No. 21A85

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, APPLICANT

v.

STATE OF TEXAS

REPLY IN SUPPORT OF APPLICATION TO VACATE STAY OF PRELIMINARY INJUNCTION

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Texas does not dispute that S.B. 8 was designed to nullify this Court's precedents and to shield that nullification from judicial review. Nor does the State deny that its gambit has succeeded, eliminating abortion in Texas at a point before many women even realize they are pregnant -- and thus systematically denying women a constitutional right the Court has recognized for half a century. Yet Texas insists that the Court must tolerate the State's ongoing nullification because S.B. 8's unprecedented structure leaves the federal Judiciary powerless to grant relief.

If Texas is right, no decision of this Court is safe. States need not comply with, or even challenge, precedents with which they disagree. They may simply outlaw the exercise of whatever rights they disfavor; disclaim state enforcement; and delegate to the general public the authority to bring harassing actions

threatening ruinous liability. On Texas's telling, no one could sue to stop the resulting nullification of the Constitution.

Fortunately, Texas is wrong. The State devotes the bulk of its opposition to purported procedural obstacles to this suit. But this Court has long recognized that the United States has authority to bring suits in equity to protect its sovereign interests. The United States has an obvious sovereign interest in preventing a State from nullifying federal law and thwarting federal judicial review. And because Texas is a proper defendant here, the district court appropriately enjoined the State to halt its ongoing violation of the Constitution. The court also specified that the injunction against the State reaches the state courts that hear S.B. 8 suits, the plaintiffs who exercise delegated state authority to bring them, and the officials who would enforce the resulting judgments. Neither the court of appeals nor Texas has shown any infirmity in any of those aspects of the injunction -- let alone all of them.

At bottom, Texas's procedural objections largely reduce to the assertion that this suit is unusual. But so is S.B. 8. In fact, it is "not only unusual, but unprecedented." Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2496 (2021) (Roberts, C.J., dissenting). The reason there has not been a suit exactly like this before is that no State has ever tried to subvert the

Constitution through this sort of brazen procedural ploy. But S.B. 8's novelty does not immunize it from effective judicial relief.

When Texas finally turns to S.B. 8's constitutionality (on page 42), it makes only a token attempt to square the law with this Court's precedents and principally asserts that Roe and Casey should be overruled. But that is no basis for resisting a preliminary injunction. This Court's precedents remain binding unless and until the Court itself overrules them. The district court therefore correctly held that the United States is likely to prevail on its claims that S.B. 8 violates the Fourteenth Amendment, as well as the doctrines of preemption and intergovernmental immunity. Texas's belief that this Court should overrule its precedents does not entitle the State to nullify them while the litigation proceeds.

Finally, Texas has little to say about the balance of the equities because there is little to be said in defense of its position. Allowing S.B. 8 to remain in force while the courts consider Texas's novel scheme would gravely injure the United States' sovereign interests and the public interest in the supremacy of federal law. And, as Texas does not dispute, it would perpetuate the ongoing irreparable harm to the women of Texas who are being denied their constitutional rights. Texas, by contrast, would suffer no cognizable injury from a preliminary injunction barring enforcement of its plainly unconstitutional statute.

I. The United States Is Likely To Succeed On The Merits

A. S.B. 8 Is Unconstitutional

1. S.B. 8 is clearly unconstitutional under this Court's precedents, which foreclose States from prohibiting abortion, or imposing an undue burden on a woman's right to choose that procedure, before viability. See, e.g., Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992). The State briefly suggests (Opp. 44) that S.B. 8 is a regulation, not a prohibition. But as Texas elsewhere acknowledges (Opp. 4), S.B. 8 "prohibits" the knowing provision of covered abortions; it does not merely regulate the means by which they may be performed. See Tex. Health & Safety Code § 171.204(a); Appl. App. 73a-78a.

