No. 21-463

IN THE

# Supreme Court of the United States

WHOLE WOMAN'S HEALTH, ET AL.,

*Petitioners*,

v.

AUSTIN REEVE JACKSON, IN HIS OFFICIAL CAPACITY AS JUDGE OF THE 114TH DISTRICT COURT, ET AL.,

*Respondents*.

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

## BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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## 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 works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in ensuring access to the courts to enforce federal constitutional protections and in this case.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Senate Bill 8 bans abortion once a "fetal heartbeat" can be detected—months before a fetus reaches viability or most people even know that they are pregnant. 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]. Remarkably, the state defendants have all but abandoned any argument that S.B. 8 comports with our federal Constitution, "the supreme Law of the Land," U.S. Const. art. VI, cl. 2, which enshrines the right to a previability abortion. Instead, these officials insist they cannot be sued pursuant to *Ex parte Young*, 209 U.S. 123 (1908), because Texas has delegated enforcement of S.B. 8 to the populace at large.

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[1] The parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

The state defendants are wrong. This challenge to S.B. 8—a state law that blatantly and intentionally defies the federal Constitution—fits squarely within the confines of this Court's *Ex parte Young* doctrine, which ensures the availability of remedies that are "necessary to vindicate the federal interest in assuring the supremacy of that law." *Green v. Mansour*, 474 U.S. 64, 68 (1985); *see id.* ("*Ex parte Young* gives life to the Supremacy Clause."). To accept Texas's arguments to the contrary would eviscerate the rule of federal supremacy that gave rise to *Ex parte Young* in the first place, opening the door to widespread nullification of constitutional rights through legislative maneuvering. Under Texas's view of the law, state legislative majorities could defeat all manner of bedrock constitutional rights—not only the right to abortion, but also countless other rights, including the rights to freedom of speech and the free exercise of religion—by the simple device of delegating enforcement to the state's populace. That cannot be right.

From the very beginning of our Constitution's history, federal courts were designed to be the front line against unlawful acts committed by state governments. When the Framers wrote our founding charter more than two centuries ago, they were particularly concerned about unlawful actions by state governments, which had gone unchecked under the dysfunctional government of the Articles of Confederation. They included in the Supremacy Clause a mandate for the judicial branch to void "any Thing" in state law to the "Contrary" of federal law. U.S. Const. art. VI, cl. 2. And as the debates in Philadelphia show, this text reflects the Framers' conscious decision to choose judicial review of state laws as the means for enforcing constitutional limits and ensuring the supremacy of federal law. The Framers understood that

constitutional "[l]imitations . . . can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." *The Federalist No. 78*, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

*Ex parte Young* vindicates these principles. "It rests on the premise—less delicately called a 'fiction'—that when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes." *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 255 (2011) (citation omitted). This "fiction" was created, and "the *Young* doctrine has been accepted[,] as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (quoting *Young*, 209 U.S. at 160).

Because of the vital role *Ex parte Young* serves in protecting the supremacy of federal law, the doctrine permits prospective relief in a pre-enforcement posture. *See Edelman v. Jordan*, 415 U.S. 651, 664 (1974). Indeed, this Court has "held that '[i]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Virginia Office for Protection*, 563 U.S. at 255 (alterations in original) (quoting *Verizon Md., Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 645 (2002)). In blocking this case from proceeding, the Fifth Circuit never conducted that inquiry.

Instead, it took note of "the 'serious questions regarding the constitutionality of the Texas law at issue,'" Pet. App. 104a (quoting *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021)), yet concluded that the ability of potential S.B. 8 defendants "to raise defenses before state courts that are bound to enforce the Constitution" was sufficient to protect the supremacy of federal law, given the complexities of S.B. 8's legislative design, *id.* That conclusion cannot be squared with this Court's holding in *Ex parte Young*. Indeed, in that very case, this Court explicitly rejected the argument that a person must await enforcement of an allegedly unconstitutional law to challenge it in federal court. *Young*, 209 U.S. at 163-65. Texas's insistence to the contrary throughout this litigation not only directly contravenes this Court's precedents, but it also substantially weakens the principles of federal supremacy that the Framers so carefully crafted the Constitution to protect.

Thus, Petitioners and the people of Texas whom they serve should not be forced to continue to suffer ruinous harm—including the chilling effects of S.B. 8 that have made abortion essentially unavailable in Texas—in order to have a federal court assess S.B. 8 on its merits. And there is no question that such an assessment must result in the invalidation of S.B. 8 and an injunction against its enforcement going forward.

