No. 21-50949

In the United States Court of Appeals for the Fifth Circuit

United States of America,
Plaintiff-Appellee,

v.

State of Texas,
Defendant-Appellant, and

Erick Graham; Jeff Tuley; Mistie Sharp,
Intervenor Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS
No. 1:21-cv-00796

MOTION FOR LEAVE TO FILE BRIEF OF LEGAL SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE

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October 11, 2021

Professors Leah Litman, (Dean) Erwin Chemerinsky, Michael C. Dorf, Barry Friedman, and Fred O. Smith hereby move for leave to file a brief as *amici curiae* in support of Plaintiff-Appellee United States of America pursuant to Federal Rule of Appellate Procedure 29. All parties have consented to the filing of this brief.

INTEREST OF *AMICI*

Amici curiae are constitutional law scholars who teach and write in the fields of constitutional law and federal courts. They share an interest in promoting the appropriate role of the federal courts in maintaining the supremacy of federal law, our federal constitutional system, and the rule of law.

WHY FILING AN AMICUS BRIEF IS DESIRABLE AND RELEVANCE OF THE MATTERS ASSERTED

The attached brief will aid the Court's consideration of important constitutional issues presented in this appeal. The arguments made by the State of Texas in challenging the standing of the United States to bring this action—and in asserting that the State is not properly subject to suit—both reflect the extraordinary effort the State has made in enacting S.B. 8 to avoid judicial review and to frustrate bedrock constitutional principles, including the Supremacy Clause.

A finding that the United States lacks standing to challenge S.B. 8 would have broad-ranging consequences that could affect a wide variety of constitutional interests unrelated to the subject matter of S.B. 8 itself. If this Court sanctions the State's effort to create an end-run around any meaningful opportunity for judicial

review of S.B. 8, it could open the door to state statutes across the country that use similar means to infringe other recognized constitutional rights.

Amici are well-suited to opine on, and have a strong interest in, promoting the appropriate role of the federal courts in maintaining the supremacy of federal law, our federal constitutional system, and the rule of law. An *amicus* brief is desirable in this context to highlight these important constitutional questions..

CONCLUSION

For these reasons, *amici* respectfully request leave to file the attached *amicus curiae* brief.

October 11, 2021

Respectfully submitted,

/s/ Julia F. Post

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CERTIFICATE OF SERVICE

I, Julia F. Post, hereby certify that a true and correct copy of the foregoing document was filed electronically. Notice of this filing will be sent by electronic mail to all parties by the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

SO CERTIFIED, this 11th day of October, 2021.

/s/ Julia F. Post
Julia F. Post

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record certifies that—in addition to the persons and entities identified in the party briefs in this case—the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Amici Curiae

Professor Leah Litman

Dean Erwin Chemerinsky

Professor Michael C. Dorf

Professor Barry Friedman

Professor Fred O. Smith

I hereby certify that I am aware of no persons or entities with any interest in the outcome of this litigation other than the signatories to this brief and their counsel, and those identified in the party and amicus briefs filed in this case.

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are constitutional law scholars who teach and write in the fields of constitutional law and federal courts. They share an interest in promoting the appropriate role of the federal courts in maintaining the supremacy of federal law, our federal constitutional system, and the rule of law.

[1] No counsel for a party authored this brief in whole or in part and no entity or person, other than *amici curiae* and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All parties consent to the filing of this brief.

INTRODUCTION

Texas's efforts to evade judicial review of Senate Bill 8 (S.B. 8) are central to the jurisdictional questions in this case. S.B. 8—which bans abortions once a heartbeat is detected, weeks before fetal viability—is plainly unconstitutional under *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southern Pennsylvania v. Casey*, 505 U.S. 833 (1992). No one seriously argues otherwise. The "unprecedented" design of S.B. 8 is intended to unleash the full coercive authority of the State to effectuate the State's unconstitutional policy while insulating the State from judicial review. *See Whole Woman's Health* v. *Jackson*, No. 21A24, 2021 WL 3910722, at *1 (U.S. Sept. 1, 2021) (Roberts, C.J., dissenting) (characterizing the delegation of authority "to insulate the State from responsibility for implementing and enforcing the regulatory regime" as "unprecedented").

