No. 21-50949

In the United States Court of Appeals for the Fifth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

THE STATE OF TEXAS,

Defendant-Appellant,

ERICK GRAHAM, JEFF TULEY, AND MISTIE SHARP,

Intervenor Defendants-Appellants

On Appeal from the United States District Court
for the Western District of Texas, Austin Division
Case No. 1:21-cv-00796-RP

REPLY BRIEF IN SUPPORT OF INTERVENORS' EMERGENCY MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL

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The judicial power of the United States is limited to deciding "cases" or "controversies." The judiciary is not a "roving commission assigned to pass judgment on the validity of the Nation's laws." *Broadrick v. Oklahoma*, 413 U.S. 601, 610–11 (1973); *see also TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) ("Federal courts do not possess a roving commission to publicly opine on every legal question. Federal courts do not exercise general legal oversight of the [political] branches, or of private entities."). And the judiciary may enforce its interpretations of the Constitution only when deciding "cases" or "controversies" between litigants; it is powerless to impose its will apart from resolving "cases" or "controversies" under Article III.

The case-or-controversy requirement limits the judiciary's power in many ways. It prohibits courts from giving advisory opinions, and it requires litigants to establish a "concrete" and "particularized" injury before asking the courts for a constitutional pronouncement. *See Spokeo, Inc. v. Robins*, 578 U.S. 856, 136 S. Ct. 1540, 1548 (2016). It also prevents courts from ruling in the absence of a cause of action that allows the plaintiff to sue the defendant. And most importantly, it gives the political branches tools by which they can counteract judicial pronouncements that they regard as lawless or inconsistent with the Constitution. The political branches can *never* disregard or undermine a judgment that the judiciary enters in a case or controversy between parties; even President Lincoln acknowledged that Dred Scott must be returned to his master despite his vehement disagreement with *Dred Scott v.*

Sandford, 60 U.S. 393 (1856).[1] At the same time, Lincoln rejected the notion that *Dred Scott* could establish "a rule of political action for the people and all the departments of the government," and insisted that the political branches could adopt and enforce differing interpretations of the Constitution in the performance of their constitutional duties.[2]

Because the judicial power is limited to resolving "cases" and "controversies," Congress and the states may enact legislation that departs from the federal judiciary's preferred interpretations of the Constitution and limits the judiciary's opportunities to pronounce that legislation unconstitutional. Congress, for example, may enact statutes that contradict the judiciary's constitutional pronouncements while stripping the federal district courts of jurisdiction to consider pre-enforcement challenges to those laws. *See Shel-*

1. *See* Abraham Lincoln, Speech at Springfield, Illinois (July 17, 1858), in II The Collected Works of Abraham Lincoln 516 (Roy P. Basler ed., 1953) (acknowledging "respect" for the *Dred Scott* decision "in so far as it decided in favor of Dred Scott's master and against Dred Scott and his family").
2. As President, Lincoln signed legislation outlawing slavery in the territories and the District of Columbia, in defiance of *Dred Scott*'s holding that Congress lacked the constitutional authority to do so. *See* Act of June 19, 1862, ch. 111, 12 Stat. 432; *see also* David P. Currie, The Civil War Congress, 73 U. Chi. L. Rev. 1131, 1147 (2006) ("In the teeth of the *Dred Scott* decision, Congress abolished slavery both in the territories and in the District of Columbia."). Lincoln's administration also issued patents to blacks, which contradicted *Dred Scott*'s holding that blacks could not be "citizens" of the United States. *See* Paul L. Colby, *Two Views on the Legitimacy of Nonacquiescence in Judicial Opinions*, 61 Tul. L. Rev. 1041, 1053 (1987); *see also* Michael Stokes Paulsen, *Lincoln and Judicial Authority*, 83 Notre Dame L. Rev. 1227 (2008).

don v. Sill, 49 U.S. (8 How.) 441, 449 (1850) (Congress holds plenary power to control jurisdiction of the inferior federal courts); John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. Chi. L. Rev. 203 (1997). Congress may also limit the Supreme Court's appellate jurisdiction under the Exceptions Clause, although the precise scope of this power remains in dispute. *See* U.S. Const., Art III, § 2, cl. 2; *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 513–14 (1868). But it undisputed that Congress has the constitutional prerogative to immunize its statutes from pre-enforcement review by depriving the lower federal courts of jurisdiction to entertain constitutional challenges—and Congress may do this even when its statutes depart from the Supreme Court's constitutional pronouncements.

The states also have tools in their arsenal to limit the judiciary's opportunities to pronounce their statutes unconstitutional—although their options are more limited. The states, unlike Congress, cannot enact statutes that strip the federal courts of jurisdiction to consider constitutional challenges to their laws. But they can structure their laws in a manner that reduces or eliminates opportunities for pre-enforcement challenges. And that is what Texas has done in enacting Senate Bill 8. By prohibiting state officials from enforcing the statute, and by authorizing the citizenry to enforce the law through private civil-enforcement actions, Texas has boxed out the judiciary from entertaining pre-enforcement challenges under 42 U.S.C. § 1983 and *Ex parte Young*, 209 U.S. 123, 147 (1908), and has left abortion providers to assert

their constitutional claims defensively in SB 8's private civil-enforcement proceedings.

