No. 21-50949

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

STATE OF TEXAS,
Defendant-Appellant

ERICK GRAHAM; JEFF TULEY; MISTIE SHARP,
Intervenor Defendants-Appellants

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

AMICUS BRIEF OF INDIANA AND SEVENTEEN OTHER STATES IN SUPPORT OF DEFENDANTS-APPELLANTS

THEODORE E. ROKITA
Attorney General of Indiana

THOMAS M. FISHER
Solicitor General

JAMES A. BARTA
Deputy Solicitor General

JULIA C. PAYNE
MELINDA R. HOLMES
Deputy Attorneys General

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

Counsel for Amici *States*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CASES [CONT'D]

CASES [CONT'D]

CASES [CONT'D]

CONSTITUTIONAL PROVISIONS

STATUTES

INTEREST OF *AMICI* STATES

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

The federal Executive Branch has taken the remarkable position that it may 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 pre-enforcement challenges themselves in federal district court. That position if accepted would permit the Executive Branch to challenge all manner of state laws subject to no meaningful constraints. Whether the Attorney General may act as a roving reviser of state laws is of profound importance for *amici*—and indeed for our entire system of government.

SUMMARY OF ARGUMENT

The district court's order threatens to expose every State to suit by the federal government whenever the U.S. Attorney General deems a state law to violate some constitutional right of someone, somewhere. That order permitted the Attorney General to sue the State of Texas, without statutory authorization, because he believed S.B. 8 to violate a "Fourteenth Amendment substantive due process right[] to pre-viability abortions," ROA.1808—a right not of the federal government but "'of the *individual*,'" *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (emphasis added) (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)). The order purported to enjoin not just "Texas" from taking action to implement S.B. 8—something no state official may do anyway—but also unnamed, unidentified private citizens. ROA.1845.

That order is unprecedented. No constitutional provision authorizes the U.S. Attorney General to sue States for all perceived violations of individual rights. By its terms, the Fourteenth Amendment may be "enforce[d]" by "Congress," not the Executive Branch. U.S. Const. amend. XIV, § 5. Both Congress and the Executive Branch thus have long shared

the view that the Attorney General can bring suit for individual-rights violations only if *Congress* first grants him a cause of action.

Congress, however, has repeatedly refused the Attorney General "broad power to seek injunctions against violations of citizens' constitutional rights." *United States v. City of Philadelphia*, 644 F.2d 187, 195 (3d Cir. 1980). And for good reason: Granting the Attorney General that potent power could easily result in "government by injunction," a practice "anathematic to the American judicial tradition." *Id.* at 203.

The district court insisted that "equity" allows the Attorney General to bring suit even absent a "cause of action created by Congress." ROA.1774. Equity, however, is "limited by historical practice." *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 535 (2021). And no longstanding tradition permits the Attorney General to sue States for alleged violations of individual rights. Congress's decision to withhold power from him to bring those suits demonstrates the opposite.

Nor, as the Supreme Court recently held, does equity permit the United States to seek the relief it obtained here—an injunction that purports to bind "'the world at large,'" including unidentified private citizens. *Woman's Health v. Jackson*, 142 S. Ct. at 535. Contorting equity

to permit the Attorney General to seek injunctions against any state official—and even private citizens—for any perceived violations of constitutional rights would effectively override Congress's decision to deny him that power.

The district court claimed "discretion" will prevent the Attorney General from abusing the novel power granted to him below, ROA.1783, but discretion cannot confer power that does not exist. And the district court identified no meaningful principle that would limit the circumstances under which the Attorney General could challenge state laws. Accepting the district court's contrary view would permit a proliferation of federal lawsuits against a multitude of state laws.

Ultimately, however, this Court need not reach whether the Attorney General may sue States without statutory authorization for alleged violations of individual rights. Under principles reaffirmed in *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021), the United States is not entitled to injunctive relief against Texas officials or unnamed private individuals who might bring suit under S.B. 8. The only benefit it could obtain from this demand for equity is an advisory opinion about S.B. 8's constitutionality—something federal courts may not give.

