No. 21-463

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.

On Petition for a Writ of Certiorari before Judgment
to the United States Court of Appeals
for the Fifth Circuit

BRIEF OF FIREARMS POLICY COALITION AS *AMICUS CURIAE* IN SUPPORT OF GRANTING CERTIORARI

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INTEREST OF *AMICUS CURIAE*[1]

The Firearms Policy Coalition, Inc. (FPC) is a nonprofit membership organization that works to defend constitutional rights and promote individual liberty, including the right to keep and bear arms and the freedom of speech, throughout the United States. FPC engages in direct and grassroots advocacy, research, legal efforts, outreach, and education to this end.

FPC is interested in this case because the approach used by Texas to avoid pre-enforcement review of its restriction on abortion and its delegation of enforcement to private litigants could just as easily be used by other States to restrict First and Second Amendment rights or, indeed, virtually any settled or debated constitutional right. FPC takes no position on whether abortion should be protected by the Constitution but believes that the judicial review of restrictions on established constitutional rights, especially those protected under this Court's cases, cannot be circumvented in the manner used by Texas.

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[1] This brief is submitted pursuant to the written consent of all parties. All parties were notified of *Amicus*'s intent to file this brief more than 10 days prior to its due date and 6 days prior to the subsequently expedited date for respondents to file their opposition. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amicus* or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief. *Amicus* is not publicly traded and has no parent corporations, and no publicly traded corporation owns 10% or more of *Amicus*.

SUMMARY OF ARGUMENT

The importance of this petition is not about any debate over the existence or scope of any constitutional right to abortion. Indeed, *Amicus* takes no position on such questions, which are before this Court in other cases. Rather, this case is about access to the means of enforcing individual constitutional rights, as determined by this Court's cases, and protecting against their infringement, regardless of the particular right involved. Texas's novel scheme for infringing upon and chilling the exercise of the right to abortion under this Court's *Roe* and *Casey* decisions while seeking to evade judicial review, if allowed to stand, could and would just as easily be applied to other constitutional rights. That result is wholly anathema to our constitutional scheme, regardless what one thinks of abortion or, indeed, of any other hotly debated constitutional right, such as the right to keep and bear arms.

1. The petition presents an important question warranting this Court's early and expedited review because, if Texas's scheme for postponing or evading review is successful here, it will undoubtedly serve as a model for deterring and suppressing the exercise of numerous constitutional rights. New York is already experimenting with private enforcement of anti-gun laws raising significant Second Amendment issues and will no doubt gladly incorporate the lessons of this case to insulate its future efforts to suppress the right to keep and bear arms. Other States, targeting those and other rights, will not be far behind. Indeed, a private bounty scheme could easily be modified to target persons who criticize the government,

refuse to wear masks or get vaccinated, make negligent or harmless false statements on public issues, or engage in any other protected but disfavored conduct. And, if Texas's asserted procedural barriers to pre-enforcement review are upheld, there is no reason to think the penalties couldn't be made even more draconian, thus increasing the deterrent and chill of constitutionally protected activity. The precedent this law sets as a model for deterring the exercise of any and all rights makes this case one of tremendous importance and worthy of this Court's prompt consideration.

2. It is well established across numerous cases that laws that deter or chill the exercise of constitutional rights violate those rights. Such deterrence or chill constitutes a present harm for which litigants can seek present redress without having to violate the laws in question and absorb the tremendous risks of thereby putting their heads on the proverbial chopping block. Even where the risk derives from prospective litigation initiated by private parties relying on state law, such risks are still the product of state action and imposed by state actors. Whether such state actors are the "deputized" potential plaintiffs or the court officials and jurists that wield the power of government at every stage of the litigation process, the chilling effect here derives from the bending of state power to such ends. In such circumstances, there should be no serious barrier to enjoining any and all state actors who facilitate or play a role in such a farce. To the extent any of this Court's sovereign immunity jurisprudence even hints otherwise,

such cases have strayed from the text, structure, and logic of the Constitution and should be reconsidered.

ARGUMENT

I. This Case Is Important Because the Approach Used by Texas Could Be Used Against Numerous Other Constitutional Rights.

The most useful way to appreciate the significance of this case is to stop thinking of it as an abortion case and recognize it for what it is: a challenge to a broadly applicable tactic for avoiding federal judicial review of state efforts to circumvent the rights of its residents as recognized by this Court. While the Texas law in question is indeed specific to abortion, the tactic it employs is not remotely so limited. Indeed, a version of the tactic has already been deployed by New York allowing "any person, firm, corporation or association that has been damaged," to sue a "gun industry member" to enforce a broad array of prohibited conduct, *i.e.*, anything at all that could "endanger[] the safety or health of the public" through conduct that is merely "unreasonable under all the circumstances."[2]

