No. 21-463

In The Supreme Court of the United States

WHOLE WOMAN'S HEALTH, ET AL.,
Petitioners,

v.

AUSTIN REEVE JACKSON, IN HIS OFFICIAL CAPACITY AS JUDGE OF THE 114TH DISTRICT COURT, ET AL.,
Respondents.

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

PETITIONERS' BRIEF

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OCTOBER 27, 2021

QUESTION PRESENTED

Whether a State can insulate from federal-court review a law that prohibits the exercise of a constitutional right by delegating to the general public the authority to enforce that prohibition through civil actions.

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PARTIES TO THE PROCEEDING

Petitioners are Whole Woman's Health; Alamo City Surgery Center, P.L.L.C. d/b/a Alamo Women's Reproductive Services; Brookside Women's Medical Center, P.A. d/b/a Brookside Women's Health Center and Austin Women's Health Center; Houston Women's Clinic; Houston Women's Reproductive Services; Planned Parenthood Center for Choice; Planned Parenthood of Greater Texas Surgical Health Services; Planned Parenthood South Texas Surgical Center; Southwestern Women's Surgery Center; Whole Woman's Health Alliance; Allison Gilbert, M.D.; Bhavik Kumar, M.D.; The Afiya Center; Frontera Fund; Fund Texas Choice; Jane's Due Process; Lilith Fund for Reproductive Equity; North Texas Equal Access Fund; Reverend Erika Forbes; Reverend Daniel Kanter; and Marva Sadler.

Respondents are Judge Austin Reeve Jackson, in his official capacity as Judge of the 114th District Court; Penny Clarkston, in her official capacity as Clerk for the District Court of Smith County; Mark Lee Dickson; Stephen Brint Carlton, in his official capacity as Executive Director of the Texas Medical Board; Katherine A. Thomas, in her official capacity as Executive Director of the Texas Board of Nursing; Cecile Erwin Young, in her official capacity as Executive Commissioner of the Texas Health and Human Services Commission; Allison Vordenbaumen Benz, in her official capacity as Executive Director of the Texas Board of Pharmacy; and Ken Paxton, in his official capacity as Attorney General of Texas.

CORPORATE DISCLOSURE STATEMENT

Whole Woman's Health is the doing business name of a consortium of limited liability companies held by a holding company, the Booyah Group, which includes Whole Woman's Health of McAllen, LLC and Whole Woman's Health of Fort Worth, LLC d/b/a Whole Woman's Health of Fort Worth and Whole Woman's Health of North Texas. Whole Woman's Health has no parent corporation, and no publicly held corporation holds 10% or more of its shares.

Planned Parenthood of Greater Texas Surgical Health Services is a subsidiary of Planned Parenthood of Greater Texas. No publicly held corporation holds 10% or more of shares in either organization.

Planned Parenthood South Texas Surgical Center discloses that Planned Parenthood South Texas is its sole member. No publicly held corporation holds 10% or more of shares of either organization.

Alamo City Surgery Center, P.L.L.C. d/b/a Alamo Women's Reproductive Services; Brookside Women's Medical Center, P.A. d/b/a Brookside Women's Health Center and Austin Women's Health Center; Houston Women's Clinic; Houston Women's Reproductive Services; Planned Parenthood Center for Choice; Southwestern Women's Surgery Center; Whole Woman's Health Alliance; The Afiya Center; Frontera Fund; Fund Texas Choice; Jane's Due Process; Lilith Fund for Reproductive Equity; and North Texas Equal Access Fund have no parent corporations, and no publicly held corporation holds 10% or more of their shares.

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BRIEF FOR PETITIONERS

Texas recently adopted a law banning abortions at approximately six weeks of pregnancy, in clear violation of nearly fifty years of this Court's precedent barring any prohibition of abortion before viability. Had Texas authorized state officials to enforce this law in the ordinary manner, the law would have been enjoined before it took effect on September 1.

But in an effort to evade federal review of the constitutional question, the Texas legislature barred state executive officials from directly enforcing the law, known as Texas Senate Bill 8, 87th Leg., Reg. Sess. (2021) ("S.B. 8" or the "Act"). Instead, Texas delegated S.B. 8 enforcement to the general public via civil actions that "any person" can file in a Texas state court, regardless of any showing of injury. The Act requires state courts to enter injunctions and impose mandatory penalties against an abortion provider or other person sued. The legislature also adopted special procedural and substantive rules to govern only S.B. 8 cases, in effect weaponizing the State's judiciary to hinder the effective vindication of the abortion right, and to suppress constitutional challenges to the law in the State's own court system.

Petitioners are Texas abortion providers and individuals and organizations that support abortion patients. They challenged S.B. 8 in federal court, naming as defendants the clerks and judges of the Texas state courts, the state attorney general and other executive officials, and a private person deputized to enforce the abortion ban. The district court denied motions to dismiss on standing and sovereign immunity, and defendants appealed. This Court granted certiorari before judgment.

The district court's determination that the state-official Respondents are subject to suit in federal court under *Ex parte Young*, 209 U.S. 123 (1908), is correct and should be affirmed. Just as the fiction that allowed the federal court to proceed in *Young* was necessary to protect the constitutional rights of railroad-corporation stockholders in 1908, rather than remitting the company to raise defenses in state proceedings based on an unconstitutional state law, federal-court review is necessary here to address ongoing, irreparable, and mass infringement of constitutional rights. The courthouse clerks and judges who are defendants in this action are unquestionably connected to the enforcement of this new law; without them, the civil suits targeting the right to abortion could not be litigated, or even commenced. Similarly, as in *Young*, the state attorney general and other executive officials named as defendants retain authority to take adverse civil action against individuals and corporations who violate the challenged law.

There is likewise no question that Petitioners have standing to bring their claims. The Court need not guess whether Petitioners' clear injuries would be redressed if Texas clerks and judges were barred from opening and advancing S.B. 8 proceedings. The record evidence shows they would, and the Petitioners' resumption of abortion services prohibited by S.B. 8 during the injunction in *United States v. Texas*, No. 1:21-cv-00796-RP, 2021 WL 4593319 (W.D. Tex. Oct. 6, 2021), confirms as much. In addition, the state executive officials named as defendants cause distinct injuries to Petitioners through threat of their indirect enforcement authority of S.B. 8's prohibitions, and through their ability to sue Petitioners for the collection of fees and costs under S.B. 8's draconian fee-

shifting provision. Finally, the private Respondent's conditional, post-filing statements about his intent to sue Petitioners lack the credibility necessary to negate Petitioners' well-pleaded allegations at the motion-to-dismiss stage.

It is a foundational principle of our federal constitutional system that "the federal judiciary is supreme in the exposition of the law of the Constitution," and States may not nullify federal rights through "evasive schemes" designed to foreclose federal judicial review. *Cooper v. Aaron*, 358 U.S. 1, 17–18 (1958). Texas has done precisely that, and nearly two months after S.B. 8 took effect, Petitioners still have not been able to get relief—much less full and durable relief—in the state court system that Texas has brandished against them. If Texas gets away with this ploy, the constitutional right to abortion will be the first but certainly not the last target of States unwilling to accept federal law with which they disagree. In circumstances like these, Article III and sovereign immunity do not require federal courts to stay their hand; indeed, the rule of law requires intervention.

OPINIONS BELOW

The district court's order denying Respondents' motions to dismiss (Petition Appendix ("App.") 1a–68a) is at 2021 WL 3821062.[1]

The Fifth Circuit's order denying the petition for a writ of mandamus filed by Respondents Clarkston and Dickson (App. 69a–70a) is unreported.

[1] Citations to the appendix are to the appendix to the petition for certiorari before judgment.

The district court's order granting in part and denying in part Respondents' motion to stay (App. 71a–76a) is unreported.

The Fifth Circuit's order granting an administrative stay and denying Petitioners' motion to expedite the appeal (App. 77a–79a) is unreported.

The Fifth Circuit's order denying Petitioners' motion for an injunction pending appeal and emergency motion to vacate stays of the district court's proceeding (App. 80a–82a) is at 2021 WL 3919252.

The Fifth Circuit's opinion explaining its previous denial of Petitioners' emergency motions, denying Petitioners' motion to dismiss Dickson's appeal, granting Dickson's motion to stay, and expediting the appeal (App. 83a–105a) is at 13 F.4th 434.

JURISDICTION

The district court denied the motions to dismiss on August 25, 2021. Having asserted sovereign-immunity claims, the state-official Respondents appealed under the collateral-order doctrine. *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993). Dickson, a private individual, also filed an interlocutory appeal that the Fifth Circuit held proper. App. 99a–104a. On October 22, this Court granted certiorari before judgment. Its jurisdiction rests on 28 U.S.C. §§ 1254(1) and 2101(e).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Texas Senate Bill 8; the Fourteenth Amendment; and 42 U.S.C. § 1983 are reprinted in the petition appendix. App. 106a–132a.

