No. 21-463

In the Supreme Court of the United States

WHOLE WOMAN'S HEALTH ET AL., PETITIONERS

v.

AUSTIN REEVE JACKSON ET AL.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND 11 CIVIL RIGHTS ORGANIZATIONS AS AMICI CURIAE SUPPORTING PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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INTEREST OF AMICI CURIAE

Amici curiae are the Lawyers' Committee for Civil Rights Under Law and 11 other civil rights organizations, who are committed to the promotion of civil rights throughout the country and the elimination of discrimination and inequality in any form.[1] A list of those other civil rights organizations is set forth in the Appendix.

[1] Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part, and that no person other than amici, their members, or their counsel made a monetary contribution to fund its preparation or submission. Counsel of record for both parties have consented to the filing of this brief.

The Lawyers' Committee is a nonpartisan, nonprofit organization formed in 1963 at the request of President John F. Kennedy to enlist the private bar's support in combating racial discrimination and vindicating the civil rights of Black people and other people of color. Much of the Lawyers' Committee's work involves suing state and local officials, as well as local governmental entities, under 42 U.S.C. § 1983, on the ground that they have violated, under color of state law, the U.S. Constitution or a federal law.

Amici routinely invoke 42 U.S.C. § 1983 to bring pre-enforcement challenges to state laws and practices. A decision that would enable Texas to continue frustrating federal court review of a blatantly unconstitutional statute—simply by outsourcing enforcement of that statute to private parties—is not only contrary to the language, meaning, and core purpose of Section 1983, but would also provide a straightforward roadmap for other states and local governments to insulate patently unconstitutional laws from pre-enforcement challenge in the federal courts. Such a stratagem would place the civil rights of amici's clients at grave risk and would seriously undermine amici's work.

INTRODUCTION

After the Civil War, the United States underwent a serious racial reckoning that recognized the need to provide Black Americans with full citizenship rights. Central to this effort were the Reconstruction Amendments (the Thirteenth, Fourteenth, and Fifteenth Amendments) proposed by Congress and ratified by the States—which, among other things, abolished slavery, extended equal protection and due process rights to all persons, and guaranteed the right to vote free from racial discrimination.

Though the Reconstruction Amendments largely use racially neutral language, they emanated from the need to guarantee those rights to Black people who had been categorically denied them.

Of the Reconstruction Amendments, the Fourteenth Amendment has the broadest reach. It mandates, among other things, that "[n]o state shall *make* or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §1 (emphasis added). As with the other Reconstruction Amendments, the Fourteenth Amendment provides Congress with the power to enforce its terms. And Congress has invoked its enforcement powers under those clauses to enact watershed civil rights statutes such as the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968.

Another essential use of Congress's enforcement power under the Reconstruction Amendments is the civil cause of action now codified at Section 1983 of Title 42 of the United States Code. Section 1983 provides a mechanism for private citizens to sue state and local officials as well as local governmental entities (and those acting in concert with them) for violating federal constitutional and statutory protections under the color of state law. The importance of this private right of action to realizing the rights granted by the Reconstruction Amendments cannot be overstated: Congress passed the first iteration of Section 1983 as Section 1 of the Ku Klux Klan Act of 1871, Pub. L. No. 42-22, 17 Stat. 13, merely a year after the ratification of the last Reconstruction Amendment. Since

then, Section 1983 has been used to vindicate a broad array of federal rights, including in some of this Court's landmark civil rights rulings.

Texas's S.B. 8 is a blatant and misguided attempt to evade the Fourteenth Amendment and circumvent Section 1983 by purporting to immunize a facially unconstitutional law—which contravenes this Court's clear holdings in *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992)—from any challenge in federal court. Texas attempts to do this by authorizing civil actions by private parties in place of enforcement actions by governmental officials. Accordingly, Texas argues, state officials cannot be sued under Section 1983 because they are not enforcing the law. But the unconstitutional law that Texas "ma[d]e" in violation of the Fourteenth Amendment would be a dead letter *unless* the apparatus of the state courts (and their judges and clerks) provided a mechanism for private citizens to bring their civil actions to "enforce" S.B. 8. See U.S. Const. amend. XIV, §1. As a result, and as Petitioners demonstrate, Section 1983 relief is clearly available in this context.