S.B. 8's "undue burden" defense does not save the law. Cf. Texas Opp. 43-45. The undue-burden standard does not apply to prohibitions on pre-viability abortion. See Casey, 505 U.S. at 846. And even if S.B. 8 were considered a mere regulation, it has effectively eliminated abortion after six weeks of pregnancy and "shut down" the overwhelming majority of all abortions in Texas. Appl. App. 85a (citation omitted); see Appl. 14-15. That is manifestly an undue burden in both purpose and effect.

Texas's primary argument on the merits is not that S.B. 8 complies with this Court's precedents, but that the Court should overrule them. Opp. 42-43; see Opp. 49. That is no justification for Texas's self-help approach, or for the Fifth Circuit's stay of

the preliminary injunction. This Court has always reserved to itself -- not to the States or the lower courts -- "the prerogative of overruling its own decisions." Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989). Any other rule would yield chaos, as States, municipalities, and district courts would be free to make their own predictions about the continued vitality of this Court's precedents.

It does not change the analysis that Mississippi has asked this Court to reconsider its abortion precedents in Dobbs v. Jackson Women's Health Organization, No. 19-1392 (oral argument scheduled Dec. 1, 2021), or that Texas briefly asks the Court do so in this case, Opp. 49. If the Court entertains those requests at all, it should reject them -- both as a matter of stare decisis, and because Roe and Casey were and remain correct. See U.S. Amicus Br. at 9-31, Dobbs, supra (No. 19-1392). But that is not the question raised by the United States' application. The question here is whether Texas should be permitted to nullify this Court's precedents before the Court itself has had an opportunity to decide whether to revisit them.

The Court should not tolerate that result. The Mississippi law at issue in Dobbs has been enjoined throughout that litigation. Every law other than S.B. 8 that purports to ban abortion after cardiac activity has likewise been enjoined. S.B. 8 should be too. And the Court should not indulge Texas's destabilizing

assertion that it is entitled to avoid that result by deliberately designing its law to thwart judicial review.

2. Texas asserts (Opp. 39-41) that the United States is unlikely to succeed on its preemption and intergovernmental-immunity claims. But the district court found that the government engages in activities "that would subject federal employees and contractors to civil liability under S.B. 8." Appl. App. 27a; see id. at 26a-28a, 101a-105a. Texas observes (Opp. 41) that some of the relevant federal policies require compliance with state law, but that does not include plainly unconstitutional laws like S.B. 8. And contrary to Texas's assertion, it burdens the federal government's operations when the unavailability of abortion in the State forces a federal agency or contractor to "'arrange for'" a constitutionally protected abortion "outside Texas." Opp. 40 (citation omitted).[1]

[1] Texas asserts that the government's injury on the preemption and intergovernmental immunity claim is "speculative." Opp. 18 (citation omitted). But the district court found otherwise after a hearing. Appl. App. 27a-28a. Texas offers no reason to question that finding. To the contrary, S.B. 8 is already affecting the government's activities. See, e.g., Office of Refugee Resettlement, Administration for Children & Families, U.S. Dep't of Health & Human Servs., Field Guidance #21 -- Compliance with Garza Requirements for Pregnant Unaccompanied Children in Texas (Oct. 1, 2021), https://go.usa.gov/xMJME (adopting special procedures in light of S.B. 8).

B. The Procedural Obstacles Identified In Whole Woman's Health Are Absent Here

The Fifth Circuit majority stayed the district court's injunction for "the reasons stated in" two prior decisions addressing a challenge by private plaintiffs to S.B. 8. Appl. App. 1a. But as the United States has explained (Appl. 17-19), those reasons do not apply here. In Whole Woman's Health v. Jackson, 13 F.4th 434 (2021) (per curiam), the Fifth Circuit concluded that the defendant executive officials, judges, and clerks were immune from suit under the Eleventh Amendment and did not fall within the exception to sovereign immunity recognized in Ex parte Young, 209 U.S. 123 (1908). See Whole Woman's Health, 13 F.4th at 441-445. The court could not have been clearer that its decision rested on "the officials' Eleventh Amendment immunity." Id. at 438; but see Intervenors Opp. 5 (asserting that Whole Woman's Health had "nothing to do with sovereign immunity"). This Court also questioned whether the individual officials were proper defendants under Ex parte Young and Article III. Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2495 (2021). Because the United States has sued the State itself, this case presents no question about which specific state officials would be proper defendants under Ex parte Young or Article III.

