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

REPLY BRIEF FOR THE UNITED STATES

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S.B. 8 is an affront to this Court's constitutionally assigned role as the final arbiter of the rights the Constitution secures to the people of this Nation. Rather than forthrightly advocating for its preferred constitutional rule, Texas has nullified a right long recognized by this Court and attempted to prevent judicial review through the mechanisms Congress and this Court have deemed vital to protecting constitutional rights. That attack on the supremacy of federal law is why the United States has authority to bring this suit.

Texas's assertion that this Court is powerless to stop the State's ongoing nullification rests on a series of formalisms. The State says that S.B. 8's unprecedented enforcement actions must be treated like ordinary private tort suits. It declares that it cannot be sued or enjoined because it claims to have no responsibility for the actions of the S.B. 8 plaintiffs it has empowered and incentivized to enforce its unconstitutional law. And it

maintains that this suit must be treated as if the United States were merely asserting the rights of individual citizens.

Texas's various procedural objections do not withstand scrutiny once S.B. 8 is recognized for what it is: a brazen nullification of this Court's precedents accomplished by subverting the judicial review Congress authorized to protect the supremacy of federal law. Texas is responsible for S.B. 8. And it is subject to this suit by the United States and an injunction by the federal courts: Texas cannot evade the strictures of the Constitution or effective injunctive relief merely by deputizing members of the public to carry out the State's enforcement of its plainly unconstitutional law.

Texas objects that the United States has not pointed to a precisely analogous injunction. But the courts of equity have long enjoined the commencement of suits at law. And although injunctive relief that binds clerks or judges is not ordinarily appropriate, courts have recognized that remedy may be proper where, as here, it is necessary to provide complete relief. To be sure, no State has ever attacked the supremacy of federal law through this mechanism before. But the novelty of Texas's unprecedented scheme does not render the federal courts powerless to redress the State's ongoing violation of the Constitution.

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

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

Texas has nullified this Court's precedents within its borders by enacting an unconstitutional law and

thwarting the mechanisms for judicial review that Congress and this Court have recognized are essential to protect federal constitutional rights. The United States may sue in equity to redress that grave affront to its sovereign interests.

1. Texas designed S.B. 8 to nullify this Court's precedents by thwarting judicial review

a. S.B. 8 flouts this Court's precedents. The Court has repeatedly reaffirmed a woman's right "to choose 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). In direct contravention of those precedents, S.B. 8 "prohibit[s]" abortion months before viability. Tex. Health & Safety Code § 171.204(a). And the law has had its intended effect: S.B. 8 has eliminated access to abortions after six weeks of pregnancy throughout the State, nullifying a constitutional right. Pet. App. 86a.

Texas nevertheless briefly asserts (Br. 57-59) that S.B. 8 complies with this Court's precedents by incorporating an "undue burden" affirmative defense. But *Casey*'s "undue burden" standard applies only to *regulations* on pre-viability abortions; it has no application where, as here, a State prohibits those abortions. *Casey*, 505 U.S. at 846; see *Jackson Women's Health Org.* v. *Dobbs*, 951 F.3d 246, 248 (5th Cir. 2020) (per curiam).

In any event, S.B. 8's "undue burden" defense is a distorted shadow of *Casey*'s standard. Most obviously, it requires a provider to show that the relief sought in the specific S.B. 8 suit would itself "impose an undue burden." Tex. Health & Safety Code § 171.209(b)(2). This Court's precedents examine the cumulative consequences of the challenged law, not the impact of a single enforcement proceeding. See *Whole Woman's Health*

v. *Hellerstedt*, 136 S. Ct. 2292, 2310-2318 (2016). But S.B. 8 expressly prohibits consideration of those broader effects. Tex. Health & Safety Code § 171.209(d)(2); see *id.* § 171.209(b). And two months of experience demonstrate that S.B. 8's purported "undue burden" defense has not stopped the law from eliminating access to abortions protected by this Court's precedents.

b. S.B. 8 has achieved that systematic denial of constitutional rights because Texas designed the law to thwart judicial review. If Texas had made S.B. 8's prohibition enforceable by the state officials who enforce its other abortion regulations, the law would have been immediately enjoined in pre-enforcement suits under 42 U.S.C. 1983 and *Ex parte Young*, 209 U.S. 123 (1908). Texas does not dispute that it delegated enforcement authority to the public in a deliberate effort to evade those suits, and its attempts to minimize the dangerous consequences of that evasion lack merit.