In short, Texas's S.B. 8 enacts a scheme of state-sanctioned private vigilantism to prevent Texans from exercising their fundamental rights—precisely the circumstances that Section 1983 was enacted to address. A decision here that would permit Texas to continue to frustrate federal court review of a flagrantly unconstitutional statute would not only be contrary to the language, meaning, and core purpose of Section 1983, but would also provide a straightforward roadmap for states and local governments to employ the same stratagem in order to thwart the exercise of any federal right that might be locally unpopular.

SUMMARY OF ARGUMENT

Our republic rests on the bedrock principle that the Federal Constitution is the supreme law of the land—and the corollary that no State may nullify federal rights. When States refused to afford federal rights to Black Americans 150 years ago, including under the then-recently enacted Reconstruction Amendments, Congress responded with a broad remedial statute, now known as Section 1983. Section 1983 offers relief in federal court to *anyone* deprived of *any* federal right by *anyone* acting under color of state law. The breadth of Section 1983 is a product of deliberate congressional design that this Court has long upheld, and it is sufficient to reach—and invalidate—Texas' illegal stratagem in S.B. 8.

1. In the wake of the Reconstruction Amendments, Congress confronted rampant efforts in the Southern states to deny Black people the rights secured to them by those Amendments. The States enacted laws, known as "Black Codes," that denied Black people political rights and equality before the law. And Black people were also prevented from exercising their rights by a campaign of terror and private criminal violence, including by the Ku Klux Klan. State officials—legislative, executive, and judicial—were often unwilling or unable to enforce the law against these criminals and sometimes directly abetted their crimes. In direct response, Congress passed the Ku Klux Klan Act of 1871, Section 1 of which is now codified as Section 1983. Congressional debate reveals, and the statute's plain text confirms, that Section 1983 created a sweeping cause of action by which any person may file suit in federal court to prevent or redress the deprivation of any federal right by anyone acting under color of state law.

2. Section 1983 has lived up to its promise. Challenges under Section 1983 have generated many of this Court's

landmark civil rights decisions. Amici know from personal experience that Section 1983 provides the backbone supporting much of federal civil rights enforcement. Accordingly, if this Court were to conclude that States may circumvent Section 1983 through schemes like S.B. 8, every federal right would be in jeopardy. States or localities could prohibit the exercise of any right by statutorily forbidding it, but evade federal review by farming out enforcement of the unconstitutional statute to private bounty hunters. This Court's landmark federal rights decisions, and much of amici's work, could be shirked.

Fortunately, as this Court has long held, the remedial powers of Section 1983 are broad, and federal courts may grant relief to those whose rights are effectively abrogated through schemes like S.B. 8. To ensure that the federal courts may continue to discharge the duty that Congress entrusted them under Section 1983, and to preserve the bedrock principle that States may not nullify federal rights, this Court should grant the relief requested by Petitioners.

ARGUMENT

I. SECTION 1983, AN INCREDIBLY BROAD REMEDIAL STATUTE, WAS DESIGNED TO OPEN THE FEDERAL COURTS TO ENFORCEMENT OF THE RECONSTRUCTION AMENDMENTS IN THE FACE OF RESISTANT STATES AND RELUCTANT STATE OFFICIALS

The procedural gimmicks of Texas's S.B. 8 are designed to circumvent Section 1983, one of the most important protections of civil rights under federal law. But the debates that led to the enactment of what is now Section 1983—not to mention the statute's plain text—make clear Congress's broad remedial intent in drafting that civil cause of action. This Court has frequently interpreted Section 1983 in light of that purpose. And it should

do so again today, by concluding that it is sufficiently broad to support the relief that Petitioners request.

A. Section 1983 Was Drafted in Response to the Unwillingness of State Officials To Enforce Reconstruction Rights

The Reconstruction Amendments were primarily designed to establish the equality of Black persons as free and full citizens of the United States and the states in which they reside. See *Slaughter-House Cases*, 83 U.S. 36, 71-73 (1872); *Buchanan* v. *Warley*, 245 U.S. 60, 74-80 (1917). Relying on the Enforcement Clauses in those Amendments, Congress enacted various statutes—including Section 1983's original incarnation—that aimed to turn the constitutional promises of the Reconstruction era into reality for formerly enslaved people living in recalcitrant states, primarily in the South.

