No. 21A85

# In the Supreme Court of the United States

UNITED STATES OF AMERICA,

*Applicant*,

v.

STATE OF TEXAS,

*Respondent*,

ERICK GRAHAM; JEFF TULEY; MISTIE SHARP,

*Intervenor-Respondents*,

## MEMORANDUM IN OPPOSITION TO EMERGENCY APPLICATION TO VACATE FIFTH CIRCUIT'S STAY PENDING APPEAL


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Less than two months ago, this Court held that abortion providers cannot obtain an injunction pending appeal that restrains Texas judges and court clerks from considering lawsuits filed under Senate Bill 8. *See Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021). The Court issued this ruling over the objections of those who insisted that the private civil remedy created by Senate Bill 8 not only violates the abortion right described in *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), but also inhibits judicial review by limiting opportunities for pre-enforcement challenges and deterring abortion providers from performing constitutionally protected abortions. *See Whole Woman's Health*, 141 S. Ct. at 2498–99 (Sotomayor, J., dissenting). Yet the per curiam opinion explained that the "complex and novel antecedent procedural questions" presented by a pre-enforcement challenge to a private civil remedy prevented the abortion providers from "carr[ying] their burden" of making a "strong showing" that they were "likely to succeed on the merits." *Id.* at 2495.

Unwilling to accept this Court's holding in *Whole Woman's Health*, the United States has brought its own lawsuit against Texas seeking the same relief—but against the state as an institution rather than the individual judges and court clerks. The district court granted a preliminary injunction, but the Fifth Circuit promptly and unsurprisingly stayed that relief given this Court's prior decision in *Whole Woman's Health*. The United States now seeks to vacate the stay, asserting that its ability to sue the State itself, rather than the individual judicial officers, makes all the difference. But the United

States' lawsuit does nothing to alleviate the problems that prevented this Court from granting relief in *Whole Woman's Health*—and it presents *additional* jurisdictional and procedural obstacles beyond those that confronted the abortion-provider plaintiffs in the previous go-around.

The ruling in *Whole Woman's Health* did not rest on the sovereign immunity of Texas or its officials, as the United States has asserted throughout this litigation. The phrase "sovereign immunity" is not even mentioned in the per curiam opinion. Instead, the Court's decision in *Whole Woman's Health* rests on the principle that "federal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves,"[1] and that it is not "clear whether, under existing precedent, this Court can issue an injunction against state judges asked to decide a lawsuit."[2]

Each of these holdings from *Whole Woman's Health* is fatal to the United States' efforts to obtain a preliminary injunction. And the United States cannot end-run these holdings of *Whole Woman's Health* by suing the State of Texas rather than the individual judges and court clerks. First, any injunction must enjoin the *enforcement* of Senate Bill 8, not the law itself, and the State of Texas does not "enforce" Senate Bill 8 by allowing its judiciary to adjudicate private civil-enforcement lawsuits brought under the statute. The State of Texas has no more of an "enforcement" role than the United States,

1. *Whole Woman's Health*, 141 S. Ct. at 2495 (citing *California* v. *Texas*, 141 S. Ct. 2104 (2021)).
2. *Id.* (citing *Ex parte Young*, 209 U.S. 123, 163 (1908)).

which allows its courts to hear SB 8 enforcement lawsuits under the diversity jurisdiction. *See* 28 U.S.C. § 1332.[3] More importantly, this Court has already held that a sovereign government is *not* a proper defendant under Article III when its "enforcement" role extends no further than adjudicating lawsuits between private parties brought under the disputed statute. *See Muskrat v. United States*, 219 U.S. 346 (1911); *Hope Clinic v. Ryan*, 249 F.3d 603, 605 (7th Cir. 2001) (en banc) (Easterbrook, J.) ("*Muskrat* . . . held that Article III does not permit the federal judiciary to determine the constitutionality of a statute providing for private litigation, when the federal government (or its agents) are the only adverse parties to the suit."). No different outcome can obtain here.

The second holding of *Whole Woman's Health* is equally fatal to the United States' efforts to obtain a preliminary injunction: That it is not "clear whether, under existing precedent, this Court can issue an injunction against state judges asked to decide a lawsuit." *Whole Woman's Health*, 141 S. Ct. at 2495. The remedy sought by the United States is no different in this regard from the remedy sought by the abortion providers: Each of them wants to restrain state-court judges and court clerks from considering or processing lawsuits that might be filed under SB 8. Yet this Court has already held that the

3. SB 8 enforcement lawsuits may be brought under the federal diversity jurisdiction if: (1) The parties are completely diverse; (2) The amount in controversy exceeds $75,000 (*i.e.*, the defendants have performed or assisted eight or more post-heartbeat abortions); and (3) The plaintiff can plausibly allege injury in fact from the performance of abortions.

law is insufficiently clear to allow an injunction pending appeal (or a preliminary injunction) that includes relief of this sort. *See id.* If the individual judicial officers cannot be enjoined at the preliminary-injunction stage, then the State of Texas cannot be enjoined either. That is because an injunction is an *in personam* remedy that prevents *persons* from taking proscribed actions,[4] and the only individuals in the Texas government who take any action under SB 8 are judicial officers who consider or process private civil-enforcement lawsuits. None of these actions can be lawfully enjoined by a federal court. *See Ex parte Young*, 209 U.S. 123, 163 (1908) ("[T]he right to enjoin an individual, even though a state official, from commencing suits . . . does not include the power to restrain a court from acting in any case brought before it, either of a civil or criminal nature."); *Whole Woman's Health v. Jackson*, 13 F.4th 434, 444 (5th Cir. 2021) ("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."). The United States cannot end-run those limits by suing the State as a nominal defendant while seeking relief that restrains the state's judicial officers.

4. *See Nken v. Holder*, 556 U.S. 418, 428 (2009) ("[A]n injunction is a judicial process or mandate operating *in personam.*" (citation and internal quotation marks omitted)).

So the United States faces the *exact problems* that prevented the abortion providers from obtaining injunctive relief in *Whole Woman's Health*. Those problems have nothing to do with sovereign immunity; they concern the propriety of enjoining state courts from hearing cases that have yet to be filed, and the fact that Article III and principles of equity prevent federal courts from issuing remedies of that sort.

And on top of that, the United States' lawsuit presents even *more* impediments to justiciability than those in *Whole Woman's Health*. Unlike the abortion providers in *Whole Woman's Health*, the United States does not even have a cause of action to sue Texas over SB 8. The United States concedes that there is no statute that authorizes it to sue Texas over SB 8, and its attempt to concoct cause a cause of action from "equity" is specious. The Constitution grants Congress, not the Executive Branch, the power to enforce the Fourteenth Amendment,[5] and Congress has enacted a comprehensive remedial scheme that authorizes various types of lawsuits to enforce the Fourteenth Amendment, yet pointedly does *not* authorize lawsuits by the United States to enforce abortion rights under *Roe* and *Casey*. This congressionally enacted regime forecloses any attempt to divine a cause of action from "equity." *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 74 (1996) ("Where Congress has created a remedial scheme for the enforcement of a

5. *See* U.S. Const. amend. XIV, § 5.

particular federal right, we have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary.").

And even in the absence of this congressional preclusion, the United States would *still* lack a cause of action to sue Texas in equity. The United States invokes *In re Debs*, 158 U.S. 564 (1895), but *Debs* merely allowed the United States to sue to redress a public nuisance in violation of a statutory scheme regulating interstate commerce. *See United States v. Solomon*, 563 F.2d 1121, 1127 (4th Cir. 1977) (requiring the federal government to demonstrate either "a property interest" or "a well-defined statutory interest of the public at large" to sue under *Debs*). Neither *Debs* nor any case in the history of the nation allows the United States to sue to prevent state judges from adjudicating private civil suits under an allegedly unconstitutional state law. The United States is demanding a massive expansion of traditional equitable relief in defiance of *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318–19 (1999), which limits the federal courts' equitable powers to relief that was "traditionally accorded by courts of equity" at the time of the Constitution's ratification. *Id.* at 318–19. Suing in equity to enjoin a court from hearing a case was unheard of in 1789.

So while the United States rails about the supposed constitutional infirmities in SB 8, its own lawsuit is an attempt to eviscerate the constitutional separation of powers. State laws that create private civil remedies have *never* been subject to pre-enforcement challenge in federal district courts, because Congress has not authorized the remedies or causes of action needed for

such litigation. When these types of laws raise constitutional concerns (as with the tort of defamation), the exclusive means of litigating the issue is to engage in the prohibited conduct, assert the constitutional claims defensively when sued, and appeal to this Court if the state judiciary rejects the defense. *See, e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 958 (8th Cir. 2015). Federal courts must presume that state courts will respect federal rights when deciding cases, *see Middlesex County Ethics Commission v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982) ("Minimal respect for the state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights."), and this Court has no basis in fact or law to presume that the Texas courts would reject valid constitutional defenses asserted in SB 8 litigation. The United States does not even assert otherwise; it just complains that SB 8 deters abortion providers from defying the law and inviting this litigation. But that objection is misguided and immaterial. It is common that the risk of losing a constitutional defense will deter a party from engaging in protected conduct—think of the Christian wedding vendors who are facing threats of private lawsuits if they decline to participate in same-sex weddings—but the deterrence comes from the uncertainty on whether the courts will ultimately accept their constitutional defense. *See Arlene's Flowers, Inc. v. Washington*, 141 S. Ct. 2884 (2021) (denying certiorari). What is deterring abortion providers here is not the procedural structure of SB 8 or its threatened penalties, but the uncertain status of the right to abor-

tion given the grant of certiorari in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392. Few if any rational abortion providers will risk violating SB 8 when this Court is considering whether to overrule *Roe* and *Casey*. *That* is what is inducing Texas abortion providers to comply with SB 8.

