No. 21-463

IN THE
Supreme Court of the United States

WHOLE WOMAN'S HEALTH, ET AL.,
Petitioners,
v.
AUSTIN REEVE JACKSON, ET AL.
Respondents.

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

BRIEF OF CONSTITUTIONAL LAW, FEDERAL COURTS, CIVIL RIGHTS, AND CIVIL PROCEDURE SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE ... 1

INTRODUCTION AND SUMMARY OF ARGUMENT ... 1

ARGUMENT ... 4

I. SECTION 1983 WAS ENACTED IN RESPONSE TO STATE-SANCTIONED PRIVATE VIGILANTISM THAT VIOLATED FEDERAL CONSTITUTIONAL RIGHTS AND EXISTS TO PREVENT SUCH CONDUCT. ... 4

A. Section 1983 Targeted States' Inability or Unwillingness to Protect Residents' Federal Constitutional Rights. ... 6

B. Section 1983's Broad Remedy Depends Upon Access to the Federal Courts. ... 11

II. THE SUPREMACY CLAUSE ENSURES THAT A STATE CANNOT ELIMINATE A FEDERAL REMEDY, INCLUDING UNDER SECTION 1983. ... 14

III. S.B. 8 CREATES A SCHEME OF STATE-SPONSORED PRIVATE VIGILANTISM TO VIOLATE FEDERAL CONSTITUTIONAL RIGHTS—PRECISELY WHAT SECTION 1983 WAS INTENDED TO PROTECT AGAINST. ... 17

TABLE OF CONTENTS
(continued)

Page

CONCLUSION 22
APPENDIX 1a

TABLE OF AUTHORITIES

Page(s)

Cases

Brown v. W. Ry. of Ala.,
338 U.S. 294 (1949) 16

Dennis v. Higgins,
498 U.S. 439 (1991) 2

Dice v. Akron, C & Y R. Co.,
342 U.S. 359 (1952) 15

Felder v. Casey,
487 U.S. 131 (1988) 16, 22

Golden State Transit Corp. v. City of Los Angeles,
493 U.S. 103 (1989) 12

Haywood v. Drown,
556 U.S. 729 (2009) 4, 15

Howlett v. Rose,
496 U.S. 356 (1990) 17

Knick v. Township of Scott,
139 S. Ct. 2162 (2019) 20

Mitchum v. Foster,
407 U.S. 225 (1972) .... *passim*

TABLE OF AUTHORITIES
(continued)

Page(s)

Monell v. Dep't of Soc. Servs. of City of New York,
436 U.S. 658 (1978) 10, 11

Monroe v. Pape,
365 U.S. 167 (1961) 10

Owen v. City of Independence,
445 U.S. 622 (1980) 11, 12

Patsy v. Bd. of Regents of State of Fla.,
457 U.S. 496 (1982) 10, 12, 21

Planned Parenthood v. Casey,
505 U.S. 833 (1992) 2

Pulliam v. Allen,
466 US. 522 (1984) 12, 13

Roe v. Wade,
410 U.S. 113 (1973) 2

Testa v. Katt,
330 U.S. 386 (1947) 14, 16

Whole Woman's Health v. Jackson,
141 S. Ct. 2494 (2021) 2, 21

Wilson v. Garcia,
471 U.S. 261 (1985) 6

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

42 U.S.C. § 1983 4

Pub. L. No. 104-317, 110 Stat. 3847 12

S.B. 8
§ 171.208(a) 18, 20
§ 171.208(b)(2) 18
§ 171.208(b)(3) 19
§ 171.208(e) 13, 18, 19
§ 171.210(a) 19

Tex. Civ. Prac. & Rem. Code
§ 15.002(a)-(b) 19
§ 30.022(a) 19

Other Authorities

Cong. Globe
42d Cong., 1st Sess. (1871) 8, 9, 12, 21

David M. Chalmers, *Hooded Americanism: The History of the Ku Klux Klan* (1965) 7

Developments in the Law—Section 1983 and Federalism, 90 Harv. L. Rev. 1133 (1977) .... *passim*