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[2] See N.Y. GEN. BUS. LAW § 898-e ("Any person, firm, corporation or association that has been damaged as a result of a gun industry member's acts or omissions in violation of this article shall be entitled to bring an action for recovery of damages or to enforce this article in the supreme court or federal district court."); *id.* § 898-a(4) ("gun industry member" defined as "a person, firm, corporation, company, partnership, society, joint stock company or any other entity or association engaged in the sale, manufacturing, distribution, importing or marketing of firearms, ammunition, ammunition magazines, and firearms ac-

While New York has only started down the path of subcontracting enforcement of constitutionally suspect laws to private parties, Texas has aggressively expanded upon the model by deputizing virtually all private persons to legally threaten citizens exercising or assisting the exercise of what is, at least for now and unless the Court says otherwise, the rights it established in *Roe* and *Casey*. To the extent this tactic is effective at evading or outright blocking pre-enforcement review, while allowing the significant and largely decisive deterrent to persist unless and until a direct application of the law is reviewed by this Court, it will easily become the model for suppression of other constitutional rights, with Second Amendment rights being the most likely targets of such suppression.

For example, it takes little in the way of creative copying for States hostile to the Second Amendment—New York, California, New Jersey, Hawaii, etc.—to declare that the ownership or sale of a handgun is illegal, notwithstanding *Heller*, and set up a bounty system with the same unbalanced procedures and penalties adopted by Texas in this case. If state officials are prohibited from bringing suit in their official capacities to enforce such a law, such States could dispute any pre-enforcement challenges on the same grounds Texas argues here. But the chill of Second Amendment rights would exist even without an actual citizen's suit being brought and there would

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cessories"); *id*. § 898-b(1) (defining prohibited conduct). Lacking Texas's creativity, New York also allows for government enforcement of its law.

be a substantial incentive to discourage an actual application of the law so long as the chill was even partially effective.

Similar tactics, could, of course, be applied to deter the exercise of many other constitutional rights or, indeed, any form of disfavored behavior, while avoiding any pre-enforcement review. Perhaps a $10,000 bounty (plus attorney's fees) against anyone uttering, even negligently or without material harm, a false statement of fact on television or the internet? Nobody really much likes First Amendment libel jurisprudence anyway these days.

Maybe even larger bounties against people refusing to be vaccinated or wear a mask? Forget religious or medical exemptions—they are just roadblocks to achieving important policy goals. The objectives might well be met long before a suit is resolved: Suppress disfavored conduct first and let the courts ask questions later if anyone ever brings an actual suit.

Don't like those bothersome protesters always criticizing the government? Bounties on everyone the next time Second Amendment advocates rally in support of the right to keep and bear arms, school choice advocates march for their children's education, police reform advocates gather to protest qualified immunity, labor picketers protest in support of unions and collective bargaining, or anyone else shows up and deigns to assemble and complain. Courts can worry about the right to speak, assemble, and petition if and when a case is brought. But in the meantime, protesters can proceed at their own risk and hope that this Court grants cert. after years of litigation in state courts and a potential string of hostile rulings

before defendants can even ask this Court for discretionary review.

And not to sound like a bad commercial from last century, but wait, there's more: In a State emboldened by the Texas bounty model, why limit the deterring penalties to a mere $10,000 plus attorney's fees? Surely state legislatures hostile to various and sundry accepted or disputed constitutional rights know how to multiply. Why not $100,000 or $1,000,000 bounties? One-sided attorney's fees not enough of a deterrent? Why not sizeable mandatory judgment bonds as a condition to appeal? Maybe even prejudgment liens on bank accounts and real estate to make sure a future judgment gets paid (and that even an unsuccessful suit has maximum financial impact in the interim).

But perhaps that still might not be enough. Why not, to paraphrase a rock parody, turn the penalties up to 11 (on the 0-10 scale) and declare that abortion is murder (though not subject to prosecution by the State itself), that defending fetal life against those who would provide or facilitate abortions is justifiable homicide in defense of others, and that no charges may be brought against private citizens acting in defense of fetal life? Or maybe declare that protests about elections are felonious threats to democracy and may be dispersed with deadly force (by private citizens only, of course), again with prosecutors barred from charging those who act against such felonious assemblages?

While these examples may seem absurd, for purposes of the petition here they are structured in precisely the same too-clever-by-half manner intended to

avoid pre-enforcement review while aggressively deterring conduct in a manner plainly incompatible with existing Supreme Court precedent. Indeed, as absurd as these examples are, one might be excused for thinking it absurd that a State could deputize all private citizens to enforce a state law, disable actual state officials and employees from *initiating* (but not later *facilitating*) enforcement of that same law, and then somehow pretend there are no state actors to be sued or pre-enforcement means of stopping the plainly intended chill of conduct protected under this Court's current caselaw until the right is virtually frozen.

