No. 21-463

IN THE

Supreme Court of the United States

WHOLE WOMAN'S HEALTH, ET AL.,

Petitioners,

v.

AUSTIN REEVE JACKSON, JUDGE, DISTRICT COURT OF TEXAS, 114TH DISTRICT, ET AL.,

Respondents.

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

BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., IN SUPPORT OF PETITIONERS

SHERRILYN A. IFILL
Director-Counsel
JANAI S. NELSON
SAMUEL SPITAL*
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006
212-965-2200
sspital@naacpldf.org

MAHOGANE D. REED
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
700 14th Street NW
Suite 600
Washington, DC 20005

October 27, 2021

* *Counsel of Record*

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INTEREST OF AMICUS CURIAE[1]

The NAACP Legal Defense & Educational Fund, Inc. (LDF) is the nation's first and foremost civil rights law organization. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans and to break down barriers that prevent Black people from realizing their basic civil and human rights. LDF has been at the forefront of efforts to enforce the Fourteenth Amendment's promise of equal justice under law, and to ensure that States do not evade this Court's constitutional rulings. *See, e.g.*, *Cooper v. Aaron*, 358 U.S. 1 (1958); *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954). LDF has an interest in this case, which will decide whether the State of Texas can circumvent this Court's precedents interpreting the Fourteenth Amendment to deny citizens their constitutional right to abortion care.

INTRODUCTION AND SUMMARY OF ARGUMENT

More than 150 years ago, our nation undertook to honor the rule of law. Through the ratification of the Reconstruction Amendments and the passage of the Civil Rights Act of 1871, we forbade the several States from violating citizens' federal constitutional rights and made the federal courts readily available to redress any such violations. Since *Brown v. Board of Education*, 347 U.S. 483 (1954), the Court has upheld the basic principles

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[1] Pursuant to Supreme Court Rule 37.6, counsel for LDF state that no counsel for a party authored this brief in whole or in part and that no person other than LDF, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel for LDF state that all parties have filed a blanket consent to the filing of amicus briefs.

established by our nation's post-Civil War Refounding and rejected States' efforts to deny federal rights or to evade federal judicial decrees. No matter how "evasive," "ingeniuos[] or ingenuous[]"the scheme, this Court has confirmed that States many not, directly or indirectly, nullify federal constitutional rights. *Cooper v. Aaron*, 358 U.S. 1, 17 (1958) (quoting *Smith v. Texas*, 311 U.S. 128, 132 (1940)).

Texas's Senate Bill 8 ("S.B.8"), flouts our nation's commitment to the rule of law. S.B.8 is unquestionably unconstitutional under this Court's precedent. But Texas has sought to elude federal judicial review by placing enforcement power in the hands of private citizens and then arguing that there is no non-immune state official who can be sued in federal court to redress the undisputed violation of the constitutional rights of thousands of its citizens.

This Court cannot countenance this direct effort to evade the Constitution, which is inconsistent with both the Fourteenth Amendment and the Civil Rights Act of 1871, codified at 42 U.S.C. § 1983. Those Reconstruction-Era laws made the federal government, and particularly the federal courts, "guarantor[s] of the basic federal rights of individuals against incursions by state power." *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 503 (1982). To vindicate this principle, this Court, under *Ex parte Young*, 209 U.S. 123 (1908), has permitted injunctive relief against state officials when necessary to ensure that federal courts may vindicate federal constitutional rights. The Court should do so here, where a state law promises to undercut the constitutional right to abortion care guaranteed by this Court's authoritative interpretation of the Fourteenth Amendment.

Neither the text of the Eleventh Amendment nor this Court's sovereign-immunity precedents shield the State from its obligations to abide by the Constitution, even where the only state actors with authority under the unconstitutional law are state judicial officers. Even assuming *arguendo* that suits against state judicial officers acting in their judicial capacity are generally impermissible, that principle must give way when such suits are the only way to vindicate federal constitutional rights.

A contrary conclusion would eviscerate this Court's careful balance of respecting States' sovereign immunity under the Eleventh Amendment on the one hand and recognizing that sovereign immunity cannot prevent the vindication of federal rights created by the later-enacted Fourteenth Amendment on the other. It would also undercut this Court's precedent recognizing the constitutional implications of state judicial officers' enforcing even private discriminatory agreements. And it would undermine, indeed thwart, the rule of law by creating a patchwork scheme of constitutional protections dictated, not by this Court's precedent, but by the degree to which states and localities choose to honor that precedent or to create schemes to defy it.

