No. 21-588

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF TEXAS, ET AL.

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

BRIEF FOR THE UNITED STATES

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

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

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

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a) is not reported, but is available at 2021 WL 4706452. The opinion of the district court (Pet. App. 2a-114a) is not yet reported, but is available at 2021 WL 4593319.[1]

JURISDICTION

The district court entered a preliminary injunction on October 6, 2021. Appeals from that order were docketed in the court of appeals on October 7, 2021. The court of appeals' jurisdiction rests on 28 U.S.C. 1292(a)(1). On October 14, 2021, the court of appeals stayed the preliminary injunction. Pet. App. 1a. On October 18, 2021, the United States filed an application to vacate the stay. On October 22, 2021, this Court treated the application

[1] References to the "Pet. App." are to the Appendix to the United States' Application in No. 21A85.

as a petition for a writ of certiorari before judgment, granted the petition, and deferred consideration of the application to vacate the stay. The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and 2101(e).

STATUTORY PROVISIONS AND RULES INVOLVED

Pertinent statutory provisions and rules are reproduced in an appendix to this brief. App., *infra*, 1a-20a.

STATEMENT

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

Texas is not the first State to question *Roe* and *Casey*. But rather than forthrightly defending its law and asking this Court to revisit its decisions, Texas crafted an "unprecedented" structure to thwart judicial review. *Whole Woman's Health* v. *Jackson*, 141 S. Ct. 2494, 2496 (2021) (Roberts, C.J., dissenting).

Seeking to avoid traditional pre-enforcement suits against state officials, Texas "delegated enforcement" of S.B. 8 "to the populace at large" through a system of bounties. *Whole Woman's Health*, 141 S. Ct. at 2496 (Roberts, C.J., dissenting). And in an effort to frustrate constitutional defenses, Texas designed S.B. 8 enforcement suits to be so multiplicitous and burdensome that the threat of enforcement deters the provision of covered abortions altogether. Thus far, S.B. 8 has worked

as intended: It has made abortion effectively unavailable in Texas after roughly six weeks of pregnancy.

The United States brought this suit after it became apparent that Texas had succeeded in nullifying this Court's decisions within Texas's borders by thwarting other avenues of judicial review. The United States sought and obtained a preliminary injunction preventing enforcement of S.B. 8. But the law is again in effect because the injunction has been stayed pending appeal. Texas's suspension of a constitutional right recognized by this Court's precedents thus remains ongoing.

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

1. S.B. 8 provides that "a physician may not knowingly perform or induce an abortion" after cardiac activity is detected in the embryo. Tex. Health & Safety Code §§ 171.203(b), 171.204(a).[2] Cardiac activity begins at about six weeks of pregnancy, as measured from a woman's last menstrual period—that is, just two weeks after a woman may first miss her period, and roughly four months before viability. Pet. App., 3a-4a, 6a-7a. S.B. 8 contains no exception for pregnancies resulting from rape or incest. And it provides only a limited exception for "medical emergenc[ies]" that "prevent[] compliance with" the law. Tex. Health & Safety Code § 171.205(a).

Because this Court has long held that a State may not prohibit any woman from choosing to terminate a pregnancy before viability, see *Casey*, 505 U.S. at 846, federal courts have uniformly enjoined similar "heartbeat laws" in suits against the state officials traditionally charged with enforcing them. See, *e.g.*, *Jackson*

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

Women's Health Org. v. *Dobbs*, 951 F.3d 246, 248 (5th Cir. 2020) (per curiam).

Seeking to avoid that result, Texas provided that S.B. 8's substantively equivalent prohibition "shall be enforced exclusively through * * * private civil actions" rather than by the State's executive branch or local officials. Tex. Health & Safety Code § 171.207(a). Those suits may be brought against anyone who performs or aids, or intends to perform or aid, a prohibited abortion. *Id.* § 171.208(a). And they may be brought by "[a]ny person" other than a state or local official or "a person who impregnated the abortion patient through an act of rape" or "incest." *Id.* § 171.208(a) and (j). An S.B. 8 plaintiff need not have any connection to the abortion, or even reside in Texas. *Ibid.* Texas has thus "delegated enforcement of [S.B. 8's] prohibition to the populace at large." *Whole Woman's Health*, 141 S. Ct. at 2496 (Roberts, C.J., dissenting). The evident purpose of that "unprecedented" scheme, *ibid.*, is to avoid traditional pre-enforcement suits against state officers under 42 U.S.C. 1983 and *Ex parte Young*, 209 U.S. 123 (1908).

In theory, providers could perform prohibited abortions and then assert S.B. 8's unconstitutionality as a defense in the resulting enforcement actions. But that path is not even theoretically available to pregnant women—whose rights S.B. 8 directly violates—because they cannot be sued under the law. Tex. Health & Safety Code § 171.206(b)(1). And S.B. 8 is designed to ensure that the threat of enforcement suits deters providers from performing covered abortions altogether.

A doctor who performs a single covered abortion faces a virtually unlimited number of potential S.B. 8 suits—as do nurses, receptionists, and anyone else who "aids" or "abets" her. Tex. Health & Safety Code

§ 171.208(a)(2). S.B. 8's special venue rules allow those suits to be brought in any or all of Texas's 254 counties. *Id.* § 171.208(b). If one of those suits succeeds, S.B. 8 requires the court to award the plaintiff a bounty of "not less than" $10,000 for each abortion, plus mandatory costs and attorney's fees. *Ibid.* The law also requires "injunctive relief sufficient to prevent the defendant from violating [S.B. 8]." *Ibid.* And it raises the specter of retroactive liability by purporting to bar defendants from asserting reliance on precedent that was later "overruled." *Id.* § 171.208(e)(3).

Even if a provider defeats an S.B. 8 suit on constitutional grounds, the law limits the relief that successful defense would afford. Unlike a successful S.B. 8 plaintiff, a successful defendant cannot recover her costs or attorney's fees. Tex. Health & Safety Code § 171.208(i). In addition, S.B. 8 bars non-mutual issue and claim preclusion. *Id*. § 171.208(e)(5); see *id.* § 171.208(c) (providing that the result of a prior suit precludes relief only if "the defendant previously paid the full amount of statutory damages" for the "particular abortion" at issue). That means that even if a provider repeatedly prevails against S.B. 8 suits, she can be sued—and forced to bear the resulting expenses—again and again by new plaintiffs, even for the very same abortion.

2. S.B. 8's architects have candidly acknowledged that the law was designed to deter constitutionally protected abortions while evading judicial review. Pet. App. 51a. One of S.B. 8's principal proponents in the Texas Senate lauded the statute's "elegant use of the judicial system" and explained that its structure was intended to avoid the fate of other "heartbeat" bills that federal courts have held unconstitutional and enjoined. *Id.* at 51a & n.34 (citations omitted); see C.A. App. 107,

111. And an attorney who helped draft the law described it as an effort to "counter the judiciary's constitutional pronouncements" on abortion. Pet. App. 51a n.34 (citation omitted); see C.A. App. 116.

B. S.B. 8's Impact

S.B. 8 took effect on September 1, 2021. The district court found that it virtually eliminated access to abortion in Texas after six weeks of pregnancy. Pet. App. 77a. Indeed, the court observed that Texas could cite—and the record revealed—"only one case" of a post-cardiac-activity abortion being performed "in post-S.B. 8 Texas." *Id.* at 86a (emphasis omitted).

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

In addition, many Texans seeking abortions cannot travel to other States "for any number of reasons," including financial constraints; childcare, job, and school responsibilities; and "dangerous family situations." Pet. App. 88a; see *id.* at 87a n.64, 88a n.66. As the district court found, women who cannot leave the State are

being forced to decide whether to have an abortion "before they are truly ready to do so." *Id.* at 84a (citation omitted). And if they do not learn they are pregnant until after six weeks, women who cannot travel "are being forced to carry their pregnancy to term against their will or to seek ways to end their pregnancies on their own," "with potentially devastating consequences." *Id.* at 88a, 106a (citations omitted); see *id.* at 93a n.76.

C. The *Whole Woman's Health* Litigation

Before S.B. 8 took effect, abortion providers and patient advocates sued several state officials and an individual who had expressed an intent to bring S.B. 8 suits. The district court denied the state defendants' motion to dismiss. *Whole Woman's Health* v. *Jackson*, No. 21-cv-616, 2021 WL 3821062 (W.D. Tex. Aug. 25, 2021). After the defendants appealed, the Fifth Circuit stayed the district court's proceedings and rejected the plaintiffs' request for an injunction pending appeal. *Whole Woman's Health* v. *Jackson*, No. 21-5079, 2021 WL 3919252 (Aug. 29, 2021) (per curiam), cert. before judgment granted, No. 21-463 (Oct. 22, 2021).

The Fifth Circuit later explained that, in its view, the claims against state officials were barred by Texas's sovereign immunity. *Whole Woman's Health* v. *Jackson*, 13 F.4th 434, 438 (2021) (per curiam). The court acknowledged that state officials may be sued under *Ex parte Young*'s exception to state sovereign immunity, but it found that exception inapplicable because it concluded that the executive defendants had no role in enforcing S.B. 8 and that state judges and clerks are not proper defendants under *Ex parte Young*. *Id.* at 441-445.

Over the dissent of four Justices, this Court declined to grant an injunction or vacate the Fifth Circuit's stay. *Whole Woman's Health*, 141 S. Ct. at 2495. The Court

explained that the private plaintiffs had "raised serious questions regarding the constitutionality of the Texas law," but it determined that they had not "carried their burden" of showing a likelihood of success on the merits because of "complex and novel antecedent procedural questions" resulting from the law's unprecedented design—principally, whether the individual officials named in the lawsuit were proper defendants under *Ex parte Young*. *Ibid.*; see *ibid.* (noting that the sole private defendant had filed an affidavit disclaiming any intent to enforce S.B. 8).

D. Proceedings Below

1. Eight days after S.B. 8 took effect, the United States brought this suit against Texas. The complaint includes three claims for relief: Count 1 alleges that S.B. 8 violates the Fourteenth Amendment and the Supremacy Clause; Count 2 alleges that it is preempted to the extent it prohibits abortions that federal agencies are charged with facilitating, funding, or reimbursing; and Count 3 alleges that it violates the federal government's intergovernmental immunity to the extent it regulates the activities of the federal government and its contractors and grantees. Compl. ¶¶ 80-91. The complaint seeks, *inter alia*, "a declaratory judgment stating that S.B. 8 is invalid, null, and void"; "[a] preliminary and permanent injunction against the State of Texas—including all of its officers, employees, and agents, including private parties who would bring suit under S.B. 8—prohibiting any and all enforcement of S.B. 8"; and "[a]ny and all other relief necessary to fully effectuate" the injunction. Compl. 26.