Erwin Chemerinsky, *Federal Jurisdiction* (8th ed. 2021) 6, 7, 10

TABLE OF AUTHORITIES
(continued)

Page(s)

Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 Mich. L. Rev. 1323 (1952) 5

Kenneth M. Stampp, *The Era of Reconstruction, 1865-1877* (1965) 7

Marshall S. Shapo, *Constitutional Tort:* Monroe v. Pape *and the Frontiers Beyond*, 60 Nw. U.L. Rev. 277 (1965) 6

Michael S. Schmidt, *Behind the Texas Abortion Law, a Persevering Conservative Lawyer*, N.Y. Times (Sept. 12, 2021) 20

S. Rep. No.
1, 42d Cong., 1st Sess. (1871) 7
104-366 (1996) 12

U.S. Senate, The Enforcement Acts of 1870 and 1871, https://www.senate.gov/artandhistory/history/common/generic/EnforcementActs.htm 6

INTEREST OF *AMICI CURIAE*

Amici curiae listed in the Appendix are law professors whose scholarship focuses on constitutional law, federal courts, civil rights, and civil procedure. *Amici* have an interest in the role that federal courts play in maintaining constitutional order and the supremacy of federal law. *Amici* believe that federal pre-enforcement injunctive relief against plainly unconstitutional state laws is, and must be, available under federal law. *Amici* write specifically to address how the history and purpose of Section 1983 of the Civil Rights Act of 1871, *see* 42 U.S.C. § 1983, support that conclusion and to explain why Section 1983 is an appropriate vehicle for a pre-enforcement challenge to Texas's Senate Bill 8.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 1983 is the foundational federal statute authorizing private civil suits against state actors for violations of the Constitution. It is properly available for Plaintiffs' suit seeking pre-enforcement injunctive relief against Texas's Senate Bill 8 ("S.B. 8"), a novel state-created scheme to enable and incentivize private actors to prevent other individuals from exercising their federal constitutional rights—here, the right to a pre-viability abortion.

Congress enacted Section 1983 in 1871, in response to the failure of state law enforcement

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[1] Pursuant to Rule 37.6, counsel for *amici* affirms that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* or their counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a), all parties have consented to the filing of this brief.

officials and state courts to respond to widespread violations of federal constitutional rights in the southern States during Reconstruction, as well as their active contribution to such violations. Section 1983's objective was to empower federal courts to prevent and redress violations of federal rights by both state officials and private entities acting at the State's encouragement. In keeping with that aim, Section 1983 has become a crucial mechanism for vindicating the Constitution's core guarantees and other federal rights. *See, e.g.*, *Dennis v. Higgins*, 498 U.S. 439, 444-45 (1991) (explaining that this Court has "given full effect to [Section 1983's] broad language" and "refused to limit" its reach only "to civil rights or equal protection laws"); *Mitchum v. Foster*, 407 U.S. 225, 238-39 (1972) ("[Section] 1983 was thus an important part of the basic alteration in our federal system" through which "the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established.").

S.B. 8 is an "unprecedented" attempt by a State to nullify a federal constitutional right and "avoid responsibility for its laws." *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2496 (2021) (Roberts, C.J., dissenting). S.B. 8 bans abortion months before viability—contrary to the federal constitutional rights recognized in *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Then, in a deliberate effort to chill constitutionally protected activity and frustrate meaningful pre-enforcement review, the law delegates enforcement of that ban to private citizens, offers the promise of financial reward to encourage them to act as bounty

hunters, and eases their path to victory by erecting a set of unique and one-sided procedural rules that do not apply to any other civil action. In short, the State's scheme spurs and rewards enforcement by vigilantes, while seeking to evade meaningful judicial review.

S.B. 8 is precisely the type of state maneuver to deprive individuals of their federal constitutional rights that Section 1983 was intended to redress. Section 1983 was enacted 150 years ago to combat the violation of federal constitutional rights by a recalcitrant State. Its remedy is available when States act directly to violate constitutional rights, when they conspire with private actors to facilitate those violations, or when they willfully turn a blind eye to assaults on fundamental rights.