Texas observes (Br. 55) that "[t]he Constitution does not * * * guarantee pre-enforcement review." But that misses the point. Section 1983 embodies *Congress's* determination that individuals threatened with state enforcement of an unconstitutional law should have "immediate access to the federal courts." *Patsy* v. *Board of Regents*, 457 U.S. 496, 504 (1982). And this Court likewise made clear in *Ex parte Young* that it would be intolerable to force individuals to risk crushing penalties in onerous state-court enforcement proceedings to vindicate their federal rights. 209 U.S. at 165.

Texas notes that pre-enforcement review may not be available if an individual has a constitutional defense to a defamation claim or a similar "private cause of action." Texas Br. 56; see Intervenors Br. 39-40. But S.B. 8 is nothing like those traditional private causes of action,

which extend only to the parties injured by the conduct and thereby limit both the universe of potential plaintiffs and the defendants' potential liability. S.B. 8, in contrast, seeks to enlist the public at large in enforcing the State's prohibitory statute. S.B. 8 plaintiffs sue not to redress any private injury, but to obtain $10,000 bounties offered by the State. And while a limitless number of plaintiffs can sue for any given abortion, the bounty goes only to the first one to recover, Tex. Health & Safety Code § 171.208(c)—making clear that it serves not to compensate any private wrong or personal harm, but to encourage suits to enforce the State's prohibition.

b. Texas asserts that S.B. 8 suits themselves provide an adequate means for protecting federal constitutional rights. But the theoretical availability of constitutional defenses in S.B. 8 suits is no substitute for the pre-enforcement review deemed vital in Section 1983 and *Ex parte Young*. And at every turn, S.B. 8 was designed to thwart effective post-enforcement review as well.

First, S.B. 8 suits provide no way for the pregnant women whose rights the law directly violates to assert those rights in court, because they cannot be sued. Texas hypothesizes (Br. 39 n.11) that a woman could intervene in an S.B. 8 suit against a provider. But S.B. 8 was designed to chill providers from offering constitutionally protected care by threatening a limitless number of enforcement suits and crippling litigation expenses and financial penalties, including retroactive liability. U.S. Br. 4-5. S.B. 8 thus systematically violates women's rights by deterring the provision of covered abortions altogether. A woman's theoretical ability to intervene in an S.B. 8 suit if an abortion occurred and a suit were filed is no answer to that problem.

Second, S.B. 8's *in terrorem* effects mean that even those individuals who may be sued under the law are deterred from risking liability to assert their constitutional defenses. S.B. 8 has thus virtually eliminated access to covered abortions, which is why only three suits have been brought. See Pet. Br. 16-17, *Whole Woman's Health* v. *Jackson* (No. 21-463). And as the petitioners in *Whole Woman's Health* explain, it is highly unlikely that any of those cases would end the threat of S.B. 8 suits and their near-total deterrent effect. Judgments for the provider-defendant would bind only the three plaintiffs—and nothing requires those plaintiffs to seek further review. At a minimum, those suits—in which the defendant apparently has not even been served, *id.* at 16—could take months if not years to wind their way through the state court system, while Texans will be denied their constitutional rights, as recognized by this Court, throughout.