The Eleventh Amendment to the U.S. Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATEMENT OF THE CASE

A. Senate Bill 8's Origin and Contours

1. This Court's precedent holds that the Constitution forbids a State from prohibiting abortion before viability, which typically occurs by approximately 24 weeks of pregnancy. *See Roe v. Wade*, 410 U.S. 113, 163–64 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992); *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2120 (2020) (plurality opinion); *id.* at 2135 (Roberts, C.J., concurring). Accordingly, when confronted with pre-viability bans, courts uniformly enjoin state officials from enforcing these laws and hold them unconstitutional.[2]

In the face of clear precedent establishing that a six-week ban is unconstitutional, Texas passed one anyway, and it did everything it could to insulate the

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[2] *See, e.g.*, *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 772–73 (8th Cir. 2015); *McCormack v. Herzog*, 788 F.3d 1017, 1028–29 (9th Cir. 2015); *Edwards v. Beck*, 786 F.3d 1113, 1116–17 (8th Cir. 2015) (per curiam); *Isaacson v. Horne*, 716 F.3d 1213, 1217 (9th Cir. 2013); *Women's Med. Pro. Corp. v. Voinovich*, 130 F.3d 187, 201 (6th Cir. 1997); *Jane L. v. Bangerter*, 102 F.3d 1112, 1114, 1117–18 (10th Cir. 1996); *Sojourner T v. Edwards*, 974 F.2d 27, 29, 31 (5th Cir. 1992); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1368–69, 1373 & n.8 (9th Cir. 1992).

ban from effective judicial review. To carry out this plan, Texas relied on a law review article that set out theories for undermining federal-court authority to protect federal constitutional rights. One such tactic was to delegate enforcement of an unconstitutional law to the public at large, so that regulated parties could not identify who would sue them in advance of enforcement. Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 1000, 1001 & n.270 (2018). That enforcement mechanism, along with a requirement that those sued "foot [their] own legal bills," could alone "induce statutory compliance even for those who expect to prevail on their constitutional objections." *Id.* at 1002. And with these and other procedural obstacles to the vindication of rights in place, even "sabre-rattling" of future enforcement might "be enough to induce substantial if not total compliance" with an unconstitutional law. *Id.* at 992.

2. The Texas Legislature put these theories to work in S.B. 8.

The Act provides that "a physician may not knowingly perform or induce an abortion * * * if the physician detect[s] a fetal heartbeat," a term that S.B. 8 defines to include embryonic cardiac activity. Tex. Health & Safety Code § 171.204(a); *see also id.* § 171.201(1), (3), (7). Such activity is typically detectable by approximately six weeks in pregnancy, App. 6a n.3, *before* many patients even realize they are pregnant, D.Ct. Dkt. 19-1, ¶ 21. The ban has no exceptions for rape, incest, or a fetal health condition incompatible with sustained life. In these ways, S.B. 8 mirrors other laws that States have enacted in recent years to ban abortion at various stages of pregnancy before viability.

In other ways, however, S.B. 8 "is not only unusual, but unprecedented." *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2496 (2021) (Roberts, C.J., dissenting). The remainder of the Act is designed to insulate the law from meaningful judicial review while deterring the exercise of constitutional rights.

a. S.B. 8 delegates enforcement of the State's asserted "compelling interests" in the pregnancy to any member of the public, anywhere; it is not designed as a remedy for individuals' private injuries. Tex. Health & Safety Code § 171.202(3). It authorizes "[a]ny person" other than a government official to bring a civil enforcement action against anyone alleged to have (1) provided a prohibited abortion, (2) engaged in activity that "aids or abets" such an abortion, or (3) intended to provide, aid, or abet a prohibited abortion. *Id.* § 171.208(a).

The Act does not require that the claimant have any connection to the person who had the abortion that is the subject of the suit, suffer an injury in connection with the abortion in any way, or be a resident of Texas or even the United States. As one of S.B. 8's proponents put it, the law "allow[s] regular citizens to participate in [enforcing] state interest[s]."[3]

Where a violation is established, the court "shall" enjoin further violations and award the S.B. 8 claimant a minimum bounty (there is no statutory maximum) of $10,000 per abortion, payable by the person sued. *Id.* § 171.208(b)(1)–(2). Each S.B. 8

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[3] BeLynn Hollers & Morgan O'Hanlon, *Amid Legal Wrangling, Texas Enacts One of Nation's Most Restrictive Abortion Laws*, Dallas Morning News (Sept. 1, 2021), https://www.dallasnews.com/news/2021/09/01/amid-legal-wrangling-texas-enacts-one-of-nations-most-restrictive-abortion-laws/.

defendant must pay the bounty for each prohibited abortion only once, favoring the first claimant to prevail rather than the first to file. *Id.* § 171.208(c). The Act thus paves the way for simultaneous suits over the same abortion and exponentially greater litigation burdens, all while attempting to evade federal-court review under *Young*, 209 U.S. 123 (1908).

By delegating enforcement to millions of uninjured people, S.B. 8 creates an overwhelming *in terrorem* effect while making it all but impossible to identify "the litigants who will enforce the statute * * * until they actually bring suit." Mitchell, *supra*, at 1001 n.270. This effect is compounded by the Act's four-year statute of limitations. *See* Tex. Health & Safety Code § 171.208(d). In this way, S.B. 8 attempts to prevent meaningful pre-enforcement relief. *E.g.*, *Jackson*, 141 S. Ct. at 2496 (Roberts, C.J., dissenting) (recognizing that S.B. 8's delegation "to the populace at large" is designed "to insulate the State from responsibility for implementing and enforcing the regulatory regime").

b. In addition to seeking to frustrate federal protection of the rights it unabashedly infringes, S.B. 8 seeks to frustrate state-court vindication of those rights, by creating a web of claimant-favoring rules applicable to S.B. 8 claims alone. In so doing, S.B. 8 has effectively "weaponize[d] the [State's] judicial system," as former Texas judges and legal scholars have observed.[4]

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[4] Letter from Tex. Att'ys to Dade Phelan, Speaker of the Tex. H. of Reps., at 2 (Apr. 28, 2021), https://npr.brightspotcdn.com/d5/51/a2eac3664529a017ade7826f3a69/attorney-letter-in-opposition-to-hb-1515-sb-8-april-28-2021-1.pdf.

First, S.B. 8 precludes declaratory-judgment suits and immunizes the State and all state officials from challenges *in the State's own courts*. Tex. Health & Safety Code § 171.211(a)–(b). Accordingly, S.B. 8 attempts to close *all* courthouse doors to challenges.

Second, S.B. 8 "dictate[s] how state courts hear S.B. 8 enforcement actions," App. 44a, including by stating that a person sued under the Act may not point to the fact that the claimant already lost an S.B. 8 lawsuit against someone else on equally applicable grounds, or that a subsequently overturned court order permitted the challenged conduct at the time that conduct occurred, Tex. Health & Safety Code § 171.208(e)(3)–(5). The Act also attempts to "severely limit[]," App. 41a, available federal constitutional defenses by, for example, creating an "undue burden" defense at odds with this Court's undue burden standard, *see* Tex. Health & Safety Code § 171.209 (titled "Civil Liability: Undue Burden Defense *Limitations*" (emphasis added)).

Third, "S.B. 8 bucks the usual rules in Texas," App. 8a n.6, by providing that defendants can be forced into court in any of Texas's 254 counties and by prohibiting transfer of the cases to any other venue without the parties' joint agreement, Tex. Health & Safety Code § 171.210(a)–(b). Thus, a Houston nurse could be dragged into courts simultaneously in El Paso, Laredo, Amarillo, and any other Texas county to defend herself for aiding a single abortion performed in Houston for a Houston resident.

Fourth, S.B. 8 ratchets up the costs of defending against the limitless suits authorized by the Act while eliminating the financial risk to claimants. S.B. 8 claimants can recover fees and costs if they win—that

is, if they are successful in blocking constitutionally protected abortions. But abortion providers and patient supporters cannot recover fees and costs if they prevail—by vindicating constitutional rights that belong to them and their patients. *Id.* § 171.208(b)(3), (i). In addition, S.B. 8 provides that if someone challenges any law that "regulates or restricts abortion," such as S.B. 8 itself, the challenger can be held liable for the opposing party's attorney's fees and costs. Tex. Civ. Prac. & Rem. Code § 30.022(a)–(b). This liability could apply, for example, to counterclaims raised in response to an S.B. 8 enforcement proceeding, and it applies irrespective of whether the challenger ultimately succeeds in invalidating S.B. 8. So long as *any* of the challenger's claims are dismissed, for any reason, S.B. 8 authorizes the person defending the Act to seek fees and costs in an entirely separate state-court action, even if the original court denied fees or held the fee provision unconstitutional. *Id.* § 30.022(b)–(d).

S.B. 8 also expands its *in terrorem* reach to the bar, providing that attorney-fee liability would be jointly and severally shared with counsel for anyone seeking to invalidate an abortion regulation, including S.B. 8. *Id.* § 30.022(a). Pro bono attorneys and solo practitioners could be on the hook for millions of dollars in fees for seeking to vindicate their clients' interests in good faith.

These provisions, all unique to S.B. 8 claims, create a heads-I-win-tails-you-lose regime whose evident purpose is to deter and obstruct access to federal and state court.

B. Petitioners' Pre-Enforcement Challenge

1. Petitioners include Texas abortion providers, individuals, and organizations that support abortion patients by providing care, defraying costs, assisting with transportation and other travel logistics, and providing counseling. App. 12a–14a. In July 2021, they filed this challenge in federal court seeking to block S.B. 8's enforcement before its September 1 effective date.

Petitioners raised seven federal constitutional claims: one asserting that S.B. 8's pre-viability abortion ban violates patients' Fourteenth Amendment rights, and the other six challenging S.B. 8's enforcement mechanisms, including its imposition of aiding-and-abetting liability. These latter claims alleged violations of Petitioners' own due-process, equal-protection, and First Amendment rights. *See* D.Ct. Dkt. 1, ¶¶ 131–63.

Petitioners named two putative defendant classes of officials integral to S.B. 8's private enforcement: one composed of clerks and the other of judges in Texas courts authorized to hear S.B. 8 claims. Penny Clarkston, a court clerk, and Judge Austin Reeve Jackson—both based in Smith County, Texas—were named as the class representatives. App. 4a, 15a.

Petitioners also sued Texas Attorney General Ken Paxton, alleging that, as the state attorney general and Texas's chief law-enforcement officer, he is a proper defendant. Additionally, Petitioners sued Paxton and certain state licensing officials on the grounds that (1) they can enforce S.B. 8's prohibitions indirectly by exercising regulatory authorities that would be triggered by violations of S.B. 8, App. 11a–12a, 15a–16a & n.9, and (2) they can enforce S.B. 8's

draconian fee-shifting provision, as parties regularly involved in Petitioners' challenges to abortion regulations in Texas, App. 25a–27a.

