Nos. 21-463 & 21-588

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.

UNITED STATES, PETITIONER

v.

TEXAS, ET AL.

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

BRIEF FOR RESPONDENTS JACKSON, CARLTON, THOMAS, YOUNG, BENZ, PAXTON, AND THE STATE OF TEXAS

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QUESTIONS PRESENTED

1. Whether a State can insulate from federal-court review a law that prohibits the exercise of a constitutional right by delegating to the general public the authority to enforce that prohibition through civil actions.

2. 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 SB 8 from being enforced.

PARTIES TO THE PROCEEDING

Whole Woman's Health v. Jackson (No. 21-463)

Petitioners Whole Woman's Health; Alamo City Surgery Center, P.L.L.C.; Brookside Women's Medical Center, P.A., d/b/a Brookside Women's Health Center and Austin Women's Health Center; Houston Women's Clinic; Houston Women's Reproductive Services; Planned Parenthood Center for Choice; Planned Parenthood of Greater Texas Surgical Health Services; Planned Parenthood South Texas Surgical Center; Southwestern Women's Surgery Center; Whole Women's Health Alliance; Dr. Allison Gilbert; Dr. Bhavik Kumar; The Afiya Center; Frontera Fund; Fund Texas Choice; Jane's Due Process; Lilith Fund, Incorporated; North Texas Equal Access Fund; Reverend Erika Forbes; Reverend Daniel Kanter; and Marva Sadler are plaintiffs-appellees in the court of appeals.

Respondents Judge Austin Reeve Jackson, in his official capacity as Judge of the 114th District Court; Stephen Brint Carlton, in his official capacity as Executive Director of the Texas Medical Board; Katherine A. Thomas, in her official capacity as Executive Director of the Texas Board of Nursing; Cecile Erwin Young, in her official capacity as Executive Commissioner of the Texas Health and Human Services Commission; Allison Vordenbaumen Benz, in her official capacity as Executive Director of the Texas Board of Pharmacy; and Ken Paxton, in his official capacity as Attorney General of Texas are defendants-appellants in the court of appeals.

Additional respondents Penny Clarkston, in her official capacity as Clerk for the District Court of Smith County; and Mark Lee Dickson are also defendants-appellants in the court of appeals.

United States v. Texas (No. 21-588)

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

Respondent the State of Texas is a defendant-appellant in the court of appeals.

Respondents Erick Graham, Jeff Tuley, and Mistie Sharp are intervenors-appellants in the court of appeals.

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OPINIONS BELOW

The district court's opinion in *Whole Woman's Health v. Jackson*, No. 21-463, is unpublished but available at 2021 WL 3821062. The Fifth Circuit motions panel's opinion is published at 13 F.4th 434.

The district court's opinion in *United States v. Texas*, No. 21-588, is unpublished but available at 2021 WL 4593319.

JURISDICTION

The district court issued its decision in *Whole Woman's Health v. Jackson*, No. 21-463, on August 25, 2021, and in *United States v. Texas*, No. 21-588, on October 6, 2021. Both appeals remain pending in the Fifth Circuit. Petitioners invoke this Court's jurisdiction under 28 U.S.C. §§ 1254(1), 2101(e).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The texts of the Fourteenth Amendment, 42 U.S.C. § 1983, and Texas Senate Bill 8 are available in the petition appendix filed in *Whole Woman's Health v. Jackson*. Pet App. 106a-132a.

STATEMENT

I. Texas Senate Bill 8

Senate Bill 8 was passed by the Texas Legislature and signed by the Governor in May 2021. Act of May 13, 2021, 87th Leg., R.S., ch. 62, 2021 Tex. Sess. Law Serv. 125. SB 8 made multiple changes to Texas's abortion laws including, as relevant here, the addition of subchapter H to chapter 171 of the Texas Health and Safety Code. Tex. Health & Safety Code §§ 171.201-.212. Under these new provisions, a physician must determine whether an unborn child has a detectable fetal heartbeat

prior to performing any abortion. *Id.* § 171.203(b). They then prohibit the physician from "knowingly perform[ing] or induc[ing] an abortion on a pregnant woman if the physician detected a fetal heartbeat for the unborn child" unless a medical emergency prevents compliance. *Id.* §§ 171.204(a), .205(a). But no pregnant woman may be sued or held liable under SB 8 for her abortion or attempted abortion. *Id.* § 171.206(b)(1).

These sections of SB 8 are not, however, enforced by any state or local government official: SB 8 specifically prohibits enforcement or threatened enforcement of the heartbeat provisions by the "state, a political subdivision, a district or county attorney, or an executive or administrative officer or employee of this state or a political subdivision." *Id.* § 171.207(a); *see also id.* § 171.208(a). Instead, the heartbeat provisions are enforced "exclusively through . . . private civil actions." *Id.* § 171.207(a). Given that text, the Office of the Texas Attorney General has interpreted state law to foreclose direct or indirect government enforcement of SB 8's heartbeat provisions. *See* Resp'ts Suppl. App'x at 50-53, *Whole Woman's Health v. Jackson*, No. 21A24 (U.S. Aug. 31, 2021).

Any private person may bring a civil action against any person who performs or induces a post-heartbeat abortion, aids or abets the performance of a post-heartbeat abortion, or intends to perform induce, aid, or abet a post-heartbeat abortion. Tex. Health & Safety Code § 171.208(a). A successful plaintiff may obtain injunctive relief and statutory damages of at least $10,000. *Id.* § 171.208(b). In keeping with this Court's holding in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 877 (1992) (plurality op.), SB 8 recognizes an affirmative defense that (1) the defendant in such an action "has standing to assert the third-party

rights of a woman … seeking an abortion," and (2) awarding relief to the claimant would impose an undue burden on that woman or group of women. *Id.* § 171.209(a)-(b).

II. *Whole Woman's Health v. Jackson*, No. 21-463

A. In July, two months after SB 8 was passed and despite the explicit prohibition on state enforcement of SB 8, multiple abortion providers and abortion advocates (the "WWH petitioners") filed suit against five state executive officials: the heads of Texas's Medical Board, Board of Nursing, Health and Human Services Commission, and Board of Pharmacy, as well as its Attorney General. WWH.ROA.39-87.[1] They also sued Judge Austin Reeve Jackson, who presides over Texas's 114th District Court, which is one of four district courts sitting in Smith County, Texas, and Penny Clarkston, who is the Smith County district clerk. WWH.ROA.53-54. Finally, they sued Mark Lee Dickson, a private individual. WWH.ROA.54.

The WWH petitioners asserted claims under the First and Fourteenth Amendments, as well as a free-standing preemption claim. WWH.ROA.77-84. Despite SB 8's prohibition on state enforcement, the WWH petitioners sought an injunction to prevent these executive officials from "enforcing S.B. 8 in any way, including by applying S.B. 8 as a basis for enforcement of laws or regulations in their charge." WWH.ROA.84. For example, they sought to enjoin the head of the Texas Medical Board's general authority to discipline abortionists for violating chapter 171 of the Health and Safety Code, WWH.ROA.54 (citing Tex. Occ. Code § 164.055), and the

[1] "WWH.ROA" refers to the record on appeal in *Whole Woman's Health v. Jackson*, No. 21-50792 (5th Cir.).

Attorney General from seeking civil penalties against them for violations of certain laws governing physicians, WWH.ROA.57 (citing Tex. Occ. Code § 165.101). The WWH petitioners also sought to enjoin a class of "all non-federal judges in the State of Texas" with jurisdiction over civil actions and a class of clerks in those same courts from processing lawsuits filed under SB 8. WWH.ROA.73, 75.

The WWH petitioners moved for summary judgment the same day they filed suit, WWH.ROA.238-302, and then a preliminary injunction over three weeks later, WWH.ROA.705-15. All defendants moved to dismiss for lack of jurisdiction. WWH.ROA.599-693. The state officials argued that, because SB 8 expressly forbade them from enforcing its requirements, (1) they were not proper defendants under *Ex parte Young*, 209 U.S. 123, 157 (1908), which permits an injunction against an executive official only if he has a connection to enforcing the challenged law, and (2) the WWH petitioners' injuries could not be traced to the state officials' conduct or redressed by an injunction against them as required by Article III. WWH.ROA.602-13. Judge Jackson also argued that (1) *Ex parte Young* does not permit federal courts to enjoin state judges from adjudicating cases, 209 U.S. at 163, and (2) "[t]he [Article III] requirement of a justiciable controversy is not satisfied where a [defendant] judge acts in his adjudicatory capacity," *Bauer v. Texas*, 341 F.3d 352, 359 (5th Cir. 2003). *See* WWH.ROA.626-30. Ms. Clarkston, who, like all court clerks, serves at the direction of the judges of her county, made immunity and

standing arguments akin to Judge Jackson's. WWH.ROA.670-93.[2]

The district court denied the motions to dismiss. WWH.ROA.1485-535. The court concluded that the *Ex parte Young* doctrine allowed suit against the executive officials because they could enforce SB 8 indirectly through other regulatory provisions, and their defense of abortion providers' past pre-enforcement challenges to unrelated abortion regulations meant they likely would do so. WWH.ROA.1499-504. Notwithstanding this ruling, the district court also held that Judge Jackson and Ms. Clarkston were proper defendants—despite their adjudicatory roles—because "there are no other government enforcers against whom Plaintiffs may bring a federal suit regarding S.B. 8's constitutionality," and "it is not possible to enjoin any other parties with the authority to seek relief under the statute." WWH.ROA.1513-14 (internal quotation marks and citation omitted); *see also* WWH.ROA.1515.

Regarding standing, the court accepted the WWH petitioners' argument that they suffered an injury by being put to the choice of either violating SB 8 or ceasing to provide abortions. WWH.ROA.1505. The court also concluded that "forcing Plaintiffs to wait until a state enforcement action is brought against them to raise their constitutional concerns would leave Plaintiffs without the ability to vindicate their constitutional rights in federal court before any constitutional violation occurs." WWH.ROA.1517-18. According to the district court, a state court's docketing cases, issuing the Texas

[2] As explained in his separately filed brief, Dickson also argued that there was no Article III controversy between himself and the WWH petitioners because he did not intend to sue them under SB 8. WWH.ROA.664-67.

equivalent of summonses, and hearing cases that could result in penalties under SB 8 sufficed to establish an imminent injury in fact caused by the judicial defendants. WWH.ROA.1522-23.

Finally, the court rejected Dickson's unrebutted sworn testimony that he did not plan to sue the WWH petitioners for violations of SB 8. WWH.ROA.1530-32.

All defendants immediately appealed. WWH.ROA.1536-39. The district court stayed further litigation as to the governmental defendants, WWH.ROA.1571-72, and the Fifth Circuit stayed it as to Dickson. *Whole Woman's Health v. Jackson*, 13 F.4th 434, 441 (5th Cir. 2021) (per curiam) (*Jackson I*).

B. Citing the September 1 effective date for SB 8, the WWH petitioners asked the Fifth Circuit for an injunction pending appeal, which the court denied, later explaining its ruling in a per curiam opinion. *Id.* at 441 n.7.

As required by *Ex parte Young*, 209 U.S. at 157, the court looked for "some connection" between the state officials sued and the enforcement of SB 8. *Jackson I*, 13 F.4th at 441-42. The Fifth Circuit concluded SB 8's "language could not be plainer": there is no connection between state executive officials and the heartbeat provisions of SB 8. *Id.* at 442-43. Because federal courts lack jurisdiction to order a defendant not to do something he cannot do, an injunction against these five executive officials would have been improper. *Id.* at 443.

The court also rejected the claims against the state-court judge and court clerk. *Id.* As it explained:

> The Plaintiffs are not "adverse" to the state judges. *See Bauer*, 341 F.3d at 359. When acting in their adjudicatory capacity, judges are disinterested neutrals who lack a personal interest in the outcome of the controversy. It is absurd to

> contend, as Plaintiffs do, that the way to challenge an unfavorable state law is to sue state court judges, who are bound to follow not only state law but the U.S. Constitution and federal law.

Id. at 444.

C. The WWH petitioners next sought the same injunctive relief from this Court. *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495-96 (2021) (*Jackson II*). The Court denied their request, explaining that "federal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves." *Id.* at 2495 (citing *California v. Texas*, 141 S. Ct. 2104, 2116 (2021)). Citing both its standing and sovereign-immunity jurisprudence, this Court stated that the plaintiffs had not carried their burden to show that (1) the named defendants "can or will seek to enforce" SB 8 against the plaintiffs, *id.* (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013)), or that (2) the Court "can issue an injunction against state judges asked to decide a lawsuit" under SB 8, *id.* (citing *Ex parte Young*, 209 U.S. at 163).

D. On September 23, the WWH petitioners filed a petition for writ of certiorari before judgment. *See* 28 U.S.C. § 2101(e). This Court granted the petition on October 22.

III. *United States v. Texas*, No. 21-588

A. On September 9, after this Court denied injunctive relief in *Jackson II*, the United States sued the State of Texas. The United States alleged that SB 8 (1) is invalid under the Supremacy Clause and the Fourteenth Amendment, (2) is preempted by the Fourteenth Amendment and other federal statutes and regulations, and (3) violates intergovernmental immunity.

US.ROA.41-44.[3] The United States sought both a declaratory judgment that SB 8 is "invalid, null, and void," and an 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." US.ROA.43.