S.B. 8's scheme of state-sanctioned private vigilantism to thwart a constitutional right recalls the genesis of Section 1983 and the threats that it was meant to neutralize. Indeed, its unprecedented approach is even more blatant because S.B. 8 explicitly incites vigilantism and is designed to avoid any meaningful pre-enforcement review. It would be as if a State in 1870 had passed a law purporting to delegate to private individuals the ability to sue Black people who exercised their right to vote; promising a bounty as a reward; providing unique and previously unknown litigation advantages to such vigilantes; and designing the law deliberately to evade any meaningful pre-enforcement review. Plainly such a law would have been the type of unlawful state action that Congress sought to put an end to with Section 1983.

This Court has repeatedly held that States, including their officials and courts, cannot extinguish federal remedies, including under Section 1983. *See, e.g.*, *Haywood v. Drown*, 556 U.S. 729 (2009). Refusing to allow this Section 1983 action against S.B. 8 to proceed because of Texas's express attempt to authorize the violation of federal constitutional rights by its citizens and insulate those violations from meaningful pre-enforcement review would contravene this Court's consistent refusal to permit state law to encroach on federal remedies. It also would be directly contrary to Section 1983's core purpose: preventing States from collaborating (whether actively or tacitly) with private actors to deny federal constitutional rights to their residents.

This Court accordingly should grant Petitioners' requested relief.

ARGUMENT

I. SECTION 1983 WAS ENACTED IN RESPONSE TO STATE-SANCTIONED PRIVATE VIGILANTISM THAT VIOLATED FEDERAL CONSTITUTIONAL RIGHTS AND EXISTS TO PREVENT SUCH CONDUCT.

Section 1983, originally enacted as Section 1 of the Civil Rights Act of 1871 (also called the Ku Klux Klan Act), provides a federal cause of action against persons acting under color of state law to deprive others of federal constitutional rights. 42 U.S.C. § 1983; *see Mitchum*, 407 U.S. at 238; Steven H. Steinglass, Section 1983 Litigation in State and

Federal Courts § 2:2 (Oct. 2021).[2] The objective of Section 1983 was "to provide civil rights protection against official inaction and the toleration of private lawlessness" that were enabling vigilante violence against Black people in southern States during Reconstruction and preventing them from exercising their federal constitutional rights. *Developments in the Law—Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1153 (1977) ("Developments in the Law"); *see also* Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 Mich. L. Rev. 1323, 1334 (1952) ("[The Civil Rights Act of 1871] was the indignant reaction of Congress to conditions in the southern states wherein the Klan and other lawless elements were rendering life and property insecure.").

Section 1983 became an imperative as resistance to Reconstruction in the South remained strong in the years following enactment of the Thirteenth, Fourteenth, and Fifteenth Amendments. *See, e.g.*,

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[2] In full, 42 U.S.C. § 1983 now provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

Erwin Chemerinsky, *Federal Jurisdiction* 529 (8th ed. 2021). "[V]iolence against blacks was endemic throughout the South." *Id.* "Members of the Ku Klux Klan, for example, terrorized black citizens for exercising their right to vote, running for public office, and serving on juries." U.S. Senate, The Enforcement Acts of 1870 and 1871, https://www.senate.gov/artandhistory /history/common/generic/EnforcementActs.htm (last accessed Oct. 25, 2021); *see also Wilson v. Garcia*, 471 U.S. 261, 276 (1985) ("The specific historical catalyst for the Civil Rights Act of 1871 was the campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights."); Developments in the Law at 1153 n.104 (describing the Klan's "[o]rganized terrorism in the Reconstruction South").

A. Section 1983 Targeted States' Inability or Unwillingness to Protect Residents' Federal Constitutional Rights.

At the time of Section 1983's enactment, it was widely understood that the Klan was not acting on its own in seeking to deprive individuals of their federal constitutional rights, but that States and their officials were enabling these deprivations by failing to act or collaborating with the Klan. "[B]y early 1871 there was overwhelming evidence that through tacit complicity and deliberate inactivity, state and local officials were fostering vigilante terrorism against politically active blacks and Union sympathizers." Developments in the Law at 1153 (citing Marshall S. Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60 Nw. U.L. Rev. 277, 279-80

(1965); Kenneth M. Stampp, *The Era of Reconstruction, 1865-1877*, at 199 (1965); David M. Chalmers, *Hooded Americanism: The History of the Ku Klux Klan* (1965)); *see also Mitchum*, 407 U.S. at 240 ("[S]tate courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights."). For example, a 600-page Senate report from 1871 details "the unwillingness or inability of Southern states to control the activities of the Klan." Chemerinsky at 529 (citing S. Rep. No. 1, 42d Cong., 1st Sess. (1871)).