## ARGUMENT

### I. *Ex parte Young* Vindicates the Supremacy of Federal Law, and Permitting Texas to Make an End Run Around *Ex parte Young* by Delegating S.B. 8's Enforcement to Private Parties Would Authorize States to Nullify Federal Law.

A brief history of our Constitution's Supremacy Clause and the role of federal judicial review in protecting the supremacy of federal law makes clear the vital role *Ex parte Young* plays in vindicating the supremacy of federal law.

**A.** The Supremacy Clause provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. By including in the Constitution a sweeping declaration of constitutional supremacy and giving courts the power to declare conflicting state law null and void, the Framers provided that "conflicts between state and federal law" would be "resolved by principled adjudication, rather than political will or force." Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1348 (2001).

The Framers crafted the Supremacy Clause against the backdrop of numerous abuses of state authority under the Articles of Confederation, which established a single branch of the federal government, but contained no mechanism for ensuring federal supremacy. Under the dysfunctional structure of the Articles, the federal government could not enforce its laws, prompting Alexander Hamilton to observe that a

"most palpable defect of the existing Confederation is the total want of a *sanction* to its laws." *The Federalist No. 21*, *supra*, at 134 (Alexander Hamilton); *see id. No. 22*, at 146 (Alexander Hamilton) (explaining that "[l]aws are a dead letter without courts to expound and define their true meaning and operation"). The result, James Madison lamented, is that acts of Congress "depend[] for their execution on the will of the state legislatures," making federal laws "nominally authoritative, [but] in fact recommendatory only." James Madison, *Vices of the Political System of the United States* (Apr. 1787), *in* 9 *The Papers of James Madison* 345, 352 (Robert A. Rutland & William M. E. Rachal eds., 1975). Without a supreme federal power overseeing the states, Madison argued, our system of government would be an "inversion of the fundamental principles of all government; it would have seen the authority of the whole society every where subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members." *The Federalist No. 44*, *supra*, at 283 (James Madison).

The Framers gathered in Philadelphia in 1787 to correct these "vices" resulting from the lack of "effectual control in the whole over its parts." 1 *The Records of the Federal Convention of 1787*, at 167 (Max Farrand ed., 1911) [hereinafter *Farrand's Records*]. At the Convention, they extensively debated different possible means of ensuring the supremacy of federal law, including use of force by the executive, a congressional veto on state laws, and judicial review. Judicial review ultimately won out: when Luther Martin of Maryland proposed an initial version of the Supremacy Clause, the Convention unanimously adopted it, 2 *Farrand's Records*, *supra*, at 28-29, and then promptly expanded it, writing a Supremacy Clause into our

Founding charter of "continental" proportions: "one Constitution, one land, one People." Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1458 (1987).

The Framers' decision to vest the federal courts with the responsibility to ensure the supremacy of federal law through the exercise of judicial review in lawsuits brought by injured parties reflected their belief that the judiciary was the "quarter . . . [to] look for protection from an infringement on the Constitution," 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 554 (Jonathan Elliot ed., 1836) [hereinafter *Elliot's Debates*] (statement of John Marshall), and that review by an independent judge was the only "natural and effectual method of enforcing laws," 4 *Elliot's Debates*, *supra*, at 146 (statement of James Iredell). Access to the courts was essential to protect individual liberty, prevent government abuse, and ensure the supremacy of federal law.

**B.** Emerging out of those principles was the "watershed case" of *Ex parte Young*. *Edelman*, 415 U.S. at 664. In *Young*, this Court held that the Eleventh Amendment did not bar a federal lawsuit seeking to enjoin the Attorney General of Minnesota from enforcing a state law claimed to violate the Fourteenth Amendment of the Constitution. The challenged law limited railroad rates within the state of Minnesota and established harsh penalties for violators, including fines and jail. *Young*, 209 U.S. at 146-47. Young, the Minnesota Attorney General, had asserted that Minnesota's sovereign immunity deprived the federal court of jurisdiction to enjoin him from performing his duties with respect to that statute. This Court rejected Young's argument. *Id.* at 159-60.

In so doing, this Court explained that "because an unconstitutional legislative enactment is 'void,' a state

official who enforces that law 'comes into conflict with the superior authority of [the] Constitution,' and therefore is 'stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.'" *Virginia Office for Protection*, 563 U.S. at 254 (alterations in original) (quoting *Young*, 209 U.S. at 159-60). In other words, "[t]he State has no power to impart . . . any immunity from responsibility to the supreme authority of the United States." *Young*, 209 U.S. at 160.

