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**Designing Statutes to
Evade Judicial Review:
The Future After
Texas' S.B. 8**

May 17, 2022

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**Warren M. Anderson Legislative Seminar Series
Designing Statutes to Evade Judicial Review:
The Future After Texas' S.B. 8**

May 17, 2022

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Designing Statutes to Evade Judicial Review: The Future After Texas' S.B. 8

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Speaker Biographies

PROF. VINCENT M. BONVENTERE is the Justice Robert H. Jackson Distinguished Professor at Albany Law School. He received his PhD in Government, specializing in public law, at University of Virginia; a JD from Brooklyn Law School; and a BS from Union College. Dr. Bonventre teaches, comments, and advises on courts, judges, and various areas of public law. Those areas include the judicial process, the Supreme Court and the New York Court of Appeals, criminal law, and civil liberties. He has authored numerous works and lectures regularly on those subjects. Prior to joining the Albany Law School faculty in 1990, he was a law clerk to Judges Matthew J. Jasen and Stewart F. Hancock, Jr. of New York's highest court, the New York Court of Appeals. Between those clerkships, he was selected by Chief Justice Warren Burger to serve as a Supreme Court Judicial Fellow. Previously, he served two tours in the U.S. Army—one in military intelligence and one as trial counsel in the JAG Corps. Dr. Bonventre is the author of *New York Court Watcher*, a blog devoted to research and commentary on the U.S. Supreme Court and the New York Court of Appeals. He is also the founder and Editor of *State Constitutional Commentary*, an annual publication of the Albany Law Review devoted to American state constitutional law, and he is the founder and Director of the *Center for Judicial Process*. Recent publications include *Religious Liberty: Fundamental Right or Nuisance*, 14 U. St. Thomas L.J. 650 (2018); and *LIVING ON DEATH ROW: THE PSYCHOLOGY OF WAITING TO DIE* [co-edited with Hans Toch and James Acker] (Amer. Psych. Assoc., 2018; PROSE Award in Psychology, 2019)

PROF. RICHARD BRIFFAULT is the Joseph P. Chamberlain Professor of Legislation at Columbia Law School. His work focuses on state and local government law, the law of the political process, and government ethics. He served as Chair of the New York City Conflicts of Interest Board (2014-2020); was a member of New York's Moreland Act Commission to Investigate Public Corruption; is the Reporter for the American Law Institute's project on Principles of Government Ethics; and is the Reporter of the Drafting Committee on Public Meetings During Emergencies of the Uniform Laws Commission. He was a member of or consultant to several New York City and State commissions, including the State Commission on Local Government Efficiency & Competitiveness, the Temporary Commission on Constitutional Revision, the Real Property Tax Reform Commission, and the New York City Charter Revision Commission. Before joining the Columbia faculty, he was assistant counsel to Governor Hugh Carey of New York. He is co-author of the texts *State and Local Government Law* and *The New Preemption Reader*, and author of *Balancing Acts: The Reality Behind State Balanced Budget Requirements* as well as more than seventy-five law review articles.

JUSTIN HARRISON, ESQ. is Senior Policy Counsel at the ACLU of New York. From the organization's Albany office, he works on free speech, protest, and other First Amendment problems in both state and local legislation, particularly legislation affecting upstate and western New York. He also focuses on online speech, privacy, and digital surveillance issues. He is the former Legal Director of the ACLU of Louisiana, where he litigated Section 1983 cases in the Fifth Circuit before coming to his senses. He currently lives in upstate New York with his wife and three young kids, and enjoys skiing, hiking, and outdoor woodworking.

DEAN DAVID L. NOLL is a Professor of Law and the Associate Dean for Faculty Research and Development at Rutgers Law School. A graduate of Columbia University and N.Y.U. School of Law, David clerked for Judge Richard J. Holwell of the U.S. District Court for the Southern District of New York and Judges Pierre N. Leval and Raymond J. Johier, Jr. of the U.S. Court of Appeals for the Second Circuit. Since joining the Rutgers faculty, his scholarly writings on civil procedure, complex litigation, administrative law have appeared in the *California Law Review*, *Michigan Law Review*, *N.Y.U. Law Review*, and *Stanford Journal of Complex Litigation*. His popular writing has appeared in venues including *The New York Times*, *Politico*, *Slate*, the *Regulatory Review*, and the *New York Law Journal*. He is the co-author, with Samuel Estreicher, of *Legislation and the Regulatory State*. David is currently working with his colleague, Jon Michaels, on a book tentatively titled *Vigilante Nation* that situates the current surge in private bounty laws (such as Texas's S.B. 8 and Florida's "Don't Say Gay") within a larger illiberal and anti-democratic political movement.

AN ACT

relating to abortion, including abortions after detection of an unborn child's heartbeat; authorizing a private civil right of action.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. This Act shall be known as the Texas Heartbeat Act.

SECTION 2. The legislature finds that the State of Texas never repealed, either expressly or by implication, the state statutes enacted before the ruling in *Roe v. Wade*, 410 U.S. 113 (1973), that prohibit and criminalize abortion unless the mother's life is in danger.

SECTION 3. Chapter 171, Health and Safety Code, is amended by adding Subchapter H to read as follows:

SUBCHAPTER H. DETECTION OF FETAL HEARTBEAT

Sec. 171.201. DEFINITIONS. In this subchapter:

.(1) "Fetal heartbeat" means cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac.

.(2) "Gestational age" means the amount of time that has elapsed from the first day of a woman's last menstrual period.

.(3) "Gestational sac" means the structure comprising the extraembryonic membranes that envelop the unborn child and that is typically visible by ultrasound after the fourth week of pregnancy.

.(4) "Physician" means an individual licensed to practice medicine in this state, including a medical doctor and a doctor of osteopathic medicine.

.(5) "Pregnancy" means the human female reproductive condition that:

.(A) begins with fertilization;

.(B) occurs when the woman is carrying the developing human offspring; and

.(C) is calculated from the first day of the woman's last menstrual period.

.(6) "Standard medical practice" means the degree of skill, care, and diligence that an obstetrician of ordinary judgment, learning, and skill would employ in like circumstances.

.(7) "Unborn child" means a human fetus or embryo in any stage of gestation from fertilization until birth.

Sec. 171.202. LEGISLATIVE FINDINGS. The legislature finds, according to contemporary medical research, that:

.(1) fetal heartbeat has become a key medical predictor that an unborn child will reach live birth;

.(2) cardiac activity begins at a biologically identifiable moment in time, normally when the fetal heart is formed in the gestational sac;

.(3) Texas has compelling interests from the outset of a woman's pregnancy in protecting the health of the woman and the life of the unborn child; and

.(4) to make an informed choice about whether to continue her pregnancy, the pregnant woman has a compelling interest in knowing the likelihood of her unborn child surviving to full-term birth based on the presence of cardiac activity.

Sec. 171.203. DETERMINATION OF PRESENCE OF FETAL HEARTBEAT REQUIRED; RECORD. (a) For the purposes of determining the presence of a fetal heartbeat under this section, "standard medical practice" includes employing the appropriate means of detecting the

heartbeat based on the estimated gestational age of the unborn child and the condition of the woman and her pregnancy.

(b) Except as provided by Section 171.205, a physician may not knowingly perform or induce an abortion on a pregnant woman unless the physician has determined, in accordance with this section, whether the woman's unborn child has a detectable fetal heartbeat.

(c) In making a determination under Subsection (b), the physician must use a test that is:

(1) consistent with the physician's good faith and reasonable understanding of standard medical practice; and

(2) appropriate for the estimated gestational age of the unborn child and the condition of the pregnant woman and her pregnancy.

(d) A physician making a determination under Subsection (b) shall record in the pregnant woman's medical record:

(1) the estimated gestational age of the unborn child;

(2) the method used to estimate the gestational age;

and

(3) the test used for detecting a fetal heartbeat, including the date, time, and results of the test.

Sec. 171.204. PROHIBITED ABORTION OF UNBORN CHILD WITH DETECTABLE FETAL HEARTBEAT; EFFECT. (a) Except as provided by Section 171.205, a physician may not knowingly perform or induce an abortion on a pregnant woman if the physician detected a fetal heartbeat for the unborn child as required by Section 171.203 or failed to perform a test to detect a fetal heartbeat.

(b) A physician does not violate this section if the physician performed a test for a fetal heartbeat as required by Section 171.203 and did not detect a fetal heartbeat.

(c) This section does not affect:

(1) the provisions of this chapter that restrict or regulate an abortion by a particular method or during a particular stage of pregnancy; or

(2) any other provision of state law that regulates or prohibits abortion.

Sec. 171.205. EXCEPTION FOR MEDICAL EMERGENCY; RECORDS.

(a) Sections 171.203 and 171.204 do not apply if a physician believes a medical emergency exists that prevents compliance with this subchapter.

(b) A physician who performs or induces an abortion under circumstances described by Subsection (a) shall make written notations in the pregnant woman's medical record of:

(1) the physician's belief that a medical emergency necessitated the abortion; and

(2) the medical condition of the pregnant woman that prevented compliance with this subchapter.

(c) A physician performing or inducing an abortion under this section shall maintain in the physician's practice records a copy of the notations made under Subsection (b).

Sec. 171.206. CONSTRUCTION OF SUBCHAPTER. (a) This subchapter does not create or recognize a right to abortion before a fetal heartbeat is detected.

(b) This subchapter may not be construed to:

(1) authorize the initiation of a cause of action against or the prosecution of a woman on whom an abortion is performed or induced or attempted to be performed or induced in violation of this subchapter;

(2) wholly or partly repeal, either expressly or by implication, any other statute that regulates or prohibits abortion, including Chapter 6-1/2, Title 71, Revised Statutes; or

(3) restrict a political subdivision from regulating or prohibiting abortion in a manner that is at least as stringent as the laws of this state.

Sec. 171.207. LIMITATIONS ON PUBLIC ENFORCEMENT.

(a) Notwithstanding Section 171.005 or any other law, the requirements of this subchapter shall be enforced exclusively through the private civil actions described in Section 171.208. No enforcement of this subchapter, and no enforcement of Chapters 19 and 22, Penal Code, in response to violations of this subchapter, may be taken or threatened by this state, a political subdivision, a district or county attorney, or an executive or administrative officer or employee of this state or a political subdivision against any person, except as provided in Section 171.208.

(b) Subsection (a) may not be construed to:

(1) legalize the conduct prohibited by this subchapter or by Chapter 6-1/2, Title 71, Revised Statutes;

(2) limit in any way or affect the availability of a remedy established by Section 171.208; or

(3) limit the enforceability of any other laws that regulate or prohibit abortion.

Sec. 171.208. CIVIL LIABILITY FOR VIOLATION OR AIDING OR ABETTING VIOLATION. (a) Any person, other than an officer or employee of a state or local governmental entity in this state, may bring a civil action against any person who:

(1) performs or induces an abortion in violation of this subchapter;

(2) knowingly engages in conduct that aids or abets the performance or inducement of an abortion, including paying for or reimbursing the costs of an abortion through insurance or otherwise, if the abortion is performed or induced in violation of this subchapter, regardless of whether the person knew or should have known that the abortion would be performed or induced in violation of this subchapter; or

(3) intends to engage in the conduct described by Subdivision (1) or (2).

(b) If a claimant prevails in an action brought under this section, the court shall award:

(1) injunctive relief sufficient to prevent the defendant from violating this subchapter or engaging in acts that aid or abet violations of this subchapter;

(2) statutory damages in an amount of not less than \$10,000 for each abortion that the defendant performed or induced in violation of this subchapter, and for each abortion performed or induced in violation of this subchapter that the defendant aided or abetted; and

(3) costs and attorney's fees.

(c) Notwithstanding Subsection (b), a court may not award relief under this section in response to a violation of Subsection (a)(1) or (2) if the defendant demonstrates that the defendant previously paid the full amount of statutory damages under Subsection (b)(2) in a previous action for that particular abortion performed or induced in violation of this subchapter, or for the particular conduct that aided or abetted an abortion performed or induced in violation of this subchapter.

(d) Notwithstanding Chapter 16, Civil Practice and Remedies Code, or any other law, a person may bring an action under this section not later than the fourth anniversary of the date the cause of action accrues.

(e) Notwithstanding any other law, the following are not a defense to an action brought under this section:

(1) ignorance or mistake of law;

(2) a defendant's belief that the requirements of this subchapter are unconstitutional or were unconstitutional;

(3) a defendant's reliance on any court decision that has been overruled on appeal or by a subsequent court, even if that court decision had not been overruled when the defendant engaged in conduct that violates this subchapter;

(4) a defendant's reliance on any state or federal court decision that is not binding on the court in which the action

has been brought;

.(5) non-mutual issue preclusion or non-mutual claim preclusion;

.(6) the consent of the unborn child's mother to the abortion; or

.(7) any claim that the enforcement of this subchapter or the imposition of civil liability against the defendant will violate the constitutional rights of third parties, except as provided by Section 171.209.

.(f) It is an affirmative defense if:

.(1) a person sued under Subsection (a)(2) reasonably believed, after conducting a reasonable investigation, that the physician performing or inducing the abortion had complied or would comply with this subchapter; or

.(2) a person sued under Subsection (a)(3) reasonably believed, after conducting a reasonable investigation, that the physician performing or inducing the abortion will comply with this subchapter.

.(f-1) The defendant has the burden of proving an affirmative defense under Subsection (f)(1) or (2) by a preponderance of the evidence.

.(g) This section may not be construed to impose liability on any speech or conduct protected by the First Amendment of the United States Constitution, as made applicable to the states through the United States Supreme Court's interpretation of the Fourteenth Amendment of the United States Constitution, or by Section 8, Article I, Texas Constitution.

.(h) Notwithstanding any other law, this state, a state official, or a district or county attorney may not intervene in an action brought under this section. This subsection does not prohibit a person described by this subsection from filing an amicus curiae brief in the action.

.(i) Notwithstanding any other law, a court may not award costs or attorney's fees under the Texas Rules of Civil Procedure or any other rule adopted by the supreme court under Section 22.004, Government Code, to a defendant in an action brought under this section.

.(j) Notwithstanding any other law, a civil action under this section may not be brought by a person who impregnated the abortion patient through an act of rape, sexual assault, incest, or any other act prohibited by Sections 22.011, 22.021, or 25.02, Penal Code.

Sec. 171.209. CIVIL LIABILITY: UNDUE BURDEN DEFENSE LIMITATIONS. (a) A defendant against whom an action is brought under Section 171.208 does not have standing to assert the rights of women seeking an abortion as a defense to liability under that section unless:

.(1) the United States Supreme Court holds that the courts of this state must confer standing on that defendant to assert the third-party rights of women seeking an abortion in state court as a matter of federal constitutional law; or

.(2) the defendant has standing to assert the rights of women seeking an abortion under the tests for third-party standing established by the United States Supreme Court.

.(b) A defendant in an action brought under Section 171.208 may assert an affirmative defense to liability under this section if:

.(1) the defendant has standing to assert the third-party rights of a woman or group of women seeking an abortion in accordance with Subsection (a); and

.(2) the defendant demonstrates that the relief sought by the claimant will impose an undue burden on that woman or that group of women seeking an abortion.

.(c) A court may not find an undue burden under Subsection (b) unless the defendant introduces evidence proving that:

.(1) an award of relief will prevent a woman or a group

of women from obtaining an abortion; or

.(2) an award of relief will place a substantial obstacle in the path of a woman or a group of women who are seeking an abortion.

.(d) A defendant may not establish an undue burden under this section by:

.(1) merely demonstrating that an award of relief will prevent women from obtaining support or assistance, financial or otherwise, from others in their effort to obtain an abortion; or

.(2) arguing or attempting to demonstrate that an award of relief against other defendants or other potential defendants will impose an undue burden on women seeking an abortion.

.(e) The affirmative defense under Subsection (b) is not available if the United States Supreme Court overrules Roe v. Wade, 410 U.S. 113 (1973) or Planned Parenthood v. Casey, 505 U.S. 833 (1992), regardless of whether the conduct on which the cause of action is based under Section 171.208 occurred before the Supreme Court overruled either of those decisions.

.(f) Nothing in this section shall in any way limit or preclude a defendant from asserting the defendant's personal constitutional rights as a defense to liability under Section 171.208, and a court may not award relief under Section 171.208 if the conduct for which the defendant has been sued was an exercise of state or federal constitutional rights that personally belong to the defendant.

Sec. 171.210. CIVIL LIABILITY: VENUE.

.(a) Notwithstanding any other law, including Section 15.002, Civil Practice and Remedies Code, a civil action brought under Section 171.208 shall be brought in:

.(1) the county in which all or a substantial part of the events or omissions giving rise to the claim occurred;

.(2) the county of residence for any one of the natural person defendants at the time the cause of action accrued;

.(3) the county of the principal office in this state of any one of the defendants that is not a natural person; or

.(4) the county of residence for the claimant if the claimant is a natural person residing in this state.

.(b) If a civil action is brought under Section 171.208 in any one of the venues described by Subsection (a), the action may not be transferred to a different venue without the written consent of all parties.

Sec. 171.211. SOVEREIGN, GOVERNMENTAL, AND OFFICIAL IMMUNITY PRESERVED. (a) This section prevails over any conflicting law, including:

.(1) the Uniform Declaratory Judgments Act; and

.(2) Chapter 37, Civil Practice and Remedies Code.

.(b) This state has sovereign immunity, a political subdivision has governmental immunity, and each officer and employee of this state or a political subdivision has official immunity in any action, claim, or counterclaim or any type of legal or equitable action that challenges the validity of any provision or application of this chapter, on constitutional grounds or otherwise.

.(c) A provision of state law may not be construed to waive or abrogate an immunity described by Subsection (b) unless it expressly waives immunity under this section.

Sec. 171.212. SEVERABILITY. (a) Mindful of *Leavitt v. Jane L.*

the severability of a state statute regulating abortion the United States Supreme Court held that an explicit statement of legislative intent is controlling, it is the intent of the legislature that every provision, section, subsection, sentence, clause, phrase, or word in this chapter, and every application of the provisions in this chapter, are severable from each other.

