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

APPELLANT THE STATE OF TEXAS'S REPLY IN SUPPORT OF EMERGENCY MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL

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INTRODUCTION

The federal government cannot justify the district court's unprecedented injunction that enjoins a State, its courts, and all its citizens. The government's response alternately misreads and ignores relevant precedent, relying on the mistaken notion that federal district courts (as opposed to state courts) must be able enjoin any constitutional violation, wherever found. This argument, and the district court's injunction, are erroneous. The Court should stay the injunction pending appeal.

ARGUMENT

I. The District Court Lacked Jurisdiction.

A sovereign defendant does not have sufficiently "adverse" interests to support Article III jurisdiction by virtue of enacting a law enforced through private litigation. *Muskrat v. United States*, 219 U.S. 346, 361-62 (1911). The federal government unsuccessfully tries to distinguish *Muskrat* in two ways. First, it suggests Texas is "adverse" because it defends the constitutionality of S.B. 8, Opp'n 15, but the federal government defended the constitutionality of its statutes in *Muskrat*, 219 U.S. at 349. Second, the federal government suggests *Muskrat* was a "collusive" suit, Opp'n 15, but the parties genuinely disputed the constitutionality of the challenged laws. The chief difference was that Congress expressly created a cause of action in *Muskrat*. Of course, that gave *Muskrat* a stronger—though still insufficient—claim to being heard in federal court. Mot. 8.

This Court should apply *Muskrat*, as it has in other litigation about private causes of action related to abortion. *Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001) (en

banc). Any other result would create a split with the Seventh Circuit, which held that the inability to enjoin private causes of action against abortion providers "follows directly from *Muskrat*." *Hope Clinic v. Ryan*, 249 F.3d 603, 605 (7th Cir. 2001) (per curiam).

II. The Federal Government Cannot Succeed on the Merits.

A. The federal government lacks a cause of action.

Disclaiming any constitutional cause of action, the federal government relies exclusively on "a cause of action in equity" under *In re Debs*, 158 U.S. 564 (1895). Opp'n 11. *Debs* rests on two limitations, neither of which the federal government can satisfy.

First, *Debs* involved a cause of action to abate a public nuisance, which is inapplicable here. *See* Mot. 10; App.330-31. "The crux of the Debs decision" was "that the Government may invoke judicial power to abate what is in effect a nuisance detrimental to the public interest." *United Steelworkers of Am. v. United States*, 80 S. Ct. 177, 186 (1959) (Frankfurter, J., concurring). The federal government suggests *Debs* is not about nuisances but does not explain why the opinion discusses the rule that "a public nuisance has always been held subject to abatement at the instance of the government." *Debs*, 158 U.S. at 587 (using "nuisance" twenty-six times).

Second, *Debs* applies only when the federal government "has assumed control" over "routes of commerce" by statute. *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 201 (1967) (interpreting the Rivers and Harbors Act of 1899). If *Debs* allowed an equitable cause of action whenever the federal government wanted "to

protect its interests," Opp'n 9 (citing *Wyandotte*), then *Wyandotte* would not have had to "infer[]" a cause of action from a particular statute, *Wyandotte*, 389 U.S. at 204. The federal government would have this Court split with the Fourth Circuit, which holds that *Debs* requires "a well-defined statutory interest of the public at large." *United States v. Solomon*, 563 F.2d 1121, 1127 (4th Cir. 1977); *see* Mot. 6-7.

That is why this Court and others have rejected the federal government's attempts to sue for violations of the Constitution without an established cause of action. Mot. 10-11. The federal government attempts to distinguish these cases—including *United States v. Madison County Board of Education*, 326 F.2d 237 (5th Cir. 1964)—on the ground that those cases involved the "rights of individuals," not the federal government's "*own* interests." Opp'n 12. The distinction is meaningless because here the federal government is claiming an interest in the alleged violation of individual rights. Opp'n 9-10. The federal government's supposed interest was equally implicated in each of the cases it is trying to distinguish.[1]

Finally, the federal government points to three additional cases, Opp'n 9, but none helps. *United States v. American Bell Tel. Co.*, 128 U.S. 315 (1888), rested on the same equitable cause of action for fraud that private individuals have, *id.* at 357, and analyzed English precedent permitting the King to sue in Chancery to revoke fraudulently obtained patents, *id.* at 360-61. The two remaining cases both rested on

[1] The federal government tries to distinguish *Madison County* because it also involved the war power (which this case does not), Opp'n 13, but that makes this case weaker, not stronger.

statutory causes of action, which are not at issue here. *See Sanitary Dist. of Chi. v. United States*, 266 U.S. 405, 428 (1925); *Heckman v. United States*, 224 U.S. 413, 442 (1912).

Federal courts' equity jurisdiction is limited to that exercised by the English Court of Chancery in 1789 unless Congress expands it by statute. *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999). The federal government concedes as much, Opp'n 12, but suggests its newfound cause of action could be limited to situations in which review is not available under Section 1983 or *Ex parte Young*, Opp'n 1, 3, 6, 9-10, 12, both of which long post-date 1789. The federal government's argument is at war with itself. A cause of action cannot both have existed in 1789 and spring into existence based on an alleged "attempt to evade judicial review" under procedures that did not exist until after the Civil War.

