No. 21A85

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Applicant,

v.

STATE OF TEXAS, ET AL.,
Respondents.

THE STATE OF TEXAS'S OPPOSITION TO THE UNITED STATES' APPLICATION TO VACATE STAY OF PRELIMINARY INJUNCTION ISSUED BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INTRODUCTION

Federal courts are not "roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973). Neither is the Department of Justice.

The United States' lawsuit against Texas is extraordinary in its breadth and consequence, having an impact on precedents that have existed far longer than any right to abortion has been recognized. Nevertheless, the federal government asks this Court to apply the "ad hoc nullification machine" that pushes aside any doctrine of constitutional law that stands in the way of abortion rights. *Hill v. Colorado*, 530 U.S. 703, 741 (2000) (Scalia, J., dissenting). Specifically, it asks the Court to ignore (among other things) requirements of justiciability, standing, and a cognizable cause of action—all so that the Court can reach the merits of the government's challenge to Texas's Senate Bill 8 (SB 8). The Court should decline this request.

The federal government failed to learn the lessons of the Fifth Circuit's decision in *Whole Woman's Health v. Jackson*, 13 F.4th 434 (5th Cir. 2021) (*Jackson I*), and this Court's decision in *Woman's Health v. Jackson*, 141 S. Ct. 2494 (2021) (*Jackson II*). Texas executive officials do not enforce SB 8, and Texas's judicial branch is not adverse to litigants who appear before it and who believe SB 8 is unconstitutional. As there is therefore no state executive or judicial official who can be enjoined, there is no Article III case or controversy in which a federal court may enter an injunction.

The federal government appears to believe that it can fix this defect by swapping out the named officials for the "State of Texas." But "federal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves." *Jackson II*, 141 S. Ct. at 2495. The district court's injunction against the State must still operate against individuals, *Nken v. Holder*, 556 U.S. 418, 428 (2009)—none of whom enforce SB 8.

But that is not even the beginning of the problems with the federal government's lawsuit. Under binding case law, the federal government is not adverse to Texas merely because it thinks a Texas law is unconstitutional. And it lacks standing because it has not been injured by SB 8. The federal government cannot get an abortion, and the Constitution does not assign it any special role to protect any putative right to abortion. Thus, the theory of standing found in *In re Debs*, 158 U.S. 564 (1895), is inapplicable. And its speculation that SB 8 may adversely affect various federal programs is just that—speculation unsupported by the government's own witnesses. The government does not even try to defend the trial court's discussion of *parens patriae* standing.

And even if the federal government could establish standing, it can point to no doctrine that allows a federal district court to enjoin the entire Texas judicial system and millions of individuals who were not parties. To the contrary, in numerous contexts, this Court has stated that it would be improper for a federal court to interfere with even a single court case—let

alone the entire court system. And the fiction that unidentified individuals are "state actors" because they file suit has been broadly rejected.

Aside from these jurisdictional and prudential problems with even entertaining this suit, the federal government lacks an equitable cause of action to sue Texas in these circumstances. Precedent squarely forecloses the federal government's effort to vindicate its citizens' Fourteenth Amendment rights, and the federal government cannot avoid that conclusion by recasting its claim as a "sovereign injury" caused by Texas's "nullification" of this Court's precedent. Behind the artful pleading, this is still an effort to bring Fourteenth Amendment claims on behalf of a subset of women in Texas. But it is also nonsensical: the only right that is supposedly nullified is the right to litigate a constitutional question as a federal-court plaintiff rather than a state-court defendant. The federal government can point to no case from this Court recognizing any such right.

The merits of the federal government's arguments fare no better. Assuming there is a claim for preemption (and there is not), none of the laws that the federal government identifies preempt SB 8 because they do not require Texas to permit post-heartbeat abortions. Intergovernmental immunity is not implicated because Texas law presumes that federal programs would be exempt from SB8. And there is no violation of the Fourteenth Amendment because SB 8 itself contains an undue-burden defense that prevents its enforcement where the Constitution requires abortion. The federal government can point to no case from this Court that holds that

abortion providers' distaste for litigating in state courts or unwillingness to use a state-law defense create an undue burden on their customers.

Finally, the federal government suggests (at 4) this Court could treat its application as a petition for a writ of certiorari before judgment. If the Court chooses to do so, it may also construe Texas's response as a conditional cross-petition on the validity of *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

Statement of the Case

I. Senate Bill 8

Senate Bill 8 was signed into law on May 2021. Act of May 13, 2021, 87th Leg., R.S., ch. 62, 2021 Tex. Sess. Law Serv. 125. It amended various laws pertaining to the provision of abortion in Texas, but the provision gaining the most attention was the addition of subchapter H to chapter 171 of the Texas Health and Safety Code. Tex. Health & Safety Code §§ 171.201-.212. Similar to existing law, *id.* § 171.012(a)(4)(D), SB 8 requires doctors to determine whether the unborn child has a detectable fetal heartbeat before performing an abortion, *id.* § 171.203(b). SB 8 prohibits a physician from "knowingly perform[ing] or induc[ing] an abortion on a pregnant woman if the physician detected a fetal heartbeat for the unborn child," *id.* § 171.204(a), except in the case of emergencies, *id.* § 171.205(a).

SB 8, however, specifically prohibits enforcement or threatened enforcement of the heartbeat provisions by the "state, a political subdivision,

a district or county attorney, or an executive or administrative office or employee of this state or a political subdivision." *Id.* § 171.207(a); *see also id.* § 171.208(a); *Jackson I*, 13 F.4th at 442-43 (per curiam).

Instead, the heartbeat provisions are enforced "exclusively through ... private civil actions." Tex. Health & Safety Code § 171.207(a). Any private person may bring a civil action against any person who, among other things, performs a post-heartbeat abortion or aids and abets such an abortion. *Id.* § 171.208(a). A successful plaintiff may obtain injunctive relief and statutory damages of not less than $10,000. *Id.* § 171.208(b). That the relief sought would impose an undue burden on a woman or group of women is an affirmative defense. *Id.* § 171.209(a)-(b).

II. Parallel Provider Litigation

A. Months after SB 8 was enacted, a group of abortion providers and advocates sought to enjoin five state executive officials, a state-court judge, a state-court clerk, and a private individual from enforcing SB 8, which was set to take effect on September 1. *Jackson I*, 13 F.4th at 439 & n.2. When the district court denied the state defendants' motions to dismiss on the grounds of sovereign immunity, they appealed, divesting the district court of jurisdiction to proceed further. *Id.* at 439.

B. The Fifth Circuit denied the plaintiffs' request for an injunction pending appeal, later explaining its ruling in a per curiam opinion. *Id.* at 441-45. As required by *Ex parte Young*, 209 U.S. 123, 157 (1980), the court looked for "some connection" between the state officials sued and the enforcement of

SB 8. *Jackson I*, 13 F.4th at 441-42. The Fifth Circuit concluded the "language could not be plainer": there is no connection. *Jackson I*, 13 F.4th at 442-43. Thus, an injunction against the state officials would have been improper. *Id.* at 443.

The court found the claims against the state-court judge and court clerk to be "specious." *Id.* As it explained:

> The Plaintiffs are not "adverse" to the state judges. *See Bauer* [*v. Texas*, 341 F.3d 352, 359 (5th Cir. 2003)]. When acting in their adjudicatory capacity, judges are disinterested neutrals who lack a personal interest in the outcome of the controversy. It is absurd to contend, as Plaintiffs do, that the way to challenge an unfavorable state law is to sue state court judges, who are bound to follow not only state law but the U.S. Constitution and federal law.

Id. at 444. Thus, the court also declined to issue injunctive relief against the state-court judge and court clerk. *Id.*

C. After failing to obtain relief from the Fifth Circuit, the plaintiffs sought injunctive relief from this Court—unsuccessfully. *Jackson II*, 141 S. Ct. at 2495-96. As this Court explained, "federal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves." *Id.* at 2495. Citing both its standing and sovereign immunity jurisprudence, this Court stated that the plaintiffs had not carried their burden to show that (1) the state officials "can or will seek to enforce" SB 8 against the plaintiffs, *id.* (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013)), or that (2) the Court

"can issue an injunction against state judges asked to decide a lawsuit" under SB 8, *id.* (citing *Ex parte Young*, 209 U.S. at 163).