Five days later—though months after SB 8 was passed and weeks after it took effect—the United States sought an emergency temporary restraining order or preliminary injunction. US.ROA.323-69. It attached declarations from abortion providers who chose to stop performing post-heartbeat abortions because they did not wish to potentially defend themselves in state court. US.ROA.373-460. It also attached declarations from federal employees who described how SB 8 could theoretically impact several federal programs. US.ROA.498-579.

Texas conducted expedited discovery and responded in accordance with the schedule set by the district court. US.ROA.764-837, 865-1136. It also filed a motion to dismiss. US.ROA.1245-87. During this time, four individuals sought to intervene in the lawsuit: three who sought to preserve their ability to file suit under SB 8, US.ROA.682-715, and one who had already done so, US.ROA.726-29. The court granted their requests to intervene. US.ROA.756-57.

B. At the preliminary-injunction hearing on October 1, Texas presented sworn testimony of the federal declarants that fatally undermined their claims of SB 8's impact on various federal programs:

Bureau of Prisons: The declarant for the BOP admitted she was unaware that SB 8 had caused any confusion

[3] "US.ROA" refers to the record on appeal in *United States v. Texas*, No. 21-50949 (5th Cir.).

among inmates, disruption of staff and contractor duties, or placed any direct burdens on BOP since it took effect. US.ROA.2313-20. She also admitted that she was unaware whether any of the four pregnant women in BOP custody in Texas had requested an abortion. US.ROA.2300-01.

United States Marshals Service: Although not deposed, the declarant for USMS stated there had been only three requests for abortions by prisoners in Texas since January 1, 2017, only one of which was paid for by the government due to risk to the woman's life. US.ROA.541.

Office of Personnel Management: The declarant for OPM admitted that no insurance carrier had raised concerns about SB 8 and could not recall any instance in which the denial of abortion coverage had resulted in litigation. US.ROA.2624, 2640-41.

Job Corps: The declarant for the Job Corps program admitted that she was unaware of any abortion-related services being provided by any Texas Job Corps Center in the last three years. US.ROA.2566.

Center for Medicare and Medicaid Services: The declarant from CMS admitted she was unaware of any payment for a reimbursable Medicaid service involving abortion being denied and conceded she was unaware of how many Medicaid patients had obtained abortion services. US.ROA.2687-88.

Office of Refugee Resettlement: The declarant for ORR admitted that none of ORR's contractors or grantees had expressed concerns about SB 8, that only two minors "may or may not" have requested abortions recently, and that his approximation of fifteen to twenty minors requesting abortions in a fiscal year was "speculative." US.ROA.2383-84.

C. The district court enjoined the heartbeat provisions of SB 8 in all their possible applications in the evening of October 6. US.ROA.1737-849.

1. The court determined that the United States had standing based on one of three injuries in fact: *first*, the court concluded that SB 8 prohibited federal personnel and contractors from providing abortion-related services and potentially subjected them to civil liability. US.ROA.1761-63. *Second*, using a *parens patriae* theory, the court determined that SB 8 injured the United States' "sovereign interest" in vindicating probable violations of its citizens' constitutional rights and ensuring federal judicial review. US.ROA.1763-68. *Third*, the court held that the United States has an interest in preventing harm "to the public interest and general welfare" under *In re Debs*, 158 U.S. 564 (1895). US.ROA.1768.

The court found causation because the State's "implementation of S.B. 8" harmed the United States' interests in its federal programs and in "upholding the Constitution." US.ROA.1774.

The court found redressability on the theory that it was interwoven with the question of an equitable cause of action. US.ROA.1774. The court declared that "traditional principles of equity allow the United States to seek an injunction to protect its sovereign rights, and the fundamental rights of its citizens under the circumstances present here." US.ROA.1774-75. Without a "blueprint" or "categorical definition" for such a claim, the court concluded it is available when "no adequate remedy exists at law." US.ROA.1775-76. Here, without recognizing the availability of state-court review, the federal district court declared that "[t]he federal courts cannot abide state foreclosure of judicial review of constitutional claims." US.ROA.1778.

2. The district court next concluded it could enjoin the State, and thereby its judicial system and private actors who might take advantage of its laws. The injunction against "the State" was permissible, according to the court, because SB 8 was signed by the State's governor, represents state policy, creates a cause of action that can be litigated in state courts, and is now being defended against attack from outside parties by the State. US.ROA.1795. The court enjoined all judicial actors in Texas after concluding that docketing, maintaining, hearing, and resolving SB 8 suits is "state action." US.ROA.1801. Finally, the court determined it could enjoin unknown private individuals because, if they were to file an SB 8 suit, they could become an "arm of the state" and "state actors." US.ROA.1802-03.

3. Turning to the merits, the district court concluded SB 8 created an undue burden on obtaining an abortion, was preempted by federal law, and violated intergovernmental immunity. US.ROA.1807-40. The court enjoined all state officials (including judges and court clerks) from "accepting or docketing, maintaining, hearing, resolving, awarding damages in, enforcing judgments in, enforcing any administrative penalties in, and administering any lawsuit" brought under SB 8. US.ROA.1845. It also enjoined private individuals "who act on behalf of the State or act in active concert with the State." US.ROA.1845. Uncertain how the State would implement its sweeping injunction, the court stated that it "trusts that the State will identify the correct state officers, officials, judges, clerks, and employees to comply with this Order." US.ROA.1845. And it ordered Texas to publish the preliminary injunction on all court websites along with easy-to-understand instructions concerning SB 8 suits and to distribute its order to all court personnel. US.ROA.1846.

Finally, the district court determined that Texas had "forfeited the right" to a stay pending appeal because the court found SB 8 an "offensive," "unprecedented and aggressive scheme to deprive its citizens of a significant and well-established constitutional right." US.ROA.1848.

D. Texas and three intervenors filed notices of appeal that evening. US.ROA.1850-55. Following expedited briefing, a divided Fifth Circuit panel issued a stay pending appeal "for the reasons stated in" *Jackson I* and *Jackson II*. Order, *United States v. State of Texas*, No. 21-50949 (5th Cir. Oct. 14, 2021).

E. The United States asked this Court to vacate the Fifth Circuit's stay. Appl. to Vacate Stay of Prelim Inj., *United States v. Texas*, No. 21A85 (U.S. Oct. 18, 2021) ("U.S. Appl."), which the Court treated as a petition for certiorari before judgment and granted.

SUMMARY OF ARGUMENT

I. Because neither lawsuit presents a case or controversy within the meaning of Article III, both should be dismissed for lack of jurisdiction.

A. The WWH petitioners allege they are injured by the prospect of private lawsuits in Texas courts, but that injury is not traceable to or redressable by the executive officials they sued. And because these officials do not enforce SB 8, *Ex parte Young* does not provide a way around Texas's sovereign immunity. Similar problems plague the WWH petitioners' claims against the Texas judiciary. At bottom, a potential litigant does not have an Article III case or controversy against the judge who may be asked to apply *both* state law and this Court's precedent in a lawsuit against that litigant. Moreover, as the judge is already bound to apply this Court's decision in *Casey*—an obligation that a state judge is presumed

to perform in good faith—an injunction to apply *Casey* would violate Article III.

B. The United States' suit against the State of Texas suffers most of the same jurisdictional maladies—and a couple more. The United States may not have to overcome Texas's sovereign immunity, but substituting the United States as *plaintiff* does not solve the WWH petitioners' inability to identify an appropriate *defendant*. Most prominantly, Texas does not cause the United States injury by the mere existence of an allegedly unconstitional state law that may affect private parties. *See Muskrat v. United States*, 219 U.S. 346 (1911). Indeed, when plaintiffs have sought to challenge private causes of action in lawsuits against state officials, the courts of appeals have unanimously held there was no case or controversy. Not even the United States can obtain an advisory opinion on the constitutionality of Texas's law by suing Texas.

The district court was wrong to allow United States to use a *parens patriae* theory to skirt its obligation to show its own cognizable injury that is caused by the State. Texas does not dispute the supremacy of federal law, but the Supremacy Clause is a rule of decision. It does not grant a freestanding federal interest or grant of federal power to sue whenever the United States wants. Put another way, that the United States is a sovereign does not allow it to sue to vindicate citizens' individual constitional rights that it does not share. And the United States did not carry its burden to clearly show an imminent injury to federal programs as requird to obtain a preliminary injunction.

II. The United States' lawsuit also fails because there is no statutory or equitable basis for it to seek an injunction. Recognizing that no statute authorizes its

suit, the United States argues it has an equitable cause of action any time its interests are implicated. That is a striking power-grab with no basis in precedent. Every case the United States cites came into federal court based on either a statutory cause of action or a cause of action traditionally recognized in courts of equity. Equity has historically allowed the sovereign to seek an injunction abating a public nuisance, to protect its property interests, and to cancel patents it granted. But equity has not traditionally allowed that same sovereign to sue to vindicate an individual's rights simply because a different sovereign does not provide that individual with a pre-enforcement judicial mechanism to vindicate his own rights.

Even if there were an equitable cause of action available, Congress has displaced it. Civil-rights claims are authorized by numerous statutory mechanisms, but those mechansims do not include a cause of action for the United States to vindicate individuals' substantive-due-process rights.

There is no cause to abandon these bedrock principles of federal jurisdiction simply because the WWH petitioners prefer to sue in federal court rather than be sued in state court. The Constitution does not guarantee pre-enforcement review of state (or federal) laws in federal court. And there is nothing unprecedented about vindicating constitutional rights as a state-court defendant. To the contrary, that is the normal path by which constitutional issues come to this Court—indeed, the only one available from the Judiciary Act of 1789 until Congress created general federal-question jurisdiction.

III. Should the Court conclude there is jurisdiction and a cause of action, the United States still failed to prove that SB 8 violates the Fourteenth Amendment, the

Supremacy Clause, or integovernmental immunity. This Court has recognized a woman's right to be free from governmentally imposed undue burdens to an abortion through part of the duration of her pregnancy. *Casey*, 505 U.S. at 846. Texas has incorporated these requirements into SB 8.

But the Court has also stated that Texas may "express[] a preference for childbirth over abortion." *Id.* at 883 (plurality op). And, like any other right, States may choose whether to protect the minimum contours of the *Casey* right or to allow additional abortions under state law. Texas has chosen the former: it allows only those abortions this Court's precedents require it to allow. But abiding the minimum that *Casey* demands does not violate the Fourteenth Amendment, intergovernmental immunity, the Supremacy Clause, or anything else. Texas may not impose liability in cases where doing so would cause an undue burden on a woman seeking an abortion—but neither private parties nor the Department of Justice can compel Texas to support abortion beyond that obligatory floor.

To ensure that Texas complies with this Court's current case law, SB 8 therefore includes the undue-burden standard from *Casey* as an affirmative defense to liability for long as this Court should continue to recognize it. And this Court has previously upheld laws that could require litigating the circumstances of individual abortions on a case-by-case basis. SB 8 also stands up under this Court's test for preemption: it does not conflict with the rules and policies that govern the federal programs identified by the United States—most of which require compliance with state law anyway. And the possibility that an individual might try to sue the United States under SB 8 (likely unsuccessfully) does not

create a conflict or violate intergovernmental immunity, which is limited to circumstances where a State tries to directly regulate or has discriminated against the federal government in some way. But the federal government does not provide and cannot receive abortions. Far from discriminating against the federal government, SB 8 is subject to a state-law presumption that it will not apply to the federal government.

IV. Finally, the preliminary injunction sought by the United States and entered by the district court is unlawful. The district court's injunction of "the State" cannot remedy the fact that no state executive official actually enforces SB 8, making the injunction an improper attempt to enjoin a law rather than a person. Texas's judges and judicial personnel cannot be enjoined without violating our scheme of government, and none of the authority cited by the United States supports an injunction of a State's entire judiciary. Precedent rejects the district court's stated belief that it could enjoin unnamed and unknown private parties by calling them "state actors" in a suit against other private parties. Lastly, even if some harm was shown, the district court should have severed any unconstitutional portions of SB 8 and limited its injunction only to the specific harms found and proven.

ARGUMENT

I. Both Cases Suffer from Multiple Jurisdictional Defects.

Lower federal courts cannot review the constitutionality of a state-law private cause of action in a pre-enforcement suit against the State or its officials. The WWH petitioners lack standing because they sued state officials who cannot enforce SB 8, officials who do not present an adversarial conflict by adjudicating cases

regarding SB 8, and an individual who will not bring SB 8 suits against them. The WWH petitioners likewise fail to abide *Ex parte Young*'s limited exception to Texas's sovereign immunity.

The United States lacks standing for similar reasons and a couple more, including that Texas lacks a sufficiently "adverse" interest under *Muskrat*, 219 U.S. 346. Moreover, SB 8 does not apply to the United States and, even if it did, does not invade any "sovereign interests," to the extent the United States even articulates interests beyond a desire to litigate on behalf of private individuals. Finally, there is no evidence the United States' federal programs will suffer any cognizable injury from SB 8.

