No. 21-50949

In the United States Court of Appeals for the Fifth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STATE OF TEXAS,

Defendant-Appellant,

ERICK GRAHAM; JEFF TULEY; MISTIE SHARP,

Intervenor Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division

BRIEF FOR APPELLANT THE STATE OF TEXAS

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Certificate of Interested Persons

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Under the fourth sentence of Fifth Circuit Rule 28.2.1, Appellant the State of Texas, as a governmental party, need not furnish a certificate of interested persons.

/s/ Lanora C. Pettit.
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Statement Regarding Oral Argument

Given that this Court previously scheduled oral argument in this case and that the Supreme Court held argument but dismissed certiorari as improvidently granted, the Court should set this case for oral argument. The United States' lawsuit raises multiple issues of first impression and constitutional significance that would benefit from a thorough discussion with the Court.

TABLE OF CONTENTS

Table of Authorities

Page(s)

Cases

Constitutional Provisions, Statutes, and Rules:

Other Authorities:

INTRODUCTION

Seeking to step into the shoes of private litigants whose claims fell outside the jurisdiction of the federal courts, the United States brought this first-of-its-kind lawsuit to try to vindicate the private rights of citizens allegedly abridged by Texas's Senate Bill 8, which creates a private cause of action regarding the provision of some post-heartbeat abortions. But the United States' attempt to enjoin Texas courts from hearing SB 8 private causes of action fares no better than the private litigants' suit.

The district court's multiple theories of standing—not all of which were even pressed by the United States—cannot overcome the fact that the United States has not been injured by the existence of SB 8. And Texas officials' inability to enforce SB 8 means any alleged injury cannot be traced to Texas or redressed by an injunction against Texas. Further, rather than identify a statutory or long-standing equitable cause of action, the district court invented a new equitable claim, good for this case only, contrary to Supreme Court precedent. And, on the merits, the district court failed to consider the dearth of evidence that SB 8 creates an undue burden or a conflict with federal law.

In giving the United States preliminary relief, the district court manufactured standing, a cause of action, and a remedy all previously unknown in the law. And the result is a federal court superintending Texas's courts and strangers to this suit. This Court properly stayed the preliminary injunction. The Supreme Court has already declined to affirm the injunction or put it back into effect. This Court should follow that Court's lead and vacate the preliminary injunction.

Statement of Jurisdiction

The United States invoked subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1345. ROA.20. This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1) because the district court entered a preliminary injunction on October 6, 2021, enjoining the State of Texas, ROA.1737-849, which Texas timely appealed, ROA.1850-52. *See also* Fed. R. App. P. 4(a)(1)(A).

Issues Presented

The question on appeal is whether the district court erred in entering a preliminary injunction, which requires the Court to resolve one or more of the following issues:

1. Whether the Court lacks jurisdiction because the United States has failed to establish a justiciable case or controversy;
2. Whether the United States has an equitable cause of action or equitable remedy;
3. Whether the United States has proven a likelihood of success that SB 8 violates the U.S. Constitution;
4. Whether the remaining preliminary-injunction factors favor the United States; and
5. Whether the preliminary injunction is overbroad.

Statement of the Case

I. Senate Bill 8

Enacted in May 2021, Senate Bill 8 added subchapter H to the Texas Health and Safety Code to govern the provision of post-heartbeat abortions in Texas. Act of May

13, 2021, 87th Leg., R.S., ch. 62, § 3, 2021 Tex. Sess. Law Serv. 125, 125-31 (codified at Tex. Health & Safety Code §§ 171.201-.212).[1] Under SB 8, a doctor must determine whether the unborn child has a detectable heartbeat prior to performing an abortion. Tex. Health & Safety Code § 171.203(b). SB 8 then 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). There is an exception if a medical emergency prevents compliance. *Id.* § 171.205(a).

The prohibition on post-heartbeat abortions is not, however, enforced by any state or local government official. Indeed, SB 8 specifically precludes enforcement or threatened enforcement of its prohibition by the "state, a political subdivision, a district or county attorney, or an executive or administrative officer or employee of this state or a political subdivision." *Id.* § 171.207(a); *see also id.* § 171.208(a); *Whole Woman's Health v. Jackson*, 13 F.4th 434, 442-43 (5th Cir. 2021) (*WWH I*). And as recently confirmed by the Texas Supreme Court, this precludes even indirect enforcement by government officials. *Whole Woman's Health v. Jackson*, No. 22-0033, 2022 WL 726990, at *1 (Tex. Mar. 11, 2022) (*WWH III*).

The prohibition is instead enforced "exclusively through . . . private civil actions." Tex. Health & Safety Code § 171.207(a). Any private person may bring a civil

[1] "SB 8" in this brief refers to Texas Health and Safety Code sections 171.201-.212. The bill itself also added or amended statutes regarding attorneys' fees and abortion reporting and record-keeping requirements. Tex. Civ. Prac. & Rem. Code § 30.022; Tex. Health & Safety Code §§ 171.008, 245.011(c). But those statutes were not enjoined by the district court and are not at issue. ROA.1845.

action against any person who performs, induces, aids, or abets a post-heartbeat 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). Among other defenses, a defendant who has third-party standing under Supreme Court precedent to assert the rights of women seeking abortion may demonstrate that the relief sought would impose an undue burden on a woman or group of women. *Id.* § 171.209(a)-(b).

II. *Whole Woman's Health* Litigation

In July 2021, a group of abortion providers and supporters sought to enjoin SB 8 before it took effect on September 1. *WWH I*, 13 F.4th at 439. Despite the prohibition on governmental enforcement, the plaintiffs sued five state officials, as well as a state-court judge, a court clerk, and a single private individual. *Id.* at 439 n.2. When the district court denied the defendants' motions to dismiss, they appealed, divesting the district court of jurisdiction to proceed further. *Id.* at 440. This Court denied the plaintiffs' request for an injunction pending appeal. *Id.* at 441-45.

After failing to obtain injunctive relief from this Court, the plaintiffs unsuccessfully sought the same injunctive relief from the Supreme Court. *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495-96 (2021). Although the Supreme Court denied relief, it subsequently granted certiorari before judgment and expedited briefing and argument. *Whole Woman's Health v. Jackson*, 142 S. Ct. 415, 415-16 (2021) (mem.).

In December 2021, the Supreme Court issued its decision, holding that the claims against the Texas Attorney General, state-court judge, court clerk, and private individual must be dismissed. *Whole Woman's Health v. Jackson*, 142 S. Ct. 522,

539 (2021) (*WWH II*). A different majority, however, allowed plaintiffs to proceed against four state licensing officials, believing they might be able to indirectly enforce the heartbeat provisions through their general regulatory authority. *Id.* at 535 (plurality op.); *id.* at 544 (Roberts, C.J., concurring in part and dissenting in part).

On remand, this Court certified the question of the state licensing officials' authority to enforce SB 8 to the Texas Supreme Court. *Whole Woman's Health v. Jackson*, No. 21-50792, 2022 WL 142193, at *6 (5th Cir. Jan. 17, 2022). That court concluded that SB 8 prohibits state officials from directly *or indirectly* enforcing the heartbeat provisions. *WWH III*, 2022 WL 726990, at *1. This Court has now ordered that the challenges to those provisions be dismissed on remand. *Whole Woman's Health v. Jackson*, No. 21-50792, 2022 WL 1231756, at *1 (5th Cir. Apr. 26, 2022) (per curiam).

III. Procedural History

A. The United States filed this suit against the State of Texas on September 9, 2021—after the Supreme Court declined to provide injunctive relief in the *Whole Woman's Health* litigation but before it granted certiorari. ROA.18-44. The United States alleged 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 the doctrine of intergovernmental immunity. ROA.41-43. The United States 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."

ROA.43. Three private individuals were granted permission to intervene as defendants to preserve their right to file suit under SB 8. ROA.682-715.

