No. 21A85

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Applicant,
v.

STATE OF TEXAS, *et al.*,
Respondents.

MOTION FOR LEAVE AND BRIEF OF INDIANA, ALABAMA, ARIZONA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, AND WEST VIRGINIA AS *AMICI CURIAE* IN OPPOSITION TO THE APPLICATION TO VACATE STAY OF PRELIMINARY INJUNCTION

Office of the Indiana
Attorney General
302 W. Washington St.
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

**Counsel of Record*

THEODORE E. ROKITA
Attorney General
THOMAS M. FISHER*
Solicitor General
KIAN J. HUDSON
Deputy Solicitor General
JULIA C. PAYNE
MELINDA R. HOLMES
Deputy Attorneys General

Counsel for Amici *States*

Additional counsel listed with signature block

The States of Indiana, Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Ohio, Oklahoma, South Carolina, South Dakota, Utah, and West Virginia move for leave to file the enclosed brief as *amici curiae* in support of respondents and in opposition to the United States' application to vacate the Fifth Circuit's stay of the district court's preliminary injunction (i) without 10 days' advance notice to the parties of amici's intent to file as ordinarily required by Sup. Ct. R. 37.2(a), and (ii) in an unbound format on 8½-by-11-inch paper rather than in booklet form. The respondents do not oppose the filing of this brief, and the United States takes no position.

The United States filed its application in this matter on October 18, 2021. In light of the expedited briefing schedule, it was not feasible to provide 10 days' notice to the parties. And the compressed timeframe prevented *Amici* States from having the brief finalized in sufficient time to allow it to be printed and filed in booklet form.

As set forth in the enclosed brief, the undersigned *Amici* States have a strong interest in the outcome of this application. *Amici* States have a critical interest in opposing the U.S. Attorney General's assertion of authority to haul any State into court any time he believes any state legal rule violates anyone's constitutional rights.

The authority the Attorney General claims in this case would permit the federal government to challenge countless state laws the constitutionality of which is ordinarily litigated in state court, and *Amici* States thus have a distinct perspective to offer the Court. The amicus brief includes relevant material not brought to the attention of the Court by the parties that may be of considerable assistance to the

Court. *See* Sup. Ct. R. 37.1. In particular, the brief explains why Congress has repeatedly refused to grant the Attorney General the sweeping authority he claims here, and why the Attorney General's attempts to limit his theory lack both legal justification and practical significance.

The undersigned *Amici* States therefore seek leave to file this brief in opposition to the application to vacate the stay of the preliminary injunction.

CONCLUSION

The Court should grant *Amici* States leave to file the enclosed brief.

Respectfully submitted,

Office of the Indiana
Attorney General
302 W. Washington St.
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

**Counsel of Record*

THEODORE E. ROKITA
Attorney General
THOMAS M. FISHER*
Solicitor General
KIAN J. HUDSON
Deputy Solicitor General
JULIA C. PAYNE
MELINDA R. HOLMES
Deputy Attorneys General

Counsel for Amici *States*

Dated: October 21, 2021

No. 21A85

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Applicant,
v.

STATE OF TEXAS, *et al.*,
Respondents.

BRIEF OF INDIANA, ALABAMA, ARIZONA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, AND WEST VIRGINIA AS *AMICI CURIAE* IN OPPOSITION TO THE APPLICATION TO VACATE STAY OF PRELIMINARY INJUNCTION

Office of the Indiana
Attorney General
302 W. Washington St.
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

**Counsel of Record*

THEODORE E. ROKITA
Attorney General
THOMAS M. FISHER*
Solicitor General
KIAN J. HUDSON
Deputy Solicitor General
JULIA C. PAYNE
MELINDA R. HOLMES
Deputy Attorneys General

Counsel for Amici *States*

Additional counsel listed with signature block

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CASES [CONT'D]

STATUTES

INTRODUCTION & INTEREST OF *AMICI* STATES

The States of Indiana, Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Ohio, Oklahoma, South Carolina, South Dakota, Utah, and West Virginia respectfully submit this brief as *amici curiae* in opposition to the Application to Vacate Stay of Preliminary Injunction.