Legislatures in those states resisted federal policies by enacting laws, known as "Black Codes," that denied Black people political rights and equality before the law. For instance, those States imposed on Black citizens mandatory year-long labor contracts, coercive apprenticeships, and criminal penalties for breach of contract. See Eric Foner, *The Story of American Freedom* 103–104 (1998). At the same time, systematic private violence against Black people became endemic, fueled in part by the emergence of the Ku Klux Klan as a formidable paramilitary force wholly dedicated to undoing the gains of the Reconstruction era.

In the lead-up to the presidential election of 1868, the Ku Klux Klan unleashed a campaign of terror to deter Black people from the polls and interfere with the exercise of their federal rights. See Robert J. Kaczorowski, *Federal Enforcement of Civil Rights During the First Reconstruction*, 23 Fordham Urb. L. J. 155, 156-157 (1995); see also *United States* v. *Price*, 383 U.S. 787, 803–804

(1966). Over the following years, the Klan systematically and ruthlessly perpetrated what became collectively known as the "outrages"—beatings, whippings, lynchings, shootings, rapes, and torture. See Kaczorowski at 157; David Achtenberg, *A "Milder Measure of Villainy": The Unknown History of 42 U.S.C. § 1983 and the Meaning of "Under Color of Law,"* 1999 Utah L. Rev. 1, 46–7 & n.23 (1999).

Victims of Ku Klux Klan violence could rarely turn to local officials for justice or protection. Those officials were often unwilling or unable to enforce the law against the Klan. Sometimes, they directly conspired with the Klan's members. See Kaczorowski at 157; see also Cong. Globe, 42d Cong., 1st Sess. 78 (1871). This was the situation Congress aimed to redress by enacting Section 1 of the Ku Klux Klan Act of 1871, which contained the provision now codified at 42 U.S.C. § 1983.

B. The Debates Leading up to the Enactment of Section 1983 Confirm Its Remedial Purposes

The bill that would become Section 1983 was drafted specifically to respond to the Ku Klux Klan's "outrages" and address Southern States' refusal to protect their people's constitutional rights under the recently ratified Reconstruction Amendments.

On March 28, 1871, Representative Shellabarger introduced House Bill 320. See H.R. 320, 42d Cong. (1871). Shellabarger aptly described it as a measure "which does affect the foundations of the Government itself, which goes to every part of it, and touches the liberties and the rights of all the people, and doubtless the destinies of the Union." Cong. Globe, 42d Cong., 1st Sess., App. 67. During congressional debate, the bills' proponents denounced Southern States' inaction and complicity. Indeed, the de-

bates made clear that H.B. 320 directly targeted state officials who, in Congress's view, had betrayed their people's trust by failing to protect their constitutional rights.

Congressmen expressed particular concern that state courts offered no remedy to aggrieved citizens. As Representative Perry put it,

> 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.

Id. at 78; see also *Mitchum* v. *Foster*, 407 U.S. 225, 240–241 (1972) (quoting this legislative history). Similarly, Representative (and later President) Garfield noted how, "even 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." Cong. Globe, 42d Cong., 1st Sess. App. 153 (1871). Representative Rainey likewise argued that the bill was needed to redress the fact that "the courts are in many instances under the control of those who are wholly inimical to the impartial administration of law and equity." Cong. Globe, 42d Cong., 1st Sess. 394 (Statement of Rep. Rainey).

Thus, proponents of the bill made clear that Section 1983 was necessary because state officials, including state courts specifically, could not be trusted as the sole guardians of federal rights. Some of the bill's opponents objected on precisely those same grounds: that the bill would permit people to hale state officials, including state judges, into federal court. See, *e.g.*, Cong. Globe, 42d

Cong., 1st Sess., 365 (Statement of Rep. Arthur of Kentucky) ("[I]f the Legislature enacts a law, if the Governor enforces it, if the judge upon the bench renders a judgment, * * * though as pure in duty as a saint * * *, for a mere error of judgment, they are liable[.]").

