**Nos. 21-463, 21-588**

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**In the Supreme Court of the United States**

WHOLE WOMAN'S HEALTH, *et al.*,
*Petitioners*,
v.
AUSTIN REEVE JACKSON, JUDGE, DISTRICT COURT OF TEXAS, 114TH DISTRICT, *et al.*,
*Respondents.*

UNITED STATES,
*Petitioners*,
v.
TEXAS, *et al.*,
*Respondents.*

On Writs of Certiorari Before Judgment to the United States Court of Appeals for the Fifth Circuit

# BRIEF OF LEGAL SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## INTEREST OF *AMICI CURIAE*[1]

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Professors Emerson, Michaels, Noll, and Zambrano (collectively, "*Amici*") have closely followed the recent wave of state laws enforced through private rights of action, of which Texas Senate Bill 8 ("S.B. 8")

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[1] All parties have filed blanket consents to the filing of *amici curiae* briefs. No counsel for a party authored this brief in whole or in part, and no person other than *Amici* or their counsel made a monetary contribution to fund its preparation or submission.

is an extreme example, and the lawsuits that have been filed under S.B. 8 since its enactment.

*Amici* have no direct financial interest in the parties or the outcome of these cases. They do share a common interest in providing crucial legal and historical context for S.B. 8's enforcement scheme. *Amici* respectfully submit this brief to explain how (1) S.B. 8's departures from traditional private rights of action violate due process; and (2) S.B. 8's novel enforcement scheme sets a dangerous precedent that already is being exported to other areas, with grave implications for constitutional governance and the rule of law.

## INTRODUCTION AND SUMMARY OF ARGUMENT[2]

S.B. 8's private enforcement scheme is a far cry from "entirely commonplace," as its defenders contend. *See* Intervenor-Resp'ts' Mem. Opp. Emergency Appl. to Vacate 5th Cir. Stay Pending Appeal at 28, *United States v. Texas*, No. 21-588 (Oct. 21, 2021) (hereinafter "Intervenor-Appellants' Stay Br."). To the contrary, it departs from the models it purports to draw upon in "unprecedented" ways that brazenly elevate vigilantism over the rule of law. *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2496 (2021), at *2 (Roberts, C.J., dissenting).

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[2] *Amici* adopt the facts and procedural history set forth in the United States's petition. *See* U.S. Appl. to Vacate Stay of Prelim. Inj. Issued by 5th Cir., *United States v. Texas*, No. 21-588 (Oct. 18, 2021) (hereinafter "U.S. Appl.").

Historically, private enforcement schemes have been tailored to promote fair and efficient enforcement of legislative and regulatory policy priorities—and have been deployed when and where public enforcement may not be adequate. Those schemes have respected defendants' due process rights and courts' authority to engage in fair and impartial judicial review.

S.B. 8 is a private enforcement scheme flipped on its head. It is reverse-engineered to bypass the traditional due process safeguards that are key to the design of extant private enforcement schemes. Under S.B. 8, defendants are subject to suit from *any* person in *any* judicial district in Texas without the possibility of transfer. S.B. 8 § 171.210(b). Even if defendants prevail, they are barred from asserting claim or issue preclusion to prevent others from bringing the exact same suit based on the exact same conduct. *Id.* § 171.208(e)(5). Brushing aside the Supremacy Clause, the law limits defendants' ability to raise federal constitutional defenses. *Id.* §§ 171.209(a)-(d). And, regardless whether suits are brought in bad faith, S.B. 8 purports to bar defendants from obtaining attorney's fees to defray the overwhelming costs of such repeat, barratrous litigation. *Id.* § 171.208(i). The combination of these provisions systematically and unconstitutionally denies potential defendants due process.

