No. 21-588

# In the Supreme Court of the United States

UNITED STATES, PETITIONER

*v.*

TEXAS, ET AL.,

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

## REPLY BRIEF FOR INTERVENOR-RESPONDENTS


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In another case featuring tight briefing deadlines, this Court famously declined the United States' truly urgent request to enjoin publication of the Pentagon Papers. *See New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam). There, as here, the Attorney General could point to no Act of Congress that authorized him to bring his suit in equity—a fact that was not lost on the Justices. *See, e.g.*, *id.* at 718 (Black, J., concurring); *id.* at 720–22 (Douglas, J., concurring); *id.* at 730 (Stewart, J., concurring); *id.* at 740 (White, J., concurring).

Justice Harlan complained that more time should have been taken to consider, among other questions, "[w]hether the Attorney General is authorized to bring

these suits in the name of the United States." *Id.* at 753–54 (Harlan, J., dissenting) (citing *In re Debs*, 158 U.S. 564 (1895), and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)). But Justice Marshall had already answered that separation-of-powers question for himself: "It is not for this Court to fling itself into every breach perceived by some Government official nor is it for this Court to take on itself the burden of enacting law, especially a law that Congress has refused to pass." *Id.* at 747 (Marshall, J., concurring). A half-century later, the Court should heed his words in this case.

## I. THE UNITED STATES LACKS AUTHORITY TO BRING THIS SUIT IN EQUITY AGAINST TEXAS

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

The United States does not even try to dispute that "federal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves." *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494 (2021) (citing *California v. Texas*, 141 S. Ct. 2104, 2115–16 (2021)). And its justiciability troubles cannot be solved by naming the State of Texas as the defendant. Under *Muskrat v. United States*, 219 U.S. 346 (1911), a sovereign government cannot properly be sued over a law that regulates relationships between private parties without any enforcement on the government's part. *See also Hope Clinic v. Ryan*, 249 F.3d 603, 605 (7th Cir. 2001) (en banc) (per curiam).

Grasping for a distinction, the United States argues that the law in *Muskrat* "merely allocate[d] private rights," U.S. Br. 25, whereas SB 8 supposedly creates an

enforcement interest and "delegate[s]" it from Texas to private parties, U.S. Br. 13. The statute does no such thing. SB 8 plaintiffs are not agents under the State's control. *See Hollingsworth v. Perry*, 570 U.S. 693, 710, 713 (2013). Nor are they *qui tam* relators who have been assigned the State's own pecuniary interest. *Cf.* Tex. Hum. Res. Code § 36.101(a) ("A person may bring a civil action for [Medicaid fraud] in the name of the person and of the state.").

SB 8 plaintiffs exercise private rights, not public powers. Specifically, SB 8 confers on each person an interest in a private tort action that presumes emotional distress over the killing of an unborn child. *See* Tex. Health & Safety Code § 171.207(a) (referring to these "*private* civil actions" (emphasis added)). This innovation by the Texas Legislature simply exercises "the freedom of the States to fashion their own laws of torts in their own way." *Monroe v. Pape*, 365 U.S. 167, 245 (1961) (Frankfurter, J., dissenting); *see also DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 203 (1989) ("The people of Wisconsin may . . . chang[e] the tort law of the State in accordance with the regular lawmaking process.").

It is no answer to say that SB 8 reflects "Texas's preferred public policy." U.S. Br. 25. Of course it does — was the Acting Solicitor General expecting to get Delaware's public policy out of the Texas Legislature? Any piece of legislation that survives bicameralism and presentment should reflect public policy of some sort, even if it deals purely in private rights. *See, e.g.*, *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 263 (1975) (noting

instances where "Congress has opted to rely heavily on private enforcement to implement public policy"); *King Street Patriots v. Tex. Democratic Party*, 521 S.W.3d 729, 732 (Tex. 2017) (noting "the Legislature's public policy choice to authorize a private right of action"). Smuggling in the word *public* like this does not fix the United States' *Muskrat* problem.

### B. The United States Has No Cause Of Action To Sue Texas Over SB 8

Unlike in *Arizona v. United States*, 567 U.S. 387 (2012), Texas did not neglect to demand that the United States show some cause of action. *See* U.S. Br. 15–16 (conceding lack of a holding on this point in *Arizona*). And without a cause of action, the United States cannot invoke federal judicial authority to pursue the extravagant remedies it desires. *Cf.* Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process 137 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) ("A right of action is a species of power — of remedial power.").

Instead of looking to Congress for a cause of action, however, the United States is hoping this Court will just make one up as a matter of equity. *But see Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001). Why bother with section 5 of the Fourteenth Amendment, when there might be one last drink left inside of *In re Debs*, 158 U.S. 564 (1895)?