ARGUMENT

I. The Fourteenth Amendment and Section 1983 Elevate Federal Courts as a Vital Forum for the Vindication of Federal Constitutional Rights.

Ratified in 1868, the Fourteenth Amendment, along with the other constitutional amendments that collectively make up the Reconstruction Amendments, radically altered the relationship between the federal government and the several states. *See Patsy*, 457 U.S. at 502–03. The

change was necessary. Following the Civil War, several Southern States blatantly rebuffed the federal government's attempts to establish equal rights for formerly enslaved African Americans by passing laws resurrecting servitude in form, if not in name. By negotiating, passing, and ratifying the Fourteenth Amendment, the country enshrined its commitments to equal rights under the law, and "life, liberty [and] property" for all. U.S. Const. amend. XIV, § 1. Importantly, the country restricted States' ability to interfere with the promises guaranteed by the Fourteenth Amendment. *See* U.S. Const. amend. XIV (starting Section 1 with "[n]o state shall . . ."). And it empowered Congress to address any attempts to thwart this constitutional restriction. *Id.* § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.").

Acting pursuant to this enforcement authority, Congress passed the Civil Rights Act of 1871, now codified at 42 U.S.C. § 1983. In so doing, Congress provided a vehicle—federal lawsuits—for individuals to remedy States' violations of their constitutional rights. Congress thereby "alter[ed] our federal system" to "assign[] to the federal courts a paramount role in protecting constitutional rights." *Patsy*, 457 U.S. at 503. Following ratification of the Fourteenth Amendment and passage of Section 1983, federal courts stood as a "guardian of the people's federal rights" against the States "to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" *Id.* (quoting *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (citation omitted)).

For many years following Reconstruction, this Court turned a blind eye to States' persisting violations of the federal rights of Black Americans and other citizens. *See, e.g.*, *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Giles v.*

Harris, 189 U.S. 475 (1903); *Gong v. Rice*, 275 U.S. 78 (1927); *Buck v. Bell*, 274 U.S. 200 (1927). Since the landmark decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), however, this Court has upheld the basic principles established by our nation's post-Civil War Refounding, including by prohibiting innovative schemes by States to evade federal judicial review of unconstitutional actions. For example, in *Cooper v. Aaron*, 358 U.S. 1 (1958), this Court confirmed that States must obey *Brown* as a final pronouncement of the Court enforcing the constitutional rights of Black people. The Court ruled that no matter how "evasive," "ingenious[] or ingenuous[]" the scheme, States cannot, directly or indirectly, nullify constitutional rights. *Cooper*, 358 U.S. at17 (citation omitted). The Court has similarly rejected States' efforts to circumvent this Court's constitutional rulings and evade federal judicial review in other contexts. *See, e.g.*, *Terry v. Adams*, 345 U.S. 461, 469 (1953) (white-only electoral primaries unconstitutional where coordinated by private organizations); *Reitman v. Mulkey*, 387 U.S. 369, 380–81 (1967) (state law authorizing racial discrimination by private landlords constituted unlawful state action and made "the right to discriminate . . . one of the basic policies of the State"). Or, as the Court stated in *Smith v. Allwright*, 321 U.S. 649 (1944), the right to participate in our "constitutional democracy" is "not to be nullified by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination." *Id*. at 664.

II. S.B.8's "Novel" Enforcement Scheme Cannot Evade Federal Judicial Review.

By passing S.B.8, Texas has sought to nullify the constitutional right to abortion care established by this Court's controlling precedent. S.B.8 prohibits reproductive care physicians from performing or inducing an abortion if

the physician detects a fetal heartbeat, *see* S.B.8 § 3, which is usually detectable approximately six weeks into pregnancy. Pet. App. 6a n.3. The law also prohibits anyone from "aid[ing] or abet[ting]" an abortion after a detectable fetal heartbeat, even where the person did not know that the abortion they were assisting was unlawful. *Id*. There is no dispute that six weeks of pregnancy is months before viability, the point in pregnancy before which a State cannot constitutionally prohibit a patient from deciding whether to have an abortion. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992).