Both Congress and President Ulysses S. Grant recognized that "remedy[ing] this situation required a further shift in the federal-state balance towards a greater, although still limited, national role in the internal operations of the states." Developments in the Law at 1153. Accordingly, "[o]n March 23, 1871, President Grant requested emergency legislation in a special message, stating that a virtual state of anarchy existed in the South and affirming that the states were powerless to control the widespread violence." *Id.* Congress responded by enacting the Civil Rights Act of 1871 one month later "to provide civil rights protection against official inaction and the toleration of private lawlessness." *Id.*

In describing the 1871 Act's objective, members of Congress focused on the need for a federal remedy to address the complicity of state actors (active or otherwise) in enabling private actors to violate recognized federal constitutional rights:

- "Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices . . . . [A]ll the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection. Among the most dangerous things an injured party can do is to appeal to justice." Cong. Globe 42d Cong., 1st Sess. App. at 78 (1871) (remarks of Rep. Perry).

- "It is said that the States are not doing the objectionable acts. This argument is more specious than real . . . . What practical security would this provision give if it could do no more than to abrogate and nullify the overt acts and legislation of a State?" *Id.* at 375 (remarks of Rep. Lowe).

- "[E]ven where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them." *Id.* at 153 (remarks of Rep. (and later President) Garfield).

- "The principal danger that menaces us today is from the effort within the States to deprive considerable numbers of persons of the civil and equal rights which the General Government is

endeavoring to secure to them." *Id.* at 335 (remarks of Rep. Hoar).

- "Governors, judges, and juries give way to a mania which sometimes seizes hold of the popular mind." *Id.* at 368 (remarks of Rep. Sheldon).

- "[T]he States do not protect the rights of the people; . . . [and] State courts are powerless to redress these wrongs. The great fact remains that large classes of people . . . are without legal remedy in the courts of the States." *Id.* at 252 (remarks of Sen. Morton).

- "[T]he courts are in many instances under the control of those who are wholly inimical to the impartial administration of law and equity." *Id.* at 394 (remarks of Rep. Rainey).

- "[T]he decisions of the county judges," who have "almost without exception" exercised powers "against Republicans without regard to law or justice, make up a catalogue of wrongs, outrageous violations, and evasions of the spirit of the new constitution . . . ." *Id.* at 186 (remarks of Rep. Platt).

These legislator statements "compel[] the conclusion that the Act was aimed at least as much at the abdication of law enforcement responsibilities by Southern officials as it was at the Klan's outrages."

Developments in the Law at 1154; *see also* Chemerinsky at 529.

This Court has repeatedly recognized that the activity Congress sought to address with the Civil Rights Act of 1871 was state endorsement of or indifference to the infringement of fundamental rights by private actors. For example, the Court in *Monroe v. Pape* explained that the Act created a federal cause of action "because, by reason of prejudice, passion, neglect, intolerance, or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." 365 U.S. 167, 180 (1961). In *Mitchum v. Foster*, the Court likewise observed that Congress "was concerned that state instrumentalities could not protect [federal constitutional] rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights." 407 U.S. at 242; *see also Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 505 (1982) ("A major factor motivating the expansion of federal jurisdiction through §§ 1 and 2 of the bill was the belief of the 1871 Congress that the state authorities had been unable or unwilling to protect the constitutional rights of individuals or to punish those who violated these rights." (citing legislators' remarks)); *id.* at 505 n.8 (noting that President Grant and the House Judiciary Committee likewise recognized "[t]he inability of state authorities to protect constitutional rights"); *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 686 n.45 (1978) ("[S]upporters were quite clear that § 1 of the Act extended a remedy

not only where a State had passed an unconstitutional statute, but also where officers of the State were deliberately indifferent to the rights of black citizens.").

