dispute, so a court cannot restrain another court from hearing a case that is brought under an allegedly unconstitutional law.

OPINIONS BELOW

The opinion of the district court is reported at 2021 WL 4593319, and reprinted at Pet. App. 2a–114a.[4] The order of the court of appeals staying the preliminary injunction is reported at 2021 WL 4786458, and reprinted at Pet. App. 1a.

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3. *Steffel v. Thompson*, 415 U.S. 452, 460–61 (1974) ("State courts have the solemn responsibility, equally with the federal courts 'to guard, enforce, and protect every right granted or secured by the constitution of the United States. . . .'" (citation omitted)); *Middlesex County Ethics Commission v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982) ("Minimal respect for the state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights.").

4. Throughout this brief, we will use "Pet. App." to refer to the appendix to the United States' application to vacate stay of preliminary injunction issued by the United States Court of Appeals for the Fifth Circuit, submitted to this Court on October 18, 2021.

JURISDICTION

The federal district court lacked subject-matter jurisdiction because there is no Article III case-or-controversy between the parties. *See Muskrat*, 219 U.S. 346. The Fifth Circuit's appellate jurisdiction is secure because the defendants and intervenors appealed an order granting a preliminary injunction. *See* 28 U.S.C. § 1292(a)(1). This Court has jurisdiction under 28 U.S.C. § 1254 because it is reviewing a case in the court of appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. III, § 2 provides, in relevant part:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority . . . .

The Texas Heartbeat Act, also known as SB 8, is reprinted in the appendix to the petition in *Whole Woman's Health v. Jackson*, No. 21-463, at Pet. App. 108a–132a.

STATEMENT

The statement provided in Texas's brief for the respondents accurately describes the background of this litigation. The intervenors add the following details relevant to their involvement.

The United States' motion for preliminary injunction asked the district court to restrain "private individuals who attempt to initiate enforcement proceedings under

S.B. 8." ROA.367. Because this threatened to enjoin private individuals from filing lawsuits under SB 8, Erick Graham, Jeff Tuley, and Mistie Sharp (the intervenors) moved to intervene to protect their state-law right to sue individuals and entities that perform or assist post-heartbeat abortions. The district court granted their motion on September 28, 2021. ROA.757.

Each of the intervenors declared that they intend to bring lawsuits only in response to violations of SB 8 that clearly fall outside the constitutional protections of *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 874 (1992). For example, Jeff Tuley intends to sue only individuals or entities that perform or assist abortions that are clearly unprotected under existing Supreme Court doctrine, such as: (a) non-physician abortions; (b) self-administered abortions; and (c) post-viability abortions that are not necessary to preserve the life or health of the mother.[5]

The intervenors argued that the district court must enforce SB 8's severability and saving-construction requirements, which instruct courts to preserve all constitutional provisions—and all constitutional applications—of SB 8. *See* Senate Bill 8, 87th Leg., §§ 3, 5, 10 (2021); *see also* Tex. Health & Safety Code § 171.212(a)

5. *See* Declaration of Jeff Tuley, *United States v. Texas*, No. 1:21-cv-00796-RP (W.D. Tex.), ECF No. 28-2 at ¶ 9 (ROA.701); *see also* Declaration of Erick Graham, *United States v. Texas*, No. 1:21-cv-00796-RP (W.D. Tex.), ECF No. 28-1 at ¶ 9 (ROA.697); Declaration of Mistie Sharp, *United States v. Texas*, No. 1:21-cv-00796-RP (W.D. Tex.), ECF No. 28-3 at ¶ 9 (ROA.705).

("Every provision, section, subsection, sentence, clause, phrase, or word in this chapter, and every application of the provisions in this chapter, are severable from each other."). The intervenors also reiterated that they intend to bring lawsuits only in response to abortions or other conduct that is *not* protected under *Roe* and *Casey*, and they insisted that any preliminary injunction must preserve their right to bring those lawsuits. But the district court rejected these arguments and enjoined the Texas judiciary from considering *any* lawsuits brought under SB 8—regardless of whether a lawsuit targets constitutionally protected conduct. And it held that it could defy the severability requirements in SB 8 because this Court had had refused to enforce a severability provision in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2319 (2016). Pet. App. 100a–101a; Pet. App. 109a–110a & n.95.

After the district court issued its preliminary injunction, the intervenors filed a timely notice of appeal, along with Texas. ROA.1853.

SUMMARY OF ARGUMENT

The United States' efforts to sue Texas encounter the same obstacles that prevent the abortion providers from suing the state's officers. The first problem is any relief must enjoin the *enforcement* of SB 8, not the law itself,[6] and the State of Texas does not "enforce" SB 8 by allow-

6. *See Whole Woman's Health*, 141 S. Ct. at 2495 ("[F]ederal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves.") (citing *California v. Texas*, 141 S. Ct. 2104, 2115–16 (2021)).

ing its judiciary to adjudicate private civil-enforcement lawsuits brought under the statute. The State of Texas has no more of an "enforcement" role than the United States, which allows its courts to hear SB 8 enforcement lawsuits under the diversity jurisdiction. *See* 28 U.S.C. § 1332.[7] More importantly, this Court has already held that a sovereign government is *not* a proper defendant under Article III when its "enforcement" role extends no further than adjudicating lawsuits between private parties brought under the disputed statute. *See Muskrat v. United States*, 219 U.S. 346 (1911); *Hope Clinic*, 249 F.3d at 605 (Easterbrook, J.). No different outcome can obtain here.

The second problem is that the federal judiciary cannot enjoin or prevent a state court from hearing a case, regardless of whether a private party or the United States is requesting this relief. *See Young*, 209 U.S. at 163 ("[T]he right to enjoin an individual, even though a state official, from commencing suits . . . does not include the power to restrain a court from acting in any case brought before it, either of a civil or criminal nature . . . . [A]n injunction against a state court would be a violation of the whole scheme of our Government."). This constraint on the federal judicial power has nothing to do with sovereign immunity; it is rooted in the presumption

7. SB 8 enforcement lawsuits may be brought under the federal diversity jurisdiction if: (1) The parties are completely diverse; (2) The amount in controversy exceeds $75,000 (*i.e.*, the defendants have performed or assisted eight or more post-heartbeat abortions); and (3) The plaintiff can plausibly allege injury in fact from the performance of abortions.

that state judges will respect federally protected rights when deciding cases,[8] and the fact that a judge does nothing unlawful by merely *hearing* a lawsuit that has been filed in his court—even if the lawsuit is based on a patently unconstitutional statute. Each of these problems sinks the abortion providers' lawsuit against the individual judicial officers, and the United States' ability to sue the state as an entity does nothing to overcome either of these insurmountable obstacles.

Indeed, the United States' lawsuit encounters *additional* procedural barriers beyond those that confront the abortion-provider plaintiffs, because the United States does not even have a cause of action to sue Texas over SB 8. The United States concedes that there is no statute that authorizes it to sue Texas, and its attempt to concoct a cause of action from "equity" is specious. The Constitution grants Congress, not the Executive Branch, the power to enforce the Fourteenth Amendment,[9] and Congress has enacted a comprehensive remedial scheme that authorizes various types of lawsuits to enforce the Fourteenth Amendment,[10] yet pointedly does *not* author-

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8. *Steffel v. Thompson*, 415 U.S. 452, 460–61 (1974) ("State courts have the solemn responsibility, equally with the federal courts 'to guard, enforce, and protect every right granted or secured by the constitution of the United States. . . .'" (citation omitted)); *Middlesex County Ethics Commission v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982) ("Minimal respect for the state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights.").