Texas contends that the reasoning in Whole Woman's Health governs here because the Court recognized that "federal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves." Opp. 24 (quoting Whole Woman's Health, 141 S. Ct.

at 2495). But the United States has not sought an injunction against S.B. 8 itself. Instead, the United States sought, and the district court awarded, an injunction against the State. Appl. App. 110a. Texas challenges the propriety of that relief on a variety of other grounds not addressed in Whole Woman's Health. But the court of appeals demonstrably erred in concluding that the "reasons stated" in the Fifth Circuit's and this Court's prior decisions resolve the very different issues raised here.

C. The District Court Properly Enjoined Enforcement Of S.B. 8

As it has at every stage of this litigation, Texas expends most of its effort not on defending S.B. 8's constitutionality, but on attempting to insulate the statute from judicial review. The State's arguments are wrong -- and dangerously so.

1. The United States Has Authority To Maintain This Suit

The United States has challenged S.B. 8 to vindicate two distinct sovereign interests: S.B. 8 is preempted and violates the doctrine of intergovernmental immunity to the extent it interferes with the actions of federal employees and contractors; and S.B. 8 offends the United States' sovereign interests in maintaining the supremacy of federal law and preventing circumvention of the traditional mechanisms of judicial review endorsed by Congress and this Court to protect constitutional rights. Contrary to the State's contentions, the United States has authority to seek equitable relief to vindicate both interests.

a. The State briefly suggests (Opp. 36) that the United States may not sue in equity to enjoin state statutes that interfere with the federal government's activities. But this Court and the lower courts have routinely considered such lawsuits. See, e.g., Arizona v. United States, 567 U.S. 387, 399 (2012) (preemption); United States v. California, 921 F.3d 865, 879-881 (9th Cir. 2019), cert. denied, 141 S. Ct. 124 (2020) (intergovernmental immunity). In response, the State cites (Opp. 36) only United States v. California, 507 U.S. 746 (1993). That decision is irrelevant here: It did not address preemption, intergovernmental immunity, or even injunctive relief; instead, it concerned an asserted "federal common-law cause of action for money had and received." Id. at 751.

b. The United States also has authority to seek to enjoin enforcement of S.B. 8 because the law's violation of the Fourteenth Amendment and the Supremacy Clause injures the United States' sovereign interests. Texas contends that In re Debs, 158 U.S. 564 (1895), which recognized the government's ability to sue in equity to protect its sovereign interests in appropriate circumstances, depended on the government's proprietary interest in the mails, its statutory authority over certain commerce, or the presence of a "nuisance." Opp. 21-22, 33 (citation omitted). But that ignores the Court's reasoning, which was not so limited. Debs, 158 U.S. at 584-586.

This Court has also recognized that the United States may seek equitable relief against threats to various other sovereign interests, without an express statutory cause of action. Appl. 21. Texas asserts that those decisions are limited to areas "entrusted to the federal government under Article I," Opp. 21, but this Court has never articulated such a limit, and Texas offers no principled basis for imposing one. To the contrary, it is difficult to imagine a more direct affront to the interests of the national government under the Constitution than a state law that nullifies a constitutional right affirmed by this Court, and does so by thwarting the mechanisms for judicial review that Congress and this Court have recognized as essential to protecting federal rights from state interference. See Appl. 22-25. Texas also does not and could not deny that S.B. 8 affects the United States' interests in interstate commerce: S.B. 8 forces Texas women who are able to do so to travel to other States to obtain pre-viability abortion services, burdening the availability of those services in other States. See Appl. 25-26.

c. Texas's efforts to minimize S.B. 8's affront to the United States' sovereign interests lack merit.

