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,

and

ERICK GRAHAM, JEFF TULEY, AND MISTIE SHARP,

Intervenors-Appellants.

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

INTERVENORS' EMERGENCY MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL AND FOR TEMPORARY ADMINISTRATIVE STAY PENDING CONSIDERATION OF MOTION

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NATURE OF EMERGENCY

At the behest of the Biden Administration, the district court issued an unprecedented, sweeping injunction against the entire State of Texas, which purports to restrain not only government entities but also private citizens who are not even parties to this litigation. The district court issued this preliminary injunction even though the United States transparently lacks a cause of action, and despite the repeated rulings from this circuit that require a "clear showing" of likely success on the merits before a preliminary injunction can issue. *See Voting for America, Inc. v. Steen*, 732 F.3d 382, 386 (5th Cir. 2013) ("'This court has repeatedly cautioned that 'a preliminary injunction is an extraordinary remedy which should not be granted unless the party seeking it has clearly carried the burden of persuasion on all four requirements.'" (citation and some internal quotation marks omitted)). The district court compounded its errors by relying on exaggerated, disputed evidence that it gave no one a genuine chance to contest. And it purported to enjoin the enforcement of the Texas Heartbeat Act in *any* circumstance, even though the statute has undeniably constitutional applications and despite the robust and emphatic severability and saving-construction requirements that appear throughout the statute. The district court's errors are aggravated by its threat of contempt against any person who violates its decree—including private individuals who may not even be aware of this lawsuit or the injunction—as well as the unworkability of the injunction and the court's refusal to issue a brief stay that would have allowed the State to come up with some way to implement it.

Given this imminent threat of contempt, the intervenors join the state of Texas in requesting a ruling from this Court on the emergency stay pending appeal by Tuesday, October 12, 2021, at 9:00 A.M. The intervenors also request a temporary administrative stay of the injunction as soon as possible.

CERTIFICATE OF INTERESTED PERSONS

Counsel of record certifies that the following persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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TABLE OF CONTENTS

Nature of emergency i

Certificate of interested persons iii

Table of contents iv

Background 1

Argument and authorities 1

I. The intervenors will likely prevail on appeal 2

A. The United States failed to make a "clear showing" of a cause of action 2

B. A federal court cannot enjoin a state's judiciary from considering lawsuits that have yet to be filed 12

C. The district court's refusal to enforce the severability and saving-construction requirements in SB 8 is indefensible 13

D. The district court abused its discretion in issuing a preliminary injunction without permitting the United States' evidence to be contested at the hearing 17

II. The remaining factors favor a stay 18

III. The Court should expedite this appeal 18

Conclusion 19

Certificate of Compliance with Rule 27.3 20

Certificate of service 21

Certificate of conference 21

Certificate of compliance 22

Appendix .....

BACKGROUND

The State of Texas's filing from earlier today accurately describes the background of this litigation. The intervenors add the following details relevant to their involvement in the case.

The United States' motion for preliminary injunction asked the district court to restrain "private individuals who attempt to initiate enforcement proceedings under S.B. 8." App. 75. Because this threatened to enjoin private individuals from filing civil-enforcement lawsuits under SB 8, Erick Graham, Jeff Tuley, and Mistie Sharp (the intervenors) moved to intervene to protect their state-law right to sue individuals and entities that perform or assist post-heartbeat abortions. The district court granted their motion to intervene on September 28, 2021. After the district court issued its preliminary injunction, the intervenors filed a timely notice of appeal. App. 829.

ARGUMENT AND AUTHORITIES

In deciding whether to stay a preliminary injunction pending appeal, a court must consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, 734 F.3d 406, 410 (5th Cir. 2013) (citations and internal quotation marks omitted). Texas has already shown that it satisfies these four requirements. The intervenors are

likewise entitled to a stay, as they will suffer irreparable injury absent a stay and will likely succeed on appeal.