B. Section 1983's Broad Remedy Depends Upon Access to the Federal Courts.

This Court has further confirmed that Section 1983 was intended to afford "a broad remedy for violations of federally protected civil rights." *Monell*, 436 U.S. at 685. In *Owen v. City of Independence*, 445 U.S. 622 (1980), the Court explained that "the congressional debates surrounding the passage of § 1 . . . —the forerunner of § 1983—confirm the expansive sweep of the statutory language," and quoted at length the introductory remarks of Representative Shellabarger, the bill's author and manager in the House:

> I have a single remark to make in regard to the rule of interpretation of those provisions of the Constitution under which all the sections of the bill are framed. This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous, were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing

> such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all people.

Id. at 635-36 (quoting Cong. Globe, 42d Cong., 1st Sess., App. at 68 (1871)). Without question, "[t]he 1871 Congress intended § 1" to provide "individuals who [are] threatened with . . . the deprivation of constitutional rights . . . immediate access to the federal courts notwithstanding any provision of state law to the contrary." *Patsy*, 457 U.S. at 504. In keeping with its plain text and remedial purpose, this Court has "repeatedly held that the coverage of [Section 1983] must be broadly construed." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 (1989).

In 1996, Congress amended Section 1983 to limit the availability of injunctive relief against state judges acting purely in their capacity as impartial decisionmakers. *See* Pub. L. No. 104-317, (b)-(c), 110 Stat. 3847 (providing that "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable"); *see also* S. Rep. No. 104-366, at 37 (1996) (explaining that the amendment "bar[s] injunctive relief unless declaratory relief is inadequate"). That amendment was prompted by a decision of this Court, *Pulliam v. Allen*, 466 US. 522 (1984), which Congress viewed as resulting in "frivolous and harassing lawsuits" against judges in situations entirely unlike that presented by S.B. 8. S. Rep. 104-366, at 37. The 1996 amendment simply "restore[d] the doctrine of judicial immunity to

the status it occupied prior to" *Pulliam*. *Id.* at 36. That pre-*Pulliam* doctrine did not preclude injunctions against state judges and court personnel where, as here, they were potentially the only state actors against whom pre-enforcement relief of an unconstitutional state law could be obtained. Indeed, the 1996 amendments expressly sought to allow injunctive relief against judges if "declaratory relief is inadequate." S. Rep. 104-366, at 37. That is precisely the situation here.

Moreover, an interpretation that Section 1983, as amended in 1996, forecloses federal pre-enforcement injunctive relief against a judicial officer when that official is potentially the only state actor that can be enjoined to prevent ongoing violations of federal constitutional rights would itself raise serious constitutional questions about the denial of any ability to meaningfully vindicate a federal right. Given that the terms "unavailable" and "declaratory relief" added in 1996 are both susceptible to meanings that allow an injunctive remedy here—for instance, because "unavailable" can include "inadequate" and because S.B. 8 attempts to disclaim the availability of declaratory relief against state officials or any relief that extends beyond a particular case, *see* S.B. 8 § 171.208(e)—Section 1983 can and should be interpreted to permit a remedy here.

In short, the 1996 amendment did not alter Section 1983's broad remedial focus. There is nothing in the history of either Section 1983 as originally enacted or as amended that indicates Congress intended to foreclose suits against judges for injunctive relief when necessary to cure a

constitutional injury or where no other redress is available to prospectively stop the enforcement of a plainly unconstitutional state law.

II. THE SUPREMACY CLAUSE ENSURES THAT A STATE CANNOT ELIMINATE A FEDERAL REMEDY, INCLUDING UNDER SECTION 1983.

The Supremacy Clause prohibits a State from interfering with the exercise of a federal constitutional right or eliminating a federal remedy. *See Testa v. Katt*, 330 U.S. 386, 391 (1947) (holding that the obligation of the state courts under the Supremacy Clause to enforce federal law "is not lessened by the form in which they are cast or the remedy which they provide"). Yet that is exactly what S.B. 8 purports to accomplish. In attempting to grant state officials absolute immunity for constitutional violations by deputizing and incentivizing private citizens to carry out those violations in the State's stead, S.B. 8 expressly aims to override the remedies otherwise afforded under Section 1983.