But to evade challenges to S.B.8's constitutionality, the Texas legislature "essentially delegated enforcement of [the] prohibition to the populace at large." *Whole Woman's Health, et al. v. Jackson, et al*., No. 21A24, slip op. at 2 (U.S. Sept. 1, 2021) (Roberts, C.J., dissenting). The purpose of S.B.8's enforcement scheme was "to insulate the State from responsibility for implementing and enforcing" the statute. *Id*. And the State has attempted to rebuff challengers' efforts to hail the primary state actors in S.B.8's enforcement scheme—state judicial officers—into federal court, invoking principles, including state sovereign immunity, to argue that such state officials may not be sued.

But, however "evasive" or "ingenious," *Cooper*, 358 U.S. at 17, Texas's effort to evade federal judicial review of its unconstitutional law is inconsistent with our national commitment to the rule of law as enshrined in the Fourteenth Amendment and Section 1983. Those laws establish the basic rule that federal courts must be available to vindicate federal rights and protect against States' infringements on those rights. *See Patsy*, 457 U.S. at 503.

State sovereign immunity cannot shield state judicial officers from suit for declaratory or prospective injunctive relief where, as here, they are the *only* state actors implicated under an unquestionably unconstitutional state law. To hold otherwise would be inconsistent with this Court's unequivocal precedent preventing state schemes designed to evade its constitutional rulings, *see, e.g.*, *Terry*, 345 U.S. at 469, *Reitman*, 387 U.S. at 380–81, *Smith*, 321 U.S. at 664, and recognizing federal courts' role as the ultimate arbiter of federal constitutional rights. It would also deviate from this Court's precedent recognizing the need for federal judicial review when state judges play a role in the deprivation of federal rights.

A. State Sovereign Immunity Does Not Bar Suit Against State Judicial Officers Under These Circumstances.

Texas has argued that state judicial officers are immune from suit the doctrine of sovereign immunity. *See* Resp'ts' Opp'n to Emergency Appl. for Writ of Inj. at 12–19, *Whole Woman's Health v. Jackson,* No. 21A24 (U.S. Aug. 31, 2021). The State is wrong.

The text of the Eleventh Amendment limits suits by citizens of one state against another sovereign state. *See* U.S. Const. amend. XI (restraining the judicial power to preclude "any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State"). And although this Court has held that the Eleventh Amendment reflects an intent to codify a broader sovereign immunity that also precludes citizens' suits against their own state, *see generally Alden v. Maine*, 527 U.S. 706 (1999), it has long been established that suits for declaratory and prospective injunctive relief against state officials for violations of federal rights are not barred by sovereign immunity. *See, e.g.*, *Ex parte Young*, 209 U.S. at

150–60; *Va. Office for Prot. and Advocacy v. Stewart*, 563 U.S. 247 (2011). This Court's *Ex parte Young* jurisprudence ensures that sovereign immunity does not prevent private citizens from vindicating federal rights in federal courts. Thus, state officers who are "*clothed with some duty* in regard to the enforcement of the laws of the state . . . may be enjoined by a federal court." *Ex parte Young*, 209 U.S. at 156 (emphasis added).

This Court has not yet resolved whether *Ex parte Young* extends to state judicial officers acting in their judicial capacity. *See Whole Woman's Health v. Jackson,* No. 21A24, slip op. at 3 (U.S. Sept. 1, 2021) (noting, among the questions raised in this case, "whether the exception to sovereign immunity recognized in *Ex parte Young* should extend to state court judges in circumstances such as these") (Roberts. C.J., dissenting) (citation omitted). However this Court ultimately resolves that issue generally, the *Ex parte Young* exception must apply where, as here, state judicial officers are the only state officials clothed with any authority to enforce a state law, and where the law was intentionally designed to ensure that no other state official enforces the law, all in a direct effort to evade federal judicial review. *See id.* at 2 (characterizing the statutory scheme of S.B.8 is "not only unusual, but unprecedented," created with the "desired consequence . . . to insulate the State from responsibility for implementing and enforcing the regulatory regime") (Roberts, C.J., dissenting).