I. The Intervenors Will Likely Prevail On Appeal

A preliminary injunction is an "extraordinary remedy," which may not be granted unless the movant has "clearly carried the burden of persuasion on all four requirements." *Texas Medical Providers v. Lakey*, 667 F.3d 570, 574 (5th Cir. 2012); *see also Voting for America, Inc. v. Steen*, 732 F.3d 382, 386 (5th Cir. 2013) ("This court has repeatedly cautioned that 'a preliminary injunction is an extraordinary remedy which should not be granted unless the party seeking it has clearly carried the burden of persuasion on all four requirements.'" (citation and some internal quotation marks omitted)). That means the United States was required to present a "clear showing" that it will likely succeed on the merits, as well as a "clear showing" on the remaining three prongs of the preliminary-injunction inquiry. *See Roho, Inc. v. Marquis*, 902 F.2d 356, 358 (5th Cir. 1990).

The district court did not even assert that the United States had "clearly carried" its burden of persuasion, and the United States came nowhere close to making a "clear showing" of likely success in the district court. That is all that is needed to show that the intervenors (and Texas) will likely succeed on appeal.

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

The United States cannot bring this lawsuit unless it identifies a cause of action that authorizes it to sue Texas over SB 8. *See Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979) ("*cause of action* is a question of whether a particular plaintiff is a mem-

ber of the class of litigants that may, as a matter of law, appropriately invoke the power of the court"); David P. Currie, *Misunderstanding Standing*, 1981 Sup. Ct. Rev. 41, 42 ("No one can sue . . . unless authorized by law to do so"). And there is no statute that authorizes the United States to sue Texas over SB 8. But the district court decided to invent a cause of action that would allow the United States' claims to proceed, by claiming that "traditional principles of equity" allow the United States to sue to enforce the Fourteenth Amendment despite the absence of a statutory cause of action. App. 750-751 ("No cause of action created by Congress is necessary to sustain the United States' action; rather, 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. 751 ("[T]he United States' cause of action is a creature of equity").

The district court's holding is wrong for many reasons. First, the Fourteenth Amendment empowers Congress to "enforce" its requirements "by appropriate legislation." U.S. Const. amend. XIV, § 5. That means it is up to Congress to decide whether and to what extent lawsuits should be authorized against individuals and entities that violate the Fourteenth Amendment—and neither the executive nor federal judiciary can create causes of action to enforce the Fourteenth Amendment when Congress has declined to do so. *See 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"). The notion that "principles of equity" allow the executive branch to unilaterally sue entities that violate the Fourteenth Amendment is incompatible with the Amendment's de-

cision to vest the enforcement authority in Congress. *See United States v. City of Philadelphia*, 644 F.2d 187, 200 (3d Cir. 1980) (refusing to recognize an implied right of action for the federal government to sue over Fourteenth Amendment violations because "[s]ection 5 of the fourteenth amendment confers on Congress, not on the Executive or the Judiciary, the 'power to enforce, by appropriate legislation, the provisions of this article.' ").

Second, Congress has on occasion created causes of action that authorize the executive to sue state entities that violate the Fourteenth Amendment. *See* 42 U.S.C. § 2000b(a) (authorizing the attorney general to sue state entities that enforce racially segregated public facilities); 42 U.S.C. § 2000c-6(a) (authorizing the attorney general to sue state entities that maintain racially segregated schools). But Congress has conferred this power sparingly—and when it has conferred this power it carefully limits the circumstances in which a federal enforcement lawsuit may be brought. Consider 42 U.S.C. § 2000b(a), which authorizes the United States to sue state entities that enforce racially segregated public facilities:

> Whenever the Attorney General receives a complaint in writing signed by an individual to the effect that he is being deprived of or threatened with the loss of his right to the equal protection of the laws, on account of his race, color, religion, or national origin, by being denied equal utilization of any public facility which is owned, operated, or managed by or on behalf of any State or subdivision thereof, other than a public school or public college as defined in section 2000c of this title, and the Attorney General believes the complaint is meritorious and certifies that the signer or signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly progress of desegregation in public facilities, the Attorney Gen-

> eral is authorized to institute for or in the name of the United States a civil action in any appropriate district court of the United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section.

