No. 21-463

In The Supreme Court of the United States

WHOLE WOMAN'S HEALTH, *et al.*,

Petitioners,

v.

AUSTIN REEVE JACKSON, JUDGE,
DISTRICT COURT OF TEXAS, 114TH DISTRICT, *et al.*,

Respondents.

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

BRIEF OF FIREARMS POLICY COALITION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

ERIK S. JAFFE
Counsel of Record
SCHAERR | JAFFE LLP
1717 K Street, NW, Suite 900
Washington, DC 20006
(202) 787-1060
ejaffe@schaerr-jaffe.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES (CONT'D)

INTEREST OF *AMICUS CURIAE*[1]

The Firearms Policy Coalition, Inc. (FPC) is a nonprofit membership organization that works to defend constitutional rights and promote individual liberty, including the right to keep and bear arms and the freedom of speech, throughout the United States. FPC engages in direct and grassroots advocacy, research, legal efforts, outreach, and education to this end.

FPC is interested in this case because the approach used by Texas to avoid pre-enforcement review of its restriction on abortion and its delegation of enforcement to private litigants could just as easily be used by other States to restrict First and Second Amendment rights or, indeed, virtually any settled or debated constitutional right. FPC takes no position on whether abortion should be protected by the Constitution but believes that judicial review of restrictions on even disputed constitutional rights as defined and protected under this Court's cases cannot be circumvented in the manner used by Texas.

SUMMARY OF ARGUMENT

This case in its current posture is not about any debate over the existence or scope of any constitutional right to abortion. Indeed, *Amicus* takes no po-

---

[1] This brief is submitted pursuant to the written blanket consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amicus* or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief. *Amicus* is not publicly traded and has no parent corporations, and no publicly traded corporation owns 10% or more of *Amicus*.

sition on such questions, which are before this Court in other cases. Rather, this case is about how far a State may go in deterring the exercise of any and all individual constitutional rights, as such rights are determined by this Court's cases. Texas's novel scheme for infringing upon and chilling the exercise of the right to abortion under this Court's *Roe* and *Casey* decisions, if allowed to stand, could and would just as easily be applied to other constitutional rights. That result is wholly anathema to our constitutional scheme, regardless what one thinks of abortion or, indeed, of any other hotly debated constitutional right, such as the right to keep and bear arms.

1. Laws that deter or chill the exercise of constitutional rights violate those rights. Such deterrence or chill constitutes a present harm for which litigants can seek present redress without having to absorb the tremendous costs and risks of putting their heads on the proverbial chopping block by violating those laws and hoping for eventual vindication. Even where the risk derives from prospective litigation initiated by private parties invoking state law, such risks are still the product of state action in adopting and implementing the law. Whether the relevant state actors are the "deputized" potential plaintiffs and/or the court officials and jurists that wield the power of government at every stage of the litigation process, the chilling of protected conduct is the consequence of invoking state power to such ends, wholly apart from the outcome in any particular case. Indeed, the Texas law is designed precisely to have that effect, biasing the playing field in a manner that likely violates due process, the right to petition, and var-

ious other provisions of the Constitution wholly apart from its restriction on abortion. In such circumstances, there should be no serious barrier to enjoining any and all state actors or agents who facilitate or play a role in such a farce.

2. If Texas's scheme for postponing or evading federal judicial review is successful here, it will undoubtedly serve as a model for deterring and suppressing the exercise of numerous constitutional rights. New York is already experimenting with private enforcement of anti-gun laws and will no doubt gladly incorporate the lessons of this case to insulate its future efforts to suppress the right to keep and bear arms. Other States will not be far behind. Indeed, a private bounty scheme could easily be modified to target persons who marry someone of the "wrong" sex or color, criticize the government, refuse to wear masks or get vaccinated, make negligent or harmless false statements on public issues, or engage in any other protected but disfavored conduct. And, if Texas's avoidance of pre-enforcement review succeeds, there is no reason to think the deterring penalties couldn't be made even more draconian. The precedent this law sets as a model for deterring the exercise of any and all rights amply illustrates why it is impermissible.