9. *See* U.S. Const. amend. XIV, § 5.

10. *See, e.g.*, 42 U.S.C. § 1983 (authorizing lawsuits by individuals against "persons" that violate their federally protected rights

(continued…)

ize lawsuits by the United States to enforce abortion rights under *Roe* and *Casey*. This congressionally enacted regime forecloses any attempt to divine a cause of action from "equity." *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 74 (1996) ("Where Congress has created a remedial scheme for the enforcement of a particular federal right, we have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary.").

And even in the absence of this congressional preclusion, the United States would *still* lack a cause of action to sue in equity because the federal judiciary's equitable powers are limited to relief that was "traditionally accorded by courts of equity" at the time of the Constitution's ratification. *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 (1999). The notion that someone could sue a judge or a court to enjoin them from hearing a case was unheard of in equity in 1789, as was the idea that the United States could sue a state for allowing its courts to hear private civil lawsuits brought under an allegedly unconstitutional statute. No case in the history of the nation has allowed the United States (or anyone else) to sue to prevent state judges from adjudicating cases that have yet to be filed, and *Grupo Mexicano* flatly prohibits courts from using equity to create a novel remedy of this sort.

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while acting under color of state law); 42 U.S.C. § 2000b(a) (authorizing the attorney general to sue state entities that enforce racially segregated public facilities); 42 U.S.C. § 2000c-6(a) (authorizing the attorney general to sue state entities that maintain racially segregated schools).

The United States complains that SB 8 is "unusual" because it is not subject to pre-enforcement challenge under 42 U.S.C. § 1983, but any imperfections with a *congressionally created* system of remedies must be fixed by *Congress*—not by the executive or the courts. Indeed, Congress is actively considering legislation that would preempt SB 8 and authorize the United States to sue states over their abortion laws, and this bill has already passed the House of Representatives. *See* H.R. 3755, 117th Cong. §§ 5, 8 (2021). The executive's impatience with the progress of this bill does not allow it to sue Texas unilaterally, and neither the United States nor this Court can invoke "equity" to create a novel cause of action that Congress has (thus far) failed to provide.

ARGUMENT

Our argument will first address the defendant-side problems with the United States' lawsuit, which mirror problems that afflict the abortion providers' efforts to sue the state's officials. We will then explain the plaintiff-side problems, which are unique to the United States' lawsuit. Finally, we will show that the United States cannot seek or obtain relief that categorically enjoins the enforcement of SB 8, as the statute is severable and the intervenors (and others) intend to file SB 8 lawsuits only in response to conduct that is not constitutionally protected.

I. THE STATE OF TEXAS IS NOT A PROPER DEFENDANT

A. Texas Cannot Be Sued For Allowing Its Courts To Hear Claims Brought By Private Litigants

The first problem for the United States is that federal courts may enjoin only "individuals tasked with enforcing laws, not the laws themselves." *Whole Woman's Health*, 141 S. Ct. at 2495 (citing *California v. Texas*, 141 S. Ct. 2104 (2021)). And the State of Texas is not "tasked with enforcing" SB 8, because the statute specifically prohibits the state and its officers from enforcing it. *See* Tex. Health & Safety Code § 171.207 ("No enforcement of this subchapter . . . may be taken or threatened by this state, a political subdivision, a district or county attorney, or an executive or administrative officer or employee of this state or a political subdivision against any person, except as provided in Section 171.208."). All Texas is doing is allowing its courts to entertain lawsuits between private parties under SB 8, in the same way that the United States government is allowing its courts to hear SB 8 lawsuits under the diversity jurisdiction.[11] And a sovereign government cannot be sued under Article III for adjudicating lawsuits between private parties. *See Muskrat*, 219 U.S. 346; *Hope Clinic*, 249 F.3d at 605 (Easterbrook, J.) ("*Muskrat* . . . held that Article III does not permit the federal judiciary to determine the constitutionality of a statute providing for private litiga-

11. See note 7 and accompanying text.

tion, when the federal government (or its agents) are the only adverse parties to the suit.").

The United States' efforts to distinguish *Muskrat* go nowhere. It claims that *Muskrat* involved a request for an "advisory opinion,"[12] but the *reason* that *Muskrat* characterized the lawsuit this way—even though the plaintiff in that case was plainly injured and seeking relief that would redress his injury—was that the federal government had *no cognizable interest in defending* a challenge to a federal statute *enforced solely by private parties*, even though the lawsuits were being adjudicated in federal courts. That is exactly the situation here. Texas has no enforcement role apart from allowing its judiciary to entertain SB 8 lawsuits between private parties. A sovereign government cannot be sued in that situation because there is no Article III case or controversy between the plaintiff and the defendant. It is no different from an abortion provider suing the United States for allowing its courts to hear SB 8 lawsuits under the diversity jurisdiction. Any lawsuit of that sort would be dismissed immediately under *Muskrat*, independent of any sovereign-immunity obstacles.

The United States' next move is to claim that SB 8 plaintiffs aren't asserting "private rights" in these enforcement lawsuits, but are instead exercising "delegated" enforcement authority on the State's behalf. *See* Appl. to Vacate Stay at 29; U.S. Reply Br. at 15. That does nothing to get around *Muskrat*. To begin, the United States is wrong to claim that SB 8 plaintiffs are exer-

12. Appl. to Vacate Stay at 29; U.S. Reply Br. at 15.

cising "delegated" powers on behalf of the State, as these individuals are in no way subject to the State's control or supervision. SB 8 enforcement lawsuits are not *qui tam* relator actions where an individual sues in the name of the State. And the State and its officials are statutorily prohibited from joining or intervening in SB 8 enforcement lawsuits. *See* Tex. Health & Safety Code §§ 171.208(a), 171.208(h). SB 8 plaintiffs do not answer to the state, and their litigation decisions and tactics are entirely immune from the State's influence. The United States' assertion that SB 8 plaintiffs are acting on "behalf"[13] of the State is also incompatible with *Hollingsworth v. Perry*, 570 U.S. 693 (2013), which rejected the notion that a state could "authorize *private parties* to represent its interests." *Id.* at 710 (emphasis in original)); *see also id.* at 713 ("[P]etitioners are plainly not agents of the State—'formal' or otherwise").

Texas has instead chosen to create a *private* tort that recognizes a *private* interest of those who oppose a third party's abortions, an action akin to the common-law tort of intentional or negligent infliction of emotional distress. The Constitution has nothing to say about what private interests a State chooses to recognize, and nothing in federal law prevents a state from recognizing or establishing private legal interests beyond those that existed at common law. *See* Cass R. Sunstein, *Lochner's Legacy*, 87 Colum. L. Rev. 873 (1987); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in the judgment) ("[W]e

13. U.S. Reply Br. at 16.

must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition."). Texas has every prerogative to create and establish a private interest of this sort, and its novelty does not convert SB 8 plaintiffs into agents of the State.

Finally, the United States says that it can avoid the holding of *Muskrat* because it is seeking an injunction, rather than a mere declaration on the validity of SB 8. *See* U.S. Reply Br. at 16. But *Muskrat*'s holding does not turn on the remedies that a plaintiff is requesting. The holding of *Muskrat* is that a sovereign government cannot be sued for allowing its courts to adjudicate lawsuits between private parties—even if the statute that authorizes these lawsuits is alleged to be invalid or unconstitutional, and even if the defendant government enacted the allegedly unconstitutional statute—because there is no Article III "case" or "controversy" in those situations. *See Muskrat*, 219 U.S. at 361 ("It is true the United States is made a defendant to this action, but it has no interest adverse to the claimants."). The lack of "adverse interests" remains regardless of whether the plaintiff is seeking an injunction alongside its request for a declaration of unconstitutionality. The constitutionality of the statute must be determined in the lawsuits between private parties, not in a preemptive lawsuit brought against the sovereign government, which is not "enforcing" the statute but merely allowing its courts to hear lawsuits arising under the disputed statutory enactment. In all events, the federal courts have no authority to enjoin a

state's judiciary from hearing cases,[14] as the United States is requesting, and a request for demonstrably improper relief cannot be used to escape the holding of *Muskrat*.

