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

OPPOSITION TO MOTIONS FOR A STAY PENDING APPEAL

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CERTIFICATE OF INTERESTED PERSONS

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Under Fifth Circuit Rule 28.2.1, the United States, as a governmental party, need not submit a certificate of interested persons.

/s/ Daniel Winik
Daniel Winik

TABLE OF CONTENTS

Page

INTRODUCTION

More than two centuries ago, Chief Justice Marshall explained that "the American union" rests on "a constitution the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several states, which none claim a right to pass." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810). Senate Bill 8 (SB8) flouts that principle by blatantly violating constitutional rights and severely constraining judicial review of its unconstitutional restrictions. That is why the United States brought this suit and why the district court preliminarily enjoined the enforcement of SB8. The motions to stay that injunction should be denied.

Texas does not even attempt to defend SB8's constitutionality in this Court. Recognizing that SB8 contravenes controlling Supreme Court precedent, Texas instead crafted the law to hinder judicial review, by disclaiming enforcement powers and by attempting to render any post-enforcement review ineffective. That effort to "counter the judiciary's constitutional pronouncements," in the words of one of the law's drafters, App.116, sets this case apart. Unconstitutional state laws—whether regulating abortion, speech, religion, firearms, or any other subject—generally do not endanger the supremacy of federal law because affected individuals can seek a judicial remedy. *See* 42 U.S.C. § 1983; *Ex parte Young*, 209 U.S. 123 (1908). But by both defying the Constitution and frustrating judicial review, Texas has not merely protracted its assault on the rights of its citizens; it has repudiated its obligations under our national compact in a manner that directly implicates sovereign interests of the United States.

Texas defends its novel scheme by invoking state sovereignty. But state sovereignty does not encompass the authority to defy the Federal Constitution. If Texas's scheme is permissible, no constitutional right is safe from state-sanctioned sabotage of this kind.

Because SB8's unconstitutionality is obvious, and because Texas's sovereign immunity poses no barrier to this suit, Texas is unlikely to succeed on the merits. Moreover, Texas will suffer no cognizable harm if the enforcement of its unconstitutional statute is enjoined during the pendency of this appeal; indeed, if Texas is to be believed, the State has no responsibility for the law at all. And the public interest weighs heavily against a stay. The motions should be denied, and the administrative stay should be lifted as quickly as possible.

STATEMENT

1. SB8 provides that "a physician may not knowingly perform or induce an abortion on a pregnant woman" after cardiac activity is detected in the embryo. Tex. Health & Safety Code (THSC) § 171.204(a). The statute does not exempt pregnancies resulting from rape or incest; the only exception is for "medical emergenc[ies]," *id.* § 171.205(a). It is undisputed, and the district court found, App.828, that cardiac activity occurs well before fetal viability—generally about two weeks after a missed period, and thus before many people even realize they are pregnant, App.831.[1]

[1] "App." citations refer to Texas's exhibits.

Because the Supreme Court has recognized a right to pre-viability abortions—and because courts have accordingly enjoined the enforcement of similar "heartbeat laws," *e.g.*, *Jackson Women's Health Org. v. Dobbs*, 951 F.3d 246, 248 (5th Cir. 2020) (per curiam)—Texas designed SB8 to frustrate judicial review, principally by providing that its requirements "shall be enforced exclusively through … private civil actions." THSC § 171.207(a). The statute expressly precludes suits against "a woman on whom an abortion is performed or induced." *Id.* § 171.206(b)(1). Instead, it creates a private right of action against anyone who performs or aids, or intends to perform or aid, a prohibited abortion, *id.* § 171.208(a)(1)-(3), and provides a bounty of "not less than" $10,000 in statutory damages per abortion, *id.* § 171.208(b)(2). The evident purpose of this structure was to frustrate challenges under Section 1983 and *Ex parte Young*.