3. There are a variety of paths for allowing a pre-enforcement challenge to proceed in this case. The simplest path is the one suggested by petitioners – a suit against those state employees and officials most instrumental in giving force and effect to the threat Texas levels against the exercise or facilitation of federal constitutional rights. Any concerns with

ripeness are misplaced given that the imminent threat of litigation, even if not the specific litigants, is palpable and already having an immediate deterrent effect. That litigants have yet to exercise their delegated authority to sue under this scheme makes no more difference than if a prosecutor had yet exercised his or her authority to bring charges under a facially unconstitutional statute.

Alternatively, this Court could recognize the option of a suit against a defendant class of all persons empowered to act under the Texas law. If Texas is going to delegate the government function of enforcing the law to its residents, then those residents should also be subject to collective suit as the agents or functional contractors of the State.

Finally, if this Court views any of its precedents as a barrier to suit here, the solution is simple: expand the court-created work-around in *Ex parte Young* or just overrule *Hans* v. *Louisiana* to allow direct suit by a State's citizens against a State that "make[s] or enforce[s]" laws violating the privileges or immunities of those within their State. Such cases strayed from the text, structure, and logic of the Constitution and their errors should not be compounded by driving the train of misdirected precedent off the cliff proposed by Texas.

ARGUMENT

I. Chilling the Exercise of a Constitutional Right Constitutes Present Infringement for Which There Must Be Present Redress.

That the deterrence or "chill" of constitutionally protected activity constitutes an infringement of con-

stitutional rights seems well established and uncontroversial. Whether in the context of speech or other rights, making the exercise of a right costly, risky, or uncertain all serve to deter that exercise and have regularly been found to violate the Constitution. See, *e.g.*, *United States* v. *Jackson*, 390 U.S. 570, 581–82 (1968) (regarding Fifth Amendment Rights: "If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional."); *Shapiro* v. *Thompson*, 394 U.S. 618, 631 (1969) (regarding the right to travel: "the purpose of deterring the in-migration of indigents * * * is constitutionally impermissible."), overruled in part on other grounds by *Edelman* v. *Jordan*, 415 U.S. 651 (1974); *Thornburgh* v. *Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 767–68 (1986) (regarding abortion: "the Court consistently has refused to allow government to chill the exercise of constitutional rights"), overruled by *Planned Parenthood of Se. Pennsylvania* v. *Casey*, 505 U.S. 833 (1992); *Laird* v. *Tatum*, 408 U.S. 1, 11 (1972) ("constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights"); *John Doe No. 1* v. *Reed*, 561 U.S. 186, 245 (2010) (Thomas, J., dissenting). ("Our cases have long recognized this reality; as the Court recently reiterated, the First Amendment does not require 'case-by-case determinations' if 'ar-

chetypical' First Amendment rights 'would be chilled in the meantime.'").[2]

In the many cases addressing laws that chill the exercise of constitutional rights, the protected activity in question is not necessarily forbidden outright but instead saddled with burdens and risks that cause citizens to steer clear of the line and to forego activity that would properly be protected. Such deterrence, even where not intentionally designed to suppress protected activity, is nonetheless a violation of the Constitution and may be challenged before enforcement. Indeed, the very purpose of pre-enforcement challenges in numerous contexts is to prevent citizens from having to absorb the serious risks of violating a law in order to challenge it. Cf. *Steffel* v. *Thompson*, 415 U.S. 452, 459 (1974) ("it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to chal-

---

[2] See also *North Carolina* v. *Pearce*, 395 U.S. 711, 724 (1969) (regarding Due Process: "'penalizing those who choose to exercise' constitutional rights, 'would be patently unconstitutional.' * * * And the very threat inherent in the existence of such a punitive policy would, with respect to those still in prison, serve to 'chill the exercise of basic constitutional rights.'"), overruled in part by *Alabama* v. *Smith*, 490 U.S. 794 (1989); *Reno* v. *ACLU*, 521 U.S. 844, 871–72 (1997) ("The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech."); *Virginia* v. *Hicks*, 539 U.S. 113, 118–19 (2003) ("the threat of enforcement of an overbroad law may deter or "chill" constitutionally protected speech."); *Citizens United* v. *FEC*, 558 U.S. 310, 327 (2010) ("The interpretive process itself would create an inevitable, pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable.").

lenge a statute that he claims deters the exercise of his constitutional rights.").