The unconstitutionality of S.B. 8's enforcement scheme is unrelated to the law's substantive provisions regulating abortion (a separate constitutional question). The exact same scheme

could be deployed to permit private citizens to sue to enforce restrictions on private firearms ownership, corporations' campaign contributions, or COVID prevention regulations. Indeed, commentators have already suggested that S.B. 8 "set[s] an ominous precedent for turning citizens against one another on whatever contentious issue their state legislature chose to insulate from ordinary constitutional review,"[3] and lawmakers in other states have introduced bills that borrow from S.B. 8's enforcement scheme verbatim.[4]

This Court should recognize that petitioners' ability to seek pre-enforcement redress is necessary to prevent S.B. 8's unique and exceptional enforcement scheme from violating due process rights.

## ARGUMENT

### I. S.B. 8's Enforcement Scheme Violates Due Process.

Federal and state laws supply myriad examples of statutes enforced by private parties. Private rights of action help ensure vigorous, efficient enforcement of the law, particularly where public enforcement may be inadequate.[5]

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[3] *See, e.g.*, Laurence H. Tribe & Stephen I. Vladeck, *Texas Tries to Upend the Legal System with its Abortion Law*, N.Y. TIMES, July 19, 2021, *available at* https://www.nytimes.com/2021/07/19/opinion/texas-abortion-law-reward.html.

[4] *See infra* at 20-21.

[5] *See, e.g.*, Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 662-66 (2013) (describing policy rationales for private

Whether to create a private right of action—and if so, how to structure it—are policy matters entrusted to the legislature in the first instance. *See Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 269-71 (1975). Yet in designing enforcement schemes, legislatures do not operate free of constitutional limitations. Just as a legislature may not create a criminal offense and deny the accused the right to a speedy and public trial, it may not create a private cause of action stripped of the procedural safeguards that due process requires. *See Burnham v. Superior Court*, 495 U.S. 604, 622 (1990) ("For new procedures, hitherto unknown, the Due Process clause requires analysis to determine whether traditional notions of fair play and substantial justice have been offended.") (internal quotation marks and citation omitted).

This Court has long recognized that "[a] fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). The design of an enforcement scheme must accordingly respect the requirement of "fundamental fairness." *Walters v. Nat'l Ass'n of Radiation*

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enforcement); Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285, 289-90 (2016) (discussing advantages of "legal regimes in which public and private agents may seek overlapping remedies for the same conduct on substantially similar theories."); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1153 (2012) (describing how "[p]rivate parties function as crucial regulators within various areas of law because of limitations on public bodies that circumscribe their effectiveness in achieving regulatory goals.").

*Survivors,* 473 U.S. 305, 321 (1985); *see also Fuentes v. Shevin*, 407 U.S. 67, 93, 96 (1972) (holding that state replevin statute allowing creditor to repossess goods with minimal judicial safeguards violated due process); *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 122-23 (1928) (finding delegation of enforcement power to private citizens subject to due process requirements); *Richards v. Jefferson Cty.*, 517 U.S. 793, 804 (1996) ("'[A] State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.'" (quoting *Brinkerhoff–Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 681-82 (1930)).

S.B. 8's enforcement provisions violate these requirements, as the District Court, the United States and others have explained. *See* Order, *United States v. Texas*, 21-cv-00796, Dkt. No. 68, at 9-10 (W.D. Tex. Oct. 6, 2021) ("Dist. Ct. Order"); U.S. Appl. at 6-7. The provisions are not designed to fill a regulatory gap or ensure adequate and efficient enforcement; in combination, they are structured to evade the strictures of due process and avoid judicial review. The resulting procedures and procedural limitations are entirely out of step with extant private enforcement schemes.

S.B. 8 permits any person, regardless whether they have any connection to the underlying conduct or the State of Texas, or suffered any injury, to bring suit to claim a minimum $10,000 award. S.B. 8 §§ 171.208(a)-(b). S.B. 8 grants plaintiffs their choice

of venue regardless how inconvenient or inhospitable that choice is to the defendant. *Id.* § 171.210(b). It denies defendants the right to raise well-recognized affirmative defenses, including non-mutual issue preclusion and non-mutual claim preclusion. *Id.* § 171.208(e)(5). It limits defendants' ability to invoke this Court's constitutional precedents as a defense. *Id.* §§ 171.209(a)-(d)). It threatens defendants with plaintiff's attorney's fees and costs. And it bars defendants from seeking attorney's fees from plaintiffs, no matter how frivolous the suit. *Id.* § 171.208(i). All told, the risks to a defendant of litigating a claim brought under S.B. 8 are so severe that, regardless of the merits of a lawsuit, few defendants will be willing or able to litigate to judgment.