ARGUMENT

I. There Is No Longer a Case or Controversy with Texas

Article III demands that "an 'actual controversy'" exist "through 'all stages'" of litigation. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90–91 (2013) (quoting *Alvarez v. Smith*, 558 U.S. 87, 92 (2009)). That demand includes a requirement that courts be likely able to redress the injuries alleged. *California v. Texas*, 141 S. Ct. 2104, 2113 (2021). Here, the Attorney General seeks an injunction against the "State of Texas" from "implementing or enforcing S.B. 8" and a declaration of invalidity, purportedly to redress harms to federal law and federal programs. ROA.1749. But recent decisions from U.S. and Texas Supreme Courts establish that *no Texas official* may implement or enforce S.B. 8. Thus, no state official is a suitable target for an injunction or declaratory judgment, and an injury is not redressable where "[t]here is no one, and nothing, to enjoin." *California*, 141 S. Ct. at 2116. Injunctions "do not simply operate 'on legal rules in the abstract.'" *Id.* at 2115. Any judicial opinion here would be merely advisory.

As the Supreme Court recently explained in *Whole Woman's Health v. Jackson*, federal courts may "resolve only 'actual controversies arising

between adverse litigants.'" 142 S. Ct. 522, 532 (2021) (quoting *Muskrat v. United States*, 219 U.S. 346, 361 (1911)). It rejected arguments that Texas officials without power to enforce S.B. 8, including state-court judges and clerks, were "adverse" parties who could be enjoined. *Id.* at 532–33; *see id.* at 536–37 ("agree[ing]" that courts may award "equitable relief against only those officials who possess authority to enforce a challenged state law"). Courts "cannot enjoin" officials who have "no power to enforce" laws. *California*, 141 S. Ct. at 2116; *see Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021).

The Supreme Court recognized that a justiciable controversy may exist between "[p]rivate parties who seek to bring S.B. 8 suits in state court" and targets of those suits. *Whole Woman's Health*, 142 S. Ct. at 532. And a plurality stated that, pending a final determination of S.B. 8's meaning from "Texas courts," abortion providers could proceed against state licensing officials who "appear[ed]" to have "authority to enforce S.B. 8." *Id.* at 536 (plurality op.). But the Court rejected the notion that federal courts could "parlay" proceedings against people with actual enforcement authority "into an injunction against any and all unnamed private persons who might seek to bring their own S.B. 8 suits." *Id.* at

535 (majority op.). "[N]o court," the Supreme Court declared, "may lawfully enjoin the world at large or purport to enjoin challenged laws themselves." *Id.* (internal citations and quotation marks omitted).

Since the Supreme Court issued its opinion in *Whole Woman's Health*, the Texas Supreme Court has clarified that *no* state official may enforce S.B. 8. It ruled that even Texas licensing officials lack "*any* authority to enforce [S.B. 8's] requirements." *Whole Woman's Health v. Jackson*, 642 S.W.3d 569, 573 (Tex. 2022) (emphasis added). The "*exclusive* means" of enforcement, the court explained, are *private civil actions*. *Id.* at 577 (emphasis added).

Hence, there is no state official to enjoin. The only relief that the United States could hope to gain against Texas is "a declaration that the statutory provision [it] attack[s] is unconstitutional, *i.e.*, a declaratory judgment." *California*, 141 S. Ct. at 2116. But "that is the very kind of relief that cannot alone supply jurisdiction otherwise absent." *Id.* To permit the suit against Texas to proceed here "would allow a federal court to issue what would amount to 'an advisory opinion.'" *Id.*[1]

[1] Even if the United States had Article III standing to seek relief against specific, identified private citizens who actually file lawsuits under S.B.

II. Regardless, the United States Lacks a Cause of Action To Challenge State Laws Deemed To Violate Individual Rights

The United States lacks a cause of action in any event. To sue a State, "the federal government," "like any other plaintiff," "must first have a cause of action." *United States v. California*, 655 F.2d 914, 918 (9th Cir. 1980). But no constitutional or statutory provision authorizes the Executive Branch to sue a State over an allegedly unconstitutional abortion law. Congress has "refused to grant the Executive" authority to "seek injunctions against violations of citizens' constitutional rights." *United States v. City of Philadelphia*, 644 F.2d 187, 195, 200 (3d Cir. 1980).