B. The Federal Judiciary Has No Authority To Enjoin Texas From Hearing Cases That Might Be Filed In Its Courts

The United States is seeking relief that would prohibit the Texas judiciary from even *considering* lawsuits that might be filed under SB 8. Pet. App. 110a. But a federal court is forbidden to issue declaratory or injunctive relief of that sort. An injunction may be used only to restrain unlawful activity, and a state court does nothing unlawful or unconstitutional by presiding over a lawsuit between private parties—even if the lawsuit were based on a patently unconstitutional statute. A state court does not violate federal law unless and until it enters or enforces a *ruling* that violates someone's federally protected rights, and federal courts must presume that state courts will respect federal rights when deciding cases. *See Steffel v. Thompson*, 415 U.S. 452, 460–61 (1974) ("State courts have the solemn responsibility, equally with the federal courts 'to guard, enforce, and protect every right granted or secured by the constitution of the United States. . . .'" (citation omitted); *Middlesex County Ethics Commission v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982) ("Minimal respect for the state pro-

14. *See Ex parte Young*, 209 U.S. 123, 163 (1908); *see also infra* at Part I.B.

cesses, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights.").

In addition, the relief requested by the United States is squarely and unequivocally foreclosed by *Ex parte Young*:

> [T]he right to enjoin an individual, even though a state official, from commencing suits . . . does not include the power to restrain a court from acting in any case brought before it, either of a civil or criminal nature . . . . [A]n injunction against a state court would be a violation of the whole scheme of our Government. . . . The difference between the power to enjoin an individual from doing certain things, and the power to enjoin courts from proceeding in their own way to exercise jurisdiction, is plain, and no power to do the latter exists because of a power to do the former.

Young, 209 U.S. at 163. The United States has no answer to this passage from *Ex parte Young*, which it has not acknowledged in either of its previous filings in this Court.

The closest the United States comes to addressing this passage from *Young* is to cite *Pulliam v. Allen*, 466 U.S. 522 (1984), which allowed a state magistrate to be enjoined from imposing bail on individuals arrested for nonjailable offenses and incarcerating those who could not meet the bail. *See id.* at 524–25; U.S. Reply Br. at 18. But *Ex parte Young* does not hold—and the respondents are not contending—that state judges can *never* be en-

joined by a federal court, and subsequent cases have allowed judicial officers to be sued and enjoined over policies that they have actually adopted and are enforcing. *See Pulliam*, 466 U.S. at 524–25; *Supreme Court of Virginia v. Consumers Union of United States, Inc.*, 446 U.S. 719, 737 (1980) (allowing a state supreme court and its chief justice to be sued over their enforcement of the state's disciplinary rules for lawyers, which were issued and enforced by the state's judiciary). *Young*, however, unequivocally prohibits an injunction that would restrain a judge or a court *from even hearing a case*—which is what the United States is seeking here. *See Young*, 209 U.S. at 163 (denying any power "to restrain a court *from acting in any case brought before it*, either of a civil or criminal nature" (emphasis added)); *id.* (denying any "power to enjoin courts *from proceeding in their own way to exercise jurisdiction*" (emphasis added)). That type of injunction would, in the words of *Young*, "be a violation of the whole scheme of our Government," *id.*, because it would restrain a court from adjudicating a dispute and reaching a decision. No court can ever enjoin another court from hearing a case, because a judge does *nothing unlawful* by presiding over a lawsuit, even when the lawsuit is seeking to enforce an unconstitutional statute.

Pulliam did not overrule *Young sub silentio*, and the United States does not contend that it did. Any such contention would be incompatible with this Court's *stare decisis* practices, which require courts to apply the precedent that directly controls. *See Hurst v. Florida*, 577 U.S. 92, 101 (2016) ("If a precedent of this Court has di-

rect application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." (alteration in original) (quoting another source)). *Pulliam* does not allow judges to be enjoined from hearing cases; it allowed them to be sued for actual policies that they had adopted and were enforcing. That does nothing to disturb the rule of *Ex parte Young*, which categorically forbids injunctions that would prevent a court adjudicating a case that might be brought before it.

Neither the district court nor the United States has cited any case in which a federal court restrained a state's judiciary from hearing a case that has yet to be filed, and to our knowledge no such injunction or declaratory judgment has ever been issued in the 245-year history of the United States. Any such injunction or declaratory relief would flout the presumption that state courts will respect federally protected rights, and it would flout *Ex parte Young*, 209 U.S. 123 (1908)—a precedent far more venerable than any of the Court's abortion-related pronouncements. And there is no conceivable basis to claim that a state court acts unlawfully merely by *adjudicating* a lawsuit between private litigants.

* * *

All of this precludes the declaratory or injunctive relief that the United States is seeking, regardless of whether the relief is directed at the state-court judges, state-court clerks, other state officials, private parties, or the State itself.

1. State-Court Judges

Any relief that would prevent state-court judges from hearing cases under SB 8 is foreclosed by: (1) the presumption that state-court judges will respect federally protected rights; (2) *Ex parte Young*'s categorical prohibition against relief that prevents other courts from adjudicating cases; and (3) the fact that a judge does nothing unlawful merely by presiding over a lawsuit between private parties. *See supra* at I.B. But there are even more obstacles to seeking this relief against the judge himself.

Article III does not allow litigants to challenge the constitutionality of a statute by suing judges who might hear cases filed under the disputed law, because a judge who acts in an adjudicatory capacity is a neutral arbiter of the law and has no personal stake in the controversy. *See Whole Woman's Health v. Jackson*, 13 F.4th 434, 444 (5th Cir. 2021) ("When acting in their adjudicatory capacity, judges are disinterested neutrals who lack a personal interest in the outcome of the controversy . . . [and] are bound to follow not only state law but the U.S. Constitution and federal law."). And the rules of judicial ethics prohibit a judge from defending a statute's constitutionality as a partisan litigant when he will be called upon to resolve those same constitutional challenges in judicial capacity.[15] Neither private parties nor the United

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15. *See* Canon 3(B)(10), Texas Code of Judicial Ethics ("A judge shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's

(continued…)

States can challenge the constitutionality of a statute by suing a judge who might adjudicate lawsuits brought under the disputed statutory enactment.

2. State-Court Clerks

Any relief that would restrain state-court clerks (or other court employees) from accepting or docketing papers under SB 8 encounters the same problems. Indeed, an injunction directed at court clerks is even harder to defend because clerks are ministerial actors who aren't even supposed to review or consider the merits of filings. It is absurd to contend that a court clerk is violating federal law if she fails to review the documents submitted by litigants and reject any filing that might be submitted under an unconstitutional statute.

