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, ET AL.,
Defendants-Appellants.

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

APPELLANT THE STATE OF TEXAS'S OPPOSED EMERGENCY MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL AND, ALTERNATIVELY, FOR A TEMPORARY ADMINISTRATIVE STAY PENDING CONSIDERATION OF THIS MOTION

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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.

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Introduction and Nature of Emergency

The United States has obtained an injunction prohibiting the adjudication of suits in state court under a law to which it will never be subject, against a State which can never enforce the law, based on real-world disputes which do not affect it, through a cause of action Congress has never authorized. This Court's immediate intervention is necessary to vindicate Texas's sovereign interest in preventing a single federal district court from superintending every Texas court.

The district court's injunction violates the separation of powers at every turn. First, the district court exceeded Article III's limits. The federal government is an improper plaintiff because it has no standing to "merely litigat[e] as a volunteer the personal claims of its citizens." *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976) (per curiam). And Texas is an improper defendant because it "has no interest adverse to" those challenging the constitutionality of S.B. 8, which is enforced through private litigation. *Muskrat v. United States*, 219 U.S. 346, 361 (1911).

Second, the district court wrongly granted an injunction in a proceeding Congress never authorized. Indeed, Congress's detailed remedial scheme for the enforcement of Fourteenth Amendment rights precludes recognition of the free-floating cause of action "at equity" that the district court found. The United States cannot seek such an extraordinary, novel form of equitable relief when Congress has denied it a cause of action through which to do so.

Third, a federal court cannot enjoin a state court "from proceeding in [its] own way to exercise jurisdiction," *Ex parte Young*, 209 U.S. 123, 163 (1908), let alone enjoin *all* of a State's courts from doing so. Such an injunction—which the district

court ordered—is "a violation of the whole scheme of our government." *Id.*; *see also Whole Woman's Health v. Jackson*, No. 21-50792, 2021 WL 4128951, at *5 (5th Cir. Sept. 10, 2021) (per curiam). A court "cannot lawfully enjoin the world at large," *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832 (2d Cir. 1930) (Hand, J.), let alone hold Texas responsible for the filings of private citizens that Texas is powerless to prevent.

The district court refused to even consider the State's request for a stay, concluding that Texas "forfeited the right to any such accommodation" because its law was "offensive." App.937. The State respectfully requests an emergency stay pending appeal by **Tuesday, October 12, 2021, at 9:00 a.m., and an administrative stay as soon as possible** to prevent it from being held in contempt for the actions of third parties it cannot and does not control.

BACKGROUND

I. S.B. 8 was enacted in May 2021.[1] Of most relevance here, S.B. 8 requires a physician to determine whether an unborn child has a detectable fetal heartbeat prior to performing an abortion. Tex. Health & Safety Code § 171.203(b). If he detects a fetal heartbeat, the physician is prohibited from knowingly performing or inducing an abortion absent a medical emergency. *Id.* §§ 171.204(a), .205(a).

S.B. 8 is enforced exclusively through private civil lawsuits brought against those who perform or induce post-heartbeat abortions, those who knowingly engage in conduct that aids or abets the performance of such abortions, and those who intend

[1] https://capitol.texas.gov/BillLookup/History.aspx?LegSess=87R&Bill=SB8.

to perform, aid, or abet the performance of such abortions. *Id.* § 171.208(a). A defendant in such a lawsuit with standing to assert the third-party rights of women may raise the affirmative defense that the relief sought will impose an undue burden on one or more women. *Id.* § 171.209(b). The prohibition on post-heartbeat abortions cannot be enforced by any state or local government official. *Id.* § 171.207; *see also Whole Woman's Health*, 2021 WL 4128951, *4-5.

In July, a group of abortion providers filed suit against multiple state officials, a state-court judge, a state-court clerk, and a private individual, seeking to enjoin enforcement of S.B. 8. Compl., *Whole Woman's Health v. Jackson*, No. 1:21-cv-00616-RP (W.D. Tex. July 13, 2021). After the district court denied defendants' motions to dismiss, defendants appealed. *Whole Woman's Health v. Jackson*, No. 21-50792. Both this Court and the Supreme Court denied those plaintiffs' requests for an injunction pending appeal. *Whole Woman's Health v. Jackson*, No. 21A24, 2021 WL 3910722, at *1 (U.S. Sept. 1, 2021); *Whole Woman's Health*, 2021 WL 4128951, at *1.