The underlying appeal from the denial of defendants' motions to dismiss is proceeding on an accelerated schedule and will be argued the week of December 6. *Whole Woman's Health v. Jackson*, No. 21-50792 (5th Cir.). The plaintiffs have filed a petition for pre-judgment certiorari, and this Court has requested a response to be filed concurrently herewith. *Whole Woman's Health v. Jackson*, 21-463 (U.S.).

III. Procedural History

A. On September 9, after this Court declined to provide injunctive relief in *Jackson II*, the United States filed this suit against the State, alleging that (1) SB 8 is invalid under the Supremacy Clause and the Fourteenth Amendment, (2) SB 8 is preempted by the Fourteenth Amendment and other federal statutes and regulations, and (3) SB 8 violates intergovernmental immunity. C.A. App.25-27.[1] The federal government sought both a declaratory judgment that SB 8 is "invalid, null, and void," and an injunction against the "State of Texas—including all officers, employees, and agents, including private parties who would bring suit under S.B. 8—prohibiting any and all enforcement of S.B.8." C.A. App.27.

[1] "C.A. App." refers to the appendix filed on October 8 in the Fifth Circuit by the State of Texas in support of its emergency motion for stay. "App." refers to the federal government's appendix filed with this Court. "ROA" refers to the record on appeal filed with the Fifth Circuit in this matter.

Five days later, months after SB 8 was passed and weeks after it took effect, the federal government filed an "Emergency Motion for Temporary Restraining Order or Preliminary Injunction." C.A. App.30-76. It attached fifteen declarations, including from abortion providers who chose to stop performing post-heartbeat abortions because they were required to litigate SB 8's constitutionality in state rather than federal court as well as from federal employees, describing how SB 8 could theoretically impact several federal programs. C.A. App.77-286.

Four individuals were permitted to intervene as defendants: one individual who had brought suit under SB 8 and three others who wished to, App.16a.

B. Following expedited discovery, the district court held a hearing on October 1. At this hearing, deposition testimony of the federal declarants undermined their claims that SB8 impacted various federal programs:

- The declarant for the Bureau of Prisons admitted she was unaware of any confusion among inmates, disruption of staff and contractor duties, or direct burdens placed on BOP since SB 8 took effect. *Compare* C.A. App.209-11, *with* ROA.2313-20. Instead, she was aware of only four pregnant women in BOP custody in Texas, none of whom had requested an abortion. ROA.2300-01.
- The declarant for the Office of Personnel Management admitted that no insurance carrier had raised concerns about SB 8 and could not recall any instance in which the denial of abortion coverage had resulted in litigation. ROA.2624, 2640-41.
- The declarant for the Job Corps program admitted that she was unaware of any abortion-related services being provided by any Texas Job Corps Center in the last three years. ROA.2566.

- The declarant from the Center for Medicare and Medicaid Services, admitted she was unaware of any payment for a reimbursable Medicaid service involving abortion being denied and conceded she was unaware of how many Medicaid patients had obtained abortion services. ROA.2687-88.
- The declarant for the Office of Refugee Resettlement admitted none of ORR's contractors or grantees had expressed concerns about SB 8, that only two minors "may or may not" have requested abortions in the last year, and that his approximation of fifteen to twenty minors requesting abortions in a fiscal year was "speculative." ROA.2383-84.

C. The district court issued an order granting a preliminary injunction on October 6. App.2a-114a. The court first determined that the federal government had standing under three theories: (1) potential increased costs and liability for facilitating abortions under federal programs, App.26a-28a; (2) its "profound sovereign interest" in vindicating citizens' constitutional rights as *parens patriae*, App.28a-33a; and (3) preventing harm to the public at large under *In re Debs*, 158 U.S. 564 (1895), App.33a-36a.

The court admitted that there was no constitutional or statutory provision authorizing the federal government's cause of action, but instead determined that "traditional principles of equity allow the United States to seek an injunction to protect its sovereign rights, and the fundamental rights of its citizens under the circumstances present here." App.39a-40a. Without a "blueprint" or "categorical definition," App.40a-41a, for such a claim, the court concluded it must exists when there is "no adequate remedy … at law," App.41a. Moreover, the court determined that cause of action allowed it to enjoin not just all state-court judges and court personnel, App.62a-67a, but

any private individual who filed suit under SB 8 on the theory that such litigants became "state actors." App.67a-72a.

The court then enjoined all state-court judges and court clerks from "accepting or docketing, maintaining, hearing, resolving, awarding damages in, enforcing judgments, enforcing any administrative penalties in, and administering any lawsuit" brought under SB 8. App.110a. It also enjoined private individuals "who act on behalf of the State or act in active concert with the State." App.110a. Uncertain how the State would implement its injunction, the court stated that it "trusts that the State will identify the correct state officers, officials, judges, clerks, and employees to comply with this Order." App.110a. And it ordered Texas to publish on all court websites the preliminary injunction and easy-to-understand instructions concerning SB 8 suits and distribute its order to all court personnel. App.111a.

D. Texas, as well as three intervenors, filed notices of appeal that same day and moved to stay the district court's preliminary injunction two days later. After briefing on the stay motion was complete, the court issued a stay pending appeal "for the reasons stated in" *Jackson I* and *Jackson II*, with one judge dissenting. App.1a. The court then expedited the appeal and ordered that it be heard before the same panel set to hear the *Jackson* appeal in December. App.1a.

ARGUMENT

A court of appeals' decision to stay a district-court ruling is "entitled to great deference." *Garcia-Mir v. Smith*, 469 U.S. 1311, 1313 (1985) (Rehnquist,

C.J., in chambers). This Court will vacate a stay only when it appears that the court of appeals was "demonstrably wrong in its application of accepted standards in deciding to issue the stay," and "the rights of the parties . . . may be seriously and irreparably injured by the stay." *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers); *see also Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 134 S. Ct. 506, 506 (2013) (Scalia, J., concurring). The federal government fails on both prongs.

Moreover, "[r]espect for the assessment of the Court of Appeals is especially warranted when that court is proceeding to adjudication on the merits with due expedition." *Doe v. Gonzales*, 546 U.S. 1301, 1308 (2005) (Ginsburg, J., in chambers). Here, the Fifth Circuit has calendared argument in this case for the week of December 6, and Texas's opening brief is due just over one week from today. There is therefore no "extraordinary" cause to "justify this Court's intervention in advance of the expeditious determination of the merits toward which the [Fifth] Circuit is swiftly proceeding." *Id.* at 1309.

I. Far from "Demonstrably Wrong," The Fifth Circuit Was Correct to Grant a Stay Pending Appeal.

When issuing its stay, the Fifth Circuit had to consider four factors: (1) whether Texas made a strong showing that it was likely to succeed on the merits, (2) whether Texas would have been irreparably injured absent a stay, (3) whether issuance of a stay would substantially injure other parties, and

(4) where the public interest lay. *See Nken*, 556 U.S. at 434. Here, multiple grounds exist for showing that Texas was likely to succeed on the merits of its appeal because the federal government has not even established jurisdiction; its newly discovered, and highly specific, equitable cause of action does not exist; and SB 8 does not violate the Constitution. And the district court's decision to enjoin Texas, Texas's entire judiciary, and all of its citizens constitutes an irreparable injury that is against the public interest.

A. The federal government is not likely to show that its claims are justiciable in a federal court.

Most fundamentally, Texas is likely to succeed on appeal because the federal government cannot meet the case-or-controversy requirement of Article III. As the party invoking federal jurisdiction, the federal government bears the burden of demonstrating standing. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103-04 (1998). In this instance, the United States has not even established that the federal and state governments are adverse: under *Muskrat v. United States*, 219 U.S. 346 (1911), Texas is not adverse to the federal government merely because the constitutionality of one of Texas's laws has been challenged. Moreover, Texas's judicial branch is not adverse to the federal government merely because SB 8 lawsuits might be filed in Texas courts. *Bauer*, 341 F.3d at 359. Even if they are adverse, the federal government has not shown that it has suffered an injury that is "*certainly impending*." *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). And the federal government does not have standing to "merely litigat[e] as a

volunteer the personal claims of its citizens." *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976) (per curiam). Moreover, enjoining a State's entire judiciary is not a remedy that is cognizable by a federal court sitting in equity.

1. The federal government is not adverse to the State merely because a state court may be asked to apply an allegedly unconstitutional statute.