1. **Unbounded Authorization to Sue**. As an initial matter, S.B. 8 ensures that any person may bring suit, no matter that person's connection to the underlying conduct. Texas thus invites ideologues and vigilantes to bring abusive suits.

S.B. 8's sponsor draws an analogy between S.B. 8 and *qui tam* laws.[6] However, *qui tam* statutes possess a key unifying principle that is conspicuously disregarded in S.B. 8: when a relator asserts a claim on behalf of the government, the government plays an important, ongoing, and supervisory role over the *qui*

[6] *See* Jenna Greene, *Column: Crafty Lawyering on Texas Abortion Bill Withstood SCOTUS Challenge*, REUTERS, Sept. 5, 2021, *available at* https://www.reuters.com/legal/government/crafty-lawyering-texas-abortion-bill-withstood-scotus-challenge-greene-2021-09-05.

*tam* litigation. Under the federal False Claims Act, for example, the government has the right to intervene and assume primary responsibility for the litigation of the action. 31 U.S.C. § 3730(b)(2). That responsibility is capacious. It includes deciding whether to take over the fraud suit (sidelining the relator), to partner with the relator, to settle with the defendant, or to dismiss the suit outright. *Id.* § 3730(c)(2).

Ordinarily, Texas imposes similar constraints on private plaintiffs. For example, under the Texas Medicaid Fraud Prevention Act, the Texas government must receive notice before a case is brought, Tex. H.R. Code § 36.102(a), is permitted to intervene, *id.* § 36.102(c), and should it choose to, assume "primary responsibility for prosecuting the action" without being "bound by an act of the person bringing the action," *id.* § 36.107(a).

These safeguards make sense. Courts have consistently recognized that the incentives of private citizens are often misaligned with the public's objectives. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 164 (2014) (discussing risks where "universe of potential complainants is not restricted to state officials who are constrained by explicit guidelines or ethical obligations"); *Nike, Inc. v. Kasky,* 539 U.S. 654, 679 (2003) (Breyer, J., dissenting) (describing risks of authorizing suits by "a purely ideological plaintiff"); *Assoc. of Am. R.R.s v. U.S. Dep't. of Transp.*, 721 F.3d 666, 677 (D.C. Cir. 2013) ("Skewed incentives are precisely the danger

forestalled by restricting delegations to government instrumentalities."). Nor are the enforcement decisions of private actors as politically or legally accountable as those of public officeholders. *Cf.* Jon D. Michaels, *Deputizing Homeland Security*, 88 TEX. L. REV. 1435, 1457-66 (2010) (describing potential dangers of delegation of investigatory responsibilities to private actors).

Heedless of these risks, S.B. 8 opens the door to abusive lawsuits by parties who may lack any legitimate interest in policing the conduct of medical offices, hospitals, insurers, transportation workers, and neighbors.[7]

2. **Venue**. Having thrown open the courthouse door to "any person," S.B. 8 grants plaintiffs their choice of venue irrespective of how inconvenient or inhospitable that choice is to the defendant. S.B. 8 § 171.210(b). This is no small, inexpensive, or inconsequential matter in a state the size of Texas; for instance, providers in El Paso may be forced to travel 730 miles to Tyler to defend themself against a plaintiff with no connection to the alleged conduct.

Various statutory schemes provide flexibility in venue as a way to ensure that potential plaintiffs are able to bring claims in a convenient forum. But here, by foreclosing defendants' ability to seek a transfer of venue, the statute encourages a plaintiff to select an

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[7] *See, e.g.*, Jon D. Michaels & David L. Noll, *Legal Vigilantes and the Institutionalization of Anti-Democratic Politics* (2021), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id= 3915944 (describing potential scope of liability).

