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
Honorable Robert Pitman, United States District Judge
Case No. 1:21-CV-796-RP

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE AND DENIAL OF STAY

Elizabeth B. Wydra
Brianne J. Gorod
David H. Gans
Miriam Becker-Cohen
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, I hereby certify that I am aware of no persons or entities, besides those listed in the party briefs, that have a financial interest in the outcome of this litigation. In addition, I hereby certify that I am aware of no persons with any interest in the outcome of this litigation other than the signatories to this brief and their counsel, and those identified in the party and *amicus* briefs filed in this case.

Dated: October 9, 2021

/s/ Brianne J. Gorod
Brianne J. Gorod

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES – cont'd

STATUTES AND CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC has a strong interest in enforcement of the Fourteenth Amendment and in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Over the past five decades, the Supreme Court has repeatedly recognized that the right to a pre-viability abortion is protected from state infringement by the Fourteenth Amendment. Yet in a brazen and unprecedented attack on the supremacy of federal law and the constitutional rights of its people, Texas enacted Senate Bill 8, banning abortion once a "fetal heartbeat" can be detected—well before a fetus reaches viability or most people even know that they are pregnant. *See* Senate Bill No. 8, 87th Leg., Ch. 62 Reg. Sess. (Tex. 2021) (to be codified at Tex. Health & Safety Code §§ 171.203(b), 171.204(a)) [hereinafter S.B. 8].

Texas intentionally crafted S.B. 8 to make it as difficult as possible for individuals and abortion providers to sue to protect their rights in court. As a result, Texans seeking to terminate their pregnancies must undertake often-daunting trips

[1] *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. All parties consent to the filing of this brief.

to neighboring states' clinics in the midst of a pandemic, and those clinics have grown so overwhelmed that they are now struggling to meet demand. It is under these unique circumstances that the United States has stepped in to defend itself and its people who have been harmed by this flagrantly unconstitutional law.

It undoubtedly has the power to do so. In a long line of cases, the Supreme Court has repeatedly recognized the right of the federal government to sue in federal court to vindicate the public interest even where Congress has not passed a law explicitly authorizing the specific type of action pursued. Most prominently, in *In re Debs*, 158 U.S. 564 (1895), the Supreme Court recognized that the government could sue to vindicate its citizens' constitutional rights.

This Court has recognized the "broad" language of the *Debs* decision, *United States v. City of Jackson*, 318 F.2d 1, 14 (5th Cir. 1963), yet it need not read *Debs* broadly to resolve this case. Under even the narrowest construction of that decision, the United States has a right to sue Texas because S.B. 8 imposes a substantial burden on interstate commerce, creates a crisis for the rule of law in the United States, and has resulted in a scenario in which it is exceedingly difficult, if not impossible, for private individuals to enforce their own Fourteenth Amendment rights. Moreover, given the unique statutory design of S.B. 8 and its effects on the fundamental right to abortion, recognizing the United States' right to sue here would vindicate

the constitutional principles of separation of powers and federalism—principles that S.B. 8 has undermined.

ARGUMENT

I. Since the Early Days of the Republic, the Supreme Court Has Recognized the Right of the United States to Sue Even in the Absence of Statutory Authorization.

The Supreme Court has long recognized the right of the United States to sue in federal court even in the absence of a statute authorizing it do so. Two principles have animated this doctrine's development: the deep-seated rule that "equitable relief . . . is traditionally available to enforce federal law," *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 329 (2015), and the related concept, dating back to English common law, that "where there is a legal right, there is also a legal remedy," *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (quoting 3 William Blackstone, *Commentaries on the Laws of England* 23 (1768)). To ensure that the United States as a sovereign nation can fulfill its duty to protect the constitutional rights of its people, the Supreme Court has repeatedly recognized the authority of its executive to sue where Congress has not otherwise barred such an action.

In the early days of the Republic, "[l]acking a guiding body of statutes, the judiciary faced the task of defining the rights of the United States, as a sovereign and representative entity, in a system of law that made few explicit provisions for government interests and actions." Note, *Protecting the Public Interest: Nonstatutory*

Suits by the United States, 89 Yale L.J. 118, 120 (1979) [hereinafter *Protecting Public Interest*]. Early statutes did not explicitly authorize the United States' right to sue in tort or contract, yet the Supreme Court recognized the incongruity of recognizing the right to own property or to enter into a contract without permitting enforcement of those rights in a court of law. *See, e.g.*, *Dugan v. United States*, 16 U.S. 172, 181 (1818); *United States v. Tingey*, 30 U.S. 115, 122 (1831).