Third, S.B. 8 enforcement suits subject defendants to skewed procedural rules governing venue, fee-shifting, and preclusion, as well as substantive provisions that purport to constrain any constitutional defense based on this Court's precedents. U.S. Br. 21-22. Ordinarily, state courts are presumed to provide a fair forum for the adjudication of federal rights. Cf. Intervenors Br. 16. But S.B. 8 rebuts that presumption with its manifest hostility to federal rights.

2. The United States may sue in equity to vindicate its sovereign interest in preventing Texas from nullifying this Court's precedents by thwarting judicial review

Texas does not appear to dispute the principle, reflected in *In re Debs*, 158 U.S. 564 (1895), that the United States may sue in equity to protect its sovereign

interests. Instead, Texas asserts (Br. 36-39, 47-52) that the interest the United States invokes here is insufficient to confer authority to sue under *Debs*. Those arguments lack merit.

a. Texas's position rests on an unduly cramped reading of *Debs*. Texas suggests (Br. 36) that *Debs* depended on the fact that the government had a "property interest in the matter." But *Debs* expressly rejected that proposition, emphasizing that when the United States sues to redress harms that "by the Constitution are entrusted to the care of the Nation," "the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts." 158 U.S. at 586.

That language was not "dicta" (Texas Br. 36); it was an essential component of the reasoning of the Court, which declined to "place [its] decision" on a property interest "alone." *Debs*, 158 U.S. at 584. Nor is Texas correct (Br. 37) that the only sovereign interests covered by the *Debs* line of precedents are those recognized by statute. As Texas elsewhere acknowledges, *Debs* expressly compared that case to others that "rested on a traditional cause of action at common law or in equity." Br. 49; see *Debs*, 158 U.S. at 584-586 (citing *United States* v. *American Bell Tel. Co.*, 128 U.S. 315, 360-361 (1888); *United States* v. *San Jacinto Tin Co.*, 125 U.S. 273 (1888)).

For similar reasons, Texas errs in asserting (Br. 51) that the *Debs* line of cases demonstrates only that the United States "can (1) sue in equity to abate a public nuisance and (2) assert the same causes of action available to private individuals." *Debs*' reasoning was not so limited. *Debs*, 158 U.S. at 586. And subsequent decisions have recognized the United States' right to sue to

protect other sovereign interests. See, *e.g.*, *Sanitary District of Chicago* v. *United States*, 266 U.S. 405, 425 (1925) (authority to sue "to carry out treaty obligations"). Texas's position further ignores cases in which the United States has sued in equity to challenge as preempted state laws that interfere with the government's "broad, undoubted power" over immigration. *Arizona* v. *United States*, 567 U.S. 387, 394 (2012); see U.S. Br. 15-16. Texas does not explain how those cases could have proceeded on its narrow theory.

Finally, Texas errs in asserting (Br. 47-52) that the portion of *Debs* on which the United States relies was limited to standing, and that the United States requires a separate cause of action beyond the authority to sue that *Debs* recognized. This Court held that the national government has the "right to apply to its own courts" to vindicate its sovereign interests. *Debs*, 158 U.S. at 584, 586. That discussion cannot be read to speak to standing alone; instead, it—like the entire *Debs* line—addresses the United States' authority to sue in equity.

b. Properly framed, then, the question is whether the interest asserted here constitutes a sovereign interest of the type that has authorized the United States to sue in cases ranging from *Debs* to *Arizona*. The answer is yes: The United States may bring this suit to protect the supremacy of federal law by preventing a State from defying this Court's precedents and attempting to insulate an unconstitutional law from judicial review.

More than two centuries ago, Chief Justice Marshall explained that "the American union" rests on "a constitution the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several states, which none claim a right to pass." *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 136 (1810). All States

acquiesced in that bedrock principle in joining the Union. The federal government has a direct and compelling interest in defending it. And it would be surprising if the United States could sue in equity when, for example, a preempted state law interferes with its authority over immigration, see, *e.g.*, *Arizona*, *supra*, but not when a State deliberately seeks to nullify a federal right by thwarting judicial review.