Yet "immunity from the responsibility to the supreme authority of the United States," *id.*, is precisely what the state defendants here seek. They assert that by delegating enforcement of S.B. 8 to the populace at large, the Texas legislature has successfully made an end run around *Ex parte Young* and the supremacy principles it was adopted to serve. But the argument that Texas officials, including the judges and clerks who will docket and adjudicate unlawful S.B. 8 lawsuits, and the Texas Attorney General himself, the state's chief law enforcer, are powerless to stop the pervasive harm of S.B. 8 is inaccurate at best and dishonest at worst. *See* Pet. 28-35; *see also Young*, 209 U.S. at 161 (holding that the Minnesota attorney general possessed a "power by virtue of his office" which "sufficiently connected him with the duty of enforcement to make him a proper party"); *Ex parte Virginia*, 100 U.S. 339, 346-47 (1880) ("[T]he prohibitions of the Fourteenth Amendment . . . have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, executive, or its judicial authorities.").

If this game of legislative "gotcha" works, any state can insulate any constitutional right from pre-enforcement judicial review simply by delegating its

enforcement to private parties. "It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence" by permitting any member of the populace to sue to enforce the state's ban on the exercise of a fundamental right. *Frost v. Railroad Comm'n of California*, 271 U.S. 583, 594 (1926). That is not what this Court declared in *Ex parte Young*, nor is it consistent with the vital Supremacy Clause principles that animate *Ex parte Young*.

Indeed, the decisions of this Court "repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights." *Pennhurst*, 465 U.S. at 105 (citing, for example, *Quern v. Jordan*, 440 U.S. 332, 337 (1979); *Scheuer v. Rhodes*, 416 U.S. 232, 237 (1974); *Georgia R. & Banking Co. v. Redwine*, 342 U.S. 299, 304 (1952)). For this reason, in *Pennhurst State School & Hospital v. Halderman*, this Court rejected the extension of the *Ex parte Young* doctrine to state officials who violated state law, reasoning that "[a] federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law." 465 U.S. at 106. Consistent with that logic, in *Virginia Office for Protection & Advocacy v. Stewart*, this Court held that a state agency may sue officers of another agency of the same state for violations of federal law under *Ex parte Young* because "the validity of an *Ex parte Young* action [does not] turn on the identity of the plaintiff," 563 U.S. at 256; rather, it turns on an allegation of "an ongoing violation of federal law" implicating federal supremacy principles, and a request for "relief properly characterized as prospective," *id.* at 255 (quoting *Verizon Maryland*, 535 U.S. at 645).

In sum, *Ex parte Young* effectuates the supremacy of federal law, reflecting this Court's judgment that "certain suits for declaratory or injunctive relief against state officers must . . . be permitted if the Constitution is to remain the supreme law of the land." *Alden v. Maine*, 527 U.S. 706, 747 (1999); *cf. Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326 (2015) ("To say that the Supremacy Clause does not confer a right of action is not to diminish the significant role that courts play in assuring the supremacy of federal law.").[2] Because S.B. 8 is a blatant violation of the Constitution and an unabashed attack on the supremacy of federal law, and the named state officials have the authority to implement it, this case fits squarely within the framework of *Ex parte Young*.

## II. Under *Ex parte Young*, Petitioners Are Not Required to Wait to Defend Themselves in State Court Lawsuits Enforcing S.B. 8.

This Court's "holding [in *Ex parte Young*] has permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely as a shield, for those whom they were designed to protect." *Edelman*,

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[2] The absence of an implied cause of action under the Supremacy Clause is irrelevant here, given that Section 1983 provides an express cause of action to challenge the constitutionality of state laws that infringe on the Fourteenth Amendment, as S.B. 8 does. *See* 42 U.S.C. § 1983 ("Every person who, under color of [state law], subjects, or causes to be subjected, any [person in] the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in [a] . . . suit in equity."); Gene R. Nichol, Jr., *Federalism, State Courts, and Section 1983*, 73 Va. L. Rev. 959, 976 (1987) (arguing that "many of the framers of section 1983 considered state judges to be active and energetic participants in a pervasive effort to deprive a substantial segment of the southern populace of fundamental human liberties").

415 U.S. at 664. This comports with the notion of *Ex parte Young* as a vehicle for the vindication of federal supremacy principles: because the federal rights protected by the Constitution are sacrosanct, no period of delay during which state laws infringe upon or chill the exercise of those rights is acceptable. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158-61 (2014) (collecting cases permitting pre-enforcement judicial review of state laws alleged to violate the federal Constitution); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) ("[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights."); *Terrace v. Thompson*, 263 U.S. 197, 214 (1923) ("Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution wherever it is essential in order effectually to protect . . . the rights of persons against injuries otherwise irremediable.").