B. There is no separate cause of action for preemption and intergovernmental-immunity claims.

The federal government wrongly suggests that Texas has not disputed the existence of a cause of action for the government's non-abortion claims. Opp'n 7. As Texas has already explained, the federal government does not have a cause of action for *any* of its claims. *See* Mot. 9-11; App.326-32; *United States v. California*, 507 U.S. 746, 759-60 (1993) (no "federal common-law cause of action" to recover unlawful taxes paid by federal contractor).

The federal government cites only two cases, neither of which discussed the cause-of-action issue. Opp'n 7-8. First, *United States v. Washington*, 971 F.3d 856 (9th Cir. 2020), rejected the federal government's intergovernmental-immunity

claims, so it had no occasion to consider the non-jurisdictional cause-of-action issue. *See Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) (explaining cases are not precedent for issues not ruled upon).

Second, *Arizona v. United States*, 567 U.S. 387 (2012), included a state official as a defendant, so it may have been based on the equitable cause of action against state officers from *Ex parte Young* or the later-rejected assumption that the Supremacy Clause creates a cause of action. *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015). Regardless, it also did not consider whether there was a cause of action. Moreover, just as *Arizona* held that the congressionally enacted scheme for enforcing federal immigration laws precluded States from supplementing that enforcement, *see Arizona*, 567 U.S. at 401-02, the congressionally enacted scheme for enforcing constitutional rights precludes the executive branch from supplementing that enforcement here—even if it considers the congressional scheme inadequate. That the executive branch claims "to vindicate, not circumvent, Congress's judgment" (Opp'n 14) is just as irrelevant in this case as the State's argument was in *Arizona*.

But even if there were a cause of action for these claims, it could not support an injunction any broader than preventing enforcement of S.B. 8 to federal employees (and perhaps contractors), which Texas courts will not do anyway. *See* Mot. 5.

C. Congress displaced any equitable cause of action.

The federal government does not deny that a congressionally enacted enforcement scheme can displace equitable causes of action, instead arguing that "Congress did not consider" whether to grant the Attorney General a civil cause of action when

it enacted Section 1983. Opp'n 14. But the case it cites says the opposite: "[T]he extensive congressional consideration of the problem of enforcement and the comprehensive legislative program that [Congress] developed [between 1865 and 1871] simply foreclose the possibility that it implicitly created an additional remedy without ever mentioning its existence in either the statutes or the debates." *United States v. City of Philadelphia*, 644 F.2d 187, 194-95 (3d Cir. 1980). Even if Congress did not reject that idea "until the 1950s," Opp'n 14, its decision would remain equally binding. The federal government does not address the numerous limited causes of action (both old and new) that Congress has given the Attorney General—all of which would be superfluous if the federal government had an equitable cause of action to enforce the Constitution.

Finally, the federal government wrongly suggests Texas's argument undermines *Ex parte Young* and *City of Jackson*. Opp'n 14. First, Supreme Court precedent recognizes that equitable causes of action, like *Ex parte Young*, are sometimes displaced by "implied statutory limitations." *Armstrong*, 575 U.S. at 327; *see Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 74 (1996) ("detailed remedial scheme" foreclosed "action against a state officer based upon *Ex parte Young*").

Second, *City of Jackson* was based on a statutory cause of action under the Interstate Commerce Act, not an equitable one. *United States v. City of Jackson*, 318 F.2d 1, 9 (5th Cir. 1963); *see* 320 F.2d 870, 872-73 (5th Cir. 1963) (Bootle, J., specially concurring) (limiting "the extent" of his concurrence); *id.* at 873 (Ainsworth, J., specially concurring) (same).

III. The District Court's Injunction Cannot Lawfully Apply To Anyone.

An injunction must "operat[e] *in personam*" by being "directed at someone, and govern[ing] that party's conduct." *Nken v. Holder*, 556 U.S. 418, 428 (2009). But the district court's injunction cannot lawfully direct anyone's conduct. Mot. 13-14. And the federal government cites no authority for its novel argument that "the State of Texas" can be enjoined because its Legislature enacted an allegedly unconstitutional private cause of action. Opp'n 15-16.

A. The federal government's suggestion that executive officials (who do not enforce S.B. 8) could be enjoined from enforcing state-court judgments (Opp'n 16) would cause inconsistent chaos. Private citizens would still have non-executive means of enforcing S.B. 8 judgments. *In re Sheshtawy*, 154 S.W.3d 114, 124-25 (Tex. 2004) (contempt); *Cont'l Oil Co. v. Lesher*, 500 S.W.2d 183, 185 (Tex. Civ. App.—Houston [1st Dist.] 1973, no writ) (referring to "judgments which are self executing"). They could also seek enforcement of judgments through other courts' systems. *See, e.g.*, 28 U.S.C. § 1332 (federal enforcement under diversity jurisdiction); *cf.* Tex. Civ. Prac. & Rem. Code §§ 35.001-.008 (domesticating foreign judgments). In any event, the district court did not enjoin executive officials from enforcing judgments, but enjoined "state court judges and state court clerks." App.934.