The bill's proponents prevailed. On April 20, 1871, President Grant signed H.B. 320 into law as the Ku Klux Klan Act of 1871, Pub. L. No. 42-22, 17 Stat. 13, which Congress referred to as "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes."

C. Section 1983, As Enacted, Was a Broad Remedial Statute

By enacting Section 1 of the Ku Klux Klan Act, Congress intended to open wide the doors of the federal courts to claims based on violations of federal rights. This Court has consistently interpreted Section 1983 in light of that broad remedial purpose.

1. As originally enacted, Section 1 of the Ku Klux Klan Act provides that:

> [A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

Pub. L. No. 42-22, § 1, 17 Stat. 13.[2]

[2] The language and purpose of Section 1983 as originally enacted have remained virtually unchanged over the intervening 150 years.

By design, then, the plain text of Section 1983 was breathtakingly broad. Congress meant to create a civil cause of action for *all* violations of federal rights under the color of state law. And it expressly displaced—consistent with the Supremacy Clause—any state law that might otherwise bless such unlawful conduct.

2. In light of that radical purpose, it is unsurprising that this Court has often stated that Section 1983 should be liberally construed.

Section 1983 was part of "a vast transformation" whose "very purpose" was to "interpose the federal courts

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See 42 U.S.C. § 1983. Congress has periodically tweaked the language of Section 1983 in "immaterial" ways. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 205 n.15 (1970) (Brennan, J., concurring in part and dissenting in part). For example, in 1874, the statute was recodified so as to clarify that it protected "rights, privileges, or immunities secured by the Constitution and laws,'" *Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600, 608 & n.16 (1979) (underlined passage added), and that it protected against unlawful action under color of territorial law, as well as state law. See *Examining Board of Engineers, Architects & Surveyors* v. *Flores de Otero*, 426 U.S. 572, 582-583 (1976). Similarly, in 1979, it was amended to clarify its applicability to "any State or Territory or the District of Columbia." Pub. L. 96-170, § 1, 93 Stat. 1284 (Dec. 29, 1979) (underlined passage added). Another minor amendment was enacted in 1996 in response to this Court's decision in *Pulliam* v. *Allen*, 466 U.S. 522 (1984). Congress added language to Section 1983 specifying 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." Federal Court Improvement Act of 1996, Pub. L. 104-317, 110 Stat. 3853. Given the exigent circumstances of this case, the exception does not bar the requested preliminary injunctive relief, as Petitioners explain, see Plaintiffs'-Appellees' Emergency Mot. for Injunction Pending Appeal at 19–21, *Whole Woman's Health* v. *Jackson*, No. 21-50792 (5th Cir. Aug. 29, 2021), Doc. No. 00515998885, for it is undisputed that declaratory relief was not available to prevent irreparable injury to the rights of Texans.

between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972) (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1879)). Quite plainly, the Congress that enacted Section 1983 "intended to give a broad remedy for violations of federally protected civil rights," *Monell* v. *Department of Social Services of the City of New York*, 436 U.S. 658, 685 (1978), because it "belie[ved] that the state authorities had been unable or unwilling to protect the constitutional rights of individuals or to punish those who violated these rights." *Patsy* v. *Board of Regents of State of Florida*, 457 U.S. 496, 505 (1982).

This Court has found "[i]t abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts 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." *Monroe* v. *Pape*, 365 U.S. 167, 180 (1961), overruled on other grounds, *Monell* v. *Dep't of Soc. Servs.*, 436 U.S. 658, 663 (1978). Because of this, Congress intended that individuals "threatened" with a "deprivation of constitutional rights" would have "immediate access to the federal courts notwithstanding any provision of state law to the contrary." *Patsy*, 457 U.S. at 504 (citation omitted).

Accordingly, this Court has stressed that, "[a]s remedial legislation," Section 1983 "is to be construed generously to further its primary purpose." *Gomez* v. *Toledo*, 446 U.S. 635, 639 (1980) (citations omitted); see also *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 105 (1989) ("We have repeatedly held that the

coverage of [Section 1983] must be broadly construed."). "[T]here can be no doubt that [Section 1983] was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights." *Monell*, 436 U.S. at 700–701.