The United States claims that there *must* be a cause of action that allows it to sue Texas over SB 8 because Texas's maneuver threatens constitutional supremacy. US Br. at 1–2; 9–10. That is nonsense. The Supreme Court's *interpretations* of the Constitution are not the Constitution itself—they are, after all, called *opinions*. *See Graves v. New York*, 306 U.S. 466, 491–92 (1939) (Frankfurter, J., concurring) ("[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it.").[3] The federal and state political branches have every prerogative to adopt interpretations of the Constitution that differ from the Supreme Court's,[4] and they have every prerogative to enact laws that deprive the judiciary of opportunities to consider pre-enforcement challenges to their statutes. Abortion is not a constitutional right; it is a court-invented right that may not even have majority support on the current Supreme Court. *See Dobbs v. Jackson Women's Health Organization*, 141 S. Ct. 2619 (2021) (granting certiorari to reconsider *Roe v. Wade*, 410 U.S. 113 (1973)). A state does not violate the Constitution by un-

3. The United States invokes the Supremacy Clause, but the Supremacy Clause designates only three sources of law as the "supreme Law of the Land": "This Constitution," "the Laws of the United States which shall be made in Pursuance thereof," and "all Treaties made, or which shall be made, under the Authority of the United States." U.S. Const. art. VI, cl. 2. Supreme Court opinions are *not* on that list. *See* Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 Mich. L. Rev. 1, 33 (2011).
4. *See* notes 1–2 and accompanying text.

dermining a "right" that is nowhere to be found in the document, and that exists only as a concoction of judges who want to impose their ideology on the nation. *See* John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 947 (1973) ("Roe v. Wade . . . is *not* constitutional law and gives almost no sense of an obligation to try to be.").

The United States raises slippery-slope concerns, warning that Texas's maneuver could be used to undermine rights that actually appear in the Constitution, such as the right to keep and bear arms. *See* U.S. Br. at 6–7. These concerns are specious. *See generally* Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 Harv. L. Rev. 1026 (2003). To begin, state officials are bound by oath to support and defend the Constitution, and enacting a law that undercuts a textual constitutional right is much harder to reconcile with the solemn promise that every elected official makes upon taking office. Even when political or constituent pressures are brought to bear, the oath provides conscientious public officials with fortitude to resist legislative enactments that contradict their beliefs of what the Constitution means.[5] Second, the public and elected officials give enormous deference to the Supreme Court, even when they disagree with the Court's pronouncements. Even controversial and ill-reasoned decisions (such as *Bush v. Gore*, 531 U.S. 98 (2000)) are accepted without riots or civil unrest, and deeply unpopular decisions (such

5. See Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 Geo. Wash. L. Rev. 1119, 1122 (1998) ("Sneering at the promise in the oath is common in the academy, but it . . . matters greatly to conscientious public officials.").

as *Texas v. Johnson*, 491 U.S. 397 (1989)) have fended off proposed constitutional amendments and other retaliatory proposals. The states have *always* had the power to do what Texas did in enacting SB 8, yet no state has attempted to run this play before, in large part because of the respect and latitude that the Supreme Court receives from the political branches. Texas enacted SB 8 in response to a Supreme Court ruling that: (1) has no textual support in the Constitution; (2) is the most controversial decision that the Supreme Court has issued in the past 50 years; and (3) that the Supreme Court is currently considering whether to overrule. It hardly follows that states will employ this tactic against better-reasoned Supreme Court rulings, or against doctrines that enjoy strong support among the current justices.

Finally, Congress can preempt laws that emulate SB 8 if a state uses this tactic to undermine an actual constitutional right. Members of Congress are bound by oath to defend the Constitution, and if a state is violating its citizens' constitutional rights then legislators are constitutionally obligated to enact preempting legislation. *See* U.S. Const. amend. XIV, § 5. Congress has not done so with respect to SB 8, because there is insufficient support in Congress for the idea that abortion is a constitutional right. But Congress would surely enact preempting legislation if a state created a private civil-enforcement action to censor the news media or trample other established constitutional rights. The states are subject to checks and balances when enacting laws such as SB 8, just as they subject the federal judiciary to checks and balances by enacting these types of laws. But the executive cannot seize

for itself a cause of action to sue Texas over SB 8; it must ask Congress to enact a cause of action before doing so.

I. The United States Failed To Make A "Clear Showing" Of A Cause Of Action

There are numerous insurmountable obstacles to the United States' efforts to concoct a cause of action in this case. We will focus on two of them: *Grupo Mexicano* and congressional preclusion.