On October 6, the district court granted the United States' motion for a preliminary injunction. Pet. App. 2a-114a. The court explained that the United States has

authority to bring this suit, *id.* at 25a-57a; that S.B. 8 plainly violates the Fourteenth Amendment and the doctrines of preemption and intergovernmental immunity, *id.* at 72a-105a; that a preliminary injunction is necessary to prevent irreparable harm, *id.* at 105a-108a; and that the balance of equities and the public interest favor an injunction, *id.* at 108a-109a.

The preliminary injunction forbids "the State of Texas, including its officers, officials, agents, employees, and any other persons or entities acting on its behalf," from "enforcing [S.B. 8], including accepting or docketing, maintaining, hearing, resolving, awarding damages in, enforcing judgments in, enforcing any administrative penalties in, and administering any lawsuit brought pursuant to" the law. Pet. App. 110a. The district court declined to stay the injunction pending appeal. *Id.* at 113a.

2. Texas and the intervenor respondents (three individuals who seek to bring S.B. 8 enforcement suits) appealed and moved for a stay pending appeal. Pet. App. 1a, 16a. On October 8—two days after the district court's order—the Fifth Circuit granted an administrative stay. Order 1. On October 14, a divided panel stayed the preliminary injunction pending an expedited appeal. Pet. App. 1a. Although this suit is brought by the United States (rather than private plaintiffs) against the State of Texas (rather than individual state officials), the panel majority's single-sentence explanation for its decision simply invoked "the reasons stated in *Whole Woman's Health v. Jackson*, 13 F.4th 434 (5th Cir. 2021), and *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494 (2021)." *Ibid.* Judge Stewart dissented. *Ibid.*

3. On October 18, the United States filed an application asking this Court to vacate the court of appeals'

stay of the district court's preliminary injunction. On October 22, the Court deferred consideration of the application to vacate the stay; treated the application as a petition for a writ of certiorari before judgment; and granted the petition "limited to the following question: 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." No. 21A85 Order 1.

SUMMARY OF ARGUMENT

The United States has authority to bring this suit in equity against the State of Texas. The federal courts, in turn, have authority to grant relief preventing enforcement of S.B. 8 and halting Texas's ongoing nullification of this Court's precedents.

I. For more than a century, the Court has recognized that, in appropriate circumstances, the United States may sue in equity to protect its interests. This suit rests on two such interests.

First, the United States has a manifest sovereign interest in protecting the supremacy of the Constitution and preventing a State from nullifying this Court's precedents by thwarting judicial review under Section 1983 and *Ex parte Young*—the mechanisms that Congress and this Court have long recognized as essential to protect federal constitutional rights from state interference. That sort of nullification is exactly what Texas set out to achieve, and what it has accomplished for two months and counting. The United States does not claim authority to sue merely because a State has violated its citizens' constitutional rights. But S.B. 8's unprecedented attack on the supremacy of the Constitution as interpreted by this Court harms distinct sovereign

interests of the sort that have long been recognized as a basis for a suit in equity.

Second, the United States has an interest in halting S.B. 8's interference with the federal government's own programs, employees, and contractors. Many federal programs require federal employees and contractors to arrange, facilitate, or pay for abortions in some circumstances. S.B. 8's prohibition on pre-viability abortion poses an obstacle to those operations. And the law also purports to expose federal employees and contractors to liability for carrying out their federal duties. That interference with the United States' own operations provides another long-established basis for suit.

II. The federal courts have authority to award effective relief in this suit by the United States against the State. Texas's assertion that federal courts are powerless to halt its ongoing constitutional violations is both wrong and dangerous.

Under Federal Rule of Civil Procedure 65, an injunction against Texas can bind the State's "officers, agents, servants, employees, and attorneys," as well as "other persons who are in active concert or participation" with the State or with those other specified individuals. Fed. R. Civ. P. 65(d)(2)(B) and (C). That remedial authority offers multiple appropriate pathways to preventing S.B. 8's enforcement: An injunction can reach the plaintiffs who act in concert with the State by exercising delegated enforcement authority to bring S.B. 8 suits; the clerks who accept those suits for filing; the judges who process or decide them; and other state or local officials who would enforce the resulting judgments.

Some of those forms of relief are unusual. But so is S.B. 8. In fact, it is "not only unusual, but unprecedented." *Whole Woman's Health* v. *Jackson*, 141 S. Ct.

2494, 2495 (2021) (Roberts, C.J., dissenting). And having chosen an unprecedented scheme in a deliberate effort to thwart ordinary judicial review, Texas should not be heard to complain when the federal courts exercise remedial authorities that are usually unnecessary.

Finally, the federal courts may also grant declaratory relief because the United States' authority to bring this action in equity also allows it to seek a declaratory judgment. A declaratory judgment against Texas would offer some relief because it would bind the plaintiffs who exercise the State's delegated authority by bringing S.B. 8 suits, and thus provide another reason why those suits must be dismissed. But a declaratory judgment is not a substitute for preliminary and permanent injunctive relief preventing enforcement of S.B. 8. To halt the irreparable injury arising from Texas's defiance of this Court's precedent and systematic denial of constitutional rights within the State's borders, this Court should grant the government's pending application to vacate the Fifth Circuit's stay of the preliminary injunction.

ARGUMENT

S.B. 8 was designed to nullify this Court's precedents and to shield that nullification from judicial review. So far, it has worked: The threat of a flood of S.B. 8 suits has effectively eliminated abortion in Texas at a point before many women even realize they are pregnant, denying a constitutional right the Court has recognized for half a century. Yet Texas insists that the Court must tolerate the State's brazen attack on the supremacy of federal law because S.B. 8's unprecedented structure leaves the federal Judiciary powerless to intervene.

If Texas is right, no decision of this Court is safe. States need not comply with, or even challenge,

precedents with which they disagree. They may simply outlaw the exercise of whatever constitutional rights they disfavor; disclaim enforcement by state officials; and delegate the State's enforcement authority to members of the general public by empowering and incentivizing them to bring a multitude of harassing actions threatening ruinous liability—or, at a minimum, prohibitive litigation costs. On Texas's telling, no one could sue to stop the resulting nullification of the Constitution. And although Texas is the first State to adopt this ploy, other States are already regarding S.B. 8 as a model. Pet. App. 112a.

This Court should reject Texas's asserted power to nullify federal law and hold that the United States has authority to bring this suit in equity and to obtain effective relief preventing enforcement of S.B. 8.

I. THE UNITED STATES HAS AUTHORITY TO BRING THIS SUIT IN EQUITY

The United States has challenged S.B. 8 to vindicate two distinct interests. First, S.B. 8 offends the United States' sovereign interest in preserving the supremacy of federal law because it seeks to nullify federal constitutional rights recognized by this Court's precedents and to shield that nullification from the traditional mechanisms of judicial review endorsed by Congress and this Court. Second, S.B. 8 is preempted and contrary to the doctrine of intergovernmental immunity because it interferes with the activities of the federal government's own employees and contractors. The United States has authority to seek equitable relief to vindicate both of those interests.

A. The United States May Sue In Equity To Prevent Texas From Nullifying This Court's Precedents By Thwarting Judicial Review

The United States has authority to challenge S.B. 8 because the law injures its sovereign interest in the supremacy of the Constitution and the availability of the judicial review mechanisms that Congress and this Court have long deemed essential to protect federal constitutional rights from state interference.

1. The United States may sue in equity to protect its sovereign interests

This Court has long held that, even absent express statutory authority, the United States may, in appropriate circumstances, bring a suit in equity to vindicate the interests of the national government under the Constitution. The canonical precedent recognizing that authority is *In re Debs*, 158 U.S. 564 (1895).

In *Debs*, the United States sought and obtained an injunction against the Pullman rail strike, which had "forcibly obstructed" interstate commerce. 158 U.S. at 577. In recognizing the United States' authority to seek that relief, this Court reasoned that "[e]very government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other." *Id.* at 584.

The Court emphasized that "it is not the province of the government to interfere in any mere matter of private controversy between individuals." *Debs*, 158 U.S. at 586. But the Court explained that "whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the Nation, and

concerning which the Nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts." *Ibid.*

In sustaining the United States' authority to sue in *Debs*, this Court noted the United States' proprietary interest in the mail carried by railroads, but expressly declined to "place [its] decision upon th[at] ground alone." 158 U.S. at 584; see *id.* at 570 (injunction not limited to mail trains). Nor did the Court rely solely upon the federal government's statutory authority over rail commerce, or the existence of a nuisance. See *id.* at 584-586. Rather, *Debs* endorsed and embodied the "general rule that the United States may sue to protect its interests." *Wyandotte Transp. Co.* v. *United States*, 389 U.S. 191, 201 (1967).

Consistent with the principles reflected in *Debs*, this Court has recognized the federal government's authority to seek equitable relief against threats to various other sovereign interests even absent an express statutory cause of action. The Court has, for example, sustained the United States' right to sue to protect the public from fraudulent patents, *United States* v. *American Bell Tel. Co.*, 128 U.S. 315, 367-368 (1888); to protect Indian tribes, *Heckman* v. *United States*, 224 U.S. 413, 438-439 (1912); and to carry out the Nation's treaty obligations, *Sanitary Dist. of Chi.* v. *United States*, 266 U.S. 405, 426 (1925).

More recently, the United States has sued in equity to challenge as preempted state laws that interfere with the federal government's "broad, undoubted power over the subject of immigration." *Arizona* v. *United States*, 567 U.S. 387, 394 (2012); see, *e.g.*, *United States* v. *South*

Carolina, 720 F.3d 518 (4th Cir. 2013); *United States* v. *Alabama*, 691 F.3d 1269 (11th Cir. 2012), cert. denied, 569 U.S. 968 (2013). The parties in those cases took it for granted that the United States could sue in equity even without express statutory authority, and in *Arizona* this Court expressed no doubt about the propriety of such suits in affirming an injunction barring enforcement of several provisions of the challenged state law. 567 U.S. at 416.