In these early cases, the Court relied primarily on analogies between the United States and a private plaintiff seeking to vindicate a proprietary interest in court. *See, e.g.*, *Cotton v. United States*, 52 U.S. 229, 231 (1850); *Dugan*, 16 U.S. at 181. But in the wake of the Civil War and the creation of the federal Department of Justice, the Supreme Court promptly recognized the flaws in such analogies—that, in fact, the federal government's right to bring lawsuits not authorized by statute was broader than that of private parties in light of its sovereign duty to protect its citizens and the public interest, *see Protecting Public Interest*, *supra*, at 121-22; *United States v. City of Philadelphia*, 644 F.2d 187, 215 (3d Cir. 1980) (Gibbons, J., dissenting from denial of rehearing) ("The analogy to private litigants is in fact imperfect, for as the Court recognized, . . . the Executive has a duty to the public, which no private litigant suing to enforce his property interests has.").

The first cases to recognize this broader non-statutory right to sue were *United States v. San Jacinto Tin* and *United States v. American Bell Telephone*. In *San*

Jacinto, the Attorney General filed suit to revoke a fraudulently obtained land patent. 125 U.S. 274 (1888). In upholding the right of the United States to sue even in the absence of an authorizing statute, the Court initially focused on the government's asserted proprietary interest in the action because revocation of the patent would have resulted in reversion of the land to the federal government. *Id.* at 286. But the Court also acknowledged a presumption in favor of executive authority to sue in the absence of a congressional prohibition, *id.* at 284, and noted that the United States might claim standing to sue to enforce an "obligation to the general public," *id.* at 286.

The Court seized on that reasoning in *American Bell*, explicitly upholding the right of the United States to sue to effectuate a statutory scheme, even in the absence of an express cause of action. 128 U.S. 315, 367-68 (1888). *American Bell* also involved a fraudulently obtained patent, but this time, the United States could claim neither a pecuniary loss nor a proprietary interest in a reversion of the subject of the patent. *See id.* at 350-51, 366-68. Even so, the Court upheld the right of the United States to sue. The Court held that "the right of the United States to interfere in the present case is its obligation to protect the public from the monopoly of the patent which was procured by fraud," *id.* at 367—to "take care that the laws be faithfully executed," U.S. Const. art. II, § 3.

On the heels of *San Jacinto* and *American Bell* came the *Debs* decision. *Debs* arose out of an injunction obtained by the Attorney General against the leaders of the Pullman rail strike of 1894. 158 U.S. at 565-67. Those leaders argued that the federal government lacked the authority to seek the injunction in the first place, *id.* at 570-73, but the Supreme Court disagreed.

In explaining its decision, the Court acknowledged that there were multiple possible grounds for its decision, some narrower than others. For example, it could have rested its holding on the United States' proprietary interest in ending the strike, or its right to sue to effectuate the guarantees of the Sherman Anti-Trust Act. *See id.* at 584, 600.

But the Court unanimously chose to go further. Citing *San Jacinto* and *American Bell*, the Court found it "obvious from these decisions" that the United States could sue in cases that "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." *Id.* at 586. Thus, the courts should not "prevent [the United States] from taking measures therein to fully discharge those constitutional duties," even if that meant suing in the absence of statutory authorization. *Id.*

Alongside this sweeping language, the Court in *Debs* also emphasized three special aspects of the Pullman strike that made suit by the United States appropriate.

First, the Court discussed the government's special duties with respect to enforcement of the Commerce Clause, the constitutional provision implicated by the strike. *See id.* at 586. Second, the Court emphasized the disastrous and immediate effects of the strike. *Id.* at 592. Third, the Court found that the strike "affect[ed] the people at large" in the exercise of common rights, *id.* at 593, meaning no individual might have standing in his or her own right to challenge it, and the Attorney General thus had a special duty to step in on behalf of the public, *see id.* at 587; *accord Protecting Public Interest*, *supra*, at 143 & n.31.

II. This Court Can Recognize the United States' Right to Sue in This Case Without Adopting a Broad or Novel Reading of *Debs*.

While some courts have read *Debs* broadly, *e.g.*, *United States v. Brand Jewelers, Inc.*, 318 F. Supp. 1293 (S.D.N.Y. 1970), others have read the decision as limited to cases presenting at least some of the special circumstances of the Pullman strike, *e.g.*, *United States v. Solomon*, 563 F.2d 1121, 1129 (4th Cir. 1977).

While this Circuit has recognized the plausibility of the broader reading, *Jackson*, 318 F.2d at 14, debates about the scope of *Debs* need not be resolved in this case. Just as in *Debs*, the government here has demonstrated that S.B. 8 substantially burdens interstate commerce in violation of the Commerce Clause, creates a crisis requiring immediate intervention, and has made it exceedingly difficult for individual Texans harmed by S.B. 8 to vindicate their own rights in court. Because all three

special circumstances of *Debs* are satisfied, this case fits squarely within the confines of existing precedent.