Of course, enjoining enforcement of hypothetical future judgments would violate Article III because there has been no showing that such judgments are "imminent" or "*certainly impending.*" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). The federal government's theory would also violate *Younger* abstention: a

federal court must "stay its hand" when its injunction would "interfere with the execution of state judgments." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14 (1987).

B. The federal government does not seriously defend enjoining judges, clerks, or other judicial officials. It conspicuously ignores this Court's ruling that "challeng[ing] an unfavorable state law" by suing "state court judges" is "absurd." *Whole Woman's Health v. Jackson*, 13 F.4th 434, 444 (5th Cir. 2021) (per curiam). It similarly disregards this Court's holding that "[t]he requirement of a justiciable controversy is not satisfied where a judge acts in his adjudicatory capacity." *Bauer v. Texas*, 341 F.3d 352, 359 (5th Cir. 2003).

The federal government purports to avoid these obstacles by simply refusing to name state judicial officials as defendants. But a suit against a sovereign does not bind that sovereign's courts in future litigation involving private parties. *See Muskrat*, 219 U.S. at 361-62. As Texas explained below, "the federal government gets things precisely backward. There are *more* hurdles, not fewer, to enjoining those who are not named as defendants." App.315.

* * *

The federal government's insistence that there *must* be someone for a federal district court to enjoin in a pre-enforcement challenge, Opp'n 16, contradicts binding precedent. Courts must determine whether each case is procedurally proper independent from whether a different pre-enforcement challenge is available. *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495-96 (2021); *Whole Woman's Health*, 13 F.4th at 447; *Okpalobi*, 244 F.3d at 429.

IV. The Federal Government's Hyperbole and Exaggeration Reveal the Weaknesses in Its Case.

The federal government's position boils down to a simple—but erroneous—claim: Any law that avoids pre-enforcement review in federal district court is an "open threat" to our constitutional order. Opp'n 10; *see also* Opp'n 7 (positing hypothetical laws). That is ahistorical nonsense. Such laws have been enacted, and how such laws have historically been reviewed is telling.

When other States' private causes of action for violations of restrictive covenants burdened the equal-protection rights of African-American homebuyers, the Supreme Court declared them unconstitutional, but it did so in an appeal from a state-court judgment, not on appeal from an injunction entered by federal district judge against his state-court colleagues. *Shelley v. Kraemer*, 334 U.S. 1, 6-8 (1948). And when Alabama's private cause of action for defamation—created by common law but "supplemented by statute"—burdened pro-civil-rights speech, the Supreme Court again reviewed it on appeal from a state-court judgment. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265, 291-92 (1964).

S.B. 8 does not threaten "constitutional nullification" any more than those laws did. Opp'n 10. And requiring abortion providers to rely on the same procedures that tort defendants with constitutional defenses use regularly is not a constitutional crisis.

But even if one focuses myopically on private causes of action regarding abortion, the federal government is wrong to claim that this case is "unique." Opp'n 14. This Court twice rejected attempts by abortion providers to challenge a private cause of

action enacted by Louisiana, as the state officials sued did not enforce that provision. *K.P. v. LeBlanc*, 729 F.3d 427, 437 (5th Cir. 2013) (holding state Board did not enforce the private cause of action); *Okpalobi*, 244 F.3d at 417-21 (plurality op.) (holding the Governor and Attorney General did not have a connection to enforcement of the law).

Similarly, the Seventh Circuit held that plaintiffs were "not entitled to challenge the state laws to the extent that these laws authorize private suits for damages" against abortion providers." *Hope Clinic*, 249 F.3d at 605. The Eleventh Circuit held that plaintiffs could not bring a pre-enforcement challenge against "the private civil enforcement provision of [Alabama's] partial-birth abortion statute." *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1342 (11th Cir. 1999); *see also Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1157 (10th Cir. 2005).

That some of these cases affirmed injunctions against other types of enforcement demonstrates that the federal government is wrong to accuse Texas of trying "to evade review." Opp'n 10. Even if Texas allowed public officials to enforce S.B. 8, federal district courts still would not have the ability to enjoin private suits. To the extent there is any practical difference between an injunction against public enforcement and a law never authorizing public enforcement in the first place, it is in the supposed value of an advisory opinion, which federal courts cannot provide. *Muskrat*, 219 U.S. at 361-62.

Conclusion

The Court should grant a stay pending appeal.

Respectfully submitted.

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Certificate of Service

On October 14, 2021, this reply was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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Certificate of Compliance

This reply complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 2590 words, excluding the parts exempted by Rule 27(a)(2)(B); and (2) the typeface and type style requirements of Rule 27(d)(1)(E) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the program used for the word count).

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