Texas first asserts (Opp. 34) that there are other situations where judicial review is unavailable. But it cites cases in which Congress precluded judicial review, Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 207 (1994), or lacked the power to override

a State's sovereign immunity, Alden v. Maine, 527 U.S. 706, 712 (1999). S.B. 8, in contrast, is a State's attempt to nullify a federal constitutional right and thwart federal judicial review.

Texas also maintains (e.g., Opp. 34-35) that it has not thwarted judicial review because providers could raise S.B. 8's unconstitutionality as a defense in enforcement suits. But Texas does not deny that even that form of review is unavailable to pregnant women, whose rights S.B 8 violates. Appl. 6. And Texas likewise has no answer to the obvious reality that S.B. 8 was designed so that even the threat of enforcement suits would deter prohibited abortions altogether -- which is exactly what has happened. Appl. 5-7, 24-25.

The intervenors, for their part, try to analogize S.B. 8 to traditional state laws providing private causes of action. Opp. 7, 28-29. But a moment's reflection reveals the obvious differences. Those laws confer a right of action on the parties injured by the regulated conduct, narrowing the universe of potential plaintiffs and limiting the potential liability. They also provide the relevant rightsholders with an avenue for asserting their constitutional rights -- including, in many cases, by seeking declaratory relief rather than risking liability. Cf. MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 128-131 (2007). And they

ordinarily provide a fair opportunity to assert a federal constitutional defense.[2]

S.B. 8 is entirely different. It seeks not to redress specific private injuries, but to enlist the public at large in enforcing the State's unconstitutional prohibitory statute. It does so by creating an unprecedented enforcement scheme in which pregnant women have no means to challenge the violation of their rights and any person (indeed, any number of people) can sue based on any abortion. And S.B. 8's lopsided procedural and substantive rules manifest overt hostility to federal constitutional rights. Far from ameliorating the lack of pre-enforcement review, therefore, S.B. 8's skewed enforcement scheme compounds the problem by structuring state-court proceedings to "nullify a federal right." Haywood v. Drown, 556 U.S. 729, 736 (2009).

That S.B. 8 is unlike traditional private rights of action is confirmed by its practical impact: While the possibility of defamation suits has not chilled all speech, or even all speech on a particular topic or about a particular public figure, S.B. 8 has virtually eliminated abortion in Texas after six weeks of

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[2] See Intervenors Opp. 28-29 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 279-280, 289-291 (1964) (defamation); Digital Recognition Network, Inc. v. Hutchinson, 803 F.3d 952, 957 (8th Cir. 2015) (considering state statute providing a damages action to a person "injured [in] his or her business, person, or reputation" by a violation) (citations omitted); Opp. 46-47 (referring, without citation, to statutes that provide causes of action against gun manufacturers or certain businesses that fail to comply with anti-discrimination laws).

pregnancy, which the record shows previously accounted for the overwhelming majority of abortions in the State. See Appl. 7-8.[3]

In short, as the intervenors readily concede (Opp. 49), "no state has attempted to run this play before." And because both the United States' suit and the district court's injunction were expressly limited to the exceptional circumstances presented here, Appl. App. 49a-50a, 111a, Texas errs in asserting (Opp. 23) that vacating the stay would open the door to suits outside the extraordinary circumstances created by Texas's extraordinary law.

d. Texas does not dispute that "injunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally." Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 74 (2001). Texas contends (Opp. 35) that those suits have most often been brought against the state officials charged with enforcement of the law at issue. But that is not because of any equitable principle or "well-established general rule," Grupo Mexicano de Desarrollo S. A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 321 (1999), barring suits by the United States against States.