Indeed, the interest the United States asserts here parallels the one at issue in *Debs* itself. There, the Court emphasized that the Constitution assigns to the federal government "power over interstate commerce" and that Congress had legislated to assume jurisdiction over rail commerce. 158 U.S. at 581. Under those circumstances, the Court held that even absent express congressional authorization, the United States could sue in equity to prevent an unlawful interference with the national government's authority. So too here. The Constitution vests Congress with authority to enforce the Fourteenth Amendment, see U.S. Const. Amend. XIV, § 5, and Congress has enacted Section 1983 to help effectuate that constitutional guarantee. The United States may sue in equity to prevent Texas from subverting the supremacy of the Fourteenth Amendment by obstructing the mechanisms for judicial review provided by Congress.

c. For much the same reason, Texas errs in asserting (Br. 51-53) that Congress has displaced the United States' equitable authority to sue by enacting Section 1983 and other statutory mechanisms for protecting federal constitutional rights. That objection might carry force if the United States asserted "authority to initiate an action whenever a civil rights violation is alleged." Texas Br. 53 (citation omitted). But it cuts in

exactly the opposite direction where, as here, the United States sues to prevent a State from thwarting the very mechanisms of judicial review adopted by Congress. U.S. Br. 22-24.

d. Finally, Texas attempts to cast doubt (Br. 36) on the substantiality of the United States' sovereign interest by noting that it did not immediately bring suit when S.B. 8 was enacted. But the United States sued as soon as S.B. 8 took effect and it became apparent that the law's unprecedented enforcement scheme had obstructed other means of judicial review and produced Texas's intended effect of suspending a constitutional right within the State's borders.

3. Texas's remaining objections lack merit

a. Texas again invokes *Muskrat* v. *United States*, 219 U.S. 346 (1911), to assert that there is no justiciable controversy. But the lower-court decision on which Texas principally relies further illustrates why *Muskrat* is inapposite here. That decision interpreted *Muskrat* to hold that "Article III does not permit the federal judiciary to determine the constitutionality of a statute providing for private litigation, when the federal government (or its agents) are the only adverse parties to the suit." *Hope Clinic* v. *Ryan*, 249 F.3d 603, 605 (7th Cir. 2001) (per curiam). The court reasoned that in such circumstances, the plaintiffs "lack standing" because the defendant "cannot cause the plaintiffs' injury by enforcing the private-action statutes" and because "any potential dispute plaintiffs may have with future private plaintiffs could not be redressed by an injunction running only against public prosecutors." *Ibid.*

Unlike the statute in *Hope Clinic*, S.B. 8 does not "provid[e] for private litigation" by parties seeking to redress private injuries, 249 F.3d at 605; instead, it

deputizes members of the public to enforce the State's broad prohibition on the State's behalf. Texas has undeniably caused the United States' injury by empowering and incentivizing S.B. 8 plaintiffs to sue. And an injunction against Texas would redress that injury—including by binding the S.B. 8 plaintiffs who exercise the State's delegated enforcement authority.

b. Texas again invokes (Br. 43) *Grupo Mexicano de Desarrollo S. A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999). But Texas does not deny that the remedy the United States seeks here—an injunction preventing enforcement of an unconstitutional statute—falls squarely within the history and tradition of courts of equity. U.S. Br. 26-27. Instead, Texas objects that some features of the injunction required to prevent enforcement of S.B. 8 are unusual. But that simply reflects S.B. 8's "unprecedented" nature, *Whole Woman's Health* v. *Jackson*, 141 S. Ct 2494, 2496 (2021) (Roberts, C.J., dissenting), and the lengths to which Texas has gone to insulate its unconstitutional scheme from judicial review. *Debs* itself rejected a similar argument for similar reasons: "It is said that seldom have the courts assumed jurisdiction to restrain by injunction in suits brought by the government, either state or national, obstructions to highways, either artificial or natural. This is undoubtedly true, but the reason is that the necessity for such interference has only been occasional." 158 U.S. at 591.