The interstate commerce effects of S.B. 8 are well-documented by the government. *See* App. 49-50.[2] S.B. 8 authorizes lawsuits by people *anywhere* in the country to enforce its unconstitutional terms. *See* Tex. Health & Safety Code § 171.208(a). Meanwhile, Texas residents are flooding clinics in neighboring states because of S.B. 8's restrictions, causing a ripple effect that makes abortion more difficult to access even outside of Texas. *See, e.g.*, App. 171-76, 179-84, 198-203.

As for the emergency nature of the situation, S.B. 8 poses at least as urgent a crisis for the United States and its people as the Pullman strike did in *Debs*. As described above, the impact of S.B. 8 has been immediate and devastating for Texans in need of abortions.

The unprecedented and lawless nature of Texas's crafting and enactment of S.B. 8 also creates a second urgency requiring intervention by the federal government and equitable relief. Here, Texas has avowedly and unapologetically disregarded binding Supreme Court precedent, *see Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). In so doing, the State has not only violated the Fourteenth Amendment, but it also has violated the most basic tenet of the Supremacy Clause: that the federal Constitution is "the supreme Law of the

[2] Citations are to the Appendix filed by Texas.

Land." U.S. Const. art. VI, cl. 2. Texas's open defiance of federal law and its effort to subvert judicial review threatens this fundamental precept and serves as a blueprint for other states to undermine constitutional rights and avoid accountability.

Finally, as in *Debs*, S.B. 8 presents a scenario where individuals face significant barriers to their own suits for equitable relief. Here, Texas has crafted a statute with a private enforcement scheme that, it has argued, renders Section 1983 lawsuits improper and the exception to Eleventh Amendment sovereign immunity under *Ex parte Young*, 209 U.S. 123 (1908), unavailable. The United States is uniquely positioned to vindicate the rights of its people under these circumstances.

III. The Rationales Counseling Against Recognizing a Public Right of Action Do Not Apply Here.

A. This Case Does Not Raise Separation of Powers Concerns.

Because the Constitution delegates the lawmaking power to Congress, some courts have expressed a hesitancy to extend a cause of action to the executive branch where Congress has not done so itself. *See, e.g.*, *Solomon*, 563 F.2d at 1128-29; *Philadelphia*, 644 F.2d at 199-201. In this case, however, it is Texas, not the federal courts or the executive branch, that has usurped Congress's power by attempting to craft a statute that prevents individuals from vindicating their constitutional rights pursuant to the express cause of action in Section 1983.

Congress enacted Section 1983 in the wake of the Civil War to "throw[] open the doors of the United States courts to those whose rights under the Constitution are

denied or impaired." Cong. Globe, 42d Cong., 1st Sess. App. 376 (1871) (Rep. Lowe). For the past fifty years, Section 1983 has been the chief vehicle through which private parties have sought injunctive relief to prevent enforcement of state laws that infringe on their constitutional right to a pre-viability abortion. Yet as described above, Texas specifically designed S.B. 8 to evade judicial review pursuant to Section 1983, effectively rendering that statute a dead letter in the abortion context. By stepping in on behalf of the American people to defend their constitutional rights, the executive branch here seeks to restore the congressional scheme disrupted by Texas.

B. This Case Does Not Raise Federalism Concerns.

Under the Supremacy Clause, the Constitution reigns as "the supreme Law of the Land." U.S. Const. art. VI, cl. 2; *see McCulloch v. Maryland*, 17 U.S. 316, 326-27 (1819). Here, Texas has flagrantly disregarded this principle, intentionally crafting a state law that deprives Texans of their long-established Fourteenth Amendment rights and is designed to evade traditional forms of judicial review.

To be sure, under our constitutional structure, states are charged with ensuring the health and wellbeing of their citizens. For this reason, state abortion regulations are permissible when they do not have the "purpose or effect of presenting a substantial obstacle to a woman seeking an abortion," *Casey*, 505 U.S. at 878. But Texas has asserted no historic state interest in regulating the health of its citizens to

defend its enactment of S.B. 8. Nor could it: S.B. 8 is an outright *ban* on most constitutionally protected abortions with no health and safety justification whatsoever. Under such circumstances, permitting the federal government to intervene in defense of that right helps preserve the Constitution's delicate balance between state and federal power.

CONCLUSION

For the foregoing reasons, this Court should deny Texas's stay request.

Respectfully submitted,

/s/ Brianne J. Gorod
Elizabeth B. Wydra
Brianne J. Gorod
David H. Gans
Miriam Becker-Cohen
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

Dated: October 9, 2021

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on October 9, 2021.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 9th day of October, 2021.

/s/ Brianne J. Gorod
Brianne J. Gorod

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 2,587 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the attached *amicus* brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using 14-point Times New Roman font.

Executed this 9th day of October, 2021.

/s/ Brianne J. Gorod
Brianne J. Gorod

Counsel for Amicus Curiae