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[3] For similar reasons, the abortion statutes intervenors cite (Opp. 46) bear no resemblance to S.B. 8. Each applied in only narrow circumstances and provided a private cause of action to certain individuals with a specific connection to the abortion. Nova Health Sys. v. Gandy, 416 F.3d 1149, 1153 (10th Cir. 2005); Okpalobi v. Foster, 244 F.3d 405, 410 (5th Cir. 2001) (en banc); Hope Clinic v. Ryan, 195 F.3d 857, 862-863 (7th Cir. 1999) (en banc), vacated and remanded, 530 U.S. 1271 (2000), vacated on other grounds, 249 F.3d 603 (7th Cir. 2001) (per curiam); Summit Med. Assocs., P.C. v. Pryor, 180 F.3d 1326, 1330 (11th Cir. 1999), cert. denied, 524 U.S. 1012 (2000).

Instead, it is simply because sovereign immunity forces most plaintiffs to sue state officials rather than States themselves. And the critical point is not the identity of the parties; it is that "the relief [the United States] requested" -- an injunction against enforcement of an invalid law -- "was traditionally accorded by courts of equity." Id. at 319; see Appl. 26-27; see also, e.g., Free Enter. Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477, 491 n.2 (2010).

Texas errs in asserting (Opp. 37-39) that Congress has displaced the United States' equitable action by enacting Section 1983. As the United States has explained, it brings this suit because the purpose of S.B. 8's unprecedented enforcement scheme is to thwart that express cause of action. Appl. 28. And Texas likewise errs in invoking statutes authorizing the United States to sue to protect individuals' constitutional rights in particular circumstances. Opp. 38-39; see Intervenors Opp. 20-21. Unlike the suits authorized by those statutes, this suit seeks not simply to protect the constitutional rights of individuals, but to vindicate a distinct sovereign interest in preventing a state from nullifying federal law by thwarting judicial review. Texas cannot plausibly maintain that by enacting other laws addressing very different circumstances, Congress impliedly barred the United

States from responding to S.B. 8's unprecedented threat to the supremacy of federal law.[4]

e. Finally, Texas errs in asserting (Opp. 13-16) that there is no justiciable controversy here based on Muskrat v. United States, 219 U.S. 346 (1911). In that case, the Court rejected Congress's attempt to structure a suit to obtain an advisory opinion on the constitutionality of a statute. But this case has neither of the features that raised concerns in Muskrat.

First, the statute at issue in Muskrat merely apportioned property among private individuals, who were the real parties in interest. 219 U.S. at 361-362. Congress made the United States a nominal defendant, but the government had "no interest adverse to the claimants." Id. at 361. Here, in contrast, S.B. 8 does not allocate private rights, but instead implements Texas's public policy by prohibiting disfavored conduct. If Texas enforced that prohibition in the usual way, a pre-enforcement suit would obviously be justiciable. The State's concrete and adverse interest in the matter does not disappear merely because it has

[4] Texas claims (Opp. 38) that Congress "anticipated" the issue here because two statutes give the Attorney General authority to sue when private citizens cannot. But those provisions address particular individuals' inability to prosecute their own claims when issues like financial resources or threats to their safety stand in the way. See 42 U.S.C. 2000b(b), 2000c-6(b). They do not suggest that Congress foresaw a State's attempt to nullify a federal constitutional right within its borders by thwarting judicial review -- much less that Congress intended to preclude the United States from suing to halt such a scheme.

delegated enforcement to private individuals empowered and incentivized to act on its behalf.

Second, the Court emphasized that a judgment in Muskrat would have amounted to an advisory opinion because it would not "conclude private parties" and thus would not settle their competing claims. 219 U.S. at 362. Here, in contrast, the United States seeks not just "an expression of opinion upon the validity" of S.B. 8, ibid., but an injunction preventing its enforcement.

2. The Relief Ordered By The District Court Was Proper

Texas is undeniably responsible for the constitutional violations caused by S.B. 8; the district court's injunction against Texas was therefore proper. Indeed, in cases where States are defendants, it is not unusual to simply enjoin the State to achieve or prevent a particular result (such as enforcement of a state law) and leave it to the State to decide what actions by which officers and employees are necessary to achieve compliance.[5] Given S.B. 8's unprecedented structure and the State's explicit request for direction about "who is supposed to do what," Appl.