In any event, Texas greatly overstates the novelty of the relief the United States seeks. Texas concedes (Br. 43-45) that courts in equity have long enjoined parties charged with enforcing invalid statutes—including by prohibiting them from initiating actions at law. Texas protests that the State itself does not bring S.B. 8 suits.

But the State has deputized members of the public to exercise its enforcement authority and can properly be held responsible for the resulting constitutional violation. No principle of equity compels the federal courts to overlook the substance of what is occurring based on that form: Texas cannot shield itself from responsibility for its unconstitutional scheme and accomplish through deputized members of the public what it would not be allowed to do directly.

Texas and the intervenors also appear to contend that the United States cannot sue a State in equity to protect the supremacy of federal law because the English Court of Chancery could not have heard such a suit in 1789. Texas Br. 43; Intervenors Br. 10, 35. But no pre-1789 case could have involved the national government (which had just been created) suing a State to prevent nullification of the Constitution (which had just been ratified). Texas fails to explain why equitable suits by the United States against a State are less proper than suits against individual state officers—a device necessary for individuals to challenge unlawful state action only given the State's own sovereign immunity. And it would be bizarre to conclude that the equitable relief available to the United States in its own courts is more restricted than that available to private individuals.

To the contrary, this Court has recognized that, upon ratification of the Constitution, "[s]ome things, undoubtedly, were made justiciable which were not known as such at the common law," including "controversies between States as to boundary lines, and other questions admitting of judicial solution." *Hans* v. *Louisiana*, 134 U.S. 1, 15 (1890). "The establishment of this new branch of jurisdiction" was "necessary," the Court

explained, given "the extinguishment of diplomatic relations between the States." *Ibid.* It is equally inherent in the constitutional design that the United States can obtain equitable relief in federal court against a State that defies the constitutional structure and seeks to thwart the mechanisms for securing federal judicial review adopted by Congress and this Court. Otherwise, "'the enforcement of all [the United States'] rights, powers, contracts, and privileges in [its] sovereign capacity would be at the mercy of the States.'" *United States* v. *Texas*, 143 U.S. 621, 641 (1892) (quoting Joseph Story, *Commentaries on the Constitution of the United States* § 1674 (1833)). Texas's contrary argument—which conflicts with an established tradition of the United States suing States in equity, see U.S. Br. 27 n.6 (collecting recent examples)—lacks merit.

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

The United States also may sue in equity to vindicate its preemption and intergovernmental immunity claims. The State's and intervenors' contrary arguments do not withstand scrutiny.

1. As the district court found after a hearing and after "[c]rediting the declarations of the administrators" of several agencies, federal agencies are obligated to provide "abortion-related services to persons in the[ir] care or custody." Pet. App. 25a, 27a; see U.S. Br. 29-30. Because S.B. 8 has virtually eliminated access to 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. And even if they could, S.B. 8 would threaten them with liability.

Contrary to Texas's argument, it is not speculative that a federal agency will be required to arrange for or

otherwise facilitate an abortion that S.B. 8 forbids. For example, it is undisputed that minors in the custody of the Office of Refugee Resettlement have recently "requested abortions that would violate S.B. 8," ROA 551; an agency declarant estimated that 15-20 such abortions were requested in the last fiscal year, ROA 2283.

Texas suggests (at 40-41) that there is no "substantial risk" that a state court will actually subject a federal actor to "liability under SB 8." But whether or not S.B. 8 ultimately leads to the imposition of damages, its *in terrorem* effect poses both present and imminent harms to federal agencies, contractors, and employees. S.B. 8 is currently interfering with the activities of federal agencies: For example, ORR has already adopted special procedures because of S.B. 8. U.S. Br. 30.