B. Shortly after filing suit, the United States sought an emergency temporary restraining order or preliminary injunction. ROA.323-579. Texas conducted limited, expedited discovery, responded to the preliminary-injunction motion on a highly compressed timeline, and filed a motion to dismiss. ROA.764-837, 865-1136, 1245-87.

Although the United States introduced declarations from federal employees describing how SB 8 might impact several federal programs, ROA.498-579, even the limited discovery Texas was permitted demonstrated SB 8 had not had any effect on those programs and is unlikely to do so.

Bureau of Prisons: BOP regulations require that BOP "arrange" for an abortion if an inmate requests one, 28 C.F.R. § 551.23(c), and that the warden "ensure compliance with the applicable law," *id.* § 551.20. *See also* ROA.523 (BOP manual stating that staff shall "be guided by[] applicable Federal and state laws"). In her declaration, BOP's representative predicted SB 8 would cause confusion among BOP staff, disruptions to BOP contractors, and burdens on BOP resources. ROA.502-03. But at her deposition, she admitted that she was unaware of any confusion, disruption, or burdens caused by SB 8 since it took effect, ROA.2313-20, and was also unaware whether any of the four pregnant women in BOP custody in Texas had requested an abortion, ROA.2300-01.

Center for Medicare and Medicaid Services: Pursuant to the Hyde Amendment, *see* Consolidated Appropriations Act, 2021, Pub. L. No. 116–260, div. H, tit. V, §§ 506–

07, 134 Stat. 1182, 1622, Medicaid plans cover abortions only when necessary to save the mother's life or when the pregnancy resulted from rape or incest. ROA.577. Despite expressing concerns that SB 8 might unlawfully limit Medicaid coverage, ROA.579, CMS's representative was unaware of any payment for a reimbursable Medicaid service involving abortion being denied and conceded she was unaware how many Medicaid patients had obtained abortion services. ROA.2687-88.

Job Corps: The Job Corps Handbook requires that Job Corps centers provide transportation to medical appointments. ROA.557. But the declarant admitted that she was unaware of any abortion-related transportation services—or any abortion-related services at all—being provided by any Texas Job Corps Center in the last three years. ROA.2566.

Office of Personnel Management: Like Medicaid, Federal Employees Health Benefits (FEHB) plans cover abortions only when necessary to save the mother's life or when the pregnancy resulted from rape or incest. ROA.569. Although the United States contended SB 8 could interfere with such insurance coverage, OPM's declarant admitted that SB 8 had had no such effect: no insurance carrier with a negotiated FEHB plan had raised concerns about SB 8, and she could not recall any instance in which the denial of abortion coverage had resulted in litigation. ROA.2624, 2640-41.

Office of Refugee Resettlement: ORR is obliged to ensure that an unaccompanied minor in custody has "access to medical appointments," ROA.897, and staff may not "undertake actions to prevent the [unaccompanied child] from obtaining [an] abortion," ROA.2436. In doing so, ORR staff are to act "in alignment with state law governing the conduct of medical providers who provide abortions to minors."

ROA.896. The ORR declarant too admitted that none of ORR's contractors or grantees had expressed concerns about SB 8, that only two minors "may or may not" have requested abortions recently, and that his approximation of fifteen to twenty minors requesting abortions in a fiscal year was "speculative." ROA.2383-84.

United States Marshals Service: Per a USMS Policy Directive, a USMS prisoner may elect to have an abortion "consistent with state law," ROA.539, but USMS will fund the abortion only if doing so meets the legal requirements of the Hyde Amendment, ROA.887. The declarant for USMS testified that there had been only three requests for abortions by prisoners in Texas since January 1, 2017, and only one of those was paid for by the government due to risk to the woman's life. ROA.541.[2]

C. After a hearing, the district court denied Texas's motion to dismiss and granted a preliminary injunction. ROA.1737-849. The court first determined that the United States had suffered an injury because (1) SB 8 prohibited federal personnel and contractors from providing abortion-related services and potentially subjected them to civil liability, ROA.1761-63; (2) the United States has a "sovereign interest" in vindicating violations of its citizens' constitutional rights and ensuring federal judicial review under a *parens patriae* theory, ROA.1763-68; and (3) SB 8 harmed "the public interest and general welfare" in a way that permitted the United States to act under *In re Debs*, 158 U.S. 564 (1895), ROA.1768-72. The court determined that the

[2] The operative complaint also references the Department of Defense, ROA.40-41, but the United States did not offer any evidence regarding SB 8's impact on DOD.

"passage of S.B. 8 caused immediate injury to interests of the United States," ROA.1772, and that the injury was redressable, ROA.1774.

The court then rejected the argument that Congress had not provided a relevant cause of action by declaring 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." ROA.1774-75. Declining to identify a "blueprint" or "categorical definition" for such a claim, the court concluded it is generally available when "no adequate remedy exists at law." ROA.1775-76; *see also* ROA.1787.

The district court next reasoned that it could enjoin "the State" because SB 8 was signed by Texas's governor, represents state policy, is enforced in state courts, and is now being defended by Texas. ROA.1795. The court also ruled that it could enjoin judicial actors because docketing, maintaining, hearing, and resolving SB 8 suits is "state action," ROA.1801, and unknown private individuals because filing SB 8 suits would make them an "arm of the state," ROA.1802-03. As for the merits, the district court concluded SB 8 created an undue burden on previability abortions, was preempted by federal law, and violated intergovernmental immunity. ROA.1807-40.

Having determined that the United States was entitled to preliminary relief, the court enjoined the State of Texas and all state officials (including judges and court clerks) from "accepting or docketing, maintaining, hearing, resolving, awarding damages in, enforcing judgments in, enforcing any administrative penalties in, and administering any lawsuit" brought under SB 8. ROA.1845. It also enjoined private

individuals to the extent their attempts to bring SB 8 lawsuits involved state action. ROA.1845. Uncertain how the State should implement the sweeping 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." ROA.1845. And it ordered Texas to publish the preliminary injunction and easy-to-understand instructions on all court websites and to distribute the order to all court personnel. ROA.1846.

Finally, the district court concluded that Texas had "forfeited the right" to a stay pending appeal because SB 8 was "offensive" and an "unprecedented and aggressive scheme to deprive [Texas] citizens of a significant and well-established constitutional right." ROA.1848.

D. Texas and three intervenors filed notices of appeal that same day. ROA.1850-55. This Court granted a stay of the preliminary injunction. Order, *United States v. State of Texas*, No. 21-50949 (5th Cir. Oct. 14, 2021). The United States asked the Supreme Court to vacate this Court's stay, which the Court treated as a petition for a writ of certiorari before judgment, granted, and expedited on the same timeline as the *Whole Woman's Health* litigation. *United States v. Texas*, 142 S. Ct. 14, 14 (2021) (mem.). After argument, however, the Court dismissed the United States' petition as improvidently granted and refused to vacate this Court's stay. *United States v. Texas*, 142 S. Ct. 522, 522 (2021) (mem.). The case is now back before this Court for resolution of Texas's appeal of the preliminary injunction.

Summary of the Argument

The district court's lengthy preliminary-injunction opinion contains numerous errors. Most fundamentally, the United States lacks standing because the bare existence of SB 8 does not injure it, and there is no evidence that SB 8 will impact any federal program. Moreover, because Texas officials do not enforce SB 8, any harm from SB 8 cannot be traced to Texas or redressed by an injunction against "Texas." And although Texas courts interpret SB 8, they are not adverse litigants. The United States is left with a suit reflecting only a disagreement about the constitutionality of Texas law, which is not justiciable under Supreme Court precedent.

The United States also lacks a cause of action. The district court failed to identify a specific equitable cause of action that existed in 1789, relying instead on a general intuition that equity must provide a remedy where none otherwise exists. But the Supreme Court has rejected that intuition—particularly where Congress has provided some avenues to enforce the general legal command (here, the Fourteenth Amendment) but not one applicable to the specific context. The district court erred in permitting the United States to bring a suit Congress did not authorize.