42 U.S.C. § 2000b(a). Notice all the preconditions that must be satisfied before the Attorney General can sue under section 2000b(a): (1) The Attorney General must "receive a complaint in writing" from the individual who is suffering a violation of his Fourteenth Amendment rights; (2) The complaint must describe a specific type of Fourteenth Amendment violation, namely a deprivation or threatened deprivation of one's right of equal access to a "public facility" on account of "race, color, religion, or national origin"; (3) The Attorney General must conclude that the complaint is "meritorious"; (4) The Attorney General must "certify" that the complainant is "unable" to sue for relief on his own; and (5) The Attorney General must "certify" that a lawsuit brought by the United States "will materially further the orderly progress of desegregation in public facilities." *Id.* Unless all five of these criteria are satisfied, the Attorney General cannot sue to enforce the Fourteenth Amendment under 42 U.S.C. § 2000b(a). 42 U.S.C. § 2000c-6(a) establishes similar preconditions for lawsuits brought by the United States to desegregate public schools. *See* 42 U.S.C. § 2000c-6(a).

These congressional enactments foreclose any possibility of an implied cause of action to sue a state over an alleged Fourteenth Amendment violation. Congress has specifically addressed the circumstances in which the Attorney General may sue in response to violations of the Fourteenth Amendment—and it has carefully limited the scope of these causes of action in a manner that precludes the Attorney

General from suing states over other alleged violations. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 74 (1996) ("Where Congress has created a remedial scheme for the enforcement of a particular federal right, we have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary."); *Hernandez v. Mesa*, 140 S. Ct. 735, 747 (2020) (refusing to infer a cause of action for aliens abroad to sue for alleged violations of their constitutional rights given that they were expressly excluded section 1983's cause of action, because "it would be anomalous to impute a judicially implied cause of action beyond the bounds Congress has delineated for a comparable express cause of action." (cleaned up)).

The district court acknowledged these congressional enactments but insisted that they could not reflect a congressional intention to foreclose an implied cause of action to enforce the right to abortion, because the abortion right did not exist when Congress enacted those statutes. App. 764. That is non sequitur. The problem for the district court is that the text of the Fourteenth Amendment empowers *Congress* to enforce its provisions, and Congress has specifically and carefully addressed the precise circumstances in which the executive may sue to enforce the Fourteenth Amendment. By specifying that the executive may sue to enforce the Fourteenth Amendment in the limited circumstances provided in sections 2000b(a) or 42 U.S.C. § 2000c-6(a), and by failing to authorize the executive to enforce the Fourteenth Amendment outside those situations, Congress has defined by statute the preconditions that *must* be met before the executive can sue over an alleged Fourteenth Amendment violation. It would turn these congressional enactments on their head to recognize an "implied" cause of action to enforce the Fourteenth

Amendment outside these carefully defined circumstances. Whether Congress was consciously aware of the right to abortion when it enacted sections 2000b(a) and 42 U.S.C. § 2000c-6(a) is irrelevant. What matters is that Congress has defined the preconditions that must be satisfied before the United States can sue to enforce the Fourteenth Amendment, and the judiciary cannot recognize or invent an "implied" right of action that allows the executive to circumvent these statutory prerequisites to suit.

Third, the district court's attempt to derive its cause of action from "traditional principles of equity" flouts the holding of *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), which forbids courts to recognize "equitable" remedies apart from those that existed when the original Judiciary Act was enacted in 1789. *See id.* at 318 ("[T]he equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act."). There is no historical pedigree for an "equitable" cause of action that would allow the United States government to sue a state to enforce the constitutional rights of its citizenry—and the district court cites no example of any such lawsuit that has ever occurred. Instead, *City of Philadelphia* empathically rejected the notion that the United States may sue a state for violating the Fourteenth Amendment, which squelches any possibility of a "traditional" equitable cause of action that allows the federal government to sue states for violating constitutional rights. *See City of Philadelphia*, 644 F.2d at 200. Of course, there *is* a traditional equitable cause of action that allows *private individuals* to sue *government officers* that violate their con-

stitutional rights,[1] as the district court observed,[2] but that is a far cry from a cause of action that would allow the *United States* to sue a *state* that enacts or enforces an allegedly unconstitutional law. *Grupo Mexicano* does not permit the district court to derive this cause of action from the traditional equitable cause of action that allows private individuals to seek injunctive relief against individual government officers. *See Grupo Mexicano*, 527 U.S. at 319 (1999) (refusing to recognize an equitable remedy that would allow pre-judgment creditors to restrain a debtor's assets, because this relief was traditionally available *only* to "creditor[s] who had already obtained a judgment establishing the debt.").

