No. 21-588

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

STATE OF TEXAS, ET AL.,
Respondents.

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

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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October 27, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

TABLE OF AUTHORITIES – cont'd

Page(s)

INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in the enforcement of the Fourteenth Amendment's protections and in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Over the past five decades, this Court has repeatedly recognized that the right to a pre-viability abortion is protected from state infringement by the Fourteenth Amendment. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). Yet in a brazen and unprecedented attack on the supremacy of federal law and the constitutional rights of its people, Texas enacted Senate Bill 8, banning abortion once a "fetal heartbeat" can be detected—months before a fetus reaches viability or most people even know that they are pregnant. *See* Senate Bill No. 8, 87th Leg., Ch. 62 Reg. Sess. (Tex. 2021) (to be codified at Tex. Health & Safety Code §§ 171.203(b), 171.204(a)) [hereinafter

[1] The parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

S.B. 8] (defining "fetal heartbeat" to include embryonic cardiac activity).

Texas intentionally crafted S.B. 8 to make it as difficult as possible for individuals and abortion providers to sue to protect their rights in court. By delegating enforcement of the law to the populace at large instead of to state authorities, the State sought to prevent private litigants from seeking pre-enforcement injunctive relief—the standard method for challenging state laws that deny constitutional rights. Pet. App. 3a.

To date, that tactic has been successful, and providers across Texas, fearing lawsuits seeking to enforce S.B. 8, have ceased providing virtually all abortion services. *Id.* at 75a-78a. As a result, Texans seeking to terminate their pregnancies must undertake often-daunting trips to neighboring states' clinics in the midst of a pandemic, and those clinics have grown so overwhelmed that they are now struggling to meet demand. *Id.* at 87a-89a. Texans unable to make the trek to neighboring states or find a provider in one of those states face an untenable choice: take matters into their own hands or carry their unwanted pregnancies to term. It is under these unique circumstances that the United States has stepped in to defend its sovereign interests in maintaining the supremacy of federal law and the ability of the courts to review harmful and unconstitutional laws like S.B. 8.

It undoubtedly has the power to do so. In a long line of cases, grounded in principles of sovereignty, federal supremacy, and the duty of the executive to "take care that the laws be faithfully executed," U.S. Const. art. II, § 3, this Court has repeatedly recognized the right of the federal government to file suit in federal court to vindicate the public interest even where

Congress has not passed a law explicitly authorizing the specific type of action pursued.

In the early days of the Republic, in order to give meaning to the executive's right to own property and enter contracts, this Court recognized the implied right of the United States to sue to vindicate its proprietary interests. *See, e.g.*, *Cotton v. United States*, 52 U.S. 229, 231 (1850) (implying right to sue for trespass); *United States v. Tingey*, 30 U.S. 115, 122-23 (1831) (implying right to sue on contract). Shortly after the Civil War and the creation of the federal Department of Justice, the Court extended this doctrine, holding that the federal government could also sue to enforce a congressionally enacted scheme in service of the public interest, even in the absence of a proprietary interest or a statutory cause of action. *See United States v. San Jacinto Tin Co.*, 125 U.S. 273 (1888) (implied right to sue from statutory patent scheme); *United States v. Am. Bell Tel. Co.*, 128 U.S. 315 (1888) (same).

And just a few years later, this Court unanimously extended that principle in *In re Debs*, 158 U.S. 564 (1895), recognizing that just as the government could sue to effectuate statutory rights, it could also sue to vindicate constitutional rights in light of its own duty to protect the public interest. As this Court explained, "[e]very government, intrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other." *Id.* at 584. Therefore, the Court went on, the federal government's "obligations . . . to promote the interest of all and to prevent the wrongdoing of one, resulting in injury to the general welfare" are often "sufficient to give it a standing in court." *Id.* at 584.