If there is a danger that a private individual might sue someone under an unconstitutional law, then the remedy is to pursue an anti-suit injunction against that individual or seek dismissal of the lawsuit after it is filed. It is not to sue the court clerk and enjoin the clerk from accepting or docketing papers. Indeed, if a court clerk can be enjoined on the theory that she violates federal law by accepting documents in SB 8 litigation, then it follows *a fortiori* that clerks can be sued for damages under 42 U.S.C. § 1983 if they accept and file papers in lawsuits brought under a "patently unconstitutional" statute. A regime of this sort would place unreasonable and oner-

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probable decision on any particular case."), available at https://www.txcourts.gov/media/1452409/texas-code-of-judicial-conduct.pdf.

ous burdens on court clerks and their staff, who be compelled to review every document submitted to ensure that the statutes relied upon comport with the Constitution, and who would face constant risks of lawsuits—not only for declaratory relief but for damages as well.

3. Other State Officials

An injunction (or declaratory judgment) that prevents state officials from executing judgments obtained in SB 8 litigation faces the same insurmountable obstacles. It violates the presumption that state courts will respect federally protected rights by assuming that state courts will enter unlawful judgments in SB 8 litigation. *See Steffel*, 415 U.S. at 460–61; *Middlesex County Ethics Comm'n*, 457 U.S. at 431. It violates *Ex parte Young* by interfering with the state judiciary's ability to adjudicate lawsuits brought before it. *See Young*, 209 U.S. at 163. And a state official does nothing unlawful by executing a court judgment—even if the court judgment is erroneous or based on an unconstitutional statute.

When a state court issues a judgment that violates someone's constitutional rights, the remedy is to appeal, not collaterally attack it. *See* U.S. Const. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."); 28 U.S.C. § 1738; *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415–16 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 486–87 (1983). One cannot sue the state's executive officials (or the state government) to halt the execution of an allegedly unlawful judgment. And the United States certainly cannot obtain an injunction to restrain the execution of a

hypothetical future state-court judgment, when the courts are obligated to presume that the state judiciary will respect federally protected rights when adjudicating cases.

4. Private Parties

The United States is asking the district court to enjoin not only the State of Texas, but every private individual who might initiate enforcement proceedings under SB 8. ROA.43. But the United States has not identified or sued any private individual that has credibly threatened to sue. The State of Texas is the only named defendant, and non-parties to a lawsuit cannot be enjoined absent notice and an opportunity to be heard. *See Hansberry v. Lee*, 311 U.S. 32, 40 (1940) ("[O]ne is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 112 (1969) ("It was error to enter the injunction against Hazeltine . . . in a proceeding to which Hazeltine was [not] a party."); *Osborn v. Bank of United States*, 22 U.S. 738, 802 (1824) ("An injunction binds no person but the parties to the suit."); *Hope Clinic v. Ryan*, 249 F.3d 603, 605 (7th Cir. 2001) (en banc) (per curiam) ("[A]n injunction prohibiting *the world* from filing private suits would be a flagrant violation of both Article III and the due process clause (for putative private plaintiffs are entitled to be notified and heard before courts adjudicate their entitlements).").

The United States tries to get around this problem by claiming that these non-parties can be bound under

Rule 65(d)(2)(C) as "persons . . . in active concert or participation" with the State. ROA.362. That is preposterous. SB 8 *prohibits* the State and its officials from enforcing the ban on post-heartbeat abortions,[16] which makes it both unlawful and impossible for a would-be litigant to coordinate with the State when bringing private civil-enforcement lawsuits. In addition, a non-party cannot be deemed a person "in active concert or participation" with a litigant unless that non-party is given notice and an opportunity to contest that designation. *See Zenith Radio*, 395 U.S. at 112 ("Although injunctions issued by federal courts bind not only the parties defendant in a suit, but also those persons 'in active concert or participation with them who receive actual notice of the order by personal service or otherwise,' Fed. Rule Civ. Proc. 65(d), a nonparty with notice cannot be held in contempt until shown to be in concert or participation. It was error to enter the injunction against Hazeltine, without having made this determination in a proceeding to which Hazeltine was a party."); *Lake Shore Asset Management Ltd. v. Commodity Futures Trading Commission*, 511 F.3d 762, 767 (7th Cir. 2007) (Easterbrook, J.) ("*[W]hether* a particular person or firm is among the 'parties' officers, agents, servants, employees, and attorneys; [or] other persons in active concert or participation with' them is a decision that may be made only after the person in question is given notice and an opportunity to be heard."). The United States' interpretation of Rule 65, which would allow every person in the world to be bound by an

16. *See* Tex. Health & Safety Code § 171.207.

injunction directed at the State of Texas, would violate the Due Process Clause and the Rules Enabling Act, by abridging a non-party's substantive right to notice and an opportunity to be heard before being bound by a court's injunction.

The district court's preliminary injunction did not go so far as to enjoin private parties from bringing private-enforcement lawsuits under SB 8, although it insisted that it had the power to enjoin those private individuals under Rule 65. Pet. App. 110a ("[T]he Court need not craft an injunction that runs to the future actions of private individuals per se"). The district court appeared to believe that an injunction directed at would-be private litigants was unnecessary, because the injunctive relief directed at Texas would ensure that no SB 8 enforcement lawsuits could proceed in state court. *See id.* ("[G]iven the scope of the injunctions discussed here and supported by law, those private individuals' actions are proscribed to the extent their attempts to bring a civil action under Texas Health and Safety Code § 171.208 would necessitate state action that is now prohibited.").

The problem with the district court's remedy is that an injunction that restrains only the State of Texas (along with its "officers, officials, agents, employees, and any other persons or entities acting on its behalf")[17] will *not* protect abortion providers from being sued in federal district court under the diversity jurisdiction. SB 8 allows "any person" to sue, regardless of whether they live in Texas, and any citizen of another state can sue a per-

17. Pet. App. 110a.

son who violates SB 8 in federal court if they can establish Article III standing. An out-of-state couple that is waiting to adopt from a Texas-based adoption agency, for example, can assert "injury in fact" from the negative effects that abortion has on adoption markets,[18] and they will clear the $75,000 amount-in-controversy requirement if the defendant has performed (or assisted) more than seven post-heartbeat abortions. The district court's preliminary injunction has no effect on those federal-court proceedings. *See Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case."); Tex. Health & Safety Code § 171.208(e)(5) (non-mutual issue or claim preclusion is no defense).

5. The State

An injunction is an *in personam* remedy, which bars a *person* from doing something. *See Nken v. Holder*, 556 U.S. 418, 428 (2009) ("[A]n injunction is a judicial process or mandate operating *in personam*." (citation and internal quotation marks omitted)). So if the state's individual officers cannot be enjoined, then the State of Texas cannot be enjoined either. The only individuals in the Texas government who take any action under SB 8 are judicial officers who consider or process private civil-

18. *See* Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. Rev. 59, 63 (1987) ("The supply of babies for adoption has been dramatically affected by the increase in abortions since the Supreme Court's decision in *Roe v. Wade*.").

enforcement lawsuits, and the officers who enforce the eventual judgments in those cases. None of these individuals may be enjoined from adjudicating cases or enforcing judgments, as explained in Parts I.B.1–I.B.4, *supra*. And the United States cannot end-run those limits on the federal judicial power by suing the State as a nominal defendant while seeking relief that runs against the state officers that it cannot sue directly.