Finally, Petitioners named as a defendant Mark Lee Dickson, a private party who presents a credible threat of enforcement against Petitioners who violate the Act. App. 16a.

2. Petitioners moved for summary judgment and certification of the defendant classes; they later moved for a preliminary injunction when it became clear that final judgment would not be available by September 1. Respondents moved to dismiss for lack of jurisdiction and on sovereign-immunity grounds. App. 4a–5a.

The district court denied the motions to dismiss, concluding that Petitioners have standing and that the claims against clerks, judges, and other government officials fall within the *Young* doctrine. The district court explained that the State's clerks and judges "are integral in executing S.B. 8 enforcement measures by coercing [Petitioners] to participate in such suits and issuing relief against those who violate S.B. 8." App. 54a. It likewise held that the agency-official Respondents had authority to "enforce violations of other state laws," such as the Medical Practice Act, when those laws are triggered by an S.B. 8 violation, and to seek attorney's fees under S.B. 8's fee-shifting provision. App. 22a–24a, 27a. Finally, the district court concluded that Petitioners had standing to sue Dickson because he "demonstrated his intent to enforce S.B. 8 if [Petitioners] violate the law." App. 64a (citing record evidence).

Respondents appealed. The district court stayed further proceedings as to the government officials

based on their sovereign-immunity defenses. The Fifth Circuit later stayed the district-court proceedings as to Dickson, too. Petitioners filed an emergency motion for an injunction pending appeal and to vacate the stays of the district-court proceedings, all of which the Fifth Circuit denied without opinion. App. 82a.

On August 30, Petitioners sought emergency relief in this Court, which it denied on September 1. The Court stated that Petitioners had "raised serious questions regarding the constitutionality of" S.B. 8, but that relief was not warranted at that time because of "complex and novel antecedent procedural questions." *Jackson*, 141 S. Ct. at 2495.

The court of appeals subsequently issued a published opinion denying Petitioners' motion to dismiss Dickson's interlocutory appeal. The court also explained its previous denial of Petitioners' emergency injunction motion. It stated that "clerks are improper defendants against whom injunctive relief would be meaningless" because "[t]heir duty within the court is to accept and file papers in lawsuits, not to classify 'acceptable' pleadings." App. 98a (citing *Chancery Clerk of Chickasaw Cnty. v. Wallace*, 646 F.2d 151, 160 (5th Cir. 1981)). The court of appeals also stated that *Young* "excludes judges from the scope of relief it authorizes" and "judges acting in their adjudicatory capacity are not proper Section 1983 defendants in a challenge to the constitutionality of state law." App. 96a.

The court of appeals concluded that the Texas Attorney General was not a proper defendant because, under circuit law, his "general duty to enforce state law" could not render him suable under *Young*. App. 95a. Additionally, ignoring Petitioners' claims as to

S.B. 8's fee-shifting provision that applies generally to abortion litigation, the court determined that Petitioners "have no *Young* claim" against those officials, App. 95a, because S.B. 8 is enforced "exclusively" through private civil-enforcement actions. App. 94a (emphasis omitted).

Finally, the court of appeals suggested that Petitioners "have no present or imminent injury from the enactment of S.B. 8," and therefore no standing. App. 98a n.14.

C. S.B. 8's Elimination of Abortion Access After Six Weeks of Pregnancy

1. Since S.B. 8 took effect on September 1, it has had precisely its intended impact. Before S.B. 8, most abortions at Petitioners' health centers occurred at or after six weeks' pregnancy. D.Ct. Dkt. 19-1, ¶ 14; D.Ct. Dkt. 19-3, ¶ 14; D.Ct. Dkt. 19-5, ¶ 9; D.Ct. Dkt. 19-6, ¶ 8; D.Ct. Dkt. 19-7, ¶ 10; D.Ct. Dkt. 19-10, ¶ 8; D.Ct. Dkt. 19-11, ¶ 12; *see also* D.Ct. Dkt. 19-2, ¶ 22; D.Ct. Dkt. 19-4, ¶ 12; D.Ct. Dkt. 19-8, ¶ 16; D.Ct. Dkt. 19-9, ¶ 5; App. 13a. Now, the serious threat that performing even one violative abortion could result in numerous enforcement actions, ruinous liability, and limitless attorney's fees and costs has coerced compliance with the statute throughout Texas. In the last eight weeks alone, thousands of pregnant Texans have been unable to exercise their federal constitutional right to obtain an abortion in Texas. Decl. of Vicki Cowart ¶ 18, *United States v. Texas*, No. 1:21-cv-00796-RP (W.D. Tex. Sept. 14, 2021), Dkt. 6-9 (providing average annual abortion numbers in Texas).

Texans with resources are being forced to travel hundreds of miles out of state for care. Because clinics

in neighboring states cannot accommodate the surge, some Texans are traveling nearly a thousand miles or more to distant states. *See* Decl. of Rebecca Tong ¶¶ 12–13, 21–22, 28, *United States v. Texas*, No. 1:21-cv-00796-RP (W.D. Tex. Sept. 14, 2021), Dkt. 6-8. Many pregnant Texans are unable to travel out of state for care and are forced to carry those pregnancies to term against their will. Decl. of Amy Hagstrom Miller ¶ 32, *United States v. Texas*, No. 1:21-cv-00796-RP (W.D. Tex. Sept. 14, 2021), Dkt. 6-6. Others may attempt to take matters into their own hands. Decl. of Melaney A. Linton ¶ 34, *United States v. Texas*, No. 1:21-cv-00796-RP (W.D. Tex. Sept. 14, 2021), Dkt. 6-7; Abby Vesoulis, *How Texas' Abortion Ban Will Lead to More At-Home Abortions*, Time (Sept. 21, 2021) (visits to online resource for accessing abortion pills went from 500 to 25,000 daily).[5]

2. The only reprieve in the last eight weeks came during the brief period when the preliminary injunction in *United States v. Texas* was in effect. *See* Paul J. Weber & Jamie Stengle, *Abortions Resume in Some Texas Clinics After Judge Halts Law*, AP News (Oct. 7, 2021).[6] That injunction, which bound the State and its officials, including court clerks and judges, allowed Petitioners to resume post-six-week abortions for two days until the Fifth Circuit stayed relief. *Id.* The state attorney general and other counsel for defendants assured the court that they had devised a method for compliance and that they would relay this information to all relevant state courthouses through the Office of Court Administration, Def.'s 2d Advisory Regarding

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[5] https://time.com/6099921/texas-self-managed-abortions/.

[6] https://apnews.com/article/abortion-us-supreme-court-business-bills-courts-53d4de794ddfeddf506cd9080277d419.

Compliance with Court's Prelim. Inj. Order, *United States v. Texas*, No. 1:21-cv-00796-RP (W.D. Tex. Oct. 8, 2021), Dkt. 74—proving that compliance by the clerk and judicial defendants was indeed possible.

Outside that two-day window, only one known post-cardiac-activity abortion has occurred in Texas since September 1. *See* Alan Braid, *Why I Violated Texas's Extreme Abortion Ban*, Wash. Post (Sept. 19, 2021).[7]

In response to that single violation, three individuals sued the doctor in state court, but none has sought emergency injunctive relief or even served him. These enforcement actions could take months or years to move through the Texas courts. And they would not resolve S.B. 8's constitutionality statewide, should claimants lose in the lower courts and decline to appeal through to the Texas Supreme Court, whose review is discretionary. After enforcement proceedings were filed, the doctor brought an action in the nature of interpleader against the three S.B. 8 claimants, but a motion to dismiss is pending. *See Braid v. Stilley*, No. 1:21-cv-05283 (N.D. Ill. filed Oct. 5, 2021).

Noting that S.B. 8 is achieving its purpose as long as it is not adjudicated on the merits, and that the Act has a four-year statute of limitations, proponents of S.B. 8 have discouraged the filing of lawsuits at this time against Dr. Braid, so as to deprive him of any meaningful opportunity to obtain a ruling. *See* Ed Whelan, *Texas Abortionist Seeks Test Lawsuit Under*

[7] https://www.washingtonpost.com/opinions/2021/09/18/texas-abortion-provider-alan-braid/.

Heartbeat Act, Nat'l Rev. (Sept. 20, 2021) (discouraging "test case" for S.B. 8);[8] Laurel Calkins & Lydia Wheeler, *Texas Abortion Doctor Draws Friendly Lawsuits Seen as Duds*, Bloomberg L. (Sept. 22, 2021) (Texas Right to Life spokesperson stating "[w]e definitely lose if a lawsuit is filed imprudently" and "[t]hat's why you didn't see us jump" at suing the physician).[9]

3. Planned Parenthood Peti-tioners in this case also filed an action in a district court in Travis County, Texas, against Texas Right to Life and a member of its staff (collectively, "TRTL") claiming that the Act violates the state constitution and seeking injunctive relief. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. TRTL* ("*PPGTSHS*"), No. D-1-GN-21-004632 (Travis Cnty. Dist. Ct. filed Sept. 2, 2021). TRTL, represented by S.B. 8's architect, stip-ulated to a temporary injunction, which foreclosed any broader relief that might have been obtained through appellate review at that early stage of litigation. *See* Agreed Temp. Inj. Order, *PPGTSHS v. TRTL*, No. D-1-GN-21-004632 (Travis Cnty. Dist. Ct. entered Sept. 13, 2021). And because the injunction binds only TRTL, not any other likely S.B. 8 claimants or the government officials involved in enforcement proceedings, it has not led to the resumption of abortion services prohibited by the Act.