II. Following the Supreme Court's denial of injunctive relief, the Department of Justice sued the State of Texas, claiming violations of the Fourteenth Amendment, preemption, and intergovernmental immunity. App.25-27. The federal government moved for emergency relief, App.30-286, which Texas opposed, App.288-361. Following a hearing, the district court issued a preliminary injunction on October 6, prohibiting judicial officials from adjudicating S.B. 8 suits and ordering Texas to publicize the injunction. App.826-938. Texas timely filed a notice of appeal and now seeks a stay pending that appeal.

ARGUMENT

Texas satisfies all four stay factors: (1) a likelihood of success on the merits, (2) irreparable harm, (3) no substantial harm to other parties, and (4) the public interest. *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 410 (5th Cir. 2013).

I. Texas Is Likely To Prevail on Appeal.

Separation-of-powers principles preclude the federal government from succeeding several times over. The federal government has no Article III cognizable interest in the validity of a state law in suits exclusively between private parties. Congress has not provided it with a cause of action to challenge such a law, and no traditional equitable action exists for the federal government's virtually unprecedented suit. Even so, both this Court and the Supreme Court have repeatedly instructed that a federal district court cannot give the only remedy it provided here—an injunction against Texas's state-court system. Each of these errors is sufficient for Texas to prevail on appeal.

A. The district court lacked jurisdiction.

The federal government lacks standing where it is "merely litigating as a volunteer the personal claims of its citizens." *Pennsylvania*, 426 U.S. at 665 (collecting cases). And while the federal government gestures to applications of S.B. 8 that would affect federal employees or interstate commerce to avoid this threshold problem, these too fail, as the United States has no adverse interest to Texas regarding the constitutionality of state law. *Muskrat*, 219 U.S. at 361-62.

1. The federal government lacks standing.

a. The district court found standing based on the erroneous assumption that S.B. 8 "prohibit[s] federal personnel and contractors from carrying out their obligations and subject[s]" them "to civil liability." App.850. It does not. Texas courts presume that state statutes do not regulate the federal government, its employees, or its contractors performing federal functions. App.341; *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).

The district court suggests S.B. 8 should have "explicitly disclaim[ed] its applicability to the federal government," App.926, but that disregards the state-law interpretive principles the district court was *Erie*-bound to apply. A federal court cannot create drafting standards for state legislators, much less do so based on "magic words."

b. The district court next approved "*parens patriae*" standing, App.852-57, even though the federal government practically abandoned that theory in its reply brief, App.670 n.1. The district court concluded S.B. 8 injured the federal government's "interest" in the supposed "potential for large-scale violations of constitutional rights." App.856. Conferring standing on the federal government to "vindicat[e]" its citizens' constitutional rights, App.857, contradicts the principle that a sovereign cannot "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).

c. Finally, the district court held that the federal government has "*Debs* standing" whenever there are "harms to 'the general welfare' and the 'public at large'" or, alternatively, "harms to interstate commerce." App.860-61 (citing *In re Debs*, 158 U.S. 564 (1895)). *Debs* is not so expansive. It turned on (1) the federal government's "property [interest] in the mails," and (2) Congress's assumption of jurisdiction, by "express statute," "over [interstate] commerce when carried upon railroads." *Debs*, 158 U.S. at 586. Thus, *Debs* requires the federal government to demonstrate either "a property interest" or "a well-defined statutory interest of the public at large." *United States v. Solomon*, 563 F.2d 1121, 1127 (4th Cir. 1977); *see also Clark v. Valeo*, 559 F.2d 642, 654 (D.C. Cir. 1977) (Tamm, J., concurring) (requiring "congressional action expressly assuming and implementing" the "power to regulate commerce"), *aff'd sub nom. Clark v. Kimmitt*, 431 U.S. 950 (1977).

Those features are absent here. There is no property interest at issue, and the district court did not find otherwise, though it erroneously relied on cases involving property interests to support its standing holding. *See* App.859 & n.25. Second, there is no "violation of some congressional enactment." *Solomon*, 563 F.2d at 1128. Absent a federal statute regulating interstate commerce, the federal government has no standing under *Debs*. *See, e.g.*, *Fla. E. Coast Ry. Co. v. United States*, 348 F.2d 682, 685 (5th Cir. 1965) (violation of the Railway Labor Act), *aff'd sub nom. Bhd. of Ry. & S. S. Clerks, Freight Handlers, Exp. & Station Emps., AFL-CIO v. Fla. E. Coast Ry.*

Co., 384 U.S. 238 (1966); *United States v. City of Jackson*, 318 F.2d 1, 7 (5th Cir. 1963) (violation of the Interstate Commerce Act).[2]

2. There is no justiciable controversy.

This is also not an Article III case or controversy because the federal government lacks an interest adverse to Texas regarding the constitutionality of S.B. 8, which will only be enforced between private parties.