II. THE UNITED STATES HAS NO CAUSE OF ACTION TO SUE TEXAS OVER SB 8

The United States cannot bring this lawsuit unless it identifies a cause of action that authorizes it to sue Texas over SB 8. *See Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979) ("*[C]ause of action* is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court"); David P. Currie, *Misunderstanding Standing*, 1981 Sup. Ct. Rev. 41, 42 ("No one can sue . . . unless authorized by law to do so"). And the United States concedes that there is no statute that authorizes it to sue a state over an allegedly unconstitutional (or allegedly preempted) abortion statute. But the district court decided to invent a cause of action that would allow the United States' claims to proceed, by claiming that "traditional principles of equity" allow the United States to sue to enforce the Fourteenth Amendment despite the absence of a statutory cause of action. Pet. App. 39a–40a ("No cause of action created by Congress is necessary to sustain the United States' action; rather, traditional principles of equity allow the United States to seek an injunction to protect its sovereign rights, and the funda-

mental rights of its citizens under the circumstances present here."); Pet. App. 40a ("[T]he United States' cause of action is a creature of equity"). The United States makes a similar argument in this Court. *See* App. to Vacate Stay at 19–20. The district court's and the United States' efforts to divine a cause of action from "equity" fail for multiple independent reasons.

First, the Fourteenth Amendment empowers Congress to "enforce" its requirements "by appropriate legislation." U.S. Const. amend. XIV, § 5. That means it is up to Congress to decide whether and to what extent lawsuits should be authorized against individuals and entities that violate the Fourteenth Amendment—and neither the executive nor federal judiciary can create causes of action to enforce the Fourteenth Amendment when Congress has declined to do so. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014) ("[A] court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied"). The notion that "principles of equity" allow the executive branch to unilaterally sue entities that violate the Fourteenth Amendment is incompatible with the Amendment's decision to vest the enforcement authority in Congress. *See United States v. City of Philadelphia*, 644 F.2d 187, 200 (3d Cir. 1980) (refusing to recognize an implied right of action for the federal government to sue over Fourteenth Amendment violations because "[s]ection 5 of the fourteenth amendment confers on Congress, not on the Executive or the Judiciary, the 'power to enforce, by appropriate legislation, the provisions of this article'").

Second, because Congress holds the constitutional authority to enforce the Fourteenth Amendment, it has on occasion created causes of action that authorize the executive to sue state entities that violate the Fourteenth Amendment. *See* 42 U.S.C. § 2000b(a) (authorizing the attorney general to sue state entities that enforce racially segregated public facilities); 42 U.S.C. § 2000c-6(a) (authorizing the attorney general to sue state entities that maintain racially segregated schools). But Congress has conferred this power sparingly—and when it has conferred this power it carefully limits the circumstances in which a federal enforcement lawsuit may be brought. Consider 42 U.S.C. § 2000b(a), which authorizes the United States to sue state entities that enforce racially segregated public facilities:

> Whenever the Attorney General receives a complaint in writing signed by an individual to the effect that he is being deprived of or threatened with the loss of his right to the equal protection of the laws, on account of his race, color, religion, or national origin, by being denied equal utilization of any public facility which is owned, operated, or managed by or on behalf of any State or subdivision thereof, other than a public school or public college as defined in section 2000c of this title, and the Attorney General believes the complaint is meritorious and certifies that the signer or signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an

> action will materially further the orderly progress of desegregation in public facilities, the Attorney General is authorized to institute for or in the name of the United States a civil action in any appropriate district court of the United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section.

42 U.S.C. § 2000b(a). Notice all the preconditions that must be satisfied before the Attorney General can sue under section 2000b(a): (1) The Attorney General must "receive a complaint in writing" from the individual who is suffering a violation of his Fourteenth Amendment rights; (2) The complaint must describe a specific type of Fourteenth Amendment violation, namely a deprivation or threatened deprivation of one's right of equal access to a "public facility" on account of "race, color, religion, or national origin"; (3) The Attorney General must conclude that the complaint is "meritorious"; (4) The Attorney General must "certify" that the complainant is "unable" to sue for relief on his own; and (5) The Attorney General must "certify" that a lawsuit brought by the United States "will materially further the orderly progress of desegregation in public facilities." *Id.* Unless all five of these criteria are satisfied, the Attorney General cannot sue to enforce the Fourteenth Amendment under 42 U.S.C. § 2000b(a). 42 U.S.C. § 2000c-6(a) establishes similar preconditions for lawsuits brought by the United States to desegregate public schools. *See* 42 U.S.C. § 2000c-6(a).

These congressional enactments foreclose any possibility of an implied cause of action to sue a state over an alleged Fourteenth Amendment violation. Congress has specifically addressed the circumstances in which the Attorney General may sue in response to violations of the Fourteenth Amendment—and it has carefully limited the scope of these causes of action in a manner that precludes the Attorney General from suing states over other alleged violations. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 74 (1996) ("Where Congress has created a remedial scheme for the enforcement of a particular federal right, we have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary."); *Hernandez v. Mesa*, 140 S. Ct. 735, 747 (2020) (refusing to infer a cause of action for aliens abroad to sue for alleged violations of their constitutional rights given that they were expressly excluded from section 1983's cause of action, because "it would be anomalous to impute a judicially implied cause of action beyond the bounds Congress has delineated for a comparable express cause of action" (cleaned up)).

The district court acknowledged these congressional enactments but insisted that they could not reflect a congressional intention to foreclose an implied cause of action to enforce the right to abortion, because the abortion right did not exist when Congress enacted those statutes. Pet. App. 53a. That is a non sequitur. The problem for the United States is that the text of the Fourteenth Amendment empowers *Congress* to enforce its provisions, and Congress has specifically and carefully addressed the precise circumstances in which the execu-

tive may sue to enforce the Fourteenth Amendment. By specifying that the executive may sue to enforce the Fourteenth Amendment in the limited circumstances provided in sections 2000b(a) or 42 U.S.C. § 2000c-6(a), and by failing to authorize the executive to enforce the Fourteenth Amendment outside those situations, Congress has defined by statute the preconditions that *must* be met before the executive can sue over an alleged Fourteenth Amendment violation. It would turn these congressional enactments on their head to recognize an "implied" cause of action to enforce the Fourteenth Amendment outside these carefully defined circumstances. Whether Congress was consciously aware of the right to abortion when it enacted sections 2000b(a) and 42 U.S.C. § 2000c-6(a) is irrelevant. What matters is that Congress has defined the preconditions that must be satisfied before the United States can sue to enforce the Fourteenth Amendment, and the judiciary cannot recognize or invent an "implied" right of action that allows the executive to circumvent these statutory prerequisites to suit.

Third, the United States' attempt to derive its cause of action from "traditional principles of equity" flouts the holding of *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), which forbids courts to recognize "equitable" remedies apart from those that existed when the original Judiciary Act was enacted in 1789. *See id.* at 318 ("[T]he equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enact-

ment of the original Judiciary Act."). There is no historical pedigree for an "equitable" cause of action that would allow the United States government to sue a state to enforce the constitutional rights of its citizenry—and the United States cites no example of any such lawsuit that has ever occurred. Instead, *City of Philadelphia* empathically rejected the notion that the United States may sue a state for violating the Fourteenth Amendment, which squelches any possibility of a "traditional" equitable cause of action that allows the federal government to sue states for violating constitutional rights. *See* 644 F.2d at 200. Of course, there *is* a traditional equitable cause of action that allows *private individuals* to sue *government officers* that violate their constitutional rights,[19] as the district court observed,[20] but that is a far cry from a cause of action that would allow the *United States* to sue a *state* that allows its judiciary to hear lawsuits filed under an allegedly unconstitutional statute. *Grupo Mexicano* does not allow the United States to derive this cause of action from the traditional equitable cause of action that allows private individuals to seek injunctive relief against individual government officers. *See Grupo Mexicano*, 527 U.S. at 319 (1999) (refusing to recognize

19. *See, e.g.*, *Young*, 209 U.S. at 155–56; *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 326 (2015) ("And, as we have long recognized, if an *individual* claims federal law immunizes him from state regulation, the court may issue an injunction upon finding the state regulatory actions preempted." (emphasis added) (citing *Young*, 209 U.S. at 155–156); *see also* John Harrison, *Ex Parte Young*, 60 Stan. L. Rev. 989, 989 (2008).