2. The United States has a sovereign interest in preventing States from nullifying this Court's decisions by thwarting judicial review

S.B. 8's unprecedented affront to the supremacy of the Constitution places this case well within the United States' authority to sue in equity to protect its sovereign interests. Texas designed S.B. 8 to violate the Constitution, as interpreted by this Court, and to thwart judicial review. The United States does not claim, and the district court did not recognize, authority to sue whenever a State enacts an unconstitutional law. Pet. App. 49a-50a. Rather, the United States sues to vindicate a distinct sovereign interest in ensuring that a State cannot nullify federal constitutional rights recognized by this Court's decisions by insulating a clearly unconstitutional statute from judicial review.

a. S.B. 8 is not simply a law of questionable constitutionality; it defies this Court's precedents by design. This Court has long recognized that the Constitution protects a woman's right "to have an abortion before viability and to obtain it without undue interference from the State." *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 846 (1992). Because S.B. 8 bans abortion several months before viability, it is unconstitutional without recourse to *Casey*'s undue-burden standard. *Ibid.*;

see *id.* at 878-879 (plurality opinion); see also, *e.g.*, *Jackson Women's Health Org.* v. *Dobbs*, 951 F.3d 246, 248 (5th Cir. 2020) (per curiam). But even if the undue-burden standard applied, S.B. 8 would fail it. By exposing abortion providers to crippling liability, thwarting pre-enforcement review, and creating an incentive for countless private parties to sue providers repeatedly under skewed procedures favoring plaintiffs, the law aims to chill the provision of constitutionally protected abortion care. See pp. 3-6, *supra*. That is the exact effect S.B. 8 has produced. The resulting near-total unavailability of abortion in Texas after six weeks of pregnancy—before many women even realize they are pregnant—is an undue burden by any measure. See *Casey*, 505 U.S. at 878 (plurality opinion).

All of this is essentially undisputed. Throughout this litigation, the State has not seriously argued that S.B. 8 complies with this Court's decisions. Texas said not one word about S.B. 8's constitutionality in the Fifth Circuit. And when it finally addressed the merits of the law in its stay briefing in this Court, the State's primary argument (Appl. Opp. 42-43) was not that S.B. 8 complies with the Court's precedents, but that the Court should overrule them. That gives the game away: S.B. 8 is unconstitutional under the Court's precedents, and plainly so.

When other States have enacted equivalent prohibitions on abortion, courts have enjoined them in traditional pre-enforcement suits against the state officials charged with enforcing the laws. See, *e.g.*, *Dobbs*, 951 F.3d at 248. In that situation—as in the vast majority of others—the federal judicial system works as Congress and this Court intended. Individuals can vindicate their constitutional rights through the mechanisms

for federal judicial review that Congress adopted in 42 U.S.C. 1983 and this Court recognized in *Ex parte Young*, 209 U.S. 123 (1908). And the States can ask this Court to reconsider precedents with which they disagree. There is no danger of constitutional nullification—and thus no impairment of the United States' sovereign interest in the supremacy of the Constitution and the availability of federal courts to vindicate constitutional rights.

b. Rather than follow that conventional path, Texas sought to take matters into its own hands by thwarting judicial review through an unprecedented enforcement scheme. Although Texas charges state officials with enforcing other abortion laws, see, *e.g.*, Tex. Health & Safety Code §§ 171.0031, 171.103, 171.153, 171.154(c); see also *id.* § 171.062 (enforcement by Texas Medical Board), the State disclaimed any such authority for S.B. 8, *id.* § 171.207(a). Instead, the State delegated its enforcement authority to the public at large—giving any person, without any connection to the abortion, a cause of action against anyone who "performs or induces" a covered abortion, "aids or abets" such an abortion, or even simply intends to do so. *Id.* § 171.208(a)(1) and (2).[3]

The evident purpose of this scheme was to impose exactly the same substantive prohibition that has been enjoined when adopted by other States while avoiding pre-enforcement review in suits against state officers

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

under Section 1983 and *Ex parte Young*. See *Whole Woman's Health*, 141 S. Ct. 2494, 2496 (2021) (Roberts, C.J., dissenting). Texas also sought to thwart effective post-enforcement review by adopting a liability scheme so lopsided that the mere threat of S.B. 8 suits dissuades providers from engaging in prohibited conduct. The State thus sought to create a situation where pregnant women have no access to constitutionally protected abortion care and no mechanism whatsoever to challenge that obvious violation of their constitutional rights.

Texas's effort to nullify this Court's precedents by thwarting judicial review threatens the United States' sovereign interest in ensuring the supremacy of the Constitution. In enacting Section 1983, Congress created "a uniquely federal remedy against incursions upon rights secured by the Constitution and laws of the Nation." *Felder* v. *Casey*, 487 U.S. 131, 139 (1988) (citation and ellipsis omitted). Section 1983 "interpose[s] the federal courts between the States and the people, as guardians of the people's federal rights." *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972). And by specifically authorizing a "suit in equity," 42 U.S.C. 1983, Congress sought to ensure that individuals "threatened" with a "deprivation of constitutional rights" would have "immediate access to the federal courts notwithstanding any provision of state law to the contrary." *Patsy* v. *Board of Regents*, 457 U.S. 496, 504 (1982). S.B. 8 was designed to frustrate "[t]he 'general rule' * * * that plaintiffs may bring constitutional claims under § 1983" rather than being forced to assert their rights in state court. *Knick* v. *Township of Scott*, 139 S. Ct. 2162, 2172 (2019) (citation omitted); see *id.* at 2172-2173.

This Court has similarly emphasized that the equitable action recognized in *Ex parte Young* is "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 105 (1984) (citation omitted); accord *Virginia Office for Prot. & Advocacy* v. *Stewart*, 563 U.S. 247, 254 (2011). Like Section 1983, *Ex parte Young* ensures that the federal courts are "open[]" to protect individuals' "legal rights" without requiring them to subject themselves to burdensome enforcement proceedings in state court. 209 U.S. at 165.

By thwarting those traditional mechanisms for judicial review, S.B. 8 severely harms the United States' sovereign interests. Indeed, it is difficult to imagine a more direct affront to the interests of the national government in the supremacy of the Constitution than this: A state law that nullifies a constitutional right affirmed by this Court, and does so by attempting to block the mechanisms for judicial review that Congress and this Court have recognized as essential to protecting federal rights from state interference.

The consequences of Texas's nullification, moreover, are not confined to its own borders. Pervasive interference with access to abortion in one State affects "[t]he availability of abortion-related services in the national market" by forcing women to travel to clinics in other States and burdening "the availability of abortion services" in neighboring jurisdictions. *United States* v. *Bird*, 124 F.3d 667, 678, 681 (5th Cir. 1997) (citation omitted), cert. denied, 523 U.S. 1006 (1998). As the district court found—and Texas has not contested—S.B. 8 has had exactly that effect. For example, the court credited a declaration from a provider at two clinics in

Oklahoma who stated that in the first twelve days S.B. 8 was in effect, "we have seen an overall staggering 646% increase of Texan patients per day," with patients from Texas "taking up at least 50% (and on some days nearly 75%) of the appointments we have available at our Oklahoma health centers." Pet. App. 92a; C.A. App. 199; see Pet. App. 93a-97a (describing effects on clinics in Kansas, Colorado, New Mexico, and Nevada).

c. Texas has suggested (*e.g.*, Appl. Opp. 34-35) that it has not truly thwarted judicial review because providers could violate S.B. 8 and then raise the law's unconstitutionality as a defense in enforcement suits. But that is no help for the women whose rights S.B. 8 most directly violates, because they cannot be defendants in S.B. 8 suits. And it is also no answer to Section 1983 and *Ex parte Young*, which recognize that even where potential defendants might be able to "interpose" the unconstitutionality of a law as a "defense in an action to recover penalties," equity permits them to sue rather than taking the risk of violating such a statute, "await[ing] proceedings" in state court, and accepting the "peril of large loss" and "great risk of fines * * * if it should be finally determined that the act was valid." *Ex parte Young*, 209 U.S. at 165; see *Patsy*, 457 U.S. at 504.

In any event, Texas's argument rings hollow. The State designed S.B. 8 to ensure that the *threat* of enforcement suits will deter covered abortions, such that enforcement suits and the opportunity to raise a constitutional defense will be rare. The statute exposes providers and their staff to an unlimited number of suits for each abortion, which can be brought in diverse and inconvenient fora. If one of those suits succeeds, the statute requires the court to award a bounty of "not less

than $10,000" per abortion, plus costs and attorney's fees—and mandatory injunctive relief against performing or aiding or abetting any covered abortion in the future. Tex. Health & Safety Code § 171.208(b). And even if the provider successfully defeats all of the suits on the ground that S.B. 8 is unconstitutional, she has no way to recover the attendant litigation expenses—which could far exceed $10,000 for every abortion performed.

Indeed, virtually every aspect of S.B. 8's structure manifests overt hostility to a defense based on the constitutional right to abortion recognized by this Court. S.B. 8 defendants are subject to uniquely unfavorable rules governing matters such as venue, Tex. Health & Safety Code § 171.210; fee-shifting, *id.* § 171.208(b) and (i); and preclusion, *id.* § 171.208(e)(5). The statute likewise purports to severely restrict the substantive terms on which a provider can assert a constitutional defense. *Id.* § 171.209. Far from an effective means of judicial review, therefore, S.B. 8 suits are themselves an improper attempt to undermine federal rights: "States retain substantial leeway to establish the contours of their judicial systems," but "they lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies." *Haywood* v. *Drown*, 556 U.S. 729, 736 (2009). That is exactly what Texas has sought to do.

d. Texas has also invoked lower-court decisions holding that the mere fact that a State has violated its citizens' Fourteenth Amendment rights does not authorize the United States to sue for equitable relief. See, *e.g.*, *United States* v. *City of Philadelphia*, 644 F.2d 187 (3d Cir. 1980); *United States* v. *Mattson*, 600 F.2d 1295 (9th Cir. 1979); *United States* v. *Solomon*, 563 F.2d

1121 (4th Cir. 1977). But this suit does not simply seek to enforce such rights; rather, it seeks to vindicate a distinct interest of the United States in protecting the supremacy of the Constitution by preventing a State from enacting a clearly unconstitutional law while simultaneously thwarting effective judicial review through the mechanisms long recognized as essential by Congress and this Court. The considerations the lower courts invoked in holding that the United States lacks general authority to "sue to enjoin violations of individuals' fourteenth amendment rights," *City of Philadelphia*, 644 F.2d at 201, support the United States' authority to sue here.

First, those courts emphasized that Congress had adopted a "comprehensive remedial scheme" for the enforcement of Fourteenth Amendment rights, consisting primarily of the right to "sue state officials for damages and injunctive relief" under Section 1983 and related statutes. *City of Philadelphia*, 644 F.2d at 192, 199-200. But the very point of S.B. 8's unprecedented enforcement scheme is to thwart that express cause of action provided by Congress. In bringing this suit, the United States thus seeks to vindicate, not circumvent, Congress's judgment that state laws that prohibit the exercise of federal constitutional rights should be subject to suits for injunctive relief in federal court.