2. Intervenors (Br. 40-42), but not Texas, contend that the United States lacks authority to bring its preemption and intergovernmental immunity claims. Intervenors err in suggesting (Br. 41-42) that the United States' cause of action must be "implied" either by the Supremacy Clause itself, contra *Armstrong* v. *Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326-327 (2015), or by a specific federal statute. This is the type of suit *Armstrong* recognized as well established: a suit in equity "to enjoin unconstitutional actions by state * * * officers," rooted in "a long history of judicial review of illegal executive action, tracing back to England." *Id.* at 327. And the United States has often invoked that authority to bring preemption and intergovernmental immunity claims like these. See U.S. Br. 27 & n.6.

3. Texas erroneously contends (Br. 61-62) that S.B. 8 is not preempted because it does not conflict with any federal law or policy. Texas observes (at 61) that

several policies "provide that federal employees must follow state law when arranging for abortion-related services." But such policies—providing, for example, that the Bureau of Prisons' staff "shall be guided by [] applicable Federal and state laws and regulations," ROA 523—do not mitigate the conflict, because a plainly unconstitutional enactment like S.B. 8 is not "applicable" state law. See *Gartrell Constr. Inc.* v. *Aubry*, 940 F.2d 437, 440 (9th Cir. 1991).

Nor is Texas correct (Br. 61) that the same authorities do not "*require*[] the United States to facilitate post-heartbeat abortions in Texas." For example, the Bureau of Prisons "shall arrange for an abortion to take place" once a pregnant inmate chooses to have one. 28 C.F.R. 551.23(c). To the extent Texas means that such abortions need not be provided "in Texas" (Br. 61), Texas's unconstitutional elimination of post-six-week abortions nonetheless stands as an obstacle to the accomplishment of federal obligations.

4. Texas's arguments (at 62-63) that S.B. 8 does not violate intergovernmental immunity also lack merit. A state law violates intergovernmental immunity when it "regulates the United States directly." *North Dakota* v. *United States*, 495 U.S. 423, 435 (1990) (plurality op.). That is the case here: S.B. 8 purports to prohibit federal employees and contractors from complying with their obligations to facilitate abortions by threatening liability for aiding and abetting the performance of such abortions.

Texas mistakenly suggests that S.B. 8 does not directly regulate federal agencies, employees, and contractors because it is a "'[g]enerally applicable' law" that merely "result[s] in 'an increased economic burden on federal contractors as well as others.'" Br. 62

(citation omitted). But contrary to Texas's suggestion (Br. 63), S.B. 8 does not merely impose incidental economic burdens on the federal government by regulating abortion providers who would supply the requested procedures. Rather, it purports to regulate the actions federal employees and contractors themselves must take through the specter of aiding-and-abetting liability.

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

Texas is clearly responsible for its unconstitutional statute, and Texas is therefore a proper defendant in this case and the proper subject of judicial relief. Texas does not dispute (Br. 27-28 n.9) that if the United States has authority to sue, it may obtain declaratory relief. As explained in the United States' opening brief, such a remedy would partially redress the United States' injuries—though it is no substitute for preliminary or permanent injunctive relief. See U.S. Br. 42-46.

As to such injunctive relief, Texas protests that "an injunction 'operat[es] *in personam*.'" Br. 28 (quoting *Nken* v. *Holder*, 556 U.S. 418, 428 (2009) (brackets in original)). But Texas does not deny that States can be, and have been, subject to *in personam* injunctions. U.S. Br. 23, 31-32 & n.7; see, *e.g.*, *Mississippi* v. *United States*, 498 U.S. 16, 16-17 (1990); *Louisiana* v. *Mississippi*, 202 U.S. 58, 58-59 (1906). The question thus is not whether the United States could have secured an injunction against any particular state official; it is whether an injunction against *Texas* can be framed to provide appropriate relief. That is a question governed by the principles of equity reflected in Federal Rule of Civil Procedure 65. And those principles allow an injunction that grants effective relief by binding the plaintiffs who file S.B. 8 suits, the clerks and judges who

docket and administer them, and the officials who enforce the resulting judgments.