The district court tried to get around *Grupo Mexicano* with the following cryptic passage:

> *Grupo Mexicano* at most stands for the proposition that federal courts have jurisdiction over suits in equity, in which the broad equitable remedies that predate the Constitution remain available. The formal source of that jurisdiction is codified in the Judiciary Act of 1789, as discussed in *Grupo Mexicano*. However, the principle itself is broader and is not defined by that Act. Indeed, by the time he returned to the question in *Armstrong*, Justice Scalia—the author of *Grupo Mexicano*—had dispensed with any need to locate this power in the Judiciary Act. Nowhere in the latter case did he cite to the Judiciary Act. Rather, he wrote of general equitable powers "tracing back to England," translat-

1. *See, e.g.*, *Ex parte Young*, 209 U.S. 123, 155–56 (1908); *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 326 (2015) ("And, as we have long recognized, if an *individual* claims federal law immunizes him from state regulation, the court may issue an injunction upon finding the state regulatory actions preempted." (emphasis added) (citing *Ex parte Young*, 209 U.S. 123, 155–156 (1908)); *see also* John Harrison, *Ex Parte Young*, 60 Stan. L. Rev. 989, 989 (2008).
2. App. 751.

> ing to the "judge-made remedy" in the federal courts. *Armstrong*, 575 U.S. at 327. It is the essential nature of equity that it is not subject to strict limitations, unless and until Congress acts directly to restrict it.

App. 752. This passage appears to be saying that Justice Scalia walked back the holding of *Grupo Mexicano* in *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320 (2015), because *Armstrong* observed that the traditional right of *private individuals* to sue to enjoin the unconstitutional actions of state and federal officers "reflects a long history of judicial review of illegal executive action, tracing back to England." *Id.* at 327. But that statement is entirely consistent with *Grupo Mexicano*, as the fact that these traditional rights of action traced back to England means that those equitable remedies existed in 1789 and were therefore incorporated in the original Judiciary Act. More importantly, the district court's claim that equity "is not subject to strict limitations"[3] is simply false. Equity *is* subject to limitations imposed by historical practice,[4] and there is no historical support for an equitable cause of action that allows the United States to sue a state for violating the constitutional rights of its citizens.

Fourth, the notion of an implied cause of action to enforce the Fourteenth Amendment was emphatically rejected in *United States v. City of Philadelphia*, 644 F.2d 187, 201 (3d Cir. 1980) ("[T]he fourteenth amendment does not implicitly authorize the United States to sue to enjoin violations of its substantive prohibitions."). The district court did not dispute the result in *City of Philadelphia*, but it thought it could carve a one-off exception to *City of Philadelphia*'s holding because

3. App. 752.
4. *See Grupo Mexicano*, 527 U.S. at 318–19; *Armstrong*, 575 U.S. at 327.

abortion providers have been unable to bring pre-enforcement challenges to Texas's abortion statute under 42 U.S.C. § 1983. App. 765 ("[I]t is the deliberate action by the State to foreclose all private remedies that separates this case from *City of Philadelphia*."). But the district court has no authority to patch up these alleged holes in 42 U.S.C. § 1983 by allowing the United States to sue Texas over its alleged Fourteenth Amendment violation. If a state enacts an abortion restriction that is not subject to pre-enforcement review under 42 U.S.C. § 1983, then the solution is for the executive to ask Congress to amend section 1983 or create a new cause of action that would allow the United States (or some other plaintiff) to obtain pre-enforcement relief against SB 8. It is not to ask the judiciary to invent a new cause of action that "fixes" these perceived shortcomings with 42 U.S.C. § 1983. The Supreme Court no longer allows the federal judiciary to invent causes of action that Congress has not provided. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856 (2017) ("If the statute does not itself so provide, a private cause of action will not be created through judicial mandate."); *Alexander v. Sandoval*, 532 U.S. 275, 286–287 (2001) ("Without [statutory intent], a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute."); *id.* at 287 ("Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals." (citation and internal quotation marks omitted)). The district court's opinion does not even cite *Alexander v. Sandoval*, and it makes no attempt to explain how this Court can create recognize an "implied" right of action when the

Supreme Court has been saying for decades that federal courts must stop inferring new causes of action from statutes or constitutional provisions.