Second, the decisions on which Texas relies emphasize that recognizing a general right to sue whenever Fourteenth Amendment rights are violated would be inconsistent with Congress's failure to grant such authority. See *City of Philadelphia*, 644 F.2d at 200; *Mattson*, 600 F.2d at 1299-1300; *Solomon*, 563 F.2d at 1129. Here, in contrast, the United States sues in response to an exigent and unprecedented situation created by a

state law that has no analogue in our Nation's history—and that Congress thus could not have foreseen.[4]

Finally, the decisions on which Texas relies emphasized that granting the United States the authority it sought there would have been inconsistent with principles of "federalism and comity." *Solomon*, 563 F.2d at 1129; see *City of Philadelphia*, 644 F.2d at 200. Here, just the opposite is true: It is Texas's enactment of S.B. 8 that has upset bedrock principles of federalism by asserting an unprecedented means of nullifying federal law and evading judicial review—all designed to subvert the constitutional hierarchy. This suit seeks to restore the established understanding that federal courts have authority to prohibit violations of federal constitutional rights.

3. Texas's remaining objections lack merit

Texas has asserted that the United States lacks authority to bring this suit because there is no justiciable controversy and because the United States lacks a cause of action. Neither objection has merit.

a. Texas's justiciability argument rests exclusively on *Muskrat* v. *United States*, 219 U.S. 346 (1911). *E.g.*, Appl. Opp. 13-16. *Muskrat* concerned a statute authorizing four individuals to sue the United States "to

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[4] Texas has claimed (Appl. Opp. 38) that Congress "anticipated" the situation presented here because two statutes give the Attorney General authority to sue when private citizens cannot. But those provisions address particular individuals' inability to prosecute their own claims when issues like financial resources or threats to their safety stand in the way. See 42 U.S.C. 2000b(b), 2000c-6(b). Texas cannot plausibly maintain that by enacting laws addressing those very different circumstances, Congress impliedly barred the United States from responding to S.B. 8's unprecedented statewide threat to the supremacy of federal law.

determine the validity" of an earlier statute broadening the class of Native Americans entitled to participate in an allotment of property. 219 U.S. at 350. This Court explained that the suit amounted to an impermissible request for an advisory opinion because the Court's judgment would have been "no more than an expression of opinion upon the validity of the acts in question." *Id.* at 362. The United States, though designated as the defendant by statute, had "no interest adverse to the claimants": The underlying statute merely apportioned property among private individuals, who were the real parties in interest. *Id.* at 361. And, the Court added, a judgment would have had no legal effect because it would not have "conclude[d] private parties" or settled their competing claims in a future lawsuit. *Id.* at 362.

Texas errs in asserting that its interest in this case is like the federal government's interest in *Muskrat*. This is not a suit structured by the Texas legislature to test S.B. 8's constitutionality. The judgment the United States seeks is not an advisory opinion; it is an injunction prohibiting S.B. 8's enforcement. And Texas manifestly has an interest adverse to that of the United States. Unlike the federal law challenged in *Muskrat*, S.B. 8 does not merely allocate private rights; it implements Texas's preferred public policy by prohibiting primary conduct that this Court has held the Constitution protects. The State's concrete interest in that law does not disappear merely because the State has delegated its enforcement authority to private individuals in an effort to evade judicial review.[5]

[5] Texas has also relied on *Muskrat*'s statement that federal courts lack the power to issue a judgment "to settle the doubtful character of the legislation in question." Appl. Opp. 14 (quoting *Muskrat*, 219

b. Texas has also asserted (*e.g.*, Appl. Opp. 33-36) that the United States lacks a "cause of action" to bring this suit in equity. But this Court has long endorsed the United States' "right to invoke the aid of a court of equity in removing unlawful obstacles to the fulfilment of its obligations"—a right "vested in it as a sovereign"—without the need to identify a specific statutory cause of action. *United States* v. *Minnesota*, 270 U.S. 181, 194 (1926). Indeed, the teaching of the entire *Debs* line of decisions is that when the United States' sovereign interests are at stake, "no statute is necessary to authorize the suit." *Sanitary District*, 266 U.S. at 425-426.

For similar reasons, Texas has erred in suggesting (Appl. Opp. 33) that the government's suit is inconsistent with *Grupo Mexicano de Desarrollo S. A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999). That decision stands for the proposition that the equity jurisdiction of the federal courts does not authorize them to grant "a remedy" that was "historically unavailable from a court of equity." *Id.* at 333. In *Grupo Mexicano*, for example, the Court applied that principle to hold that, "in an action for money damages," a court may not

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U.S. at 361-362). That statement is best understood to reflect that, at the time of *Muskrat*, the Court "harbored doubts" about whether federal courts could issue declaratory judgments consistent with Article III. *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 126 (2007); see, *e.g.*, 3 Kenneth Culp Davis, *Administrative Law Treatise* § 21.01, at 119-124 (1958) (interpreting *Muskrat* in this manner). But the Court "dispelled those doubts" in 1933, and "[t]he federal Declaratory Judgment Act was signed into law the following year." *MedImmune, Inc.*, 549 U.S. at 126. The Court has thus recognized that *Muskrat*'s concern about issuance of a judgment without immediate coercive effect "has the hollow ring of another era." *Port of Bos. Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 & n.20 (1970).

"issue a preliminary injunction preventing the defendant from transferring assets in which no lien or equitable interest is claimed." *Id.* at 310.

Unlike the novel form of relief sought by the private plaintiffs in *Grupo Mexicano*, the relief the United States seeks here—an injunction against enforcement of an unconstitutional statute—falls squarely within the history and tradition of courts of equity. "Injunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 74 (2001). Indeed, *Ex parte Young* itself observed that the action it recognized—"[a] bill filed to prevent the commencement of suits to enforce an unconstitutional act"—"is no new invention," but rather has a strong basis in equity. 209 U.S. at 167; see, *e.g.*, *Armstrong* v. *Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015). And in the last decade alone, the United States has brought numerous suits for equitable relief against States and localities.[6]

B. The United States May Sue In Equity To Vindicate Its Preemption And Intergovernmental Immunity Claims

The United States also has authority to sue because S.B. 8 interferes with the activities of the federal

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[6] See, *e.g.*, *Arizona, supra*; *United States* v. *State Water Res. Control Bd.*, 988 F.3d 1194 (9th Cir. 2021); *United States* v. *Washington*, 971 F.3d 856 (9th Cir. 2020), as amended, 994 F.3d 994 (9th Cir. 2021), petition for cert. pending, No. 21-404 (filed Sept. 8, 2021); *United States* v. *California*, 921 F.3d 865, 876 (9th Cir. 2019), cert. denied, 141 S. Ct. 124 (2020); *United States* v. *Board of Cnty. Comm'rs*, 843 F.3d 1208 (10th Cir. 2016), cert. denied, 138 S. Ct. 84 (2017); *South Carolina, supra*; *Alabama, supra*; *United States* v. *City of Arcata*, 629 F.3d 986 (9th Cir. 2010).

government in violation of principles of preemption and intergovernmental immunity.

1. Even absent an express statutory cause of action, the United States routinely sues in equity to enjoin state statutes that impermissibly interfere with the federal government's own activities. See, *e.g.*, *United States* v. *Washington*, 971 F.3d 856 (9th Cir. 2020), as amended, 994 F.3d 994 (9th Cir. 2021), petition for cert. pending, No. 21-404 (filed Sept. 8, 2021); *United States* v. *California*, 921 F.3d 865, 876 (9th Cir. 2019), cert. denied, 141 S. Ct. 124 (2020). The United States' preemption and intergovernmental immunity claims fall within that authority because they challenge S.B. 8's interference with federal programs and its threatened imposition of liability on federal employees and contractors.

Conflict preemption doctrine provides that "state laws are preempted when they conflict with federal law." *Arizona*, 567 U.S. 399; see *id.* at 399-400. As relevant here, that occurs where federal law imposes obligations on the federal government and "'compliance with both federal and state regulations is a physical impossibility'" or "the challenged state law 'stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.'" *Ibid.* (citations omitted). Under the doctrine of intergovernmental immunity, States can neither "control the operations of the constitutional laws enacted by Congress" nor directly impede the Executive Branch's "execution of those laws." *Trump* v. *Vance*, 140 S. Ct. 2412, 2425 (2020); see *Mayo* v. *United States,* 319 U.S. 441, 445 (1943). States accordingly cannot impose liability on federal officials or contractors for carrying out their federal duties. See *In re Neagle*, 135 U.S. 1, 75-76 (1890); see also *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 181 (1988) (intergov-

ernmental immunity applies even if a "federal function is carried out by a private contractor").

S.B. 8 is preempted and violates the doctrine of intergovernmental immunity because it impairs the ability of federal agencies, contractors, and employees to carry out their duties under federal law. For example, the Bureau of Prisons must protect the rights of pregnant inmates by "arrang[ing] for an abortion to take place" if an inmate requests one. 28 C.F.R. 551.23(c). Similarly, the Department of Health and Human Services' Office of Refugee Resettlement, which has custody of certain unaccompanied noncitizen minors, has adopted policies to comply with its legal obligations that require it to "provide access to abortion services when requested and permitted by law." Pet. App. 27a. Other federal agencies have responsibilities that require them to arrange, pay for, or otherwise facilitate abortion in certain circumstances, including cases of rape or incest. See *id.* at 26a-27a (discussing the United States Marshals Service, the Department of Defense, the Department of Labor, the Centers for Medicare and Medicaid Services, and the Office of Personnel Management). And by imposing liability on anyone who aids or abets an abortion, or even intends to do so, S.B. 8 threatens suits against federal employees and contractors for carrying out their duties under federal law. *Id.* at 26a; see *id.* at 101a.

2. Texas has not seriously disputed that the United States has authority to seek injunctive relief against the enforcement of State laws that purport to regulate federal agencies, employees, and contractors. It has asserted instead (Appl. Opp. 18-20) that the United States lacks Article III standing to bring those claims here on the theory that the injury to federal programs, employ-

ees, and contractors is speculative. But the district court found otherwise, specifically determining that the government engages in activities "that would subject federal employees and contractors to civil liability under S.B. 8." Pet. App. 27a; see *id.* at 26a-28a.