This case illustrates the point. As Petitioners describe, in the nearly two months since S.B. 8 went into effect, nearly all abortions have stopped in Texas, leaving thousands of Texans unable to exercise their federal constitutional right to abortion, *see* Pet. 18-19, and burdening the constitutional rights of people seeking abortions in neighboring states, as desperate Texans overwhelm those states' clinics, *id.* at 20-21. The supremacy of federal law is meaningless if *months* can pass during which citizens are deprived of their federal rights by a state law because they are powerless to initiate judicial review of the law creating that deprivation. That is especially so where, as here, the federal right being infringed involves a highly time-sensitive procedure.

And, as this Court in *Ex parte Young* explicitly recognized, it is not just the period of delay that is intolerable if pre-enforcement judicial review is unavailable to challenge state laws that threaten federal constitutional rights. Rather, the threatened effects that an S.B. 8 lawsuit itself could inflict on Petitioners—including "ruinous liability and limitless attorney's fees and costs *even if* the abortion provider ultimately prevails," Pet. 18-19—are equally intolerable. For this reason, this Court in *Young* rejected the attorney general's argument that a railroad company must "disobey" the state law "at least once" and undergo "subsequent proceedings to test its validity" from a defensive posture. *Young*, 209 U.S. at 163. This Court held that such an approach "would place the company in peril of large loss and its agents in great risk of fines and imprisonment if it should be finally determined that the act was valid. This risk the company ought not be required to take." *Id.* at 165.

Notably, in *Young*, as here, the magnitude of the risk that the railroad companies and their agents could suffer in a single enforcement proceeding brought under the Minnesota law was not purely speculative. Rather, the law explicitly laid out a severe fine and imprisonment scheme designed to deter anyone from violating it. For instance, under the passenger-rate provision, "[a] sale of a single ticket above the price mentioned in that act might subject the ticket agent to a charge of felony, and, upon conviction, to a fine of $5,000 and imprisonment for five years. . . . The wonder would be that a single agent should be found ready to take the risk." *Young*, 209 U.S. at 164. So too under S.B. 8's enforcement scheme, which expressly authorizes a minimum award of $10,000 per abortion (without a statutory maximum) against anyone who violates S.B. 8, Tex. Health & Safety Code

§ 171.208(b)(2), and a one-way fee shifting provision that permits only S.B. 8 claimants to recover fees and costs if they win, *id.* § 171.208(b)(3), (i). There is no question that the goal of these harsh penalties is to deter providers and advocates like Petitioners from facilitating the exercise of the constitutional right to abortion in direct defiance of the rule of federal supremacy. In other words, by design and operation, S.B. 8 establishes "a highly efficient *in terrorem* mechanism" to undermine the exercise and enjoyment of fundamental constitutional rights. *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 601 (1967).

Moreover, here, as in *Young*, the threat that S.B. 8 will in fact be enforced against its violators is also concrete. The *Young* case came to this Court following an injunction against the Minnesota law that the attorney general had violated by actually *bringing* an enforcement action (for which he had been jailed and thus sought a writ of habeas corpus on the premise that the federal court lacked authority to enjoin him in the first place). 209 U.S. at 126-41. Similarly, here, several individuals have expressed such a strong interest in enforcing S.B. 8 that they have intervened in the related case challenging S.B. 8, *United States v. Texas*, to defend the law's merits. *See* Intervenors' Mem. in Opp'n to Emergency Appl. to Vacate Fifth Circuit's Stay Pending Appeal at 8-9, *United States v. Texas* (No. 21A85).[3]

In sum, just as in *Ex parte Young*, the threat of ruinous harm to Petitioners that S.B. 8 poses is

[3] One Respondent here, Mark Lee Dickson, also credibly threatened to file suits against Petitioners pursuant to S.B. 8, *see* Pet. App. 16a, though he later disavowed that threat when Petitioners initiated this action, *see Whole Woman's Health*, 141 S. Ct. at 2495.

concrete and calculable, and the harm that such a threat itself has wreaked on the supremacy of federal law and the constitutional right to abortion through its chilling effects is pervasive and ongoing. Under these circumstances, pre-enforcement judicial review pursuant to *Ex parte Young* is needed to "give[] life to the Supremacy Clause." *Green*, 474 U.S. at 68.

## CONCLUSION

For the foregoing reasons, this Court should grant Petitioners' requested relief.

Respectfully submitted,

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