It is also entirely commonplace for laws to "escape" pre-enforcement review under 42 U.S.C. § 1983. A state's defamation laws, for example, are enforced exclusively through private civil lawsuits, which means that there is no way for a publisher to sue the state or its officers under 42 U.S.C. § 1983 if it believes that the defamation laws violate the First Amendment. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Many other state laws are enforced solely through private civil lawsuits, and these statutes are likewise immune from pre-enforcement challenge. *See, e.g.*, *Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 958 (8th Cir. 2015); Eugene Volokh, *Challenging Unconstitutional Civil Liability Schemes, as to Abortion, Speech, Guns, Etc.*, Reason: Volokh Conspiracy (September 3, 2021, 2:31 P.M.), https://bit.ly/3iJiS5D. The district court's theory would allow the executive to sue a state whenever it enacts a law or establishes a common-law rule that is enforced through private litigation, an astonishing result. Does the district court believe that the federal government could have sued Alabama (or any other state) over its defamation laws before *New York Times v. Sullivan*?

Finally, the district court cites no authority that allows the federal government to sue a state over an alleged violation of the Fourteenth Amendment. The closest it comes is *United States v. City of Jackson*, 318 F.2d 1 (5th Cir. 1963), but that case allowed the United States to sue a city only because its policy violated the Commerce Clause in addition to the Fourteenth Amendment. *See id.* at 14. And *Jackson* specifically held that it was the Commerce Clause—and not the Fourteenth

Amendment—that provided the cause of action for the United States to sue in that case:

> When the action of a State violative of the Fourteenth Amendment conflicts with the Commerce Clause and casts more than a shadow on the Supremacy Clause, the United States has a duty to protect the "interests of all." . . . The issue here is framed by the Commerce Clause. *Under that clause* there is authority for the United States to sue without specific congressional authorization.

See id. at 14 (emphasis added). And even if *Jackson* had held that a mere violation of the Fourteenth Amendment could authorize a federal lawsuit, that holding would not be sustainable after the enactment of 42 U.S.C. § 2000b(a) and 42 U.S.C. § 2000c-6(a), which carefully spell out the limited circumstances in which the United States may sue to enforce the requirements of the Fourteenth Amendment.

This is more than enough to show that the United States failed to make a "clear showing" of a cause of action that would allow it to sue Texas over its alleged violations of the Fourteenth Amendment. The novelty of the district court's cause of action is reason alone to reject it at the preliminary-injunction stage.

B. A Federal Court Cannot Enjoin A State's Judiciary From Considering Lawsuits That Have Yet To Be Filed

The district court enjoined the Texas judiciary from even *considering* lawsuits that might be filed under SB 8. App. 821. There is no authority for a federal court to issue an injunction of that sort. An injunction may be used only to restrain unlawful activity, and a state court does not do anything unlawful or constitutional by presiding over a lawsuit between private parties—even when the lawsuit is based on a patently unconstitutional statute. A state court does not violate federal law unless and

until it enters a *ruling* that violates someone's federally protected rights, and federal courts must presume that state courts will respect federal rights when deciding cases. *See Steffel v. Thompson*, 415 U.S. 452, 460–61 (1974) ("State courts have the solemn responsibility, equally with the federal courts 'to guard, enforce, and protect every right granted or secured by the constitution of the United States. . . .'" (citation omitted); *Middlesex County Ethics Commission v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982) ("Minimal respect for the state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights.").

Neither the district court nor the United States cited any case in which a federal court enjoined a state's judiciary from considering a lawsuit that has yet to be filed in its courts, and to our knowledge no such injunction has ever been issued in the 245-year history of the United States. The district court's injunction also flouts *Ex parte Young*, 209 U.S. 123 (1908), which declares that "an injunction against a state court would be a violation of the whole scheme of our Government." *Id.* at 163; *see also Whole Woman's Health v. Jackson*, --- F.4th ----, 2021 WL 4128951, *5 (5th Cir. Sept. 10, 2021). There certainly has not been a "clear showing" that an injunction of this type is permissible.