Texas has also suggested that its courts might not hold a federal defendant liable. See Appl. Opp. 20. But S.B. 8's text includes no such exception. And even if state courts might construe the law not to apply to the federal government or its contractors, S.B. 8 would still pose an obstacle to the federal government's operations: Because the law has essentially eliminated abortion in Texas after six weeks of pregnancy, federal employees and contractors who are required to facilitate abortion care cannot do so within the State. Pet. App. 28a. As a result, S.B. 8 is already interfering with the government's activities in Texas. See, *e.g.*, Office of Refugee Resettlement, Administration for Children & Families, U.S. Dep't of Health & Human Servs., *Field Guidance #21—Compliance with Garza Requirements for Pregnant Unaccompanied Children in Texas* (Oct. 1, 2021), https://go.usa.gov/xMJME (adopting special procedures in light of S.B. 8).

II. THE FEDERAL COURTS HAVE AUTHORITY TO ENTER RELIEF PREVENTING ENFORCEMENT OF S.B. 8

The federal courts have authority to enter injunctive relief against Texas that will redress the United States' injuries by preventing enforcement of S.B. 8. The courts also have authority to enter declaratory relief. This Court should reject Texas's assertion that the federal courts are powerless to address its nullification of federal constitutional rights.

A. The Federal Courts May Enjoin Texas To Prevent Enforcement of S.B. 8

S.B. 8 is a statute enacted by the Texas legislature, signed by the Texas governor, and enforceable in Texas courts. In a calculated effort to evade judicial review, the law delegates the State's enforcement authority to members of the public who have no connection to the prohibited conduct. But it is the State that has empowered and encouraged those plaintiffs to sue. And it is the State that crafted this unprecedented regime in a deliberate attempt to make constitutionally protected abortions unavailable in Texas. It is, in short, plain that the State of Texas is responsible for the constitutional violations caused by S.B. 8. It should be equally plain that where, as here, the State's sovereign immunity does not apply, see *Alden* v. *Maine*, 527 U.S. 706, 755-756 (1999), Texas can be enjoined to prevent those violations.

Everything after that is just a question of how to craft appropriate relief. Those remedial questions should not distract from the core point: It was proper for the district court to enjoin the State to halt its ongoing constitutional violations. Indeed, in cases where States are defendants, it is not unusual to simply enjoin the State (and perhaps the governor or other senior officials) and leave it to the State to determine what actions should be taken by which state officers and employees to achieve compliance.[7]

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[7] See, *e.g.*, *Pennsylvania* v. *West Virginia*, 262 U.S. 623, 624 (1923) (ordering "[t]hat the defendant state, and her several officers, agents and servants, are hereby severally enjoined from enforcing, or attempting to enforce" an unconstitutional law); *United States* v. *Alabama*, 443 Fed. Appx. 411, 420 (11th Cir. 2011) (per

In the usual case, it is relatively clear how a State should comply with a directive to prevent enforcement of an unconstitutional law. Here, that question is complicated by Texas's deliberate attempt to "insulate the State from responsibility for implementing and enforcing the regulatory regime," *Whole Woman's Health*, 141 S. Ct. at 2495 (Roberts, C.J., dissenting), by delegating the State's S.B. 8 enforcement authority to members of the public. Accordingly—and in response to the State's express request for direction about "who is supposed to do what" under an injunction, Pet. App. 59a (citation omitted)—the district court specified that an injunction against Texas would prevent enforcement of the law at each stage of S.B. 8 enforcement proceedings. Specifically, the injunction against the State properly binds the plaintiffs who file S.B. 8 suits; the clerks and judges who docket and administer them; and the state officials who enforce the resulting judgments. *Id.* at

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curiam) (injunction pending appeal barring "the State of Alabama's enforcement" of two challenged provisions); *United States* v. *Arizona*, 703 F. Supp. 2d 980, 1008 (D. Ariz. 2010) (preliminary injunction affirmed in part in *Arizona*, *supra*, which "enjoin[ed] the State of Arizona and [the Governor] from enforcing the following Sections" of the challenged law); *United States* v. *South Carolina*, 11-cv-2958 D. Ct. Doc. 153, at 1 (D. S.C. Mar. 4, 2014) (permanently enjoining the "State of South Carolina," as well as the State's Governor and Attorney General, from "implementing" certain provisions of challenged law); cf. *United States* v. *Texas*, 340 U.S. 900 (1950) (in suit against the State, enjoining "the State of Texas, its privies, assigns, lessees, and other persons claiming under it" from engaging in certain activities); *United States* v. *Louisiana*, 340 U.S. 899 (1950) (similar); *Organized Village of Kake* v. *Egan*, 80 S. Ct. 33, 34 (1959) (Brennan, J., in chambers) (in suit against State and its governor, entering a temporary restraining order "restraining the State of Alaska and its Governor, and the agents of both" from enforcing a state prohibition).

110a-111a. Texas has not shown any impropriety in any of those aspects of the injunction—let alone all of them.

Texas's remedial arguments have, moreover, consistently addressed the wrong question. The issue is not whether the United States could have brought a suit, or obtained an injunction against, S.B. 8 plaintiffs, clerks, judges, or the officials who enforce S.B. 8 judgments. The question instead is whether those persons are properly bound by an injunction against the *State of Texas*, the only defendant the United States sued here. That question is governed by Federal Rule of Civil Procedure 65(d), which codifies traditional equitable rules defining who can be bound by an injunction.

1. An injunction against Texas properly binds private parties who file and maintain S.B. 8 suits with notice of the injunction

a. Under Rule 65(d)(2), an injunction binds "only the following who receive actual notice of it by personal service or otherwise: (A) the parties; (B) the parties' officers, agents, servants, employees, and attorneys; and (C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B)." Fed. R. Civ. P. 65(d)(2). This Court has explained that the rule "is derived from the common-law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control." *Regal Knitwear Co.* v. *NLRB*, 324 U.S. 9, 14 (1945). The essence of the rule is that "defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding." *Ibid.*

Private plaintiffs who bring suit under S.B. 8 with notice of the district court's injunction fall squarely

within the text and the purpose of Rule 65(d)(2). They do not sue to redress any personal injury or to vindicate any private rights; instead, they accept the State's offer to exercise authority delegated by the State to enforce the State's public policy in exchange for compensation in the form of bounties of at least $10,000. In so doing, those plaintiffs at a minimum act "in active concert or participation" with the State under Rule 65(d)(2)(C).

Individuals satisfy that criterion if they are in "privity" with an enjoined party, *e.g.*, *Texas* v. *Department of Labor*, 929 F.3d 205, 210-211 (5th Cir. 2019), or if they "knowingly aid[] or abet[]" a violation of the injunction, *Goya Foods, Inc.* v. *Wallack Mgmt. Co.*, 290 F.3d 63, 74 (1st Cir.), cert. denied, 537 U.S. 974 (2002). Private plaintiffs who file S.B. 8 suits notwithstanding an injunction against the State's enforcement of S.B. 8 would do precisely that. Although the State itself would be enjoined from enforcing the statute, plaintiffs who the State has empowered and encouraged to act on its behalf would aid and abet—indeed, carry out—the enforcement that the injunction prohibits. Their actions would "negate" both the United States' right to the nonenforcement of S.B. 8, as recognized by the injunction, and Texas's "constitutional obligation" to ensure that result. *United States* v. *Hall*, 472 F.2d 261, 265 (5th Cir. 1972) (Wisdom, J.) (upholding contempt sanction against non-party where his actions "imperiled the court's fundamental power to make a binding" and effective "adjudication between the parties properly before it").

In addition, private plaintiffs are in "privity" with the State, because they have a "'sufficiently close identity of interests' to justify application of nonparty claim preclusion," and Rule 65(d)(2) reflects the same principles.

National Spiritual Assembly of the Baha'is of the United States Under Hereditary Guardianship, Inc. v. *National Spiritual Assembly of Baha'is of the United States, Inc.*, 628 F.3d 837, 849 (7th Cir. 2010) (citation omitted). For purposes of both doctrines, the State is properly considered to represent the interests of the private plaintiffs the State has deputized to enforce S.B. 8. See pp. 43-45, *infra*.

Nor is there anything anomalous about treating nominally private actors as part of, or in active concert with, the State. In a "traditional" pre-enforcement challenge under Section 1983 or *Ex parte Young*, an affected party would sue the state officers charged with enforcing the allegedly unconstitutional law and, if successful, would obtain an injunction against them. Such relief would also be proper if the "enforcer" is not a state official, but a private individual; indeed, *Ex parte Young* is premised on the idea that once stripped of their state immunity, executive officials are merely private individuals who are proper defendants in a pre-enforcement challenge. See 209 U.S. at 159-160.

Here, the State has tried to avoid *Ex parte Young* suits by disclaiming enforcement by its executive officials and instead deputizing members of the public. And by not requiring any connection between an S.B. 8 plaintiff and the challenged abortion, the State has tried to make it impossible to identify the universe of persons who will bring S.B. 8 suits in advance. But once S.B. 8 plaintiffs actually bring such suits, their actions are attributable to, and in concert with, the State. By bringing S.B. 8 enforcement actions, S.B. 8 plaintiffs "exercise * * * a right or privilege having its source in state authority." *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 621 (1991). And they may "be described in all

fairness as * * * state actor[s].” *Ibid.* S.B. 8 plaintiffs rely on “governmental assistance and benefits”—a state-created cause of action, and the promise of a $10,000 bounty; they perform the “traditional government function” of enforcing Texas’s abortion restrictions, without any private injury; and the result of the scheme is to chill constitutional rights in a manner and to a degree that private actors could not achieve without “the incidents of government authority.” *Id.* at 620-622. Recognizing that private plaintiffs may be bound by an injunction against the State ensures that the State cannot “nullif[y]” constitutional rights simply by delegating enforcement authority to private actors. *Smith* v. *Allwright*, 321 U.S. 649, 664 (1944).

The district court thus correctly determined that its injunction could bind persons who act on behalf of or in concert with the State. Pet. App. 110a. And to make its relief effective and facilitate the notice required by Rule 65, the court ordered the State to publish notice of the injunction “on all of its public-facing court websites” or to propose other means of “plainly informing the public.” *Id.* at 111a.

b. Texas has objected that an injunction that reaches S.B. 8 plaintiffs would be improper because a court “cannot lawfully enjoin the world at large.” Appl. Opp. 30 (citation omitted); see *id.* at 31. But an injunction against the State, including those individuals who affirmatively choose to exercise the State’s delegated enforcement authority, would not do that. Such an injunction would not reach the universe of *potential* S.B. 8 plaintiffs; it would bind only those individuals who *actually* act in concert with or on behalf of the State by bringing or maintaining an S.B. 8 suit with notice of the injunction. Pet. App. 69a; see *id.* at 110a (explaining

that the preliminary injunction does not "run[] to the future actions of private individuals per se" and that "those private individuals' actions are proscribed to the extent" that they actually attempt to bring an S.B. 8 action). Texas's decision to delegate its enforcement power to private bounty hunters rather than state officials does not strip the federal courts of authority to craft effective injunctive relief by reaching those who choose to exercise their delegated authority to enforce the State's unconstitutional law.