Other individuals and entities, including some of the abortion-fund and practical-support-organization

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[8] https://www.nationalreview.com/bench-memos/texas-abortionist-seeks-test-lawsuit-under-heartbeat-act/.

[9] https://news.bloomberglaw.com/health-law-and-business/texas-abortion-doctor-lawsuits-filed-by-allies-may-go-nowhere.

Petitioners here, also sued TRTL and state officials in state court. Before those matters could be heard for temporary injunctions, TRTL moved to have them, along with *PPGTSHS*, trans-ferred to a multi-district litigation ("MDL") pretrial judge. While that motion was pending, TRTL obtained a stay, resulting in the cancellation of a summary-judgment hearing in *PPGTSHS* and temporary-injunction hearings in the other cases. *See, e.g.*, *Van Stean v. Texas*, No. D-1-GN-21-004179 (Travis Cnty. Dist. Ct. filed Aug. 23, 2021).[10] At this time, the cases have been transferred into a single MDL proceeding, with hearings on pending motions set for November.[11] TRTL also moved to dismiss each case under the Texas Citizens Participation Act, which pro-vides for an automatic stay of trial-court proceedings during any appeal. Tex. Civ. Prac. & Rem. Code § 51.014(a)(12), (b).

At every stage of these state-court proceedings, TRTL and its counsel have sought to delay adjudication. Even if plaintiffs are able to reach final judgment in these suits, the trial-court decisions will bind only the defendants and cannot control other courts throughout the state. After the state officials asserted broad immunity from suit, those plaintiffs who had named them as defendants dismissed their claims. Pls.' Notice of Nonsuit Without Prejudice of Claims Against State Defs., *Van Stean v. Texas*, No. D-1-GN-21-004179 (Travis Cnty. Dist. Ct. Oct. 19, 2021).

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[10] Filings before the MDL Panel are available at https://search.txcourts.gov/Case.aspx?cn=21-0782&coa=cossup.

[11] All parties to the MDL proceeding have been directed to file any future trial-court submissions in the docket for *Van Stean v. Texas*, No. D-1-GN-21-004179 (Travis Cnty. Dist. Ct. filed Aug. 23, 2021).

SUMMARY OF ARGUMENT

Where, as here, a State enacts a blatantly unconstitutional statute, assigns enforcement authority to everyone in the world, and weaponizes the state judiciary to obstruct those courts' ability to protect constitutional rights, the federal courts must be available to provide relief.

I. This Court need not break new ground to provide such relief here. Petitioners' claims fit neatly within Section 1983, which was devised to provide a federal remedy against state action that deprives a person of her federal rights. And Section 1983 expressly permits suits against "judicial officers" acting in their "judicial capacity." 42 U.S.C. § 1983. In light of Section 1983's plain text and purpose, both this Court and the federal courts of appeals have long permitted suits against defendants like Respondents, who include courthouse clerks, judges, state executive officials, and a private party acting under color of state law.

II. The district court correctly concluded that none of the government-official defendants is entitled to sovereign immunity. While the Eleventh Amendment bars suits against state officials as representatives of the State itself, *Young* ensures that federal courts are open to pre-enforcement suits against state officials linked to the enforcement of an unconstitutional law.

Petitioners' claims against Texas court clerks and judges fit comfortably within *Young*'s reach. Each of these parties bears more than "some connection," *Young*, 209 U.S. at 157, to the enforcement of S.B. 8, taking steps that are properly the subject of equitable relief. Clerks docket S.B. 8 enforcement actions and

issue citations commanding defendants to appear and defend on the pain of default judgment. Once an action commences, judges preside over S.B. 8 matters under a stacked statutory scheme and determine the burdens of litigation that a defendant must endure under a patently unconstitutional law. Similarly, Attorney General Paxton has a "general duty" to enforce the law, *Young*, 209 U.S. at 161, and he and the other state-official defendants maintain indirect enforcement authority for S.B. 8's prohibitions and may, at minimum, seek attorney's fees and costs from Petitioners in abortion cases, rendering them all proper defendants under *Young*. And where, as here, a law hamstrings state courts' ability to provide defendants a fair opportunity to vindicate their rights—all while deputizing millions of private citizens to sue—equity requires that federal courts step in and prevent irreparable constitutional injury.

III. The district court also correctly held that Petitioners have standing. The threat of enforcement is a well-recognized Article III injury, and Respondents contribute to that injury for the reasons just discussed. Prospective relief would alleviate the widespread constitutional injury resulting from the enforcement threat, as well as the injuries associated with defensive S.B. 8 litigation. That is vividly illustrated by Petitioners' resumption of abortions prohibited by S.B. 8 during the *United States v. Texas* injunction, which reached Texas's court clerks and judges.

Prudential standing concerns also pose no obstacle because Respondents are sufficiently adverse. They have vigorously defended the Act, ensuring sharp presentation of the "complex and novel antecedent procedural questions," *Jackson*, 141 S. Ct.

at 2495, before this Court and of the merits in this case.

IV. Affirmance of the district court will protect federal supremacy from the imminent threat posed by S.B. 8 and copycat bills already under consideration by States seeing what Texas has achieved thus far—enactment of a law that baldly defies this Court's precedent yet is insulated from effective judicial review. If this is permissible, nothing would stop legislatures unhappy with this Court's rulings on free speech, religious freedom, the right to bear arms, or property rights from following suit. States cannot be permitted to insulate unconstitutional action by outsourcing enforcement of the State's assertedly "compelling interests" in regulating abortion to private citizens and rigging the rules in state court to frustrate any meaningful protection of rights. If ever there were a need for the federal courts to step in, this is it.

ARGUMENT

I. Congress Has Provided A Mechanism And A Federal Forum To Ensure That Individuals Can Meaningfully Challenge State Deprivations Of Federal Rights

Petitioners seek declaratory and injunctive relief under 42 U.S.C. § 1983 and the Declaratory Judgment Act ("DJA"). D.Ct. Dkt. 1 ¶¶ 1, 21 (invoking court's inherent equitable authority). Section 1983 and the DJA make clear that Congress intended to provide a federal cause of action and a federal forum for precisely the type of claims that Petitioners bring here.

1. Section 1983 speaks in broad terms, authorizing suits in law and equity against "[*e*]*very person* who, under color of [state law], * * * subject[s] [an individual], or cause[s] [an individual] to be subjected," to a "deprivation of any [federal] rights." 42 U.S.C. § 1983 (emphasis added); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 685–86 (1978).

Under Section 1983's terms, litigants whose federal constitutional rights are being violated may obtain prospective equitable relief against a range of state actors, including in suits against state-court clerks, *Strickland v. Alexander*, 772 F.3d 876 (11th Cir. 2014); state-court judges, *Pulliam v. Allen*, 466 U.S. 522 (1984); other state officials, *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246 (2009); and private individuals acting under color of state law, including through their use of state-court procedures, *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). Section 1983 injunctive relief against state-court proceedings is also a well-established exception to the Anti-Injunction Act. *Mitchum v. Foster*, 407 U.S. 225, 240, 242–43 (1972).

In 1996, Congress also confirmed that Section 1983 expressly authorizes suits against "judicial officers" for "an act or omission taken in such officer's judicial capacity." 42 U.S.C. § 1983; Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 309, 110 Stat. 3847, 3853 (Oct. 19, 1996). Although it does not define "judicial officers," that term is used throughout the U.S. Code to refer to judges and magistrates. *See, e.g.*, 18 U.S.C. § 3156(a)(1) (added 1975); *id.* § 3172(1) (added 1975); 28 U.S.C. § 1827(c)(2), (d)(1) (added 1978 and amended 1988); *id.* §§ 480, 482 (added 1990); 5 U.S.C. App. 4 § 103(c) (as amended 1990); *id.* § 109(8), (10) (added 1989); *see*

also S. Rep. No. 104-366, at 37 (1996) (in justifying 1996 amendment, defining "judicial officers" as "justices, judges and magistrates").

Congress thus expressly contemplated that Section 1983 litigants could bring claims like those asserted against Judge Jackson and the defendant judge class. And it already crafted what it deemed to be appropriate safeguards for such suits. *See* 42 U.S.C. § 1983 (barring injunctive relief against judicial officers "unless a declaratory decree was violated or declaratory relief was unavailable"); *id.* § 1988(b) (precluding assessment of attorney's fees and costs against judicial officers in some instances).

2. Congress intended Section 1983 to provide a remedy against anyone acting under color of state law to violate federal constitutional rights. Section 1 of the Ku Klux Klan Act of 1871, the "direct lineal ancestor" of Section 1983, *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 545 (1972), was "designed primarily in response to the unwillingness or inability of * * * state governments to enforce their own laws against those violating the civil rights of others," *Dist. of Columbia v. Carter*, 409 U.S. 418, 426 (1973).

In particular, Congress sought to address the Klan's "reign of terrorism and bloodshed" directed toward Black Americans during Reconstruction. *Briscoe v. LaHue*, 460 U.S. 325, 337, 340 (1983) (quoting congressional debate). In the face of such violence, state courts "were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights." *Mitchum*, 407 U.S. at 240; *Allen v. McCurry*, 449 U.S. 90, 98–99 (1980).

When it adopted Section 1, Congress fundamentally "alter[ed] the relationship between the States and the Nation" in two ways to correct this deficiency. *Mitchum*, 407 U.S. at 242. First, Congress afforded a new federal right to enforce the Fourteenth Amendment. *Monroe v. Pape*, 365 U.S. 167, 180 (1961), *overruled in part by Monell*, 436 U.S. 658. Second, instead of relying on state courts to adjudicate these federal claims (general federal-question jurisdiction did not exist at the time), Congress conferred federal subject-matter jurisdiction over Section 1 actions so as to provide "at least indirect federal control over the unconstitutional actions of state officials." *Carter*, 409 U.S. at 427–28; *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 504 (1982).