Finally, the United States cannot establish the remaining requirements for an order vacating the stay of the preliminary injunction. The United States itself suffers no cognizable harm from SB 8, and abortion providers (and the women they represent) have an adequate remedy at law through their ability to assert a constitutional defense in litigation under SB 8 and appeal any adverse ruling by state courts to this Court. At a minimum, any harms they suffer are far outweighed by the harms to Texas from this unprecedented and outrageous injunction, which subjects state judicial officials to the penalty of contempt merely for neutrally adjudicating claims and defenses under SB 8.

## STATEMENT OF CASE

The statement of the case in Texas's brief accurately describes the background of this litigation, and the intervenors respectfully incorporate that discussion by reference. The intervenors add the following details relevant to their involvement in the case.

The United States' motion for preliminary injunction asked the district court to restrain "private individuals who attempt to initiate enforcement

proceedings under S.B. 8."[6] Because this threatened to enjoin private individuals from filing civil-enforcement lawsuits under SB 8, Erick Graham, Jeff Tuley, and Mistie Sharp (the intervenors) moved to intervene to protect their state-law right to sue individuals and entities that perform or assist post-heartbeat abortions. The district court granted their motion to intervene on September 28, 2021.

Each of the intervenors has stated that they intend to bring civil-enforcement lawsuits *only* in response to violations of SB 8 that clearly fall outside the constitutional protections of *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 874 (1992). Erick Graham, for example, intends to sue only employers and insurance companies that provide or arrange for coverage of abortions that violate Senate Bill 8, as there is no constitutional right to pay for another person's abortion.[7] Mr. Graham also intends to sue the city of Austin if it uses taxpayer money to subsidize the provision of post-heartbeat abortions performed in Austin, as it was doing before the Heartbeat Act took effect.[8] Jeff Tuley intends to sue only individuals or entities that perform or assist abortions that are clearly unprotected under existing Supreme Court doctrine, which in-

6. *See* Complaint, *United States v. Texas*, No. 1:21-cv-00796-RP (W.D. Tex.), ECF No. 1, at 26.

7. *See* Declaration of Erick Graham, *United States v. Texas*, No. 1:21-cv-00796-RP (W.D. Tex.), ECF No. 28-1 at ¶ 9.

8. *See id.* at ¶ 9; *see also Zimmerman v. City of Austin*, 620 S.W.3d 473, 482 (Tex. App. — El Paso 2021, pet. filed).

clude: (a) non-physician abortions; (b) self-administered abortions; and (c) post-viability abortions that are not necessary to preserve the life or health on the mother.[9] And Mistie Sharp intends to sue only abortion funds who pay for post-heartbeat abortions performed in Texas.[10]

The intervenors argued, among other things, that the district court must enforce SB 8's severability requirements, which instruct courts to sever and preserve all constitutional provisions—and all constitutional applications—of SB 8. *See* Senate Bill 8, 87th Leg., §§ 3, 5, 10; *see also* Tex. Health & Safety Code § 171.212(a) ("Every provision, section, subsection, sentence, clause, phrase, or word in this chapter, and every application of the provisions in this chapter, are severable from each other."). The intervenors also reiterated that they intend to bring civil-enforcement lawsuits only in response to abortions that are *not* protected under *Roe* and *Casey*, and they argued that any preliminary injunction must preserve their right to bring such civil-enforcement lawsuits. But the district court rejected these arguments and enjoined the Texas judiciary from considering *any* lawsuits brought under the statute—and it held that it could defy the severability requirements in Texas's abortion statutes because this Court had done so in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2319 (2016). App. 100a–101a; App. 109a–110a & n.95.

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9. *See* Declaration of Jeff Tuley, *United States v. Texas*, No. 1:21-cv-00796-RP (W.D. Tex.), ECF No. 28-2 at ¶ 9.
10. *See* Declaration of Mistie Sharp, *United States v. Texas*, No. 1:21-cv-00796-RP (W.D. Tex.), ECF No. 28-3 at ¶ 9.

After the district court issued its preliminary injunction, the intervenors filed a timely notice of appeal, along with the State of Texas.

## SUMMARY OF ARGUMENT

A preliminary injunction is an "extraordinary and drastic remedy," which may not be granted "'unless the movant, *by a clear showing*, carries the burden of persuasion.'" *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis in original) (citation omitted); *Ex parte Young*, 209 U.S. 123, 166 (1908) ("[N]o injunction ought to be granted unless in a case reasonably free from doubt."); *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021) ("To prevail in an application for a stay or an injunction, an applicant must carry the burden of making a 'strong showing' that it is 'likely to succeed on the merits,' that it will be 'irreparably injured absent a stay,' that the balance of the equities favors it, and that a stay is consistent with the public interest." (citations omitted)).

There are five separate and independent reasons why the United States cannot possibly obtain a preliminary injunction under the "clear showing" standard. First, the United States cannot overcome the holdings of *Whole Woman's Health v. Jackson*. Second, the United States has come nowhere close to a "clear showing" that it has a cause of action to sue Texas over Senate Bill 8. Third, the federal courts have no authority to enjoin state judges (or the state judiciary) from hearing cases between private parties, as there is nothing unlawful about a court's *hearing* a lawsuit, regardless of whether the lawsuit is filed under an unconstitutional statute. Fourth, the United States

cannot obtain a preliminary injunction that enjoins the enforcement of SB 8 in its entirety when the statute contains an emphatic severability clause and it is undisputed that at least some civil-enforcement lawsuits authorized by SB 8 are constitutional under the precedents of this Court. Fifth, a preliminary injunction that restrains Texas from enforcing SB 8 will do nothing to eliminate the *in terrorem* effects of SB 8, as abortion providers will remain subject to lawsuits in federal court under the diversity jurisdiction, and they will remain subject to future state-court lawsuits if the injunction is vacated or if *Roe* or *Casey* is overruled.

Neither the United States nor the district court has even asserted that the United States made the "clear showing" of likely success on the merits required by the precedent of this Court. That alone warrants the stay of the preliminary injunction issued by the court of appeals, and it defeats any attempt to show that the Fifth Circuit was "demonstrably wrong" in issuing the stay.[11] Instead, the United States has chosen to ignore the preliminary-injunction standard in the hope that this Court will conduct a *de novo* review

11. *See Western Airlines, Inc. v. International Brotherhood of Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers) ("'[A] Circuit Justice has jurisdiction to vacate a stay where it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed here upon final disposition in the court of appeals, may be seriously and irreparably injured by the stay, and the Circuit Justice is of the opinion that the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay.'" (citation omitted)); *Coleman v. Paccar, Inc.,* 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers) (same).

of the parties' arguments surrounding the existence of a cause of action and the other legal issues in this case. If the United States is hoping this Court will dilute the preliminary-injunction standard because this is an abortion case, the Court's recent pronouncement in *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494 (2021), should put those aspirations to rest. *See id.* at 2495 (requiring a "strong showing" of likely success on the merits). The Court should deny the motion and make clear that the United States is subject to the same preliminary-injunction standard as everyone else.

## ARGUMENT

### I. The Obstacles To Injunctive Relief In Whole Woman's Health v. Jackson Are Equally Applicable To This Lawsuit And Equally Insurmountable

The Fifth Circuit stayed the preliminary injunction "for the reasons stated in *Whole Woman's Health v. Jackson*, 13 F.4th 434 (5th Cir. 2021), and *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494 (2021)." App. 1a.[12] The Fifth Circuit's holding is unassailable. Federal courts have no authority to enjoin state judges from considering lawsuits between private parties, both because Article III prohibits these lawsuits and because there is no cause of action in law or equity that authorizes such suits. And *Whole Woman's Health* specifically holds that the novelty of this remedy precludes litigants from obtaining that relief in a preliminary injunction or an injunction pending appeal. *See Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021) ("Nor is it

12. "App." citations refer to the appendix to the United States' motion.

clear whether, under existing precedent, this Court can issue an injunction against state judges asked to decide a lawsuit under Texas's law."). The holding of *Whole Woman's Health* is equally applicable to this lawsuit brought by the United States—as the United States cannot make a "strong showing" that the federal courts can enjoin Texas's judiciary from considering lawsuits filed under SB 8.