The United States does not dispute that *Grupo Mexicano* prohibits courts from expanding equity jurisdiction beyond that which existed when the Constitution was ratified. *See* U.S. Br. at 12; *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318–19 (1999). Yet the United States makes the astounding claim that the cause of action it asserts against Texas is not "anomalous," because (according to the United States) "[i]t is no anomaly for the United States to seek equitable relief against a State." U.S. Br. at 12. But the question is not whether the United States can sue a state in equity; it is whether the United States can sue a state in equity *for enacting a statute that allegedly violates the constitutional rights of its citizens*. The United States cannot evade the holding of *Grupo Mexicano* by defining its cause of action at such a high level of abstraction, and then arguing that because the United States may *sometimes* sue a state in equity, that any equitable suit it brings against a state is therefore historically grounded.

The cause of action that the United States is asserting is not only anomalous but unprecedented. No case has ever allowed the United States to con-

vert a state's violation of its citizens' constitutional rights into a "sovereign injury." More importantly, no case has ever allowed the United States to seek an injunction that would restrain state-court judges and court clerks from adjudicating cases brought under state law. *Ex parte Young* holds that "equitable" lawsuits of this sort are categorically improper when brought against the judges and court clerks,[6] and no case has ever allowed the United States to end-run those limits by suing the State as a nominal defendant while asking for relief to run against the state's judicial officers.

On congressional preclusion, the United States acknowledges the statutes that authorize the Attorney General to sue states over Fourteenth Amendment violations in defined and limited circumstances. *See* U.S. Br. at 14. Yet it claims that these "express cause[s] of action" were "unnecessary in light of *Debs*." *Id.* That is an argument *against* the United States' expansive interpretation of *Debs*, because courts should presume that Congress does not enact meaningless or superfluous legislation. *See Corley v. United States*, 556 U.S. 303, 314 (2009) ("[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant" (citations and internal quotation marks omitted)). The United States is also wrong to claim that our congressional-preclusion argument would foreclose equitable rights of action under *Ex parte Young*, because *Ex parte Young* is concerned with suits by *individuals*, while 42 U.S.C.

6. *See Ex parte Young*, 209 U.S. 123, 163 (1908).

§§ 2000b and 2000c-6 define the circumstances in which the *United States* may sue over Fourteenth Amendment violations. And the United States is wrong to say that our congressional-preclusion argument contradicts *United States v. City of Jackson*, 318 F.2d 1, 14 (5th Cir. 1963), because 42 U.S.C. §§ 2000b and 2000c-6 were enacted in 1964, *after* this Court's ruling in *City of Jackson*.

II. The United States Ignores The Standard For Granting Preliminary Injunctions

The United States says nary a word about the standard for obtaining a preliminary injunction, which requires a movant to "clearly carr[y]" its burden of persuasion on all four prongs of the preliminary-injunction inquiry. *Texas Medical Providers v. Lakey*, 667 F.3d 570, 574 (5th Cir. 2012); *Voting for America, Inc. v. Steen*, 732 F.3d 382, 386 (5th Cir. 2013); *see also Roho, Inc. v. Marquis*, 902 F.2d 356, 358 (5th Cir. 1990) (requiring a "clear showing" on all four components). And the United States does not assert (let alone argue) that it has made a "clear showing" of a cause of action. Instead, it wants this Court to follow the district court's lead and conduct a *de novo* review of the parties' arguments surrounding the existence of a cause of action and the other legal issues in this case.

This Court's repeated pronouncements that preliminary injunctions may issue only upon a "clear showing" of likely success on the merits have failed to penetrate the consciousness of litigants who ignore the preliminary-injunction standard and ask district judges to casually enjoin the enforcement

of state law on less than the "clear showing" required by binding authority. If the United States is hoping that courts will dilute the preliminary-injunction standard because this is an abortion case, the Supreme Court's pronouncement in *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494 (2021), should put those aspirations to rest. *See id.* at 2495 ("To prevail in an application for a stay or an injunction, an applicant must carry the burden of making a "strong showing" that it is "likely to succeed on the merits"). The panel should make clear that the United States is subject to the same preliminary-injunction standard as everyone else.[7]

7. The United States does not contest that the district court denied Intervenors an opportunity to test contested facts at the preliminary-injunction hearing. But according to this Court, "the notice contemplated by rule 65(a) mandates that where factual disputes are presented, the parties *must* be given a fair opportunity and a meaningful hearing to present their differing versions of those facts before a preliminary injunction may be granted." *Com. Park at DFW Freeport v. Mardian Const. Co.*, 729 F.2d 334, 341 (5th Cir. 1984). Given that the United States fails to even dispute this, this is an independent ground for staying the preliminary injunction because the district court abused its discretion in entering it without an appropriate evidentiary hearing.

CONCLUSION

The Court should grant the motion for stay and expedite the appeal.

Respectfully submitted.

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CERTIFICATE OF SERVICE

On October 14, 2021, this motion was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of VirusTotal and is free of viruses.

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CERTIFICATE OF COMPLIANCE

This motion complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 2,596 words, excluding the parts exempted by Rule 27(a)(2)(B); and (2) the typeface and type style requirements of Rule 27(d)(1)(E) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the program used for the word count).

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