Petitioners' claims in this case fall squarely within Section 1983's scope, as is evident from its text and history.

3. Through Section 1983 and the DJA, Congress also authorized pre-enforcement constitutional challenges.

The Court has long recognized that pre-enforcement challenges may be necessary to ensure effective vindication of a constitutional right, because threatened enforcement alone will often chill the exercise of that right. *See, e.g.*, *Susan B. Anthony List v. Driehaus* ("*SBA List*"), 573 U.S. 149, 155, 163 (2014); *Steffel v. Thompson*, 415 U.S. 452, 475 (1974). Put another way, an unconstitutional law that chills the exercise of a constitutional right amounts to a "deprivation" of that right within the meaning of Section 1983, even before an enforcement proceeding could be filed. 42 U.S.C. § 1983; *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392–93 (1988).

Likewise, by enacting the DJA, Congress provided a procedure to be "used by the federal courts to test the constitutionality" of state laws, *Steffel*, 415 U.S. at 467–68 (quoting *Perez v. Ledesma*, 401 U.S. 82 (1971) (Stewart, J., concurring)), even in cases "where an injunction would be inappropriate," *id.* at 471; 28 U.S.C. § 2201(a) (permitting a declaration of "rights and other legal relations" in any "case of actual controversy" within a court's jurisdiction). The DJA was specifically designed to ameliorate the "dilemma" posed by an unconstitutional law that would force a challenger to "bet the farm" to vindicate legal rights. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129, 134 (2007).

These procedures afford access to a federal forum for the protection of federal constitutional rights even where state courts are available. Where, as here, the legislature has enacted a set of S.B. 8-only rules designed to undermine the ability of the state courts to provide timely and effective remedy, the need for relief under Section 1983 and the DJA is all the more essential.

II. Petitioners' S.B. 8 Challenge Is Squarely Permitted By *Ex Parte Young*

For "more than a century," this Court has made clear that sovereign immunity does *not* bar official-capacity suits seeking prospective relief against state officials for ongoing violations of federal law. *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 254–55 (2011). The Court's decision in *Young* applied this "important limit on the sovereign-immunity principle," *id.* at 254, a limitation that in fact has its roots "in the traditional balance between judicial oversight and sovereign immunity that American

courts borrowed from English administrative law as it had developed from the seventeenth century," James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of* Ex Parte Young, 72 Stan. L. Rev. 1269, 1344 (2020). Application of the *Young* doctrine here is particularly necessary, where the State has stacked the deck in its own courts to undermine their ability to provide timely and effective relief for constitutional violations.

In *Young*, a railroad company's stockholders challenged Minnesota laws that reduced the rates railroads were permitted to charge. 209 U.S. at 130–31. The federal circuit court had enjoined Edward Young, the Minnesota Attorney General, from enforcing the rates. *Id.* at 133. Ignoring that order, Young brought an enforcement action in state court, and the federal circuit court held him in contempt. *Id.* at 126. In this Court, Young argued that sovereign immunity prevented the federal court from enjoining performance of his official duties. *Id.* at 134.

The Court rejected that claim, holding that a state official who performs an unconstitutional act "proceed[s] without the authority of * * * the state" and "comes into conflict with the superior authority of [the U.S.] Constitution," such that he is "stripped of his official or representative character." *Id.* at 159–60. Recognizing that federal protection of constitutional rights was necessary, *Young* thus rests on the "fiction" that "when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes." *Stewart*, 563 U.S. at 255 (quotation marks omitted).

The *Young* doctrine is indispensable because "the availability of prospective relief * * * gives life to the Supremacy Clause," *Green v. Mansour*, 474 U.S. 64, 68 (1985), and permits the Fourteenth Amendment "to serve as a sword, rather than merely as a shield, for those whom [it was] designed to protect," *Edelman v. Jordan*, 415 U.S. 651, 664 (1974). *Young*'s rationale applies with even greater force here, where the State has clearly designed an unconstitutional law to evade federal review and has undermined the ability of its own courts to conduct that review.

A. Texas clerks and judges are proper defendants under *Young*.

"In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry' into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997) (O'Connor, J., concurring in judgment)); *Stewart*, 563 U.S. at 255–56.

If a plaintiff seeks this sort of prospective relief, the Eleventh Amendment poses no bar so long as the defendants have "some connection with the enforcement of the act." *Young*, 209 U.S. at 157. Without this enforcement connection, a suit against a state official would necessarily "mak[e] him a party as a representative of the state, and thereby attempt[] to make the state a party." *Id.* But where plaintiffs seek relief against some action that the state official himself might take, the "concern of sovereign-

immunity—whether the suit is against an unconsenting State, rather than against its officers"—disappears. *Stewart*, 563 U.S. at 259.

Petitioners unquestionably meet this standard here.

1. Petitioners have sought prospective relief against clerks and judges, D.Ct. Dkt. 1, at 46–47, alleging that the threat of S.B. 8 lawsuits is causing ongoing violations of federal constitutional rights, *id.* ¶¶ 131–63. In addition, they have demonstrated the requisite connection to enforcement that *Young* requires.

Clerks. S.B. 8 cannot be enforced without the participation of Texas's court clerks. A civil suit in Texas commences upon the filing of a petition "in the office of the clerk." Tex. R. Civ. P. 22. Under Texas Rule of Civil Procedure 99(a), when a petition is filed, the Texas clerks "shall forthwith issue a citation and deliver the citation as directed by the requesting party." *See* App. 38a n.13, 52a–53a ("[H]ere Clarkston will exert coercive power over defendants in S.B. 8 actions by issuing citations against them."). Like federal court summonses, Texas citations "direct the defendant to file a written answer to the plaintiff's petition" and notify the defendant that failure to respond may result in a default judgment. Tex. R. Civ. P. 99(b)–(c).

Clarkston, a court clerk in Smith County, Texas, agrees "that she will docket cases and issue citations filed under S.B. 8 *as is required by her under state law*." App. 52a (emphasis added). Indeed, since S.B. 8 took effect, Clarkston has docketed an S.B. 8 enforcement action. *See Tex. Heartbeat Project v. Braid*, No. 21-2276-C (Smith Cnty. Dist. Ct. filed Sept. 22, 2021).

Clerks plainly have a connection to S.B. 8 enforcement, because it is their performance of a ministerial act that inflicts the constitutional harm Petitioners are challenging: The credible threat of private enforcement actions—no matter whether Petitioners could ultimately prevail—has already halted the exercise of constitutional rights, and indeed has all but eliminated abortions after the earliest stages of pregnancy throughout Texas. *See Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) (recognizing that the chilling effect of an overbroad statute cuts against the "assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights").

In addition, the filing of a private enforcement action would immediately draw Petitioners into the warped procedural system the law establishes, designed to be as skewed against Petitioners as possible. Among other harms, those sued under S.B. 8 could be required to respond to an unlimited number of actions filed in any of Texas's 254 counties, all premised on the same activity, imposing substantial administrative, logistical, financial, and legal burdens. App. 52a; D.Ct. Dkt. 1, ¶¶ 102–03. *Briscoe*, 460 U.S. at 343 (observing that "even the processing of a complaint that is dismissed before trial consumes a considerable amount of time and resources"); *see also* Mitchell, *supra*, at 1002 (forcing defendants "to foot [their] own legal bills" induces compliance).

Moreover, as *Young* recognized, "it would be difficult, if not impossible" to test the law's unconstitutionality through a violation, plus "several years might elapse before there was a final determination of the question." 209 U.S. at 145, 163. Even if Petitioners prevail at every stage, the time it

would take to obtain a final judgment binding on all Texas courts would involve an ongoing deprivation of Petitioners' rights and the rights of their patients, which are indisputably time-bound. D.Ct. Dkt. 19-2, ¶¶ 24–25. In the meantime, those sued under S.B. 8 would be "harass[ed] * * * with a multiplicity of suits or litigation generally in an endeavor to enforce penalties under an unconstitutional enactment." *Young*, 209 U.S. at 160.

No one disputes that without the Texas clerks' involvement, these harms could not be brought to bear. Accordingly, Clarkston and the putative defendant class of clerks have a connection to S.B. 8's enforcement that satisfies *Young*, and relief directed at them would enjoin "the performance of ministerial duties in connection with [an] allegedly unconstitutional law[]." *Finberg v. Sullivan*, 634 F.2d 50, 53–54 (3d Cir. 1980) (en banc); *see also Kitchen v. Herbert*, 755 F.3d 1193, 1201–02 (10th Cir. 2014); *Strickland*, 772 F.3d at 879–81, 885.

Judges. The Texas judges likewise have a crucial connection with enforcement of S.B. 8; indeed, Jackson, a Smith County judge, conceded as much at a press conference after Petitioners' lawsuit was filed. App. 15a (quoting Ex. A to D.Ct. Dkt. 53-1, at 1). State judges are tasked with presiding over the S.B. 8 enforcement proceedings and entering judgments under S.B. 8's mandatory monetary-penalty and injunctive-relief provisions. Tex. Health & Safety Code § 171.208(b). Some Texas judges also perform administrative functions and accept and keep filings and dockets. *See* Tex. Gov't Code § 27.004; Tex. R. Civ. P. 507.3.

2. Despite Petitioners' satisfaction of *Young*'s "straightforward" standard, *Verizon*, 535 U.S. at 645, Respondents contend—and the Fifth Circuit agreed—that Petitioners' claims against court clerks and judges are barred by sovereign immunity. These arguments are incorrect.