[5] See, e.g., United States v. Alabama, 443 Fed. Appx. 411, 420 (11th Cir. 2011) (injunction pending appeal barring "the State of Alabama's enforcement" of two challenged provisions); United States v. Arizona, 703 F. Supp. 2d 980, 1008 (D. Ariz. 2010) (preliminary injunction affirmed in part in Arizona, supra, which "enjoin[ed] the State of Arizona and [the Governor] from enforcing the following Sections" of the challenged law); United States v. South Carolina, 11-cv-2958, D. Ct. Doc. No. 153, at 1 (D. S.C. Mar. 4, 2014) (permanently enjoining the "State of South Carolina," as well as the State's Governor and Attorney General, from "implementing" certain provisions of challenged law).

App. 59a, the district court properly outlined three independent ways in which its injunction against Texas precludes enforcement of S.B. 8. Each aspect of the court's injunction was proper. Appl. 30-34. Texas still has not come forward with any alternative form of relief; instead, it rests on the startling assertion that federal courts are powerless to halt its ongoing constitutional violations.

a. Texas first asserts (Opp. 16-17, 26) that the district court erred in specifying that the injunction against the State reaches the actions of state judges and court clerks. Texas insists that there is no justiciable controversy between the United States and the judges and clerks, and that federal courts may only enjoin the parties to a suit. But that misses the point: The injunction runs against the State, which is a party, and there is a justiciable controversy between the United States and Texas.

It is likewise no answer that state-court judges are expected to follow the federal Constitution in adjudicating cases. Texas Opp. 27. By design, the threat of even unsuccessful S.B. 8 suits chills constitutionally protected conduct: Among other things, those suits can be brought in unlimited numbers, in diverse and inconvenient fora, and with no prospect of the defendant recovering the attendant expenses because of S.B. 8's one-way fee-shifting. As seven weeks of experience have made clear, the mere fact that state court judges may ultimately reject such suits does not

eliminate the need for injunctive relief. And although injunctions that foreclose state courts or clerks from processing or deciding cases are rare, they are hardly unheard of.[6]

Texas thus errs in asserting (Opp. 25) that "federal district court judges are forbidden from enjoining state judges." Indeed, the State itself is forced to admit (Opp. 26-27) that this Court has held otherwise. See Pulliam v. Allen, 466 U.S. 522, 541-542 (1984). The decisions Texas cites simply recognize that the "normal thing to do," Opp. 25 (quoting Younger v. Harris, 401 U.S. 37, 45 (1971)), or the "ordinar[y]" practice, Opp. 16 (quoting In re Justices of the Sup. Ct. of Puerto Rico, 695 F.2d 17, 21 (1st Cir. 1982) (Breyer, J.)), is to enjoin the individual charged with

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[6] See, e.g., In re BankAmerica Corp. Sec. Litig., 263 F.3d 795, 798 (8th Cir. 2001) (affirming injunction barring state court from certifying plaintiff classes or ordering alternative dispute resolution), cert. denied, 535 U.S. 970 (2002); Maseda v. Honda Motor Co., 861 F.2d 1248, 1255 (11th Cir. 1988) (holding that the "district court properly enjoined the state court" from enforcing its judgment after removal); Peterson v. BMI Refractories, 124 F.3d 1386, 1395 (11th Cir. 1997) (similar); WXYZ, Inc. v. Hand, 658 F.2d 420, 422, 427 (6th Cir. 1981) (affirming injunction against state court judge where unconstitutional statute required issuance of a suppression order barring media from publishing defendant's identity); cf. Blackard v. Memphis Area Med. Ctr. for Women, Inc., 262 F.3d 568, 57574 (6th Cir. 2001) (determining that under Fed. R. Civ. P. 65(d), "Tennessee juvenile courts were within the scope" of an injunction "and could not enforce" the State's parental consent statute and judicial bypass procedure "during the pendency of that injunction"), cert. denied, 535 U.S. 1053 (2002); Strickland v. Alexander, 772 F.3d 876, 8886 (11th Cir. 2014) (holding that court clerk was a proper defendant under Article III in suit for injunctive relief, where docketing of affidavit and issuing of summons "were the immediate cause[s]" of plaintiff's past and likely future injuries).