This Court has already recognized that an injunction should not issue against Texas officials and judges based on claims that they will "enforce" SB 8. *Jackson II*, 141 S. Ct. at 2495. That problem remains despite the substitution of the State of Texas as the defendant. The federal government cannot avoid *Muskrat* and fails to offer any explanation of how the interests of state-court judges are adverse to those of the United States.

a. Under *Muskrat*, the abstract determination regarding a law's constitutionality is not a justiciable controversy.

Clearly defined precedent holds that an allegation that a law may be unconstitutional does not make the federal and state governments adverse in the sense of an Article III case or controversy. Specifically, in *Muskrat*, 219 U.S. 346, this Court examined whether Congress could create a case or controversy by enacting a statutory cause of action allowing Indians "to determine the validity of certain acts of Congress." *Id.* at 348. The Court concluded that Congress could not because there was no guarantee that the parties were truly adverse in the Article III sense.

In *Muskrat*, the Indian plaintiffs filed suit against the United States, seeking "to restrain the enforcement of [certain challenged statutes] upon the

ground that [they were] unconstitutional and void." *Id.* at 349. Even though there was no doubt that the challenged statutes injured the plaintiffs' property interests, this Court held that the suit was not "a 'case' or 'controversy,'" because the federal government, though "made a defendant," had "no interest adverse to the claimants" who merely wanted "to determine the constitutional validity of this class of legislation." *Id.* at 361. Federal courts cannot entertain "a proceeding against the government in its sovereign capacity" when "the only judgment required is to settle the doubtful character of the legislation in question." *Id.* at 361-62. Instead, the Court stated that "[t]he questions involved in this proceeding as to the validity of the legislation ... must be determined in the exercise of [the Court's] judicial functions" in a case between individuals. *Id.* It might be more efficient to allow pre-enforcement adjudication, but an interest in more quickly deciding "the constitutionality of important legislation" could not outweigh the Article III limitations on federal court jurisdiction. *Id.*

Just as in *Muskrat*, a suit against Texas officials who do not enforce the law cannot lie in federal court to determine the abstract constitutionality of the legislation. Such an order will not bind "private parties, when actual litigation brings to the court the question of the constitutionality of such legislation." *Id.* at 362. And it will have no immediate effect on individuals who are not "tasked with enforcing [the] law[]." *Jackson II*, 141 S. Ct. at 2495.

In response, the federal government insists (at 29) that *Muskrat* concerned private rights, while this case concerns public harms. But that is

simply untrue. If a right to abortion exists, *but see infra* pp. 42-43, it is a private right. SB 8 also creates a private cause of action. Tex. Health & Safety Code § 171.208(a). Any lawsuit will be between private parties—not the State. That undermines any claim that public rights are at issue. *See Crowell v. Benson*, 285 U.S. 22, 51 (1932) (defining a case "of private right" as one concerning "the liability of one individual to another"). Neither the federal government's views on who should be required to defend SB 8 nor the abortion industry's preference in forum transforms SB 8 into a public harm. If so, any industry could call on the federal government to come to its rescue whenever that industry feared liability in state court.

But even if the federal government were right about *Muskrat* involving private rights and this case involving public rights, that would cut against federal jurisdiction here. "'[P]rivate rights' . . . are at the 'core' of 'matters normally reserved to Article III courts.'" *Coit Indep. Joint Venture v. Fed. Sav. & Loan Ins. Corp.*, 489 U.S. 561, 578-79 (1989). Cases involving public rights, on the other hand, are less likely to satisfy Article III standards. *See, e.g.*, *Spokeo, Inc. v. Robins*, 578 U.S. 330, 348 (2016) (Thomas, J., concurring) (requiring a greater showing from a public-rights plaintiff than a private-rights plaintiff). The federal government's purported distinction shows that the lack of jurisdiction here follows *a fortiori* from *Muskrat*.

Nor does it matter that purported due process rights are at issue. The same was true in *Muskrat*. *See Muskrat v. United States*, 44 Ct. Cl. 137, 151-52 (1909), *rev'd*, 219 U.S. 346, (1911).

Muskrat remains good law. It bars the federal government's lawsuit and supports the Fifth Circuit's decision to stay the injunction against Texas.

b. State-court judges are not adverse to parties who may litigate in front of them.

The federal government's argument is particularly troubling as it assumes that the entire judicial branch of a State is "adverse" to a litigant who believes a law is unconstitutional. Adopting that view would create a massive expansion in constitutional litigation because anyone who disagrees with a law could sue the courts that might enforce it, forcing judges to take sides in constitutional disputes before the cases reach their courts.

It is for that reason that while sitting on the First Circuit, then-Judge Breyer recognized that "at least ordinarily, no 'case or controversy' exists between a judge who adjudicates claims under a statute and a litigant who attacks the constitutionality of the statute." *In re Justs. of Sup. Ct. of P.R.*, 695 F.2d 17, 21 (1st Cir. 1982); *see also Bauer*, 341 F.3d at 359 ("The requirement of a justiciable controversy is not satisfied where a judge acts in his adjudicatory capacity."). Other courts have followed suit. *See Allen v. DeBello*, 861 F.3d 433, 440 (3d Cir. 2017); *Grant v. Johnson*, 15 F.3d 146, 148 (9th Cir. 1994); *Paisey v. Vitale In & For Broward Cnty.*, 807 F.2d 889, 893 (11th Cir. 1986); *In re Justices*, 695 F.2d at 22; *cf. Just. Network Inc. v. Craighead County*, 931 F.3d 753, 763 (8th Cir. 2019). Put simply, a judge's posture is "not in any sense the posture of an adversary to the contentions made on either side of the case." *Mendez v. Heller*, 530 F.2d 457, 459 (2d Cir. 1976). To the

contrary, a judge acts as "a disinterested judicial adjudicator, bound to decide the issues before him according to the law." *Cooper*, 702 F. App'x at 333-34.

And this rule has been applied to other court personnel. Courts routinely hold that clerks, like judges, "do not have a sufficiently 'personal stake in the outcome of the controversy'" to allow for federal jurisdiction. *Wallace*, 646 F.2d at 160 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)); *Chancery Clerk of Chickasaw Cnty. v. Wallace*, 646 F.2d 151, 160 (5th Cir. Unit A 1981); *accord Cooper v. Rapp*, 702 F. App'x 328, 333 (6th Cir. 2017); *Mendez*, 530 F.2d at 461. The principle behind this rule is simple: court personnel work at the direction of judges and can be no more adverse to a litigant than the judge himself. *Wallace*, 646 F.2d at 160.

As this precedent establishes, there is no justiciable controversy between the judges of the State and the federal government merely because those judges might hear cases pursuant to a law that the federal government believes unconstitutional.

2. The federal government lacks standing to bring this suit.

Even if in some metaphysical sense the State and the United States were adverse, there would still be no justiciable controversy because the federal government lacks standing. Standing requires the government to show that (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of Texas; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision,

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Moreover, because the federal government has sought a preliminary injunction, mere allegations of possible harm are not enough; it must have made a clear showing of entitlement to relief. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, (2008). Further, standing "in no way depends on the merits of the … contention that particular conduct is illegal." *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

Although vaguely referring to its "authority" to bring suit, the federal government asserts two "interests" in this case: (1) interference with federal programs, and (2) "maintaining the supremacy of federal law and ensuring that the traditional mechanisms of judicial review endorsed by Congress and this Court remain available to challenge unconstitutional state laws." Appl. 19. Neither suffices, and the federal government does not attempt to defend the *parens patriae* holding put forth by the district court.

a. Any injury regarding federal programs is speculative.

The district court determined that the federal government established an injury because potential costs and liability could result from providing abortion-related services through several federal programs. App.26a-28a. But the federal government failed to prove that these hypothetical injuries were "likely, as opposed to merely speculative." *Lujan*, 504 U.S. at 561. And as the evidence submitted by Texas demonstrated, such injuries are unlikely—and largely based on a chain of speculation that depends on the actions of third parties who are not before the Court.

This Court has explained that "[a]llegations of possible future injury" are not enough to demonstrate standing. *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). Rather, the "threatened injury must be *certainly impending* to constitute injury in fact." *Clapper*, 568 U.S. at 409 (citing cases). Stated differently, there must be a "substantial risk" that the harm will occur. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). Moreover, injuries that result from the independent actions of third parties that are not before the Court are insufficient to demonstrate standing. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976).