In short, Section 1983 "assign[s] to the federal courts a paramount role in protecting constitutional rights," *Patsy*, 457 U.S. at 503, by creating "a uniquely federal remedy against incursions upon rights secured by the Constitution and laws of the Nation," *Felder* v. *Casey*, 487 U.S. 131, 139 (1988) (quotation marks omitted). That is the remedy that Texas is openly attempting to circumvent so it can continue to violate Texans' constitutional rights.

II. STATES SHOULD NOT BE ALLOWED TO CIRCUMVENT SECTION 1983'S PROMISE OF ACCOUNTABILITY BY DELEGATING ENFORCEMENT OF UNCONSTITUTIONAL SCHEMES TO PRIVATE PARTIES

True to Congress's purpose and to the statute's broad remedial text, federal suits against state officials under Section 1983 have been the backbone of civil rights enforcement. Indeed, many of this Court's landmark rulings striking down discriminatory enactments and policies, and enforcing constitutional rights, came in Section 1983 challenges. And Section 1983 has also been deployed in many other contexts, including in amici's own work, in order to enforce the protections guaranteed by the U.S. Constitution and federal law. If Texas's S.B. 8 were allowed to circumvent Section 1983 liability, no right under the U.S. Constitution would be secure.

A. Section 1983 Has Been a Key Tool for Civil Rights Enforcement, Just As Its Enacting Congress Intended

Most litigation to enforce federal civil rights is filed by private parties in federal court. Section 1983 is the principal cause of action on which such litigants rely.

It is no surprise that many of this Court's landmark rulings enforcing constitutional rights were the result of successful challenges under Section 1983. See, *e.g.*, *Myers* v. *Anderson*, 238 U.S. 368 (1915) (grandfather-clause exemptions to literacy tests); *Buchanan* v. *Warley*, 245 U.S. 60 (1917) (city ordinances mandating racial segregation in residential areas); *Shelley* v. *Kraemer*, 334 U.S. 1 (1948) (holding that judicial enforcement of private racially discriminatory real property covenants is "state action" that violates the Equal Protection Clause); *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (racial segregation in schools); *Obergefell* v. *Hodges*, 576 U.S. 644 (2015) (same-sex marriage).

Similarly, today, a large component of amici's own work involves suing state and local governmental actors under Section 1983 for violating federal law. See, *e.g.*, *Arizona* v. *Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1 (2013) (holding that Arizona violated the National Voter Registration Act of 1993 by requiring documentary proof of citizenship for voter registration applicants who used the Federal Mail Voter Registration Form); *Cain* v. *White*, 937 F.3d 446 (5th Cir. 2019) (finding that Orleans Parish judges violated the Due Process Clause through an unconstitutional practice for collecting criminal fines and fees), cert. denied, 140 S. Ct. 1120 (2020); *Mhany Management, Inc.* v. *County of Nassau*, 819 F.3d 581 (2d Cir. 2016) (holding that village violated the Equal Protection Clause and the Fair Housing Act of 1968 by rezoning property based on racially discriminatory motive).

B. This Court Should Not Bless Texas's Misguided Attempt To Subvert the U.S. Constitution

If Texas's stratagem in enacting S.B. 8 were sufficient to evade any challenge under Section 1983, all of those landmark constitutional protections (and many more)

would become vulnerable to some hostile State or locality enacting a scheme of civil actions by private bounty hunters designed to chill or thwart the exercise of locally disfavored federal rights. That cannot be the law.

1. Texas's scheme relies on both private citizens and state courts. Texas did not simply outsource the unconstitutional chilling of protected rights to private parties, formally disclaiming any governmental enforcement by creating a private civil right of action (including a bounty and other draconian penalties designed to chill the exercise of constitutional rights. See Pet. 9-10. It also enlisted the State judiciary to preside over those civil suits and back the award of the relevant bounties and other penalties with the force of Texas law.

Indeed, the entire scheme could not work without the state judges and clerks who provide the machinery for the violation of federal rights. If this Court were to find that the involvement of state judges and clerks in Texas's scheme were insufficient to support a Section 1983 challenge, then nothing could stop state and local governments from using their judicial machinery to directly impede federal rights, rendering those rights a nullity. This is especially true for litigants who lack the financial means to endure ruinous penalties, and for time-sensitive constitutional rights that must be exercised or forfeited in less time than it takes to obtain a final judgment on the merits.