The United States persuaded the district court that "equity allow[s]" it "to seek an injunction." ROA.1744. But "[t]he equitable powers of federal courts are limited by historical practice." *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 535 (2021). And no long-standing tradition authorizes the federal government to seek injunctions against States whenever their laws violate *individual* rights. That would

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8, that would not allow it to seek broader relief against Texas. *See Town of Chester, N.Y. v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1650 (2017).

upend the constitutional balance. The radical expansion of authority the Executive Branch seeks must come from Congress, not the courts.

A. No constitutional or statutory provision authorizes this challenge to Texas law

All agree that no constitutional or statutory provision expressly authorizes the United States to seek injunctions when state laws violate individual constitutional rights. And that authority cannot be inferred; indeed, "almost every court that has had the opportunity pass on the question" has held that "the United States may not sue to enjoin violations of individuals' fourteenth amendment rights without specific statutory authority." *City of Philadelphia*, 644 F.2d at 201; *see United States v. Mattson*, 600 F.2d 1295, 1297 (9th Cir. 1979) ("the 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 constitutional text, precedent, and history all compel that conclusion. As the Supreme Court has repeatedly emphasized in recent years, gone is the "'*ancien regime*'" in which courts "assumed it to be a proper judicial function" to imply causes of action. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017); *see, e.g.*, *Hernandez v. Mesa*, 140 S. Ct. 735, 742

(2020); *Alexander v. Sandoval*, 532 U.S. 275, 287–93 (2001). Now, the "watchword is caution." *Hernandez*, 140 S. Ct. at 742. If Congress "does not itself so provide, a private cause of action will not be created through judicial mandate." *Ziglar*, 137 S. Ct. at 1856. That is true even where federal and state law conflict. *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 325–27 (2015) (holding the Supremacy Clause does not create an "implied right of action").

By its terms, the Fourteenth Amendment does not authorize the Executive Branch to seek injunctions against state actors whenever they take allegedly unconstitutional actions. Instead, Section 5 of the Fourteenth Amendment grants Congress the "power to enforce, by appropriate legislations, the provisions of this article." U.S. Const. amend. XIV, § 5. Thus, "'in the first instance,'" it is for *Congress* to determine what "'legislation is needed to secure the guarantees of the Fourteenth Amendment.'" *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 80–81 (2000) (quoting *City of Boerne v. Flores*, 521 U.S. 507, 517 (1997)). Congress's role in "establishing appropriate [enforcement] mechanisms" is "central." *City of Philadelphia*, 644 F.2d at 200.

Congress, however, has "repeatedly refused to sanction federal executive intervention in local affairs in order to protect" individual rights. *City of Philadelphia*, 644 F.2d at 198. "Between 1865 and 1871," Congress "enacted a comprehensive statutory scheme" for securing individual rights under the Thirteenth, Fourteenth, and Fifteenth Amendments. *Id.* at 194. That legislation provided the Executive Branch with certain powers. *See id.* Congress, however, withheld the power to sue States over perceived violations of individual rights. *See id.* at 194–95.

And Congress has stood by its decision ever since. In the mid-twentieth century, the Executive Branch made "several attempts," *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. Those proposals met with "'shock[]' that the Attorney General would be 'endowed with the privilege of setting up law through injunction,'" and with profound concern that "'the Attorney General could virtually convert Federal district courts into administrative branches of the executive department'" for superintending the operations of state and local governments. *Id.* at 195–96. Thus, "for reasons of constitutional principle and

sound public policy," Congress "express[ly] refus[ed]" to grant the Attorney General "general injunctive powers." *Id.* at 195, 201.

At the same time, Congress provided the Attorney General with authority to seek "injunct[ions]" against States to prevent certain violations of individual rights. 52 U.S.C. § 10306(b) (poll taxes); *see, e.g.*, 42 U.S.C. § 2000a-5(a) ("Attorney General" may seek "injunction" for discrimination in public accommodations); 52 U.S.C. § 10504 ("Attorney General" may seek "injunction" to prevent Voting Rights Act violations). Those provisions would be redundant if the Attorney General already had authority to seek injunctions against States for individual-rights violations.

In short, the actions of Congress and the Executive Branch demonstrate that the Fourteenth Amendment means what it says: federal executive authority to sue States for violations of individual rights must come from Congress. "[N]either Attorneys General nor Congress . . . believed that . . . the Constitution had created this power sub silentio." *City of Philadelphia*, 644 F.2d at 201.