20. Pet. App. 751.

an equitable remedy that would allow pre-judgment creditors to restrain a debtor's assets, because this relief was traditionally available *only* to "creditor[s] who had already obtained a judgment establishing the debt").

The district court tried to get around *Grupo Mexicano* with the following cryptic passage:

> *Grupo Mexicano* at most stands for the proposition that federal courts have jurisdiction over suits in equity, in which the broad equitable remedies that predate the Constitution remain available. The formal source of that jurisdiction is codified in the Judiciary Act of 1789, as discussed in *Grupo Mexicano*. However, the principle itself is broader and is not defined by that Act. Indeed, by the time he returned to the question in *Armstrong*, Justice Scalia—the author of *Grupo Mexicano*—had dispensed with any need to locate this power in the Judiciary Act. Nowhere in the latter case did he cite to the Judiciary Act. Rather, he wrote of general equitable powers "tracing back to England," translating to the "judge-made remedy" in the federal courts. *Armstrong*, 575 U.S. at 327. It is the essential nature of equity that it is not subject to strict limitations, unless and until Congress acts directly to restrict it.

Pet. App. 41a. This district court appears to be saying that Justice Scalia walked back the holding of *Grupo Mexicano* in *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320 (2015), because *Armstrong* observed that the traditional right of *private individuals* to sue to

enjoin the unconstitutional actions of state and federal officers "reflects a long history of judicial review of illegal executive action, tracing back to England." *Id.* at 327. But that statement is entirely consistent with *Grupo Mexicano*, as the fact that these traditional rights of action traced back to England means that those equitable remedies existed in 1789 and were therefore incorporated in the original Judiciary Act. More importantly, the district court's claim that equity "is not subject to strict limitations"[21] is simply false. Equity *is* subject to limitations imposed by historical practice,[22] and there is no historical support for an equitable cause of action that allows the United States to sue a state for violating the constitutional rights of its citizens. Nor is there any historical support for a suit in equity to enjoin a judge (or the judiciary) from hearing a case.

The United States, for its part, claims that its proposed cause of action is entirely consistent with *Grupo Mexicano*, insisting that it seeks nothing more than "an injunction against the enforcement of an unconstitutional statute," which "falls squarely within the history and

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21. App. 41a.

22. *See Grupo Mexicano*, 527 U.S. at 318–19; *Armstrong*, 575 U.S. at 327; *Heine v. Board of Levee Commissioners*, 86 U.S. 655, 658 (1873) (rejecting the notion that a court of equity may "depart from all precedent and assume an unregulated power of administering abstract justice at the expense of well-settled principles"); Samuel L. Bray, *The Supreme Court and the New Equity*, 68 Vand. L. Rev. 997, 1041 (2019) ("[I]t has long been a commonplace that equitable discretion is bounded. Even in equity, Chief Judge Cardozo said, 'there are signposts for the traveler.'").

tradition of courts of equity." Appl. to Vacate Stay at 27. But a litigant cannot evade the holding of *Grupo Mexicano* by defining its cause of action at this level of generality. The issue in *Grupo Mexicano* was whether a litigant could take a form of equitable relief that had traditionally existed (an injunction for a *post-judgment* creditor to restrain a debtor's assets) and extend it in a historically novel way (to *pre-judgment* creditors). The Court answered no. *See Grupo Mexicano*, 527 U.S. at 318–33. So the fact that there is historical precedent for injunctions sought by *private parties* against *state officers* who violate their rights does nothing to support an injunction sought by the *United States* against a *state* for violating the rights of its citizens, and it certainly does nothing to support an injunction that restrains the state's judiciary from adjudicating a category of cases—which we *know* is not traditionally rooted in equity. *See Young*, 209 U.S. at 163 ("[A]n injunction against a state court would be a violation of the whole scheme of our Government."). As this Court explained:

> To accord a type of relief that *has never been available before*—and *especially* (as here) a type of relief that has been specifically disclaimed by longstanding judicial precedent—is to invoke a "default rule," *post*, at 342, not of flexibility but of omnipotence. *When there are indeed new conditions that might call for a wrenching departure from past practice, Congress is in a much better position than we both to perceive them and to design the appropriate remedy*.

Grupo Mexicano, 527 U.S. at 322 (emphasis added).

The United States has no answer to this. It fails to cite any case from any court that has allowed the federal government to sue a state in equity over an alleged violation of the Fourteenth Amendment, or any case that allows a suit in equity to restrain a judge (or a state's judiciary) from adjudicating a lawsuit. The United States invokes *In re Debs*, 158 U.S. 564 (1895), but *Debs* merely allowed the United States to sue to redress a public nuisance in violation of a statutory scheme regulating interstate commerce. *See United States v. Solomon*, 563 F.2d 1121, 1127 (4th Cir. 1977) (requiring the federal government to demonstrate either "a property interest" or "a well-defined statutory interest of the public at large" to sue under *Debs*). Neither *Debs* nor any case in the history of the nation allows the United States to sue to prevent state judges from adjudicating private civil suits under an allegedly unconstitutional state law. The United States is demanding a massive expansion of traditional equitable relief in defiance of *Grupo Mexicano*, which limits the federal courts' equitable powers to relief that was "traditionally accorded by courts of equity" at the time of the Constitution's ratification. 527 U.S. at 318–19. Suing in equity to enjoin a court from hearing a case was unheard of in 1789.

The United States' complaint that SB 8 is "unusual"[23] cannot justify the judicial creation of a previously unheard-of cause of action. *See Grupo Mexicano*, 527 U.S. at 322. And its complaint that SB 8 falls outside the lim-

23. U.S. Reply Br. at 2.

ited scope of pre-enforcement review that Congress authorized under 42 U.S.C. § 1983 means that *Congress* should fix the problem by enacting new legislation. Indeed, the House of Representatives has already passed legislation that would preempt SB 8 and authorize the United States to sue Texas (and other states) over their abortion statutes. *See* H.R. 3755, 117th Cong. §§ 5, 8 (2021). But this bill has not passed the Senate, and the courts cannot invoke "equity" to create a cause of action that Congress has (thus far) withheld.

Fourth, the notion of an implied cause of action to enforce the Fourteenth Amendment was emphatically rejected in *United States v. City of Philadelphia*, 644 F.2d 187, 201 (3d Cir. 1980) ("[T]he fourteenth amendment does not implicitly authorize the United States to sue to enjoin violations of its substantive prohibitions."). The district court did not dispute the result in *City of Philadelphia*, but thought it could carve a one-off exception to *City of Philadelphia*'s holding because abortion providers have been unable to bring pre-enforcement challenges to Texas's abortion statute under 42 U.S.C. § 1983. App. 54a ("[I]t is the deliberate action by the State to foreclose all private remedies that separates this case from *City of Philadelphia*."). The United States makes the same argument. *See* Appl. to Vacate Stay at 27–28. But the district court has no authority to patch up these alleged holes in 42 U.S.C. § 1983 by allowing the United States to sue Texas over its alleged Fourteenth Amendment violation. If a state enacts an abortion restriction that is not subject to pre-enforcement review under 42 U.S.C. § 1983, then the solution is for the executive to

ask Congress to amend section 1983 or create a new cause of action that would allow the United States (or some other plaintiff) to obtain pre-enforcement relief against SB 8. It is not to ask the judiciary to invent a new cause of action that "fixes" these perceived shortcomings with a congressionally created remedial scheme. This Court no longer allows the federal judiciary to invent causes of action that Congress has not provided. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856 (2017) ("If the statute does not itself so provide, a private cause of action will not be created through judicial mandate."); *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001) ("Without [statutory intent], a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute."); *id.* at 287 ("Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals." (citation and internal quotation marks omitted)). The district court's opinion and the United States' briefing to this point do not even cite *Alexander v. Sandoval*, and they make no attempt to explain how the judiciary can create or recognize an "implied" right of action when this Court has been saying for decades that federal courts must stop inferring new causes of action from statutes or constitutional provisions.