2. With this Court's blessing, state and local government could utilize this same strategy to pass flagrantly unconstitutional laws. Examples are not hard to imagine. Indeed, several recent Section 1983 challenges that amici have litigated illustrate just how easy it would be for state and local officials to undermine core federal civil rights protections with apparent impunity through a scheme like S.B. 8.

a. After extensive third-party voter-registration efforts in Tennessee before the November 2018 election, many of which were focused on Black voters, the Tennessee legislature passed H.B. 1079, a law that was aimed at chilling third-party voter-registration efforts by imposing civil and criminal penalties.

The Lawyers' Committee and its partners filed suit. The district court preliminarily enjoined several provisions of H.B. 1079 on the grounds that it was unconstitutionally vague and violated the plaintiffs' First Amendment rights of free expression and advocacy. See *Tennessee State Conference of the NAACP* v. *Hargett*, 420 F. Supp. 683 (M.D. Tenn. 2019). In particular, the court noted the "chilling effect" of the State's civil penalties. *Id.* at 699. Tennessee subsequently repealed the challenged provisions. See *Tennessee State Conference of the NAACP v. Hargett*, No. 3:19-cv-00365, 2021 WL 4441262 at *1 (M.D. Tenn. 2021).

Things would have gone quite differently in a world where States were permitted to circumvent Section 1983 through bills like S.B. 8: Jurisdictions could eliminate third-party voter registration (which would be unconstitutional) by passing a statute that abjures any government enforcement while enabling the general public to sue in state court in order to seek civil penalties from any organization or individual that helps voters register. Constitutional rights would be empty promises if they could be so easily, albeit indirectly, denied.

b. In the summer of 2020, activists in Alamance County, North Carolina, began protesting at the confederate monument in front of the courthouse in the City of Graham. The protests focused on demanding the removal of the confederate monument, and the City enacted an ordinance essentially prohibiting protests in front of the monument. The Lawyers' Committee and its partners

filed suit on behalf of local groups under Section 1983. See *NAACP Alamance County Branch* v. *Peterman*, 479 F. Supp. 3d 231 (M.D.N.C. 2020). Though the City repealed the ordinance after the parties consented to a temporary restraining order, the County Sheriff "decided to deny access to the grounds immediately surrounding the courthouse to all protest groups." *Id.* at 236. The district court preliminarily enjoined the Sheriff's policy as a violation of the First Amendment. *Id.* at 241.

If Texas's position in this case were to prevail, a State or local government could chill protests like those in Alamance County by passing a law or ordinance that enables private parties to sue people who protest within a certain distance of a confederate monument and collect civil penalties and attorneys' fees in the event they were to prevail. In our constitutional, federal democracy, that would be an absurd outcome.

c. A recent Section 1983 lawsuit that the Lawyers' Committee and partners brought in Oklahoma offers yet another example. See *Black Emergency Response Team v. O'Connor*, No. 5:21-cv-01022-G (W.D. Okla. filed Oct. 19, 2021). The case involves First and Fourteenth Amendment challenges to H.B. 1775 and its implementing rules, which censor educators who discuss race and gender in schools. Educators that violate this state law face severe penalties including suspension or license revocation and schools can face accreditation penalties. This law, unsurprisingly, has chilled speech in the classrooms. District administrators have eliminated works by Black and women authors from reading lists (such as *To Kill a Mockingbird*; *Their Eyes Were Watching God*; *I Know Why the Caged Bird Sings*; *Narrative of the Life of Frederick Douglass*; and *A Raisin in the Sun*). And educators have been fearful of discussing racial issues at all because

of the potential penalties. But, according to Texas, Oklahoma could easily insulate its law—or any law prohibiting educators from raising particular issues in the classroom or requiring educators to advocate a particular point of view—from facial constitutional challenges in federal court by substituting penalties enforced by the government with civil penalties enforceable by private parties in civil actions.