*inconvenient* one. It has long been recognized that venue may be misused by plaintiffs. As this Court stated in *Gulf Oil Corp. v. Gilbert*:

> A plaintiff sometimes is under temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself. . . . Many states have met misuse of venue by investing courts with a discretion to change the place of trial on various grounds, such as the convenience of witnesses and the ends of justice.

330 U.S. 501, 507 (1947).

Such concerns underlie the common law doctrine of *forum non conveniens* and its modern counterpart, the federal transfer statute, 28 U.S.C. § 1404(a). *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 429 (2007) (noting that a court may dismiss on grounds of *forum non conveniens* if, among other things, "trial in the chosen forum would establish oppressiveness and vexation to a defendant out of all proportion to plaintiff's convenience") (internal quotation marks, alterations, and citation omitted); *see also id.* at 430 (noting that "[f]or the federal court system, Congress has codified the doctrine and has provided for transfer" to other federal district courts). S.B. 8, however, practically insists upon an inconvenient forum: "the action may not be transferred to a different venue without the written consent of all parties." S.B. 8 § 171.210(b).

Equally troublingly, S.B. 8's venue provision threatens defendants' ability to be tried by an impartial jury of their peers. *See Warger v. Shauers*, 574 U.S. 40, 50 (2014) ("[T]he Constitution guarantees both criminal and civil litigants a right to an impartial jury."). The statute encourages plaintiffs to bring suit in localities that are not just inconvenient, but also where residents staunchly disapprove of abortion; where communities are culturally, economically, and racially quite different from those where the alleged violations took place; and, therefore, where any S.B. 8 prosecution would attract outsized publicity. Even before S.B. 8 was enacted, Texans' views on cultural issues such as abortion have been polarized.[8] Where these risks are present, the ability to transfer venue is critical to ensure an impartial and representative jury.

In the criminal context, this Court has held unconstitutional a misdemeanor statute barring transfer altogether, *see Groppi v. Wisconsin*, 400 U.S. 505, 512 (1971), and even considered a statute permitting a single change of venue constitutionally suspect, *see Irvin v. Dowd*, 366 U.S. 717, 720-21 (1961). S.B. 8 imposes a civil penalty exceeding that of many felonies and misdemeanors and expressly disallows even a single venue change. *Cf. Sessions v.*

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[8] As of June 2021, 32% of Texans strongly supported a six-week ban, and 37% strongly opposed. *Support or Oppose: Making Abortion Illegal After 6 Weeks of Pregnancy*, THE TEXAS POLITICS PROJECT AT THE UNIVERSITY OF TEXAS AT AUSTIN. June 2021, *available at* https://texaspolitics.utexas.edu/set/support-or-oppose-making-abortion-illegal-after-6-weeks-pregnancy-june-2021.

*Dimaya*, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J., concurring) (observing that "today's civil laws regularly impose penalties far more severe than those found in many criminal statutes").

3. **Defenses**. S.B. 8 next ties defendants' hands: those sued under S.B. 8 are prohibited from raising generally applicable defenses, including that they believed the law was unconstitutional; that they relied on a court decision, later overruled, that was in place at the time of the acts underlying the suit; or that the patient consented to the abortion. S.B. 8 § 171.208(e). Texas structured these prohibitions in a manner that invites abstruse debates over their consistency with *Roe* and *Casey* and penalizes potential defendants' conduct regardless of this Court's pronouncements.

This Court is "not required to exhibit a naiveté from which ordinary citizens are free." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.)). The provisions' practical effect is to chill defendants' conduct and stack the deck against constitutional defenses. As we note below, *infra* at 20-21, it is not difficult to envisage states enacting similar provisions to chill other protected rights.

4. **Attorney's Fees**. S.B. 8 next grants successful plaintiffs attorney's fees and costs while barring defendants from seeking fees from plaintiffs even if the suit was brought in bad faith. S.B. 8 § 171.208(i). Defendants are thus forced to bear the full costs of

litigating through dismissal, quite possibly over and over again.