The declarations submitted by various federal employees do not meet the government's evidentiary burden to establish standing, *Winter*, 555 U.S. at 22, because they are at odds with the reality revealed in their deposition testimony. There was no evidence that any of the four pregnant women in BOP custody wanted an abortion, that any student in the Job Corps program wanted an abortion or had been provided one in the last three years, that any minor in ORR custody wanted an abortion, that any carrier had raised concerns about SB 8 to OPM, or that any person had been denied coverage for an abortion under Medicaid. *See supra* pp. 8-9. And there was no evidence demonstrating a substantial risk that any of these potential injuries would occur in the future.

Moreover, any fears of liability under SB 8 depend on (1) a woman requesting a post-heartbeat abortion, (2) a federal employee or contractor facilitating that abortion, (3) a third party bringing a lawsuit against that

individual, (4) a Texas court holding that federal defendant liable, and (5) that judgment withstanding appellate review, including up through this Court. Each link in this hypothetical chain is speculative and controlled by a different party, making the possibility that this entire process would occur conjectural in the extreme. *Clapper*, 568 U.S. at 409. For example, as SB 8 makes clear, any hypothetical future federal defendant would be able to mount an undue-burden defense. And this Court must assume that Texas courts would apply the law correctly. *See Jackson I*, 13 F.4th at 444 (noting that state-court judges are bound to apply the Constitution and federal law).

In any event, it is unlikely a Texas court would hold a federal defendant liable because Texas courts presume that state statutes do not regulate the federal government, its employees, or its contractors performing federal functions. *See R.R. Comm'n v. United States*, 290 S.W.2d 699, 702 (Tex. App.—Austin 1956), *aff'd*, 317 S.W.2d 927 (Tex. 1958); *Louwein v. Moody*, 12 S.W.2d 989, 990 (Tex. Comm'n App. 1929). The federal government has not proven that any one of these steps that would lead to a cognizable injury, much less that all of them are "certainly impending." Consequently, it lacks standing regarding any hypothetical future injury related to its federal programs. *Clapper*, 568 U.S. at 409.

b. The federal government does not have standing under *In re Debs*.

The district court relied on this Court's decision in *In re Debs*, 158 U.S. 564 (1895), to support its conclusion that the United States nevertheless suffers an

injury in fact from "harms to the public interest and general welfare." App.34a. And the federal government appears to have adopted a similarly broad interpretation. Appl. 20-21. *Debs* did not go so far.

First, the *Debs* Court held that the federal government, like any other party, can bring a lawsuit when it has a property interest in the matter. 158 U.S. at 583-84. In *Debs*, the federal government had such an interest "in the mails," so it had standing on that basis. *Id.* There is no property interest here.

Second, the *Debs* Court explained that the lack of a property interest might not bar standing if "the wrongs complained of . . . are in respect of matters which by the constitution are [e]ntrusted to the care of the nation" and "concerning which the nation owes the duty to all the citizens of securing to them their common rights." *Id.* at 586. The Court noted that the federal government's interest sprang from two provisions in Article I that empowered Congress to regulate (1) interstate commerce, U.S. Const. art. I, § 8, cl. 3; and (2) post offices and post roads, *id.* cl. 7. *Debs*, 158 U.S. at 579. Other cases cited by the government similarly involve matters entrusted to the federal government under Article I. Appl. 21; *United States v. Am. Bell Tel. Co.*, 128 U.S. 315 (1888) (concerning patents; U.S. Const. art. I, § 8, cl. 8); *Heckman v. United States*, 224 U.S. 413 (1912) (concerning Indian tribes; U.S. Const. art. I, § 8, cl. 3); *Sanitary Dist. of Chi. v. United States*, 266 U.S. 405 (1925) (concerning interstate and foreign commerce; U.S. Const. art. I, § cl. 3).

Here, however, irrespective of whether the Constitution includes a right to abortion, regulating the provision of abortion has not been entrusted to the

care of the federal government in the Constitution such that it has "duty" to secure that right for all its citizens. And the Supremacy Clause does not entrust the Attorney General with the obligation to challenge unconstitutional state laws. Instead, it provides only a rule of decision applicable to courts. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324-25 (2015).

Third, the federal government may bring suit under *Debs* only when it demonstrates "a well-defined statutory interest of the public at large." *United States v. Solomon*, 563 F.2d 1121, 1127 (4th Cir. 1977). "[A]n interest, in the generic sense," is not enough—or the federal government would literally be able to sue a State about anything. *Id.* at 1125. If that were what *Debs* meant, it would have been a far shorter opinion. And numerous statutes authorizing the Attorney General to file suit would be unnecessary. *See infra* pp. 38-39.

Instead, "the Debs Court specifically noted that the duty on which the standing of the United States rested arose not simply from the constitutional grant of power to regulate commerce but from congressional action expressly assuming and implementing that power." *Clark v. Valeo*, 559 F.2d 642, 654 (D.C. Cir. 1977) (Tamm, J., concurring); *see also Debs*, 158 U.S. at 586 (noting that the government had been "given by the constitution power to regulate interstate commerce" and had "by express statute assumed jurisdiction over such commerce").

In this case, however, the federal government has not "by express statute assumed jurisdiction over" post-heartbeat abortions. The federal government

therefore has no constitutional or statutory duty that would provide it with standing in this case.

c. The federal government does not claim *parens patriae* standing

Finally, the federal government makes no attempt to defend the district court's conclusion that it has *parens patriae* standing, and for good reason. Conferring standing on the federal government to vindicate its citizens' constitutional rights, contradicts the principle that a sovereign generally cannot "step[] in to represent the interests of particular citizens who, for whatever reason, cannot represent themselves." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 600 (1982). Holding, as did the district court, that the federal government has standing to sue "for probable violations of its citizens' Constitutional rights," App.30a, places no principled limit on the authority of the federal government to bring suit any time it identifies a constitutional disagreement with a State's law. If the district court is right, there is no reason why the United States cannot simply sue on a *parens patriae* theory any time it thinks a state law is unconstitutional.

3. A federal court sitting in equity may not enjoin a State's entire judiciary or the public at large.

Even if the federal government could establish the basic components of justiciability under Article III, the relief the district court entered went well beyond the scope of its equitable jurisdiction. It enjoined "the State of Texas, including its officers, officials, agents, employees, and any other persons or

entities acting on its behalf" from "maintaining, hearing, resolving, awarding damages in, enforcing judgments in, enforcing any administrative penalties in, and administering any lawsuit brought pursuant to" SB 8. App.110a. That injunction defies the Constitution and this Court's precedent, which has held under a variety of different doctrines that a federal court cannot (or at least should not) superintend a state court's handling of an individual case—let alone enjoin the entire state judiciary from hearing a class of cases.

Without citation, the federal government insists (at 30) that the existence of SB 8 creates some sort of right to judicial review of that law in federal court. But the Texas Legislature is not a federal agency. And outside the context of administrative law, *see* 5 U.S.C. § 706(2)(B), "federal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves." *Jackson II*, 141 S. Ct. at 2495. The federal courts cannot simply enjoin *someone* or *everyone* where "neither [the State] nor its executive employees possess the authority to enforce the Texas law either directly or indirectly." *Id.*

From this false premise, the federal government next asserts (at 31)—again without citation—that "Texas should bear the obligation to identify an alternative form of injunctive relief if it is dissatisfied with the particular mechanism adopted by the district court." This argument is in the nature of a confession: despairing at identifying an injunction that comports with this Court's precedent, the federal government attempts to shift the burden of prosecuting its case to the State. But that is not how our adversarial process

works. Because the district court's injunction cannot stand under this Court's precedent—either as applied to the state judiciary or to unnamed individuals who were never properly brought within its jurisdiction—it must fall.

a. The district court could not properly enjoin the state judiciary.