In this case, Texas has argued, and the Fifth Circuit agreed, that there is no state action under its tactical model until enforcement and thus no state actor to enjoin in the meantime. But that conflates substance and timing. If there is state action (and hence a state actor) once a suit has been filed or resolved, then there is a state actor to enjoin pre-enforcement. For example, there should be little question that even a private litigant invokes the power of the State when applying or enforcing state law in a private lawsuit. See, *e.g.*, *Shelley* v. *Kraemer*, 334 U.S. 1, 14, 19 (1948) ("That the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court."; "These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government * * *.").[3]

---

[3] Cf. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 277–78 (1964) ("What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute." (footnote omitted); "Plainly the Alabama law of civil libel is 'a form of regulation that creates hazards to protected

Once the courts are understood as state actors regardless whether the plaintiff is a public official or a private person, it is simple to recognize that allowing the litigation itself, not merely its eventual outcome, is the most immediate relevant threat and penalty on those seeking to assert constitutional rights. *City of Houston* v. *Hill*, 482 U.S. 451, 467–68 (1987) (regarding Free Speech: "to force the plaintiff who has commenced a federal action to suffer the delay of state-court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect.") (citation omitted); *Dombrowski* v. *Pfister*, 380 U.S. 479, 494 (1965). ("Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression.").

The difficulty of forcing defendants to litigate individual state-court cases in order to raise constitutional defenses is compounded by the other likely constitutional violations built into S.B. 8. It is hard to imagine, for example, how the law's one-sided attorney's fees, venue provisions, limits on estoppel, and limits on the raising of defenses comport with (procedural) due process or equal protection, for example. It is likewise doubtful that allowing the recovery of attorney's fees against parties who challenge the constitutionality of S.B. 8 (though not against its defenders), even if the challenge is in federal court, squares with the First Amendment's Speech or Petition Clauses. Likewise with the provisions for joint and several liability of the attorneys

---

freedoms markedly greater than those that attend reliance upon the criminal law.'" (citation omitted)).

who bring such plainly non-frivolous challenges for their clients. Indeed, it is a modern spin on sedition laws that tries to penalize anyone who challenges state law, even where they are successful on most, but not all, counts. And one likewise must wonder how a minimum $10,000 penalty plus costs and fees payable to persons with no injury or personal interest squares with due process or the excessive fines clause. In short, the suggestion by respondents that potential defendants must run that gauntlet and hope for the best is unrealistic at best and craven at worst.

II. The Approach Used by Texas Could Be Used Against Numerous Other Constitutional Rights and With Even More Abusive Deterrents.

Although S.B. 8 directs its procedural abuses at those who would facilitate abortions, the tactic it employs is not remotely so limited. Indeed, a version of the tactic has already been deployed by New York allowing "any person, firm, corporation or association that has been damaged," to sue a "gun industry member" to enforce a broad array of prohibited conduct, *i.e.*, anything at all that could "endanger[] the safety or health of the public" through conduct that is merely "unreasonable under all the circumstances."[4]

---

[4] See N.Y. GEN. BUS. LAW § 898-e ("Any person, firm, corporation or association that has been damaged as a result of a gun industry member's acts or omissions in violation of this article shall be entitled to bring an action for recovery of damages or to enforce this article in the supreme court or federal district court."); *id.* § 898-a(4) ("gun industry member" defined as "a person, firm, corporation, company, partnership, society, joint

While New York is so far only slouching down the path of subcontracting enforcement of constitutionally suspect laws to private parties, Texas has taken off at a sprint, deputizing virtually all private persons to legally threaten citizens assisting the exercise of what is, at least for now and unless the Court says otherwise, the rights established in *Roe* and *Casey*. To the extent this tactic is effective at evading or outright blocking pre-enforcement review, while still deterring protected behavior, it will easily become the model for suppression of other constitutional rights, with Second Amendment rights being the most likely targets.

For example, it takes little in the way of creative copying for States hostile to the Second Amendment—New York, California, New Jersey, Hawaii, etc.—to declare that the ownership or sale of a handgun is illegal, notwithstanding *Heller*, and set up a bounty system with the same unbalanced procedures and penalties adopted by Texas in this case.[5] If state

---

stock company or any other entity or association engaged in the sale, manufacturing, distribution, importing or marketing of firearms, ammunition, ammunition magazines, and firearms accessories"); *id.* § 898-b(1) (defining prohibited conduct). Lacking Texas's creativity, New York also allows for government enforcement of its law.