The district court erred on the merits as well. Texas can prohibit all abortions that are not protected by Supreme Court precedent. And the United States has provided insufficient evidence that private civil lawsuits (that cannot result in liability when the abortion is protected under Supreme Court precedent) will nonetheless create an undue burden. Further, because the federal programs can comply with both SB 8 and federal law, there is no preemption concern. And because SB 8 does not

regulate the United States or its programs, it does not violate the intergovernmental-immunity doctrine.

For these and the other reasons described within, the district court's injunction should be reversed.

Standard of Review

This Court reviews a decision to grant a preliminary injunction for an abuse of discretion. *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 537 (5th Cir. 2013). Findings of fact are reviewed for clear error, and conclusions of law are considered de novo. *Id.* A district court abuses its discretion when it relies on erroneous legal principles. *Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs*, 894 F.3d 692, 696 (5th Cir. 2018).

Argument

A preliminary injunction is "an extraordinary and drastic remedy" and "should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam). To obtain a preliminary injunction, the United States was required to prove (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm if the injunction does not issue; (3) the balance of equities tips in its favor; and (4) the grant of an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The United States did not meet its burden—as the Supreme Court indicated when it declined to vacate this Court's stay of the district court's injunction. *United States*, 142 S. Ct. at 522; *see also, e.g.*, *Ala. Ass'n of Realtors v. Dep't of Health & Human*

Servs., 141 S. Ct. 2485, 2487 (2021) (listing factors to vacate stay of injunction). This Court should reverse.

I. The United States Is Unlikely to Prevail Because Its Claims Are Not Justiciable.

The United States is unlikely to prevail because this is not an Article III "case" or "controvers[y]." U.S. CONST. art. III, § 2. While the parties disagree about the constitutionality of SB 8, "[t]he presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art[icle] III's requirements." *Diamond v. Charles*, 476 U.S. 54, 62 (1986). The United States did not meet its burden of demonstrating the three elements of standing, and "in the absence of standing, the court has no 'power to declare the law.'" *In re Gee*, 941 F.3d 153, 161 (5th Cir. 2019) (per curiam) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998)). Further, no justiciable controversy exists when a sovereign is sued and, as here, "the only judgment required is to settle the doubtful character of the legislation in question." *Muskrat v. United States*, 219 U.S. 346, 361-62 (1911).

A. The United States lacks standing.

A preliminary injunction cannot be granted to a plaintiff that lacks standing. *Speech First, Inc. v. Fenves*, 979 F.3d 319, 329 (5th Cir. 2020). And as the party seeking relief, the United States bore the burden of demonstrating standing. *Steel Co.*, 523 U.S. at 103-04. But the United States has not suffered an injury in fact. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). The Texas Legislature's decision to enact an allegedly unconstitutional law does not, standing alone, injure the United States. Further, as the Supreme Court recently held in *California v. Texas*, a plaintiff

lacks standing to sue the government when the government does not enforce the challenged law. 141 S. Ct. 2104, 2113-20 (2021). Because no Texas official may enforce SB 8, Tex. Health & Safety Code § 171.207(a), any purported injury is not traceable to the unlawful conduct of or redressable with an injunction against Texas. *See Lujan*, 504 U.S. at 560-61. Any one of these faults deprives the United States of standing to sue Texas.

1. The United States has not suffered an injury from SB 8.

To establish standing, a plaintiff must "'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct' of the other party." *Diamond*, 476 U.S. at 62 (quoting *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99 (1979)). While the United States certainly disagrees with Texas regarding the constitutionality of SB 8, observing conduct with which one disagrees "is not an injury sufficient to confer standing under Art[icle] III, even though the disagreement is phrased in constitutional terms." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-86 (1982). Because the United States has demonstrated nothing more, it has not suffered an injury as a result of its disagreement.

The district court identified three potential theories to support an injury: harm to federal programs, *parens patriae*, and *In re Debs*. ROA.1760-72. None of them suffice. There is no evidence that any harm to federal programs is imminent, the United States lacks a sovereign or quasi-sovereign interest to bring a *parens patriae* claim, and *Debs* is inapplicable because the United States does not regulate or control the provision of abortion in America.

a. Federal programs

The district court first determined that Texas injured the United States by "prohibiting federal personnel and contractors from carrying out their obligations to provide abortion-related services" and "subjecting federal employees and contractors to civil liability for aiding and abetting the performance of an abortion." ROA.1761. But the evidence does not support either injury, leaving the United States without standing to bring its preemption and intergovernmental-immunity claims.

First, SB 8 does not prohibit federal employees from carrying out their abortion-related obligations because there is no federal requirement that the abortion with which they are assisting occur in Texas. Accordingly, federal employees may assist with any pre-heartbeat abortion in Texas and arrange for any post-heartbeat abortion elsewhere. Moreover, many of the federal programs require compliance with state law when providing abortion-related services. ROA.523 (BOP), 539 (USMS), 896 (ORR). Thus, complying with Texas law does not *prohibit* federal employees from carrying out their duties but is a *requirement* of carrying out their duties.

Second, there is no evidence that any federal program will be asked to facilitate a post-heartbeat abortion in the immediate future—let alone under circumstances that would subject program personnel to liability under SB 8. "Allegations 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 v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). 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), and "theoretical possibilities" do not suffice, *In re Gee*, 941 F.3d at 164.

The evidence shows that federal-program assistance with abortion is rare—as one would expect in light of the significant restrictions that the Hyde Amendment places on the use of federal funds for the procedure. There is no evidence that any of the four pregnant prisoners in BOP custody wants an abortion. ROA.2300-01. The USMS has provided transportation for abortions for only three women since January 2017. ROA.541. Only two minors in ORR custody "may or may not" have requested post-heartbeat abortions in the last year, and ORR's declarant admits that his larger figures were "speculative." ROA.2383. The declarant for the Job Corps program was unaware of any abortion-related services being provided in the last three years. ROA.2566. And the declarants for CMS and OPM failed to identify any "certainly impending" conflicts regarding paying for post-heartbeat abortions. Thus, the United States' alleged injury is "merely 'speculative,'" *Lujan*, 504 U.S. at 561, and cannot support standing.

Third, contrary to the district court's opinion, ROA.1762-63, there is no evidence that a federal employee or contractor will imminently be held liable under SB 8. Even setting aside the above evidence that these programs are unlikely to be called upon to facilitate an abortion, the United States has not proven a substantial risk that it will be found liable under SB 8. *Susan B. Anthony*, 573 U.S. at 158. The United States has not identified evidence that any private party intends to sue it, or that a Texas court would hold it liable in light of the presumption 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).[3]

And even if there were evidence of an SB 8 enforcement lawsuit against a federal actor, injuries that result from the independent actions of third parties do not establish standing. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). Such a lawsuit would be brought by private parties, not the State. Tex. Health & Safety Code § 171.208(a); *WWH III*, 2022 WL 726990, at *1. And, as discussed *infra* pp. 27-28, private litigants are not agents of the State.

The United States has not proven that SB 8 causes a cognizable injury to any of its programs. Consequently, it lacks standing to bring its preemption and intergovernmental-immunity claims. But even if the Court believed that the United States had demonstrated an injury-in-fact with respect to its federal programs, that injury has no relevance to—and thus would not create standing for—its Fourteenth Amendment claim, as "standing is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996); *see also In re Gee*, 941 F.3d at 160. The United States' other theories do not support standing to bring that claim.

[3] For example, the federal government did not demonstrate how many abortions funded by programs that are subject to the Hyde Amendment (which often requires the abortion to be necessary or the health of the mother) would lead to liability under SB 8 (which has an exception for medical emergencies). *Compare* Tex. Health & Safety Code § 171.205(a), *with* Pub. L. No. 116–260, div. H, tit. V, §§ 506–07, 134 Stat. 1182 at 1622.

b. *Parens patriae*

The district court also erroneously relied on a *parens patriae* theory that the United States largely disclaimed in the district court, ROA.1645 n.1, and did not pursue in the Supreme Court, ROA.1763-68. *Parens patriae* does not permit a sovereign to "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). Instead, the United States must identify its own sovereign or quasi-sovereign interest that is at stake, *id.* at 601, and cannot "merely litigat[e] as a volunteer the personal claims of its citizens," *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976) (per curiam) (collecting cases).