The United States tries to get around *Whole Woman's Health* by pretending that the only reason the Court denied relief in that case was because of sovereign immunity, and that the holding of *Whole Woman's Health* is therefore inapplicable in a lawsuit brought by the United States against Texas. *See* Mot. to Vacate Stay at 18 ("The concerns raised in *Whole Woman's Health* are wholly inapplicable in this suit by the United States against Texas itself. 'In ratifying the Constitution, the States consented to suits brought by * * * the Federal Government.' *Alden v. Maine*, 527 U.S. 706, 755 (1999)."). That is nonsense. The per curiam opinion does not even mention sovereign immunity. Instead, it denied an injunction against the judicial defendants for two (and only two) reasons. First, it held that "federal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves." *Whole Woman's Health*, 141 S. Ct. at 2495 (citing *California* v. *Texas*, 141 S. Ct. 2104 (2021)). Second, it held that it is not "clear whether, under existing precedent, this Court can issue an injunction against state judges asked to decide a lawsuit." *Id.* (citing *Ex parte Young*, 209 U.S. 123, 163 (1908)). Each of these holdings squarely precludes the preliminary injunction that the

United States is demanding, as the Fifth Circuit correctly determined in its decision staying the injunction. App. 1a.

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

The first problem for the United States is that federal courts may enjoin only "individuals tasked with enforcing laws, not the laws themselves." *Whole Woman's Health*, 141 S. Ct. at 2495. And the State of Texas is not "tasked with enforcing" SB 8, because the statute specifically prohibits the state and its officers from enforcing it. *See* Tex. Health & Safety Code § 171.207 ("No enforcement of this subchapter . . . may be taken or threatened by this state, a political subdivision, a district or county attorney, or an executive or administrative officer or employee of this state or a political subdivision against any person, except as provided in Section 171.208."). All Texas is doing is allowing its courts to entertain lawsuits between private parties under SB 8, in the same way that the United States government is allowing its courts to hear SB 8 lawsuits under the diversity jurisdiction.[13] And a sovereign government cannot be sued under Article III for adjudicating lawsuits between private parties. *See Muskrat v. United States*, 219 U.S. 346 (1911); *Hope Clinic v. Ryan*, 249 F.3d 603, 605 (7th Cir. 2001) (en banc) (Easterbrook, J.) ("*Muskrat* . . . held that Article III does not permit the federal judiciary to determine the constitutionality of a statute providing for pri-

13. *See* note 3 and accompanying text.

vate litigation, when the federal government (or its agents) are the only adverse parties to the suit.").

The United States' efforts to distinguish *Muskrat* go nowhere. It claims that *Muskrat* involved a request for an "advisory opinion,"[14] but the *reason* that the *Muskrat* Court characterized the lawsuit this way—even though the plaintiff in that case was plainly injured and seeking relief that would redress his injury—was that the federal government had *no cognizable interest in defending* a challenge to a federal statute *enforced solely by private parties*, even though the lawsuits were being *adjudicated* in federal courts. That is exactly the situation here. Texas has no enforcement role apart from allowing its judiciary to entertain SB 8 lawsuits between private parties. A sovereign government cannot be sued in that situation, because there is no Article III case or controversy between the plaintiff and the defendant. It is no different from an abortion provider suing the United States for allowing its courts to hear SB 8 lawsuits under the diversity jurisdiction. Any lawsuit of that sort would be dismissed immediately under *Muskrat*, independent of any sovereign-immunity obstacles.

The United States' next move is to claim that SB 8 plaintiffs aren't asserting "private" rights in these enforcement lawsuits, but are rather suing to address "an alleged *public* harm." Mot. to Vacate Stay at 29. That does nothing to get around *Muskrat*. The fact that Texas allows private parties to sue to

14. Mot. to Vacate Stay at 29.

enforce a state law that goes beyond their own private rights does *not* mean that Texas itself has a cognizable interest in defending a challenge to the law when it does not itself enforce it. And the United States does not try to characterize the private parties as *agents* of the State—a claim that would be demonstrably untenable in light of *Hollingsworth v. Perry*, 570 U.S. 693 (2013).

### B. The Federal Judiciary May Not Enjoin State Judges From Hearing Cases

The second obstacle from *Whole Woman's Health* is equally problematic, and it forecloses any possibility of a preliminary injunction: That it is not "clear whether, under existing precedent, this Court can issue an injunction against state judges asked to decide a lawsuit." *Whole Woman's Health*, 141 S. Ct. at 2495. The United States thinks it can escape this holding by seeking to enjoin the State as an institution rather than the individual judicial officers. But this is sophistry. A "State" is the sum of its parts, and if no part of the State can properly be enjoined then the State itself can't be either. *Whole Woman's Health* specifically holds that the law is insufficiently clear to allow an injunction that would restrain a state judge from deciding a lawsuit. The United States cannot circumvent this holding by suing the state and seeking an injunction that imposes identical restraints on the state judiciary.

Article III does not allow litigants to challenge the constitutionality of a statute by suing judges who might hear cases filed under the disputed law, because a judge who acts in an adjudicatory capacity is a neutral arbiter of the law and has no personal stake in the controversy. *See Whole Woman's Health*

*v. Jackson*, 13 F.4th 434, 444 (5th Cir. 2021) ("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."). And a federal court cannot enjoin a judge from hearing a lawsuit, even if the lawsuit is filed under an unconstitutional statute, because a judge does nothing unlawful by *hearing* a lawsuit that a party files in his court. All of this remains the case regardless of whether the judge or the State is the named defendant. Federal courts simply cannot enjoin state judges (or the state judiciary) from hearing cases. And *Whole Woman's Health* specifically holds that injunction pending appeal that seeks to restrain the state judiciary in this manner cannot be granted, because it is not "clear" that the law allows this type of relief. *See Whole Woman's Health*, 141 S. Ct. at 2495. That holding sinks the United States' request for a preliminary injunction.

## II. The United States Failed To Make A "Clear Showing" Of A Cause Of Action

The United States cannot bring this lawsuit unless it identifies a cause of action that authorizes it to sue Texas over SB 8. *See Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979) ("*cause of action* is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court"); David P. Currie, *Misunderstanding Standing*, 1981 Sup. Ct. Rev. 41, 42 ("No one can sue . . . unless au-

thorized by law to do so"). And the United States concedes that there is no statute that authorizes it to sue a state over an allegedly unconstitutional (or allegedly preempted) abortion statute. But the district court decided to invent a cause of action that would allow the United States' claims to proceed, by claiming that "traditional principles of equity" allow the United States to sue to enforce the Fourteenth Amendment despite the absence of a statutory cause of action. App. 39a–40a ("No cause of action created by Congress is necessary to sustain the United States' action; rather, 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."); App. 40a ("[T]he United States' cause of action is a creature of equity"). The district court's holding is wrong for many reasons.

First, the Fourteenth Amendment empowers Congress to "enforce" its requirements "by appropriate legislation." U.S. Const. amend. XIV, § 5. That means it is up to Congress to decide whether and to what extent lawsuits should be authorized against individuals and entities that violate the Fourteenth Amendment—and neither the executive nor federal judiciary can create causes of action to enforce the Fourteenth Amendment when Congress has declined to do so. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014) ("[A] court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied"). The notion that "principles of equity" allow the executive branch to unilaterally sue entities that violate the Fourteenth Amendment is incompatible

with the Amendment's decision to vest the enforcement authority in Congress. *See United States v. City of Philadelphia*, 644 F.2d 187, 200 (3d Cir. 1980) (refusing to recognize an implied right of action for the federal government to sue over Fourteenth Amendment violations because "[s]ection 5 of the fourteenth amendment confers on Congress, not on the Executive or the Judiciary, the 'power to enforce, by appropriate legislation, the provisions of this article.'").

Second, because Congress holds the constitutional authority to enforce the Fourteenth Amendment, it has on occasion created causes of action that authorize the executive to sue state entities that violate the Fourteenth Amendment. *See* 42 U.S.C. § 2000b(a) (authorizing the attorney general to sue state entities that enforce racially segregated public facilities); 42 U.S.C. § 2000c-6(a) (authorizing the attorney general to sue state entities that maintain racially segregated schools). But Congress has conferred this power sparingly—and when it has conferred this power it carefully limits the circumstances in which a federal enforcement lawsuit may be brought. Consider 42 U.S.C. § 2000b(a), which authorizes the United States to sue state entities that enforce racially segregated public facilities:

> Whenever the Attorney General receives a complaint in writing signed by an individual to the effect that he is being deprived of or threatened with the loss of his right to the equal protection of the laws, on account of his race, color, religion, or national origin, by being denied equal utilization of any public facility which is owned, operated, or managed by or on behalf of any State or subdivision thereof, other than a public school or public

> college as defined in section 2000c of this title, and the Attorney General believes the complaint is meritorious and certifies that the signer or signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly progress of desegregation in public facilities, the Attorney General is authorized to institute for or in the name of the United States a civil action in any appropriate district court of the United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section.

42 U.S.C. § 2000b(a). Notice all the preconditions that must be satisfied before the Attorney General can sue under section 2000b(a): (1) The Attorney General must "receive a complaint in writing" from the individual who is suffering a violation of his Fourteenth Amendment rights; (2) The complaint must describe a specific type of Fourteenth Amendment violation, namely a deprivation or threatened deprivation of one's right of equal access to a "public facility" on account of "race, color, religion, or national origin"; (3) The Attorney General must conclude that the complaint is "meritorious"; (4) The Attorney General must "certify" that the complainant is "unable" to sue for relief on his own; and (5) The Attorney General must "certify" that a lawsuit brought by the United States "will materially further the orderly progress of desegregation in public facilities." *Id.* Unless all five of these criteria are satisfied, the Attorney General cannot sue to enforce the Fourteenth Amendment under 42 U.S.C. § 2000b(a). 42 U.S.C. § 2000c-6(a) establishes similar preconditions for lawsuits brought by the United States to desegregate public schools. *See* 42 U.S.C. § 2000c-6(a).