[5] Just as many States question this Court's decisions in *Roe* and *Casey*, other States (and many courts) both question and resist this Court's decision in *Heller*. It is not uncommon to find states asserting (and various judges accepting) arguments based on the dissent in *Heller* rather than the opinion itself. See, *e.g.*, *Caetano* v. *Massachusetts*, 577 U.S. 411 (2016) (GVR of State court opinion that did not attend to *Heller*); *id.* at 415, 421 (Alito, J., concurring) ("Although the Supreme Judicial Court [of Massachusetts] professed to apply *Heller*, each step of its analy-

officials are prohibited from bringing suit in their official capacities to enforce such a law, such States could dispute any pre-enforcement challenges on the same grounds Texas argues here. But the chill of Second Amendment rights would exist even without a suit being brought and there would be a substantial incentive to discourage an actual application of the law so long as the chill was even partially effective.

Similar tactics, could, of course, be applied to deter the exercise of many other constitutional rights or, indeed, any form of disfavored behavior, while avoiding any pre-enforcement review. States still mad about *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015), might offer bounties on people facilitating same-sex marriage. Or, those upset by claimed free-exercise defenses to discrimination laws might offer the entire populace private bounties against anyone *declining* to facilitate such weddings. For States in a really old school frame of mind who have never gotten over *Loving* v. *Virginia*, 388 U.S. 1 (1967), perhaps bounties against people facilitating interracial marriage. Perhaps a minimum $10,000 bounty (plus attorney's fees) against anyone uttering, even negligently or without material harm, a false statement of fact on television or the internet?

Maybe even larger bounties against people refusing to be vaccinated or wear a mask? Forget religious or medical exemptions.

Don't like those bothersome protesters always criticizing the government? Bounties on everyone the

---

sis defied *Heller*'s reasoning."; "The lower court's ill treatment of *Heller* cannot stand.").

next time Second Amendment advocates rally in support of the right to keep and bear arms, school choice advocates march for their children's education, police reform advocates gather to protest qualified immunity, labor picketers protest in support of unions and collective bargaining, or anyone else shows up and deigns to assemble and complain. Courts can worry about the right to speak, assemble, and petition if and when a case is brought. But in the meantime, protesters can proceed at their own risk and hope that this Court grants cert. after years of litigation in state courts under rules that would make Mickey Mouse and kangaroos blush.

And in a State emboldened by the Texas bounty model but wanting to show some originality, why limit the minimum penalties to a mere $10,000 plus attorney's fees? Surely hostile state legislatures know how to multiply. Why not $100,000 or $1,000,000 bounties? One-sided attorney's fees not enough of a deterrent? Why not sizeable mandatory judgment bonds as a condition to appeal? Maybe even pre-judgment liens on bank accounts and real estate to make sure a future judgment gets paid (and that even an unsuccessful suit has maximum financial impact in the interim).

If the parade is still not horrible enough, why not, to paraphrase a rock parody, turn the penalties up to 11 (on the 0-10 scale) and declare that abortion is murder (though not subject to prosecution by the State itself), that defending fetal life against those who would provide or facilitate abortions is justifiable homicide in defense of others, and that no charges may be brought against private citizens acting in de-

fense of fetal life? Or maybe declare that protests about elections are felonious threats to democracy and may be dispersed with deadly force (by private citizens only, of course), again with prosecutors barred from charging those who act against such felonious assemblages? When outcome matters more than process and the federal judiciary and Constitution are just barriers to State desires, it is hard to know how far a State might go.

While these examples may seem absurd, for purposes of this case they are structured in precisely the same too-clever-by-half manner intended to avoid pre-enforcement review while aggressively deterring conduct in a manner plainly incompatible with existing Supreme Court precedent. Indeed, as absurd as these examples are, one might be excused for thinking it absurd that a State could deputize all private citizens to enforce a state law, disable actual state officials and employees from *initiating* (but not later *facilitating*) enforcement of that same law, and then somehow pretend there are no state actors to be sued or pre-enforcement means of stopping the plainly intended freeze of conduct protected under this Court's current caselaw.