The order below threatens to expose every State in the Union to suit by the federal government whenever the U.S. Attorney General deems a state law to violate some constitutional right of someone, somewhere. Critically, the district court enjoined everyone in the world from enforcing all of S.B. 8 *not* on the basis of any legal right the federal government *itself* holds, but on the ground the law violates the putative "Fourteenth Amendment substantive due process right[] to pre-viability abortions," App. 73a—which is, of course, a "'right of the *individual*.'" *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (emphasis in original)).

All agree that no statute provides the federal government a cause of action to seek such an injunction to enforce individuals' Fourteenth Amendment rights. The district court, however, declared that "[n]o cause of action created by Congress is necessary" because the federal government has inherent power "to seek an injunction to protect . . . the fundamental rights of its citizens under the circumstances present here." 39a–40a. *Amici* States submit this brief to explain why this conclusion is wrong and why the Fifth Circuit was therefore correct to stay the order pending appeal.

1. As even the federal government acknowledged in the district court below, for many years "courts have held that the mere fact that federal constitutional rights are being violated does not necessarily authorize the United States to sue." ECF 8 at 25–26. Indeed, Congress has repeatedly refused "to give the Attorney General broad power to seek injunctions against violations of citizens' constitutional rights." *United States v. City of Philadelphia*, 644 F.2d 187, 195 (3d Cir. 1980). For good reason: Allowing the Attorney General to seek invalidation of any legal rule he believes violates individuals' constitutional rights would amount to "government by injunction," a practice "anathematic to the American judicial tradition." *Id.* at 203.

2. The federal government scarcely contests this general point but instead insists it must be able to sue to enjoin state conduct in what it claims are the "'exceptional' circumstances" presented here. Application at 28 (quoting App. 111a). The district court adopted this position, accepting the "three limiting principles" the federal government argues make this case exceptional. App. 49a. Yet these "limiting principles" are neither principled nor limiting. They lack grounding in any legal authority and would permit federal challenges to a wide variety of state laws. At bottom, the federal government's theory is premised on the notion that the Constitution guarantees individuals the right "to vindicate their federal constitutional rights in federal court." Application at 28. The Constitution does not do so, and for that reason the Fifth Circuit correctly stayed the district court's order pending appeal. The Court should therefore decline the federal government's application to vacate that stay.

ARGUMENT

I. As Even the Federal Government Seems to Acknowledge, It Lacks a General Cause of Action in Equity to Challenge State Laws as Violative of Individual Constitutional Rights

Before suing a State, the federal government, "like any other plaintiff . . . must first have a cause of action against the state." *United States v. California*, 655 F.2d 914, 918 (9th Cir. 1980). Because the federal government has failed to clear this threshold, its suit fails at the outset, and the Fifth Circuit correctly stayed the district court's order purporting to preliminarily enjoin anyone from enforcing S.B. 8.

Notably, neither the federal government nor the district court suggest that any statute grants the federal government authority to seek injunctions on behalf of individuals' constitutional rights. The contention, rather, is that the Constitution itself—the Fourteenth Amendment or Supremacy Clause—provides the cause of action. *See* Application at 20 (contending "the law's violation of the Fourteenth Amendment and the Supremacy Clause injures the United States' sovereign interests"); App. 57a (arguing that there is an "equitable cause of action" because S.B. 8 attempts to "supersede the Supremacy Clause and the Fourteenth Amendment").

The federal government's argument on this score, however, runs headlong into this Court's precedents. *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324–25 (2015) ("[T]he Supremacy Clause . . . certainly does not create a cause of action."); *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 365 (1991) (Scalia, J., concurring in part and concurring in judgment) ("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."). Implied rights of action are disfavored: "In

both statutory and constitutional cases, [the Court's] watchword is caution." *Hernandez v. Mesa*, 140 S. Ct. 735, 742 (2020); *see also, e.g., Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856–58 (2017); *Alexander v. Sandoval*, 532 U.S. 275, 286–93 (2001).

Accordingly, "almost every court that has had the opportunity to pass on the question" has agreed "that the United States may not sue to enjoin violations of individuals' fourteenth amendment rights without specific statutory authority." *United States v. City of Philadelphia*, 644 F.2d 187, 201 (3d Cir. 1980); *see also United States v. Mattson*, 600 F.2d 1295, 1297 (9th Cir. 1979) ("[T]he United States may not bring suit to protect the constitutional rights of [individuals in state mental-health facilities] without express statutory approval . . . ."); *United States v. Solomon*, 563 F.2d 1121, 1129 (4th Cir. 1977) (similar).