Although a defendant in an enforcement suit could in theory contest the law's validity, pregnant persons—whose rights SB8 most directly violates—cannot do so because they cannot be defendants to enforcement suits. Moreover, SB8 imposes such severe disincentives to providing the abortions it prohibits that suits will be few and far between. For example, in addition to mandating a $10,000 bounty per abortion, the law mandates an award of "costs and attorney's fees" to a successful enforcement plaintiff, while a prevailing defendant cannot recover costs or fees. THSC § 171.208(b), (i). The law also raises the specter of retroactive liability by purporting to bar defendants from asserting reliance on a judicial decision that was later "overruled." *Id.* § 171.208(d), (e)(3).

Even if a defendant successfully raises SB8's unconstitutionality as a defense to an enforcement action, moreover, SB8 aims to limit the resulting relief. The law provides that defendants may not assert "non-mutual issue preclusion or non-mutual claim preclusion," THSC § 171.208(e)(5), so that even if a provider repeatedly prevails against enforcement actions, she remains subject to further suits by other plaintiffs and the attendant expenses.

2. As the district court found and Texas does not contest, SB8 had the intended effect: It virtually eliminated access to abortion in Texas after roughly six weeks of pregnancy. App.898-902. Some Texans with sufficient means have traveled hundreds of miles to obtain abortions elsewhere, App.912-14, overwhelming providers and creating backlogs for care in other States, App.915-921.

3. SB8 was challenged by abortion providers and patient advocates, but this Court stayed the district court's proceedings pending an interlocutory appeal. The Supreme Court declined to vacate the stay, citing concerns over whether the plaintiffs had sued appropriate defendants. *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494 (2021).

The United States then brought this suit against Texas itself. The district court granted a preliminary injunction. App.826-938. Texas and intervenors appealed and filed stay motions.

ARGUMENT

To obtain the "extraordinary remedy" of a stay pending appeal, a movant must make "a strong showing of likelihood to succeed on the merits" and must show that it

"will be irreparably harmed absent a stay," that a stay will not "substantially injure other interested parties," and that "the public interest" favors a stay. *Thomas v. Bryant*, 919 F.3d 298, 303 (5th Cir. 2019). Texas and intervenors cannot carry that burden.

I. TEXAS IS UNLIKELY TO SUCCEED ON APPEAL

A. SB8 Is Unconstitutional

Texas does not seriously dispute that the United States is likely to prevail on the merits of its two claims that SB8 violates the U.S. Constitution.

First, the Supreme Court has recognized the right "to have an abortion before viability … without undue interference from the State." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (plurality op.). Because SB8 bans abortions well before viability, it "is unconstitutional under Supreme Court precedent without resort to the undue burden balancing test." *Dobbs*, 951 F.3d at 248. And SB8 also fails that test because it has the purpose and effect of "plac[ing] a substantial obstacle in the path of a woman seeking an abortion." *Casey*, 505 U.S. at 878. SB8's so-called "undue burden defense" does not cure its constitutional infirmity. That defense is a shadow of the *Casey* standard, *see* THSC § 171.209(b), (c), (d) (limiting defense), and does not mitigate SB8's chilling effects, which virtually eliminate any opportunity to raise the defense and which themselves constitute an undue burden. Taken together with its extraordinary measures to frustrate judicial review, SB8 flouts the Supreme Court's admonition that "the Supremacy Clause cannot be evaded by formalism," as a "contrary conclusion … would provide a roadmap for States wishing to circumvent" the Court's precedents.

Haywood v. Drown, 556 U.S. 729, 742 & n.9 (2009). And SB8 reflects a hostility to "[t]he 'general rule' … that plaintiffs may bring constitutional claims under § 1983" rather than being required to pursue such claims in state court, *Knick v. Township of Scott*, 139 S. Ct. 2162, 2172-2173 (2019).

Second, SB8 violates the doctrines of conflict preemption and intergovernmental immunity by impairing the ability of federal agencies, contractors, and employees to exercise their duties in a manner consistent with the Constitution and federal law. App.925-929. Texas responds that its courts might construe SB8 not to apply to federal actors. Mot. 5. But SB8's text contains no such exception, and Texas's authorities from more than six decades ago afford little comfort given Texas courts' current emphasis on "the plain meaning of the text." *Greater Hous. P'ship v. Paxton*, 468 S.W.3d 51, 58 (Tex. 2015). And SB8 would still hinder the federal government's operations even if it did not directly govern federal actors.