In *Muskrat*, the Supreme Court considered a series of federal statutes: the first gave a defined group of Indians certain property rights, and subsequent statutes reduced those rights. 219 U.S. at 348-49. Congress then created a cause of action allowing Indians injured by the subsequent statutes to sue the federal government "to determine the validity of [those subsequent] acts of Congress." *Id.* at 349–50. The Indian plaintiffs filed suit, just as Congress invited, seeking "to restrain the enforcement of [the challenged statutes] upon the ground that [they were] unconstitutional and void." *Id.* at 349.

Although the challenged statutes undoubtedly injured the plaintiffs' property interests, the Supreme Court held that the suit was not "a 'case' or 'controversy.'" *Id.* at 360-61. The federal government, though "made a defendant," had "no interest adverse to the claimants." *Id.* at 361. The plaintiffs wanted "to determine the constitutional validity of this class of legislation," but federal courts could not

[2] To the extent one could read *Jackson* more broadly to support non-statutory and non-proprietary standing, the panel majority subsequently abandoned that language. *See United States v. Jackson*, 320 F.2d 870, 872-73 (5th Cir. 1963) (Bootle, J., specially concurring); *id.* at 873 (Ainsworth, J., specially concurring).

entertain "a proceeding against the government in its sovereign capacity" when "the only judgment required is to settle the doubtful character of the legislation in question." *Id.* at 361–62. Such a judgment would not even have settled the constitutionality of the legislation because it would not have bound "private parties, when actual litigation brings to the court the question of the constitutionality of such legislation." *Id.* at 362.

The Court was willing to hear subsequent suits involving private parties: "The questions involved in this proceeding as to the validity of the legislation may arise in suits between individuals, and when they do and are properly brought before this court for consideration they, of course, must be determined in the exercise of its judicial functions." *Id.* But the interest in more quickly deciding "the constitutionality of important legislation" could not outweigh the Article III limitations on federal-court jurisdiction. *Id.* at 363.

So too here. Just as a judgment against the United States in *Muskrat* would have been improper and ineffective for governing future federal-court litigation among private parties, an order against Texas here cannot control future state-court litigation among private parties.

The district court distinguished *Muskrat* because here "Congress has not purported to legislatively manufacture standing for the United States" as it had in *Muskrat*. App.863. That distinction—that *Muskrat* involved an express cause of action, and this case does not—makes this dispute *less* suitable for Article III adjudication, not more. Under *Muskrat*, there is no justiciable controversy.

B. The federal government cannot succeed on the merits.

The district court could not identify a cause of action available to the federal government, so it created an "equitable" one unlike any known to traditional equity jurisdiction. No such equitable cause of action exists, and even if it did, Congress foreclosed it by adopting a detailed remedial scheme for enforcing Fourteenth Amendment rights.

1. The federal government lacks a cause of action.

The federal government disclaimed any statutory cause of action, express or implied, App.62, and the district court did not find one. Instead, the federal government appealed to two constitutional provisions—the Supremacy Clause and the Due Process Clause—to provide a cause of action. Neither does. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 325 (2015) (Supremacy Clause); *Hearth, Inc. v. Dep't of Pub. Welfare*, 617 F.2d 381, 382-83 (5th Cir. 1980) (per curiam) (Due Process Clause). Thus, the district court instead held that the federal government has a free-floating, equitable cause of action without "blueprint" or "categorical definition," App.864-65, based in part on its view that equity would not tolerate a wrong without a remedy, App.867-68. It erred with both parts of its holding.

As the Supreme Court has explained, federal courts' equity jurisdiction is limited to that exercised by the English Court of Chancery in 1789. *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999). Beyond that, the Supreme Court's "traditionally cautious approach to equitable powers . . . leaves any substantial expansion of past practice to Congress." *Id.* at 329.

The district court's amorphous cause of action does not resemble any recognized by the Supreme Court. The equitable cause of action underlying *Ex parte Young*, for example, does not apply here because it requires that the defendant be a state officer, not the State itself. *Freedom From Religion Found., Inc. v. Mack*, 4 F.4th 306, 311–12 (5th Cir. 2021). Other cases cited by the district court concern long-established equitable causes of action—none of which apply here, either. *See, e.g.*, *Debs*, 158 U.S. at 587 (concerning a "public nuisance"); *United States v. Am. Bell Tel. Co.*, 128 U.S. 315, 352 (1888) ("to relieve against accident, mistake, fraud, covin, and deceit"); *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 279 (1888) ("relieving itself from frauds, impostures, and deceptions").