But that is all the United States is doing—suing to "vindicate[] the constitutional rights of [its] citizens." ROA.1767. Labeling that vindication of rights a "sovereign interest," as the district court did, ROA.1767-68, does not alter the fundamental nature of the United States' suit: to "vindicate the rights of individuals," ROA.22. A sovereign plaintiff asserting "nothing more than a collectivity of private suits" has "[n]o sovereign or quasi-sovereign interests" at stake. *Pennsylvania*, 426 U.S. at 666.

The district court cited a single case to support its view that a violation of federal law is a violation of federal sovereignty: *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 771 (2000). ROA.1768 n.23. But that case involved a violation of a federal law that prohibited fraud against the United States, which is a classic injury to the United States and its sovereignty. *Stevens*, 529 U.S. at 771. It

does nothing to establish that the United States is injured by any alleged injury to the constitutional rights of individual citizens.

The district court also purported to find a federal sovereign interest in ensuring that constitutional rights "remain redeemable in federal court." ROA.1767. But any constitutional question determined by state courts remains ultimately reviewable in federal court via a petition to the Supreme Court. 28 U.S.C. § 1257. Moreover, as the Supreme Court since explained, it has never recognized "an unqualified right to pre-enforcement review of constitutional claims in federal court." *WWH II*, 142 S. Ct. at 537-38. There is no constitutional injury in having to proceed in state courts which are also obligated to apply federal constitutional law. *Id.*; *see Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976). The United States thus cannot be injured simply because some of its citizens do not wish to proceed in state court. *See WWH II*, 142 S. Ct. at 537. Without a sovereign interest separate from vindicating the rights of its citizens, the United States lacks *parens patriae* standing.

c. *In re Debs*

Finally, the district court erred in concluding that the United States established an injury through reliance on *In re Debs*. ROA.1768-72. *Debs* concerned a public-nuisance suit brought by the United States to stop the disruptions to interstate commerce and the mails caused by the Pullman Railroad strike. 158 U.S. 564. It has always been highly controversial, has been abrogated by statute, and is still considered

at the outer bounds of the Court's equitable jurisdiction.[4] It does not extend so far as to permit the United States to evade the limits of *parens patriae* standing.

i. *Debs* recognized a limited cause of action to enforce either the United States' own proprietary interests, or pseudo-proprietary interests held by the general public that only the United States may vindicate. As the *Debs* court noted, at the time, the Pullman Railroad Strike was considered criminal activity that would have justified—should the federal government have so chosen—armed intervention. *Id.* at 582. A civil suit was a less drastic means of enforcing federal law. *Id.* Because traditional courts of equity could not enjoin the commission of a crime absent the existence of a property interests, Bamzai & Bray, *supra* n.4, the Court took pains to note that the United States had a propriety interest over the mail. *Debs*, 158 U.S. at 583-84. Moreover, it had a constitutional role respecting interstate commerce that involved "direct supervision, control, and management" on behalf of the public. *Id.* at 578.

As the *Debs* Court explained, the Constitution vested Congress with power 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. Congress then exercised its power over interstate commerce "in a variety of legislative acts." *Id.* It also "by a mass of

[4] Aditya Bamzai & Samuel L. Bray, Debs *and the Federal Equity Power* at 22, SSRN (October 30, 2021), https://tinyurl.com/8zuhbpud (describing *Debs* as "politically explosive"); *id.* at 3 ("It is rare that the scope of equitable remedies makes its way into political party platforms and the State of the Union address.").

legislation, established the great post-office system of the country." *Id.* at 580. Thus, the Court concluded,

> The national government, given by the constitution power to regulate interstate commerce, has by express statute assumed jurisdiction over such commerce when carried upon railroads. It is charged, therefore, with the duty of keeping those highways of interstate commerce free from obstruction, for it has always been recognized as one of the powers and duties of a government to remove obstructions from the highways under its control.

Id. at 586. In other words, constitutional power, when combined with the extensive statutory schemes enacted by Congress, created an obligation or duty on the part of the United States to act to protect commerce and the mails. *See Clark v. Valeo*, 559 F.2d 642, 654 (D.C. Cir. 1977) (Tamm, J., concurring).

None of this can be said for abortion. No one suggests that armed intervention would be appropriate here. As discussed above (at 18-19), the United States has no proprietary interest at stake. Far from claiming a right to regulate abortion, the United States spent decades attempting to obtain reversal of *Roe v. Wade*, 410 U.S. 113, 154 (1973). *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992) (noting the United States had asked that *Roe* be overturned six times). The Hyde Amendment prohibits federal funding of elective abortion. *Harris v. McRae*, 448 U.S. 297, 302 (1980). And Congress recently failed to pass legislation that purported to grant broad access to abortion in the United States and give the Attorney General the authority to sue any State or state official that attempted to limit that access. Women's Health Protection Act, H.R. 3755, 117th Cong. (2021).

ii. The district court's two stated reasons for expanding *Debs*—and thereby the scope of federal-court equitable jurisdiction—do not hold water. *First*, because the court admitted that the most common reading of *Debs* limits it to the context of interstate commerce, ROA.1769 (citing *United States v. Solomon*, 563 F.2d 1121, 1129 (4th Cir. 1977)),[5] the district court attempted to find a link to commerce to justify its jurisdiction. ROA.1771-72. But the United States did not bring a Commerce Clause claim, and the Commerce Clause has *never* been among the plethora of potential constitutional sources cited for the putative right to elective abortion. *See Roe*, 410 U.S. at 152 (citing the First, Fourth, Fifth, Ninth, and Fourteenth Amendments). If any tangential effect on interstate commerce were enough to invoke the unique authority recognized in *Debs*, the United States would have presumably used it in the 1960s to challenge allegedly unconstitutional state laws. It did not: the U.S. Solicitor General admitted at oral argument before the Supreme Court, the United States "can't point to a case" where it "play[ed] the exact same role . . . in other areas involving constitutional rights." Tr. 6-8, *United States v. Texas*, No. 21-588 (U.S. Nov. 1, 2021).

Second, the district court took refuge in *Debs*' statement that the United States may "promote the interest of all" and prevent injury to "the general welfare." ROA.1769 (citing *Debs*, 158 U.S. at 584). But finding an injury anytime the United

[5] This admission was for good reason: on the rare occasions this Court has cited *Debs*, it has been in lawsuits that both (1) concern the obstruction of interstate commerce, and (2) involve a federal statute regarding commerce. *See Fla. E. Coast Ry. Co. v. United States*, 348 F.2d 682, 685 (5th Cir. 1965); *United States v. City of Jackson*, 318 F.2d 1, 5, 16 (5th Cir. 1963).

States articulates a public interest would render unnecessary the *Debs* Court's efforts to identify both a proprietary interest as well as an "obligation on the part of the United States to the public or to any individual" to act. *Debs*, 158 U.S at 585. Absent such factors, *Debs* made clear that the United States "can no more sustain such an action than any private person could under similar circumstances." *Id.* As the Fourth Circuit subsequently held, the federal government may bring suit under *Debs* only when it demonstrates "a well-defined *statutory* interest of the public at large." *Solomon*, 563 F.2d at 1127 (emphasis added). "[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. 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*, 559 F.2d at 654 (Tamm, J., concurring).

In sum, *Debs* cannot be used to manufacture standing here. Unlike in the Pullman rail strike, the United States would not be justified to call out the army because a statutory scheme requires individuals to vindicate their constitutional rights in state courts. *Compare Debs*, 158 U.S. at 582, *with WWH II*, 142 S. Ct. at 537 ("[T]hose seeking to challenge the constitutionality of state laws are not always able to pick and choose the timing and preferred forum for their arguments."). Moreover, the United States has no propriety interest in abortions. Nor has it been "given by the constitution power to regulate" abortion, has not "by express statute assumed jurisdiction over" abortion in the fifty States, and is not "charged . . . with the duty of" ensuring abortion access throughout the country. *See Debs*, 158 U.S. at 586.