Several courts of appeals have recognized the "broad" language of the *Debs* decision, *e.g.*, *United States v. City of Jackson*, 318 F.2d 1, 14 (5th Cir. 1963), yet this Court need not read *Debs* broadly to resolve this case. Indeed, under even the narrowest construction of that decision, the United States has a right to sue Texas because S.B. 8 imposes a substantial burden on interstate commerce, creates a crisis for the rule of law and our constitutional structure given the unique threat it poses to the supremacy of federal law, and has resulted in a scenario in which it is exceedingly difficult, if not impossible, for private individuals to enforce their own Fourteenth Amendment rights.[2] This Court can thus recognize the right of the federal government to sue under these unique circumstances without reaching any broader or novel questions about the scope of federal executive power to seek injunctive relief.

And significantly, given the unique statutory design of S.B. 8 and its effects on the constitutional right to abortion, permitting this suit to go forward would vindicate separation of powers and federalism principles. As for separation of powers, Congress passed 42

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[2] In fact, the related challenge to S.B. 8 brought by abortion advocates and providers fits squarely within the confines of this Court's *Ex parte Young* doctrine. *See* Br. of CAC as *Amicus Curiae* in Support of Pet'rs, *Whole Woman's Health v. Jackson* (No. 21-463). But under *Debs*, suits by private individuals need not be unavailable *as a matter of law* for the government to file suit; rather, this Court in *Debs* focused on the fact that there were *significant barriers* for individuals seeking to bring private actions. *Debs*, 158 U.S. at 592. And equally significant barriers plainly exist here: the federal government filed this suit only after the Fifth Circuit stayed the related providers' litigation and after this Court itself refused to step in, citing "complex and novel antecedent procedural questions." *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021).

U.S.C. § 1983 to create a new remedy to vindicate the uniquely federal rights guaranteed by the Constitution against infringement by state officials. Texas has sought to make an end run around that exercise of congressional authority by crafting S.B. 8 in a manner designed to preclude Section 1983 challenges and make it impossible to enjoin a law designed to flout well-settled constitutional rights. By stepping in under these unprecedented circumstances to defend the supremacy of federal law and the rights of those individuals whom Congress expected would have their day in court, the federal government supports—not undermines—the separation of powers. Indeed, the fact that there is no explicit cause of action to enforce abortion rights merely reflects that the efficacy of private enforcement suits for injunctive relief under Section 1983 meant no such cause of action was necessary until Texas passed S.B. 8.

As for federalism, while the Constitution creates a carefully balanced system of dual sovereignty between the states and the federal government, it also makes clear that in cases of conflict between state and federal law, the Constitution reigns as "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. Here, Texas has flagrantly disregarded that principle, intentionally crafting a law that deprives Texans of their long-established Fourteenth Amendment rights and seeks to prevent judicial review of those claims. Under such circumstances, permitting the federal government to intervene helps preserve the Constitution's balance between state and federal power—a balance that Texas has disrupted by flouting this Court's precedent.

ARGUMENT

I. Since the Early Days of the Republic, This Court Has Recognized the Right of the United States to Sue Even in the Absence of Statutory Authorization.

This Court has long recognized the right of the United States to sue in federal court even in the absence of a statute authorizing it do so. As this doctrine has evolved over the years, two principles have animated its development: the deep-seated rule that "equitable relief . . . is traditionally available to enforce federal law," *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 329 (2015); *see* John F. Preis, *In Defense of Implied Injunctive Relief in Constitutional Cases*, 22 Wm. & Mary Bill Rts. J. 1, 5 (2013) ("federal courts having jurisdiction over a dispute have, from the Founding, enjoyed the power to create injunctive actions without explicit authorization from Congress"), and the related concept, dating back to English common law, that "where there is a legal right, there is also a legal remedy," *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (quoting 3 William Blackstone, *Commentaries on the Laws of England* 23 (1768)). In order to ensure that the United States as a sovereign nation can fulfill its duty to protect the constitutional rights of its people, this Court has repeatedly recognized the United States' authority to file suit where Congress has not otherwise barred such an action.

In the early days of the Republic, "[l]acking a guiding body of statutes, the judiciary faced the task of defining the rights of the United States, as a sovereign and representative entity, in a system of law that made few explicit provisions for government interests and actions." Note, *Protecting the Public Interest: Nonstatutory Suits by the United States*, 89 Yale L.J. 118, 120 (1979) [hereinafter *Protecting the Public Interest*].