The drafters of S.B. 8 made no secret of the fact that they developed the law's enforcement scheme for the specific purpose of frustrating judicial review. *See, e.g.*, Michael S. Schmidt, *Behind the Texas Abortion Law, a Persevering Conservative Lawyer*, N.Y. Times (Sept. 15, 2021), https://nyti.ms/3lqCBc6. Multiple features of the law underscore this design. S.B. 8 prohibits defendants from asserting as a defense that they believe S.B. 8 to be unconstitutional or that its enforcement would violate the constitutional rights of third parties. Tex. Health & Safety Code § 171.208(e)(2), (7). Additionally, it is no defense under S.B. 8 if a person violates

its terms while it is judicially enjoined should that injunction later be overturned. *Id.* § 171.208(e)(3).

Insulating state laws from meaningful judicial review flouts the bedrock principle that there must be some mechanism for challenging unconstitutional state action in order to ensure the supremacy of federal law and the rule of law in general. As the Supreme Court explained more than two centuries ago: "It is emphatically the province and duty of the judicial department to say what the law is. . . . So if a law be in opposition to the constitution . . . the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty." *Marbury v. Madison*, 5 U.S. 137, 177–78 (1803). By attacking well-established constitutional rights through a scheme designed to evade judicial review, S.B. 8 represents a challenge to the rule of law, our system of constitutional government, and the Constitution's Supremacy Clause.

The United States has standing to sue because Texas's scheme represents the type of exceptional circumstance that provides the federal government with the authority to bring suit. And Texas is the proper defendant in this suit. Private litigants take up the State's enforcement mantle; state judicial personnel facilitate, enforce, or otherwise enable these litigants' attacks. As the district court correctly notes, "the State has its prints all over the statute." *United States v. Texas*, 21-cv-796, 2021 WL 4593319, at *30 (W.D. Tex. Oct. 6, 2021). The federal courts should

not countenance Texas's efforts to shield itself from accountability for its transparent attack on constitutional rights.

ARGUMENT

I. The United States Has Standing to Challenge S.B. 8.

A. Texas's Transparent Scheme to Evade Judicial Review of S.B. 8 Represents an Exceptional Circumstance that the United States Has Standing to Challenge.

As the Supreme Court explained in *In re Debs*, 158 U.S. 564 (1895): "Every government intrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other." 158 U.S. at 584; *see also id.* ("The obligations which [the government] is under to promote the interest of all and to prevent the wrongdoing of one, resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court.").

While there is debate about how broadly *Debs* should be interpreted, this Court has concluded that, at minimum, it allows the United States to challenge decisions affecting interstate commerce in emergency or exceptional circumstances. In *United States v. City of Jackson*, 318 F.2d 1 (5th Cir. 1963), this Court held that the United States may seek an injunction "[w]hen the action of a State violative of the Fourteenth Amendment conflicts with the Commerce Clause and casts more than a shadow on the Supremacy Clause." 318 F.2d at 14; *see also Fla. E. Coast Ry. Co.*

v. United States, 348 F.2d 682, 685 (5th Cir. 1965) (finding the United States possessed standing under *Debs*), *aff'd*, 384 U.S. 238 (1966); *cf. United States v. Brand Jewelers, Inc.*, 318 F. Supp. 1293 (S.D.N.Y. 1970) (concluding "the United States has 'standing' . . . to seek injunctive and other civil remedies for an allegedly 'long-standing and systematic practice'" of violating constitutional rights). That test is satisfied here.