A. The WWH petitioners failed to establish jurisdiction.

As plaintiffs seeking to sue a sovereign entity or its agents, the WWH petitioners must both show standing and overcome sovereign immunity. They do neither. Any plaintiff invoking federal jurisdiction must demonstrate "that it has suffered an 'injury in fact' that is 'fairly traceable' to the defendant's conduct and would likely be 'redressed by a favorable decision.'" *Collins v. Yellen*, 141 S. Ct. 1761, 1779 (2021) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). "[T]he relevant inquiry is whether the plaintiffs' injury can be traced to 'allegedly unlawful *conduct of the defendant*, not to the provision of law that is challenged." *Id.* (emphasis added) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

Because no statute waives or abrogates Texas's sovereign immunity in this context, the WWH petitioners must also show that the specific government official sued has "some connection with the enforcement of" the challenged law. *Ex parte Young*, 209 U.S. at 157. If the

named defendant does not enforce the challenged state law, then petitioners are "merely making him a party as a representative of the state, and thereby attempting to make the state a party," which sovereign immunity forbids. *Id.* For over a century, this Court has rejected such a "convenient way for obtaining a speedy judicial determination of questions of constitutional law" as incompatible "with the fundamental principle that [States] cannot, without their assent, be brought into any court at the suit of private persons." *Id.* at 157.[4]

The WWH petitioners have failed to establish jurisdiction to sue *any* of the named defendants. The executive officials cannot bring suit under SB 8. The judicial officers who might process or preside over such claims are not adverse to potential litigants. And the only named private individual has stated under oath (and without contradiction) that he will not enforce SB 8 against petitioners.

1. Executive officials cannot enforce SB 8.

a. *Standing*. The WWH petitioners' primary alleged injury is the threat of private lawsuits. But the WWH petitioners cannot establish standing based on this injury because it is not traceable to "conduct of the defendant[s]." *Collins*, 141 S. Ct. at 1779. As this Court has already recognized, the named state defendants cannot initiate the lawsuits that form the basis of the WWH petitioners' injuries. *Jackson II*, 141 S. Ct. at 2495-96. For the same reason, an injunction against the executive

[4] In this context, "the questions of Article III jurisdiction and Eleventh Amendment immunity are related." *Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 957 (8th Cir. 2015) (Colloton, J.) (finding no federal jurisdiction to review constitutionality of state law authorizing private suits for damages).

officials will not redress petitioners' grievances; enjoining them from enforcing SB 8 will not prevent private lawsuits from being filed. And it is a bedrock principle of this Court's standing jurisprudence that "[r]elief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998).

The WWH petitioners' "indirect enforcement" theory changes nothing: SB 8 prohibits government enforcement, whether direct or indirect. Tex. Health & Safety Code §§ 171.005, 171.207(a). And even if respondents were wrong as a matter of Texas law (which is a question for the Texas Supreme Court rather than the federal courts), that they believe themselves to be prohibited from indirect enforcement fatally undermines the WWH petitioners' theory of standing. In light of respondents' interpretation of Texas law, indirect enforcement cannot be "imminent." *Clapper*, 568 U.S. at 409.

b. *Sovereign Immunity*. Similar concerns deprive plaintiffs of a route around sovereign immunity. The WWH petitioners have relied entirely on the exception to sovereign immunity contained in *Ex parte Young*. *E.g.*, WWH Pet. 31-35. But *Ex parte Young* permits only an injunction prohibiting a state official from enforcing the challenged state law, and "[t]he doctrine is limited to that precise situation." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011). As a result, only state officials who otherwise *could* and *would* enforce the law are appropriate *Ex parte Young* defendants. Again, because the executive officials are expressly prohibited from enforcing SB 8, there is nothing for a federal court to enjoin.

A suit against executive officials who cannot enforce SB 8 would upend this Court's conception of judicial

review. As this Court correctly stated in denying the WWH petitioners' request for emergency relief, "federal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves." *Jackson II*, 141 S. Ct. at 2495 (citing *California*, 141 S. Ct. at 2116). If a plaintiff is entitled to relief on a claim that a statute is unconstitutional, "the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding." *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923). But such "[c]onstitutional judgments . . . are justified only out of the necessity of adjudicating rights in particular cases between the litigants brought before the Court." *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973).

When the defendants do not enforce the challenged law, a judgment could not have any legal effect because it would effectively be an order to continue not doing what the defendants were already not doing. Such a meaningless judgment is nothing more than an impermissible advisory opinion providing "oversight of decisions of the elected branches of Government." *California*, 141 S. Ct. at 2116. For this reason, federal courts refuse to decide the constitutionality of state-court proceedings in which the federal-court defendant does not participate.[5] Lower federal courts have correctly concluded that abortion cases are no exception.[6]

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[5] *See Lewis v. Governor of Ala.*, 944 F.3d 1287, 1300-01 (11th Cir. 2019) (en banc) (finding no standing to sue over private cause of action); *Digital Recognition Network*, 803 F.3d at 958 (sovereign immunity and no standing); *Doe v. Pryor*, 344 F.3d 1282, 1285-86 (11th Cir. 2003) (no standing).

[6] *See K.P. v. LeBlanc*, 729 F.3d 427, 437 (5th Cir. 2013) (no standing); *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1155-60 (10th

Contrary to petitioners' hyperbolic insistence, neither the structure of SB 8 nor the State's argument that petitioners must meet the burden applicable to every lawsuit brought in federal court is an effort "to evade federal-court review." WWH Pet. 3. Subject-matter jurisdiction goes to a court's power to resolve a question; it must exist regardless of the question. And the only value of the injunction a petitioner seeks against public enforcement of a law that does not permit public enforcement is in the guidance that this Court could give about the result the state court should reach. Such an advisory opinion is not permitted under Article III. *Muskrat*, 219 U.S. at 361-62.

2. State judicial officers are neutral adjudicators of SB 8 suits.

The WWH petitioners also lack an Article III case or controversy with Judge Jackson or the rest of Texas's judiciary. Because state judicial officers acting in their adjudicatory capacity are neutral between parties and bound to apply federal law, litigants lack standing to sue them. A litigant seeking to prevent the enforcement of an unconstitutional state action likewise cannot rely on *Ex parte Young* against a neutral adjudicator, who does not enforce a State's laws in any sense by deciding a case involving those laws.

Cir. 2005) (no standing); *Hope Clinic v. Ryan*, 249 F.3d 603, 605 (7th Cir. 2001) (en banc) (per curiam) (no standing); *Okpalobi v. Foster*, 244 F.3d 405, 409 (5th Cir. 2001) (en banc) (majority for no standing, plurality for sovereign immunity); *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1341 (11th Cir. 1999) (sovereign immunity); *Women's Med. Prof'l Corp. v. Taft*, 162 F. Supp. 2d 929, 965-66 (S.D. Ohio 2001) (no standing), *holding not challenged on appeal*, 353 F.3d 436 (6th Cir. 2003).

This Court has long identified that traditional injunctions at equity ran between litigating parties and not to courts or judicial personnel. Indeed, *Ex parte Young* itself declared that "an injunction against a state court would be a violation of the whole scheme of our government." 209 U.S. at 163. "The difference between the power to enjoin an individual from doing certain things, and the power to enjoin courts from proceeding in their own way to exercise jurisdiction, is plain, and no power to do the latter exists because of a power to do the former." *Id.*

The prohibition on enjoining state courts derives from multiple sources. First and foremost, it is foreign to traditional equitable principles. *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 333 (1999). Such injunctions are likewise incompatible with Article III, as judges are "disinterested neutrals," *Jackson I*, 13 F.4th at 444, when they adjudicate cases. Section 1983 as amended in 1996 likewise prohibits such an injunction. Each of these notions reveals that an injunction preventing a state court from adjudicating a case would be a "violation of the whole scheme of our government," *id.*

a. Multiple courts of appeals have held that "no case or controversy exists between a judge who adjudicates claims under a statute and a litigant who attacks the constitutionality of the statute." *Bauer*, 341 F.3d at 361; *see also Cooper v. Rapp*, 702 F. App'x 328, 333-34 (6th Cir. 2017); *Chancery Clerk of Chickasaw Cnty. v. Wallace*, 646 F.2d 151, 160 (5th Cir. Unit A 1981); *Mendez v. Heller*, 530 F.2d 457, 461 (2d Cir. 1976); *cf. In re Justices of the Sup. Ct. of P.R.*, 695 F.2d 17, 22 (1st Cir. 1982) (Breyer, J.).

This view is correct. State judges, like federal judges, take an oath to follow the U.S. Constitution. *See* U.S. CONST. art. VI; TEX. CONST. art. XVI, § 1(a). State courts, like federal courts, adhere to principles of vertical *stare decisis*. *See Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993) (per curiam). And "[s]tate courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law." *Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976) (citing *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 341–44 (1816)); *Gras v. Stevens*, 415 F. Supp. 1148, 1151 (S.D.N.Y. 1976) (three-judge district court) (Friendly, J.) (recognizing that, when faced with an unconstitutional law, state judges "are as bound to strike it down as [federal judges] are").

This Court presumes that state judges exercise that obligation in good faith—including in particular that state judges do not pre-judge cases in front of them. *Cf., e.g.*, *Haywood v. Drown*, 556 U.S. 729, 735 (2009); *Howlett ex rel. Howlett v. Rose*, 496 U.S. 356, 367 (1990).[7] As a result, there is no way to know in advance how a judge will rule on the constitutionality of a challenged law. A potential state-court defendant cannot demonstrate that an adverse judgment from any particular judge is "*certainly impending*." *Clapper*, 568 U.S. at 409.

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[7] In the "rare instances" where this presumption proves unjustified, the Due Process Clause provides a federal remedy. *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 890 (2009). But even in criminal cases, the burden of the person challenging judicial impartiality is a stringent one. *Id.* at 880-81. Petitioners' undifferentiated and unsubstantiated suggestions that the entire Texas judiciary would abdicate their judicial duties come nowhere close to meeting that standard.

b. Congress has reinforced this conclusion by statute. As several courts of appeals have correctly concluded, section 1983 does not extend to claims against a judge to challenge the constitutionality of state law. *See Allen v. DeBello*, 861 F.3d 433, 440 (3d Cir. 2017); *Grant v. Johnson*, 15 F.3d 146, 148 (9th Cir. 1994); *In re Justices*, 695 F.2d at 22; *cf. Just. Network Inc. v. Craighead County*, 931 F.3d 753, 763 (8th Cir. 2019). Either way, a district court cannot enjoin Judge Jackson—or a class of all Texas judges—from adjudicating claims under SB 8.

It is true that courts have occasionally allowed a judicial officer performing non-adjudicative functions to be properly enjoined. *In re Justices*, 695 F.2d at 23 (citing *Sup. Ct. of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719 (1980)). For example, a state court may have authority to initiate disciplinary proceedings against attorneys. *See Sup. Ct. of Va.*, 446 U.S. at 721-22 & n.1. In such cases, the Court has been careful to distinguish between the capacities in which the judges are being sued, and to allow only those claims brought against them in their "enforcement capacit[y]." *Id.* at 736; *see In re Justices*, 695 F.2d at 23. But that is irrelevant: the WWH petitioners seek to enjoin Texas state court judges precisely *because* of their adjudicative function. They want to ensure no courts decide SB 8 suits in the first place, for fear they might lose. That is not a cognizable harm.

The WWH petitioners also cite *Pulliam v. Allen*, 466 U.S. 522 (1984), and argue there is no judicial immunity under section 1983. *See* WWH Pet. 31-32. Leaving aside that Congress amended section 1983 to permit only declaratory relief in direct response to *Pulliam*,[8]

[8] Federal Courts Improvement Act of 1996 § 309(c), PL 104–317, 110 Stat. 3847 (1996).

petitioners' argument is immaterial: immunity is a separate question from whether petitioners' claim presents a case or controversy that falls within the scope of the cause of action created by section 1983. Indeed, *Pulliam* itself acknowledged that "Article III also imposes limitations on the availability of injunctive relief against a judge," including the absence of a "case or controversy between a judge who adjudicates claims under a statute and a litigant who attacks the constitutionality of the statute." *Pulliam*, 466 U.S. at 538 n.18 (citing *In re Justices*, 695 F.2d at 21).

c. Subjecting state courts to injunctions from federal district courts upends the structure of the judicial system. As a general rule, "the views of [lower federal courts] do not bind" state courts. *Johnson v. Williams*, 568 U.S. 289, 305 (2013). And lower federal courts do not have appellate jurisdiction to review state-court rulings on the back end. *See Rooker v. Fid. Tr. Co.*, 263 U.S. 413, 416 (1923); *cf.* 28 U.S.C. § 1257(a).

Both the WWH petitioners and the United States seek to up-end these long-understood principles by enjoining Texas state courts on the theory those courts may adjudicate cases in a way the WWH petitioners and the United States view as incorrect. Those efforts not only violate elementary principles of federalism by converting federal district courts into ersatz state appellate courts, they usurp *this* Court's proper role as the only federal court entitled to correct state-court errors of federal law.