Early statutes did not explicitly authorize the United States' right to sue in tort or contract, yet this Court recognized the incongruity of recognizing the right to own property or to enter into a contract without permitting enforcement of those rights in a court of law. *See United States v. Gear*, 44 U.S. 120, 128 (1845) (permitting United States to maintain action of trespass); *Dugan v. United States*, 16 U.S. 172, 181 (1818) ("In all cases of contract with the United States, they must have a right to enforce the performance of such contract, or to recover damages for their violation, by actions in their own name."); *Tingey*, 30 U.S. at 122 ("If the United States are competent to become parties to such a bond without legislative requisitions, it is equally true that the right to direct or require such a bond belongs to the executive.").

In these early cases, this Court relied primarily on analogies between the United States and a private plaintiff seeking to vindicate a proprietary interest in court. *See, e.g.*, *Cotton*, 52 U.S. at 231 ("As an owner of property in almost every State of the Union, [the United States] have the same right to have it protected by the local laws that other persons have."); *Dugan*, 16 U.S. at 181 (recognizing the right of the United States to sue on a bill of exchange because "[i]t would be strange to deny to them a right which is secured to every citizen of the United States"). But in the wake of the Civil War and the creation of the federal Department of Justice, *see* An Act to Establish the Department of Justice, ch. 150, 16 Stat. 162 (1870), empowering the Attorney General for the first time to litigate cases in any federal court to protect the interests of the United States, *see id.* § 5 (codified at 28 U.S.C. § 518(b)),[3] this Court promptly recognized the flaws in

[3] Prior to the creation of the Department of Justice, the first Judiciary Act had granted the Attorney General such authority

such analogy—that, in fact, the federal government's right to bring lawsuits not expressly authorized by statute was broader than that of private parties, in light of its sovereign duty to protect its citizens and the public interest, *see Protecting the Public Interest*, *supra*, at 121-22; *United States v. City of Philadelphia*, 644 F.2d 187, 215 (3d Cir. 1980) (Gibbons, J., dissenting from denial of rehearing) ("The analogy to private litigants is in fact imperfect, for as the Court recognized, . . . the Executive has a duty to the public, which no private litigant suing to enforce his property interests has.").

The first cases to recognize this broader non-statutory right to sue were *United States v. San Jacinto Tin* and *United States v. American Bell Telephone*. In *San Jacinto*, the Attorney General filed suit to revoke a fraudulently obtained land patent covering a tract of land in the possession of the respondents. 125 U.S. at 274. The United States did not allege a pecuniary loss as a result of the fraud, and the respondents claimed that the government was a placeholder for the real party in interest, a private claimant to the land. *Id.* at 286; *see Protecting the Public Interest*, *supra*, at 121 n.13. In upholding the right of the United States to sue even in the absence of an authorizing statute, this Court initially focused on the government's asserted proprietary interest in the action because revocation of

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only for suits before this Court. *See* An Act to Establish the Judicial Courts of the United States, ch. 20 § 35, 1 Stat. 92 (1789). Several scholars have argued that the Department of Justice was created specifically to assist in enforcement of the Reconstruction Amendments and the rights of formerly enslaved people and their allies. *See, e.g.*, Norman W. Spaulding, *Independence and Experimentalism in the Department of Justice*, 63 Stan. L. Rev. 409, 438 (2011); Seth P. Waxman, *Twins at Birth: Civil Rights and the Role of the Solicitor General*, 75 Ind. L.J. 1297, 1300-01 (2000).

the patent would have resulted in reversion of the land to the federal government. *San Jacinto*, 125 U.S. at 286. But this Court also acknowledged a presumption in favor of executive authority to sue in the absence of a congressional prohibition, *see id.* at 284 ("if restrictions are to be placed upon the exercise of this authority by the attorney general, it is for the legislative body which created the office to enact them"), and noted that the United States might claim standing to sue to enforce an "obligation to the general public," *id* at 286.