The United States urges the Court to do Congress's job on the strength of *Debs*, which it describes as "canonical." U.S. Br. 14. But that opinion has been more aptly called "perplexing," "unclear," "difficult to fathom," and "remarkably lacking in specificity." *United States v. Sol-*

*omon*, 563 F.2d 1121, 1127 (4th Cir. 1977); Henry P. Monaghan, *The Protective Power of the Presidency*, 93 Colum. L. Rev. 1, 61 (1993); Note, *Nonstatutory Executive Authority to Bring Suit*, 85 Harv. L. Rev. 1566, 1569 & n.23 (1972). Hence the United States' vague assertion that "*Debs* endorsed and embodied the 'general rule that the United States may sue to protect its interests.'" U.S. Br. 15 (quoting *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 201 (1967)).[1]

In proffering the interest that allows for a suit in equity, the United States disclaims, as it must, a broad "authority to sue merely because a State has violated its citizens' constitutional rights." U.S. Br. 10. But its attempt at a limiting principle is a head-scratcher: The United States can sue, we're told, over "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

1. The *Wyandotte* Court did not actually cite *Debs* for the quoted proposition, opting instead for cases that betray *Debs*'s outlier status. 389 U.S. at 196 n.5, 201 (giving *Debs* a pair of "*cf.*" cites); *see, e.g.*, *Cotton v. United States*, 52 U.S. (11 How.) 229 (1851) (allowing suit in equity against loggers trespassing on federal land); *United States v. San Jacinto Tin Co.*, 125 U.S. 273 (1888) (allowing suit in equity to annul fraudulent federal-land patent); Henry M. Hart, Jr. & Herbert Wechsler, The Federal Courts and The Federal System 1114–20 (1953) (recounting the early line of cases).

and *Ex parte Young*." U.S. Br. 10; *see also id.* at 16. For several reasons, that cannot be right.[2]

First, words like *nullification* and *thwart* falsely suggest that an SB 8 defendant will never get into a federal court. *E.g.*, U.S. Br. III, 2–3, 10, 12–14, 16–20, 22, 24, 30, 33, 36, 39, 41–42, 45–46; *see also id.* at 12 (fretting that "no decision of this Court is safe"). Of course, Texas courts' "[f]inal judgments or decrees" will be subject to certiorari review in this Court, 28 U.S.C. § 1257(a), so the United States' scare tactics are over a century out of date. *See* Richard H. Fallon, Jr. et al., Hart and Wechsler's The Federal Courts and The Federal System 474 (7th ed. 2015) (recounting other States' resistance to Section 25 of the Judiciary Act of 1789). In the meantime, Texas's judges swear the same "Oath . . . to support this Constitution" as federal judges, and are bound by "the supreme Law of the Land." U.S. Const. art. VI. If SB 8 is "plainly" unconstitutional under this Court's precedent, U.S. Br. 17, then it is "particular[ly] insult[ing] to the state courts to suggest that they will be unable to detect patent unconstitutionality in state statutes." Fallon, *supra*, at 1142.

Second, any perceived gaps in Section 1983 are for Congress to fill, not the Court. Congress has enacted a broad array of procedural mechanisms to protect constitutional rights in the federal courts, some of which empower the Attorney General. *See, e.g.*, 42 U.S.C. §§ 1983,

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2. And even if it were, the necessary implication would be that the United States cannot win unless the petitioners lose in *Whole Woman's Health v. Jackson*, No. 21-463 (U.S.).

2000b(a), 2000c-6(a); 18 U.S.C. §§ 241, 242. If he needs an even broader array due to SB 8, then he should write to Congress in accordance with Section 5 of the Fourteenth Amendment. By resting instead on *Debs*, the Attorney General suggests that Congress wasted its time by authorizing him to sue in the Civil Rights Acts of 1957, 1964, and 1965:

> Does the principle of *Debs* render such statutory authority unnecessary in suits for injunction or other specific relief whenever the President or the Attorney General considers that there is an important public interest in the deprivation alleged?

Paul M. Bator et al., *Hart and Wechsler's The Federal Courts and The Federal System* 1307 (2d ed. 1973); *cf.* William F. Young, Jr., *Book Review*, 32 Tex. L. Rev. 483, 484 (1954) (reviewing first edition of Hart & Wechsler) ("It is clear, is it not, that some of these question marks are gratuitous?").

Third, the United States fails to distinguish a number of opinions that persuasively refused its statute-free requests for injunctions to protect individuals from constitutional violations. *See United States v. City of Philadelphia*, 644 F.2d 187 (3d Cir. 1980) (refusing to enjoin unconstitutional police practices); *United States v. Mattson*, 600 F.2d 1295 (9th Cir. 1979) (refusing to enjoin unconstitutional institutionalization practices); *United States v. Solomon*, 563 F.2d 1121, 1127 (4th Cir. 1977) (same); *see also Estelle v. Justice*, 426 U.S. 925, 929 (1976) (Rehnquist, J., dissenting from denial of certiorari) ("If *Debs*, which held that a federal court had authori-

ty to issue an injunction against an armed conspiracy that threatened the interstate transportation of the mails, is to be extended to the [inmate litigation] situation presented by this case, I think the decision to do so should be made by this Court."). As those opinions suggest, inviting a separation-of-powers violation as the United States does here is an odd way of "protecting the supremacy of the Constitution." U.S. Br. 10.