S.B. 8's burden on interstate commerce was well articulated by the district court. *Texas*, 2021 WL 4593319, at *17–18, 23–24. These burdens are contributing to an emergency of care and, for some, will mean an irreversible violation of their right to pre-viability abortion care. But the exceptional circumstances here go well beyond the specific subject matter of this statute. S.B. 8's very design—which is intended to nullify rights guaranteed under the Constitution while insulating this denial of rights from meaningful judicial review—is an exceptional circumstance that supports the federal government's standing to challenge the law. S.B. 8's *in terrorem* enforcement scheme works by using the threat of litigation and back-breaking personal damages—with a constitutional defense expressly forbidden—to chill constitutionally protected conduct. Denying standing to the United States would sanction end-runs by states around constitutional rights. *Cf. Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (explaining that *Ex Parte Young*, 209 U.S. 123 (1908), "has been accepted as necessary to permit the federal

courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States'").

If countenanced here, S.B. 8's enforcement scheme could be used in a variety of contexts to alter fundamentally the landscape of constitutional rights, well beyond reproductive rights. By delegating enforcement authority to citizens through a private cause of action, states could ban the sale of firearms, the expression of particular viewpoints, or worship by certain faiths. States could, for example, pass laws to circumvent the Supreme Court's ruling in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S.Ct. 1719 (2018), by permitting private suits against bakeries that refuse to bake cakes for same-sex weddings, or to avoid the Court's ruling in *Tandon v. Newsom*, 141 S.Ct. 1294 (2021), by permitting private citizens to sue to limit in-person religious gatherings. The unprecedented enforcement scheme in S.B. 8 presents an exceptional circumstance that readily supports the federal government's standing to challenge the law in order "to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" *Pennhurst*, 465 U.S. at 105 (quoting *Young*, 209 U.S. at 160).

B. Texas's Scheme Represents an Unprecedented Attack on the Supremacy Clause and the Framers' Constitutional Design.

Unless the United States has standing in cases such as this, basic constitutional rights will be subject to the whim of defiant state legislative bodies.

The Supremacy Clause makes clear a basic principle of constitutional design: "This Constitution, and the laws of the United States . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. Const. art. VI, cl. 2. Without it, we would have "a system of government founded on an inversion of the fundamental principles of all government; . . . the authority of the whole society everywhere subordinate to the authority of the parts; . . . a monster, in which the head was under the direction of the members." The Federalist No. 44 (James Madison). By depriving individuals of a constitutionally protected right and insulating that deprivation from judicial scrutiny, S.B. 8 impermissibly overrides the Supremacy Clause.

The Framers expected the Executive to play an important role in ensuring faithful adherence to the constitutional framework. The Constitution directs the Executive to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. This obligation exists independent of any cause of action created—or not created—by Congress; the Executive cannot abandon protection of constitutional rights simply because Congress is silent. As this Court explained in *City of Jackson*:

> The Constitution cannot mean to give individuals standing to attack state action inconsistent with their constitutional rights but to deny to the United States standing when States jeopardize the constitutional rights of the Nation. Or that the United States may sue to enforce a statute but not sue to preserve the fundamental law on which that statute is based. Or that the United States may sue to protect a proprietary right but may not sue to protect much more important governmental rights, the existence and protection of which are necessary for the preservation of our Government under the Constitution.

318 F.2d at 15–16; *see also Debs*, 158 U.S. at 600 (stressing that the Court's holding rested on such "broader ground" derived from constitutional principles and not on a statutory enactment).

For similar reasons, the district court correctly recognized that *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), does not bar this suit. *Texas*, 2021 WL 4593319, at *20. In *Grupo*, the Supreme Court held that a federal court cannot enjoin a foreign litigant from transferring assets "in which no lien or equitable interest is claimed" because that remedy was "previously unknown to equity jurisprudence." *Grupo*, 527 U.S. at 310, 332–33. *Grupo* thus limits courts to the general forms of relief that were available at the time of ratification; it does not require, however, that the relief have the *same exact contours* as that awarded during the ratification period. Here, the district court ordered the traditional equitable remedy for cases involving unconstitutional state action: an injunction against enforcement of the unconstitutional law. The equity

jurisdiction of the federal courts has always encompassed suits by the United States to enjoin unconstitutional actions by states. As the Supreme Court has recognized repeatedly, and reaffirmed last term, "[i]n ratifying the Constitution, the States consented to suits brought by . . . the Federal Government." *Alden v. Maine*, 527 U.S. 706, 755 (1999); *PennEast Pipeline Co. v. New Jersey*, 141 S.Ct. 2244, 2258 (2021) (agreeing with *Alden*).