A federal district court must treat a state court as "an independent tribunal, not deriving its authority from the same sovereign, and, as regards the District Court, a foreign forum, in every way its equal." *Peck v. Jenness*, 48 U.S. (7 How.) 612, 624 (1849). Federal district courts

have "no supervisory power over" state courts. *Id.* "The acts of Congress point out but one mode by which the judgments of State courts can be revised or annulled, and that is by this [C]ourt." *Id.*

3. The district court did not have jurisdiction to enjoin a private would-be plaintiff.

Petitioners are also wrong that they can establish jurisdiction today because potential SB 8 plaintiffs may be adverse to them someday. As described in respondent Dickson's concurrently filed brief, the only private individual named as a defendant "has no present intention to enforce the law." *Jackson II*, 141 S. Ct. at 2495. And numerous courts of appeals have concluded that "Article III does not allow a plaintiff who wishes to challenge state legislation to do so simply by naming as a defendant anyone who, under appropriate circumstances, might conceivably have an occasion to file a suit for . . . damages under the relevant state law at some future date." *Nova Health Sys.*, 416 F.3d at 1157-58. Such "putative private plaintiffs are entitled to be notified and heard before courts adjudicate their entitlements." *Hope Clinic*, 249 F.3d at 605. "[A]n injunction prohibiting *the world* from filing private suits would be a flagrant violation of both Article III and the due process clause." *Id.*

B. The United States failed to establish jurisdiction.

The United States tried to solve the jurisdictional problems plaguing the WWH petitioners by bringing suit itself against the State of Texas as an entity. But the United States appears to labor under the misunderstanding that just because it can overcome Texas's sovereign immunity, it has solved all of the WWH petitioners' jurisdictional woes. It has not. Texas's executive

officers still do not enforce SB 8, so the United States lacks standing as to them. Texas's courts and judges remain disinterested neutrals, so the United States lacks a controversy with them. And the United States cannot obtain an injunction against SB 8 as a law itself.

These federal jurisdictional limits cannot be cured. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021). And they cannot be evaded by the United States' decision to seek an injunction against Texas as a state and then demanding Texas nominate someone against whom injunctive relief would be proper. An injunction is an essentially *in personam* remedy; there are no persons with an Article III dispute against the United States—at least not yet—and thus there is no one to enjoin. The United States' strident preference for pre-enforcement, lower-federal-court review does not create an exception to any of these well-established federal-courts doctrines.

1. The United States cannot sue indirectly those it cannot sue directly.

Seemingly conceding that there were no state officials who could be enjoined directly, the United States sought to enjoin Texas instead. But a litigant cannot invoke federal jurisdiction "to do indirectly what" it cannot "do directly." *Rooker*, 263 U.S. at 416 (citing *Voorhees v. Bank of United States*, 35 U.S. (10 Pet.) 449, 474 (1836)). The United States' effort to do so fails to overcome the standing problems highlighted above because an injunction must order someone not to do something. And there are no state officials to whom such an order can be addressed.[9]

[9] Seeking declaratory relief instead would not help the United States. The Declaratory Judgment Act, 28 U.S.C. § 2201(a), does

a. The United States' substitution of the State for specific state officials does not solve its standing problem because an injunction "operat[es] *in personam*" and must be "directed at someone, and govern[ing] that party's conduct." *Nken v. Holder*, 556 U.S. 418, 428 (2009). Given that "[a] state can act only through its agents," *Briscoe v. Bank of Commonwealth of Kentucky*, 36 U.S. 257, 318 (1837), an injunction against Texas must operate by requiring some agent to take, or refrain from taking, some action. Since an injunction against each potential alleged agent would be improper, *supra* I.A, an injunction against Texas—or against the United States for that matter—is improper too.

Although a few plaintiffs have attempted to evade this limitation on federal jurisdiction by suing a government directly, those that have tried have failed because even when sovereign immunity is not at issue, plaintiffs lack standing to sue a state defendant where the challenged law "doesn't require (or even contemplate) 'enforcement' by anyone, let alone" the named defendant. *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1299 (11th Cir. 2019) (en banc); *see also Bldg. Owners & Managers Ass'n of Chi. v. City of Chicago*, 513 F. Supp. 3d 1017, 1030 (N.D. Ill. 2021). "That reasoning applies equally to the plaintiffs' standing to sue the State" rather than the official who would act for the State. *Lewis v. Governor of Ala.*, 816 F. App'x 422, 424 (11th Cir. 2020) (per curiam) (panel opinion).

b. The United States has countered that even if the federal courts cannot prevent a state court from hearing an SB 8 suit to final judgment, it can enjoin county-level

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not expand the jurisdiction of the federal courts. *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950).

executive officials (like a county sheriff) from enforcing SB 8 judgments. U.S. Appl. 33. But beyond the fact that county officials are not state officials within the scope of Rule 65(d), such an injunction would fail for at least three reasons.

First, it would not redress the alleged harm, as private citizens would nonetheless have non-executive means of enforcing SB 8 judgments under state law. *See, e.g.*, *In re Sheshtawy*, 154 S.W.3d 114, 124-25 (Tex. 2004) (contempt); *Cont'l Oil Co. v. Lesher*, 500 S.W.2d 183, 185 (Tex. App.—Houston [1st Dist.] 1973, orig. proceeding) (self-executing judgments).

Second, there are no such judgments to be enjoined, and even the United States has admitted that there may never be any: it predicts "that few enforcement proceedings will be brought," U.S. Appl. 24, and insists that SB 8 is "plainly unconstitutional," U.S. Appl. 13. Because state courts are presumed to apply this Court's constitutional holdings in good faith and are ultimately subject to review by this Court on constitutional questions, *supra* I.A.2, any alleged injuries stemming from attempts to enforce future judgments are speculative, not "*certainly impending*." *Clapper*, 568 U.S. at 409.

Third, it would be improper to enjoin the enforcement of a Texas court's judgment. As Justice Story explained, "the national courts have no authority (in cases not within the appellate jurisdiction of the United States) to issue injunctions to judgments in the state courts; or in any other manner to interfere with their jurisdiction or proceedings." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 626 § 1753 (1833). Federal courts cannot issue "a remedy [that] was historically unavailable from a court of equity," at least not without congressional authorization. *Grupo*

Mexicano, 527 U.S. at 333. No such authorization has been forthcoming. *Infra* II.A.

2. Texas and the federal government are not adverse merely by virtue of disagreeing as to SB 8's constitutionality.

In addition to the problems discussed above, the United States seeks to enjoin potential future litigation to which neither the United States nor Texas would be a party. Such a claim does not satisfy "[t]he requirement for adversity" necessary to sustain federal jurisdiction. *Poe v. Ullman*, 367 U.S. 497, 505 (1961) (plurality op.).

a. That the United States and Texas disagree about the constitutionality of SB 8 is not enough to create constitutional adversity. "The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements." *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013) (quoting *Diamond v. Charles*, 476 U.S. 54, 62 (1986)).

Illustrating that principle is this Court's decision in *Muskrat*, which considered a series of federal statutes governing Indian property rights. 219 U.S. at 348-49. The first statute gave a defined group of Indians certain property rights, but subsequent statutes reduced those rights. *Id.* Congress then created a cause of action allowing Indians injured by the subsequent statutes to sue the federal government "to determine the validity of [those subsequent] acts of Congress." *Id.* at 349-50. The Indian plaintiffs filed suit, seeking "to restrain the enforcement of [the challenged statutes] upon the ground that [they were] unconstitutional and void" under the Due Process Clause. *Id.* at 349. The United States defended the constitutionality of its laws and won on the merits in the lower court.

This Court reversed and remanded with directions to dismiss "for want of jurisdiction." *Id.* at 363. The suit was not "a 'case' or 'controversy'" because the federal government, though "made a defendant," had "no interest adverse to the claimants"—notwithstanding its general interest in the constitutionality of federal statutes. *Id.* at 361. Federal courts cannot entertain "a proceeding against the government in its sovereign capacity" when "the only judgment required is to settle the doubtful character of the legislation in question." *Id.* at 361-62.

This Court recognized that "the validity of the legislation may arise in suits between individuals" and would then be "properly brought before this court for consideration." *Id.* at 362. But a judgment against the United States would "not conclude private parties, when actual litigation brings to the court the question of the constitutionality of such legislation." *Id.* As in *Ex parte Young*, *Muskrat* recognized that deciding "the constitutionality of important legislation" in pre-enforcement adjudication might have been more efficient, but that was irrelevant in the face of Article III limitations on jurisdiction. *Id.* at 362-63.

This case shares *Muskrat*'s key features: (1) a sovereign defendant (2) defending the constitutionality of its law, (3) which is given effect in private litigation, (4) against a due process challenge, (5) and a request for injunctive relief against enforcement. Jurisdiction is no more proper here than it was in *Muskrat*. A district court injunction against Texas cannot be conclusive "when actual litigation brings to [a Texas] court the question of [SB 8's] constitutionality." *Id.* at 362. It is therefore meaningless.

The lack of federal jurisdiction to consider the constitutionality of state-law private causes of action

concerning abortion "follows directly from *Muskrat*." *Hope Clinic*, 249 F.3d at 605; *see also Okpalobi*, 244 F.3d at 426 (citing *Muskrat* and vindicating a panel dissent that relied on *Muskrat*).

b. The United States has sought to distinguish *Muskrat* on the theory that an injunction that binds state judges would provide relief. U.S. Appl. 29. But *Muskrat* itself recognized that a judgment against the United States would *not* have bound the federal courts to rule in the *Muskrat* plaintiffs' favor in any subsequent "litigation" involving "private parties." *Muskrat*, 219 U.S. at 362.

Moreover, binding a sovereign's courts through litigation against that sovereign would be both unworkable and inconsistent with the hierarchical structure of the federal judicial system. Consider the Administrative Procedure Act's waiver of sovereign immunity, *see* 5 U.S.C. § 702, which allows Texas and other litigants to secure judgments against the United States. *See, e.g.*, *Texas v. Biden*, No. 2:21-cv-67, 2021 WL 3603341 (N.D. Tex. Aug. 13, 2021), *stay denied*, *Biden v. Texas*, No. 21A21, 2021 WL 3732667, at *1 (U.S. Aug. 24, 2021); *Texas v. United States*, No. 1:18-cv-68, 2021 WL 3022434 (S.D. Tex. July 16, 2021). Almost no one would assert that other federal courts are bound to follow the ruling of a single district court in favor of a single litigant.

Indeed, the United States has itself defended—and benefited from—the principle that a judgment against a sovereign does not bind that sovereign's courts. For example, in *Jenkins v. United States*, a state prisoner had previously sought habeas relief in federal court. 386 F.3d 415 (2d Cir. 2004). The federal district court in Georgia denied his petition under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), and the Eleventh

Circuit did not grant the broad certificate of appealability he requested. *Id.* at 416. In response, the prisoner filed a declaratory judgment action against the United States, arguing that "[a]s a result of the actions of" those federal courts, he had "been deprived by [the United States] of his constitutional rights to petition for habeas corpus relief and to appeal." *Id.* Alleging that AEDPA was "unconstitutional as applied to [him] by the courts of the Eleventh Circuit," the prisoner sought a declaratory judgment against the United States in an effort to "promote the effectiveness of his bid for habeas relief in" federal court. *Id.* at 416, 418.

The United States argued that federal jurisdiction was lacking because a declaratory judgment against it would not "be binding upon the" the federal court in Georgia. Br. for the United States at *15, *Jenkins v. United States*, No. 03-6160 (2d Cir. Mar. 29, 2005), 2005 WL 1153351. The Second Circuit agreed, holding that "a declaration" against the United States would not "have any binding or authoritative effect" on other federal courts, meaning the prisoner and the United States were not "adverse parties." *Jenkins*, 386 F.3d at 418 & n.**. "The real dispute" was "between [the prisoner] and his custodian." *Id.* at 418.

The United States seems to fear that applying the adversity requirement will forever prevent review of SB 8's constitutionality. Not so. Recognizing the jurisdictional defects in this case does not involve forswearing review in a later, "procedurally proper" case. *Jackson II*, 141 S. Ct. at 2496. After all, the laws at issue in *Muksrat* were later reviewed in *Gritts v. Fisher*, 224 U.S. 640 (1912), and the law at issue in *Poe* was later reviewed in *Griswold v. Connecticut*, 381 U.S. 479 (1965). Moreover, in light of the history of this litigation, there is little

doubt that this Court could review a state-court judgment holding in favor of an SB 8 plaintiff. There is no reason to create (another) abortion-specific exception to the ordinary rules of federal jurisdiction.

Indeed, a number of lawsuits have been filed under SB 8's private cause of action. A time will come—and no doubt soon—for the state courts to rule on the constitutionality of SB 8, and this Court will, in turn, retain the last word on the correctness of their adjudication of federal law. But the United States does not get a free pass around long-settled federal-courts doctrines because it would prefer to litigate in a federal forum just a bit faster.

3. Purported "sovereign interests" do not give the United States standing here.

Nor should this Court create an exception to its ordinary rules of standing. The United States has no relevant interests to support standing under either a *parens patriae* theory or *In re Debs*, 158 U.S. 564.

a. The United States effectively disclaimed *parens patriae* standing below, US.ROA.1645 n.1, but the district court held that "[t]he United States has standing to file suit in *parens patriae* for probable violations of its citizens' Constitutional rights." US.ROA.1765. In its stay briefing, the United States made no attempt to defend the district court's conclusion. U.S. Appl. 20-28; Opp'n to Mots. to Stay Pending Appeal 7-11, *United States v. Texas*, No. 21-50949 (5th Cir. Oct. 11, 2021)—for good reason. The district court's limitless holding contradicts the principle that a sovereign cannot "litigat[e] as a volunteer the personal claims of its citizens." *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976).

If the federal government truly had such a power, one would expect some decision of this Court approving

parens patriae standing for the United States against a State long before now. Although this Court has addressed the circumstances under which a State can assert *parens patriae* standing against the United States, *see Massachusetts v. E.P.A.*, 549 U.S. 497, 520 n.17 (2007), it has never approved the United States asserting *parens patriae* standing against a State, *cf. Mellon*, 262 U.S. at 486 (rejecting a suit by Massachusetts because the United States "represents [citizens] as parens patriae" "in respect of their relations with the federal government"). This "lack of historical precedent" is "the most telling indication of the severe constitutional problem." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010) (quoting dissent in court of appeals by Kavanaugh, J.).