### C. The United States' Attempt To Derive A Cause Of Action From Equity Is Foreclosed By *Grupo Mexicano*

There is yet another fatal problem with the United States' proposed cause of action: It is incompatible with this Court's holding in *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), which prohibits courts from invoking "equity" to create remedies and causes of action that did not exist when the original Judiciary Act was enacted in 1789. *See id.* at 318 ("[T]he equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act.").

The United States is proposing a cause of action that would allow it to sue a state over an allegedly unconstitutional statute, but *only* when that statute cannot be challenged pre-enforcement under 42 U.S.C. § 1983 and *Ex parte Young*. *See* U.S. Br. 10. In other words, the United States wants this Court to recognize a cause of action in equity that would allow the United States to sue, but only in situations where the traditional equitable cause of

action from *Ex parte Young* is unavailable. That confesses a violation of *Grupo Mexicano*. Equity cannot be used to expand or fill gaps in traditional equitable remedies, even when the proposed expansion or gap-filling seems consistent with overarching purpose of a traditional equitable cause of action.

Consider the facts of *Grupo Mexicano*. The litigants in that case sought to extend a traditional form of equitable relief—which allowed a *post-judgment* creditor to restrain a debtor's assets—into a similar but slightly different situation, which would have allowed a *pre-judgment* creditor to restrain a debtor's assets and prevent transfers or dissipation that might frustrate the collection of the debt. The dissenters in *Grupo Mexicano* thought this proposed extension was reasonable and warranted, invoking "the grand aims of equity," and noting that the available legal remedies were not "practical and efficient." *See id.* at 342 (Ginsburg, J., dissenting). But the majority would have none of it, despite the fact that the protection of pre-judgment creditors would have been only a minor extension of the traditional equitable remedy, and despite the fact that this proposed extension would have furthered the overall purpose of the traditional equitable relief available to post-judgment creditors. All that mattered was that the *particular remedy sought*—an injunction allowing *pre-judgment* creditors to restrain a debtor's assets—was not traditionally available in equity. And no amount of "analog[y]"[3] to a

3. *See id.* at 319 ("The United States as *amicus curiae,* however, contends that the preliminary injunction issued in this case is (continued…)

traditional equitable remedy could allow a court to adopt this proposed variation.

The United States tries to get around *Grupo Mexicano* by omitting relevant details about its proposed "equitable" cause of action, by characterizing it as a member of the broad family of remedies that seek "an injunction against enforcement of an unconstitutional statute." U.S. Br. at 27. By that logic, the dissenters in *Grupo Mexicano* should have prevailed by characterizing their proposed remedy as an injunction that merely seeks to "restrain a debtor's assets," without regard to whether the injunction protects a pre-judgment or post-judgment creditor, and then claiming that an equitable remedy defined at that level of abstraction is deeply rooted in historical practice. But the majority of *Grupo Mexicano* specifically rejected this abstraction maneuver, which can *always* be used to characterize a novel remedy (or a novel right) as grounded in history and tradition.[4]

* * *

The most remarkable feature about the United States' argument is that it attempts to justify its proposed cause of action by invoking the existence of a con-

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analogous to the relief obtained in the equitable action known as a 'creditor's bill.'").

4. *See, e.g.*, Jack M. Balkin, *Abortion and Original Meaning*, 24 Const. Comment. 291 (2007) (asserting that the original meaning of the Fourteenth Amendment encompasses a right to abortion, despite the fact that abortion was criminalized shortly after the Amendment's ratification, by boosting the level of generality at which the relevant right is defined).

gressional statute that it claims does not go far enough (42 U.S.C. § 1983), as well as the existence of a traditional cause of action (*Ex parte Young*) that it likewise claims is insufficient because it cannot accommodate pre-enforcement lawsuits against private rights of action. *See* U.S. Br. at 10 ("[T]he 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"). And the United States claims that this Court should recognize an equitable cause of action to fill the gaps in this existing remedial scheme. But this runs headlong into the congressional-preclusion and *Grupo Mexicano* problems. If the United States' grievance is that Congress created a remedy to vindicate constitutional rights in 42 U.S.C. § 1983 that does not far enough to for pre-enforcement challenges to private rights of action, then it cannot ask a court to invoke "equity" to fill those statutory gaps. That is the very definition of congressional preclusion, and the executive must seek its remedy from Congress and not the courts. And if the United States is frustrated with the limited reach of *Ex parte Young*—a cause of action that is traditionally rooted in equity—then it cannot invoke equity to "fix" that problem given the holding of *Grupo Mexicano*.

## CONCLUSION

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

Respectfully submitted.

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