II. Chilling the Exercise of a Constitutional Right Constitutes Present Infringement for Which There Must Be Present Redress.

That the deterrence or "chill" of constitutionally protected activity constitutes an infringement of constitutional rights seems well established and uncontroversial. Whether in the context of speech or other rights, making the exercise of a right costly, risky, or uncertain all serve to deter that exercise and have regularly been found to violate the Constitution. See, *e.g.*, *United States* v. *Jackson*, 390 U.S. 570, 581–82 (1968) (regarding Fifth Amendment Rights: "If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional."); *Shapiro* v. *Thompson*, 394 U.S. 618, 631 (1969) (regarding the right to travel: "the purpose of deterring the in-migration of indigents * * * is constitutionally impermissible. If a law has 'no other purpose than to chill the assertion of

constitutional rights by penalizing those who choose to exercise them, then it (is) patently unconstitutional.'"), overruled in part on other grounds by *Edelman* v. *Jordan*, 415 U.S. 651 (1974); *Thornburgh* v. *Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 767–68 (1986), overruled by *Planned Parenthood of Se. Pennsylvania* v. *Casey*, 505 U.S. 833 (1992) (regarding abortion: "the Court consistently has refused to allow government to chill the exercise of constitutional rights by requiring disclosure of protected, but sometimes unpopular, activities * * *. [T]hey pose an unacceptable danger of deterring the exercise of that right, and must be invalidated."); *City of Houston* v. *Hill*, 482 U.S. 451, 467–68 (1987) (regarding Free Speech: "to force the plaintiff who has commenced a federal action to suffer the delay of state-court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect.") (citation omitted); *Dombrowski* v. *Pfister*, 380 U.S. 479, 494 (1965). ("Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression."); *John Doe No. 1* v. *Reed*, 561 U.S. 186, 245 (2010) (Thomas, J., dissenting). ("Our cases have long recognized this reality; as the Court recently reiterated, the First Amendment does not require 'case-by-case determinations' if 'archetypical' First Amendment rights 'would be chilled in the meantime.'").[3]

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[3] See also *North Carolina* v. *Pearce*, 395 U.S. 711, 724 (1969) (regarding Due Process: "'penalizing those who choose to exercise' constitutional rights, 'would be patently unconstitutional.' * * * And the very threat inherent in the existence of such a punitive policy would, with respect to those still in prison, serve to

In the many cases addressing laws that chill the exercise of constitutional rights, the protected activity in question is not necessarily forbidden outright but instead saddled with burdens and risks that cause citizens to steer clear of the line and to forego activity that would properly be protected. Such deterrence, even where not intentionally designed to suppress protected activity, is nonetheless a violation of the Constitution and may be challenged before enforcement. Indeed, the very purpose of pre-enforcement challenges in numerous contexts is to prevent citizens from having to absorb the serious risks of violating a law in order to challenge it. Cf. *Steffel* v. *Thompson*, 415 U.S. 452, 459 (1974) ("it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights.").

In this case, Texas has argued, and the Fifth Circuit agreed, that there is no state action under its

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'chill the exercise of basic constitutional rights.'"), overruled in part by *Alabama* v. *Smith*, 490 U.S. 794 (1989); *Laird* v. *Tatum*, 408 U.S. 1, 11 (1972) ("constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights"); *Reno* v. *ACLU*, 521 U.S. 844, 871–72 (1997) ("The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech."); *Virginia* v. *Hicks*, 539 U.S. 113, 118–19 (2003) ("the threat of enforcement of an overbroad law may deter or "chill" constitutionally protected speech."); *Citizens United* v. *FEC*, 558 U.S. 310, 327 (2010) ("The interpretive process itself would create an inevitable, pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable.").

tactical model until enforcement and thus no state actor to enjoin in the meantime. But that conflates substance and timing. If there is state action (and hence a state actor) once a suit has been filed or resolved, then there is a state actor to enjoin pre-enforcement. For example, there should be little question that even a private litigant invokes the power of the State when applying or enforcing state law in a private lawsuit. See, *e.g.*, *Shelley* v. *Kraemer*, 334 U.S. 1, 14, 19 (1948) ("That the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court."; "These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government * * *.").[4]

Recognizing that a suit would involve state action, the next question is to identify the appropriate state actor or actors to attempt to enjoin. One possibility is

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[4] Cf. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 277–78 (1964) ("What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute." (footnote omitted); "Plainly the Alabama law of civil libel is 'a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law.'" (citation omitted)).

that the "private" litigant would be acting under color of state law and therefore may be deemed the relevant state actor. Indeed, the practical effect of the Texas law is to deputize the universe of private citizens to enforce the law in lieu of actual state employees or officials. Subcontracting out enforcement of these types of laws to everyone *except* state officials is problematic for a host of reasons, but here it merely speaks to their potential role as state actors.[5] And if that is the case—that all private citizens are now deputized enforcers of Texas law no different than state attorneys—then they also can be enjoined as such. While suing a defendant class in such circumstances would undoubtedly be unwieldy and raise a host of procedural and ethical issues, those very issues would be created by the sheer audacity of the Texas scheme and cannot be used to insulate it from review.