This Court seized on that reasoning several months later in *American Bell*, explicitly upholding the right of the United States to sue to effectuate a congressionally established scheme, even in the absence of a statutory cause of action. 128 U.S. at 367-68. Like *San Jacinto*, *American Bell* involved a fraudulently obtained patent (in *American Bell*, an inventor's patent), but this time, the United States could claim neither a pecuniary loss nor a proprietary interest in the subject of the patent. *See id.* at 350-51, 366-68. Even so, this Court upheld the right of the United States to sue. Rejecting the respondent's argument "that the government of the United States—the representative of 60,000,000 people, acting for them, on their behalf and under their authority—can have no remedy against a fraud which affects them all, and whose influence may be unlimited," *id.* at 357, this Court held that "the right of the United States to interfere in the present case is its obligation to protect the public from the monopoly of the patent which was procured by fraud," *id.* at 367—*i.e.*, to "take care that the laws [including the patent laws] be faithfully executed," U.S. Const. art. II, § 3.

On the heels of *San Jacinto* and *American Bell* came the *Debs* decision, "the cornerstone for modern

judicial recognition of nonstatutory executive power to bring suit." Note, *Nonstatutory Executive Authority to Bring Suit*, 85 Harv. L. Rev. 1566, 1568 (1972). *Debs* arose out of the Pullman rail strike of 1894 and an injunction obtained by the Attorney General against the strike's leaders. *Debs*, 158 U.S. at 565-67. When those leaders were held in contempt for violating the injunction and detained, they sought a writ of habeas corpus on the ground that the federal government lacked the authority to seek the injunction in the first place. *Id.* at 570-73.

This Court disagreed. In explaining its decision, this Court acknowledged that there were multiple possible grounds on which it could rule, some narrower than others. For example, it could have rested its holding on the United States' proprietary interest in ending the strike, as the strike had disrupted the federal postal system. *See id.* at 583-84 (recognizing that "the United States have a property in the mails, the protection of which was one of the purposes of this bill," but that "[w]e do not care to place our decision upon this ground alone"). It also could have recognized a right to sue to effectuate the guarantees of the Sherman Anti-Trust Act, *see id.* at 600, which barred "[e]very . . . conspiracy, in restraint of trade or commerce among the several states," 15 U.S.C. § 1. Indeed, the lower court had relied on that ground in recognizing the government's right to sue. *See United States v. Debs*, 64 F. 724, 745-55 (7th Cir. 1894).

But this Court unanimously chose to go further. Citing *San Jacinto* and *American Bell*, the Court found it "obvious from these decisions" that "while it is not the province of the government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another," the United States could sue in

cases that "affect the public at large, and are in respect of matters which by the constitution are intrusted to the care of the nation, and concerning which the nation owes the duty to all the citizens of securing to them their common rights." *Debs*, 158 U.S. at 586. As this Court explained, the courts should not "prevent [the United States] from taking measures therein to fully discharge those constitutional duties." *Id.*

Alongside this sweeping language, this Court in *Debs* also emphasized three special aspects of the Pullman strike that made suit by the United States both appropriate and indispensable. First, the Court discussed the government's special duties with respect to enforcement of the Commerce Clause, the specific constitutional provision violated by the strike. *See Debs*, 158 U.S. at 586 ("The national government, given by the constitution power to regulate interstate commerce," has "the duty of keeping those highways of interstate commerce free from obstruction, for it has always been recognized as one of the powers and duties of a government to remove obstructions from the highways under its control."). Second, the Court emphasized the disastrous and immediate effects of the strike, requiring emergency intervention by the federal government. *See id.* at 592 ("If ever there was a special exigency, one which demanded that the courts should do all that courts can do, it was disclosed by this bill."). Third, the Court adopted the government's characterization of the strike as a "public nuisance." *Id.* at 591-94. Specifically, it found that the strike "affect[ed] the people at large" in the exercise of common rights, *id.* at 593, meaning no individual might have standing in his or her own right to challenge it, *see, e.g.*, *United States v. Richardson*, 418 U.S. 166, 171, 176-77 (1974) (dismissing suit that rested on an impermissible "generalized grievance"), and the Attorney

General thus had a special duty to step in on behalf of the public, *see Debs*, 158 U.S. at 587; *accord Protecting the Public Interest*, *supra*, at 123 & n.31. The Attorney General having done so, this Court also recognized its own duty to craft an equitable remedy to serve the public interest. *See Debs*, 158 U.S. at 589 (where there is "an indictable nuisance, there must be a remedy . . . , and that remedy is by injunction" (internal quotation marks omitted)).

