

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 before Judgment
to the United States Court of Appeals
for the Fifth Circuit**

**BRIEF OF AMERICAN BAR
ASSOCIATION AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

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QUESTION PRESENTED

May the United States bring suit in federal court and obtain injunctive or declaratory relief against the State, state court judges, state court clerks, other state officials, or all private parties to prohibit S.B. 8 from being enforced?

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INTEREST OF *AMICUS CURIAE*¹

The American Bar Association (“ABA”) is the largest voluntary association of attorneys and legal professionals in the world. Its members come from all fifty States and other jurisdictions and include prosecutors, public defenders, and private defense counsel, as well as attorneys in law firms, corporations, non-profit organizations, and government agencies. The ABA’s membership also includes judges, legislators, law professors, law students, and non-lawyer associates in related fields.²

As the national representative of the legal profession, the ABA’s goals include advancing the rule of law both in the United States and abroad, by “[h]old[ing] governments accountable under law” and “[a]ssur[ing] meaningful access to justice for all persons.”³ In furtherance of this mission, the ABA adopted in 2006 a Statement of Core Principles, committing to key rule of law principles.⁴ The ABA has submitted a number of amicus briefs urging

¹ No counsel for a party authored this brief in whole or in part. No person other than amicus or its counsel made a monetary contribution to this brief’s preparation or submission. The parties have consented to the filing of this amicus brief.

² Neither this brief nor the decision to file it should be interpreted as reflecting the views of any judicial member. No member of the ABA Judicial Division Council participated in this brief’s preparation or in the adoption or endorsement of its positions.

³ ABA Resolution 08A121 (adopted 2008), *available at* https://www.americanbar.org/content/dam/aba/directories/policy/annual-2008/2008_am_121.pdf.

⁴ ABA Resolution 06M111 (adopted 2006), *available at* https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2006/2006_my_111.pdf.

faithful application of rule-of-law principles to preserve the integrity of, and public confidence in, our judicial system.

For example, the ABA’s policy on advancing the rule of law provided the basis for the ABA’s *amicus curiae* brief in *Moore v. Texas*, 139 S. Ct. 666 (2019), in which the ABA explained: “No practice is more vital to preserving the rule of law—and ensuring that the ABA’s promotion of that rule is legitimized in the eyes of developing countries—than the following by lower courts of binding precedent of this Court.”⁵ In *June Medical Services LLC v. Russo*, 140 S. Ct. 2103 (2020), the ABA urged this Court to adhere to precedent rejecting state laws requiring abortion providers to have hospital admitting privileges. The ABA explained that both this Court’s adherence to its precedent and the lower federal and state courts’ adherence to this Court’s decisions are critical to the stability of our legal system and public confidence in the judiciary.⁶ In *Dobbs v. Jackson Women’s Health Organization*, 19-1392, the ABA again called upon the

⁵ Brief of Amicus Curiae ABA, No. 18-443, at 5 n.4, available at <https://www.americanbar.org/content/dam/aba/administrative/amicus/bobby-james-moore-v-texas-in-the-supreme-court-of-the-united-states-november-8-2018.pdf>.

⁶Brief of Amicus Curiae ABA, No. 18-1323, available at https://www.supremecourt.gov/DocketPDF/18/18-1323/124077/20191202141458213_18-1323tsacABA.pdf.

Court to reaffirm the rule of law by adhering to its long-standing precedent.⁷

Texas acknowledges that it has attempted to craft its law so that “[n]either the federal government nor abortion providers” are entitled to challenge Texas’s abortion law in federal court. State of Texas’s Opposition to the United States’ Application to Vacate Stay of Preliminary Injunction [hereafter “Tex. Opp.”] at 45. In intentionally aiming to evade federal courts’ review of the law’s constitutionality, Texas has undercut the rule of law and this Court’s role as the ultimate expositor of the Constitution.

Texas’s actions are particularly troubling where it has sought to ensconce beyond the reach of federal review a law that unquestionably contradicts this Court’s holdings that the Constitution protects the right to abortion until the point of fetal viability. See *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). In keeping with the ABA’s commitment to the rule of law, it has adopted a policy “oppos[ing] state or federal legislation which restricts the right of a woman to choose to terminate a pregnancy (i) before fetal

⁷ Brief of Amicus Curiae ABA, No. 19-1392, *available at* https://www.supremecourt.gov/DocketPDF/19/19-1392/192947/20210920132742521_Final%20ABA%20Amicus%20Brief.pdf.

viability; or (ii) thereafter, if such termination is necessary to protect the life or health of the woman.”⁸

Consistent with its mission and its policy, the ABA files this brief to support the federal government’s ability to hold Texas accountable for its unconstitutional acts and to ensure continuing access to the courts to protect fundamental constitutional rights.