2. In these unusual circumstances, an injunction against Texas properly binds state court clerks and judges

The district court also correctly concluded that its injunction could reach "state court judges and state court clerks who have the power to enforce or administer" S.B. 8 actions. Pet. App. 110a. This Court has held that "judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity." *Pulliam* v. *Allen*, 466 U.S. 522, 541-542 (1984). And although Section 1983 prohibits injunctions against judicial officers unless declaratory relief was violated or unavailable, see *Whole Woman's Health*, 13 F.4th at 444, this suit by the United States is not based on Section 1983.

To be sure, injunctions that run to state clerks and judges are unusual. But that is because other forms of relief are typically more appropriate—most obviously, a plaintiff can ordinarily secure an injunction binding "the enforcement official authorized to bring suit under the statute." *In re Justices of the Supreme Court of Puerto Rico*, 695 F.2d 17, 21 (1st Cir. 1982) (Breyer, J.); see *Ex parte Young*, 209 U.S. at 163. Here, Texas has deliberately sought to thwart that ordinary remedy.

And where "it is arguably necessary to enjoin a judge to ensure full relief to the parties," *In re Justices*, 695 F.2d at 23, injunctions that foreclose state clerks or courts from processing or maintaining cases have long been permitted.[8]

Texas has objected (Appl. Opp. 16-17, 26) that there is no justiciable controversy between the United States and the judges and clerks and that a federal court may only enjoin the parties to the suit. But that misses the point: The injunction runs against the State, which is a party, and there is a justiciable controversy between the United States and Texas.

Texas has also observed (Appl. Opp. 27) that state-court judges are ordinarily expected to follow the federal Constitution in adjudicating cases. But in this unique context, that does not remove the need for injunctive relief. By design, the mere threat of even unsuccessful S.B. 8 suits chills constitutionally protected conduct: Those suits can be brought in unlimited numbers, in diverse and inconvenient fora, subject to a bar

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[8] See, *e.g.*, *In re BankAmerica Corp. Sec. Litig.*, 263 F.3d 795, 798 (8th Cir. 2001) (affirming injunction barring state court from certifying plaintiff classes to avoid circumvention of prior injunction), cert. denied, 535 U.S. 970 (2002); *Blackard* v. *Memphis Area Med. Ctr. for Women, Inc.*, 262 F.3d 568, 573-574 (6th Cir. 2001) (determining that under Rule 65(d), "Tennessee juvenile courts were within the scope" of an injunction "and could not enforce" the State's parental consent statute and judicial bypass procedure "during the pendency of that injunction"), cert. denied, 535 U.S. 1053 (2002); *WXYZ, Inc.* v. *Hand*, 658 F.2d 420, 422, 427 (6th Cir. 1981) (affirming injunction against state court judge where unconstitutional statute required issuance of a suppression order barring media from publishing defendant's identity); cf. *General Motors Corp.* v. *Buha*, 623 F.2d 455, 463 (6th Cir. 1980) (finding error in injunction against state court judges and court personnel "when an injunction against the litigant would have accomplished the same purpose").

on applying preclusion principles to defeat successive suits, and with no prospect of the defendant's recovering the attendant expenses of litigation because of S.B. 8's one-way fee-shifting. As nearly two months of experience have made clear, the fact that state court judges would ultimately be obligated to reject such suits does not eliminate S.B. 8's harm to the supremacy of federal law and to women who are unable to exercise their constitutional rights.

In this case, therefore, the cause of the United States' injury is not primarily a risk that state judges hearing S.B. 8 suits would disregard federal law. It is instead that S.B. 8 is structured so that the mere prospect of the *filing* of a blizzard of enforcement suits has effectively nullified a constitutional right. And the lopsided procedures in those suits were deliberately structured to maximize that deterrent effect. In these unusual circumstances, where the mere threat of filing and docketing of actions contributes to a constitutional violation, it is appropriate to enjoin the courts from administering the suits to redress that chilling effect. And to the extent Texas objects to an injunction that binds judges acting in their adjudicatory capacities, the same relief could be afforded by simply enjoining clerks from accepting S.B. 8 suits for filing. See, *e.g.*, *Strickland* v. *Alexander*, 772 F.3d 876, 886 (11th Cir. 2014) (holding that court clerk was a proper defendant under Article III in suit for injunctive relief, where docketing of affidavit and issuing of summons "were the immediate cause[s]" of plaintiff's past and likely future injuries); *Finberg* v. *Sullivan*, 634 F.2d 50, 53 (3d Cir. 1980) (en banc) (similar; rejecting argument that court clerk was not a proper defendant because his duties were "ministerial" in nature).

3. An injunction against Texas properly binds state officials who enforce S.B. 8 judgments

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

Texas has responded that sheriffs, constables, and county clerks may technically work for political subdivisions rather than the State itself. Appl. Opp. 28 (citing *Monsanto Co.* v. *Cornerstones Mun. Util. Dist.*, 865 S.W.2d 937, 939-940 (Tex. 1993) (interpreting the meaning of the word "state" in a state-law statute of limitations provision)). But even if that meant those officials are not agents or employees of the State under Rule 65(d)(2)(B), they would, at a minimum, act "in active concert or participation" with the State under Rule 65(d)(2)(C). And although Texas has speculated (*ibid.*) that S.B. 8 plaintiffs might find *other* means of enforcing S.B. 8 judgments, foreclosing executive officials from doing so would help to alleviate the injury from S.B. 8's deterrent effect. To the extent that this aspect of the injunction is not a complete answer, that merely underscores the need for its other facets.

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Texas thus cannot identify any impropriety in any aspect of the district court's injunction. And the State

should not be heard to complain about the particulars of the district court's response to its unprecedented scheme unless it is prepared to offer some alternative form of effective relief. But Texas has steadfastly refused to do so. See, *e.g.*, Appl. Opp. 24-25. That is because Texas's objection is, at bottom, not to the structure of any particular injunction, but to *any* relief that would halt S.B. 8's ongoing nullification of the Constitution as interpreted by this Court. After all, that is why the State adopted S.B. 8's extraordinary structure to begin with.

The implications of Texas's position are startling: If, as Texas insists, courts cannot enjoin the State itself, or reach the actions of the parties who exercise delegated state enforcement authority by bringing S.B. 8 suits, or prevent administration of those suits by court personnel, or bar enforcement by officials of any resulting judgments, then a State could use the same mechanism to effectively nullify any constitutional decision of this Court with which it disagreed. A State might, for example, ban the sale of firearms for home protection, contra *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), or prohibit independent corporate campaign advertising, contra *Citizens United* v. *FEC*, 558 U.S. 310 (2010), and deputize its citizens to seek large bounties for each sale or advertisement. See generally Firearms Policy Coalition Amicus Brief, *Whole Woman's Health*, *supra* (No. 21-463). Those statutes, too, would plainly violate the Constitution as interpreted by this Court. But under Texas's theory, they could be enforced without prior judicial review—and, by creating an enforcement scheme sufficiently lopsided and punitive, the State could deter the exercise of the targeted constitutional right altogether.

The State's procedural ingenuity should not permit it to nullify the Constitution, or this Court's decisions. To the contrary, this Court has long held that its authoritative interpretations of the Constitution "can neither be nullified openly and directly by state legislators or state executive or judicial officers nor nullified indirectly by them through evasive schemes." *Cooper* v. *Aaron*, 358 U.S. 1, 17 (1958).

B. The Federal Courts May Issue A Declaratory Judgment Against Texas

In granting certiorari before judgment, this Court asked the parties to address the question whether the United States may seek and obtain declaratory as well as injunctive relief. Declaratory relief is available, but it is not an adequate substitute for preliminary and permanent injunctive relief prohibiting enforcement of S.B. 8.

1. The Declaratory Judgment Act provides that "[i]n a case of actual controversy within its jurisdiction * * * any court of the United States * * * may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. 2201(a); see Fed. R. Civ. P. 57. Accordingly, the United States' authority to bring this action in equity allows it to seek declaratory as well as injunctive relief.

2. It is not clear, however, that declaratory relief by itself would redress the United States' injuries. One of the purposes of the Declaratory Judgment Act is "to provide a milder alternative to the injunction remedy." *Steffel* v. *Thompson*, 415 U.S. 452, 467 (1974) (citation omitted); see 28 U.S.C. 2202 (providing for "[f]urther necessary or proper relief based on a declaratory judgment"). Accordingly, courts sometimes find that "an

injunction is not necessary or appropriate" if a government defendant "has represented that it will obey the law as declared by the court in the future." *Calderon Jimenez* v. *Nielsen*, 399 F. Supp. 3d 1, 2 (D. Mass. 2018); cf. *Sanchez–Espinoza* v. *Reagan*, 770 F.2d 202, 208 n.8 (D.C. Cir. 1985) (Scalia, J.) ("[I]t must be presumed that federal officers will adhere to the law as declared by the court."). But given S.B. 8's unusual structure, it is far from apparent that the Texas Attorney General would make such a representation here.

In other circumstances, declaratory judgments provide effective relief largely because of their preclusive effect. The Declaratory Judgment Act provides that a declaratory judgment "shall have the force and effect of a final judgment or decree." 28 U.S.C. 2201(a). One of the drafters of the Declaratory Judgment Act explained that that provision "is designed to indicate that the declaratory judgment is a final judgment like any coercive judgment conclusively determining the rights of the parties and constituting *res judicata.*" Edwin Borchard, *The Federal Declaratory Judgments Act*, 21 Va. L. Rev. 35, 47 (1934); see *Steffel*, 415 U.S. at 468 n.18.