After all, the mid-twentieth century saw the federal Executive Branch make "several attempts extending over a period of twenty years," *Solomon*, 563 F.2d at 1125 n.4, to convince Congress to enact legislation authorizing the Attorney General to "seek injunctions against violations of citizens' constitutional rights," *Philadelphia*, 644 F.2d at 195. Officials, including multiple Attorneys General, seriously debated these legislative proposals and clearly believed they would *change* the Executive Branch's *lack* of authority on this score: "Those officials did not act out a meaningless charade, debating whether to create what they believed already existed, but in a serious and responsible manner decided for reasons of constitutional principle and sound public policy not to create new federal authority over state and local governments." *Id.* at 201; *see also id.* at 195 (quoting Attorney General's observation that

under current law conspiracies to violate constitutional rights "'can be redressed only by a civil suit by the individual injured thereby'" (citation omitted)).

Furthermore, while these particular proposals met with Congress's "express refusal[]," *id.* at 195, Congress has occasionally provided the Attorney General narrow authority to sue States to seek injunctions against violations of certain constitutional or statutory rights, *see, e.g.,* 52 U.S.C. § 10306(b) (poll taxes); 52 U.S.C. § 10504 (Voting Rights Act). If the Attorney General possessed an inherent equitable cause of action to sue States to enjoin violations of individual rights, such provisions would plainly be unnecessary. Both Congressional action and inaction thus "demonstrate[] that neither Attorneys General nor Congress . . . believed that either Congress or the Constitution had created this power sub silentio." *Philadelphia,* 644 F.2d at 201.

The district court responded to this overwhelming evidence with a non sequitur: This "history has little bearing on the action here," it argued, because these "legislative debates . . . occurred between 1957 and 1964, placing them a decade before the Supreme Court first recognized the right to abortion in *Roe v. Wade*, 410 U.S. 113 (1973)." App. 53a. Yet not even the district court suggested that among constitutional rights abortion is somehow uniquely amenable to federal enforcement. And neither *Roe* nor any other abortion-rights precedent says anything about the federal government's authority to seek injunctions against States to enforce abortion rights. Regardless of the constitutional right at issue, "the longstanding and uniform agreement of all concerned" is that "the fourteenth amendment does not implicitly authorize the United States to sue to enjoin violations of its substantive prohibitions." *Philadelphia*, 644 F.2d at 201.

Other than a 1963 opinion whose constitutional reasoning was later disavowed by two-thirds of the panel, *see United States v. City of Jackson, Miss.*, 320 F.2d 870 (5th Cir. 1963), the district court cited just one other authority on this point: *In re Debs*, 158 U.S. 564 (1895). App. 47a. Yet this one-and-a-quarter-century-old decision, which permitted the federal government to enforce an anti-strike injunction quelling violent railroad labor unrest, vindicated no private rights and invalidated no state laws; rather, the suit was premised on the federal government's property interests in the mail and *public* rights in unobstructed interstate rights of way. 158 U.S. at 581–84. As the Fourth Circuit has observed, in *Debs* "Congress had exercised the constitutional power" at stake, which in turn "was impugned by the action sought to be redressed." *Solomon*, 563 F.2d at 1127. No such congressional exercise of authority is present here. Furthermore, "the harm was a public nuisance, and there was a statute [the Sherman Act] authorizing suit on which the decision could have been grounded." *Id.* This case presents no public nuisance, no statute on which the action could be grounded, and no "interferences, actual or threatened, with property or rights of a pecuniary nature." *Debs*, 158 U.S. at 593.

Expanding *Debs* to permit federal equitable enforcement of individual constitutional rights absent a statutory cause of action would undermine the Court's "traditionally cautious approach to equitable powers, which leaves any substantial expansion of past practice to Congress." *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 329 (1999). And if the Court "were to read *Debs* to authorize this suit," it would "authorize the executive to do what Congress has repeatedly declined to authorize him to do." *Solomon*, 563 F.2d at 1129. It should refuse to do so.