B. The expansive enforcement power—and sweeping injunction—sought is unprecedented in equity

1. Even though the Fourteenth Amendment entrusts enforcement to Congress, and even though Congress has not created a cause of

action for this case, the district court declared that "[n]o cause of action created by Congress is necessary." ROA.1774. It adopted the federal government's view that "equity" supplies a cause of action whenever a "state behaves so egregiously that it actively infringes constitutional protections" afforded to individuals. ROA.1784. That capacious view of equity cannot be reconciled with the "limit[s]" imposed by precedent or "historical practice." *Whole Woman's Health*, 142 S. Ct. at 535.

As the Supreme Court explained long ago, equity does not supply a cause of action or remedy merely because some "illegality or unconstitutionality" is alleged. *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U.S. 276, 282 (1909). A suit at equity must instead fall "within some clear ground of equity jurisdiction." *Id.* at 285. Federal courts have "no authority" to create causes of action or "remedies previously unknown to equity jurisprudence." *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 332 (1999). Their inherent equitable authority extends no further than that exercised by equity courts "at the time of the adoption of the Constitution and the enactment of the original Judiciary Act, 1789." *Id.* at 318; *see Atlas Life Ins. Co. v. W. I. Southern, Inc.*, 306 U.S. 563, 568 (1939).

Here, neither the district court nor the United States identified a single Framing-era precedent recognizing an equitable cause of action that permits the federal government to sue States for individual-rights violations. They instead staked their analysis on a decision from 106 years later: *In re Debs*, 158 U.S. 564 (1895). In that decision, the Supreme Court upheld enforcement of an anti-strike injunction to remove "forcible obstructions of the highways along which interstate commerce travels and the mails are carried." *Id.* at 598–600. But that injunction vindicated no individual rights and challenged no state laws. Rather, it protected the *federal government's* "property in the mails" and historic *public rights* in unobstructed interstate rights of way. *Id.* at 581–84.

This case could not be more different. In *Debs*, the United States had a "property interest" in mail "to be protected." *Solomon*, 563 F.2d at 1127. It has none here. In *Debs*, "Congress had exercised the constitutional power" at stake, which "was impugned by the action sought to be redressed." *Solomon*, 563 F.2d at 1127. No similar exercise of power by Congress (or interference with it) exists here. In *Debs*, the "harm was a public nuisance," *Solomon*, 563 F.2d at 1127—which equity had "*always*" recognized was "subject to abatement at the instance of the government,"

Debs, 158 U.S. at 587 (emphasis added). No invasion of public rights the government is charged with protecting has arisen here.[2]

In passing, the district court asserted that S.B. 8 "implicates interstate commerce." ROA.1783. *Debs*, however, nowhere holds that the federal government may sue at equity whenever an action "implicate[s]"—affects—interstate commerce. It merely recognized that the government may sue to keep "highways of interstate commerce free from obstruction, for it has always been recognized as one of the powers and duties of a government to remove obstructions from the highways under its control." 158 U.S. at 586. Reading *Debs* to permit lawsuits whenever an action somehow "implicate[s]" commerce would give the federal government a near-universal cause of action.

Nor does it help to characterize S.B. 8 as injuring a putative "sovereign interest in the supremacy of the Constitution." U.S. Br. 14, *United States v. Texas*, No. 21-588 (U.S.) (cited as U.S. Sup. Ct. Br.); *see* ROA.1767 (similar). Rooting out state or local practices that appear

[2] The United States also alleges harms to federal programs and employees. ROA.1836. Whether S.B. 8 applies to them is disputed. Texas Br. 16–17, 39–42. Regardless, any interest the federal government may have in protecting its own programs and employees has no bearing on whether it can sue in equity based solely on impacts to citizens.

inconsistent with the Constitution is not the federal Executive's job. The Supremacy Clause of course instructs courts not to give contrary state laws effect. *See Armstrong*, 575 U.S. at 324. But it "certainly does not create a cause of action." *Id.* at 324–25.