Here, the preclusive effect of a declaratory judgment would likely offer some, but not complete, relief. Because Texas is the named defendant in this suit, the declaratory judgment would issue against Texas itself (as well as the defendants-intervenors). The United States would argue that a judgment against Texas declaring S.B. 8 invalid would bind private S.B. 8 plaintiffs as a matter of issue preclusion. "The preclusive effect of a federal-court judgment is determined by federal common law." *Taylor* v. *Sturgell*, 553 U.S. 880, 891 (2008). This Court has explained that although a judgment generally does not bind nonparties, that rule is "subject to

exceptions." *Id.* at 893. Most relevant here, "a party bound by a judgment may not avoid its preclusive force by relitigating through a proxy. Preclusion is thus in order when a person who did not participate in a litigation later brings suit as the designated representative of a person who was a party to the prior adjudication." *Id.* at 895.

Private S.B. 8 plaintiffs are in substance the designated representatives of the State in bringing S.B. 8 actions. See, *e.g.*, *Chicago, Rock Island & Pac. Ry. Co.* v. *Schendel*, 270 U.S. 611, 620 (1926) ("Identity of parties is not a mere matter of form, but of substance."). S.B. 8 effects an unprecedented delegation of state enforcement authority to individuals who need have no personal relationship to the abortion at issue. S.B. 8 plaintiffs thus act as the State's "designated representative[s]." *Sturgell*, 553 U.S. at 895.

Although Texas's method of enforcing its abortion ban is unprecedented, there is nothing novel about the proposition that "government litigation can preclude relitigation by individuals" who seek to prosecute a public interest. 18A Charles Alan Wright et al., *Federal Practice and Procedure* § 4458.1 (3d ed. 2017). For example, in *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958), the Court held that a judgment in an earlier suit in which the State of Washington was a party "was effective, not only against the State, but also against its citizens, including the taxpayers of Tacoma, for they, in their common public rights as citizens of the State, were represented by the State in those proceedings." *Id.* at 340-341 (citing authority); see, *e.g.*, *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 692 n.32 (1979); cf. *Hinderlider*

v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106-108 (1938).

By similar reasoning, a judgment against the State declaring S.B. 8 invalid would require the dismissal of actions brought by S.B. 8 plaintiffs as a matter of issue preclusion. But this Court's Fourteenth Amendment precedents already require dismissal of those actions on the merits. And as discussed above, the fact that S.B. 8 suits are legally foreclosed has not prevented the statute from nullifying the right to abortion in Texas because it does not address one of S.B. 8's principal burdens: The threat of a potentially unlimited number of harassing and expensive lawsuits filed in courts throughout the State.

3. Accordingly, while a declaratory judgment would provide some relief, the appropriate remedy for Texas's deliberate nullification of this Court's precedents is a permanent injunction against the State prohibiting enforcement of S.B. 8, which would appropriately bind S.B. 8 plaintiffs, clerks, judges, and other state officials. And at a minimum, the availability of a declaratory judgment at the end of this litigation in no way diminishes the need for preliminary injunctive relief now. Although "a district court can generally protect the interests of a federal plaintiff by entering a declaratory judgment" at the conclusion of the proceedings, "prior to final judgment there is no established declaratory remedy comparable to a preliminary injunction." *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931 (1975). Because S.B. 8 is *presently* causing irreparable harm, the United States' authority to seek and obtain a declaratory judgment later is no substitute for the preliminary injunctive relief granted by the district court to

safeguard constitutional rights and the supremacy of federal law now.

Accordingly, if this Court determines that the United States is likely to establish that it has authority to seek injunctive or declaratory relief, it should affirm the preliminary injunction. It should also immediately vacate the Fifth Circuit's stay of the injunction, which—as the United States demonstrated in its pending application—is enabling Texas's ongoing nullification of this Court's precedents and systematic denial of constitutional rights in the State.

CONCLUSION

The Court should hold that the United States has authority to bring this suit and obtain effective relief, vacate the stay entered by the Fifth Circuit, and affirm the preliminary injunction entered by the district court. Alternatively, the Court could hold that the United States has authority to bring this suit and obtain effective relief, vacate the stay, and remand to allow the Fifth Circuit to consider any other issues respondents might seek to raise in their appeals of the preliminary injunction.

Respectfully submitted.

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APPENDIX

1. 28 U.S.C. 2201(a) provides:

Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(9) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

2. 28 U.S.C. 2202 provides:

Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

3. 42 U.S.C. 1983 provides:

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

4. Tex. Health & Safety Code, ch. 171, subch. H, §§ 171.201-171.212 provides:

SUBCHAPTER H. DETECTION OF FETAL HEARTBEAT

Sec. 171.201. DEFINITIONS. In this subchapter:

(1) "Fetal heartbeat" means cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac.

(2) "Gestational age" means the amount of time that has elapsed from the first day of a woman's last menstrual period.

(3) "Gestational sac" means the structure comprising the extraembryonic membranes that envelop the unborn child and that is typically visible by ultrasound after the fourth week of pregnancy.

(4) "Physician" means an individual licensed to practice medicine in this state, including a medical doctor and a doctor of osteopathic medicine.

(5) "Pregnancy" means the human female reproductive condition that:

(A) begins with fertilization;

(B) occurs when the woman is carrying the developing human offspring; and

(C) is calculated from the first day of the woman's last menstrual period.

(6) "Standard medical practice" means the degree of skill, care, and diligence that an obstetrician of ordinary judgment, learning, and skill would employ in like circumstances.

(7) "Unborn child" means a human fetus or embryo in any stage of gestation from fertilization until birth.

Sec. 171.202. LEGISLATIVE FINDINGS. The legislature finds, according to contemporary medical research, that:

(1) fetal heartbeat has become a key medical predictor that an unborn child will reach live birth;

(2) cardiac activity begins at a biologically identifiable moment in time, normally when the fetal heart is formed in the gestational sac;

(3) Texas has compelling interests from the outset of a woman's pregnancy in protecting the health of the woman and the life of the unborn child; and

(4) to make an informed choice about whether to continue her pregnancy, the pregnant woman has a compelling interest in knowing the likelihood of her unborn child surviving to full-term birth based on the presence of cardiac activity.

Sec. 171.203. DETERMINATION OF PRESENCE OF FETAL HEARTBEAT REQUIRED; RECORD.

(a) For the purposes of determining the presence of a fetal heartbeat under this section, "standard medical practice" includes employing the appropriate means of detecting the heartbeat based on the estimated gestational age of the unborn child and the condition of the woman and her pregnancy.

(b) Except as provided by Section 171.205, a physician may not knowingly perform or induce an abortion on a pregnant woman unless the physician has determined, in accordance with this section, whether the woman's unborn child has a detectable fetal heartbeat.

(c) In making a determination under Subsection (b), the physician must use a test that is:

(1) consistent with the physician's good faith and reasonable understanding of standard medical practice; and

(2) appropriate for the estimated gestational age of the unborn child and the condition of the pregnant woman and her pregnancy.

(d) A physician making a determination under Subsection (b) shall record in the pregnant woman's medical record:

(1) the estimated gestational age of the unborn child;

(2) the method used to estimate the gestational age; and

(3) the test used for detecting a fetal heartbeat, including the date, time, and results of the test.

Sec. 171.204. PROHIBITED ABORTION OF UNBORN CHILD WITH DETECTABLE FETAL HEARTBEAT; EFFECT.

(a) Except as provided by Section 171.205, a physician may not knowingly perform or induce an abortion on a pregnant woman if the physician detected a fetal heartbeat for the unborn child as required by Section 171.203 or failed to perform a test to detect a fetal heartbeat.

(b) A physician does not violate this section if the physician performed a test for a fetal heartbeat as required by Section 171.203 and did not detect a fetal heartbeat.

(c) This section does not affect:

(1) the provisions of this chapter that restrict or regulate an abortion by a particular method or during a particular stage of pregnancy; or

(2) any other provision of state law that regulates or prohibits abortion.

Sec. 171.205. EXCEPTION FOR MEDICAL EMERGENCY; RECORDS.

(a) Sections 171.203 and 171.204 do not apply if a physician believes a medical emergency exists that prevents compliance with this subchapter.

(b) A physician who performs or induces an abortion under circumstances described by Subsection (a) shall make written notations in the pregnant woman's medical record of:

(1) the physician's belief that a medical emergency necessitated the abortion; and

(2) the medical condition of the pregnant woman that prevented compliance with this subchapter.

(c) A physician performing or inducing an abortion under this section shall maintain in the physician's practice records a copy of the notations made under Subsection (b).

Sec. 171.206. CONSTRUCTION OF SUBCHAPTER.

(a) This subchapter does not create or recognize a right to abortion before a fetal heartbeat is detected.

(b) This subchapter may not be construed to:

(1) authorize the initiation of a cause of action against or the prosecution of a woman on whom an abortion is performed or induced or attempted to be performed or induced in violation of this subchapter;

(2) wholly or partly repeal, either expressly or by implication, any other statute that regulates or prohibits abortion, including Chapter 6-1/2, Title 71, Revised Statutes; or

(3) restrict a political subdivision from regulating or prohibiting abortion in a manner that is at least as stringent as the laws of this state.

Sec. 171.207. LIMITATIONS ON PUBLIC ENFORCEMENT.

(a) Notwithstanding Section 171.005 or any other law, the requirements of this subchapter shall be enforced exclusively through the private civil actions described in Section 171.208. No enforcement of this subchapter, and no enforcement of Chapters 19 and 22, Penal Code, in response to violations 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.

(b) Subsection (a) may not be construed to:

(1) legalize the conduct prohibited by this subchapter or by Chapter 6-1/2, Title 71, Revised Statutes;

(2) limit in any way or affect the availability of a remedy established by Section 171.208; or

(3) limit the enforceability of any other laws that regulate or prohibit abortion.

Sec. 171.208. CIVIL LIABILITY FOR VIOLATION OR AIDING OR ABETTING VIOLATION.

(a) Any person, other than an officer or employee of a state or local governmental entity in this state, may bring a civil action against any person who:

(1) performs or induces an abortion in violation of this subchapter;

(2) knowingly engages in conduct that aids or abets the performance or inducement of an abortion, including paying for or reimbursing the costs of an abortion through insurance or otherwise, if the abortion is performed or induced in violation of this subchapter, regardless of whether the person knew or should have known that the abortion would be performed or induced in violation of this subchapter; or

(3) intends to engage in the conduct described by Subdivision (1) or (2).

(b) If a claimant prevails in an action brought under this section, the court shall award:

(1) injunctive relief sufficient to prevent the defendant from violating this subchapter or engaging in acts that aid or abet violations of this subchapter;

(2) statutory damages in an amount of not less than $10,000 for each abortion that the defendant performed or induced in violation of this subchapter, and for each abortion performed or induced in violation of this subchapter that the defendant aided or abetted; and

(3) costs and attorney's fees.