As an initial matter, Respondents' suggestion that a State can adopt an obviously unconstitutional law and then wash its hands of responsibility is at odds with our entire system of laws. As the Court has recognized, "[a] state acts by its legislative, its executive, or its judicial authorities. It can act in no other way." *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948) (quoting *Ex parte Virginia*, 100 U.S. 339, 347 (1879)). Here, in enacting S.B. 8, the Texas Legislature does not give itself or executive-branch officials enforcement authority. Tex. Health & Safety Code § 171.207(a). Therefore, consistent with the purpose of *Young*'s vital fiction, relief for Petitioners should run against the courthouse clerks and judges who make S.B. 8's abusive enforcement proceedings possible.

In addition, the position advanced by Respondents and accepted by the Fifth Circuit rests heavily on a passage in *Young* that they misconstrue to bar a federal court's "power to restrain a [state] court from acting in any case brought before it." App. 96a (quoting *Young*, 209 U.S. at 163); Br. Opp'n Pet. Writ Cert. Before J. ("Cert. Opp'n") 6, 12–13. That passage does not help Respondents because *Young* expressly allows an injunction against "commencing suits." 209 U.S. at 163. Docketing a lawsuit is a purely ministerial task that does not implicate judicial discretion or judgment at all. Accordingly, relief against clerks—who are not, in any event, "judicial officers" under Section 1983, *see supra* Part I.1—is fully proper where it restrains them

from "commencing" S.B. 8 enforcement actions. 209 U.S. at 163.

As to the judges, consistent with Section 1983's text, Petitioners have sought a declaratory judgment that taking any action beyond dismissal would violate Petitioners' constitutional rights; Petitioners have not sought permanent injunctive relief as to judges. *See* App. 38a–39a. Were a judge to violate the declaration, Plaintiffs would seek an injunction, but that is as Section 1983 expressly contemplates.[12]

In any event, the passage in *Young* on which Respondents rely is concerned not with sovereign immunity but with the remedy available in suits at equity, and it was written in a setting where the state had not sought to insulate its actions from federal review as Texas has here. *See* 209 U.S. at 162–63 (discussing cases showing "that a court of equity is not always precluded from granting an injunction to stay proceedings"). Section 1983 now governs the available remedy. And in the decades since *Young*, both Congress and this Court have acknowledged on multiple occasions that state judges may be sued under Section 1983 for prospective relief. *See* 42 U.S.C. § 1983; *Mireles v. Waco*, 502 U.S. 9, 10 n.1 (1991) (per curiam) (rejecting judicial immunity from suit for prospective relief); *Pulliam*, 466 U.S. at 536–43 (same); *Sup. Ct. of Va. v. Consumers Union of U.S.,*

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[12] Mindful that Section 1983 generally does not authorize injunctive relief against judicial officers, Petitioners moved for summary judgment at the same time they brought this action. D.Ct. Dkt. 19. When it became clear the district court would be unable to resolve that motion before the Act's effective date, Petitioners requested a preliminary injunction, including against Respondent Jackson, as declaratory relief was unavailable. D.Ct. Dkt. 53, at 5.

Inc., 446 U.S. 719, 736–37 (1980) (same); *In re Justs. of Sup. Ct. of P.R.*, 695 F.2d 17, 23 (1st Cir. 1982) (Breyer, J.) (observing that in an "unusual" case it may be "necessary to enjoin a judge to ensure full relief to the parties").

In a similar context and in service of this same equitable principle, the Court also has held that even injunctive relief may be appropriate to restrain judicial proceedings in exceptional circumstances. In *Younger v. Harris*, for example, the Court observed that an "injunction against state court proceedings" may be necessary to prevent irreparable injury where a statute is "flagrantly and patently violative of" the Constitution. 401 U.S. 37, 53–55 (1971). And in *Mitchum*, the Court emphasized that "federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights." 407 U.S. at 242–43.

Because Congress has not limited, but instead preserved, federal courts' equitable authority to enjoin state judges and clerks, "the full scope of that jurisdiction is to be recognized and applied." *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291 (1960).

B. Petitioners' claims against the Texas Attorney General and other state-agency Respondents also satisfy *Young*.

1. Petitioners have only sought prospective relief against the state attorney general and other executive officials based on ongoing violations of federal law. D.Ct. Dkt. 1, ¶¶ 51–55. And these Respondents, too, have a connection to S.B. 8's enforcement that satisfies *Young*. App. 27a. Each is authorized to take

indirect enforcement action against Petitioners through other statutes triggered by an S.B. 8 violation, D.Ct. Dkt. 1, ¶¶ 51–55, 107, and they need not wait for a private party to first establish that violation, *e.g.*, Tex. Occ. Code § 164.053(b). *Contra* App. 95a–96a (court of appeals' assumption that state officials' enforcement would hinge on the outcome of antecedent S.B. 8 proceedings by private parties).

Respondents have claimed, however, that executive officials are forbidden from taking *any* action to enforce S.B. 8. That is incorrect. Although S.B. 8 bars executive officials from bringing direct enforcement actions under the statute and from enforcing chapters 19 and 22 of the Texas Penal Code "in response to violations" of S.B. 8, it does not prohibit them from taking action under *other* provisions of Texas law in response to violations of S.B. 8. Tex. Health & Safety Code § 171.207(a).

If it did, then the specific prohibition on taking action under Chapters 19 and 22 of the Texas Penal Code would be superfluous. The canon against surplusage, however, instructs that no provision of a statute should be construed in a way that renders it redundant. *See Kallinen v. City of Houston*, 462 S.W.3d 25, 28 (Tex. 2015) (per curiam); *see also Kungys v. United States*, 485 U.S. 759, 778 (1988).

Thus, S.B. 8's limitation on indirect enforcement actions extends only to actions arising under Chapters 19 and 22 of the Texas penal code. But Texas law authorizes the state attorney general to hold individuals and corporations who violate S.B. 8 accountable in numerous other ways. Like the Minnesota Attorney General in *Ex parte Young*, 209 U.S. at 160–61, the

Texas attorney general has broad constitutional, statutory, and common law authority to take civil legal action against those who violate State law. *Compare id.*, *with* Tex. Const art. IV, § 22 (granting the Attorney General the power to "take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power . . . not authorized by law"); Tex. Gov't Code § 402.023(b) (same); *Agey v. Am. Liberty Pipe Line Co.*, 172 S.W.2d 972, 947 (Tex. 1943) ("[I]t is incumbent upon [the Attorney General] to institute in the proper courts proceedings to enforce or protect any right of the public that is violated."). The Texas attorney general also has specific statutory authority to "institute an action for civil penalty" against licensed Texas physicians for misconduct, Tex. Occ. Code § 165.101, and the other state agency Respondents likewise have statutory authority to take civil legal actions against those who violate S.B. 8, D.Ct. Dkt. 1, ¶¶ 51–55, 107; App. 22a–23a.

In this Court's order denying emergency relief, it noted that "[t]he State has represented that neither it nor its executive employees possess the authority to enforce the Texas law either directly or indirectly." *Jackson*, 141 S. Ct. at 2495. Under Texas law, however, such a representation cannot bind the State and its officials outside of this litigation, and under this Court's precedent, it is insufficient to trigger judicial estoppel of future enforcement actions. *See* Tex. Gov't Code § 402.004 ("An admission, agreement, or waiver made by the attorney general in an action or suit to which the state is a party does not prejudice the rights of the state."); *cf. Thermo Prods. Co. v. Chilton Indep. Sch. Dist.*, 647 S.W.2d 726, 732 (Tex. App. 1983), *writ ref'd N.R.E.* (June 1, 1983) ("The rule is

that public officers cannot bind the government they represent beyond the authority conferred upon them in the absence of an estoppel."); *New Hampshire v. Maine*, 532 U.S. 742, 749–51 (2001).

2. In any event, where, as here, the attorney general, as the state's top law enforcement officer, has general authority to enforce state laws, the principles animating *Young* should authorize suit against him if no other state official is an appropriate defendant. As this Court has recognized, *Young* is a fiction made necessary to ensure adequate federal protection of federal constitutional rights. Thus, if the Court deems no other official a proper defendant, it should extend *Young* to the attorney general under the peculiar circumstances presented here.

3. Finally, even if this Court were to conclude that the state-agency officials do not satisfy *Young* as to S.B. 8's substantive prohibitions, they plainly have a connection to the enforcement of the fee-shifting provision in Section 4 of S.B. 8. That part of the Act authorizes them to seek their attorney's fees and costs against Petitioners and their attorneys in any action challenging the constitutionality of an abortion restriction, including S.B. 8. Because they are frequent defenders of such laws, with suits involving Petitioners currently pending, S.B. 8 empowers them to obtain their fees notwithstanding federal law. *See* Tex. Civ. Prac. & Rem. Code § 30.022; D.Ct. Dkt. 19-5, ¶ 28. This alone is enough to make these state officials proper defendants for Petitioners' challenge to Section 4 of S.B. 8, which includes its draconian fee-shifting provision.

C. Suit against the government Respondents is necessary to vindicate Petitioners' federal rights and consistent with *Young*'s purpose.

Throughout this litigation, Respondents have asserted that refusal to apply *Young*'s exception is inconsequential because Petitioners can violate S.B. 8 and raise their constitutional challenges to it as defenses in state-court enforcement proceedings. *E.g.*, D.Ct. Dkt. 48, at 19; D.Ct. Dkt. 49, at 9; D.Ct. Dkt. 51, at 7. That assertion should be rejected.

As an initial matter, *Young* itself refuted the adequacy of such an alternative. 209 U.S. at 163–64. First, an isolated violation of law might not yield an enforcement action, and even if it did, it would force the party to suffer "great risk of fines" during the years to adjudicate the claim. *Id.* at 165. *Young* concluded that "[t]his risk" a party "ought not to be required to take." *Id.* Second, a party confronting an unconstitutional regulation might be unable "to find an agent or employee who would disobey the law," even to generate test cases, because of the magnitude of potential liability. *Id.* at 163–64.