C. The District Court's Refusal To Enforce The Severability And Saving-Construction Requirements In SB 8 Is Indefensible

Many of the civil-enforcement lawsuits authorized by SB 8 are undeniably constitutional under existing Supreme Court precedent. These include:

> Lawsuits brought against those who perform (or assist) non-physician abortions;[5]
>
> Lawsuits brought against those who perform (or assist) post-viability abortions that are not necessary to save the life or health of the mother;[6]
>
> Lawsuits brought against those who use taxpayer money to pay for post-heartbeat abortions;[7]
>
> Lawsuits brought against those who covertly slip abortion drugs into a pregnant woman's food or drink.[8]

And each of the intervenors has stated that they intend to bring civil-enforcement lawsuits *only* in response to violations of SB 8 that clearly fall outside the constitutional protections of *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 874 (1992). App. 160-170. Yet the district court's preliminary injunction blocks the Texas judiciary from entertaining *any* civil-enforcement lawsuits filed under SB 8—even in situations in which the civil-enforcement lawsuit is undeniably constitutional and consistent with federal law.

The district court has no authority to enjoin Texas from enforcing the indisputably constitutional applications of SB 8. *See Alabama State Federation of Labor, Local Union No. 103 v. McAdory*, 325 U.S. 450, 465 (1945) ("When a statute is assailed as unconstitutional we are bound to assume the existence of any state of facts which

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5. *See Roe v. Wade*, 410 U.S. 113, 165 (1973); *Connecticut v. Menillo*, 423 U.S. 9, 9–10 (1975); *Mazurek v. Armstrong*, 520 U.S. 968, 973 (1997).
6. *See Roe*, 410 U.S. at 164–65;
7. *See Harris v. McRae*, 448 U.S. 297 (1980).
8. *See* Alexandra Hutzler, *Former Trump Aide Jason Miller Accused of Secretly Administering Abortion Pill*, Newsweek (Sept. 18, 2018), https://bit.ly/3stDRx2.

would sustain the statute in whole or in part."); *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, 748 F.3d 583, 589 (5th Cir. 2014) ("Even when considering facial invalidation of a state statute, the court must preserve the valid scope of the provision to the greatest extent possible."). And that is especially true when SB 8 contains emphatic severability and saving-construction requirements that compel reviewing courts to preserve every constitutional application of the law. *See* Senate Bill 8, 87th Leg., §§ 3, 5, 10; *see also* Tex. Health & Safety Code § 171.212(a) ("Every provision, section, subsection, sentence, clause, phrase, or word in this chapter, and every application of the provisions in this chapter, are severable from each other."); *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, 748 F.3d 583, 589 (5th Cir. 2014) ("Federal courts are bound to apply state law severability provisions.").

The district court thought it could disregard the severability requirements in SB 8 because the Supreme Court refused to enforce a severability clause in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2319 (2016). App. 811-812; App. 820-821 & n.96. But the Texas legislature anticipated this maneuver and included a saving-construction clause, which preserves all constitutional applications of SB 8 in the event that the severability requirements are ignored:

> If any court declares or finds a provision of this chapter facially unconstitutional, when discrete applications of that provision can be enforced against a person, group of persons, or circumstances without violating the United States Constitution and Texas Constitution, those applications shall be severed from all remaining applications of the provision, ***and the provision shall be interpreted as if the legislature had enacted a provision limited to the persons, group of persons, or***

> ***circumstances for which the provision's application will not violate the United States Constitution and Texas Constitution***.

See Tex. Health & Safety Code § 171.212(b-1) (emphasis added). The Texas legislature also amended its Code Construction Act to ensure that abortion statutes will be construed, as a matter of state law, to apply *only* in situations that do not result in a violation of the United States or Texas Constitutions:

> If any statute that regulates or prohibits abortion is found by any court to be unconstitutional, either on its face or as applied, then all applications of that statute that do not violate the United States Constitution and Texas Constitution shall be severed from the unconstitutional applications and shall remain enforceable, notwithstanding any other law, ***and the statute shall be interpreted as if containing language limiting the statute's application to the persons, group of persons, or circumstances for which the statute's application will not violate the United States Constitution and Texas Constitution.***

See Tex. Gov't Code § 311.036(c) (emphasis added). The district court has no way around these saving-construction requirements,[9] and its refusal to preserve the constitutional applications of SB 8 in the teeth of these statutory commands is an act of lawlessness. *See Voting for America, Inc. v. Steen*, 732 F.3d 382, 398 (5th Cir. 2013): ("Severability is a state law issue that binds federal courts.").