.(b) If any application of any provision in this chapter to

any person, group of persons, or circumstances is found by a court to be invalid or unconstitutional, the remaining applications of that provision to all other persons and circumstances shall be severed and may not be affected. All constitutionally valid applications of this chapter shall be severed from any applications that a court finds to be invalid, leaving the valid applications in force, because it is the legislature's intent and priority that the valid applications be allowed to stand alone. Even if a reviewing court finds a provision of this chapter to impose an undue burden in a large or substantial fraction of relevant cases, the applications that do not present an undue burden shall be severed from the remaining applications and shall remain in force, and shall be treated as if the legislature had enacted a statute limited to the persons, group of persons, or circumstances for which the statute's application does not present an undue burden.

(b-1) If any court declares or finds a provision of this chapter facially unconstitutional, when discrete applications of that provision can be enforced against a person, group of persons, or circumstances without violating the United States Constitution and Texas Constitution, those applications shall be severed from all remaining applications of the provision, and the provision shall be interpreted as if the legislature had enacted a provision limited to the persons, group of persons, or circumstances for which the provision's application will not violate the United States Constitution and Texas Constitution.

(c) The legislature further declares that it would have enacted this chapter, and each provision, section, subsection, sentence, clause, phrase, or word, and all constitutional applications of this chapter, irrespective of the fact that any provision, section, subsection, sentence, clause, phrase, or word, or applications of this chapter, were to be declared unconstitutional or to represent an undue burden.

(d) If any provision of this chapter is found by any court to be unconstitutionally vague, then the applications of that provision that do not present constitutional vagueness problems shall be severed and remain in force.

(e) No court may decline to enforce the severability requirements of Subsections (a), (b), (b-1), (c), and (d) on the ground that severance would rewrite the statute or involve the court in legislative or lawmaking activity. A court that declines to enforce or enjoins a state official from enforcing a statutory provision does not rewrite a statute, as the statute continues to contain the same words as before the court's decision. A judicial injunction or declaration of unconstitutionality:

(1) is nothing more than an edict prohibiting enforcement that may subsequently be vacated by a later court if that court has a different understanding of the requirements of the Texas Constitution or United States Constitution;

(2) is not a formal amendment of the language in a statute; and

(3) no more rewrites a statute than a decision by the executive not to enforce a duly enacted statute in a limited and defined set of circumstances.

SECTION 4. Chapter 30, Civil Practice and Remedies Code, is amended by adding Section 30.022 to read as follows:

Sec. 30.022. AWARD OF ATTORNEY'S FEES IN ACTIONS CHALLENGING ABORTION LAWS. (a) Notwithstanding any other law, any person, including an entity, attorney, or law firm, who seeks declaratory or injunctive relief to prevent this state, a political subdivision, any governmental entity or public official in this state, or any person in this state from enforcing any statute, ordinance, rule, regulation, or any other type of law that regulates or restricts abortion or that limits taxpayer funding for individuals or entities that perform or promote abortions, in any state or federal court, or that represents any litigant seeking

such relief in any state or federal court, is jointly and severally liable to pay the costs and attorney's fees of the prevailing party.

(b) For purposes of this section, a party is considered a prevailing party if a state or federal court:

(1) dismisses any claim or cause of action brought against the party that seeks the declaratory or injunctive relief described by Subsection (a), regardless of the reason for the dismissal; or

(2) enters judgment in the party's favor on any such claim or cause of action.

(c) Regardless of whether a prevailing party sought to recover costs or attorney's fees in the underlying action, a prevailing party under this section may bring a civil action to recover costs and attorney's fees against a person, including an entity, attorney, or law firm, that sought declaratory or injunctive relief described by Subsection (a) not later than the third anniversary of the date on which, as applicable:

(1) the dismissal or judgment described by Subsection (b) becomes final on the conclusion of appellate review; or

(2) the time for seeking appellate review expires.

(d) It is not a defense to an action brought under Subsection (c) that:

(1) a prevailing party under this section failed to seek recovery of costs or attorney's fees in the underlying action;

(2) the court in the underlying action declined to recognize or enforce the requirements of this section; or

(3) the court in the underlying action held that any provisions of this section are invalid, unconstitutional, or preempted by federal law, notwithstanding the doctrines of issue or claim preclusion.

SECTION 5. Subchapter C, Chapter 311, Government Code, is amended by adding Section 311.036 to read as follows:

Sec. 311.036. CONSTRUCTION OF ABORTION STATUTES. (a) A statute that regulates or prohibits abortion may not be construed to repeal any other statute that regulates or prohibits abortion, either wholly or partly, unless the repealing statute explicitly states that it is repealing the other statute.

(b) A statute may not be construed to restrict a political subdivision from regulating or prohibiting abortion in a manner that is at least as stringent as the laws of this state unless the statute explicitly states that political subdivisions are prohibited from regulating or prohibiting abortion in the manner described by the statute.

(c) Every statute that regulates or prohibits abortion is severable in each of its applications to every person and circumstance. If any statute that regulates or prohibits abortion is found by any court to be unconstitutional, either on its face or as applied, then all applications of that statute that do not violate the United States Constitution and Texas Constitution shall be severed from the unconstitutional applications and shall remain enforceable, notwithstanding any other law, and the statute shall be interpreted as if containing language limiting the statute's application to the persons, group of persons, or circumstances for which the statute's application will not violate the United States Constitution and Texas Constitution.

SECTION 6. Section 171.005, Health and Safety Code, is amended to read as follows:

Sec. 171.005. COMMISSION [DEPARTMENT] TO ENFORCE; EXCEPTION. The commission [department] shall enforce this chapter except for Subchapter H, which shall be enforced exclusively through the private civil enforcement actions described by Section 171.208 and may not be enforced by the commission.

SECTION 7. Subchapter A, Chapter 171, Health and Safety Code, is amended by adding Section 171.008 to read as follows:

Sec. 171.008. REQUIRED DOCUMENTATION. (a) If an abortion

is performed or induced on a pregnant woman because of a medical emergency, the physician who performs or induces the abortion shall execute a written document that certifies the abortion is necessary due to a medical emergency and specifies the woman's medical condition requiring the abortion.

(b) A physician shall:

(1) place the document described by Subsection (a) in the pregnant woman's medical record; and

(2) maintain a copy of the document described by Subsection (a) in the physician's practice records.

(c) A physician who performs or induces an abortion on a pregnant woman shall:

(1) if the abortion is performed or induced to preserve the health of the pregnant woman, execute a written document that:

(A) specifies the medical condition the abortion is asserted to address; and

(B) provides the medical rationale for the physician's conclusion that the abortion is necessary to address the medical condition; or

(2) for an abortion other than an abortion described by Subdivision (1), specify in a written document that maternal health is not a purpose of the abortion.

(d) The physician shall maintain a copy of a document described by Subsection (c) in the physician's practice records.

SECTION 8. Section 171.012(a), Health and Safety Code, is amended to read as follows:

(a) Consent to an abortion is voluntary and informed only if:

(1) the physician who is to perform or induce the abortion informs the pregnant woman on whom the abortion is to be performed or induced of:

(A) the physician's name;

(B) the particular medical risks associated with the particular abortion procedure to be employed, including, when medically accurate:

(i) the risks of infection and hemorrhage;

(ii) the potential danger to a subsequent pregnancy and of infertility; and

(iii) the possibility of increased risk of breast cancer following an induced abortion and the natural protective effect of a completed pregnancy in avoiding breast cancer;

(C) the probable gestational age of the unborn child at the time the abortion is to be performed or induced; and

(D) the medical risks associated with carrying the child to term;

(2) the physician who is to perform or induce the abortion or the physician's agent informs the pregnant woman that:

(A) medical assistance benefits may be available for prenatal care, childbirth, and neonatal care;

(B) the father is liable for assistance in the support of the child without regard to whether the father has offered to pay for the abortion; and

(C) public and private agencies provide pregnancy prevention counseling and medical referrals for obtaining pregnancy prevention medications or devices, including emergency contraception for victims of rape or incest;

(3) the physician who is to perform or induce the abortion or the physician's agent:

(A) provides the pregnant woman with the printed materials described by Section 171.014; and

(B) informs the pregnant woman that those materials:

(i) have been provided by the commission

~~[Department of State Health Services];~~

(ii) are accessible on an Internet website sponsored by the commission ~~[department]~~;

(iii) describe the unborn child and list agencies that offer alternatives to abortion; and

(iv) include a list of agencies that offer sonogram services at no cost to the pregnant woman;

(4) before any sedative or anesthesia is administered to the pregnant woman and at least 24 hours before the abortion or at least two hours before the abortion if the pregnant woman waives this requirement by certifying that she currently lives 100 miles or more from the nearest abortion provider that is a facility licensed under Chapter 245 or a facility that performs more than 50 abortions in any 12-month period:

(A) the physician who is to perform or induce the abortion or an agent of the physician who is also a sonographer certified by a national registry of medical sonographers performs a sonogram on the pregnant woman on whom the abortion is to be performed or induced;

(B) the physician who is to perform or induce the abortion displays the sonogram images in a quality consistent with current medical practice in a manner that the pregnant woman may view them;

(C) the physician who is to perform or induce the abortion provides, in a manner understandable to a layperson, a verbal explanation of the results of the sonogram images, including a medical description of the dimensions of the embryo or fetus, the presence of cardiac activity, and the presence of external members and internal organs; and

(D) the physician who is to perform or induce the abortion or an agent of the physician who is also a sonographer certified by a national registry of medical sonographers makes audible the heart auscultation for the pregnant woman to hear, if present, in a quality consistent with current medical practice and provides, in a manner understandable to a layperson, a simultaneous verbal explanation of the heart auscultation;

(5) before receiving a sonogram under Subdivision (4) (A) and before the abortion is performed or induced and before any sedative or anesthesia is administered, the pregnant woman completes and certifies with her signature an election form that states as follows:

"ABORTION AND SONOGRAM ELECTION

(1) THE INFORMATION AND PRINTED MATERIALS DESCRIBED BY SECTIONS 171.012(a)(1)-(3), TEXAS HEALTH AND SAFETY CODE, HAVE BEEN PROVIDED AND EXPLAINED TO ME.

(2) I UNDERSTAND THE NATURE AND CONSEQUENCES OF AN ABORTION.

(3) TEXAS LAW REQUIRES THAT I RECEIVE A SONOGRAM PRIOR TO RECEIVING AN ABORTION.

(4) I UNDERSTAND THAT I HAVE THE OPTION TO VIEW THE SONOGRAM IMAGES.

(5) I UNDERSTAND THAT I HAVE THE OPTION TO HEAR THE HEARTBEAT.

(6) I UNDERSTAND THAT I AM REQUIRED BY LAW TO HEAR AN EXPLANATION OF THE SONOGRAM IMAGES UNLESS I CERTIFY IN WRITING TO ONE OF THE FOLLOWING:

____ I AM PREGNANT AS A RESULT OF A SEXUAL ASSAULT, INCEST, OR OTHER VIOLATION OF THE TEXAS PENAL CODE THAT HAS BEEN REPORTED TO LAW ENFORCEMENT AUTHORITIES OR THAT HAS NOT BEEN REPORTED BECAUSE I REASONABLY BELIEVE THAT DOING SO WOULD PUT ME AT RISK OF RETALIATION RESULTING IN SERIOUS BODILY INJURY.

____ I AM A MINOR AND OBTAINING AN ABORTION IN ACCORDANCE WITH JUDICIAL BYPASS PROCEDURES UNDER CHAPTER 33, TEXAS FAMILY CODE.

____ MY UNBORN CHILD ~~[FETUS]~~ HAS AN IRREVERSIBLE MEDICAL

CONDITION OR ABNORMALITY, AS IDENTIFIED BY RELIABLE DIAGNOSTIC PROCEDURES AND DOCUMENTED IN MY MEDICAL FILE.

(7) I AM MAKING THIS ELECTION OF MY OWN FREE WILL AND WITHOUT COERCION.

(8) FOR A WOMAN WHO LIVES 100 MILES OR MORE FROM THE NEAREST ABORTION PROVIDER THAT IS A FACILITY LICENSED UNDER CHAPTER 245, TEXAS HEALTH AND SAFETY CODE, OR A FACILITY THAT PERFORMS MORE THAN 50 ABORTIONS IN ANY 12-MONTH PERIOD ONLY:

I CERTIFY THAT, BECAUSE I CURRENTLY LIVE 100 MILES OR MORE FROM THE NEAREST ABORTION PROVIDER THAT IS A FACILITY LICENSED UNDER CHAPTER 245 OR A FACILITY THAT PERFORMS MORE THAN 50 ABORTIONS IN ANY 12-MONTH PERIOD, I WAIVE THE REQUIREMENT TO WAIT 24 HOURS AFTER THE SONOGRAM IS PERFORMED BEFORE RECEIVING THE ABORTION PROCEDURE. MY PLACE OF RESIDENCE IS:_____.

SIGNATURE

DATE";

(6) before the abortion is performed or induced, the physician who is to perform or induce the abortion receives a copy of the signed, written certification required by Subdivision (5); and

(7) the pregnant woman is provided the name of each person who provides or explains the information required under this subsection.

SECTION 9. Section 245.011(c), Health and Safety Code, is amended to read as follows:

(c) The report must include:

(1) whether the abortion facility at which the abortion is performed is licensed under this chapter;

(2) the patient's year of birth, race, marital status, and state and county of residence;

(3) the type of abortion procedure;

(4) the date the abortion was performed;

(5) whether the patient survived the abortion, and if the patient did not survive, the cause of death;

(6) the probable post-fertilization age of the unborn child based on the best medical judgment of the attending physician at the time of the procedure;

(7) the date, if known, of the patient's last menstrual cycle;

(8) the number of previous live births of the patient; [and]

(9) the number of previous induced abortions of the patient;

(10) whether the abortion was performed or induced because of a medical emergency and any medical condition of the pregnant woman that required the abortion; and

(11) the information required under Sections 171.008(a) and (c).

SECTION 10. Every provision in this Act and every application of the provision in this Act are severable from each other. If any provision or application of any provision in this Act to any person, group of persons, or circumstance is held by a court to be invalid, the invalidity does not affect the other provisions or applications of this Act.

SECTION 11. The change in law made by this Act applies only to an abortion performed or induced on or after the effective date of this Act.

SECTION 12. This Act takes effect September 1, 2021.

I hereby certify that S.B. No. 8 passed the Senate on March 30, 2021, by the following vote: Yeas 19, Nays 12; and that the Senate concurred in House amendments on May 13, 2021, by the following vote: Yeas 18, Nays 12.

Secretary of the Senate

I hereby certify that S.B. No. 8 passed the House, with amendments, on May 6, 2021, by the following vote: Yeas 83, Nays 64, one present not voting.

Chief Clerk of the House

Approved:

Date

Governor

Date of Hearing: March 15, 2022

ASSEMBLY COMMITTEE ON JUDICIARY
Mark Stone, Chair
AB 1666 (Bauer-Kahan) – As Introduced January 19, 2022

As Proposed to be Amended

SUBJECT: ABORTION: CIVIL ACTIONS

KEY ISSUES:

- 1) SHOULD CALIFORNIA PROHIBIT ITS COURTS FROM BEING USED AS A VENUE TO HEAR CIVIL ACTIONS TO ENFORCE OUT-OF-STATE “FETAL HEARTBEAT” LAWS?
- 2) SHOULD CALIFORNIA PROHIBIT THE ENFORCEMENT OF CIVIL JUDGMENTS STEMMING FROM CASES INVOLVING OUT-OF-STATE “FETAL HEARTBEAT” LAWS?

SYNOPSIS

In 2021, the State of Texas enacted a sweeping, civilly enforced, abortion restriction that prohibited any person from performing, or aiding and abetting, a person in obtaining an abortion after the detection of a “fetal heartbeat.” That law prohibited state enforcement, and instead opted to permit third parties to file lawsuits to enforce the law, regardless of the plaintiff’s relation to the defendant. The Texas law does not even require the plaintiff to live in the state or suffer any actual harm. Due to the broad definition of “aiding and abetting” in the Texas statute it could be used, in theory, against a wide range of persons, including Californians who donate to pro-choice, pro-women organizations.

Recognizing that more than a dozen other states are now seeking to implement laws similar to the legislation enacted in Texas, this bill seeks to protect Californians from liability for engaging in conduct that would constitute a legal and fundamental right under the laws of this state. This bill would prohibit the commencement of a lawsuit in California state courts of any out-of-state law that imposes civil liability on a person who receives, performs, or aides a person in obtaining an abortion. The bill also provides that California will not enforce an out-of-state judgment stemming from such a law. Proposed amendments simply broaden the scope of the protections of this bill to include entities in addition to persons.

This bill is supported by a coalition of medical, pro-choice, and pro-women’s rights organizations including Planned Parenthood, NARAL Pro-Choice California, and the American Congress of Obstetricians & Gynecologist. These groups highlight California’s commitment to women’s rights, privacy, and reproductive freedom. These organizations lament that this bill is necessary to protect the rights of Californians against a growing national effort to curtail a woman’s right to make her own choices about her body and reproduction. This measure is opposed by two anti-abortion organizations who contend that this bill is trampling on the rights of other states, violating the federal Constitution, and potentially opening the door for doctors and other professional to leave this state.

SUMMARY: Prohibits the enforcement of out-of-state fetal heartbeat abortion restriction laws in California. Specifically, **this bill:**

- 1) Provides that a law of another state that authorizes a person to bring a civil action against a person or entity who does any of the following is contrary to the public policy of this state:
 - a) Receives or seeks an abortion;
 - b) Performs or induces an abortion;
 - c) Knowingly engages in conduct that aids or abets the performance or inducement of an abortion;
 - d) Attempts or intends to engage in the conduct described in a) through c).
- 2) Prohibits the application of an out-of-state law as described in 1) from being applied to a case or controversy heard in state court.
- 3) Prohibits the enforcement or satisfaction of a civil judgment received through an adjudication under a law described in 1).
- 4) Adopts a severability clause.

EXISTING LAW:

- 1) Establishes the Reproductive Privacy Act. (Health & Safety Code Section 123461.)
- 2) Declares that every individual possesses a fundamental right of privacy with respect to personal reproductive decisions. (Health & Safety Code Section 123462.)
- 3) States the following as the public policy of the State of California:
 - a) Every individual has the fundamental right to choose or refuse birth control;
 - b) Every woman has the fundamental right to choose to bear a child or to choose and to obtain an abortion, except as specified; and
 - c) The state will not deny or interfere with a woman's fundamental right to choose to bear a child or to choose to obtain an abortion, except as specified. (*Ibid.*)
- 4) Defines, for the purposes of the Reproductive Privacy Act, the following terms:
 - a) "Abortion" means any medical treatment intended to induce the termination of a pregnancy except for the purpose of producing a live birth;
 - b) "Pregnancy" means the human reproductive process, beginning with the implantation of an embryo; and
 - c) "Viability" means the point in a pregnancy when, in the good faith medical judgment of a physician, on the particular facts of the case before that physician, there is a reasonable

likelihood of the fetus' sustained survival outside the uterus without the application of extraordinary medical measures. (Health & Safety Code Section 123464.)