Ascertaining that aim does not require any guesswork or inferences by this Court. S.B. 8's key architect was clear about the intent behind the law's design: "By prohibiting state officials from enforcing the statute, and by authorizing the citizenry to enforce the law through private civil enforcement actions, Texas has boxed out the judiciary from entertaining pre-enforcement challenges under 42 U.S.C. § 1983 and *Ex parte Young* . . . ." Reply Br. in Support of Intervenors' Emergency Motion to Stay Preliminary Injunction Pending Appeal at 3, *United States v.*

Texas, No. 21-50949 (5th Cir. Oct. 14, 2021). This effort to subvert otherwise available federal remedies is constitutionally impermissible.

This Court has repeatedly held that States and their courts cannot extinguish federal remedies, including under Section 1983. In *Haywood v. Drown*, 556 U.S. 729 (2009), this Court held that a State cannot use a jurisdictional rule "to nullify a federal right or cause of action." *Id.* at 736. There, New York had passed a law prohibiting its courts from exercising jurisdiction over Section 1983 claims for damages against state corrections officers, believing those suits to be "too numerous or too frivolous (or both)." *Id.* The law forced plaintiffs instead to sue the State directly in the Court of Claims without access to "the same relief, or the same procedural protections" as would be available under Section 1983. *Id.* at 734. *Haywood* held that the law violated the Supremacy Clause, emphasizing that a State "is not at liberty to shut the courthouse door to federal claims that it considers at odds with its local policy." *Id.* at 740.

Similarly, in *Dice v. Akron, C & Y R. Co.*, 342 U.S. 359 (1952), the Court rejected the application of a state law that defeated a right to damages under the Federal Employers' Liability Act in state court. There, a court had overturned a verdict in the plaintiff's favor by relying on a state common law doctrine providing that signed liability releases, even if fraudulently obtained, nullified any right to damages. *Id.* at 360-61. This Court reversed and reinstated the verdict, holding that Congress had "granted petitioner a right to recover against his employer for damages

negligently inflicted" and "[s]tate laws are not controlling in determining what the incidents of this federal right shall be." *Id.* at 361. "[I]f states were permitted to have the final say as to what defenses could and could not be properly interposed to suits under the Act," this Court explained, then "the federal rights affording relief to injured railroad employees under a federally declared standard could be defeated." *Id.* Such a result, moreover, would undermine the "uniform application throughout the country essential to effectuate [the law's] purposes." *Id.*

Other cases have applied this same principle that a state court may not extinguish federal remedies. *See, e.g.*, *Felder v. Casey*, 487 U.S. 131, 139 (1988) ("[W]e have held that a state law that immunizes government conduct otherwise subject to suit under § 1983 is preempted . . . because the application of the state immunity law would thwart the congressional remedy." (collecting cases)); *id.* at 139-40 ("[I]n actions brought in federal courts, we have disapproved the adoption of state statutes of limitation that provide only a truncated period of time within which to file suit, because such statutes inadequately accommodate the complexities of federal civil rights litigation and are thus inconsistent with Congress' compensatory aims." (collecting cases)); *Brown v. W. Ry. of Ala.*, 338 U.S. 294, 299 (1949) (holding that "desirable uniformity in adjudication of federally created rights could not be achieved" if overly exacting state pleading requirements were allowed to defeat recovery under FELA); *Testa*, 330 U.S. at 394 (state

courts with adequate jurisdiction to adjudicate federal claims "are not free to refuse enforcement of [the] claim").