The federal government's argument, moreover, proves too much. If a perceived threat to federal supremacy were by itself sufficient to justify suit at equity, *Debs* would not have needed to invoke the government's "property interest" in the mails, Congress's exercise of the interstate commerce power, or "ancient" authority establishing that governments may remove obstructions to roads. 158 U.S. at 583, 599–600. It could simply have invoked federal sovereignty.

Similarly, if any perceived slight to federal law were sufficient to justify suits at equity, most if not all congressionally created causes of action for the federal government would be entirely superfluous. That result, however, cannot be reconciled with the Framers' decision to give "Congress" principal responsibility for "guid[ing] the implementation of federal law." *Armstrong*, 575 U.S. at 326. The Constitution "refutes the idea that [the President] is to be a lawmaker," *Youngstown Sheet & Tube*

Co. v. Sawyer, 343 U.S. 579, 587 (1952), "'setting up law through injunction,'" *City of Philadelphia*, 644 F.2d at 195.

Other than *Debs*, the district court principally relied on *United States v. City of Jackson*, 318 F.2d 1 (5th Cir. 1963), which permitted the United States to seek injunctions to end racial segregation at rail and bus terminals. In that case, however, a statute enacted under the Commerce Clause provided a cause of action. *See id.* at 9–13. Although the decision also said the United States could sue without specific statutory authorization, *see id.* at 14, two-thirds of the panel later disavowed that reasoning, *see United States v. City of Jackson*, 320 F.2d 870, 871 (5th Cir. 1963). This Court should not recognize a novel cause of action based solely on disavowed commentary that was unnecessary to the result.

2. The equitable cause of action the district court recognized here—a general power to seek injunctions against state laws that violate the Constitution—is unprecedented. That alone is reason enough to reject it: A suit at equity must fall "within some clear ground of equity jurisdiction." *Boise*, 213 U.S. at 285. Equally unprecedented is the remedy that the United States seeks—an injunction directed at *all* "state

officials," including the "state judiciary," and *all* "private individuals" who *might* bring suit under S.B. 8. ROA.1792, 1797.

The Supreme Court's decision in *Whole Woman's Health* makes the overreach clear. Under "traditional equitable principles," a majority "agree[d]," "suits seeking equitable relief against executive officials are permissible" against "only those officials who possess authority to enforce a challenged state law." 142 S. Ct. at 535–36 (plurality op.); *see id.* at 539–41 (Thomas, J., concurring in part). As discussed above, however, no state executive officials have authority to enforce S.B. 8. *See* pp. 6–7, *supra*. The "*exclusive*" remedy is a private action for damages. *Whole Woman's Health v. Jackson*, 642 S.W.3d 569, 577 (Tex. 2022) (emphasis added).

Nor are state judicial officials a proper target. Although injunctions may "prevent[] state executive officials from enforcing state laws that are contrary to federal law," federal courts generally "lack . . . power under traditional equitable principles" to enjoin state-court judges and clerks. *Whole Woman's Health*, 142 S. Ct. at 532–34. And as the Supreme Court recently held, nothing about the nature of S.B. 8 alters that principle. *See id.* An "'injunction against a state court' or its 'machinery' 'would be a

violation of the whole scheme of our Government.'" *Id.* at 532 (quoting *Ex parte Young*, 209 U.S. 123, 163 (1908)).

An injunction directed against all potential plaintiffs fares no better. "[U]nder traditional equitable principles, no court may lawfully enjoin the world at large or purport to enjoin challenged laws themselves." *Whole Woman's Health*, 142 S. Ct. at 535 (internal quotations and citations omitted). A federal court thus cannot do what the district court did here—issue "an injunction against any and all unnamed private persons who might seek to bring their own S.B. 8 suits." *Id.* Even sitting as courts of equity, federal courts have "no authority" to create "remedies previously unknown to equity jurisprudence." *Grupo Mexicano*, 527 U.S. at 332.

Ultimately, the district court tried to sidestep any constraints with pronouncements that equity "eschews categorical definition" and "'suffers not a right to be without a remedy.'" ROA.1775–76, 1778. As the Supreme Court has emphasized, however, any "flexibility" in equity is "confined" by historical practice. *Grupo Mexicano*, 527 U.S. at 322. "'A court of equity is as much so limited as a court of law.'" *Whole Woman's Health*, 142 S. Ct. at 535 (quoting *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832

(2d Cir. 1930) (L. Hand, J.)). "'A [c]ourt of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law.'" *Immigr. & Naturalization Serv. v. Pangilinan*, 486 U.S. 875, 883 (1988) (quoting *Rees v. City of Watertown*, 86 U.S. (19 Wall.) 107, 122 (1873)). The district court's decision defies those principles.