- 5) Prohibits the State of California from denying or interfering with a woman's right to choose or obtain an abortion prior to viability of the fetus, or when the abortion is necessary to protect the life or health of the woman. (Health & Safety Code Section 123466.)
- 6) Provides that a court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States. (Code of Civil Procedure Section 410.10.)
- 7) Provides that when a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court must stay or dismiss the action in whole or in part on any conditions that may be just. (Code of Civil Procedure Section 410.30.)
- 8) Permits a defendant, on or before the last day of their time to plead or within any further time that the court may for good cause allow, may serve and file a notice of motion for one or more of the following purposes:
 - a) To quash service of summons on the ground of lack of jurisdiction of the court over them;
 - b) To stay or dismiss the action on the ground of inconvenient forum; or
 - c) To dismiss the action for failure to prosecute the action in a timely manner, as specified. (Code of Civil Procedure Section 418.10.)
- 9) Provides that full faith and credit must be given in each state to the public acts, records, and judicial proceedings of every other state, and that the United States Congress may by general laws prescribe the manner in which such acts, records and proceedings must be proved, and the effect thereof. (U.S. Const. art. IV, sec. 1.)
- 10) Provides that records and judicial proceedings of any court of any such state, territory or possession, or copies thereof, must be proved or admitted in other courts within the United States and its territories and possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form, and that such acts, records and judicial proceedings or copies thereof, so authenticated, have the same full faith and credit in every court within the United States and its territories and possessions as they have by law or usage in the courts of such State, territory or possession from which they are taken. (28 U.S.C. Section 1738.)

FISCAL EFFECT: As currently in print this bill is keyed non-fiscal.

COMMENTS: Over the past twelve months, several states have enacted or proposed legislation permitting any person to file a civil lawsuit against any person that performs an abortion, or aides and abets a person in having an abortion after a fetal heartbeat can be detected. (Note that it is misleading and inaccurate to use the term "fetal heartbeat" to describe embryonic development at six weeks of pregnancy, when an embryo does not have a heart, and when a "beat" is not audible with a stethoscope. Rather, it would be more accurate to say that at six weeks there is "a little flutter" from electrical activity in the area that will become the future heart because "the group of

cells that will become the future "pacemaker" of the heart gain the capacity to fire electrical signals which are detectable only via ultrasound.” (Retner, Rachael, “Is a ‘fetal heartbeat’ really a heartbeat at 6 weeks?” (Sept. 1, 2021) Live Science, available at: [Is a 'fetal heartbeat' really a heartbeat at 6 weeks? | Live Science](#); Also see Bethany Irvine, *Why “heartbeat bill” is a misleading name for Texas’ near-total abortion ban*, Sept. 2, 2021, The Texas Tribune, available at: <https://www.texastribune.org/2021/09/02/texas-abortion-heartbeat-bill/>.) Therefore, this analysis places quotation marks around the term “fetal heartbeat.”)

Because electrical activity in the area that will later become a heart in the course of fetal development can be detected via ultrasound before a woman may even know she is pregnant, these laws are clearly designed to prevent abortions from occurring. However, due to the scope of potential liability imposed by these laws, they may implicate people well beyond the borders of the states which pass these statutes. Accordingly, this bill seeks to protect Californians from being implicated in a civil action related to a “fetal heartbeat” law of another state. In support of this measure the author states:

California must take proactive steps to protect access to and provision of abortion. Brought in partnership with the Future of Abortion Council, AB 1666 protects the California providers, supporters, and patients that face unjust legal repercussions for providing vital, legal abortion care. States across the country are targeting providers and patients with hundreds of thousands of dollars in fines. Without sufficient protection, providers in California could be ruined for providing basic, legal abortion care. The Supreme Court has chosen to abandon the spirit of *Roe v. Wade* and allow these blatant attacks of the pregnant people whose lives depend on their right to choose. It is no longer sufficient to permit abortion care to occur. This right is being shamelessly attacked with the broadest legal means available, AB 1666 protects abortion by providing a mechanism to defend against such attacks.

States are adopting increasingly aggressive measures to limit abortions. Following the appointment of several Supreme Court justices by former President Donald Trump, dozens of states have enacted legislation in an effort to test the limits, or outright overturn, the federally protected right to an abortion granted in the landmark ruling of *Roe v. Wade* (1973) 410 US 113. One of the first states to restrict abortion access was Mississippi when it enacted a ban on abortion after the fifteenth week of pregnancy. The Mississippi law authorizes the state’s Attorney General as well as the Mississippi State Department of Health or the Mississippi State Board of Medical Licensure to impose professional sanctions, including fines and a loss of licensure, on any physician that performs an abortion after 15 weeks. (MS Code Section 41-41-191.) The constitutionality of that statute is currently under review by the United States Supreme Court, which is expected to rule in the matter of *Dobbs v. Jackson Women's Health Organization* (No. 19-1392) later in 2022.

Although several states opted to follow Mississippi’s lead and enact similar laws, in 2021, the State of Texas adopted a unique and far more menacing approach to restricting abortion access. Rather than directing state regulators or prosecutors to impose criminal or professional sanctions on persons receiving or performing an abortion, the Texas law permits the filing of a civil lawsuit against any person who performs an abortion or “aids or abets” a person receiving an abortion after a “fetal heartbeat” has been detected. (Texas Health and Safety Code Section 171.208.) As of March 2022, more than one dozen other states have moved to introduce legislation to adopt their own versions of the Texas law.

The Texas law, like the copycat statutes being introduced in other states, is uniquely aggressive in several ways. First, the bill imposes the shortest timeline for restricting abortion of any law adopted since the ruling in *Roe v. Wade*. By utilizing a “fetal heartbeat” standard, doctors note the Texas law restricts abortions within as few as six weeks of pregnancy. (Shannon Najmabadi, *Gov. Greg Abbott signs into law one of nation’s strictest abortion measures, banning procedure as early as six weeks into a pregnancy*, The Texas Tribune, May 19, 2021, available at: <https://www.texastribune.org/2021/05/18/texas-heartbeat-bill-abortions-law/>.) Secondly, the Texas law implicates persons well beyond the person performing or receiving an abortion. The “aiding and abetting” language is so broad as to implicate and impose significant civil liability upon a person providing transportation to or from an abortion clinic, a person donating to a fund to assist women receive an abortion, or even a person who simply discusses getting an abortion with a woman. This appears to expand the sanctions beyond traditional health and safety related criminal or professional liability statutes tied to the procedure itself or the conditions and facilities in which the procedure is performed. Finally, in order to avoid direct judicial attack, the bill prohibits any lawsuit from being brought by a state actor, including state health regulators or prosecutors. (Texas Health and Safety Code Section 171.208 (a).)

The civil actions authorized by “fetal heartbeat” laws do not require the plaintiff to demonstrate any personal harm or violation of the plaintiff’s legal rights. In addition to providing a new means of enforcing abortion restrictions, the Texas law also is unique in that it confers standing on *any person* so long as they are not an agent of Texas state or local government. Typically in order for one private individual to bring a lawsuit against another individual, one party’s conduct must be the legal cause of *harm* to another. (Restat. 2d of Torts, Section 431.) Although statutes can confer standing in various circumstances, it is rare for standing to arise when no harm or violation of individual rights were inflicted upon the party bringing the lawsuit. Per the text of the Texas statute, any person may bring an action another person performed or aided and abetted in the performance of an abortion, or intended to engage in such conduct. (Texas Health and Safety Code Section 171.208 (a).) In order to recover the \$10,000 damages conferred by the Texas statute, the plaintiff must simply prove that the abortion occurred or was intended to occur. The plaintiff need not show any individualized harm or even a relationship to any of the parties involved in the procedure. (Texas Health and Safety Code Section 171.208 (b).)

While California has several statutes in which a private plaintiff can bring a civil action on behalf of the rights of others (for example, the Private Attorney General Act in the Labor Code), California’s laws still require the individual plaintiff to show that they were harmed. Indeed, courts across the country have looked skeptically upon cases in which the plaintiff did not suffer any actual harm. For example, when a plaintiff sued their cable provider for failing to destroy certain personal identifying information, the Eight Circuit held that although the company failed its statutory duty, the plaintiff’s inability to show any actual harm or any “material risk of harm” beyond a “bare procedural violation” was inadequate to support standing. (*Braitberg v. Charter Communications* (8th Cir. 2016) 836 F.3d 925, 929-930.) Thus by permitting the recovery of damages in cases in which the plaintiff has suffered no harm or violation of rights, the Texas law, and its progeny in other states, appears to confer standing in a manner that is significantly outside the main stream of most recognized civil causes of action.

This bill seeks to prevent the enforcement of out-of-state “fetal heartbeat” laws in California. As more states consider adopting “fetal heartbeat” laws like those in Texas, this bill seeks to protect Californians from civil liability for exercising a fundamental right in this state. To

achieve that protection this bill advances two policy goals. The first goal is to prohibit an action from being brought in California courts to enforce any out-of-state law that would impose civil liability on a person seeking, receiving, performing, inducing, or aiding a person in obtaining an abortion. The second policy goal of this bill is to prohibit the enforcement of a judgment rendered under an out-of-state “fetal heartbeat” law obtained in a non-California court. Each of these aspects of this bill pose unique considerations under the federal Constitution, and will be discussed further below. The bill also adopts a severability clause.

The legal history of the Full Faith and Credit Clause of the United States Constitution. Article IV, Section 1 of the United States Constitution, generally referred to as the Full Faith and Credit Clause, requires every state to give full faith and credit to the public acts (statutes), records, and judicial proceedings of every other state. By refusing to recognize the law and judgments of another state, this bill potentially implicates the Full Faith and Credit Clause. Several legal scholars have suggested that the Full Faith and Credit Clause was originally intended to ensure that statutes, records, and judgments from one state were merely be accepted as evidence in the proceedings of another state as to the proof of their existence, especially in light of how the phrase was used in English common law. (Whitten, *Full Faith and Credit for Dummies* (2005) 38 Creighton L. Rev. 465.) However, in 1813, Justice Story had other ideas and opted to significantly strengthen the effect of the clause and the corresponding Congressional implementing statute. In ruling that the Circuit Court for the District of Columbia was incorrect for refusing to recognize a judgment debt from the State of New York the Supreme Court ruled the law “declares that the record duly authenticated shall have such faith and credit as it taken. If in such court it has the faith and credit of evidence of the highest nature...it must have the same faith and credit in every other court,” and that “the constitution contemplated a power in Congress to give conclusive effect to such judgments.” (*Mills v. Duryee* (1813) 7 Cranch 481, 484-485.)

Despite the seemingly bright line put forward by Justice Story, in the 200 years since the *Mills* decision, three distinct tracks have begun to develop in the jurisprudence of the Full Faith and Credit Clause. To this day, the strict application of res judicata generally applies to determinative judicial proceedings; as the Supreme Court reiterated, “for claim and issue preclusion purposes...the judgement of the rendering state gains nationwide force.” (*Baker v. General Motors Corp.* (1998) 522 U.S. 222, 233.)

However, the law has moved well away from the strict rule when it comes to public acts or statutes. In upholding the application of California law to settle a dispute of conflicting workers compensation statutes, the Supreme Court ruled, “A rigid and literal enforcement of the Full Faith and Credit Clause, without regard to the statute of the forum, would lead to the absurd result that wherever a conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own.” (*Alaska Packers Association v. Industrial Accident Commission* (1935) 294 U.S. 532, 547.) Thus, the law now acknowledges a preference to uphold the public policy of the forum state when a conflict of laws arises, recognizing that, “the Full Faith and Credit Clause is not an inexorable and unqualified command. It leaves some scope for state control within its borders...” (*Pink v. AAA Highway Express, Inc.* (1941) 314 U.S. 201,210.).

The Supreme Court has also begun to move away from the strict ruling of *Mills* as it pertains to state records. In determining the applicability of an equity decree in Michigan that prevented a former General Motors employee from testifying against the company, to a subpoena for testimony issues in Missouri, the Supreme Court held, “we simply recognize that just as the

mechanisms for enforcing a judgment do not travel with the judgment itself for the purposes of Full Faith and Credit ... similarly the Michigan decree cannot determine the evidentiary issues in a lawsuit brought by parties who were not subject to the jurisdiction of the Michigan court.” (*Baker v. General Motors*, *supra*, 522 U.S. 222 at p. 239.) The handling of records has been further expanded upon by appellate courts in a manner that mixes the approach to judgments and public policy. In 2011, the Fifth Circuit upheld the Louisiana Department of Vital Records and Statistics refusal to amend the Louisiana birth certificate of a child who was legally adopted by a non-married gay couple in New York on the grounds that it violated Louisiana’s public policy. Building upon the notion that the manner of a judgment’s enforcement does not travel with the judgment, the court held, “obtaining a birth certificate falls in the heartland of enforcement, and therefore outside the Full Faith and Credit obligation of recognition.” (*Adar v. Smith* (5th Cir. 2011) 639 F.3d 146,160.) It should be noted that the Supreme Court appears to endorse this view as it denied certiorari in the *Adar* case.

Thus, when looking at the case law as a whole, legal scholars are beginning to argue that the Full Faith and Credit Clause applies differently to each aspect of the Clause. The jurisprudence would seem to indicate that public acts are subject to the public policy exemption, permitting states to generally apply local laws to cases in their jurisdiction; records are subject to recognition, but not clear enforcement; and judicial proceedings generally are required to be enforced. (Redpath, *Between Judgment and Law: Full Faith and Credit, Public Policy, and State Records* (2013) 62 Emory L.J. 639.)

Preventing a person from bringing a “fetal heartbeat” cause of action in California courts is likely a public act, implicating the public policy exception to the Full Faith and Credit Clause.

As noted above, this bill seeks to protect California residents from liability under out-of-state “fetal heartbeat” laws using a two-pronged approach. The first approach involves prohibiting California courts from being utilized as a venue for hearing such cases. In so much as this bill seeks to prevent “fetal heartbeat” civil actions from being filed in California courts, should this bill become law, it would essentially be a public action expressing California’s public policy that the courts of this state should “choose” California law when evaluating such a case. It can be argued that by adopting this measure, the Legislature would simply be avoiding the “absurd result” of this state’s courts not being able to enforce their own laws as envisioned in *Alaska Packers Association*.

In opposition to this measure, however, the Pacific Justice Institute argues that this bill reflects what it characterizes as a, “policy of hostility toward the public acts of another state,” thus negating the public policy exception to the Full Faith and Credit Clause. Indeed, the opposition is correct in stating that since the 1950s, the United States Supreme Court has looked negatively at state statutes that show hostility to the policy of another state. (*Hughes v. Fetter* (1951) 341 U.S. 609.) The opposition goes so far as to argue that California frequently benefits from this rule, noting that as recently as 2019, California applied the rule against a Nevada Supreme Court ruling. (*Franchise Tax Board v. Hyatt* (2019) 139 S. Ct. 1485, citing *Franchise Tax Board v. Hyatt* (2016) 578 U.S. 171.) It should be noted, however, that the Nevada law implicated in the *Hyatt* string of litigation differed from this bill in several important ways. First, the Nevada law also implicated state sovereign immunity, which implicates additional constitutional issues. Additionally, because the Texas statute and its progeny explicitly barred state action, the two statutes are not necessarily comparable given that no state entity can be a party to the civil actions created by the Texas law.

Secondly, the very case cited by the opposition highlights another difference between this bill and the *Hyatt* cases, and even reaffirms the validity of the public policy exception as it applies to instances like this bill. In “*Hyatt II*” the Supreme Court noted, “when a state ‘seeks to exclude from its courts actions arising under a foreign statute’ but permits similar actions under its own laws, the state has adopted a policy of hostility to the ‘public acts’ of another state.” (*Franchise Tax Board v. Hyatt, supra*, citing in part *Carroll v. Lanza* (349 U.S. 408, 413.)) The *Hyatt* series of litigation involved questions of which state’s sovereign immunity statute should apply in adjudicating the dispute, given that both states had different policies. As has been noted above, and will be discussed in additional detail below, the current set of “fetal heartbeat” laws are unique. There is no equivalent cause of action permitting an unrelated third party to sue a person for receiving, performing, or aiding in an abortion when no actual harm has occurred to either that third person, or in California. This is not a matter where one state’s laws treat a similar issue with wildly different outcomes such as if, for example, the Texas law permitted punitive damages and hypothetical California equivalent did not. Should California ever enact such a statute, legal analysis would be different.

The Supreme Court has held that the Full Faith and Credit Clause does not compel “a state to substitute the statutes of another state for its own statutes dealing with a subject matter concerning which it is competent to legislate.” (*Baker v. General Motors Corp., supra*, 522 U.S. 222, at pp. 232-233.) Thus, this bill is simply an instance where the California Legislature seeks to ensure that its California courts can uphold the public policy of this state, affirming the right for women to access reproductive healthcare and others to assist them in doing so, and that the courts will not be usurped by the whims of another state.

Preventing the enforcement of out-of-state judgments and the Full Faith and Credit Clause.

The second aspect of this bill seeks to prevent in this state the enforcement of a judgment that stems from a “fetal heartbeat” law in another state. While this provision implicates the public policy issues discussed above, it additionally implicates the judicial proceeding and final judgment provisions of the Full Faith and Credit Clause. As noted above, court jurisprudence has held that states must recognize the final judgment of the courts of other states in nearly all circumstances. Legal Scholars, however, have noted that Supreme Court jurisprudence has opened up several rare exceptions to the otherwise strict rule adopted in *Mills* in the 200 years since that decision. (Reynolds, *The Iron Law of Full Faith and Credit* (1994) 746 Univ. of Maryland Carey School of Law Faculty Scholarship 412.)