That reasoning applies *a fortiori* here, where the stakes are, in fact, far greater than in *Young*. Unlike in *Young*, the State has attempted to frustrate judicial review by constructing skewed procedural rules that apply only to S.B. 8 claims. Nearly a week after S.B. 8 took effect, Dr. Braid provided a single abortion in violation of S.B. 8, triggering three lawsuits in state court (but not from the advocates of the law), but those suits have stalled. The evidence also demonstrates that Petitioners and their staff are frightened that litigation and the possibility of $10,000+ bounties will bankrupt them and their families. Dickson has even

gone so far as to say that no "rational" abortion provider would continue to offer abortions as they did prior to September 1, in light of S.B. 8's extreme penalties. D.Ct. Dkt. 50-1, ¶ 7; *see supra* Stmt. Part A. In these circumstances, equity requires the federal court's intervention to prevent further irreparable loss of constitutional rights. *Young*, 209 U.S. at 160.

Moreover, under the circumstances presented by this case, the narrow, technical reading of *Young* urged by Respondents does not serve the interests that the Eleventh Amendment is intended to protect. As *Young* explained, if a statute is unconstitutional, "the use of the name of the state to enforce [it] * * * is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity." 209 U.S. at 159. Here, there is no serious question that S.B. 8's pre-viability abortion ban violates the Due Process Clause of the Fourteenth Amendment under longstanding precedent. *Supra* Stmt. Part A.1. As a result, granting prospective relief from the statute's unconstitutional effects would not infringe on the sovereign authority of Texas. There is no reason grounded in principles of federalism or comity to bar the State's chief law enforcement official—or the judges and clerks charged with performing certain acts necessary to S.B. 8's enforcement—from serving as defendants in a lawsuit seeking to declare the law unconstitutional. Just as the *Young* exception should be construed narrowly in cases implicating "special sovereignty interests," *Coeur d'Alene Tribe*, 521 U.S. at 281 (opinion of the Court), it should be construed broadly in exceptional cases like this one where no state sovereignty interest is seriously implicated.

III. Petitioners Have Article III Standing

A. Petitioners are suffering an injury-in-fact.

A plaintiff suffers Article III injury where it alleges "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat" of enforcement. *SBA List*, 573 U.S. at 160 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). As long as the threat is not "imaginary or wholly speculative," a pre-enforcement challenge to a statutory prohibition "present[s] an Article III case or controversy." *Id.* (quoting *Babbitt*, 442 U.S. at 302).

Here, Petitioners engaged in and seek to continue engaging in activities that S.B. 8 proscribes: performing pre-viability abortions after six weeks of pregnancy, and providing assistance for patients seeking such abortions. D.Ct. Dkt. 1, ¶¶ 24–46, 102–03, 110–13.

Petitioners also established that S.B. 8 is already chilling the exercise of constitutionally protected activity, *supra* Stmt. Part C, and affecting their ability to hire new staff, D.Ct. Dkt. 19-11, ¶ 19; D.Ct. Dkt. 19-6, ¶ 20. They further have demonstrated that defending themselves in S.B. 8's skewed enforcement actions, irrespective of outcome, would cause Article III injury as well. App. 41a; D.Ct. Dkt. 1, ¶¶ 7–9, 81–83, 102–13; *supra* Stmt. Part A.2.b. These injuries far exceed the minimal threshold for Article III standing. *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017); *SBA List*, 573 U.S. at 165.

In addition, there is no genuine dispute that, should Petitioners provide abortions as they did before

S.B. 8 took effect, they will face numerous enforcement actions. App. 64a. As in *SBA List*, where this Court found injury-in-fact based on the possibility that private actors would file complaints against the plaintiffs, 573 U.S. at 164–66, the credibility of S.B. 8's threat to Petitioners is bolstered by the fact that "any person" can bring an enforcement action, *id.* at 164. Accordingly, "there is a real risk of complaints from, for example, political opponents," *id.*; *see id.* at 156, as well as from individuals motivated simply by S.B. 8's bounty of at least $10,000, *see supra* Stmt. Part A.2.b.

B. Respondents' roles in S.B. 8 enforcement contribute to Petitioners' injuries, which would be redressed by the requested relief.

1. Clerks. Petitioners' injuries are specifically traceable to Clarkston and the putative clerk class. As Clarkston has conceded, clerks "docket cases and issue citations filed under S.B. 8 as is required by [them] under state law." App. 52a; *supra* Part II.A.1. Indeed, the sole abortion performed in Texas in violation of S.B. 8 has already led to an enforcement action in Smith County. *See supra* Stmt. Part C.2; *SBA List*, 573 U.S. at 164 (observing that "past enforcement against the same conduct is good evidence that the threat of enforcement is not 'chimerical'" (quoting *Steffel*, 415 U.S. at 459)). Here, an injunction preventing Clarkston and the clerk class from docketing or issuing citations for any S.B. 8 petitions would redress Petitioners' injuries by saving Petitioners from the expenses and burdens of defending themselves in enforcement proceedings and by alleviating S.B. 8's constitutional chill.

The Fifth Circuit believed that injunctive relief against clerks would be "meaningless" because "[t]heir duty within the court is to accept and file papers in lawsuits, not to classify 'acceptable' pleadings." App. 98a. But that assertion is belied by the impact of the *United States v. Texas* preliminary injunction. That injunction extended to state officials (including, expressly, clerks and judges). The State represented that it would notify the clerks of the order. And during the two days it was in effect, some Petitioners resumed providing abortions proscribed by S.B. 8, and others were taking steps to do so. *See supra* Stmt. Part C.2.

2. Judges. For much the same reasons, Petitioners have shown that Jackson and the judge class will take steps to enforce S.B. 8, causing Article III injury to Petitioners. *See supra* Part II.A.2. This is only bolstered by Jackson's August 2021 statement that he will "enforce" the law and is "one hundred percent committed to seeing * * * the voice and the vote of pro-life Texans defended." Ex. A to D.Ct. Dkt. 53-1, at 1.

Moreover, halting the judges from taking part in enforcing S.B. 8 would certainly provide relief to Petitioners: private parties cannot unilaterally enjoin Petitioners from performing abortions or order them to pay the Act's mandatory financial penalties, fees, and costs. App. 53a–54a, 60a. And a declaratory judgment against judges should prevent them from advancing S.B. 8 enforcement actions and remove the specter of default judgments that effectively compel Petitioners to appear and otherwise chill their constitutionally protected activity. *See supra* Part III.B.1. Even if Jackson or other judges ultimately ruled for Petitioners, their actions still would have caused Petitioners harm in the form of substantial

time and resources necessary to defend a limitless number of lawsuits. *Cf. Pulliam*, 466 U.S. at 538 n.18 (citing *In re Justs. of Sup. Ct. of P.R.*, 695 F.2d at 21 (Breyer, J.)).

3. Dickson. As Dickson concedes, Petitioners met their required pleading standard by "alleging a 'credible threat' that that [sic] Mr. Dickson will sue them when [S.B. 8] takes effect." Mandamus Pet. 7 n.6, *In re Clarkston*, No. 21-50708 (5th Cir. Aug. 7, 2021), Doc. No. 00515969448 (citing D.Ct. Dkt. 1, ¶¶ 17, 50). That concession plainly follows from Dickson's own statements. He has trumpeted S.B. 8 as "mak[ing] everyone in Texas an attorney general" to "go[] after" abortion providers, D.Ct. Dkt. 57-1, at 3, and actively conspired to facilitate the filing of S.B. 8 enforcement actions, D.Ct. Dkt. 57-2, at 7. In addition, Dickson threatened to sue one Petitioner if it violated a materially similar city ordinance, forcing the cessation of all abortion services in the City of Lubbock. Ex. 1 to D.Ct. Dkt. 19-5.

Given the adequacy of Petitioners' allegations, Dickson filed two declarations below in an attempt to disavow his intent to sue, but any such disavowal is illusory. In those declarations, Dickson was clear that not suing is contingent on his "expect[ation]" that Petitioners would comply with S.B. 8 in light of the "threat of civil lawsuits." D.Ct. Dkt. 50-1, ¶ 5; D.Ct. Dkt. 64-1, ¶¶ 7–11. In other words, he is disavowing enforcement only for so long as Petitioners do not exercise their constitutional rights. And if Petitioners do violate the law, Dickson claims he would sue only if he could do so "without encountering an 'undue burden' defense." D.Ct. Dkt. 64-1, ¶¶ 11–13. However, Dickson's counsel has separately argued that such a defense already cannot be raised by the Petitioner

abortions funds. Mot. to Intervene 3–4, *United States v. Texas*, No. 1:21-cv-00796-RP (W.D. Tex. Sept. 22, 2021), Dkt. 28.

At bottom, Dickson's conditional, self-serving, and limited disavowals do not defeat Petitioners' standing, nor do they render moot Petitioners' claims. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287–88 (2000).

4. State executive officials. The district court also correctly determined that Petitioners had alleged a credible threat of enforcement by the state-executive Respondents based on their collateral enforcement authority under Texas statutes triggered by an S.B. 8 violation. App. 22a–23a. For all the same reasons that these Respondents are amenable to suit under *Young*, both with respect to claims involving S.B. 8's prohibitions and its fee-shifting provision, Petitioners have standing to bring their claims. *See supra* Part II.B; App. 30a–32a.