d. One need not focus exclusively on amici's efforts to protect constitutional rights in order to see how a ruling in favor of Texas in this case would undermine core constitutional protections. For instance, to take a historical example, a State could have unconstitutionally barred the schoolhouse door against integration by empowering citizens to sue any school district that integrated its schools. In a world where such evasions were countenanced, *Brown* v. *Board of Education*, 347 U.S. 483 (1954), would have been a dead letter. Similarly, states could enact laws to remove undocumented children from public schools, in contravention of *Plyler* v. *Doe*, 457 U.S. 202 (1982), by authorizing a private right of action against anyone who assisted such children in enrolling. Or, to provide a more modern hypothetical, a State could adopt a scheme similar to S.B. 8 in an attempt to undermine this Court's decision in *Obergefell* v. *Hodges*, 576 U.S. 644 (2015), which recognized the right of same-sex couples to marry. Such a law would merely have to enable individuals to sue people who participate in same-sex marriage ceremonies.

The number of hypotheticals is endless. But the point is clear: Texas's scheme cannot be limited to abortion rights. If the Court decimates Section 1983 in the manner Texas requests, no federal right is safe.

2. A final troubling feature of the enforcement mechanism behind Texas's S.B. 8 is that it essentially deputizes private citizens to violate a constitutional right where the

state government may not do so directly—a form of vigilantism that could be (and has been) used to enable private citizens to violate peoples' constitutional rights during citizens' arrests.

Citizens' arrests in this country are strongly linked to their use, during and after slavery, to subject Black people to unchecked private violence and maintain white supremacy. See Roger M. Stevens, *A Legacy of Slavery: The Citizen's Arrest Laws of Georgia and South Carolina*, 72 S.C. L. Rev. 1005 (2021). Examples include laws in South Carolina, Florida, Mississippi, and Georgia[3]—a state that repealed its Civil-War-era citizens' arrest law only in May 2021, after the killing of Ahmaud Arbery.[4]

The violent history of state-authorized citizens' arrests and racist vigilantism in the South during and after the Reconstruction era illustrates both the grave dangers of authorizing the public to enforce the State's unconstitutional laws and the vigilantism that such an authorization can fan. It is, indeed, astonishing that the financial incentives for citizens' arrests of Black persons that Mississippi put in place in 1865 resemble the financial incentives offered under Texas's S.B. 8 to control pregnant women in 2021.[5]

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[3] The Black Codes passed in Mississippi and Florida explicitly allowed for the arrest of Black people by private white persons for petty crimes such as vagrancy. See Joe M. Richardson, *Florida Black Codes*, 4 Fla. Hist. Q. 47, 371 (1968).

[4] See Emma Hurt, *In Ahmaud Arbery's Name, Georgia Repeals Citizen's Arrest Law*, NPR (May 11, 2021) <tinyurl.com/GeorgiaAhmaudArbery>.

[5] In Mississippi, the private arrest of Black citizens carried a financial incentive, as white individuals would receive 5 and 10 cents per mile from the place of arrest to the place of delivery. See Michael J. Perry, Brown, Bolling, *& Originalism: Why Ackerman and Posner (Among Others) Are Wrong*, 20 S. Ill. U. L.J. 53, 56 (1995).

* * *

In sum, States cannot evade the reach of Section 1983 by delegating the violation of their residents' rights to "bounty hunters." In doing so here, Texas enlisted the judiciary to preside over such civil suits. If the threat of draconian penalties, backed by judicial sanction as mandated by Texas law, were not enough to warrant preliminary injunctive relief under Section 1983, then nothing would stop state governments from rendering civil rights a nullity. As this Court has bluntly put it, "[t]he United States is a constitutional democracy," and "[c]onstitutional rights would be of little value if they could be thus indirectly denied." *Smith* v. *Allwright*, 321 U.S. 649, 664 (1944). That remains true in the face of Texas's latest assault on our Constitution.

CONCLUSION

This Court should grant the relief requested by Petitioners.

Respectfully submitted.

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OCTOBER 2021

APPENDIX

List of Additional Amici Curiae

Alliance for Justice

AFSCME

Asian Americans Advancing Justice - AAJC

LatinoJustice PRLDEF

League of Women Voters

National Asian Pacific American Women's Forum (NAPAWF)

National Association of Social Workers

National Health Law Program

National Women's Law Center

People's Parity Project

Service Employees International Union (SEIU)