In keeping with this long line of cases protecting the availability of federal remedies, this Court should not allow S.B. 8's unprecedented procedural manipulation to thwart pre-enforcement actions for injunctive relief under Section 1983. It is up to Congress—not the States—to decide when federal claims and remedies are (or are not) available. Congress's decisions are "made on behalf of all the People." *Howlett v. Rose*, 496 U.S. 356, 383 (1990). Texas is not "free to nullify for [its] own people the legislative decision[] that Congress" made in enacting Section 1983, *id.*, a statute whose "very purpose . . . was to "interpose the federal courts between the States and the people, as guardians of the people's federal rights." *Mitchum*, 407 U.S. at 242.

III. S.B. 8 CREATES A SCHEME OF STATE-SPONSORED PRIVATE VIGILANTISM TO VIOLATE FEDERAL CONSTITUTIONAL RIGHTS—PRECISELY WHAT SECTION 1983 WAS INTENDED TO PROTECT AGAINST.

Through S.B. 8, Texas is deliberately annulling the federal constitutional right of individuals state-wide to a pre-viability abortion. And it is doing so not simply by acquiescing to the injurious actions of certain private actors, but rather by proactively creating an elaborate and *sui generis* set of rules to incentivize private individuals to infringe upon the federal constitutional rights of others. This official,

state-sanctioned vigilantism is as unprecedented as it is unlawful.

S.B. 8 imposes a plainly unlawful ban on nearly all pre-viability abortions and then empowers private vigilantes to bring civil suits in state court against anyone who performs, aids and abets, or intends to participate in a prohibited abortion. *See* S.B. 8 §§ 171.208(a), (e)(1). S.B. 8 encourages individuals to bring these suits by requiring courts to award *at least* $10,000 (with no upward limit), payable by the person sued, to any person who successfully shows a violation of S.B. 8. *Id.* § 171.208(b)(2).

S.B. 8 also makes it easier for these deputized bounty hunters to bring and win such suits as compared to any other kind of civil action by stripping defendants of traditional procedural protections and introducing novel procedural hurdles. For example, S.B. 8 suspends the normal rules of standing applicable to those bringing suit—an individual seeking to win the state-created bounty is not required to allege any personal injury. *See* App. 8a-9a. And whereas Texas's Civil Practice and Remedies Code (1) generally restricts the venue in which an action may be brought to the venue in which the events giving rise to the claim occurred or the defendant resides and (2) permits courts to transfer cases to the proper venue, S.B. 8 (1) allows natural persons to bring suit in their county of residence and (2) prohibits the transfer of any case brought in a venue permitted under the law—thereby imposing an incredible burden on persons accused of violating the law by allowing them to be sued in any one of Texas's 254 counties. *Compare*

Tex. Civ. Prac. & Rem. Code § 15.002(a)-(b) *with* S.B. 8 § 171.210(a)(4), (b).

The procedural imbalances imposed by S.B. 8 that favor the deputized bounty hunters do not end there. S.B. 8 also shields claimants from having to respond to certain defenses, as it prohibits defendants from asserting, *inter alia*, that they believed S.B. 8 was unconstitutional, that they relied on a court decision in place when they acted that was later overruled, or that the patient consented to the abortion. S.B. 8 § 171.208(e). Additionally, S.B. 8 creates an asymmetrical fee-shifting regime that serves both to uniquely burden persons accused of violating S.B. 8 and to hamstring any efforts to challenge S.B. 8's constitutionality. The law provides that only individuals who accept the State's invitation to file enforcement actions under S.B. 8—not persons defending against such claims—are entitled to attorney's fees in the event they prevail. *Id.* § 171.208(b)(3), (i). It also provides that individuals *and their attorneys* who challenge S.B. 8 are liable for the other side's attorney's fees if any of their claims are dismissed for any reason, even if the case is ultimately decided in their favor. *See* S.B. 8 § 4 (to be codified at Tex. Civ. Prac. & Rem. Code § 30.022(a)).