A. An Injunction Against Texas Properly Binds Private Parties Who File S.B. 8 Suits With Notice Of The Injunction

An injunction properly reaches plaintiffs who bring suit under S.B. 8 with notice of the injunction. Those individuals at a minimum act "in active concert or participation" with the State, Fed. R. Civ. P. 65(d)(2)(C), when they exercise the State's delegated authority to enforce its public policy in exchange for a bounty. U.S. Br. 33-37.

Texas asserts that private parties who choose to exercise the State's delegated enforcement authority are not the State's "agents." Br. 67 (citing *Hollingsworth* v. *Perry*, 570 U.S. 693, 713 (2013)). But even if that is true, Rule 65(d)(2)(C)'s "active concert or participation" language reaches additional parties who do not fit within Rule 65(d)(2)(B)'s coverage of the State's "officers, agents, servants, employees, and attorneys." Rule 65's provisions thus work together to ensure that "defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors." *Regal Knitwear Co.* v. *NLRB*, 324 U.S. 9, 14 (1945).

That aptly describes the situation here: Texas could plainly be enjoined from enforcing S.B. 8's unconstitutional prohibition through its officers and employees, and it should not be permitted to evade that prohibition by empowering and encouraging members of the public to do for it what it could not do directly. If, for example, a company were enjoined from bringing harassing lawsuits against a competitor, Rule 65(d)(2)(C) would plainly prohibit it from offering members of the public $10,000 bounties to file those suits in its stead. And that

would be true whether or not the company controlled the plaintiffs' conduct of the suits. The same logic applies here—especially because Texas adopted S.B. 8's unprecedented structure with the very goal of evading effective injunctive relief.

Nor is Texas correct in analogizing this case to those in which courts have found no state action in the filing of a "private civil tort action in state court." Br. 67 (citation omitted). S.B. 8 bears no resemblance to such private rights of action because S.B. 8 plaintiffs need have no connection to, or allege any injury from, the abortion at issue. Instead, S.B. 8 plaintiffs pick up the State's mantle to enforce its public policy in exchange for a bounty.

Texas objects (Br. 68) that whether a particular individual is in active concert under Rule 65(d)(2)(C) must be determined after notice and an opportunity to be heard. To be sure, that describes the procedural requirements before a nonparty can "be held in contempt" for violating an injunction that binds it under Rule 65(d)(2). *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 112 (1969). But the necessary premise of those contempt proceedings is that if the nonparty is found to have had notice and to have acted in active concert, then it was bound by the injunction and may be held accountable for contempt. As the Seventh Circuit put it, this Court's decision in *Hazeltine* "clearly anticipated that a nonparty may properly be held in contempt for violating an injunction if the court acquires jurisdiction over the nonparty and gives the nonparty an opportunity to contest whether he is bound by the injunction and is in fact in contempt." *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, 853 (2010).

Those procedural protections further underscore the focused nature of the district court's remedy. The court did not purport to "enjoin the world at large." Texas Br. 68 (citation omitted); see Br. 69 (similar). Rather, the court correctly recognized that an injunction against Texas would bind plaintiffs who actually file S.B. 8 suits with notice of the injunction. Pet. App. 110a.

B. 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. In this unique context—where the State has attempted to obstruct the typical remedy of enjoining an executive officer charged with enforcing the law, and the threat of litigation itself creates the injury, regardless of whether the defendant ultimately prevails—enjoining court clerks and judges "is arguably necessary * * * to ensure full relief to the parties." *In re Justices of the Supreme Court of Puerto Rico*, 695 F.2d 17, 23 (1st Cir. 1982) (Breyer, J.).