The Fifth Circuit's stay was clearly appropriate as applied to the injunction against Texas's judiciary. Indeed, this Court just recognized that, at a minimum, it is not "clear whether, under existing precedent, this Court can issue an injunction against state judges asked to decide a lawsuit under Texas's law." *Jackson II*, 141 S. Ct. at 2495. The court of appeals cannot have been "demonstrably wrong in its application of accepted standards," *Coleman*, 424 U.S. at 1304, in recognizing what this Court just recognized *regarding the same statute*—and so the federal government cannot satisfy this Court's standard to disturb the stay. But even setting *Jackson II* aside, the district court's order was improper.

i. This Court has repeatedly emphasized in multiple contexts that federal district court judges are forbidden from enjoining state judges: "an injunction against a state court would be a violation of the whole scheme of our government." *Ex parte Young*, 209 U.S. at 163; *see also, e.g.*, *Younger v. Harris*, 401 U.S. 37, 45 (1971) ("[I]t has been perfectly natural for our cases to repeat time and time again that the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions."). Even as it recognized a federal court's power to enjoin state

executive officials "from commencing suits" in state courts, this Court cautioned that such authority "does not include the power to restrain a court from acting in any case brought before it." *Ex parte Young*, 209 U.S. at 163. "The difference between the power to enjoin an individual from doing certain things, and the power to enjoin courts from proceeding in their own way to exercise jurisdiction, is plain, and no power to do the latter exists because of a power to do the former." *Id.*

As Justice Story explained, "[a] writ of injunction" cannot be "a prohibition to [other] courts in the exercise of their jurisdiction" because "[i]t is not addressed to those courts" but "only to the parties." 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE at 166 § 575 (1836). This historical limitation on the remedy should have prevented the district court from claiming such power. *See Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999).

The district court also improperly enjoined other members of the state judiciary, including clerks. But just as surely as a federal court cannot enjoin state judges from merely hearing cases, it cannot enjoin "part of the machinery of a [state] court." *Ex parte Young*, 209 U.S. at 163.

ii. The federal government makes three arguments to the contrary. None has merit. *First*, the federal government contends (at 32) that judicial immunity does not bar prospective injunctive relief, citing *Pulliam v. Allen*, 466 U.S. 522, 541-42 (1984). Again, that reads *Pulliam* too far: that case examines whether judicial immunity prevents a federal court from enjoining

an individual judge who had demonstrated a pattern of unconstitutional behavior. *Id.* at 524. *Pulliam* does not, however, establish the principle that federal courts can enjoin an entire court system from considering cases the federal government disfavors. Indeed, the idea that merely hearing a case "violates . . . federal rights" "is without merit" for the simple reason that state judges are obliged to uphold the federal Constitution too, and there is no reason to infer that the judge will abandon that obligation just by haring a case that implicates a problematic statute. *Paisey*, 807 F.2d at 893; *In re Justs.*, 695 F.2d at 21 ("[A]t least ordinarily, no 'case or controversy' exists between a judge who adjudicates claims under a statute and a litigant who attacks the constitutionality of the statute"); *Bauer*, 341 F.3d at 359 (no justiciable controversy when a judge acts in his "adjudicatory capacity").

Second, (at 33) the federal government points to the Anti-Injunction Act for the proposition that federal courts may "grant an injunction to stay proceedings in a state court." But the Anti-Injunction Act makes clear that "[a] court of the United States may not grant an injunction to stay proceedings in a State court *except as expressly authorized by Congress*, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. Far from establishing a norm that federal courts may enjoin proceedings in state courts, the Anti-Injunction Act establishes precisely the opposite. Since the federal government has not pointed to an express authorization to bring this suit, *see infra* pp. 32-39, the Anti-Injunction Act does nothing to help the government's cause, irrespective of whether it applies

to suits brought by the federal government. In any event, an injunction to stay proceedings is properly directed to a litigant, not another court. *See, e.g.*, *Steelman v. All Continent Corp.*, 301 U.S. 278, 290–91 (1937) (rejecting the argument that "the restraint of a proper party is legally tantamount to the restraint of the court itself.").

Third, the federal government contends (at 33) that the district court could properly enjoined state executive officials who would enforce these hypothetical future judgments. This ignores that a sheriff, constable, or county clerk is a representative of a political subdivision that is not itself the State, *Monsanto Co. v. Cornerstones Mun. Util. Dist.*, 865 S.W.2d 937, 939-40 (Tex. 1993)—and thus not properly subject to the injunction under Rule 65(d)(2). Moreover, such an injunction would not redress the alleged harm, as private citizens would nonetheless have non-executive means of enforcing SB 8 judgments. *In re Sheshtawy*, 154 S.W.3d 114, 124-25 (Tex. 2004) (contempt); *Cont'l Oil Co. v. Lesher*, 500 S.W.2d 183, 185 (Tex. App.—Houston [1st Dist.] 1973, no writ) (referring to "judgments which are self executing"). They could also seek enforcement of judgments through other courts' systems, which would be required to give Texas's judgment full faith and credit. *See, e.g.*, 28 U.S.C. § 1332; *cf.* Tex. Civ. Prac. & Rem. Code §§ 35.001-.008.

b. The district court could not enjoin unnamed and unrepresented private individuals based on the fiction that they are agents of or in concert with the State.

The district court also erroneously enjoined unnamed and unknown private parties who were never before the court on the ground that any person who brings suit under SB 8 is "acting as an arm of the state." App.67a; *see also* App.68a (stating that such persons are "properly regarded as state actors"). The court concluded that it had the authority under Federal Rule of Civil Procedure 65(d)(2)(C) to enjoin individuals who bring SB 8 lawsuits because they are acting in "active concert" with the State. App.69a. The district court's conclusions are contrary to precedent and the right of private individuals to be heard in court before being subjected to possible contempt.

i. Private parties "are plainly not agents of the State" even when they have an interest in defending the constitutionality of state law. *Hollingsworth v. Perry*, 570 U.S. 693, 713 (2013). A private plaintiff bringing an SB 8 suit cannot be Texas's agent because Texas lacks "the right to control the conduct of" that private plaintiff. Restatement (Second) of Agency § 14 (1958). And the courts of appeals have routinely held that private parties are not state actors because "there is no 'state action' to be found in the mere filing of a private civil tort action in state court." *Henry v. First Nat'l Bank of Clarksdale*, 444 F.2d 1300, 1312 (5th Cir. 1971); *see also Slotnick v. Garfinkle*, 632 F.2d 163, 166 (1st Cir. 1980) (per curiam); *Stevens v. Frick*, 372 F.2d 378, 381 (2d Cir. 1967); *Dist. 28, United Mine Workers of Am., Inc. v. Wellmore Coal Corp.*, 609 F.2d 1083, 1086 (4th Cir. 1979); *Hu v. Huey*, 325 F. App'x 436, 440 (7th Cir. 2009); *Gras v.*

Stevens, 415 F. Supp. 1148, 1152 (S.D.N.Y. 1976) (three-judge district court) (Friendly, J.).

ii. Moreover, whether a particular individual is "'in active concert or participation' with [the enjoined party] is a decision that may be made only after the person in question is given notice and an opportunity to be heard." *Lake Shore Asset Mgmt. Ltd. v. Commodity Futures Trading Comm'n*, 511 F.3d 762, 767 (7th Cir. 2007) (Easterbrook, J.) (cleaned up) (quoting Fed. R. Civ. P. 65(d)(2)). No such opportunity was offered to the millions of individuals who are nominally subject to contempt under the district court's order.

If such an opportunity had been offered, the court would have been required to find that private parties are not "in concert" with the State. Texas has no legal relationship with absent third parties, and Texas does not represent the interests of those who would bring private causes of action, as the Texas Attorney General is generally not authorized to represent private individuals. *See* Tex. Civ. Prac. & Rem. Code §§ 104.001, 104.004; Tex. Gov't Code § 402.045.

Thus, an injunction purporting to bind non-parties would be ineffective. *See Detroit Edison Co. v. NLRB*, 440 U.S. 301, 315 (1979) (noting "substantial doubt whether the Union would be subject to a contempt citation were it to ignore the restrictions"). A court "cannot lawfully enjoin the world at large, no matter how broadly it words its decree. If it assumes to do so, the decree is pro tanto brutum fulmen [to that extent ineffectual], and the persons enjoined are

free to ignore it." *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832 (2d Cir. 1930) (Hand, J.).

iii. In arguing to the contrary, the federal government (at 33-34) simply recounts what the district court did. But the district court's injunction does not even plausibly reflect the law, and the federal government's failure to even defend the district court's reasoning is telling: it is effectively asks this Court to enjoin "'all persons to whom notice of the order of injunction should come," but such an overbroad injunction would be "clearly erroneous." *Chase Nat'l Bank v. City of Norwalk*, 291 U.S. 431, 436 (1934). Third parties have a right to be heard on whether they are "agents" or "in active concert," with the State. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 112 (1969). The Court cannot "make punishable as a contempt the conduct of persons who act independently and whose rights have not been adjudged according to law." *Chase Nat'l Bank*, 291 U.S. at 437 (citing *Alemite Mfg. Corp.*, 42 F.2d at 832).