B. This Suit Is A Proper Vehicle For Enjoining The Enforcement Of SB8

Texas principally argues that this suit is not a proper vehicle for enjoining the enforcement of its unconstitutional statute. That mistaken argument has extraordinary implications.

SB8 is "unprecedented." *Whole Woman's Health*, 141 S. Ct. at 2496 (Roberts, C.J., dissenting). But other States are already regarding it as a model. App.936. And it is easy to imagine other uses for this procedural device. A State might ban the possession

of all handguns in the home, *contra District of Columbia v. Heller*, 554 U.S. 570 (2008), or prohibit independent corporate campaign advertising, *contra Citizens United v. FEC*, 558 U.S. 310 (2010), and deputize its citizens to seek bounties for each firearm or advertisement. Those statutes would violate the Constitution, but under Texas's theory, that would not stop a State from subjecting its citizens to a cascade of bounty-hunting lawsuits for exercising their rights. A State could also use this device to promote defiance of federal court orders. For example, Mississippi—whose "heartbeat law" this Court held facially unconstitutional, *Dobbs*, 951 F.3d at 248—could, on Texas's view, have responded by reenacting the same substantive prohibition with SB8's private-enforcement mechanism. Partisans of one stripe or another might cheer these outcomes, but they should horrify anyone committed to the principle that this diverse nation is bound by one Constitution.

Texas has elsewhere urged the Supreme Court to reconsider its construction of the Fourteenth Amendment. Br. for Texas, et al., as Amici Curiae, *Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (U.S. July 29, 2021). But unless and until the Supreme Court does so, there should be no serious doubt that a federal court can enjoin the enforcement of a statute that violates the Constitution.

1. The United States has authority to maintain this suit

Texas appropriately does not question the government's authority to bring its preemption and intergovernmental immunity claims. The federal government has well-established authority to challenge state actions that offend those doctrines. *See, e.g.*,

Arizona v. United States, 567 U.S. 387 (2012) (preemption); *United States v. Washington*, 971 F.3d 856 (9th Cir. 2020), *as amended*, 994 F.3d 994 (9th Cir. 2020) (intergovernmental immunity). Texas does question the government's authority to challenge SB8 on the basis that it violates the Fourteenth Amendment, but that authority is also well grounded.

a. *In re Debs*, 158 U.S. 564 (1895), is the canonical precedent recognizing the federal government's authority to bring suits to seek redress for this sort of injury. In *Debs*, the government sought an injunction against the Pullman rail strike. The Supreme Court explained that "[e]very government, intrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other." *Id.* at 584. Although "it is not the province of the government to interfere in any mere matter of private controversy between individuals," the Court continued, "whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the constitution are intrusted to the care of the nation, and concerning which the nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts." *Id.* at 586.

Contrary to Texas's cramped reading (Mot. 6), *Debs* did not rest on the federal government's proprietary interest in the mail (indeed, the Court expressly declined to

"place [its] decision upon" that ground, 158 U.S. at 584) or on the government's statutory authority over rail commerce. Rather, *Debs*' broad holding reflects the "general rule that the United States may sue to protect its interests," *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 201 (1967). The Supreme Court has routinely recognized the government's authority—even without an express statutory cause of action—to seek equitable relief against threats to various federal interests. In addition to allowing challenges to state laws that conflict with federal law or hinder federal operations (as discussed above), the Court has allowed federal suits to protect the public from fraudulent patents, *United States v. American Bell Tel. Co.*, 128 U.S. 315 (1888); protect Indian tribes, *Heckman v. United States*, 224 U.S. 413 (1912); and carry out the Nation's treaty obligations, *Sanitary Dist. of Chi. v. United States*, 266 U.S. 405, 426 (1925). *Debs* recognizes that the United States has an equally cognizable interest in violations of federal law that affect its sovereign interests.

b. This suit fits well within the *Debs* doctrine. SB8 offends federal sovereignty in three ways.