These congressional enactments foreclose any possibility of an implied cause of action to sue a state over an alleged Fourteenth Amendment violation. Congress has specifically addressed the circumstances in which the Attorney General may sue in response to violations of the Fourteenth Amendment—and it has carefully limited the scope of these causes of action in a manner that precludes the Attorney General from suing states over other alleged violations. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 74 (1996) ("Where Congress has created a remedial scheme for the enforcement of a particular federal right, we have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary."); *Hernandez v. Mesa*, 140 S. Ct. 735, 747 (2020) (refusing to infer a cause of action for aliens abroad to sue for alleged violations of their constitutional rights given that they were expressly excluded section 1983's cause of action, because "it would be anomalous to impute a judicially implied cause of action beyond the bounds Congress has delineated for a comparable express cause of action." (cleaned up)).

The district court acknowledged these congressional enactments but insisted that they could not reflect a congressional intention to foreclose an implied cause of action to enforce the right to abortion, because the abortion right did not exist when Congress enacted those statutes. App. 53a. That is non sequitur. The problem for the district court (and the United States) is that the text of the Fourteenth Amendment empowers *Congress* to enforce its provisions, and Congress has specifically and carefully addressed the precise

circumstances in which the executive may sue to enforce the Fourteenth Amendment. By specifying that the executive may sue to enforce the Fourteenth Amendment in the limited circumstances provided in sections 2000b(a) or 42 U.S.C. § 2000c-6(a), and by failing to authorize the executive to enforce the Fourteenth Amendment outside those situations, Congress has defined by statute the preconditions that *must* be met before the executive can sue over an alleged Fourteenth Amendment violation. It would turn these congressional enactments on their head to recognize an "implied" cause of action to enforce the Fourteenth Amendment outside these carefully defined circumstances. Whether Congress was consciously aware of the right to abortion when it enacted sections 2000b(a) and 42 U.S.C. § 2000c-6(a) is irrelevant. What matters is that Congress has defined the preconditions that must be satisfied before the United States can sue to enforce the Fourteenth Amendment, and the judiciary cannot recognize or invent an "implied" right of action that allows the executive to circumvent these statutory prerequisites to suit.

Third, the district court's attempt to derive its cause of action from "traditional principles of equity" flouts the holding of *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), which forbids courts to recognize "equitable" remedies apart from those that existed when the original Judiciary Act was enacted in 1789. *See id.* at 318 ("[T]he equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Con-

stitution and the enactment of the original Judiciary Act."). There is no historical pedigree for an "equitable" cause of action that would allow the United States government to sue a state to enforce the constitutional rights of its citizenry—and the district court cites no example of any such lawsuit that has ever occurred. Instead, *City of Philadelphia* empathically rejected the notion that the United States may sue a state for violating the Fourteenth Amendment, which squelches any possibility of a "traditional" equitable cause of action that allows the federal government to sue states for violating constitutional rights. *See City of Philadelphia*, 644 F.2d at 200. Of course, there *is* a traditional equitable cause of action that allows *private individuals* to sue *government officers* that violate their constitutional rights,[15] as the district court observed,[16] but that is a far cry from a cause of action that would allow the *United States* to sue a *state* that allows its judiciary to hear lawsuits filed under an allegedly unconstitutional statute. *Grupo Mexicano* does not permit the district court to derive this cause of action from the traditional equitable cause of action that allows private individuals to seek injunctive relief against individual government officers. *See Grupo Mexicano*, 527 U.S. at 319 (1999)

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15. *See, e.g.*, *Ex parte Young*, 209 U.S. 123, 155–56 (1908); *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 326 (2015) ("And, as we have long recognized, if an *individual* claims federal law immunizes him from state regulation, the court may issue an injunction upon finding the state regulatory actions preempted." (emphasis added) (citing *Ex parte Young*, 209 U.S. 123, 155–156 (1908)); *see also* John Harrison, *Ex Parte Young*, 60 Stan. L. Rev. 989, 989 (2008).

16. App. 751.

(refusing to recognize an equitable remedy that would allow pre-judgment creditors to restrain a debtor's assets, because this relief was traditionally available *only* to "creditor[s] who had already obtained a judgment establishing the debt.").

The district court tried to get around *Grupo Mexicano* with the following cryptic passage:

> *Grupo Mexicano* at most stands for the proposition that federal courts have jurisdiction over suits in equity, in which the broad equitable remedies that predate the Constitution remain available. The formal source of that jurisdiction is codified in the Judiciary Act of 1789, as discussed in *Grupo Mexicano*. However, the principle itself is broader and is not defined by that Act. Indeed, by the time he returned to the question in *Armstrong*, Justice Scalia—the author of *Grupo Mexicano*—had dispensed with any need to locate this power in the Judiciary Act. Nowhere in the latter case did he cite to the Judiciary Act. Rather, he wrote of general equitable powers "tracing back to England," translating to the "judge-made remedy" in the federal courts. *Armstrong*, 575 U.S. at 327. It is the essential nature of equity that it is not subject to strict limitations, unless and until Congress acts directly to restrict it.

App. 41a. This passage appears to be saying that Justice Scalia walked back the holding of *Grupo Mexicano* in *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320 (2015), because *Armstrong* observed that the traditional right of *private individuals* to sue to enjoin the unconstitutional actions of state and federal officers "reflects a long history of judicial review of illegal executive action, tracing back to England." *Id.* at 327. But that statement is entirely consistent with *Grupo Mexicano*, as the fact that these traditional rights of ac-

tion traced back to England means that those equitable remedies existed in 1789 and were therefore incorporated in the original Judiciary Act. More importantly, the district court's claim that equity "is not subject to strict limitations"[17] is simply false. Equity *is* subject to limitations imposed by historical practice,[18] and there is no historical support for an equitable cause of action that allows the United States to sue a state for violating the constitutional rights of its citizens. No is there any historical support for a suit in equity to enjoin a judge (or the judiciary) from hearing a case.

The United States, for its part, claims that its proposed cause of action is entirely consistent with *Grupo Mexicano*, and insists that it is seeking nothing more than "an injunction against the enforcement of an unconstitutional statute," which "falls squarely within the history and tradition of courts of equity." Mot. to Vacate Stay at 27. But a litigant cannot evade the holding of *Grupo Mexicano* by defining its cause of action at this level of generality. The very issue in *Grupo Mexicano* was whether a litigant could take a form of equitable relief that traditionally existed (an injunction for a *post-judgment* creditor

17. App. 41a.

18. *See Grupo Mexicano*, 527 U.S. at 318–19; *Armstrong*, 575 U.S. at 327; *Heine v. Board of Levee Commissioners*, 86 U.S. 655, 658 (1873) (rejecting the notion that a court of equity may "depart from all precedent and assume an unregulated power of administering abstract justice at the expense of well-settled principles"); Samuel L. Bray, *The Supreme Court and the New Equity*, 68 Vand. L. Rev. 997, 1041 (2019) ("[I]t has long been a commonplace that equitable discretion is bounded. Even in equity, Chief Judge Cardozo said, 'there are signposts for the traveler.'").

to restrain a debtor's assets) and to extend it in a historically novel way (to *pre-judgment* creditors). The Court answered no. *See Grupo Mexicano*, 527 U.S. at 318–33. So the fact that there is historical precedent for injunctions sought by *private parties* against *state officers* who violate their rights does nothing to support an injunction sought by the *United States* against a *state* for violating the rights of its citizens, and it does nothing to support an injunction to restrain the state judiciary from adjudicating a category of cases.

Fourth, the notion of an implied cause of action to enforce the Fourteenth Amendment was emphatically rejected in *United States v. City of Philadelphia*, 644 F.2d 187, 201 (3d Cir. 1980) ("[T]he fourteenth amendment does not implicitly authorize the United States to sue to enjoin violations of its substantive prohibitions."). The district court did not dispute the result in *City of Philadelphia*, but it thought it could carve a one-off exception to *City of Philadelphia*'s holding because abortion providers have been unable to bring pre-enforcement challenges to Texas's abortion statute under 42 U.S.C. § 1983. App. 54a ("[I]t is the deliberate action by the State to foreclose all private remedies that separates this case from *City of Philadelphia*."). The United States makes the same argument. *See* Mot. to Vacate Stay at 27–28. But the district court has no authority to patch up these alleged holes in 42 U.S.C. § 1983 by allowing the United States to sue Texas over its alleged Fourteenth Amendment violation. If a state enacts an abortion restriction that is not subject to pre-enforcement review under 42 U.S.C. § 1983, then the solution is for the executive to ask Congress to amend section 1983 or

create a new cause of action that would allow the United States (or some other plaintiff) to obtain pre-enforcement relief against SB 8. It is not to ask the judiciary to invent a new cause of action that "fixes" these perceived shortcomings with 42 U.S.C. § 1983. This Court no longer allows the federal judiciary to invent causes of action that Congress has not provided. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856 (2017) ("If the statute does not itself so provide, a private cause of action will not be created through judicial mandate."); *Alexander v. Sandoval*, 532 U.S. 275, 286–287 (2001) ("Without [statutory intent], a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute."); *id.* at 287 ("Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals." (citation and internal quotation marks omitted)). The district court's opinion and the United States' brief do not even cite *Alexander v. Sandoval*, and they make no attempt to explain how the judiciary can create recognize an "implied" right of action when this Court has been saying for decades that federal courts must stop inferring new causes of action from statutes or constitutional provisions.