* * *

In sum, far from being demonstrably wrong, the Fifth Circuit's conclusion that Texas is likely to prevail was entirely right. The federal government failed to show that this controversy is justiciable for at least two reasons. Moreover, even if it were, the type of sweeping injunction at issue here falls well outside the equitable jurisdiction of the federal courts.

B. The federal government is not likely to show that it will succeed on the merits.

Even if the federal government could overcome these threshold faults with its sweeping complaint, Texas is still likely to succeed on the merits because the federal government lacks a cause of action to challenge the constitutionality of SB 8 on behalf of a subset of Texas women. And, even if it did, that cause of action would fail because SB 8 is does not violate any of the constitutional provisions the federal government has identified.

1. The federal government lacks a cause of action.

Even if the federal government had standing, it would nonetheless lack a cause of action. Multiple courts of appeals have held that there is no equitable cause of action that permits the federal government to sue for violations of citizens' Fourteenth Amendment rights. *See, e.g.*, *United States v. City of Philadelphia*, 644 F.2d 187 (3d Cir. 1980); *United States v. Mattson*, 600 F.2d 1295 (9th Cir. 1979); *United States v. Solomon*, 563 F.2d 1121 (4th Cir. 1977). The federal government does not dispute this conclusion or even argue that those cases are wrong. Appl. 27.

Instead, terming SB 8 a "nullification" of federal law, the federal government asks the Court to create a new equitable cause of action that will enable it to seek injunctive relief against the State of Texas. This new cause of action appears to have two general elements: (1) an allegedly unconstitutional state law, and (2) an allegedly inadequate remedy that includes an inability to obtain pre-enforcement review in federal courts and some level of frustration

in obtaining post-enforcement review. Appl. 22. No such equitable cause of action exists, and this Court should not create one out of whole cloth.

Indeed, if the federal government intends to maintain a cause of action on such terms, then it necessarily must take the position that the plaintiffs in *Whole Woman's Health v. Jackson*, No. 21-463, whose petition is pending before this Court, cannot win. After all, if those plaintiffs are able to obtain pre-enforcement review in federal court, then the federal government's newfound equitable claim, which depends on the inability to obtain pre-enforcement relief, fails on its own terms.

a. The federal government failed to establish an equitable cause of action.

i. As this Court has explained, federal courts' equity jurisdiction is limited to that exercised by the English Court of Chancery in 1789. *Grupo Mexicano*, 527 U.S. at 318. Beyond that, the Court's "traditionally cautious approach to equitable powers … leaves any substantial expansion of past practice to Congress." *Id.* at 329. The federal government does not identify any case that has recognized the equitable cause of action it seeks to bring here, much less one from 1789.

The federal government generally asserts that *Debs* gives it an equitable cause of action to assert Fourteenth Amendment rights. Appl. 20. It did not, as it was focused on interests created by the Commerce Clause and the fact that the government "has always" had a cause of action to abate "a public nuisance" that interferes with commerce. *Debs*, 158 U.S. at 579, 587. Instead,

"almost every court that has had the opportunity to pass on the question" has shared "[t]he same understanding, that the United States may not sue to enjoin violations of individuals' fourteenth amendment rights without specific statutory authority." *Philadelphia*, 644 F.2d at 201.

The federal government seeks to avoid this conclusion by creatively wording its claim as seeking to vindicate "the supremacy of federal law," rather than individual rights under the Fourteenth Amendment. But it cannot escape the reality that it is attempting to secure the ability to obtain post-heartbeat abortions for women in Texas. Indeed, if the federal government's theory were correct, it could bring suit concerning any individual rights under the Constitution simply by claiming it was vindicating "federal supremacy." It cites no authority for this extraordinary expansion of power.

The federal government's proposed equitable cause of action also requires proof that individuals have no adequate remedy at law, including an inability to obtain pre-enforcement review in federal court and some level of "frustrat[ion]" in obtaining post-enforcement review. Appl. 22. But there are many circumstances in which there is no judicially enforceable remedy. *See, e.g.*, *Alden v. Maine*, 527 U.S. 706, 712 (1999) (sovereign immunity); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994) (Congress may preclude initial judicial review). An equitable cause of action does not spring into existence every time an individual is unable to obtain federal judicial relief.

But there is a judicially enforceable remedy here in any event: litigation of SB 8 suits in state court, where this Court must presume that state judges will

apply the law in good faith. The federal government claims (at 22) the structure of SB 8 "frustrat[es]" that post-enforcement review. But, again, it cites no long-standing equitable cause of action that exists whenever there is some undefined level of frustration to private litigants who would prefer to be federal-court plaintiffs over state-court defendants.

ii. Speaking more broadly, the federal government generally asserts (at 26) that its authority to protect its sovereign interests is "well-grounded in equity." As explained above, the federal government is not seeking to protect its sovereign interests but is simply repackaging its attempt to protect the Fourteenth Amendment interests of a subset of women in Texas.

Regardless, the federal government's precedent fails to support its claim, as it is limited to suits against state officers engaged in unconstitutional conduct, not the State itself. Citing *Ex parte Young*, this Court in *Armstrong* explained, "federal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law." 575 U.S. at 326-27 (citing, *inter alia*, *Ex parte Young*, 209 U.S. at 150-51); *see also D.C. Ass'n of Chartered Pub. Sch. v. District of Columbia*, 930 F.3d 487, 493 (D.C. Cir. 2019) (citing *Armstrong*). The "ability to sue to enjoin unconstitutional actions by state and federal officers" is an equitable remedy that can be traced back to England. *Armstrong*, 575 U.S. at 327.

But the existence of an equitable cause of action to seek an injunction against state *officers* is not the same as an injunction to enjoin the *State* itself. Thus, even if one accepts the federal government's strained reading of *Grupo*

Mexicano as being limited only to remedies, Appl. 27, its claim would still fail, as it has not identified an equitable cause of action that permits it to seek injunctive relief against an entire State for alleged Fourteenth Amendment violations.[2] This serves only to reiterate the points made by this Court and the Fifth Circuit in *Jackson I* and *Jackson II*. Texas officials and judges do not enforce SB 8 and, therefore, cannot be enjoined from enforcing it. The federal government identifies no existing equitable cause of action that would permit it to circumvent these facts merely by suing the State instead.

iii. The federal government contends (at 19) that *Arizona v. United States*, 567 U.S. 387, 399 (2012), and *United States v. California*, 921 F.3d 865 (9th Cir. 2019), establish that an equitable cause of action exists insofar as state statutes interfere with the federal government's activities. This Court has rejected such a broad rule. *See United States v. California*, 507 U.S. 746, 754 (1993). But regardless that does not help the federal government here. Texas law has long applied a presumption that state statutes do not regulate the federal government, its employees, or its contractors performing federal functions. *See R.R. Comm'n v*, 290 S.W.2d at 702; *Louwein*, 12 S.W.2d at 990. So the federal government cannot rely on these cases to establish a cause of action.

[2] None of the cases cited by the federal government as examples of suits to protect its sovereign interests involves Fourteenth Amendment rights. Appl. 26-27 n.5.

b. Any potential equitable cause of action has been displaced by Congress.

Even if the Court were inclined to find an equitable cause of action here, Congress displaced it by enacting a detailed remedial scheme for enforcement of Fourteenth Amendment rights that does not include this kind of suit by the federal government against States. The Constitution gives Congress, not the other branches, "power to enforce, by appropriate legislation," the Fourteenth Amendment. *See* U.S. Const. amend. XIV, § 5. Congress has long exercised that power to create "numerous mechanisms for the redress of denials of due process." *Philadelphia*, 644 F.2d at 192. But Congress has not provided a broad *civil* cause of action *for* the federal government or *against* a State.