Due to the unique nature of “fetal heartbeat” laws, several issues related to the Full Faith and Credit clause may arise. For example, should a party seek to claim that a Californian who donated to a pro-choice organization that subsequently provided funds for women to leave Texas to obtain an abortion, jurisdictional issues may arise. Additionally, legal scholars note that in instances of a fraudulently obtained judgment, the Full Faith and Credit Clause may not apply. (Reynolds, *The Iron Law of Full Faith and Credit, supra*, at pp. 422-23.)

While scholars continue to write about other theories related to the Full Faith and Credit Clause, the Supreme Court has implicitly noted that certain circumstances may, in fact, render one state’s judgment unenforceable in another jurisdiction. (Restat. 2d of Conflict of Laws, Section 100.) One particular set of judgments that the Supreme Court appears to contend are not enforceable in another jurisdiction are so-called “penal judgments.” In 1892, the Supreme Court was asked to evaluate whether a Maryland court’s refusal to uphold a New York judgment was correct when the Maryland court found that the New York cause of action was “intended as a punishment for

doing any acts forbidden, and was, therefore...a penalty which could not be enforced.” (*Huntington v Attrill* (1892) 146 U.S. 657.) The *Huntington* court opted to examine the definition of “penal” in the “international sense” and harkened back to Chief Justice Marshall’s maxim, “the courts of no country execute the penal laws of another.” (*The Antelope* 10 Wheat 66, 123.) The *Huntington* court further explained that whether or not a law were considered penal, and thus could not be enforced in the court of another jurisdiction, “depends on the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act.” (*Huntington v Attrill, supra*, 146 U.S. 657, 673-674.) Although the *Huntington* court held that the New York statute in question was not penal, as it related to compensating a victim of a fraud, the Supreme Court has continued to examine Full Faith and Credit Clause claims using the penal exception standard. (See *Milwaukee County v. M. E. White Company* (1935) 296 U.S. 268.) The Supreme Court also continues to apply the *Huntington* analysis of whether a statute is penal in nature to this day. Thus, such an analysis would likely apply to any review of this bill. (See *Kokesh v. Securities & Exchange Commission* (2017) 137 S. Ct. 1635, 1642.)

Putting aside the jurisdiction and other exceptions to the Full Faith and Credit Clause that are also likely to apply to this bill, California can credibly argue that the Texas statute is purely penal in nature, and thus cannot be enforced in this state. The Texas law and its progeny do not require any actual showing of harm or violation of personal rights on the part of the plaintiff. Accordingly, it is unclear what private, personal injury the \$10,000 penalty is actually remedying or compensating the plaintiff for. Furthermore, as evidenced by the above discussed Mississippi abortion ban, abortion laws have traditionally been enforced by criminal prosecutors and state regulatory agencies. The enforcement by state actors evidences a historic treatment of abortion as an offense against the public justice of the state, thus categorizing abortion restrictions as penal statutes. Finally, some of the strongest evidence that the Texas “fetal heartbeat” law is a penal statute masquerading as private civil action comes from the very man who drafted the bill. John Seago, the legislative director of Texas Right to Life, was a sponsor of the Texas measure. In an interview in *The Atlantic* magazine, Mr. Seago stated the following in response to a question about the novel legal approach employed by the bill:

“There are two main motivations. The first one is lawless district attorneys that the pro-life movement has dealt with for years. In October, district attorneys from around the country publicly signed a letter saying they will not enforce pro-life laws. They said that even if *Roe v. Wade* is overturned, they are not going to use resources holding the abortion industry to account. That shows that the best way to get a pro-life policy into effect is not by imposing criminal penalties, but civil liability.” (Green, *What Texas Abortion Foes Want Next*, Sept. 2021) *The Atlantic*, available at: <https://www.theatlantic.com/politics/archive/2021/09/texas-abortion-ban-supreme-court/619953/>.)

Mr. Seago’s own acknowledgement that district attorneys, and other state actors, are the traditional enforcers of abortion laws highlights the penal nature of abortion statutes, and that the Texas statute is designed to enact a punishment, but avoid state enforcement that he perceives as too weak. Furthermore, by highlighting the perceived weakness of state officials, Mr. Seago suggests the Texas law deputizing private persons to enforce the public justice will result in greater enforcement actions against abortion providers, even if those private persons have no cognizable personal injury or suffer no violation of personal rights. Following from Mr. Seago’s logic, should California be required to enforce judgments from actions resulting from the Texas law, California would be forced to enforce Texas state statutes that Texas’s own state attorneys

refuse (or are apparently too weak) to enforce, thus resulting in an outcome perhaps more absurd than the one the Supreme Court sought to avoid in *Alaska Packers Association*.

Proposed technical amendment. As currently in print this bill applies to “persons” who are sued under out-of-state “fetal heartbeat” laws. While the United States Supreme Court has applied a very broad definition to the term “person” (see, e.g. *Citizens United v. Federal Election Commission* (2010) 558 U.S. 310), the author notes that some loosely configured organizations may still be exposed to liability if they are not formally organized. Seeking to broaden the protections of the bill, the author proposes to add the term “entity” to the bill so that subdivision (a) of Health and Safety Code Section 123469 would read, in part:

(a) A law of another state that authorizes a person to bring a civil action against a person **or entity that who** does any of the following is contrary to the public policy of this state:

Additional amendments add several co-authors to the bill.

ARGUMENTS IN SUPPORT: This measure is supported by a coalition of medical professionals, pro-choice organizations, and a municipality. Representative of the coalition NARAL Pro-Choice California writes:

In the event Roe is overturned, at least 26 states are poised to criminalize abortion immediately, with millions of pregnant people’s lives at stake. This risk is particularly high for women who lack the resources to travel out of their home states to access care. They would need to uproot their lives to obtain the most basic healthcare. With new laws in states across the nation penalizing access to abortion, anyone aiding or assisting someone in obtaining an abortion could face devastating consequences. With more and more patients relying on California providers for telehealth-based reproductive care, California has the opportunity and obligation to protect providers and protect the rights of their patients.

AB 1666 protects all those who could be sued as defendants in actions involving reproductive rights by prohibiting seizure of their financial assets here in California. Put more plainly, if a judgment or penalty goes through a California court, a patient or provider’s assets here in California would be shielded from seizure. The right to an abortion is enshrined in the California constitution. This bill would declare it to be against the public policy of the state of California to infringe upon an individual’s reproductive health choices. It would change the law so that the state would not vest full faith and credit in any laws by other states that prohibit reproductive choice. AB 1666 therefore makes it possible for California courts to uphold reproductive rights and protect providers.

ARGUMENTS IN OPPOSITION: This bill is opposed by two groups who argue against a woman’s right to reproductive freedom. Representative of these organizations’ sentiments, the Pacific Justice Institute writes:

AB 1666, with its unabashed contempt for states that are more protective of unborn life, is irreconcilable with this basic test. Even if it somehow survived a court challenge, it is not difficult to forecast the unintended effects this legislation could produce. To begin with, proponents assume that medical providers can offer telehealth to patients across state lines, with no concern for those states’ licensing or professional regulation. As other states follow

California's lead, we should fully expect they will offer havens to physicians who want to flee California's exorbitant taxes and excessive regulation, with the promise that they can still offer telehealth services to Californians, free of our regulations and liability. With high-income earners and businesses already fleeing California for states like Texas, Florida, and Arizona, to name just a few, it is hard to see how this could end well for anyone other than abortion providers.

REGISTERED SUPPORT / OPPOSITION:**Support**

American Congress of Obstetricians & Gynecologists - District IX
City of Oakland
NARAL Pro-choice California
Oakland Privacy
Planned Parenthood Affiliates of California
Santa Barbara Women's Political Committee

Opposition

Pacific Justice Institute
Right to Life League of Southern California

Analysis Prepared by: Nicholas Liedtke / JUD. / (916) 319-2334

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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WHOLE WOMAN’S HEALTH ET AL. *v.* JACKSON,
JUDGE, DISTRICT COURT OF TEXAS, 114TH
DISTRICT, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

No. 21–463. Argued November 1, 2021—Decided December 10, 2021

The Court granted certiorari before judgment in this case to determine whether the petitioners may pursue a pre-enforcement challenge to Texas Senate Bill 8—the Texas Heartbeat Act—a Texas statute enacted in 2021 that prohibits physicians from performing or inducing an abortion if the physician detected a fetal heartbeat. S. B. 8 does not allow state officials to bring criminal prosecutions or civil actions to enforce the law but instead directs enforcement through “private civil actions” culminating in injunctions and statutory damages awards against those who perform or assist with prohibited abortions. Tex. Health & Safety Code Ann. §§171.204(a), 171.207(a), 171.208(a)(2), (3). Tracking language from *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833, S. B. 8 permits abortion providers to defeat any suit against them by showing, among other things, that holding them liable would place an “undue burden” on women seeking abortions. §§171.209(a)–(b).

The petitioners are abortion providers who sought pre-enforcement review of S. B. 8 in federal court based on the allegation that S. B. 8 violates the Federal Constitution. The petitioners sought an injunction barring the following defendants from taking any action to enforce the statute: a state-court judge, Austin Jackson; a state-court clerk, Penny Clarkston; Texas attorney general, Ken Paxton; executive director of the Texas Medical Board, Stephen Carlton; executive director of the Texas Board of Nursing, Katherine Thomas; executive director of the Texas Board of Pharmacy, Allison Benz; executive commissioner of the Texas Health and Human Services Commission, Cecile Young;

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and a single private party, Mark Lee Dickson. The public-official defendants moved to dismiss the complaint citing, among other things, the doctrine of sovereign immunity. Mr. Dickson also moved to dismiss, claiming that the petitioners lacked standing to sue him. The District Court denied these motions. The public-official defendants filed an interlocutory appeal with the Fifth Circuit under the collateral order doctrine, which allows immediate appellate review of an order denying sovereign immunity. The Fifth Circuit decided to entertain a second interlocutory appeal filed by Mr. Dickson given the overlap in issues between his appeal and the appeal filed by the public-official defendants. The Fifth Circuit denied the petitioners' request for an injunction barring the law's enforcement pending resolution of the merits of the defendants' appeals, and instead issued an order staying proceedings in the District Court until that time. The petitioners then filed a request for injunctive relief with the Court, seeking emergency resolution of their application ahead of S. B. 8's approaching effective date. In the abbreviated time available for review, the Court concluded that the petitioners' filings failed to identify a basis in existing law that could justify disturbing the Fifth Circuit's decision to deny injunctive relief. *Whole Woman's Health v. Jackson*, 594 U. S. ___, ___. The petitioners then filed another emergency request asking the Court to grant certiorari before judgment to resolve the defendants' appeals in the first instance, which the Court granted.

Held: The order of the District Court is affirmed in part and reversed in part, and the case is remanded.

___F. Supp. 3d ___, affirmed in part, reversed in part, and remanded.

JUSTICE GORSUCH announced the judgment of the Court, and delivered the opinion of the Court except as to Part II–C, concluding that a pre-enforcement challenge to S. B. 8 under the Federal Constitution may proceed past the motion to dismiss stage against certain of the named defendants but not others. Pp. 4–11, 14–17.

(a) Because the Court granted certiorari before judgment, the Court effectively stands in the shoes of the Court of Appeals and reviews the defendants' appeals challenging the District Court's order denying their motions to dismiss. As with any interlocutory appeal, the Court's review is limited to the particular order under review and any other ruling "inextricably intertwined with" or "necessary to ensure meaningful review of" it. *Swint v. Chambers County Comm'n*, 514 U. S. 35, 51. In this preliminary posture, the ultimate merits question, whether S. B. 8 is consistent with the Federal Constitution, is not before the Court. P. 4.

(b) The Court concludes that the petitioners may pursue a pre-enforcement challenge against certain of the named defendants but not others. Pp. 4–11, 14–17.

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(1) Under the doctrine of sovereign immunity, named defendants Penny Clarkston (a state-court clerk) and Austin Jackson (a state-court judge) should be dismissed. The petitioners have explained that they hope to certify a class and request an order enjoining all state-court clerks from docketing S. B. 8 cases, and all state-court judges from hearing them. The difficulty with this theory of relief is that States are generally immune from suit under the terms of the Eleventh Amendment or the doctrine of sovereign immunity. While the Court in *Ex parte Young*, 209 U. S. 123, did recognize a narrow exception allowing an action to prevent state officials from enforcing state laws that are contrary to federal law, that exception is grounded in traditional equity practice. *Id.*, at 159–160. And as *Ex parte Young* itself explained, this traditional exception does not normally permit federal courts to issue injunctions against state-court judges or clerks. The traditional remedy against such actors has been some form of appeal, not an *ex ante* injunction preventing courts from hearing cases. As stated in *Ex parte Young*, “an injunction against a state court” or its “machinery” “would be a violation of the whole scheme of our Government.” *Id.*, at 163. The petitioners’ clerk-and-court theory thus fails under *Ex parte Young*.

It fails for the additional reason that no Article III “case or controversy” between “adverse litigants” exists between the petitioners who challenge S. B. 8 and either the state-court clerks who may docket disputes against the petitioners or the state-court judges who decide those disputes. *Muskraat v. United States*, 219 U. S. 346, 361; see *Pulliam v. Allen* 466 U. S. 522, 538, n. 18. Further, as to remedy, Article III does not confer on federal judges the power to supervise governmental operations. The petitioners offer no meaningful limiting principle that would apply if federal judges could enjoin state-court judges and clerks from entertaining disputes under S. B. 8. And if the state-court judges and clerks qualify as “adverse litigants” for Article III purposes in the present case, when would they not? Many more questions than answers would present themselves if the Court journeyed the way of the petitioners’ theory. Pp. 4–9.

(2) Texas Attorney General Paxton should be dismissed. The petitioners seek to enjoin him from enforcing S. B. 8, which the petitioners suggest would automatically bind any private party interested in pursuing an S. B. 8 suit. The petitioners have not identified any enforcement authority the attorney general possesses in connection with S. B. 8 that a federal court might enjoin him from exercising. The petitioners point to a state statute that says the attorney general “may institute an action for a civil penalty of \$1,000” for violations of “this subtitle or a rule or order adopted by the [Texas Medical Board],” Tex. Occ. Code Ann. §165.101, but the qualification “this subtitle” limits the

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attorney general's enforcement authority to the Texas Occupational Code, and S. B. 8 is not codified within "this subtitle." Nor have the petitioners identified for us any "rule or order adopted by the" Texas Medical Board that the attorney general might enforce against them. And even if the attorney general did have some enforcement power under S. B. 8 that could be enjoined, the petitioners have identified no authority that might allow a federal court to parlay any defendant's enforcement authority into an injunction against any and all unnamed private parties who might seek to bring their own S. B. 8 suits. Consistent with historical practice, a court exercising equitable authority may enjoin named defendants from taking unlawful actions. But under traditional equitable principles, no court may "enjoin the world at large," *Alemite Mfg. Corp. v. Staff*, 42 F. 2d 832 (CA2), or purport to enjoin challenged "laws themselves." *Whole Woman's Health*, 594 U. S., at ____ (citing *California v. Texas*, 593 U. S. ____, ____ (slip op, at 8)). Pp. 9–11.

(3) The petitioners name other defendants (Stephen Carlton, Katherine Thomas, Allison Benz, and Cecile Young), each of whom is an executive licensing official who may or must take enforcement actions against the petitioners if the petitioners violate the terms of Texas's Health and Safety Code, including S. B. 8. Eight Members of the Court hold that sovereign immunity does not bar a pre-enforcement challenge to S. B. 8 against these defendants. Pp. 11–14.

(4) The sole private defendant, Mr. Dickson, should be dismissed. Given that the petitioners do not contest Mr. Dickson's sworn declarations stating that he has no intention to file an S. B. 8 suit against them, the petitioners cannot establish "personal injury fairly traceable to [Mr. Dickson's] allegedly unlawful conduct." See *California*, 593 U. S., at ____ (slip op, at 9). P. 14.

(c) The Court holds that the petitioners may bring a pre-enforcement challenge in federal court as one means to test S. B. 8's compliance with the Federal Constitution. Other pre-enforcement challenges are possible too; one such case is ongoing in state court in which the plaintiffs have raised both federal and state constitutional claims against S. B. 8. Any individual sued under S. B. 8 may raise state and federal constitutional arguments in his or her defense without limitation. Whatever a state statute may or may not say about a defense, applicable federal constitutional defenses always stand available when properly asserted. See U. S. Const., Art. VI. Many federal constitutional rights are as a practical matter asserted typically as defenses to state-law claims, not in federal pre-enforcement cases like this one. See, e.g., *Snyder v. Phelps*, 562 U. S. 443 (First Amendment used as a defense to a state tort suit). Other viable avenues to contest the law's compliance with the Federal Constitution also may be possible and the

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Court does not prejudge the possibility. Pp. 14–16.

GORSUCH, J., announced the judgment of the Court, and delivered the opinion of the Court except as to Part II–C. ALITO, KAVANAUGH, and BARRETT, JJ., joined that opinion in full, and THOMAS, J., joined except for Part II–C. THOMAS, J., filed an opinion concurring in part and dissenting in part. ROBERTS, C. J., filed an opinion concurring in the judgment in part and dissenting in part, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined. SOTOMAYOR, J., filed an opinion concurring in the judgment in part and dissenting in part, in which BREYER and KAGAN, JJ., joined.

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 21–463

WHOLE WOMAN’S HEALTH, ET AL., PETITIONERS *v.*
AUSTIN REEVE JACKSON, JUDGE, DISTRICT
COURT OF TEXAS, 114TH DISTRICT, ET AL.

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

[December 10, 2021]

JUSTICE GORSUCH announced the judgment of the Court, and delivered the opinion of the Court except as to Part II–C.

The Court granted certiorari before judgment in this case to determine whether, under our precedents, certain abortion providers can pursue a pre-enforcement challenge to a recently enacted Texas statute. We conclude that such an action is permissible against some of the named defendants but not others.

I

Earlier this year Texas passed the Texas Heartbeat Act, 87th Leg., Reg. Sess., also known as S. B. 8. The Act prohibits physicians from “knowingly perform[ing] or induc[ing] an abortion on a pregnant woman if the physician detected a fetal heartbeat for the unborn child” unless a medical emergency prevents compliance. Tex. Health & Safety Code Ann. §§171.204(a), 171.205(a) (West Cum. Supp. 2021). But the law generally does not allow state officials to bring criminal prosecutions or civil enforcement actions. Instead, S. B. 8 directs enforcement “through . . .