This result is required by both this Court's precedent and the constitutional structure. The immunity enshrined in the Eleventh Amendment must yield to the extent it is inconsistent with or undermines the later-ratified Reconstruction Amendments, enforced by Section 1983, which fundamentally altered the balance of power between state and federal governments. *See Patsy v. Board of*

Regents of Fla., 457 U.S. 496, 503 (1982) ("The Civil Rights Act of 1871, along with the Fourteenth Amendment it was enacted to enforce, were crucial ingredients in the basic alteration of our federal system accomplished during the Reconstruction Era."); *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). Any other outcome would be inconsistent with this Court's pronouncements of the role of federal courts in *Patsy* and the numerous civil rights cases recognizing that the Fourteenth Amendment and Section 1983 guarantee the availability of federal courts to provide redress when state laws and policies result in violations of federal rights.

B. S.B.8 Gives State Judicial Officers an Outsized Role in Private Litigants' Ability to Enforce the Statute, Thus Confirming State Judicial Officers as Proper Defendants for Federal Declaratory and Injunctive Relief.

Recognizing state judicial officers as proper defendants in this case also makes sense given the role of state courts in enforcing the provisions that have chilled abortion care providers and largely ended the constitutional right to abortion care in the State of Texas.

S.B.8's "centerpiece" is its so-called private enforcement scheme, which empowers private citizens to bring civil actions against anyone who allegedly performs, or aids and abets in the performance of, an abortion banned under the statute. *See* Pet. App. 7a. But S.B.8's enforcement scheme also contravenes traditional rules of standing, venue, and the awarding of damages and attorneys' fees to chill the exercise of constitutional rights. In each respect, the statute makes state judges integral players in the "private" enforcement of a law that flouts this Court's constitutional precedent.

Under S.B.8's enforcement scheme, any person may sue in their county of residence—even if none of the events giving rise to the claim occurred there, and the defendant does not reside in the venue. *Id*. at 8a. *But see* Tex. Civ. Prac. & Rem. Code § 15.002(a) (general rule limiting venue where an action may be brought tone where the events giving rise to a claim took place or where the defendant resides). And the plaintiff may block transfer to a more appropriate venue if transfer is not consented to by all parties. Pet. App. 8a. *But see* Tex. Civ. Prac. & Rem. Code § 15.002(b) (generally permitting transfer of venue "[f]or convenience of the parties and witnesses and in the interest of justice," even in the absence of consent). Furthermore, a private claimant need not allege *any injury* caused by the defendants and need not even know the person seeking an abortion, in contravention of the traditional rules of standing. *See* Pet. App. 8a–9a.

Additionally, S.B.8 simultaneously limits the defenses available in civil enforcement suits and subjects defendants to a fee-shifting regime skewed in favor of claimants. *Id*. at 9a. The statute purports to prohibit S.B.8 defendants from raising defense on the grounds that they believed the law was unconstitutional; that they relied on a court decision, later overruled, that was in place at the time of the acts underling the suit; or that the patient consented to the abortion. *Id*.

S.B.8 also empowers courts to award costs and fees against defendants in S.B.8 enforcement actions and any challenges to the law, including lawsuits challenging the constitutionality of the law. *Id*. at 10a. Meanwhile, S.B.8 imposes extreme limitations on defendants' ability to recover costs and fees, even where they were the prevailing parties. *See id*. ("[T]hose sued under S.B. 8 who prevail in their case are barred from recovering their costs and attorney's fees even if they prevail 'no matter how many

times they are sued or the number of courts in which they must defend.'").

There is no denying that S.B.8 stacks all the cards against abortion care providers in enforcement actions State courts are the engine behind all these provisions, required to enforce a highly anomalous adjudicatory regime that flips standard litigation procedure on its head to chill and punish abortion care providers. Without state courts' participation, Texas' enforcement scheme would be toothless. It is therefore a "private" enforcement scheme in name only which is propelled by the policy of the State and enforced by state judicial officials. *Cf. Reitman*, 387 U.S. at 381 ("The right to discriminate is now one of the basic policies of the State.").

Under these circumstances, it makes sense, and is consistent with this Court's precedent, to permit constitutional challenges to proceed against state judicial officers.[2] *See Ex parte Young*, 209 U.S. 123, 156 (state officers who are "*clothed with some duty* in regard to the enforcement of the laws of the state . . . may be enjoined by a federal court") (emphasis added).

C. This Court's Precedent Makes Clear That Judicial Enforcement of a Patently Unconstitutional Law Confers the Requisite State Action to Implicate the Constitution.