2. Any alleged injury is not traceable to or redressable by Texas.

Even if the United States has suffered or will certainly suffer an injury from SB 8, it has not established that such an injury is traceable to Texas. As the Supreme Court recently held, if the government does not enforce a challenged law, any injury from that law is not traceable to the government. *California*, 141 S. Ct at 2114-15. Because Texas officials do not enforce the challenged provisions of SB 8, any alleged harm cannot be traced to them.

Nor can any injury be redressed by an injunction against Texas. As the Supreme Court just reiterated, "federal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves." *Whole Woman's Health*, 141 S. Ct. at 2495. That is because remedies do not operate "on legal rules in the abstract" but "with respect to specific parties." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1486 (2018) (Thomas, J., concurring) (internal quotation marks omitted). Because "an injunction is a judicial process or mandate operating *in personam*," *Nken v. Holder*, 556 U.S. 418, 428 (2009), there must be someone against whom an injunction could operate to provide redress. And "[a] state can act only through its agents." *Briscoe v. Bank of Ky.*, 36 U.S. 257, 318 (1837). The district court admitted it was uncertain who exactly to enjoin. ROA.1845. Because none of the options identified could provide relief, the United States' injury is not redressable by an injunction against Texas.

a. Executive officials

The district court purported to enjoin "officers, officials, agents, employees, and any other persons or entities acting on [Texas's] behalf" from enforcing SB 8.

ROA.1845. But as the Texas Supreme Court has confirmed, SB 8's heartbeat provisions cannot be enforced by any state official. *WWH III*, 2022 WL 726990, at *1; Tex. Health & Safety Code §§ 171.207(a), .208(a). Consequently, any injury caused by SB 8 cannot be traced to any executive official.

Relatedly, because executive officials lack power to enforce the challenged law, the district court's injunction of state officials redresses nothing. *See California*, 141 S. Ct. at 2116. Because here "there is no action—actual or threatened—whatsoever" by any Texas official, but "only [SB 8's allegedly] textually unenforceable language," any injury to the United States cannot be redressed with an injunction aimed at Texas executive officials. *Id.* at 2115; *see also Okpalobi v. Foster*, 244 F.3d 405, 426-27 (5th Cir. 2001) (en banc).

b. Members of the judicial branch

The district court also attempted to enjoin state judges and court clerks from accepting, docketing, hearing, and resolving SB 8 lawsuits. ROA.1845; *see also* ROA.1798-802. But the Supreme Court has repeatedly forbidden federal district judges from enjoining state judges because "an injunction against a state court would be a violation of the whole scheme of our government." *Ex parte Young*, 209 U.S. 123, 163 (1908). Even as it recognized a federal court's power to enjoin state executive officials "from commencing suits" in state courts, the Supreme Court cautioned that such authority "does not include the power to restrain a court from acting in any case brought before it." *Id.* "Clerks serve to file cases as they arrive, not to participate as adversaries in those disputes," and "[j]udges exist to resolve controversies about a law's meaning or its conformance to the Federal and State Constitutions,

not to wage battle as contestants in the parties' litigation." *WWH II*, 142 S. Ct. at 532. Thus, the Court reiterated, "'no case or controversy' exists 'between a judge who adjudicates claims under a statute and a litigant who attacks the constitutionality of the statute.'" *Id.* (quoting *Pulliam v. Allen*, 466 U.S. 522, 538 n.18 (1984)).

Courts of appeals have likewise long rejected lawsuits against state judges, holding that "[t]he requirement of a justiciable controversy is not satisfied where a judge acts in his adjudicatory capacity." *Bauer v. Texas*, 341 F.3d 352, 359 (5th Cir. 2003). And it recently confirmed that *Bauer* applies here when it held that the *Whole Woman's Health* plaintiffs challenging SB 8 were "not 'adverse' to the state judges," who were "disinterested neutrals who lack a personal interest in the outcome of the controversy." *WWH I*, 13 F.4th at 444 (quoting *Bauer*, 341 F.3d at 359). The First and Eleventh Circuits have also 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) (Breyer, J.); *see also Paisey v. Vitale In & For Broward Cnty.*, 807 F.2d 889, 893 (11th Cir. 1986).[6]

Because Texas's judicial personnel are not adverse to the United States, there is no injury traceable to them. And because a federal court cannot enjoin a State's judges, there can be no redress. The United States lacks standing to seek an injunction of Texas's judicial personnel.

[6] For the same reasons, other circuits have rejected attempts to name the judges who apply challenged statutes as defendants under section 1983. *See Allen v. DeBello*, 861 F.3d 433, 442 (3d Cir. 2017); *Grant v. Johnson*, 15 F.3d 146, 148 (9th Cir. 1994).

c. Private parties

Nor was it proper for the district court to enjoin unnamed private parties. Unlike public officials, SB 8 *is* enforced by private parties who bring civil actions regarding post-heartbeat abortions. Tex. Health & Safety Code § 171.208(a). Yet the United States did not sue any private parties. Because "under traditional equitable principles, no court may 'lawfully enjoin the world at large,'" *WWH II*, 142 S. Ct. at 535 (quoting *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832 (2d Cir. 1930) (L. Hand, J.)), the United States is without a means of redress.

As an initial matter, it is unclear exactly what the district court intended with its injunction respecting private parties. The court concluded it did not need to craft one that ran to private individuals per se. ROA.1845. But it also asserted that private individuals' actions would be proscribed because state action is now prohibited. ROA.1845. And the district court asserted that it could enjoin private parties as state actors. ROA.1802-04, 1845. Assuming this vague language even satisfies Federal Rule of Civil Procedure 65, the theory is wrong.

Private parties "are plainly not agents of the State" even when they seek to defend state law. *Hollingsworth v. Perry*, 570 U.S. 693, 713 (2013). A private plaintiff bringing an SB 8 suit is not 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.). As Justice O'Connor put it, "not all that occurs in the court-room is state action." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 150 (1994) (O'Connor, J., concurring).

Because the United States did not sue any private party, and the actions of unknown private parties who might file suit are not "state action," any alleged injury caused by private parties cannot be redressed by an injunction against "Texas."

* * *

The decision to file a lawsuit "is not to be placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" *Diamond*, 476 U.S. at 62 (quoting *United States v. SCRAP*, 412 U.S. 669, 687 (1973)). That principle does not change simply because the United States is the plaintiff. While the United States currently opposes SB 8, its opposition does not translate into an identifiable injury that can be traced to Texas or be redressed by an injunction against Texas. For that reason, it lacks standing, and the preliminary injunction should be reversed.

B. The United States' lawsuit is not a justiciable case or controversy.

In the end, the United States' lawsuit is a suit solely to determine the constitutionality of SB 8. Such suits are not justiciable. *See Muskrat*, 219 U.S. at 361-63. "[U]nder our constitutional system[,] 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). Instead, "[c]onstitutional judgments . . . are justified only out of the necessity of adjudicating rights in particular cases between the litigants brought before the Court." *Id.* at 611.

This sentiment is not new. As the Court explained in *Muskrat*, the "judicial power . . . is the right to determine actual controversies arising between adverse litigants." 219 U.S. at 361. Thus, the power of a court to declare a law unconstitutional arises only when "the rights of the litigants in justiciable controversies require the court to choose between the fundamental law [i.e., the Constitution] and a law purporting to be enacted within constitutional authority." *Id.* In other words, federal courts lack the power to declare SB 8 unconstitutional unless that declaration is necessary to resolve an otherwise existing controversy between Texas and the United States. As shown above, there is no existing Article III controversy between Texas and the United States.