The United States has claimed this case is different because it has a "sovereign interest" in preventing SB 8 from "thwarting . . . mechanisms of judicial review." U.S. Appl. 25. But a sovereign cannot "step[] in to represent the interests of particular citizens who, *for whatever reason*, cannot represent themselves." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 600 (1982) (emphasis added).

In any event, Texas has not thwarted judicial review. Review is available in the same mechanism that countless cases have been reviewed since the Founding: through state-court litigation.

To the extent pre-enforcement review is not available in lower federal courts, that fault lies with Congress, which has the constitutional authority to determine the means by which the Fourteenth Amendment will be enforced. U.S. CONST. amend. XIV, § 5. The United States' interests are similarly determined by "the operation of federal statutes." *Massachusetts*, 549 U.S. at 520 n.17. If

the United States' executive branch wants to ensure that pre-enforcement judicial review is always available, it should take that up with Congress—not demand that this Court "transform[] itself into the Council of Revision which was rejected by the Constitutional Convention." *Flast v. Cohen*, 392 U.S. 83, 107 (1968) (Douglas, J., concurring).

Perhaps most telling is the United States' litigation conduct. It did not challenge SB 8 for nearly four months. Only after the abortion providers failed to secure injunctive relief in *Jackson II* did the United States discover its supposedly sovereign interest in making sure that abortion providers win the lawsuits they file. But "the judicial process" is not "a vehicle for the vindication of the value interests of concerned bystanders," even if the bystander is the United States. *United States v. Students Challenging Regul. Agency Procs.*, 412 U.S. 669, 687 (1973).

b. The United States next claims that it has standing under *In re Debs*, 158 U.S. 564, but neither of that case's twin theories applies here.

First, the *Debs* Court held that the United States, like any other party, can bring a lawsuit when it has a property interest in the matter. *Id.* at 583-84 (finding a property interest "in the mails"). There is no property interest here, and the United States has not relied on that part of *Debs*. U.S. Appl. 21.

Second, the *Debs* Court addressed (in dicta) whether even without a "pecuniary interest," the United States could suffer an "injury . . . sufficient to give it a standing in court" based on the need for "assistance in the exercise of" its "powers" or in "the discharge of" its "duties" to regulate interstate commerce. *Debs*, 158 U.S. at 584. *Debs* concluded that it did because "[t]he national

government, given by the constitution power to regulate interstate commerce, ha[d] by express statute assumed jurisdiction over such commerce when carried upon railroads." *Id.* at 586. The United States therefore had "the duty of keeping those highways of interstate commerce free from obstruction," *id.*, "the discharge of" which gave the federal government "standing." *Id.* at 584.

Debs does not apply here. The United States does not claim that abortions are interstate commerce over which Congress "has by express statute assumed jurisdiction." *Id.* at 586. Nor does it claim to have a "duty . . . to remove obstructions" to such abortions. *Id.* Indeed, this Court has expressly stated that "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation." *Harris v. McRae*, 448 U.S. 297, 316 (1980); *see Maher v. Roe*, 432 U.S. 464, 474 (1977). Regardless of Texas's constitutional obligations, no law imposes on the Attorney General the duty to maximize abortion access in Texas.

Recognizing the limited holding in *Debs*, lower courts have consistently rejected the United States' efforts to expand its standing. *Debs* requires the United States to demonstrate "a well-defined *statutory* interest of the public at large" because "an interest, in the generic sense" is not enough. *United States v. Solomon*, 563 F.2d 1121, 1125, 1127 (4th Cir. 1977) (emphasis added). "[T]he *Debs* Court specifically noted that the duty on which the standing of the United States rested arose not simply from the constitutional grant of power to regulate commerce but from congressional action expressly assuming and implementing that power." *Clark v. Valeo*, 559 F.2d 642, 654 (D.C. Cir. 1977) (Tamm, J., concurring); *see United States v. Sch. Dist. of Ferndale, Mich.*, 400 F.

Supp. 1122, 1130 (E.D. Mich. 1975), *aff'd*, 577 F.2d 1339 (6th Cir. 1978) (rejecting the United States' standing because "there is no statutory expression of a national interest").

Even the broadest interpretations of *Debs* accepted to date—which "allowed tentative and much criticized forays into the area of civil rights violations based on a nonstatutory grant of authority"—"also included the need to relieve a burden on interstate commerce caused by the violation of some congressional enactment." *United States v. Mattson*, 600 F.2d 1295, 1298 (9th Cir. 1979). "Where that additional factor was not present, the courts have found that the government lacks standing." *Id.*[10] To go beyond this would fundamentally rewrite our federal structure by allowing the federal government to sue a State whenever it felt the State was being insufficiently solicitous to its preferred right.

Not even the United States can bring itself to defend its previous claims in lower courts to broader standing based on constitutional violations. U.S. Appl. 27-28. Instead, it insists that *somebody* must have standing to sue. But this Court has squarely held that "[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974); *accord Clapper*, 568 U.S. at 420; *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 489 (1982).

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[10] Until now, the only exception to this unanimity among lower courts was *United States v. Brand Jewelers, Inc.*, 318 F. Supp. 1293 (S.D.N.Y. 1970), which "has been widely criticized as an excessively broad reading of In re Debs." *Mattson*, 600 F.2d at 1298 n.3; *see United States v. City of Philadelphia*, 644 F.2d 187, 202 (3d Cir. 1980) (collecting "numerous critics of that decision").

"Lack of standing" to sue in federal court "does not impair the right to assert [one's] views" in another forum, including "in the political forum or at the polls." *United States v. Richardson*, 418 U.S. 166, 179 (1974). Although the "electoral process" can be "[s]low, cumbersome, and unresponsive . . . at times," it nonetheless represents an adequate remedy for the "dissatisfied citizens" whose rights the United States is seeking indirectly to vindicate. *Id.* And that is not all: dissatisfied citizens can raise their objections in a judicial forum too—state court.[11]

4. The United States has not established standing based on purported interference with federal programs.

Finally, the United States has not established an injury based on SB 8's supposed impact on several federal programs. US.ROA.1761-63. The United States alleged complying with SB 8 could impose costs on federal programs such as the Bureau of Prisons and Jobs Corps. US.ROA.1761-63. Even assuming those allegations could suffice at the pleading stage, the United States failed to provide sufficient evidence to satisfy the preliminary injunction standard that these hypothetical injuries were "likely, as opposed to merely speculative." *Lujan*, 504 U.S. at 561 (internal quotation marks omitted). Instead, the federal government's own witnesses admitted that

[11] The United States complains that because women seeking abortions "cannot be defendants in S.B. 8 suits," they will not be able "raise the statute's unconstitutionality as a defense." U.S. Appl. 24. That is incorrect: Texas courts liberally allow intervention by those whose interests are implicated in litigation. *See* Tex. R. Civ. P. 60.

such injuries are unlikely, speculative, and based on the actions of third parties who are not before the Court.

This Court has explained that "[a]llegations of possible future injury" are not enough to demonstrate standing. *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). Rather, the "threatened injury must be *certainly impending* to constitute injury in fact." *Clapper*, 568 U.S. at 409 (citing cases). Stated differently, there must be a "substantial risk" that the harm will occur. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). Moreover, injuries that result from the independent actions of third parties that are not before the Court are insufficient to demonstrate standing. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976).

The district court found that compliance with SB 8 might increase the travel necessary to obtain an abortion and, consequently, impose additional costs on the federal programs—and particularly for the Bureau of Prisons. US.ROA.1763. But there is no evidence that any of the four pregnant prisoners in BOP custody in Texas wants an abortion. US.ROA.2300-01. The Marshals Service's declarant admitted that it has provided transportation for abortions for only three women since January 2017. US.ROA.541. Only two minors in ORR custody "may or may not" have requested abortions in the last year, and the government's witness admitted that the approximation of fifteen to twenty minors requesting abortions in a fiscal year was "speculative." US.ROA.2383-84. Finally, the declarant for the Job Corps program was unaware of *any* abortion-related services being provided in the last three years. US.ROA.2566.

Even assuming, contrary to the above evidence, that these programs might be called upon to facilitate an abortion, the United States has not proven a substantial

risk of liability under SB 8 sufficient to support standing in a facial challenge to a state law. *Susan B. Anthony*, 573 U.S. at 158. Such liability would require (1) a woman requesting a post-heartbeat abortion, (2) a federal employee or contractor facilitating that abortion, (3) a third party bringing a lawsuit against that individual, (4) a Texas court holding that federal defendant liable (notwithstanding a state-law presumption that state law does not apply to the federal government[12]), and (5) that judgment withstanding appellate review, including up through this Court.

The United States lacks evidence that any of these links in the hypothetical chain, most of which concern third parties not before the Court, will come to pass, much less that all are certainly impending. *See Clapper*, 568 U.S. at 409. The United States has thus not met its burden of proof at the preliminary-injunction phase to show that SB 8 causes a cognizable injury to any of its federal programs. Consequently, it lacks standing to bring its preemption and intergovernmental-immunity claims.

* * *

Under this Court's normal approach, the United States does not have standing. The United States suggests that the Court should dispense with its normal approach because this is an extraordinary situation. "Implicit in" that argument "is the philosophy that the business of the federal courts is correcting constitutional

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[12] *R.R. Comm'n v. United States*, 290 S.W.2d 699, 702 (Tex. App.—Austin 1956), *aff'd*, 317 S.W.2d 927 (Tex. 1958); *Louwein v. Moody*, 12 S.W.2d 989, 990 (Tex. Comm'n App. 1929). In all likelihood, a case brought against the United States and its officers would be resolved in federal court under the federal-officer removal statute. *See* 28 U.S.C. § 1442(a).

errors," regardless of whether a case or controversy exists. *Valley Forge*, 454 U.S. at 489. But this Court has repeatedly held that "[t]his philosophy has no place in our constitutional scheme." *Id.*

II. The United States Does Not Have an Equitable Cause of Action.

Even if the federal courts had jurisdiction to hear this suit, Congress has not authorized the Attorney General to bring it. Congress has created numerous causes of action for enforcing federal-law rights, but none of them applies here. Indeed, the United States does not dispute that no statute gives it a cause of action to sue Texas. It instead relies on a purported cause of action in equity that has no historical basis, the elements of which seem to have been invented for purposes of this case.

A. The United States has not identified any cause of action traditionally available in courts of equity.

Unless expanded by Congress, "the 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, 1789." *Grupo Mexicano*, 527 U.S. at 318. The United States must establish not only that it seeks relief traditionally available in a court of equity, but also "that the basis for its claim is equitable." *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356, 363 (2006). The United States' sovereign status does not change those requirements. "When the state as plaintiff invokes the aid of a court of equity, it is not exempt from the rules applicable to ordinary suitors; that is, it must establish a case of equitable cognizance, and a right to the particular relief demanded." 1 JOHN NORTON

POMEROY, JR., A TREATISE ON EQUITABLE REMEDIES at 586 § 330 (1905). The United States points to "an injunction against enforcement of an unconstitutional statute." U.S. Appl. 27. But that remedy belonged to a citizen based on his own rights and ran against a state official. It did not belong to the sovereign based on an individual's rights, nor did it run against a separate sovereign.

1. Rather than arguing that there is a traditional equitable basis for its suit here, the United States proposes a new, good-for-one-case-only cause of action 232 years after the Judiciary Act of 1789. That cause of action appears to have three general elements: (1) an allegedly unconstitutional state law, (2) some sort of barrier to private parties securing "pre-enforcement review," and (3) some level of "frustrat[ion]" in obtaining "post-enforcement review." U.S. Appl. 22.

The United States does not identify any case that has recognized such a cause of action, much less one from 1789. Nor could it: historically, pre-enforcement review has been the exception, not the rule. *See, e.g.*, Steven J. Lindsay, *Timing Judicial Review of Agency Interpretations in* Chevron*'s Shadow*, 127 YALE L.J. 2448, 2481-88 (2018); Kristin E. Hickman & Gerald Kerska, *Restoring the Lost Anti-Injunction Act*, 103 VA. L. REV. 1683, 1749 (2017). This Court should not create the United States' proposed cause of action now given its "traditionally cautious approach to equitable powers," which "leaves any substantial expansion of past practice to Congress." *Grupo Mexicano*, 527 U.S. at 329.

2. At a very high level of generality, the United States seeks something like an anti-suit injunction to prevent litigation in another court. And this has some similarity to a "bill to restrain proceedings at law," by which a plaintiff sought an anti-suit injunction. John

Harrison, *Ex Parte Young*, 60 STAN. L. REV. 989, 997 (2008). By filing a bill to restrain proceedings at law, a defendant at law could turn himself into a plaintiff in equity and simultaneously turn the plaintiff at law into a defendant in equity. *See id.* at 1000. But *Grupo Mexicano* demands more than consistency with "the grand aims of equity." 527 U.S. at 321. It requires federal courts to respect the traditional limits on equitable jurisdiction. *See id.* at 319.