For similar reasons, Texas errs in relying (Br. 65) on this Court's statement in *Ex parte Young* that "an injunction against a state court" would be a "violation of the whole scheme of our Government." 209 U.S. at 163. That statement speaks to the impropriety of enjoining a state court if it is possible instead to "enjoin an individual * * * state official from commencing suits" in violation of the Constitution. *Ibid.* But Texas sought to avoid that usual method of relief by instead deputizing all members of the public to file suit—making it

impossible to identify those who will exercise the State's enforcement authority in advance. Having adopted an unprecedented enforcement scheme designed to obstruct the traditional remedies that would ordinarily suffice to prevent constitutional violations from occurring, Texas cannot complain that the district court's order reaches beyond typical enforcement officials.

Ordinarily, an injunction preventing clerks and judges from filing or accepting a suit is not necessary or appropriate for the additional reason that the mere filing of a suit does not inflict a cognizable injury. But again, S.B. 8 is different. The law achieves its unconstitutional result—extinguishing access to pre-viability abortions after six weeks of pregnancy—in part by threatening a limitless number of burdensome suits in diverse fora for every abortion performed. U.S. Br. 39. And even though state judges would be bound to dismiss every one of those suits as barred by this Court's precedents, S.B. 8's one-way fee-shifting provision and bar on applying preclusion principles in the defendant's favor expose providers to endless unrecoverable litigation expenses. By design, S.B. 8 ensures that the mere threat of enforcement suits—no matter their outcome—will achieve the law's unconstitutional goal of eliminating access to post-six-week abortions.

In these circumstances, the district court appropriately enjoined state court clerks from docketing, and state judges from administering, S.B. 8 suits. Nor is an injunction reaching clerks and judges improper because those individuals' acts do not independently violate federal law. See Intervenors Br. 30-31. It is well established that to "ensure * * * that relief is effectual, otherwise permissible practices connected with the acts found to be illegal must sometimes be enjoined." *United States*

v. *Loew's, Inc.*, 371 U.S. 38, 53 (1962) (collecting authority), abrogated on other grounds by *Illinois Tool Works Inc.* v. *Independent Ink, Inc.*, 547 U.S. 28 (2006). Here, to redress the harm produced by the threat that S.B. 8 suits could be filed, the injunction appropriately enjoins acts by Texas's court personnel that would otherwise contribute to the constitutional violation.

C. An Injunction Against Texas Properly Binds State Officials Who Enforce S.B. 8 Judgments

An injunction may also properly reach the executive officials who would enforce S.B. 8 judgments—and who thus, at a minimum, act in active concert with the State. Texas's lead objection (Br. 29) that this aspect of the injunction might not provide full relief only underscores that the rest of the injunction was appropriate too. And Texas's observation (*ibid.*) that few judgments may ultimately issue once again ignores the mechanism by which S.B. 8 operates. Texas's scheme is so lopsided and draconian that the mere threat of suits has successfully deterred virtually all covered abortions to date. An injunction prohibiting executive officials from enforcing judgments entered in any S.B. 8 suits would address part of that threat.

D. The District Court Was Not Required To Rewrite Texas's Unconstitutional Statute

Finally, the State (Br. 69-71) and intervenors (Br. 43-48) contend that the district court erred in failing to sever certain provisions and applications of S.B. 8. But as this Court explained with respect to a similar severability clause, federal courts need not "proceed application by conceivable application when confronted with a facially unconstitutional statutory provision"—a requirement that "would, to some extent, substitute the

judicial for the legislative department of the government." *Hellerstedt*, 136 S. Ct. at 2319. The intervenors all but concede that they would require just that type of legislative work when they ask this Court (Br. 48) to "limit *Hellerstedt* to its facts."

In addition, the State and intervenors provide no support for their argument that a district court must engage in a laborious application-by-application parsing of an unconstitutional statute—particularly one as unprecedented as S.B. 8—before entering even preliminary injunctive relief. And that is especially true because the post-viability abortions on which Texas principally focuses are already prohibited by Texas law. Tex. Health & Safety Code § 171.044; see *id.* § 171.046 (providing limited exceptions).

* * * * *

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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