No. 21-588

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.

STATE OF TEXAS, *ET AL.*,
Respondents.

On Writ of Certiorari Before Judgment to the United States Court of Appeals for the Fifth Circuit

BRIEF OF INDIANA, ALABAMA, ARIZONA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

May the United States bring suit in federal court and obtain injunctive or declaratory relief against the State, state court judges, state court clerks, other state officials, or all private parties to prohibit S.B. 8 from being enforced.

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INTEREST OF *AMICI* STATES

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

In this case the federal Executive Branch has taken the remarkable position that it can go into federal court to seek an injunction against a State any time it thinks a state law violates someone's constitutional rights—or at least, it insists, it can do so whenever individuals would find it difficult to bring preenforcement challenges themselves in federal district court. This would permit the Executive Branch to challenge all manner of state laws, and *Amici* States submit this brief to explain why the Court should reject this position and should therefore reverse the district court's preliminary injunction.

SUMMARY OF THE ARGUMENT

The district court's order below threatens to expose every State in the Union to suit by the federal Executive Branch 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. 73a—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 Attorney General a cause of action to seek such an injunction to enforce individuals' Fourteenth Amendment rights. It is thus clear that if he has authority to seek "the order he did, it must be found in some provisions of the Constitution." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). Yet the district court made no effort to specify any constitutional provision granting such authority, but instead simply declared that "[n]o cause of action created by Congress is necessary," for in its view the federal Executive Branch has *inherent* power "to seek an injunction to protect . . . the fundamental rights of its citizens under the circumstances present here." App. 39a–40a.

1. Even the Attorney General, however, acknowledged in the district court below that 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." ECF 8 at 25–26. And both Congress and the Executive Branch have long shared the view that the Attorney General can bring suit only if *Congress* first grants him a cause of action to enforce individuals' federal constitutional or statutory rights: In the mid-twentieth century, the Attorney General repeatedly sought "broad power to seek injunctions against violations of citizens' constitutional rights," and Congress repeatedly refused to give him such power. *United States v. City of Philadelphia*, 644 F.2d 187, 195 (3d Cir. 1980). And 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. Here, the Attorney General scarcely contests this general point but rather insists he must be able to sue to enjoin state conduct in what he claims are the "'exceptional' circumstances" presented here. Application at 28 (quoting App. 111a). The district court adopted this position, accepting the "three limiting principles" the Attorney General argues make this case exceptional. App. 49a. 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 position of the Attorney General and the district court is premised on the notion that the Constitution guarantees individuals the right "to vindicate their federal constitutional rights in federal court." Application at 28. The Constitution does not do so. As the Court has observed, the Constitution instead presumes "that state courts, as judicial institutions of co-extant sovereigns, are equally capable of safeguarding federal constitutional rights." *Hawaii Hous. Auth. v. Midkiff*, 463 U.S. 1323, 1325 (1983). The district court's order thus contravenes the Court's precedents—as well as the longstanding positions of both Congress and the Executive Branch—and threatens to undermine the principles of separation of powers and federalism that lie at the core of our Nation's constitutional structure. The Court should therefore reverse the district court's order and reject this unprecedented assertion of executive authority.

ARGUMENT

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

Before suing a State, the federal Executive Branch, "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). Because this suit fails to clear this threshold, it fails at the outset, and the district court therefore erred in granting the preliminary injunction.

Notably, unlike situations where the Attorney General has brought suit to enjoin a state law to enforce the federal government's *own* rights and powers—such as its "constitutional power to 'establish an uniform Rule of Naturalization,' and its inherent power as sovereign to control and conduct relations with foreign nations," *Arizona v. United States*, 567 U.S. 387, 394–95 (2012)— here the Attorney General seeks to enjoin every application of S.B. 8 on the ground that the law violates the purported *individual* right declared in *Casey*, *see Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992); Application 14–15. The Attorney General must therefore identify *something* authorizing him to seek this injunction to enforce private individuals' constitutional rights, and neither he nor the district court have suggested that any statute does so. The contention, rather, is that the Constitution itself—the Fourteenth Amendment or Supremacy Clause—provides the cause of action. *See id.* at 20 (contending "the law's violation of the Fourteenth Amendment and the Supremacy Clause injures the United States' sovereign interests"); App. 57a (arguing that there is an "equitable cause of action" because S.B. 8 attempts to "supersede the Supremacy Clause and the Fourteenth Amendment").

The Attorney General's argument on this score, however, runs headlong into the Court's precedents. *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324–25 (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."). The Court has long held that implied rights of action are disfavored: "In both statutory and constitutional cases, [the 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, 286–93 (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).

The political branches have long shared this understanding as well. 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," *City of 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 the 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 in fact occasionally provided the Attorney General narrow authority to sue States to seek injunctions against violations of certain constitutional or statutory rights, *see, e.g.,* 42 U.S.C. § 2000a-5 (Title II of the 1964 Civil Rights Act); 52 U.S.C. § 10306(b) (poll taxes); 52 U.S.C. § 10504 (Voting Rights Act). And 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.

This evidence thus "demonstrates that neither Attorneys General nor Congress . . . believed that either Congress or the Constitution had created this power sub silentio." *City of Philadelphia,* 644 F.2d at 201. Congress has repeatedly addressed the issue and has

determined that the Attorney General's authority to enforce individuals' Fourteenth Amendment constitutional rights should be limited to the criminal prosecution of certain constitutional violations. *See* 18 U.S.C. §§ 241, 242; *City of Philadelphia*, 644 F.2d at 190–93 (discussing these two statutory provisions). Otherwise, Congress has left the enforcement of constitutional rights to the individuals who bear them. *See* 42 U.S.C. § 1983. In short, "Congress could not more clearly and emphatically have withheld [the] authority" the Attorney General claims here. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 602 (1952) (Frankfurter, J., concurring).