It is also entirely commonplace for laws to "escape" pre-enforcement review under 42 U.S.C. § 1983. A state's defamation laws, for example, are enforced exclusively through private civil lawsuits, which means there is no way for a publisher to sue the state or its officers

under 42 U.S.C. § 1983 if it believes that the defamation laws violate the First Amendment. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Many other state laws are enforced solely through private civil lawsuits, and these statutes are likewise immune from pre-enforcement challenge under 42 U.S.C. § 1983 and *Ex parte Young*. *See, e.g.*, *Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 958 (8th Cir. 2015); Eugene Volokh, *Challenging Unconstitutional Civil Liability Schemes, as to Abortion, Speech, Guns, Etc.*, Reason: Volokh Conspiracy (September 3, 2021, 2:31 p.m.), https://bit.ly/3iJiS5D. The United States' theory would allow the executive to sue a state whenever it enacts a law or establishes a common-law rule that is enforced through private litigation, an astonishing result. Does the United States believe that the federal government could have sued Alabama (or any other state) over its defamation laws before *New York Times v. Sullivan*?

* * *

The United States also complains that that SB 8 is partially preempted by federal law. Appl. to Vacate Stay at 15–17. But Texas has insisted that SB 8 does not regulate the activities of the federal government, and courts must defer to the State's representations. *See Frisby v. Schultz*, 487 U.S. 474, 483 (1988) (construing a town ordinance "more narrowly" in part because "[t]his narrow reading is supported by the representations of counsel for the town at oral argument"); *see also Bellotti v. Baird*, 428 U.S. 132, 143 (1976); *Doe v. Bolton*, 410 U.S. 179, 183 n.5 (1973). In addition, the preemption arguments cannot be entertained unless a cause of action au-

thorizes the United States to sue Texas over this supposedly preempted statute. And the United States cannot derive such a cause of action from any statute or constitutional provision.

This Court has already rejected the notion that the Supremacy Clause can provide an implied right of action to sue over allegedly preempted laws. *See Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 326–27 (2015). And none of the statutes or regulations that allegedly preempt SB 8 purport to establish a cause of action that would allow the United States to sue a state that enacts or enforces a conflicting law. *See Alexander*, 532 U.S. at 287 (prohibiting federal courts from "[r]aising up causes of action where a statute has not created them"). So the United States has nothing from which it can derive a cause of action, as neither the relevant statutes nor the relevant constitutional provision purports to authorize lawsuits against states that enact or enforce allegedly preempted laws.

The United States tries to get around this problem by claiming that it can sue a state or anyone else for equitable relief whenever it does so to protect "sovereign interests" (whatever that means)—and that it can bring such lawsuits regardless of whether the underlying law establishes a cause of action. *See* Appl. to Vacate Stay at 20 ("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."). The United States begins by observing that the Supreme Court has occasionally allowed the United States to seek equitable relief to vin-

dicate "various sovereign interests," even in the absence of a statutory cause of action. *See id.* at 21 (listing the "sovereign interests" at issue in those cases). It then infers from those cases that the federal government may sue and seek equitable relief whenever it purports to be vindicating *any* "sovereign interest." *See id.* at 22–24. But that is a non sequitur. That this Court has allowed the United States to sue to vindicate *some* sovereign interests does not mean that the United States can seek equitable relief whenever it asserts that *any* "sovereign interest" is at stake. More importantly, the United States' position would produce a radical expansion of implied rights of action, because it will always be possible for the executive branch to assert a "sovereign interest" of some sort when it wants to sue a state (or an individual) for engaging in conduct that it dislikes. And there will always be some "sovereign interest" at stake when the executive asserts a preemption claim against a state or its officials. *See id.* at 22 ("The United States has a sovereign interest in ensuring the supremacy of federal law."). The United States' position will create an implied cause of action in *any* situation in which the executive alleges that a state law or policy is preempted by federal law—an outcome that turns *Armstrong* on its head and defies this Court's warnings against the creation of new implied rights of action.

III. THE UNITED STATES MAY NOT SUE TO PREVENT PRIVATE-ENFORCEMENT LAWSUITS OVER CONDUCT THAT IS UNPROTECTED BY THE CONSTITUTION

The United States is demanding relief that would prevent the filing of *any* lawsuits under SB 8. Yet many lawsuits authorized by SB 8 are undeniably constitutional under existing precedent. These include:

> Lawsuits against those who perform (or assist) non-physician abortions;[24]
>
> Lawsuits against those who perform (or assist) post-viability abortions that are not necessary to save the life or health of the mother;[25]
>
> Lawsuits against those who use taxpayer money to pay for post-heartbeat abortions;[26]
>
> Lawsuits against those who covertly slip abortion drugs into a pregnant woman's food or drink.[27]

And each of the intervenors has stated that they intend to bring civil-enforcement lawsuits *only* in response to violations of SB 8 that clearly fall outside the constitu-

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24. *See Roe v. Wade*, 410 U.S. 113, 165 (1973); *Connecticut v. Menillo*, 423 U.S. 9, 9–10 (1975); *Mazurek v. Armstrong*, 520 U.S. 968, 973 (1997).

25. *See Roe*, 410 U.S. at 164–65.

26. *See Harris v. McRae*, 448 U.S. 297 (1980).

27. *See* Kristine Phillips, *A Doctor Laced His Ex-Girlfriend's Tea With Abortion Pills and Got Three Years in Prison*, Wash. Post (May 19, 2018), https://wapo.st/30NYQRp.

tional protections of *Roe* and *Casey*.[28] Yet the district court's preliminary injunction blocks the Texas judiciary from entertaining *any* lawsuits filed under SB 8—even in situations in which the lawsuit is undeniably constitutional and consistent with federal law. And the United States is asking this Court to reinstate that overbroad injunction and allow it to seek a final judgment that would enjoin the enforcement of SB 8 across the board.