It is also entirely commonplace for laws to "escape" pre-enforcement review under 42 U.S.C. § 1983. A state's defamation laws, for example, are enforced exclusively through private civil lawsuits, which means that there is no way for a publisher to sue the state or its officers under 42 U.S.C. § 1983 if it believes that the defamation laws violate the First Amendment. *See New York*

*Times Co. v. Sullivan*, 376 U.S. 254 (1964). Many other state laws are enforced solely through private civil lawsuits, and these statutes are likewise immune from pre-enforcement challenge. *See, e.g.*, *Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 958 (8th Cir. 2015); Eugene Volokh, *Challenging Unconstitutional Civil Liability Schemes, as to Abortion, Speech, Guns, Etc.*, Reason: Volokh Conspiracy (September 3, 2021, 2:31 P.M.), https://bit.ly/3iJiS5D. The United States' theory would allow the executive to sue a state whenever it enacts a law or establishes a common-law rule that is enforced through private litigation, an astonishing result. Does the United States believe that the federal government could have sued Alabama (or any other state) over its defamation laws before *New York Times v. Sullivan*?

Finally, the United States cites no case from any court that has allowed the federal government to sue a state in equity over an alleged violation of the Fourteenth Amendment. Nor can the United States cite any case that allows a suit in equity to restrain a judge (or a state's judiciary) from adjudicating a lawsuit.

This is more than enough to show that the United States failed to make a "clear showing" of a cause of action that would allow it to sue Texas over its alleged violations of the Fourteenth Amendment. The novelty of the United States' proposed cause of action and remedy is reason alone to reject it at the preliminary-injunction stage.

* * *

The United States also complains that that SB 8 is partially preempted by federal law. Mot. to Vacate Stay at 15–17. But these arguments cannot be entertained unless a cause of action authorizes the United States to sue Texas over this supposedly preempted statute. And the United States cannot derive such a cause of action from any statute or constitutional provision.

This Court has already rejected the notion that the Supremacy Clause can provide an implied right of action to sue over allegedly preempted laws. *See Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 326–27 (2015). And none of the statutes or regulations that allegedly preempt SB 8 purport to establish a cause of action that would allow the United States to sue a state that enacts or enforces a conflicting law. *See Alexander*, 532 U.S. at 287 (prohibiting federal courts from "[r]aising up causes of action where a statute has not created them"). So the United States has nothing from which it can derive as a cause of action, as neither the relevant statutes nor the relevant constitutional provision purports to authorize lawsuits against states that enact or enforce allegedly preempted laws.

The United States tries to get around this problem by claiming that it can sue a state or anyone else for equitable relief whenever it does so to protect "sovereign interests" (whatever that means)—and that it can bring such lawsuits regardless of whether the underlying law establishes a cause of action. *See* Mot. to Vacate Stay at 20 (Pl.'s Br., ECF No. 8 at 22 ("The government also has authority to challenge S.B. 8 because the law's violation of the Fourteenth Amendment and the Supremacy Clause injures the United

States' sovereign interests."). The United States begins by observing that the Supreme Court has occasionally allowed the United States to seek equitable relief to vindicate "various sovereign interests," even in the absence of a statutory cause of action. *See id.* at 21 (listing the "sovereign interests" at issue in those cases). It then infers from those cases that the federal government may sue and seek equitable relief whenever it purports to be vindicating *any* "sovereign interest." *See id.* at 22–24. But that is a non sequitur. That the Supreme Court has allowed the United States to sue to vindicate *some* sovereign interests does not mean that the United States can seek equitable relief whenever it asserts that *any* "sovereign interest" is at stake. More importantly, the United States' position would produce a radical expansion of implied rights of action, because it will always be possible for the executive branch to assert a "sovereign interest" of some sort when it wants to sue a state (or an individual) for engaging in conduct that it dislikes. And there will always some "sovereign interest" at stake when the executive asserts a preemption claim against a state or its officials. *See id.* at 22 ("The United States has a sovereign interest in ensuring the supremacy of federal law."). The United States' position will create an implied cause of action in *any* situation in which the executive alleges that a state law or policy is preempted by federal law—an outcome that turns *Armstrong* on its head and defies this Court's warnings against the creation of new implied rights of action.

## III. A Federal Court Cannot Enjoin A State's Judiciary From Adjudicating Lawsuits Between Private Parties

The district court enjoined the Texas judiciary from even *considering* lawsuits that might be filed under SB 8. App. 110a. There is no authority for a federal court to issue an injunction of that sort. An injunction may be used only to restrain unlawful activity, and a state court does nothing unlawful or constitutional by presiding over a lawsuit between private parties—even when the lawsuit is based on a patently unconstitutional statute. A state court does not violate federal law unless and until it enters a *ruling* that violates someone's federally protected rights, and federal courts must presume that state courts will respect federal rights when deciding cases. *See Steffel v. Thompson*, 415 U.S. 452, 460–61 (1974) ("State courts have the solemn responsibility, equally with the federal courts 'to guard, enforce, and protect every right granted or secured by the constitution of the United States. . . .'" (citation omitted); *Middlesex County Ethics Commission v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982) ("Minimal respect for the state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights.").

Neither the district court nor the United States has cited any case in which a federal court enjoined a state's judiciary from considering a lawsuit that has yet to be filed in its courts, and to our knowledge no such injunction has ever been issued in the 245-year history of the United States. The district court's injunction also flouts *Ex parte Young*, 209 U.S. 123 (1908), which de-

clares that "an injunction against a state court would be a violation of the whole scheme of our Government." *Id.* at 163; *see also Whole Woman's Health v. Jackson*, 13 F.4th 434, 443 (5th Cir. 2021). There certainly has not been a "clear showing" that an injunction of this type is permissible.

## IV. The District Court's Refusal To Enforce The Severability And Saving-Construction Requirements In SB 8 Is Indefensible

Many of the civil-enforcement lawsuits authorized by SB 8 are undeniably constitutional under existing Supreme Court precedent. These include:

> Lawsuits brought against those who perform (or assist) non-physician abortions;[19]
>
> Lawsuits brought against those who perform (or assist) post-viability abortions that are not necessary to save the life or health of the mother;[20]
>
> Lawsuits brought against those who use taxpayer money to pay for post-heartbeat abortions;[21]
>
> Lawsuits brought against those who covertly slip abortion drugs into a pregnant woman's food or drink.[22]

And each of the intervenors has stated that they intend to bring civil-enforcement lawsuits *only* in response to violations of SB 8 that clearly fall

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19. *See Roe v. Wade*, 410 U.S. 113, 165 (1973); *Connecticut v. Menillo*, 423 U.S. 9, 9–10 (1975); *Mazurek v. Armstrong*, 520 U.S. 968, 973 (1997).
20. *See Roe*, 410 U.S. at 164–65;
21. *See Harris v. McRae*, 448 U.S. 297 (1980).
22. *See* Kristine Phillips, *A Doctor Laced His Ex-Girlfriend's Tea With Abortion Pills and Got Three Years in Prison*, Wash. Post (May 19, 2018), https://wapo.st/30NYQRp.

outside the constitutional protections of *Roe* and *Casey*. *See* notes 7–10 and accompanying text. Yet the district court's preliminary injunction blocks the Texas judiciary from entertaining *any* civil-enforcement lawsuits filed under SB 8—even in situations in which the civil-enforcement lawsuit is undeniably constitutional and consistent with federal law. And the United States is demanding that this Court reinstate that grossly overbroad injunction.

The district court has no authority to enjoin Texas from enforcing the indisputably constitutional applications of SB 8. *See Alabama State Federation of Labor, Local Union No. 103 v. McAdory*, 325 U.S. 450, 465 (1945) ("When a statute is assailed as unconstitutional we are bound to assume the existence of any state of facts which would sustain the statute in whole or in part."); *Connecticut v. Menillo*, 423 U.S. 9, 9–10 (1975) (allowing Connecticut to enforce its pre-*Roe* criminal abortion statutes against non-physician abortions, and rejecting the Connecticut Supreme Court's argument that *Roe* had rendered those statutes "null and void, and thus incapable of constitutional application even to someone not medically qualified to perform an abortion"); *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 646 (2012) (Ginsburg, J., concurring in part and dissenting in part) ("For when a court confronts an unconstitutional statute, its endeavor must be to conserve, not destroy, the legislature's dominant objective."). And that is especially true when SB 8 contains emphatic severability and saving-construction requirements that compel reviewing courts to preserve every constitutional application of the law. *See* Senate Bill 8, 87th Leg., §§ 3, 5, 10; *see also* Tex.

Health & Safety Code § 171.212(a) ("Every provision, section, subsection, sentence, clause, phrase, or word in this chapter, and every application of the provisions in this chapter, are severable from each other."); *Virginia v. Hicks*, 539 U.S. 113, 121 (2003) ("Severab[ility] is of course a matter of state law."); *Leavitt v. Jane L.*, 518 U.S. 137, 138 (1996) ("Severability is of course a matter of state law."); *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924) ("[T]he state court['s] decision as to the severability of a provision is conclusive upon this Court.").