Alternatively, if citizen-litigants are not themselves state actors, then it is the courts who are the state actors implementing and enforcing the questionable state law involved. But if the courts are the proper state actors once a suit is filed, they are still the proper state actors for any pre-enforcement suit. If the very premise of pre-enforcement suits is that the mere threat of state action chills the exercise of rights and thus creates a ripe case or controversy, then so too here, the mere threat of having to endure

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[5] That the prospective litigants in this case need not be pursuing redress for any personal injury or have any other interest in the case beyond reaping the state-created bounty is all the more reason to recognize that any suit under the Texas law would involve state action.

a lawsuit with a largely predetermined outcome under state law chills the exercise of constitutional rights even before the suit is filed and regardless of any eventual constitutional defense. Furthermore, state court officials apply the coercive power of government against even civil defendants the moment they issue a summons in support of a complaint, when they stand behind procedural rules demanding production of testimony or documents, and throughout the course of a judicial proceeding, not merely at the last moment when judgment is entered. A pre-enforcement challenge and potential injunction thus requires intervention before the *first* application of coercive state power that burdens or penalizes protected conduct, not simply before final judgment.

Enjoining the facilitating state actors from playing their role in this broader farce thus is no different than enjoining any other state actor from enforcing a law that chills constitutional conduct, at least until preliminary judicial review has occurred.

Amicus thus agrees with petitioners that pre-enforcement suit against state court employees and jurists to bar their role as state actors facilitating prospective private actions under color of state law that are credibly alleged to chill, and hence infringe upon, constitutional rights protected by this Court's precedents is a perfectly valid approach that should be held to fall within *Ex parte Young*'s exception to claimed state sovereign immunity.[6]

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[6] Although a bit premature at the cert. stage, *amicus* notes that if there is an appetite for questioning existing precedent, one might start with precedent applying sovereign immunity to States being sued for violating the rights of their own citizens.

CONCLUSION

This case is important not because of its specific subject matter of abortion, but instead for Texas's cavalier and contemptuous mechanism for shielding from review potential violations of constitutional rights as determined by this Court's precedents. It is one thing to disagree with precedents and seek their revision or reversal through judicial, congressional, or constitutional avenues; it is another simply to circumvent judicial review by delegating state action to the citizenry at large and then claiming, with a wink and a nod, that no state actors are involved.

Hans v. *Louisiana*, 134 U.S. 1 (1890); *Ex parte Young*, 209 U.S. 123 (1908). The text of the Eleventh Amendment certainly does not support, and would seem to actively rebut, such a conclusion. See John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1670 (2004) (criticizing counter-textual interpretation of the Eleventh Amendment); James Sample, *Textual Rights, Living Immunities*, 41 S. ILL. U. L.J. 29, 37 (2016) ("Quite frankly, and to use Justice Bradley's own words, the Eleventh Amendment has reached such a point (through *Hans* and its progeny) at which it has become 'almost an absurdity on its face.'"); Andrew B. Coan, *Text as Truce: A Peace Proposal for the Supreme Court's Costly War Over the Eleventh Amendment*, 74 FORDHAM L. REV. 2511, 2530 (2006) ("the Eleventh Amendment restricts federal jurisdiction only with respect to suits against states 'by citizens of another state,' not with respect to suits by a state's own citizens."). And even apart from baseline flaws in Eleventh Amendment jurisprudence, the Fourteenth Amendment would seem to supersede any previous potential state sovereign immunity as against violations of the federal Constitution. If a State could be sued directly to challenge unconstitutional laws, the complicated search for a state actor to enjoin would be unnecessary. A deeper dive into the textual basis, or lack hereof, for insulating States from direct challenge of unconstitutional laws, while perhaps needed, is best left for review on the merits.

From *Amicus's* perspective, if pre-enforcement review can be evaded in the context of abortion it can and will be evaded in the context of the right to keep and bear arms. While the political valences of those issues seem to be opposites, the structural circumstances are too similar to ignore. As with *Roe* and *Casey*, many States view *Heller* as wrongly decided. Those States, with the help of many circuit courts, have showed an ongoing refusal to accept the holding in *Heller* and a continuing creativity in seeking to circumvent any protections for, and to chill the exercise of, Second Amendment rights. It is hardly speculation to suggest that if Texas succeeds in its gambit here, New York, California, New Jersey, and others will not be far behind in adopting equally aggressive gambits to not merely chill but to freeze the right to keep and bear arms.

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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