II. Texas is a Proper Defendant.

S.B. 8 was drafted to permit private parties to enforce the law in hopes of obscuring obvious state action. Even if the State's only role is to provide the coercive power necessary for a private party to enforce the state policy embodied in the statute, Texas is a proper defendant.

Enforcement of Texas's abortion restrictions traditionally has been a state function. *See* Tex. Health & Safety Code § 171.005 (providing that S.B. 8 is the sole exception to State enforcement). Although the State purports to disclaim its authority to enforce S.B. 8 in light of the private cause of action, in reality the State has deputized bounty hunters to carry out its traditional enforcement authority. In doing so, Texas has made its state judicial system available to provide the coercive authority that enables the law's enforcement. And it has supplied that coercive authority in a manner that explicitly *precludes* affected parties from asserting the statute is unconstitutional. *Id.* § 171.208(e)(2). Thus, the State makes its courts

available to private parties to implement a state policy of preventing the exercise of constitutional rights, while forbidding those courts from exercising their obligation to respect the Constitution in their judgments. In short, Texas has provided the apparatus to chill the exercise of constitutional rights.

In *Shelley v. Kraemer*, 334 U.S. 1 (1948), the Supreme Court held that where private actors' enforcement of a law can be "secured only by judicial enforcement by state courts," judicial enforcement of private agreements amounts to state action. 334 U.S. at 13, 18; *see also id.* at 20 ("We hold that, in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws, and that, therefore, the action of the state courts cannot stand."). *Shelley* concerned racially-restrictive covenants—a classic attempt to circumvent the enforcement of constitutional rights through purported privatization of the conduct that infringed those rights. Still, in *Shelley*, the Supreme Court had "no doubt" that "enforcement by state courts" of racially-restrictive covenants amounted to "state action . . . in the full and complete sense of the phrase," because, "but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint." *Id.* at 18–19. The Court recognized that the State had not "merely abstained from action, leaving private individuals free to impose such discriminations as they see fit." *Id.* at 19. Rather, the State had "made available to

such individuals the full coercive power of government to deny to petitioners" their rights under the Constitution. *Id.*

Shelley definitively defeats the State's effort to disclaim legal accountability over S.B. 8. Regardless of whether the bounty hunters to whom the State purports to delegate enforcement authority are viewed as state actors—and the district court was correct in holding that they are—it cannot be disputed that instrumentalities of the State, including its judiciary, play a central and necessary role in enforcing the law. This alone is sufficient to make the State a proper defendant.

It is far from novel to enjoin state courts and judges in such circumstances. In fact, this essential check on government authority pre-dates the Founding, and has persisted ever since. *See Pulliam v. Allen*, 466 U.S. 522 (1984) (reciting history and collecting cases); *Mireles v. Waco*, 502 U.S. 9, 9, 10 n.1 (1991) (stating that while a judge is generally immune from a suit for money damages, a "judge is not absolutely immune from . . . a suit for prospective injunctive relief"); *United States v. Texas*, 356 F. Supp. 469, 473 (E.D. Tex. 1972) (permanently enjoining the state court from further proceedings), *aff'd*, 495 F.2d 1250 (5th Cir. 1974); *United States v. Washington*, 459 F. Supp. 1020, 1034 (W.D. Wash. 1978) (enjoining the state court from enforcing its temporary injunction and from interfering with the federal court's judgment), *aff'd*, 645 F.2d 749 (9th Cir. 1981); *see also In re BankAmerica Corp. Sec. Litig.*, 263 F.3d 795 (8th Cir. 2001), *cert. denied sub nom. Desmond v.*

BankAmerica Corp., 535 U.S. 970 (2002). Accordingly, neither judicial immunity nor a purported absence of state action supports Texas's attempt to evade legal accountability for S.B. 8.

October 11, 2021

Respectfully submitted,

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/s/ Julia F. Post
Julia F. Post

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