The district court thought it could disregard the severability requirements in SB 8 because this Court refused to enforce a severability clause in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2319 (2016). App. 100a–101a; App. 109a–110a & n.95. But the Texas legislature anticipated this maneuver and included a saving-construction clause, which preserves all constitutional applications of SB 8 in the event that the severability requirements are ignored:

> If any court declares or finds a provision of this chapter facially unconstitutional, when discrete applications of that provision can be enforced against a person, group of persons, or circumstances without violating the United States Constitution and Texas Constitution, those applications shall be severed from all remaining applications of the provision, ***and the provision shall be interpreted as if the legislature had enacted a provision limited to the persons, group of persons, or circumstances for which the provision's application will not violate the United States Constitution and Texas Constitution***.

*See* Tex. Health & Safety Code § 171.212(b-1) (emphasis added). The Texas legislature also amended its Code Construction Act to ensure that abortion statutes will be construed, as a matter of state law, to apply *only* in situations that do not result in a violation of the United States or Texas Constitutions:

> If any statute that regulates or prohibits abortion is found by any court to be unconstitutional, either on its face or as applied, then all applications of that statute that do not violate the United States Constitution and Texas Constitution shall be severed from the unconstitutional applications and shall remain enforceable, notwithstanding any other law, ***and the statute shall be interpreted as if containing language limiting the statute's application to the persons, group of persons, or circumstances for which the statute's application will not violate the United States Constitution and Texas Constitution.***

*See* Tex. Gov't Code § 311.036(c) (emphasis added). The district court has no way around these saving-construction requirements,[23] and its refusal to preserve the constitutional applications of SB 8 in the teeth of these statutory commands is an act of lawlessness.

## V. The District Court's Preliminary Injunction Will Not Protect Abortion Providers From Lawsuits And Will Not Remove The In Terrorem Effects Created By SB 8

The United States complains that it is suffering irreparable harm from SB 8 and the court of appeals' stay, and it claims that the "balance of equities"

23. *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 Harv. L. Rev. 2085 (2002); Adrian Vermeule, *Saving Constructions*, 85 Geo. L.J. 1945 (1997).

and the "public interest" warrant relief because of harms being inflicted on women seeking post-heartbeat abortions. *See* Mot. to Vacate Stay at 35–36. But those observations do not warrant a vacatur of the stay, because the United States must show how a vacatur of the stay and the restoration of the preliminary injunction will alleviate or eliminate those harms. *See Certain Named & Unnamed Non-Citizen Children & Their Parents v. Texas*, 448 U.S. 1327, 1332 (1980) (Powell, Circuit Justice) (applicant must show "irreparable harm *if the stay is not vacated*" (emphasis added)); *Roho, Inc. v. Marquis*, 902 F.2d 356, 358 (5th Cir. 1990) (litigant seeking preliminary injunction must demonstrate, "by a clear showing: . . . (2) a substantial threat of irreparable harm *if the injunction is not granted*" (emphasis added)). The United States cannot make this showing because abortion providers will remain subject to lawsuits in federal court even if the preliminary injunction is reinstated, and the *in terrorem* effects of SB 8 will remain given the uncertain future of *Roe* and *Casey*.

First. A preliminary injunction against the state of Texas will *not* prevent abortion providers (and their enablers) from being sued in federal district court under the diversity jurisdiction. Senate Bill 8 allows "any person" to sue, regardless of whether they live in Texas, and any citizen of another state can sue a person who violates SB 8 in federal court if they can establish Article III standing. An out-of-state couple that is waiting to adopt from a Texas-based adoption agency, for example, can assert "injury in fact" from the neg-

ative effects that abortion has on adoption markets,[24] and they will clear the $75,000 amount-in-controversy requirement if the defendant has performed (or assisted) more than seven post-heartbeat abortions. The district court's preliminary injunction will have no effect on those federal-court proceedings. *See Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case."); Tex. Health & Safety Code § 171.208(e)(5) (non-mutual issue or claim preclusion is no defense).

Second. The district court's preliminary injunction will *not* protect abortion providers from being sued over post-heartbeat abortions if the injunction is vacated or if *Roe* and *Casey* are overruled. *See* Tex. Health & Safety Code § 171.208(e)(3)–(4). A preliminary injunction does not operate as a permanent shield from civil liability, and it cannot protect abortion providers from lawsuits if the injunction is dissolved. *See Edgar v. MITE Corp.*, 457 U.S. 624, 648–53 (1982) (Stevens, J., concurring); Tex. Health & Safety Code § 171.208(d) (four-year statute of limitations to file private civil-enforcement actions).

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24. *See* Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. Rev. 59, 63 (1987) ("The supply of babies for adoption has been dramatically affected by the increase in abortions since the Supreme Court's decision in *Roe v. Wade.*").

Many people believe that a preliminary injunction has the effect of revoking or suspending the underlying statute,[25] but that is a widely held myth. *See Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021) ("[F]ederal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves."); *Okpalobi v. Foster*, 244 F.3d 405, 426 n.34 (5th Cir. 2001) (en banc) ("An injunction enjoins a defendant, not a statute."); *see also Edgar*, 457 U.S. at 651 (Stevens, J., concurring) ("The fact that a federal judge has entered a declaration that the law is invalid does not provide" an "absolute assurance that he may not be punished for his contemplated activity" because "every litigant is painfully aware of the possibility that a favorable judgment of a trial court may be reversed on appeal."). SB 8 will remain in effect regardless of whether its enforcement is temporarily enjoined, and a ruling that reinstates the preliminary injunction will merely prevent Texas from *enforcing* SB 8 during the life of that injunction. The *in terrorem* effects of SB 8 will remain.

The burden is on the United States to show how a vacatur of the stay—and a reinstatement of the preliminary injunction—will cause abortion providers to resume post-heartbeat abortions in Texas. The United States does not attempt to make this showing or explain how this would happen, and it ignores the fact that the vast majority of Texas abortion providers refused to

25. *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2498 (2021) (Sotomayor, J., dissenting) (suggesting that the federal judiciary can "enjoin" a "law" ); *id.* at 2499 (suggesting that the judiciary can "enjoin" a legislative "Act").

provide post-heartbeat abortions after the district court issued its preliminary injunction due to the continued threat of liability. *See* Jacob Sullum, *Despite the Injunction Against the Texas Abortion Ban, Clinics That Resume Their Usual Services Could Face "Crippling Liability,"* Reason (October 8, 2021), https://bit.ly/3vxzNx7 ("[M]ost clinics are not doing [post-heartbeat abortions] yet. They are still worried about the litigation threat the law continues to pose—with good reason."). Instead, the United States is acting as though the preliminary injunction will somehow block the law itself, and it ignores the continued *in terrorem* effects that the statute will impose on abortion providers.

## VI. The United States' Remaining Arguments Are Meritless

The United States spends most of its brief complaining about the supposed unconstitutionality of Senate Bill 8, and insisting that there *must* be some way, somehow, for someone to challenge SB 8 pre-enforcement in federal court. The United States also worries that SB 8 will lead states to enact copycat laws targeting the right of free speech or the right to keep and bear arms. *See* Mot. to Vacate Stay at 31–32. These contentions are specious. SB 8 is entirely constitutional, and there is nothing improper or unconstitutional about structuring a law to avoid pre-enforcement review in federal court. There is also no reason to believe that state or local jurisdictions will enact laws emulating SB 8 in any context other than abortion. Finally, the United States' factual claims about SB 8's effects are unsupported.

### A. Senate Bill 8 Is Constitutional

The United States says throughout its brief that SB 8 is "clearly unconstitutional,"[26] but that is wrong for two reasons. First, abortion is not a constitutional right; it is a court-created right that may or may not have majority support on the current Court. *See Dobbs v. Jackson Women's Health Organization*, 141 S. Ct. 2619 (2021) (granting certiorari to reconsider *Roe v. Wade*, 410 U.S. 113 (1973)). Claiming that SB 8 is "unconstitutional" (or "flagrantly unconstitutional"[27]) begs the question by assuming that *Roe* is correctly decided and that abortion actually is a constitutional right. Not everyone on the Court shares that view. *See, e.g.*, *June Medical Services LLC v. Russo*, 140 S. Ct. 2103, 2150–51 (2020) (Thomas, J., dissenting). The fact that this Court has not yet overruled *Roe* does not mean that Texas is violating "the Constitution" by enacting a law such as SB 8. *See Graves v. New York*, 306 U.S. 466, 491–92 (1939) (Frankfurter, J., concurring) ("[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it."). The members of this Court who believe that *Roe* is wrongly decided should not have any constitutional angst over SB 8. And they should not feel any obligation to accommodate the novel cause of action proposed by the United States on the ground that it is somehow needed to thwart an "unconstitutional" legislative enactment.

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26. Mot. to Vacate Stay at 3.
27. *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2498 (2021) (Sotomayor, J., dissenting).