This Court has previously rejected the federal government's appeal to an undefined equitable cause of action to enforce the Fourteenth Amendment rights of individuals. In *United States v. Madison County Board of Education*, the federal government brought suit for "violations of the Fourteenth Amendment rights" of certain individuals. 326 F.2d 237, 239, 242 (5th Cir. 1964). This Court rejected that claim as "unprecedented and extremely dangerous," holding that the federal government could not sue a local government to vindicate the Fourteenth Amendment rights of individuals despite a claimed connection to the war power. *See id.* at 242-43. Indeed, "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).

Madison County also belies the district court's assertion that there must be an adequate judicial remedy. There, the federal government also brought a breach-of-contract claim for which Congress had provided a statutory remedy. 326 F.2d at 239, 242. The federal government argued that the statutory remedy was "wholly inadequate," but this Court concluded that was a "matter appropriate for the consideration of Congress." *Id.* at 242.

The district court attempted to distinguish this holding on the theory that "[h]ere, federal judicial review is not merely 'inadequate'" but "unavailable." App.868 n.28. But there are many circumstances in which there is no 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). Regardless, there is a judicially enforceable remedy here—litigation of S.B. 8 suits in state court, where this Court must presume that state judges will apply the law in good faith.

2. Congress has displaced any equitable cause of action.

a. Congress has foreclosed any equitable cause of action by providing a detailed remedial scheme for the enforcement of Fourteenth Amendment rights. "[A] court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014). 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. It adopted many different remedies, but it "never intended

to grant a civil action to the Attorney General." *Id.* at 195 (noting this understanding was "unanimously shared by members of Congress and Attorneys General").

The scope of the remedies that Congress has provided—none of which applies here, *e.g.*, 42 U.S.C. § 1983—demonstrates that it intentionally declined to provide a civil cause of action to the federal government. Instead, Congress has authorized the Attorney General to engage in civil litigation regarding constitutional rights in only limited circumstances, including with respect to abortion. *See, e.g.*, 18 U.S.C. § 248(c)(2)(A) (regarding forceful or physical obstruction to abortion clinic entrances); 52 U.S.C. §§ 10101(c) (voting rights), 10701(a)(1) (twenty-sixth amendment); *see also* 42 U.S.C. § 2000h-2 (certain equal-protection cases).

Judicially recognized causes of action may not undermine the 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)); *Armstrong*, 575 U.S. at 327 ("The power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations."). The more limited options that Congress has provided for enforcing constitutional rights generally and abortion rights in particular demonstrate that the federal government cannot have a cause of action here, let alone one against the State.

b. The district court wrongly overrode "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). First, it treated congressional action taken before *Roe v. Wade* was decided as irrelevant because the purported right to an abortion "did not yet exist." App.877. Whether Congress considered abortion specifically is immaterial because it considered due process generally: "Congress has created numerous mechanisms for the redress of denials of due process," *Philadelphia*, 644 F.2d at 192, but none of them applies here.

Second, the district court held that impediments to private lawsuits made a public suit more appropriate, App.878-79, but Congress anticipated that issue. In other cases, Congress has authorized the Attorney General "to institute for or in the name of the United States a civil action" when private individuals "are unable, in [the Attorney General's] judgment, to initiate and maintain appropriate legal proceedings." 42 U.S.C. § 2000b(a) (public facilities); *id.* § 2000c-6(a) (public schools). It did not do so here. And, regardless, S.B. 8 defendants are free to litigate all of their defenses in state court—there is no constitutional right to demand to be a federal plaintiff, rather than a state-court defendant. The district court erred in creating a cause of action that Congress did not.

C. The district court violated binding precedent by enjoining state courts and private plaintiffs.

The district court entered an injunction against the State itself, App.934, but the only relevant officials are part of the state judiciary. Any injunction against state executive officials would be meaningless because those officials do not enforce S.B. 8. *See Whole Woman's Health*, 2021 WL 4128951, at *4. And any injunction against legislative officials would be meaningless because the Constitution does not "permit[]

a court to dictate to legislative bodies . . . what laws . . . they must promulgate." *Mi Familia Vota v. Abbott*, 977 F.3d 461, 469 (5th Cir. 2020). The federal government thus attempts to accomplish indirectly that which it cannot accomplish directly: enjoining state courts from adjudicating S.B. 8 cases and private parties from bringing such cases.