SUMMARY OF ARGUMENT

From the founding of the nation, the Constitution has been the supreme law of the land, and this Court has been the sole, final arbiter of its meaning. To maintain this constitutional order, the founders charged the federal executive with the duty to ensure the faithful execution of federal law, and, thus, violation of that law grants the executive standing to seek redress in federal court, *see In re Debs*, 158 U.S. 564, 584 (1895) (*abrogated on other grounds by Bloom v. Illinois*, 391 U.S. 194, 208 (1968)) (“The obligations which [the federal executive] is under to promote the interest of all and to prevent the wrongdoing of one, resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court.”)

⁸ ABA Resolution 92A12 (adopted 1992), *available at* https://www.americanbar.org/content/dam/aba/directories/policy/annual-1992/1992_am_12.pdf; *see also* ABA Resolution 19A115F (adopted 2019), *available at* <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2019/115f-annual-2019.pdf>.

In attempting to avoid federal judicial review of its unconstitutional abortion law by delegating enforcement to private citizens, Texas has injured the federal interest in faithful execution of the law. Under this Court's precedents such private constitutional violations effected through State courts and with the knowledge and encouragement of the State are attributable to the State, *see Shelley v. Kramer*, 334 U.S. 1, 18-20 (1948); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 614 (1989), and may be enjoined by federal courts.

ARGUMENT

THE FEDERAL GOVERNMENT'S ENFORCEMENT OF CONSTITUTIONAL RIGHTS IS A CORNERSTONE OF FEDERAL CONSTITUTIONAL ORDER AS WELL AS ESSENTIAL TO THE RULE OF LAW.

Enforcement of the Constitution in federal courts lies at the heart of American liberty, and federal courts have long held the State to account for constitutional violations resulting from private use of the courts and authorized by the State.

A. State Legislation That Violates Federal Constitutional Rights Injures The Interests Of The United States.

Since the founding era, the supremacy of the Constitution and federal judicial review of constitutional questions have been fundamental to the functioning of American democracy. The

founders made the federal Constitution the supreme law of the land and required adherence to it at all levels of government. U.S. Const., art. VI cl. 2. And, since *Marbury v. Madison*, 5 U.S. 137 (1803), the availability and finality of federal judicial review of federal constitutional challenges has remained an unquestioned pillar of American justice.

These principles form the very foundation of our system of judicially protected constitutional rights, as the ABA has consistently recognized. For example, the ABA celebrated the two-hundredth anniversary of *Marbury* by “rededicate[ing] itself in support of the United States Constitution as the supreme law of the land and reaffirm[ing] its commitment to the doctrine of ‘judicial review’ as a fundamental principle for a nation governed by the rule of law.”⁹ In adopting its long range plan for the federal courts, the ABA considered that the federal courts’ “constitutional role in a governmental system of checks and balances [is] to preserve and protect the individual rights and liberties guaranteed by the Constitution.”¹⁰ In adopting a policy supporting federal judicial review of immigration decisions, the ABA considered that the right to seek judicial review “differentiates the United

⁹ ABA Resolution 03M112 (adopted 2003), *available at* https://www.americanbar.org/content/dam/aba/directories/policy/2003_my_112.pdf.

¹⁰ ABA Resolution 95AM305 (1995), Report at 4, *available at* https://www.americanbar.org/content/dam/aba/directories/policy/annual-1995/1995_am_305.pdf.

States from other countries that lack the same commitment to the rule of law.”¹¹

Federal courts cannot guarantee constitutional rights in a vacuum. Especially in circumstances where rights-holders would have difficulty vindicating their rights themselves, the ability of the federal executive to champion the Constitution in court has also remained an essential feature of the American system since its conception. Indeed, the founders expressed this in the Constitution itself by tasking the executive to “take Care that the Laws be faithfully executed.” U.S. Const., art. II § 3.

The federal government need not acquiesce in attempts by States to constrain the federal government’s ability to fulfill that duty. As the Court has explained, “[t]o impose on [the federal government] the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution.” *McCulloch v. Maryland*, 17 U.S. 316, 424 (1819).

The Court later reiterated, “Every 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

¹¹ ABA Resolution 10M114D (adopted 2010), Report at 3, available at https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2010/2010_my_114d.pdf.

for any proper assistance in the exercise of the one and the discharge of the other” *Debs*, 158 U.S. at 584.

The supremacy of the Constitution, the availability and finality of federal judicial review, and the federal executive’s ability to ensure faithful execution of the Constitution in court remain as critical today as they were at the founding.