II. This Court Can Recognize the United States' Right to Sue in This Case Without Adopting a Broad or Novel Reading of *Debs*.

While some lower courts have read *Debs* as authorizing suit by the federal government whenever a state or private party takes an action that is contrary to the Constitution and detrimental to the public interest, *e.g.*, *United States v. Brand Jewelers, Inc.*, 318 F. Supp. 1293 (S.D.N.Y. 1970), others have read the decision as limited to cases presenting at least one (or in some cases, all) of the special circumstances of the Pullman strike, *e.g.*, *United States v. Solomon*, 563 F.2d 1121, 1129 (4th Cir. 1977).

Debates about the scope of *Debs*, however, need not be resolved in this case. Just as in *Debs*, the federal government here has demonstrated that S.B. 8 substantially burdens interstate commerce, creates a crisis for the rule of law requiring immediate intervention, and has made it exceedingly difficult for individual Texans harmed by S.B. 8 to vindicate their own rights in court. Because all three special circumstances of *Debs* are satisfied, this case fits squarely within the confines of existing precedent.

The interstate commerce effects of S.B. 8 are well-documented by the government in a series of declarations from providers that the district court cited. *See*

Pet. App. 36a-37a, 48a. As those declarations describe, Texas residents are flooding clinics in neighboring states because of S.B. 8's restrictions—indeed, at one clinic in Oklahoma City, two-thirds of patient calls are now coming from Texas. *Id.* at 91a. Clinics in neighboring states like Oklahoma and Kansas are so overwhelmed that they are scheduling abortions weeks out—a threat to the abortion rights of even non-Texans, given the time-sensitivity of an abortion procedure. *See id.* at 94a & n.79 (describing how delaying abortion increases the risk of medical complications and that individuals will reach the legal gestational limit in those states before they can obtain an abortion). Thus, S.B. 8 is directly causing Texas residents to cross state lines to seek medical services, and in turn, making it more difficult for people in neighboring states to obtain abortions and other forms of reproductive healthcare.

Moreover, S.B. 8 purports to authorize lawsuits by people *anywhere* in the United States against individuals or entities located *anywhere* in the United States who aid or abet, or intend to aid or abet, the provision of a banned abortion in Texas. *See* Tex. Health & Safety Code § 171.208(a). For example, a person from California who learns that a friend obtained an unlawful abortion in Texas and that the friend's mother from Oklahoma drove her to the clinic could sue the Oklahoma mother for monetary damages in Texas court. The California resident might also sue the out-of-state insurance company that covered the abortion or the out-of-state pharmaceutical company that manufactured the drug used to induce the abortion. *See* Pet. App. 36a-37a. In short, the interstate commerce effects of S.B. 8 are concrete and significant.

As for the emergency nature of the situation, S.B. 8 poses at least as urgent a crisis for the United State

and the rule of law as the Pullman strike did in *Debs*. As in *Debs*, the impact of S.B. 8 has been immediate and devastating, forcing people to take drastic measures. Some Texans are driving thousands of miles to neighboring states to seek abortions. *See, e.g.*, *id.* at 94a n.78 (quoting a declaration from an Oklahoma provider describing treating a patient "who got in her car at midnight in Texas so she could drive through the night and make it to Oklahoma in the morning for her abortion appointment, and then she had to turn around the same day to travel back to Texas"). Others are frantically trying to scrape together the funds for such a trip without their abusive partners finding out. *See, e.g.*, *id.* at 95a (quoting a provider describing a Texas woman with an abusive husband who was "selling personal items" to afford to leave Texas "discreetly" for an abortion). Where the right to abortion "is either threatened or in fact being impaired," *Elrod v. Burns*, 427 U.S. 347, 373 (1976), there is plainly irreparable injury. Here the impairment of the right to abortion is obvious.