First, Texas designed SB8 to violate the Constitution *and* avoid judicial review—both by forswearing enforcement by the State's executive officials, in an effort to avoid pre-enforcement review, and by attempting to frustrate effective post-enforcement review (including by foreclosing pregnant persons from challenging SB8's validity in the context of an enforcement suit). The United States does not claim authority to sue any State that enacts an unconstitutional law. If the law is subject to judicial review through

ordinary channels, there is no danger of constitutional nullification. But Texas's effort to evade review of a blatantly unconstitutional enactment is an open threat to the supremacy of the Federal Constitution, not unlike the defiance at issue in *Cooper v. Aaron*, 358 U.S. 1 (1958). The United States has a paramount interest in preserving respect for the Supreme Court's "considered interpretation of the United States Constitution," *id.* at 4.

Second, SB8 affects interstate commerce in a manner that (as in *Debs*) implicates federal concerns. SB8 burdens the interstate commercial activities of insurance companies that reimburse for abortions, banks that process payments for abortions, and the manufacturers of drugs or devices used in abortions, by subjecting them to the threat of liability. *See* App.860-861. This Court has recognized that interference with abortion clinic access can have a substantial effect "on the availability of abortion-related services in the national market," by causing "women to travel from the states where abortion services [a]re interrupted to clinics, often out of state, that [a]re able to provide unobstructed abortion services," thus reducing "the availability of abortion services at the unobstructed clinics." *United States v. Bird*, 124 F.3d 667, 678, 681 (5th Cir. 1997). SB8 has had exactly those effects. App.915-922.

Third, SB8 impairs the federal government's own operations, both by hindering agencies' compliance with the duty to facilitate access to constitutionally protected abortions and by licensing suits against federal agencies, contractors, and employees.

This Court has recognized that "the United States has a duty to protect the 'interests of all,'" and possesses "authority … to sue without specific congressional authorization," "[w]hen the action of a State violative of the Fourteenth Amendment conflicts with the Commerce Clause and casts more than a shadow on the Supremacy Clause." *United States v. City of Jackson*, 318 F.2d 1, 14 (5th Cir. 1963).[2] This suit raises similarly profound constitutional concerns.

c. Texas objects (Mot. 9-13) that the United States lacks a cause of action. But *Debs* recognizes a cause of action: the government's "right to apply to its own courts" for the vindication of its sovereign interest in preventing violations of federal law that "affect the public at large." 158 U.S. at 584, 586. Texas fails to explain how *Debs* could have proceeded under its theory.

More fundamentally, Texas misunderstands the cause of action that the United States invokes here. It is a cause of action in equity—not, as Texas suggests (Mot. 9), one implied under the Supremacy Clause or the Due Process Clause. "'[S]uits to enjoin official conduct that conflicts with the federal Constitution are common,'" and "a cause of action routinely exists for such claims"—not "under the Constitution itself," but "as 'the creation of courts of equity.'" *D.C. Ass'n of Chartered Public Schools v. District of Columbia*, 930 F.3d 487, 493 (D.C. Cir. 2019) (quoting *Armstrong v. Exceptional Child Ctr.,*

[2] Texas cites concurrences in the denial of rehearing en banc by two members of the *City of Jackson* panel. But those concurrences do not alter the precedential force of the panel opinion. *See Florida E. Coast Ry. Co. v. United States*, 348 F.2d 682, 685 (5th Cir. 1965), *aff'd*, 384 U.S. 238 (1966).

Inc., 575 U.S. 320, 327 (2015)). A cause of action in equity "is not 'implied,' because it exists in the body of equitable doctrine in the same way that a cause of action for breach of contract is not 'implied' from the contract but exists in the body of common law." *Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 493 n.2 (5th Cir. 2020) (en banc) (Elrod, J., concurring, joined by Higginson and Costa, JJ.).