III. A Pre-Enforcement Suit Against the Threatened Enforcement of S.B. 8 Can Proceed Under a Variety of Approaches.

Recognizing that suits under S.B. 8 involve, at a minimum, threatened state action, one need only identify the appropriate state actor or actors to attempt to enjoin. The simplest option is precisely the one proposed by petitioners: sue the state actors who have the most immediate role in implementing the

scheme and whose prospective conduct (even before judgment) plays a central role in deterring protected behavior.

It is the state courts who are implementing and enforcing the questionable state law involved, including the various procedural affronts. If the courts are the proper state actors once a suit is filed, they are still the proper state actors for any pre-enforcement suit. The very premise of pre-enforcement suits is that the mere threat of state action chills the exercise of rights and thus creates a ripe case or controversy. So too here, the mere threat of having to endure a lawsuit on an intentionally skewed playing field under state law chills protected behavior even before the suit is filed and regardless of any eventual constitutional defense.[6] Moreover, the burden imposed by the courts themselves on civil defendants begins the moment a summons is issued in support of a complaint. The coercive conduct of the state courts con-

---

[6] That the state courts themselves could conceivably declare the law and its burdensome procedures unconstitutional is no reason to allow litigation to progress in those courts. Such an answer has never been deemed sufficient to allow prosecutors to avoid pre-enforcement challenges to laws chilling free speech and the same should be true here. Indeed, having to exhaust state court remedies and absorb the interim consequences shows why it is the court procedures themselves that are the offending state action. And given that there is no estoppel for successful defendants in state court, plaintiffs will just keep trying until they inevitably find a judge less concerned about the niceties of the Constitution and unwilling to listen to some pointy-headed jurist in Austin (or Washington, for that matter). To rely on the usual presumptions of procedural regularity and respect for the federal law often accorded to state courts is wholly unwarranted in the wake of S.B.8's effort to eliminate such procedural regularity.

tinues throughout the proceeding whenever production of testimony or documents is required, hearings are called, and throughout the many phases of a judicial proceeding, not only at the last moment when judgment is entered. A pre-enforcement challenge and potential injunction thus requires intervention before the *first* application of coercive state power that burdens or penalizes protected conduct, not simply after the final judgment and any appeal but before collection of penalties and fees.

Enjoining the facilitating state actors from playing their role in this broader farce thus is no different than enjoining any other state actor from enforcing a law that chills constitutional conduct, at least until preliminary judicial review has occurred. *Amicus* thus agrees with petitioners that pre-enforcement suit against state court employees and jurists to bar their role as state actors facilitating prospective private actions under color of state law that are credibly alleged to chill, and hence infringe upon, constitutional rights protected by this Court's precedents is a perfectly valid approach that should be held to fall within *Ex parte Young*'s exception to claimed state sovereign immunity.

Alternatively, prospective "private" litigants acting under color of state law could be deemed the relevant state actors subject to suit collectively. Indeed, the practical effect of the Texas law is to deputize the universe of private citizens to enforce the law in lieu of actual state employees or officials. Subcontracting out enforcement of these types of laws to everyone *except* state officials is problematic for a host of reasons, but here it merely speaks to their potential role as

state actors.[7] And if that is the case—that all private citizens are now deputized enforcers of Texas law no different than state attorneys—then they also can be enjoined as such. While suing a defendant class in such circumstances would undoubtedly be unwieldy and raise a host of procedural and possibly ethical issues given conflicting interests among the various "deputies," those very issues would be created by the sheer audacity of the Texas scheme and cannot be used to insulate it from review.

Finally, to the extent the Court is troubled by its sovereign immunity precedent, there is a simple solution: overrule it. Much of that precedent lacks a coherent textual basis and has been largely made up by the Court – both in covering suits by citizens against their own State in the first place and then by the various contortions to mitigate that mistake.