While the facts on the ground are enough to create an emergency under *Debs*, the unprecedented and lawless nature of Texas's crafting and enactment of S.B. 8 also creates a second urgency requiring intervention of the federal government and equitable relief. Here, Texas has avowedly and unapologetically disregarded binding Supreme Court precedent recognizing the constitutional right to a pre-viability abortion, *see Roe*, 410 U.S. 113; *Casey*, 505 U.S. 833. In so doing, the State has not only violated the Fourteenth Amendment, but it also has violated the most basic tenet of the Supremacy Clause: that the federal Constitution is "the supreme Law of the Land." U.S. Const. art. VI, cl. 2; *see Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("[T]he federal judiciary is supreme in the exposition of the

law of the Constitution, and . . . [i]t follows that the interpretation of the Fourteenth Amendment enunciated by this Court . . . is the supreme law of the land."). Texas's open defiance of federal law and its effort to subvert judicial review threatens this fundamental precept at the heart of our constitutional system and serves as a blueprint for other states to undermine constitutional rights and avoid accountability. If multiple states were to defy federal law in this manner—as some are already threatening, *see* Meryl Kornfield et al., *Texas Created a Blueprint for Abortion Restrictions. Republican-Controlled States May Follow Suit*, Wash. Post (Sep. 3, 2021), https://www.washingtonpost.com/nation/2021/09/03/texas-abortion-ban-states/—and get away with it, our executive's ability to "take care that the laws be faithfully executed," U.S. Const. art. II, § 3, would be rendered a hollow promise.

Finally, as in *Debs*, S.B. 8 presents a scenario where individuals face significant barriers to their own suits for equitable relief. In *Debs*, the public nature of the strike and the fact that no private individual suffered a "special injury resulting therefrom" meant the federal government was uniquely positioned to move to enjoin it. 158 U.S. at 593; *see Protecting the Public Interest*, *supra*, at 123 n.31 (calling the public-nuisance mode of analysis in *Debs* "significant" because "[i]n traditional cases of public nuisance, . . . no one citizen may suffer an injury distinguishable from those suffered by all others"). Here, Texas has capitalized on the interplay of the doctrines of standing and sovereign immunity to craft a statute with a private enforcement scheme that, it has argued, renders Section 1983 lawsuits improper and the exception to Eleventh Amendment sovereign immunity under *Ex parte Young*, 209 U.S. 123 (1908), unavailable. In light of that enforcement scheme, and the fact that the

Eleventh Amendment does not bar a suit by the United States against a state, *see United States v. Texas*, 143 U.S. 621, 642-46 (1892), the United States is uniquely positioned to vindicate the rights of its people.

III. The Rationales Counseling Against Recognizing a Public Right of Action Do Not Apply Here.

Since *Debs* was decided, this Court has repeatedly recognized the right of the United States to sue in the absence of explicit statutory authorization. *See, e.g.*, *Arizona v. United States*, 567 U.S. 387 (2012); *Sanitary Dist. of Chi. v. United States*, 266 U.S. 405 (1925); *Heckman v. United States*, 224 U.S. 413 (1912). Still, in a handful of cases in which the United States has sought to enforce its citizens' constitutional rights, lower federal courts have declined to imply a cause of action, reasoning that under the specific facts presented, recognizing a non-statutory cause of action would raise separation of powers and federalism concerns. *See, e.g.*, *Solomon*, 563 F.2d at 1128-29 (refusing to grant government right to sue to enforce rights of institutionalized persons); *United States v. Mattson*, 600 F.2d 1295, 1297 (9th Cir. 1979) (noting "substantial agreement" with *Solomon* in a factually similar case); *City of Philadelphia*, 644 F.2d at 201 (refusing to grant government right to sue in police reform case). *But see City of Philadelphia*, 644 F.2d at 207 (Gibbons, J., joined by Seitz, C.J., A.L. Higgenbotham and Sloviter, JJ., dissenting from denial of rehearing).