Recruiting and encouraging private vigilantes to deprive individuals of their constitutional rights is the extreme type of state defiance that so concerned President Grant and the Reconstruction Congress, and that Section 1983 was meant to remedy. Given that S.B. 8 embodies the very type of effort to annul federal rights that prompted the creation of Section 1983, it is no surprise that the state officials named as

Defendants in this action disclaim Plaintiffs' ability to access Section 1983's well-established remedial power. Indeed, the structural features of S.B. 8 on which they rely to so argue were consciously chosen to enable exactly this argument. S.B. 8's architects knew well that banning nearly all pre-viability abortions would not withstand any constitutional challenge. Accordingly, by their own admissions, they barred Texas executive officials from bringing civil enforcement actions, *see* S.B. 8 §§ 171.207(a), 171.208(a), in a deliberate effort to evade federal judicial review of S.B. 8 and thwart "[t]he 'general rule' . . . that plaintiffs may bring constitutional claims under § 1983." *Knick v. Township of Scott*, 139 S. Ct. 2162, 2172 (2019) (citation omitted).[3]

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[3] *See, e.g.*, Reply Br. in Support of Intervenors' Emergency Motion to Stay Preliminary Injunction Pending Appeal at 3, *United States v. Texas*, No. 21-50949 (5th Cir. Oct. 14, 2021) (statement of S.B. 8 key architect that it "has boxed out the judiciary from considering pre-enforcement challenges under 42 U.S.C. § 1983 and *Ex parte Young*"); Michael S. Schmidt, *Behind the Texas Abortion Law, a Persevering Conservative Lawyer*, N.Y. Times (Sept. 12, 2021), https://www.nytimes.com/2021/09/12/us/politics/texas-abortion-lawyer-jonathan-mitchell.html (statement from same individual that S.B. 8 is a "way[] to counter the judiciary's constitutional pronouncements"); Decl. of J. Alexander Lawrence in Support of Pls.' Motion for Temp. Restraining Order & Preliminary Injunction, Ex. A, at 5, *Whole Woman's Health v. Jackson*, No. 21-cv-00616 (W.D. Tex. Aug. 4, 2021), ECF No. 53-1 (statement

Texas's intentional design of S.B. 8 to "delegate[] enforcement . . . to the populace at large" in an effort to "avoid responsibility for its laws," is "not only unusual, but unprecedented." *Whole Woman's Health*, 141 S. Ct. at 2496 (Roberts, C.J., dissenting). No State has ever before resorted to such procedural machinations to subvert the Constitution and foreclose federal remedies.

"The 1871 Congress intended [Section 1983] to 'throw open the doors of the United States courts' to individuals who were threatened with, or who had suffered, the deprivation of constitutional rights." *Patsy*, 457 U.S. at 504 (quoting Cong. Globe, 42d Cong., 1st Sess., App. at 376 (1871) (remarks of Rep. Lowe)). S.B. 8 tries to slam those same doors shut. This Court has never allowed a State to foreclose

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of State Senator who sponsored S.B. 8 that it was intentionally crafted to not "require any action by the district attorney, by the state, or any government actor"); *id.,* Pls.' Opp'n to Def. Dickson's Motion to Dismiss, Ex. 1 at 3 (May 5, 2021), ECF No. 57-1 (statement of Defendant Mark Lee Dickson that "[t]here's no way for a court to hear the validity of this law until someone actually brings a civil lawsuit" because "the government can't enforce this law"); *id.*, Complaint ¶ 6 (July 13, 2021), ECF No. 1 (statement from the Legislative Director for Texas Right to Life during legislative proceedings that every other six-week abortion ban "has been enjoined or had at least some negative court action . . . because of the [government] enforcement mechanism[]" and S.B. 8 was an effort to "try a different route"); Emergency App. to J. Alito, *Whole Woman's Health v. Jackson*, No. 21A24, (Aug. 30, 2021) App.242 (declaration of Defendant Dickson calling S.B. 8's penalties "ruinous" and observing that "no rational abortion provider . . . would subject itself to the risk of civil liability under Senate Bill 8").

specific categories of Section 1983 suits or to impose a state-created barrier uniquely extinguishing Section 1983 remedies. It certainly should not do so here, where S.B. 8's scheme is "manifestly inconsistent with the purposes of [Section 1983]." *Felder*, 487 U.S. at 141. Plaintiffs' Section 1983 claims should be allowed to proceed so that they may vindicate the federal constitutional rights at issue.

CONCLUSION

Amici respectfully urge the Court to grant Petitioners' requested relief.

Respectfully submitted,

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