Instead, as in *Muskrat*, the "whole purpose" of the United States' lawsuit is to "determine the constitutional validity" of SB 8 "in a proceeding against the government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in question." *Id.* at 361-62. The reasons the Court found *Muskrat* nonjusticiable apply here: "[t]his attempt to obtain a judicial declaration of the validity of [SB 8] is not presented in a 'case' or 'controversy,' to which, under the Constitution of the United States, the judicial power alone extends." *Id.* at 361.

Because SB 8 permits only private civil actions, not enforcement by Texas officials, a judgment here would "amount[] in fact to no more than an expression of

opinion upon the validity" of SB 8. *Id.* at 362. Any questions regarding the constitutionality of SB 8 may still be raised in the private civil suits authorized by SB 8, and when they "are properly brought before [a] court for consideration they, of course, must be determined in the exercise of its judicial functions." *Id.* The United States cannot short circuit the state-court process through this nonjusticiable action. *See WWH II*, 142 S. Ct. at 532 (citing *Muskrat*, 219 U.S. at 361).

II. The United States Is Unlikely to Prevail Because It Lacks an Equitable Claim.

Even if the United States has brought a justiciable case or controversy, it has no equitable claim or remedy. Federal courts' equitable jurisdiction is limited to those equitable claims and remedies that existed in 1789, *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999), and Congress can displace that jurisdiction by providing statutory causes of action, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014). The good-for-one-case-only claim that the United States seeks to bring did not exist (at least) until 2021. And Congress has enacted multiple statutes giving effect to the rights guaranteed by the Fourteenth Amendment, allowing the United States to bring suit in limited circumstances, but has denied the United States the authority to bring suit in these circumstances. The district court was wrong to conclude that, merely because the United States could not identify any other claim to meet its needs, an equitable claim must spring into existence. *See, e.g.*, ROA.1776 ("That remedy is available where no adequate remedy exists at law.").

A. The United States does not have an equitable claim.

Because the Constitution does not create a cause of action for preemption, *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324-25 (2015), or due process, *Hearth, Inc. v. Dep't of Pub. Welfare*, 617 F.2d 381, 382-83 (5th Cir. 1980) (per curiam), the United States has attempted to bring an equitable claim. But as the Supreme Court has explained, "[t]he equitable powers of federal courts are limited by historical practice" to those exercised by the English Court of Chancery in 1789. *WWH II*, 142 S. Ct. at 535 (citing *Atlas Life Ins. Co. v. W. I. Southern, Inc.*, 306 U.S. 563, 568 (1939)); *Grupo Mexicano*, 527 U.S. at 318. Beyond that, the Supreme Court's "traditionally cautious approach to equitable powers . . . leaves any substantial expansion of past practice to Congress." *Grupo Mexicano*, 527 U.S. at 329. The district court departed from these well-established principles.

1. The Supreme Court has rejected the view that "the grand aims of equity" permit a "general power to grant relief whenever legal remedies are not 'practical and efficient.'" *Id.* at 321. The Court instead recognized that "[w]hen there are indeed new conditions that might call for a wrenching departure from past practice, Congress is in a much better position than we both to perceive them and to design the appropriate remedy." *Id.* at 322. For example, the Court declined to extend the equitable "creditor's bill," which permitted a creditor whose debt had been reduced to judgment to prevent a debtor from disbursing certain assets, to a scenario in which the creditor had not reduced his debt to judgment. *Id.* at 319-21. Thus, the district court's assertion there need be no "blueprint" or "categorical definition" for an equitable cause of action contravenes precedent. ROA.1775-76.

The Supreme Court has also cautioned that a request for judicial innovation in this field must be viewed in the context that "general federal question jurisdiction did not even exist for much of this Nation's history." *WWH II*, 142 S. Ct. at 538 (citing *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 376 (2012)). And it has never held that there is a constitutional right to pre-enforcement federal review of state-law causes of action. *Id.* at 537-38. Instead, "[t]o this day, many federal constitutional rights are as a practical matter asserted typically as defenses to state-law claims, not in federal pre-enforcement cases like this one." *Id.* at 538 (citing *Snyder v. Phelps*, 562 U.S. 443 (2011)). And there are many circumstances in which parties may never have a 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).

There is no long-existing equitable action that permits the United States to sue a State to stop private parties from filing certain suits or to obtain an injunction against judges and clerks. Indeed, the Supreme Court held not long after its creation that "a circuit court of the United States had not jurisdiction to enjoin proceedings in a *state court*." *Diggs v. Wolcott*, 8 U.S. (4 Cranch) 179, 180 (1807). And Justice Story similarly wrote that "the State Courts cannot injoin proceedings in the Courts of the United States; nor the latter in the former." 2 Joseph Story, Commentaries on Equity Jurisprudence at 186 § 900 (1836). By the mid-twentieth century, the "general rule" was well-understood to be "that state and federal courts would not interfere with or try to restrain each other's proceedings." *Donovan v. City of Dallas*, 377 U.S. 408, 412 (1964).

2. The district court refused to heed these rules of judicial restraint. Far from attempting to analogize the United States' claim to a pre-1789 cause of action, the district court allowed the United States to seek to enjoin state courts from hearing certain causes of action because "[w]hen no other remedy is available, by statutory right or otherwise provided by law, traditional principles of equity remain to ensure that fundamental rights are protected." ROA.1778. This conclusion mirrors that of the *dissent* in *Grupo Mexicano*, which argued that it was sufficient to "define[] the scope of federal equity in relation to the *principles* of equity existing at the separation of this country from England," rather than "limit[ing] federal equity jurisdiction to the specific practices and remedies of the pre-Revolutionary Chancellor." 527 U.S. at 336 (Ginsburg, J., dissenting in relevant part) (internal citations omitted).

The examples cited by the district court do not support the court's conclusion. They typically concern long-established equitable causes of action such as to abate a public nuisance, *Debs*, 158 U.S. at 587, or provide relief against fraud, *United States v. Am. Bell Tel. Co.*, 128 U.S. 315, 352 (1888); *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 279 (1888). The district court also repeatedly cited the *dissent* in *Paine Lumber Co. v. Neal*, 244 U.S. 459 (1917). ROA.1775-79. It did *not* cite a prior case reading the Fourteenth Amendment to provide a means for the federal courts to dictate what causes of action a state court might here. Nor could it: "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." *United States v. City of Philadelphia*, 644 F.2d 187, 201 (3d Cir. 1980). This "lack of historical precedent"

is "the most telling indication of the severe constitutional problem," *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010)—in this instance, the judicial creation of a cause of action that Congress chose not to provide.

B. Any equitable remedy existed has been displaced by Congress.

To the extent the Court believes the equitable claim the United States seeks to assert here existed in 1789, it has since been displaced by Congress. "[A] court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied." *Lexmark*, 572 U.S. at 128. After all, judicially recognized causes of action could undermine any more limited remedial schemes that Congress has established. *See Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 499-501 (5th Cir. 2020) (en banc) (Oldham, J., concurring); *see also Hernandez v. Mesa*, 140 S. Ct. 735, 747 (2020) ("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)).

Congress knows how to provide a remedy to the United States when it wants to do so. After the ratification of the Reconstruction Amendments, Congress "gave extensive consideration to the creation of remedies to enforce" them. *Philadelphia*, 644 F.2d at 194. And it has given the Attorney General the ability to enforce other legal regimes: 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), to enforce the Voting Rights Act, *see* 52 U.S.C. §§ 10101(c), 10308(d), 10504, 20510(a), as well as to "intervene in" certain federal equal-protection suits, 42 U.S.C. § 2000h-2. Congress has also given the Attorney General express causes

of action to enforce various statutory rights, including statutory rights related to abortion. *See* 18 U.S.C. § 248(c)(2)(A); 42 U.S.C. §§ 2000a-5(a), 2000e-5(f)(1).

But Congress has never given the Attorney General a free-standing cause of action to pursue any and every Fourteenth Amendment violation. *Philadelphia*, 644 F.2d at 195 (noting this understanding was "unanimously shared by members of Congress and Attorneys General"). To the contrary, Congress declined to provide such a cause of action—most recently just last year. Women's Health Protection Act, H.R. 3755, 117th Cong. (2021) (purporting to create abortion rights and allow the Attorney General to enforce them). 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). Congress has not granted the Attorney General the authority to bring this lawsuit—the district court should not have done so either.