Second, even if one believes that *Roe* and *Casey* are correctly decided, SB 8 specifically allows abortion providers to escape liability if they show that an award of damages or injunctive relief would impose an "undue burden" on abortion patients:

> A defendant in an action brought under Section 171.208 may assert an affirmative defense to liability under this section if:
>
> (1) the defendant has standing to assert the third-party rights of a woman or group of women seeking an abortion in accordance with Subsection (a); and
>
> (2) the defendant demonstrates that the relief sought by the claimant will impose an undue burden on that woman or that group of women seeking an abortion.

Tex. Health & Safety Code § 171.209(b). The United States acknowledges this provision but complains that the statutory definition of "undue burden" is too narrow and inconsistent with *Hellerstedt*. *See* Mot. to Vacate Stay at 15. But even if that were true, the state judiciary must *still* accept an "undue burden" defense that rests on the decisions of this Court, even if SB 8 purports to preclude a defense in those situations. *See Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993) ("Texas courts . . . are *obligated* to follow . . . the United States Supreme Court" (emphasis in original)); *Middlesex County Ethics Commission v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982) ("Minimal respect for the state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights." (emphasis in original)); *see also* Tex. Health & Safety Code

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

The United States also complains that "the theoretical availability of S.B. 8's 'undue burden' defense has not actually prevented the law from achieving near-total deterrence of covered abortions." Mot. to Vacate Stay at 15. But that is because this Court is currently considering whether to limit or overrule *Roe* and *Casey*.[28] *See* Tex. Health & Safety Code § 171.209(e) ("The affirmative defense under Subsection (b) is not available if the United States Supreme Court overrules *Roe v. Wade*, 410 U.S. 113 (1973) or *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)"). If abortion providers felt confident that this Court would persist in its support for *Roe* and *Casey*, then they could violate the statute without fear of liability. The deterrence comes from the uncertainty surrounding the future of *Roe*, and there is nothing unconstitutional about a statute that threatens to impose retroactive civil liability in response to a Supreme Court ruling. *See Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 96 (1993) ("[A] rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all

28. *See Dobbs v. Jackson Women's Health Organization*, No. 19-1392.

courts adjudicating federal law."); *Legg's Estate v. Commissioner,* 114 F.2d 760, 764 (4th Cir. 1940) ("Decisions are mere evidences of the law, not the law itself; and an overruling decision is not a change of law but a mere correction of an erroneous interpretation."); Noah Feldman, *Cosmopolitan Law?*, 116 Yale L.J. 1022, 1056 n.140 (2007) ("[R]etroactive civil liability has often been found not to violate the Ex Post Facto Clause or constitutional due process.").

### B. Congress And The States May Structure Their Laws To Avoid Pre-Enforcement Review

The United States suggests that there is something improper or unconstitutional about crafting a statute that eliminates opportunities for pre-enforcement judicial review. Mot. to Vacate at 2. Some of the dissenting justices in *Whole Woman's Health* made similar suggestions. *See Whole Woman's Health*, 141 S. Ct. at 2496 (Roberts, C.J., dissenting); *id.* at 2499 (Sotomayor, J., dissenting). But there is nothing improper about enacting a law that cannot be subject to pre-enforcement challenge in federal court—even if that law departs from this Court's interpretations of the Constitution.

The judicial power of the United States is limited to deciding "cases" or "controversies." U.S. Const. art. III. The federal judiciary was not established as a Council of Revision,[29] and it does not hold a preclearance power over legislative enactments. *See Broadrick v. Oklahoma*, 413 U.S. 601, 610–11

29. *See Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125, 145–46 (2011).

(1973) ("[U]nder our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws."). The case-or-controversy requirement limits the judiciary's power in many ways, and it will on occasion prevent the judiciary from imposing its preferred interpretations of the Constitution on the nation.

Congress, for example, may enact statutes that depart from the judiciary's constitutional pronouncements while stripping the federal district courts of jurisdiction to consider pre-enforcement challenges to those laws. *See Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850) (Congress holds plenary power to control jurisdiction of the inferior federal courts); John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. Chi. L. Rev. 203 (1997) (same); Raoul Berger, *Insulation of Judicial Usurpation: A Comment on Lawrence Sager's "Court-Stripping" Polemic*, 44 Ohio St. L.J. 611, 642 (1983) ("[T]he unbroken string of Supreme Court pronouncements, stretching from 1796 to the present day, . . . recognize the plenary power of Congress over the lower federal courts' jurisdiction"). Congress may also deprive the lower courts of jurisdiction to consider any category of pre-enforcement challenge under 42 U.S.C. § 1983, *Ex parte Young*, 209 U.S. 123, 147 (1908), the Declaratory Judgment Act, or the Administrative Procedure Act. Congress has not used this power very often, but it is a crucially important component of the system of checks and balances. The lower federal courts cannot consider *any* pre-enforcement challenge to a statute unless Congress affirmatively authorizes them to do so. Indeed, Con-

gress did not even confer general federal-question jurisdiction on the district courts until 1875. *See Mims v. Arrow Financial Services, LLC*, 565 U.S. 368, 376 (2012).

The states, unlike Congress, cannot enact statutes that strip the federal courts of jurisdiction to consider constitutional challenges to their laws. But the fact that the judicial power extends only to "cases" or "controversies" enables the states to structure their laws in a manner that reduces or eliminates opportunities for pre-enforcement challenges. State laws that are enforced solely through private rights of action cannot be challenged pre-enforcement under 42 U.S.C. § 1983 or *Ex parte Young*—and this has been settled law for decades. *See Okpalobi v. Foster*, 244 F.3d 405, 426–27 (5th Cir. 2001) (en banc); *Hope Clinic v. Ryan*, 249 F.3d 603, 605 (7th Cir. 2001) (en banc) (Easterbrook, J.); *Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 958 (8th Cir. 2015); *Nova Health Systems v. Gandy*, 416 F.3d 1149, 1152–53 (10th Cir. 2005); *Summit Medical Associates, P.C. v. Pryor*, 180 F.3d 1326, 1341-42 (11th Cir. 1999). That is the consequence of a Constitution that limits the judiciary's powers to the resolution of "cases" or "controversies," and that requires a cause of action before a plaintiff can bring its constitutional grievances before a judicial tribunal.

It is not "unprecedented" for a state to use the threat of private civil litigation to deter conduct that many believe to be constitutionally protected. Anti-gun activists in the late 1990s were using state tort law in an attempt to sue the gun industry out of existence, and their efforts persisted until Con-

gress enacted legislation to put a stop to it in 2005. *See* Protection of Lawful Commerce in Arms Act, Pub. L. 109-92, 119 Stat. 2095 (2005) (codified at 15 U.S.C. §§ 7901–7903). Many state and local jurisdictions are authorizing private civil suits against Christian businesses that refuse to participate in activities that violate their religious beliefs. *See* Nico Lang, *Masterpiece Cakeshop owner in court again for denying LGBTQ customer*, NBC News (April 15, 2020), https://nbcnews.to/3pm2xb3 ("Christian business owner Jack Phillips is being sued by a transgender woman who tried to order a trans-themed birthday cake from his Colorado bakery."). There is no way for the targets of these private civil suits to obtain pre-enforcement relief in federal court; they must wait to be sued and assert their constitutional claims defensively. Texas abortion providers find themselves in the same boat.

This is not to say that SB 8 is immune from constitutional challenge. Far from it. Any abortion provider can challenge SB 8 on constitutional grounds after it is sued for violating the Act. One Texas abortion provider has already violated the Act to trigger private civil-enforcement lawsuits that he intends to use to challenge the constitutionality of the statute. *See* Alan Braid, *Why I violated Texas's extreme abortion ban*, Wash. Post (Sept. 18, 2021), https://wapo.st/3DUx4ki. Congress can also enact legislation to preempt SB 8 if it believes that Texas is violating the constitutional rights of its citizens. But the United States cannot sue Texas in the absence of a cause of action, and it cannot concoct an "equitable" cause of action that allows it to sue

whenever it thinks a private right of action allowed by state law is deterring constitutionally protected conduct.

### C. The Slippery-Slope Concerns Raised By The United States Are Unfounded

The United States raises fears that state could enact SB 8–type laws to undermine rights that actually appear in the Constitution, such as the right of free speech and the right to keep and bear arms. *See* Mot. to Vacate Stay at 31–32. Like most slippery-slope arguments, this is sophistry. *See generally* Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 Harv. L. Rev. 1026 (2003). There is no reason to believe that state or local jurisdictions will enact laws like SB 8 outside the abortion context, or that they will use SB 8–like tactics to deter the exercise of textually guaranteed rights.

First. State officials are bound by oath to support and defend the Constitution of the United States, and enacting a law that undercuts a textual constitutional right is much harder to reconcile with the solemn promise that every elected official makes upon taking office. Even when political or constituent pressures are brought to bear, the oath provides conscientious public officials with fortitude to resist legislative enactments that contradict their beliefs of what the Constitution means.[30] The Texas legislators could enact SB 8 consistent with their oath, because anyone who reads the Constitution

30. See Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 Geo. Wash. L. Rev. 1119, 1122 (1998) ("Sneering at the promise in the oath is common in the academy, but it . . . matters greatly to conscientious public officials.").

can see that there is no right to abortion in the document. It hardly follows that legislatures will enact laws like SB 8 to undermine rights that can actually be found in the Constitution.