enforcing the law rather than the judge. But this is not the normal case, because S.B. 8 is not the normal law. And although the district court also made clear that its injunction would bar the State's chosen enforcers -- private plaintiffs -- from enforcing S.B. 8, see pp. 19-21, infra, it correctly determined that an injunction that reaches state judges and clerks is appropriate in the extraordinary circumstance in which a State attempts to insulate a plainly unconstitutional scheme from the usual forms of relief.[7]

b. The district court also properly barred state executive officials from "enforcing judgments in" S.B. 8 suits. Appl. App. 110a; see Appl. 33. Texas contends that was error (Opp. 28) based on a case interpreting the meaning of the word "state" in a state-law statute of limitations provision. But even if sheriffs, constables, and county clerks technically work for political subdivisions -- and even if that means they are not agents or employees of the State under Fed. R. Civ. P. 65(d)(2)(B) -- they would, at a minimum, act "in active concert or participation" with the State under Fed. R. Civ. P. 65(d)(2)(C). And although Texas speculates (Opp. 28) that S.B. 8 plaintiffs might find other means of enforcing unconstitutional S.B. 8 judgments, foreclosing

[7] Texas cites (Opp. 28) Steelman v. All Continent Corp., 301 U.S. 278, 290-291 (1937), for the proposition that "the restraint of a proper party is [not] legally tantamount to the restraint of the court itself." But Steelman did not involve a State as defendant and thus does not speak to the question whether an injunction against a State defendant may bind its courts.

executive officials from doing so will help to alleviate the present injury from S.B. 8's in terrorem effect.

c. Finally, the district court correctly determined that an injunction against Texas could bind private plaintiffs who actually file S.B. 8 suits, because they act both "on behalf of the State" and "in active concert with" it. Appl. App. 110a; see id. at 67a-72a; see also Fed. R. Civ. P. 65(d)(2)(B) and (C). Texas's contrary arguments lack merit. Private plaintiffs do not merely "have an interest in defending the constitutionality of state law," Opp. 29; the State has delegated its enforcement authority to them by statute. Contra Hollingsworth v. Perry, 570 U.S. 693, 707 (2013) (finding that proponents of ballot initiative lacked Article III standing where they had "no role -- special or otherwise -- in the enforcement" of the challenged statute). For similar reasons, the filing of an S.B. 8 action -- which requires no connection between the plaintiff and the abortion at issue -- differs markedly from "the mere filing of a private civil tort action" that some courts have held not to constitute state action. Opp. 29 (citation omitted). At a minimum, because private plaintiffs who file S.B. 8 actions exercise the State's delegated enforcement authority, they "aid[] and abet[]" the State's constitutional violations. Regal Knitwear Co. v. NLRB, 324 U.S. 9, 14 (1945).

Texas also errs in asserting (Opp. 31) that the district court's injunction is inconsistent with Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969). Although that decision recognizes that "a nonparty with notice cannot be held in contempt until shown to be in concert or participation," id. at 112, plaintiffs who file S.B. 8 suits necessarily act in concert with the State, and no contempt proceeding is at issue here. See Appl. App. 72a. Texas likewise misses the mark in arguing that the injunction is "ineffective" because a court "cannot lawfully enjoin the world at large." Opp. 30 (citation omitted); see id. at 31. The district court did not do that here; rather, it enjoined the State, including those individuals who affirmatively choose to exercise the State's delegated enforcement authority. That injunction does not reach the universe of potential S.B. 8 plaintiffs; it covers only those individuals who actually act in concert with and on behalf of the State by "bring[ing] an S.B. 8 lawsuit." Appl. App. 68; see id. at 110a. Texas's decision to delegate its enforcement power to private bounty hunters rather than state officials does not strip the federal courts of authority to enjoin those who choose to act on the State's behalf to enforce its unconstitutional law.