III. The United States Is Unlikely to Prevail on the Merits of Its Claims.

The district court also erred on the merits by oversimplifying the undue-burden analysis and ignoring evidence that SB 8 is not likely to impact federal programs. Because this is a facial challenge to an abortion regulation, the United States must prove SB 8 poses an undue burden on the ability of a large fraction of women to obtain a previability abortion. *Casey*, 505 U.S. at 895 (plurality op.). But no court has grappled with whether a State may limit abortions to only those the Supreme Court's precedent requires it to permit and enforce that limit via private civil suit. Tex. Health & Safety Code § 171.209(b) (incorporating undue-burden defense to lawsuits brought under SB 8). And the district court failed to grapple with evidence

demonstrating that the United States' predictions of harm to its programs were simply unfounded. Nothing about SB 8 conflicts with the rules and policies identified by the United States nor does SB 8 attempt to govern the United States' conduct.

A. SB 8 does not violate the Fourteenth Amendment but incorporates the undue-burden test.

Although 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), it incorporates an undue-burden affirmative defense, *id.* § 171.209(b). *See also WWH II*, 142 S. Ct. at 530 n.1 (rejecting argument that SB 8 limited the undue-burden defense). Thus, SB 8 creates liability only for those post-heartbeat abortions that are not protected under current Supreme Court precedent. The United States has not shown that drawing this line, and enforcing it with private civil suits, is an undue burden for a large fraction of women.

The district court concluded SB 8 was per se unconstitutional because it "ban[ned]" some previability abortions. ROA.1809-10; *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 that ignores the built-in undue-burden defense. Creating the potential for liability for only those abortions that are not constitutionally protected is not a "ban" on abortions that are protected. *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 United States must instead demonstrate that SB 8 imposes a substantial obstacle on abortion access for a large fraction of women. *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 607 (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 provide them because they do not wish to litigate their liability in a state court under a statute they deem unconstitutional. *See, e.g.*, ROA.385, 427, 454. Resting an undue-burden finding on the independent decisions of abortion providers gives them a heckler's veto over any abortion regulation with which they disagree. Instead, the United States should have been required to prove that the number of SB 8 lawsuits likely to be filed and the amount of liability likely to be imposed was so burdensome that providers were left with no choice but to stop performing post-heartbeat abortions. Given that Texas courts hearing SB 8 suits would be bound by Supreme Court precedent on abortion, proving such a scenario would have been difficult, if not impossible. *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).

There can be no question that limiting abortions in Texas to those required to be permitted under Supreme Court precedent does not violate Supreme Court precedent. *See, e.g.*, *Casey*, 505 U.S. at 879 (plurality op.) (holding that the States may proscribe some abortions). The only question remains whether adjudicating those challenges on a case-by-case basis would amount to an undue burden. The record does not contain sufficient evidence that it would. Instead, as the Supreme Court has held, "as-applied challenges are the basic building blocks of constitutional

adjudication." *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007). Texas should be permitted to limit access to abortions that fall outside Supreme Court protection and to enforce that limit through private suits.

B. SB 8 is not preempted by any law concerning federal programs.

1. The district court also erred in finding that SB 8 conflicts with, and is therefore preempted by, various federal regulations, manuals, and policies that govern the operation of several federal programs. ROA.1836-40. The United States failed to demonstrate that "compliance with both federal and state regulations is a physical impossibility," or that SB 8 "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona v. United States*, 567 U.S. 387, 399 (2012).

First, if the Court agrees that SB 8 does not unduly burden abortions protected by the Supreme Court's decisions in *Roe* and *Casey*, then it is not preempted by any law governing the federal programs. The United States has not identified any law, regulation, or policy that requires its federal programs to assist with any abortions that fall outside Supreme Court protection.

Second, the United States points to several regulations and policies that require federal employees to "arrange" for certain abortions, 28 C.F.R. § 551.23(c) (BOP); ROA.887 (USMS must arrange for abortion only if it falls within the Hyde Amendment); or provide transportation to the appointments, ROA.557 (Job Corps Handbook), 890-91 (USMS policy); or in the case of ORR "not undertake actions to prevent the [unaccompanied child] from obtaining the abortion," ROA.2436. But the United States has not identified any law, regulation, or policy that guarantees a

woman a post-heartbeat abortion performed *in Texas*. Thus, federal employees can comply with any obligations to provide pre-heartbeat abortions by using in-state providers; any obligation to provide post-heartbeat abortions can be acquired from out-of-state providers. Because compliance with both SB 8 and federal law is possible, there is no preemption. *See Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1678 (2019).

Similarly, the United States points to FEHB plans, state Medicaid plans, and a BOP policy, that cover or pay for abortions as permitted under the Hyde Amendment—when the mother's life is in danger or when the pregnancy is the result of rape or incest. ROA.523, 569, 577-78. For similar reasons, these laws do not prevent a woman from obtaining any covered abortion, and the United States has not shown that (1) its agencies or contractors would refuse payment or coverage, or (2) its agencies and contractors would be sued under SB 8, let alone be held liable given the exemption under SB 8 for medical emergencies.

Third, several of the policies the United States cites provide that federal employees must follow state law when arranging for abortion-related services. ROA.523 (BOP), 539 (USMS), 2435 (ORR). As the Court has explained, "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Wyeth v. Levine,* 555 U.S. 555, 565 (2009). It cannot be that Congress intended to preempt all state abortion laws through these programs when the statutory structure either permits or requires the programs to comply with state law. The district court attempted to avoid this conclusion by asserting that federal law assumes state law is constitutional. ROA.1838. But that reasoning is without textual support in the relevant laws and

would enable federal employees to pick and choose which state laws are preempted based on their beliefs about the Constitution.

2. SB 8 also does not "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona*, 567 U.S. at 399. There is no congressional purpose or objective of providing post-heartbeat abortions or ensuring that women have access to such abortions. As noted above, current congressional policy is that federal funds may not be used to pay for elective abortions. *Harris*, 448 U.S. at 302.

The United States' collection of handbooks and policies does not establish a congressional purpose or objective and is not entitled to preemptive effect under the Supremacy Clause. *See, e.g.*, ROA.539 (USMS Policy Directive), 557 (Job Corps Handbook), 897 (ORR Policy Memorandum). The Supremacy Clause states that only the "Constitution," "the Laws of the United States," and Treaties" are the "supreme Law of the Land." U.S. CONST. art. VI, cl. 2. "'There is no federal preemption *in vacuo*,' without a constitutional text, federal statute, or treaty made under the authority of the United States." *Kansas v. Garcia*, 140 S. Ct. 791, 801 (2020) (quoting *P.R. Dep't of Consumer Aff. v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988)). "Invoking some brooding federal interest or appealing to a judicial policy preference" does not show preemption. *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019) (plurality op.); *see also Lipschultz v. Charter Advanced Servs. (MN), LLC*, 140 S. Ct. 6, 7 (2019) (Thomas, J., concurring in the denial of certiorari) ("It

is doubtful whether a federal policy—let alone a policy of nonregulation—is 'Law' for purposes of the Supremacy Clause.").[7]

It is possible to comply with SB 8 and the federal law, regulations, and policies identified by the United States. And compliance with SB 8 is not an obstacle to any congressional policy. The district court therefore erred in concluding that SB 8 was preempted by federal law.