Indeed, there have been "three express refusals of modern Congresses to grant the Executive general injunctive powers in this field, which not only demonstrates explicit congressional intent not to create the power claimed here by the Attorney General but also reveals an understanding, unanimously shared by members of Congress and Attorneys General, that no such power existed." *Id.* at 195. This Court should not override "congressional policy denying the federal government broad authority to initiate an action whenever a civil rights violation is alleged." *United States v. Mattson*, 600 F.2d 1295, 1299-300 (9th Cir. 1979); *accord Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014) ("[A] court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied.").

Nevertheless, the federal government insists (at 22-23) that because Congress enacted § 1983 to enable individuals to sue state and local government officials, it must also have implicitly intended to enable the Attorney General to sue the States. This notion is not only absent from the text of § 1983 but also contrary to other laws enacted by Congress authorizing the Attorney General to engage in civil litigation regarding constitutional rights in limited circumstances.

For example, the Attorney General is empowered to institute actions for injunctive relief for violations of the Twenty-Sixth Amendment, 52 U.S.C. § 10701(a)(1), enforce the Voting Rights Act, *see* 52 U.S.C. §§ 10101(c), 10308(d), 10504, 20510, and "intervene in" federal equal-protection suits, 42 U.S.C. § 2000h-2. Congress has even given the Attorney General express causes of action to enforce various statutory rights, including statutory rights related to abortion. 18 U.S.C. § 248(c)(2)(A); *see also* 42 U.S.C. §§ 2000a-5(a), 2000e-5(f)(1). But Congress has not given the Attorney General a cause of action to enforce abortion rights, let alone against a State. Under the federal government's theory, each and every statute discussed other than § 1983 would simply be surplus—because the Attorney General would have the power to bring suit under § 1983 in any event. That is not how this Court reads statutes. *See Armstrong*, 575 U.S. at 327; *see also Hernandez v. Mesa*, 140 S. Ct. 735, 747 (2020).

The federal government theorizes that it must be able to sue when private citizens cannot, Appl. 22, but Congress anticipated this issue. In other cases,

Congress has authorized the Attorney General "to institute . . . a civil action" when private individuals "are unable, in [the Attorney General's] judgment, to initiate and maintain appropriate legal proceedings." 42 U.S.C. §§ 2000b(a), 2000c-6(a). Congress did not provide similar authority here.

2. SB 8 does not violate the Supremacy Clause, intergovernmental immunity, or the Fourteenth Amendment.

Even if the Court were to conclude that the federal government had established jurisdiction and that it should create a tailor-made cause of action, the Fifth Circuit was still correct to conclude that the federal government is unlikely to prevail on the merits of its claims under principles of preemption, the intergovernmental-immunity doctrine, or the Fourteenth Amendment. In seeking emergency relief, the federal government gives short shrift to its claim that SB 8 is preempted and violates intergovernmental immunity with respect to various federal programs—perhaps because it does not. Nothing about those programs requires Texas to permit post-heartbeat abortions. And its claim that SB 8 violates the Fourteenth Amendment fails to grapple with SB 8's structure, which does not impose liability when the defendant in state court proceedings establishes an undue burden.

a. The federal government has not proven its preemption claim.

As an initial matter, the federal government has not proven that SB8 conflicts with—and therefore is preempted by—any of the federal programs it has identified. Conflict preemption is proven when "compliance with both

federal and state regulations is a physical impossibility," and when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona*, 567 U.S. at 399. But "possibility of impossibility is not enough." *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1678 (2019) (cleaned up). The Court has "refused to find clear evidence of such impossibility where the laws of one sovereign permit an activity that the laws of the other sovereign restrict or even prohibit." *Id.* (citations omitted).

The federal government cites (at 16) only one regulation that it claims is hindered by SB 8. The reason for this minimalist approach is that there is no federal statute or regulation requiring Texas to permit abortions after a heartbeat is detected. Indeed, many federal statutes, such as the Hyde Amendment, expressly forbid public funds from being spent on elective abortion. *See* Consolidated Appropriations Act, 2021, Pub. L. No. 116- 260, div. H, §§ 506–07, 134 Stat. 1182 (Dec. 27, 2020).

At most, some federal laws state that, at a woman's request, federal agencies such as the BOP "shall arrange for an abortion to take place" under certain circumstances. 28 C.F.R. § 551.23(c) (standards for BOP). That is not a requirement that States allow abortions, let alone at all gestational ages. For example, the BOP can arrange for an abortion inside or outside Texas in full compliance with SB 8 and federal regulations. The same holds true for the Job Corps Handbook's requirement that requires Job Corps centers to provide transportation to abortion appointments. C.A. App.264.

Moreover, many of the guidance documents upon which the United States relies state that staff "should abide by applicable federal and state. . . laws and regulations." C.A. App.377. For example, U.S. Marshal policy is that a prisoner may elect to have an abortion "consistent with state law." C.A. App.246. And ORR policy requires care providers to "comply with state law governing access to abortion and abortion services." C.A. App.257. Rather than demand that Texas permit federal actors to violate Texas law, it appears the federal government has gone out of its way to ensure compliance with state laws.

Nor is there evidence that SB 8 is an obstacle to the accomplishment of congressional purposes and objectives. Again, there is no act of Congress making it federal policy to ensure all women can obtain post-heartbeat abortions. Instead, such legislation remains stalled. Women's Health Protection Act, H.R. 3755, 117th Cong. (2021).

b. The federal government has not proven that SB 8 violates the intergovernmental immunity doctrine.

The federal government's intergovernmental immunity claim fails for similar reasons. Intergovernmental immunity prohibits State laws that "regulate[] the United States directly or discriminate[] against the Federal Government or those with whom it deals." *North Dakota v. United States*, 495 U.S. 423, 435 (1990) (plurality op.) (citations omitted). "[G]enerally applicable" laws do not run afoul of intergovernmental immunity, even if they result in "an

increased economic burden on federal contractors as well as others." *Boeing Co. v. Movassaghi*, 768 F.3d 832, 839 (9th Cir. 2014).

The federal government has not shown that it would be subject to SB 8, given that Texas courts typically exempt the United States from the application of Texas laws. *R.R. Comm'n*, 290 S.W.2d at 702. Moreover, Texas courts "interpret statutes in a manner to avoid constitutional infirmities" whenever "possible." *Osterberg v. Peca*, 12 S.W.3d 31, 51 (Tex. 2000). Unless and until it is determined whether the United States, its agencies, employees, and contractors are subject to SB 8, there is no potential interference.

Beyond that, the federal government is in no different position than anyone else seeking to facilitate post-heartbeat abortions. And any potential increased costs due to compliance with SB 8 are not enough to render the law a violation of intergovernmental immunity. *See Boeing Co.*, 768 F.3d at 839.

c. The heartbeat provisions do not violate the Fourteenth Amendment.

Finally, SB8 does not facially violate the Fourteenth Amendment—either as it was originally ratified or under current doctrine. As the United States has not challenged any particular application of SB 8, it has not shown a likelihood of success on this claim either.

i. SB8 does not violate the Fourteenth Amendment as it was originally understood. As has been expressed by multiple Justices, the idea that the Constitution requires States to permit a woman to abort her unborn child is unsupported by any constitutional text, history, or tradition. *See, e.g.*, *June*

Med. Servs. LLC v. Russo, 140 S. Ct. 2103, 2149-53 (2020) (Thomas, J., dissenting); *Casey*, 505 U.S. at 979-1002 (Scalia, J., concurring in the judgment in part and dissenting in part); *Doe v. Bolton*, 410 U.S. 179, 221-23 (1973) (White, J., dissenting); *Roe*, 410 U.S. at 172-78 (Rehnquist, J., dissenting). The Court erred in recognizing the right to abortion in *Roe* and in continuing to preserve it in *Casey*. Properly understood, the Constitution does not protect a right to elective abortion, and any laws affecting abortion should be subject only to a rational-basis test. The heartbeat provisions in SB 8 reasonably further Texas's interest in protecting unborn life, which exists from the outset of pregnancy. *See Casey*, 505 U.S. at 846. If it reaches the merits, the Court should overturn *Roe* and *Casey* and hold that SB 8 does not therefore violate the Fourteenth Amendment.

ii. Even under existing precedent, SB 8 is constitutional. SB 8 creates a private cause of action against those who perform or aid and abet the performance of post-heartbeat abortions, Tex. Health & Safety Code § 171.208(a), but also incorporates an undue-burden affirmative defense, *id.* § 171.209(b). In other words, SB 8 creates the potential for liability only for those post-heartbeat abortions that are not protected under current this Court's precedent.[3]

[3] The Court should reject any characterization by the federal government of what the Texas Legislature intended when enacting SB 8. The only evidence of legislative intent cited by the federal government is a handful of news articles, some of which contain quotes from a single state senator. C.A. App.104-23. That does not establish legislative intent. *Consumer Prod. Safety*

Under current precedent, abortion regulations cannot impose an undue burden on a woman's ability to obtain a previability abortion. *See Casey*, 505 U.S. at 877 (plurality op.). "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* The federal government asserts that the undue-burden test does not apply because SB 8 "bans" post-heartbeat abortions. Appl. 14; *see also Jackson Women's Health Org v. Dobbs*, 945 F.3d 265, 272-73 (5th Cir. 2019), *cert. granted*, 141 S. Ct. 2619 (2021). But merely creating the potential for liability for some abortions is not a ban on all post-heartbeat abortions. *Cf. In re Abbott*, 954 F.3d 772, 788-89 (5th Cir. 2020) (holding that postponement of some abortions was not a "ban" on previability abortion), *vacated as moot*, *Planned Parenthood Ctr. for Choice v. Abbott*, 141 S. Ct. 1261 (2021).