However valid those concerns were under the particular circumstances of the cases in which they were raised, they are not implicated here. As described below, this Court can recognize the United States' right to sue without treading on congressional

authority or traditional state powers. Indeed, allowing the United States to sue here would vindicate, rather than undermine, our constitutional system's interest in separation of powers and federalism.

A. This Case Does Not Raise Separation of Powers Concerns.

Because the Constitution delegates the lawmaking power to Congress, some lower courts have expressed hesitancy about extending a cause of action to the executive branch where Congress has not done so itself. *See, e.g.*, *Solomon*, 563 F.2d at 1128-29; *City of Philadelphia*, 644 F.2d at 199-201. In this case, however, it is Texas, not the federal courts or the executive branch, that has usurped Congress's power by crafting a statute that attempts to prevent individuals from vindicating their constitutional rights pursuant to the express cause of action in Section 1983.

Congress enacted Section 1983 in the wake of a bloody Civil War to "throw[] open the doors of the United States courts to those whose rights under the Constitution are denied or impaired." Cong. Globe, 42d Cong., 1st Sess. App. 376 (1871) (Rep. Lowe); *see* An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, ch. 22, § 1, 17 Stat. 13 (1871) (codified at 42 U.S.C. § 1983) (authorizing "an action at law, suit in equity, or other proper proceeding for redress" against "every person" acting under color of state law who causes the "deprivation of any rights, privileges, or immunities secured by the Constitution"). Yet as described above, Texas specifically designed S.B. 8 to evade judicial review pursuant to Section 1983, attempting to render that statute a dead letter in the abortion context. *Cf. City of Philadelphia*, 644 F.2d at 192 (declining to recognize public right of action for unconstitutional police conduct because

"[p]ersons denied constitutional rights may sue state officials for damages or injunctive relief under [Section] 1983"). In so doing, Texas has robbed federal courts of their "paramount role in protecting constitutional rights," *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 503 (1982), and frustrated the text, history, and purpose of a duly enacted law. By stepping in with this lawsuit, the executive branch here attempts to vindicate Section 1983's promise of access to the courts.

The fact that Congress has enacted causes of action for the federal government to vindicate the public interest in other areas of law where Congress expected the Attorney General to litigate regularly does not change that calculus. *See, e.g.*, 52 U.S.C. § 10308(d) (voting); 42 U.S.C. § 3614 (housing). For the past fifty years, from the foundational case of *Roe v. Wade* to last year's decision in *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103 (2020), Section 1983 has been the chief vehicle through which individuals and abortion providers have sought injunctive relief to prevent enforcement of state laws that infringe on their constitutional rights, including the fundamental right to a pre-viability abortion. *See Roe v. Wade*, 314 F. Supp. 1217, 1219 n.1 (N.D. Tex. 1970) (specifying Section 1983 as the cause of action); Complaint at 2, *June Med. Servs. L.L.C. v. Kliebert*, 158 F. Supp. 3d 473 (M.D. La. 2016) (No. 14-CV-00525) (same). Thus, Congress has never encountered the need to create a cause of action for the federal government to challenge restrictive abortion laws. It is only under the unprecedented circumstances of this case—where Texas has attempted to insulate S.B. 8 from pre-enforcement judicial review in suits brought by private parties—that the federal executive has needed to step in, relying on its power to

do so pursuant to *Debs* and the constitutional precepts that *Debs* rests upon.

Nor is it relevant that the Reconstruction-era Congresses, which "gave extensive consideration to the creation of remedies to enforce the [Thirteenth, Fourteenth, and Fifteenth] amendments," *City of Philadelphia*, 644 F.2d at 194, never created a cause of action for executive enforcement of those amendments. First, as described above, *supra* Section II, this Court could recognize the government's right to sue here based on S.B. 8's burden on interstate commerce without deciding whether a broader implied cause of action exists for the Attorney General to enforce the Fourteenth Amendment. Indeed, although the *effect* of an injunction against S.B. 8 would be to vindicate Texans' Fourteenth Amendment right to abortion, the ground for the United States' *authority* to sue lies in its right to enforce its own sovereign interests in maintaining the supremacy of federal law and the right to judicial review.