C. SB 8 does not violate intergovernmental immunity.

SB 8 does not violate intergovernmental immunity either. 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.). "[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 United States has not shown that SB 8 either directly regulates the United States or discriminates against it. Because SB 8 nowhere mentions the United States, its agencies, employees, or contractors, it can neither regulate nor not discriminate

[7] At minimum, the United States cannot base its preemption claim on any agency policy or practice that was not formally adopted through notice-and-comment rulemaking, thereby lacking the force of law. *E.g.*, *City of Morgan City v. S. La. Elec. Co-op. Ass'n*, 49 F.3d 1074, 1078 n.7 (5th Cir. 1995) (Jones, J., dissenting from denial of rehearing en banc) (citing *Wabash Valley Power Ass'n v. Rural Electrification Admin.,* 903 F.2d 445, 453 (7th Cir.1990); *Thomas v. New York,* 802 F.2d 1443 (D.C. Cir. 1986)).

against them. Moreover, it is unlikely a court would include federal employees within the scope of those who may be sued. *See R.R. Comm'n*, 290 S.W.2d at 702.

The district court wrongly assumed that the possibility of hypothetical, and likely unsuccessful, lawsuits filed by private parties constitutes a "regulation" of the United States by Texas. ROA.1837. But the possibility that a citizen might try to sue the United States does not mean a State has regulated the United States otherwise every private cause of action enacted by a State would be subject to this constitutional challenge.

Taken to its extreme, the United States' position would invalidate any abortion regulation that the United States deems inconvenient on the ground that it "regulates" federal employees seeking to arrange abortion services. *E.g.*, Tex. Health & Safety Code § 171.012(a)(4) (24-hour waiting period requiring requires two trips); *id.* § 171.003 (physician-only law, which could require longer travel). Again, given that the policy of multiple federal programs is to act in accordance with state law, *see supra* pp. 6-8, the United States cannot now claim that Texas law unconstitutionally regulates it.

IV. The Remaining Preliminary-Injunction Factors Favor Texas.

A. The United States failed to show it faced a likelihood of irreparable harm absent an injunction. *Winter*, 555 U.S. at 20. Indeed, its failure to file a lawsuit until four months after SB 8 became law demonstrates a decided absence of urgency. The lack of evidence that an injury to the United States' federal programs is certainly impending also demonstrates the lack of a likelihood of irreparable harm. *See supra* pp. 15-17.

Further, the injunction may not even alleviate the alleged harm. Given that the injunction could eventually be reversed, abortion providers may be unwilling to perform post-heartbeat abortions for fear of future lawsuits. *See, e.g.*, *Chiafalo v. Inslee*, 224 F. Supp. 3d 1140, 1148 (W.D. Wash. 2016). The only evidence to the contrary was a single declaration containing hearsay statements about what some other clinics might do if an injunction were entered. ROA.1709.

B. The United States also failed to demonstrate that the equities tip in its favor or that the injunction is in the public interest. *Winter*, 555 U.S. at 20. The injunction of a state law "clearly inflicts irreparable harm on the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018) (citing *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers)). Further, it is in the public interest not to upend subject-matter jurisdiction, equity, and injunctive remedies, all so that the United States can enjoin state courts from hearing lawsuits that the United States disfavors.

The Supreme Court saw no reason to reinstate the preliminary injunction pending appeal after full briefing and argument on its merits. *United States*, 142 S. Ct. at 522. This Court should follow the lead of the Supreme Court and reverse the preliminary injunction.

V. The Preliminary Injunction Is Overbroad.

Even if the United States had shown a likelihood of success on one of its claims and irreparable harm (and it has not), the injunction the district court entered is vastly overbroad. An "injunction is overbroad" if "it attempts to affect rights between [a party] and [others] who [a]re not parties to the action." *Bethell v. Peace*, 441 F.2d 495, 498 (5th Cir. 1971); *see also Scott v. Donald*, 165 U.S. 107, 117 (1897). The

district court did precisely that. Moreover, the district court improperly ignored SB 8's severability clauses.

A. The district court erred first by making vague statements about how the injunction would work against third parties and particularly private parties, stating that "private individuals' actions are proscribed to the extent their attempts to bring a civil action under Texas Health and Safety Code § 171.208 would necessitate state action that is now prohibited." ROA.1845. This language is overbroad for two primary reasons.

First, as explained above, there is no standing to enjoin private parties in a suit against Texas because filing a private civil lawsuit is not "state action." *See supra* pp. 27-28. As the Supreme Court stated, even if Texas state officials could be enjoined from enforcing SB 8, there is "nothing that might allow a federal court to parlay that authority . . . into an injunction against any and all unnamed private persons who might seek to bring their own S. B. 8 suits." *WWH II*, 142 S. Ct. at 535.

Second, federal law generally prohibits enjoining individuals who are not parties to a lawsuit, with exceptions only for the parties' officers, agents, servants, employees, and attorneys and those in active concert or participation with them. Fed. R. Civ. P. 65(d)(2). It is, therefore, "error to enter the injunction against" non-parties "without having" determined they were "in concert" with the State "in a proceeding to which [each non-party was made] a party." *Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, 395 U.S. 100, 112 (1969). "*[W]hether* a particular person or firm is among the 'parties' officers, agents, servants, employees, and attorneys; [or] other persons in active concert or participation with' them 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, C.J.) (quoting Fed. R. Civ. P. 65(d)(2); citation omitted; alteration in original).

Other than the intervenors, no private individual was given the opportunity to be heard in this case before being subjected to the district court's injunction. Thus, even if private individuals could be in active concert with Texas, the district court erred in enjoining them without giving them an opportunity to be heard.

B. The district court also erred in failing to apply SB 8's severability clauses. The Texas Legislature explicitly stated that (1) it intended all provisions of chapter 171, in which the heartbeat provisions are located, to be severable, and (2) it would have enacted any and all provisions of chapter 171 regardless of whether any provisions are subsequently determined to be unconstitutional. Tex. Health & Safety Code § 171.212. Section 10 of SB 8 also confirms that each provision of SB 8 is severable. Act of May 13, 2021, 87th Leg., R.S., ch. 62, § 10, 2021 Tex. Sess. Law Serv. at 135.

Federal courts are to apply severability clauses in state laws. *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) (per curiam) ("Severability is of course a matter of state law."). Where the legislature "has explicitly provided for severance by including a severability clause in the statute," the Court must presume that the legislature "did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987); *see also Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2209

(2020) (plurality op.). Courts should "enjoin only the unconstitutional applications of a statute while leaving other applications in force, or . . . sever its problematic portions while leaving the remainder intact." *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328-29 (2006) (citation omitted).

The district court declined to sever any applications of SB 8, citing *Hellerstedt*, 579 U.S. at 625-26. ROA.1835. But unlike that case, this case does not involve an "integrated" set of health-and-safety standards that make severability difficult. *Id.* Rather, there are several obvious lines the district court should have drawn. It should not have enjoined SB 8 as applied to post-viability abortions, as those are not subject to the undue-burden test. *Casey*, 505 U.S. at 846. And it should have severed section 171.203, which requires the physician to first determine whether the unborn child has a detectable heartbeat. Texas law already requires the physician to make the heart auscultation audible, Tex. Health & Safety Code § 171.012(a)(4)(D), and there is no allegation or evidence that this requirement is an undue burden on a large fraction of women.

In their briefing below, the intervenors identified other applications of SB 8 that should have been severed in accordance with the Texas Legislature's intent. ROA.853-54. The district court's decision to enjoin sections 171.201-.212 in their entirety should be reversed.

C. Relatedly, any injunction "must of course be limited to the inadequacy that produced the injury in fact." *Lewis*, 518 U.S. at 357. If the only harm this Court finds is with respect to the federal programs, then the injunction must be limited to suits involving the United States, its agencies, employees, and contractors, as "injunctive

relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Lion Health Servs., Inc. v. Sebelius*, 635 F.3d 693, 703 (5th Cir. 2011); *see also Missouri v. Jenkins*, 515 U.S. 70, 88, 89 (1995) ("[T]he nature of the . . . remedy is to be determined by the nature and scope of the constitutional violation.").

Conclusion

The Court should reverse the district court's order granting a preliminary injunction.

Respectfully submitted.

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Certificate of Service

On May 2, 2022, this brief 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 Symantec Endpoint Protection and is free of viruses.

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This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,923 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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