Second. The public and elected officials give enormous deference to this Court, even when they disagree with the Court's pronouncements. Even controversial and ill-reasoned decisions (such as *Bush v. Gore*, 531 U.S. 98 (2000)) are accepted without riots or civil unrest, and deeply unpopular decisions (such as *Texas v. Johnson*, 491 U.S. 397 (1989)) have fended off proposed constitutional amendments and other retaliatory proposals. The states have *always* had the ability to do what Texas did in enacting SB 8, yet no state has attempted to run this play before, in large part because of the respect and latitude that this Court receives from the political branches. Texas enacted SB 8 in response to a ruling from this Court that: (1) has no textual support in the Constitution; (2) is the most controversial decision that the Supreme Court has issued in the past 50 years; and (3) that this Court is currently considering whether to overrule. That does not portend that the states will employ this tactic against better-reasoned Supreme Court rulings, or against doctrines that enjoy strong support among the current justices.

Third. The opposition to *Roe v. Wade* among state legislators and their constituents is the product of a belief that *Roe* is both a legal and moral abomination. The anti-abortion movement regards abortion as an act of violence akin to murder, and those who the reject the living-constitution mindset view *Roe* as an act of lawlessness that invents a "constitutional right" out of whole

cloth. *See* John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 947 (1973). It was the combination of that legal and moral opposition to *Roe* — along with the intensity of that opposition — that produced a statute such as SB 8. There is nothing even remotely approaching this level of opposition toward any other ruling of this Court. SB 8 is the heavy artillery, akin to an Act of Congress that formally strips the federal district courts of jurisdiction to entertain pre-enforcement challenges to a statute. And just as Congress has used its jurisdiction-stripping power sparingly, one should expect the states to enact SB 8–like statutes only in rare and extraordinary circumstances, and only when they believe that this Court is acting in a manner that is both lawless and morally reprehensible.

Fourth. Statutes such as SB 8 are unlikely to work when there is clear majority support on this Court for the right at issue. Suppose that a state enacted an SB 8–type law that authorizes private civil lawsuits against anyone who criticizes the government. Anyone who reads that statute would know that these lawsuits will be quickly thrown out of court, and that there is no chance that this Court would overrule its previous decisions protecting that conduct. It is also hard to imagine that any plaintiff or attorney would waste their time pursuing such a lawsuit when there is zero chance of success, which should eliminate most if not all of the deterrent effect. With SB 8, by contrast, the *in terrorem* effects come from the fact that the future of *Roe* and *Casey* is uncertain. Even critics of SB 8 recognize this fact. *See* Michael C. Dorf, *The Cloud Cast by SCOTUS Conservatives Over Roe Distinguishes the Texas Law From*

*Most Procedurally Similar Ones*, Dorf on Law (September 2, 2021, 7:48 A.M.), https://bit.ly/3C40kVf (last visited on October 21, 2021); Harper Neidig, *Court Fight Over Texas Abortion Restriction Tests Limits of State Laws*, The Hill, October 13, 2021, https://bit.ly/3aV0m5M ("'I would hasten to point out that this only works in areas where the constitutional law is uncertain,' Dorf said. 'So if the Supreme Court had not indicated that it's thinking about overruling the right to abortion, it would not be a big deal that Texas did this because a clinic's lawyers would tell the clinic, "Just perform the abortions, and if you're sued in Texas court, you'll just have the lawsuit struck down."'").

Finally, Congress will always have the prerogative to preempt laws that emulate SB 8 if a state uses this tactic to undermine an actual constitutional right. Members of Congress are bound by oath to defend the Constitution, and if a state is violating its citizens' constitutional rights then legislators are constitutionally obligated to enact preempting legislation. *See* U.S. Const. amend. XIV, § 5. Congress has not done so with respect to SB 8, because there is insufficient support in Congress for the idea that abortion is a constitutional right. But Congress would surely enact preempting legislation if a state created a private civil-enforcement action to censor the news media or trample other established constitutional rights. The states are subject to checks and balances when enacting laws such as SB 8, just as they subject the federal judiciary to checks and balances by enacting these types of laws.

### D. The United States' Factual Claims About SB 8 Are Unsupported

The United States contends that SB 8 has "blocked the vast majority of *all* abortions that would otherwise have been performed in the State," relying on untested hearsay declarations. App. 7. To the extent that the United States relies on this to support its argument for inventing a cause of action, the Court should be aware that the limited evidence available offers no support for this claim. And even if this fact could somehow support the United States' baseless claims, they certainly have not met their burden to clearly establish it.

According to the CDC, in 2018, nearly 40% of all Texas abortions, and over 40% nationwide, were performed at or below six weeks of pregnancy.[31] In some states, that number is even higher. For example, in Florida—a state with no prohibition on post-heartbeat abortions—CDC data show that 72% of abortions in that state were performed at or before six weeks of pregnancy.[32] That means that a significant number—perhaps even as high as three-quarters—of abortions performed previously may still be permissible under the Heartbeat Act. Thus, publicly available data refute the United States'

31. Katherine Kortsmit, et al., *Centers for Disease Control: Abortion Surveillance—United States, 2018* at Table 9, https://www.cdc.gov/mmwr/volumes/69/ss/pdfs/ss6907a1-H.pdf; *see also* Intervenors' Exhibits in Opposition to Preliminary Injunction Motion, *United States v. Texas*, No. 1:21-cv-00796-RP (W.D. Tex. Oct. 1, 2021), ECF No. 58-1 at 30.

32. *Id.*

claim that outlawing abortion after a fetal heartbeat is detected "block[s] the vast majority of *all* abortions."

The district court refused to permit the intervenors to present testimony or cross-examine witnesses at the preliminary-injunction hearing, but they nevertheless introduced evidence that undercuts the United States' claims.[33] According to the latest data provided by abortion providers and relied on by the United States, it appears that from September 12, 2021, through September 16, 2021, Planned Parenthood clinics in Houston and Stafford, Texas performed between 50 and 63% of the average number of abortions they performed before the Heartbeat Act.[34] That is certainly not the "vast majority of *all* abortions" that the United States claims.

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33. *See* Intervenors' Mot. to Stay Inj. at 17–18, *United States v. Texas*, No. 21-50949 (5th Cir. Oct. 7, 2021).

34. *See* Decl. of Monique Chireau Wubbenhorst, M.D., M.P.H., at ¶ 25, *Texas*, No. 1:21-cv-00796-RP (W.D. Tex. Oct. 1, 2021), ECF No. 58-1 at 141. Based on statistics given by Melaney Linton, CEO of Planned Parenthood Center for Choice (PPCFC), PPCFC performed between 14.3 and 17.9 abortions per day before the Heartbeat Law (the daily average for 400-500 abortions per month). Ms. Linton attested that PPCFC performed 52 abortions between September 1 and September 11 and 97 abortions between September 1 and September 16, which means that PPCFC performed 45 abortions between September 12 and September 16. That averages to approximately 9 abortions per day, which is between 50-63% of the abortions that were performed on average before the Heartbeat Law.

## VII. Certiorari Before Judgment Is Improper

The United States suggests at the end of its brief that the Court grant certiorari before judgment, but that is demonstrably inappropriate. This case presents novel issues on which the Fifth Circuit's considered views would be warranted. And there's no emergency from a regime that requires abortion providers to assert their constitutional challenges to SB 8 in a defensive posture, in the same manner as Christian wedding vendors and other business owners who face private civil lawsuits for acting in accordance with their faith.

If the Court decides to grant certiorari before judgment, then the intervenors conditionally cross-petition for certiorari on each of the two issues presented in Mark Lee Dickson's conditional cross-petition in response to *Whole Woman's Health v. Jackson*, No. 21-463: (1) Should the Court overrule *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992)?; and (2) Should the Court overrule *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), which refused to enforce an explicit severability requirement in a state abortion statute? The intervenors respectfully incorporate by reference the arguments for certiorari in Mr. Dickson's conditional cross-petition, which are equally applicable here.

* * *

The United States' constitutional grievances with Senate Bill 8 do not permit this Court (or any other court) to disregard the jurisdictional and procedural obstacles to its lawsuit. *See Whole Woman's Health*, 141 S. Ct. at 2495.

The federal courts "are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973); *see also TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) ("Federal courts do not possess a roving commission to publicly opine on every legal question. Federal courts do not exercise general legal oversight of the [political] branches, or of private entities."). The judiciary may decide constitutional challenges to statutes only when resolving an Article III case or controversy, and only when there is a cause of action that authorizes the plaintiff's lawsuit. Each of those is transparently lacking here. *See Spokeo*, *Inc. v. Robins*, 578 U.S. 856, 136 S. Ct. 1540, 1547 (2016) ("[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies" (citation and internal quotation marks omitted)). Any attempt by this Court to remedy the alleged constitutional infirmities of SB 8 would give rise to a constitutional violation of its own.

## CONCLUSION

The motion to vacate the Fifth Circuit's stay pending appeal should be denied. The United States' request for certiorari before judgment should be denied. If the Court grants certiorari before judgment, then it should grant the intervenors' conditional cross-petition.

Respectfully submitted.

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Dated: October 21, 2021

## CERTIFICATE OF SERVICE

I certify that a copy of this document has been sent by e-mail on October 21, 2021, to all counsel of record in this case.

/s/ Jonathan F. Mitchell
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