This Court's decision in *Shelley v. Kraemer*, 334 U.S. 1 (1948) confirms that state judicial officers may be proper defendants where a state law deprives citizens of their

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[2] *See also* Georgina Yeomans, *Ordering Conduct Yet Evading Review: A Simple Step Toward Preserving Federal Supremacy*, Yale Law Journal Forum, forthcoming Jan. 2022, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3936655.

Fourteenth Amendment rights.[3] To be sure, *Shelley* concerns the question of state action and does not directly address whether state judicial officers are subject to suits for declaratory or injunctive relief under the *Ex parte Young* exception. *See generally Shelley*, 334 U.S. at 1 (addressing whether state adjudication and enforcement of private, racially restrictive covenant agreements amounts to state action for purposes of the Fourteenth Amendment). But the logic of the case is highly instructive: in *Shelley*, the Court recognized that a State may act through its judges, and the importance of a federal remedy when States act through their judges to deny federal rights.

Shelley involved two lawsuits in which white homeowners sought to enforce private covenants that restricted the ownership and occupancy of land to white people. *See Shelley*, 334 U.S. at 4. The state courts held that state law compelled recognition and enforcement of the covenants. *See id.* at 6. In a decision reversing the state courts, this Court held that, "in granting judicial enforcement of the restrictive agreements, . . . the States ha[d] denied" Black would-be property owners "the equal protection of the laws" as promised by the Fourteenth Amendment. *Id.* at 20. The Court thus concluded that the action of the state court could not stand, and it enjoined enforcement of the restrictive covenants. *Id.* In its holding, the Court recognized that at the time of the decision, it had "long been established" that "the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment." *Id.* at 14.

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[3] *See* Patrick O. Patterson, *Texas Abortion Law and Shelley v. Kraemer*, American Constitution Society, Expert Forum, Law and Policy Analysis (Sep. 21, 2021), https://www.acslaw.org/expertforum/the-texas-abortion-law-and-shelley-v-kraemer/.

The logic of *Shelley*, recognizing that judicial enforcement of even private matters confers the requisite state action to implicate federal constitutional rights, counsels in favor of jurisdiction here, where the role of the State is even more direct than the private covenants at issue in *Shelley*. In this case, the State itself passed a patently unconstitutional law and purposefully sought to circumvent federal judicial review by placing all enforcement power in the hands of private citizens through enforcement actions brought in state court. State courts in Texas should be similarly accountable for constitutional violations they case under S.B.8, just as the state courts were recognized as accountable for constitutional violations in *Shelley*. As Patrick Patterson has observed, "[w]hen the Texas courts apply the state's unconstitutional abortion law in litigation brought by private-citizen bounty hunters, *Shelley* demands that the action of the state courts cannot stand." (Internal quotation marks omitted). And, under the reasoning of *Shelley*, the unconstitutional law itself—even before the courts take any action to enforce it—is a sufficient "manifestation of State authority" to warrant federal redress. *Shelley*, 334 U.S. 14 (quoting the *Civil Rights Cases*, 109 U.S. 3, 17 (1883)).

III. Inaction by This Court Threatens to Upend All Manner of Constitutional Rights and Protections.

This Court's intervention is warranted here. The Texas legislature's gamut has already had real consequences. What Respondents have characterized as the mere "threat" of judicial enforcement of S.B.8's restrictions on abortion providers has all but halted abortion care in the State. *See* Pet. 18–19 (noting that the "serious threat that performing even one violative abortion could result in numerous enforcement actions, ruinous liability, and limitless attorney's fees and costs . . . has stopped nearly all

abortions in Texas"). It has thereby effectively denied, to thousands of Texans, a constitutional right established by this Court's clear precedent.

Absent this Court's intervention, it is likely that, like prior attempts to curtail abortion access in the State of Texas,[4] S.B.8 will disproportionately burden Black people, Latino people, and other low-income people. Because of economic hardships, inflexible work schedules, and extensive family obligations, people of color and indigent people in Texas are less likely to be able to afford costly travel to other states to obtain abortion care.[5]

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[4] Several studies on the impact of H.B. 2, a Texas House Bill placing limitations on abortion care providers, confirm that the law disproportionately impacted people of color and low-income people, who were disproportionately likely to seek abortion care and were more likely to be saddled by laws restricting abortion care. *See The Impact of the Texas' Abortion Clinic Shutdown Law on Latinas*, The Center for Reproductive Rights, (2021), http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Latinas%20and%20HB2%20Fact%20Sheet%20020816.pdf; *The Impact of the Texas' Abortion Clinic Shutdown Law on Black Women*, In Our Own Voice: National Black Women's Reproductive Justice Agenda, (2021), https://blackrj.org/wp-content/uploads/2016/02/Black-Women_and_HB2-_Fact_Sheet_FINAL.pdf.