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private civil actions” culminating in injunctions and statutory damages awards against those who perform or assist prohibited abortions. §§171.207(a), 171.208(a)(2), (3). The law also provides a defense. Tracking language from *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833 (1992), the statute permits abortion providers to defeat any suit against them by showing, among other things, that holding them liable would place an “undue burden” on women seeking abortions. §§171.209(a)–(b).¹

After the law’s adoption, various abortion providers sought to test its constitutionality. Not wishing to wait for S. B. 8 actions in which they might raise their arguments in defense, they filed their own pre-enforcement lawsuits. In all, they brought 14 such challenges in state court seeking, among other things, a declaration that S. B. 8 is inconsistent with both the Federal and Texas Constitutions. A summary judgment ruling in these now-consolidated cases arrived last night, in which the abortion providers prevailed on certain of their claims. *Van Stean v. Texas*, No. D–1–GN–21–004179 (Dist. Ct. Travis Cty., Tex., Dec. 9, 2021).

Another group of providers, including the petitioners before us, filed a pre-enforcement action in federal court. In their complaint, the petitioners alleged that S. B. 8 violates the Federal Constitution and sought an injunction barring the following defendants from taking any action to enforce the statute: a state-court judge, Austin Jackson; a state-court clerk, Penny Clarkston; Texas attorney general, Ken

¹JUSTICE SOTOMAYOR suggests that the defense described in S. B. 8 supplies only a “shell of what the Constitution requires” and effectively “nullif[ies]” its guarantees. *Post*, at 2–4 (opinion concurring in judgment in part and dissenting in part); see also *post*, at 1, n. 1 (ROBERTS, C. J., concurring in judgment in part and dissenting in part). But whatever a state statute may or may not say, applicable federal constitutional defenses always stand fully available when properly asserted. See U. S. Const., Art. VI.

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Paxton; executive director of the Texas Medical Board, Stephen Carlton; executive director of the Texas Board of Nursing, Katherine Thomas; executive director of the Texas Board of Pharmacy, Allison Benz; executive commissioner of the Texas Health and Human Services Commission, Cecile Young; and a single private party, Mark Lee Dickson.

Shortly after the petitioners filed their federal complaint, the individual defendants employed by Texas moved to dismiss, citing among other things the doctrine of sovereign immunity. App. to Pet. for Cert. 3a. The sole private defendant, Mr. Dickson, also moved to dismiss, claiming that the petitioners lacked standing to sue him. 13 F. 4th 434, 445 (CA5 2021) (*per curiam*). The District Court denied the motions. *Ibid.*

The defendants employed by Texas responded by pursuing an interlocutory appeal in the Fifth Circuit under the collateral order doctrine. See *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U. S. 139, 147 (1993) (collateral order doctrine allows immediate appellate review of order denying claim of sovereign immunity). Mr. Dickson also filed an interlocutory appeal. The Fifth Circuit agreed to take up his appeal because the issues it raised overlapped with those already before the court in the Texas official defendants' appeal. 13 F. 4th, at 438–439.

Separately, the petitioners also sought relief from the Fifth Circuit. Citing S. B. 8's impending effective date, they asked the court to issue an injunction suspending the law's enforcement until the court could hear and decide the merits of the defendants' appeals. *Ibid.* The Fifth Circuit declined the petitioners' request. Instead, that court issued an order staying proceedings in the District Court until it could resolve the defendants' appeals. App. to Pet. for Cert. 79a; 13 F. 4th, at 438–439, 443.

In response to these developments, the petitioners sought emergency injunctive relief in this Court. In their filing,

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the petitioners asked us to enjoin any enforcement of S. B. 8. And given the statute's approaching effective date, they asked us to rule within two days. The Court took up the application and, in the abbreviated time available for review, concluded that the petitioners' submission failed to identify a basis in existing law sufficient to justify disturbing the Court of Appeals' decision denying injunctive relief. *Whole Woman's Health v. Jackson*, 594 U. S. ____ (2021).

After that ruling, the petitioners filed a second emergency request. This time they asked the Court to grant certiorari before judgment to resolve the defendants' interlocutory appeals in the first instance, without awaiting the views of the Fifth Circuit. This Court granted the petitioners' request and set the case for expedited briefing and argument. 595 U. S. ____ (2021).

II

Because this Court granted certiorari before judgment, we effectively stand in the shoes of the Court of Appeals. See *United States v. Nixon*, 418 U. S. 683, 690–692 (1974); S. Shapiro, K. Geller, T. Bishop, E. Hartnett, D. Himmel-farb, *Supreme Court Practice* 2-11 (11th ed. 2019). In this case, that means we must review the defendants' appeals challenging the District Court's order denying their motions to dismiss. As with any interlocutory appeal, our review is limited to the particular orders under review and any other ruling "inextricably intertwined with" or "necessary to ensure meaningful review of" them. *Swint v. Chambers County Comm'n*, 514 U. S. 35, 51 (1995). In this preliminary posture, the ultimate merits question—whether S. B. 8 is consistent with the Federal Constitution—is not before the Court. Nor is the wisdom of S. B. 8 as a matter of public policy.

A

Turning to the matters that are properly put to us, we

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begin with the sovereign immunity appeal involving the state-court judge, Austin Jackson, and the state-court clerk, Penny Clarkston. While this lawsuit names only one state-court judge and one state-court clerk as defendants, the petitioners explain that they hope eventually to win certification of a class including all Texas state-court judges and clerks as defendants. In the end, the petitioners say, they intend to seek an order enjoining all state-court clerks from docketing S. B. 8 cases and all state-court judges from hearing them.

Almost immediately, however, the petitioners' theory confronts a difficulty. Generally, States are immune from suit under the terms of the Eleventh Amendment and the doctrine of sovereign immunity. See, e.g., *Alden v. Maine*, 527 U. S. 706, 713 (1999). To be sure, in *Ex parte Young*, this Court recognized a narrow exception grounded in traditional equity practice—one that allows certain private parties to seek judicial orders in federal court preventing state executive officials from enforcing state laws that are contrary to federal law. 209 U. S. 123, 159–160 (1908). But as *Ex parte Young* explained, this traditional exception does not normally permit federal courts to issue injunctions against state-court judges or clerks. Usually, those individuals do not enforce state laws as executive officials might; instead, they work to resolve disputes between parties. If a state court errs in its rulings, too, the traditional remedy has been some form of appeal, including to this Court, not the entry of an *ex ante* injunction preventing the state court from hearing cases. As *Ex parte Young* put it, “an injunction against a state court” or its “machinery” “would be a violation of the whole scheme of our Government.” *Id.*, at 163.

Nor is that the only problem confronting the petitioners' court-and-clerk theory. Article III of the Constitution affords federal courts the power to resolve only “actual controversies arising between adverse litigants.” *Muskrat v.*

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United States, 219 U. S. 346, 361 (1911). Private parties who seek to bring S. B. 8 suits in state court may be litigants adverse to the petitioners. But the state-court clerks who docket those disputes and the state-court judges who decide them generally are not. Clerks serve to file cases as they arrive, not to participate as adversaries in those disputes. Judges exist to resolve controversies about a law's meaning or its conformance to the Federal and State Constitutions, not to wage battle as contestants in the parties' litigation. As this Court has explained, "no case or controversy" exists "between a judge who adjudicates claims under a statute and a litigant who attacks the constitutionality of the statute." *Pulliam v. Allen*, 466 U. S. 522, 538, n. 18 (1984).

Then there is the question of remedy. Texas Rule of Civil Procedure 24 directs state-court clerks to accept complaints and record case numbers. The petitioners have pointed to nothing in Texas law that permits clerks to pass on the substance of the filings they docket—let alone refuse a party's complaint based on an assessment of its merits. Nor does Article III confer on federal judges some "amorphous" power to supervise "the operations of government" and reimagine from the ground up the job description of Texas state-court clerks. *Raines v. Byrd*, 521 U. S. 811, 829 (1997) (internal quotation marks omitted).

Troubling, too, the petitioners have not offered any meaningful limiting principles for their theory. If it caught on and federal judges could enjoin state courts and clerks from entertaining disputes between private parties under *this* state law, what would stop federal judges from prohibiting state courts and clerks from hearing and docketing disputes between private parties under *other* state laws? And if the state courts and clerks somehow qualify as "adverse litigants" for Article III purposes in the present case, when would they not? The petitioners offer no satisfactory answers.

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Instead, only further questions follow. Under the petitioners’ theory, would clerks have to assemble a blacklist of banned claims subject to immediate dismissal? What kind of inquiry would a state court have to apply to satisfy due process before dismissing those suits? How notorious would the alleged constitutional defects of a claim have to be before a state-court clerk would risk legal jeopardy merely for filing it? Would States have to hire independent legal counsel for their clerks—and would those advisers be the next target of suits seeking injunctive relief? When a party hales a state-court clerk into federal court for filing a complaint containing a purportedly unconstitutional claim, how would the clerk defend himself consistent with his ethical obligation of neutrality? See Tex. Code of Judicial Conduct Canon 3(B)(10) (2021) (instructing judges and court staff to abstain from taking public positions on pending or impending proceedings). Could federal courts enjoin those who perform other ministerial tasks potentially related to litigation, like the postal carrier who delivers complaints to the courthouse? Many more questions than answers would present themselves if the Court journeyed this way.

Our colleagues writing separately today supply no answers either. They agree that state-court judges are not proper defendants in this lawsuit because they are “in no sense adverse” to the parties whose cases they decide. *Post*, at 4 (opinion of ROBERTS, C. J.). At the same time, our colleagues say they would allow this case to proceed against clerks like Ms. Clarkston. See *ibid.*; see also *post*, at 7 (opinion of SOTOMAYOR, J.). But in doing so they fail to address the many remedial questions their path invites. They neglect to explain how clerks who merely docket S. B. 8 lawsuits can be considered “adverse litigants” for Article III purposes while the judges they serve cannot. And they fail to reconcile their views with *Ex parte Young*. THE CHIEF JUSTICE acknowledges, for example, that clerks set in motion the “‘machinery’” of court proceedings. *Post*, at 3. Yet

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he disregards *Ex parte Young*'s express teaching against enjoining the "machinery" of courts. 209 U. S., at 163.

JUSTICE SOTOMAYOR seems to admit at least part of the problem. She concedes that older "wooden" authorities like *Ex parte Young* appear to prohibit suits against state-court clerks. *Post*, at 7. Still, she insists, we should disregard those cases in favor of more "modern" case law. *Ibid*. In places, THE CHIEF JUSTICE's opinion seems to pursue much the same line of argument. See *post*, at 4. But even overlooking all the other problems attending our colleagues' "clerks-only" theory, the authorities they cite do not begin to do the work attributed to them.

Most prominently, our colleagues point to *Pulliam*. But that case had nothing to do with state-court clerks, injunctions against them, or the doctrine of sovereign immunity. Instead, the Court faced only the question whether the suit before it could proceed against a judge consistent with the distinct doctrine of judicial immunity. 466 U. S., at 541–543. As well, the plaintiff sought an injunction only to prevent the judge from enforcing a rule of her own creation. *Id.*, at 526. No one asked the Court to prevent the judge from processing the case consistent with state statutory law, let alone undo *Ex parte Young*'s teaching that federal courts lack such power under traditional equitable principles. Tellingly, our colleagues do not read *Pulliam* to authorize claims against state-court judges in this case. And given that, it is a mystery how they might invoke the case as authority for claims against (only) state-court clerks, officials *Pulliam* never discussed.

If anything, the remainder of our colleagues' cases are even further afield. *Mitchum v. Foster* did not involve state-court clerks, but a judge, prosecutor, and sheriff. See 315 F. Supp. 1387, 1388 (ND Fla. 1970) (*per curiam*). When it came to these individuals, the Court held only that the Anti-Injunction Act did not bar suit against them. 407 U. S. 225, 242–243 (1972). Once more, the Court did not purport

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to pass judgment on any sovereign immunity defense, let alone suggest any disagreement with *Ex parte Young*. To the contrary, the Court went out of its way to emphasize that its decision should not be taken as passing on the question whether “principles of equity, comity, and federalism” might bar the suit. 407 U. S., at 243. Meanwhile, *Shelley v. Kraemer* did not even involve a pre-enforcement challenge against any state-official defendant. 334 U. S. 1 (1948). There, the petitioners simply sought to raise the Constitution as a *defense* against other private parties seeking to enforce a restrictive covenant, *id.*, at 14, much as the petitioners here would be able to raise the Constitution as a defense in any S. B. 8 enforcement action brought by others against them. Simply put, nothing in any of our colleagues’ cases supports their novel suggestion that we should allow a pre-enforcement action for injunctive relief against state-court clerks, all while simultaneously holding the judges they serve immune.

B

Perhaps recognizing the problems with their court-and-clerk theory, the petitioners briefly advance an alternative. They say they seek to enjoin the Texas attorney general from enforcing S. B. 8. Such an injunction, the petitioners submit, would also automatically bind any private party who might try to bring an S. B. 8 suit against them. Reply Brief for Petitioners 21. But the petitioners barely develop this back-up theory in their briefing, and it too suffers from some obvious problems.

Start with perhaps the most straightforward. While *Ex parte Young* authorizes federal courts to enjoin certain state officials from enforcing state laws, the petitioners do not direct this Court to any enforcement authority the attorney general possesses in connection with S. B. 8 that a federal court might enjoin him from exercising. Maybe the closest the petitioners come is when they point to a state

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statute that says the attorney general “may institute an action for a civil penalty of \$1,000” for violations of “this subtitle or a rule or order adopted by the [Texas Medical Board].” Tex. Occ. Code Ann. §165.101 (West 2012). But the qualification “this subtitle” limits the attorney general’s enforcement authority to the Texas Occupational Code, specifically §§151.001 through 171.024. By contrast, S. B. 8 is codified in the Texas Health and Safety Code at §§171.201–171.212. The Act thus does not fall within “this subtitle.” Nor have the petitioners identified for us any “rule or order adopted by the” Texas Medical Board related to S. B. 8 that the attorney general might enforce against them. To be sure, some of our colleagues suggest that the Board might in the future promulgate such a rule and the attorney general might then undertake an enforcement action. *Post*, at 3 (opinion of ROBERTS, C. J.) (citing 22 Tex. Admin. Code §190.8(7) (West 2021)). But this is a series of hypotheticals and an argument even the petitioners do not attempt to advance for themselves.

Even if we could overcome this problem, doing so would only expose another. Supposing the attorney general did have some enforcement authority under S. B. 8, the petitioners have identified nothing that might allow a federal court to parlay that authority, or any defendant’s enforcement authority, into an injunction against any and all unnamed private persons who might seek to bring their own S. B. 8 suits. The equitable powers of federal courts are limited by historical practice. *Atlas Life Ins. Co. v. W. I. Southern, Inc.*, 306 U. S. 563, 568 (1939). “A court of equity is as much so limited as a court of law.” *Alemite Mfg. Corp. v. Staff*, 42 F. 2d 832 (CA2 1930) (L. Hand, J.). Consistent with historical practice, a federal court exercising its equitable authority may enjoin named defendants from taking specified unlawful actions. But under traditional equitable principles, no court may “lawfully enjoin the world at

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large,” *ibid.*, or purport to enjoin challenged “laws themselves,” *Whole Woman’s Health*, 594 U. S., at ____ (slip op., at 1) (citing *California v. Texas*, 593 U. S. ____, ____ (2021) (slip op., at 8)).

Our colleagues offer no persuasive reply to this problem. THE CHIEF JUSTICE does not address it. Meanwhile, JUSTICE SOTOMAYOR offers a radical answer, suggesting once more that this Court should cast aside its precedents requiring federal courts to abide by traditional equitable principles. *Post*, at 9, n. 3. This time, however, JUSTICE SOTOMAYOR does not claim to identify any countervailing authority to support her proposal. Instead, she says, it is justified purely by the fact that the State of Texas in S. B. 8 has “delegat[ed] its enforcement authority to the world at large.” *Ibid.* But somewhat analogous complaints could be levied against private attorneys general acts, statutes allowing for private rights of action, tort law, federal anti-trust law, and even the Civil Rights Act of 1964. In some sense all of these laws “delegate” the enforcement of public policy to private parties and reward those who bring suits with “bount[ies]” like exemplary or statutory damages and attorney’s fees. Nor does JUSTICE SOTOMAYOR explain where her novel plan to overthrow this Court’s precedents and expand the equitable powers of federal courts would stop—or on what theory it might plausibly happen to reach just this case or maybe those exactly like it.²

C

While this Court’s precedents foreclose some of the petitioners’ claims for relief, others survive. The petitioners

²This is not to say that the petitioners, or other abortion providers, lack potentially triable state-law claims that S. B. 8 improperly delegates state law enforcement authority. Nor do we determine whether any particular S. B. 8 plaintiff possesses standing to sue under state justiciability doctrines. We note only that such arguments do not justify federal courts abandoning traditional limits on their equitable authority and our precedents enforcing them.

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also name as defendants Stephen Carlton, Katherine Thomas, Allison Benz, and Cecile Young. On the briefing and argument before us, it appears that these particular defendants fall within the scope of *Ex parte Young*'s historic exception to state sovereign immunity. Each of these individuals is an executive licensing official who may or must take enforcement actions against the petitioners if they violate the terms of Texas's Health and Safety Code, including S. B. 8. See, e.g., Tex. Occ. Code Ann. §164.055(a); Brief for Petitioners 33–34. Accordingly, we hold that sovereign immunity does not bar the petitioners' suit against these named defendants at the motion to dismiss stage.³

JUSTICE THOMAS alone reaches a different conclusion. He emphasizes that suits seeking equitable relief against executive officials are permissible only when supported by tradition. See *post*, at 2–3 (opinion concurring in part and dissenting in part). He further emphasizes that the relevant tradition here, embodied in *Ex parte Young*, permits equitable relief against only those officials who possess authority to enforce a challenged state law. *Post*, at 3–4. We agree with all of these principles; our disagreement is restricted to their application.

JUSTICE THOMAS suggests that the licensing-official defendants lack authority to enforce S. B. 8 because that statute says it is to be “exclusively” enforced through private civil actions “[n]otwithstanding . . . any other law.” See Tex. Health & Safety Code Ann. §171.207(a). But the same provision of S. B. 8 *also* states that the law “may not be construed to . . . limit the enforceability of any other laws that regulate or prohibit abortion.” §171.207(b)(3). This saving clause is significant because, as best we can tell from the briefing before us, the licensing-official defendants *are*

³The petitioners may proceed against Ms. Young solely based on her authority to supervise licensing of abortion facilities and ambulatory surgical centers, and not with respect to any other enforcement authority under Chapter 171 of the Texas Health and Safety Code.

