No. 21-50949

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

THE STATE OF TEXAS,
Defendant-Appellant

ERICK GRAHAM; JEFF TULEY; MISTIE SHARP,
Intervenor Defendants-Appellants

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

AMICUS BRIEF OF INDIANA AND 17 OTHER STATES IN SUPPORT OF THE MOTION FOR STAY PENDING APPEAL

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INTRODUCTION & INTEREST OF *AMICI* STATES

The States of Indiana, Alabama, Arizona, Arkansas, Florida, Georgia, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Ohio, Oklahoma, South Carolina, South Dakota, West Virginia, and Utah respectfully submit this brief as *amici curiae* in support of the Motion for Stay Pending Appeal.

The order below threatens to expose every State in the Union to suit by the federal government whenever the U.S. Attorney General deems a state law to violate some constitutional right of someone, somewhere. Critically, the district court enjoined everyone in the world from enforcing all of S.B. 8 *not* on the basis of any legal right the federal government *itself* holds, but on the ground the law violates the putative "Fourteenth Amendment substantive due process right[] to pre-viability abortions," App. 897—which is, of course, a "'right of the *individual*.'" *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (emphasis in original)).

All agree that no statute provides the federal government a cause of action to seek such an injunction to enforce individuals' Fourteenth Amendment rights. The district court, however, declared that "[n]o cause

of action created by Congress is necessary" because the federal government has inherent power "to seek an injunction to protect . . . the fundamental rights of its citizens under the circumstances present here." App. 864. *Amici* States submit this brief to explain why this conclusion is wrong and why the Court should therefore stay the order pending appeal.

1. As even the federal government acknowledged below, for many years "courts have held that the mere fact that federal constitutional rights are being violated does not necessarily authorize the United States to sue." App. 64. Indeed, Congress has repeatedly refused "to give the Attorney General broad power to seek injunctions against violations of citizens' constitutional rights." *United States v. City of Philadelphia*, 644 F.2d 187, 195 (3d Cir. 1980). For good reason: Allowing the Attorney General to seek invalidation of any legal rule he believes violates individuals' constitutional rights would amount to "government by injunction," a practice "anathematic to the American judicial tradition." *Id.* at 203.

2. The federal government scarcely contests this general point but instead insists it must be able to "sue to enjoin state conduct" in the "unique circumstances presented here." App. 64–65. The district court adopted this position, accepting the "three limiting principles" the federal

government argues make this case unique. App. 873. Yet these "limiting principles" are neither principled nor limiting. They lack grounding in any legal authority and would permit federal challenges to a wide variety of state laws. At bottom, the district court's order is premised on the notion that the Constitution guarantees a federal trial-court forum for every constitutional claim. Because the Constitution does not do so, Texas's appeal is likely to succeed, and this Court should therefore stay the district court's order pending appeal.

ARGUMENT

I. As Even the Federal Government Seems to Acknowledge, It Lacks a General Cause of Action in Equity to Challenge State Laws as Violative of Individual Constitutional Rights

Before suing a State, the federal government, "like any other plaintiff . . . must first have a cause of action against the state." *United States v. California*, 655 F.2d 914, 918 (9th Cir. 1980). The federal government has failed to clear this threshold, and its suit thus fails at the outset.

Notably, neither the federal government nor the district court suggest that any statute grants the federal government authority to seek injunctions on behalf of individuals' constitutional rights. The contention,

rather, is that the Constitution itself—the Fourteenth Amendment or Supremacy Clause—provides the cause of action. *See* App. 881 (arguing that there is an "equitable cause of action" because S.B. 8 attempts to "supersede the Supremacy Clause and the Fourteenth Amendment").

This suggestion, however, runs headlong into Supreme Court precedent. *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 325 (2015) ("[T]he Supremacy Clause . . . certainly does not create a cause of action."); *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 365 (1991) (Scalia, J., concurring in part and concurring in judgment) ("Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals."). Implied rights of action are disfavored: In both statutory and constitutional contexts, the Supreme Court's "watchword is caution." *Hernandez v. Mesa*, 140 S. Ct. 735, 742 (2020); *see also, e.g., Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856–58 (2017); *Alexander v. Sandoval*, 532 U.S. 275, 287–93 (2001).

Accordingly, "almost every court that has had the opportunity to pass on the question" has agreed "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); *see also United States v. Mattson*, 600 F.2d 1295, 1297 (9th Cir. 1979) ("[T]he United States may not bring suit to protect the constitutional rights of [individuals in state mental-health facilities] without express statutory approval . . . ."); *United States v. Solomon*, 563 F.2d 1121, 1129 (4th Cir. 1977) (similar).