9. *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 Harv. L. Rev. 2085 (2002); Adrian Vermeule, *Saving Constructions*, 85 Geo. L.J. 1945 (1997).

D. The District Court Abused Its Discretion In Issuing A Preliminary Injunction Without Permitting The United States' Evidence To Be Contested At The Hearing

Rule 65(a)(1) provides that "[n]o preliminary injunction shall be issued without notice to the adverse party." Fed. R. Civ. P. 65(a). According to this Court, Rule 65's notice requirement means 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). Yet the United States relied solely on hearsay declarations to support its arguments, and the intervenors disputed many facts asserted in those declarations. Because of these factual disputes, the intervenors should have "be[en] given a fair opportunity and a meaningful hearing" to present their differing facts and evidence. *Id.* A "fair opportunity" in this context includes the opportunity to present live testimony and cross-examine the declarants. "[I]t is fundamental that, '[i]f there is a factual controversy, . . . oral testimony is preferable to affidavits because of the opportunity it provides to observe the demeanor of the witnesses.'" *Heil Trailer Int'l Co. v. Kula*, 542 F. App'x 329, 334 (5th Cir. 2013) (quoting Wright & Miller et al., 11A Fed. Prac. & Proc. Civ. § 2949 (2d ed.)). But the district court would not allow the intervenors to present witnesses. App. 262 (stating "Intervenors have been allotted thirty minutes to present *facts and arguments* not already raised by Texas" in rejecting the request for two hours of time for witness testimony (emphasis added)).

When the parties' affidavit testimony contradict each other on material questions of fact, "the propriety of proceeding upon affidavits becomes the most ques-

tionable." *Heil Trailer*, 542 F. App'x at 334. Yet that is exactly what the district court did. The district court claims that it held an "full evidentiary hearing," App. 734, but there was no cross-examination, live testimony, or evidence presented aside from the State playing excerpts of declarations of the government declarants. That is not a "full evidentiary hearing" in any sense of the word. The district court abused its discretion by relying on disputed factual evidence that it gave no one a chance to contest.

II. The Remaining Factors Favor A Stay

The intervenors will suffer irreparable injury absent a stay because they are being deprived of their state-law right to sue and enjoin individuals who violate the Texas Heartbeat Act. The balance-of-equities and the public-interest factors also support a stay for the reasons set forth in Texas's brief. It is also undisputed that at least some applications of SB 8 are constitutional, and maintaining an overbroad injunction that prevents the enforcement of a statute's constitutional applications is contrary to the public interest. *See Berman v. Parker*, 348 U.S. 26, 32 (1954) ("Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.").

III. The Court Should Expedite This Appeal

The intervenors join Texas in requesting expedited consideration of this appeal.

CONCLUSION

The Court should grant the emergency motion for stay pending appeal, the motion for temporary administrative stay, and the motion for expedited consideration.

Respectfully submitted.

/s/ Jonathan F. Mitchell

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CERTIFICATE OF COMPLIANCE WITH RULE 27.3

I certify the following in compliance with Fifth Circuit Rule 27.3:

- Before filing this motion, counsel for Appellant contacted the clerk's office and opposing counsel to advise them of Appellant's intent to file this motion.

- The facts stated herein supporting emergency consideration of this motion are true and complete.

- The Court's review of this motion is requested by Tuesday, October 12, or alternatively, Appellant requests a temporary administrative stay pending that review at the earliest possible date.

- True and correct copies of relevant orders and other documents are attached in the Appendix to this motion, filed separately.

- This motion is being served at the same time it is being filed.

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
Counsel for Intervenors-Appellants

CERTIFICATE OF SERVICE

On October 8, 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.

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
Counsel for Intervenors-Appellants

CERTIFICATE OF CONFERENCE

On October 8, 2021, counsel for the United States indicated by way of e-mail that they oppose this motion and intend to file a brief in opposition.

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
Counsel for Intervenors-Appellants

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 5,162 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).

/s/ Jonathan F. Mitchell
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