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charged with enforcing “other laws that regulate . . . abortion.” Consider, for example, Texas Occupational Code §164.055, titled “Prohibited Acts Regarding Abortion.” That provision states that the Texas Medical Board “shall take an appropriate disciplinary action against a physician who violates . . . Chapter 171, Health and Safety Code,” a part of Texas statutory law that *includes* S. B. 8. Accordingly, it appears Texas law imposes on the licensing-official defendants a duty to enforce a law that “regulate[s] or prohibit[s] abortion,” a duty expressly preserved by S. B. 8’s saving clause. Of course, Texas courts and not this one are the final arbiters of the meaning of state statutory directions. See *Railroad Comm’n of Tex. v. Pullman Co.*, 312 U. S. 496, 500 (1941). But at least based on the limited arguments put to us at this stage of the litigation, it appears that the licensing defendants do have authority to enforce S. B. 8.⁴

In the face of this conclusion, JUSTICE THOMAS advances an alternative argument. He stresses that to maintain a suit consistent with this Court’s *Ex parte Young* and Article III precedents, “it is not enough that petitioners ‘feel inhibited’” or “‘chill[ed]’” by the abstract possibility of an enforcement action against them. *Post*, at 6–7. Rather, they must show at least a credible threat of such an action against them. *Post*, at 7. Again, we agree with these observations in principle and disagree only on their application

⁴Tending to confirm our understanding of the statute is the fact that S. B. 8 expressly prohibits “enforcement of Chapters 19 and 22, Penal Code, in response to violations of this subchapter.” Tex. Health & Safety Code Ann. §171.207(a). This language suggests that the Texas Legislature knew how to prohibit collateral enforcement mechanisms when it adopted S. B. 8, and understood that it was necessary to do so. To read S. B. 8 as barring any collateral enforcement mechanisms without a specific exclusion would thus threaten to render this statutory language superfluous. See *Kallinen v. Houston*, 462 S. W. 3d 25, 28 (Tex. 2015) (courts should avoid treating any statutory language as surplusage); *Kungys v. United States*, 485 U. S. 759, 778 (1988) (same).

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to the facts of this case. The petitioners have plausibly alleged that S. B. 8 has already had a direct effect on their day-to-day operations. See Complaint ¶¶103, 106–109. And they have identified provisions of state law that appear to impose a duty on the licensing-official defendants to bring disciplinary actions against them if they violate S. B. 8. In our judgment, this is enough at the motion to dismiss stage to suggest the petitioners will be the target of an enforcement action and thus allow this suit to proceed.

D

While this interlocutory appeal focuses primarily on the Texas official defendants’ motion to dismiss on grounds of sovereign immunity and justiciability, before we granted certiorari the Fifth Circuit also agreed to take up an appeal by the sole private defendant, Mr. Dickson. In the briefing before us, no one contests this decision. In his appeal, Mr. Dickson argues that the petitioners lack standing to sue him because he possesses no intention to file an S. B. 8 suit against them. Mr. Dickson has supplied sworn declarations so attesting. See, *e.g.*, Brief for Respondent Dickson 32. The petitioners do not contest this testimony or ask us to disregard it. Accordingly, on the record before us the petitioners cannot establish “personal injury fairly traceable to [Mr. Dickson’s] allegedly unlawful conduct.” *California v. Texas*, 593 U. S., at ____ (slip op., at 9) (internal quotation marks omitted). No Member of the Court disagrees with this resolution of the claims against Mr. Dickson.

III

While this should be enough to resolve the petitioners’ appeal, a detour is required before we close. JUSTICE SOTOMAYOR charges this Court with “shrink[ing]” from the task of defending the supremacy of the Federal Constitution over state law. *Post*, at 10. That rhetoric bears no relation to reality.

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The truth is, many paths exist to vindicate the supremacy of federal law in this area. Even aside from the fact that eight Members of the Court agree sovereign immunity does not bar the petitioners from bringing this pre-enforcement challenge in federal court, everyone acknowledges that other pre-enforcement challenges may be possible in state court as well.⁵ In fact, 14 such state-court cases already seek to vindicate both federal and state constitutional claims against S. B. 8—and they have met with some success at the summary judgment stage. See *supra*, at 2. Separately, any individual sued under S. B. 8 may pursue state and federal constitutional arguments in his or her defense. See n. 1, *supra*. Still further viable avenues to contest the law’s compliance with the Federal Constitution also may be possible; we do not prejudge the possibility. Given all this, JUSTICE SOTOMAYOR’S suggestion that the Court’s ruling somehow “clears the way” for the “nullification” of federal law along the lines of what happened in the Jim Crow South not only wildly mischaracterizes the impact of today’s decision, it cheapens the gravity of past wrongs. *Post*, at 11.

The truth is, too, that unlike the petitioners before us, those seeking to challenge the constitutionality of state laws are not always able to pick and choose the timing and preferred forum for their arguments. This Court has never recognized an unqualified right to pre-enforcement review of constitutional claims in federal court. In fact, general federal question jurisdiction did not even exist for much of this Nation’s history. See *Mims v. Arrow Financial Services, LLC*, 565 U. S. 368, 376 (2012). And pre-enforcement review under the statutory regime the petitioners invoke,

⁵JUSTICE SOTOMAYOR’S complaint thus isn’t really about *whether* this case should proceed. It is only about *which* particular defendants the petitioners may sue in this particular lawsuit. And even when it comes to that question, JUSTICE SOTOMAYOR agrees with the Court regarding the proper disposition of several classes of defendants—state-court judges, licensing officials, and Mr. Dickson.

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42 U. S. C. §1983, was not prominent until the mid-20th century. See *Monroe v. Pape*, 365 U. S. 167, 180 (1961); see also R. Fallon, J. Manning, D. Meltzer, & D. Shapiro, Hart and Wechsler's *The Federal Courts and the Federal System* 994 (7th ed. 2015). To this day, many federal constitutional rights are as a practical matter asserted typically as defenses to state-law claims, not in federal pre-enforcement cases like this one. See, e.g., *Snyder v. Phelps*, 562 U. S. 443 (2011) (First Amendment used as a defense to a state tort suit).

Finally, JUSTICE SOTOMAYOR contends that S. B. 8 “chills” the exercise of federal constitutional rights. If nothing else, she says, this fact warrants allowing further relief in this case. *Post*, at 1–2, 7–8. Here again, however, it turns out that the Court has already and often confronted—and rejected—this very line of thinking. As our cases explain, the “chilling effect” associated with a potentially unconstitutional law being “on the books” is insufficient to “justify federal intervention” in a pre-enforcement suit. *Younger v. Harris*, 401 U. S. 37, 42, 50–51 (1971). Instead, this Court has always required proof of a more concrete injury and compliance with traditional rules of equitable practice. See *Muskrat*, 219 U. S., at 361; *Ex parte Young*, 209 U. S., at 159–160. The Court has consistently applied these requirements whether the challenged law in question is said to chill the free exercise of religion, the freedom of speech, the right to bear arms, or any other right. The petitioners are not entitled to a special exemption.

Maybe so, JUSTICE SOTOMAYOR replies, but what if other States pass legislation similar to S. B. 8? Doesn't that possibility justify throwing aside our traditional rules? *Post*, at 10. It does not. If other States pass similar legislation, pre-enforcement challenges like the one the Court approves today may be available in federal court to test the constitutionality of those laws. Again, too, further pre-enforcement challenges may be permissible in state court and federal

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law may be asserted as a defense in any enforcement action. To the extent JUSTICE SOTOMAYOR seems to wish even *more* tools existed to combat this type of law, Congress is free to provide them. In fact, the House of Representatives recently passed a statute that would purport to preempt state laws like S. B. 8. See H. R. 3755, 117th Cong., 1st Sess. (2021). But one thing this Court may never do is disregard the traditional limits on the jurisdiction of federal courts just to see a favored result win the day. At the end of that road is a world in which “[t]he division of power” among the branches of Government “could exist no longer, and the other departments would be swallowed up by the judiciary.” 4 Papers of John Marshall 95 (C. Cullen ed. 1984).⁶

IV

The petitioners’ theories for relief face serious challenges but also present some opportunities. To summarize: (1) The Court unanimously rejects the petitioners’ theory for relief against state-court judges and agrees Judge Jackson should be dismissed from this suit. (2) A majority reaches the same conclusion with respect to the petitioners’ parallel theory for relief against state-court clerks. (3) With respect to the back-up theory of relief the petitioners present against Attorney General Paxton, a majority concludes that he must be dismissed. (4) At the same time, eight Justices hold this case may proceed past the motion to dismiss stage against Mr. Carlton, Ms. Thomas, Ms. Benz, and Ms. Young, defendants with specific disciplinary authority over medical licensees, including the petitioners. (5) Every Member of

⁶JUSTICE SOTOMAYOR charges this Court with “delay” in resolving this case. See *post*, at 11. In fact, this case has received extraordinary solicitude at every turn. This Court resolved the petitioners’ first emergency application in approximately two days. The Court then agreed to decide in the first instance the merits of an appeal pending in the Court of Appeals. The Court ordered briefing, heard argument, and issued an opinion on the merits—accompanied by three separate writings—all in fewer than 50 days.

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the Court accepts that the only named private-individual defendant, Mr. Dickson, should be dismissed.

The order of the District Court is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

Opinion of THOMAS, J.

SUPREME COURT OF THE UNITED STATES

No. 21–463

WHOLE WOMAN’S HEALTH, ET AL., PETITIONERS *v.*
AUSTIN REEVE JACKSON, JUDGE, DISTRICT
COURT OF TEXAS, 114TH DISTRICT, ET AL.

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

[December 10, 2021]

JUSTICE THOMAS, concurring in part and dissenting in part.

I join all but Part II–C of the Court’s opinion. In my view, petitioners may not maintain suit against any of the governmental respondents under *Ex parte Young*, 209 U. S. 123 (1908).¹ I would reverse in full the District Court’s denial of respondents’ motions to dismiss and remand with instructions to dismiss the case for lack of subject-matter jurisdiction.

¹ I also would hold that petitioners lack Article III standing. As I have explained elsewhere, abortion providers lack standing to assert the putative constitutional rights of their potential clients. See *June Medical Services L. L. C. v. Russo*, 591 U. S. ___, ___–___ (2020) (dissenting opinion) (slip op., at 12–14). Third-party standing aside, petitioners also have not shown injury or redressability for many of the same reasons they cannot satisfy *Ex parte Young*. For injury, petitioners have shown no likelihood of enforcement by any respondent, let alone that enforcement is “certainly impending.” *Clapper v. Amnesty Int’l USA*, 568 U. S. 398, 410 (2013) (internal quotation marks omitted). For redressability, we held last Term that a party may not “attack an unenforceable statutory provision,” because this Court may not issue “an advisory opinion without the possibility of any judicial relief.” *California v. Texas*, 593 U. S. ___, ___ (2021) (slip op., at 9) (internal quotation marks omitted); see also *Muskraat v. United States*, 219 U. S. 346, 361 (1911). Likewise here, petitioners seek a declaration that S. B. 8 is unlawful even though no respondent can or will enforce it.

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To begin, there is no freestanding constitutional right to pre-enforcement review in federal court. See *Thunder Basin Coal Co. v. Reich*, 510 U. S. 200, 220 (1994) (Scalia, J., concurring in part and concurring in judgment). Such a right would stand in significant tension with the longstanding Article III principle that federal courts generally may not “give advisory rulings on the potential success of an affirmative defense before a cause of action has even accrued.” *MedImmune, Inc. v. Genentech, Inc.*, 549 U. S. 118, 142 (2007) (THOMAS, J., dissenting); see also *Coffman v. Breeze Corps.*, 323 U. S. 316, 324 (1945) (a party may not “secur[e] an advisory opinion in a controversy which has not arisen”).

That said, a party subject to imminent threat of state enforcement proceedings may seek a kind of pre-enforcement review in the form of a “negative injunction.” This procedural device permits a party to assert “in equity . . . a defense that would otherwise have been available in the State’s enforcement proceedings at law.” *Virginia Office for Protection and Advocacy v. Stewart*, 563 U. S. 247, 262 (2011) (Kennedy, J., concurring); accord, *Douglas v. Independent Living Center of Southern Cal., Inc.*, 565 U. S. 606, 620 (2012) (ROBERTS, C. J., dissenting). In *Ex parte Young*, this Court recognized that use of this negative injunction against a governmental defendant provides a narrow exception to sovereign immunity. See 209 U. S., at 159–160. That exception extends no further than permitting private parties in some circumstances to prevent state officials from bringing an action to enforce a state law that is contrary to federal law.

The negative injunction remedy against state officials countenanced in *Ex parte Young* is a “standard tool of equity,” J. Harrison, *Ex Parte Young*, 60 Stan. L. Rev. 989, 990 (2008), that federal courts have authority to entertain under their traditional equitable jurisdiction, see Judiciary

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Act of 1789, §11, 1 Stat. 78. As we have explained elsewhere, a federal court’s jurisdiction in equity extends no further than “the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act.” *Grupo Mexicano de Desarrollo, S. A. v. Alliance Bond Fund, Inc.*, 527 U. S. 308, 318 (1999) (internal quotation marks omitted). For this reason, a negative injunction must fall “within some clear ground of equity jurisdiction.” *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U. S. 276, 285 (1909); see also *Missouri v. Jenkins*, 515 U. S. 70, 127 (1995) (THOMAS, J., concurring) (“[C]ourts of equity must be governed by rules and precedents no less than the courts of law”). Federal courts therefore lack “power to create remedies previously unknown to equity jurisprudence.” *Grupo Mexicano*, 527 U. S., at 332.

The principal opinion “agree[s] with all of these principles.” *Ante*, at 12. I part ways with the principal opinion only in its conclusion that the four licensing-official respondents are appropriate defendants under *Ex parte Young*. For at least two reasons, they are not.

First, an *Ex parte Young* defendant must have “some connection with the enforcement of the act”—i.e., “the right and the power to enforce” the “act alleged to be unconstitutional.” 209 U. S., at 157, 161. The only “act alleged to be unconstitutional” here is S. B. 8. And that statute explicitly denies enforcement authority to any governmental official. On this point, the Act is at least triply clear. The statute begins: “*Notwithstanding . . . any other law*, the requirements of this subchapter shall be enforced *exclusively* through . . . private civil actions.” Tex. Health & Safety Code Ann. §171.207(a) (West Cum. Supp. 2021) (emphasis added). The Act continues: “No enforcement of this subchapter . . . in response to violations of this subchapter, may be taken or threatened by this state . . . or an executive or administrative officer or employee of this state.” *Ibid.*

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Later on, S. B. 8 reiterates: “Any person, *other than an officer or employee of a state or local governmental entity in this state*, may bring a civil action.” §171.208(a) (emphasis added). In short, the Act repeatedly confirms that respondent licensing officials, like any other governmental officials, “hav[e] no duty at all with regard to the act,” and therefore cannot “be properly made parties to the suit.” *Ex parte Young*, 209 U. S., at 158.

The principal opinion does not dispute the meaning of these provisions. Instead, it finds residual enforcement authority for the licensing officials elsewhere in S. B. 8. In its saving clause, the Act provides that no court may construe S. B. 8 as “limit[ing] the enforceability of any other laws that regulate or prohibit abortion.” §171.207(b)(3). If one of these “other laws” permits a governmental official to enforce S. B. 8, the principal opinion reasons, the saving clause preserves that enforcement authority. The principal opinion then proposes that the Texas Medical Board may enforce S. B. 8 under §164.055 of the Texas Occupations Code. Thus, on that view, S. B. 8 permits the Medical Board to discipline physicians for violating the statute despite the Act’s command that “the requirements of this subchapter shall be enforced *exclusively* through . . . private civil actions,” “[n]otwithstanding . . . any other law.” Tex. Health & Safety Code Ann. §171.207(a) (emphasis added).

Rather than introduce competing instructions in S. B. 8, I would read the Act as a “harmonious whole.” *Roberts v. Sea-Land Services, Inc.*, 566 U. S. 93, 100 (2012). By its terms, S. B. 8’s saving clause preserves enforcement only of laws that “*regulate or prohibit abortion*.” §171.207(b)(3) (emphasis added). Such laws include, for example, restrictions on late-term or partial-birth abortions. See §§171.044, 174.102. Section 164.055 of the Texas Occupations Code, by contrast, does not “regulate or prohibit abortion.” As the principal opinion explains, that provision

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merely grants authority to the Texas Medical Board to enforce *other* laws that *do* regulate abortion. See Tex. Occ. Code Ann. §164.055 (West 2012). Thus, the saving clause does not apply, and S. B. 8 explicitly forecloses enforcement of its requirements by the Texas Medical Board.²

The principal opinion contends that the Act “confirm[its] understanding” by explicitly proscribing criminal prosecution. *Ante*, at 13, n. 3 (citing Tex. Health & Safety Code Ann. §171.207(a)). By withholding criminal enforcement authority, the principal opinion argues, S. B. 8 tacitly leaves at least some civil enforcement authority in place. But “[t]he force of any negative implication . . . depends on context.” *Marx v. General Revenue Corp.*, 568 U. S. 371, 381 (2013). A statute may “indicat[e] that adopting a particular rule . . . was probably not meant to signal any exclusion.” *Ibid.* (internal quotation marks omitted).

That is the case here. Again, S. B. 8 repeatedly bars governmental enforcement. See *supra*, at 3–4. That Texas identified a “specific example” of withheld enforcement authority alongside the Act’s “general” proscription “is not inconsistent with the conclusion that [S. B. 8] sweeps as broadly as its language suggests.” *Ali v. Federal Bureau of Prisons*, 552 U. S. 214, 226–227 (2008). Texas “may have simply intended to remove any doubt” that criminal prosecution is unavailable under S. B. 8. *Id.*, at 226; see also

² For the remaining licensing officials—the heads of the Texas Health and Human Services Commission, the Texas Board of Nursing, and the Texas Board of Pharmacy—the principal opinion identifies no law that connects these officials to S. B. 8 or overrides the Act’s preclusion of governmental enforcement authority. Indeed, as to the Health and Human Services Commission, S. B. 8 explicitly forecloses enforcement authority. The Act states: “The commission shall enforce [Chapter 171] except for Subchapter H,” where S. B. 8 is codified, “which shall be enforced exclusively through . . . private civil enforcement actions . . . and may not be enforced by the commission.” Tex. Health & Safety Code Ann. §171.005 (West 2021).