Attorney's fee provisions are designed to "mak[e] it possible for persons without means to bring suit to vindicate their rights." *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 559 (2010) (discussing 42 U.S.C. § 1988); *see also*, *e.g.*, *Alyeska Pipeline*, 421 U.S. at 262-64 (discussing rationales for congressional enactment of attorney's fees provisions). But legislatures have always recognized (if not supplemented) courts' authority to police bad faith, vexatious, and frivolous filings in actions brought by private-enforcer plaintiffs. *See, e.g.*, 15 U.S.C. § 15(a)(1) (subordinating amount of a private litigant's recovery under the Sherman Act to courts' *a priori* analyses of "whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith."); 42 U.S.C. § 2000e-5(k) (deputizing courts to police bad-faith filings under Title VII by placing award of attorney's fees within their discretion). The same holds true in the environmental context, which has some of the more expansive private enforcement schemes. *See, e.g.*, Fla. Stat. Ann. § 403.412(f) (prevailing party in suit under Florida Environmental Protection Act may receive attorney's fees, which "shall be discretionary with the court"); La. Stat. Ann. § 30:2026(A)(3) (same); *see also* Susan George, William J. Snape, III & Rina Rodriguez, *The Public in Action: Using State Citizen Suit Statutes to Protect*

*Biodiversity*, 6 U. BALT. J. ENVT'L. L. 1, 30-36 (1997) (summarizing cost provisions in state environmental citizen suit statutes).

This Court has recognized the concerns that lopsided attorney's fees provisions raise. In *Christianburg Garment Co. v. EEOC*, the Court highlighted the dangers of tilting the playing field too drastically against a defendant and in favor of a plaintiff through fee-shifting provisions, stating:

> A fair adversary process presupposes both a vigorous prosecution and a vigorous defense. It cannot be lightly assumed that in enacting [a statute], Congress intended to distort that process by giving the private plaintiff substantial incentives to sue, while foreclosing to the defendant the possibility of recovering his expenses in resisting even a groundless action unless he can show that it was brought in bad faith.

434 U.S. 412, 419 (1978) (holding "a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith"). S.B. 8 goes even farther than the scheme contemplated in *Christianburg Garment*: it denies defendants attorney's fees not only if the suit is groundless, but also if the suit was brought in subjective bad faith.

5. **Preclusion**. Last, but not least, S.B. 8 provides that defendants may not rely on non-mutual issue or claim preclusion or any other "state or federal court decision that is not binding on the court in which the action" was brought as a defense. S.B. 8 § 171.208(e)(4)-(5). Thus, even when a defendant defeats a suit, finality is denied. A defendant may be sued again and again, forced to bear all the costs such vexatious suits entail.

Preclusion doctrines "protect against 'the expense and vexation attending multiple lawsuits, conserv[e] judicial resources, and foste[r] reliance on judicial action by minimizing the possibility of inconsistent decisions.'" *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (quoting *Montana v. United States*, 440 U.S. 147, 153-54 (1979)); *see also* CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4403 (3d ed. Apr. 2021 Update).

Here the effects of S.B. 8's provisions are manifest. Because any person can bring claims, a defendant—even one who prevails multiple times—may still be subject to suit and forced to pay statutory damages, attorney's fees, and the costs of litigation: "A single positive trumps all the negatives." *In re Bridgestone/Firestone, Inc., Tires Prods.*, 333 F.3d 763, 766-67 (7th Cir. 2003).

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Viewed in isolation, one or even a few of these features would not necessarily rise to the level of a due process violation. And in light of the complex and

ever-changing fields that state and federal law regulates, *Amici* recognize that legislatures require discretion to structure enforcement schemes that are calibrated to ensure efficient, effective, and fair enforcement of the law.