II. The Balance Of Equities Favors Vacating The Stay

The balance of the equities strongly supports vacating the stay and restoring "the status quo ante -- before the law went

into effect" -- while the courts consider Texas's attempt to evade the supremacy of federal law and the traditional mechanisms of judicial review. Whole Woman's Health, 141 S. Ct. at 2496 (Roberts, C.J., dissenting); see Appl. 34-37.

Texas contends (Opp. 46) that it will suffer harm from an injunction that binds state court judges and individuals who bring S.B. 8 suits. But as the United States has explained, a State cannot be cognizably harmed by the inoperability of a plainly unconstitutional law. Nor can Texas complain (ibid.) that any injunction that reaches its judges, clerks, or citizens constitutes irreparable harm; that is simply the result of Texas's decision to structure its law in this unprecedented manner.

Contrary to Texas's assertion, the public interest merges with the federal government's interest, see Nken v. Holder, 556 U.S. 418, 435 (2009) -- not the State's -- when the United States seeks to prevent the State from violating constitutional rights and thwarting judicial review. And Texas says little to refute the grave harms that the Fifth Circuit's stay imposes on the United States and the public interest, including the nullification of federal law and the disruption of judicial review through the channels this Court and Congress have identified as essential for the vindication of constitutional rights.

Texas also errs in asserting (Opp. 47) that those irreparable harms are diminished by the government's decision not to

immediately file suit following S.B. 8's enactment -- or to seek to enjoin other "allegedly unconstitutional state law[s]," Opp. 48. To the contrary, those circumstances confirm that the United States does not seek to be a "roving commission[]" to enforce constitutional rights, Opp. 1 (citation omitted), but rather brought suit only when it became clear that S.B. 8 had effectively nullified this Court's precedents within the State of Texas.

Texas does not deny (Opp. 47) that S.B. 8 has forced women to travel to other States to obtain constitutionally protected abortion care; required women who cannot travel to make decisions about abortion before they are ready, to carry pregnancies to term against their will, or to seek to end them without medical care; and threatened to permanently shutter abortion providers. Appl. 8-9, 36-37. Under a "traditional" ban on pre-viability abortion, none of those harms would be permitted to continue during the pendency of litigation. See p. 5, supra. Texas should not obtain a different result simply by pairing its unconstitutional law with an unprecedented enforcement scheme designed to evade the traditional mechanisms for judicial review.[8]

[8] Intervenors, but not the State, contend that these harms will continue even if the Court vacates the stay, on the theory that "the uncertain future of Roe and Casey" will dissuade providers from providing abortions prohibited by S.B. 8. Intervenors Opp. 37; see id. at 37-40. But the district court credited evidence that clinics would resume providing covered abortions if a preliminary injunction is in effect. Appl. App. 106a-107a.

III. The Court May Treat This Application As A Petition For A Writ Of Certiorari Before Judgment

For many of the same reasons that this Court should vacate the Fifth Circuit's stay, it also may construe the government's application as a petition for certiorari before judgment, grant the petition, and set the case for briefing and argument this Term. The State contends (Opp. 48-49) that such action is unnecessary because the Fifth Circuit has expedited its consideration of this case. But even with that expedited schedule, the Court is unlikely to be able to hear the case this Term unless it grants certiorari before judgment.

CONCLUSION

The stay of the district court's preliminary injunction should be vacated and the injunction restored pending proceedings in the Fifth Circuit and, if that court reverses the injunction, further proceedings in this Court. In addition, the Court may construe the application as a petition for a writ of certiorari before judgment, grant the petition, and set the case for briefing and argument this Term.

Respectfully submitted.

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