1. The court wrongly enjoined state courts.

This Court and the Supreme Court have repeatedly forbidden federal district judges from enjoining state judges: "an injunction against a state court would be a violation of the whole scheme of our government." *Young*, 209 U.S. at 163. 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.* "The difference between the power to enjoin an individual from doing certain things, and the power to enjoin courts from proceeding in their own way to exercise jurisdiction, is plain, and no power to do the latter exists because of a power to do the former." *Id.*

This Court has 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 plaintiffs challenging S.B. 8 were "not 'adverse' to the state judges," who were "disinterested neutrals who lack a personal interest in the outcome of the controversy." *Whole Woman's Health*, 2021 WL 4128951, at *5 (quoting *Bauer*, 341 F.3d at 359). "It is absurd to

contend . . . that the way to challenge an unfavorable state law is to sue state court judges, who are bound to follow not only state law but the U.S. Constitution and federal law." *Id.*

As now-Justice Breyer similarly recognized, "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). And the Eleventh Circuit has concluded that the idea that a state judge's "action in hearing [a] lawsuit . . . violates [someone's] federal rights" was "without merit." *Paisey v. Vitale In & For Broward Cnty.*, 807 F.2d 889, 893 (11th Cir. 1986).

Ignoring *Bauer* entirely, the district court claimed it was "not bound" by this Court's recent *Whole Woman's Health* decision because it was about "sovereign immunity." App.888 n.41. But this Court's analysis was not so limited, and regardless, *Bauer* (which is still binding) concerned Article III, not sovereign immunity.

As Justice Story explained, "[a] writ of injunction" cannot be "a prohibition to [other] courts in the exercise of their jurisdiction" because "[i]t is not addressed to those courts" but "only to the parties."[3] This historical limitation on the remedy should have prevented the district court from claiming such power. *See Grupo Mexicano*, 527 U.S. at 318.

[3] 2 Joseph Story, Commentaries on Equity Jurisprudence at 166 § 575 (1836), available at https://www.google.com/books/edition/Commentaries_on_Equity_Jurisprudence_as/u7E-_kNzfCgC?hl.

The district court also improperly enjoined other members of the state judiciary, including clerks. A federal court cannot enjoin "part of the machinery of a [state] court." *Young*, 209 U.S. at 163. Again, as this Court recently held, "the clerks are improper defendants against whom injunctive relief would be meaningless." *Whole Woman's Health*, 2021 WL 4128951, at *5. Other courts agree. *See* App.315-16. The district court did not grapple with any of this and erred by issuing a ruling contrary to Supreme Court and Fifth Circuit precedent.

2. The court wrongly enjoined private would-be plaintiffs.

The district court also erred by granting the federal government's novel request to enjoin private individuals who may bring S.B. 8 suits—an unknown number of unidentified individuals in unknown locations who are not parties to this proceeding. App.891-97, 934.

First, the district court held that "[t]he private individuals who bring S.B. 8 lawsuits are in active concert with the State." App.894. But "[i]t was 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, J.) (quoting Fed. R. Civ. P. 65(d)(2)).

Second, private would-be plaintiffs are not in concert with Texas under this Court's decision in *Texas v. Department of Labor*, 929 F.3d 205 (5th Cir. 2019). When the Department of Labor ("DOL") was enjoined from enforcing one of its regulations, a private plaintiff stepped in to do so. The district court held the private plaintiff in contempt for violating the injunction against DOL, but this Court reversed: DOL had no "legal relationship" with the private plaintiff, *id.* at 211, and the fact that the private plaintiff had "a private right of action" gave her separate interests, *id.* at 212.

So too here. Texas has no legal relationship with the private individuals who may make use of S.B. 8's private cause of action. If they do so, Texas will be no more involved than DOL was in a private suit enforcing its regulation.[4]

D. The district court failed to conduct a severability analysis.

The Texas Legislature included multiple, strong severability provisions in S.B. 8. Tex. Health & Safety Code § 171.212; S.B. 8 § 12. Federal courts are to apply severability clauses in state laws, *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) (per curiam), and should "sever [a statute's] problematic portions while leaving the remainder intact." *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328-29 (2006) (citation omitted).

[4] The district court also suggested that S.B. 8 plaintiffs engage in state action. App.893-94. But "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).