C. Recognizing a new equitable cause of action would be contrary to the constitutional design

This case's unprecedented nature is not the only reason why the United States cannot invoke equity here. Recognizing a cause of action in equity would also be contrary to the constitutional design. As explained above, Congress—the branch charged with enforcing the Fourteenth Amendment—has "repeatedly refused to sanction federal executive intervention in local affairs in order to protect" individual rights. *City of Philadelphia*, 644 F.2d at 198; *see* pp. 11–12, *supra*. That decision must be heeded: Courts may not "circumvent Congress's" decisions. *Armstrong*, 575 U.S. at 327–28; *see City of Philadelphia*, 644 F.2d at 200; *Solomon*, 563 F.2d at 1129.

The district court responded with a non sequitur: Congress's refusal to create a cause of action has "little bearing" here, it argued, because Congress was focused on "racial discrimination" and acted "before the

Supreme Court first recognized the right to abortion in *Roe v. Wade*, 410 U.S. 113 (1973)." ROA.1788. The district court, however, identified nothing about abortion rights that somehow elevates them above all other rights (speech, equal protection, etc.). It cannot be that the Fourteenth Amendment—enacted "[a]bove all else" to combat racial discrimination, *Oregon v. Mitchell*, 400 U.S. 112, 126 (1970)—withholds from the Attorney General the power to seek injunctions against States for "racial discrimination" while granting that for abortion rights.

Federalism considerations militate against recognizing a new equitable cause of action as well. Under the Fourteenth Amendment, even Congress lacks "unlimited" enforcement power. *Oregon*, 400 U.S. at 127. That amendment does not "strip the States of their power, carefully preserved in the original Constitution, to govern themselves." *Id.* at 127. As Congress has recognized, giving the Executive Branch powers to seek injunctions against States for any alleged violation of individual rights would "trample on important constitutional principles that underlie and give life to our federal system." *City of Philadelphia*, 644 F.2d at 200; *see id.* at 195–97; *Mattson*, 600 F.2d at 1299–300; pp. 11–12, *supra*.

This Court should not go further than even Congress has seen fit to go. That would be "incompatible with [federal courts'] traditionally cautious approach to equitable powers, which leaves any substantial expansion of past practice to Congress." *Grupo Mexicano*, 527 U.S. at 329.

D. The equitable cause of action recognized below lacks any meaningful limit

As it happens, neither the federal government nor the district court "go so far as to endorse the broadest reading of *Debs*." ROA.1783. Both disclaim that the United States may "sue whenever a State enacts an unconstitutional law." U.S. Sup. Ct. Br. 16. Precisely what limits the United States besides its own "discretion" the district court declined to lay out fully. ROA.1783–84. It accepted the United States' view that suits would generally be limited to where "(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." ROA.1784. But promises to use power wisely cannot confer power that does not exist. Regardless, those purported limits lack practical and legal significance.

To begin, the first purported limiting principle—that "a state law violates the constitution"—is no limit at all. An allegation of

unconstitutionality is the premise of a claim. Similarly, the second condition—that a law "ha[ve] widespread effect"—will virtually always be satisfied because legislatures "usually" enact laws of "general applicability." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 n.9 (1995).

That leaves only the third purported limitation that a "state law is designed to preclude review by the very people whose rights are violated." But that standard, too, is "so vague as to lack real content." *City of Philadelphia*, 644 F.2d at 201. Plainly, judicial review of S.B. 8 is possible: At least fourteen "state-court cases" have already been filed asserting "both federal and state constitutional claims against S.B. 8—and they have met with some success at the summary judgment stage." *Whole Woman's Health*, 142 S. Ct. at 537. "Separately, any individual sued under S.B. 8" will have a right to "pursue state and federal constitutional arguments in his or her defense." *Id.*; *see id.* at 530 n.1. Whatever the district court (and United States) means by "preclud[ing] review," ROA.1784, it cannot be "foreclosing judicial review of constitutional claims altogether."