[5] Nicole Chavez, *Texans Fear the Dire Consequences of New Laws Targeting People of Color*, CNN (Sep. 3, 2021), available at https://www.cnn.com/2021/09/03/us/texas-laws-abortion-education-voting-access/index.html; Anastasia Moloney, *Poor, Black, Hispanic Bear Brunt of Texas Abortion Law*, Thompson Reuters Foundation, (Sept. 20, 2021), https://news.trust.org/item/20210917172256-63p53; Jolie McCullough and Neelam Bohra, *As Texans Fill Up Abortion Clinics in Other States, Low-Income People Get Left Behind*, The Texas Tribune (Sep. 3, 2021), https://www.texastribune.org/2021/09/02/texas-abortion-out-of-state-people-of-color/; Libby Seline, *Data Shows How Texas' New Abortion Law Disproportionately Impacts Black People, Border Towns*, Houston

If permitted by this Court, S.B.8 also risks a more widespread constitutional crisis. S.B.8 promises to be the first of several state legislative attempts to flout this Court's precedent by stripping traditional state actors of traditional enforcement power to circumvent federal judicial review; multiple states have promised to adopt Texas's evasive maneuver to further restrict abortion rights. form of legislation, as

And the enforcement scheme would not be limited to constitutional rights in the abortion context. States are likely to adopt laws with similar schemes in other contexts. For example, in Idaho, the legislature proposed banning discussion of "critical race theory" through a private right of action for parents to sue schools for providing a "venue" for speakers who advance "any racist or sexist concept."[6] All manner of constitutional protections and civil liberties could be targeted in the same manner by state legislatures that refuse to honor this Court's constitutional mandates. *See* Pet. Br. at 26–27 (explaining how S.B.8's enforcement scheme could be used to subject gun owners to civil liability for firearm purchases, threaten newspapers that criticize the incumbent government with citizen suits, and

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Chronicle (Sept. 10, 2021), https://www.houstonchronicle.com/news/interactives/article/Data-shows-how-Texas-new-abortion-law-16447150.php.

[6] As Michaels and Noll note, "[a]lthough the final Idaho bill omitted a private right of action, scores of anti-CRT bills, some of which authorize civil lawsuits, are making their way through state legislatures." Jon D. Michaels & David L. Noll, *Legal Vigilantes and the Institutionalization of Anti-Democratic Politics*, at 2, SSRN (Sept. 2, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3915944&download=yes (citing Bill Request 60, 2022 Reg. Session Pre-filed (Ky. 2022); *Critical Race Theory: Legislation Tracker*, Data Visualization, Education (Sept. 29, 2021), https://datavisualizations.heritage.org/education/criticalrace-theory-legislation-tracker).

discourage gatherings of unpopular political groups exposed to vigilante lawsuits).[7]

This Court would not have permitted its constitutional rulings outlawing Jim Crow circumvented by state laws making a restaurant, hotel, or movie theater subject to civil suit for permitting admission to a Black person, or placing a wedding officiant under constant threat of civil suit for performing marriages for interracial couples. It must likewise prohibit the State of Texas from evading its constitutional rulings through S.B.8."Constitutional rights would be of little value if they could thus indirectly be denied." *Smith*, 321 at 664 (1944); *see also United States v. Peters*, 5 Cranch 115, 136 (1809) ("If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery.").

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

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[7] *See also* Yeomans, *supra* note 2, at 12 (citing as additional examples laws that permit students to sue schools for having to play sports with transgender athletes or share a bathroom with a transgender person).

Respectfully submitted,

SHERRILYN A. IFILL
Director-Counsel
JANAI S. NELSON
SAMUEL SPITAL*
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006
212-965-2200
sspital@naacpldf.org

MAHOGANE D. REED
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
700 14th Street NW
Suite 600
Washington, DC 20005

October 27, 2021

* *Counsel of Record*