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Yellen v. Confederated Tribes of Chehalis Reservation, 594 U. S. ___, ___ (2021) (GORSUCH, J., dissenting) (slip op., at 14) (“illustrative examples can help orient affected parties and courts to Congress’s thinking”). It is unsurprising that Texas repeated itself to make its point “doubly sure.” *Barton v. Barr*, 590 U. S. ___, __ (2020) (slip op., at 16). And, in all events, “[r]edundancy in one portion of a statute is not a license to rewrite or eviscerate another portion of the statute contrary to its text.” *Ibid.*³

Second, even when there is an appropriate defendant to sue, a plaintiff may bring an action under *Ex parte Young* only when the defendant “threaten[s] and [is] about to commence proceedings.” 209 U. S., at 156. Our later cases explain that “the prospect of state suit must be imminent.” *Morales v. Trans World Airlines, Inc.*, 504 U. S. 374, 382 (1992). Here, none of the licensing officials has threatened enforcement proceedings against petitioners because none has authority to bring them. Petitioners do not and cannot dispute this point.

Rather, petitioners complain of the “chill” S. B. 8 has on the purported right to abortion. But as our cases make clear, it is not enough that petitioners “feel inhibited” because S. B. 8 is “on the books.” *Younger v. Harris*, 401 U. S. 37, 42 (1971) (internal quotation marks omitted). Nor is a “vague allegation” of potential enforcement permissible. *Boise Artesian*, 213 U. S., at 285. To sustain suit against the licensing officials, whether under Article III or *Ex parte Young*, petitioners must show at least a credible and specific threat of enforcement to rescind their medical licenses or assess some other penalty under S. B. 8. See *Susan B. Anthony List v. Driehaus*, 573 U. S. 149, 159 (2014). Petitioners offer nothing to make this showing. Even if the

³Because the principal opinion’s errors rest on misinterpretations of Texas law, the Texas courts of course remain free to correct its mistakes. See, e.g., *Estate of Thornton v. Caldor, Inc.*, 472 U. S. 703, 709, n. 8 (1985).

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licensing-official respondents had enforcement authority, the chance of them using it is, at present, entirely “imaginary” and “speculative.” *Younger*, 401 U. S., at 42.

The irony of this case is that S. B. 8 has generated more litigation against those who *oppose* abortion than those who *perform* it. Respondent Clarkston, a state-court clerk, reports that only three S. B. 8 complaints have been filed in the State of Texas, none of which has been served. Brief for Respondent Clarkston 9–10. The private litigants brought those actions only after a San Antonio doctor performed a postheartbeat abortion and openly advertised it in the Washington Post. See A. Braid, Why I Violated Texas’s Extreme Abortion Ban, Washington Post, Sept. 19, 2021, p. A31, col. 2. Opponents of abortion, meanwhile, have been sued 14 times in the Texas state courts, including by some of the very petitioners in this case. See Brief for Respondent Clarkston 10.⁴ Petitioners cast aspersions on the Texas state courts, but those courts are not dawdling in these pre-enforcement actions. The Texas courts held summary-judgment hearings on November 10 and entered partial judgment for the abortion providers on December 9. See *Van Stean v. Texas*, No. D–1–GN–21–004179 (Dist. Ct. Travis Cty., Tex., Dec. 9, 2021). Simply put, S. B. 8’s supporters are under greater threat of litigation than its detractors.

Despite the foregoing, the principal opinion indicates that the prospect of suit by the licensing respondents is imminent. It cites petitioners’ complaint, but the only relevant paragraph conclusorily asserts a “risk [of] professional discipline” because certain respondents allegedly “retain the

⁴Dr. Braid also has filed suit in the Northern District of Illinois against the three *pro se* plaintiffs who filed S. B. 8 actions against him. See Complaint in *Braid v. Stilley*, No. 21–cv–5283 (Oct. 5, 2021), ECF Doc. 1. Two of the three S. B. 8 plaintiffs have made filings in the case, and both are proceeding *pro se*. Meanwhile, 12 attorneys, all from major law firms or interest groups, represent Dr. Braid.

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authority and duty to enforce *other* statutes and regulations . . . that could be triggered by a violation of S. B. 8.” Complaint ¶107. This “conclusory statemen[t],” paired with a bare “legal conclusion,” cannot survive a motion to dismiss. *Ashcroft v. Iqbal*, 556 U. S. 662, 678 (2009).

* * *

I would instruct the District Court to dismiss this case against all respondents, including the four licensing officials, because petitioners may not avail themselves of the exception to sovereign immunity recognized in *Ex parte Young*. I join the Court’s opinion in all other respects and respectfully dissent only from Part II–C.

Opinion of ROBERTS, C.J.

SUPREME COURT OF THE UNITED STATES

No. 21–463

WHOLE WOMAN’S HEALTH, ET AL., PETITIONERS *v.*
AUSTIN REEVE JACKSON, JUDGE, DISTRICT
COURT OF TEXAS, 114TH DISTRICT, ET AL.

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

[December 10, 2021]

CHIEF JUSTICE ROBERTS, with whom JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, concurring in the judgment in part and dissenting in part.

Texas has passed a law banning abortions after roughly six weeks of pregnancy. See S. B. 8, 87th Leg., Reg. Sess. (2021). That law is contrary to this Court’s decisions in *Roe v. Wade*, 410 U. S. 113 (1973), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833 (1992). It has had the effect of denying the exercise of what we have held is a right protected under the Federal Constitution.¹

Texas has employed an array of stratagems designed to shield its unconstitutional law from judicial review. To cite just a few, the law authorizes “[a]ny person,” other than a government official, to bring a lawsuit against anyone who

¹The law states that abortion providers may raise an “undue burden” defense, see *ante*, at 2, but that defense is no more than a distorted version of the undue burden standard set forth in *Casey*, 505 U. S. 833. The defense in the statute does not, for example, allow defendants to rely on the effect that an award of relief would have on others throughout the State, see Tex. Health & Safety Code Ann. §171.209(d)(2) (West Cum. Supp. 2021), even though our precedents specifically permit such reliance. *June Medical Services L. L. C. v. Russo*, 591 U. S. ___, ___–___ (2020) (opinion of BREYER, J.) (slip op., at 32–35). The provision, after all, is entitled “Undue Burden Defense *Limitations*.” See §171.209 (emphasis added).

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“aids or abets,” or intends to aid or abet, an abortion performed after roughly six weeks; has special preclusion rules that allow multiple lawsuits concerning a single abortion; and contains broad venue provisions that allow lawsuits to be brought in any of Texas’s 254 far flung counties, no matter where the abortion took place. See Tex. Health & Safety Code Ann. §§171.208(a), (e)(5), 171.210 (West Cum. Supp. 2021). The law then provides for minimum liability of \$10,000 plus costs and fees, while barring defendants from recovering their own costs and fees if they prevail. §§171.208(b), (i). It also purports to impose backward-looking liability should this Court’s precedents or an injunction preventing enforcement of the law be overturned. §§171.208(e)(2), (3). And it forbids many state officers from directly enforcing it. §171.207.

These provisions, among others, effectively chill the provision of abortions in Texas. Texas says that the law also blocks any pre-enforcement judicial review in federal court. On that latter contention, Texas is wrong. As eight Members of the Court agree, see *ante*, at 11, petitioners may bring a pre-enforcement suit challenging the Texas law in federal court under *Ex parte Young*, 209 U. S. 123 (1908), because there exist state executive officials who retain authority to enforce it. See, e.g., Tex. Occ. Code Ann. §164.055(a) (West 2021). Given the ongoing chilling effect of the state law, the District Court should resolve this litigation and enter appropriate relief without delay.

In my view, several other respondents are also proper defendants. First, under Texas law, the Attorney General maintains authority coextensive with the Texas Medical Board to address violations of S. B. 8. The Attorney General may “institute an action for a civil penalty” if a physician violates a rule or order of the Board. Tex. Occ. Code Ann. §165.101. The Board’s rules—found in the Texas Administrative Code, see 22 Tex. Admin. Code §160.1(a) (West 2021)—prohibit licensed physicians from violating Texas’s

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Health and Safety Code, which includes S. B. 8. See 22 Tex. Admin. Code §190.8(7) (“the Board shall take appropriate disciplinary action against a physician who violates . . . Chapter 171, Texas Health and Safety Code”); S. B. 8, 87th Leg., Reg. Sess. (2021) (amending Chapter 171 of the Texas Health and Safety Code by adding Subchapter H). Under Texas law, then, the Attorney General maintains authority to “take enforcement actions” based on violations of S. B. 8. *Ante*, at 12. He accordingly also falls within the scope of *Young*’s exception to sovereign immunity. *Ante*, at 9–10.

The same goes for Penny Clarkston, a court clerk. Court clerks, of course, do not “usually” enforce a State’s laws. *Ante*, at 5. But by design, the mere threat of even unsuccessful suits brought under S. B. 8 chills constitutionally protected conduct, given the peculiar rules that the State has imposed. Under these circumstances, the court clerks who issue citations and docket S. B. 8 cases are unavoidably enlisted in the scheme to enforce S. B. 8’s unconstitutional provisions, and thus are sufficiently “connect[ed]” to such enforcement to be proper defendants. *Young*, 209 U. S., at 157. The role that clerks play with respect to S. B. 8 is distinct from that of the judges. Judges are in no sense adverse to the parties subject to the burdens of S. B. 8. But as a practical matter clerks are—to the extent they “set[] in motion the machinery” that imposes these burdens on those sued under S. B. 8. *Sniadach v. Family Finance Corp. of Bay View*, 395 U. S. 337, 338 (1969).

The majority contends that this conclusion cannot be reconciled with *Young*, pointing to language in *Young* that suggests it would be improper to enjoin courts from exercising jurisdiction over cases. *Ante*, at 7–8; *Young*, 209 U. S., at 163. Decisions after *Young*, however, recognize that suits to enjoin state court proceedings may be proper. See *Mitchum v. Foster*, 407 U. S. 225, 243 (1972); see also *Pulliam v. Allen*, 466 U. S. 522, 525 (1984). And this conclusion is consistent with the entire thrust of *Young* itself. Just as

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in *Young*, those sued under S. B. 8 will be “harass[ed] . . . with a multiplicity of suits or litigation generally in an endeavor to enforce penalties under an unconstitutional enactment.” 209 U. S., at 160. Under these circumstances, where the mere “commencement of a suit,” and in fact just the threat of it, is the “actionable injury to another,” the principles underlying *Young* authorize relief against the court officials who play an essential role in that scheme. *Id.*, at 153. Any novelty in this remedy is a direct result of the novelty of Texas’s scheme.²

* * *

The clear purpose and actual effect of S. B. 8 has been to nullify this Court’s rulings. It is, however, a basic principle that the Constitution is the “fundamental and paramount law of the nation,” and “[i]t is emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 1 Cranch 137, 177 (1803). Indeed, “[i]f the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery.” *United States v. Peters*, 5 Cranch 115, 136 (1809). The nature of the federal right infringed does not matter; it is the role of the Supreme Court in our constitutional system that is at stake.

²A recent summary judgment ruling in state court found S. B. 8 unconstitutional in certain respects, not including the ban on abortions after roughly six weeks. See *ante*, at 2, 15. That order—which does not grant injunctive relief and has not yet been considered on appeal—does not legitimate the State’s effort to legislate away a federally protected right.

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SUPREME COURT OF THE UNITED STATES

No. 21–463

WHOLE WOMAN’S HEALTH, ET AL., PETITIONERS *v.*
AUSTIN REEVE JACKSON, JUDGE, DISTRICT
COURT OF TEXAS, 114TH DISTRICT, ET AL.

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

[December 10, 2021]

JUSTICE SOTOMAYOR, with whom JUSTICE BREYER and JUSTICE KAGAN join, concurring in the judgment in part and dissenting in part.

For nearly three months, the Texas Legislature has substantially suspended a constitutional guarantee: a pregnant woman’s right to control her own body. See *Roe v. Wade*, 410 U. S. 113 (1973); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833 (1992). In open defiance of this Court’s precedents, Texas enacted Senate Bill 8 (S. B. 8), which bans abortion starting approximately six weeks after a woman’s last menstrual period, well before the point of fetal viability. Since S. B. 8 went into effect on September 1, 2021, the law has threatened abortion care providers with the prospect of essentially unlimited suits for damages, brought anywhere in Texas by private bounty hunters, for taking any action to assist women in exercising their constitutional right to choose. The chilling effect has been near total, depriving pregnant women in Texas of virtually all opportunity to seek abortion care within their home State after their sixth week of pregnancy. Some women have vindicated their rights by traveling out of State. For the many women who are unable to do so, their only alternatives are to carry unwanted pregnancies to

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term or attempt self-induced abortions outside of the medical system.

The Court should have put an end to this madness months ago, before S. B. 8 first went into effect. It failed to do so then, and it fails again today. I concur in the Court's judgment that the petitioners' suit may proceed against certain executive licensing officials who retain enforcement authority under Texas law, and I trust the District Court will act expeditiously to enter much-needed relief. I dissent, however, from the Court's dangerous departure from its precedents, which establish that federal courts can and should issue relief when a State enacts a law that chills the exercise of a constitutional right and aims to evade judicial review. By foreclosing suit against state-court officials and the state attorney general, the Court effectively invites other States to refine S. B. 8's model for nullifying federal rights. The Court thus betrays not only the citizens of Texas, but also our constitutional system of government.

I

I have previously described the havoc S. B. 8's unconstitutional scheme has wrought for Texas women seeking abortion care and their medical providers.¹ I do not repeat those details here, but I briefly outline the law's numerous procedural and substantive anomalies, most of which the Court simply ignores.

S. B. 8 authorizes any person—who need not have any relationship to the woman, doctor, or procedure at issue—to sue, for at least \$10,000 in damages, anyone who performs, induces, assists, or even intends to assist an abortion in violation of Texas' unconstitutional 6-week ban. See Tex. Health & Safety Code Ann. §171.208(a) (West Cum. Supp.

¹ See *United States v. Texas*, 595 U. S. ___, ___–___ (2021) (SOTOMAYOR, J., concurring in part and dissenting in part) (slip op., at 4–7); *Whole Woman's Health v. Jackson*, 594 U. S. ___, ___–___ (2021) (SOTOMAYOR, J., dissenting) (slip op., at 1–3).

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2021). Those vulnerable to suit might include a medical provider, a receptionist, a friend who books an appointment, or a ride-share driver who takes a woman to a clinic.

Importantly, S. B. 8 also modifies state-court procedures to make litigation uniquely punitive for those sued. It allows defendants to be haled into court in any county in which a plaintiff lives, even if that county has no relationship to the defendants or the abortion procedure at issue. §171.210(a)(4). It gives the plaintiff a veto over any venue transfer, regardless of the inconvenience to the defendants. §171.210(b). It prohibits defendants from invoking nonmutual issue or claim preclusion, meaning that if they prevail, they remain vulnerable to suit by any other plaintiff anywhere in the State for the same conduct. §171.208(e)(5). It also bars defendants from relying on any nonbinding court decision, such as persuasive precedent from other trial courts. §171.208(e)(4). Although it guarantees attorney's fees and costs to prevailing plaintiffs, §171.208(b)(3), it categorically denies them to prevailing defendants, §171.208(i), so they must finance their own defenses no matter how frivolous the suits. These provisions are considerable departures from the norm in Texas courts and in most courts across the Nation.²

S. B. 8 further purports to limit the substantive defenses

²S. B. 8's procedural meddling is not limited to suits filed under the law. To deter efforts to seek pre-enforcement review, the law also establishes a special fee-shifting provision for affirmative challenges to Texas abortion laws, including S. B. 8 itself. Under that provision, any person or entity, including an attorney or a law firm, who seeks declaratory or injunctive relief against the enforcement of any state restriction on abortion is jointly and severally liable to pay the costs and attorney's fees of a prevailing party. Tex. Civ. Prac. & Rem. Code Ann. §30.022 (West Cum. Supp. 2021). The provision specifies that it is "not a defense" to liability for attorney's fees if "the court in the underlying action held that" any part of the fee-shifting provision "is invalid, unconstitutional, or preempted by federal law, notwithstanding the doctrines of issue or claim preclusion." §30.022(d)(3).

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that defendants may raise. It permits what it calls an “undue burden” defense, but redefines that standard to be a shell of what the Constitution requires: Rather than considering the law’s cumulative effect on abortion access, see *Whole Woman’s Health v. Hellerstedt*, 579 U. S. 582, 609–624 (2016), it instructs state courts to focus narrowly on the effect on the parties, §§171.209(b)(2), (d)(2). It further purports to impose retroactive liability for abortion care provided while the law is enjoined if the injunction is later overturned on appeal, §171.208(e)(3), as well as for abortion care provided while *Roe* and *Casey* are in effect if this Court later overrules one of those cases, §171.209(e).

As a whole, these provisions go beyond imposing liability on the exercise of a constitutional right. If enforced, they prevent providers from seeking effective pre-enforcement relief (in both state and federal court) while simultaneously depriving them of effective post-enforcement adjudication, potentially violating procedural due process. To be sure, state courts cannot restrict constitutional rights or defenses that our precedents recognize, nor impose retroactive liability for constitutionally protected conduct. Such actions would violate a state officer’s oath to the Constitution. See U. S. Const., Art. VI, cl. 3. Unenforceable though S. B. 8 may be, however, the threat of its punitive measures creates a chilling effect that advances the State’s unconstitutional goals.

II

This Court has confronted State attempts to evade federal constitutional commands before, including schemes that forced parties to expose themselves to catastrophic liability as state-court defendants in order to assert their rights. Until today, the Court had proven equal to those challenges.

In 1908, this Court decided *Ex parte Young*, 209 U. S. 123. In *Young*, the Court considered a Minnesota law fixing

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new rates for railroads and adopting high fines and penalties for failure to comply with the rates. *Id.*, at 128–129, 131. The law purported to provide no option to challenge the new rates other than disobeying the law and taking “the risk . . . of being subjected to such enormous penalties.” *Id.*, at 145. Because the railroad officers and employees “could not be expected to disobey any of the provisions . . . at the risk of such fines and penalties,” the law effectively resulted in “a denial of any hearing to the company.” *Id.*, at 146.