B. Federal Courts May Enjoin The Use Of Texas’s Courts By Private Citizens To Effect Violations Of The Federal Constitution.

Texas asserts that, despite the deeply rooted traditions of federal judicial review and federal executive enforcement of the Constitution, “[n]either the federal government nor abortion providers” may seek federal judicial review or remedy of its abortion law. *Tex. Opp.* at 45. Texas premises this unprecedented position upon the extraordinary notion that its abortion law is “enforced ‘exclusively through . . . private civil actions.’” *Id.* at 5 (quoting *Tex. Health & Safety Code Ann.* § 171.207(a)). Acceptance of this position directly undermines the founding principles discussed above.

Indeed, Texas acknowledges that “women in Texas are unable to receive post-heartbeat abortions [because] abortion providers choose not to provide them because they do not wish to litigate their liability in a state court under a statute they deem unconstitutional.” *Tex. Opp.* at 44-45. This chilling

of constitutionally protected activity is the intended result of Texas's enactment of a state-court system that severely limits a provider's defenses, subjects it to potentially crippling monetary damages, and allows the award of fees and costs to successful plaintiffs but not defendants. Tex. Health & Safety Code Ann. § 171.208. Moreover, by denying a provider the ability to raise constitutional defenses, *id.* § 171.208(e), the law deprives a provider of the ability to establish a record for constitutional challenges in further proceedings on appeal. This scheme runs counter to fundamental values of government accountability, access to justice, and the rule of law.

Texas's attempt to avoid federal constitutional scrutiny fails under this Court's well-established precedent. To begin, Texas's weaponization of its courts to allow enforcement of its laws by private citizens dooms its attempts to avoid liability for its constitutional violations. In *Shelley*, the Court held that States violated the Equal Protection Clause of the Fourteenth Amendment when State courts enforced race-based restrictive covenants entered among private citizens. 334 U.S. at 18-20. Texas likewise cannot avoid liability for its role in "ma[king] available to [private] individuals the full coercive power of government" through suits it authorizes by law to be brought and enforced in its courts. *Id.* at 19.

As the *Shelley* Court explained, "from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court

that the action of the States to which the Amendment has reference, includes action of state courts and state judicial officials.” 334 U.S. at 18. “[I]t has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government.” *Id.*

This case perfectly illustrates the necessity of this rule. If a State could disclaim constitutional responsibility for private lawsuits that it authorizes and enforces through its courts, no constitutional right would be safe. Through the limitations and burdens placed on defendants sued under its law, Texas has authorized private use of its courts to chill exercise of the constitutional right to abortion before viability. Another State could similarly declare, for example, handgun ownership illegal and prohibit enforcement of that law by State officials but allow private suits against handgun sellers with limited defenses and heavy burdens on defendants. In Texas’s view, so long as a State did nothing more than allow and enforce such suits, no federal court, including this one, could do anything about it. This Court has never countenanced such lawlessness.

Nor can Texas shelter itself from liability for constitutional violations caused by its private-suit scheme on the ground that it “lacks the right to control the conduct of that private plaintiff.” *Tex. Opp.* at 29 (internal quotation marks omitted). Texas readily admits that it has delegated enforcement of its unconstitutional abortion law to private civil suits. *Id.* at 5. And, within the context of law enforcement

action, this Court has never held that “control” of private conduct is a necessary condition for a constitutional violation. Rather, whether private conduct gives rise to a constitutional violation by the State “turns on the degree of the Government’s participation in the private party’s activities.” *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 614 (1989). That question “can only be resolved ‘in light of all the circumstances.’” *Id.* (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971)). In assessing those circumstances, lower courts have considered whether the government knew of and acquiesced in the conduct, whether the private actor’s purpose was to assist law enforcement efforts, *e.g.*, *United States v. Steiger*, 318 F.3d 1039, 1045 (11th Cir. 2003); *United States v. Souza*, 223 F.3d 1197, 1201 (10th Cir. 2000), and whether the State has offered a reward for the conduct, *United States v. Hall*, 142 F.3d 988, 993 (7th Cir. 1998).

Texas’s actions here satisfy all of these factors for deeming constitutional violations caused by private suits acts of the State. Texas not only knows of and acquiesces in those suits but authorized them by statute; Texas admits that the purpose of those suits is to enforce its law; and Texas financially incentivizes those suits by offering “statutory damages of not less than \$10,000,” Tex. Opp. at 5 (citing Tex. Health & Safety Code Ann. § 171.208(b)). Consequently, federal courts may enjoin the actions attributable to Texas through private actors who file suit in Texas courts.

CONCLUSION

For these reasons, this Court should allow the federal government to bring suit in federal court to hold Texas accountable for its constitutional violations.

Respectfully submitted,

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