The United States may not sue to prevent enforcement of the indisputably constitutional applications of SB 8. *See Alabama State Federation of Labor, Local Union No. 103 v. McAdory*, 325 U.S. 450, 465 (1945) ("When a statute is assailed as unconstitutional we are bound to assume the existence of any state of facts which would sustain the statute in whole or in part."); *Connecticut v. Menillo*, 423 U.S. 9, 9–10 (1975) (allowing Connecticut to enforce its pre-*Roe* criminal abortion statutes against non-physician abortions, and rejecting the Connecticut Supreme Court's argument that *Roe* had rendered those statutes "null and void, and thus incapable of constitutional application even to someone not medically qualified to perform an abortion"); *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 646 (2012) (Ginsburg, J., concurring in part and dissenting in part) ("For when a court confronts an unconstitutional statute, its endeavor must be to conserve, not destroy, the legislature's dominant objective."). That is especially true when SB 8 contains emphatic severability and saving-construction requirements that compel reviewing

28. *See* note 5 and accompanying text.

courts to preserve every constitutional application of the law. *See* Senate Bill 8, 87th Leg., §§ 3, 5, 10; *see also* Tex. Health & Safety Code § 171.212(a) ("Every provision, section, subsection, sentence, clause, phrase, or word in this chapter, and every application of the provisions in this chapter, are severable from each other."); *Virginia v. Hicks*, 539 U.S. 113, 121 (2003) ("Severab[ility] is of course a matter of state law."); *Leavitt v. Jane L.*, 518 U.S. 137, 138 (1996) ("Severability is of course a matter of state law."); *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924) ("[T]he state court['s] decision as to the severability of a provision is conclusive upon this Court.").[29]

The district court thought it could disregard the severability requirements in SB 8 because this Court refused to enforce a severability clause in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2319 (2016). Pet. App. 100a–101a; App. 109a–110a & n.95. But the Texas legislature included a saving-construction clause, which ensures that all constitutional applications of SB 8 will be preserved in the event that the severability requirements are ignored:

> If any court declares or finds a provision of this chapter facially unconstitutional, when discrete applications of that provision can be enforced against a person, group of persons, or circum-

29. In like manner, the United States' "preemption" and "intergovernmental immunity" claims can warrant only as-applied relief against the enforcement of SB 8, limited to the circumstances in which the enforcement of SB 8 will allegedly conflict with federal law.

> stances without violating the United States Constitution and Texas Constitution, those applications shall be severed from all remaining applications of the provision, *and the provision shall be interpreted as if the legislature had enacted a provision limited to the persons, group of persons, or circumstances for which the provision's application will not violate the United States Constitution and Texas Constitution.*

See Tex. Health & Safety Code § 171.212(b-1) (emphasis added). The Texas legislature also amended its Code Construction Act to ensure that abortion statutes will be construed, as a matter of state law, to apply *only* in situations that do not result in a violation of the United States or Texas Constitutions:

> If any statute that regulates or prohibits abortion is found by any court to be unconstitutional, either on its face or as applied, then all applications of that statute that do not violate the United States Constitution and Texas Constitution shall be severed from the unconstitutional applications and shall remain enforceable, notwithstanding any other law, *and the statute shall be interpreted as if containing language limiting the statute's application to the persons, group of persons, or circumstances for which the statute's application will not violate the United States Constitution and Texas Constitution.*

See Tex. Gov't Code § 311.036(c) (emphasis added). The district court and the United States have no way around these saving-construction requirements,[30] which they have simply ignored throughout this litigation.

The United States appears to subscribe to a reverse-*Salerno* principle that applies only to abortion statutes,[31] where "facial invalidation" is required if there is even a single unconstitutional or invalid application of the law, and where severability clauses are disregarded whenever they appear in abortion legislation. The United States appears to have been emboldened by this Court's decision in *Hellerstedt*, which both the United States and district court regard as license to defy severability requirements in abortion statutes—even though statutory severability provisions are supposed to be enforced in all other contexts. *See Barr v. American Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2349 (2020) (plurality opinion of Kavanaugh, J.) ("At least absent extraordinary circumstances, the Court should adhere to the text of the severability or nonseverability clause."); *Virginia v. Hicks*, 539 U.S. 113, 121 (2003) ("Severab[ility] is of course a matter of state law.").

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30. *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 Harv. L. Rev. 2085 (2002); Adrian Vermeule, *Saving Constructions*, 85 Geo. L.J. 1945 (1997).

31. *United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.").

This is lawlessness. Litigants challenging abortion statutes do not get special dispensations from statutory severability requirements. Yet *Hellerstedt* is emboldening litigants and judges to defy severability provisions whenever they want to categorically enjoin the enforcement of an abortion regulation, even as courts insist that state-law severability requirements be enforced in every other situation. *See Barr*, 140 S. Ct. at 2349 (plurality opinion of Kavanaugh, J.); *Hicks*, 539 U.S. at 121; *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, 748 F.3d 583, 589 (5th Cir. 2014) ("Federal courts are bound to apply state law severability provisions."); *Voting for America, Inc. v. Steen*, 732 F.3d 382, 398 (5th Cir. 2013) ("Severability is a state law issue that binds federal courts."). The Court should hold that SB 8's severability and saving-construction requirements must be enforced, and that they preclude the United States from seeking an across-the-board injunction against SB 8's enforcement. If the Court needs to limit *Hellerstedt* to its facts to reach that result, then it should not hesitate to do so.

IV. THE COURT SHOULD NOT CREATE AN ABORTION-SPECIFIC EXEMPTION TO FEDERAL-COURTS JURISPRUDENCE

State laws that create private civil remedies will often chill or deter constitutionally protected conduct. The torts of defamation and intentional infliction of emotional distress have subjected people to lawsuits for engaging in constitutionally protected speech. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988). Modern

anti-discrimination laws subject business owners to private civil lawsuits if they refuse to participate in same-sex weddings or provide services that violate their religious beliefs. *See* Nico Lang, *Masterpiece Cakeshop owner in court again for denying LGBTQ customer*, NBC News (April 15, 2020), https://nbcnews.to/3pm2xb3 ("Christian business owner Jack Phillips is being sued by a transgender woman who tried to order a trans-themed birthday cake from his Colorado bakery."). And anti-gun activists use state tort law to sue gun dealers and manufacturers, in an attempt to deter them from marketing a constitutionally protected product. *See, e.g.*, Mike Robinson, *Chicago Targets Gun Industry in $433 Million Public Nuisance Lawsuit*, Associated Press (November 13, 1998).

But private rights of action have never been subject to pre-enforcement challenge in federal district courts—either by the affected individuals or by the United States—because Congress has not authorized the remedies or causes of action needed for such pre-enforcement litigation. When these types of laws raise constitutional concerns (as they often do), the exclusive means of litigating the issue is to engage in the prohibited conduct, assert the constitutional claims defensively when sued, and appeal to this Court if the state judiciary rejects the defense. *See New York Times*, 376 U.S. at 256–65; *Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 958 (8th Cir. 2015). Federal courts must presume that state courts will respect federal rights when decid-

ing cases,[32] and this Court has no basis in fact or law to presume that the Texas courts would reject valid constitutional defenses asserted in SB 8 litigation.

The United States does not even assert that the Texas judiciary will fail to honor federal constitutional defenses in SB 8 lawsuits; it just complains that SB 8 deters abortion providers from defying the law and inviting litigation. But it is common that the risk of losing a constitutional defense in a private civil lawsuit will deter a party from engaging in protected (or arguably protected) conduct—think of all the Christian wedding vendors who feel compelled to participate in same-sex weddings because they fear private lawsuits if they refuse. *See Davis v. Ermold*, 141 S. Ct. 3 (2020) (Thomas, J., respecting the denial of certiorari). But the deterrence comes from the uncertainty on whether the courts will ultimately accept their constitutional defense. *See Arlene's Flowers, Inc. v. Washington*, 141 S. Ct. 2884 (2021) (denying certiorari); *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2017) (leaving unresolved most questions surrounding the constitutional rights of wedding vendors who object to same-sex marriage). What is deterring abortion providers is not the procedural structure of SB 8 or its threatened penalties, but the uncertain status of the right to abortion given the grant of certiorari in *Dobbs v. Jackson Women's Health*

32. *See Middlesex County Ethics Commission v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982) ("Minimal respect for the state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights."),

Organization, No. 19-1392. None of that can justify injunctive or declaratory relief directed at the Texas judiciary, which is doing nothing unlawful by hearing cases filed under SB 8.

CONCLUSION

The district court's preliminary-injunction order should be vacated, and the case remanded with instructions to dismiss.

Respectfully submitted.

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