After all, the mid-twentieth century saw the federal Executive Branch make "several attempts extending over a period of twenty years," *Solomon*, 563 F.2d at 1125 n.4, to convince Congress to enact legislation authorizing the Attorney General to "seek injunctions against violations of citizens' constitutional rights," *Philadelphia*, 644 F.2d at 195. Officials, including multiple Attorneys General, seriously debated these legislative proposals and clearly believed they would *change* the Executive Branch's *lack* of authority on this score: "Those officials did not act out a meaningless charade, debating whether to create what they believed already existed, but in a serious and responsible manner decided for reasons of constitutional principle and sound public policy not to create new federal authority over state and local governments." *Id.* at 201; *see also id.* at 195

(quoting Attorney General's observation that under current law conspiracies to violate constitutional rights "'can be redressed only by a civil suit by the individual injured thereby'" (citation omitted)).

Furthermore, while these particular proposals met with Congress's "express refusal[]," *id.* at 195, Congress has occasionally provided the Attorney General narrow authority to sue States to seek injunctions against violations of certain constitutional or statutory rights, *see, e.g.,* 52 U.S.C. § 10306(b) (poll taxes); 52 U.S.C. § 10504 (Voting Rights Act). If the Attorney General possessed an inherent equitable cause of action to sue States to enjoin violations of individual rights, such provisions would plainly be unnecessary. Both Congressional action and inaction thus "demonstrate[] that neither Attorneys General nor Congress . . . believed that . . . the Constitution had created this power sub silentio." *Philadelphia,* 644 F.2d at 201.

The district court responded to this overwhelming evidence with a non sequitur: This "history has little bearing on the action here," it argued, because these "legislative debates . . . occurred between 1957 and 1964, placing them a decade before the Supreme Court first recognized the right to abortion in *Roe v. Wade*, 410 U.S. 113 (1973)." App. 877. Yet

not even the district court suggested that among constitutional rights abortion is somehow uniquely amenable to federal enforcement. And neither *Roe* nor any other abortion-rights precedent says anything about the federal government's authority to seek injunctions against States to enforce abortion rights. Regardless of the constitutional right at issue, "the longstanding and uniform agreement of all concerned" is that "the fourteenth amendment does not implicitly authorize the United States to sue to enjoin violations of its substantive prohibitions." *Philadelphia*, 644 F.2d at 201.

Other than a 1963 opinion whose constitutional reasoning was later disavowed by two-thirds of the panel, *see United States v. City of Jackson, Miss.*, 320 F.2d 870 (5th Cir. 1963), the district court cited just one other authority on this point: *In re Debs*, 158 U.S. 564 (1895). App. 871. Yet this one-and-a-quarter-century-old decision, which permitted the federal government to enforce an anti-strike injunction quelling violent railroad labor unrest, vindicated no private rights and challenged no state laws. Rather, the federal government's lawsuit protected its property interests in the mail and *public* rights in unobstructed interstate rights of way. *Id.* at 581–84. As the Fourth Circuit has observed, in *Debs* "Congress had

exercised the constitutional power" at stake, which in turn "was impugned by the action sought to be redressed." *Solomon*, 563 F.2d at 1127. No such congressional exercise of authority is present here. Furthermore, "the harm was a public nuisance, and there was a statute [the Sherman Act] authorizing suit on which the decision could have been grounded." *Id.* This case presents no public nuisance, no statute on which the action could be grounded, and no "interferences, actual or threatened, with property or rights of a pecuniary nature." *Debs*, 158 U.S. at 593.

Expanding *Debs* to permit federal equitable enforcement of individual constitutional rights without a statutory cause of action would be "incompatible with [the Court's] traditionally cautious approach to equitable powers, which leaves any substantial expansion of past practice to Congress." *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 329 (1999). What is more, if the Court "were to read *Debs* to authorize this suit," it would "authorize the executive to do what Congress has repeatedly declined to authorize him to do." *Solomon*, 563 F.2d at 1129. It should not do so.

II. The "Unique Circumstances" the Federal Government Cites as Limiting Principles Lack Legal Significance and Are Far from Unique

As it happens, neither the federal government nor the district court "go so far as to endorse the broadest reading of *Debs*." App. 873. Both disclaim the notion that the federal government may sue States to enjoin purported violations of constitutional rights in all circumstances. Instead, the federal government suggested, App. 64, and the district court accepted, three principles that would limit the proposed equitable cause of action to the "circumstances present here"—that "(1) a state law violates the constitution, (2) that state action has a widespread effect, and (3) the state law is designed to preclude review by the very people whose rights are violated." App. 873.