Perhaps "preclud[ing] review" refers to laws that are difficult for private parties to target in "federal court" via pre-enforcement challenge.

ROA.1784–85. Citizens, however, have "*never*" had "an unqualified right to pre-enforcement review of constitutional claims in federal court." *Whole Woman's Health*, 142 S. Ct. at 537–38 (emphasis added). Indeed, federal pre-enforcement review was not even possible for much of this Nation's history. "In accord with the so-called Madisonian Compromise," the Framers "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." *Printz v. United States*, 521 U.S. 898, 907 (1997). And even after Congress created lower federal courts, it withheld from them general federal question jurisdiction for nearly 100 years. *See Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 376–77 & n.6 (2012). Pre-enforcement review in federal court is largely a mid-20th-century phenomenon. *See Whole Woman's Health*, 142 S. Ct. at 538.

Even "[t]o this day, many federal constitutional rights are as a practical matter asserted typically as defenses to state-law claims" in state courts. *Woman's Health*, 142 S. Ct. at 538. 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); constitutional challenges to state criminal statutes and rules, *see, e.g.*, *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (unanimous juries); *Medina v. California*, 505 U.S. 437 (1992) (burden shifting); and 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).

Holding that state-court review of constitutional challenges to S.B. 8 is insufficient would require assuming that "state courts [a]re not competent to adjudicate federal constitutional claims"—a notion the Supreme Court has "repeatedly and emphatically" rejected. *Moore v. Sims*, 442 U.S. 415, 430 (1979). The district court's inability to identify any principled limit on the powers claimed by the United States confirms they should be rejected.

* * *

This case does not permit, much less require, the Court to address S.B. 8, but instead presents a question of considerable significance for federalism and the separation of powers—whether the U.S. Attorney

General has inherent authority to challenge state laws as violative of individual constitutional rights even absent congressional authorization. For decades, Congress, courts, and even the Attorney General himself thought the answer was "no." That "'weighty evidence'" should not be cast aside, especially given the limited equitable powers of federal courts. *Printz*, 521 U.S. at 906 (quoting *Bowsher v. Synar*, 478 U.S. 714, 723–24 (1986)). This Court should not be the first to grant the Attorney General authority to act as a roving reviser of state law, challenging as unconstitutional any rule with which he disagrees.

CONCLUSION

The Court should vacate the preliminary injunction.

Respectfully submitted,

THEODORE E. ROKITA
Attorney General of Indiana

/s/ Thomas M. Fisher
THOMAS M. FISHER
Solicitor General

JAMES A. BARTA
Deputy Solicitor General

JULIA C. PAYNE
MELINDA R. HOLMES
Deputy Attorneys General

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

ADDITIONAL COUNSEL

STEVE MARSHALL
Attorney General
State of Alabama

TREG TAYLOR
Attorney General
State of Alaska

MARK BRNOVICH
Attorney General
State of Arizona

LESLIE RUTLEDGE
Attorney General
State of Arkansas

ASHLEY MOODY
Attorney General
State of Florida

CHRISTOPHER M. CARR
Attorney General
State of Georgia

DANIEL CAMERON
Attorney General
Commonwealth of Kentucky

JEFF LANDRY
Attorney General
State of Louisiana

LYNN FITCH
Attorney General
State of Mississippi

AUSTIN KNUDSEN
Attorney General
State of Montana

DOUG PETERSON
Attorney General
State of Nebraska

DAVE YOST
Attorney General
State of Ohio

JOHN M. O'CONNOR
Attorney General
State of Oklahoma

ALAN WILSON
Attorney General
State of South Carolina

JASON R. RAVNSBORG
Attorney General
State of South Dakota

SEAN D. REYES
Attorney General
State of Utah

PATRICK MORRISEY
Attorney General
State of West Virginia

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with Fed. R. App. P. 27(d)(2)(A) and 29(a)(5) because it contains 5,077 words as measured by Microsoft Word software. The brief also complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5) & 32(a)(6) because it has been prepared in a proportionally spaced, Roman-style typeface of 14 points or more.

Dated: May 9, 2022

/s/ Thomas M. Fisher
Thomas M. Fisher

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2022, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

Dated: May 9, 2022

/s/ Thomas M. Fisher
Thomas M. Fisher