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. 53a. Yet not even the district court suggested that among constitutional rights abortion is somehow uniquely amenable to federal Executive Branch enforcement. And neither *Roe* nor any other abortion-rights precedent says anything about the Attorney General'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." *City of 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). *See* App. 47a. 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 invalidated no state laws; rather, the suit was premised on the federal government's property interests in the mail, its constitutional authority over interstate commerce, and the "public right" in unobstructed interstate rights of way. 158 U.S. at 592. 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 absent a statutory cause of action would undermine 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). And 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. The Court should refuse to do so.

II. The "Exceptional Circumstances" the Attorney General Cites as Limiting Principles Lack Legal Significance and Are Far from Exceptional

As it happens, neither the Attorney General nor the district court "go so far as to endorse the broadest reading of *Debs*." App. 48a. Indeed, the Attorney General has expressly disclaimed the notion that he may sue States "whenever a State enacts an unconstitutional law." Application at 22. Instead, the Attorney General suggested, ECF 8 at 26, and the district court accepted, three conditions that would limit the proposed equitable cause of action to the "circumstances present here"— "(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. 49a.

These purported limitations, however, have no legal basis and impose no real constraints. 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 pro-

posed 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 does not conflict with federal law, obviously a federal court cannot enjoin the state law's enforcement. Similarly, the second purported condition, that the state law "has widespread effect," has neither legal relevance nor any capacity to narrow when the federal government may sue: By their very nature, *all* state legal rules have statewide effect.

The district court and the Attorney General thus rely heavily on the third condition, that the state law is "designed to preclude review." *See* App. 49a ("The final factor identified by the United States will likely carry the most weight . . . ."); Application at 28 (distinguishing "*City of Philadelphia*, *Mattson*, and *Solomon*" solely on the ground those cases "involved no effort to frustrate other mechanisms for judicial review"). But this condition, like the others, also lacks legal justification and practical significance. The district court offered the theory that a lack of federal-court review satisfies the traditional equitable requirement that there be "no adequate remedy at law," App. 44a, but equity *always* requires the absence of adequate legal relief, *see, e.g., Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156 (2010). This condition thus does nothing to identify an "exceptional circumstance" where the federal government has an otherwise-unavailable equitable cause of action.

Meanwhile, the rationale the Attorney General offers—that *Ex parte Young* guarantees challengers a right "to vindicate their federal constitutional rights in federal court," Application at 28—fails as well, for the problem in *Ex parte Young* was that the law had "preclude[d] a resort to the courts (*either state or Federal*) for the purpose of testing its validity," 209 U.S. 123, 146 (1908) (emphasis added). Here, state courts *are* available to test the constitutionality of S.B. 8. *See Whole Woman's Health v. Jackson*, 13 F.4th 434, 447 & n.20 (5th Cir. 2021) (noting "that potential S.B. 8 defendants will be able to raise defenses before state courts that are bound to enforce the Constitution" and citing pending state-court challenges). While the district court doubted that state courts could vindicate federal rights because S.B. 8 purports to limit available defenses, *see* App. 44a, Texas law clearly permits litigants to challenge the constitutionality of statutory limits on defenses in state court, *see State v. Scott*, 460 S.W.2d 103, 107 (Tex. 1970) (holding that the 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 this Court via a writ of certiorari. 28 U.S.C. § 1257(a).

In any case, the Attorney General's theory necessarily presumes "that "state courts [a]re not competent to adjudicate federal constitutional claims," a notion this Court has "repeatedly and emphatically re-

jected." *Moore v. Sims*, 442 U.S. 415, 430 (1979). Indeed, his theory contravenes the very foundations of the Madisonian Compromise, whereby the Constitution created the Supreme Court but not lower federal courts—thus presuming that *state* courts are in fact capable of resolving federal constitutional claims in the first instance. *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.").

After all, many legal rules can be adjudicated only in state-court proceedings, with the resolution of federal claims reviewable by this 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). There can therefore be no suggestion that the practical unavailability of federal-court pre-enforcement challenges to state legal rules presents any constitutional problem.

Finally, beyond these three express limitations, the district court suggested this suit is permissible because, as in *Debs*, "the offending law implicates interstate commerce." App. 48a. Yet again, however, this argument offers neither a legal justification nor a significant limitation on the Attorney General's authority to challenge state laws. *Debs* provides no legal rationale, for it involved no "offending law" at all, and the private activity that had been enjoined there far more than "implicate[d] interstate commerce," *id.*—it constituted "forcible interference" with interstate commerce and thereby violated the federal government's constitutional "power over interstate commerce and the transportation of the mails," *In re Debs*, 158 U.S. 564, 581 (1895). Here, the claim is not that S.B. 8 violates the Commerce Clause, but that it violates the putative right of individual women to pre-viability abortions. If the Attorney General can seek injunctions to enforce such individual rights any time a state law merely "implicates" interstate commerce,

App. 48a, his authority on this score would be expansive indeed. *See, e.g., Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536–37 (2012); *Taylor v. United States*, 136 S. Ct. 2074, 2086 (2016) (Thomas, J., dissenting).

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This case does not permit, much less require, the Court to address the constitutional merits of 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 seek injunctions against 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)). The Attorney General has effectively conceded he has no such authority—at least as a general matter. And just as in *City of 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,'" the limiting principles proposed here "lack real content." *United States v. City of Philadelphia*, 644 F.2d 187, 201 (3d Cir. 1980).

In sum, 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 the Attorney General such authority. The Court should refuse to do so as well.

CONCLUSION

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

Respectfully submitted,

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