II. The "Exceptional Circumstances" the Federal Government Cites as Limiting Principles Lack Legal Significance and Are Far from Exceptional

As it happens, neither the federal government nor the district court "go so far as to endorse the broadest reading of *Debs*." App. 48a. Indeed, the federal government has expressly disclaimed the notion that it may sue States "whenever a State enacts an unconstitutional law." Application at 22. Instead, it suggested, ECF 8 at 26, and the district court accepted, three conditions that would limit the proposed equitable cause of action to the "circumstances present here"—that "(1) a state law violates the constitution, (2) that state action has a widespread effect, and (3) the state law is designed to preclude review by the very people whose rights are violated," App. 49a.

These purported limitations, however, have no legal basis and impose no real constraints. As to the first two, the district court did not even attempt to explain their legal relevance or practical significance—and no such explanation is conceivable. The first proposed condition, that "a state law violates the constitution," cannot possibly justify recognizing a novel equitable cause of action, for it simply states a universal requirement for enjoining a law: If a state law does not conflict with federal law, obviously a federal court cannot enjoin enforcement of the state law. Similarly, the second purported condition, that the state law "has widespread effect," has neither legal relevance nor any capacity to narrow when the federal government may sue: By their very nature, *all* state legal rules have statewide effect.

The district court and the federal government thus rely heavily on the third condition, that the state law is "designed to preclude review." *See* App. 49a ("The final

factor identified by the United States will likely carry the most weight . . . ."); Application at 28 (distinguishing "*City of Philadelphia*, *Mattson*, and *Solomon*" solely on the ground those cases "involved no effort to frustrate other mechanisms for judicial review"). Yet again, however, this element is neither legally justified nor practically significant. The district court offered the theory that a lack of federal-court review satisfies the traditional equitable requirement that there be "no adequate remedy at law," App. 44a, but equity *always* requires the absence of adequate legal relief, *see, e.g., Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156 (2010). This condition thus does nothing to identify an "exceptional circumstance" where the federal government has an otherwise-unavailable equitable cause of action.

Meanwhile, the federal government's theory—that *Ex parte Young* guarantees challengers a right "to vindicate their federal constitutional rights in federal court," Application at 28—fails as well, for that decision expressly states that the problem was that the law had "preclude[d] a resort to the courts (*either state or Federal*) for the purpose of testing its validity," 209 U.S. at 146 (emphasis added). Here, state courts *are* available to test the constitutionality of S.B. 8. *See Whole Woman's Health v. Jackson*, 13 F.4th 434, 447 & n.20 (5th Cir. 2021) (noting "that potential S.B. 8 defendants will be able to raise defenses before state courts that are bound to enforce the Constitution" and citing pending state-court challenges). While the district court doubted that state courts could vindicate federal rights because S.B. 8 limits available defenses, *see* App. 44a, Texas law clearly permits litigants to challenge the constitutionality of statutory limits on defenses in state court as well as federal court, *see State v. Scott*, 460 S.W.2d 103, 107 (Tex. 1970) (holding that Texas Rules of Civil

Procedure "authorize pleading of every conceivable defense in an answer, including unconstitutionality of a statute on which suit may be based"). And of course, whatever decision a state court might reach, its resolution of federal constitutional questions is reviewable by this Court via a writ of certiorari. 28 U.S.C. § 1257(a).

In any case, the federal government's theory necessarily presumes "that "state courts [a]re not competent to adjudicate federal constitutional claims," a notion this Court has "repeatedly and emphatically rejected." *Moore v. Sims*, 442 U.S. 415, 430 (1979); *see also, e.g., Hawaii Hous. Auth. v. Midkiff*, 463 U.S. 1323, 1325 (1983) (recognizing "that state courts, as judicial institutions of co-extant sovereigns, are equally capable of safeguarding federal constitutional rights"). Indeed, its theory contravenes the very foundations of the Madisonian Compromise, whereby the Constitution created the Supreme Court but not lower federal courts—thus presuming that *state* courts are capable of resolving federal constitutional claims in the first instance. *Printz v. United States*, 521 U.S. 898, 907 (1997) ("In accord with the so-called Madisonian Compromise, Article III, § 1, established only a Supreme Court, and made the creation of lower federal courts optional with the Congress—even though it was obvious that the Supreme Court alone could not hear all federal cases throughout the United States.").