Texas notes that the federal courts' equity jurisdiction is cabined by history and tradition. *See Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999). But Texas never explains what, exactly, it finds so anomalous about the equitable cause of action the United States asserts here. It is no anomaly for the United States to seek equitable relief against a State. And the United States does not bring this suit merely "to enforce the Fourteenth Amendment rights of individuals" (Mot. 10). It brings this suit to vindicate its *own* sovereign interest in preventing Texas from disrupting the supremacy of federal law and evading the provision, Section 1983, that Congress enacted for enforcing rights under the Federal Constitution. *Debs* recognized that interest, and the federal courts have jurisdiction to protect it just as they have jurisdiction over suits by the United States to enjoin other violations of the Supremacy Clause.

Texas invokes *United States v. Madison County Board of Education*, 326 F.2d 237 (5th Cir. 1964), and *United States v. City of Philadelphia*, 644 F.2d 187 (3d Cir. 1980), for the proposition that the United States may not sue in equity "to enforce the Fourteenth Amendment rights of individuals." Mot. 10. But, again, the United States is bringing this suit to vindicate its *own* interests: Texas's attempt to evade judicial review of its

unconstitutional statute distinctly harms the United States' sovereignty, whereas *City of Philadelphia*—like *Madison County*, *United States v. Mattson*, 600 F.2d 1295 (9th Cir. 1979), and *United States v. Solomon*, 563 F.2d 1121 (4th Cir. 1977)—involved no effort to frustrate judicial review. The district court's reasoning here would not have authorized those suits. *See* App.878-879. *Madison County* is also inapposite because the relevant portion of the opinion rejected the government's "attempted direct exercise of the war power outside of military bases without any authorization by Congress and during peace time." 326 F.2d at 242-243. This suit does not invoke the war power.

Texas suggests (Mot. 11) that it has not frustrated judicial review because defendants in SB8 enforcement proceedings could raise the statute's unconstitutionality as a defense. But Texas designed SB8 to ensure that such constitutional defenses will be both infrequent (because SB8 has so thoroughly chilled providers that very few enforcement proceedings will likely be brought) and, if Texas has its way, ineffective (because SB8 purports to limit the consequences of a successful constitutional defense to the particular plaintiff and abortion at issue). And pregnant persons cannot assert their rights in enforcement actions *at all* because they cannot be defendants to such actions. That is a mirage of judicial review.

Finally, Texas contends (Mot. 11-13) that Congress "displaced any equitable cause of action" by creating certain statutory causes of action for the enforcement of constitutional rights. But whatever the force of that argument in other contexts, it is inapposite here. The very point of SB8's unprecedented private-enforcement scheme

is to thwart the express cause of action Congress provided in Section 1983. In bringing this suit, the United States seeks to vindicate, not circumvent, Congress's judgment that state laws prohibiting the exercise of federal constitutional rights should be subject to suits for injunctive relief in federal court, and does so only because the State has sought to frustrate such suits.

In any event, Congress did not consider and reject a governmental cause of action at the same time as it enacted a parallel individual cause of action. Congress enacted Section 1983 in 1871 but did not consider a similar cause of action for the Attorney General until the 1950s, *see City of Philadelphia*, 644 F.2d at 195—by which point an express cause of action was unnecessary in light of *Debs*. Congress's consideration of those provisions at different times cannot be understood to reflect Congress's deliberate specification of a "detailed remedial scheme" (Mot. 11) permitting individual but not federal actions—much less an intent to preclude federal actions in the unique circumstances presented here. *See Gomez-Perez v. Potter*, 553 U.S. 474, 496 (2008). Moreover, Texas's argument would seem to apply with equal force to the equitable cause of action recognized by *Ex parte Young*, and it is inconsistent with this Court's decision in *City of Jackson*.

d. Finally, Texas is incorrect to invoke *Muskrat v. United States*, 219 U.S. 346 (1911), for the proposition that there is no justiciable controversy here.