But the sum total of S.B. 8's features combine to deny defendants the "fair trial in a fair tribunal" required by due process. *In re Murchison*, 349 U.S. 133, 136 (1955). By delegating enforcement authority to private actors, systematically stripping defendants of basic procedural protections traditionally afforded in civil litigation, and removing judicial controls, S.B. 8 is legislation *in terrorem*: it controls private behavior through the specter of private enforcement in skewed proceedings.[9]

## II. S.B. 8's Precedent is Dangerous and Easily Copied.

S.B. 8's enforcement scheme not only violates due process; it also intrudes both on the executive's traditional prerogative to oversee enforcement of healthcare regulations and on the "emphatic[] . . . duty of the judicial department to say

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[9] Private bounty schemes that encourage neighbors to turn on other neighbors to reap a financial reward—while depriving individuals of liberty without any effective mechanism to challenge that deprivation—have a sordid place in this nation's history; this Court should be particularly wary of any steps down that path. *See generally* Scott J. Basinger, *Regulating Slavery: Deck-Stacking and Credible Commitment in the Fugitive Slave Act of 1850*, 19 J. L. ECON. & ORG. 307, 323-34 (2003) (describing ways Fugitive Slave Laws stacked the deck in favor of slave-owners with procedural and evidentiary rules that blocked any effective defense to the charges).

what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). *Amici* are unaware of any private enforcement scheme, state or federal, that permits and effectively underwrites private enforcement of state regulatory goals while simultaneously exempting those plaintiffs from generally applicable laws that govern litigation misconduct *and* expressly disclaiming any role in enforcement by the state.

S.B. 8 is a striking departure from legislatures' traditional recognition that duly-elected executive officials play an important role in the regulation of health care providers. Politically and legally accountable, fiscally minded, and resource constrained public officials are uniquely positioned to ensure fair and uniform enforcement of laws and regulations. That is why private enforcement has traditionally been structured as an adjunct of public enforcement; as an extension of a personally felt, concrete injury; or as a means of holding government agencies accountable. When one or more of those three restrictions or conditions is satisfied, private enforcement is highly disciplined and narrowly focused, thereby supporting rather than undercutting the executive's role.[10] S.B. 8's design, in contrast,

[10] This Court has heavily criticized far less extensive efforts to bypass executive authority. *See, e.g., TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207 (2021) ("A regime where Congress could freely authorize unharmed plaintiffs to sue defendants who violate federal law not only would violate Article III but also would infringe on the Executive Branch's Article II authority."); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) ("[T]o permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual

undermines the executive's ability to ensure enforcement comports with any number of overarching fiscal, policy, and legal priorities—including, of course, respect for extant constitutional rights.

The concerns raised by unbounded private enforcement are heightened by the expansive set of potential defendants S.B. 8 targets. The law imposes liability on anyone who "knowingly engages in conduct that aids or abets the performance or inducement of an abortion," § 171.208(a)(2), potentially putting at risk hospital employees, friends, neighbors, or colleagues who may encourage a patient's decision to terminate a pregnancy, or family members or livery drivers who escort patients to abortion clinics. While one might expect politically accountable public officials to exercise discretion and prudence in bringing claims, private citizens may be far less circumspect or disciplined, making the provision ripe for abuse.

Beyond the circumvention of the executive is, of course, S.B. 8's circumvention of the courts. This design feature is likewise no accident. As its supporters boast, S.B. 8 was deliberately structured to evade judicial review in the federal courts. *See* Dist. Ct. Order at 49-51; *see also* Intervenor-Appellants' Reply Br. Supp. Intervenors' Emergency Mot. to Stay

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right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3.").

Prelim. Inj. Pending Appeal, at 3-4, *United States v. Texas* (5th Cir. Oct. 14, 2021) (observing that "Texas has boxed out the judiciary" while asserting that States "have every prerogative to adopt interpretations of the Constitution that differ from the Supreme Court's."). Respondents do not argue that S.B. 8's enforcement scheme furthers any legitimate policy objective such as the regulation of medicine. To the extent that judicial review of the law's constitutionality is available in state court proceedings, it will occur in a forum hand-picked by the citizen-enforcer, with novel limitations on defendants' ability to raise the law's unconstitutionality as a defense. For this reason, it is likely only a scant number of defendants would be willing to proceed to verdict. The manifest purpose is to arrogate to the Texas legislature the question of the Texas legislature's own authority to regulate conduct in a manner contrary to this Court's prior rulings.