After all, many legal rules can be adjudicated only in state-court proceedings, with the resolution of federal claims reviewable by this Court. *See, e.g., New York Times v. Sullivan*, 376 U.S. 254, 264 (1964) (reviewing a defamation suit that wound its way through state courts and holding that applicable state-law rule was "constitutionally deficient"); *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2252–53,

2661 (2020) (reversing on Free Exercise Clause grounds a Montana Supreme Court decision construing state scholarship program to exclude religious schools under state constitution's "no-aid" clause). Other examples include due-process challenges to state rules governing punitive damages and personal jurisdiction, *see, e.g.*, *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (punitive damages); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (personal jurisdiction); state criminal cases, where defendants may challenge any number of state rules of criminal law or procedure by invoking the federal Constitution, *see, e.g., Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (unanimous juries); *Medina v. California*, 505 U.S. 437 (1992) (burden shifting); and other due-process challenges to state procedures, *see, e.g.*, *Stanley v. Illinois*, 405 U.S. 645 (1972) (due-process challenge to state rule that failed to provide an unwed father a parental-fitness hearing before taking his children). There can therefore be no suggestion that the practical unavailability of federal-court pre-enforcement challenges to state legal rules presents any constitutional problem.

This case does not permit, much less require, the Court to address the constitutional merits of S.B. 8, but instead presents a legal question of considerable significance for federalism and the separation of powers—whether the Attorney General has inherent authority to seek injunctions against state laws as violative of individual constitutional rights even absent congressional authorization. *See United States v. Solomon*, 563 F.2d 1121, 1129 (4th Cir. 1977) ("[W]hen the executive acts in an area in which he has neither explicit nor implicit statutory authority, 'what is at stake is the equilibrium established by our constitutional system.'" (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952)). The Attorney General has

effectively conceded he has no such authority—at least as a general matter—and just as in *Philadelphia*, where the Attorney General (unsuccessfully) assured the court that "the asserted right of action w[ould] be limited to 'exceptional' cases involving 'widespread and continuing' violations, for which the remedies expressly provided [were] not 'adequate,'" the limiting principles proposed here "lack real content." *United States v. City of Philadelphia*, 644 F.2d 187, 201 (3d Cir. 1980). Every relevant precedential and historical authority points to the same conclusion: The Attorney General has no authority to act as a roving reviser of state law, challenging as unconstitutional any rule with which he disagrees. Congress has repeatedly refused to grant such authority; the Court should refuse to do so as well.

CONCLUSION

The Court should deny the application to vacate the stay of the preliminary injunction.

Respectfully submitted,

Office of the Indiana
Attorney General
302 W. Washington St.
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

**Counsel of Record*

THEODORE E. ROKITA
Attorney General
THOMAS M. FISHER*
Solicitor General
KIAN J. HUDSON
Deputy Solicitor General
JULIA C. PAYNE
MELINDA R. HOLMES
Deputy Attorney General

Counsel for Amici *States*

Dated: October 21, 2021

ADDITIONAL COUNSEL

STEVE MARSHALL
Attorney General
State of Alabama

MARK BRNOVICH
Attorney General
State of Arizona

LESLIE RUTLEDGE
Attorney General
State of Arkansas

ASHLEY MOODY
Attorney General
State of Florida

CHRISTOPHER M. CARR
Attorney General
State of Georgia

LAWRENCE G. WASDEN
Attorney General
State of Idaho

DEREK SCHMIDT
Attorney General
State of Kansas

DANIEL CAMERON
Attorney General
Commonwealth of Kentucky

JEFF LANDRY
Attorney General
State of Louisiana

LYNN FITCH
Attorney General
State of Mississippi

ERIC SCHMITT
Attorney General
State of Missouri

AUSTIN KNUDSEN
Attorney General
State of Montana

DAVE YOST
Attorney General
State of Ohio

JOHN M. O'CONNOR
Attorney General
State of Oklahoma

ALAN WILSON
Attorney General
State of South Carolina

JASON R. RAVNSBORG
Attorney General
State of South Dakota

SEAN D. REYES
Attorney General
State of Utah

PATRICK MORRISEY
Attorney General
State of West Virginia

Counsel for Amici *States*