If there is an appetite for questioning existing precedent, one might start with precedent applying sovereign immunity to States being sued for violating the rights of their own citizens. *Hans* v. *Louisiana*, 134 U.S. 1 (1890); *Ex parte Young*, 209 U.S. 123 (1908). The text of the Eleventh Amendment certainly does not support, and would seem to actively rebut, such a conclusion. See John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 Yale L.J. 1663, 1670 (2004) (criticizing counter-textual interpretation of the Eleventh

---

[7] That the prospective litigants in this case need not be pursuing redress for any personal injury or have any other interest in the case beyond reaping the state-created bounty is all the more reason to recognize that any suit under the Texas law would involve state action.

Amendment); James Sample, *Textual Rights, Living Immunities*, 41 S. Ill. U. L.J. 29, 37 (2016) ("Quite frankly, and to use Justice Bradley's own words, the Eleventh Amendment has reached such a point (through *Hans* and its progeny) at which it has become 'almost an absurdity on its face.'"); Andrew B. Coan, *Text as Truce: A Peace Proposal for the Supreme Court's Costly War Over the Eleventh Amendment*, 74 Fordham L. Rev. 2511, 2530 (2006) ("the Eleventh Amendment restricts federal jurisdiction only with respect to suits against states 'by citizens of another state,' not with respect to suits by a state's own citizens.").

And even apart from baseline flaws in Eleventh Amendment jurisprudence, the Fourteenth Amendment would seem to supersede any previous potential state sovereign immunity as against violations of the federal Constitution. Looking at the Privileges or Immunities Clause, for example, a State may not "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST., amend. XIV. Properly understood, it is that Clause, rather than the Due Process Clause, that is the proper foundation for incorporation of the Bill of Rights and for any other substantive constitutional limits on state conduct. See *McDonald* v. *Chicago*, 561 U.S. 742, 808 (2010) (Thomas, J, concurring in part and concurring in judgment); *Timbs* v. *Indiana*, 139 S. Ct. 682, 691-92 (2019) (Thomas, J., concurring in the judgment). Recognizing the Privileges or Immunities Clause as the relevant constitutional limit would seem to negate any state sovereign immunity for "making" unconsti-

tutional laws, not merely for enforcing them via particular state actors. And if a State could be sued directly to challenge unconstitutional laws, the potentially complicated search for a state actor to enjoin would be unnecessary.[8]

CONCLUSION

This case is important not because of its specific subject matter of abortion, but instead for Texas's cavalier and contemptuous mechanism for avoiding federal review of a scheme intentionally designed to chill the exercise of constitutional rights as determined by this Court's precedents. It is one thing to disagree with precedents and seek their revision or reversal through judicial, congressional, or constitutional avenues; it is another simply to circumvent judicial review by delegating state action to the citizenry at large and then claiming, with a wink and a nod, that no state actors are involved.

From *Amicus's* perspective, if pre-enforcement review can be evaded in the context of abortion it can and will be evaded in the context of the right to keep and bear arms. While the political valences of those

---

[8] Given the expedited briefing schedule, this Court may not be prepared to do the serious work of overruling longstanding, though seriously problematic, precedent. But that is no reason to allow such precedent to distort the results in a case that does not even pass the most cursory smell test. Recognizing that the procedural hurdles to review thrown up by Texas are the product of a wrong turn at least cautions against adding more cars to a train going in the wrong direction (or, to use another metaphor, adding one more barnacle on top of the past barnacles adding drag to the constitution).

issues seem to be opposites, the structural circumstances are too similar to ignore. As with *Roe* and *Casey*, many States view *Heller* as wrongly decided. Those States, with the help of many circuit courts, are persistent in their refusal to accept the holding in *Heller* and their continuing creativity in seeking to circumvent any protections for, and to chill the exercise of, Second Amendment rights. If Texas succeeds in its gambit here, New York, California, New Jersey, and others will not be far behind in adopting equally aggressive gambits to not merely chill but to freeze the right to keep and bear arms.

For the foregoing reasons, this Court should reverse the ruling of the Fifth Circuit, grant the interim relief sought by petitioners, and allow the suit to proceed on the merits.

Respectfully submitted,

ERIK S. JAFFE
Counsel of Record
SCHAERR | JAFFE LLP
1717 K Street, NW, Suite 900
Washington, DC 20006
(202) 787-1060
ejaffe@schaerr-jaffe.com

Counsel for Amicus Curiae

Dated: October 27, 2021