Second, as this Court made clear in *San Jacinto*, "if restrictions are to be placed upon the exercise of this authority by the attorney general, it is for the legislative body which created the office to enact them." 125 U.S. at 284; *see* Larry W. Yackle, *A Worthy Champion for Fourteenth Amendment Rights: The United States in* Parens Patriae, 92 Nw. U. L. Rev. 111, 129-34 (1997) (collecting authorities suggesting that a clear congressional statement is required to *displace*, rather than to create, the United States' right to sue to enforce its citizens' constitutional rights); *cf. United States v. United Mine Workers of Am.*, 330 U.S. 258, 272 (1947) ("There is an old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect.").

And third, even in the absence of any presumption in favor of a cause of action or clear statement rule, "[i]t is at best treacherous" to infer meaning from "congressional silence alone." *NLRB v. Plasterers' Local Union No. 79*, 404 U.S. 116, 129-130 (1971) (quoting *Girouard v. United States*, 328 U.S. 61, 69 (1946)). Indeed, "even if silence could speak, it could not speak unequivocally to the issue here," *United States v. Wells*, 519 U.S. 482, 496 (1997), so this Court should honor its longstanding precedents that permit the executive to sue Texas under the unprecedented circumstances of this case.

B. This Case Does Not Raise Federalism Concerns.

Under the Supremacy Clause, the Constitution reigns as "the supreme Law of the Land." U.S. Const. art. VI, cl. 2; *see McCulloch v. Maryland*, 17 U.S. 316, 326-27 (1819). The Framers intended the Supremacy Clause to serve an important function in establishing the relationship between the federal government and the individual states in our Constitution's federalist system. As James Madison noted, because the Articles of Confederation lacked a federal supremacy rule, "'[w]henever a law of a State happened to be repugnant to an act of Congress,' it 'will be at least questionable' which law should take priority, 'particularly when the latter is of posterior date to the former.'" James Madison, *Vices of the Political System of the United States* (Apr. 1787), *in* 9 Papers of James Madison 345, 352 (Robert A. Rutland & William M.E. Rachal eds., 1975). The Constitution corrected this deficiency.

Here, Texas has flagrantly disregarded these principles of federal supremacy, intentionally crafting a state law that deprives Texans of their long-established Fourteenth Amendment rights and is designed to evade traditional forms of judicial review. Indeed,

S.B. 8 admits its defiance of federal law on its face. Section 2 of the law acknowledges this Court's ruling in *Roe v. Wade*, yet notes that "the state of Texas never repealed, either expressly or by implication, the state statutes enacted before [that decision] that prohibit and criminalize abortion unless the mother's life is in danger." S.B. 8 § 2. It then articulates its substantive provisions banning abortion after embryonic cardiac activity, in furtherance of those earlier state laws that *Roe v. Wade* indisputably overruled.

Despite the mandates of the Supremacy Clause, the Constitution does reserve a vital role for states in our government's structure, charging them with ensuring the health and wellbeing of their citizens in exercise of their historic police powers. For this reason, this Court has long "recognize[d] that the 'State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient,'" *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016) (quoting *Roe*, 410 U.S. at 150), provided that state abortion regulations, when thoroughly scrutinized, do not have the "purpose or effect of presenting a substantial obstacle to a woman seeking an abortion," *id.* (quoting *Casey*, 505 U.S. at 878).

No such scrutiny, however, is required here. Texas has asserted no historic state interest in regulating the health of its citizens to defend its enactment of S.B. 8. Nor could it: S.B. 8 does not merely *regulate* abortion; rather, it is an outright *ban* on most constitutionally protected abortions with no health and safety justification whatsoever, infringing on a long-established federal right. Under such circumstances, permitting the federal government to intervene in defense of that right and the supremacy of federal law helps preserve

the Constitution's delicate balance between state and federal power.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner's requested relief.

Respectfully submitted,

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October 27, 2021 * Counsel of Record