These purported principles, however, have no legal basis and impose no real limits. As to the first two, the district court did not even attempt to explain their legal relevance or practical significance—and no such explanation is conceivable. The first proposed condition—that "a state law violates the constitution"—cannot possibly justify recognizing a novel equitable cause of action, for it simply states a universal requirement for enjoining a law: If a state law is not unconstitutional, obviously

its enforcement cannot be enjoined. Similarly, the second purported limit—"has widespread effect"—has neither legal relevance nor any capacity to narrow when the federal government may sue (because, by their very nature, *all* state legal rules have statewide effect).

As to the third element—"designed to preclude review"—the district court offered the theory that where federal-court review is unavailable, an equitable cause of action must exist because "no adequate remedy at law" immediately presents itself. App. 868, 873. Yet again, however, this condition is *always* required for equitable relief. *See, e.g., Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156 (2010). It therefore does nothing to identify a "unique circumstance" where the federal government has an otherwise-unavailable equitable cause of action. Just as in *Philadelphia*, where the Attorney General (unsuccessfully) assured the court that "the asserted right of action w[ould] be limited to 'exceptional' cases involving 'widespread and continuing' violations, for which the remedies expressly provided [were] not 'adequate,'" here, the proposed limiting principles "lack real content." *United States v. City of Philadelphia*, 644 F.2d 187, 201 (3d Cir. 1980).

Moreover, the circumstances here are far from unique. The district court leaned heavily on its observation that S.B. 8 allows for no "redress through the courts," App. 863, but *state* courts *are* available to offer redress. Many legal rules can be adjudicated only in state-court proceedings, and state-court adjudications of federal claims may still be appealed to the U.S. Supreme Court. *See, e.g., New York Times v. Sullivan*, 376 U.S. 254, 264 (1964) (reviewing a defamation suit that wound its way through state courts and holding that applicable state-law rule was "constitutionally deficient"); *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2252–53, 2661 (2020) (reversing on Free Exercise Clause grounds a Montana Supreme Court decision construing state scholarship program to exclude religious schools under state constitution's "no-aid" clause).

Other examples include due-process challenges to state rules governing punitive damages and personal jurisdiction, *see, e.g.*, *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (punitive damages); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (personal jurisdiction); state criminal cases, where defendants may challenge any number of state rules of criminal law or procedure by invoking the federal

Constitution, *see, e.g., Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (unanimous juries); *Medina v. California*, 505 U.S. 437 (1992) (burden shifting); and other due-process challenges to state procedures, *see, e.g.*, *Stanley v. Illinois*, 405 U.S. 645 (1972) (due-process challenge to state rule that failed to provide an unwed father a parental-fitness hearing before taking his children).

State courts thus can and do frequently decide issues of federal constitutional law. Indeed, that is the critical premise of the Madisonian Compromise, whereby the Constitution created the Supreme Court but not lower federal courts. *Printz v. United States*, 521 U.S. 898, 907 (1997) ("In accord with the so-called Madisonian Compromise, Article III, § 1, established only a Supreme Court, and made the creation of lower federal courts optional with the Congress—even though it was obvious that the Supreme Court alone could not hear all federal cases throughout the United States.").

Yet here, with no evidence, the district court doubted that state courts could vindicate federal rights because S.B. 8 limits available defenses. App. 868. But a litigant could challenge the constitutionality of the statute's limits on defenses in state court as well as federal court. *See*

State v. Scott, 460 S.W.2d 103, 107 (Tex. 1970) (holding that Texas Rules of Civil Procedure "authorize pleading of every conceivable defense in an answer, including unconstitutionality of a statute on which suit may be based"). And of course, whatever decision a state court might reach, its resolution of federal constitutional questions is reviewable by the U.S. Supreme Court via a writ of certiorari. 28 U.S.C. § 1257(a).

This case does not permit, much less require, the Court to address S.B. 8, but instead presents a legal question of considerable significance for federalism and the separation of powers—whether the Attorney General has inherent authority to challenge state laws as violative of individual constitutional rights even absent congressional authorization. *See United States v. Solomon*, 563 F.2d 1121, 1129 (4th Cir. 1977) ("[W]hen the executive acts in an area in which he has neither explicit nor implicit statutory authority, 'what is at stake is the equilibrium established by our constitutional system.'" (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952)). And every relevant precedential and historical authority points to the same conclusion: The Attorney General has no authority to act as a roving reviser of state law, challenging as

unconstitutional any rule with which he disagrees. Congress has repeatedly refused to grant him such authority; this Court should refuse to do so as well.

CONCLUSION

The Court should grant the motion for stay pending appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with Fed. R. App. P. 27(d)(2)(A) and 29(a)(5) because it contains 2,599 words as measured by Microsoft Word software. The brief also complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5) & 32(a)(6) because it has been prepared in a proportionally spaced, Roman-style typeface of 14 points or more.

Dated: October 13, 2021 *<u>/s/ Thomas M. Fisher</u>*
Thomas M. Fisher

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2021, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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