In America, the limitations on anti-suit injunctions were significant and applied with special vigor. "Early in the history of our country a general rule was established that state and federal courts would not interfere with or try to restrain each other's proceedings." *Donovan v. City of Dallas*, 377 U.S. 408, 412 (1964). In 1807, for example, this Court held "that a circuit court of the United States had not jurisdiction to enjoin proceedings in a *state* court." *Diggs v. Wolcott*, 8 U.S. 179, 180 (1807) (reversing an injunction directed at litigants). Thus, Justice Story wrote that "the State Courts cannot injoin proceedings in the Courts of the United States; nor the latter in the former." 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE at 186 § 900 (1836). A federal court was bound to regard a state court as "a foreign forum, in every way its equal," over which it "had no supervisory power." *Peck*, 48 U.S. (7 How.) at 624.

"While Congress has seen fit to authorize courts of the United States to restrain state-court proceedings in some special circumstances," for example, to protect their own jurisdiction, *Donovan*, 377 U.S. at 412 (citing 28 U.S.C. §§ 1651, 2283), the United States does not argue that those statutory exceptions to the general rule apply here. Because the United States' suit rests, at best, on general equitable jurisdiction under the Judiciary Act

of 1789, it is subject to the limitations that adhere to the equitable principles of 1789. *See Grupo Mexicano*, 527 U.S. at 318, 326.

Here, the district court's injunction trespassed the historical limits on anti-suit injunctions in at least two key ways. *First*, like a plaintiff seeking a declaratory judgment, a plaintiff cannot seek an anti-suit injunction against a party that cannot bring the suit that the plaintiff seeks to enjoin. *Cf. Skelly Oil Co.*, 339 U.S. at 669. Because an anti-suit injunction was "directed only to the parties," courts of equity have not historically granted anti-suit injunctions against those who have not brought and are not threatening litigation. 2 STORY, EQUITY, *supra*, 166 § 875. The State of Texas is expressly prohibited from bringing SB 8 suits. Tex. Health & Safety Code § 171.207(a). And it suffices to say that a state-court judge does not threaten SB 8 litigation by having a case brought before him.

Second, the United States cannot seek an anti-suit injunction because it could not be a state-court defendant. SB 8 does not apply to the United States. *See supra* I.B.4. The United States does not contend that such a suit is likely to be filed against it anyway. *Cf.* U.S. Appl. 24 (predicting "few enforcement proceedings will be brought" even against abortion providers).[13]

3. Perhaps recognizing that enjoining Texas from bringing an SB 8 action against it would be pointless, the United States seeks an injunction against state courts hearing any SB 8 cases against anyone. But that is also "relief" that English and "federal equity courts have traditionally rejected." *Grupo Mexicano*, 527 U.S. at 321.

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[13] If such a suit *were* brought, it would likely be barred by sovereign immunity. 5 U.S.C. § 702.

"At the common law itself, there was no such thing as an injunction against a judge." *Pulliam*, 466 U.S. at 529.

Even when a court of equity enjoined proceedings in another court, it always did so by enjoining a litigant, not the court itself. *See id.* As Justice Story explained, "when [an injunction's] object is to restrain proceedings at law, is directed only to the parties." 2 STORY, EQUITY, *supra*, at 166 § 875. An injunction "is not addressed to those courts" and "does not even affect to interfere with them." *Id.*

The same principle prevented courts of equity from attempting to restrain the courts of other sovereigns. "Nothing can be clearer, than the proposition, that the Courts of one country cannot exercise any control or super-intending authority over those of another country." *Id.* at 184 § 899. Courts of equity would "not pretend to direct, or control the foreign Court" itself. *Id.* at 185 § 899. Instead, if "both parties to a suit in a foreign country" were English residents, then courts of equity could "act *in personam* upon those parties and direct them, by injunction, to proceed no farther in such suit." *Id.* at 184-85 § 899. Even this limited power, though, was somewhat controversial. *Id.* at 185-86 § 900.

4. The United States' only other proposed cause of action is the one from *Ex parte Young* "to enjoin unlawful executive action." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015). But that cause of action "reflects a long history of judicial review of illegal *executive* action," not review of judicial proceedings themselves. *Id.* (emphasis added). The *Ex parte Young* cause of action requires the defendant to be an executive official with "some connection with the enforcement of the act" being challenged. 209 U.S. at 157. That is lacking here. *See supra* I.A. The United States' proposed

expansion of *Ex parte Young* would be far more significant than the remedial expansion rejected in *Grupo Mexicano*. *See* 527 U.S. at 319 (pre- versus post-judgment remedy for creditor).

5. The United States suggests that *Debs* might support a cause of action as well as standing, but that case did not feature any of the elements that the United States claims make a cause of action appropriate here. It did not involve: (1) an allegedly unconstitutional state law, (2) a barrier to private parties securing "pre-enforcement review," or (3) "frustrat[ion]" in obtaining "post-enforcement review." U.S. Appl. 22.

On the contrary, *Debs* arose from a bill in equity to abate a public nuisance, a well-recognized equitable cause of action for the government. *See* 2 STORY, EQUITY, *supra*, 201-03 §§ 921-23. In *Debs*, the federal government sought to enjoin union activity that interfered with interstate commerce, 158 U.S. at 597; the Court explained that causing "obstruction of a highway is a public nuisance, and a public nuisance has always been held subject to abatement at the instance of the government." *Id.* at 587 (citation omitted). Indeed, "stopping a highway" is a paradigmatic example of a public nuisance. 2 STORY, EQUITY, *supra*, 202-03 § 923. Far from endorsing a free-ranging authority to pursue suits in equity, *Debs* asserted "the jurisdiction of courts to interfere" in public nuisances "by injunction," which has been "recognized from ancient times and by indubitable authority." 158 U.S. at 599. As the United States does not maintain that this litigation is attempting to abate a public nuisance, *Debs* does not support its claim.

The United States has tried to divorce *Debs* from the traditional cause of action to abate a public nuisance by suggesting that "the Court's reasoning . . . was not so

limited." Reply in Supp. of Appl. to Vacate Stay 9, *United States v. Texas*, No. 21A85 (U.S. Oct. 22, 2021). And the United States claims, quoting *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 201 (1967), that "Debs reflects the 'general rule that the United States may sue to protect its interests.'" U.S. Appl. 21. This fails for three reasons.

First, the United States cites the section of the opinion addressing standing—that is, whether "the government has such an interest in the subject-matter as enables it to appear as party plaintiff in this suit." *Debs*, 158 U.S. at 583-86.

The portion of *Debs* discussing the relevant cause of action is on the next page where the Court states: "a public nuisance has always been held subject to abatement at the instance of the government." *Id.* at 587 (citation omitted) (quoting *City of Georgetown v. Alexandria Canal Co.*, 37 U.S. 91, 98 (1838)). Though less controversial, the Court discussed the abatement of public nuisances for pages. *See id.* at 587-89, 591-93. It specifically addressed an argument that the "obstruction" was too "fitful and temporary" to "constitute[] a nuisance." *Id.* at 596-97. *Debs* would not have spilled so much ink discussing the United States' authority to abate a public nuisance if that were irrelevant to the cause of action.

In reality, "[t]he crux of the *Debs* decision" was "that the Government may invoke judicial power to abate what is in effect a nuisance detrimental to the public interest." *United Steelworkers of Am. v. United States*, 80 S. Ct. 177, 186 (1959) (Frankfurter, J., concurring).

Second, the United States' cherry-picked quote from *Wyandotte* is misleading. *Wyandotte* describes *Debs* in terms of removing nuisances that obstruct interstate commerce: "The Federal Government is charged with

ensuring that navigable waterways, like any other routes of commerce over which it has assumed control, remain free of obstruction." *Wyandotte*, 389 U.S. at 201 (citing *Debs*, 158 U.S. at 586). The United States quotes *Wyandotte*'s description of other cases, all of which stand for the proposition that "the United States may sue to protect its interests" under an available cause of action—a right that Texas does not dispute. *Id.* (citing *Cotton v. United States*, 52 U.S. (11 How.) 229 (1850), *United States v. San Jacinto Tin Co.*, 125 U.S. 273 (1888), *Sanitary Dist. of Chicago v. United States*, 266 U.S. 405 (1925)).

Each of the cases that *Wyandotte* cites rested on a traditional cause of action at common law or in equity. *Cotton* held that the United States could bring "an action of trespass *quare clausum fregit*" because, "[a]s an owner of property in almost every State of the Union, they have the same right to have it protected by the local laws that other persons have." 52 U.S. (11 How.) at 231. *San Jacinto Tin* similarly held that the United States could sue in equity to void a land patent for fraud because it "should not be more helpless in relieving itself from frauds, impostures, and deceptions than the private individual." 125 U.S. at 279.

Sanitary District was, like *Debs*, a suit to enjoin a public nuisance—"to remove obstructions to interstate and foreign commerce." *Sanitary Dist.*, 266 U.S. at 426. *Sanitary District* "is not authority for a broad reading of *Debs*" because "the *Debs* elements of commerce and nuisance were both present and [in *Sanitary District*] there were both a treaty and a federal statute defining the interests to be protected." *Solomon*, 563 F.2d at 1127. *Sanitary District* also involved an express statutory cause of

action regarding obstructions of navigable waterways. 266 U.S. at 428.

Third, the United States cannot patch over the gaps in *Debs* by citing additional cases that it says "recognized the government's authority—even without an express statutory cause of action—to seek equitable relief against threats to various sovereign interests." U.S. Appl. 21 (citing *United States v. Am. Bell Tel. Co.*, 128 U.S. 315, 360-61 (1888); *Heckman v. United States*, 224 U.S. 413 (1912)). All those cases establish is that no statute is necessary *if* there is a traditional equitable cause of action available to the United States. Texas does not dispute that principle.

The United States highlights (at U.S. Appl. 21 n.3) *Sanitary District*'s explanation that "[t]he Attorney General by virtue of his office may bring this proceeding and no statute is necessary to authorize the suit." 266 U.S. at 426. But *Sanitary District* was referring to *San Jacinto Tin*'s holding that, when the United States has a cause of action in equity, the Attorney General can bring it on the United States' behalf, despite the fact that no statute gives him "express authority … to authorize suits." 125 U.S. at 278. Neither *San Jacinto Tin* nor *Sanitary District* suggests that the United States does not need a cause of action.

American Bell similarly stands for the uncontroverted proposition that the United States can sue in equity to cancel a patent for an invention issued due to fraud. 128 U.S. at 360-61 (recounting English precedent). "[T]he right of the government of the United States to institute such a suit depends upon the same general principles which would authorize a private citizen to apply to a court of justice for relief against an instrument

obtained from him by fraud or deceit." *Id.* at 367 (quoting *San Jacinto Tin*, 125 U.S. at 285).

And *Heckman* holds that the United States could sue in equity "to cancel certain conveyances" of land by members of an Indian tribe because their interests in the land were inalienable for a period of years. 224 U.S. at 415. The Court emphasized that the suit was brought "on behalf of" the Indians, who were under "the guardianship" of the United States. *Id.* at 444. Just as the Indians would have been able to sue on their own behalf, the United States could sue on their behalf. *Id.* at 442. In that case, the United States also had a statutory cause of action: Congress authorized the executive branch to "take such steps as may be necessary, including the bringing of any suit ... to acquire or retain possession of restricted Indian lands." *Id.* at 443-44 (quoting Act of May 27, 1908, chap. 199, 35 Stat. at L. 312).

None of these cases helps the United States here. They establish 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. They cannot support the United States' newfound cause of action that apparently depends on private individuals *lacking* a valid cause of action. U.S. Appl. 22.

6. If *Debs* were truly as broad as the United States claims, the United States would have no need for statutory causes of action. It would be allowed to sue whenever it wanted. But "almost every court that has had the opportunity to pass on the question" has shared "[t]he same understanding, that the United States may *not* sue to enjoin violations of individuals' fourteenth amendment rights without specific statutory authority." *Philadelphia*, 644 F.2d at 201 (emphasis added); *see also United States v. Madison Cnty. Bd. of Educ.*, 326 F.2d 237, 242-

43 (5th Cir. 1964). Again, the United States' chief response is that this is an "exceptional" case. U.S. Appl. 28. But the United States has a habit of claiming that the cases it brings are "exceptional," and courts have developed a habit of rejecting such an exception to the rule that Congress must create causes of action as vague, unworkable, and inefficient. *Philadelphia*, 644 F.2d at 201.

The United States' argument boils down to policy arguments in favor of creating a cause of action. Of course, "there are weighty considerations on the other side as well." *Grupo Mexicano*, 527 U.S. at 330. Congressional concerns about giving the Attorney General too much power have prevented passage of express causes of action to enforce Fourteenth Amendment rights more broadly. *See Philadelphia*, 644 F.2d at 195-97. Accordingly, "[t]he debate concerning this formidable power . . . should be conducted and resolved where such issues belong in our democracy: in the Congress." *Grupo Mexicano*, 527 U.S. at 333.

B. Congress has displaced any equitable cause of action.

It would be particularly inappropriate for the Court to create a cause of action here because Congress displaced it by enacting a detailed remedial scheme for enforcement of Fourteenth Amendment rights that does not include this kind of suit by the federal government against States. The Constitution gives Congress, not the other branches, "power to enforce, by appropriate legislation," the Fourteenth Amendment. *See* U.S. CONST. amend. XIV, § 5. Congress has long exercised that power to create "numerous mechanisms for the redress of denials of due process." *Philadelphia*, 644 F.2d at 192. But Congress has not provided a broad *civil* cause of action *for* the federal government or *against* a State. This is not

a "mere oversight." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1849 (2017).