Muskrat concerned a statute authorizing four individuals to sue the United States "to determine the validity" of a prior statute broadening the class of Native Americans

entitled to participate in an allotment of property. 219 U.S. at 350. The United States was "a defendant" to such an action but had "no interest adverse to the claimants" because it was not a potential claimant to the property in question. *Id.* at 361. The Supreme Court held that Article III did not permit a federal court "to determine the constitutional validity of" the reapportionment statute in what amounted to a collusive suit, as opposed to one "between parties concerning a property right necessarily involved in the decision in question." *Id.* at 361-362. Unlike in *Muskrat*, both Texas and the United States have interests at stake here, and those interests are adverse. There is nothing collusive about this suit.

2. The relief ordered by the district court was proper

The district court properly enjoined "the State of Texas, including its officers, officials, agents, employees, and any other persons or entities acting on its behalf" from "maintaining, hearing, resolving, awarding damages in, enforcing judgments in, enforcing any administrative penalties in, and administering any lawsuit brought pursuant to" SB8. App.934.

a. SB8 is a statute enacted by the legislature of Texas, signed by the governor of Texas, and enforceable in the courts of Texas. If SB8 did not exist, no private plaintiff could maintain the cause of action it creates—one requiring no showing of harm to the plaintiff or even any connection between the plaintiff and the abortion.

And no plaintiff could maintain an SB8 suit or recover the damages it authorizes without action by the Texas courts or the enforcement of their judgments by the Texas executive branch.

It is, in short, obvious that the State of Texas is responsible for the constitutional violations caused by SB8. It should accordingly be obvious that the State of Texas can be enjoined against those constitutional violations in a suit—like this one—where its sovereign immunity does not apply.

Everything after that is a question of exactly which individual state actors (whether executive officials, judges, clerks, or individual SB8 plaintiffs) can be named in an injunction or held in contempt for violating an injunction against the State. But Texas's focus on those questions should not distract from the core point: It was proper for the district court to enjoin the State. Having chosen this supremely unusual means of enforcing its unconstitutional law, Texas bears the obligation to identify an alternative form of injunctive relief if it is dissatisfied with the particular mechanism adopted by the district court. Tellingly, Texas has not done so.

b. The district court's order properly bars state executive officials from enforcing judgments in SB8 suits. Texas barely addresses this feature of the injunction; its only response (Mot. 13) is that any injunctive relief against executive officials would be "meaningless" because those officials "do not enforce" SB8. But while SB8 relies on private citizens to bring enforcement suits, action by executive officials is still necessary to enforce any resulting judgments. *See* Tex. R. Civ. P. 622; Tex. Prop. Code Ann.

§ 52.004. Enjoining that state action is meaningful, and Texas raises no other reason why an injunction against the State would not properly reach these officials.

c. It was also proper for the district court to specify that the injunction against the State would run to state court judges and clerks. Judicial immunity does not bar injunctive relief against judicial officers acting in their judicial capacity, *see Pulliam v. Allen*, 466 U.S. 522, 541-542 (1984), and the Anti-Injunction Act does not apply to actions by the United States, *see Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 226 (1957). Texas contests neither point, instead relying on cases holding that state judges and clerks are not ordinarily proper defendants in a private suit challenging the constitutionality of a state statute. *See* Mot. 14-15. But those holdings are inapplicable here, where the United States sued the State itself.

Moreover, the principles underpinning those cases lack force given Texas's unprecedented enforcement scheme. The root of the doctrinal branch—*In re Justices of Supreme Court of Puerto Rico*, 695 F.2d 17 (1st Cir. 1982)—explains that, "at least ordinarily," there is "'no case or controversy' between a judge who adjudicates claims under a statute and a litigant who attacks the constitutionality of the statute," in part because the litigant can "ordinarily sue[] the enforcement official authorized to bring suit under the statute." *Id.* at 21. *Ex parte Young* likewise speaks to the impropriety of enjoining a state court where it is possible to "enjoin an individual … state official[] from commencing suits" in violation of the Constitution. 209 U.S. at 163. But Texas forbade

state officials from enforcing SB8 precisely to frustrate these pathways of review. Having done so, it cannot complain that the district court's order reaches beyond typical enforcement officials to restrain the State's judiciary.