The federal government must instead demonstrate that SB 8 imposes a substantial obstacle on abortion access. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016) (citing *Casey*, 505 U.S. at 877-78 (plurality op.)). It has not done so. At present, the only reason women in Texas are unable to receive post-heartbeat abortions is that abortion providers choose not to

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Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 118 (1980) ("[O]rdinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history."); *see also Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021) (rejecting a "cat's paw" theory of legislative intent because "the legislators who vote to adopt a bill are not the agents of the bill's sponsor or proponents").

provide them because they do not wish to litigate their liability in a state court under a statute they deem unconstitutional. *See, e.g.*, C.A. App.92, 134, 161. But those courts would be obligated to follow this Court's precedent every bit as much as the court in which providers sought a pre-enforcement injunction. *See Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993) (per curiam) (stating that Texas courts are obligated to follow the Supreme Court).

Moreover, the federal government's complaint (at 15) that the undue-burden defense in SB 8 does not match this Court's undue-burden standard is premature. Ordinarily, this Court does not presume an unclear state law is unconstitutional; it allows the state court to decide what it means. *Cf. R.R. Comm'n of Tex. v. Pullman*, 312 U.S. 396 (1941). If abortion providers believe SB 8 unconstitutionally cabins this Court's undue-burden precedent, they may make that argument in state court and seek to rely on this Court's precedent that they assert is more expansive.

At bottom, the federal government's complaint is that SB 8 is difficult to effectively enjoin. But there is no requirement that a state write its laws such that they can be easily enjoined, under § 1983 or otherwise. Under SB 8, state courts are open to hear constitutional challenges and, if federal subject-matter jurisdiction can be found, so are federal courts. Neither the federal government nor abortion providers are entitled to demand Texas write its laws to permit them to be challenged in a pre-enforcement action in federal court.

C. The Fifth Circuit acted well within its discretion to conclude that the remaining *Nken* factors favor Texas.

In addition to challenging the Fifth Circuit's ruling that Texas was likely to succeed on appeal, the federal government asserts (at 3) that a stay was unnecessary because Texas will suffer no injury from a preliminary injunction. Not so. As an initial matter, this Court has recognized for over a century that "[a]n injunction against a state court would be a violation of the whole scheme of our government." *Ex parte Young*, 209 U.S. at 163. And an injunction against Texas's citizenry for accessing that state court is no less injurious, as it subjects them to potential contempt proceedings for merely bringing their grievances to their government. Moreover, the federal government's argument is at odds with itself. If it violates the federal government's sovereign interests to prevent women from obtaining pre-enforcement federal review, then it violates Texas's sovereign interests to prevent its citizens from obtaining review of their claims under SB 8.

Further, because Texas sought a stay pending appeal, "its interest and harm merge with that of the public." *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam) (citing *Nken*, 556 U.S. at 435). The Fifth Circuit was, therefore, not demonstrably wrong to enjoin the district court's clearly erroneous injunction pending appeal.

In sum, the federal government has not established the first element of this Court's test in determining whether to lift a stay: that the Fifth Circuit

was "demonstrably wrong in its application of accepted standards in deciding to issue the stay." *Coleman*, 424 U.S. at 1304 (Rehnquist, J., in chambers).

II. The Federal Government Has Not Shown Irreparable Harm.

The federal government also has not demonstrated the second: that it will suffer irreparable harm if the stay is not lifted. *See id.* As an initial matter, it is difficult to square the federal government's current claim of an emergency with its decision to wait four months before seeking an injunction of Texas's law. The Governor signed SB 8 on May 19.[4] Yet the federal government did not file its motion for a preliminary injunction until mid-September. C.A. App.30.

Regardless, as described above, the federal government's proposed injuries are entirely hypothetical—maybe a prisoner or Job Corps student will request an abortion or maybe an insurance carrier will seek to renegotiate its contract. *See supra* pp. 18-20. These injuries are not certainly impending, much less likely to cause irreparable damage to the federal government.

The federal government also complains of the alleged irreparable injury of women being unable to obtain post-heartbeat abortions in Texas. Appl. 36. But that is not an injury to the federal government. Instead, that argument serves only to demonstrate, once again, that the federal government is not suing to vindicate its sovereign interests, but those of a subset of women in Texas.

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[4] https://capitol.texas.gov/BillLookup/History.aspx?LegSess=87R&Bill=SB8

Moreover, there is no irreparable harm to the federal government's purported sovereign interest in the supremacy of federal law. Appl. 35-36. SB 8 is not the only allegedly unconstitutional state law in existence. Yet, the federal government has not brought suit to challenge each and every one of those as an irreparable injury to its sovereign interests. There is therefore no irreparable injury permitting the Court to vacate the Fifth Circuit's stay.

III. The Court Should Not Grant a Pre-Judgment Petition for a Writ of Certiorari; Alternatively, It May Construe This Response as a Conditional Cross-Petition Whether to Overturn *Roe* and *Casey*.

A. Perhaps recognizing that lifting the stay is not an appropriate way to bring these issues before the Court in an expedited manner, the federal government suggests that the Court "may" construe the government's application as a petition for a writ of certiorari before judgment.[5] Appl. 37-38. But there is no call for this extraordinary measure. The Fifth Circuit has expedited the briefing and argument in this case. App.1a. This case, along with the *Jackson* appeal, will be heard by that court in December, and there is no reason to believe the Fifth Circuit will take long to reach its decision, given how expeditiously the Fifth Circuit has treated these cases.

The only reason offered by the federal government for moving so quickly is to fit this case into this Term. Appl. 38. Assuming the Fifth Circuit moves

[5] The federal government stops short of asking the Court to treat its application as a petition for certiorari, presumably because doing so would violate Supreme Court Rule 12.4 which prohibits joining a petition for certiorari with any other pleading.

quickly, the Court would be free to expedite any further petitions for certiorari that the federal government wishes to file. But the Court would then have the benefit of the Fifth Circuit's opinion to aid in its decision. *See United States v. Mendoza*, 464 U.S. 154, 160 (1984) (noting the Court "benefit[s]" when courts of appeals "explore a difficult question" before certiorari).

B. The federal government criticized Texas for not "forthrightly … asking this Court to revisit its decisions." Appl. 2. Texas has done so now. *See supra* pp. 42-43.

Despite the Court's hope that its decision in *Casey* would "call[] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution," 505 U.S. at 866-67, abortion remains a divisive issue. There will always be those who deem abortion "nothing short of an act of violence against innocent human life." *Id.* at 852. Consequently, there will always be States who seek to protect unborn life through their laws, and there will be those who seek to challenge such laws, unless and until this Court returns the question of abortion to where it belongs—the States.

If the Court decides to construe the federal government's application as a cert petition, it may also construe this response as a conditional cross-petition on the question whether the Constitution recognizes and protects a right to abortion and whether the Court should reconsider its decisions in *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*. *See supra* pp. 42-43.

CONCLUSION

The Court should deny the emergency application to vacate the Fifth Circuit's stay pending appeal. The Court may also construe this response as a conditional cross-petition for certiorari on the question whether to revisit *Roe* and *Casey*.

Respectfully submitted.

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