Congress has specifically granted and withheld from the Attorney General the power to enforce various federal rights. For example, the Attorney General is empowered to institute actions for injunctive relief for violations of the Twenty-Sixth Amendment, 52 U.S.C. § 10701(a)(1), to enforce the Voting Rights Act, *see* 52 U.S.C. §§ 10101(c), 10308(d), 10504, 20510, as well as to "intervene in" certain federal equal-protection suits, 42 U.S.C. § 2000h-2. Congress has also given the Attorney General express causes of action to enforce various statutory rights, including statutory rights related to abortion. *See* 18 U.S.C. § 248(c)(2)(A); 42 U.S.C. §§ 2000a-5(a), 2000e-5(f)(1).

But Congress has *not* given the Attorney General a cause of action to enforce abortion rights—or even more generally to enforce the Fourteenth Amendment—let alone against a State. To the contrary, there have been "three express refusals of modern Congresses to grant the Executive general injunctive powers" to enforce the Fourteenth Amendment. *Philadelphia*, 644 F.2d at 195. This repeated rejection "not only demonstrates explicit congressional intent not to create the power claimed here by the Attorney General but also reveals an understanding, unanimously shared by members of Congress and Attorneys General, that no such power existed." *Id.* This Court should not override "congressional policy denying the federal government broad authority to initiate an action whenever a civil rights violation is alleged." *United States v. Mattson*, 600 F.2d 1295, 1299-300 (9th Cir. 1979).

The federal government insists it must be able to sue when private citizens cannot, U.S. Appl. 22, but Congress

anticipated private citizens would not always be able to vindicate their own interests. In other cases, Congress has authorized the Attorney General "to institute . . . a civil action" when private individuals "are unable, in [the Attorney General's] judgment, to initiate and maintain appropriate legal proceedings." 42 U.S.C. §§ 2000b(a), 2000c-6(a). Congress did not provide similar authority here. "[A] court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014).

C. Raising a constitutional defense in state court is a traditional and adequate means of vindicating constitutional rights.

1. The United States' position reduces to a simple—but erroneous—claim: there must always be a way for a federal district court to ensure that an allegedly unconstitutional state law will never have real-world effects. "The Federal Government does not, however, have a general right to review and veto state enactments before they go into effect." *Shelby County v. Holder*, 570 U.S. 529, 542 (2013).

This Court has long rejected the theory "that parties have an appeal from the legislature to the courts, and that the latter are given an immed[i]ate and general supervision of the constitutionality of the acts of the former." *Chi. & G.T. Ry. Co. v. Wellman*, 143 U.S. 339, 344-45 (1892). In our system, a federal court decides the constitutionality of a state law only when necessary for deciding a case properly before it. *See, e.g.*, *Valley Forge*, 454 U.S. at 474; *Mellon*, 262 U.S. at 488-89; *Marye v. Parsons*, 114 U.S. 325, 330 (1885); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

According to the United States, on the other hand, a federal court has a case properly before it whenever necessary for deciding the constitutionality of a state law. The suggestion is "inimical to the Constitution's democratic character." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 133 (2011).

The Constitution does not even guarantee pre-enforcement review of *federal* law. Congress can preclude pre-enforcement review in federal court. *E.g.*, *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994). It can even strip federal courts of jurisdiction to hear cases within the judicial power vested by Article III. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 513-14 (1868); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850). And this Court has recognized that there are situations in which *no* court will pass upon the constitutionality of a law, including when the political question doctrine applies, *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), and when no one has standing, *California*, 141 S. Ct. 2104.

The Constitution certainly does not guarantee that every state law will be subject to pre-enforcement federal review, much less review in the lower federal courts, which are not mandated by the Constitution in the first place. *See* U.S. CONST. art. I, § 8, cl. 9; *id.* art. III, § 1. To the contrary, a "federal negative" on state laws was considered—and resoundingly rejected—at the Constitutional Convention. *See* Alison L. LaCroix, *The Authority for Federalism: Madison's Negative and the Origins of Federal Ideology*, 28 LAW & HIST. REV. 451, 472-83 (2010). Indeed, it was "rejected in favor of allowing state laws to take effect, subject to later challenge." *Shelby County*, 570 U.S. at 542. Then the First Congress enacted the Judiciary Act of 1789 without giving the lower federal courts general federal-question jurisdiction. *See*

An Act to Establish the Judicial Courts of the United States, ch. 20, 1 Stat. 73 (1789). They did not have it for nearly a century. *See* Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470 (codified as amended at 28 U.S.C. § 1331). The founding generation understood that challenges to the constitutionality of state laws would routinely be raised in state court. Indeed, that was their design.

2. There is nothing that requires the recognition of a new jurisdictional rule to ensure SB 8 will receive judicial review. Indeed, its private cause of action cannot be implemented at all without the opportunity for a court to pass upon its validity.

That this review occurs initially in state court—with the opportunity to seek appellate review in this Court—is neither unusual nor suspicious. When other States' private causes of action for violations of restrictive covenants burdened the equal-protection rights of African-American homebuyers, this Court declared them unconstitutional in an appeal from a state-court judgment—not on appeal from an injunction entered by a federal district judge against his state-court colleagues. *Shelley v. Kraemer*, 334 U.S. 1, 6-8 (1948).

When Alabama's private cause of action for defamation—created by common law but "supplemented by statute"—burdened pro-civil-rights speech, this Court again reviewed it on appeal from a state-court judgment. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265, 291-92 (1964).

Criminal defendants must almost always raise their federal constitutional defenses in state-court proceedings. This is true for both criminal-procedural defenses, *see, e.g.*, *Crawford v. Washington*, 541 U.S. 36 (2004), and substantive-due-process defenses to state crimes, *see, e.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003).

At bottom, abortion providers may prefer litigating in federal courts to litigating in state courts under threat of significant financial penalties, but that preference is not constitutionally protected. "That a litigant's choice of forum is reduced has long been understood to be a part of the tension inherent in our system of federalism." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 123 (1984) (quotation omitted). That a plaintiff faces the possibility of substantial financial penalties does not guarantee a right of pre-enforcement review. *See generally Sackett v. E.P.A.*, 566 U.S. 120 (2012). And the possibility that abortion providers will have to rely on the same procedures as other litigants—including criminal defendants—is not a constitutional crisis requiring deviation from this Court's ordinary understanding of the constitutional separation of powers.

III. SB 8 Is Constitutional.

Assuming the Court gets beyond these procedural hurdles, it should hold that the district court erred in concluding that the United States was likely to prevail on its Fourteenth Amendment, preemption, and intergovernmental-immunity claims. US.ROA.1807-40.

A. SB 8 does not violate the Fourteenth Amendment.

SB 8 is entirely consistent with *Casey*, whose test it expressly incorporates. Under current precedent, abortion regulations cannot impose an undue burden on a woman's ability to obtain a previability abortion. *See Casey*, 505 U.S. at 877 (plurality op.). "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* Texas seeks to permit and not

otherwise burden those abortions which, by virtue of this Court's holding in *Casey*, it must. But it wishes to prohibit all other abortions.

The alleged undue burden in this case is the prospect of a civil lawsuit for performance of a post-heartbeat abortion, for which an abortion provider would be able to assert an undue-burden defense. Tex. Health & Safety Code §§ 171.208(a), .209(b). But by incorporating the undue-burden defense, SB 8 creates liability for only those post-heartbeat abortions that are not protected under this Court's current precedent. SB 8 therefore does not unconstitutionally "ban" previability abortions, nor does it delegate the authority to any person to prevent an abortion that this Court's precedent protects. *Contra Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 69 (1976). Instead, it respects both this Court's rulings protecting some abortions and Texas's strong policy view that, beyond these, no further abortions should be permitted. That may leave some marginal cases regarding the application of the "undue burden" standard to specific circumstances in uncertainty—but then, that is no different than when a First Amendment claimant faces state-court litigation for an allegedly defamatory statement, or a Second Amendment claimant faces a state indictment for possessing a weapon that allegedly falls within the core right recognized in *District of Columbia v. Heller,* 554 U.S. 570, 573 (2008).

And more specifically, abortionists complain about the *type* of litigation in which they will be required to raise their objections. Abortion providers are not afraid of litigation in general: they are willing to challenge the constitutionality of even the smallest regulations on abortion in federal court. *See, e.g.*, *In re Gee*, 941 F.3d 153, 156 (5th Cir. 2019) (per curiam). The only burden

imposed by SB 8 is the potential for litigation as state-court defendants, not federal-court plaintiffs.

While abortion providers would undoubtedly prefer to litigate the constitutional questions en masse, this Court has never mandated that method of analysis. Minors, for example, must often go through individual judicial-bypass proceedings *before* obtaining abortions, if they wish to obtain one without their parents' knowledge. *E.g.*, *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 517 (1990). And when declining to enjoin Congress's ban on partial-birth abortions for lack of a health exception, the Court noted that "[a]s-applied challenges are the basic building blocks of constitutional adjudication." *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007). As a result of stare decisis, individual SB 8 suits to challenge specific abortions (if any) will likely produce general rules that draw the necessary constitutional lines. And, as detailed above, it is not constitutionally necessary that those lines be drawn by federal courts—state courts are equally capable of applying the Constitution. *See Penrod Drilling Corp.*, 868 S.W.2d at 296.

B. SB 8 does not conflict with laws governing federal programs.

Equally without merit is the United States' claim that SB 8 is conflict-preempted by a hodgepodge of federal statutes, regulations, manuals, and policies that govern the operation of several federal programs. US.ROA.1836-40. The United States failed to demonstrate that "compliance with both federal and state regulations is a physical impossibility," and or that SB 8 "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona v. United States*, 567 U.S. 387, 399 (2012). "[P]ossibility of impossibility is not enough." *Merck Sharp &*

Dohme Corp. v. Albrecht, 139 S. Ct. 1668, 1678 (2019) (cleaned up). The Court has "refused to find clear evidence of such impossibility where the laws of one sovereign permit an activity that the laws of the other sovereign restrict or even prohibit." *Id.* (citations omitted). The United States fails to meet this standard for three reasons.

1. As an initial matter, it is far from clear that many of these documents, which represent internal agency guidance *can* preempt state law. While "an agency regulation with the force of law can pre-empt conflicting state requirements," *Wyeth*, 555 U.S. at 576, preemption is less certain when it comes to policies. *See Lipschultz v. Charter Advanced Servs. (MN), LLC*, 140 S. Ct. 6, 7 (2019) (Thomas, J., concurring in the denial of certiorari).

2. It is highly speculative that these policies will conflict with—and therefore preempt—state law: the United States does not seem to claim that federal employees themselves are performing post-heartbeat abortions. Thus, the only potential impact is the possibility that a private individual might sue the United States or its employees or contractors for facilitating an abortion. Such suits are unlikely because, as discussed above, the federal government's evidence that it is facilitating abortions is somewhere between speculative and nonexistent. *Supra* I.B.4. Moreover, Texas courts presume that state statutes do not regulate the federal government, its employees, or its contractors performing federal functions. *R.R. Comm'n*, 290 S.W.2d at 702; *Louwein*, 12 S.W.2d at 990. The possibility that a litigant would attempt to sue the United States under SB 8 does not demonstrate a conflict with federal law where state law would prevent the United States from being held liable. After all, any state statute could be misapplied to a federal employee

acting in the scope of his employment. The district court cited no precedent to support preemption in such a situation.

3. And based on the materials provided to the trial court, none of the laws relied on by the United States do conflict with SB 8. *First*, several of the policies the United States cites provide that federal employees must follow state law when arranging for abortion-related services. US.ROA.523 (BOP), 539 (USMS), 1002 (Job Corps), 2435 (ORR). As the Court has explained, "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Wyeth v. Levine,* 555 U.S. 555, 565 (2009). It cannot be that the United States intended to preempt all state abortion laws through these programs when the programs themselves mandate compliance with state law. The district court brushed this off by concluding that the policies assume state laws are constitutional. US.ROA.1838. But that begs the question of whether the law is unconstitutional because it conflicts with federal law.

Second, the United States points to several regulations and policies that require federal employees to "arrange" for certain abortions, 28 C.F.R. § 551.23(c) (BOP); US.ROA.887 (USMS); or provide transportation to the appointments, US.ROA.557 (Job Corps), 890-91 (USMS). And in the case of ORR, the only requirement is that staff "shall not undertake actions to prevent the [unaccompanied child] from obtaining the abortion" but need only ensure that the child has "access" to medical appointments. US.ROA.897. But none of these provisions *requires* the United States to facilitate post-heartbeat abortions in Texas. The United States' reading of these regulations and policies would preempt any state-law gestational limit on abortion.

Third, the United States points to Federal Employee Health Benefits plans and state Medicaid plans, as well as a BOP policy, that cover or pay for abortions as permitted under the Hyde Amendment—when the mother's life is in danger or when the pregnancy is the result of rape or incest. US.ROA.523, 569, 577-78. These laws do not guarantee that a woman will receive a covered abortion, and the United States has not shown that (1) its agencies or contractors would refuse payment or coverage, or (2) its agencies and contractors would be sued under SB 8.