The district court refused to perform a severability analysis. App.924-25. For example, the court did not even ask whether S.B. 8's private cause of action is constitutional as applied to post-viability abortions, which States can prohibit in nearly all circumstances. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992). The district court also did not analyze whether to sever particular provisions of S.B. 8, such as the requirement that doctors attempt to detect a heartbeat before performing an abortion. Tex. Health & Safety Code § 171.203(b). The federal government provided no evidence that this requirement poses an undue burden.

Whole Woman's Health v. Hellerstedt is not to the contrary, as it concerned a single statute that incorporated an "integrated" set of health-and-safety standards. 136 S. Ct. 2292, 2319-20 (2016). The Court concluded that independently considering each individual safety standard would amount to "quintessentially legislative work." *Id.* at 2319. This case does not require legislative work. Instead, it resembles *Jane L.*, in which the Supreme Court required severance when abortion regulations applied both before and after 20-weeks' gestation. 518 U.S. at 139-44.

II. Texas Will Suffer Irreparable Harm If the Injunction Is Not Stayed Pending Appeal.

"When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws." *Veasey v. Perry*, 769 F.3d 890, 895 (5th Cir. 2014) (quoting *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013)). "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012)

(Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). By enjoining state court judges, the district court has issued an order that "violat[es] . . . the whole scheme of our government." *Young*, 209 U.S. at 163. There is no precedent for the district court's injunction; it grossly and irreparably interferes with Texas state-court operations.

It also places state courts and their employees under imminent threat of contempt based on the actions of third parties that they cannot control. For example, state court clerks are now enjoined from "accepting," "docketing," or "maintaining" any S.B. 8 case, App.934, but "[t]he longstanding rule in Texas is that an instrument is deemed in law filed at the time it is left with the clerk, regardless of whether or not" a clerk adds "a file mark." *Hecker v. Wal-Mart Stores, Inc.*, 33 F.3d 531, 532 (5th Cir. 1994) (per curiam) (quotation omitted). Thus, an S.B. 8 suit "is 'filed' when it is tendered to the clerk," regardless of the clerk's actions. *Jamar v. Patterson*, 868 S.W.2d 318, 319 (Tex. 1993) (per curiam). Once such a suit is filed, clerks can be accused of "accepting," "docketing," and "maintaining" it, especially given the district court's failure to define the terms it used. Put simply, there is no way for the State to ensure compliance with this injunction and avoid contempt proceedings.

III. The Remaining Stay Factors Favor Texas.

A stay will not injure the federal government. The federal government faces neither a realistic threat of liability under S.B. 8 nor a cognizable interest in challenging that law and therefore has not shown that it will be irreparably injured. *See supra* Part I.A.1. A stay also furthers the public interest. When, as here, the State seeks a stay

pending appeal, "its interest and harm merge with that of the public." *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)).

IV. The Court Should Expedite Briefing and Decision of This Appeal.

For all of the reasons detailed above, the Court should expedite consideration of this appeal.

Conclusion

The Court should stay the district court's preliminary injunction pending resolution of this appeal, and alternatively, enter a temporary administrative stay while it considers this motion. The Court should also expedite consideration of this appeal.

Respectfully submitted.

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Certificate of Conference

On October 8, 2021, Beth Klusmann, counsel for Appellant the State of Texas conferred by email with Sarah Harrington, counsel for the United States and Jonathan Mitchell, counsel for the Individual Appellants. The United States will oppose the stays requested in this motion, but is unopposed in principle to expedition, depending on the schedule set. The Individual Appellants are unopposed to all relief requested.

/s/ Judd E. Stone II
Judd E. Stone II

Certificate of Compliance with Rule 27.3

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

- Before filing this motion, counsel for Appellant contacted the clerk's office and opposing counsel to advise them of Appellant's intent to file this motion.
- The facts stated herein supporting emergency consideration of this motion are true and complete.
- The Court's review of this motion is requested by Tuesday, October 12, or alternatively, Appellant requests a temporary administrative stay pending that review at the earliest possible date.
- True and correct copies of relevant orders and other documents are attached in the Appendix to this motion, filed separately.
- This motion is being served at the same time it is being filed.

/s/ Judd E. Stone II
Judd E. Stone II

Certificate of Service

On October 8, 2021, this motion was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Judd E. Stone II
Judd E. Stone II

Certificate of Compliance

This motion complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5172 words, excluding the parts exempted by Rule 27(a)(2)(B); and (2) the typeface and type style requirements of Rule 27(d)(1)(E) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the program used for the word count).

/s/ Judd E. Stone II
Judd E. Stone II