The Court unequivocally rejected this design. Concluding that the legislature could not “preclude a resort to the courts . . . for the purpose of testing [the law’s] validity,” the Court decided the companies could obtain pre-enforcement relief by suing the Minnesota attorney general based on his “connection with the enforcement” of the challenged act. *Id.*, at 146, 157. The Court so held despite the fact that the attorney general’s only such connection was the “general duty imposed upon him, which includes the right and the power to enforce the statutes of the State, including, of course, the act in question.” *Id.*, at 161. Over the years, “the *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to ‘the supreme authority of the United States.’” *Pennhurst State School and Hospital v. Halderman*, 465 U. S. 89, 105 (1984) (quoting *Young*, 209 U. S., at 160); accord, e.g., *Virginia Office for Protection and Advocacy v. Stewart*, 563 U. S. 247, 254–255 (2011).

Like the stockholders in *Young*, abortion providers face calamitous liability from a facially unconstitutional law. To be clear, the threat is not just the possibility of money judgments; it is also that, win or lose, providers may be forced to defend themselves against countless suits, all across the State, without any prospect of recovery for their losses or expenses. Here, as in *Young*, the “practical effect of [these] coercive penalties for noncompliance” is “to foreclose all access to the courts,” “a constitutionally intolerable choice.”

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Thunder Basin Coal Co. v. Reich, 510 U. S. 200, 218 (1994). “It would be an injury to [a] complainant to harass it with a multiplicity of suits or litigation generally in an endeavor to enforce penalties under an unconstitutional enactment, and to prevent it ought to be within the jurisdiction of a court of equity.” *Young*, 209 U. S., at 160. In fact, the circumstances at hand present an even stronger need for pre-enforcement relief than in *Young*, given how S. B. 8 not only threatens a multiplicity of suits, but also turns state-court procedures against providers to ensure they cannot effectively defend their rights in a suit.

Under normal circumstances, providers might be able to assert their rights defensively in state court. See *ante*, at 15. These are not normal circumstances. S. B. 8 is structured to thwart review and result in “a denial of any hearing.” *Young*, 209 U. S., at 146. To that end, the law not only disclaims direct enforcement by state officials to frustrate pre-enforcement review, but also skews state-court procedures and defenses to frustrate post-enforcement review. The events of the last three months have shown that the law has succeeded in its endeavor. That is precisely what the Court in *Young* sought to avoid. It is therefore inaccurate to characterize the foregoing analysis as advocating “an unqualified right to pre-enforcement review of constitutional claims in federal court.” *Ante*, at 15. If that were so, the same charge could be leveled against the Court’s decision in *Young*.

In addition, state-court clerks are proper defendants in this action. This Court has long recognized that “the action of state courts and judicial officers in their official capacities is to be regarded as action of the State.” *Shelley v. Kraemer*, 334 U. S. 1, 14 (1948). In *Shelley*, private litigants sought to enforce restrictive racial covenants designed to preclude Black Americans from home ownership and to preserve residential segregation. The Court explained that these ostensibly private covenants involved state action because “but

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for the active intervention of the state courts, supported by the full panoply of state power,” the covenants would be unenforceable. *Id.*, at 19. Here, there is more. S. B. 8’s formidable chilling effect, even before suit, would be nonexistent if not for the state-court officials who docket S. B. 8 cases with lopsided procedures and limited defenses. Because these state actors are necessary components of that chilling effect and play a clear role in the enforcement of S. B. 8, they are proper defendants.

These longstanding precedents establish how, and why, the Court should authorize relief against these officials as well. The Court instead hides behind a wooden reading of *Young*, stitching out-of-context quotations into a cover for its failure to act decisively. The Court relies on dicta in *Young* stating that “the right to enjoin an individual . . . does not include the power to restrain a court from acting in any case brought before it” and that “an injunction against a state court would be a violation of the whole scheme of our Government.” 209 U. S., at 163. Modern cases, however, have recognized that suit may be proper even against state-court judges, including to enjoin state-court proceedings. See *Mitchum v. Foster*, 407 U. S. 225, 243 (1972); see also *Pulliam v. Allen*, 466 U. S. 522, 525 (1984). The Court responds that these cases did not expressly address sovereign immunity or involve court clerks. *Ante*, at 8–9. If language in *Young* posed an absolute bar to injunctive relief against state-court proceedings and officials, however, these decisions would have been purely advisory.

Moreover, the Court has emphasized that “the principles undergirding the *Ex parte Young* doctrine” may “support its application” to new circumstances, “novelty notwithstanding.” *Stewart*, 563 U. S., at 261. No party has identified any prior circumstance in which a State has delegated an enforcement function to the populace, disclaimed official enforcement authority, and skewed state-court procedures

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to chill the exercise of constitutional rights. Because S. B. 8's architects designed this scheme to evade *Young* as historically applied, it is especially perverse for the Court to shield it from scrutiny based on its novelty.³

Next, the Court claims that *Young* cannot apply because state-court clerks are not adverse to the petitioners. *Ante*, at 5–6. As THE CHIEF JUSTICE explains, however, *ante*, at 3 (opinion concurring in judgment in part and dissenting in part), the Texas Legislature has ensured that docketing S. B. 8 cases is anything but a neutral action. With S. B. 8's extreme alterations to court procedure and substantive defenses, the Texas court system no longer resembles a neutral forum for the adjudication of rights; S. B. 8 refashions that system into a weapon and points it directly at the petitioners. Under these circumstances, the parties are sufficiently adverse.

Finally, the Court raises “the question of remedy.” *Ante*, at 6. For the Court, that question cascades into many others about the precise contours of an injunction against Texas court clerks in light of state procedural rules. *Ante*, at 6–7. Vexing though the Court may find these fact-intensive questions, they are exactly the sort of tailoring work that District Courts perform every day. The Court should have afforded the District Court an opportunity to craft appropriate relief before throwing up its hands and declaring the task unworkable. For today's purposes, the answer is

³ The Court responds by seizing on my mention of S. B. 8's chilling effect. *Ante*, at 16. No one contends, however, that pre-enforcement review should be available whenever a state law chills the exercise of a constitutional right. Rather, as this Court explained in *Young*, pre-enforcement review is necessary “when the penalties for disobedience are . . . so enormous” as to have the same effect “as if the law in terms prohibited the [litigant] from seeking judicial construction of laws which deeply affect its rights.” 209 U. S., at 147. All the more so here, where the State achieves its unconstitutional aim using novel procedural machinations that the Court fails to acknowledge.

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simple: If, as our precedents make clear (and as the question presented presumes), S. B. 8 is unconstitutional, contrary state rules of civil procedure must give way. See U. S. Const., Art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land”).

In the midst of its handwringing over remedy, the Court also complains that the petitioners offer no “meaningful limiting principles for their theory.” *Ante*, at 6. That is incorrect. The petitioners explain: “Where, as here, a State law (1) deliberately seeks to evade federal judicial review by outsourcing enforcement of the law to private individuals without any personal stake, while forbidding state executive officials from direct enforcement; and (2) creates special rules for state-court adjudication to maximize harassment and make timely and effective protection of constitutional rights impossible, federal relief against clerks is warranted.” Reply Brief for Petitioners 6. The petitioners do not argue that pre-enforcement relief against state-court clerks should be available absent those two unique circumstances, and indeed, those circumstances are why the petitioners are threatened with a multiplicity of suits and face a constitutionally intolerable choice under *Young*.⁴

⁴The Court also holds that the Texas attorney general is not a proper defendant. For the reasons explained by THE CHIEF JUSTICE, *ante*, at 2–3, this conclusion fails even under the Court’s own logic.

The Court further observes that “no court may ‘lawfully enjoin the world at large.’” *Ante*, at 10–11 (quoting *Alemite Mfg. Corp. v. Staff*, 42 F. 2d 832 (CA2 1930)). But the petitioners do not seek such relief. It is Texas that has taken the unprecedented step of delegating its enforcement authority to the world at large without requiring any pre-existing stake. Under the Court’s precedents, private actors who take up a State’s mantle “exercise . . . a right or privilege having its source in state authority” and may “be described in all fairness as . . . state actor[s].” *Edmonson v. Leesville Concrete Co.*, 500 U. S. 614, 620 (1991). This Court has not held that state actors who have actual notice of an injunction may

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III

My disagreement with the Court runs far deeper than a quibble over how many defendants these petitioners may sue. The dispute is over whether States may nullify federal constitutional rights by employing schemes like the one at hand. The Court indicates that they can, so long as they write their laws to more thoroughly disclaim all enforcement by state officials, including licensing officials. This choice to shrink from Texas' challenge to federal supremacy will have far-reaching repercussions. I doubt the Court, let alone the country, is prepared for them.

The State's concessions at oral argument laid bare the sweeping consequences of its position. In response to questioning, counsel for the State conceded that pre-enforcement review would be unavailable even if a statute imposed a bounty of \$1,000,000 or higher. Tr. of Oral Arg. 50–53. Counsel further admitted that no individual constitutional right was safe from attack under a similar scheme. Tr. of Oral Arg. in *United States v. Texas*, No. 21–588, pp. 59–61, 64–65. Counsel even asserted that a State could further rig procedures by abrogating a state supreme court's power to bind its own lower courts. *Id.*, at 78–79. Counsel maintained that even if a State neutered appellate courts' power in such an extreme manner, aggrieved parties' only path to a federal forum would be to violate the unconstitutional law, accede to infringement of their substantive and procedural rights all the way through the state supreme court, and then, at last, ask this Court to grant discretionary certiorari review. *Ibid.* All of these burdens would layer atop

flout its terms, even if it nominally binds other state officials, and it errs by implying as much now. The Court responds by downplaying how exceptional Texas' scheme is, but it identifies no true analogs in precedent. See *ante*, at 11 (identifying only "somewhat" analogous statutes). S. B. 8 is no tort or private attorneys general statute: It deputizes anyone to sue without establishing any pre-existing personal stake (*i.e.*, standing) and then skews procedural rules to favor these plaintiffs.

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S. B. 8’s existing manipulation of state-court procedures and defenses.

This is a brazen challenge to our federal structure. It echoes the philosophy of John C. Calhoun, a virulent defender of the slaveholding South who insisted that States had the right to “veto” or “nullif[y]” any federal law with which they disagreed. Address of J. Calhoun, *Speeches of John C. Calhoun* 17–43 (1843). Lest the parallel be lost on the Court, analogous sentiments were expressed in this case’s companion: “The Supreme Court’s *interpretations* of the Constitution are not the Constitution itself—they are, after all, called *opinions*.” Reply Brief for Intervenors in No. 21–50949 (CA5), p. 4.

The Nation fought a Civil War over that proposition, but Calhoun’s theories were not extinguished. They experienced a revival in the post-war South, and the violence that ensued led Congress to enact Rev. Stat. §1979, 42 U. S. C. §1983. “Proponents of the legislation noted that 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. Thus, §1983’s “very purpose,” consonant with the values that motivated the *Young* Court some decades later, was “to protect the people from unconstitutional action under color of state law, ‘whether that action be executive, legislative, or judicial.’” *Mitchum*, 407 U. S., at 242 (quoting *Ex parte Virginia*, 100 U. S. 339, 346 (1880)).

S. B. 8 raises another challenge to federal supremacy, and by blessing significant portions of the law’s effort to evade review, the Court comes far short of meeting the moment. The Court’s delay in allowing this case to proceed has had catastrophic consequences for women seeking to exercise their constitutional right to an abortion in Texas. These consequences have only rewarded the State’s effort at nullification. Worse, by foreclosing suit against state-

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court officials and the state attorney general, the Court clears the way for States to reprise and perfect Texas' scheme in the future to target the exercise of any right recognized by this Court with which they disagree.

This is no hypothetical. New permutations of S. B. 8 are coming. In the months since this Court failed to enjoin the law, legislators in several States have discussed or introduced legislation that replicates its scheme to target locally disfavored rights.⁵ What are federal courts to do if, for example, a State effectively prohibits worship by a disfavored religious minority through crushing “private” litigation burdens amplified by skewed court procedures, but does a better job than Texas of disclaiming all enforcement by state officials? Perhaps nothing at all, says this Court.⁶ Although some path to relief not recognized today may yet exist, the Court has now foreclosed the most straightforward route under its precedents. I fear the Court, and the country, will come to regret that choice.

* * *

In its finest moments, this Court has ensured that constitutional rights “can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor

⁵See Brief for Petitioners 48–49 (collecting examples targeting abortion rights and gun rights). In addition, one day after oral argument, Ohio legislators introduced a variation on S. B. 8 that would impose a near total ban on abortion care in that State. See H. B. 480, 134th Gen. Assem., Reg. Sess. (Ohio 2021).

⁶Not one of the Court's proffered alternatives addresses this concern. The Court deflects to Congress, *ante*, at 17, but the point of a constitutional right is that its protection does not turn on the whims of a political majority or supermajority. The Court also hypothesizes that state courts might step in to provide pre-enforcement relief, even where it has prohibited federal courts from doing so. *Ante*, at 15, 16. As the State concedes, however, the features of S. B. 8 that aim to frustrate pre-enforcement relief in federal court could have similar effects in state court, potentially limiting the scope of any relief and failing to eliminate the specter of endless litigation. Tr. of Oral Arg. 86–88.

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nullified indirectly by them through evasive schemes . . . whether attempted ‘ingeniously or ingenuously.’” *Cooper v. Aaron*, 358 U. S. 1, 17 (1958) (quoting *Smith v. Texas*, 311 U. S. 128, 132 (1940)). Today’s fractured Court evinces no such courage. While the Court properly holds that this suit may proceed against the licensing officials, it errs gravely in foreclosing relief against state-court officials and the state attorney general. By so doing, the Court leaves all manner of constitutional rights more vulnerable than ever before, to the great detriment of our Constitution and our Republic.

STATE OF NEW YORK

8163

IN SENATE

January 27, 2022

Introduced by Sen. SEPULVEDA -- read twice and ordered printed, and when printed to be committed to the Committee on Judiciary

AN ACT to amend the civil practice law and rules, in relation to creating a civil cause of action for the manufacture, sale, or distribution of assault weapons or ghost guns within the state

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The civil practice law and rules is amended by adding a new article 13-C to read as follows:

ARTICLE 13-C

CIVIL REMEDIES; GUN SAFETY LAWS

Section 1360. Definition.

1361. Action to recover damages.

1362. Prohibited defenses.

1363. Affirmative defenses.

1364. Construction.

§ 1360. Definition. For the purposes of this article: 1. "Assault weapon" shall have the same meaning as such term is defined in subdivision twenty-two of section 265.00 of the penal law.

2. "Ghost gun" shall have the same meaning as such term is defined in subdivision thirty-two of section 265.00 of the penal law.

§ 1361. Action to recover damages. 1. Any person, other than an officer or employee of a state or local government entity in this state may bring a civil cause of action against any person or entity who:

(a) manufactures, distributes, or sells assault weapons or ghost guns, or parts for any such weapons or ghost guns within the state;

(b) aids and abets an individual or entity in manufacturing, distributing, or selling assault weapons or ghost guns, or parts for any such weapons or ghost guns within the state; or

(c) intends to manufacture, distribute, or sell assault weapons or ghost guns within the state or aid and abet an individual or entity in manufacturing, distributing, or selling assault weapons or ghost guns, or parts for any such weapons or ghost guns within the state.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD14024-01-1

2. (a) If a plaintiff prevails in an action brought pursuant to this section, such plaintiff shall be awarded injunctive relief sufficient to prevent the defendant from continuing to aid and abet any violation the provisions of law set forth in subdivision one of this section, statutory damages in an amount not less than ten thousand dollars for each violation of such provisions and for any aiding and abetting of such provisions, and attorney's fees and other costs associated with bringing such cause of action.

(b) A court may not award relief under paragraph (a) of this subdivision in response to a cause of action brought pursuant to this section if the defendant demonstrates that he or she previously paid the full amount of statutory damages pursuant to paragraph (a) of this subdivision in a previous action for that particular violation of a provision of law as set forth in subdivision one of this section or for the particular aiding and abetting the violation of a provision of law set forth in subdivision one of this section.

3. A plaintiff may bring a cause of action pursuant to this section within four years of the date of the violation or aiding and abetting of the violation of the provisions of law.

4. Notwithstanding any other law, this state, a state official, or a district or county attorney may not intervene in an action brought under this section. This subdivision does not prohibit any such person from filing an amicus curiae brief in the action.

5. Notwithstanding any other law, a court may not award costs or attorney's fees to a defendant in an action brought pursuant to this section.

§ 1362. Prohibited defenses. The following shall not be a defense to an action brought pursuant to section thirteen hundred sixty-one of this article:

1. ignorance or mistake of law;

2. a defendant's belief that the requirements of this section are or were unconstitutional;

3. a defendant's reliance on any state or federal court decision that is not binding on the court in which the action has been brought;

4. a defendant's reliance on any court decision that has been overruled on appeal or by a subsequent court, even if such decision has not been overruled when the defendant violated, aided or abetted in violating, or intended to violate the provisions of subdivision one of section thirteen hundred sixty-one of this article;

5. non-mutual preclusion or non-mutual claim preclusion; or

6. any claim that the enforcement of the provisions of this section or the imposition of civil liability against the defendant will violate the constitutional rights of third parties.

§ 1363. Affirmative defenses. 1. The following shall be affirmative defenses to an action brought pursuant to section thirteen hundred sixty-one of this article:

(a) a defendant who aided or abetted a violation of one or more of the provisions of subdivision one of section thirteen hundred sixty-one of this article reasonably believed, after conducting a reasonable investigation, that an individual violating such provision or provisions had complied or would comply with such laws; or

(b) a defendant who intended to violate or aid and abet a violation of one or more of the provisions of subdivision one of section thirteen hundred sixty-one of this article reasonably believed, after conducting a reasonable investigation, that an individual violating such provision or provisions would comply with such laws.

- 1 2. The defendant shall have the burden of proving an affirmative
2 defense under subdivision one of this section.
3 § 1364. Construction. This article may not be construed to impose
4 liability on any speech or conduct protected by the first amendment of
5 the United States constitution.
6 § 2. This act shall take effect immediately.