Finally, SB 8 does not "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona*, 567 U.S. at 399. There is no congressional policy of providing post-heartbeat abortions or ensuring that women have access to such abortions. Instead, such legislation has been proposed, but not passed by both houses of Congress. *See, e.g.*, Women's Health Protection Act, H.R. 3755, 117th Cong. (1st Sess. 2021). And, as noted above, the federal programs simply take state laws as they find them. There is no conflict, and the district court erred in finding one.

C. SB 8 does not violate principles of intergovernmental immunity.

Nor does SB 8 violate intergovernmental immunity. Intergovernmental immunity prohibits state laws that "regulate[] the United States directly or discriminate[] against the Federal Government or those with whom it deals." *North Dakota v. United States*, 495 U.S. 423, 435 (1990) (plurality op.) (citations omitted). "[G]enerally applicable" laws do not run afoul of intergovernmental immunity, even if they result in "an increased economic burden on federal contractors as well as others." *Boeing Co. v. Movassaghi*, 768 F.3d 832, 839 (9th Cir. 2014).

Even assuming SB 8 would apply to federal employees and contractors, *but see R.R. Comm'n*, 290 S.W.2d at 702, the United States has not shown that SB 8 either directly regulates the United States or discriminates against it. SB 8 nowhere mentions the United States, its agencies, employees, or contractors, let alone discriminates against them.

SB 8 does not directly regulate the United States either. The United States wrongly assumes that hypothetical, and likely unsuccessful, lawsuits filed by private parties are a "regulation" of the United States by Texas. They are not. As with conflict preemption, the possibility that a citizen might try to sue the United States does not mean a State has regulated the United States.

Taken to its extreme, the United States' position that SB 8 interferes with its operations by possibly making it more expensive to facilitate abortions would require invalidating all sort of state laws: the 24-hour waiting period (which requires two trips), Tex. Health & Safety Code § 171.012(a)(4); the physician-only law (if no willing physicians are nearby), *id.* § 171.003; and even speed limits (which can make trips longer). Again, given that the policy of multiple federal programs is to act in accordance with state law, *see supra* III.B, the United States cannot now claim that Texas law unconstitutionally regulates it.[14]

IV. The Requested Remedy Is Improper.

The district court in the United States' litigation wrongly believed it could enjoin the State, state

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[14] Respondent Jackson does not join Part III—or any other argument about the constitutionality of SB 8—because it would be inappropriate for him, as a neutral state judge, to pre-judge even a hypothetical case.

judiciary, and private citizens and that it need not sever or otherwise tailor its injunction to the harms proven. This is contrary to precedent, federal rules, and the explicit intent of the Texas Legislature.

A. A federal district court cannot enjoin the entire state judiciary, much less the world at large.

The district court's attempt to enjoin "the State" is an improper attempt to work around the fact that the district court could not "identify the correct state officers, officials, judges, clerks, and employees" who had to be enjoined "to comply with this Order." US.ROA.1845. As this Court just reiterated, "federal courts enjoy the power to enjoin *individuals* tasked with enforcing laws, not the laws themselves." *Jackson II*, 141 S. Ct. at 2495 (emphasis added). And that "injunction is a judicial process or mandate" that "operat[es] *in personam*." *Nken*, 556 U.S. at 428. It therefore must "direct[] the conduct of a particular actor." *Id.; see also California*, 141 S. Ct. at 2115. If the district court could not "state its terms specifically; and . . . describe in reasonable detail . . . the act or acts restrained or required," Fed. R. Civ. P. 65(d), it should not have entered an injunction. The district court cannot avoid that result by enjoining "the State" and leaving it to "the State" to figure out what is required to avoid contempt.

1. Enjoining judges is improper.

Considering that the district court's injunction focused exclusively on stopping SB 8 lawsuits and required Texas to post information on court websites, the injunction appears aimed at Texas's judiciary. And the district court's conclusion that it was permissible to do so appears to be based on its belief that (1) this is an exceptional case,

and (2) courts have permitted injunctions of judges in other circumstances. But those circumstances are not present here, and the injunction cannot stand.

As explained above, "an injunction against a state court" is "a violation of the whole scheme of our government." *Ex parte Young*, 209 U.S. at 163. Even as it recognized a federal court's power to enjoin state executive officials "from commencing suits" in state courts, this Court cautioned that such authority "does not include the power to restrain a court from acting in any case brought before it." *Id.* There is a difference between enjoining an individual from acting and enjoining a court from adjudicating cases brought before it—a federal court can do the first, but that does not mean it can do the second. *See id.*

The district court wrongly cited *Pulliam* as support for its broad injunction of Texas's judiciary. US.ROA.1801-02. *Pulliam* dealt with whether judicial immunity applied in a section 1983 suit. 466 U.S. at 524-25. Whether the underlying injunction against a state judge was proper was not before the Court. *Id.* at 541-42. And as *Pulliam* itself acknowledged, it is not "proper" to "assume that a state court will not act to prevent a federal constitutional deprivation or that a state judge will be implicated in that deprivation." *Id.* at 541.

The district court also treated the inapplicability of the Anti-Injunction Act, 28 U.S.C. § 2283, as permission for the federal government to enjoin the entire judiciary of Texas. US.ROA.1797. But the cases recognizing the United States' ability to obtain an injunction of some state-court proceedings involve not enjoining a state court, but enjoining a state-court litigant from proceeding in state court. *Leiter Minerals, Inc. v. United States*, 352 U.S. 220 (1957), for example, concerned state-court proceedings when there were competing cases in state and

federal court attempting to resolve a dispute over mineral rights involving the United States. *Id.* at 222. The injunction was directed at the state-court plaintiff, not the state court. *Id.* at 223. This distinction—which tracks traditional limitations on equitable remedies—only highlights how radical a form of relief the United States seeks.

And in *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971), the NLRB was permitted to seek an injunction of state-court proceedings aimed at stopping picketing by a union because the National Labor Relations Act provided an "implied authority of the Board . . . to enjoin state action where its federal power preempts the field." *Id.* at 144. That case, too, involved an "injunction to prevent the Nash-Finch Company . . . from enforcing a state court injunction," not enjoining a state court. *See NLRB v. Nash-Finch Co.*, 320 F. Supp. 858, 859 (D. Neb. 1969), *aff'd*, 434 F.2d 971 (8th Cir. 1970), *rev'd*, 404 U.S. 138.

The United States' claim here is not that federal and state courts will reach conflicting conclusions regarding the United States' property rights. Nor does it concern a field in which Congress has given an agency the authority to preempt entirely. *See supra* III.B. Instead, the United States claims the authority to stop state-court lawsuits that might seek allegedly unconstitutional relief because of an alleged injury to its "sovereign interest" in protecting the rights of its citizens. No such authority exists to restrain an entire judiciary.

2. Enjoining unknown potential future litigants is improper.

The district court also erroneously enjoined unnamed and unknown private parties who were never before the court on the ground that any person who brings suit under SB 8 is "acting as an arm of the state," US.ROA.1802, that filing an SB 8 suit makes them "state actors,

US.ROA.1803, and that they are acting "in active concert" with Texas for purposes of Federal Rule of Civil Procedure 65(d)(2)(C), US.ROA.1804-05. Each conclusion is contrary to precedent.

First, private parties "are plainly not agents of the State" even when they have an interest in defending the constitutionality of state law. *Hollingsworth*, 570 U.S. at 713; *accord Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-81 (1977) (analyzing whether a school board is an "arm of the State"). A private plaintiff bringing an SB 8 suit cannot be Texas's agent because Texas lacks "the right to control the conduct of" that private plaintiff. RESTATEMENT (SECOND) OF AGENCY § 14 (1958). Holding otherwise makes every private plaintiff bringing a state-law claim an arm of the state.

Second, the courts of appeals have routinely held "there is no 'state action' to be found in the mere filing of a private civil tort action in state court." *Henry v. First Nat'l Bank of Clarksdale*, 444 F.2d 1300, 1312 (5th Cir. 1971); *see also Slotnick v. Garfinkle*, 632 F.2d 163, 166 (1st Cir. 1980) (per curiam); *Stevens v. Frick*, 372 F.2d 378, 381 (2d Cir. 1967); *Dist. 28, United Mine Workers of Am., Inc. v. Wellmore Coal Corp.*, 609 F.2d 1083, 1086 (4th Cir. 1979); *Hu v. Huey*, 325 F. App'x 436, 440 (7th Cir. 2009); *Gras*, 415 F. Supp. at 1152 (Friendly, J.).

The district court's reliance on *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), is incorrect, as the Court there explained that generally "the initial decision whether to sue at all" is "without the requisite governmental character to be deemed state action." *Id.* at 627-28; US.ROA.1803. Again, the fact that a State enacts a statutory cause of action that can be heard in its courts does not transform those suits into state action.

Third, for purposes of Rule 65(d)(2), there is no evidence that the unidentified private individuals the district court enjoined are acting in concert with the only named defendant—the State of Texas. Whether a particular individual is "'in active concert or participation' with [the enjoined party] is a decision that may be made only after the person in question is given notice and an opportunity to be heard." *Lake Shore Asset Mgmt. Ltd. v. Commodity Futures Trading Comm'n*, 511 F.3d 762, 767 (7th Cir. 2007) (Easterbrook, J.) (cleaned up) (quoting Fed. R. Civ. P. 65(d)(2)). No such opportunity was offered to the individuals who are potentially subject to contempt proceedings under the district court's injunction.

Courts may not grant an injunction "so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law." *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13 (1945); *see also Scott v. Donald*, 165 U.S. 107, 117 (1897) ("The decree is also objectionable because it enjoins persons not parties to the suit."). As explained by Judge Learned Hand,

> [N]o court can make a decree which will bind any one but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree. . . . It is not vested with sovereign powers to declare conduct unlawful; its jurisdiction is limited to those over whom it gets personal service, and who therefore can have their day in court.

Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 832-33 (2d Cir. 1930); *see also Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, 395 U.S. 100, 110 (1969) ("[O]ne is not bound by a

judgment in personam resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process.").

The district court's injunction is "clearly erroneous," as it purports to enjoin "all persons to whom notice of the order of injunction should come." *Chase Nat'l Bank v. City of Norwalk*, 291 U.S. 431, 436 (1934). The district court cannot "make punishable as a contempt the conduct of persons who act independently and whose rights have not been adjudged according to law." *Id.* at 437 (citing *Alemite Mfg. Corp.*, 42 F.2d 832).

B. No injunction may be broader than the claims that justify it.

1. The district court also erred in creating its universal injunction without applying SB 8's severability clauses. In section 171.212 of the Texas Health and Safety Code, the Texas Legislature explicitly stated that (1) it intended all provisions of chapter 171, in which the heartbeat provisions are located, to be severable, and (2) it would have enacted any and all provisions of chapter 171 regardless of whether any provisions are subsequently determined to be unconstitutional. Section 12 of SB 8 also confirms that each provision of SB 8 is severable. Act of May 13, 2021, 87th Leg., R.S., ch. 62, § 12, 2021 Tex. Sess. Law Serv. 125, 135.

Federal courts are to apply severability clauses in state laws. *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) (per curiam) ("Severability is of course a matter of state law."). Where the legislature "has explicitly provided for severance by including a severability clause in the statute," the Court must presume that the legislature "did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987); *see also*

Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2209 (2020) (plurality op.). As this Court has explained, courts should "enjoin only the unconstitutional applications of a statute while leaving other applications in force, or . . . sever its problematic portions while leaving the remainder intact." *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328-29 (2006) (citation omitted).

Unlike *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), this case does not involve an "integrated" set of health-and-safety standards that make severability difficult. *Id.* at 2319-20. Rather, there are at least multiple lines the district court should have drawn, assuming its merits decision was correct. *First*, it should have severed applications of the law (if any) that interfere with federal programs.

Second, the district court should not have enjoined SB 8 as applied to post-viability abortions. Post-viability abortions are not subject to the undue-burden test, *Casey*, 505 U.S. at 846, so there are no grounds to enjoin SB 8 lawsuits as to them.

Third, the district court should have severed section 171.203, which requires the physician to first determine whether the unborn child has a detectable heartbeat. Texas law already requires the physician to make the heart auscultation audible, Tex. Health & Safety Code § 171.012(a)(4)(D), and there is no allegation or evidence that this requirement is an undue burden on a large fraction of women.

Fourth, as discussed by the intervenors in their concurrently filed brief, there are applications of SB 8 that should have been severed in accordance with the Texas Legislature's intent. US.ROA.853-54. The district court's

decision to enjoin sections 171.201-.212 in their entirety violates this Court's precedent and should be reversed.

2. Any injunction "must of course be limited to the inadequacy that produced the injury in fact." *Lewis v. Casey*, 518 U.S. 343, 357 (1996). If the only harm this Court finds is with respect to the preemption or intergovernmental immunity claims, then the injunction must be limited to suits involving the United States, its agencies, employees, and contractors, as "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Lion Health Servs., Inc. v. Sebelius*, 635 F.3d 693, 703 (5th Cir. 2011) (cleaned up); *see also Missouri v. Jenkins*, 515 U.S. 70, 88, 89 (1995) ("[T]he nature of the ... remedy is to be determined by the nature and scope of the constitutional violation.").

CONCLUSION

In *Whole Woman's Health v. Jackson*, this Court should reverse the district court's order denying the motions to dismiss.

In *United States v. Texas*, this Court vacate the district court's preliminary injunction and reverse the district court's order denying the State's motion to dismiss.

Respectfully submitted.

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