C. Prudential considerations regarding the clerks and judges do not support declining review.

As explained above, there is no doubt that Petitioners have standing and, accordingly, that a decision here "will have real meaning." *United States v. Windsor*, 570 U.S. 744, 758 (2013) (quoting *INS v. Chadha*, 462 U.S. 919, 939 (1983)). Nevertheless, Respondents have argued that the courts should decline jurisdiction over Jackson because a judge acts as "a disinterested judicial adjudicator," Br. for Judge Jackson & Tex. Exec. Offs. 21, *Whole Woman's Health v. Jackson*, No. 21-50792 (5th Cir. Oct. 13, 2021), Doc. No. 00516054311 (quotation marks omitted), and over Clarkston because "clerks act at the direction of judges," Br. of Clarkston 13, *Whole Woman's Health*

v. Jackson, No. 21-50792 (5th Cir. Oct. 13, 2021), Doc. No. 00516054372. Neither argument is availing.

As an initial matter, Clarkston's argument is foreclosed by both Texas law and her own admission. Clarkston "has stated that she will docket cases and issue citations filed under S.B. 8 as is required by her under state law." App. 52a; Tex. R. Civ. P. 99(a); *see also supra* Part II.A.1. She is therefore not acting "at the direction of judges" in the performance of the ministerial acts that harm Petitioners; those acts follow directly from state law.[13]

Moreover, as this Court's cases make plain, once the Article III "triad of injury in fact, causation, and redressability" is met, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103–04 (1998), questions about the degree of adversity between the parties are prudential considerations, not constitutional barriers, *Windsor*, 570 U.S. at 756; *Chadha*, 462 U.S. at 940. And the root prudential question is whether the case presents "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Windsor*, 570 U.S. at 760 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

Here there can be no doubt that the federal courts have such a sharp adversarial presentation. Indeed, Respondents—including Clarkston—have gone so far as to cross-petition for certiorari on whether this

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[13] In Texas, court clerks are elected, *see* Tex. Const. art. V, §§ 9, 20, and may be removed only for cause, *id.* §§ 9, 24; Tex. Local Gov't Code § 87.012. Clerks are also required to carry insurance against "liabilities incurred through errors or omissions in the performance of official duties." Tex. Gov't Code § 51.302(c).

Court should overrule *Roe* and *Casey*. *See generally* Conditional Cross-Pet., *Clarkston v. Whole Woman's Health*, No. 21-587 (U.S. Oct. 21, 2021). And even setting aside his press-conference statements, *see supra* Part III.B.2, any concerns regarding Jackson's level of adverseness are alleviated because other parties are "prepared to defend with vigor the constitutionality of the legislative act," *Windsor*, 570 U.S. at 760. Those other parties include Attorney General Paxton, whose office serves as Jackson's counsel.

There is thus no reason for this Court to decline to exercise its jurisdiction. If it did, the "[r]ights and privileges" of "thousands of persons would be adversely affected," and "the cost in judicial resources and expense of litigation * * * would be immense." *Id.* at 761. "In these unusual and urgent circumstances, the very term 'prudential' counsels that it is a proper exercise of the Court's responsibility to take jurisdiction" and issue a ruling. *Id.*[14]

IV. This Court Must Stop Texas's Open Attack On Federal Supremacy

Despite their periodic efforts to do so, States are not permitted to decide whether federal rights must be honored within their borders. As this Court has explained, "[i]f the legislatures of the several states may, at will, annul the judgments of the courts of the

[14] The extraordinary combination of the facts of this case—the assurance of adversariness and the lack of other means to effectively vindicate constitutional rights—serves to distinguish this case from others in which courts have declined to exercise jurisdiction over judicial officers. *Cf. In re Justs.*, 695 F.2d at 23 (noting that relief against judges may be appropriate where necessary "to ensure full relief to the parties").

United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery." *United States v. Peters*, 9 U.S. (5 Cranch) 115, 136 (1809); *Cooper v. Aaron*, 358 U.S. 1, 17 (1958) (Constitutional rights "can neither be nullified openly and directly" nor nullified indirectly "through evasive schemes.").

But annulment of this Court's precedent is precisely what Texas has tried to do by blocking its executive officials from what would be their usual enforcement powers, and by attempting to "box[] out the judiciary from enter-taining pre-enforcement challenges," no matter the law's constitutional repugnance. Interve-nors' Reply Br. 3, *United States v. Texas*, No. 21-50949 (5th Cir. Oct. 14, 2021), Doc. 00516055058. Respondents' counsel even proclaimed that States are free to "enact legislation that departs from the federal judiciary's preferred inter-pretations of the Constitution." *Id.* at 2. This Court's decisions, counsel continued, "are, after all, called *opinions*." *Id.* at 4.

The Court should reject this lawlessness, as it has done many times before.

1. The most prominent historical examples of the private-enforcement tactic come from the Jim Crow era. At that time, numerous States adopted laws attempting to preserve unconstitutional discrimination in defiance of this Court's decisions. The Court repeatedly blocked those laws, applying precedent in a practical way to head off States' efforts to subvert the Constitution.

In *Terry v. Adams*, for example, the Court considered whether Texas violated the Fifteenth Amendment by "circumvention" when it permitted a

political organization to hold white-only primaries. 345 U.S. 461, 469 (1953). The Court found it "immaterial that the state [did] not control" the part of the elective process that it left for the organization to manage. *Id.* It was apparent that the primaries were "purposefully designed to exclude" Black people "from voting and at the same time to escape the Fifteenth Amendment's command." *Id.* at 463–64. The Court held that the primaries constituted reviewable state action and admonished Texas for its "flagrant abuse of [election] processes to defeat the purposes of" the Constitution. *Id.* at 469.

The Court has taken the same practical approach in numerous other cases. *See, e.g.*, *Gilmore v. City of Montgomery*, 417 U.S. 556, 568–69 (1974) (affirming injunction against a city policy granting segregated private schools "exclusive access to public recreational facilities"); *Reitman v. Mulkey*, 387 U.S. 369, 380–81 (1967) (holding unconstitutional a law providing as "one of the basic policies of the State" a private right to racially discriminate in the housing market because it would "involve the State in private discriminations"); *Anderson v. Martin*, 375 U.S. 399, 404 (1964) (enjoining requirement that a candidate's race be listed on the ballot and emphasizing "that which cannot be done by express statutory prohibition cannot be done by indirection").

It is evident from these examples that, if a State after *Brown v. Board of Education*, 349 U.S. 294 (1955), had enacted a law authorizing private citizens to sue for a bounty on anyone integrating a school, this Court would have immediately put a stop to it.

If the Court departs from this history and holds that federal courts lack jurisdiction to hear

Petitioners' challenge to S.B. 8, it will allow Texas to violate the premise, foundational of our judicial system, holding that "every right, when withheld, must have a remedy, and every injury its proper redress." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803).

2. If this Court sanctions S.B. 8's scheme, other States will follow Texas's lead, both in the abortion context and in others. Legislation prohibiting abortion modeled on S.B. 8 has been introduced in Florida, and other States are considering it. H.B. 167, 2022 Reg. Sess. (Fla. 2021); Ewan Palmer, *Florida and 5 Other GOP-Led States Consider Texas-Style Curbs on Abortion*, Newsweek (Sept. 3, 2021) (noting that lawmakers in Arkansas, Florida, Indiana, North Dakota, Mississippi, and South Dakota are contemplating parallel laws).[15]

Moreover, "Texas's novel scheme * * *, if allowed to stand, could and would just as easily be applied to other constitutional rights," such as the Second Amendment. Br. of Firearms Pol'y Coal. as *Amicus Curiae* in Supp. of Granting Cert. 2. For example, Illinois legislators introduced a bill, the "Protecting Heartbeats Act," that, like S.B. 8, prohibits enforcement by any governmental entity but allows "any person" to sue manufacturers, importers, or dealers for gun-related injuries or deaths and obtain a damages award of at least $10,000 per violation. H.B. 4156, 102d Gen. Assemb., Reg. Sess. (Ill. 2021); *see*

[15] https://www.newsweek.com/republican-states-texas-style-restrictive-curbs-legislation-abortion-florida-1625876.

also Br. of Amicus Fire-arms Pol'y Coal. 4–6 (cataloging States' efforts to chill Second Amendment rights through private rights of action).

Likewise, a State could authorize neighbors to sue same-sex couples for damages and an injunction to prevent them from getting married. Recently, Texas State Representative James White requested an attorney general opinion that *Obergefell v. Hodges*, 576 U.S. 644 (2015), does not "require[] private citizens to recognize homosexual marriages," and does not allow "them to disregard the extant laws of Texas that continue to define marriage as the union between one man and one woman," Letter from Tex. H. Rep. White to Tex. Att'y Gen. Paxton (Oct. 19, 2021).[16]

The possibilities go on. For example, a State could pass a law allowing private citizens to sue individuals or corporations to:

- enforce COVID-19 restrictions blocking in-home religious gatherings, *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam);
- enjoin and seek monetary penalties against a person who burns the American flag, *Texas v. Johnson*, 491 U.S. 397 (1989);
- prevent people from wearing attire consistent with their religious faith, *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015);
- enjoin the enrollment of an undocumented child in public school, *Plyler v. Doe*, 457 U.S. 202 (1982); or

[16] https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2021/pdf/RQ0436KP.pdf.

- impose bounties on corporations that make expenditures to a political campaign, *Citizens United v. FEC*, 558 U.S. 310 (2010).

See also Br. of Amicus Firearms Pol'y Coal. 6 (providing examples); Br. of *Amici* Current and Former Law Enforcement Leaders 8–9, *United States v. Texas*, No. 21-588 (U.S. Oct. 19, 2021) (same); Mitchell, *supra*, at 1000 (saying that model could be used to craft a gun-control measure or campaign-finance law).

* * *

Sanctioning Texas's cynical strategy here would invite S.B. 8-like limitations throughout the country. That outcome would be inconsistent with Section 1983 and the formative obligation of federal courts to exercise jurisdiction where it exists. It also would present an imminent threat to the rule of law and should be soundly rejected by this Court.

CONCLUSION

The Court should affirm the district court's denial of the motions to dismiss and remand forthwith to the district court.

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