(c) Notwithstanding Subsection (b), a court may not award relief under this section in response to a violation of Subsection (a)(1) or (2) if the defendant demonstrates that the defendant previously paid the full amount of statutory damages under Subsection (b)(2) in a previous action for that particular abortion performed or induced

in violation of this subchapter, or for the particular conduct that aided or abetted an abortion performed or induced in violation of this subchapter.

(d) Notwithstanding Chapter 16, Civil Practice and Remedies Code, or any other law, a person may bring an action under this section not later than the fourth anniversary of the date the cause of action accrues.

(e) Notwithstanding any other law, the following are not a defense to an action brought under this section:

(1) ignorance or mistake of law;

(2) a defendant's belief that the requirements of this subchapter are unconstitutional or were unconstitutional;

(3) a defendant's reliance on any court decision that has been overruled on appeal or by a subsequent court, even if that court decision had not been overruled when the defendant engaged in conduct that violates this subchapter;

(4) a defendant's reliance on any state or federal court decision that is not binding on the court in which the action has been brought;

(5) non-mutual issue preclusion or non-mutual claim preclusion;

(6) the consent of the unborn child's mother to the abortion; or

(7) any claim that the enforcement of this subchapter or the imposition of civil liability against the defendant will violate the constitutional rights of third parties, except as provided by Section 171.209.

(f) It is an affirmative defense if:

(1) a person sued under Subsection (a)(2) reasonably believed, after conducting a reasonable investigation, that the physician performing or inducing the abortion had complied or would comply with this subchapter; or

(2) a person sued under Subsection (a)(3) reasonably believed, after conducting a reasonable investigation, that the physician performing or inducing the abortion will comply with this subchapter.

(f-1) The defendant has the burden of proving an affirmative defense under Subsection (f)(1) or (2) by a preponderance of the evidence.

(g) This section may not be construed to impose liability on any speech or conduct protected by the First Amendment of the United States Constitution, as made applicable to the states through the United States Supreme Court's interpretation of the Fourteenth Amendment of the United States Constitution, or by Section 8, Article I, Texas Constitution.

(h) Notwithstanding any other law, this state, a state official, or a district or county attorney may not intervene in an action brought under this section. This subsection does not prohibit a person described by this subsection from filing an amicus curiae brief in the action.

(i) Notwithstanding any other law, a court may not award costs or attorney's fees under the Texas Rules of Civil Procedure or any other rule adopted by the supreme court under Section 22.004, Government Code, to a defendant in an action brought under this section.

(j) Notwithstanding any other law, a civil action under this section may not be brought by a person who impregnated the abortion patient through an act of rape, sexual assault, incest, or any other act prohibited by Sections 22.011, 22.021, or 25.02, Penal Code.

Sec. 171.209. CIVIL LIABILITY: UNDUE BURDEN DEFENSE LIMITATIONS.

(a) A defendant against whom an action is brought under Section 171.208 does not have standing to assert the rights of women seeking an abortion as a defense to liability under that section unless:

(1) the United States Supreme Court holds that the courts of this state must confer standing on that defendant to assert the third-party rights of women seeking an abortion in state court as a matter of federal constitutional law; or

(2) the defendant has standing to assert the rights of women seeking an abortion under the tests for third-party standing established by the United States Supreme Court.

(b) A defendant in an action brought under Section 171.208 may assert an affirmative defense to liability under this section if:

(1) the defendant has standing to assert the third-party rights of a woman or group of women seeking an abortion in accordance with Subsection (a); and

(2) the defendant demonstrates that the relief sought by the claimant will impose an undue burden on that woman or that group of women seeking an abortion.

(c) A court may not find an undue burden under Subsection (b) unless the defendant introduces evidence proving that:

(1) an award of relief will prevent a woman or a group of women from obtaining an abortion; or

(2) an award of relief will place a substantial obstacle in the path of a woman or a group of women who are seeking an abortion.

(d) A defendant may not establish an undue burden under this section by:

(1) merely demonstrating that an award of relief will prevent women from obtaining support or assistance, financial or otherwise, from others in their effort to obtain an abortion; or

(2) arguing or attempting to demonstrate that an award of relief against other defendants or other potential defendants will impose an undue burden on women seeking an abortion.

(e) The affirmative defense under Subsection (b) is not available if the United States Supreme Court overrules Roe v. Wade, 410 U.S. 113 (1973) or Planned Parenthood v. Casey, 505 U.S. 833 (1992), regardless of whether the conduct on which the cause of action is based under Section 171.208 occurred before the Supreme Court overruled either of those decisions.

(f) Nothing in this section shall in any way limit or preclude a defendant from asserting the defendant's personal constitutional rights as a defense to liability under Section 171.208, and a court may not award relief under Section 171.208 if the conduct for which the defendant has been sued was an exercise of state or federal

constitutional rights that personally belong to the defendant.

Sec. 171.210. CIVIL LIABILITY: VENUE.

(a) Notwithstanding any other law, including Section 15.002, Civil Practice and Remedies Code, a civil action brought under Section 171.208 shall be brought in:

(1) the county in which all or a substantial part of the events or omissions giving rise to the claim occurred;

(2) the county of residence for any one of the natural person defendants at the time the cause of action accrued;

(3) the county of the principal office in this state of any one of the defendants that is not a natural person; or

(4) the county of residence for the claimant if the claimant is a natural person residing in this state.

(b) If a civil action is brought under Section 171.208 in any one of the venues described by Subsection (a), the action may not be transferred to a different venue without the written consent of all parties.

Sec. 171.211. SOVEREIGN, GOVERNMENTAL, AND OFFICIAL IMMUNITY PRESERVED.

(a) This section prevails over any conflicting law, including:

(1) the Uniform Declaratory Judgments Act; and

(2) Chapter 37, Civil Practice and Remedies Code.

(b) This state has sovereign immunity, a political subdivision has governmental immunity, and each officer and employee of this state or a political subdivision has official immunity in any action, claim, or counterclaim or any type of legal or equitable action that challenges the validity of any provision or application of this chapter, on constitutional grounds or otherwise.

(c) A provision of state law may not be construed to waive or abrogate an immunity described by Subsection (b) unless it expressly waives immunity under this section.

Sec. 171.212. SEVERABILITY.

(a) Mindful of Leavitt v. Jane L., 518 U.S. 137 (1996), in which in the context of determining the severability of a state statute regulating abortion the United States Supreme Court held that an explicit statement of legislative intent is controlling, it is the intent of the legislature that 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.

(b) If any application of any provision in this chapter to any person, group of persons, or circumstances is found by a court to be invalid or unconstitutional, the remaining applications of that provision to all other persons and circumstances shall be severed and may not be affected. All constitutionally valid applications of this chapter shall be severed from any applications that a court finds to be invalid, leaving the valid applications in force, because it is the legislature's intent and priority that the valid applications be allowed to stand alone.

Even if a reviewing court finds a provision of this chapter to impose an undue burden in a large or substantial fraction of relevant cases, the applications that do not present an undue burden shall be severed from the remaining applications and shall remain in force, and shall be treated as if the legislature had enacted a statute limited to the persons, group of persons, or circumstances for which the statute's application does not present an undue burden.

(b-1) 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 circumstances 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.

(c) The legislature further declares that it would have enacted this chapter, and each provision, section, subsection, sentence, clause, phrase, or word, and all constitutional applications of this chapter, irrespective of the fact that any provision, section, subsection, sentence, clause, phrase, or word, or applications of this chapter, were to be declared unconstitutional or to represent an undue burden.

(d) If any provision of this chapter is found by any court to be unconstitutionally vague, then the applications of that provision that do not present constitutional

vagueness problems shall be severed and remain in force.

(e) No court may decline to enforce the severability requirements of Subsections (a), (b), (b-1), (c), and (d) on the ground that severance would rewrite the statute or involve the court in legislative or lawmaking activity. A court that declines to enforce or enjoins a state official from enforcing a statutory provision does not rewrite a statute, as the statute continues to contain the same words as before the court's decision. A judicial injunction or declaration of unconstitutionality:

(1) is nothing more than an edict prohibiting enforcement that may subsequently be vacated by a later court if that court has a different understanding of the requirements of the Texas Constitution or United States Constitution;

(2) is not a formal amendment of the language in a statute; and

(3) no more rewrites a statute than a decision by the executive not to enforce a duly enacted statute in a limited and defined set of circumstances.

5. Fed. R. Civ. P. 57 provides:

Declaratory Judgment

These rules govern the procedure for obtaining a declaratory judgment under 28 U.S.C. § 2201. Rules 38 and 39 govern a demand for a jury trial. The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate.

The court may order a speedy hearing of a declaratory-judgment action.

6. Fed. R. Civ. P. 65 provides:

Injunctions and Restraining Orders

(a) PRELIMINARY INJUNCTION.

(1) *Notice.* The court may issue a preliminary injunction only on notice to the adverse party.

(2) *Consolidating the Hearing with the Trial on the Merits.* Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial.

(b) TEMPORARY RESTRAINING ORDER.

(1) *Issuing Without Notice.* The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:

(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

(2) *Contents; Expiration.* Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry—not to exceed 14 days—that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.

(3) *Expediting the Preliminary-Injunction Hearing.* If the order is issued without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order must proceed with the motion; if the party does not, the court must dissolve the order.

(4) *Motion to Dissolve.* On 2 days' notice to the party who obtained the order without notice—or on shorter notice set by the court—the adverse party may appear and move to dissolve or modify the order. The court must then hear and decide the motion as promptly as justice requires.

(c) SECURITY. The court may issue a preliminary injunction or a temporary restraining order only if the

movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.

(d) CONTENTS AND SCOPE OF EVERY INJUNCTION AND RESTRAINING ORDER.

(1) *Contents.* Every order granting an injunction and every restraining order must:

(A) state the reasons why it issued;

(B) state its terms specifically; and

(C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required.

(2) *Persons Bound.* The order binds only the following who receive actual notice of it by personal service or otherwise:

(A) the parties;

(B) the parties' officers, agents, servants, employees, and attorneys; and

(C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

(e) OTHER LAWS NOT MODIFIED. These rules do not modify the following:

(1) any federal statute relating to temporary restraining orders or preliminary injunctions in actions affecting employer and employee;

(2) 28 U.S.C. § 2361, which relates to preliminary injunctions in actions of interpleader or in the nature of interpleader; or

(3) 28 U.S.C. § 2284, which relates to actions that must be heard and decided by a three-judge district court.

(f) COPYRIGHT IMPOUNDMENT. This rule applies to copyright-impoundment proceedings.