None of the private enforcement schemes that S.B. 8's defenders insist are close analogues manipulates judicial review in this manner. As further evidence that even S.B. 8's defenders concede that extant private enforcement laws are not analogous, these defenders contend that "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." Intervenor-Appellants' Stay Br. at 49 (emphasis added). S.B. 8 is justified, in their view, because this Court got the abortion question wrong or

is moving too slowly. But the "respect" to which S.B. 8's defenders refer is not mere courtesy; it is a constitutional obligation. The Texas legislature's actions transgress the "emphatic[] . . . duty of the judicial department to say what the law is." *Marbury*, 5 U.S. at 177.

If countenanced, S.B. 8's design is sure to be repeated elsewhere, enabling this and other state legislatures to abrogate other constitutional and federal rights and to do so in a manner that, as with S.B. 8, necessarily tramples due process. Apparently recognizing the radicalness of Texas's actions, S.B. 8's defenders assert that "there is . . . no reason to believe that state or local jurisdictions will enact laws emulating S.B. 8 in any context other than abortion." Intervenor-Appellants' Stay Br. at 40. And they assure that "[s]tatutes such as SB 8 are unlikely to work when there is clear majority support on this Court for the right at issue." *Id.* at 50. Setting aside the lawlessness of the position that a state can simply decline to follow this Court's precedent based on their view of the future leanings of the Justices, there is simply no reason to believe states will be so restrained.

Already, legislation copying S.B. 8's enforcement scheme verbatim has been introduced in other jurisdictions.[11] And it is not difficult to imagine

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[11] For example, legislators in Florida and Oklahoma have introduced similar legislation. *See* Fla. H.B. 167 (2021) (copying SB 8's enforcement scheme in heartbeat abortion bill); Okla. H.B. 2441 (2021) (same). And the National Association of Christian Lawmakers has drafted a model act for other states' use that incorporates S.B. 8's private enforcement structure. *See* NAT'L

legislatures of varying political stripes creating private enforcement schemes to strip individuals of the ability to defend any number of federally protected rights.[12] As the United States and others note, laws could be enacted to bar gun owners from availing themselves of their rights under *District of Columbia v. Heller*, 554 U.S. 570 (2008).[13] *See, e.g.,* Br. of Firearms Policy Coal. as Amicus Curiae Supp. Granting Cert., *Whole Woman's Health v. Jackson*, No. 21-463 (Oct. 21, 2021). Beyond gun rights, states could also enact private enforcement schemes targeting corporations that bundle donations for political candidates, despite this Court's decision in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). States could likewise erect private enforcement schemes targeting persons of faith and faith-based institutions for availing themselves of various regulatory exemptions recognized as constitutional imperatives in, among other cases, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021) and *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63 (2020).

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ASS'N OF CHRISTIAN LAWMAKERS, NACL MODEL STATE HEARTBEAT ACT, July 17, 2021, *available at* https://christianlawmakers.com/wp-content/themes/nacl-simple-theme/assets/docs/20210722_NACL_NLC_Heartbeat_Model.pdf

[12] *See, e.g.*, Jon D. Michaels & David L. Noll, *We Are Becoming a Nation of Vigilantes*, N.Y. TIMES, Sept. 4, 2021, *available at* https://www.nytimes.com/2021/09/04/opinion/texas-abortion-law.html.

[13] At least one such bill appears to have been introduced. *See* Ill. H.B. 4156 (2021) (copying S.B. 8's enforcement scheme to regulate firearms dealers and importers).

## CONCLUSION

For the foregoing reasons, this Court should recognize that petitioners' ability to seek pre-enforcement redress is necessary to prevent S.B. 8's unique and exceptional enforcement scheme from violating due process rights.

Respectfully submitted,

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