d. Because Texas has deputized private individuals to enforce SB8, such individuals are properly considered either agents of the State or in active concert and participation with the State. Fed. R. Civ. P. 65(d)(2)(B), (C); *see Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945). Texas's reliance on *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969), and *Texas v. Department of Labor*, 929 F.3d 205 (5th Cir. 2019), is misplaced, as those cases concern the distinct question of when a nonparty can be held in contempt for violating an injunction. In any event, the district court concluded that it "need not craft an injunction that runs to the future actions of private individuals per se," explaining that "those private individuals' actions are proscribed" only "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." App.934.

e. Texas contends (Mot. 17-18) that SB8's severability clause insulates it from facial unconstitutionality and thus from the district court's injunction against enforcement. But the Supreme Court rejected that argument as to a similar severability clause in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). It explained that federal courts need not "proceed application by conceivable application when confronted with a facially unconstitutional statutory provision"—a requirement that "'would, to some

extent, substitute the judicial for the legislative department of the government.'" *Id.* at 2319.

Texas retreats to the argument that SB8's ban is at least constitutional as applied to post-viability abortions, a conclusion that, in Texas's view, does not require "'legislative work.'" Mot. 18. But this Court has rejected that argument, too. The Mississippi law at issue in *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265 (5th Cir. 2019), *cert. granted*, 141 S. Ct. 2619 (2021), contains a severability clause like SB8's, but the Court held the ban facially unconstitutional, explaining that the fact that the law "applies both pre- and post-viability does not save it." *Id.* at 276. The district court also properly concluded, App.923, that the remaining provisions of SB8 are not severable from the abortion ban because the law "lacks functional coherence" absent the prohibition. *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 537 (5th Cir. 2013) (en banc) (plurality op.).

II. TEXAS CANNOT SATISFY THE OTHER REQUIREMENTS FOR A STAY PENDING APPEAL

A State is not cognizably harmed by an injunction against the enforcement of an unconstitutional statute. *See, e.g.*, *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 784 (5th Cir. 1990), *abrogated on other grounds as recognized by Johnson v. Baylor Univ.*, 214 F.3d 630, 633 (5th Cir. 2000); *United States v. Alabama*, 691 F.3d 1269, 1301 (11th Cir. 2012). And Texas is poorly positioned to assert irreparable injury from an injunction against

SB8: Its motion declines to defend the statute on the merits and disclaims an interest in enforcing the statute.

Texas claims (Mot. 19) that its state court employees are exposed to contempt proceedings based on third-party actions because the district court "fail[ed] to define" terms like "accepting," "docketing," and "maintaining" or to consider the interplay between those terms and Texas's state-law definition of "filing." But those terms have well-understood meanings, and to the extent there is a better means of effectuating the injunction, Texas was and remains free to propose it. App.800-801; *see* 28 U.S.C. § 2106; Fed. R. Civ. P. 62(g). Texas's failure to do so makes clear that its real objective is to dodge "responsibility for implementing and enforcing" its unconstitutional scheme. *Whole Woman's Health*, 141 S. Ct. at 2496 (Roberts, C.J., dissenting).

A stay would prolong SB8's substantial harm to the United States' sovereign interests and would disserve the public interest. "[P]reventing a violation of the Supremacy Clause serves the public interest." *United States v. California*, 921 F.3d 865, 893 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 124 (2020). Contrary to Texas's assertion, the public interest merges with the federal government's interest, *see Nken v. Holder*, 556 U.S. 418, 435 (2009)—not the State's—when the United States seeks to prevent the State from violating constitutional rights. There is an overwhelming interest in ensuring that all States honor the Federal Constitution and controlling precedents of the Supreme Court.

CONCLUSION

This Court should deny the stay motions and lift the administrative stay as quickly as possible in light of the ongoing irreparable harm. The United States does not oppose reasonable expedition of the appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This opposition complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,187 words. This opposition also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in 14-point Garamond, a proportionally spaced typeface.

/s/ Daniel Winik
Daniel Winik